Arbitration and Politics: Analysis of a Peculiar Arbitration Between Libya and Switzerland

By Bernhard Berger / Stefanie Pfisterer*

On 15 July 2008, Hannibal Muammar Gaddafi, son of the Head of State of the Great Socialist People's Libyan Arab Jamahiriya (Libya), Muammar Gaddafi, and his wife were arrested in Geneva, Switzerland. The arrest led to political tensions which spread out and seriously worsened the diplomatic relations between Switzerland and Libya in all respects. With an Agreement dated 20 August 2009 (the "Agreement", see p. 184 infra) and a Plan of Action (the "Plan of Action", see p. 187 infra) dated 14 May 2010, Switzerland and Libya agreed to establish an Arbitral Tribunal that shall settle their difference that had arisen from the incident of July 2008. This article examines the Agreement and the Plan of Action, focusing on the provisions concerning the establishment of an arbitral tribunal (the "Arbitral Tribunal").

I. The Agreement and the Plan of Action:

On 15 July 2008, Hannibal Gaddafi and his wife were arrested by the police in Geneva. A criminal complaint accused the two of assault on members of their staff. On 17 July 2008, they were released on bail. The criminal complaint was withdrawn later. At the relevant time, Hannibal Gaddafi and his wife were having Libyan diplomatic passports, but were not accredited as diplomatic representatives in Switzerland. They were on a private journey. Libya demanded that Switzerland officially apologizes for the arrest that Libya considered as being illegal.

On 19 July 2008, two Swiss businessmen, Max Göldi and Rachid Hamdani, were arrested in Libya due to alleged contempt of immigration and other laws. Libya also withdrew funds from Swiss banks, refused entry visas for Swiss nationals and curtailed oil

* Dr. Bernhard Berger, LL.M. (Harvard) is a partner at Kellerhals Attorneys at Law with offices in Zurich, Basel and Berne, Switzerland. Stefanie Pfisterer, MLaw, is an associate with Kellerhals Attorneys at Law.
supplies. In Switzerland, these acts were seen as retaliation of Libya for the incident in Geneva.

Despite negotiations between Switzerland and Libya, no agreement as to the legal assessment of the arrest in Geneva could be reached. Even an *ad hoc* committee, consisting of representatives of Switzerland and Libya, did not come to an agreement: The Swiss representative, Lucius Caflisch, held that the arrest of Hannibal Gaddafi and his wife was not against international or national law, but simply that they were treated in an inadequate manner by the police of Geneva; the Libyan representative, Mohamed Werfalli, was of the opinion that the actions of the police of Geneva were to be considered as criminal acts.¹

On 8 April 2009, Libya filed a civil action against the Canton of Geneva, claiming damages and compensation for personal suffering ("tort morale").

On 20 August 2009, the President of the Swiss Confederation, Hans-Rudolf Merz, and the Libyan Prime Minister, El Baghdadi A. Mahmudi, signed the Agreement.

On 30 August 2009, the Swiss Federal Council appointed the British lawyer Elizabeth Wilmshurst as arbitrator.²

On 2 September 2009, Libya appointed the British attorney Saad Jabbar as arbitrator. Jabbar was Libya's representative in the prosecution of the 1988 Lockerbie assassin.

On 4 September 2009, the *Tribune de Genève*, a Geneva newspaper, published police mug shots of Hannibal Gaddafi. This publication exacerbated the political tensions.

After a challenge filed by Switzerland against the nomination of Saad Jabbar as arbitrator, Libya appointed the Indian lawyer Sreenivasa Pemmaraju Rao as arbitrator on 25 September 2009.³

On 4 November 2009, the Swiss Federal Council suspended the Agreement because Libya refused to release the two Swiss businessmen kept in arrest.

---

² Mrs. Wilmshurst is a fellow of the Royal Institute of International Affairs at Chatham House in London and known as the Deputy Legal Adviser at the Foreign and Commonwealth Office of the United Kingdom who resigned because she held that it was unlawful to use force against Iraq in 2003. According to the Federal Council, Wilmshurst is acknowledged as being an experienced and independent expert on international law. Press release of the Federal Department of Foreign Affairs of 30 August 2009.
³ Mr. Rao was a former legal adviser to India's Ministry of External Affairs.
Rachid Hamdani was released by Libya on 22 February 2010.

In March 2010, Switzerland apologized for the publication of the police mug shots, stating that their publication had been unlawful.

On 14 May 2010, the Swiss State Secretary, Peter Maurer, and the Libyan Vice Minister for Foreign Affairs, Khaled Kaim, signed the Plan of Action.

