REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, 24 July 2024
Ref. no.: AGJ 2491/24

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI199/22

Applicant

N.P.T. "Arta XH"

Constitutional review of Decision [E. Rev. no. 75/20] of the Supreme Court of Kosovo, of 1 August 2022

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge, and
Enver Peci, Judge

Applicant

1. The referral was submitted by company "Arta XH", with its seat in the village Begrace – Kaçanik (hereinafter: the applicant). The applicant is represented by Nezir Bytyqi, a lawyer from Ferizaj.

Contested decision

2. The applicant challenges the constitutionality of Decision [E. Rev. no. 75/20) of the Supreme Court of Kosovo, of 1 August 2022.

3. The Decision [E. Rev. no. 75/20] of the Supreme Court of 1 August 2022, was served on the applicant's representative on 14 October 2022.

Subject matter

4. The subject matter is the constitutional review of Decision [E. Rev. no. 75/20] of the Supreme Court of 1 August 2022, whereby it is claimed that the applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR) have been violated.

Legal basis

5. The referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals) and 47 (Individual Requests) of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, during the examination of the Referral, the Constitutional Court refers to the provisions of the aforementioned Rules of Procedure. In this regard, in accordance with Rule 78 (Transitional Provisions) of the Rules of Procedure No. 01/2023, exceptionally, certain provisions of the Rules of Procedure No. 01/2018, will continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

Proceedings before the Court

7. On 14 December 2022, the applicant submitted the referral to Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 16 December 2022, Judge Enver Peci took an oath before the President of the Republic of Kosovo, in which case his mandate at the Court began.

9. On 20 December 2022, the President of the Court by Decision [GJR. No. KI199/22] appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and by Decision [KSH. No. KI199/22] appointed the Review Panel, composed of judges: Selvete Gërxhaliu-Krasniqi (Presiding), Safet Hoxha and Radomir Laban, members.

10. On 23 January 2023, the Court: **(i)** notified the applicant about the registration of the referral; **(ii)** sent a copy of the referral to the Supreme Court and **(iii)** requested from the Commercial Court in Prishtina additional information regarding the date when the applicant was served with the Decision [E. Rev. no. 75/20] of the Supreme Court of 1 August 2022.

11. On 26 January 2023, the Court received a letter from the Commercial Court regarding the Court's referral.

12. On 11 March 2024, Judge Jeton Bytyqi took an oath before the President of the Republic of Kosovo, in which case his mandate at the Court began.

13. On 24 May 2024, Judge Jeton Bytyqi requested the President of the Court to be excluded from the decision-making process in the present referral.

14. On 29 May 2024, the President of the Court rendered the decision [Ref. no.: KK294/24] whereby it approved the request for the recusal of judge Jeton Bytyqi. Consequently, judge Jeton Bytyqi did not participate in the review and decision-making process regarding the referral in question.

15. On 30 May 2024, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the referral admissible.

16. On the same date, the Court, by seven (7) votes for and one (1) against, decided to (i) declare the referral admissible; (ii) to hold that the Decision [E. Rev. no. 25/20] of 1 August 2022 of the Supreme Court, is not in compliance with paragraph 1 of article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with paragraph 1 of article 6 (Right to a fair trial) of the European Convention on Human Rights.

Summary of facts of the case

17. The Court, from the case file, notes that the circumstances of the present case are related to the contractual relationship that the applicant had with the company "Sharr Beteilgungs GmbH" regarding the sale and purchase of old scrap metal. The basic contract was signed on 13 April 2002, but due to changing prices of materials in the market, the contract was renewed every three years. The last contract was renewed on 11 March 2009.

18. On 9 December 2010, the Socially Owned Enterprise "Sharr Cem" was privatized and it was registered as a new legal entity "SharrCem" LLC at the Kosovo Business Registration Agency (KBRA). Based on the letters and statements submitted by the applicant, the registered company "SharrCem" L.L.C. has continued to fulfill its contractual obligations to the applicant.

19. On 19 August 2011, the company "SharrCem" LLC stopped the sale and purchase of old scrap metal to the applicant and expressly terminated the contractual relationship with the applicant.

20. On 12 February 2014, the applicant filed a lawsuit with the Basic Court in Prishtina (hereinafter: the Basic Court) against the registered company "SharrCem" LLC requesting: (i) that his claim be approved as grounded; and (ii) that, in accordance with Article 124 of the LOR, be paid compensation for the damage caused by the non-fulfillment of contractual obligations by the respondent starting from 19 August 2011 until the day of drafting the expertise, with legal interest from the day of filing the lawsuit until the final payment, as well as paying the costs of the proceedings.

21. In support of this, the claimant proposed to the Court that after the administration of evidence with financial expertise, determine the amount of real damage and lost profit.

22. On an unspecified date, the respondent's representative, through the reply to the lawsuit, requested that the claim be rejected because the respondent lacks passive legitimacy to be a party to the proceedings, because the lawsuit was filed with the assumption that the respondent is a successor of the company "Sharr Beteiligungs GmbH". Also, regarding the applicant's referral to Article 124 of the LOR, as a legal basis for the compensation of damages, the respondent claimed that the applicant first had to prove that the company "Sharr Beteiligungs GmbH" has any contractual obligation to fulfill or that it is not guaranteed the right to purchase old scrap metal.

23. On 21 January 2016, at the preparatory hearing, the applicant expanded the lawsuit, including the company "Sharr Beteiligungs GmbH" as the second respondent with which the applicant concluded the contract on 13 April 2002.

24. On 12 February 2016, the respondent, the company "Sharr Cem" L.L.C.., through a submission submitted to the Basic Court, objected to the amendment of the lawsuit on the grounds that it was filed after the legal deadline and in violation of Article 258 of LCP, because such a proposal was filed after the preparatory session.

25. On 17 October 2016, the applicant submitted to the Basic Court a submission for clarification of the extension of the lawsuit, where it reasoned that the objection of the first respondent and the second respondent that the amendment of the lawsuit was filed after the legal deadline is not grounded, because the applicant had realized in the preparatory session that the second respondent is still an active legal entity and registered in the BRAK and thus according to article 258 paragraph 4 of the LCP, the Court would have to allow the amendment of the lawsuit even in case of objection, if the conditions are met that a) the claimant, through no fault of his own, could not previously amend the lawsuit and b) the respondent has the opportunity to participate in the review of the case filed with the amended lawsuit without postponing the court session.

26. On 18 November 2016, at the next preparatory session, the applicant again clarified the referral, requesting, "*to carry out a financial expertise to extract as evidence the value of compensation for damage, the amount and value of the material produced from 2009 until the termination of the contract "*, as well as from the termination of the contract to the drafting of expertise. On the other hand, the representative of the first respondent "SharrCem" L.L.C. requested to be excluded from the case as a respondent, since the court has accepted the expansion of the lawsuit including the company "Sharr Beteilgungs GmbH".

27. On 22 December 2016, the Basic Court in the preparatory session, by the Decision [IV. C. no. 453/14]: (i) approved the proposal of the applicant for the appointment of an expert who would determine the value of compensation for the damage and (ii) rejected the proposal of "SharrCem" L.L.C. to be excluded from this contested case.

