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FOREIGN CORPORATIONS: WHAT CONSTITUTES "DOING BUSINESS" UNDER NEW YORK'S QUALIFICATION STATUTE?

I. INTRODUCTION

New York Business Corporation Law section 1301(a)¹ provides: "A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article."² The qualification³ requirement of section 1301 is strictly limited to foreign corporations organized for profit.⁴

The purpose of the statute is to protect New York's domestic corporations from unfair competition⁵ on the part of foreign corporations by placing both of them on an equal footing;⁶ but it is also "the policy of the State to

1. Adapted from N.Y. Gen. Corp. Law § 210 (1943).

2. N.Y. Bus. Corp. Law § 1301(a) (McKinney Supp. 1975). The concept of "doing business" deals with the question of state control over foreign corporations. " 'Doing business' is a highly practical field, and generalities on its application are of limited value. Instead, careful study must be given statutory and judicial materials in the particular jurisdiction under consideration." Caplin, "Doing Business," 5 Prac. Law., Oct. 1959, at 72, 76. There are three distinct situations in which the courts must determine what constitutes "doing business": (1) activity subjecting foreign corporations to penalties unless they have obtained a certificate of authority (qualification); (2) activity subjecting foreign corporations to taxation; (3) activity subjecting foreign corporations to service of process. The test of what constitutes "doing business" in each of these situations is one of degree. The greatest degree of activity will be required to subject a corporation to the qualification statute. Isaacs, *An Analysis of Doing Business*, 25 Colum. L. Rev. 1018, 1024-25 (1925).

3. "[Q]ualification or registration is compliance with a statute requiring obtainment of a certificate of authority from a state officer to do business within its jurisdiction." Comment, *Corporations—What Constitutes "Doing Business" To Require a Foreign Corporation to Obtain a Certificate of Authority in Order to Be Able to Maintain Suit Within the State*, 8 N.Y.L.F. 293, 293 n.1 (1962). The Business Corporation Law § 1312(a) provides: "A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority." N.Y. Bus. Corp. Law § 1312(a) (McKinney 1963). See also 1 G. Hornstein, *Corporation Law and Practice* §§ 290-92 (1959).

4. The statute defines a foreign corporation as "a corporation for profit formed under laws other than the statutes of this state . . ." N.Y. Bus. Corp. Law § 102(a)(7) (McKinney 1963). See *Anti-Defamation League of B'nai B'rith v. American Italian Anti-Defamation League, Inc.*, 54 Misc. 2d 830, 832, 283 N.Y.S.2d 828, 831 (Sup. Ct. 1967).

5. *Angldile Computing Scale Co. v. Gladstone*, 164 App. Div. 370, 374, 149 N.Y.S. 807, 811 (3d Dep't 1914); *Dixie Dinettes, Inc. v. Schaller's Furniture, Inc.*, 71 Misc. 2d 102, 103, 355 N.Y.S.2d 632, 635 (N.Y. City Civ. Ct. 1972). " [T]he State interests to be promoted [are], simply, preventing foreign corporations from entering the State . . . in the general prosecution of their ordinary business, without first complying . . ." *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 230, 151 N.E. 214, 215 (1926).

6. *Penn Collieries Co. v. McKeever*, 183 N.Y. 98, 102, 75 N.E. 935, 936 (1905); see *Lancaster v. Amsterdam Improvement Co.*, 140 N.Y. 576, 590, 35 N.E. 964, 968 (1894); *Angldile Computing Scale Co. v. Gladstone*, 164 App. Div. 370, 374, 149 N.Y.S. 807, 811 (3d Dep't 1914); *Stronghold Corp. v. Linden Store Front Corp.*, 172 N.Y.L.J. at 21, col. 4 (N.Y. City Civ. Ct. Nov. 27, 1974). Corporations have been held as not being within the protection of U.S.

encourage foreign corporations to enter its boundaries for the transaction of lawful business, and it is manifestly for the interest of the State that foreign capital should be actively employed within its borders.⁷⁷ Courts have taken both these policies into account in construing this statute.⁸

In 1961, when the statute was amended and recodified, subsection (b) was added.⁹ "This section contains a . . . list of certain activities which do not Const. art. IV, § 2, which provides in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), in considering the effect of this clause on a corporation's conduct of business outside its charter state, the Supreme Court stated: "The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created." *Id.* at 181. It is the local nature of a corporation which makes its right to do business in another state dependent upon those terms and conditions which the states may think proper to impose. The extent of this power is broad: "[The states] may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgement will best promote the public interest. The whole matter rests in their discretion." *Id.*; see *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 313 (1892). However, this power of a state to regulate foreign corporations is subject to limitations. The states can not impair the freedom of interstate commerce when Congress has acted. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 11 (1877). "[The New York Court of Appeals has] steadily upheld the right of foreign corporations, without the aid of any license, to engage in activities incidental to commerce between the states." *International Text Book Co. v. Tone*, 220 N.Y. 313, 318, 115 N.E. 914, 915 (1917). " 'A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.' " *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 229, 151 N.E. 214, 215 (1926); *Vaughn Mach. Co. v. Lighthouse*, 64 App. Div. 138, 140-42, 71 N.Y.S. 799, 801 (4th Dep't 1901); *Librairie Hachette, S.A. v. Paris Book Center, Inc.*, 62 Misc. 2d 873, 875, 309 N.Y.S.2d 701, 703 (Sup. Ct. 1970); *William L. Bonnell Co. v. Katz*, 23 Misc. 2d 1028, 1030-31, 196 N.Y.S.2d 763, 767-68 (Sup. Ct. 1960); *Pittsburg & Shawmut Coal Co. v. State*, 118 Misc. 50, 57-58, 192 N.Y.S. 310, 317 (Ct. Cl. 1922); *Matter of Aquamar Shipping Corp.*, 154 N.Y.L.J. at 14, col. 7 (Sup. Ct. Dec. 16, 1965); *Lager & Hurrell v. Saykaly*, 163 N.Y.L.J. at 16, col. 8 (N.Y. City Civ. Ct. March 10, 1970). Nor can the states impose conditions on a corporation in the employ of the federal government. *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 190 (1888); *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N.Y. 64, 70, 29 N.E. 1002, 1003 (1892); *Murphy Varnish Co. v. Connell*, 10 Misc. 553, 559, 32 N.Y.S. 492, 495 (Sup. Ct. 1894) (dictum). The states also can not impose any unconstitutional conditions. See 1 G. Hornstein, *Corporation Law and Practice* § 282, at 371 (1959); Note, *Unconstitutional Conditions*, 73 *Harv. L. Rev.* 1595, 1605-09 (1960).

7. *Dunbarton Flax Spinning Co. v. Greenwich & Johnsonville Ry.*, 87 App. Div. 21, 25, 83 N.Y.S. 1054, 1056 (3d Dep't 1903).

8. "The statute is a rigorous one and should receive a reasonable interpretation, having in view the extensive interstate trade carried on and the necessity of maintaining comity in business among the several States." *Ozark Cooperage Co. v. Quaker City Cooperage Co.*, 112 App. Div. 62, 64, 98 N.Y.S. 113, 114-15 (4th Dep't 1906); see *Penn Collieries Co. v. McKeever*, 183 N.Y. 98, 101-02, 75 N.E. 935, 936 (1905); *Cummer Lumber Co. v. Associated Mfrs. Mut. Fire Ins. Corp.*, 67 App. Div. 151, 154, 73 N.Y.S. 668, 670 (2d Dep't 1901), *aff'd mem.*, 173 N.Y. 633, 66 N.E. 1106 (1903); *In re Winko-Matic Signal Co.*, 174 N.Y.L.J. at 6, col. 3 (Sup. Ct. Aug. 18, 1975).

9. Law of April 24, 1961, ch. 855, § 1301, [1961] N.Y. Laws 2453 (effective 1963), amending

constitute the doing of business in this state so that prior authorization would be required"¹⁰ It does not exclude other activities from being held *not* to constitute "doing business," but merely removes the necessity of a court determining whether the listed activities are such as would require the corporation to qualify. The statute then clearly is conclusive in a dispute involving only one of these activities.¹¹ However, the decisions in the "doing business" area are usually concerned with more than a single activity, and accordingly, the statute's practical effect lies in how the listed activities are treated in a cumulative determination. The section provides: ". . . a foreign corporation shall not be considered to be doing business in this state . . . by reason of carrying on in this state *any one or more* of the following activities"¹² In a determination involving only these activities, it appears then that taken collectively they will not constitute "doing business."¹³ However, in a determination involving other transactions, some courts have continued to utilize them as factors¹⁴ even though the statute's history appears to remove them from any consideration at all.¹⁵

Of course, a statute must be applied to the facts of a particular dispute,¹⁶

N.Y. Gen. Corp. Law § 210 (1943). The amendment as codified was based on Model Bus. Corp. Law § 99 (1966), renumbered to § 106 in 1971.

