

DECISION

Place and date of decision : Arnhem, 19 November 2003

Case number : 2003/06

Appellant : Meester J.L. de Kreek

The Respondent : Foundation for Internet Domain Registration in the
Netherlands

Appeal against : Decision of the Foundation for Internet Domain Registration in
the Netherlands
dated 28 May 2003

Concerning : The domain name *digitale-advocaat.nl*

Introduction

- 1.1 On 6 May 2003, prompted by an enquiry from the Appellant, Meester J.L. de Kreek, regarding the domain name *digitale-advocaat.nl*, the Respondent (also referred to below as 'SIDN') asked the Appellant's registrar, InTouch NV, to forward the forms supporting the registration of the domain name *digitale-advocaat.nl* for perusal, as provided for in Article 12 of the Regulations on the Registration of '.nl' Domain Names (referred to below as 'the Regulations'). Upon examining the said forms and accompanying documents, SIDN concluded that it did not comply with the conditions set out in the Regulations. SIDN subsequently asked the Appellant and the Appellant's registrar several times to provide forms that did comply with the Regulations.
- 1.2 On 28 May 2003, SIDN accordingly made a formal decision, as provided for in Article 14.1, under c, of the Regulations, to withdraw the Appellant's right to use the domain name *digitale-advocaat.nl* and to remove the name from the Register of Domain Names. According to SIDN, it had come to the latter's attention that, on 26 March 2003, the registrant of the domain name *digitale-advocaat.nl* had been changed, and when SIDN had asked to peruse the forms and documents required under the Regulations for such a change, correct documentation could not be provided. SIDN stated that its intention was to implement its decision on 28 June 2003. When communicating its decision, SIDN gave the Appellant the opportunity to provide SIDN with the necessary documentation by 27 June 2003. In justification of its decision, SIDN stated that the registration of the domain name *digitale-advocaat.nl* was governed by the Regulations, and that the documentation identified in Article 12 of the Regulations as necessary for the registration of a domain name was apparently not available. SIDN also stated that it had given the Appellant and the latter's registrar ample opportunity to bring the situation into line with the conditions set out in the Regulations. SIDN therefore concluded that the Appellant and the latter's registrar had defaulted on the contractual obligation arising out of Article 12.2 of the Regulations. In the notice regarding its decision, SIDN drew attention to Article 14, clause 3, of the Regulations, which states that a party disadvantaged by a decision of SIDN may appeal to the Complaints & Appeals Board (also referred to below as 'the C&AB') within thirty days.
- 1.3 In an e-mail dated 25 June 2003, received on 25 June 2003, the Appellant appealed to the C&AB against SIDN's decision of 28 May 2003 regarding the domain name *digitale-advocaat.nl*. The said appeal related not only to the latter domain name, but also to the domain names *advocaat.nl*, *lawyers.nl*, *lawlink.nl*, *wwwadvocaat.nl*, *digitaleadvocaat.nl*, *troonrede.nl*, *prinsjesdag.nl* and *miljoenennota.nl*.
- 1.4 In his notice of appeal, the Appellant petitioned the C&AB to annul SIDN's decision of 28 May 2003 and to rule that SIDN was not entitled to demand anything from the Appellant. The Appellant also petitioned the C&AB to rule that the arbitration requirement referred to in Article 21 of the Regulations was not applicable to the domain name *digitale-advocaat.nl*. Furthermore, the Appellant petitioned the C&AB to require SIDN to modify the WHOIS accordingly. The Appellant took the view that

SIDN's decision was inconsistent with statutory law, the Regulations and SIDN's constitution. It was also contended that the assertions made by SIDN were 'incorrect'. To sign a registration contract for a domain name would, the Appellant argued, be to enter into an agreement whose provisions were inconsistent with the statutory law and regulations governing general terms and conditions of trade. The Appellant additionally expressed dissatisfaction with SIDN's attitude and approach. The Appellant indicated that any change(s) to the registrant of the domain name *digitale-advocaat.nl* had been made before the current Regulations on the Registration of '.nl' Domain Names were introduced in January 2003. According to the Appellant, the appropriate forms, accompanied by supporting information, were submitted to SIDN at the time such changes were made. Finally, the Appellant indicated that his intention was to provide SIDN with the necessary forms by the deadline of 27 June 2003. The Appellant's reason for doing so was, he said, to prevent exacerbation of the situation and did not diminish his objections and complaints, as detailed in the notice of appeal.

