



BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

## DECISION OF THE THIRD-PARTY DECIDER

**ATITA NV/ Interoffex**

**Case no. 44265: atita.be**

### 1. The parties

- 1.1. Complainant: **ATITA NV**, with registered office at 9940 Evergem, Brugsesteenweg 1 and with company number 0890.633.016.

*Represented by:*

Mr Thomas Goethals, attorney-at-law, with offices at 8500 Kortrijk, President Kennedypark 4A.

- 1.2. Licensee: **Mr Guy Mouchart**, trading under the name **Interoffex**, residing at 1860 Eversem, Prinsendreef 18

### 2. Domain name

Domain name: atita.be  
Registered on: 23 May 2007

hereafter referred to as "the domain name".

### 3. Procedural history

On 30 March 2012, the Complainant filed a Complaint, in the English language, with the Belgian Centre for Arbitration and Mediation (hereinafter referred to as "CEPINA");

On 2 May 2012, the Licensee filed a Response, in the Dutch language, to the Complaint with CEPINA.

On 8 May 2012 CEPINA invited the Third-Party Decider to settle the dispute concerning the Domain Name as Third-Party Decider. On the same day the Third-Party Decider sent the statement of independence to CEPINA.

By e-mail of 10 May 2012, CEPINA informed the Third-Party Decider of his appointment and transferred the entire file concerning the Complaint and the Response to the Third-Party Decider.

The deliberations were closed on 16 May 2012.

On 30 May 2012 the Third-Party Decider requested Cepina on the basis of article 15.2 the Rules of the Belgian Centre for Arbitration and Mediation for Domain Name dispute resolution (hereinafter the “CEPINA rules”) to extend the term within which the Third-Party Decider must hand down his decision by one day. On the same day, this request was granted by CEPINA.

The Third-Party Decider will issue his decision based on (i) the Complaint, (ii) the Response, (iii) the evidence presented by both parties, (vi) the CEPINA rules and (v) the “Terms and Conditions of domain name registrations under the ‘.be’ domain operated by DNS”, entitled “Dispute Resolution Policy” (hereinafter “the Policy”).

#### **4. Factual information**

The relevant facts as they appear from the file submitted by CEPINA to the Third Party Decider can be summarized as follows.

- On 23 May 2007, the Domain Name was registered in the name of a company called International Protection Systems BVBA (“IPS”), represented by the Licensee.
- On 19 June 2007, the Complainant was incorporated. One of the founders was the Licensee. The Licensee was also one of the directors.
- The Complainant’s company name is ATITA and it is not contested by the Licensee that the Complainant has used the name ATITA as its trade name.
- It is not contested by the Licensee that the Complainant paid for all costs relating to the Domain Name.
- It is also not contested by the Licensee that the Domain Name is and has always been used for the website of the Complainant.

- On 19 November 2010, the Licensee was dismissed as director of the Complainant but remained a shareholder.
- From the correspondence submitted by both parties, it is clear that there is a dispute between the shareholders of the Complainant.
- On 7 June 2011, the Licensee was dismissed as director of IPS.
- On 13 February 2012, the Licensee requested the transfer of the Domain Name from IPS to “Interoffex”, which is the name under which the Licensee is trading.
- On 2 March 2012, the Complainant sent a letter to the Licensee i) stating that it has become aware of the fact that the Domain Name had been registered in the name of IPS and of the Licensee and ii) requesting the Licensee to sign the enclosed agreements through which the Domain Name would be transferred to the Complainant.
- On 6 March 2012 the Licensee replied that he was unable to sign because the agreement was *“not the correct reflection of the reality”* (in Dutch: *“omdat ze niet de correcte weergave is van de realiteit”*).
- On the same day the Complainant asked what the Licensee meant by that statement.
- On 7 March 2012 the Licensee replied without answering the Complainant’s question but by stating that it would be better if the Complainant were to dedicate its time to drafting a shareholders agreement that would take care of a number of outstanding issues.
- On the same day the Complainant replied that the issues mentioned in the Licensee’s letter had nothing to do with the registration of the Domain Name. The Complainant listed the principles relating to domain name registration and domain name disputes and reiterated its request for the Licensee to voluntarily transfer the Domain Name.
- On 8 March 2012 the Complainant sent a letter to IPS and also requested IPS to transfer the Domain Name.
- On the same day, the Licensee replied confirming explicitly that he was not answering the question raised by the Complainant and that he was merely repeating a number of outstanding issues relating to a shareholders agreement. The Licensee also stated:

*“it is not the first time that I ask this question relating to the drafting of such agreement.*

*Because we do not often hear or see each other, I use every opportunity to bring this up again”*

*(in Dutch: het is overigens niet de eerste keer dat ik deze vraag betreffende het opstellen van zo'n overeenkomst stel. Omdat wij mekaar niet veel horen of zien, neem ik elke gelegenheid ten baat om dit opnieuw aan te kaarten")*

- The Complainant subsequently filed the Complaint.

