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Fall 2018

International Dispute Resolution: International Commercial Arbitration: 2018-19

Hugh Meighen

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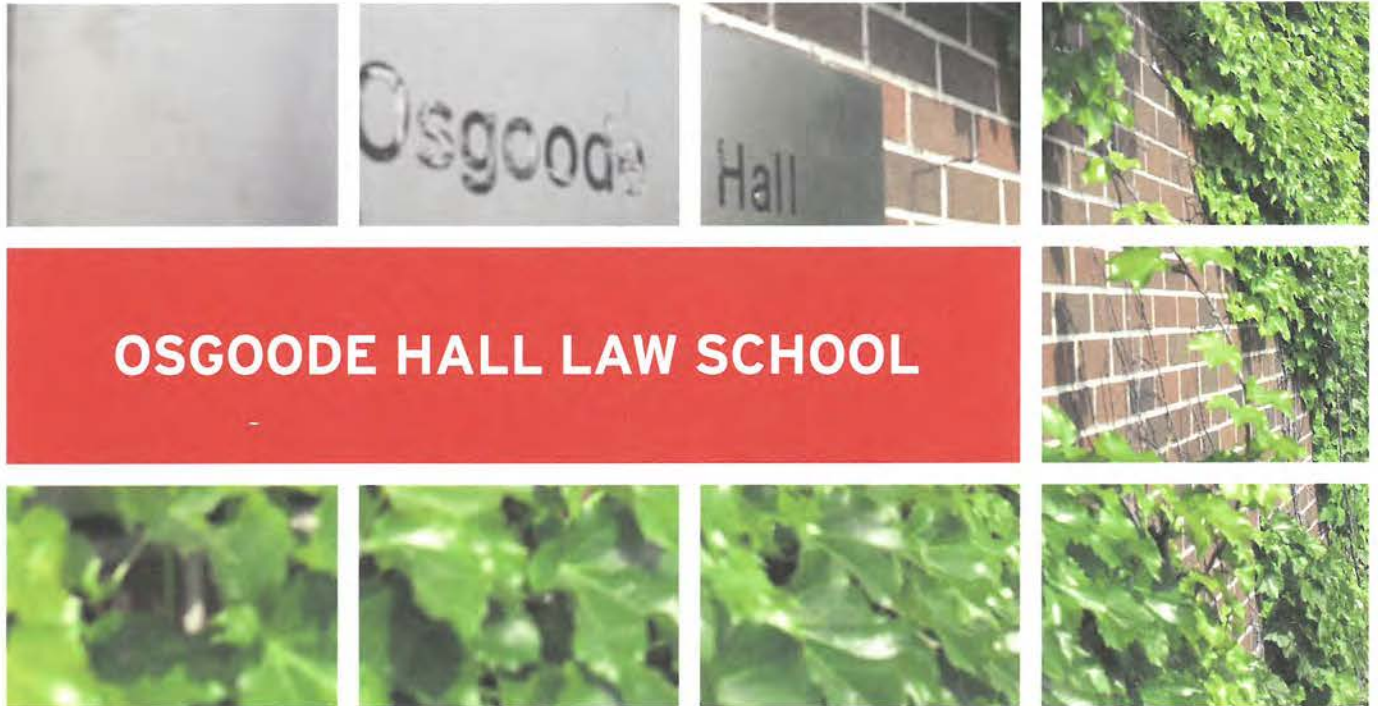


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International Dispute Resolution: International Commercial Arbitration