28. On 18 September 2017, expert Sh.M. chosen by the Basic Court to carry out the financial expertise submitted the expertise in which he concluded that the signatory and owner of "SharrCem" L.L.C. is the signatory of the contract "Sharr Beteiligungs GmbH" with the applicant, both of these separate legal entities. Furthermore, the expert appointed by the court had concluded that "SharrCem" L.L.C. had continued for one year the sale and purchase of scrap metals according to Contract no. 94 of 11 March 2009 between the company "Sharr Beteiligungs GmbH" and the applicant. In conclusion, it stated that, in case the court finds that the contract has been unilaterally terminated, a new expertise would be necessary, which would be much more voluminous and expensive.

29. On 18 February 2018, the Basic Court in the main review session by the Decision [IV. C. no. 453/14] rejected the applicant's proposal for completing the expertise, because the latter concluded that the issue has been sufficiently clarified by the expertise and the answers of the expert in this session.

30. On 22 October 2018, the Basic Court by the Judgment [IV. EC. C. no. 453/14]: **(i)** rejected the applicant's claim filed against the first respondent "Sharr Cem" L.L.C., due to the lack of passive legitimacy; **(ii)** rejected the claim filed against the second respondent "Sharr Beteiligungs GmbH, due to the lack of legal basis; and **(iii)** decided that each party should bear its own costs of proceedings.

31. The Basic Court in the reasoning of the Judgment [IV. EC. C. no. 453/14], emphasized that:

> *"The claimant failed to prove during the procedure that the first respondent could be a party to this procedure, because by the evidence, the statements of the litigants and the expertise of the financial expert, the court found and confirmed that the first respondent "NewCO Sharr Cem" l.l.c. lacks passive legitimacy. This is confirmed by the fact that when the claimant and the second respondent concluded the contract for the sale of scrap metal, the first respondent "Sharr Cem" l.l.c. was not yet established. Then, the court has nowhere found in the case file that there is any contract on transfer, by which the second respondent has transferred the claims, or even the obligations of the first respondent. According to the Contract on Privatization, with no. 1791/2010 (...) it has been proven that the second respondent did not receive any obligation for any other legal work".*
>
> *[...]*
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> *"The claimant has also failed to prove his claim for the damage caused to him by the actions of the second respondent. Although the fact remains that the second respondent "Sharr Beteiligungs GmbH" had entered into a contract for the sale of the claimant's scrap metal, at the time until it was commercialized by SOE "Sharr Cem", on the occasion of the sale of this company by PAK- here, this contract was terminated, that is, it was not binding on the first respondent, because the first respondent did not have any obligation to keep it in force. From the contract, there is no obligation for the second respondent to unconditionally sell the scrap metal to the claimant, within a certain period of time, which means that it was at the complete discretion of the second respondent, since the object of the contract were old scrap out of use".*
>
> *[...]*
>
> *"The second respondent, "Sharr Beteiligungs GmbH" until it was under the commercialization of SOE "Sharr Cem", the remaining material – scrap metal was under its management, as well as the contract for the sale of scrap metal with the company "Arta XH" has been binding for it. From the sale of the company SOE "Sharr Cem" with a special spinoff, "NewCO Sharr Cem" has taken over the management of both the factory and the waste from the production, so that the contract concluded between the company "Sharr Beteiligungs GmbH" and "Arta XH" has remained without an object, due to the fact that its object was scrap metal from production, therefore when it disappears or when the object of the contract is transferred to another entity, unless the entity that has become the owner accepts demands and obligations arising from this object of the contract, accepts with a new contract, or with the sales contract".*

"Based on this, even the expert during the compilation of the expertise was not able to determine the volume of damage caused to the claimant, because the expert was not able to find any evidence that shows that the claimant had lost profit".

"The claimant invokes Article 124 of the LOR for the compensation of damages, which is an unfounded claim, because in order to gain the right to compensation for damages, the claimant first had to prove with evidence that "Sharr Beteiligungs GmbH" is obliged to fulfill a contractual obligation, while the contract for the sale of the remaining materials did not guarantee the claimant the right to purchase any scrap metal. (...) The responsibility for compensating the damage caused is defined by article 154.1 of the Law on Obligations, where it is defined that "Whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault". (...) Since the claimant has failed to prove that the respondent has taken actions to cause damage, the court came to the conclusion that the claim is unfounded and rejected it in its entirety."

32. Within the legal deadline, the applicant submitted an appeal to the Court of Appeals against the Judgment [IV. C. no. 453/14] of the Basic Court of 22 October 2018 on the grounds of **a)** violations of the provisions of the contested procedure; **b)** erroneous determination of factual situation; and c) erroneous application of substantive law and requested that: **(i)** his complaint be accepted as grounded and **(ii)** the judgment challenged by appeal be annulled and the case be remanded to the first instance court for retrial.

33. As for the allegation for **(a)** essential violations of the provisions of the contested procedure, the applicant in his appeal emphasized that: "*The contested judgment has flaws due to which it cannot be examined because the enacting clause of this judgment is incomprehensible and contradictory to itself and the reasons for the decisive facts have not been shown at all.... so that there is a fundamental violation of the provision of Article 182.1 and 182.2, subparagraph (n) in conjunction with article 2.1 of the LCP".* While, regarding the claim for **(b)** incomplete and incorrect determination of the factual situation, the applicant emphasized that*: "In the hearing of this contested case, of 18.11.2016, the applicant's represented, proposed the issuance of evidence with financial expertise, with the obligation for the expert to assess the quantity and value of the out-of-production material that the claimant had to accept from the first respondent and the second respondent, which during the contractual relationship of the claimant and to the second respondent and the contractual relationship of the claimant and the first respondent, and after its unilateral separation from the first respondent, the respondents gave it to other persons (...), while by its decision (the Basic Court) of 22.12.2016, for the administration of expert evidence, the court, in addition to these tasks, of determining the quantity and value of materials given to other persons, to assess the claimant's missing profit, the expert has also given tasks that are not of a financial nature, but they are of a legal nature such as: when the first respondent was privatized and established, was there a sales contract between the claimant and the first respondent...".* In this regard, the applicant objected to the rejection of the proposal by the Basic Court to appoint another expertise to determine the value of the potential damage that he claimed was caused by this dispute, emphasizing as follows*: "... the authorized of the claimant by the submission of 22.02.2018, proposed to the judge of the case to correct this procedural flaw, in the obligation of the same expert to also fulfill this task or in the commitment of the other expert to produce this evidence, outside the session hearing (...) but the judge of the case did not reflect in this direction".* On the other hand, as regards the claim related to **(c)**

the erroneous application of the substantive law, the applicant concluded that the Basic Court has erroneously applied the provision of Article 154.1 of the Law on Obligations, because, according to him, we are dealing with contractual damage due to unilateral termination of the contract, not with tortious damage where the fault of the causer is required.

34. Within the legal deadline, the respondent's representative submitted a response to the appeal, with a proposal that the Court of Appeals reject the appeal and uphold the Judgment in its entirety [IV. C. no. 453/14] of the Basic Court of 22 October 2018.

