IN THE APPEAL BEFORE THE
EBRD ADMINSTRATIVE TRIBUNAL

AT/02/18

Mr Andrew George

v.

the European Bank for Reconstruction and Development

Decision by the Administrative Tribunal

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14 September 2018

Procedural history

1. On 2 July 2018 Mr Andrew George (the "**Appellant**") filed, under the Appeals Procedures established pursuant to the Resolution No. 102 of the Board of Governors and Section 10 of the Staff Regulations (the "**Appeals Procedures**"), an Application to the EBRD Administrative Tribunal (the "**Tribunal**") for an Appeal (the "**Statement of Appeal**") against the European Bank for Reconstruction and Development (the "**Respondent**" or the "**Bank**"), requesting the Tribunal to issue an order which would (i) quash the Administrative Decision rendered by the European Bank for Reconstruction and Development on 1 May 2018; (ii) declare that the Appellant was a Staff Member of the European Bank for Reconstruction and Development as of 9 February 2018; (iii) declare that the rules of the European Bank for Reconstruction and Development Staff Handbook applied to the Appellant as of 9 February 2018; (iv) order the Respondent to pay the Appellant the sum of £121,876.80 as a severance payment in accordance with Section 12.6.3 (1) of the European Bank for Reconstruction and Development Staff Handbook; and (v) order the Respondent to pay the Appellants' reasonable legal costs incurred in presenting this Appeal. The Statement of Appeal was dated 1 July 2018. The Appellant and the Bank below are collectively referred to as the "**Parties**".

2. More specifically, the Appellant alleged that the Bank improperly did not treat him as its employee and for that reason failed to pay him the severance payment due in accordance with the level of his compensation and longevity of work for the Bank. On 3 August 2018 the Respondent filed a Response to the Statement of Appeal (the "**Response**") denying all contentions of the Appellant.

3. The matter was not previously considered in the course of the grievance (administrative review) procedure. According to Sections IV 3 c) and d) of the Directive on the Administrative Review Process, decisions by the President of the Bank cannot be reviewed in the frame of the Administrative Review Process. Those decisions may be appealed directly before the Tribunal, which is the case at stand.

4. The contested decision was rendered by the Respondent's President, Mr Suma Chakrabarti, on 1 May 2018 (the "**Administrative Decision**"), on the grounds that the Appellant could not be considered to be a Staff Member of the EBRD and therefore could not avail himself of the process and rights set out for staff members under the EBRD's rules.

5. The Statement of Appeal was considered in accordance with the Agreement Establishing the Bank, the Staff Regulations in force on 1 May 2018 (being the date on which the Appellant believes the erroneous administrative decision was taken) and the Appeals Procedures included as Annex 14.2 to the EBRD Staff Handbook issued on 1 April 2018.

6. Neither of the Parties requested an oral hearing. According to Rule 7.02 (a) of the Appeals Procedures, an oral hearing is to be held only in exceptional cases. The Tribunal decided that it was not necessary to hold an oral hearing.

7. The Appellant requested reimbursement of his reasonable legal costs incurred in presenting his Appeal (Section 5 of the Statement of Appeal). The Appeal was prepared and filed for the Appellant by his counsel, Bretton Woods Law. The Appellant did not ask for anonymization of the Decision. The Bank also did not ask for anonymity of this Decision (paragraph 1.9 of the Response).

8. On 17 August 2018 the Tribunal issued an Order requiring the Parties to produce the following additional evidence and arguments on the question of whether there exists a jurisdiction clause or an arbitration agreement binding upon the Parties:
   (i) Is there proof that the Appellant signed with the Bank the Consultancy Agreement?
   (ii) Is there proof that the Bank signed the dispute resolution clause of the Consultancy Agreement?
   (iii) Was Annex 1 to the Consultancy Contract signed by the Appellant?
   (iv) Is there other written evidence proving that the Appellant agreed to the arbitration clause contained in the Consultancy Contract?
   (v) Is there proof that the Appellant agreed by conduct to the arbitration clause contained in the Consultancy Contract?

9. On 7 September 2018 the Parties sent their answers to the Order of 17 August 2018 concerning additional evidence and arguments on the question of whether there exists a jurisdiction clause or an arbitration agreement binding upon the Parties.

The dispute

10. The Appellant submits that "he worked as a Reporting and Analysis Consultant for the Respondent, having entered into a Consultancy Agreement on 14 December 2009 (the "**Consultancy Agreement**"). The Consultancy Agreement was systematically renewed for a continuous period of eight (8) years, from 2014 till 2018 each new extension was exactly for a term of one year (paragraphs 1.1 and 1.2 of the Statement of Appeal).

11. On 9 February 2018, the Appellant was informed by his line manager at the EBRD that his contract would not be extended, and that his last day of work at the EBRD would be 28 February 2018 (the "**Termination Decision**").

12. The Appellant was not provided with a notice period, severance package, or indeed any of the rights and indemnities to which EBRD Staff Members are entitled to in accordance with the EBRD Staff Handbook. On 10 April 2018, the Appellant filed a Request for Review of this Termination Decision by the Respondent, in which he requested that the Respondent to: (a) overturn its decision to terminate his employment; and (b) grant him fair treatment under

the EBRD Staff Handbook, including payment of an adequate termination indemnity.

13. This Request for Review was rejected in the Administrative Decision rendered by the Respondent's President, Mr Suma Chakrabarti, on 1 May 2018, on the grounds that the Appellant could not be considered to be a Staff Member of the EBRD and therefore could not avail himself of the process and rights set out for staff members under the EBRD's rules.

14. The Appellant believes that his Appeal of the Administrative Decision will naturally resolve the issues related to the Termination Decision, which is also unlawful and should have been overturned following the Appellant's Request for Review.

15. In the Response, the Respondent argued that the Appellant's request for remedies sought should be rejected in its entirety. The Bank also alleged that the Administrative Decision of the President of the Bank ruled only on the matter of admissibility of the Appellant's Request for Review under Section 6.4.1(e) of the Directive on the Administrative Review Process (Annex 14.1 to the Staff Handbook, the "**Directive**").

16. The Bank submitted that if the Tribunal determines that the President's Decision on admissibility taken pursuant to Section 6.4.1(e) of the Directive was not lawful and correct, the legal consequence of such decision of the Tribunal would be that the President would be required to refer the Appellant's Request for Review of the Respondent's decision not to extend the Consultancy Contract to the Chair of the Administrative Review Committee pursuant to Section 6.4.1(e) of the Directive. In the opinion of the Bank, a determination as to whether or not the Appellant was entitled to a severance package pursuant to Section 12.6.3(1) of the Staff Handbook and whether an abuse of authority occurred would only be within the scope of that review of the Administrative Review Committee, and not within the scope of review of the present Appeal before the Tribunal, who at present is only called upon to decide on the matter of jurisdiction.

17. The Parties' respective arguments are summarized below.

Summary of the Appellants' position

18. The Appellant submits that "he initially entered the employment of the Respondent on 14 December 2009, having been hired via the recruitment agency Sentinel IT (the "**Agency**") to work as a Reporting and Analysis Consultant". Despite the initial Consultancy Agreement entered into on 14 December 2009 was concluded for a fixed term of 197 days, the Appellant's employment was constantly renewed by the Respondent for a continuous period of eight years, from 14th December 2009 to 28 February 2018 (paragraphs 2.2 and 2.3 of the Statement of Appeal).

