

BOTSWANA COMMUNICATIONS REGULATORY AUTHORITY



Dispute Resolution Service Procedure

Introduction

The purpose of this Dispute Resolution Service Procedure is to provide a cheaper, speedier alternative to litigation for the resolution of disputes between the registrant of a .bw domain name and a party with competing rights in the domain name. This Procedure should be read with the Dispute Resolution Policy.

1. Definitions

Abusive Registration means a Domain Name which either:

- i. was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; OR
- ii. has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights;

Complainant means a third party who asserts to BOCRA the elements set out in paragraph 2 of the Policy and according to this Procedure, or, if there are multiple Complainants, the 'lead complainant' (see paragraph 3(b));

Contract means the contract between BOCRA and the Respondent, made up of BOCRA Terms and Conditions, the policies for .bw domain and sub-domains, and this Procedure;

Days means unless otherwise stated any day other than Saturday, Sunday or public holiday in the Republic of Botswana;

Decision means the decision reached by an Expert and where applicable includes decisions of an appeal panel;

Dispute Resolution Service means the service provided by BOCRA according to the Policy and this Procedure;

Domain Name means a domain name registered in any sub-domain of the .bw domain;

Expert means the expert(s) BOCRA appoint under paragraphs 8 or 18 of this Procedure;

In Person Hearings means hearings called by an Expert where both the Complainant and Respondent can present their case verbally (including hearings by conference call, video conference and web conference);

Informal Mediation means impartial mediation which BOCRA conduct to facilitate an acceptable resolution to the dispute;

ISP means the internet service provider through which the Domain Name in dispute has been registered or is hosted;

Party means a Complainant or Respondent and 'Parties' has a corresponding meaning;

Policy means .bw Dispute Resolution Service Policy;

Respondent means the person (including a legal person) in whose name or on whose behalf a Domain Name is registered and against whom the Complainant makes a complaint;

Reverse Domain Name Hijacking means using the Policy in bad faith in an attempt to deprive a registered domain-name holder of a domain name;

Rights includes, but is not limited to, rights enforceable under the Botswana law. However, a Complainant shall be unable to rely on rights in a name or term which is wholly descriptive of the Complainant's business;

2. Communication

a. BOCRA will send a complaint (see paragraph 3) to the Respondent by using, in BOCRA discretion, any of the following means:

i. sending the complaint by post, fax or e-mail to the Respondent at the contact details shown as the registrant or other contacts in BOCRA Domain Name register database entry for the Domain Name in dispute;

ii. sending the complaint in electronic form (including attachments to the extent available in that form) by e-mail to;

- postmaster@<the Domain Name in dispute>; or
- if the Domain Name resolves to an active web page (other than a generic page which BOCRA conclude is maintained by an ISP for parking Domain Names), to any e-mail address shown or e-mail links on that web page so far as this is practicable; or

iii. sending the complaint to any addresses provided to BOCRA by the Complainant under paragraph 3(b)(iii) so far as this is practicable.

b. Except as set out in paragraph 2(a) above, all written communication to a Party or a Party's representative under the Policy or this Procedure shall be made by fax, post or e-mail.

c. Communication shall be made in English. E-mail communications should be sent in plain text so far as this is practicable.

d. During the course of proceedings under the Dispute Resolution Service, if either Party wishes to change its contact details it must notify BOCRA of all changes.

e. Except as otherwise provided in this Procedure or as otherwise decided by BOCRA or if appointed, the Expert, all communications provided for under this Procedure shall be deemed to have been received:

i. if sent by facsimile, on the date transmitted; or

ii. if sent by post, on the second Day after posting; or

iii. if sent via the email, on the date that the communication was transmitted;

iv. and, unless otherwise provided in this Procedure, the time periods provided for under the Policy and this Procedure shall be calculated accordingly.

f. Any communication (except for communications relating to Informal Mediation) between:

i. BOCRA and any Party shall be copied by BOCRA to the other Party and if appointed, the Expert, subject to paragraph (13), below; and

ii. a Party to another Party shall be copied by the sender to BOCRA and BOCRA Shall copy such correspondence to the Expert, if appointed.