35. On 4 August 2020, the Court of Appeals by the Judgment [Ae. no. 306/2018] rejected the applicant's appeal as ungrounded and upheld in entirety the Judgment [IV. EC. C. no. 453/2015] of the Basic Court of 22 October 2018.

36. In the reasoning of the Judgment [Ae. no. 306/2018], the Court of Appeals concluded as follows:

> *"The first instance court after the administration of the evidence concluded that the claimant failed to prove during the procedure that the first respondent could have been a party to this proceedings, because by the evidence the statements of the litigating parties, because the evidence was the declarations of the litigating parties and from the expertise of the financial expert proved that the first respondent "New CO Sharr Cem" l.l.c. lacks passive legitimacy. This is confirmed by the fact that when the claimant and the second respondent concluded the contract for the sale of scrap metal, the first respondent "Sharr Cem" l.l.c. was not yet established. The fact that the first respondent "Sharr Cem" l.l.c. does not have passive legitimacy in this matter is also proven by the fact that the second respondent "Sharr Beteilingungs GmbH" is still active because it is an active tax declarant at TAK. Although both of these companies are owned by the same foreign legal entity, they do not have any influence on their separate legal personality".*
>
> *[...]*
>
> *"The Court of Appeals, as a second instance court, approves the legal assessment of the first instance court as regular and legal (...) assesses that the first instance court, fully determining the factual situation, has correctly applied the provisions of the contested procedure and substantive law when it found that the claimant's claim is ungrounded".*
>
> *"The claims in the respondent's complaint that the impugned judgment was rendered with essential violation of the provisions of Article 182 par.2 point n) of the Law on Contested Procedure, that the judgment has flaws, the enacting clause of the judgment is incomprehensible and in contradiction with itself and there is no reason on decisive facts. According to the assessment of this court, the first instance court gave sufficient and convincing reasons when it rejected the claimant's claim and based its decision on the administered evidence..."*
>
> *"Also, the respondent's claims in the complaint, that the contested judgment was rendered on the basis of incorrect and incomplete determination of the factual situation, are ungrounded, because from the administered evidence it appears that the first instance court has correctly determined the facts which are related to the existence or non-existence of the respondent's debt and that there is no valid legal basis by which any obligation of the respondent was created in relation to the claimant".*

"According to Article 319.1 of the LCP, the claimant had the duty to prove the facts on which it bases his claims and allegations, while it did not provide the court with convincing evidence that the respondent is responsible for the obligations created."

37. On 28 August 2020, the applicant submitted a revision to the Supreme Court on the grounds of: **a)** essential violations of the provisions of the contested procedure provided for in article 182 paragraph 2 of the LCP by the second instance court; **b)** essential violations of the provisions of the contested procedure from article 182 paragraph 2 subparagraph n) and article 2.1 of the LCP by the court of first instance; and **c)** the incorrect application of substantive law by both courts, asking the Supreme Court to: **(i)** accept the revision as grounded; (ii) quash the Judgment [Ae. no. 306/2018] of the Court of Appeals of 4 August 2020 and the Judgment [IV. C. no. 453/2014] of the Basic Court of 22 October 2018; and (iii) remand the case to the first instance court for retrial.

38. On an unspecified date, the respondent submitted a response to the revision and requested that the revision submitted by the applicant be dismissed as impermissible and the judgments of the first and second instance be upheld.

39. On 1 August 2022, the Supreme Court by the Decision [E. New. no. 75/20] rejected as impermissible the revision submitted by the applicant with the following reasoning:

"*By article 508 of the LCP, it is determined that: "Revision in trade disputes is not allowed if the value of the disputed subject dispute does not exceed 10.000 Euro.*"

"By article 30 paragraph 1 of the LCP, it is determined that: "The claimant is obliged, in the legal disputes over property, to determine the value of the disputed facility. Only the value of the disputed facility included in the main claim...".

"From the interpretation of these legal provisions, the Supreme Court came to the conclusion that revision is not allowed against the judgment of the Court of Appeals of Kosovo Ac. no. 306/18, of 04.08.2020, because that the cited provisions refer to the permissibility of the revision conditional on the value of the dispute, which must be over 10,000 euro (...) In this case, the value of the dispute affected by the revision is not over €10,000, that is, the claimant has not determined the value of the dispute, and if we refer to the court fee for the lawsuit of €15, which was paid by the claimant, it does not exceed the value of the dispute over €10,000 , based on the administrative instructions for court tax unifications and also the nature of the dispute does not constitute an exception for the permissibility of the revision (exceptions regardless of the value), therefore in this case due to the value of the dispute, the revision is not allowed".

Applicant's allegations

40. The applicant claims that the Supreme Court by the Decision [E. Rev. 75/20] of 1 August violated his right to "access to court", guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

41. Regarding the claim of violation of Article 31, the applicant claims that if a legal remedy is foreseen and a local court refuses to deal with the merits of the case, this results in a violation of the right to "access to court" guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, therefore the latter emphasizes that: *"...in the*

present case, the legal remedy was available to the applicant according to the legislation in force and that the Supreme Court violated the access to the court rejecting the Revision in violation of the law, as Article 211 of the LCP stipulates "Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought". So, the right to revision against the Judgment of the second instance, in this case of the Court of Appeals, is guaranteed by law".

42. Based on the above, the applicant concludes that the revision can be rejected only if the value of the dispute does not exceed the amount of €3,000, while in commercial disputes if it does not exceed the amount of €10,000, but in the present case the amount of the value of the dispute has not been determined, and therefore, the latter cannot be rejected. In this regard, the applicant states that: "*Furthermore, according to the provisions of Article 36 of the LCP, "If the claimant did not specify the value of the disputed facility in the claim filed to the court, or the amount is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter (...) determine or verify accurately the value claimed by the claimant. In such a case, the decision of the court is not subject to appeal". Thus, it is clear that according to the law, if the claimant has not determined the value of the dispute according to article 30 of the LCP, then the duty of the court is to "ex officio" determine the same. Also, in the LC it is not defined that Revision is not allowed in disputes without a defined value*".

43. In this regard, the applicant emphasizes that he proposed that the amount of the value of the object of the dispute be determined by supplementing the financial expertise, a proposal which was not approved by the Basic Court and as a result it emphasizes that: *"...the Basic Court rejected this proposal on the grounds that this matter has been clarified sufficiently with this expertise, so that the amount and value of this claim remained undetermined, and this with the flaw of the first instance court, because according to the provision of Article 36 of the LCP, if the claimant has not determined the value of the dispute according to article 30 of the LCP, then the duty of the court is to determine the same "ex officio".*

44. In the end, the applicant emphasizes that the amount of € 15, which he paid in the name of court tax, cannot serve as a reason for determining the value of the dispute, because the latter was paid for the dispute in which the amount was not determined at the time of filing the lawsuit, but it was requested that such an action be taken by the Basic Court.

Relevant constitutional and legal provisions

CONSTITUION OF THE REPUBLIC OF KOSOVO

Article 31
[Right to Fair and Impartial Trial]

1. "Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".