10. Revisers' Notes and Comments on the Business Corporation Law as Proposed to be Amended During the 1963 Session in 3 N.Y. Legis. Doc. 170 (1963). N.Y. Bus. Corp. Law § 1301(b) (McKinney 1963) provides in part: "(1) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting settlement thereof or the settlement of claims or disputes. (2) Holding meetings of its directors or its shareholders. (3) Maintaining bank accounts. (4) Maintaining offices or agencies only for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities."

11. See, e.g., *Starr Poultry Co. v. Spinelli*, 156 N.Y.L.J. at 19, col. 3 (Sup. Ct. Nov. 23, 1966) (maintaining a bank account).

12. N.Y. Bus. Corp. Law § 1301(b) (McKinney 1963) (emphasis added).

13. There is still some question as to the validity of this interpretation. See 2 G. Hornstein, *Corporation Law and Practice* § 582, at 57 (1959).

14. See *Comarg, S.A. v. N.Y. World's Fair 1964-65 Corp.*, 152 N.Y.L.J. at 16, col. 8 (Sup. Ct. Dec. 3, 1964); but see *Colfax Internationale v. Olympic Airways*, 164 N.Y.L.J. at 10, col. 4 (N.Y. City Civ. Ct. Dec. 28, 1970).

15. Model Business Corporation Law § 99, upon which § 1301(b) was based, contained ten activities which would not constitute "doing business"; however, New York adopted only four even though the New York courts had held that individually the other six would not constitute doing business in the state. This fact, coupled with the apparent practical ineffectiveness of the statute when limited to controversies involving a single activity, may evidence a legislative intent to exclude the adopted activities from any consideration in a cumulative determination of what constitutes "doing business."

16. "The problem is essentially one of fact. There are no fixed standards of appraisal. The tokens of a forbidden activity must be found in the nature of the particular foreign corporate enterprise, and what is done in this State in the furtherance thereof." *Lebanon Mill Co. v. Kuhn*, 145 Misc. 918, 920, 261 N.Y.S. 172, 174 (N.Y. City Mun. Ct. 1932); see *Conklin Limestone Co. v. Linden*, 22 App. Div. 2d 63, 64-65, 253 N.Y.S.2d 578, 580 (3d Dep't 1964); *William L. Bonnell Co. v. Katz*, 23 Misc. 2d 1028, 1030, 196 N.Y.S.2d 763, 767 (Sup. Ct. 1960); *Berkshire*

and much of the law of "doing business" is found in the decisions of the courts. The case law reveals the potential for confusion in the area. Opposite results are sometimes reached on apparently similar facts,¹⁷ and it is not unusual for a court to cite decisions involving the amenability of unlicensed foreign corporations to service of process as indirect authority for the determination of a qualification question.¹⁸ It is therefore necessary to make a careful review of the case law interpreting this statute. What constitutes sufficient activity to require a corporation to comply with New York's qualification statute¹⁹ will be the subject of this Note.

II. GENERAL GUIDELINES

There is no standard definition of the term "doing business,"²⁰ and each case must be decided upon its particular facts.²¹ No one factor decides the issue,²² the "determination . . . depends rather upon [a corporation's] course of conduct and activities generally, than upon the character of the particular transaction involved in [the] claim."²³ Nevertheless, there are general criteria for the appraisal of the local activities of a foreign corporation.

The amount and regularity of activity will be a significant factor in the determination of what constitutes "doing business." A corporation will be required to comply with the statute where its New York transactions evidence a continuous and regular conduct of business.²⁴ In addition, the courts will

Eng'r Corp. v. Scott-Paine, 29 Misc. 2d 1010, 1012, 217 N.Y.S.2d 919, 921 (Colum County Ct. 1961); 2 G. Hornstein, Corporation Law and Practice § 581, at 53 (1959).

17. See notes 34-38 *infra* and accompanying text.

18. See *Globe Knitwear Co. v. Screen Modes, Inc.*, 166 N.Y.L.J. at 10, col. 1 (Sup. Ct. July 15, 1971), where the lower court based its holding that a foreign corporation was "doing business" in part on United States Supreme Court cases concerned with the application of long-arm statutes.

19. N.Y. Bus. Corp. § 1301 (McKinney 1963), as amended (McKinney Supp. 1975).

20. A proposed statutory definition which was never adopted would have defined "doing business" as "the transaction by a foreign corporation of some part of its business substantial and continuous in character and not merely casual or occasional." Uniform Foreign Corp. Act § 2 in Handbook of the National Conference of Commissioners on Uniform State Acts and Proceedings (1934).

21. See note 16 *supra* and accompanying text.

22. E.g., *Ameritex Dev. Corp. v. Brown & Sites Co.*, 135 N.Y.S.2d 478, 481 (Sup. Ct. 1954); *Pollak v. Western Dep't Stores, Inc.*, 136 N.Y.S.2d 393, 394 (Sup. Ct. 1954)

23. *Pittsburg & Shawmut Coal Co. v. State*, 118 Misc. 50, 57, 192 N.Y.S. 310, 316 (Ct. Cl. 1922). "[D]ecisions have not been resolved solely [on] the basis of whether the foreign corporation maintained an office here, but on an assessment of the totality of the foreign corporation's 'local' activities. . . ." *Marion Lab., Inc. v. Wolins Pharmacal Corp.*, 162 N.Y.L.J. at 17, col. 7 (Sup. Ct. Nov. 24, 1969).

24. See *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 230, 151 N.E. 214, 215-16 (1926); *Penn Collieries Co. v. McKeever*, 183 N.Y. 98, 103, 75 N.E. 935, 936 (1905); *Conklin Limestone Co. v. Linden*, 22 App. Div. 2d 63, 64, 253 N.Y.S.2d 578, 580 (3d Dep't 1964) ("A showing of business conduct, regular and continuous, is essential to bring a foreign corporate plaintiff within [the statute]."); see *William L. Bonnell Co. v. Katz*, 23 Misc. 2d 1028, 1030, 196 N.Y.S.2d 763, 767 (Sup. Ct. 1960). See also *Laurence Univ. v. State*, 68 Misc. 2d 408, 411-12, 326 N.Y.S.2d 617, 622 (Ct. Cl. 1971), *rev'd on other grounds*, 41 App. Div. 2d 463, 344

require a degree of permanence²⁵ evidenced by the corporation transacting a substantial part of its ordinary business in the state.²⁶

In *Penn Collieries Co. v. McKeever*,²⁷ the New York Court of Appeals made a significant statement on the effect that the degree of activity will have on the process of determination:

To be "doing business in this State" implies corporate continuity of conduct . . . such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business.²⁸

Isolated and occasional transactions will not be enough to require compliance.²⁹ The fact that a corporation has made one or two contracts in New York will usually not constitute "doing business."³⁰ However, in *Franklin Enterprises Corp. v. Moore*,³¹ the Supreme Court, Nassau County found a

N.Y.S.2d 183 (3d Dep't 1973); *Dixie Dinettes, Inc. v. Schaller's Furniture, Inc.*, 71 Misc. 2d 102, 103, 335 N.Y.S.2d 632, 635 (N.Y. City Civ. Ct. 1972); *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1013-14, 217 N.Y.S.2d 919, 922-24 (Colum. County Ct. 1961); *M.M. Mades Co. v. Gassman*, 77 N.Y.S.2d 236, 238 (N.Y. City Ct. 1948).

25. The corporation must intend "to establish a continuous business . . . and not one of a temporary character." *Alfred J. Brown Seed Co. v. Richardson*, 53 Misc. 517, 519, 103 N.Y.S. 243, 245 (Sup. Ct. 1907), quoting *Penn Collieries v. McKeever*, 183 N.Y. 98, 103, 75 N.E. 935, 936 (1905); see *People ex rel. Armstrong Cork Co. v. Barker*, 157 N.Y. 159, 51 N.E. 1043 (1898); *Badische Lederwerke v. Capitelli*, 92 Misc. 260, 262, 155 N.Y.S. 651, 652 (Sup. Ct. 1915); *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1013, 217 N.Y.S.2d 919, 922 (Colum. County Ct. 1961).

26. A corporation's permanence "is attested by both the volume and the continuity of its purely intrastate activities in New York." *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1014, 217 N.Y.S.2d 919, 923 (Colum. County Ct. 1961).

27. 183 N.Y. 98, 75 N.E. 935 (1905).

28. *Id.* at 103, 75 N.E. at 936. "The general rule is that, when a foreign corporation transacts some substantial part of its ordinary business in a state, continuous in character, it is doing, transacting, carrying on, or engaging in business therein, within the meaning of the statutes under consideration." 20 C.J.S. Corporations § 1829, at 46 (1940).

