ADR.eu - .eu Alternative Dispute Resolution

Panel decision



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.: 06611

Administrative Contact: Lada Valkova

Complainant: Schiess Tech GmbH

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Domain Names: smtcl.eu, symg.eu

In Case the Complaint is filed against the decision(s) of EURID **Disputed EURID's decision(s)**:

[Insert disputed EURID's decision(s)]

Decision(s) Number(s):

Date(s) of Issue of decision(s):

Factual Background: On 21 October 2014, the Court issued to the Complainant a Notification of Deficiencies in the Complaint filed herein by the Complainant. The deficiencies are set out in the decision. The Court filed a non-standard communication on 24 October 2014 to the effect that the deadline for filing an administratively compliant Complaint would expire on October 28, 2014. The communication also contained the following sentence:

"If you would like to request an extension of this deadline due to serious reasons, please file your petition as a Non-standard Communication via our on-line platform."

The Court filed another nonstandard communication on 29 October, 2014, headed "Notification of Termination: Defective Complaint", stating that the proceeding had been "deemed to be withdrawn".

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On 31 October, 2014 the Complainant filed a nonstandard communication and made the submission set out below under Complainant Contentions.

Complainant' Contentions:

"Because of a virus infestation in our computer network we were not able to receive or send electronic messages for a few days.

After eliminating the disturbance we received the information at the ADR platform and informed our client and asked him for instructions immediately.

Complaint commissioned us to separate the proceedings SYMG and SMTCL and open a further proceeding concerning the transfer of the domain name SYMG.

Because of this exceptional and undeserved difficulties we ask for continue the proceeding. I add the correction of the deficiencies in the Complaint.

Respondent: Razvan, Zofota / Metalkid 2008 / Str. Aeroportului, Nr. 1, Cladirea C18 / 700038 Iasi

Adress: Iasi / Romania /

E-Mail: radu@romarg.ro

Phone: *4.0332441823

Registrar: Organisation Romarg Srl. / www.romarg.ro

There are no other proceedings related to the disputed Domain Name I know. We opened only the ADR Dispute and no other proceeding."

Discussion and Findings:

Nature of the Proceeding

This is a challenge to a decision of the Czech Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (Czech Arbitration Court or the Court). The decision under challenge is a decision that deems a .eu domain name Complaint to have been withdrawn. To understand the full nature of the challenge, it is necessary to look at the background to the dispute and how this has given rise to the present proceeding.

Background

On 13 October, 2014, the Complainant filed a Complaint with the Court pursuant to paragraph B1 of the .eu Dispute Resolution Rules (ADR Rules) against the Respondent Razvan Zofota. The relief sought in the Complaint is that two .eu domain names be transferred from the Respondent, in whose name the domain names are registered, to the Complainant. The Complaint relates to the two domain names <smtcl.eu> and <symg.eu>. It is clear, therefore, from the outset that this is a case of a single Complaint for the transfer of two domain names and that it is subject to those provisions in the ADR Rules specifically drawn to deal with such cases. In particular, the Complaint is subject to paragraph B1(c) of the ADR Rules, which provides:



"(c) The Complaint may relate to more than one domain name, provided that the Parties and the language of the ADR Proceedings are the same."

In the case of each of the two domain names, the Complainant has purported to identify, as it is required to do by the Rules, the registrar. The registrar is given as the same in the case of each domain name. The registrar is given as Metalkid 2008, and this entity is clearly described in the Complaint as the registrar "organization", together with a contact name given as Razvan Zofota, who is apparently the same Razvan Zofota as the Razvan Zofota who is said to be the Respondent, as its name address and contact details are the same in its capacity of registrar as it is in its capacity of Respondent. The Panel should also say at this stage that a Respondent is defined under the rules as the holder of the domain name registration; so the allegation is that Razvan Zofota was both registrar and registrant.