- 1.5 Accompanying an e-mail dated 4 July 2003, and a letter dated 4 July 2003, received on 7 July 2003, SIDN sent the C&AB a copy of a communication received by e-mail from the Appellant on 27 June 2003, stating that the latter had submitted a fresh set of duly completed and signed forms to SIDN. The e-mail sent to the C&AB by SIDN was also accompanied by a copy of a letter from SIDN to the Appellant, dated 3 July 2003, in which SIDN stated that the Appellant had still not provided correctly completed forms, and that SIDN's decision regarding the domain name *digitale-advocaat.nl* therefore remained effective. In response to SIDN's letter of 3 July 2003, the Appellant submitted a set of forms with further modifications to SIDN. Accompanying a letter dated 22 July 2003, received on 23 July 2003, SIDN provided the C&AB with a copy of a letter from SIDN to the Appellant dated 21 July 2003, stating that, despite being given numerous opportunities to do so, the Appellant had still not provided SIDN with a set of correctly completed forms. The copied letter also stated that, pending the outcome of the appeal procedure, the Appellant could still submit the necessary forms to SIDN, but that in the interim SIDN's decision of 28 May 2003 remained effective.
- 1.6 As provided for in Article 6.6 of the Regulations Governing the Composition, Working Methods and Procedures of the Complaints & Appeals Board (referred to below as the 'Complaints and Appeals Regulations'), the C&AB asked SIDN to provide additional information regarding the history and status of the domain name *digitale-advocaat.nl*. SIDN provided the requested information in an e-mail dated 23 July 2003. In addition, as permitted by Article 6.2 of the Complaints and Appeals Regulations, SIDN submitted a table listing the correspondence between SIDN and the Appellant. Copies of some items of this correspondence had previously been sent to the C&AB by the Appellant or by SIDN.
- 1.7 In a letter and e-mail dated 22 August 2003, as provided for in Article 6.6 of the Complaints and Appeals Regulations, the C&AB asked the Appellant (partly in view of the provisions of Article 15 and 29 of the Regulations) to specify and provide documentary evidence as to the date on which the domain name *digitale-advocaat.nl*

was transferred to him. On 22 August, the Appellant made a summary response to this request by e-mail, but did not provide any documentary evidence.

- 1.8 In response to the C&AB's notice regarding the date of the session at which the case was to be considered, the Appellant sent an e-mail, dated 1 September 2003, indicating that he intended to argue at the session that the C&AB was not competent to consider the case, partly because it was not impartial. The C&AB responded on 15 September 2003 by letter and e-mail, making it clear to the Appellant that, if and insofar as he intended to formally assert that the C&AB was not competent, this assertion and the supporting argumentation should be made in writing to the C&AB prior to the session.
- 1.9 In an e-mail dated 19 September 2003, the Appellant provided argumentation in support of his assertion that the C&AB was not competent to consider the case. The crux of his argument was that the C&AB derived its authority from the revised Regulations that came into force on 29 January 2003, which the Appellant asserted were not applicable to the domain name *digitale-advocaat.nl*. The Appellant also argued that no decision regarding establishment of the C&AB or the appointment of its members was available. The Appellant made a third assertion, namely that the C&AB was not impartial, because Article 26, clause 2, of the Complaints and Appeals Regulations stated that, subject to consultation with the C&AB, SIDN had the authority to decide all matters concerning which the Complaints and Appeals Regulations made no provision or was unclear. To further support his assertion of partiality, the Appellant argued that the C&AB's members were drawn from the market or the industry and therefore had an interest in SIDN. Fourth, the Appellant contended that the C&AB did not apparently arrive at its decisions without interference from or consultation with SIDN. As a fifth argument against the competence of the C&AB, the Appellant cited 'the fact that it is held that a decision of the C&AB is final'. Finally, the Appellant argued that his relationship with SIDN should be viewed in the context of contract law. In a further e-mail dated 21 September 2003, the Appellant added to his third point by asserting that the various rules and regulations were formulated in such a way that SIDN could manipulate a decision so as to render it 'a complex decision under circumstances not foreseen by the regulations, so that – possibly after discussing the matter with your Board – the import of the decision is ultimately determined by SIDN itself'.
- 1.10 After the session on 24 September 2003, the Appellant sent the C&AB an e-mail dated 25 September 2003, received on 26 September 2003, in which (contrary to the procedure for the submission of a notice of appeal and supporting documents, as set out in the Complaints and Appeals Regulations) he submitted an unsolicited supplementary document and asked for it to be regarded as part of his notice of appeal.

