Panel Decision for dispute CAC-ADREU-002306

Case number	CAC-ADREU-002306
Time of filing	2006-07-28 12:06:24
Domain names	labview.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	National Instruments Ireland Resources Limited, National Instruments Ireland Resources Limited

Respondent

Organization / Name	EURid

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

None

FACTUAL BACKGROUND

The Complainant filed an application for the domain name <labview.eu> (the "Disputed Domain Name") on 7 December 2005. The application was first in the queue (indeed it was the only application) and the documentary evidence was received by EURid on 2 January 2006, before the deadline of 16 January 2006.

The Complainant's application was based on the Community Trade Mark LABVIEW (number 000582890) in the name of National Instruments Corporation. A trade mark licence made between the Complainant and National Instruments Corporation was also provided, as required by the Sunrise Rules. However, the name of the applicant was stated on the covering letter as being "National Instruments Ireland R", as opposed to the full name of the Complainant, namely "National Instruments Ireland Resources Limited". The Complainant's application was rejected by the Respondent.

The Complainant filed a Complaint against the decision of the Respondent on 7 July 2006 (the deadline being 10 July 2006). The Complaint was sent by courier, fax and the online platform of the Czech Arbitration Court, using the "Non-Standard Communication" form rather than the "Complaint" form.

On 25 July 2006 the Disputed Domain Name was registered by a third party. The Complainant therefore wrote to the Court on 26 July 2006 enquiring why the Disputed Domain Name had been registered when, according to Commission Regulation (EC) No 874/2004 of 28 April 2004 (the "Regulation"), once a Complaint is filed the Disputed Domain Name should be suspended until a decision is made. On 26 July 2006, the Court wrote to the Complainant explaining that the Complaint had not been correctly filed as it had not been sent via the online platform using the correct form. On 27 July 2006, the Complainant filed the Complaint via the online platform on the correct form, as per the Court's instructions.

On 28 July 2006, the Court acknowledged receipt of the Complaint and stated that the Time of Filing was 28 July 2006. It then sent a Request for Verification to the Respondent in its role as the Registry, to which the Respondent responded on 7 August 2006, enclosing the documentary evidence sent by the Complainant as part of its application. On 8 August 2006, the Court posted a message on its online platform stating that the Time of Filing was 11 July 2006. Further correspondence between the Court and the Complainant ensued, although no agreement was reached as to the Time of Filing.

On 27 September 2006, the Respondent filed a Response arguing that the Complaint was not filed in time and thus should be dismissed. The Panel was appointed on 9 October 2006. In order to ensure fairness between both parties in the event that the Panel decided to

accept review of the Complaint, on 24 October 2006 the Panel granted the Respondent 14 days to file a substantive Response, and the Respondent did so on 6 November 2006.

A. COMPLAINANT

The Complainant asserts that the abbreviation of its name occurred because it could not enter its complete name on the application form as this was technically impossible. The maximum number of characters that could be inserted was 30, while the complete name of the Complainant consists of 46 characters (including spaces).

The Complainant argues that a quick search on the internet, using the Google search engine, on "National Instruments Ireland" would immediately show that the complete company name of the Complainant is National Instruments Ireland Resources Limited. This also appears on the Irish Company Registration Office's online register, where the only company name that contains "National Instruments Ireland R" is National Instruments Ireland Resources Limited.

In the Complainant's view, the validation agent should therefore have used its discretion to clear up any doubts about the evidence submitted by the Complainant, and should not have simply rejected the Complainant's application.

The Complainant therefore requests that the Respondent's decision not to attribute the Disputed Domain Name to the Complainant be annulled and that the Disputed Domain Name be attributed to the Complainant. The Complainant also requests that the Respondent be ordered to pay the costs of the procedure.

B. RESPONDENT

In its initial Response filed on 27 September 2006, the Respondent argued that the Complaint should not be accepted as it was filed after the expiration of the Sunrise Appeal Period, which ended on 10 July 2006. This is because the ADR Rules clearly define the "Time of Filing" as a point in time when the following conditions are fulfilled:

"(a) a Complaint or a request to change the language of the ADR Proceeding has been properly filed with the Provider; and
(b) the appropriate fee for the ADR Proceeding is received by the Provider."

