



**Department of Human Rights and Communities**

**Report on the Commercial Court of Kosovo**

**July 2009**

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## EXECUTIVE SUMMARY

This report assesses the work of the District Commercial Court of Prishtinë/Priština.<sup>1</sup> Through analysis of relevant laws and monitoring of individual cases, significant problems have been identified that must be addressed so that the court successfully fulfils its mandate.

The Commercial Court has first instance jurisdiction in “mutual economic disputes”, claims for damage compensation, “economic disputes”, and “administrative-accounting disputes”, among others.<sup>2</sup> Additionally, the law gives the court jurisdiction in proceedings of enforced settlements, bankruptcy, and regular liquidation as well as in contests arising from those proceedings.<sup>3</sup>

Significant legal, economic, and political changes since the Commercial Court’s inception call into question the need for the court to continue in its present form. The legal framework establishing the court and outlining its jurisdiction dates back to 1978, during the communist system in Yugoslavia.<sup>4</sup> Its terminology is often outdated, undefined, and unclear. Further, new legislation adopted in the last years have limited the court’s power by giving jurisdiction to other courts, while jurisdictional rules multiply, they sometimes result in a decrease of the Court’s power. Moreover, the court bases its jurisdiction on the identity of the parties, rather than the subject matter of the dispute, a practice that works counter to the idea of a court specialized in certain types of disputes. In addition, the existence of different courts with concurrent jurisdiction allows the parties to choose “the most favourable jurisdiction or court in which a claim might be heard...” (*forum shopping*),<sup>5</sup> jurisdictional disputes, and delays. Finally, the public is confused regarding the jurisdiction, that negatively impacts court management. All of these factors have contributed to a decrease in the court’s caseload.

From a practical standpoint, two major issues have been identified. Firstly, the court’s failure to publish judgments, hold hearings in rooms large enough to accommodate the public, and failure to post trial schedules violate the public hearing guarantees of the European Convention on Human Rights. Secondly, the judgments of the Commercial Court often fail to contain sufficient reasoning, raising thus further human rights concerns.

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<sup>1</sup> Pursuant to UN Security Council Resolution 1244, the Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) has the mandate to monitor the Kosovo justice system for compliance with domestic law and international human rights standards. The OSCE began monitoring criminal cases in 1999 and extended its monitoring to civil cases in 2004. The OSCE has been monitoring property cases as a matter of priority since 2004. Its court monitoring methodology involves collecting data about individual court proceedings and analyzing it for patterns of problematic court practices or violations of the law applied in Kosovo.

<sup>2</sup> Article 30, Law on Regular Courts, Official Gazette of the Socialist Autonomous Province of Kosovo No. 21/1978 (Law on Regular Courts). The English translation of the Law on Regular Courts uses mostly the term “economic district court”, but in this report the term “commercial court” is used. The other terms will be defined later in this report.

<sup>3</sup> Article 30(2), Law on Regular Courts.

<sup>4</sup> Law on Regular Courts.

<sup>5</sup> Brian A. Garner, Black’s Law Dictionary, Eighth Edition, Thomson West, 1999, page. 681.

The report concludes with recommendations on the ways to overcome the identified problems.

## I. INTRODUCTION

Commercial law plays an important role in economic stimulation. Clear rules applied in a consistent and predictable manner by independent and professional courts lower transaction costs and help promote the rule of law. Kosovo has a growing body of commercial law. That body of law must develop along with Kosovo's rapid and almost complete transition from a socialist to a free market economy in order to create an enabling environment for commercial transactions and thus contribute to sustainable economic growth.

This report focuses on the functioning of the District Commercial Court located in Prishtinë/Priština, which covers all the regions of Kosovo. The Law on Regular Courts establishes the Commercial Court, giving it first instance jurisdiction in "mutual economic disputes", claims for damage compensation, "economic disputes", and "administrative-accounting disputes", among others.<sup>6</sup> Additionally, the law gives the court jurisdiction in proceedings of enforced settlements, bankruptcy, regular liquidation, and in contests arising from those proceedings.<sup>7</sup> The court is mandated to "decide and conduct execution of the decisions which are made in the first instance, as well as disputes which are created during and because of the execution of these decisions, provided that they may entrust the conduct of the execution over non-monetary means of the offender to the municipal court."<sup>8</sup>

Originally, Kosovo had two commercial courts, one in Gjakovë/ Đakovica and another in Prishtinë/Priština.<sup>9</sup> However, given the political developments in the area, the Gjakovë/Đakovica court was closed in January 1992.<sup>10</sup> When the Gjakovë/Đakovica Commercial Court was still operating, both courts employed seventeen judges specializing in different areas.<sup>11</sup> Today, the Prishtinë/Priština Commercial Court has seven judges.<sup>12</sup> The Kosovo Judicial Council,<sup>13</sup> which is the central authority responsible for administering Kosovo's courts, assigned three of those judges to the Prishtinë/Priština District Court,<sup>14</sup> but it is unclear whether that assignment is temporary or permanent.

