

Arnold & Porter



Global Construction Forum: Dealing With COVID-19 and Its Aftereffects

September 15, 2020

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Global Construction Forum: Dealing With COVID-19 and Its Aftereffects

September 15, 2020
10:00–11:00 am BST

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Tab 1: Agenda

Global Construction Forum: Dealing With COVID-19 and Its Aftereffects

September 15, 2020
10:00–11:00 am BST

Agenda

10:00–10:05 am BST

Welcome and Introduction

10:05–10:55 am BST

Presentation

Speakers:

William Godwin QC, *Counsel, London*

Jun Hee Kim, *Partner, Washington, DC*

David Reed, *Partner, London*

Anton A. Ware, *Partner, Shanghai*

10:55–11:00 am BST

Question-and-Answer Session

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Tab 2: Presentation Slides

Global Construction Forum: Dealing With COVID-19 and Its Aftereffects

September 15, 2020

William Godwin QC, David Reed, Jun Hee Kim, Anton Ware

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Presenters



William Godwin QC



David Reed



Jun Hee Kim



Anton A. Ware

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Agenda



- **Time and Money Claims/Termination and Suspension** — claims notices and time bars, suspension of work or termination of contract in light of disruptive effects of COVID-19, defences and pitfalls to avoid
- **Extension of time claims, and costs claims** in construction contracts - the impact of COVID-19
- **Dispute Avoidance and Resolution** — avoiding conflicts, preventing a dispute from escalating, alternatives to arbitration and practical points about dealing with a complex construction dispute in light of COVID-19
- **Belt & Road Initiative Disputes** — risks to and disruptions of BRI projects resulting from COVID-19; how to mitigate legal and political risk in BRI projects

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Time and Money Claims/ Termination and Suspension



William Godwin QC, Arnold & Porter London

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Claims Notices and Time Bars



- Notices an important feature of every construction contract:
 - E.g. pay-less notices in 2017 NEC 4 contract when employer wishes to claim delay damages; shipbuilder's notice of delaying event for which postponement to delivery is claimed, SAJ form clause 10.
- Can be a contractual bar to remedies if not given in right form and in time:
 - E.g. FIDIC 1999 contracts, clause 20.1 (Contractor's time and money claims): if initial notice not given within 28 days, absolute bar to Contractor's claim (no bar if Employer's claim late).

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Claims Notices and Time Bars



- Contractors' and Employers' claims are treated in the same way in the FIDIC 2017 editions; clause 20 deals with both.
- 28-day time limit for initial notice of a time or money claim applies now to Employer too (clause 20.2). But it may be waived in some circumstances, where there are good reasons for the delay (clause 20.2.2).
- The pandemic has generated Contractors' claims and Employers are more inclined to take technical points.
- One of the most common is: has the Contractor given its notice in time?

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Claims Notices and Time Bars



- In the 1999 FIDIC forms, this question often emerges at DAB or dispute review board stage, after Engineer or (in Silver Book) Employer has given decision rejecting the fully detailed claim. No procedure for the issue to be dealt with earlier, as it arises.
- Note this is different in 2017 FIDIC forms: if Engineer or (in Silver Book) other party thinks the initial notice was late, he must so notify claiming party within 14 days; if he doesn't then (in Silver) the claim notice is deemed to be valid. Procedure more complicated in Red and Yellow Books but in all three 2017 forms timing of initial claim notice is dealt with separately as it arises.

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Defences



- Employers should raise any timing issue as soon as possible, otherwise may face argument that irregularity was waived.
- If Employer rejects claim because notice was late, what can the Contractor do?
- Governing law might make a time bar unenforceable in some circumstances.
- In some civil law jurisdictions the party's obligations of good faith may prevent one party from taking advantage of a technical breach of a time provision to exclude an otherwise meritorious claim about which the other party was aware. (The English law position is in general to give effect to precisely drafted time bar clauses.)

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Defences



- Time bar may be interpreted to give some flexibility:
 - E.g. Contractor claiming extension of time under clause 20.1 of FIDIC 1999 forms may be able to take the 28 days to start from either (a) when it was clear there would be delay resulting from a relevant event or (b) at a later date, after the delay had begun to be incurred, since the EOT clause (8.4) provides for EOTs if and to the extent that completion ‘...is or will be delayed...’ by the relevant event: *Obrascon Huarte Lain SA v HM Attorney General for Gibraltar* [2014] EWHC 1028 (TCC).

Termination and Suspension



- Parties are invoking their rights to suspend the works or terminate the contract altogether in the face of the disruptive effects of the pandemic.
- Force majeure is often invoked: suspension is to be distinguished.
- Depending on its wording, a Force Majeure clause might give a party the right to stop performing the contract if doing so becomes impossible because of a supervening event for which it is not responsible or which is outside its control; suspension by contrast is a step typically open to contractors when the employer is in default by e.g. not making payments on time.

Pitfalls to avoid (1)



- Make sure you have a valid ground to terminate or (if Contractor) suspend the works.
- Particularly difficult where relevant ground may not be easy to establish. E.g. FIDIC 1999 forms enable Contractor to terminate where Employer '*substantially fails to perform his obligations under the Contract*' (clause 16.2); or Employer to terminate where Contractor without 'reasonable excuse' fails to proceed with due expedition (clause 15.2)
- Some contracts may contain a proviso of good faith: e.g. the UK JCT standard form 2011 clause 8.2.1 says notice terminating contractor's employment not to be given unreasonably or vexatiously; similar constraint under NEC3 and NEC4 mutual trust and co-operation obligations.
- If found subsequently to have terminated wrongfully, could mean having substantial damages to pay, or itself constitute a ground of termination by the other party.
- If in doubt, is there anything you can do to improve the relationship and avoid the nuclear option?

