DISMISSAL UNDER *FORUM NON CONVENIENS*: SHOULD THE AVAILABILITY REQUIREMENT BE A THRESHOLD ISSUE WHEN APPLIED TO NONESSENTIAL DEFENDANTS

JOHN P. DOBROVICH, JR.*

---

* Clerk to the Honorable Justice John Warner, Supreme Court of Montana; J.D., Gonzaga University School of Law, *Honors*, 2005; Editor-in-Chief, *Gonzaga Law Review* 2004-2005; B.A., Washington State University, *Magna Cum Laude*, 2002; Member, Washington State Bar. The author would like to thank Professor Ann Murphy and the Honorable Chief Judge Fred Van Sickle of the United States District Court for the Eastern District of Washington, for their support and consultation in writing this article.

I. INTRODUCTION

In today's international economy, commercial transactions increase at exponential rates. Many U.S. entities now conduct more business with companies located in China, for example, than they do with other U.S. based companies. In light of this fact, it only seems logical that, as our relationships with other countries expand, so too will our legal battles. This means the U.S. legal system, already burdened with overloaded dockets, will be forced to take on more and more international claims. Foreign plaintiffs seeking to litigate their claims under the more favorable U.S. laws will aggravate this problem further.

To alleviate this dilemma, under the doctrine of *forum non conveniens*, a court may decline to exercise its jurisdiction over an action brought by a foreign plaintiff. To warrant such a ruling, a court must determine first that an alternative forum exists and that the defendant would make itself available for proceedings there.[1] Then, after considering the private interests of the litigants, the court must find that the alternative forum would be more convenient.[2] In essence, a district court may dismiss a case filed in the United States, that otherwise satisfies all jurisdictional and venue requirements, on reliance that the plaintiff instead may seek a remedy in some other country, where a proceeding would arguably be more convenient.[3]

The practical effect is that U.S. corporations have an effective means of removing international claims from the U.S. court system.[4] More importantly, U.S.-based defendants are able to remove themselves from potential liability under U.S. law that is generally more favorable to the plaintiff.[5] As a safeguard, a court may not dismiss a case unless it is shown that the plaintiff will, in fact, have a sufficient remedy in the alternative forum.[6] In addition, the defendant must agree to make itself available in the alternative forum.[7] Thus, the doctrine of *forum non conveniens* is an important tool for courts—allowing for the disposal of cases where a trial in a U.S. court could be very

---

1. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). In dismissing an action on *forum non conveniens*, a Court must examine: (1) whether an adequate alternative forum exists; and (2) whether the balance of public and private interest factors favor dismissal. *Id.* at 254 n.22 & 255-56.

2. *Id.* at 259.

3. *See generally Piper*, 454 U.S. at 235. *See also* Jason Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transcontinental Litigation,* 65 OHIO ST. L.J. 659, 659 (2004).

4. *See* Wilson, *supra* note 3, at 659.

5. *See id.*

6. *Piper*, 454 U.S. at 254.

7. *Id.* at 259 n.22.

costly, both to the private parties and to the public.[8]

The requirement that the defendant make itself available in the alternative forum is the focus of this article. This threshold condition is, of course, justified by the fact that most plaintiffs otherwise would have no remedy at all if their claims were dismissed. In foreign forums, plaintiffs are not subject to involuntary process; thus, when dismissing pursuant to *forum non conveniens,* a court must ensure the plaintiff will have an available remedy elsewhere by conditioning the dismissal upon the defendant's appearance in the foreign forum.

That said, consider the situation where there are several named defendants. For example, a foreign plaintiff files suit in the United States, naming both a U.S. corporation as a defendant as well as a former employee of the defendant corporation. Imagine all factors point toward dismissal pursuant to *forum non conveniens*; *e.g.*, all the plaintiffs are from New Zealand, the accidental plane crash in question occurred in New Zealand, all the evidence and witnesses reside in New Zealand, and New Zealand is shown to provide an adequate legal remedy if liability is found.[9] In addition, the defendant corporation agrees to make itself available for any proceeding in New Zealand and agrees to submit to any liability found against it there.

But, what if the second named defendant, the former employee of the corporation, will not agree to make herself available in the foreign forum? If this former employee is a legitimate defendant, say under a theory of negligence, but simply refuses to make herself available, the defendant-corporation's motion for dismissal under *forum non conveniens* will most likely be denied and the entire trial will continue in a U.S. court.[10]

This article argues that, in such situations, a court should not consider the availability of the nonessential defendant as a prerequisite of the *forum non conveniens* doctrine but rather consider it in the second part of the analysis, weighing it equally with the other private interests of the litigants.

Following this introduction, Section Two of this paper gives a brief history of the doctrine of *forum non conveniens* and discusses the analysis set forth by the United States Supreme Court and its interpretation by the lower courts. Section Three articulates, in detail, the alternative forum requirement,

---

8. The cost to the public, for example, could be great when a U.S. court is forced to try a case where the litigants reside in a foreign country, the accident in question occurred in a foreign country, and most of the witnesses and evidence are located in a foreign country. The U.S. court would have to devote already limited resources to not only the general litigation proceeding but also to the interpretation of foreign law. Jury members would be expected to devote their time to a case having no real connection to their community, where the circumstances arose in some other country. *See Piper*, 454 U.S. at 241 n.6 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

9. *See*, *e.g.*, Lueck v. Sundstrand Corp., 236 F.3d 1137 (9th Cir. 2000).

10. Intuitively, one may consider the option of severing the claims and dismissing the claim against the defendant corporation pursuant to *forum non conveniens*, but as mentioned, the doctrine is premised on the notion of convenience. Severing the claims and potentially creating two trials, one remaining in the U.S. court and the second moving to an alternative forum, would contradict the intended policy of promoting convenience. *See Piper*, 454 U.S. at 256.

specifically the adequacy of available remedies and the availability of defendants in the foreign forum. Finally, Section Four discusses the availability requirement as applied to multiple defendants.

II. THE *FORUM NON CONVENIENS* DOCTRINE

The exact origin of *forum non conveniens* is unknown, but its practice dates back to early English and Scottish law.[11] The doctrine was first introduced into American law in 1929 in a *Columbia Law Review* article by Paxton Blair, a New York attorney.[12] Blair implored American courts to employ such a doctrine in an effort to reduce "calendar congestion in the trial courts."[13] The article quickly received "the kind of judicial reception that law professors dream of"[14] when the United States Supreme Court addressed the issue in *Gulf Oil Corp. v. Gilbert* in 1947.[15]

A. The Supreme Court Endorses Forum Non Conveniens

In *Gulf Oil,* the Supreme Court held that dismissal pursuant to *forum non conveniens* was proper when a balancing of the private and public interest factors weighed in favor of moving the case elsewhere.[16] Mr. Gilbert filed suit in the United States District Court for the Southern District of New York against the Gulf Oil Corporation, alleging that Gulf was responsible for a fire damaging Gilbert's property.[17] The district court granted Gulf's motion for dismissal based on *forum non conveniens.*[18] Although Gulf was amenable to service in New York, the Supreme Court concluded that the convenient place for trial was Virginia, where both the defendant and plaintiff conducted business, where the incident occurred, and where most of the witnesses and evidence were located.[19]

---

11. *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796-97 (1985). The early English and Scottish courts feared the doctrine of *forum non conveniens* would conflict with the common law rule of *judex tenetur impertiri judicium suum* ("a judge must exercise jurisdiction in every case in which he is seized of it"), but eventually *forum non conveniens* was accepted as an exception to the rule. *Id.*

12. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

13. *Id.* at 1.

