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C.A. Brijesh Mo Gey

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STAMP VENDOR
Distt. Court, Gurgaon

BEFORE THE SOLE ARBITRATOR C.A. BRIJESH
.IN REGISTRY
C/o NIXI (NATIONAL INTERNET EXCHANGE OF INDIA)
NEW DELHI, INDIA

Avocent Corporation

4991 Corporate Drive

Huntsville AL 35805

USA

.... Complainant

versus

Mr. Zhou Lu

Room 503, Shaoyang

Hunan – 422 000

CHINA

.... Respondent

1. The Parties

The Complainant is Avocent Corporation of 4991 Corporate Drive Huntsville, AL 35805, USA through its Authorised Representatives, Banana IP Counsels, No. 40, 1st Floor, Chirra Electronics Building, J.C. Industrial Estate, 3rd Main, Kanakapura Road, Bangalore – 560 062.

The Respondent is Mr. Zhou Lu of Room 503, Shaoyang, Hunan – 422 000, China. The Respondent is represented by himself.

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2. The Domain Name and Registrar

The disputed domain name is <avocent.co.in>. The said domain name is registered with 'Webiq Domains Solutions Pvt. Ltd.'.

3. Procedural Timeline

- June 23, 2015 :** The .IN Registry appointed C.A. Brijesh as Sole Arbitrator from its panel as per paragraph 5 (b) of INDRP Rules of Procedure.
- June 23, 2015 :** Arbitrator has accorded his consent for nomination as Arbitrator and submitted Statement of Acceptance and Declaration of Impartiality and Independence to the .IN Registry.
- June 29, 2015 :** Parties to the dispute are informed of the constitution of the Arbitration panel and the effective date of handover.
- July 1, 2015 :** Arbitral proceedings were commenced by sending notice to the Respondent through e-mail, with a copy marked to the NIXI, directing the Complainant's Authorized Representative to forward a soft copy of the Complaint alongwith the annexures to the Respondent within two days.
- July 2, 2015:** Complainant forwarded a copy of the Complaint alongwith all the annexures to the Respondent with a copy of the mail marked to Arbitral tribunal.
- July 6, 2015 :** Arbitral Tribunal addresses a notice to the Respondent, with a copy marked to the Complainant's Authorized Representative, directing the Respondent to file its response, if any, to the Complaint within ten days.
- July 13, 2015 :** Respondent is directed to furnish complete address to enable service of physical copy of the Complaint alongwith annexures *via* courier.
- July 22, 2015 :** Absent a response from the Respondent, the pleadings in the arbitration proceedings were closed.

The language of the proceedings shall be English.

4. Factual Background:

4.1 Complainant's Activities

The Complainant states, *inter alia*, that it is a Indian subsidiary of Emerson Electric Co., which is a privately owned company based in Alabama, United States of America. Complainant states its parent entity is a global manufacturing and technology company offering a wide range of products and services in the industrial, commercial and consumer markets through process management, industrial automation, network power, climate technologies and commercial & residential solutions business. The parent company is claimed to be recognized widely for its engineering capabilities and management excellence and has various subsidiaries including the Complainant with approximately 1,40,000 employees and 230 manufacturing locations across the globe. The Complainant states that it deals in providing data centre management solutions alongwith offering innovative data centre design, centralized infrastructure, network monitoring and management tools.

Apart from the aforementioned, the Complainant has not placed any other material on record re its business activities in India or abroad.

4.2 Complainant's use of AVOCENT

The Complainant states that the mark AVOCENT is registered in its favour in India since the year 2003. The said mark is being used for providing data centre management solutions offering innovative data centre design, centralized infrastructure, and network monitoring and management tools across the globe. The Complainant has furnished a copy of the Registration Certificate in its favour pertaining to Registration No. 1211470 (Class 9) for the mark AVOCENT bearing the sealing date February 28, 2008. The Complainant further states that the mark AVOCENT under Application no. 1237623 (Class 41 and 42) is also subsisting in its favour.

