INTERLOCUTORY JUDGEMENT

On Jul 31, 2007, the High Court of Justice in Prague decided the case of the petitioner S. against the defendants 1/ Š.P. and 2/ CZ.NIC on the motion to render an interlocutory judgement, on the basis of an appeal of the defendant 1/ from the resolution of the Regional Court in Hradec Králové dated June 14, 2007 as follows:

1. The verdict I of the resolution by a court of first instance is changed in such a way that the motion to render an interlocutory judgement ordering the defendant 1/ to refrain from using the domain name "x+y+z.cz" is dismissed, in other respects, as concerns the imposition of an obligation on the defendant 1/ not to dispose of the domain name "x+y+z.cz" except for its transfer to the petition and as concerns verdicts II and IV, it is confirmed.

By the above-mentioned resolution, the court of the first instance satisfied the motion to render an interlocutory judgement and ordered the defendant 1/ to refrain from using the domain name "x+y+z.cz" and dispose of it except for its transfer to the petitioner (verdict I.), and the defendant 2/ to refrain from conduct, through which he would enable the defendant 1/ to dispose of the domain name "x+y+z.cz" except for its transfer to the petition (verdict II). In the same time, it ordered the petition to file a petition on the merit in 30 days (verdict III) whereas the court would consider this obligation to be met upon delivery of a document confirming that the petitioner filed a petition with the Arbitration Court by the Economic Chamber (verdict IV).

The court of the first instance started from the motion to render an interlocutory judgement before initiation of proceedings, in which the petition claimed he was a subsidiary of the company X+Y+Z and it was an authorized used of the marking "X+Y+Z" in its business name. The defendant 1/ is a natural person and the sole partner and executive of the company A+B+C. The defendant 2/ is a professional association of legal entities established in order to administer domains of the highest degree "cz". The company X+Y+Z is a worldwide-recognized producer of motorbikes, cars and engines and it is the owner of a number of lexical or combined trademarks including the marking "X+Y+Z", the petitioner is the exclusive importer of the products of his parent company into the Czech Republic. As of April 19. 2005, the defendant 1/ has been a holder of the domain name "x+y+z.cz", which he has been using to present products of the company A+B+C, himself being a partner as well as an executive of this company. If anyone enters the address www.x+y+z.cz to the internet, he is redirected to the web site www.a+b+c.cz. In this way, through the domain x+y+z, the defendant 1/ directly meets the plaintiff on the market of bicycles sale as the web pages www.a+b+c.cz used by the company A+B+C present an offer of bicycles and other means of transport, mostly under the trademark X+Y+Z. According to the petitioner, the defendant 1/ misuses this marking with the aim of giving an impression to consumers that one may access the offer of the petitioner's products and services via the domain x+y+z.cz. In the opinion of the petitioner, the conduct of the defendant 1/ is fully capable of creating a false impression in business relationships that products and services of the defendant 1/ originate with the petitioner. The petitioner considers it impossible, also in consideration of his previous demands addressed to the defendant 1/, that the defendant 1/ would not be aware of the fact that the marking "x+y+z" is protected as a petitioner's trademark and forms a part of his business name. In addition, the fact that the defendant 1/ is a holder of the domain "x+y+z", prevents the petitioner from using his trademark via internet. The petitioner stated he had never granted his consent to the defendant 1/ with the use of his trademarks in connection with services and products, which the defendant 1/ provides and promotes at the web site www.x+y+z.cz . The conduct of the defendant 1/ shall be considered as an unfair competition conduct according to Section 44 Clause 1 of the Commercial Code and it further accomplishes certain special bodies of unfair competition offences like for example misleading marking of goods and services according to the provision of Section 46 of the Commercial Code, conduct contributing to mistaken

identity in accordance with provision of Section 47 of the Commercial Code or parasitic use of reputation according to Section 48 of the Commercial Code. The petitioner considers the defendant 2/ to be subject to the right to be sued as the defendant 2/ is the only entity authorized to assign domain names to the interested persons and administer changes of their holders. It is also just the defendant 2/, who can transfer a domain name or effectively prevent its transfer respectively. The petitioner is convinced that the concerned case meets the conditions for rendering the proposed interlocutory judgement as he is endangered by substantial and with difficulties reparable loss as a result of the conduct by the defendant 1/. In the same time he stated he was filing a petition with the Administration Court by the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic.