19. While the Appellant had been hired through a recruiting agency, he was, at all relevant times throughout his work for EBRD, interacting with the Respondent directly, and treated as an employee and staff member of the Respondent rather than an independent, external service provider. The Agency had no involvement in the interview process, which was carried out directly between the Appellant and the Respondent's recruiting staff. Likewise, the Agency was not involved in the Appellant's termination that took place on 9 February 2018. Indeed, the only role the Agency played was to act as a relay for the Appellant's remuneration. In short, at no time did the Agency play a material role in the relationship between the Respondent and the Appellant, who was, *de facto*, an employee of the Respondent (paragraph 2.4 of the Statement of Appeal).

20. The Appellant submits that his role was that of a Reporting and Analysis developer. He was one of many team members assigned to one of the core EBRD work streams and was tasked with continuously addressing queries for support and maintenance. This was done on a continuous basis and the Appellant's work was in no way limited to a specific project, as would be the case for an independent consultant. He was indeed obliged to accept the work assigned to him by his managers from the Bank. He did not enjoy any degree of professional freedom as to the means of performing of his work. The Appellant was obliged to have his workplans reviewed and authorized by his team's data architect and line managers before he could carry out his tasks, a process that was built in his team's workflow. As such, the Appellant contends that a clear relationship of subordination existed between him and his line managers (paragraphs 2.6 and 2.7 of the Statement of Appeal).

21. The Appellant was remunerated on the basis of hours spent working on this unlimited stream of queries and requests, which in his opinion is in the manner usual for a salaried employee. This is evidenced by the fact that the Appellant was required to record the time spent at work into the Respondent's staff activity recording system via the application *Keyed In.* The Appellant's remuneration was never based on a set of milestones or specific goals to achieve, which would be expected of a genuine service provider (paragraphs 2.8 and 2.9 of the Statement of Appeal).

22. In the opinion of the Appellant, the Respondent appears to have recognised this situation and accordingly treated the Appellant as an employee. He was

using the same work pass, telephone, computer equipment, and facilities as all other EBRD Staff Members, and also attended the same social events organised by his department. Additionally, the Appellant was required by his line managers to attend all staff meetings for his department. He was also given a formal staff appraisal in June 2017 (paragraph 2.10 of the Statement of Appeal).

23. On 29 January 2018, the Appellant was informed by his line manager, Mr Mike Cochran, that his contract with the Respondent is intended to be extended, as it had been the case for the past eight years. This was reiterated on 5 February 2018. On Friday, 9 February 2018, the Appellant was however abruptly informed by Mr Cochran, that "his contract with the Respondent" would not be renewed, and that his final day of work would be 28 February 2018 (paragraphs 2.12 and 2.13 of the Statement of Appeal).

24. Although the Respondent did not directly provide the Appellant with any information as to why his employment was being terminated, the absence of any disciplinary or performance concerns emanating from the Respondent before 9 February 2018 strongly suggests that the Appellant's termination was being made for redundancy. The fact that the Respondent would advertise a job posting with similar requirements as the Appellant's previous position mere weeks after the Appellant's termination, albeit with a reduced rate of pay, lends further credence to this view (paragraph 2.15 of the Statement of Appeal).

25. The Appellant was only provided with a two-and-a-half-week period of notice before the end of his employment. Following a complaint by the Appellant to the line management, this notice period was supplemented with the payment of an indemnity in lieu of notice which brought the Appellant's effective notice period to a total of four weeks (paragraph 2.16 of the Statement of Appeal).

26. The Appellant submits that the manner in which the Respondent chose to terminate his employment is in contravention with the Respondent's own rules for its Staff Members. Employees terminated on grounds of redundancy, such as the Appellant, are entitled to the payment of a severance package in accordance with Section 12.6.3 (2) of the EBRD Staff Handbook. No such payment was made to the Appellant or even offered by the Respondent (paragraph 2.17 of the Statement of Appeal).

27. In the Administrative Decision of 1 May 2018, the Respondent rejected the Appellant's claim on the grounds that, as he was rendering services pursuant to a Consultancy Agreement, he could not be qualified as a Staff Member and thus not benefit from the protections and administrative recourses accorded to said staff members under the EBRD's internal rules. In the opinion of the Appellant, this determination relies solely on a faulty and misguided interpretation of the Consultancy Agreement and fails to take into account the factual reality of the Appellant's relationship with the Respondent. Taken as a whole, the facts of the case clearly show that the Appellant's relationship with the Respondent had all the hallmarks of an employer-employee relationship

and should have been recognised as such (paragraphs 3.2 and 3.3 of the Statement of Appeal).

28. The Appellant relies on several factors in the case at hand which strongly point out to the existence of a *de facto* employer-employee relationship, despite the wording of the written agreements between the Appellant and the Respondent, representing the sources of applicable case law, originating from (i) the Asian Development Bank Administrative Tribunal and (ii) the EBRD Grievance Committee in the case of *Staff Member A* v. *EBRD* and *Staff Member B* v. *EBRD*, 15 October 2014 (paragraphs 3.4, 3.5 and 3.26 of the Statement of Appeal).

29. In the case *Amora* v. *Asian Development Bank*, ADBAT Decision No. 24, 6 January 1997 (the "***Amora* case**") (see Exhibit 9 to the Statement of Appeal) the Asian Development Bank Administrative Tribunal ("**ADBAT**") established a series of criteria to be considered in order to determine whether an individual could be considered to be a *de facto* employee despite being formally considered an independent service provider.

30. The ADBAT formulated the following conclusion cited and discussed by Appellant (paragraphs 3.5 - 3.12 of the Statement of Appeal):

> *32. The MOAs* [The Memorandum of Agreement, being forms of contracts which were considered by the ADBAT – the Tribunal] *did not describe the work which the Applicant was required to do; he was to work, in the Bank's premises, under the direction of the Bank's officers and in accordance with their instructions; he was not to be paid for the job or the result, but was to receive a regular, stated monthly remuneration; indeed, he even received increments mid-way through several contracts, just like an ordinary employee; he had to work full-time in accordance with the Bank's working hours, and could even be required to work overtime or on shifts; and he was entitled to annual, medical and casual leave. One of his obligations was at all times [to] refrain from actively engaging in any political activity (emphasis supplied). All along, the Applicant was neither carrying on an independent business nor could he assign the performance of the work to anyone else. On the contrary, his work was part of, or ancillary to, the Bank's business.*
> *33. The Tribunal finds that all the relevant tests applicable to the situation under consideration indicate that the Applicant was not an independent contractor. On the contrary, all these features, being totally inconsistent with the Applicants status as an independent contractor, are consistent only with his being an employee of the Bank.*

31. Accordingly, the Appellant relies on the following criteria of determination of *de facto* employment formulated on the basis of approach formulated by ADBAT (paragraphs 3.7 - 3.12 of the Statement of Appeal):

> "**Length of service and nature of tasks performed** – The Appellant's contract was renewed systematically year after year for an uninterrupted period of eight years of service with the Respondent. Regardless of the term specified in the contract, the multiple, systematic renewals meant that his

employment with the Respondent was, *de facto*, for an indefinite term, as there was no start or end date like a genuine contractor agreement would have had. His work was not limited to specific elements or projects: he was assigned to the Respondent's core IT workflow and dealt with an unlimited stream of requests and queries. This shows that his position was not meant to be transitory but permanent, much like that of a staff member.