14. Stein, *supra* note 11, at 811.

15. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

16. *Id.* at 508-09.

17. *Id.* at 502-03.

18. *Id.* at 503.

19. *Id.*

B. Weighing the Private and Public Interests

First, it should be noted that the doctrine of *forum non conveniens* cannot be implemented unless the court already has jurisdiction over the action.[20] Thus, the doctrine gives the district court the power to decline to exercise its jurisdiction over a case.[21]

Under *Gulf Oil*, assuming another forum is available,[22] the trial court is to weigh the private and public interests of each party.[23] The Court felt the most "pressing" issue to be weighed would be the private interests of the litigants.[24] The most "important considerations" are:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[25]

Here, the Court wished to ensure that the intent of the plaintiff, in choosing an arguably inconvenient forum, was not to "harass" the defendant.[26]

In addition, the interests of the public are to be considered.[27] For example, the burden of jury duty should not be placed upon citizens of a community having no interest or connection to the action.[28] Indeed, "[t]here is a local interest in having localized controversies decided at home."[29] In *Gulf Oil*, for example, the Court felt Virginia had such a "localized" interest.[30]

C. Level of Deference Afforded the Foreign Plaintiff

The Supreme Court made it clear that a great deal of deference should be given to the plaintiff's choice of forum, stating, "unless the balance [of private and public interests] is strongly in favor of the defendant, the plaintiff's choice

---

20. *Gulf Oil*, 330 U.S. at 504 ("the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue.").

21. *See id.* In *Gulf Oil*, the New York District Court clearly had diversity jurisdiction over the matter. *Id.* at 503.

22. The availability of an alternative forum is a threshold requirement for dismissal pursuant to *forum non conveniens*. *See id.* at 506-07. This requirement is the focus of this paper and will be discussed in detail below.

23. *See id.* at 508.

24. Id.

25. *Gulf Oil*, 330 U.S. at 508.

26. *Id.* ("It is often said that the plaintiff may not, by choice of inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.") (citing Blair, *supra* note 12).

27. *Id.* at 508-09.

28. Id.

29. *Id.* at 509.

30. *Gulf* Oil, 330 U.S. at 511.

of forum should rarely be disturbed."[31] However, some thirty-four years later, in *Piper Aircraft Co. v. Reyno*,[32] the Court held that a foreign plaintiff deserved less deference when analyzing the interests in their choice of forum.[33]

Justice Marshall, writing for the majority, reasoned that a foreign plaintiff's choice of forum should receive less deference because the doctrine of *forum non conveniens* is based on convenience.[34] Intuitively, it is not convenient for a foreign plaintiff to bring action in the United States; thus the plaintiff must have some ulterior motive.[35] The *Piper* majority adhered to the defendant's argument that the plaintiff filed suit in the United States, not because it was convenient for either party, but because California law was far more favorable than that of Scotland.[36]

Clearly, most jurisdictions have interpreted *Piper* as affording less deference to a foreign plaintiff's choice of forum.[37] The United States Court of Appeals for the Ninth Circuit held that even the "presence of an American plaintiff[,]" where there are also several foreign plaintiffs, "is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*."[38]

In *Cheng v. Boeing Co.*, several plaintiffs filed suit against the Boeing Corporation in the United States District Court for the Northern District of California.[39] The plaintiffs represented the estates of the victims in a plane crash that occurred in China aboard a Boeing 737 aircraft.[40] Most of the

---

31. *Gulf Oil*, 330 U.S. at 511.

32. 454 U.S. 235 (1981).

33. *Piper*, 454 U.S. at 256. This decision has been adopted by most circuits. *See infra* note 37.

34. *Piper*, 454 U.S. at 256.

35. *See id.* Of course, it must be noted that this notion applies to the inverse as well, i.e., a defendant seeking an alternative forum away from home also could be disingenuous. Stein, *supra* note 11, at 842-43 ("when each party is attempting to litigate away from its home forum, the focus on convenience is disingenuous.").

36. *Piper*, 454 U.S. at 256 n.24. However, at least one commentator believes this portion of the opinion is not reliable precedent. *See* Wilson, *supra* note 3, at 680-81. In *Piper*, the Court granted *certiorari* to review the issue of whether an alternative forum is adequate when it provides for a potentially less favorable remedy than that of the plaintiff's choice of forum. *Piper*, 454 U.S. at 680. Wilson argued that the issue of deference afforded to the plaintiff, therefore, falls outside the issue reviewed by the Court and thus constituted only dicta at best. *Id.*

37. *See, e.g.,* Esfeld v. Costa Crocierre, 289 F.3d 1300, 1312 n.15 (11th Cir. 2002) ("[T]the bias towards the plaintiff's choice of forum is much less pronounced when the plaintiff is not an American resident or citizen"); Lueck v. Sundstrand Corp., 236 F.3d 1137, 1145 (9th Cir. 2000) (holding that "a foreign plaintiff's choice of forum merits less deference than that of a plaintiff who resides in the selected forum, and thus the showing required for dismissal is reduced"); *Cf.* Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) ("less deference is not the same thing as no deference").

38. Cheng v. Boeing Co., 708 F.2d 1406, 1411 (9th Cir. 1983).

39. *Id.* at 1407-08.

40. *Cheng*, 708 F.2d at 1408.

plaintiffs were Taiwanese; however, there were several Americans and Taiwanese residents of America.[41] The District Court dismissed the case pursuant to *forum non conveniens*.[42] On appeal, plaintiff's argued, amongst other things, that because American plaintiffs were involved, the court should give deference to their choice of forum as a group.[43] However, the court did not find this argument persuasive and affirmed the dismissal of the lower court.[44]

On the other hand, the United States Court of Appeals for the Second Circuit has an analysis all its own, which falls somewhere between granting full versus little deference, describing its analysis as a "sliding scale" of deference.[45] The Court explained its criteria for this analysis in *Iragorri v. United Technologies Corp.*, as "the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*."[46] The court continued, stating that "[o]n the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons. . . the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion. . ."[47]

Thus, the Second Circuit created a rule that "requires a balancing of contacts and convenience against the likelihood of forum shopping."[48] This differs greatly from the hard and fast rule articulated in *Piper*, calling for very little deference to the choice of a U.S. forum by a foreign plaintiff.[49]

In *Tarasevich v. Eastwind Transp. Ltd.*, a New York district court found the choice of a Russian plaintiff to file suit in a New York forum fell on the

---

41. *Id.*

42. *Id.* at 1410, 1411.

43. *Id.* at 1411.