The Complaint must be submitted in hard copy and in electronic form (ADR Rules Paragraph B(1)). The Czech Arbitration Court received the Complaint in hard copy on 10 July 2006, the fees on 11 July 2006, and the electronic Complaint on 27 July 2006. Therefore, the requirements imposed by the ADR Rules were only met on 27 July 2006, although the deadline was 10 July 2006.

The Respondent makes reference to the non-standard communication of the Czech Arbitration Court dated 23 August 2006, in which the Court confirms that the Complaint was filed on 27 July 2006.

The Respondent underlines that the Czech Arbitration Court informed the Complainant by email that "During the control we went through all your communications – you never asked for any prolongation of any period relating to the filing of your Complaint No 2306. Hence we can confirm that both Date of disputed initiation and the Time of filing were stated correctly".

The Respondent cites a number of cases whereby Complaints were filed late and were thus not accepted. It therefore argues that the case in present should also be dismissed.

Further to the Panel's request for the Respondent to file a substantive Response, the Respondent filed a Response on 6 November 2006 setting out in detail the reasons why it rejected the Complainant's application for the Disputed Domain Name.

The Respondent points out that Article 10(1) of the Regulation states that only holders of prior rights recognised or established by national or Community law shall be eligible to apply to register .EU domain names during a period of phased registration before the commencement of general registration. Article 14 of the Regulation states that "every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question.(…) If the documentary evidence has not been received in time or if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the Registry of this.(…) The Registry shall register the domain name, on the first come first served basis, if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in the second, third and fourth paragraphs".

The Respondent also points out that Section 20.3 of the Sunrise Rules states that "If, for any reasons other than as are referred to in Section 20(1) and 20(2) hereof, the Documentary Evidence provided does not clearly indicate the name of the Applicant as being the holder of the Prior Right claimed (e.g. because the Applicant has become subject to a name change, a merger, the Prior Right has

become subject to a de iure transfer, etc.), the Applicant must submit official documents substantiating that it is the same person as or the legal successor to the person indicated in the Documentary Evidence as being the holder of the Prior Right".

The Respondent asserts that, although the Complainant was stated on the licence declaration as being the licensee, the applicant for the Disputed Domain Name was "National Instruments Ireland R". No documentary evidence was submitted substantiating that the Complainant and the applicant were the same entity. The validation agent therefore found that the applicant did not demonstrate clearly that it was the holder or the licensee of a prior right in the name LABVIEW, and so the Respondent rejected its application.

In support of its case the Respondent advances various arguments, as follows:

1) The burden of proof is on the applicant to demonstrate that it is the holder or the licensee of a prior right.

Section 21.2 of the Sunrise Rules states that the validation agent examines whether the applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence received and scanned by the processing agent. The validation agent must therefore be provided with all the documentary evidence necessary for it to assess whether the applicant is indeed the holder of a prior right. In support of this, the Respondent cites various cases demonstrating that the burden of proof is on the applicant, and points out that it would be wrong to shift the burden of proof on to the Respondent, as this would mean that the validation agent would be obliged to conduct further investigations in order to correct deficiencies in applications.

2) The documentary evidence does not demonstrate that the applicant is the holder of a prior right.

The WHOIS record shows that the applicant's name is "National Instruments Ireland R", with its address at "39/40 Upper Mount Street 99999 Dublin 2 Ireland ". The applicant was represented by Mr Thomas Yoo (Corporate Counsel), as can be seen from the covering letter enclosed with the documentary evidence.

According to the documentation submitted, the trade mark holder is "National Instruments Corporation", located in the US, represented as a licensor by Mr Thomas Yoo. The licensee of the trade mark is "National Instruments Ireland Resources Limited", with its address at "Willsborough Industrial Estate, 17 Dublin, Ireland", represented by Mr. David Hugley.

When the name of the applicant and the name of the owner of the trade mark are different, Section 20 of the Sunrise Rules states what documents should be submitted to demonstrate how the applicant is entitled to rely upon the claimed prior right pursuant to article 14 of the Regulation. In this case the applicant submitted a license declaration form signed by "National Instruments Corporation" and "National Instruments Ireland Resources Limited". The name of the licensee, "National Instruments Ireland Resources Limited", was therefore not the same as the name of the applicant, namely "National Instruments Ireland R". According to the Respondent, this should have been explained by the applicant.