Remuneration – The Appellant's remuneration was in the form of a regular, monthly salary, and not based on milestones or services performed as would have been the case for a genuinely independent contractor.

Nature of work performed – The nature of the Appellant's work was substantially similar to *de jure* staff members, and he would generally function under the same protocols and partake in the same meetings. In addition, he was convened to staff meetings, included in all staff communications and was even subjected to a formal staff appraisal, something which genuinely independent contractors had been exempt form.

Training – The Appellant was also required by the Respondent from time to time to undergo the same training courses as *de jure* staff members. Genuine contractors, hired for their specific expertise, would not be required to undergo such training.

Level of control over the work – The Appellant had no level of control upon his work. At all relevant times, he was treated as a subordinate, instead of with the freedom normally associated with a true contractor mandate. All technical decisions had to be authorized by the line manager, meaning he had no professional freedom in the performance of its work. He was also not allowed to subcontract or assign his work to someone else, be it an assistant or subcontractor".

32. The Appellant further submits that it is a clearly established principle of International Administrative Law that an employer cannot use a fictitious contractual structure that adversely affects a person's rights unless there is a legitimate reason to do so. Doing so without a legitimate justification has been deemed as *an abuse of power*, which is further confirmed by the above-mentioned precedent of the ADBAT (paragraphs 3.15 and 3.16 of the Statement of Appeal):

"as no reason exists objectively, and no good reason was provided by the Bank, for the use of annual contracts for what was in reality a long-term employment, the Tribunal concludes that the use of annual contracts without any functional justification is an abuse of power".

33. The Appellant concludes that the Termination Decision, in which the Respondent invokes the Appellant's alleged status as an independent contractor to deny him the severance package to which Staff Members are entitled to under the rules set out in the EBRD Staff Handbook, despite having treated him as and benefited from the Appellant's services as a *de facto* Staff Member for more than eight years is the culmination of this abuse of power.

The Administrative Decision of 1 May 2018 effectively perpetuates this abuse of power by denying the Appellant even his procedural right to the Administrative Review Process and thus constitutes a breach of Rule 3.02 of the EBRD Appeals Procedure and Rules of Procedure (paragraphs 3.20 to 3.22 of the Statement of Appeal).

34. Finally, the Appellant asserts that in addition to being in contradiction with the generally recognized principles of International Administrative Law which the EBRD is bound to observe, the impugned decisions are *contrary to the EBRD's own internal rules and the precedents* established by its own Administrative Tribunal (paragraph 3.25 of the Statement of Appeal)[1].

35. The Appellant submits that the ADBAT formulated the following conclusion cited by the EBRD Grievance Committee in the case of *Staff Member A* v. *EBRD* and *Staff Member B* v. *EBRD*, 15 October 2014 and by the Appellant (paragraph 3.26 of the Statement of Appeal):

> *The Tribunal holds that recourse to successive short term contracts or temporary contractual appointments to jobs which are essentially of a permanent nature is not a fair employment practice, particularly if such appointments can be shown to have been made only to deny employees security of tenure or other conditions and benefits of service. Such appointments are permissible only if they have a clear functional justification and rationale in the exigencies of management and the nature of the job in question, and are subject to limitations based on norms of good administration.*

36. The Appellant submits that his case is in essence similar to the one in which EBRD Grievance Committee in the case of *Staff Member A* v. *EBRD* and *Staff Member B* v. *EBRD*, 15 October 2014 concluded that the contractual arrangements do not correspond with the factual reality of the complainant's situation. For this reason, it chose to set aside the letter of the contractual arrangements and ruled that the complainants were, in fact, employees, and thus were entitled to the rights, protections and benefits given to staff members under EBRD rules (paragraph 3.28 of the Statement of Appeal).

37. The Appellant then explains the grounds for the relief being sought by him in the case. He submits that Section 12.6.3 (1) of the EBRD Staff Handbook provides that, upon termination of their employment with the Respondent, Staff Members are entitled to the payment of a severance package equivalent to a month and a half's salary per year of service. This rule applies to the Appellant: as a *de facto* Staff Member of the EBRD terminated for redundancy, he is entitled to the payment of a severance package. At the time of his termination, the Appellant had spent over eight years in the Respondent's employ, and his monthly salary was of £10,156.40 GBP. The Appellant is therefore entitled to a total severance package of £121,876.80

[1] Although it is obvious that the Statement of Appeal construes the Report and Recommendation of EBRD's Grievance Committee as a piece of case law of the EBRD Administrative Tribunal, which is clearly not true, the Tribunal believes it to be prudent to describe the merits of this argument of the Appellant.

pursuant to 12.6.3 (1) of the EBRD Staff Handbook. (paragraphs 4.4 to 4.6 of the Statement of Appeal).

38. He concludes that in presenting his Appeal, the Appellant has incurred legal costs, including but not limited to attorney's fees, which he is entitled to recover from the Respondent under Rule 8.06 of the EBRD Appeals Procedures and Rules of Procedure (paragraph 4.7 of the Statement of Appeal).

39. Replying to the Tribunal's Order of 17 August 2018 concerning additional evidence and arguments on the question of whether there exists a jurisdiction clause or an arbitration agreement binding on the Parties, the Appellant submitted on 7 September 2018 his Response to the Order of the Administrative Tribunal for Production of Additional Evidence (the "**Appellant's Second Submission**").

40. The Appellant's Second Submission explains that the Consultancy Agreement was entered into by and bears the signatures of the Appellant and the Agency, and the Respondent was never a party to the Consultancy Agreement, and there is no evidence that it ever did or meant to intervene or otherwise agree to be bound by its terms, in whole or in part (paragraphs 2.3 and 2.4).

41. For that reason the Appellant assumes that the dispute resolution clause contained in Section 14.3 of the Consultancy Agreement (reserving all disputes for exclusive jurisdiction of English courts) does not apply to the Respondent (paragraph 2.5 of the Appellant's Second Submission).

42. At paragraph 2.7 of Appellant's Second Submission, the Appellant insists that he never signed Annex 1 of the Consultancy Contract.

43. He further submits that he could not have been validly bound by Annex 1 and the Consultancy Contract, "both of which are documents which he has never seen, much less signed" (paragraph 2.13 of the Appellant's Second Submission).

44. Accordingly, it is submitted that the Appellant could not be deemed to be validly bound by the arbitration clause contained in Section 16 of the Consultancy Contract (paragraph 2.15 of the Appellant's Second Submission).

45. The Appellant contends that the jurisdiction of the Tribunal in the present matter stems from the Respondent's internal rules, which apply to all of the Respondent's Staff Members. The Appellant, being a *de facto* Staff Member, knew that under these rules, his recourses laid within the Respondent's internal administrative justice system (paragraph 2.22 of the Appellant's Second Submission).