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<sup>6</sup> *Id.* Article 30(1).

<sup>7</sup> *Id.* Article 30(2).

<sup>8</sup> *Id.* Article 30(4).

<sup>9</sup> *Id.* Article 36.

<sup>10</sup> Interviews conducted by the OSCE staff with Commercial Court practitioners and former staff from January to March 2009.

<sup>11</sup> Interviews conducted by the OSCE staff with Commercial Court judges and staff during Fall 2008.

<sup>12</sup> At the time of drafting this report the European Union Rule of Law Mission in Kosovo (EULEX) was not engaged in handling of Commercial Court cases. The EULEX assumed full operational capability on 6 April 2009. See "EULEX Report to the UN" of 17 June 2009, available at the EULEX official web page at: <http://www.eulex-kosovo.eu>

<sup>13</sup> UNMIK Regulation 2005/52 on the establishment of the Kosovo Judicial Council, 20 December 2005. The Kosovo Judicial Council succeeded the Kosovo Judicial and Prosecutorial Council established by UNMIK Regulation 2001/8, on the Establishment of the Kosovo Judicial and Prosecutorial Council, 6 April 2001.

<sup>14</sup> *Id.*

## II. LEGAL FRAMEWORK

Significant legal, economic, and political changes since the Commercial Court's inception question the need for the court to continue in its present form. The legal framework establishing the court and outlining its jurisdiction dates back to 1978, during the communist system in Yugoslavia.<sup>15</sup> Its terminology is often outdated, undefined, and unclear. Further, new legislation adopted in the last years have limited the court's power by giving jurisdiction to other courts, while jurisdictional rules sometimes result in the limitation of the court's power. Moreover, the court bases its jurisdiction on the identity of the parties rather than the subject matter of the dispute, a practice that works counter to the idea of a court specialized in certain types of disputes. In addition, the existence of different courts with concurrent jurisdiction contributes to forum shopping, jurisdictional disputes, and delays. Finally, the public is confused regarding the jurisdiction, and thus this has a negative impact on court management

### A. Laws erode the commercial court's jurisdiction

The 1978 Law on Regular Courts sets out the jurisdiction of Kosovo's courts and gives the Commercial Court first-instance jurisdiction in proceedings involving, among other things:

- Mutual commercial disputes, including contract disputes;
- Damage compensation when the parties are worker-run enterprises ("organizations of associated labour") or other socially-run organizations such as labour unions, public utility boards, and municipalities<sup>16</sup> (referred to in the law as "other self-management organizations, or communities and social-political communities");
- Commercial offences;
- Commercial disputes related to intellectual property and competition;
- Administrative-accounting contests;
- Enforced settlements; and
- Bankruptcy proceedings and disputes arising there from.<sup>17</sup>

However, the post-1999 environment in Kosovo brought many changes to Kosovo's legal system, including the introduction of laws on contracts for the sale of goods, bankruptcy, competition, internal trade, patents, trademarks, copyright, and business organizations.<sup>18</sup> These laws often contain provisions assigning disputes to courts other

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<sup>15</sup> Article 30, Law on Regular Courts.

<sup>16</sup> Page 11, 1<sup>st</sup> paragraph, Constitution of the Socialist Federal Republic of Yugoslavia, 1974.

<sup>17</sup> *Id.*

<sup>18</sup> UNMIK Regulation 2000/68 on Contracts for the Sale of Goods, 29 December 2000; UNMIK Regulation 2003/7, promulgating Law No. 2003/04 on the Liquidation and Reorganisation of Legal Persons in Bankruptcy, 14 April 2003 ( Law on Bankruptcy); UNMIK Regulation 2004/44, promulgating Law No. 2004/36 on Competition, 29 October 2004; UNMIK Regulation 2004/43, promulgating Law No. 2004/18 on Internal Trade, 20 October 2004; UNMIK Regulation 2004/56, promulgating Law No. 2004/49, the Patent Law, 20 October 2004; UNMIK Regulation 2006/38, promulgating Law No. 02/L-54 on Trademarks, 28 June 2006 (Law on Trademarks); UNMIK

than the Commercial Court. If they do not specifically revoke the Commercial Court's jurisdiction, their provisions are often sufficiently vague to question the Commercial Court's power to decide on certain cases.