2 Interim decision

- 2.1 Partly in consideration of the Appellant's formal assertion that the C&AB was not competent to consider the case, the Board reached an interim decision regarding this aspect of the appeal on 24 September 2003.

- 2.2 The C&AB received the notice of appeal within the time limit specified in the Regulations and the appeals procedure of the Foundation for Internet Domain Registration in the Netherlands. Hence, the Appellant's appeal against SIDN's decision of 28 May 2003 was punctually submitted. Furthermore, the Appellant made prompt payment to SIDN of the fee due in accordance with Article 5.4 of the Complaints and Appeals Regulations.
- 2.3 With regard to the Appellant's arguments concerning the competence of the C&AB to consider the case, the C&AB's deliberations were as follows. The C&AB is of the opinion that, in its handling of this case, the Board has acted within the authority afforded to it by the Regulations and the Complaints and Appeals Regulations. In the opinion of the C&AB, the Appellant has misinterpreted various aspects of the Regulations and the Complaints and Appeals Regulations, as in the first and second points made in support of his contention. It is also the case that not all the points made by the Appellant can be judged by the C&AB; those that the Board cannot judge include the fifth point and sixth (supplementary) point. The third and fourth points are unfounded, because the members of the C&AB do arrive at their decisions without interference or consultation, as stipulated in Article 4.4 of the Complaints and Appeals Regulations. Furthermore, as SIDN pointed out in its decision of 28 May 2003, the Appellant had the opportunity of pursuing his case by other legal means and through other legal channels.
- 2.4 On the basis of the foregoing considerations, the Complaints & Appeals Board of the Foundation for Internet Domain Registration in the Netherlands is of the opinion that it is competent to consider the appeal lodged by Meester J.L. de Kreek.

3 Consideration of the appeal

- 3.1 The appeal was considered at the session held on 24 September 2003, which was attended by Meester J.L. de Kreek and, representing SIDN, by Meester K. Vink (Legal Officer, SIDN Operations Department) and Meester B.E. Vastenburg (SIDN company lawyer).
- 3.2 At the session, the Appellant presented an account of the history of the domain name *digitale-advocaat.nl* and associated registrant changes. In that context, the Appellant asserted that the documentation regarding the domain name was in order. The Appellant also reiterated the arguments set out in his notice of appeal.
- 3.3 SIDN explained its position in a written statement. SIDN argued that, in relation to the appeal, two questions were of particular importance: whether the Regulations that came into effect on 29 January 2003 applied to the domain name, and whether it was reasonable for SIDN to require the Appellant to comply with the formal registration conditions concerning the use of appropriate, correctly completed forms. In SIDN's opinion, judgement of the appeal turned on the applicability of the formal registration conditions, as referred to in Article 3 and following, and in Articles 12, 14 and 15 of the Regulations. SIDN concluded that the Appellant had had ample opportunity to

familiarise himself with the formal registration conditions, which were communicated to him beforehand through his registrar and could also be perused on the public area of SIDN's website. Furthermore, SIDN argued, the Appellant had by signing various forms acknowledged having read the Regulations that came into force on 29 January 2003. Even if he had not done so, SIDN asserted that the Appellant had had ample opportunity to familiarise himself with the conditions. According to SIDN, therefore, the formal registration conditions formed part of the contract between the parties. SIDN took the view that it was reasonable to expect the Appellant to comply with the formal registration conditions, and that by not fulfilling his obligations arising out of the Regulations, the Appellant was accountably in breach of his contract with SIDN, and thus in default. SIDN also contended that, contrary to the Appellant's contention, the question of the acceptability of the arbitration requirement referred to in Article 21 of the Regulations was not relevant to this case, and that alternative legal avenues were open to the Appellant if he wished to obtain a ruling on the legal validity or applicability of the arbitration arrangements.

