Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

2 Cases Show Int'l Orgs Should Brush Up On Venue Defenses

By **Tiana Bey and Sofia Castillo** (May 6, 2020, 5:48 PM EDT)

Tiana Bey

Sofia Castillo

Since the U.S. Supreme Court decided Jam v. International Finance Corp.,[1] international organizations — as designated under the International Organizations Immunities Act of 1945, or IOIA[2] — have increasingly faced litigation that can no longer be dismissed on absolute immunity grounds.[3]

These organizations now have to navigate preliminary jurisdictional defenses that they would not have normally considered or asserted before Jam. One such defense is improper venue pursuant to the venue provision of the Foreign Sovereign Immunities Act of 1976, or FSIA, which can result in case dismissal or transfer to a forum that an international organization defendant finds more familiar or strategically advantageous.

Two recent cases deciding venue challenges by international organization defendants after Jam illustrate this point: Matos Rodriguez v. Pan American Health Organization[4] and Francisco S. v. Aetna Life Insurance Co.[5] The international organization defendants in both cases sought transfer of the case to the U.S. District Court for the District of Columbia, but they used different procedural tools and obtained differing outcomes.

The international organization in Matos Rodriguez asserted it was immune from litigation outside FSIA venues and won its transfer.

The international organization in Francisco, however, failed to assert that any particular venue rule applied and instead argued that the case should be transferred based on an inconvenient forum-balancing test. That organization was denied its transfer and it likely waived its FSIA venue immunity defense by failing to raise it in its initial response to the complaint.

As explained below, the differing outcomes in these cases should prompt international organizations to become acquainted with all FSIA immunity-related defenses available to them as they traverse the new post-Jam world where they may increasingly be sued in U.S. federal and state courts.

Also, if international organizations can identify a strategic advantage in asserting a venue immunity defense, they should assert it early in their response to a complaint, or risk being foreclosed from asserting it altogether.

The Impact of Jam v. International Finance Corp. on International Organizations' Venue Challenges

Generally, venue determinations in federal courts encompass a fact-based analysis of procedural rules found in Title 28, Section 1391 of the U.S. Code or other federal statutes supplying venue rules.

These analyses can be complicated when a court must decide if, based on the facts of the case, more than one venue rule is applicable. And, they are even more complicated when claims involve immune international organizations because courts must rely on the IOIA to determine whether Congress

intended certain venue rules to apply to those organizations.

The challenge with the IOIA, however, is its scarcity of specifics that define the scope of an international organization's immunity and its silence on the organization's procedural rights. The IOIA simply states that these organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."

In Jam, the Supreme Court interpreted that phrase to mean that an international organization's immunity is limited to the same extent that a foreign state's immunity is limited under the FSIA unless an executive order from the U.S. president otherwise limits its immunities.

In Jam, the Supreme Court focused on jurisdictional immunity, but it did not address application of the FSIA's procedural rules, which could also affect a court's exercise of jurisdiction over an international organization. So, trial courts are now left to interpret whether certain procedural rules apply in cases involving designated international organizations.

One such rule concerns the proper venue in which a case can be brought against an international organization if a U.S. court has both personal jurisdiction over the international organization and subject-matter jurisdiction over the claims, and proper venue allows a court to exercise its personal jurisdiction over the organization.

But, does venue also concern an international organization's immunity from suit, such that the FSIA's venue protections, as specified in Section 1391(f), should apply to international organizations, as it does to foreign states? This question was considered for the first time in Matos Rodriguez.

Addressing a conflict between application of the FSIA's venue rule — which limits cases brought against foreign states to certain forums — and the venue rule set out under the Racketeer Influenced and Corrupt Organizations Act, or RICO, the Matos Rodriguez court decided definitively (1) that immunity encompasses the FSIA's venue limitations; (2) that the FSIA's venue protections apply to designated international organizations; and (3) that the FSIA's venue rule supersedes other statutory venue rules in cases involving designated international organizations.