44. *Id.* The *Cheng* court cited a case from the United States Court of Appeals for the Second Circuit, *Alcoa S.S. Co. v. M/V Nordic Regent*, to support this notion. *Cheng*, 708 F.2d at 1411. Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 154, 159 (2d Cir. 1978) rejects "according a talismanic significance to the citizenship or residence of the parties," and says that "the American citizenship of a plaintiff" does not justify "creating a special rule of forum non conveniens." Note that *Alcoa* otherwise may be "disapproved" after *Piper*. *See* Jerry A. Richardson, Piper v. Reyno: *Change of Law and the Forum Non Conveniens Inquiry*, 36 ARK. L. REV. 273, 288-89 n.97 (1982).

45. Iragorri v. United Technologies Corp., 274 F.3d 65, 71-72 (2d Cir. 2001) (en banc); *see also* Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 74 (2d Cir. 2003) ("a plaintiff's choice to initiate suit in the defendant's home forum—as opposed to any other where the defendant is amenable to suit—only merits heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and the convenience factors favor, that forum.").

46. *Iragorri*, 274 F.3d at 72.

47. *Id.*

48. Wilson, *supra* note 3, at 687.

49. *Id.* "Whereas *Piper Aircraft* presumes that a foreign plaintiff's forum choice will always receive lesser deference, *Iragorri* allows for equal deference if the plaintiff's or lawsuit's contacts with the United States are strong and the forum-shopping motivation appears to be weak." Wilson, *supra* note 3, at 687.

"lesser end of the sliding scale."[50] The court found that the choice of the plaintiff was motivated by forum shopping,[51] as opposed to convenience, and the plaintiff, who was severely injured, lived in Russia, obviously far from the chosen forum of New York.[52] In addition, the plaintiff's lead council was a Russian attorney, and there was no significant reason to hold the trial in New York; rather, the only proposed justification was the potential for a greater recovery in the U.S. court.[53]

D. Congress Codifies the Doctrine for Cases Where the Alternative Forum Remains Within U.S. Jurisdiction

Today, the *Gulf Oil* analysis would be inapplicable to similar facts where a defendant moves to transfer the action to an alternative forum for reasons of convenience within the United States. In reaction to *Gulf Oil*, Congress codified the *forum non conveniens* doctrine in 28 U.S.C. Section 1404(a).[54] Section 1404(a) allows a court to transfer cases to another federal forum that may be more appropriate or convenient for the parties.[55] However, in cases where the statute does not apply—generally where the alternative forum is a foreign country—courts still adhere to the *Gulf Oil* analysis in determining whether dismissal is appropriate.[56]

III. THE ALTERNATIVE FORUM REQUIREMENT

As a threshold requirement, when moving for dismissal pursuant to *forum non conveniens*, a defendant has the burden of showing the alternative forum is both adequate and available.[57] In *Gulf Oil*, the Court noted that the doctrine of *forum non conveniens* "presupposes at least two forums in which the defendant

---

50. Tarasevich v. Eastwind Transp. Ltd., Civ. A. No. 02-1806, 2003 U.S. Dist. LEXIS 12452, at *5, 2003 WL 21692759, at *2 (S.D.N.Y. July 21, 2003).

51. Forum shopping is the process of choosing between a number of possible forums, or jurisdictions which could consider a legal application, and make a legally-binding decision in the case. Forum shopping is generally discouraged by courts when it is used to benefit one party over another. Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1610 (2003).

52. *Tarasevich*, 2003 U.S. Dist. LEXIS 12452, at *4-5, 2003 WL 21692759, at *2.

53. *Id.*

54. 28 U.S.C. § 1404(a) (1982).

55. *Id.*

56. Ann Alexander, *Forum Non Conveniens in the Absence of An Alternative Forum*, 86 COLUM. L. REV. 1000, 1004 (1986). The *Gulf Oil* analysis, for *forum non conveniens* motions, is also occasionally applied in state courts. *See*, *e.g.*, Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245 (N.Y. 1984), *cert. denied*, 469 U.S. 1108 (1985).

57. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 (1981).

is amenable to process[.]"[58] This is believed to be the origin of the alternative forum requirement.[59]

A. Adequacy of the Alternative Forum

Before a court will dismiss a case on *forum non conveniens* grounds, the moving party must show that the alternative forum can provide an adequate remedy for the plaintiff.[60] For the alternative forum to be adequate, it must provide the plaintiff with some remedy for his or her wrong.[61] However, it is only in "rare circumstances" that this requirement is not met, essentially where the remedy provided by the alternative forum is so "clearly unsatisfactory" that it is no remedy at all.[62]

In *Piper*, the United States Court of Appeals for the Third Circuit held that where the law of the purported alternative forum is less favorable to the plaintiff, dismissal on *forum non conveniens* grounds is inappropriate.[63] The United States Supreme Court reversed, holding that a foreign country was not an inadequate forum merely because its laws offered the plaintiff a lesser remedy than he expected to receive in the United States judicial system; specifically, in *Piper*, the law of the foreign forum did not recognize strict liability in tort.[64] The Court disfavored the bright line rule proposed by the lower court, stating it would be contrary to the main purpose of the *forum non conveniens* doctrine, convenience.[65] Thus, under *Piper*, a foreign forum will be deemed adequate unless it offers no practical remedy at all.[66]

The circuit courts have liberally interpreted this rule to allow for virtually any potential remedy in the alternative forum to meet the requirement.[67] In *Lueck v. Sundstrand Corp.*, the United States Court of Appeals for the Ninth Circuit held the alternative forum of New Zealand to be sufficient, even though it provided only a statutory remedy for defendant's alleged wrong and did not allow for a tort remedy.[68] There, the plaintiffs, in essence, "admitted that the impetus for the lawsuit [was] money[;]" plaintiffs argued that U.S. law

---

58. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947). It should be noted that this statement was dicta. Whether there was an available alternative forum was not at issue in *Gulf Oil*. *See id.* The requirement for two forums has also been adopted under some state law. *See* Restatement (Second) of Conflict of Laws § 84 (1971).

59. Alexander, *supra* note 56, at 1003.

60. *Piper*, 454 U.S. at 254.

61. *Id.*

62. *Id.* at n.22.

63. *Id.* at 255.

64. *Id.*

65. *Piper*, 454 U.S. at 249-51. The Court also noted that such a ruling would have the negative effect of requiring district courts to interpret the law of foreign jurisdictions; this outcome would conflict with another of the doctrine's purposes, as it was "designed in part to help the courts avoid conducting complex exercises in comparative law." *Id.* at 251.

66. *Id.* at 254.

67. *See, e.g.*, Lueck v. Sundstrand Corp., 236 F.3d 1137, 1144 (9th Cir. 2001).

68. *Lueck*, 236 F.3d at 1144.

offered a greater potential remedy for their losses than New Zealand law.[69] The *Lueck* court recognized that this same argument failed under *Piper*, and the fact that American law may be more favorable is irrelevant to the analysis.[70]

B. The Availability of Defendants

The requirement of availability is ordinarily satisfied when the defendant is amenable to service in the alternative forum.[71] However, the defendant will most likely not be subject to involuntary process when the alternative forum is located outside of the United States.[72] Thus, the defendant must agree to make itself available in the alternative forum.