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Pitfalls to avoid (2)



- Don't forget that contractual termination rights may be in addition to rights a party has to terminate under the governing law:
 - E.g. in an English law contract, if conduct amounting to a repudiatory breach occurs the other party may be able to terminate lawfully even if that conduct is not a ground of termination under the terms of the contract.
- Whether the contractual rights are exclusive will depend on the interpretation of the contract applying the governing law; the same applies to the remedies available to the terminating party. Sometimes the contract expressly preserves those rights: e.g. clauses 15 and 16 of the FIDIC contracts.

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Extension of time and costs claims in construction contracts: The impact of COVID-19



David Reed, Arnold & Porter London

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Introduction



- Impact of COVID-19 on construction:
 - Site closure
 - Delays to the work
 - Reduced productivity on site
- Potential remedies:
 - Extension of time
 - Cost claims

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Establishing the facts



- What are the precise measures impacting the site?
 - Mandatory measures or voluntary changes?
 - Variation from country to country
- How susceptible are the specific works to disruption?
 - Period of disruption vs total length of contract
 - Ability of contractor to implement additional H&S regulations on-site
- How significant has the delay/disruption been?

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Claiming for additional payment or extension of time: FIDIC Silver Book 2017



Clause 8.5: Extension of time for Completion

The Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to Extension of Time if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over the Works and Sections] is or will be delayed by any of the following causes:

- (a) a Variation (except that there shall be no requirement to comply with Sub-Clause 20.2 [Claims For Payment and/or EOT]);
- (b) a cause of delay giving an entitlement to EOT under a Sub-Clause of these Conditions; or
- (c) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site (or any Unforeseeable shortages in the availability of Employer-Supplied Materials, if any, caused by epidemic or governmental actions).

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Causes of delay under 8.5(b)



- Clause 2.1: delayed access to the site
- Clause 8.6: unforeseeable delay or disruption caused by a public authority or private utility entity
- Clause 8.9/8.10: a decision by the employer to suspend the works
- Clause 13.6: change in law
- Clause 17.2: the consequences of events that remain at the Owner's risk
- Clause 18: Exceptional Events

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Non-contractual remedies



- Availability depends on jurisdiction
- Force Majeure
- Frustration/Impossibility of performance
- Change of circumstances
- Variation of contract/rebus sic stantibus

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General comments



- Contractors should take reasonable steps to mitigate
 - Progress construction using all reasonable measures
 - Only close sites when absolutely necessary
- Demonstrating causation may be complicated
- Contractors likely to submit claims on multiple grounds
- Contracts currently in negotiation likely to factor in these costs, as well as the possibility of a 'second wave' and consequent further delays

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Dispute Avoidance and Dispute Resolution



Jun Hee Kim, Arnold & Porter Seoul

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Dispute Avoidance and Dispute Resolution



Common Framework for Construction Dispute Resolution

Negotiation	Mediation	Adjudication
<ul style="list-style-type: none">• Direct negotiation• Dispute escalation clauses• Expert appraisal• Early neutral evaluation	Mediation / Conciliation	<ul style="list-style-type: none">• Dispute Review Boards• Expert determination• Adjudication• Arbitration• Litigation

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Dispute Avoidance and Dispute Resolution – Conflict Avoidance (1)



Contract administration

- Need to consider impact of COVID on completion dates and response periods
- Notwithstanding contractual obligations seek collaborative approach for successful completion of projects
- Until a new agreement is reached, comply with existing obligations while preserving contractual rights and remedies
- Good written records and correspondence will be essential if dispute cannot be avoided

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Dispute Avoidance and Dispute Resolution – Conflict Avoidance (2)



“Without Prejudice” negotiations

- Allows parties to exchange terms without risk of future use in legal proceedings
- Applies to both in person meetings and written communications
- Should be used as part of a genuine attempt to negotiate or settle

Collaborative meetings

- Can be used for discussions and to seek compromise (in addition to meetings required by contract)
- Meetings for settlement negotiations best attended by representatives with authority to settle

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Dispute Avoidance and Dispute Resolution – Conflict Avoidance (3)



Dispute Escalation Clauses

- Certain contracts provides required meetings by senior executives and other procedures prior to formal dispute commencement, and usually involves exchange of briefing papers in advance of actual meetings
- Frequently used to negative reasons (to protract disputes for short term position enhancement) or merely out of contractual obligation
- Can be useful if both sides are prepared and serious about dispute avoidance

Successful Settlement

- Focus on interest not on persons or positions
- Look for mutual gain
- Use objective criteria and substantiate claims

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Dispute Avoidance and Dispute Resolution -Mediation



Mediation/Conciliation

- Mediation is process in which the parties to a dispute engage a neutral individual (the mediator) to facilitate communication between them with the objective of achieving a mutually acceptable resolution to the dispute, or part of the dispute
- Mediation vs. Conciliation: Is there a difference?
- Does mediation work in construction disputes?
- Are mediations and other forms of ADR likely to increase with COVID situation?
- What are some of the key traits for a successful mediation?
 - Willingness to compromise and settle
 - Experience of participants
 - Actual gap between the parties

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Dispute Avoidance and Dispute Resolution –Adjudication



