DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU POVERENIČKU AGENCIJU

ASC-09-0072

In the lawsuit of

[redacted] Claimant/Appellant

[redacted] Prishtinë/Priština,

represented by [redacted], Lawyer in Prishtinë/Priština

vs.

[redacted], **POE** Respondent

former [redacted]

now [redacted], Prishtinë/Priština

the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC) composed of Richard Winkelhofer, President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Eija-Liisa Helin, Judges, on the appeal of the Claimant against the decision of the SCSC of 15 October 2009, SCC-09-0090, after deliberation held on 29 April 2010, delivers the following

DECISION

The appeal is grounded.

The decision of the SCSC of 15 October 2009, SCC-09-0090, is set aside. The Trial Panel is ordered to retry the claim.

The Appellant is obliged to pay court fees in the amount of 60,-- Euros for the appeals proceedings to the Special Chamber.

The Trial Panel will have to decide on the amount of costs in the first instance procedure and their allocation among the parties, as well as the allocation of the costs of the appeals proceedings.

Reasons at Law:

In his claim of 15 May 2009, the Claimant seeks the verification of ownership rights over a certain parcel of land, acquired and possessed by his father, which (due to unknown reasons) has been registered in the cadastral books in the name of the Respondent. A power of attorney dated 7 May 2009, including its English translation, was submitted alongside the claim, together with other documents.

With their order of 10 August 2009 the Trial Panel requested the Claimant to submit within 14 days 1.) an address for service of the Respondent, 2.) "all material facts pertaining to the claim, legal arguments on which the claim is based and a list of evidence which the Claimant intends to produce with translation into English", 3.) "a power of attorney granting the authority to the lawyer that signed the claim to represent the Claimant in the proceedings before the Special Chamber with its translation into English (the power of attorney attached to the claim authorizes the lawyer only to represent the Claimant before the Municipal Court in Prishtinë/Priština)", and 4.) "the evidence that written notice of the intention to file an action was submitted to the Kosovo Trust Agency in accordance with UNMIK Regulation 2002/12 with its translation into English", indicating that in case of failure "to submit the above required documents within 14 (fourteen) days from acknowledgement of the service, the Special Chamber shall reject the claim on the grounds of inadmissibility."

Within the time limit stated (on 4 September 2009), the Claimant submitted an(other) power of attorney in Albanian language, and the copy of a "notification on filing of the claim", dated 6 July 2009, in Albanian and English language. Furthermore, he named an address of the Respondent, claiming that this address was publicly known; in addition, he referred to the legal arguments and the provided evidence in the claim, and maintained that the power of attorney included also his representation before the Special Chamber. Lately, the names of (further) witnesses were provided.

With the challenged decision of 15 October 2009, the Trial Panel of the Special Chamber rejected the claim as inadmissible. In its legal reasoning, the decision refers to the order of 10 August 2009. Even upon that order, the Claimant "failed

to provide the information as required in section 27.2 UNMIK AD 2008/6. In particular, the Claimant did not provide a translation into English language of the power of attorney, additionally the document provided by the Claimant shows that the notification to the Privatization Agency of Kosovo was effected too late, namely after the submission of the claim, while according to the law it should be done 60 days prior to filing a claim to the Special Chamber". Thus the claim had to be rejected as inadmissible, the Trial Panel concluded.

In the appeal, timely filed by the Claimant, the Appellate Panel of the Special Chamber is requested to set the appealed decision aside and to return the case to the first instance for retrial.

The appeal is grounded.

The Appellant submits that with his answer of 4 September 2009, the Trial Panel's order of 10 August 2009 was fulfilled entirely. He particularly claims that all relevant facts had been given and the evidence had been provided, that the address of the Respondent was well known in Prishtinë/Priština, and that there was no (further) reason to have the power of attorney translated. Though, the English translation of the power of attorney dated 7 May 2009, as already submitted with the claim, was attached again (together with a further English translation).

The Appellant's argumentation is correct:

Address of the Respondent:

Section 27.2 (c) UNMIK AD 2008/6 provides for the statement of the address for service of the Respondent in the claim. According to Section 28.2 (f) UNMIK AD 2008/6, in conjunction with Section 28.4 leg cit, the failure to submit the address shall result in an order for completion or correction of the claim within a prescribed period, and the dismissal of the claim as inadmissible if the order is not fulfilled in time.

In the claim at stake, such an address was provided timely upon the Trial Panel's order. Therefore, the address was not an issue any more as to the admissibility

of the claim. It has to be noted on that occasion, that in case a Claimant maintains the Respondent's address is well known, without providing it, it may well be advisable to ask for this address (as done by the Trial Panel here); however, the (final) dismissal of a claim as inadmissible would require that the service on the Respondent at that address actually failed. Or, to put it differently: A claim may only be dismissed as inadmissible on the grounds of Section 27.2 (c) AD 2008/6, if the Claimant does not upon request provide an address at all, or if service fails at an address claimed to be notorious.

