Panel Decision for dispute CAC-ADREU-003072

Case number	**CAC-ADREU-003072**
Time of filing	**2006-09-21 12:31:30**
Domain names	**kontakta.eu**

Case administrator

Name	**Josef Herian**

Complainant

Organization / Name	**Kontakta spol. s r. o., Dipl.-Ing. Veit (Vít) Kolar (Kolář)**

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

No other legal proceedings concerning the disputed domain name are currently pending.

FACTUAL BACKGROUND

Complainant launched by e-mail a Complaint with the Czech Arbitration Court on September 15, 2006 to contest EURid Decision 2978102529865839 of August 07, 2006 not to register the domain name <kontakta.eu> (hereafter “Contested Decision”). The Czech Arbitration Court, after assigning as Time of Filing the date of September 21, 2006, notified the Complainant of Complaint deficiencies on October 10, 2006, and, subsequently, the Complainant filed an amended version of the Complaint on October 13, 2006. In response to Complainant’s request to the Czech Arbitration Court to require EURid to disclose the Documentary Evidence as defined in the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (hereafter “Sunrise Rules”), the Respondent disclosed, inter alia, the Documentary Evidence on October 11, 2006.

On October 20, 2006 the Czech Arbitration Court notified the commencement of the ADR Proceeding, informing the Respondent that Respondent’s Response was to be submitted within 30 working days from the delivery of the notification and drawing Respondent’s attention to the fact that the Complainant elected to submit the dispute in this ADR Proceeding to a Panel consisting of a single panelist.

The respondent submitted a response on December 06, which was acknowledged by the Czech Arbitration Court on December 08, 2006.

Following an invitation to serve as a Panel in this dispute, this Panelist accepted the mandate and submitted a Declaration of Impartiality and Independence in due time. The Czech Arbitration Court duly notified the Parties of the identity of the panelist appointed on December 08, 2006, in accordance with Paragraph B4(e) of the .eu Alternative Dispute Resolution Rules (hereafter “ADR Rules”) and the date, by which a Decision on the matter was due, which was specified as January 06, 2007.

In the absence of a challenge of the Panelists’ appointment by either Party according to Paragraph B5(c) of the ADR Rules, the Czech Arbitration Court forwarded the case file to the Panel on December 14, 2006.

Following the transmission of the case file to the Panel, the Complainant filed a non-standard communication on December 20, 2006, incorporating additional observations in the pending case for consideration by the Panel.

A. COMPLAINANT

Complainant contends that it is a company officially named in Czech language as "Kontakta spol. s r. o." and registered in the Czech Republic. It is the owner of the company name KONTAKTA. The registrar 1&1 Internet has been instructed by Kontakta spol. s r. o., through its director Mr. Veit (Vít) Kolar (Kolář) to file the applications for the registration of the domain names, one of them being the

disputed domain name of this case - <kontakta.eu>.

On August 7, 2006, Complainant was informed by an e-mail that its application for the domain name <kontakta.eu> was rejected because the documentary evidence received by EURid did not sufficiently prove the prior right of Complainant. As Complainant have outlined, the rejection did not include any specific explanation what should be missing or any advice.

Complainant in its Complaint and amended Complaint contends that relevant documentary evidence was submitted in time on March 7, 2006, and that documentary evidence consisted of the documents as it is required in the Sunrise Rules. Therefore, the Contested Decision is “unbelievable and could not be understand”.

Complainant argues that the mere fact that the Applicant has two nationalities, Czech and German, shall not be the reason to reject an application for a domain name under the .eu TLD.

To support its allegations the Complainant referred to previous decisions AVENTIS (01115 and 01678), EITO EEIG (02012) and CAPRI (984) which have the similarity with this case as the name of the applicant and the name of the right-holder differs.

For the reasons mentioned above, it is to believe that the Complainant has brought sufficient evidence before the Validation Agent to comply with Article 14 of the Commission Regulation (EC) No. 874/2004 of 28 April 2004 (hereafter "the Regulation 874/2004") and Complainant, as a result, seeks the remedy specified in Paragraph B11(c) of the ADR Rules.

