

## JONES DAY

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**Via fax in advance:** [REDACTED]

**Via courier**

Appellate Court of Cologne  
19th. Senate for Civil Matters  
Reichenspergerpl. 1  
50670 Köln

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### **Plea of Remonstrance**

In the preliminary injunction proceedings

**Internet Corporation for Assigned Names and Numbers (ICANN)**

**- Applicant -**

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versus

**EPAG Domainservices GmbH**

**- Defendant -**

Attorneys of record: Rickert Rechtsanwaltsgesellschaft mbH / Fieldfisher (Germany)  
LLP

**Docket- No.: 19 W 32/18**

we make reference to the Appellate Court's decision dated 1 August 2018 (hereinafter the "Order") and herewith submit a plea of remonstrance with the application to:

**to continue the immediate appeal proceedings pursuant to Section 321a para. 5  
ZPO;**

and

To order Defendant by way of a preliminary injunction, due to the urgency without prior oral hearing and issued by the presiding judge instead of the full bench, and under penalty of a disciplinary fine of up to EUR 250,000.00, to cease and desist,

1. as an ICANN accredited registrar with regard to any generic top level domain listed in Appendix AS 1,

from offering and/or registering second level domain names without collecting the following data from the registrant that registers a second level domain name through the Defendant:

The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the registered second level domain names;

and/or

The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the registered second level domain name.

And in the **alternative**,

2. as an ICANN accredited registrar with regard to any generic top level domain listed in Appendix AS 1,

from offering and/or registering second level domain names without collecting the following data from the registrant that registers a second level domain name through the Defendant,

- a) whereby the data is provided with requested consent of the persons named regarding use of the personal data,

and/or,

- b) whereby the data does not contain personal data relating to a natural person,

The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the registered second level domain names;

and/or

The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the registered second level domain name.

## REASONING

The Senate has based its decision on procedural reasons. It states that the application by the Applicant for a cease and desist injunction is in reality an application for a performance injunction. And it denies that the requirement of urgency is met regarding such claim.

The Applicant has a claim for the immediate appeal proceedings to be continued pursuant to Sec. 321a para. 5 ZPO. No appeal is otherwise possible against the Appellate Court's decision (Sec. 321a para. 1, No. 1) and the Appellate Court violated the Applicant's right to be heard, (Sec. 321a para. 1, No. 1). Further consideration of facts and legal consequences require an order in favor of the Applicant:

### **A. Violation of the Applicant's right to be heard**

By interpreting the Applicant's request as a performance injunction the Appellate Court surprisingly and without giving mandatory notice to the Applicant (Sec. 139 ZPO) based its decision on wrong facts and unduly applied excessive legal requirements which were never considered applicable by the Regional Court throughout the entire proceedings (see Section A. I. below). In addition, the Appellate Court did not take into account further crucial facts and legal consequences already explained by the Applicant, which require a decision in the Applicant's favor (see Section A. II. below).

#### **I. The Appellate Court failed to give the Applicant proper notice, Sec. 139 ZPO**

The Appellate Court based its decision on factual and legal aspects, which were unforeseeable by the Applicant, without giving a mandatory prior notice in accordance with Sec. 139 para. 2 ZPO (Zöller § 321a Rn. 10 "*Hinweisfälle*").

The Appellate Court redefined the Applicant's explicit application for a cease and desist injunction:

*"The Applicant aims for a regulating injunction. Like the alternative claim, the main claim asserted by the Applicant only on the basis of its wording, but not on the basis of its content, is directed at ceasing and desisting. With its main application, the Applicant aims to ensure that the Defendant collects the data of the technical and administrative contact and thus ultimately provides the services required in its view for the proper and complete performance of the contract. The same applies to the alternative claim, since it has the same direction, albeit with limitations.*

*Such regulating injunction aimed at satisfaction is subject to special conditions. The Applicant must demonstrate that he is urgently dependent on immediate com-*

*pliance and that the issuing of the order to avert major disadvantages is inevitable (cf. OLG Düsseldorf, judgment of 24 March 2004, VI - U (Kart) 35/03); OLG München, judgment of 14 September 1995, 29 U 3707/95). A cease and desist order to satisfy the main claim is only admissible if the reason for the order is based on an otherwise occurring irreparable damage causing an emergency situation, which does not correspond to a comparable damage to the Applicant and which in particular cannot adequately compensate a later claim for damages (cf. OLG Frankfurt, decision of 02.02.2004, 19 U 240/03)." (Decision, dated 1 August 2018, pp. 2-3)*