Different Forms of Adjudication

- Dispute Boards (Dispute Adjudication Board, Dispute Avoidance and Adjudication Board, Dispute Resolution Board etc.)
- Expert determination
- Adjudication
- Arbitration
- Litigation

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Dispute Avoidance and Dispute Resolution – Adjudication (Arbitration -1)



Changes in how arbitrations are conducted

- Increased caseloads, potentially impacting arbitrator availability
- Postponement of existing proceedings
- Proceedings may take longer
- Increased need for remote dispute resolution
- Potential increase use of Arb-Med

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Dispute Avoidance and Dispute Resolution –Adjudication (Arbitration - 2)



Increase need for remote / virtual arbitration proceedings

- New online hearing rules in development
- Multiple camera angles for participants
- Reduction of participants (witnesses, counsel, other hearing attendees)
- Reduction of hearing length (e.g., written rather than oral closings)
- Reconsideration of hearing facilities
- Review local regulations on gathering

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Dispute Avoidance and Dispute Resolution – Areas of Other Impact



Other areas of arbitration potentially impacted

- Impact on evidence gathering and method document production
- Potential increased need for emergency relief (Emergency Arbitration or court assistance)
- Impact on arbitral seat and venue selection
- Investor State Arbitration (ISD arbitration)
 - Has local government action adversely harmed your investment
 - Is there an investment treaty with the host State
 - Has there been a violation of the treaty and should it be resolved through ISD arbitration

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Belt & Road Initiative Disputes



Anton Ware, Arnold & Porter Shanghai

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Overview



- **BRI Facts**
- **COVID-19 and Resulting Disruptions to BRI Projects**
- **Mitigating BRI Risks**
- **Negotiating and Drafting Dispute Resolution Clauses for BRI Disputes**
- **Corruption Risks and Potential Implications for Arbitration Award Enforcement**

BRI Facts



B&R: vast web of development and investment initiatives intended to promote regional economic and infrastructural cooperation

- **Key players to-date are Chinese SOEs**
 - *E.g.*, China Development Bank, the Export-Import Bank of China, China Communications Construction, China State Construction Engineering, Power China, China Railway Group, Sinohydro, China Road & Bridge
- **Chinese private firms are increasingly active**
 - *E.g.*, Tencent, Oppo, Envision Energy, Shanghai Challenge Textiles, Country Garden

B&R FACTS

\$4 trillion promised investments (2018)

70%
WORLD POPULATION (2018)

143 B&R countries (2020)

55%
WORLD GNP (2018)

Industry sectors: infrastructure, transportation, energy, technology, telecommunication, manufacturing, industrial, financial institutions, etc.

75%
WORLD ENERGY RESERVES (2018)

Source: The Diplomat, "[What Does China's Belt and Road Initiative Mean for US Grand Strategy?](#)" (2018)

COVID-19 and Resulting Disruptions to BRI Projects



- Up to 40% of B&R projects have been “affected” by COVID-19; and 20% of B&R projects have been “seriously affected” (Source: Lianhe Zaobao, June 2020)
- Several major infrastructure projects funded by China in Southeast Asia have been delayed by coronavirus restrictions, e.g.:
 - Jakarta-Bandung high-speed railway project (\$9 billion Muse-to-Mandalay railway)
 - China-Myanmar Economic Corridor (\$10 billion deep seaport project) (Source: Global Construction Review, May 2020)
- Signing of China-Thailand railway agreement might be delayed by COVID-19 (Source: Xinhua, May 2020)

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Mitigating BRI Risks



- **Political and legal risks for BRI investors:**
 - 71 B&R countries' economic freedom scores are below world average
 - Environmental and social concerns
 - Risk of backlash to Chinese investment
 - Mandatory local laws
- **Mitigating risks:**
 - Due diligence
 - Political risk insurance
 - Corporate structuring
 - Attention to governing law and dispute resolution clause

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Negotiating and Drafting Dispute Resolution Clauses for BRI Disputes (1)



- **Governing law**
 - English law
 - Law of the country in which the project is being developed (when local laws do not permit the application of foreign governing law)
- **Dispute resolution institutions**
 - Established arbitral institutions: ICC, HKIAC, SIAC, CIETAC, BAC
 - Emerging Chinese institutions
 - China International Commercial Court
 - “One Belt, One Road” Arbitration Court
- **Neutral seat of arbitration**
 - Hong Kong; Singapore; London

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Negotiating and Drafting Dispute Resolution Clauses for BRI Disputes (2)



Hong Kong’s future as a leading international arbitration seat?

Benefits of arbitrating in Hong Kong:

- Arbitration Ordinance (Cap. 609) (based on the UNCITRAL Model Law)
- Skilled, bilingual arbitration practitioners
- common law traditions (Article 8 of the Basic Law; landmark decisions)
- judicial independence
- Unique advantage: interim relief from Mainland Chinese courts

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Recent political developments
(e.g., National Security
Law effective from 1 July 2020)

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Corruption Risks and Potential Implications for Arbitration Award Enforcement (1)



- BRI projects in countries rated as “high risk” by Transparency International’s Corruption Perception Index (CPI)
- Corruption allegations and scandals involving BRI projects
- Attempts to vacate arbitration awards on basis that underlying contract and arbitration agreement are invalid due to bribery and that enforcing award would be against public policy

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Corruption Risks and Potential Implications for Arbitration Award Enforcement (2)



Vantage Deep Water Co. (“Vantage”) v. Petrobras Am., Inc. (“Petrobras”)

- Vantage and Petrobras entered into an agreement for offshore drilling services referring disputes to arbitration.
- Petrobras’ premature termination of the agreement led Vantage to commence arbitration.
- Petrobras argued in arbitration that underlying agreement was unenforceable “for allegedly being procured through bribery.”
- Vantage was awarded US\$615.62 million in arbitration.
- On 17 May 2019, a US court confirmed the arbitration award and denied Petrobras’ effort to vacate the award on public policy grounds.
 - **Court reasoning:** Public policy does not favor allowing a party engaged in fraud to use fraud as a defense to a valid arbitration in favor of its alleged co-conspirator.

