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# THE ASSERTION OF PERSONAL JURISDICTION OVER JAPANESE CORPORATIONS BY NEW YORK COURTS

Peter Nadler & Ryan P. Parham

## INTRODUCTION

Shortly after the end of the Second World War, Japanese business and industry began a period of reconstruction and expansion that has produced one of the most powerful national economies in the world.<sup>1</sup> Japanese multinational corporations have become some of the world's most influential and diverse corporations and are rivaled in size only by the large American conglomerates, which provided, in part, a pattern upon which the post-war Japanese could build.<sup>2</sup> As corporations have increasingly expanded the manufacturing and marketing of their products beyond national perimeters, courts have created the means by which these corporations can be rendered amenable to suit in the states where the corporations conduct their activities.<sup>3</sup> Thus, the evolution of the rules of personal jurisdiction in

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<sup>1</sup> At the conclusion of the Korean war, American policy focused on the development of a strong, economically sound ally in the Pacific, setting the stage for Japan's spectacular growth of 10% per year from 1956 until the early 1970's. KANJI HAITANI, *THE JAPANESE ECONOMIC SYSTEM: AN INSTITUTIONAL OVERVIEW* 7 (1976); EDWARD LINCOLN, *JAPAN FACING MATURITY* 14 (1988). From 1967 onward, the country had a stable balance of payments surplus. TAKAFUSA NAKAMURA, *THE POSTWAR JAPANESE ECONOMY, ITS DEVELOPMENT AND STRUCTURE* 102-03 (1980). By 1968, its gross national product was third only to that of the United States and the Soviet Union. *Id.*

<sup>2</sup> RICHARD T. PASCALE & ANTHONY G. ATHOS, *THE ART OF JAPANESE MANAGEMENT* 29, 34, 40, 45-46, 50 (1981); John B. Rhodes, *The American Challenge Challenged*, 47 *HARV. BUS. REV.* 45 (Sept-Oct 1969).

<sup>3</sup> *Asahi Metal Indus. Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987) (Taiwanese manufacturer of motorcycle tubes brought indemnity action against Japanese manufacturer of valve stems for tubes); *Gulf Consol. Services, Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071 (5th Cir. 1990) (action commenced against Greek oil field casing manufacturer because products failed to conform to warranted standards); *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26 (1st Cir.

the United States has been influenced by the evolution of the multiforum-multinational corporation.<sup>4</sup>

In the last two decades, Japanese business and industry have increasingly targeted and penetrated the lucrative American markets previously dominated by American and European corporations.<sup>5</sup> These inroads into American markets have produced a great deal of corporate litigation.<sup>6</sup> American plaintiffs have expended great sums of money seeking to enforce rights against Japanese corporations only to find that their defendants were beyond the reach of state or federal courts.<sup>7</sup> Conversely, Japanese companies incorporated in Japan have been subjected to expensive litigation based upon business relationships which they considered entirely and exclusively pertaining to their domestic forums.<sup>8</sup>

This article will examine the traditional and statutory bases of obtaining personal jurisdiction in New York over foreign-

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1988)(plaintiffs sued foreign manufacturer of pressure cooker for injuries sustained in course of using latter's product); *Robinson v. Audi Nsu Auto Union Aktiengesellschaft*, 739 F.2d 1481 (10th Cir. 1984)(products liability action brought against importer and manufacturer of automobile with defective gas tank design); *Hedrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355 (9th Cir. 1983)(longshoreman brought action against Japanese manufacturer of defective wire-rope splice used to secure ship boom); *Doula v. United Technologies Corp.*, 759 F. Supp. 1377 (D. Minn. 1991)(plaintiffs, residents of Republic of Cameroon, sued aircraft manufacturer in action arising out of aircraft explosion, which occurred in Cameroon).

<sup>4</sup> See B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1100 (1990); R. Lawrence Dessem, *Mr. Justice Potter Stewart: Personal Jurisdiction After Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 43 (1987); Note, *Jurisdictional Fair Play and Foreign Defendants: Asahi Metal Industry Co. v. Superior Court*, 61 ST. JOHN'S L. REV. 629 (1986-87); Murray M. Weinstein, Note, *Constitutional Law: Conflict of Laws: Due Process in Judicial Proceedings: Jurisdiction Over Non-Residents and Foreign Corporations*, 18 CORNELL L. Q. 435-36 (1933).

<sup>5</sup> Thomas J. Schoenbaum, *Trade Friction with Japan and the American Policy Response*, 82 U. MICH. L. REV. 1648-49 (1984); see generally CLYDE V. PRESTOWITZ, JR., *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD 26-70* (1988).

<sup>6</sup> Prestowitz, *supra* note 5, at 55-61, 203-04. Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 116 (1983).

<sup>7</sup> See, e.g., *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1986); *Arrow Trading Co., Inc. v. Sanyei Corporation (Hong Kong) Ltd.*, 576 F. Supp. 67 (S.D.N.Y. 1983).

<sup>8</sup> AKIO MORITA, EDWIN M. REINGOLD AND MITSUKO SHIMOMURA, *MADE IN JAPAN* 174-78 (1986); E. Charles Routh, *Litigation Between Japanese and American Parties*, in *CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA* 188 (John O. Haley ed., 1978).

based Japanese corporations.<sup>9</sup> The article traces the development of the law of personal jurisdiction in New York from the presence doctrine to the approach heralded by *International Shoe Co. v. Washington*,<sup>10</sup> to wit, long-arm jurisdiction.

Part I of this article examines the "doing business" test of section 301<sup>11</sup> of New York's Civil Procedure Law and Rules

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<sup>9</sup> The exercise of personal jurisdiction requires compliance with the due process clause. *Milliken v. Meyer*, 311 U.S. 457, 463 (1941); DAVID D. SIEGEL, *NEW YORK PRACTICE* 59 (1978). Under the due process clause, three requirements must be met before a court may exercise jurisdiction: (1) notice, (2) opportunity to be heard and, (3) basis. SIEGEL, *supra* at 59. This article will concentrate on the basis aspect of personal jurisdiction. There will be no attempt to outline the principles of jurisdiction as they relate to notice and opportunity to be heard, except indirectly, in that all three are met when a defendant is served while physically present in New York. SIEGEL, *supra* at 60. See *Burnham v. Superior Court of Calif., Marin County*, 495 U.S. 604 (1990) (service on defendant while temporarily in state does not offend due process). For a discussion of notice and service of process, see SIEGEL, *supra* at 66-100; *Survey of New York Practice*, 55 ST. JOHN'S L. REV. 560 (1981). For a discussion of service of process under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Criminal Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, see *Volkswagenwerk v. Schlunk*, 486 U.S. 694 (1988) (service in United States on subsidiary of German corporation as agent of parent corporation complied with Hague Convention); *Philip Knitting Mills v. Monarch Knitting Machinery Corp.* 169 A.D.2d 603, 565 N.Y.S.2d 21 (1st Dep't 1991) (service on Japanese corporation by registered mail at its principal place of business in Japan conformed with Hague Convention); *Vasquez v. Sund Emba*, 152 A.D.2d 389, 548 N.Y.S.2d 728 (2d Dep't 1989) (personal service by Swedish notary public of English language summons and complaint on managing director of Swedish corporation in Sweden complied with Hague Convention); *Rissew v. Yamaha*, 129 A.D.2d 94, 515 N.Y.S.2d 352 (4th Dep't 1987) (service on Japanese corporation by delivery of copy of summons and complaint to Secretary of State and by mailing copy to corporation headquarters in Japan complied with Hague Convention); *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S.2d 295 (3d Dep't 1987) (service by registered mail on Japanese corporation and voluntary acceptance by Japanese corporation of mailed amended summons and complaint did not comply with article 5(b) of Hague Convention). For commentary on service of process under the Hague Convention, see Comment, *How May I Serve You? Service of Process By Mail Under the Hague Convention* 12 PACE L. REV. 177 (1992); Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention & Fed. R. Civ. P.*, 24 INT'L LAW. 55 (1990). In order to further delineate the boundaries of this article, the reader should be mindful of the fact that of the various forms of basis jurisdiction, this article will not cover *in rem* nor *quasi in rem* jurisdiction. For a comprehensive treatment of the subject, see SIEGEL, *supra* at 118-126. For commentaries on the subject see Michael B. Mushlin, *The New Quasi in Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059 (1989-90); Steven Duke, *Towards a Single Theory of State Court Jurisdiction?*, 45 BROOK. L. REV. 863 (1979).

<sup>10</sup> 326 U.S. 310 (1945).

<sup>11</sup> N.Y. CIV. PRAC. L. & R. § 301 (McKinney 1990).

(CPLR)—the equivalent of presence. Part II discusses the “transacting business” test of section 302<sup>12</sup> of the New York long-arm statute. Part III discusses the factors relevant to an assertion of personal jurisdiction over Japanese Corporations through their American subsidiaries.

Part IV discusses five cases decided under the traditional “doing business” test and the long-arm statute. The cases are used to explore the issues of how the courts of New York state have viewed Japanese corporate structure, how they have viewed Japanese business activity, and how far the “long arm” of personal jurisdiction has been extended to reach Japanese enterprises.

#### I. “DOING BUSINESS” IN NEW YORK, CPLR SECTION 301

The primary criterion used by the courts of New York to determine whether a foreign corporation is amenable to suit in New York is known as the “doing business test.”<sup>13</sup> This test is codified in the CPLR at section 301, which states: “A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.”<sup>14</sup>

This section has been construed to mean that any defendant over whom the courts of New York might have asserted jurisdiction prior to the enactment of the CPLR is subject to the jurisdiction of the New York courts and may be served with process even if that defendant is found outside the state.<sup>15</sup> This section is of particular importance for foreign corporations who have contacts with the State of New York.

The focus of section 301 is upon those acts of persons which constitute doing business. If a corporation is found to be doing business in New York, it is subject to the jurisdiction of the New York courts, regardless of its principal place of business, its place of incorporation or the percentage of its business transacted elsewhere.

The burden of proof is on the plaintiff to show that the de-

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<sup>12</sup> N.Y. CIV. PRAC. L. & R. § 302 (McKinney 1990).

<sup>13</sup> *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 415 (1917).

<sup>14</sup> N.Y. CIV. PRAC. L. & R. § 301 (McKinney 1990).

<sup>15</sup> Joseph M. McLaughlin, Practice Commentary C 301:1, N.Y. CPLR § 301 (McKinney 1990).

fendant is doing business within the state.<sup>16</sup> In addition, under New York law, a defendant must be shown to be doing business in New York when the action was commenced.<sup>17</sup>

The courts of New York have formulated several criteria to determine whether a foreign entity is doing business in New York. This determination should above all be "simple [and] pragmatic."<sup>18</sup>

In applying this pragmatic test for section 301 jurisdiction, the New York courts have, in a nutshell, focused on the following facts: "the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign defendant in the state."<sup>19</sup> The evolution of this pragmatic test is described briefly below.

In *Tauza v. Susquehanna Coal Co.*,<sup>20</sup> Justice Cardozo, speaking for the New York State Court of Appeals, stated that a defendant corporation must conduct activities with "a fair measure of permanence and continuity" within New York for it to be found to be doing business in New York.<sup>21</sup> Justice Cardozo also emphasized that under the "doing business test," codified in section 301 of the CPLR, the claim against a defendant need not arise out of business done in New York.<sup>22</sup>

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<sup>16</sup> *Hoffritz For Cutlery, Inc. v. Amajac, Ltd.* 763 F.2d 55 (2d Cir. 1985); see also *Marine Midland Bank v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). The plaintiff must establish jurisdiction by a preponderance of the evidence. *Id.* However until an evidentiary hearing is held, the plaintiff need only make a *prima facie* showing that jurisdiction exists. *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 768 (2d Cir. 1983).

<sup>17</sup> *Top Form Mills v. Sociedad Nationale Ind.*, 428 F. Supp. 1237, 1246 n.12 (S.D.N.Y. 1977) (citing *Gaboury v. Central Vermont Ry. Co.*, 250 N.Y. 233, 165 N.E. 275 (1929); *Propulsion Systems v. Avondale Shipyards, Inc.*, 77 Misc. 2d 259, 260, 352 N.Y.S.2d 749, 751-52 (1973)).

