WHAT HAPPENS IN VEGAS STAYS IN VEGAS: ASSERTING A TORT CLAIM IN NEW YORK COURTS AGAINST A FOREIGN CORPORATION ARISING FROM A NEW YORKER'S OUT-OF-STATE ACCIDENT POST-*DAIMLER*

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I. INTRODUCTION

A New York resident seeks legal representation regarding personal injuries she sustained in an accident or incident that occurred in another state or country.[1] The prospective defendant is a readily recognizable large national/international corporation, not incorporated in New York, that conducts business in multiple states, including New York. The first question to the attorney contacted is most likely to be: "Can I sue in New York?" She obviously does not want to have to take repeated trips to a faraway state, find a local attorney in that state, and manage an action against the defendant from afar. To respond to that inquiry, the attorney will have to determine initially whether the corporation is subject to personal jurisdiction in New York.

The existence of personal jurisdiction over a defendant in New York is a threshold inquiry since a New York court cannot render a valid and binding judgment, enforceable in New York pursuant to New York Civil Practice Law and Rules ("CPLR") Articles 51 and 52[2] and in other states pursuant to the Full Faith and Credit Clause,[3] in

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[1] A litany of many of these occurrences is set forth in Thomas A. Dickerson, *Accidents Abroad and Inconvenient Forums*, N.Y. ST. B.J., Mar./Apr. 2009, at 27, 28–29.

[2] *See generally* DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE ch. 18 (6th ed. 2018) [hereinafter SIEGEL & CONNORS, NEW YORK PRACTICE] ("Enforcement of Judgments").

[3] U.S. CONST. art. IV, § 1. *See generally* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994) (discussing the mandatory comity that the Full Faith and Credit Clause imposes on the states).

the absence of personal jurisdiction.[4] The concept of personal jurisdiction is derived from the Due Process Clause of the Fourteenth Amendment which, as construed by the United States Supreme Court, limits the power of a state court to render a valid judgment.[5] As stated by the Supreme Court: "[T]hose who live or operate primarily outside a state have a due process right not to be subjected to judgment in its courts as a general matter."[6] In this regard, a court may exercise personal jurisdiction over a defendant only if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[7]

Prior to January 2014 when the United States Supreme Court decided *Daimler AG v. Bauman*,[8] the rules for exercising personal jurisdiction over a foreign corporation with respect to that corporation's conduct vis-à-vis a New Yorker occurring outside New York were relatively straightforward, easy to apply, and provided broad bases for asserting personal jurisdiction.[9] CPLR 302 provided the necessary statutory basis for the exercise of personal jurisdiction over a foreign corporation in a New York court for a cause of action arising out of activities in another state that harms a New Yorker in that state.[10] Pursuant to CPLR 301, personal jurisdiction over a foreign corporation could be exercised under a "doing business" in New York standard[11] or by consent to jurisdiction established by the corporation's acquisition of authority to do business in New York.[12] Most importantly, where personal jurisdiction existed under either

[4] *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 608–09 (1990); McKinney v. Collins, 88 N.Y. 216, 224 (1882); Dunn v. Dunn, 4 Paige Ch. 425, 430 (N.Y. Ch. 1834); *see also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 4 (AM. LAW INST. 1982). A personal jurisdiction defense can nonetheless be waived if it is not raised in a timely manner. N.Y. C.P.L.R. 3211(e) (McKinney 2019); Gager v. White, 425 N.E.2d 851, 856 (N.Y. 1981).

[5] *See* Kulko v. Superior Court of Cal., 436 U.S. 84, 91 (1978) (citing Sheffer v. Heitner, 433 U.S. 186, 198–200 (1977)).

[6] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980) ("The concept of minimum contacts . . . protects the defendant against the burdens of litigating in a distant or inconvenient forum.").

[7] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[8] Daimler AG v. Bauman, 571 U.S. 117 (2014).

[9] For purposes of this article, a foreign corporation is a corporation that is not incorporated or organized under New York law.

[10] N.Y. C.P.L.R. 302(a)(2)–(3) (McKinney 2019).

[11] *See infra* Section II.B.

[12] *See infra* Section II.C.

basis, the dictates of the Due Process Clause were satisfied.[13] However, the decision in *Daimler* sent these jurisdictional standards "careening into the abyss."[14] While the Supreme Court did not *per se* invalidate these standards, its articulated due process analysis renders the doing business standard constitutionally impermissible as a basis for personal jurisdiction in most cases[15] and gives rise to an argument as to the unconstitutionality as well of the consent standard as a basis for personal jurisdiction.[16]

This Article will examine the opportunities for asserting personal jurisdiction in a New York court over a foreign corporation for a tort claim arising from a New Yorker's out-of-state accident post-*Daimler*. It will discuss initially CPLR 301's "doing business" and "consent" bases as applied to foreign corporations. The article will next examine *Daimler* itself. It will then discuss *Daimler's* impact upon the two bases and what, if anything, is left under CPLR 301 as a means to assert personal jurisdiction. As an alternative statutory basis to CPLR 301, the Article will discuss CPLR 302(a)(1)'s "transaction of business in New York" basis and examine whether it can in fact be utilized to fill the CPLR 301 void left by *Daimler* with respect to tortious activity occurring outside New York to a New Yorker. In doing so, it will focus on the Court of Appeals' recent decision in *D&R Global Selections, S.C. v. Bodega Olegario Falcon Pineiro*[17] and its impact.

II. CPLR 301

A. Generally

CPLR 301 provides: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."[18] Taking effect on September 1, 1963 when the CPLR became effective,[19] CPLR 301 incorporated into the CPLR all of the bases of jurisdiction over persons, property and status that existed

[13] *See* David D. Siegel, *U.S. Supreme Court Severely Circumscribes "Presence" As Basis for Personal Jurisdiction of Foreign Corporations*, 265 SIEGEL'S PRAC. REV. 1 (Jan. 2014).

[14] *Id*.

[15] *See infra* Section IV.A.1.

[16] *See infra* Section IV.A.4.b.

[17] D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 78 N.E.3d 1172 (N.Y. 2017).

[18] N.Y. C.P.L.R. 301 (McKinney 2019).

[19] C.P.L.R. 10005.

prior to September 1, 1963.[20] The "persons" part of CPLR 301 refers to personal jurisdiction.[21] CPLR 301 was intended to make clear that the enactment of long-arm personal jurisdiction in CPLR 302 did not supersede or limit in any way then existing bases of personal jurisdiction permitted by statute and judicial decisions.[22] However, CPLR 301's drafters decided not to restate those bases in CPLR 301.[23]

Prior to September 1, 1963, New York recognized four potential bases for personal jurisdiction—presence, domicile, consent, and "doing business"—for any cause of action irrespective of whether it arose from the defendant's contacts with or activities in New York.[24] These bases developed in an era governed by *Pennoyer v. Neff*,[25] wherein the Supreme Court held that the only permissible way of obtaining personal jurisdiction over an individual was by service of process upon the individual while the individual was present in the state.[26] The rule that developed post-*Pennoyer* was "in the absence of a waiver the presence of the defendant within the state was a necessary prerequisite to a court's asserting personal jurisdiction over him."[27]

With the emergence of corporations in the American economy, an issue arose as to personal jurisdiction over corporations under *Pennoyer* and its physical presence requirement.[28] For the purpose of analogizing the corporation to the individual so as to determine whether the corporation is physically present within the State of New York, decisional law construing the state's statutes relating to corporations created two concepts, one a "doing business" standard[29] and the other a consent standard based on the appointment of the

[20] *See* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, at 165.

[21] *See id.*; Vincent C. Alexander, *Practice Commentaries*, C301:1, *in* N.Y. C.P.L.R. 301 (McKinney 2019) [hereinafter Alexander, *Practice Commentaries*]. "Property" and "status" refer to *in rem* and *quasi-in rem* jurisdiction. *See* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, at 165 & n.6.

[22] *See* ADVISORY COMM. ON PRACTICE & PROCEDURE, TEMP. COMM'N ON THE COURTS, SECOND PRELIMINARY REPORT 38 (1958) [hereinafter SECOND PRELIMINARY REPORT].

[23] *See id.*

[24] *See* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, at 165; 2 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE: CPLR ¶ 301.04 (David L. Ferstendig ed., 2d ed. 2019) [hereinafter WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE].

[25] Pennoyer v. Neff, 95 U.S. 714 (1878).

[26] *See id.* at 733.

[27] 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1064 (4th ed. 2018).

[28] *See* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, § 82, at 213–14.

[29] *See id.*

Secretary of State as its agent for service of process.[30] If the corporation, whether a New York or foreign corporation, were "doing business" in New York or had "consented" to the appointment of the Secretary of State as its agent for service of process, the corporation was subject to personal jurisdiction in New York, irrespective of whether the cause of action asserted against the corporation related to any other contacts or activities in New York.[31] In essence, the corporation was "present" by reason of its business activities in New York or had consented to be present in New York.

B. "Doing Business" In New York

The "doing business" basis is invoked where the defendant is a foreign corporation. It traces its origin to Civil Practice Act § 229, and its predecessors, which specified various methods by which process could be served upon a foreign corporation.[32] Although the section referred only to service of process, it was construed to establish a basis for personal jurisdiction for a foreign corporation where the corporation is "doing business" in New York.[33]

This standard for personal jurisdiction was strictly adhered to, with one study concluding that:

> [T]he New York courts would almost certainly not feel authorized by section 229 to assume jurisdiction over a foreign corporation which does not do business in New York but which has done one or more acts in the state or has done acts outside the state which resulted in consequences in the state.[34]

The seminal doing business decision is *Tauza v. Susquehanna Coal Co*. In *Tauza*, the plaintiff, a New York resident, was injured in an

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[30] *See* N.Y. BUS. CORP. LAW § 304 (McKinney 2019).

[31] *See* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1344–45 (2015).

[32] *Article III of the New York Civil Practice Law and Rules: Jurisdiction, Service and Appearance*, 37 ST. JOHN'S L. REV. 285, 290 (1963).

[33] *See, e.g.*, Hulzer v. Dodge Bros., 135 N.E. 268, 268–69 (N.Y. 1922); Robert Dollar Co. v. Canadian Car & Foundry Co., 115 N.E. 711, 711–12 (N.Y. 1917); Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917 (N.Y. 1917). At the common law, use of the phrase "service of process" was understood to refer to and delineate the bounds of personal jurisdiction. *See* Dunn v. Dunn, 4 Paige Ch. 425, 430 (N.Y. Ch. 1834); Gruman v. Raymond, 1 Conn. 40, 44 (1814).

[34] LAW REVISION COMM'N, RECOMMENDATION OF THE LAW REVISION COMMISSION RELATING TO SERVICE OF PROCESS ON FOREIGN CORPORATIONS 25 (1959) [hereinafter LAW REVISION COMM'N, RECOMMENDATION].

accident involving defendant Susquehanna Coal, a Pennsylvania corporation, that occurred outside New York.[35] The defendant maintained an office in New York under the direction of a sales agent, with a number of salesmen and with clerical assistants.[36] Through these employees, defendant "systematically and regularly solicit[ed] and obtain[ed] orders . . . in . . . New York."[37] The orders were subject to confirmation in Pennsylvania, and when confirmed the coal orders were shipped from Pennsylvania.[38] The customers paid directly to the Pennsylvania office.[39] Service of process was made on the sales agent in New York.[40]

The Court of Appeals in an opinion by Judge Cardozo, held that the recited facts constituted "doing business" and found personal jurisdiction in New York over the defendant.[41] The standard for "doing business" was phrased:

> If in fact [the foreign corporation] is here, if it is here, not occasionally or causally, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts.[42]

Of note, the court specifically held that personal jurisdiction "does not fail because the cause of action sued upon has no relation in its origin to the business here transacted."[43] Whether the cause of action arose is irrelevant since "[t]he essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action."[44]

Lastly, it should be noted that the court distinguished between the term as used in General Corporation Law section 15 and "kindred" statutes.[45] In this regard, section 15 is a qualification statute: a foreign corporation, which elects to do business in New York, must

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[35] *Tauza*, 115 N.E. at 916–17.
[36] *Id.*
[37] *Id.* at 917.
[38] *Id.* at 916.
[39] *Id.*
[40] *Id.* at 918.
[41] *Id.*
[42] *Id.* at 917 (citing Int'l Harvester Co. v. Kentucky, 234 U.S. 579, 587 (1914)).
[43] *Tauza*, 115 N.E. at 918.
[44] *Id.*
[45] *Id.* at 917. Section 15 of the General Corporation Law has been recodified as N.Y. BUS. CORP. LAW § 1112 (McKinney 2019).

first obtain authority from the Secretary of State.[46] These "doing business" standards are different.[47]

This classic doing business surrogate for physical "presence" test is still followed in New York.[48] In *Landoil Resources Corp. v. Alexander & Alexander Services*, the Court of Appeals most recent CPLR 301 doing business decision, the court reaffirmed the continuing validity of *Tauza*.[49] It held a foreign corporation is subject to personal jurisdiction in New York under CPLR 301 if it has engaged in such a continuous course of "doing business" in New York that a finding of its presence in New York is warranted.[50] Quoting *Tauza*, the court stated personal jurisdiction exists if a court can conclude from the facts before it that a corporation is "present" in New York "not occasionally or casually, but with a fair measure of permanence and continuity."[51]

The doing business standard, conceived in the *Pennoyer* physical presence era and continued in the *International Shoe* "minimum contacts" era, did not present any due process concerns to the courts once there was a finding of doing business. In this regard, *Tauza* was never really constitutionally challenged. In fact, the Court of Appeals observed that its doing business standard survived *International Shoe*.[52]

C. Consent by Designation of the Secretary of State as Foreign Corporations Agent for Service of Process

Prior to September 1, 1963, New York law recognized that a foreign corporation consented to personal jurisdiction in New York for all causes of action asserted against it by registering to do business in New York and appointing the Secretary of State as its agent for the service of process.[53] The now operative statutory processes serving

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[46] *See* Hovey v. DeLong Hook & Eye Corp., 105 N.E. 667, 668–69 (N.Y. 1914).

