

## Jurisdiction of courts with a focus on the Special Chamber of the Supreme Court of Kosovo

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### **Abstract**

*The legal solution offered by the Law establishing the Special Chamber of the Supreme Court of Kosovo is rather challenging for practical implementation. Due to this fact, the decisions of the Special Chamber contain various dilemmas of judges on the jurisdiction of the Chamber on the matters related to natural persons sued by the PAK, which are related to various liabilities of these persons to socially-owned enterprises, namely to the PAK. Since the PAK administers and represents socially owned property in general, it is naturally bound to seek for legal resolutions for all legal contests before a competent court. Naturally, the PAK would seek for such a solution before the Special Chamber of the Supreme Court of Kosovo on PAK-related matters, which is already bound by the title itself, "on PAK-related matters".*

*Comparisons of remedies by various laws related to subject competence are based on legal literature used in higher education in Kosovo. Analysis of subject competences of regular and special courts is two-fold: the Commercial Court and the Military Court, while the competence of the Special Chamber is only analysed in relation with the Law on Courts, and the Law on the Special Chamber of the Supreme Court, comparing it with the Law on Contested Procedure and the Law on the PAK.*

*The Special Chamber has before and still continues to avoid jurisdiction of this Court, which is sanctioned by Articles 4 and 5 of the Law on the Special Chamber, due to the fact that in cases in which the PAK has sued a natural or legal person, due to debts, occupation of socially owned property, or any other disputed matter, which is directly related to socially owned properties, the Special Chamber proclaims itself incompetent, and transfers the case to regular courts, although the Special Chamber adjudicates "on PAK-related matters", but in this case only when the PAK is respondent, not when it is claimant.*

**Keywords:** court jurisdiction, jurisdiction of the Special Chamber of the Supreme Court of Kosovo, PAK.

### **I. A short background of establishment of the SCSC**

Along regular courts, the judicial and legislative environment of Kosovo includes also a Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related Matters, a special court which applies “special” rules in its judicial activity. This court is established by special law, it has applied and applies “special” law, hence specific rules and procedures compared to regular courts. This is further argued with the fact that the Parliament of Kosovo has adopted the Law on the Special Chamber of the Supreme Court no. 04/L-033, and the Rules of Procedure (Annex), which regulates the procedures to be applied by the Chamber in its operations, despite the existence of the Law on Courts.

Due to the political and economic situation in Kosovo, as a consequence of the last war against the Serbian occupation of Kosovo, but also deriving from major changes in political/governance systems in the region, with a distinct focus on the liberation war in Kosovo, changes occurred in Kosovo as well. Therefore, comprehensive solutions were found for the legal and social environment in Kosovo, mainly at the discretion of the international community. Initially, there were dilemmas on the ownership and on what had happened and was happening in Kosovo. After the “scanning” of the general situation, international missions in Kosovo were still unclear on what had happened in several decades in Kosovo. It was unclear about the political, economic, social and other situations, since with a ten-year rule, specifics of the socialist system, but even with its departure, Serbia had tried to expunge all traces of such invasion, even of the system, but also of everything else which was related to the past, the history of law, namely the “statehood” character of Kosovo.

A major uncertainty involved the status of property, which was dubbed as socially owned, publicly owned and state owned during the Communist regime. It was not clear what was publicly and what was socially owned. An even larger uncertainty was with the “socially-owned” property, because it was impossible to ascertain who it belonged, who was the owner/titleholder, or possessor. On the other hand, public property was not defined well either, therefore even local “experts” did not make a proper distinction between the two statuses.

In due consideration of the situation, and in order of having a single address for the socially-owned property, for administering what was “nobody’s property” before, KTA was established initially, and later also the Special Chamber of the Supreme Court of Kosovo. These institutions were initially

established pursuant to UNMIK Regulations, while since 2008, the PAK was established as a legal successor to the KTA, pursuant to a Kosovo Law, and then also a “new” Special Chamber, pursuant to Law no. 04/L-033 and the PAK, pursuant to the Law no. 03/L-067 of the Republic of Kosovo.

In terms of KTA establishment, it may be stated that there is no other reason for its establishment but for the ones stipulated with the UNMIK Regulation no. 2002/12, further legitimated with the Law on the PAK, no. 03/L-067, which is administration, protection and privatization of socially-owned property. The same cannot be stated though for the reasons for establishing the Special Chamber of the Supreme Court of Kosovo. Based on what can be “read between the lines”, this court had a political background as well. At the onset, this is related to the “share” of Serbian employees, who could not be present at socially owned enterprises at the time of privatization, due to the condition after the war in Kosovo. This was spotted also in decisions of the Special Chamber, especially in recognizing the employees’ rights to the 20 % shares from the SOE privatization. This right was recognized to Serbian employees and other non-Albanian employees, based on legal provisions, applicable only with the Special Chamber, where the criteria to be met by employees for recognition of such rights included also the discrimination. In the case of non-Albanian employees, discrimination was taken as the primary ground in recognizing legitimate rights of employees to the 20% of the privatization amount. The political background in this case can be discerned from the fact that such matters could have been solved by regular courts, namely commercial courts or municipal courts.

