

## ADMINISTRATIVE PANEL DECISION

ITM Power PLC v. 吴仲志 (wuzhongzhi)

Case No. D2022-3073

### 1. The Parties

The Complainant is ITM Power PLC, United Kingdom, represented by Potter Clarkson AB, Sweden.

The Respondent is 吴仲志 (wuzhongzhi), China.

### 2. The Domain Name and Registrar

The disputed domain name <itmpower.com> is registered with Alibaba Cloud Computing Ltd. d/b/a HiChina (www.net.cn) (the “Registrar”).

### 3. Procedural History

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the “Center”) on August 19, 2022. On the same day, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On August 23, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name that differed from the named Respondent and contact information in the Complaint. On the same day, the Center sent an email communication to the Complainant providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amendment to the Complaint in English on September 2, 2022, adding the Registrar-disclosed registrant of the disputed domain name as the Respondent.

On August 23, 2022, the Center transmitted another email communication to the Parties in English and Chinese regarding the language of the proceeding. On the same day, the Complainant requested that English be the language of the proceeding. The Respondent did not comment on the language of the proceeding.

The Center verified that the Complaint together with the amendment to the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent in Chinese and English of the Complaint, and the proceedings commenced on September 6, 2022. In accordance with

the Rules, paragraph 5, the due date for Response was September 26, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on September 27, 2022.

The Center appointed Matthew Kennedy as the sole panelist in this matter on September 30, 2022. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

#### 4. Factual Background

The Complainant manufactures integrated hydrogen energy solutions for grid balancing, energy storage and the production of renewable hydrogen for transport, renewable heat and chemicals. It holds multiple registrations for a semi-figurative mark featuring the textual element ITM POWER and, below it in smaller type, the words "Energy Storage | Clean Fuel". These registrations include the following:

- United Kingdom trademark registration number UK00908642605, registered on July 5, 2010, specifying goods and services in classes 1, 6, 7, 9, 11, 12, 19, 37, 39, and 42;
- European Union trademark registration number 008642605, registered on July 5, 2010, specifying goods and services in classes 1, 6, 7, 9, 11, 12, 19, 37, 39, and 42; and
- United States figurative mark number 4,508,483, registered on April 8, 2014, specifying goods and services in classes 1, 9, and 11.

The Complainant also holds trademark registrations for ITM POWER, including United Kingdom trademark number UK00003767424, registered on July 29, 2022. All these trademark registrations remain current.

The Complainant holds the domain name <itm-power.com> (registered on May 30, 2002) that it uses in connection with a website where it provides information about itself and its products.

The Respondent is an individual resident in China.

The disputed domain name was registered on May 7, 2017. At the time of the Complaint, the disputed domain name resolved to a website in English for a Chinese company named "Xiamen Zhongxinda Hydrogen Technology Co., Ltd." (referred to below as "ZXD"), which showed a contact address that matched the Respondent's contact address in the Registrar's Whois database. The website prominently displayed a "ZXDH2" logo and offered hydrogen production equipment, electrolyser systems for green hydrogen generation and containerized PEM electrolysers. According to the website, ZXD's products are sold in many countries and regions around the world. At the time of this Decision, the disputed domain name no longer resolves to any active website; rather, it is passively held.

According to evidence provided by the Complainant, between August 2021 and January 2022, ZXD filed Chinese trademark applications numbers 58800654, 60158442, 60181770, 61754737, 61766176, 62227131, and 62239425 for two ZXD POWER logos that contain a figurative element and certain textual elements identical to those in the Complainant's semi-figurative ITM POWER mark. ZXD's trademark applications specify goods in classes 7 and 9, including electrolytic water hydrogen oxygen equipment and electrolysers. The earlier two applications have been rejected but an appeal against refusal of the first is pending. The third application has been accepted and the Complainant has filed an opposition. The other applications are awaiting examination. ZXD also operates a website in connection with the domain name <zxdpower.com> offering green hydrogen generation products. This website displays one of the ZXD POWER logos and, according to evidence provided by the Complainant, previously reproduced text and images from the Complainant's website. In May 2022, the Complainant's legal representative sent a cease-and-desist letter to ZXD regarding, among other things, ZXD's website and trademark applications.

## 5. Parties' Contentions

### A. Complainant

The disputed domain name is confusingly similar to the Complainant's ITM POWER trademarks.

The Respondent has no rights or legitimate interests in respect of the disputed domain name. The Respondent is not known by the disputed domain name; his company name is "Xiamen Zhongxinda Hydrogen Technology Co., Ltd." The Respondent is neither affiliated with, nor authorized by, the Complainant in any way. Neither license nor authorization has been granted to the Respondent to make any use of the Complainant's trademarks or to apply for registration of the disputed domain name. The Respondent is misleading consumers by diverting them to its website instead of the Complainant's website.

