

ADR Center for .eu attached to the Czech Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (Czech Arbitration Court)

PANEL DECISION

§ B2(c)(3) of the .eu Dispute Resolution Rules (ADR Rules)

Case No.: 1639

Administrative Contact: Mr. Josef Herian

Complainant: *EH Gaming Ventures Inc., formerly, English Harbour Entertainment Limited*

Postal address:

E-mail:

Telephone:

Fax:

Authorized representative: *Fasken Martineau DuMoulin LLP*

Postal address:

E-mail:

Telephone:

Fax:

Domain Name(s): *englishharbour.eu; englishharbourpoker.eu*

English summary of the decision: English summary of this Decision is hereby attached as Annex 1

Factual Background:

1. On 2006, 5th May EH Gaming Ventures Inc., formerly, English Harbour Entertainment Limited (hereinafter, also, the "Complainant") filed a Complaint (hereinafter, also "Complaint n. 1") before this Czech Arbitration Court (hereinafter, also, the "Court"). The Complaint n. 1 was related to 2 domain names: "ENGLISHHARBOUR.EU" and "ENGLISHHARBOURPOKER.EU". The Complainant indicated as Respondent Janush Kurt and "X-6 Ltd.; H-7 Ltd." in the file "Organization".

2. The Complainant attached original documents that are:

1. Annex A - WHOIS printout for disputed domain names;

2. Annex B - Contact Information for EXIMP s.a r.l.;

3. Annex C - Certificate of Good Standing of the Corporation English Harbour Entertainment Limited registered December 27, 2000;

4. Annex D - Domain name Registry information and web pages for Internet sites ENGLISHHARBOUR.COM and ENGLISHHARBOURPOKER.COM;

5. Annex E - Administrative panel decision in World Wrestling Federation Entertainment, Inc. v. Michael Bosman, WIPO Case No. D99-0001 (dated January 14, 2000);

6. Annex F - Web pages downloaded from the Internet sites ENGLISHHARBOUR.EU and ENGLISHHARBOURPOKER.EU on April 27, 2006;

7. Annex G - Administrative panel decision in Stella D'oro Biscuit Co., Inc. v. Patron Group Inc., WIPO Case No. D2000-0012 (dated February 17, 2000);

3. The Court acknowledged Complaint's receipt on 2006, 20th July. The Court notified EURID on the Complaint and its time of filing.

4. The Court asked EURID for some information for verification of the Complaint's administrative compliance. On 2006, 28th July, EURID answered to the request with a Non-standard Communication, confirming that: (1) as far as "ENGLISHHARBOUR.EU" is concerned, the current Registrant of the domain name was "X-6 Ltd"; and (2) as far as "ENGLISHHARBOURPOKER.EU" is concerned, the current Registrant of the domain name was "H-7 Ltd."

5. On the basis of the Complainant Check, the Court pointed out that the Complainant: (1) "had not identified the correct Respondent's Registrar with whom the domain name ENGLISHHARBOURPOKER was registered at the time the Complaint was filed" and that (2) there were two different Respondents in the Complaint. As far as the second deficiency of the Complaint is concerned, the Court informed the Complainant that it was necessary to file other Complaint regarding the second domain name, in the case the Complaint wished to initiate proceedings with respect to both domain names. Consequently, on 2006, 28th July the Court notified the above mentioned deficiencies of the Complaint and requested the Complainant to correct those deficiencies and submit an amended Complaint within 7 (seven) days from the receiving of the notification. The Complainant was also advised that in case the deadline passed, "the ADR Proceeding would be deemed cancelled without prejudice to (...) submission of a new Complaint".

6. On 2006, 31st July the Complainant filed a Complaint Amend (hereinafter, also "Complaint n. 2"). The Complainant identified the correct current Respondent's Registrar related to "ENGLISHHARBOUR.EU. In the "Factual and Legal Grounds" of the Complaint n.2, he explained the reasons that justified – in his opinion – the filing of one Complaint concerning two different domain names.

7. On 2006, 8th August the Court checked the Complaint n. 2, and pointed out that there still were two different Respondents in the Complaint and that apparently the Complaint n. 2 didn't comply with provision of par. B1(c) ADR Rules. Consequently, the Court notified the termination of the ADR due to Defective Complaint (expiration of the deadline to correct the deficiencies of the Complaint) and informed the Complainant about his right to challenge the Withdrawal of the Complaint n. 2.

8. On 2006, 13th August, the Complainant declared his will to challenge the Decision of the Court to terminate / cancel the ADR.

9. On 2006, 16th August, the initial deadline for submitting the Challenge was prolonged by the Court till 2006, 23rd August due to technical problems (formally indicated by the Complainant) in downloading the model of the Challenge of Withdrawal.

