

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 POVERENIÇKU AGENCIJU
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**ASC-10-0013**

In the lawsuit of

**██████████, Joint Stock Company**

Prishtinë/Priština

Claimant

vs.

**1. Privatization Agency of Kosovo (PAK)**

Ilir Konushevci 8, Prishtinë/Priština

**2. ██████████, Joint Stock Company**

██████████), Prishtinë/Priština

Respondents

**██████████, Limited-Liability Company**

██████████, Prishtinë/Priština

Represented by ██████████, attorney-at-law from Prishtinë/Priština,

██████████

Appellant

**To: Appellant**

The Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), Appellate Panel, composed of Richard Winkelhofer, President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Eija-Liisa Helin, Judges, on the appeal of the Aragosta Group, Limited-Liability Company, against the decision of the Trial Panel of the SCSC of 27 October 2009 (SCC-09-0151), after deliberations held on this 29 April 2010, issues the following

**DECISION:**

1. The appeal is dismissed as inadmissible.
2. The Appellant is obliged to pay court fees in an amount of 60,-- Euros for the appeals proceedings.

**Factual and Procedural Background:**

On 27 October 2009, the Trial Panel issued a decision in case no. SCC-09-0151, JSC "██████████" (Prishtinë/Priština) vs. 1. Privatization Agency of Kosovo / 2. ██████████ (Prishtinë/Priština), granting a preliminary injunction to the claimant and thereby enjoining the Privatization Agency of Kosovo from carrying on any procedure related to the privatization of the ██████████ (Prishtinë/Priština). The Special Chamber further decided that the preliminary injunction would remain in effect until the final decision of the Special Chamber in this case. ██████████ (Prishtinë/Priština) was obliged to deposit with the Special Chamber within 3 (three) banking days from the service of the mentioned decision the amount of 5.000 Euros to indemnify the Privatization Agency of Kosovo for any damages, should the claim not be substantiated. JSC ██████████ (Prishtinë/Priština) was advised that the failure to deposit such security without a valid reason could result in the *ex officio* withdrawal of the injunction.

The Appellant filed its appeal against this decision on 27 January 2010.

The Appellate Panel on 10 February 2010 issued an order requesting the Appellant to submit within 14 (fourteen) days from the receipt of the order a copy of the decision against which the appeal is brought, including a copy of the acknowledgement of service of this decision, the English translation of the supporting documents to the appeal, including the power of attorney, a certified copy of the power of attorney granted to the Appellant's lawyer, and an explanation on which legal argument the Appellant who, following the wording of the appeal, did not participate as a party in the first instance proceedings, bases its right to appeal against the challenged decision.

The Appellant confirmed the receipt of this order on 15 February 2010. On 27 February 2010, the Appellant submitted several documents, some of which only in Albanian. It submitted a statement on which legal argument it bases its right to appeal against the challenged decision. Additionally, the Appellant included in its submission a confirmation from the Chamber of Advocates of Kosovo, according to which the Appellant's representative, [REDACTED], has been registered as a lawyer in the register of the Chamber of Advocates of Kosovo since 5 September 2001. Neither the English nor the Albanian documents provided with the Appellant's submission following the Special Chamber's order dated 10 February 2010 include a certified power of attorney. Additionally, some of the requested translations have not been provided.

### **Legal Reasoning:**

The appeal is inadmissible for the following reasons:

1. The Appellant has no right to join the proceedings by filing an appeal on its own.

As the SFRY Law on Contested Procedure (Official Gazette of SFRY 4/77, 36/80, 69/82) and the new "Kosovar Law on Contested Procedure (Law No. 03/L-006)" are not contradicting each other with regard to the relevant stipulations in this case, the Appellate Panel does not have to take a stance on which of the laws is applicable. The Appellant's appeal is inadmissible whichever of the laws the Appellate Panel applies, for the below mentioned reasons.

