

Procedural and factual background:

On 12 August 2004 the Claimant filed a claim against the Respondent, Publicly Owned Enterprise [REDACTED] with the Municipal Court in Deçan/Deçani. In his claim the Claimant requested the Municipal Court to oblige the Respondent to award him damages of 21,500 (in the English translation "ceiling of the damage 21,200", in Albanian 21,500) Euros for the reason that his house was burnt "by the electrical energy, which at that point was higher than usually and before burning of the house there was a continuous interruption of power in every ten minutes". During the proceedings at the Municipal Court the claim for damages for the house was reduced to 6,564.20 Euros.

The Respondent contested the entire claim stating that no evidence was submitted that the damage occurred due to the fault of the Respondent.

The Municipal Court in Deçan/Deçani in its judgment C number 237/2004, dated 11 April 2008, partially allowed the action of the Claimant and obliged the Respondent to pay compensation for the destroyed house in an amount of 6,564.20 Euros and for the damaged electrical installation in an amount of 675 Euros, both with legal interest from 17 August 2004 until the final payment, and the costs of the proceedings in an amount of 787.80 Euros. The Municipal Court stated that the Claimant's house had been connected with the power supply system of low voltage governed by the Respondent. The fire in the Claimant's house resulted from an unusually high voltage within the power supply. The Municipal Court considered that the material damage to the Claimant was therefore caused due to hazardous materials or hazardous activities under the possession or control of the Respondent. Pursuant to Article 185 in conjunction with Articles 154(2), 173 and 174 of the Law on Obligations (1978), the Municipal Court concluded that the Respondent shall be held liable for the damages caused to the Claimant.

The Municipal Court also gave a legal advice that an appeal against its judgment would have to be filed with the SCSC through the Municipal Court within 15 days from the service of the judgment.

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On 30 May 2008 the Respondent filed an appeal against the aforementioned judgment, and requested to set it aside and to reject the claim as ungrounded, or to return the case to the Municipal Court for retrial. The appeal was based on claimed violations of the provisions of the Law on Contested Procedure (Official Gazette of the SFYR 4/77-1478, 36/80-1182, 69/82-1596, hereinafter the LCP), as incomplete and erroneous determination of the factual situation and wrongful application of the substantive law. Furthermore, the Respondent stated that the Municipal Court failed to consider the statements and the written opinions of the expert witnesses.

The Claimant did not reply to the appeal.

By its judgment of 2 April 2009, SCA-08-0072, the Trial Panel rejected the appeal as ungrounded and confirmed the judgment of the Municipal Court in Deqan/Dečani C.nr 237/2004 dating 11 April 2008. The Trial Panel considered that the contested judgment of the Municipal Court does not contain any essential violation of Article 354 of the LCP, and that the Municipal Court had correctly based its judgment on the established facts and the conclusions presented by the two expert witnesses. Further, the Trial Panel referred to the burden of proof regarding the objective liability of the Respondent and stated that under the circumstances given, the first instance court provided sufficient arguments and strong proofs in support of its judgment. In addition, the Trial Panel did not find any irregularities with regards to examining the expert witnesses.

The judgment of the Trial Panel was served on the Respondent on 6 May 2009; on 5 June 2009 the Respondent filed an appeal against it with the Appellate Panel of the SCSC.

Appeal before the Appellate Panel:

The Respondent requests the Appellate Panel to revise the judgment of the Trial Panel and to reject the Claimant's claim as ungrounded, to annul the judgment of the Trial Panel and to return the case to the Municipal Court for retrial.

The Respondent bases its appeal to the Appellate Panel on the grounds of essential violations of the provisions of the LCP, of an incomplete and erroneous determination of the factual situation and the wrongful application of the substantive law. The Respondent maintains that the Trial Panel failed to consider the statements and the written opinions of the expert witnesses presented at the first instance correctly.

Response before the Appellate Panel:

The Claimant requests to reject the appeal as ungrounded and to confirm the judgment of the Trial Panel.

The Claimant submits that the Municipal Court and the Trial Panel of the SCSC have not made essential violations of provisions of the LCP, that they have justly determined the factual situation and did not violate provisions of the substantive law.

Legal Reasoning:

Scope of the Appeals Procedure

According to Section 4.3 of UNMIK REG 2008/4 a judgment or decision of a court to which a matter has been referred by a Trial Panel of the SCSC pursuant to Section 4.2 may be appealed only to a Trial Panel of the SCSC, unless the Trial Panel decides otherwise in accordance with the procedural rules promulgated under Section 7. Section 4.4 shall apply to any subsequent judgment issued by the Trial Panel. According to Section 4.4 the Appellate Panel shall have exclusive jurisdiction to decide appeals against any judgment or decision by a Trial Panel of the SCSC, unless otherwise provided by the present regulation. Section 9.5 stipulates that if a decision, including a judgment issued pursuant to Section 4.3, is appealed the Appellate Panel shall first determine whether the decision or judgment so appealed merits a review. If the Appellate Panel decides not to review the decision or judgment of the Trial Panel issued pursuant to section 4.3, such judgment or decision becomes final. Where the Appellate Panel reviews a

judgment or decision it may decide to confirm, revoke or alter the judgment or decision made by the Trial Panel.