1. How Does the Court Ensure the Defendant Will Be Available in the Alternative Forum?

The defendant who files an affidavit, stating he, she, or it will submit to the jurisdiction of the foreign forum and waive any statute of limitations defense that may exist in that forum, preliminarily satisfies the availability requirement.[73] Theoretically, if a defendant really believes that a proceeding in the alternative forum will be more convenient, then it is likely to submit to such jurisdiction because it would be in the defendant's best interest. However, most courts will condition the dismissal upon the defendant's appearance in the foreign jurisdiction.[74]

---

69. *Id.*

70. *Id.*

71. *Piper*, 454 U.S. at 254 n.22. Blair notes in his 1929 article that the requirement of availability originated under early common law in cases where one party moved a court of general jurisdiction to dismiss for lack of jurisdiction. The moving party would be required, first, to show that there was some other court capable of exercising jurisdiction over the claim. Blair, *supra* note 12, at 32. In addition, Blair noted that early English law ignored the availability requirement, while Scottish cases required it, when these courts considered dismissal pursuant to *forum non conveniens*. *Id.*

72. Some international treaties subject U.S. citizens to such involuntary process.

73. *See* Stuart R. Fraenkel, *Preparing for and Presenting Opposition to Forum Non Conveniens Motions*, 2 ANN. 2001 ATLA—CLE 1659 (2001); *see also* Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002) (defendants failed to meet requirement where only one defendant agreed to submit to the jurisdiction of the foreign forum); Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 (11th Cir. 2001) (defendant's consent to alternative jurisdiction is sufficient for amenability); *cf.* Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 249 (N.Y. 1984) (holding that the availability requirement is not a threshold issue but rather weighed with the other private and public interests).

74. Garrett J. Fitzpatrick, *"Reyno": Its Progeny and Its Effects on Aviation Litigation*, 48 J. AIR L. & COM. 539, 542 (1983).

> Whether or not the defendant is subject to jurisdiction in the foreign forum, the granting of a *forum non conveniens* motion is usually conditioned upon the defendant submitting itself to that jurisdiction. Generally, the conditions a defendant must

This concept of ensuring a defendant's availability by placing conditions upon dismissal was first discussed in a 1959 law review note.[75] The note argued that dismissal pursuant to *forum non conveniens* is appropriate when defendants are not subject to involuntary process in the alternative forum, if such a defendant agreed to make itself available in the alternative forum.[76] Essentially, a trial court may dismiss a case but retain jurisdiction to the extent it can later reinstate the action if necessary, *i.e.*, if the defendant fails to meet the conditions set by the court.[77] The conditions, thus, reassure the plaintiff that she will be able to pursue her claim in the alternative forum or, in a worst-case-scenario, have the claim reinstated in the original court.[78]

Of course, the first condition to be set by the court is simply to have the defendant consent to appear in the more convenient forum.[79] A court then may condition dismissal of the action upon the defendant's actual appearance in the alternative forum.[80] If the defendant fails to appear, or otherwise make itself amenable to service there,[81] the court then may reinstate the original claim.[82]

In *Ford v. Brown*, the United States Court of Appeals for the Eleventh Circuit reversed the lower court, holding the case should have been dismissed under *forum non conveniens*.[83] The trial court had held that affidavits filed by the defendants, stating they would appear in the foreign alternative forum and waive any statue of limitations defenses, were not sufficient to show the alternative forum was available.[84] Instead, the trial court decided that the defendants would have to go further and somehow show that the foreign forum would, in fact, assert jurisdiction over the action if given the

---

> follow are: (1) consent to the jurisdiction of the foreign court; (2) the foreign court must in fact exercise jurisdiction; (3) agree to satisfy judgments by the foreign court; (4) waiver of statute of limitations; (5) agree to facilitate discovery; (6) translation of documents; and (7) make witnesses available to the action in the foreign jurisdiction.

Id.; *see also*, *e.g.*, Ford v. Brown, 319 F.3d 1302, 1310 (11th Cir. 2003) ("Since the district court's dismissal is conditional, it may reassert jurisdiction in the event that the foreign court refuses to entertain the suit.").

75. Note, *Requirement of a Second Forum for Application of Forum Non Conveniens*, 43 MINN. L. REV. 1199, 1200-01 (1959).

76. *Id.* at 1199.

77. *Id.* at 1202.

78. *Id.*

79. *Id.*

80. Note, *supra* note 75.

81. A court may require the defendant to appoint an attorney to be amenable for service in the foreign forum. *Id.* Once the defendant's attorney has been served and the action filed in the alternative forum, the court could then have the defendant sign an "express written acknowledgement of service and waiver of further notice." *Id.* at 1202-03. This would allow the plaintiff to obtain a default judgment in the foreign forum if the defendant failed to appear. *Id.* at 1202.

82. *Id.* at 1202.

83. Ford v. Brown, 319 F.3d 1302, 1311 (11th Cir. 2003).

84. *Ford*, 319 F.3d at 1310-11.

opportunity.[85] Apparently, plaintiffs argued that the defendants should have been required to, at least, obtain an affidavit from an attorney, practicing in the foreign jurisdiction (Hong Kong), stating that the foreign court would assert jurisdiction.[86]

The appellate court found that requiring the defendant to show the foreign court would assert jurisdiction would be superfluous.[87] The court first noted previous cases where it had found that conditioning dismissal upon defendant's agreeing, by affidavit, to appear in the alternative forum was sufficient to show the foreign forum was available.[88] The court then stated:

> We never indicated that a defendant must have an affidavit from a lawyer in the foreign jurisdiction predicting that the foreign tribunal will ultimately assert jurisdiction over the case and recognize any limitations waiver. Since the district court's dismissal is conditional, it may reassert jurisdiction in the event that the foreign court refuses to entertain the suit. There would be little point in approving of this device while simultaneously requiring proof that the foreign jurisdiction will reach the merits of the case.[89]

Therefore, in *Ford*, the Eleventh Circuit agreed that where a defendant failed to make itself available in the alternative forum, the fact that the original court may simply reinstate its jurisdiction was a sufficient means to an end for the plaintiff.[90]

Unfortunately, a defendant may be willing to risk the consequences of noncompliance only to delay the proceedings.[91] Therefore, a court may choose to place additional conditions on dismissal, or rather incentives, to

---

85. *Id.* at 1310.

86. *Id.*

87. *Id.* at 1310-11.

88. *Id.* 1311.

89. *Ford*, 319 F.3d at 1310-11 (internal citations omitted).

90. *See id. See also* Ministry of Health v. Shiley Inc., 858 F. Supp. 1426, 1442 (C.D. Cal. 1994) (holding an alternative forum to be adequate where the defendant submited to conditions similar to those set forth in Stangvik v. Shiley Inc., 819 P.2d 14 (Cal. 1991)). In *Stangvik*, the court conditioned its dismissal pursuant to *fourm non conveniens* on the defendant's agreement to comply with the following conditions:

> (1) submission to jurisdiction in Sweden and Norway, [the foreign forums]; (2) compliance with discovery orders of the Scandinavian courts; … (4) tolling of the statute of limitations during the pendency of the actions in California, [the original forum]; (5) agreement to make documents in their possession in the United States available for inspection in Sweden and Norway, as required by Scandinavian law, at defendants' expense; … and (7) agreement to pay any final judgments rendered in the Scandinavian actions.

