



Neutral Citation Number: [2020] EWHC 2979 (Comm)

Case No: CL-2019-000118

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice

Rolls Building, Fetter Lane,  
London, EC4A 1NL

Date: 06/11/2020

**Before :**

**THE HONOURABLE MR JUSTICE HENSHAW**

**Between :**

**THE PUBLIC INSTITUTION FOR SOCIAL  
SECURITY**

**Claimant**

**- and -**

**MR FAHAD MAZIAD RAJAAN AL RAJAAN &  
OTHERS**

**Defendants**

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**Twelfth Defendant**

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**Fourteenth Defendant**

Written submissions were received on behalf of the **Fifth Defendant**

The other Defendants did not appear and were not represented

Hearing dates: 20-23 July 2020

Further submissions received in writing on 28 and 30 July 2020

Draft judgment circulated to the parties on 30 October 2020

## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## (A) INTRODUCTION

1. The Claimant (“*PIFSS*”) is a public institution authorised by law to operate the State of Kuwait’s social security system and pension scheme. Its primary role is to provide Kuwaiti nationals with insurance for retirement, disability, sickness and death.
2. In these proceedings, PIFSS brings claims against 37 defendants, for sums totalling US\$847.7 million, arising from the alleged corruption between 1994 and 2014 of its former Director General, the First Defendant Mr Fahad Maziad Rajaan Al Rajaan. That sum is said to represent the known total of unlawful corrupt payments received by Mr Al Rajaan and his associates. Mr Al Rajaan is the main anchor defendant in relation to other defendants.
3. PIFSS alleges that the financial institution defendants, together with certain individual partners or representatives of those institutions and a number of other financial intermediaries and associated corporate vehicles, acted in concert in various combinations to make corrupt payments to Mr. Al Rajaan and to assist him to conceal and dispose of such payments. The payments are alleged to have been in violation both of Mr Al Rajaan’s fiduciary duties to PIFSS (as its most senior officer) and of Kuwaiti public property and anti-bribery laws. PIFSS has identified seven corrupt schemes to date, pursuant to which it alleges the corrupt payments were made and concealed by different groups of defendants.
4. Mr Al Rajaan and his wife, the Second Defendant (“*Ms Al Wazzan*”), are sued here on the basis of being now domiciled in England. The Fifteenth to Seventeenth Defendants are English companies. PIFSS seeks to found English jurisdiction against the majority of the other defendants pursuant to Article 6(1) of the Lugano Convention, or its counterpart in the Recast Brussels Regulation (Article 8(1)), on the basis that the claims against them are so closely connected to those against Mr Al Rajaan that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In the case of two parties involved in the present application – Pictet Bank and Trust Limited (“*Pictet Bahamas*”) and Bank Pictet & Cie (Asia) Limited (“*Pictet Asia*”) – PIFSS was given permission to serve proceedings out of the jurisdiction pursuant to CPR 6.36/Practice Direction 6B § 3.1(3) on the basis that they are necessary or proper parties.
5. This judgment relates to a jurisdiction challenge made by ten of the defendants, whom PIFSS alleges were in aggregate involved in unlawful corrupt payments of over US\$500 million.
6. Three of those ten defendants – Banque Pictet & Cie SA (“*Banque Pictet*”), Pictet & Cie (Europe) SA (“*Pictet Europe*”) and Mirabaud & Cie SA (“*Mirabaud*”) – are banks based in Switzerland or (in the case of Pictet Europe) Luxembourg who contend that PIFSS is bound by exclusive jurisdiction agreements to bring all such claims against them in Geneva or Luxembourg, albeit Pictet Europe has undertaken to consent to Geneva jurisdiction for the purposes of this claim. Alternatively, if PIFSS is bound to pursue at least some of the claims against them in Geneva or Luxembourg, these defendants contend that the English court cannot assume jurisdiction in relation

to the balance of the claims against them pursuant to Lugano Convention Article 6/Recast Brussels Regulation Article 8.

7. The Fourth Defendant (“*M. Bertherat*”) is a former partner of Banque Pictet; and the Twelfth and Thirteenth Defendants (“*M. Mirabaud*” and “*M. Fauchier-Magnan*”) were partners in Mirabaud. It is common ground that, subject to certain important points of contention, these defendants are entitled to rely on the exclusive jurisdiction clauses if and to the same extent as Banque Pictet and Mirabaud are. They argue that all claims against them fall within those jurisdiction agreements, and make a similar alternative argument in relation to Article 6/Article 8 to that made by Banque Pictet, Pictet Europe and Mirabaud.
8. The Fourteenth Defendant (“*M. Argand*”) is a senior Swiss lawyer, domiciled and practising in Switzerland, who is alleged to have assisted Mirabaud in setting up structures for the payment of secret commissions to Mr Al Rajaan. He contends that, if Mirabaud, M. Mirabaud and M. Fauchier-Magnan successfully challenge the jurisdiction, it will follow that the requirements of Lugano Convention Article 6 are not satisfied in relation to him.
9. Pictet Bahamas and Pictet Asia submit that if Banque Pictet successfully challenges the jurisdiction, then this court should decline on *forum non conveniens* grounds to exercise jurisdiction over them. They have undertaken to consent to Geneva jurisdiction.
10. M. Amouzegar is a former employee of Banque Pictet and is domiciled in Switzerland. He was not represented before me, for reasons I shall explain later, though his solicitor filed a witness statement on his behalf. He too challenges jurisdiction, relying on the exclusive jurisdiction agreement between PIFSS and Banque Pictet, and an exclusive jurisdiction clause in a contract between him and Banque Pictet, and contending in any event that the requirements of Lugano Convention Article 6 are not satisfied in relation to him.
11. I have come to the conclusion, for the reasons given below, that the jurisdiction challenges should succeed.
  - i) The claims against Banque Pictet, Pictet Europe and Mirabaud relating respectively to the ‘Pictet Scheme’ and the ‘Mirabaud Scheme’ detailed below fall within the scope of valid and binding jurisdiction agreements in favour of the courts of Geneva or Luxembourg.
  - ii) The ‘accessory’ claims against those entities, for assisting in relation to other schemes, do not fall within the jurisdiction agreements. However, in circumstances where the claims in relation to the Pictet Scheme and the Mirabaud Scheme must be brought in Geneva/Luxembourg, and in the light of the risks of irreconcilable judgments that thereby arise on the particular facts of the present case, the requirements of Lugano Convention Article 6/Recast Brussels Regulation Article 8 are not satisfied in relation to these accessory claims.
  - iii) The conclusions outlined in (i) and (ii) above apply also to the claims against M. Bertherat, M. Mirabaud and M. Fauchier-Magnan.

- iv) Given that the claims against Mirabaud, M. Mirabaud and M. Fauchier-Magnan must be brought in Geneva, and in the light of the risks of irreconcilable judgments that thereby arise on the particular facts of the present case, the requirements of Lugano Convention Article 6 are not satisfied in relation to the claims against M. Argand.
- v) M. Amouzegar is not entitled to take the benefit of the jurisdiction clauses on which he claims to rely. However, given that the claims against Banque Pictet and M. Bertherat must be brought in Geneva, and in the light of the risks of irreconcilable judgments that thereby arise on the particular facts of the present case, the requirements of Lugano Convention Article 6 are not satisfied in relation to the claims against M. Amouzegar.
- vi) In all the circumstances, PIFSS has not shown that England is clearly the appropriate forum for the claims against Pictet Bahamas and Pictet Asia. The court should therefore decline jurisdiction over those claims.
- vii) It follows that the claims against all of these defendants must be pursued in the courts of Geneva.

## **(B) BACKGROUND**

### **(1) Key parties**

- 12. Mr Al Rajaan, a Kuwaiti national, was the Director General of PIFSS from 14 January 1984 to 30 January 2014.
- 13. On or around 20 January 1997, PIFSS opened a custodian bank account with Mirabaud (“*Account 500750*”) through which PIFSS made investments in various funds, including funds managed by entities in the Mirabaud group and funds managed by third parties. Mirabaud is a Swiss company whose registered office is in Geneva. Mirabaud operates a bank which specialises primarily in wealth management and asset management, though Mirabaud itself did not provide any management or advisory services to PIFSS. It is also active in the area of securities trading.
- 14. Mirabaud was a Swiss unlimited liability partnership until January 2014, when (whilst remaining the same entity in law) it transformed itself into a Swiss limited company. M. Mirabaud was a partner in Mirabaud until 31 December 2009 and M. Fauchier-Magnan was a partner until 31 December 2011.
- 15. PIFSS was a client of Banque Pictet from 1998 until 2017 and was a client of Pictet Europe from September 2000 to October 2018. During the relevant period, PIFSS opened a total of 61 accounts with Banque Pictet and two with Pictet Europe. The four corporate Pictet defendants are part of the Pictet Group, a Swiss international private banking and financial services group based in Switzerland offering wealth and asset management and related services.
- 16. Banque Pictet and Pictet Europe provided, principally, wealth management and global custody services to PIFSS, together with related financial services. PIFSS did not open any accounts or have any contractual relationship with Pictet Bahamas or Pictet

Asia. According to PIFSS, it had by 2014 invested a total of US\$20.1bn of funds with the Pictet Group.

17. Banque Pictet was a partnership until 1 January 2014, when (like Mirabaud) it transformed itself into a Swiss limited company, with Pictet & Cie Group SCA as the top holding company. PIFSS's case is that its relationship with the corporate Pictet defendants was carried out under the management and oversight of M. Bertherat and (at least) M. Amouzegar. M. Bertherat was a partner in Banque Pictet until its incorporation, and then became a partner in Pictet & Cie Group SCA until his retirement on 31 December 2014. M. Amouzegar was an employee of Banque Pictet until October 2003.

## **(2) Procedure for Mutual Legal Assistance**

18. The summary of events set out under this subheading is largely drawn from Mirabaud's evidence, which PIFSS has indicated is not common ground. I include it as part of the background, but should not be regarded as making findings of fact on these matters, which did not form part of the focus of the applications before me.
19. In 2008 the Kuwait Attorney General's Office received a complaint in respect of Mr Al Rajaan's conduct while in office at PIFSS. According to Mirabaud, the complaint was of gross negligence on the part of Mr Al Rajaan which had allegedly resulted in PIFSS suffering a loss on its investments. The Kuwait Attorney General subsequently commenced criminal proceedings against Mr Al Rajaan and others alleging embezzlement.
20. In June 2011, the Prosecutor General at the Kuwait Ministry of Justice submitted a request for mutual legal assistance to the Office of the Attorney General in Switzerland ("**OAG**") in connection with the criminal proceedings in Kuwait.
21. In April 2012, Mirabaud was served with a notice of a search and seizure order by the OAG in connection with the request for mutual legal assistance. The request stated that Mr Al Rajaan and his accomplices had allegedly diverted substantial amounts of monies for their benefit through complex financial transactions, particularly through the purchase of securities, to the detriment of PIFSS, causing damages in excess of US\$390 million. Mirabaud states that it complied with the search and seizure order. No allegation of wrongdoing was made against Mirabaud.
22. Later in April 2012, having learned about the criminal proceedings in Kuwait, Mirabaud suspended Mr Al Rajaan's signing authority in respect of Account 500750. In May 2012, as soon (Mirabaud states) as it was legally entitled to do so, Mirabaud informed PIFSS of the existence of the request for mutual legal assistance and of the steps taken in Switzerland. More specifically, Mirabaud informed PIFSS that it had been informed "*by the General Attorney of Switzerland of a judicial assistance request originating from the General Attorney of Kuwait raising suspicions in connection with alleged misappropriation of funds by Mr. Fahad Al Rajaan...Our bank has been extremely surprised by these judicial decisions and has taken a number of immediate measures to protect your interests. It has in particular decided to suspend with immediate effect the execution of any instructions from Mr. Fahad Al Rajaan as authorized signatory on your account*". Mirabaud's evidence is that



between May 2012 and December 2015, PIFSS (acting through other individuals) increased its investments in funds through Mirabaud.

23. In April 2016, Mr Al Rajaan was convicted in absentia of embezzling public money by the Criminal Court in Kuwait and was sentenced to 10 years' imprisonment. An international arrest warrant was subsequently issued for Mr Al Rajaan and in April 2017 he was arrested in London. An order was made for his extradition to Kuwait, but he then sought to claim political asylum in the United Kingdom.
24. In June 2019, following a second criminal trial in Kuwait in relation to the matters which are the subject of the present proceedings, Mr Al Rajaan and Ms Al Wazzan were both convicted in absentia and sentenced to life imprisonment, fined US\$164 million and US\$147 million respectively, and ordered to repay US\$82 million.

### **(3) Swiss Criminal Proceedings**

25. In light of the mutual legal assistance request, Mirabaud carried out an internal review and on 24 April 2012 filed a suspicious activity report with the Money Laundering Reporting Office in Switzerland.
26. In May 2012, the OAG commenced a criminal investigation in Switzerland in relation to payments made by Mr Al Rajaan and froze all assets belonging to him and/or held for his benefit.
27. In January 2015, the OAG informed PIFSS that criminal proceedings were pending against Mr Al Rajaan and Ms Al Wazzan in Switzerland, specifically in relation to offences of embezzlement, misappropriation, embezzlement of public funds, and money laundering. The OAG invited PIFSS to join the criminal proceedings as an injured party.
28. In May 2015, PIFSS appointed two attorneys at the Geneva Bar, Mr Jean-Pierre Jacquemoud and Mr Guy Stanislas, to represent the interests of PIFSS in the criminal proceedings and PIFSS informed the OAG that it wished to participate in the criminal proceedings as criminal and civil claimant. PIFSS's initial application was refused by the OAG and it was asked to re-submit its request in proper form. In October 2015 PIFSS (acting as a private claimant) re-filed a criminal complaint against Mr Al Rajaan and Ms Al Wazzan with the OAG. PIFSS was granted standing as a private complainant by the OAG in May 2016. An appeal against that decision by Mr Al Rajaan and Ms Al Wazzan was subsequently dismissed by the Swiss Federal Criminal Court.
29. PIFSS was entitled under the Swiss Criminal Code to pursue both a criminal complaint and a civil claim against Mr Al Rajaan and Ms Al Wazzan in the criminal proceedings. PIFSS did initially commence such an 'adhesive' civil claim. However, it appears that PIFSS subsequently withdrew this civil claim.

### **(4) Swiss Debt Collection Proceedings**

30. In January 2016, tolling agreements were made between PIFSS, Mirabaud, M. Mirabaud, M. Fauchier-Magnan, and certain other former and current partners of Mirabaud. They were renewed on an annual basis thereafter.

31. PIFSS thereafter commenced the present proceedings against Mirabaud, M. Mirabaud and M. Fauchier-Magnan in England, and in December 2019 approached Mirabaud with a view to extending the tolling agreements. During the same period, PIFSS submitted debt collection claims in Switzerland, apparently to protect its limitation position. A summons to pay was served by the Geneva Debt Collection Office on Mirabaud and various former and current partners on 15 January 2020, stating that PIFSS was claiming compensation due to Mirabaud's alleged participation in "*the complex and hidden structures set up to provide Fahad Al Rajaan, the creditor's former managing director, and his wife with undue advantages granted in exchange for investments between 1994 and 2015, amounting to the equivalent of Fr 228 million, among others from the Mirabaud Group*". The amount claimed in the summons was the same as the amount claimed in these proceedings. On the same date, Mirabaud served a notice of opposition to the summons. The information before me does not indicate whether or not these proceedings remain extant as against Mirabaud, and no submissions were made to me in this connection.

### **(C) OUTLINE OF PIFSS'S CLAIMS AGAINST THE APPLICANTS**

#### **(1) Overview**

32. On 21 February 2019 PIFSS issued a claim form ("**Claim Form 1**") against Mr Al Rajaan, Ms Al Wazzan, the four corporate Pictet defendants, M. Bertherat, M. Amouzegar, and the Sixth and Seventh Defendants.
33. On 11 March 2019 PIFSS issued a further claim form ("**Claim Form 2**") against Mr Al Rajaan and Ms Al Wazzan, the defendants sued in connection with Mirabaud (Mirabaud itself, M. Mirabaud, M. Fauchier-Magnan and M. Argand), together with the Fifteenth to Thirty-first Defendants.
34. PIFSS issued a further Claim Form on 12 September 2019 ("**Claim Form 3**") bringing claims against various further defendants. M. Amouzegar is also a defendant to this claim.
35. These three sets of proceedings have been consolidated on the basis that such consolidation is not to affect the parties' arguments in relation to jurisdiction. PIFSS has served Consolidated Particulars of Claim ("**CPOC**"). PIFSS has identified seven corrupt schemes to date, pursuant to which it alleges the payments ("*secret commissions*") were made and concealed by different groups of defendants.
36. PIFSS alleges in CPOC § 30 that, while each scheme enjoyed its own particular features, in general the schemes at their core operated as follows:
- “a. Under the control and/or influence of Mr. Al Rajaan, PIFSS made decisions, in Kuwait, to enter into arrangements for the provision of financial services to PIFSS and to make investments, the investment capital being typically provided from PIFSS' bank account at the Ahli United Bank in London, of which Mr. Al Rajaan was Chairman at material times.

- b. Fees were payable by PIFSS on financial services supplied to it or investments which it entered into.
  - c. Mr. Al Rajaan procured the banks and investment companies with whom he was dealing on behalf of PIFSS in his capacity as Director General to make Secret Commissions to him equating to an agreed proportion of the relevant fee.
  - d. The Secret Commissions were arranged between Mr. Al Rajaan and the relevant partner/executive or intermediary involved in broking the financial service or investment in question and were “fronted” and thus concealed by corrupt intermediaries who purported to contract with the bank or investment company to disguise the payment of Secret Commissions as legitimate retrocessions (rebates), commissions or introduction fees – referred to generically below in this statement of case as “commissions”. As Mr. Al Rajaan arranged for PIFSS to enter into further investments, the purported contractual arrangements between the “front” and the relevant entity through which payment of Secret Commissions was made would be varied to accommodate the new “commissionable” investment.
  - e. PIFSS believes that on a number of the schemes Mr. Al Rajaan shared the Secret Commissions with the party which “fronted” their payment.
  - f. To enable ultimately successful payment, without detection or regulatory scrutiny, the payments were routed through a number of offshore bank accounts and in part through corporate and personal accounts held in the name of Ms. Al Wazzan, acting as Mr. Al Rajaan’s nominee.
  - g. This “routing” was facilitated by banks which were implicated in the corrupt schemes and which acted in concert with Mr. Al Rajaan and the corrupt intermediaries so as to assist Mr. Al Rajaan in (a) the establishment of companies and bank accounts through which to route the funds and (b) actioning and/or permitting payments to be made to (and by) Mr. Al Rajaan and on his behalf without challenge, or scrutiny, which they knew or believed (acting dishonestly and unconscionably) to be Secret Commissions or the traceable proceeds thereof.”
37. PIFSS says there were thus two elements that were integral to the successful operation of the schemes as a whole and of each individual scheme:
- i) the payment, or procurement of payment, of secret commissions – giving rise to claims characterised as the “*secret commission*” or “*bribery*” claims; and

- ii) the assistance provided to enable Mr Al Rajaan to receive, retain and conceal the payments of secret commissions (whether paid by that institution or another party) by routing them, unchallenged by regulatory oversight, through a secret network of bank accounts to facilitate transmission without detection – giving rise to claims characterised as the “*money laundering*” or “*accessory*” claims.
38. On PIFSS’s case, the schemes were interlinked through the conduct giving rise to the accessory claims: secret commissions payable under one scheme were, in effect, laundered as part of another scheme or schemes, with flows of money between the numerous bank accounts established for Mr Al Rajaan by the Defendant banks and bankers.
39. In his judgment granting a worldwide freezing order against Mr Al Rajaan on 16 October 2019, which sets out the background to the claims, Jacobs J summarised PIFSS’s case as to the way in which the corrupt schemes operated, through Mr Al Rajaan acting in concert with the Defendant banks, partners, executives and intermediaries, as follows:
- “I was taken in the course of argument to a large number of paragraphs of the Particulars of Claim and Mr. Ritchie summarised the position, in my view fairly, by saying that the case advanced as set out in that document is, and I quote:
- “There has been repeatedly and through a number of different devices and techniques concealment and subterfuge on a grand scale. This has been done through a variety of disreputable techniques, including using notional agency contracts as fronts for payment. It has been done through not just the use but the establishment and use of pocket wallet non-trading corporate vehicles offshore for the purpose of disguising the routing of assets. It has also been done with the purpose of deliberately and further concealing these activities from both PIFSS and anyone else who would have a reasonable interest to know, regulators or otherwise, through, on occasions, the falsification of documents through the use of pseudonyms, through the deliberate decision to keep secret materials which might otherwise blow Mr. Al Rajaan’s cover, and there has also been a deliberate attempt, once there was a risk that matters might come into the public domain through a formal investigation in Switzerland, to move substantial money in direct response to that threat.” (§ 10)
40. PIFSS brings its claims under Kuwaiti law as the proper governing law. Its case is that the illicit acts complained of were tortious and criminal both under Kuwaiti law (which PIFSS says is the governing law of its claims) and Swiss law, and, indeed, would be tortious and criminal under any reputable system of law.
41. PIFSS states that as a result of the deliberate concealment of the relevant facts by Mr Al Rajaan and the defendants, PIFSS did not know of any of the corruption that forms the basis of its claims until 2015, when it received copies of materials relevant to the

Mirabaud Scheme that had initially been made available through criminal mutual legal assistance proceedings between Switzerland and Kuwait (the “*MLA Material*”). PIFSS says it knew nothing of the facts underlying the Pictet Scheme until 2016. The nature, scale and inter-connectedness of the schemes (and thus the claims) has only become apparent to PIFSS since July 2017 when it first obtained access to the Prosecutor’s File in Switzerland (the “*Swiss Domestic Material*”). However, that access has been severely restricted. In respect of the Pictet Scheme, the CPOC is substantially pleaded by reference to PIFSS’s notes of a detailed report which Banque Pictet was required to file with its regulator, FINMA, in 2014 (the “*FINMA Report*”), and which forms part of the Swiss Domestic Material. Ultimately, PIFSS has thus been able, through access to copies of the MLA Material and notes taken from the Swiss Domestic Material, to gain an insight into the establishment and operation of the corrupt schemes allegedly perpetrated over approximately 20 years. This understanding is reflected in the case advanced in the CPOC.

42. Some of the defendants have already pleaded Defences to the claims. Although the amount of the alleged secret commissions (US\$847 million in total) has not been admitted in full, no Defendant has so far positively pleaded that commissions were not paid or that the amounts paid were less than that which PIFSS alleges; nor that the way in which schemes were set up, and secret commissions were paid, funnelled around the world and concealed, is other than as PIFSS has alleged. It should be noted, of course, that the present applicants, consistently with their objection to this court’s jurisdiction, have not to date served Defences.
43. The gist of Mr Al Rajaan’s Defence is that he accepts receipt of very substantial sums from the sources alleged, but denies that there was anything wrongful about such receipt. The other defendants who have pleaded Defences do not deny the payments made, but plead that they did not believe they were doing anything wrong, and did not act dishonestly, either because they did not realise they were dealing with Mr Al Rajaan, or because they knew that they were making payments to him but thought there was nothing wrong in doing so.
44. The seven schemes that PIFSS has identified to date have been labelled the Mirabaud Scheme, the Pictet Scheme, the MAN Group Scheme, the UBP Scheme, the EFG/Nasrallah Scheme, the Mombelli Scheme and the VP Banking Assistance Scheme. The present jurisdiction challenge is concerned with defendants said to have been directly involved in the Mirabaud and Pictet Schemes. PIFSS’ secret commission claims and accessory claims in relation to the Mirabaud defendants total US\$232.5 million and in relation to the Pictet defendants US\$298.1 million.
45. PIFSS contends that the *modus operandi* of the schemes required Mr Al Rajaan to foster relationships with senior representatives of financial institutions who were willing to pay him secret commissions, dishonestly to establish and operate accounts of offshore shell companies to enable the receipt and transfer of very substantial sums of money for Mr Al Rajaan, payable under the various schemes, and to take such dishonest steps as were necessary to avoid detection or regulatory scrutiny of these payments. PIFSS alleges that Mr Al Rajaan succeeded in doing so through relationships he established with Mirabaud, through M. Mirabaud and M. Fauchier-Magnan (successive senior partners of Mirabaud) beginning in or about 1994; and with Pictet, through M. Bertherat and M. Amouzegar (respectively a partner and

employee of Banque Pictet), beginning in the early-mid 1990s in the case of M. Amouzegar and no later than 1997 for M. Bertherat.

46. I now summarise PIFSS's claims in relation to the Pictet and Mirabaud defendants in a little more detail.

**(2) Pictet**

47. Against the Pictet defendants, PIFSS claims US\$298.1 million, alleging as follows:
- i) secret commission or 'bribery' claims: Banque Pictet and Pictet Europe paid US\$22.8 million of secret commissions to Mr Al Rajaan (through the Seventh Defendant ("*Mr. Nasrallah*")) and a further US\$3.9 million of corrupt payments to M. Amouzegar; and
  - ii) accessory or 'money laundering' claims: the Pictet corporate defendants facilitated and concealed the payment of at least US\$294.2 million, made up of US\$22.8 million referred to above, and US\$271.5 million of additional payments, of which at least US\$217.7 million represented payments made pursuant to other pleaded schemes.
48. PIFSS alleges that Mr Al Rajaan came to have dealings with Banque Pictet through his contacts and prior association with M. Amouzegar and/or M. Bertherat. He had known M. Amouzegar when the latter was working at Citibank. In 1998 Mr Al Rajaan was a director of Albait S.A ("*Albait*"), an Islamic investments joint venture between Banque Pictet and a Kuwaiti investment bank, The International Investor, with whom PIFSS had a commercial relationship. M. Amouzegar and M. Bertherat were also board directors of Albait. Albait was (at least ostensibly) retained by PIFSS to manage particular investment portfolios, which task it sub-contracted to Banque Pictet.
49. In the second quarter of 1998 PIFSS opened a deposit account with Banque Pictet, account 99501, as a client of Albait.
50. The CPOC define "*Pictet*" as "*Banque Pictet & Cie SA*". CPOC §§ 172-175 allege:
- "172. In the commercial context above and pursuant to the scheme set out in section C above, on dates unknown prior to August 1998 it is to be inferred that Mr. Al Rajaan had discussions with Pictet, through Mr. Bertherat and Mr. Amouzegar, with a view to:
- a. Securing Secret Commissions from Pictet in relation to investments and the provision of financial services which Mr. Al Rajaan would authorize PIFSS to agree, and in respect of which Pictet would have a commercial interest including by way of fees;
  - b. Putting in place an off-shore corporate structure for him personally and Mr. Nasrallah through Phoenix as

intermediary, through which Secret Commissions could be paid and concealed.

173. Further to the above discussions, in or about early August 1998, as evidenced by an internal Pictet memo of 11 August 1998, it was agreed by Mr Bertherat and Mr Al Rajaan that the latter would receive a commission of 0.125% (being one third) of the administrative fees withheld by Pictet on PIFSS' account no 99501. The commission was to be "*payable to an account that will be named later and whose economic beneficiary will be Mr Fahad Al Rajaan*" and thus was to be paid by way of Secret Commissions to or for the benefit of Mr Al Rajaan.

174. On or about 1 September 1998, Pictet additionally assumed the role of custodian in respect of the PIFSS investments notionally managed by Albait as described above, for which it was paid a fee.

175. It is to be inferred that a subsequent agreement was reached between Mr. Al Rajaan and Mr. Bertherat and Mr. Amouzegar on behalf of Pictet extending the categories of services on which Secret Commissions would be payable to encompass Global Custody, brokerage and net securities lending, in light of Mr. Al Rajaan's indication that if it did so, he would authorise PIFSS to open accounts with Pictet on which such fees were payable."

51. PIFSS says that from 1999 arrangements were formalised under which an account was set up in the name of Mr Nasrallah and purported "business finder" agreements were put in place by Banque Pictet with Mr Nasrallah. It says those arrangements were a sham because:
- i) All parties knew that those business finder agreements were merely a front for the purpose of transferring secret commissions from Banque Pictet to Mr Al Rajaan and that Mr Nasrallah was acting as nominee for Mr Al Rajaan. For his role in this, Mr Nasrallah says Banque Pictet paid him US\$500,000 per annum, a sum that was fronted by M. Amouzegar so as to distance Banque Pictet from the making of the payment - something of which PIFSS learned for the first time on reading Mr Nasrallah's Defence in this action.
  - ii) The account opened in Mr Nasrallah's name (no. 97519), into which a large proportion of the secret commissions under this scheme was paid, was beneficially owned and controlled by Mr Al Rajaan, and Banque Pictet accordingly treated Mr Al Rajaan as principal of it.
52. Further, it is said, M. Amouzegar himself became party to business introducer agreements from 2003 (when he left the bank) pursuant to which corrupt commissions of US\$3.9m were paid. These corrupt arrangements were (according to Mr Nasrallah's pleaded case) agreed not only with Banque Pictet but with VP Bank (the 36<sup>th</sup> and 37<sup>th</sup> Defendants) as well – which would explain a subsequent transfer of secret commissions between the two banks – and were formalised by the banks'

lawyers. The “*business introducer document*” was varied from time to time to provide for commissions on additional PIFSS business brought by Mr Al Rajaan to the Pictet group.

53. CPOC §§ 178 and 180-185, 189, 191 and 194 allege:

“178. In April 1999 PIFSS opened a further account (1000700.001) authorised by Mr. Al Rajaan, which was the first of many accounts opened by PIFSS at Pictet on which Global Custody and brokerage fees were charged.

...

180. Thereafter, and at all material times, the Pictet Group provided services to PIFSS in roles as investment manager, custodian and nominee, across a range of investments through accounts with Pictet administered in Switzerland and in Luxembourg through Pictet Europe. Mr Al Rajaan was at all material times the main contact for Pictet at PIFSS. He signed requests to open accounts for PIFSS and had individual signing authority without limit.

181. Over time PIFSS came to hold up to 96 accounts with the Pictet Group. As at June 2014 PIFSS had a total of almost US\$20.1 billion of funds invested in or via accounts held at Pictet.

182. As pleaded below, as over time PIFSS expanded its commercial relationship with Pictet into further types of accounts and/or investments the Pictet Nasrallah Agreements were amended (formally or by practice) to ensure that Secret Commissions were paid in respect of the further accounts and/or investments.

183. Prior to 15 March 2001, the Pictet Nasrallah Agreement was varied so as to provide, additionally, for commissions at a rate of 25% on commissions derived from assets invested in Pictet-managed funds.

184. That variation was agreed by Mr Bertherat and Mr Amouzegar on behalf of Pictet and Mr Al Rajaan in circumstances where, at the time, PIFSS had not invested in any such funds; but on Mr Al Rajaan’s recommendation Pictet was about to assume management of a pre-existing fund held by PIFSS (the Mayur fund) which was at the time managed by a third party (Lazard).

185. It is to be inferred from the following further facts and matters that Mr. Al Rajaan procured the change of manager to Pictet with the agreement of Mr. Bertherat in order to provide a source of investment management fees from which further



Secret Commissions could be paid, and that the variation to the Pictet Nasrallah Agreement was made as part of that plan:

- a. Mr. Al Rajaan introduced the individual who had been managing the fund at Lazard - Ms. Mahurkur - to Mr. Bertherat in late 2000 and Pictet employed her from 1 April 2001;
- b. At the time PIFSS wholly owned the fund in question;
- c. The fact that at all material times Mr Al Rajaan almost exclusively represented PIFSS in its dealings regarding the Mayur Fund; and
- d. The fact that commissions of c. US\$9.5 million referable to the Mayur Fund and its successor investments were then paid by Pictet to Mr Nasrallah and Mr Amouzegar between 2001-2015 representing the single largest source of Secret Commissions paid to Mr. Al Rajaan by Pictet.

...

189. From 2000 PIFSS had assets on deposit with Pictet Europe, and Secret Commissions were paid to Mr Nasrallah personally and/or through Phoenix by Pictet Europe referable to the latter's fees notwithstanding that there was no 'business finder' agreement between Pictet Europe and Mr Nasrallah and/or Phoenix which covered such fees.

...

191. In addition to the arrangement with Mr Nasrallah through Phoenix, a separate 'business finder' agreement was entered into between Pictet and Mr Amouzegar on 21 October 2003 pursuant to which Mr Amouzegar was purportedly entitled to commissions of 30% of the fees earned by Pictet in respect of any investments or business of PIFSS (excluding Global Custody) generated after 31 October 2003 ("the Amouzegar Agreement"). By a subsequent agreement dated 7 April 2006, the commission rate payable under that agreement was reduced to 5% but the commissions were extended to fees paid on all PIFSS' accounts whatever the date on which they were opened.

...

194. Between 1999 and 2015, pursuant to the above arrangements, the total sum of approximately US\$26.7 million was paid by way of Secret Commissions in respect of financial services provided by Pictet to PIFSS and procured or authorised by Mr. Al Rajaan. Tables summarising the

investments and the commissions generated in respect of them are appended as Appendix 3.”

54. In relation to the accessory claims against the Pictet defendants, PIFSS alleges that through the various account and lending services afforded to Mr Al Rajaan by the Pictet corporate defendants, (through companies owned by him, Mr Nasrallah and Ms Al Wazzan), Mr Al Rajaan was able without detection to receive, transfer and conceal, not only the proceeds of the secret commissions payable under the Pictet Scheme, but, additionally, the proceeds of other schemes in the estimated aggregate amount referred to in § 47.ii) above.
55. PIFSS alleges that each of the Pictet corporate entities knew, through at least M. Bertherat, M. Amouzegar and those working under their supervision, that the sums transferred into the Al Rajaan and Nasrallah accounts pursuant to the Pictet Scheme were secret commissions by reason of the facts and matters pleaded in connection with that Scheme. In relation to the accessory claims against Pictet corporate entities, PIFSS alleges in CPOC § 212 that they knew that some or all of the relevant sums were secret commissions “*by reason of the facts and matters set out in paragraphs 214 to 216*” of the CPOC. Those matters include knowledge gained by reason of involvement in the Pictet Scheme (see e.g. CPOC § 216: “... *if and to the extent that the Pictet Defendants did not have actual knowledge that the transfers in and out of accounts held at Pictet, Pictet Europe, Pictet Asia and Pictet Bahamas were Secret Commissions or the traceable proceeds thereof (by reason of the discussions between Mr. Al Rajaan, Mr. Bertherat and Mr. Amouzegar at the outset of the Pictet Scheme) ...*”) but other matters as well.
56. PIFSS adds that by virtue of the corporate structure established for Mr Al Rajaan, he (personally) established substantial dealings with the Pictet corporate defendants including the provision of loan facilities, advice and broking services on personal investments made by Mr Al Rajaan through Pictet accounts.
57. PIFSS alleges that Banque Pictet took various steps actively to conceal the secret commission arrangements. Then, in May 2012, on learning of the criminal investigation into Mr Al Rajaan’s activities, Banque Pictet terminated the “business introducer” agreements, transferred substantial sums (at least US\$ 91.3 million) held in Mr Al Rajaan’s accounts offshore and to other less transparent jurisdictions, and moved Mr Al Rajaan’s corporate operation off-shore, so as to dissipate corrupt funds and to avoid further criminal investigation and asset freezing in Switzerland.

### **(3) Mirabaud**

58. Against the Mirabaud defendants PIFSS claims \$232.5 million, alleging as follows:
  - i) secret commission claims: Galmir Advisory Services Ltd (“**Galmir**”), a subsidiary of Banque Mirabaud, paid US\$78.9 million of secret commissions to Mr Al Rajaan; and
  - ii) accessory claims: Banque Mirabaud facilitated and concealed the payment of at least US\$232.5 million of secret commissions, made up of US\$78.9 million referred to above, and US\$153.6 million of additional payments, of which at

least US\$136.3 million represented payments made pursuant to other pleaded schemes.

59. The CPOC define “*Mirabaud*” as “*Mirabaud & Cie SA*”. CPOC § 79 alleges that:

“79. On dates unknown between about 1994 and January 1997 Mr. Al Rajaan had discussions with Mirabaud, through Mr. Mirabaud and Mr. Fauchier-Magnan who at all material times had supervision of the relationships between PIFSS and Mirabaud and Mr. Al Rajaan and Mirabaud, with a view to:

- a. Putting in place an off-shore corporate structure for him personally and beneficially, through which Secret Commissions could be paid and concealed;
- b. Securing Secret Commissions from Mirabaud in relation to investments which Mr. Al Rajaan would authorise PIFSS to make, and in respect of which Mirabaud and/or its partners would have a commercial interest (directly or through group entities) including by way of management and/or brokerage fees, commissions (as introducer or otherwise) and/or shareholdings.”

60. As a first step, PIFSS alleges, M. Mirabaud procured the incorporation of two Panamanian companies on Mr Al Rajaan’s behalf by a school friend and long-time business associate, Antoine Richard, principal of the Richard Trust which had a business as *inter alia* a corporate fiduciary. The two Panamanian companies were Overton Group SA (“*Overton*”), incorporated on 4 January 1995, and New Market Properties Inc. (“*New Market*”), incorporated on or about 26 January 1995. Both companies were, PIFSS alleges, beneficially owned by Mr Al Rajaan and legally controlled by M. Mirabaud.

61. On 26 February 1996, on Mr Al Rajaan’s instructions, M. Mirabaud is said to have procured M. Richard to open an account for Overton at Mirabaud. The account opening form identified the beneficial owner as M. Mirabaud, but an internal Mirabaud entry stated “*en fait [in fact] Mr Al Rajaan*”. The form stated the origin of the funds to be “*Kuwait*” and wrongly identified the account as a savings account.

62. CPOC §§ 85-89 allege:

“85. By no later than 20 January 1997 Mr. Al Rajaan reached agreement with Mr. Mirabaud and Mr. Fauchier-Magnan as to the payment by Mirabaud of Secret Commissions further to the discussions referred to in paragraph 79 above, as evidenced by: (a) the subsequent payment of Secret Commissions referred to in paragraphs 31.a above and detailed below and (b) Mr. Mirabaud’s admission to the Swiss Prosecutor that commissions had been paid to Mr. Al Rajaan as “introducer” of PIFSS’ business.

86. On 20 January 1997 Mr. Al Rajaan authorised Mirabaud to open custodian account number 500750 with Mirabaud which subsequently came to hold 12 of PIFSS' investments on which Secret Commissions were paid.

87. On or before 14 January 1997 and acting on Mr. Al Rajaan's further instructions, Mr. Mirabaud and Mr. Fauchier-Magnan had one or more discussions with Mr. Argand, including by telephone. It is to be inferred, from the circumstances of the call(s), the email referred to in paragraph 88 below, and the events which followed as pleaded below, that they:

- a. explained to him that they had a client to whom Mirabaud was intending to pay Secret Commissions;
- b. requested that, in order to facilitate such payments without detection, Mr. Argand should establish and act for an off-shore company, held in their personal names, Silvery Bay Investments Limited ("**Silvery Bay**");
- c. requested that he sign on its behalf a purported "Introducer" agreement with Mirabaud's wholly owned Bahamian subsidiary, Galmir Advisory Services Limited ("**Galmir**") as the front for the payment of Secret Commissions by Mirabaud to its client.

88. It is to be inferred that Mr. Argand agreed to the above requests, pursuant to which he caused Silvery Bay to be incorporated in Mauritius on 14 January 1997. By e-mail of 30 January 1997, date-stamped 31 January 1997, Mr. Mirabaud and Mr. Thierry Fauchier-Magnan purported to confirm, but, in fact (it is to be inferred) sanitised, what they had discussed with Mr. Argand orally. They asked him to act for them personally in establishing Silvery Bay, which had, by then already been established, and attached a copy of a purported agreement between Galmir and Silvery Bay which had been prepared by Mirabaud at their instigation, and which they had signed in duplicate purportedly on behalf of Galmir. They requested him to return the signed agreements to Mr. Mirabaud in Geneva. Mr. Argand counter-signed the agreements on 1 February 1997, ("**The Silvery Bay Agreement**").

89. Under the terms of the Silvery Bay Agreement, Silvery Bay was entitled to the payment of commissions by Galmir in consideration of its introduction of identified PIFSS investments."

63. PIFSS claims that in about 2005 M. Argand caused Silvery Bay Investments Limited to be incorporated in the Seychelles, where the regulatory regime was laxer, and that thereafter this entity assumed the role previously performed by the Mauritian entity. At least twelve further purported agreements were entered into between Galmir, purporting to act as agent for “*Mirabaud (the Mirabaud Group)*” and Silvery Bay between 15 November 2006 and 23 August 2011 providing for commissions to be paid in relation to further specified investments. PIFSS says no genuine introductory services were provided by Galmir or Silvery Bay to PIFSS, and the Silvery Bay Agreement and successor agreements were (and were always intended to be) no more than a front for the payment of secret commissions by Mirabaud to Mr Al Rajaan.
64. CPOC §§ 98-101 allege:-
- “98. Between 1997 and about 8 May 2012 the total sum of US\$76.9 million was paid by way of Secret Commissions to Mr. Al Rajaan in respect of 28 investments by PIFSS (“the **Galmir Funds**”). Tables summarising the investments and the payments generated in respect of them are appended as Appendix 1.
99. Such payments were, at the direction of Mirabaud, acting through Mr. Mirabaud, made to Silvery Bay through Mirabaud’s wholly owned Bahamian subsidiary Galmir.
100. In addition, further payments of US\$2.1million were made, at the direction of Mirabaud, to Mr. Al Rajaan either via Silvery Bay or directly from Galmir, in connection with investments made by PIFSS which (pending disclosure) PIFSS infers to have been unauthorised benefits received by Mr. Al Rajaan in connection with the Mirabaud Scheme.
101. Save for the sum of US\$97,457 which was either retained by Silvery Bay or attributable to currency fluctuations, all of the Secret Commissions paid to Silvery Bay pursuant to the purported Silvery Bay Agreements were paid to Mr. Al Rajaan through the network of (principally offshore) companies beneficially owned and controlled by Mr Al Rajaan and/or Ms Al Wazzan as set out in paragraphs 103 to 107 below and set up and used for the purposes of concealing the payment of Secret Commissions to him from PIFSS.”
65. The Overton and New Market accounts were later replaced, in 2002/2003, by accounts in the names of Panamanian companies ostensibly beneficially owned by Ms Al Wazzan – Intermac and Domini – but, PIFSS alleges, in fact owned by Mr Al Rajaan. Their essential function remained the same.
66. In 2001 an account was also opened at Mirabaud in the name of Mr El Ghazzi, a financial intermediary who PIFSS alleges “fronted” the payment of secret commissions to Mr Al Rajaan in the total sum of US\$156 million pursuant to the MAN Group Scheme.