The disputed domain name was registered and is being used in bad faith. The Respondent has previously filed bad faith trademark applications in China and Hong Kong, China in addition to making blunt copies of the Complainant's logotypes and website, which have been used on a website formerly associated with the domain name <zxdpower.com> and on social media. The Respondent started using the disputed domain name after the Complainant sent its cease-and-desist letter and initiated trademark opposition proceedings. Thus, at the time of registration of the disputed domain name, the Respondent had been put on notice of the Complainant's trademark protection for ITM POWER. The Respondent is using the disputed domain name to attract Internet users to the Respondent's own website instead of the Complainant's for the purpose of commercial gain.

### B. Respondent

The Respondent did not reply to the Complainant's contentions.

## 6. Discussion and Findings

### 6.1 Language of the Proceeding

Paragraph 11(a) of the Rules provides that "unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding". The Registrar confirmed that the Registration Agreement for the disputed domain name is in Chinese.

The Complainant requests that the language of the proceeding be English. Its main arguments are that the Complainant does not speak Chinese and would incur significant unnecessary expenses for translation, whereas the disputed domain name contains an English word and the associated webpage is in English which is strong evidence that the Respondent speaks proficient English.

Paragraphs 10(b) and (c) of the Rules require the Panel to ensure that the Parties are treated with equality, that each Party is given a fair opportunity to present its case and that the administrative proceeding take place with due expedition. Prior UDRP panels have decided that the choice of language of the proceeding should not create an undue burden for the parties. See, for example, *Solvay S.A. v. Hyun-Jun Shin*, WIPO Case No. [D2006-0593](#); *Whirlpool Corporation, Whirlpool Properties, Inc. v. Hui'erpu (HK) electrical appliance co. Ltd.*, WIPO Case No. [D2008-0293](#).

The Panel observes that the Complaint and amendment to the Complaint were filed in English. The website to which the disputed domain name resolved was also in English, from which it is reasonable to infer that the Respondent understands that language. Moreover, despite the Center having sent an email regarding the language of the proceeding, notifying the Respondent of the commencement of the proceeding by email, and having sent the Written Notice by courier, in both Chinese and English, the Respondent did not comment on

the language of the proceeding or express any interest in otherwise participating in this proceeding.

Therefore, the Panel considers that requiring the Complainant to translate the Complaint into Chinese would create an undue burden and delay whereas accepting the Complaint in English does not cause prejudice to either Party.

Having considered all the circumstances above, the Panel determines under paragraph 11(a) of the Rules that the language of this proceeding is English. The Panel would have accepted a Response in Chinese, but none was filed.

## **6.2 Analysis and Findings**

Paragraph 4(a) of the Policy provides that the Complainant must prove each of the following elements:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) the disputed domain name has been registered and is being used in bad faith.

### **A. Identical or Confusingly Similar**

Based on the evidence presented, the Panel finds that the Complainant has rights in the ITM POWER wordmark and in the ITM POWER semi-figurative mark.

The disputed domain name incorporates the ITM POWER wordmark, omitting only the space between the textual elements, for technical reasons. The fact that the trademark was registered after the disputed domain name is not relevant to the comparison between them for the purposes of the first element of paragraph 4(a) of the Policy. However, given that that fact is relevant to the Panel's findings regarding bad faith under the third element, the Panel will also compare the disputed domain name with the Complainant's other, earlier-registered, mark.

The disputed domain name includes the dominant textual element of the ITM POWER semi-figurative mark, *i.e.*, the letters and word ITM POWER. It omits the words shown in the mark in smaller font (*i.e.*, "Energy Storage | Clean Fuel") but the dominant feature of this mark remains clearly recognizable in the disputed domain name. The Panel disregards the figurative elements of this mark in the comparison with the disputed domain name because the figurative elements cannot be reflected in a domain name for technical reasons. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 1.10.

The only additional element in the disputed domain name is a generic Top-Level Domain ("gTLD") extension (".com"). As a standard requirement of domain name registration, the gTLD extension may be disregarded in the comparison between the disputed domain name and the Complainant's trademarks. See [WIPO Overview 3.0](#), section 1.11.

Therefore, the Panel finds that the disputed domain name is identical to one trademark, and confusingly similar to another trademark, in which the Complainant has rights. The Complainant has satisfied the first element in paragraph 4(a) of the Policy.

