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

20 March 2013

C-I.-12-0042

[redacted]
Represented by lawyer [redacted]

Claimant

Vs.

Privatization Agency of Kosovo, 8 Ilir Konushevci Street, Prishtinë/Priština
Represented by [redacted] Attorney at law from [redacted]

Respondent

The Specialized Panel 1 of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters composed of the Presiding Judge Alfred Graf von Keyserlingk, Judge Shkelzen Sylaj and Judge Ćerim Fazliji, after deliberation held on 20 March 2013, issues the following

Judgment

The Claim is rejected as ungrounded

Factual and procedural background

On 8 June 2012 the Claimant submitted a claim challenging the validity of Decision rendered by the Respondent dated 31 May 2012 to "exercise a Share Call Option" on the shares of Newco [redacted], privatised by the Kosovo Trust Agency as a "Special Spin Off" on 10 August 2006 . The Claimant states that he already before this rightfully acquired the ownership of these shares and that the Respondent had no right to reverse the sale and exercise the Share Call Option on 31 May 2012.

The Claimant further filed a request for issuing a preliminary injunction to prevent the PAK from implementing the challenged Decision until two months after the claim is finally decided. On 25 June 2012 the Specialized Panel 1 rejected the Request for Preliminary Injunction as ungrounded.

On 27 September 2012 the Appellate Panel quashing the Specialised Panel Decision and partially granted the Request for Preliminary Injunction until the final decision on the merits.

In its defence the Respondent submits that the claim should be rejected as ungrounded. He argues that he acted in full compliance with the Privatization Contract of 10 August 2006 and the Law on PAK and he states that pursuant to the Privatization Contract the Claimant should have fulfilled commitments before 13 October 2009. The commitments are: investment commitment 20,200,000.00 euro and employment commitment for 270 employees during the first 6 months and 540 at the end of 12 months. Instead the Claimant would have implemented only 8.32% of the investment commitment and 79.52% of the employment commitment. The Respondent refers to Article 6.2.2 of the commitment agreement and Articles 1 and 8 of the Law on PAK. He alleges that Article 8.6 of the Law on PAK gives mandate to the Respondent to reverse the privatization sale.

The Claimant alleges, that the contract of 10 August 2006 has been modified later and that the Respondent contributed the failures and omissions of the Claimant to fully comply with his contractual obligations. He assumes that pursuant to Article 6.2 of the commitment agreement the Share Call Option shall only be exercised upon written instructions of the Exercising Authority and that pursuant to Article 1 of the commitment agreement, concerning the definition of "Exercising Authority" in the event that the SRSG no longer exists, he shall be replaced by an arbitral tribunal formed in accordance with procedures set out at 9.3.2(b) of the Agreement. The Claimant states that the contract clearly refers to an independent and impartial tribunal, which would decide whether or not the parties have implemented their contractual obligations. The Claimant further states that the PAK as the legal successor of the KTA has only the right to ask from the Exercising Authority permission to exercise the Share Call Option and not to reverse the sale by a unilateral decision. The Claimant assumes that, as there was no arbitration, the reverse of the sale is invalid. It would violate the Constitution of Kosovo, Article 6 ECHR and Article 1 Protocol 1 ECHR. According to the Claimant the Special Chamber can decide itself on the validity and, in case it feels not entitled to do so, it should refer the question to the Constitutional Court in accordance with Article 113 of the Constitution.

The Respondent contests that the contractual relation between the parties after 10 August 2006 has been modified and that the respondent has contributed to the failure of the claimant to fulfil the contract.

Legal Reasoning

The claim is ungrounded.

The Decision of the Respondent of 31 May 2012 to exercise a share call option on the stock shares of Newco [redacted] is valid.

1.
The Claimant by commitment agreement of 10 August 2006 has accepted the obligation to invest a minimum of 20.200000,00 Euro and to employ a minimum of 270 full time (or equivalent) paid workers in the first six month and 540 full time (or equivalent) paid workers in the end of 12 month after the date of entry into force of the Commitment Agreement. (Art 1.2, Art. 1.3.1 and 2 of the Commitment Agreement of 10 August 2006).