[47] *Tauza*, 115 N.E. at 917; *see* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, § 83, at 172–73.

[48] Landoil Resources Corp. v. Alexander & Alexander Servs., Inc., 565 N.E.2d 488, 490 (N.Y. 1990).

[49] *Id.* at 490.

[50] *Id.* at 490 (citing Laufer v. Ostrow, 434 N.E.2d 692, 694 (N.Y. 1982)); Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967); Simonson v. Int'l Bank, 200 N.E.2d 427, 428–29 (N.Y. 1964)).

[51] *Landoil Resources Corp.*, 565 N.E.2d at 490 (quoting *Tauza*, 115 N.E. at 917); *see* SECOND PRELIMINARY REPORT, *supra* note 22, at 38 (discussing *Tauza*); Alexander, *Practice Commentaries*, *supra* note 21, C:301.8 (discussing the "doing business" cases).

[52] *See* Simonson v. Int'l Bank, 200 N.E.2d 427, 429–30 (1964).

[53] *See* Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration"*

as the legal foundation for this corporation rule are: (1) Business Corporation Law section 1301(a), which provides that "[a] foreign corporation shall not do business in this state until it has been authorized to do so";[54] (2) Business Corporation Law section 304(a)–(b), which provides, *inter alia*, that no foreign corporation may be authorized to do business in New York unless in its application for authority, it "designates the Secretary of State" as the agent "upon whom process against the corporation may be served";[55] and (3) Business Corporation Law section 1304(a)(6) requires a foreign corporation, in its application of authority to do business in New York "[a] designation of the Secretary of State as its agent upon whom process against it may be served and the post office address within or without this state to which the Secretary of State shall mail a copy of any process against it served upon [the Secretary of State]."[56] Failure to register when the foreign corporation is "doing business" in New York—for purposes of these statutes as governed by Business Corporation Law section 1312(a)—precludes the corporation from maintaining an action or special proceeding in a New York court until it obtains authorization and pays specified fees and taxes.[57]

These registration statutes do not expressly provide that registration and appointment of the Secretary of State constitutes consent to personal jurisdiction. However, by judicial construction, similar to that employed with respect to the "doing business" standard, foreign corporations were deemed to have consented to personal jurisdiction by becoming authorized to do business and appointing the Secretary of State as agent for service of process.[58]

The seminal decision is *Bagdon v. Philadelphia & Reading Coal & Iron Co.*[59] Judge Cardozo's opinion in *Bagdon* initially focused on the filing of the application with the Secretary of State by the foreign corporation and the designation of the Secretary of State in it as the corporation's agent for service of process.[60] The designation was viewed as a "stipulation" and thus a "true contract," expressing "real

Statutes, 73 N.Y.U. ANN. SURV. AM. L. 159, 174–80 (2018).

[54] N.Y. BUS. CORP. LAW § 1301(a) (McKinney 2019).

[55] *Id.* § 304(a)–(b).

[56] *Id.* § 1304(a)(6).

[57] *Id.* § 1312(a).

[58] *See* Chase, *supra* note 53, at 174 (discussing a case in which the corporation was subject to jurisdiction because process was served on a designated agent doing business on its behalf).

[59] Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075 (N.Y. 1916).

[60] *Id.* at 1076.

consent."[61] Judge Cardozo then explored the voluntariness of the foreign corporation's application.[62] He noted that while the failure to obtain authorization would result in the inability to maintain an action in New York, any right the foreign corporation was seeking to enforce was not rendered void, and could still be enforced in other jurisdictions.[63] Thus, the penalty extracted did not render the consent illusory.[64] Judge Cardozo concluded the opinion by observing that its holding was consistent with the Due Process clause.[65]

One year after *Bagdon*, the Supreme Court in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co*.[66] addressed the consent issue. The Court in an opinion by Justice Holmes upheld personal jurisdiction in a Missouri state court of an action sued by an Arizona plaintiff against a Pennsylvania corporation based on an insurance claim arising in Colorado.[67] The basis for the Court's holding was that the Pennsylvania corporation consented to service of process in Missouri by its registration to do business in Missouri.[68] Further, there was no denial of due process since the corporation, having voluntarily registered, ran the "risk of the interpretation that may be put upon [the statute] by the [Missouri] courts,"[69] which "hardly [left] a constitutional question open."[70]

Twenty-two years later, the Supreme Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp*.[71] reaffirmed its holding in *Pennsylvania Fire*.[72] It did so in the context of interpreting a successor New York registration statute post-*Bagdon* in accordance with *Bagdon*. The Court concluded that the defendant had consented to be sued in New York by designating an agent in New York for the service of process.[73] It observed that the registration statute requiring such a designation was constitutional and the designation of the agent was "a voluntary act."[74]

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[61] *Id.*
[62] *See id.* at 1077.
[63] *Id.* at 1076.
[64] *Id.*
[65] *Id.* at 1077.
[66] Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917).
[67] *Id.* at 94.
[68] *See id.* at 95.
[69] *Id.* at 96.
[70] *Id.* at 95.
[71] Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939).
[72] *See id.* at 175.
[73] *See id*. at 174–75.
[74] *See id*. at 175 (citing *Pa. Fire Ins. Co.*, 243 U.S. at 96).

Prior to *Daimler*, the New York courts followed *Bagdon* and uniformly held that a foreign corporation's compliance with New York's registration statutes constituted consent by the corporation to personal jurisdiction over it in New York.[75] Such consent applied to all causes of action, even those that had no relation to New York.[76]

III. *DAIMLER*

A. Constitutional Setting

Since *International Shoe*, the Supreme Court has framed the modern personal jurisdiction doctrine as taking two basic forms: "general jurisdiction," which permits a court to hear any claim against a defendant with "continuous and systematic" contacts with the state, and "specific jurisdiction," which permits a court to hear an action only if the defendant's contacts within the state give rise to or relate to the claim.[77] General jurisdiction is often called "all-purpose" jurisdiction as it permits the exercise of personal jurisdiction even if the claim does not arise out of—or relate to—the defendant's contacts in the forum state.[78] Specific jurisdiction, on the other hand, allows personal jurisdiction only if the asserted claim "aris[es] out of or relate[s] to" those contacts but requires a lesser showing of forum state contacts.[79]

Predicating personal jurisdiction over a foreign corporation based solely under CPLR section 301 and its "doing business" or "consent" bases for a claim that does not arise out of, or relate to defendant's contacts with New York is "general jurisdiction."[80] Prior to *Daimler*, such jurisdictional predicates were clearly constitutionally permissible.

B. The Daimler *Decision*

In *Daimler*, a group of Argentine plaintiffs commenced an action against Daimler AG, a German corporation, in the Northern District

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[75] *See, e.g.*, Flame S.A. v. Worldlink Int'l Holding, 967 N.Y.S.2d 328, 330 (App. Div. 2013), *lv. denied*, 2 N.E.3d 929 (N.Y. 2013); Doubert LLC v. Trustees of Columbia Univ. in the City of N.Y., 952 N.Y.S.2d 16, 18 (App. Div. 2012); Augsbury Corp. v. Petrokey Corp., 470 N.Y.S.2d 787, 789 (App. Div. 1983); Le Vine v. Isoserve, Inc., 334 N.Y.S.2d 796, 799 (Sup. Ct. 1972).

[76] *See, e.g.*, *Flame S.A.*, 967 N.Y.S.2d at 330.

[77] *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 nn.8–9 (1984).

[78] *See* Walden v. Fiore, 571 U.S. 277, 283 n.6 (2014).

[79] *See Helicopteros*, 466 U.S. at 409.

[80] *See* Aybar v. Aybar, 93 N.Y.S.3d 159, 163 (App. Div. 2019).

of California, alleging that "Mercedes-Benz Argentina ("MB Argentina"), a subsidiary of Daimler AG, collaborated with Argentine state security forces to "kidnap, detain, torture, and kill" certain Mercedes-Benz Argentina workers during Argentina's "Dirty War" of 1976–1983.[81] The actions complained of all occurred in Argentina.[82] The plaintiffs named only Daimler AG as defendant in their complaint, and sought to hold it vicariously liable for the actions of its Argentine subsidiary MB Argentina.[83]

Personal jurisdiction over Daimler AG in California was alleged to be proper because its indirect subsidiary, Mercedes-Benz USA ("MBUSA"), a Delaware corporation with its principal place of business in New Jersey, maintained multiple California-based facilities and realized substantial revenues from California sales.[84] Specifically, MBUSA, the exclusive importer and distributor of Mercedes-Benz vehicles in the United States, maintained three offices in California, including a regional headquarters, and total sales of Mercedes-Benz vehicles in California at the time the action was commenced in 2004 were $4.6 billion, constituting 2.4 percent of Daimler AG's worldwide sales of $192 billion.[85] In essence, personal jurisdiction was premised on an agency theory.

The District Court granted Daimler AG's motion to dismiss for lack of personal jurisdiction.[86] It first held that Daimler AG's own affiliations with California were insufficient to support a finding of personal jurisdiction under principles of general jurisdiction.[87] The District court also declined to attribute MBUSA's California contact to Daimler AG on an agency theory, determining that plaintiffs failed to demonstrate that MBUSA acted as Daimler AG's agent.[88]

Reversing the District Court, the Ninth Circuit held that MBUSA was Daimler AG's agent for jurisdictional purposes so that Daimler AG was also subject to personal jurisdiction in California.[89] In so

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[81] *See* Daimler AG v. Bauman, 571 U.S. 117, 122 (2014).

[82] *See id.*

[83] *See id*. at 122–23.

[84] *See id*. at 121.

[85] *See id.* at 148 (Sotomayor, J., concurring in the judgment).

[86] *Id*. at 124 (majority opinion).

[87] *Id*.

[88] *Id*.

