

## The Advanced Intensive Program in Cross-Border Litigation and Arbitration

This practical and in-depth program will give you expert tips and winning strategies for resolving challenging cross-border disputes. Get the most up-to-date information on:

### Cross Border Litigation (Day One)

- Developments in the test for jurisdiction *Simpliciter*
- *Forum Non Conveniens*: making your most persuasive case
- Determining and proving the applicable law
- Enforcement of foreign judgements
- Gathering evidence across borders
- Managing class actions that cross borders

### International Arbitration (Day Two)

- Getting the arbitration agreement right
- Selecting the arbitral regime
- The role of the courts
- Arbitration advocacy
- Enforcement and recognition of arbitral awards

### Course Chairs

Jane Southren, Leners LLP

Sonia Bjorkquist, Osler Hoskin Harcourt LLP



### DATES & TIME

September 27 - 28, 2010

8:30 a.m. - 4:30 p.m. EDT/EST

### LOCATION

Osgoode Professional  
Development Centre

1 Dundas St. W., 26th Floor  
Toronto, ON

Webcast  
available



# The Advanced Intensive in Cross-Border Litigation and Arbitration

**Get the tools you need  
to successfully navigate  
challenging cross-border  
litigation issues**

It's no secret that business is increasingly international in scope. Even small and mid-size companies find themselves doing business with partners, suppliers, and customers in other jurisdictions, and large transactions routinely involve entities from around the globe. But as business increasingly crosses borders, so too do disputes. As a result, litigators are faced with many added layers of complications.

This *Osgoode Professional Development* program has been designed to give litigators the knowledge and strategic savvy to successfully handle complex cross-border files. The program recognizes that international arbitration has developed into a sophisticated practice in its own right, and counsel who want to provide top service to clients with international business need to be able to advise and represent their clients in all aspects of arbitration as well as litigation. On **Day One**, you'll hear about the latest on the courts' approach to determining jurisdiction over a case, how to challenge the forum, how to deal with complex evidence gathering across borders, and more. On **Day Two**, a series of top international arbitration experts will help you get the right arbitration clause in your agreements, deal with problematic clauses when faced with them, choose the best arbitration forum, and understand how to best utilize the arbitration process to maximize results for your client.

**For those who prefer, you can choose to attend either the cross-border litigation or the international arbitration sessions only. You'll hear from the very best litigators, arbitration counsel, and arbitrators, who will share tips and knowledge that can only be gained from experience.**

Don't miss this valuable opportunity to enhance your ability to handle cross-border disputes.

**Register now by visiting [www.osgoodepd.ca](http://www.osgoodepd.ca), calling 416.597.9724 or 1.888.923.3394, emailing [opd-registration@osgoode.yorku.ca](mailto:opd-registration@osgoode.yorku.ca) or faxing 416.597.9736.**

## Chairs

Jane Southren, Lerner LLP

Sonia Bjorkquist, Osler, Hoskin & Harcourt LLP

## Faculty

Sandra Barton, Heenan Blaikie LLP, Toronto

Bradley E. Berg, Blakes LLP, Toronto

J. Brian Casey, Baker & McKenzie LLP, Toronto

Kathryn I. Chalmers, Stikeman Elliott LLP, Toronto

Tina Cicchetti, Fasken Martineau DuMoulin LLP, Vancouver

Marc J. Goldstein, Marc J. Goldstein Litigation and Arbitration Chambers, New York