For example, the 1978 Law on Regular Courts gives district courts jurisdiction over intellectual property cases in general (including trademark and copyright)<sup>19</sup> and gives the Commercial Court jurisdiction in "commercial disputes" related to intellectual property, including trademark and copyright.<sup>20</sup> However, the 2006 Law on Copyright and Related Rights gives exclusive jurisdiction over copyright disputes to the District Court of Prishtinë/Priština<sup>21</sup> and jurisdiction over articles seized as part of a copyright dispute to the minor offences court,<sup>22</sup> thus removing these disputes entirely from the Commercial Court's jurisdiction.

The 2006 Law on Trademarks defines "court" as "the competent court in Prishtinë/Priština".<sup>23</sup> This could be read as retaining the Commercial Court's jurisdiction in trademark cases, though it is unclear why jurisdiction would be taken away in copyright and left in trademark. However, the trademark law does appear to change one aspect of the Commercial Court's jurisdiction, stipulating that "[w]ithout prejudice to the powers conferred by the present law upon the court (in Prishtinë/Priština), requests for the surrender, destruction, or forfeiture of contraband may be brought in the court with jurisdiction over the territory in which the suspect items are situated or in which the entity with possession, custody, or control of the items is located."<sup>24</sup>

The Law on Regular Courts also gives to the Commercial Court the responsibility for maintaining the registry of business organizations.<sup>25</sup> However, the Law on Business Organizations grants this authority to the Kosovo Registry of Business Organizations and Trade Names.<sup>26</sup>

The applied 2008 Law on Contested Procedure contains many rules, particularly regarding territorial jurisdiction, some of which appear to remove the Commercial Court's jurisdiction.<sup>27</sup> For example, if the respondent is a legal person, the

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Regulation 2006/46, promulgating Law No. 2004/45 on Copyright and Related Rights, 24 August 2006 (Law on Copyrights and Related Rights); UNMIK Regulation 2008/26, promulgating Law No. 02/L-123 on Business Organisations, 27 May 2008 (Law on Business Organizations).

<sup>19</sup> Article 29(2), Law on Regular Courts.

<sup>20</sup> *Id.* Article 30(1)(c).

<sup>21</sup> Article 194, Law on Copyrights and Related Rights.

<sup>22</sup> *Id.* article 213.

<sup>23</sup> Article 2, Law on Trademarks.

<sup>24</sup> *Id.* article 85, "Without prejudice to the powers conferred by the present law upon the Court, proceedings for an order under Article 20 or 23 *may* be brought in the Court in the location in which [...]" (emphasis added). The use of "may" rather than that of "shall" implies that the aggrieved party may choose in which court to bring his or her request. However, with regard to the use of the term "may" in the English version of this article there is a translation discrepancy, as both Albanian and Serbian language versions use the term "shall".

<sup>25</sup> Article 30(3), Law on Regular Courts.

<sup>26</sup> Article 7, Law on Business Organizations. It is an agency within the Ministry of Trade and Industry that registers business organisations. Articles 6 and 7, UNMIK Regulation 2008/26, promulgating Law No. 02/L-123 on Business Organizations, 27 May 2008.

<sup>27</sup> *See* Articles 37-62, Law No. 03/L-006 on Contested Procedure, Kosovo Official Gazette, 20 September 2008 (2008 Law on Contested Procedure).

jurisdiction is vested in the court of the territory where the headquarters of that legal person is registered,<sup>28</sup> while in property disputes the exclusively competent court is the court of the territory where the immovable property is located.<sup>29</sup>

Even before new laws and legal practice changed some of the powers originally given to the Commercial Court, the 1978 Law on Regular Courts itself spread jurisdiction over certain issues among the courts of Kosovo.<sup>30</sup> Article 30 of the Law on Regular Courts has also been interpreted as giving the Commercial Court jurisdiction over cases involving parties which are non-natural persons.<sup>31</sup> Such jurisdiction based on the identity of the parties raises particular questions.

