

ARBITRATION PUBLIC BID

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Abstrakt

Článek se zabývá novým smluvním institutem, který se objevil v kontraktační praxi, tzv. Veřejnou rozhodčí nabídkou. Ta se objevuje ve smlouvách mezi českými registrátory doménových jmen a držiteli doménových jmen. Toto nové smluvní ustanovení se pokouší regulovat řešení možných doménových sporů mezi držitelem doménového jména a třetími osobami. Článek vysvětluje smysl tohoto institutu a jeho reálný dopad na strany případného budoucího doménového sporu.

Klíčová slova

Rozhodčí řízení, veřejná rozhodčí nabídka, řešení doménových sporů

Abstract

The article deals with one new practical contractual institute “Arbitration public bid” that has started to appear in contracts between the Czech Registrars of domain names and the Holders of these domain names. This new institute tries to regulate solving possible disputes between the Holder of a domain name and the third party. The article explains the sense of this institute and its real impact on the parties of future domain dispute.

Key words

Arbitration, arbitration public bid, domain name disputes

Arbitration and domain names

Arbitration, as an alternative to the judicial proceeding, is still more used way of dispute resolution in the Czech Republic although the number of disputes solved via arbitration is much more less than those that are litigated at courts. Nevertheless, it is true that there are some types of disputes for which the arbitration is more suitable solution than a court proceeding. One of these areas is the issue of domain names disputes. The most important

reason is simple – domain name disputes are very specific. They must be decided in very short time interval of weeks or months. The litigants (especially if the adverse party is a domain speculator) can hardly wait years for the final court decision. And the arbitration is undoubtedly faster than civil court proceeding.

It is understandable that there are attempts to implement arbitration process into domain disputes from the side of the association CZ.NIC, z. s. p. o. (hereinafter CZ.NIC).¹ But while doing this, it is important to respect valid arbitration law and find the right solution of implementation arbitration process into domain names disputes. The association CZ.NIC has chosen a specific approach. Contracts between an association and the Registrars² and between the Registrars and the end users contain one new arbitral institute called “Arbitration public bid”. This tries to regulate solving possible disputes between the Holder of a domain name and the third party.

This article will deal especially with this new institute and will explain its sense and impact on the parties of future domain disputes.

Alternative dispute resolution

The regulation of solving domain names disputes is incorporated in two separate documents, in Registration Rules and in ADR Rules. These form integral parts of contracts between Registrars and domain name Holders (hereinafter referred to as a Holder). The first interesting regulation of solving disputes is contained in the Registration Rules. The article 16 of the Rules is called Resolution of disputes between Holder and the third parties. The interesting thing on this provision is that the way of solving disputes between the Holder and the third party is regulated in the contract between the Registrar and the Holder. This is not a normal way of creating contracts, but if there are no legal duties imposed on the third party, it is not prohibited. The article 16.1 of the Rules enacts: “*Holders are obligated to make every effort that may reasonably be required from them to achieve an amicable settlement of disputes*”

¹ CZ.NIC, z. s. p. o., is an interest association of legal entities, founded in 1998 by leading providers of Internet services. The key activities of the association include operation of the domain name registry for the .CZ domain and the 0.2.4.e164.arpa (ENUM) domain, operation of the CZ top-level domain and public education in the area of domain names. Information cited on 20. 4. 2008, accessible from <http://www.nic.cz/page/351/>.

² Registrar is a subject, which can approach the Central Registry in a defined way and can order demands for changes of records kept in the Central Registry. Registrar administers domains for end users – the Holders of domain names.

concerning Domain Names and/or their registrations that might arise Rules of Domain Name Registration Under ccTLD .cz between a Holder and other persons. If the disputing parties cannot agree on an amicable settlement of their dispute, they are at full liberty to resolve their dispute under the applicable legislation, i.e. by means of arbitration or before general courts of justice.”³ At the beginning of this provision we can see the reasonable attempt to settle the disputes by the negotiation. Problematic is the intention of the second part of the provision. In fact it is not an arbitration agreement. This article of the Registration Rules only informs a Holder (and a party of some possible dispute that is unable to reach this information) about the Czech law that enables to solve certain disputes via courts or via arbitration. The Holder is not legally bound to accept the arbitration as the only way of solving the possible dispute. It is not an arbitration agreement, because there is not expressed a will to transfer power to decide a dispute from the courts on the arbitrators. While closing there is no obligation coming from this provision, the question on sense of it still remains.

Arbitration public bid

We can find the answer on the question posed above in article 16.3. of the Registration Rules, that deals with a new term “Arbitration public bid“. It says: *“The Holder hereby makes a public arbitration offer in accordance with the Rules of Alternative Dispute Resolution, specifically for all Holder’s Domain Names entered in an electronic database of Domain Names under ccTLD .cz maintained by CZ.NIC.”* Public arbitration offer is a completely new institute that has appeared in the Czech arbitration law. To be able to interpret this regulation, we have to find out, how the Public arbitration offer is defined. It is explained in the Rules of ADR: *“2. 1. The Holder hereby irrevocably and publicly pledges to comply with the decisions of the Arbitration Court at the Chamber of Economy of the Czech Republic and the Chamber of Agriculture of the Czech Republic (hereinafter the “Arbitration Court” only), based on arbitration proceedings held at this Arbitration Court according to the special amendment to its Rules governing on-line arbitration proceedings, published in the Commercial Journal (hereinafter the “On-line Rules”), with respect to property disputes in which a compromise can be achieved and in which a third person challenges any Holder’s Domain Name, included in the electronic database of domain names under the national domain ccTLD .cz, administered by the CZ.NIC Association; provided that the third person expresses its will to*

³ Rules of Domain Name Registration Under ccTLD .cz. [Cited on 20. 4. 2008], accessible from: http://www.nic.cz/files/nic/doc/registrar_package.zip.

