



Neutral Citation Number: [2022] EWCA Civ 29

Case No: CA-2021-000446  
(formerly A4/2021/0302)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**  
**MR JUSTICE HENSHAW**  
**[2020] EWHC 2979 (Comm)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26 January 2022

**Before :**

**LORD JUSTICE PETER JACKSON**  
**LADY JUSTICE SIMLER**  
and  
**LADY JUSTICE CARR**

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**Between :**

**THE PUBLIC INSTITUTION FOR SOCIAL  
SECURITY**

**Appellant/  
Claimant**

**- and -**

**BANQUE PICTET & CIE SA & OTHERS**

**Respondents/  
Defendants**

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**Daniel Beard QC and Louise Merrett (instructed by Stewarts Law LLP) for the  
Appellant/Claimant**  
**Kenneth MacLean QC, James MacDonald and Tamara Kagan (instructed by Slaughter  
and May) for the Third, Eighth, Ninth and Tenth Respondents/Defendants**  
**Jonathan Adkin QC and Charlotte Beynon (instructed by Peters & Peters Solicitors LLP)  
for the Fourth Respondent/Defendant**  
**Philip Marshall QC and Simon Hattan (instructed by Eversheds Sutherland (International)  
LLP) for the Fifth Respondent/Defendant**  
**Francis Tregear QC and Tony Singla QC (instructed by Herbert Smith Freehills LLP) for  
the Eleventh Respondent/Defendant**  
**Daniel Jowell QC and Richard Blakeley (instructed by Milbank LLP) for the Twelfth  
Respondent/Defendant**

**David Davies QC** (instructed by **Macfarlanes LLP**) for the **Thirteenth Respondent/Defendant**  
**Nathan Pillow QC and Tom Ford** (instructed by **Hogan Lovells International LLP**) for the **Fourteenth Respondent/Defendant**

Hearing dates: 13, 14 and 15 December 2021

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**Approved Judgment**

**This judgment was handed down remotely at 10.30am on Wednesday 26 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.**

## **Lady Justice Carr :**

This judgment is divided into the following sections:

- A. The parties
- B. Introduction
- C. Preliminary observations
- D. Overview of the parties' positions on appeal
- E. Background facts, outline of the claims and the exclusive jurisdiction clauses
- F. The Judge's material findings
- G. The issues on appeal
- H. The Lugano Convention/Brussels I Regulation Recast
- I. Article 23: formal requirements
- J. Article 23: material validity requirements
- K. The wider accessory claims
- L. Article 6: approach in principle
- M. Article 6: application to the facts
- N. Mr Amouzegar and Mr Argand
- O. Pictet Bahamas and Pictet Asia
- P. Conclusion

and an Annex.

### **A. The Parties**

1. The parties to this appeal are identified as follows:
  - i) The Claimant Appellant, the Public Institution for Social Security: "PIFSS";
  - ii) The Defendant Respondents, together "the Respondents":
    - a) The Third Defendant Respondent, Banque Pictet & Cie SA, domiciled in Switzerland: "Banque Pictet";
    - b) The Fourth Defendant Respondent, Mr Philippe Bertherat, a former partner in Banque Pictet, domiciled in Switzerland: "Mr Bertherat";
    - c) The Fifth Defendant Respondent: Mr Kamran Amouzegar, a former associate and employee of Banque Pictet between 1996 and 2003, domiciled in Switzerland: "Mr Amouzegar";
    - d) The Eighth Defendant Respondent, Pictet & Cie (Europe) SA, domiciled in Luxembourg: "Pictet Europe";
    - e) The Ninth Defendant Respondent, Pictet Bank and Trust Limited, domiciled in the Bahamas: "Pictet Bahamas";
    - f) The Tenth Defendant Respondent, Bank Pictet & Cie (Asia) Limited, domiciled in Singapore: "Pictet Asia";

- g) The Eleventh Defendant Respondent, Mirabaud & Cie SA, a former limited partnership, domiciled in Switzerland: “Banque Mirabaud”;
  - h) The Twelfth Defendant Respondent, Mr Pierre Mirabaud, a former unlimited partner in Banque Mirabaud until 31 December 2009, cousin of Mr Fauchier-Magnan, domiciled in Switzerland: “Mr Mirabaud”;
  - i) The Thirteenth Defendant Respondent, Mr Thierry Fauchier-Magnan, a former unlimited partner in Banque Mirabaud until 31 December 2011, cousin of Mr Mirabaud, domiciled in Switzerland: “Mr Fauchier-Magnan”;
  - j) The Fourteenth Defendant Respondent, Mr Luc Argand, a Swiss lawyer, domiciled in Switzerland: “Mr Argand”.
2. Banque Pictet, Pictet Europe, Pictet Bahamas and Pictet Asia are referred to collectively as “the Pictet Respondents”. Banque Pictet, Pictet Europe and Banque Mirabaud are referred to collectively as “the Respondent Banks”.

## **B. Introduction**

3. These proceedings arise out of claims brought by PIFSS in respect of the alleged corruption of its former Director General, the First Defendant, Mr Fahad Maziad Rajaan Al Rajaan (“Mr Al Rajaan”). PIFSS is a public institution in Kuwait which operates the national social security system and pension scheme (“the Scheme”). In order to fund the Scheme, PIFSS invests very substantial amounts of money with numerous financial institutions around the world. PIFSS alleges that between 1994 and 2014 Mr Al Rajaan illegally solicited and received bribes totalling at least US\$847.7 million from numerous international financial institutions and intermediaries in return for causing or influencing PIFSS to invest substantial funds with or through those institutions and intermediaries (or related entities). This enabled the financial institutions, intermediaries and associated entities in question to earn fees or other benefits in connection with PIFSS’ investments.
4. Between February and September 2019 PIFSS launched three sets of proceedings against, amongst others, the ten Respondents. As set out in the Amended Consolidated Particulars of Claim, it alleges that there were multiple (at least seven) schemes under which bribes were paid to Mr Al Rajaan and then concealed or laundered. There are presently (by reference to wider proceedings commenced subsequently by PIFSS and the Re-Re-Amended Consolidated Particulars of Claim) 37 active defendants; the claims against 22 of them will, whatever the outcome of this appeal, be heard in England.
5. In summary, the claims against the Respondents relate in the first instance to two of the alleged schemes, referred to as the “Pictet Scheme” and the “Mirabaud Scheme”. The Pictet Scheme is said to involve the Pictet Respondents, Mr Bertherat and Mr Amouzegar. The Mirabaud Scheme is said to involve Banque Mirabaud, Mr Mirabaud, Mr Fauchier-Magnan and Mr Argand. PIFSS contends that the Respondents paid or aided and/or abetted the payment of bribes to or for the benefit of Mr Al Rajaan under these two Schemes (“the Pictet/Mirabaud bribery claims”) and, with the exception of Mr Argand, also participated in the laundering and concealment of those bribes (“the

Pictet/Mirabaud accessory claims”). It is also alleged that the Respondents (again with the exception of Mr Argand) participated in the laundering and concealment of very substantial other bribes paid by other defendants pursuant to other schemes (“the wider accessory claims”). The claims against the Respondents relating to the Pictet/Mirabaud bribery and Pictet/Mirabaud accessory claims amount to some US\$105.6 million; the claims against the Respondents relating to the wider accessory claims amount to some US\$425million.

6. PIFSS seeks to sue the Respondents in England on the basis that the principal defendant, Mr Al Rajaan, is now domiciled in England (as is his wife, the Second Defendant, Ms Al Wazzan). Mr Al Rajaan has submitted to the jurisdiction of the Court (“the Court”) and is the anchor defendant for the purpose of Article 6 of the (2007) Lugano Convention (“Article 6”) (“the LC”) and Article 8 of the Brussels I Regulation Recast (“Article 8”) (“BRR”). As a result, PIFSS contends that the Court has jurisdiction over all the Swiss domiciliaries and Pictet Europe, together with common law jurisdiction over Pictet Bahamas and Pictet Asia pursuant to CPR PD 6B 3.1(3) (as necessary or proper parties to the claims).
7. During the course of October and November 2019 the Respondents variously issued applications under CPR Part 11 disputing the jurisdiction of the Court. In a judgment dated 6 November 2020 (“the Judgment”) Henshaw J (“the Judge”) held as follows:
  - i) The Court’s jurisdiction is excluded in relation to the Pictet/Mirabaud bribery and Pictet/Mirabaud accessory claims against the Swiss and Luxembourg domiciled entities, and the former partners of those entities, under Article 23 of the LC (“Article 23”) or Article 25 of the BRR (“Article 25”) on the basis of exclusive jurisdiction clauses (“EJCs”) in contracts between PIFSS and the relevant entities;
  - ii) Although the requirements of Article 23/25 were not met in relation to the wider accessory claims, because of his findings in i) above, it was not expedient for the Court to hear and determine the wider accessory claims in order to avoid the risk of irreconcilable judgments within the meaning of Article 6/8;
  - iii) It was also not expedient for the Court to hear and determine the Pictet bribery claims, the Pictet accessory claims or the wider accessory claims against Mr Amouzegar (who could not take the benefit of any EJC) or the Mirabaud bribery claims against Mr Argand (who also could not take the benefit of any EJC) in order to avoid the risk of irreconcilable judgments within the meaning of Article 6;
  - iv) As a result of the above findings, England was not the convenient forum for the claims against Pictet Bahamas and Pictet Asia.
8. Accordingly, by order dated 14 December 2020 (“the Order”), he ruled that:
  - i) The Court did not have jurisdiction to try PIFSS’ claims against Banque Pictet, Pictet Europe, Mr Bertherat, Mr Amouzegar, Banque Mirabaud, Mr Mirabaud, Mr Fauchier-Magnan and Mr Argand;

- ii) The Court would decline to exercise its jurisdiction to try PIFSS' claims against Pictet Bahamas and Pictet Asia.
9. This is PIFSS' challenge to the Judgment and Order. It is said that questions of general importance are raised. Amongst other things, PIFSS suggests that existing English appellate authority on Article 23/25 conflicts with binding authority of the Court of Justice of the European Union ("the ECJ"); questions of expedience have not previously been considered in the context of claims for fraud or by reference to the types of legal relationships that arise on the facts here; there is no directly relevant prior authority on the questions that arise in relation to Article 6/8.

### **C. Preliminary observations**

10. The Judge had before him not only a large number of parties but also a vast volume of material, including 20 lever arch files of documents relating to issues of Swiss law alone. The hearing before him took four days, followed by further written submissions. The position is thus very far removed from that envisaged by Lords Templeman and Goff in *Spiliada Maritime Corp v Cansulex Limited* [1987] 1 AC 460 (at 465 G – H) where it was hoped that future submissions on the merits of trial in England and trial abroad would be measured "in hours and not days". Nor is it consistent with what Lord Neuberger stated in *VTB Capital plc v Nutritek International* [2013] UKSC 5 at [82] and [83]:

"82. The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

83. Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, un-controversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial."

11. As Flaux J (as he then was) said in *Erste Group Bank AG v JSC "VMZ RED OCTOBER"* [2013] EWHC 2926 (Comm) (at [11]), although Lord Neuberger's deprecation of the proliferation of documentation and argument was in the context of the determination of appropriate forum, his observations are obviously equally applicable to other aspects of jurisdictional challenges.

12. It does not appear that the parties here chose to heed this guidance. There will of course be cases where a novel and/or complex point of law needs to be debated fully and decided and, as foreshadowed above, this litigation raises some new, albeit relatively short, legal issues. Further, the sums involved are substantial and the allegations made are serious. However, these features did not create a licence to turn a jurisdictional dispute into an extensive and essentially self-standing piece of litigation. The costs incurred below ran to many, many millions of pounds: the interim payment orders in respect of the Respondents' costs amounted to £6.88 million against a claimed total of some £13.5 million.
13. The (conspicuously careful) Judgment extends to 497 paragraphs and covers 156 pages. It was described fairly during the course of the appeal as "a labour of Hercules". It contains an exceptionally full and detailed exposé and thorough analysis of the statements of case, the facts and submissions on all sides.
14. I do not begin to attempt to replicate its detail. It would be both inappropriate and unnecessary to do so. First, the appeal is limited to a review of the Judgment and is not a rehearing (see CPR 52.21(1) and the remarks in *The Republic of Mozambique (acting through its Attorney General) v Credit Suisse International and others* [2021] EWCA Civ 329 at [83]). Secondly, in so far as there is a challenge to the Judge's evaluative assessment, this court will only interfere if it considers the decision to be wrong by reason of some identifiable flaw in his treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion (see for example *Re Sprintroom* [2019] EWCA Civ 932; [2019] BCC 1031 at [76]). Thirdly, as indicated, jurisdiction challenges should be resolved as swiftly and succinctly as possible, reflecting the fact that the court is not reaching any final decisions on the merits but rather determining simply where the litigation should proceed (significant though the outcome of that decision may be).