46. That was the reason why he filed a Request for Review of the termination decision within the Bank, and following the rejection of this request, his Statement of Appeal. At no time did the Appellant ever seek to litigate the matter in English courts or to initiate arbitration, as he understood that, as a

Staff Member of the Respondent, such recourses were not available to him (paragraph 2.23 of the Appellant's Second Submission).

Summary of the Respondent's position

47. Generally, the Respondent argued that the Appellant's request for remedies sought should be rejected in its entirety, since the Administrative Decision of the President of the Bank ruled only on the matter of *admissibility* of the Appellant's Request for Review under Section 6.4.1(e) of the Directive. The main piece of the documentary evidence relied upon by the Respondent is the Consultancy Contract dated 19 November 2009 concluded between the Bank and Sentinel IT LLP entitled as the Agent (the "**Consultancy Contract**").

48. More specifically, the Bank submits that its President's Administrative Decision relates to his and the Administrative Review Committee's *competence* under the Directive to review the challenge to the decision of the Respondent not to extend the Consultancy Contract, rather than to the *merits* of the Appellant's allegations regarding the Respondent's decision not to extend the Consultancy Contract. Consequently, in the opinion of the Bank, the President's Decision does not uphold, overturn or modify in any way the decision of the Respondent not to extend the Consultancy Contract, as the Appellant seems to allege in the Appeal (paragraphs 3.1 to 3.3 of the Response).

49. Accordingly, the Bank concludes that the only possible remedy for the Appellant in the present Appeal could be that the Tribunal overturns the President's Decision on *admissibility*, i.e. that the Tribunal determines that the President's Decision on admissibility taken pursuant to Section 6.4.1(e) of the Directive was not lawful and correct. The Bank submits that the legal consequence of such decision of the Tribunal would be that the President would be required to refer the Appellant's Request for Review of the Respondent's decision not to extend the Consultancy Contract to the Chair of the Administrative Review Committee pursuant to Section 6.4.1(e) of the Directive. A determination as to whether or not the Appellant was entitled to a severance package pursuant to Section 12.6.3(1) of the Staff Handbook and whether an abuse of authority occurred would only be within the scope of that review, and not within the scope of review of the present Appeal before this Tribunal (paragraph 3.4 of the Response).

50. This was the reason why the Bank did not address in its Response the allegations made and remedies sought by the Appellant in relation to the decision of the Respondent not to extend the Consultancy Contract. The Respondent believes that the Tribunal need not examine the merits of the Appellant's claim in order to decide whether the request for review was admissible, and thus focused solely on the President's Decision regarding the *admissibility* for review, pursuant to the Directive, of the decision of the Respondent not to extend the Consultancy Contract. In relation to the President's Decision, the Respondent noted that in taking his Administrative Decision, the President has taken a decision of law as contemplated by the Directive, and *not* a discretionary decision (paragraphs 3.5 to 3.6 of the Response).

51. The Bank submits that Report and Recommendation of the Grievance Committee on Staff Member A v. EBRD and Staff Member B v. EBRD (dated 15 October 2014) relied upon by the Appeal has no precedential value and neither the Respondent, nor the Tribunal is bound by the analysis or reasoning either in reports and recommendations of the Grievance Committee or previous Administrative Review Decisions of the President. The Bank submits that that Report and Recommendation of the Grievance Committee does not create "an administrative practice" of the Respondent and does not form a part of its internal law (paragraphs 3.8 to 3.9 of the Response).

52. The Respondent asserts that the Request for Review submitted by the Appellant to the President pursuant to the Directive is inadmissible *ratione personae* and *ratione materiae* because (a) the Appellant was *"an independent contractor"* providing services to the Respondent pursuant to a commercial consultancy contract and the Directive provides access to the Administrative Review Process only to individuals which are current or former staff members, current or former retirement plan participants or, in limited circumstances, to legal representatives of any of the foregoing; and (b) only claims that challenge decisions *"taken in the administration of staff"* and *"allegedly alter, in an adverse manner, or allegedly breach terms and conditions of employment of a Staff Member"* are admissible for review in accordance with the Administrative Review Process pursuant to the Directive. The Appellant is not a current or former staff member, the decision not to extend the Consultancy Contract was not a decision in the administration of staff and the relationship between the Appellant and the Respondent is not governed by terms and conditions of employment (paragraphs 4.1, 16(e) of the Response).

53. Further, the Consultancy Contract regulating the relationship between the Appellant and the Contractor[2] (concluded in adherence to the principle of the freedom of the parties to contract) includes an express agreement to arbitrate and provides that it shall be governed by and construed in accordance with English law and not with the internal law of the Respondent. The parties to a contract must be able to rely on the terms of such contract as they are written and agreed upon. Neither the Administrative Review Committee nor the Tribunal have the competence to review a decision for its compliance with English Law and any dispute between the Appellant and the Respondent should be resolved through the dispute resolution mechanism set out in the Consultancy Contract, namely arbitration, and not under the Respondent's internal justice system (being a mechanism set up to resolve employment disputes between the Respondent and its staff members) (paragraphs 4.2 and 4.3 of the Response).

54. Section 16 of the General Conditions (appearing in Schedule C to the Consultancy Contract) sets out the governing law of the Consultancy Contract and its mechanism for dispute resolution, namely that:

[2] Probably the word "Contractor" was utilised in the Response by mistake – the Tribunal believes that according to the Bank's position the Consultancy Contract regulated the relationship between the Appellant and the Respondent.

(a) "This Contract shall be construed in accordance with English law. Any noncontractual obligations arising out of or in connection with this Contract shall be governed by and construed in accordance with English law.
(b) *Any dispute controversy or claim arising out of or relating to this Contract or the breach, termination or invalidity hereof or any non-contractual obligations arising out of or in connection with this Contract which cannot be amicably settled, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rides as in force and effect on the date of this Contract. There shall be one (1) arbitrator, and the appointing authority for the purposes of the UNCITRAL Rides shall be the LCIA (London Court of International Arbitration). The seat and place of arbitration shall be London, England and the English language shall be used throughout the arbitral proceedings. The Parties hereby waive any rights under the Arbitration Act 1996 or otherwise to appeal any arbitration award to, or to seek determination of a preliminary point of law by, the courts of England or elsewhere. The arbitrator shall not be authorised to take or provide, and the Consultant agrees that it shall not seek from any judicial authority, any interim measures of protections or pre-award relief against the Bank, any provisions of the UNCITRAL Arbitration Rules notwithstanding.*" (paragraph 6.18 of the Response).

55. The Respondent further submits that the Consultancy Contract does not deprive the Appellant of access to justice but simply sets out a different recourse mechanism than the one available to staff members, recognising that the internal justice system of the Respondent is one of limited jurisdiction (paragraphs 4.4 and 4.5 of the Response).

56. The Bank asserts that the Appellant agreed to be bound by terms and conditions of the Consultancy Contract, which is specifically evidenced by Annex 1 to the Consultancy Contract (paragraph 7.3 of the Response).

