ALERT MEMORANDUM

New York Court of Appeals Finds Personal Jurisdiction Over Swiss Bank Due to Intentional and Repeated Use of Correspondent Accounts

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

NEW YORK

Jonathan I. Blackman
+1 212 225 2490
jblackman@cgsh.com

Lawrence B. Friedman
+1 212 225 2840
lfriedman@cgsh.com

Howard S. Zelbo
+1 212 225 2452
hzelbo@cgsh.com

Jeffrey A. Rosenthal
+1 212 225 2086
jrosenthal@cgsh.com

Carmine D. Boccuzzi, Jr.
+1 212 225 2508
cboccuzzi@cgsh.com

Boaz S. Morag
+1 212 225 2894
bmorag@cgsh.com

Inna Rozenberg
+1 212 225 2972
irozenberg@cgsh.com

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

December 1, 2016

On November 22, 2016, the New York Court of Appeals held in *Rushaid v. Pictet & Cie*[1] that plaintiffs alleged sufficient facts to justify the exercise of personal jurisdiction over a foreign bank which was alleged to have intentionally and repeatedly used New York correspondent bank accounts in order to launder its customers' illegally obtained funds. In so holding, the Court relied heavily on the reasoning in its recent decision in *Licci v. Lebanese Canadian Bank, SAL*,[2] which also involved New York correspondent bank accounts, and engaged in a fact-intensive analysis of the allegations in the complaint, in which, according to the Court, plaintiffs had alleged that the foreign bank played a central role in the illegal scheme. The dissenting judges, however, criticized the majority as having misread and misapplied *Licci*, and as having upended forty years of precedent. It remains to be seen whether the *Rushaid* decision will further expand plaintiffs' ability to establish personal jurisdiction over foreign banks in New York courts, and whether such banks can succeed in having suits against them dismissed based on other legal principles, such as *forum non conveniens*.

[1] __ N.E.3d __, 2016 WL 6837930 (N.Y. Nov. 22, 2016).
[2] 20 N.Y.3d 327 (2012).

Background

Saudi resident Rasheed Al Rushaid and two of his businesses, Al Rushaid Petroleum Investment Corporation ("ARPIC") and Al Rushaid Parker Drilling, Ltd. ("ARPD"), sued Swiss bank Pictet & Cie ("Pictet"), one of its executives, and Pictet's eight general partners.

The complaint alleges that defendants assisted three ARPD employees responsible for procuring services and vendors for an oil rig construction project in Saudi Arabia in laundering and concealing bribes and kickbacks the employees received from certain vendors.[3] Specifically, plaintiffs allege that Pictet and its executive set up a "bogus" company – TSJ Engineering Consulting Co. – to receive the bribes, opened and actively managed Geneva-based Pictet accounts for TSJ and the employees, and orchestrated the laundering of funds from the vendors who wired bribes in favor of "Pictet and Co. Bankers Geneva" to Pictet's New York correspondent bank account.[4] Plaintiffs further allege that Pictet's executive knew money being deposited in the account was the result of a breach of the employees' duties.[5] Plaintiffs assert claims of aiding and abetting breach of fiduciary duty and civil conspiracy.

Defendants moved to dismiss for, among other things, lack of personal jurisdiction. Plaintiffs argued that defendants' alleged use of a New York correspondent account to receive and transfer the illicit funds constituted the transaction of business substantially related to their claims, and thus was sufficient to establish personal jurisdiction over them under CPLR 302(a)(1), the "transacting business" section of New York's long-arm statute.

The Supreme Court granted defendants' motion to dismiss for lack of personal jurisdiction, concluding that defendants' alleged use of the correspondent account was passive, not purposeful, and defendants therefore did not avail themselves of the privilege of conducting activities within New York.[6] The Supreme Court further reasoned that the wire transfers through a New York correspondent account were "merely coincidental" to the alleged fraudulent scheme, and thus were insufficient to establish a substantial relationship between plaintiffs' claims and the use of the correspondent account.[7]

Plaintiffs appealed, arguing that personal jurisdiction exists based on the use of the correspondent accounts under the reasoning of *Licci*. The Appellate Division affirmed the dismissal, concluding that *Licci* required deliberate acts by the defendants to further the alleged scheme that were not present here, because defendants simply carried out their clients' directions and instructions.[8]

The Court of Appeals' Decision

A divided Court of Appeals reversed, concluding that "defendants' intentional and repeated use of New York correspondent bank accounts to launder their customers' illegally obtained funds constitutes purposeful transaction of business substantially related to plaintiffs' claims, thus conferring personal jurisdiction within the meaning of CPLR 302(a)(1)."[9] In reaching this conclusion, the majority relied heavily on *Licci*, which it said established the principle that "the requirements of CPLR 302(a)(1) are satisfied where the quantity and quality of contacts establish a 'course of dealing' with New York, and the transaction and claim are not 'merely coincidental.'"[10]

The Court's jurisdictional inquiry proceeded in two steps: first, it analyzed whether the defendants conducted sufficient activities to have transacted business in New York, and second, it considered whether the plaintiffs' claims arise from such transactions.[11]

[3] 2016 WL 6837930, at 1-2.
[4] *Id.*
[5] *Id.*

[6] *See Rushaid v. Pictet & Cie*, No. 652375/2011 (Sup. Ct. N.Y. Cnty. Aug. 26, 2014).
[7] *See id.*, slip op. at 9.
[8] *See Rushaid v. Pictet & Cie*, 127 A.D.3d 610, 611 (1st Dep't 2015).
[9] 2016 WL 6837930, at 1.
[10] *Id.* at 2 (quoting *Licci*, 20 N.Y.3d at 340).
[11] *See id.* at 2-6.

