New York
Official Reports

KeyCite Yellow Flag - Negative Treatment
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62 N.Y.2d 474, 467 N.E.2d 245,
478 N.Y.S.2d 597, 57 A.L.R.4th 955

Islamic Republic of Iran, Appellant,
v.
Mohammed Reza Pahlavi, Respondent,
and Farah Diba Pahlavi, Defendant.

Court of Appeals of New York
Argued June 6, 1984;
decided July 5, 1984

CITE TITLE AS: Islamic Republic of Iran v Pahlavi

SUMMARY

Appeal from so much of an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 30, 1983, as affirmed, by a divided court, so much of an order of the Supreme Court at Special Term (Irving Kirschenbaum, J.), entered in New York County, as granted a motion by defendants to dismiss the complaint on the ground of *forum non conveniens.*

Plaintiff, the Islamic Republic of Iran, brings this action against Iran's former ruler, Shah Mohammed Reza Pahlavi, and his wife, Empress Farah Diba Pahlavi. It alleges in its complaint that defendants accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds in breach of their fiduciary duty to the Iranian people and it seeks to recover those funds and 20 billion dollars in exemplary damages. It asks the court to impress a constructive trust on defendants' assets located throughout the world, for an accounting of all moneys and property received by the defendants from the government of Iran, and for other incidental relief. The action was commenced in November, 1979 by substituted service on the Shah made at New York Hospital where he was undergoing cancer therapy. The Empress was personally served at the same time at the New York residence of the Shah's sister. Thereafter, defendants moved to dismiss the complaint alleging that it raised nonjusticiable political questions, that the court lacked personal jurisdiction due to defective service of process on them and that the complaint should be dismissed on grounds of *forum non conveniens.* Special Term granted defendants' motion based on *forum non conveniens,* concluding that the parties had no connection with New York other than a claim that the Shah had deposited funds in New York banks, a claim which it found insufficient under the circumstances to justify the court in retaining jurisdiction. A divided Appellate Division affirmed. ***475**

The Court of Appeals dismissed the appeal as against defendant Mohammed Reza Pahlavi, and affirmed the order of the Appellate Division as against defendant Farah Diba Pahlavi, holding, in an opinion by Judge Simons, that the courts below did not abuse their discretion as a matter of law in dismissing the action on the ground of *forum non conveniens* since the record does not demonstrate a substantial nexus between New York State and plaintiff's cause of action, even though there may be no other forum in which plaintiff can obtain the relief it seeks; and that the provisions of the January, 1981 agreements between the United States and Iran, commonly known as the Algerian Accords, did not require reversal.

Islamic Republic of Iran v Pahlavi, 94 AD2d 374, affirmed.

HEADNOTES

Appeal
Matters Appealable
Failure to Substitute for Deceased Party

(1) In an action by the Islamic Republic of Iran against Iran's former ruler, the Shah, and his wife, alleging that defendants accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds, plaintiff's appeal from an Appellate Division order affirming the granting of defendants' motion to dismiss the complaint on the ground of *forum non conveniens* is dismissed as against the defendant Shah; the Shah died while the motion was pending before Special Term, and no party has been substituted to represent him.

Courts
Forum Non Conveniens
Action by Foreign Government against Its Former Ruler

(2) An action by the Islamic Republic of Iran against Iran's former ruler, the Shah, and his wife, alleging that defendants accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds was properly dismissed on the ground of *forum non conveniens,* even though there may be no other forum in which plaintiff can obtain the relief it seeks; the trial court and Appellate Division considered all the relevant factors, and there has been no abuse of discretion reviewable by the Court of Appeals. The availability of an alternative forum is not an absolute precondition to dismissal on *forum non conveniens* grounds, and the record does not demonstrate a substantial nexus between New York State and plaintiff's cause of action.

Courts
Forum Non Conveniens
Action by Foreign Government against Its Former Ruler

(3) The provisions of the 1981 agreements between the United States and Iran, commonly known as the Algerian Accords, dealing with the unfreezing of Iranian assets located in the United States and the method for resolving suits by nationals of the United States against the government of Iran, do not require reversal of the Appellate Division's affirmance of Special Term's dismissal on the ground of *forum non conveniens* of an action by the Islamic Republic of Iran against Iran's former ruler, the Shah, and his wife, alleging that defendants accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds; at the time the Accords were executed, this action had been instituted in Supreme Court and defendants' motion to dismiss was ***476** pending, and the Accords contained no reference to the pending suit asserting plaintiff's claims against the Shah and his family nor did the United States guarantee that a forum would be available to plaintiff to litigate them. Indeed, inasmuch as treaties are subject to constitutional restraints, it is questionable whether the Federal Government could guarantee a New York forum by treaty without violating constitutional principles of federalism and separation of powers.