57. The Bank with reference to ILOT 701, consideration 10, submits that "it can only be very rarely, in very exceptional, if not unique cases, that a case comes before a tribunal (or an administrative review body) in which the tribunal (or administrative review body) will look behind the documents to ascertain the intention of the parties. In such instances, overwhelming and strong evidence is necessary to justify that the intention of the parties was different than the one formalised through the written contractual arrangement between them" (paragraph 6.19(f) of the Response).

58. The Bank observes that international administrative tribunals have consistently held that they will not interfere with formal written contractual arrangements between international organisations and individuals performing services and that matters arising out of such agreements do not fall within the scope of review of internal justice systems of international organisations which have been set up to resolve employment disputes. Particularly, tribunals have determined that they do not have competence to hear cases brought by consultants/contractors where the contracts held by such individuals make it clear that they are not staff members and provide for an alternative dispute resolution mechanism so as not to amount to a denial of justice, even where

such contracts have been periodically renewed (paragraphs 4.5 and 6.19(a) of the Response).

59. The Bank with references to various sources of caselaw of international administrative law submits that tribunals (and respectively administrative review bodies) will not review complaints from individuals which do not have standing before them, such as consultants and contractors (paragraph 6.19(d) of the Response).

60. In opinion of the Bank, the Consultancy Contract between the Appellant and the Respondent satisfies the foregoing requirements. The Respondent submits that the President's Decision on admissibility was both lawful and correct and should be confirmed by the Tribunal (paragraphs 4.6 and 4.7 of the Response).

61. Section 1.2(1) of the Staff Handbook provides that an "employee" or "staff member" is a person appointed to the staff of the Respondent and serving under a letter of appointment and that the terms "employee(s)" and "staff member(s)" refer to the same group of persons, and are used interchangeably in the Staff Handbook. Section 1.1.3(2) of the Staff Handbook specifically excludes the application of the Staff Handbook, unless otherwise stated therein, to *"consultants, personnel supplied by contractors and/or employment agencies, and other individuals providing services to the Bank who do not hold an appointment as a staff member"*. Section 2.4.1 of the Staff Handbook provides that an appointment as a staff member shall take effect when: (a) the Managing Director, Human Resources has made an offer to employ an individual, such offer contained in a letter of appointment and setting out the applicable conditions of employment; (b) such individual has duly signed and accepted the letter of appointment and the applicable conditions of employment; and (c) any conditions precedent set out in the letter of appointment have been met (paragraphs 6.10 and 6.12 of the Response).

62. Schedule B of the Consultancy Contract sets out that the fees payable to the Respondent were on a daily rate, while Section 1(c) of the General Conditions (being Schedule C to the same Consultancy Contract) specifies that such fees *"shall be deemed to include provision for all leave, insurance, social welfare charges or contributions to which the Consultant may be or may become liable to pay (by law or by agreement) during the Term of Engagement. "* Section 10 of the General Conditions sets out that: "[…] *Bank insurances will not apply to the Consultant or any permitted subcontractor used by the Consultant. The Consultant shall be responsible for appropriate insurance coverage and for assuring that any subcontractors it uses also maintain adequate insurance coverage."* Section 14 of the General Conditions provides that: *"Nothing contained in these Conditions or in the Contract shall be construed as establishing or creating any relationship other than that of* ***independent contractor*** [emphasis added by the Bank] *between the Bank and the Agent/Consultant."* (paragraphs 6.13, 6.16 and 6.17 of the Response).

63. The Bank concludes that the Appellant was not appointed to the Respondent's staff by a letter of appointment and did not serve under a letter of appointment. Therefore he was not, at any time, a staff member of the Respondent. The

relationship between the Appellant and the Respondent was at all times governed solely by the terms of the Consultancy Contract. The Appellant agreed to be bound by the terms and conditions of the Consultancy Contract. The Consultancy Contract does not create an employment relationship between the Appellant and the Respondent. On the contrary, Section 14 of the Consultancy Contract clearly identifies the status of the Appellant to be that of *"an independent contractor"*. This is reaffirmed *inter alia* by (i) Section 4 of the General Conditions of the Consultancy Contract which identifies the privileges and immunities applicable to the consultant as being those accorded to an expert performing a mission for the Respondent and not those accorded to staff members; (ii) Sections 6(f) and 6(i) of the General Conditions pursuant to which the Appellant was permitted to subcontract his services and render other services to third parties, rights that are not granted to staff members; (iii) Sections 1(c) and 10 of the General Conditions pursuant to which the Appellant was paid at a daily rate, which was deemed to include provision for insurance and social security contributions, for which the Appellant was liable, a situation different from that of staff members of the Respondent (paragraphs 7.3 and 7.4 of the Response).

64. Accordingly, the Appellant does not have a standing to initiate the Administrative Review Process pursuant to the Directive and the President lawfully and correctly decided that the Request for Review is inadmissible *ratione personae.* Decisions taken by the Respondent which affect individuals who are not staff members cannot therefore amount to administrative decisions subject to the Administrative Review Process under Section IV. The President therefore lawfully and correctly decided that the Request for Review submitted by the Appellant is inadmissible *ratione materiae* (paragraphs 7.6 and 7.7 of the Response).

65. Moreover, the same Section 16 of the General Conditions of the Consultancy Contract provides that the contract shall be governed by and construed in accordance with English Law and not with the internal law of the Respondent. Neither the Administrative Review Committee nor the Tribunal have the competence the review a decision for its compliance with English law. Any dispute between the Appellant and the Respondent should be resolved through the dispute resolution mechanism set out in the Consultancy Contract, namely arbitration, and not under the Respondent's internal justice system (a mechanism set up to resolve employment disputes between the Respondent and its staff members). Having read and voluntarily subscribed to the above provisions regarding his status and arbitration as the mechanism for resolution of disputes between himself and the Respondent, the Appellant must have taken note and accepted that he will not have the status of a staff member and access to the internal justice system of the Respondent (paragraphs 7.10 to 7.12 of the Response).

66. The Respondent submits that the Tribunal need not examine the merits of the Appellant's claim in order to decide whether the request for review was admissible in this case. The language of the Consultancy Contract and the intention of the parties, as reflected in the Consultancy Contract, as well as the Directive, are express and clear and do not provide any room for

interpretation. The Bank submits that in this case there is no overwhelming and strong evidence to justify that the intention of the parties was different than the one formalised through the written contractual arrangement (paragraph 7.16 of the Response).

67. The Bank concludes that the Appellant agreed to provide his services to the Respondent as an *"independent contractor"* on the terms and conditions of the Consultancy Contract. The Appellant further reaffirmed such agreement each time the Consultancy Contract was renewed. He was well aware and agreed that (i) he would enjoy a status that is different from that of a staff member of the Respondent; (ii) he would enjoy different rights, including fees increased to include a provision for all leave, insurance, social welfare charges or contributions to which the Consultant may be or may become liable to pay (by law or by agreement) during the term of Consultancy Contract; and (iii) he would not have access to the internal justices system of the Respondent set and any disputes between him and the Respondent would be resolved through arbitration (paragraph 8.1 of the Response).