David R. Haigh, Q.C., Burnet, Duckworth & Palmer LLP, Calgary

John A.M. Judge, Stikeman Elliott LLP, Toronto

Michael W. Lacy, Barrister & Solicitor, Toronto

Daniel E. Laytin, Kirkland & Ellis LLP, Chicago

Andrew D. Little, Bennett Jones LLP, Toronto

Jim McCartney, McCartney ADR Inc., Calgary

Andrew McDougall, Perley-Robertson Hill & McDougall LLP, Ottawa

John Lorn McDougall, Q.C., Fraser Milner Casgrain LLP Toronto

Paul Michell, Lax O'Sullivan Scott LLP, Toronto

Andrew Morganti, Sutts Strosberg LLP, Windsor

Mike Peerless, Siskinds LLP, London, Ontario

Kathryn Podrebarac, Tough & Podrebarac LLP, Toronto

L. David Roebuck, Heenan Blaikie LLP, Toronto

Malcolm N. Ruby, Gowling Lafleur Henderson LLP, Toronto

Robyn M. Ryan Bell, Bennett Jones LLP, Toronto

Todd A. Seaver, Berman DeValerio, San Francisco

John A. Terry, Torys LLP, Toronto

Robert Torralbo, Blake, Cassels & Graydon LLP, Montréal

Janet Walker, Osgoode Hall Law School, Toronto

Robert Wisner, McMillan LLP, Toronto

# Agenda

## Day One: Cross-Border Litigation Monday, September 27, 2010

### 8:30 Welcome and Introduction from the Chairs

### 8:35 Contesting Forum: Developments in the Test for Jurisdiction *Simpliciter*

Professor Janet Walker, Osgoode Hall Law School, Toronto

Kathryn Podrebarac, Tough & Podrebarac LLP, Toronto

Contests about the proper jurisdiction to hear a matter are often the first and most fundamental issue in cross-border disputes. This session will review the state of the law, including some very recent developments in Ontario, and will provide guidance on how best to argue for or against jurisdiction.

- The *Muscutt* test revisited: *Van Breda*, *Bouch v. Penny*, and other case law developments
- Update on the current test for “real and substantial connection”
- What “connections” are critical – who’s connection to whom or what?
- What presumptions will now operate?
- The role of the Uniform Law Conference model CJPTA
- Provincial statutory schemes and their interaction with the common law
- The rise of “forum of necessity”: what is the role of this doctrine now?
- The relationship between the *forum non conveniens* test and real and substantial connection
- The concept of “order and fairness”, and its relationship to the real and substantial connection test
- How much residual discretion does the court have?
- What will most effectively influence a court on the real and substantial connection test?
- The role of foreseeability by the defendant
- Enforcement/non-enforcement of forum selection clauses in commercial agreements
- How does a forum selection clause interact with the real and substantial connection test?
  - the “strong cause” test
  - changes of circumstance
  - the “Italian torpedo” and other tactical consideration

### 9:50 Refreshment Break

### 10:05 *Forum Non Conveniens*: Making Your Most Persuasive Case

Bradley E. Berg, Blakes LLP, Toronto

Robyn M. Ryan Bell, Bennett Jones LLP, Toronto

In virtually all cases where jurisdiction is in issue, *forum non conveniens* will be argued in the alternative. The current test will be reviewed. In addition, since the test depends so critically on how the law applies to particular facts, this

session will also provide the opportunity to work with the presenters through some specific fact scenarios to solidify your understanding of how to identify the factors that are likely to sway the court in your favour.

### Part A: The Test and Judicial Interpretation

- The key factors that a court will consider
- Maintaining distinction between jurisdiction *simpliciter* arguments and *forum non conveniens*
- *Amchem Products* and its offspring
- *Teck Cominco* and other recent cases: what can we learn?
- Examples of how specific factors played greater or lesser roles in particular cases

### Part B: Sample Cases

The *forum non conveniens* test applied: the facilitators will work through scenarios with varying fact patterns, allowing you to have an opportunity to see how you might argue – or decide – a *forum non conveniens* contest.

### 11:15 Determining and Proving the Applicable Law

Paul Michell, Lax O’Sullivan Scott LLP, Toronto

- Enforcement of choice of law clauses
- How choice of law clauses can be challenged
- Sample choice of law clauses – the good, the problematic
- Dealing with pleadings containing mixed causes of action
- Determining the *lex loci* of torts
- Tips for proving the substantive law: the effective use of legal experts
- Can a party escape a choice of law clause?