POINTS OF COUNSEL

Brian O'Dwyer, Paul O'Dwyer, Gary Silverman, Abram Chayes and *Bruno A. Ristau* for appellant.

I. The Algerian Accords, by which the United States, in the exercise of its powers over foreign affairs, assured Iran of the availability of a United States judicial forum for the adjudication of its claims against the Shah, preclude the dismissal of this action. (Dames & Moore v Regan, 453 US 654; United States v Belmont, 301 US 324; United States v Pink, 315 US 203; Itel Corp. v M/S Victoria U, 710 F2d 199; Itek Corp. v First Nat. Bank, 704 F2d 1; Behring Int. v Imperial Iranian Air Force, 699 F2d 657; United States v Curtiss-Wright Corp., 299 US 304.) II. Under controlling precedents and all the circumstances of this case, dismissal of this action was an abuse of discretion. (Gulf Oil Corp. v Gilbert, 330 US 501; Irrigation & Ind. Dev. Corp. v Indag S. A., 37 NY2d 522; Silver v Great Amer. Ins. Co., 29 NY2d 356; Varkonyi v S. A. Empresa De Viacao Airea Rio Grandense [Varig], 22 NY2d 333; Taylor v Interstate Motor Frgt. System 309 NY 633; Blais v Beyo, 60 NY2d 679; Belachew v Michael, 59 NY2d 1004; Meritum Corp. v Lawyers Tit. Ins. Co., 57 NY2d 765; Wienke v Wienke, 96 AD2d 1136; Mollendo Equip. Co. v Sekisan Trading Co., 56 AD2d 750.)

Roger Boyle for Farah Diba Pahlavi, respondent.

I. New York is an inappropriate forum. (Luther v Borden, 7 How [48 US] 1; Massachusetts v Laird, 400 US 886; Ferguson v Neilson, 58 Hun 604; Pietraroia v New Jersey & Hudson Riv. Ry. & Ferry Co., 197 NY 434; Varkonyi v S. A. Empresa de Viacao Airea Rio Grandense [Varig], 22 NY2d 333; Bata v Bata, 304 NY 51; Robinson v Oceanic Steam Nav. Co., 112 NY 315; Silver v Great Amer. Ins. Co., 29 NY2d 356; Martin v Mieth, 35 NY2d 414; Westwood Assoc. v Deluxe Gen., 53 NY2d 618.) II. The unavailability of an alternative forum is irrelevant. (Gulf Oil Corp. v Gilbert, 330 US 501; Alcoa S. S. Co. v M/V Nordic Regent, 654 F2d 147; Noto v Cia Secula di Armanento, 310 F Supp 639.) III. ***477** The court lacks personal jurisdiction over defendant. (International Shoe Co. v Washington, 326 US 310; Shaffer v Heitner, 433 US 186; World-Wide Volkswagen Corp. v Woodson, 444 US 286; Rush v Savchuk, 444 US 320.) IV. The Algerian Accords in no way prevent dismissal of this case. (Chicago & Southern Air Lines v Waterman Corp., 333 US 103; Delay v United States, 602 F2d 173, 444 US 1012; United States v Nixon, 418 US 683; Banco Nacional de Cuba v Sabbatino, 376 US 398; Underhill v Hernandez, 168 US 250; Sullivan v State of Sao Paolo, 122 F2d 355; Stephen v Zivnostenska Banka, 15 AD2d 111, 12 NY2d 781; Cummings v State of Missouri, 4 Wall [71 US] 277.)

OPINION OF THE COURT

Simons, J.

Plaintiff, the Islamic Republic of Iran, brings this action against Iran's former ruler, Shah Mohammed Reza Pahlavi, and his wife, Empress Farah Diba Pahlavi. It alleges in its complaint that defendants accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds in breach of their fiduciary duty to the Iranian people and it seeks to recover those funds and 20 billion dollars in exemplary damages. It asks the court to impress a constructive trust on defendants' assets located throughout the world, for an accounting of all moneys and property received by the defendants from the government of Iran, and for other incidental relief.

(1) The action was commenced in November, 1979 by substituted service on the Shah made at New York Hospital where he was undergoing cancer therapy. The Empress was personally served at the same time at the New York residence of the Shah's sister, Ashraf Pahlavi. Thereafter, defendants moved to dismiss the complaint alleging that it raised nonjusticiable political questions, that the court lacked personal jurisdiction due to defective service of process on them and that the complaint should be dismissed on grounds of *forum non conveniens.* [1] Special Term granted defendants' motion based on *forum non conveniens* concluding that the parties had no connection with New ***478** York other than a claim that the Shah had deposited funds in New York banks, a claim which it found insufficient under the circumstances to justify the court in retaining jurisdiction. A divided Appellate Division affirmed, Justice Fein arguing in dissent that jurisdiction must be assumed because no other forum was available to plaintiff. [2]

On this appeal plaintiff claims that the courts below erred, that the New York courts must entertain this action because the record does not indicate that there is any alternative forum available and because the United States Government undertook to guarantee plaintiff an American forum to litigate its claims against the former royal family in the hostage settlement agreements between it and plaintiff known as the Algerian Accords.

