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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 25074/MK/PDP

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

(U.S.A.)

vs/

ATGRON, INC.

(U.S.A.)

This document is an original of the final award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

FINAL AWARD

ICC Arbitration 25074/MK/PDP

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (U.S.A.) vs/
ATGRON, INC. (U.S.A.)**

The Parties and their Representatives

Claimant and Counter-Respondent

**INTERNET CORPORATION FOR
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Having been appointed in accordance with section 5.2 of the Registry Agreement between the Parties dated 1 October 2013, and having examined the submissions, proof and allegations of the Parties, and having issued a Partial Award on 15 September 2020, I, THE UNDERSIGNED ARBITRATOR, now find, conclude and issue this Final Award as follows:

I. Introduction

A. *The Parties*

1. Claimant and Counter-Respondent Internet Corporation for Assigned Names and Numbers (“ICANN”) is a California not-for-profit public benefit corporation that coordinates the technical aspects of the Internet’s Domain Name System (“DNS”) on behalf of the Internet community. (Claimant’s Request for Arbitration [“Request”] ¶ 9.) ICANN enters into registry agreements with entities that act as “registry operators,” which are the companies that operate and manage generic top-level domains (“gTLDs”), such as the “.ORG” portion of ICANN.org. (*Id.* ¶ 10.)
2. Respondent and Counter-Claimant Atgron, Inc. (“Atgron”) is a Delaware corporation incorporated on or about May 23, 2011 in order to contract with ICANN and provide registry services related to the top level domain “.WED.” (Declaration of Adrienne McAdory ¶ 2.) On 1 October 2013, Atgron and ICANN entered into a Registry Agreement (the “Agreement”) for this purpose. (Request ¶ 16.)

B. *The arbitration agreement*

3. Claimant and Respondent have made claims under the arbitration agreement contained in the Agreement, which provides:

5.2 Arbitration. Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, (ii) the parties agree in writing to a greater number of arbitrators, or (iii) the dispute arises under Section 7.6 or 7.7. In the case of clauses (i), (ii) or (iii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties’ filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys’ fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator’s right to sell new registrations). Each party shall treat information received from the other party pursuant to the arbitration that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15. In any litigation involving ICANN concerning this Agreement, jurisdiction

and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

C. Applicable law, rules, and place of the arbitration

4. The Parties agreed that the law of the State of California governs this dispute. (See Terms of Reference ¶ 22.)
5. The ICC Arbitration Rules in force as of 1 March 2017 govern these proceedings.
6. In light of the Parties' disagreement, on 12 March 2020, pursuant to Article 18(1) of the Rules, the Court fixed the City of Los Angeles, CA (U.S.A.) as the place of arbitration.

D. Defined terms

7. Unless otherwise stated, terms used herein are as defined in the Terms of Reference and the Partial Award dated 15 September 2020 ("Partial Award").

II. Procedural History

8. The Arbitrator issued the Partial Award on 15 September 2020, and the same was notified to the Parties on 16 September 2020. The Partial Award and its procedural background are incorporated by reference herein.
9. The issues to be decided in the Partial Award were as follows:
 - a. Did ICANN breach section 2.3 or section 3.1 of the Agreement?
 - b. Did ICANN breach section 3.5 of the Agreement?
 - c. Did ICANN have a conflict of interest?
 - d. Did Atgron breach Article 6 of the Agreement?
 - e. To what remedies is ICANN entitled?
 - f. To what remedies is Atgron entitled?
10. The Partial Award decided the first three questions in the negative and the fourth in the affirmative. It awarded ICANN:
 - a. A declaration that Atgron is in breach of its payment obligations under the Agreement; and
 - b. USD [REDACTED] through 2 March 2020 (Request Exh. G; Answer ¶ 1) plus any Registry-Level Fees still unpaid as of the date the Final Award is rendered. (Partial Award ¶ 117.) The Partial Award further instructed ICANN to provide competent evidence of the latter in conjunction with its memorandum of costs and fees. (*Id.*)

The Partial Award did not award any remedies to Atgron.

