Panel Decision for dispute CAC-ADREU-004283

Case number	**CAC-ADREU-004283**
Time of filing	**2007-04-04 15:08:32**
Domain names	**hotely.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**HOTELY**

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

There are no other legal proceedings of which the Panel is aware that are pending or decided and that relate to the Disputed Decision or the Disputed Domain Name.

FACTUAL BACKGROUND

1. On 2006, 6TH April, HOTELY applied for registration of the domain name “HOTELY” (hereinafter, also, the “Disputed domain name”).
2. On 2006, 21st April, HOTELY provided EURID with a Certificate of Incorporation with the Ministry of Interior of the Czech Republic (hereinafter, also, “the Ministry”), dated 2006, 10th April, with the incorporation kept on file under reference number VS/1-1/63 855/06-E. Business ID. No. 270 28 325, documenting HOTELY’s prior right to the domain name.
3. On 2006, 5th April, HOTELY submitted to the Ministry an application for the incorporation of HOTELY, an organization of emploeyers.
4. On 2006, 31st October, EURID informed HOTELY that the application for registration of the domain name “HOTELY” was rejected because “The documentary evidence we have received does not sufficiently proves the proprietary rights on the basis of which the domain name has been claimed”.
5. On 2006, 6th December, HOTELY received a notification by the Ministry concerning the Legal Capacity of Trade Union and Employer Organization.
6. On 2007, 5th January, EURID upheld the rejection of the application dated 2006, 6th April, after having carried out internal review.
7. On 2007, 14th February, HOTELY (hereinafter, also, the “Complainant”) filed a Complaint before this Czech Arbitration Court (hereinafter, also, the “Court”), choosing English as language for the ADR Proceeding. The Complaint was related to the domain name: “HOTELY”. The Complainant asks the Court to quash EURID’s Decision that rejects its application about the above mentioned Domain Name and to order EURID to grant that application on its behalf.
6. The Complainant attached the following documents:
1. Certificate of the Complainant’s Incorporation with the Ministry of the Interior of the Czech Republic, dated 10 April 2006,
2. A copy of the e-mail message sent to the Complainant by EURid on 31 October 2006 – rejection of domain name application,
3. A copy of the notification of the Ministry of the Interior of the Czech Republic concerning the Legal Capacity of Trade-Union and Employer Organizations,
4. A copy of the email message sent to the Complainant by EURid on 5 January 2007 – result of the internal review,
5. Power of Attorney for the authorized representatives of the Complainant, dated 13 February 2007
All the documents attached were non translated in English.
7. On 2007, 16th February, the Court checked that Complainant didn’t pay amount that covered the fee and notified a request to pay all the fees due within 10 days of the date of the Notification. On 2007, 9th March the Complainant submitted a Nonstandard Communication: this document is not in the language of the ADR Proceeding.
8. On 2007, 12th March, the Court confirmed to have prolonged the deadline for delivering the ADR fee by March 16, 2007.
9. The payment of the fee was performed on 2007, 9th March (see Payment check dated 2007, 4th April).

10. The Court acknowledged Complaint's receipt on 2007, 4th April. The Court notified EURID on the Complaint and its time of filing.
11. The Court asked EURID for some information for verification of the Complaint's administrative compliance. On 2007, 6th April, EURID answered to the request with a Nonstandard Communication. Documentary evidence attached was not in English.
12. On 2007, 10th April, the Court checked the Complaint.
13. On 2007, 10th April, EURID has been notified on the formal date of the commencement of the ADR Proceeding (2007, 10th April) and it has been invited to submit a Response within 30 working days from the delivering of the notification. It has been also advised of the consequences in case the Response would not have been sent within the deadline or if it would not have complied with all administrative requirements mentioned in the ADR Rules and the ADR Supplemental Rules.
14. On 2007, 8th May, EURID filed the Response to the Complaint asking for its rejection. On 2007, 9th May, the Court acknowledged the receipt of the Response and checked the Response. EURID provided a translation of documentary evidence.
15. On 2007, 10th May, the Court appointed this Panel (Marco Vincenti), who accepted to serve as a Panel under .eu Dispute Resolution Rules and Supplemental Rules of the Court.
16. On 2007, 10th May, the Court notified to the parties that this Panel had been appointed and that he had submitted the Statement of Acceptance and Declaration of Independence and Impartiality.
17. On 2007, 14th May, the Complainant submitted a Nonstandard Communication, with a document attached ("Legal Capacity of Trade-Union and Employer Organizations" – in English).
18. The Case File was transmitted to the Panel on 2007, 15th May.
19. On 2007m 29th May, the Complainant submitted a Nonstandard Communication.
20. The Panel was required to forward his decision within 2007, 8th June.