68. The Bank submits that the President's Decision is both lawful and correct and invites the Tribunal to confirm the President's Decision and to dismiss the Appeal of the Appellant in full. If the Appellant wishes to dispute the non-renewal of the Consultancy Contract, he has the opportunity to do so through arbitration. This is no less than what he agreed to and is not in any way unjust (paragraph 8.3 and 8.4 of the Response).

69. Replying to the Tribunal's Order of 17 August 2018 concerning additional evidence and arguments on the question of whether there exist a jurisdiction clause or an arbitration agreement binding on the Parties, the Respondent on 7 September 2018 submitted its document entitled Additional Arguments Further to the Order of the Administrative Tribunal (the "**Respondent's Second Submission**").

70. As set out in paragraph 5.1 of the Respondent's Response, the Consultancy Contract was entered into by the Agent but expressly states that "the *Agent has the authority to act on behalf of and legally bind [the Appellant]"*. Consequently, the Appellant has the benefit of the rights set out under the Consultancy Contract, including the right to commence arbitration proceedings against the Respondent in respect of any claim relating to the Consultancy Contract or the breach, termination or any non-contractual obligations arising out of or in connection with the Consultancy Contract, in accordance with the arbitration provisions set out in Section 16 of the General Conditions to the Consultancy Contract (the "**Arbitration Clause**") (paragraph 3 of the Respondent's Second Submission).

71. The Respondent submits that it has no records confirming that the Appellant signed Annex 1 to the Consultancy Contract, confirming that he has authorised the Agent to act as his agent for all contractual negotiations with the Respondent and that he agrees to be bound by such terms as are agreed by the Agent and the Respondent. However, as will be shown below in the argumentation of that Respondent's Second Submission, this does not deprive

the Appellant of the benefits under the Consultancy Contract, including the right to arbitrate any claim he may have against the Respondent. The Respondent confirmed that the Appellant possesses such right to arbitrate in the President's Decision in this matter (paragraph 5 of the Respondent's Second Submission).

72. The Consultancy Contract and any non-contractual obligations arising out of or in connection thereof are to be construed in accordance with English law, as set out under Section 16(a) of the General Conditions to the Consultancy Contract (paragraph 6 of the Respondent's Second Submission). This argument is developed by the Respondent in several ways.

73. Firstly, it is alleged that under all developed legal systems (including English law), one party (an "agent") may in certain circumstances legally bind another party (a "principal") by its acts. Among other things, an agent may execute contracts, including arbitration agreements, which will be legally binding on its principal (paragraph 7 of the Respondent's Second Submission).

74. Secondly, the Bank explains that under English law, even if the Agent lacked the requisite authorisation from the Appellant to enter into the Consultancy Contract (which the Respondent does not accept) and the Appellant did not sign Annex 1 to the Consultancy Contract or otherwise agree to be bound by the terms of the Consultancy Contract, the Appellant has the power to ratify the Consultancy Contract and avail himself of the benefit of the Arbitration Clause. A non-signatory party may be bound by an arbitration clause if he has ratified or assumed that provision (paragraph 8 of the Respondent's Second Submission).

75. Thirdly, the Respondent concludes that the Appellant's conduct since the conclusion of the Consultancy Contract (including in these proceedings) reveals his implied consent to the Consultancy Contract, including the Arbitration Clause and the provisions establishing his status as an independent consultant contained in the Consultancy Contract. In the Bank's opinion, the Appellant's involvement in the performance of the Consultancy Contract was undoubtedly substantial - for eight years he performed under the Consultancy Contract. According to the Appellant's Statement of Appeal, the Respondent's past renewals of the Consultancy Contract was the basis for his expectation that it would be renewed again (paragraphs 2.12 and 2.14 of the Statement of Appeal) (paragraph 10 of the Respondent's Second Submission).

76. Further and alternatively, the Bank pleads that under English law, the Appellant has a statutory right to enforce the Arbitration Clause (paragraph 11 of the Respondent's Second Submission).

77. The Respondent explains that it was not a party to the Consultancy Agreement and the Respondent only became aware of its existence, terms, and subsequent extensions when the Appellant submitted it to the Tribunal (paragraph 14 of the Respondent's Second Submission).

78. In opinion of the Bank, the Consultancy Agreement regulates a commercial relationship "between two legal entities, incorporated in England and Wales" and appropriately provides that any dispute between the parties to it shall be subject to the exclusive jurisdiction of the courts of England (paragraph 17 of the Respondent's Second Submission).

79. The Bank submits that by agreeing to the contractual arrangements with the Agent, the Appellant clearly accepted that he would not have the status of a staff member of the Respondent and would not have access to the internal justice system of the Respondent, which is available only to its staff. Further, the Appellant expressly accepted that any disputes, claims or proceedings relating to the validity, construction or performance of the Consultancy Agreement into which he entered (for and on behalf of his company) with the Agent would be subject to the exclusive jurisdiction of the courts of England (paragraph 20 of the Respondent's Second Submission).

80. The Bank concludes that contractual arrangements entered into by the parties in respect of the Appellant's services, as personnel of an independent contractor, do not deprive the Appellant of access to justice with respect to any claim he may have against the Respondent, as the Appellant is in a position to enforce the terms of the Consultancy Contract against the Respondent through arbitration (paragraph 22 of the Respondent's Second Submission).

The Tribunal's evaluation

The issue concerning this Tribunal's jurisdiction to consider the merits of this Appeal

81. First of all, the Tribunal shall consider the Bank's argument that the disputed President's Administrative Decision relates to his and the Administrative Review Committee's *competence* under the Directive to review the challenge to the decision of the Respondent not to extend the Consultancy Contract, rather than to the *merits* of the Appellant's allegations regarding the Respondent's decision not to extend the Consultancy Contract.

82. The Administrative Decision of the President of the Bank, following its determination of the Appellant's request to review its complaint as inadmissible, contains the following wording:

> "You have rendered services to the Bank pursuant to the Consultancy Contract and your relationship with the Bank is governed solely by the terms and conditions of such Consultancy Contract.
>
> Specifically, Section 14 of the General Conditions enclosed to the Consultancy Contract provides that the Consultancy Contract should not *"be construed as establishing or creating any relationship other than that of independent contractor between the Bank and [you]."* This is reaffirmed by Section 4 of the General Conditions, which identifies your privileges and immunities as being those accorded to an expert performing a mission for the Bank under Articles 51 and 52 of the Agreement Establishing the Bank, and not those accorded to a staff member.
>
> Section 16 of the General Conditions sets out a mechanism for settlement of any dispute, controversy or claim arising out of, or relating to the Consultancy Contract which cannot be amicably settled, namely arbitration in accordance with UNCITRAL Arbitration Rules. Accordingly, any claims in relation to the Consultancy Contract, including the Bank's decision not to extend the Consultancy Contract beyond the date of its contractually agreed expiration, should be resolved through arbitration as provided in the terms of the Consultancy Contract".

83. In the view of the Tribunal, that wording in fact means that the President of the Bank indeed considered just the matter of his jurisdiction (*competence*), rather than *the merits*, of the Appellant's case and dismissed it for the reasons that it understood the Appellant to be bound by the terms and conditions of the Arbitration Clause of the Consultancy Contract, i.e. on purely jurisdictional grounds.

