ADMINISTRATIVE PANEL DECISION

Case Number： DCN-1400593

Complainant: COMUTO
Respondent: 林清茂
Disputed Domain Name(s): BlaBlaCar.cn
Registrar: eName Technology Co. Ltd.

I. Parties and Disputed Domain Name

Complainant: COMUTO
Address: 84 avenue de la Republique, 75011 Paris France

Respondent: 林清茂
Address: N/A

Domain Name: BlaBlaCar.cn
Registrar: eName Technology Co. Ltd.

II. Procedural History

On 25 October 2014, the Complainant submitted its complaint (the Complaint) about the domain name “BlaBlaCar.cn” (the Disputed Domain Name) in English to the Hong Kong International Arbitration Centre (HKIAC), a domain name dispute resolution service provider authorized by China Internet Network Information Center (CNNIC) in accordance with the CNNIC Domain Name Dispute Resolution Policy (CNDRP) issued by CNNIC on 1 September 2014.

On 27 October 2014, HKIAC requested the registrar eName Technology Co. Ltd to confirm the registration information about the Disputed Domain Name; the registrar confirmed that it is registrar of the Disputed Domain Name and confirmed the registration details on the same day.

On 5 November 2014, HKIAC requested the Complainant to correct certain formal defects in its Complaint. In addition, HKIAC pointed out that the domain name dispute resolution procedure under CNDRP shall proceed in Chinese unless otherwise decided by the panel and, therefore, the Complaint should consider submitting a Chinese translation of the Complaint or submit an explanation why it pleases to have the domain procedure proceeded in English.

On 7 November 2014, the Complainant submitted a revised Complaint in English and explained the reason why it pleases to have the domain name procedure proceeded in English. On 10 November 2014, as requested by HKIAC, the Complainant submitted the revised Complaint in pdf format.

On 11 November 2014, HKIAC sent a copy of the Complaint to the Respondent. The Respondent replied on 22 November 2014, requesting to have the domain name procedure
On 25 November 2014, HKIAC notified the Complainant that the Respondent did not agree to use English as the language for the domain name procedure and requested that the Complainant submit a Chinese translation of the Complaint. HKIAC further pointed out that the Panel would have the final power to decide the language of the procedure.

On the same day, the Complainant emailed to HKIAC, insisting on using English as the language for the procedure and gave out detailed reasons.

On 28 November 2014, HKIAC forwarded Complainant’s said email to the Respondent. The Respondent replied on the same day, insisting on using the Chinese language for the procedure also with reasons.

On 1 December 2014, HKIAC notified both the Complainant and the Respondent that both parties may submit additional comments on the selection of procedural language until 3 December 2014 and that the case would be transferred to the Panel after 5 December 2014.

On 8 December 2014, HKIAC confirmed that no additional comment on procedural language or request for three-member panel had been raised and, thus, the case would be transferred to a Panel duly appointed.

Having received a Declaration of Impartiality and Independence, on 10 December 2014, HKIAC appointed Mr. Yang, Xun as the sole Panelist and informed the Complainant and the Respondent of the appointment of the Panelist, and transferred the case file to the Panelist on the same day.

III. Decision on Language

The first issue that the Panel must take a position is which language, Chinese or English, should be used for this domain name dispute resolution procedure. Obviously, by rendering this decision, the Panel has clearly voted for the English language.

It is the Panel’s responsibility to point out that the decision in favor of the English is only an exceptional decision, which may not be considered to be persuasive in other domain name cases. In other words, the decision in favor of the English language is very specific to the facts of this case.

As a principle, a domain name resolution procedure under CNDRP should proceed in Chinese because: the domain names subject to the CNDRP procedure are regulated by the Chinese organizations and are supposed to target Chinese customers. By registering a domain name under CNDRP, subject to the exceptions provided under CNDRP, the registrant only agrees to subject itself (him-or herself, as the case may be) to a domain name dispute procedure in Chinese but not any proceeding in English or in any foreign language.

CNDRP provides for two exceptions where the domain name procedure can proceed in a language other than Chinese: (1) mutual consents by the Complainant and the Respondent; and (2) decision made by the Panel.

Obviously, the disputed parties can agree on an alternative language for the procedure, which falls within the region of the parties’ “freedom of contract.” However, the disputed parties in this case failed to reach a mutual agreement on the language.