## **5. Position of the parties**

### 5.1. Position of the Complainant

According to the Complainant:

- The Domain Name is identical to the trade name and corporate name of the Complainant.
- The mere act of registration of a domain name and/or the capacity as (minority) founder / shareholder or even director of Complainant cannot amount to a right or legitimate interest in the Domain Name
- The Complainant never agreed to the registration of the Domain Name in the name of the Licensee. It was until recently of the opinion that the Domain Name had been registered in its name. This belief was strengthened by the fact that the Complainant has consistently received and paid the invoices for the renewal of the registration and the hosting of the website
- The Domain Name is used in bad faith because from the facts and exhibits provided by the complainant, it is clear that the Licensee holds on to the Domain Name (refuses to transfer control to the Complainant), in order to use it as leverage in negotiations regarding its position as a shareholder of the Complainant.
- Use for the sole purpose of obtaining a better negotiation position vis-à-vis the Complainant has been qualified as use in bad faith in other decisions (in this respect, the Complainant refers to CEPINA case N° 44158 of 12 June 2009, denazeele.be; CEPANI case n° 44256, of 22 February 2012, biosolar.be and CEPINA case n° 44236 of 28 July 2011, duratherm.be).
- A Domain Name in which another party has rights cannot be held hostage for the sole purpose of obtaining a more favourable bargaining position in a broader dispute with that party (or its shareholders), in or out of court and regardless of who is right in the underlying dispute (in this respect the Complainant refers to CEPINA case n° 44256 of 22 February 2012, biosolar.be).
- The Licensee clearly expressed that he has no intention to pay the costs for the hosting/registration or maintenance of the Domain Name. The Licensee has declined the related invoice, and requested the hosting company to continue to

invoice the costs relating to the domain name registration, maintenance and hosting to the Complainant. Complainant emphasizes that it has always paid, in good faith, these costs, in the opinion that it was the legitimate owner of the Domain Name.

On the basis of the above the Complainant argues that the three conditions for a mandatory transfer of the Domain Name have been met.

## 5.2. Position of the Licensee

In his Response, the Licensee describes in detail the dispute that has arisen between on the one hand i) himself as former director and shareholder of the Complainant and ii) his sister as former director and former manager of one of the shops, and on the other hand the other shareholders of the Complainant.

Regarding the three conditions that have to be met for a mandatory transfer of the Domain Name, the Licensee states in essence:

- That he registered the Domain Name in his name because it was agreed between the shareholders of the Complainant that he would be the owner of the Domain Name.
- That this is supported by the fact that the other shareholder did not register the name himself on 23 May 2007 and that the Licensee was never asked to transfer the name to the Complainant before.
- That the Complainant clearly knew that the Domain Name had been registered in the name of the Licensee since i) this had been agreed upon, ii) in an email to the Complainant the Licensee had explicitly asked the Complainant who was the owner of the Domain Name and the Complainant did not answer this email, iii) the registration took place prior to the incorporation of the Complainant and iv) on 29 August 2011 and on 10 September 2011 the Complainant attempted to change the ownership of the Domain Name. Only when these attempts did not work did the other shareholders start using other means.
- That there is no proof that he is misusing the Domain Name and that any reference to the Biosolar case is irrelevant since, contrary to the facts in the Biosolar case, i) he is still a shareholder of the Complainant and ii) he has never prevented access to the Complainant's website.
- That it is *"no problem whatsoever"* (in Dutch: *"helemaal geen probleem"*) for him to transfer the Domain Name to the Complainant on the day he sells his shares to a third party and that he is not looking for a better negotiating position; he simply wants the parties to uphold the agreement.

## 6. Discussion and findings

Pursuant to Article 11 of the Rules, *“the language of the proceeding for the domain name in dispute shall be the language mentioned in the WHOIS database on the DNS website”, “unless otherwise agreed by the Parties”.*

In the case at hand, that language is English and the Parties did not agree otherwise.

According to article 11.2 of the Rules the Third-Party Decider **“may order that any documents submitted in languages other than the language of the proceeding be accompanied by a translation in whole or in part into the language of the proceeding”** (emphasis added by the Third-Party Decider).

The Complainant has submitted the Complaint in English but has not submitted any translations of the supporting evidence (which is all in Dutch). The Licensee has submitted his Response in the Dutch language and has not submitted any translations of the supporting evidence (which is all in Dutch).

The Third-Party Decider will not order the translation of any of the documents since i) the Rules do not require him to do so, ii) none of the parties have made any objections to the use of the Dutch language and iii) it is clear that both parties have a good command of both English and Dutch, which implies that the rights of defence are safeguarded.

Pursuant to Article 10b(1) of the Policy, the Complainant must provide evidence of the following:

- *“ the licensee's domain name is identical or confusingly similar to a trademark, a tradename, a social name or corporation name, a geographical designation, a name of origin, a designation of source, a personal name or name of a geographical entity in which the Complainant has rights; and*
- *the licensee has no rights or legitimate interests in the domain name; and*
- *the licensee's domain name has been registered or is being used in bad faith.”*

### 6.1. Identical or similar to

There is no discussion between the parties that the Complainant has rights in the corporation name and trade name “ATITA”.

