

JURISDICTION RECONSIDERED: THE UNCERTAIN STATE OF REGISTRATION AS CONSENT TO JURISDICTION IN NEW YORK

In October 2021, the New York Court of Appeals held in *Aybar v. Aybar* that an out-of-state corporation does not consent to the exercise of general, all-purpose jurisdiction in New York courts by registering to do business and appointing a service of process agent in the state.¹ For now, the *Aybar* decision is good news for foreign corporations registered in New York, but corporations should remain wary of potential amendments to New York's registration statute that may expressly condition registration on consent to general jurisdiction.

Background: Consent Jurisdiction in New York

The Due Process Clause of the U.S. Constitution mandates that a U.S. court can issue a binding judgment only on defendants subject to that court's "personal jurisdiction." In the 1945 *International Shoe* decision, the Supreme Court held that U.S. courts can assert personal jurisdiction over defendants that maintain sufficient "minimum contacts" with the forum state, such that "the suit does not offend traditional notions of fair play and substantial justice."² Personal jurisdiction can be general (all-purpose), or specific (conduct-linked). A court with general jurisdiction over a party can hear "any and all claims" against that party, even those unrelated to the defendant's actions within that state. Specific jurisdiction is far narrower: it exists only over claims that "arise out of or relate to" a defendant's contacts with a state. The minimum contacts analysis is intended to foster predictability and fairness for absent defendants. For corporate defendants, the constraints of personal jurisdiction are important tools for assessing the risk of suit in a given forum.

For decades, courts in many U.S. states have grappled with the intersection of the "minimum contacts" test and the jurisdictional effect of business registration statutes. Each U.S. state has such statutes: they typically require out-of-state

¹ *Aybar v. Aybar*, --- N.E.3d ---, 2021 WL 4596367 (N.Y. Oct. 7, 2021).

² *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

corporations to register with the state and to appoint an agent for service of process before conducting business in the state. Most such statutes are silent as to whether they can create jurisdiction over a registered foreign company. Yet courts in many states have held they do so: in many states, this reasoning appears to be premised on a legacy analysis from an earlier, territorial approach to personal jurisdiction that preceded *International Shoe's* “minimum contacts” analysis.

As is true of most state registration statutes, New York’s business registration statute—New York Business Corporation Law §§ 1301, 1304—is silent as to whether a foreign corporation’s registration in New York amounts to consent to jurisdiction. For decades, most New York courts held that registration amounted to constructive consent to general jurisdiction in New York courts.

But in New York and elsewhere, that reasoning has been challenged by a pair of decisions by the U.S. Supreme Court in the last decade, which dramatically curbed the exercise of general jurisdiction over foreign corporations. Together, the Supreme Court’s decisions in *Goodyear* and *Daimler* clarified that general jurisdiction exists only where a defendant has such “continuous and systematic” contacts with the forum as to render it “essentially at home” there, creating a jurisdictional paradigm based on the location of a corporation’s headquarters and incorporation.³

***Aybar v. Aybar*: Registration Does Not Amount to Constructive Consent to Jurisdiction**

As with many recent decisions clarifying the boundaries of personal jurisdiction, *Aybar* concerned an automobile accident. The case was premised on a car crash in Virginia. The driver and all passengers were New York residents. Plaintiffs—the surviving passengers and representatives of the deceased passengers’ estates—sued in New York state court. Among other claims, they sued two corporate defendants, Ford and Goodyear, claiming they negligently manufactured the car and tires, respectively. Both defendants are incorporated and headquartered out of state and neither the car nor tires were manufactured in New York. Plaintiffs did not assert that either corporate defendant was subject to specific personal jurisdiction in New York. Instead, they argued defendants were subject to general jurisdiction in New York by virtue of having registered to do business there and having “conducted business in New York and derived substantial revenue from such business.”⁴ The trial court agreed and denied defendants’ motions to dismiss.

The intermediate appeals court reversed and dismissed both corporate defendants for lack of personal jurisdiction. Recognizing the Supreme Court had clarified that that “continuous and systematic” forum activity alone cannot give rise to general jurisdiction unless it renders a defendant “essentially at home” there, the *Aybar* intermediate court reasoned that, as a matter of constitutional due process, “[a]sserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be ‘unacceptably grasping’ under *Daimler*.”

³ *Daimler AG v. Bauman, et al.*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011).

⁴ *Aybar v. Aybar*, 169 A.D.3d 137, 145 (2d Dep’t 2019).

The New York Court of Appeals affirmed dismissal, albeit on slightly different grounds.⁵ The Court of Appeals sidestepped constitutional due process concerns. Rather, it reasoned that the “plain terms” of New York’s registration statute do not expressly condition the right to do business in New York on a foreign corporation’s consent to general jurisdiction there. The court held that implying such consent to general jurisdiction would “improperly amend the statute by adding words that are not there.” As a result, the court held that registration constituted consent to receive service of process in the state, but not consent to general jurisdiction.

In so holding, the Court of Appeals cabined the effect of its 1916 decision in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, the precedent that many New York courts had cited as the basis for holding that registration amounted to consent to jurisdiction. In *Bagdon* the court held that an in-state agent for service could be served for all claims against the defendant, not just those related to New York. But *Aybar* explained that *Bagdon*’s holding was a “narrow[]” one that was “limited to the effect of service of process to which a foreign corporation consented.” Because its decision “rest[ed] solely on New York law grounds,” it had “no occasion to address whether consent by registration, if it existed in New York, would comport with federal due process under *Daimler*.”

Potential Legislative Changes: Explicit Consent to Jurisdiction by Registration

Aybar serves as an important final word from New York’s highest court, clarifying and narrowing the bases for exercise of all-purpose jurisdiction over non-New York businesses registered there.

But there is some concern this good news may be short-lived. In June 2021, the New York State legislature passed a bill that would amend New York’s business registration statute to *explicitly* state that a foreign corporation’s registration to do business in the state constitutes consent to general jurisdiction in the state. That bill presently awaits the signature of New York’s governor.

If enacted, the statute could create new uncertainty over the jurisdictional consequences of registration in New York. Foreign companies could be expected to challenge its constitutionality. For example, there may be arguments that even express consent is unconstitutional, perhaps because that consent—as a condition of doing business here—is “functionally involuntary” and, therefore, violative of the “unconstitutional conditions” doctrine, which prevents the government from conditioning a benefit (the right to conduct business) on the forfeiture of a constitutional right (due process). A similar fight is presently before the Pennsylvania Supreme Court, concerning that state’s registration statute.⁶

Conclusion

Companies registered to do business in New York—and indeed, in *any* U.S. state—should consult counsel to understand the jurisdictional consequences of such registration.

⁵ *Aybar*, 2021 WL 4596367 at *7.

⁶ *Mallory v. Norfolk S. Ry. Co.*, No. 3 EAP 2021 (Pa. 2021).

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