[…]

KONVENTA EVROPIANE PËR TË DREJTAT E NJERIUT

Article 6.1
(Right to a fair trial)

1. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…".
[…]

Relevant legal provisions

LAW No. 03/L-006 ON CONTESTED PROCEDURE

4. Determination of the value of the disputable facility

Article 30
(no title)

"30.1 The claimant is obliged, in the legal disputes over property, to determine the value of the disputed facility. Only the value of the disputed facility included in the main claim is taken into consideration.
30.2 If not included in the main claim, the interest, procedural expenditure, contracted penalties and other claims are not taken into consideration".

Article 36
(no title)

"If the claimant did not specify the value of the disputed facility in the claim filed to the court, or the amount is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter but before the start of the principal proceeding, promptly and appropriately determine or verify accurately the value claimed by the claimant. In such a case, the decision of the court is not subject to appeal."

REVISION
Article 211.1

"Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought."

[…]
CHAPTER XXX
PROCEDURE IN TRADE DISPUTE
[…]

Article 508
(no title)

"Revision in trade disputes is not allowed if the value of the disputed subject dispute does not exceed 10.000 Euro".

LAW NO. 04/L-118 ON AMENDING AND SUPPLEMENTING THE LAW NO.03/L-006 ON CONTESTED PROCEDURE

Article 11
(no title)

"Article 218 of the basic law, shall be reworded with the following text:

Article 218

1. A belated, impermissible or incomplete revision shall be dismissed by a ruling of the court of first instance without conducting a main hearing.
2. The revision is not permissible:
a) if it is presented by an unauthorized person;
b) a person who has withdrawn it;
c) a person who has no legal interest or is against a judgment;
d) not subject to revision according to the law".

Admissibility of the Referral

45. The Court first examines whether the applicant's referral has met the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

46. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

47. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which stipulates: "*Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable*".

48. In this respect, the Court notes that the Applicant is entitled to file a constitutional complaint, invoking violations of its fundamental rights and freedoms, which apply to individuals and legal entities (see, the Constitutional Court case no. KI41/09, Applicant *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

49. The Court further examines whether the Applicant has fulfilled the admissibility criteria, as established by Law, namely articles 47, 48 and 49 of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".

Article 48
[Accuracy of the Referral]]

"In his /her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".

50. As to the fulfillment of the aforementioned criteria, the Court assesses that the Applicant is an authorized party, pursuant to Article 113.7 of the Constitution; ii. challenges the constitutionality of Decision [E. Rev. 75/20] of the Supreme Court of 1 August 2022; iii. has exhausted all legal available legal remedies, in accordance with Article 113.7 of the Constitution and Article 47.2 of the Law; iv. has specified the rights guaranteed by the Constitution, which it claims to have been violated, in accordance with the requirements of Article 48 of the Law; and submitted the referral within the legal deadline of 4 (four) months, as provided for in Article 49 of the Law.

51. However, in addition, the Court examines whether the Applicant has fulfilled the admissibility criteria set forth in rule 34 [Admissibility Criteria], namely provisions (1) (d) and (2) of rule 34 of the Rules of Procedure, which establishes:

(1) "The Court may consider a referral as admissible if:
(…)
(d) The referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(2) The Court may consider a referral as inadmissible if the referral is intrinsically unreliable when the applicant has not sufficiently proved and substantiated his/her allegations".

52. The Court considers that the referral raises serious constitutional justified *prima facie* claims and that it is not manifestly ill-founded within the meaning of rule 34 (2) of the Rules of Procedure. Therefore, the Court assesses that the applicant's referral fulfills the requirements for assessment of merits.

Merits of the Referral

53. In the context of assessing the admissibility of the referral, the Court will first recall the essence of the case as well as the relevant claims of the applicant, in the assessment of which, the Court will apply the standards of the case law of the ECtHR, in harmony with which, based on Article 53 [Interpretation of Human Rights

Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

54. At the outset, the Court recalls that the essence of the legal dispute before the regular courts concerns the non-fulfillment of contractual obligations by the company "Sharr Beteilgungs GmbH" towards the applicant. More specifically, the applicant, on 13 April 2002, concluded the basic contract with the company "Sharr Beteilgungs GmbH", in which the parties defined their rights and obligations. Based on this contract, the company "Sharr Beteilgungs GmbH" undertook to sell the old scrap metal only to the applicant, while the applicant undertook to purchase all the old scrap metal from the company "Sharr Beteilgungs GmbH". On 9 December 2010, the company "Sharr Beteilgungs GmbH" was privatized and on this occasion it was registered as a new legal entity, the company "SharrCem" L.L.C. However, despite this fact, according to the case file and the claims of the applicant, the newly registered company "SharrCem" L.L.C., continued to fulfill the contractual obligations from the contract until 19 August 2011, when it unilaterally terminated the contract with the applicant.

55. The applicant initiated the court proceedings before the Basic Court on the grounds of unilateral termination of the fulfillment of the contractual obligation, filing a claim in which it did not specify the value of the dispute, but requested the competent court that, in accordance with Article 124 of the LOR, to pay compensation for the damage due to non-fulfillment of the contractual obligations by the respondent and that from 19 August 2011 until the day of drafting the financial expertise, with legal interest starting from the date of filing the lawsuit until definitive payment, as well as to pay the costs of the proceedings, the applicant also requested that the value of the damage be determined by evidence and financial expertise by the financial expert. The applicant submitted the same request, respectively, that the value of the damage be determined with evidence and financial expertise by the financial expert, in the extended claim, as well as during the court hearing held on 18 November 2016.

56. The claim of the applicant was rejected in its entirety by the Basic Court. Against the Judgment of the Basic Court, the applicant submitted an appeal to the Court of Appeals, contesting the findings of the Basic Court, including the fact that the Basic Court did not determine the value of the dispute, even though this, according to the applicant, was its duty. The Court of Appeals rejected the applicant's appeal as ungrounded. Bearing this in mind, the applicant submitted the request for revision, which was rejected by the Supreme Court on procedural grounds, concluding that the applicant's claim does not exceed the value of 10,000 €.

57. The Supreme Court rejected the applicant's request for revision on procedural grounds and the applicant was forced to submit the referral to the Court, claiming that this Decision of the Supreme Court violates his right to "access to court" guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. More specifically, the applicant emphasized that it used the legal remedy available according to the legislation in force and that the Supreme Court violated its access to the court by rejecting the revision contrary to the law, because article 211 of the LCP stipulates that, "*Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought*". Therefore, the right of revision to the judgment of the second instance, and in this case to that of the Court of Appeals, is guaranteed by law.

58. Based on the above, the applicant emphasizes that the revision can be rejected only if the value of the dispute does not exceed the amount of €3,000, while in commercial disputes if it does not exceed the amount of €10,000, but in the present case the

amount of the value of the dispute has not been determined and therefore the latter cannot be rejected. In this regard, the applicant claims: "*Furthermore, according to the provisions of Article 36 of the LCP, "If the claimant did not specify the value of the disputed facility in the claim filed to the court, or the amount is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter (...) determine or verify accurately the value claimed by the claimant*". Therefore, it is clear that according to the law, if the claimant has not specified the value of the dispute according to Article 30 of the LCP, then it is the duty of the court to determine this value "*ex officio*". Also, the applicant points out that in the LCP it is not determined that revision is not allowed in disputes without a specified value.

