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THE  
INTERNATIONAL  
ARBITRATION  
REVIEW

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SEVENTH EDITION

EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

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# EDITOR'S PREFACE

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International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**

Wilmer Cutler Pickering Hale and Dorr LLP

New York

June 2016

## Chapter 10

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# CHINA

*Keith M Brandt and Michael K H Kan*<sup>1</sup>

### I INTRODUCTION

The trend towards globalisation and internationalisation of arbitration in China is ever increasing, and at a rapid pace. In our previous review, we reported the promulgation by China International Economic and Trade Arbitration Commission (CIETAC) of the CIETAC arbitration rules in 2015 (2015 Rules) and by the Shanghai International Arbitration Center of the Shanghai Pilot Free Trade Zone arbitration rules (Shanghai FTZ Arbitration Rules), both of which are benchmarked against prevailing international best practices. The Beijing Arbitral Commission has now joined the league with its new, long-awaited 2015 arbitration rules.

At the Chinese judiciary level, following a Supreme People's Court (SPC) decision upholding the validity of an arbitration agreement providing for foreign-administered (ICC) arbitration seated in China (Shanghai), the SPC has published a paper in effect confirming its 'pro-arbitration' stance in the recognition and enforcement of foreign arbitral awards in China.

As one of the initiatives promulgated through the Shanghai Free Trade Zone (Shanghai FTZ), foreign arbitral institutions are now invited to establish a presence in China. This invitation has been accepted by prominent arbitral institutions including the Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and ICC, which have established representative offices in the Shanghai FTZ.

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<sup>1</sup> Keith M Brandt is the managing partner and Michael K H Kan is a counsel at Dentons Hong Kong.

## II THE YEAR IN REVIEW

### i Shanghai FTZ – the entry of foreign arbitration institutions into China

Following the publication of the Shanghai FTZ Arbitration Rules, which took effect on 1 May 2014, the Chinese government has stated its policy to support the introduction of internationally renowned commercial dispute resolution institutions as part of its plan to develop the Shanghai FTZ. This marked the fact that, for the first time, foreign arbitral institutions are permitted to establish a formal presence in China.

Following a six-month period between late 2015 and early 2016, the HKIAC set up its representative office in the Shanghai FTZ in November 2015, and was followed by the SIAC and ICC in January and February 2016, respectively. This comes as no surprise, as these arbitral institutions perceive China to be an important ‘market’ for administered foreign arbitrations involving Chinese entities. For instance, Chinese entities have ranked among the top five foreign ‘clients’ of the SIAC in the past few years (and first in 2012 and 2014).<sup>2,3</sup>

#### *HKIAC*

The HKIAC has announced its intention to collaborate, through its representative office, with Chinese arbitral commissions to promote international best practices and to facilitate the development of Chinese arbitration law and pro-arbitration policies in China. In so doing, it intends to work closely with Chinese courts and judges to enhance their understanding of arbitration to facilitate the development of an overall pro-arbitration policy across China, provide professional training to Chinese arbitrators and practitioners, and provide logistical support for arbitrations taking place in China. However, at this stage, the representative office will not provide arbitral administration services in China, which will continue to be provided by the HKIAC Secretariat in Hong Kong.

#### *SIAC*

The SIAC anticipates that its representative office shall promote the SIAC’s arbitration services to Chinese entities in foreign and foreign-related arbitrations. As with the HKIAC, the SIAC will also collaborate with Chinese arbitral commissions to further the development of international arbitration in China and encourage international best practices through training workshops and networking events for Chinese arbitrators and practitioners. At this stage, the representative office will not provide arbitral administration services in China.

#### *ICC*

As the first non-Asian arbitration institution to establish a representative office in China, the ICC seeks to improve its visibility among Chinese entities as a suitable choice of arbitral institution. At this stage, the representative office will not provide arbitral administration services in China.

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2 *Asian Legal Business*, *SIAC sets up office in Shanghai*, Eileen Ang, *Asian Legal Business*, 26 January 2016.

3 *SIAC launches Shanghai office to further tap China market*, *Vantage Asia*, 7 March 2016.

### *Going forward*

The establishment of representative offices by prominent international arbitral institutions in the Shanghai FTZ brings international best practices one step closer to China's doors. Chinese judges, arbitrators and practitioners are now able to learn from the 'experts' about how international arbitrations are conducted as well as the practical application of relevant international rules, such as the IBA Rules on the Taking of Evidence. It is anticipated that through such process, a level playing field will be created between local players (including arbitral commissions, arbitrators and practitioners alike) and their international counterparts in the market for administered international arbitrations. On the other hand, we envisage even greater learning opportunities for international arbitral institutions to learn from arbitral commissions in China. After all, an international arbitration seated in China remains subject to Chinese law. In particular, China's arbitration, civil procedure and evidence laws differ in various important aspects from those that common law jurisdictions are familiar with, all of which have an impact on how an arbitration seated in China shall be administered.

