

**Plenary Session: Globalization and Its Impact on the Law of  
International Business  
International Trade in Legal Services: Admission Rules for Foreign  
Attorneys in South Africa in the Light of GATS**

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## **I. Introduction**

Globalisation requires ever closer co-operation between legal professionals hailing from different jurisdictions. Today, the legal practitioner cannot contend her- or him-self with the knowledge of one's own jurisdiction's law only, but must be able to advise on issues which involve various legal systems. Not only the commercial attorney has to be prepared to give profound advice on transactions which span the globe, but increasingly practitioners in other fields are also encountering growing numbers of cross-border problems. For example, in the field of the law of succession problems evolving from split estates, that is estates which are situate in more than one country, have to be resolved.

This interactive global environment has fostered growing international training and mobility among legal practitioners. Traditionally, legal professionals mostly studied in the country in which they intended to practise for the rest of their career and worked solely in that jurisdiction thereafter. The trend to greater interdependence between the various national legal systems has resulted in a gradual shift away from this situation. Increasing numbers of law students get trained in other countries as part of their undergraduate degrees or even come to foreign shores to obtain postgraduate law degrees. Major commercial law firms ensure that they can offer in-house expertise on major foreign legal systems and co-operate with partner firms in other parts of the globe. Some firms even expand internationally, founding branch offices abroad.

The need for a global regulatory response to the globalisation of the trade in legal services is recognised by the General Agreement on Trade in Services<sup>1</sup> (GATS) to which South Africa is a party. Legal services fall within the scope of this agreement<sup>2</sup>, and South Africa is obliged to give effect to the commitments it made in this Agreement. In this short paper I shall evaluate the rules governing the admission of attorneys hailing from other countries in South Africa in the light of South Africa's obligations under GATS. The discussion will not be limited to the law as it stands at the moment but will also consider the current proposal for reform of the rules on the admission of attorneys in South Africa.

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<sup>1</sup> The General Agreement on Trade in Services was signed on 15 April 1994. South Africa was one of the initial signatories, it has ratified this agreement.

<sup>2</sup> Article 1 paragraph (2) defines the scope of services covered by the agreement in the widest terms, they include the supply of a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other member (subparagraph d).

## II. GATS and its implications for national admission rules for attorneys

GATS has an impact on the regulatory framework which governs the admission of attorneys in its member states<sup>3</sup>. GATS comprises generally applicable provisions as well as provisions requiring future work concerning legal services. GATS requires all member states to grant all other member states the ‘Most Favoured Nation Status’ within its scope of application<sup>4</sup>. This means that every member state has to accord every other member state no less favourable treatment than it accords any other member state. Exceptions from the ‘Most Favoured Nation (MFN) Principle’ are only possible where a country has exempted itself from it<sup>5</sup>, where a country has entered into ‘Mutual Recognition Agreement’ as contemplated in Article VII GATS or where preferential treatment results from regional integration and proper notice has been given<sup>6</sup>. To date, South Africa has not resorted to declaring any MFN exemption with regard to legal services.

GATS furthermore imposes certain transparency requirements on the member states<sup>7</sup>, and prescribes certain minimum standards concerning the domestic regulation of trade in service<sup>8</sup>. However, the only mandatory minimum standard of general application is laid down by Article VI (2) GATS, which requires Member States to maintain or institute procedures to have an objective and impartial review of any negative decisions by a country to exclude foreign service providers.

Further obligations concerning the provision of a service arise under GATS when a member state has made a specific commitment with regard to the provision of this kind of service. Depending on the commitments made in a country’s ‘schedule of specific commitments’, the country will be bound to apply further liberalising provisions laid down in GATS concerning the trade in the service specified in the schedule. A GATS Member State can make specific commitments *inter alia* with regard to ‘Market Access’<sup>9</sup>, ‘National Treatment’<sup>10</sup>, and further ‘Domestic Regulation’ provisions<sup>11</sup>. South Africa has made certain specific commitments with regard to legal services. It committed itself to applying the ‘Market Access’ and ‘National Treatment’ provisions of GATS without limitation with respect to Commercial Presence, i.e. the establishment of permanent business presence in South Africa, which would encompass for example the founding branch offices in South Africa. Furthermore, it committed itself to apply the ‘Market Access’ provisions of GATS with respect to natural persons in South Africa provided such persons are intra-company transferees<sup>12</sup>.