### 12:00 Luncheon

### 1:00 Enforcement of Foreign Judgements

Sandra Barton, Heenan Blaikie LLP, Toronto

- Beyond *Beals v. Saldanha*: update on recent case law developments
- *US v. Yemec* – is there a defence of “loss of meaningful opportunity to be heard”?
- Denial of natural justice in foreign proceedings: what role does it play?
- Treaties on reciprocal enforcement of judgements

### 1:45 Gathering Evidence Across Borders

Jane Southren, Lerner LLP, Toronto

L. David Roebuck, Heenan Blaikie LLP, Toronto

Michael W. Lacy, Barrister & Solicitor, Toronto

Todd A. Seaver, Berman DeValerio, San Francisco

In cross-border actions, what might normally be straightforward pre-trial procedures of production and discovery can suddenly become considerably more complicated. Strategic decisions arise that can significantly affect the litigation going forward. A panel of experienced counsel will help you recognize the issues and explain how they can be effectively managed, or turned to your advantage.

# Agenda

## A. Prosecuting and Defending Foreign Requests for Evidence from Canada

- Prosecuting and defending letters rogatory from US Courts: understanding the procedure and the test that courts will apply
- The effect of deemed/implied undertaking rule and/or confidentiality orders
- Costs issues associated with letters rogatory applications
- Sample precedents

## B. Making Requests for Evidence from Foreign Jurisdictions for Use in Canadian Proceedings

- Methods for requesting and obtaining access to evidence from the US
- US MDL: limitations on production of documents from depositories when requested for Canadian litigation
- Obtaining evidence from other jurisdictions: UK, European Union, China
- Comparing different procedural options in varying circumstances

## C. Dangers Arising from Parallel Criminal and/or Regulatory Proceedings

- Cautions: protections and immunities that may not cross borders
- What options do you have when faced with potentially conflicting obligations?
- Application and effect of the deemed/implied undertaking rule
- The effect of Mutual Legal Assistance Treaties (MLATs)

## D. Other Issues in Cross-Border Evidence Gathering

- Conventions and treaties affecting private international law disputes: additional avenues for gathering evidence, rules you need to be aware of
- Negotiating creative solutions to procedural and production disputes

### 3:00 Refreshment Break

### 3:15 A Practical Guide to Litigating Class Actions Across Borders

**Mike Peerless**, Siskinds LLP, London, Ontario

**Andrew Morganti**, Sutts Strosberg LLP, Windsor (formerly of Milberg LLP, NY)

**Daniel E. Laytin**, Kirkland & Ellis LLP, Chicago

**Robert Torralbo**, Blake, Cassels & Graydon LLP, Montréal

**Moderator**

**Kathryn I. Chalmers**, Stikeman Elliott LLP, Toronto

When class actions involve more than one jurisdiction, additional complications can arise that make these files even more challenging for counsel. A panel of experienced class action litigators, from both Plaintiff and Defence perspective, will help sort through this sometimes very tricky terrain.

- Differences in class action certification standards
  - evidentiary standards
  - common issues requirements
- Dealing with the challenges presented by parallel proceedings
  - challenges presented by provincial borders
  - challenges presented by national border
  - what happens when the plaintiffs are in one jurisdiction and the action is in another?
  - problems with procedure, enforcement and notice
  - anti-suit injunctions
- National class actions in Canada
  - do they work?
  - strategies to employ to make them work
  - are they constitutional?
- Issues arising in particular types of actions:
  - competition law class actions
  - securities class actions
  - medical device and product liability actions