See Vantage Deepwater Company et al v. Petrobras Americas Inc. et al, Civ. Action No. 4:18-CV-02246 (S.D. Tex., May 17, 2019).

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Corruption Risks and Potential Implications for Arbitration Award Enforcement (3)



Process and Industrial Development Limited (“P&ID”) v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria (“Nigeria”)

- P&ID allegedly entered into a gas supply and processing agreement with Nigeria in 2010.
- P&ID commenced an ad hoc arbitration in London in 2012 pursuant to arbitration agreement and alleged that Nigeria’s failure to supply gas amounted to a repudiation of agreement.
- After London tribunal awarded P&ID \$6.6 billion plus interest, Nigeria asserted as a defense in a 2009 English enforcement proceeding that contract had been procured by fraud and corruption.
- **September 2020: The English Commercial Court granted Nigeria’s application for extension of time to challenge award and to adduce new evidence on basis that Nigeria had made out a “strong prima facie case” that contract had been procured by bribery and that arbitration had been tainted by perjured testimony.**

See Federal Republic of Nigeria v. Process and Industrial Development Limited [2020] EWHC 2379 (Comm), at paragraph 184.

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William Godwin QC

William Godwin QC acts in complex, multi-jurisdictional and high-value disputes often with a cross-border element. He has substantial experience of a wide range of disputes in arbitration and English high court litigation including joint venture, shareholder, partnership, corporate acquisition, insurance, shipping, professional negligence and indemnity disputes. His practice also includes construction and technology disputes and he has particular expertise in FIDIC contracts. He has been described in the directories as "an outstanding advocate", "very bright and experienced, providing detailed analysis of issues" and as having "good credentials in the arbitration communities of China and Asia."

Mr. Godwin was appointed Queen's Counsel in 2017, an award made for excellence in advocacy in the higher courts in England. He is a member of several international arbitration panels and acts as adjudicator.

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David Reed

David Reed represents multinational corporations, sovereign states and government-owned entities in international commercial and international investment arbitrations. David has more than 20 years' experience with international arbitration disputes, most notably in the construction and engineering, power, oil and gas, telecoms, information technology, life sciences, banking, and shipping sectors. These disputes fall under a variety of rules including those of the ICC, LCIA, and UNCITRAL. He also represents both investors and sovereign states in investment treaty arbitrations under the ICSID and UNCITRAL rules. He has been recognised as a notable practitioner in numerous publications including *Chambers*, *The Legal 500*, and *Legal Experts*.

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Jun Hee Kim

Jun Hee Kim focuses his practice on providing counsel in the international arbitration space in a variety of sectors, including construction, intellectual property, technology, shipping, engineering and disputes related to joint venture and post-M&A transactions. He has represented clients in Asia, Europe, North America, and Latin America in a variety of arbitral fora, including the ICC, ICSID, AAA, SIAC, HKIAC, LCIA, LMAA, KCAB, SCC, NAI, and UNCITRAL rules, and in ad hoc proceedings.

Mr. Kim's practice also includes advising clients on issues related to international trade, criminal matters in foreign jurisdictions, and in civil litigation. He is a former International General Counsel and Executive Vice President with Hyundai Heavy Industries and is recognized by Chambers & Partners for dispute resolution in Korea as well as Who's Who Legal for construction disputes.

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Anton A. Ware

Recognized as a "future leader" in the field of international arbitration, Anton Ware acts as counsel and advocate for private sector companies, sovereign states, and government-owned entities in commercial and investment treaty arbitration proceedings around the world, with a particular focus on the Asia Pacific region.

Mr. Ware is "a widely acclaimed advocate" (*Who's Who Legal: Arbitration*, Future Leaders 2018) who clients praise for his "skills as a presenter and cross examiner" during arbitration hearings and for his client service (*Who's Who Legal: Arbitration*, Future Leaders 2017).

Based in Shanghai, China, Mr. Ware speaks and reads Mandarin Chinese and is skilled in handling disputes involving Chinese parties. He regularly advises companies regarding investor protections for Belt and Road Initiative projects, and serves as an Ambassador of the ICC Commission on the Belt and Road Initiative. Mr. Ware is listed on the List of Arbitrators of the Hong Kong International Arbitration Centre (HKIAC), the Panel of International Arbitrators of KCAB International, and the Panel of Arbitrators of the Shenzhen Court of International Arbitration (SCIA).

In addition to his arbitration practice, Mr. Ware also has extensive experience in US litigation and anti-corruption investigation and compliance matters.

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Questions?