<sup>18</sup> *Bryant v. Finnish National Airline*, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 441, 260 N.Y.S.2d 625, 628 (1965). Since this article is primarily geared to provide guidance to New York State legal practitioners, citation to all appropriate New York reporters is given.

<sup>19</sup> *Hoffritz For Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985) (citations omitted).

<sup>20</sup> 220 N.Y. 259, 115 N.E. 915 (1917).

<sup>21</sup> *Id.* at 267, 115 N.E. at 917.

<sup>22</sup> *Id.* at 268, 115 N.E. at 918. In discussing the "doing business" test, Justice Cardozo stated: "We hold further that the jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted . . . . The essential thing is that the corporation shall have come into the state." *Id.* at 268-69, 115

The Court of Appeals in *Sterling Novelty Corp. v. Frank & Hirsch Distributing Co.*<sup>23</sup> described the activity necessary for "doing business" as a "[c]ontinuity of action from a permanent locale . . . ."<sup>24</sup> Further, numerous New York courts have stated that the activity must not be merely peripheral to the main business of a foreign corporation but rather a substantial part thereof.<sup>25</sup>

The Court of Appeals has identified some in-state activities of foreign corporations which, when aggregated, would constitute "doing business" for jurisdictional purposes. For example, a small office in New York which carries out minimal business activities for a defendant foreign corporation has been held sufficient to confer jurisdiction upon New York courts.<sup>26</sup> In *Bryant v. Finnish Nat'l Airline*, the court found determinative the facts

N.E. at 918.

Under the traditional power theory of jurisdiction, which rested on the sovereignty of a state within its territory, a state could only exercise authority over persons present within the state. *Pennoyer v. Neff*, 95 U.S. 714 (1878). Thus, service of process could only be made on the defendant if he or she were physically present within the state. The traditional power theory permitted service of process on a corporation's agents, because it could be said that the corporation was present within the jurisdiction. *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914). Presence turned on the degree of business the corporation conducted within the state: whether it was systematic and regular. *Tauza*, *supra* at 266, 115 N.E. at 917.

The CPLR § 302(a) transaction-of-business test was developed to take advantage of the minimum contacts theory of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Schroeder v. Loomis*, 46 Misc.2d 184, 259 N.Y.S.2d 42 (1965). For a discussion of *International Shoe* and its progeny, see Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). Although under the transacting business test plaintiff's claim must arise out of the transaction, the test requires considerably less contacts than those required under the § 301 doing business test. *Nexsen v. Ira Haupt & Co.*, 44 Misc. 2d 629, 254 N.Y.S.2d 637 (1964).

<sup>23</sup> 299 N.Y. 208, 86 N.E.2d 564 (1949).

<sup>24</sup> *Id.* at 210, 86 N.E.2d at 565.

<sup>25</sup> See, e.g., *Chaplin v. Selznick*, 293 N.Y. 529, 536-38, 58 N.E.2d 719, 723 (1944); *Trans World Airlines, Inc. v. Curtiss-Wright Corp.*, 119 N.Y.S.2d 729, 733 (1953).

<sup>26</sup> 15 N.Y.2d 426, 432, 208 N.E.2d 439, 441, 260 N.Y.S.2d 625, 629 (1965); see also *W. Lowenthal Co. v. Colonial Woolen Mills, Inc.*, 38 A.D.2d 775, 776, 327 N.Y.S.2d 899, 900-01 (3d Dep't 1972) (where defendant buys materials in New York and 85% to 90% of its production was sold through New York parent, defendant was subject to New York jurisdiction). But see *Carbone v. Fort Erie Jockey Club, Ltd.*, 47 A.D.2d 337, 388-89, 366 N.Y.S.2d 485, 487 (1985) (where systematic solicitation of business and advertising in New York was insufficient to subject Canadian corporation to New York jurisdiction in personal injury action).

that the defendant had seven employees in New York, leased office space in New York, had a bank account in New York, and did public relations and publicity work in New York.<sup>27</sup>

The rationale in *Bryant* was used by a trial court to subject a Delaware corporation to New York jurisdiction where the "cumulative significance of all these activities" in New York constituted doing business.<sup>28</sup> Thus, a Delaware corporation, with national sales of almost \$3,000,000 but total sales in New York of only \$250,000,<sup>29</sup> was held to be within the jurisdiction of the New York courts because it employed a single employee (whom the court characterized as "a full time, high salaried employee")<sup>30</sup> in New York on collateral business.<sup>31</sup> This employee had (1) an office in New York; (2) a secretary; (3) a phone listing; and (4) a checking account which listed the name of the defendant corporation.<sup>32</sup>

In seeking to determine what constitutes doing business in New York, the Court of Appeals in *Miller v. Surf Properties*<sup>33</sup> held that "mere solicitation" of business in New York is not sufficient to conclude that a non-resident corporation is doing business in New York.<sup>34</sup> However, solicitation in New York "plus some additional activities there" may support a finding of doing business.<sup>35</sup> Judge Friendly explicated this "solicitation plus" standard in *Aquascutum of London, Inc. v. S.S. American Champion*,<sup>36</sup> where he pointed out that the requisite "plus" involved either "financial or commercial dealings in New York . . . or the defendant's holding himself out as operating in New York, either personally or through an agent."<sup>37</sup>

A thorough survey of the development of the "solicitation plus" rule is contained in *Rolls-Royce Motors, Inc. v. Charles*

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<sup>27</sup> 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

<sup>28</sup> *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92, 100 (E.D.N.Y. 1968).

<sup>29</sup> *Id.* at 97.

<sup>30</sup> *Id.* at 100.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 98.

<sup>33</sup> 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

<sup>34</sup> *Id.* at 480, 151 N.E.2d at 876, 176 N.Y.S.2d at 321.

<sup>35</sup> *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 314, (1945)).

<sup>36</sup> 426 F.2d 205 (2d Cir. 1970).

<sup>37</sup> *Id.* at 212.



*Schmitt & Co.*<sup>38</sup> In *Schmitt*, District Judge Leisure refused to find jurisdiction under the "solicitation plus" rule because plaintiff failed to demonstrate both solicitation in New York and the additional "pluses" needed to establish jurisdiction.<sup>39</sup> Notwithstanding plaintiff's assertions to the contrary, the court found that although defendant made substantial purchases in New York, it did not make regular sales there.<sup>40</sup> The court explained that although defendant advertised in New York newspapers, those advertisements sought a national clientele.<sup>41</sup> The defendant's alleged New York salesmen were in fact independent contractors who worked for numerous other companies and who bought cars for defendant rather than sold cars for it.<sup>42</sup>

#### A. *Doing Business Through Subsidiaries*

Many foreign corporations that seek to avoid being haled into court in New York have wholly or substantially owned subsidiaries which are incorporated in New York, or subsidiaries incorporated elsewhere that do business in New York. Much of the case law in this area focuses on the business operations of the subsidiary as a means of asserting jurisdiction over the parent corporation.

In *Taca International Airlines, S.A. v. Rolls-Royce of England, Ltd.*,<sup>43</sup> the Court of Appeals held that the defendant Rolls-Royce Ltd. ("Ltd.") was doing business in New York through its subsidiary Rolls-Royce Inc. ("Inc.").<sup>44</sup> The Court of Appeals' holding was based on its findings that Ltd. had freely interchanged employees with its subsidiary, Inc., all personnel of Inc. were trained in England by Ltd., all the business operations of Inc. were carried on the books of Ltd., Inc. and Ltd. had common directors, and Inc.'s sales literature was produced by Ltd.<sup>45</sup> Based on these findings, the Court of Appeals concluded that Ltd. "was doing extensive business in [New York] through its

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<sup>38</sup> 657 F. Supp. 1040, 1045-46 (S.D.N.Y. 1987).

<sup>39</sup> *Id.* at 1050.

<sup>40</sup> *Id.* at 1046.

<sup>41</sup> *Id.* at 1047.

<sup>42</sup> *Id.* at 1048-49.

<sup>43</sup> 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965).

<sup>44</sup> *Id.* at 102, 204 N.E.2d at 331, 256 N.Y.S.2d at 132.

<sup>45</sup> *Id.* at 101-02, 204 N.E.2d at 330-31, 256 N.Y.S.2d at 131-32.

local department separately incorporated as Inc.”<sup>46</sup>

Carrying a subsidiary on the parent's books has been viewed as a factor supporting jurisdiction by a New York court.<sup>47</sup> In *Public Administrator of County of New York v. Royal Bank of Canada*,<sup>48</sup> the Court of Appeals found that a subsidiary branch of the bank that had been separately incorporated in France was subject to suit in New York despite the parent corporation's attempt to “treat its French branch as a separate entity.”<sup>49</sup> As in *Taca*,<sup>50</sup> the parent corporation freely interchanged personnel with the subsidiary branch, carried the branch's assets on the parent's own books, recruited and trained all of the branch's staff, and “merely notified [the branch] and [did] not consult [the branch] on accounts which [were] transferred to it from other Royal Bank branches . . . .”<sup>51</sup> The subsidiary had been separately incorporated, according to the court, for tax purposes,<sup>52</sup> and since it was in all things but name identical to its parent, valid service upon the parent in New York conferred jurisdiction on the subsidiary.<sup>53</sup>

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<sup>46</sup> *Id.* at 102, 204 N.E.2d at 331, 256 N.Y.S.2d at 132.

<sup>47</sup> *Public Administrator of County of New York v. Royal Bank of Canada*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 131-32, 224 N.E.2d at 879, 278 N.Y.S.2d at 381-82.

<sup>50</sup> *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965).

<sup>51</sup> *Royal Bank*, 19 N.Y.2d at 131-32, 224 N.E.2d at 879, 278 N.Y.S.2d 381-82.

<sup>52</sup> *Id.* at 131, 224 N.E.2d at 879, 278 N.Y.S.2d at 381.

<sup>53</sup> *Id. Accord Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 122 (2d Cir. 1984); *Kossoff v. Samsung*, 123 Misc. 2d 177, 178, 474 N.Y.S.2d 180, 183 (1984).

In *Volkswagenwerk*, the United States Court of Appeals for the Second Circuit held that New York courts have jurisdiction over a foreign corporation based on the presence in New York of a wholly owned subsidiary. 751 F.2d at 122. First, the court found that since Beech owned all the stock in the subsidiary, the requirement of common ownership was satisfied. *Id.* at 120. Second, the subsidiary was completely dependent on Beech financially. For example, Beech had made interest free loans to the subsidiary. *Id.* at 121. Third, Beech exercised significant control over the selection and assignment of the subsidiary's executive personnel, and Beech failed to observe corporate formalities. *Id.* Finally, the subsidiary only sold Beech Aircraft, and Beech tightly controlled its marketing and operating policies. *Id.* at 122.

In *Kossoff*, the trial court asserted jurisdiction over a foreign multinational, Samsung Korea. The court found that the Korean corporation was subject to New York jurisdiction based on service upon its New York subsidiary, Samsung America. 123 Misc.2d at 178, 474 N.Y.S.2d at 183. The court reasoned that the parent “retained complete control over its wholly owned New York subsidiary,” personnel were exchanged between the two

The "mere department" theory of *Taca*<sup>54</sup> and *Royal Bank*<sup>55</sup> was refined by the Court of Appeals in *Frummer v. Hilton Hotels International, Inc.*<sup>56</sup> There, the Court of Appeals held that Hilton Hotels (U.K.), a foreign corporation, was doing business in New York through an agent because the agent "does all the business which Hilton (U.K.) could do were it here by its own officials."<sup>57</sup>

In determining whether a subsidiary is a "mere department" of its foreign parent, New York courts assess the following factors: (1) the parent's ownership of the subsidiary; (2) the subsidiary's financial dependence upon its parent; (3) the parent's participation in personnel decisions of the subsidiary; (4) the observance of corporate formalities between the parent and subsidiary; and (5) the parent's control over the subsidiary's marketing and operations. These factors were used by courts in the cases discussed below.

