

NOTE

PUTTING THE “CONVENIENCE” BACK IN FORUM NON CONVENIENS: *GUTIERREZ V. ADVANCED MEDICAL OPTICS, INC.*

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INTRODUCTION

Forum non conveniens is a powerful judicial doctrine that allows a court to refuse to hear a case even when it has proper jurisdiction.¹ This doctrine

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1. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447–48 (1994) (recognizing that a variety of considerations may lead a lower court to dismiss a case on forum non conveniens grounds when a more appropriate forum exists).

has been used to dismiss a case where a plaintiff brought suit in a United States court on behalf of Scottish residents who died in a plane crash in Scotland;² where a plaintiff sued in a United States court on behalf of a Mexican citizen who died in a car crash in Mexico;³ and recently, in a case where Mexican residents brought suit in a United States court after suffering adverse reactions to eye surgery performed in Mexico.⁴

Recognizing that plaintiffs often exploit jurisdictional rules to utilize favorable but inappropriate forums, or to harass a defendant, courts have long employed the doctrine of forum non conveniens to dismiss certain actions when a more appropriate forum was available.⁵ The doctrine of forum non conveniens is premised on the availability of an adequate alternative forum.⁶ Thus, if no alternative forum exists, the district court cannot dismiss the case on the basis of forum non conveniens.⁷

In accordance with this tradition, the United States Court of Appeals for the Ninth Circuit, in *Gutierrez v. Advanced Medical Optics, Inc.*,⁸ agreed with the district court's initial dismissal of a case brought by Mexican residents against an American corporation.⁹ While the Ninth Circuit remanded the case for reevaluation because new facts had emerged, it declined to establish a requirement that a return jurisdiction clause be included in all forum non conveniens decisions.¹⁰ The court reasoned that imposing the requirement of a return clause would interfere with the

2. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238–40, 249 & n.15 (1981).

3. *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 703 (7th Cir. 2005).

4. *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1028 (9th Cir. 2011).

5. *See Piper*, 454 U.S. at 238, 250 (dismissing a claim where the plaintiffs chose the forum solely based on the most advantageous law even though the action should have been brought elsewhere); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (maintaining that the doctrine of forum non conveniens allows a district court to deny jurisdiction if the particular forum is being used primarily to harass the defendant, even when jurisdiction is allowed under the general letter of the law); *see also* *Kirch v. Liberty Media Corp.*, No. 04 Civ. 667 (NRB), 2006 WL 3247363, at *4 (S.D.N.Y. Nov. 8, 2006) (observing that a German plaintiff primarily brought suit in a New York forum to take advantage of more favorable laws); *Ionescu v. E. F. Hutton & Co. (France) S.A.*, 465 F. Supp. 139, 147–48 (S.D.N.Y. 1979) (finding that a New York plaintiff selected a New York forum to harass a French defendant, since the events in question and evidence at issue were all located in France).

6. *See Piper*, 454 U.S. at 254 (holding that an alternative forum exists if it can provide the plaintiffs with a remedy, even if that remedy is less favorable than the remedy available in the original jurisdiction).

7. *See id.* (stating that an alternative venue is not available if the remedy is “so clearly inadequate or unsatisfactory that it is no remedy at all”—thus precluding dismissal on forum non conveniens grounds).

8. 640 F.3d 1025 (9th Cir. 2011).

9. *Id.* at 1032.

10. *Id.* Return jurisdiction clauses ensure that a district court can maintain jurisdiction over a case should a foreign court decline jurisdiction. *Id.*; *see also* *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675 (5th Cir. 2003) (explaining that a return jurisdiction clause alleviates the concern that an alternate forum will become unavailable after the original court's dismissal “by permitting parties to return to the dismissing court should the lawsuit become impossible in the foreign forum”).

flexibility that forum non conveniens decisions require.¹¹

This Note examines the *Gutierrez* decision, analyzing it in light of the doctrine of forum non conveniens and the decisions of other federal courts. Part I sets forth the facts and procedural history of the case. Part II argues that the Ninth Circuit misinterpreted a key element of the forum non conveniens doctrine in *Gutierrez*, leading the court to apply a stricter standard than required by Supreme Court precedent.¹² Part II also examines the Ninth Circuit’s decision not to require return jurisdiction clauses and the impact that this may have on future cases.¹³ This Note concludes that the Ninth Circuit should have used *Gutierrez* as a vehicle for requiring return jurisdiction clauses in forum non conveniens dismissals because such clauses increase judicial efficiency and fairness to the parties, both of which are important goals of the forum non conveniens doctrine.¹⁴

