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Al Rushaid v. Pictet & Cie

New York’s High Court Holds That a Bank’s Repeated Use of New York Correspondent Accounts Is Sufficient in Some Circumstances To Justify Jurisdiction Over It by New York Courts

SUMMARY

In *Al Rushaid v. Pictet & Cie*,¹ the New York Court of Appeals held, in a 4-3 decision, that the defendant bank’s repeated and knowing use of New York correspondent accounts to help customers move ill-gotten money from abroad into Swiss bank accounts justified subjecting the bank to New York jurisdiction over claims related to that money. Although *Al Rushaid* could be read to allow New York courts to exercise jurisdiction over non-New York based banks that repeatedly use New York correspondent accounts, the decision appears to have turned on allegations that the bank *knowingly* facilitated wrongdoing through New York correspondent accounts, and the Court of Appeals reaffirmed that the use of correspondent accounts must be connected to the alleged wrongdoing to subject a bank to jurisdiction. The opinion remains subject to the bank’s possible petition for a writ of certiorari to the U.S. Supreme Court for review of whether jurisdiction over the bank is consistent with the U.S. Constitution’s due process clause.

BACKGROUND

Two Saudi corporations—Al Rushaid Parker Drilling, Ltd. (“ARPD”) and its parent, Al Rushaid Petroleum Investment Corporation—brought suit against Swiss bank Pictet & Cie (“Pictet”), Pictet’s general partners, and Pictet’s Vice President and Client Relations Manager (“Pictet VP”) in New York state court, alleging that Pictet had knowingly helped conceal funds obtained improperly by three ARPD employees. Specifically, Plaintiffs alleged that three ARPD employees responsible for procuring vendors had accepted bribes and kickbacks from certain vendors in exchange for purchasing products from those vendors at inflated prices and overlooking deficiencies in those vendors’ services. Pictet’s alleged role was twofold: first, the Pictet VP managed the three ARPD employees’ Pictet accounts and knowingly set

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up an offshore company (with an account at Pictet) to receive the bribes from the vendors; and second, Pictet facilitated the movement of those bribes from the vendors, who, at the direction of the ARPD employees, wired the bribes to Pictet's New York correspondent accounts. Pictet then credited those payments to the offshore company's Pictet account for later distribution to the ARPD employees. To help support their claims, Plaintiffs cited an email to the Pictet VP, in which he was asked to add the offshore company's account to make the transactions "appear to be okay," and his knowledge that the money being transferred to the ARPD employees "vastly exceeded the employees' pay and was the result of some breach of their duties."² Overall, Plaintiffs alleged that Pictet's activity constituted not only aiding and abetting the ARPD employees' breach of their fiduciary duties, but also a civil conspiracy with the ARPD employees, and sought over \$350 million in damages.³

Defendants moved to dismiss the complaint, arguing that the claims' only connection to New York—the movement of money through Pictet's New York correspondent accounts—was insufficiently purposeful to subject defendants to jurisdiction under New York's long-arm statute, because the money had been directed to those accounts by the ARPD employees, and not by defendants. The trial court granted defendants' motion, and the Appellate Division affirmed, holding that, in using New York correspondent accounts, defendants had simply carried out the instructions of Pictet's clients and had not "purposefully availed [themselves] of the privilege of conducting activities in New York."⁴

THE COURT OF APPEALS' DECISION

The Court of Appeals reversed, holding that defendants' repeated and knowing use of New York correspondent accounts in furtherance of the alleged scheme was sufficient to bring claims against them related to the scheme within the jurisdiction of the State of New York.

First, the court considered whether the use of correspondent accounts in New York constituted "[t]ransacting business in New York."⁵ Although Pictet never entered New York, the court held that Pictet's repeated and knowing use of correspondent accounts to receive bribes and kickbacks from vendors on behalf of the ARPD employees—including dozens of transfers totaling millions of dollars—rose to the level of a "course of dealing" showing the "purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States."⁶

In reaching this conclusion, the court relied on its prior decisions in *Amigo Foods Corp. v. Marine Midland Bank-NY*⁷ and *Licci v. Lebanese Can. Bank, SAL*,⁸ which, in the court's view, established that, although "unintended and unapproved use of a correspondent bank account, where the non-domiciliary bank is a passive and unilateral recipient of funds later rejected . . . does not constitute purposeful availment for personal jurisdiction," "[r]epeated, deliberate use that is approved by the foreign bank on behalf and for the benefit of a customer . . . demonstrates volitional activity constituting transaction of business."⁹ Under this framework, the court reasoned, the fact that Pictet itself did not affirmatively direct deposits through

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the New York correspondent accounts was irrelevant, because Pictet affirmatively credited the funds to the ARPD employees' accounts. According to the court, Pictet's course of action showed that it had made a choice to use New York correspondent accounts; it "chose New York, when other jurisdictions [were] available," thus making the New York connection "volitional" and not "coincidental."¹⁰ This point was further underscored in Judge Garcia's concurring opinion, which emphasized that Pictet's maintenance of correspondent accounts in New York was a "service to its clients" and was, therefore, "done for the bank's own commercial purposes."¹¹