Considering Sections 4.3, 4.4 and 9.5 of UNMIK REG 2008/4 in their context it seems that the legislator's will has been that in referred cases in which the Trial Panel has rendered a decision as second instance and the Appellate Panel is third instance, the Appellate Panel shall first determine whether the decision or judgment so appealed merits a review.

UNMIK REG 2008/4 and UNMIK AD 2008/6 contain no further specific provisions regarding the question when a "review", as stipulated in Section 9.5 of UNMIK REG 2008/4, shall be granted. This question can be answered by considering the provisions of the LCP, as applicable according to Section 70.3 lit a) of UNMIK AD 2008/6, which reads: *"When interpreting UNMIK AD 2008/6 or in considering any question which is not answered sufficiently in the AD the SCSC may have regard with such modifications or qualifications, as it considers necessary or appropriate in the circumstances, to any provisions of the Law on Contested Procedure applicable in Kosovo and any provision of the applicable law on the powers of the Supreme Court of Kosovo relating to civil matters."* Article 382 paragraph 1 LCP foresees the "review" of judgments of the 2nd instance court. According to Article 385 of the LCP the extraordinary legal remedy, "review", may be applied 1) on the point of any violation of practice and procedure under Article 354 paragraph 2 of the LCP with certain exceptions 2) on the point of any violation of practice and procedure described under Article 354 paragraph 1 of the LCP relating to the proceedings before the court of second instance and 3) on the point of violation of any provision of the substantive law. Separately, it is stipulated that the review procedure does not allow to challenge the actual results of fact finding. These legal provisions of the LCP are, which has to be stated clearly, as such not directly applicable, but they can be used as guidelines for deciding on the question on how interpret the words "merits review" in Section 9.5 of UNMIK REG 2008/4. Making use of the ratio legis of those provisions an appeal merits review when a violation of one of the above mentioned principles seems not to be in principio improbable from the allegations made by the Appellant in connection with the decision rendered by the second instance court. The scope of the jurisdiction of the Appellate Panel of the SCSC as third instance court is at

the same time restricted to scrutinizing the second instance decision on the point of a violation of the law, thus not establishing a third fact finding instance.

The Respondent claims in the appeal that Article 354 paragraph 2 item 13 of the LCP is violated for the reason that "it is meaningless, and the enacting clause contravene the provided justification, while the latter does not correspond the proof documents of this case". Further the Respondent claims an incomplete and wrong verification of the actual situation, because it is "unclear as which proof and/or expertise does the court base its decision, because the expertise are against each other". As a consequence, the Respondent maintains that the court also wrongly applied the substantive law.

From the allegations of the Respondent as quoted above, read in conjunction with the judgment of the Trial Panel, it seems improbable that there was a violation of the substantive law while rendering the challenged judgment.

Anyhow, the question whether the judgment of the Trial Panel contains an error because the Trial Panel did not ex officio pay attention to the possible lack of subject matter jurisdiction of the Municipal Court in Deçan/Dečani over the Claimant's claim. The Appellate Panel considers that the judgment of the Trial Panel on that part merits review for the following reasons:

Jurisdiction of the Municipal Court over the claim

According to Article 354 paragraph 2 item 3 of the LCP a substantial breach of law on the point of practice and procedure is always given when the decision has been made on a case that was not within the jurisdiction of that court (Article 16). Article 16 stipulates that all the time during the procedure the court's official duty is to pay attention to whether the resolution of the dispute lies within the court's jurisdiction.

At the time when the Claimant's claim was filed, the jurisdiction of the SCSC was defined in Section 4 of UNMIK REG 2002/13. Section 4.2 of the mentioned REG stipulates that no court in Kosovo shall exercise jurisdiction over claims or adjudicate cases involving subject matters as described in Section 4.1, unless

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such claims or matters have been referred to it in accordance with this Section. Furthermore, Section 4.1 lit c) stipulates that claims, including creditor or ownership claims, brought against an enterprise or corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such enterprise or corporation is or was subject to the administrative authority of the Agency, are within the jurisdiction of the SCSC. According to the definitions given in Section 3 „enterprise“ has the meaning set out in UNMIK Regulation 2002/12. Section 5.1 of UNMIK REG 2002/12 stipulates that the Agency shall have the authority to administer publicly owned and socially owned enterprises that are registered or operating in the territory of Kosovo and the assets of such enterprises situated in the territory of Kosovo.

