Neutral Citation Number: [2019] EWHC 57 (Comm)

Case Nos: CL-2017-000402 & CL-2018-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 18 January 2019

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

CL-2017-000402 ('the 2017 Claim')

CUNICO RESOURCES NV **CUNICO MARKETING FZE** **FENI INDUSTRIES AD**	**Claimants**
- and -	
KONSTANTINOS DASKALAKIS **ARVIND MUNDHRA**	**Defendants**

CL-2018-000025 ('the 2018 Claim')

CUNICO MARKETING FZE	**Claimant**
- and -	
KONSTANTINOS DASKALAKIS **ARVIND MUNDHRA**	**Defendants**

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Thomas Grant QC and Caley Wright (instructed by **Hogan Lovells International LLP**) for **Cunico Resources NV and Cunico Marketing FZE**
Alain Choo-Choy QC (instructed by **Wallace LLP**) for the **Defendants**
Feni Industries AD did not appear and was not represented on this hearing
Hearing dates: 5, 6, 7 November 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. I handed down a judgment in this matter on 7 December 2018, [2018] EWHC 3382 (Comm), dealing with an application in the 2018 Claim by the claimant Cunico Marketing FZE ('Marketing') for judgment against the first defendant, Mr Daskalakis, in default of acknowledgment of service. It also dealt with an application by Mr Daskalakis for an extension of time and/or relief from sanctions in respect of the lateness of his acknowledgment of service. Much of the introduction to that judgment is repeated here, so that either judgment can be read without reference to the other.

2. Mr Daskalakis and the second defendant, Mr Mundhra, worked for the Cunico group, respectively from late 2004 to January 2016 and from August 2005 to October 2015. The group operated in base metals industries and markets. The name 'Cunico' is an amalgam of the periodic table abbreviations for copper (Cu), nickel (Ni) and cobalt (Co). The defendants' primary jobs were CEO and CFO respectively of Feni Industries AD ('Feni'), the main industrial operating subsidiary of the group, incorporated and operating in FYR Macedonia. Feni owned and operated a ferronickel production plant in Kavadarci and the Rzanovo iron and nickel mine 50 km or so south of the city.

3. Cunico Resources NV ('Resources') was incorporated in the Netherlands, to become the group holding company, in May 2007. Marketing was incorporated in Dubai, UAE, in July 2007, and operated in the Jebel Ali Free Zone as the main market-facing trading entity in the group. Resources had no operating activities. It existed as a holding company for the operating subsidiaries as investment assets, with a single dedicated (full-time) employee. Marketing traded by purchasing ore from other Cunico subsidiaries, and bailing the ore to a ferronickel plant within the group under a 'tolling agreement', for conversion by the plant to finished ferronickel. Marketing then sold the finished product to the market. Under the tolling agreement, fees for converting Marketing's ore into finished ferronickel would be payable by Marketing to the operator of the ferronickel plant (e.g. Feni).

4. Thus, the group became the Cunico group only in May 2007, when Resources was incorporated, whereas the defendants joined in late 2004 and August 2005. Where it is necessary to have regard to that timing point below, I do so; but for convenience I shall refer to the group as the Cunico group throughout.

5. The Cunico group was owned, at the time of the events said to give rise to claims against the defendants, as a joint venture between International Mineral Resources BV ('IMR') and BSGR Cooperatief UA ('BSGR'). Latterly, IMR has effectively all but bought BSGR out, via the intervention of proceedings in the Amsterdam Enterprise Chamber, so that today Resources is owned as to c.80% by Summerside Investments S.a.r.l., IMR's parent company, with 50% of the remainder owned by each of IMR and BSGR.

6. So-called 'Advisory Contracts' were signed as between Marketing and each of the defendants, in 2007 and again in 2010, that contained a jurisdiction provision in these words: "*In case of disagreements, they shall be solved in the Court of the United Kingdom*". The claimants say that provision gives this court jurisdiction over their

respective claims against the defendants under Article 23 of the Lugano Convention. It is common ground that the defendants were domiciled in Switzerland when proceedings were brought and that the claims brought against them are within the material scope of the Lugano Convention, so indeed it governs the question of jurisdiction in this case. It is also common ground that, in this international business context, the reference in the Advisory Contracts to "*the Court of the United Kingdom*" should be interpreted to mean the courts of England and Wales.

7. Feni is now subject to a form of insolvency process in Macedonia pursuant to which a trustee in bankruptcy has been appointed who has control of Feni's affairs. There is a dispute that does not require to be considered at this stage whether any rights Feni may have against the defendants have been validly assigned to Resources. Because of that dispute, Feni, acting by the trustee in bankruptcy, is separately represented in the proceedings generally. But it made no separate appearance in or submissions on the applications argued before me. They were therefore argued by Mr Choo-Choy QC for the defendants and by Mr Grant QC for Resources and Marketing, but Mr Grant's submissions on behalf of Resources as (so it claims) assignee of Feni's rights dealt also with the position of Feni. In the description I give below of the claims being made, I shall ignore this aspect entirely and refer to Feni's claims simply as such.

8. It is clear to me that all of the claims advanced against them are disputed on the merits by the defendants, but those merits do not fall to be considered in this judgment. The summary description of the claims that I give below is therefore, and must be understood as, just a description of those claims as they are asserted by the claimants, to allow analysis of the jurisdictional issues that arise for determination.

9. The following applications were argued before me:

    i) In the 2017 Claim, the defendants' application dated 11 January 2018 challenging jurisdiction, dealt with in this judgment. The principal issue is whether the claims made are matters relating to individual contracts of employment so as to engage Section 5 of the Lugano Convention. It is common ground that any claims that do engage Section 5 cannot be brought here. That is because the only basis for English jurisdiction relied on by the claimants is the jurisdiction provision in the defendants' respective Advisory Contracts with Marketing, quoted above. That jurisdiction provision does not satisfy Article 21 of the Convention. Therefore, it has no legal effect if Section 5 of the Convention applies, because it departs from the rule of jurisdiction under Section 5 that in matters relating to individual contracts of employment, the employer may only sue an employee domiciled in a Convention state in his or her state of domicile (see Articles 18, 20 and 23(5)).

    ii) In the 2018 Claim, the applications I dealt with in my earlier judgment [2018] EWHC 3382 (Comm), that is to say:

        a) Marketing's application dated 4 July 2018 for judgment against Mr Daskalakis in default under CPR 12.3(1), and

        b) Mr Daskalakis' cross-application dated 10 July 2018 for a retrospective extension of time for filing an acknowledgment of service and/or for

relief from sanctions for the late filing of his acknowledgment of service.

10. The defendants have also applied to challenge jurisdiction in the 2018 Claim, by application dated 26 July 2018, relying on the same grounds as they raise in respect of Marketing's claims in the 2017 Claim. That application was not listed for consideration at this stage, but the parties agreed that the ruling on the jurisdiction challenge in the 2017 Claim will determine it. That involved an acceptance by Marketing that Mr Daskalakis should be entitled to challenge jurisdiction in the 2018 Claim even though he filed his acknowledgment of service late, and to that extent I granted Mr Daskalakis relief from sanctions as I explained in my earlier judgment.

The Claims

11. In CL-2017-000402 ('the 2017 Claim'), Resources, Marketing and Feni are all claimants. The following claims are asserted.