67. PIFSS alleges that through the various account and lending services afforded to Mr Al Rajaan (and Mr El Ghazzi) by Mirabaud, he was able without detection to receive, transfer and conceal, not only the proceeds of the secret commissions payable under the Mirabaud Scheme, but, additionally, the proceeds of other pleaded schemes in the total estimated amount referred to in § 58.ii) above. This forms the basis of the accessory claims against Mirabaud. PIFSS alleges that Mirabaud knew these further sums were secret commissions because of:
- i) the purpose for which the bank accounts were initially set up;
  - ii) the use to which they were put on the Mirabaud Scheme (which must, in order to avoid circularity, be taken as a reference to the facts concerning the secret commission claims against Mirabaud); and
  - iii) M. Mirabaud and M. Fauchier-Magnan's knowledge of the Man Group Scheme (details of which scheme and knowledge are further pleaded).
68. It follows that the basis for the allegations of knowledge in relation to the accessory claims against Mirabaud includes, though it is not limited to, Mirabaud's knowledge of the facts relating to the secret commissions claims against it.
69. PIFSS alleges that the Mirabaud Scheme ceased to operate (and the Galmir/Silvery Bay agreements were terminated) in May 2012 as soon as it became known that a criminal investigation was being launched into Mr Al Rajaan's conduct.

#### **(4) Legal basis of claims**

70. PIFSS's claims against Mr Al Rajaan are for breach of the (fiduciary) duties he owed it under the Kuwaiti Civil Service Laws and for breach of the Kuwaiti Public Property and Bribery Laws which contain anti-bribery and money-laundering provisions. PIFSS claims that breach of these criminal laws also gives rise to civil liability in tort. PIFSS claims (as a personal, alternatively proprietary, remedy) payment of the secret commissions or their value, in a total sum of US\$847million.
71. PIFSS's claim against the present applicants is for their role in the above schemes, (a) as primary wrongdoers in relation to the Pictet Scheme (Banque Pictet, Pictet Europe, Pictet Asia, Pictet Bahamas, M. Bertherat and M. Amouzegar) and the Mirabaud Scheme (Banque Mirabaud, M. Mirabaud, M. Fauchier-Magnan and M. Argand) and because of their role in paying or procuring the payment of secret commissions; and (b) for their unlawful participation in the concealment of the secret commissions arising from both their "own" schemes and other schemes (save, in the latter case, for Mr Argand), giving rise to the accessory claims. These matters are said to give rise to joint and several liability under Kuwaiti law to pay the value of all such secret commissions.
72. In the alternative, PIFSS claims loss and damage in the total sum of (no less than) US\$847 million paid under the schemes, of which it claims US\$232.5 million pursuant to the Mirabaud claims and US\$298.1 million pursuant to the Pictet claims.
73. PIFSS has not to date pleaded causes of action under Swiss law in the CPOC, having pleaded English law in the alternative to Kuwaiti law as the presumptive law

applicable to the claims to the extent that Swiss or other foreign laws are held to apply to the claims, and in advance of any pleading by the defendants as to the content of Swiss (or other) law. However, PIFSS has adduced evidence in response to the present applications that the pleaded facts disclose claims in tort/delict by reference to Swiss criminal wrongdoing, including bribery of a public official and money-laundering. Indeed, PIFSS's case is that it is obvious that the pleaded facts would be tortious and criminal under any reputable system of law.

#### **(D) ISSUES AND STANDARD OF PROOF ON THE PRESENT APPLICATIONS**

74. The key issues that arise on the present applications are:
- i) whether the exclusive jurisdiction clauses (“*EJCs*”) relied on by the applicants were agreed between the parties and incorporated into their respective contracts, applying;
    - a) the formal validity requirements set out in Lugano Convention Article 23/Recast Brussels Regulation Article 25, and
    - b) if relevant, the laws governing the contracts i.e. Swiss or Luxembourg law;
  - ii) if so, whether the *EJCs* satisfy the requirements for material validity under Lugano Convention Article 23/Recast Brussels Regulation Article 25;
  - iii) if so, how the *EJCs* are to be interpreted under their respective governing laws;
  - iv) whether, and if so to what extent, the *EJCs* apply to PIFSS's claims against the applicants;
  - v) if and to the extent that the *EJCs* apply to only some of PIFSS's claims against particular applicants, or apply to PIFSS's claims against some but not all of the applicants, whether this court has jurisdiction over the remainder of the claims pursuant to Lugano Convention Article 6(1)/Recast Brussels Regulation Article 8(1); and
  - vi) whether the court should decline jurisdiction over the claims against Pictet Asia and Pictet Bahamas on *forum non conveniens* grounds.
75. The burden and standard of proof on these issues is largely, if not entirely, common ground. The starting point is that PIFSS as the Claimant must show a “*good arguable case*” that the court has jurisdiction, which requires it to have “*the better of the argument*” on the materials available to the court (see, e.g., *Tugushev v Orlov* [2019] EWHC 645 (Comm) at § 59 per Carr J).
76. So far as concerns reliance on the *EJCs*, the parties accept that the authorities, whilst not entirely explicit, tend to suggest that the party seeking to rely on such a clause has the burden of showing a good arguable case on that point (see e.g. *Konkola Copper Mines plc v Coromin Ltd* [2006] EWCA Civ 5 § 95; *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805 §§ 49-51; *Etihad Airways PJSC v Flöther* [2019] EWHC 3107 (Comm) § 31; *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm) §

25; Briggs, “*Civil Jurisdiction & Judgments*” (6th ed.) § 2.126; and Dicey, Morris and Collins, “*The Conflict of Laws*” (15th ed.) §§ 12-114 and 12-120).

77. As to what is meant by a ‘good arguable case’ and having ‘the better of the argument’, in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, Lord Sumption (with whom the other members of the Supreme Court agreed) explained that, following *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 § 7, it means:

“(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) 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.” (§ 9)

78. The Court of Appeal in *Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA Civ 10 elucidated these three limbs, explaining as follows:

- i) In applying limb (i) the question is whether the claimant has discharged the burden of showing a plausible evidential basis indicating that he has the better argument (but not ‘much’ the better argument); this does not require proof on the balance of probabilities and is a context specific and flexible test (*Kaefer* §§ 71-76).
- ii) Limb (ii) (“*if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so*”) is:

“... an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence" .... It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening up the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant



on an assumed basis and ask whether jurisdiction is nonetheless established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses.” (Kaefer § 78)

- iii) Limb (iii) (if “*the nature of the issue and the limitations of the material available at the interlocutory stage [are] such that no reliable assessment can be made*” then “*there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it*”) arises where the court is unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument (Kaefer § 79). As to this situation:

“... In [*WPP Holdings Italy Sarl v Benatti* [2007] EWCA Civ 263] Lord Justice Toulson stated that the Court could still assume jurisdiction if there were “*factors which exist which would allow the court to take jurisdiction*” ... and in [*Antonio Gramsci Shipping Corp v Reoletos Ltd* [2012] EWHC 1887 (Comm)] Teare J asked whether the claimant’s case had “*sufficient strength*” to allow the court to take jurisdiction (ibid paragraph [48]). The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits.” (Kaefer § 80)

79. Finally, to the extent that Pictet Bahamas and Pictet Asia challenge jurisdiction on *forum non conveniens* grounds, it remains for PIFSS as claimant to persuade the court that England is clearly the forum in which the case can be suitably tried for the interests of all parties and for the end of justice (*Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 (PC) § 88, and *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 481 (HL)).

## **(E) CONTENTS OF JURISDICTION AGREEMENTS**

### **(1) Banque Pictet**

80. During the relevant period, Banque Pictet used General Business Conditions incorporating an EJC. The General Business Conditions 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 EJCs.
81. The October 1994 General Business Conditions 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 General Business Conditions 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.”

82. The style of the documents changed somewhat 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 General Business Conditions 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.”

83. 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.”

84. Further, non-material, changes were made in August 2008.
85. 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.”

86. The General Business Conditions 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.”

87. Further changes of wording, not material for present purposes, occurred in October 2011, January 2014 and July 2016.
88. The latest set of General Business Conditions of potential relevance, 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.”

## (2) Pictet Europe

89. 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.”

90. Pictet Europe’s General Business Conditions 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”

91. The latest set of General Business Conditions of potential relevance, 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”.

**(3) Banque Mirabaud**

92. The earliest set of Mirabaud’s General Terms and Conditions that PIFSS has located is undated, though Mirabaud alleges that they were most likely provided to PIFSS when it opened its account with Mirabaud on 20 January 1997 (see further §§ 180-185 below). They include 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”.

93. A Signature Card signed by PIFSS dated 20 January 1997 includes 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.”

94. The General Terms and Conditions which PIFSS accepts 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.”

95. The latest set of General Terms and Conditions of potential relevance, dating from 2016, 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.”

**(F) INCORPORATION/FORMAL VALIDITY OF JURISDICTION AGREEMENTS**

**(1) Scope of the dispute**

96. There is some dispute about which of the EJCs relied on by the applicants are binding on PIFSS. In outline, PIFSS’s position is that:
- i) as regards Banque Pictet:
    - a) PIFSS does not accept that Banque Pictet provided PIFSS with access to its General Business Conditions in 1998 when PIFSS first opened an account with Banque Pictet;
    - b) no copy of the General Business Conditions was signed by PIFSS; and
    - c) the General Business Conditions were provided to PIFSS in 2012 and “*Contracts after that date incorporated the General Terms including a [choice of forum clause]*”.
  - ii) as regards Pictet Europe, PIFSS accepts that a formally valid EJC was agreed in relation to account 300046, and that the General Terms were incorporated within any subsequent contract between PIFSS and Pictet Europe that was expressed to be subject to the General Business Conditions; and
  - iii) as regards Mirabaud, PIFSS accepts that:
    - a) when it opened account 500750 it signed a signature page which included a choice of forum clause which was incorporated into the account contract; and

- b) it signed General Terms in 2007, with the effect that they were incorporated into account 500750 at that time.

97. I consider below the disputed issues as regard incorporation and formal validity of the EJs.

## (2) Principles

### (a) Applicable law(s)

98. The first question is whether these issues are governed solely by EU law, in the form of the Lugano Convention and Recast Brussels Regulation, or whether it is also necessary for a jurisdiction agreement to be contractually binding under the law governing the contract which contains it, in this case Swiss or Luxembourg law.
99. Mirabaud, with whose analysis PIFSS agrees, submits that the answer is unclear. It notes that Dicey, Morris and Collins at § 12-103 states: “*It should follow that once the law governing the contract has been identified...it is that law which must be used to make the definitive assessment whether the jurisdiction agreement in question is in fact one of the terms of the contract*”. However, §§ 12-104 and 12-128 of the same work state, in the context of the incorporation of a jurisdiction agreement from another instrument:

“Where the Brussels I Regulation or the Lugano Convention is applicable to the jurisdiction agreement, it is not clear whether the question of incorporation is answered by sole reference to the rules governing formality, or is, or is also, regulated as a matter of substantive law by the *lex contractus* of the agreement into which it is alleged the term was incorporated. But if the second contract contains words which satisfy the “clear and specific” requirement of the common law, it is unlikely that the result will be different.”

“Likewise, if it is contended that a jurisdiction agreement in one contract has been incorporated into another contract, it is not certain whether the issue for decision is one which is entirely governed by Art.23 or by the substantive law of the second contract. In principle, if the issue is understood as one which is essentially contractual in nature, recourse to the law governing the second contract, to identify its terms as including, or not, a jurisdiction agreement is appropriate. If instead the issue is not seen as an essentially contractual one, but is conceived as one which asks whether the party to be bound by it indicated his agreement to the jurisdiction of the particular court, the question is not one for a contractual governing law, but one which is to be determined by recourse only to the formal requirements set out in Art.23 itself. A practical solution may be to conclude that a test which asks whether the material before the court shown [sic] that the jurisdiction was accepted clearly and precisely by the party who is proposed to be held to it will satisfy whichever test is

the correct one. In principle, if the agreement on jurisdiction is said to have been incorporated into the second contract, it must be shown that the formalities prescribed for the second contract, by Art.23, have been complied with. In practice, if they are satisfied, it is improbable that there is any further requirement which national law would impose.”

100. Mirabaud cites the following English authorities:

- i) In *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 § 61 the Court of Appeal expressly left open the question of whether “*a jurisdiction agreement cannot be proved unless it is valid by its proper law as well as by the autonomous test of article 17*”.
- ii) In *Bols Distilleries BV v Superior Yacht Services Ltd* [2007] 1 WLR 12 there was an issue between the parties as to whether an exclusive jurisdiction clause in favour of the courts of Gibraltar had in fact been agreed, and the Privy Council when determining that issue applied the national law governing the relationship, which was the law of Gibraltar (see in particular § 25).
- iii) In *Africa Express Line Limited v Socofi SA & Plantations Dam SA* [2009] EWHC 3223 (Comm) there was a dispute about whether the exclusive jurisdiction clause relied upon by the claimant was incorporated into the contract between the parties. Whilst Christopher Clarke J did not squarely address the legal issue of which law should be applied to determine this question, it appears from his judgment that in substance he regarded this as both an autonomous question and a question of national law (English law on the facts).
- iv) In *JSC Aeroflot v Berezovsky & Ors* [2013] EWCA Civ 784 the issue of which law governed the validity of a jurisdiction clause was considered by the Court of Appeal, the choice being between Swiss law and “*an autonomous European law regime*”. Aikens LJ stated that the construction of Article 23, and hence what is comprised in the phrase “*...the parties... have agreed that a court or courts of a State bound by this Convention are to have jurisdiction to settle any disputes which...may arise in connection with a particular legal relationship*”, must be determined by autonomous rules of construction rather than any rules of national law.

101. To this list there could usefully be added the earlier decision of Aikens J in *Provimi v Roche Products* [2003] EWHC 961 (Comm), in which he said:

“There is some confusion here, in my view. Article 17 of the Lugano Convention is concerned with what English lawyers would probably call the “formal” and “material” validity of a jurisdiction clause. It is clear that Article 17 defines the necessary and sufficient requirements for formal and material validity of jurisdiction clauses. Those requirements replace any requirements imposed by the various national laws” (§ 61).

102. Of the authorities mentioned in § 100 above, only *JSC Aeroflot v Berezovsky & Ors* directly addresses the issue by reference to the EU authorities. As Aikens LJ pointed out there (§ 59), and as Banque Pictet submits, the EU Court of Justice (“*CoJ*”) in Case C-269/95 *Benincasa v Dentalkit* stated, in a passage which merits quoting in full:

“25 A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the *lex causae* determined by the private international law of the State of the court having jurisdiction.

26 Next, as the Court has consistently held, the objectives of the Convention include unification of the rules on jurisdiction of the Contracting States' courts, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (Case 38/81 *Effer v Kantner* [1982] ECR 825, paragraph 6, and Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11).

27 It is also consonant with that aim of legal certainty that the court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case.

28 The aim of securing legal certainty by making it possible reliably to foresee which court will have jurisdiction has been interpreted in connection with Article 17 of the Convention, which accords with the intentions of the parties to the contract and provides for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated, by fixing strict conditions as to form (see, in this regard, Case C-106/95 *MSG* [1997] ECR I-0000, paragraph 34).

29 Article 17 of the Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardized if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole

of the contract was void on grounds derived from the applicable substantive law.”

103. Thus, in order to promote legal certainty, the CoJ made clear both that the applicability of jurisdiction clauses should be assessed solely by reference to the requirements of Article 17 (thereby *inter alia* making them separable from any dispute as to the validity of the underlying contract), and that there need be no objective connection between the relationship in dispute and the designated court. Although the focus in *Benincasa* was on separability, the same considerations of legal certainty point to the conclusion that the formal requirements of what are now Lugano Convention Article 23/Recast Brussels Regulation Article 25 are the sole matter to be considered when deciding whether a jurisdiction clause must be taken to have been agreed between the parties.
104. That view is also consistent with the previous explicit statement of Advocate General Lenz in his Opinion in Case C-288/92 *Custom Made Commercial v Stawa Metallbau GmbH* [1994] ILPr 516 (proposed response to question 3):

“For the sake of completeness I should like to deal briefly with the problem raised by this question of whether, if there is a validly agreed jurisdiction clause pursuant to Article 17, there should be “further examination, under the national substantive law which is applicable in accordance with the conflicts rules of the court hearing the case, of the question whether the jurisdiction clause is validly incorporated in the contract”.

In the context in which it is put, this question must be answered in the negative. Article 17 is intended to create independent and, therefore, uniform, law in its ambit of application. It conclusively sets out the requirements concerning substantive consensus and the forms necessary to safeguard those requirements. Consequently national provisions with the same function cannot be used simultaneously. The reply to the third question should be in these terms.”

The CoJ did not find it necessary to address question 3 in that case.

105. Similarly, the CoJ in Case C-543/10 *Refcomp v Axa Corporate Solutions*, when considering, under Article 23 of the original Brussels Regulation, whether a jurisdiction clause in a sale contract could be relied on by a sub-purchaser, said:

“39. In such circumstances, to refer the assessment as to whether the sub-buyer may rely on a jurisdiction clause incorporated in the initial contract between the manufacturer and the first buyer to national law, as Refcomp and the German and Spanish Governments have suggested, would give rise to different outcomes among the Member States liable to compromise the aim of unifying the rules of jurisdiction pursued by the Regulation, as is clear from recital 2 in the preamble thereto. Such a reference to national law would also be an element of uncertainty incompatible with the concern to

ensure the predictability of jurisdiction which is, as stated in recital 11 in the preamble to the Regulation, one of its objectives.

40 Therefore, it is appropriate to revert to the general rule, set out in paragraph 21 of the present judgment, according to which the concept of ‘jurisdiction clause’ referred to in that provision must be interpreted as an independent concept, and to give full effect to the principle of freedom of choice on which Article 23(1) of the Regulation is based.”

106. Finally, the CoJ in Case C-222/15 *Hoszig Kft v Alstom* stated:

“31. With regard to the first paragraph of art.17 of that Convention, which was replaced by art.23 of the Brussels I Regulation, the Court held that a jurisdiction clause, which serves a procedural purpose, is governed by the provisions of that Convention, whose aim is to establish uniform rules of international jurisdiction (judgment of 3 July 1997 in *Benincasa v Dentalkit Srl* (C-269/95) [1997] E.C.R. I-3767; [1998] All E.R. (EC) 135; [1997] E.T.M.R. 447; [1997] I.L.Pr. 559, [25] ).

32. The Court also had occasion to make it clear that that provision is intended to lay down itself the conditions as to form which jurisdiction clauses must meet, so as to ensure legal certainty and to ensure that the parties have given their consent (see, to that effect, judgment of 16 March 1999 in *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* (C-159/97) [1999] E.C.R. I-1597; [1999] I.L.Pr. 492, [34] and the case law cited).

...

38. Thus, as the Advocate General emphasised in [AG33] and [AG34] of his Opinion, it follows from the case law of the Court that the existence of an “agreement” between the parties within the meaning of art.23(1) of the Brussels I Regulation can be inferred from the fact that the formal requirements laid down in art.23(1) of that Regulation have been complied with.” (my emphasis)

107. In my view these CoJ authorities, and the statement of Aikens LJ in *JSC Aeroflot*, make clear that issues of incorporation are to be addressed solely by reference to the requirements of what is now Article 25 of the Recast Brussels Regulation and the corresponding provision in Lugano Convention Article 23.

108. In case I am wrong in that conclusion, I also consider (in sections (f) and (g) below) the principles that would apply under Swiss and Luxembourg law.

*(b) EU law requirements*

109. Lugano Convention Article 23(1)(a)-(c) requires that the jurisdiction agreement sought to be relied on “*shall be either:*

a) in writing or evidenced in writing; or

b) in a form which accords with practices which the parties have established between themselves; or

c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.”

Article 25(1)(a)-(c) of the Recast Brussels Regulation is in the same terms. For convenience, I focus below on the Lugano Convention version.

*(c) Article 23(1)(a): agreement in or evidenced in writing*

110. The CoJ has held that a real consent to or acceptance of the relevant jurisdiction clause must be shown in order to satisfy the requirements of Article 23(1): see, e.g., Case 24/76 *Estasis Salotti di Colzani Aimò e Gianmario Colzani v RUWA Polstereimaschinen GmbH* § 7; *Refcomp* § 26; and Case C-366/13 *Profit Investment Sim Spa v Ossi* §§ 24-28.

111. The CoJ has considered in this context the situation where a jurisdiction clause is contained in general conditions incorporated by cross-reference. In *Estasis Salotti* the CoJ said:

“[7] ... In view of the consequences that such an option may have on the position of 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 ...”

[8] The first question asks whether a clause conferring jurisdiction, which is included among general conditions of sale printed on the back of a contract signed by both parties, fulfils the requirement of a writing under the first paragraph of Article 17 of the Convention.

[9] Taking into account what has been said above, it should be stated that 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 17, 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.

[10] Thus it should be answered that where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.

[11] The second question asks whether the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled if the parties expressly refer in the contract to a prior offer in writing in which reference was made to general conditions of sale including a clause conferring jurisdiction.

[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.”

112. Thus *Estasis* held it sufficient for the general conditions containing the jurisdiction clause to be (at least) either:
- i) printed on the back of a signed contract and expressly referred to in the contract, or
  - ii) sent to the counterparty with an offer letter to which the contract cross-refers.



113. It is unclear whether the last sentence of § 9 *Estasis* (“... where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause conferring jurisdiction”) extends to cases where a contract does cross-refer to general conditions but those conditions are not printed on the back of the contract or otherwise made available. Read in isolation, this sentence might suggest that that would be sufficient: whereas the reasoning in § 12 (on the second question referred to the CoJ) may suggest that the CoJ regarded it as necessary for the general conditions to have been made available to the counterparty in some way.
114. However, the Court of Appeal in *Credit Suisse Financial Products v Société Generale d’Enterprises* [1997] CLC 168 held there to be no requirement for the general conditions to be made available:

“To my mind the question is simply whether the express reference in the written contract in the present case amounts to a ‘clear and precise’ demonstration that the clause conferring jurisdiction was the subject of a consensus between the parties.

I have no doubt at all that it does. It seems to me that there is nothing in *Salotti* which begins to suggest that where in the written contract itself there is an express incorporation by reference of other written terms, no consensus is established unless the profferee signing the contract has been supplied with a copy of those terms, or as the judge put it, he has ‘a copy of those conditions in his possession and readily available to him’. It is true that in *Salotti* the conditions were printed on the back of the contract, but as the court pointed out, in the absence of a reference to them in the contract itself, this was not enough to satisfy art. 17 ‘since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction’. The court went on to say:

‘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.’

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. Indeed, 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. To my mind the fact that Mr Mossler in the present case did not have a copy of the master agreement in his possession and readily available to him, or, as he said in his affidavit, that he thought the reference

to the master agreement was a 'standing clause' is neither here nor there; for in truth Mr Mossler, by signing the confirmation, did agree in writing that the terms of the master agreement formed part of the contract he was making.

In my view the answer the court in *Salotti* gave to the second of the questions posed in that case and the discussion in the judgment on this second question in no way alters this conclusion. It is from this part of the decision that the judge in the present case concluded that:

'*Salotti* shows that it must be established that the party whom it is sought to bind by the jurisdiction clause had at least the means of knowledge of it, and can therefore be checked by a party exercising reasonable care'.

The judge then expressed the view that this requirement would be satisfied if the individual dealing with the transaction had a copy of the conditions in his possession and readily available to him.

As I have already observed, the court answered the second question by ruling that the requirement of a writing under the first paragraph of art. 17 is satisfied only if the reference is express 'and can therefore be checked by a party exercising reasonable care'. Although it is perhaps not entirely clear, it seems to me that the ruling is referring not to the reference in the contract to the earlier offers but only to the reference in the earlier offers to the general conditions. Be that as it may, what seems to me to be wholly clear is that the court was emphasising, by the use of the word 'therefore', that an express reference is what is required in such circumstances. Indeed the court said that indirect or implied references to earlier correspondence would not suffice, '*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*'. In other words, it is only an express reference that will provide that certainty.'" (pp171-172)

115. This reasoning might, with respect, be regarded as unsatisfactory, since it does not grapple with the point made by the CoJ in § 12 of *Estasis* about the general conditions having actually been communicated to the counterparty along with the prior offer. The latter point, though, might reasonably have been distinguished on the basis that the CoJ in that portion of *Estasis* was addressing the particular situation where a contract refers to a prior offer, which itself refers to general terms and conditions, thus placing those terms and conditions at one further remove from the contract itself.
116. In any event, in *7E Communications Ltd v Vertex Antennaentechnik GmbH* [2007] 1 WLR 2175 the Court of Appeal followed its own decision in *Credit Suisse*, rejecting the suggestion that the CoJ's answer to the second question referred in *Estasis* indicated that the general terms containing the jurisdiction clause must actually have

been made available to the counterparty. The Court of Appeal took the view that where the signed contract expressly refers to the general conditions, it is the CoJ's answer to the *first* question in *Estasis* that is relevant (see in particular *7E Communications* §§ 32 and 43-44).

117. The Court of Appeal once again reached essentially the same conclusion in *Sherdley v Nordea Life and Pension SA* [2012] EWCA Civ 88. The court at § 48 approved the summary of the position given by Fraser J in *Coys of Kensington Automobiles Ltd v. Pugliese* [2011] EWHC 655 (QB) as follows:

“[30] From those decisions I derive the following. (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 the *Estasis Salotti* case. (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 the *Crédit Suisse* case [ *Crédit Suisse Financial Products v. Société Générale d'Enterprises* [1997] CLC 168, CA ]. (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 the *7E Communications* case [ *7E Communications v. Vertex Antennentechnik GmbH* [2007] EWCA Civ 140, [2007] 1 WLR 2175 ].”

118. Subsequently, in 2016 the CoJ in *Profit Investment* held *inter alia* that where a jurisdiction clause is included in a bond issue, the formal requirement laid down in Article 23(1)(a) of the Brussels Regulation is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause *or* contains an express reference to that prospectus. The court stated:

“28. In the main proceedings, the clause conferring jurisdiction on the English courts is contained in the prospectus, a document produced by the bond issuer. It is not entirely clear from the order for reference whether that clause was included, or expressly referred to, in the contractual documents signed upon the issue of the bonds on the primary market.

29. The answer to the first part of the second question is therefore that, where a jurisdiction clause is included in a prospectus concerning the issue of bonds, the formal requirement laid down in article 23(1)(a) of Regulation No 44/2001 is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express

reference to that prospectus, which it is for the referring court to verify.

30. If so, it is also for the referring court to determine whether the contract signed by Redi and Profit upon the sale of the bonds on the secondary market also mentions the acceptance of that clause or contains such a reference. If that is the case, that clause must be regarded as enforceable against Profit.

31. It is only if that is not the case that the second part of the second question arises, namely whether a jurisdiction clause, validly agreed in the contract concluded between the issuer of a bond and the subscriber for that bond, may be enforceable against a third party who acquired that bond from that subscriber, without expressly consenting to that clause, and who has brought an action for damages against that issuer.

...

37. ... the answer to the second part of the second question is that article 23 of Regulation No 44/2001 must be interpreted as meaning that a jurisdiction clause contained in a prospectus produced by the bond issuer concerning the issue of bonds may be relied on against a third party who acquired those bonds from a financial intermediary if it is established, which it is for the referring to verify, that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause."

119. This reasoning indicates that a party who has signed a contract containing express reference to terms and conditions, which in turn contain a jurisdiction clause, is bound by it without any additional requirement that the terms and conditions be positively made available to the party. In *Profit Investment* the requirement of actual communication of the terms and conditions arose only in relation to a subsequent purchaser in the secondary market, who had *not* signed a contract containing an express reference to either the jurisdiction clause or the prospectus containing it.
120. However, a few months later in 2016, the CoJ in *Hoszig* considered a case where a contract referred to general conditions, containing a jurisdiction clause, that had been forwarded to the counterparty before the contract was entered into (see § 5 of the Advocate General's Opinion). The CoJ stated:

"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, judgment of 14 December 1976 in *Estasis Salotti di Colzani Aimò et Gianmario Colzani v. RÜWA Polstereimaschinen GmbH* (24/76) [1976] E.C.R. 1831; [1977] 1 C.M.L.R. 345, [12] ).

41. In the present case, it is apparent from the decision to refer that the jurisdiction clause was stipulated in the general terms and conditions of Technos, themselves contained in the instruments witnessing the contracts between the parties and forwarded upon their conclusion.

42. Therefore, it follows from the above that a jurisdiction clause, such as that at issue in the main proceedings, meets the formal requirements set out in art.23(1) of the Brussels I Regulation.”

121. The CoJ’s statement in § 40 above would appear to suggest that a jurisdiction clause in general terms and conditions, expressly referenced in a contract, is not binding unless the terms and conditions have actually been communicated to the counterparty. The issue did not in fact arise, because in the case before the CoJ the terms *had* been communicated to the counterparty. PIFSS submits that the statement in § 40 should nonetheless not be regarded as *obiter*, because the CoJ was clarifying the law and its statement was consistent with what it had said in *Estasis*. I do not accept that submission. Had any issue as to a need for actual communication arisen in *Hoszig*, the CoJ might reasonably have been expected to grapple more fully with the implications of whatever it decided, including whether *Profit Investment* was being overruled, and if so to what extent. As I note above, the CoJ in *Profit Investment* did not require actual communication save in relation to a secondary market purchaser who had not signed a contract incorporating by reference the terms set out in the prospectus. Further, *Hoszig* § 40, whilst citing *Estasis* § 12, does not address the particular circumstances being considered in that part of the judgment in *Estasis* (see the point I make in § 115 above).
122. Accordingly, I consider that the CoJ’s decision in *Profit Investment*, and the three Court of Appeal decisions I discuss above, constitute binding authority to the effect that no requirement of actual communication exists where the counterparty has signed a contract that includes express reference to (and hence agreement to) the general terms and conditions which contain the EJC.

*(d) Article 23(1)(b): parties' established usage*

123. Article 23(1)(b) requires that a qualifying jurisdiction agreement be in a form which accords with practices the parties have established between themselves. Banque Pictet submits that this requirement would cover a situation where a bank and customer repeatedly execute documentation incorporating the bank's general terms and conditions, or documentation containing freestanding jurisdiction clauses.
124. However, I agree with PIFSS that the reference to "*practices*" must be to past dealings by which the parties have agreed to be bound by a jurisdiction clause, or to terms including a jurisdiction clause. That might apply, for example, where parties have established a practice of concluding contracts by telephone subject to a set of terms and conditions that include a jurisdiction clause. Unless the parties have at some stage reached a consensus including the jurisdiction clause, the fact that they have repeatedly contracted will not in my view suffice to satisfy Article 23(1)(b).

*(e) Article 23(1)(c): usage in international trade or commerce*

125. Article 23(1)(c) allows for the requisite consent to be presumed where there are "*in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*" The CoJ said in *Profit Investment*:

"39. It follows from the case law that one of the aims pursued by article 23(1)(c) of Regulation No 44/2001 is to ensure that there is real consent on the part of the persons concerned, so as to avoid jurisdiction clauses, incorporated in a contract by one party, going unnoticed: *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* (Case C-106/95) [1997] QB 731; [1997] ECR I-911, para 17 and the *Castelletti* case [1999] ECR I-1597, para 19.

40. The court has added, however, that article 23(1)(c) makes it possible to presume that such consent exists where commercial usages of which the parties are or ought to have been aware exist in this regard in the relevant branch of international trade or commerce: the *MSG* case, para 19 and the *Castelletti* case, paras 20 and 21.

...

44. The court has added that there is a usage in the branch of trade or commerce in question where, in particular, a certain course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type: the *MSG* case, para 23 and the *Castelletti* case, para 26.

45. ... The determining factor remains, however, whether the course of conduct in question is generally and regularly

followed by operators in the branch of international trade or commerce in which the parties to the contract operate: the Castelletti case, para 27.

46. In that respect, the court has also stated that since article 23 of Regulation No 44/2001 does not contain any reference to forms of publicity, it must be held that, although any publicity which might be given in associations or specialised bodies to the standard forms on which a jurisdiction clause appears may help to prove that a practice is generally and regularly followed, such publicity cannot be a requirement for establishing the existence of a usage: the Castelletti case, para 28.”

126. It is clear in my view from the language of Article 23(1)(c) that the relevant usage must be one which relates to the *form* in which jurisdiction agreements are made. The mere fact that there may be a usage, in a particular sector, of agreeing jurisdiction clauses *per se* does not in my view suffice.

*(f) Incorporation principles of Swiss law*

127. In this and the following section I briefly consider the principles relevant to incorporation of jurisdiction clauses in Swiss and Luxembourg law, in case (contrary to my earlier conclusion) they are relevant.
128. The parties submitted reports on Swiss law from the following expert witnesses:
- i) (PIFSS) Professor Dr Thomas Kadner Graziano, Professor of Law at the University of Geneva, Visiting Professor at KU Lieven and Adjunct Professor at Notre Dame University (USA, London Campus).
  - ii) (Pictet) Professor Dr Isabelle Romy, a member of the Bar of Vaud and entitled to practice throughout Switzerland, in practice as a partner in a business law firm in Zurich, and a Professor at the University of Fribourg, who served from 2003 to 2008 as a Deputy Judge of the Swiss Federal Supreme Court.
  - iii) (Mirabaud) Professor Dr Alexandre Richa, a member of the Geneva Bar, in practice as a banking and financial law partner at a law firm in Geneva, and an Associate Professor at the University of Lausanne.
  - iv) (M. Bertherat) Professor Dr Nicolas Kuonen, a member of the Geneva and New York Bars, in practice as head of commercial litigation in a law firm in Geneva, and Professor of the University of Fribourg.
  - v) (M. Mirabaud and M. Fauchier-Magnan) Professor Dr Ramon O Mabillard, a member of the Swiss Bar, a judge of the Court of Appeal of the Canton Basel-City, and Professor at the University of Fribourg.
129. On the issue of incorporation, the experts’ Joint Memorandum records that the experts agreed that:

“The user of GTCs must give a reasonable opportunity to the client to have access to the GTCs in order to incorporate them into the contract.

This opportunity must be given at the latest at the time of the formation of the contract (see below section A.6, as regards GTCs provided at a later point in time).

The reasonable opportunity does not mean that the GTCs must be handed over to the client.

Whether the client actually read the GTCs or understood them is irrelevant for incorporating the GTCs.”

130. The experts disagree as to what a “reasonable opportunity” means. The Joint Memorandum records that:

“Prof Kadner sets out that in order for GTCs to be incorporated into a contract, it is required that they be made available, i.e. access to their content was offered to the other party when the contract was formed. It is essential that the addressee of the GTCs had the opportunity to read them. It does not matter if it in fact read them; what matters is that they could have been read, see Kadner Report §28-29 and the Swiss Federal Supreme Court (“SFSC”) case referred to in section A.1bis column 2.

In the case SFSC 139 III 345 cited below at A.1bis (column 2) the SFSC further held: “The ... conditions for the validity of choice of court agreements must be interpreted strictly, and the requirements as to form are therefore very rigid (BGE 131 III 398 E. 6 p. 400; Tilly Russ v Nova, paragraph 14 with references; see also Case C- 159/97 Castelletti v Trumpy Spa [1999] ECR I- 0597, paragraph 48; KILLIAS, choice of court agreements, op. cit, p. 146 et seq.; KROPHOLLER v. HEIN, op. cit., n. 38 on Article 23 EC; REITHMANN v. Martiny, op. cit.) An obligation of the contractual partner to make inquiries must therefore be rejected.”

3 Prof Kuonen, Mabillard, Richa and Romy disagree with Prof Kadner. They note that the relevant test is for the user of the GTCs to "give a reasonable opportunity" to the client to access them and it is no higher than this (i.e. the test is not to make "available" the GTCs). ....”

131. The experts also agreed that general terms and conditions can be incorporated through tacit agreement, i.e. by conduct, but that the core question was to determine whether the client had a reasonable opportunity to access them. They disagreed on the scope of the case law, and the effect of contractual wording to the effect that the client is “*familiar with*” general conditions.



132. In summary, Professor Kadner does not consider it sufficient for such language to be used, unless the client was also given access to the general terms themselves. He cites the decision of the Swiss Federal Supreme Court (“*SFSC*”) 4A\_347/2011 of 10 August 2011, summarised as follows:

“An offer was made including the following statement:  
Appendix: Terms of delivery. ... If you are not aware of our terms and conditions, you can request them from us at any time. The GTCs contained a jurisdiction clause. The Court held: It is for the user to prove that the GTCs were indeed contained in the offer and made available to the other party. The user was unable to provide this proof and could therefore not rely on the jurisdiction clause (para. 1.1.1).”

133. Professors Kuonen, Mabillard, Richa and Romy disagree, expressing the view that if a contract states that general terms are attached to it, it will be assumed that they were indeed provided to the client, who then bears the burden of proving that the terms were not provided. They cite decisions DSFSC 142 III 369 and 154 II 77 of the SFSC. Professor Romy further states that if the client expressly confirms that he has taken due notice of or agreed to general terms and conditions, then he is bound by that declaration regardless of whether he did or did not have access to the terms.
134. Turning to the Swiss case law to which I was taken, I note as a preliminary point that some of the case law concerns the EU provisions on jurisdiction agreements, or parallel Swiss rules applicable when allocating jurisdiction as between different regions of Switzerland, rather than Swiss domestic law on incorporation of terms. For example, as the Joint Memorandum recognises, decision SFSC 139 III 345, referred to in the passages quoted in § 130 above, is specifically an application by the Swiss court of Lugano Convention Article 23. Such decisions are not in my view a reliable guide to the Swiss law principles of incorporation, which must be the applicable ones in the context of the exercise I am required (contingently) to undertake.
135. In case BGE 77 II 154 (1951), the SFSC held the assignee of a consignor (Steiner) to be bound by limitations of liability contained in the General Terms and Conditions of the Swiss Association of Forwarding Agents. The court stated:

“However, the applicability of the SS GTCs was not specifically agreed between Steiner and the Defendant for the disputed forwarding contract. However, in agreement with the court of first instance, it must be assumed that they were tacitly used as a basis for the contractual relationship as both parties expected their application to be obvious. From exhibits 1 and 2 of the defence answer, it emerges in particular that the colonial goods import company Steiner had been in a business relationship with the Defendant forwarding company for years and had awarded it four major transport orders in 1946. Steiner used the pre-printed order form of the Defendant for this purpose, the first sentence of which reads: “We transfer to you the following party for transport based on the “General Terms and Conditions” set forth by the Swiss Association of Forwarding Agents.” Whether Steiner had read the SS GTCs at

the time or earlier or whether it referred to unread general terms and conditions does not matter. It is a matter of course, especially among business people, that general terms and conditions that are referred to become contents of the contract. It suffices that the customer who is explicitly and conspicuously made aware of the existence of general terms and conditions has the ability to inform him/herself of their contents. Whether he/she makes the effort does not matter from a legal perspective. Apart from this, it can be assumed from experience that a Swiss import company generally knows about the existence of SS GTCs, which have been in use since 1922. Plus, in all likelihood, Steiner must have possessed the SS GTCs. As was evident from the files, the Defendant was in the habit of creating its offers on pre-printed forms. On the bottom of this form, it is underlined that the SS GTCs apply to all agreements and orders, and reference is clearly made to the reverse side, where the SS GTCs are printed in their entirety. It is obvious that even Steiner received offers on such forms in the course of business correspondence with the Defendant. But even if this were not the case, Steiner knew, based on the previous transport orders issued on pre-printed forms, that the Defendant always contracted on the basis of the SS GTCs. It goes against good faith in dealings if it, after having issued forwarding orders to the Defendant throughout 1946 on the basis of such forms, now suddenly disputes the applicability of the SS GTCs for a similar order issued at the beginning of May 1947 without any reservation.” (my emphasis)

136. Although this ruling is based in part on the relevant terms being well-known generic trade terms, the passages underlined above appear to be of more general application.
137. In decision BGE 100 II 200 (1974) the same court held that Swiss law applied to a dispute concerning a bank deposit account. The court’s first reason concerned the effect of Swiss private international law. The second reason was that that law was specified in the bank’s general terms and conditions, to which the account opening contract referred. The court said:

“Furthermore, the application of Swiss law in this regard is imposed for another purpose. Under the ”comments” heading, appearing at the top of the holder’s signature, the account opening contract of 18 October 1962 specifies that “the holder of this account declares having received the general conditions of the Banque Commerciale Arabe SA”. This remark can have no other meaning, in the business relationship between a bank and its customer, than to subject these to the general terms and conditions mentioned; so that these conditions become an integral part of the contract, it is sufficient that the person who intends these conditions has clearly drawn to it the attention of its co-contracting party and has notified them to read them (OR 77 II 156; BEAT KLEINER, Die allgemeinen

Geschäftsbedingungen der Banken [The general terms and conditions of banks], 2nd ed., Zurich 1964, pg. 10).

However, according to art. 15 of the “General Terms and Conditions relating to the current accounts and other business reports with our customers” of the defendant, “all legal relationships between the customers and the bank are subject to Swiss law. The place of execution and the court of jurisdiction for all that concerns the account are the domicile of the bank’s registered office”. Through this clause, the parties to the contract of 18 October 1962 have duly accepted to submit all their legal relationships to Swiss law, which is therefore also applicable under an election of law.”