He also granted the Kosovo Trust Agency a Share Call Option in case of an egregious violation of the Commitments (Art 6.2 of the Commitment Agreement of 10 August 2006).

This contractual situation remained unchanged. It was valid when the Respondent exercised the Share Call Option on 31 May 2012. The allegation of the Claimant that the contract has been modified after 10 August 2006 was contested by the Respondent and the Claimant did not allege and specify any facts which would allow assuming a modification of the contract. Insofar reference is made to the court's Order of Clarification of 9 January 2013 and the Claimant's submission of 24 January 2013.

2.
The Claimant violated the commitment for investing and for employing, this is uncontested. The parties only dissent on the issue to which degree the commitments were violated. The Respondent alleges that the Claimant fulfilled his obligation to invest only to 8.32 % and his obligation to employ only to 79,52 %. The Claimant alleges he fulfilled to a higher degree and the Respondent would have contributed to the nonfulfillment. However, the Respondent submitted exact figures referring to the Auditors report of [redacted] of 16 November 2009. Therefore, it would have been the Claimant who had to contest by displaying detailed figures and also any contribution of the Respondent to the nonfulfillment would have to be alleged in detail by the Claimant. Also insofar reference is made to the court's Order of Clarification of 9 January 2013 and the Claimant's submission of 24 January 2013.

The court evaluates the Claimant's violations as egregious.

This means that the Kosovo Privatization Agency rightfully reversed the sale by exercising the Share Call Option.

3.
The Respondent acquired this right by virtue of Art 31.3 of the Law No.04/L-034 on the Privatization Agency of Kosovo (the PAK Law), which transferred all assets held by the Kosovo Trust Agency to the Respondent.

The PAK Law replacing KTA by PAK is valid Kosovo Law (Judgment of the Constitutional Court of Kosovo Case No. KL 25/10 of 4 February 2010, Paragraph 55). The Panel as a Kosovar Court holds itself bound by this decision (Art 112.1 Kosovo Constitution, Decision of the Special Chamber SCA-09-0042).

4.

The Board of Directors of the Respondent could validly issue the Share Call. It needed no prior written instruction by the SRSG as prescribed in Article 6.2 Commitment Agreement and it needed no prior arbitration. Both requirements have been abolished by Art. 31.4 of the PAK Law. The power of the SRSG was transferred by Law on the Board of Directors of the Respondent. Instead of the SRSC instructing KTA to issue a Share Call now the Board of Directors of the Respondent can issue the Share Call without instruction. It is of no relevance whether the SRSG still exists because the PAK Law gave his power to the Respondent's Board of Directors. The Respondent's Board of Directors Decision leaves no room for action of the SRSG and leaves no room for arbitration. Anyhow arbitration would presuppose that the SRSG does not exist anymore. He exists. His tasks and competences may have changed.

The change of law does not mean that the Respondent being a party in the commitment agreement and being foreseen as a party in a possible arbitration changes into the position of a judge in its own case. The Respondent remains a party also in exerting its right to a new Share Call. It remains exposed to the Special Chambers independent judicial appraisal whether it has acted legally or not in doing so.

5.
Art.31.4 PAK Law does not violate the Constitution of Kosovo.

It is true that by Art.31.4 PAK Law the contractual duties and rights of the parties of the Commitment Agreement are changed. The Claimant loses the

chance that the SRSG refrains from instructing a Share Call and he also loses the right to enter arbitration in case the SRSG does not exist anymore.

However these losses are not unconstitutional. The legislator may modify contractual relations and does it often. Such Legislation is only unconstitutional if the legal change violates rights and guarantees granted by the constitution.

By virtue of Article 2.1 of the Kosovo Constitution the Rights and Freedoms granted by the European Convention on Human Rights are incorporated into the Constitution. This means that a violation of the European Convention of Human Rights necessarily is also violation of the Kosovo Constitution.