The merits of the claim set out in the Complaint are not, of course, relevant for the present challenge but, briefly, the Complaint recites that the Complainant owns trade various names and trademarks that are set out, that the Respondent has registered the two domain names in question, that the first of them <smtcl.eu> is identical to the Complainant's trademark SMTCL, that the second domain name <symg.eu> is "identical to the Name of the Company SYMG", that the Respondent is improperly using the domain names to inflict damage on the Complainant, that its conduct amounts to bad faith and that the two domain names should be transferred to the Complainant.

On 13 October 2014, after receiving the Complaint, the Court wrote to EURID, the registry of .eu top-level domains under contract to the European Commission, seeking the usual EURID verification of registration of the disputed domain names with the nominated registrar and also verification of the Respondent, the contact details of the registrar, that the domain names will remain locked and the language of the registration agreements for the domain names in question.

EURID replied on 17 October, 2014 and provided the verification information with respect to each domain name. The Panel will not set out all of this detailed information provided, but the essential information is as follows:

Domain name SMTCL.eu

The registrar is Romarg Srl. The registrant is Metalkid 2008 whose contact details are described as "Registrant Name Razvan, Zofota Organisation Metalkid 2008." The website address of the registrar, Romarg Srl, is then given and the language of the registration agreement is said to be English.

NAMES SMTCL.eu SYMG.eu

Domain name SYMG.eu

The registrar is EURODOMENII. The registrant is Metalkid 2008 whose contact details are set out and they are the same as those given with respect to the domain name <smtcl.eu>. The website address of the registrar, EURODOMENII, is then given and the language of the registration agreement is said to be Romanian.

Armed with that information , the Court continued to proceed with its obligations under the Rules and conducted a review of the Complaint for the purpose of administrative compliance with the abovementioned rules, as it was required to do by paragraph B2 (a) of the ADR Rules.



Having conducted that review, the Court found that the Complaint was not in administrative compliance with the rules and on 21 October 2014 it set out its concerns. It will be seen later that the Panel is of the view that the Court was clearly right in reaching its conclusion and in the action that it then took The concerns of the Court were:

- "1) According to paragraph B1(c) of the 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. From EURid's verification results that the language of registration Agreements differs for each of the disputed domain names. You are invited to choose only one domain name that will continue in this proceeding. Regarding the other domain name you may file a new Complaint.
- 2) In your Complaint you have stated an insufficient identification of the Respondent. Please see the EURid's verification available in the online case file in the form of a non-standard communication dated 17 October 2014 regarding the appropriate identification of the Respondent. Kindly identify only one Respondent including its all contact details.
- 3) We have found that you have not identified the Registrar. Please see the EURid's verification available in the online case file in the form of a non-standard communication dated 17 October 2014, point 1. regarding the appropriate identification of the Registrar. Please note that registrar and its technical contact may not be the same entities; please identify only the correct Registrar.
- 4) Please specify if there are any other proceedings related to the disputed domain name(s)." On the same day, 21 October 2014, the Court issued to the Complainant a Notification of Deficiencies in Complaint. The notification, formal parts omitted, is in the following terms.

"In accordance with Paragraph B2 (b) of the .eu Dispute Resolution Rules (the ADR Rules), we would like to notify you that your Complaint has the following deficiencies:

- Does the Complaint provide the name of the Respondent and information regarding how to contact Respondent or any representative of Respondent in sufficient detail to allow the Provider to send the Complaint in accordance with ADR Rules, Paragraph A2 (a) (b) (ADR Rules, Paragraph B1 (b) (5)]?
- According to the relevant WHOIS confirmation(s), is/are the domain name(s) specified in the Complaint registered with the registrar(s) indicated by the Complainant?
- Is the Complaint filed in the language of the registration agreement, as confirmed by the EURID or does the complaint indicate an agreement between the parties to proceed in a different language or is the Complaint in the language as decided by the Panel pursuant to the ADR Rules?

Additional Comments:

• 1) According to paragraph B1(c) of the 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. From EURid's verification results that the language of registration Agreements differs for each of the disputed domain names. You are invited to choose only one domain name that will continue in this proceeding. Regarding the other domain name you may file a new Complaint.