#### **D. Overview of the parties' positions on appeal**

##### **PIFSS**

15. PIFSS emphasises that the person alleged to be at the centre of the alleged corruption is Mr Al Rajaan, who is domiciled here and has submitted to the jurisdiction of the Court. It is already established that the claims of 22 of a total of 37 active defendants will be heard in London. The circumstances of the establishment of the alleged unlawful arrangements and their nature will be at the heart of these claims. The role of each of the various persons involved will be scrutinised, as will the arrangements and structures for the alleged laundering of illegitimate monies paid by parties under, for example, what is described as "the MAN Scheme", including by Banque Mirabaud, and its officers or employees. Yet the Judgment envisages accessory money laundering claims against Banque Mirabaud involving the self-same alleged money laundering to be heard in Switzerland.
16. PIFSS submits that the Judge was wrong to find that the relevant EJs satisfied the requirements of Article 23. He was right to conclude that the wider accessory claims were not within the scope of the EJs but wrong to hold that Article 6/8 meant that the wider accessory claims had to be tried in Switzerland. That conclusion rested on a false premise relating to Article 23/25 and a misinterpretation of Article 6/8, as well as a

flawed assessment of the risk of inconsistent judgments with the proceedings in London.

#### The Pictet Respondents and Mr Bertherat

17. The Pictet Respondents contend that PIFSS' claims ignore the EJC's in favour of Switzerland (Banque Pictet) and Luxembourg (Pictet Europe) referred to and incorporated via their General Business Conditions ("GBCs") or General Terms and Conditions ("GTCs"). These were contained in the standard form account opening documents signed by PIFSS on the multiple accounts that it opened with the Pictet Respondents during the course of a nearly 20-year relationship (between 1998 and 2017). The Judge was right to conclude that the requirements of Article 23 were met in relation to the EJC's as applicable to the Pictet bribery and Pictet accessory claims. To the extent necessary, Banque Pictet contends that the Judge ought to have found that it also had the better of the argument that the Banque Pictet GBCs were supplied to PIFSS in 1998 (and not for the first time in 2012). Since the EJC's are formally and materially valid, the Court has no jurisdiction over the Pictet bribery and Pictet accessory claims against Banque Pictet and Pictet Europe. The Judge should also have held that the EJC's extended to the wider accessory claims. In any event, as for the wider accessory claims, again the Judge was right to conclude that it was not expedient to determine them in this jurisdiction for the purpose of Article 6. Seeking to determine the wider accessory claims against the Respondent Banks in the Court, when the (overlapping) Pictet bribery and Pictet accessory claims were bound to proceed abroad pursuant to the EJC's, would create a serious risk of irreconcilable judgments against the same parties. In the absence of jurisdiction over any of the claims against Banque Pictet and Pictet Europe, it follows that England was not the appropriate forum for the claims against Pictet Asia and Pictet Bahamas. Pictet Europe, Pictet Asia and Pictet Bahamas have undertaken to consent to the jurisdiction of the Geneva courts.
18. Mr Bertherat's position is materially the same as that of Banque Pictet. It is common ground for the purpose of the appeal that he is entitled to rely on the EJC's in favour of the Swiss courts to the same extent as Banque Pictet.

#### Mr Amouzegar

19. Mr Amouzegar's position is that the claims against him and Banque Pictet are inextricably linked. As a result of the EJC's governing the claims against Banque Pictet, those claims will have to be pursued in Switzerland and it was then entirely appropriate for the Judge to conclude that the claims against Mr Amouzegar should be addressed in the same proceedings there. By contrast, there is no sufficient connection between the claims against Mr Amouzegar and those which will continue to be pursued in England against other defendants such as to justify invoking jurisdiction under Article 6. Once it is established that there was no error of law in the Judge's interpretation of Article 6, there is no basis for appellate interference with the balancing exercise that he then carried out.

#### Banque Mirabaud, Mr Mirabaud and Mr Fauchier-Magnan

20. Banque Mirabaud also supports the Judge's finding that the substantive requirements of Article 23 were met in relation to the Mirabaud bribery and Mirabaud accessory claims, and also contends that he should have gone further: the wider accessory claims



were not materially different to the Mirabaud accessory claims and fell within the scope of Article 23. Liability in respect of the wider accessory claims could not be established without PIFSS first establishing Banque Mirabaud's liability under the alleged Mirabaud Scheme. That is because PIFSS relies on Banque Mirabaud's alleged knowledge of the Mirabaud Scheme as the most important ingredient of its claim on the wider accessory claims. That alleged knowledge was acquired by Banque Mirabaud in the course of its banker/customer relationship with PIFSS. Mr Mirabaud and Mr Fauchier-Magnan adopt these submissions; again, it is common ground on appeal that they are entitled to rely on the EJC's in favour of the Swiss courts to the same extent as Banque Mirabaud (although there is a dispute as to whether Mr Mirabaud is entitled to rely on the EJC's after he left the partnership in December 2009).

21. Banque Mirabaud, Mr Mirabaud and Mr Fauchier-Magnan also make common cause on Article 6. When regard is had to the underlying policy objectives of the LC, namely to create a coherent system of jurisdiction between signatories, it would be wrong to ignore the Swiss proceedings. The Judge was correct to decline to exercise jurisdiction over the wider accessory claims under Article 6. It is said to be obvious that if the Mirabaud bribery and Mirabaud accessory claims are to be heard by the Swiss court, so too should the wider accessory claims, in order to avoid the risk of potentially inconsistent judgments being entered.

#### Mr Argand

22. Mr Argand points to the narrow nature of the claim against him. Mr Mirabaud and Mr Fauchier-Magnan are said in January 1997 to have instructed Mr Argand to act for them in establishing and acting for a company held in their personal names, Silvery Bay Investments Limited ("Silvery Bay"). Silvery Bay was used by Mr Mirabaud and Mr Fauchier-Magnan to facilitate the transmission of payments from Banque Mirabaud between 1997 and 2012. The claims against Mr Argand are limited to these payments and assistance under the Mirabaud Scheme.
23. It is said that, in circumstances where PIFSS was bound from the outset to pursue the Mirabaud Scheme claims against Banque Mirabaud, Mr Mirabaud and Mr Fauchier-Magnan in Geneva, the Judge was right to conclude that the Article 6 test was not satisfied in relation to Mr Argand. Mr Argand had no direct dealings with Mr Al Rajaan; any liability on his part could only be established on the coat-tails of liability on the part of Mr Mirabaud and Mr Fauchier-Magnan. There was no error of law by the Judge and this court should not be drawn into undertaking for itself the evaluative assessment properly conducted by the Judge. In any event, the Judge was plainly right.

#### **E. Background facts, outline of the claims and the EJC's**

24. The Judge gave a helpful exposition of the background facts and outline of PIFSS' claims against the Respondents at [12] to [73] of the Judgment. Those paragraphs can be adopted and need not be repeated here. The detailed passage and evolution of the EJC's in respect of each of Banque Pictet, Pictet Europe and Banque Mirabaud are set out in the Annex to this judgment. The position can be summarised as follows.

#### Banque Pictet EJC's

25. On every occasion that PIFSS opened an account with Banque Pictet, PIFSS signed account opening documentation confirming that PIFSS had taken due note of or agreed to Banque Pictet's GBCs. It also signed a number of other agreements and documents incorporating Banque Pictet's GBCs by reference. Including account opening documents, PIFSS signed more than 100 such documents.
26. By way of example, in 2011 PIFSS signed account opening documentation which contained a freestanding jurisdiction clause ("the 2011 clause") as follows:

"Any dispute concerning the relationship between the Bank and the Client shall be subject to the exclusive jurisdiction of the Courts of Geneva."

27. PIFSS' position was that it did not accept that Banque Pictet had provided PIFSS with access to its GBCs in 1998 when PIFSS first opened an account with Banque Pictet. No copy of the GBCs was ever signed by PIFSS. The GBCs were only ever provided to PIFSS in 2012. This was the first time that the GBCs (including an EJC) became part of the contractual relationship between PIFSS and Banque Pictet. Banque Pictet, on the other hand, contended that it had provided its GBCs (incorporating an EJC) to PIFSS in 1998.
28. The Banque Pictet GBCs (issued in 2011) and sent to PIFSS in 2012 provided:

**"Article 1 - Scope**

These General Business Conditions shall govern the legal relationship between Pictet & Cie (hereinafter "the Bank") and its Clients. They shall govern existing business relationships upon their taking effect, as well as relationships established thereafter.

They shall remain valid regardless of any other standard contractual forms or equivalent documents that the Client may have signed.

Further, these General Business Conditions shall remain subject to:

– particular agreements entered into between the Bank

and the Client;

– framework or master agreements among Swiss banks

or with foreign banks;

– standard practices in certain areas of business, namely stock exchange transactions and matters handled through correspondents in other countries.

**Article 34 - Governing law**

The relationship between the Bank and the Client shall be governed exclusively by Swiss law.

### **Article 35 - Place of jurisdiction**

Any dispute concerning the relationship between the Bank and the Client shall be subject to the exclusive jurisdiction of the Courts of Geneva. An appeal to the Federal Supreme Court of Switzerland is reserved.

The place of execution, jurisdiction, and the place of debt collection procedures shall be Geneva.

The Bank shall nonetheless be entitled to initiate proceedings in the jurisdiction of domicile of the Client or in any other competent jurisdiction.”

### Pictet Europe EJs

29. The standard account opening form in 2000, when PIFSS opened its account with Pictet Europe, contained the following statement:

“This account is subject to the provisions of Luxembourg law and governed by the General Business Conditions laid down by the Banque Pictet (Luxembourg) S.A., which are appended to this application form. The undersigned corporate entity hereby declares that due note has been taken of the General Business Conditions referred to above and, by signing, has approved them.”

30. Pictet Europe’s GBCs themselves at this time included these provisions:

“1. Applicability of General Business Conditions and legislation

Business relations between the Bank and its Clients are governed by the general conditions laid down in this document and by any special agreements which might be concluded between the Bank and its Clients.

Business relations shall be subject to applicable Luxembourg legislation unless there are specific waivers written into these General Business Conditions and into any specific agreements.

...

17. Judicial competence

The courts of the Grand-Duchy of Luxembourg shall be the sole instances competent to judge any dispute between the Client and the Bank. However, the Bank may institute proceedings against the Client in other jurisdictions which, unless it is the choice of

jurisdiction specified above, should, under normal circumstances, be competent to act with regard to the Client.”

### Banque Mirabaud EJs

31. A Signature Card signed by PIFSS on 20 January 1997, when its banking relationship with Banque Mirabaud was first established, stated on its reverse:

“The entire contractual relationship between the client and Mirabaud & Co shall be governed by the Bank’s present and future General Terms and Conditions.

...

All legal aspects of the relationship between client and Bank shall be governed exclusively by Swiss law. Place of performance of all obligations of both parties, as well as the exclusive jurisdiction of lawsuits and any other kinds of legal proceedings shall be Geneva.”

32. The General Terms and Conditions (“GTCs”) which PIFSS signed in 2007 contained these provisions:

“These General Terms and Conditions shall govern all of the contractual relations between Mirabaud & Cie (hereinafter “the Bank”) and its Clients, subject to any specific agreements and bank practices”.

...

Clause 19: “All relationships between the Client and the Bank shall be governed by and construed exclusively in accordance with Swiss law.

Any disputes which might arise shall be brought exclusively before the Swiss courts at the place of the Bank’s head office or the branch where the account was opened, subject to any appeal to the Swiss Federal Tribunal in the cases provided for by law.

Nevertheless, the Bank reserves the right to commence proceedings before any other court or competent authority, whether in Switzerland or abroad, in particular before the courts in the place of domicile of the Client. In such case, Swiss law shall remain equally applicable.”