12. EC Ecotech Consulting AG ('Ecotech'), a Swiss company incorporated in December 2013 and alleged by the claimants to be connected to Mr Daskalakis or his family, is said to have received US$230,000 from Resources during 2014 and 2015 under two contracts for consulting services, dated 1 January 2014 and 1 January 2015, concluded between Resources and Ecotech. Resources alleges that the defendants caused or procured Resources to conclude those contracts and/or make those payments in breach of contractual and fiduciary duties owed to Resources.

13. Ecotech is also said to have received US$1,539,838.11 from Marketing in February 2015 under a service agreement dated 28 January 2015 concluded between Marketing and Ecotech for the provision of phyto-sanitary and environmental compliance services. Marketing alleges that the defendants caused or procured Marketing to enter into that contract and/or make that payment in breach of contractual and fiduciary duties owed to Marketing.

14. Finally, as regards Ecotech, it is said to have received US$39,486.80 from Marketing in settlement of an August 2015 invoice from Ecotech to Resources under the 1 January 2015 contract referred to in paragraph 12 above. Marketing alleges that the defendants caused or procured it to make that payment in breach of contractual and fiduciary duties owed to it.

15. In relation to each of the Ecotech claims, there is a further or alternative claim against Mr Daskalakis only for an account of profits "*to the extent that [he] personally benefited from*" the respective payments, although there is in fact no allegation that he did benefit personally. The Ecotech claims are pleaded under the heading, '**The Ecotech Fraud**' and the sub-heading, 'Fraudulent scheme'. However, no claim in deceit is asserted and those labels should not have been used.

16. Feni, it is said, contracted for transportation and forwarding services with Fersped AD ('Fersped'), between 2004 and 2014, including by written contracts concluded in January 2007, June 2007 (with an amendment in June 2008) and June 2013. Total amounts paid to Fersped for the years 2006 to 2014 are pleaded, said to be equivalent in aggregate to c.€135 million. Feni claims that the defendants acted in breach of contract by, essentially, failing to make a proper effort to keep transport costs down,

from mid-2011 through 2014, for which period the total paid to Fersped is said to have been c.€64.5 million. I envisage the start date for the claim may have been chosen with an eye on limitation, as the Claim Form was issued in June 2017. The allegation is that as a result of the defendants' breaches of contract Feni's actual transport costs were at least 10% higher than they ought to have been, leading to a claim (said to be conservatively estimated) for c.€6.5 million.

17. Feni also says it concluded an electricity contract with Energy Delivery Solutions DOO Skopje ('EDS') in December 2012, supplemented by confirmation letters in November 2012 and July 2013. Feni claims that the defendants acted in breach of contract by agreeing a disadvantageous fixed price for electricity in 2013, said to have caused loss of c.€4.1 million in 2013 as against what are said to have been average (variable) market electricity prices that year. Feni also claims for c.€240,000 in aggregate paid to EDS for MWh nominated by Feni under the contract with EDS, but unused, for July 2013, September 2013 and each month between April 2014 and December 2015. This is said to have involved the defendants in breach of contract in failing to prevent, or stop, Feni over-nominating under the contract.

18. Finally, as regards Feni, it claims that the defendants acted in breach of contractual and fiduciary duties owed to it in relation to charges paid to Theodorou Brothers and Kastro Co. from 2006 to 2009 in relation to transportation and other work for Feni's Rzanovo mine. The Rzanovo mine claims may be separated out further as follows:

    i) US$725,024 is claimed as excessive transportation costs paid to Theodorou Brothers for 2006, but that is a claim against Mr Daskalakis only;

    ii) US$489,300 is claimed as excessive transportation costs paid to Kastro Co. for the period April 2007 to March 2009 pursuant to a contract dated 18 April 2007, a claim made against both defendants;

    iii) US$1,230,812 is claimed as an aggregate amount over-charged by Kastro Co. under the April 2007 contract for drilling and blasting work at Rzanovo not in fact undertaken, again a claim made against both defendants.

19. Marketing claims that, in breach of contractual and fiduciary duties owed to it, Mr Mundhra caused or procured payments to himself from Marketing to which he was not entitled, in US$ and €, between April 2011 and November 2015. The totals claimed are c.US$1.6 million and c.€820,000.

20. Finally, for the 2017 Claim, Marketing claims that Mr Daskalakis and Mr Mundhra received bonus payments from Marketing to which they were not entitled and/or to procure payment of which they acted in breach of contractual and fiduciary duties owed to it. The amounts claimed are US$1,350,000, US$850,039.01 and US$1,250,000 said to have been paid to Mr Daskalakis as bonus, and US$300,000, US$275,000 and US$100,000 said to have been paid to Mr Mundhra as bonus, in each case for 2011, 2012 and 2014 respectively.

21. In CL-2018-000025 ('the 2018 Claim'), Marketing is the only claimant. I was told by Mr Grant QC that a fresh action to pursue the claim I describe below was thought to be 'procedurally cleaner' (not a view I would endorse), but also that there was a

concern about simply seeking to amend in the 2017 Claim because of possible limitation issues.

22. The claim asserted by Marketing in the 2018 Claim is as follows:

    i) It says the tolling arrangements between Marketing and Feni (see paragraph 3 above) were contained in a written contract dated 18 June 2010, amended by written addenda in March 2011, January, June and September 2012, January and July 2013, September and December 2014, and May, July and August 2015.

    ii) The terms agreed, says Marketing, were disadvantageous to it and favourable to Feni. It asserts that this was intentional, on the part of the defendants, to divert losses that would otherwise have been incurred on Feni's books. This is alleged to have involved breaches of contractual and fiduciary duties owed by the defendants to Marketing. Whilst the merits are for another day, if jurisdiction is established, it is right to observe that on the face of the Marketing-Feni contract and addenda, the defendants were always on Feni's side of the contractual fence rather than Marketing's.

    iii) Marketing asserts that its entire cumulative net loss on the sale of nickel processed for it by Feni between January 2011 and August 2016, said to be US$125,468,000, was caused by the defendants' breaches of duty. It gives credit for a debt balance of US$51,505,526 owed to Feni that it says has been written off by Feni, so long as that write-off is not reversed and Feni does not pursue Marketing for the debt. The claim amount as things stand, therefore, is US$73,962,474.

Jurisdiction – General

23. It is trite law, and was common ground, that whether this court has jurisdiction over the claims advanced must be considered severally, by claimant, defendant and claim. For each claim advanced by each claimant against either defendant, the question of jurisdiction gives rise to the following issues in this case:

    i) Is that claim a matter relating to the employment of the defendant by that claimant, for the purpose of Section 5 of the Lugano Convention?

    ii) If not, is that claim within the scope of the jurisdiction provision in either of the defendant's Advisory Contracts?

    iii) If so, for a claim by Resources or Feni, does that jurisdiction provision confer on the claimant an effective benefit? (This is a question under the Contracts (Rights of Third Parties) Act 1999, as each Advisory Contract was a contract only between the respective defendant and Marketing.)