In addition, the Respondent points out that various other elements of the documentary evidence cast further doubts in the validation agent's mind, such as the fact that the addresses of the applicant and the licensee were different and that the representatives of the applicant and the licensee were different.

Therefore, according to the Respondent, the validation agent correctly found that the applicant did not clearly demonstrate that it was the holder of the relevant prior right and so the Respondent correctly rejected the applicant's application. The Respondent cites a large number of cases in support of this contention.

3) Mistakes made by the applicant's registrar may not be attributed to the Respondent and/or to the validation agent.

The Respondent points out that Section 5.3 of the Sunrise Rules states that "The Registry, Validation Agents and the Government Validation Points are not party to the agreement between the Applicant and his Registrar or to the agreement between the Applicant and his Document Handling Agent and therefore cannot incur any obligation or liability under these agreements".

The Complainant contends that the mistake in the applicant's application was made by the applicant's registrar because the registrar's form was limited to 30 characters. The Respondent emphasises that this is a technical limitation of the applicant's registrar and not of the Respondent's system, and so the Respondent should therefore not be held responsible.

4) The Respondent and the validation agent are under no obligation to investigate the circumstances of the application.

The Respondent points out that Section 21.2 of the Sunrise Rules states that "[t]he Validation Agent examines whether the Applicant has

a Prior Right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received and scanned by the Processing Agent (including the Documentary Evidence received electronically, where applicable) and in accordance with the provisions of these Sunrise Rules".

Section 21.3. of the Sunrise Rules states that "The Validation Agent is not obliged, but it is permitted in its sole discretion, to conduct its own investigations into the circumstances of the Application, the Prior Right claimed and the Documentary Evidence produced".

The Respondent argues that Section 21.3 of the Sunrise Rules does not impose any obligation for the validation agent to conduct its own investigation: it is a mere possibility that the Respondent can use "in its sole discretion". The Respondent cites various previous cases supporting this argument.

5) The present ADR proceedings may not be used to correct a defective application.

The Respondent emphasises that fact that Article 22(1)(b) of the Regulation states that a decision taken by the Respondent may only be annulled when it conflicts with the Regulation. Therefore, only the documentary evidence which the Respondent was able to examine at the time of validation of the application should be considered by the Panel to assess the validity of the Respondent's decision. The Respondent asserts that this verification is the only task for the Panel in these proceedings, which may not in any case serve as a "second chance" or an additional round providing applicants an option to remedy their imperfect original application that was rejected during the Sunrise Period. The Respondent cites various cases in support of this contention.

6) Cost of the procedure

The Respondent asserts that costs are not a remedy that the Panel may grant to the Complainant pursuant to the Regulation, the Sunrise Rules or the ADR Rules. The Respondent refers in particular to Paragraph B(11)(c) of the ADR Rules.

For these reasons, the Respondent argues that the Complaint must be rejected.

DISCUSSION AND FINDINGS

1. Timing of the Complaint

The Panel will first address the relevant procedural question in this case, namely whether the Complaint was in fact filed in time. As the Respondent points out, the ADR Rules define the "Time of Filing" as a point in time when the following conditions are fulfilled:

"(a) a Complaint or a request to change the language of the ADR Proceeding has been properly filed with the Provider; and
(b) the appropriate fee for the ADR Proceeding is received by the Provider."

As far as (a) is concerned, and as the Respondent also correctly points out, the ADR Rules provide that the Complaint must be submitted both in hard copy and electronic form. In this particular case, the deadline for submission was 10 July 2006. There is no dispute that the Court received the hard copy in good time, but it is not clear whether the requirement concerning the Court's receipt of the electronic copy was fulfilled.

Paragraph B(1)(b) of the Supplemental ADR Rules states that "the Complainant shall be required to prepare its Complaint using the Complaint Form included in the list of Forms contained in Annex B hereto and posted on the Provider's website". The Complainant duly did go to the Court's website, download the relevant form and fill it in correctly. On 7 July 2006, it filed this form using the Court's online platform, although as an Annex to a "Nonstandard Communication" rather than directly on the electronic version of the Complaint form. The Complainant then received a message stating that "This form has been accepted". However, when the Complainant wrote to the Court on 26 July 2006 asking why the Disputed Domain Name had been registered in the name of a third party when a Complaint had been filed, the Court replied that, "We cannot see your Complaint if you send just a Nonstandard Communication".