Sec. 139 para. 2 ZPO provides that courts may not base their decisions on aspects that "*a party has recognizably overlooked or has deemed to be insignificant*" without giving the party a prior notice. This applies to factual aspects as well as legal reasoning that the court applies. Indeed, it follows from the constitutional right to be heard (Article 103 GG) that where a court intends to base its decision on legal aspects that the parties could not have foreseen, the court must notify the parties so that they have a chance to submit their arguments (Zöller, 31. Aufl., Vor § 128, Rn. 6a; BVerfGE NJW 1994, 1274; Beschluss vom 28-06-1993 - 1 BvR 42/90). Notification of the parties is always required if the court wishes to base its decision on the ground of alleged lack of presentation of facts, which even a knowledgeable litigant need not foresee in view of the course of the proceedings to date (BGH NJW 29007, 1455). This is the case, inter alia, if the lower court has conveyed the impression that certain aspects which are now considered decisive are not relevant (BGH NJW-RR 94, 566, generally: Zöller, 31. Aufl., § 139 Rn. 6). So-called "surprise decisions" violate Section 139 para. 2 ZPO and Article 103 GG (BVerfGE NJW 1994, 1274).

In the present case, the Applicant expressly applied for a cease and desist injunction, whereas the Appellate Court assumes a performance injunction, which is ordered in preliminary injunction in exceptional cases of urgency only (Zöller, 31. Aufl., § 940, Rn. 6.). This was unforeseeable for the Applicant.

Nothing in the course of the proceedings enabled the Applicant to foresee the Appellate Court's reasoning. To the contrary, prior to the Appellate Court's decision, the Regional Court rendered two decisions in which the legal aspects that the Appellate Court now relies on have played no role at all, thus giving the impression that these aspects (i.e. the legal requirements of a performance injunctions) are not relevant.

Accordingly, the Applicant learned for the first time of the Appellate Court's reasoning in its final decision, leaving the Applicant without recourse or possibility to put forward its legal position. These circumstances fall squarely within the case law outlined above:

*“In case the first instance court has considered the pleading as conclusive the Applicant may trust that the Appeal court makes legal notice to the Applicant beforehand in case it has a different opinion in this.*

(BGH NJW-RR 1994, 566, guiding principle)

The Appellate Court may also not argue that the Defendant’s pleading sufficiently gave reason to expect this decision. The Defendant just claimed that the present case is to be considered as inadmissible because of anticipation of main proceedings (Protective letter of 28 May 2018, p. 12). However, the Applicant has made clear hereafter that it does not request collection of the data in dispute. The Applicant has expressly pointed out that it is not requesting the court to order the Defendant to offer and sell second level domain name registrations and to collect Admin-C and Tech-C data, instead the Applicant has explained that the **“Defendant would only have to refrain temporarily from selling further domain name registrations [...]”** (see Immediate Appeal p. 33).

The Defendant then also acknowledged the fact that this case is about a cease and desist order:

*“This is not changed by the surprising view of the Applicant that the Defendant could cease and desist from distribution of domains (Immediate Appeal, p. 35). **Certainly, one could follow any cease and desist order by stopping the whole business.** Would that be the only opportunity to follow the order the required balancing of interests would be also on the Defendant’s favor.”* (Defendant’s submission of 10 July 2018, p. 30)

Thus, the Defendant’s argumentation was based on the (correct) fact that **the Defendant has no obligation to offer or sell domain name registrations in case the court grants the requested order.**

The Regional Court has therefore not questioned the fact that the case is about a cease and desist claim. And the Appellate Court has surprisingly provided a different opinion based on wrong factual assumptions. It argues that the Applicant aims for a regulating injunction even though the Defendant acknowledges that it would just have to stop selling domain name registrations under the RAA in case of such court order.

The Appellate Court’s argumentation is therefore new and obviously based on wrong factual assumptions. Against this background, the Appellate Court was required to give the Applicant a mandatory notice according to Sec. 139 para. 2 ZPO. Only then would the Applicant have had the opportunity to explain to the Appellate Court why its request is, based on the true facts of the case, a mere request for a cease and desist injunction (see Section A. II. below), and why, in any event, even the stricter requirements of a preliminary injunction are fulfilled in the present case.