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Tab 3: Speaker Biographies

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William Godwin QC acts in complex, multi-jurisdictional and high-value disputes often with a cross-border element. He has substantial experience of a wide range of disputes in arbitration and English high court litigation including joint venture, shareholder, partnership, corporate acquisition, insurance, shipping, professional negligence and indemnity disputes. His practice also includes construction and technology disputes and he has particular expertise in FIDIC contracts. He has been described in the directories as "an outstanding advocate", "very bright and experienced, providing detailed analysis of issues" and as having "good credentials in the arbitration communities of China and Asia."

Mr. Godwin was appointed Queen's Counsel in 2017, an award made for excellence in advocacy in the higher courts in England. He is a member of several international arbitration panels and acts as adjudicator.

Experience

Commercial Litigation

- Acting in English High Court (Commercial Court) claims by *German industrial group* arising from acquisition debt pushdown in 15 jurisdictions following private equity buy-out and restructuring involving conflicts of laws, German corporate law and law of succession, Mexican tax law and valuation of shares in group subsidiary.
- Acting for *UK mining engineers* in English High Court (Technology & Construction Court) claims arising from project in central Asia.
- Acting in English High Court (Chancery Division) claims concerning complex offshore trust structures, share sale and loan agreements.
- Acting for *policyholder accountants* against insurers in landmark decision in *HLB Kidsons v Lloyds Underwriters and Others* [2009] Lloyds Rep IR 8 (CA) and acting in related professional negligence proceedings against brokers and solicitors.
- Acting for *Bosnian corporations* in setting aside multimillion dollar Commercial Court judgment in a claim by Chinese SOE under an on-sale of Iranian crude oil.
- Acting for *developers* in claims against insurers and contractors following total collapse of docklands development.

International Arbitration

- Acting for *Indian buyers of breeding poultry* under a sales right agreement with US sellers in challenge proceedings to an ICC award raising issues of

Areas of Focus

- Commercial Litigation
- International Arbitration

Education

- BPhil, DPhil (PhD), Oriel College, Oxford University
- BA, University College London, *first class*

Admissions

- Bar of England and Wales

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US state and federal law, New York Convention issues and coordination of US and London proceedings.

- Acting for *privatised Russian shipping corporation* defending UNICTRAL arbitration claims by European bank on parent company guarantee raising Russian and English company law issues.
- Acting for *French joint venture contractors* in arbitration concerning EPC contract for container terminal project in North Africa and acting for same client in nuclear containment project in central Europe.
- Acting in LCIA arbitration for *Italian receivers* in jurisdiction challenge involving the European Insolvency Regulation, Italian and English law.
- Acting in LMAA arbitrations defending *Chinese shipyard and finance house* in claims for late delivery in respect of multiple chemical tanker new-build contracts and a Hong Kong International Arbitration Centre hearing for *Chinese pharmaceutical company* in claims arising from a share sale agreement.
- Acting for *Chinese metal traders* in an LCIA arbitration concerning supply of alumina in breach of UN/US sanctions and for *Chinese charterers* in Hong Kong ad hoc arbitration arising from voyage charters for commodities shipments from Australia to China.

Recognition

- *The Legal 500 UK*
Leading Individual–Construction (London Bar)
- *Chambers UK*
International Arbitration: General Commercial & Insurance (London Bar) (2010)

Professional and Community Activities

- Board Member, Great Britain China Centre
- Arbitration Panel Member, China International Economic and Trade Arbitration Commission
- Arbitration Panel Member, Shanghai International Arbitration Center
- Arbitration Panel Member, Shenzhen Court of International Arbitration
- Arbitration Panel Member, Chongqing Arbitration Commission
- Arbitration Panel Member, Dubai International Arbitration Centre
- Arbitration Panel Member, Mauritius MARC

Perspectives

- London Commercial Litigation Team Welcome Drinks, (February 28, 2020)
- The 2017 Fidic Contracts: The Second Editions of the Red, Yellow and Silver Books Wiley, *Wiley Online Library* (February 20, 2020)

Jun Hee Kim

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Jun Hee Kim focuses his practice on providing counsel in the international arbitration space in a variety of sectors, including construction, intellectual property, technology, shipping, engineering and disputes related to joint venture and post-M&A transactions. He has represented clients in Asia, Europe, North America, and Latin America in a variety of arbitral fora, including the ICC, ICSID, AAA, SIAC, HKIAC, LCIA, LMAA, KCAB, SCC, NAI, and UNCITRAL rules, and in ad hoc proceedings.

Mr. Kim's practice also includes advising clients on issues related to international trade, criminal matters in foreign jurisdictions, and in civil litigation. He is a former International General Counsel and Executive Vice President with Hyundai Heavy Industries and has served as a faculty member of the Korea Military Academy.

Recognition

- *Who's Who Legal*
Construction: Multi-Jurisdictional Disputes (Korea) (2019-2020)
- *Chambers Global*
"Spotlight Table"—Dispute Resolution: International Firms (South Korea) (2020)
- *Chambers Asia-Pacific*
"Recognised Practitioner" – Dispute Resolution: International Firms (South Korea) (2019-2020)
- ILO/ACC Global Counsel Award
Asia Pacific Leading Individual in Litigation (2017)
- *Juris Publishing*
"Roster of International Arbitrators" (2012-2018)

Professional and Community Activities

- Council Member and Chairperson of the Appointments Committee, HKIAC
- Member, SIAC's User Council (Korea's National Committee)
- Member, Korean Government's Arbitration Development Advisory Panel
- Director, Korea Corporate Legal Affairs Association
- Arbitrator/Panel of Arbitrators for KCAB (Korea), SIAC (Singapore), DIAC (Dubai), AIAC (Kuala Lumpur), CAA (Taipei), BAC (Beijing), PIAC (Vietnam), SCMA (Singapore), THAD (Thailand)

