1. **BACKGROUND**

Since 2009 the LSSA has been considering the broad issue of the liberalisation of the cross-border delivery of legal services. The LSSA has recognised the complexities and potential risks to the legal profession in permitting the cross-border delivery of legal services by foreign lawyers *without putting in place appropriate regulatory and monitoring systems*. These include the risk to clients in permitting free access by foreign lawyers without the necessary knowledge about the law and legal systems of the country of intended practice (the host country) and the risk of absconding foreign lawyers. There is need for foreign lawyers to have the necessary knowledge and training, and to be obliged to adhere to the disciplinary authority of the regulatory bodies in the host country.

2. **CROSS-BORDER PRACTICE RIGHTS: SADC PROTOCOL**

In 2011 the LSSA appointed a special Task Team to consider and assess the potential legal complexities and practical implications to be expected if cross-border practice rights were to be introduced within the SADC region. The implications on regional level as well as on national level were considered, as well as the implications of implementation.

2.1 Regional level

South Africa is a signatory in April 1994 of the founding instrument which establishes the World Trade Organisation (WTO) and has thus also acceded to the General Trade in Services (GATS) Agreement with effect from 1 January 1995. The GATS Agreement contains a ‘Most-Favoured Nation Treatment’ principle, which means that a GATS member country shall accord immediately and unconditionally to service suppliers of any other GATS member country treatment no less favourable than it accords to service suppliers from any other country.

However, the GATS Agreement does give recognition to regional agreements, such as the SADC Agreement, which aims to facilitate and liberalise trade in services between the member countries of such region. If cross-border practising rights are granted to lawyers within the context of such a regional agreement, the obligation of the ‘Most-Favoured Nation Treatment’ principle does not apply. Practising rights may thus be granted to legal practitioners from other SADC countries without opening the door for lawyers from other GATS member countries to claim similar concessions.

To determine whether the granting of certain rights will fall within the principles of a regional organisation as contemplated in GATS, i.e. so as to be exempted from the ‘Most-Favoured Nation Treatment’ principle, it will be necessary to determine the extent and ambit of the practising rights to be afforded to practitioners from other SADC countries, including –
2.1 Whether foreign practising rights

- whether foreign lawyers would be allowed to provide services in all legal disciplines and practice areas in all of the SADC countries;
- whether foreign lawyers would be allowed to use all modes of service delivery in all of the SADC countries, i.e. also personal presence, commercial presence (setting up an office);
- whether such practising rights would be reciprocal rights.

2.2 National level

In order to structure and define a fully integrated and homogeneous practice system within the entire SADC region, it will be necessary to investigate the national regimes and assess the manner in which these may be harmonised and ultimately integrated, i.e. –

- the different systems of normative and regulatory rules applicable to legal practice within the different countries (i.e. their equivalent to the South African Legal Practice Act and the Code of Conduct for Legal Practitioners), e.g. as regards trust accounts and disciplinary regimes. A system of cross-border practice rights should not erode or negate the systems of regulatory control in place in individual SADC countries. It will be essential to define a system which will enable law societies to retain an appropriate level of regulatory and disciplinary control over practitioners from other countries.
- the academic qualifications required for legal practice in the different countries (so as to determine whether these would be substantially equivalent to the qualifications in the host country);
- the practical legal training (PLT) requirements, and the admission requirements in the different countries (to assess their similarity). A cross-border practice system should incorporate appropriate mechanisms for accreditation of legal qualifications and practical legal training, and for dealing with other admission requirements such as citizenship.
- the insurance cover regime.

2.3 Implementation

Once the similarity and compatibility of the different country regimes have been assessed, it will be necessary to formulate an implementation plan and mechanism. It is difficult to see that a simple opening up of legal practice in all of the countries to all practitioners will work. It will be necessary to create a framework that will have to address several issues, such as –
• whether practitioners of other countries will have to be ‘admitted’ or at least be placed on a practitioners’ roll in the country of intended practice (the host country);

• whether practitioners will have to become ‘foreign members’ of the law society of the host country;

• whether a local practice address (i.e. a physical office presence) will be required;

• whether foreign practitioners will be integrated into, and covered by, the fidelity cover system of the host country, in respect of local transactions only or all transactions;

• whether foreign practitioners will be granted practice rights – and appearance rights – in the courts of the host country;

• whether foreign practitioners will be subject to the regulatory and disciplinary authority of the law societies in the host countries.

The following aspects will be relevant to the granting of practising rights within the SADC region, and it will be important for appropriate legislative provisions or at least regulatory provisions to be enacted to provide for the following:

(a) reciprocal recognition of law degrees;

(b) reciprocal recognition of practical vocational training or equivalent practical training and/or experience;

(c) reciprocal recognition of admission examination or admission criteria;

(d) uniform systems of fidelity cover. This is a matter of primary importance and the position of the Legal Practitioners’ Fidelity Fund in South Africa and similar fidelity cover systems in other countries, as well as the equally important issue of professional indemnity insurance should be carefully considered;

(e) uniform systems regarding requirements for citizenship, residency, commercial (office) presence;

(f) uniform rules as regards fields of practice.
3. **SADC PROTOCOL ON TRADE IN SERVICES (PTIS) AND PROTOCOL ON EDUCATION AND TRAINING (SPET)**

There are two SADC Protocols, namely the PTIS and the SPET, that provide for mutual recognition of qualifications in the SADC region.