[89] *See* Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 931 (9th Cir. 2011), *reh'g and reh'g en banc denied*, 676 F.3d 774 (9th Cir. 2011), *rev'd sub nom. Daimler*, 571 U.S. 117. The court assumed personal jurisdiction over MBUSA was proper under California law. *See id.* at 919 (noting that California's long-arm statute permits that state's courts to exercise personal jurisdiction to the extent due process allows).

holding, the Ninth Circuit recognized that it was finding that personal jurisdiction in California was proper even though none of the activities complained of occurred in California. Personal jurisdiction was nonetheless proper since Daimler AG's activities in California were "substantial" or "continuous and systematic," by reason of its relationship to MBUSA which had such activities.[90] In this connection, the Ninth Circuit concluded MBUSA was Daimler AG's agent for jurisdictional purposes.[91] A significant factor in reaching this conclusion was that MBUSA was sufficiently important to Daimler AG because Daimler AG "would perform equivalent services if no agent were available."[92]

The Ninth Circuit then addressed the issue of whether the exercised personal jurisdiction over Daimler AG would be reasonable.[93] Reasonableness involved the consideration of several factors, including the "[e]xtent of [p]urposeful [i]nterjection," the "[b]urden on the [d]efendant," the "[e]xtent of [c]onflict with [s]overeignty of the [d]efendant's [s]tate," the "[f]orum [s]tate's [i]nterest in [a]djudicating the [s]uit," the "[m]ost [e]fficient [j]udicial [r]esolution of the [d]ispute," and the "[c]onvenience and [e]ffectiveness of [r]elief for the [p]laintiff" and the "[e]xistence of an [a]lternative [f]orum."[94] After considering these factors, the Ninth Circuit concluded that it had "no doubt that [Daimler AG was] subject to personal jurisdiction in California, and that the exercise of such jurisdiction is not only reasonable, but fair and just."[95]

The Supreme Court reversed, holding the "Due Process Clause of the Fourteenth Amendment precludes [a California court] from exercising jurisdiction over [Daimler AG] in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."[96] Applying the constitutional principle of due process most recently set forth in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[97] the Supreme Court emphasized that where the plaintiff's cause of action does not arise out of or relate to a defendant's activities in the forum state, "only a limited set of affiliations with a forum will render a defendant amenable to

[90] *See id.* at 920–21.
[91] *See id.* at 924.
[92] *Id.* at 922 (quoting Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000)).
[93] *See Bauman*, 644 F.3d at 924.
[94] *Id.* at 925–929.
[95] *Id.* at 931.
[96] Daimler AG v. Bauman, 571 U.S. 117, 121 (2014).
[97] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

[general jurisdiction] there."[98] Those affiliations must be of such a quality "as to render [the defendant] at home in the forum State."[99] Here, the Supreme Court ruled, even assuming that the activities of MBUSA were "imputable to [Daimler AG], there would still be no basis to subject [Daimler AG] to general jurisdiction in California, for [Daimler AG's] slim contacts with the State hardly render it at home there."[100]

As to when a corporation is "at home," the Supreme Court held the "paradigm forum" is its "place of incorporation and principal place of business."[101] A corporation will not be at home simply because it "engages in a substantial, continuous, and systematic course of business."[102] However, there may be an "exceptional case" where "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[103] Notably, the activities of Daimler AG as imputed to it "plainly d[id] not approach that level."[104]

The majority rejected the approach suggested by Justice Sotomayor in her concurring opinion.[105] Justice Sotomayor urged a scrutiny of the foreign corporation's contacts with the forum state to determine whether the exercise of general jurisdiction was proper instead of a strict "at home" standard.[106] Upon such scrutiny, she concluded that notwithstanding the case's underdeveloped jurisdictional facts suggesting Daimler AG's contacts with California may have subjected it to general jurisdiction there, it was not reasonable to do so.[107] The majority did not address "reasonableness" as it was of the view that such factor is more appropriately applied in a due process evaluation of long-arm or specific jurisdiction.[108]

Overall, the Court's decision showed its concern that any lesser

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[98] *Daimler*, 571 U.S. at 136 (citing *Goodyear Dunlop*, 564 U.S. at 924); *see also* Oscar G. Chase & Lori Brooke Day, *Re-examining New York's Law of Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown *and* J. McIntyre Machinery, Ltd. v. Nicastro, 76 ALB. L. REV. 1009, 1009–18 (2013) (interpreting *Goodyear Dunlop* the same way *Daimler* did).

[99] *Daimler*, 571 U.S. at 139 (quoting *Goodyear Dunlop*, 564 U.S. at 919).

[100] *Daimler*, 571 U.S. at 136.

[101] *Id*. at 137 (quoting *Goodyear Dunlop*, 564 U.S. at 924).

[102] *Daimler*, 571 U.S. at 138.

[103] *Id*. at 139 n.19.

[104] *Id*.

[105] *See id*. at 142–160 (Sotomayor, J., concurring in the judgment).

[106] *Id.* at 152–53.

[107] *See id*. at 146–48.

[108] *Id.* at 139, n.20 (majority opinion).

general jurisdiction statement would expose a multistate or multinational corporation to a lawsuit on any claim, no matter where in the world they arose in all the many states in which the corporation had business operations.[109] The mere "continuous and systematic" formulation was therefore "exorbitant" and "unacceptably grasping."[110]

The Court also noted that its "at home" general jurisdiction standard is consistent with international standards for the exercise of personal jurisdiction over corporations and would advance the adoption of dictates between foreign countries and the United States or the reciprocal recognition and enforcement of judgments.[111] Notions of "international comity," in sum, supported its "at home" holding.[112]

In sum, *Daimler* permits a state forum court to exercise personal jurisdiction over a corporation with respect to harm sustained by a resident of the state outside the state as a result of the corporation's activities in that state in "three instances: (1) when the corporation is incorporated in the [forum] state, (2) when the corporation has its principal place of business in the [forum] state, or (3) 'in an exceptional case' where the corporation's activities in the [forum] state are 'so substantial and of such a nature as to render the corporation at home in that [forum] State.'"[113] As noted by Justice Sotomayor,[114] this "at home" standard is a restrictive one as compared to its prior foundations in *International Shoe* and *Helicopteros*.

IV. IMPACT OF *DAIMLER* UPON CPLR 301 PERSONAL JURISDICTION OVER A FOREIGN CORPORATION

A. Demise of Doing Business as a Permissible Standard?

1. Generally

"*Daimler* strikes the death knell to the corporate presence [doing

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[109] *See id*. at 138–39.

[110] *Id.*

[111] *Id*. at 140.

[112] *Id*.

[113] SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, § 82, at 215 (quoting *Daimler*, 571 U.S. at 139 n.19).

[114] *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1560–61 & n.3 (2017) (Sotomayor, J., concurring in part, dissenting in part).

business] doctrine," proclaims one commentator.[115] For the most part this is true as post-*Daimler*, a *Tauza*-type "doing business" basis for personal jurisdiction against an unregistered foreign corporation on a New Yorker's claim which rises outside New York would be constitutionally impermissible.[116] As noted in *Daimler* itself, *Tauza* "should not attract heavy reliance today."[117] New York appellate decisions have reached the same conclusion.[118]

With this said, at least three ways of establishing "at home" general jurisdiction over a foreign corporation under CPLR 301's doing business standard are available. All find support in *Daimler*.

2. Principal Place of Business in New York

One way is where the factual predicate for compliance with the doing business standard is that New York is the foreign corporation's principal place of business.[119] If New York is the corporation's principal place of business, such status would certainly satisfy New York's doing business standard, and under *Daimler* the corporation is "at home" in New York and, thus, subject to general jurisdiction in New York.[120]

Daimler did not delineate a standard for a corporation's principal place of business for purpose of its "at home" holding. It did, however, cite to *Hertz Corp. v. Friend*,[121] wherein the Court defined a corporation's principal place of business for purposes of a corporation's citizenship under 28 U.S.C. §1332(c)(1) as the "place where the corporation's high[-]level officers direct, control, and coordinate the corporation's activities" or in other words "the corporation's 'nerve center.'"[122] There appears to be no principled reason why this standard would not be used for "at home" purposes.

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[115] Edward D. Cavanagh, *General Jurisdiction 2:0: The Updating and Uprooting of the Corporate Presence Doctrine*, 68 ME. L. REV. 287, 307 (2016).

[116] *See* Leslie R. Bennett, *Daimler Decision Topples Longstanding New York Cases*, N.Y.L.J., Jan. 24, 2014, p. 4, col. 1; Patrick M. Connors, *Impact of Recent U.S. Supreme Court Decisions on Practice in New York,* N.Y.L.J., June 18, 2014, p. 3, col. 1; Tanya J. Monestier, *Where Is Home Depot "At Home"?:* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 265–75 (2014).

[117] Daimler AG v. Baumann, 571 U.S. 117, 138 n.18 (2014).

[118] *See, e.g.*, Fernandez v. DaimlerChrysler, A.G., 40 N.Y.S.3d 128, 130–31 (App. Div. 2016); Magdalena v. Lins, 999 N.Y.S.2d 44, 45 (App. Div. 2014).

[119] *E.g.*, Robins v. Procure Treatment Ctrs., Inc., 70 N.Y.S.3d 457, 458 (App. Div. 2018)

[120] *See id.* (first quoting *Daimler*, 571 U.S. at 127; and then quoting Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs., 850 N.E.2d 1140, 1142 (N.Y. 2006)).

[121] Hertz Corp. v. Friend, 559 U.S. 77 (2010).

[122] *Id.* at 80–81.

In this connection, such standard designates a single location and is readily ascertainable, factors that the Supreme Court referenced in *Daimler* with regards to its "at home" general jurisdiction standard.[123]

3. "Exceptional Case"

Daimler did not rule out "the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[124] The Court gave no specifics as to what circumstances would support an exceptional case, other than to emphasize that a jurisdictional inquiry cannot be based solely on the quantity of the corporation's activities in the forum state;[125] and cite to *Perkins v. Benguet Consolidated Mining Co*.[126] as an example of an exceptional case.[127]

The Supreme Court's decision in *BNSF Railway Co. v. Tyrell* shows the heavy burden of establishing such an exceptional case. *BNSF* involved an action brought by a North Dakota plaintiff against the defendant railroad company, a Delaware corporation whose principal place of business is Texas, in a Montana state court wherein he sought to recover damages for an accident occurring in Washington.[128] The defendant has over 2,000 miles of railroad track and more than 2,000 employees in Montana,[129] and its revenue derived from Montana was approximately $1.75 billion in 2013.[130] Since the miles of railroad track in Montana was about 6% of its total track mileage, its employee count in Montana was less than 5% of its

[123] *See Daimler*, 571 U.S. at 137 ("clear and certain forum").

[124] *Id.* at 139 n.19.

[125] *Id.* n.20.

[126] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[127] *See Daimler*, 571 U.S. at 139 n.19. *Perkins* involved a Philippine corporation during the Japanese occupation of the Philippines during World War II. *See Perkins*, 342 U.S. at 447. This occupation forced the company to temporarily relocate its management team to Ohio. *See id.* The Court in *Perkins* held general jurisdiction over the corporation was proper because of its president's "continuous and systematic supervision" of the company in Ohio. *Id.* at 447–49.

[128] *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1554 (2017) (citing Tyrrell v. BNSF Ry. Co., 2016 MT 126, ¶¶3, 5, 383 Mont. 417, 419–20, 373 P.3d 1, 3, *rev'd*, 137 S. Ct. 1549); Brief for Respondents at 7, *BNSF*, 137 S. Ct. 1549 (No. 16–405).

[129] *BNSF*, 137 S. Ct. at 1559.

[130] *The Supreme Court 2016 Term: Leading Case: Federal Jurisdiction and Procedure: Civil Procedure–Personal Jurisdiction–*BNSF Railway Co. v. Tyrrell, 131 HARV. L. REV. 333, 333 (2017).

total work force, and its Montana revenue was less than 10% of its total revenue, the Court found an "exceptional case" was not present.[131] To the Court, while the size of BNSF's operations in Montana was large, that did not control as BNSF operated in many other states and its operations in Montana, while large, were small when viewed in the context of BNSF's overall operations.[132]

In effect, *BNSF* precludes a finding of an exceptional case where the foreign corporation operates in more than one state, a point made initially in *Daimler*. The Court had noted in *Daimler* that "[a] corporation that operates in many places can scarcely be deemed at home in all of them."[133] A strong argument can thus be made that an exceptional case will only be found on the *Perkins* facts.[134]

The only New York appellate court decision addressing the exceptional case status, *Aybar v. Aybar*, confirms this reading of *Daimler's* and *BNSF's* view of the exceptional case.[135] *Aybar* involved an automobile accident that occurred in Virginia, which resulted in the death of three passengers and injuries to three other passengers.[136] Plaintiffs, the representatives of the deceased passengers' estates and the surviving passengers, commenced an action against Ford Motor Company ("Ford"), the manufacturer of the vehicle involved, and Goodyear Tire & Rubber Company ("Goodyear"), the manufacturer of the tire on the vehicle which allegedly failed, causing the accident.[137] Both Ford and Goodyear were foreign corporations with their principal place of business outside New York.[138] Personal jurisdiction in New York against both defendants was predicated upon general jurisdiction under CPLR 301 based upon defendants doing business in New York, which was argued to be constitutionally permissible as Ford's and Goodyear's presence in New York brought them within *Daimler's* exceptional case.[139] In support, plaintiff adduced proof that Ford operated a stamping (manufacturing) plant in New York, which employed approximately 600 people, had "hundreds" of Ford

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[131] *BNSF*, 137 S. Ct. at 1554, 1558, 1559 (first citing Tyrrell v. BNSF Ry. Co., No. DV 14-699, slip op. at 2–3 (13th Jud. Dist., Yellowstone Cty., Mont. Oct. 7, 2014); and then quoting *Daimler*, 571 U.S. at 139 n.19)).