The second exception, “decision made by the Panel” requires that the Panel consider the values of fairness and efficiency in deciding the language.

The Panel disagrees with the Complainant’s first argument that the case should proceed in English because the Disputed Domain Name is registered in ASCII. In fact, a majority of
domain names (including a large number of .cn domain names) are registered in ASCII. People in non-English speaking countries are used to typing English alphabets for Internet addresses but this does not mean that they are competent in using English as a language for communications, nor for legal proceedings. It is unfair to subject all registrants of ASCII domain names to English legal proceedings.

The Panel disagrees with the Complainant’s second argument, either, that case should proceed in English because that English is an International language. “All men are created equal” and should have equal right to use their own language. The Panel believes that the Complainant, as a French company, would not be willing to see legal proceedings in France proceed in English. Were the Complainant’s argument sustained, Art. 8 of CNDRP would be meaningless.

The Panel fully understands that, if the Panel decided to proceed with the case in Chinese, the Complainant would incur significant cost for translation. However, the Complainant ought to understand that, should the Panel decide to proceed with the case in English, the Respondent would face language difficulties, too. The panel cannot subject the Respondent (who has only entered into Chinese domain name registration agreement) to an English proceeding merely because the Complainant is unable to use Chinese. Otherwise, the Panel would have deprived the Respondent of its equal right to defend itself.

The Panel, nevertheless, decide to proceed with this case in English in consideration of the value of efficiency. Generally speaking, a panel must not, to pursue the value of efficiency, deprive of a party’s equal right of defence or of the right to fair trial. However, there is an exception: if the Panel has solid ground to believe that the case can be decided merely on one party’s argument regardless of whether the other party submits any defence or counter-argument (i.e., similar to “summary judgment” in common law countries), the panel may ignore such other party’s right to defence or counter-argument because such ignorance does not harm such other party’s interest.

In this case, as the Panel discusses below, even if all facts stated in the Complaint are true, and even if the Respondent does not defend itself, the Panel would decide in favor of the Respondent. Therefore, it does not prejudice to the Respondent’s interest to proceed with the case in English and to ignore his right to defend himself.

As such, the Panel decides to proceed with the case in English.

IV. Factual Background

The Complainant is a French Company named “COMUTO.” It operates a website www.blablacar.com that connects drivers with empty seats to passengers looking for a ride.

The Respondent is an individual. No other information is available.

V. Parties’ Contentions

The Complainant

The Complainant claims that:

(1) The Disputed Domain Name is identical to its trademark.

The Complainant contends that it is the owner of the trademark “BlaBlaCar” and that the Disputed Domain Name is identical to the distinctive part of such trademark because the ccTLD
of the Disputed Domain Name (i.e., “.cn”) “is not sufficient to escape the finding that the domain name is identical to its trademark” and cannot prevent the likelihood of confusion between the Disputed Domain Name and the Complainant.

(2) The Respondent has no legitimate right or interest over the Disputed Domain Name or the major part of the Disputed Domain Name.

The Complainant argues that the Respondent has no relationship with the Complainant and that there is no evidence shows that the Respondent is known as “BlaBlaCar.” Therefore, the Complainant contends that the Respondent has no legitimate right or interest over the Disputed Domain Name.

(3) The Respondent registers or uses the Disputed Domain Name in Bad Faith.

The Complainant argues that the mark “BlaBlaCar” is only known in relation with the Complainant and that the website linked to by the Disputed Domain Name displays an inactive page. Therefore, the Complainant contends that “the incorporation of a famous mark into a domain name, coupled with an inactive website, may be evidence of bad faith registration and use.”

The Respondent

The Respondent did not submit a response (except for the email requesting on the Chinese language) within the required period.

VI. Findings

According to the registration agreement between the Respondent and the Registrar, the Respondent has agreed to be bound by CNDRP. Furthermore, the Disputed Domain Name was registered within two years before the Complaint was filed. Therefore, CNDRP governs this case.

According to Article 8 of CNDRP, a complainant must prove ALL of the following three conditions to establish its case:

(i) The disputed domain name is identical with or confusingly similar to the Complainant's name or mark in which the Complainant has civil rights or interests;

(ii) The disputed domain name holder has no right or legitimate interest in respect of the domain name or major part of the domain name;

(iii) The disputed domain name holder has registered or has been using the domain name in bad faith.