These Protocols promote services sectors in respect of which progressive intra-regional liberalisation of trade in services is to take place. Until now, legal services was not a priority sector for liberalisation. The LSSA however understands that the SADC Secretariat has been directed to initiate work on the mutual recognition of qualifications and other related matters. This may be done by way of Mutual Recognition Agreements (MRA), to allow for a professional qualification in one jurisdiction to be recognised in another jurisdiction. The LSSA will provide input to the Department of Trade and Industry (as the Department responsible for GATS) and the Department of Justice and Constitutional Development (as the Department responsible for the legal profession) so that the implications relating to cross-border practice rights are taken into consideration.
Annexure A

Cross border Trade

At the 2002 SADCLA AGM a position paper was tabled for the development of Cross Border Trade in the SADC region. Ironically it was commissioned from a professor at Pretoria University at the behest of the SADCLA.

At the time the SADC protocol was being developed for free trade in the zone and a multitude of other multilateral protocols.

In addition, during the same time GATS was being addressed by various countries across the world including our continent. This was the initial multinational effort to address the growing importance of services as a subject of international trade and to add services to the menu of services for negotiation as part of the process of progressive liberalisation of trade.

As a legal profession South Africa adopted the IBA principle that “its role in facilitating the administration of and guaranteeing access to justice and the upholding of the rule of law” and its duty to observe the core principles of the profession.

That “the preservation an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society” and that “any steps taken with a view to deregulating the legal profession should respect and observe” those core principles.

The position was similarly adopted by other countries on the continent.

This allowed countries in the SADC region to consider self-preservation of work but at the same time thinking that there might be opportunities for additional work across the border. The Legal profession largely therefore hid behind this same thinking and protected there work, which was not in the interest of the region and the continent and with hindsight if we are honest was prejudicial to the profession which suffered “narrow confined thinking,” despite what we profess to ourselves and our fellow brothers and sisters in the profession in our region.

The SADC regional economic bloc afforded opportunity for the legal profession to have effectively implemented cross border trade in legal services but a lack of will and commitment by the member states and the legal profession did not allow this to be implemented.

GATS¹

The General Agreement on Trade Services (GATS) is a World Trade Organization agreement to provide legally enforceable rules covering all international trade services and investment in the service sector. (previously only goods were part of multilateral and other types of agreements.

Attached to the framework agreement are annexes dealing with rules for specific sectors (movement of natural persons, legal services, telecommunications, etc.). The agreement also provides for exceptions to the principles of national treatment and most-favoured nation treatment

¹ IBA Guide on GATS
Most of our country’s trade representatives are negotiating about liberalisation of the conditions under which foreign lawyers may practice in that WTO Member State. These negotiators are often not lawyers besides direct trade-offs, legal services may be “bundled” or swapped as part of a deal involving other services.

Some of the key WTO principles are:

- That Most favoured Nations (MFN’s) status between countries must be offered to WTO member states.
- That National legislation cannot be used as a rationale to hinder the implementation of trade in services (it is a no brainer that sectors will hide behind national protectionism mechanisms)
- There must be reciprocal benefits and arrangements on no less favourable basis.

Incidentally on the 31 July 2019 the LSSA received via the SA Department of Trade and Industry a copy of the SADC Protocol on Trade in Services for comment and input and this has not been considered, other Bar associations in SADCLA members states have also received similar requests.

“The Committee of Minister of Trade (CMT) at their 30th Meeting held on 23 July 2018, in Pretoria, South Africa directed the Secretariat to initiate work on the mutual recognition of qualifications and other relevant matters in priority sectors for discussion in the TNF-Services in a manner consistent with the regional qualifications framework (see decision 3(ii)(a)). The CMT decision is in line with Article 7(1) of the SADC Protocol on Trade in Services (PTIS), which requires “TNF-Services to establish necessary steps for the negotiation of an agreement providing for the mutual recognition of requirements, qualifications, licences and other regulations, for the purpose of the fulfilment, in whole or in part, by service suppliers of the criteria applied by State Parties for the authorisation, licensing, operation and certification of service suppliers and, in particular, professional services”. Also, Article 7(2) of PTIS states that in the development of such an agreement, and any other possible arrangements or initiatives, account shall be taken of relevant processes and mechanisms under other SADC Protocols.

Taking into account the CMT decision, this paper has been prepared by the Secretariat to guide TNF-Services in the development of Mutual Recognition Agreements (MRAs) for professional services in SADC.”

This is an opportunity for the SADC Lawyers Association member institutions to commit themselves to actively pursuing the cross-border trade and practice rights and engage with their respective governments.
Liberalisation of Trade

As a result of global business trade there is an increased demand for multi-jurisdictional legal services. Most foreign lawyers are actively and almost exclusively engaging in consultant services in the facilitation of transnational commercial and financial transactions. They are not interested in more traditional legal services offered in the host country. Their focus is on home country, third country international law globally.

This is generally facilitated by Free Trade Agreements (FTA’s). These sometimes are included in additional WTO commitments under GATS but are generally contracted outside of GATS as a discretionary arrangement. Some include provisions on regulatory cooperation in professional services including licensing etc. in the form of Mutual Recognition agreements.