- 2) In your Complaint you have stated an insufficient identification of the Respondent. Please see the EURid's verification available in the online case file in the form of a non-standard communication dated 17 October 2014 regarding the appropriate identification of the Respondent. Kindly identify only one Respondent including its all contact details.
- 3) We have found that you have not identified the Registrar. Please see the EURid's verification available in the online case file in the form of a non-standard communication dated 17 October 2014, point 1. regarding the appropriate identification of the Registrar. Please note that registrar and its technical contact may not be the same entities; please identify only the correct Registrar.
- 4) Please specify if there are any other proceedings related to the disputed domain name(s).

In view of the timelines specified in the ADR Rules [Paragraph B2 (b)], you are requested to correct the above-mentioned deficiencies and submit an amended Complaint within seven (7) days of receiving this Notification. The amended Complaint must be submitted using the Form "Amend Complaint" available on the On-line Arbitration Platform of the Czech Arbitration Court.

After the deadline mentioned above, the ADR Proceeding will be deemed cancelled without prejudice to your submission of a new Complaint."

The comments of the Court set out above under the heading Additional Comments make it perfectly clear exactly what the concerns of the Court were about the Complaint and how, the Complaint was administratively deficient. Nor can there be any doubt about three other matters. The first is that the Court identified four fundamental deficiencies in the Complaint. Secondly, the Court had no power to waive the deficiencies, but was obliged under the Rules to act on them and to prevent the Complainant from proceeding any further at that stage. The third is that the Court did not have a discretion to notify the Complainant of the deficiencies, but an obligation to do so; paragraph B 2(b) of the Rules provides that the provider, in this case the Court, "shall" notify the Complainant of the deficiencies and the consequences of not rectifying them, not that it might or might not do so.

As well as the Notification of Deficiencies in Complaint of 21 October 2014, the Court filed a non-standard communication on 24 October 2014 to the effect that the deadline for filing an administratively compliant Complaint would expire on October 28, 2014. The communication also contained the following sentence:

"If you would like to request an extension of this deadline due to serious reasons, please file your petition as a Non-standard Communication via our on-line platform."

As the deficiencies were not corrected by filing an Amended Complaint, the Court filed another nonstandard communication on 29 October, 2014, headed "Notification of Termination: Defective Complaint", stating that the proceeding had been "deemed to be withdrawn" as the Rules express it, or "cancelled" as the communication put it, which is a more accurate word. However, the communication also stated that the Complainant had a right of challenge the Court's decision which it has done and which has led to the present matter before the Panel. It also noted that the cancellation was without prejudice to the right to file a new complaint.

The next step in the proceeding was instigated by the Complainant. On 31 October, 2014 the Complainant filed a nonstandard communication and made the following submission:

"Because of a virus infestation in our computer network we were not able to receive or send electronic messages for a few days.

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Respondent: Razvan, Zofota / Metalkid 2008 / Str. Aeroportului, Nr. 1, Cladirea C18 / 700038 Iasi

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Registrar: Organisation Romarg Srl. / www.romarg.ro

There are no other proceedings related to the disputed Domain Name I know. We opened only the ADR Dispute and no other proceeding."

The communication does not state the domain name or names to which the challenge relates.

However, the text of the communication makes it clear enough that the Complainant wants to proceed with a new Complaint relating to the domain name <symg.eu>. One would therefore expect that the "new Complaint" attached to the communication and described in that way, would deal with that domain name. One can only assume that the intention of the Complainant is that, as a consequence, the challenge relates to the other domain name, <smtcl.eu>.

Form C1 attached to that communication sets out the same points made in the communication. Part of the form appears to be in the German language, but the grounds of the challenge are in the English language.

Although the communication does not state the domain name or names to which it relates, the Form C1 does do so and it states that the challenge relates to the domain name <smtcl.eu>.That creates a problem in itself, as the only withdrawal or cancellation that can be challenged by the Complaint is one relating to both domain names as the essence of the Court's decision was that a Complaint relating to two domain names subject to different languages was administratively deficient. It is difficult to see how a challenge relating to two domain names can be made when the essence of the deficiency is that there are two domain names with registration agreements in two different languages and yet the form of the challenge made relates to only one domain name; in other words, a right is given under the Rules to challenge "the withdrawal of the Complaint", which must mean the Complaint seeking the transfer of the two domain names. It must therefore be doubtful whether there is a valid challenge before the Panel at all.