Fall 2018

Course Director(s): Hugh Meighen



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Contents

Syllabus	1
Just Do It - Drafting the Arbitration Clause in an International Agreement	11
Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?	27
BWV Investments Ltd v. Saskferco Products Inc	51
Dell Computer Corp v. Union des consommateurs	69
Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?	189
The Party Appointed Arbitrator in International Arbitrators - Role and Selection	203
The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration	215
Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries (Without Commentary)	233
ASM Shipping Ltd of India v TTMI Ltd of England	241
Dallah Real Estate and Tourism Holding Company (Appellant) v. The Ministry of Religious Affairs, Government of Pakistan (Respondent)	259
Buckeye Check Cashing Inc. v. John Cardegna, et al.	323
Premium Nafta Products Ltd. v. Fili Shipping Company Ltd.	329
Xerox Canada Ltd v. MPI Technologies	339
Corporacion Transnacional de Inversiones v. STET International	375
Mexico v. Cargill, Inc	407
SMART Technologies ULC v. Electroboard Solutions Pty Ltd	455
The Russian Federation v. Luxtona Limited	473
Awarding Costs in International Commercial Arbitration: An Overview	481
Decision on Saint Lucia's Request for Security Costs	513
BKMI Industrieranlagen GmbH & Siemens AG v. Dutco Construction Company Ltd.	553
Smart Systems Technologies Inc. v. Domotique Secant Inc.	559
Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.	569
Witness Statements and Expert Reports	601
Acknowledgements	647

INTERNATIONAL DISPUTE RESOLUTION: INTERNATIONAL COMMERCIAL ARBITRATION

1. COURSE INSTRUCTOR

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Availability by appointment

2. COURSE INFORMATION

a. Class Times

Thursday, 6:30-8:20pm.

b. Learning Objectives

This seminar will introduce participants to the resolution of international disputes through arbitration, and in particular, the key stages of an international arbitration, including the drafting of arbitration clauses, constitution of the tribunal, managing the arbitral procedure, evidentiary hearings, and finally, the set aside and enforcement of awards. In addition, the seminar will provide particular instruction on key features of international commercial arbitration, including arbitral institutions, investor-state arbitration, and various procedural rules. Special emphasis is placed on the practical management of complex international arbitral proceedings by counsel. In this regard, the seminar will include particular instruction on client management, maximizing costs and efficiency, arbitrator selection, key advocacy skills, and ethical challenges that can arise in the context of international commercial arbitration. By the end of the seminar, students should be comfortable with the key legal concepts underpinning the arbitral process and considerations structuring and managing an effective arbitral process.

c. Evaluation

Take Home Assignment 1 (30%): Take-home assignment dealing with issues arising from first half of course (i.e. all seminars until reading week). Take Home Assignment 1 will be assigned on 1 November 2018 and will be a maximum of 3,000 words. Grading to be completed shortly after the submission of the assignment.

Take Home Assignment 2 (40%): Take-home assignment dealing with issues arising from the full course. Take Home Assignment 2 will be assigned on 22 November 2018 and will be a maximum of 4,000 words. Grading to be performed at end of semester.

Osgoode Hall Law School – Fall Term 2018

Participation (30%): Participation grade will be based on a combination of class attendance and participation in one designated in-class presentation. Grading to take place on the day of the presentation, but will not be available until end of the semester.

Lateness policy: late Take Home Assignments will be penalized by 1/3 letter grade per week. Non-attendance without a valid reason during designated in-class presentation will result in a zero for that element of the grading.

Grading Questions: students who wish to discuss their grades may contact the instructor at the above contact information.

d. Content information

Reading Schedule

Week	Date	Topic	Detailed List of Issues
1	Sept 6	Introduction	What is arbitration? What law governs an arbitration? Commercial vs. investment arbitration Outline of the course
<p><i>Week 1 Readings:</i></p> <ul style="list-style-type: none"> - N/A. <p><i>Recommended:</i></p> <ul style="list-style-type: none"> - J. Brian Casey, <i>Arbitration Law of Canada: Practice and Procedure</i>, 3rd ed. (Juris, 2017), 1-7, 19-21, 27-40. - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 1.01-1.37; 3.01-3.29; 3.34-3.140. - <i>International Commercial Arbitration Act</i>, 2017, SO 2017, c 2, Sch 5, Schedule 2 UNCITRAL Model Law, Articles 18 and 19. 			
2	Sept 13	The Arbitration Agreement	Validity and applicability Elements of an agreement
<p><i>Week 2 Readings:</i></p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 1.152-1.198; 2.13-2.27; 2.89-2.100; 2.111-2.144. - M. Ball, “Just Do It – Drafting the Arbitration Clause in an International Agreement”, <i>Journal of International Arbitration</i>, vol. 10(4), December 1993. 			

