

To the Council, Asian Domain Name Dispute Resolution Centre ("ADNDRC")

On 9th October 2009, the Council of ADNDRC resolved that a Special Investigation Committee should be formed with the following Terms of Reference:-

1. To investigate whether, in view of the potential claims which have been made against ADNDRC and its personnel, there are potential liabilities of ADNDRC caused by any wrongdoings or misconduct on the part of ADNDRC administrative personnel in Hong Kong.
2. To identify the possible drawbacks/deficiencies in respect of the current practice of administration of domain name dispute cases in accordance with the Uniform Domain Name Dispute Resolution Policy ("UDRP").
3. To make recommendations for further action to ensure the effective management of the UDRP proceedings.
4. To report on the above matters to the Council of ADNDRC.

ADNDRC is a corporation limited by guarantee formed under the laws of the Hong Kong Special Administrative Region of the People's Republic of China. It has offices in Beijing, Hong Kong and Seoul, South Korea but our investigation is limited to particular cases dealt with by the Hong Kong office about which complaints were received prior to the setting up of the Special Investigation Committee.

UDRP which has been adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") is administered under two sets of rules:-

- a. Rules for Uniform Domain Name Dispute Resolution Policy ("the Rules").
- b. The ADNDRC Supplemental Rules to the Rules ("the Supplemental Rules").

This Report is divided into two parts. Part I deals with item 1 of the Terms of Reference and Part II deals with items 2 and 3.

Part I

A. Complaints were made to ADNDRC prior to the appointment of the Special Investigation Committee in three cases, relevant details of which are as follows:-

1. Case No.HK-0800179 ("Case No.179")

In this case the Complainant was Cheung Kong Infrastructure Holdings Limited of Hong Kong and the Respondent and complaining party was Long River (Ji Jian) Trading apparently of the British Virgin Islands although no incorporation details or business address could be identified. The Panelist was Mr. David Kreider.

2. Case No.HK-0800235 ("Case No.235")

The Complainants were Mr. Li Ka Shing and his foundation Li Ka Shing Foundation Limited both of Hong Kong and the Respondent and complaining party was Lee. Jia. Cheng (Co-Run) Inc. apparently of Guangzhou, PRC although no incorporation details or business address could be identified. The Panelist was Dr. Timothy Sze.

3. Case No.HK-0800237 ("Case No.237")

The Complainant was Cheung Kong Infrastructure Holdings Limited and the Respondent and complaining party was Long River (Ji Jian) Trading. The parties were in fact the same as those for Case 179. The Panelist was Mr. Chi Shao Jie.

B. Steps taken by the Special Investigating Committee

Initially the files relating to the three cases held by the Hong Kong office of ADNDRC were examined and the administrative personnel in the Hong Kong office were interviewed. In March 2010 a letter was sent by email to the two complaining parties inviting them to bring any further matters about which they wished to complain to the attention of the Special Investigation Committee. At the same time the complaining parties were asked to identify the names, genders and nationalities of the persons in

charge of the complaining parties together with a physical address and telephone number through which the Special Investigation Committee could contact the complaining parties. The letter confirmed that information about such identities would be kept confidential. The complaining parties repeated the Complaints about the three cases which they had already made without adding any further relevant information. No identification information was provided by the complaining parties; hence the only possible contact with the complaining parties was by email.

C. Case No.179

In this case the Complainant elected to have one panelist to decide the case. The papers in the case were sent to the Respondent on 19th September 2009 and the Respondent was reminded that it had 20 days (i.e. on or before 9th October 2009) to submit a response. The Respondent did not submit a response and therefore on 10th October 2009, in accordance with paragraph 6 of the Rules and Article 8 of the Supplemental Rules, ADNDRC asked Mr. Kreider whether he was available to act as panelist. He confirmed his availability by email on the same day and, on the same day, ADNDRC confirmed Mr. Kreider's appointment with the parties by email. The Respondent complained that the appointment was one of many given to Mr. Kreider and that his appointment was carried out very quickly in an improper manner. So far as this complaint goes, the Panel can see no justification since this was Mr. Kreider's first appointment and, bearing in mind matters were dealt with by email, his quick appointment was proper and was in accordance with the Rules and Supplemental Rules.

The Respondent's second complaint relates to the fact that Mr. Kreider found in his decision that the Complainant owned the relevant trademark and service marks / trade names. The Respondent complains that such trademark and service marks / trade names were not registered. So far as ADNDRC is concerned, they have no power or obligation to vet the correctness of Panelists' decisions as such is not provided for either under the Rules or the Supplementary Rules. The course which the Respondent should have followed was to take Court proceedings to have Mr. Kreider's decision set aside (see paragraph 4k of UDRP) but it appears that it did not do so. It is not within our brief to analyse the correctness or otherwise of Mr. Kreider's decision; we merely note that it is possible to obtain enforceable rights in a trademark or service mark / trade name without registration. Such rights are enforced in Hong Kong by an action for passing off. They

are referred to in the decision in Case 237 which finds that such rights are available to the Complainant in that case.