- 3.4 Following these presentations, there was further oral debate and the Appellant called on the C&AB to rule in the manner requested in his original notice of appeal. SIDN indicated that the Appellant had not used the correct form to request registration of the change of registrant. Although the form was dated 1 January 2003, the form in question was not officially introduced until after that date. Furthermore, SIDN asserted, in March 2003 there was another change to the name under which the domain name *digitale-advocaat.nl* was registered. The C&AB asked SIDN to provide a copy of the registration contract relating to the domain name for clarification.
- 3.5 After the session, the Appellant agreed with SIDN that the documentation relating to the domain name *digitale-advocaat.nl* would be regularised. On 24 September 2003, the Appellant accordingly provided SIDN with a correct and fully completed form for changing the registrant of the domain name. The Appellant subsequently also provided SIDN with a registration contract, as required by SIDN. In response, SIDN decided to rescind its decision of 28 May 2003 regarding the domain name *digitale-advocaat.nl*. In the notice of its rescindment decision of 25 September 2003 (reference SIDN/KV/2003/52), SIDN also stated that the administrative block on the domain name was lifted with immediate effect, and that the domain name *digitale-advocaat.nl* was thus freely available to the Appellant. SIDN explained its rescindment on the grounds that the Appellant had now satisfied the formal registration conditions contained in Article 3 of the Regulations, thus removing the basis for the decision of 28 May 2003. SIDN informed the C&AB of its decision by e-mail dated 26 September 2003. In response to these developments, the Appellant sent the C&AB an e-mail on 7 October 2003, asking the Board to nevertheless rule in the manner requested in his original notice of appeal, to the effect that the arbitration requirement referred to in Article 21 of the Regulations was not applicable to the domain name *digitale-advocaat.nl*.

4 **Judgement**

- 4.1 At issue in this case was the legitimacy of SIDN's decision of 28 May 2003, to deny the Appellant use of the domain name *digitale-advocaat.nl* and cancel its registration, as provided for in Article 14, clause 1, of the Regulations. The provisions of the said passage give SIDN the right to deny a registrant use of a domain name and cancel its registration, if SIDN may reasonably conclude that any of the circumstances referred to in the said passage exist.
- 4.2 It is beyond the remit of the C&AB to consider the Appellant's petition that the Board should rule that the arbitration requirement referred to in Article 21 of the Regulations is not applicable to the domain name *digitale-advocaat.nl*, and should require SIDN to revise the WHOIS accordingly. The Regulations allow appeal to the C&AB exclusively on the bases referred to in the Articles 8, 14 and 23 of the Regulations. Other legal avenues are open to the Appellant if he wishes to pursue the matters referred to in the said petitions. Similarly, the C&AB has no authority to consider the Appellant's petition that the Board should indicate whether by signing a domain name registration contract, one is entering into an agreement whose provisions are inconsistent with the statutory law and regulations governing general terms and conditions of trade.
- 4.3 Furthermore, the C&AB rules that the document sent to the C&AB by the Appellant by e-mail on 25 September 2003 cannot be taken into consideration. The Complaints and Appeals Regulations provide no grounds for the submission of this document, and the provisions of Article 6.4 of the Complaints and Appeals Regulations preclude the C&AB from considering unsolicited documents and communications.
- 4.4 The C&AB rules that the basis of the Appellant's appeal, as contained in the notice of 25 June 2003, has been removed by SIDN's decision of 25 September 2003, and that Meester J.L. de Kreek's appeal to the C&AB is not sustainable.
- 4.5 Having concluded that the Appellant's appeal is not sustainable, the C&AB has not considered the material question of the legitimacy of SIDN's decision of 28 May 2003.

5 **Decision**

The Complaints & Appeals Board of the Foundation for Internet Domain Registration in the Netherlands:

Hereby declares that the Appellant's appeal of 25 June 2003 is not sustainable.

This decision has been issued by Meester A. Oskamp, chairman, in the presence of Meester A.P. Meijboom and J.C.M. van Oers, members of the Complaints & Appeals Board, and Meester H.J.M. Gardeniers, member of and secretary to the Complaints & Appeals Board.

The chairman

The secretary

Meester A. Oskamp

Meester H.J.M. Gardeniers