The ADR Rules do not define in any detail what is meant by "submitted in electronic form", and it therefore seems to the Panel that the Complaint was indeed submitted electronically in accordance with the broad procedures stated in the Rules. The Complainant used the correct form, as stated in the Supplemental Rules, and transmitted it electronically to the Court, as evidenced by the notice of acceptance received from the Court. In the Panel's opinion, the fact that the Complainant failed to comply with the somewhat complex requirements of the Court's platform, not explicitly referred to in the Rules, cannot be used against it. In the Panel's own personal experience, using the online platform is not self-evident by any means.

The Panel therefore finds that part (a) of the definition of "Time of Filing" in the ADR Rules is satisfied because the Complaint was filed

both in hard copy and electronically in due time. However, parts (a) and (b) of the definition must both be satisfied. Part (b) presents rather more of a problem as it refers to the time when payment was received by the Court. Although the evidence of payment transfer attached to the Complaint is dated 7 July 2006, the Court apparently only received the fees on 11 July 2006, a day after the deadline of 10 July 2006. Technically speaking therefore the Time of Filing was 11 July 2006 and the Complaint was therefore filed too late. This is also implied by the Court's reference to the Time of Filing as being 11 July 2006, although it should be noted that the Court's postings on the online platform with respect to this case are often contradictory because the "Time of Filing" is always stated as being 28 July 2006 at the top, regardless of the Court's assertions below, presumably as a result of an automated process.

The question for the Panel is therefore whether receipt of payment a day after the deadline for the filing of an ADR Complaint should mean that the Complaint therefore becomes inadmissible, which would seem to be the case upon a strict interpretation of the ADR Rules. However, the Panel considers that it would be unfair to the Complainant to make such a finding, not least because the frequently asked questions on the Court's website are not conclusive on this point. Indeed, in June 2006 the Panel itself had reason to ask the Court this very question with regard to an unrelated matter due to the somewhat contradictory information available, and received the following answer from the Court by email, "If the complaint is filed via the online platform by the end of the deadline it means that the complaint is initiated within the deadline. The payment and the hardcopy can follow afterwards". In short, it therefore seems to the Panel that if the Court's practice has been to accept Complaints even when payment is received after the deadline, then it would be unfair to find against the Complainant in this instance. On this particular point the Panel also follows the reasoning of the Panel in Case Number 00119 (NAGEL). In this case, payment was also received after the deadline, and the Panel commented as follows:

"However, it must be kept in mind that the failure to initiate the ADR Proceeding within the Sunrise Appeal Period results in the Complainant’s loss of the only remedy available against the decision of the Registry. Therefore, a rejection of a Complaint on the grounds that it was not initiated timely requires that the Complainant is able to clearly determine in advance what actions have to be taken in order to meet the deadline set by the Sunrise Rules. Hence, in cases of doubt, within all the available possibilities the one that is most favourable for the Complainant must be regarded as the initiation of the ADR Proceedings. Therefore, I come to the conclusion that a Complainant can rely on the publication of Question No. 10 of the FAQ, stipulating that it is sufficient to file the Complaint via the online-platform in order to initiate an ADR Proceeding within the Sunrise Appeal Period and that the correct fees and the hard copies can be submitted at a later stage. In other words: whereas there exists no clear definition of the “initiation” of an ADR Proceeding in the ADR Rules; and whereas the FAQ contain an interpretation favourable for the Complainant, I consider myself estopped from defining a less favourable time for the initiation of the ADR Proceedings since it would be unfair to punish the Complainant with the loss of his remedy only because he relied on the FAQ".

Having said this, the Panel would emphasise that it is in agreement with the Respondent that a Complaint against the decision of the Respondent may not be filed after the end of the Sunrise Appeal Period, and would deny a Complaint on procedural grounds if it was clearly filed late (as per certain of the decisions cited by the Respondent in support of its arguments). If Complaints against the decision of the Respondent could be filed at any time, this would make the system unworkable, not least because unconnected third parties who had subsequently acquired domain names legitimately would run the risk of having them removed. The Panel will return to this point in part 3.

The Panel therefore finds that the Complaint is admissible and has proceeded to consider the substantive issues.