**B. Jurisdiction based predominantly on the identity of the parties works counter to the idea of a court specialized in certain types of disputes**

Although the name Commercial Court implies a court specialized in certain types of disputes, the court effectively specializes in cases involving certain types of parties. As mentioned earlier, the Law on Regular Courts lists the specific types of proceedings over which the Commercial Court has jurisdiction. The first paragraph of Article 30 of that law gives the Commercial Court jurisdiction in “mutual economical disputes and disputes for compensation of damage in which as parties appear organizations of associated labour, other self-management organizations or communities and social-political communities”. Most of the court’s cases are based on this provision, which the court has interpreted as giving it jurisdiction in cases in which both parties are non-natural persons.<sup>32</sup>

This personal jurisdiction rule runs counter to the idea of having specialized courts addressing cases involving a particular area of law. Natural persons are equally able to engage in commercial disputes as corporations, and they deserve the same benefits of a specialized court, if there is one.

Further, basing jurisdiction on the identity of the parties means that commercial disputes between different categories of parties are subject to the jurisdiction of different courts. This creates a risk that different courts come to different judgments regarding similar subject matters. Moreover, the legislation fails to explain which court is competent in case one of several plaintiffs or respondents is a natural person. In addition, basing jurisdiction of the Commercial Court on the identity of the parties, makes it difficult for judges to gain specialized experience with commercial disputes.

**C. Outdated, undefined, and unclear terminology make unclear what is the subject of the court’s power**

In both the original Albanian and Serbian texts and the English translation of the Law on Regular Courts, the meanings of some legal terms are not clear. Laws rarely

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<sup>28</sup> *Id.* article 39.2.

<sup>29</sup> *Id.* article 41.1. The 2008 Law on Contested Procedure never mentions the “Commercial Court.” It does make reference to a “Trade Court” and “trade disputes” but does not define either term. *Id.* article 505 et seq.

<sup>30</sup> Articles 29 and 30, Law on Regular Courts.

<sup>31</sup> Interviews with Commercial Court judges and staff during fall 2008.

<sup>32</sup> *Id.*

provide an introductory list of definitions. For example, in the 1978 Law on Regular Courts, terms mentioned, but not defined include “commercial offences”, “administrative-accounting disputes”, “enforced settlements”, and “commercial disputes”.<sup>33</sup> Moreover, some concepts such as “mutual commercial disputes”, “organizations of associated labour”, “self-management organizations”, and “social-political communities” are relics of Yugoslavia’s planned economy and carry little meaning in Kosovo’s more modern and competitive environment.<sup>34</sup> Definitions of some of these terms are located in other laws.

The Law on Commercial Offences defines a “commercial offense” as “a violation of rules on commercial and financial business committed by legal person and responsible person within the legal person, which has caused or could have caused severe consequences and which in the provisions issued by the authorised body is specified as a commercial offence.”<sup>35</sup> For example, trading in uncertified goods or conducting business without registration are considered to be commercial offences.<sup>36</sup> The court has not addressed many commercial offence cases in the recent years for various reasons. Specifically, municipal inspectorates are not active, charges are not filed with prosecutors, prosecutors do not prosecute, or cases are brought before minor offences courts instead of the Commercial Court.<sup>37</sup>

“Administrative-accounting disputes”<sup>38</sup> refer to claims against decisions of the Social Accounting Service, the entity in charge of keeping records of social resources and managing the disposal of social assets.<sup>39</sup> The Social Accounting Service no longer operates in Kosovo, thus removing jurisdiction over administrative-accounting disputes from the Commercial Court.

At the time of the establishment of the commercial courts, an “enforced settlement”<sup>40</sup> was an agreement on repayment and reduction of debts between the debtor and “at least half of the total number of creditors whose claims rate to more than half of the claims of creditors”.<sup>41</sup> Enforced settlements appear to have been used to prevent costly and drawn-out bankruptcy proceedings while still enabling creditors to collect at least part of the debts owed to them.<sup>42</sup> Courts could order enforced settlements

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<sup>33</sup> Article 30, Law on Regular Courts.

<sup>34</sup> *Id.* article 30.1(a).