3. The Complaint

a. Any person or entity may submit a complaint to BOCRA in accordance with the Policy and this Procedure. In exceptional circumstances, BOCRA may have to suspend BOCRA's ability to accept complaints. If so, BOCRA shall post a message to that effect on the ccTLD web-site which shall indicate when the suspension is likely to be lifted.

b. More than one person or entity may jointly make a complaint. Where this occurs the joint Complainants must:

i. all sign the hard copy of the complaint (or have it signed on their behalf) ;

ii. specify one of the Complainants, or a single representative, who shall be the 'lead Complainant' who shall receive correspondence on behalf of all the Complainants and is entitled to act on behalf of them all (e.g. in Informal Mediation); and

iii. specify which Complainant the Complainants wish to become the sole registrant of each Domain Name(s) which are the subject of the complaint if the Complainants are successful (this does not bind the Expert).

c. The Complainant must send the complaint to BOCRA in hard copy and (except to the extent not available for attachments) in electronic form. The complaint shall:-

i. not exceed 2000 words (not including the text set out in paragraph 3(c)(ix) below and annexes);

- ii. specify whether the Complainant wishes to be contacted direct or through an authorised representative, and set out the e-mail address, telephone number, fax number and postal address which should be used;
- iii. set out any of the Respondent's contact details which are known to the Complainant;
- iv. specify the Domain Name which is the subject of the dispute and the name or mark which is identical or similar to the Domain Name and in which the Complainant asserts it has Rights;
- v. describe in accordance with the Policy the grounds on which the complaint is made including in particular: what Rights the Complainant asserts in the name or mark; why the Domain Name should be considered to be an Abusive Registration in the hands of the Respondent; and discuss any applicable aspects of paragraph 3 of the Policy, as well as any other grounds which support the Complainant's assertion;
- vi. specify whether the Complainant is seeking to have the Domain Name transferred, suspended, cancelled or otherwise amended;
- vii. tell BOCRA whether any legal proceedings have been commenced or terminated in connection with the Domain Name which is the subject of the complaint;
- viii. state that the Complainant shall submit to the exclusive jurisdiction of the Botswana courts with respect to any legal proceedings seeking to reverse the effect of a Decision requiring the suspension, cancellation, transfer or other amendment to a Domain Name registration, and that the Complainant agrees that any such legal proceedings Shall be governed by the laws of the Republic of Botswana.;
- ix. conclude with the following statement followed by the signature of the Complainant or its authorised representative:-

"The Complainant agrees that its claims and remedies concerning the registration of the Domain Name, the dispute, or the dispute's resolution shall be solely against the Respondent and that neither BOCRA its directors, officers, employees or servants nor any Expert shall be liable for anything done or omitted in connection with any proceedings under the Dispute Resolution Service unless the act or omission is shown to have been in bad faith.";

"The information contained in this complaint is to the best of the Complainant's knowledge true and complete. This complaint is not being presented in bad faith and the matters stated in this complaint comply with the Procedure and applicable law.";
and

"If the Expert orders a transfer of the domain name(s) then I agree to be bound by BOCRA's Terms and Conditions for the Registration of Domain Names, and in particular the provisions relating to BOCRA's processing of personal data."

x. attach three copies of any documentary or other evidence on which the Complainant relies including correspondence and any trade mark registration and/or evidence of use of or reputation in a name or mark, together with an index of the material attached.

d. The complaint may relate to more than one Domain Name, provided that those Domain Names are registered in the name of the Respondent.

4. Notification of Complaint

a. BOCRA Shall check that the complaint complies with the Policy and this Procedure and, if so, BOCRA shall forward it to the Respondent together with BOCRA's explanatory coversheet within three (3) days of BOCRA receipt of the complaint.

b. If BOCRA finds that the complaint does not comply with the Policy and this Procedure, BOCRA Shall promptly notify the Complainant of the deficiencies BOCRA have identified. The Complainant shall have three (3) Days from receipt of notification within which to correct the deficiencies and return the complaint to BOCRA, failing which BOCRA Shall deem the complaint to be withdrawn. This shall not prevent the Complainant submitting a different complaint to BOCRA.

c. Proceedings under the Dispute Resolution Service will commence on the earliest date upon which the complaint is deemed to have been received by the Respondent in accordance with paragraph 2(e) of this Procedure. BOCRA shall promptly notify the Parties of the date of commencement of such proceedings.