### **1. Meaning of Jurisdiction, with a focus on the Special Chamber**

Competence is of major importance in civil procedure. It represents one of the procedural presumptions<sup>1</sup>, which means that a case presented before a court may be solved by such a court only if it is competent for its adjudication. If a claim suit would be adjudicated by an incompetent court, such court would engage in substantial violations of the Law on Contested Procedure (LCP), as provided by Article 182 of the CPL<sup>2</sup>.

The term jurisdiction/competence of a court, in an objective view, we mean the range of actions/activities of such a court, namely the scope of activity of a court. In a subjective view, jurisdiction is right and duty of the Court to act

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<sup>1</sup> Brestovci, Faik, *Civil Procedure Law (E drejta Procedurale Civile)*, page 97.

<sup>2</sup> Article 182, paragraph 2 item (b) if a decision is rendered on a claim which is not part of judicial jurisdiction, and item (f) for a claim suit for which a higher court of the same type has subject competence, a court of another type, viewed on 23 December 2012.

upon a certain legal case<sup>3</sup>. The rules which determine the range of activities of the Court also stipulate the jurisdiction of all courts, while special law stipulates on the jurisdiction of the Special Chamber of the Supreme Court of Kosovo.

The rules on subject competence determine the range of activities pertaining to regular and other courts<sup>4</sup>, which are part of regular courts, but are of a different nature, or a different level.

Based on the above, it may be derived that the primary jurisdiction of the Chamber is precisely related to socially owned property, not directly to its privatization, but to resolve all matters which are related to and on this type of property.

Pursuant to the Law on the Special Chamber, the Special Chamber enjoys exclusive competence in relation to the fields related to objection of a decision of the KTA and the PAK, different claims of financial losses caused by the KTA or PAK decision or action, based on administrative authority as determined by KTA regulation or PAK Law, claims against an enterprise or corporation, claims of a right, title or interest on any property or asset over which the KTA or PAK has or has asserted administrative authority, ownership of an enterprise or corporation, ownership over the capital of an enterprise ....<sup>5</sup>

Pursuant to the Law on the Courts no. 03/L-199, the Supreme Court includes an Appellate Panel of the Kosovo Property Agency, and the Special Chamber of the Supreme Court, judges of which are part of the Supreme Court. *"The Supreme Court is competent to adjudicate in its Special Chamber, Privatization Agency of Kosovo or Kosovo Trust Agency cases as provided by Law"*<sup>6</sup>.

In legal literature, namely in doctrine elaborations in civil procedure books, several types of competence are described: subject (functional) competence, territorial (geographical) competence, competence in contests with international elements, contractual competence (forum prorogatum). In the case of the Special Chamber of the Supreme Court, we can talk about subject competence in the field of special competence. According to literature, this type of competence is usually given to District Commercial Courts and Military Courts. Hence, the competence of the Special Chamber is only provided upon by UNMIK Regulations, namely with successor legislation thereof – laws of the Republic of Kosovo.

Since the competence of the Special Chamber is special subject competence (competentia ratione materiae), it resolves matters related to the Privatization

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<sup>3</sup> Brestovci, Faik, Civil Procedure Law (E drejta Procedurale Civile), page 31.

<sup>4</sup> Brestovci, Faik, Civil Procedure Law (E drejta Procedurale Civile), page 32.

<sup>5</sup> Article 4, paragraph 1.5, items 1,2,3...of the Law on the Special Chamber, No. 04/L-033, read on 25 December 2012.

<sup>6</sup> Article 22, paragraph 1.5 of the Law on Courts, no. 03/L-199, read on 25 December 2012.

Agency of Kosovo. Since the Privatization Agency of Kosovo (PAK), pursuant to the Law on the PAK no. 03/L-067, administers and manages socially owned property, it is rather logical that the competence of the Special Chamber is established around contests related to such socially owned property. That is precisely stipulated initially with the UNMIK Regulation 2003/12, UNMIK Regulation no. 2008/4, and later the Law no. 04/L-033<sup>7</sup> of the Republic of Kosovo.