2. The Respondent's Decision

Article 22(11) of the Regulation states that, in the case of a procedure against the Registry, as is the case here, the Panel must decide whether the Registry's decision conflicts with the Regulation or Regulation (EC) 733/2002 (collectively referred to as the "Regulations"). The Panel must therefore decide, from a purely objective standpoint, whether the Respondent's actions were in accordance with the Regulations. The Panel would also add that, whilst the Sunrise Rules are helpful in clarifying the meaning of the Regulations, and set down detailed procedures for applicants to follow, they are not particularly pertinent when deciding whether the Respondent's actions were in accordance with the Regulations.

As the Respondent correctly points out, Article 10(1) of the Regulation states that only holders of prior rights recognised or established by national or Community law shall be eligible to apply to register .EU domain names during a period of phased registration before the commencement of general registration. Article 14 of the Regulation states that "every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question".

In this instance, the licence declaration evidenced that the Complainant was indeed the holder of a prior right in the term LABVIEW. However, strictly speaking the Complainant did not apply for the Disputed Domain Name - an entity called "National Instruments Ireland R" did. The Respondent therefore concluded that the applicant had not demonstrated that it was the holder of a valid prior right because

the prior right was in fact held by "National Instruments Ireland Resources Limited", rather than "National Instruments Ireland R". The crux of the question for the Panel to consider is therefore whether it was reasonable for the Respondent, acting via the validation agent, to conclude that there was a possibility that "National Instruments Ireland R" and "National Instruments Ireland Resources Limited" were two separate entities. In this regard, and on the strength of these particular facts alone, the Panel finds that it was not.

The Panel is well aware that there are two conflicting lines of Panel decisions concerning what investigations, if any, the validation agent is obliged to make in the event that an applicant's prior right is not clear on the face of the documents submitted. This particular Panel is of the opinion that decisions should be made on a case by case basis and that there can be no hard and fast rules concerning when or how the validation agent should investigate. In this particular case the Panel finds that it is highly unlikely that there could have been two entities, one called "National Instruments Ireland Resources Limited" and one called "National Instruments Ireland R". It seems clear to the Panel that "R" is not a word in itself, nor a company type, and so this should have alerted the validation agent that the word "Resources" had been truncated.

The Panel is in agreement with the Respondent that the burden of proof is on the applicant to demonstrate its prior right and that the validation agent should not be obliged to undertake additional research (although may do so at its sole discretion). In the case of fundamental errors, where, for example, the documentary evidence shows that the prior right in question belongs to an entity which is clearly different from the applicant, or that the prior right has expired (as is the case in many of the cases cited by the Respondent), then the application should be rejected. In general terms the Panel would point out that, in view of the sheer scale of the launch of the .EU extension, from a practical point of view it was necessary to insist that applicants complied with the relevant procedures and time periods set down in the Regulation. In the Panel's view those applicants who clearly failed to do so should have not have any recourse against the Respondent, and to find otherwise would be impractical. It was not for the Respondent to correct the mistakes of applicants, as this would have been an almost infinite task and would have shifted not only the burden of proof but the burden of cost onto the Respondent / validation agent.

However, on this particular occasion, the Panel feels that it would be wrong to find that the validation agent had a legitimate expectation that "National Instruments Ireland Resources Limited" and "National Instruments Ireland R" were two different legal entities. From a practical point of view, it is not unreasonable to suggest that the validation agent should be expected to use basic common sense in such a situation and, in the Panel's view, to find otherwise would be unjust. The Respondent claims that various other elements of the documentary evidence cast further doubts in the validation agent's mind, such as the fact that the addresses of the applicant and the licensee were different and that the representatives of the applicant and the licensee were different. In the Panel's opinion, the purpose of Section 21.3 of the Sunrise Rules is to allow the validation agent to make further investigations in the event of potential fraud. It does not place an obligation on the validation agent to rectify applicants' mistakes and to perfect defective applications, as has been asserted by some complainants. The Panel is therefore of the opinion that the fact that the applicant and the licensee had different addresses should have encouraged the validation agent to use its discretion and check whether "National Instruments Ireland R" could in fact have been a separate entity attempting to obtain the Disputed Domain Name by deception.

As an aside the Panel would add that it is not in agreement with the Complainant that a Google search would have any probative value, but a search of the Irish Companies Register does indeed reveal that "National Instruments Ireland Resources Limited" has the same address as the applicant, thus eliminating any doubts that "National Instruments Ireland R" and "National Instruments Ireland Resources Limited" could be separate entities. It cannot be argued that on each occasion the validation agent should just have simply checked whether the name of the applicant and the holder of the prior right matched, and rejected all defective applications without further analysis. If so the validation process may as well have been done by machine. The Panel feels that this is one of the cases (admittedly rare) that Section 21.3 of the Sunrise Rules was specifically drafted to cover.