24. It was common ground that for each claim, the applicable test is whether the claimant has a good arguable case that because of the Advisory Contract jurisdiction provision, this court has jurisdiction to determine the claim under Article 23 of the Lugano Convention, the burden of persuasion being on the claimant. It was also common ground that for there to be a good arguable case the claimant must have the better of

the argument, on the material available to the court on the jurisdiction application. When I deal with the facts below, I express my findings and conclusions in the same language I might use after a trial, as it would be cumbersome to keep repeating the 'good arguable case' formula. For the avoidance of doubt, therefore, I make clear now that what I express below by way of findings or conclusions on the facts represents how matters strike me, asking what propositions of fact have the better of any argument on the evidence as it stands.

25. The claimants submitted that whilst they bear the burden of persuasion overall, they can establish jurisdiction for any claim, *prima facie*, by showing a good arguable case that it falls within the Advisory Contract jurisdiction provision and (for Resources or Feni) that the claimant is entitled to enforce that provision. The invocation of Article 18 of the Lugano Convention, and thence Articles 20, 21 and 23(5), was in the nature of an affirmative jurisdictional defence raised by the defendant on which, the claimants said, he bore the burden of persuasion. It will not be necessary to decide whether the claimants are right about that.

26. It was common ground that for Section 5 of the Lugano Convention to apply, Article 18 requires that the relationship between the parties, to which the claim relates, be one of employment, governed by contract. It was not said that the need for it to be an 'individual' contract of employment gives rise to any difficulty in this case. It was also common ground that the 'employment' concept used is an autonomous one under the Convention, not a matter of the national employment law of the forum or the governing law of the contract.

27. The question whether the relationship was one of employment is a question of substance, not form. Whilst there must be a contract, it need not be in writing. If it is in writing, it need not be constituted by or contained in a single document. To the extent the relationship is documented, the terminology used by the parties to characterise it is relevant and may be important, but it cannot be determinative. In a summary both sides before me were content to adopt, Field J said this in *WPP Holdings Italy SRL et al. v Benatti* [2006] EWHC 1641 (Comm) at [69]:

> "*... the objective criteria of an employment contract for the purposes of Section 5 ... are: (i) the provision of services by one party over a period of time for which remuneration is paid; (ii) control and direction over the provision of the services by the counterparty; and (iii) integration to some extent of the provider of the services within the organizational framework of the counterparty.*"

28. Those criteria were essentially endorsed as useful by the Court of Appeal in that case, [2007] EWCA Civ 263, but Toulson LJ (as he was then) added at [47] that "… *these are not "hard edged" criteria which can be mechanistically applied. For example, in the case of a person with a non-executive role, there may be degrees of control and degrees of integration within the organizational framework of the company. As the judge rightly observed, in applying these broad criteria regard must be had particularly to the terms of the contract.*" Since the question is one of fact and degree and "*quite different relationships may share to a considerable extent some of the criteria, the court should use as reference points a paradigm contract of employment (e.g. a contract under which a clerk works full time in an office) and a paradigm of a contract for services (e.g. a contract under which an architect agrees to design a*

number of houses as in Shenavai *[i.e.* Shenavai v Kreischer *[1987] ECR 239]*", *per* Field J at [69].

29. It may be important to bear in mind, when dealing with senior roles within corporations, that significant executive authority and/or autonomy at work is not inconsistent with employment. The biggest of businesses often employ even the most senior of their executives. Nor is membership of a company's Board of Directors inconsistent with employment, although of course employment by the company may not be a requirement for appointment to the Board and many Boards have at least some members who are not employees.

30. That is relevant in the present case because a theme in the evidence served by Resources and Marketing, emphasised by Mr Grant QC, was that Mr Daskalakis and Mr Mundhra operated with very substantial authority and autonomy within the Cunico group. This was said to demonstrate that they were not subordinate to anyone (except, for Mr Mundhra, that he was subordinate to Mr Daskalakis); and that was said to indicate that they were not employees. But the most senior executive management in a company may well be subordinate to no more senior managers. They may report only and directly to the Board of Directors. That is not inconsistent with their being employees.

31. Nor do they stop being employees if, though engaged on terms subjecting them to the Board's instruction and direction, senior executives are not in fact very closely supervised by the Board in practice. That may lead to trouble, but if it does, and the company later takes action against the senior executive for loss caused to the business, the degree to which the executive was allowed a free hand by the Board cannot prevent the resulting litigation from being a matter relating to his employment, if otherwise it would be.

Jurisdiction – Employment Claims and Corporate Groups

32. The particular context in which Section 5 of the Lugano Convention falls to be considered in this case is that of the engagement of the defendants to work within a corporate group and, as part of that engagement, to occupy senior positions at more than one company within the group. The claimants say that the defendants did not have any contract of employment, within the meaning of Article 18 of the Convention, with any company in the Cunico group. If that is correct, then Section 5 of the Convention has no application to the case. The defendants say they had a contract of employment with each of the claimants (and also with at least one other Cunico group company that is not a claimant, NewCo Ferronikeli Complex LLC ('Ferronikeli')).

33. For each claim, if indeed the defendant had a contract of employment with the claimant at the time of the events, as alleged, that are said to give rise to the claim, then I am clear that Section 5 of the Convention applies so that this court has no jurisdiction over the claim. On that premise, each of the claims would be a claim by the claimant employer for malperformance, disloyalty or dishonesty (or a combination thereof) by the defendant employee in relation to his employment, in breach of duties alleged to arise under or pursuant to that employment. The characterisation by the claimant of the defendant's relevant duties as, in some cases, fiduciary (either rather than or as well as being contractual) would not affect that conclusion.

34. Nor would the fact that the claimants plead all their claims as arising under or out of the Advisory Contracts (as they must, since otherwise the jurisdiction provision on which they rely could not apply). The nature, meaning and effect of the Advisory Contracts must be considered, for each claimant, as part of considering whether the defendant's relevant relationship was one of employment. But if it was, notwithstanding the contrary tenor of the terms of the Advisory Contracts if taken at face value, then the Advisory Contracts were (part of) the defendant's employment and the pleader's exclusive focus on those Contracts, with an eye on establishing jurisdiction, cannot then affect the substance of the matter. On the premise that the substance of the matter is that there was a contract of employment between the claimant in question and the defendant, all the claims brought related to that employment.

35. The conclusion just stated, if the premise be correct, was accepted by Mr Grant QC in relation to Feni's claims. It was resisted, however, for Resources' and Marketing's claims. For those, the high water mark for the contrary submission was reached by the claims by Marketing identified in paragraphs 13 and 19 above. The conduct alleged in those claims is, in one sense, the furthest from the (proper) conduct of an employee of anything that is asserted in the 2017 Claim. But in truth it is no more than 'taking from the till', albeit in a more sophisticated form given the more sophisticated setting of the business of the Cunico group. Accepting that logic, Mr Grant submitted that an ordinary civil litigation claim by an employer against an employee for putting his or her hand in the till is not a matter relating to the employee's contract of employment so as to engage Section 5 of the Lugano Convention. I have no doubt that is incorrect.