[132] *See BNSF*, 137 S. Ct. at 1559 (quoting *Daimler*, 571 U.S. at 127, 139 n.20).

[133] *Daimler*, 571 U.S. at 139 n.20.

[134] *See supra* note 127.

[135] Aybar v. Aybar, 93 N.Y.S.3d 159, 160 (App. Div. 2019).

[136] *See id.* at 160–61.

[137] *Id.* at 161.

[138] *See id.*

[139] *See id.* at 163–64.

dealerships, which employed numerous New York residents, and spent $150 million to maintain its properties in New York;[140] and that Goodyear had operated numerous stores in New York since 1924 and employed thousands of workers who engaged in daily activities in those stores.[141] Ford and Goodyear in response showed the extensiveness of their operations throughout the United States and worldwide, and argued that their contracts with New York were not so substantial as compared with its contacts elsewhere.[142]

State Supreme Court denied Ford's and Goodyear's motions to dismiss for lack of personal jurisdiction.[143] It determined that their activities in New York were "so continuous and systematic that [they were] essentially at home here," and thus were within *Daimler*'s exceptional case category.[144]

The Appellate Division, First Department, reversed, and held that plaintiffs' proof was insufficient to bring Ford and Goodyear within the exceptional case category.[145] The proof was insufficient because appraising Ford's and Goodyear's activities in their "entirety" it could not be said they were "at home" in New York.[146]

In sum, it is incredibly difficult to establish general jurisdiction in a forum state other than the state of incorporation or principal place of business. While in theory there exists an "exceptional case," in reality an exceptional case will rarely, if ever, exist.[147] Presumably, though, an exceptional case would exist where facts, similar to *Perkins*, establish a foreign corporation relocating its principal place of business to New York for a period of time would suffice.[148]

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[140] *Id*. at 161, 165.

[141] *See id*. at 162, 165.

[142] *See id*. at 165.

[143] *Id.* at 160.

[144] *Id.* at 162.

[145] *See id.* at 165, 170.

[146] *Id*. at 165.

[147] A 2017 study of the federal and state court decisions reaches a similar conclusion. *See* Robert N. Holtzman et al., N.Y. State Bar Assoc. Fed. Procedure Comm., *Evolution of General Jurisdiction Rules in the Years Since* Daimler Ag v. Bauman, NYLITIGATOR, Fall 2017, at 91, 103 [hereinafter *Federal Procedure Committee Report*].

[148] *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952). The Supreme Court acknowledged in *Daimler* that it had not yet otherwise addressed the issue. *See* Daimler AG v. Bauman, 571 U.S. 117, 134, 139 n.19 (2014). However, it did criticize the Ninth Circuit's broad agency theory, without explicitly rejecting it. *See id*. at 134–35. The Court also acknowledged the existence of a more rigorous "alter ego" imputation theory, but deliberately made no ruling as to its validity. *See id*. at 135.

4. New York Subsidiary as a Department of a Foreign Parent Corporation

An issue left open by the Supreme Court in *Daimler* is whether the "at home" in New York status of a subsidiary of a foreign corporation can be imputed to the parent foreign corporation so that the foreign corporation is "at home" in New York. Under New York's "mere department" rule which applies when a New York based corporation and a foreign corporation, despite separate incorporations, is in reality a "mere department" of the foreign corporation, such imputation will occur.[149] To invoke this rule the foreign corporation and the New York based corporation must have a parent-subsidiary relationship and the parent must exert such "complete control" over the activities of the subsidiary that it is "in fact, merely a department of the parent."[150] In essence, the subsidiary is the parent's "alter ego."[151]

Whether New York's mere department rule will pass constitutional muster is an issue subject to conflicting views.[152] A New York commentator has argued that where a foreign corporation has a wholly owned American subsidiary, the Supreme Court is likely to find the foreign corporation parent subject to general jurisdiction under the mere department or alter ego theory.[153] However, where the foreign parent corporation has multiple subsidiaries in the United States, the Supreme Court may not find general jurisdiction present as that would be the kind of "exorbitant exercises of all-purpose jurisdiction."[154]

B. Continued Viability of Consent Basis?

Daimler calls into question the continued viability of New York's

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[149] *See* Taca Int'l Airlines, S.A. v. Rolls-Royce of Eng., Ltd., 204 N.E.2d 329, 330–31 (N.Y. 1965). *See generally* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra*, note 2, § 82, at 217–18 (discussing *Taca* and the "mere department" rule); Alexander, *Practice Commentaries*, *supra* note 21, C301:9 (same).

[150] Delagi v. Volkswagenwerk AG, 278 N.E.2d 895, 897 (N.Y. 1972) (citing Pub. Adm'r of County of N.Y. v. Royal Bank of Can., 224 N.E.2d 877, 879 (N.Y. 1967)); *see* Sheila Birnbaum, *Civil Practice*, 24 SYRACUSE L. REV. 447, 457–58 (1973).

[151] *See* GEM Advisors, Inc. v. Corporacion Sidenor, S.A., 667 F. Supp. 2d 308, 319 (S.D.N.Y. 2009) (citing Storm LLC v. Telenor Commc'ns AS, No. 06 Civ. 13157 (GEL), 2006 U.S. Dist. LEXIS 90978, at *39 n.8 (S.D.N.Y. Dec. 18, 2006)).

[152] *See* Monestier, *supra* note 116, at 287–92.

[153] Cavanagh, *supra* note 115, at 315–16.

[154] *Id*. at 316; *see also* Alexander, *Practice Commentaries*, *supra* note 21, C301:8 (2014 Supp.).

consent to personal jurisdiction by a foreign corporation based upon the corporation's acquisition of authorization to do business in New York.[155] Commentators[156] and the courts[157] are split on whether such consent personal jurisdiction is still constitutionally permissible.

The case for unconstitutionality was made in *Brown v. Lockheed Corp*.,[158] which indicated *in dicta* that it was unlikely that registration of an agent could constitute consent to general jurisdiction following *Daimler*.[159] More specifically, the *Brown* court stated:

> In any event, we can say that the analysis that now governs general jurisdiction over foreign corporations—the Supreme Court's analysis having moved from the "minimum contacts" review described in *International Shoe* to the more demanding "essentially at home" test enunciated in *Goodyear* and *Daimler*—suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate "consent"—perhaps unwitting—to the exercise of general jurisdiction by state courts, particularly in circumstances where the state's interests seem limited.[160]

A New York commentator has made the case for the continued constitutional validity of consent by registration as follows:

> The constitutionality of general jurisdiction by registration was established almost a century ago in *Pennsylvania Fire* and has not since been challenged by the Supreme Court. The arguments to overrule it are not persuasive largely because registration by a corporation reflects a knowing, voluntary choice. The Supreme Court has regularly upheld state judicial jurisdiction based on implicit or explicit consent, even in

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[155] *See* Jason P. Gottlieb & Michael Mix, *Registration and Jurisdiction After* 'Daimler'*: Awaiting Clarity; Outside Counsel*, N.Y.L.J., Dec. 30, 2016, at 3, col.3.

[156] *See* Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 510–12 (2016) (discussing cases following and departing from *Pennsylvania Fire*); Monestier, *supra* note 31, at 1361 (discussing critiques of the consent by registration approach in light of case law).

[157] *See* Genuine Parts Co. v. Cepec, 137 A.3d 123, 145 n.119 (Del. 2016) (collecting cases holding that *Daimler* negates consent by registration); *id.* at 148–49 n.130 (Vaughn, J., dissenting) (collecting cases holding that consent by registration remains valid after *Daimler*).

[158] Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016).

[159] *See id.* at 637.

[160] *Id.*

> situations where it appeared the defendant lacked any realistic alternatives. The assertion that the consent given by registration is not freely given ignores the reality of corporate principals' powers of decision. Weighing the alternatives, they may elect to limit or avoid activity in some states or to proceed with business in the state anyway but decline to register (risking little if any sanction), or they may elect to register. Importantly, these options reflect realistic alternatives that individual corporations can pursue according to their particular purposes. Nothing in *Daimler* or *Goodyear* explicitly challenges the long line of cases validating consent. Rather, the Court's long and continuing endorsement of state exercise of general jurisdiction based only on incorporation within the state—i.e., by consent and nothing more—strongly supports the constitutionality of registration jurisdiction.[161]

The Appellate Division, Second Department, addressed the issue in *Aybar v. Aybar*. The court held New York's consent by registration rule was an unconstitutional basis to assert personal jurisdiction over a foreign corporation.[162] After a review of the development of the rule and the pertinent Supreme Court decisions, it stated its rational for so holding:

> We agree with those courts that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be "unacceptably grasping" under *Daimler*.[163]

Needless to say, it is not realistic at this point to say with any certainty how the New York Court of Appeals will determine the issue if *Aybar* is appealed to that court. Furthermore, any decision by the Court of Appeals would give way once the United States Supreme Court determines the issue. The result is until *Aybar* is overruled or another department of the Appellate Division rejects it holding, personal jurisdiction over a foreign corporation cannot be

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[161] Chase, *supra* note 53, at 199–200.
[162] Aybar v. Aybar, 93 N.Y.S.3d 159, 170 (App. Div. 2019).
[163] *Id*. (quoting Daimler AG v. Bauman, 571 U.S. 117, 138 (2014)).

exercised merely because it has been authorized to do business in New York.

C. Practical Consequences for Litigants

For almost 100 years, the New York courts never questioned the constitutionality of personal jurisdiction over a foreign corporation with respect to a claim against that corporation which occurs outside New York and harmed a New Yorker based upon a doing business standard and consent standard as discussed in this article. However, the Supreme Court in *Daimler* has limited the use of the doing business standard to, in essence, three narrow situations,[164] and called into question the continued viability of the consent standard.[165] New Yorkers may as a result be forced to litigate their claims occurring outside New York in the corporation's state of incorporation or principal place of business. Another basis for personal jurisdiction for such claims must be sought out. The basis, as will be discussed, is CPLR 302(a)(1).

V. CPLR 302(A) AS AN ALTERNATIVE BASIS FOR PERSONAL JURISDICTION

A. Generally

CPLR 302(a) provides as follows:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any

[164] *See supra* Section IV.A.
[165] *See supra* Section IV.B.

> other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.[166]

It authorizes New York courts to assert personal jurisdiction over foreign corporations,[167] as well as non-domiciliary individuals, that are not subject to personal jurisdiction under CPLR 301, but instead have contacts with New York which are specifically enumerated in the section.[168] The sole limitation placed on the exercise of jurisdiction pursuant to the section is that the asserted cause of action arises from the specifically enumerated New York contacts.[169]

Where personal jurisdiction is available under CPLR 302(a), the constitutionality of the exercise of personal jurisdiction will be

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[166] N.Y. C.P.L.R. 302 (McKinney 2019). As initially enacted, CPLR 302(a) provided as follows:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. owns, uses or possesses any real property situated within the state.

Ann Marie Burke, *CPLR 302(a)(3)(ii): Out-of-State Conversion Deemed Sufficient Predicate for Asserting in Personam Jurisdiction over Nonresident Defendant*, 53 ST. JOHN'S L. REV. 603, 603 n.1 (1979) (citing 1962 N.Y. Laws Ch. 308). CPLR 302(a)(1) was amended to add "contracts anywhere to supply goods or services in the state" upon the recommendation of the Law Revision Commission. RECOMMENDATION OF THE LAW REVISION COMMISSION 12, Bill Jacket, 1979 N.Y. Laws Ch. 252. CPLR 302(a)(3) was added by 1966 N.Y. Laws Ch. 599 in response to the Court of Appeals decision in Feathers v. McLucas, 209 N.E.2d 68 (N.Y. 1965). *See* David L. Ferstendig, *The CPLR at Fifty: Its Past, Present, and Future: The CPLR: A Practitioner's Perspective*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 680, 681 (2013). The present CPLR 302(a)(4) was renumbered to (a)(4) with the addition of a new (a)(3) by 1966 N.Y. Laws Ch. 599.

[167] *See* Simonson v. Int'l Bank, 200 N.E.2d 427, 431 (N.Y. 1964) ("Although the section does not in terms refer to corporations, its application to foreign corporations, as well as to nonresident individuals, seems clear.").

[168] *See* C.P.L.R. 302(a); *see also* Zibiz Corp. v. FCN Tech. Sols., 777 F. Supp. 2d 408, 420 (E.D.N.Y. 2011) ("Section 302 requires that the cause of action 'arise from' the defendant's contacts with New York.")