*the Holder to pledge to the decision of this Arbitration Court in the given issue, particularly by initiating such proceedings at the Arbitration Court in writing [...] 2. 2. This arbitration public bid concerns all domain names of the holder, including those registered by the holder after making this arbitration public bid.”*⁴ This is all we can find about Arbitration public bid in all the Rules published by the association. Very important is that there is no penalty settled here for the breach of this provision in the whole contract.

This instrument – Arbitration public bid – is not known to the Czech arbitration law. Therefore it seems that there has been a really new instrument created in the Czech contractual practice. So it is important to describe, what rights and duties come from this regulation and who is under which obligation rising from this provision.

Interpretation

Prima facie, it seems, that the Holder of a domain name (in fact the one, who asks for a registration and later becomes a Holder of a domain name), covenants in the contract with the Registrar, that if there appears any third person, who wants to solve the dispute about the domain name via arbitration, the Holder has no chance to refuse the arbitration, because of the obligation from the Arbitration public bid. It seems that the Arbitration public bid means that the Holder of a domain name is legally bound to conduct arbitration about the domain disputes every time, when some third person calls upon him to start arbitration. And according to the web sites of the association CZ.NIC, z. s. p. o., it is clear that this is the purpose for which the Arbitration public bid was created.⁵ But in fact the meaning of the Arbitration public bid is rather different.

The contract about the domain name establishes the legal relationship between Holder and Registrar. It is natural, that there is an enforceable liability for the breach of the contractual

⁴ Rules of Alternative Settlement of Disputes. [Cited on 20. 4. 2008], accessible from: http://www.nic.cz/files/nic/doc/registrar_package.zip.

⁵ „Provisions of the Alternative Dispute Resolution Rules state that a third party which thinks that their rights were injured by registration of a domain name may decide to resolve such dispute using a general jurisdiction court, or using the Arbitration Court of the Chamber of Commerce and Agriculture of the Czech Republic. Should such third person decide to use the Arbitration Court of the Chamber of Commerce and Agriculture of the Czech Republic, the domain name holder is obliged to comply with its ruling.“ [Cited on 20. 4. 2008], accessible from: <http://www.nic.cz/page/314/pravidla-a-postupy/>.

obligations between the parties. The contract can't establish the obligations for the third parties and it can't substitute the declaration of will between the one of the contractual party and the third party.

The arbitration agreement is an agreement between the parties that the disputes from their legal relationship between them will settle one or more arbitrators (§ 2 of the Czech arbitration law, 216/1994 Sb.). The Czech law does not allow entering into an arbitration agreement via "public proclamation" containing an obligation that all the disputes between the one who declares an Arbitration public bid and any other subject will be settled via arbitration. The arbitration agreement is not made even at the moment of service of an action to the arbitration court. The obligation to accede to arbitration is claimable only by the party of a contract, where the Arbitration public bid was incorporated but not by any third subject. It means that when anybody wants to settle the disputes related to the domain name between him and the Holder of a domain name via arbitration, he will have to enter into an arbitration agreement with the Holder irrespective of the existence of any public proclamation. If the Holder refuses to conclude an arbitration agreement to settle the dispute via arbitration, there is no other possibility to solve the dispute than to bring the action against the Holder before a court.

If the Holder of a domain name does not settle the dispute via arbitration, he will break the contract about the registration of a domain name between him and the Registrar. Therefore the Holder is responsible for breach the contract only to the Registrar. It is very problematic to enforce performance of any obligation from any contract that is not rightly secured. The obligation contained in Arbitration public bid is very specific one. And in the respect of the fact, that there is no penalty for breach of the obligation declared in Arbitration public bid, the obligation to settle the dispute via arbitration is in principle unenforceable. The only way how to secure the performance of this obligation is to settle some kind of easily enforceable penalty for its breach. In that case the Holder of a domain name should choose what will cause less troublesome consequences, if breach of the contract or its completion. To settle the contractual penalty in a reasonable motivating rate it seems to be the most suitable solution of this situation. The third party has no chance to force the Holder of a domain name to accept the arbitration. It is only the fear of paying the contractual penalty for breach of the contract between the Holder and the Registrar that can force the Holder to complete the contract. And it is only Registrar, who can compel the contractual penalty. If the Registrar does not know

about the breach of contract, he can't claim for the penalty. The problem is also on the other side. The third party that wants to settle the disputes via arbitration should be informed about the contract between the Holder of a domain name and the Registrar. And if the Holder refuses arbitration, the third party can inform the Registrar about breach of their contract.

Conclusion

The idea and the sense of creating Arbitration public bid are clear. The association CZ.NIC wanted to implement arbitration as an essential way of disputes resolution, because it is more suitable solution of domain name disputes than court proceeding. In fact it is an attempt how to effectively force to the attack of domain speculators (in the positions of the Holders). The association CZ.NIC intends to use arbitration as the fastest way to decide disputes between domain speculators and the third parties that wants to assert their claim on the certain domain name. But the practical realisation of this "arbitration implementation" is not planned well to reach the presumed result.

This means that the Arbitration public bid in fact does not influence the way of solving domain disputes, despite of the opinion of the association CZ.NIC and the Registrars. According the information from web sites of CZ.NIC it seems to be clear, that the association presumes, that if the third party brings an action against the Holder at arbitrator, the arbitration agreement will be created by delivering this action to the arbitrator and this domain name dispute will be settled via arbitration. This article showed that it is not a true and explained that Arbitration public bid has no real effect on the rights and obligations between of the Holder and the third party and their domain dispute.

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