

ASC-10-0047

In the lawsuit of

██████████,
██████████ Gnjilane/Gjilan
represented by ██████████
lawyer in Gnjilane/Gjilan

Claimant / Appellant

vs

1. SOE ██████████
Gnjilane/Gjilan

2. Privatization Agency of Kosovo,
Pristhinë/Priština,

Respondents

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer, President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Mr.sc. Sahit Sylejmani, Judges, on the appeal of the Claimant against the decision of the Trial Panel of the SCSC of 18 May 2010, SCC-09-0230, after deliberation held on 11 November 2010, delivers the following

DECISION

- 1. The appeal is dismissed as inadmissible.**
- 2. On the occasion of the appeal, point 2 of the decision of the Trial Panel of 18 May 2010, SCC-09-0230, is eliminated.**

3. The Appellant is obliged to pay court fees in the amount of 55,-- Euros to the Special Chamber.

Reasons at Law:

With order of 30 December 2009, served on the Claimant on 16 January 2010, the Trial Panel of the SCSC requested the Claimant to supplement his Albanian-only claim of 14 December 2009 with an English translation, and to fix other deficiencies within 30 days (submission / attachement of a valid power of attorney, the proof of a notice to 'the Agency', 'name and address for service of the Respondent [REDACTED]').

On 19 February 2010, the Claimant filed a submission answering to the order.

With the attacked decision of 18 May 2010, the Trial Panel of the SCSC rejected the claim as inadmissible (point 1), for the Claimant not having submitted a proper power of attorney, signed by him, and for not having provided 'the complete name and address for service of the Respondent "[REDACTED]"'). The Trial Panel in this decision further indicated that an appeal (to the Appellate Panel of the SCSC) may be filed within 30 days (point 2).

The decision was served on the Claimant on 9 June 2010.

In the appeal, posted on 9 July 2010 in an envelope addressed to the Supreme Court of Kosovo, the Claimant (represented by lawyer [REDACTED]) requests to revoke this decision.

The appeal has to be dismissed as inadmissible.

Pursuant to Section 9.5 UNMIK REG 2008/4 a decision of the Trial Panel of the SCSC may be appealed with the Appellate Panel of the SCSC within 30 (thirty) days from the receipt of the decision (ASC-09-0096, ASC-10-0012 et al).

Contrary to this provision, Section 59.1 UNMIK AD 2008/6 determines that 'an appeal shall be filed with the Special Chamber within two months of the service of the judgment on the party appealing'. However, Section 9.5 UNMIK REG 2008/4 supersedes as the higher ranking norm. Therefore, the scope of application of Section 59.1 UNMIK AD 2008/6 is restricted to cases not covered by Section 9.5 UNMIK REG 2008/4. Hence, the time limit of 30 (thirty) days from the receipt of the decision applies.

Section 20.1 UNMIK AD 2008/6 provides that any period of time prescribed by UNMIK REG 2008/4 or the AD shall be calculated as follows: Where a period is expressed in days, it is to be calculated from the moment at which an event takes place (here: the service of the decision), while the day during which that event takes place shall not be counted as falling within the period in question (compare Article 112 [1] of the Code of Civil Procedure, Official Gazette 4/77-1478 et al. of the SFRY ["LCP"], which follows the same pattern).

The attacked decision was served on the Claimant on 9 June 2010. This means that the period of 30 days ended on 9 July 2009. The appeal was filed on this very day, but addressed to the Supreme Court of Kosovo, which is a court that has to be clearly distinguished from the SCSC, which exclusively deals with privatisation related matters. In particular, the SCSC is not a part of the Supreme Court of Kosovo, but a completely separate entity. The Supreme Court of Kosovo passed the appeal then to the SCSC, where it was received on 14 July 2010.

It lies within a party's responsibility to address submissions to the competent court (compare Art 113 [1] LCP). If a time-bound submission is addressed to an incompetent court (even if posted in time), it travels at the party's risk (compare Art 113 [7] LCP). If it finally reaches the competent court after the deadline expired, it has to be considered untimely filed.

This is the case here. The appeal was thus filed too late (see ASC-09-0096, ASC-10-0012, ASC-09-0021 et al).