Complainant in its non-standard communication set out additional observations that Respondent is failing in his arguments as well as the cases cited by the Respondent have no similarity with the present case. It is obvious that the Complainant is the Applicant, because he is the legal representative of the company (juridical person) and did submit documentary evidence that he is the owner and right holder.

B. RESPONDENT

Respondent filed a Response indicating the factual and legal grounds on the basis of the decision to reject the application for the domain name <kontakta.eu>.

In particular, Respondent focused its analysis on the application of the Articles 10 (1), 10 (2) and 14 of Regulation 874/2004 and Section 20.3 of the Sunrise Rules, according to which the Applicant Mr. Veit Kolar should demonstrate to be the holder of the prior right in the company name KONTAKTA, based on the documentary evidence submitted. Respondent contends that the Applicant's application for the domain name KONTAKTA was rejected because the Applicant failed to submit documentary evidence substantiating the fact that Applicant was licensed by the actual owner of the company name KONTAKTA.

Respondent pointed out that from a legal point of view a shareholder and the company cannot be considered one and the same, which means that the former is not entitled to rights held by the latter and vice versa. The Applicant is not entitled to use the Complainant's right in the latter's company name KONTAKTA without there being a license thereto and the Complainant is not entitled to the Applicant's rights resulting from the latter's application for the KONTAKTA domain name.

Respondent further contends that according to the Regulation 874/2004 and the Sunrise Rules the burden of proof is with an applicant to demonstrate that it is the holder of a prior right. As the Applicant and Complainant are different persons and the Applicant applied for the <kontakta.eu> domain name on the basis of the KONTAKTA company name which was held by a different person, the Applicant was required to submit documentary evidence to demonstrate that it is entitled to rely upon the claimed prior right according to the Section 20 of the Sunrise Rules, which further substantiates Article 14 of the Regulation 874/2004.

Respondent also stressed 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 Respondent can use "in its sole discretion". Therefore, the Respondent/Validation Agent cannot be expected and/or forced to speculate whether the Applicant was licensed by the owner of the prior right or that the Applicant was a successor of the owner of the prior right, and therefore correctly rejected the Applicants' application.

Respondent also contends that Complainant did not even apply for the domain name. Complainant cannot claim the rights resulting from the Applicant's application. Indeed, the Complainant did not apply for the KONTAKTA domain name, the Applicant did. For these reasons the Complainant’s request to annul Contested Decision and attribute the domain name <kontakta.eu> to the Complainant must be rejected.

To support its allegations Respondent also referred to several previous decisions and quoted decisions BGB (1886), SBK (903),

MEGAMAN (1542), BPW (127), 7X4MED (1323), VANDIJK (1695), TANOS (2592), ISL (219), PLANETINTERNET (1627), which have very similar facts as the present case.

Finally Respondent concludes that the Applicant must comply with the strict procedure laid out by the Regulation 874/2004 for dealing with the thousands of applications received during the phased registration and making sure that these applications are substantiated. The Applicant's applications in the present case did not correctly fulfill the substantial requirements. Since the Respondent correctly decided to reject the Applicants' application, pursuant to the Regulation, Respondent's decision may not be annulled and the domain names may not be granted to the Applicants. For these reasons, the complaint must be rejected.

DISCUSSION AND FINDINGS

1. Timely initiation of the ADR Proceeding

Pursuant to Section 26(1) of the Sunrise Rules, the Domain Name Applicant may initiate an ADR Proceeding against a decision of the Registry within forty calendar days following that decision ("Sunrise Appeal Period").

In this particular case, Respondent rejected the domain name application on August 7, 2006, and Complainant launched a Complaint by e-mail with the Czech Arbitration Court on September 15, 2006, to contest this decision. The Czech Arbitration Court assigned as Time of Filing the date of September 21, 2006. On October 10, 2006 the Czech Arbitration Court notified Complainant of deficiencies in the Complaint and on October 13, 2006 the Complainant filed an amended version of the Complaint.