138. The SFSC’s decision 4A\_347/2011 concerned the tacit incorporation of GTCs containing a forum selection clause into a contractual relationship. The SFSC held there was no valid agreement on jurisdiction, because the general conditions containing the forum selection clause were not attached to the contractor’s offer and the defendant or his representative were not otherwise aware of the content of the general conditions. Professor Romy expresses the view that this case did not lay down any rule of general application. The court stated that under the circumstances of the particular case, the contractor could not expect his client to object to the missing general conditions or to the forum selection clause; hence, the contractor could not expect that the acceptance of the offer also included the acceptance of the forum selection clause where the general conditions were not attached to the offer. The court held that there was no tacit incorporation of the GTCs, and hence of the forum selection clause, into the contract.
139. I agree with Professor Romy that this case does not appear to lay down any rule of general application. First, it is not clear from the decision precisely how, or whether, the general terms of sale containing the jurisdiction clause were incorporated into the contractual offer letter relied upon by the claimant supplier. The report indicates that the offer (a) stated that it was made in accordance with the supplier’s delivery terms (“*selon nos conditions de livraison*”) which it said were annexed (“*Annexe: conditions de livraison*”), and (b) stated that the customer could ask for the supplier’s “*conditions generale de vente*” (CGV) if it was not aware of them. It was the CGV which contained the jurisdiction clause. Secondly, it appears to have been important to the decision that from the customer’s point of view, agreement to the jurisdiction clause would have involved waiver of its constitutional right to be sued in its place of domicile. The court said (in the translation provided)

“Since the jurisdiction clause contained in the general terms and conditions generally represents a non-business related and therefore unusual provision and also restricts a constitutional right (Art. 30 para. 2 BV), this assumption is only justified if it can be assumed that the waiver of the clause on jurisdiction has actually been noted and its meaning correctly recognised. If the waiving party is business-experienced and legally competent, his contractual partner may generally accept such a deliberate waiver of the domiciliary judge, if the general terms and conditions of the contract offer were enclosed or if their

applicability and content were known to him from previous business relationships. In these circumstances, an experienced and legally competent business partner can be expected to observe and understand the jurisdiction clause, and to expressly reject it if he does not agree to waive the domiciliary judge (cf. BGE 118 Ia 294E. 2a p. 297; 104 Ia 278E. 3 p. 280 f.; confirmed in decision 4C.282/2003 of 15 December 2003 E. 3.1).

In fact, it can be assumed that the CGV – which contains the jurisdiction clause – was not included in the respondent’s offer and that the complainant or its representative did not know the content of the CGV in any other way. Under these circumstances, the respondent was not allowed to assume in good faith in accordance with the principles mentioned above that the complainant also accepted the jurisdiction clause by accepting the offer. From the fact that the complainant or her representative did not inquire about the content of the CGV, it cannot be concluded in good faith that they had agreed to waive the constitutional claim to the domiciliary judge in the event that the CGV provided for such a waiver.”

140. These considerations appear to focus on a constitutional right under Swiss law to be sued in the place of one’s domicile, absent an informed decision to agree to be sued elsewhere.
141. I do not therefore consider that the case departs from or relevantly qualifies the principles set out in the cases referred to in §§ 135 and 137 above. At any rate, I consider Banque Pictet has the better of the argument that the case does not do so.
142. As a result, I conclude that under Swiss law, as under EU law, it is sufficient, in order to incorporate a jurisdiction agreement into the parties’ contract, that the parties have made a written agreement which incorporates by reference general terms including a jurisdiction clause.
143. More recently, in decision BGE 142 III 369, the Swiss Federal Supreme Court considered whether a form for the notification of initial rent should be taken to have been received by a tenant in circumstances where the rental agreement sent to him mentioned it as an attachment. The court said:

“4.2 ... when the lease agreement which is sent to the lessee - receipt of which is not contested - mentions that the official form was included in it, the lessor is, according to general experience, presumed to have actually put the lease agreement and the official form in the envelope that was sent if the lessor is able to produce a copy or photocopy of this official form containing the information necessary to the lease in question. It must be admitted that this is a rule of experience (art. 1 para. 2 CC), which results in a reversal of the burden of proof ...”

As Professor Kadner points out, this case was not about a jurisdiction agreement or general terms and conditions, though it illustrates how the Swiss courts may approach the burden of proof in the light of declarations passing between the parties.

144. The experts also agree that general conditions can be incorporated at a later stage i.e. post contract:

“Assuming that the GTCs were not incorporated upon the formation of the contract, they may still be incorporated at a later stage.

The submission of the GTCs by the user to the client, after the contract has been concluded, may be regarded as an offer to modify the initial contract and to integrate the GTCs at this later stage.

In this case, the requirements governing the incorporation of the GTCs are the very same as those governing the incorporation of GTCs upon the formation of the contract.

The determination whether the GTCs that were incorporated subsequently apply retroactively (i.e. as of the formation of the contract) is a matter of interpretation of the parties’ will.

A signature of the amended GTCs is not required for them to be incorporated.”

145. As to unilateral modification clauses, the experts agree that:

“The most usual way to unilaterally modify GTCs is through a unilateral modification clause contained in the GTCs.

Such unilateral modification clause must have been incorporated initially and the client must retain the right to terminate the contract or oppose the amendment.

If the amended version of the GTCs is signed by the client, this version is incorporated through explicit agreement.

Once incorporated, the amended GTCs supersede the former version of GTCs. In case of doubt, the issue is solved by interpreting the parties’ will.”

*(g) Incorporation principles of Luxembourg law*

146. The principles under Luxembourg law can be addressed briefly, given the large measure of agreement between the experts and the lack of any material dispute about the incorporation of the Pictet Europe EJs.

147. The parties submitted reports on Luxembourg law from the following expert witnesses:

- i) (PIFSS) Patrick Kinsch, a member of the Luxembourg Bar, in practice as a partner in a Luxembourg law firm, and a Professor at the University of Luxembourg.
- ii) (Pictet Europe) Professor Gilles Cuniberti, a member of the Luxembourg Bar, formerly in private practice in commercial law in Paris, and a Professor at the University of Luxembourg.

148. The Joint Memorandum on Luxembourg law records the experts' agreement on issues of incorporation (no areas of disagreement are recorded) as follows:

“Article 1135-1 of the Civil Code defines the conditions under which a party's general conditions of trade will be binding on a counterparty. They bind the counterparty

*“only if that party has been put into the position to know them at the moment of signing the contract and if that party must be considered, given the circumstances, as having accepted them”.*

[Kinsch report § 10]; [Cuniberti Report § 11].

Where general terms and conditions are signed by a counterparty, the requirements of Article 1135-1 are met.

[Cuniberti Report §12]”

### **(3) Banque Pictet**

149. Banque Pictet did not in general require PIFSS to sign its General Business Conditions. However, each time PIFSS opened an account with Banque Pictet, it signed account opening documentation confirming that it had taken due note of or agreed to the GBCs. The wording of this documentation changed slightly over time but always incorporated the GBCs. Banque Pictet mentions the following examples:

- i) An early account opening document signed by PIFSS in 1998 (for account no. 99503) provided as follows:

“This account is subject to the provisions of Swiss law and the General Business Conditions stipulated by [Banque Pictet]. The undersigned hereby declare(s) that he/they has/have taken due note of the latter”.

- ii) Later account opening documentation signed by PIFSS in 2011 stated:

“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”.

- iii) There was a slight change in the 2014 account opening documentation onwards, with the word “*contractual*” being deleted from the wording quoted above.
150. Banque Pictet has found signed account opening forms relating to 58 of the 61 accounts that PIFSS held with it. Each such form contains wording to the effect that PIFSS has taken note of or agrees to the terms of the Banque Pictet General Business Conditions.
151. As well as signing account opening documentation incorporating the General Business Conditions, PIFSS signed a number of other agreements and documents with Banque Pictet expressly incorporating the General Business Conditions. The Pictet defendants have identified approximately 60 such agreements between 2003 and 2015.
152. In total, PIFSS signed over 100 account opening or other agreements or documents during its relationship with Banque Pictet which incorporated its General Business Conditions by reference.
153. Some documents signed by PIFSS not only referenced the General Business Conditions but also contained a freestanding Geneva EJC. Examples include the 2011 account opening documentation referred to earlier which, in addition to the text quoted above, stated:
- “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” .
154. Banque Pictet has located some other documents or agreements signed by PIFSS which did not refer to the GBCs, but (a) contained their own EJC in favour of Geneva or (b) in certain cases contained no EJC or reference to the General Business Conditions at all. Banque Pictet’s evidence is that the significant majority of agreements signed by PIFSS contain or incorporate a Geneva EJC.
155. The fourth witness statement of PIFSS’s solicitor, Mr Martin Walsh of Stewarts Law (“*Walsh 4*”) dated 24 January 2020 indicated that PIFSS had found no copy of Banque Pictet’s General Business Conditions in its files, nor had it signed any.
156. The third witness statement of Ms Deborah Finkler of Slaughter and May, Banque Pictet’s solicitors, dated 6 March 2020 (“*Finkler 3*”) stated, based on her discussions with members of the bank’s Internal Audit, Legal and Client Register, that:
- “30. ...
- (i) I am informed that the general practice was for the Conditions to be handed to the client during an initial meeting with their Relationship Manager, and that the client would generally take the Conditions away. The Pictet Defendants contend that PIFSS would have been given a copy of the

Conditions (at the very least) during one of its initial meetings with Banque Pictet.

(ii) I understand that prior to October 2007, copies of the Conditions were not attached to the account opening documentation kept on Banque Pictet's system and/or files.

...

31. As regards amendments to the Conditions over the years, I understand from the Head of Legal Search at Banque Pictet that, from 2010, updated versions of the Conditions were sent to private and institutional clients in cases of significant modifications. However, the relevant correspondence for institutional clients (such as PIFSS) was not systematically archived in the bank's system and/or files.

32. Banque Pictet has identified (at least) two letters sent to PIFSS enclosing current versions of the Conditions, dated 18 May 2012 and 11 January 2017.”

157. In the light of this evidence, PIFSS conceded in Mr Walsh's 11<sup>th</sup> witness statement dated 1 July 2020 that Banque Pictet sent it letters dated 18 May 2012 and 11 January 2017 attaching updated General Business Conditions.
158. PIFSS therefore accepts that contracts entered into between it and Banque Pictet after 2012 and referencing the General Business Conditions validly incorporated those conditions.
159. However, PIFSS submits that Banque Pictet has not discharged the burden of showing that it provided its General Business Conditions to PIFSS before 2012. It notes that Banque Pictet cannot identify any particular meeting between it and PIFSS at or around the time the first account (account 99501) was opened in 1998, at which the General Business Conditions would, according to Banque Pictet's stated normal general practice, have been handed to it. PIFSS suggests that that practice may well not have been followed in the present case, since the account was opened in the context of established relationships between Mr Al Rajaan, M. Amouzegar and Banque Pictet, rather than the more typical situation of a new customer.
160. Banque Pictet submits that the fact that PIFSS has only belatedly accepted that it did receive copies of the General Business Conditions on two later occasions (2012 and 2017) suggests that PIFSS's files may be incomplete or may have been defectively searched. Taken together with the evidence of usual practice referred to above, and the acknowledgments in account opening documents that PIFSS had taken due note of or agreed to the General Business Conditions, Banque Pictet contends that it is overwhelmingly likely that PIFSS did receive the General Business Conditions before 2012.
161. I bear in mind that agreement to a jurisdiction clause must be clearly and precisely demonstrated, albeit that in the context of the present application Banque Pictet needs to show only that it has the better of the argument on the issue. I am not persuaded



that Banque Pictet has shown it has the better of the argument to the effect that PIFSS actually received copies of the General Business Conditions prior to 2012. In the absence of any kind of record of an introductory meeting at which these would normally have been handed over, and given the pre-existing relationship with Mr Al Rajaan, it seems quite possible that no such meeting occurred. I do not consider that any inference that might be drawn from PIFSS's late discovery of the 2012 and 2017 communications provides sufficient reason to conclude that earlier versions of the General Business Conditions are likely to have been received. The acknowledgements in account opening documents may have contractual force, but in terms of proof (that being, in my view, a matter for this court operating under its *lex fori*) they do not in reality provide a sound basis on which to conclude that the General Business Conditions had in fact been received. As a result, I do not consider Banque Pictet to have discharged the burden of showing that it has the better of the argument on this particular point.

162. However, that conclusion does not in my view affect the outcome, for three reasons.
163. First, I have concluded that:
- i) under EU jurisdictional law, Lugano Convention Article 23 is satisfied where a party agrees to a written contract incorporating by reference general terms including a jurisdiction clause (see § 121 above);
  - ii) it is EU law which governs this issue, to the exclusion of domestic law (see § 107 above); and
  - iii) in any event, the position is the same under Swiss law (see § 140 above).
164. Secondly, even if my first conclusion above is incorrect, then where accounts continued to operate after May 2012 when PIFSS received Banque Pictet's General Business Conditions, those conditions were in my view incorporated at that stage into the contracts relating to those accounts. At that stage, any requirement under EU jurisdictional law for the conditions actually to have been communicated to the counterparty will have been satisfied, and the General Business Conditions will form part of an agreement in writing or evidenced in writing within Article 23(1)(a). Under Swiss law, if it applies, the experts accept that general conditions can be incorporated subsequently: see § 144 above. The submission of the General Business Conditions by Banque Pictet can be regarded as an offer to modify the contract by incorporating them into it, and acceptance (according to the experts, a matter of interpretation of the parties' will, not necessarily requiring signature) can be inferred from PIFSS's continued operation of the account.
165. Thirdly, it is common ground that:
- i) PIFSS signed in 2011 account opening documentation containing a freestanding jurisdiction clause including agreement that "*Any dispute concerning the relationship between the Bank and the Client shall be subject to the exclusive jurisdiction of the Courts of Geneva*" (see § 153 above); and
  - ii) contracts entered into after PIFSS received a copy of the General Business Conditions in 2012 incorporated them.

166. The jurisdiction agreement contained in the 2011 clause quoted above, and the General Business Conditions jurisdiction agreements quoted in section (E)(1) above, are on their face not limited to disputes relating to the contracts containing those clauses. They are drafted sufficiently widely to cover other disputes arising in connection with the legal relationship between the parties, and also antecedent acts. That is, however, a question of the scope of the clauses, and is subject to the considerations discussed in section (H) below. I therefore return to this point in §§ 269-272 and 281 below.
167. Since the jurisdiction provisions in the 2017 General Business Conditions are materially the same as those in the 2012 version, I do not consider it strictly necessary to decide whether the 2017 conditions were incorporated into the contract. Were it necessary to do so, I would conclude that they were, applying the same reasoning as indicated in § 164 above.
168. Finally, and for completeness, I consider Banque Pictet's submission in relation to the application of Lugano Convention Article 23(1)(b) and (c).
169. I have already concluded that Article 23(1)(b) applies to past dealings by which the parties have agreed to be bound by a jurisdiction clause, or to terms including a jurisdiction clause. The mere fact that they have repeatedly contracted will not in my view suffice to satisfy Article 23(1)(b), nor the fact that they have repeatedly contracted on terms which refer to but do not incorporate general conditions including a jurisdiction clause. As a result, if I am incorrect in my conclusion that Article 23(1)(a) is satisfied by agreement to terms incorporating by reference general conditions which themselves include a jurisdiction clause, then I do not consider that Article 23(1)(b) can assist Banque Pictet.
170. In relation to Article 23(1)(c), Banque Pictet relies on expert evidence of "*a well-established practice of Swiss banks to contract on the basis of exclusive Swiss jurisdiction clauses*" and the fact that Banque Pictet's EJs are "*in all aspects in conformity with banks' market practice in Switzerland and in a form that is widely known to, and regularly observed by parties to banking contracts with Swiss banks*". However, that does not amount to a usage relating to the *form* in which jurisdiction agreements are made (see my conclusion in § 126 above). That would require evidence of a widely known usage of Swiss banks contracting on the basis of jurisdiction clauses contained in general conditions referred to in account documentation but not positively provided to customers. As a result, Article 23(1)(c) does not assist.

#### **(4) Pictet Europe**

171. PIFSS's relationship with Pictet Europe commenced in September 2000 when it opened account 300046. On 15 September 2000, PIFSS signed account opening documentation for that account which expressly incorporated Pictet Europe's General Business Conditions and thereby a Luxembourg EJC. On 10 October 2000, PIFSS signed the Pictet Europe General Business Conditions themselves.
172. As a result, PIFSS accepts that a formally valid jurisdiction clause was agreed in relation to account 300046, and that the General Business Conditions were

incorporated within any subsequent contract between PIFSS and Pictet Europe that was expressed to be subject to the General Business Conditions.

173. For completeness, PIFSS appears to have opened another account with Pictet Europe in June 2002 (account 300075), seemingly also on the basis of account opening documentation incorporating the General Business Conditions, albeit a signed version of the account opening document has not been located. This account was later merged with account no. 300046.
174. Account no. TA6891 was opened with Pictet Europe in December 2009. This was an account in PIFSS's name as the transfer agent for the purposes of holding shares of certain Pictet funds. PIFSS did not sign any account opening documentation in relation to it.
175. In February 2004, PIFSS signed a nominee agreement with Pictet Europe containing a freestanding EJC in favour of the Luxembourg courts.

#### **(5) Banque Mirabaud**

176. PIFSS accepts that the EJC contained in the signature card referred to in § 93 above, which it signed when it opened account 500750 in January 1997, was incorporated into the account contract.
177. It also accepts that Mirabaud's General Terms and Conditions were incorporated into the account contract when it signed them on 6 March 2007.
178. PIFSS does not accept that the General Terms and Conditions were incorporated into the account contract at any earlier stage. It says it did not receive a copy of the General Terms and Conditions until 2005, and at that stage it did not sign them: there was no contemporaneous agreement and access to the General Terms and Conditions until 2007. The evidence of PIFSS's solicitor, Mr Walsh, is that there is "*no evidence of any letter or other communication of the bank's general terms and conditions to the Claimant prior to March 2007*" and "*To the best of the Claimant's knowledge the parties did not agree any further contractual document until the Claimant was asked to sign, and on 6 March 2007 duly signed, Banque Mirabaud's then-prevailing general terms and conditions*".
179. Mr Walsh states that PIFSS has located in its file relating to account 500750 an undated and unsigned English version of Mirabaud's General Terms and Conditions. However, Mr Walsh adds that (a) it is not in identical form to the 1987 version of Mirabaud's General Terms and Conditions referred to in the witness statement of Mirabaud's solicitor, Mr Whiteoak, and (b) the English language version "*makes clear that the French version – which the Claimant does not have on file – is the legally binding version*". Mr Walsh states that he does not know how or when the document was provided to PIFSS.
180. The evidence of Mirabaud's solicitor, Mr Whiteoak of Herbert Smith Freehills, based on his review of the documents, instructions (including discussions with Ms Renate Wey, Mirabaud's General Counsel Wealth Management) and searches conducted by Mirabaud for hard copy documents, is to the following effect:

- i) Prior to 2007, Mirabaud's general practice was to send a copy of its GTCs to new account holders at the time of opening an account.
- ii) Discussions first took place between PIFSS and Mirabaud about the possibility of opening an account before January 1997. At that time, in accordance with its usual practice, Mirabaud provided an account opening pack of documents to PIFSS in hard copy. It is not Mirabaud's practice to retain hard copies of documents sent to clients, but only hard copies of documents returned to it by clients.
- iii) Mirabaud's practice in 1997 was to send to new clients opening a corporate account a pack of documents containing at least: (a) Mirabaud's then applicable General Terms and Conditions; (b) a Signature Card containing boxes in which the clients' authorised signatories were to sign their name, with a summary of the most important terms and conditions on the reverse; (c) a corporate account opening form, individual account opening form, joint account opening form, and joint account agreement (found on each of the four sides of a two page pack, in a booklet format); (d) a "*permanent power to effect fiduciary deposits abroad*"; and (e) powers of representation to general meetings.
- iv) Mirabaud cannot now definitively confirm that the undated and unsigned version of the GTCs which Mr Walsh says PIFSS has located was sent to PIFSS as part of the account opening pack. However, that version is substantively similar to the version that was in force in 1987 at the latest, in particular so far as the jurisdiction clause is concerned, and it pre-dates the subsequent versions dating from 2002 onwards.
- v) On 20 January 1997 at 14.46 (Geneva time), Mirabaud received a fax from PIFSS which contained: (a) a cover letter confirming instructions; (b) the permanent power to effect fiduciary deposits abroad; (c) a document stating that PIFSS wished to be consulted prior to Mirabaud representing PIFSS at general meetings with respect to PIFSS's securities that it managed; (d) the Signature Card, containing signatures from Mr Al Rajaan and Mr Mohammed Al-Qassar; (e) a signed corporate account opening form; and (f) an unsigned individual account opening form.
- vi) The corporate account opening form – which it is common ground was signed on behalf of PIFSS by Mr Al Rajaan in 1997 and was returned to Mirabaud – states: "*The holder recognises to be familiar with the General Terms and Conditions of the Bank and with the Deposit Regulations which govern his relations with the Bank and indicate which law is applicable and the valid place of jurisdiction*".
- vii) Subsequently, on 20 January 1997 at 20.41 (Geneva time), Mirabaud received a further fax from PIFSS. This contained the same documents as listed in (v) above, with an additional cover sheet.
- viii) In accordance with its usual practice, Mirabaud subsequently received certain hard copy account opening documents from PIFSS. Of these original hard copy documents, Mirabaud still holds copies of documents (b) to (e) listed in

paragraph (iii) above, i.e. all of them except the General Terms and Conditions.

- ix) The hard copy original Signature Card retained by Mirabaud is dated 20 January 1997 and contains the signatures of Mr Al Rajaan and Mr Al-Qassar. On its reverse it has a summary of the most important terms and conditions in French and English, including those quoted in § 93 above. The back page of this document does not appear to have been attached to the two faxes which PIFSS sent to Mirabaud, and this was likely because the back page was not itself required to be signed and did not need to be sent back to Mirabaud, and/or because fax machines do not scan both sides of a document. However, Mirabaud retains the hard copy of both sides of the document.
- x) The same reasons probably explain why the General Terms and Conditions that would have been sent to PIFSS as part of the account opening pack were not attached to PIFSS's faxes to Mirabaud: the General Terms and Conditions themselves did not need to be signed and did not need to be returned by PIFSS to Mirabaud. Unlike the signature card, however, Mirabaud does not retain a hard copy of the General Terms and Conditions that were sent to PIFSS in 1997.
- xi) Subsequently to the opening of Account 500750, in accordance with its usual practice, Mirabaud circulated updated versions of the Mirabaud General Terms and Conditions to PIFSS as and when they were produced. Mirabaud did not, throughout the entire period relevant to the proceedings, routinely request all existing account holders to re-sign the General Terms and Conditions on each occasion on which they were revised. However, Mirabaud did undertake a consistent practice of sending a copy of revised General Terms and Conditions to all account holders by letter indicating that the revised General Terms and Conditions would take effect immediately and would replace previous versions.
- xii) Having checked its hard copy files, Mirabaud has located cover letters to PIFSS enclosing revised General Terms and Conditions dated 30 June 2005, 14 February 2007, June 2008, 31 December 2009, 25 July 2013, and 2 January 2016. The last of these letters, for example, stated that "*These new terms and conditions, which take account of recent legislative and regulatory changes, enter into effect immediately and replace all previous versions*".
- xiii) In some cases, PIFSS actually signed and returned the General Terms and Conditions. The earliest such version Mirabaud has located is the 2007 version. Specifically, the English version of the 2007 General Terms and Conditions was signed by Mr Al Rajaan, acting on behalf of PIFSS, on 6 March 2007. The 2008 version was signed by Mr Abdullah Jaber Al-Ahmad Al-Sabah, the Deputy Director General - Investment Affairs of PIFSS, on 14 July 2008. Mirabaud had been unable to locate any other signed versions of the General Terms and Conditions.
- xiv) The original signature page was replaced with a new signature page on 7 January 2014, with Mr Al Rajaan, Mr Al-Qassar and Mr Lama M. Al-Dakheel as signatories (following the cancellation of Ms Al Muraikhi as a signatory in

June 2013). The replacement signature page stated on its reverse that “*all the contractual relationship existing between the client and Mirabaud & Cie shall be governed by the Bank’s present and future General Terms and Conditions which designate, in particular, the applicable law and the competent jurisdiction*”.

- xv) On 23 October 2014, the replacement signature page was itself replaced by a further signature page with Mr Hamad Mishari Al-Humaidhi and Mr Al-Sabah as signatories. The reverse of this document contained the same statement.
  - xvi) Further versions of the General Terms and Conditions were sent to PIFSS in January 2010, June 2013 and January 2014, culminating in the version sent to PIFSS in January 2016. Those versions of the General Terms and Conditions and the terms contained in them were incorporated pursuant to the variation clause.
  - xvii) At no point did Mirabaud receive any objections from PIFSS in respect of any of its revised General Terms and Conditions.
181. Mirabaud has been able to find, and Mr Whiteoak exhibits, a 1987 version of the General Terms and Conditions and the 2002 version. The copy of the General Terms and Conditions in English that PIFSS has disclosed from its files is undated and unsigned. However, it is more similar in form to the 2002 version than the 1987 version. For example, unlike the 1987 version, the PIFSS version and the 2002 version bear the heading “*Mirabaud & Co General terms and conditions*” or (in the 2002 version) “*Mirabaud & Cie General Terms and Conditions*”. The use of headings, and the order of the substantive clauses, is much more similar as between the PIFSS version and the 2002 version, as distinct from the 1987 version. The PIFSS and 2002 versions also contain a new clause on termination of business relations that did not appear in the 1987 version. At the same time, the respects in which the 2005 version moves on from the 2002 version (for example, the addition of new rubric at the beginning indicating the scope of the General Terms and Conditions, the greater elaboration of several clauses, and the reorganisation of clauses, e.g. to bring the clauses on current accounts from section III into section I) are not reflected in the PIFSS version. It therefore seems unlikely that the PIFSS version post-dates 2002.
182. The law and jurisdiction clauses in the various versions read:

- i) [1987 version]

“The rights and obligations arising from the relations between the bank and its customers shall be subject to Swiss law alone.

Any dispute between the bank and a customer shall be validly settled by the Genevan courts, subject to appeal to the Swiss Federal Tribunal within the statutory limits. To this end, customers shall elect domicile for the purposes of legal venue, legislation and jurisdiction at the bank’s offices. The bank, however, reserves the right to take action before the home court of the customer or any other legal venue.”

ii) [PIFSS version]

“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.”

iii) [2002 version]

“All relations between the client and the Bank shall be subject to Swiss law. All disputes that may arise between the client and the Bank will be brought before the Courts of the Canton of Geneva, subject to appeal to the Federal Tribunal in the cases provided for by law.

However, the Bank reserves the right to bring an action before any other competent Court or authority, both in Switzerland and abroad, in particular at the client’s domicile. In this case, Swiss law shall also apply.”

iv) [2005 version]

“All relationships between the client and the Bank shall be governed by Swiss law. Any dispute that might arise between the client and the Bank shall be brought before the courts of the canton of Geneva, subject to any appeal to the Swiss Federal tribunal in the cases provided for by law.

The Bank nevertheless 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.”

Again, there is a development in the wording from the 1987 version to the PIFSS, 2002 and 2005 versions, and a further development from the 2002 version to the 2005 version that is not reflected in the PIFSS version.

183. In these circumstances, I conclude that it is most likely that the PIFSS version dates from a time between 1987 and 2002, and that it was sent by Mirabaud to PIFSS when the account was opened in January 1997.
184. As to Mr Walsh’s point that the English language version states the French version to be the legally binding version, the Mirabaud General Terms and Conditions located by PIFSS state that *"the General Terms and Conditions of the Bank and the account opening documents have been issued in French and are exclusively binding in all*

*respects in this version. The English version is a mere translation which is supplied only as a convenience for English speaking clients".* However, the Swiss law experts agree that the fact that the General Terms and Conditions are made available in the English language rather than in its French original version has no impact on the incorporation, citing §§ 3.21-3.24 of Professor Richa's report. He states there that the wording quoted above, though less clear than the language used in later versions:

"3.22 ... should also be interpreted to give a priority to the French version in case of inconsistency; it does not prevent the Mirabaud GTCs from being incorporated should only the English version be circulated.

3.23 Such linguistic clauses are rather common in GTCs. The result of these clauses is not that the French version needs to be circulated to the parties for the GTCs to be integrated into the contractual relationship between the parties and be binding upon them. It would be sufficient for the English version of the GTCs to be circulated to PIFSS for it to be binding upon PIFSS, since those clauses do not state that a party needs to receive the French version for it to be binding upon them. Instead, the purpose of such a clause is to resolve potential contradictions between the same version in different languages by giving a priority to the French version.

3.24 For this reason, even if Mirabaud did not circulate the French version of the GTCs to PIFSS in 1997, I consider that it would not prevent PIFSS from having a reasonable opportunity to access the GTCs before the conclusion of the contract. Thus, according to the trust principle, the Mirabaud 1997 GTCs would have been validly incorporated into their contractual relationship in view of the purpose of the clause. The same reasoning applies for the subsequent versions of the Mirabaud GTCs: the fact that only the English version may have been circulated to PIFSS does not exclude the incorporation of the Mirabaud GTCs to the contractual relationship."

185. I therefore conclude in relation to Mirabaud that:

- i) PIFSS is bound (for the purposes of both EU and Swiss law) by Mirabaud's General Terms and Conditions, including the jurisdiction clause in them, having signed in January 1997 an account opening form incorporating them by cross-reference.
- ii) Even if (contrary to my primary conclusion as set out above in relation to Banque Pictet) PIFSS was not bound unless and until the General Terms and Conditions were provided to it, the Mirabaud General Terms and Conditions were provided to PIFSS when it opened its account with Mirabaud in January 1997.
- iii) Had I not reached that conclusion, I would have concluded that PIFSS was bound by (a) the jurisdiction clauses in the later version of the General Terms



and Conditions which it received in 2005, for reasons parallel to those set out in § 164 above in relation to Banque Pictet, and (b) the jurisdiction clauses in the versions of the General Terms and Conditions which PIFSS actually signed in 2007 and 2008; and that these later versions are capable of applying to antecedent acts (cf § 166 above and §§ 269-272 and 281 below).

iv) PIFSS is in any event bound by the jurisdiction clause in the signature card it signed in January 1997.

186. Finally, although differently expressed, the jurisdiction provisions in the 2016 General Terms and Conditions are in my view to essentially the same effect as those in the earlier versions referred to above. I therefore doubt it is strictly necessary to decide whether the 2016 conditions were incorporated into the contract. Were it necessary to do so, I would conclude that they were, applying the same reasoning as indicated in § 164 above in relation to Banque Pictet.

## **(G) MATERIAL VALIDITY UNDER EU LAW**

### **(1) Principles**

187. Lugano Convention Article 23(1) provides:

“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. ....”

188. Recast Brussels Regulation Article 25(1) provides:

“If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State 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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. ....”

189. Both provisions thus require 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*”.

190. The question of which disputes actually fall within the scope of a jurisdiction clause is to be determined applying the law governing the contract containing the agreement (see Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NB* [2015] QB 906). There is an obvious link between that issue and the material validity issue under EU law: the latter asks whether an agreement has been reached in relation to a particular legal relationship, and the scope issue under national

law will involve deciding whether the dispute has the requisite degree of connection with that legal relationship.

191. However, the Court of Appeal has concluded in the light of CoJ case law that the EU material validity issue is to be determined by reference to autonomous EU principles and so the contract's governing law cannot be decisive (see *Deutsche Bank AG v Petromena ASA* [2015] EWCA Civ 226 §§ 85-86). Moreover, as the cases mentioned below illustrate, the CoJ in considering the material validity issue has in practice appeared to treat that issue as also encroaching on the scope issue, by considering whether particular types of dispute can be regarded as originating in or stemming from a particular legal relationship, even though the issues in principle might appear to be separate. As PIFSS indicates in its submissions, it is apparent from *Cartel Damages Claims* that the foreseeability requirement imposed under EU law makes substantial inroads into the question of the scope of a jurisdiction clause; and PIFSS refers to this as the “*EU proximity requirement*”.

192. In Case C-214/89 *Powell Duffryn plc v Petereit* [1992] IL Pr 300 the CoJ stated, in relation to the ‘particular legal relationship’ requirement:

“This 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 all disputes which arise in the relationships which it has with the other party and which may originate in relationships other than that in connection with which the agreement conferring jurisdiction was concluded.” (§ 31)

193. It is necessary to add that the same must follow where a dispute arises from no pre-existing relationship whatever. To take an extreme example, if a bank's customer is alleged to have robbed the bank by hijacking one of its security vehicles carrying cash, and the bank sues to recover the stolen money, that dispute does not arise from any other relationship between the parties. It obviously does not follow that the dispute must therefore be regarded as arising from the banker-customer relationship.

194. In *Etihad*, after citing *Powell Duffryn* (which he described as the “*leading case*”) Jacobs J said:

“I consider (in agreement with Mr Joseph) that, applying *Powell Duffryn*, it is important to identify the legal relationship in connection with which the agreement conferring jurisdiction was concluded, and then to ask whether the dispute has originated in a different relationship; i.e. a relationship other than that in connection with which the agreement conferring jurisdiction was concluded. These questions should be asked bearing in mind that the purpose of the relevant words in article 25 is to avoid a party being taken by surprise by the referral of the dispute to a contractually agreed court, because the dispute had originated in a different legal relationship.

I agree with Mr Joseph that the relevant question is not simply whether a party would be taken by surprise: this is not the legal test. However, that question serves as a very useful cross-check on what I consider to be the relevant legal questions. If it is clear that a party would not be taken by surprise by the referral of the dispute, then it is very likely indeed that the dispute has not originated in a relationship other than that in connection with which the agreement was concluded. It is therefore very likely that application of the legal test, and the answer to the question whether a party would be taken by surprise, will lead to the same result.” (§§ 124-125)

195. The same rider as indicated in § 193 above must apply to the point about whether the dispute has originated in a different relationship.
196. In *Cartel Damage Claims* the issue before the CoJ was whether claims for damages arising out of cartel arrangements contrary to Article 101 TFEU (agreements between undertakings) fell within the scope of certain EJCs relied upon by the defendants under Article 23 of the then Brussels Regulation (predecessor to current Article 25). The CoJ said:

“68. A jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. The purpose of that requirement is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made: the *Powell Duffryn* case, para 31.

69. In the light of that purpose, 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.”

The CoJ added that the position would be different if the jurisdiction clause expressly referred to disputes concerning liability incurred as a result of an infringement of competition law.

197. In *Etihad* Jacobs J stated that the connection requirement is largely a factual matter to be assessed by reference to all available background material:

“130. ... Ultimately, the court has to consider, in the light of the admissible evidence as a whole, whether the dispute has originated from the legal relationship in connection with which the jurisdiction agreement was concluded. I consider that this is largely a factual question ...

131. Accordingly, the test requires identification, by reference to the facts of the case as a whole, of the legal relationship between the parties in connection with which the jurisdiction agreement was concluded. It then requires consideration of whether the dispute originates from that legal relationship or a different one.

...

133. It is also important to note that 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: is the dispute a claim which arises under the terms of contract which creates the legal relationship? At times, it seemed to me that Mr Joseph’s submission which focused on the terms on which money was to be advanced under the loan agreement sought to assimilate the two. But it is in my view clear that a dispute can be within a jurisdiction agreement covered by article 25 even if it does not allege a breach of the particular contract containing the jurisdiction clause. Any other conclusion would mean that non-contractual claims fall outside the scope of an article 25 jurisdiction agreement. This cannot be right as illustrated by *Hydrogen Peroxide*. A recent illustration of a jurisdiction clause applying to a claim in tort is *Airbus* [2019] Bus LR 2997.

134. Nor do I accept that *Airbus* is authority for the proposition that, in order to identify the relevant legal relationship, or to decide whether the dispute originates from that relationship, the court can and should only look at the way in which the claim is formulated in the proceedings (here Germany) which are alleged to have been brought in breach of the jurisdiction clause ...”

198. I respectfully agree with Jacobs J’s point in quoted § 133 that the legal relationship to which the jurisdiction clause relates need not be confined to the contract that contains the jurisdiction clause. Articles 23 and 25 refer to the legal relationship “in

*connection with which*” the jurisdiction agreement was entered into. Parties might, for example, enter into a whole series or panoply of contracts, but also make a freestanding written agreement dealing with dispute resolution, selecting a dispute resolution forum for disputes arising under all or any of those contracts. That jurisdiction clause will have been entered into “*in connection with*” all of the legal relationships contained or reflected in those other contracts.

199. I accept PIFSS’s submission that where there is more than one contract between the parties, each contract will (or at least may) constitute a “*particular legal relationship*” (see *Deutsche Bank v Petromena* §§ 85, 89, 100-101, 104-108; *Deutsche Bank v Comune di Savona* [2018] EWCA Civ 1740 §§ 2-4; and *BNP Paribas v Trattamento Rifiuti Metropolitan* [2019] EWCA Civ 768 § 77). The Court of Appeal in *Petromena*, in the course of deciding which of two ‘competing’ contracts a claim arose out of or in connection with, asked itself whether the “*thrust*” of the claim (an expression used in *Continental Bank v Aeakos* [1994] 1 WLR 588) was an allegation of breach of one contract or the other. It does not follow, however, that a jurisdiction clause in one contract, which is expressed to apply to that and other contracts between the parties, cannot be regarded as having been made “*in connection with*” all the contracts within its scope. One should naturally have regard to the ‘thrust’ of the claim when deciding whether or not it arises in connection with a particular legal relationship. However, that approach does not imply any narrowing of the nature of the connection required between the claim and the legal relationship in question (for example by requiring the thrust of the claim to be an alleged breach of the legal relationship): the question remains whether the claim arises in connection with the legal relationship.
200. PIFSS submits that if a jurisdiction agreement is either ambiguously or very abstractly and generically worded – so as to purport to capture every potential legal relationship between the parties and every potential dispute between the parties – it will *prima facie* be unenforceable: citing the Opinion of Advocate-General Jaaskinen in Case C-543/10 *Refcomp v Axa Corporate Solution*. PIFSS says that in such a case, the jurisdiction agreement should be read restrictively, so as to limit its effect to the relevant (“*particular*”) legal relationship between the parties in connection with which the jurisdiction clause was agreed: citing *Powell Duffryn* and *Etihad* § 129.
201. In principle I would agree that if a jurisdiction clause is not clear, then it may be restrictively construed, consistently with the policy expressed in the relevant EU case law of promoting certainty and avoiding parties being taken by surprise. On the other hand, I see no reason why parties cannot make a jurisdiction clause in deliberately wide-ranging terms which covers many, or indeed all, of their present and future contractual relationships. I do not read the Opinion of the Advocate General in *Refcomp* as indicating the contrary. *Refcomp* was essentially concerned with whether a jurisdiction clause could be relied on against a sub-purchaser of goods, and it is notable that the CoJ referred in its judgment to “*the principle of freedom of choice on which Article 23(1) is based*” (§ 40). Nor do I read *Powell Duffryn* as restricting the parties’ ability to choose the scope of the particular legal relationships to which a jurisdiction clause is to apply. Jacobs J in *Etihad* made the point that “[a]n abstract reference to disputes would not suffice, given the lack of knowledge of the unlawful cartel at the time” (§ 129). However, the present discussion relates not to abstract

references to disputes, but rather to the range of legal relationships to which the parties may choose to apply their jurisdiction agreement.

202. Jacobs J in *Etihad* added:

“149. ... If a particular agreement is concluded within the context of a wider legal relationship between the parties, I consider it appropriate to look at that context in considering whether the dispute arises from the legal relationship in connection with which the agreement was concluded. This is the approach taken by the court in *Altera* [2018] 1 All ER (Comm) 71. Consideration of the context is consistent with the purpose of article 25, namely to prevent a party from being surprised by the referral of the dispute to the chosen tribunal. The contrary approach seems to me to be artificial, since it has the effect of divorcing the agreement containing the jurisdiction clause from its context. It also has the potential to lead to the inapplicability of the jurisdiction clause to the particular dispute, notwithstanding that (given the context) a party could not be taken by surprise.

150. In my view, consideration of the wider context is fully in accordance with *Powell Duffryn* [1992] IL Pr 300. The court in that case referred to the legal relationship in connection with which the agreement was concluded. As Mr Dicker correctly submitted, that is not necessarily the same as identifying the legal relationship contained in the contract which contains the jurisdiction clause. In some cases, such as *Powell Duffryn* itself, the only legal relationship will be the contract which contains the jurisdiction clause. But in other cases, depending on the facts, it may be possible to say that the jurisdiction clause was concluded in connection with a wider legal relationship.”

Again, I respectfully agree.

203. The claimant in *Etihad* had made a loan to the defendant airline in which it was a shareholder. The facility agreement contained an EJC in favour of the English courts for the benefit of the claimant only. The claimant also provided the defendant with a comfort letter in which it confirmed that it intended to provide the airline with financial support for 18 months. The comfort letter did not itself contain a jurisdiction clause, and when the defendant later sued the claimant for breach of it in the German courts, the claimant brought proceedings in England seeking a declaration that the German claims were subject to the English EJC in the facility agreement. The defendant argued, amongst other things, that the jurisdiction clause was inapplicable because the dispute had not arisen “*in connection with the particular legal relationship between the parties*”. Jacobs J held that the dispute did arise in connection with the lender/borrower relationship that was created by the facility agreement (§§ 136-144).

204. PIFSS submits, however, that the above reasoning cannot be extended from legal relationships to mere ‘status’ relationships, such as banker/client, ‘commercial’ or ‘business’ relationships: these do not qualify as “*particular legal relationships*” for the purpose of Article 23/Article 25. In principle, that proposition would appear to be correct. However, if on its fair reading a jurisdiction clause applies to the *legal* relationship(s) comprising or forming part of the status relationship to which the parties have referred, then it may be appropriate to construe the clause in that way, provided that (in the light of the clause in question, read in its context) to do so would be consistent with the principles of legal certainty and the avoidance of surprise.
205. The CoJ distinguished its decision in *Cartel Damage Claims* in Case C-595/17 *Apple Sales International v MJA*, a damages claim by a distributor against its supplier for breach of Article 102 TFEU (abuse of dominant position) rather than Article 101 TFEU as was the case in *Cartel Damages Claims*. The claimant relied on a jurisdiction clause that did not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law. After referring to *Cartel Damages Claims* the CoJ held:

“26. In the light of that case-law, it is appropriate to examine whether that interpretation of Article 23 of Regulation No 44/2001 and the grounds on which it is based are also valid with regard to a jurisdiction clause invoked during a dispute that relates to the tortious liability allegedly incurred by one contracting party as a result of a breach of Article 102 TFEU.