The court, however, also considered that this "course of dealing" was in the context of the Pictet VP's and Pictet's alleged knowledge that the funds being deposited into the correspondent accounts were the proceeds of an illegal scheme, noting that, under plaintiffs' alleged facts, the Pictet VP "was no innocent banker."¹² Judge Garcia's concurrence highlighted that the Pictet VP personally knew and assisted the ARPD employees in their scheme, and that the Pictet VP "knew the corrupt [individual defendants] . . . were accepting bribes in the course of their employment" and helped them "with setting up a personal account with Pictet in Switzerland and . . . to create a front company in the British Virgin Islands . . . to receive the bribes."¹³ And Judge Garcia further noted that "the allegations that Pictet was a knowing participant . . . in the wrongdoing strongly support[ed] a finding of purposeful availment," as "Pictet was not a passive banking establishment providing commercial services to the ARPD employees" but rather "knew of, and affirmatively assisted in, the kickback arrangement between the ARPD employees and the vendors."¹⁴ This knowledge of wrongdoing, in the court's view, distinguished the case from *Amigo Foods*, where the use of a New York correspondent account was directed unilaterally by a third party, and where the defendant rejected the funds deposited into the correspondent account. According to the court, Pictet and the Pictet VP's knowledge aligned this case more with *Licci*, where the repeated use of New York correspondent accounts, combined with the defendant's knowledge of the misuse of those accounts, meant that the conduct at issue was a purposeful choice by the bank, not a "unilateral" choice by the bank's customer.¹⁵

Second, the court analyzed whether plaintiffs' claims "ar[is]e from" the use of Pictet's New York correspondent account.¹⁶ The court held that this requirement was satisfied, both because "the money laundering could not proceed without the use of the correspondent bank account," and because plaintiffs' claims "require[d] proof that the bribes and kickbacks were in fact paid," thus making the use of correspondent accounts critical to the proof of plaintiffs' claims.¹⁷

Finally, the court held that exercising personal jurisdiction over defendants did not conflict with the due process protections of the U.S. Constitution, because it would not offend "notions of fair play and substantial justice."¹⁸ Specifically, the court held that the burden on defendants of litigating in New York would not be too onerous and that New York has a significant interest in the integrity of its banking system.¹⁹ Thus, the Court of Appeals reversed the order of the Appellate Division and remanded the

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case to the Supreme Court for further proceedings, including considerations of alternative grounds for dismissal such as *forum non conveniens*.

Judge Pigott, joined by Chief Judge DiFiore and Judge Stein, dissented, stating that “the only intentional conduct . . . that relates in any way to New York was carried out by the foreign [ARPD] employees . . . who directed the vendors to wire the bribes and kickbacks to [Pictet’s correspondent accounts in New York] and the vendors, who followed that direction.”²⁰ In Judge Pigott’s view, the crux of the *Licci* decision was the fact that the bank in that case had “deliberately chose[n]” to process the funds at issue through its correspondent accounts in New York; given that Pictet had made no affirmative choice to use New York accounts to transfer the illegally obtained funds, the dissent argued, the intentional conduct relevant in *Licci* was not present on the part of Pictet here, and the decision of the court therefore represented a break with precedent and an eschewal of “the clear and predictable rules that are important in this area of law.”²¹

IMPLICATIONS

Although the Court of Appeals’ decision indicates that repeated use of New York correspondent accounts may subject a bank to the jurisdiction of New York courts, the decision may have turned on the bank’s *knowledge* of the illegal nature of the transfers into those accounts. Thus, the mere use of correspondent accounts in New York may still be insufficient to justify the exercise of personal jurisdiction by New York courts. Furthermore, to justify jurisdiction, the use of the correspondent accounts must be directly related to the claims at issue, and the exercise of personal jurisdiction over banks that use correspondent accounts in New York is still constrained by the due process requirements of the U.S. Constitution (as to which the Court of Appeals’ decision remains subject to possible review by the U.S. Supreme Court). *Finally*, the doctrine of *forum non conveniens* provides a continuing basis for possible dismissal in cases where the exercise of personal jurisdiction has been found permissible. Indeed, in cases where, as here, the only connection to New York is the use of correspondent bank accounts, defendants will often be able to argue that the location of evidence and witnesses, the burden on the defendant of litigating in New York, and considerations of judicial economy militate in favor of litigating in a non-New York forum.

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ENDNOTES

¹ 2016 N.Y. Slip Op. 07834 (Nov. 22, 2016) (hereinafter *Al Rushaid*).

² *Id.* at 4.

³ *Id.* at 1-4.

⁴ 127 A.D.3d 610, 611 (1st Dept. 2015); see also 2014 WL 4226466 (Sup. Ct., N.Y. Cnty. 2014).

⁵ *Al Rushaid* at 7 (citing CPLR 302(a)(1)).

⁶ *Id.* at 11, 14.

⁷ 39 N.Y.2d 391 (1976).

⁸ 20 N.Y.3d 327 (2012).

⁹ *Al Rushaid* at 13.

¹⁰ *Id.* at 16.

¹¹ *Id.* at 10 (Garcia, J., concurring).

¹² *Id.* at 4.

¹³ *Id.* at 3-4 (Garcia, J., concurring).

¹⁴ *Id.* at 10 (Garcia, J., concurring).

¹⁵ *Id.* at 8-10, 13-14.

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 19.

¹⁸ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks and citations omitted).

¹⁹ *Al Rushaid* at 21.

²⁰ *Id.* at 6-7 (Pigott, J., dissenting).

²¹ *Id.* at 8 (Pigott, J., dissenting).

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