The Panel would like to emphasise that the fact that the applicant's name was truncated as a result of the registrar's error has no bearing on the Panel's decision, made for the reasons referred to in detail above. In the event that an application was rightfully rejected due to the registrar's negligence, the ADR procedure cannot be used to assist the unfortunate applicant, who must pursue any claims directly against the registrar. In this regard, the Panel is in agreement with the Respondent's contention that mistakes made by the applicant's registrar may not be attributed to the Respondent and/or the validation agent. However, as an aside the Panel would observe that on this occasion the registrar was at best sloppy and at worst negligent, not only because the applicant's name was truncated, but because it should subsequently have realised that the application was defective and should have striven to correct it, either by sending an additional explanation with the documentary evidence or by making a new application.

The Respondent also argues that the present ADR proceedings may not be used to correct a defective application, and again the Panel is in agreement. As far as the Panel is concerned, it is clear that the first set of documentary evidence must be considered, and allowing applicants to submit later evidence would be contrary to the system of fairness and certainty that the Regulation is intended to provide. However, the Panel does not feel that this argument is relevant in this particular case, as the validation agent should have been able to

deduce that "National Instruments Ireland Resources Limited" and "National Instruments Ireland R" were the same entity merely by using rational thought at the time that the documentary evidence was reviewed.

Finally, the Panel agrees with the Respondent that the ADR Rules, Paragraph B11(c), do not allow the Panel to make any orders as to costs.

3. Registration by a Third Party

The Panel notes that, due to the Court's failure to take any action upon receipt of the Complaint, the Disputed Domain Name was registered by a third party when it was released for general registration on 25 July 2006. However, as a result of the Complaint, the Respondent, in its role as Registry, placed the Disputed Domain Name on hold, although it appears to have been registered perfectly legitimately.

The Panel is therefore somewhat concerned that a third party could suffer undue prejudice if it orders the transfer of the Disputed Domain Name to the Complainant. However, in view of the above, the Panel feels that this is the most appropriate solution and points out that the current registrant could take up the matter with the Respondent. In any event, the Panel would expect the Respondent to refund the registrant's registration fee. Evidently the Respondent is not to blame for the release of the Disputed Domain Name for general registration, as the Court failed to realise that a Complaint had been filed and thus to notify the Respondent to place the Disputed Domain Name on hold. It therefore seems to the Panel that this situation would not have arisen if the Court had either acted upon the filing of the hard copy of the Complaint or had made its online platform more user-friendly.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12(b) and (c) of the Rules, the Panel orders that the Respondent's decision be annulled and that the Disputed Domain Name be transferred to the Complainant.

PANELISTS

Name	**David Taylor**

DATE OF PANEL DECISION 2006-12-08

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Panel first addressed whether the Complaint was filed in time. The ADR Rules define the "Time of Filing" as a point in time when the following conditions are fulfilled:

"(a) a Complaint or a request to change the language of the ADR Proceeding has been properly filed with the Provider; and
(b) the appropriate fee for the ADR Proceeding is received by the Provider."

As far as (a) was concerned, the ADR Rules provide that the Complaint must be submitted both in hard copy and electronic form, but it was not clear whether the requirement concerning the Court's receipt of the electronic copy was fulfilled because the Complainant filed the Complaint as an Annex to a "Nonstandard Communication" rather than directly on the electronic version of the Complaint form. The ADR Rules do not define in any detail what is meant by "submitted in electronic form", and so the Panel held that the Complaint was indeed submitted electronically in accordance with the broad procedures stated in the Rules.

Turning to (b), the Court apparently only received the fees on 11 July 2006, a day after the deadline of 10 July 2006. Technically speaking therefore the Time of Filing was 11 July 2006 and the Complaint was filed too late. However, the Panel found that it would be unfair to the Complainant to make such a finding. The frequently asked questions on the Court's website were not conclusive on this point, and it seemed to the Panel that in general the Court's practice was to accept Complaints even when payment was received after the deadline. The Panel therefore found that the Complaint was admissible.

