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A New Tool For Obtaining Jurisdiction In New York Courts

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In the past, a foreign bank's use of correspondent bank accounts in the United States to facilitate wire transfers has not necessarily given New York courts a sufficient basis for jurisdiction over the bank. But a recent 4-3 Court of Appeals decision may change that. In Rushaid et al. v. Pictet & Cie et al., No. 180, 2016 BL 387923 (N.Y. Nov. 22, 2016), Judge Jenny Rivera, writing for the four-person majority (and overturning decisions of both the First Department and the Commercial Division), ruled that a foreign bank's "repeated, deliberate" use of correspondent bank accounts in the United States is enough to establish New York jurisdiction.


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Pictet involved a money laundering scheme orchestrated by employees of a Saudi oil company, Al Rushaid Parker Drilling (ARPD). ARPD contracted with Saudi Arabia's national oil company to build six oil rigs. However, three of ARPD's officers and directors, who were responsible for procuring and paying vendors for the project, allegedly breached their fiduciary duties by soliciting and accepting kickbacks from vendors. According to the complaint, in order to receive, launder, and hide the proceeds from this scheme, the employees sought assistance from defendant Pictet & Cie, a Swiss financial institution, and one of Pictet's bankers.

Allegedly, the Pictet banker established a shell company in the British Virgin Islands, TSJ Engineering Consulting Co. Ltd., to receive the kickback money. To facilitate the scheme, the Pictet banker instructed that funds be wired to TSJ's account at Pictet via correspondent accounts in New York. Once the money was deposited in the Pictet account, it was distributed to the individual employees. Many of the invoices from TSJ to the vendors referenced the New York bank accounts for Pictet. From July 2006 to October 2008, more than $4 million worth of alleged bribes moved through Pictet's correspondent bank accounts in New York.

On Aug. 26, 2011, the plaintiffs filed the action in the Commercial Division against Pictet, the Pictet banker and Pictet's general partners. The complaint asserted claims for breach of fiduciary duties and civil conspiracy. The defendants moved to dismiss for lack of personal jurisdiction (among other reasons), arguing that the transfer of funds through Pictet's correspondent accounts in New York was passive — not purposeful — and was thus insufficient to establish jurisdiction in New York. Judge Saliann Scarpulla of the Commercial Division agreed, and dismissed the plaintiffs' action solely based on lack of personal jurisdiction. The Appellate Division, First Department, thereafter affirmed, finding that Pictet

"merely carried out their clients' instructions" to wire the money through New York and did not "purposefully avail" themselves of conducting business activities in New York.[1]

The Court of Appeals reversed, holding that "[D]efendants' use of the correspondent bank accounts was purposeful and that plaintiffs' aiding and abetting and conspiracy claims arise from these transactions."[2] In reaching this conclusion, the court used a two-pronged test: (1) whether defendants purposefully availed themselves of conducting business in New York and (2) whether there was a substantial relationship between the transaction and the claim asserted.

As to the first prong, the Pictet court relied primarily on two Court of Appeals cases that had outlined the conduct necessary to establish that the use of correspondent bank accounts constitutes "purposeful availment" of the New York banking system: Amigo Foods Corp. v. Marine Midland Bank-NY 39 N.Y.2d 391 (1976) and Licci v. Lebanese Can. Bank SAL. 20 N.Y.3d 327 (2012).

The Amigo court had rejected the use of New York correspondent bank accounts as a basis for establishing jurisdiction, finding that the foreign bank in that case was merely the "passive" recipient of funds via its correspondent bank in New York. Indeed, when the correspondent bank attempted to transfer funds to the intended recipient, a bank in Maine, the funds were rejected.[3]

The Amigo decision had often been interpreted to mean that personal jurisdiction over a foreign bank could only arise when the use of correspondent bank accounts in New York was accompanied by additional activity in the state. The Pictet court rejected this reading, reasoning that Amigo was just an example of the type of activities that do not give rise to personal jurisdiction, i.e., a nondomiciliary bank's passive receipt (or intended receipt) of a transfer from a correspondent bank in New York.