The District Commercial Court, as a court of special competence, adjudicates a) economic matters/disputes, which for parties has joint labour organizations, political-social communities, and other legal or natural persons engaging in trading activities; b) disputes related to protection of samples, models, seals, right of use of signature, and disputes of improper competition and copyrights; c) administrative/accounting disputes; d) disputes related to enforcement of regular bankruptcy, independently of the litigating parties ...<sup>8</sup>

On the other hand, military courts mainly adjudicate on a) contests on compensation of damage incurred by military or civilian persons serving military incur upon the state, in relation to service; b) disputes related to state claims for indemnification, when it compensates damages caused by illicit work by military and civilian persons, by service in the military<sup>9</sup>.

## **II. Primary jurisdiction pursuant to the Special Chamber Law and practical challenges**

According to the Law on the Special Chamber, the Chamber has exclusive competence on all cases and procedures related to the following fields: *a challenge to a decision or other action of the KTA or the Agency taken pursuant to, respectively, the KTA Regulation or the Law on the Privatization Agency of Kosovo; a claim against the KTA or the Agency arising from the failure or refusal of the KTA or the Agency to perform an act or obligation required by law or contract; a claim against the KTA or the Agency for financial losses alleged to have been caused by a decision or action taken by the KTA or the Agency pursuant to the administrative authority provided by the KTA Regulation or the Law on the Privatization Agency of Kosovo in respect of an Enterprise or Corporation; a claim against an Enterprise or Corporation that is alleged to have arisen during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the KTA, the Agency; a claim alleging a right, title or interest with respect to: a) any asset or property over which the Agency or the KTA has or has asserted administrative authority; b) the ownership of an Enterprise or Corporation; c) the ownership of any capital of an*

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<sup>7</sup> Articles 4 and 5 of the Law on the Special Chamber of the Supreme Court no. 04/L-033, read on 27 December 2012.

<sup>8</sup> Brestovci, Faik, Civil Procedure Law (E drejta Procedurale Civile), page 33.

<sup>9</sup> Brestovci, Faik, Civil Procedure Law (E drejta Procedurale Civile), page 33 and 34 .

*Enterprise or Corporation; or d) any property or asset in the possession or control of an Enterprise or Corporation if such right, title or interest is alleged to have arisen during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the KTA or the Agency; e) a claim or complaint challenging any aspect of an official list of eligible employees of an Enterprise issued by the KTA or the Agency under Article 10 of UNMIK Regulation No. 2003/13 or any successor legislation governing the establishment of such a list; f) a claim related to the liquidation of an Enterprise conducted by the KTA pursuant to the KTA Regulation or by the Agency pursuant to the PAK Law; g) an application made by the KTA or the Agency pursuant to Article 21 of Annex A to the PAK Law for the voidance of a transaction of an Enterprise that has undergone or is undergoing liquidation by the KTA or the Agency; h) enforcement of a right or authority of the KTA or the Agency if the KTA or the Agency has submitted an application to the Special Chamber seeking such enforcement; i) a case or proceeding arising under or within the scope of UNMIK Regulation No. 2005/48 or any successor legislation thereto, or a claim, matter, issue or proceeding arising in or related to a case under or within the scope of such regulation or legislation; j) any application to review and decide the legality of, any Judgment or Decision issued by another court in Kosovo involving or relating to any claim or matter specified in this paragraph 1; k) the review of a decision made by the international members of the Agency's Board of Directors to suspend a decision of the Board pursuant to Article 14. 9 of the PAK Law<sup>10</sup>; and l) such other matters as may be assigned to the Special Chamber by law<sup>11</sup>.*

### **1. Special subject competence of the Special Chamber**

Based on the Special Chamber Law, but also pursuant to the Law on Courts, the primary jurisdiction of the Special Chamber of the Supreme Court for PAK related matters is determined by the matters related to the PAK and disputes related to property transformation, mainly socially owned property.

According to scientific literature, the criteria for determining subject competence are: the object of dispute (*causal criterion - competentia ratione causae*) and the value of object of such dispute *-(competentia ratione valoris)*<sup>12</sup>.

The jurisdiction of the Special Chamber was determined by UNMIK Regulations until January 2012, while it is now regulated by the Law on the Special Chamber of the Supreme Court. According to both the UNMIK Regulations and the Law on the Chamber, the jurisdiction of the Chamber was

<sup>10</sup> ...three international members of the Board, in a joint and unanimous manner, may suspend any decision rendered by the Board, if they decide such decision is in contradiction to the principles enshrined in the European Convention for Human Rights, including all protocols to this Convention or the applicable legislation...

<sup>11</sup> Law on the Special Chamber, Article 4, viewed on 28 December 2012.

<sup>12</sup> Brestovci, Faik, Civil Procedure Law (E drejta Procedurale Civile), page 32.

determined based on the dispute object criterion *competentia ratione causae*, which had and has a permanent procedural party, the Kosovo Trust Agency (KTA), respectively the Privatization Agency of Kosovo (PAK).