29. "[T]he foreign corporation must do more than make a single contract, engage in an isolated piece of business, or an occasional undertaking . . ." *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 230, 151 N.E. 214, 215 (1926); see *Penn Collieries Co. v. McKeever*, 183 N.Y. 98, 103, 75 N.E. 935, 936 (1905); *Knight Prods., Inc. v. Donnen-Fuel Co.*, 20 N.Y.S.2d 135, 139-40 (Sup. Ct. 1940); *Dixie Dinettes, Inc. v. Schaller's Furniture, Inc.*, 71 Misc. 2d 102, 103, 335 N.Y.S.2d 632, 636-37 (N.Y. City Civ. Ct. 1972); *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1013-14, 217 N.Y.S.2d 919, 923-24 (Colum. County Ct. 1961).

30. "Merely making [a] contract is not doing business within the meaning of the statute." *Commercial Wood & Cement Co. v. Northhampton Portland Cement Co.*, 41 Misc. 242, 244, 84 N.Y.S. 38, 39 (Sup. Ct.), *aff'd mem.*, 87 App. Div. 633, 84 N.Y.S. 1121 (1st Dep't 1903); see *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 233, 151 N.E. 214, 215-16 (1926); *New York Architectural Terra-Cotta Co. v. Williams*, 102 App. Div. 1, 92 N.Y.S. 808 (1st Dep't 1905), *aff'd*, 184 N.Y. 579, 77 N.E. 1192 (1906) (*per curiam*) (mere furnishing of materials for a building); *Suss v. Durable Knit Corp.*, 4 Misc. 2d 666, 669, 147 N.Y.S.2d 363, 367 (N.Y. City Ct. 1955) (series of orders held to equal one transaction). For cases involving two transactions see, e.g., *Ozark Cooperage Co. v. Quaker City Cooperage Co.*, 112 App. Div. 62, 98 N.Y.S. 113 (4th Dep't 1906).

31. 34 Misc. 2d 594, 226 N.Y.S.2d 527 (Sup. Ct. 1962).

foreign corporation which had made only two contracts in New York to be "doing business." The court stated: "[w]hether or not it does fall within the statute depends upon whether [the contract] constitutes a part of a general attempt to transact business in violation of the statute."³² The fact that the corporation had advertised in New York papers and employed an answering service was found to evidence sufficient intent to do business in New York.³³

Two cases involving corporations organized for the purpose of building and operating a pavilion at the New York World's Fair illustrate the amount of activity necessary to require qualification, and the effect that a slight change of circumstances can have on the court's determination. In *Comarg, S.A. v. New York World's Fair 1964-1965 Corp.*,³⁴ the Supreme Court, New York County held that where a foreign corporation "entered into a contract with the defendant Fair, engaged in the construction of a building, requiring numerous contracts, sought to acquire exhibitors to use their facilities, opened bank accounts and contemplated the operation of a restaurant, all within this state, and from which activities it anticipated profits"³⁵ it was doing business sufficient to require the dismissal of the action pursuant to section 1312.³⁶

However, in *Greek Pavilion, New York World's Fair 1964-1965, Ltd. v. Pavilion of Greece, Inc.*,³⁷ the Supreme Court, Queens County reached the opposite conclusion. In this case, the foreign corporation entered into a contract with the Fair, engaged an architect and general contractor for the construction of a building, and subleased space in it to a New York restaurant corporation. Before the opening of the Fair, the corporation transferred all its interests in the pavilion to the defendant—although it did continue to consign goods to the defendant throughout the duration of the Fair. The court

32. *Id.* at 595, 226 N.Y.S.2d at 529, quoting *Mahar v. Harrington Park Villa Sites*, 146 App. Div. 756, 758, 131 N.Y.S. 514, 516 (1911), *rev'd on other grounds*, 204 N.Y. 231, 97 N.E. 587 (1912).

33. 34 Misc. 2d at 594-95, 226 N.Y.S.2d at 529.

34. 152 N.Y.L.J. at 16, col. 8 (Sup. Ct. Dec. 3, 1964).

35. *Id.*

36. N.Y. Bus. Corp. Law § 1312(a) (McKinney 1963) provides: "A foreign corporation doing business in this state without authority shall not maintain any action . . ." Several lower court cases have denied motions to dismiss suits under section 1312 when a foreign corporation secured a certificate of authority subsequent to bringing the action. The reasoning is that the statute prohibits the maintenance and not the bringing of suit so that compliance at any time during the course of the action will be adequate to fulfill the requirements. See *Astro Dye Works, Inc. v. Genesco, Inc.*, 162 N.Y.L.J. at 2, col. 5 (1st Dep't, App. T. Nov. 19, 1969); *Hooton Chocolate Co. v. Star Chocolate Novelty, Inc.*, 63 Misc. 2d 482, 311 N.Y.S.2d 698 (Sup. Ct. 1970), *Oxford Paper Co. v. S.M. Liquidation Co.*, 45 Misc. 2d 612, 257 N.Y.S.2d 395 (Sup. Ct. 1965). See also *Copeland Co. v. Port of New York Authority*, 151 N.Y.L.J. at 15, col. 4 (Sup. Ct. Apr. 28, 1964), where the court reached the same conclusion but for different reasons. The court found that authorization was a technical requirement that a foreign corporation must satisfy before bringing suit. However, in this case, where the corporation received authorization subsequent to bringing suit the court did not dismiss the action. It reasoned that the dismissal would be useless and time-consuming because the corporation would merely reinstitute the same action. See Comment, Section 1312 of The Business Corporation Law: The Dilemma of Legislative History and Judicial Interpretation, 30 *Fordham L. Rev.* 331 (1961).

37. 153 N.Y.L.J. at 18, col. 6 (Sup. Ct. March 2, 1965).

reasoned that these transactions were merely isolated activities and did not constitute the doing of business in New York.

Although these cases appear contradictory, upon closer scrutiny they are distinguishable. In *Comarg*, the corporation carried on a continuous business in New York making numerous contracts for profit over a two year period. Although the court recognized that the corporation would cease operations at the end of the Fair, it reasoned that carrying on numerous profit-seeking transactions over a reasonably long period of time would constitute doing sufficient business to dismiss the action. In *Greek Pavilion*, two facts accounted for the different result. The first was the foreign corporation's transference of all its interests to the defendant before the Fair began. The court reasoned that this clearly evidenced no intent on the part of the corporation to operate its business in New York. The cause of action itself was the other factor which distinguished the two cases. In *Greek Pavilion*, the foreign corporation sought an accounting of funds owed to it by the defendant. The court held that if the action was dismissed the defendant would be unjustly enriched and "[e]quity [will not] countenance such a result."³⁸ These two cases demonstrate the difficulty in determining what degree of activity will be considered "doing business."

The relationship of the activity to the ordinary and regular business of the corporation is also an important factor in such a determination. If the work is vital and essential to the corporation's business, the corporation will be required to comply with the statute;³⁹ but where the activity is merely incidental to the corporation's out-of-state or interstate trade, it will not be considered "doing business."⁴⁰

The New York courts have held that when a corporation transacts business in interstate commerce it will not be subject to the qualification conditions.⁴¹ Where a court does not refer to the amount of activity transacted in the state,

38. *Id.* See *Dann v. Silverstein*, 119 N.Y.L.J. 1066 (N.Y. City Ct. 1948). Where a buyer clearly knew that the seller with whom he was transacting business was foreign, a lower court would not allow the buyer to use the defense because it "would make the lack of a certificate a sword against said corporation and a shield for working injustice by the domestic seller." The foreign corporation was organized in China.

39. *American Sec. Credit Co. v. Empire Properties Corp.*, 154 Misc. 191, 192, 276 N.Y.S. 970, 973 (N.Y. City Mun. Ct. 1935); see *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1012, 217 N.Y.S.2d 919, 921-22 (Colum. County Ct. 1961).

40. "This language clearly contemplates the transaction of the business for which the foreign corporation was primarily organized, and not the incidental business of insuring its property located in another State, nor yet the employment of an agent to solicit orders . . ." *Cummer Lumber Co. v. Associated Mfrs. Mut. Fire Ins. Corp.*, 67 App. Div. 151, 156, 73 N.Y.S. 668, 671 (2d Dep't 1901), *aff'd mem.*, 173 N.Y. 633, 66 N.E. 1106 (1903); see *Kline Bros. & Co. v. German Union Fire Ins. Co.*, 147 App. Div. 790, 132 N.Y.S. 181 (1st Dep't 1911), *aff'd*, 210 N.Y. 534, 103 N.E. 1125 (1913) (*per curiam*) (insuring of property); *System Co. v. Advertisers' Cyclopedia Co.*, 121 N.Y.S. 611, 613 (App. T. 1910) (office leases, bank accounts and keeping of samples); *Eaton Cotton Mills, Inc. v. Goodyear Tire & Rubber Co.*, 124 Misc. 211, 208 N.Y.S. 218 (Sup. Ct. 1924), *aff'd*, 212 App. Div. 885, 208 N.Y.S. 857 (2d Dep't 1925) (deliveries on contract incidental to interstate business).