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<sup>3</sup> A comprehensive analyses of the application of GATS to legal services can for example be found in Laurel S. Terry, ‘GATS’ Applicability to Transnational Lawyering and its Potential Impact on US State Regulation of Lawyers’, 34 *Vanderbilt J. of Transnational Law* 989 (2001) as revised 35 *Vanderbilt J. of Transnational Law* 1387 (2002) and Laurel S. Terry, ‘GATS General Agreement on Trade in Services, A Handbook for International Bar Association Member Bars’. See also Sydney M. Cone III, ‘Legal Services in the Doha Round, *Journal of World Trade Law*’, Volume 37, No. 1, pp. 29 – 47, 2003

<sup>4</sup> Article II GATS

<sup>5</sup> Article II (2) GATS

<sup>6</sup> Article V GATS

<sup>7</sup> Article III GATS

<sup>8</sup> Article VI GATS

<sup>9</sup> Article XVI GATS

<sup>10</sup> Article XVII GATS

<sup>11</sup> Article VI (1), VI (3), VI (5) and VI (6) GATS

<sup>12</sup> South Africa’s schedule of specific commitments defines them to include Professionals–natural persons who are engaged, as part of a services contract negotiated by a juridical person of another Member in the activity at a professional level in a profession set out in Part II (this includes Legal Services since they are set out in said Part II), provided such persons possess the necessary academic credentials and professional qualifications, which have been duly recognised, where appropriate, by the professional association in South Africa.

The consequence of South Africa's specific commitments is that it has, *inter alia*, to ensure that regulatory measures, including admission, are administered in a reasonable, objective, and impartial manner<sup>13</sup>. Furthermore, in the absence of the relevant discipline contemplated in Article VI (4) GATS, it has to ensure that it does not apply licensing and qualification requirements that nullify or impair its specific commitments in a manner which does not comply with the following criteria: (a) 'that qualification requirements are based on objective and transparent criteria', or (b) 'are not more burdensome than necessary to ensure the quality of the service' **and** (c) 'could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made'<sup>14</sup>. Furthermore, it is obliged to 'provide for adequate procedures to verify the competence of professionals of any other Member'<sup>15</sup>.

### III. South African law

Does South African law concerning the admission of attorneys comply with the obligations it has to meet under GATS? At present the Law Societies in South Africa are still following the so-called 're-qualification policy' in respect of attorneys hailing from foreign jurisdictions who wish to practise in South Africa. This policy is entrenched in the Attorneys Act<sup>16</sup>. In terms of section 15(1)(b)(iii) of the Attorneys Act it is in principle necessary that one holds a South African LL.B. degree in order to be admitted to practise as an attorney in South Africa<sup>17</sup>. Furthermore, the said Act makes permanent residency or citizenship prerequisite as well as the passing of the South African Attorney's Admission Examination prerequisite to the admission as attorney in South Africa. It is submitted that the so-called 're-qualification policy' as implemented through the Attorney's Act contravenes South Africa's obligations under Article VI (5) in that the requirement to obtain a South African LLB degree is more burdensome than necessary to ensure the quality of legal service in South Africa and that it could not have reasonably expected of South Africa at the time when the commitment in the legal sector was made.

However, there are certain exceptions to this rule. Firstly, the Attorneys Act itself relaxes admission requirements with regard to candidates hailing from certain designated countries. In terms of section 13(1) of the Attorneys Act certain candidates from countries which have been designated by regulation promulgated under the Attorneys Act do not have to serve as candidate attorneys and can be exempted from the need to obtain a South African LLB degree as well as from the need to sit for the South African Attorneys admission examination<sup>18</sup>. At present such regulations have been promulgated

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<sup>13</sup> Article VI (1) GATS

<sup>14</sup> Article VI (5) GATS

<sup>15</sup> Article VI (6) GATS

<sup>16</sup> Attorneys Act, Act 53 of 1979

<sup>17</sup> Only persons satisfying the following requirements are eligible to be admitted as attorneys:

(15)(1)(b)(iii) (aa) has satisfied all the requirements for the degree referred to in paragraph (a) of section 2 (1), or for the degrees referred to in paragraph (aA) of that section, after pursuing for that degree or degrees a course of study referred to in paragraph (a) or (aA) of that section, as the case may be; or

(bb) has satisfied all the requirements for a degree or degrees referred to in paragraph (aB) of section 2 (1) in respect of which a certification in accordance with that paragraph has been done; or

(cc) has previously been admitted as an advocate.