In the UNMIK Regulation, the full name of the Chamber was “Special Chamber of the Supreme Court of Kosovo for Kosovo Trust Agency related matters”, while with the Law on the Special Chamber, it only changes the last part, “for matters related to the Privatization Agency of Kosovo”. Based on the above, it is clear that the Chamber competence is built around the disputes on socially owned property/enterprises, where a party in procedure are socially owned enterprises, represented by the PAK.

By UNMIK Regulations, but also by the Kosovo Law, the primary jurisdiction of the Special Chamber is determined as an “exclusive competence” for all cases related to objections of a decision or action of the Agency, and all other claims or appeals against the KTA, respectively the PAK, or socially owned enterprises, upon which the KTA or the PAK has asserted administrative authority<sup>13</sup>.

## **2. Functional competence within the Special Chamber**

The notion of functional competence is a product of science. This competence divides various court functions on the same matter into various instances of a court<sup>14</sup>. By this division, the first instance court decides upon the grounds of the claim suit, while the second instance decides on eventual appeals against the first instance court, while the third instance court decides upon revision. When talking about such competence, we imply also the competence of the Trial Panel, respectively of a Single Judge, for the preparation of the main trial, and competence of the Trial Panel for the main trial of the legal matter.

The Law on Courts does not even mention the term of “functional competence”, in defining the notion. Instead, it uses the term subject competence, or only competence. It is so, because the functional competence (instance) is indeed only a sub-type of subject competence of the courts, and therefore, within such subject competence, the Law regulates indirectly the functional competence.

The instance competence in the Special Chamber is exclusively stipulated by the Chamber Law, because against decisions of specialized panels (at first instance), the second instance is already necessary in the form of an Appellate Panel.

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<sup>13</sup> Law on the Special Chamber, Article 4, paragraph 1, viewed on 27 December 2012 04/L-033.

<sup>14</sup> Pozniq, Borivoje, Civil Procedure Law, page

Nevertheless, *The Presidium of the Special Chamber shall assign every case or claim falling within the scope of paragraph 1 of this Article to the appropriate specialized panel, and such specialized panel shall then have primary jurisdiction within the Special Chamber over such claim or matter*<sup>15</sup>. If the Specialized panel is assigned a case which includes a claim which the panel considers to be beyond its competence, the panel shall require from the Presidium to assign such a claim to the Specialized Panel with the necessary jurisdiction.

*The appellate panel of the Special Chamber shall have exclusive jurisdiction to review and decide a matter involving a decision specified in sub-paragraph 1.12 of this Article (related to review of decisions rendered by the international members of the PAK Board of Directors suspending a decision of the Board) and shall conduct that review and issue that decision as a matter of urgency*<sup>16</sup>.

The jurisdiction of the Chamber is even more clearly stipulated with the entry into force of the Special Chamber Law, since upon entry into force of this Law, the Special Chamber will not be able to refer any case or special procedure to regular courts.

*“As of the effective date of this law, neither the Special Chamber nor any panel or judge of thereof, shall have any further authority to refer any specific claim, matter, proceeding or case falling within its primary jurisdiction to another court of Kosovo. For any claim, matter, case or proceeding (collectively hereafter referred to in this paragraph as a “matter”) so referred prior to the effective date of the present law: (i) if the court to which the matter has been referred has, as of the effective date of this law, not taken any substantive Decision with respect to the matter, such court shall no longer have any jurisdiction over the matter and shall return all concerned documents and case files to the Special Chamber; (ii) if the court to which the matter has been referred has, as of the effective date of this law, taken or issued a substantive Decision with respect to the matter, such court shall continue to have jurisdiction over the matter, and its Decisions and Judgment with respect thereto shall be subject to the review of the Special Chamber upon the timely submission of an application by a party or an affected third party; (iii) if the court to which the matter has been referred has, as of the effective date of this law, issued a Judgment with respect to the matter, such Judgment shall be subject to review by the Special Chamber upon the timely submission of an application by a party or affected third party; provided, that, if the Special Chamber overturns such Judgment, in whole or in part, the concerned matter(s) shall be subject to re-litigation before the concerned specialized panel, and not the court that issued the Judgment. If the Agency is not named as a party to any matter that is properly pending before another court under this paragraph 4, the concerned court shall be required to name the Agency as a party, and the Agency shall have the right to fully participate in the case as an ex officio party and shall be immediately provided with a*

<sup>15</sup> Law on the Special Chamber, Article 4, paragraph 3, viewed on 3 January 2013.

<sup>16</sup> Law on the Special Chamber, Article 4, paragraph 3, viewed on 3 January 2013.

