

Legal Framework of Conditions with Respect to International Surveying Activities

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ABSTRACT

Being a surveyor is not only an economical and a technical profession. The profession is also subject to State legislation for many reasons. However, State legislation is itself, subject to international rules. In the following presentation we try to show how European and worldwide limitations (by way of EC contracts and WTO, GATS respectively) are imposed to the legislations of the states. These limits are especially important when the surveyor starts to do business internationally.

ZUSAMMENFASSUNG

Vermesser zu sein, ist nicht nur eine wirtschaftliche Tätigkeit. Diese Tätigkeit ist auch aus verschiedenen Gründen der staatlichen Rechtssetzung unterworfen. Allerdings ist die staatliche Regelungsgewalt ihrerseits internationalen Schranken unterworfen. Es geht nun im nachfolgenden Beitrag darum aufzuzeigen, inwiefern weltweit (durch die WTO bzw. durch den GATS) und europaweit (durch die Verträge der Europäischen Gemeinschaften) der staatlichen Regelungsgewalt Schranken gesetzt werden. Diese Schranken kommen vor allem dann zum Tragen, wenn der Vermesser grenzüberschreitend tätig wird.

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1. QUESTION TO BE EXAMINED

If a surveyor as an individual or a surveyor's office as a legal entity (both hereinafter referred to simply as "the surveyor") decides to carry out *work abroad*, he will find himself confronted with a wide variety of legal regulations which will often not even allow him to take up any activities abroad. In this way surveyors are prevented from providing surveying services at an international level. Examples of such national state requirements are for instance:

- Nationality stipulation by the host country
- Business domicile in the host country
- Education which can only be obtained in the host country
- Passing an examination in the host country
- Preferential treatment of surveyors from certain countries.

These conditions imposed by the state are often aimed directly or indirectly at making it impossible for foreign competitors to gain *access to the domestic market for surveying services* and at setting up a protective barrier for the national market. This applies primarily to the field of official surveying (ordnance survey), i.e. to the creation of a land information system which is to be established in the "public interest".

The question, of course, immediately arises as to whether such purely national regulations are admissible at all or whether there is not an *international legal framework of conditions* which excludes and nullifies national rules that only serve the purpose of fending off foreign competition but have no other relevant function. There is in fact a tendency towards an international legal framework of conditions which is intended – among other things – to promote the cross-border provision of surveying services. These tendencies will be presented below, using the example of the General Agreement on Trade in Services (GATS) and the Treaty Establishing the European Economic Community.

2. RULES OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

2.1 General Agreement on Trade in Services (GATS)

The General Agreement on Trade in Services (GATS) was entered into as Annex 1 C to the Marrakech Agreement establishing the World Trade Organization (WTO) between 12 and 15 April 1994 in Marrakech, Morocco. This Agreement entered into force on 1 January 1995 in most countries. The General Agreement on Trade in Services (GATS) reflects the growing *importance of international trade in services to the global economy* in general and to

international trade in particular. Until 1 January 1995 the individual states were largely free to restrict access to their services markets. The GATS broke the ground for opening up markets to a larger extent and represents the foundation stone for better protection under international law against discrimination and for greater legal consistency in international trade in services.

All members of the WTO are automatically also *members of the GATS*. In substantive terms the GATS applies to *governmental regulations and measures* which concern services in general and all forms of international trade in services in particular (Art. I.1 and I.2 GATS). The only services which are excluded are any services performed while exercising sovereign power, i.e. not for any commercial purposes or in competition with one or several suppliers of services (Art. I.3 GATS).

Since surveying is a typical service (similar to the professions such as lawyers, doctors, accountants, architects, engineers, etc.), GATS also creates legal restrictions in respect of governmental regulations concerning surveying work. In this case it is primarily a question of state rules which act as an impediment to or even prevent the supply of surveying services by persons who travel abroad for a limited period of time for this purpose (movement of persons in accordance with Art. I.2 a GATS).

2.2 The Key Principles of GATS

2.2.1 The Principle of the Most-Favoured Nation Treatment

The GATS is based on the *unconditional obligation to give Most-Favoured Nation Treatment* (Art. II GATS). This constitutes an obligation on the part of the member states which applies unconditionally when the GATS comes into effect. This obligation fundamentally applies as soon as the GATS has been signed. If a foreign supplier of services is admitted in the territory of a member of the WTO, then this country must in accordance with the principle of the Most Favoured Nation Treatment likewise accept the same type of suppliers of services and the same type of services from all other countries which are members of the WTO. This treatment must be accorded immediately and unconditionally. Moreover, it is of no consequence whether preferential treatment is accorded on the basis of an international treaty, an autonomous act of legislation in the country in question or simply as a matter of standing practice on the part of authorities. This principle *guarantees that the members of individual foreign contracting states are afforded equal treatment*. Exceptions are only possible in regions which are close to the border between two countries. Furthermore, at the time when the GATS was negotiated it was possible to make a non-recurring exception and exempt certain governmental measures from the principle of the Most Favoured Nation Treatment (the exemptions which were included are stated in special *country lists*; these lists are final).