84. The Tribunal accepts this argument of the Respondent as logical and compelling. This conclusion, however, does not prevent the Tribunal from reviewing the correctness of the Administrative Decision of the President of the Bank on the matter of jurisdiction.

The Consultancy Agreement and the Consultancy Contract

85. The basics of the Bank's defence rely on the text of the Consultancy Contract (Exhibit to the Response) dated 19 November 2019. This Consultancy Contract was clearly concluded between the Bank and Sentinel IT LLP entitled as the Agent. The "whereas clause" at the first page of that contract submits that "*the Agent has authority to act on behalf and legally bind"* the Appellant (referred to by that Consultancy Contract as the Consultant). The Bank submits that the Appellant agreed to be bound by terms and conditions of the Consultancy Contract, which is specifically evidenced by Annex 1 to the Consultancy Contract (paragraph 7.3 of the Response). This Annex 1 is extremely important for understanding of the role of the Consultancy Contract, so the Tribunal paid a specific attention to study of that Annex 1.

86. The wording of Annex 1 is very promising for the Bank's case: in it the Appellant (the Consultant) makes the following statements to the Bank:

> "I hereby confirm that I have authorised Sentinel IT LLP (the "Agent") to act as my agent for all contractual negotiations with the European Bank for Reconstruction and Development (the "Bank") until such time as I give the Bank written notice to the contrary. This authorisation shall apply to Cl9592[3] and any extensions, revisions or amendments thereof.
>
> I agree to be bound by such terms as are agreed by my Agent with the Bank".

87. However, this Annex 1 appears to be just an annex to the text of the Consultancy Contract, which contract was physically executed by the Bank and the Agent, not by the Consultant (the Appellant). That Annex 1 was neither signed by the Appellant, nor dated. In the opinion of the Tribunal, this is just the form of consent which was required by the Bank to be procured by the Agent as a condition precedent for execution of the Consultancy Contract. That form may not be relied upon as an evidence that the Appellant indeed agreed to be bound in general by the Consultancy Contract concluded by the Agent, and, more specifically, by its arbitration clause. In its Second Submission, the Bank acknowledged that that Annex 1 was never signed by the Appellant. The Bank's arguments that the Appellant was nevertheless bound by its terms and displayed an "implicit consent" with it (see paragraphs 6 to 11 of the Respondent's Second Submission") do not persuade the Tribunal that on the basis of established facts one should accept the Bank's interpretation of the Consultancy Contract as a piece of documentation which regulates the rights and obligations of the very Appellant, rather than the Agent.

88. Accordingly, the ground for that authority of the Agent to bind the Consultant remained without proof. This seriously undermines the Bank's contentions about the existence and validity of the Arbitration Clause between the Parties preventing the Tribunal from consideration of this dispute. In the absence of

[3] Being the number of the Consultancy Contract.

the duly executed (and dated) Annex 1 the mere existence of that Consultancy Contract as a document which binds the Appellant should be put under a question mark.

89. For that particular reason, contrary to the Respondent's allegations, the Tribunal concludes that the Appellant *was not bound by the* Arbitration Clause contained in the *terms and conditions of the Consultancy Contract*, providing for UNCITRAL arbitration of disputes stemming from that Consultancy Contract (see paragraph 54 of this Decision above). Under the circumstances of this case considered at paragraphs 87 and 88 above, the Tribunal believes that there exists no valid arbitration agreement between the Parties which prevents this Tribunal from considering the dispute at stand.

90. The Bank's arguments about the Appellant's *right* to arbitrate the dispute with the Bank under the Arbitration Clause of the Consultancy Contract and the Bank's arguments that the Appellant remains at liberty to *ratify* the Arbitration Clause and even *enforce* it (paragraphs 8 and 10 of the Respondent's Second Submission) in the opinion of the Tribunal miss the target: the Appellant obviously opted for resolution of his dispute with the Bank under the Directive, claiming that he was *de facto* employed by the Respondent, rather than under the Consultancy Contract, which obviously does not allow him to claim the remedies sought by the Appellant in the present proceeding. This is reflected at paragraph 2.23 of the Appellant's Second Submission (see paragraph 46 of this Decision above).

91. The jurisprudence and provisions of English law referred to by the Bank at paragraphs 7 to 11 of its Second Submission do not help its case: those were disputes in which the claimant, rather than the respondent, wished to arbitrate its dispute, while the respondent contested the validity (or existence) of the arbitration agreement. To the best knowledge of the Tribunal, there exists no legal theory which allows the respondent to enforce the arbitration agreement which the claimant has never signed and does not wish to sign or ratify. The cases in which the arbitration agreement binding the claimant was signed by the agent lawfully acting for the principal are also not pertinent to this case in which in the opinion of the Tribunal the role and authority of the Agent to bind the Appellant by the Consultancy Contract remain mute (see paragraph 85 to 88 of this Decision above) and Annex 1 to the Consultancy Contract (specifically designed for proof of the Agent's authority to act on behalf of the Appellant) was never signed by the Appellant.

92. At paragraph 10 of the Respondent's Second Submission, it is alleged that "In the Appellant's Statement of Appeal, he refers to the Consultancy Contract as *"his contract with the Respondent"* (paragraph 2.13 of the Statement of Appeal), leaving no doubt that he understood that he was a party to the Consultancy Contract and demonstrating a common understanding among the Appellant and the Respondent that it was valid and binding on each of them". The Tribunal is not prepared to accept that Bank's argument either. The word "contract" in paragraph 2.13 of the Statement of Appeal relied upon by the Bank (and also the same word in the preceding paragraph 2.12) could not be

reasonably construed as a reference to the very Consultancy Contract (not at all mentioned at the Statement of Appeal).

93. The Statement of Appeal is based on the contention that the Appellant worked for the Bank in capacity of a Reporting and Analysis Consultant "having entered into a Consultancy Agreement on 14 December 2009 (the "Consultancy Agreement")" (paragraph 1.1 of the Statement of Appeal). In paragraph 2.1 of the Statement of Appeal, the Appellant contends that "he initially entered the employment of the Respondent on 14 December 2009, having been hired via the recruitment agency Sentinel IT … to work as a Reporting and Analysis Consultant". Probably paragraph 2.1 of the Statement of Appeal refers to the same Consultancy Agreement mentioned in its paragraph 1.1. This Consultancy Agreement refers to the Appellant as the Contractor. The Appellant failed to supply a signed copy of the Consultancy Agreement, the text of which appearing in Exhibit 1 to the Statement of Appeal lacks the first and the final pages with signatures and titles of the parties thereto. The wording of paragraphs 1.1, 2.1 and 2.13 of the Statement of Appeal suggests that the Consultancy Agreement was concluded directly between the Appellant and the Bank, rather than between the Appellant and Sentinel IT LLP. The Bank did not address that issue in its Response, since, most likely, it was deemed to appear as an argument of the ***merits***, rather than the argument of the ***competence***, to which latter arguments the Respondent decided to confine its Response. This ambiguity required the Tribunal to issue on 17 August 2018 an order requesting the Parties to explain the situation.

94. On 7 September 2018 the Respondent explained in its Second Submission that in fact it never signed the Consultancy Agreement. That was also admitted by the Appellant in its Second Submission of the same date.