11. Subsequent to the issuance of the Partial Award, on 22 September 2020 and pursuant to the schedule set forth in the Procedural Timetable, ICANN submitted a Memorandum on Costs and Fees ("Costs Memo") seeking the following fees and costs:
 - a. USD [REDACTED] in arbitration costs

- b. USD ██████ in legal fees.
- 12. In its Costs Memo, ICANN also provided evidence to support an additional USD ██████ in Registry-Level Fees accruing from 3 March 2020 through the date of the Final Award. (Costs Memo at 6 & Exhs. E-G.)
- 13. On 5 October 2020 and in compliance with the Procedural Timetable, Atgron timely filed an Opposition to ICANN's September 22, 2020 Memorandum on Fees and Costs ("Costs Opposition").
- 14. The proceedings were closed on 24 October 2020.
- 15. The Court fixed 18 November 2020 as the time limit for the Final Award.

III. Issues to be Decided

- 16. The two issues to be decided herein are:
 - a. the additional Registry-Level Fees still unpaid between 3 March 2020 and the date of the Final Award; and
 - b. the *quantum* of fees and costs, including costs to be determined under Article 38 of the Rules (see Procedural Timetable, at 1-2).

IV. Consideration and Findings

- 17. Section 5.2 of the Agreement provides that "[t]he prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards."
- 18. Pursuant to the Arbitrator's decision in the Partial Award, ICANN is the prevailing party in this arbitration and is accordingly entitled to an award of costs and reasonable attorneys' fees.

A. Unpaid Registry-Level Fees

- 19. In its Costs Memo, ICANN provided competent evidence to support an award of an additional USD ██████ in unpaid Registry-Level Fees. (Costs Memo at 6 & Exhs. E-G.) Atgron did not contest this amount in its Costs Opposition. ICANN is therefore entitled to those fees for the reasons set forth in the Partial Award. (See *ante* ¶ 10.) Together with the USD ██████ previously awarded in the Partial Award, ICANN is entitled to a total of USD ██████ in unpaid Registry-Level Fees through the date of this Final Award.

B. Costs of the Arbitration

- 20. Atgron does not oppose ICANN's request for reimbursement of its share of the arbitration costs. Those costs have now been fixed by the Court pursuant to Article 38 of the Rules at an amount of USD ██████. They will be borne entirely by Atgron. ICANN is therefore entitled to the return of its share of the advance on costs, in the amount of USD ██████. Of that amount, the Court will reimburse ICANN USD ██████, and Atgron will compensate ICANN for the remaining USD ██████. (See ICC Financial Table.)

C. Reasonable Attorneys' Fees

- 21. Atgron argues that ICANN's claim for USD ██████ in attorneys' fees should be denied in its entirety on the ground that ICANN provided no detailed timesheets summarizing the work done and by whom. (Costs Opposition at 2.) The only evidentiary

support provided by ICANN for the attorneys' fees it claims was the Declaration of [REDACTED] and the following chart:

Description	Rate	Hours	Billed Amount
Partner Fees, Jones Day	US\$ [REDACTED]	64	US\$ [REDACTED]
Associate Fees, Jones Day	US\$ [REDACTED] US\$ [REDACTED]	107	US\$ [REDACTED]
TOTAL	N/A	171	US\$ [REDACTED]

(Costs Memo Exhs. B, C.)

22. Atgron contends that, “with the paucity of information about which attorney did what, and what their hourly rates are, it is impossible to objectively evaluate the work done and the applicable rate.” (Costs Opposition at 3.)
23. The ICC Commission Report entitled, Decisions on Costs in International Arbitration, provides helpful guidance regarding the reasonableness of costs claimed. (See Costs Memo Exh. A.) To determine reasonableness, the Arbitrator may take into account various factors, depending on the circumstances of the case, including but not limited to:
- the reasonableness of the rates and number and level of fee-earners;
 - the reasonableness of the level of specialist knowledge and responsibility retained for the dispute, including the legal qualification of representatives, involvement of specialist teams or team members and level of seniority; and
 - the reasonableness of the amount of time spent.