41. See note 6 *supra*.

the method utilized in reaching the decision is illogical.⁴² The proper procedure should involve a determination of whether the activities are sufficient to constitute "doing business" followed by a determination of their relationship to interstate commerce.⁴³ The court's discretion in these determinations will not be limited by a contract provision⁴⁴ or by a prior federal ruling on a similar set of facts.⁴⁵

In summary, the totality of the activities must reach a level sufficient to evidence a "local" character⁴⁶ before the corporation will be subject to the state's regulatory statute. A closer review of the cases involving "doing business" determinations⁴⁷ demonstrates the application of these general criteria to particular activities, and also the significant effect that the addition or removal of a single factor can have on the determination of what constitutes "doing business."

III. SPECIFIC ACTIVITIES

A. Advertising

The mere advertisement of a foreign corporation's business in New York newspapers will not constitute "doing business,"⁴⁸ nor will the distribution of

42. "[T]o approach the subject by first inquiring whether the activities involved are interstate commerce, and then to decide ipso facto that no business has been done, is . . . illogical . . ." Isaacs, *An Analysis of Doing Business*, 25 Colum. L. Rev. 1018, 1022 (1925) (emphasis deleted).

43. *Id.* at 1021.

44. "To release the corporation from compliance with our laws requires something more than a mere clause in its contracts making its transactions here subject to approval abroad." *American Sec. Credit Co. v. Empire Properties Corp.*, 154 Misc. 191, 194, 276 N.Y.S. 970, 975 (N.Y. City Mun. Ct. 1935); see *American Case & Register Co. v. Griswold*, 143 App. Div. 807, 128 N.Y.S. 206 (3d Dep't 1911), *aff'd mem.*, 206 N.Y. 723, 100 N.E. 1124 (1912); *Allen Indus. Inc. v. Exquisite Form Brassiere, Inc.*, 146 N.Y.L.J. at 12, col. 6 (Sup. Ct. Oct. 19, 1961).

45. "[U]nless we cross the path of interstate commerce or breach constitutional rights, the court need not fear the Federal rulings. For subject to these limitations, the State courts may independently decide whether a foreign corporation is doing business in this jurisdiction within the purview of our statutes." *American Sec. Credit Co. v. Empire Properties Corp.*, 154 Misc. 191, 194-95, 276 N.Y.S. 970, 976 (N.Y. City Mun. Ct. 1935).

46. See notes 23-28 *supra* and accompanying text.

47. The question of whether a foreign corporation must qualify usually arises as a result of a defendant's raising a section 1312 defense, which denies unauthorized corporations access to the courts until they have qualified and paid all back fees. See note 36 *supra*.

48. *Krakowski v. White Sulphur Springs, Inc.*, 174 App. Div. 440, 161 N.Y.S. 193 (1st Dep't 1916) (hotel maintained an agent to do its advertising and to assist customers seeking accommodations); *Western Hair Goods Co. v. B.R. Haberkorn Co.*, 131 Misc. 930, 932, 229 N.Y.S. 273, 275 (Sup. Ct. 1928) ("advertising a business is not doing business"). These cases deal with "doing business" for purposes of subjecting a corporation to service of process. New York courts have required a lesser degree of activity to subject foreign corporations to service than to qualification. It follows then that where the activities did not constitute "doing business" for service, they will not for qualification. *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917); *Librairie Hachette, S.A. v. Paris Book Center, Inc.*, 62 Misc. 2d 873, 874-75, 309 N.Y.S.2d 701, 703-04 (Sup. Ct. 1970); *Neu v. Teen Time, Inc.*, 18 Misc. 2d 234, 235, 188 N.Y.S.2d 1018, 1019-20 (Sup. Ct.), modified on other grounds, 9 App. Div. 2d 961, 195 N.Y.S. 670 (1959); *Pittsburg & Shawmut Coal Co. v. New York*, 118 Misc. 50, 56, 192 N.Y.S. 310, 315

its advertising literature.⁴⁹ However, the fact that a foreign corporation has advertised in New York has been a significant factor in a lower court's determination of a corporation's intent to avail itself of the privilege to carry on its business there.⁵⁰ Another court has even stated that a corporation which had placed signs at its construction sites was advertising and that factor was utilized in the determination that the corporation was "doing business."⁵¹

However, mere solicitation of orders in New York for advertisements by out-of-state publishers—such orders subject to acceptance in the foreign state—was not considered "doing business"⁵² for purposes of mandatory compliance with the statute. The fact that the corporation also maintains an office for these purposes will not change the result.⁵³ Similarly, in *People ex rel. A.N. Kellogg Newspaper Co. v. Roberts*,⁵⁴ a foreign corporation which not only solicited advertisements for a newspaper which it printed outside New York, but also delivered the paper to in-state publishers, was found not to be "doing business."

B. Construction Contracts

The test used by some lower courts in the construction contract cases is whether "the transactions completed within [the] State are vital and essential to [the corporation's] business and are regularly conducted here"⁵⁵

In *Berkshire Engineering Corp. v. Scott-Paine*,⁵⁶ a general construction

(Ct. Cl. 1922); *Aardewerk Diamonds, Ltd. v. Richards Discount Jewelers, Inc.*, 162 N.Y.L.J. at 13, col. 4 (Sup. Ct. Sept. 19, 1969); *Sol-Rey Pictures, Inc. v. American Int'l. Pictures*, 152 N.Y.L.J. at 16, col. 3 (Sup. Ct. Dec. 14, 1964).

49. *Guile v. Sea Island Co.*, 11 Misc. 2d 496, 66 N.Y.S.2d 467 (Sup. Ct. 1946), aff'd, 272 App. Div. 881, 71 N.Y.S.2d 911 (1st Dep't 1947), appeal denied, 297 N.Y. 781, 77 N.E.2d 793 (1948) (service of process; independent agent's office released and distributed information and advertising material for hotel held not to be "doing business" even though hotel had a telephone listing); see *Trans World Airlines, Inc. v. Curtiss-Wright Corp.*, 119 N.Y.S.2d 729, 733 (Sup. Ct. 1953) (service of process; distribution of advertising material).

50. *Franklin Enterprises Corp. v. Moore*, 34 Misc. 2d 594, 226 N.Y.S.2d 527 (Sup. Ct. 1962); see notes 31-33 *supra* and accompanying text.

51. *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1014, 217 N.Y.S.2d 919, 923-24 (Colum. County Ct. 1961).

52. *American Contractor Pub. Co. v. Michael Nocenti Co.*, 139 N.Y.S. 853 (App. T. 1913) (*per curiam*) (collected news and solicited ads from New York office); *System Co. v. Advertisers' Cyclopedic Co.*, 121 N.Y.S. 611 (App. T. 1910) (solicited ads through salesman from New York office); *American Contractor Pub. Co. v. Bagge*, 91 N.Y.S. 73 (Sup. Ct. 1904) (solicited ads through agent).

53. The maintenance of an office has been declared merely incidental to the interstate business of the corporation. See *System Co. v. Advertisers' Cyclopedic Co.*, 121 N.Y.S. 611 (App. T. 1910).

54. 30 App. Div. 150, 51 N.Y.S. 866 (3d Dep't 1898).

55. *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1012, 217 N.Y.S.2d 919, 921 (Colum. County Ct. 1961), quoting *American Sec. Credit Co. v. Empire Properties Corp.*, 154 Misc. 191, 192, 276 N.Y.S. 970, 973 (N.Y. City Mun. Ct. 1935).