## II. The Appellate Court did not take into account crucial facts and legal aspects

The Appellate Court also did not take into account crucial facts and arguments presented in the Applicant's submissions and thus fundamentally misunderstood the Applicant's position (see Zöller § 321a Rn. 11 "*Übergehensfälle*").

### 1. Erroneous assumption of a request for a performance injunction

The Appellate Court fundamentally misunderstands the Applicant's request when it assumes a performance injunction instead of a cease and desist injunction. The Applicant has requested the Defendant to cease and desist from offering and/or selling second level domain names in violation of the RAA it has with the Applicant. The injunction would merely require the Defendant stop what it is doing: This is the very essence of a cease and desist claim. It is undisputed between the parties that the **Defendant is not obliged to offer or sell domain name registrations under the RAA** in case the Senate grants the order.

The Appellate Court nevertheless assumes a performance injunction. Performance injunctions aim at an immediate contractual performance (Zöller, 31. Aufl., Vor § 935, para. 2 and § 940 para. 6; BeckOK ZPO/Mayer ZPO § 935 Rn. 5, beck-online). For example, performance injunctions have been granted in the cases of claims for alimony payments, medical treatments costs, or evictions (for more examples see: Zöller, 31. Aufl., § 940, Rn. 6). All these examples have in common that the respective applicants urgently require a certain performance from the defendant. As described above, the injunction requested by the Applicant does not require any action or performance. If granted, the injunction would only order the Defendant to stop performance under the RAA with the Applicant. Consequently, the Appellate Court made an obvious mistake and fundamentally misunderstood the Applicant's claim when it assumed that the injunction requested by the Applicant is a performance injunction.

The Appellate Court does not provide any reasoning to support its view, except that it claims that the Applicant "*aims to ensure that the Defendant collects the data of the technical and administrative contact and thus ultimately provides the services required in its view for the proper and complete performance of the contract.*" This is neither what the Applicant aims at, nor what it applied for. The Applicant aims to stop the Defendant from continuing to accept registrations for second level domain names without collecting Admin-C or Tech-C data. This aim would be reached if the Defendant did not register any domain names at all.

The precedents cited by the Appellate Court also do not support its reasoning. Indeed, all of the cases cited by the Appellate Court concern different factual backgrounds,

which are not comparable to the case at hand. In all of them the respective applicant's cease and desist requests would have resulted in an obligation of the defendant to a certain contractual performance:

- a)** In the first case cited by the Appellate Court (OLG Düsseldorf, Urteil vom 24.03.2004, VI – U (Kart) 35/03), the applicant by way of a preliminary injunction sought (i) to stop the defendant from blocking certain SIM cards and (ii) to reactivate SIM cards that were already blocked. The court held that both applications are directed at performance of the defendant's existing contractual obligations, i.e. that the defendant provide its mobile network to the applicant for terminating a phone call. In the cited case, the defendant was under the obligation to terminate phone calls. Therefore, ceasing and desisting from blocking SIM cards meant that the defendant had to perform its contractual obligation. However, in the present case, the Defendant is under no obligation under the RAA or the Temporary Specification to offer and/or sell second level domain names. In other words, the Defendant could satisfy the court order requested by the Applicant by simply doing nothing, the defendant in the cited case had to provide its services to the applicant in order to comply with the contract and requested court order.
- b)** In the second case cited by the Appellate Court (OLG München, Urteil vom 14.09.1995, 29 U 3707/95), the applicant's request was for the defendant to stop using a certain test procedure when conducting elevator inspections. The court considered the requested cease and desist injunction to be in fact a request for a performance injunction because it would have resulted in an obligation of the defendant to a certain contractual performance, that is, the Defendant would have been obligated to conduct the inspections albeit without using the disputed test procedure. Again, the defendant in that case could not comply with its contractual obligations and the requested court order by doing nothing but had to perform its obligation under the respective contract. As there is no contractual obligation for the Defendant under the RAA or the Temporary Specification to offer and or selling second level domain name registrations the Defendant could satisfy the requested court order by simply doing nothing.
- c)** In the third case cited (OLG Frankfurt, Beschluss vom 02.02.2004, 19 U 240/03), the defendant had participated in a tender for certain devices. Pursuant to the tender, the defendant was obligated to deliver said devices to the party issuing the tender. The applicant had requested the court to order the defendant to cease and desist from using components that were not delivered by the applicant. Therefore, in order to meet its obligations under the tender, the defendant had to source the components from the applicant if the injunction were ordered. Thus, the defend-