As provided in the Plan of Action, a review meeting had to take place within 15 days in Madrid. On 13 June 2010, the Ministers of Foreign Affairs of Switzerland, Micheline Calmy-Rey, and of Libya, Musa M. Kusa, signed the following Statement (the "Statement"):  

"Statement

The Ministers of Foreign Affairs of Switzerland and of the Great Jamahiriya for the Parties and the Minister of Foreign Affairs of the Federal Republic of Germany and of the Kingdom of Spain for the Guarantors herewith approve of and confirm the Plan of Action signed in Berlin on 14, May 2010 by State Secretary Peter Maurer for the Swiss Government, Undersecretary Khaled Kaim for the Great Jamahiriya (both for the Parties) and by the Secretary General Francisco Javier Elorza Cavengt for the EU rotation Spanish Presidency and by the State Secretary Wolf-Ruthart Born for the German Government and of the side signed by the Parties on 24, May 2010.

[signatures]"

On 14 June 2010, the second of the two Swiss business men, Max Göldi, was also released by Libya.

In September 2010, Libya replaced the nomination of Sreenivasa Pemmaraju Rao as arbitrator by the appointment of the British lawyer Michael Wood. Switzerland confirmed the appointment of Elizabeth Wilmshurst.

The two party-appointed arbitrators selected Philippe Kirsch as presiding arbitrator in February 2011.4

All three arbitrators are considered to be distinguished experts in public international law.

---

4. Mr. Kirsch was the first president of the International Criminal Court (2003 to 2009) and is a member of the Permanent Court of Arbitration in The Hague.
II. Validity of the Agreement and the Plan of Action:

The Agreement and the Plan of Action are international agreements concluded between States in written form and, thus, are to be qualified as international treaties in terms of Art. 2(1)(a) of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT). This Convention has been in force for Libya since 21 January 2009 and for Switzerland since 6 June 1990.

The validity of an international treaty requires that the person acting for the state is authorized to conclude the treaty. By virtue of their functions and without having to produce full powers, the following are considered as representing their state: Heads of State, Heads of Government and Ministers for Foreign Affairs (Art. 7(2)(a) VCLT); heads of diplomatic missions (Art. 7(2)(b) VCLT).

The Agreement was signed by the President of the Swiss Confederation, Hans-Rudolf Merz, and the Libyan Prime Minister, El Baghdadi A. Mahmudi. The status of the President of the Swiss Confederation is not Head of State or Head of Government, but only *primus inter pares*, i.e. the first among the seven members of the Federal Council. But the Federal Council *in corpore* can be considered as the “Head of State” of Switzerland and, accordingly, the President of the Swiss Confederation as its representative. Thus, even if Hans-Rudolf Merz had not been authorized by the Federal Council to sign the Agreement, this argument could not have been invoked by Switzerland as defense.

The Plan of Action was signed by the Swiss State Secretary, Peter Maurer, and the Libyan Vice Minister for Foreign Affairs, Khaled Kaim, and the Statement by the Ministers of Foreign Affairs of Switzerland and Libya.

Accordingly, we conclude that the individuals having signed the Agreement, the Plan of Action and the Statement have to be considered as representing their state in terms of Art. 7(2)(a) VCLT. Hence, they are binding under international law.

In Switzerland, a debate arose as to whether, from a Swiss perspective, the conclusion of the Agreement by the President of the Swiss Confederation violated the rights of participation of the Federal Assembly (the legislative body in Switzerland) and the Canton of Geneva. But even if Swiss law had been violated in this respect, that would not affect the validity of the treaty. According to Art. 27 VCLT, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

---

III. Content of the Agreement and the Plan of Action:

1. Arbitration agreement:

   According to its preamble, the purpose of the Agreement is to pursue the parties' desire to settle the difference that resulted from the arrest of Hannibal Gaddafi.

   The Agreement contains the parties' agreement to establish an Arbitral Tribunal (Art. 2) and further obligations in this respect (Arts 3-5). Art. 2 of the Agreement thus constitutes an international arbitration agreement, a so-called *compromis*, i.e. an agreement of parties to settle an existing dispute by an arbitral award to be handed down by an *ad hoc* arbitral tribunal. In Art. 1 of the Plan of Action, the parties confirmed their arbitration agreement, but amended it in some points.

   In addition to the *compromis*, the Agreement and the Plan of Action contain other provisions, such as: Switzerland's duty to express official and public apology, Switzerland's commitment not to repeat this incident in the future against the Libyan Citizens, or the duty of both parties to restore their normal relations. These provisions are independent from the parties' agreement to arbitrate and will thus not be further considered in this article.

2. Place and Language of the Arbitration:

   According to the Agreement, the seat of the arbitration was to be London (Art. 2(e)). In the Plan of Action, however, the parties relocated the seat from London to Berlin (Art. 1). English is the language of the arbitration, pursuant to Art. 2(e) of the Agreement.