### F. The Judge’s material findings

33. On incorporation and formal validity of the Banque Pictet EJs the Judge held that:
- i) Banque Pictet did not have the better of the argument that PIFSS received copies of the GBCs prior to 2012;

- ii) However, under EU law, Article 23 was satisfied where a party agrees to a written contract incorporating by reference general terms including a jurisdiction clause;
  - iii) In any event, the GBCs were incorporated after May 2012 when PIFSS did receive the GBCs and these applied to contracts operating after that date;
  - iv) Further, the 2011 clause and the Banque Pictet EJC were wide enough to cover, amongst other things, future disputes arising out of “antecedent acts”.
34. Thus, the Judge found that the Banque Pictet EJC was incorporated into the contractual relationship between Banque Pictet and PIFSS from the outset. Beyond that, it was common ground that the Pictet Europe EJC was incorporated into the contractual relationship between Pictet Europe and PIFSS from the outset. The Judge also held that the Banque Mirabaud EJC was incorporated into the contractual relationship between Banque Mirabaud and PIFSS when that relationship commenced in 1997 (and Banque Mirabaud’s then applicable GTCs were sent to PIFSS). There is no challenge to these latter findings.
35. The Judge made the following findings on material validity under Article 23:
- i) The EJC on which the Respondent Banks relied related to particular legal relationships, “being the totality of the legal relationships between the parties forming part of the banker/customer relationship between them”. They were broadly drafted as being capable of applying to a wide range of activities within the overall bank/customer relationship. By way of example, in relation to Banque Mirabaud, these activities included current accounts, custody accounts, precious metal accounts and the purchase and sale of securities, precious metals, foreign currencies and other financial instruments. The application of Swiss or Luxembourg law (as appropriate) led to the same conclusion.
36. On applicability of the EJC to PIFSS’ claims, the Judge held that:
- i) Banque Pictet and Pictet Europe had the better of the argument that the Pictet bribery and the Pictet accessory claims fell within the scope of the respective EJC;
  - ii) Banque Pictet and Pictet Europe did not have the better of the argument that the wider accessory claims against them fell within the scope of the respective EJC;
  - iii) Banque Mirabaud had the better of the argument that the Mirabaud bribery and the Mirabaud accessory claims fell within the scope of its EJC, but not the wider accessory claims.
37. In relation to the individual Respondents seeking to rely on EJC, the Judge held that:
- i) Mr Bertherat was entitled to rely on the Banque Pictet EJC in relation to the Pictet bribery and Pictet accessory claims against him including in so far as they related to acts and omissions after he ceased to be a partner on 1 January 2014;
  - ii) Mr Mirabaud was entitled to rely on the Banque Mirabaud EJC in relation to the Mirabaud bribery and Mirabaud accessory claims against him in relation to

events pre-dating January 2010 but not in relation to the wider accessory claims. However, Mr Mirabaud did not have the better of the argument that he was entitled to benefit from the EJC's in respect of events after he ceased to be a partner on 31 December 2009;

- iii) Mr Fauchier-Magnan was entitled to rely on the Banque Mirabaud EJC's in relation to the Mirabaud bribery and Mirabaud accessory claims against him, but not the wider accessory claims;
- iv) Mr Amouzegar did not have the better of the argument that he was entitled to rely on EJC's incorporated into the contracts between PIFSS and Banque Pictet.

38. As to Article 6, the Judge held that:

- i) The case for the Court not accepting jurisdiction over the wider accessory claims against the Respondent Banks, Mr Bertherat and Mr Fauchier-Magnan was compelling;
- ii) Nor was it expedient in those circumstances for the Court to assume jurisdiction in respect of Mr Argand;
- iii) Whilst the Judge considered the position in relation to Mr Amouzegar to be "more finely balanced" than in relation to Mr Argand, PIFSS did not have the better of the argument that the requirements of Article 6 were satisfied in relation to him either.

39. Finally, in relation to Pictet Bahamas and Pictet Asia, considering all relevant factors together, PIFSS had not shown that England was clearly the appropriate forum for the resolution of the claims against them. Resolving those claims in England would lead to a more acute risk of irreconcilable judgments than would otherwise be the case, and the most relevant connecting factors also pointed more strongly towards Geneva being the appropriate forum.

### **G. The issues on appeal**

40. Weaving through the morass of detail in the parties' arguments, the central issues on appeal can be distilled as follows.

41. Article 23 formal requirements (involving Banque Pictet and Mr Bertherat only):

- i) For the purposes of the requirement in Article 23(1)(a) that a jurisdiction agreement must be in or evidenced in writing, was the Judge right to conclude that it was unnecessary for the GBC's containing the EJC's actually to have been communicated to PIFSS?
- ii) If so, was the Judge right to find that Banque Pictet did not have the better of the argument that the GBC's were communicated to PIFSS prior to 2012?

42. Article 23 material validity (involving all Pictet and Mirabaud Respondents (save for Pictet Asia, Pictet Bahamas and, for the avoidance of doubt, also Mr Amouzegar and Mr Argand)):

- i) Was the Judge right to conclude that the “particular legal relationship(s)” in connection with which the EJC’s were entered into for the purpose of Article 23 was the totality of the legal relationships between the parties forming part of the banker/customer relationship between them?
  - ii) Was the Judge right to conclude that the relevant Respondents had the better of the argument that the disputes relating to (a) the Pictet/Mirabaud bribery claims; (b) the Pictet/Mirabaud accessory claims “ar[o]se out of” those “particular legal relationship(s)”?
43. Scope of EJC’s (as a matter of the relevant domestic law) (involving all Pictet and Mirabaud Respondents (save for Pictet Asia and Pictet Bahamas and again, for the avoidance of doubt, Mr Amouzegar and Mr Argand)):
- i) Was the Judge right to find that PIFSS had the better of the argument that, on the true construction of the relevant EJC’s, the disputes relating to the wider accessory claims fell outside the scope of the applicable EJC’s?
  - ii) (Mr Mirabaud only): Was the Judge right to conclude that PIFSS had the better of the argument that claims against Mr Mirabaud relating to events after 1 January 2010 fell outside the scope of the relevant EJC’s?
44. Article 6: (the number of Respondents to whom the Article 6 challenge is relevant will depend on the outcome of the appeals on the issues above, but on any view the issue of principle arises in relation to Mr Amouzegar and Mr Argand):
- i) Was the Judge right to conclude that, for the purpose of Article 6, the Court was not required to consider solely the risk of irreconcilable judgments between the claim against the anchor defendant and the claim(s) against the proposed Article 6 defendant(s) but rather was permitted to consider other relevant circumstances including, in particular, the risk of irreconcilable judgments between the claims sought to be made against the proposed defendant and other claims in other member states?
  - ii) Did the Judge apply the test correctly in relation to each relevant Respondent?
45. Forum non conveniens: Pictet Asia and Pictet Bahamas:
- i) Depending on the outcome of the issues above, was the Judge right to conclude that PIFSS had not shown that England was clearly the appropriate forum for the resolution of the claims against Pictet Asia and Pictet Bahamas?

#### **H. The Lugano Convention/Brussels I Regulation Recast**

46. The (2007) LC follows closely the EU instruments on jurisdiction in civil and commercial matters (as identified in *PrivatBank v Kolomoisky* [2019] EWCA Civ 1708; [2020] Ch 783 (“*Kolomoisky*”) at [35]). Article 2 provides:
- “1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.”

47. Thus, express priority is given to a defendant’s jurisdiction of domicile. Article 3 identifies the limited scope of derogation from that principle:

“1. Persons domiciled in a State bound by this Convention may be sued in the courts of another State bound by this Convention only by virtue of the rules set out in Sections 2 to 7 of this Title.”

48. Article 6 appears as one of the exceptions in Section 2 and provides materially:

“A person domiciled in a State bound by this Convention may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, *provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;...*”

(emphasis added)

49. The original text of Article 6 (in the original (1988) LC) stated simply that a person domiciled in a contracting state may also be sued “where he is one of a number of defendants, in the courts for the place where any one of them is domiciled”. However, in his report on the parallel 1968 Brussels Convention (OJEC No. C59/1, 26) (“the Jenard Report”), Professor Jenard commented that, in order for Article 6 to be applicable:

“...there must be a connection between the claims made against each of the defendants, as for example in the case of joint debtors. It follows that action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled.”

50. It appears therefore to have been intended from the outset that a connection between the claims made against each of the defendants was required in order for Article 6 to be engaged, even though (the original) Article 6 did not say so in terms. The italicised words above in Article 6 were added following the decision in Case 189/87 *Kalfelis v Banque Schröder* EU:C: 1988:459; [1988] ECR 5565 (“*Kalfelis*”), with a similar phrase being adopted in the 2001 Brussels Regulation when it replaced the 1968 Brussels Convention. In *Kalfelis* it was held (at [13]) that “there must exist between various actions brought by the same plaintiff against different defendants a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

51. The recitals to the 2001 Brussels Regulation included the following:

“...(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in



which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor...[“Recital 11”]

(12) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice...[“Recital 12”]

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two member states. [“Recital 15”].”

52. Article 8 (applicable to Pictet Europe) is materially identical to Article 6. Save where otherwise indicated, references below to Article 6 should be read where necessary as references to both Article 6 and 8.

53. Article 23 (formerly Article 17 in the 1988 LC) appears as one of the exceptions in Section 7 and provides materially:

“1. If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

a. in writing or evidenced in writing;...”

54. Article 25 (again applicable to Pictet Europe) is materially identical to Article 23. Save where otherwise indicated, references below to Article 23 should be read where necessary as references to both Articles 23 and 25.

### Burden and standard of proof

55. The relevant burden and standard of proof on the jurisdiction issues arising under the LC and BRR were essentially common ground before the Judge and can be summarised as follows:

- i) It was for PIFSS as claimant to show a good arguable case that the Court had jurisdiction. This required PIFSS to demonstrate that it had the better of the argument on the materials available to the Court. (The Judge expressed himself in the Judgment from time to time (naturally by way of shorthand and for convenience) in terms of an outright conclusion on the merits. However, it is clear that, in reaching his overall conclusions on jurisdiction, he was proceeding (correctly) by reference to the question of which party had the better of the argument, and (rightly) no one has suggested otherwise);
- ii) Demonstrating a good arguable case and “having the better of the argument” means:

- a) That a claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway. This does not require proof on the balance of probabilities and is a context-specific and flexible test;
  - b) If there is an issue of fact about application of the gateway, or some other reason for doubting whether the gateway applies, the Court has to take a view on the material available if it can reliably do so. This is an instruction to use judicial common sense and pragmatism; but
  - c) The nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. This is a more flexible test not necessarily conditional upon relative merits;
- iii) The relevant authorities tend to suggest that the party seeking to rely on an EJC carries the burden of showing a good arguable case on that point.

### **I. Article 23: formal requirements**

56. The issue here is whether, although the relevant GBCs were referred to expressly in the relevant contractual documentation between the parties, actual communication of the EJC (contained in the GBCs) was required in order to satisfy the formal validity requirements of Article 23. As set out above, the issue only arises in relation to Banque Pictet (and Mr Bertherat): there is no equivalent dispute in relation to the EJC relating to Pictet Europe and Banque Mirabaud, in respect of which it is accepted that the formal validity requirements were met.
57. PIFSS points to the fact that the ECJ has held that real consent to or acceptance of the relevant EJC must be shown in order to satisfy the requirements of Article 23(1) (see eg. Case 24/76 *Estasis Salotti di Colzani Aimò e Gianmario Colzani v RÜWA Polstereimaschinen GmbH* (“*Salotti*”) at [7]; Case C-543/10 *Refcomp v Axa Corporate Solutions* (“*Refcomp*”) at [26]; and Case C-366/13 *Profit Investment Sim SpA v Ossi* EU:C:2016:282; [2016] 1 WLR 3832 (“*Profit Investment*”) at [24] to [28]). The formal requirements are to be interpreted strictly and the consensus of the parties must be clearly and precisely demonstrated. It is submitted in these circumstances that actual communication was required, as said to have been established in *Salotti* and confirmed in *Höszig Kft v Alstom Power Thermal Services* Case -222/15 EU:C:2016:525; [2016] ILPr 36 (“*Höszig*”). It is contended that the Judge was bound to follow this approach in the light of the EU case law and erred in failing to do so. PIFSS does not shy away from the necessary associated submission that this court has also (on three separate occasions) misunderstood and misapplied *Salotti*. Given that there was no communication to PIFSS by Banque Pictet of its EJC prior to 2012, PIFSS argues that those EJC did not bind it in the preceding years.
58. The question of whether the formal requirements of Article 23 were met is, as the Judge understood, an autonomous question of EU law. It is clear that, in order to establish the necessary agreement between the parties, the EJC must be the subject of a consensus which is clearly and precisely demonstrated: see [7] of *Salotti*:

“The way in which that provision [Article 17(1)(a)] is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed. By making such validity subject to the existence of an “agreement” between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.”

59. However, contrary to the submissions for PIFSS, neither *Salotti* nor subsequent EU case law demonstrates that communication of the GBCs (containing the EJs) is necessarily required in order for that consensus to be established. In circumstances where the parties have clearly agreed to terms which themselves expressly refer to GBCs which include the EJC, actual communication of the EJs themselves is not required.

60. Fundamental to a proper understanding of *Salotti* is recognition of the fact that the ECJ was there being asked to address whether the requirements in Article 23(1)(a) were satisfied by reference to two separate questions based on two different scenarios: scenario (A), where there is express reference within a contract signed by both parties to the GBCs containing the EJC; and scenario (B), where there is express reference in a contract signed by both parties only to a prior offer which includes the GBCs containing the EJC.

61. As to scenario (A) the ECJ held (at [9]):

“ ... the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article [23], since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction. It is otherwise in the case where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause conferring jurisdiction.”

62. As to scenario (B), the ECJ held (at [12]):

“In principle, the requirement of a writing under the first paragraph of Article 17 is fulfilled if the parties have referred in the text of their contract to an offer in which reference was expressly made to general conditions including a clause

conferring jurisdiction. This view of the matter, however, is valid only in the case of an express reference, which can be checked by a party exercising reasonable care, and only if it is established that the general conditions including the clause conferring jurisdiction have in fact been communicated to the other contracting party with the offer to which reference is made.

But the requirement of a writing in Article 17 would not be fulfilled in the case of indirect or implied references to earlier correspondence, for that would not yield any certainty that the clause conferring jurisdiction was in fact part of the subject-matter of the contract properly so-called.”