I. FACTS AND PROCEDURAL HISTORY

The eight plaintiffs in *Gutierrez* are elderly individuals who live in Monterrey, Nuevo Leon, Mexico.¹⁵ Between October 11 and 16, 2007, each plaintiff underwent eye surgery in Mexico and subsequently developed a serious eye infection.¹⁶ Due to these infections, physicians were forced to remove the infected eye of three plaintiffs; the remaining five plaintiffs were left blind in the infected eye.¹⁷

The plaintiffs believe a defective Healon viscoelastic product, utilized in each of their surgeries, caused their injuries.¹⁸ They brought suit against the product manufacturer, Advanced Medical Optics, Inc. (“AMO”), in the United States District Court for the Central District of California.¹⁹ AMO is incorporated and has its principal place of business in Santa Ana,

11. *Gutierrez*, 640 F.3d at 1032.

12. *See infra* Part II.A (examining various federal courts of appeals cases that have required return jurisdiction clauses).

13. *See infra* Part II.B (discussing the utility of return jurisdiction clauses).

14. *See Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 432 (2007) (holding that a district court may dismiss a claim on forum non conveniens grounds when “considerations of convenience, fairness, and judicial economy so warrant”); *see also Huhtamaki Co. Mfg. v. CKF, Inc.*, 648 F. Supp. 2d 167, 179 (D. Me. 2009) (noting that the defendant must show that “considerations of convenience and judicial efficiency strongly favor litigating . . . in the alternative forum” to succeed on a forum non conveniens motion (quoting *Iragorri v. Int’l Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000))).

15. *Gutierrez*, 640 F.3d at 1028.

16. *Id.* The ophthalmologist was experienced, having practiced for twenty-five years at the time of the surgeries. *Id.* Within hours of the surgeries, however, each plaintiff began to experience extreme pain in the eye on which the ophthalmologist performed the operation and developed an infection known as bacterial endophthalmitis soon thereafter. *Id.*

17. *Id.*

18. *Id.* (explaining that, following the onset of the plaintiffs’ infections, unopened Healon viscoelastic products were tested, revealing that the product was contaminated with bacteria).

19. *Id.* at 1027.

California and has no place of business in Mexico.²⁰ On April 2, 2009, the district court dismissed the suit on the grounds of *forum non conveniens*, finding that Mexico was an adequate and appropriate alternative forum.²¹ In its pursuit of dismissal on *forum non conveniens* grounds, AMO agreed to submit to jurisdiction in Mexico.²²

The plaintiffs subsequently appealed the district court's decision to the Ninth Circuit, while simultaneously pursuing litigation in a Mexican court.²³ While the appeal to the Ninth Circuit was pending, the Mexican Federal District Court dismissed the plaintiffs' case for lack of jurisdiction.²⁴ Two other Mexican courts subsequently upheld the lower court's decision.²⁵

Before the Ninth Circuit, AMO argued that the plaintiffs had intentionally made Mexico an unavailable forum, which, if true, could allow the district court to uphold the dismissal even if Mexico is no longer an available alternative forum.²⁶ This would effectively leave the plaintiffs without a judicial forum in which to adjudicate their claims.²⁷ The plaintiffs failed to address this argument, instead proffering that the district court's decision should be reversed because the district court failed to include a return jurisdiction clause in its order.²⁸ The Ninth Circuit chose to remand the case to the district court, holding:

[W]hen intervening developments in a foreign jurisdiction, subsequent to a district court's initial *forum non conveniens* ruling, could leave plaintiffs without an available forum in which to bring their claims, it is appropriate to remand the matter back to the district court so it can reconsider its decision based upon updated information.²⁹