27. That is the case where the alleged anti-competitive conduct has no connection with the contractual relationship in the context of which the jurisdiction clause was agreed.

28. However, while the anti-competitive conduct covered by Article 101 TFEU, 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 TFEU, 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 TFEU, 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 mentioned at paragraph 22 of the present judgment.

30. In the light of all the foregoing, the answer to the first and second questions is that Article 23 of Regulation No 44/2001 must be interpreted as meaning that the application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a

jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law.”

206. *Apple Sales* makes clear, first, that there is no need for the jurisdiction clause to make express reference to the particular type of dispute that has arisen in order for the dispute to fall within the clause (see quoted § 30 above). As Advocate General Wahl said:

“57. By entering into a jurisdiction clause, the parties seek, essentially, to confer jurisdiction on a particular court to settle all questions pertaining to the relationship which they have formed, even though they are not always able to foresee and draw up a list of the types of disputes that might arise between them. Were that not so, the function and scope of such a clause would be significantly undermined.”

See, to similar effect, the comment of the Court of Appeal in *BNP Paribas v Trattamento Rifiuti Metropolitani*: “Save in relation to such ad hoc agreements, the interpretation of the scope of a jurisdiction clause is necessarily forward looking and looks towards the general nature of dispute or disputes that would fall within the clause” (§ 57).

207. Secondly, *Apple Sales* indicates that the EU proximity requirement (insofar as such a requirement appears to exist) can be satisfied where the events giving rise to the dispute can “materialise” in the contractual relations between the parties. In principle that requirement could be satisfied in a range of cases. To take two familiar examples, a claim for fraudulent or negligent pre-contractual misrepresentation alleged to have induced a claimant to enter into a contract (or to do so on particular terms) would relate to events said to have materialised in the parties’ contractual relations: and thus, subject to the scope of the clause as interpreted under its governing law, could fall within a jurisdiction clause for Article 23/Article 25 purposes. Similarly, a claim that a contract has been induced by bribery (as was the case in *Fiona Trust & Holding Corp v Privalov* [2007] 4 All E.R. 951) might well concern events said to have materialised in the parties’ contractual relations, and (subject to the scope of the jurisdiction clause) could fall within the clause for Article 23/Article 25 purposes.
208. In the ensuing sections of this judgment, I consider whether the jurisdiction clauses relied on in this case have been agreed in relation to a particular legal relationship or relationships, and (if so) what legal relationship(s). To the extent that this involves interpretation of the scope of the clauses, my conclusions here may be regarded as provisional in the sense that it is also necessary to consider the governing law when addressing issues of interpretation (as I do in section (H) below). At this stage I apply the autonomous principles of EU law discussed above.

## **(2) Banque Pictet**

209. As a convenient starting point, I consider first the General Business Conditions introduced in January 2011, since as noted earlier it is common ground that the



General Business Conditions were provided to PIFSS in 2012 and that contracts after that date incorporated them. I quote provisions from the January 2011 General Business Conditions in § 86 above, and the account opening form in use at that time in § 85 above.

210. Were the account opening form to be construed in isolation, the words “[t]he contractual relationship between the Client and the Bank” in the first quoted paragraph, and the words “the relationship between the Bank and the Client” in the second paragraph, could perhaps be read as relating only to the contractual relationship concerning the account being opened. However, the wording of the account opening form must be read in the light of the contents of the General Business Conditions, and in any event (as I have concluded earlier) the General Business Conditions are incorporated into the contract in their own right.
211. The first sentence of Article 1 of the General Business Conditions indicates that they apply to “the legal relationship” between the bank and the client. That indicates that the parties intend the Conditions to apply, specifically, to legal relationships, and did not refer merely to what PIFSS has referred to as a ‘status’ relationship. That view is also supported by Article 33, regarding the ending of the parties’ relationship, which in its use of terminology tends to indicate that references in the Conditions to the parties’ “business relationship” denote, or at the very least specifically include, their legal relationships:

“The Bank may terminate its business relationship with the Client at any time with immediate effect and without being required to provide a reason therefor. At the end of the business relationship, and unless otherwise instructed by the Client within the period specified by the Bank in advance, the Bank may decide to realise the assets and hold the proceeds thereof at the Client’s disposal in a manner that it deems appropriate, including in the form of cash or a cheque.

Upon termination of the contractual relationship between the Bank and the Client, all of the Bank’s claims against the Client shall become due and payable, including any deferred or contingent claims.

The contractual relationship between the Bank and the Client shall not terminate upon the death of the Client ...” (my emphasis)

212. The second sentence of Article 1 indicates which relationships, in terms of time, are covered, namely both existing and future relationships. Reading it in the light of the first sentence, it is apparent that the reference to “business relationships” is to, or at least includes, the legal relationships arising as part of the existing and future business between the parties.
213. Similarly, the use in clauses 34 and 35 of the term “[t]he relationship” between the parties should be read, in the light of Article 1 (which sets out the scope of the General Business Conditions as a whole), as being a reference to, or at least including, the legal relationships arising as part of the parties’ dealings.

214. These provisions make clear that the legal relationships to which they apply is not limited to the contract in respect of any one account. That is clear from:
- i) the reference in Article 1 to the General Business Conditions governing both existing and future relationships;
  - ii) the provision in Article 1 second paragraph about other standard contractual forms, and the list in Article 1 third paragraph of other contracts and practices to which the General Business Conditions will be subject: by obvious implication, the General Business Conditions are intended to be of general application and to apply (subject only to being overridden where necessary by the contracts/practices specified in Article 1 third paragraph) to the parties' legal relationships in all parts of the parties' business dealings; and
  - iii) the fact that the substantive contents of the General Business Conditions deal with a wide range of categories of business going beyond those which could be expected to be the subject of any single account between the parties. Thus, for example, Article 2 deals with current accounts, giro and custody accounts; Article 10 covers aspects of stock exchange orders; Article 12 applies to buy and sell orders in relation to securities, currencies and other investments; Article 17 concerns the use of asset sub-custodians; Article 18 applies to assets in foreign currencies; Article 24 confers broad rights of set-off and pledge "*As security for any and all claims, including and without limitation, any potential, contingent and future claims the Bank may have against the Client*" over "*all the Client's current, contingent and future assets and claims held in safekeeping and/or posted, on the Client's behalf, in its own books or anywhere else in Switzerland or abroad*"; Articles 27 and 28 concern remuneration received from or paid to third parties, including "*in particular when it distributes shares in investment funds or other financial instruments*"; and Article 33 addresses the end of the relationship between the bank and the client in very wide terms as quoted above.
215. PIFSS objects to this approach, submitting that insofar as the general terms utilised by Banque Pictet (and Mirabaud) contained provisions relevant to services that were never contractually sought, offered or agreed between PIFSS and the bank, those provisions are not relevant; and that the bank cannot rely on references to such services as defining (or extending) the content of the "*particular legal relationship*" between the parties. There was no framework or umbrella contract between the parties, and the proper analysis of the provisions is that each contract gave rise to a separate ("*particular*") legal relationship. Each particular legal relationship was a contractual relationship to be analysed by reference to the services which the respective banks were performing for PIFSS pursuant to that contract.
216. I do not accept that submission, at least in full. It is true that if PIFSS did not employ Banque Pictet to provide (say) stockbroking services, then there will be no legal relationship between the parties relating specifically to such services. However, the question to be decided is whether the General Business Conditions, including their jurisdiction clauses, apply solely to any individual accounts that were being opened at the time the Conditions were provided, or apply more generally to other legal relationships (existing and/or future) that did exist between the parties. The fact that the General Business Conditions have potential application to a wide range of services

is one indication that they were likely to have been intended to be of general application. It is true that a set of general conditions could be drafted so as to contain clauses relevant to different types of business, but with the intention that it needed to be incorporated separately on a contract by contract basis into each of the parties' legal relationships. However, the contents of Banque Pictet's General Business Conditions taken as a whole, as outlined in § 214 above, in my view indicate that they are not conditions of that nature. Rather, the General Business Conditions, when incorporated into any one contract between the parties, are applicable to the totality of the legal relationships between the parties – save as specifically carved out in the third paragraph of Article 1.

217. The earlier and later versions of Banque Pictet's General Business Conditions in force from 2003 onwards referred to in §§ 82-84 and 87-88 above were in materially similar form and the same considerations apply.
218. The even earlier Conditions, referred to in § 81 above, were in different form. The 'scope' provision appeared only in the heading, which stated that the General Business Conditions governed "*the relations*" between the parties; and the law and jurisdiction clause began by referring to "[*a*]ll Client/Bank relations". Nonetheless, since that sentence provided that those relations were subject to Swiss law, it is clear that the subject-matter was the *legal* relations between the parties. The immediately ensuing sentence, dealing *inter alia* with the exclusive jurisdiction "*for all proceedings*", read in the light of the first sentence, applied in my view to proceedings in connection with *all* the legal relationships between the parties. Further, though not as wide-ranging as the later versions, these General Business Conditions applied to a range of activities including current accounts, execution of orders, foreign currency assets, asset custody, transactions in securities and precious metals, portfolio management, and termination of business relations. As a result, these General Business Conditions (if relevant) were materially to the same effect as the later versions.
219. For all these reasons, I conclude that the jurisdiction clauses on which Banque Pictet relies did relate to particular legal relationships, being the totality of the legal relationships between the parties forming part of the banker/customer relationship between them.

### **(3) Pictet Europe**

220. The latest General Business Conditions of potential relevance are those quoted in part in § 91 above. Article 1 ("*Scope*") is in similar form to the corresponding clause in the Banque Pictet 2011 General Business Conditions considered in §§ 211-219, except for the reference in the first line to "*the contractual relations*" between the parties rather than "*the legal relations*" between the parties.
221. I do not consider that difference to be material for present purposes. So far as concerns the scope of the General Business Conditions as a whole, the reference in Article 1 first paragraph to "*contractual relations*" in the plural, along with (a) the reference in the second non-indented paragraph to both existing and future relationships, (b) the provision in the third paragraph about other standard contractual forms and (c) the list in the fourth paragraph of other contracts and practices to which the General Business Conditions will remain subject, clearly indicate that the General

Business Conditions are intended to be of general application, and to apply (subject only to being overridden where necessary by the contracts/practices specified in Article 1 fourth paragraph) to the parties' legal relationships in all parts of the parties' business dealings.

222. Further, the substantive provisions of the Pictet Europe General Business Conditions include clauses similar to those in the Banque Pictet General Business Conditions summarised in § 214.iii) above, indicating their potentially wide field of application. (I note that the provision on remuneration/commissions is different, but includes the statement that “*The Bank hereby informs the Client that it may charge fees or retrocessions relating to its dealings with other professionals in respect of the transactions carried out on behalf of the Client.*”)
223. Article 29 then confers on the courts of Luxembourg sole jurisdiction in “*any dispute between the Client and the Bank*”. Reading that provision in the light of Article 1, it is apparent that the legal relationships in connection with which the jurisdiction agreement has been made comprise the totality of the legal relationships between the parties forming part of the banker/customer relationship between them.
224. On balance I would conclude that the same applies to the earlier version of the General Business Conditions, dating from 2000. Article 1 of this version provides that:

“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”

and the jurisdiction clause provides that Luxembourg courts shall be “*the sole instances competent to judge any dispute between the Client and the Bank*”.

225. Whilst it might be objected that the words “*business relations*” are too vague to refer to a particular legal relationship, in the context of a clause which states that these relations are subject to (a) the General Business Conditions, (b) any special agreements between the parties and (c) applicable Luxembourg legislation, it is clear in my view that the parties intended the General Business Conditions to apply to the aggregate of the *legal* relationships comprising their banking relationship.
226. Further, the range of provisions in the General Business Conditions was broad enough to cover a range of activities, including bank accounts, assets held in foreign currencies, execution and transmission of orders (at least in the limitation of liability clause), and safe custody of securities and deposits. Clause 4, on the bank's right to terminate its “*relations*” with the client, included the following provision:

“In the context of agreements concluded between the Bank and the Client for which no expiry date has been stipulated, one or other of the parties may terminate the reciprocal relations at any

time, without being required to give reasons and with immediate effect.”

indicating that the General Business Conditions were of general application even in relation to activities otherwise covered by other agreements between the parties.

#### **(4) Banque Mirabaud**

227. It is convenient to consider first the signature card and General Terms and Conditions which PIFSS accepts it signed in 1997 and 2007 respectively, quoted in §§ 93 and 94 above.
228. The signature card stated that the signatures provided were valid “*for all present and future relationship with the Bank*”, thereby indicating at the outset that the contents of the signature card extended well beyond whatever account(s) were being opened at the time the card was signed. The card then applied the bank’s present and future General Terms and Conditions to “[*t*]he entire contractual relationship” between the client and the bank. The choice of law sentence applied to “[*a*]ll legal aspects of the relationship between the client and Bank”. Read in the context of the scope provisions just mentioned, that sentence applied to the totality of the parties’ legal relations forming part of their present and future banker/customer relationship. Finally, the words “*the exclusive jurisdiction of lawsuits and any other kinds of legal proceedings*” in the next sentence, read in the context of the choice of law provision and the scope provisions, indicated that it applied to disputes arising in connection with all or any of the parties’ legal relations forming part of their existing and future banker/customer relationships.
229. The 2007 General Terms and Conditions similarly state in the introductory scope clause that they govern “*all of the contractual relations*” between the parties, subject to any specific agreements and bank practices. The choice of law provision covers “[*a*]ll relationships between the Client and the Bank”. That in substance must mean all *legal* relationships, given (a) the context provided by the scope clause and (b) the fact that only *legal* relationships can sensibly be described as being ‘governed by’ or ‘construed ... in accordance with’ a system of law. Again read in context, the ensuing jurisdiction provision, covering “[*a*]ny disputes which might arise”, refers to any dispute arising in connection with any of the contractual relations between the parties forming part of their banker/customer relationship.
230. Like the Banque Pictet General Business Conditions, the Mirabaud General Terms and Conditions are broadly drafted as being capable of applying to a wide range of activities within the overall banker/customer relationship, including current accounts (Clause 13), custody accounts (section II), precious metal accounts (section III), and the purchase and sale of securities, precious metals, foreign currencies and other financial instruments (Clause 8). The bank is given a right of pledge and compensation, as security for “*all its claims resulting from its business relationships with the Client, irrespective of their due date or the currency in which they are denominated,*” over “*all assets held in custody with it or at another location for the account of the Client*”. Clause 11 provides *inter alia* that the client agrees that the bank or its affiliated companies may receive commission and other payments from third parties, including in respect of collective investment instruments in which the assets of the client are invested, and may also have to pay remuneration to third

parties. Clause 17 reserves the bank's right "to terminate business relations with a Client". These provisions reinforce the width of the potential application of the General Terms and Conditions.

231. The corresponding features of the 2016 General Terms and Conditions are substantially the same in their relevant features, and the same considerations apply.
232. Finally, and for completeness in case they are relevant, I would reach the same conclusion in relation to the 1997 General Terms and Conditions. Briefly, these General Terms and Conditions do not contain an introductory clause setting out their scope. However, like the later versions they contain provisions capable of applying to a broad range of activities including current accounts, safekeeping and management of securities, purchases and sales of securities, metal accounts, and the deposit of precious metals and coins. There is a right of pledge and compensation, as security for "all its claims resulting from its business relations with the client, regardless of maturity, date or currency of denomination," over "all assets in its possession at its premises or in other places for the account of the client". Clause 17 reserves the bank's right "to terminate, with immediate effect, its business relations with the client". Of most immediate relevance, the governing law sentence in clause 16 applies to "[a]ll relations between the client and the Bank", and the following sentence confers on the courts of Geneva jurisdiction over "[a]ll disputes which may arise between the client and the Bank". The governing law provision must logically refer to (or at the very least include) the legal relationships forming part of the banker/customer relationship, and the jurisdiction provision should be construed in the same way.

#### **(H) SCOPE UNDER DOMESTIC LAW**

233. As noted earlier, it is common ground that (subject to the impact of EU law as discussed above) the jurisdiction clauses are to be construed in accordance with their governing laws. Those laws will thus determine, among other things, the types of disputes falling within them.
234. Banque Pictet cites, essentially as a comparator, the corresponding principles of English law, to which it submits the Swiss and Luxembourg principles are similar. In summary:
- i) Jurisdiction clauses should be given a broad, purposive and commercially-minded interpretation in light of the overall transaction (*BNP Paribas v Trattamento Rifiuti Metropolitan* § 68(2)-(3), concentrating on the bigger picture (*Airbus* § 67)).
  - ii) There is a "strong presumption" that business parties intend all their disputes to be resolved in the chosen forum, rather than fractured across multiple jurisdictions (*Yegiazaryan v Smagin* [2016] EWCA Civ 1290 § 44; *Ashville Investments Ltd v Elmer* [1989] QB 488, 517E-F (CA); *BNP Paribas* § 68(4); Dicey, Morris & Collins, *The Conflict of Laws* (15th ed.) § 12-109).
  - iii) Broadly worded jurisdiction clauses will cover claims for tortious (or equitable) wrongdoing (*Fiona Trust; Interprods v De La Rue* [2014] EWHC 68 (Comm)), particularly if there is sufficient connection with a contract or the

relationship established by it (*Bilta (UK) Ltd v Nazir* [2010] EWHC 1086 (Ch)); as well as contractual claims (*Microsoft v Sony* [2017] EWHC 374 (Ch)).

**(1) Swiss law**

*(a) General approach*

235. It is common ground between the experts that:

- i) Contracts are construed in accordance with Article 18 of the Swiss Code of Obligations (“*SCO*”), which requires the court to find the “*true and common intention of the parties*”.
- ii) The court seeks to find the parties’ subjective intention but, if unable to do so, adopts an objective interpretation. Subjective interpretation of general business conditions and EJs is usually inconclusive, and the court is very likely to use an objective interpretation.
- iii) An objective interpretation is a question of law, not fact. It requires the court to apply the “*principe de la confiance*”. The experts agree that this means Swiss courts:

“must determine how parties, who are hypothetically honest and reasonable, could and should, in good faith, understand the expression of will of the other, on the basis of the circumstances which were or should have been known to each party at the time of receipt of the expression of will of the other. In their assessment Swiss courts will assume that these hypothetical parties are in the same situation and have the same knowledge as the actual parties were and had at the time of the formation of the contract.”

- iv) The *principe de la confiance* is derived from the overriding requirement of good faith set out in Article 2 of the Swiss Civil Code (“*SCC*”):

“The principle of good faith ... is a fundamental principle under Swiss law. Under Swiss private law, the principle of good faith is anchored in Art 2 of the SCC which provides:

“(1) Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.

(2) The manifest abuse of a right is not protected by law...”

In the ambit of contractual interpretation pursuant to Art 18 para 1 SCO, the principle of good faith is the basis from which derives the principle of trust/good faith - *principe de la confiance* (in French; *Vertrauensgrundsatz* in German) which is the guiding principle of objective interpretation.”

- v) One of the rules of good faith is the prohibition of abuse of right, which is provided for in Article 2 para. 2 of the SCC. According to that principle, the judge shall not grant any protection to the party who brings a claim while abusing manifestly of his/her right.
  - vi) A jurisdiction clause (or choice of forum clause (“*CFC*”)) is an independent agreement that should be distinguished from the main contract.
  - vii) Swiss law recognises a *contra proferentem* rule, but this is a last resort. It is used only if the courts are otherwise unable to resolve ambiguity and if there is an imbalance between the parties.
  - viii) Tort claims will be covered by a CFC when either (a) the tort gives rise to a concurrent breach of contract or (b) there is a “*connexité*” (i.e. connection) between the tort and the subject matter of the contract (see the SFSC’s decision DSFSC 4C.142/2006 § 2, affirmed by the same court in decision DSFSC 4A\_433/2019 § 4.2.4.).
  - ix) Whether a “*connexité*” exists is to be determined by applying the Swiss law principles of contractual interpretation.
  - x) If the alleged tort arises from unlawful criminal or intentional acts, the dispute can fall within the scope of a CFC, depending on the circumstances.
236. The SFSC in decision ATF 121 III 495 (1996) *G vs X AG and Arbitral Tribunal*, considered a jurisdiction clause in favour of the courts of Istanbul, in a compromise agreement which settled disputes under a number of sales contracts. One party later sought to arbitrate, relying on arbitration clauses in the sales contracts, and the arbitrators held that the compromise agreement had not superseded those clauses. The SFSC rejected that view, holding that the jurisdiction clause in the compromise agreement, properly construed, prevailed. It stated that:
- “The election of jurisdiction clause should ... be considered in light of the principle stating that, in case of doubt, procedural clauses are not interpreted in a restrictive manner, but rather as a means of expressing the parties’ intentions to assign a general jurisdiction to the court ...”
237. The SFSC cited by way of analogy its earlier decision ATF 116 Ia 56 (1990) *X v Y*, which concerned the interpretation of an arbitration clause, where it said:
- “In the case of an arbitration agreement, the Parties waive the decision by state courts in the case of disputes, a waiver, which has considerable consequences, in view of the associated reduction in legal remedies and, in view of the regularly higher costs of the arbitration proceedings compared to State proceedings; in the event of a dispute, it is therefore not easy to assume that such an agreement has been made. If, however, the existence of an arbitration agreement is determined, there is no reason for a particularly restrictive interpretation; in this case, it can be assumed that the Parties would like the Arbitration



Court to have full jurisdiction if they already have entered into an arbitration agreement ...

It should also be noted that even if as is often the case - the arbitration clause is appended to the main contract in a single document, has a significant meaning as a procedural agreement in so far as the Parties can be assumed in case of doubt would have provided for settlement of the arbitration procedure not only for disputes about the fulfilment of their mutual contractual obligations, but also for a possible process about whether their contract was concluded. The arbitration clause therefore does not necessarily share the fate of the main contract ...”

Banque Pictet highlights the potential comparison with English law, where the approach in *Fiona Trust*, an arbitration case, has been applied to jurisdiction clauses too.

238. More recently, in decision 4A\_342/2019 (2020) the SFSC considered a case where a defendant/appellant automotive component supplier bid successfully to supply products to the claimant/respondent. It was intended that the parties would enter into both a corporate agreement and a quality assurance agreement, but the former was never signed as final terms could not be agreed. Delivery nonetheless commenced, but when a dispute later arose the defendant denied that a binding agreement existed. The claimant commenced arbitration relying on an arbitration clause in the quality assurance agreement, but the defendant asserted that the arbitrators lacked jurisdiction. The SFSC said:

“When interpreting international arbitration agreements, it is usually assumed that the Parties wanted to provide the arbitration court with extensive jurisdiction. While it is not easy to assume that the Parties wanted to provide the jurisdiction for a court of arbitration, there is no reason for a narrow interpretation of an arbitration clause, if the Parties had agreed on the jurisdiction of an arbitration court. In the case to be assessed, the arbitration court was convinced that the Parties wanted all disputes arising from their business relationship to be assessed by an ICC arbitration court based in Zurich, including disputes concerning the legal meaning and effect of the award and the validity of the CA.

Primarily, the intention of the parties follows from the wording of the arbitration clause in Article 9 (3) sentence 4 of QAA, because the term “contract disputes” in the QAA is not defined and Sentence 4 of Article 9 (3) of QAA - in contrast to other paragraphs of Article 9 of QAA - does not presuppose that such “contract disputes” must result from or in connection with this agreement (“out of or in connection with ‘this agreement’“), i.e., the QAA. As a result, the term “contract disputes” is not

restricted to contractual disputes which arise from the QAA but rather includes all contractual disputes, irrespective of whether they result from the QAA or another contract, which form part of the business relationship between the Parties. The result of this analysis of the wording is also confirmed by other aspects that expressed the will of both Parties to have their disputes decided by an ICC arbitration court based in Zurich: ...

This opinion of the arbitration court is also confirmed by the preamble to the QAA. Although the preamble to a contract does not have a legal binding effect, it could nonetheless provide an indication of the motivations of the Parties for concluding the contract, which can be taken into consideration when interpreting the contract. The preamble to the QAA states that “this agreement {and with it the ICC arbitration clause contained in Art.9 (3)] form part of the supply agreement with B. and is binding for business relationships between the SUPPLIER and B. “.

This broad and comprehensive wording - in particular the general reference to the “business relationships” between the parties - show that it was the desire of the Parties that the arbitration clause in Article 9 (3) QAA should apply to all disputes arising from their business relationship. This also includes disputes in the case that - not expected at the time of conclusion of the QAA - no CA would be signed and the Appellant terminated the delivery agreement concluded by the Parties with regard to the completed award dated 23 July 2015.” (§ 3.3)

239. These decisions indicate that Swiss law will generally tend to give effect to broadly expressed jurisdiction clauses, construing them broadly in order to fulfil the parties’ expressed intentions, even (as the last quoted paragraph above indicates) in relation to disputes of a kind that were not foreseen at the time of contracting.

*(b) Tort claims and foreseeability*

240. PIFSS and Professor Kadner suggest that a narrower approach should be taken in relation to tort claims, suggesting that Swiss law requires a high or “*intensive*” degree of connection between tort claims and a contract in order for the claims to fall within a jurisdiction clause.
241. Professor Kadner places particular reliance on a decision of the Commercial Court of the Canton of Zurich, ZR 103/2004 p.261 (2004). In that case, one contractual party had denigrated the other after contract termination. The latter brought a claim in tort and the former sought to rely on a jurisdiction clause. After citing Article 17 of the then Lugano Convention, the court stated:

“Accordingly, an agreement on the place of jurisdiction only covers legal disputes which have their origin in the legal relationship on the occasion of which the agreement was

concluded (Kropholler, European Civil Procedure Law, 7. A. Heidelberg 2002, Art. 23 EuGVO, para. 69). This provision is intended to prevent an economically superior contractual partner from imposing a place of jurisdiction on the weaker party with a single comprehensive clause, even for disputes arising from future contractual relationships that cannot yet be foreseen (Kropholler, *ibid.*). Furthermore, it should be ensured - irrespective of the economic distribution of power - that the parties know in advance, or at least can estimate, for which disputes they will enter into a jurisdiction agreement (foreseeability; see Donzallaz, *The Lugano Convention*, Vol. III, Bern 1998, para. 6654; Geimer/Schütze, *European Civil Procedure Law*, Munich 1997, Art. 17 EuGVÜ para. 156; Killias, *The choice of court agreements under the Lugano Convention*, Diss. Zurich 1993, 104). In general, the application of a jurisdiction clause is unproblematic if a contractual claim is made in connection with the performance of the contract. In addition, however, the agreement may also cover tortious claims. A will of the corresponding party is assumed - for lack of contrary indications - if the claims in tort compete with the contractual claims and are based on the same factual grounds (Kropholler, Art. 23 Rz. 69 with references; Killias, 106). In individual cases, the scope of a choice of court agreement is determined by its interpretation.

c) ... The purpose of the jurisdiction clause was - as the applicant can see - to ensure that all disputes arising from the distribution contract would be heard before the courts at the place where the respondent was domiciled. This applies on the one hand to claims arising from breaches of contract, in particular also in connection with the termination of the contract. On the other hand, the intention to prorogue or derogate jurisdiction also had to reasonably refer to certain tortious claims. One might think, for example, of the case where unauthorised acts, e.g. in the form of damage to goods, are committed during the execution of the distribution contract. Due to the close functional connection between the violation of legal interests and the execution of the contract, it appears appropriate in this case in good faith to extend the scope of the jurisdiction agreement to include tortious liability claims. On the other hand, the choice of jurisdiction agreement does not cover disputes arising out of tort or delict which the parties could not reasonably have foreseen when they concluded the contract. This applies to the present case: A dispute concerning “denigration” or disparagement of third parties as a result of the termination of the contractual cooperation is not envisaged by the parties to a distribution contract when agreeing on the jurisdiction clause in good faith.”

242. However:

- i) it is clear from both the headnote to and the text of this case that it is a decision applying Article 17 of the Lugano Convention, as opposed to Swiss law principles of interpretation; and
- ii) I do not in any event understand the court, where it used the phrase “*close functional connection*”, to have been stating such a connection to be necessary as a legal test.

243. In any event, the application of jurisdiction clauses to unlawful acts is addressed in a more recent decision of the SFSC, *viz* decision DSFSC 4C.142/2006 (2006): a decision referred to by all the Swiss law experts. The parties made a contract for the defendant Y, a mobile phone network operator, to route calls for the claimant X’s subscribers, for an initial period of 12 months. The contract incorporated Y’s general terms and conditions, which stated “*The exclusive court for all disputes relating to this contract is in Zurich, subject to different jurisdictions resulting from mandatory rules under federal law*”. Disputes arose, and Y indicated that it would not renew the contract save on more expensive terms. X sued Y not in Zurich but in the Canton of Vaud, alleging that Y’s conduct violated federal laws against cartels. The first instance court rejected Y’s jurisdiction challenge, holding that in the absence of a sufficiently close connection between X’s claim under the cartel laws and its claims based on the contract, the jurisdiction clause did not apply. The Court of Appeal and the SFSC rejected that approach. The SFSC said:

“When the agreement of choice of court refers to a future dispute and it is designed in general terms to be applied, according to the example in this same case, to “all disputes” relating to the contract in which it is found, it refers, in the first place, to claims based on this contract; it furthermore refers to claims resulting from unlawful acts, when these acts simultaneously constitute a violation of the contract ([commentary cited]) or where there is a link between them and the object thereof (Yves Donzallaz, Comment on the Act on Jurisdiction in Civil Matters, Bern 2001, ch. 89 ad Art. 9). However, based on the submissions taken before the Civil Court, the allegedly illegal acts by the defendant, held to be contrary to the legislation protecting competition, consist exclusively in the refusal to execute the contract of 10 October 2003, in the defective execution of this contract, in its termination and in the modification of the general terms and conditions which have been incorporated therein. In this situation, the link between the illegal acts and the object of the contract must be recognised, with this consequence that the action by the plaintiff is subject to the agreement of choice of court...” (§ 2)

244. The author of the article cited in this above passage on the point about unlawful acts with a link to the object of the contact, Yves Donzallaz, has himself been a SFSC judge since 2008. The relevant part of his article states, in French and in English (free translation by Professor Romy):

“Les éventuelles prétentions concurrentes en relation avec des actes illicites ou avec I ‘enrichissement illégitime pourront également être portées au for choisi. Il serait ainsi erroné d’exiger que I ‘acte illicite corresponde en sus à une violation du contrat, quand bien même ce sera très généralement le cas. Il faudra pourtant toujours exiger une relation minimale entre le contrat et l’acte illicite. En l’absence de ce lien de connexité il ne sera pas envisageable d’agir au for proroge. Cette régie n’est toutefois pas absolue et ne vaut qu’en l’absence de stipulation contractuelle contraire.”

“Any concurrent claims relating to unlawful acts or unjust enrichment may also be brought in the chosen forum. It would thus be wrong to require that the unlawful act also corresponds to a breach of contract, even though this will most often be the case. However, there must always exist a minimum relationship between the contract and the wrongful act. In the absence of such a connection it will not be possible to act in the prorogated forum. This rule is not absolute, however, and applies only in the absence of a contractual stipulation to the contrary.”

(my emphasis in both cases)

245. PIFSS cites a more recent decision of the SFSC, decision 4A 433/2019 (14 April 2020), in which it analysed and applied the 2006 SFSC court decision discussed above and the CoJ’s decisions in *Apple* and *Cartel Damages Claims*. In holding that the claim before it fell within the terms of the jurisdiction clause, the SFSC in decision 4A 433/2019 stated that “*it was sufficiently possible for the Appellant to foresee that the jurisdiction clause would also apply to the current (civil law) action based on anti-trust law*”. That statement was, however, explicitly in the context of an application of Lugano Convention Article 23, and I do not therefore find it to be of assistance. Similarly, I do not consider that the court is assisted by decisions (such as the SFSC’s decision SJ 1995, 179 (28 June 1994)) on the Swiss Federal Act on Private International Law (“*PILA*”) Article 5, which codifies Switzerland’s domestic rules as to private international law, and may be regarded as the Swiss equivalent to the Lugano Convention as applied to issues of jurisdictional demarcation within Switzerland.
246. Professor Kadner makes a further point relating to good faith and legitimate expectations, citing an article written in 2004 by Professor Frank Vischer, a leading Swiss private international law lawyer, whose conclusion includes the following:

“Making tortious claims subject to the jurisdiction clause or, where applicable, the arbitration clause in a contract seems justified only if there is a close connection between the contract and the tort.

This may generally be the case if the deficient performance alongside the claim arising from breach of contract also meets the requirements for a tortious claim at the same time. The same should apply if the validity of the contract is to be decided

due to unlawfulness of the content and the unlawfulness can be attributed to a party with respect to tortious conduct.

If, on the other hand, the tortious act took place outside of or at the time of conclusion of the contract, inclusion must be rejected. The fact that contractual claims can also arise from the tortious conduct does not pose an obstacle to exclusion. Upon conclusion of the contract, the injured party generally did not have to expect a tortious act on the part of the other party. The decision regarding the tortious claim by the selected court or arbitral tribunal does not correspond to the “legitimate expectation” of the party concerned.” (Frank Vischer, “*The inclusion of tortious claims in the jurisdiction agreement for the contract*”, *Festschrift Jayme, 2004*)

In the course of the article, Professor Vischer indicates that the answer should depend on the parties’ hypothetical will based on objective criteria, and that:

“...torts that were committed prior to conclusion of the contract but had effects on the contract, or that were committed upon conclusion of the contract, should generally not be covered by the jurisdiction clause. In this case, the “specific legal relationship” alone is the contract with the exclusion of the tort. This must apply particularly if the injured party had no knowledge of the tort upon conclusion of the contract and the inclusion of the tort would be surprising for the injured contracting party.”

and:

“Tortious claims from an antitrust violation that was committed before and outside of the contract are not covered by the contractual jurisdiction clause. This applies all the more if the jurisdiction clause was proposed by the defendant in its General Terms and Conditions without explaining the cartel agreement to the other party. In this case, fraud exists with respect to the jurisdiction agreement and could justify setting aside the clause.

...

The circumstance that the buyer may also have contractual claims in addition to his/her tortious claim against the seller and that no tortious claim would arise without conclusion of the contract would change nothing with regard to the tortious claim’s not being subject to the jurisdiction clause. The violation of antitrust law lies outside of the contract. Upon entering into the agreement in good faith, the buyer could not, and did not have to, expect that he/she was the victim of an illicit cartel of which he was not aware. The placement of the claims arising from this violation within the jurisdiction agreed

for the sales contract therefore lies outside of any legitimate expectations.”

247. Professor Kadner expresses the view, citing the above article, that if one party intended to include current or future intentional tortious or even criminal behaviour when forming a choice of court agreement, that would be regarded in Swiss law as being incompatible with the requirements of good faith, as enshrined in Article 2 of the Swiss Civil Code.
248. This view is not shared by the other experts, who consider there to be no support for Professor Kadner’s statement that in case of an alleged fraud against the client, the claim arising thereof should necessarily fall outside of the CFC’s scope. They note that Swiss courts interpret CFCs broadly and, as part of the objective interpretation, they examine whether the alleged tortious acts constitute a simultaneous breach of contract, or whether there is a “*connexité*” between the tortious acts and the contract. The “*connexité*” test is the test of the objective interpretation, which leaves no room for a subjective appreciation of the parties’ conduct. Neither a principle of ‘decency’ nor a principle of fair dealing comes into the reasoning.
249. I do not consider that the Vischer article provides support for Professor Kadner’s proposition that an agreement on a CFC covering current or future intentional tortious or even criminal behaviour would be inconsistent with the good faith principle set out in SCC Article 2. In any event, the other experts point out that the Vischer Article has not found its way into Swiss law, as the views expressed therein (which are based on foreign decisions) have not been adopted by Swiss courts. In their view, the question as to whether the act is intentional or criminal has no relevance to the application of the “*connexité*” test. Excluding “*connexité*” where the act on which the claim rests was intentional would logically exclude all claims based on intentional breach of contract from the scope of the CFC, which is not supported by any case law or other authority.
250. Professor Vischer’s view does not appear to have been taken up in decisions of the SFSC (or, so far as the evidence indicates, any other court decisions) and in my view runs contrary to the general trend of the decisions cited above of giving jurisdiction clauses a broad interpretation including in relation to disputes the parties did not anticipate. His approach is in my view inconsistent with the approach subsequently taken by the SFSC in decision DSFSC 4C.142/2006, summarised in § 243 above, which post-dates the Vischer article and does not suggest that the application of jurisdiction clauses to unlawful acts (cartels in that case) is contrary to policy or subject to special restrictions.
251. It would also seem illogical to exclude from the scope of jurisdiction clauses (as Vischer appears to suggest) pre-contractual events unknown to the parties, which have an effect on the contract, on the ground that there is no pre-existing legal relationship. On the contrary, a pre-contractual misrepresentation (for example) alleged to have induced the formation of the contract, or its formation on particular terms, would appear to be closely connected with the contract and to be the type of claim that parties might reasonably be regarded, objectively, as having intended to fall within a jurisdiction agreement. A contracting party later faced with a claim for alleged misrepresentation, brought in the counterparty’s home jurisdiction instead of the parties’ chosen jurisdiction, might very well be surprised to be told that he/she is not

to be regarded (objectively) as having intended such claims to fall within the clause. Indeed, it is common ground between all the experts in the present case that:

“The issue of whether GTCs or the CFC contained therein (included in GTCs) also apply to disputes arising out of pre-contractual dealings, if any, or to alleged unlawful conduct prior to the formation of any contract, is a matter of interpretation of the parties' will pursuant to the principles explained hereinabove ...

It is commonly accepted that claims based on culpa in contrahendo conduct [fault in the conclusion of a contract] are to be considered as contractual claims and are capable of being covered by the GTCs and the CFCs, respectively.”

252. Professor Kadner further cites the views expressed by a leading Swiss banking lawyer, Professor Guggenheim, in Daniel A. Guggenheim, Anath Guggenheim, *Les contrats de la pratique bancaire suisse* (“*The contracts of the Swiss banking practice*”) (5th ed., Berne, Stämpfli, 2014) including the following:

“Choice of court agreements raise an interesting problem regarding wrongful acts.

377 Article 5(1) PILA provides that the jurisdiction agreement can be formed only for a specific legal relationship. If a bank intends to apply a jurisdiction clause in favour of the courts of its head office or branch and the unlawful act took place after the jurisdiction clause was formed, can the clause be invoked against the customer of the bank? The answer must be in the negative; as the unlawful act took place after the conclusion of the jurisdiction clause, there can be no question of a "specific legal relationship" which is required for the prorogation clause to be valid under article 5 paragraph 1 of the LDIP.

378 A choice of forum clause which provides to be applied to a future fraud would be contrary to Article 27(2) CC [Article 27 of the Swiss Civil Code protects the personality rights of persons]. In other words, the scope of the choice of court agreement must, in case of doubt, be established on the basis of the theory de la confiance. Only claims arising from the foreseeable performance of the banking relationship are covered by the jurisdiction clause. Thus, in the event of a conspiracy by the bank against the customer, there is no dispute arising from a specific legal relationship, within the meaning of Article 5 paragraph 1 of the LDIP, and the clause extending the jurisdiction in favor of the registered office of the bank is not valid. It will then be necessary to determine the forum having jurisdiction according to the applicable general rules on jurisdiction.



“FN 117 See also Art. 132 PILA which provides for a right to choose the application of the law of the forum, after the harmful event. This is the formulation of a general principle which also applies to the choice of forum. The Lugano Convention lays down a rule similar to Article 17 LC in respect of consumer contracts.”

253. These views appear to be based on, or at least strongly influenced by, the author’s approach to the foreseeability test in PILA Article 5, i.e. the Swiss domestic equivalent to what is now Lugano Convention Article 23. In any event, and with respect, I do not consider them to be cogent. The fact that an unlawful act occurs after the conclusion of the contract containing the jurisdiction clause (quoted § 377 above) does not logically prevent it from being connected with the contract i.e. the existing legal relationship.
254. Further, the other experts note that the views expressed by Guggenheim are isolated and find no support in Swiss law. They say that the authors omit to cite abundant Swiss academic materials related to this topic; and that the only case law the authors quote, DSFSC 110 II 184 of 24 January 1984, relates to a matter that has nothing to do with the validity of a CFC in relation with a tortious claim (namely liability of a bank for the rectification, made against the will of the principal, of a transfer of values made on the basis of an ambiguous order). In addition, they state that there is no support in Swiss law for the view that Art. 132 PILA lays down a general principle also applicable to CFCs.
255. PIFSS also relies in this context on the analysis of Swiss law by Aikens J in *Provimi Ltd v Aventis Animal Nutrition SA* [2003] ECC 29, where the issue was whether a jurisdiction clause in favour of the defendant’s seat, contained in the defendant’s standard terms and conditions, was effective to cover a competition law claim. The Vischer article referred to above also cites this decision. It was common ground between the experts in *Provimi* that under Swiss law a jurisdiction clause will cover a claim in tort only if the claim arises in connection with the contract containing the clause. Aikens J, based on the evidence before him, concluded that:

“62. ... I accept that much the better argument is that the scope of the Swiss jurisdiction clause is limited to the types of claim that the opposing party could reasonably foresee when entering the contract that contains the jurisdiction clause.

...

64. Both experts agree that there is a Swiss law principle of construction that a jurisdiction clause will only cover a claim in tort if those claims arise in connection with the contract that contains the clause. Professor Schwander accepts that there is a difference of views amongst writers on Swiss law as to the necessary degree of connection. He relies on some German authority for a view that the connection need not be close. But in doing so he appears to stray from principles of Swiss law on the construction of jurisdiction clauses and invokes both German law and Article 17 of the Lugano Convention. There is

no positive support amongst the authors cited by Professor Schwander for the view that the connection between the contract and the tortious act need only be broad or loose.

...