A. COMPLAINANT

In support of its position, Complainant contests as follows.
In particular, it asserts that "EURID's Decision on the rejection of the Complainant's application for the domain name hotely.eu was made in contradiction with .eu Sunrise Rules".
1. Complainant states that "the reasons indicated by EURid ("The documentary evidence we have received does not sufficiently proves the proprietary rights on the basis of which the domain name has been claimed.") are totally inconsistent
a. with .eu Sunrise Rules,
b. as well as with the body of laws of the Czech Republic governing the establishment, incorporation and existence of the legal entity/Complainant".
2. Moreover, the Complainant states that "there exist no grounds for the domain name hotely.eu not being registered in the Complainant's name on the basis of the above-specified application:
a. according to the Czech Republic's legislation, at the time of the application being filed the Complainant was a legal entity with full legal capacity,
b. the above-specified application for the domain name was filed during the Sunrise Period when, on the basis of a Prior Right, applications could also be filed by the applicants whose names correspond to the domain names they are applying for (the Complainant's name is "HOTELY") – Section 16(1) of .eu Sunrise Rules,
c. the above-specified application was filed with EURid duly and in time and included documentary evidence proving the existence of the Prior Right (authenticated copy of the Certificate from the Ministry of the Interior of the Czech Republic proving the Complainant's incorporation, issued on 10 April 2006) – Section 16(4) (iii) of .eu Sunrise Rules,
d. of all the applications for the domain name in question which demonstrated a Prior Right to the domain name, the above-specified application was the first one to arrive ("first come, first served principle") – Section 22(2) of .eu Sunrise Rules".
Finally, the Complainant asks for:
- quashing of EURID's decision on the rejection of the Complainant's application for the domain name HOTELY, filed on 6 April 2006 at 08:08:15.655 during the Sunrise Period,
- ordering EURID to grant the application on its behalf.
With a Nonstandard Communication dated 2007, 14th May, on the ground that "not until 8 May 2007, as part of the ADR proceeding, did the Complainant have an opportunity to become familiar with the reason for his application for the application of the domain name HOTELY been rejected", the Complainant states that it could not make detailed representation on the reasons for the rejection in the Complainant. Complainant's remarks concern:
a) an "incorrect citation in the Response to Complaint, included in the Panel Decision concerning ADR proceedings (ADR 04281 DOTACE)",
b) Respondent's false contentions in the Response to Complaint,
c) inconsistencies in the Panel decision concerning ADR proceedings (ADR 04281 DOTACE).
With a Nonstandard Communication dated 2007, 29th May, the Complainant makes some considerations about documentary evidence supporting the registration of the Domain Name (letter from the Ministry on 2006, 10th April): "the letter provides evidence pursuant to Section 16(4)(iii) of Sunrise Rules".