In *Furman v. General Dynamics Corp.*,<sup>58</sup> the subsidiary was found to be doing its "own business" and thus the parent corporation was not subject to suit in New York.<sup>59</sup> The court looked to the fact that the companies had separate books and separate product lines, and to the fact that the subsidiary was acquired and not created.<sup>60</sup> The subsidiary was found to be "a separate corporation, not a mere department of [the parent corporation]"<sup>61</sup> as had been the case in *Taca*.<sup>62</sup>

In *Katz Agency, Inc. v. Evening News Association and KTVY, Inc.*,<sup>63</sup> the court, in determining whether a subsidiary's in-state activities could establish New York jurisdiction over its parent, went through a two-tiered analysis. In this case, the non-

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companies, the earnings of the subsidiary were reflected in the parent's financial statement, and certain management decisions of the subsidiary were made by the parent. *Id.* at 178, 474 N.Y.S.2d at 183.

<sup>54</sup> 15 N.Y.2d 97, 102, 204 N.E.2d 329, 331, 256 N.Y.S.2d 129, 132 (1965).

<sup>55</sup> 19 N.Y.2d 127, 131, 224 N.E.2d 877, 879, 272 N.Y.S.2d 378, 382 (1967).

<sup>56</sup> 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied*, 389 U.S. 923 (1967).

<sup>57</sup> *Id.* at 537, 227 N.E.2d at 854, 281 N.Y.S.2d at 44.

<sup>58</sup> 377 F. Supp. 37 (S.D.N.Y. 1974).

<sup>59</sup> *Id.* at 42.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129.

<sup>63</sup> 514 F. Supp. 423 (S.D.N.Y. 1981).

resident parent, Evening News, wholly owned a subsidiary, KTVY, Inc., which operated television station KTVY in Oklahoma.<sup>64</sup> Katz, a New York advertising agency, sued KTVY, Inc., and Evening News for breach of their advertising contract.<sup>65</sup> Katz had solicited advertisements for KTVY in New York and billed and collected the advertisers' accounts with KTVY.<sup>66</sup>

First, the court determined that the subsidiary, KTVY, was doing business under section 301 because of systematic and substantial solicitation.<sup>67</sup> In addition Katz's solicitation of business in New York generated substantial revenues for KTVY.<sup>68</sup> Furthermore, although KTVY officials visited New York relatively infrequently, the nature and quality of the meetings were vital to KTVY's sales and business relationships.<sup>69</sup>

Second, the court asserted that KTVY's parent corporation, Evening News, was doing business in New York through KTVY.<sup>70</sup> "Where a wholly-owned subsidiary is present in New York, a New York court may exercise personal jurisdiction over the parent if the latter's 'control over the subsidiary's activities [is] so complete that the subsidiary is, in fact, merely a department of the parent'."<sup>71</sup> The court's finding that Evening News controlled KTVY was supported mainly by the fact that plaintiff was terminated as subsidiary KTVY's advertising agent not by KTVY, but by Evening News.<sup>72</sup>

When a foreign parent completely controls its subsidiary, the Court of Appeals has not hesitated to subject the foreign parent to New York jurisdiction.<sup>73</sup> However, when the foreign

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<sup>64</sup> *Id.* at 424.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 425.

<sup>67</sup> *Id.* at 428.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 428-29.

<sup>71</sup> *Id.* at 428 (citing *Delagi v. Volkswagenwerk AG, of Wolfsburg*, 29 N.Y.2d 426, 432, 278 N.E.2d 895, 897, 328 N.Y.S.2d 653, 657 (1972)); *Public Administrator of County of New York v. Royal Bank of Canada*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967); *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965)).

<sup>72</sup> *Id.* at 428.

<sup>73</sup> *Royal Bank*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378; *Taca*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129.

parent's only relation to New York is through wholesalers of its products to whom it is related by contract, the Court of Appeals has refused to exercise jurisdiction over the foreign parent.<sup>74</sup> In *Delagi v. Volkswagenwerk A.G. of Wolfsburg*, the Court of Appeals held that it did not have jurisdiction over a foreign parent that did no business in New York and that did not control or own the New York wholesalers of its products.<sup>75</sup> Defendant, Volkswagenwerk (VWAG), was a German manufacturer of automobiles.<sup>76</sup> Neither VWAG nor its subsidiary Volkswagen of America (VWoA), incorporated in New Jersey, had an office in New York or was qualified to conduct business there.<sup>77</sup> VWoA contracted with independently-owned wholesale distributors operating out of New York to sell VWAG's products.<sup>78</sup> The court found that, unlike the parent corporations in *Taca*<sup>79</sup> and *Royal Bank*,<sup>80</sup> the parent, VWAG, did not exert sufficient control over VWoA and its independent franchise dealers for it to be said that the New York distributor franchised by the subsidiary was a mere department of the parent.<sup>81</sup>

The sharing of directors and officers by subsidiaries and their parents has often been considered a strong indication of control of the subsidiary by its parent.<sup>82</sup> However, the Second Department in *Ioviero v. Ciga Hotels, Inc.*,<sup>83</sup> refused a plaintiff discovery as to whether there was common management of two separate and distinct corporate entities, stating:

Courts will only pierce the corporat[e] veil and hold two corporations to constitute a single unit, where one is so related to, or organized, or controlled by, the other as to be its instrumentality

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<sup>74</sup> *Delagi v. Volkswagenwerk A.G. of Wolfsburg*, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972).

<sup>75</sup> *Id.* at 431-32, 278 N.E.2d at 897, 328 N.Y.S.2d at 656-57.

<sup>76</sup> *Id.* at 430, 278 N.E.2d at 896, 328 N.Y.S.2d at 655.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129.

<sup>80</sup> 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378.

<sup>81</sup> *Delagi*, 29 N.Y.2d 426, 431-32, 278 N.E.2d 895, 897, 328 N.Y.S.2d 653, 656-57 (1972).

<sup>82</sup> See, e.g., *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 121 (2d Cir. 1984); *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 101, 204 N.E.2d 329, 330, 256 N.Y.S.2d 129, 131 (1965).

<sup>83</sup> 101 A.D.2d 852, 475 N.Y.S.2d 880 (2d Dep't 1984).

or alter ego. The fact plaintiffs may discover that the two corporations have identical controlling shareholders, officers and directors does not, by itself, warrant disregarding the separate corporate entities.<sup>84</sup>

### B. *Doing Business Through Agents*

The *Frummer* “doing all the business” test<sup>85</sup> has been a controlling standard in the assertion of jurisdiction over foreign corporations through the actions of agents.<sup>86</sup> For purposes of jurisdiction, the Court of Appeals stated that “[t]he ‘presence’ of Hilton (U.K.) in New York . . . is established by the activities conducted here on its behalf by its agent.”<sup>87</sup>

In *Central Gulf Lines Inc. v. Cooper/T. Smith, Stevedoring*,<sup>88</sup> the defendant’s only identifiable contacts with New York were sporadic and informal “word of mouth” solicitations by a retained consultant, which were not binding on the defendant.<sup>89</sup> These factors, in conjunction with the absence of any evidence that the defendant principal engaged in any other business or financial dealings in New York, led the court to conclude that it had no personal jurisdiction over the defendant.<sup>90</sup> Authority of the agent to bind the principal is thus a critical consideration.<sup>91</sup>

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<sup>84</sup> *Id.* 101 A.D.2d at 853, 475 N.Y.S.2d at 881.

<sup>85</sup> *Frummer v. Hilton Hotels Int’l, Inc.*, 19 N.Y.2d at 533, 537, 227 N.E.2d at 851, 854, 281 N.Y.S.2d at 41, 44, *cert. denied*, 389 U.S. 923 (1967) (“the service [i.e., the agent] does all the business which Hilton (U.K.) could do were it here by its own officials.”).

<sup>86</sup> *See, e.g., Central Gulf Lines Inc. v. Cooper/T. Smith, Stevedoring*, 664 F. Supp. 127, 129-30 (S.D.N.Y. 1987); *I. Oliver Engebretson, Inc. v. Aruba Palm Beach Hotel and Casino*, 587 F. Supp. 844, 849-50 (S.D.N.Y. 1984).

<sup>87</sup> *Frummer*, 19 N.Y.2d at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.

<sup>88</sup> 664 F. Supp. 127 (S.D.N.Y. 1987).

<sup>89</sup> *Id.* at 130.

<sup>90</sup> *Id.* at 130-31. The court also noted that the defendant had no office, telephone, property or employees in New York. *Id.* at 129.

<sup>91</sup> *See Baird v. Day & Zimmerman, Inc.*, 390 F. Supp. 883, 884-85 (S.D.N.Y. 1974) (no jurisdiction over principal where agent was “devoid of authority to bind [principal] in any way. [Agent] could solicit orders, but that is all it was empowered to do. It had no power to confirm sales or to set price schedules, or terms or conditions of sales.”). *See also Arbitron Co. v. E.W. Scripps, Inc.*, 559 F. Supp. 400, 403 (S.D.N.Y. 1983) (no jurisdiction based on agent’s in-state activities because in-state advertising agency could not confirm orders or guarantee payments. “Essentially, their activities are those of a depositor and transmitter of funds and not those of one actively engaged in financial or commercial dealings.”). *But see Carter Wallace, Inc. v. Ever-Dry Corporation*, 290 F. Supp. 735, 737-39 (S.D.N.Y. 1968) (Tennessee corporation subject to New York jurisdiction

The undisputed authority to bind the principal was the deciding factor in *I. Oliver Engebretson, Inc. v. Aruba Palm Beach Hotel and Casino*.<sup>92</sup> District Judge Kram<sup>93</sup> there stated: "I find that the presence of an agent in New York with the undisputed authority to bind the foreign principal by confirming reservations is sufficient to warrant a finding that the Aruba defendants are 'doing business' in New York."<sup>94</sup>

In *Miller v. Surf Properties*,<sup>95</sup> the court viewed the amount of discretion or the exercise of judgment by the agent as material to an analysis of personal jurisdiction.<sup>96</sup> Consequently, the court refused to subject a Florida hotel to New York jurisdiction because its New York agent solicited but did not confirm reservations.<sup>97</sup>

Finally, even if a third party were able to assert jurisdiction over a foreign defendant based on the in-state activities of that defendant agent, the agent *itself* may not use its own in-state activities as a basis for asserting jurisdiction over its principal.<sup>98</sup> In *Pneuma-Flo Systems, Inc. v. Universal Machinery*, the New York sales representative of a California company, with no New York contacts other than its retention of the sales representatives, attempted to sue the California company in New York.<sup>99</sup> The court refused to find CPLR section 301 jurisdiction not only because New York law had traditionally prohibited an in-state agent from obtaining jurisdiction over a principal based on that agent's *own* in-state activities but also because the agent was wholly independent and was not controlled by defendant.<sup>100</sup>

The factors New York courts have most frequently consid-

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based on its sales representative's substantial activities in New York including sales solicitation, collection of delinquent accounts, authority to return merchandise without principal's permission, and authority to conduct investigations of possible takeover targets). See also *Meat Systems Corp. v. Ben Langel-Mol, Inc.*, 410 F. Supp. 231, 233 (S.D.N.Y. 1976) (agent's role as principal's exclusive "claims adjuster" in New York was an important factor in holding Dutch company subject to New York jurisdiction).

<sup>92</sup> 587 F. Supp. 844, 850 (S.D.N.Y. 1984).

<sup>93</sup> *Id.* at 846.

<sup>94</sup> *Id.* at 850.

<sup>95</sup> 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

<sup>96</sup> *Id.* at 480-81, 151 N.E.2d at 876-77, 176 N.Y.S.2d at 321-22.

<sup>97</sup> *Id.*

<sup>98</sup> 454 F. Supp. 858 (S.D.N.Y. 1978).

<sup>99</sup> *Pneuma-Flo Systems, Inc. v. Universal Machinery*, *id.* at 861-62.