(2, 3) There should be an affirmance. The application of the doctrine of *forum non conveniens* is a matter of discretion to be exercised by the trial court and the Appellate Division. We do not find that those courts abused their discretion as a matter of law under the circumstances presented, even though it appears that there may be no other forum in which plaintiff can obtain the relief it seeks. Nor is reversal required by the provisions of the Algerian Accords.

I

Ordinarily, nonresidents are permitted to enter New York courts to litigate their disputes as a matter of comity. Obviously, however, our courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State. The common-law doctrine of *forum non conveniens,* also articulated in CPLR 327, [3] permits a court to stay or ***479** dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere (see, generally, Siegel, NY Prac, § 28; 1 Weinstein-Korn-Miller, NY Civ Prac, par 327.01, pp 3-469 -- 3-470). The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (see Piper Aircraft Co. v Reyno, 454 US 235; Bader & Bader v Fort, 66 AD2d 642) and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (Banco Ambrosiano, S.p.A. v Artoc Bank & Trust, 62 NY2d 65; Irrigation & Ind. Dev. Corp. v Indag S.A., 37 NY2d 522, 525; Varkonyi v S.A. Empresa De Viacao Airea Rio Grandense [Varig], 22 NY2d 333, 335). The court may also consider that both parties to the action are nonresidents (Bata v Bata, 304 NY 51) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (Silver v Great Amer. Ins. Co., 29 NY2d 356, 361). No one factor is controlling (see Irrigation & Ind. Dev. Corp. v Indag S.A., supra.; see, also, Piper Aircraft Co. v Reyno, 454 US 235, supra.; Gulf Oil Corp. v Gilbert, 330 US 501, 508). The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case (Martin v Mieth, 35 NY2d 414, 418; Silver v Great Amer. Ins. Co., supra). The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court (Banco Ambrosiano, S.p.A. v Artoc Bank & Trust, supra.; Irrigation & Ind. Dev. Corp. v Indag S.A., supra; Varkonyi v Varig, supra, at p 337).

(2) Here, the trial court and the Appellate Division considered all of the relevant factors, including the fact that there may be no alternative forum in which this claim can be tried because of the political situation in Iran under ***480** the Khomeini regime. They also noted the substantial financial and administrative burden on the New York courts, the genesis of the claims in Iran, the likely applicability of Iranian law, the nonresidence of both parties and that plaintiff was requesting a sweeping review of the conduct of the Shah's government during the 38 years of his reign, a review which undoubtedly would require extended trial and pretrial proceedings and which would necessitate the appearance of many foreign witnesses not only to establish liability but also to discover and evaluate defendant's assets. Indeed, plaintiff's appendix lists two and one-half pages of single-spaced typewritten entries of property of all kinds throughout the world allegedly owned or controlled by defendant and the royal family through the Pahlavi Foundation. The courts below, after reviewing these factors, concluded that the public interest factors involving the court system and the private interest factors affecting defendant outweighed plaintiff's claim to litigate this action in the New York courts notwithstanding the unavailability of an alternative forum.

Plaintiff contends that this was error because the availability of an alternative forum is not merely an additional factor for the court to consider but constitutes an absolute precondition to dismissal on *conveniens* grounds.

The perceived requirement that an alternative forum must be available had its origin in dicta by the United States Supreme Court in Gulf Oil Corp. v Gilbert (330 US 501, 507, supra). Writing for the court, Justice Jackson stated (at pp 506-507): "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." The *Gulf Oil* case involved a New York dismissal of a Virginia-based action on the ground that all the relevant contracts were with Virginia. Unlike the present case, there was plainly an alternative forum present in *Gulf Oil* and the court's statement was unnecessary to the result. Nevertheless, the dictum has persisted and has been quoted in subsequent cases (see, e.g., Piper Aircraft Co. v Reyno, 454 US 235, supra; Calavo Growers v Belgium, 632 F2d 963, 968) and scholarly treatises (1 Weinstein-Korn-Miller, ***481** NY Civ Prac, par 327.02, p 3- 479). Indeed, dicta in many of this court's decisions have also stated it as a general rule (see, e.g., Irrigation & Ind. Dev. Corp. v Indag S.A., 37 NY2d 522, 525, supra; Silver v Great Amer. Ins. Co., 29 NY2d 356, 361, supra; Varkonyi v Varig, 22 NY2d 333, supra).