B. RESPONDENT

In support of its position, Respondent contests as follows.
Respondent contests the requirement of “eligibility”, making reference to art. 10 (1) Reg. 874/2004 and to Section 11.3 Sunrise Rules.
Moreover, it points out that Complainant didn’t comply to art. 14 Reg. 874/2004, as far as complete and timely documentary evidence is concerned.
The Validation Agent received the documentary evidence on 2006, 21st April. The documentary evidence submitted by the Complainant consisted of a letter from the Ministry showing a proposal for recording of a Company that would be called “HOTELY”.
EURID rejected the Complainant’s application because, on the ground of the documentary evidence received within the deadline, it found that “the Complainant did not sufficiently demonstrate that it was the holder of a prior right on the name HOTELY, which was in full force and effect on the date of the application”.
As far as time of Complainant’s application and requirement of legal capacity are concerned, Respondent observes that Complainant applied for incorporation on 2006, 5th April and that it submitted a Ministry’s letter, showing that the Complainant had delivered to the Ministry a “Proposal for recording of a company that would be called HOTELY”. Moreover, Respondent observes that Complainant argues “that it was a legal entity at the time of the application for the domain name HOTELY, because the legal personality of the company dates back to the day following the proposal for recording”.
EURID observes also that the applied for the domain HOTELY on 6 April 2006, which is a generic word meaning “hotels” in the Czech language.
In particular, EURID takes Panelist’s attention to the fact that Complainant’s authorized representative filed “identical ADR complaints on behalf of other similar Czech entities which applied for the registration of .eu domain names based on similar documentary evidence and for which the application was rejected by the Respondent based on the same grounds as in the present proceeding”.
One case has been already decided, that is ADR 04281 DOTACE (which is a generic word meaning “subsidies” in the Czech language).
Nine other cases are currently pending, that are: 04284 HRY (which is a generic word meaning “games” in the Czech language); 04286 DOVOLENA (which is a generic word meaning “holiday” in the Czech language); 04287 UBYTOVANI (which is a generic word meaning “accommodation” in the Czech language); 04288 MAPY (which is a generic word meaning “maps” in the Czech language); 04289 AKCIE (which is a generic word meaning “equities” in the Czech language); 04290 ZAKONY (which is a generic word meaning “laws” in the Czech language); 04291 FONDY (which is a generic word meaning “funds” in the Czech language); 04292 ZAJEZDY (which is a generic word meaning “excursions” in the Czech language); 04293 KURZY (which is a generic word meaning “courses” in the Czech language).
Moreover, EURID contests that
- the Complainant did not fulfil the burden of prove to demonstrate that it is the holder of the claimed prior right,
- the documentary evidence received did not demonstrate that it was the holder of a valid prior right at the time of the application.
For complete Panelist’s information, EURID prepared a translation of the letter to the Ministry, observing that:
- the document is not a certificate of incorporation,
- a prima facie review of the document only demonstrates that the Ministry received an application for the registration of the company HOTELY,
- such prima facie review does not clearly demonstrate that the company HOTELY was duly incorporated on the day of the application for the domain name by the Complainant (i.e. 6 April 2006).
Finally, Respondent refers to the ADR Decision 04281 (DOTACE), as “highly relevant precedent”, and to other numerous Decisions dealing with trademarks applications which were not yet registered at the time of the application [e.g.: ADR 1518 (VANHOUTEN)].
As consequence, the Respondent correctly rejected Complainant's applications and Respondent’s decision does not conflict with the Regoluation.

DISCUSSION AND FINDINGS

1. Language of the ADR Proceeding
The language of this ADR Proceeding is English (see Language selection and Complainant’s statements in the Complaint); furthermore, it has not been challenged, as the Complaint is filed in English and there are not specific claims on this point.
Pursuant to art. 3 (c) ADR Rules: “All documents including communications made as part of the ADR Proceeding shall be made in the language of the ADR Proceeding. The Panel may disregard documents submitted in other languages than the language of the ADR Proceeding without requesting their translation. Any communication by the Provider which, from its content, cannot be regarded as amounting to procedural documents (such as cover letters with which the Provider sends procedural documents or automatic system notifications generated by the Provider’s application) shall be made in the language of the ADR Proceeding or in English”.
Complainant did not fulfil the provision of art. 3 (c) ADR Rules, because it submitted documentary evidence in Czech.
Pursuant to art. 7 (d) ADR Rules: “the Panel shall determine in its sole discretion the admissibility, relevance, materiality and weight of the evidence”, also if they are submitted in an language different from the language of the proceeding and notwithstanding Respondent submitted a translation. The Panel was not put by the Complainant in condition to examine the documentary evidence which the Complaint is based on.
2. Complaint’s Nonstandard Communications submitted after Notification of Appointment of the ADR Panel
This Panel thinks it is important to notice that Complainant has submitted two Nonstandard Communications after its Appointment.