<sup>100</sup> *Id.* at 865.

ered to determine whether a foreign corporation is doing business in New York are:

1. The presence of employees within the state;<sup>101</sup>
  2. The status of employees within the state;<sup>102</sup>
  3. The presence of a bank account within the state;<sup>103</sup>
  4. A telephone listing within the state;<sup>104</sup>
  5. Office space rented or owned within the state;<sup>105</sup>
  6. Taxes paid within the state;<sup>106</sup>
  7. The relative volume of business done within the state;<sup>107</sup>
- and
8. The nature and number of visits to the state.<sup>108</sup>

<sup>101</sup> *Bryant v. Finnish National Airlines*, 15 N.Y.2d 426, 429, 208 N.E.2d 439, 440, 260 N.Y.S.2d 625, 627 (1965); *Laufer v. Ostrow*, 55 N.Y.2d 305, 310, 434 N.E.2d 692, 695-96, 449 N.Y.S.2d 456, 459-60 (1982) (citing cases); *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92 (E.D.N.Y. 1968).

<sup>102</sup> *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92 (E.D.N.Y. 1968).

<sup>103</sup> *Bryant v. Finnish National Air Lines*, 15 N.Y.2d 426, 429, 208 N.E.2d 439, 441, 260 N.Y.S.2d 625, 627 (1965); *Potter's Photographic Applications*, 292 F. Supp. at 98.

<sup>104</sup> *Potter's Photographic Applications*, 292 F. Supp. at 98; *Vincent v. Davis-Grabowski, Inc.*, 628 F. Supp. 430, 432 (S.D.N.Y. 1985). *But see* *J.E.T Advertising Associates v. Lawn King, Inc.*, 84 A.D.2d 744, 744, 443 N.Y.S.2d 745, 747 (2d Dep't 1981) (maintenance of New York telephone number is insufficient to render corporation subject to New York jurisdiction when corporation is not authorized to do business in New York); *Carbone v. Fort Erie Jockey Club*, 47 A.D.2d 337, 339, 366 N.Y.S.2d 485, 487 (4th Dep't 1975) (maintenance of New York telephone number is insufficient to confer jurisdiction on New York courts).

<sup>105</sup> *Bryant*, 15 N.Y.2d at 429, 208 N.E.2d at 440, 260 N.Y.S.2d at 626-27; *Oral-B Lab., Inc. v. Mi-Lor Corp.*, 611 F. Supp. 460, 462 (S.D.N.Y. 1985); *Potter's Photographic Applications*, 292 F. Supp. at 97.

<sup>106</sup> *Nursery Plastics, Inc. v. Newton & Thompson, Inc.*, 191 N.Y.S.2d 655, 657 (1959) (defendant was not engaged in business within the state because defendant sold its products in New York only on an occasional basis, paid no local taxes in New York and maintained no sales offices within the state).

<sup>107</sup> *Laufer v. Ostrow*, 55 N.Y.2d 305, 311-312, 434 N.E.2d 692, 695, 449 N.Y.S.2d 456, 459-60 (1982)("[t]he volume of business thus generated, while not determinative, may have relevance."); *Buckley v. Redi-Bott, Inc.*, 49 Misc.2d 864, 268 N.Y.S.2d 653, 657 (1966) (while not controlling, the total dollars volume of defendant's business is a relevant factor in determining the courts jurisdiction). *See also* *Amalgamet Inc. v. Ledoux & Company*, 645 F. Supp. 248, 249 (S.D.N.Y. 1986) (Although the percentage of defendant's gross income earned in New York ranged only from 0.95% to 0.02%, since at least 33% of defendant's total revenues were from New York, defendant obtained substantial benefit from its business in New York).

<sup>108</sup> *Pneuma-Flo Systems, Inc. v. Universal Machinery*, 454 F. Supp. 858, 861, 865 (S.D.N.Y. 1978); *George Reiner & Co., Inc. v. Schwartz*, 41 N.Y.2d 648, 650-54, 363 N.E.2d 551, 552-55, 344 N.Y.S.2d 844, 846-48 (1977).



Under a subsidiary theory of doing business, the inquiry is whether "the subsidiary does all the business which the [parent] could do were [the parent] here by its own officials."<sup>109</sup> The courts will consider the following factors in addressing this issue:

1. The separateness of the books of parent and subsidiary;<sup>110</sup>
2. The authority exercised over the subsidiary by the parent;<sup>111</sup>
3. The similarity of the product lines or services of subsidiary and parent;<sup>112</sup>
4. The hiring, training and interchanging of employees;<sup>113</sup>
5. Common shareholders, directors and officers.<sup>114</sup>

Under an agency theory of doing business the courts consider:

1. The authority of the agent to bind the principal;<sup>115</sup>
2. The exclusivity of the agency relationship;<sup>116</sup>
3. The volume of business done by the agent for the principal;<sup>117</sup> and

<sup>109</sup> *Frummer v. Hilton Hotels International Inc.*, 19 N.Y.2d 533, 537, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 44 (1967), *cert. denied*, 389 U.S. 923 (1967); *Arbitron Co. v. E.W. Scripps, Inc.*, 559 F. Supp. 400, 403 (S.D.N.Y. 1983).

<sup>110</sup> *Public Administrator of County of New York v. Royal Bank of Canada*, 19 N.Y.2d 127, 131, 224 N.E.2d 877, 879, 278 N.Y.S.2d 378, 381 (1967); *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 101-02, 204 N.E.2d 329, 330-31, 256 N.Y.S.2d 129, 131-32 (1965).

<sup>111</sup> *Katz Agency, Inc. v. Evening News Ass'n and KTVY, Inc.*, 514 F. Supp. 423, 428-29 (S.D.N.Y. 1981); *Volkswagenwerk Aktiengesellschaft v. Beech Aircft. Corp.*, 751 F.2d 117, 120-22 (2d Cir. 1984).

<sup>112</sup> *Taca*, 15 N.Y.2d at 100-01, 204 N.E.2d at 330-31, 256 N.Y.S.2d at 131.

<sup>113</sup> *Royal Bank*, 19 N.Y.2d at 132, 224 N.E.2d at 879, 278 N.Y.S.2d at 381-82. *See also* *Gonzales v. Amtek, Inc.*, 50 Misc.2d 62, 68, 269 N.Y.S.2d 616, 622 (1966) (secretary acted on behalf of parent and subsidiary); *Rabinowitz v. Kaiser-Frazer Corp.*, 198 Misc. 707, 711, 96 N.Y.S.2d 642, 645 (1950) (parent paid salaries of some common officers).

<sup>114</sup> *Royal Bank*, 19 N.Y.2d at 131, 224 N.E.2d at 879, 278 N.Y.S.2d at 381; *Taca*, 15 N.Y.2d at 100-01, 204 N.E.2d at 330, 256 N.Y.S.2d at 130-31.

<sup>115</sup> *I. Oliver Engerbretson v. Aruba Palm Beach Hotel*, 587 F. Supp. 844, 850 (S.D.N.Y. 1984); *Arbitron Co. v. E.W. Scripps, Inc.*, 559 F. Supp. 400, 403 (S.D.N.Y. 1983).

<sup>116</sup> *Ackert v. Ausman*, 218 N.Y.S.2d 822, 828, 29 Misc.2d 962, 247 N.Y.S.2d 999 (1st Dep't 1964).

<sup>117</sup> *Ackert v. Ausman*, 218 N.Y.S.2d 822, 29 Misc.2d 962, 247 N.Y.S.2d 999 (1st Dep't 1964); *Singer v. Walker*, 32 Misc.2d 782, 784, 223 N.Y.S.2d 935, 938 (1962); *Rochester Happy House, Inc. v. Happy House Shops, Inc.*, 14 A.D.2d 491, 491, 217 N.Y.S.2d 791, 791 (4th Dep't 1961) (mem.).

4. The solicitation of business by the agent for the principal.<sup>118</sup>

## II. "TRANSACTIONING BUSINESS" UNDER SECTION 302

CPLR section 302(a)(1)<sup>119</sup> provides an independent basis on which a New York plaintiff can assert personal jurisdiction over a non-resident defendant found to be "transacting business" in New York. The "transaction of business" analysis requires significantly fewer contacts than those required under the "doing business" test in New York.<sup>120</sup>

Although the statute sets forth at least six bases upon which a foreign resident can be made subject to the jurisdiction of New York state courts, this paper discusses only that part of the statute which asserts jurisdiction based on the transaction of any business in New York.

The focus of section 302 of the CPLR is upon a single or limited business transaction as opposed to a "systematic and continuous" business activity as required under the "doing business" standard of section 301. Section 302, by its express terms, requires the cause of action to arise out of the business transacted within New York, whereas section 301 does not.

The evolution of the doctrine of personal jurisdiction, from *Pennoyer's*<sup>121</sup> strict residence requirement, to *International Shoe's*<sup>122</sup> "minimum contacts" standard, to *Hanson v. Denckla's*<sup>123</sup> inquiry as to whether defendant has "purposefully

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<sup>118</sup> *Laufer v. Ostrow*, 55 N.Y.2d 305, 311, 434 N.E.2d 692, 698, 449 N.Y.S.2d 456, 462 (1982); *Katz Agency, Inc. v. Evening News Association and KTVY, Inc.*, 514 F. Supp. 423, 428-29 (S.D.N.Y. 1981).

<sup>119</sup> Section 302 provides, in part:

Personal jurisdiction by acts of non-domiciliaries (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 or her 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

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N.Y. CIV. PRAC. L. & R. §302, PARA. (A)(1) (McKINNEY 1990).

<sup>120</sup> *Simonson v. International Bank*, 14 N.Y.2d 281, 285-86, 200 N.E.2d 427, 251 N.Y.S.2d 433, 436 (1964).

<sup>121</sup> 95 U.S. 714 (1877).

<sup>122</sup> 326 U.S. 310 (1945).

<sup>123</sup> 357 U.S. 235 (1953).

avail[ed] itself of the privilege of conducting activities within the forum State,"<sup>124</sup> has had a substantial impact on the development of CPLR section 302.

One of the landmark cases under section 302 is *Longines-Wittnauer Co. v. Barnes Reinecke*.<sup>125</sup> Judge Fuld's opinion contained an extensive analysis of section 302. The Court of Appeals concluded that Barnes & Reinecke Corporation, a Delaware corporation with its principle place of business in Illinois, was subject to the jurisdiction of the New York courts because it engaged in numerous activities in New York, in connection with a single business transaction.<sup>126</sup> The activities included

substantial preliminary negotiations through high-level personnel during a period of some two months; the actual execution of a supplementary contract; the shipment for use here [in New York], subject to acceptance following delivery, of two specially designed machines, priced at the not inconsiderable sum of \$118,000; and the rendition of services over a period of some three months by two of the appellant's top engineers in supervising the installation and testing of the complex machines.

We need not determine whether any one of the foregoing activities would in and of itself, suffice to meet the statutory standard; in combination they more than meet that standard.<sup>127</sup>

Contacts by high level personnel was also a factor considered in *Potter's Photographic Application Co. v. Ealing Corporation*.<sup>128</sup> The United States District Court for the Eastern District of New York applied its analysis of personal jurisdiction based upon "doing business" and considered defendant's high level contacts under the section 302 "transacting business" test. The District Court held that the defendant was subject to personal jurisdiction in New York on the ground that "high-level officials" of the defendant conducted substantial negotiations in New York.<sup>129</sup>

The defendant's representatives visited New York at least

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<sup>124</sup> *Id.* at 253.

<sup>125</sup> 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

<sup>126</sup> *Id.* at 457-58, 209 N.E.2d at 75-76, 261 N.Y.S.2d at 19.

<sup>127</sup> *Longines-Wittnauer Co. v. Barnes Reinecke*, 15 N.Y.2d at 457-458, 209 N.E.2d at 75, 261 N.Y.S.2d at 19.

<sup>128</sup> 292 F. Supp. 92 (E.D.N.Y. 1968).