*complete copy of all documents in the case file, and shall be immediately served with all written submissions, Decisions and Judgments filed or issued in the future in such case or proceeding. If a referred matter is pending before another court, such court shall not, and shall have no authority to, issue any Judgment or Decision that would violate or be inconsistent with the limits established by Article 11 of this law*<sup>17</sup>.

*No court in Kosovo other than the Special Chamber shall have any jurisdiction or authority over any claim, matter, proceeding or case described in paragraph 1. of this Article except as specifically provide for in paragraph 4. above. If a court has exercised or has attempted to exercise jurisdiction or authority over a claim, matter, proceeding or case within the jurisdiction of the Special Chamber and such matter or claim is not within the jurisdiction of such court under paragraph 4<sup>18</sup>, any Judgment or Decision issued by such a court with respect to such a claim, matter, proceeding or case shall, as a matter of law, be invalid and unenforceable; and the Special Chamber shall, upon the application of any person or on its own initiative, issue an order to such effect*<sup>19</sup>.

If one refers to the paragraph 1.11 of the Article 4 of this Law, it may be derived that the Chamber shall review the legality of such decisions<sup>20</sup>, a power that so far has seldom been used by the courts, due to uncertainties in the Special Chamber legislation.

If it is understood that a Court has nevertheless initiated a proceeding on these matters under the competence of the Special Chamber, by submission of a person or self-initiative, the Chamber shall have the authority and jurisdiction, upon application by any interested person or upon its own initiative, to issue an order requiring any court of Kosovo to transfer any claim, matter or proceeding or case pending in such court to the Special Chamber, in compliance with the paragraph 7 of the Article.

*The Special Chamber shall have the authority and jurisdiction, upon application by any interested person or upon its own initiative, to issue an order requiring any court of Kosovo to transfer any claim, matter or proceeding or case pending in such court to the Special Chamber if: the subject matter of such claim, matter, proceeding or case is within the exclusive jurisdiction of the Special Chamber as specified in paragraph 1. of this Article; or an Enterprise, Corporation or the Agency has been named as a party to the concerned case or proceeding or should have – under the law of Kosovo – been named as a party to the concerned case or proceeding*<sup>21</sup>.

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<sup>17</sup> Article 4, paragraph 4 of the Law on the Special Chamber, viewed on 05 January 2013.

<sup>18</sup> Article 4, paragraph 5 of the Law on the Special Chamber, viewed on 05 January 2013.

<sup>19</sup> Article 4, paragraph 5, items 2 and 3 of the Law on the Special Chamber, viewed on 06 January 2013.

<sup>20</sup> Article 4, paragraph 1 of the Law on the Special Chamber provides that any application to review and decide the legality of, any Judgment or Decision issued by another court in Kosovo involving or relating to any claim or matter specified in this paragraph, viewed on 6 January 2013.

<sup>21</sup> Article 4, paragraph 7, items 1 and 2, Law on the Special Chamber, viewed on 06 January 2013.

### 3. Procedural parties before the Special Chamber

The Article 5 of the Law on the Special Chamber determines the procedural parties before the Special Chamber, namely who can be claimant and respondent before the Special Chamber.

This is where the dilemma and differing stances between Special Chamber judges spring, whether the Chamber has competency to decide upon cases in which a private or public, natural or legal person is a respondent.

In terms of claimants, it is very clear and there is no ambiguity, and there is a full match with the Article 4, related to the jurisdiction of the Special Chamber, because a claiming party may be: *a person that claims ownership or possessory rights or interests in or to: an Enterprise or Corporation or the capital of an Enterprise or Corporation; assets owned by or in the possession of an Enterprise or Corporation, or assets in the possession, or under the administrative authority or trusteeship, of the Agency; a person that claims creditor, contractual or other legal rights... etc.*

The paragraph 1.3 of the Article 5 of this Law, defines other entities that may file claim with the Special Chamber: the Agency (PAK); an enterprise; a corporation; any other person that the Special Chamber or any panel thereof deems necessary or appropriate to admit in order to ensure the full and complete adjudication of the concerned case or issue<sup>22</sup>.

Nevertheless, this "peace" in implementing this provision only persists since the judges have not created troubles, because in fact, there is room for a different interpretation. If claiming parties include the Agency<sup>23</sup>, an enterprise<sup>24</sup>, or Corporation<sup>25</sup>, there is a logical and professional question, whom will these entities file claim against? It is logical that the PAK will not file claim against itself, or against an enterprise or corporation, since it already manages such enterprises itself. An enterprise cannot claim against the enterprise, or against itself, because the Agency is the administering and representing body for socially owned enterprises. A logical question is against whom the PAK or an enterprise will file claim, since the law provides that they are claimants. The logical and professional answer should be that the PAK, pursuant to the provision mentioned, is entitled to file claim with the Special Chamber to resolve respective legal matters, also against natural and legal persons, who have occupied socially owned properties, those who have any monetary liability, or any other liability arising from a lease contract, or any

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<sup>22</sup> Article 5, paragraph 1.2, items 3, 4, 5 and 6 of the Law on the Special Chamber, viewed on 06 January 2013.