Instead, the Court of Appeals in Pictet concluded that the use of New York correspondent bank accounts in this case more closely resembled the use of a correspondent account in Licci, where Hizballah had used a New York correspondent bank account to facilitate transfers of monies that were used to fund terrorist attacks.[4] In that case, the court ruled that allegations about the foreign banks' "repeated use of a correspondent account in New York on behalf of a client ... show[ed] purposeful availment of New York's dependable and transparent banking system."[5] Here, the court reasoned that Pictet's use of a New York correspondent account similarly reflected a "repeated, deliberate use that is approved by the foreign bank on behalf of and for the benefit of a customer," which "demonstrates volitional activity constituting transaction of business."[6]

The Pictet court further emphasized that the "quantity and quality of a foreign bank's contacts with the correspondent bank must demonstrate more than banking by happenstance."[7] As the court observed, the plaintiffs alleged that Pictet received at least 15 wires from the New York correspondent accounts, which amounted to the movement of millions of dollars between the vendors and TSJ. The court noted that Licci did not require the foreign bank itself to direct the deposits, only that it "affirmatively act" on them. Thus, a foreign bank's repeated approval of transfers of funds through correspondent accounts for the benefit of its customers was considered "transacting business in New York" for purposes of establishing purposeful availment of the New York forum.[8]

Importantly, the court noted that the New York correspondent accounts at issue in Pictet were "integral" to the scheme because the defendants chose New York when they could have picked other jurisdictions. Therefore, the court ruled that the defendants' actions were sufficient to establish a purposeful course of dealing and thus satisfied this prong of the jurisdictional requirement.

Considering the next prong of the test for New York jurisdiction, the Pictet court ruled that there was a "substantial nexus" between the transaction in question and the claim being asserted. Disposing of the defendants' assertions that the use of New York bank accounts was "incidental" to the scheme, the court concluded that the complaint "easily" satisfied the nexus requirement.[9] The court reasoned that since the money laundering could not have proceeded without the use of the New York correspondent bank accounts and since the money laundering was essential to the plaintiffs' claims, there was a sufficient nexus between the business conducted in New York and the claims being asserted.

In his concurring opinion, Judge Michael J. Garcia emphasized that Pictet was not a departure from the court's Amigo and Licci decisions regarding the first prong of the long-arm test, but rather "fit comfortably within the guideposts" established by those cases.[10] In reaching this conclusion, the concurrence focused on Pictet's knowledge, via the individual banker, of the illegal nature of the money transfers involved. According to Judge Garcia, Pictet was not a "passive recipient" of funds that were transferred through New York. Instead, the bank knew of, and affirmatively coordinated, the claimed kickback arrangement. Pictet's alleged knowledge of the wrongdoing "strongly support[ed] a finding of purposeful availment," the concurrence reasoned, since the use of the New York correspondent bank accounts amounted to a "deliberate step" by the bank and its clients "to move funds central to [their] shared goals."[11]

In dissent, Judge Eugene F. Pigott Jr. strongly disagreed with both the majority and concurring opinion as to their application of Licci to the first prong of the long-arm test. According to Judge Pigott, their "misreading" of Licci "upend[ed] over forty years of precedent that holds the mere maintenance of a New York correspondent account is insufficient to assert personal jurisdiction over a foreign bank."[12] According to the dissent, Licci and Amigo established that the first prong of long-arm jurisdiction test may be satisfied by a defendant's use of a New York correspondent bank account — even if no other contacts exist between the defendant and New York — only if the defendant's choice of the New York account was purposeful. In contrast to Licci, the dissent concluded that there were no allegations in Pictet that the defendants "deliberately chose" the New York correspondent accounts in implementing their kickback scheme. The dissent strenuously argued that Pictet's alleged knowledge of the unlawful activities was insufficient to satisfy the jurisdictional requirements without evidence that the foreign bank's actions were intentionally directed at New York. According to Judge Pigott, the majority had backtracked from its prior precedent and had thus "eschew[ed] the clear and predictable rules that are important in this area" to financial institutions.[13]

Despite the various interpretations of Amigo and Licci, by the majority, concurring and dissenting opinions, Pictet may represent a significant tool for plaintiffs who seek to bring cases against foreign entities in New York. It remains to be seen how far-reaching this precedent will extend.

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[1] Rushaid et al. v. Pictet & Cie et al., 127 A.D. 3d 610, 611 (1st Dep't 2015).

[2] Rushaid et al. v. Pictet & Cie et al., No. 180, 2016 BL 387923 (N.Y. Nov. 22, 2016) (citing CPLR § 302(a)(1)).

[3] Rushaid, 2016 BL 387923 at *4 (citing Amigo Foods Corp. v. Marine Midland Bank-NY, 39 N.Y.2d 391, 396 (1976)).

[4] Rushaid, 2016 BL 387923 at *4-5 (citing Licci v. Lebanese Can. Bank SAL.,20 N.Y.3d 327 (2012)).

[5] Rushaid, 2016 BL 387923 at *5.

[6] Id. at *6.

[7] Id.

[8] Id. at *7.

[9] Id.

[10] Id. at *12.

[11] Id. at *14.

[12] Id. at *15.

[13] Id. at *17.