<sup>35</sup> Article 2 (1), Law on Commercial Offences, Socialist Federal Republic of Yugoslavia Official Gazette 4/1977, 14 January 1977. The term “commercial offence” can be misleading, as it does not necessarily refer to a criminal act. Sanctions for commercial offences include fines, public announcement of judgments, and exclusion for participation in a particular commercial activity. Articles 17 and 20-35, Law on Commercial Offences, Socialist Federal Republic of Yugoslavia Official Gazette 4/1977, 14 January 1977 (Law on Commercial Offences). Procedural rules for addressing commercial offences are located in the Law on Commercial Offences, and, if the commercial offence is considered criminal in nature, the criminal procedure code. *Pravna Enciklopedija, ISKRO Savremena Administracija, Beograd, 1985, page 1318; see also Articles 32(2) and 56, Law on Commercial Offences.*

<sup>36</sup> UNMIK Regulation 2003/10 promulgating Law No. 2003/5 on Seeds, 15 April 2003.

<sup>37</sup> Interviews with lawyers and Commercial Court judges and staff during fall 2008.

<sup>38</sup> Article 30(1)(d), Law on Regular Courts. *See also Pravna Enciklopedija 1 ISKRO Savremena Administracija, Beograd, 1985, page 1785.*

<sup>39</sup> *Pravna Enciklopedija, page 1529, citing the Law on the Social Accounting Service, and Article 77, Constitution of the Socialist Federal Republic of Yugoslavia, 1974.*

<sup>40</sup> Article 30.2, Law on Regular Courts.

<sup>41</sup> *Pravna Enciklopedija, page 1300.*

<sup>42</sup> *See id.*

during the same pre-trial hearing in which they determined whether the requirements to proceed with a bankruptcy had been met.<sup>43</sup> In current practice, enforced settlement is understood as referring to a procedure according to which the Social Accounting Service requests bankruptcy proceedings be initiated in respect to a particular entity.<sup>44</sup> However, the Social Accounting Service no longer functions.

The change of political and economic circumstances in Kosovo has taken away the court's jurisdiction over organizations of associated labour, self-management organizations, and social-political communities. Moreover, trying commercial offences, administrative-accounting disputes, enforced settlements, and commercial disputes becomes difficult, as most of these terms have lost their meaning in the current legal context. Based on the provisions of the Law on Regular Courts outlining the Commercial Court's jurisdiction, historical developments could be considered to have taken away at least half of the court's power. Moreover, legal and social changes will only continue that trend.

#### **D. Existence of different courts with concurrent jurisdiction**

The concurrent jurisdiction of the Commercial Court with other courts presents challenges and opportunities for litigants who have to decide before which court they should file their claim. Parties may be engaged in forum shopping and seek for the court which they perceive will better serve their interests. The practice of forum shopping could lead to different results in similar cases, although the outcome should not depend on which court hears a case. Further, courts that are already overburdened, such as the Prishtinë/Priština district and municipal courts, could see a further increase in their workloads, if plaintiffs consider them to be favorable forums.

Moreover, this could impact the judicial system management. Courts may declare themselves lacking jurisdiction and refer a matter to another court, contributing to delays and confusion in an already-backlogged justice system. In a June 2003 case monitored by the OSCE involving two legal persons, the court declared the provision of the 1978 Law on Regular Courts referring to the commercial court's jurisdiction inapplicable because the subject "[...] of the dispute is the payment of rent and does not involve an inter-commercial relation between two legal entities." The court remanded the case to the municipal court under the provision of the Law on Regular Courts giving municipal courts jurisdiction "to try contests regarding suspension of the lease contract or rent of things or working premises and also the disputes regarding housing relations, if they are under the competence of the regular courts."<sup>45</sup> Arguably, the payment of rent from one legal entity to another for a business premise could fit the definition of mutual economic dispute.

The lack of clear jurisdictional rules naming a single court with jurisdiction over a particular issue can lead to disputes among parties, among courts, and between parties and courts. In general, it would create confusion for both public, parties and judicial staff.

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<sup>43</sup> Interviews conducted by the OSCE staff with Commercial Court practitioners and former staff during fall 2008.

<sup>44</sup> Interviews conducted by the OSCE staff with Commercial Court judges and staff. During fall 2008.

<sup>45</sup> Article 26(13), Law on Regular Courts.