Article 271.2 of the new "Kosovar Law on Contested Procedure (Law No. 03/L-006)" stipulates: "*The interfeerer can enter the court process during the entire procedure that ends with a verdict of the absolute decree over the claim in charge, as well as during the procedure initiated with extraordinary measures of attack.*" Furthermore, Article 273.2 of the new "Kosovar Law on Contested Procedure (Law No. 03/L-006)" stipulates: "*If the third party has entered the*

*contestation procedure after the verdict over the claim charge became absolute, the party owns the right to present the extraordinary measure of strike against the verdict."* Both of these stipulations indicate that the interferer, which the Appellant would like to become, does have the right to enter existing proceedings, but not to initiate ordinary appeals proceedings on its own without prior participation in the proceedings.

Article 206 of the SFRY Law on Contested Procedure (Official Gazette of SFRY 4/77, 36/80, 69/82) stipulates: "*A person whose legal interest in a pending action between other persons is for one of the parties to prevail, may join such party. The participating third party can enter the dispute at any time during the proceedings, until the final decision upon the claim is reached, as well as during the proceedings which continued on the basis of demand for extraordinary legal remedy. [...]"* Furthermore, Article 208 of the SFRY Law on Contested Procedure (Official Gazette of SFRY 4/77, 36/80, 69/82) stipulates: "*The participating third party must admit to the dispute in the state as it happens to be at the moment of his entering the dispute. During the further course of the proceedings, he is authorised to make motions and undertake all procedural steps within the terms within which such steps may be taken by the party he has joined. If the participating third party has entered the dispute after the decision on the claims became effective, he is also entitled to submit extraordinary legal remedy. [...]"*

These stipulations also indicate that the third party does not have the right to initiate ordinary appeals proceedings on its own. Insofar, the Appellate Panel reiterates what it said above concerning the Kosovar Law on Contested Procedure. The entering of a third party into a law suit is thus in the phase after the issuance of a first instance decision only possible, if at all, if the regular parties (or one of them) already (or at the same time) lodged a legal remedy against the decision. Any other interpretation of the law would infringe the basic principle of party disposition, which is common to most European Civil Law Systems and foreseen in Article 3 of the SFRY Law on Contested Procedure as well as in Article 3 of the Kosovar Law on Contested Procedure.

The Appellant is therefore not entitled to enter into proceedings between the first instance parties by filing an appeal with the Appellate Panel as long as none of the parties lodged such an appeal. The appeal at hand is therefore inadmissible.

2. Additionally, the Appellant has not provided a certified power of attorney and some of the translations requested by the Appellate Panel with the clarification order dated 10 February 2010, which also makes the appeal inadmissible.

Section 28.2 UNMIK AD 2008/6 reads as follows:

*"(...) the Claim is admissible if*

*(f) The pleadings submitted conform to the requirements of sections 25 and 27 of the present Administrative Direction."*

Section 58.2 of the UNMIK AD 2008/6 states:

*"The rules of procedure and evidence that govern proceedings in the Trial Panels shall apply mutatis mutandis to proceedings in the Appellate Panel"*.

The appeal failed to meet the admissibility requirements set out in Section 60 and Section 28.2 in conjunction with Section 58.2 UNMIK AD 2008/6. The Appellant was advised by the order issued on 10 February 2010 to submit within 14 (fourteen) days from the receipt of the order the above mentioned documents, and it was duly warned that should it fail to submit a completed or corrected appeal which meets the requirements set forth in Section 28.2 (f) of UNMIK AD 2008/6 (in conjunction with Section 58.2 leg cit) within the prescribed period, the Appellate Panel would reject the appeal on the grounds of inadmissibility.

The Appellant did not comply completely with this order. It did not include a certified power of attorney and some of the translations have also not been provided. The appeal is therefore inadmissible and has to be rejected according to Section 61.4 UNMIK AD 2008/4, also for these reasons.

The decision rendered by the Trial Panel on 27 October 2009 remains effective.

3. According to Section 11 REG 2008/4 and Section 66 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.

Based on Section 57.2 of 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 2<sup>nd</sup> 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 the decision in first instance was rendered before the day of entry into force of the above mentioned rules, only court fees for the appeals procedure are to be dealt with here:

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.

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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 have been made. The court fee for the decision in second instance therefore is set to 30,-- Euros.

In total, the following court fees for the appeals proceedings 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 borne by the Appellant.

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