36. The converse to paragraph 33 above is not necessarily the case, however. That is to say, if the defendant was an employee within the Cunico group, but the claimant was not the employer, it can still be the case that Section 5 of the Lugano Convention applies. This issue has been considered by the Court of Appeal in three cases, *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, *Petter v EMC Europe Ltd* [2015] EWCA Civ 828 and *Arcadia Petroleum v Bosworth* [2016] EWCA Civ 818:

    i) *Bosworth* is authority (if authority were needed) for the proposition that there is no general concept of 'group employment' by which, for the purpose of Section 5 of the Convention, an employee within a corporate group is treated as employed by every company within the group, or every company with whom the employee has a role or interacts.

    ii) *Bosworth* is also authority for the proposition that if the claim by the claimant, not being the employer, concerns conduct on the part of the employee that is wholly outside the scope of his employment by the associated company, the existence of that employment within the group cannot bring the claim within the scope of Section 5.

    iii) *Bosworth* is not authority for a proposition that a claim by an employer against an employee falls outside Section 5 of the Lugano Convention, i.e. is not a matter relating to the contract of employment, merely because it alleges dishonesty or other serious misconduct, or is founded upon fiduciary rather than contractual duties, or is a claim in tort rather than for breach of contract. As the Court of Appeal in *Bosworth* recognised and confirmed, *Alfa Laval*

Tumba AB v Separator Spares International Ltd [2012] EWCA Civ 1569, [2013] 1 WLR 1110, is in fact authority to the contrary.

iv) *Samengo-Turner* (confirmed and followed in *Petter*), on the other hand, is authority for the proposition that in some circumstances, a claim by a group company that is not the employer can fall within Section 5. *Bosworth* cautions that *Samengo-Turner* and *Petter* should not be taken too far, but it does not cast any doubt on the decision in either case or on the soundness of the proposition I have just stated.

v) Where the *Samengo-Turner* point is raised, the focus will be on the particular contractual arrangements within the group to which the employee is party, as indeed it was in *Bosworth* in distinguishing *Samengo-Turner* on the facts. In both *Samengo-Turner* and *Petter*, claims were made by a claimant company that was not the employer that arose out of a contract between that claimant company and the employee that was regarded as an integral part of his employment by a different company within the group; and the claims were of such a nature as would typically be brought by an employer where there is a relationship of employment.

37. The Court of Appeal in *Samengo-Turner* (and *Petter*) held that Section 5 applied on the basis that in the circumstances of the case, the group company pursuing the claims was to be regarded as an employer for that purpose. That had to be the analysis because the jurisdiction rule under Article 20 is in terms of where alone the employer may sue, not in terms of where alone the employee may be sued. The result in *Samengo-Turner* therefore cannot be justified or explained by saying simply that the non-employer's claim related to the contract of employment between the employee and the employer, to which the non-employer was not privy. It required a characterisation of the contract between the non-employer and the employee as a contract of employment, for the purpose of Section 5.

Jurisdiction – Feni's Claims

38. Mr Daskalakis and Mr Mundhra both joined the Cunico group before Resources or Marketing existed. They were recruited to join Feni and did so, with effect from dates in November 2004 and August 2005 respectively.

39. Mr Daskalakis joined Feni as 'General Manager' or 'General Director', effectively as CEO, and that was his role at Feni throughout. On the evidence, in my judgment it was an employed role, documented as such. He was, plainly and simply, a full-time, salaried, executive employee of Feni. His employed status generated and defined his entitlement to reside in Macedonia, authorised initially under a temporary work visa, then successive annual work permits and finally in 2011 a 10-year work permit, issued by the Employment Agency of Macedonia. He was employed under successive contracts that were kept in step with those work permits, thus an initial, temporary, contract, then successive annual contracts and finally an indefinite contract in 2011. He was granted statutory pension and other benefits as an employee.

40. To the extent he came to have some role elsewhere within the group, that did not change the nature of his engagement by Feni, except that by definition when Mr Daskalakis worked on tasks that were not Feni tasks, he was, in those moments, not

working for Feni. That accounted for a very small proportion of Mr Daskalakis' time, however. I see no reason to doubt (and Mr Grant QC did not challenge) Mr Daskalakis' own estimate that something like 95% of his time was spent working for Feni. Thus, only c.5% of his time was spent working for the wider group – and even that, generally, was done from his office at Feni in Macedonia.

41. As an adjunct to his employment by Feni, Mr Daskalakis was appointed CEO of Ferronikeli as from May 2006. A written contract of employment by Ferronikeli was issued to him, alongside his primary employment by Feni.

42. The 2007 and 2010 Advisory Contracts signed between Mr Daskalakis and Marketing did not affect the nature of his relationship with Feni. They were introduced by the ultimate shareholders of the Cunico group as a confidential, cost-effective mechanism for paying a proportion of the remuneration of senior Cunico group employees. I am not in a position to say how widespread was their use within the group, but these Advisory Contracts were certainly not unique to Mr Daskalakis (and Mr Mundhra). The senior employees who were asked to sign Advisory Contracts with Marketing would thus be paid by Marketing part (it may have been the lion's share) of their total remuneration as Cunico employees.

43. The Advisory Contracts purported to record an agreement between Marketing and the employee by which Marketing engaged the employee as an 'advisor' to provide 'advisory services' to Marketing and/or other companies within the group. But there was no such agreement. The Advisory Contracts were just a tax-saving device. Whether they were a legitimate and effective means, for the employees or for the employers, of avoiding tax obligations in their respective tax domicile(s) was not explored before me. But I am clear that this Advisory Contract mechanism within the group was and is irrelevant to the question (as a matter of ordinary employment law) whether individuals paid by that mechanism were employed within the Cunico group and, if so, by which company or companies within the group.

44. Under *Samengo-Turner*, *Petter* and *Bosworth*, the question arises whether claims by Marketing against a Cunico group employee, founded upon Advisory Contracts issued to that employee as part of his employment by one or more other companies in the group, are employment claims for the purpose of Section 5 of the Lugano Convention. That is a separate point, considered in its proper context below, where it will be seen that what I have said here, as to the true nature and purpose of the Advisory Contracts, is in fact rather decisive. For now, though, what matters is that the Advisory Contracts with Marketing issued to Mr Daskalakis do not affect at all the proposition that he was, in ordinary terms and for the purpose of Section 5 of the Lugano Convention, an employee of Feni.

45. The defendants' evidence, which I have accepted, was that the Advisory Contract mechanism dated from a decision by the shareholders in November 2007 to use Marketing as a "*back office and payroll/administration support office*" for the entire Cunico group (over and above its trading activity within the group and with external parties). Their evidence, in addition, was that the mechanism "*reflected ... earlier arrangements in place for the payment of partial remuneration to the Defendants since the commencement of their employment in 2005*", and that the Advisory Contracts themselves, when provided to the defendants for signature, were "*substantially the same [in form and structure] as similar "advisory" contracts they*

had entered into from the commencement of their employment in 2005 …". I do not accept that further evidence. The existence of a predecessor arrangement is lacking in supporting detail or documentary evidence. In the absence of such support, it seems to me inherently unlikely. The use of Marketing in Dubai as an off-shore conduit for tax reasons (whether amounting to lawful tax efficiency only or involving tax evasion) I find plausible, following the creation of Resources and Marketing and thus the structuring of the business as the Cunico group. I had no evidence that any potentially relevant group structure with 'off-shore' captive existed prior to 2007. Thus on the evidence as it stands, in my judgment it is more likely that the Advisory Contract tax saving mechanism came in with Marketing and the defendants are mistaken in recalling that it had some pre-Cunico antecedent.