Internationally, the Complainant states that the trade/service mark AVOCENT has been registered/applied for in various classes across jurisdictions. Details of the said registrations/applications have been reproduced hereinbelow:

S. No.	Trade Mark	Application/ Registration No.	Date of Application/ Registration	Country	Class
1.	AVOCENT	3184105/2548570	August 14, 2002	Argentina	9
2.	AVOCENT	3184106/2548568	August 14, 2002	Argentina	41
3.	AVOCENT	3184107/2548569	August 14, 2002	Argentina	42
4.	AVOCENT	995412/995412	June 26, 2002	Australia	9,41,42
5.	AVOCENT	879922/879922	June 24, 2002	Australia	42
6.	AVOCENT *logo	862267/862267	July 24, 2001	Australia	9,41,42
7.	AVOCENT	822975645/822975645	November 25, 2008	Brazil	41
8.	AVOCENT	822975653/822975653	May 8, 2007	Brazil	9
9.	AVOCENT	822975661/822975661	August 11, 2009	Brazil	42
10.	AVOCENT	1088185/TMA616951	March 1, 2005	Canada	0
11.	AVOCENT &Design (Horizontal)	1089668/TMA616387	August 6, 2004	Canada	0
12.	AVOCENT &Design (Vertical)	108966/TMA616227	August 4, 2004	Canada	0
13.	AVOCENT CARE	1115331/TMA633711	February 24, 2005	Canada	0
14.	AVOCENT CARE	1133368/TMA617518	August 24, 2004	Canada	0
15.	AVOCENT Logo	1089667/TMA633723	February 24, 2005	Canada	0
16.	AVOCENT	977169/943243	November 14, 2001	Chile	41,42
17.	AVOCENT	977173/608235	November 14, 2001	Chile	9
18.	AVOCENT	2001016077/1983675	September 7, 2002	China	9
19.	AVOCENT	2001016078/1955334	September 14,	China	41

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20.	AVOCENT	2001016079/2015450	September 14, 2002	China	42
21.	AVOCENT (in Chinese characters)	6207051/6207051	September 14, 2010	China	42
22.	AVOCENT(in Chinese characters)	6207052/6207052	June 14, 2010	China	41
23.	AVOCENT(in Chinese characters)	6207053/6207053	June 14, 2010	China	9
24.	AVOCENT	01007452/251208	April 2, 2002	Colombia	9
25.	AVOCENT	1007073/241677	September 13, 2001	Colombia	42
26.	AVOCENT	1007074/241676	September 13, 2001	Colombia	41
27.	AVOCENT	001902881/ 001902881	February 21, 2002	CTM	9,41,42
28.	AVOCENT & Design (Horizontal)	002038578/002038578	February 13, 2002	CTM	9,41,42
29.	AVOCENT & Design (Vertical)	002038479/002038479	February 13, 2002	CTM	9,41,42
30.	AVOCENT CARE	002480630/002480630	July 25, 2003	CTM	36,37,42
31.	AVOCENT Logo	002038438/002038438	May 15, 2002	CTM	9,41,42
32.	AVOCENT SIMPLY [MANAGE] & Design	008631681/008631681	April 26, 2010	CTM	9,41,42
33.	AVOCENT	83759/2044	April 8, 2002	Ecuador	9
34.	AVOCENT	83760/2045	April 8, 2002	Ecuador	42
35.	AVOCENT	83761/2046	April 8, 2002	Ecuador	41
36.	AVOCENT	200301077AA/200301077AA	December 4, 2001	Hong Kong	9,41,42
37.	AVOCENT	203525/203525	April 23, 2009	Israel	9
38.	AVOCENT	203556/203556	January 22, 2009	Israel	41
39.	AVOCENT	203557/203557	January 22, 2009	Israel	42

40.	AVOCENT	2001007051/4613771	October 18, 2002	Japan	9,41,42
41.	AVOCENT Logo	2003091090/5008799	December 8, 2006	Japan	9,35,37,42
42.	AVOCENT	200101178/01001178	February 13, 2004	Malaysia	42
43.	AVOCENT	200101179/01001179	August 18, 2004	Malaysia	41
44.	AVOCENT	200101180/01001180	April 24, 2007	Malaysia	9
45.	AVOCENT	469441/749681	May 30, 2002	Mexico	9
46.	AVOCENT	469442/719485	October 29, 2001	Mexico	41
47.	AVOCENT	469443/719486	October 29, 2001	Mexico	42
48.	AVOCENT	631446/631446	August 2, 2001	New Zealand	9
49.	AVOCENT	631448/631448	August 2, 2001	New Zealand	41
50.	AVOCENT	631449/631449	August 2, 2001	New Zealand	42
51.	AVOCENT	1227242001/00072952	June 6, 2001	Peru	9
52.	AVOCENT	1227252001/00026337	June 6, 2001	Peru	41
53.	AVOCENT	1227262001/26338	June 6, 2001	Peru	42
54.	AVOCENT	4520020000389/45007877	July 28, 2004	Republic of Korea (South)	9,41,42
55.	AVOCENT	20037122116/267999	April 28, 2004	Russian Federation	9
56.	AVOCENT	T0101272D/ T0101272D	May 26, 2003	Singapore	9
57.	AVOCENT	T0101273B/ T0101273B	June 5, 2002	Singapore	41
58.	AVOCENT	T0101274J/ T0101274J	April 16, 2003	Singapore	42
59.	AVOCENT	201230763/201230763	January 30, 2015	South Africa	9
60.	AVOCENT	201230764/Pending		South Africa	11
61.	AVOCENT	201230764/201230764	January 30, 2015	South Africa	11
62.	AVOCENT	201230765/ Pending		South Africa	35
63.	AVOCENT	201230765/201230765	January 30, 2015	South Africa	35
64.	AVOCENT	201230766/ Pending		South Africa	37
65.	AVOCENT	201230766/201230766	January 30, 2015	South Africa	37
66.	AVOCENT	201230767/ Pending		South Africa	38
67.	AVOCENT	201230767/201230767	January 30, 2015	South Africa	38
68.	AVOCENT	201230768/ Pending		South Africa	42