While the Ninth Circuit observed that the unavailability of a forum in Mexico was a sufficient reason to warrant remand, it refused to require the district court to place a return jurisdiction clause in its *forum non conveniens* decision.³⁰ The Ninth Circuit reasoned that the Supreme Court's ruling that a *forum non conveniens* decision must retain flexibility prohibited an inferior court from imposing a bright-line rule mandating the

20. *Id.* at 1028.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The Mexican Federal Court of Appeals and the constitutional Amparo court both upheld the dismissal. *Id.*

26. *Id.* at 1031.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.* at 1032 (maintaining that return jurisdiction clauses are only appropriate if a reasonable likelihood exists that the party will not submit to jurisdiction in the alternative forum).

inclusion of return jurisdiction clauses.³¹ If the district court had a “justifiable reason” to doubt the availability of the alternative forum, then a return jurisdiction clause may be appropriate; however, absent this doubt, the Ninth Circuit refused to require such a clause.³²

The concept of forum non conveniens is a common law tradition whereby a court will not exercise otherwise valid jurisdiction over a defendant if such exercise would be unduly oppressive.³³ As one early twentieth-century commentator described it, “the court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction.”³⁴ A forum non conveniens decision requires the court to analyze three factors: (1) the availability of an adequate alternative forum; (2) the appropriate amount of deference to give the plaintiff’s choice of forum; and (3) the balance of certain public and private interest factors.³⁵ While each factor is essential to the forum non conveniens decision, the only factor at issue in *Gutierrez* was the availability of an adequate alternative forum.³⁶

II. ANALYSIS

The Ninth Circuit erred in refusing to require the inclusion of a return jurisdiction clause in forum non conveniens dismissal orders. Specifically, the court erroneously concluded that requiring such a clause would

31. *Id.*

32. *Id.* (recognizing that while the Ninth Circuit had required return jurisdiction clauses in some instances, it refuses to require them in all forum non conveniens dismissals).

33. *See* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 507 (1947) (declaring that “a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute”).

34. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 2 (1929) (quoting ANDREW DEWAR GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 212 (1926)) (internal quotation marks omitted).

35. *See, e.g.,* *Steward Int’l Enhanced Index Fund v. Carr*, No. 09-CV-5006, 2010 WL 336276, at *2, *11 (D.N.J. Jan. 22, 2010) (dismissing the action on the grounds of forum non conveniens because the conduct at issue occurred in the United Kingdom, and the United Kingdom provided an adequate alternative forum). The private interest factors to be considered are: (1) the relative ease of access to evidence, including the ability to view the premise, if applicable; (2) the availability of compulsory process to compel attendance of unwilling witnesses; (3) the cost of attendance for witnesses; (4) the enforceability of the judgment; and (5) all other practical concerns that make a trial inexpensive, easy, and prompt. *See, e.g.,* *Gilbert*, 330 U.S. at 502–03, 508, 512 (upholding the dismissal of a suit from a New York forum on forum non conveniens grounds where the suit was against a Pennsylvania company for an accident which occurred in Virginia and injured a Virginia resident). The public interest factors to be considered are: (1) the administrative difficulties relating to court congestion; (2) the burden on the local community to perform jury duty; (3) the interest in having local disputes resolved locally; and (4) the difficulty of applying the laws of another jurisdiction. *Id.* at 508–09. The Court in *Gilbert* emphasized that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” *Id.* at 508.

36. *Gutierrez*, 640 F.3d at 1029.

interfere with the flexibility of forum non conveniens decisions.³⁷ The inclusion of a return jurisdiction clause, as required by some federal courts of appeals, ensures that the plaintiff will have an available forum in which he may litigate the claim in the event the alternative forum proves unavailable. Moreover, mandating a return jurisdiction clause ensures that both the defendant and the plaintiff recognize that their actions in the alternative forum could have consequences on the availability of the original forum.³⁸

A. *A Court's Ability to Grant a Dismissal on Forum Non Conveniens Grounds Must Remain Flexible, but that Flexibility Does Not Need to Extend to the Conditions Placed on that Dismissal.*

In *Gutierrez*, the Ninth Circuit emphasized that its refusal to require a return jurisdiction clause was based primarily on Supreme Court precedent, which states that forum non conveniens decisions “need to retain flexibility.”³⁹ By misinterpreting Supreme Court precedent, the Ninth Circuit opined it could not require a return jurisdiction clause because the court believed this would conflict with Supreme Court rulings;⁴⁰ its rationale, however, was flawed.