[169] *See* C.P.L.R. 302(a).

subject to specific jurisdiction analysis.[170] Specific jurisdiction analysis has two separate components: a "minimum contacts" analysis and a "reasonableness" analysis.[171] The "minimum contacts" analysis requires a court to consider whether the defendant's "'conduct and connection with [New York]' are such that it 'should reasonably anticipate being haled into court there.'"[172] The reasonableness analysis requires a court to consider whether the exercise of personal jurisdiction in New York "comport[s] with traditional notions of 'fair play and substantial justice.'"[173]

Does CPLR 302(a) with its statutory requirements and the applicable specific jurisdictions constitutional limitations provide an alternative basis for personal jurisdiction in New York over a foreign corporation's tortious conduct injuring a New Yorker outside the state, thereby filling the void left by *Daimler*? Certainly, CPLR 302(a)(3) is inapplicable by its very terms: although it encompasses a tortious act committed outside New York, the injury has not occurred in New York;[174] and CPLR 302(a)(2) is inapplicable as the "tortious act [did not occur] within [New York]."[175]

However, CPLR 302(a)(1)'s "transact[ion] [of] any business within [New York]" basis may, depending on the facts of a particular case, be a potential way to assert personal jurisdiction in the posited

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[170] *See* Daimler AG v. Bauman, 571 U.S. 117, 127–28 (2014); AlbaniaBEG Ambient Sh.p.k v. Enel S.p.A., 73 N.Y.S.3d 1, 9 n.10 (App. Div. 2018); Amelius v. Grand Imperial LLC, 64 N.Y.S.3d 855, 865–866 (Sup. Ct. 2017). Curiously, the Court of Appeals uses the terminology in the context of whether a plaintiff has established personal jurisdiction under CPLR 302(a) and not whether the jurisdiction so exercised is constitutional. *See* Licci v. Lebanese Canadian Bank, SAL, 984 N.E.2d 893, 901 (N.Y. 2012).

[171] *See* D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 78 N.E.3d 1172, 1177 (N.Y. 2017); Rushaid v. Pictet & Cie, 68 N.E.3d 1, 12–13 (N.Y. 2016); LaMarca v. Pak-Mor Mfg. Co., 735 N.E.2d 883, 887 (N.Y. 2000).

[172] *See LaMarca*, 735 N.E.2d at 887 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[173] *LaMarca*, 735 N.E.2d at 888 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)). The Court of Appeals noted that the Supreme Court in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), stated that "reasonableness" required a consideration of the "burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantial social policies.'" *LaMarca*, 735 N.E.2d at 888 (quoting *Asahi*, 480 U.S. at 113).

[174] *See* Paterno v. Laser Spine Inst., 23 N.E.3d 988, 996 (N.Y. 2014) (quoting Hermann v. Sharon Hospital, Inc., 522 N.Y.S.2d 581, 583 (App. Div. 1987)) ("[T]he situs of the injury . . . is the location of the original event which caused the injury, and not where a party experiences the consequences of such injury.").

[175] Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc. 209 N.E.2d 68, 76 (N.Y. 1965), *rev'g* Feathers v. McLucas 251 N.Y.S.2d 548 (App. Div. 1964), *cert. denied*, 382 U.S. 905 (1965).

situation.[176] The reason is CPLR 302(a)(1) by its very terms applies to *any* cause of action involving tortious conduct that occurred outside New York as long as the cause of action being asserted arose from the defendant's transaction of business in New York.

B. Evolution of CPLR 302(a)(1)

Prior to September 1, 1963, when the CPLR became effective, the only statutory basis for the exercise of personal jurisdiction over non-domiciliaries and foreign corporations was CPLR 301[177] and other specific statutes providing for personal jurisdiction in actions arising out of specified kinds of activity.[178] These limited bases for personal jurisdiction were the result of *Pennoyer*, and its focus on physical presence as the source for the exercise of personal jurisdiction.[179]

Personal jurisdiction doctrine was freed from the restraints of *Pennoyer* when the Supreme Court in *International Shoe v. Washington* revisited its prior notion of due process. The Supreme Court in *International Shoe* opined that a state can exercise personal jurisdiction of a defendant if the claim(s) sued on "arise out of or are connected with the activities within the state," no matter where the defendant is served with process.[180] The limiting condition was that:

> [D]ue process require[d] only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[181]

This constitutional limitation will require a *sui generis* inquiry in every case, namely, "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to

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[176] *See infra* Part VII.

[177] *See supra* Part II.

[178] *See, e.g.*, N.Y. GEN. BUS. LAW § 250 (McKinney 2019) (operation of an aircraft "within or above" New York); N.Y. VEH. & TRAF. LAW § 253 (McKinney 2019) (operation of a motor vehicle in New York by a non-resident); N.Y. WORKERS' COMP. LAW § 150-a (McKinney 2019) (proceeding against non-residents, non-insured employer who has engaged in work in the state); LAW REVISION COMM'N, RECOMMENDATION, *supra* note 34, at 18–26.

[179] *See supra* Section II.A; *see also* Note, *Jurisdiction in New York: A Proposed Reform*, 69 COLUM. L. REV. 1412, 1413 (1969) (discussing the inadequacy of the *Pennoyer* framework).

[180] Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[181] *Id*. at 315 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

the fair and orderly administration of the law which it was the purpose of the due process clause to ensure."[182]

In the aftermath of *International Shoe*, states enacted so-called long-arm statutes, pressing toward the new limits of the due process clause set forth therein.[183] For example, a California statute subjected foreign corporations to personal jurisdiction in California on any insurance policy issued on the life of a California resident.[184] This statute was in issue in *McGee v. International Life Insurance Co*.[185] Defendant life insurance company, a Texas corporation, had issued through its predecessor a life insurance policy on the life of a California resident, which had been mailed to the insured in California.[186] The insurer had no office in California, and had never solicited business or performed any insurance business there except for the policy involved in the case.[187] Upon the insured's death, the beneficiary under the policy made a claim for benefits under the policy, which the insurer denied.[188] The beneficiary then commenced an action in California where she resided, and recovered a judgment against the insurer.[189]

Relying upon its decision in *International Shoe*, the Supreme Court found a sufficient contact between the Texas insurer and California to support personal jurisdiction over the defendant on a cause of action related to the policy involved.[190] The Court further found that it was not unreasonable to subject the Texas insurer to personal jurisdiction in California because the action and the cause of action therein were based on a contract which had "substantial connection" with California;[191] and because of California's "manifest interest" in providing a forum for its residents to sue foreign insurers.[192]

McGee certainly construed *International Shoe* broadly and showed without doubt the necessary "minimum contacts" could consist of a

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[182] *Int'l Shoe*, 326 U.S. at 319; SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, § 84, at 174.

[183] *See* LAW REVISION COMM'N, RECOMMENDATION, *supra* note 34, at 63–70 (collecting the statutes).

[184] CAL. INS. CODE § 1610 (West 2019).

[185] McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

[186] *See id*. at 221.

[187] *See id*. at 222.

[188] *See id*. at 221–22.

[189] *See id*. at 221.

[190] *See id*. at 222–23.

[191] *See id*. at 223.

[192] *See id*.

single act.[193] To be sure, the Supreme Court in *Hanson v. Denckla*[194] warned against over-reading *McGee* for "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[195] Nonetheless, state legislatures, taking their cue from *International Shoe* and *McGee* began enacting long-arm statutes that encompassed not just one activity, as the California statute did in *McGee*, but a wide variety of contacts with their states.[196] One of these statutes was Illinois Civil Practice Act §17, enacted in 1955 as part of a revised Illinois Civil Practice Act.[197] It provides:

> Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
> (1) The transaction of any business within this State;
> (2) The commission of a tortious act within this State;
> (3) The ownership, use, or possession of any real estate situated in this State;
> (4) Contracting to insure any person, property, or risk located within this State at the time of contracting . . . .[198]

A comparison of section 17 with CPLR 302(a) as originally enacted reveals that CPLR 302(a)(1)–(3) was derived verbatim from section 17, except as to the defamation exclusions and section 17's subdivision (d).[199]

The drafters of CPLR 302(a) acknowledged that like the Illinois statute the section "is designed to take advantage of the

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[193] *See id.* at 221–23

[194] Hanson v. Denckla, 357 U.S. 235 (1958).

[195] *Id.* at 251.

[196] *See* LAW REVISION COMM'N, RECOMMENDATION, *supra* note 34, at 63–70.

[197] *See* 735 Ill. COMP. STAT. ANN. 5 / 2-209 (2019); Edward W. Cleary & Arthur R. Seder, Jr., *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U. L. REV. 599, 599 (1955); Albert E. Jenner, Jr. & Philip W. Tone, *Historical and Practice Note*, SMITH-HURD ANNOTATED STATUTES Ch. 10 (1956), *reprinted in* SECOND PRELIMINARY REPORT, *supra* note 22, 471–78.

[198] 735 ILL. COMP. STAT. ANN. 5 / 2-209.

[199] *See* SECOND PRELIMINARY REPORT, *supra* note 22, at 39 ("This section, [CPLR 302(a) is] modeled upon section 17 of the Illinois Civil Practice Act which was effective on January 1, 1956.").

constitutional power of the state of New York to subject non-residents to personal jurisdiction when the commit acts within the state."[200] However, CPLR 302(a), as originally enacted and amended, was not extended in all respects to the constitutional limits established by *International Shoe* and its progeny.[201] Apparently, as noted by a New York commentator, the Legislature "felt that the time was not ripe for a statute of . . . [broader] sweep."[202]

C. CPLR 302(a)(1)'s Transaction of Business Basis: Scope and Elements

1. Scope

The scope of CPLR 302(a)(1)'s transaction of business basis is broad. In this regard, *any* cause of action, tort or contract, is encompassed by this basis. While one might assume that only a contract or commercial cause of action would fall within its scope due to the "transaction of business" condition, which certainly do,[203] such assumption would be wrong. The courts have consistently noted that tort causes of action arising from a New York business transaction seeking damages for personal injuries suffered outside New York can fall within its scope.[204] Furthermore, "any business" transaction

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[200] *Id.*

[201] *See* Best Van Lines, Inc. v. Walker, 490 F.3d 239, 244–45 n.8 (2d Cir. 2007) (noting "gaps" between the personal jurisdiction bases of CPLR 302(a) and that permissible under the Due Process Clause); Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd., 464 N.E.2d 432, 435 (N.Y. 1984) ("[I]n setting forth certain categories of bases for long-arm jurisdiction, CPLR 302 does not go as far as is constitutionally permissible."); 2 WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE, *supra* note 24, ¶ 301.04; Alexander, *Practice Commentaries*, *supra* note 21, C302:2; *see also* Patrick J. Borchers, *The Problem with General Jurisdiction*, 204 U. CHI. LEG. F. 119, 122 n.17 (listing long-arm statutes in other states that extend to constitutional limits).

[202] Adolf Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 BUFF. L. REV. 61, 62 (1966).

[203] *See, e.g.*, Fischbarg v. Doucet, 880 N.E.2d 22, 24 (N.Y. 2007); Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs., 850 N.E.2d 1140, 1141 (N.Y. 2006); George Reiner & Co., Inc. v. Schwartz, 363 N.E.2d 551, 555 (N.Y. 1977).

[204] *See* Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 209 N.E.2d 68, 81 (N.Y. 1965) ("It is clear that paragraph 1 is not limited to actions in contract; it applies as well to actions in tort when supported by a sufficient showing of facts."), *aff'g* Singer v. Walker, 250 N.Y.S.2d 216 (App. Div. 1964), *cert. denied*, 382 U.S. 905 (1965); *see, e.g.*, SCPA of Upstate N.Y., Inc. v. Am. Working Collie Ass'n, 963 N.E.2d 1226, 1228 (N.Y. 2012); *see also Longines-Wittnauer*, 209 N.E.2d at 80 (negligence action alleging personal injuries due to a defective hammer), *aff'g Singer*, 250 N.Y.S.2d 216; Lebel v. Tello, 707 N.Y.S.2d 426, 427 (App. Div. 2000) (negligence action alleging personal injuries due to airplane crash); McLenithan v. Bennington Cmty. Health Plan, 635 N.Y.S.2d 812, 813–14 (App. Div. 1996) (medical malpractice action), *lv. denied*, 672 N.E.2d 609 (N.Y. 1996).

involving goods or services is encompassed by this basis, irrespective of whether it is a commercial or non-commercial transaction.[205]

2. Elements

To establish personal jurisdiction over a defendant under CPLR 302(a)(1), a plaintiff by the statute's terms must establish two elements: (1) the defendant, in person or through an agent, transacted business in New York; and (2) the cause of action alleged arose from the transaction. The initial decision of the Court of Appeals interpreting and applying them to the facts of the case before it noted these elements as "liberal statutory criterion" designed "to take advantage of the 'new [jurisdictional] enclave.'"[206]

a. "Transaction of Business" Element

Initially, it must be noted that a finding of a "transaction of business" requires considerably less than the contacts required under the "doing business" standard.[207] The Court of Appeals has expressly recognized that one business transaction, from which the cause of action arises, is sufficient for purposes of establishing a "transaction of business."[208]

To establish the requisite transaction of business in New York, the Court of Appeals has noted there must be proof of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within New York,"[209] thereby "invoking the benefits and protections of its laws."[210] So long as the defendant's activities in New York were purposeful, the defendant need not physically enter New York.[211] A defendant's use of electronic and telephonic means "to project [the defendant] into New York to conduct business transactions" is sufficient.[212] Overall, it is the quality of the

[205] *See, e.g.*, Ferrante Equip. Co. v. Lasher-Goldman Corp., 258 N.E.2d 202, 203 (N.Y. 1970) (writing of performance bond); *Longines-Wittnauer*, 209 N.E.2d at 74 (machinery purchase), *aff'g* 251 N.Y.S.2d 740 (App. Div. 1964); Kochenthal v. Kochenthal, 282 N.Y.S.2d 36, 37 (App. Div. 1967) (separation agreement).