Areas of Focus

- International Arbitration
- Korea

Education

- JD, Georgetown University Law Center
- MA, University of Pennsylvania
- BSFS, Georgetown University

Admissions

- Registered Foreign Legal Consultant, Korea
- District of Columbia
- US Court of International Trade
- US Court of Appeals for the Federal Circuit

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David Reed represents multinational corporations, sovereign states and government-owned entities in international commercial and international investment arbitrations. David has more than 20 years' experience with international arbitration disputes, most notably in the construction and engineering, power, oil and gas, telecoms, information technology, life sciences, banking, and shipping sectors. These disputes fall under a variety of rules including those of the ICC, LCIA, and UNCITRAL. He also represents both investors and sovereign states in investment treaty arbitrations under the ICSID and UNCITRAL rules. He has been recognised as a notable practitioner in numerous publications including *Chambers*, *The Legal 500*, and *Legal Experts*.

Experience

International Arbitration

- *US corporation* in an LCIA arbitration with a Lithuanian company arising out of the reconstruction of part of a fire-damaged oil refinery.
- *Swedish company* in an ICC arbitration with a US subsidiary of a French company relating to the construction of a modular pharmaceutical plant.
- *European company* in an ICC arbitration with a Russian company relating to the construction of a Class A commercial real estate development.
- *Peruvian company* in an ICC arbitration with another Peruvian company relating to the construction of an ethanol plant.
- *Indian company* in an LCIA arbitration with a European company relating to a supply agreement in the pharmaceutical sector.
- *North African company* in an ICC arbitration with a Middle Eastern company in the telecoms sector.
- *UK-based consortium* in a series of disputes relating to the construction of a LNG receiving terminal.
- *Consortium in the Middle East* in a dispute relating to the calculation of LNG prices.
- *The General Roads Authority of a sovereign state* in an ICC arbitration against a Greek company arising from the construction of a highway.
- *Middle Eastern power producer* in a dispute relating to the calculation of a price adjustment under a power purchase agreement.
- *The same Middle Eastern power producer* in a dispute relating to payments for spare parts under a power purchase agreement.

Areas of Focus

- International Arbitration

Education

- DESS, Université de Paris I Panthéon-Sorbonne, 1993
- LLB, King's College London, 1991
- D.E.A., Université Paris 1 Panthéon-Sorbonne, 1992
- Maîtrise, Université Paris 1 Panthéon-Sorbonne, 1991

Admissions

- Registered Foreign Lawyer, SRA
- New York

- *Middle Eastern power and water producer* in relation to change of legislation, force majeure and global claims brought by an EPC contractor in relation to the construction of a power plant and a desalination plant.
- *Middle Eastern power and water producer* in a series of disputes relating to the construction of a desalination plant.
- *Middle Eastern company* in an LCIA arbitration against an Italian company relating to the construction of a salt plant.
- *Middle Eastern company* in an ICC arbitration against a joint venture between US and Saudi companies out of the construction of an air separation unit in a space plant.
- *The lenders* in a series of disputes relating to the construction of a national sports stadium.
- *European defence electronics company* in a post-M&A dispute with a European company.
- *European oil & gas company* in a dispute relating to transportation of gas in the North Sea.
- *North African oil & gas company* in an UNCITRAL arbitration relating to the sale and purchase and transportation of LNG.
- *The same North African oil & gas company* in a litigation in Texas.
- *Investor* in an ICSID arbitration under the Energy Charter Treaty against the Republic of Bulgaria.
- *Investor* in an ICSID arbitration under a Bilateral Investment Treaty against the Republic of Romania.
- *Investor* in an ICSID arbitration under a Bilateral Investment Treaty against the Islamic Republic of Pakistan.
- *Eastern European State* in an ICSID arbitration against a US investor.
- *Eastern European State* in an ICSID arbitration against an Omani investor.
- *Eastern European State* in an ICSID arbitration against a Hungarian investor.
- *European infrastructure company* in an ICC arbitration and related expert determination with users of the infrastructure concerning the calculation of usage charges.
- *European insurance company* in an ICC post-M&A arbitration with a North American insurance company.
- *European insurance company* in a litigation in New York.
- *European company* in two ICC arbitrations against a Middle Eastern company arising under a long-term sale and purchase agreement and a tolling agreement in respect of phosphorous.
- *European-led consortium* in an ICC arbitration against a sovereign state concerning the reconstruction and extension of an international airport.
- *European consortium* in an ICC arbitration against a sovereign state concerning the construction of a power plant in Italy.
- *European consortium* in an ICC arbitration concerning the construction of a hydro-electric power scheme in the Middle East.

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- *A US defence contractor* in an LCIA arbitration against an Afghan company arising out of certain construction projects.
- *A North African owner* in an EPC dispute arising out of the construction of an oil refinery.
- *An Asian shipbuilder* in an ad-hoc arbitration under 1996 Arbitration Act against a BVI Company in a dispute concerning the sale and charter of a deep sea drill ship.
- *A property developer* in a DIAC dispute against a Saudi property developer regarding ownership interests in certain property developments.
- *A North African owner* in relation to a mezzanine finance dispute with an Asian lender.
- *A US company* in an ICC arbitration against a European company arising out of alleged defective products in the automotive sector.