<sup>129</sup> *Id.* at 101.

five times in order to consummate a distribution contract with the plaintiff (whereby plaintiff would be the exclusive distributor of defendant's products in the metropolitan New York area), and in order to secure the business of a large potential customer, the New York City Board of Education.<sup>130</sup> These negotiations resulted in the shipment of over \$10,000 worth of merchandise into New York for resale to New York customers.<sup>131</sup> The Court continued that although the assignment to plaintiff of defendant's sales contract with the Board of Education was concluded in Massachusetts, and thus that maybe "where the seed ripened into fruit, there can be no doubt that it was cultivated in New York."<sup>132</sup>

In *Pneuma-Flo Systems, Inc. v. Universal Machinery, Corp.*,<sup>133</sup> the Southern District elaborated on the analysis of visits to the forum state as a factor in determining whether the defendant was subject to the jurisdiction of New York courts.<sup>134</sup> Although it described the types of in-state activities that would subject a defendant to jurisdiction under the "transacting business" test,<sup>135</sup> the Southern District refused to extend personal jurisdiction over a California corporation whose visits to New York were not "essential to the ongoing relationship of the parties" and were for the "benefit of plaintiff only."<sup>136</sup>

A visit into the forum state for "further talks" at the plaintiff's office was not sufficient to subject the defendant to the jurisdiction of New York courts in *Presidential Realty Corporation v. Michael Square West, Ltd.*<sup>137</sup> The Court of Appeals held that

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> 454 F. Supp. 858.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 865-66.

<sup>136</sup> *Id.* at 866. In so holding the court stated:

It is not the number of such incursions, or their duration, however, which is dispositive; rather, it is their nature and quality. Thus, in each of the cases where jurisdiction over a non-resident has been upheld due to the visits of its officials, those meetings were for purposes essential to the formation or continuance of the contracts which has given rise to the litigation.

*Id.* at 866.

<sup>137</sup> 44 N.Y.2d 672, 376 N.E.2d 198, 405 N.Y.S.2d 37 (1978).

This meeting allegedly resulted in conciliatory modifications incorporated into an agreement which the defendants' representative concededly signed . . . . Therefore on the record before us there is no proof of any contacts with this State other than the fact that the modification letter and the agreement were signed in New York. This is not sufficient to confer jurisdiction.<sup>138</sup>

In *Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc.*,<sup>139</sup> Schuminsky, the president of the plaintiff-corporation, was impleaded as a third-party defendant on the grounds that he had personally guaranteed all payments plaintiff owed the defendant.<sup>140</sup> The plaintiff, Hi Fashion Wigs, sued the defendant advertising company for fraudulent actions under the contract, such as excessive billing and improper advertising.<sup>141</sup> The court found that the president's personal delivery of the signed instrument of guarantee in New York was sufficient to justify haling the president into New York even without further contacts.<sup>142</sup> The court reasoned that the president's delivery of guarantee was "so essential . . . to [the contract's] validity and existence . . . that Schuminsky must be deemed to have 'purposefully' availed himself 'of the privilege of conducting activities within [this] state', thereby 'invoking the benefits and protections of its laws'."<sup>143</sup>

The volume of business done by the defendant in New York may also be a factor considered pertinent by New York courts in their CPLR section 302 analyses. In *McKee Electronic Co., Inc. v. Rauland Borg Corp.*,<sup>144</sup> the court found that the defendant did less than five percent of its sales in New York, that all goods were shipped FOB<sup>145</sup> Chicago and that all orders were placed by mail to Chicago. Only then were the goods shipped to New York.<sup>146</sup> The contacts there were found not to meet the *Hanson*

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<sup>138</sup> *Id.* at 673, 376 N.E.2d at 198, 405 N.Y.S.2d at 38 (citations omitted).

<sup>139</sup> 32 N.Y.2d 583, 300 N.E.2d 421, 347 N.Y.S.2d 47 (1973).

<sup>140</sup> *Id.* at 584, 300 N.E.2d at 421-22, 347 N.Y.S.2d at 48.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 586-87, 300 N.E.2d at 423, 347 N.Y.S.2d at 50.

<sup>143</sup> *Id.* at 587, 300 N.E.2d at 423, 347 N.Y.S.2d at 50 (citations omitted).

<sup>144</sup> *McKee Electric Co., Inc. v. Rauland Borg Corp.*, 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967).

<sup>145</sup> Free on Board. The term generally means that the seller assumes all responsibilities and costs up to the point of delivery. BLACK'S LAW DICTIONARY 665 (6th ed. 1990).

<sup>146</sup> *Id.* at 379, 229 N.E.2d at 605, 283 N.Y.S.2d at 35.

*v. Denckla*<sup>147</sup> minimum standard but, rather, were "infinitesimal" and as such would not sustain jurisdiction.<sup>148</sup>

### SUMMARY OF TRANSACTING BUSINESS

Factors that New York courts examine to determine personal jurisdiction based upon transacting business in New York are:

1. The status of personnel who make visits to New York and the nature of those visits;<sup>149</sup>
2. Whether or not substantial negotiations took place in New York;<sup>150</sup>
3. The volume of and/or dollar amount of business done in New York by the defendant;<sup>151</sup> and
4. Whether the goods were shipped FOB outside of New York.<sup>152</sup>

### III. JAPANESE CORPORATE STRUCTURE

Is it appropriate for a court to make some basic assumptions about Japanese corporations for the purpose of a jurisdictional analysis? Do the courts in fact do this, treating Japanese corporations differently than other foreign corporations? As set forth herein, there exist certain prevalent ideas about Japanese corporations. Japanese corporations are seen by many in the United States as a potential threat to our security. Numerous

<sup>147</sup> 357 U.S. 235 (1953).

<sup>148</sup> *McKee*, 20 N.Y.2d at 379-82, 229 N.E.2d at 604, 283 N.Y.S.2d at 37.

<sup>149</sup> *Longines-Wittnauer Co. v. Barnes Reinecke*, 15 N.Y.2d 443, 455, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8, 19 (1965); *Potter's Photographic Application Co. v. Ealing Corporation*, 292 F. Supp. 92, 100-103 (E.D.N.Y. 1968); *Pneuma-Flo Systems, Inc. v. Universal Machinery*, 454 F. Supp. 858, 866 (S.D.N.Y. 1978).

<sup>150</sup> *George Reiner & Co., Inc. v. Schwartz*, 41 N.Y.2d 648, 653, 363 N.E.2d 551, 554, 394 N.Y.S.2d 844, 847-48 (1977); *Longines-Wittnauer Co. v. Barnes Reinecke*, 15 N.Y.2d 443, 455, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8, 19 (1965). See also *Presidential Realty Corporation v. Michael Square West Ltd.*, 44 N.Y.2d 672, 673, 376 N.E.2d 198, 199, 405 N.Y.S.2d 37, 38 (1978)(mem.)(one day business meeting may supply minimum contacts).

<sup>151</sup> *Longines-Wittnauer Co. v. Barnes Reinecke*, 15 N.Y.2d 443, 455, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8, 19 (1965); *Potter's Photographic Application Co. v. Ealing Corporation*, 292 F. Supp. 92, 101 (1968); *McKee Electric Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 379, 229 N.E.2d 604, 605, 283 N.Y.S.2d 34, 35 (1967).

<sup>152</sup> See *McKee Electric Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 379, 229 N.E.2d 604, 605, 283 N.Y.S.2d 34, 35 (1967)(court considered, *inter alia*, the Illinois defendant shipped goods to New York FOB Chicago).

texts address the subject.<sup>153</sup> Do these concerns affect the analyses New York courts apply in determining whether Japanese corporations are subject to jurisdiction in New York?

The organization of Japanese corporations has its greatest impact on the personal jurisdiction analyses of CPLR sections 301 and 302 in the area of jurisdiction based upon the activities of subsidiaries; that is, subsidiaries that are dominated by parent corporations or are "mere departments" of their parent corporations.<sup>154</sup>

A common perception of Japanese subsidiaries incorporated in the United States is that they are dominated by their Japanese parent corporations. "One of the commonly used control mechanisms of the HQ [headquarters], however, is to give a subsidiary substantial *formal* autonomy but to send competent expatriates who will manage the subsidiary in accordance with the HQ's wish without its direct intervention."<sup>155</sup> But Takamiya goes on to point out that "[t]he form of subsidiary acquisition is known to have a substantial effect on the degree of subsidiary autonomy. Head offices tend to exercise more influence on a subsidiary which was built from scratch than on one purchased from local corporations."<sup>156</sup>

Takamiya's research also indicates that there are pressures on the parent corporation to maintain both centralized and decentralized management.<sup>157</sup> The former gives the subsidiary less autonomy than the latter. Factors tending to encourage centralized control of subsidiaries include (1) an increasing need for coordination within corporate groups to fend off competition<sup>158</sup> and (2) the need for global marketing and manufacturing strate-

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<sup>153</sup> See, e.g., LAWRENCE FRANKO, *THE THREAT OF JAPANESE MULTINATIONALS, HOW THE WEST CAN RESPOND* (1983); CLYDE V. PRESTOWITZ, JR. *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD* 20-21 (1988).

<sup>154</sup> See *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965) (jurisdiction over a local subsidiary was established based on the court's view that this subsidiary was not an independent corporation but was completely dominated by its parent and was a "mere department" of the parent).

<sup>155</sup> Makoto Takamiya, *The Degree of Organizational Centralization in Multinational Corporations*, in *JAPAN'S EMERGING MULTINATIONALS* 35, 37 (Susumu Takamiya & Keith Thurley eds., 1985).

<sup>156</sup> *Id.* at 42 (citation omitted).

<sup>157</sup> *Id.* at 47.

<sup>158</sup> *Id.* at 38.

gies to more efficiently allocate resources.<sup>159</sup>

Factors that cause pressure to decentralize include (1) the cost of using expatriates to manage foreign subsidiaries,<sup>160</sup> (2) the increasing number of subsidiaries owned by Japanese multinationals,<sup>161</sup> and (3) local pressures including legal consequences (e.g., jurisdictional consequences) for failing to give more autonomy to the subsidiary.<sup>162</sup>

Additional evidence which weighs against the generalization that subsidiaries are somehow culturally submissive to their parent corporations is the Japanese concept of *ringi*.<sup>163</sup> The *ringi* system of decision-making is a relic of feudal Japan where middle ranking officers were expected to make vital decisions so as to shield their superiors from responsibility.<sup>164</sup>

One author suggests that the *ringi* influence in decision-making still exists.<sup>165</sup> This indicates that middle managers, such as those who typically lead subsidiaries, act with a considerable amount of autonomy in making substantial decisions, and that their seniors merely coordinate efforts to back them up.<sup>166</sup> This view cuts against the generalization that Japanese subsidiaries are parent-dominated, "mere department" subsidiaries.

Another author suggests that there is a conflict between the basic management style of a corporation's headquarters and the style of the host countries.<sup>167</sup> He categorizes the resolution of this conflict as a function of the evolution of the parent corporation and of the type of business in which the corporation is engaged.<sup>168</sup>

Thus it would seem that any assumptions about the relationship between Japanese corporations and their American sub-

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<sup>159</sup> *Id.* at 46.

<sup>160</sup> *Id.* at 42.

<sup>161</sup> *Id.* at 47.

<sup>162</sup> *Id.*

<sup>163</sup> KANJI HAITANI, *THE JAPANESE ECONOMIC SYSTEM: AN INSTITUTIONAL OVERVIEW* 89-90 (1976).

<sup>164</sup> NAOTO SASAKI, *MANAGEMENT & INDUSTRIAL STRUCTURE IN JAPAN* 56 (1981).

<sup>165</sup> *Id.* at 58.

<sup>166</sup> HAITANI, *supra* note 163, at 89.

<sup>167</sup> Noritake Kobayashi, *The Patterns of Management Style Developing in Multinationals in the 1980's*, in *JAPAN'S EMERGING MULTINATIONALS* 229, 235, 248-51 (Susumu Takamiya & Keith Thurley eds., 1985).

<sup>168</sup> *Id.*



subsidiaries must include a detailed analysis of (1) the chronological age of the subsidiary, (2) the way in which it was acquired, (3) the type of business in which it is engaged (which may or may not be different than that of the parent corporation) and (4) the degree to which the parent corporation has developed into a true multinational.