Stangvik, 819 P.2d at 17 n.2.

91. Note, *supra* note 75, at 1204.

induce the defendant to appear elsewhere as agreed.[92] These additional conditions may include, for example, fines or payment of plaintiff's costs and attorney's fees upon the defendant's noncompliance.[93] Such conditions may, at least, force a defendant to rethink any intention to agree to comply only to delay proceedings.[94] Another important condition, although not frequently discussed in case law, is to require the defendant to waive any right to move for dismissal pursuant to *forum non convenie*ns in the new forum.[95] Indeed, if the defendant were allowed to make such a motion once the action had been moved to the alternative forum, it would defeat all purposes of creating convenience for the parties.[96]

2. When Must the Defendant Be Available in the Alternative Forum?

It is important to address quickly the issue of exactly when the defendant must be available, or make itself amenable to service in the alternative forum, to satisfy the availability requirement. Many cases, in which *forum non conveniens* becomes an issue, arise from tort claims where an accident occurred in a foreign country. Often times, the defendant is an entity conducting business in this foreign country with employees, and hence representatives, in the foreign jurisdiction. Such representatives render the entity, and potentially the employees themselves,[97] amenable to service in the foreign jurisdiction at that moment in time. The issue may arise as to whether being available at this earlier time is sufficient to meet the availability requirement for *forum non conveniens*, as set forth in *Piper*.[98] Further, must the defendant be available at the time the action is brought, at the time of dismissal, or perhaps both?

---

92. *Id.* at 1202-03 (listing additional conditions); *cf. In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203-05 (2nd. Cir. 1987). In *Union Carbide*, the court held that dismissal on *forum non conveniens* was proper. *Id.* at 202. The court also found it permissible to require the defendant to agree to submit to the jurisdiction of Indian courts (the alternative forum) and waive all statute of limitations defenses. *Id.* at 203-04. However, the court found it was an error for the district court to also require the defendant to agree to enforcement of Indian judgment and to abide by discovery provisions of the Federal Rules of Civil Procedure. *Id.* at 204-05.

93. Note, *supra* note 75, at 1203. This commentator goes a step further, recommending that a court could condition dismissal upon a defendant's willingness to pay for plaintiff's costs and attorney's fees for the proceedings in the original forum; "[i]n any case appropriate for such a condition the plaintiff would not be forced to consider the cost and fees of instituting the action in the original forum as money wasted when his case is dismissed." *Id.* (internal citation omitted). But in many cases, this condition would conflict with the policy of preventing a plaintiff from harassing a defendant by bringing suit in an inconvenient forum.

94. *Id.* at 1203-04.

95. *Id.* at 1203.

96. *See id.* ("This condition would assure the plaintiff that the defendant would not obstruct the trial in the second forum by interposing this defense which, even if unsuccessful, would serve to delay and obstruct a trial on the merits") (internal citation omitted).

97. For example, when a plaintiff sues a corporation in a tort action, the plaintiff can name employees of the corporation as additional defendants on an independent theory of liability.

98. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

The United States Supreme Court has not addressed this issue directly, but it is clear in several circuits that a defendant's availability at the time of dismissal meets the requirement under *Piper*.[99] In *Piper,* the Court states, in a footnote, that the availability requirement is satisfied "when the defendant is 'amenable to process' in the other jurisdiction."[100] In *Verba-Chemie v. GETAFIX*, the United States Court of Appeals for the Fifth Circuit, interpreting *Piper*, found that the "amenable to process" requirement was a "present tense" requirement.[101] Specifically, the Fifth Circuit stated, "[o]n a straightforward reading of [*Piper's*] language, when defendant submits to the jurisdiction of an alternative forum, the availability requirement is satisfied because there 'exists' an alternative forum in which the defendant 'is' amenable to process."[102] The plaintiff-appellant in *Verba-Chemie* argued that the defendant failed to meet the availability requirement because it was not available in the alternative forum at the time the action was brought.[103] However, the court refused to accept this notion.[104]

When faced with the same issue, the United States Court of Appeals for the Eleventh Circuit followed *Verba-Chemie*, and held that a defendant needs to be available only at the time of dismissal.[105] There is no reason to believe that any other circuit would rule differently on this issue.

Perhaps, it is possible that a defendant's availability at an earlier time,

---

99. Verba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1246 (5th Cir. 1983); Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 n.3 (11th Cir. 2001) (citing *Verba-Chemie*, holding that the defendant needed to be available at the time of dismissal only); *cf.* Hoffman v. Blaski, 363 U.S. 335, 344 (1960) (alternative forum is available, under 28 U.S.C. §1404(a)(1996), "[i]f *when a suit is commenced*, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where [the action] might have been brought'") (emphasis added) (citations omitted); Silver v. Countrywide Realty, Inc., 39 F.R.D. 596, 598 (S.D.N.Y. 1966) ("test is whether plaintiff could have brought the action in Canada in the first instance"). It should be noted that *Silver* arguably was overruled by *Piper*. *See infra* note 103.

100. *Piper*, 454 U.S. at 254 n.22 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).).

101. *Verba-Chemie*, 711 F.2d at 1246.

102. *Id.*

103. *Id.* Plaintiff relied upon the United States Supreme Court case, Hoffman v. Blaski, 363 U.S. 335 (1960), in making this argument. *Verba-Chemie*, 711 F.2d at 1246. However, in *Hoffman,* the Court was interpreting the language of the "Change of Venue" statute, 28 U.S.C. §1404(a)(1976), which provides for the transfer of venue to an alternative federal forum. *Hoffman*, 363 U.S. at 336. The Court made it clear, in *Piper*, that "[a]lthough §1404 was drafted in accordance with the doctrine of forum non conveniens, it was intended to be a revision rather than a codification of the common law." *Verba-Chemie*, 711 F.2d at 1246-47 (quoting *Piper*, 454 U.S. at 253). Accordingly, the *Verba-Chemie* court refused to apply the Supreme Court's interpretation of Section 1404 to the doctrine of *forum non conveniens*. *Verba-Chemie*, 711 F.2d at 1246-47.

104. *Id.* at 1246.

105. Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 n.3 (11th Cir. 2001).

although not required, still would satisfy the requirement on its own.[106] For example, if an American corporation had representatives in a foreign jurisdiction sometime before or at the start of an action filed against it in the United States, the defendant then may argue that because it was available at the earlier time (through its agents), it satisfies the availability requirement, even if the defendant would not be available at the time of dismissal. This argument is, of course, entirely illogical. If the defendant is not available in the alternative forum at the time of dismissal, then there really is no alternative forum.