59. In this regard, the applicant emphasizes that it has proposed that the amount of the value of the dispute be determined by supplementing the financial expertise, but this proposal has not been approved by either the Basic Court or the Court of Appeals, even though this, among others, was his appealing request.

60. Therefore, the Court, before analyzing the claims of the applicant, highlights that in this referral it will not deal with the contractual relationship between the applicant and the respondent, nor with the legal legitimacy of the parties in the regular court proceedings, but will focus exclusively on the issue of the possible violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the context of the violation of the right of access to the court, namely if the procedural flaws of the regular courts resulted in the situation that the applicant's request be rejected by the Supreme Court for the reason that the latter, when deciding on the permissibility of the revision, took a formalist approach, not taking into account the possible procedural flaws of the lower instance courts.

61. The present case which is examined by the Court is related to the way in which the existing conditions *ratione valoris* have acted in the case of the applicant. Specifically, the case concerns the issue of whether the Supreme Court, in the special circumstances of the case, by declaring the applicant's revision inadmissible, applied excessive formalism and disproportionately affected its ability to adjudicate the merits of the case in its property dispute, as guaranteed by the legal provisions. In the context of the above, the Court will examine whether the action of the lower instance courts and the undertaking/non-undertaking of procedural actions by the latter, have resulted in the limitation of access to the higher court.

62. In implementing this analysis, the Court will first refer to the case law of the Court, as well as the case law of the ECtHR regarding the limitations of access to the court, including the case law related to the limitations of access to the higher courts . It will then analyze the case law related to the issue of *ratione valoris* limitation of access to the higher courts, as well as the special issues of proportionality that arise in this case, namely, who should bear the adverse consequences of the errors made during the procedure, and with the question of the existence of excessive formalism.

63. Therefore, the Court must determine whether the failure of the Basic Court to act in accordance with Article 36 of the LCP and to determine the value of the dispute resulted in the situation where the Supreme Court rejected his request for revision for purely formal reasons, without considering the substance of his appealing allegations.

64. Bearing this in mind, the Court first points out that the issue of rejecting or not permitting the revision because it does not reach the value determined by law falls within the framework of the principle or the right of access to the court, guaranteed by

the article 31 of the Constitution, in conjunction with Article 6 of the ECHR (see Court case KI96/22, applicants *Naser Husaj and Uliks Husaj*, Resolution on inadmissibility of 29 August 2023, paragraph 49). Consequently, the denial of the right to access to the court, has as a consequence the denial of the effective legal remedy and the judicial protection of rights, which rights the applicants also claim to have been violated by the arbitrary conclusions of the Supreme Court, in relation to the assessment of the value of the object of the dispute, as a prerequisite to assess the merits of the case (see, the case of the Court, KI143/21, applicant *Avdyl Bajgora*, Judgment of 25 November 2021, paragraph).

65. Having said this, the Court refers to the conclusion of the Supreme Court that the revision of the applicant is not permitted because, "*By article 508, of the LCP, it is established that: "Revision in commercial disputes is not allowed if the value of the object of the dispute in the affected part of the final judgment does not exceed €10,000", where "Article 30 paragraph 1 of the LCP, stipulates that: "The claimant has the duty to determine the value of the object of the dispute in property - legal disputes, in the lawsuit...".*

66. Taking into account the above, the circumstances of the present case are related to the fact whether the Supreme Court, by declaring "*revision not permitted*" for purely legal/procedural issues, has disproportionately affected the possibility of the applicant to obtain a decision o merits for his case by the Supreme Court (see Court case KI96/22, applicants *Naser Husaj and Uliks Husaj, cited above,* paragraph 50*).*

67. The Court, based on its case law and that of the ECtHR, has in principle emphasized that the right of access to the court should be "*practical and effective*" and not "*theoretical and illusory*" (see, among others, the cases of the Court KI20/21, applicant *Violeta Todorović,* Judgment of 13 April 2021, paragraph 43 and KI224/19, applicant *Islam Krasniqi*, Judgment of 10 December 2020, paragraph 39; see also the ECtHR case *Lupeni Greek Catholic Parish v. Romania [GC],* no. 76943/11, Judgment of 29 November 2016, paragraph 84). According to the case law of the Court and that of the ECtHR, this right is not absolute, but may be subject to limitations that must reduce access to the court in that way or to an extent that violates the very essence of the right. Such restrictions will not be justified if they do not pursue a legitimate aim or if there is no reasonable relation of proportionality between the means employed and the aim sought to be achieved through them (see Court cases KI96/22, applicant *Naser Husaj and Uliks Husaj*, cited above, paragraph 51; KI20/21, applicant *Violeta Todorović*, cited above, paragraph 45; and KI54/21, applicant *Kamber Hoxha*, Judgment of 4 November 2021, paragraphs 63-64; see also ECtHR cases: *Sotiris and Nikos Koutras ATTEE v. Greece*, no. 39442/98, Judgment of 16 November 2000, paragraph 15; *Běleš and Others v. Czech Republic*, no. 47273/99, Judgment of 12 November 2002, paragraph 61; and *Lupeni Greek Catholic Parish v. Romania*, cited above, para 89).

I. General principles on access to the superior courts and the ratione valoris restrictions in this respect

68. The Court recalls that Article 6 of the ECHR does not oblige the Contracting States to establish courts of appeal or cassation. However, in cases where such courts exist, the guarantees of Article 6 of the ECHR must be respected, and therefore they must guarantee to litigants an effective right of access to the courts for the determination of their civil rights and obligations (see, Court cases, *Andrejeva v. Latvia*, no. 55707/00, Judgment of 18 February 2009, paragraph 97; see also, *Levages Prestations Services v. France*, no. 21920/93 Judgment of 23 October 1996, paragraph 44; and *Brualla*

Gómez de la Torre v. Spain, no. 26737/95, Judgement of 19 December 1997, paragraph 37).

69. However, it is not the Court's task to express a view on whether the policy choices made by the Contracting Parties defining the limitations on access to a court are appropriate or not; its task is confined to determining whether their choices in this area produce consequences that are in conformity with the ECHR. Similarly, the ECtHR role is not to resolve disputes over the interpretation of domestic law regulating such access but rather to ascertain whether the effects of such an interpretation are compatible with the ECHR (see, for example, *Platakou v. Greece* no. 38460/ 97, Judgment of 1 January 2001, paragraphs 37-39; *Yagtzilar and Others v. Greece*, no. 41727/98, Judgment of 10 July 2002, paragraph 25, and *Bulfracht Ltd v. Croatia*, no. 53261/08, Judgment of 21 June 2011, paragraph 35).

70. In this regard it should be reiterated that the manner in which paragraph 1 of Article 6 of the ECHR applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them; the conditions of admissibility of an appeal on points of law may be stricter than for an ordinary appeal (see, case cited above, *Levages Prestations Services v. France*, cited above, paragraph 45; case cited above *Brualla Gómez de la Torre v. Spain* paragraph 37; and *Kozlica v. Croatia*, no. 29182/03, Judgment of 2 November 2006, paragraph 32; see also *Shamoyan v. Armenia* , no. 18499/08, Judgment of 7 July 2015, paragraph 29).