3. Appointment of Arbitrators:

   The Agreement provides for a three-member-tribunal whereby each party designates a third country arbitrator within ten days from the signature of the Agreement and the two party-appointed arbitrators designate the presiding arbitrator; if they fail to agree on the chair, the nomination shall be made by the President of the International Court of Justice (Art. 2(b)). In the Plan of Action, the parties agreed that the Arbitral Tribunal shall be constituted and function in accordance with the provisions contained in the Agreement (Art. 1). Hence, the terms for the appointment of the Arbitral Tribunal contained in the Agreement were to be observed.

As mentioned above, Switzerland appointed Elizabeth Wilmshurst (British) on 30 August 2009. Libya had originally nominated Saad Jabbar, then appointed Sreenivasa Pemmaraju Rao and, finally, replaced the latter (for unknown reasons) by Michael Wood (British). The two co-arbitrators appointed Philippe Kirsch as chair. Thus, it appears that the Arbitral Tribunal has been constituted in accordance with the agreement of the parties.

4. Mandate of the Arbitral Tribunal:

The mandate of the Arbitral Tribunal is "to look into the incident", and in particular to review the evidence submitted by the parties or requested by the tribunal, to determine the actions taken by members of the Geneva Police and other Swiss Officials and to review the requests of the parties (Art. 2(c) of the Agreement). The term "incident" refers to the arrest of Hannibal Gaddafi and "accompanying unjustified and unnecessary measures and actions against him and his family from the authorities of the Canton of Geneva and the Federal Swiss Authorities before during and after 15/07/2008" (Preamble of the Agreement).

The task of the Arbitral Tribunal 'to look into the incident' appears to be rather broad and indefinite. After all, other provisions of the Agreement shed more light on what the Arbitral Tribunal shall examine:

First, it shall determine whether "wrongful actions" had been committed during the incident. If so, it shall order Switzerland to take the necessary measures against those responsible for the incident (Art. 3 of the Agreement).

Secondly, the Arbitral Tribunal shall determine the nature of the "wrongful actions", if any, and in case it finds that there were criminal actions or other violations of law, order Switzerland to refer those responsible for these actions to trial (Art. 4 of the Agreement).

Thirdly, the Arbitral Tribunal shall determine whether or not there is any civil or criminal responsibility. If so, it shall order Switzerland to pay compensation (Art. 5 of the Agreement).

Although these directives provide a clearer definition of the Arbitral Tribunal's mandate, it remains somewhat unclear to what terms such as "wrongful actions" and "criminal actions or legal violations" really refer.

8. The reasons for the replacement of Sreenivasa Pemmaraju Rao have, to the best of our knowledge, not been made public.
In any event, we believe the mandate assigned to the Arbitral Tribunal shows that international arbitration may indeed serve as an effective means for the resolution of international conflicts between States, as it has been the idea behind the Conventions for the Pacific Settlement of International Disputes of 1899/1907 for more than 100 years. National courts would not appear to have been the appropriate bodies “to look into the incident”, neither the Swiss nor the Libyan judicial authorities. Arbitration in a neutral forum before a panel composed of distinguished citizens from neutral countries seems better suited for settling a dispute that politics and diplomacy have failed to resolve.  

5. Arbitral Procedure:

The Agreement provides that the Arbitral Tribunal shall determine the procedure. It may apply the rules of the Convention for the Pacific Settlement of International Disputes adopted in The Hague on 18 October 1907 (“1907 Convention”) (Art. 2(f) of the Agreement).

The 1907 Convention aims at avoiding recourse to force in the relations between States (Art. 1 of the 1907 Convention). The Convention has been in force for Libya since 2 September 1996 and for Switzerland since 11 July 1910. It contains several provisions on international arbitration (Art. 37 of the 1907 Convention). With a view to encouraging the development of arbitration, the Contracting States agreed on several rules that apply to the arbitral procedure unless other rules have been agreed upon by the parties (Art. 51 of the 1907 Convention).

If the Arbitral Tribunal were to apply the rules of the 1907 Convention, the case would be dealt with in two distinct phases: pleadings and oral discussions. The pleadings consist of an exchange of written submissions including all documents on which the parties intend to rely. The discussions consist in the oral development of the case before the Arbitral Tribunal (Art. 63 of the 1907 Convention). Unless special circumstances arise, the Arbitral Tribunal will not meet until the pleadings are closed (Art. 65 of the 1907 Convention). The discussion is only public if so decided by the Arbitral Tribunal with the consent of the parties (Art. 66 of the 1907 Convention). After the close of the pleadings, no further submission or argument may be made, unless requested or authorized by the Arbitral Tribunal or agreed by the other party (Art. 67 of the 1907 Convention). The Arbitral Tribunal is authorized to decide on its jurisdiction (Art. 73 of the 1907 Convention). It deliberates in private and the proceedings remain secret. All questions are decided by a majority of its members (Art. 78 of the 1907 Convention). The award must give the reasons on which it is based (Art. 79 of the 1907 Convention). It is read out in public sitting, the parties being present or duly summoned to attend (Art. 80 of the 1907 Convention).