Identity or Confusing Similarity to Trademark

Pursuant to Article 8 of CNDRP, the first condition for a complainant to claim for the transfer of a disputed domain name is that such disputed domain name is identical with or confusingly similar to the Complainant's name or mark in which the Complainant has civil rights or interests. In line with this condition, a complainant must prove: (i) it owns a trademark or service mark; and (ii) the disputed domain name is identical with or confusingly similar to the
Complainant's name or mark in which the Complainant has civil rights or interests.

In this case, clearly, the distinctive part of the Disputed Domain Name is “BlaBlaCar,” which is identical to the “BlaBlaCar” brand with respect to which the Complainant has registered a trademark in France and as two community marks (collectively, the Relevant Marks). The question here is whether these Relevant Marks are considered “a trademark or service mark in which the complainant has civil rights” for the purpose of Article 8 of CNDRP.

The Panel holds the view that, when comparing a mark and a domain name, not only the spelling and pronunciation should be compared, but their usage (including the regions where they are used) should also be considered.

A ccTLD domain name, different from gTLD, is labeled to a specific country or region. A ccTLD domain name ended with “.cn” is supposed to be used for websites operated in China and primarily facing Chinese customers. Although a website linked to by a .cn domain name is accessible from outside of China but most reasonable people view such website as operated in and from China. In other words, a ccTLD domain name ended with “.cn,” such as the Disputed Domain Name, is primarily limited to the jurisdiction of China.

It is well accepted that trademark right, as a type of intellectual property right, is subject to geographic limitations, too. The Relevant Marks were registered in France and EU and, therefore, their effects should be limited to France and EU accordingly. There is no evidence indicating that the Complainant had ever filed any trademark in China in relation to the brand “BlaBlaCar” and therefore, the Panel concludes that the Complainant has no registered trademark right in China in relation to the brand “BlaBlaCar.”

As stated in the decision of CND-2007000187 (GEA Group AG and GEA Messo GmbH v. Shenzhen Melingda Industry Co.), “[C]onsidering that the protection of trademarks is subject to geographic restrictions, a mark registered in a foreign jurisdiction cannot receive protection in China … and cannot function as the basis for opposing a domain name registration.” Therefore, it is the Panel’s view that the Relevant Marks do not form the base on which the Complainant can assert its right in the Disputed Domain Name.

It is worthy noting that if the Complainant had generated a certain degree of goodwill in China associated with the “BlaBlaCar” brand through its actual use of the brand, it might be able to base its claim on the “well-known” status of the unregistered mark of “BlaBlaCar.” However, there is no evidence demonstrating the Complainant’s actual use of the “BlaBlaCar” brand in China.

The Complainant has submitted to the Panel some searching results from Google and Baidu, suggesting that “BlaBlaCar” is referred to the Complainant on Chinese websites. However, these results cannot prove the Complainant’s use of the “BlaBlaCar” brand in China.

As stated in the case Pfizer Inc. v. Jiangsu Lianhuan Pharmaceutical Corp. ((2009) Min Shen Zi No.312, by Supreme People’s Court), “the use by media of [a brand] … cannot demonstrate the applicant’s intention to use the brand [in China].” Therefore, the Panel takes the view that there is nothing suggesting that the Complainant has ever used or even intended to use the “BlaBlaCar” brand in China and that no “well-known status” of such brand has been established through continuous use in China.

In light of the above, the Panel concludes that the Complainant does not own a trademark or service mark, for the purpose of Article 8 of CNDRP, which is identical or confusingly similar to the distinctive part of the Disputed Domain Name. Therefore, the first condition of Article 8 of CNDRP is not satisfied.
Lack of Right or Legitimate Interest of Respondents

Article 8 of CNDRP requires that a complainant prove all three conditions to establish its case. Since the Complainant failed to meet the first condition under Article 8 of CNDRP, the Panel does not need to discuss whether the second condition is met.

Respondent’s Bad Faith

Article 8 of CNDRP requires that a complainant prove all three conditions to establish its case. Since the Complainant failed to meet the first condition under Article 8 of CNDRP, the Panel does not need to discuss whether the third condition is met.

VII. Conclusion

For all the foregoing reasons, in accordance with Article 8 of CNDRP, the Panel decides that the Complainant’s claim is denied.

Panelist: Yang Xun

Date: 5 January 2015