Power of Attorney:

The (English translation of) the power of attorney, as foreseen in Section 24.6 in connection with Sections 25, 28.3 (f) and 28.4 AD 2008/6, is among the admissibility criteria for a claim, too.

In the case at hand, the English translation of the power of attorney of 7 May 2009, as submitted together with the claim, reads: *"...I give this power of attorney to ... to represent ... in juridical-civil ... and administrative matters with competent courts, ... UNMIK authorities and KTA and other organs to be conducted at Municipal Court in Pristina ... I give this power of attorney to ... to represent me in juridicial matters before UNMIK, courts and other organizations to realize my rights ...."*

Contrary to the Trial Panels position as laid down in the attacked decision, and their order of 10 August 2009, this power of attorney is not limited to the representation of the Appellant before the Municipal Court Prishtinë/Priština. Therefore, the reason given by the Trial Panel for dismissing the claim on these grounds is not valid.

Facts and legal arguments, list of evidence (Section 27.2 [e] AD 2008/6):

Section 28.2 (f) lists among the admissibility criteria for a claim (all) "... the requirements of Sections 25 and 27 ...", at first sight giving the impression that all the elements listed therein may lead to the dismissal of the claim as inadmissible, if not provided upon order (see Section 28.4 AD 2008/6). A closer

reflection, however, reveals that the scope of this provision has to be reduced on teleological grounds:

Apparently, one of the main common principles of continental European Civil Procedural Codes is the conclusiveness of a claim (as the question if the claimed facts, in connection with the legal arguments presented may have the legal consequence as requested in the claim) not being an issue of the admissibility of the claim, but of its merits. If (sufficient) facts and / or legal arguments are not presented, or the claimed facts do not lead to the conclusion as drawn by the Claimant, the claim can only be subject to rejection as ungrounded, if not clarified upon request.

The same goes for the list of evidence: On principle, only contested facts need to be proven by the Claimant. If the Respondent does not contest the facts as claimed in a conclusive claim, there is no need to take evidence. A list of evidence may come in handy only if the gathering of evidence is necessary. If at all, a claim may be rejected as ungrounded if the Claimant fails to submit evidence to proof the facts the Respondent has contested. Prior to the involvement of the Respondent, the list of evidence may well be asked for, if the Claimant has to clarify on other issues, anyway, but cannot be an issue at that stage of the proceedings. Moreover, the missing list can never lead to the dismissal of the claim.

In the case at stake, the Respondent had not been involved yet. Material facts, the list of evidence, and legal arguments therefore are not yet relevant issues. In addition, it cannot be seen to what extent the Trial Panel considers the claim being insufficient: Facts and legal arguments are given (the claimed ownership over a specified parcel of land, the registration in the name of the Respondent without known reasons), alongside the evidence to use (the name of witnesses). The missing link between the claimed purchase of the Claimant's father and the claimed ownership of the Claimant (as to the question of legal succession) is a matter of the conclusiveness of the claim. The Trial Panel did not ask for clarification regarding this issue; as shown above, it may lead to the rejection of the claim at a later stage, if not clarified.

As a consequence, the legal reasoning of the Trial Panel as regards the issue of facts, evidence and legal arguments cannot be followed.

Notification of the Agency (Section 28.2 [e] AD 2008/6):

According to Section 29.1 UNMIK REG 2002/12 (in conjunction with Section 28.2 [e] AD 2008/6), written notice of the intention to file action against a SOE has to be given to the Agency prior to the submission of the claim (the Trial Panel's reference to the 60 days notice as foreseen in Section 30.2 UNMIK REG 2002/12 is incorrect, as this provision only applies to claims against the Agency). The notice to the Agency about the intention to file a claim is among the admissibility criteria as set forth in Section 28.3 UNMIK AD 2008/6, as well. Even though the admissibility criteria have to be examined ex officio, at that early stage of the proceedings (without the Respondent having been involved yet) the mere contention by the Claimant that a proper notice was given, is – on principle – sufficient, following the same pattern as described above. If a Claimant maintains (in the claim or upon order pursuant to Section 28.4 AD 2008/6) that a proper notification was filed, the Trial Panel cannot dismiss the claim as inadmissible out of this reason. Unless the claim is inadmissible on other grounds, it has to give the Respondent the opportunity to take a stand on the (claimed) notification, alongside the merits of the case (by serving the claim and other documents on the Respondent; *audiatur et altera pars*). It rests with the Respondent then to contest the facts as maintained in the claim, including the alleged (timeliness of the) notification. Only if the Respondent (potentially represented by the Agency) contests the (timeliness of the) notification, the Claimant will be required to proof the notification.

In the case at stake, the Respondent has not had the opportunity to contest the notification yet. The Claimant submitted a copy of the notification dated 6 July 2009, but, clearly showing that it was filed after the submission of the claim (15 May 2009), and therefore not being in line with Section 29.1 UNMIK REG 2002/12 in conjunction with Section 28.2 (e) UNMIK AD 2008/6. Under these circumstances no further necessity arose to involve the Respondent; after the Claimants submission of 4 September 2009, it was already clear that not all admissibility criteria were met at the date of the filing of the claim.