Recognition

- *Chambers UK*
"Recognized Practitioner" – International Arbitration (UK-wide) (2020)
International Arbitration (2012)
- *The Legal 500 UK*
International Arbitration (2015-2020)
Public International Law (2015-2020)

Professional and Community Activities

- Member, International Arbitration Institute
- Member, Swiss Arbitration Association
- Member, London Court of International Arbitration
- Assistant Professor, University of Paris I Panthéon-Sorbonne (1994-1999)
- Assistant Professor, Centre Universitaire d'Etudes des Communautés Européennes (1995-1997)

Anton A. Ware

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Recognized as a "future leader" in the field of international arbitration, Anton Ware acts as counsel and advocate for private sector companies, sovereign states, and government-owned entities in commercial and investment treaty arbitration proceedings around the world, with a particular focus on the Asia Pacific region.

Mr. Ware is "a widely acclaimed advocate" (*Who's Who Legal: Arbitration, Future Leaders 2018*) who clients praise for his "skills as a presenter and cross examiner" during arbitration hearings and for his client service (*Who's Who Legal: Arbitration, Future Leaders 2017*).

Based in Shanghai, China, Mr. Ware speaks and reads Mandarin Chinese and is skilled in handling disputes involving Chinese parties. He regularly advises companies regarding investor protections for Belt and Road Initiative projects, and serves as an Ambassador of the ICC Commission on the Belt and Road Initiative. Mr. Ware is listed on the List of Arbitrators of the Hong Kong International Arbitration Centre (HKIAC), the Panel of International Arbitrators of KCAB International, and the Panel of Arbitrators of the Shenzhen Court of International Arbitration (SCIA).

In addition to his arbitration practice, Mr. Ware also has extensive experience in US litigation and anti-corruption investigation and compliance matters.

Mr. Ware regularly speaks on international arbitration topics and previously taught international commercial arbitration at UC Hastings College of the Law in San Francisco.

Mr. Ware earned his JD from Columbia Law School, where he was a Harlan Fiske Stone Scholar and Editor of the *Columbia Law Review*. He also served as a judicial extern to the Honorable Sonia Sotomayor, who at the time was a judge on the US Court of Appeals for the Second Circuit, and is now a US Supreme Court Justice.

Experience

International Commercial Arbitration and Transnational Litigation

- *Hana Financial Group* in obtaining complete dismissal of \$1.4 billion claims by US private equity fund and award of attorneys' fees and costs in post-M&A dispute (ICC, Singapore).
- *Chinese metals conglomerate* in successfully resolving investment dispute with US mineral development company (ICC, Hong Kong).

Areas of Focus

- International Arbitration
- Commercial Litigation
- Anti-Corruption

Education

- JD, Columbia Law School, 2005, Harlan Fiske Stone Scholar
- MA, Johns Hopkins School of Advanced International Studies, 2002, *with distinction*
- BA, Johns Hopkins University, 2001, Phi Beta Kappa

Admissions

- California
- New York

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- *Asian mobile device manufacturer* in defeating request by component supplier for worldwide injunction under copyright and patent license agreement (ICC, Maui).
- *Latin American railroad concessionaire* in obtaining complete dismissal of \$1 billion breach of contract claims (ICC, Bogota).
- *US pharmaceutical company* in obtaining complete dismissal of claims by Swiss pharmaceutical company for royalties under patent license agreement (JAMS, Boston).
- *Asian shipbuilder* in dispute involving sale and charter of a deep sea drill ship (ad hoc, London).
- *Chinese investor* in fraud action against former business partners in private air charter business (California Superior Court).
- *German equipment manufacturer* in breach of contract and intellectual property dispute with California solar panel producer (ICC, London).
- *US private equity fund* in breach of contract and fraud dispute with former co-investors in Korean credit card joint venture (ICC, Singapore).
- *Private equity arm of major US financial institution* in four arbitration proceedings relating to corporate control of Brasil Telecom (ICC, Paris).
- *Private equity arm of major US financial institution* in successfully obtaining a series of injunctions against its former fund manager in Brazil. *Int'l Equity Invs. v. Opportunity Equity Partners*, 246 F. App'x 73 (2d. Cir. 2007) (affirming injunctions).
- *US private equity fund* in breach of contract and trademark infringement dispute with former joint venture partner in Chinese shopping mall chain (ICC, Hong Kong).

Investor-State Arbitration

- *The Republic of Korea* in an investor-state arbitration involving a claim of \$4.7 billion filed by the Lone Star Funds (ICSID).
- *Turkish energy company* in successfully obtaining arbitration award of nearly \$800 million in an investor-state arbitration against the Islamic Republic of Pakistan (ICSID).
- *The Republic of the Philippines* in an investor-state arbitration involving a multibillion dollar claim by Shell Philippines Exploration B.V. (ICSID).
- *The Kingdom of Thailand* in an investor-state arbitration involving claims by Australian mining company, Kingsgate Consolidated Ltd. (UNCITRAL).

Pro Bono

- *Amicus curiae* in support of multiple challenges to the "Travel Ban" Executive Orders.
- *Amicus curiae* in support of petition for rehearing of Ninth Circuit panel decision in *Teixeira v. County of Alameda*, involving Second Amendment challenge to zoning ordinance.
- *Plaintiffs in California Voting Rights Act lawsuit* challenging San Mateo County's at-large system of elections for County Board of Supervisors.