(*Id.* ¶ 65(i) – (iii).)

24. In addition, the Arbitrator may take into account the proportionality between the fees claimed and the amount in dispute. (*Id.* ¶ 66.) Relevant factors include:
- The overall complexity of the matter;
 - The length and phases of the proceedings;
 - The scope, relevance and extent of fact and/or expert evidence;
 - The length and conduct of any oral hearings.

(*Id.* ¶ 70.)

25. Appendix A to the ICC Commission Report entitled, Analysis of Allocation of Costs in Arbitral Awards, provides further guidance on the subject by presenting the results of a review of arbitral awards on fees and costs. (*Id.* at 19.) It noted that some tribunals “took into account the cost allocation presumptions or principles in the law at the seat of the arbitration” as a guide, on the theory that parties would reasonably expect such principles to apply. (*Id.* at 22.) It provided examples of tribunals that shifted costs for “failure to provide timesheets to substantiate claims for legal fee[s].” (*Id.* at 23.) The Analysis concluded that

The majority of tribunals attached considerable importance to whether the

fees were substantiated, differentiated, well documented and supported by evidence. If the legal fees were not substantiated, some tribunals assessed their reasonableness simply by comparing them with the other side's costs, while others were inclined to fix an amount they considered to be reasonable in the circumstances.

(*Id.* at 24.)

26. With this background, I turn to an analysis of Claimant's fee claim.
27. I begin by expressing my appreciation for the professionalism displayed by counsel for both Parties. During the case management conference, counsel readily agreed that the matter could be heard on the papers, thus significantly promoting the efficiency of the proceedings for their clients. They complied with all procedural deadlines and in all other respects demonstrated a keen appreciation of the differences between litigation and arbitration, and the goals sought to be furthered by the latter.
28. I am somewhat surprised, however, that ICANN did not provide a more detailed breakdown of the hours billed and by whom, given that it is customary in the U.S. for fee applications to be supported by such records. For example, the U.S. District Court for the Northern District of California has held that a party seeking fees

must justify his or her claim by submitting detailed time records. The court must review the time records to determine whether the hours are adequately documented in a manner that can be properly billed directly to clients. The court may adjust these hours down if it believes the documentation to be inadequate, if the hours were duplicative, or if they were either excessive or unnecessary. The Court must also assess whether the hours claimed are vague, block-billed, excessive, and/or duplicative

(*Xu v. Yamanaka*, 2014 WL 3840105, at *2 (N.D. Cal. August 1, 2014).

29. Here, both Parties are U.S. entities, counsel for both sides are U.S. lawyers, and the place of the arbitration is in the U.S. Although the ICC Commission Report states that "[c]opies of invoices will rarely be appropriate if they show details of work done," (Costs Memo Exh. A, ¶ 77), this general admonition must be interpreted in light of the reasonable expectations of the Parties and counsel, and the strong connections that this dispute enjoys to the U.S. Even if it did not see fit to provide detailed billing records, at minimum ICANN could have supplied more information about (a) precisely who worked on the case, (b) what each associate attorney's billing rates were and, most importantly, (c) the rough allocation of work among different activities, such as legal research, drafting, client meetings or correspondence, and hearings.
30. In subsequent e-mail correspondence, ICANN offered to supplement its proof of fees. But I agree with Atgron that the time to do so has now passed. The deadlines for submission of costs memoranda were agreed to by the Parties in advance; absent a showing of prejudice, changed circumstances, or other equitable grounds, it is not for the Arbitrator to upset that agreement in order to afford one Party a second opportunity to present arguments and proofs.
31. In the absence of further details about the number of hours billed, by whom and for what tasks, it devolves to the Arbitrator's discretion to make a determination about the reasonableness of fees in light of his experience and the available facts. (See Rules, Article 38(5) ("In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant...").) Those available facts are as follows:

- a. First, this case was heard on the papers in lieu of an evidentiary hearing with fact and expert witnesses. Exclusive of exhibits, ICANN's Request for Arbitration was nine pages, its Reply to Atgron's Counterclaims was twenty-five pages, and its response to Respondent's 15 June 2020 Brief was ten pages—for a total of forty-four pages of brief-writing. The Partial Award disposing of the merits of the case was issued approximately nine months after the Request for Arbitration was filed.
 - b. Second, ICANN brought what was essentially a collections case in the total amount of USD [REDACTED] (USD [REDACTED] of which was awarded to Claimant in the Partial Award). Atgron did not contest the fact of non-payment, although it vigorously defended on the ground that the non-payment was excused due to Claimant's material breaches of the Agreement. Even when the monetary components of Atgron's counterclaims are factored in, however, the total value of the claims and counterclaims is approximately USD [REDACTED].
 - c. It should be noted, however, that ICANN prevailed on all of its claims and defences and is the undisputed prevailing party. I am also mindful of the fact that Atgron retained counsel only after I was appointed sole arbitrator. This extended the proceedings somewhat because I granted Atgron's request to have its counsel file a further brief, to which ICANN replied. A final consideration is that ICANN is only seeking fees associated with the arbitration proceeding itself. (See Costs Memo Exh. C (Declaration of [REDACTED]) ¶ 2.)
32. ICANN's Schedule of Costs shows that a partner or partners charged a total of 64 hours at a rate of USD [REDACTED] per hour, and that more than one associate charged a total of 107 hours at rates of USD [REDACTED] to USD [REDACTED] per hour. (See *id.* Exh. B.)
 33. The Schedule of Costs does not disclose the identity of all associate attorneys who billed time on the case, although it would be reasonable to assume that those associates were [REDACTED] and [REDACTED], who are also attorneys of record. Based on the information available on Jones Day's website, [REDACTED] and [REDACTED] appear to be first- and eighth-year associates, respectively. (See *also* Costs Opposition at 3.)
 34. Given that a total of USD [REDACTED] was charged for associate time, the average hourly rate for the 107 associate hours billed is approximately USD [REDACTED]—an amount far closer to USD [REDACTED] than USD [REDACTED]. (See *id.*) If [REDACTED] and [REDACTED] were the only two associate attorneys who worked on the case, this would mean that [REDACTED] billed more than three times as many hours as [REDACTED]. This is not a reasonable division of labour between senior and junior attorneys. If, as would have been expected, the reverse had been true and the division of labour had been bottom-heavy, I estimate that the total fee for 107 associate hours would have been 20-30% less.
 35. Taking into account the facts recited above regarding the nature of the proceedings, the relative lack of complexity of the claims, and the amounts in dispute (see *ante* ¶ 31), I also find the total of 171 hours charged—64 of which by the supervising partner(s) alone—to be unreasonably high. This is particularly so given that ICANN appears to be seeking fees only for the papers-only arbitration, not other aspects of Jones Day's representation in connection with this dispute, such as the mediation before Judge [REDACTED]. (See Costs Memo at 3 & Exh. C, ¶ 2.)
 36. For the foregoing reasons, ICANN will be awarded USD [REDACTED] in attorneys' fees. I deem this to be a reasonable amount given the totality of the circumstances described above.

V. Disposition

The following disposition is in addition to the decisions of the Partial Award dated 15 September 2020.

37. Atgron shall pay ICANN an additional **USD** [REDACTED] in unpaid Registry-Level Fees from 3 March 2020 through the date of the Final Award.
38. ICANN is entitled under the Agreement to its reasonable attorneys' fees in the amount of USD [REDACTED].
39. Atgron shall bear the entire cost of the arbitration, fixed by the Court pursuant to Article 38 of the Rules at USD [REDACTED]. As explained above, this means that ICANN is entitled to recoup from Atgron USD [REDACTED] in costs. (*See ante* ¶ 20.)
40. Adding the sums in paragraphs 38 and 39, Atgron shall pay ICANN a total of **USD** [REDACTED] in fees and costs.
41. This Final Award determines all remaining issues submitted for decision. Any claims or requests not expressly addressed herein are rejected.

Place of Arbitration: City of Los Angeles, CA (U.S.A.)

Dated: November 16, 2020

[REDACTED]
[REDACTED]
Sole Arbitrator