

New York Court of Appeals Finds ‘Repeated, Deliberate Use’ of Correspondent Account Sufficient to Establish Personal Jurisdiction Over Non-U.S. Bank

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In a decision that has implications for non-U.S. financial institutions with correspondent accounts in New York, a closely divided New York Court of Appeals held on November 22, 2016, that the “[r]epeated, deliberate use [of a New York correspondent account] that is approved by the foreign bank on behalf and for the benefit of a customer” satisfies the purposeful availment prong of the test for personal jurisdiction under New York’s long-arm statute.¹ In *Al Rushaid v. Pictet & Cie*, New York’s highest court overturned decisions of two lower courts, emphasizing the need to analyze under New York’s long-arm statute the “quantity and quality of a foreign bank’s contacts with the correspondent bank” in determining whether personal jurisdiction exists for a nondomiciled bank.²

Background

In August 2011, Pictet & Cie (Pictet), a private Swiss bank with its principal place of business in Geneva, Switzerland, was sued by Saudi national Rasheed Al Rushaid and two companies owned by Al Rushaid for allegedly participating in a kickback and money-laundering scheme orchestrated by three of Al Rushaid’s employees.³

Al Rushaid’s company, Al Rushaid Parker Drilling, Ltd. (ARPD) was contracted to build six oil rigs for the Saudi Arabian national oil company. As alleged in the complaint, three of ARPD’s employees engaged in a bribery and kickback scheme with certain ARPD vendors contracted to work on the rigs. Al Rushaid accused Pictet and its relationship-manager of establishing an offshore company in the British Virgin Islands (BVI) for the ARPD employees, setting up Geneva-based Pictet accounts for that BVI company and the ARPD employees, and effectuating the transfer of funds from ARPD’s vendors to the employees with the knowledge that the sums of money deposited vastly exceeded the employees’ annual pay.⁴ The vendors allegedly “wired bribes in favor of ‘Pictet and Co. Bankers Geneva’ to Pictet’s New York correspondent bank account,” which “[f]rom there ... were credited by Pictet to [the BVI company’s] Geneva-based account, and ... later divided up and transferred to the employees’ individual accounts.”⁵

Pictet moved to dismiss the complaint for lack of personal jurisdiction.⁶ The Supreme Court agreed with Pictet, “concluding that the defendants’ use of the correspondent accounts was passive not purposeful.”⁷ The Appellate Division, First Department agreed, finding that under prior precedent New York’s long-arm statute required deliberate acts by Pictet.⁸

Analysis of the Court of Appeals

New York’s long-arm statute requires that: (1) a defendant conduct sufficient activities to have transacted business in the state and (2) the claims arise from such activities.⁹ Focusing on the first part of the test, the Court of Appeals examined prior cases involving correspondent accounts where courts analyzed whether the defendant purposely

¹ *Al Rushaid v. Pictet & Cie*, 2016 N.Y. Slip Op. 07834, 2016 WL 6837930 (N.Y. Nov. 22, 2016), at *7, available at http://nycourts.gov/reporter/3dseries/2016/2016_07834.htm.

² *Id.*

³ *Id.* at *2.

⁴ *Id.* at *2-3.

⁵ *Id.*

⁶ Pictet’s motion to dismiss also argued for dismissal for failure to state a claim, forum non conveniens, and lack of standing. Due to the posture of the prior decisions, the Court of Appeals only addressed the issue of personal jurisdiction.

⁷ *Al Rushaid*, 2016 N.Y. Slip Op. 07834, at *4.

⁸ *Id.*

⁹ *Id.* at *5.