On the basis of the motion and attached documents, the court of first instances took it for proven that the defendant 1/ used the domain "x+y+z.cz" in the manner described in the motion, i.e. in such a way that after the eventual interested person in this web site entered the address www.x+y+z.cz, he was automatically redirected to the web site www.a+b+c.cz. According to the court of first instance, in this way, the elements of the so-called general clause according to Section 44 Clause 1 of the Commercial Code may be accomplished as well as any of the special bodies of unfair competition offences specified in Sections 45, 46, 47 or 49 of the Commercial Code, and in the same time, the right may be endangered according to the provision of Section 8 Clause 1 of Act No. 441/2003 Coll., on Trademarks.

As in such cases, it is necessary to regulate the relationship of the parties by an interlocutory judgement, in particular of the danger of delay is imminent, and hence there is an urgent need to regulate the provisional relationship of the parties, the court of the first instance satisfied the motion to render an interlocutory judgement stating that the obligation imposed on the defendant 2/ is of informative nature.

In consideration of the fact that the petitioner only alleged but did not prove filing of a petition with the Arbitration Court by the Economic Chamber and the Agricultural Chamber of the Czech Republic, the court ordered him to file a petition on the merit or at least to deliver a proof of its filing.

The defendant 1/ filed a timely appeal against this resolution in the extent of verdicts I, II and IV and as a ground of the appeal, he claimed erroneous determination of law in the case by the court of first instance. The defendant 1/ is convinced that the legal conditions of rendering an interlocutory judgement have not been met as most allegations of the petitioner were not proved in any way. This concerns in particular the allegation that the petitioner is an authorized use of the marking X+Y+Z, which forms a part of his business name, and that he possesses the rights from trademarks X+Y+Z. The owner of the trademarks is a foreign company X+Y+Z, the petitioner does not possess the rights from the trademarks and hence he is not entitled to sue for protection, which is reserved only for a registered owner of trademarks. As concerns the domain x+y+z, according to the defendant 1/, the company A+B+C purchased it from Mr. M.S. on Apr 5, 2005 for the amount of CZK 119,000.

Already before 2005, the defendant 1/ tried to purchase the domain and the petitioner had the same chance to do so, however, he did not make use of the opportunity to buy the domain as he was not willing to pay the required sum. In addition, the petitioner perhaps intentionally failed to mention an important fact that until 2006, the company A+B+C was a brand dealer of the motorbikes X+Y+Z and within its sales activities, it was one of the most successful ones. The defendant 1/ presented dealer contract as well as withdrawals from then by the petitioner. Hence it is clear that there must have been a business relationship between the petitioner and the defendant 1/ in recent past and that the petitioner must have been aware of this fact at the time when he filed the motion. The defendant 1/ further pointed out that event after termination of his cooperation with the petitioner, he keeps selling, in addition to other products, also products of the petitioner's parent company, in particular motorbikes under the trademark X+Y+Z. At the web site www.a+b+c.cz, there is no information,

through which an average consumer might get the impression that the defendant 1/ is an exclusive exported and the sole authorized representative of the company X+Y+Z in the Czech Republic. If the petitioner suggest something like this, it is purely an unjustified speculation. The defendant 1/ is not domain speculator but he trades in goods, the marking of which is also the name of the domain, which he bought from a speculative businessman. Therefore he suggested for the appellate court to cancel the resolution of the court of first instance in the challenged extent and return the case to the court for further proceedings.

The appellate court reviewed the resolution of the court of first instance in the challenged extent according to the provision of Section 212 et seq. of the Code of Civil Procedure starting from the provision of Section 75c Clause 4 of the Code of Civil Procedure and without ordering a hearing (Section 214 Clause 2 Subclause c) of the Code of Civil Procedure), it reached the conclusion that the appeal is partially justified.