The Supreme Court’s reference to flexibility applies to the initial decision to dismiss on forum non conveniens grounds, not to the conditions attached to that decision.⁴¹ The requirement of a return jurisdiction clause has no connection to the initial forum non conveniens decision.⁴² Since a return jurisdiction clause is irrelevant until the court decides to dismiss the case on forum non conveniens grounds,⁴³ it follows that the initial decision and the requirement of the clause are two distinct events.

Decisions from the United States Courts of Appeals for the District of

37. See *infra* Part II.A (discussing return jurisdiction clauses and their interplay with the Supreme Court’s requirement of flexibility).

38. See *infra* Part II.B (arguing that return jurisdiction clauses will increase the effectiveness of the forum non conveniens doctrine by improving judicial efficiency and fairness).

39. *Gutierrez*, 640 F.3d at 1032 (quoting *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981))) (internal quotation marks omitted).

40. *Id.*

41. See *Piper*, 454 U.S. at 249–50 (declining to create rigid rules governing the grant or denial of forum non conveniens dismissals).

42. See *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1166 (5th Cir. 1987) (en banc) (emphasizing the need to ensure the plaintiff’s ability to reinstate the case in the district court if the foreign court declines jurisdiction comes *after* the district court determines that dismissal on forum non conveniens grounds is appropriate), *vacated on other grounds sub nom.* *Pan Am. World Airways, Inc. v. Pampin Lopez*, 490 U.S. 1032 (1989).

43. See *id.* (“[T]he relevant circumstances at the time the motion [to dismiss for forum non conveniens] is filed should serve as the factual backdrop of the court’s decision.”).

Columbia and Fifth Circuits further support this position. In *El-Fadl v. Central Bank of Jordan*,⁴⁴ the D.C. Circuit required the district court to ensure that the plaintiff would have access to the district court again should the alternative forum fail to accept jurisdiction.⁴⁵ In *Robinson v. TCI/US West Cable Communications, Inc.*,⁴⁶ the Fifth Circuit upheld its prior rulings and declared that the district court’s failure to include a return jurisdiction clause was a per se abuse of discretion.⁴⁷ The Ninth Circuit’s reasoning in *Gutierrez* indicates that these decisions directly conflicted with Supreme Court precedent;⁴⁸ however, neither the D.C. Circuit nor the Fifth Circuit noted any conflict with prior Supreme Court decisions.⁴⁹ Moreover, the Supreme Court has not overruled any of these decisions for mandating a return jurisdiction clause.

While this argument does not shed light on the propriety of requiring a return jurisdiction clause, it does illustrate that such a requirement is not in conflict with Supreme Court precedent. The Court has repeatedly refused to draw bright-line rules to regulate forum non conveniens decisions because of its goal to ensure that each decision turns on the specific facts of the case.⁵⁰ A return jurisdiction clause, however, has no impact on the initial decision because the clause is irrelevant until the district court decides to dismiss the case on forum non conveniens grounds. Therefore, the requirement of a return jurisdiction clause does not collide with the Supreme Court’s requirement that forum non conveniens decisions retain flexibility.

44. 75 F.3d 668 (D.C. Cir. 1996).

45. *See id.* at 679 (stating that a return jurisdiction clause must be included in a forum non conveniens dismissal if there is a question as to the availability of the alternative forum).

46. 117 F.3d 900 (5th Cir. 1997).

47. *See id.* at 907–08 (reasoning that the return jurisdiction clause is one of many measures intended to ensure that a defendant does not obstruct access to a foreign venue after obtaining dismissal from a district court).

48. *See Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1032 (9th Cir. 2011) (“We reasoned that a bright line test would ‘contradict[] the Supreme Court’s observation that *forum non conveniens* determinations . . . ‘need to retain flexibility.’” (quoting *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981)))).

49. *See supra* notes 44–47 and accompanying text.

50. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (recognizing that the district court must retain the flexibility to determine each forum non conveniens motion based on the facts of the case); *Piper*, 454 U.S. at 249 (observing that emphasis on any one factor of a case is at odds with traditional forum non conveniens decisions); *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 554–57 (1946) (providing a list of possible circumstances that a district court could take into consideration, but noting that each case must be decided based on its facts).