However, this may be a plausible argument if we alter the above scenario slightly. If the American corporation *and* several of its representatives were *named* as defendants, then they may argue that, because they were available at the earlier time, they satisfy the availability requirement. This may be effective where perhaps the corporation also has submitted to the alternative jurisdiction, but one or more of the other defendants were not available at the time of dismissal.[107]

IV. THE AVAILABILITY REQUIREMENT AS APPLIED TO MULTIPLE DEFENDANTS

As one may have already discovered, the issue of how one or more defendants can make themselves available in the alternative forum is derived from the broader issue of whether an alternative forum itself is available.[108] Thus, when analyzing whether all named defendants in a suit need to make themselves available, as is required to show another available forum, one may first ask if an alternative forum is really even necessary at all.[109]

A. Arguments for No Alternative Forum Requirement

The first to address the requirement of the alternative forum was Blair in

106. Think of the situation where there was an accident in a foreign country involving an American corporation. For any number of reasons, this American corporation, likely to be a named defendant in future litigation, may end its business operations in the foreign state and consequently remove all of their representatives from the foreign jurisdiction. In this case, the defendant would have been amenable to service in the foreign jurisdiction while they had representatives there, i.e., a time earlier than that of potential dismissal through *forum non conveniens*.

107. *See infra* Section IV herein.

108. *See, e.g.,* Lueck v. Sunstrand Corp., 236 F.3d 1137, 1143 (9th Cir. 2001).

109. Note that virtually all jurisdictions, including, arguably, the United States Supreme Court, have found the alternative forum to be a prerequisite. *See, e.g.*, Schertenleib v. Traum, 589 F.2d 1156, 1160 n.8 (2d Cir. 1978) (recognizing commentators who argue there is no alternative forum requirement, but interpreting *Gulf Oil* as to require such an alternative forum); *see also* Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 915 (S.D.N.Y. 1977) (holding the alternative forum requirement is mandated by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States); *Cf.* Islamic Republic of Iran v. Pahlavi, 467 N.E. 2d 245, 247 (N.Y. 1984).(alleged absence of a suitable alternative forum did not require the court to retain jurisdiction over action brought by a foreign country).

his classic article on *forum non conveniens*, discussed earlier.[110] Blair expressly denied the existence of such a requirement of an alternative forum in American law.[111] In addition, Blair noted an English case where "counsel for the plaintiff argued to no avail that the defendant should be required to show that there was some other court capable of exercising jurisdiction. The principle [of requiring an alternative forum], in consequence, seems to form no part of the doctrine of *forum non conveniens* in England."[112]

Some fourteen years after the *Gulf Oil* decision, which is unquestionably the most cited precedent for the alternative forum requirement,[113] Hebert Korbel, another New York attorney, argued that the doctrine of *forum non conveniens* did not require the defendant to show an alternative forum.[114] Korbel noted that no mention of such a requirement could be found prior to *Gulf Oil*[115] and that the Supreme Court's imposition of the alternative forum requirement was mere dicta. [116] This makes it unclear if the Court intended the balancing test,[117] set forth in *Gulf Oil*, to be applied in situations where no alternative forum is available.[118] As one commentator explains:

> When the Court "presuppose[d]" the existence of two forums, it may have intended the set of discretionary guidelines [balancing test] which followed to apply only in situations where two forums in fact exist. Rather than intentionally ruling out the possibility of dismissal in the absence of a second forum, it simply may not have intended to address the situation in which only one forum is available.[119]

Regardless, the Court itself cited *Gulf Oil* as requiring a court to determine whether an alternative forum exists at the "outset" of the *forum non conveniens*

---

110. *See* Blair, *supra* note 12, at 32-33.

111. *Id.* at 33.

112. *Id.* However, Blair notes that, at the time, the alternative forum requirement was prevalent in Scotland. *Id.*

113. *See, e.g., Schertenleib*, 589 F.2d at 1160 n.8 (recognizing Korbel's argument but deciding to follow the *Gulf Oil* dicta).

114. Herbert J. Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 611 (1961) ("The practice hitherto observed under forum non conveniens did not compel inclusion of such a proviso, since that doctrine provided for dismissal [as opposed to transfer], and hence no problem could arise as to whether venue or process should be proper in another forum.").

115. *Id.* at n.28.

116. *Id.* In *Gulf Oil*, the availability of an alternative forum was not at issue and plaintiffs did not contest that Virginia was available. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 503 (1947).

117. See *supra* Section II.B herein..

118. *See* Alexander, *supra* note 56, at 1004.

119. Alexander, *supra* note 56, at 1004 (citation omitted). Alexander also noted that the Court failed to articulate any constitutional significance in the requirement.

analysis, thus making it a threshold issue.[120]

At least one jurisdiction has deviated from this interpretation.[121] In *Islamic Republic of Iran v. Pahlavi*, the high court of New York held that an available alternative forum is not a prerequisite to dismissal pursuant to *forum non conveniens*.[122] Rather, the availability of an alternative forum is a "pertinent factor" to be balanced with the other private and public interest factors.[123] The court stated that this requirement was "without a doubt . . . the most important factor to be considered;"[124] however, it refused to follow *Gulf Oil* in finding it to be a threshold issue.[125] Thus, in the state of New York, a case may be dismissed where no alternative forum is available at all.[126]

The *Pahlavi* court reasoned that requiring the availability of an alternative forum would place an undue burden on the courts.[127] It would require courts to accept foreign-based cases with no relation to the state of New York, "merely because a more appropriate forum is unwilling or unable to accept jurisdiction."[128] The court went on to note that even if it were to require an alternative forum, the burden should be on the plaintiff, not the defendant, to disprove its existence.[129] The foreign plaintiff's "presence in the New York courts is a matter of choice and permitted because of comity[130] and the public and private burden of its action appearing, [thus] it should justify the need for New York to assume jurisdiction."[131] The lower courts of New York State

---

120. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981). As discussed *infra*, however, the Court in *Piper* lowered the bar, thereby making the availability requirement easier for a defendant to meet. *See id.*

121. *See* Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 247 (N.Y. 1984).

122. *Id.* at 249.

123. *Id.*

124. *Id.*

125. *See id.*

126. *Pahlavi*, 467 N.E.2d at 247. The plaintiff, the Islamic Republic of Iran, filed suit against Iran's former ruler, Shah Mohammed Reza Pahlavi. *Id.* at 246-47. The plaintiff was able to serve Pahlavi when he was undergoing cancer therapy in a New York hospital. *Id.* at 247. It is unclear why Iran was not an available forum, only that plaintiffs failed to show it was not available. *Id.* at 250.

127. *Id.* at 249.

128. *Id.* (citing Korbel, *supra* note 114, at n.28); *cf.,* Stein, *supra* note 12 (arguing that in many of these instances courts may dismiss for lack of meeting other jurisdictional requirements).

129. *Pahlavi*, 467 N.E. 2d at 249 (citing Blair, *supra* note 12, at 33-34).

130. For an explanation of comity, *see* Hilton v. Guyot, 159 U.S. 113, 164-65 (1895). Essentially, a foreign government must express, legislatively, executively, or judicially, that it should have jurisdiction over a particular case:

> "Comity," in the legal sense, is neither a matter of absolute obligation . . . nor of mere courtesy and good will … [b]ut it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton, 159 U.S. at 163-64.