56. 29 Misc. 2d 1010, 217 N.Y.S.2d 919 (Colum. County Ct. 1961).

corporation was held to be "doing business" where its only activity in New York—aside from the construction work done by its employees for two and one half years—was the acquisition of a telephone listing. The court emphasized that the contract was in its nature one for labor⁵⁷ and was not taken out of the scope of the statutes regulating the doing of business by virtue of the commerce clause, merely because supplies, materials, and articles involved in the work, and laborers to perform it, are . . . brought in from other states . . .⁵⁸

Therefore, where a foreign construction corporation has transacted its business within New York for a reasonable period of time, it will be required to comply with the statute. The only exception to the performance of construction work being held "doing business" is the isolated transaction rule.⁵⁹ However, a New York court has stated "that the undertaking of a single construction contract in a foreign jurisdiction may be sufficient to take the transaction without the scope of the Federal commerce clause and invoke a State's regulatory legislation."⁶⁰

A determination that labor is at the heart of the transaction in New York has also been a factor in bringing other types of business within the control of the authorization statute.⁶¹

C. Correspondence Schools

A correspondence school, chartered in another state, whose in-state activities are limited to the soliciting of students, the forwarding of the necessary materials and the collection of fees will not be required to comply with the qualification statute.⁶² The policy behind such a rule is that these corporations are organized for educational purposes. The Supreme Court of the United States has stated that "it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the *transmission of intelligence* are not obstructed or unnecessarily encumbered by State legislation."⁶³ This right comes within the commerce clause of the United States Constitution.⁶⁴

There will be instances, however, where a foreign correspondence school

57. Id. at 1014-15, 217 N.Y.S.2d at 923-24.

58. Id. at 1016, 217 N.Y.S.2d at 925.

59. Id. at 1013, 217 N.Y.S.2d at 922, quoting *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 230, 75 N.E. 214, 215 (1926); see notes 29-30 supra and accompanying text.

60. 29 Misc. 2d at 1015, 217 N.Y.S.2d at 924.

61. A lower court decision concerned with labor sufficient to require qualification is *Nash Refrigerator Co. v. E. Fucini & Co.*, 101 N.Y.L.J. 790 (N.Y. City Ct. 1939), where a foreign sales corporation that had an office with its name on the door, was listed in the telephone and building directories and maintained a staff to install and service refrigerators was held to be "doing business." See *Conklin Limestone Co. v. Linden*, 22 App. Div. 2d 63, 253 N.Y.S.2d 578 (3d Dep't 1964) (spreading crushed limestone); *American Sec. Credit Co. v. Empire Properties Corp.*, 154 Misc. 191, 276 N.Y.S. 970 (N.Y. City Mun. Ct. 1935) (collection agency).

62. *International Text Book Co. v. Tone*, 220 N.Y. 313, 115 N.E. 914 (1917); *Empire School of Piano Tuning v. Fields*, 162 N.Y.L.J. at 2, col. 2 (Sup. Ct. Aug. 14, 1969).

63. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1877) (emphasis added).

64. See *International Textbook Co. v. Pigg*, 217 U.S. 91, 105-07 (1910).

may overstep this protection. In *International Textbook Co. v. Connelly*,⁶⁵ the fact that the school maintained numerous offices (thirty) within the state staffed by its employees who were qualified to give and did in fact give instruction at the various offices within New York constituted "doing business" in the state.⁶⁶

It should be noted that section 1301 has not been applied to a foreign educational institution. In *Laurence University v. State*,⁶⁷ a profit-making foreign university which had students residing in New York and local advisors for dissertation guidance was not required to obtain a certificate of authority.⁶⁸ The court reasoned that if this corporation was held to be "doing business" so would "every foreign university with enrollments in New York and who employed instructors and advisors here Such a position is untenable."⁶⁹

D. Debt Collection

The Supreme Court of the United States has stated:

[W]hen a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the State cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose.⁷⁰

The Model Business Corporation Law also provides that "[s]ecuring or collecting debts or enforcing any rights in property securing the same" will not constitute "doing business."⁷¹

Where, however, the foreign corporation is a collection agency and its regularly conducted transactions are vital and essential to its business, it will be required to comply with the statute. In *American Security Credit Co. v. Empire Properties Corp.*,⁷² a foreign collection corporation was found to be "doing business" where it had been consummating transactions from an office in New York, staffed by anywhere from three to five employees for fifteen years. It also had leased property in its own name, was listed in both the building and telephone directories, and paid its salesmen from a New York bank account which had been active for nineteen years.⁷³ Thus, the general rule is that where a foreign corporation is in the business of collecting debts,

65. 67 Misc. 49, 124 N.Y.S. 603 (Monroe County Ct.), aff'd mem., 140 App. Div. 939, 125 N.Y.S. 1125 (4th Dep't 1910), aff'd, 206 N.Y. 188, 99 N.E. 722 (1912).

66. Id. at 52, 124 N.Y.S. at 605-06.

67. 68 Misc. 2d 408, 326 N.Y.S.2d 617 (Ct. Cl. 1971), rev'd on other grounds, 41 App. Div. 2d 463, 344 N.Y.S.2d 183 (3d Dep't 1973).

68. Id. at 412, 326 N.Y.S.2d at 622-23.

69. Id., 326 N.Y.S.2d at 623.

70. *Furst & Thomas v. Brewster*, 282 U.S. 493, 498 (1931).

71. Model Bus. Corp. Act § 106(h) (1974). Although this section of the act was never adopted in New York, it is still persuasive authority for the fact that collecting debts will not be considered "doing business."

72. 154 Misc. 191, 276 N.Y.S. 970 (N.Y. City Mun. Ct. 1935) (involving both qualification and taxation questions).

73. Id. at 193-94, 276 N.Y.S. at 974-75.

such activity will ordinarily require qualification; otherwise, the collection will merely be a factor in the cumulative determination.

E. Property

The Supreme Court of the United States has also held that a state has the power "to exclude a foreign corporation from doing business or *acquiring or holding property* within [its borders]."⁷⁴ The New York rule is that the mere ownership and leasing of real estate, incidental to another enterprise, is not "doing business."⁷⁵ But where the corporation has entered into a series of transactions or engaged in other local activities, qualification may be required. In *Woodridge Heights Construction Co. v. Gippert*,⁷⁶ a foreign corporation which engaged in a series of real estate transactions from a New York office, to which payments were made, was held to be doing sufficient business to require compliance with the statute.

Where a foreign corporation is organized for the very purpose of leasing or acquiring title to land as its business, it will be "doing business" and subject to section 1301.⁷⁷ In *Cassidy's Ltd. v. Rowan*,⁷⁸ a corporation was found to be "doing business" since it rented the building that it had sublet. The court held that this was leasing for profit as it was *not* a mere investment of surplus funds on the part of the corporation.⁷⁹

F. Purchases

The general criteria involved in buying activities are similar to those applicable to selling activities.⁸⁰ A continuity and regularity of conduct is essential.⁸¹

In *Stafford-Higgins Industries, Inc. v. Gaytone Fabrics, Inc.*,⁸² a foreign corporation placed orders for merchandise with the defendant who accepted them in New York and delivered them to the corporation's independent contractor in Brooklyn. The corporation also maintained an office in New York staffed by five salesmen with a telephone listing in the Manhattan

74. *Asbury Hosp. v. Cass County*, 326 U.S. 207, 211 (1945) (emphasis added).

75. *Wm. G. Roe & Co. v. New York*, 43 Misc. 2d 417, 251 N.Y.S.2d 151 (Ct. Cl. 1964) (ownership of vacant real property); *Singer Mfg. Co. v. Granite Spring Water Co.*, 66 Misc. 595, 123 N.Y.S. 1088 (Sup. Ct. 1910) (leased premises it owned only to defendant).

76. 92 Misc. 204, 155 N.Y.S. 363 (App. T. 1915). The contracts provided that the deeds for the property should be delivered to vendee at the New York City office and that all payments should be made there.

77. *Singer Mfg. Co. v. Granite Spring Water Co.*, 66 Misc. 595, 596, 123 N.Y.S. 1088, 1089 (Sup. Ct. 1910).

78. 99 Misc. 274, 163 N.Y.S. 1079 (App. T. 1917).

79. *Id.* at 275, 163 N.Y.S. at 1080.

80. *Sterling Novelty Corp. v. Frank & Hirsch Distrib. Co.*, 299 N.Y. 208, 86 N.E.2d 564 (1949) (service of process); see *Stafford-Higgins Indus., Inc. v. Gaytone Fabrics, Inc.*, 300 F. Supp. 65 (S.D.N.Y. 1969); *Nicolich v. E. Muniz Ferreira & Cia, Ltda.*, 149 N.Y.S.2d 662, 665 (Sup. Ct. 1956) (agents of corporation made purchases in New York and gave advances on those purchases to be delivered in the foreign state).

81. See notes 24-28 *supra* and accompanying text.

82. 300 F. Supp. 65 (S.D.N.Y. 1969).

directory. Nevertheless the federal district court held "[t]he placement of orders within New York [to be] no more doing business within the state than the in-state solicitation of orders"⁸³ and did not require the foreign corporation to comply with the statute before maintaining the suit.

In all purchasing situations, it is the place of acceptance of the contract offer and not of delivery of merchandise that is relevant in a "doing business" determination.⁸⁴

G. Sales Activities and Solicitation

Evidence of a single sale⁸⁵ or of two sales⁸⁶ will ordinarily not constitute the doing of business in New York, nor will "occasional or casual act[s] of selling."⁸⁷ Neither the fact that a foreign corporation has customers in New York,⁸⁸ nor the fact that it makes deliveries into the state from its out-of-state factory will be controlling.⁸⁹ A New York court has said:

[T]he making of a single sale, or the making of a series of sales, through a mere selling agent, by means of orders directed to the foreign corporation in its own State, where the goods are delivered to a common carrier of that State under the terms of the contract, is not doing business in the State of New York⁹⁰

83. *Id.* at 67.