Pursuant to art. 7 (d) ADR Rules: “the Panel shall determine in its sole discretion the admissibility, relevance, materiality and weight of the evidence”; art. 8 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”. In accordance to these rules, the Panel can determine if considering or not these submissions.
Complainant submitted these Nonstandard Communications without asking for being authorized or without this Panel authorized the submission. In any case, if the Complainant had submitted them before Panelist Appointment, the Panel could have considered to ask the Respondent to take a formal position on the matter.
The Respondent has not taken any formal position about the content of the Nonstandard Communications. In any case, the Panel deems that it is not necessary authorizing further communications.
As far as the merit of the communications is concerned, the Panel thinks that any considerations about HOTELY’s being a legal entity (proved with the late letter of the Ministry dated 2006, 6th December) should have been made clearer in the Complaint and, better, in the application for the registration of the Domain Name..
In any case, the Panel deems not to consider these Communications, also because they are not sufficient – at its opinion - to prove the existence of a valid Prior Right, that is to be proved in accordance of ADR Rules and Sunrise Rules.
3. Documentary evidence supporting the application for the Registration of the Domain Name
The Complainant submitted the application for the registration of the Domain Name on 2006, April 6th, supported by a Certificate of its incorporation with the Ministry, dated 2006, 10th April. It is not clear if the Complainant submitted other pertinent documentation within the time limit ex art. 14.4 Reg. 874/2004 and Section 8 (5) (4) Sunrise Rules.
Pursuant to art. 14.4 Reg. 874/2004: “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. The documentary evidence shall be submitted to a validation agent indicated by the Registry. The applicant shall submit the evidence in such a way that it shall be received by the validation agent within forty days from the submission of the application for the domain name. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected”.
Pursuant to Section 8 (5) (4) Sunrise Rules: “Documentary Evidence must be received by the Processing Agent within forty (40) calendar days following receipt of the Application by the Registry, failing which the Application will be considered to have expired”.
As consequence, without considering the merit of the Ministry’s letter dated 2006, 6th December, the Panel thinks that the submission of this document hasn’t respected the time limit established by the above mentioned rule.
4. The (generic) word “HOTELY” as a Domain Name
As far as a generic word to be registered as Domain Name is concerned, the Panel observes what follows.
First of all, it is to be taken into consideration that Prior Right claimed is not a Trade Mark, but it has been classified under the class “Company Names – Trade Names – Business Identifiers”.
For this reason, the Panel thinks that a company could register a generic word in the case it has a valid prior right, i.e., for example, if the generic word is the same of its Company Name – Trade Name – Business Identifier. Moreover, as technical reason of Internet system (“First come first served principle”), this can be an obstacle to competition, especially in the country of the language of the word..
In the case under discussion, the Panel thinks that the circumstance of a generic word (HOTELY) to be registered as a Domain Name, on the basis of a Prior Right consisting in a Company Name – Trade Name – Business Identifier, shouldn’t have been an obstacle to the registration of the Domain Name “HOTELY.EU”.
5. Burden of proof to demonstrate to be the holder of the claimed prior right
The Complainant has to demonstrate to be the holder of the claimed Prior Right, to be eligible to apply for registration of a domain name “.eu”.
Pursuant to art. 10 (1) (2) Reg. 874/2007: “‘Prior rights’ shall be understood to include, inter alia, registered national and community trademarks, geographical indications or designations of origin, and, 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”; and art. 10 (2) Reg. 874/2007 states: “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”.
Pursuant to art. 14 (1) Reg. 874/2004: “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”; and art. 14.4 states: “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. The documentary evidence shall be submitted to a validation agent indicated by the Registry. The applicant shall submit the evidence in such a way that it shall be received by the validation agent within forty days from the submission of the application for the domain name. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected”.
Pursuant to Section 4 (1) (ii) Sunrise Rules: “In addition to the representations and warranties contained in Section 4 of the Terms and Conditions, the Applicant represents and warrants that: (…) (ii) the Prior Right claimed is, on the date of the Application, a legally valid right”.
Section 11.3 Sunrise Rules states that: “The Applicant must be the holder (or licensee, where applicable) of the Prior Right claimed no later than the date on which the Application is received by the Registry, on which date the Prior Right must be valid, which means that it