In the absence of a clear definition in the Sunrise Rules or the ADR Rules of what exactly amounts to a timely initiation of an ADR Proceeding and in light of the fact that the Complaint of September 15, 2006 was initiated within the time prescribed by Section 26(1) of the Sunrise Rules, the Panel finds that a fair treatment of the Complainant only dictates that the interpretation and approach to be followed is that the timely initiation of the ADR Proceeding should be examined on the basis of the earliest date, on which the Complaint was initiated, irrespective of whether a later Time of Filing was assigned and an amended Complaint rectifying deficiencies was submitted at a later time point, after the expiry of the forty calendar days for the initiation of an ADR Proceeding against the decision of the Registry.

Therefore, the Panel finds that the Complaint was initiated properly within the prescribed time frame.

2. The Complainant's non-standard communication

Following the transmission of the case file to the Panel, the Complainant filed a non-standard communication on December 20, 2006, incorporating additional observations for consideration by the Panel.

Paragraph B8 of the ADR Rules states: "In addition to the Complaint and the Response, the Panel may request or admit, in its sole discretion, further statements or documents from either of the Parties."

When exercising its discretion the Panel is, however, bound to observe procedural guarantees and Paragraph B7(b) of the ADR Rules reads: "In all cases, the Panel shall ensure that the Parties are treated fairly and with equality."

As the Respondent did not challenge the admissibility of the Complainant's non-standard communication and as the Complainant's non-standard communication does not bring forward new factual elements, the consideration of which could be prejudicial to the fair and equal treatment of both Parties in the framework of this ADR Proceeding, the Panel finds the non-standard communication of December 20, 2006, to be admissible.

3. The relevant provisions

The ADR procedure at issue has been commenced by the Complainants against the decision to reject a domain name application. The application for the domain name <kontakta.eu> has been filed, according to the Sunrise Rules, by the Applicant on the ground of asserted prior rights.

This Complaint arises in relation to the application and interpretation of primarily Regulation 874/2004, Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain (hereafter "Regulation 733/2002"), the Sunrise Rules, the Registration Terms and Conditions and is governed by the ADR Rules and the ADR Supplemental Rules.

The Panel considers the following legal aspects.

According to Recital 12 of Regulation 874/2004, in order to safeguard prior rights recognized by Community or national law, a procedure for phased registration should be put in place with the purpose of ensuring that holders of prior rights have appropriate opportunities to register the names on which they hold prior rights on a first-come, first-served basis, subject to validation of such rights on the basis of evidence provided by the Applicants.

Article 10(1) of the Regulation 874/2004 provides that "holders of prior rights recognized or established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts". The provision continues stating that "prior rights shall be understood to include, inter alia, […] company names […]".

Article 10(2) of the Regulation 874/2004 states that the registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists.

Article 12(2) of Regulation 874/2004 states: "[…] During the first part of phased registration, only registered national and Community trademarks, geographical indications, and the names and acronyms referred to in Article 10(3), may be applied for as domain names by holders or licensees of prior rights and by the public bodies mentioned in Article 10(1)."

Article 14 of the Regulation 874/2004 states that "all claims for prior rights under Article 10(1) and (2) must be verifiable by documentary evidence which demonstrates the right under the law by virtue of which it exists. […] 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. […]".

According to the above mentioned provisions, Section 20(3) of the Sunrise Rules affirms 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 […] 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".

Finally, Section 21(2) of the Sunrise Rules provides as follows: "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 […]". And Section 21(3) of the same regulation clarifies that "the Validation Agent is not obliged, but 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".

Therefore, in this particular case, it is imperative to examine, firstly, whether a prior right was claimed and, secondly, whether the Domain Name Applicant could substantiate that the Domain Name Applicant was the holder, licensee, transferee of the claimed prior right or was otherwise the same person as or the legal successor to the person indicated in the Documentary Evidence as being the holder of the prior right. It is only if Complainant has indeed satisfied all requirements as set out by the relevant European Union Regulations and has proven, in particular, the aforementioned issues at the time of the domain name application that the issue of whether Respondent erred in rejecting Complainant's application arises, as such a decision would conflict with Regulation 874/2004 or Regulation 733/2002.