84. *Id.*; see *Kevork Allalemdjian, Ltd. v. Trotta*, 134 N.Y.L.J. at 2, col. 8 (Sup. Ct. Aug. 26, 1955), where a court held that a foreign corporation which purchased and sold goods from a New York office where goods were delivered for shipment was doing business in intrastate trade and was subject to the statute.

85. *Penn Collieries Co. v. McKeever*, 183 N.Y. 98, 103, 75 N.E. 935, 936 (1905) (orders were usually subject to acceptance outside New York but in this instance the contract was made in the state); *Haddam Granite Co. v. Brooklyn Heights R.R.*, 131 App. Div. 685, 116 N.Y.S. 96 (1st Dep't 1909) (sale of quarried stone to be delivered from time to time over a ten month period); *Spiegel-May-Stern Co. v. Mitchell*, 125 Misc. 604, 211 N.Y.S. 495 (Sup. Ct. 1925) (complaint alleged only one sale); see *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1013, 217 N.Y.S.2d 919, 921-22 (Colum. County Ct. 1961).

86. *Ozark Cooperage Co. v. Quaker City Cooperage Co.*, 112 App. Div. 62, 98 N.Y.S. 113 (4th Dep't 1906).

87. *Nursery Plastics, Inc. v. Newton & Thompson, Inc.*, 19 Misc. 2d 883, 885, 191 N.Y.S.2d 655, 658 (Sup. Ct. 1959) (service of process); *Knapp v. Robertson Mfg. Co.*, 155 N.Y.S.2d 490 (Sup. Ct. 1956) (service of process—engaged in selling activities for one day); *Berkshire Eng'r Corp. v. Scott-Paine*, 29 Misc. 2d 1010, 1013, 217 N.Y.S.2d 919, 921-22 (Colum. County Ct. 1961); *Lebanon Mill Co. v. Kuhn*, 145 Misc. 918, 921, 261 N.Y.S. 172, 175 (N.Y. City Mun. Ct. 1932) (a few previous sales strictly to the defendant).

88. *Laurence Univ. v. State*, 68 Misc. 2d 408, 412, 326 N.Y.S.2d 617, 623 (Ct. Cl. 1971), *rev'd* on other grounds, 41 App. Div. 2d 463, 344 N.Y.S.2d 183 (3d Dep't 1973) (university had students in New York with employees to advise them); see *Tropical Tiles, Inc. v. Carefree Swimming Pool Mfg. Corp.*, 167 N.Y.L.J. at 17, col. 4 (Sup. Ct. June 16, 1972).

89. *Rundle Spence Mfg. Co. v. Gainsborough Constr. Co.*, 123 N.Y.S. 785 (App. T. 1910) (*per curiam*) (all business transacted outside the state including the shipment of goods into the state); *La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp.*, 28 Misc. 2d 764, 768, 216 N.Y.S.2d 186, 191 (N.Y. City Ct. 1961); see *Globe Rubber Prod. Corp. v. East Coast Warehouse Distribs., Inc.*, 159 N.Y.L.J. at 18, col. 3 (Sup. Ct. March 18, 1968).

90. *Anglidle Computing Scale Co. v. Gladstone*, 164 App. Div. 370, 375, 149 N.Y.S. 807, 811 (3d Dep't 1914).

However, a systematic selling of merchandise may constitute the doing of business in New York. In *American Can Co. v. Grassi Contracting Co.*,⁹¹ the appellate term determined that a foreign corporation that made sales contracts in New York and maintained a warehouse in the state from which goods were regularly delivered was "doing business" in the state.

A similar result was reached in *Pittsburg Electric Specialties Co. v. Rosenbaum*,⁹² where a foreign corporation maintained a branch office in New York. The office contained a loft which had the corporation's name and the words "Shipping Department" on signs. The general sales manager and six employees worked there, some payments were made at the office, and a stock of goods kept there was used to fill orders. The corporation also maintained a bank account in New York in the name of one of its employees, and was listed in the New York telephone directory. The court held that these activities were sufficient to constitute "doing business" in New York under the qualification statute.⁹³

A foreign corporation having no place of business in this state, however, will not be "doing business" where it consigns goods to a commission merchant, who maintains an office at his own expense, for sale subject to its approval outside the state.⁹⁴ In *Bertha Zinc & Mineral Co. v. Clute*,⁹⁵ the foreign corporation allowed the merchant to keep a stock of its goods from which deliveries were made. The merchant rendered accounts of all materials sold and the proceeds realized from such sales at the end of the month. The court refused to hold this to be "doing business," because it "would prevent many of our merchants from being factors for foreign corporations, which is a large part of the business of many in this city . . ."⁹⁶ The rules are similar when the business is contracted by a broker.⁹⁷

The solicitation of orders within a state by the agent of the foreign corporation with shipment of the goods coming from the foreign state will be within the character of interstate commerce and thus will not subject the corporation to the statute.⁹⁸ The maintenance of an office for these purposes

91. 102 Misc. 230, 168 N.Y.S. 689 (App. T. 1918).

92. 102 Misc. 520, 169 N.Y.S. 157 (App. T. 1918).

93. *Id.* at 521-22, 169 N.Y.S. at 158.

94. *Chase Hackley Piano Co. v. Griffen*, 149 N.Y.S. 998 (App. T. 1914) (per curiam) (no office, stock of goods; simply consigned pianos to merchants for sale—the conditional sales contract being subject to acceptance outside New York); see *Brookford Mills, Inc. v. Baldwin*, 154 App. Div. 553, 139 N.Y.S. 195 (1st Dep't 1913) (no office; consigned its products to commission merchant who made own sales which corporation could confirm or reject).

95. 7 Misc. 123, 27 N.Y.S. 342 (C.P. 1894).

96. *Id.* at 130, 27 N.Y.S. at 346-47.

97. *Fresno Home Packing Co. v. Turle & Skidmore*, 60 Misc. 79, 111 N.Y.S. 839 (App. T. 1908), *aff'd mem.*, 132 App. Div. 930, 117 N.Y.S. 1134 (1st Dep't 1909) (sales made through broker subject to approval outside New York). See also *People ex rel. Southern Cotton Oil Co. v. Roberts*, 25 App. Div. 13, 48 N.Y.S. 1028 (3d Dep't 1898) (tax case) (orders by broker subject to approval outside New York with delivery from consigned goods deposited in New York).

98. "[W]here a foreign corporation's primary contact here is to solicit business . . . then such a corporation should be exempt from any burdens which our laws place upon foreign corporations

or as headquarters for its salesman similarly will not require compliance with the statute, nor will the fact that the corporation's name appears on the door⁹⁹ or that it is listed in the telephone or building directories.¹⁰⁰ There are, however, some decisions in which a different result appears to have been reached. In *American Case & Register Co. v. Griswold*,¹⁰¹ a foreign corporation maintained an office in New York and its general agent solicited the sale of cash registers to be shipped from the foreign state. Even though the contract provided that the sales were subject to acceptance outside New York, the appellate division held that the corporation was "doing business" in the state. The case may be distinguished by the fact that all payments were to be made in New York.¹⁰² It also appears that in his deposition the treasurer of the corporation stated that the corporation was "doing business" in New York.¹⁰³ In another case, a foreign corporation was held to be "doing business" where it solicited orders for goods in New York.¹⁰⁴ It was also proven that plaintiff had an office in the state, employed salesmen and received orders here. In addition there was no proof that business done here was subject to approval of the home office in Massachusetts.¹⁰⁵ Therefore, this case is also distinguishable because the business was transacted entirely in New York.¹⁰⁶

doing business here." *William L. Bonnell Co. v. Katz*, 23 Misc. 2d 1028, 1031, 196 N.Y.S.2d 763, 768 (Sup. Ct. 1960) (New York sales representative was a domestic corporation headed by one of the directors of the foreign corporation who paid all his own expenses); *Eatonon Mills, Inc. v. Goodyear Tire & Rubber Co.*, 124 Misc. 211, 208 N.Y.S. 218 (Sup. Ct. 1924), aff'd, 212 App. Div. 885, 208 N.Y.S. 857 (2d Dep't 1925) (orders taken by commission merchants subject to approval outside of New York; corporate records in New York only to defend claim); see *Eagle Mfg. Co. v. Arkell & Douglas, Inc.*, 197 App. Div. 788, 189 N.Y.S. 140 (1st Dep't 1921), aff'd, 234 N.Y. 573, 138 N.E. 451 (1922) (no bank account or office—orders taken by commission merchants, who worked for other corporations, subject to approval outside New York); *St. Albans Beef Co. v. Aldridge*, 112 App. Div. 803, 99 N.Y.S. 398 (3d Dep't 1906) (orders obtained by traveling salesmen with delivery by common carrier); *Gilmer Bros. Co. v. Singer*, 149 N.Y.S. 904 (App. T. 1914) (orders solicited by broker with samples at his New York office subject to approval outside the state); *Librairie Hachette, S.A. v. Paris Book Center, Inc.*, 62 Misc. 2d 873, 309 N.Y.S.2d 701 (Sup. Ct. 1970). See also *Sirois Leather, Inc. v. Lea-Suede Corp.*, 44 App. Div. 2d 815, 355 N.Y.S.2d 428 (1st Dep't 1974) (orders obtained by independent sales agent).