67. ... it seems to me that, on the material available to me, “much the better of the argument” on the Swiss law principles of construction and application leads to a narrower construction of the wording of clause 9(b) of the Swiss terms and conditions. I think that the highest Swiss Courts would hold that the phrase “any controversies” must be confined to those controversies that would be foreseen by the parties at the time that they concluded the relevant contract. I think it fair to assume that when the present claimants entered the contracts for the supply of vitamins, they would have assumed that there were no secret cartels on price and market fixing and that the prices that they would have to pay for vitamins were not those fixed by a secret cartel that infringed Article 81. I have concluded that “much the better of the argument” on the proper construction of the clause 9(b) of the terms and conditions leads to the conclusion, based on Swiss law principles, that a claim for damages for infringement of Article 81(1) of the Treaty is not within the scope of the phrase “any controversies” in the jurisdiction clauses 9(b).”

256. The decision does not provide details of the Swiss law evidence adduced, and pre-dates the decisions of the SFSC to which I refer in §§ 236-238 and 243 above. Those decisions do not support either a narrow interpretation of jurisdiction clauses or a foreseeability requirement of the kind Aikens J found to exist. I am bound to decide the present case on the evidence before me, and do not consider *Provimi* to be of assistance.

*(c) Whether any connection is needed in this case*

257. I mention for completeness that Professor Richa expresses the view that it is unnecessary to decide under Swiss law whether there is a connection at all between the alleged tort and a contract. He explains that:
- i) When the Swiss courts construe jurisdiction clauses in the international context, they apply either Article 23 of the Lugano Convention (or Article 5 of the Swiss Private International Law Act where the Lugano Convention does not apply). This will involve taking into account the *Powell Duffryn*, *CDC*, and *Apple* line of cases.
  - ii) When the Swiss courts construe jurisdiction clauses in the domestic context (e.g. cases where the issue is whether a court in Geneva or Zurich has jurisdiction) they apply Article 17 of the Swiss Code of Civil Proceedings, or what Professor Richa terms “*Swiss procedural rules*”. These Swiss procedural rules include the test of “*connexité*” that is referred to by Professor Kadner and the other experts.

iii) Accordingly, “*connexité*” is not a test that exists under Swiss substantive law and it is entirely hypothetical to consider a situation in which an EJC would be interpreted by applying solely Swiss substantive law. In an international context the Swiss court would apply the Lugano Convention.

258. Mirabaud submits on this basis that the court therefore need only apply the EU case law, and no separate question of connection arises under Swiss law. In view of the conclusions I reach in section (I) below, it is not necessary to resolve this issue.

*(d) Concurrent tort and breach of contract*

259. The SFSC decision referred to in § 243 above indicates that a jurisdiction clause will also apply to claims alleging unlawful acts that would also constitute a breach of the contract. It is relevant in this context that the experts agree that the “*mandate agreement is governed by Articles 394 et seq SCO*”. Article 398 SCO, entitled “*Faithful performance*” states *inter alia* that “*The agent is liable to principal for the diligent and faithful performance of the business entrusted to him.*” In addition, Article 400 SCO, entitled “*Account of agency*”, provides (in translation):

“(1) The agent is obliged at the principal’s request, which may be made at any time, to give an account of his agency activities and to return anything received for whatever reason as a result of such activities.

(2) He must pay interest on any sums which he is late in forwarding to the principal.”

260. Professor Mabillard explains the interaction between Articles 398 and 400 as follows:

“... the protection of a customer's pecuniary interests is a main contractual obligation covered by specific statutory provisions, i.e. art. 398 and art. 400 CO. While art. 398 CO provides for the bank's contractual duty of care and loyalty, art. 400 CO provides for the bank's contractual duty to give account of its activities and return anything received to the customer (see hereto section B.8.iv of the Issue 1 Memorandum; see also paras 112- 116 Kadner Report).

Consequently, a violation by a bank of a customer's pecuniary interests amounts to a specific contract violation of arts 398 and 400 CO. In particular, the receipt of undisclosed and unaccounted secret commissions (“*Retrozessionen*”) and failure to account for the same, in the manner alleged at para. 13 Kadner Report, would in principal potentially amount to a breach of contract.”

261. Professors Kuonen, Mabillard, Richa and Romy agree that:

“In order to determine whether a claim based on an alleged tortious conduct falls within the scope of a CFC, the duties set forth in Art. 398 SCO and 400 SCO, in particular the duty of care, are of relevance. In a case of alleged conspiracy and/or commissions in relation with a banking contract, before Swiss courts, a litigant would typically invoke a breach of the contractual

duties set forth in Art. 398 and 400 SCO along with non-contractual bases. The alleged tortious conduct would be considered a breach of contract or to be in “connexité” with the contract so that it would be covered by the CFC. In any event, in general terms, the breach of secondary contractual duties constitutes a breach of contract on an equal footing (for the purpose of assessing the scope of CFCs) with the breach of main contractual duties such as Art.398 and 400 SCO.”

262. Professor Kadner states on this topic:

“... the fact that allegations of tortious conduct might or might not amount to a breach of the general duty of loyalty under Art. 398 SCO does not mean that the dispute falls within the terms of a CFC: what matters is whether the allegations on which the claim is based are non-contractual in nature, even if they could be alternatively substantiated as a breach of a general duty of loyalty under Art. 398 SCO or any other type of contract: see Obergericht Zürich (High Court of Zürich), ZR 103/2004 p. 261, 262.

All that matters is if there is “connexité”, i.e. foreseeability of the claim in its nature and importance (see above section B.8.i and below section B.9). As the Zürich Court stated “the choice of court agreement does not cover disputes arising from tort or delict which the parties could not reasonably have foreseen when they formed the contract” (see above).”

Professor Kadner notes the statement in the Zurich Commercial Court decision cited earlier:

“Insofar as the respondent submits that “an obligation to be owed according to the contract (namely ultimately the observance of the duty of loyalty) has allegedly been breached post-contractually”, it should be noted that the non-contractual nature of the allegations (unfair disparagement and violation of personality rights) is very much to the fore in the present case.

Whether the asserted claims could be substantiated on the basis of the allegation of breach of contractual or post-contractual duties of loyalty can be left open (on the question of whether an encroachment on the legal interests of the contractual partner is only relevant under tort law or also under contract law: Middendorf, Retroactive contractual obligations, Freiburg 2002, para. 170 f.).”

263. However, the SFSC decision quoted in § 243 above indicates that, separately from the question of “*connexité*”, a jurisdiction clause expressed in general terms (such as ‘all disputes’) will cover “*claims resulting from unlawful acts, when these acts simultaneously constitute a violation of the contract*”. If the acts alleged in the present case would indeed also constitute breaches of Articles 398 and/or 400 SCO, then they would be likely to fall within the jurisdiction clauses in the present case.

264. PIFSS submits that an approach based on the existence of a concurrent claim under Articles 398 or 400 would be liable to drive a coach and horses through the need for a connection between the alleged tort and the contract, citing the discussion of this point (and on Article 398 specifically) in *Terre Neuve v Yewdale* [2020] EWHC 772 (Comm). There Bryan J, after citing *Fiona Trust* and Marcus Smith J's decision in *Microsoft Mobile v Sony Europe* [2017] EWHC 374 (Ch), made the point that the generous approach to interpreting jurisdiction clauses applies only to the extent that the dispute arises out of the parties' relationship created by their contract. He held that jurisdiction clauses in four written agreements between the parties did not extend to disputes arising out of oral agreements which they had also made. The parties to the written and oral agreements were different, they did not form part of the same 'package', and their subject matter was different. There was also a temporal disparity between the two sets of agreements. In relation to one of the written agreements Bryan J said:

“(1) This agreement relates to the trusteeship of the shares in Largely, which GPF was to hold in a fiduciary capacity on behalf of and for the account of Mr Zahut. The Claimants' claims have nothing to do with the shares in Largely, so do not fall within the scope of the jurisdiction clause, which only concerns the "interpretation... execution... or inexecution" of the 2003 Fiduciary Agreement.

(2) GPF argued that the 2003 Fiduciary Agreement ought to be given a broad scope by virtue of Article 3, which provides that "The Mandatory [GPF] shall exercise his best efforts to safeguard the interests of the Mandator [Mr. Zahut] and to exercise the various formalities necessary for the duration and good functioning of the corporation". However, this obligation is clearly directed at, and restricted to, the scope of the Agreement. In this regard: -

(a) The Clause must be read as part of the subject-matter of the whole agreement. The Fiduciary Agreement's purpose is for GPF to hold shares in Largely on behalf of Mr. Zahut: it is not related to the transfer of monies pursuant to the tax optimisation scheme.

(b) In any event, Article 3 expressly relates to the "good functioning" of Largely.

(c) Under Article 398 Swiss Code of Obligations ("SCO"), a contractual agent always has a duty "at all times to look after and safeguard the interests of" its principal. In those circumstances it cannot realistically be argued that in every Swiss law contract that expressly included such a term, the intention is to create a general obligation extending beyond the subject-matter of the agreement.” (§ 55)

265. Bryan J in *Terre Neuve* was applying Lugano Convention Article 23 and English law principles of construction, on the basis that neither party had suggested there was any

difference between the applicable Swiss law and English law principles of construction (§ 24(1)). I doubt, however, that a different result in principle would arise as a result of applying Swiss law. Articles 398 and 400 apply, respectively, to “*the business entrusted to [the agent]*” and “*his agency activities*”. Those concepts are inherently rooted in the activities which the agent (here the bank) is carrying out in connection with the contract or contracts between the principal and the agent that govern the agency business/activities in question. As a result, I consider the ‘coach and horses’ objection to be overstated.

*(e) Applicability of jurisdiction clauses to other contracts*

266. The experts agree that it is common for banks to enter into particular or general framework agreements with their clients that refer to their general terms and conditions or include specific jurisdiction clauses. The relationship or hierarchy between these documents is a matter of interpretation of the parties’ will.
267. Professor Kadner nonetheless considers that CFCs must be included in each specific contract between the bank and the client, citing the statements of the Swiss legal author Carlo Lombardini, *Droit bancaire Suisse*, 2nd ed., Zürich: Schulthess, 2008, p. 330 f. that:

“Swiss legal doctrine does not recognise the existence of a general banking contract between bank and client - a kind of framework contract - which is essentially subject to mandate law.”

“The doctrine considers that each contractual relationship between bank and client must contain a specific clause and that it is not enough to have one clause contained in the general terms and conditions valid for all contractual relationships.”

268. Professors Kuonen, Mabillard, Richa and Romy disagree on the basis that the above position is not supported by case law and contradicts general principles of contract law. They note that if a general agreement, such as a framework agreement, contains a CFC, the choice of jurisdiction also applies to the entire banking relationship, including to individual contracts concluded at a later date, unless these provide otherwise. The SFSC held in DSCS 4A\_323/2013 (of 29 November 2013) (§ 5) that if several contracts are concluded which, according to the will of the parties, have a close economic relationship to each other, and if a CFC is concluded in the third and last contract which, as a framework contract, regulates the main performance and has retroactive effect to the time of the formation of the first contract, this CFC must also be observed for disputes arising from the other two contracts. I accept that evidence and consider the defendants to have the better of the argument that there is no principle of Swiss law that would prevent a suitably worded jurisdiction clause in one contract from applying to disputes arising in connection with other contracts.

*(f) Temporal scope*

269. I have already noted (see § 251 above) the Swiss law experts’ agreement that:

“The issue of whether GTCs or the CFC contained therein (included in GTCs) also apply to disputes arising out of pre-contractual dealings, if any, or to alleged unlawful conduct prior to the formation of any contract, is a matter of interpretation of the parties' will pursuant to the principles explained hereinabove ...

It is commonly accepted that claims based on culpa in contrahendo conduct [fault in the conclusion of a contract] are to be considered as contractual claims and are capable of being covered by the GTCs and the CFCs, respectively.”

270. The experts add that:

“Further details are set out in the Mabillard Report (§61-70).”

271. In those paragraphs of his report, Professor Mabillard addresses the application of jurisdiction clauses to instances of pre-contractual unlawful acts, and also considers their temporal scope more generally. In §§ 66-68 he states:

“66 A Swiss Court would assess the temporal scope (“scope *ratione temporis*”) of a jurisdiction clause by applying the parties’ actual intention or, subsidiarily, the principle of good faith (i.e. determine how the clause was to be understood by a reasonable person in the position of the parties, based on the clause’s wording, the clause’s context and the overall circumstances it was concluded in, at the moment of the contract’s conclusion).

67 In the present case, the Swiss Court would have regard to the broad formulation of the jurisdiction clauses in the various GTC, including that on their face they encompass any kind of disputes/actions between the bank and its clients, without any apparent limitation as to whether they are based on events that took place before or after the conclusion of the jurisdiction clauses (e.g. “Any disputes which might arise [between the Client and the Bank]”/“in respect of any kinds of actions [between the Client and the Bank]”).

68 That a jurisdiction clause can apply to disputes based on events that took place before the clause’s conclusion is undisputed amongst Swiss scholars including, for example, also unlawful acts stemming from the time before the conclusion of the contract, such as the negotiation phase (i.e. acts of culpa in contrahendo), which are considered to be governed by a contractual jurisdiction clause.”

272. Based on that evidence, which I accept, the question of whether an EJC applies to dealings over a period of time before any EJC was entered into is a question of interpretation applying the Swiss law principles referred to in section (H)(1)(a) above.

## (2) Luxembourg law

273. The Luxembourg law experts agree that:

- i) The interpretation of contracts is covered by Articles 1156-1164 of the Luxembourg Civil Code, and in particular by Article 1156, which requires the court to seek to identify the parties' subjective intention, in the absence of which an objective interpretation will be adopted. This is a question of fact.
- ii) An objective interpretation requires the court to ascertain the common intention of the parties from the words of the contract or any other relevant contract.
- iii) There are no special rules of interpretation for jurisdiction clauses.
- iv) Luxembourg law has both a *contra proferentem* rule and a principle of "*effect utile*", a presumption of construction that prefers to construe a contractual term in a way which makes it lawful. The former is only applied in cases of "*otherwise insuperable doubt*": and, as far as Professor Cuniberti is aware, neither rule has ever been applied by the Luxembourg courts to construe a jurisdiction clause.
- v) Whether and to what extent a given contractual clause covers pre-contractual conduct or post-contractual conduct or both is a matter of interpretation of the clause.
- vi) Whether tort claims fall within the scope of a jurisdiction clause is to be determined by construing the clause.

274. Professor Cuniberti states that decisions of the French Cour de Cassation – whose decisions are frequently referred to by Luxembourg courts – construe jurisdiction clauses broadly, citing *Jean-Pierre X v Hypromat France* (appeal no. 15-10639, 24 February 2016) (impugning validity of contract based on pre-contractual misrepresentation), *SBMM v Kranzle* (appeal no. 11-11570, 20 March 2012) (tort of 'brutal termination' of contract) and *Stadium Innovation SL v société Charles Faraud* (appeal no. 18-11609, 13 February 2019) (anti-competitive practices); and often construes jurisdiction clauses so as to encompass tort claims (citing the latter two cases). Professor Cuniberti states that he has reviewed all the judgments of the French Cour de Cassation on the issue of the application of jurisdiction clauses to tort claims in the past 20 years, and has identified a clear trend towards construing jurisdiction clauses broadly from 2010 onwards and as covering tort claims arising out of or connected with the contract. I accept that evidence.

275. Professor Kinsch states, however, that even a broadly worded jurisdiction clause needs to be read down to refer to disputes that were reasonably foreseeable to the parties at the moment of contracting. That view is based on Article 1163 of the Luxembourg Commercial Code. Articles 1163 and 1164 provide (in translation):

"1163. However general the terms in which an agreement is worded, it includes only the things on which the parties appear to have intended to contract.



1164. When in a contract a case was mentioned to give an explanation of the obligation, it shall not be deemed that the parties thereby intend to restrict the scope of their contract which, as a matter of right, shall apply to the cases not expressed.”

276. I do not consider that Article 1163 imports a requirement of foreseeability. If parties choose, and thus intend, to select a dispute resolution forum for ‘all disputes’ arising in connection with their contract, then they objectively must be taken to intend it to apply to disputes of whatever nature, regardless of whether or not they can foresee at the outset the types of dispute that may arise. Such disputes are often inherently unpredictable. Neither of the Luxembourg law experts has identified a Luxembourg or French case which has construed a jurisdiction clause by reference to the foreseeability of the dispute at the time of contracting. On the contrary, the decisions of the French Cour de Cassation referred to in § 274 above apply jurisdiction clauses to disputes that are unlikely to have been foreseeable at the time of contracting. I therefore conclude that no foreseeability requirement applies.

### **(3) The Banque Pictet and Mirabaud jurisdiction clauses**

277. Applying the principles set out above, I deal first with the question of identifying the legal relationship to which the Banque Pictet and Mirabaud jurisdiction clauses apply, if and insofar as this remains a matter for domestic law after satisfying the EU material validity test considered in section G above. I then deal, at a very high level, with the scope of the disputes to which the jurisdiction clauses apply.
278. As to identifying the legal relationship, Swiss principles of contract interpretation are fundamentally based on identifying the parties’ true common intention, asking (in cases where no subjective intention is shown) how hypothetically honest and reasonable parties should in good faith understand the expression of will of the other, on the basis of the circumstances which were or should have been known to each party at the time of the agreement.
279. In my view the application of Swiss law leads to the same conclusion as I reach in sections (G)(2) and (4) above, to the effect that the broadly expressed Banque Pictet and Mirabaud jurisdiction clauses apply to the totality of the legal relationships between the parties forming part of the banker/customer relationships between PIFSS and those two banks respectively. I am reinforced in that view by the recent SFSC decision about arbitration clauses quoted in § 238 above, including the court’s willingness to give effect to the parties’ choice of forum for (in the court’s words) “*all disputes arising from their business relationship*” and not merely disputes arising from the particular contract containing the jurisdiction clause.
280. As to scope, the Swiss law evidence indicates that these broadly expressed jurisdiction clauses (the current versions referring in Banque Pictet’s case to “[a]ny dispute concerning” the parties’ relationship, and in Mirabaud’s case covering any dispute arising in connection with any of the contractual relations between the parties forming part of their banker/customer relationship: see §§ 229 and 231 above) would be given a generous interpretation; and that they would be regarded as applying to tort claims provided they either correspond to a concurrent claim for breach of contract, or have a connection with the parties’ contractual relationships.

281. In addition, applying the approach set out in §§ 269-272 above, I consider that if (contrary to my conclusion in § 122 above), the EJC's were not binding for Article 23 purposes until PIFSS accepts that it received the general terms containing them (in 2012 for Banque Pictet and in 2007 for Mirabaud), then the clauses contained in those later general terms applied to any future disputes within their scope regardless of whether the events in question occurred before or after the EJC's became binding. A hypothetical honest and reasonable party, on the basis of the circumstances which were or should have been known to each party at that time, would in my view understand the EJC's to be intended to apply to all future disputes, regardless of whether or not they relate to prior events. An EJC is inherently forward looking *in the sense that* it binds the parties as to where they may in future sue one another; and in the absence of some particular indication to that effect there is no reason why the hypothetical party would expect the other party to have intended the jurisdiction agreement to exclude disputes arising from existing events.

#### **(4) The Pictet Europe jurisdiction clauses**

282. As to identifying the legal relationship, contract interpretation under Luxembourg law is fundamentally based on identifying the parties' common intention, ascertaining objectively (in cases where no subjective intention is shown) the parties' intention from the words of the contract or of any other relevant contract. In my view the application of Luxembourg law leads to the same conclusion as I reach in section (G)(3) above, to the effect that the wide language of the Pictet Europe jurisdiction clauses covers the totality of the legal relationships between the parties forming part of the banker/customer relationship between them.

283. As to scope, the Luxembourg law evidence indicates that the jurisdiction clauses should be interpreted in the light of their broad wording (referring in the current version to "*any dispute between the Client and the Bank*") and as covering tort claims arising out of or connected with the parties' contractual relationships. Further, I consider that the breadth of wording of the clauses indicates that the parties intended them to apply to both pre- and post-contractual events. It follows from the latter point that the fact that (as PIFSS points out) the first EJC with Pictet Europe post-dated the inception of the Pictet Scheme does not prevent it from potentially applying to PIFSS's claims against Pictet Europe.

### **(I) APPLICABILITY OF JURISDICTION AGREEMENTS TO PIFSS'S CLAIMS**

#### **(1) Pictet Secret Commission Claims**

284. PIFSS's central allegation in this part of its claim is, in simple terms, that Banque Pictet and Pictet Europe paid secret commissions to Mr Al Rajaan which were at least in part (a) paid in order to induce him to place PIFSS business with Banque Pictet/Pictet Europe, (b) paid from revenue earned by Banque Pictet/Pictet Europe from PIFSS business and/or (c) referable to such revenue.

285. The relevant section of the CPOC (quoted more fully in section (C)(2) above) includes numerous passages setting out this claim as relating, at least in part, to business placed *with Banque Pictet* (defined in the CPOC as "*Pictet*", and noting that the CPOC separately use the term "*Pictet Group*") or Pictet Europe, and *by PIFSS*:

- i) *“the provision of financial services which Mr. Al Rajaan would authorize PIFSS to agree, and in respect of which Pictet would have a commercial interest including by way of fees”* (§ 172(a));
- ii) *“it was agreed by Mr Bertherat and Mr Al Rajaan that the latter would receive a commission of 0.125% (being one third) of the administrative fees withheld by Pictet on PIFSS’s account no 99501”* (§ 173);
- iii) *“Pictet additionally assumed the role of custodian in respect of the PIFSS investments notionally managed by Albait as described above, for which it was paid a fee”* (§ 174);
- iv) *“... a subsequent agreement was reached between Mr. Al Rajaan and ... Pictet extending the categories of services on which Secret Commissions would be payable ..., in light of Mr. Al Rajaan’s indication that if it did so, he would authorise PIFSS to open accounts with Pictet on which such fees were payable”* (§ 175);
- v) *“PIFSS opened a further account (1000700.001) authorised by Mr. Al Rajaan, which was the first of many accounts opened by PIFSS at Pictet on which Global Custody and brokerage fees were charged”* (§ 178);
- vi) *“... the Pictet Group provided services to PIFSS in roles as investment manager, custodian and nominee, across a range of investments through accounts with Pictet administered in Switzerland and in Luxembourg through Pictet Europe”* (§ 180);
- vii) *“commissions at a rate of 25% on commissions derived from assets invested in Pictet-managed funds”* (§ 183);
- viii) *“... on Mr Al Rajaan’s recommendation Pictet was about to assume management of a pre-existing fund held by PIFSS (the Mayur fund) ...”* (§ 184);
- ix) *“From 2000 PIFSS had assets on deposit with Pictet Europe, and Secret Commissions were paid to Mr Nasrallah ... by Pictet Europe referable to the latter’s fees ...”* (§ 189);
- x) *“... a separate ‘business finder’ agreement was entered into between Pictet and Mr Amouzegar on 21 October 2003 pursuant to which Mr Amouzegar was purportedly entitled to commissions of 30% of the fees earned by Pictet in respect of any investments or business of PIFSS ...”* (§ 191);
- xi) *“Between 1999 and 2015, pursuant to the above arrangements, the total sum of approximately US\$26.7 million was paid by way of Secret Commissions in respect of financial services provided by Pictet to PIFSS and procured or authorised by Mr. Al Rajaan. Tables summarising the investments and the commissions generated in respect of them are appended as Appendix 3.”* (§ 194);

- xii) *“Pictet ... further concealed the payment of Secret Commissions under the Pictet Scheme from PIFSS by ... (j) ... failing to disclose to PIFSS the payment of Secret Commissions to Mr Al Rajaan, including in the normal course of the ongoing business relationship with PIFSS ...”* (§ 204).
286. Similarly, the general allegation in CPOC § 30 states that, while each scheme enjoyed its own particular features, in general the schemes at their core operated as set out in subparagraphs 30a to 30g. §§ 30a and 30b allege that under the control and/or influence of Mr Al Rajaan, PIFSS decided to enter into arrangements for the provision of financial services *“to PIFSS”*; that fees were payable *“by PIFSS”* on financial services supplied *“to it”* or investments which *“it”* entered into; and that secret commissions were arranged between Mr Al Rajaan and *“the relevant partner/executive or intermediary involved in broking the financial service or investment in question ...”*.
287. The earliest PIFSS account with Banque Pictet was account 99501, opened in 1998, which appears to have been a custody account that held PIFSS’s investment in a joint venture called Albait. When that account was replaced by account 99503 later the same year, the latter account took over custody of PIFSS’s investment in Albait. PIFSS subsequently opened further custody accounts with Banque Pictet. Over time PIFSS and Banque Pictet entered into various further agreements and documents incorporating jurisdiction clauses, namely a Custody Agreement and agreements relating to securities lending and foreign exchange trading. In addition, there were some very specific mandates and authorities relating to particular accounts.
288. Appendix 3.1 to the CPOC, referred to in CPOC § 194 (quoted above), is headed *“Pictet scheme: Schedule of investments/payments”* and contains a list of investments/payments, identifying with which entity the account was held, being in each case either Banque Pictet or Pictet Europe. Leaving aside the superseded account 99501, there were 96 accounts in total: 77 with Banque Pictet and 19 with Pictet Europe. Appendix 3.1 states the *“Total value of PIFSS investments held via Pictet at 30-June-14, according to Pictet’s report to [its regulator]”* as US\$20,076,640,000. It also contains a list of *“Known payments related to scheme”* listing six sets of payments to Mr Nasrallah or M. Amouzegar totalling US\$26,677,902. For five of these, the account is said to have been with Banque Pictet, and the stated sums to have been *“paid from [Banque Pictet]”*. The largest of these five relates to the account/investment *“Mayur Fund/Banyan”* and is said to have involved known commissions paid to Mr Nasrallah and M. Amouzegar totalling US\$9,468,739 and US\$1,356,856 respectively. The sixth account is said to have been with Pictet Europe, and the stated sums to have been *“paid from Pictet Europe”*.
289. On the basis of these allegations, it would appear that Banque Pictet and Pictet Europe have the better of the argument that these claims fall within the scope of the banks’ respective EJs. The gist of the allegations is that by agreeing to pay, and paying, secret commissions to or for the benefit of Mr Al Rajaan, Banque Pictet and Pictet Europe induced him to cause PIFSS to invest large sums with or through Banque Pictet and Pictet Europe on which those entities earned substantial revenues; and that the secret commissions were at least in part funded by and/or referable to such revenues. In substance, they are equivalent to allegations that contracts between PIFSS and Banque Pictet/Pictet Europe, or the placing of investments pursuant to such contracts, were induced by bribery. On that basis, they are claims in connection

with the legal relationships forming part of the banking relationships between PIFSS and Banque Pictet/Pictet Europe, falling within the broad wording of the EJC's considered above. The alleged corruption involved in the payment of secret commissions 'materialised' in those legal relationships by playing a causal role in their creation and/or the placing of transactions under them. In Swiss law terms, there is a clear "*connexité*" between the claims and those legal relationships.

290. In addition:

- i) The fact that the terms and conditions including the EJC's included specific provisions relating to the receipt and payment of commission or other remuneration by the banks tends to reinforce the view set out above.
- ii) The allegation referred to in § 285.xii) above of ongoing alleged concealment and failure to disclose the secret commissions to PIFSS is also directly rooted in the parties' banker/customer relationship to which the General Business Conditions applied.
- iii) Banque Pictet and Pictet Europe also have in my view the better of the argument that the alleged wrongdoing would amount to a concurrent breach of the contractual duties they owed to PIFSS pursuant to SCO Articles 398 and 400. It is likely that the allegations made, if proven, would involve breaches by the banks of their contractual duties of care and loyalty to PIFSS and/or their contractual duties to account for their activities and return anything received to the customer.

291. However, PIFSS makes several arguments to the contrary, which can conveniently be listed as follows:

- i) a proportion of the secret commissions were paid pursuant to contracts to which related entities, rather than PIFSS or Banque Pictet/Pictet Europe themselves, were parties;
- ii) further portions of the secret commissions were paid pursuant to dealings not governed by any formal contract between PIFSS and Banque Pictet/Pictet Europe;
- iii) the secret commissions were not paid in connection with the contracts containing the EJC's;
- iv) the secret commissions claims do not involve or depend on the contracts between the parties, which were coincidental in the context of the matters to which the claims relate;
- v) the EJC's do not cover claims for deliberate torts, particularly when committed before the EJC's were agreed; and
- vi) the secret commissions were part of a unitary scheme also including the laundering of large sums arising from non-Pictet schemes, which scheme when viewed as a whole was not connected with the contractual relationships between PIFSS and Banque Pictet/Pictet Europe.

(i) *Contracts with related entities*

292. On the first point, PIFSS contends that, notwithstanding the way in which the claims are expressed as set out above, a detailed examination of the evidence indicates that the great majority by value of the secret commissions paid pursuant to the Pictet Scheme were in fact paid pursuant to investments made (a) not by PIFSS itself but by a related entity and/or (b) not with Banque Pictet/Pictet Europe themselves but with other entities. For example, the largest single known commission related to investments by the Mayur Fund, a related entity wholly owned by PIFSS, with a Pictet entity other than Banque Pictet or Pictet Europe.
293. In so far as PIFSS's contentions might depart from its pleaded case, they are problematic in principle. Banque Pictet cites, in this context, cases on the doctrines of election and abuse of process (*Benedictus v Jalaram Ltd* (1988) 58 P&CR 330; *Union Music Ltd v Russell John Watson* [2002] EWCA Civ 680 and *Nexus Communications Group Limited v Lambert* [2005] EWHC 345 (Ch)). The simple point though, which Banque Pictet also makes, is that the claim over which the court is asked to assume jurisdiction is that set out in the Claimant's statements of case, and those must be the essential basis on which the court assesses who has the better of the argument as to jurisdiction.
294. PIFSS responds that its pleaded claim is not restricted to investments made by PIFSS itself with Banque Pictet or Pictet Europe themselves, since the CPOC also refer to services provided to PIFSS by "*the Pictet Group*" (§ 180); to investments "*in respect of which [Banque Pictet] would have a commercial interest including by way of fees*" (§ 172a); and to PIFSS holding up to 96 accounts held with "*the Pictet Group*" (§ 181). The evidence shows that the Mayur Fund was a wholly-owned separate entity from PIFSS, and that the management was actually provided by Pictet Asset Management Ltd ("**PAM**"), a separate entity from Banque Pictet or Pictet Europe. Further, as to Banque Pictet's objection that PIFSS lacks standing to bring a claim for loss occasioned in respect of an investment made by a separate entity, PIFSS says it is entitled to claim simply on the basis of the fiduciary duties owed to it by Mr Al Rajaan as its director general, in which capacity he procured the Mayur Fund investment with PAM.
295. Those contentions are, though, open to objection on three grounds.
296. First, CPOC § 184 refers specifically to the Mayur Fund as a fund held by *PIFSS* and to be managed by *Banque Pictet*. Moreover, Appendix 3.1 lists the investment as being held in or through an "[a]ccount held with" Banque Pictet. I am not persuaded that it is open to PIFSS, through its evidence, now to seek entirely to dissociate the Mayur investment from PIFSS (as an entity) and Banque Pictet.
297. Secondly, the evidence indicates that the Mayur investment was at least to a degree connected with both Banque Pictet and Pictet Europe, as well as their related entity PAM. It appears that following the transfer from Lazard in 2001, Banque Pictet initially became Mayur Fund Limited's manager whilst delegating management to PAM. Later the same year PAM formally replaced Banque Pictet as investment manager. When Mayur Fund Limited was converted in 2010 into a different legal entity, Mayur Fund Luxembourg SIF – SICAV, still wholly owned by PIFSS, Pictet Europe became the custodian bank and administrative agent, PAM was the asset

manager and Banque Pictet ceased to have any formal or documented role in the arrangement. In December 2011 the fund assets were transferred to a third entity, the ‘Banyan’ sub-fund of ‘Pictet Total Return’, a Luxembourg SICAV, for which Pictet Europe remained the custodian and administrative agent.

298. Thirdly, although the matters set out in § 297 above did not involve any direct contractual relationship between PIFSS itself (as opposed to wholly owned entities) and Banque Pictet or Pictet Europe, the CPOC indicate that the Mayur investment developed from the PIFSS/Banque Pictet relationship. CPOC §§ 171 and 174 refer to PIFSS opening account 99501 with Banque Pictet, as a client of Albait (whom PIFSS retained to manage certain investment portfolios), and to Banque Pictet in September 1998 assuming the role of custodian in relation to those PIFSS investments. CPOC § 175 refers to an inferred agreement between Banque Pictet and Mr Al Rajaan to extend the categories of services in which Mr Al Rajaan would receive a fee in return for authorising PIFSS to open accounts with Banque Pictet on which such fees were payable. Similarly, CPOC § 182 alleges that “*As pleaded below, as over time PIFSS expanded its commercial relationship with Pictet into further types of accounts and/or investments the Pictet Nasrallah Agreements were amended (formally or by practice) to ensure that Secret Commissions were paid in respect of the further accounts and/or investments*”. The paragraphs pleaded below include the allegation in § 184 about Banque Pictet taking over the management of the Mayur Fund. The Mayur investment is thus a facet of the expansion of the commercial relationship between PIFSS and Banque Pictet, and in that sense connected with the legal relationships forming part of that commercial relationship. To regard particular investments such as these, forming part of the Pictet Scheme, as falling outside the EJC because they happened to have been entered into by a wholly owned subsidiary rather than by PIFSS itself would in my view involve an unduly narrow view of the scope of the clause.

*(ii) Lack of ‘relevant’ formal contracts*

299. PIFSS’s second point is that the EJC cannot apply to the extent that secret commissions arise in respect of services or investments where there is no evidence of any specific formal contract between PIFSS and Banque Pictet/Pictet Europe. PIFSS highlights the following services and investments:
- i) Cash management services US\$6.24 million of the secret commissions paid by Banque Pictet was calculated by reference to ‘margins’ the bank received in respect of cash management services. PIFSS’s evidence is that there was no written contract save for a cash management mandate dated 10 July 2003 which did not purport to incorporate Banque Pictet’s General Terms and did not include a jurisdiction clause. For a short time from March 2003 until October 2003 Banque Pictet provided these services to PIFSS directly. In October 2003, some of this activity was transferred to a fund, initially the IGF Fund, and from December 2005 the Turbo Cash Fund. The funds were managed or advised by Banque Pictet and/or Pictet Europe, but Banque Pictet continued to provide PIFSS with some advice directly. Pictet continued to pay Secret Commissions but these would have been based on the ‘margin’ charged to the transactions undertaken on behalf of the fund (IGF and later Turbo) rather than fees paid by or debited to PIFSS. To the extent that the underlying ‘margins’ related to services that Banque Pictet provided to PIFSS directly

during 2003, there is no evidence of any formal contract between PIFSS and Banque Pictet in relation to these services. To the extent that the ‘margins’ related to services that Banque Pictet and/or Pictet Europe provided to the funds in which PIFSS had invested, the secret commissions were not calculated by reference to the terms of the parties’ contractual relationship at all. Banque Pictet did not report details of the ‘margins’ to PIFSS but, on the contrary, later reduced them in order (on PIFSS’s case) to avoid questions from PIFSS and its auditors and to avoid uncovering the secret arrangements with Mr Al Rajaan.

- ii) Albait US\$1.06 million of the secret commissions paid by Banque Pictet was initially calculated by reference to the investment management fees charged by Albait to PIFSS, not fees paid by PIFSS to Banque Pictet. It was later calculated by reference to fees charged by Banque Pictet to an investment fund but was not debited to PIFSS’s account with Banque Pictet in which the Albait investment was held. There was no relevant contract or other direct dealing between PIFSS and Banque Pictet.
  - iii) Pictet Emerging Local Currency Debt Fund US\$411,000 of the secret commissions paid by Banque Pictet was calculated by reference to management fees charged on PIFSS’s investment in the above fund which was managed by Pictet Funds (Europe) SA. While PIFSS had some dealings directly with Banque Pictet in relation to this investment, it was not held in a Banque Pictet custody account and there was no relevant contract between PIFSS and Banque Pictet in relation to it.
  - iv) Brokerage services US\$2.26 million of the secret commissions paid by Banque Pictet was calculated by reference to fees the bank received from PIFSS for brokerage services. Although Banque Pictet’s General Business Conditions envisage that brokerage services would be the subject of separate agreement, and Pictet Europe did enter into such agreements, there is no evidence of any formal contract in relation to these services.
300. PIFSS argues that in the context of the present case, the existence of contractual relationships between PIFSS and Banque Pictet/Pictet Europe was a matter of coincidence, which depended on how matters were structured within the financial institutions which paid or handled bribes under each of the schemes complained of. In the Pictet Scheme, the majority of the secret commissions were calculated by reference to PIFSS’s investments with the Mayur Fund, Albait, Pictet Emerging Local Currency Debt Fund and the IGF and Turbo funds, in relation to services provided to those parties (US\$18.54 million), and as to which there was no contract in place as between PIFSS and Banque Pictet.
301. Thus PIFSS appears to accept that only the following services, giving rise to secret commissions, were provided under a contract between PIFSS and Banque Pictet or Pictet Europe:
- i) US\$4.5 million of the secret commissions was paid by reference to fees charged by Banque Pictet to PIFSS in respect of the services it provided in respect of the various custody accounts. These accounts were operated under



formal written agreements which referred to the incorporation of Banque Pictet's General Terms by reference.

- ii) Pictet Europe paid US\$1.37 million of secret commissions which was calculated by reference to the fees that Pictet Europe charged PIFSS on one of the accounts that PIFSS held with it (account 300046).
302. Overall, PIFSS says only US\$8.13 million of secret commissions (relating to brokerage, custody and Pictet Europe) was calculated by reference to services provided to PIFSS directly; and that the portion of that amount relating to brokerage services (US\$2.26 million) was not paid pursuant to any formal contract.
303. I do not, however, accept PIFSS's approach. First, as already noted, it is alleged in the CPOC that all the investments giving rise to secret commissions related to an "[a]ccount held with" either Banque Pictet or Pictet Europe. Secondly, the scope of the EJC's incorporated into the numerous account opening and other documents PIFSS executed was broad, and (I have concluded) applied to all the banks' legal relationships with PIFSS. The services and investments referred to in § 299 above are said to have involved, at least to some degree, services provided by, accounts held with or other dealings with Banque Pictet or Pictet Europe. I do not accept PIFSS's submission that the absence of fees paid by PIFSS to Banque Pictet attributable to these particular services (cf *Petromena* § 91) indicates that they were not provided in connection with any PIFSS/Banque Pictet contract at all. In the absence of any applicable specific contracts, I consider the banks to have the better of the argument that these matters fell within the scope of the broadly worded contractual provisions (including the widely phrased EJC's) set out in each of the banks' General Business Conditions.

*(iii) Scope of contracts containing EJC's*

304. PIFSS's third point is that EJC's contained in account opening or other documents applied only to services within the scope of those contemplated for the account in question. In each case the contractual relationship was concerned with the provision of a business account and associated services of an administrative and execution only nature which were limited in content and scope. PIFSS referred to them as concerning 'vanilla' banking services. Thus, the scope of disputes that might foreseeably arise from the contractual relationship and which might foreseeably be referred to an agreed court under that relationship was commensurately limited.
305. For example, PIFSS makes the point in relation to the original accounts 99501 and 99503 that there is no evidence that the services Banque Pictet provided or contracted to provide in relation to those two accounts extended beyond the usual custody services. It would follow on PIFSS's case that if, for example, Banque Pictet later provided cash management advice to PIFSS without any specific formal contract being concluded for those services (see § 299.i) above), then no EJC would apply to them. Indeed, it would appear to follow that no written terms and conditions would apply to them at all, even if the terms and conditions incorporated into the original account opening documents were broad enough to cover such services.
306. I do not accept that argument. By having agreed from the outset terms and conditions capable of applying to a wide range of services, the parties agreed that those terms

would apply to any such services as might later be provided, subject only – as the terms and conditions specifically contemplated – to any more specific contracts made for the services in question.

*(iv) Claims not related to contracts*

307. Fourthly, PIFSS says the secret commission claims do not stem from or have their origin in any contractual relationship between PIFSS and the banks. No remedy is sought to enforce or avoid those contracts or any term of them. No complaint is made, directly or indirectly, as to the performance of the subject matter of the contract. Conceptually, they do not involve or depend on a concurrent (or any) breach of contract between PIFSS and the banks. The corrupt schemes did not require or depend on contractual relationships between PIFSS and the defendant parties which, respectively, paid or procured bribes, and there is no material connection between the dispute and the subject matter of any of the contracts between PIFSS and Banque Pictet or Pictet Europe. Moreover, the relief sought is non-contractual both as to basis and to measure.
308. In my view, however, the facts that the claims do not seek performance of or allege the breach of the contracts between PIFSS and the bank, nor (were it the case) involve a concurrent breach of those contracts, do not prevent them from arising in connection with the contracts. The same features are true of claims for damages or other relief for fraudulent or negligent pre-contractual misrepresentation, and of claims that a contract has been induced by bribery. Nonetheless, those categories of claim may readily be regarded as arising in connection with a contract. In addition, for the reasons set out earlier in this section (H)(1), I do not accept PIFSS’s contention that the claims have no relevant connection with the contracts between PIFSS and Banque Pictet/Pictet Europe.
309. PIFSS makes the further point that it does not allege that the opening of the accounts with Banque Pictet (or Pictet Europe or Mirabaud) was induced by corruption, so any analogy with (for example) *Fiona Trust* is misplaced. However, an allegation of corruptly inducing a party to place business pursuant to or under the auspices of an existing contractual relationship can be regarded as being ‘in connection with’ that relationship just as much as an allegation that the formation of the relationship was induced by corruption.
310. As to the relief claimed in the present case, CPOC § 354 pleads:

“Further or in the alternative, PIFSS is entitled to compensation in the value of the Secret Commissions in the sum of the bribe, being the sum which represents the direct and financial loss caused by the wrongdoing. If Mr. Al Rajaan had not acted corruptly and in his self-interest in seeking and procuring the payment of Secret Commissions, and had he acted in accordance with his obligations under the Civil Service Law set out in paragraph 59 PIFSS would have received the benefit of those sums whether by way of reduced fees, waiver of fees or a rebate in fees payable to PIFSS. ...” (my emphasis)

Although such relief is not contractual, its connection with the contractual relationships between PIFSS and Banque Pictet/Pictet Europe is clear.