10. See as one of the recent cases, e.g. the “Abey Arbitration” between The Government of Sudan and The Sudan People’s Liberation Movement/Army (materials available at www.pca-cpa.org/).
6. Applicable Law:

In the exercise of its mandate, i.e. to "look into the incident", the Arbitral Tribunal shall be obliged to apply the "relevant national laws, international conventions, international custom, as well as evidence of a general practice accepted as law, and the general principles of law and courtesy recognized by civilized nations" (Art. 2(d) of the Agreement).

This choice of law provision is rather broad and vague. Not surprisingly, it has been criticized by Swiss lawyers.\textsuperscript{11} As concerns the term "national laws", it is broadly accepted that international arbitral tribunals consider "national law" as a matter of fact.\textsuperscript{12} Hence, the interpretation of national law by the judicial authorities is binding. In the instant case, the Arbitral Tribunal is thus bound to apply national Swiss law in compliance with its application and interpretation by the Swiss Courts.

But even if the Arbitral Tribunal cannot proceed to its own interpretation of Swiss law, it is accepted by Swiss commentators that it is by all means authorized to examine whether the existing national case law is in accordance with the applicable rules of international law.\textsuperscript{13} The standard of review will thus in any case be international law.

Moreover, the term "general principles of courtesy" used in the Agreement is not a common source of international law, as such sources are conclusively listed in Art. 38 of the Statute of the International Court of Justice of 26 June 1945.\textsuperscript{14} Rather, "general principles of courtesy" is a standard term used in diplomatic relations that does not grant a party any actionable rights and duties.\textsuperscript{15} Hence, the Arbitral Tribunal will arguably apply the "general principles of courtesy" only as means of interpretation.\textsuperscript{16} After all, it might allow the Arbitral Tribunal to assess not only the legality of the measures taken by the Geneva police, but also their proportionality.

\textsuperscript{14} This list is uniformly accepted in legal doctrine; see, e.g. Ipsen, Völkerrecht, 5th ed., München 2004, page 210.
7. Time-limits:

The Arbitral Tribunal shall make its final decision "within sixty days from the start of the arbitration procedures" (Art. 2(f) of the Agreement).

The Agreement does not define the "start" of the arbitration process. A reasonable interpretation, however, should lead to the conclusion that it shall commence when the Arbitral Tribunal is fully constituted, i.e. in February 2011.

The 1907 Convention contains provisions on Arbitration by Summary Procedure which allow the Arbitral Tribunal to fix the time-limits within which the parties must present their cases (Art. 88 of the 1907 Convention) and to conduct the proceedings in writing only (Art. 90 of the 1907 Convention). In the instant case, the Arbitral Tribunal might have recourse to these rules in order to comply with the parties' agreement to the best extent possible. Nevertheless, it seems doubtful that the Arbitral Tribunal will be able to come to a final award within sixty days from the start of the proceedings.

IV. Effects of the Award:

The Agreement does not contain any provision on legal remedies against the award. Pursuant to Art. 81 of the 1907 Convention, an award settles the dispute definitively and without appeal. As neither the Agreement nor the 1907 Convention allow for any legal remedy, we conclude that the decision of the Arbitral Tribunal will be final and binding on the parties, i.e. an enforceable instrument with conclusive and preclusive effects (res judicata).

V. Future of the Arbitration:

In Switzerland, voices say that whether or not the Arbitral Tribunal will commence its work is uncertain. On the one hand, Libya seems to have realized that the arbitration will not be the key to the restoration of Hannibal Gaddafi's dignity. On the other hand, Switzerland has little interest in proceeding with the arbitration either. The relationship between Switzerland and Libya is still tense and there is little expectation that the arbitration will be able to remedy this situation.

Moreover, the upheavals that commenced in Libya on or about 15 February 2011 caused Switzerland to suspend the Plan of Action and the Agreement on 21 February 2011. Hence, we do not expect the Arbitral Tribunal to start its work in the near future.

17. The time-limit for the appointment of the Arbitral Tribunal refers to the signature of the Agreement (Art. 2(b) of the Agreement), while the period of time for the Arbitral Tribunal to render the final award refers to the "start of the arbitration procedures".