<sup>23</sup> Article 5, paragraph 1.2, item 3 of the Law on the Special Chamber, viewed on 07 January 2013.

<sup>24</sup> Article 5, paragraph 1.2, item 4 of the Law on the Special Chamber, viewed on 08 January 2013.

<sup>25</sup> Article 5, paragraph 1.2, item 5 of the Law on the Special Chamber, viewed on 08 January 2013.

other contract. Otherwise, this provision would only be a major burden in paper, but also a problem in terms of practical implementation of the law itself.

#### **4. Unjustifiable collisions between Articles 4 and 5 of the Special Chamber Law**

A major dilemma appears with the question on who can be a responding party in procedures before the Special Chamber. This is defined with the Article 5 of the Special Chamber Law. From the remedies provided by this Article, to be analysed further, strong collisions appear with the Article 4, respectively with the “jurisprudence” of the Special Chamber. According to this Law, responding parties in procedures before the Chamber are: “with respect to a claim described in subparagraph 1.1, 1.2, 1.3, 1.6 or 1.7 of Article 4 of this law: the Agency”.

According to Article 4, respectively the items mentioned above, this is about objecting against a decision or action of the KTA or the PAK, various claims against the KTA or the PAK, claims against the KTA or PAK related to financial losses which may have been caused by a decision or action of the KTA or the PAK, claims or complaints related to employee lists, and claims related to enterprise liquidation.

Another responding party may be, *with respect to a claim described in subparagraph 1.4 or 1.5 of Article 4 of the present law: at the choice of the Agency, the concerned Enterprise/Corporation or the Agency acting on behalf of the concerned Enterprise/ Corporation*<sup>26</sup>.

If one analyses the sub-paragraph 1.5 of Article 4 of the Special Chamber Law, it is clear that these are claims claiming a right, title or interest related to: “any asset or property over which the Agency or the KTA has or has asserted administrative authority; the ownership of an Enterprise or Corporation; the ownership of any capital of an Enterprise or Corporation; or any property or asset in the possession or control of an Enterprise or Corporation if such right, title or interest is alleged to have arisen during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the KTA or the Agency”<sup>27</sup>. This is about any property or asset under ownership of the KTA, or the PAK.

If one refers back to the earlier argument, that the agency is the sole administrator and representative of socially owned enterprises, then the only authority for protecting and managing properties, rights and assets of an enterprise is precisely the agency, and it is entitled to protect them in proceedings before the Special Chamber, also when the property is violated by

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<sup>26</sup> Paragraph 2.2, Article 4, the Law on the Special Chamber, viewed on 20 January 2013.

<sup>27</sup> Article 4, paragraph 1.5, items 1, 2, 3, 4 of the Law on the Special Chamber, viewed on 10 January 2013.

natural and legal persons. This is stipulated, as mentioned above, by Article 5, paragraph 2, item 2, in connection with Article 4, paragraph 1, items 1.5.1, 1.5.2, 1.5.3 and 1.5.4 of the Law on the Special Chamber, with no ambiguity. Although the PAK is directly designated also as a responding party, it is not clear against whom it may appear also as claimant, since Article 5, which provides on the responding parties in proceedings before the Special Chamber, does not expressly provide on natural and legal persons as respondents. This is precisely where the dilemma is with many judges at the Special Chamber, even objections of competence, in cases when the PAK files claim against an entity beyond the range determined by Article 5 of this Law.

The author of this paper bears a more reflective position, since all provisions must be interpreted in connection with one or more provisions. Also, in due account of paragraph 1 of Article 5, where the agency, enterprise or corporation appear as claimants, linking it with paragraph 2.5 of Article 5 of the Special Chamber Law, which provides that *with respect to any case or issue before it: any person that the Special Chamber or any panel thereof deems necessary or appropriate to name or admit as a Respondent in order to ensure the full and complete adjudication of such case or issue*<sup>28</sup>, it is clear that the Special Chamber enjoys proper grounds to take up such cases under its competency.

Article 6 of the same Law providing on the "Period of Time to File a Claim Challenging Decisions or Actions of the Agency", does not fall far from this meaning.