There is no discussion between the parties that this corporation and trade name is identical to the Domain Name.

The first requirement is therefore met.

## 6.2. Rights and legitimate interests

According to article 10.(b).3 of the Policy, the Licensee can demonstrate his rights or legitimate interests to the Domain Name by the following circumstances:

- prior to any notice of the dispute, the Licensee used the domain name or a name corresponding to the Domain Name in connection with a bona fide offering of goods or services or made demonstrable preparations for such use; or
- the Licensee (as an individual, business, or other organization) has been commonly known by the Domain Name, even if he has acquired no trademark; or
- the Licensee is making a legitimate and non-commercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark, trade name, social name or corporation name, geographical designation, name of origin, designation of source, personal name or name of the geographical entity at issue.

None of these circumstances are present in the case at hand and the Third-Party Decider can find no other circumstances in the case file that lead to the conclusion that the Licensee would have a right or legitimate interest in the Domain Name.

The Licensee argues that it was agreed upon between the parties that he would be the *owner* of the Domain Name. The Third-Party Decider cannot accept that argument. It is clear that the Licensee registered the Domain Name in his own name but for the account of the Complainant. This is confirmed by the fact that the Complainant paid for all costs related to the Domain Name.

Whether the Complainant knew or not that the Domain Name had been registered in the name of the Licensee is irrelevant. What matters is that – as stated above – it is clear that the Licensee registered the Domain Name in his own name but for the account of the Complainant.

The second condition is therefore met.

## 6.3. Registration or use in bad faith

According to article 10.(b).2 of the Policy, bad faith registration or use of a domain name can inter alia be demonstrated by the following circumstances:

- circumstances indicating that the domain name was registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name to the Complainant who is the owner of the trademark, trade name, social name or corporation name, geographical designation, name of origin, designation of source, personal name or name of the geographical entity, or to a competitor of that Complainant, for valuable consideration in excess of the costs directly related to the domain name; or

- the domain name was registered in order to prevent the owner of a trademark, a trade name, a social name or corporation name, a geographical designation, a name of origin, a designation of source, a personal name or a name of a geographical entity from reflecting this name in a corresponding domain name, provided that the domain name holder has engaged in a pattern of such conduct; or
- the domain name was registered primarily for the purpose of disrupting the business of a competitor; or
- the domain name was intentionally used to attract, for commercial gain, Internet users to the domain name holder's web site or other on-line location, by creating a likelihood of confusion with the Complainant's trademark, trade name, social name or corporation name, geographical designation, name of origin, designation of source, personal name or name of a geographical entity as to the source, sponsorship, affiliation, or endorsement of the domain name holder's web site or location or of a product or service on his web site or location.
- the domain name holder registers one or more personal names without the existence of a demonstrable link between the domain name holder and the registered domain names.

None of these circumstances are applicable here. Bad faith can, however, be proven by any means, including presumptions and circumstantial evidence tending to show, with a reasonable degree of certainty, the existence thereof (see e.g. CEPANI case 44019, Verfaillie Bauwens bvba / Stichting Juridisch Eigendom Domeinen).

In the case at hand, it appears from the facts and exhibits submitted by the parties that the Licensee holds on to the Domain Name to use it as leverage in the dispute that has arisen between the parties regarding a shareholders' agreement.

The Licensee has repeatedly refused to answer the Complainant's legitimate request to transfer the Domain Name. Instead, he always refers to the fact that the parties still need to agree on a shareholders' agreement. It is therefore clear that he is only willing to (possibly) transfer the Domain Name once a satisfactory shareholders' agreement has been reached.

In previous cases, Third-Party Deciders have correctly held that use for the purpose of obtaining a better negotiation position vis-à-vis the Complainant is indeed to be qualified as use in bad faith (CEPINA case N° 44158 of 12 June 2009, denazeele.be; CEPANI case n° 44256, of 22 February 2012, biosolar.be and CEPINA case n° 44236 of 28 July 2011, duratherm.be).

The fact that – contrary to the Biosolar case – the Licensee is still a shareholder of the Complainant and has not disabled access to the Complainant's website and e-mail accounts does not change the fact that he is acting in bad faith. It is clear from the Biosolar decision that it was sufficient for the Third-Party Decider that the Licensee used the Domain Name as leverage in negotiations (see §39 of the



Biosolar decision where it is stated that the use is “the more” in bad faith since access to the website has been disabled).

The third condition is therefore also met.

## 7. Decision

Consequently, pursuant to Article 10(e) of the *Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE*, the Third-party Decider hereby rules that the domain name registration for the "**atita.be**" domain name is to be transferred to the Complainant.

Brussels, 31 May 2012.



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Hans Dhondt  
The Third-party decider