[206] *Longines-Wittnauer*, 209 N.E.2d at 75 (alteration in original).

[207] Simonson v. Int'l Bank, 200 N.E.2d 427, 429–31 (N.Y. 1964).

[208] Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs., 850 N.E.2d 1140, 1142 (N.Y. 2006).

[209] Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 834 (N.Y. 2007) (quoting McKee Elec. Co. v. Rauland-Borg Corp., 229 N.E.2d 604, 607 (N.Y. 1967)).

[210] Fischbarg v. Doucet, 880 N.E.2d 22, 26 (N.Y. 2007) (quoting *McKee Elec. Co.*, 229 N.E.2d at 607).

[211] *Fichsbarg*, 880 N.E.2d at 26 (quoting *Deutsche Bank*, 850 N.E.2d at 1142).

[212] *Deutsche Bank*, 850 N.E.2d at 1143.

defendant's purposeful contacts with New York that is the primary consideration in determining whether a transaction of business in New York has occurred.[213]

Notably, while the term "purposeful availment" is an important part of the transaction of business standard, the legislative history of CPLR 302(a)(1) does not support its use in determining whether there has been a transaction of business for purposes of the statute.[214] As pointed out by a commentator,[215] this term was adopted from the Supreme Court's decision in *Hanson v. Denckla*[216] which was employed by the Supreme Court in examining the Due Process clause limitations on a state court's exercise of personal jurisdiction over a non-domiciliary defendant.[217] Use of a "purposeful availment" requirement to satisfy the statute "'tend[s] to conflate the long-arm statutory and constitutional analyses by focusing on the constitutional standard[s]' which results in a significant overlap of definitions for what constitutes a 'transaction of business' under CPLR section 302(a)(1) with the constitutional 'minimum contacts' doctrine."[218] As a result, the drafter's intent as to the statutory reach of CPLR 302(a)(1) is obviously restricted. Furthermore, defining purposeful availment has also become an "elusive pursuit."[219]

b. "Arising From" Element

A defendant's transaction of business in New York will provide a basis for personal jurisdiction only if the plaintiff's cause of action "arises from" that transaction. This element appears to be intended by the drafters as a means to limit the intended broad reach of the "transaction of business" element.[220] While the element requires

[213] *See Fischbarg*, 880 N.E.2d at 26; C. Mahendra (NY), LLC v. Nat'l Gold & Diamond Ctr., Inc., 3 N.Y.S.3d 27, 31 (App. Div. 2015).

[214] *See* SECOND PRELIMINARY REPORT, *supra* note 22, at 38–39.

[215] *See* Jay C. Carlisle, *Seeking Justice in the Empire State: Court of Appeals Broadens the Reach of Long Arm Jurisdiction and Clarifies the Statutory Guidelines for Application of CPLR Section 302(a)(1)*, 77 ALB. L. REV. 89, 106–107 & n.129 (2013).

[216] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[217] According to the Supreme Court, the purposeful availment requirement ensures that jurisdiction is not premised on "random, isolated, or fortuitous" contacts with the forum state, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 714 (1984), but rather guarantees that the exercise of personal jurisdiction is "fair, just, or reasonable," Rush v. Savchuk, 444 U.S. 320, 329 (1980).

[218] *See* Carlisle, *supra* note 215, at 107 (quoting Best Van Lines, Inc. v. Walker, 490 F.3d 239, 247 (2d Cir. 2007).

[219] Note, *Jurisdiction in New York: A Proposed Reform*, *supra* note 179, at 1420 n.61.

[220] Licci v. Lebanese Canadian Bank, SAL, 984 N.E.2d 893, 900–01 (N.Y. 2012).

some nexus between the transaction of business and the cause of action alleged, how closely a cause of action must be tied to the transaction of business is not addressed in CPLR 302(a)(1)'s legislative history.[221] Thus, the question: what does the phrase mean, that is, when does a cause of action arise from the transaction of business? An issue of statutory interpretation is presented.

Analysis starts with recognition that the phrase "arises from" is most certainly is derived from *International Shoe*'s "minimum contacts" Due Process rule. In this regard, Due Process is satisfied, according to the Supreme Court, where the cause of action asserted "arise[s] out of" the relied upon minimum contacts.[222] Furthermore, the minimum contacts in *International Shoe* were the activities of International Shoe's salesmen in Washington, that is, the transaction of business in Washington.[223] Thus, the phrase has a constitutional background.

Such use raises another question, namely, whether its use in a state statute specifying permissible *statutory* bases for personal jurisdiction is to be used in a manner that is distinguishable from its *constitutional* origin. Giving it the same meaning that it has for constitutional purposes would certainly then make it unnecessary to have such a phrase in the statue as the absence of an "arising from" phrase would be imposed by constitutional analysis. However, what the actual intent of the drafters is on this matter is not readily discernable.[224]

In the absence of any guidance for the legislative history, the Court of Appeals in its decisions interpreted the phrase "arising from" as requiring an "articulable nexus"[225] or "substantial relationship"[226] between the business transaction and the cause of action alleged. Such a causal connection is considerably stricter then its

[221] *See* SECOND PRELIMINARY REPORT, *supra*, note 22, at 38–39.

[222] Int'l Shoe Co. v. Washington, 326 U.S. 310, 319–21 (1945). In subsequent decisions the Supreme Court referred to specific jurisdiction when the cause of action arose out of or were "related to" the defendant's contacts with the forum state. *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984). The Supreme Court did not in *Helicopteros* discuss the alternative standard, *id.* n.10, and has not yet addressed "exactly how a defendant's activities must be tied to the forum [state] for a court to properly exercise specific personal jurisdiction over a defendant," SPV Osus, Ltd. v. UBS AG, 882 F.3d 333, 344 (2d Cir. 2018).

[223] *See Int'l Shoe*, 326 U.S. at 320, 321.

[224] SECOND PRELIMINARY REPORT, *supra* note 22, at 38–39.

[225] McGowan v. Smith, 419 N.E.2d 321, 323 (1981).

[226] Kruetter v. McFadden Oil Corp., 522 N.E.2d 40, 43 (N.Y. 1988) (citing Reiser & Co. v. Schwartz, 363 N.E.2d 551, 553 (N.Y. 1977)); *McGowan*, 419 N.E.2d at 323.

constitutional counterpart.[227]

Of note, multiple interpretations and contractions of the phrase "arising out of" have emerged in states which have adopted a transaction of business standard identical to CPLR 302(a)(1). One interpretation is that the phrase incorporates a "proximate cause" standard.[228] Under this interpretation the business transaction must be the legal cause of the plaintiff's harm or injury.[229] A second interpretation requires only "but for" causation.[230] Under this interpretation a plaintiff must show that no injury or harm would have been suffered but for the defendant's transaction of business.[231] A third interpretation requires a "substantial connection" and "discernable relationship" between the business transaction and the cause of action.[232] Under this interpretation the issue is whether the connection between the transaction of business and plaintiff's cause of action is close enough to make jurisdiction fair and reasonable.[233] A fourth interpretation is whether it is reasonably foreseeable for the defendant that as a result of defendant's transaction of business defendant could be sued in the forum state.[234] Review of New York decisions involving the "arising from" element do not reveal any effort by the litigants or the courts to reconsider New York's adoption of the "substantial relationship" standard in view of this national split.

A comparison of these interpretations suggest that the proximate cause standard is the most restrictive and the but for standard the

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[227] *See* Talbot v. Johnson Newspaper Corp., 522 N.E.2d 1027, 1028–29 (N.Y. 1988) ("[T]he New York long-arm statute (CPLR 302) does not provide for in personam jurisdiction in every case in which due process would permit it." (citing Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, Ltd., 464 N.E.2d 432, 434–35 (N.Y. 1984))); *see also* Graphic Controls Corp. v. Utah Med. Prods., Inc., 149 F.3d 1382, 1386–87 (Fed. Cir. 1998) (concluding the statutory nexus requirement has been "interpreted very narrowly" by the Court of Appeals).

[228] *See, e.g.*, Pizarro v. Hoteles Concorde Int'l, C.A., 907 F.2d 1256, 1259 (1st Cir. 1990); Gelfand. v. Tanner Motor Tours, Ltd., 339 F.2d 317, 321–22 (2d Cir. 1964).

[229] The First Circuit commented that the standard may be "loosen[ed] . . . when circumstances dictate [as] such flexibility is necessary in the jurisdictional inquiry: relatedness cannot merely be reduced to one tort concept for all circumstances." Nowak v. Tak How Invs., 94 F.3d 708, 716 (1st Cir. 1996).

[230] *See, e.g.*, Shute v. Carnival Cruise Lines, 897 F.2d 377, 384 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); Lanier v. Am. Bd. of Endodontics, 843 F.2d 901, 909 (6th Cir. 1988), *cert. denied*, 488 U.S. 926 (1988); Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. 1981); Tatro v. Manor Care, Inc., 625 N.E.2d 549, 553 (Mass. 1994).

[231] *See* Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995).

[232] *See, e.g.*, Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085, 1094 (Cal. 1996); Shoppers Food Warehouse v. Moreno, 746 A.2d 320, 335 (D.C. Ct. App. 2000); Domtar, Inc. v. Niagara Fire Ins. Co., 533 N.W.2d 25, 31 (Minn. 1995).

[233] *Shoppers Food*, 746 A.2d at 336.

[234] *See, e.g.*, Thomason v. Chem. Bank, 661 A.2d 595, 603 (Conn. 1995).

most liberal as to establishing the requisite nexus.[235] The other two are more flexible in that a determination of whether their standard is met will require a fact intensive inquiry. Such inquiry, however, will be hampered because there are no clear guidelines as to what constitutes "substantial" or when the injury or harm is foreseeable.

VI. CPLR 302(A)(1) AS INTERPRITED BY *D&R GLOBAL*

A. Introduction

In *D&R Global Solutions, S.L. v. Bodega Olegario Falcon Pineiro*, the Court of Appeals had its first opportunity to examine and apply CPLR 302(a)(1) since *Daimler* and *BNSF* were decided. As will be shown, the lesson learned from *D&R Global* is that CPLR 302(a)(1)'s transaction of business-based personal jurisdiction basis is broad, much broader than prior Court of Appeals precedent has instructed, at least until the United States Supreme Court determines a finding of personal jurisdiction under CPLR 302(a)(1) based on *D&R Global* is vacated as impermissible under a constitutional specific jurisdiction analysis.

B. Decision

1. Facts

In *D&R Global*, plaintiff, a Spanish company, was engaged in the business of procuring American wine importers for Spanish wine makers.[236] In March, 2005, the defendant, a Spanish winery, entered into an oral agreement with plaintiff[237] in Spain to procure an American wine importer for the defendant's wine.[238] Neither plaintiff nor defendant had offices in New York, and the contract was entered into in Spain.[239]

Under the agreement, defendant would pay a commission to plaintiff based upon sales of its wine to a distributor procured by

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[235] The "but for" standard has been lauded because it "is consistent with the basic function of the 'arising out of' requirement." THOMAS A. DICKERSON ET AL., LITIGATING INTERNATIONAL TORTS IN U.S. COURTS § 9:17 (Aug. 2018 Update).

[236] *See* D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 78 N.E.3d 1172, 1174 N.Y. 2017).