5. The Response

a. Within fifteen (15) Days of the date of commencement of proceedings under the Dispute Resolution Service, the Respondent shall submit a response to BOCRA.

b. Within three (3) Days following BOCRA receipt of the response, BOCRA Shall forward the response to the Complainant.

c. The Respondent must send the response to BOCRA in hard copy and (except to the extent not available for attachments) in electronic form to BOCRA at the addresses set out in BOCRA's explanatory coversheet. The response shall:

i. not exceed 2000 words (not including the text set out in paragraph 5(c)(v) and annexes);

ii. include any grounds the Respondent wishes to rely upon to rebut the Complainant's assertions under 3(c)(v) above including any relevant factors set out in paragraph 4 of the Policy;

- iii. specify whether the Respondent wishes to be contacted direct or through an authorised representative, and set out the e-mail address, telephone number, fax number and postal address which should be used;
- iv. tell BOCRA whether any legal proceedings have been commenced or terminated in connection with the Domain Name which is the subject of the complaint;
- v. conclude with the following statement followed by the signature of the Respondent or its authorised representative:-

"The information contained in this response is to the best of the Respondent's knowledge true and complete and the matters stated in this response comply with the Procedure and applicable law."; and

vi. attach three copies of any documentary or other evidence on which the Respondent relies including correspondence and any trade mark registration and/or evidence of use of or reputation in a name or mark together with an index of the material attached.

d. If the Respondent does not submit a response, BOCRA shall notify the Parties that BOCRA shall appoint the Expert on BOCRA receipt from the Complainant of the applicable fees according to paragraph 21 and in the absence of exceptional circumstances.

6. Reply by the Complainant

a. Within five (5) Days of receiving the response from BOCRA, the Complainant may submit to BOCRA a reply to the Respondent's response, which shall not exceed 2000 words (not including annexes). If a reply is submitted it must be submitted in hard copy (including three copies of all annexes) and as far as possible in electronic form to BOCRA. If the Complainant does not submit a reply to BOCRA within five (5) Days BOCRA shall proceed to Informal Mediation

7. Informal Mediation

a. Within three (3) Days of BOCRA receipt of the Complainant's reply (or the expiry of the deadline to do so), BOCRA shall begin to conduct Informal Mediation. Informal Mediation shall be conducted in a manner which BOCRA, in BOCRA sole discretion, consider appropriate. No Informal Mediation shall occur if the Respondent does not file a Response.

b. Negotiations conducted between the Parties during Informal Mediation (including any information obtained from or in connection to negotiations) shall be confidential, that is they shall not be shown to the Expert. Neither BOCRA nor any Party may reveal details of such negotiations to any third parties unless a court of competent jurisdiction orders disclosure, or BOCRA or either Party are required to do so by applicable laws or regulations. Neither Party shall use any information gained during mediation for any ulterior or collateral purpose or include it in any submission likely to

be seen by any Expert, judge or arbitrator in this dispute or any later dispute or litigation.

c. If the Parties reach a settlement during Informal Mediation then the existence, nature and terms of the settlement shall be confidential, unless the Parties specifically agree otherwise or a court of competent jurisdiction orders otherwise.

d. No binding verbal agreements can be reached as part of the Informal Mediation: any settlement reached by the Parties must be in writing or similar electronic form to be enforceable.

e. If the Parties do not achieve an acceptable resolution through Informal Mediation within ten (10) Days, BOCRA Shall send notice to the Parties that BOCRA shall appoint an Expert when the Complainant has paid the applicable fees set out under paragraph 21(a) within the time limit specified in paragraph 21(c). BOCRA shall tell the Expert whether or not Informal Mediation occurred, but BOCRA shall not tell the Expert what happened during Informal Mediation or why it failed to resolve the dispute.

f. No Party may ask BOCRA (including BOCRA directors, officers, employees, contractors, agents and any Expert) to reveal information or materials gained as a result of any Informal Mediation under the Dispute Resolution Service unless such disclosure has been ordered by a court of competent jurisdiction. Neither Party shall call the Expert or BOCRA (including BOCRA directors, officers, employees, contractors, or agents) as a witness (either in person or to produce documents or other materials) in any proceedings which arise from, or are in connection with, the matters discussed in the mediation.