<sup>18</sup> (13)(1) Any person lawfully admitted to the Republic for permanent residence therein who is ordinarily resident in the Republic and who has been admitted and enrolled as a solicitor or attorney of the supreme or high court of any country or territory which has been approved for the purposes of this subsection by regulation made under section 81(1)(a)-

(a) shall-

with respect to candidates hailing inter alia from Zimbabwe and Namibia<sup>19</sup>. Other isolated relaxation of admission requirements to the South African legal profession under the Attorneys Act are the designations of Nigeria<sup>20</sup> and the Kingdom of Lesotho<sup>21</sup> as countries whose nationals may enter into contracts of articles of clerkship for a period of two years provided that their LLB degree has been certified to be equivalent to the South African LLB qualification by a South African university. With regard to certain candidates from the above countries the residency, degree and admission requirements have been further relaxed in terms of other provisions of the Attorneys Act. Furthermore, admitted attorneys from the Kingdom of Lesotho may apply for admission to practise in South Africa under section 17 of the Attorneys Act<sup>22</sup>. The result of those incoherent provisions is that nationals of the respective countries are being awarded preferential treatment compared to candidates from other GATS member states. It is submitted that this is problematic in the light of South Africa's obligation to accord all other GATS Member states most Favoured Nation treatment.

Secondly, in terms of the now moribund Recognition of Foreign Legal Qualifications and Practice Act<sup>23</sup> persons of South African origin who were expatriated pursuant to circumstances related to the *apartheid* system in South Africa and who obtained legal qualifications while living in exile before 1994 were able gain admission to the South African attorney's profession without having to re – qualify in South Africa. This legislation has been repealed after its purpose had been fulfilled. The said legislation could also not be easily reconciled with South Africa's obligations under GATS. It is an example of discriminatory legislation which was arguably justified by sound policy objectives. It could have been brought in line with South Africa's GATS obligations had corresponding MFN exemptions been notified when South Africa signed GATS in 1994.

Reform of the rule pertaining to the admission of foreign legal practitioners has been mooted for a long time. The Legal Practice Bill of 2002<sup>24</sup> provides for a new approach to the admission of qualified legal practitioners from other jurisdictions in South Africa. This bill provides that a panel for the recognition of legal qualifications shall be established<sup>25</sup>. It is to be composed of three persons appointed by the Minister of Justice, two of whom must be legal academics, and two persons who are

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(i) if he has practised for at least 5 years as a solicitor or an attorney, as the case may be, in the country or territory in which he has been so admitted and enrolled and belongs to a class of persons (if any) which has been designated by any such regulation; or

(ii) if the country or territory referred to has been designated for the purposes of this subparagraph by regulation made under section 81 (1) (a), without his having practised as contemplated in subparagraph (i), and if he belongs to a class of persons (if any) which has been designated by any such regulation,

be exempted from service under articles;

(b) shall, if a university in South Africa which has a law faculty has certified that an examination which he or she has passed in any country or territory is, in so far as it relates to the syllabus of instruction and the standard of training, together with a supplementary examination (if any) required by that university, the requirements of which have been satisfied by that person, equivalent or superior to the examination which is required for the degree mentioned in section 2 (1) (a) be exempted from satisfying the requirements for the degree mentioned in the said section 2 (1) (a);

(c) may, by regulation made under section 81 (1) (c), be exempted from the requirement to pass any examination referred to in section 14 (1) (a), (b) or (c) or any part thereof.

<sup>19</sup> Regulation No. R. 588 under section 81 of the Attorneys Act, 1979 dated 2 April 1993

<sup>20</sup> Government Notice 1410 of Government Gazette 21927 dated 22/12/2000

<sup>21</sup> Regulation No. R. 334 dated 28/2/2003

<sup>22</sup> Regulation R. 1350 dated 30/6/1989 and Regulation R. 1813 dated 1/10/1993

<sup>23</sup> Recognition of Foreign Legal Qualifications and Practice Act, Act 114 of 1993

<sup>24</sup> Final draft prepared by the Law Society of South Africa

<sup>25</sup> Section 7 of the Legal Practice Bill

appointed by the National Legal Practice Council<sup>26</sup>. The said panel is tasked with the following functions:

- (a) developing criteria for recognising foreign and other legal qualifications;
- (b) developing criteria for granting permanent or temporary exemptions; and,
- (c) considering applications for exemptions or amendments to the terms of any exemption and making recommendations on the merits of such applications.<sup>27</sup>