It should, however, be noted that only a limited obligation to give Most Favoured Nation Treatment exists with regard to the *mutual recognition of foreign qualification requirements* such as may be stipulated in national requirements for admission. In this field there is no obligation to afford citizens equal treatment. Instead the only obligation is to conduct

negotiations with member states regarding the recognition of comparable qualification requirements (Art. VII GATS).

2.2.2 Free Market Access and the Principle of National Treatment

The obligation to allow free market access and ensure national treatment only applies to a country if the service in question for which access to the market or national treatment is demanded is included in a special list (*Schedule of Specific Commitment*). However, if such service activity has been included in this schedule and no reservation was stipulated, then the country in question is obliged to abstain from *barriers to market access* or from imposing limitations in terms of numbers (Art. XVI GATS). Similarly this country is obliged to *refrain from affording worse treatment* to foreign suppliers of services in the sectors listed in the schedule than to comparable domestic suppliers (Art. XVII GATS). The applicable criterion here is equality in respect of the conditions of competition (*de facto*) and not the formal equality of treatment (*de jure*). The principle of national treatment *ensures that a member state's own nationals receive the same treatment as the nationals of other foreign contracting states*.

2.2.3 The Principle of a Progressively Higher Level of Liberalisation

Both the country lists (exemptions from the Most Favoured Nation Principle) as well as the schedules of specific commitments (scope of free access to the market and national treatment) have to be periodically reviewed and adjusted by the member states in future negotiations (*Obligation to Launch Successive Rounds of Negotiations* Art. XIX GATS). These negotiations are aimed at *liberalisation*, i.e. the removal of barriers to market access and the elimination of measures which impose less favourable conditions of competition on foreign suppliers of services in comparison to domestic suppliers.

2.3 The Enforcement of the Rules of GATS

The crux of the provisions contained in the GATS is the fact that scarcely any country stipulates that these provisions are to have a *direct effect*. This means that an individual supplier of services - for example in any dispute regarding his admission as an official surveyor - cannot invoke a violation of the provisions contained in GATS. As far as that is concerned, the GATS provisions only comprise obligations under international law, i.e. it is only the individual member states which are bound by them. If member states do not comply with the GATS provisions, only sanctions under international law are possible. At least an Understanding on Rules and Procedures Governing the Settlement of Disputes was agreed upon within the WTO which may be invoked by member states in connection with violations of GATS provisions (Art. XXIII GATS).

3. RULES OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

3.1 The Treaty Establishing the European Community

The Treaty establishing the European Community (originally the Treaty establishing the European Economic Community) was entered into in 1957. The goal was to *create a large, single market encompassing European countries*. The treaty has been amended several times since then (Single European Act, came into force on 1 July 1987; the Maastricht Treaty, came into force on 1 November 1993; the Treaty of Amsterdam, came into force on 1 May 1997; the Treaty of Nice, the ratification of which has still not been completed).

3.2 Freedom to Provide Services

3.2.1 Fundamental Freedoms

In the Treaty establishing the European Community the rules concerning the freedom of movement of various "economic factors" have been standardised. It is the goal of these fundamental freedoms to guarantee a single standard European market for these factors (called the single or joint market). The Treaty contains specific regulations regarding the *free movement of goods* (Art. 23 ff. Treaty establishing the European Community), the *free movement of persons* with respect to the aspects of workers' freedom of movement (Art. 39 ff. loc.cit.), their right to settle anywhere (Art. 43 ff. loc.cit.) and free movement of services (Art. 49 ff. loc. cit.) as well as lastly the *free movement of capital and money payments* (Art. 56 ff. loc.cit.).

3.2.2 The Free Movement of Services

For the surveyor the main focus is on the *free movement of services* as was the case under the law of the WTO. Art. 49 TREATY ESTABLISHING THE EUROPEAN COMMUNITY guarantees the free movement of services within the territory of the European Communities. This concerns the guarantee of freedom for the provider of services: he should be able to carry out his activities whenever he wants in another member state for a limited period of time. Services mean *activities carried out on a self-employed basis*; this is as opposed to workers who perform their activities within a relationship of dependency. In this connection this in particular applies to the activities of surveyors who regularly carry out their work on a self-employed basis and travel to another member state to perform their activities, to obtain new orders for work there and to execute the new orders thus obtained.