However, it has to be taken into account here that from 6 July 2009 the PAK was aware of the claim. Since then, they did not opt to enter into the proceedings as representatives of the Respondent. Bearing in mind that the notification's aim is to inform the Agency about (potential) claims, and to provide them with the opportunity to take the matter up on behalf of the SOE, the notification's target has been met (in the meantime). In addition, it has to be taken into consideration that the duty of a claimant to notify the agency in advance adds extra burden to him as to the access to justice, and must therefore be interpreted in a restrictive way. Under the specific circumstances of the case it could even be considered an abuse of a legal right, if the (PAK on behalf of the) Respondent would now refer to the untimely notification. In this peculiar situation, the Appellate Panel considers the untimely notification without (further) relevance as to the adjudication of the claim.

Thus the dismissal of the claim as inadmissible was not appropriate. The attacked decision therefore cannot persist and has to be revoked. The Trial Panel will have to deal (again) with the claim, refraining from a further dismissal based on the same grounds.

When retrying the claim, the Trial Panel may deem it necessary (later) to clarify the above mentioned issue of legal succession on the Claimant's side, and the fact that the sales contract provided does neither concern the parcel of land in dispute, nor any of the parties of the case.

Court fees / costs:

According to Section 11 REG 2008/4 and Section 66 UNMIK AD 2008/6, the Trial Panel has to decide on the allocation of costs of the proceedings in first instance, and the Appellate Panel – when deciding a case finally - on the allocation of costs of the proceedings in both instances. The case at hand has to be retried in the first instance; therefore, no decision on any allocation on costs can be taken for the time being, as this allocation depends on the future decision of the Trial Panel. As of now, only the amount of court fees in the 2nd instance can be determined:

Based on Section 57.2 UNMIK AD 2008/6 the Special Chamber issued Additional Procedural Rules regarding Court Fees, in force from 10 March 2010. They read as follows:

'Section 10 of Administrative Instruction No. 2008/2 on Unification of Court Fees of the Kosovo Judicial Council of 27.11.2008, concerning "The Court Fee Tariffs", is hereby – with the following specifications - declared to be applicable for the court proceedings in front of the SCSC.

Section 10.9 till Section 10.23 are – mutatis mutandis – applicable for the appeals procedure in front of the Trial Panel and in front of the Appellate Panel.

As a clarification, Section 10.11 is also applicable for the procedure governing the appeal against 2nd instance decisions of the Trial Panel.

(...)

These Additional Procedural Rules enter into force on 10 March 2010 and are valid until 31 December 2010.'

The court fees in both instances consist on the one hand of a fee for the filing of submission(s), on the other hand of a fee for the issuance of (a) decision(s).

As said above, it will rest with the Trial Panel to decide upon the amount of court fees in first instance, consisting of the two components, and their allocation.

As to the appeals procedure:

The amount of the fee for the filing of the appeal as governed by Section 10.11 of the Administrative Direction of the Kosovo Judicial Council No.2008/2 on Unification of the Court Fees ("ADJ") is 30,-- Euros.

Section 10.15 ADJ determines that for decisions dismissing claims (as inadmissible) only half the amount of the fee as ruled in Section 10.1 ADJ (which on principle bases the court fees on the value of the claim) has to be paid, up to a maximum of 30,-- Euros. This applies to decisions in second instance, too (Section 10.21 ADJ refers to Sections 10.12 to 10.18 ADJ). Section 10.15 in

conjunction with Section 10.21 covers decisions in second instance dismissing appeals as inadmissible, as well as decisions on appeals against first instance decisions that do not touch upon the merits of the case.

Unless the value of the claim is proven less (in first instance by the claimant, in second instance by the appellant), according to Section 10.1 in conjunction with Sections 10.15 and 10.21, the court fee is 30,-- Euros.

In the case at hand, neither in first nor in second instance statements as to the value of the claim, were made. The court fee for the decision in second instance therefore is set to 30,-- Euros.

As a consequence, the following court fees for the appeals proceedings finally apply:

Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros
Court Fee Tariff Section 10.15 in conjunction with 10.21 and 10.1 (decision in second instance)	30 Euros
Total	60 Euros

These court fees are to be preliminarily borne by the Appellant who is therefore obliged to pay the mentioned amount to the Special Chamber (see Article 2 [1] Law on Court Fees, Official Gazette of the Socialist Autonomous Province of Kosovo of 3 October 1987).

It will rest with the Trial Panel to allocate these costs of the appeals proceedings among the parties, together with the decision in first instance, including the decision on the (future) costs of the first instance.

Richard Winkelhofer, EULEX Presiding Judge	signed
Torsten Koschinka, EULEX Judge	signed
Eija –Liisa Helin, EULEX Judge	signed
Tobias Lapke, EULEX Registrar	signed