Without doubt, the availability of another suitable forum is a most important factor to be considered in ruling on a motion to dismiss but we have never held that it was a prerequisite for applying the *conveniens* doctrine and in *Varkonyi* we expressly described the availability of an alternative forum as a "pertinent factor", not as a precondition to dismissal (at p 338). Nor should proof of the availability of another forum be required in all cases before dismissal is permitted. That would place an undue burden on New York courts forcing them to accept foreign-based actions unrelated to this State merely because a more appropriate forum is unwilling or unable to accept jurisdiction (see Korbel, Law of Federal Venue and Choice of Most Convenient Forum, 15 Rutgers L Rev 607, 611, n 28; see, also, Ferguson v Neilson, 58 Hun 604, opn in 33 NY St Rep 814, 11 NYS 524; Noto v Cia Secula di Armanento, 310 F Supp 639). Moreover, even if we were to hold that the motion should be denied if no alternative forum is available, then the burden of demonstrating that fact should fall on plaintiff. Its presence in the New York courts is a matter of choice and permitted because of comity and the public and private burden of its action appearing, it should justify the need for New York to assume jurisdiction (Blair, Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col L Rev 1, 33-34 [holding that there need not be an alternative forum available before dismissal is warranted]). The result may appear arbitrary to some but *forum non conveniens* dismissals are not the only instance in which New York courts decline to entertain jurisdiction even though no alternative forum may exist. Typically, the courts also refuse to adjudicate claims otherwise actionable because they involve unclean hands, diplomatic immunity and claims in which the applicable law is penal in nature or is contrary to the public policy of the forum State (see Restatement, Conflict of Laws 2d, § 85, and Comment *a;* §§ 89, 90; Siegel, Conflicts in a Nutshell, §§ 49-53). ***482**

In this case the convenience of the plaintiff is served because it acquired jurisdiction over defendant in New York. That circumstance is entitled to some weight, although less than usual because nonresident parties are involved (see Piper Aircraft Co. v Reyno, 454 US 235, 255-256, supra), but generally, a plaintiff must be able to show more than its own convenience for selecting the forum when the choice imposes a heavy burden on the court and the defendant (Gulf Oil Corp. v Gilbert, supra, at p 508). To that end, plaintiff claims the action should proceed in this jurisdiction because assets of

the Shah are located here. Nothing before us establishes that fact, however, and the Surrogate's Court has apparently found no grounds for ancillary administration of the estate yet (see n 1, infra.). The absence of an alternative forum is the only substantial consideration advanced for denial of the motion.

Arrayed against this is the substantial burden upon the courts of this State and the possibility that its judgment may be ineffectual because of its inability to impose a constructive trust on defendant's assets if they are not in New York. Moreover, defendant probably cannot defend this claim in any realistic way because the witnesses and evidence are located in Iran under plaintiff's control and are not subject to the mandate of New York's courts. Indeed, plaintiff's counsel conceded on oral argument that ideally the action should be maintained in Iran but contended that New York was the better forum. If the action cannot be maintained in Iran, however, under laws which result in judgments cognizable in the United States or other foreign jurisdictions where the Shah's assets may be found, then that failure must be charged to plaintiff. It is, after all, the government in power, not a hapless national victimized by its country's policies. Any infirmity in plaintiff's legal system should weigh against its claim of venue, not impose disadvantage on defendant or the judicial system of this State.

As the dissent states (and as has been noted above), some courts and commentators have taken the view that an action will not be dismissed on *forum non conveniens* grounds unless a suitable alternative forum is available to plaintiff (see ***483** Gulf Oil Corp. v Gilbert, 330 US 501, 508, supra [dictum]; Restatement, Conflict of Laws 2d, § 84, p 251; see, also, Vandam v Smit, 101 NM 508; Hill v Upper Miss. Towing Corp., 252 Minn 165). At the threshold we note that the Supreme Court, while ruling with respect to procedural rights in the Federal courts, has never suggested that the doctrine of *forum non conveniens* implicates constitutional due process rights. Although the existence of a suitable alternative forum is a most important factor to be considered in applying the *forum non conveniens* doctrine, its alleged absence does not require the court to retain jurisdiction. Plaintiff has failed to establish that no alternative forum exists and, even if it were assumed that normally an alternative forum is a prerequisite and that plaintiff has none, a *forum non conveniens* dismissal is still warranted when plaintiff's chosen forum is unable to afford the parties appropriate relief (Restatement, Conflict of Laws 2d, § 85). Despite the fact that plaintiff's complaint requests monetary relief, it really seeks a sweeping review of the political and financial management of the Iranian government during the several years of the late Shah's reign with the object of accounting for and repossessing the nation's claimed lost wealth wherever it may be located throughout the world. For the reasons stated, that relief cannot properly be afforded by a New York forum with little if any nexus to the controversy and the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral (Silver v Great Amer. Ins. Co., 29 NY2d 356, 361, supra; Bata v Bata, 304 NY 51, 56, supra; Pietraroia v New Jersey & Hudson Riv. Ry. & Ferry Co., 197 NY 434, 439).