131. *Pahlavi*, 467 N.E.2d at 249 (citing Blair, *supra* note 12, at 33-34).

continue to follow *Pahlavi*.[132]

B. Cases Discussing the Availability of Multiple Defendants

In the few cases that have dealt with the availability of multiple defendants, it seems clear that, where multiple defendants are involved, each defendant must consent to the alternative jurisdiction to satisfy the availability requirement under *Piper*.[133] In *Dole Food Co., Inc. v. Watts*, the United States Court of appeals for the Ninth Circuit refused to allow dismissal based on *forum non conveniens* where it was unclear if both defendants would make themselves available in the foreign jurisdiction.[134]

The two defendants were residents of European countries and former employees of the plaintiff, Dole Food.[135] The defendants argued that the Netherlands would provide a more convenient forum.[136] However, only one of the two defendants had filed an affidavit agreeing to submit to personal jurisdiction in the Netherlands.[137] The court found this lack of consent to render the alternative forum unavailable; in other words, holding all defendants must be available to satisfy the requirement.[138]

In support of this notion, the *Dole* court cited *Alpine View Co., Ltd. v. Atlas Copco*, where the United States Court of Appeals for the Fifth Circuit upheld the lower court's dismissal pursuant to *forum non conveniens*.[139] In *Alpine*, the court stated that, "[a] foreign forum is available when the *entire case* and *all parties* can come within the jurisdiction of that forum."[140] This statement is only dicta, however, as applied by the *Dole* court.[141] The facts of *Alpine* did

---

132. *See, e.*g., Shin-Etsu Chem. Co. v. 3033 ICICI Bank Ltd., 777 N.Y.S.2d 69, 73 (N.Y. App. Div. 2004) (the factors to be considered on a motion to dismiss on the basis of *forum non conveniens* include "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 . . . and no one factor is controlling"); Intertec Contracting A/S v. Turner Steiner Int'l, S.A., 774 N.Y.S.2d 14, 17 (N.Y. App. Div. 2004) (no one factor is controlling).

133. Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002). *See also supra* note 10.

134. *Id.* at 1118-19; *Cf.* Kerr v. Inamed Corp., 51 Fed. App'x. 718, 719 (9th Cir. 2002) (alternative forum was available where both defendants, a university and one of its professors, filed affidavits, consenting to the foreign forum and waiving statute of limitations defenses there).

135. *Id.* at 1108.

136. *Id.* at 1118.

137. *Id.*

138. *Id.* at 1118. Also, in *Dole*, neither defendant agreed to waive the statute of limitations defense. *Id.* The court assumed, *arguendo*, that such a defense was not available when it discussed the issue of consenting to the foreign jurisdiction. *Id.*

139. *Dole Food Co.*, 303 F.3d at 1118 (citing Alpine View Co. Ltd. v. Atlas Copco, 205 F.3d 208, 221 (5th Cir. 2000)).

140. *Alpine View Co.*, 205 F.3d at 221 (emphasis added).

141. *See Dole Food Co.*, 303 F.3d at 1118.

not involve a situation where one of several defendants had not agreed to submit to the foreign jurisdiction; to the contrary, all four *Alpine* defendants had consented to submit to the alternative forum.[142]

In an earlier case, *Silver v. Countrywide Realty, Inc.*, the New York district court noted that, since eight of the eleven named defendants could not be served in the alternative forum, that forum was thus unavailable.[143] However, this court applied the wrong analysis for the availability requirement; thus, the opinion is most likely irrelevant to this issue. The *Silver* court required all named parties to be amenable to service in the alternative jurisdiction at the time the action was *filed*.[144] As discussed above, this is not the accepted standard today; rather, the defendants must be available at the time of dismissal.[145]

The *Silver* court adopted its availability standard from the United States Supreme Court case, *Hoffman v. Blaski*, where the Court articulated the standard for availability under 28 U.S.C. § 1404(a).[146] The *Silver* court stated:

> Hoffman … [was] decided under 28 U.S.C. Section 1404(a), which is a *codification* of the doctrine of *forum non conveniens* in cases where there is an alternative federal forum available to the plaintiff. These cases are equally applicable where, as here, dismissal is sought under the doctrine of *forum non conveniens* rather than transfer under Section 1404(a).[147]

However, for the moment, this assumption is incorrect. In *Piper*, the Court made it clear that, "[a]lthough [§1404] was drafted in accordance with the doctrine of *forum non conveniens*, it was intended to be a revision *rather than a codification* of the common law."[148] Thus, a court should not follow opinions interpreting §1404 when applying the doctrine of *forum non conveniens*.[149]

C. Should Availability Be a Threshold Issue When Applied To Nonessential Defendants?

Federal courts have occasionally used the term "nonessential" to reference parties that are otherwise dispensable under Federal Rule of Civil Procedure 19(b).[150] Rule 19(b) is used to determine when persons who cannot be joined

---

142. *Alpine View Co.*, 205 F.3d at 221. The *Dole* court also cited two other cases holding that the alternative forum was available where all of the defendants agreed to make themselves amenable to process there. *Dole Food Co.*, 303 F.3d at 1118-19 (citing Lueck v. Sunstrand Corp., 236 F.3d 1137, 1143 (9th Cir. 2001)); Stangvik v. Shiley, Inc., 819 P.2d 14 (Cal. Sup. Ct. 1991)).

143. Silver v. Countrywide Realty, Inc., 39 F.R.D. 596, 598 (1966).

144. *Id.*

145. *See supra* Section III.B.2 herein.

146. *Silver*, 39 F.R.D. at 598 n.3 (citing Hoffman v. Blaski, 363 U.S. 335 (1960)).

147. *Id.* at 598 n.3 (emphasis added).

148. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981) (emphasis added); *see also supra* note 100 and accompanying text.

149. *See Piper*, 454 U.S. at 253.

150. *See, e.g.*, United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp., Civ. A. Nos. 89-4525, 93-8220, 1997 WL 122792, at *4 n.8 (S.D.N.Y. Mar. 17, 1997) ("The Court found subject matter jurisdiction existed after recharacterizing the lawsuit as a class action and dismissing *the*

under Rule 19(a) are indispensable.[151] The Rule states that, when a person found to be necessary under paragraph (a) "cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party thus being regarded as indispensable."[152] Rule 19(b) then sets out four factors to be weighed in each case before the court decides whether the case should go on without the absentee.[153]

As stated, Rule 19(b) essentially allows a court to determine when an action should proceed even in the absence of a defendant.[154] This situation is analogous to dismissing an action under the doctrine of *forum non conveniens* where one or more defendants may be absent from any further proceedings in the alternative jurisdiction. Thus, the analysis under Rule 19(b) would be applicable in helping a court to determine which defendants may be nonessential in a dismissal pursuant to *forum non conveniens*.[155] The second and third factors from Rule 19(b) are the most relevant in a comparative analysis of which parties may be nonessential[156] under the doctrine of *forum non conveniens*.[157] The second factor under 19(b) is "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can by lessened or avoided . . . "[158] Similarly, the third factor is "whether a judgment rendered in the person's absence will be

---

partnership as a nonessential party under Rule 19(b).") (citing Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81 (2d Cir. 1990)); FED. R. CIV. P. 19(b) states:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

151. FED. R. CIV. P. 19(b).
152. *Id.*
153. *Id.*
154. *See id.*
155. *See id.*
156. Note, I use the word "nonessential" here to articulate the value or necessity of a particular defendant within the doctrine of *forum non conveniens*. I do not, however, intend to claim that Rule 19(b) should have any legal influence upon the doctrine of *forum non conveniens*, only that the Rule could be used as a valuable analogy in weighing the value of any party in such a case.
157. *See* FED. R. CIV. P. 19(b).
158. *Id.*

adequate."[159]

