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

SCC-09-0167

Claimant

1. **M.M.** from XX
2. **M.N.,** from XX

Both represented by lawyer XX

Vs.

Respondent

XX, SOE, XX,
Represented by **Privatization Agency of Kosovo**, Ilir Konushevci Street, No. 8, Prishtinë/Priština

The first Panel 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 Qerim Fazliji, after deliberation held on 24 October 2012, issues the following

JUDGMENT

The claim is rejected as ungrounded

Factual and Procedural Background

On 3 September 2009 the Claimants filed a claim for declaring null and void the sales contract, dated 25 March 1964, their predecessors S.Ž. and P.M. signed with the Respondent Agricultural Industrial Cooperative XX (SOE) (Page 14-17 of the file). They also request a judgment by which the Respondent is obliged to return to the Claimants the property subject to the contract i.e. agricultural land with the surface of 2.41.80ha, located at "Alipasina Cesma", registered as cadastral plot 116, Cadastral Zone Fushë

Kosovë/ Kosovo Polje, Possession List 401, and they are obliged to return the purchase price. Alternatively, they request to be compensated with land of similar type.

The Claimants allege that the Claimants' predecessors signed the above contract against their will and under intimidation that they would be expelled from the communist party and their families would lose their jobs and right to education. They claim that the conditions of the contract were not agreed upon; particularly the price their predecessors received was not fair and did not correspond to the market value of the property.

By order of the Panel of 8 August 2012 PAK was requested to submit an authorization appointing a lawyer who is a member of a bar association or chamber of advocates to represent it before the Special Chamber.

Legal Reasoning

The allegations of the Respondent submitted by its representative PAK are not to be taken into account because they were not submitted by a lawyer.

Before the Special Chamber every party, except for natural persons, must be represented by a lawyer (Annex Art 24 SCL 04/L-033). This also applies to SOEs represented by PAK. The wording of this provision lacks any indication why it should not apply. Art 73, 74, 85 and 86 Code of Contested Procedure (Law No03/L-006, CCP), regulating who can be party, which actions can a party take and who can represent a party allows that parties and representatives who are not registered lawyers act in court but in relation to these provisions Annex Art 24 SCL is Lex Posterior and Lex Specialis. The Legislator issued Annex Art 24 SCL when the CCP already existed and he regulated by the Annex Art 24 SCL a special procedure in a special court, different from other Kosovo courts. The Annex Art 24 SCL supersedes also Art 29 Law on the PAK (04/L-034, PAKL) because it is issued later and regulates not representation generally, as does the PAKL but specifically representation in front of the SCSC. This also applies to Art29.2 PAKL which regulates the Agency's "Legal standing" to pursue any rights of an enterprise in a competent court on behalf of the enterprise concerned.

The Legal regulation that natural persons do not need a lawyer but all others need a lawyer does not violate Art 73 and 74 CCP. This is not possible

because Art 73 and 74 do not apply. They are superseded by Art 24 Annex SCL.

The requirement to be represented by a lawyer is not a violation of the constitutional right of Equality before the Law. It may remain open whether PAK as a "public body" (Art1.1 PAKL) can plead for the fundamental right of equality, which is historically and in its constitutional context a right of natural persons and private legal entities against the state, not a right for a state organ against the state. The Respondent has a right to be treated equal, but constitutional Equality does not mean that everybody is treated equally regardless if they are reasonably and non-discriminatory aspects of differentiation. It is neither unreasonably nor discriminatory to privilege natural persons in front of the court in relation to legal entities (or a public state authority). Often, if not even regularly natural persons do not have the financial means to afford a lawyer. This under constitutional aspects is a sufficient reason for their privilege to appear before the SCSC without a lawyer.

As result it may be stated that the Respondent as everybody except for natural persons must be represented before the Special Chamber by a lawyer who is member of a bar association or a chamber of advocates. As the respondent was not represented by a registered Lawyer it has to be regarded as not having appeared in court.

However no default judgement against the Respondent can be issued (Art 52.2 Annex SCL). The facts submitted by the Claimant do not support his Claim.

1.
The sales contract of 25.03.1964 between the Respondent and S.Z. and P.M. was originally valid.

A contract is concluded by both parties forming and expressing the will to create the same legal result. S.Z. and P.M. and the Respondent of the sales contract of 25.03.1964 wanted that the sale of the immovable takes place and expressed this common will in the sales contract. S.Z. and P.M. cannot be equated with a person whose hand has been led with force to sign or who was exposed such violence that the formation of an own will was not possible. The threat to exclude them from work and from the communist

party was influencing their will, but not making it virtually impossible for him to abstain from selling his land.

The plaintiffs assessment that the Constitution of the Socialist Federal Republic of Yugoslavia of 7. April 1963 (in the following: Constitution 1963), which than was valid also for the territory of today Kosovo did not allow the threat exerted on him is correct. To force the owners by threat to sell had the effect of an expropriation which the constitution would have allowed only if fair compensation would have been granted (Art 25 Constitution 1963). The threat to exclude the owners from work if they would not sell was a violation of their right to work (Art 36 Constitution 1963) and also other constitutional rights may have been violated by threatening the owners.

However this does not make the sales contract void. The legal system can choose between many options how to react on a breach of constitution. It can open the path to a Constitutional Court, it can give the inflicted party the right to revoke, or it can make the contract void from the very beginning or it can provide for financial compensation and so on. It may even abstain from imposing any legal consequence to a breach of the constitution which means to rely exclusively on the preparedness of the authorities to comply with the constitution and on the political ban of any breach. Neither the Constitution 1963 nor any law of the Socialist Federal Republic of Yugoslavia declared that contracts which have been concluded under an unconstitutional threat are per se invalid from the very beginning.