63. I do not accept PIFSS’ contention that a requirement for communication in scenario (A) was implicit, because on the facts in *Salotti* the GBCs containing the relevant EJC were printed on the back of the contract signed by the parties. The ECJ did not in its conclusion on scenario (A) refer to any need for communication of the relevant EJC, nor did it suggest that the presence of the GBCs on the back of the contract was material to its conclusion that agreement to terms which referred expressly to GBCs which included the EJC was sufficient. What mattered was that “the text of the contract signed by both parties itself contains an express reference” to the GBCs, including the EJC. That yielded the necessary certainty, or “guarantee” of consent. By contrast, in scenario (B) – where the relevant EJC was at one removed – there was a requirement of communication in order to achieve the necessary certainty.
64. Had there been no material distinction to be drawn between scenarios (A) and (B) in terms of communication, it is difficult to understand why the ECJ would have provided separate answers by reference to the two scenarios: there would have been a single answer. The ECJ was not, as PIFSS submits, laying down cumulative conditions, but rather addressing different scenarios with different requirements for Article 23 purposes.
65. Likewise, in *Profit Investment*, the ECJ (at [29]) held that an EJC contained in a bond prospectus satisfied Article 25(1)(a) if the contract signed by the parties “expressly mention[ed] the acceptance of that clause or contain[ed] an express reference to that prospectus”.
66. PIFSS suggests that a need for communication was implicit because, on the facts in *Profit Investment*, the relevant prospectus was available for viewing on the website of the Irish Stock Exchange. But again, nowhere in its judgment did the ECJ rely on this availability (or communication) as part of its conclusion that signature of a contract that made express reference to the prospectus was sufficient for Article 25 purposes. The publication of the prospectus on the website received no more than a passing mention (in [11]) of the judgment. Nor is such a line of reasoning evident in the Advocate General’s opinion.
67. Rather, referring to *Salotti*, the ECJ emphasised that what mattered was the real consent of the parties: the contract signed by the parties needed to make express mention of acceptance of the EJC or to contain express reference to the prospectus. Further, the ECJ treated the position of a third party buyer in the secondary market differently: the EJC would only satisfy Article 25 if, amongst other things, the third party had the

opportunity “to acquaint himself with the prospectus containing that clause” (see [37]). This serves to emphasise the lack of need of any positive communication in the case of the direct purchaser who signed up to terms and conditions containing an EJC.

68. PIFSS relies heavily on *Höszig*, a decision delivered only a few months after the judgment in *Profit Investment*. In *Höszig* the ECJ commented on both *Salotti* and *Profit Investment* as follows:

“39. As regards a situation such as that at issue in the main proceedings, in which the jurisdiction clause is stipulated in the general conditions, the Court has already held that such a clause was lawful where the text of the contract signed by both parties itself contains an express reference to general conditions which include a jurisdiction clause (see, to that effect, judgments of 16 March 1999 in *Castelletti* [1999] I.L.Pr. 492, [13], and 20 April 2016 in *Profit Investment SIM* EU:C:2016:282, [26] and the case law cited).

40. This applies, however, only in case of an explicit reference, which can be controlled by a party applying normal diligence and where it is established that the general conditions containing the jurisdiction clause was actually communicated to the other contracting party (see, to that effect, [*Salotti*] [12]).”

69. Whether or not it is helpful to refer to these comments as *obiter*, as the Judge did, *Höszig* cannot bear the weight attributed to it by PIFSS. First and most obviously, the need (or otherwise) for communication with a counterparty was not an issue before the court. It was common ground that the relevant terms and conditions in *Höszig* had been communicated pre-contractually for the purpose of the questions before the court. The questions before the ECJ were unrelated to the need (or otherwise) for communication or the formal validity requirements under Article 23, but rather focussed on i) whether or not *Höszig Kft* could rely on Rome I (Regulation 593/2008 of 17 June 2008 on the law applicable to contractual disputes) and ii) the correct interpretation of Article 23, specifically whether or not an EJC which designated the courts of Paris as the courts with jurisdiction met the requirements of Article 23.
70. Secondly, the ECJ referred in [39] to *Profit Investment* without demur (and without any reference to any publication on the Irish Stock Exchange website). Thirdly, whilst in [40] it referred to *Salotti*, it did so by reference to [12] of *Salotti* which, as set out above, addressed only the second of the two scenarios (scenario (B)) before the court.
71. For these reasons, whilst respecting the need to adopt a strict approach to the requirements of Article 23, the Judge was correct to reach the conclusion that he did, namely that, as a matter of EU law, no requirement of actual communication exists where the counterparty has signed a contract that includes express reference (and hence agreement) to the GBCs which contain the EJC. In short, real consent does not necessarily require actual communication of a particular term; express agreement to incorporation can be enough. As Professor Briggs put it in *Civil Jurisdiction and Judgments* (7<sup>th</sup> ed) at 12.06, referring to *Salotti* and *Höszig* amongst other authorities:

“If a party signs a document which refers plainly enough to trading conditions which themselves contain an agreement on jurisdiction, this should satisfy the requirements of [Article 23]...”

72. This analysis is consistent with a clear line of English appellate authority to which it is appropriate now to turn.
73. First in time comes *Crédit Suisse Financial Products v Societe Generale d’Enterprises* [1997] CLC 168 (“*Crédit Suisse*”), where *Salotti* was considered in some detail. Saville LJ stated (at [171H] to [172A]) that the question was simply whether the express reference in the written contract in the instant case amounted to a clear and precise demonstration that the clause conferring jurisdiction was the subject of a consensus between the parties. He was in no doubt that it did. There was nothing in *Salotti* that “begins to suggest” that in such circumstances there was no consensus until the counterparty had been supplied with a copy of the clause. Whilst it was true that in *Salotti* the conditions were printed on the back of the contract, that was not enough to satisfy Article 23 (since no “guarantee” of real consensus was thereby given). Saville LJ went on (at 172C):

“It seems to me to be clear from the judgment in *Salotti* that the court considered that a “guarantee” of real consent does exist where there is an express reference in the written contract itself by way of incorporation of other written terms which include a clause conferring jurisdiction....given such an express reference, it seems to me self-evident that the profferee of the written contract, by signing without reservation, has agreed in writing the incorporated terms (and thus the clause conferring jurisdiction) for the simple reason that the very words of the signed written contract itself are to that effect....”

74. In his view, the consensus was “incontrovertibly established by the express reference in the written contract itself” (see [173A]).
75. The same approach was adopted in *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140; [2007] 1 WLR 2175 (“*7E*”). Again, the court rejected the suggestion that the ECJ’s answer to scenario (B) in *Salotti* meant that the GBCs in question must actually have been made available to a counterparty in scenario (A). The fact that the counterparty did not have a copy of the terms and conditions (or the EJC) in its possession was not relevant. As Sir Anthony Clarke MR put it at [43]:

“...The contract here, comprising the quotation signed by the defendant, which expressly referred to the terms and conditions including the German jurisdiction clause, and the purchase order accepting the quotation which was signed by the claimant amounts to a writing which complies with article 23.”

76. Finally, the formal validity requirements of Article 23 were considered again in *Sherdley v Nordea Life and Pension* [2012] EWCA Civ 88; [2012] 2 All ER (Comm) 725. At [48] Rix LJ approved, amongst others, the following propositions of law:

“...(1) Where the jurisdiction clause is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of art 23 is fulfilled only if the contract contains an express reference to those general conditions: see [*Salotti*]... (2) Where there is an express reference in the contract itself by way of incorporation of other written terms which include a clause conferring jurisdiction, art 23 is fulfilled even if the party signing did not have a copy of those conditions in their possession or readily available or did not understand what was incorporated: see *Crédit Suisse*... (3) It is not necessary for there to be a specific reference to the jurisdiction clause itself for the requirements of art 23 to be fulfilled: see [7E]...”

77. This line of reasoning is compelling; in particular it respects the need for a guarantee of consensus and is an approach which promotes certainty.
78. In any event, even if one were to disagree with these English decisions, it cannot be said that they are clearly inconsistent with later EU jurisprudence, and in particular with *Höszig*. Amongst other things, as set out above, *Höszig* did not grapple with the (communication) point at issue. This court should accordingly not depart from what is a well-established line of English dicta (see *Condé Nast Publications Limited v Commissioners of HM Revenue & Customs* [2006] EWCA Civ 976 at [44]; *O’Byrne v Avenir Pasteur MSD Ltd* [2007] EWCA Civ 996 at [34] and [35]; *Actavis UK Ltd v Merck & Co Inc* [2008] EWCA Civ 444 at [107]).
79. Given this conclusion, it is not necessary to consider the further submissions:
- i) For PIFSS, that the Judge was wrong to find (as a matter of scope) that the EJC’s communicated to PIFSS in 2012 were wide enough to cover future disputes arising out of events occurring both before and after the EJC’s became binding; and
  - ii) For Banque Pictet (and Mr Bertherat), that the Judge was wrong to conclude that in any event they did not have the better of the argument that Banque Pictet’s GBCs were in fact provided to PIFSS at the outset in 1998. (Such a proposition would in any case have faced formidable hurdles. There is no readily identifiable flaw of law or principle that might properly undermine the Judge’s conclusion based, as it was, on the absence of any kind of record of an introductory meeting at which the GBCs would normally have been handed over. As the Judge said, given the pre-existing relationship with Mr Al Rajaan, it was perfectly possible that no such meeting took place. Acknowledgments in account opening documents, whilst contractually relevant, did not provide a sound basis on which to conclude that the GBCs had in fact been provided.)

#### **J. Article 23: material validity requirements**

80. Article 23 requires the parties to have agreed that the nominated court is to “have jurisdiction to settle any disputes which have arisen, or which may arise in connection with a particular legal relationship”. This is often referred to as “the material validity

requirement”, an issue again to be determined by reference to autonomous EU legal principles.

81. PIFSS contends that the Judge was wrong to hold that the substantive requirements of Article 23 were met in relation to the Pictet/Mirabaud bribery and accessory claims. It is said in particular that he erred in holding that there was sufficient proximity between those claims and the legal relationship(s) in relation to which the EJC's had been agreed such as to satisfy the requirement for the relevant disputes to have arisen “in connection with a particular legal relationship”. PIFSS’ case is that the only relevant “legal relationship(s)” were the contractual ones.
82. When determining whether or not the material validity requirement is met, a court is required to:
  - i) Identify the particular legal relationship in connection with which the exclusive jurisdiction clause was agreed;
  - ii) Ask whether the dispute in question arose from that legal relationship.
83. The following relevant general propositions of law can be identified on the authorities:
  - i) The requirements of Article 23 must be strictly construed: see *Salotti* at [7];
  - ii) The material validity requirement aims to limit the effect of an agreement conferring jurisdiction to disputes originating from the legal relationship in connection with which the agreement was concluded. It seeks to prevent a party from being surprised by the referral to a specified court of other disputes which arise in the relationships which it has with the other party but which may originate in relationships other than that in connection with which the agreement conferring jurisdiction was concluded: see the leading decision in Case C-214/89 *Powell Duffryn plc v Petereit* [1992] IL Pr 300 (“*Powell Duffryn*”) (at [31]);
  - iii) The question of whether a party would be taken by surprise is not a legal test but serves as a useful cross-check: see *Etihad Airways PJSC v Flöther* [2019] EWHC 3107; [2020] 2 WLR 333 (“*Etihad*”) at [125];
  - iv) The connection requirement is largely a factual matter to be assessed by reference to all available background material: see *Etihad* at [130] and [131];
  - v) The relevant question is whether the dispute has arisen from the legal relationship in connection with which the jurisdiction agreement was concluded. This is not the same as asking whether the dispute is a claim which arises under the terms of contract which create the legal relationship: see *Etihad* at [133];
  - vi) Where there is more than one contract between the parties, each contract will (or at least may) constitute a “particular legal relationship”: see for example *Deutsche Bank v Petromena*, *Deutsche Bank v Comune di Savona* [2018] EWCA Civ 1740 at [2] to [4];
  - vii) If relevant, a court will look at the “package of agreements” for the purpose of determining the particular legal relationship: see *Altera Absolute Global*



*Masterfund v Sapinda Invest SARL* [2017] EWHC 871 (Comm); [2018] 1 All ER (Comm) 71 at [25] and [26];

- viii) “Status” relationships (for example a banker/customer relationship) do not without more qualify as “particular legal” relationships. But if a particular agreement is concluded within the context of a wider legal relationship, it may be appropriate to look at that context in considering whether the dispute arises from the legal relationship in connection with which the agreement was concluded: see for example *Etihad* at [149] and [150].
84. The Judge addressed the relevant legal principles applicable to the material validity requirement in detail at [198] to [208] of the Judgment. PIFSS makes no criticism of those paragraphs as such, nor does it challenge the correctness of the authorities referred to therein, including *Etihad*. Rather what is said is that the Judge overlooked the basic principle of strict construction and so took an unduly broad approach. PIFSS submits in particular that:
- i) The requirements of Article 23 are aimed at limiting the effects of exclusive jurisdiction clauses. A court should only be concerned with disputes originating from the particular legal relationship. The Judge erroneously concluded that the EJCs extended to the totality of the legal relationships arising from the parties’ dealings. The suggestion that by opening an account the EJCs thereby came to govern disputes arising out of a relationship between the Respondent Banks and third parties is simply not a tenable reading as a matter of European law. Specifically, a bank account which is subject to GBCs does not in any way necessitate a broadening of the legal relationship as a result of those terms and conditions. This is particularly so with regard to the Mirabaud Scheme bribery and accessory claims where the alleged secret commissions did not pass through, nor were they held in, PIFSS’ Mirabaud bank account;
  - ii) The Judge misunderstood the effect of the ECJ’s decisions in Case C-352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* EU:C:2015:335; [2015] QB 906 (“*CDC*”) and Case C-595/17 *Apple Sales International v MJA* Case 17 EU:C:2018:854; [2019] CMLR 1 (“*Apple Sales*”). Specifically, he failed to draw the necessary analogy with *CDC*, an authority which is said to dictate that a court must adopt a narrow approach to the question of material validity. He also erroneously distinguished the facts of *Apple Sales*.
85. As for PIFSS’ overarching submission, it is not right to say that the Judge overlooked the basic principle of strict construction. He was clearly alive to the need for any derogation from Article 2 to be approached on a restrictive basis. Thus, by way of example, in the context of Article 23 he cited the material parts of *Salotti* in full (at [111] of the Judgment).
86. At the same time, Article 23 recognises the importance of party autonomy. Nothing in *Salotti* or *Powell Duffryn* restricts the parties’ ability to choose the scope of the legal relationships to which a particular exclusive jurisdiction clause applies, or the Court’s ability to consider the wider context (where relevant). The Judge correctly held that the legal relationship to which the EJCs related need not be confined to the contract containing the EJC itself. He was also careful not to equate a “status” relationship with a legal relationship.