To complicate matters, both the 1978 Law on Regular Courts and the 2008 Law on Contested Procedure have different rules for the settlement of jurisdictional disputes. The 1978 Law on Regular Courts gives to the Supreme Court the power to “resolve conflicts of jurisdiction between regular courts, conflicts of jurisdiction between regular courts and courts of the associated labour, and conflicts between regular courts and other self-management courts in the territory of the Province.”<sup>46</sup> Under the 2008 Law on Contested Procedure, a jurisdictional dispute between two courts of the same level is settled by a court that is of higher instance and common for the courts in dispute.<sup>47</sup> A jurisdictional dispute between courts of different instances is settled by the Supreme Court of Kosovo.<sup>48</sup> Further, Article 43 of the 2008 Law on Contested Procedure attributes jurisdiction over disputes that arise during and related to the procedure of bankruptcy to the court of the territory where the bankruptcy procedure takes place. All of this may lead to jurisdictional disputes.

The unclear meaning and interpretation of the identity of the parties mentioned in Article 30(1)(a) of the Law on Regular Courts, could also be a source of jurisdictional disputes, but this risk seems small, as the staff of the commercial court registry office say that the court assumes jurisdiction if both parties are listed in the Register of Business Organizations.<sup>49</sup>

When courts decline jurisdiction in a case and refer it to another court, delays often arise. In monitored cases, the basis for declining jurisdiction of the commercial court involved primarily the lack of a clear definition of “mutual economic dispute” in Article 30 of the Law on Regular Courts.

Delays also occur if a party objects to a decision on jurisdiction or if parties file the same claim in different courts, each of which reaches a different conclusion on jurisdiction, in which case the Supreme Court decides.<sup>50</sup> Such lengthy procedural disputes mean it can take years before the substance of the case comes to trial, increasing the risk of violating the right to trial within a reasonable time.

In a contract dispute in the Gjilan/Gnjilane region, the plaintiff filed its original claim with a municipal court in October 2001. The municipal court declared the case to be outside of its jurisdiction because the case concerned an economic dispute between a labour organisation and a “social-political union” and referred the matter to the Commercial Court. The plaintiff appealed, but the district court upheld the municipal court’s decision based on Article 30 of the Law on Regular Courts which says that the Commercial Court presides over disputes between two legal persons. However, the Commercial Court returned the matter to the municipal court, holding that “commercial conflict” in Article 30 means the “conflict from reciprocal commerce in connection with the

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<sup>46</sup> Article 31(8), Law on Regular Courts.

<sup>47</sup> Article 25.1, 2008 Law on Contested Procedure.

<sup>48</sup> *Id.* article 25.2.

<sup>49</sup> Interview conducted by the OSCE with Commercial Court Judges and staff, October and November 2008.

<sup>50</sup> Article 31(8), Law on Regular Courts.

commerce of the subjects from Article 30(1)(a) of the Law on Regular Courts [...].

This case does not involve a reciprocal commercial conflict but rather an annulment of a contract the subject of which is an exchange of immovable property which does not present a reciprocal economic conflict but a civil legal property dispute for which pursuant to Article 26(1)(6) of the Law on Regular Courts the competent court is the [...] municipal court.” As permitted by Article 22(1) of the 1982 Law on Contested Procedure, the Commercial Court referred the issue of jurisdiction to the Kosovo Supreme Court, which affirmed the Commercial Court’s decision and returned the case to the municipal court on 31 December 2002. On 6 May 2006, the municipal court held in favour of the respondent. The plaintiff appealed to the district court, which overturned the municipal court on 28 June 2006. The respondent petitioned the Supreme Court for revision on 15 March 2007 - nearly five and a half years after the plaintiff filed its original claim.<sup>51</sup>

#### **E. The decrease in the court’s caseload calls into question the necessity for a commercial court in its present form**

The erosion of the Commercial Court’s jurisdiction caused by the legal and economic developments in Kosovo has led to a decline in its caseload. Many organizations mentioned in Article 30(1)(a) of the Law on Regular Courts such as organizations of associated labour, self-management organizations, and social-political communities no longer exist, were transformed into socially owned enterprises,<sup>52</sup> or were privatized. Legal action involving these enterprises must be submitted to the Special Chamber of the Supreme Court on Kosovo Trust Agency Matters rather than to the Commercial Court.<sup>53</sup> As explained earlier, administrative-accounting disputes and proceedings of enforced settlements no longer occur.

Accordingly, the number of cases filed with the Commercial Court has been limited in recent years. In 2007 the Commercial Court did not receive or process any cases in the categories of commercial offenses, regular liquidations, bankruptcies, payment orders, and non-contested matters.<sup>54</sup>

In addition to presiding over fewer disputes, the Commercial Court is no longer responsible for maintaining the registry of businesses. That duty now falls under the purview of the Ministry of Trade and Industry.<sup>55</sup>

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<sup>51</sup> Such delays are less likely to occur with the application of the 2008 Law on Contested Procedure. Article 26.3 thereof does not permit appeal against judgments in jurisdictional disputes.