This type of analysis seems to open the proverbial Pandora's box, and is certainly not a subject open to traditional notions of judicial notice. Neither members of the judiciary nor corporate counsel have the expertise to make such an analysis. Certainly any perceived advantage of being able to make some generalizations about Japanese corporations would be lost in the time and cost associated with cataloging the development of each of the Japanese corporations which owns American subsidiaries.

The best and most reasonable approach to analysis of the relationship between a defendant Japanese parent corporation and its American subsidiary for purposes of a personal jurisdiction inquiry is simply to apply the criteria developed by the New York courts for the section 301 "doing business" test and the section 302 "transacting business" test.

The following section examines the manner in which New York courts have actually dealt with Japanese defendant corporations.

#### IV. PERSONAL JURISDICTION AS APPLIED TO JAPANESE CORPORATIONS

The authors have selected five cases involving Japanese corporate defendants and the issue of personal jurisdiction as examples of how New York courts have applied CPLR sections 301 and 302 to Japanese corporations.

##### A. *Louis Marx & Co. v. Fuji Seiko Co.*<sup>169</sup>

Plaintiff, a Delaware toy distributor, sued in New York Fuji Seiko, a Japanese toy manufacturer, and Fukunaga & Co., a Japanese buying agent.<sup>170</sup> Fukunaga & Co. represented plaintiff,

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<sup>169</sup> 453 F. Supp. 385 (S.D.N.Y. 1978).

<sup>170</sup> *Id.* at 387. The plaintiff also sued Manji Fukunaga, the principal officer of

Louis Marx & Co. (Marx), as well as Marx's competitor, Buddy L Corp. (Buddy L), in their dealings with Japanese manufacturers.<sup>171</sup> Plaintiff Marx, a purchaser of toy typewriters, alleged breach of contract, unfair competition, and tortious interference with contract against Fuji Seiko, the manufacturer of the toy typewriters, and Fukunaga & Co., the agent through whom Marx had purchased Fuji Seiko's typewriters.<sup>172</sup> The suit stemmed from Fukunaga & Co.'s sale of Fuji Seiko's typewriters to Buddy L, Marx's competitor.<sup>173</sup>

The court found that Fukunaga & Co. was subject to jurisdiction in New York under section 302.<sup>174</sup> The president of Buddy L had traveled to Japan to meet Manji Fukunaga (Fukunaga) the principal officer of Fukunaga & Co.<sup>175</sup> Thereafter, in a period of nineteen months, Fukunaga & Co. made four visits to New York.<sup>176</sup> The first visit was to participate in an annual trade show or toy fair, where the plaintiff's representative discussed various topics with Fukunaga, including Fuji's sale of typewriters to Buddy L.<sup>177</sup> The second visit involved a meeting in Connecticut between Fukunaga and plaintiff, to arrange sales to Marx. It also allegedly involved another meeting at the same time in New York between Fukunaga and Buddy L.<sup>178</sup> The third visit to New York by Fukunaga was for a deposition in a companion lawsuit brought by plaintiff against Buddy L "and, apparently, for the toy show."<sup>179</sup> The fourth visit to New York was announced to the plaintiff by a phone call made by Fukunaga to the plaintiff from Buddy L's office in New York, during which sales of Fuji Seiko's toys to the plaintiff were again discussed.<sup>180</sup>

On the basis of these four visits to New York by Fukunaga,

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Fukunaga & Co. in the same action. *Id.* However the court held that it did not have jurisdiction over him personally, because he was acting on corporate business as an officer of the corporation, not in his personal capacity. *Id.* at 389.

<sup>171</sup> *Id.* at 388-89.

<sup>172</sup> *Id.* at 387.

<sup>173</sup> *Id.* at 388.

<sup>174</sup> *Id.* at 389.

<sup>175</sup> *Id.* at 388.

<sup>176</sup> *Id.* at 388-89.

<sup>177</sup> *Id.* at 388.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 389; *see also*, *Louis Marx & Co. v. Buddy L Corp.*, 453 F. Supp. 392 (S.D.N.Y. 1978).

<sup>180</sup> 453 F. Supp. 385, 388-89.

the court found that Fukunaga & Co. had transacted business in New York.<sup>181</sup> The court's rationale was based upon the transaction of business between Buddy L and Fukunaga & Co. during Fukunaga's visits to New York, and not on any transactions between Fukunaga and the plaintiff.<sup>182</sup> Ordinarily, such contacts would not confer jurisdiction over Fukunaga & Co. with respect to plaintiff. However, the cause of action asserted by Marx resulted from the business relationship between Fukunaga & Co. and Buddy L and thus the requirements of section 302 were found to be satisfied.<sup>183</sup>

This case appears to apply strictly the CPLR sections 301 and 302 tests developed in the New York case law. With respect to defendant Fukunaga & Co., the visits to New York by its managing agent were viewed as highly significant to the court, since it was through these visits that the business relationship between Fukunaga & Co. and Buddy L developed.<sup>184</sup> This constituted "substantial preliminary negotiations through high level personnel"<sup>185</sup> and "meetings . . . for purposes essential to the formation or continuance of the contract which has given rise to the litigation."<sup>186</sup>

With regard to defendant Fuji Seiko, the court refused to exert personal jurisdiction because Fuji Seiko had no contacts with New York other than through Fukunaga as its buying agent.<sup>187</sup> The plaintiff then seized upon the theory that

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<sup>181</sup> *Id.* at 389.

<sup>182</sup> *Id.*

<sup>183</sup> In passing upon the question of whether Fukunaga's activities within New York reflect a sufficient transaction of business upon which to subject it to the court's jurisdiction, the court stated that because "the development of this business relationship, which resulted in substantial sales of merchandise, [gave] rise to some of Marx's claims, there is jurisdiction over Fukunaga & Co." *Id.*

<sup>184</sup> *Id.* at 388-89.

<sup>185</sup> *Longines-Wittnauer Co. v. Barnes Reinecke*, 15 N.Y.2d 443, 457, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8, 19 (1965).

<sup>186</sup> *Pneuma-Flo Systems, Inc. v. Universal Machinery*, 454 F. Supp. at 866 (S.D.N.Y. 1978).

<sup>187</sup> *Louis Marx & Co.* 453 F.Supp. at 389-90. Defendant Fuji was neither incorporated in New York, nor had its principle place of business there. *Id.* Defendant did not conduct promotion or advertising in New York. *Id.* In addition, all manufacturing took place in Japan, and all the products were shipped FOB Japan. *Id.* at 389. All buyers were responsible for making their own arrangements in shipping the products from Japan to the United States. *Id.* Finally, all purchase orders were issued and all payments were made to Fukunaga & Co., Ltd. *Id.*

Fukunaga acted on behalf of Fuji as an agent.<sup>188</sup> The section 301 agency theory failed because (1) the agent did not do all of the activities that the defendant would do if it were in the state itself, and (2) the agent had no power to bind the principal.<sup>189</sup>

2. *Bulova Watch Company, Inc. v. K. Hattori & Co., Ltd.*<sup>190</sup>

Plaintiff, a domestic watch company, sued Hattori, a watch company located in Tokyo that had no offices or personnel in New York. Hattori did, however, fully own an American subsidiary, Seiko Corporation of America, which in turn owned all the stock in three New York corporations, Pulsar Time, Inc., Seiko Time Corp., and SPD Precision, Inc., (collectively the Seiko Subsidiaries) which competed directly with plaintiff.<sup>191</sup> The Seiko Subsidiaries sold watches manufactured by Hattori and exported to the United States.<sup>192</sup>

Plaintiff's suit alleged that Hattori, through an officer named Hideaki Moriya, who was simultaneously a director of the Seiko Subsidiaries, had attempted to establish a distribution network in America by hiring away key sales personnel from plaintiff.<sup>193</sup> Although Hattori itself had absolutely no contacts with New York, Judge Weinstein found that it dominated the Seiko Subsidiaries so completely that it was subject to New York jurisdiction, since its subsidiaries did all the business it could do were it here by its own officers.<sup>194</sup> En route to its decision, the court formulated two vivid analogies to describe the intimate relationship between the Tokyo-based defendant, Hattori, and its New York subsidiaries:

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<sup>188</sup> *Id.* at 390.

<sup>189</sup> The court's rationale apparently rests upon these two reasons because the court points to the fact that neither Fuji nor Fukunaga maintains offices, owns property, employs individuals, or advertises in New York. *Id.* at 388. The court also points to the fact that Fukunaga was a buying agent for different purchasers and dealt with various manufacturers. *Id.* at 391. Thus, Fuji did not control Fukunaga. Furthermore, Fuji was not even aware of Fukunaga's four trips to New York, and therefore the trips were not undertaken with Fuji's knowledge and consent. *Id.*

<sup>190</sup> 508 F. Supp. 1322 (E.D.N.Y. 1981).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1330-31.

<sup>194</sup> *Id.* at 1344-45.

Hattori and its American subsidiaries do maintain some independence—about as much as the egg and vegetables in a western omelette.

. . . Large and sophisticated as it may be, it [Hattori] is very much the hub of a wheel with many spokes. It is appropriate, therefore, to look to the center of the wheel in Japan when the spokes [i.e., the Seiko Subsidiaries] violate substantive rights in other countries.<sup>195</sup>

The first noteworthy aspect of this case is the court's use of both sections 301 and 302 *simultaneously*. Judge Weinstein announced the following rule:

. . . [w]hile not within the strict limit of the 302 long arm provision, the parent's actions might be sufficiently within the CPLR's penumbra so that the combination of 301 and 302 read together covers the particular claims asserted and long arm jurisdiction lies. None of this would violate any constitutional requirement.<sup>196</sup>

The court's statement implies that a section 302 action predicated on the activities of a parent corporation which would fail for insufficient contacts directly related to the transaction, might succeed if other section 301 "doing business" contacts on the part of the parent corporation existed. This is an important concept for Japanese and other foreign corporations to consider as they order their affairs in New York. It would, for example, suggest that Japanese companies should scrupulously avoid establishing any, even casual, continual contacts with New York (such as maintenance of a bank account or a telephone number), because such activities could conceivably be construed as indicia of "doing business."

Another remarkable aspect of the *Hattori* case is Judge Weinstein's liberal use of judicial notice.<sup>197</sup> The case is replete

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<sup>195</sup> *Id.* at 1341.

<sup>196</sup> *Id.* at 1327.

<sup>197</sup> *Id.* at 1327-29. Judicial notice is defined as:

[t]he act by which a court . . . will . . . recognize the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, *e.g.*, the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc.

BLACK'S LAW DICTIONARY 848 (6th ed. 1990).

with citations from texts describing Japanese business practices, Japanese society, and Japanese multinational corporations. These citations, when added to language in the opinion, which is at best editorial and at worst bigoted, seriously undermine the court's reasoning. This case may very well exemplify American public opinion of Japanese corporations and the perceived threat of Japanese financial power.

An example of the quasi-editorial language found in the *Bulova* opinion is as follows:

To any layman it would seem absurd that our courts could not obtain jurisdiction over a billion dollar multinational which is exploiting the critical New York and American markets to keep its home production going at a huge volume and profit. This perception must have a bearing on our evaluation of fairness. The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution.<sup>198</sup>

This language appears to evince a threshold bias toward the foreign defendant. Moreover, the suggestion that a layman's perception should be included in the court's analysis has no legal basis.

The court's emphasis on seemingly irrelevant facts further demonstrates its apparent bias towards the defendant. Judge Weinstein found that "[i]n 1980 over four million Hattori timepieces were sold in this country at prices to the consumer of one hundred twenty five dollars and higher—far more than half a billion dollars at retail."<sup>199</sup> While the volume of business done by the defendant within the forum state of New York is relevant, in this case, sales outside the state with no connection to New York would have no bearing on personal jurisdiction in New York.<sup>200</sup>

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<sup>198</sup> *Id.* at 1327.

<sup>199</sup> *Id.* at 1329.