D. Case No.235

Here the Respondent has made accusations of misconduct and dishonesty against the Complainant's legal representatives and other unrelated panelists. No evidence has been produced to substantiate such serious allegations and we will therefore ignore them; in any event they are not within our Terms of Reference.

Similar serious allegations of misconduct and dishonesty have been made by the Respondent against the personnel of ADNDRC based on the following:-

- i. ADNDRC failed to follow up with Enom, the Registrar of the relevant domain name, for 45 days.
- ii. ADNDRC failed to notify / communicate with the Respondent after the Respondent had contacted ADNDRC to enquire why the relevant domain name had been frozen by the Registrar of Enom.
- iii. ADNDRC failed to appoint the Panel within the scheduled deadline.
- iv. ADNDRC had a double standard in treating the parties. It remained silent when the Complainant filed its Reply to the Respondent's response 45 days after the Respondent's response was submitted while ADNDRC did not approve the Respondent's request for time extension to file a Response to the Claimant's Reply.
- v. ADNDRC deliberately manipulated the case proceedings and intentionally ignored the Respondent's requests.

We will deal with these allegations in turn:-

- i & ii. Under paragraph 4(a) of the Rules the Complaint should be forwarded to the Respondent within three calendar days following receipt of the fees to be paid by

the Complainant. The administrative proceedings commence once this has been done and ADNDRC is then obligated to notify the Complainant, the Respondent, the concerned Registrar and ICANN of the date of commencement of the administrative proceedings (see paragraphs 4(c) and (d) of the Rules).

In fact ADNDRC first advised the Registrar of the proceedings on 5th December 2008 (i.e. before the Respondent was advised of the Complaint). ADNDRC sent two further emails to the Registrar and only received a response indicating that the domain name had been "locked up" 59 days after the receipt of the Complaint and payment of the fee.

The personnel of ADNDRC explained to us that, in practice, they initially informed the relevant Registrar of the filing of the Complaint and would only advise the Respondent of the Complaint after the relevant Registrar had taken appropriate steps to prevent the Respondent from transferring the domain name to another Register or otherwise taking steps to defeat the purpose of the administrative proceedings. Although the personnel of ADNDRC who have adopted this practice have done so in good faith and for what appeared to them to be good reason, this does not justify a departure from the clear provisions of the Rules which are intended to allow for the Respondent and the relevant Registrar to be informed of a complaint at about the same time, leaving it up to the relevant Registrar promptly to take the necessary steps to "lock up" the relevant domain name. It follows also that the Respondent, despite enquiring about the status of the administrative proceedings with ADNDRC, did not receive prompt notification of the Complaint as provided for under paragraph 4(a) of the Rules but was only provided with a copy on 22nd January 2009.

iii. Paragraph 6(b) of the Rules provides that:-

"If neither the Complainant nor the Respondent has elected a three-member Panel, the Provider (i.e. ADNDRC) shall appoint, within 5 calendar days following receipt of the response by the Provider, or the lapse of time period for the submission thereof, a single panelist from its list of panelists"

The Complainant and the Respondent elected to have the proceedings decided by one panelist and hence, according to paragraph 6(b) of the Rules, a panelist should have been appointed on 5th March 2009, 5 days after the Respondent had submitted its response on 28th February 2009. However ADNDRC first approached various panelists to find out whether they were available on 8th April 2009 and on 11th June 2009 ADNDRC invited the parties to rank the five panelists who were available. The Panel was eventually appointed on 3rd August 2009 or 157 days after the Respondent had submitted the response.

Although the 5 calendar days provided for in Article 6(b) of the Rules may well be insufficient time for ADNDRC to identify panelists who might be available, this does not explain why it took until 3rd August 2009 to appoint the panel. In addition, Article 8.4 of the Supplemental Rules provides for ADNDRC to present to the parties a list of five proposed panelists within three days of the receipt of the response from the Respondent. This provision is clearly impractical.

Having interviewed the relevant personnel at ADNDRC, it appears that a combination of work pressure and the practical difficulties presented by the provisions of the Rules and the Supplemental Rules led to excessive delay in appointing a single panelist in this case. However we find no justification for the allegation of intentional bias or other misconduct directed by the Respondent against ADNDRC personnel nor is there any substance in allegations of dishonesty against ADNDRC personnel. In fact no real prejudice was suffered by the Respondent as a result of the delay in appointing the panel.

