

ADR SUMMARY DECISIONS



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Summary Decisions

- November 2017 amendments introduced summary decisions
- Largely followed the DRS. Not many ccTLDs with summary decisions
- But under DRS complainant can still request reasoned decision if no response. Not under ZA ADR. Consider amending – good use cases
- Short, sharp decisions made where no response to the complaint
- Adjudicator still required to consider merits
- Fee reduced by 50%. Adjudicator not required to spend time providing lengthy reasoned decision

ADR Regulations

- Reg 18(3):
 - Adjudicators must issue summary decision if no response
 - Must base decision on the complaint as filed
- Reg 28(1): On default, adjudicator must decide "*on the dispute*"
- Not a default judgement, must still apply one's mind
- Examples of summary decisions against complainants:
ZA2018-0317, UK DRS 04635

ADR Regulations

- Reg 28(2): May draw inferences from default
- WIPO Jurisprudential Overview 3.0 at 4.3. Inferences appropriate:
 - where a particular conclusion is prima facie obvious
 - where an explanation by the respondent is called for but is not forthcoming
 - where no other plausible conclusion is apparent

ADR Regulations...

- Reg 18(4): Summary decision should only be granted where:
 - Registrant notified in accordance with Regs
 - Complainant has, to Adjudicator's "*reasonable satisfaction*", shown rights and domain abusive/offensive
 - No other factors that would "*unfairly*" deprive registrant
 - Seems redundant. Fairness baked into abusiveness assessment

Reasonable Satisfaction

- Reg 3(2) requires "*balance of probabilities*" for all complaints
- "*reasonable satisfaction*" only applies to summary judgements
- "*reasonable satisfaction*" different / in addition to "*balance of probabilities*?
 - Rule of interpretation against redundancy suggests yes

Reasonable Satisfaction...

- Meaning of “*reasonable satisfaction*”?
- Australian divorce case of *Briginshaw v Briginshaw* (1938) 60 CLR 336
 - “*reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the facts to be proved. The seriousness of an allegation, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer...In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*”

Reasonable Satisfaction...

- “*reasonable satisfaction*” may require higher degree of satisfaction in some circumstances:
 - Where consequences for parties serious, e.g. registrant running bona fide business from domain
- Reason: Adjudicator has not had benefit of evidence from Respondent

Deficient response?

- Is deficient response still “response” ito Reg 18(3) and 19A(1)?
- If **NO**, then summary decision and no informal mediation
- If **YES**, informal mediation & reasoned decision if mediation fails
- Tendency is to say no – less work!
- Regs 18(3) and 19A(1) only refer to “response”, not a response compliant with Reg 18
 - Implies a deficient response is acceptable as “response”

Deficient response?...

- Reg 24(3): Adjudicators empowered to determine admissibility
- Many adjudicators have accepted deficient responses: E.g. ZA2008-0024; ZA2009-0031 and ZA2011-0070
- Adjudicator in ZA2008-0024: Manner and form provisions directory, not peremptory, thus non-compliance \neq nullity
- To ignore response would be to put form above substance, per Adjudicator in ZA2009-0031

Deficient response?...

- Reg 24(1): Must ensure parties treated with equality and given fair opportunity to present case
- Thus, deficient responses should largely be accepted for procedural purposes of informal mediation and for substantive determination on the merits
- But, adjudicator must assess relevance, materiality and weight, which may be affected negatively by deficiency

Form of Summary Decisions

- Template. Checkboxes, but optional field for comments
- Adjudicator must provide “*brief reasons*” where cancellation ordered
ito Reg 9(3) - See SAIPL Supplementary Procedure at para 13(c)
- Suggest that comments also be used:
 - To explain decision to losing Complainant (they paid the fee!)
 - To explain independent factual research by Adjudicator
 - limited factual research into matters of public record permitted,
especially if in the interests of justice. See ZA2015-0193

Appeals from Summary Decisions

- None reported yet in ZA ADR
- Appeal by Respondents problematic:
 - Allowing appeal after doing nothing undermines efficiency
 - Unfairness to Complainant: delays and costs
 - Any evidence necessarily new evidence
 - Reg 32(9): No new evidence unless in interests of justice
 - Appeal notice limited to 1000 words

Appeals from Summary Decisions

- Thus, Respondent appeals must satisfy “*interests of justice*”
- Interests of justice where Respondent appeals summary decision? UK DRS appeal decision DRS 11211 <tumblr.co.uk>:
 - Consider reasons for failure to respond
 - Where failure to respond deliberate, Respondent must show “*significant injustice*” if decision is to stand
 - Consider merits

QUESTIONS?



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