B. Failing to Require a Return Jurisdiction Clause Conflicts with the Guiding Forum Non Conveniens Principles of Promoting Fairness and Judicial Efficiency by Ensuring an Available Alternative Forum.

The first step in evaluating a motion to dismiss for forum non conveniens is determining whether an adequate alternative forum exists; without this, the inquiry cannot proceed.⁵¹ An adequate alternative forum is necessary because forum non conveniens dismissals are premised on the belief that “the convenience of the parties and the court, and the interests of justice indicate that the action should be tried in another forum.”⁵² Courts will usually find an adequate alternative forum exists if: (1) the defendant is amenable to process there and can come within the jurisdiction of the forum; (2) the jurisdiction recognizes the subject-matter and offers some form of relief; and (3) the plaintiff can appear before the alternative forum.⁵³ In *Gutierrez*, the Mexican courts refused to assert jurisdiction over the defendants.⁵⁴ Mexico, therefore, was not an available alternate forum, and a required element for granting a forum non conveniens dismissal went unfulfilled.

When such a circumstance arises, courts need to ensure that the plaintiff has access to the original forum. Failing to do so goes against the basic principles of fairness and justice upon which the doctrine of forum non conveniens is premised.⁵⁵ Several federal courts of appeals have recognized the utility of return jurisdiction clauses, requiring them in cases where the availability of an alternative jurisdiction is in question.⁵⁶ The

51. See *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 607 (D.C. Cir. 1983) (“Availability of adequate alternative fora is a threshold test . . . in the sense that a *forum non conveniens* motion cannot be granted unless the test is fulfilled.”).

52. *Ford v. Brown*, 319 F.3d 1302, 1307, 1311 (11th Cir. 2003) (quoting *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1218 (11th Cir. 1985)) (internal quotation marks omitted) (declaring that a suit brought by an English plaintiff should be dismissed on forum non conveniens grounds when brought against an American company for actions taken in Hong Kong).

53. See, e.g., *Mercier v. Sheraton Int’l, Inc.*, 935 F.2d 419, 424 (1st Cir. 1991) (citing *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Pampin Lopez*, 490 U.S. 1032 (1989)) (noting that other circuits require all parties to come within the forum’s jurisdiction and that fairness will dictate a forum non conveniens decision).

54. *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1028 (9th Cir. 2011).

55. See J. Stanton Hill, Note, *Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts*, 41 VAND. J. TRANSNAT’L L. 1177, 1195 (2008) (recognizing that fairness, convenience, and judicial economy are often recurring themes in forum non conveniens jurisprudence).

56. See *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 679 (D.C. Cir. 1996) (“If doubts about the availability of an alternative forum remain due to the difficulties in determining Jordanian law, the district court may dismiss for *forum non conveniens*, but only if conditioned on the defendants’ submitting to jurisdiction in Jordan and on the Jordanian courts’ acceptance of the case.”); *In re Air Crash Disaster*, 821 F.2d at 1166 (requiring the district court to “ensure that a plaintiff can reinstate his suit in the alternative forum without

First, Second, Fifth, and D.C. Circuits have all utilized return jurisdiction clauses to ensure a plaintiff has access to the original court should the alternative forum prove unavailable.⁵⁷ The Fifth Circuit has even gone so far as to hold that it is a per se abuse of discretion for a district court to fail to include a return jurisdiction clause.⁵⁸ A return jurisdiction clause ensures the plaintiff will not be left without a forum, as it leaves open the possibility of the plaintiff returning to the original forum.