The Minister of Justice may in consultation with the said panel determine categories of persons who may be exempted from the citizenship and residency requirement or the qualification and training requirements for the following purposes:

- (a) for the purposes of giving effect to reciprocal inter-governmental agreements regulating such matters; or
- (b) if it is in the public interest to permit the person or category of person concerned to expeditiously commence practising as a legal practitioner by virtue of his or her academic qualifications or professional experience.<sup>28</sup>

It would also fall upon the Minister of Justice to determine the procedure under which the said exemptions could be applied for<sup>29</sup>. The adoption of the Legal Practice Bill is in spite of repeated promises from government<sup>30</sup> still being delayed. The Law Society of South Africa has in November 2007<sup>31</sup> in its draft of the Legal Services Sector Charter called for the finalisation of the Legal Practice Bill in the following terms:

- 3.2 ii) In view of the current disparate requirements affecting access to the legal profession and governance of the legal profession, the Legal Practice Bill must be completed, approved and promulgated.

This call has yet to be responded to by the government. It is hoped that a new Legal Practice Act based on the Legal Practice Bill, 2002 will enter into force in the near future. It would have the potential to provide equal access to foreign practitioners subject to rules which have been developed by the government in consultation with the legal profession. Unfortunately, especially clause 6 of the legal practice Bill is worded in a manner which does not preclude conflict with South Africa's GATS obligations. It is submitted that it would be desirable that the wording would be amended to require the contemplated reciprocal inter-governmental agreements to be 'Mutual Recognition Agreements'

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<sup>26</sup> This Council is to be established in terms of Section 62 (1) of Legal Practise Bill and would be dominated by legal practitioners. It however also comprises representatives of academia and the users of legal services. Section 63 of the Legal Practise Bill sets out the composition of the said Council.

<sup>27</sup> Section 7 (2) of the Legal Practice Bill

<sup>28</sup> Section 6 (2) of the Legal Practice Bill

<sup>29</sup> Section 6 (3) of the Legal Practice Bill

<sup>30</sup> For example Barbara Whittle, 'Justice DG urges the profession to debate Charter, Bill and liberalisation of legal services', De Rebus March 2006

<sup>31</sup> Press Release of the Law Society of South Africa, website of the Law Society of South Africa dated 30 November 2006, available at <http://www.lssa.org.za/LinkClick.aspx?link=LSC+-+4+DECEMBER+2007.doc&tabid=53&mid=412>

notified under Article VII GATS or, in the alternative, form part of Regional Integration as contemplated by Article V GATS.

#### **IV. Concluding Remarks**

Unfortunately, there appears to be a conflict between the domestic law of South Africa regulating the admission of foreign lawyers and its obligations under GATS. Furthermore, the South African legislation is at the moment protectionist and makes it very difficult for foreign attorneys to get admitted as South African legal practitioners, to an extent which may, in the writer's opinion, infringe South Africa's obligations under Article 6(5) GATS. It is hoped that the Legal Practice Bill, which already in its present format constitutes a major step in the right direction, will be amended before its promulgation to prevent any such clashes in the future. In order to become progressive, the Legal Practice Bill has to be reconciled with GATS to such an extent that it incorporates the relevant GATS provisions into domestic law.

GATS is not a static document and at present negotiations are ongoing both with respect to the development of disciplines covering legal services and with regard to further specific commitments<sup>32</sup>. South Africa has been requested by Australia, Canada, European Community, Japan, New Zealand to liberalise access to the legal profession in South Africa and to make further specific commitments concerning Legal Services under GATS.<sup>33</sup> It is hoped that South Africa will not only fully comply with its existing obligations under GATS in the future but that it will also respond to the multilateral requests and make further commitments and thereby help to facilitate the globalisation of trade in legal services.

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<sup>32</sup> E. Du Plessis, 'WTO/GATS and SADC: Hong Kong and Beyond, Presentation made at SADC Lawyers' Association Annual Conference and General Meeting, Birchwood Conference Centre, 23 – 26 November 2006, available at <http://www.lssa.org.za/Portals/0/SADC%20LAWYERS%20ASSOCIATION%20-%20WTO-GATS%20AND%20SADC%20HONG%20KONG%20AND%20BEYOND%20%2023-25%20November%202006.pdf>

<sup>33</sup> E. Du Plessis, Seeking a balance in the liberalisation of legal services, De Rebus October 2006