Unlike the court of first instance, the appellate court does not consider the facts alleged by the petitioner, which are decisive for imposition of an obligation on the defendant 1/ in the verdict I, to be proven to such an extent that would justify the proposed interlocutory judgement in this extent. It is not clear from the grounds of the court of first instance, from which the court of first instance concluded the possibility of a right being endangered according to Section 8 of Act No. 441/2003 Coll. as the petitioned did not provide any evidence proving his right to the trademarks "x+y+z" whether as their owner or a person other than the owner that may seek judicial protection on the basis of another fact. Neither a competitive relationship nor an eventual unfair competition conduct of the defendant 1/ may not be deduced directly from the position of the petitioner and the defendant 1/ without further action either as the petitioner himself says the competitor is the company A+B+C and in relation to the defendant 1/, he argues only with the fact that the defendant 1/ is the sole partner and in the same time executive of this company. In the opinion of the appellate court, the very fact that the defendant 1/ is a holder of the domain x+y+z.cz is not sufficient to impose an obligation to refrain from using the domain x+y+z.cz. The appellate court does not consider it proven either that in the concerned case, there is an imminent danger of delay as the defendant 1/ obtained the domain in April 2005 but the motion to render an interlocutory judgement was filed in June 2007.

In consideration of the above-mentioned, the appellate court changed the resolution of the court of first instance in the verdict I in the extent of imposing an obligation on the defendant 1/ to refrain from using the domain name "x+y+z.cz" in such a way that in this extent, it dismissed the motion to render an interlocutory judgement in accordance with Section 220 Clause 3 of the Code of Civil Procedure.

As concerns the obligation imposed on the defendant 1/ to refrain from disposal of the domain name "x+y+z.cz" with the exception of its transfer to the petitioner and the related obligation imposed on the defendant 2/ - to refrain from conduct, which would allow the defendant 1/ to dispose of this domain name except for its transfer to the petitioner, the situation is different in the opinion of the appellate court. The imposition of this obligation represents a formal precondition for deciding the merits of the case with the same parties, in order to prevent a situation when the holder of the domain "x+y+z.cz" changes in the course of the proceedings. Hence is it convenient in the opinion of the appellate court for the holder of the domain to remain unchanged until the decision on the merits is rendered, which may be secured by the rendered interlocutory judgement. It is necessary to state that imposition of the above-mentioned obligation does not pose any restrictions on the defendant 1/, moreover as he states himself that he uses the domain for his business and he is no domain speculator.

Therefore the appellate court in the verdict I, in the extent of the obligation imposed on the defendant 1/ to refrain from disposal with the domain "x+y+z.cz" except for its transfer to the petitioner, confirmed verdicts II and IV of the resolution of the court of first instance as a materially correct one according to Section 219 of the Civil Code of Procedure. As concerns verdict IV, it is not an obligation but a specifying condition related to the verdict III challenged by the appeal. A decision on

the costs of the interlocutory judgement as well as the appellate procedures shall be rendered within the decision on the merit by the Arbitration Court by the Economic Chamber and the Agricultural Chamber of the Czech Republic.

Except for the association CZ.NIC, the parties to the proceedings are identified by the first letters of heir surnames or business names only. The concerned domain names are replaces with a sequence x+y+z.cz. If the wording of the decision mentions also other domain names, they were randomly replaced with other symbol sequences. Except for the data allowing identification of the parties to the proceedings or other persons and domain names, as few changes were made in the wording of the decision as possible. Any relationship of the applied abbreviations and abbreviating symbols with persons and domain names that actually apply a marking using such abbreviations or abbreviating symbols, is purely accidental.

When studying the judgement, it is necessary to bear in mind that it includes not only the verdict and its grounds but also a summary of allegations of individual parties whereas the court might have decided not to consider some of them at all (for example when an interlocutory judgement is rendered) and hence these allegations represent only a legal opinion of the relevant party and not a conclusion by the court.

The decision of the court may not be automatically applied to other cases (though similar in their facts) and the association CZ.NIC recommends to consult a specific case with experts on domain names and with lawyers.