In any event, also attached to the communication is the "new Complaint", i.e. the proposed complaint dealing with the domain name <symg.eu>. However, when it is looked at, it is seen that



the "new Complaint" does not deal with that domain name, but with the domain name <smtcl.eu>. Adding to the confusion, a perusal of the new Complaint shows that, although it certainly makes claims about the way <smtcl.eu> has been used, it alleges that the parent company of Complainant has authorised action on "domain issues", "especially SYMG.eu", suggesting that the complaint is about the domain name <symg.eu", which the nonstandard communication foreshadowed and not about the domain name in the heading, namely <smtcl.eu.> The new Complaint, if that is what it is (for it omits virtually all of the information mandated to be included by paragraph B1(b) of the Rules) ends with the statement that the Respondent, who is not disclosed, does not have a right or legitimate interest "on the domain names" implying that the complaint is about both domain names. The "new Complaint" may therefore itself be administratively deficient, although this will be a matter for the Court and not this Panel to decide.

Perhaps because the challenge had been expressed partly in the German language, the Court filed a further non-standard communication on 7 November 2014 drawing the Complainant's attention to the facts that the challenge was not in the language of the proceeding , namely English, that it did not contain the information required according to paragraph 2 (c) (i), (ii) and (iii) of the Rules, which withdrawal it was that the Complainant wanted cancelled and most importantly, the reasons for the challenge, raising in the mind of the Panel again whether the challenge itself was administratively deficient.

On 13 November 2014 the Complainant made an attempt to correct the deficiencies highlighted by the Court by filing a further Form C1 in the English language and a further version of the new Complaint. However, this process perpetuates the confusion created by the earlier filings, as the challenge relates to one domain name, <smtcl.eu>, whereas the termination or cancellation by the Court related to both domain names; the new Complaint also relates to that domain name, although the declared intention of the Complainant in the communication was that the new complaint would be with respect to <symg.eu> and the new Complaint has the same very substantial defects and may itself be administratively deficient.

DISCUSSION OF THE ISSUES

The matter before the Panel is a challenge to the withdrawal of a Complaint due to administrative deficiency that has been made pursuant to paragraph B2 (c) of the .eu Dispute Resolution Rules (ADR Rules). This means that a Complaint has been withdrawn by the Court because of administrative deficiency found to exist by the Court and the Complainant is challenging that decision. Perhaps rather than describing the action of the Court as a withdrawal, it might make the process clearer to the reader if it were described as a termination, the word used by the Court itself on its electronic platform that tracks the progress of cases before the Court. In other words, the Court has examined the Complaint, has found that it does not comply with the rules and has ordered that the Complaint be terminated, or withdrawn, as it has brought the administrative efficiency in question to the notice of the Complainant, invited it to rectify the deficiency, but found that the Complainant has not rectified the deficiency.

The challenge, as has been pointed out, is brought pursuant to paragraph B2 (c) of the .eu Dispute Resolution Rules (ADR Rules). That provision provides that the request to which the challenge relates shall, *inter alia*, specify certain details about the Complainant and the domain names that are the subject of the Complaint. It also, importantly, shall "specify the requested cancellation of the withdrawal"; in other words the challenge must specify the withdrawal that the Complainant maintains should be cancelled or set aside. The provision also requires, importantly, that the



challenge shall "specify the reasons of the requested cancellation"; in other words the challenge must give the reasons why, in the submission of the Complainant, the withdrawal should be cancelled or overruled. Finally, the provision also requires that the challenge should conclude with the statement required in Complaints that the information supplied by the Complainant is "complete and accurate."

The role of the Panel is also spelt out in paragraph B2 (c) (3) and that role is to decide "whether or not to allow the requested challenge...". This can only mean that the Panel is to decide whether or not to allow the requested challenge that the Complainant has made and which has been put before the Panel by the Court as Provider. No doubt the rule means that the Panel is to consider whether the grounds advanced by the Complainant are valid and should be upheld. But what it does not mean is whether the Complainant should have been given an extension of time or should now be given such an extension.

