VERDICT

The High Court of Justice in Prague decided on 23 April 2005 in the legal case of the plaintiff K. S. against the defendant no. 1 CZ.NIC and the defendant no. 2 M, in which the plaintiff claims breach of contractual conditions and unfair competition, originally adjudged by the District Court of Justice in Prague on 2 June 2004 and appealed against by the defendant no. 2, as follows:

- The High Court hereby affirms Sections I and II of the verdict issued by the first instance court. The defendant no. 1 is obliged to allow the plaintiff to register as the owner of the internet domain "systemy.cz" in the register (database) of first-level "cz" domains administered by the defendant no. 1 and enable the plaintiff to make full use of the domain "systémy.cz", and the defendant no. 2 is obliged to refrain from using the domain "systémy.cz".
- Sections III and IV of the verdict are changed as follows: the plaintiff is not entitled to claim compensation for its procedural expenses on the defendant no. 1 and the defendant no. 2 is obliged to deposit with JUDr. S. S., the plaintiff's legal representative, the amount of CZK 10,055.50 as a compensation for the plaintiff's procedural expenses no later than 3 days after this verdict becomes legally effective.
- The plaintiff is not entitled to claim compensation for its appeal expenses on the defendant no. 1 and the defendant no. 2 is obliged to deposit with JUDr. S. S., the plaintiff's legal representative, the amount of CZK 7,645.75 as a compensation for the plaintiff's appeal expenses no later than 3 days after this verdict becomes legally effective.

Pursuant to the aforementioned verdict of the first instance court the defendant no. 1 is obliged to allow the plaintiff to register as the owner of the internet domain "systemy.cz" in the register (database) of first-level "cz" domains administered by the defendant no. 1 and accessible at the address http://www.nic.cz and to enable the plaintiff to make full use of the domain "systémy.cz" (Section I), and the defendant no. 2 is obliged to refrain from using the domain "systémy.cz" (Section II) and deposit with the plaintiff's legal representative the amount of CZK 9,275.00 as a compensation for the plaintiff's procedural expenses no later than three days after the verdict becomes legally effective (Section IV), and that the plaintiff and the defendant no. 2 are not entitled to claim compensation for their procedural expenses on each other (Section III).

The defendant no. 2 appealed against the verdict in full extent within the statutory time limit. It claims that the facts of the case established by the first instance court are not based on evidence and that the court's legal opinion is incorrect. According to the defendant no. 2 the court's conclusion that the relation between the plaintiff and MH at the time the domain was transferred can be classified as a relation between a mandatory and a client in compliance with Section 566 of the Commercial Code or Section 724 of the Civil Code is not supported by relevant evidence. The defendant no. 2 is convinced that when MH ceased to be a member of the plaintiff's Board of Directors, yet remained the plaintiff's administrator, the plaintiff should have modified its relationship with MH and/or limited his authorisation accordingly. As the plaintiff failed to do so, the defendant no. 2 is convinced that MH did not need any special authorisation to transfer the domain "systémy.cz" to a third party. As a result, the defendant no. 2 regards the conclusion of the first instance court that MH overstepped the extent of his authorisation and that the transfer never became legally effective as incorrect. The defendant no. 2 also points out that it took no active part in the transfer and, therefore, could not breach any legal regulations. The defendant no. 2 furthermore states that if the court of appeal comes to a conclusion that MH indeed overstepped his authorisation, it shall not agree with the fact that it should pay all procedural expenses. The first instance court's decision on the settlement of procedural expenses is based the fact that the defendant no. 1 did not know that MH had overstepped his authorisation. However, the same applies to the defendant no. 2. As a result, the defendant no. 2 is convinced that the procedural expenses should be borne equally by both defendants. The defendant no. 2 furthermore

claims that is not guilty of unfair competition in relation to the plaintiff and that the arguments of the first instance court supporting its verdict based on the fact that the actions of the defendant no. 2 can be classified as unfair competition pursuant to Section 44 et seq. of the Commercial Code are not justified. The defendant no. 2 does not regard itself as the plaintiff's competitor because the registered activities and business partners of both parties are mostly different. In the opinion of the defendant no. 2, the plaintiff does not support its claim that the word "systémy" featured in the domain concerned and the plaintiff's internet address is characteristic for the plaintiff by sufficient evidence. The plaintiff does not have an exclusive business position in the region where it conducts its commercial activities. As a result, the defendant no. 2 proposes that the court of appeal change the first instance court's verdict, by dismissing the plaintiff's suit completely and deciding on the settlement of procedural expenses in accordance with the result of the parties' dispute.