69.	AVOCENT	201230768/201230768	January 30, 2015	South Africa	42
70.	AVOCENT	009642001/493871	January 1, 2002	Switzerland	9,37,41,42
71.	AVOCENT	090002992/01014640	September 16, 2002	Taiwan	9
72.	AVOCENT	090002999/00164025	May 16, 2002	Taiwan	41
73.	AVOCENT	090002992/00165153	June 16, 2002	Taiwan	42
74.	AVOCENT	444978/TM157535	July 24, 2002	Thailand	9
75.	AVOCENT	444979/SM16577	July 4, 2002	Thailand	41
76.	AVOCENT	444980/SM16576	July 4, 2002	Thailand	42
77.	AVOCENT	76/103702/2773874	October 14, 2003	United States of America	9,41,42
78.	AVOCENT	85/624793/Pending		United States of America	9,11,35,37,38,42
79.	AVOCENT & Design (Horizontal)	76/139106/2732721	July 1, 2003	United States of America	9,41,42
80.	AVOCENT & Design (Vertical)	76/139124/2732722	July 1, 2003	United States of America	9,41,42
81.	AVOCENT Logo	76/139105/2732720	July 1, 2003	United States of America	9,41,42
82.	AVOCENT	329280/329280	June 28, 2001	Uruguay	9,41,42
83.	AVOCENT	10101523/P2340239	November 11, 2002	Venezuela	9
84.	AVOCENT	10101524/S022078	June 27, 2003	Venezuela	41
85.	AVOCENT	12001001522/S022077	June 27, 2003	Venezuela	42

Complainant has annexed copies of Registration Certificates subsisting in its favour for the mark AVOCENT under No. 001902881 dating back to February 21, 2002 and No. 2773874 dating back to October 14, 2003 with first use in commerce claimed since November 20, 2000 in OHIM and USA, respectively alongwith a list of various jurisdictions wherein the mark AVOCENT is registered/applied for.

Based on the aforesaid, it is the Complainant's assertion that consequent of the expenses incurred in protecting the rights vesting in the mark AVOCENT as well as on the promotional activities in relation thereto, the trade mark has come to embody substantial goodwill and is widely recognised by the public as being associated with the Complainant.

In connection with its business, the Complainant claims to have registered the domains 'avocent.in' and 'avocent.com' comprising the registered trade mark 'AVOCENT'. Marked as 'Annexure C' is a print out from the Complainant's parent company's website 'www.emersonnetworkpower.com' illustrating use of the mark AVOCENT as well as the WHOIS records for the domain 'avocent.in'. A perusal of the said records indicate that the domain 'avocent.in' was registered by Complainant on April 4, 2008.

4.3 Respondent's activities and its use of AVOCENT

The Respondent has registered the domain name 'avocent.co.in' on January 10, 2014 as is clearly discernable from the WHOIS. Further, the Complainant has annexed a print out of the website 'www.avocent.co.in' which is a SEDO parking page wherein the Respondent is offering the said domain for sale for an amount of Euro 2000 (approximately INR 139,000).

Given that the Respondent has not participated in the present proceedings, no further information is available on its business activities and/or its use of the domain comprising the mark AVOCENT.

5. Contentions of Parties as summarised in the Pleadings

5.1 Complainant

a) The domain name is identical or confusingly similar to a trade mark of the Complainant in which Complainant has the statutory and/or common law rights.