must be in full force and effect".
Pursuant to Section 12.1 Sunrise Rules: "Unless otherwise provided under Sections 13 to 18 of these Sunrise Rules, the Applicant must submit Documentary Evidence containing: (i) an affidavit signed by a competent authority, legal practitioner or professional representative declaring that the type of Prior Right claimed by the Applicant is protected under the laws of the relevant member state, including: a. references to the relevant legal provisions, scholarly works and court decisions, and b. the conditions required for such protection; and (ii) proof that the complete name for which a Prior Right is claimed meets all of the conditions set forth in such laws, including the relevant scholarly works and court decisions, and that such name is protected by the relevant Prior Right claimed". Section 12.4 Sunrise Rules states that: "Any affidavit submitted in accordance with this Chapter must clearly state or include evidence that the signatory qualifies as a competent authority, legal practitioner or professional representative, as referred to in the foregoing paragraphs of this Section".
This Panel thinks that the Prior Right claimed can be classified under the class "Company Names – Trade Names – Business Identifiers". It is necessary to make reference also to Section 16.5 Sunrise Rules, that states "Unless otherwise provided in Annex 1 hereto, it is sufficient to submit the following Documentary Evidence for trade names and business identifiers referred to in Section 16(2) respectively 16(3): (i) where it is obligatory and/or possible to register the relevant trade name or business identifier in an official register (where such a register exists in the member state where the business is located): a. an extract from that official register, mentioning the date on which the trade name was registered; and b. proof of public use of the trade name or business identifier prior to the date of Application (such as, but not limited to, proof of sales volumes, copies of advertising or promotional materials, invoices on which the trade name or business identifier is mentioned etc., proving public use of the name in the relevant member state); (ii) where registration is not obligatory, the Documentary Evidence referred to in Section 12(3) hereof. The Documentary Evidence for a trade name or a business identifier must clearly indicate that the name for which the Prior Right is claimed is the trade name or business identifier of the Applicant".
The Panel thinks that Complainant has not respected what requested by the above mentioned rules, even reference made to the letter of the Ministry 2006, 6th December, that was submitted late.
The burden of proof to demonstrate to be the holder of a valid prior right at the time of application is on the Complainant [see, for example, cases: cases 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS)].
It can also be mentioned case 1886 (GBG): "to the Procedure laid out in the Regulation the relevant question is thus not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrated to the validation agent that it is the holder of a prior right. If an applicant fails to submit all documents which show that it is the owner of a prior right the application must be rejected".
The Panel thinks that the Complainant doesn't respect what required by the above mentioned rules.
6. Documentary evidence submitted to the Validation Agent: insufficient to demonstrate that the Complainant was the holder of a valid prior right at the time of the application
Besides art. 10 (1) Reg. 874/2004, section 11.3 Sunrise Rules and art. 14 Reg. 874/2004, it is important to take in consideration also section 21.2 Sunrise Rules, that states : "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 (including the Documentary Evidence received electronically, where applicable) and in accordance with the provisions of these Sunrise Rules."
The Panel notices that the (only) documentary evidence submitted at the time of application consisted in the letter of the Ministry dated 2006, 10th April.
The Panel thinks that the Complainant doesn't respect what required by the above mentioned rules.

DECISION

For all the foregoing reasons, in accordance with Reg. (CE) n. 733/2002, Reg. (CE) n. 874/2004, Sunrise Rules, ADR Rules, Supplemental Rules, the Panel concludes that the Decision does not conflict with Reg. (CE) n. 733/2002, Reg. (CE) n. 874/2004: as consequence, the Panel rejects the Complaint.

PANELISTS

Name	**Marco Vincenti**

DATE OF PANEL DECISION 2007-06-08

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

HOTELY, an organization of employers with its registered office in Praha, applied for the registration of the Domain Name "HOTELY", on the ground of a "Certificate of its Incorporation with the Ministry of the Interior of the Czech Republic.
EURID rejected the application because the documentary evidence received didn't' "sufficiently prove the proprietary rights in the basis of which the domain name has been claimed".

HOTELY filed a Compliant asserting that: (a) according to the Czech Republic's legislation, at the time of the application being filed the Complainant was a legal entity with full legal capacity; (b) the application for the domain name was filed during the Sunrise Period when, on the basis of a Prior Right, applications could also be filed by the applicants whose names correspond to the domain names they are applying for – ex Section 16(1) of .eu Sunrise Rules; (c) the application was filed with EURid duly and in time and included documentary evidence proving the existence of the Prior Right – ex Section 16(4) (iii) of .eu Sunrise Rules; (d) of all the applications for the domain name in question which demonstrated a Prior Right to the domain name, the application was the first one to arrive ("first come, first served principle") – ex Section 22(2) of .eu Sunrise Rules. It attached documentary evidence non in the language of the ADR Proceeding.
EURID contests the Complaint asking its rejection. EURID made preliminary remark as far as other ADR Proceeding regarding application for generic word. The Complaint is to be denied because Complainant didn't respect the burden of proof to demonstrate that it is the holder of the claimed prior right and that it was the holder of a valid prior right at the time of the application.
The Complainant submitted two Nonstandard Communications (with documentary evidence attached).
The Panel considered that documentary evidence was submitted without translation; that Complainant filed two Nonstandard Communications without being authorized; that Complainant submitted further documentary evidence only when the ADR Procedure was started. For all these reasons, the Panel denied the Complaint.
The Panel made also some considerations about application for registration of Domain Name consisting in generic word.