8. Appointment of the Expert and Timing of Decision

a. If BOCRA does not receive the Complainant's request to refer the matter to an Expert together with the applicable fees within ten (10) Days of the Complainant's receipt of the notice referred to in paragraph 7(e) above, BOCRA Shall deem the complaint to be withdrawn. This shall not prevent the Complainant submitting a different complaint to BOCRA.

b. Within five (5) Days of BOCRA receipt of the applicable fees from the Complainant, BOCRA Shall appoint an Expert on a rotational basis from our list of Experts.

c. BOCRA Shall maintain and publish a list of Experts and their qualifications.

d. Once BOCRA have appointed the Expert, BOCRA Shall notify the Parties of the name of the Expert appointed and the date by which, except in exceptional circumstances, the Expert Shall forward his or her Decision to BOCRA.

9. Impartiality and Independence

a. The Expert shall be impartial and independent and both before accepting the appointment and during the proceedings shall disclose to BOCRA any circumstances giving rise to justifiable doubt as to his or her impartiality or independence. BOCRA shall have the discretion to appoint a substitute Expert if necessary in which case BOCRA Shall adjust the timetable accordingly.

10. Communication Between Parties and the Expert

a. A Party and the Expert must not communicate directly. All communication between a Party and the Expert must be made through BOCRA.

11. Transmission of the File to the Expert

a. BOCRA shall forward the file except for documents relating to Informal Mediation to the Expert as soon as the Expert is appointed.

12. General Powers of BOCRA and the Expert

a. BOCRA, or the Expert if appointed, may in exceptional cases extend any period of time in proceedings under the Dispute Resolution Service.

b. The Expert shall determine the admissibility, relevance, materiality and weight of the evidence.

c. BOCRA shall decide a request by a Party to consolidate multiple Domain Name disputes in accordance with the Policy and this Procedure

13. Further Statement

a. In addition to the complaint, the response and if applicable the reply and any appeal, the Expert may request further statements or documents from the Parties. The Expert Shall not be obliged to consider any statements or documents from the Parties which he or she has not received according to the Policy or this Procedure or which he or she has not requested.

b. Any communication with BOCRA intended to be passed to the Expert which is not part of the standard process (e.g. other than a complaint, response, reply, submissions requested by the Expert, appeal notice or appeal notice response) is a 'non-standard submission'. Any non-standard submission must contain as a separate, first paragraph, a brief explanation of why there is an exceptional need for the non-standard submission. BOCRA shall pass this explanation to the Expert, and the remainder shall only be passed to the Expert at his or her sole discretion. If there is no explanation, BOCRA may not pass on the document or information.

14. In Person Hearings

a. No In Person Hearings (including hearings by conference call, video conference and web conference) shall be held unless the Expert determines in his or her sole discretion and in exceptional cases, that such a hearing is necessary to enable him or her to come to a Decision.

15. Default

a. If BOCRA find that a submission by a Party exceeds the word limit, BOCRA shall return the submission to that Party who shall within three (3) Days return a submission to BOCRA which complies with the word limits. If BOCRA do not receive the submission back from:

i. the Complainant, BOCRA shall deem the complaint to be withdrawn, which shall not stop the Complainant from submitting a different complaint; or

ii. the Respondent, BOCRA shall notify the Parties that BOCRA shall appoint the Expert when the Complainant has paid the applicable fees set out in paragraph 21 and in the absence of exceptional circumstances. Once appointed the Expert Shall decide the dispute based upon the complaint and evidence attached to it.

b. If, in the absence of exceptional circumstances, a Party does not comply with any time period laid down in the Policy or this Procedure, the Expert shall proceed to a Decision on the complaint. If the Expert has not been appointed BOCRA shall take any action which it deems appropriate in its sole discretion, unless prescribed by this Procedure.

c. If, in the absence of exceptional circumstances, a Party does not comply with any provision in the Policy or this Procedure or any request by BOCRA or the Expert, the Expert Shall draw such inferences from the Party's non compliance as he or she considers appropriate.