46. Mr Mundhra joined Feni as 'Finance Manager'. His job title at Feni evolved over time, ultimately to 'Chief Financial Director' (i.e. CFO), via 'Internal Auditor-Consultant' and 'Costs Control and Business Development Manager'. On the evidence, it is equally plain to me that Mr Mundhra's job at Feni was an employed role, documented as such. He was, like Mr Daskalakis, a full-time, salaried, executive employee of Feni, whose employed status likewise generated and defined his entitlement to reside in Macedonia. In similar fashion, Mr Mundhra had initially a temporary work visa, then successive annual work permits, before obtaining in 2011 a 10-year work permit, and he was employed under successive contracts in step with those work permits. He was also granted statutory pension and other benefits as an employee.

47. As with Mr Daskalakis, to the extent Mr Mundhra came to have roles elsewhere within the group, that did not change the nature of his engagement by Feni, except that by definition those roles took up some of his time on non-Feni tasks. For Mr Mundhra, that may have accounted for somewhat more of his time than was the case for Mr Daskalakis (paragraph 40 above). For example, Mr Mundhra's evidence, which in general I see no reason to doubt, was that once appointed to wider roles within the group, he carried out "*substantial amounts of work for [Marketing] in my capacity as the Chief Financial Officer of the Cunico Group … from my Macedonian base*", interacted with Marketing on a daily basis and exercised a substantial degree of control at Marketing. The claimants' evidence is to like effect, especially that of Mr Meijer, who was based in Dubai as General Manager of Marketing between September 2009 and March 2014. (There is a separate point whether in that work Mr Mundhra was truly working <u>for Marketing</u>, rather than for Resources as group holding company; but that is not important in the present discussion of whether he was employed by Feni.)

48. As an adjunct to his employment by Feni, Mr Mundhra was appointed CFO of Ferronikeli, although perhaps only from as relatively late as December 2013, and a written contract of employment by Ferronikeli was issued to him, alongside his primary employment by Feni.

49. The 2007 and 2010 Advisory Contracts signed between Mr Mundhra and Marketing did not affect the nature of his relationship with Feni. My analysis in relation to Mr Daskalakis (paragraphs 42-43 above) applies equally here. As will be seen below, there may be more of a case for Mr Mundhra than for Mr Daskalakis that he was employed by Marketing (apart from the Advisory Contract), and the *Samengo-Turner* issue again arises if he was not. But the present conclusion, as for Mr Daskalakis, is

that Mr Mundhra's relationship with Marketing and its proper characterisation for the purpose of the Lugano Convention does not affect at all the proposition that he was an employee of Feni for that purpose.

50. For forensic reasons, since Mr Daskalakis and Mr Mundhra say they were also employed by Resources and Marketing, in some places their evidence sought to elevate their subsequently taking on wider roles to be the creation of some sort of 'mother' contract with Resources, encompassing employment by Resources and by all its subsidiaries (thus including employment by *inter alia* Marketing and Feni). Mr Grant QC tried to make something of that as telling against the notion that either defendant was, or was at all times, an employee of Feni. I did not find the attempt persuasive. Messrs Daskalakis and Mundhra were asked to take on positions at Resources, as parent company of the Cunico group, and/or elsewhere within the group, in Mr Daskalakis' case from when Resources came into existence as parent company for the group, in Mr Mundhra's case from a few years later in 2010, as an expansion of their primary jobs, which remained those of CEO and CFO of Feni. An issue arises whether, in and because of those parent company roles, Mr Daskalakis or Mr Mundhra became an employee (also) of Resources, or what was the nature of his relationship with Resources if it was not employment. But to my mind that does not call into question at all their status as employees of Feni throughout.

51. Feni's claims are therefore all subject to Section 5 of the Lugano Convention; as such, they are claims over which this court does not have jurisdiction. The defendants' application challenging jurisdiction in respect of Feni's various claims, against either or both of the defendants, is well founded and succeeds.

Jurisdiction – Resources v Daskalakis

52. There is good evidence, and I find, that Mr Daskalakis was appointed to be, and acted as, CEO of Resources (and thus of the Cunico group as a whole) from its incorporation as the group holding company in May 2007. In that capacity, i.e. as CEO, he was also on the Board of Directors of Resources until October 2010. He was asked by the shareholder representatives to step down so as to maintain voting balance on the Board between the shareholders. Since he continued to act and to be held out as CEO thereafter, he was granted powers of attorney enabling him to demonstrate to third parties that he had authority to act on behalf of Resources although he was not a Director. As CEO of Resources, Mr Daskalakis reported regularly to its Board and/or shareholder representatives. Mr Daskalakis says, and his conduct as group CEO corroborates the claim, that he saw himself as accountable ultimately to the shareholder representatives, via the Board of Resources.

53. There was, however, no written contract appointing Mr Daskalakis as CEO of Resources or of the Cunico group, or confirming that appointment or its terms. The evidence of the actual appointment, i.e. the making of the appointment, let alone any detailed express terms, is a little sketchy. Mr Daskalakis has been able to say only that he exercised duties and responsibilities "*based on terms that were verbally agreed with IMR and BSGR from time to time*", whatever that might mean. Even allowing for the difficulty that over a decade has passed, I find it a little surprising that he has not been able to say more about the process by which he was appointed Resources / group CEO. It seems perhaps a fair prospect that Mr Daskalakis may just have been asked to take on the new role of CEO of Resources and/or the Cunico group, as an 'added

extra' to his engagement as CEO of Feni, without much thought being given to what the additional role would entail.

54. Nor is there evidence that Mr Daskalakis was remunerated in any identifiably separate or additional way, or amount, because of his role as overall CEO. I accept his evidence that he was remunerated on a basis and in amounts agreed from time to time directly with the shareholder representatives. His evidence to that effect is general, however, and provides no basis for a finding that he was affected at all in his remuneration by having the group CEO function.

55. All that said, it seems to me the proper conclusion is that the appointment of Mr Daskalakis as Resources / group CEO was contractual. Even if the detail is sketchy or absent, it is clear to me that the appointment was by way of, and pursuant to, an express agreement (between Mr Daskalakis for himself and the shareholder representatives for and on behalf of Resources). That agreement by nature supplemented, i.e. varied, his engagement by Feni, which was an engagement under a contract of employment.

56. The relationship between Mr Daskalakis and Resources, then, was contractual, even if the contract was informal. It was an adjunct to his primary employment within the Cunico group, which was his (continuing) employment as full-time CEO of Feni. It was a contract to be, and act as, CEO of Resources, and therefore of the Cunico group as a whole, the precise scope of which was never well defined. That was by nature a contract for the provision of executive management services by Mr Daskalakis to Resources, as need arose and time allowed bearing in mind the burden of his primary role at Feni. Mr Daskalakis was subject to the control and direction of the Board of Resources (and ultimately, therefore, of the shareholder representatives). In all of his work, he was fully integrated within the organisational framework of the Cunico group headed by Resources and his role as CEO of Resources was a key role within its specific organisational framework as holding company.

