Case comment: *Dawood Rawat v The Republic of Mauritius*

Dr Sam Luttrell, Counsel, Clifford Chance, Perth

Clementine Packer, Associate, Clifford Chance, Perth

In *Dawood Rawat v The Republic of Mauritius* (***Rawat***),[1] an investment treaty tribunal was tasked with deciding competing applications for interim measures. In dealing with the parties' requests, the Tribunal addressed a number of current issues in international arbitration, including the tests for interim measures and security for costs, the link between third-party funding and access to justice and the principles that apply where a Most Favoured Nation (**MFN**) clause is invoked to establish jurisdiction.

By way of background, in 2015, Mr Rawat – a dual French and Mauritian national – commenced arbitration against the Republic of Mauritius under the France-Mauritius bilateral investment treaty[2] (**BIT**). Mr Rawat claims that Mauritius has taken unlawful measures against his investments in the Mauritian banking sector. The arbitration is being conducted under the 1976 UNCITRAL Arbitration Rules (**UNCITRAL Rules**).

The France-Mauritius BIT does not contain an advance offer to arbitrate investor-State disputes. Mr Rawat's position is that he can use the MFN clause in the France-Mauritius BIT to import the offer of investor-State arbitration that Mauritius has made to foreign investors in another treaty (the Finland-Mauritius BIT[3]).

Mr Rawat requested interim measures, including orders that (i) Mauritius fund the advance on the costs of the arbitration and/or release certain documents so that Mr Rawat could provide them to potential third-party funders and (ii) Mauritius be enjoined from continuing measures being taken against Mr Rawat, his family and the administrators of his assets (such as media campaigns against him).[4] Mauritius applied for security for costs in the amount of €3 million.[5]

In its decision of 11 January 2017, the Tribunal declined to grant any of the interim measures sought by the parties. Four points stand out in the Tribunal's reasons.

First, the Tribunal took a strict (or conservative) approach to the test for interim measures under the UNCITRAL Rules, particularly as regards the harm component of necessity. Many tribunals have taken the *Rawat* approach, which is to require the applicant to show "*irreparable harm*".[6] But many other tribunals have shown a preference for a lower threshold

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1 *Dawood Rawat v The Republic of Mauritius* (PCA Case 2016-20), UNCITRAL, Order Regarding Claimant's and Respondent's Requests for Interim Measures, 11 January 2017 (***Rawat v Mauritius***).

2 *Convention entre le Gouvernement de la République française et le Gouvernement de l'Ile Maurice sur la protection des investissements*, signee à Port-Louis le 22 mars 1973.

3 *Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments*, dated 12 September 2007.

4 *Rawat v Mauritius*, paras. 4 and 47.

5 *Rawat v Mauritius*, para. 4.

6 *Rawat v Mauritius*, para. 45.

of "*substantial prejudice*" or "*significant*" *harm*.[7] While there is ample authority to support the *Rawat* panel's position that "*it is well-established that harm claimed is not irreparable if it can be compensated by monetary damages*",[8] not all arbitrators see the jurisprudence as quite so stable in this area.[9]

Second, as far as the authors are aware, *Rawat* is the first investor-State case in which a claimant has sought interim measures on the basis that the measures are necessary for the procurement of third-party funding and, by extension, access to justice.[10] While the Tribunal ultimately declined to grant the relief sought, it did so not out of principle but rather because it found that Mr Rawat "*ha*[d] *not supported this request with particulars as to the identity of allegedly interested funders, or the information they require to complete their necessary due diligence*."[11] Indeed, the Tribunal gave something of a hint to Mr Rawat, opining that "*this document production request would in any event more appropriately be made at the merits phase of the arbitration*".[12] Third-party funders are increasingly active in investor-State arbitration, where a common problem is that the respondent State will often be the exclusive custodian of evidence the investor needs to prove its case. These remarks by the *Rawat* panel may be quoted in the future.

