

**A Series of Lectures by Adv. A.P. JOUBERT SC on
"TRANSNATIONAL COMMERCIAL PRACTICE"**

**A Personal Perspective of a practising South African Advocate and Professor
having spent a life at law.**

The set of lectures will, broadly speaking, cover the fields set out herein. The principles dealt with will be illustrated with examples, many of them culled from Joubert's own experience as an advocate. Hopefully, at least some of the topics will give rise to healthy debate amongst the students. Each of the 12 lectures is anticipated to last 2 hours, resulting in 24 hours of lecturing. Alternatively, I can present 8 lectures of 3 hours each.

[A] OUTLINE OF THE LECTURES

- [1] Development of law in Western Civilization** and the spread thereof throughout the world, will be considered and discussed. A perspective will be given on practising law in various parts of the world. The purpose of this first set of lectures is to impress upon students that they should not harbour exaggerated fears of the "foreignness" of the law of other countries, mostly due to so much commonality in the roots of their sources of law and to contextualize the differences amongst various legal systems.

To this end an understanding of the development of law in modern Western civilization is an imperative. Consequently, an overview will be given of the historical development of Roman law and its acceptance in what we now know as the **civil law systems** of Europe. The development of Roman law will be traced from its origins in the Republic, its development during the time of the emperors, culminating in the Corpus Iuris Civilis, the loss and rediscovery thereof by Irnerius in Bologna in 1100, the contributions of the Glossatores, Commentatores, Ultramontani and reception of Roman law into the law of Holland, France, Germany, Spain and elsewhere in Europe. An analysis will be given of the codifications in France and Germany; the influence of the French and German codes in South America, the Far East and elsewhere; mostly due to the obvious advantage of easy accessibility of a codified system of law.

An overview will be given of the spread of Roman Law influence in England, especially through the Universities of Oxford and Cambridge and the development of **English common law**. The contribution of English statutory law and international commercial practice during the time of her great imperialism will be discussed. English law and its accusatorial procedure and rules of evidence, in contrast to the inquisitorial procedure of civil law systems, will be discussed and a

perspective given on how the European Court of Justice and the mere existence of the European Union have effected both English common law and the civil law systems of Europe.

Living systems of Roman Law, that is to say where Roman Law still forms part of a country's common law, e.g. of Roman Dutch law in South Africa, will be analyzed and discussed.

The influence of the **Bill of Rights** of the United States of America and how it functions in the federal system making up the USA. The principle of rule of law and the influence and spread of a constitutional Bill of Rights will be analyzed and discussed. Particular emphasis will be placed on the South African Bill of Rights, how it is applied to influence the development of South African common law and to control executive excesses of the State, especially through constitutional protection ensuring fair administrative action.

[3 x lectures of 2 hours each]

- [2] The lectures will cover the influence of European Law in **Sub-Sahara Africa**, especially French Law, Portuguese Law, English Law, Roman-Dutch Law and Belgian Law. The influence of the Organisation for the Harmonization of Business Law in Africa ("OHADA") and Sharia Law will also be discussed.

The practice of law in the various countries and the **challenges that multinational companies face** in doing business in various African countries will be considered, especially in the field of mining, telecommunication and banking. Some time will be spent on the importance of AGOA, bi-lateral trade agreements between African countries and the existence of the South African customs union and the South African Development Community. Trade in natural resources and the tax issues, especially regarding transfer pricing, will be considered and discussed, also at the hand of case studies. The significance of transfer pricing for former colonial countries, including those in Africa, will be dealt with.

Burning socio-economic issues such as access to medicine, lack of education, high unemployment and agricultural sustainability will be considered, evaluating how statutory regulation assist or hamper resolution of these issues and their geo-political impact, including the sustainability of democracy, respect for the rule of law and independence of the judiciary.

[2 x lectures of 2 hours each]

- [3] The influence of the **World Trade Organisation** and its predecessors and the influence they have and had on international trade law and practice. An in depth analysis of tariff classification under the WTO will be given, including several case studies on how to deal with tariff classification in practice, in all its complexities. An analysis will be given of valuation for customs purposes and dumping under the WTO. Case studies will serve to illustrate how to deal with such matters in practice.