87. As set out above, the EJs into which the parties chose to enter were in very broad terms. In order to determine the “particular legal relationship” the Judge carried out a meticulous analysis of the individual EJs. That was entirely logical in the context of a search for the legal relationship in connection with which they were entered into. He was entitled, taking account of their terms, to conclude that the particular legal relationship for the purpose of Article 23 was in each case the totality of the legal relationships between the parties. PIFSS suggests that this definition lacks the necessary specificity. However, it is important not to place undue emphasis on the word “particular”, which does no more than signify the need to identify a relevant legal relationship. Moreover, it was unnecessary to produce a more particularised analysis by reference to discrete legal relationships, given the breadth of the EJs.
88. As for the question of connection between the disputes and the EJs, as set out above, PIFSS relies heavily on *CDC* and *Apple Sales*. In *CDC* the ECJ held that claims for damages arising out of cartel arrangements contrary to Article 101 of the Treaty of the Functioning of the EU (“TFEU”) (arrangements between undertakings) did not arise in connection with the particular legal relationship for the purpose of Article 23 of Brussels Regulation I. In *Apple Sales* the ECJ held that a claim by a distributor against its supplier for breach of Article 102 of the TFEU (abuse of dominant position) did arise in connection with a particular legal relationship for the purpose of Article 23 of Brussels Regulation I. The exclusive jurisdiction clause was held to apply even though it did not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law.
89. The reasoning in these cases does not assist PIFSS. Each is illustrative of the application of already established principles to the facts (as was remarked in *Etiihad* at [126], referring to *CDC*). Whether or not the requirements of Article 23 are met in any case turns on the facts of that case: see for example Advocate General Wahl’s opinion in *Apple Sales* (at [33]); argument by analogy with the detail of other cases is unlikely to be helpful, and such cases are not to be treated as binding factual precedents.
90. *CDC* related to a dispute characterised by a far-reaching cartel agreement which distorted competition throughout the internal hydrogen peroxide market. The cartel’s target was the market as a whole, not any specific third party further down the supply chain. There was no direct link between the cartel agreement and the subsequent contracts into which the relevant claimants entered containing the exclusive jurisdiction clauses in question. The entire claim in *CDC* could have been brought against any of the cartelists, even those with whom the claimant had no contractual relationship.
91. The ECJ in these circumstances reasoned:
- “69...the referring court must, in particular, regard a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of the other’s participation in an unlawful cartel.
70. Given that the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause and that that undertaking had no knowledge of the unlawful cartel at that time, such litigation cannot be

regarded as stemming from a contractual relationship. Such a clause would not therefore have validly derogated from the referring court's jurisdiction."

92. PIFSS contends that, by analogy with *CDC*, i) the tortious claims arise in relation to activities between the Respondents and third parties and ii) PIFSS also could not reasonably foresee the present litigation at the time that it entered into the EJCs. Thus, adopting the correct narrow approach under EU law, it is said that the necessary proximity did not exist.
93. However, the facts of this case are wholly different: there are direct and immediate links between the Pictet and Mirabaud Schemes and the relationship between PIFSS and the Respondent Banks. Thus, for example, the Pictet Scheme is said to have involved secret commissions paid in order to induce the formation or placement of investments pursuant to contractual relationships between PIFSS and Banque Pictet/Pictet Europe. The Judge was not impermissibly transforming non-contractual dealings into a legal relationship: as the Amended Consolidated Particulars of Claim demonstrate and as considered in detail by the Judge, the accounts are front and centre of the relationships between the parties. (It can also be noted in this context that the Judge found that, as a matter of Swiss law, the breaches alleged by PIFSS could have been pleaded as breaches of contract.) The fact that the bribes did not pass through the accounts is not to the point; what matters is the context of the activities that created the stream of commissions forming the subject of the Pictet/Mirabaud bribery and accessory claims.
94. The ECJ in *Apple Sales* reached a different result on the different facts of that case. Having referred to *CDC*, the ECJ reasoned as follows:

“28...while the anti-competitive conduct covered by Article 101 FEU, namely an unlawful cartel, is in principle not directly linked to the contractual relationship between a member of that cartel and a third party which is affected by the cartel, the anti-competitive conduct covered by Article 102 FEU, namely the abuse of a dominant position, can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms.

29. It must therefore be stated that, in the context of an action based on Article 102 FEU, taking account of a jurisdiction clause that refers to a contract and “the corresponding relationship” cannot be regarded as surprising one of the parties within the meaning of the case law...”
95. There is nothing in *Apple Sales* as a matter of principle that cuts across the Judge's approach to the connection requirement on the facts of this case. There can be no criticism of the fact that the Judge noted in particular the reference to “materialis[ation]” in the context of sufficiency of connection. The facts on which PIFSS relies to make its claims are inextricably bound up in the banker/customer relationships governed by the EJCs: the disputed facts materialised in the contractual relations between the parties, or, in the language of *CDC*, stemmed from those contractual relations, deriving as they are alleged to have done from investments placed by PIFSS with or through the Respondent Banks and /or based on knowledge acquired as PIFSS' bankers.

96. It can also be noted that in *Apple Sales* the ECJ made clear that there is no need for the jurisdiction clause in question to make express reference to the particular type of dispute that has arisen in order for the dispute to fall within scope (see [30]). That is an important point to consider when it comes to PIFSS' suggestion that, absent reasonable foreseeability, the relevant nexus does not exist. That submission comes close to saying that it is necessary for the parties to foreshadow in terms and contemplate the relevant alleged conduct, here fraud; it is an approach that would undermine the function of exclusive jurisdiction clauses (as identified by Advocate General Wahl in his opinion in *Apple Sales* at [57]).
97. In short, there is no proper basis for overturning the Judge's conclusion that the proximity requirement was met, both as a matter of principle and fact.
98. Finally, standing back and applying the cross-check identified in the authorities, it cannot sensibly be said that PIFSS would be taken by surprise by the referral of the Pictet/Mirabaud bribery and accessory claims against the relevant Respondents to Switzerland, not least given the breadth of the EJs in question and their continued use by the parties over many years.
99. For these reasons, I would dismiss PIFSS' challenge to the Judge's findings on the material validity requirement.

#### **K. The wider accessory claims**

100. It is convenient to deal at this stage with the challenge by those Respondents entitled to rely on the EJs to the Judge's conclusion that the EJs, as a matter of construction under Swiss (or Luxembourg) law, did not extend to cover the wider accessory claims. If the challenge is made good, the Article 6 issues relating to those Respondents fall away: it is common ground, reflecting the respect afforded to party autonomy, that jurisdiction established under Article 23 prevails over any jurisdiction that might be established on grounds of expediency under Article 6.
101. The relevant Respondents contend in summary that, having correctly recognised that what was alleged by PIFSS were unitary schemes arising out of continuing courses of conduct, the Judge was then wrong to conclude that they did not have the better of the argument that the wider accessory claims also fell within the EJs. Knowledge of the Pictet and Mirabaud Schemes was pleaded as a significant element of the knowledge necessary for the wider accessory claims. There was thus a clear connection between the Pictet/Mirabaud bribery and Pictet/Mirabaud accessory claims on the one hand, and the wider accessory claims on the other, to which the Judge's reasoning allegedly "did not give sufficient weight". A difference in the source of the monies should not have made any difference to the answer to the question of whether or not the claims fell within the EJs. It is said that commercial parties in the position of PIFSS and the Respondent Banks would, viewed objectively, have expected all disputes relating to their relationship to be subject to the contractually stipulated court. Reliance is also placed on Articles 398 and 400 of the Swiss Code of Obligations ("SCO") to the effect that provision of the alleged (wider) accessory assistance would give rise to concurrent contractual claims for breach of the contractual duties to act in good faith and to account arising under those provisions.

102. These submissions are not persuasive. There is no challenge to the Judge’s findings on Swiss and Luxembourg law. His reasoning in applying those principles of construction to the facts was both clear and principled. He did recognise that it was “possible” in relation to the Pictet and Mirabaud Schemes to view the allegations relating to the Pictet/Mirabaud bribery, Pictet/Mirabaud accessory claims and the wider accessory claims as “concerning a single ongoing course of conduct” involving Mr Al Rajaan and his accomplices. Further, to the extent that the alleged course of conduct involved the agreement and implementation of each Scheme, and the associated laundering of commissions thereby obtained, it was connected with the relevant contractual relations with PIFSS. But that did not mean that the element of the course of conduct involving the laundering of money from other schemes was connected in any relevant sense with those contractual relations.
103. Nor did the fact that alleged knowledge from the Pictet and Mirabaud Schemes contributed to the Respondents’ alleged knowledge of the nature of wider money laundering schemes mean that the wider schemes were relevantly connected to the relevant contractual relations. In any event, PIFSS’ allegations of knowledge for the purpose of the wider accessory claims went beyond knowledge gained from the Pictet and Mirabaud Schemes, extending for example to alleged “blind eye” dishonesty and failures to make enquiries about funding sources, companies and accounts, or, in the case of Banque Mirabaud, participation in the MAN Scheme (albeit only from November 2001 onward). The Judge was not persuaded by any reliance on Articles 398 and 400 of the SCO, and there has been no meaningful attempt to undermine his approach as a matter of Swiss law, namely that the Articles in question are rooted in the activities of the Respondent Banks as agents to which the wider accessory claims did not relate.
104. The Judge’s conclusion that the relevant Respondents did not have the better of the argument that there was any sufficient connection between the wider accessory claims and the relevant banking relationships such as to fall as a whole within the scope of the EJC’s should therefore stand. The wider accessory claims did not relate to secret commissions paid in order to induce the formation or placement of investments pursuant to contractual relationships between PIFSS and the Respondent Banks, nor commissions that were funded from or paid by reference to such investments, or to remuneration arising from such investments.

#### **L. Article 6: correct approach in principle**

105. The scene is now set for consideration of the Article 6 issues: the Pictet/Mirabaud bribery and Pictet/Mirabaud accessory claims against the Respondent Banks, Mr Bertherat, Mr Mirabaud (in relation to pre-2010 claims) and Mr Fauchier-Magnan are all to be heard in Switzerland. The question is where the wider accessory claims against these Respondents should be heard, and where all of the claims against Mr Amouzegar, Mr Mirabaud (in relation to post-2010 payments) and Mr Argand should be heard.
106. There is rightly no criticism of the Judge’s exposition (at [409] to [426]) of the general principles relating to Article 6, which it is not necessary in the circumstances to repeat. The Judge referred to Recitals 11, 12 and 15 and numerous authorities, including Case C-98/06 *Freeport v Arnoldsson* EU:C:2007:595; [2007] ECR I-8319; [2008] QB 634 (“*Freeport*”); Case C-103/05 *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827 (“*Reisch Montage*”); *Madoff Securities International Ltd v*

*Raven* [2011] EWHC 3102 (Comm); [2012] ILPr 15; *Lungowe and others v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045; *Kolomoisky; Terre Neuve SARL and others v Yewdale Ltd and others* [2020] EWHC 772 (Comm); Case C-145/10 *Painer v Standard Verlags GmbH and others* EU:C:2013:138; [2012] ECDR 6 (“*Painer*”) and *Linuzs v Latmar Holdings Corp* [2013] EWCA Civ 4; [2013] ILPr 19 (“*Latmar*”).