Finally, it should be noted that the Federal cases cited in the dissent rest upon the Federal "change of venue" statute (US Code, tit 28, § 1404, subd [a]) which is substantially different from New York's CPLR 327 because a successful motion under Federal law results in a transfer of the case to another district within the country. New York's statute contains no similar provision (Siegel, NY Prac, § 28, p 28).

In sum, the record does not demonstrate a substantial nexus between this State and plaintiff's cause of the action. ***484** That being so the courts below could, in the exercise of their discretion, dismiss the action on grounds of *forum non conveniens* notwithstanding the fact that the record does not establish an alternative forum where the action may be maintained and they could do so without conditioning their dismissal on defendant's acceptance of process in another jurisdiction.

II

The crisis arising from the seizure of American hostages in Iran was settled on January 19, 1981 when Iran and the United States executed the General Declaration and the Claims Settlement Declaration, agreements commonly known as the Algerian Accords. These agreements dealt primarily with the unfreezing of Iranian assets located in the United States and the method for resolving suits by nationals of the United States against the government of Iran. They also provided that the United States Government would take certain steps in connection with legal actions involving the Shah's property. Specifically, the United States agreed to freeze the Shah's assets within this country, to inform United States courts that in any litigation involving Iran and the Shah's estate sovereign immunity and the Act of State doctrine were not available as defenses and to guarantee the enforcement of any final judgments involving these matters. Any claimed failure of

the United States to meet these treaty obligations was made subject to arbitration between the signatories in a specially designated international tribunal and its award of damages to plaintiff for the breach could be enforced in the courts of any nation. In addition, a summary statement issued by the United States Government prior to the signing of the Accords stated that it would advise American courts of the right of the Iranian government to bring an action in this country to recover the Shah's assets. Plaintiff contends that these promises preclude New York courts from dismissing the action on *forum non conveniens* grounds.

(3) At the time the Accords were executed, this action had been instituted in Supreme Court and there was pending a motion to dismiss, made several months earlier, ***485** based upon defendant's contentions that the action involved a nonjusticiable political question, that plaintiff had unclean hands and on grounds of *forum non conveniens*. Indeed, the action was mentioned in an earlier communication of the United States directed to the government of Iran on December 3, 1980. Nevertheless, although the Accords when finally concluded contained specific provisions concerning plaintiff's claims against the Shah and his family, they contained no reference to the pending suit asserting those claims nor did the United States guarantee that a forum would be available to plaintiff to litigate them.

Plaintiff asserts, however, that various statements issued by the State Department when read in conjunction with these treaties evidence a commitment by the United States to assure that New York courts would entertain plaintiff's claim. It refers particularly to a State Department summary of the United States position on the Iranian situation, which indicated that the Federal Government would "facilitate any legal action" brought by the government of Iran to recover on claims to the former Shah's assets and request the court's assistance in obtaining information about such assets (Summary Report, Hostage Crisis in Iran, 1979-1981, submitted by Secretary of State Edmund Muskie in Hearings before the Senate Committee on Foreign Relations, 97th Cong, 1st Sess, Feb. 17, 18 and March 4, 1981, p 14).

Generally, a treaty is to be construed according to principles applied to written contracts between individuals and the clear language of the treaty controls unless it is inconsistent with the intent or expectations of the parties (Sumitomo Shoji Amer. v Avagliano, 457 US 176; Sullivan v Kidd, 254 US 433, 439; Hamilton v Erie R. R. Co., 219 NY 343, 352-353). Permissibly the history of the treaty, diplomatic correspondence and other extraneous documents may be considered to discover that intent (see Sumitomo Shoji Amer. v Avagliano, supra, at p 180; Maximov v United States, 373 US 49, 54; Ross v Pan Amer. Airways, 299 NY 88; and see, generally, Restatement, Foreign Relations Law of United States [rev-Tent Draft No. 1], § 329 et. seq.). We have no difficulty interpreting the Accords and ***486** the extraneous evidence submitted by the parties to determine that the United States Government did not guarantee plaintiff a New York forum for its claim. Neither the agreements nor the statement of the Summary Report indicates otherwise when analyzed in terms of the natural and ordinary meaning of the words used (see Sullivan v Kidd, supra, at p 439; Hamilton v Erie R. R. Co., 219 NY 343, 352-353, supra). The Federal Government simply expressed a willingness to "facilitate" or aid Iran in bringing the claims, presumably by complying with the limited promises it made in the Accords. Indeed, inasmuch as treaties are subject to constitutional restraints (Reid v Covert, 354 US 1; Restatement, Foreign Relations Law of United States [rev-Tent Draft No. 1], § 304), it is questionable whether the Federal Government could guarantee a New York forum by treaty without violating constitutional principles of federalism and separation of powers (see, generally, Guaranty Trust Co. v United States, 304 US 126, 140 [Statute of Limitations]; see, also, United States v Pink, 315 US 203, 216, 230-234).