ant could only comply with the cease and desist order by performing its contractual obligations with products of the applicant. Again, the case at hand is not comparable to such a situation. The Defendant can meet the obligation under the court order requested by the Applicant by simply doing nothing.

In all of these cases, the respective defendants were obliged by contractual agreement to a certain performance. The order applied by the applicants just had the aim to ensure such performance in a certain way. As explained above, this is not the case here, because the RAA does not oblige the Defendant to offer and sell domain name registrations. Further, the requested injunction does not obligate the Defendant to collect Admin-C or Tech-C data: the Defendant could also do nothing and still comply with the injunction, as already explained in the Immediate Appeal:

*“The Defendant would only have to refrain temporarily from selling further domain name registrations in such a way as the Applicant's certified registrar.”*

The Applicant thus asserts a contractual cease and desist claim in order to prevent the Defendant from further contraventions against its existing contractual obligations. This cease and desist claim is acknowledged by the German Federal High Court (BGH) in case of an ongoing contravention against the contractual obligations of an existing agreement whereby further damages resulting from such contravention still can be cured (BGH NJW 1995, 1284 and BGH NJW 2009, 1504).

The Senate has neglected the Applicant's respective pleadings in its decision process.

**2. The assumption of the Appellate Court that the data may still be collected at a later stage is wrong**

The Senate has further assumed that the Admin-C and Tech-C data can be collected at a later stage. This is surprising as not even the Defendant had argued this. Additionally, the Senate does not consider the Applicant's submission explaining that it is not possible to collect the Admin-C and Tech-C data at a later stage as this does not rectify that the Registrant was not able to designate an Admin-C and Tech-C until the data is collected (see Immediate Appeal, p. 34).

Both of the following statements by the Appellate Court regarding the collection of Admin-C and Tech-C data at a later stage are incorrect:

*“it is not apparent, nor is it claimed by the Applicant, that this technical change [in a way that the domain holders will no longer be able provide the Admin-C and Tech-C data] is irreversible”*



[...]

*[EPAG] could at a later point collect this data from the respective domain holder by a simple inquiry” (p. 3).*

In reality, as is apparent from the Applicant's submissions that the failure to collect Admin-C and Tech-C data will result in the irreversible loss of such data: If and to the extent the Defendant is not providing the opportunity of naming an Admin-C and Tech-C when registering a domain in the first place, Registrants have no other choice but to refrain from identifying an Admin-C and a Tech-C. Any Registrant, be it a grandmother operating a small website or a CEO of a multinational company having registered a multitude of second level domain names, would have no other choice than managing communication by themselves via its Registrants contact data.

Therefore, Admin-C and Tech-C data would not exist with regard to these domain name registrations. Even once a final decision is reached in this matter the respective domain name registrations would not contain Admin-C and Tech-C data. Each Registrant would have to be contacted by the Defendant and requested to provide Admin-C and Tech-C data (being the Registrant itself or a third person). And the Registrant would have to newly decide how to structure communication with regard to domain name registrations registered through the Defendant. Hereby, it is not said that all the Registrants would follow the request to provide respective data. And in case Registrants have registered a domain name for just one year, then that Registrant's information could be lost forever.

Thus, Admin-C and Tech-C data would not exist at least for years until the main proceedings are concluded. And there is a high probability that many Registrants do not provide Admin-C and Tech-C data at all at a later stage. The Defendant conceded itself that more than 50% of millions of existing domain name registrations contain Admin-C and Tech-C data. Thus, after years again millions of domain name registrations could be affected.

The Appellate Court therefore fundamentally misunderstood the immediate consequences of its decision.