10. On 2006, 22nd August the Complainant submitted a Challenge of Withdrawal of Complaint. The Court acknowledged the pertinent receipt.

11. The Court appointed this Panel (Marco Vincenti), who accepted to serve as a Panellist under .eu Dispute Resolution Rules and Supplemental Rules of the Court.

12. On 2006, 1st September, the Court notified to the Complaint that this Panel has been appointed and that he has submitted the Statement of Acceptance and Declaration of Independence and Impartiality.

13. The Panellist is required to forward his decision within 2006, 11th September.

Complainant' Contentions:

In support of its position, Complaint contents as follows.

1. The Complainant challenged the Withdrawal of the Complaint on the ground of the fact that, even if there are formally two different current Respondents ("X-6 Ltd." as far as "ENGLISHHARBOUR.EU" is concerned and "H-7 Ltd." as far as "ENGLISHHARBOURPOKER.EU" is concerned), "it is obvious single identity of the Respondent": this should also be confirmed by the circumstance that the Respondent has "a single address for service and a single e-mail address, and that he filed "two nearly identical domain names with the words <English Harbour> in them".

2. The Complainant also asserts that is to the Respondent to prove that the two companies are separated, despite "the fact that they share the same individual contact information, same street address and same e-mail address".

3. Furthermore, the Complainant refers to the principle that "the purpose of ADR process should be to assist Complainants in seeking justice against unscrupulous Respondents that attempt to thwart dispute resolution by creating false companies". In order to describe the mentioned characteristic of the Respondent, the Complaint shows that the "individual Respondent has done virtually nothing to attempt to suggest there are two entities" and that has tried to mask his identity because the illegal nature of his activities.

4. The Complainant thinks he has suffered a prejudice and injustice by rejecting the Complaint "on such a narrow and technical ground", because he has "filed a Complaint in a timely manner and in good faith".

Discussion and Findings:

First of all, the Panellist deems to say exactly that the Decision on the Challenge of Withdrawal doesn't concern the merit of the case.

The Panellist thinks that Challenge can be solved by adopting a formal and juridical correct approach and having attention to the correct way of filing a Complaint, with particular reference to the individuation of the Respondent (passive legitimization).

The passive legitimization is a requirement for the formal and substantial correctness of the Complaint, and it is object of the administrative review, carried out by the Court before notifying the Complaint to the Respondent.

Pursuant to par. B1(a)1 ADR Rules, the Complaint can be filed against a domain name holder. As stated in par. A1 ADR Rules, for "Domain Name Holder" is to be meant "a legal or natural person who holds an activated registration of a .eu domain name".

The case concerns two different domain names: ENGLISHHARBOUR.EU" and "ENGLISHHARBOURPOKER.EU". A Complaint can be filed about one domain name except what is stated in par. B1(c) ADR Rules: "The Complaint may relate to more than one domain name, provided that the Parties and the language of the ADR Proceedings are the same". Reference again made to definitions of ADR Rules, the (Party) Respondent is "the holder of a .eu domain name registration in respect of which a Complaint is initiated".

Because it is a Complainant's requirement, the Panellist thinks that it is on Complainant's burden to identify correctly the Respondent and to prove his characteristics. In any case, the Complainant hasn't done nothing sufficient, as he based his arguments only on the administrative information by WHOIS database, without giving any other prove.

Pursuant to par. B1(b)5, the Complainant has to "provide the name of the Respondent and, in case of an ADR Proceeding against a Domain Name Holder provide all information (including any postal and e-mail addresses and telephone and fax numbers) known to the Complainant on how to contact the Respondent or any representative of the Respondent, including contact information based on pre-Complaint dealings, in sufficient detail to allow the Provider to send the Complaint to the Respondent as described in Paragraph A2(a)". In order to do so, the Complainant can use (also) the WHOIS database.

It is important to note what is the function of the rule ex par B1(b)5, and the function of WHOIS data base.

Rule ex par. B1(b)5 has two functions:

- (1) identify the Respondent, meant as the subject that has the right to contradict and debate on the Complaint, because he is Holder of the right that is disputed (in our particular case, he is the holder of the Domain Name);
- (2) allow the Provider to send the Complaint to the Respondent (ex par. A2(a) ADR Rules).