The Claimant, by referring to the two ECHR decisions Stran Greek Refineries an Stratis Andreadis v. Greece (Application no.13427/87) and Zielinski and others v. France (ECHR1999-VII) claim a violation of the right to fair trial (Art 6(1) European Convention on Human Rights and the right to peaceful enjoyment of possessions (Article 1of the Protocol No 1(Pi-1)).

a.
Article 1 (art.6-1) of the Convention provides:
" In the determination of civil rights and obligations …., everyone is entitled to a fair…. hearing…..by (a) tribunal…."

The abolition of the contractual right for arbitration did not expose the Claimant to an unfair trial. The right for fair trial in Kosovo is a right to be fairly tried by the Jurisdiction of Kosovo. This right is protected by the Human Rights Convention and thereby also by the Kosovo Constitution. The contractual arbitration is not protected by Constitution. The ECHR in the case Stran Greek Refineries an Stratis Andreadis v. Greece (Application no.13427/87) found only in a very specific and extreme case that the abolition of arbitration was a violation of fair trial:
The Greek state being a contractual party has been convicted by an arbitration court by a final and binding decision to pay damages. The first instance state court and the Appeals court held this decision and the reporting judge of the Court of Cassation had sent an opinion in favor of the Claimant. Then, after the state had asked for postponement of the hearing a law has been promulgated which denies the enforcement of arbitration awards. This law was exactly tailored to the case of the Claimant.

The important difference between this case and the case at hand is that the claimant in the case at hand had not yet a judgment by the arbitration awarding compensation of damages but just a contractual position to be judged by arbitration. It is indeed a breach of procedural fairness if the state as debtor devaluates a title which would give the claimant a right for compensation. Also

the creation of a law specifically tailored to this procedure and against this claimant was unfair. However this does not mean that the state may not abolish arbitration before it took place. The Claimant does not even allege that he would have succeeded to prevent the Respondent from a Share Call in the arbitration procedure. This is not likely as the financial commitment has been fulfilled only to 8.32%.

Also the case Zielinski and others v. France (ECHR1999-VII) is not comparable with the case at hand regarding fair trial. Also in this case the legislator interfered into the procedure after the Claimant had obtained a favorable court decision.

b.
Article 1of the Protocol No 1(Pi-1) provides
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions"

The Claimant's contractual right to go in arbitration is no possession in the sense of this provision. Only a favourable result of such arbitration, for instance a monetary benefit could become possession. Also the ECHR did not qualify the right to go to arbitration as possession.

As a result may be stated that the abolition of arbitration by the PAK Law is not unconstitutional. Therefore, the Panel has to apply the PAK Law also as far as the Claimant loses the way to arbitration. The court does not refer the question of constitutional compatibility to the Constitutional Court because the panel is not uncertain on the question of compatibility (Art113 Kosovo Constitution).

The claim had to be rejected as ungrounded.

Court costs

The court does not assign court costs as the courts presidium till now did not issue a written schedule which is approved by the Kosovo Judicial Council (Art.57 Paragraph2 Special Chamber Law). This means that till now there is no sufficient legal base to impose costs.

Legal Advice

Against this judgment the Claimant may appeal. **Such Appeal can be submitted within 21 days to the Appellate Panel of the Special Chamber.** The Appeal shall also be served to the other party and submitted to the Trial

Panel by the Appellant, all within 21 days. The Appellant shall submit to the Appeals Panel a proof that he has served the Appeal also to the other party.

The prescribed time limit begins at midnight of the day, when the Appellant has been served with the judgment in writing.

The Appellate Panel shall reject the Appeal as inadmissible if the Appellant has failed to file it within the prescribed period.

The Respondent may file a response with the Appellate panel within 21 days from the date he was served with the appeal, submitting the response also to the appellant and the other party.

The appellant then has 21 days after being served with the response to its appeal, to submit to the Appellate panel and to serve the other party its own response. The other party then has 21 days after being served with the appellant's response to submit to the Appellant and to the Appellate panel its counter-response.

Alfred Graf von Keyserlingk
Presiding Judge