Even if Art 113 [7] LCP were considered (directly) applicable in this context (via Section 70.3 [a] UNMIK AD 2008/6), this would not help the Appellant: Art 113 [7] LCP provides for the delivery of time-bound submissions to incompetent courts, ordering to treat them as timely filed, if the wrongful delivery was due "to ignorance or obvious inadvertent error of the submitter". If a party is duly represented by a lawyer, however, (s)he cannot benefit from this provision. Professional lawyers, as certified by the Bar Association of Kosovo, are supposed to clearly tell between the SCSC and the Supreme Court as separate legal entities (as described above). Addressing the Supreme Court instead of the SCSC goes well beyond inadvertence, if done by a lawyer. For the same reasons, an application for restoration to the previous position (Article 117 LCP) could not be successful, so that the Appellate Panel does not have to make the Appellant aware of this possibility before deciding the case.

As a consequence, the untimely appeal has to be dismissed as inadmissible, without dealing with its merits. The following questions can therefore remain unanswered, but may be considered by the Trial Panel in case a similar situation arises again: The timeliness of the Claimant's submission of 19 February 2010, answering to the order of 30 December 2009 (served on him on 16 January 2010), the issue to clarify if the Claimant actually intended to name the Privatization Agency of Kosovo (the PAK) as 2nd Respondent, or as the 1st Respondent's representative only, the question if the Claimant silently approved the actions of his representative in case the power of attorney was not considered sufficient, by directly answering to the order to supplement the claim previously submitted by the lawyer, and the question to what extent the order to submit English translations can be valid, if it did not advise the party of the possibility to ask for assistance in translation (Section 25.8 UNMIK AD 2008/4). Lately, the Appellate Panel's jurisprudence (see ASC-09-0072 et al) regarding the missing address of service shall be recalled:

"Section 27.2 (c) UNMIK AD 2008/6 provides for the statement of the address for service of the Respondent in the claim. According to Section 28.2 (f) UNMIK AD 2008/6, in conjunction with Section 28.4 leg cit, the failure to submit the address shall result in an order for completion or correction of the claim within a prescribed period, and the dismissal of the claim as inadmissible if the order is not fulfilled in time. ... It has to be noted on that occasion, that in case a Claimant maintains the Respondent's address is well known, without providing it, it may well be advisable to ask for this address (as done

by the Trial Panel here); however, the (final) dismissal of a claim as inadmissible would require that the service on the Respondent at that address actually failed. Or, to put it differently: A claim may only be dismissed as inadmissible on the grounds of Section 27.2 (c) AD 2008/6, if the Claimant does not upon request provide an address at all, or if service fails at an address claimed to be notorious.”

Point 2 of the appealed decision has to be eliminated on the occasion of the appeal, as instructions to file an appeal by quoting the law, without any discretion on the side of the court, are no decisions to be taken in the enacting clause. Such information may be given within the legal reasoning or – rather – to be attached to a decision only, but cannot be a part of it (see ASC-09-0075, ASC-09-0108, ASC-10-0023, ASC-10-0036, et al).

According to Section 11 UNMIK 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.

Based on Section 57.2 UNMIK AD 2008/6 the Special Chamber issued Additional Procedural Rules regarding Court Fees. 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 rules enter into force on 30 June 2010, amending the Additional Procedural Rules regarding Court Fees as of 10 March 2010.

They also cover and apply to all operations of the SCSC from 1 January 2010, as appropriate, 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 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, the value of the claim is EUR 3,905.04. The court fee for the decision in second instance therefore is set to 12.50 Euros.

As outlined above, the same goes for the decision in 1st instance (the attacked decision did not impose court fees yet).

In total, the following court fees for the proceedings apply:

Court Fee Tariff Section 10.15 in conjunction with 10.1 (decision in first instance)	12.50 Euros
Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros
Court Fee Tariff Section 10.15 in	12.50 Euros

conjunction with 10.21 and 10.1
(decision in second instance)

Total 55 Euros

These court fees are to be borne by the Appellant.

Richard Winkelhofer, EULEX Presiding Judge

Torsten Koschinka, EULEX Judge

Mr.sc. Sahit Sylejmani, Judge

Tobias Lapke, EULEX Registrar