### **B. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy sets out the following circumstances which, without limitation, if found by the Panel, shall demonstrate that the Respondent has rights to, or legitimate interests in, a disputed domain name, for the purposes of paragraph 4(a)(ii) of the Policy:

- (i) before any notice to [the Respondent] of the dispute, [the Respondent's] use of, or demonstrable preparations to use, the [disputed] domain name or a name corresponding to the [disputed] domain name in connection with a *bona fide* offering of goods or services; or
- (ii) [the Respondent] (as an individual, business, or other organization) [has] been commonly known by the [disputed] domain name, even if [the Respondent has] acquired no trademark or service mark rights; or
- (iii) [the Respondent is] making a legitimate noncommercial or fair use of the [disputed] domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

As regards the first and third circumstances set out above, the disputed domain name resolved at the time of the Complaint to a website offering goods for sale that are directly competitive with those of the Complainant. The Complainant submits that the Respondent is neither affiliated with it nor authorized by it in any way and that the Complainant has neither licensed nor authorized the Respondent to make any use of the Complainant's trademarks or to apply for registration of the disputed domain name. In the Panel's view, this evidence constitutes a *prima facie* case that the disputed domain name is not being used in connection with a *bona fide* offering of goods or services and that the Respondent is not making a legitimate noncommercial or fair use of the disputed domain name.

As regards the second circumstance, the Respondent's name is listed in the Registrar's Whois database as "吴仲志 (wuzhongzhi)", not the disputed domain name. The company located at the Respondent's contact address, which operates the website associated with the disputed domain name, is named "Xiamen Zhongxinda Hydrogen Technology Co., Ltd." or "ZXD" for short, not the disputed domain name either. There is no evidence indicating that the Respondent has been commonly known, either as an individual, a business or other organization, by the disputed domain name.

In summary, the Panel considers that the Complainant has made a *prima facie* case that the Respondent has no rights or legitimate interests in respect of the disputed domain name. The Respondent failed to rebut that *prima facie* case because he did not respond to the Complaint.

Therefore, based on the record of this proceeding, the Complainant has satisfied the second element in paragraph 4(a) of the Policy.

### **C. Registered and Used in Bad Faith**

Paragraph 4(b) of the Policy provides that certain circumstances, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. The fourth circumstance is as follows:

- (iv) by using the [disputed] domain name, [the respondent has] intentionally attempted to attract, for commercial gain, Internet users to [the respondent's] website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of [the respondent's] website or location or of a product or service on [the respondent's] web site or location.

The disputed domain name was registered in 2017. Although the registration information for the disputed domain name in the Registrar's Whois database was updated on June 2, 2022, the Panel is unable to infer that the update reflected a transfer. Instead, the Panel will proceed on the assumption that the Respondent, 吴仲志 (wuzhongzhi), is the original registrant. Given that the ITM POWER wordmark was not registered until five years later, the Panel does not find that the Respondent targeted that particular mark at the time of registration of the disputed domain name in 2017.

However, the disputed domain name was registered years after the Complainant obtained its trademark registrations for the semi-figurative ITM POWER mark in 2010 and 2014. The disputed domain name incorporates the dominant textual element of that mark with no other element besides a gTLD extension.

Even though “power” is descriptive of the Parties’ respective businesses, the combination of the letters “itm” with that word is arbitrary with respect to the types of goods that the mark is used to identify. Given that the website associated with the disputed domain name offers goods that are directly competitive with those of the Complainant, and that the market for those goods is highly specialized, the Panel finds it likely that the Respondent was aware of the Complainant and its mark at the time of registration of the disputed domain name. This finding is confirmed by the fact that the company at the Respondent’s contact address that operates the website associated with the disputed domain name, ZXD, also operates a website in connection with another domain name that previously reproduced text and images from the Complainant’s website, and filed trademark applications for a logo that contained the figurative element and certain textual elements identical to those in the semi-figurative ITM POWER mark. Accordingly, the Panel finds that the Respondent knew of the Complainant and its semi-figurative ITM POWER mark at the time that he registered the disputed domain name and that he targeted that mark in bad faith.

The disputed domain name has been used in connection with a commercial website offering hydrogen production equipment and other goods that compete directly with the Complainant’s goods. The disputed domain name is clearly intended to divert Internet users searching for information about the Complainant and its goods toward a competitor’s site. This use is for the commercial gain of ZXD, and possibly of the Respondent 吴仲志 (wuzhongzhi). Accordingly, the Panel considers that the disputed domain name is intended to attract Internet users by creating a likelihood of confusion with the Complainant’s ITM POWER marks as to the source, sponsorship, affiliation, or endorsement of the Respondent’s website of the products offered on such other website within the terms of paragraph 4(b)(iv) of the Policy.

The Panel notes that the use of the disputed domain name has changed and that it no longer resolves to an active website. This recent change in use does not alter the Panel’s conclusion; in fact, it may constitute a further indication of bad faith.

Therefore, the Panel finds that the disputed domain name has been registered and is being used in bad faith. The Complainant has satisfied the third element in paragraph 4(a) of the Policy.

## **7. Decision**

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name <itmpower.com> be transferred to the Complainant.

*/Matthew Kennedy/*

**Matthew Kennedy**

Sole Panelist

Date: October 14, 2022