The precedents cited by plaintiff are not helpful (Dames & Moore v Regan, 453 US 654; United States v Pink, 315 US 203, supra; United States v Belmont, 301 US 324). Those cases concern the broad powers of the Federal Government to mandate that the resolution of claims against Iran by nationals of the United States shall be pursued in an international tribunal (Dames & Moore v Regan, supra), or to implement the right of the Soviet government (by assignment to the United States) to recapture Russian assets held by Americans or American institutions in this country (United States v Pink, supra; United States v Belmont, supra). Such commitments of the Federal Government to resolve claims between the signatories or nationals are viewed liberally because unless resolved the claims may provide continuing irritations and conflicts which interfere with peaceful relations between the nations. Similar commitments are made in Points I-III of the General Declaration and in the Claims Settlement Declaration of the Accords and are not at issue here. This is litigation by a foreign government against its own national who happened to be within the State of New York at the ***487** time this suit was commenced. It involves an internal dispute, not normally a matter considered in the exercise of treaty

powers and a matter which does not generally engage the national interest to the same extent as claims by nationals of one signatory nation against the other signatory nation (see Nowak-Rotunda-Young, Constitutional Law [2d ed], p 202).

The parties have culled statements from the various documents and communiques and the testimony of witnesses before the Senate allegedly supporting their respective positions. The evidence suggests, however, that the State Department recognized the problems inherent in this litigation and the restraints of federalism in our system of government and that, as Mr. Warren Christopher, the United States negotiator, stated in his testimony before the Senate, the courts would have to decide whether plaintiff had "a right [to maintain this action] within our legal system" (Senate Committee on Foreign Relations Hearing, 97th Cong, 1st Sess, Feb. 17, 1981, at p 56). The United States agreed that plaintiff would not be foreclosed from pursuing its claim in our courts by preclusive doctrines of international law but it did not undertake to guarantee the opportunity for plaintiff to prove its claim in the New York courts. The United States has met its commitment to "facilitate" this lawsuit by freezing the Shah's assets and by advising the courts that the Act of State doctrine and sovereign immunity principles are not to apply to plaintiff's claim. Nothing in the record or in its communication to the trial court suggests that a promise was made that it or the courts would do more.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Meyer, J.

(Dissenting).

The majority cites several sections of the Restatement of Conflict of Laws, Second, but rejects section 84, the only section directly in point, cites Piper Aircraft Co. v Reyno (454 US 235) but ignores the effect of its footnote 22, cites CPLR 327 but ignores its language and its legislative history. Its conclusion is, moreover, inconsistent with that of "[t]he majority of jurisdictions * * * that an alternative forum is not merely a factor in analysis, but rather *an essential prerequisite* to ***488** application of *forum non conveniens"* (MacLeod v MacLeod, 383 A2d 39, 43, n 3 [Me]; italics in original). Respectfully, therefore, I dissent.

Section 84 of the Restatement is unequivocal. Its statement of *forum non conveniens* is clear and direct: "A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action *provided that a more appropriate forum is available to the plaintiff"* (emphasis supplied). The import of the underscored words is emphasized by its Comment *c,* which states that: "The two most important factors look to the court's retention of the case. They are (1) that since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons, and *(2) that the action will not be dismissed unless a suitable alternative forum is available to the plaintiff. Because of the second factor, the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states"* (emphasis supplied).

That the United States Supreme Court agrees on the essentiality of an alternative forum is clear from its statement of the rule in Gulf Oil Corp. v Gilbert (330 US 501, 507), quoted by the majority. That there existed an alternative forum in that case does not make the presence or absence of such a forum any the less a factor "necessarily involved in the case or essential to its determination" (Black's Law Dictionary [4th ed], p 541 ["Dictum"]). Rather, the court's holding was that it was required to consider whether there was an alternative forum before it could balance the other interests involved. Only after having determined that Virginia was an available forum did the *Gilbert* court proceed to balance the equities. *Gilbert* would not have been decided differently if the rule now announced by the majority had been applied, but that does not mean that the rule which *Gilbert* announced was not a holding. Thus, we find the Supreme Court once again carefully considering, as not just a factor, but as one that must be determined "[a]t the outset of any *forum non conveniens* inquiry * * * whether there exists an alternative forum" (Piper Aircraft Co. v Reyno, 454 US 235, 254, n 22) and concluding that: "Ordinarily, this requirement will ***489** be satisfied when the defendant is 'amenable to process' in the other jurisdiction. Gilbert, 330 U.S., at 506-507. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."