Osgoode Hall Law School – Fall Term 2018

Week	Date	Topic	Detailed List of Issues
			<ul style="list-style-type: none"> - N. Kaplan QC, “Is the need for Writing as expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?” 5 Asia Pac. L. Rev. (1996).
3	Sept 20	Effects of the Arbitration Agreement	Negative effect of arbitration agreement Positive effect of arbitration agreement
<p><i>Week 3 Readings:</i></p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 2.39-2.54; 2.209-2.218. - <i>International Commercial Arbitration Act</i>, 2017, SO 2017, c 2, Sch 5, Schedule 2 UNCITRAL Model Law, Article 8. - <i>BWV Investments Ltd. v. Saskferco Products Inc.</i>, 1994 CanLII 4557 (SK CA) - <i>Dell Computer Corp. v. Union des consommateurs</i>, [2007] 2 SCR 801, 2007 SCC 34 (CanLII), paras. 75-77 - F. Bachand, “Does Article 8 of the Model Law Call for Full or Prima Facie review of the Arbitral Tribunal’s Jurisdiction?” <i>Arbitration International</i>, vol. 22(3), LCIA (2006). 			
4	Sept 27	Arbitrators	Procedure Practical considerations Role of arbitrators
<p><i>Week 4 Readings:</i></p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 4.48-4.71. - Daly, Goriatcheva, and Meighen, <i>Guide to the PCA Arbitration Rules</i>, (Oxford University Press: 2014), paras. 4.05-4.30; 4.70-4.79. - de Fina, A. A., “The Party-Appointed Arbitrator in International Arbitration – Role and Selection” (1999) - Arbitration Rules of the London Court of International Arbitration (LCIA), Article 5 [available online]. - <i>International Commercial Arbitration Act</i>, 2017, SO 2017, c 2, Sch 5, Schedule 2 UNCITRAL Model Law, Articles 10-11. 			

Osgoode Hall Law School – Fall Term 2018

Week	Date	Topic	Detailed List of Issues
<p>Recommended:</p> <ul style="list-style-type: none"> - C. Partasides, “The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration”, <i>Arbitration International</i>, Vol. 18(2), LCIA, 2002. - Young ICCA Guide on Arbitral Secretaries, ICCA Reports No. 1, 2014, Annex D. 			
5	October 4	Arbitrators	Duties of arbitrators Grounds on which to challenge arbitrators Process of a challenge
<p>Week 5 Readings:</p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 4.72-4.155. - Daly, Goriatcheva, and Meighen, <i>Guide to the PCA Arbitration Rules</i>, (Oxford University Press: 2014), paras. 4.39-4.65. - <i>IBA Guidelines on Conflicts of Interest in International Arbitration</i>, International Bar Association, 23 October 2014 [available online]. - <i>International Commercial Arbitration Act</i>, R.S.O., c. I.9, UNCITRAL Model Law, Articles 12-13. <p>Recommended:</p> <ul style="list-style-type: none"> - <i>ASM Shipping Ltd of India v TTMI Ltd of England</i>, [2005] EWHC 2238 (Comm) (19 October 2005). 			
6	October 11	Jurisdiction	Principle of competence-competence Timing of the question of jurisdiction Ultimate power over jurisdiction Typical grounds for contesting jurisdiction
<p>Week 6 Readings:</p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 5.85-5.128. - Daly, Goriatcheva, and Meighen, <i>Guide to the PCA Arbitration Rules</i>, (Oxford University Press: 2014), paras. 5.53-5.89. - <i>International Commercial Arbitration Act</i>, 2017, SO 2017, c 2, Sch 5, Schedule 2 UNCITRAL Model Law, Article 16. 			