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- *Bay Area restaurant workers* in immigration proceedings on motions to suppress evidence obtained during US Immigration and Customs Enforcement raids.
- *Petitioner* in successful appeal from Board of Immigration Appeals denial of motion to re-open proceedings on the basis of ineffective assistance of former counsel. *Aris v. Mukasey*, 517 F. 3d 595 (2d Cir. 2008).
- *Petitioner* in successful appeal from Board of Immigration Appeals denial of eligibility for discretionary relief from deportation, decided on constitutional equal protection grounds. *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

Recognition

- *Who's Who Legal*
Arbitration: Future Leaders (2017-2020)
- *The Legal 500 US*
International Arbitration (2017-2018)
- *Northern California Super Lawyers*
"Rising Star" (2016-2017)

Professional and Community Activities

- Ambassador of the ICC Commission on the Belt and Road Initiative
- Arbitrator, List of Arbitrators, Hong Kong International Arbitration Centre (HKIAC)
- Arbitrator, Panel of International Arbitrators of KCAB International
- Arbitrator, Panel of Arbitrators of the Shenzhen Court of International Arbitration (SCIA)
- Arbitrator, List of Arbitrators, Hangzhou Arbitration Commission (HAC)
- Regional Ambassador, HK45
- Adjunct Professor, UC Hastings College of the Law
- Member, American Bar Association, Section of International Law
- Member, State Bar of California, International Law Section

Perspectives

- What to Do When You Receive a Coronavirus-Related Force Majeure Notice, *Coronavirus: Multipractice Advisory* (March 4, 2020)
- Chinese Investors Investing in One Belt One Road Lack an Effective Enforcement Mechanism at Home, *HK45 Newsletter Blog* (November 21, 2019)
- Arbitration: A Better Way to Resolve Intellectual Property and Technology Disputes? , *Speaker, SVAMC/KCAB Conference, Seoul, Korea* (October 28, 2019)
- Future Leaders, *Debator, 2nd Annual Who's Who Arbitration Conference, Hong Kong* (October 24, 2019)
- Navigating the Life Cycle of a Cross-Border Deal, *ABA Section of International Law, Asia-Pacific Forum, Hong Kong* (October 24, 2019)
- Management of Legal Risks and Dispute Resolution in High-Tech Industry, *Moderator, SCIA-ICC Joint Seminar, Shenzhen, China* (April 26, 2019)

- Increasing Diversity in International Arbitration, *Presenter, HKIAC WIA, HK45 Conference, Shanghai, China* (March 8, 2019)
- Regulatory Powers of States and Recent Investment Treaty Practice, *ABA International Law Section Investment Arbitration Conference, Singapore* (May 10, 2018)
- How to be successful as counsel in international arbitration, *Presenter, HKIAC Arbitration Workshops, Shanghai, China* (April 25, 2018)
- Comparative Legal Guide, United States: Arbitration, *The Legal 500 & The In-House Lawyer* (November 10, 2017)
- China's New Cybersecurity Law Imposes Heightened Restrictions on Company Computer Networks, *Advisory* (July 20, 2017)
- Improving the Transparency and Efficiency of Arbitration Services, *ICC / CIETAC Conference, International Arbitration Without Frontiers, Shanghai, China* (June 27, 2017)
- Recent Developments in International Arbitration: London, Hong Kong, Singapore, *In-House Counsel Forum, Seoul, Korea* (April 1, 2017)
- Default Application of Emergency Arbitrator Provisions in Commercial Arbitration Rules, *Advisory* (August 4, 2016)
- Interim Measures Against States, *28th Annual ITA Workshop, Dallas, Texas* (June 16, 2016)
- Enforcement of Annulled Arbitration Awards, *University of International Business and Economics School of Law, Shanghai* (May 13, 2016)
- Enforcement of Annulled Arbitration Awards, *University of International Business and Economics School of Law, Beijing* (May 10, 2016)
- Arbitration in Emerging Markets, *Adjudicating Across Borders: Contemporary Challenges in International Arbitration, Stanford, CA* (April 30, 2016)
- Global Anti-Corruption Insights: 2015 Year-End Review, *FCPA News and Insights* (January 27, 2016)
- International Commercial Arbitration 2015: A Year in Review, *International Arbitration Law360* (January 25, 2016)
- Enforcement of Arbitral Awards and Court Judgments, *Resolving Disputes With Companies from Asia: What is the Best Approach?, Chartered Institute of Arbitrators, San Francisco, CA* (January 22, 2016)

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Tab 4: Practice Overview



International Construction Arbitration

Arnold & Porter's construction and international projects attorneys are located in multiple offices around the world and have more than two decades of significant expertise in complex construction disputes around the world with a strong record of success. Our team have very broad experience ranging from infrastructure projects to residential projects, power and process plant, EPC/turnkey projects, off-shore structures and shipbuilding. The team have represented both contractors and project sponsors in numerous international arbitration and litigation cases involving issues such as:

- delay and disruption
- disputed change orders/variations
- scope of work claims
- defects
- workmanship
- design disputes and fitness for purpose
- materials quality/engineering criticality
- global claims
- suspension of work
- process engineering disputes
- unforeseen ground conditions
- critical delay analysis
- customs clearance
- escalation of material costs
- industrial action
- final account disputes
- repudiation and termination
- delay liquidated damages
- performance liquidated damages
- and many other types of claims

We have experience working with leading firms of experts in areas such as critical delay analysis, quantity surveying, steelworks design, engineering criticality analysis, HAZOP assessment, concrete quality, process engineering and other areas. We have also successfully handled litigation regarding the calling of performance bonds and guarantees.

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