4. Type of prior right claimed

Article 10 of Regulation 874 reads: "1. […] "Prior rights" shall be understood to include, inter alia, […] in as far as they are protected under national law in the Member-State where they are held: unregistered trademarks, trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works.
2. The registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists.
[…]"

In terms of the first issue, whether a prior right was claimed, it can be seen in the Documentary Evidence disclosed by the Respondent in response to the Complainant's request that the Complainant submitted a certificate from the Czech companies register, issued for the company KONTAKTA, spol. s r. o. Since the Documentary Evidence disclosed by the Respondent has not been contested by the Complainant, the Panel is satisfied that the prior right claimed is a company name, protected under national law in the Member State.

5. Relationship between the Domain Name Applicant and the Holder of Prior Right as well as the extent of obligations of the Validation Agent

The Complainant filed an application for the disputed domain name through its director Mr. Veit Kolar as the Applicant.

Article 10.1 of the Regulation 874/2004 states that “holders of prior rights recognized or established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts”.

It follows that according to the Article 10.1 of the Regulation 874/2004 only the holder of a prior right is eligible to file an application for a domain name in the Sunrise period. However, the certificate from the Czech companies register submitted by the Applicant, confirms that the holder of the prior right is not Mr. Veit Kolar, but his company Kontakta spol. s r. o. Complainant also contends in his complaint that: "The Complainant is a company in the Czech Republic and the owner of the company name KONTAKTA, named official in the Czech language “Kontakta spol. s r. o.” The representative (director) and sole owner of the company is Mr. Veit Kolar. […]". Following these facts there is no question that the Applicant applied for the <kontakta.eu> domain name on the basis of the KONTAKTA company name which was held by a different person, the Complainant Kontakta spol. s r. o.

However, the Applicant did not submit neither any evidence that he is the holder of the prior rights nor that the Applicant is the transferee or was otherwise the same person as or the legal successor to the person indicated in the documentary evidence as being the holder of the prior right.

It is the Panel’s view that the Validation Agent or the Respondent is not obligated to notify the Applicant of the insufficient nature of the submitted evidence or to include in the Rejection specific explanation what is missing or specific advice. The Sunrise Rules applying to all phased registration period domain name applications clearly and unequivocally set out the documents to be submitted. The Sunrise Rules are incorporated by reference in the cover letter signed and submitted by the Complainant together with the invoked and supporting Documentary Evidence. Item 6 of the cover letter explicitly states the consequence of any breach of the rules, which can lead to the invalidation of the application or the cancellation of the registration.

With regard to the Section 21(2) of the Sunrise Rules the Validation Agent shall examine applications in the order in which the application was received at the Registry and with regard to the submitted Documentary Evidence. It is moreover in the Validation Agents sole discretion to do further investigation, whereas the Section 21(3) of the Sunrise Rules clearly 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 Validation Agent does not have an obligation to conduct own investigations in the circumstances of the domain name application, the prior right claimed and the Documentary Evidence produced and any examination is only a prima facie examination based on the evidence produced by the Applicant.

However, the Panel notes that in some instances, it shall be expected that the Validation Agent would exercise his right to conduct its own investigations particularly if it would appear reasonable under the circumstances. The Validation Agent shall verify obvious errors between the application and the documentary evidence (e.g. the applicant indicated the wrong right or country at the cover letter – iura novit curia), but this should not amount to verifying a difference in legal forms regarding the application and the Documentary Evidence. In the present case, the Validation Agent did not exercise this right and the Panel holds that such decision was lawful, especially as the Applicant clearly failed to proof the ownership of the prior rights.

As the Applicant applied for the <kontakta.eu> domain name on the basis of the KONTAKTA company name which was held by a different person, the Complainant Kontakta spol. s r. o., and Mr. Veit Kolar did not furnish documentary evidence that he has the rights to the company name KONTAKTA, the Validation Agent made a reasonable assessment under the circumstances based on the documents submitted. And consequently, the Respondent rightfully rejected the application for the domain name <kontakta.eu>.