It seems clear that these factors would be satisfied, where an action was dismissed, if the *essential* defendants made themselves available in the alternative jurisdiction.[160] "Essential" defendants would simply be those able to provide the plaintiff with an "adequate remedy," even in the absence of another nonessential defendant.[161] In fact, providing an adequate remedy, in the absence of the nonessential defendant, could be a condition of the dismissal.[162]

Imagine a scenario where such consent by one defendant, willing to submit to the alternative jurisdiction, would be practical. As discussed above, a case may exist where a foreign forum would be ideal to host the pending claim, meeting all the elements of *Piper*, except for the fact that one of the named defendants, arguably a nonessential party, would not submit to the foreign jurisdiction. Say this uncooperative defendant was an employee of the other named defendant, a corporation that has consented to submit to the alternative jurisdiction. In this example, if a court interprets *Dole*[163] as creating a hard and fast rule of availability, it would be forced to retain jurisdiction over a case that would otherwise qualify for dismissal pursuant to *forum non conveniens.*[164] However, what if the employee was shown to be a nonessential defendant? Could the corporation show this by agreeing to be responsible for any potential liability found against its employee as well as for itself? Here, the defendant corporation could be liable under a theory of *respondeat superior.*[165]

It is important to note that the absence of the nonessential defendant could still be weighed by the court in balancing the private and public interests in the case, as set forth in *Gulf Oil.*[166] However, the test of availability would not be a preliminary requirement, with respect to the nonessential defendant, serving to bar the court from further considering dismissal.[167] In addition, the court would be left to weigh other potential problems created by a nonessential defendant's unavailability, for example, if the nonessential defendant was an employee who was allegedly responsible for the relevant accident creating the

---

159. *Id.*; *see also* Curley v. Brignoli, Curly & Roberts Assocs., 915 F.2d 81 (2d Cir. 1990) (applying the four factors of Rule 19(b)).

160. One must distinguish the essential or necessary defendant, i.e., an essential party from an essential witness. It very well could be the case that a nonessential defendant is, in fact, a very essential witness to the case. However, a party's value as a witness is to be considered in the latter portion of the *forum non conveniens* analysis, when balancing the private interests of the relevant parties, not to be considered in the availability analysis.

161. *See* FED. R. CIV. P. 19(b).

162. *See supra* Section III.B.1. herein.

163. *Supra* notes 133-34 and accompanying text.

164. *See id.*

165. Latin for "let the master answer," a key doctrine in the law of agency, which provides that a principal (employer) is responsible for the actions of his/her/its agent (employee) acting in the "scope of . . . employment." BLACKS LAW DICTIONARY (8th ed. 2004).

166. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

167. *Cf.* Islamic Republic of Iran v. Pahlavi, 467 N.E. 2d 245, 249 (N.Y. 1984); *supra* note 116 and accompanying text.

claim in tort. If such is the case, then an employee-defendant also may be a key witness to the plaintiff. A court would need to consider how plaintiffs might be prejudiced by the absence of such a witness.[168]

The argument of eliminating the preliminary requirement for nonessential defendants seems even more plausible when one considers the latitude the Supreme Court has given lower courts in applying the doctrine of *forum non conveniens*. In *Piper*, the Court expressly stated that the primary goal of the doctrine is convenience.[169] Further, the "flexibility" in the application of the doctrine is what "makes it so valuable."[170] This flexibility is evident in *Piper*.

One issue in *Piper* was whether the proposed alternative forum, Scotland, was available.[171] But, inclusive in this issue, was not whether the defendant would make itself available in Scotland,[172] but whether Scotland could provide an adequate remedy to plaintiffs (the other element required to show an alternative forum is available).[173] The plaintiffs argued that Scotland would not provide an adequate remedy because the substantive law there was less favorable than that of the United States.[174] The Court not only disagreed with this argument, but also went on to state that only "[i]n rare circumstances . . . where the remedy offered by the other forum is *clearly unsatisfactory*, [may] the other forum [ ] not be an adequate alternative, and the initial requirement may not be satisfied."[175] In effect this statement lowered the threshold for showing that an alternative forum provides an adequate remedy.[176]

The Court certainly knew what it was doing when it made it easier for a defendant to show the availability of an alternative forum.[177] If confronted

---

168. However, it could be possible that such a witness, although unwilling to submit to a foreign jurisdiction, may be willing to participate in depositions, for example, within the United States.

169. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-50 (1981); *Cf.* Wilson, *supra* note 3, at 678. Wilson argues that *Gulf Oil* focused on preventing harassment to the defendant, and therefore, in *Piper*, Justice Marshall, speaking for the majority, was wrong to cite *Gulf Oil* in holding that convenience should be the primary focus of the *forum non conveniens* doctrine. *Id.* However, the Court noted the policy of convenience throughout the *Gulf Oil* decision: "Never until today has this Court held, in actions for money damages for violations of common law or statutory rights, that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a lawsuit." *Gulf Oil*, 330 U.S. at 513. Therefore, although the facts from *Gulf Oil* differ from *Piper*, the policy of promoting convenience for both parties clearly encompasses both cases. *Cf.* Wilson, *supra* note 3, at 678.

170. *Piper*, 454 U.S. at 250.

171. *Id.* at 254-55 n.22. Note that the Court accepted the lower court's determination that the balancing of all the private and public interests relevant to the case favored dismissal. *Id.* at 255.

172. The defendant in *Piper* agreed to make itself available in Scotland. *See id.* at 242.

173. *Piper*, 454 U.S. at 247.

174. *Piper*, 454 U.S. at 255 (Scottish law did not provide for strict liability).

175. *Id.* at 247 (emphasis added).

176. *See id.*

177. *See id.* at 249-50.

with the same issue today, perhaps regarding the availability of a nonessential defendant, the Court would likely rule the same way—promoting the convenience and efficiency created by the doctrine of *forum non conveniens*.[178]

V. CONCLUSION

The doctrine of *forum non conveniens* is not a tool for courts to deny a deserving plaintiff his or her day in court. However, the doctrine is an essential means for disposing of foreign-based actions where an alternative jurisdiction is more suitable. With the support of the United States Supreme Court, many lower courts have been confident in using the doctrine where necessary. This becomes increasingly important as our Nation increases its international ties and relations. As a result, foreign plaintiffs' attorneys will go to great lengths in finding ways to keep foreign-based actions within the jurisdiction of the more favorable American laws. Naming several defendants, although perhaps under legally legitimate claims, should not serve as a means for maintaining U.S. venue.[179] Courts should embrace the flexibility of the *forum non conveniens* doctrine, as promoted by the Supreme Court, and dismiss cases under the balancing test set out in *Piper*.[180]

178. *Id.* at 249-50, 251-53.

179. Plaintiffs should not be permitted to name defendants, who otherwise meet requirements for personal and subject matter jurisdiction, simply as a means of keeping a case under United States law.

180. *See supra* note 25 and accompanying text.