Decision

The Panel has considered all of the material put before it and has decided not to allow the challenge. In summary, the Panel's conclusions are:

- 1. The issue is whether the Court was right or wrong in making a finding of administrative deficiency.
- 2. The issue is not whether the Court was right or wrong in not giving the Complainant an extension of time to rectify the administrative deficiency or whether it should be given an extension now.
- 3. Once the Court made its finding of administrative deficiency, it was obliged to notify the Complainant of that fact and, if the deficiencies were not corrected, the Court was obliged to deem the Complaint to be withdrawn.
- 4. The Court had no power to extend the time for the Complainant to rectify the deficiencies after it had notified the Complainant that the proceeding was deemed to be withdrawn. Nor does the Panel now have any such power, as the Panel has been appointed only "to decide the request" for the cancellation of the withdrawal.
- 5. If the Court had such a power, no case has been made out for the Court to have exercised any such power in favour of the Complainant or to do so now.
- 6. The Court was right in all of its findings of administrative deficiency and it should have deemed the proceeding to be withdrawn because of the deficiencies, as it did.
- 7. If the Panel has power to extend the time for the Complainant to rectify the deficiencies, which the Panel finds it does not, no case has been made out for the Panel to exercise any such power in favour of the Complainant.
- 8. None of these conclusions are negated by the subsequent filings of the Complainant.
- 9. The challenge therefore fails.



The Panel will now amplify those conclusions and make some further comments.

First, if the challenge succeeds, a complaint of some sort will be allowed to go forward as that is the purpose of the challenge procedure. The Complainant seems to maintain that the challenge now relates only to one domain name, namely <smtcl.eu>, but the withdrawal by the Court related to both domain names. The Panel has very grave doubts whether a withdrawal by the Court can be bifurcated in this way. Indeed, as already indicated, the Panel has doubts whether there is a proper challenge before the Panel at all. The Panel is certainly not satisfied that there is such a challenge before it. The form used by the Complainant to launch the challenge, on its face, relates only to one domain name and does not seek to challenge the only decision that was made, namely that the Complaint should be withdrawn because, among other reasons, it was a claim for two domain names in the one proceeding and the registration agreements for those two domain names were in different languages. Even if the withdrawal by the Court can be bifurcated, the Complainant's challenge relates to <smtcl.eu>, but it has filed or foreshadowed the filing of a new complaint which appears to relate to the same domain name, although the complaint speaks of "domain names." This seems to the Panel to be a formula for more confusion which can be easily avoided by the Complainant starting new proceedings, one relating to each domain name and in compliance with the Rules. In the interests of the domain name arbitration process, nothing would be served by allowing the challenge, even if there is a valid challenge on foot.

Secondly, the challenge instigated by the Complainant is not, in the opinion of the Panel, a challenge which the rules allow the Panel to adjudicate upon. That is so because it omits significant material that the rules require to be included. The form used by the Complainant, Form C1, does not "specify the requested cancellation of the withdrawal" or give any information as to what withdrawal it is that the Complainant maintains should be cancelled.

More importantly, the form instituting the challenge does not contain reasons why the Court's termination of the proceeding should be set aside. This provision essentially means that there must be reasons given as to why the Court was wrong in finding there was an administrative deficiency. The challenge is not to whether the Court should have given the Complainant more time to rectify the deficiencies; it is a challenge to whether the Court was right or wrong on the finding of administrative deficiency. Once the Court found administrative deficiency which was not rectified in time, it was obliged to give the Notification to the Complainant that the proceeding was withdrawn or cancelled and it had no power to waive it or defer it.

The form submitted by the Complainant purports to give the reasons for the challenge and those alleged reasons are set out above. The Complainant's case on this issue is substantially that there was a virus infestation of the computer network of the Complainant's representative and that this prevented it from replying in time. But none of that, even it is accepted as having taken place at all and as having been of some substance, is a reason why the Court was wrong in finding an administrative deficiency. It is, at best, a reason why the Complainant did not respond within time to the Court's notification of the deficiencies and the invitation to rectify them.