Pursuant to whereas n, 12 of Reg. 733/2002, "Public query services associated with the TLD are referred to as 'Who is' queries. 'Who is'-type databases should be in conformity with Community law on data protection and privacy. Access to these databases provides information on a domain name holder and is an essential tool in boosting user confidence". Art. 16 Reg. 874/2002 states that "(1) The purpose of the WHOIS database shall be to provide reasonably accurate and up to date information about the technical and administrative points of contact administering the domain names under the .eu TLD. (2) The WHOIS database shall contain information about the holder of a domain name that is relevant and not excessive in relation to the purpose of the database. In as far as the information is not strictly necessary in relation to the purpose of the database, and if the domain name holder is a natural person, the information that is to be made publicly available shall be subject to the unambiguous consent of the domain name holder. The deliberate submission of inaccurate information, shall constitute grounds for considering the domain name registration to have been in breach of the terms of registration". The Purpose of the WHOIS database is to provide reasonably and accurate and up to date information about the technical and administrative points of contact administering the domain names under the .eu TLD (par. 2.2, Section 2 WHOIS Policy). As far as

identifying Natural person and Legal person is concerned, par. 2.3, Section 2 WHOIS Policy states that: " (...) in respect of the name of the Registrant there are two fields: the first is <Name> and the second is <Company>. Both fields can be completed or just the <Name> field. If only the first field is completed, it is assumed that the registration is in the name of a private individual (natural person). If the <Company> field is completed, it is assumed that the Company is the Registrant".

The above mentioned rules mean that information contained in the WHOIS database has only those mentioned functions and that – all over in case there can be some doubts in order to passive legitimization – they cannot be considered sufficient. In order to file a correct Complaint, it is on Complainant's burden to make every effort to have all the necessary information to identify correctly the Respondent.

In the case at issue, reference made to both domain names, Domain Details (Annex A to the Complaint) shows that both fields has been completed. (The information are confirmed by querying WHOIS database – 2006, 9th September)

Furthermore, the Complainant hasn't done anything (e.g., submitted pertinent documentary evidence concerning the Respondent's characteristics) to win the presumption of the registration to a company or to an individual person (and, in any case, is not sufficient what he has done).

In any case, the Panellist deems that it doesn't matter if two companies have the same address, phone number, e-mail address or legal representative in order to state that they are the same subject.

Documentary evidence (official information provided by EURID) shows that there are formally two different subjects, who have registered a different domain names each one. For this reason, according to .eu Rules (Reg. n. 733/2000, Reg. n. 874/2002, ADR Rules and ADR Supplemental Rules) each domain names should have been disputed in an ADR begun with a different Complaint and it is not possible to begin only an ADR, reference made to both domain names.

In the case at issue, notwithstanding Complainant had the chance to correct the administrative deficiency, he didn't do anything different (sufficient), rule ex par. B1(c) ADR Rules has not been observed.

As far as Complainant's arguments about fees are concerned, pursuant to par. 22.3 Reg. 874/2002 and par. 6(a) ADR Rules, "the Complainant shall pay to the Provider an initial fixed fee, in accordance with the Supplemental ADR Rules". In the case the Complainant initiating a challenge to the withdrawal of Complaint due to its administrative deficiency under par. B2(c) ADR Rules, he has to pay to the Provider separate fees in accordance with the Supplemental ADR Rules (par. 6(b) ADR Rules). Ex par. 6.(e), the fees paid are not reimbursable.

This means that Complainant's challenges about payment of the fees has no legal grounds: in particular, the Panellist deems that should be paid a fee for each Complain for each domain name, and a different fee for the Challenge of Withdrawal.

If the Claimant thinks that it is an injustice being obliged to file two different Claim – especially reference made to the fact that he deems it is not clear the identity / non identity of the Domain Name Holder – he could, in a second moment, in the pertinent places and in case there are sufficient and correct requirements – e.g. domain names transferred), ask Competent Authorities for damages.

Decision:

For all the foregoing reasons, in accordance with Paragraphs B2(c)3 of the ADR Rules, the Panel confirms the decision of the Czech Arbitration Court on the withdrawal of the Complaint under the Case No. 1639 mentioned above for its administrative deficiency.

Panellist: Marco Vincenti

Date: 2006, 11th September

Annex 1:

The case concerns a Challenge of Withdrawal due to defective Complaint.

In particular, the Complainant didn't observe par. B1(c) ADR Rules, because he filed only one Complaint concerning two different domain names that – as proved by EURID's documentation and WHOIS query results – have been registered by two different subjects.

Complainant's arguments (the two different registration made by the two different companies can be considered as made by the same individual person) are not correct (nor sufficient) in order to prove that the same subject has registered two different domain names and, as consequence, that it was correct to file only one Complaint (as permitted by the above mentioned rule).

Taking a juridically correct approach, the Panellist deems that, on the basis of the documentary evidence at his disposal (information by EURID and results of query of the WHOIS database), the two disputed domain names have been registered by two different subjects. Consequently, the Complainant – who, in any case, has not submitted valid proves to the contrary – should have filed two different Complaints, one for each domain name.

For all the above mentioned considerations, the Panellist confirms the Decision of the Court on the Withdrawal of the Complaint and denies the Challenge.