<sup>52</sup> Section 3, UNMIK Regulation 2005/18, amending UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency, 22 April 2002; Article 2(1) and (2), Law on Enterprises, Official Gazette of the Socialist Federal Republic of Yugoslavia 77/1988, 31 December 1988.

<sup>53</sup> Section 4, UNMIK Regulation 2002/13, on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, as amended by UNMIK Regulations 2008/4 and 2008/19.

<sup>54</sup> Interviews with Commercial Court judges and staff, during fall 2008.

<sup>55</sup> It is an agency within the Ministry of Trade and Industry that registers business organisations. Articles 6 and 7, UNMIK Regulation 2008/26, promulgating Law No. 02/L-123 on Business Organizations, 27 May 2008.

The Commercial Court was established in a time when the central government played a much greater role in economic policy and when business was structured in a way that took into account such central control. The political and economic changes since the inception of Commercial Court have led to a significant decrease in its caseload. In order to avoid the risk of falling into obsolescence the legal framework by which the Commercial Court operates must be substantially revised and modernized.

### **III. COMMERCIAL COURT PRACTICE**

#### **A. Violation of public hearing guarantees of the European Convention on Human Rights**

The right to a public hearing extends beyond holding open trials. It “also appl[ies] to the public delivery of judgments [...] and [has] the same purpose, namely a fair trial...”.<sup>56</sup> The Commercial Court holds public hearings and pronounces judgments publicly, however copies of the court’s judgments are not readily available to the public as they are neither published in a gazette nor posted on the internet. This is not only a problem of this court but is common throughout the Kosovo judiciary. In the past, several printed volumes and CDs with judgments of the Supreme Court have been published, but this is the exception.

Public decisions increase transparency, public scrutiny and confidence in the justice system and educate lawyers about how to interpret laws. Moreover, parties who consider submitting a claim to the Commercial Court may encounter problems when trying to review earlier judgments on similar matters of the Commercial Court. Consequently, the Commercial Court and all other courts of Kosovo should regularly publish relevant decisions.

Further, the Commercial Court’s practice of holding hearings and sessions in the offices of individual judges which generally fit only a few people is less desirable from the perspective of full compliance with the European Convention on Human Rights’ guarantee of a public hearing.<sup>57</sup>

Finally, the Commercial Court does not publicize the schedule of its hearings and sessions, thus potentially violating the provisions of the European Convention on Human Rights, according to which a trial only complies with the publicity requirement if the public can obtain information of its date and place and if this place was easily accessible.<sup>58</sup>

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<sup>56</sup> *Werner v. Austria*, app. no. 21835/93, para. 54, European Court of Human Rights, 24 November 1997.

<sup>57</sup> *See Riepan v. Austria*, app. no. 35115/97, para. 30, European Court of Human Rights, 14 Nov. 2000.

<sup>58</sup> *Id.* para. 29.

## **B. Commercial Court judgments often lack sufficient reasoning**

Parties in commercial trials, as in all civil trials, have the right to a reasoned decision.<sup>59</sup> In line with the requirement of a reasoned decision, the 1982 Law on Contested Procedure requires a final decision to contain an explanation including the facts and evidence upon which it is grounded.<sup>60</sup> The court shall also specify the legal provisions on which the decision relies.<sup>61</sup> The lack of reasoning of a decision constitutes a substantial breach of procedural law and serves as a ground for appeal.<sup>62</sup>

The European Convention on Human Rights requires reasoned judgments. A reasoned decision “demonstrate(s) to the parties that they have been heard [...]. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.”<sup>63</sup> Reasoned decisions are particularly important because they enable parties to appeal. It is true that without reasons justifying a court decision, the appealing party cannot properly challenge the basis of a court’s decision.<sup>64</sup>

Commercial Court judgments often fail to contain sufficient reasoning and fail to cite any supporting legal provision. Moreover, the court often does not include an explanation of how the evidence presented at trial meets the requirements of the law.