Osgoode Hall Law School – Fall Term 2018

Week	Date	Topic	Detailed List of Issues
			<ul style="list-style-type: none"> - <i>Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent)</i> [2010] UKSC 46. <p>Recommended:</p> <ul style="list-style-type: none"> - <i>Buckeye v. Check Cashing Inc. v. Cerdeña</i>, 546 US 440, Supreme Court 2006. - <i>Premium Nafta Products Limited v. Fili Shipping Company Ltd.</i> [2007] UKHL 40. - <i>Xerox Canada Ltd. v. MPI Technologies</i> 2006 CanLII 41006 (ON SC)
7	October 18	Procedure	Emergency Arbitrators / interlocutory injunctions Interim measures Judicial review
			<p>Week 7 Readings:</p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 7.13-7.64. - J. Brian Casey, “Court Involvement in Commercial Arbitration”, <i>A Practitioner’s Guide to Commercial Arbitration</i>, Huberman, ed. (Irwin Law, 2017), at pp. 303-333. - <i>Arbitration Rules of the ICC</i>, Appendix V, [available online]; <i>Arbitration Rules of the London Court of International Arbitration (LCIA)</i>, Article 9 [available online]. - <i>International Commercial Arbitration Act</i>, 2017, SO 2017, c 2, Sch 5, Schedule 2 UNCITRAL Model Law, Articles 9, 17, and 27. - <i>Arbitration Act, 1991</i>, SO 1991, c 17, s. 45(1) and (2). <p>Recommended:</p> <ul style="list-style-type: none"> - <i>Corporacion Transnacional de Inversiones v. Stet International</i>, 2000 CanLII 16840 (ON CA) - <i>Mexico v. Cargill, Incorporated</i>, 2011 ONCA 622 (CanLII) - <i>SMART Technologies ULC v Electroboard Solutions Pty Ltd</i>, 2017 ABQB 559 (CanLII) - <i>The Russian Federation v. Luxtona Limited</i>, 2018 ONSC 2419 (CanLII)
8	October 25	Managing Evidence	Pleadings Document production

Osgoode Hall Law School – Fall Term 2018

Week	Date	Topic	Detailed List of Issues
			Witness evidence Tribunal orders
<p><i>Week 8 Readings:</i></p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 6.54-6.181. - Daly, Goriatcheva, and Meighen, <i>Guide to the PCA Arbitration Rules</i>, (Oxford University Press: 2014), paras. 5.107-5.120. - N. Mizrahi, “The Use of Experts and the Assessment of Economic Damages in Commercial Arbitration”, <i>A Practitioner’s Guide to Commercial Arbitration</i>, Huberman, ed. (Irwin Law, 2017), at pp. 361-376. - <i>IBA Rules on the Taking Evidence in International Arbitration</i>, 29 May 2010, International Bar Association [available online]. 			
9	November 1	Costs and Arbitration	Paper 1 Assigned Managing Costs in International Arbitration Security for Costs Costs awards
<p><i>Week 9 Readings:</i></p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 5.31-5.33; 9.87-9.100. - Micha Bühler, “Awarding Costs in International Commercial Arbitration: An Overview (1/2)” (2004) 22 ASA Bulletin, Issue 2, pp. 249–261 - <i>RSM Production Corporation v. Saint Lucia</i>, ICSID Case No. ARB/12/10, Decision on Request for Security for Costs, 13 August 2014. 			
10	November 8	Reading Week	Paper 1
<p><i>Week 10 Readings</i></p> <ul style="list-style-type: none"> - Reading Week. Paper 1. 			
11	November 15	Enforcement / Set Aside	Paper 1 Due New York Convention Model Law