Similarly in MacLeod (383 A2d, at p 43, supra) the Supreme Judicial Court of Maine, after noting that the record did not "display any other facts so much as hinting that the defendant is subject to personal jurisdiction anywhere else in American territory", held it error to dismiss an action

against a nonresident over whom personal jurisdiction had been obtained in Maine except on condition that he, by submitting to the jurisdiction of a court of the State of plaintiff's residence, assured the existence of a true alternative forum. Even the State's interest was held subject to the requirement: "From the standpoint of the State of Maine, it is generally undesirable to expend our judicial resources in resolving a dispute between nonresident parties *if* such is avoidable without depriving the plaintiff of a forum" (italics in original).

A like result necessarily follows from the plain language of CPLR 327, which authorizes stay or dismissal of an action "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum". If the majority's view were correct, the rule would apply when "the action should not be heard in this forum." The reference to "another forum" presupposes that there is another forum.

Not only the plain language of the section, but also the history of its adoption bears out this conclusion. The section was added to the CPLR in 1972 on the recommendation of the Judicial Conference. Its report states that under the proposed provision jurisdiction may be declined if the court finds "that the forum is seriously inconvenient for the trial of the action *and that a more appropriate forum is available"* (Seventeenth Ann Report of NY Judicial Conference, 1972, at p A35 [italics supplied]). It notes also that its proposal was based upon Professor Hans Smit's Report ***490** On Whether to Adopt in New York, in Whole or in Part, the Uniform Interstate and International Procedure Act (Thirteenth Ann Report of NY Judicial Conference, 1968, p 130), which repeatedly states as a fundamental that "the action could better be adjudicated in another forum" (p 136, see, also, pp 138, 139).

CPLR 327 reflects the basic approach of the Uniform Interstate and International Procedure Act (IIPA) as to *forum non conveniens* (Fifteenth Ann Report of NY Judicial Conference, 1970, p A114). It differs, however, in that it inserted the words "on the motion of any party" which the 1970 Report explained in the following paragraph: "This proposal differs somewhat from the IIPA in that it would not permit the court to apply the doctrine of forum non conveniens on its own motion over the objections of all the parties. This reflects the considered view of the Committee that when the court has jurisdiction of an action or proceeding, the convenience of the court alone should not be sufficient to bring this equitable doctrine into operation where all parties prefer to carry on the litigation in this state." It is, thus, evident that the convenience of the court alone was never intended to have the importance which the majority opinion attributes to it.

The Restatement rule "that a more appropriate forum is available to the plaintiff" comports with the principles of equity and comity, upon which the *forum non conveniens* doctrine rests. Its "absurd complexity" prior to statutory reform (Braucher, Inconvenient Federal Forum, 60 Harv L Rev 908, 930) resulted from the confusion of various distinct policies under the same title. Thus, as Braucher pointed out (id., at pp 912- 914), Blair (29 Col L Rev 1), upon whom the majority relies (majority opn, at p 481), confused principles of jurisdiction and venue, which should result in nondiscretionary dismissal with principles of abuse of process and trial convenience, where dismissal is discretionary, but which result in inconsistent policies. Those factors were untangled by the statutory reform of which CPLR 327 was a part. Earlier proposals made the bounds of jurisdiction depend on the discretionary question of convenience (Act, Recommendation and Study Relating to Service of Process on Foreign Corporations, NY Legis ***491** Doc, 1959, No. 65[C], pp 56, 57, 58 [1959 Report of NY Law Rev Comm, pp 69, 124, 125, 126]). The present CPLR, however, makes the bounds of jurisdiction a question of law, depending on the extent of contacts with the State (CPLR 302) and makes *forum non conveniens* discretionary (CPLR 327) but dependent on the finding that an alternative forum is available. *Forum non conveniens* is a necessary antidote to the greatly expanded jurisdiction provided by "long-arm" statutes such as CPLR 302 (Homburger and Laufer, Expanding Jurisdiction Over Foreign Torts: 1966 Amendment of New York's Long-Arm Statute, 16 Buffalo L Rev 67, 73-74). It is, however, a "flexible procedure for the discretionary determination of place of trial" (Braucher, 60 Harv L Rev, at p 939, and see id., at pp 931-932), not a technique for leaving unpopular litigants without a court to press their claims.