99. *National Tool Salvage Co. v. National Tool Salvage Indus., Inc.*, 186 Misc. 833, 837, 60 N.Y.S.2d 308, 312 (Sup. Ct. 1946); *Ideal Werke A. G. Fur Drahtlose Telephonie v. Roos*, 140 Misc. 298, 299-300, 250 N.Y.S. 481, 482 (N.Y. City Ct. 1931).

100. *Schwarz v. Sargent*, 197 N.Y.S. 216, 218 (App. T. 1922); *William L. Bonnell Co. v. Katz*, 23 Misc. 2d 1028, 1029, 196 N.Y.S.2d 763, 766 (Sup. Ct. 1960); *National Tool Salvage Co. v. National Tool Salvage Indus., Inc.*, 186 Misc. 833, 837, 60 N.Y.S.2d 308, 312 (Sup. Ct. 1946); *Lebanon Mill Co. v. Kuhn*, 145 Misc. 918, 920, 261 N.Y.S. 172, 175 (N.Y. City Mun. Ct. 1932).

101. 143 App. Div. 807, 128 N.Y.S. 206 (3d Dep't 1911), aff'd, 206 N.Y. 723, 100 N.E. 1124 (1912).

102. *Id.* at 810, 128 N.Y.S. at 207.

103. *Id.* at 809, 128 N.Y.S. at 207.

104. *Westerly Shirt Co. v. Kaufman*, 145 N.Y.S. 68 (App. T. 1914).

105. *Id.* at 69.

106. *Accord, Warner Instrument Co. v. Sweet*, 65 Misc. 57, 58, 119 N.Y.S. 166, 167 (App.

H. *Secondary Activities*

Secondary activities are those incidental to the main business of a corporation. Although they do play a part in the cumulative determination of a corporation's local activities, alone they will not require compliance with the statute.

Courts have held that the maintenance of a bank account is not "doing business."¹⁰⁷ The Business Corporation Law now expressly so provides.¹⁰⁸

The bringing of a suit will not amount to "doing business" in this state.¹⁰⁹ The statute has extended this ruling to the maintenance of any proceeding "whether judicial, administrative, arbitative or otherwise, or effecting settlement thereof or the settlement of claims or disputes."¹¹⁰ Neither hiring of¹¹¹ nor consultation with¹¹² counsel constitutes "doing business."

The keeping of the corporate books and records in New York is not sufficient to bring the corporation within the statutory requirements.¹¹³ Mere maintenance of an office by a foreign corporation within the state is not evidence that the corporation is "doing business" within the state.¹¹⁴ The determination will hinge upon the purpose for which it is maintained. Where it is kept for the convenience of salesmen who solicit orders subject to approval in the foreign state, the corporation will not be required to qualify;¹¹⁵ but where it appeared that orders were taken and accepted at the

T. 1909) (prima facie case of "doing business" when foreign corporation "sold and delivered goods in New York, and . . . maintained personal representatives in New York, apparently with an office for the transaction of business").

107. *Starr Poultry Co. v. Spinelli*, 156 N.Y.L.J. at 19, col. 3 (Sup. Ct. Nov. 23, 1966); see *Badische Lederwerke v. Capitelli*, 92 Misc. 260, 155 N.Y.S. 651 (Sup. Ct. 1915).

108. "[A] foreign corporation shall not be considered to be doing business in this state . . . by reason of . . . (3) Maintaining bank accounts." N.Y. Bus. Corp. Law § 1301(b)(3) (McKinney 1963).

109. *Schneider v. Greater M. & S. Circuit, Inc.*, 144 Misc. 534, 538, 259 N.Y.S. 319, 324 (Sup. Ct. 1932).

110. N.Y. Bus. Corp. Law § 1301(b)(1) (McKinney 1963).

111. *Wollman v. Newark Star Publishing Co.*, 191 App. Div. 881, 180 N.Y.S. 513 (1st Dep't 1920) (per curiam) (employment of counsel in federal courts not sufficient to subject corporation to jurisdiction of New York courts).

112. *Fremay, Inc. v. Modern Plastic Mach. Corp.*, 15 App. Div. 2d 235, 241, 222 N.Y.S.2d 694, 700 (1st Dep't 1961); *Hastings v. Piper Aircraft Corp.*, 274 App. Div. 435, 438, 84 N.Y.S.2d 580, 584 (1st Dep't 1948).

113. *Chasan v. Caruso Spaghetti Place, Inc.*, 55 F. Supp. 831 (S.D.N.Y. 1943), aff'd, 143 F.2d 660 (2d Cir. 1944) (per curiam).

114. *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 229-30, 151 N.E. 214, 215 (1926) ("The office may be maintained merely as a place of accounting, for the meeting of directors and officers, a station point for its superintendents or salesmen, or for mere showrooms."); *James Talcott, Inc. v. J.J. Delaney Carpet Co.*, 28 Misc. 2d 600, 213 N.Y.S.2d 354 (Sup. Ct.), aff'd mem., 14 App. Div. 2d 866, 222 N.Y.S.2d 312 (1st Dep't 1961) (office, showroom and sales manager in New York); *Ideal Werke A.G. Fur Drahtlose Telephonie v. Roos*, 140 Misc. 298, 299, 250 N.Y.S. 481, 482 (N.Y. City Ct. 1941) (company name on door of office leased by agent).

115. *Hovey v. De Long & Eye Co.*, 211 N.Y. 420, 425, 105 N.E. 667, 668 (1914) (office used

office, and the buyers could communicate there for all purposes, the corporation in *Stevens v. Silverman*¹¹⁶ was found to be "doing business."

Whether found to be "doing business" or not, the maintenance of an office will always be a significant factor in a court's determination of a corporation's total local activities. In *Mahar v. Harrington Park Villa Sites*,¹¹⁷ the Appellate Division inferred from a foreign corporation's maintenance of an office in New York that it had the requisite intent to do business in the state.¹¹⁸

The statute now provides that the mere meeting of directors and stockholders within the state will not constitute "doing business."¹¹⁹ Nor will the taking out of an insurance policy with a New York insurer by a foreign corporation on its lands outside the state be sufficient to require compliance with the statute.¹²⁰

Where a foreign corporation's letterhead contains the address of a New York office, it will not per se constitute "doing business;"¹²¹ however, in *Talbot Mills, Inc. v. Benezra*,¹²² a significant factor in the court's determination that a foreign corporation was "doing business" was the fact that its order form stated that for immediate acceptance it should be mailed to the New York address.¹²³

In addition, acts which amount to preparation for doing business, will not of themselves require qualification. The submission of a bid¹²⁴ and the opening of an account with a brokerage firm prior to effective organization of the corporation¹²⁵ are examples of activities held not to constitute "doing business."

as headquarters to meet customers and conduct correspondence); *System Co. v. Advertisers' Cyclopedia Co.*, 121 N.Y.S. 611, 612 (App. T. 1910) (magazine publisher with local office for agents to solicit business).

116. 157 Misc. 381, 382, 283 N.Y.S. 744, 746 (N.Y. City Ct. 1935).

117. 146 App. Div. 756, 131 N.Y.S. 514 (1st Dep't 1911), rev'd on other grounds, 204 N.Y. 231, 97 N.E. 587 (1912).

118. *Id.* at 758-59, 131 N.Y.S. at 516.

119. N.Y. Bus. Corp. Law § 1301(b)(2) (McKinney 1963).

120. "This language clearly contemplates the transaction of the business for which the foreign corporation was primarily organized, and not the incidental business of insuring its property located in another State . . ." *Cummer Lumber Co. v. Associated Mfrs.' Mut. Fire Ins. Corp.*, 67 App. Div. 151, 156, 73 N.Y.S. 668, 671 (2d Dep't 1901), aff'd mem., 173 N.Y. 633, 66 N.E. 1106 (1903); accord, *Kline Bros. & Co. v. German Union Fire Ins. Co.*, 147 App. Div. 790, 132 N.Y.S. 181 (1st Dep't 1911), aff'd mem., 210 N.Y. 534, 103 N.E. 1125 (1913).