The case studies will, for the most part, be actual cases. In many of the cases adv. Joubert acted as counsel for one of the parties. Students will be given the advantage of not only reading the judgments in these matters, but also to consider the context of how they came about, the issues that were identified and how they were resolved, the prospective arguments that were abandoned or advanced, the structure of the court papers and the presentation of written argument.

[4 x lectures of 2 hours each]

- [4] The **Proper Structure and presentation** of legal documents will be discussed, also at the hand of examples and case studies. These lectures will deal with what amounts to **good (legal) English** and the best way to structure and present **pleadings, application papers, letters and heads of argument**.

The lectures will include topics such as the importance to first and foremost think through the issues in the case, before drafting – language follows the thought, not the other way round. The lectures will deal with the structure of sentences and paragraphs, the importance of short sentences, preference for the active rather than the passive tense, avoiding (where possible) long-winded sentences conjoining thoughts with “unless”, “provided”, semi-colons and the like, making it hard to establish the substance of the point raised.

In dealing with **heads of argument**, emphasis will be placed on how to make it easy for a judge to understand your point of view: a useful table of contents, an unelaborated chronology of facts, sensible numbering and effective spacing and typography and other related matters will be discussed and debated. So, too, the most effective way of dealing with principles culled from statutes, leading cases and academic learning. Some time will be spent on the skill of writing clearly and precisely, instead of vaguely and generally, and to have respect for the specific words and phrases used in statutes and contracts, rather than to rely on a general idea of what was written and intended.

Style to be avoided (or at least used sparingly) will be discussed – emotive comment, jargon and legalize, unfamiliar acronyms, longwinded sentences and verbiage, overuse of adjectives and hyperbole. Useful guidelines for good English will be considered. There are many, but to name a few: Avoid using a figure of

speech which you are used to seeing in print. Never use a long word where a short one will do. If it is possible to cut out a word, do so. Do not use a foreign phrase or a scientific word if an everyday English equivalent will do. These principles and pointers will be illustrated with examples and case studies.

Proper **management of documentation** that come up in the course of litigation will be considered. Attention will be given to matters such as chronology, the importance to be given to the source of documents, attention to documents not only for what they say, but also what they avoid to deal with, and much more.

[2 x lectures of 2 hours each]

- [5] A parting lecture will be given on the **“Big Picture” for Europe, the USA, Asia and the rest of the world**. This lecture will, by its very nature, largely be a rather personal perspective. The starting point will be the geo-political and trade metamorphosis of Europe over the past few centuries. This will lead to a discussion of Europe and the USA prior to and after World War II, the creation and development of instruments of international trade, e.g. the General Agreement on Tariffs and Trade, the International Monetary Fund, the World Bank and ultimately the World Trade Organisation, the Cold War and polarization of the world along ideological lines, the creation and enlarging of the European Union and influence of the Euro, the dismantling of the Iron Curtain and geo-political consequences thereof and the growing influence and economic importance of China and the rest of Asia. The cause and effect of the most recent international developments will be considered – the influx of Islamic refugees into Europe, the Greek banking crisis, destabilization of the Ukraine, Britain’s decision to exit the European Union, the election of president Trump and the military threat of North Korea and Iran.

The cumulative effect of all this will be considered. The main purpose of this lecture is to analyze cause and effect, to debate weight of issues and to obtain a balanced overall perspective on the future of international trade. The nature of these topics is also likely to give rise to lively debate in class.

[1 x lecture of 2 hours]

[B] REQUIRED READING

The required reading will be provided electronically at least two months in advance:

- [i] The Constitution of the Republic of South Africa, 1996. Chapter 2, the Bill of Rights.
 - [ii] South Africa's Promotion of Administrative Justice Act No 3 of 2000.
 - [iii] Trade Agreement between South Africa and Malawi. The implementation of this (fairly typical) trade agreement will be illustrated by reference to case law. Students are referred, in particular, to the provisions of article 6.
 - [iv] Case Studies on Tariff Classification: *Adcock Ingram Ltd v The Commissioner for Customs and Excise* (on the drafting of application papers) and *SA Breweries Ltd v Commissioner for SARS*, Case No 442/2017(SCA) on the drafting of heads of argument.
 - [v] South Africa's International Trade Administration Act No 71 of 2002.
 - [vi] A Case Study on Dumping: Report of International Trade Administration Commission on the alleged dumping of soda ash originating in or imported from the USA.
 - [vii] Hemmingway's *The Old Man and the Sea*.
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