In addition to ensuring the availability of an adequate alternative forum, a district court must weigh the judicial efficiency of litigating the case in a foreign, alternative forum versus the original one.⁵⁹ Requiring a return jurisdiction clause would aid judicial efficiency. As the process currently works, a plaintiff needs to appeal the forum non conveniens decision to a federal court of appeals or seek reconsideration from the district court; the plaintiff must then show the alternative forum was unavailable and move to have the case remanded or reheard by the district court.⁶⁰ The district court then determines whether the alternate forum was actually unavailable and how to proceed.⁶¹ Requiring a return jurisdiction clause would eliminate

undue inconvenience or prejudice and that, if the defendant obstructs such reinstatement in the alternative forum, the plaintiff may return to the American forum”); *see also Mercier*, 935 F.2d at 426 (emphasizing that, when an alternative forum’s willingness to entertain an action is questionable, the district court must condition dismissal on the alternative forum’s ultimate acceptance of the action); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551–52 (5th Cir. 1991) (holding that the district court must provide plaintiffs with the ability to return to the original forum regardless of whether there is doubt as to the availability of the alternative forum); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 829 (2d Cir. 1990) (modifying the lower court’s forum non conveniens dismissal to provide the plaintiff with return jurisdiction if the alternative forum refused to exercise jurisdiction).

57. *See supra* note 56 (identifying numerous circuit decisions requiring return jurisdiction clauses).

58. *E.g., Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675 (5th Cir. 2003) (emphasizing that a return jurisdiction clause is necessary to ensure the plaintiff may return to the original forum if the defendant fails to submit to the alternative forum); *Robinson v. TCI/US W. Cable Commc’ns Inc.*, 117 F.3d 900, 907 (5th Cir. 1997) (citing *In re Air Crash Disaster*, 821 F.2d at 1166) (holding that the district court must use a return jurisdiction clause to ensure the plaintiff may return to the American forum when dismissing a case based on forum non conveniens).

59. *See Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 432 (2007) (noting the district court’s discretion to dismiss a case under the forum non conveniens doctrine and bypass traditional questions of jurisdiction); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (explaining that a court should consider a number of judicial efficiency factors, including court congestion, the burden of jury duty, and the difficulty of applying foreign law).

60. *See, e.g., MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 570–71 (D.C. Cir. 2010) (describing the district court’s dismissal of the case on forum non conveniens grounds, the alternate forum’s subsequent dismissal of the actions, the district court’s denial of the plaintiffs’ motion for reconsideration based on this dismissal, and the plaintiffs’ subsequent appeal to the circuit court); *see also Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1028 (9th Cir. 2011) (explaining how the plaintiffs appealed the forum non conveniens decision to a circuit court).

61. *E.g., Gutierrez*, 640 F.3d at 1032 (remanding the case to the district court to allow the district court to examine the new facts of the case and to issue a new forum non

the need to appeal to a circuit court of appeals or to petition for rehearing based on subsequent events, allowing the district court to immediately reassert jurisdiction and determine whether the alternative forum is unavailable.

Further, a return jurisdiction clause could be used to place both the plaintiff and the defendant on notice as to how their actions in the alternate forum may affect return jurisdiction. Typically, return jurisdiction clauses are utilized to ensure that the defendant complies with the district court's order and submits to the jurisdiction of the alternate forum.⁶² In *Gutierrez*, however, the defendant alleged that the plaintiffs purposely sabotaged the case in the alternate jurisdiction.⁶³ The Ninth Circuit hinted that the district court should deny jurisdiction if the plaintiffs acted in bad faith in the Mexican forum, even if the plaintiffs would be left without an available forum.⁶⁴ A return jurisdiction clause could serve to place both parties on notice that they must act in good faith in the alternate forum. Should a defendant fail to do this, the case may be returned to the district court.⁶⁵ Should a plaintiff fail to do this, the district court may refuse to hear the case.⁶⁶

Finally, mandating the inclusion of return jurisdiction clauses in forum non conveniens dismissals adds clarity to the current doctrine, which will increase judicial efficiency. According to the Ninth Circuit in *Leetsch v. Freedman*,⁶⁷ “[a] district court can be required to impose conditions if there is a justifiable reason to doubt that a party will cooperate with the foreign

conveniens decision).

62. See *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 679 (D.C. Cir. 1996) (requiring the defendants to submit to jurisdiction in the alternate forum as a condition of dismissal).