[237] *See id.*

[238] *See id.*

[239] *See id.*

defendant.[240] "Following the agreement, defendant accompanied plaintiff to New York several times to meet potential distributors and promote defendant's wine."[241] At an event in May 2005, "plaintiff introduced defendant to Kobrand Corp., a wine importer and distributor located in New York."[242] In November 2005, "[d]efendant began selling wine to Kobrand."[243] In January, 2006, at an event in New York, attended by defendant, plaintiff acquired Kobrand Corporation as the exclusive United States distributor for defendant's wine.[244] Plaintiff was paid a commission for the year 2006, but thereafter defendant made no further payment despite continuing to receive sales orders from Kobrand.[245] It claimed "that its obligation to pay commissions under the oral agreement expired after one year."[246] Plaintiff asserted that the agreement had an indefinite duration, and would continue for so long as the defendant winery sold its wine to Kobrand.[247]

Plaintiff commenced an action in Supreme Court, New York County, against defendant, alleging breach of contract.[248] Defendant defaulted, allegedly on the advice of counsel that personal jurisdiction was so lacking the action would have to be dismissed.[249] The plaintiff was granted a default judgment, and after inquest, judgment was rendered in favor of plaintiff for $133,570.21.[250] The defendant then moved to vacate the default, which motion Supreme Court denied.[251] It held defendant failed to establish a reasonable excuse for the default and personal jurisdiction over defendant was not present.[252] On appeal, the Appellate Division, First Department, reversed and vacated the default judgment.[253] It ruled initially that defendant proffered a reasonable excuse for default.[254] As to the

[240] *See id*.
[241] *Id*.
[242] *Id*.
[243] *Id*.
[244] *See id*.
[245] *See id*.
[246] *Id*.
[247] *See id*.
[248] *See id*; D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 934 N.Y.S.2d 19, 19 (App. Div. 2015).
[249] *See D&R Glob.*, 934 N.Y.S.2d at 20.
[250] *See id*.
[251] *See* D&R Glob. Selections, S.L. v Bodega Olegario Falcon Pineiro, No. 603732/2007, 2010 WL 10791406, at *4 (N.Y. Sup. Ct. June 2, 2010).
[252] *See id*. at *1, *3.
[253] *See D&R Glob.*, 934 N.Y.S.2d at 19–20.
[254] *See id*. at 22.

personal jurisdiction issue, the court held a question of fact was present and remanded the matter for a hearing.[255]

On remand, defendant moved for summary judgment based on lack of personal jurisdiction and subject matter, which motion Supreme Court denied.[256] On appeal, the Appellate Division, First Department reversed, finding that defendant was not subject to personal jurisdiction under CPLR 302(a)(1).[257] It held that "defendant's visits to New York to promote its wine constitute[d] the transaction of business" in New York, but concluded that "there is no substantial nexus between plaintiff's claim for unpaid commissions in connection with the sales of that wine, pursuant to an agreement made and performed wholly in Spain, and those promotional activities."[258]

2. Holdings

The Court of Appeals unanimously reversed in an opinion by Chief Judge DiFiore.[259] The court noted that the first inquiry under the "transaction of business" test is whether the defendant transacted business in New York. The court ruled in the affirmative, stating:

> CPLR 302(a)(1) requires us to first determine if defendant purposefully availed itself of "the privilege of conducting activities" in the state by transacting business in New York. A non-domiciliary defendant transacts business in New York when "on his or her own initiative[,] the non-domiciliary projects himself or herself into this state to engage in a

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[255] *See id.* at 21.

[256] *See* D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, No. 603732/2007, 2013 WL 9608855, at *3 (N.Y. Sup. Ct. Aug. 26, 2013). The lack of subject matter argument was premised upon Business Corporation Law section 1314(b) which lists the only cases in which one foreign corporation may maintain an action in New York against another foreign corporation. *D&R Glob.*, 2013 WL 9608855, at *2. Supreme Court had concluded sections 1314(b)(4) and (b)(5) provided the statutory authority to allow plaintiff to bring its action. *See id.* These provisions permitted actions where the defendant foreign corporation was subject to personal jurisdiction pursuant to CPLR 302 and was "doing business" in New York, respectively. *See* N.Y. BUS. CORP. LAW § 1314(b).

[257] *See* D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 9 N.Y.S.3d 234, 235 (App. Div. 2015).

[258] *Id.* (citing Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 209 N.E.2d 68, 74 (N.Y. 1965)). The court also held that the New York courts did not have subject matter jurisdiction over the action pursuant to Business Corporation Law section 1314(b)(5). *See D&R Glob.*, 9 N.Y.S.3d at 235.

[259] *See* D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 78 N.E.3d 1172, 1174 (N.Y. 2017).

> sustained and substantial transaction of business." The primary consideration is the quality of the non-domiciliary's New York contacts. As relevant here, purposeful availment occurs when the non-domiciliary "seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship."
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> . . . .
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> [N]ot only was defendant physically present in New York on several occasions, but its activities here resulted in "the purposeful creation of a continuing relationship with a New York corporation." Defendant's contacts with New York establish that defendant purposefully availed itself of "the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws."[260]

In contrast to the Appellate Division, the Court of Appeals ruled that the plaintiff's claims had an "articulable nexus" with the New York transactions, stating:

> It is not enough that a non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff's cause of action must have an "articulable nexus" or "substantial relationship" with the defendant's transaction of business here. At the very least, there must be "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim." *This inquiry is "relatively permissive"* and an articulable nexus or substantial relationship exists "where at least on element arises from the New York contacts" rather than "every element of the cause of action pleaded[.]" The nexus is insufficient where the relationship between the claim and transaction is "too attenuated" or "merely coincidental."
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> . . . .
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> . . . [A]s set forth above, both sides engaged in activities in New York in furtherance of their agreement. There is an

[260] *Id.* at 1175–76 (first quoting Paterno v. Laser Spine Inst., 23 N.E.3d 988, 993 (N.Y. 2014); then citing Fischbarg v. Doucet, 880 N.E.2d 22, 26 (N.Y. 2007); then quoting *Paterno*, 23 N.E.3d at 993; then quoting *Fischbarg*, 880 N.E.3d at 27; and then quoting Rushaid v. Pictet & Cie, 68 N.E.3d 1, 7 (N.Y. 2016)).

> articulable nexus or substantial relationship between defendant's New York activities and the parties' contract, defendant's alleged breach thereof, and potential damages. Accordingly, we hold that plaintiff's claim arises from defendant's transaction of business in New York.[261]

C. D& R Global's Adoption of a Relatively Permissive Standard

In *D&R Global*, the New York Court of Appeals has expanded the reach of long-arm jurisdiction under CPLR 302(a)(1) in general and especially with respect to foreign corporations. Most importantly, it has done so when the Supreme Court has effectively in recent years limited the utility of CPLR 301 when sought to be invoked as the basis for asserting personal jurisdiction over foreign corporations for its out-of-state conduct to a few limited situations.[262] The expansion has occurred in two ways. First, the court has broadened the requirement of a business transaction and the purposeful act in New York as relating to that business transaction. Second, the court has loosened the requirement that the asserted cause of action must arise from the business transaction.

1. Transaction of Business

As to this element being satisfied, the court did not focus exclusively upon the parties' oral agreement and its formation as the requisite business transaction.[263] Rather, the court viewed the business transaction as constituting not only the oral agreement but also activities engaged-in pursuant to the parties' agreement in order to achieve the bargained-for result.[264] There was, in short, in *D&R Global* a "continuing relationship" in New York with a New York business.[265] In so finding, the court was adopting a view taken by the courts that a transaction of business is to be determined in the "totality of the circumstances" of the parties' dealings.[266]

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[261] *D&R Glob.*, 78 N.E.3d at 1176–77 (emphasis added) (first quoting Licci v. Lebanese Canadian Bank, SAL, 984 N.E.2d 893, 900–01 (N.Y. 2012); and then quoting Johnson v. Ward, 829 N.E.2d 1201, 1203 (N.Y. 2005)).

[262] *See supra* Section IV.A.

[263] *See D&R Glob.*, 78 N.E.2d at 1176–77.

[264] *See id.*

[265] *See id.*

[266] *See* Best Van Lines v. Walker, 490 F.3d 239, 242 (2d Cir. 2007) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485–86 (1985)); Sterling Nat'l Bank & Trust Co. v. Fid. Mortg. Inv'rs, 510 F.2d 870, 873 (2d Cir. 1975) (quoting Galgay v. Bulletin Co., 504 F.2d 1062, 1064

Furthermore, the "purposeful availment" required for a transaction of business was met because of the defendant's interactions with a New York distributor, rather than the plaintiff.[267] In prior decisions the court had focused only on interaction between the plaintiff and defendant.[268]

As to the requisite of "purposeful availment," the court in *Licci* had previously defined it as "an objective inquiry . . . requir[ing] a court to closely examine the defendant's contacts for their quality."[269] *D&R Global*, however, suggests that the inquiry is not always a *sui generis* one but rather the transaction of business element is easily established when the New York activity facilitates the achievement of the intended goal of the transaction.[270]

Overall, the court in *D&R Global* has made it easier to establish a transaction of business in New York. It also provides clear guidance for the bench and bar to determine whether the element has been satisfied.

2. Arising From

After noting that this requirement means the plaintiff's cause of action must have an "articulable nexus" or "substantial relationship" with the transaction of business, the element's traditional standard, the court stated that the requirement can be established by proof that "at least one element [of the cause of action] arises from the New York's contacts."[271] This approach is clearly a liberalization of the "substantial relationship" test standard which, as previously interpreted by the court, required in essence the element of proximate cause to be present.[272]

This approach had been set forth for the first time five years

(2d Cir.1974)); Farkas v. Farkas, 830 N.Y.S.2d 220, 221 (App. Div. 2007) (citing Catauro v. Goldome Bank for Sav., 592 N.Y.S.2d 422, 422 (App. Div. 1993)).

[267] *See D&R Glob.*, 78 N.E.3d at 1176 ("Defendant's contacts with New York establish that defendant purposefully availed itself of 'the privilege of conducting activities within [New York] . . . .'" (quoting Rushaid v. Pictet & Cie, 68 N.E.3d 1, 7 (N.Y. 2016))); *see also* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 2, § 86, at 28 (Supp. Jan. 2019) (discussing the *D&R Global* holding).

[268] *See* Fischbarg v. Doucet, 880 N.E.2d 22, 24 (N.Y. 2007) ("[D]efendants' retention and subsequent communication *with plaintiff* in New York established a continuing attorney-client relationship in this state[.]") (emphasis added).

[269] *See* Licci v. Lebanese Canadan Bank, SAL, 984 N.E.2d 893, 899–900 (N.Y. 2012).

[270] *See D&R Glob*, 78 N.E.3d at 1176; *Licci*, 984 N.E.2d at 900.

[271] *See D&R Glob.*, 78 N.E.3d at 1176 (citing *Licci*, 984 N.E.2d at 900–01).

[272] *See* Carlisle, *supra* note 215, at 109.

earlier in *Licci*.[273] However, it was set forth without any supporting authority, and arguably was adopted for use with respect to the facts in *Licci*, namely, the presence in New York of a corresponding bank relationship, and thus not a new broad-based standard.[274] Thus, it could be viewed as having limited application.

The Court of Appeals in *D&R Global* clearly rejects such a limited application of the "at least one element aris[ing]" approach as it was the basis for finding the arising from requirement satisfied.[275] In this regard, the element of the alleged breach of contract cause of action was establishing plaintiff performed under the contract as required, *i.e.*, acquisition of a distributor for defendant which occurred in New York.[276] The fact that the contract was formed in Spain and the breach occurred in Spain where plaintiff was to be paid the commissions it earned under the agreement was irrelevant.[277]

The court, in sum, has embraced this element of the cause of action approach as a means of establishing the "arising out of" requirement, and rejected any notion that its appearance in *Licci* was solely for purposes of the facts in the case. As noted by a commentator: "The court's language can be characterized as an expansive reading of the second prong of the CPLR section 302(a)(1) statutory inquiry."[278]

VII. A NEW DAWN FOR OBTAINING PERSONAL JURISDICTION OVER FOREIGN CORPORATIONS IN A TORT ACTION FOR INJURIES ARISING OUT-OF-STATE

To fully understand the impact *D&R Global* has upon the use of CPLR 302(a)(1) as a basis for obtaining personal jurisdiction over a foreign corporation in a tort action seeking damages for personal injuries sustained out-of-state as a result of the corporation's tortious conduct, the pre-*D&R Global* setting must be examined. While, as previously noted,[279] a cause of action in tort alleging injury tortious conduct occurring outside the state, arising from a transaction of business would fall within CPLR 302(a)(1)'s language, decisional law held otherwise. Starting with the seminal decision specifically addressing the issue, *Gelfand v. Tanner Motor Tours, Ltd.*, the

[273] *See Licci*, 984 N.E.2d at 900–01.
[274] *See id*.
[275] *See D&R Glob.*, 78 N.E.3d at 1176.
[276] *See id.* at 1176–77.
[277] *See id.* at 1177.
[278] Carlisle, *supra* note 215, at 110.
[279] *See supra* Section V.C.1.