Paragraph 3 of this Article provides that *"A person sued by the Agency or an Enterprise or Corporation may bring a counterclaim against the Agency or Enterprise or Corporation within the applicable time limits established by the law of Kosovo"*. This provision which provides on the possibility of a *"person sued by the Agency bringing a counterclaim"*, which clearly stipulates that in no circumstances does the Law preclude the PAK to be a claiming party in proceedings before the Special Chamber, when the matter is about protecting interests related to socially owned property violated by any person. A solution which determines the argument is given in literature, where it is stated that *"the relevance of a counterclaim is in the fact that the competent body is the court before which the trial is held as per claim"*<sup>29</sup>. Considering that the counterclaim is a claim

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<sup>28</sup> Respondents in proceedings before the Special Chamber shall be: with respect to a claim described in subparagraph 1.1, 1.2, 1.3, 1.6 or 1.7 of Article 4 of this law: the Agency; with respect to a claim described in subparagraph 1.4 or 1.5 of Article 4 of the present law: at the choice of the Agency...; with respect to any case or issue before it: any person that the Special Chamber or any panel thereof deems necessary or appropriate to name or admit as a Respondent in order to ensure the full and complete adjudication of such case or issue, viewed on 15 January 2013.

<sup>29</sup> Pozniq, Borivoje, Civil Procedure Law (E Drejta e Procedurës Civile), page 422.

of the respondent against the claimant, filed with the court of the case<sup>30</sup>, in the case when a natural person has brought a counterclaim, which is now a claim against the claimant, this shows that these cases also fall within the competence of the Special Chamber, namely within the remit of the Article 4 of the Special Chamber Law. Although these cases are numerous in the practice of the Chamber, it maintains that such cases are not within its jurisdiction.

Since in principle, the proceeding of a counterclaim must be held before the court which begun the claim adjudication, and in this case, counterclaimants are natural persons, which according to Article 4 of the Chamber Law, have absolute and exclusive right to file their claims with the Special Chamber, while in this concrete case, they are deprived of the right, since the Chamber rejects competence on such cases.

Also pursuant to the PAK Law, socially owned enterprises and their assets are under administrative authority of the PAK. The agency is exclusively competent to administer: (i) Socially-owned Enterprises, regardless of whether they underwent a Transformation; and (ii) any assets located in the territory of Kosovo, whether organized into an entity or not, which comprised socially-owned property on or after 22 March 1989, regardless of whether they underwent a Transformation though subject to Article 5.1(b) below; and (iii) Minority Stakes, regardless of whether the relevant legal entity underwent a Transformation<sup>31</sup>.

Also due to the fact that *“the PAK has exclusive competence to administer socially owned enterprises and assets in the territory of Kosovo ...”*, it is clear that the Special Chamber must have jurisdiction also upon PAK claims, when such properties are violated by private natural and legal persons.

## **II. “Jurisprudence” of the Special Chamber**

Setting from this legal uncertainty, the Special Chamber of the Supreme Court, namely the Appellate Panel, has already created its case law, in such cases when the PAK, or an enterprise, is a responding party in proceedings before the Special Chamber. Even here, there is collision in the case law itself, since there is a decision of 2010, which is referred to by the Agency, ASC-09-0087, of 09 March 2010. According to this decision, in cases when the PAK or the socially owned enterprise is claimant against natural persons, competence belongs to the Special Chamber.

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<sup>30</sup> Pozniq, Borivoje, Civil Procedure Law (E Drejta e Procedurës Civile), page 421.

<sup>31</sup> Article 5 paragraph 1, Law on the Privatization Agency of Kosovo, no. 03/L-067, viewed on 17 January 2013.

**Example 1**

In this decision, the claimant was SOE KBI "KOSOVO EXPORT" against two natural persons. The Appellate Panel, upon complaint of the PAK against a decision of the Trial Panel (first instance court within the Special Chamber) had rendered this:

*DECISION*

1. *To approve the complaint as grounded.*
2. *The Decision of the SCSC, of 15 October 2009, SCC-09-0134 is annulled.*
3. *The Trial Panel is ordered to re-adjudicate the claim.*

In the reasoning of this verdict, beside others is stated:

Contrary to the Trial Panel's conclusion, claims against natural persons are not per se excluded from the jurisdiction of the SCSC, as defined in Section 4.1 UNMIK REG 2008/4: As outlined in the removal decision of the SCSC of 8 July 2009, RR-09-0001, claims involving the recognition of a right, title or interest in property in the possession or control of an enterprise or corporation currently or formerly under the administrative authority of the KTA, fall under the jurisdiction of the trial panel(s) of the SCSC, regardless of the respondent (see Section 4.1 [d] leg cit). In addition, Section 5.2 (e) leg cit provides for claims against "other persons" the SCSC "deems necessary for the full and complete adjudication of the case before it", including natural persons.

In the claim at stake, the recognition of claimed property rights in favour of the Claimant, a SOE, is the relevant subject matter. It therefore falls under the SCSC's jurisdiction.