Accordingly, the Complainant has not included significant material specifically required by paragraph B2 (c) of the .eu Dispute Resolution Rules (ADR Rules). The Panel's decision is, therefore, that the Complainant has not made a valid challenge on which the Panel can adjudicate because it has not given reasons why, if they were proved, the Court's decision on administrative deficiency was wrong.

If the Panel is wrong on this and if there is a valid challenge before the Panel, it finds that the requested challenge should not be allowed as it has not been made out. That is so because it is clear from the information provided by EURID that the court was correct in all of the findings it made on



administrative efficiency. The Court was correct, as is seen from the unequivocal evidence, when it said: "From EURID's verification results that the language of registration Agreements differs for each of the disputed domain names" and that accordingly the Complaint could not support claims for the two domain names. The Court was also correct, as is seen from the unequivocal evidence, when it found that there was "an insufficient identification of the Respondent" which is made very clear from the verification information provided by EURID. The Court was also correct, as is also seen from the unequivocal evidence, when it found that the Complaint did not identify the registrar, which is also apparent from the EURID material and that it did not specify whether there were other proceedings.

The Panel also finds that the Notification of Deficiencies was valid and that its contents were correct. It is clear from the material and the history of the matter that the Court acted properly when it gave the Complainant notice on 21 October 2014.

The Complainant did not avail itself of the opportunity to rectify the specified deficiencies by filing an amended Complaint on or before 28 October 2014 and from that point the Court was entitled to withdraw or terminate the proceeding, as it did. Indeed, there was no other course open to the Court. Its power to withdraw the proceeding is not discretionary but mandatory. That is so because Paragraph B2 (b) provides that the Provider in these circumstances "shall" inform the Complainant that the proceeding is deemed to be withdrawn. Moreover, such an interpretation of the power and duty of the Court is not a matter of complex interpretation of the Rules, as rules governing domain name disputes habitually emphasise the tight deadlines under which the proceedings take place. There is a limited power under Rule A2(i) to extend time limits in proceedings but that power can be exercised only if a request for an extension is made before the time limit expires, which was not done in the present case. Other than that, there is no power for the Court to give an extension of time after the time for responding has elapsed and in, particular, after the deficiencies have been notified and after the Complaint is deemed to have been withdrawn. Nor is there any injustice done to a complainant who does not rectify deficiencies in time in those circumstances because it is expressly given the right under Paragraph B2 (b) to file a different complaint, a right that the present Complainant still has.

Accordingly, when the Court withdrew the Complainant it did so validly and, indeed, it is difficult to see on the evidence and the rules how the Court could have made any other finding.

The Panel should also make it clear that it does not accept the argument that the computer virus relied on by the Complainant's representative is a ground why the Court's decision should be overruled. There is no provision to the effect that a withdrawal can itself be withdrawn for such a reason and the Court had no power to do so. If there is a case for such a provision it should be expressly provided for in the rules. Moreover, the Panel finds that even if such a decision based on the computer malfunction could have been made in the present case, it should not have been made; there is no evidence as to when the virus immobilised the computer network, the nature and effect of the malfunction, what were the "few days" during which the Complainant could not receive or send electronic messages, whether alternative computer facilities were available or why the Complainant did not make other inquiries about steps being taken in the proceeding during the time that it knew its computer was not working. Moreover, it is difficult to believe that a party and its representatives, engaged as they were in a proceeding that they knew was being conducted online, would not have checked by other computer facilities as to what was happening in the case. All of these matters are solely within the knowledge of the Complainant and its representatives and could have been put before the Court and the Panel, but were not.



Accordingly, the Panel finds that the challenge should not be allowed. The result is that the proceeding No 06611 was withdrawn as from 21 November 2014 and remains withdrawn, without prejudice to the right of the Complainant to file other proceedings.

2 December 2014

The Hon N A Brown QC

Decision:

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

The Honourable Neil Anthony Brown QC

Date: 2 December 2014