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7 See, for example, *City Oriente Ltd. v Republic of Ecuador* (ICSID Case No ARB/06/21), Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, para. 72, where the tribunal cast doubt on the requirement of "irreparable harm", instead preferring to impose a requirement that the "*harm spared to the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby*". See also *Chevron Corp. and Texaco Petroleum Co. v Republic of Ecuador* (PCA Case No 2009–23), UNCITRAL, Second Interim Award on Interim Measures, 16 February 2012, para. 3 ("*a risk that substantial harm may befall the Claimants before this Tribunal can decide the Parties' dispute by any final award*"). See also K-P Berger, *International Economic Arbitration in Studies in Transnational Economic Law*, vol 9, (Kluwer, The Hague, 1993) at 336 ("[t]*o preserve the legitimate rights of the requesting party, the measures must be 'necessary'. This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a 'substantial' (but not necessarily 'irreparable' as known in common law doctrine) prejudice for the requesting party*"). Other tribunals link the harm aspect of necessity to the balance of convenience, resulting in what is sometimes expressed as a "*balance of harm*". On this interpretation, the harm feared by the requesting party must substantially outweigh the harm that is likely to be suffered by the party against whom the measure is directed (if the measure is granted). See, for example, *Burlington Resources Inc. et al. v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador* (ICSID Case No ARB/08/05), Procedural Order 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, para. 82.

8 *Rawat v Mauritius*, para. 45.

9 As the tribunal noted in *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* (ICSID Case No. ARB/13/33), Decision on the Claimant's Request for Provisional Measures, 21 January 2015, para. 109: "*There are variations in approach or the precise wording used by the ICSID tribunals as to whether this requirement is that of 'irreparable' harm, or whether a demonstration of 'serious' harm will suffice. In the Tribunal's view, the term 'irreparable' harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally 'irreparable' in what is sometimes regarded as the narrow common law sense of the term [...] substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures*." See *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* (ICSID Case No. ARB/13/33), Decision on the Claimant's Request for Provisional Measures, 21 January 2015, para. 109.

10 *Rawat v Mauritius*, paras. 42 and 92.

11 *Rawat v Mauritius*, para. 114.

12 *Rawat v Mauritius*, para 115.

Third, the decision is interesting for its treatment of the element of *prima facie* jurisdiction, which must be shown before interim measures can be granted. As noted above, Mr Rawat is seeking to establish jurisdiction on the basis that the MFN provision in the France-Mauritius BIT entitles him to import the arbitration provision in the Finland-Mauritius BIT. This use of MFN is controversial. The theory against "MFN jurisdiction" can be illustrated with a bridge analogy: the investor is on one side of the bridge; the substantive provisions of the treaty (including MFN) are on the other; the bridge is made up of the jurisdictional provisions of the treaty – the investor can only cross if jurisdiction is established (which requires the investor to show that the State has consented to arbitration). On this reasoning, Mr Rawat tried to use MFN not only before he crossed the bridge but in fact to build it. Mindful of the risk of being seen to prejudge this "*difficult question*",[13] the Tribunal exercised judicial economy, making no finding on whether *prima facie* jurisdiction was present.[14] Nevertheless, the decision is useful because it illustrates how tribunals approach contested jurisdiction in the context of interim measures.

Finally, on the issue of security for costs, the *Rawat* decision shows that the 2014 decision in *RSM v St Lucia*[15] remains a Black Swan: no investment treaty tribunal since *RSM* has ordered a claimant to post security for costs. *Rawat* makes it clear that, to get security, a State needs to show that the circumstances are truly exceptional (e.g. the claimant has a record of not paying costs orders).[16] It is interesting that the Tribunal expressly stated it made no finding regarding Mr Rawat's argument that Mauritius already had *de facto* security in the form of the property seized[17] – an argument that, at least in the circumstances of this case, would seem to have some merit.

[13] *Rawat v Mauritius*, para. 84.

[14] *Rawat v Mauritius*, para. 86.

[15] *RSM Production Corporation v Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs, of 13 August 2014.

[16] *Rawat v Mauritius*, paras. 144-145.

[17] *Rawat v Mauritius*, paras. 142-143 and 145.