121. *Lebanon Mill Co. v. Kuhn*, 145 Misc. 918, 921, 261 N.Y.S. 172, 176 (N.Y. City Mun. Ct. 1932); accord, *Ware Bros. Co. v. Lakeland Press Corp.*, 157 N.Y.L.J. at 15, col. 7 (Sup. Ct. April 21, 1967).

122. 35 Misc. 2d 924, 231 N.Y.S.2d 229 (Sup. Ct. 1962).

123. *Id.* at 925, 231 N.Y.S.2d at 231. However, the fact that a note has been executed and delivered in New York to a foreign corporation will not amount to "doing business" in the state. *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559, 561, 39 N.Y.S. 432, 433 (3d Dep't 1896); *Central Bergan Supply Co. v. V.L. Consiglio, Inc.*, 35 Misc. 2d 146, 147, 230 N.Y.S.2d 84, 85-86 (Sup. Ct. 1961).

124. *Odell v. City of New York*, 206 App. Div. 68, 72-73, 200 N.Y.S. 705, 710 (1st Dep't 1923), aff'd mem., 238 N.Y. 623, 144 N.E. 917 (1924).

125. *In re Estate of Scheftel*, 275 N.Y. 135, 143, 9 N.E.2d 809, 811 (1937).

I. *Transportation Companies*

Where a foreign transportation corporation is engaged in the transporting of passengers and freight between New York and a point outside the state, it will not be required to comply with the qualification statute.¹²⁶ The Business Corporation Law provides: "This chapter applies to commerce with foreign nations and among the several states . . . only to the extent permitted under the constitution and laws of the United States."¹²⁷ The maintenance of a terminal in New York run by several employees for these purposes will not constitute "doing business."¹²⁸ A transportation company will also be allowed to solicit passengers and freight for transportation outside the state.¹²⁹

Where a foreign corporation has done more than carry on activities which are incidental to its interstate trade, it might be required to qualify. In *People ex rel. Pennsylvania R.R. v. Knight*,¹³⁰ a tax case,¹³¹ the foreign railroad company maintained a cab service which handled passengers in New York who had traveled on its interstate ferry. This amounted to intrastate commerce in New York and required compliance with the franchise tax statute.¹³² Arguably, where a transportation company carries on its business between two points solely in New York, the courts will require qualification.

J. *Miscellaneous Activities*

There are certain other activities which must be considered in a determination of "doing business." For example, a corporation engaged in manufacturing in New York will be required to comply with the qualification statute, for that is a substantial part of the ordinary business of a manufacturing corporation. The conducting of research and the training of employees in this state does not constitute business sufficient to require a foreign corporation to comply with the statute;¹³³ however, a corporation organized for the purpose of doing research will be required to qualify.

The sale of its stock by a foreign corporation in New York does not constitute "doing business,"¹³⁴ nor does the arranging to procure capital by

126. This amounts to "foreign commerce" within the meaning and protection of the commerce clause of the U.S. Constitution. *El Al Israel Airlines, Inc. v. Spring Travel, Inc.*, 155 N.Y.L.J. at 17, col. 1 (Sup. Ct. June 3, 1966).

127. N.Y. Bus. Corp. Law § 103(b) (McKinney 1963).

128. *United Transp. Co. v. Hertz Corp.*, 173 N.Y.L.J. at 17, col. 1 (N.Y. City Civ. Ct. May 16, 1975). The courts will allow the corporation to carry on all activity incidental and necessary to its operation as an interstate carrier. See *Erie Beach Amusements, Ltd. v. Spirella Co.*, 105 Misc. 170, 173-74, 173 N.Y.S. 626, 628-29 (Niagara County Ct. 1918).

129. *Cohen v. Gulf, Mobile & Ohio R.R.*, 95 N.Y.S.2d 633 (Sup. Ct. 1950) (service of process; solicitation within state of passenger and freight traffic for lines outside New York).

130. 171 N.Y. 354, 64 N.E. 152 (1902), *aff'd*, 192 U.S. 21 (1904).

131. Although this was a tax case, the amount of activity appears sufficient to also constitute "doing business" for qualification purposes.

132. 171 N.Y. at 355, 64 N.E. at 152.

133. *Brocia v. Franklin Plan Corp.*, 235 App. Div. 421, 423, 257 N.Y.S. 167, 170 (4th Dep't 1932) (service of process).

134. *In re Estate of Scheftel*, 275 N.Y. 135, 143, 9 N.E.2d 809, 811 (1937). See also *People v. Equitable Trust Co.*, 96 N.Y. 387, 397-98 (1884); *Hope Mut. Life Ins. Co. v. Perkins*, 38 N.Y. 404, 408 (1868).

the issue and sale of securities.¹³⁵ The same rule will apply to the sale of bonds and other securities.¹³⁶ However, where a corporation is in the business of selling the stock of other corporations in a foreign state, it will be "doing business" sufficient to require qualification. The statute now provides that "[m]aintaining offices or agencies only for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities" will not constitute sufficient activity to require a corporation to qualify.¹³⁷

This statute has also been applied to the promotions area.¹³⁸ In *Marion Laboratories, Inc. v. Wolins Pharmacal Corp.*,¹³⁹ a foreign corporation involved in interstate commerce with wholesalers was found to be "doing business" in New York by promoting the sale of its drugs between the wholesalers and their retail clients.

Thus, the mere fact that a foreign corporation is selling its securities or doing research in New York will not constitute "doing business;" however, where it is engaged in manufacturing or the promotion of intrastate sales it will be required to qualify.

This section of specific activities should demonstrate the general principles discussed in the previous section. It is clear from the cases that, subject to the interstate commerce exception, where a foreign corporation transacts in New York a substantial amount of the business for which it is organized, it will be required to qualify.

The problem arises where the specific activities are merely incidental or secondary to the corporation's ordinary business. These activities will be factors which the courts will utilize in determining whether the corporation is "doing business." Their effect will be determined by whether they evidence an intent on the part of the corporation to carry on a continuing business in New York. Some activities, such as the purchase of property, the advertisement of its business or the maintenance of an office, clearly demonstrate this requisite intent and will be significant factors in a court's determination that a corporation was "doing business." However, where the activities are not directly related to the corporation's carrying on a permanent and continuous business, such as the maintenance of a bank account, the bringing of a lawsuit, the collection of debts or the sale by a corporation of its own securities, their effect will be minimal unless conducted to a significant extent.

135. *Southworth v. Morgan*, 143 App. Div. 648, 652, 128 N.Y.S. 196, 199 (4th Dep't 1911), rev'd on other grounds, 205 N.Y. 293, 98 N.E. 490 (1912).

136. *Sunrise Lumber Co. v. Homer D. Biery Lumber Co.*, 195 App. Div. 170, 173, 185 N.Y.S. 711, 713 (2d Dep't 1921); *Union Trust Co. v. Sickels*, 125 App. Div. 105, 109, 109 N.Y.S. 262, 265 (4th Dep't 1908); *Robbins v. Ring*, 9 Misc. 2d 44, 45, 166 N.Y.S.2d 483, 484-85 (Sup. Ct. 1957) (service of process).

137. N.Y. Bus. Corp. Law § 1301(b)(4) (McKinney 1963).

138. The leading case in the area is *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961) (5-4 decision) (promoting products to retailers who buy them intrastate from wholesalers and sell them intrastate is "doing business" intrastate).

139. 28 N.Y.2d 884, 271 N.E.2d 554, 322 N.Y.S.2d 720 (1971) (mem.).

IV. CONCLUSION

A court's determination of what constitutes "doing business" under New York's qualification statute is based on the totality of the corporation's local activities.¹⁴⁰ A foreign corporation's failure to properly gauge the level of its activities in New York will leave it without access to the courts, until it has complied with the statute.¹⁴¹ Nevertheless, the concept of "doing business" is still a source of confusion to courts and corporations. There is no definitive standard to guide the determination,¹⁴² and some courts have used service of process cases as authority for their decisions on qualification.¹⁴³ By completely removing the section 1301(b) activities from consideration¹⁴⁴—activities which have never been held to constitute "doing business"—some of this confusion would be alleviated. This Note has attempted to illustrate the gist of the "doing business" rulings through a discussion of the more critical factors. However, the wide variety of factual circumstances which arise in these determinations will continue to make "doing business" an uncertain standard for all corporations considering business in New York.

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140. See note 23 *supra* and accompanying text.

141. See notes 3 & 36 *supra*.

142. See note 20 *supra* and accompanying text.

143. See note 18 *supra*.

144. See notes 9-15 *supra* and accompanying text.