63. *Gutierrez*, 640 F.3d at 1031 (noting that the district court retains discretion to dismiss the case again should it determine the refusal of the Mexican courts to assert jurisdiction is due to the plaintiffs' actions or inactions). The defendant alleged that the plaintiffs did not notify it about the Mexican case, which prevented it from submitting to Mexican jurisdiction; this, according to the defendant, directly led the Mexican courts to hold that they did not have jurisdiction over the case. Brief for Appellee at 22–23, *Gutierrez*, 640 F.3d 1025 (No. 09-55860) (arguing that, if the plaintiffs had submitted the defendant's declaration, the defendant would have submitted to Mexican jurisdiction and the Mexican courts would not have dismissed the case).

64. See *Gutierrez*, 640 F.3d at 1031 (declaring that “[i]f the district court determines that the primary reason the Mexican courts declined to take jurisdiction of Plaintiffs' case was Plaintiffs' actions or inactions in the case, it retains discretion to again order dismissal”).

65. See *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) (holding that a conditional dismissal is necessary when there is a possibility that the defendant may evade or obstruct the jurisdiction of the alternate forum).

66. See *MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 572 (D.C. Cir. 2010) (“A conditional forum non conveniens dismissal . . . does not give the plaintiff license to deliberately prevent his suit in the foreign court from going forward in order to render an alternative forum defective.”).

67. 260 F.3d 1100 (9th Cir. 2001).

forum.”⁶⁸ The court, however, offered minimal guidance on what constitutes a “justifiable reason.”⁶⁹ This discretionary standard has led to numerous appeals within the Ninth Circuit, all of which may have been avoided if a return jurisdiction clause was mandatory.⁷⁰ To prevent confusion and to eliminate appeals based on this discretionary requirement, the Ninth Circuit should require return jurisdiction clauses.

Tying the return jurisdiction analysis to the availability of an alternative forum promotes the significant principles of fairness and judicial efficiency that underpin the doctrine of forum non conveniens. A return jurisdiction clause would further both of these principles by ensuring that a forum remains open to the plaintiff, eliminating the need for multiple appeals or rehearings, placing both the plaintiff and the defendant on notice as to how their actions in the alternative forum could affect return jurisdiction, and eliminating the appeals that currently arise out of the discretionary requirement.

CONCLUSION

The Ninth Circuit erred in stating that it was prohibited from requiring return jurisdiction clauses by Supreme Court precedent, which mandates that forum non conveniens decisions must remain flexible. The Supreme Court has held only that the decision itself, not the conditions placed on that decision, must retain flexibility. Because a return jurisdiction clause would only be contemplated *after* the district court decided to dismiss the case, the requirement of this clause does not interfere with the flexibility of the initial decision. Therefore, no Supreme Court precedent prohibits the Ninth Circuit from requiring a return jurisdiction clause.

The Ninth Circuit should require such a clause because, most importantly, it is useful to further the reasoning and purpose behind the doctrine of forum non conveniens. To obtain a dismissal, an adequate alternative forum must exist and, in ruling on the motion, a court should consider fairness and judicial efficiency. To satisfy these requirements, the Ninth Circuit should have utilized *Gutierrez* as a vehicle to require that all forum non conveniens decisions include a return jurisdiction clause. In the event an alternative forum proves unavailable, the original forum remains

68. *Id.* at 1104.

69. *See id.* (providing only that return jurisdiction should be required when the defendant expressly states he has no intention to return to the foreign forum).

70. *See id.* at 1103 (observing that the plaintiffs appealed dismissal because the district court did not include a return jurisdiction clause in its decision); *see also* *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1032 (9th Cir. 2011) (remanding the forum non conveniens decision to the district court for rehearing based on new events); *Pereira v. Utah Transp., Inc.*, 764 F.2d 686, 689 (9th Cir. 1985) (stating that the dismissal on forum non conveniens grounds should be conditioned on the alternate forum’s acceptance of the claim if there is uncertainty as to whether the alternative forum has jurisdiction).

accessible. Moreover, such a clause guarantees fairness to both the plaintiff and the defendant as it places both parties on notice that their actions in the alternative forum may affect their ability to return to the original forum. Finally, a return jurisdiction clause supports judicial efficiency because it eliminates the plaintiff's need to appeal the district court's decision once the alternative forum proves unavailable. Given the utility of a return jurisdiction clause in furthering the principles of the forum non conveniens doctrine, the Ninth Circuit erred in failing to require this clause in the *Gutierrez* decision.