According to Section 17.1 lit b) of UNMIK AD 2003/13 (and also Section 15.1 lit b) of UNMIK AD 2008/6) the SCSC may, upon application by a party or on its own motion, refer specific claims or parts thereof to a court having the required subject matter jurisdiction under the applicable law, when the SCSC is satisfied that the court to which it refers the claim will make an impartial decision, and with having regard to (i) the nature of the parties, (ii) the value of the amount in controversy and (iii) other circumstances of the claim.

In the case at hand the Claimant filed the claim against the Respondent, a Publicly Owned Enterprise, with the Municipal Court in Deçan/Dečani. According to the above mentioned provisions, the Municipal Court did not have the jurisdiction over the Claimant's claim, as the SCSC did not refer the case to that court. Without a referral by the SCSC the Municipal Court should not have examined the claim. The lack of jurisdiction over the Claimant's claim should have been taken under consideration ex officio by the first instance court and also by the Trial Panel of the SCSC.

However, based on the non-contested facts of the case it can be stated ex post, that the conditions for the referral of the claim to the Municipal Court would have been met if the claim had been filed correctly with the SCSC and that thus the claim would have been subject to referral. After this referral the Municipal Court would have had the jurisdiction over the Claimant's claim and the appeal

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would have had to be lodged, as in fact it was, with the SCSC. It can be seen that in the case at hand the procedure would have been the same if the claim had been earlier referred to the Municipal Court. In this specific situation there is no need to restart the whole procedure by setting aside the judgment of the Trial Panel and ordering the Trial Panel to hear the case as first instance court (with the most probable outcome of a new referral). The ratio legis of the above mentioned provisions concerning the jurisdiction of the SCSC is met, as the case has been heard by the SCSC in the same way it would have been heard if it were lodged with the SCSC from the very beginning. In this consideration it has also been taken into account that the claim of the Claimant has been pending before the courts for already nearly six years and repeating the procedure would mean that the parties' right to have their case adjudicated in reasonable time would most probably be violated.

As a consequence of the above given reasoning, the decision of the Municipal Court remains in force.

Error in the legal advice of the Municipal Court

In the legal advice attached to the judgment of the Municipal Court it is stated that "an appeal against this judgment with the SCSC through this court is allowable within 15 days from service of this judgment".

According to the at that time applicable Section 56.1 of UNMIK AD 2006/17 the time limit for filing an appeal was two months from the service of the decision on parties. The appeal should have been filed directly with the Special Chamber, not through the Municipal Court. This has to be taken into consideration by the Municipal Court in other cases pending before it.

The legal advice in the judgment of the Trial Panel

Point III of the enacting clause of the appealed judgment has to be eliminated without substitution, as instructions to file an appeal by quoting the law without any discretion on the side of court, are no decisions and thus cannot be included in the enacting clause. Such information may be given within legal reasoning or –

rather to be attached to a decision only, but cannot be part of the enacting clause (see ASC-09-0108 et al).

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.

In the proceedings of the Trial Panel the Claimant did not submit a reply to the appeal of the Respondent and thus did not have any costs.

In the proceedings of the Appellate Panel the Claimant submitted a reply to the appeal of the Respondent. The Claimant was not any more represented by a lawyer, but himself. Therefore, the Claimant did not have any costs in the proceedings of the Appellate Panel.

On 13 November 2009 the Claimant was granted assistance in translation. On behalf of the Claimant three pages were translated by the SCSC into English. According to the SCSC's Additional Procedural Rules regarding Court Fees as in force from 10 March 2010 (based on Section 57.2 of UNMIK AD 2008/6), the translation costs are 12 (twelve) Euros per page and thus make up to a total amount of 36 Euros. The translation costs of the pleadings are to be understood as a part of the court fees.

According to the SCSC's Additional Procedural Rules regarding Court Fees based on the value of the claim ($6,564.20 + 675 = 7,239.20$ Euros) the following court fees for the appeals proceedings apply (see ASC-09-0072 et al):

Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros
Court Fee Tariff Section 10.1 in conjunction with 10.22 (decision in third instance)	100 Euros

Total 130 Euros

The unsuccessful party of the case, the Respondent, is obliged to pay to the SCSC the translation costs of the pleadings of the Claimant in the appeals proceedings (36 Euros) and court fees (130 Euros), in total 166 Euros.

Richard Winkelhofer signed
EULEX Presiding Judge

Torsten Frank Koschinka signed
EULEX Judge

Eija-Liisa Helin signed
EULEX Judge

Tobias Lapke signed
EULEX Registrar