- iv. On 30th January 2009 the Complainant sent a Supplemental Complaint to ADNDRC which was forwarded to the Respondent the next day. An application for an extension of time to 8th March 2009 for serving the response by the Respondent was notified to the Claimant by ADNDRC; the Complainant agreed to an extension to 28th February 2009. ADNDRC, in accordance with Article 5(d) of the Rules, granted the extension until 28th February 2009; the Respondent served its response by such date.

On 14th April 2009 the Complainant filed a Reply to the Respondent's response for which there is no provision in the Rules or the Supplemental Rules. ADNDRC merely received and noted the Respondent's application for an extension until 31st May 2009 to respond to the Claimant's Reply. On 28th May 2009 the Respondent informed ADNDRC that their data files had crashed and sought a further extension of time to respond to the Claimant's Reply until 31st August 2009. After a number of emails from the Respondent chasing for a response, ADNDRC replied to the Respondent on 16th July 2009 advising it would be in the panel's discretion as to whether to give an extension of time. On 5th August 2009 the Respondent wrote to ADNDRC and the panelist (who had been appointed 2 days before) for an extension to 30th September 2009. On 8th August 2009 ADNDRC issued a procedural order which gave the Respondent 5 days to provide the reasons for the time extension application. On 10th August 2009 the Complainant commented that they had considered the Respondent's application unreasonable but agreed to a time extension until 31st August 2009. On 17th August 2009 ADNDRC sent the panelist a draft procedural order in which the Respondent was allowed until 7th September 2009 to respond to the Complainant's Reply. The Panel issued such order on 18th August 2009. The Respondent in fact served such a response in the form of 5 files on 9th September 2009.

A problem facing ADNDRC is that there were no provisions in the Rules or the Supplemental Rules as to how submissions additional to the initial Complaint and the initial response are to be dealt with if no Panel has been appointed. This emphasises the fact that it is important to appoint a Panel at an early date so that any such applications can be dealt with by the Panel rather than ADNDRC. Although we accept from our discussions with the ADNDRC personnel that they were acting in good faith in trying to deal with these applications, ADNDRC would be well advised in future not to become involved in such applications which should be dealt with by the Panel rather than ADNDRC.

- v. We have already indicated that we can find no intentional misconduct or bias against the Respondent on the part of ADNDRC personnel; there is no basis for allegations of dishonesty against such personnel. In fact the Respondent suffered no real prejudice either as a result of the late notification of the Complaint or as a

result of the additional Reply by the Complainant as the Respondent was able to respond to such Reply and this was taken into consideration by the Panel in reaching the decision.

E. Case No.237

In this case the parties elected to have one panelist who rendered a decision on 15th April 2009.

The Respondent has questioned whether ADNDRC sent to the panelist its response, supplemental response and second supplemental response. From the correspondence it is clear that these documents were sent by ADNDRC to the panelist. The Respondent further made complaints about the decision in Case 179 which has been dealt with above. We find that there is no substance in these complaints.

There remains the Respondent's dissatisfaction with the appointment of the panelist. The panelist was appointed on 6th April 2009. On 30th March 2009, the Complainant ranked the panelist as their fourth preference of the five candidates suggested to the parties by ADNDRC. Mr. Tang Guang Liang ("Tang") was ranked as the Complainant's fifth preference.

On 2nd April 2009 the Respondent ranked only two candidates. The panelist was ranked as the Respondent's second choice while Tang was the Respondent's first choice. The remaining three candidates were considered "non-impartial" and "non-independent" by the Respondent and were the Complainant's first to third preferences. The Respondent requested for a replacement of these three candidates. ADNDRC was not obliged to do this.

On 6th April 2009 the Respondent raised queries as to how the panelist was chosen. ADNDRC replied by referring to Article 8(4) of the Supplemental Rules which reads:-

"Where a single panelist is elected and a response is received, the sole panelist will be the highest mutually ranked panelist on the list of five panelists that will be provided to each party within 3 days."

On 8th April 2009 the Respondent asked how the panelist was chosen on the basis that the panelist Tang "tie and rank the same" according to Article 8(4) of the Supplemental Rules. ADNDRC replied on the same day that the appointment of either the panelist or Tang would "meet the requirement of Article 8(4) of the Supplemental Rules". Therefore, in these circumstances, ADNDRC "(took) the liberty to exercise its power under Article 6(b) of the Rules to appoint one of them as the panelist for the case. After reasonably balancing the preference of both parties [ADNDRC] appointed Mr. Chi Shao Jie as the panelist."

The relevant part of Article 6(b) of the Rules reads:-

"If neither the Complainant nor the Respondent has elected a three-member panel, the Provider (i.e. ADNDRC) shall appoint, within 5 calendar days following receipt of the response by the Provider or the lapse of time period for the submission thereof, a single panelist from the list of panelists".

The Respondent was not satisfied with this explanation which was suggested to lack a "transparent and level playing field".