### **3. The Appellate Court erroneously assumed "only an abstract danger"**

The Appellate Court arbitrarily rejected the (wrongly assumed) performance injunction based on a non-existent criterion. The Court held:

*“Irrespective of the fact that only the abstract danger of delays in a case of abusive practices cannot justify the sought preliminary injunction, the Defendant also stated, undisputed by the Applicant, that previous practical experiences do not confirm this.” (Decision, dated 1 August 2018, p. 4)*

First, the Appellate Court erred in holding that abstract dangers could not justify a preliminary injunction. Where a Registrant is not able anymore to identify an Admin-C or Tech-C in the WHOIS data there is by definition no Admin-C or Tech-C who could be approached in a situation where immediate action is necessary. Additionally, the procedural requirement of urgency does not require a concrete danger. In particular, the legally protected interests involved in case of abusive practices in the present case are of such high significance that also abstract dangers justify a preliminary injunction.

The Applicant has explained in detail the relevance of the Admin-C and Tech-C in particular to inform victims in case their website has been compromised (see application for preliminary injunction, p. 6 et seq.), to give cyber crime units or DNS misuse units the opportunity to seek urgent information or reaction (see immediate appeal, page 21) or to make sure that the Admin-C immediately reacts on requests regarding potential IP issues raised by example from trademark owners (see immediate appeal, page 21, 30).

This has remained undisputed. The limited description of the Defendant's alleged "practical experiences" during a short period of time since 25 May 2018, on which the Appellate Court relies, are of no informative value in this context. The affidavit provided deals with proceedings under UDRP rules and complaints about phishing vis-à-vis EP-AG. In other words, the affidavit as well as the Defendant's submission is mute on situations where third parties attempt to contact the Registrant and/or a Admin-C and/or a Tech-C. Thus, such affidavit does not evidence that the lack of Admin-C and Tech-C data can lead to delays in addressing abusive practices, and thus potentially aggravating the effects of such practices.

## **B. The Appellate Court's errors were decisive**

These violations of the Applicant's right to be heard were evidently decisive for the Appellate Court's decision. The Appellate Court's errors described above were also decisive [*"entscheidungserheblich"*].

A violation of the right to be heard is decisive whenever it cannot be excluded that the court would have reached a different decision, had the right to be heard not been violated (Zöller, 31. Aufl., § 321a, Rn. 12).

First, the lack of a notification pursuant to Sec. 139 para. 2 ZPO was evidently decisive for the Appellate Court's decision: Had the Appellate Court given such a notice and heard the Applicant on these aspects, the Appellate Court would have decided in the Applicant's favor. The Applicant would have had the chance to explain beforehand why its request is not for a performance injunction.

Second, the erroneous assumption of a request for a performance injunction is likewise decisive for the Appellate Court's decision. A cease and desist injunction is similar to an injunction of a protective measure (Sec. 935 ZPO), and its requirements are less strict (Zöller, 31. Aufl., § 940, Rn. 1). In particular, the urgency requirement (*Verfügungsgrund*) is less strict in the case of a simple cease and desist injunction. As the Appellate Court points out, a performance injunction is only admissible to avert "*major disadvantages*" or "*irreparable damage causing an emergency situation*". In contrast, in case of a cease and desist injunction the urgency requirement is already fulfilled if a change in the existing situation could frustrate or significantly impede the realization of the Applicant's rights (Zöller, 31. Aufl., § 935, Rn. 10).

The erroneous application of the much stricter standard was obviously decisive for the Appellate Court's decision, as the entire reasoning of the Court rests on it.

In case the Senate applies the procedural and material requirements of a cease and desist order the case is well-founded:

### **I. Material cease and desist claim**

Firstly, the Defendant has the clear contractual obligation to collect Admin-C and Tech-C data. At least with regard to the alternative claims (the option to collect Admin-C and Tech-C data not being personal data and/or with consent of the data subject) **this is neither questioned by the Regional Court nor by the Senate.**

The Defendant clearly contravenes against such contractual obligation of the RAA. As this contravention is not justified according to Sec. 242 BGB, the Applicant may assert a cease and desist claim in order to prevent further continuous contravention against such obligations arising from the existing contractual agreement (BGH NJW 1995, 1284 and BGH NJW 2009, 1504).

This is the case here.

## II. Urgency

According to Sec. 935 injunctions regarding the subject matter of the litigation are an available remedy given the concern that a change of the status quo might frustrate the realization of the right enjoyed by a party, or might make its realization significantly more difficult.