(v) *EJCs not covering intentional/hidden wrongdoing*

311. Fifthly, PIFSS contends that applying Swiss principles of contract interpretation, the alleged wrongdoing would fall outside the EJCs because:
- i) If one party intended to include current or future intentional tortious or even criminal conduct of the sort alleged in this case when putting forward an EJC, this would be regarded in Swiss law as being incompatible with the requirements of good faith as enshrined in Article 2.
  - ii) The same applies *a fortiori* to an intention to cover claims based on past tortious conduct that was being deliberately concealed from the other contracting party. If (as PIFSS contends) the EJCs in the banks' general business conditions were not incorporated until 2012, then a reasonable observer, knowing that the relevant bank had knowledge of and was deliberately concealing deliberate torts which had already been committed against PIFSS, would not assume that PIFSS was agreeing that such torts would fall within the scope of the EJC.
  - iii) There is insufficient connection between the banks' wrongdoing and the purpose of the contracts of which the EJCs were terms to enable PIFSS to foresee that the claims would be subjected to the EJCs at the dates on which it contracted. The deliberate and criminal nature of the banks' tortious wrongdoing takes PIFSS's claims well outside the scope of the EJCs because subjecting PIFSS's claims to them would conflict with the expectations of reasonable and honest persons in the position of the parties at the dates of the relevant contracts and thus with the overriding principle of good faith.
312. I do not accept those submissions. I have considered and rejected, in section (H)(1)(b) above, PIFSS's contentions to the effect that unlawful actions fall outside the scope of jurisdiction clauses. The deliberate nature of any such acts cannot in my view make any difference. The cartels at issue in Decision SFSC 4C.142/2006 (2006) must by their very nature have involved deliberate wrongdoing, but there is no suggestion in the SFSC's decision that that fact took them outside the scope of the jurisdiction clause. Moreover, it would be illogical to draw a distinction for jurisdiction purposes between, for example, negligent pre-contractual misrepresentations on the one hand, and fraudulent pre-contractual misrepresentations or bribery on the other; and equally illogical to distinguish between wrongs committed after a contract is concluded and wrongs which pre-dated it and (as would often be the case) were hidden from the counterparty. It must be borne in mind that, at the jurisdiction stage, the allegations in question have been made but not proven. I very much doubt that reasonable commercial parties should be taken to have intended that a party to the contract can, by dint of having some evidential basis to allege deliberate wrongdoing by the other, thereby avoid the application of the parties' choice of forum.

*(vi) Part of larger scheme unconnected to Pictet accounts*

313. Sixthly, PIFSS submits that when one stands back and views the bigger picture, the Pictet Scheme formed part of a unitary scheme which also included Banque Pictet and Pictet Europe's alleged involvement in laundering secret commissions which Mr Al Rajaan obtained not only in relation to the Pictet Scheme but also other schemes. The banks' activities in relation to those money laundering activities fell outside the EJC's. Moreover, the accessory claims against Banque Pictet and Pictet Europe in relation to non-Pictet schemes are much larger in amount (US\$271.4 million) than the claims relating to the Pictet Scheme (US\$26.7 million). As a result, the overall scheme – including the Pictet Scheme – is not sufficiently connected with PIFSS's contractual relationships with Banque Pictet and Pictet Europe to fall within the EJC's.
314. This argument has to be considered in the light of the conclusion I reach in section (I)(2) below that the accessory claims, save in relation to Pictet Scheme secret commissions, fall outside the scope of the EJC's. As I set out there, there are significant areas of factual overlap between the Pictet Scheme claims and the Pictet accessory claims. Many of the same persons are alleged to have been involved, and the alleged scheme for the laundering of Pictet Scheme commissions is essentially the same as the scheme for the laundering of non-Pictet Scheme commissions. Those considerations are highly relevant when one comes to consider Lugano Convention Article 6/Recast Brussels Regulation Article 8. However, it does not follow that the latter scheme arises in connection with the contractual relations between PIFSS and Banque Pictet/Pictet Europe. Nor, though, does it follow that the Pictet Scheme is any the less connected with those contractual relations.
315. It is certainly possible to view the allegations relating to the Pictet Scheme, the arrangements to launder commissions arising from that Scheme, and the arrangements to launder through Pictet accounts commissions arising from other schemes, as concerning a single ongoing course of conduct involving Mr Al Rajaan, his accomplices, M. Bertherat and M. Amouzegar. However, to the extent that that alleged course of conduct involved the agreement and implementation of the Pictet Scheme, and the associated laundering of commissions thereby obtained, it remains one which arises in connection with the PIFSS/Banque Pictet/Pictet Europe contractual relations, for the reasons discussed earlier, notwithstanding that other parts of the course of conduct lack such connection. I do not consider that those connections can be brushed aside, and the jurisdiction agreements thereby sidestepped, by virtue of the fact that (on PIFSS's case) the elements of the course of conduct related to the Pictet Scheme may be viewed as forming part of a wider set of activities.
316. For these reasons, I conclude that the claims relating to the Pictet Scheme and to the laundering of commission obtained by that Scheme fall within the scope of the Banque Pictet and Pictet Europe EJC's.

**(2) Pictet Accessory Claims**

317. I have outlined the nature of the 'accessory' or 'money laundering' claims against the Pictet corporate defendants in §§ 54-56 above. They involved, on PIFSS's case, Banque Pictet/Pictet Europe dishonestly assisting Mr Al Rajaan to conceal and dispose of about US\$271.4 million of payments made by other financial institutions

and/or intermediaries to Mr Al Rajaan and his associates under other dishonest schemes.

318. PIFSS submits that these claims have nothing to do with the contractual relationship between PIFSS and the banks at all. The conduct of the defendants of which complaint is made contributes to the corruption of Mr Al Rajaan's relationship with PIFSS, and concerns the banking services that the banks provided to Mr Al Rajaan and his associates so that they could conceal and launder the payments that they received from other banking institutions or funds pursuant to their own separate arrangements. Those banking services were wholly separate from any services provided to PIFSS and were in many cases provided in different jurisdictions (such as Singapore and the Bahamas) from those where PIFSS's accounts were held (Geneva and Luxembourg).
319. The Pictet defendants argue that that is an incorrect and uncommercial interpretation:
- i) Banque Pictet/Pictet Europe's alleged provision of money laundering assistance is said by PIFSS to be an integral part of the very same "*Pictet Scheme*" that resulted in the alleged wrongful payment of secret commissions. PIFSS's money laundering allegations cannot be separated out from the rest of its claims in relation to the Pictet Scheme, and it is highly unlikely, if not inconceivable, that commercial parties would have intended their disputes to be fragmented in this way.
  - ii) PIFSS alleges that the Pictet defendants helped Mr Al Rajaan to launder both the secret commissions Pictet allegedly paid to Mr Al Rajaan, and secret commissions he received from other sources. The former allegation undoubtedly relates directly to the PIFSS/Pictet relationship, and it would be uncommercial and illogical to separate out the latter, leading directly to fragmentation of the dispute.
  - iii) In any event, on PIFSS's case, the alleged money laundering assistance to Mr Al Rajaan was provided as a result of, and pursuant to, PIFSS's banking relationship with Banque Pictet/Pictet Europe. It thus has an obvious "*connexité*" to the PIFSS/Pictet banking relationship. For example, PIFSS relies on the knowledge the Pictet defendants are alleged to have gained in connection with the Pictet Scheme in support of its allegations of knowledge in relation to the wider money laundering scheme.
  - iv) PIFSS's allegations would also amount to a concurrent breach of Banque Pictet/Pictet Europe's contractual obligations to PIFSS.
320. I do not accept the Pictet defendants' submissions on this issue, save insofar as they relate to the alleged laundering of the Pictet Scheme commissions themselves. As noted earlier, I would accept that it is possible to view the allegations relating to the Pictet Scheme, the arrangements to launder commissions arising from that scheme, and the arrangements to launder through Pictet accounts commissions arising from other schemes, as concerning a single ongoing course of conduct involving Mr Al Rajaan and his accomplices, M. Bertherat and M. Amouzegar. Further, to the extent that that alleged course of conduct involved the agreement and implementation of the

Pictet Scheme, and the associated laundering of commissions thereby obtained, it is connected with the PIFSS/Banque Pictet/Pictet Europe contractual relations.

321. However, that does not mean that the element of the course of conduct involving (on PIFSS's case) the laundering of money received from other schemes is connected in any relevant sense with the contractual relationship between PIFSS and Banque Pictet/Pictet Europe.
322. It is true that PIFSS's allegations of knowledge in relation to the wider money laundering activities are based in significant part on knowledge gained in connection with the Pictet Scheme and/or the alleged laundering of the proceeds of that Scheme. PIFSS's allegations of knowledge in relation to the accessory claims include the following:

*“Knowledge*

...

211. ... each of the Pictet entities, through at least Mr. Bertherat and Mr. Amouzegar and those working under their supervision, knew that the sums transferred into the above accounts pursuant to the Pictet Scheme were Secret Commissions by reason of the facts and matters pleaded in connection with that scheme.

212. They also knew, by reason of the facts and matters set out in paragraphs 214 to 216 below, that some or all of the sums in paragraphs 205 b – d [non Pictet Scheme payments] were Secret Commissions.

213. Accordingly, the Pictet entities and each of them, through at least Mr. Bertherat and Mr. Amouzegar and those working under their supervision, knew that the bank accounts which they had established and operated for Mr. Al Rajaan and Mr. Nasrallah:

- a. were wholly (or at least substantially) funded by Secret Commissions or the traceable proceeds thereof;
- b. were being used to assist and facilitate the payment of Secret Commissions.

*Particulars of Knowledge*

214. The Pictet entities, through at least Mr. Bertherat and Mr. Amouzegar and those acting under their supervision, knew that:

- a. In respect of the payments from Phoenix's account at EFG Bank, the payments were from the same corporate party (i.e. Phoenix) as Pictet was, itself, using as a front for the payments of Secret Commissions as pleaded above;

b. In respect of the payments from Ozak's account at EFG Bank, the payments were from the same bank and followed a similar pattern to the Phoenix payments;

...

216. Accordingly, if and to the extent that the Pictet Defendants did not have actual knowledge that the transfers in and out of accounts held at Pictet, Pictet Europe, Pictet Asia and Pictet Bahamas were Secret Commissions or the traceable proceeds thereof (by reason of the discussions between Mr. Al Rajaan, Mr. Bertherat and Mr. Amouzegar at the outset of the Pictet Scheme) alternatively, it is to be inferred that they believed this to be the case and deliberately shut their eyes and took no steps to enquire. In fact, they deliberately took such active steps as were necessary to protect the transfers of Secret Commissions from regulatory oversight, and to ensure that the transfers were not the subject of due diligence, so as to conceal and facilitate the payment of Secret Commissions and to protect Mr. Al Rajaan and Mr. Nasrallah from criminal investigation."

Thus the knowledge allegations in relation to the accessory claim are closely linked and in part dependent on those in relation to the Pictet Scheme.

323. However:

- i) the fact that defendants' knowledge gained from the Pictet Scheme also contributes to their knowledge of the nature of the wider money laundering scheme does not mean that the wider scheme is itself relevantly connected with the contractual relationships between PIFSS and Banque Pictet/Pictet Europe involved in the Pictet Scheme; and
- ii) PIFSS's allegations of knowledge in relation to the wider money laundering scheme go somewhat beyond knowledge gained in connection with the Pictet Scheme, and include such matters as failure to make enquiries about sources of funds, failing to react properly to the evidently corrupt nature of the transactions in question, and failure to undertake adequate enquiries about companies and accounts they were creating in connection with the wider scheme.

324. Whether or not the alleged wider scheme arose directly or indirectly out of the Pictet Scheme, it did not itself have any sufficient connection with the PIFSS/Banque Pictet/Pictet Europe banking relationship such as to fall as a whole within the scope of the EJCs. Unlike the Pictet Scheme, it did not involve secret commissions paid in order to induce the formation or placement of investments pursuant to contractual relationships between PIFSS and Banque Pictet/Pictet Europe, nor commissions that were funded from or paid by reference to such investments (or to remuneration arising from such investments).

325. I am also not persuaded that the Pictet defendants have the better of the argument that PIFSS's money laundering allegations would amount to a concurrent breach of

Banque Pictet/Pictet Europe's contractual obligations to PIFSS. As indicated in § 265 above, the concepts in Articles 398 and of "*the business entrusted to [the agent]*" and "*his agency activities*" are in my view rooted in the activities which the agent (here the bank) is carrying out in connection with the contract or contracts between the principal and the agent that govern the agency business/activities in question. On balance I do not consider that the wider accessory claims themselves relate to things done as part of the business entrusted by PIFSS to the banks or to the banks' agency activities on behalf of PIFSS.

### (3) Mirabaud Secret Commission Claims

326. I summarise these claims in section (C)(3) above.
327. CPOC §§ 79b and 85 allege that the original discussions and agreement between Mr Al Rajaan and representatives of Mirabaud were "*with a view to*" putting in place a structure for the routing of secret commissions to Mr Al Rajaan and:
- "Securing Secret Commissions from Mirabaud in relation to investments which Mr. Al Rajaan would authorise PIFSS to make, and in respect of which Mirabaud and/or its partners would have a commercial interest (directly or through group entities) including by way of management and/or brokerage fees, commissions (as introducer or otherwise) and/or shareholdings" (CPOC § 79b)
328. CPOC § 18 states that:
- "... At all material times, Mirabaud provided investment management and other financial services to PIFSS".
329. CPOC §§ 86 and 98 allege that:
- "On 20 January 1997 Mr. Al Rajaan authorised Mirabaud to open custodian account number 500750 with Mirabaud which subsequently came to hold 12 of PIFSS' investments on which Secret Commissions were paid"
- and
- "Between 1997 and about 8 May 2012 the total sum of US\$76.9 million was paid by way of Secret Commissions to Mr. Al Rajaan in respect of 28 investments by PIFSS ("the **Galmir Funds**"). Tables summarising the investments and the payments generated in respect of them are appended as Appendix 1."
330. The alleged Mirabaud Scheme thus involved the payment of secret commissions "*in relation to*" investments made by PIFSS, and "*Mirabaud*" (defined in CPOC § 17 as Mirabaud & Cie SA) providing investment management and other financial services "*to PIFSS*". The investments were to be ones in which Mirabaud was interested



either directly or through group entities, and 12 of the 28 investments came to be held in PIFSS's sole account, number 500750, with Mirabaud.

331. PIFSS contends that these allegations must be read in the light of CPOC Appendix 1.1, which lists PIFSS's investments falling within the Mirabaud Scheme and identifies the investment manager in each case. The investment managers are in all but three cases identified as being not Mirabaud but third parties. In three cases the investment manager is listed as "Mirabaud" but PIFSS's evidence is that the manager was not Mirabaud itself but another member of its group. PIFSS submits that:
- i) The services that Banque Mirabaud provided to PIFSS related to a single account numbered 500750.
  - ii) Under that account number, Banque Mirabaud provided PIFSS with specific banking services, being Swiss Franc and US Dollar current accounts and custodian services in relation to investments made by PIFSS in various investment products.
  - iii) Mirabaud's limited custodian services included supplying statements of asset values and exercising rights associated with investments on PIFSS's behalf and on its instructions.
  - iv) Account 500750 only extended to 12 of the 28 investments by reference to which secret commissions were paid.
  - v) Mirabaud also provided the usual banking services in relation to current accounts, such as receiving cash deposits and executing payment orders, generally in relation to securities within the custody arrangement.
  - vi) The secret commissions were not calculated by reference to the (minimal) fees paid by PIFSS in connection with account 500750. The only fees that Banque Mirabaud charged to PIFSS were a brokerage fee of US\$2,500 in 2003 on a subscription for units in a Mirabaud group investment fund and other modest fees from 1997 to 1999 which are not relevant to the claim.
  - vii) Banque Mirabaud undertook no management of PIFSS's investments and did not provide PIFSS with any investment advice.
  - viii) Galmir had no contractual role with PIFSS at all. It managed a small number of the investments for third parties on which fees were paid. Galmir's conduct giving rise to this claim was its secret fronting of purported introductions and payment of secret commissions to Mr Al Rajaan, which forms part of the extensive and secret commercial relationship between Mirabaud and Mr Al Rajaan which facilitated his corruption.
332. Mirabaud submits, first of all, that the mere fact that account 500750, PIFSS's custodian account with Mirabaud, "*came to hold 12 of PIFSS's investments on which Secret Commissions were paid*" provides a direct nexus between that account and the alleged secret commissions.

333. More broadly, Mirabaud says the alleged Mirabaud Scheme relates to investments made by PIFSS *through* Mirabaud in the course of the banking relationship and in respect of which the alleged secret commissions were allegedly paid. Mirabaud had relationships with a number of funds, very often Mirabaud-related funds, and the relationships that developed between PIFSS and Mirabaud involved PIFSS placing investments in such funds through Mirabaud. The model of the alleged Mirabaud Scheme was not based on fees paid by PIFSS (which were minimal) but rather on fees arising as a natural and disclosed (in the General Terms and Conditions) incident of the nature of the investments into which PIFSS invested via Mirabaud.
334. That was, Mirabaud says, precisely the position contemplated by clause 10 of the General Terms and Conditions, which (in the 2016 version) stated:

**“10. Remuneration connected with the Bank's activities and conflicts of interest**

The Bank offers its clients a broad range of financial instruments. The Client is aware that the Bank or its subsidiaries may, directly or indirectly, receive from group entities or third parties, payments or other financial benefits for the services performed by the Bank, in particular relating to the sale of investment instruments. These payments are typically calculated on the basis of the volume of the amounts invested in the investment instruments or the volume of transactions carried out for customers. Details of the calculation parameters for these services can be found in the Bank's fee schedule, thereby allowing the Client to calculate the sums that the Bank may receive in this respect. Thus, as indicated in the fee schedule, the maximum remuneration that the Bank may receive, as of the date of publication of these General Terms and Conditions, are as follows, calculated in percentage terms on an annual basis:

Money market funds 0.50%

Equity funds 1.25%

Bond funds 0.75%

Asset allocation funds 0.75%

Other funds (especially alternative funds and, private equity funds) 1.00%

Structured products 2.00%

The Client understands and accepts that the Bank may select or recommend certain investment types and instruments, receiving remuneration in return for their sale and that this may constitute a conflict of interest. The Bank has taken steps to best

safeguard its clients' interests in cases where this remuneration could result in such a conflict.

Should the Bank receive remuneration that, pursuant to Art. 400 of the Swiss Code of Obligations or other legal provisions, should accrue to the Client, it shall waive its right to such remuneration.

Furthermore, the Customer acknowledges and accepts that the Bank or its subsidiaries may make payments to third parties, such as independent wealth managers retained by the Client or other intermediaries. This remuneration may be calculated on the basis of the banking commission received by the Bank and debited from the Client as well as on the remuneration paid to the Bank by product providers or on the amount of assets deposited. The Client understands and accepts that this remuneration may constitute a potential conflict of interest. The Bank has taken steps to best safeguard its clients' interests in cases where this third party remuneration could result in a conflict of interests.”

Such provisions date back to the 2005 GTCs.

335. The alleged Mirabaud Scheme relates to alleged commission payments: and commission payments to third parties in general are expressly contemplated in these provisions, as are payments to Mirabaud or its subsidiaries (as alleged by PIFSS at CPOC 79(b) quoted in § 327 above). For example, if PIFSS invested in a fund of which a Mirabaud subsidiary (as opposed to Mirabaud itself) or a third party was the fund manager, then that would still be a financial instrument that had been offered by Mirabaud within the first sentence of clause 10, and Mirabaud’s offering of which was intended to be governed by the General Terms and Conditions. That point holds good regardless of whether the investment was held via account 500750 itself (which 12 were but others were not).
336. Mirabaud says the essential service it was providing to PIFSS was giving it access to funds, both Mirabaud funds and other funds. Those investments were made through Mirabaud. The fees accruing from the investments were collected by Galmir, a Mirabaud subsidiary set up for the legitimate purpose of being a collecting point for fees paid in relation to investments that PIFSS and many other customers made through Mirabaud. Mr Whiteoak’s evidence on this point is that:

“Galmir ... was a wholly-owned subsidiary of the Mirabaud group of companies ...and was subject to consolidated supervision by FINMA (the Swiss Financial Market Supervisory Authority).

Galmir acted in different capacities in relation to various investment funds depending on the particular contractual framework relating to those funds. These included funds in which the Claimant did not invest. Galmir was remunerated in accordance with the relevant contractual framework for acting

in those capacities in respect of those funds. Galmir had further received dividends paid by entities in which it held a shareholding interest.

Such payments were common in the investment fund industry. Investments in funds of this kind usually generated a variety of commissions and/or fees payable to various parties. In most cases, the relevant fees were set out in the prospectuses which not uncommonly expressly provided for them or payments derived from to be paid on to other parties.

In many instances, in relation to various funds, including funds in which the Claimant did not invest, these fees were payable to or routed through Galmir.

Mirabaud's practice was to provide clients (including the Claimant) - who were not subject to a discretionary management agreement - with all the necessary information on the funds, including the prospectuses, before the investment was made. The Claimant had therefore been provided with information regarding the fees that would be paid in relation to the funds in which it invested. Accordingly, the Claimant was aware of the existence of these payments.

To the extent that any claims are asserted against Mirabaud itself in relation to commission payments to and/or from Galmir, such payments were and were expressly envisaged to be, paid in the course of the banking relationship between the Claimant and Mirabaud, as set out in the Mirabaud GTCs. ...

...

Between 2011 and 2013-2014, Galmir's activities were reduced and ultimately taken over by Mirabaud Asset Management Europe S.A. ("MAM Europe"), which was formed in 2010 and gradually took over Mirabaud's asset management activities."

337. The fourth witness statement of Mr Walsh, solicitor to PIFSS, exhibits some examples of documents relating to the investments PIFSS made. In one instance, Mirabaud wrote to Mr Al Rajaan on 20 July 2001 in order to "*point out to you two new funds of funds, that might be of interest for your institution*". These were the MirAlt Sicav Europe and MirAlt Sicav Multitech funds, whose features the letter briefly described. The letter stated that "*[g]iven our excellent long-standing relationship, no charge will be levied at subscription nor redemption ...*" and that "*We would be very pleased to have you as a shareholder in those two funds and remain at your disposal for further information*". The exhibited Articles of Association indicate that M. Mirabaud was one of the incorporators and shareholders of the first of these funds.
338. It appears that at least one of the funds was of interest to Mr Al Rajaan/PIFSS, as Mirabaud wrote by fax to PIFSS's Manager for Direct Investment, Mr Sulaiman Al-Muraikhi, on 11 September 2001 referring to "*your fax August 20, 2001*" and stating

*“Please find below the details regarding your purchase of Miralt Sicav Europe Z Eur”*. The number of shares and price were then set out, followed by the words *“Thank you very much for your order”*. The second page of the fax was a print-out on Mirabaud headed paper setting out details of the purchase and referencing (twice) account 500750.

339. The exhibited documents include other examples of Mirabaud putting forward investment suggestions to PIFSS, and of PIFSS signing a subscription agreement for one of them (the Sito Emerging Fund).
340. I accept Mirabaud’s submissions on these matters. Both the pleaded allegations and the available evidence indicate that the essential nature of the business was for Mirabaud (itself) to provide PIFSS with access to investments, putting forward recommendations and information, and facilitating the investment process, on which Mirabaud or one of its entities would then earn remuneration as contemplated by the General Terms and Conditions. PIFSS’s claim is in essence that Mirabaud paid Mr Al Rajaan secret commissions in order to induce PIFSS to make those investments, and/or which were funded by or referable to remuneration received by the Mirabaud group from such investments. In my view those are claims in connection with the legal relationship between PIFSS and Mirabaud, falling within the broad wording of the EJC’s considered earlier. The alleged corruption ‘materialised’ in the PIFSS/Mirabaud legal relationship by playing a causal role in its creation and/or the placing of transactions pursuant to it. In Swiss law terms, there is a clear *“connexité”* between the claims and the legal relationship. The fact that the terms and conditions including the EJC’s included specific provisions relating to the receipt and payment of commission or other remuneration by Mirabaud tends to reinforce that view. Further, Mirabaud has in my view the better of the argument that the alleged wrongdoing would amount to a concurrent breach of the contractual duties they owed to PIFSS pursuant to SCO Articles 398 and 400. It is likely that the allegations made, if proven, would involve breaches by Mirabaud of its contractual duties of care and loyalty to PIFSS and/or its contractual duties to account for its activities and return anything received to the customer.
341. So far as PIFSS’s objections are concerned, I have already addressed above PIFSS’s point that investments were made with and managed by entities other than Mirabaud, and involved PIFSS contracting with entities other than Mirabaud. For these reasons, and for reasons corresponding to those set out in §§ 304-315 above in relation to Banque Pictet and Pictet Europe, I do not accept PIFSS’s contention that the Mirabaud Scheme claims fall outside of the EJC.
342. An additional point highlighted by PIFSS is that some of the conduct alleged against Mirabaud took place before PIFSS opened its account with Mirabaud in January 1997. Two Panamanian companies (Overton and New Market) were formed in early 1995, and an account was opened for Overton and Mirabaud in February 1996 in order to facilitate the payment and concealment of secret commissions.
343. However, these steps are said to have been taken pursuant to the discussions pleaded in CPOC § 79, which envisaged both (a) putting in place an offshore corporate structure for Mr Al Rajaan through which secret commissions could be paid and concealed and (b) securing secret commissions *from Mirabaud* in relation to investments to be made by PIFSS in respect of which Mirabaud and/or its partners

would have a commercial interest as set out in § 79(b) (quoted in § 327 above). I do not consider that these preparatory steps had the result that the Mirabaud Scheme activities fall outside the purview of the EJCs. By way of analogy, in a classic case of a contract said to have been induced by bribery, preparatory steps and indeed often the bribe itself will have taken place before the contract is concluded.

344. It was also suggested, at least in oral argument, that actual payments representing secret commissions from another scheme, the Mombelli Scheme, were paid into Overton's account with Mirabaud prior to January 1997. This was the subject of written submissions submitted by PIFSS and Mirabaud shortly after the end of the hearing. In relation to the Mombelli Scheme, CPOC §§ 320, 321 and Appendix 6.1 allege that “[b]etween around 1995 and not earlier than 2015, Mr. Mombelli, whether personally or through his companies on his behalf .... received commissions from at least seventeen investment managers in respect of investments made by PIFSS ..., as set out in Appendix 6 ...”, but that “PIFSS is not presently able to quantify the sums received by Mr. Al Rajaan from Mr. Mombelli in the period from 1995 to 1999 inclusive”. The first investment alleged to have been made pursuant to the Mombelli Scheme was in the Interfin Global Fund on 2 November 1995. CPOC §§ 323 and 326 allege that Mr Mombelli first met Mr Al Rajaan in about 1995, and that at a later meeting they made a commission-sharing agreement and “*Mr. Al Rajaan handed Mr. Mombelli a piece of paper containing the details of the bank account to be credited. It is to be inferred that this was, until 2003, the Overton account*”.
345. The Mombelli defendants admit this last point, but deny that the Mombelli companies were incorporated until 1999. They plead that from 1995 to 1999 Mr Mombelli worked for Gesfinance SA (which is not a defendant) and that all introductory fees paid by the funds' managers to Gesfinance were split 50/50 between Gesfinance and Mr Al Rajaan.
346. PIFSS says it has a good arguable case, based on inference at least, that commission-sharing arrangements were in place by the time of the Interfin investment in November 1995, and that Gesfinance would have made payments to Mr Al Rajaan via the Overton account at Mirabaud. PIFSS accepts that the Interfin investment was made *before* the Overton account was opened (February 1996) but suggests that commission payments would have arisen only some months thereafter, on a quarterly basis.
347. Mirabaud points out that PIFSS's pleaded case is that the quantum of any pre-1999 Mombelli Scheme payments is unknown, and that no case is pleaded about Gesfinance or its being a component of the Mombelli Scheme. Moreover, if the Overton account details were handed over (as PIFSS alleges) at the same time as commission-sharing arrangements were made, then that must have post-dated the Interfin investment, in which event there is no good reason to infer that commissions were paid in relation to that investment. Mirabaud also notes that quarterly payments were allegedly established by M. Argand pursuant to the arrangements set up by him in 1997 as alleged in the CPOC (§§87 to 90 and 102 to 106), but PIFSS does not plead that any quarterly payment arrangement came into existence in relation to the Mirabaud Scheme until early 1997, which is too late for any payment of commission in relation to the Interfin investment.

348. In these circumstances, I do not consider that PIFSS's claim alleges, or that PIFSS has a good arguable case, that a commission payment was made into the Overton account prior to January 1997 in connection with the Mombelli Scheme.
349. Separately, PIFSS notes that CPOC Appendix 4.1 lists *inter alia* fourteen investments made pursuant to another scheme, referred to as the "*Further Nasrallah scheme*", prior to January 1997. PIFSS submits that secret commission payments in respect of these investments "*could have been made into Mr Al Rajaan's accounts at Banque Mirabaud prior to the opening of PIFSS's account 500750*". That is, however, speculation and does not reflect a positive pleaded case on which PIFSS could be said to have a good arguable case.
350. These arguments in relation to the Mombelli and Further Nasrallah Schemes are in any event of limited relevance since (a) they do not in my view shed light on whether the Mirabaud Scheme was connected with the PIFSS/Mirabaud contractual relationship and (b) as set out below, I have in any event concluded that the allegations relating to accessory liability in respect of non-Mirabaud schemes do not fall within the Mirabaud EJs.

#### **(4) Mirabaud Accessory Claims**

351. The 'accessory' or 'money laundering' claims against Mirabaud are outlined in § 67 above. They involved, on PIFSS's case, Mirabaud dishonestly assisting Mr Al Rajaan to conceal and dispose of about US\$153.6 million of payments made by other financial institutions and/or intermediaries to Mr Al Rajaan and his associates under other dishonest schemes. That compares to US\$78.9 million alleged to have been paid and laundered pursuant to the Mirabaud Scheme itself.
352. PIFSS submits that these claims have nothing to do with the contractual relationship between PIFSS and the banks at all, for essentially the same reasons as it advances in relation to Banque Pictet and Pictet Europe. Mirabaud submits that they fall within the EJs because:
- i) Like the claims regarding the Mirabaud Scheme, the claims in respect of the other alleged unlawful schemes relate to alleged commission payments received by Mr Al Rajaan from third parties in relation to investment services and products.
  - ii) PIFSS is making claims against Mirabaud in relation to the other alleged unlawful schemes in the same set of proceedings which covers the Mirabaud Scheme.
  - iii) The claims relating to the other alleged unlawful schemes are said to be based on knowledge that Mirabaud allegedly obtained as a result of the relationship of banker/customer which came into existence between Mirabaud and PIFSS in 1997 and which continued thereafter. More specifically, it is alleged by PIFSS that Mirabaud's knowledge of the other alleged unlawful schemes was derived from its knowledge of the alleged Mirabaud Scheme, which relates to the banker/customer relationship between the parties. CPOC § 114(b) alleges that Mirabaud knew the alleged commissions paid under the other alleged unlawful schemes were "*Secret Commissions*" due to the use of the same

accounts for the purpose of secret commission payments under the alleged Mirabaud Scheme itself, and CPOC § 122 invites the inference of such knowledge “*in light of the purpose of setting up the accounts, their knowledge of the payments under the Mirabaud Scheme ... and their purpose*”.

- iv) When considering the wide wording of the jurisdiction clause it should be assumed that rational contracting parties agreeing a jurisdiction clause would wish for all related claims to be subject to the jurisdiction of the same court. The Mirabaud Scheme claims and the claims in respect of the other allegedly unlawful schemes are brought in the same proceedings. They are closely related and it would be contrary to the intentions of any rational parties that they should be heard in different jurisdictions.
  - v) At the time of the conclusion of the 2016 General Terms and Conditions PIFSS had retained Swiss lawyers in Geneva, and knew (a) that the Kuwaiti government had made a request for mutual legal assistance to the Swiss Attorney General relating to misappropriations by Mr Al Rajaan, (b) that Mirabaud had suspended Mr Al Rajaan’s signing authority over PIFSS’s accounts with the bank and (c) that there were criminal proceedings against Mr Al Rajaan in Switzerland in respect of which it had retained Swiss lawyers. PIFSS had by this time taken steps to join the Swiss criminal proceedings against Mr Al Rajaan as a criminal and civil claimant, and knew the facts on which those claims were based, which are to a significant extent similar to the facts on which the present proceedings are based.
  - vi) If relevant, the 2013 and 2014 jurisdiction clauses were agreed at a time when PIFSS knew that mutual legal assistance had been sought from the Swiss prosecuting authorities in relation to misappropriations made by Mr Al Rajaan. By then, all the same matters other than the commencement of the criminal investigations would have been known. Therefore, the application of the objective interpretation technique under Swiss law would compel the conclusion that all of the claims fall within the scope of the relevant jurisdiction clause.
353. I do not accept these submissions, except in so far as the accessory claims relate to money obtained from the Mirabaud Scheme itself. Similar considerations to those I set out in §§ 320-324 in relation to Banque Pictet and Pictet Europe again apply.
354. On the specific topic of knowledge, the general point made in § 323.i) above applies, and (similarly to the position with Banque Pictet and Pictet Europe) the knowledge allegations against Mirabaud are based in part on knowledge gained from involvement in the Mirabaud Scheme but also from other matters *viz* participation in the Man Scheme (CPOC § 114c and 122).
355. Mirabaud’s point mentioned in § 352.iv) above begs the question of to what extent Mirabaud Scheme claims and the accessory claims are related. As with Banque Pictet and Pictet Europe, there are significant areas of factual overlap between the Mirabaud Scheme claims and the Mirabaud money laundering claims. Many of the same persons are alleged to have been involved, and the alleged scheme for the laundering of Mirabaud Scheme commissions is essentially the same as the scheme for the laundering of non Mirabaud Scheme commissions. However, it does not follow that



the latter activities are connected with the contractual relations between PIFSS and Mirabaud. Nor does that follow from the fact that the two sets of claims are sought to be pursued in the same set of proceedings.

356. The fact that by the time later versions of the EJC's were agreed the parties would have had a degree of knowledge of the alleged money laundering activities also does not bring those activities within the scope of the jurisdiction clauses. I do not consider that the parties, after receiving such knowledge, should be assumed to have intended henceforth to cover in the next restatement of their jurisdiction clause matters that would otherwise fall outside it.

**(5) Claims against M. Bertherat**

357. PIFSS claims against M. Bertherat (a) as a primary wrongdoer in relation to the Pictet Scheme because of his alleged role in paying or procuring the payment of secret commissions giving rise to the secret commission claims, and (b) for his alleged unlawful participation in the concealment of the secret commissions under the Pictet Scheme and other schemes, giving rise to the accessory claims, which PIFSS says gives rise to joint and several liability under Kuwaiti law to pay the value of all such secret commissions.

358. In slightly more detail, the claims against M. Bertherat may be summarised as follows:

- i) Mr Al Rajaan arranged with Banque Pictet, acting via M. Bertherat and M. Amouzegar, for Banque Pictet to pay secret commissions to Mr Al Rajaan (via intermediaries) equating to an agreed proportion of the relevant fee being paid to Banque Pictet by PIFSS.
- ii) The arrangement with Mr Al Rajaan for the payment of secret commissions is alleged to have been formed, on dates unknown prior to August 1998, with M. Bertherat's involvement.
- iii) As PIFSS expanded its commercial relationship with Banque Pictet into further types of accounts and/or investments, the arrangements with Mr Al Rajaan (via Messrs Nasrallah and Amouzegar as intermediaries) were extended, with M. Bertherat's involvement, to cover the further categories of banking services provided. The final such extension that has been pleaded by PIFSS was agreed in May 2011 (CPOC § 190).
- iv) Between 1999 and 2015, approximately US\$26.7 million was paid by Banque Pictet and Pictet Europe in secret commissions pursuant to these arrangements.
- v) M. Bertherat played a role in opening and administering bank accounts held with the Pictet defendants and owned or beneficially owned by Mr Al Rajaan, his accomplices (Ms Al Wazzan and Mr Nasrallah) and entities associated with them, for the purpose of receiving or transferring secret commissions derived from (a) the Pictet Scheme and (b) other alleged schemes said to have been in operation with other banks. M. Bertherat managed the relationship between Mr Al Rajaan, his accomplices, their companies and Pictet up to May 2012.

359. M. Bertherat is said to be fixed with liability in respect of these actions as a result of his alleged knowledge that:
- i) Banque Pictet (and, to a lesser extent, Pictet Europe) were making payments into Pictet group accounts owned or beneficially owned by Mr Al Rajaan, his accomplices (Ms Al Wazzan and Mr Nasrallah) and entities associated with them pursuant to the Pictet Scheme; and
  - ii) other banks were making similar commission payments pursuant to other similar schemes, that were also being paid to or transferred through the Pictet accounts of Mr Al Rajaan, his accomplices and entities associated with them.
360. Banque Pictet was a Swiss law partnership of which M. Bertherat was a partner until it was incorporated on 1 January 2014. It is common ground that under Swiss law, at least as regards EJC's entered into while the relevant individual was a partner:
- i) a jurisdiction agreement concluded by a partnership also encompasses claims against the partners of the partnership for acts done in the exercise of their partner functions; and
  - ii) a partner is in principle entitled to rely on the jurisdiction agreement insofar as he was a partner at the relevant time.
361. It is therefore common ground that:
- i) as a matter of Swiss law, M. Bertherat is entitled to rely on any jurisdiction agreements that were entered into with PIFSS during the time in which he was a partner in Pictet & Cie, which apply to him to the same extent as they apply to Banque Pictet;
  - ii) M. Bertherat was a 'party' to such clauses for the purposes of Lugano Convention Article 23(1); and
  - iii) as a former partner of the limited partnership, M. Bertherat continues to be covered by such jurisdiction agreements in respect of events that took place before the partnership was incorporated on 1 January 2014.
362. PIFSS contends, however, that the above conclusions are limited to acts carried out by M. Bertherat in the exercise of the partnership functions, in other words at a time when he was a partner. In relation to acts carried out otherwise than in the exercise of partnership functions, in particular acts carried out after he had ceased to be a partner (either because he had retired as partner or because the act was carried out after incorporation of the relevant partnership), the position is different. Here, the relevant Swiss law partnership principles will not apply, and M. Bertherat will be a third party to the jurisdiction agreement and not entitled to rely on it.
363. Professor Kadner refers to a line of authority, including decisions of the CoJ, to the effect that in general third parties cannot rely on jurisdiction clauses. In particular, employees or directors of a company cannot rely on a jurisdiction clause entered into by that company: see Case C- 436/16 *Georgios Leventis, Nikolaos Vafeias v Malcon Navigation Co. Ltd., Brave Bulk Transport Ltd* [2018] 1 WLR 80 §§ 35 and 43.

364. PIFSS states that M. Bertherat remained with Banque Pictet after its incorporation in January 2014, and had continuous oversight and management of the relationships between PIFSS, Mr Al Rajaan, Mr Nasrallah (and his companies) and Pictet entities (CPOC § 24). As a result, acts and omissions of M. Bertherat after incorporation are not covered by any jurisdiction clause.
365. M. Bertherat responds that:
- i) there are no such pleaded acts which took place after he ceased to be partner on 1 January 2014;
  - ii) in any event, he is entitled to rely on the EJC's entered into by Banque Pictet while he was a partner even in respect of any claims arising out of acts which did take place after that date; and
  - iii) M. Bertherat is also entitled to take the benefit of EJC's entered into by Banque Pictet after it was incorporated and he ceased to be a partner.
366. As to the first of these points, the general allegation in CPOC § 24 about M. Bertherat's ongoing role should be read in the light of the allegation in CPOC § 209 that M. Bertherat managed the relationship between Mr Al Rajaan and associated parties on behalf of the Pictet defendant entities at all material times *up to May 2012*, i.e. a date prior to incorporation, and the fact that the alleged Pictet Scheme commissions ceased at that time (CPOC § 204d).
367. PIFSS draws attention, however, to the allegation in CPOC § 204(e)(c) that:
- “On 27 May 2014, US\$27 million was paid from the Chulani account to an account of Mr Al Rajaan at Citibank purportedly for the purchase of real estate in the USA. It is to be inferred based on the co-incidence of timing and the quantum of the payment that this transfer was enacted immediately after Mr Al Rajaan had been tipped off by Mr Bertherat and/or others subordinate to him that the preceding day the Swiss criminal authorities had written to Pictet asking for the first time whether Mr Nasrallah and/or Phoenix had received commissions relating to PIFSS.”
368. M. Bertherat argues that this alleged ‘concealment’ is not an ingredient of the bribery claim alleged against him, and there is no allegation that there were payments of any secret commissions under the Pictet Scheme after 2012. However, the allegation quoted above forms part of an allegation that Banque Pictet (through M. Bertherat and others) further concealed the payment of secret commissions under the Pictet Scheme. It is thus part of the allegations of dishonest assistance in relation to the money laundering of the proceeds of *inter alia* the Pictet Scheme. I do not therefore accept M. Bertherat's first point.
369. As to the second point, M. Bertherat argues that if any liability is alleged to have arisen on his part after the incorporation of Banque Pictet, such liability arose in the course of his performance of the agreement concluded while he remained a partner

and is covered by the EJC contained in that agreement. Professor Mabillard, states in his supplementary report:

“75 ... a jurisdiction clause entered into by the partnership covers acts carried out by the partners, regardless of whether such acts are known of before or after the partner's stepping-down as an unlimited partner. In other words, the acts carried out during his tenure as partner remain covered by the jurisdiction clause even once the partner steps down. Further, the jurisdiction clause covers any alleged liability deriving from the performance of an agreement concluded by a partner, regardless of whether the agreement is put into effect at a time after he has ceased to be a partner. In this sense, the partner may rely on the jurisdiction clause for any acts carried out in performance of this agreement. Whether the partner benefits from the jurisdiction clause depends entirely on his status as a partner at the time the jurisdiction clause was concluded.