3.2.3 Ban on Restrictions

The free movement of services is mainly interpreted as a *ban on restrictions*. Originally it was primarily *discrimination on the basis of nationality* which was banned. In addition to which restrictions produced by measures of an indiscriminate nature which were imposed by the member state's legislation were banned in general, i.e. in general terms measures which affect citizens of the legislative member state in the same way as citizens of other member

states. The main emphasis is on *keeping access to the market open* for all citizens of member states of the European Community. This market access should not be obstructed or impeded by government restrictions.

3.2.4 The Limitations of Free Movement of Services

The free movement of services does not, of course, apply in absolute terms in the territory of the European Communities. Limitations are possible if they are in the *public interest* and are *reasonable*. The following are recognised as being public interests: reasons of public order, safety or health. Such limitations are hardly significant with regard to surveying.

Limitations are also possible if a member state deems the activity in question to constitute the exercise of public power. The concept of "exercise of public power" has, however, been limited by the European Court of Justice to its core meaning of government activity. This applies mainly to activities for which a special relationship of loyalty to the state is required. Only such activities should be reserved for the state's own citizens. This stipulation can hardly be applied to a surveyor's work.

3.2.5 Summary

Viewed overall working as a surveyor in Europe is the subject of a comprehensive guarantee. Limitations or restrictions in respect of such work imposed by a member state's regulations are only seldom admissible.

3.3 Enforcing Free Movement of Services

In contrast to the provisions contained in the GATS the provisions concerning free movement of service are *directly and immediately applicable*. The individual citizen may directly invoke Art. 49 ff. Treaty establishing the European Community. If a national regulation is at variance with the free movement of services, it may moreover not be applied in a specific case. Consequently, in the European Communities the individual also enjoys a comprehensive guarantee of possibilities for remedies in respect of legal protection.

4. SUMMARY

If we now examine the above-mentioned limitations on international activities on the part of surveyors in light of their legality, then the following can be stated:

Nationality stipulation: In global commerce such requirements are to a large extent at variance with the principle of national treatment incorporated in the GATS and the ban on discrimination based on nationality anchored in the Treaty establishing the European Community. These requirements are however also in the process of disappearing.

Requirement of a business domicile in the host country: This requirement mostly constitutes a violation of the guarantee of free access to the market within the meaning of the GATS. Moreover it violates the free movement of services as defined in the Treaty establishing the

European Community. Exceptions invoking public interests are scarcely conceivable in connection with the carrying out of surveying activities. Such requirements mostly constitute - inadmissible – hidden competitive restrictions to protect domestic providers of services.

Educational requirement which can only be obtained in the host country: Insofar as special requirements are necessary based on particular features of the national land information system, then presumably no objection can be raised to having to produce proof of such special knowledge. The possession of such know-how can also conceivably be examined in a licensing procedure. However, the special characteristics of the national land information system must be proven in detail. Furthermore, proof of the necessary knowledge should not be demanded in all too narrow-minded a manner: In most cases it would probably be going too far to demand qualifications from a university in the host country. Besides which, as the land information systems in various countries are increasingly harmonised, such requirements should become less and less admissible.

Passing an examination in the host country: To the extent that an examination appears necessary due to the special requirements of the national land information systems, no objection can be raised to this stipulation either. Nonetheless particular attention should be paid to verifying that the examination is limited to these special features of the national land information system and that it is not used as a hidden barrier to market access.

Preferential treatment of surveyors from certain countries: This limitation clearly violates the principle of Most Favoured Nation Treatment as defined in the GATS. Within the limits of the Treaty establishing the European Community this requirement constitutes discrimination on the grounds of nationality which is not permissible.

The overall conclusion is that there is an *ever decreasing acceptance* of restrictions which apply to surveying work in the international supply of services while the individual state's discretionary powers are being significantly limited by international regulations. Official or government surveying is also particularly affected by this liberalisation. However, a noticeable continued tendency to protect purely national interests above all in the field of accounting/auditing as well as in other fields such as educational requirements should not be overlooked. It is almost possible to speak of a shift away from the original requirements based on nationality in the direction of subtler methods of enforcing government tendencies to block access to the market. In this connection an efficient international judiciary means of enforcement with a role similar to that of the European Court of Justice in Europe would be needed in order to remedy this situation.

BIOGRAPHICAL NOTES

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