57. Mr Daskalakis was not directly or separately remunerated for his role as CEO of Resources; but it would be unreal to describe it as an unpaid role since it was an adjunct of his full-time paid employment as CEO of Feni. In other words, his time spent working as CEO of Resources (as distinct from time spent working on Feni-specific tasks) was paid time, and Mr Daskalakis was paid a full-time senior executive employee's salary, not consultancy fees or commissions or some other kind of non-salaried remuneration.

58. Mr Daskalakis' position as CEO of Resources / Cunico group CEO is thus readily distinguishable from that of Mr Bosworth and Mr Hurley as *de facto* CEO and CFO of the Arcadia group in the *Bosworth* decision, *supra*. There, it was important that there was no contract appointing them Arcadia CEO and CFO respectively. The reality or substance of the matter was that the over-arching conspiracy claims pursued concerned activities (as alleged) "*outside of their contracts of employment and ranging across the Group*", such contracts of employment as they had forming simply "*part of the history and thus a very small part of the picture*", *per* Gross LJ at [68], [69].

59. Mr Daskalakis' position as Resources' CEO is also unlike that of the individuals in *Samengo-Turner* and *Petter*. The contract between Resources and Mr Daskalakis is

not merely a bonus or remuneration vehicle supplementing and forming part of his employment by Feni. But that is because it had real substance as an engagement by Resources to work for Resources – so Mr Daskalakis' position is to my mind stronger than that of those individuals, as regards Section 5 of the Lugano Convention.

60. The Advisory Contracts again do not affect the position, because it is not true, as they purport to record, that Marketing engaged Mr Daskalakis as a self-employed advisor to provide advisory services to (*inter alia*) Resources. That Mr Daskalakis may have been paid by Marketing, via the Advisory Contracts, such part (if any) of his remuneration package as might in some identifiable way relate to his being Resources' CEO, is not more significant in the proper characterisation of that role than was the fact that the major proportion of his salary as CEO of Feni was paid in that way in the proper characterisation of that role.

61. In my judgment, applying the guidance in *WPP Holdings v Benatti*, *supra* to those findings, the contract pursuant to which Mr Daskalakis was appointed and acted as CEO of Resources (and therefore, in effect, as group CEO for the Cunico group) was an individual contract of employment between Mr Daskalakis and Resources for the purpose of Section 5 of the Lugano Convention. Applying then my initial conclusion as to the nature of the claims being made (paragraph 33 above), Mr Daskalakis' challenge to the jurisdiction of this court is well founded and succeeds in relation to the claims against him brought by Resources.

Jurisdiction – Resources v Mundhra

62. Mr Mundhra's appointment to a wider role within the Cunico group came later than Mr Daskalakis'. In Mr Mundhra's case, it was documented in writing, by a two-page "**CONTRACT OF EMPLOYMENT**" dated 28 July 2010 signed between Mr Daskalakis as CEO of Resources and Mr Mundhra for himself. It opened with a statement that it set out "*the heads of terms between* ***Cunico Resources NV (Cunico)*** *… and* ***Mr. Arvind Kumar Mundhra (Arvind)*** *with regard to Arvind's employment with Cunico as the* ***Chief Financial Officer***." Nineteen numbered provisions followed, after a statement that, "*The parties intend to enter into an appropriate agreement reflecting the terms herein:*".

63. Resources did not contend that, because of that introductory statement, this signed, written "**CONTRACT**" was not intended to create legal relations prior to the signing of a fuller, more detailed or more formal document (in the event, no such document was ever signed). The argument, instead, was that it was a "*sham or contractual device created for other purposes than to show the true relationship between the parties*". No such other purpose was identified, however, and in my judgment there is no reason to treat this document as anything other than the signed, written record it purports to be, of the terms upon which it was agreed that Mr Mundhra be appointed as CFO of Resources. The contrary argument amounted, in substance, to no more than the assertion that if the Advisory Contracts signed between Mr Mundhra and Marketing constituted the real, primary document governing Mr Mundhra's relationship with the Cunico group, then this "**CONTRACT**" cannot have been a contract employing him as CFO of Resources. But in truth, it is the Advisory Contracts that were, as I have held, the 'devices' that do not reflect the true nature of Mr Mundhra's (or Mr Daskalakis') engagement within the Cunico group.

64. Paragraph 1 of the "**CONTRACT**" stated that Mr Mundhra's "*employment*" as CFO would commence with effect from 22 July 2010, that he would "*serve as* ***Chief Financial Officer*** *of Cunico and any subsidiaries*" and that he would "*be responsible for cost control, management and financial reporting, and treasury management as well as business development within Cunico and any other duties as reasonably required of him by the Chief Executive Officer (CEO) of Cunico [i.e. Mr Daskalakis] and the Board and Shareholders of Cunico*". Other terms provided, for example, that Mr Mundhra was to devote his full working time and attention to the business of the Cunico group (paragraphs 2 and 4), that it was for a period of two years, terminable "*on three months written notice or three months of net salary in lieu of notice*" (paragraph 4), for an annual salary of €154,800 that "*might be paid … out of various Group companies keeping in mind the taxation structure within Cunico*" (paragraph 7), and for various other typical features of a senior executive employment contract. Successive renewals on similar terms were signed for further two-year terms, dated 30 July 2012 and 23 July 2014. There was a signed Addendum dated 6 August 2014 raising the annual salary to €174,000 with effect from 1 August 2014.

65. On the basis of those documents, Mr Mundhra used a business card holding himself out as CFO of Resources and carried out that role. In consequence, he operated and was recognised within the Cunico group as the senior financial officer of the group. That role did not require Mr Mundhra to be in the Netherlands, nor did he have a work permit to be employed there. But that is no reason, in my view, for discounting the written basis, agreed with Mr Daskalakis as CEO of Resources, upon which Mr Mundhra was engaged as CFO of Resources.

66. The employment contracts between Mr Mundhra and Feni each contained a declaration by him that he was not in an employment relationship with any other company. Those declarations were thus included both before and after Mr Mundhra was appointed by Resources as group CFO in 2010. Mr Grant QC submitted that therefore I could not or should not find that appointment to be an employment. Those declarations do not in law preclude Mr Mundhra from saying that his appointment by Resources was employment, if otherwise it was. On the facts, I think it most likely that no thought was given to the continued accuracy of the Feni contract declarations after Mr Mundhra was appointed to his role at Resources; and in any event I am not persuaded that Mr Mundhra would have perceived those declarations to be falsified by the fact that he had additionally been employed directly by Resources as group CFO as an adjunct to his primary employment by Feni. The Feni contract declarations therefore do not dissuade me from concluding, as otherwise I would conclude, that indeed Mr Mundhra was employed by Resources.

67. A separate question arises whether the written contracts documenting Mr Mundhra's engagement by Resources as group CFO mean that he was an employee of Marketing, for the purpose of Section 5 of the Lugano Convention, and I consider that below. However, I am clear in concluding that he was an employee of Resources for that purpose. The analysis is the same as in the case of Mr Daskalakis, except that Mr Mundhra's appointment as CFO of Resources was documented, as I have just described, in a way that only makes the case that he was an employee of Resources stronger, if anything, than the case for Mr Daskalakis. Mr Mundhra's challenge to the jurisdiction of this court is therefore well founded, and succeeds, in relation to the claims against him brought by Resources.