Reacting to the appeal of the defendant no. 2, the plaintiff states that the facts presented by the defendant no. 2 bear no relevance to the plaintiff's claim. The plaintiff asked that the defendant no. 2 refrain from using the domain "systemy.cz" because in its opinion, further utilisation of the domain "systemy.cz" by the defendant no. 2 could be regarded as unfair competition. The defendant no. 2 had been using the said domain until the first instance court issued an interlocutory judgement, despite knowing that MH had no longer been authorised to act on the plaintiff's behalf and that the domain had been registered by the plaintiff interested in its further utilisation. The plaintiff also points out that the defendant no. 2 took part in the plaintiff's general meeting of 25 July 2000, as one of the plaintiff's shareholders, and, therefore, had to know that MH had not been re-appointed as a member of the plaintiff's Board of Directors. As a result, the defendant no. 2 had to be aware that MH had overstepped his authorisation when he had transferred the domain concerned to the defendant no. 2. In addition, the defendant no. 2 had to know that MH had left the plaintiff's company at the beginning of 2000. In Summer 2000, MH even became an employee and associate of the defendant no. 2. The plaintiff also emphasises that MH worked as an administrator and as a such was not authorised to transfer the domain concerned to the defendant no. 2 without the plaintiff's authorisation. As a result, when MH did so regardless, its action could not become legally effective. In the plaintiff's opinion, the actions of the defendant no. 2 clearly show that it agreed with the transfer of the domain concerned. The plaintiff is also convinced that the defendant no. 2 can be regarded as its competitor, albeit an indirect one. The plaintiff claims that it suffered damages as a result of the activities of the defendant no. 2 described in detail before the first instance court. By "occupying" the plaintiff's domain, the defendant no. 2 severely limited and even prevented contacts between the plaintiff and its clients because even telephone, mail or fax contacts are usually looked for in the Internet. Reacting to the objection of the defendant no. 2 that the expression "systémy" cannot be regarded as characteristic exclusively for the plaintiff, the plaintiff states that its claim does not concern the general expression "systémy" but the term "systemy.cz" which is clearly linked with its business name within client circles. In this context, the plaintiff regards as sufficient that the link between the term "systemy.cz" and its business name is perceived by those members of the public which in the past received the plaintiff's offers. That is why the plaintiff proposes that the court of appeal affirm the first instance court's verdict as materially correct.

In compliance with Section II, Subsection 2, of the transitory provisions of Act No. 59/2005 of the Collection of Laws the court of appeal reviewed the first instance court's verdict issued pursuant to Section 212 et seq. of the Rules of Civil Procedure valid until 31 March 2005, coming to a conclusion that although the appeal of the defendant no. 2 is permissible even in the extent concerning the defendant no. 1, it is without foundation. In the opinion of the court of appeal, Section I of the verdict (concerning the defendant no. 1) depends directly on Section II of the verdict in which the defendant no. 2 is ordered to refrain from using the domain "systémy.cz". This fact is determined by the position of the defendant no. 1, who is the administrator of the first-level "cz" domains under which the second-level domain "systemy" is registered and as a such is the only subject capable of implementing

the changes ordered by the court.

The court of appeal regards the facts of the case established by the first instance court and based on the presented evidence as sufficient. This opinion is further supported by the fact that none of the parties proposed that additional evidence be presented in the course of the appeal. The plaintiff's objective was to re-acquire the second-level domain "systemy" registered in 1997 through its internet provider with the legal predecessor of the defendant no. 1 administering the first-level domains "cz" and transferred by MH to the defendant no. 2, whose associate MH subsequently became, at a time when he was no longer a member of the plaintiff's Board of Directors, and to continue using the said domain for its business purposes. Having assessed all presented evidence, the first instance court came to a conclusion that the plaintiff and the defendant no. 2, both engaged in providing software, could be regarded as competitors and that MH worked as the plaintiff's administrator and until 25 July 2000 was a member of the plaintiff's Board of Directors. The first instance court also assessed the relationship between the plaintiff and MH after 25 July 2000 (i.e. after the date of the plaintiff's general meeting that recalled MH from his post in the Board of Directors) as a relationship between a mandatory and a client. Considering the fact that MH transferred the domain "systemy.cz" to the defendant no. 2 through the defendant no. 1 without the plaintiff's consent, by overstepping his authorisation and that MH's action was not subsequently approved by his client (the plaintiff), the first instance court decided that the transfer had not become legally effective. That is why it ordered the defendant no. 2 to refrain from using the domain concerned. The first instance court also found the plaintiff's suit against the defendant no. 1 administrating the first-level domains "cz" rightful, yet decided that the defendant no. 1 had not breached any legal regulations. That is why all compensation claims between the plaintiff and the defendant no. 1 are to be governed by Section 150 of the Rules of Civil Procedure.