Coincidentally, the Francisco court decided another venue challenge by an international organization three days after the Matos Rodriguez court. The venue challenge implicated the same FSIA venue restrictions considered in Matos Rodriguez, but the Francisco court focused solely on inconvenient forum factors because the international organization failed to argue the exclusive application of the FSIA venue rule. Both Matos Rodriguez and Francisco are discussed further below.

The Matos Rodriguez v. Pan American Health Organization Case

The dispute in Matos Rodriguez arose out of an agreement between the Pan American Health Organization, or PAHO, Brazil and Cuba. Under the agreement, Cuba recruited doctors to go to Brazil to treat residents of lower income neighborhoods in Brazil. The agreement provided that Brazil would pay PAHO for the doctors' services and, in turn, PAHO would distribute a 95% share of those fees to Cuba and the doctors (85% to Cuba and 10% to the doctors) and would retain the remaining 5% for itself.

Plaintiffs brought a class action suit against PAHO, certain PAHO individuals and unnamed John Doe defendants, alleging forced labor, human trafficking and racketeering violations.

Specifically, they allege, among other things, that Cuba coerced them to provide services in Brazil through threats and other means, that Brazilian officials used intimidation tactics against the doctors to silence their complaints about their coerced labor, and that PAHO paid Cuban doctors a fraction of their salaries while paying non-Cuban doctors their full salaries. They allege that PAHO entered into the agreement to exploit the doctors' coerced services for a profit.

The Matos Rodriguez plaintiffs sued in the U.S. District Court for the Southern District of Florida, alleging it to be the proper venue for their claims under RICO's venue provision, which is codified in Title 18, Section 1965 of the U.S. Code. That provision allows a suit to be filed "in the district court of the United States for any district in which [a defendant] resides, is found, has an agent, or transacts his affairs."

The Matos Rodriguez plaintiffs also argued that Section 1391(c)(2) appropriately applied to determine that the Southern District of Florida was a proper court to hear its RICO claims.

Section 1391(c)(2) broadly allows a federal claim to be brought in "any judicial district in which [a] defendant is subject to the court's personal jurisdiction." Plaintiffs alleged that PAHO, a District of Columbia-based organization, was subject to Florida's personal jurisdiction, primarily, because it performed services in the state (unrelated to the alleged labor, human trafficking, and racketeering violations) while also engaging in injurious acts toward plaintiffs (PAHO's payment of unfair wages to the doctors) in the District of Columbia.

Before raising any substantive jurisdictional immunity defenses — while preserving its right to do so later — PAHO specially appeared to challenge venue, arguing that, after Jam, the FSIA's venue provision[6] exclusively applies to actions involving international organizations and thus neither RICO's venue provision nor Section 1391(c)(2) could apply.

Introducing the concept of venue immunity, PAHO sought to transfer the case to the District of Columbia — the default forum under Section 1391(f) — which, it asserted, has more experience handling cases against foreign sovereigns and international organizations as well as developed expertise with IOIA immunity.

As indicated above, the case presented a first impression question of whether the FSIA's venue restrictions extend to international organizations as part of their congressionally afforded immunity from suit under the IOIA. A magistrate judge addressed the issue in the first instance, finding that, because the FSIA's venue provision does not include mandatory application language, she could rely on either Subsection (c)(2) or Subsection (f) to make a discretionary determination of venue.

She chose to rely on Subsection (c)(2) and proceeded to analyze inconvenient forum factors under Section 1404(a), finding that those factors weighed in favor of plaintiffs' choice of the Southern District of Florida as the forum. PAHO appealed to the district judge presiding over the case.

The district judge sided with PAHO, interpreting the FSIA to confer venue immunity to a foreign state (and by extension to an international organization pursuant to Jam), which could be asserted as a procedural ground to deny the exercise of jurisdiction. The court concluded that statutory venue rules generally applied to federal claims are inapplicable to FSIA cases, because the FSIA is the exclusive source of rules that define not only when immunity is waived, but also where immunity from suit has been waived by Congress.