107. The controversy arises out of the Judge’s approach to an issue which has not been the subject of express consideration in any of the EU or English authorities, namely the correct operation of Article 6 when there are overlapping claims i) against the same defendant some of which must be considered in that defendant’s state of domicile pursuant to an EJC under Article 23 and ii) against connected claims against another defendant. In a straightforward case the court considering the application of Article 6 is confronted with an allegation of conspiracy against two defendants, one of whom is domiciled here and one of whom is domiciled in another LC state. Here, the complicating factor is that there are claims against the Pictet and Mirabaud Scheme Respondents that are closely related to the wider accessory claims which must be heard in Switzerland pursuant to EJCs. Switzerland is also where each of the Article 6 Respondents (save for Pictet Europe) is domiciled.
108. The Judge’s approach was to compare the position on the one hand, if the Court took jurisdiction over the wider accessory claims and on the other, if it did not. In doing so, he took account of the proceedings that he assumed will take place in Switzerland. He rejected PIFSS’ submission that he should focus only on the risk of inconsistent judgments as between Mr Al Rajaan on the one hand and the Article 6 Respondents on the other, declining to engage in what he described as a form of “wilful blindness as regards the existence of the [EJCs]”.
109. PIFSS contends that in doing so the Judge seriously misdirected himself as a matter of law. Although the Judge noted that the wording of Article 6 had been modified in light of *Kalfelis*, it is said that he failed to recognise the significance of that fact, a failure which infected the rest of his analysis. Under the original text, the only question was whether the person in question was one of a number of defendants being sued in the state of domicile of one of them. The qualification by amendment did not alter the basic nature of the jurisdiction conferred under Article 6. It was an amendment limited to preventing abuse of the Article 6 jurisdiction. The existence of yet further actions (whether against the same or other parties) was irrelevant under either wording. The language of close connection applies to the anchor claim and the claim brought against the other party which is under consideration: the only question is whether those two claims are closely connected. PIFSS submits that authorities such as *Reisch Montage, Freeport, CDC, Kolomoisky* and *Terre Neuve* confirm that the only question is a risk of irreconcilability on this narrow basis. There is no broad balancing exercise to be carried out; issues such as inadmissibility (*Reisch Montage*) or settlement (*CDC*) are left out of account. This is also said to be a position supported by the decision in *JSC Aeroflot Russian Airlines v Berezovsky and others* [2013] EWCA Civ 784; [2013] 2 CLC 206 (“*Aeroflot*”), a case which PIFSS contends the Judge was wrong to distinguish from the present facts.
110. The Judge’s interpretation is said to result in exclusive jurisdiction clauses having practical effects well beyond the scope of their application, with the collateral effect of conferring on them a “gravitational pull” which is inconsistent with the proper

interpretation of Article 23. PIFSS submits that it undermines the drive for legal certainty that motivates the strict approach to Article 6 identified in the authorities.

111. PIFSS also suggested (in oral submission) that for Article 6 purposes only actual, and not merely potential, proceedings are properly to be taken into account.
112. Dealing with this last point first, there is no justification for such a restrictive approach. Article 6 looks at the risk of irreconcilable judgments; in doing so there is no reason why it cannot look ahead (on an informed basis) for the purpose of what is a hypothetical exercise. (It can be noted here, for example, that PIFSS has taken steps in Switzerland, where Mr Amouzegar is domiciled, to preserve limitation for claims against him there, including by serving a demand in the same amount as the pleaded claim against him in these proceedings.) Further, decisions such as *Alfa Laval Tumba AB and another v Separator Spares International Ltd and others* [2012] EWCA Civ 1569; [2013] 1 WLR 1110 (“*Alfa Laval*”) (at [36]) confirm the relevance of future as well as extant claims.
113. In this context the Judge recorded expressly (at [408]) that, in the absence of a binding undertaking by PIFSS to the contrary, he would assume that PIFSS would pursue abroad those claims against the Respondents that it was required to by virtue of the EJs. There was no challenge to the correctness of this approach.
114. I turn then to the central issue of autonomous EU law relating to the correct interpretation of Article 6. As PIFSS accepts, the Judge did not ignore the background to the amendment to Article 6 following *Kalfelis*. At [412] he referred expressly to it. It is not right to say that he failed properly to consider its significance. The present circumstances were not under consideration in *Kalfelis*. The Judge rightly stated at [430] that there was no indication in the wording of Article 6 or the legislative recitals that the legislator had in contemplation at all a situation such as arises in the present case, where a court contemplates assuming Article 6 jurisdiction over a defendant against whom related claims must, however, be pursued in another member state, which is also its state of domicile, by reason of an Article 23 jurisdiction agreement. However, as he went on to say, it does not follow that the legislator must be assumed to have taken the view that, were the situation to arise, such related claims would be irrelevant.
115. One therefore looks, as the Judge did, to the object and purpose of Article 6 in construing its wording. A purposive approach to the interpretation of EU legislation is well-established: see for example Case C-199/08 *Eschig v UNIQA Sachversicherung AG* [2009] ECR I-08295 (at [38]):

“It should be recalled, at the outset, that according to the settled case law of the Court, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part...”
116. Adopting this approach, first, there is nothing in the language of Article 6 itself that dictates that what is or is not “expedient” must be judged solely by reference to the nature of the degree of the connection with the claims against the anchor defendant. Significantly, the reference to “separate proceedings” is not limited in any way.

117. Secondly, the justification for assuming jurisdiction under Article 6 (as a derogation from the fundamental policy that defendants should be sued in their state of domicile) is the desirability of avoiding concurrent proceedings and irreconcilable judgments between different member states: see for example the Jenard report which stated:

“Jurisdiction derived from the domicile of one of the defendants was adopted by the Committee because it makes it possible to obviate the handing down in the Contracting States of judgments which are irreconcilable with one another...”

The intention behind the Convention is to obviate cases of refusal of recognition and enforcement on the basis of Articles 28 and 34 and so, as already stated, to promote the free movement of judgments...”

118. The broader objectives underlying the legislation include the “sound” or “harmonious” administration of justice (see for example Recitals 12 and 15), an objective which Article 6 was designed to meet (as confirmed in *Painer* at [77]).
119. An approach which permits a person to be sued as a co-defendant in one member state on certain claims, in circumstances where that person must be sued in another member state on claims with a close factual connection to them, offends that objective. PIFSS’ construction, which requires the national court to ignore the other claims to be brought in another member state, can be said to frustrate, rather than accomplish, the legislative purpose: it creates a risk of inconsistent factual findings in relation to the same defendant in different member states.
120. As the Judge said, depending on the facts, it may well not be expedient to hear and determine claims against the anchor defendant and those against a proposed Article 6 defendant together in order to avoid the risk of irreconcilable judgments from separate proceedings in respect of those claims if to do so would create a risk of irreconcilable judgments arising from separate proceedings against the proposed Article 6 defendant itself in respect of closely connected claims.
121. One can test the point of principle by reference to the examples of Mr Mirabaud and Mr Argand. Taking Mr Mirabaud first, the claims against him in respect of payments under the Mirabaud Scheme whilst he was a partner (up to 2010) relate to 24 payments. Between 2010 and 2012 there were only four further payments. On PIFSS’ approach, the Court would have to ignore the fact that the claims against him in respect of the first 24 payments had to proceed in Switzerland (because of the EJC’s) when considering whether or not it was expedient for the post-2009 claims against him to be heard in England. The position of Mr Argand equally demonstrates the absurdity of PIFSS’ approach, which would require the fact that proceedings against Banque Mirabaud and Mr Mirabaud and Mr Fauchier-Magnan were to proceed in Switzerland to be ignored. Mr Argand, the target defendant least connected to the anchor defendant, would be sued in London, whilst the entity and individuals with whom he was intimately connected, would proceed elsewhere. This would give rise to the most obvious and serious risk of irreconcilable judgments.
122. The relevant authorities either positively support or do not undermine the Judge’s analysis. So for example, as already stated, *Kalfelis* did not address the circumstances



arising here; but the court's reasoning makes clear that the object of Article 6 is the avoidance of irreconcilable judgments between member states. *Reisch Montage*, properly read, does not establish a general principle that the court must look only at the state of play at the time that claims are issued; rather, matters of national law, including the admissibility of claims under national law against an anchor defendant, are to be left out of account when considering the operation of the autonomous rules of the LC. In *Freeport* (at [41]) the ECJ described the court's task as follows:

“It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case-file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court.”

123. This is, at least, consistent with an approach which takes into account all factors relevant to the question of expediency, to be assessed by reference to the risk of irreconcilable judgments. In *Latmar* the court cited this passage in *Freeport*, stating (at [44]):

“..it is necessary for the court to examine [the]...essence [of the claims] in the relevant factual context and assess whether their nature and interrelationship are such that, if tried separately, there would be a risk of essentially incompatible judgments, so as to make it expedient in the interests of justice for them to be heard together.”

124. In addition, there are two further authorities to which the Judge's attention was not drawn: *Research in Motion UK Ltd v Visto Corporation* [2008] EWCA Civ 153; [2008] 2 All ER (Comm) 560 (“*Research in Motion*”) and *Alfa Laval*. Both support his analysis, in particular *Alfa Laval*.

125. The court in *Research in Motion* considered the application of Article 28 of the 2001 Brussels Regulation (concerning *lis alibi pendens*), and so a degree of caution is required. However, the relevant wording is materially similar, namely:

“(3) For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.

126. At [37] Mummery LJ stated:

“...[the] effect [of Article 28] is not entirely mechanical. It requires an assessment of the degree of connection, and then a value judgment as to the expediency of hearing the two actions together...in order to avoid the risk of inconsistent judgments. It does not say that any possibility of inconsistent judgments means that they are inevitably related. It seems to us that the article

leaves it open to a court to acknowledge a connection, or a risk of inconsistent judgments, but to say that the connection is not sufficiently close, or the risk is not sufficiently great, to make the actions related for the purpose of the article...”

127. Thus, the consideration of expediency involved “a value judgment”, and the mere risk of inconsistent judgments was not in itself sufficient to require a stay under Article 28 to be granted.
128. *Alfa Laval* concerned the Brussels 1 Regulation, Article 6(1) of which was in materially identical terms to Article 6. Briggs J (as he then was) at first instance treated the comments of Mummery LJ above as applicable, stating (at [34]) that for Article 6 purposes a “similar value judgment” fell to be carried out. (Whilst the first instance decision was overturned in the result, no issue was taken with this part of the reasoning.) More significantly, Longmore LJ, having found that Articles 18 and 20 mandated the bringing of (prospective) proceedings against a Polish defendant, Mr Jasikowski, in Poland, then considered the ramifications of that decision for the purpose of considering whether the (English) court should assume jurisdiction over the claim against another (Polish) defendant, referred to as “SSIP”. At [34] he referred to the “appropriate discretion” to be exercised in this regard and went on to conclude:
- “36. For myself, however, I cannot see that it would be expedient for proceedings against SSIP to be joined to what is effectively a dormant case against Mr Pacy when any proceedings against Mr Jasikowski have to take place in Poland. Joining SSIP in England will not avoid the risk of irreconcilable judgments because that risk will exist in any event once proceedings against Mr Jasikowski are begun in Poland. It is true that there are no current proceedings against Mr Jasikowski in Poland, but *Alfa Laval* have not said that they will not proceed against Mr Jasikowski there; on the contrary they have at all times expressly reserved their right to do so...”
129. The court clearly did not confine its consideration to claims against the anchor defendant, Mr Pacy, and the target defendant, SSIP, as PIFSS suggests that it was bound to do. Further, implicit in its reasoning (and its reference to the dormant nature of the proceedings against Mr Pacy) was a weighing up of the risk of inconsistent judgments on the two competing scenarios, one where the English court assumed jurisdiction and one where it did not. This mirrors precisely the approach in principle adopted by the Judge here.
130. Finally on the authorities, the Judge considered *Aeroflot* in detail at [437] to [442] of the Judgment. The fundamental point for present purposes is that Aikens LJ at [113] in *Aeroflot* was not laying down a general point of principle that the fact there were other proceedings more closely connected was irrelevant to a consideration of expediency under Article 6, and thus that anything other than a consideration of the claims against the anchor defendant and the target defendant was irrelevant. Rather, Aikens LJ was stating that the existence of other proceedings with a much closer connection was irrelevant on the facts of that case – because the risk of inconsistent judgments involving Holdings on the one hand, and Services and Cyprus on the other, was inevitable. Holdings could never be party to the proceedings in Lausanne against

Services or to the arbitration against Cyprus. The risk of inconsistency would not be reduced in any way by the English court declining jurisdiction over the claim against Holdings. Beyond that, as the Judge identified, there are material distinctions to be drawn between the facts of the two cases including in particular the fact that this case concerns the risk of inconsistent judgments against the same defendant, a feature which cuts acutely across the policy underlying Article 6 and the LC as a whole. Further, a finding against jurisdiction under Article 6 in *Aeroflot* would have resulted in the need for the claimant to sue a defendant in a further (fourth) forum.