76 In light of the foregoing, from a Swiss law perspective, if a former partner of a limited partnership played any role, whilst he was a partner, in agreeing to procure alleged "illegal retrocessions"/"unlawful secret commissions" and/or agreeing to set up an alleged "unlawful scheme" to help hide these and similar other payments, this former partner can rely on the jurisdiction clause concluded by the partnership in relation to claims arising out of payments pursuant to that agreement, regardless of their timing (i.e. regardless of whether certain of the payments were actually made after he ceased to be a partner).” (§§ 75-76)

370. The first proposition in quoted § 75 above relates expressly to acts done while an individual is a partner. The second proposition, starting with the word “*Further*”, and § 76, might relate to liability for actions taken *by third parties* pursuant to an agreement made by the partner while he was a partner. They might also cover payments made or other steps taken *by the partner himself*, after he ceased to be a partner, pursuant to an agreement made while he was a partner.
371. M. Bertherat made what I understand to be the broader submission that as a matter of pure construction of the EJCs, they covered matters in connection with the Banque Pictet/PIFSS relationship, and the allegations against M. Bertherat were such matters even if and to the extent that they concerned events after he ceased to be a partner. Further, the last iteration of the General Business Conditions prior to the incorporation of Banque Pictet provided at Article 1 that the Conditions would govern “*existing business relationships upon their taking effect, as well as relationships established thereafter*” and would “*remain valid regardless of any other standard contractual forms or equivalent documents that [PIFSS] may have signed.*”
372. It would be possible for parties to agree that a jurisdiction clause will apply, as between one party and other parties, to matters arising after that party has ceased to be a party to the contract. However, one would not ordinarily expect parties to do so. It would I think normally be in parties’ reasonable contemplation that the clause will

continue to apply as between all parties in respect of acts or omissions occurring up to the date on which the departing party left; but not that it would apply in favour of or against the departing party as regards future acts or omissions. Moreover, in the present case, the pre-incorporation jurisdiction clause in substance applied to the relationship between PIFSS and the partners in Banque Pictet, whereas post-incorporation it applies to the relationship between PIFSS and the new legal entity.

373. On the other hand, a jurisdiction clause may well apply to acts or omissions occurring after a party has departed but which are closely related to the relationship that existed between him and the other parties prior to his departure. For example, in the present case steps taken post-incorporation in order to implement or complete transactions initiated while M. Bertherat was still a partner would be likely to fall within the scope of the EJs. I consider that M. Bertherat has the better of the argument here, albeit the point is finely balanced. Assuming (as appears to be the case) that the allegation pleaded in CPOC § 204(e)(c) relates to Pictet Scheme proceeds, it can reasonably be regarded as the last stage, so far as concerns M. Bertherat, in the implementation of the concealment process alleged in § 204(e) as a whole, and it occurred only a few months after M. Bertherat's status changed from partner to employee.
374. Conversely, however, in so far as the allegations against M. Bertherat relate to the accessory claims I consider – for the same reasons as I have given above in relation to Banque Pictet/Pictet Europe themselves – that they do not fall within the EJs, whether they relate to acts/omissions before or after incorporation.
375. In these circumstances (as well as in the light of my conclusions later in relation to Lugano Convention Article 6) I do not find it necessary to consider in this context M. Bertherat's third point, namely that he is entitled to take the benefit of any EJs entered into by Banque Pictet after he ceased to be a partner. M. Bertherat relies on Professor Kuonen's opinion that, as a matter of Swiss law, the intention of PIFSS and Banque Pictet can properly have been said to have been that M. Bertherat should continue to be able to take the benefit of EJs entered into with the bank after it was incorporated; or that PIFSS should have reasonably understood from M. Bertherat's position, role and involvement in the relationship that he was personally bound by any post-incorporation jurisdiction clause as a third party. The consequence would be that M. Bertherat is entitled insofar as necessary to rely on the post-incorporation EJs between Banque Pictet and PIFSS as a third party. Further, M. Bertherat submits, Lugano Convention Article 23(1)(a) does not have the effect of subjecting an unnamed party, for whose benefit and to whose burden the clause is made, to the same formal requirements. He cites the decision in Case 201/82 *Gerling v Amministrazione del Tesoro Dello Stato* [1983] ECR 2503 §§ 13-15 that a beneficiary of an insurance policy may rely, as against the insurer, on a jurisdiction clause in the insurance policy taken out by the insured notwithstanding that the beneficiary did not personally satisfy the formal requirements of the equivalent provision to Article 23(1)(a) (Article 17 of the Brussels Convention). I express no view on these matters in so far as they might apply to M. Bertherat, though I return to some of them later in relation to M. Amouzegar.
376. For these reasons, I consider that M. Bertherat is entitled to rely on the EJs in relation to the allegations against him insofar as they relate to the Pictet Scheme including the accessory claims insofar as they concern the alleged laundering of commissions paid pursuant to the Pictet Scheme.

**(6) Claims against M. Mirabaud and M. Fauchier-Magnan**

*(a) M. Mirabaud*

377. The central allegations set out in the CPOC against M. Mirabaud are that:

“98. Between 1997 and about 8 May 2012 the total sum of US\$76.9 million was paid by way of Secret Commissions to Mr. Al Rajaan in respect of 28 investments by PIFSS (“the Galmir Funds”). Tables summarising the investments and the payments generated in respect of them are appended as Appendix 1.

99. Such payments were, at the direction of Mirabaud, acting through Mr. Mirabaud, made to Silvery Bay through Mirabaud’s wholly owned Bahamian subsidiary Galmir.

100. In addition, further payments of US\$2.1million were made, at the direction of Mirabaud, to Mr. Al Rajaan either via Silvery Bay or directly from Galmir, in connection with investments made by PIFSS which (pending disclosure) PIFSS infers to have been unauthorised benefits received by Mr. Al Rajaan in connection with the Mirabaud Scheme.”

378. M. Mirabaud is alleged to have known of these matters and that sums transferred to Mr Al Rajaan were “*Secret Commissions*”. In respect of the investments made, Mirabaud and/or its partners (including M. Mirabaud) were said to have a commercial interest in these “*(directly or through group entities) including by way of management and/or brokerage fees, commissions (as introducer or otherwise) and/or shareholdings*”. It is further alleged that:

- i) M. Mirabaud procured the incorporation of Overton and New Market.
- ii) M. Mirabaud requested on or before 14 January 1997 that M. Argand establish an offshore company (Silvery Bay) and that it sign an introducer agreement with Galmir.
- iii) Transfers were made from Silvery Bay to Mr Al Rajaan “*through a network of further bank accounts held with [Bank] Mirabaud*”, “*controlled*” by Mr Al Rajaan.
- iv) M. Mirabaud knew that payments made through Bank Mirabaud accounts in respect of *other* alleged schemes (not the alleged Mirabaud Scheme) were “*Secret Commissions*”.

379. Mirabaud was not incorporated until 2013. However, M. Mirabaud retired from being a partner on 31 December 2009.

380. 24 of the investments/payments listed in CPOC Appendix 1.1 as being related to the Mirabaud Scheme were made by PIFSS between 10 February 1997 and 16 November 2009, and they account for 86% of the investments by both number and by value. The other four investments, made after 2009, account for 14% in number and value. A

further investment said to be an “*Al Rajaan investment*” was made in 2013. However, PIFSS’s pleaded case is that the Mirabaud Scheme secret commissions were paid in respect of the 28 investments and between 1997 and about 7 May 2012.

381. It is not alleged that the four post-2009 PIFSS investments had any different characteristics from the 24 pre-2010 investments or that they formed part of any different scheme from that alleged to have been agreed as between Mr Al Rajaan, M. Mirabaud and M. Fauchier-Magnan by 20 January 1997. No specific act of M. Mirabaud is alleged to have taken place after around 2005, save that:
- i) PIFSS pleads that knowledge gained by M. Mirabaud (amongst others) prompted the termination of the Silvery Bay Agreement in May 2012; and
  - ii) PIFSS makes the broad general allegation that payments spanning a period of some 15 years between January 1997 and 8 May 2012 from Galmir to Silvery Bay were “*at the direction of [Bank] Mirabaud, acting through Mr. Mirabaud*”.
382. It is not alleged that any new or distinct scheme came into being at any point from 1 January 2010 onwards (or it seems at any time after 1997). M. Mirabaud thus contends that the allegation against him for the period after 1 January 2010 is, at most, that he knew of an alleged scheme and arrangements that were already in place and, perhaps, assisted in its implementation until May 2012.
383. In light of the common ground discussed above in relation to M. Bertherat regarding the applicability of jurisdiction clauses to partners in respect of acts and omissions while they were partners, the only live issue specifically relating to M. Mirabaud is whether he can benefit from the EJC’s in respect of events occurring after he ceased to be a partner on 31 December 2009.
384. M. Mirabaud points out that this issue is new, not having been presaged in PIFSS’s factual or expert evidence, or any version of the list of issues circulated prior to finalisation of the Swiss law experts’ joint memorandum. In any event, he points out that PIFSS’s claim is based on an alleged ‘Scheme’ that is said to have been concocted and implemented in 1997 and continued essentially unchanged thereafter. M. Mirabaud relies on the points set out in §§ 381 and 382 above. Accordingly, and based on the opinion of Professor Mabillard quoted in § 369 above, he submits that these matters fall within the EJC’s.
385. Like the corresponding issue in relation to M. Bertherat, I find this point finely balanced. However, I have concluded that M. Mirabaud does not have the better of the argument on this particular point. Unlike in the case of M. Bertherat and Pictet, PIFSS continued to make further investments (the 4 referred to above) alleged to have given rise to secret commissions during a period of something approaching two years after M. Mirabaud ceased to be a partner. Although on one view this could be regarded as no more than further implementation of the alleged agreement originally made in or before January 1997, I do not consider the jurisdiction clause can be stretched so far as to treat the payment and concealment of new secret commissions over such a period as relating to the parties’ pre-2010 relationship. I therefore conclude that the EJC does not apply to the post-2009 allegations against M. Mirabaud.

*(b) M. Fauchier-Magnan*

386. The allegations against M. Fauchier-Magnan in some respect closely parallel those against M. Mirabaud. However, M. Fauchier-Magnan was a partner until 31 December 2011, and the allegations made in CPOC §§ 98-99 and 106 against M. Mirabaud of continued direction of payments up until 2012 are not made against M. Fauchier-Magnan. The very general allegation at CPOC § 18 that M. Mirabaud and M. Fauchier-Magnan had “*continuous oversight and management of the relationship between PIFSS, Mr Al Rajaan and Mirabaud entities*” must be read in the light of that fact. It should also be borne in mind that, as noted earlier, PIFSS’s pleaded case is that the Mirabaud Scheme secret commissions were paid in respect of the 28 investments made between 1997 and about 7 May 2012. M. Fauchier-Magnan was a partner until 31 December 2011, and no specific allegation is made of wrongdoing by him after that date.
387. In these circumstances, M. Fauchier-Magnan has the better of the argument that the Mirabaud EJs apply to the claims made against him in respect of the Mirabaud Scheme. For the reasons given earlier, the EJs do not apply to the accessory or ‘money laundering’ claims.

**(7) Claims against M. Argand**

388. M. Argand does not claim that he benefits directly from any of the EJs. The jurisdiction issues in relation to him depend on the application of Lugano Convention Article 6. I therefore consider his position in section (J) below.

**(8) Claims against M. Amouzegar**

389. M. Amouzegar is a former employee of Banque Pictet, and is domiciled in Switzerland. PIFSS alleges that Mr Al Rajaan had a long-term pre-existing relationship with M. Amouzegar dating from the latter’s time at Citibank. M. Amouzegar moved to Banque Pictet in 1996, and thereafter Banque Pictet commenced a relationship with Mr Al Rajaan in the second quarter of 1997.
390. The claims against M. Amouzegar to a very significant degree parallel those against M. Bertherat and Banque Pictet itself. He is alleged to have been party to the agreement made by no later than August 1998 to put in place arrangements with a view to routing secret commissions by Mr Al Rajaan (CPOC § 172), the agreement as to the amount of commission Mr Al Rajaan would receive on fees withheld by Banque Pictet on account 99501 (CPOC § 173) and the subsequent alleged agreement to extend the categories of services on which secret commissions would be payable (CPOC § 175). Thereafter, he is alleged to have been involved alongside M. Bertherat in the agreements and arrangements, and to have had the knowledge, relating to the Pictet Scheme referred to in CPOC §§ 176, 184, 187, 192, 199, 200, 204 and 209-216.
391. PIFSS alleges that at all material times M. Bertherat and M. Amouzegar were responsible for and had continuous oversight of Pictet’s relationship with Mr. Al Rajaan, Ms Al Wazzan, Mr. Nasrallah and PIFSS, and the bank accounts which they held with the various Pictet entities (including Pictet Asia and Pictet Bahamas and Pictet Europe); and that M. Amouzegar remained involved in that relationship even



after his departure from Pictet in 2003 (CPOC § 199). A difference between the alleged positions of M. Amouzegar and M. Bertherat is that US\$3.9 million is said to have been paid into an account of M. Amouzegar himself, representing secret commissions, which were apparently then paid away mainly for Mr Al Rajaan's benefit (CPOC §§ 195 and 206-207).

392. M. Amouzegar has challenged the court's jurisdiction on two bases:
- i) on the ground that the claim form was not served within six months after it was issued (and that an order extending the time for its service made *ex parte* should be set aside); and
  - ii) because: (a) the Swiss courts have jurisdiction over the claim against him by reason of EJCs in the relevant contracts; and (b) given that the claims involving him, Banque Pictet, Pictet Europe and M. Bertherat are so closely connected, it is expedient to hear and determine them together in Switzerland under Lugano Convention Article 6.
393. Challenge (i) was decided against M. Amouzegar by Jacobs J pursuant to his judgment dated 15 May 2020. As at the date of the hearing before me, M. Amouzegar had applied to the Court of Appeal for permission to appeal.
394. As regards challenge (ii), M. Amouzegar did not appear and was not represented at the hearing before me, but Mr Byford, a partner with M. Amouzegar's solicitors, filed a witness statement explaining M. Amouzegar's position and setting out his position on the issues. M. Amouzegar complains that PIFSS initially wrongly excluded him from preliminary hearings relating to the present jurisdiction challenges, and that it was only at a relatively late stage (the evening of 15 May 2020) when he was served with the voluminous evidence served by the other parties. Bearing in mind also that he was dealing with challenge (i), M. Amouzegar says he was not able to deal fully with challenge (ii) in the time available. He reserved his rights, but did not ask me to adjourn the hearing of the jurisdiction challenges (including his challenge (ii)). Instead he set out his position on the issues via his solicitor's witness statement. I therefore address M. Amouzegar's challenge as part of this judgment.
395. M. Amouzegar claims to be entitled to rely on EJCs incorporated into the contracts between PIFSS and Banque Pictet. He relies on the evidence of Professor Kuonen, in relation to M. Bertherat's position, that I mention in § 375 above. Professor Kuonen in his first report, as clarified in § 39 of his supplemental report, considered whether the Banque Pictet EJCs could benefit M. Bertherat on the alternative bases that M. Bertherat should be considered (a) as a party to the EJC during the period while he was a partner (as became common ground) or (b) as a third party to the EJC.
396. As to alternative (b), Professor Kuonen notes that in principle privity of contract means that EJCs produce effects only between the parties to them, though a party could become bound by such a clause by legal succession or where the clauses specifically provides for this (a "*contract for a third party*"). He states that he is unaware of any Swiss case law where a jurisdiction clause has been applied to a third party, but refers by way of analogy to cases where an arbitration clause has been held to bind a third party who intervenes in such a way that he could legitimately be assumed to have intended to be involved in and bound by the contractual relationship

in question (noting, though, that such cases involve the third party being bound by, rather than taking the benefit of, the clause). Professor Kuonen considers it “*not easy*” to recognise that a jurisdiction clause could be extended to a third party. However, after considering the wording of the Banque Pictet EJC’s and the extrinsic circumstances, he says:

“67. On the basis of the considered parts of the CPoC, the following elements may be drawn into the analysis:

- Mr. Bertherat had a prominent role since the beginning of the relationship with PIFSS over the critical period and until 2015 (see – namely – CPoC §§ 40, 42, 168, 199);
- At the time PIFSS entered the relationship, Mr. Bertherat was one of the few partners of Pictet as limited partnership (CPoC § 24), with unlimited liability for Pictet’s debts and obligations, which was widely known as a marketing tool showing partners’ commitment to their clients;
- Mr. Bertherat had continuous oversight of Pictet’s relationship with Mr. Al Rajaan and PIFSS and the bank accounts they held with the various Pictet entities (see CPoC § 199);
- Mr. Bertherat had a relationship and contact with Mr. Al Rajaan, who was at all material times the main contact for Pictet at PIFSS (see – namely – CPoC §§ 40, 42 168, 180) and PIFSS’ representative (CPoC § 11).

68. The above elements lead me to conclude that the subjective intent of the parties was to include Mr. Bertherat into the banking relationship as the latter was developed around Mr. Bertherat, between him and PIFSS, and that such remained the case even after Pictet was incorporated.

69. Assuming the above elements are insufficient to define the parties’ subjective common intent, and in my opinion they are sufficient to hold that, from an objective perspective, PIFSS could understand and should have reasonably understood that Mr. Bertherat’s involvement in the relationship was such that he had to be considered as covered by the Jurisdiction Clause. The fact that Pictet was incorporated from 2014, with Mr. Bertherat formally losing its partner status, could weaken the likeliness of reaching such conclusion. Mr. Bertherat however materially kept his leading position and it is unclear to what extent the incorporation as such and the legal consequences therefrom were explained to PIFSS.” (first report §§ 67-69)

397. It appears from Professor Kuonen’s ultimate conclusion that he thinks it unlikely, however, that the EJC could apply to M. Bertherat, even as a former partner, after Banque Pictet was incorporated in 2014 and Banque Pictet “*became most probably the sole formal party to the Jurisdiction Clause*” (first report § 72(b)).
398. M. Amouzegar submits that (in the event, which he denies, that as an employee he could have any liability at all), “*If the exclusive jurisdiction clause covers Mr Bertherat on this basis, then it must also cover the position of ... Mr Amouzegar, both for the first 6 years of the alleged scheme (namely from 1997 onwards – ...), during which [M. Amouzegar] was an employee of Pictet Bank and thereafter, when he ceased to be a Pictet Bank employee*”.
399. M. Amouzegar argues that the key to being able to take advantage of the EJC arises from the parties’ intention, and it is obvious that the parties would want an employee’s actions to be covered by the EJC. If PIFSS were required to bring a claim against Banque Pictet in the Geneva courts, pursuant to the EJC in the agreements between them, it would be absurd to think that the parties would intend or think it expedient for a claim arising from the same facts, albeit against an employee of the bank, to be brought elsewhere.
400. I do not accept those submissions. It is clear from Professor Kuonen’s report that the principle of privity of contract in general applies. That would *prima facie* prevent a third party from relying on the Banque Pictet EJC, even if the parties to the contract wished the third party to be able to do so, unless perhaps the clause expressly conferred a benefit on the third party. Professor Kuonen tentatively puts forward an exception based on the parties’ intentions in the very particular circumstances of M. Bertherat being, at the relevant time, one of the few partners of Banque Pictet, with unlimited liability for the limited partnership’s debts and obligations. Those very particular circumstances have no application to M. Amouzegar, who was never anything other than an employee of Banque Pictet. Further, as PIFSS points out, the CoJ’s decision in Case C-436/16 *Leventis* [2018] 1 WLR 80 confirms that pursuant to Article 23/Article 25 a non-party cannot rely on a jurisdiction agreement. PIFSS thus has the better of the argument that there is no applicable exception to the doctrine of privity that would enable M. Amouzegar to take the benefit of the Banque Pictet or Pictet Europe EJCs.
401. M. Amouzegar also submits that claims against him regarding the period after he ceased to be an employee of Banque Pictet, namely from 2003 onwards, are covered by a separate business finder agreement between him and Banque Pictet. This agreement states that any dispute is to be governed by Swiss law and resolved by way of arbitration in Geneva. On no view could such an agreement bind PIFSS, and it therefore does not assist M. Amouzegar.
402. Accordingly, none of the claims against M. Amouzegar is subject to an EJC or other forum agreement.

## **(J) ARTICLE 6/ARTICLE 8 JURISDICTION**

### **(1) Relevance to the present case**

403. I have concluded in section (I) above that, by reason of the Banque Pictet, Pictet Europe and Mirabaud EJCs, PIFSS is bound to pursue its claims against those entities, M. Bertherat, M. Mirabaud (in part) and M. Fauchier-Magnan, in relation to (as the case may be) the Pictet Scheme and the Mirabaud Scheme, in Geneva.
404. I have concluded that the EJCs do not apply to:
- i) the accessory claims against any parties relating to the laundering of secret commissions derived from other schemes; or
  - ii) the claims against M. Mirabaud relating to acts or omissions after he retired as a partner on 31 December 2009.
405. In relation to the claims referred to in § 404 above, the question arises whether the court should assume jurisdiction pursuant to Lugano Convention Article 6/Recast Brussels Regulation Article 8 as PIFSS contends. That issue also arises in relation to:
- iii) the claims against M. Argand and M. Amouzegar; and
  - iv) the claims against M. Bertherat for the period after Banque Pictet's incorporation in January 2014, if I am wrong on the issue considered in § 369-373 above (which I there describe as being finely balanced).
406. The burden is on PIFSS to show a good arguable case, i.e. that it has the better of the argument, that the Article 6(1) test is satisfied in respect of these claims.
407. A curious feature of the way in which the arguments developed is that Banque Pictet and Pictet Europe did not address this point in its original application or written submissions, putting forward only the argument that all the claims against it were covered by its EJCs. Mirabaud took the point only in a footnote to its skeleton argument, in which it indicated that insofar as the court decided that any claims fell outside the EJC, then PIFSS must satisfy the court that the relevant claims should proceed before the English court pursuant to Article 6(1). The point was, however, argued in the written submissions on behalf of the other defendants, and ultimately adopted by Banque Pictet and Pictet Europe and Mirabaud in oral argument. It is, as Mirabaud says, for PIFSS to satisfy the court that it should assume jurisdiction under Article 6, and in any event I am satisfied that all parties (including, most pertinently, PIFSS) had the opportunity fully to address the Article 6 issues.
408. I raised during oral argument the question of whether, when considering these matters, the court should assume that claims that must be pursued abroad because of an EJC will be pursued, as opposed to being dropped. Counsel for M. Fauchier-Magnan submitted that in the absence of a binding undertaking not to pursue such claims, I should assume that they will be pursued. In principle that appears to me the correct approach, and no contrary submission was made by any other party. I note that the Court of Appeal in *Aeroflot*, in the paragraphs quoted later, appears to have

proceeded on a similar assumption, though in view of its conclusions on the relevant jurisdiction question it did not need to address that issue.

## (2) General principles relating to Article 6

409. Under Lugano Convention Article 2 and Recast Brussels Regulation Article 4, defendants are entitled to be sued in their state of domicile unless one of the provisions which displaces that *prima facie* position can be shown by the claimant to apply.

410. PIFSS relies on Lugano Convention Article 6(1), and its equivalent in Recast Brussels Regulation Article 8, to displace the primary rule in this case. Article 6(1) permits a person domiciled in a Convention state to be sued in a different state:

“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.”

Recast Brussels Regulation Article 8 is to the same effect. For convenience, in the rest of this section I refer only to Article 6.

411. It is common ground that the burden is on a claimant seeking to invoke Article 6(1) to demonstrate a good arguable case that the test set out in the Article is satisfied, and thus that it has the better of the argument on the material available in that regard.

412. The drafting of Article 6 has changed as between the original Lugano Convention in 1988 and the present Lugano II Convention entered into in 2007. The original 1988 text of Lugano Convention Article 6(1) stated 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*”. The Lugano II Convention added the words: “*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*”, a similar change having first been made when the 2001 Brussels Regulation replaced the 1968 Brussels Convention. Those changes appear to have reflected the CoJ decision in Case 189/87 *Kalfelis* 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*” (§ 13).

413. 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...

(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.

...

(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."

414. In Case C-98/06 *Freeport v. Arnoldsson* [2008] QB 634, the CoJ observed:

"34 In that regard, the jurisdiction provided for in article 2 of Regulation No 44/2001, namely that the courts of the member state in which the defendant is domiciled are to have jurisdiction, constitutes the general principle and it is only by way of derogation from that principle that that Regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another member state: see *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* (Case C-103/05) [2006] ECR I-6827, para 22, and the case law cited.

35 Moreover, it is settled case law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by Regulation No 44/2001: the *Reisch Montage* case, para 23, and the case law cited.

36 As stated in the eleventh recital in the Preamble to Regulation No 44/2001, 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 that 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."

415. In *Reisch Montage* the CoJ held that Article 6(1) had to be interpreted having regard to the principle of legal certainty and that this principle required the exceptions to be "interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he is domiciled, he may be sued" (§§ 24-25).

416. The principle of narrow construction of the exceptions to domiciled-based jurisdiction was also recognised in *Madoff Securities International Ltd v. Raven* [2012] I.L.Pr.15 § 59, *Lungowe v. Vedanta Resources plc* [2019] UKSC 20 § 31 and *Privatbank v Kolomoisky* [2019] EWCA Civ 1708 § 98.

417. Article 6(1) requires the court to ask whether the connection between the relevant claims makes it “*expedient*” to hear the two claims together to avoid the risk of irreconcilable judgments.
418. The Court of Appeal in *Privatbank v. Kolomoisky* (§ 191) held that the word “*expedient*” in the context of the *lis alibi pendens* provision in Lugano Convention Article 28 must mean “*desirable*” as opposed to merely practicable or possible.
419. Bryan J in *Terre Neuve* stated that “*expedient*” in Article 6 means ““*appropriate*” (*i.e. there is such a risk of irreconcilable judgments that it is appropriate to hear the claims together*)” (§ 71(6)) rather than involving a *forum non conveniens* analysis. It is incorrect to rely on *forum non conveniens* factors in determining whether the Article 6(1) criteria are fulfilled: see C-281/02 *Owusu v Jackson*; Case C-281/02 *FKI Engineering Ltd v De Wind Holdings* [2008] EWCA Civ 316 (“*No question of forum convenience arises when one is applying the provisions of the Judgments Regulation*”); and the Explanatory Report by Dr Fausto Pocar on the Lugano Convention at § 123 (“*the doctrine of forum non conveniens... is alien to the legal tradition of most of the States bound by the Convention*”).
420. The justification for applying Article 6(1) and suing a defendant in a place other than that where he is domiciled is that doing so will “*avoid the risk of irreconcilable judgments resulting from separate proceedings*”. Some of the present defendants submit that it follows that if that risk is in fact unavoidable, then Article 6(1) cannot be satisfied. That submission in my view goes somewhat too far. It is uncontroversial that a purposive approach is appropriate when interpreting EU legislation (see, e.g., Case C-199/08 *Eschig v UNIQA Sachversicherung AG* [2009] E.C.R. I-8295, paragraph 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 ...*”). On that approach, Article 6(1) could apply in circumstances where the assumption of jurisdiction under it would reduce, even if it would not eliminate, the risk of irreconcilable judgments flowing from separate proceedings. However, it is correct in my view, when considering whether or not it is correct to assume jurisdiction under Article 6(1), to consider whether doing so would be likely materially to increase or decrease such risks.
421. The CoJ has held that, in order for two decisions to be regarded as irreconcilable, it is not sufficient for there to be a divergence in the outcome of the dispute: the divergence must “*arise in the context of the same situation of law and fact*”: see *Freeport* § 40, citing Case C-539/03 *Roche Nederland BV v. Primus* [2006] ECR I-6535 § 26, where the CoJ agreed with the Advocate General’s opinion that:

“We have trouble conceiving that a judgment may be considered as conflicting with another for the sole reason that there would be a mere divergence in the solution of the dispute, that is at the end of the trial. For there to be conflicting judgments, it would require, in our opinion, that such a divergence fell within a same situation of law and fact. It is only in that hypothesis that one can conceive the existence of conflicting judgments, in so far as starting from the same

situation of law and fact, the courts reached diverging or even totally contrary solutions.” (§ 113)

422. It is not a requirement of Article 6(1) that the two claims have identical legal bases (*Freeport* § 38). Rather:

“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”. (*Freeport* § 41)

423. In Case C-145/10 *Painer*, the CoJ explained that a different legal basis for the actions against the different defendants “does not, in itself, preclude the application of art. 6(1) of Regulation 44/2001, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled”.

424. The law applicable to the claims against the anchor defendant and the foreign domiciled defendant is a relevant, although not decisive, factor in relation to the potential irreconcilability of judgments (*Gard Marine & Energy Ltd v. Tunnicliffe* [2010] EWCA Civ 1052 § 36; *Madoff Securities International Ltd v. Raven* [2011] EWHC 3102 §§ 70-75). Flaux J in the latter case explained that:

“70 ... the fact that one claim is governed by one system of law and another claim is governed by a different system of law does not, without more, mean that the judgments on each claim in different jurisdictions would be irreconcilable. Not only does the court have to look more closely to see to what extent the two systems of law are seeking to achieve the same result on a given set of facts (in which case different conclusions on the applicable system of law in different jurisdictions might well mean the judgments were irreconcilable) but, even if they do diverge in their purpose or intent, that is not necessarily determinative against irreconcilability. Whilst it is a factor pointing away from irreconcilability, it is only one factor to be considered.

71 ... on a proper analysis of the *Gard Marine* [2011] I.L.Pr. 10 case, Thomas L.J. is not saying that, if the claims were governed by different systems of law, that would be conclusive against judgments being irreconcilable in every case. Quite apart from the fact ... that the point was not one the Court of Appeal actually had to decide, it does not seem to me that Thomas L.J. was saying that if different systems of law had applied, that would be conclusive against divergence or irreconcilability. He was only saying that the fact that different



systems of law led to a different result would not of itself lead to irreconcilability.

...

74 ... whilst the fact that the participations were both governed by English law was one of the factors which led Thomas L.J. to conclude that there was a risk of irreconcilable judgments, it was by no means the only factor and the factual overlap clearly had a considerable influence. In my judgment, this demonstrates that the fact that the two claims are governed by different systems of law is not determinative against the risk of irreconcilable judgments within the meaning of art.6(1). It depends upon all the circumstances.

75 Obviously, in a case where the claims against the anchor defendant and the non-domiciled defendant are being made by the same claimant, if the evidence on the jurisdiction application were that whatever factual conclusions are reached by each court, the different systems of law will lead to a different result, that would militate strongly against any conclusion that there is a risk of irreconcilable judgments. Equally, if the evidence were that, on any given set of factual conclusions, the two systems of law, despite their differences, would arrive at the same result, that would suggest that despite the different systems of law applied to the claims being made by the claimant, there is a risk of irreconcilable judgments.”

425. In *Latmar Holdings v. Linuzs* [2013] EWCA Civ 4 § 44 Toulson LJ summarised the overall position as follows:

“In *Freeport PLC v Arnoldsson*, at paragraphs 40 - 41, the court cited *Roche Nederland* but went on to observe that it is for the national court to assess whether there is a connection between the different claims involving a risk of irreconcilable judgments if the claims were determined separately and, in that regard, it is for the court to take account of “*all the necessary factors in the case file*”, which may, but need not necessarily, involve taking into consideration the legal bases of the actions. This suggests that there is no single formula for determining whether the connection is such as to give rise to a risk of irreconcilable judgments if the claims were determined separately. Whatever the precise legal bases of the claims, it is necessary for the court to examine their essence 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. Whether the overlap between the claims is such as to have that effect is inevitably a fact specific question.”

426. Finally, Bryan J recently summarised certain of the key principles in *Terre Neuve* §§ 64-66 including as follows:

“64. I bear in mind a number of points in relation to the application of the Lugano Convention:-

(1) Exceptions to Article 2 are to be construed restrictively (see *Melzer v MF Global UK Ltd* (C-228/11), in the context of the Brussels I Regulation).

(2) In order for a foreign defendant to be brought in under Article 6(1), there must be: (a) a claim against an anchor defendant over which the English Court has jurisdiction due to its domicile; (b) which is so closely connected to the claim(s) against the foreign defendant and (c) it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

...

(5) "Irreconcilable" means a 'divergence in the outcome of the dispute [which arises] in the context of the same situation of law and fact': *Freeport plc v. Arnoldsson* [39]-[40] (emphasis added). The two claims do not need to have identical legal bases: this is only one relevant factor amongst others.

65. Where a defendant is within a jurisdictional provision of the Brussels I Regulation (and by extension, the Lugano Convention) because they are domiciled in a Member State, there is no room for English courts to apply the principle of forum non conveniens (*Vedanta* at [16] and [81], applying *Owusu*). ...

66. Where the anchor defendant is sued in England under a provision of the Brussels I Regulation, but the "necessary or proper parties" are not domiciled in a Member State (so claims must be brought against them under the "necessary or proper party" gateway under PD6B), the forum conveniens consideration that hearing all the cases in England avoids the risk of irreconcilable judgments should not always be considered a decisive factor: *Vedanta* at [75].”

### **(3) Interaction of Article 6 with Article 23 jurisdiction agreements**

427. The conclusions I have reached in relation to the EJs give rise to the question: what should the court do where a claimant is required to sue a defendant in an overseas jurisdiction under Article 23 of the Convention in relation to some claims, but seeks to pursue in this jurisdiction (a) connected claims against the same defendant, or (b) connected claims against another defendant, in reliance on Article 6? Situation (a) arises in relation to *Banque Pictet, Pictet Europe* (in the case of *Pictet Europe* the relevant provisions are Articles 8 and 25 of the Recast Brussels Regulation),

Mirabaud, M. Mirabaud and (possibly) M. Bertherat; and situation (b) in relation to M. Argand and M. Amouzegar.

*Situation (a): jurisdiction clause covering claims against same defendant*

428. PIFSS submits that:

- i) As made clear by the CoJ in *Cartel Damages Claims* and the Court of Appeal in *Aeroflot*, the first question is to assess the applicability of Article 6(1). So long as the claimant seeks to join all of the defendants in a single forum, Article 6(1) is engaged. The next question is to consider whether any party is entitled to derogate from that jurisdiction pursuant to Article 23. Once the criteria of Article 6 are fulfilled, there is no reconsideration of the position in light of (successful) reliance by one or more parties (in whole or part) on Article 23.
- ii) Even if the applicants establish that some or all of PIFSS's claims fall within EJCs so as successfully to derogate from the application of Article 6(1) to that extent, this would not affect the validity of jurisdiction established under Article 6(1) in respect of claims that are not within the EJCs; the test does not fall to be re-applied in the light of any successful derogation from Article 6(1) jurisdiction pursuant to Article 23.
- iii) Article 6(1) is intended to grant a claimant the option of suing in a number of different fora, so long as a relevant connection is made out. That is so even where 'more' connected proceedings might proceed in other fora (as in *Kolomoisky*, where numerous defendants were brought before the English court on the basis of ultimately peripheral claims brought against a handful of English companies), and even where related actions already exist or may exist in other jurisdictions, as was the case in *Aeroflot* (§§ 111-112). As Aikens LJ held in *Aeroflot*, "[i]t does not have to be shown that there is any greater probability of irreconcilable judgments if the cases were not to be tried together" (§ 111).
- iv) It is also relevant to consider the existence of Article 28, which indicates that 'related actions' can be brought in multiple jurisdictions, and that the court second seised has a discretion to stay the claim on case management grounds. Indeed, if claims against these defendants were brought in Switzerland, they would be able to apply to stay those proceedings in favour of the English proceedings.
- v) Any claims other than the 'anchor' claims do not found jurisdiction and do not even need to pass an arguability threshold (see *Senior Taxi Aereo Executive Ltda v Agusta Westland* [2020] EWHC 1348 (Comm) at § 72 per Waksman J). It would therefore be irrational for the application of Article 6(1) to depend on connections to those other claims.
- vi) What matters is whether there is a risk of irreconcilable judgments in respect of the 'anchor' claim. As Aikens LJ held in *Aeroflot* at § 112, where a similar challenge was made, the fact that "*there are going to be different tribunals that deal with each of these claims [i.e. such that irreconcilable judgments were*

*inevitable]... is simply the result of the jurisdictional agreements made between the parties*"; it was "irrelevant" to the application of Article 6(1).

- vii) As for the potential for overlap between claims brought against the same defendant (for example, if an EJC were held to cover the secret commission claims but not the accessory claims), the test remains whether the further claims are connected to those brought against the anchors. An allegation that a bank and its partners dishonestly laundered the proceeds of Mr Al Rajaan's multiple frauds would not be less connected to the claims against Mr Al Rajaan because a dispute relating to the bank's own bribery is covered by an EJC.
  - viii) Similarly, the fact that one category of alleged bribes is covered by an EJC (such as those paid in respect of a specific contract or in respect of a given time period) would not mean that other categories of bribes (such as those paid in respect of different contracts or time periods) would cease to be connected to the claims against Mr Al Rajaan.
  - ix) It follows that, as regards the banks and the partner defendants, if there were to be a split between claims that fall within the terms of the EJC and those which did not, Article 6(1) jurisdiction would continue to be established over the latter set of claims without more.
  - x) Article 6(1) jurisdiction would also continue to be established against M. Amouzegar and M. Argand, who do not have the benefit of EJCs in any event and without more.
429. Starting with the language of Article 6(1), the question is whether "*the claims*" against the anchor defendant and those against the proposed Article 6 defendant "*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*".
430. I am inclined to agree that the words "*to avoid the risk of irreconcilable judgments resulting from separate proceedings*" would tend naturally to refer to the avoidance of risks arising from the claims against the anchor defendant and the proposed Article 6 defendant being pursued in separate proceedings and resulting in irreconcilable judgments. There is 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 Convention State, which is also its state of domicile, by reason of an Article 23 jurisdiction agreement.
431. It does not follow, however, that the legislator must be assumed to have taken the view that, were the situation to arise, such related claims would be irrelevant. On the contrary, the fundamental policy of the Lugano Convention and Recast Brussels Regulation is that defendants should be sued in their state of domicile, save for a few limited exceptions that must be properly confined so as not to undermine that policy. The justification for assuming jurisdiction under Article 6, as a derogation from that basic rule, is the desirability of avoiding concurrent proceedings and irreconcilable judgments between different Convention States. Moreover, the broader objectives

underlying the legislation, as expressed in recital 12 to the Brussels Regulation 2001, include the “*sound administration of justice*”. The CoJ in Case C-145/10 specifically linked Article 6 to this particular objective:

“As regards its purpose, the rule of jurisdiction in art.6(1) of Regulation 44/2001, first, meets, in accordance with recitals 12 and 15 in the preamble to that regulation, the wish 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.”

It would be at least *prima facie* inconsistent with those policy objectives to permit a person to be sued as a co-defendant in this jurisdiction on certain claims, in circumstances where that person must be sued (by operation of Article 23) in another Convention State on claims with a close factual connection to them. To create a risk of inconsistent factual findings vis a vis the very same defendant in different Convention States would tend to defeat rather than advance the policy that Article 6(1) is intended to promote.

432. It is well established that EU legislation should be interpreted so far as possible in the light of the purposes it aims to serve (see § 420 above). I do not accept PIFSS’s submission that the language of Article 6 dictates that what is or is not ‘expedient’ must be judged solely by reference to the nature of degree of the connection with the claims against the anchor defendant. 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 by doing so the court would create a risk of irreconcilable judgments arising from separate proceedings against the proposed Article 6 defendant itself in respect of closely connected claims.
433. I would agree with PIFSS that an allegation that a bank and its partners dishonestly laundered the proceeds of Mr Al Rajaan’s multiple frauds would not be any less connected to the claims against Mr Al Rajaan because a dispute relating to the bank’s own bribery is covered by an EJC. However, that is only part of the picture. If the laundering allegation against the bank is intimately connected with the allegation relating to the bank’s own bribery, then to assume jurisdiction under Article 6 in relation to the former claim would create a risk of inconsistent judgments against the very same defendant in respect of intimately connected claims. That factor should also be taken into account when considering whether or not jurisdiction can properly be assumed under Article 6.
434. That conclusion is not affected by the fact that some discussions of Article 6, such as in *Freeport* § 41 (quoted in § 422 above) and *Painer* § 83, omit reference to the word “*expedient*” in Article 6. It is unproductive to seek to resolve issues of law (particularly issues of EU law) by parsing the language used in cases in which the current issue did not arise and was not considered. Such statements do not demonstrate that the word ‘*expedient*’ adds nothing to the test of connection, nor that Article 6 must be applied in a mechanistic fashion without regard to the broader aspects of the dispute as a whole or of the policy aims which Article 6 seeks to promote.

435. The national court when faced with this situation must in my view determine whether the degree of connection between the claims against the anchor defendant and the claims over which the court is invited to assume jurisdiction under Article 6 makes it expedient to assume such jurisdiction, taking account, however, of any risk that doing so would create of irreconcilable judgments of this court and the court the parties have chosen in the EJC.
436. Turning to the case law, *Cartel Damages Claims* does not in my view provide any support for PIFSS's submission that Article 6(1) should be considered first. The judgment suggests that the CoJ considered Article 6(1) first there simply because that was the order of the questions referred by the national court. On the contrary, in *Profit Investment* both the Advocate General (§ 29) and the CoJ (§ 21) indicated expressly that a jurisdiction clause should be considered before Article 6(1) on the basis that (as the Advocate General put it) the former concerns exclusive jurisdiction and the latter optional jurisdiction. There is in my view no need for the court to engage in a form of wilful blindness as regards the existence of jurisdiction agreements when it comes to applying Article 6(1). It is also logical to consider Article 23 first because it operates at a higher stage in the jurisdictional hierarchy than Article 6: if and to the extent that there is an Article 23 jurisdiction agreement in favour of another forum, the court cannot assume jurisdiction under Article 6(1). Indeed, Aikens LJ at *Aeroflot* § 43 decided that it was best to address the Article 23 issues in that case before the Article 6(1) issues.
437. In *Aeroflot* there were, so far as relevant:
- i) individual defendants, the 'anchor' defendants, domiciled in England;
  - ii) a corporate defendant, 'Holdings', which was domiciled in Luxembourg and which was not party to a choice of forum clause; and
  - iii) two of Holdings' subsidiary companies, 'Services' and 'Cyprus', which were parties to choice of forum agreements with the claimant. Services was party to an exclusive jurisdiction agreement in favour of the courts of Lausanne. The contract with Cyprus provided for arbitration in Cyprus.