The majority cites no case, and none has been called to our attention, which holds that dismissal on *forum non conveniens* grounds is permissible in the absence of an alternative forum. Not only is the Restatement rule recognized in ALR annotations without any indication that any court has ever held otherwise (48 ALR2d 800, 815 ["It has been generally held that the doctrine cannot be applied where the defendant is not subject to suit in the forum which he alleges to be more convenient"]; 9 ALR3d 545, 548 ["the courts in a number of cases have held that jurisdiction of a matrimonial action between nonresident litigants will be assumed or denied

depending upon whether the defendant was in fact amenable to and willing to accept the process of the other state"]), but also there are a number of cases which hold that, as a matter of law, the court must retain jurisdiction when no other forum exists to hear the claim (MacLeod v MacLeod, 383 A2d 39 [Me], supra.; Wilburn v Wilburn, 192 A2d 797 [DC App]; Rodriguez v Pan Amer. Life Ins. Co., 311 F2d 429, vacated on Act of State grounds 376 US 779; North Branch Prods. v Fisher, 284 F2d 611, cert den 365 US 827; Glicken v Bradford, 204 F Supp 300; Phoenix Canada Oil Co. v Texaco, Inc., 78 FRD 445, cited with approval on this issue in Reyno's footnote 22 [454 US, at p 254], supra.; see Wright, Federal Courts [3d ed], p 186, n 23). In each of ***492** those cases the court applied the alternative forum requirement as a precondition to the application of *forum non conveniens* and in each case put the burden on the defendant to prove the existence of the alternative forum.

The dismissal of the instant action on *forum non conveniens* grounds makes it possible for defendant, subject as the courts below have held to the jurisdiction of our courts, to abort that jurisdiction without offering to submit to jurisdiction elsewhere and without any finding that there is an alternative forum. The suggestion of the majority that it is plaintiff's burden to establish that no alternative forum exists is inconsistent with the authorities cited above. Moreover, its reliance on the appropriate relief exception of section 85 of the Restatement is inconsistent with both Bata v Bata (304 NY 51) and the Restatement itself. In *Bata,* as in the present case, the action was brought to establish a constructive trust on the basis of a claimed violation of fiduciary duty in a foreign country. We concluded that (304 NY, at p 57): "We realize that this suit may, when it comes to trial, be found to involve property, transactions and laws almost entirely foreign to New York State. Nevertheless, on the record before us, we cannot say that there was no basis at all for retaining jurisdiction here."

Comment *b* to section 85 of the Restatement also makes clear its inapplicability:

"A court will be reluctant to dismiss the action if there is no other convenient state in which the plaintiff could obtain more appropriate relief. If no such other state is available, the court will not dismiss unless the plaintiff's cause of action is contrary to the strong public policy of the forum (see § 90), or unless the court believes that the ends of justice would better be served by giving the plaintiff no relief at all rather than by giving him such relief as it could grant.

"It will, however, entertain the action if no other forum able to render such relief is open to the plaintiff, and if the court feels that the ends of justice would better be served by giving the plaintiff such relief as it can grant." ***493** All its dramatic stage decoration aside, this case presents the fairly ordinary situation of a defendant who, although a former resident of the plaintiff's jurisdiction, has no intention of returning. In such a situation, jurisdiction must be retained by the jurisdiction in which the refugee has been properly served.

To paraphrase MacLeod (383 A2d, at p 43): "We would ill serve the interests of justice and comity should we shut the doors of the [New York] Courts to this plaintiff who has in reality no 'alternative' forum." Concluding as I do that the court is wrong in approving dismissal in the absence of the offer by defendant of an alternative forum (and, indeed, even with such an offer, in doing more than staying the instant action), I find it unnecessary to discuss the effect of the Algerian Accords, other than to note that I dissent from its conclusion there also. It is necessary to add, however, in view of the majority's discussion of public policy, unclean hands and the like as affecting the acceptance by the court of jurisdiction of this case, that, for the reasons stated in the dissent of Justice Fein below, the record here does not permit a dismissal on these alternative bases.

Chief Judge Cooke and Judges Jasen, Jones and Wachtler concur with Judge Simons; Judge Meyer dissents and votes to reverse on the appeal as against Farah Diba Pahlavi in a separate opinion; Judge Kaye taking no part.
On appeal as against defendant Farah Diba Pahlavi: Order affirmed, with costs.

On appeal as against defendant Mohammed Reza Pahlavi: Appeal dismissed, without costs. ***494**

Footnotes

1 The Shah died while the motion was pending before Special Term and no party has been substituted to represent him. Accordingly, the appeal should be dismissed(CPLR 1021).

2 Defendant argues that the court lacks personal jurisdiction over her, even though she was served in accordance with applicable State law, because her contacts with this State were insufficient under modern standards of due process (see Shaffer v Heitner, 433 US 186, 203-204). Special Term rejected this argument and defendant has cross-appealed. This court dismissed defendant's cross appeal on March 22, 1984 on the ground that she was not a party aggrieved. (See Cohen and Karger, Powers of the New York Court of Appeals [rev ed], § 91, p 395.)

3 The statute reads as follows: “When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.”