*"Contrary to the Trial Panel's conclusions, claims against natural persons are not per se excluded from the jurisdiction of the SCSC, as defined in Section 4.1 UNMIK REG 2008/4: as outlined in the removal decision of the SCSC of 8 July 2009, RR-09-0001, claims involving the recognition of a right, title or interest in property in the possession or control of an enterprise or corporation currently or formerly under the administrative authority of the KTA, fall under the jurisdiction of the trial panel(s) of the SCSC, regardless of the respondent (see Section 4.1 [d] leg cit). In addition, Section 5.2 leg cit provides for claims against "other persons" the SCSC "deems necessary for the null and complete adjudication of the case before it", including natural persons. In the claim at stake, the recognition of claimed property rights in favour of the Claimant, a SOE, is the relevant subject matter. It therefore falls under the SCSC's jurisdiction".*

This decision was rendered in 2010, when UNMIK Regulations on matters related to the Kosovo Trust Agency were in force.

Currently, when the applicable legislation is the Law on the Special Chamber no. 04/L-033, on matters related to the Privatization Agency of Kosovo, in terms of competence, nothing has changed. Nevertheless, an appellate panel acted otherwise in the case of PAK claims against natural persons.

### **Example 2**

The following is one of these decisions, no. AC-I-12-0070, January 2013, which is completely opposite to the one presented above.

#### **DECISION**

1. *Complaint is set aside as ungrounded.*
2. *Decision of the Specialised Panel of the SCSC, of 13 April 2012, C-III-12-0002 is upheld.*
3. *No court fees are imposed for the appellate procedure.*

The reasoning of this decision provides, amongst others:

*“The jurisdiction of the SCSC is regulated by Article 4 of the LSC and Article 5 of the LSC, which provide on the claimant, respectively respondent party in proceedings before the SCSC. A respondent, pursuant to Article 5, sub-paragraph 2 of the LSC, by choice of the Agency, is the enterprise which is subject to administration of the Agency, or the Agency acting on behalf of the Enterprise”.*

*“Nevertheless, in compliance with Article 5.2, sub-paragraph 2.5 of the LSC, “with respect to any case or issue before it: any person that the Special Chamber or any panel thereof deems necessary or appropriate to name or admit as a Respondent in order to ensure the full and complete adjudication of such case or issue”.*

*“According to the provision of the LSC mentioned, it is clear that a natural person may join the case only if there is already, in the pending case before the SCSC, one (or more) respondents falling within the definition given with Article 5.2 of the LSC. Otherwise, the SCSC has no jurisdiction over a claim if the natural person is the only respondent in the case”.*

*“For reasons above, the Appellate Panel cannot agree with the specific interpretation rendered by the SCSC in its decision of 9 March 2010, in the case SC-09-0087 (presented by the appellant to support his arguments)”.*

From this reasoning, especially in the last paragraph, it is clear that there is no solid legal argument for rejecting competence in such cases, apart from the sentence that *“For reasons above, the Appellate Panel cannot agree with the specific interpretation rendered by the SCSC in its decision of 9 March 2010, in the case SC-09-0087”*. If the “reasons above” are viewed, there is no true reason for such an action or decision, apart from quoting the Article 5, which, if viewed in connection with Article 4, definitely and undoubtedly asserts competence in such cases.

### **Conclusion**

This topic is rather important and very challenging, not because there are inconsistencies between the Contested Procedure Law and scientific literature, but due to the fact that the legislators did not properly think over the writing of provisions of the Special Chamber Law, which collide between themselves. This collision especially appears in Articles 4 and 5 of the Special Chamber Law, but also with the Article 5 of the PAK Law, which are related to the court competences and the authorizations of the PAK upon socially owned enterprises, namely assets and properties of such enterprises.

I hope this dilemma is resolved with a substantial change in the Law on the Special Chamber, especially in terms of clear definition of the Chamber jurisdiction, pursuant to the legal title of the Court, "Special Chamber of the Supreme Court of Kosovo for Matters related to the Privatization Agency of Kosovo".

This paper has made modest efforts in presenting all collisions in such provisions, but also it aims at providing concrete solutions of coming out of the situation, which should also affect the reputation of this Court.

### **Literature**

- Brestovci Faik, Civil Procedure Law (E Drejta Procedurale Civile)
- Pozniq Borivoje, Civil Procedure Law (E Drejta Procedurale Civile)

### **Other sources**

- Decisions of the Special Chamber of the Supreme Court of Kosovo.
- Law on the Privatization Agency of Kosovo.
- Law on the Special Chamber of the Supreme Court of Kosovo.
- Contested Procedure Law.
- Annex of the Special Chamber Law.