### 4:30 Wrap Up of Day One; Program Adjourns

## Day Two: Effectively Using International Commercial Arbitration Tuesday, September 28, 2010

### 8:30 Introduction and Overview

### 8:35 Getting the Arbitration Agreement Right

**Sonia Bjorkquist**, Osler, Hoskin & Harcourt LLP, Toronto

- The imperatives: defining what will be arbitrated, who will arbitrate, and where
- The importance of choosing the right seat: legal and practical concerns in international disputes
- Strategic use of attornment and choice of law clauses
- Private does not always mean confidential: say it if you mean it
- Settling on the ground rules in international disputes (discovery, documents and appeals)
- Addressing costs issues early: who pays now and who pays later?
- Avoiding pathological clauses
- Dealing with 11th hour calls for generic arbitration clauses

### 9:30 Selecting the Arbitral Regime

**Marc J. Goldstein**, Marc J. Goldstein Litigation and Arbitration Chambers, New York

**John A.M. Judge**, Stikeman Elliott LLP, Toronto

- What are the differences between *ad hoc* and institutional arbitration?
- What are the pros and cons of each?
- Why institutional arbitration can be the right choice for some international arbitrations

# Agenda

- A brief overview of the arbitration Institutions: who to consider and why
- Understanding the Institution's Rules
- How the nature of the dispute and/or location of parties may influence best institutional choice
- Does the right tribunal assist with enforcement later?
- Educating your client about the options and costs

## 10:30 Refreshment Break

## 10:45 Steps Before Arbitration

**John Lorn McDougall, Fraser Milner Casgrain LLP, Toronto**

**John A. Terry, Torys LLP, Toronto**

**Tina Cicchetti, Fasken Martineau DuMoulin LLP, Vancouver**

**Moderator**

**Sonia Bjorkquist, Osler Hoskin Harcourt LLP, Toronto**

- Dealing with a pathological clause when a dispute arises
- Don't take a step in the proceeding if you want to arbitrate: what constitutes "a step"?
- Motions to stay litigation: where to bring them and when?
- Choosing an international arbitration tribunal
  - taking or avoiding home field advantage
  - advantages/disadvantages of choosing an arbitrator who is an expert
  - nominating someone with the appropriate legal training in an international arena
- Seeking or opposing interim relief – what may be available, how to get it, and where
- Default proceedings: should you ever not defend?

## 12:00 Luncheon

## 1:00 The Role of the Courts in International Arbitrations

**Andrew D. Little, Bennett Jones LLP, Toronto**

**Andrew McDougall, Perley-Robertson, Hill & McDougall LLP Ottawa**

- How far will the courts go to uphold the parties' agreement?
- Anticipating whether the local courts are "arbitration friendly"
- The importance of the local arbitration legislation in determining the court's role
- Judicial intervention – what are the parameters, limits?
- Statutory protections you can't contract out of (e.g. *Solicitors Act*, etc.); the effect of local laws
- Reviews, challenges, and appeals of arbitral decisions

## 2:00 Arbitration Advocacy

**J. Brian Casey, Baker & McKenzie LLP, Toronto**

**Jim McCartney, McCartney ADR Inc., Calgary**

- Written advocacy: memorials, written submissions and evidence in international arbitration
- Will-say statements and witness statements: setting the expectations early when dealing with parties from other legal systems
- Oral advocacy: know your audience: the advantages of using private sector decision makers
- Minimizing evidentiary objections— it's not a courtroom
- Dealing with limits on length of submissions and oral argument
- Keeping an eye on expense with a view to the tribunal's jurisdiction to award costs
- Possible avenues for simplifying procedure: Agreed facts? Agreed and pre-marked exhibits?

