

DECISION OF THE THIRD-PARTY DECIDER

LeanIT B.V.B.A. / Rombouts

Case no. 44362: leanit.be

1. The parties

- 1.1. Complainant: Leanit B.V.B.A.;
with registered office at 2990 Wuustwezel, Heivelden 23.

Represented by:

Ms. Sofie Van Looveren, director,
with office at 2990, Wuustwezel, Heivelden 23.

- 1.2. Licensee: Gunther Rombouts,
With address at 2920 Kalmthout, Heiken 5.

Represented by:

Mr. Marcus Van den Keybus, Attorney-at-law,
with office at 2990 Wuustwezel, Bredabaan 311.

2. Domain name

Domain name: **"leanit.be"**
Registered on: 5 march 2012

hereafter referred to as "the Domain name".

3. Background to the case

- 3.1 On 6 October 2014, Complainant filed a complaint (hereafter the Complaint) with the Belgian Center for Arbitration and Mediation (hereafter "Cepani") in

relation to the Domain name. The Licensee did not submit an answer to the Complaint.

By letter dated 25 November 2014 Cepani informed the Complainant and the Licensee of the appointment of the undersigned as Third-Party decider and the intended closure of deliberations on 2 December 2014.

- 3.2 On 29 November 2014 counsel for Licensee wrote to Cepani expressing Licensee's objection for the conflict to be submitted to the current dispute resolution proceedings.

By email of 3 December 2014 Cepani informed the Licensee of the automatic submission of domain name disputes under the ".be" domain to alternative dispute resolution as organized in accordance with the Terms and conditions for domain name registrations under the ".be" domain. By the same email parties were informed of the Third-Party decider's decision to reopen the debates in order to allow the Licensee to bring forward his viewpoint at the latest on 17 December 2014, and this given the concise nature of the Complaint, the intervention of counsel for the Licensee and the respect of all parties' rights to file a defence.

- 3.3 Counsel for Licensee filed its response on 16 December 2014 (hereafter Response).

The debates were closed on 24 December 2014. The Third-Party decider had to submit her Decision by 7 January 2015.

4. Factual information

- 4.1 Complainant is LeanIT B.V.B.A., a company established on 23 April 2012, by amongst others Mr Gunther Rombouts, Licensee. Complainant develops open ERP applications.

In the month preceding the establishment of Complainant and more in particular on 5 March 2012, Mr Rombouts registered the Domain name in its own name.

As appears from the exhibits submitted by Complainant, the Domain name was used for:

- (a) a website promoting the activities of Complainant (see print of Google's cache memory of 16 August 2014),
- (b) email addresses used by Complainant's collaborators (see e.g. same document (info@leanit.be)).

- 4.2 By letter of 17 July 2014, Mr Gunther Rombouts handed in his resignation as a director of Complainant, which resignation was accepted by the general assembly on 18 August 2014. It is unclear whether Mr Rombouts still owns shares in the Complainant.

Mr Rombouts is also owner of Hew Automation, a company that is equally active in open ERP applications.

5. Position of the parties

5.1. Position of the Complainant

Complainant requests the transfer of the Domain name to Complainant for the following reasons:

- The Domain name was registered to serve as a domain name for the Complainant. It is used to provide email addresses to individuals working for the Complainant.
- After having resigned as a director of the Complainant, Licensee has no rights to the Domain name any more, nor legitimate interests in maintaining the Domain name.
- Complainant's access to its website (developed by Ms Van Looveren, current director of Complainant), the email account linked to its contactpage (info@leanit.be) and other email addresses (e.g. sofie.vanlooveren@leanit.be) are blocked.
- Licensee is using the website under the Domain name (including all commercial references included in the website) for its own competitive activities, i.e. for attracting Complainant's clients to its other company Hew Automation. Licensee is equally using the email addresses of Complainant's collaborators, and is replying to emails that are addressed to Complainant's collaborators in order to lead the Customers away from the Complainant and to Hew Automation. Licensee is also using the logo of the Complainant. Hence, Licensee is confusing customers by acting in this way.

5.2. Position of the Licensee

Licensee points out that:

- Licensee is the sole and exclusive holder of the Domain name. If it would have been the intention to make the Complainant holder of the Domain name, the registration should have been executed in the name of the Complainant.
- The website under the Domain name was developed by a third party supplier. The logo was developed by Licensee/ Hew Automation. Hew Automation paid all costs for the DNS-registration and hosting of the website.

6. Discussion and findings

Preliminary Remark

Parties both refer in their submission, either the Complaint or the Response, to matters that are outside of the scope of these proceedings. Indeed, Parties refer to intellectual property rights in the website hosted under the Domain name, and/ or in the logo of Complainant. This is not the appropriate venue to decide such matters, nor does the Third-Party decider have jurisdiction to do so. This Decision is strictly limited to the matter of the Domain name, and the question whether or not this Domain name should be transferred to the Complainant.

On the domain name dispute

Pursuant to Article 16.1 of the *CEPANI rules for domain name dispute resolution*, the Third-party decider shall rule on domain name disputes with due regard for the Policy and the CEPANI rules for domain name dispute resolution.

Pursuant to Article 10b(1) of the Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE, 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

6.1.1. In order to meet the first condition of Article 10(b)(1), the Domain name must be either identical or similar to one of the rights or interests listed therein.

According to Belgian law, a trade name is the name that a commercial entity uses to engage in business affairs and to distinguish itself from other companies. The right to use a trade name is accorded to whoever has the first visible, public and continuous use of the trade name (see Kaesmaecher, D., *les droits intellectuels*, Larcier 2007, p. 207, nr. 95; Mayaert, P., *De bescherming van de handelsnaam en de vennootschapsnaam in België*, De Boeck & Larcier 2006, p. 27).