It is settled case law that cease and desist claims fulfil the requirement of urgency in case the Applicant has shown its interest to urgently assert its cease and desist claim. Because with such a preliminary cease and desist order the Applicant is in the position to avoid further continuous infringements until a final decision is reached after years (OLG Köln GRUR-RR 2016, 240; OLG Hamburg WRP 2010,201).

But even if the court requires the Applicant to credibly show severe consequences in case no order is granted, the Applicant has credibly shown respective facts to the court:

- The Admin-C and Tech-C data are essential part of the domain name system. The Tech-C position ensures that the Registrant provides a contact being competent to solve technical issues with regard to the domain name and respective content provided via this domain name registration (see application preliminary injunction, page 7). The Admin-C position ensures that the Registrant provides a contact being competent to change access control or to transfer the domain name registration. The delegation of such tasks also enables the Registrant to outsource liability and thus limit its own liability risks (see application for relief page 8,9). If such data is not collected such data is lost (see application for preliminary injunction, page 22/23). The Registrant would not have any possibility to delegate Admin-C and Tech-C tasks for years. The request to provide Admin-C and Tech-C data at a later stage after having achieved a final decision in main action proceedings does not cure such loss. While this may enable to designate an Admin-C and Tech-C going forward, it does not change the fact that the Admin-C and Tech-C role is effectively abolished until a decision in the main action is taken.
- Registrants make use of the option to provide Admin-C and Tech-C different from the Registrant. Nearly 5 million of 10 million domain name registrations registered via Tucows Inc., the mother company of the Defendant, refer to such additional Admin-C and/or Tech-C data. This shows that there is a practical need for delegating these tasks to experts taking responsibility for communication and obligations in connection with the domain name registration (immediate appeal, page 7/8 and 28).
- The Admin-C and Tech-C contacts are considered to be important contact options for third persons. Public authorities like cyber crime units or DNS misuse units or trade-

mark owners detecting an infringement may contact the Admin-C or Tech-C directly being competent to immediately react on their request (immediate appeal, p. 21, 30).

- In particular in cases where the Registrant is not regularly online and thus unavailable there is a strong interest for the Registrant to protect its interest regarding the prolongation of the domain name registration and an immediate reaction in case of third party claims (immediate appeal page 30/31).
- And it is obvious from general life experience that it becomes more dangerous for the Registrants and the domain name system in general in case non-competent persons or unavailable persons have to fulfill the tasks of an Admin-C and Tech-C in comparison to skilled individuals or professional service providers.

These rights and interests would be frustrated in the present case at least for years until a final decision is reached in this case.

Furthermore, there is a risk that other companies follow the opinion of the Defendant in case no immediate decision on the question of violation of GDPR by collection of Admin-C and Tech-C data is rendered. The Applicant has therefore repeatedly stressed the importance of the case for the Applicant and the domain name system in general.

**And also the Defendant acknowledges that main action proceedings would not serve the purpose to quickly clarify the legal questions regarding the GDPR** and apply for transfer of these questions to the ECJ (see Defendant's brief of 11 July 2018, page 32 to 35).

Further, the Defendant cannot argue that such cease and desist claim unfairly affects its interests. The Defendant has decided not to request Admin-C and Tech-C data in its registration process even though their own legal advisors have explicitly advised that a collection of Admin-C and Tech-C data with consent is legally possible. And with such order the Defendant would still have the opportunity to decide whether the Defendant wishes to further offer or sell the second-level domain name registrations in question in accordance with the contract or not.

In any case, according to the BGH in case of a cease and desist claim even if rendered within preliminary injunction proceedings it is regularly reasonable to expect that the defendant does not further distribute the goods (most recently BGH I I ZB 96/176 PharmaR 2018, 135 (138)). This should equally apply to domain name registrations.

The Defendant is further protected by Sec. 945 ZPO or may claim necessity of a security deposit but should not be allowed to further continuously infringe its contractual obligations to the Applicant.

Thus, in the present case the requirement of urgency is fulfilled had the Appellate Court not wrongly applied stricter requirements on urgency and assumed that the Admin-C and Tech-C data can be collected at a later stage and had it not wrongly rejected a concrete danger from the delays in collecting Admin-C and Tech-C data, it would not have rejected the urgency of the Applicant's claim.

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