Turning to the substantive issues, the licence declaration evidenced that the Complainant was indeed the holder of a prior right in the term LABVIEW. However, strictly speaking the Complainant did not apply for the Disputed Domain Name - an entity called "National Instruments Ireland R" did. The Respondent therefore concluded that the applicant had not demonstrated that it was the holder of a valid prior right because the prior right was in fact held by "National Instruments Ireland Resources Limited", rather than "National Instruments Ireland R". However, and on the strength of the particular facts alone, the Panel found that it was not reasonable to conclude that there was a possibility that "National Instruments Ireland R" and "National Instruments Ireland Resources Limited" were two separate entities.

It seemed clear to the Panel that "R" was not a word in itself, nor a company type, and so this should have alerted the validation agent that the word "Resources" had been truncated.

The Panel was in agreement with the Respondent that the burden of proof was on the applicant to demonstrate its prior right and that the validation agent should not be obliged to undertake additional research. In the case of fundamental errors, where, for example, the documentary evidence showed that the prior right in question belonged to an entity which was clearly different from the applicant, or that the prior right had expired, then the application should be rejected. It was not for the Respondent to correct the mistakes of applicants, as this would have been an almost infinite task and would have shifted not only the burden of proof but the burden of cost onto the Respondent / validation agent.

However, on this particular occasion, the Panel felt that it would be wrong to find that the validation agent had a legitimate expectation that "National Instruments Ireland Resources Limited" and "National Instruments Ireland R" were two different legal entities. The Respondent claimed that various aspects of the documentary evidence cast doubt in the validation agent's mind that the same entity was involved. However, in the Panel's opinion, the purpose of Section 21.3 of the Sunrise Rules was to allow the validation agent to make further investigations in the event of potential fraud. The Panel was therefore of the opinion that the fact that the applicant and the licensee had different addresses should have encouraged the validation agent to use its discretion and check whether "National Instruments Ireland R" could in fact have been a separate entity attempting to obtain the Disputed Domain Name by deception.

The Panel added that it was not in agreement with the Complainant that a Google search would have any probative value, but a search of the Irish Companies Register did indeed reveal that "National Instruments Ireland Resources Limited" had the same address as the applicant, thus eliminating any doubts that "National Instruments Ireland R" and "National Instruments Ireland Resources Limited" could be separate entities. The Panel was of the opinion that it could not be argued that on each occasion the validation agent should just have simply checked whether the name of the applicant and the holder of the prior right matched, and rejected all defective applications without further analysis. If so the validation process may as well have been done by machine. The Panel felt that this was one of the cases (admittedly rare) that Section 21.3 of the Sunrise Rules was specifically drafted to cover.

The fact that the applicant's name was truncated as a result of the registrar's error had no bearing on the Panel's decision. In the event that an application was rightfully rejected due to the registrar's negligence, the ADR procedure could not be used to assist the unfortunate applicant, who must pursue any claims directly against the registrar. The Panel observed that on this occasion the registrar was at best sloppy and at worst negligent, not only because the applicant's name was truncated, but because it should subsequently have realised that the application was defective and should have striven to correct it, either by sending an additional explanation with the documentary evidence or by making a new application.

The Panel also agreed that ADR proceedings could not be used to correct a defective application. As far as the Panel was concerned, allowing applicants to submit later evidence would be contrary to the system of fairness and certainty that the Regulation was intended to provide. However, the Panel did not feel that this argument was relevant in this particular case, as the validation agent should have been able to deduce that "National Instruments Ireland Resources Limited" and "National Instruments Ireland R" were the same entity merely by using rational thought at the time that the documentary evidence was reviewed.

The Panel noted that, due to the Court's failure to take any action upon receipt of the Complaint, the Disputed Domain Name was registered by a third party when it was released for general registration on 25 July 2006. The Panel was therefore somewhat concerned that a third party could suffer undue prejudice if the Disputed Domain Name was transferred to the Complainant. However, the Panel felt that this was the most appropriate solution and pointed out that the current registrant could take up the matter with the Respondent, although the Respondent was not to blame for the release of the Disputed Domain Name for general registration, as the Court failed to realise that a Complaint had been filed and thus to notify the Respondent to place the Disputed Domain Name on hold.

The Respondent's decision was therefore annulled and the Panel ordered that the Disputed Domain Name be transferred to the Complainant.