The Complainant clearly establishes that it uses the name LeanIT (leanit) as trade name (e.g. print of its website – Google cash memory of 16 August 2014).

Moreover LeanIT is also Complainant's corporation name (see exhibits Complainant – annexes to the Belgian State Gazette (Moniteur Belge)).

6.1.2. The trade name and corporation name LeanIT are identical, at least confusingly similar to the Domain name.

6.1.3. The Complainant however does not bring forward any exhibits on the basis of which the Third-Party decider can determine as of what moment the trade name has been used by the Complainant. Given the fact that the Complainant was only established on 23 April 2012, i.e. after the registration of the Domain name on 5 March 2012, it is possible that the Domain name predates both the corporation name and the trade name.

Earlier case law is divided on the question of whether the name or sign relied on by the Complainant must predate the Licensee's registration of the Domain name. As in the Sputnik.be case (Cepina nr 44260) and the Muckboots.be case (Cepina nr 44323) the Third-Party decider is of the opinion that no such anteriority of the invoked rights is necessary for the first condition of Article 10(b)(1) to be fulfilled.

Article 10(b)(1) does not specify that the rights must predate the registration of the Domain name. It is sufficient that the Complainant is entitled to the right at the time of

filing of the Complaint (see also Cepina cases nr 44012 (napster.be), 44/81 (qcare.be), 44085 (casas.be)).

6.1.4 Moreover, in this case the registration of the Domain name by the Licensee took place in the same course of events that lead to the establishment of the Complainant.

It would be rather arbitrary to decide this case on the sole basis of whether the Domain name was registered prior to or the day after the establishment of the Complainant.

In the Third-Party decider's view, the three conditions set out in Article 10(b)(1) must be read and interpreted together. The lack of anteriority is not relevant for the first condition, but may influence the Third-Party decider's assessment of the third condition (bad faith).

Therefore, the Third-Party decider finds that the first requirement is fulfilled.

6.2. Rights and legitimate interests

Pursuant to Article 10(b)(3), the Licensee can demonstrate his rights or legitimate interest to the Domain name by a number of circumstances such as:

- the use of the Domain name by the Licensee in connection with a bona fide offering of goods or services,
- the fact that the Licensee is commonly known by the Domain name, or
- a legitimate, non-commercial or fair use of the Domain name, without intent to misleadingly divert consumers for commercial gain.

In casu the Licensee only refers to the fact that the Domain name was registered on the Licensee's name, and that Hew Automation paid for the registration and hosting of the website under this Domain name.

The fact that the Licensee registered the Domain name and/or paid for the registration, is not relevant for the assessment of the Licensee's rights and legitimate interests in the Domain name (see Cepina nr 44256: biosolar.be). The domain name holder will indeed normally be the one registering the domain name and paying the registration fees. These facts cannot in itself be relevant for any domain name dispute.

More relevant than who paid for the registration, or even hosting of the website, are in the Third-Party decider's view the following facts that can be derived from the Complainant's exhibits:

- It is the Complainant rather than the Licensee that was offering goods or services on the website that was hosted under the Domain name.
- It is the Complainant, rather than the Licensee, that is commonly known by the Domain name.
- The use that the Licensee is making of the Domain name is commercial and intends to mislead and divert customers for commercial gain (infra 6.3).

In the Third-Party decider's view, the Licensee does not at all prove his rights and/or legitimate interests in the Domain name. Therefore, the second condition is fulfilled.

6.3. Registration or use in bad faith

For the third condition to be fulfilled, the Domain name must either be registered or used in bad faith by the Licensee.

The Third-Party decider finds that the registration by the Licensee was not in bad faith. The Domain name was registered prior to establishment of the Complainant, and was then put to use for the benefit of the Complainant.

The situation is different however for the use that is made of the Domain name by the Licensee. The Complainant proves that the Licensee is using the Domain name for its own competitive activities, i.e. for leading customers away from the Complainant and to its own company Hew Automation.

Licensee is doing that by:

- o Pretending that the website under the Domain name belongs to Hew Automation (exhibit Complainant: Email of Licensee to Jo's Repair Shop, dated 5 September 2014),
- o Using email addresses under the Domain name (exhibit Complainant: Email of Mr Nelen dated 6 August 2014).

These acts are in the Third-Party decider's view very confusing for the customers and the general public that will not be able to distinguish the Complainant and the Licensee's other company Hew Automation. This clearly demonstrates the Licensee's bad faith.

Moreover, the Licensee does not contest that the Licensee has disabled access to the Complainant's website and e-mail accounts. This equally constitutes use in bad faith (see Cepina nr. 44256: biosolar.be).

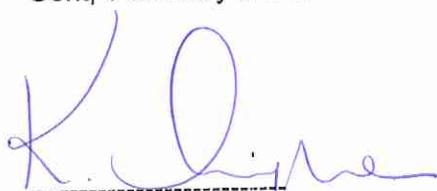
Finally, and for the sake of completeness, the Licensee also does not contest having used (and got access to) the email addresses of Complainant's collaborators under the Domain name, and having replied to emails that are addressed to Complainant's collaborators for the competitive commercial purposes of Hew Automation.

Therefore, also the third condition is fulfilled.

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 "**leanit**" domain name is to be transferred to the Complainant.

Gent, 6 January 2015.



Karen Ongena
The Third-Party decider
(signature)