Having reviewed the appointment, we can see no reason for criticism of the actions by ADNDRC. Where two panelists have essentially equal ranking, it is in the discretion of ADNDRC to decide on which panelist to appoint; in this case we can see no reason to criticise the exercise of discretion by ADNDRC.

F. General conclusions on Part I

The complaining parties (the respective Respondents in the 3 cases) have made numerous and repetitive complaints to ADNDRC, ICANN and the Special Investigation Committee alleging misconduct by ADNDRC personnel, bias against the complaining parties by ADNDRC personnel and even going so far as to alleged dishonesty and fraud against such personnel. Similar allegations have been made against the lawyers for the Complainants and certain panelists.

It is tempting for us to dismiss such allegations on the basis that they are made by individuals who are not prepared to disclose their identity and hide behind dubious

corporate names when making the allegations. We have nevertheless decided to investigate the complaints, in so far as they relate to the actions of ADNDRC and its personnel, in order that individuals can, where appropriate, be cleared of such allegations while at the same time identifying any proven allegations.

First we wish to make it clear that allegations of dishonesty and fraud (which need to be clearly defined and evidenced) have not been established either against ADNDRC personnel or against individual panelists and Complainant's lawyers. Hence the lengthy, repetitive and unjustified allegations of dishonesty and fraud should never have been made.

We are then left with the criticisms of the actions of ADNDRC personnel in respect of Case No.235 which we have set out above. Our investigations satisfy us that the personnel of ADNDRC involved have acted in good faith and have not shown bias against the Respondent, despite the fact that they have been subjected to lengthy and largely unjustified criticism in correspondence. No deliberate wrongdoing has been established by the complaining parties.

Paragraph 20 of the Rules (Exclusion of Liability) states:-

"Except in the case of deliberate wrongdoing, neither the Provider nor a panelist shall be liable to a party for any act or omission in connection with any administrative proceeding under these Rules".

In addition, paragraph 16 of the Supplemental Rules (Exclusion of Liability) provides as follows:-

- "1. ...
2. Without prejudice to any existing rule of law, the Centre (i.e. ADNDRC), its officers and its staff, shall not be liable to any party, a concerned Registrar or ICANN for any act or omission in connection with any administrative proceedings conducted under these Rules, the Policy and the Supplemental Rules, save in the case of fraud, dishonesty or deliberate wrongdoing."

We conclude that, since the complaining parties have not established fraud, dishonesty or deliberate wrongdoing, there can be no liability of ADNDRC or its personnel in respect of the complaints made by the complaining parties.

Part II

We make the following recommendations under paragraphs 2 and 3 of our Terms of Reference:-

1. We have drawn attention to the problems arising under paragraph 4(a) of the Rules. We understand that, in the past, where a Respondent was advised of the Complaint in accordance with this paragraph and the relevant Registrar did not promptly "lock up" the particular domain name, the Respondent would move the registration to another Registrar or change the registered owner prior to the relevant Registrar taking action to prevent this. We recommend that this problem be brought to the attention of ICANN with a recommendation that the Rules be changed so that, initially, the Provider's obligation is to inform the relevant Registrar of the Complaint who is obliged promptly to advise the Provider that the relevant domain name has been "locked up". Only then should the Provider provide a copy of the Complaint to the Respondent and inform ICANN of the date of commencement of the administrative proceedings. This will also involve the deletion of paragraph 3(b)(xii) of the Rules so as to eliminate the need for the Complainant to send a copy of the Complaint to the Respondent.
2. The time limit of 5 calendar days in paragraph 6(b) of the Rules presents a problem to the Provider in that there is often insufficient time to identify a panelist who is available to accept appointment. This problem is exaggerated by Article 8.4 of the Supplemental Rules whereby ADNDRC has to produce a list of 5 panelists within 3 days of the receipt of the response. It is virtually impossible to achieve this when ADNDRC has to contact a substantial number of panelists in order to try and identify 5 who would be prepared to accept appointment. We recommend that, in conjunction with ICANN, realistic time limits should be developed for inclusion in the Rules and the Supplemental Rules.
3. Apart from dealing with the complaint and response as provided for in the Rules and Supplemental Rules, we recommend that ADNDRC should not become involved in the exchange of any further submissions or other documents prior to the appointment of the panel. After appointment of the panel, ADNDRC should

merely act as a conduit for communications between the parties and the panel without involvement in any decision making.

4. Likewise there is no provision in the Rules or the Supplemental Rules for ADNDRC to participate in decision making which, under paragraph 15(a) of the Rules, is a matter for the panel only. If it is advisable for ADNDRC to review decisions for administrative compliance, then the Rules or the Supplemental Rules should make this clear. However we do not recommend this as it is important that ADNDRC is seen to remain neutral without participation in decision making.


Dated 4th August 2010.



Michael Hartmann JA
Chairman



Fred Kan Ka Chong
Member



Robin Somers Peard
Member