2.
The contract remained valid.
The Constitution 1963 did not offer to the Claimant the option to revoke the sales contract.
The Law on Obligations of the Socialist Federal Republic of Yugoslavia of 1 October 1978 (in the following: Law on Obligations 1978) regulates nullity of contracts and relatively void contracts and how to invoke nullity (Art 103 till Art 117 Law on Obligations 1978) but this law is not applicable retroactively (Art 1106 Law on Obligations 1978). Therefore also provisions of this law regarding prescription do not apply.

Art 8a of the Law of the Socialist Republic of Serbia of 23.7.1987 amending the Serbian Law on Transfer of Immovable Property of 1981 (in the

following: Serbian Amendment of 23.7.1987) also does not lead to the invalidity of the sales contract of 25.03.1964.

The provision reads as follows:

A contract on transfer of immovable property shall be null and void if it was concluded under pressure and by the use of violence, or under such conditions and in such circumstances that threatened or failed to secure the safety of people and property, the exercise of protection of rights, freedoms and responsibilities of the man and citizen, or the legality and equality of nations and ethnic groups.

The provisions of paragraph 1 of this section shall also apply to contracts on transfer of immovable property concluded prior to the coming into effect of this law.

This Article is not applicable on the contract of 25.03.1964.

The Transfer of Immovable Property has been regulated by Law in the year 1981 in Serbia by the Serbian Assembly (Serbian Official Gazette 43/81, in the following: Law of Serbia on Transfer) and in the same year in Kosovo by the Kosovo Assembly (Kosovo Official Gazette 45/81, in the following Kosovo Law on Transfer). The Serbian Amendment of 23.7.1987 according to its Art. 1 only amended the Serbian Law on Transfer. The Serbian Legislator also had no power to amend a law of another legislature. So the Kosovo Law on Transfer remained without the amendment of Art 8a of the Serbian legislation. The result was that according Kosovo Law contracts which have been entered under thread remained valid and under Serbian Law they became invalid.

However Art 12 of the Amendment of the Law of Serbia on Transfer stipulates that Art 8a of the Amendment shall be equally applied in the entire territory of the Republic of Serbia (which then included Kosovo).This means according to Kosovo Law Art 8a was not applicable in Kosovo and according to Serbian Law it was applicable. The Serbian constitution of 1974 although requiring that provincial law must not deviate from the law of the Republic of Kosovo (Art 228 of the Constitution 1974) does not resolve the conflict by just stating that the Law of the Republic of Kosovo prevails but requests that the provincial Law is applied till the Constitutional Court of the republic of Serbia has decided on the conflict (Art 229 of the

Constitution 1974). As such decision has not been issued Art 8a of the Serbian Amendment of 23.7.1987 does not apply in Kosovo.

The contract of 25.03.1964 by which the Claimant lost his ownership remains valid. Therefore the claim under the presently applying law had to be dismissed as ungrounded.

3.
But even assumed Art 8a of the Amendment of 23.7.1987 of the Law of Serbia on Transfer would apply in Kosovo the invalidity of the contract of 25.03.1964 could today not anymore be invoked. It would be forfeited. The claim pleading for invalidity has been submitted to the court 45 years after the contract and 22 years after the Serbian Amendment has been passed. There may have been years in which the original threat which caused the Plaintiff to accept the contract continued to exist, preventing the Claimant from claiming invalidity. However, the claimant did not till 2009 have to fear to lose his work or to be excluded from his party when he challenges the contract of 1964. The legal community, above all the present possessor of the immovable, could trust that a right not executed for so many years will remain unexecuted. This trust deserves protection and the protection takes place by assuming forfeiture.

4.
This does not mean that the plaintiff must remain without any satisfaction. It is up to the legislator to follow Martti Ahtisaari's Comprehensive Proposal for Kosovo Status Settlement - according to Article 143 of the Constitution of Kosovo directly applicable and even superseding the Constitution itself - which explicitly requests that Kosovo addresses the property restitution (Article 6 of Annex VII of the Comprehensive Proposal). Before a Kosovo law regulating the issues of property restitution is passed the court cannot give legal relief to the claimant.

Court fees:

The court does not assign costs to the Claimant as the courts presidium till now did not issue a written schedule which is approved by the Kosovo Judicial Council (Art.57 Paragraph 2 Special Chamber Law). This means that till now there is no sufficient legal base to impose costs.

Legal Remedy

An appeal may be field against this Judgment within 21 days with the Appellate Panel of the Special Chamber. The Appeal should be served also to the other parties and to the Trial Panel by the Appellant within 21 days. The Appellant should submit to the Appellate Panel evidence that the Appeal was served to the other parties.

The foreseen time limit begins at the midnight of the same day the Appellant has been served with the written Judgment.

The Appellate Panel rejects the appeal as inadmissible if the Appellant fails to submit it within the foreseen time limit.

The Respondent may file a response to the Appellate Panel within 21 days from the date he was served with the appeal, serving the response to the Appellant and to the other parties.

The Appellant then has 21 days after being served with the response to his appeal, to submit his response to the Appellate Panel and the other party. The other party then has 21 days after being served with the response of the Appellant, to serve his rejoinder to the Appellant and the Appellate Panel.

Alfred Graf von Keyserlingk
Presiding Judge