The court of appeal regards the first instance court's conclusion that the plaintiff and the defendant no. 2 are competitors as correct and the objection of the defendant no. 2 claiming the opposite as ungrounded. According to the court of appeal the plaintiff and the defendant no. 2 offer similar software-related services through the Internet. The fact that the defendant no. 2 was using the domain "systemy.cz" - originally registered and continuously used by the plaintiff - for its business purposes, even though it did not participate actively on its transfer conducted without the plaintiff's consent by MH at a time when MH was no longer a member of plaintiff's collective statutory body, contravenes good manners of economic competition and may harm the plaintiff's business situation. Because the plaintiff lost its opportunity to present its products at the internet domain "systemy.cz" as a result of MH's actions benefiting the defendant no. 2, its commercial activities were negatively affected and it was to a large extent excluded from competition. The defendant no. 2 used the website on which the plaintiff was presenting its products and services and which also featured the plaintiff's other contacts (telephone and fax numbers, address) to present its own products and services, thus acquiring a competitive advantage. The court of appeal, therefore, regards the activities of the defendant no. 2 as accomplishing the elements of unfair competition as defined by Section 44, Subsection 1, of the Commercial Code. The court of appeal agrees with the first instance court that the relationship between MH and the plaintiff was similar to a relationship between mandatory and client (Section 724 et seq. of the Civil Code cannot be applied to this case) but only during the time when MH was a member of the plaintiff's Board of Directors (see the first sentence of Subsection 2, Section 66, of the Commercial Code). This means that in the opinion of the court of appeal, the said relationship ended when MH ceased to be a member of the plaintiff's collective statutory body. It appears that after that, MH only continued acting in accordance with the plaintiff's original authorisation, with the actual relationship between the parties having no contractual basis. That is why it is not possible to state that MH overstepped his authorisation when he transferred the domain concerned to the defendant no. 2 because his original authorisation had already expired at that time. As a result, the court of appeal agrees with the first instance court that the steps leading to the transfer of the domain concerned taken

by MH were not and could not be legally effective and the domain concerned, therefore, was not and could not be transferred to the defendant no. 2. However, the domain was transferred to the defendant no. 2 in compliance with the Regulations issued by the defendant no. 1. The court of appeal does not accept the plaintiff's objection that it was bound only by the original Regulations issued in 1997 (when the domain was registered) and not by their subsequent changes. By using continuously the domain and paying all relevant charges (the plaintiff's will to use the domain is in no way affected by the fact that in the last periods, the charges were paid by the defendant no. 2 without the plaintiff's knowledge), the plaintiff accepted the terms and conditions of the domain's administrator, including all changes applied throughout the years. In the opinion of the court of appeal, the plaintiff's suit against both defendants is, therefore, justified. However, the court of appeal also acknowledges that the defendant no. 1 - while ordered to register the plaintiff again as the domain's owner - is not guilty of breaching any legal regulations. As far as the defendant no. 2 is concerned, its obligation to refrain from using the domain "systemy.cz" corresponds with the facts that it never acquired any right to the said domain and that it is guilty of unfair competition because it was using the domain without any legal reason.

That is why the court of appeal hereby affirms Sections I and II of the first instance court's verdict as materially correct in compliance with Section 219 of the Rules of Civil Procedure, according to which the defendant no. 1 is obliged to register the plaintiff as the owner of the domain "systemy.cz" (the original verdict incorrectly identifies the domain as "systémy.cz") in its register of first-level "cz" domains and to allow the plaintiff to use the said domain, and the defendant no. 2 is obliged to refrain from using the domain "systemy.cz". The court of appeal also changes Sections III and IV of the first instance court's verdict as follows, taking into account the fact that the first instance court correctly applied yet incorrectly cited Section 150 of the Rules of Civil Procedure in Section III and also the fact that the plaintiff's legal representative is VAT-registered: the plaintiff is not entitled to claim compensation for its procedural expenses on the defendant no. 1, the plaintiff is entitled to the following compensation for its procedural expenses: judicial fee totalling CZK 1,500.00, legal representation costs totalling CZK 6,000.00 (Section 8, Subsection b), Edict No. 484/2000 of the Collection of Laws), CZK 1,200.00 (Section 9, Edict No. 484/2000 of the Collection of Laws) and CZK 600.00 (Sections 9 and 18, Subsection 1, Edict No. 484/2000 of the Collection of Laws) and 6 x overhead compensation totalling CZK 75.00 each (Section 13, Subsection 3, Edict No. 177/1996 of the Collection of Laws), plus 19% VAT on the amount of CZK 8,450.00.

The court of appeal hereby adopts the following resolution on appeal-related expenses pursuant to Section 224, Subsection 1, Section 142, Subsection 1, and Section 150, of the Rules of Civil Procedure: the plaintiff is not entitled to claim compensation for its appeal-related expenses on the defendant no. 1; the plaintiff, as the injured party, is, however, entitled to claim compensation for its appeal-related expenses on the defendant no. 2, as the responsible party. The said appeal-related expenses consist of the plaintiff's legal representation expenses of CZK 6,200.00 calculated pursuant to Section 8, Subsection b), and Section 10, Subsection 3, Edict No. 484/2000 of the Collection of Laws and 3 x overhead compensation totalling CZK 75.00 each, plus 19% VAT, calculated pursuant to Section 13, Subsection 3, Edict No. 177/1996 of the Collection of Laws.

When studying this resolution, it is necessary to bear in mind the fact that it contains not only the verdict itself and its grounds, but also the respective statements of the parties concerned. However, some of them (or parts thereof) the court did not have to take into account (for instance, when issuing an interlocutory judgement). Such statements, therefore, represent only a legal opinion of the given party and not a judicial conclusion.

The court's resolution cannot be automatically applied to other cases (even if their merits are similar or identical) and the association CZ.NIC recommends that each individual case be consulted with

internet domain experts and lawyers.