131. In summary therefore, in circumstances such as those arising here, the national court considering expediency under Article 6 can take account of any risk created by the assumption of jurisdiction of irreconcilable judgments of the national court and the court chosen contractually by the parties through exclusive jurisdiction clauses. In this sense, and not unnaturally given the evaluative process inherent in the word “expedient”, there is an evaluative exercise to be carried out, namely an assessment of whether the acceptance of jurisdiction under Article 6 would increase or decrease the risk of irreconcilable judgments. This is not an impermissible *forum conveniens* analysis by the backdoor; rather it considers the question of expediency by reference to the touchstone of the avoidance of irreconcilable judgments so far as possible. It is correct, as PIFSS identifies, that this approach can be said to give “gravitational pull” to Article 23. There is nothing objectionable about that, given the respect to be accorded to party autonomy.
132. It follows from the above that the Judge’s approach under Article 6 as a matter of principle was correct.

#### **M. Article 6: application to the facts**

133. Beyond the challenge of principle identified and rejected above, PIFSS contends that the Judge failed to give any or sufficient weight to the fact that substantial litigation will be proceeding in the Court in any event against (at the time of the Judgment) some 22 other defendants, including in respect of the receipt and payment of bribes which are the subject of the wider accessory claims. It is said that the Judge ought to have held that it was expedient for all of the wider accessory claims to proceed in England notwithstanding the existence of related claims for the payment and laundering of bribes under the Pictet and Mirabaud Schemes proceeding abroad under Article 23. The allegations in relation to the central defendant, Mr Al Rajaan, will be heard in London, where all of the key factual issues will be considered. The example of the MAN Scheme is used as an illustration: the main protagonists of the MAN Scheme have submitted to the Court’s jurisdiction. Banque Mirabaud is alleged to have assisted Mr Al Rajaan in concealing receipt of the secret commissions derived from the MAN Scheme by laundering the proceeds through the intricate banking system said to have been established by Banque Mirabaud for him. The overlap and risk of inconsistent findings is said to be “extensive and fundamental”. The same considerations are said to apply with equal force to the wider accessory claims against Banque Pictet (by reference to other schemes, such as the UBP and Mombelli Schemes).
134. PIFSS’ challenge to the Judge’s conclusions under Article 6 faces very real difficulty. It amounts to no more than a challenge to what was a careful evaluative assessment by the Judge on the facts. There is no identifiable flaw in the Judge’s treatment of the question to be decided. Specifically, the Judge recognised the connection between

PIFSS' claims against Mr Al Rajaan and the wider accessory claims, and the resulting risk of irreconcilable judgments if the wider accessory claims were tried in Switzerland. Thus, by way of example, he stated at [450]:

“...there is an inevitable risk of irreconcilable judgments in relation to the bribery claims, resulting from PIFSS having sued Mr Al Rajaan and others in England but being bound to pursue the bribery claims in Geneva. It is true that assuming jurisdiction over the [wider] accessory claims under Article 6 would reduce the risk of irreconcilable judgments on those claims as between England and Switzerland...”

135. However, the Judge considered the risk of irreconcilable judgments if the wider accessory claims were divorced from the Pictet/Mirabaud bribery and Pictet/Mirabaud accessory claims to be much more significant. That was a value judgment that he was entitled to make on the material before him. He carried out the balancing exercise required of him. As he said in the context of the wider accessory claims against Banque Pictet, assuming jurisdiction would be “at the expense of creating a new risk of irreconcilable judgments as between the very same parties ...on the very same issues”. Those issues would extend to Banque Pictet’s own knowledge, thus (at [451]) he stated:

“...the result of this court assuming jurisdiction over the [wider] accessory claims would be that, even though only the Swiss court has jurisdiction over the Pictet Scheme bribery claims, the English court will in fact be invited to hear evidence...and make findings about Banque Pictet’s knowledge of the bribery claims and the Pictet defendants’ honesty; and there would be a risk of the English and Swiss courts reaching irreconcilable judgments as between PIFSS and Banque Pictet as to those issues. To my mind such a situation would be wholly inconsistent with the policy objectives pursued by Article 6 and the Lugano Convention as a whole. By contrast, if the bribery and accessory claims are all heard by the Geneva court, then that court will be able to reach a coherent set of findings about both Mr Al Rajaan’s actions and the knowledge and culpability of the Pictet defendants in respect of both the bribery and the accessory claims. Bearing in mind also that (a) Geneva is the place of domicile of Banque Pictet and its former partners and (b) as a derogation from the domicile rule Article 6 should be construed restrictively, the case for *not* assuming jurisdiction over the [wider] accessory claims is in my view compelling.”

136. This reasoning and the same considerations applied materially to the other relevant Respondents and cannot be impugned.
137. What the Judge was not required to do, but what PIFSS’ submissions come close to suggesting he should have done, is apply a *forum conveniens* test. As the Judge rightly observed (at [475]), that is not the exercise under Article 6, which demands a more specific analysis: the task was to evaluate the closeness of the connection between the claims and whether taking jurisdiction over the wider accessory claims would avoid, or at least materially reduce, the risk of irreconcilable judgments. The Judge’s reasoned

assessment was that the taking of jurisdiction by the Court would materially increase, and not reduce, the risk of irreconcilable judgments.

138. For these reasons, there is no legitimate basis for interference with the Judge's conclusion that the wider accessory claims against the Respondent Banks, Mr Bertherat, Mr Mirabaud (in relation to pre-2010 events) and Mr Fauchier-Magnan were not properly to be tried in the place where Mr Al Rajaan was domiciled (pursuant to Article 6). It was a conclusion which ensures consistency of result viz-a-viz each Respondent, in accordance with the LC's policy objectives. It has the added synergy that each of the Respondents (with the exception of Pictet Europe) is in fact domiciled in Switzerland where, by virtue of Article 2 of the LC, each should in principle be sued.
139. Before moving on to consider the position of the remaining Respondents, I mention briefly the submission for Mr Mirabaud that the Judge misapplied the uncontroverted expert evidence of Swiss law from Professor Maillard in concluding that Mr Mirabaud did not have the better of the argument that the post 2009 Mirabaud bribery and Mirabaud accessory claims against him fell to be covered by the Mirabaud EJs. There may well have been force in that challenge; however, given the conclusions reached above on Article 6, it does not arise for determination. Further and in any event, PIFSS accepts that the claim against Mr Mirabaud in respect of bribes paid after 2009 should be tried in Switzerland in the event that all of the claims against Banque Mirabaud and Mr Fauchier-Magnan are to be tried there.

#### **N. Mr Amouzegar and Mr Argand**

140. Once the arguments of principle are resolved, and it is established that all of the claims against the Respondent Banks, Mr Bertherat, Mr Mirabaud and Mr Fauchier-Magnan, including the wider accessory claims, are to be heard in Switzerland, there can be no serious criticism of the Judge's analysis of the individual positions of Mr Amouzegar and Mr Argand for Article 6 purposes. Indeed, PIFSS accepts that to be the case in respect of Mr Argand.
141. As for Mr Amouzegar, there is again no identifiable flaw in the Judge's assessment on expediency. Mr Amouzegar is central to the claims against Banque Pictet, all of which are to be tried in Switzerland. PIFSS seeks to attribute his actions to Banque Pictet which in turn is said to be vicariously liable for his actions. The Judge considered the particular nuances in Mr Amouzegar's position, including his alleged direct involvement (in conjunction with Mr Bertherat) with Mr Al Rajaan. He carried out a delicate balancing exercise, again recognising in terms that assuming jurisdiction would tend to decrease the risk of inconsistent judgments on issues as to what took place in the joint dealings between Mr Amouzegar and Mr Bertherat and Mr Al Rajaan but also, however, that at the same time it would increase the risk of inconsistent judgments on the same issues as between the claims against Mr Amouzegar and those against Banque Pictet and Mr Bertherat. It would also create "a serious risk of inconsistent judgments on critical issues of knowledge".
142. Having conducted the correct exercise, the Judge's overall conclusion "on balance" was that PIFSS did not have the better of the argument that the requirements of Article 6 were satisfied in respect of the claims against Mr Amouzegar either. There is no proper basis on which this conclusion could be overturned.

## **O. Pictet Bahamas and Pictet Asia**

143. PIFSS rightly accepts that, if the Judgment is otherwise upheld, the Judge's conclusion on *forum conveniens* for its claims against Pictet Bahamas and Pictet Asia cannot sensibly be impugned. The Judge set out the relevant legal principles comprehensively. It was for PIFSS to persuade the Court that England was clearly the forum in which the case could suitably be tried for the interests of all parties and for the ends of justice. The Judge considered the competing arguments in detail. PIFSS' claims against Pictet Bahamas and Pictet Asia are parasitic and contingent on its claims against Banque Pictet and Banque Europe. Those claims are to be heard in Switzerland. Further, the most relevant connecting factors pointed more strongly towards the Swiss courts being the appropriate forum. His conclusion that PIFSS had not shown that England was clearly the proper forum is unimpeachable.

## **P. Conclusion**

144. For these reasons, I would dismiss the appeal. The challenges raised by way of Respondents' Notices either do not arise for determination and/or are dismissed to the extent and for the reasons set out above.

145. On the issues of general legal importance:

- i) Article 23(1)(a): as a matter of EU law, there is no requirement of actual communication of an exclusive jurisdiction clause where the counterparty has signed a contract that includes express reference (and hence agreement) to general business conditions which contain the clause. "Real consent" for the purpose of Article 23 does not necessarily require actual communication of a particular term; express agreement to incorporation can be enough. There is in any event no sufficient basis on which to depart from well-established English appellate authority to this effect;
- ii) Article 6: in circumstances where a claimant is required (by Article 23) to sue a defendant in an overseas jurisdiction but seeks to pursue in this jurisdiction connected claims against the same defendant, the court's consideration is not limited to a consideration of the risk of irreconcilable judgments between the claim against the anchor defendant and the claim(s) against the proposed Article 6 defendant(s). Rather, where relevant, the court can consider the risk of irreconcilable judgments between the claims sought to be made against the proposed defendant and other claims in other member states. This is consistent with the policy objectives of Article 6, namely to facilitate the sound administration of justice, to minimise the possibility of concurrent proceedings and thus to avoid irreconcilable outcomes if cases are decided separately.

146. In practical terms, although the jurisdictional conclusions reached by the Judge were no more than the product of a correct application of the law to the facts, their consequences are not counter-intuitive. With the exception of Pictet Europe (which has agreed to submit to the jurisdiction of the Swiss courts), all of the Article 6 Respondents will be sued in the jurisdiction of their domicile, namely Switzerland. Given the parties' agreements to the EJC's, the risk of irreconcilable judgments so far as PIFSS is concerned is unavoidable; the position under the Judgment and Order is the best solution in all the circumstances, ensuring that there is at least consistency of outcome

so far as each Respondent is concerned, consistent with the policy that Article 6 is intended to promote.

**Lady Justice Simler :**

147. I agree.

**Lord Justice Peter Jackson :**

148. I also agree.

149. At paragraph 12 above, Lady Justice Carr has described the scale of costs already incurred at the hearing before the Judge. I only wish to add this in respect of the costs of the appeal.

150. Since our judgments were handed down in draft, the Respondents have applied for costs and interim payments. We find no reason to depart from the general rule that the losing party should bear the costs of the appeal.

151. As to interim payments, the Respondents each claim approximately 65% of their costs of this appeal. They assert that these collectively amount to some £4.4 million, and they accordingly request orders for interim payments of some £2.5 million. At the same time, we are told that the PIFSS' costs of the appeal amount to some £700,000. Accordingly, the total costs of this three-day appeal are said to exceed £5 million.

152. Since we are ordering a detailed assessment of the costs payable by PIFSS, the costs judge will (if the parties do not reach agreement) assess what costs are proportionate to the matters in issue, and will have the power to disallow or reduce costs that are disproportionate in amount: CPR 44.3(2)(a). In my view it is plainly arguable that expenditure on this scale on an appeal in an interlocutory application engages this rule, even in a case involving such substantial sums. We therefore make significantly reduced provision for interim payments in the sums that appear in the order below.