16. Expert Decision

a. The Expert shall decide a complaint on the basis of the Parties' submissions, the Policy and the Procedure.

b. Unless exceptional circumstances apply, an Expert shall forward his or her Decision to BOCRA within ten (10) Days of his or her appointment pursuant to paragraph 8.

c. The Decision shall be in writing and signed, provide the reasons, on which it is based, indicate the date on which it was made and identify the name of the Expert.

d. If the Expert concludes that the dispute is not within the scope of paragraph 2 of the Policy, he or she shall state that this is the case. If, after considering the submissions, the Expert finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking, the Expert shall state this finding in the Decision. If the Complainant is found on three separate occasions

within a 2-year period to have brought a complaint in bad faith, BOCRA Shall not accept any further complaints from that Complainant for a period of 2 years.

17. Communication of Decision to Parties and Implementation of Decision

a. Within three (3) Days of BOCRA receipt of a Decision from the Expert, BOCRA Shall communicate the full text of the Decision to each Party and the date for the implementation of the Decision in accordance with the Policy.

b. BOCRA shall publish the full Decision and the date that any action which the Decision requires shall be taken, on BOCRA website.

c. If the Expert makes a Decision that a Domain Name registration should be cancelled, suspended, transferred or otherwise amended, BOCRA shall implement that Decision by making any necessary changes to the Domain Name register database after ten (10) Days of the date that the parties were notified, unless, during the ten (10) Days following the date that the parties were notified BOCRA receive from either Party:

i. an appeal or statement of intention to appeal complying with paragraph 18 of the Procedure, in which case BOCRA Shall take no further action in respect of the Domain Name until the appeal is concluded; or

ii. official documentation showing that the Party has issued and served (or in the case of service outside Botswana, commenced the process of serving) legal proceedings against the other Party in respect of the domain name. In this case, BOCRA shall take no further action in respect of the Domain Name unless BOCRA receive:

- evidence which satisfies BOCRA that the Parties have reached a settlement; or
- evidence which satisfies BOCRA that such proceedings have been dismissed, withdrawn or are otherwise unsuccessful

18. Appeal

a. Either Party shall have the right to appeal a Decision by submitting either:

i. a statement of the intention to appeal (see paragraph 18(b)), plus the non-refundable deposit (see paragraph 21(e)), which must be followed within fifteen (15) Days by an appeal notice (see paragraph 18(c)) and the balance of the fee (see paragraph 21(e)); or

ii. an appeal notice (see paragraph 18(c)) and the whole fee (see paragraph 21(e)).

b. A statement of intention to appeal should only contain sufficient information to make it clear that an appeal is requested. The statement of intention to appeal should not contain the actual grounds or reasons for appeal.

c. An appeal notice should not exceed 1000 words, should set out detailed grounds and reasons for the appeal, but shall contain no new evidence or annexes.

d. Within three (3) Days of BOCRA receipt of the:

- i. statement of the intention to appeal and deposit; or
- ii. appeal notice and the full fee

BOCRA shall forward the statement of intention to appeal or appeal notice (as the case may be) to the other Party.

e. Within ten (10) Days of receiving the appeal notice from BOCRA, the other Party may submit to BOCRA an appeal notice response (paragraph 18(f)).

f. An appeal notice response must not exceed 1000 words, should set out detailed grounds and reasons why the appeal should be rejected but should contain no new evidence or annexes.

g. Following the filing of an appeal notice response (or the expiry of the deadline to do so) BOCRA shall appoint an appeal panel of three Experts. The test of impartiality shall apply to each appeal Expert subject to this the appeal panel shall consist of:

- i. the chairman of the group of Experts, or at his or her discretion, an Expert of his or her choice; and
- ii. the next available two Independent Experts appointed by rotation from BOCRA list.

h. The appeal panel should not normally take into consideration any new evidence presented in an appeal notice or appeal notice response, unless they believe that it is in the interests of justice to do so.

i. So far as is appropriate in the circumstances paragraphs 16 and 17 apply equally to appeal Decisions, except that:

- i. appeal Decisions should be returned by the appeal panel to BOCRA within thirty (30) days of the appointment of the last panellist, but this deadline may be extended by up to ten (10) Days by agreement with BOCRA; and
- ii. appeal Decisions cannot be subject to any appeal within the Dispute Resolution Service.