<sup>200</sup> Although the extent to which a corporation conducts interstate or international business is relevant to CPLR § 302(a) (3)(ii), plaintiff did not seek to claim jurisdiction pursuant to that section, because it was not applicable. Under § 302(a)(3)(ii) plaintiff must show that a tortious act was committed without the state causing injury within the state, plus it must be shown that the defendant "expect[ed] or should reasonably [have] expect[ed] the act to have consequences in the state and derive[d] substantial revenue from interstate or international commerce." N.Y. CIV. PRAC. L. & R. § 302(a)(3)(ii) (McKinney 1990). *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 433 (2d. Cir. 1971); *Chemical Bank v. World Hockey Ass'n*, 403 F. Supp. 1374, 1379-80 (S.D.N.Y. 1975).

The retail price of Hattori timepieces is mentioned almost by way of complaint.

The most astonishing argument advanced by the court, however, involves a view of Japanese society derived from texts such as JAPAN AS NUMBER ONE,<sup>201</sup> and JAPAN'S MULTINATIONAL ENTERPRISES.<sup>202</sup> These and other related texts are cited repeatedly as sources of factual information about the Japanese.<sup>203</sup>

The court's view of Japanese society, which is then superimposed over the court's jurisdictional analysis, suffers from overbroad generalizations. The court stated that "[i]n Japan subsidiaries are commonly referred to as ko-gaisha (child company) in relation to oya-gaisha (parent)."<sup>204</sup> The court accepted as dogma the notion of a "widely-noted hierarchical structure that joins the Japanese subsidiary to its parent, and the Japanese employee to his or her employer."<sup>205</sup>

The court attempted to validate its sweeping cultural generalizations by making broad references to the above texts.<sup>206</sup> Yet, the court was far from clear as to why the Japanese culture is singled out as a factor in its jurisdictional analysis. Are German and French multinationals to undergo the same test? While the court claimed to reject any simplistic test of whether a foreign corporation does business in New York,<sup>207</sup> the court's approach raises the question whether a stereotypical view of a Japanese Corporation can be used, to some extent, as a substitute for a careful application of the law to particular facts at hand.

The examination of the *actual* control exerted by a parent corporation over a domestic subsidiary has been the traditional

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<sup>201</sup> EZRA F. VOGEL, JAPAN AS NUMBER ONE 134-36 (1979).

<sup>202</sup> M. YOSHINO, JAPAN'S MULTINATIONAL ENTERPRISES 169 (1976).

<sup>203</sup> Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1323, 1336-39 (1981).

<sup>204</sup> *Id.* at 1339 (quoting KANJI HAITANI, THE JAPANESE ECONOMIC SYSTEM: AN INSTITUTIONAL OVERVIEW 126 (1976)).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* For example, the court includes parenthetical information when citing one text, pointing out the "tendency of [a] parent to impose its will on [a] subsidiary because of [the] strong Japanese sense of hierarchy." *Id.* (citing YOSHINO, *supra* note 201, at 169). The court goes on to state that "[t]he sense of hierarchy is apparently to be found in typical employee-employer relations as well. An inferior in Japanese social organization is 'conditioned to attribute authority to the wishes of his superior . . . (ellipses in original) the subordinate is extremely conscious of his standing in the group.'" *Id.* (quoting Haitani, *supra* note 204, at 92 (1976)).

<sup>207</sup> *Id.* at 1335.

focus of analysis of New York courts.<sup>208</sup> The view suggested by the *Bulova* court (which apparently is to be applied solely in cases involving Japanese companies) creates a presumption of control, which in turn would violate the burden of proof standard in personal jurisdiction as exists in New York, by shifting the burden to the defendant to show a lack of parental control.<sup>209</sup>

Actions and negotiations by high level personnel of defendant foreign corporations are valid factors in a section 302 minimum contacts analysis.<sup>210</sup> But Judge Weinstein's analysis again creates a presumption that a former employee of a parent corporation, now employed by its domestic subsidiary, is an agent of the parent and is acting for and on behalf of the parent. "Under the *shukko* system, an employee may be assigned to another employer or to a subsidiary. While on external assignment the employee keeps his 'security in, and identity with' his original employer."<sup>211</sup> The interchanging or transferring of employees between subsidiaries is, of course, an important criteria under the section 301 "doing business through subsidiaries" test as formulated in New York case law, but to assume that all Japanese employees thus transferred retain allegiance to the transferor corporation is another broad generalization not appropriate for judicial notice. As noted above, the sharing of officers and directors does not by itself establish the control necessary for personal jurisdiction based upon activities of subsidiaries.<sup>212</sup>

<sup>208</sup> See, e.g., *Delagi v. Volkswagenwerk AG of Wolfsburg*, 29 N.Y.2d 426, 432, 278 N.E.2d 895, 897, 328 N.Y.S.2d 653, 657 (1972); *Titu-Serban Ionescu v. E.F. Hutton & Co.*, 434 F. Supp. 80 (S.D.N.Y. 1977), *aff'd*, 636 F.2d 1202 (2d Cir. 1980); *Freeman v. Gordon & Breach, Science Publishers, Inc.*, 398 F. Supp. 519, 522 (S.D.N.Y. 1975); *Tokyo Boeki (U.S.A.), Inc. v. SS Navarino*, 324 F. Supp. 361, 366 (S.D.N.Y. 1971).

<sup>209</sup> The burden is on the plaintiff to establish by a preponderance of the evidence that the court has jurisdiction over the defendant. *Hoffritz For Cutlery, Inc. v. Amajac, Ltd.* 763 F.2d 55 (2d Cir. 1985). See also *Marine Midland Bank v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). However, until an evidentiary hearing is held, the plaintiff need only make a prima facie showing that jurisdiction exists. *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 768 (2d Cir. 1983).

<sup>210</sup> See, e.g., *Longines-Wittnauer Co. v. Barnes Reinecke*, 15 N.Y.2d 443, 209 N.E.2d 75, 261 N.Y.S.2d 8 (1965).

<sup>211</sup> *Bulova Watch Co. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1340 (E.D.N.Y. 1981) (citing HAITANI, *supra* note 204, at 46).

<sup>212</sup> See, e.g., *Ioviero v. Ciga Hotels, Inc.*, 101 A.D.2d 852, 853, 475 N.Y.S.2d 880, 881 (2d Dep't 1984).



In defense of the court's decision, it appears that the evidence suggested that Hattori exercised extensive control over its subsidiaries.<sup>213</sup> This, when viewed with the interchanging of personnel, identical product lines, and Moriya's status as an officer of both Hattori and the Seiko Subsidiaries, supports jurisdiction under a section 301 "doing business through subsidiaries" (mere department) analysis or a section 302 "minimum contacts" (negotiations and actions in the forum by a high level employee of the parent) analysis.

However, this court's stereotypical view of Japanese society and of Japanese business practices is a factor that Japanese corporations need to consider as they order their economic relations with New York.

*C. Arrow Trading Co., Inc. v. Sanyei Corp. (Hong Kong) Ltd.*<sup>214</sup>

This action was brought by Arrow Trading Company, a New York corporation, against Sanyei Corporation (Hong Kong) Ltd. (Sanyei Hong Kong), a Hong Kong corporation with no offices in New York.<sup>215</sup> Sanyei Hong Kong was a subsidiary of non-party Sanyei Corporation of Japan, which also owned non-party Sanyei New York, a New York corporation.<sup>216</sup> The most significant aspect of this case was plaintiff's attempt to assert jurisdiction over Sanyei Hong Kong based on the activities of its "sister" subsidiary, Sanyei New York.<sup>217</sup> Thus the effort here was not to reach the "parent" corporation based on that parent's control over its "child" subsidiary but to reach beyond the parent to a "sister" based on the activities of the parent's other daughter.<sup>218</sup>

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<sup>213</sup> Virtually all of Hattori's sales in America were through the subsidiaries. *Hattori*, 508 F. Supp. at 1342. Hattori owned all the stock of its subsidiaries. *Id.* at 1340. If the New York subsidiaries needed funds, Hattori was to act as the lender, as it did with its other subsidiaries. *Id.*

<sup>214</sup> 576 F. Supp. 67 (S.D.N.Y. 1983).

<sup>215</sup> *Id.* at 68.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 70.

<sup>218</sup> Usage of familial analogies to describe corporate structure are in accord with Judge Weinstein's practice in *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1339 (E.D.N.Y. 1981).

The transaction which formed the basis for the litigation was initiated in 1978 by plaintiff Arrow's president, who travelled to Hong Kong to meet and to negotiate with officials of Sanyei Hong Kong for Arrow's purchase of flashlights.<sup>219</sup> Following the meeting in Hong Kong, further negotiations by telex and mail took place.<sup>220</sup> Arrow forwarded a purchase order to Sanyei Hong Kong, which order was confirmed by Sanyei Hong Kong in writing.<sup>221</sup> Arrow later ordered additional flashlights by telex.<sup>222</sup> Letters of credit were opened by Arrow in favor of Sanyei Hong Kong.<sup>223</sup> A significant component of the parties' contract was Sanyei Hong Kong's guarantee of delivery—but not of quality.<sup>224</sup> Thus Sanyei's role was that of a buying agent for Arrow assigned to locate a Hong Kong manufacturer for Arrow's flashlights. Sanyei Hong Kong's status as a mere buying agent may have prompted the court to accord its jurisdictional defense greater weight than this defense ordinarily would have merited.

A dispute as to quality arose and Arrow's vice president visited Hong Kong to try to resolve the problem.<sup>225</sup> Telexes were exchanged and culminated in a visit by an officer of defendant's sister subsidiary, Sanyei New York, to Arrow's warehouse in New York to view the defects and report his findings to Sanyei Hong Kong.<sup>226</sup> Following this, Arrow's officers twice visited Hong Kong and Sanyei Hong Kong's officers twice visited New York, but the parties could not resolve their disagreements.<sup>227</sup>

After Arrow instituted suit in New York, Sanyei Hong Kong moved to dismiss based on lack of personal jurisdiction.<sup>228</sup> The district court granted the motion, finding that Sanyei Hong Kong was not subject to the jurisdiction of the New York courts because Arrow had failed to establish that Sanyei Hong Kong was either doing business or transacting business in New

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<sup>219</sup> 576 F. Supp. 67, 68 (S.D.N.Y. 1983).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 68.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 69.

<sup>228</sup> *Id.* at 68.

York.<sup>229</sup>

Under section 301 (the "doing business" analysis) the court looked to the totality of Sanyei Hong Kong's contacts with New York and found that "[i]n 1981, each of four representatives of Sanyei Hong Kong visited New York once, for visits totalling twenty-six days. Defendant characterizes these visits as social visits, which were apparently intended to maintain good will between Sanyei Hong Kong and its clients across the globe."<sup>230</sup>

An issue of fact existed as to whether Sanyei Hong Kong had used these trips to New York to solicit business. Even if Sanyei Hong Kong had solicited, however, the court found that such would, under *Frummer*,<sup>231</sup> constitute "mere solicitation" and could not establish jurisdiction under New York law.<sup>232</sup>

Faced with the court's refusal to find that Sanyei Hong Kong itself did business in New York, plaintiff argued that the in-state activities of Sanyei New York, performed for the benefit of defendant, Sanyei Hong Kong, the sister subsidiary, were attributable to defendant and constituted doing business.<sup>233</sup> The court rejected this argument, finding that the services performed by Sanyei New York, such as booking reservations, relaying information and transmitting samples, were ministerial and "few if any can be said to require the use of discretion or [an] exercise of judgment."<sup>234</sup> The court also noted that Sanyei New York was paid for rendering these services.<sup>235</sup> Classifying Sanyei New York's functions as "ministerial", the court applied the *Frummer* test (does the New York agent do all the business which defendant could do were it here by its own officials?),<sup>236</sup> and concluded that Sanyei Hong Kong was not doing business based on Sanyei New York's in-state activities.<sup>237</sup>

For its "transaction of business" analysis under section 302, the court focused on the two visits to New York by the defend-

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<sup>229</sup> *Id.* at 71.

<sup>230</sup> *Id.* at 69.