Jurisdiction – Marketing v Daskalakis

68. I find it elusive to identify from the evidence that Mr Daskalakis had any role at all at, or on behalf of, Marketing. His submission was that pursuant to his role as CEO of Resources, and thus *de facto* group CEO, Mr Daskalakis "*was responsible for the day-to-day management of the Cunico Group and oversaw the operations of Marketing as its de facto CEO …*". His evidence was that he was the CEO of Resources and "*by extension the de facto [CEO] of [Marketing]*", and that the nature of his role as effective group CEO was such that he "*exercised a degree of control over the day-to-day operational management of Cunico Group affairs*".

69. I quite follow how, as CEO of Resources reporting to the shareholders, directly and/or via the Board of Resources, Mr Daskalakis would need to report on the activities and performance of Marketing. There is evidence that he did so, within his reports on the activities and performance of the whole Cunico group. I also follow that, as (effectively) group CEO, Mr Daskalakis was in a position to provide direction across the entire group and thus to exercise, as he put it, 'a degree of control' over the operational management of Marketing. But that is all normal for the running of a substantial corporate group. It does not make the holding company (or group) CEO an employee of every subsidiary. It does not mean, in this case, that Mr Daskalakis was ever, in ordinary terms, an employee of Marketing.

70. Some of the powers of attorney granted to Mr Daskalakis by Resources, from late 2010 onwards, granted him power to act either for all subsidiaries (which would include Marketing) or for named subsidiaries including Marketing. That again, to my mind, does not mean that Mr Daskalakis was constituted, in ordinary terms, an employee of Marketing. Those powers of attorney meant that, if occasion required, Mr Daskalakis was in a position to take a step on behalf of Marketing; it may be an important step such as signing a contract. But if that occurred, he would have been acting, as it seems to me, as CEO of Resources under the power(s) of attorney in question, not as an employee of Marketing.

71. Accordingly, to the extent that Mr Daskalakis' challenge to jurisdiction asserted that he was properly to be regarded, in ordinary terms, as the employed CEO of Marketing, the challenge is not well founded.

72. However, that is not the end of the challenge as regards the claims made by Marketing. It leaves open the question, raised by *Samengo-Turner*, *Petter* and *Bosworth*, whether the Advisory Contracts signed between Mr Daskalakis and Marketing, in respect of his employment within the Cunico group by (as I have held) Feni, Ferronikeli and Resources, should be regarded as contracts of employment for the purpose of Section 5 of the Lugano Convention. In my judgment, they should be so regarded. They are indistinguishable from the contracts in *Samengo-Turner* and *Petter*; they were offered to and accepted by Mr Daskalakis just to provide documentary 'cover' for Marketing to be the payment vehicle within the Cunico group for some or all of the salary and/or bonus payments to which Mr Daskalakis was entitled as employee, i.e. as employee of Cunico group companies not including Marketing itself.

73. Recalling again my initial conclusion at paragraph 33 above, the claims made by Marketing are all in the nature of claims that would be made by an employer in respect of an employment.

74. For that reason, that is to say applying *Samengo-Turner* and *Petter*, not because Mr Daskalakis is otherwise to be regarded as having been employed by Marketing, the claims made against Mr Daskalakis by Marketing are matters relating to an individual contract of employment within Article 18 of the Lugano Convention, and the challenge to jurisdiction in respect of Marketing's claims against Mr Daskalakis therefore also succeeds.

Jurisdiction – Marketing v Mundhra

75. Mr Mundhra's relationship to Marketing is more complex to analyse, but that is because there is a substantial basis for contending that he was an employee of Marketing without relying on the *Samengo-Turner* analysis. That is in fact sufficient for a conclusion that the challenge to jurisdiction in relation to Marketing's claims against Mr Mundhra is well founded and should succeed. The best Marketing could hope for is a conclusion that, like Mr Daskalakis (as I have held) Mr Mundhra was not, in ordinary terms, employed by Marketing. But that would not affect my findings as to the nature and purpose of the Advisory Contracts, or as to the nature of Mr Mundhra's engagement within the Cunico group.

76. That is to say, Mr Mundhra was, in ordinary terms, an employee of Feni, Ferronikeli and Resources. If he was not also, in ordinary terms, an employee of Marketing, then his Advisory Contracts signed with Marketing were, like Mr Daskalakis', merely documentary 'cover' for remuneration as an employee within the Cunico group to be paid out of Dubai, for tax reasons. *Samengo-Turner* and *Petter* would then apply for Mr Mundhra to be able to justify his challenge to jurisdiction in respect of the claims made by Marketing, as they do for Mr Daskalakis.

77. For completeness, although (as I said above) there is a substantial basis for contending that Mr Mundhra was an employee of Marketing anyway, that would not in fact have been my conclusion had it mattered. I think it reads too much into the description of Mr Mundhra's position as CFO of "*Cunico [i.e. Resources] and any subsidiaries*" (paragraph 64 above; *cf* "*employment with [Resources] as the [CFO]*", paragraph 62 above) to contend that he was, literally and severally, appointed to be CFO of each company within the Cunico group, employed by that company. To my mind, 'CFO of Resources and its subsidiaries' is synonymous with 'CFO of the Cunico group', which either is neutral as regards which company or companies within the group actually employs the CFO or suggests, at most, a possible employment (not necessarily exclusively) by Resources, the company at the head of the group.

78. Unlike Mr Daskalakis, Mr Mundhra appears able to say that he undertook work for Marketing, as distinct from merely reporting at holding company level on the activities or finances of Marketing within the group. But it seems to me his doing so was consistent with his role as group CFO, employed (in that role) by Resources, and does not evidence employment by Marketing. Thus, the apparent reporting line, as regards Marketing's financial performance and accounts, from Mr Meijer (General Manager of Marketing) to Mr Mundhra, cannot be said to have been a reporting line

within Marketing as opposed to a reporting line *from Marketing (as subsidiary) to Resources (as parent).*

79. Also unlike Mr Daskalakis, it appears that Mr Mundhra may have visited Marketing in Dubai on a very few occasions latterly, as part of his work as group CFO, and that one or more standard-form Jebel Ali Free Zone documents may have been generated that purported to evidence that he was an employee of Marketing. On balance, that does not alter my analysis of the position as between Mr Mundhra and Marketing. On the material as it stands, the better view is that those documents were generated in that form solely to enable Mr Mundhra to obtain the business visas he needed to visit Marketing and are not reliable guides to whether he was in truth employed by Marketing, or employed only by other Cunico group companies, or for that matter was not an employee at all.

Resignation / Termination Documents

80. Mr Choo-Choy QC relied on statements in documents generated when the defendants left the Cunico group as additional support for the proposition that they had been employees. In Mr Mundhra's case, a termination agreement was concluded. In Mr Daskalakis' case, there were negotiations and drafts but no agreement was ever concluded, but the provisions on which Mr Choo-Choy focused did not generate any surprise, objection or counter-proposal when reviewed by or on behalf of the shareholders. The provisions on which Mr Choo-Choy focused were statements to the effect that Mr Mundhra, respectively Mr Daskalakis, had been employees.