- i) Complainant submits that the disputed domain includes the mark AVOCENT, which is identical/confusingly similar to Complainant's and registered trade mark AVOCENT.
- ii) Further, it is the Complainant's assertion that by virtue of long standing and continuous use of the mark AVOCENT, the same has acquired distinctiveness and is exclusively associated with the Complainant. Consequently, by registering the impugned domain, the respondent has established its intent to create a likelihood of confusion amongst the general public looking to access information about Complainant. Reliance is placed on *F. Hoffmann-La Roche AG v. Relish Enterprises, WIPO Case No. D2007-1629*.

b) The Respondent has no legitimate interest in respect of the domain name

It is the Complainant's contention that the Respondent neither has any legitimate interest in the mark AVOCENT nor is Respondent engaged in any business under the said domain. Reliance is placed on the case *Pfizer Inc. v. Deep Soni and Akash Soni, WIPO Case No. D2002-0782*.

c) The domain name was registered and is being used in bad faith

- i) The Complainant asserts that given the worldwide fame of the Complainant's trade mark, no person/entity can claim to be ignorant of it. According, the Respondent must have been aware of the long standing reputation of the Complainant's mark AVOCENT. Based on the said presumption, the Complainant states that such a registration of the domain is prima facie evidence of Respondent's bad faith.
- ii) The Complainant states that the Respondent is not actively using the said domain and is only holding the same passively. Further, the Respondent has no legitimate interest in the domain and offering the same for sale for a sum of Euro 2000. Reliance is placed on *Telstra Corporation Limited v. Nuclear Marshmallows, WIPO Case NO. D2000-0003*.
- iii) The Complainant on May 12, 2015 addressed a 'cease and desist' notice to the Respondent, a copy whereof is annexed as 'Annexure E', to which the Complainant claims it has received no response as on the date of filing of the instant Complaint.

5.2 Respondent

As per the INDRP Rules of Procedure, the Complainant forwarded a copy of the Complaint along with all annexures to the Respondent on July 2, 2015 under the directions of this Arbitral Tribunal. On July 6, 2015 this Tribunal issued a notice to the Respondent directing it to file a response within 10 days. Due to an incomplete/incorrect address being mentioned in the WHOIS records by the Respondent, a physical copy of the Complaint alongwith its annexures could not be served on the Respondent. Accordingly, on July 13, 2015, the Respondent was directed to furnish a complete address to enable service. Absent any response thereto, the matter has proceeded *ex-parte*.

6. Discussion and Findings

As per paragraph 4 of the .IN Domain Name Dispute Resolution Policy (INDRP), any person who considers that a registered domain name conflicts with his legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:

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

Based upon the pleadings, it is required to be examined as to whether the parties have been able to justify/rebut the aforesaid premises:

6.1 Identical or confusingly similar trade/service mark

As per the WHOIS records, the Respondent has registered the disputed domain name "AVOCENT.CO.IN" on January 10, 2014.

The Complainant is the registered proprietor of the trade mark AVOCENT in many countries including India, as indicated above. To substantiate the same, the Complainant placed on record copies of registration certificates obtained for the trade mark AVOCENT in India as well as abroad. Further, the Complainant also owns domain names comprising AVOCENT in its name. The Complainant has annexed the WHOIS details of "AVOCENT.IN" as '**Annexure C**' and accordingly, for the purpose of the dispute at hand, we shall limit ourselves to the said domain registered in favour of the Complainant

The disputed domain name incorporates the mark AVOCENT in its entirety. It has been held in *Inter-Continental Hotels Corporation vs. Abdul Hameed* (INDRP/278) as well as in *Indian Hotels Company Limited v. Mr. Sanjay Jha* (INDRP/148) that when a disputed domain name incorporates a mark in entirety, it is adequate to prove that the disputed domain name is either identical or

confusingly similar to the mark. Similarly, in the case of *Farouk Systems Inc. v. Yishi*, WIPO Case No. d2010-006, it has been held that the domain name wholly incorporating a Complainant's registered mark may be sufficient to establish identity or confusing similarity, despite the addition or deletion of other words to such marks.

In addition, the Complainant has registered the domain name "AVOCENT.IN" on April 4, 2008 and is doing/operating business/website there under. The Respondent on the other hand registered the domain "AVOCENT.CO.IN" much subsequent to the Complainant on January 10, 2014 and is not doing/operating any business/website thereunder.

In view of the foregoing discussions, the Complainant has satisfied this tribunal that:

- i) it has both statutory and proprietary rights in respect of the mark AVOCENT; and
- ii) the domain name in question "AVOCENT.CO.IN" is phonetically, structurally as well as visually identical/similar to the Complainant's prior registered trade mark AVOCENT.