Second Circuit took the position that while in theory the tort cause of action could arise from a transaction of business, in reality where the plaintiff was injured out-of-state, the cause of action would rarely, if ever, arise from a transaction of business in New York.[280]

The plaintiffs in *Gelfand* selected at a travel agency in Long Island, New York from various bus trips available for purchase at the travel agency an extended tour through the western United States.[281] The tour selected was operated by the defendant, a foreign corporation.[282] The tour package purchased included tickets for transportation on defendant's bus from Las Vegas to the Grand Canyon.[283] Plaintiffs were allegedly injured while riding to the Grand Canyon when the bus left the highway and crashed.[284]

Plaintiffs sued defendant in federal court in New York, alleging diversity jurisdiction and personal jurisdiction over defendant under CPLR 301 and 302(a)(1).[285] Assuming arguendo, that defendant had transacted business in New York, the court concluded the plaintiff's tort action did not arise from that business.[286] It stated:

> The alleged negligence of defendant, the subsequent injury to plaintiffs, and every relevant occurrence connecting these two events, all took place three thousand miles from Long Island, New York. It cannot even be said that the duty of due care owed by defendant to plaintiffs arose in New York, for that duty did not finally arise until plaintiffs boarded defendant's bus in Las Vegas.[287]

Thus, personal jurisdiction under CPLR 302(a)(1) could not be sustained, and the Second Circuit remanded the case to the district court to determine whether personal jurisdiction could be sustained under CPLR 301.[288]

Gelfand's rationale is that when the tortious conduct occurred out-

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[280] *See* Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 321–22 (2d Cir. 1964).
[281] *See id.* at 319.
[282] *See id.*
[283] *See id.* at 318.
[284] *See id.*
[285] *See id.* at 318, 320.
[286] *See id.* at 321–22.
[287] *Id.*
[288] *See id.* at 323. Jurisdiction was ultimately sustained on the theory defendant was doing business in New York. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 118 (2d Cir. 1967), *cert. denied,* 390 U.S. 996 (1968).

of-state it is not possible to trace that conduct to the transaction of business in New York so as to satisfy the "substantial relationship" because the tortious conduct and transaction of business are separated by time and geography. This rationale has been consistently followed by the New York courts in tort actions in finding the arising from element has not been established.[289] This view is so well established that the New York courts in recent decisions apply it without any discussion.[290] Indeed, prior to *D&R Global*, no court had even questioned the continuing validity of this restrictive view of "arising from."

Now, under *D&R Global*, where, for example, the tort action alleges a breach of a duty owed to the plaintiff, which duty was assumed or imposed by law in New York in the context of a business transaction in New York, to wit, purchase of a train ticket, and the breach of the duty occurs outside New York, injuring a New York resident, CPLR 302(a)(1)'s "arising from" element would be satisfied.[291] The element would be satisfied because an element of the tort action, a duty of due care owed to the plaintiff by defendant existing during the contracted for transportation, arose at the time of the purchase of the tour package, a transaction of business in New York. If *Gelfand* applied, the "arising from" element would not be satisfied. However, *Gelfand* and its progeny are now of questionable precedential value in view of *D&R Global*.

With the *D&R Global* approach, emphasis must be placed on whether the injury sustained was in an activity that was an integral part of the business transaction. Thus, in the example given the injury occurred while traveling on the mode of transportation that the person purchased in New York. Another example would be where a New Yorker is injured while staying at an out-of-state hotel, with the hotel reservation made in New York and the injury occurring

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[289] *See, e.g.*, Hedlund v. Prods. from Swed., Inc., 698 F. Supp. 1087, 1092 (S.D.N.Y. 1988); Diskin v. Starck, 538 F. Supp. 877, 880 (E.D.N.Y. 1982); Chamberlain v. Jiminy Peak, 547 N.Y.S.2d 706, 707 (App. Div. 1989); Apicella v. Valley Forge Military Acad. & Junior Coll., 478 N.Y.S.2d 663, 665–66 (App. Div. 1984); Meunier v. Stebo, Inc., 328 N.Y.S.2d 608, 611 (App. Div. 1971); *see also* WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE, *supra* note 24, at ¶ 302.04.

[290] *See, e.g.*, Stern v. Four Points by Sheraton Ann Arbor Hotel, 19 N.Y.S.3d 289, 290 (App. Div. 2015); Mejia-Haffner v. Killington, Ltd., 990 N.Y.S.2d 561, 564 (App. Div. 2014). *Gelfand's* alternative reason, i.e., where the tort duty arose, *see Gelfand*, 339 F.2d at 321–22, has not been addressed by the courts.

[291] *See* Hing Piu Wong v. S. Pa. Transp. Auth., 45 N.Y.S.3d 774, 776 (Sup. Ct. 2017) (finding personal jurisdiction on similar facts, without putting fourth reasons to support the conclusion). A subsequent ruling dismissed the action on *forum non conveniens* grounds. Hing Piu Wong v. S. Pa. Transp. Auth., No. 710043, 2017 WL 6603066, at *2 (N.Y. Sup. Ct. Nov. 17, 2017).

while engaged in an activity promoted by the hotel with brochures in New York. A tort action alleging a breach of due care owed to plaintiff when engaged in a promoted activity should be viewed as arising from the hotel reservation made, a transaction of business.[292] In both of these examples, the business transaction was part of the bargained for performance. However, where the injury producing activity was separate and not connected with business transaction, personal jurisdiction would likely not be present.[293]

The result permitted under *D&R Global*, obtaining personal jurisdiction over the foreign corporation in New York, as a result of a tortious conduct injuring a New Yorker outside the state is certainly justifiable. In this regard, it certainly seems unfair that the foreign corporation can reap the benefit of conducting business in New York and not be subject to suit in New York when a New Yorker who it dealt with is injured while in an activity integral to the relationship the corporation sought to establish as in the above stated example. Indeed, it is doubtful that the drafters intended to foreclose a New York resident injured in an out-of-state action, in these circumstances, from seeking relief in New York when the literal requisites of CPLR 302(a)(1) are met as in the example.[294]

Issues may arise in determining whether a specific element of the tort in issue arose from the business transaction in issue. For example, an issue may arise where the cause of action alleges negligence and an issue arises as to where the requisite duty of due

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[292] *See, e.g.*, Nowak v. Tak How Invs., 94 F.3d 708, 712 (1st Cir. 1996); Conley v. MLT, Inc., No. 11-11205, 2012 WL 1893509, at *2, *5 (E.D. Mich. May 23, 2012); Huang v. Marriott Int'l, Inc., No. 2:11-01574, 2012 WL 170166, at *4 (E.D. Cal. Jan. 19, 2012); *see also* Shute v. Carnival Cruise Lines, 897 F.2d 377, 379 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) (finding the owner of ship, a Panamanian corporation, amenable to personal jurisdiction in Washington in a suit brought by a passenger claiming injuries sustained in international waters off the Mexican coast while on defendant's cruise ship, when the cruise was based in Washington, and the defendant advertised, promoted, and solicited business in Washington).

[293] *Cf.* Viches v. MLT, Inc., 124 F. Supp. 2d 1092, 1094 (E.D. Mich. 2008) (granting summary judgment for defendant Dominican Republic resort when plaintiffs, who were tour participants, could not establish elements of their negligence, loss of consortium, and misrepresentation claims).

[294] *See* Jay C. Carlisle et al., *Paterno v. Laser Spine Institute: Did the New York Court of Appeals' Misapplication of Unjustified Policy Fears Lead to a Miscarriage of Justice and the Creation of Inadequate Precedent for the Proper Use of the Empire State's Long-Arm Statute?*, 79 ALB. L. REV. 1371, 1406–08 (2016) (arguing that when non-domiciliary defendants have contacts with New York in the context of a business transaction, New Yorkers should not be deprived of access to New York courts).

care arose.[295] Such an issue may arise as a result of *Gelfand.* [296]

In *Gelfand*, the Second Circuit noted the duty owed to plaintiffs by the defendant tour company—the duty to drive the bus they were riding on in a safe manner—arose when they boarded the bus in Las Vegas and not when the ticket was sold as part of the tour package.[297] This conclusion appears to be based on a view that a tort duty cannot arise from a contract, the purchase of the tour.[298] However, New York law recognizes that "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship."[299] It is only where the plaintiff is in essence seeking enforcement of the bargained for performance is a tort action precluded.[300] *Gelfand*'s rationale thus seems to be questionable.

Gelfand's holding can be questioned for another reason. It takes a restricted view of when the duty arises, when a broader view is more appropriate. The duty of care in *Gelfand* should be viewed as one that is owed to plaintiffs while they were on the tour they purchased from the defendant, and that duty arose when they purchased the tour package as part of the subject business transaction. This was the beginning of a continuing relationship that plaintiffs maintained with the defendant. In this connection, as observed by the Fifth Circuit: "Logically, there is no reason why a tort cannot grow out of a contractual contact."[301]

D&R Global, it must be emphasized, did not reject the well-established "substantial relationship" standard for determining whether the "arising from" element has been proven. Rather, the court added a new twist to it, creating a standard for whether there is substantial relationship between the cause of action and the transaction of business in issue, and phrasing it in terms of the elements of the same action in issue. By citing to *Johnson v. Ward*,

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[295] *See* Strauss v. Belle Realty Co., 482 N.E.2d 34, 35–36 (N.Y. 1985) (citing Pulka v. Edelman, 358 N.E.2d 1019, 1020–21 (N.Y. 1976)); *see generally* 14 LEE S. KREINDLER ET AL., NEW YORK LAW OF TORTS § 6:4 (2018) (discussing the requirement and scope of duty in negligence cases).

[296] *See* Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 321–22 (2d Cir. 1964); *supra* notes 280–290 and accompanying text.

[297] *See Gelfand*, 339 F.2d at 321–22.

[298] *See id.* at 322.

[299] Dormitory Auth. of the State of N.Y. v. Samson Constr. Co., 94 N.E.3d 456, 460 (N.Y. 2018) (quoting Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1369 (N.Y. 1992)).

[300] *See Sommer*, 593 N.E.2d at 1369 (citing Bellevue S. Assocs. v. HRH Constr. Corp., 579 N.E.2d 195, 200 (N.Y. 1991); Clark-Fitzpatrick, Inc. v. Long Island R.R., 516 N.E.2d 190, 193–94 (N.Y. 1987)).

[301] Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. 1981).

the court noted the "substantial relationship" standard's continued viability.[302] In *Johnson*, the court held that a New York resident could not sue a New Jersey resident in New York for injuries arising out of an accident in New Jersey.[303] The plaintiff had argued that the defendant had transacted business in New York by the acquisition of a driver's license and registration for his vehicle, and his cause of action for negligence arose from such transaction of business.[304] The court rejected the argument finding that the claimed relationship was "too attenuated" to warrant the exercise of personal jurisdiction.[305]

Retention of this "substantial relationship" standard to preclude personal jurisdiction on the facts in *Johnson* is sensible. Notably, it does not at all detract from the liberalization that *D&R Global* has given to CPLR 302(a)(1).

VIII. CONCLUSION

D&R Global has adopted a liberal interpretation of the standard for establishing personal jurisdiction over a foreign corporation under CPLR 302(a)(1). To be sure, CPLR 302(a)(1), as interpreted and applied in *D&R Global*, does not completely fill the void in CPLR 301 created by *Daimler*. However, it does provide a basis for asserting personal jurisdiction over a foreign corporation where personal jurisdiction would be present under CPLR 301 before *Daimler* was decided in some but not all such actions. The attorney should therefore consider CPLR 302(a)(1) as a viable basis for jurisdiction over a foreign corporation for a cause of action alleging a tortious activity causing injury outside New York until complete analysis shows otherwise.

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[302] *See* D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 78 N.E.3d 1172, 1176 (N.Y. 2017) (quoting Johnson v. Ward, 829 N.E.2d 1201, 1203 (N.Y. 2005)).

[303] *See Johnson*, 829 N.E.2d at 1202, 1203.

[304] *See id.* at 1202. The court assumed the issuance of a New York license and registration were transactions of business. *See id.* at 1203.

[305] *See id.* at 1203.