Osgoode Hall Law School – Fall Term 2018

Week	Date	Topic	Detailed List of Issues
			Grounds for Set Aside and Enforcement
<p><i>Week 11 Readings</i></p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 11.01-11.120. - <i>International Commercial Arbitration Act</i>, R.S.O., c. I.9, UNCITRAL Model Law, Articles 34 and 35. - <i>Siemens AG and BKMI. Industrienlagen GmbH v Dutco Consortium Construction. Company Ltd</i> (7 January 1992 – XV Yearbook Com. Arb. (1992)) 124 et seq. - <i>Smart Systems Technologies Inc. c. Domotique Secant inc.</i> 2008 QCCA 444 - <i>Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.</i>, 2017 ONCA 939. <p><i>Recommended</i></p> <ul style="list-style-type: none"> - <i>SMART Technologies ULC v Electroboard Solutions Pty Ltd</i>, 2017 ABQB 559 (CanLII) 			
12	November 22	Investment Arbitration	Background on Investor-State Arbitration Procedural Rules Substantive Protections Paper 2 Assigned
<p><i>Week 12 Readings</i></p> <ul style="list-style-type: none"> - Blackaby and Partasides, <i>Redfern and Hunter on International Arbitration</i>, 5th ed. (Oxford University Press: 2009), paras. 8.01-8.122. 			
13	November 29	Advocacy in Arbitration	Effective written submissions Effective witness statements and expert reports Paper 2 Due
<p><i>Week 13 Readings</i></p> <ul style="list-style-type: none"> - P. Bienvenu and M. Valasek, “Witness Statements and Expert Reports”, <i>The Art of Advocacy in International Arbitration</i>, 2nd ed., p. 235. - John Judge, “Advocacy in Commercial Arbitration”, <i>A Practitioner’s Guide to Commercial Arbitration</i>, Huberman, ed. (Irwin Law, 2017), at pp. 343-265. <p><i>Recommended:</i></p>			

Osgoode Hall Law School – Fall Term 2018

Week	Date	Topic	Detailed List of Issues
<p>- L. Newman and B. Sheppard, <i>Take the Witness: Cross-Examination in International Arbitration</i>, Juris Net LLC (2010).</p>			

4. OSGOODE and YORK ACADEMIC POLICIES

a. Academic Honesty and Integrity

Osgoode students are required to maintain high standards of academic integrity and are subject to the York Senate Policy on Academic Honesty and the relevant Osgoode Academic Rules. The Senate Policy can be found at <http://www.yorku.ca/secretariat/policies/document.php?document=69>. The York University academic integrity website can be found at <http://www.yorku.ca/academicintegrity>.

The Senate Policy and Osgoode Academic Rules are also found in the Student Handbook, which is available on the MyOsgoode website, under the Documents and Publications tab.

b. Religious Observance

York University is committed to respecting the religious beliefs and practices of all members of the community, and making accommodations for observances of special significance to adherents. Should any of the dates relating to examinations or assignments for this course pose such a conflict for you, please let Assistant Dean, Students, Mya Rimon, know within the first three weeks of class.

c. Students with Disabilities and Accommodation Needs

York University has a range of resources to assist students with physical, mental, and learning disabilities/challenges in achieving their educational objectives. Students with disabilities requiring accommodation in the classroom or in the examination or evaluation process are encouraged to identify themselves to York's Counselling & Disability Services office (N110, Bennett Centre for Student Services or 416-736-5297) or Osgoode's Office of Admissions & Student Services as soon as possible. Students seeking accommodation in experiential education settings are encouraged to read the *Accommodation Information for Clinical & Intensive Program* handout provided to them with their enrolment offer. All requests for accommodation will be kept confidential.

Requests for accommodation for in-term work must be made, in writing, to either the instructor or to the Assistant Dean, Students, Mya Rimon. Such requests must be made as soon as the need for accommodation arises and, barring exceptional circumstances, in advance of the deadline for the work.

Requests for accommodation for final examinations and final papers may only be made to and approved by the Assistant Dean, Students, Mya Rimon and must be made in advance of the examination date or final paper due date.

d. Other York University Policies, including Ethics Review Process

Further information concerning relevant York University academic policies, such as the Ethics Review Process for research involving human participants is available on the Senate Committee on Academic Standards, Curriculum and Pedagogy webpage (see Reports, Initiatives, Documents) – <http://www.yorku.ca/secretariat/senate/committees/ascp/index-ascp.html>