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availed themselves of New York’s jurisdiction. The court found that, as alleged in the complaint, Pictet’s “correspondent banking activity [was] sufficient to establish a purposeful course of dealing, constituting the transaction of business in New York.”¹⁰ In a dissent, Judge Eugene F. Pigott, Jr. argued that the majority’s opinion was “based on a misreading of” the court’s prior decision in *Licci v. Lebanese Canadian Bank*, and “risk[ed] upending over forty years of precedent” holding that “mere maintenance of a New York correspondent account is insufficient to assert personal jurisdiction over a foreign bank.”¹¹

The key issue separating the decisions was whether Pictet’s or its employees’ actions were “purposeful” under the personal jurisdiction standard articulated in *Licci*. In *Licci*, the plaintiffs alleged that the Lebanese Canadian Bank (LCB) used a New York correspondent account to make multiple transfers worth several million dollars to the financial arm of Hizballah with the knowledge that Hizballah was a terrorist organization and as part of an LCB policy to support and assist Hizballah’s goals.¹² The *Licci* court found that:

“repeated use of a correspondent account in New York on behalf of a client — in effect, a course of dealing — show[s] 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.”¹³

In concluding that Pictet purposefully availed itself of New York, the Court of Appeals focused on allegations that: (1) the bank maintained and marketed business relations in New York on its website; (2) the correspondent account was used to wire money to Pictet that was then divided between the corrupted employees in other Pictet accounts; (3) Pictet employees had knowledge that the money being transferred was illicit; and (4) Pictet employees “orchestrated the money laundering and [] the New York account was integral to the scheme.”¹⁴ The complaint did not allege that Pictet or its employees directed the vendors to use Pictet’s

New York correspondent account, and importantly, the court concluded that prior “cases do not require that the foreign bank itself direct the deposits [to the correspondent account], only that the bank affirmatively act on them.”¹⁵

Judge Pigott’s dissent concluded that *Licci* required “something more than the mere receipt of funds in a New York correspondent account” at “the unilateral direction of third parties.”¹⁶ He distinguished *Licci*, arguing that unlike Pictet, LCB had “projected itself” into New York because it could have processed the transactions outside of the United States and LCB used the New York account to serve its shared goals with Hizballah.¹⁷

In a concurring opinion, Judge Michael Garcia wrote separately to dispute Judge Pigott’s assertion that the plaintiffs in *Licci* alleged additional facts demonstrating purposeful availment or that it was necessary that Pictet engage in an “affirmative act ... directing the money *into* the New York correspondent bank account.”¹⁸ He emphasized that the “[f]unds arrived into the [account] at the direction of the front company the bank helped establish” and that “clearing these transitions through its New York correspondent account for a client depositing millions of dollars into that Swiss bank was certainly ‘affirmative and deliberate’ and done for the bank’s own commercial purposes.”¹⁹

Implications

The multiple opinions in *Pictet* demonstrate that, as applied to correspondent accounts, the purposeful availment test will continue to be a fact-intensive inquiry without precise guidelines on the specific actions that are necessary to establish personal jurisdiction under New York law. Judge Pigott’s dissent warned that the majority’s reasoning “eschew[ed] the clear and predictable rules that are important in this area of the law.”²⁰ Financial institutions not domiciled in New York should be mindful that actions taken on behalf of clients in relation to New York-based correspondent accounts may increase the risk of a court finding personal jurisdiction in New York has been established.

¹⁰ *Id.* at *8. The court also found that the cause of action “easily” arose from contacts with New York. *Id.* at *9.

¹¹ *Id.* at *15 (Pigott, J. dissenting).

¹² *Licci v. Lebanese Can. Bank*, SAL, 20 N.Y. 3d. 327, 322 (N.Y. 2012). The decision was the result of two certified questions from the U.S. Court of Appeals for the Second Circuit.

¹³ *Id.* at 339 (internal quotations and citations omitted).

¹⁴ *Al Rushaid*, 2016 N.Y. Slip Op. 07834, at *8.

¹⁵ *Id.*

¹⁶ *Id.* at *14-15 (Pigott, J. dissenting)

¹⁷ *Id.* at *15 (Pigott, J. dissenting).

¹⁸ *Id.* at *13-14 (Garcia, J. concurring) (emphasis in original).

¹⁹ *Id.* at *14 (Garcia, J. concurring).

²⁰ *Id.* at *16 (Pigott, J. dissenting).