<sup>231</sup> 19 N.Y.2d 533, 536, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 43 (1967).

<sup>232</sup> *Arrow Trading Co., Inc. v. Sanyei Corp. (Hong Kong) Ltd.*, 576 F. Supp. 67, 69 (S.D.N.Y. 1983).

<sup>233</sup> *Id.* at 70.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> 19 N.Y.2d 533, 537, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 44.

<sup>237</sup> *Arrow Trading Co., Inc.*, 576 F. Supp. at 70.

ant's vice president to inspect the defective goods and to settle the dispute.<sup>238</sup> In its analysis of these contacts, the court could find no act on the part of the defendant by which it purposefully availed itself of the privilege of conducting activities within the forum state.<sup>239</sup>

Plaintiff's claim arose out of its dissatisfaction with the shipment of flashlights it received. The transaction, the sale of flashlights, had already been completed, when defendant on two occasions visited New York.<sup>240</sup> The court noted that it was plaintiff who initiated the underlying agreement between the parties, that negotiations were conducted by mail and telex, and that defendant's performance was to take place in Hong Kong.<sup>241</sup> Consequently, these two visits to New York by defendant were held to fall short of the threshold of "minimum contacts" and did not constitute "transacting business" in New York.<sup>242</sup>

*Arrow* sets forth several important rules that foreign corporations seeking to avoid New York jurisdiction should follow when dealing with New York corporations. First, foreign corporations should solicit and negotiate agreements in their foreign locales or by mail and telex, and should not send their officials to New York until *after* consummation of contracts. Second, a foreign corporation should, if possible, assume the role of "buying agent" for a New York purchaser, so that ultimate responsibility and jurisdictional consequences attach to the manufacturer rather than to the intermediate buying agent. Finally, if a foreign corporation seeks to use the services of an agent or affiliate located in New York, it should delegate only ministerial duties, and not any discretionary powers, to that affiliate and should pay the affiliate for its services.

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<sup>238</sup> *Id.* at 70.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 68.

<sup>241</sup> *Id.* at 70-71.

<sup>242</sup> *Id.* at 71.

D. *Bon Jour International, Ltd. v. Nissho Iwai Hong Kong Corporation, Ltd.*<sup>243</sup>

In this unreported decision, which is almost squarely on point with the facts in *Arrow*, and in which the authors of this article represented defendant, the trial court sustained defendant's affirmative defense of lack of personal jurisdiction.<sup>244</sup> Defendant Nissho Iwai Hong Kong ("NIHK"), like Sanyei Hong Kong in the *Arrow* case, was the Hong Kong subsidiary of a Japanese trading company, was incorporated in Hong Kong, and had no offices or personnel in New York state.<sup>245</sup>

NIHK and plaintiff had negotiated and executed contracts in Hong Kong for the sale of garments from defendant to plaintiff.<sup>246</sup> Plaintiff was a New York apparel company, whose high level personnel (president and vice president) had travelled to Hong Kong to consummate these transactions.<sup>247</sup> When delivery difficulties later arose, the parties communicated not only by telex, but NIHK on one occasion enlisted the aid of its New York sister subsidiary, Nissho Iwai America Corporation, to explain more fully to plaintiff the specifics of the delivery difficulties.<sup>248</sup> Plaintiff sued in New York alleging that NIHK's single use of its New York sister subsidiary to help remedy the delivery problems constituted either doing business under section 301 or transacting business under section 302.<sup>249</sup> Sharp issues of fact also existed because plaintiff claimed that the contracts were negotiated and signed in New York while defendant maintained that negotiation and execution occurred in Hong Kong.<sup>250</sup> Recommending dismissal of the complaint on jurisdictional grounds, the special referee assigned to conduct a hearing on the jurisdictional issue found:

[t]he facts in this case are directly analogous to those in *Arrow*. . . . I find that there is no credible evidence of negotiation or signing of a contract in New York, nor were goods to be sup-

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<sup>243</sup> No. 87-7450, slip op. (N.Y. July, 1990).

<sup>244</sup> *Id.* at 4.

<sup>245</sup> *Id.* at 1.

<sup>246</sup> *Id.*

<sup>247</sup> No. 87-07450, slip op. at 1 (N.Y. July, 1990).

<sup>248</sup> *Id.* at 2-3.

<sup>249</sup> *Id.* at 2, 3.

<sup>250</sup> *Id.* at 3.

plied in New York. As in *Arrow*, the only contact with New York was the plaintiff's place of business.<sup>251</sup>

The trial court followed the referee's recommendation and dismissed the complaint.<sup>252</sup>

Several important jurisdictional lessons can be learned from *Bon Jour*. The various local subsidiaries of Nissho Iwai wisely maintained strict independence from each other and did not freely assist each other in transactions, which assistance might have created an inference of agency. Additionally, the contracts at issue were negotiated and executed outside of New York and all subsequent communications regarding them were also done outside New York via telex. Finally, NIHK, unlike plaintiff, kept excellent records of all its transactions and these records, combined with the willingness of NIHK's personnel to come to the United States and testify about the transaction, made NIHK's jurisdictional defense successful.

E. *Lemme v. Wine of Japan Import, Inc. and Konishi Brewing Co.*<sup>253</sup>

Plaintiff, a New York wine distributor, brought a breach of contract action against Wine of Japan Import, Inc. (Wine of Japan), a New York importer, and Konishi Brewing Company, a Japanese distiller and the guarantor of the contract.<sup>254</sup> Konishi's guarantee was unusually comprehensive in that it guaranteed not merely delivery but all "obligations, representations and warranties" of Wine of Japan.<sup>255</sup>

Although Konishi was incorporated in Japan and had no office or personnel in New York, it did own twenty-seven percent of Wine of Japan's stock.<sup>256</sup> Defendant Konishi moved to dismiss the complaint for lack of personal jurisdiction, arguing that it neither transacted nor did business in New York.<sup>257</sup> The court

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<sup>251</sup> *Id.* at 4.

<sup>252</sup> *Bon Jour Int'l, Ltd. v. Nissho Iwai Hong Kong Corp.*, No. 87-07450 (N.Y. July, 1990) (order directing dismissal of complaint).

<sup>253</sup> 631 F. Supp. 456 (E.D.N.Y. 1986).

<sup>254</sup> *Id.* at 458.

<sup>255</sup> *Id.* at 461.

<sup>256</sup> *Id.* at 458-59.

<sup>257</sup> *Id.* at 458. Defendant's lack of personal jurisdiction motion was made under Fed. R. Civ. P. 12 (b)(2). The defendant also based its motion to dismiss on insufficiency of

agreed with Konishi, but nonetheless found that Konishi was subject to New York's jurisdiction based on Konishi's execution of the unusually comprehensive guarantee.<sup>258</sup>

Under its section 302 analysis, the court found that Konishi was not transacting business in New York.<sup>259</sup> Plaintiff claimed that Konishi "contract[ed] . . . to supply goods or services in the state" under section 302(a)(1).<sup>260</sup> However, since Wine of Japan was to perform the contract in Japan, the court summarily dismissed this argument.<sup>261</sup>

In its section 301 analysis the court focused on plaintiff's claim that Konishi was doing business through the in-state activity of its alleged agent and co-defendant, Wine of Japan. Relying on the Southern District of New York's decision in *Louis Marx & Co. v. Fuji Seiko Co.*,<sup>262</sup> the court held that Konishi's owning twenty-seven percent of Wine of Japan's stock, absent any evidence of control by Konishi over Wine of Japan, was in itself insufficient to establish agency.<sup>263</sup>

The court flatly rejected plaintiff's "startling" assertion that by the very act of guaranteeing Wine of Japan's obligations Konishi automatically established a principal-agent relationship with Wine of Japan.<sup>264</sup> This court's refusal to find an agency relationship absent an affirmative showing of control should be contrasted with the *Hattori*<sup>265</sup> court's rigid rule that in the corporate world of Japan, all parents control their subsidiaries.

However, rather than dismissing the complaint after it had found that Konishi neither did nor transacted business in New York, the court went beyond the traditional statutory jurisdictional analysis and held Konishi subject to the jurisdiction of New York.<sup>266</sup> The contract between plaintiff and defendant

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process and insufficient service of process under FED. R. CIV. P. 12 (b)(4),(5). However, the issues related to service of process are beyond the scope of this article and therefore will not be addressed.

<sup>258</sup> *Id.* at 461.

<sup>259</sup> *Id.* at 459.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> 453 F. Supp. 375 (S.D.N.Y. 1978).

<sup>263</sup> *Lemme*, 631 F. Supp. 459-60.

<sup>264</sup> *Id.* at 460.

<sup>265</sup> 508 F. Supp. 1322 (E.D.N.Y. 1981).

<sup>266</sup> *Lemme*, 631 F.Supp. at 461.

Wine of Japan had a provision by which the parties consented to personal jurisdiction in New York. Seizing on this clause, the court held: "Konishi undertook to guarantee more than simply the delivery of the products ordered by the plaintiff; it adopted as its own each and every term and condition of the Agreement. This emphatic expression of intent to assume every obligation under the contract necessarily included the consent-to-jurisdiction clause."<sup>287</sup> Hence, the court reasoned that under these circumstances, "Konishi could reasonably anticipate being [haled] into court [in New York]."<sup>288</sup>

The most noteworthy learning from *Lemme* is that foreign corporations should exercise caution when executing guarantees of contracts that contain consent-to-jurisdiction clauses. If a comprehensive guarantee is given, it should expressly exempt a consent-to-jurisdiction clause in the guaranteed contract.

#### CONCLUSION

Japanese corporations who have business contacts in New York and American corporations who deal with Japanese clients can anticipate that the personal jurisdiction requirements as codified in CPLR sections 301 and 302 will be applied to Japanese corporations as they would be applied to other foreign corporations. There is however the possibility, based on cases such as *Bulova*, that a Japanese corporation will be viewed in light of prevalent notions of Japanese business practices.

Management should be aware of what actions will constitute doing business, and what actions will constitute transacting business within the state, and accordingly order their relationships

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<sup>287</sup> *Id.* In rejecting Konishi's argument, the court distinguished two cases where foreign corporations who acted as guarantors to contracts that included consent to jurisdiction clauses, were held not to have consented to jurisdiction merely by virtue of the clauses themselves. *Id.* The court pointed out that in *Pal Pools, Inc. v. Billiot Bros., Inc.*, 57 A.D.2d 891, 394 N.Y.S.2d 280 (2d Dep't 1977), the guarantee agreement expressly included a choice of law provision and yet lacked a consent to jurisdiction clause and thereby indicated an intent not to be subject to New York jurisdiction. *Lemme*, 631 F.Supp. at 461. The court distinguished *General Electric Credit Corp. v. Troups*, 644 F. Supp. 11 (S.D.N.Y. 1985), by pointing out that the inclusion of certain provisions of the contract in the guaranty agreement and the omission of others, specifically the consent to jurisdiction clause, indicated that the parties did not intend to be subject to New York jurisdiction. *Lemme*, 631 F. Supp. at 461.

<sup>288</sup> *Id.* (citing *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).



with domestic clients. For example, in order to avoid "doing business" in New York, Japanese companies should if possible not maintain any offices, personnel or bank accounts in New York. Transactions with New York corporations should be negotiated in Japan or by mail and telex. If the Japanese corporation has a subsidiary located in New York, it should not use that subsidiary for any but ministerial tasks and should pay the subsidiary for services performed. In addition, parent and subsidiaries must be truly independent and should not share common employees or corporate records.

Japanese parent corporations can attempt to avoid "transacting business" in New York by, among other things, negotiating and signing all contracts outside of New York and by not sending to New York any "high-level" corporate personnel to negotiate or promote transactions with New York companies.

Finally, Japanese companies can also insist on the inclusion in contracts of arbitration, choice of forum,<sup>269</sup> and choice of law provisions. Through such provisions, by selecting sites and methods of dispute resolution, Japanese companies can eliminate the need for courts to intervene.

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<sup>269</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) (a recent view of forum selection clauses in transnational contracts).