95. Accordingly, the Parties wish the Tribunal to resolve their dispute basing on ***different underlying documents***, being the Consultancy Agreement allegedly dated 14 December 2009 (the Appellant) and the Consultancy Contract dated 19 November 2019 (the Respondent), concluded by the Agent and the Bank (the Consultancy Contract) and the Appellant and the Agent (the Consultancy Agreement). The Tribunal finds that nothing in the produced documentation and in the submissions made by the Parties suggests that there is a binding arbitration clause between the Parties preventing that the Administrative Review Process is carried out with regard to the disputed matter. The Tribunal also rejects the Bank's arguments that the Appellant implicitly agreed to be bound by that Consultancy Contract following its execution and renewal.

96. The Bank submits that the language of the Consultancy Contract and the intention of the parties, as reflected in the Consultancy Contract, as well as the Directive, are sufficiently clear (paragraph 3.5 of the Response), in order to reject the Appeal without considering the dispute on the merit, for lack of jurisdiction of the Tribunal to decide cases involving appeals filed by consultants, rather than Staff Members of the Bank. The Tribunal points out that this Decision is purely on jurisdiction and does not take a stand on whether the Appellant was a consultant or a ***de facto*** Staff Member of the Bank. This latter issue is to be decided in a proceeding relating to the merits.

97. Having studied the evidence, the Tribunal can't agree with the position of the Bank regarding the existence of a valid and binding arbitration agreement between the Appellant and the Bank. Neither does it accept the Bank's argument that the Appellant has the right to ratify the arbitration agreement. Having the right to ratify an agreement is not the same as being bound by that agreement. The Tribunal observes that there exists no legal norm which could require the Appellant to arbitrate its present dispute with the Respondent under existing circumstances contrary to the Appellant's volition. Accordingly, the Tribunal declares that it has jurisdiction to consider this Appeal, otherwise that would amount to denial of justice for the Appellant, who cannot apply to English courts (due to the Bank's status) and has no reasons to ratify the Arbitration Clause.

Plea of the Bank to return the matter for the second consideration of the Bank's President

98. The Bank submits that if the Tribunal determines that the President's Decision on admissibility taken pursuant to Section 6.4.1(e) of the Directive was not lawful and correct, the legal consequence of such decision of the Tribunal would be that the President would be required to refer the Appellant's Request for Review of the Respondent's decision not to extend the Consultancy Contract to the Chair of the Administrative Review Committee pursuant to Section 6.4.1(e) of the Directive. In the opinion of the Bank, a determination as to whether or not the Appellant was entitled to a severance package pursuant to Section 12.6.3(1) of the Staff Handbook and whether an abuse of authority by the Bank ever occurred in this case would only be within the scope of that review, and not within the scope of review of the present Appeal before the Tribunal.

99. In the opinion of the Bank, the President's Decision does not uphold, overturn or modify in any way the decision of the Respondent not to extend the Consultancy Contract, as the Appellant seems to allege in the Appeal (paragraphs 3.1 to 3.3 of the Response).

100. At the same time, in the opinion of the Bank, neither the Administrative Review Committee nor the Tribunal have the competence to review a decision for its compliance with English law which governs the Consultancy Contract (paragraph 7.10 of the Response). According to that latter argument, a return of the matter to the President of the Bank for referral to the Administrative Review Committee may not take place, since that Administrative Review Committee indeed was not authorised to review compliance of any administrative decisions of the Bank with English substantive law which governed the Consultancy Contract. That would be contrary to the contention of the Response in accordance with which as a result of such referral a determination as to whether or not the Appellant was entitled to a severance package pursuant to Section 12.6.3(1) of the Staff Handbook and whether an abuse of authority occurred would be made by the Administrative Review Committee following a future referral of the matter to that committee by the President of the Bank (paragraph 3.4 of the Response).

101. Having considered those arguments of the Respondent the Tribunal concludes that there exists an obvious inconsistency between them. The Tribunal believes that the matter indeed should be referred to the Administrative Review Committee for the reason that the arbitration agreement contained in the Consultancy Contract appeared not to be binding upon the Appellant who never signed it and never authorised the Agent to sign it on his behalf. Accordingly, the Consultancy Contract's Arbitration Clause and the norm about the choice of applicable English substantive law cannot prevent consideration of the Appellant's requests in the course of the administrative review under the Directive on the Administrative Review Process.

102. This is the reason why the Tribunal believes that it should grant the Bank's plea to return the matter to the President of the Bank for future referral to the Administrative Review Committee. The Appellant's Request for Review of the Respondent's decision not to extend the Consultancy Contract and not to consider the Appellant to be a *de facto* employee of the Bank should be subject to the Administrative Review Process in accordance with the Directive.

The matters to be considered in the course of the future procedure of administrative appeal

103. The Administrative Tribunal points out that a main issue to be resolved in the course of the Administrative Review Process is whether the Appellant in the course of his 8 years period of work for the Bank was its *de facto* employee (as it is alleged in the Statement of Appeal), or, rather, was an independent consultant operating under the guise of a consultancy contract which was renewed 13 times (see paragraph 2.3 of the Statement of Appeal). The Tribunal reiterates that, by this decision on the applicability of the Administrative Review Process to the dispute, it has not adressed the question of the merits of the dispute. The affirmative answer to this question would lead to considering the remedies sought by the Appellant; the negative answer would result in ultimate dismissal of the Appellant's requests on the merits.

104. In this context, the Tribunal finds it would be helpful if the Administrative Review Committee evaluated evidence that can lead to a finding of facts on the basis of the criteria for *de facto* employment that are formulated, i.a., in international administrative case law. The Administrative Review Committee shall decide whether the Appellant's allegations of the *de facto* employment are proven, and also consider the legal significance of roles played by the Parties and the Agent during their several-years of cooperation.

Legal fees

105. Normally, the appellant which prevails in a case before the Administrative Tribunal should be eligible for compensation of his reasonable legal fees. In this case the Tribunal decided to set aside the disputed Administrative Decision, which decision of the Tribunal, however, does not put an end to this dispute. The Tribunal believes that the resolution of the Appellant's plea for

compensation of the legal fees should be reserved for the future process of administrative review. Depending upon the outcome of the future administrative review process, that matter may be further appealed to the Administrative Tribunal.

Decision

On the basis of the foregoing, the Tribunal, acting by a panel composed of Judges Boris Karabelnikov (Chair), Professor Giuditta Cordero-Moss and Professor Stanislaw Soltysinski, hereby decides as follows:

(i) The Administrative Decision of the President of the Bank of 1 May 2018 is hereby annulled;

(ii) The President is required to refer the Appellant's Request for Review of the Respondent's decision not to extend the Consultancy Contract and not to consider the Appellant to be a *de facto* employee of the Bank to the Chair of the Administrative Review Committee pursuant to Section 6.4.1(e) of the Directive on the Administrative Review Process;

(iii) The award of the Appellant's legal fees (unless those fees would be paid by the Bank voluntarily in the course of the future administrative review procedure) is reserved for future consideration by the Administrative Tribunal;

(iv) Other remedies sought by the Parties are hereby rejected.

For the EBRD Administrative Tribunal

Boris Karabelnikov