81. In my judgment, those statements do offer some additional support (if additional support were needed) for the proposition that Messrs Daskalakis and Mundhra were employees, to the extent they were engaged by Cunico group companies to work for them, and were not independent 'advisors' as purportedly stated by the Advisory Contracts. On the other hand, I do not think they take the defendants very far where there is room to debate whether they were in fact engaged by a particular Cunico group company to work for it at all. Thus, to my mind they do not tip the balance back in the defendants' favour as regards Marketing – they do not mean that the better case is, after all, that they were (in ordinary terms) employees of Marketing. The success of their challenge to jurisdiction as against Marketing continues to rest upon the extension of the notion of employment for the purposes of Section 5 of the Lugano Convention, under *Samengo-Turner* and *Petter*, and not upon a finding that they were actually employees of Marketing, ordinarily considered.

Conclusion

82. Although the reasoning differs as between Feni, Resources and Marketing, and also as between Mr Daskalakis and Mr Mundhra so far at least as Resources and Marketing are concerned, the result is that all of the claims brought against the defendants or either of them in the 2017 Claim are matters relating to individual contracts of employment within Article 18 of the Lugano Convention. The jurisdiction provisions in the respective Advisory Contracts between Marketing and the defendants are therefore ineffective to confer jurisdiction on this court over any of those claims. In the case of Resources and Feni, that is so whether or not those jurisdiction provisions would otherwise be enforceable by them as third parties, they not being parties to the Advisory Contracts.

83. Subject to discussion with counsel when this judgment is handed down, I envisage there will be a declaration in the 2017 Claim that this court has no jurisdiction and an order setting aside service of that Claim on each of the defendants. I shall also invite submissions as to whether relief should now be granted in relation to the 2018 Claim, without requiring any further hearing, in the light of paragraph 10 above and the order I made in that Claim allowing Mr Daskalakis to challenge jurisdiction despite his lateness in acknowledging service.

Alternative Arguments

84. It is therefore unnecessary to deal with the alternative arguments raised by the defendants for a conclusion that some of the claims made against them are outwith this court's jurisdiction. The starting point throughout remains that the claimants only assert jurisdiction upon the basis of the jurisdiction provision in the Advisory Contracts between the defendants and Marketing. Each of the defendants' alternative arguments therefore, like their primary argument that has succeeded, is by nature an attack on the effectiveness of those provisions to found jurisdiction. I shall not deal with those further arguments at length since they do not now affect the outcome.

85. Firstly, the defendants denied that the Contracts (Rights of Third Parties) Act 1999 operated on the jurisdiction provisions in the Advisory Contracts so as to confer upon Resources or Feni a right to bring their claims here. Three points were taken by the defendants. To my mind there is also a logically prior point whether the 1999 Act could confer on Resources or Feni an enforceable right to sue the defendants here if, because of the Lugano Convention, the Advisory Contracts did not confer such a right on Marketing. If I am right that Section 5 of the Convention applies to the Advisory Contracts, then by Article 23(5) of the Convention, the jurisdiction provisions "*shall have no legal force*" since they do not satisfy Article 21. In my judgment, the 1999 Act (if otherwise applicable) cannot create out of a provision agreed in a contract with Marketing but having "*no legal force*" a right enforceable by Resources or Feni.

86. Thus, the premise upon which the points raised by the defendants as to the 1999 Act would arise would be if Section 5 of the Lugano Convention applied to neither the Advisory Contracts nor the relationship between the defendant in question and either Resources or Feni (as the case may be). Those points, then, were these:

    i) The defendants denied that the Advisory Contracts were governed by English law and on that basis contended that the 1999 Act did not apply. No permission had been granted to adduce evidence of foreign law, nor was any permission sought at the hearing, so I did not read such evidence of foreign law as had been served between the parties. I cannot say therefore whether it addressed the existence or absence of rules of law equivalent to those of the 1999 Act under any system of foreign law that might have governed the Advisory Contracts if they were not governed by English law. In those circumstances, the assertion *in vacuo* that the Advisory Contracts were not governed by English law would have taken the defendants nowhere. The default rule is that English law applies if it is not shown by evidence that the content of an applicable foreign law is different (see *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA et al.* [2018] EWHC 2759 (Comm)); I would not have disapplied the default rule for the 1999 Act, in that regard adopting an approach similar to that taken by

Christopher Clarke J, as he was then, in respect of the Unfair Contract Terms Act 1977, in *Balmoral Group Ltd v Borealis (UK) Ltd et al* [2006] EWHC 1900 (Comm) at [431*ff*]. Finally, I would have agreed with Mr Grant QC's submission that the jurisdiction provision in the Advisory Contracts led to the conclusion that they were governed by English law anyway.

ii) The defendants disputed that the creation by the 1999 Act of a right to enforce the jurisdiction provision involved a sufficient consensus between the relevant parties, i.e. Resources or Feni (as the case may be) and the defendant in question, for the purpose of Article 23 of the Lugano Convention. This raises a difficult question. In *WPP Holdings v Benatti*, *supra*, Field J effectively answered it in a way that would favour Resources and Feni in the present case, but the Court of Appeal pointedly refused to deal with the point since it was not necessary to do so and since it raised issues of importance that had not been properly addressed in that case (see *per* Toulson LJ at [61]). The explanatory notes to the 1999 Act indicate that the question was not tackled explicitly by the Act on the basis that Parliament regarded it as a matter for the CJEU (as it now is). I propose to follow the Court of Appeal's lead and not deal with this argument in this judgment. (As in *WPP Holdings*, the point was not properly addressed in the argument before me, at all events on the claimants' side; I would have required further assistance before attempting to come to a view if it had been necessary to do so.)

iii) Finally, the defendants submitted that the 1999 Act does not generate any right in Resources or Feni to pursue here claims for breaches of fiduciary duty. I would have said that was wrong as regards fiduciary duties alleged to have arisen out of the Advisory Contracts themselves. If the 1999 Act operated at all to confer on Resources or Feni a right to pursue claims here, it would be a right to have "*disagreements*" resolved here. That would include disagreements of any legal character that arose out of the performance by the defendant in question of advisory services under the relevant Advisory Contract. This perhaps highlights the artificiality of considering these alternative arguments – the reality of the case is that neither defendant at any time performed advisory services under the Advisory Contracts, because no such services were performed, the Advisory Contracts being merely documentary cover for paying from Marketing some or all of their salaries as employees of other companies within the Cunico group. However, on the contrary premise stated above, upon which the 1999 Act would have fallen to be considered, I would have said that the fiduciary duty claims as pleaded fell within the scope of the Advisory Contract jurisdiction provisions.

87. Secondly, and much more narrowly, the defendants argued that certain of Feni's claims included causes of action that accrued prior to 1 November 2007, the date on which the earlier of the Advisory Contracts came into effect. Those pre-November 2007 claims, it was argued, did not fall within the Advisory Contract jurisdiction provisions come what may. I would have agreed with that. The jurisdiction provisions in the Advisory Contracts do not purport to govern disputes in respect of the performance of services by the defendants that pre-dated those Contracts. I do not think, to be fair to him, Mr Grant QC offered any substantial contrary argument, albeit the point was not conceded. Thus, had the challenge to jurisdiction otherwise failed, it

would have succeeded nonetheless to this limited extent, namely that there would have needed to be an order in some appropriate terms effective to excise pre-November 2007 claims from the proceedings. As it is, the challenge to jurisdiction has succeeded generally upon the defendants' primary argument under the Lugano Convention.