On 25 April 2006 in a debt case between two legal entities, the Commercial Court approved the plaintiff’s claim and obliged the respondent to pay the debt. The case had been transferred from the Supreme Court to the Commercial Court, and the judgment says that the Commercial Court “[...] administered the evidence during the evidentiary procedure while directly reviewing the Special Chamber of the Supreme Court of Kosovo judgment [...], notification of the KTA [...], certificate for currency conversion, the Istog/Istok Municipal Court decision, the District Commercial Court decision, [...] the evidence through hearing of the witness [...] as proposed by the plaintiff.” Further, “[...] based on verified grounds of the factual state and pursuant to articles 15, 17, and 262 of the Law on Obligations, the court obliged the respondent to pay [...] due to the reason that the litigants are obliged through obligatory-contractual relations to perform its duties and are responsible to fulfill these obligations, thus the respondent is obliged to fulfill its duty entirely, as it was previously foreseen.” Although the

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<sup>59</sup> *Van de Hurk v. Netherlands*, app. no. 16034/90, para. 61, European Court of Human Rights, 19 April 1994. See also *Suominen v. Finland*, app. no. 37801/97, paras. 34-38, European Court of Human Rights, 24 July 2003.

<sup>60</sup> Article 338(1), 1982 Law on Contested Procedure. The reference is made to the 1982 Law on Contested Procedure because the monitored cases date before the adoption of the 2008 Law on Contested Procedure.

<sup>61</sup> *Id.* Article 338(4).

<sup>62</sup> *Id.* Article 354(2)(13). Under Article 354(1) of the 1982 Law on Contested Procedure, a “substantial breach on the point of practice and procedure exists if the court, while conducting the proceedings, has not applied, or has wrongly applied some provision of this Code, and that has or might have, affected the passing of a lawful and fair judgment”.

<sup>63</sup> *Suominen v. Finland*, app. no. 37801/97, para. 37, European Court of Human Rights, 24 July 2003.

<sup>64</sup> *Id.* paragraphs. 34-38.

judgment cited legal provisions supporting the court's decision, it did not explain how the evidence presented meets the requirements of the law.<sup>65</sup>

On 30 December 2001 in a trademark case, the plaintiff asked the court to temporarily enjoin the respondent from distributing the product at issue. On 11 February 2002, the court refused the plaintiff's request citing a lack of evidence and referring to Article 267 of the Law on Executive Procedure and Article 278 of the 1982 Law on Contested Procedure without further explanation. On 28 February 2002, the court issued a judgment rejecting the plaintiff's claim. In the judgment, the court describes the evidence presented but fails to mention any legal provision: "[...] the plaintiff does not have active legitimacy of a plaintiff and that the same is represented in the manner of the distributor of [the product] and has no other authorisation that in a name and for the producer of [the product] request to establish the identity of the contested brands [...] and prohibition of the distribution of [the product]".

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<sup>65</sup> Law on Obligations, Official Gazette of the Socialist Federal Republic of Yugoslavia 29/1978, 30 March 1978.

#### **IV. CONCLUSION**

New laws that grant other courts jurisdiction over issues traditionally within the Commercial Court's purview, outdated and undefined terminology, and the obsolescence of terms like "self-management organizations" and "organizations of associated labor" mean that the Commercial Court must adapt to the new circumstances in order to successfully fulfil its mandate. Further, the practice of exerting personal rather than subject matter jurisdiction often defeats the purpose of a court specialized in a particular area of law. In its present form, the Commercial Court stands as largely a relic of a time when the state was the primary mover in Kosovo's economy. Without adapting to current circumstances, the court risks becoming completely obsolete.

#### **V. RECOMMENDATIONS**

- If the Commercial Court remains in its current form as a separate district court with Kosovo-wide jurisdiction, the legal framework on which it operates should be substantially revised and modernised.
- If Kosovo continues to have a Commercial Court, rules regarding its jurisdiction should be described in one law and should not make jurisdiction dependent on the nature of the parties as natural or non-natural persons. The Commercial Court could have exclusive competence for all disputes arising under certain laws such as the Law on Business Organizations, the Law on Bankruptcy, the Law on Copyrights and Related Rights, and the Law on Trademarks.
- One comprehensive and modern set of rules should lay out the jurisdiction of all Kosovo's courts.
- The rules for the settlement of jurisdictional disputes should be clear, concise, and provided within one law. They should clearly address disputes in which the Commercial Court is involved.
- The Commercial Court should regularly publish its judgments, post trial schedules, and hold hearings in rooms large enough to accommodate the public.
- The Commercial Court should ensure judgments are fully reasoned and include references to specific legal provisions on which their decision was based and the facts supporting such decisions.