To find that the scope of foreign states' immunity includes venue restrictions, the court relied on various principles declared by federal courts in cases invoking individual U.S. States' sovereign immunity. It took this approach because it was the first case to decide the issue squarely in connection with foreign sovereign immunity. The court also noted that venue immunity could be waived where a defendant subject to the FSIA does not challenge venue.

Matos Rodriguez appears to be the first decision to address two important issues for international organizations after Jam made clear they are vulnerable to suit in U.S. courts through application of the FSIA. While federal courts typically rely on the FSIA's venue provision as the controlling authority to establish venue in cases against foreign states, courts have not expressly applied the broader concept of jurisdictional immunity to disputes over venue.

Courts typically analyze jurisdictional immunity in two contexts: personal jurisdiction — by way of effecting service of process through the FSIA's service provisions — and subjection-matter jurisdiction — under the FSIA's immunity exception provisions.

Thus, the Matos Rodriguez case marks the first time a court framed its answer to a venue question in terms of immunity, thereby raising an additional jurisdictional immunity hurdle a party may need to overcome to successfully sue a designated international organization in a particular U.S. court.

It also is the first case in which a court addressed the exclusive application of the FSIA's venue provision to a suit against a designated international organization where the source of substantive federal law (e.g., RICO) also provides a venue rule.

The Francisco S. v. Aetna Life Insurance Co. Case

The dispute in Francisco involves the World Bank medical group insurance plan, which Aetna Life Insurance Co. serviced as a third-party claims administrator for the benefit of World Bank's employees.

A World Bank employee participating in the insurance plan had a minor daughter who received benefits under in the plan. She underwent an 11-month mental health treatment at two inpatient facilities in Utah and her father sought payment of the treatment under the plan.

Aetna denied payment because it deemed the treatment not medically necessary. After exhausting Aetna's internal appeals process, the plaintiffs filed a complaint against both Aetna and the World Bank, seeking payment for the medical treatment, including pre- and post-judgment interest.

Before the Supreme Court decided Jam, the plaintiffs filed claims under the Employee Retirement Income Security Act and breach of contract in the federal judicial district of Utah, alleging Utah as the proper venue pursuant to Section 1391(c). The plaintiffs are residents of Maryland, the World Bank is a resident of the District of Columbia, and Aetna is a resident of both Connecticut and Florida.

The plaintiffs asserted that Utah was the proper forum, however, because the medical treatment at issue was provided in Utah and Aetna does business in Utah. The complaint was silent about why Utah would be a proper venue to hear claims against the World Bank.

After Jam, the plaintiffs amended their first complaint, this time only claiming breach of contract, in response to a motion to dismiss by Aetna and the World Bank. The amended complaint, however, also failed to allege facts concerning the district court's jurisdiction over the World Bank and it failed to invoke FSIA jurisdictional immunity exceptions that, as Jam made clear, apply to designated international organizations like the World Bank.

Aetna and the World Bank similarly failed to invoke the FSIA in their motion to dismiss the amended complaint, arguing only that the World Bank enjoyed immunity under the IOIA and never waived its immunity for the type of claim brought by the plaintiffs.

One month later, Aetna and the World Bank moved to transfer the case to the District of Columbia but they again failed to invoke the FSIA's venue limitations. Instead, they presented inconvenient forum arguments pursuant to Section 1404(a), including the assertion that the district and circuit courts in the District of Columbia would be the proper venue because they had "extensive experience analyzing the privileges and immunities of the World Bank and other international organizations."

In its April 6 decision, the Francisco court denied the motion to transfer venue, dismissed the breach of contract claim only against Aetna and allowed the breach of contract claim against the World Bank. Interestingly, the court pointed to the major shift caused by Jam, which exposed international organizations to more litigation.

Specifically, the court undertook a substantive immunity analysis, applying the FSIA's exceptions to immunity notwithstanding the parties' silence on both the implication of Jam and the application of FSIA to suits brought against international organizations.