19. Settlement or Other Grounds for Termination

a. If, before a Decision is made the Parties agree and notify BOCRA of a settlement which BOCRA approve, whether or not pursuant to Informal Mediation, BOCRA shall terminate proceedings under the Dispute Resolution Service.

b. If, before a Decision is made, it becomes unnecessary or impossible to continue proceedings under the Dispute Resolution Service for any reason, BOCRA shall terminate proceedings under the Dispute Resolution Service unless a Party raises justifiable grounds for objection within a period of time which BOCRA shall determine.

20. Effect of Court Proceedings

a. If legal proceedings relating to a Domain Name which is the subject of a complaint are issued in a court of competent jurisdiction before or during the course of proceedings under the Dispute Resolution Service and are brought to BOCRA attention, BOCRA shall suspend the proceedings, pending the outcome of the legal proceedings.

b. A Party must promptly notify BOCRA if it initiates legal proceedings in a court of competent jurisdiction in relating to a Domain Name which is the subject of a complaint during the course of proceedings under the Dispute Resolution Service.

21. Fees

a. The applicable fees in respect of the referral of proceedings under the Dispute Resolution Service to an Expert are P1000+ VAT for disputes involving 1-5 Domain Names and only one Complainant. For disputes involving 6 or more Domain Names, and/or more than one Complainant, BOCRA shall set a fee in consultation with the Complainant. Fees are calculated on a cost-recovery basis, and are passed on in their entirety to the Expert(s). BOCRA does not charge for its mediation or administration services in respect of the Dispute Resolution Service.

b. Fees are payable by the Complainant only if an acceptable resolution has not been reached and BOCRA notify the Parties that an Expert is to be appointed.

c. If BOCRA have not received the fees from the Complainant as set out in paragraph 21(a) above within ten (10) Days of receipt by the Complainant of notice from BOCRA that an Expert is to be appointed under paragraphs 5(d), 7(e) or 15(a)(ii) BOCRA Shall deem the complaint to be withdrawn.

d. In exceptional circumstances, for example if an in person hearing is held, BOCRA shall request that the Parties pay additional fees to be agreed between BOCRA, the Parties and the Expert.

e. The applicable fees for the submission of an appeal are P4000 + VAT. If the option is used to pay a deposit and the balance, the deposit is P400+ VAT and non-refundable, and the balance is P3600 + VAT. If the deposit is paid, and the balance of the fee and/or appeal notice are not filed in time, that appeal is deemed withdrawn and the case shall be closed.

22. Exclusion of Liability

a. Neither BOCRA nor BOCRA directors, officers, employees or servants nor any Expert shall be liable to a party for anything done or omitted in connection with any proceedings under the Dispute Resolution Service unless the act or omission is shown to have been in bad faith.

23. Modifications to the Policy and Procedure of the Dispute Resolution Service

a. The Internet is an emerging and evolving medium and the regulatory and administrative framework under which BOCRA operate is constantly developing. For these reasons BOCRA reserve the right to make reasonable modifications to the Policy and Procedure at any time following the procedure set out in the Policy Development Framework. BOCRA shall only do so when BOCRA have good reason. Except where BOCRA are acting in pursuance of a statutory requirement or a court order, changes shall be implemented following the policy development lifecycle. Each such change shall be published in advance (where practicable, thirty (30) calendar days in advance) on the ccTLD web site: <http://www.nic.net.bw/> and shall become binding and effective upon the date specified therein.

b. The Respondent shall be bound by the Policy and Procedure which are current at the time the Dispute Resolution Service is commenced until the dispute is concluded.