71. The Court has further recognized that the application of a statutory *ratione valoris* threshold for appeals to the supreme court is a legitimate and reasonable procedural requirement having regard to the very essence of the supreme court's role to deal only with matters of the requisite significance (see, ECtHR, *Brualla Gómez de la Torre v. Spain*, paragraph 36; case *Kozlica v. Croatia*, paragraph 33; case cited above *Bulfracht LTD*, paragraph 34, *Dobrić v. Serbia*, no. 2611/07 and 15276/07, Judgment of 21 June 2011, paragraph 54; and *Jovanović v. Serbia*, no. 32299/08, Judgment of 2 October 2012, paragraph 48).

72. Moreover, when confronted with issues of whether the proceedings before courts of appeal or of cassation complied with the requirements of paragraph 1 of Article 6 of the ECHR, the Court has had regard to the extent to which the case was examined before the lower courts, the (non-) existence of issues related to the fairness of the proceedings conducted before the lower courts, and the nature of the role of the court at issue (see, for the relevant considerations, *Levages Prestations Services*, paragraphs 45-49; *Brualla Gómez de la Torre*, paragraphs 37-39; *Sotiris dhe Nikos Koutras ATTEE v. Greece*, no. 39442/98, Decision of 19 December 1998, paragraph 22; and *Nakov v. Former Yugoslav Republic of Macedonia* , no. 68286/01, Decision of 24 October 2002).

73. Having said that, the Court refers to the case of the Grand Chamber of the ECtHR in the case *Zubac v. Croatia*, no. 40160/12, Judgment of 5 April 2018, through which, in relation to the issue of the permissibility of the revision and which is related to the value threshold defined by law, in principle reiterated that: *"the manner in which Article 6 paragraph 1 [of the ECHR] applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted before those courts. The conditions of admissibility of a revision may be stricter than for an ordinary appeal"* (see, paragraph 82 of the Judgment and the references used therein as the case *Kozlica v. Croatia*, no. 29182/03, Judgment of 2 November 2006, paragraph 32). Following this,

the ECtHR emphasized that: "*the application of a statutory* ***ratione valoris*** *threshold for appeals to the supreme court is a legitimate and reasonable procedural requirement having regard to the very essence of the supreme court's role to deal only with matters of the requisite significance* (see, paragraph 83 of the Judgment in case *Zubac v. Croatia* and the references used in this case, *inter alia* the case *Jovanović v. Serbia*, no. 32299/08, Judgment of 2 October 2012, paragraph 48; and see also the Court's case KI96/22, applicant *Naser Husaj and Uliks Husaj*, cited above, paragraph 52).

74. In this respect, the ECtHR in the case *Zubac v. Croatia*, and regarding the application of legal restrictions ***ratione valoris*** for access to higher courts, developed a three-step test, through which must be examined and assessed: (i) foreseeability of limitations; (ii) the issue of whether the applicant or the state should bear the adverse consequences of errors made during the procedure; and (iii) the issue of "*excessive formalism*" in the application of restrictions (see paragraphs 80-86 of the Judgment in the case of *Zubac v. Croatia*, and the references used in this Judgment; as well as see the Court's case KI96/22, applicant *Naser Husaj and Uliks Husaj*, cited above, paragraph 53).

75. Regarding the first, the ECtHR specified that (i) the issue of the legal remedy in this case was foreseeable from the point of view of the litigants. In this sense, the ECtHR added that (ii) the assumption that the restriction of access is foreseeable is met if there is coherent case law and (iii) consistent application of this practice, and further also assessed that (iv) it takes into account the approach of the applicant in the relevant case law and (v) if the same is represented by a qualified lawyer (see paragraphs 87-89 of the Judgment in the case *Zubac v. Croatia*, see also Court case KI96/22, applicants *Naser Husaj and Uliks Husaj*, cited above, paragraph 54).

76. In relation to the second, the ECtHR emphasized that it should be established whether the applicant was represented during the proceedings and whether the applicant and/or his or her legal representative displayed the requisite diligence in pursuing the relevant procedural actions, proceeding with the determination whether the errors could have been avoided from the outset and whether the errors are mainly or objectively attributable to the applicant or to the relevant authorities (see paragraphs 90-95 of the Judgment in the case of *Zubac v. Croatia*; as well as see Court case KI96/22, applicants *Naser Husaj and Uliks Husaj*, cited above, paragraph 55).

77. Regarding the third, namely the issue of excessive formalism, the ECtHR emphasized that excessive formalism on the regard of the courts may be in conflict with the right of access to the court. In this sense, the ECtHR emphasized that, *"however, the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court"* (see paragraph 98 of the Judgment in the case of *Zubac v. Croatia*; as well as see Court case KI96/22, applicants *Naser Husaj and Uliks Husaj*, cited above, paragraph 56).

78. Following this, the ECtHR in case *Zubac v. Croatia*, applying the principles and criteria developed in this case, found that the restriction of access to the Supreme Court of the Republic of Croatia was not the result of inflexible procedural rules, namely, the law and the relevant domestic case law provided for the possibility of changing the value of the case in dispute at an earlier stage of the judicial process, which enables access to the Supreme Court in case of a change in the circumstances of the case. In addition, the Applicant could have filed another extraordinary remedy established by law that would have also given her access to the Supreme Court, which

she did not do. Following this, the ECtHR concluded that: *"The main function of the Supreme Court, as the highest court in Croatia, is to ensure the uniform application of the law and the equality of all in its application.*" The restriction of access to that court by setting a legal *ratione valoris* threshold is justified by the legitimate aim of the Supreme Court to deal only with more significant cases. The resolution of irregularities committed by the lower courts in determining the value of the dispute also aimed at a legitimate aim, namely respect for the rule of law and the proper functioning of the judicial system (see, paragraphs 101-125 of the Judgment in case *Zubac v. Croatia*; as well as see Court case KI96/22, applicants *Naser Husaj and Uliks Husaj*, cited above, paragraph 57).

79. The Court considers that in such circumstances, the regular courts enjoy a wide margin of appreciation of the manner of application of the relevant limitations *ratione valoris* in this case. However, this does not mean that the courts enjoy unlimited discretion in this sense. When considering whether this margin of appreciation has been exceeded, the Court must pay special attention to three criteria, namely (i) the foreseeability of the procedure which is applied in relation to the revision; (ii) the issue of who should bear the adverse consequences of errors made during the procedure, and (iii) the issue of whether the applicant's access to the Supreme Court was limited by excessive formalism.

II. The application of general principles of access to the higher courts and the ratione valoris limitations in the circumstances of the present case

80. Therefore, in what follows, the Court will apply the aforementioned principles and test developed by the ECtHR in the circumstances of the present case, namely (i) in relation to the criterion of foreseeability of the restriction through the legal threshold, will assess whether the case law of the Supreme Court is consistent and clear about the permissibility of revision; then (ii) will assess whether the limitation of access to the Supreme Court can be attributed to the error of the applicant; and (iii) will assess whether the Supreme Court applied excessive formalism during the interpretation and application of the legal provisions in force that were related to the threshold of permissibility of the revision.