## 3:00 Refreshment Break

## 3:15 Enforcement and Recognition of Arbitral Awards

**Malcolm N. Ruby, Gowling Lafleur Henderson LLP, Toronto**

**David R. Haigh, Q.C., Burnet, Duckworth & Palmer LLP, Calgary**

**Robert Wisner, McMillan LLP, Toronto**

- Key recent case law developments:
  - the SCC decision in *Yugraneft*: what are the implications?
  - the Ont CA *Zemensky* ruling: does this change the game?
- Limitation periods in international arbitration in light of *Yugraneft*
- Anticipating enforcement issues in the law of the country where enforcement is desired
- Understanding the role of treaties between the foreign state and Canada or a province
- The New York Convention and the UNCITRAL Model Law

## 4:30 Program Concludes

### Who Should Attend

- Commercial litigators
- Class action plaintiff and defence counsel
- In-house counsel for businesses with international reach

# Registration

Please complete all registrant information.

Gain invaluable resources  
for complex litigation files

## Register Me For: *Cross-Border Litigation and Arbitration*

Full Program  Day One only  Day Two only

I will attend:  On site  Via webcast (single viewer)

I am unable to attend. Please send me information about ordering program materials.

## Fee Per Delegate

**Full Program: \$1095 plus 13% HST for a total of \$1237.35.**

**Day One or Day Two only: \$595 plus 13% HST for a total of \$672.35.**

Fees include attendance, program materials, continental breakfast, lunch and break refreshments. Group discounts are available for both on site and webcast participants. Visit [www.osgoodepd.ca](http://www.osgoodepd.ca) for details. Please inquire about financial assistance and CLE credits.

OPD Searchable e-Binder now available! Contact us for more information.

## CLE Credits

Approved in accordance with the requirements of the **LSUC Certified Specialist** program (pending), **Barreau du Québec, BC CPD** and **NY CLE Board** (for transitional and non-transitional lawyers). **Note:** NY CLE Credits are not available for webcast participants. BC CPD webcast participants must contact us for further information.

## Interested in Custom and In-house Programs?

Osgoode Professional Development also offers many of its programs in-house and can customize some programs to your specific needs. If you would like further information, please contact Heather Gore, Program & Business Development Lawyer, at 416.597.8847 or [custom@osgoode.yorku.ca](mailto:custom@osgoode.yorku.ca) or visit [www.osgoodepd.ca](http://www.osgoodepd.ca).

## Program Changes

We will make every effort to present the program as advertised, but it may be necessary to change the date, location, speakers or content with little or no notice. In the event of program cancellation, York University's and Osgoode Hall Law School's liability is limited to reimbursement of paid fees.

## Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute, a full refund (less \$50 administration fee) is available if a cancellation request is received in writing 14 days prior to the program date. No other refund is available.

## Dates & Time

September 27 - 28, 2010

8:30 a.m. - 4:30 p.m. EDT/EST

Please arrive a half hour early for sign-in and material pick-up.

Dress is business casual.

## Location

Osgoode Professional Development  
Downtown Toronto Conference Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON M5G 1Z3

## Registrant Information

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Firm/Company: \_\_\_\_\_

Practice Area: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ Prov: \_\_\_\_\_ Postal Code: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

Email: \_\_\_\_\_

- Add me to your mailing list  
 Delete me from your mailing list  
 I do not wish to be contacted by e-mail

Priority Service Code  
(from mailing label below)

1 0 1 3 0 L

## Payment Options

- Cheque enclosed (payable to York University — GST# R119306736)  
 Bill my credit card:  VISA  Mastercard

Card# \_\_\_\_\_ Expiry: \_\_\_\_\_

Signature: \_\_\_\_\_ Payment amount: \$ \_\_\_\_\_

Public CLE Seminars

Customized CLE Programs

Skills Training & Certification

ITAW

Part-time LLM

**OSGOODE**

OSGOODE HALL LAW SCHOOL  
YORK UNIVERSITY

Professional Development  
CLE

## 4 Convenient Ways to Register

- MAIL** your registration form to:  
Osgoode Professional Development  
Downtown Toronto Conference Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON M5G 1Z3
- ONLINE** at  
[www.osgoodepd.ca](http://www.osgoodepd.ca)
- FAX** your registration to  
416.597.9736
- CALL US** at 416.597.9724  
or 1.888.923.3394