The court found that the World Bank's commercial activity in the U.S. gave rise to the claims at issue, and therefore, made it subject to suit in the U.S. But it failed to go a step further in applying the FSIA to its venue transfer analysis. Instead, the court analyzed the venue challenge only under an inconvenient forum rubric and concluded that Utah was the more convenient forum over the District of Columbia.

Notably, the court disregarded defendants' arguments concerning the District of Columbia federal courts' extensive experience interpreting the privileges and immunities of international organizations, reasoning that it had already addressed immunity in its analysis on dismissal, which left no reason for the federal court in the District of Columbia to exercise its expertise.

Although the decision does not explain the difference in the court's approach to its venue analysis, it

is likely that the World Bank waived any venue immunity argument it could assert under the FSIA by failing to raise it in either its motion to dismiss or its motion to transfer.

It is difficult to predict how the Francisco court would have ruled on the venue transfer if the World Bank, in particular, had linked its venue challenge with the concept of FSIA immunity (like PAHO did in Matos Rodriguez) rather than relying on Section 1404(a) to argue the inconvenience of plaintiffs' chosen forum.

It is possible, however, that the World Bank could have succeeded in transferring the case to the District of Columbia had it argued both venue immunity and that applying Section 1391(f) is the exclusive means available to select the proper venue in cases against international organizations.

For example, in contrast to defendants' inconvenient forum approach, an immunity-based challenge would have empowered the World Bank to focus the relevant facts on the only two venue options in which it would be subject to suit under the FSIA: (1) the U.S. District Court for the District of Columbia, or (2) "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

Such a focus would have enabled the World Bank to argue that the District of Columbia was the only venue accessible to plaintiffs, because it was both the default venue and the situs of the alleged injury (the breaching conduct — i.e., the World Bank's failure to pay for treatment — occurred while it sat in the District of Columbia).

Conclusion

Matos Rodriguez and Francisco are instructive to post-Jam international organization defendants that consider asserting venue challenges. Matos Rodriguez demonstrates that the FSIA venue rule is now a procedural tool to use when such organizations identify a strategic advantage to transferring a case to a different venue.

Francisco demonstrates that these organizations should become more familiar with the use of FSIA's procedural protections — including venue protections — as defenses and should assert those procedural defenses, along with their substantive immunity defenses, at the first opportunity to respond to the complaint.

It remains to be seen whether other courts will follow Matos Rodriguez in holding that venue protections fall within the scope of international organizations' immunity and, therefore, that the FSIA venue rule applies to them, as it does to foreign states.

Tiana A. Bey is an associate and Sofia Castillo is of counsel at Mitchell Silberberg & Knupp LLP.

[1] Jam v. International Finance Corp. , 139 S. Ct. 759 (2019).

[2] The IOIA covers only those public international organizations in which the United States participates by treaty or statute and which the President, by Executive order, has designated as enjoying all or only some of the privileges, exemptions, and immunities of a foreign state (hereinafter "designated international organizations"). See 22 U.S.C. § 288.

[3] Prior to Jam, U.S. courts generally held that international organizations, such as the World Bank, the World Health Organization, the International Monetary Fund, and the International Finance Corporation, were immune from suit unless the organization's immunity was waived by itself or through Executive Order. Jam effectively eliminated that absolute immunity by linking the jurisdictional immunity of international organizations under the IOIA to that enjoyed by foreign states under the Foreign Sovereign Immunities Act.

[4] Matos Rodriguez v. Pan American Health Organization, No. 18-cv-24995 (S.D. Fla. Apr. 3, 2020).

[5] Francisco S. v. Aetna Life Insurance Co., No. 18-cv-00010 (D. Utah Apr. 6, 2020).

[6] The relevant portions of section 1391(f) provides that "[a] civil action against a foreign state as defined in Section 1603(a) of this title may be brought — (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; … or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof."