6.2 Rights and legitimate interests

The Complainant has asserted that the Respondent has no rights or legitimate interests in the disputed domain name. Paragraph 7 of the INDRP enumerates three circumstances (*in particular but without limitation*) and if the Arbitrator finds that the Registrant has proved any of the said circumstances, the same shall demonstrate its rights to or legitimate interest in the disputed domain name. The said paragraph is reproduced herein under:

"Registrant's Rights to and Legitimate Interests in the Domain Name – Any of the following circumstances, in particular but without limitation, if found by the Arbitrator to be proved based on its evaluation of all evidence presented, shall demonstrate the Registrant's rights to or legitimate interests in the domain name for the purposes of Paragraph 4 (ii):

- i) *before any notice to the Registrant of the dispute, the Registrant's use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services;*

- ii) *the Registrant (as an individual, business, or other organization) has been commonly known by the domain name, even if the Registrant has acquired no trademark or service mark rights; or*
- iii) *the Registrant is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.”*

The Respondent has not filed any response in this case. There is no evidence to suggest that the Respondent has used or made demonstrable preparations to use the domain name or a name corresponding to the domain name in connection with *bonafide* offering of goods; or is commonly known by the disputed domain name; or has made fair use of the domain name.

Further, as observed by the Panel, in the case of *Intercontinental Hotels v. Abdul Hameed (INDRP/278)*, it is well established, that trade mark registration is recognised as *prima facie* evidence of rights in a mark. Infact, the said Principle stems from Section 31 of the Trade Marks Act, 1999. Complainant, in the instant case, is the owner of the registered trade mark AVOCENT in India and has sufficiently demonstrated its rights in the trade mark AVOCENT in India.

From the review of the webpage pertaining to the disputed domain, it is evident that the domain name “AVOCENT.CO.IN” is not used by the Respondent inasmuch as it does not resolve into a website ‘www.avocent.co.in’ for offering of any goods/services.

Further, the Complainant has not licensed or otherwise permitted the Respondent to use its name/mark AVOCENT or to apply for or use the domain name incorporating the same. Infact, in the case of *American Home Products Corporation v. Ben Malgioglio, WIPO Case No. D2000-1602*, it has been held that a passive holding of a domain is an evidence of a lack of legitimate rights and interests in that domain.

6.3 Bad faith

Paragraph 6 of the INDRP enumerates the circumstances evidencing registration and use of domain name in bad faith. The said paragraph is reproduced herein under:

“Evidence of Registration and use of Domain Name in Bad Faith - For the purposes of Paragraph 4(iii), the following circumstances, in particular but without limitation, if found by the Arbitrator to be present, shall be evidence of the registration and use of a domain name in bad faith:

- (i) *circumstances indicating that the Registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant, who bears the name or is the owner of the trademark or service mark, or to a competitor of that Complainant, for valuable consideration in excess of the Registrant's documented out-of-pocket costs directly related to the domain name; or*
- (ii) *the Registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the Registrant has engaged in a pattern of such conduct; or*
- (iii) *by using the domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other on-line location, by creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.”*

The contention of the Complainant is that the Respondent has, despite being well aware of the Complainant and its prior rights in the mark AVOCENT, registered the disputed domain.

Further, the Respondent has not created any website under the disputed domain name for offering any goods/services even after a lapse of 2 years of registration. In fact, the website www.avocent.co.in is a SEDO parking page wherein the Respondent is offering the said domain for sale for an amount of Euro 2000 (approximately INR 139,000). Thus, it is crystal clear that the Respondent has registered the disputed domain name in bad faith for obtaining illegal monetary gain.

Further, there is lack of evidence on record suggesting *bonafide* adoption and nexus/connection of the disputed domain name by Respondent. Thus, it is squarely established that such registration of the disputed domain name by the Respondent has resulted into denying the Complainant its lawful right to register and use the disputed domain name “AVOCENT.CO.IN” towards promoting its products/business.

In view of the foregoing, the Panel is of the view that Respondent has registered the domain name "AVOCENT.CO.IN" in bad faith.

7. Award

In light of the foregoing findings, it is established beyond doubt that (1) the domain name is confusingly similar to the mark AVOCENT which is proprietary to the Complainant, (2) the Respondent has no rights or legitimate interests in respect of the disputed domain name, and (3) the domain name is registered in bad faith.

Thus, in accordance with the Policy and the Rules, this Arbitral Tribunal directs the Respondent to immediately transfer the disputed domain name "AVOCENT.CO.IN" to the Complainant.

The parties shall bear their own cost.



C.A. Brijesh
Sole Arbitrator

Dated: August 28, 2015