(i) Regarding the foreseeability of the procedure which is applied in relation to the revision

81. Following this, and returning to the circumstances of the present case, in relation to (i) the issue of foreseeability of the limitation, the Court will, **first**, carefully assess the way the Supreme Court examined the revision of the applicant to determine whether the Supreme Court has a consolidated case law regarding the legal threshold for the permissibility of revision. In support of this, the Court notes that in the legal order, access to the Supreme Court in civil cases is provided through revision based on Article 211 of the LCP. Revision refers to disputes in which the affected part of the judgment exceeds a certain value threshold. When this value threshold is reached, access to the Supreme Court becomes a matter of individual right. As part of the revision, the Supreme Court can annul the judgments of the lower courts and remand the case for retrial or, in certain cases, modify the contested judgment. In any case, the Supreme Court is authorized to declare impermissible any revision that does not fulfill the relevant legal requirements.

82. In the circumstances of the present case, the applicant submitted a revision to the Supreme Court, claiming, among other things, that the Basic Court had not determined the value of the claim. The Supreme Court rejected this revision as

impermissible, emphasizing that, "*By article 508, of the LCP, it is established that:* "*Revision in commercial disputes is not allowed if the value of the object of the dispute in the affected part of the final judgment does not exceed €10,000"*. Thus, the Supreme Court referred to Article 508 (no title) of the Law on Contested Procedure, according to which revision cannot be filed in commercial disputes if the value of the dispute does not exceed the amount of 10,000 euro. Therefore, such a decision was in accordance with the usual practice of the Supreme Court regarding this issue, and this can also be ascertained from its reasoning, which states:

> *"From the interpretation of these legal provisions, the Supreme Court came to the conclusion that revision is not allowed against the judgment of the Court of Appeals of Kosovo Ac. no. 306/18, of 04.08.2020, because that the cited provisions refer to the permissibility of the revision conditional on the value of the dispute, which must be over 10,000 euro, for the revision to be allowed, and the situation when the revision is allowed regardless of the value of the dispute according to the exclusion criterion for the nature of the disputed issue. In this case, the value of the dispute affected by the revision is not over €10,000, that is, the claimant has not determined the value of the dispute, and if we refer to the court fee for the lawsuit of €15, which was paid by the claimant, it does not exceed the value of the dispute over €10,000, based on the administrative instructions for court tax unifications and also the nature of the dispute does not constitute an exception for the permissibility of the revision (exceptions regardless of the value), therefore in this case due to the value of the dispute, the revision is not allowed".*

83. Therefore, the Court notes that the Supreme Court rejected as impermissible the revision filed by the applicant, concluding that the relevant value of the disputed object is below the legal minimum. During the assessment of admissibility *ratione valoris*, the Supreme Court referred to Article 508 (No title) of the LCP, which specifies that, "*Revision in commercial disputes is not allowed if the value of the object of the dispute in the affected part of the final judgment does not exceed €10,000"*. In addition, as a guideline for determining the value of the dispute, the Supreme Court also emphasized the fact that "*the applicant has paid the tax for filing the claim in the amount of 15 euro"*.

84. Also, the Court notes that in its reasoning the Supreme Court referred to and acted in accordance with the legal provision of Article 30, paragraph 1 and 2 as well as Article 508 of the LCP, which specifically defines the legal limitation of the review of revision, without taking into account in advance that the value of the dispute has not been determined, namely that the value of the dispute has not been determined at all neither by the applicant nor by the competent court.

85. Therefore, the Court finds that the legal provisions referred to by the Supreme Court certainly contain limitations regarding the approval of revision in the formal sense and as such, it is clear and foreseeable both for the applicant and for the Court. However, the foreseeability of legal restrictions and their application depend on the case, and they, as such, should be the subject of a comprehensive assessment, where in their assessment a formalistic approach should be avoided when the restrictions are applied in a concrete case.

(ii) Regarding who should bear the adverse consequences of errors made during the procedure

86. By careful examination of the second requirement (ii) *whether the limitation of access to the Supreme Court can be attributed to the errors of the applicant*, the Court, in

order to reach an answer, must take into account the very beginning of filing the claim as well as the legal provisions of the LCP, which regulate the issue and the procedure for determining the value of the dispute when filing a claim.

87. Precisely in support of this, the Court recalls that the restriction of access to the Supreme Court is covered by the generally accepted legitimate purpose of the legal threshold *ratione valoris* for appeals to the Supreme Court, the purpose of which is to ensure that the Supreme Court, considering the very essence of its role, to deal only with matters of importance. In support of this, the Court recalls that the role of the Supreme Court, among other things, is to ensure the unique application of the law, as well as the equality of all in its application. Given this function, the Court finds it necessary to assess whether the decision of the Supreme Court pursues a legitimate aim, namely respect for the rule of law and the proper functioning of the justice system.

88. In this regard, the Court will carefully examine the extent to which the applicant's case has been addressed before the lower courts, more specifically how his request for determining the value of the dispute has been addressed, as well as the nature of the role of Supreme Court.

89. Therefore, for the Court, the fact that the applicant filed a lawsuit in the Basic Court without specifying the value of the claim is not disputed, even though article 30.1 of the LCP states that "*The claimant is obliged, in the legal disputes over property, to determine the value of the disputed facility* [...]".

90. However, the Court refers to the provisions of Article 36 of the LCP, which establishes as follows:

Article 36

> *If the claimant did not specify the value of the disputed facility in the claim filed to the court, or the amount is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter but before the start of the principal proceeding, promptly and appropriately determine or verify accurately the value claimed by the claimant. In such a case, the decision of the court is not subject to appeal.*

91. Therefore, from the text of the legal provision of article 36 of the LCP, it can be seen that the value of the object of dispute is one of the elements of the lawsuit, the determination of which element is defined by law, but is not a necessary prerequisite for filing a lawsuit. Therefore, even in cases where the party has not determined the value of the object of the dispute at the time of filing the claim, the court will not reject the claim, nor will it return the claim to the claimant for correction.

92. In other words, in cases where the claimant has not determined the value of the object of the dispute or if he has determined its value too low or too high, the court, *ex-officio* or according to the respondent's objection, at the latest in the preparatory session, and if the preparatory session has not been held, then before the start of the main hearing, it appropriately determines the value of the object of the dispute, taking into account the objective circumstances of the claim in question.

93. The Court finds that the legal provision of Article 36 of the LCP is quite clear, both in terms of rights and in terms of procedural actions and obligations, and clearly determines that the Basic Court has the obligation to determine the value of the

dispute in 3 different situations, and they are: *i) when the claimant has not determined the value of the dispute, ii) when the claimant has determined the very low value of the dispute; and iii) when the claimant has set the value of the dispute too high*. Moreover, the obligation of the Basic Court, when a claim is filed from article 36 of the LCP, is to determine the value of the object of the dispute *ex-officio* by decision before the start of the main hearing session. Therefore, the prerequisite for the Court to be able to act upon the claim on the merits is to first determine the value of the dispute in question through a separate decision in a special session.