In addressing both prongs of the inquiry, the Court examined prior case law on whether a non-domiciliary's use of New York-based correspondent accounts provides a jurisdictional basis under CPLR 302(a)(1). Specifically, the Court distinguished *Amigo Foods Corp. v. Marine Midland Bank-N.Y.*,[12] in which there was a lack of jurisdiction because the Maine bank in question had "passively and unilaterally been made the recipient of funds"[13] that passed through a New York correspondent bank, from *Licci*, in which personal jurisdiction existed because a Lebanese bank used a New York correspondent account to effectuate wire transfers that provided the funds to Hizballah's financial arm, which were necessary to the commission of terrorist attacks in Israel.[14]

The Court read these precedents as establishing that "unintended and unapproved use of a correspondent bank account, where the non-domiciliary bank is a passive and unilateral recipient of funds . . . does not constitute purposeful availment for personal jurisdiction" but "[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."[15]

The Court then turned to a close analysis of the allegations in the complaint, noting in particular that Pictet's executive allegedly knew the wired funds were proceeds of an illegal scheme, but nevertheless credited the funds in the New York correspondent account to TSJ and then distributed those funds to the employees' accounts. The Court also noted that "[i]t is of no moment that the employees 'directed the vendors' to deposit the money in the New York accounts because what matters is defendants' banking activity with the correspondent accounts . . . . Our cases do not require that the foreign bank itself direct the deposits, only that the bank affirmatively act on them."[16] Accordingly, the Court found that the first prong of the jurisdictional inquiry – a purposeful course of dealing, constituting the transaction of business in New York – was satisfied.[17]

As to the second prong, the Court described the inquiry as "relatively permissive," and merely requiring that the claim be "in some way arguably connected to the transaction."[18] The Court found that this standard was satisfied because the allegation was that "Pictet and defendants effected the transfer of money to the New York correspondent bank as part of the money-laundering scheme that put the bribes/kickbacks in the hands of the employees."[19]

The Dissenting Opinion

A strongly worded dissenting opinion, issued by three judges, argued that "the majority risks upending 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."[20]

The dissent appears to have adopted a fundamentally different reading of the allegations in the complaint, taking the position that, unlike in *Licci*, this case involved only "the passive receipt of payments" into a New York correspondent account, and Pictet was "nothing more than an 'adventitious' recipient of money that had been transferred into its account at the unilateral direction of foreign nationals . . . ."[21] The dissent further argued that "plaintiffs have not identified any volitional act on the part of defendants that was directed at New York."[22]

A concurring opinion attempted to defuse the dissent's assessment of the effect of the majority's opinion on settled law by emphasizing that the complaint alleged that Pictet "was not a passive banking establishment providing commercial services to the ARPD employees," but rather, "through its executive ... knew of, and affirmatively assisted in, the

[12] 61 A.D.2d 896 (1st Dep't 1978), *aff'd*, 46 N.Y.2d 855 (1979).
[13] 2016 WL 6837930, at 3 (citation omitted).
[14] *Id*.
[15] *Id.* at 4 (citation omitted).
[16] *Id*. at 5.
[17] *Id*.
[18] *Id*. (quoting *Licci*, 20 N.Y.3d at 339, 340).
[19] *Id*. at 6.
[20] *Id.* at 10 (Pigott, J., dissenting).
[21] *Id.* at 10, 12 (Pigott, J., dissenting).
[22] *Id.* at 12 (Pigott, J., dissenting).

kickback arrangement between the ARPD employees and the vendors."[23] The concurrence also highlighted that in this case, just like in *Licci*, Pictet provided a correspondent account in New York as a service to its clients, and is alleged to have had "a shared purpose" with the corrupt employees to further the kickback scheme.[24]

Conclusion

The *Rushaid* decision is likely to become an important precedent in future cases in which plaintiffs attempt to establish personal jurisdiction in New York over foreign banks on the basis of the banks' use of New York correspondent accounts. It remains to be seen, however, whether the decision will result in an expansion of the exercise of jurisdiction in these circumstances or, rather, serve only as a further clarification of the principles articulated in *Licci*.

It is also unclear what the result will be of any further proceedings in the *Rushaid* case. The Court of Appeals declined to consider defendants' arguments regarding dismissal on *forum non conveniens* grounds because the Supreme Court had not yet addressed that argument in the first instance, and remanded the case to the Supreme Court for further proceedings. However, the Supreme Court has already indicated that even if personal jurisdiction existed, it would "most likely dismiss this case" on *forum non conveniens* grounds because the defendants "would face significant hardship if forced to litigate in New York; discovery and witness testimony would be particularly costly and burdensome because the defendants' primary language is French; much of the evidence and most of the witnesses are located in Switzerland or Saudi Arabia; and . . . the connection to New York is tenuous."[25] Such a dismissal would be consistent with existing New York case law. For example, in *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros.*, which involved claims that New York bank accounts were used to further a fraud occurring abroad, the Court of Appeals dismissed the action, finding that it was a "classic case" for the application of the *forum non conveniens* doctrine because "[a]part from the use of New York banks to facilitate dollar transfers," there was nothing in the case "to justify resort to a New York forum."[26]

Accordingly, while complaints may allege sufficient facts to justify the exercise of personal jurisdiction, the *forum non conveniens* doctrine may end up acting as an effective barrier to suing foreign banks in New York courts solely on the basis of their use of New York correspondent accounts.

…

CLEARY GOTTLIEB

[23] *Id.* at 7-8 (Garcia, J., concurring).
[24] *Id.* at 10 (Garcia, J., concurring).
[25] No. 652375/2011, slip op. at 10 n.3.
[26] 23 N.Y.3d 129, 138-39, 12 N.E.3d 456, 461 (2014). Cleary Gottlieb Steen & Hamilton LLP successfully represented the appellant Mashreqbank.