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**Order**

UPON the hearing on 13, 14 and 15 December 2021 of the Claimant's appeal ("the Appeal") from the Order of Mr Justice Henshaw dated 21 December 2020 (the "Order")

IT IS ORDERED THAT:

1. The Appeal is dismissed.
2. The Claimant is to pay the Respondents' costs of the Appeal on the standard basis, to be subject to detailed assessment if not agreed.
3. The Claimant is to make interim payments on account of the Respondents' costs of the Appeal in the following amounts:
  - a. Third, Eighth, Ninth and Tenth Defendant Respondents: £400,000 (in total);

- b. Fourth Defendant Respondent: £110,000;
  - c. Fifth Defendant Respondent: £110,000;
  - d. Eleventh Defendant Respondent: £300,000;
  - e. Twelfth Defendant Respondent: £110,000;
  - f. Thirteenth Defendant Respondent: £110,000;
  - g. Fourteenth Defendant Respondent: £110,000.
4. All the payments referred to in paragraph 3 above are to be made by 4pm on 16 February 2022.
  5. The Claimant is to pay interest on the Respondents' costs of the Appeal as follows:
    - a. At a rate of 1% above the applicable Bank of England base rate from the date of payment of each invoice until the earlier of the date on which payment is made by the Claimant or the date from which the Claimant is to pay interest at the rate applicable under the Judgments Act 1838 ("Judgments Act") as set out in paragraph 6(b) below;
    - b. At the rate applicable under the Judgments Act:
      - i. in respect of the interim payments on account referred to at paragraph 3 above, from 16 February 2022 until the date of payment; and
      - ii. in respect of all other sums, from 26 April 2022 until the date of payment
  6. The stay of detailed assessment proceedings provided for at paragraph 8 of the Order is lifted.
  7. The stay of paragraph 3 of the Order, as provided for at paragraph 14(A) of the Order, is lifted such that, in relation to each of the Respondents, the Claim Form and service of the Claim Form are set aside.
  8. The Appellant's application for permission to appeal to the Supreme Court be refused. Pursuant to CPR 40.2(4)(b), it is recorded that an appeal lies (with the Supreme Court's permission) to the Supreme Court, to which any application for permission should be made.

DATED: 26 January 2022

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## Annex

### The EJC's

#### **Banque Pictet**

During the relevant period, Banque Pictet used General Business Conditions (“GBCs”) incorporating an EJC. The GBCs were revised and updated from time to time pursuant to unilateral modification clauses, and as part of this process some changes were made to the text of the EJC's.

The October 1994 GBCs were in use when PIFSS opened its first account with Banque Pictet in 1998. The standard form of account opening document included the statement:

“This account is subject to the provisions of Swiss law and the General Business Conditions stipulated by Messrs Pictet & Cie. The undersigned hereby declares that he/they has/have taken due note of the latter.”

The GBCs themselves were headed “GENERAL BUSINESS CONDITIONS governing the relations between Messrs. PICTET & cie (the Bank) and their Clients”, and contained this clause:

#### “10. Applicable law and Jurisdiction

All Client/Bank relations are subject to Swiss law. The place of performance, the place of prosecution for debts and the exclusive jurisdiction for all proceedings are in Geneva; to this end, the Client hereby states to elect the offices of the Bank as special domicile. The Bank still retains the right, however, to institute proceedings at the domicile of the Client or before any other competent court of law.”

The style of the documents changed in August 2003 and March 2005. As from March 2005 the Global Custody account opening form stated that:

“The contractual relationship between the Client and the Bank is subject to Swiss law and is governed by the Global Custody Agreement as well as the Bank’s General Business Conditions (including their subsequent modifications, if any). The Client declares that he expressly agrees to the provisions contained therein.

The place of execution and the place of jurisdiction is Geneva.”

The GBCs introduced in August 2003 included these provisions:

#### “Article 1 - Scope

“These General Business Conditions shall govern the legal relationship between Pictet & Cie (hereinafter, "the Bank") and its Clients. They shall govern all existing business relationships

upon their taking effect, as well as new relationships established thereafter.

These General Business Conditions shall remain valid regardless of any other standard contractual forms or equivalent documents that the Client may have signed. Any subsequent amendments hereto shall also be binding upon the Client.

Reserved are:

- particular agreements entered into between the Bank and the Client;
- framework or master agreements among Swiss banks or with foreign banks;
- standard practices in certain areas of business, namely stock exchange transactions and matters handled through correspondents in other countries.”

...

#### Article 30 - Place of Jurisdiction

“Any dispute concerning the relationship between the Bank and the Client shall be subject to the exclusive jurisdiction of the Courts of Geneva, subject to appeal to the Swiss Federal Tribunal. The place for all debt enforcement proceedings shall be Geneva. The Bank shall nonetheless be entitled to initiate proceedings against the Client in any other court of competent jurisdiction.”

Minor changes of wording were made in September 2005. In September 2007 the “Place of Jurisdiction” provision was changed to read:

“The relationship between the Bank and the Client shall be governed exclusively by Swiss law.

Any dispute concerning the relationship between the Bank and the Client shall be subject to the exclusive jurisdiction of the Courts of Geneva. An appeal to the Federal Supreme Court of Switzerland is reserved.

The place of execution, of jurisdiction, and the place of any debt collection procedures shall be Geneva. The Bank shall nonetheless be entitled to initiate proceedings in the jurisdiction of domicile of the Client or in any other competent jurisdiction.”

Further, non-material, changes were made in August 2008.

The account opening form in use from June 2009 included the following wording:

“The contractual relationship between the Client and the Bank is subject to Swiss law and is governed by the Global Custody Agreement as well as the Bank’s General Business Conditions (including their subsequent modifications, if any). The Client declares that he expressly agrees to the provisions contained therein.

Any dispute concerning the relationship between the Bank and the Client shall be subject to the exclusive jurisdiction of the Courts of Geneva. An appeal to the Federal Supreme Court of Switzerland is reserved.

The place of execution, of jurisdiction, and the place of any debt collection procedures shall be Geneva. The Bank shall nonetheless be entitled to initiate proceedings in the jurisdiction of domicile of the Client or in any other competent jurisdiction.”

The GBCs in use from January 2011 included these provisions:

**“Article 1 - Scope**

These General Business Conditions shall govern the legal relationship between Pictet & Cie (hereinafter “the Bank”) and its Clients. They shall govern existing business relationships upon their taking effect, as well as relationships established thereafter.

They shall remain valid regardless of any other standard contractual forms or equivalent documents that the Client may have signed.

Further, these General Business Conditions shall remain subject to:

– particular agreements entered into between the Bank

and the Client;

– framework or master agreements among Swiss banks

or with foreign banks;

– standard practices in certain areas of business, namely stock exchange transactions and matters handled through correspondents in other countries.

**Article 34 - Governing law**

The relationship between the Bank and the Client shall be governed exclusively by Swiss law.

**Article 35 - Place of jurisdiction**

Any dispute concerning the relationship between the Bank and the Client shall be subject to the exclusive jurisdiction of the Courts of Geneva. An appeal to the Federal Supreme Court of Switzerland is reserved.

The place of execution, jurisdiction, and the place of debt collection procedures shall be Geneva.

The Bank shall nonetheless be entitled to initiate proceedings in the jurisdiction of domicile of the Client or in any other competent jurisdiction.”

Further changes of wording, not material for present purposes, occurred in October 2011, January 2014 and July 2016.

The latest potentially material set of GBCs, issued in January and May 2017, included these provisions:

“Article 1 - Scope

These General Business Conditions (hereinafter the “General Business Conditions”) govern the legal relationship between Banque Pictet & Cie SA (hereinafter the “Bank”) and the Client. They govern existing business relationships upon their taking effect, as well as relationships established thereafter.

These General Business Conditions remain valid even if the Client signs other standard contract forms or other similar documents.

Further, these General Business Conditions remain subject to:

- particular agreements entered into between the Bank and the Client;
- framework or master agreements among Swiss banks or with foreign banks;
- standard practices in certain areas of business, asset classes and/or in certain jurisdictions, especially stock exchange transactions and matters handled through correspondents in other countries.

...

Applicable law

The relationship between the Bank and the Client is governed exclusively by Swiss law.

Place of jurisdiction

Any dispute concerning the relationship between the Bank and the Client is subject to the exclusive jurisdiction of the Courts of Geneva. An appeal to the Federal Supreme Court of Switzerland is reserved.

The place of performance, the place of debt collection procedures and the place of enforcement is Geneva.

The Bank is nonetheless entitled to initiate proceedings in the jurisdiction of domicile of the Client or in any other competent jurisdiction.”

## **Pictet Europe**

The standard account opening form in 2000, when PIFSS opened its account with Pictet Europe, included a statement that:

“This account is subject to the provisions of Luxembourg law and governed by the General Business Conditions laid down by the Banque Pictet (Luxembourg) S.A., which are appended to this application form. The undersigned corporate entity hereby declares that due note has been taken of the General Business Conditions referred to above and, by signing, has approved them.”

Pictet Europe’s GBCs themselves at this time included these provisions:

### “1. Applicability of General Business Conditions and legislation

“Business relations between the Bank and its Clients are governed by the general conditions laid down in this document and by any special agreements which might be concluded between the Bank and its Clients.

Business relations shall be subject to applicable Luxembourg legislation unless there are specific waivers written into these General Business Conditions and into any specific agreements.

...

### 17. Judicial competence

“The courts of the Grand-Duchy of Luxembourg shall be the sole instances competent to judge any dispute between the Client and the Bank. However, the Bank may institute proceedings against the Client in other jurisdictions which, unless it is the choice of jurisdiction specified above, should, under normal circumstances, be competent to act with regard to the Client”

The latest potentially material set of GBCs, dating from April 2013, included the following slightly revised provisions:

“Article 1 - Scope

“These General Business Conditions govern the contractual relations between:

– Pictet & Cie (Europe) S.A. (hereinafter, "the Bank"), licensed as a credit institution and subject to the supervision of the Luxembourg financial sector monitoring authority, i.e. the Commission de Surveillance du Secteur Financier, of L-1150 Luxembourg, 110, route d'Arlon and its Clients.

They apply to business relationships in existence at the time of their coming into force and to business relationships created subsequently.

They remain valid even if the Client signs other standard contract forms or other similar documents. Any subsequent amendments hereto shall also be binding upon the Client.

The contractual relations between the Bank and the Client are also governed by:

- particular agreements entered into between the Bank and the Client;
- framework or general agreements concluded between Luxembourg banks or with foreign banks;
- customary practices applicable to certain categories of business, especially transactions on the regulated markets or MTF (Multilateral Trading Facilities) and business handled by foreign correspondents”

...

Article 29 - Judicial competence

“The courts of the Grand Duchy of Luxembourg shall have sole jurisdiction in any dispute between the Client and the Bank; however, the latter may initiate legal proceedings in any other jurisdiction(s) which, in the absence of the foregoing election of jurisdiction, would have normally exercised jurisdiction over the Client”.

**Banque Mirabaud**

The earliest set of Banque Mirabaud’s GTCs located by PIFSS is undated, though Banque Mirabaud alleges that they were most likely provided to PIFSS when it opened its account with Banque Mirabaud on 20 January 1997. They included this clause on law and forum:

“Clause 16: “All relations between the client and the Bank are subject to Swiss law. All disputes which may arise between the

client and the Bank shall be submitted to the Courts of Geneva, subject to appeal to the Federal Tribunal as provided by law.

However, the Bank reserves the right to bring action before any other competent Court or authority in Switzerland or abroad, in particular at the place of residence of the client, in which case, Swiss law shall also apply”.

A Signature Card dated 20 January 1997 and signed by PIFSS included the following:

“These signatures are valid for all present and future relationship with the Bank.

The entire contractual relationship between the client and Mirabaud & Co shall be governed by the Bank’s present and future General Terms and Conditions.

...

All legal aspects of the relationship between client and Bank shall be governed exclusively by Swiss law. Place of performance of all obligations of both parties, as well as the exclusive jurisdiction of lawsuits and any other kinds of legal proceedings shall be Geneva. The Bank may sue the client in any competent court at the domicile of the client or any other court having jurisdiction.”

The GTCs which PIFSS accepts that it signed (in 2007) contained these provisions:

“These General Terms and Conditions shall govern all of the contractual relations between Mirabaud & Cie (hereinafter “the Bank”) and its Clients, subject to any specific agreements and bank practices”.

...

Clause 19: “All relationships between the Client and the Bank shall be governed by and construed exclusively in accordance with Swiss law.

Any disputes which might arise shall be brought exclusively before the Swiss courts at the place of the Bank's head office or the branch where the account was opened, subject to any appeal to the Swiss Federal Tribunal in the cases provided for by law.

Nevertheless, the Bank reserves the right to commence proceedings before any other court or competent authority, whether in Switzerland or abroad, in particular before the courts in the place of domicile of the Client. In such case, Swiss law shall remain equally applicable.”

The latest potentially material set of GTCs dated from 2016 and included the following:

“These General Terms and Conditions shall govern all of the contractual relationships between Mirabaud & Cie (hereinafter “the Bank”) and its Client(s) (hereinafter “the Clients”), subject to any specific agreements and bank practices.

...

#### 18. Applicable law and choice of forum

All relationships between the Client and the Bank shall be governed by and construed exclusively in accordance with Swiss law.

The place of performance, the exclusive forum for all types of proceedings and the place of debt collection, with the last point applying solely to Clients not domiciled in Switzerland, shall be that of the head office of the Bank or the branch where the contractual relationship was established, subject to any appeal to the Swiss Federal Supreme Court where provided for by law.

Nevertheless, the Bank reserves the right to commence proceedings before any other court or competent authority, whether in Switzerland or abroad, in particular before the courts in the place of domicile of the Client. In such an event, Swiss law shall remain equally applicable.”