94. Regarding the manner of determining and verifying the value of the object of the dispute, the court is obliged, according to objective criteria, to determine the monetary equivalent of the claim based on the data from the claim and only if this is possible due to the nature of the case, namely to determine in advance the value of the object of the dispute, namely if the value of the object of the dispute has been marked and if it has been marked as too high or too low. This verification is applied up to the limit of acceptable probability, because any deeper examination of the problem, namely the claim, would jeopardize the realization of the basic duty of the court, which is to ensure legal protection.

95. Therefore, the very fact that the applicant requested the Basic Court to determine the value of the dispute qualifies his claim as a claim of category *i) when the claimant has not determined the value of the dispute* from Article 36 of the LCP, according to which had initiated the procedure in which the Basic Court has the obligation to deal with this request according to its official duty.

96. More specifically, the Court notes that the applicant, during the procedure of filing the claim, submitted the request for the determination of the value of the object of the dispute, and consequently, the non-determination of the value of the object of the dispute by the regular courts according to the opinion of this Court, cannot be objectively attributed to the applicant. Moreover, the Court finds that the applicant has made an effort to contribute to the correction of the non-determination of the value of the dispute by the Basic Court, a) by filing the proposal for the conduct of additional expertise which would contribute to the determination of the value of the dispute, which proposal the Basic Court rejected by its Decision, and b) submitting the appeal to the Court of Appeals in order to deal with this issue.

97. The Court emphasizes that it is not disputed that the applicant, when submitting the claim in accordance with the value of the object of the dispute, must also pay the court fee determined by the Administrative Instruction of the Kosovo Judicial Council. In essence, the payment of the fee in the amount of 15 euro cannot serve as the only parameter for determining the value of the dispute in question, especially for the reason that the applicant has paid the court fee in the amount of 15 euro as a conditional amount that the party is obliged to pay when the value of the dispute is unknown, while the fee itself in the amount of 15 euro is a condition that enables the party to have its claim accepted by the court in a procedural sense, and not be rejected as an incomplete claim before the start of the procedure.

98. In accordance with the above, it appears that the applicant has shown due diligence in trying to determine the value of the dispute, which is in accordance with the relevant legal provisions. The Court is of the opinion that errors in the procedure could have been avoided from the beginning, if the Basic Court would have acted in accordance with the legal provision of Article 36 of the LCP. From this it follows that these errors cannot be attributed to the applicant.

iii) regarding the use of excessive formalism in the interpretation and application of the legal provisions in force regarding the threshold of permissibility of revision

99. Regarding the assessment of the fulfillment of the third criterion, respectively if excessive formalism has been used during the interpretation and application of the legal provisions in force regarding the threshold of permissibility of the revision, the Court emphasizes that the observance of the formal rules of the contested procedure, through which the parties ensure the decision-making for the civil dispute, is valid and important because it can limit discretionary freedom, ensure equality of arms, prevent arbitrariness and ensure effectiveness in decision-making for the dispute and trial within a reasonable time, as well as legal certainty and respect of the court.

100. However, in the case law of the ECtHR, it is established that "excessive formalism" may be contrary to the requirement to ensure the practical and effective right of access to the court based on Article 6 paragraph 1 of the ECHR. This usually happens in cases of a strict interpretation of a procedural rule that prevents consideration of the merits of the applicant's claim, with the corresponding risk that his or her right to effective judicial protection will be violated (see ECHR cases *Běleš and Others v. Czech Republic*, no. 47273/99, Decision of 12 November 2002, paragraphs 50-51 and 69, and *Walchli v. France*, no. 35787/03, Judgment of 26 July 2007, paragraph 29).

101. Therefore, in the present case, the Supreme Court should not have been bound by the errors of the lower courts when deciding whether to allow access to the applicant but should have examined whether access to it was prevented by procedural flaws of lower instance courts.

102. The Court emphasizes that the competence of the Supreme Court, established by law, to examine the permissibility of the revision in terms of the threshold *ratione valoris*, based on Article 508 (no title) of the Law on Contested Procedure, before assessing the revision on the merits, is not disputed. However, the Court notes that the Supreme Court's invoking to the legal provision of Article 508 of the LCP and the provision of reasoning without prior consideration of the possible procedural issue, that "*Revision in trade disputes is not allowed if the value of the disputed subject dispute does not exceed 10.000 Euro*", transferring the responsibility and error only on the applicant and justifying this with the fact that based on article 30 paragraph 1 of the LCP it is determined that: " *revision is not allowed, claimant is obliged, in the legal disputes over property, to determine the value of the disputed facility…*", according to the Court's conclusion, constitutes excessive formalism in the interpretation of legal regulations, especially because the Supreme Court did not take into account Article 36 of the LCP and, if it had done so and if it had examined the provision in the circumstances of the present case, it could have reached its conclusion about possible flaws or errors committed in the first place by the Basic Court, and in the further procedure also by the Court of Appeals.

103. In these circumstances, taking into account that in the case of the applicant, two instances of regular courts, the Basic Court and the Court of Appeals, which had full jurisdiction decided in this case, that the applicant raised the issue of their obvious flaw, and that the role of the Supreme Court is also to review the implementation of the law in force by the lower instance courts, it can be said that the decision of the Supreme Court in the present case constituted a disproportionate obstacle that violates the very essence of the right of the applicant, guaranteed by Article 31, paragraph 1 of the Constitution in conjunction with Article 6, paragraph 1 of the ECHR and that the latter has exceeded the margin of appreciation.

104. The Court also emphasizes that its finding of the violation of paragraph 1 of article 31 of the Constitution in conjunction with paragraph 1 of article 6 of the European Convention on Human Rights, applies only to the specific circumstances of the present case, the assessment of which must be done on case by case basis, and is only related to the right of access to the court, namely the Supreme Court, so that it does not in any way prejudice the outcome of the merits of the case.

Conclusion

105. In sum, the Court, based on the above analysis, concluded that the contested Decision [E. Rev. no. 75/20] of the Supreme Court of Kosovo, of 1 August 2022, violates the constitutional rights of the applicant guaranteed by paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with paragraphs 1 and 7 of article 113 of the Constitution, articles 20 and 47 of the Law and rule 48 (1) (a) of the Rules of Procedure, on 30 May 2024:

DECIDES

I. TO DECLARE, by seven (7) votes for and 1 (one) against, the Referral admissible;

II. TO HOLD, by seven (7) votes for and 1 (one) against, that there has been a violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE, by seven (7) votes for and 1 (one) against, invalid Decision [E. Rev. no. 75/20] of the Supreme Court of Kosovo of 1 August 2022;

IV. TO REMAND, by seven (7) votes for and 1 (one) against, Decision [E. Rev. no. 75/20) of the Supreme Court of Kosovo of 1 August 2022, to the latter for retrial, in accordance with the findings of the Court in this Judgment;

V. TO ORDER the Supreme Court, to notify the Court, in accordance with paragraph (5) of rule 60 of the Rules of Procedure, by 30 November 2024, about the measures taken to implement the Judgment of the Court;

VI. TO NOTIFY this Judgment to the Parties;

VII. TO PUBLISH this Judgment in the Official Gazette, in accordance with paragraph 4 of article 20 of the Law;

VIII. TO HOLD that this Judgment is effective on the date of its publication in the Official Gazette of the Republic of Kosovo, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.