The question was whether the court should assume jurisdiction against defendant (ii), Holdings.

438. Aikens LJ said:

"110. I move on then to what I regard as the sole question to be answered so far as Holdings is concerned: has Aeroflot demonstrated a "good arguable case" in the sense that it has shown that it has "the better of the argument" that there is a connection between the different claims brought before the English court so that "...there would be a risk of irreconcilable judgments if those claims were determined separately..."? To determine this question, the national court must "take account of all the necessary factors in the case file", which may require it to take into consideration also the legal bases of the actions brought before the court. In my view Aeroflot has plainly

satisfied this test. The “anchor” claim of Aeroflot to establish the English court's jurisdiction is that against the individual defendants and that case is based on an allegation of a conspiracy. The anchor claim relies primarily on breaches of Russian law. That claim will remain before the English court, despite the removal of the claims against Services and Cyprus if my views are shared by my colleagues.

111. The Amended Particulars of Claim allege that Holdings is a party to this same conspiracy: see paragraphs 24 and 25. Factual issues about whether Mr Glushkov and Mr Berezovsky were parties to a conspiracy and whether they controlled Forus companies and used those companies to further their fraudulent aims affect both the claim against the individual defendants and against Holdings. All the claims are primarily based on breaches of Russian law, although the precise bases of the claim in Russian law against Holdings may be different from that against the individual defendants. In my judgment there is the necessary context of “the same situation of law and fact” referred to by the ECJ in *Freeport plc v Arnoldsson*, such that there is a risk that if the case against Holdings were tried in Luxembourg and those against the individual defendants in England, there may be irreconcilable judgments. I deliberately emphasise the word “risk”. It does not have to be shown that there is any greater probability of irreconcilable judgments if the cases were not to be tried together.

112. Mr Tregear argued that there was a much closer connection between the claim against Holdings and those against Services and Finance and that the risk of “irreconcilable” judgments in different jurisdictions was greater in respect of those claims. That may be so but it is irrelevant. If Aeroflot pursues Services it must do so (on my ruling) in the Lausanne court and if it pursues Cyprus it must do so in arbitration. So, necessarily, there are going to be different tribunals that deal with each of these claims. That is simply the result of the jurisdictional agreements made between the parties. It has nothing to do with the claims against the individual defendants, which must be brought in England under Article 2 of the Judgments Regulation. Mr Tregear suggested at one point that Aeroflot could pursue the individual defendants in any proceedings against Services in Lausanne. That is wrong, because the individual defendants are entitled to be sued in their state of domicile and now that the English Court is seised of that matter, it would be impossible for the Swiss court to take over such proceedings. It is from the fact that Aeroflot has rightly chosen England as the “anchor” forum against the individual defendants that it is entitled to rely on Article 6(1) to sue Holdings in England.”

(I note in passing that quoted § 112 refers in the first sentence to Holdings, Services and Finance, and in the third sentence to Services and Cyprus. It appears from the judgment that ‘Finance’ was a BVI company over which the English court assumed jurisdiction as a ‘necessary and proper party’. It may therefore be that the submission mentioned in the first sentence should in fact refer to the link between the claims against Holdings and those against Services and Cyprus.)

439. The situation which arose in *Aeroflot* is markedly different from that in the present case, for two main reasons.
- i) First, in *Aeroflot* the argument against Article 6 jurisdiction was a risk of inconsistency between a judgment against Holdings on the one hand, and judgments against other defendants, namely Services and Cyprus. In the present case, the question is whether jurisdiction should be assumed under Article 6 over claims against a particular defendant in circumstances where other claims against the *same* defendant are the subject of an EJC. The present case thus involves the risk of inconsistent judgments against the same defendant, a prospect which may even more acutely undercut the policy underlying Article 6 and the Convention as a whole. I do not consider it relevant in that context that either set of claims does not (unlike the claims against the anchor defendant) have to pass an arguability test. The risk of inconsistency is not dependent on the strength of the claims.
  - ii) Secondly, in *Aeroflot*, Holdings was domiciled in Luxembourg, and thus not in a place where proceedings would have to be brought against any of the other defendants. As a result, to require the claimant to have sued Holdings in Luxembourg would have involved further fragmentation of proceedings by involving an additional forum (on the facts, a fourth forum). By contrast, in the present case, the courts chosen by the parties in the EJCs to which the Pictet entities, Mirabaud and their former partners are parties are also the courts of their places of domicile. As a result, all the claims against any given defendant bank or partner can be pursued in a single forum.
440. Aikens LJ stated in § 112 of *Aeroflot* that it was irrelevant to consider whether the claims against Holdings were more closely connected with the claims against its subsidiaries than they were with the claims against the anchor defendants. It may have been a relevant factor, in that context that, since the claims against Holdings could not be pursued in the same forum as those against Services or Cyprus, there was in any event going to be fragmentation of proceedings as regards the claims against the various corporate defendants.
441. Even leaving that point aside, however, Aikens LJ’s reasoning cannot in my view simply be transposed to a case such as the present one where the question is where two sets of claims against the same defendant are to be pursued. In this situation, assuming jurisdiction under Article 6 over the claims falling outside the EJC is liable to lead to fragmentation of proceedings, and the risk of irreconcilable judgments by different courts, in respect of claims against the same defendant, neither of which risks were present in *Aeroflot*.
442. Aikens LJ at § 111 recognised that in applying Article 6(1) the court should “*take account of all the necessary factors in the case file*”, that being a quotation from



Case C-98/06 *Freeport v Arnoldsson* [2008] QB 634 § 41. I agree with PIFSS that the CoJ in *Freeport* referred to the case file in the context of assessing the degree of connection between the claims against the anchor defendant and those against the proposed Article 6 defendant. I do not agree, however, that that is the sole purpose for which the court may or should do so.

443. I also do not accept PIFSS's implicit suggestion that the problem can be resolved, pursuant to Lugano Convention Article 28, by defendants sued in Geneva asking the court to stay such proceedings in favour of the English proceedings. To expect defendants who are entitled by reason of an EJC to be sued in the parties' chosen forum to take this course would tend to undermine the principle of freedom of choice underlying Article 23, in effect presenting such defendants with the invidious choice of waiving their Article 23 rights or facing litigation in two jurisdictions.

*Situation (b): jurisdiction clause covering claims against another defendant*

444. PIFSS submits that this situation is directly comparable to the position of Holdings in *Aeroflot*, and that the Court of Appeal's reasoning there must apply. All its other arguments about the language and meaning of Article 6, considered above, also apply.
445. However, as M. Argand submits, the second point of distinction referred to in § 439 continues to apply here. In substance, the issue before the Court of Appeal in *Aeroflot* was whether Holdings should be able to force the claimant to open up a new fourth front in Luxembourg merely because its claims were more closely connected to the claims against its subsidiaries that had to be pursued in Lausanne or by arbitration. It is not difficult to see why, in those circumstances, the court considered a connection to those claims to be irrelevant. The position may well be different where the alternative to the English court assuming jurisdiction under Article 6 is the pursuit of the claims in the same overseas forum as the claims against other defendants to which it is closely connected.
446. Accordingly, in situation (b) as in situation (a) the task for the court in the present case is in my view to apply Article 6 without any rigid preconceptions as to the relevance or otherwise of closely connected claims that must be pursued in an overseas forum by reason of EJCs.

**(4) Banque Pictet**

447. PIFSS submits that even if it is correct to take account of the fact that (on my conclusions) the Pictet Scheme claims must be pursued in Geneva, the English court should assume jurisdiction under Article 6 in respect of the accessory claims. PIFSS says it would clearly be appropriate for claims that Banque Pictet laundered money for Mr Al Rajaan and Mr Nasrallah, together with other financial institutions, to be heard together with the claims against each of those defendants. That would remain the case even if the much smaller secret commission claims against Banque Pictet and Pictet Europe were heard in Geneva.
448. PIFSS points out that Mr Al Rajaan's case is that there was nothing wrong with receiving money from Pictet, Mirabaud or any of the other financial institutions involved. His Defence includes averments that he had authority to receive all the payments, and that no loss was caused to PIFSS. As a result, PIFSS submits, there is

“*the potential for the most colossal irreconcilability on the facts*” if the question of whether Mr Al Rajaan has acted wrongfully has to be determined in every jurisdiction in which any defendant is going to be sued. The question of whether Mr Al Rajaan is entitled to receive the alleged secret commissions is central to every claim against every defendant, and it is plainly a question which could be answered one way in one jurisdiction and another way in another jurisdiction.

449. Moreover, PIFSS says, the more aspects of the claim are transferred to Switzerland, the more the risk of irreconcilable judgments so far as Mr Al Rajaan's position is concerned. If money laundering is tried here and bribery is tried in Switzerland, there will be a risk of irreconcilable judgments in relation to bribery, but there will not be irreconcilable judgments as to money laundering because all the money laundering claims will have been tried in this jurisdiction. However, if both claims are litigated in Switzerland, that will produce a new risk of irreconcilable judgments with regard to money laundering to add to the existing risk in relation to bribery. That outcome would be the opposite of what Article 6 aims for, because on any view it is seeking to minimise the risk of irreconcilable judgments as between the anchor claim and the claim brought pursuant to Article 6.
450. As PIFSS thus recognises, 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 accessory claims under Article 6 would reduce the risk of irreconcilable judgments on those claims as between England and Switzerland. However, that would be at the expense of creating a new risk of irreconcilable judgments as between the very same parties (PIFSS and Banque Pictet) on the very same issues.
451. Moreover, those issues would not be confined to the question of whether Mr Al Rajaan is guilty of wrongdoing. They would include Banque Pictet's own knowledge. As noted earlier, PIFSS relies on the knowledge it says Banque Pictet acquired in the course of the Pictet Scheme as a factor demonstrating that Banque Pictet knew that the funds involved in the accessory claims were the proceeds of illicit secret commissions: see § 322 above. Thus the result of this court assuming jurisdiction over the 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 (including disclosure, witness statements and cross-examination of Pictet defendants and witnesses) 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 accessory claims is in my view compelling.

### **(5) Pictet Europe**

452. The same considerations apply in my view in relation to Pictet Europe.
453. PIFSS submits that the fact that Pictet Europe has now offered to submit to jurisdiction in Geneva is irrelevant, because the applicability of Article 6(1) is assessed at the date of issue. The position is therefore identical to that in *Aeroflot* § 112, where fragmentation between various fora was inevitable.
454. I assume that proposition to be based on the logic of the Court of Appeal's decision in *Canada Trust Co v Stolzenberg (No.2)* [1998] 1 WLR 547 838 that the critical date for the determination of the domicile of the anchor defendant is the date of the issue of proceedings against him, and that other defendants can be added pursuant to Article 6 even if the anchor defendant subsequently becomes domiciled outside England, regardless of whether there has been prior service on the defendant domiciled in England. By extension, it is arguable that the questions of expediency and connection arising under Article 6 must also be assessed at that date, based on policy considerations of the kind referred to in *Stolzenberg* relating to the need for claimants to be able to predict where they can sue.
455. However, I do not consider it necessary to resolve any such issue. In the present case, even if one ignores Pictet Europe's undertaking to consent to Geneva jurisdiction, the position remains that PIFSS is bound to litigate the bribery claims against it in Luxembourg, and the English court should not accept jurisdiction over the accessory claims, pursuant to Article 8 of the Recast Brussels Regulation, for all the same reasons (*mutatis mutandis*) as are set out above in relation to Banque Pictet. The fact that fragmentation of *fora* as between Banque Pictet and Pictet Europe would be inevitable does not justify assuming jurisdiction over the accessory claims against either Banque Pictet or Pictet Europe, and *Aeroflot* remains clearly distinguishable for the reasons set out earlier.

### **(6) Banque Mirabaud**

456. The same considerations apply to Mirabaud as apply to Banque Pictet, including (for completeness) the fact that knowledge in relation to the accessory claims is based in part on knowledge in relation to the Mirabaud Scheme bribery claim: see § 352.iii) above.

### **(7) M. Bertherat**

457. An Article 6 issue arises in relation to the claims against M. Bertherat (a) in relation to the bribery claims, as regards the period after Banque Pictet's incorporation in January 2014, but only if I am wrong on the issue considered in § 369-373 above; and (b) in relation to the accessory claims against M. Bertherat.
458. As to the bribery claims, PIFSS submits that the fact that one category of alleged bribes is covered by an EJC (such as those paid in respect of a specific contract or in respect of a given time period) would not mean that other categories of bribes (such as those paid in respect of different contracts or time periods) would cease to be connected to the claims against Mr Al Rajaan.

459. I do not accept that submission. In reality, the issues between PIFSS and M. Bertherat as regards the periods prior to and after January 2014, including the issues relating to knowledge of Mr Al Rajaan's alleged wrongdoing, are identical or virtually identical. For the Swiss court to consider claims for the period up to that date, and the English court those for the remaining period, would create a clear and obvious risk of irreconcilable judgments between the same parties and on the same issues.
460. As to the accessory claims, the same considerations as apply to Banque Pictet apply to M. Bertherat (who was of course a partner in Banque Pictet). The claims against M. Bertherat are so far as relevant, including as to knowledge, pleaded on the same basis as those against Banque Pictet. As with Banque Pictet itself, I do not consider Article 6 to be satisfied in relation to these claims.

**(8) M. Mirabaud and M. Fauchier-Magnan**

461. An Article 6 issue arises in relation to the claims against these defendants (a) in relation to the bribery claims against M. Mirabaud relating to acts or omissions after he retired as a partner on 31 December 2009, and (b) in relation to the accessory claims against both M. Mirabaud and M. Fauchier-Magnan.
462. As to (a), similar considerations apply to those in relation to M. Bertherat. The issues between PIFSS and M. Mirabaud as regards the periods prior to and after 31 December 2009, including the issues relating to knowledge of Mr Al Rajaan's alleged wrongdoing, are identical or virtually identical. For the Swiss court to consider claims for the period up to that date, and the English court those for the remaining period, would create a clear and obvious risk of irreconcilable judgments between the same parties and on the same issues.
463. As to the accessory claims, the same considerations as apply to Mirabaud apply to M. Mirabaud and M. Fauchier-Magnan, who were partners in the bank. The claims against them are so far as relevant, including as to knowledge, pleaded on the same basis as those against Mirabaud itself. As with Mirabaud itself, I do not consider Article 6 to be satisfied in relation to these claims.

**(9) M. Argand**

464. The claims against M. Argand are closely linked to those against Mirabaud, M. Mirabaud and M. Fauchier-Magnan in relation to the Mirabaud Scheme. PIFSS alleges that:
- i) in around January 1997, M. Mirabaud and M. Fauchier-Magnan discussed with M. Argand, and instructed him in relation to, the establishment of Silvery Bay and an introducer agreement between Silvery Bay and Galmir. PIFSS asserts that it should be inferred that M. Argand was informed by M. Mirabaud and M. Fauchier-Magnan that they had a client to whom Mirabaud was intending to pay secret commissions and that, in order to facilitate such payments without detection, he should establish and act for Silvery Bay. It is not part of PIFSS's case that M. Argand himself received any significant benefit from so acting;

ii) at the direction of M. Mirabaud and M. Fauchier-Magnan, M. Argand subsequently incorporated Silvery Bay and, over the next 10 to 15 years, signed on its behalf various introducer agreements between Galmir and Silvery Bay, which provided for the payment of commissions by Galmir to Silvery Bay in consideration of its introduction of certain investments to Mirabaud. PIFSS further contends that M. Argand arranged a power of attorney authorising his management of Silvery Bay and provided general management services to Silvery Bay on the instructions of M. Mirabaud and M. Fauchier-Magnan, including the receipt and onward payment of funds; and

iii) M. Argand is liable:

“for civil wrongs under Article 229 of the Kuwaiti Civil Code arising out of:

a. His liability as a perpetrator and aider and abettor within the meaning of Articles 47-48 of the Penal Code in respect of his role in relation to the payment of bribes by Mirabaud to Mr Al Rajaan in breach of Articles 35 and 39 of the Penal Code in furtherance of his interests and the interest of others.

b. His liability as a perpetrator and aider and abettor within the meaning of Articles 47-48 of the Penal Code in respect of his role in relation to the breach by Mr Al Rajaan of Article 11 of the Public Property Law.

Alternatively, he is liable under principles of English law for dishonest assistance in Mr Al Rajaan’s breach of fiduciary duty.” (CPOC §§ 130-131)

465. It is important to note, first, that M. Argand is not alleged to have been involved in anything other than the Mirabaud Scheme itself. There is no allegation against him in relation to the accessory claims.

466. Secondly, as M. Argand points out, resolution of the claim against him will essentially consist of an investigation into whether, based on his communications with Messrs Mirabaud and Fauchier-Magnan, Mr Argand’s knowledge was sufficient to render him liable in connection with the payment of moneys to a client of Mirabaud. Any liability of Mr Argand is fundamentally bound up in his relationship with Messrs Mirabaud and Fauchier-Magnan. For this court to assume jurisdiction under Article 6, rather than leaving him to be sued in Switzerland as his state of domicile, would lead to the separate determination of the claims against these Swiss individuals in two different jurisdictions and a real and substantial risk of inconsistent judgments.

467. Thirdly, although M. Argand could not be held liable absent a finding against Mr Al Rajaan, the issues relating to M. Argand are far removed from those concerning Mr Al Rajaan and give rise to distinct and separate issues and investigations. It is notable in this context that none of the onward payments that Messrs Mirabaud and Fauchier-Magnan are alleged to have instructed M. Argand to cause Silvery Bay to make involved payments to Mr Al Rajaan himself; and there is no explicit allegation that M.

Argand knew that he was facilitating payments to a recipient who was any kind of public official, let alone a Kuwaiti public official, or allegedly facilitating payments that constituted public funds.

468. As a result, the fundamental factual component in any trial against Mr Argand will be Mr Argand's own knowledge and intentions, as to which the content of his communications with Messrs Mirabaud and/or Fauchier-Magnan will be central, as illustrated by the allegations relevant to M. Argand in CPOC §§ 87, 88, 92, 106 and 109.
469. A trial in England of the allegations against M. Argand would create a significant risk of inconsistent findings as to what was (or was not) said, and the meaning of documents passing, between M. Argand on the one hand and the other Mirabaud defendants on the other. That risk may be exacerbated by the absence in the English proceedings of any documents produced by the Mirabaud defendants.
470. Fourthly, the knowledge and intentions of M. Argand, and the communications between him and Messrs Mirabaud and Fauchier-Magnan, are not necessary elements of the claims against Mr Al Rajaan. PIFSS does not allege that there were any communications or meetings between M. Argand and Mr Al Rajaan in relation to the setting up or operation of the alleged scheme or the payments being made. His instructions are alleged to have come only from Messrs Mirabaud and Fauchier-Magnan.
471. In these circumstances, and on the footing that I have concluded that this court should not assume jurisdiction over the claims against Mirabaud, M. Mirabaud, or M, Fauchier-Magnan, it is in my judgment not expedient for the court to do so over M. Argand either in order to avoid the risk of irreconcilable judgments as between the claims against him and those against the anchor defendants. To do so would create a clear and obvious risk of irreconcilable judgments as against M. Argand and the Mirabaud defendants, whereas to decline jurisdiction would enable all the claims against M. Argand and the Mirabaud defendants to proceed in a single forum *viz* the courts of Geneva.

**(10) M. Amouzegar**

472. I outline the claims against M. Amouzegar, and their connection with the claims against Banque Pictet and M. Bertherat, in §§ 389-390 above.
473. M. Amouzegar contends that:
- i) for the reasons given in Banque Pictet's evidence relating to what are, in substance, *forum non conveniens* factors relevant to the claims against Pictet Asia and Pictet Bahamas, it is more expedient for the Pictet Scheme claims (and therefore all of the claims against M. Amouzegar) to be tried in Switzerland; and
  - ii) for the claims against M. Amouzegar to be tried in England and Wales but those against the Pictet entities and M. Bertherat in Switzerland could lead to conflicting judgments as to the use of Swiss banking evidence, the

interpretation of Swiss law including as to the limitation periods applicable and generally as to the decision reached.

474. PIFSS submits that even if the claims against the Pictet corporate entities and M. Bertherat must be pursued in Switzerland, the court should assume jurisdiction under Article 6 over the claims against M. Amouzegar. PIFSS says:
- i) There is a very clear factual connection between the claims against M. Amouzegar and the claims against Mr Al Rajaan. The claims put in issue the discussions and alleged corrupt agreements between those two individuals: see e.g. CPOC at *inter alia* §§ 168, 172, 175, 184, 187, 192-193, 196-197, 199-200, 209, 214.c.d and 216.
  - ii) There is also a clear legal connection. The CPOC pleads claims against M. Amouzegar under Kuwaiti law including as “*perpetrator, and aider and abettor... in respect of [his] role in relation to Mr Al Rajaan’s breach of Article 11 of the Public Property Law*”: at § 220.b. It also pleads a claim of dishonest assistance in Mr Al Rajaan’s breach of fiduciary duty under English law: at § 221.b. If the claims against Mr Al Rajaan and M. Amouzegar proceed in separate jurisdictions, there will inevitably be a risk of divergent outcomes.
  - iii) The *forum non conveniens* arguments that M. Amouzegar has transposed from the Pictet Asia and Pictet Bahamas challenges are irrelevant, as is his argument that Switzerland is a “*more expedient*” forum.
  - iv) The claims against M. Amouzegar overlap with those against Pictet Europe (which is domiciled in Luxembourg), so it is incorrect for M. Amouzegar to argue that all claims related to those against him could and should proceed in Geneva.
475. In so far as M. Amouzegar’s contentions are in substance merely *forum non conveniens* arguments I agree with PIFSS that they are not relevant. The relevant question is whether the connections between the claims against Mr Al Rajaan and M. Amouzegar make it expedient for them to be tried together to avoid the risk of irreconcilable judgments.
476. In that context PIFSS’s starting point is that the place where the claims against the other Pictet-related defendants will be tried is irrelevant: I have rejected that argument at §§ 444-446 above. A striking feature of the list of allegations against M. Amouzegar highlighted by PIFSS as set out in §§ 474.i) and 474.ii) above is that apart from §§ 196 and 214.c.d, they all relate to both M. Amouzegar and M. Bertherat. Virtually all of the key allegations against M. Amouzegar involve his being said to have acted with or in the same way as M. Bertherat, who as a partner of the bank was M. Amouzegar’s employer. Moreover, the allegations in CPOC §§ 172, 175, 176, 184, 187 and possibly 204 involve M. Amouzegar and M. Bertherat having acted together and at the same time. For this court to assume jurisdiction over the claims against M. Amouzegar would create a clear risk of conflicting judgments in respect of the same facts.

477. I consider the Article 6 issue in relation to M. Amouzegar to be more finely balanced than in relation to M. Argand. Most of the instances listed above of M. Amouzegar and M. Bertherat acting together at the same time involved their having made an agreement with Mr Al Rajaan. Thus M. Amouzegar's position so far as Article 6 is concerned differs from that of Banque Pictet, Mirabaud and their former partners, where the problem is that assuming jurisdiction under Article 6 would create a risk of inconsistent judgments on the same issues as between the same claimant and defendant. His position also differs to a degree from that of M. Argand, whose dealings were all with Mirabaud personnel and not with Mr Al Rajaan.
478. Insofar as issues arise as to what took place in M. Amouzegar's and M. Bertherat's joint dealings with Mr Al Rajaan, assuming jurisdiction over the claims against M. Amouzegar would tend to decrease the risk of inconsistent judgments on those issues as between the claims against the anchor defendant and those against M. Amouzegar. At the same time, though, it would increase the risk of inconsistent judgments, on those same issues, as between the claims against M. Amouzegar and those against Banque Pictet and M. Bertherat. Moreover, it would create a serious risk of inconsistent judgments on critical issues of knowledge. The allegations in CPOC §§ 208-216 attribute to Banque Pictet the knowledge of both M. Amouzegar and M. Bertherat (whose knowledge is also pleaded in various of the preceding paragraphs including §§ 192, 199 and 200). M. Amouzegar and M. Bertherat are, moreover, said to have been involved in many of the same events. In order to determine the knowledge to be attributed to Banque Pictet, the Swiss court will have to make findings about the knowledge of both M. Amouzegar and M. Bertherat. For this court to assume jurisdiction over the claims against M. Amouzegar would create a serious and obvious risk of irreconcilable findings about M. Amouzegar's knowledge of those matters.
479. For these reasons I have come to the conclusion, albeit on balance and with a degree of hesitation, that PIFSS does not have the better of the argument that the requirements of Article 6 are satisfied in respect of the claims against M. Amouzegar either.

#### **(K) CLAIMS AGAINST PICTET BAHAMAS AND PICTET ASIA**

480. The claims against Pictet Bahamas and Pictet Asia are outside the scope of the Lugano Convention and Recast Brussels Regulation. Jacobs J on 4 July 2019 granted permission to serve proceedings on them out of the jurisdiction, pursuant to CPR 6.36-6.38 and Practice Direction 6B, paragraph 3.1(3), on the basis that they were necessary or proper parties. They no longer contend that this court has no jurisdiction over the claims against them on the ground that they are not necessary or proper parties to the claim; but they apply to set aside service of proceedings against them on the ground of *forum non conveniens*, conditionally on the court holding that it has no jurisdiction over Banque Pictet and Pictet Europe under the Lugano Convention and Recast Brussels Regulation. Like Pictet Europe, they have offered to submit to the jurisdiction of the courts of Geneva so as to create a more convenient forum than England.
481. The classic formulation of the *forum non conveniens* test is set out in the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 475-484 per Lord Goff, and summarised in *Altimo Holdings and Investment Ltd v Kyrgyz*



*Mobil Tel Ltd.* [2011] UKPC 7. As Lord Collins stated in that case (§ 88), and is common ground, the claimant must show that England is clearly the appropriate forum.

482. The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated (*Vedanta Resources Ltd plc v Lungowe* [2019] UKSC 20 § 66 per Lord Briggs).
483. Relevant connecting factors include whether the claim against the anchor defendant will proceed, in circumstances where the claim against that defendant cannot be stayed because of the effect of relevant treaties (see Case C-281/02 *Owusu v Jackson*). In *Vedanta* Lord Briggs said:

“68. ... The concept behind the phrases "the forum" and "the proper place" is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried. The *Altimo* case also involved multiple defendants. Although it was decided after *Owusu v Jackson*, it concerned the international jurisdiction of the courts of the Isle of Man, so that the particular problems thrown up by this appeal did not arise.

69. An unspoken assumption behind that formulation of the concept of forum conveniens or proper place, may have been (prior to *Owusu v Jackson*) that a jurisdiction in which the claim simply could not be tried against some of the multiple defendants could not qualify as the proper place, because the consequence of trial there against only some of the defendants would risk multiplicity of proceedings about the same issues, and inconsistent judgments. But the cases in which this risk has been expressly addressed tend to show that it is only one factor, albeit a very important factor indeed, in the evaluative task of identifying the proper place. For example, in *Société Commerciale de Réassurance v Eras International Ltd (The Eras Eil Actions)* [1992] 1 Lloyd's Rep 570, Mustill LJ said this, at p 591:

"... in practice the factors which make the party served a necessary or proper party ... will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive."

70. In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction: see

eg *OJSC VTB Bank v Parline Ltd* [2013] EWHC 3538 (Comm), per Leggatt J at para 16.”

484. Relevant connecting factors also include:
- i) the place where the allegedly wrongful acts or omissions occurred, what caused the resulting losses and where the losses were felt (*Vedanta* § 85(i)-(iii)); and
  - ii) matters of practical convenience or expense such as accessibility for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence (*Vedanta* §§ 66 and 85(iii)-(viii)).
485. PIFSS makes the point that the claim against Mr Al Rajaan will proceed in England in any event. That claim is brought pursuant to Article 2 of the Lugano Convention so the English court has no discretion to decline jurisdiction over it. Mr Al Rajaan is not only the anchor defendant but also the central defendant in the claim.
486. Moreover, claims will also proceed in England against at least another 19 defendants who are either domiciled here or who have submitted to the jurisdiction: these are Ms Al Wazzan (who held front companies and bank accounts for Mr Al Rajaan), Mr Nasrallah (who played important roles fronting introductions and concealing bribes in four of the seven schemes), all of the active defendants in the Man, UBP and Mombelli Schemes, together with EFG Bank and Mr Guérin. Some of those defendants are parties only to claim forms other than those by which the Pictet parties have been sued. The claims were consolidated on the express basis that PIFSS would not thereby gain any jurisdictional advantage. However, as PIFSS points out, regardless of consolidation, the fact that other related claims are being litigated in this jurisdiction is relevant to whether the English court is the convenient forum, given the desirability of avoiding or minimising conflicting judgments (see *Masri v Consolidated Contractors International (UK) Ltd* [2005] EWCA Civ 1436). In any case, Mr Al Rajaan and Mr Nasrallah are sued in the same claim form as the Pictet defendants.
487. As to the facts, PIFSS submits that:
- i) The claims against Pictet Asia and Pictet Bahamas concern the opening of accounts on behalf of Mr Al Rajaan or Ms. Al Wazzan in Singapore and the Bahamas, and the subsequent laundering of monies through those accounts: CPOC §§ 197 and 205. Those activities were carried out in Singapore and the Bahamas respectively, although supervised by M. Bertherat and/or M. Amouzegar from Switzerland: CPOC § 200. Although PIFSS held assets or investments principally in accounts at Banque Pictet in Geneva, the accounts principally relevant to the claims against Pictet Asia and Pictet Bahamas were in Singapore and the Bahamas, not Geneva.
  - ii) The alleged money laundering was performed in respect of the Pictet, EFG/Further Nasrallah, UBP and Mombelli Schemes, in particular via various front companies. Of the US\$294.2 million of money laundering claims brought against Pictet entities, only US\$22.8 million (7.7%) concern bribes

paid under the Pictet Scheme itself. Only US\$800,000 of the Pictet Scheme secret commissions were ultimately paid via Pictet Asia or Pictet Bahamas. By contrast, it is known or inferred that (as set out in appendices to the CPOC):

- a) in connection with the Further Nasrallah and UBP Schemes, Mr Nasrallah's company, Phoenix, made payments from its account at EFG of \$138,631,112 to accounts at Pictet Bahamas and US\$11,058,102 to an account at Pictet Asia;
  - b) in connection with the Further Nasrallah Scheme, Mr Nasrallah's company, Ozak, made payments from its accounts at EFG of US\$19,921,905 to an account at Pictet Asia and US\$723,672 to an account at Pictet Bahamas; and
  - c) in connection with the Mombelli Scheme, a total of US\$44,291,243 was paid to accounts at Pictet Bahamas and Pictet Asia.
- iii) The schemes involved in the above payments concern:
- a) Mr Nasrallah, who has accepted jurisdiction and filed a Defence and who controlled Phoenix;
  - b) EFG and Mr Guérin, who have each accepted jurisdiction and filed Defences;
  - c) the five UBP defendants, who have accepted jurisdiction and filed a Defence; and
  - d) the four Mombelli defendants, who have accepted jurisdiction and filed a Defence.
- iv) Accordingly, the clear majority of the non-anchor defendants against whom overlapping claims are brought are already before the English court (see Annex 3). As such there is a critical mass of defendants before the English court. Given the scale of the overlap with the claims against those defendants, the risk of irreconcilable judgments is much stronger if the claims against Pictet Asia and Pictet Bahamas are tried in Geneva.
- v) While there is an overlap between the claims against Pictet Asia and Pictet Bahamas on the one hand and Banque Pictet and Pictet Europe on the other, that overlap is much less significant than the overlap between the claims against Pictet Asia and Pictet Bahamas and the claims against the other defendants over which the court has jurisdiction. This is because of the nature of the claims, those against Pictet Asia and Pictet Bahamas being accessory claims in respect of secret commissions paid pursuant to other schemes and those against Banque Pictet and Pictet Europe being primarily secret commission claims in respect of bribes which those banks paid to Mr Al Rajaan.

- vi) Extensive witness evidence will be given by each of the above-mentioned defendants, as well as Mr Al Rajaan (and potentially Ms Al Wazzan), who, for risk of arrest in Switzerland, will not appear in Switzerland. Leaving aside M. Amouzegar, the only other principal witness not already before the English court would be M. Bertherat, who as an international banker should face no difficulties in coming to London or giving evidence in English.
  - vii) Mr Al Rajaan, Ms Al Wazzan and the other defendants can all be expected to provide substantial disclosure. The documents held by Pictet Asia and Pictet Bahamas will be held in Singapore and the Bahamas and are likely to be in English.
  - viii) Regardless of whether the Swiss banking secrecy issues are as acute as is asserted on behalf of the applicants, materially the same secrecy issues will arise whether the claims are heard in London or in Switzerland. It is common ground between the relevant experts that whether the claim proceeds in London or Geneva, a Geneva court will be required to rule on whether banking secrecy can be lifted.
  - ix) PIFSS's case is that Mr Al Rajaan's banking relationships were overseen from Geneva, but each relevant act of dishonest assistance by Pictet Asia or Pictet Bahamas took place in Singapore or the Bahamas. This does not provide a link to Geneva.
  - x) As PIFSS relies on Kuwaiti law and the defendants rely on Swiss law, it is unlikely that any substantive issues will be determined under English law in the English proceedings. In so far as Swiss law applies to the claims against Pictet Asia and Pictet Bahamas, all relevant Swiss law will already be in issue in the English proceedings in order to resolve the Swiss law issues raised by other defendants.
488. Though there is force in several of these factors, there are weighty factors pointing in the opposite direction.
489. The claims against Pictet Asia and Pictet Bahamas are intricately bound up with those against Banque Pictet, Pictet Europe, M. Bertherat and M. Amouzegar. I have already concluded that those claims either must (by reason of jurisdiction agreements), or should be resolved in Geneva, making a degree of fragmentation of jurisdiction inevitable. PIFSS alleges that “[a]t all material times, Mr Bertherat and Mr Amouzegar were responsible for and had continuous oversight of Pictet's relationship with Mr. Al Rajaan, Ms Al Wazzan, Mr Nasrallah and PIFSS and the bank accounts which they held with the various Pictet entities (including Pictet Asia and Pictet Bahamas and Pictet Europe)” (CPOC § 199, my emphasis). Further, it is alleged that:
- “... the accounts held with Pictet Bahamas and Pictet Asia and Pictet Europe for Mr Al Rajaan, Ms Al Wazzan and Mr Nasrallah were managed centrally and by the same personnel in Geneva until at least May 2012, when their management and administration was transferred to be dealt with locally. Mr Bertherat and Mr Amouzegar had knowledge and overall

supervision of all of the Al Rajaan and Nasrallah accounts, including on behalf of Pictet Bahamas and Pictet Asia and Pictet Europe.” (CPOC § 200)

Even the transfer to local administration in May 2012 is alleged to be part of the concealment effected by Banque Pictet acting through M. Bertherat and M. Amouzegar (CPOC § 204d.c.b; see also CPOC § 204.h.a).

490. Similarly, CPOC § 208 alleges that:

“Until May 2012, Pictet was liable for the management and administration of the Al Rajaan and Nasrallah accounts on behalf of Pictet Bahamas, Pictet Asia and Pictet Europe accounts, because authority to do so had been delegated to it, alternatively because, as a matter of fact, Pictet employees were conducting business on these accounts (transferring payments between accounts, paying invoices) at the direction of Mr. Al Rajaan.”

and CPOC §§ 209 and 210 allege that the knowledge of M. Bertherat and M. Amouzegar is to be imputed to all the Pictet entities, and that those entities (including Pictet Asia and Pictet Bahamas) were alternatively vicariously liable for the conduct of M. Bertherat, M. Amouzegar and those acting under their supervision.

491. Two things follow from this. First, the fact that the Pictet Asia and Pictet Bahamas accounts were located in Singapore and the Bahamas is a matter of very limited real significance in terms of the issues or the manner in which the litigation will proceed. Secondly, to assume jurisdiction over Pictet Asia and Pictet Bahamas would create a clear risk of conflicting judgments, as between this court and the Geneva court, in relation to the actions and knowledge of M. Bertherat and M. Amouzegar, who were acting on behalf of all the Pictet entities, and, in effect, the knowledge of Banque Pictet and Pictet Europe. It is, on PIFSS’s case, the knowledge and actions of the same individuals at Banque Pictet (M. Bertherat, M. Amouzegar and certain other employees working under M. Bertherat) that are said to give rise to liability on behalf of all four of the Pictet entities. PIFSS alleges that these individuals agreed and operated the Pictet Scheme with Mr Al Rajaan on behalf of Banque Pictet and Pictet Europe, and then established accounts for Mr Al Rajaan and his associates with Pictet Bahamas and Pictet Asia which they managed and oversaw from Banque Pictet in Geneva.

492. Thus PIFSS’s claims against Pictet Bahamas and Pictet Asia cannot be unravelled from its claims against Banque Pictet and Pictet Europe. As Pictet points out, the former are parasitic and contingent on the latter. Switzerland is the only jurisdiction where it will be possible for the claims against all the Pictet entities to be resolved together. In the submission referred to in § 487.v) above, PIFSS highlights the point that the claims against Pictet Asia and Pictet Bahamas are accessory claims in respect of secret commissions paid pursuant to other schemes, whereas those against Banque Pictet and Pictet Europe are “*primarily secret commission claims in respect of bribes which those banks paid to Mr Al Rajaan*”. However, the claims against Banque Pictet and Pictet Europe extend both to bribery and to accessory liability in respect of secret commissions paid pursuant to other schemes; and I have concluded earlier that this

court cannot properly assume jurisdiction over either category of claims. Moreover, the accessory liability claims against Pictet Asia and Pictet Bahamas are intricately connected with the accessory claims against Banque Pictet and Pictet Europe.

493. It is true that to assume jurisdiction over the claims against Pictet Asia and Pictet Bahamas would reduce the chance of irreconcilable judgments, as between PIFSS's claims against the anchor and other defendants already being sued in England, and those against Pictet Asia and Pictet Bahamas, on the issues relating to Mr Al Rajaan's activities. However, (a) there is already an unavoidable risk of irreconcilable judgments on those issues in the light of the EJs applicable to the claims against Banque Pictet, Pictet Europe and M. Bertherat (as well as the Mirabaud defendants); (b) whilst decreasing the risk of inconsistency on those issues as between the existing claims in England and the PIFSS/Pictet Asia/Pictet Bahamas claims, the assumption of jurisdiction over Pictet Asia and Pictet Bahamas would increase the risk as between those claims and the claims against the other Pictet parties, and (c) it would create the new incremental and serious risk of irreconcilability referred to in §§ 489-492 above.
494. As to other connecting factors, Pictet Asia and Pictet Bahamas point out a number of further factors against the appropriateness of the claims being pursued here, including the following:
- i) Many of the relevant witnesses (including M. Bertherat and M. Amouzegar) live in Switzerland.
  - ii) Given the allegations that those two individuals in substance controlled Pictet Asia and Pictet Bahamas's involvement in the matter, the bulk of the documentary evidence is likely to be located in Switzerland. Further, a significant proportion of the documents will be in French and would not need to be translated for the Swiss court.
  - iii) Professor Romy's evidence is that the Swiss court can compel witnesses domiciled in Switzerland to appear in Swiss proceedings and to produce relevant documents, and that individuals party to PIFSS's claims, (including Mr Al Rajaan and Mr Nasrallah) who do not live in Switzerland would be able to give evidence before the Swiss court via video link. Mr Nasrallah would need to travel regardless of where the trial was held.
  - iv) Many of Banque Pictet's documents are also likely to be subject to Swiss banking secrecy laws, including Article 47 of the Swiss Banking Act. Although the Swiss court has the power to order disclosure of documents subject to Article 47 in relation to litigation pending before a foreign court, it can do so only within the framework of international judicial assistance, which would at least add a layer of complication to the English proceedings that would not arise if the proceedings were held in Switzerland.
  - v) Many of the relevant accounts were allegedly held and/or managed in Geneva and the principal banking relationship conducted there.
  - vi) By contrast, PIFSS's claims have no substantial connection to England. For instance:

- a) The assets and investments that PIFSS placed with the Pictet group were held principally in accounts at Banque Pictet in Geneva (or, to a much lesser extent, in accounts at Pictet Europe in Luxembourg).
  - b) As noted above, PIFSS's case is that the relevant accounts and banking relationships were overseen or centrally managed by M. Bertherat, M. Amouzegar and other Banque Pictet employees from Geneva and its claims against Pictet Bahamas and Pictet Asia rely on a number of steps allegedly taken by Banque Pictet employees based in Switzerland. Most (if not all) of the relevant meetings between PIFSS and representatives of the Pictet group occurred in either Geneva or Kuwait.
  - c) There is no suggestion that any relevant fees allegedly paid to Mr Al Rajaan's alleged accounts with the Pictet defendants moved through England. On PIFSS's case, the most substantial fee payments to Mr Al Rajaan's alleged accounts with the Pictet defendants were transferred from accounts held at another Swiss bank, EFG.
  - d) There is no suggestion that any of the alleged torts took place in England. On PIFSS's case, the alleged steps giving rise to the liability of Pictet Asia and Pictet Bahamas were taken by M. Bertherat and his employees in Geneva.
- vii) Such connecting factors as exist with England – Mr Al-Rajaan's residence in England, his submission to the jurisdiction and (to the extent this is a separate point) his alleged substantial business connections to London, and the allegation that the Mayur Fund (a Guernsey entity) was managed by a Pictet group entity domiciled in England – are insubstantial especially compared to the connections with Switzerland.
  - viii) Any court determining PIFSS's claims in relation to the alleged Pictet Scheme will need to consider both Kuwaiti and Swiss law. The English court, accordingly, would be required to consider two foreign systems of law requiring expert evidence, whereas the Swiss court would need to consider only one.
495. Considering all these factors taken together, I conclude that PIFSS has not shown that England is clearly the appropriate forum for the resolution of the claims against Pictet Asia and Pictet Bahamas. Resolving them 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 point more strongly towards Geneva than towards England as being the appropriate forum. The court should therefore decline jurisdiction on *forum non conveniens* grounds.

## **(L) CONCLUSION**

496. The jurisdiction challenges succeed. I shall hear from counsel on the appropriate form of relief.

497. I am most grateful for the legal teams on all sides, and the experts, for their extremely knowledgeable and skilful submissions and evidence.