It should be noted, that in accordance with the analysis of the documents (specially the non-standard communication submitted by the Complainant on December 20, 2006) and the understanding of this Panel, it seems that Mr. Veit Kolar was considered “representative” of the company Kontakta spol. s r. o. when filling the domain name application as the Applicant. However, the Applicant did not refer or pointed out in the Application for the domain name <kontakta.eu> that he is acting in the name of the company Kontakta spol. s r. o.

The Applicant submitted the certificate from the Czech company’s register which clearly shows that he is the legal representative of the company Kontakta spol. s r. o., but he failed to file the application notifying that in fact not Mr. Veit Kolar but the company Kontakta spol. s r. o. should be considered the Applicant.

Unfortunately, Mr. Veit Kolar was stated in the application field and did not refer to the name of the holder Kontakta spol. s r. o., what

meant an intention of Mr. Veit Kolar being the Applicant. Therefore, the Validation Agent, applying the rules set forth by Section 21(2) of the Sunrise Rules, carried out a “prima facie” review of the Documentary Evidence submitted and did not find any evidence of the ownership of any title on the prior right in the name of the Applicant Mr. Veit Kolar. As mentioned above, it was no duty for the Validation Agent to perform a research in order to verify if Mr. Veit Kolar has rights to apply for the domain name based on his company name KONTAKTA.

Therefore, according to the above and Article 14 of the Regulation no. 874/2004, Mr. Veit Kolar had the duty to demonstrate his relationship with Kontakta spol. s r. o. – and, in particular, the reason why he was the Applicant of the domain name application – and he failed to submit adequate evidence.

Following Recital 11 Regulation 874/2004 (first-come, first-served basis) and Article 11 (c) of the ADR Rules the transfer of a domain name is available only if the Complainant is the next applicant in the queue for the domain name concerned and the Complainant shall satisfy all registration criteria set out in the Regulation. As the Complainant Kontakta spol. s r. o. did not even apply for the domain name <kontakta.eu>, the remedy requested by the Complainant (transfer disputed domain to the company Kontakta spol. s r. o.) is not lawful at the present case.

The Contested Decision can only be annulled if Complainant can prove that such a decision conflicts with the European Union Regulations. The burden of proof is clearly on the Applicant to establish a valid prior right, on which it can rely at the time of the domain name application, pursuant to Article 14 of Regulation 874/2004. The Panel is satisfied that the Respondent’s decision does not conflict with the European Union Regulations.

In the absence of evidence to conclude otherwise, the Panel has no choice, but to dismiss the Complaint.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that

the Complaint is Denied

PANELISTS

Name	**Darius Sauliunas**

DATE OF PANEL DECISION 2007-01-07

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant contested the Respondent’s decision to reject the Applicant’s application for the registration of the domain name <kontakta.eu> and sought the annulment of this decision and the attribution of the disputed domain name to the Complainant.

In respect of the prior right claimed and after examining the Documentary Evidence submitted by the Respondent in response to the Complainant’s request, the Panel accepted that the prior right claimed is a company name.

The Panel was satisfied that the Documentary Evidence submitted by the Complainant to the Respondent was not sufficient in light of the Sunrise Rules applying to all phased registration period domain name applications. At the time of the domain name application, the Applicant failed to substantiate neither that he was the holder of the prior rights nor that the Applicant is the transferee or was otherwise the same person as or the legal successor to the person indicated in the documentary evidence as being the holder of the prior right. However, Applicant Mr. Veit Kolar was stated in the application field and did not refer to the name of the holder, Complainant Kontakta spol. s r. o., what meant intention of Mr. Veit Kolar being the Applicant.

The burden of proof lies with the domain dame Applicant and supporting evidence to this effect cannot be presented as late as during this ADR Proceeding. The Panel was also satisfied that the Validation Agent or the Respondent (Registry) did not have an obligation to notify the Domain Name Applicant of the insufficient nature of the submitted evidence.

The Panel found that, according to Paragraph B11(d)(2) of the ADR Rules, the Complainant did not prove that the decision taken by the Registry conflicts with the European Union Regulations.