

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.

Factual and Procedural Background:

On 10 October 2008, the Claimant filed a claim with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), against the Respondents, requesting the SCSC to annul the contracts on purchase and sale of immovable property, Cert. No. [REDACTED] dated 14 July 1961 and Cert. No. [REDACTED] dated 20 November 1963, and to oblige the Respondents to return the cadastral parcels no. [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] of the Cadastre Municipality Llaple Seljo, in total an area of 2.98,91 ha, to the Claimant in exchange for the purchase price.

With order of 23 December 2009 the Trial Panel ordered the Claimant to present the proof that notice has been given to the Agency in due time pursuant to Sections 29.1 and 30.2 of UNMIK Regulation 2002/12. On 13 January 2010, the Special Chamber received a submission submitted by the Claimant with an attached copy of a notification to the Privatization Agency of Kosovo (PAK), which had been logged by the PAK on 27 October 2008.

Following this submission the Trial Panel, with its decision dating 11 February 2010 (SCC-08-0269), rejected the Claim as inadmissible because of a lack of a **prior** notification of the intention to file a claim as foreseen by Section 29.1 of UNMIK Regulation 2002/12, without giving any more elaborate reasoning than a plain quotation of the law .

On 5 March 2010 the Claimant filed an appeal against the above mentioned decision, requesting the Appellate Panel of the SCSC to abrogate the decision and to return the case to the Trial Panel for retrial.

The Claimant in his appeal claims an essential violation of procedural rules regarding the application of Sections 28.4 and 28.2 of UNMIK AD 2008/6, in conjunction with Section 29.1 of UNMIK Regulation 2002/12.

Legal Reasoning:

The appeal is admissible and grounded.

The Appellate Panel cannot follow the Trial Panel's only implicitly (thus not fully complying with Section 9.3 lit b UNMIK REG 2008/4) given reasoning that the wording of Section 29.1 UNMIK REG 2002/12 cannot be subject to interpretation on the grounds of taking into consideration the ratio legis.

Notification of the Agency:

According to Section 29.1 UNMIK REG 2002/12 (in conjunction with Section 28.2 [e], 28.3 UNMIK AD 2008/6), written notice of the intention to file an action against a SOE has to be given to the Agency prior to the submission of the claim. The notice to the Agency about the intention to file a claim is among the admissibility criteria as set forth in Section 28.3 of 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. 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 27 October 2008, but, clearly showing that it was filed after the submission of the claim (10 October 2008), and therefore not being in line with Section 29.1 UNMIK REG 2002/12 in conjunction with Section 28.2 (e) AD 2008/6. Under these circumstances no further necessity arose to involve the Respondent; after the Claimants submission of 13 January 2010, 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 27 October 2008 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 obviously 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, especially taking into consideration that it took the Trial Panel more than one year to deliver a decision on the admissibility of the claim (see also decision of the Appellate Panel, ASC-09-0072, 29 April 2010).

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.

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
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VII

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 Frank Koschinka, EULEX Judge	signed
Eija-Liisa Helin, EULEX Judge	signed
Tobias Lapke, EULEX Registrar	signed