For these reasons, until meaningful training and exchange of information and experience have taken place and a level playing field has been created, it is premature for representative offices to provide arbitral administration services in China. There are also legal issues that need to be resolved. First, the Chinese judiciary's and local authority's approval for a representative office to be able to administer arbitrations seated in China as (or as if it were) a local arbitral commission is required. Secondly, the SPC needs to issue clear confirmation and guidance to remove any uncertainty that an arbitral award made in those circumstances will be recognised and enforced in China.

#### **ii Beijing Arbitration Commission (BAC) – 2015 BAC Rules**

The BAC, which was established in 1995, amended its 2008 arbitration rules with effect from 1 April 2015 in line with international best practice while maintaining its compatibility with the characteristics of Chinese arbitration practice. The BAC has stressed in particular three points in the revision process:

- a* the openness and transparency of the review process with an emphasis on collecting views of professionals;
- b* the attention paid to user experience and party autonomy as opposed to the past emphasis on an institution's administration of arbitral proceedings; and
- c* the adoption of international arbitration practices.

The major amendments of the BAC 2015 Rules are summarised below.

#### ***Introduction of a concurrent name as 'Beijing International Arbitration Center'***

As a step towards the BAC's globalisation, the BAC has registered 'Beijing International Arbitration Center' as its concurrent name. (Article 1.)

#### ***More transparent, predictable and efficient***

The 2015 BAC Rules now specify that parties may amend their claims or counterclaims, although the BAC or the arbitral tribunal shall have the power to refuse acceptance of such requests for amendments where such amendments are made too late or may affect the normal course of arbitral proceedings. (Article 12.)

A good faith element has been added to the 2015 BAC Rules, whereby emphasis is placed on the principles of good faith, collaboration to adopt methods that are appropriate

to resolve disputes, and alerting parties of any cost consequences should they cause delay to the arbitration proceedings. This empowers an arbitral tribunal to exercise tighter control in the arbitral proceedings with a view to be able to resolve disputes more efficiently and effectively. The arbitral tribunal is also empowered to penalise, by way of the imposition of costs sanctions, acts that deliberately obstruct or delay the arbitral proceedings. (Articles 2 and 51.)

### *Jurisdiction decision*

Decisions on a tribunal's jurisdiction subject to challenge by a party may be made by the arbitral tribunal upon authorisation from the BAC, either by a separate decision, an interlocutory award or by a final award. (Article 6.) Nonetheless, one may reasonably expect any challenge to jurisdiction to be made before the local Chinese courts, which may be perceived to be more authoritative.

### *Joinder of additional parties*

The previous BAC arbitration rules did not contain provisions to allow a party to an arbitration proceeding to join an additional party. In line with the growing complexities of commercial activities, and to cater for agreements reached by and between multiple parties with connected yet distinct contractual rights and obligations, the 2015 BAC Rules now permit parties to join additional parties bound by the same underlying agreement to the same arbitration. If the arbitral tribunal is already constituted, a joinder application will only be accepted if the claimant, respondent and the party to be joined all agree. This amendment closely resembles the joinder provisions stipulated in Article 7 of the ICC arbitration rules, which permit a party to apply to the ICC Secretariat to join a third party before the constitution of the arbitral tribunal, and similarly all parties, including the party to be joined, must agree in order for a third party to be joined once the arbitral tribunal has been constituted. (Article 13.)

### *Consolidation of arbitral proceedings*

The BAC may direct the consolidation of arbitral proceedings. Where either all parties request, or a particular party requests and the BAC considers it necessary, the BAC may decide to consolidate two or more pending arbitrations into a single arbitration. This can be seen as another step towards providing parties involved in complicated disputes with more procedural benefits and has significant cost-saving implications. It also avoids the situation of different arbitral tribunals delivering inconsistent awards in cases with similar facts. The new consolidation provisions closely resemble Article 10 of the ICC arbitration rules. (Article 29.)

### *Concurrent hearings*

An arbitral tribunal may now order concurrent hearings for two or more pending arbitrations, subject to satisfaction of certain conditions. This effectively permits the arbitral tribunal to hear more than one case in the same hearing. (Article 28.)

### *Language autonomy*

In the absence of party agreement, the 2015 BAC Rules will not by default designate Chinese as the language of arbitral proceedings. Instead, the BAC or the arbitral tribunal should select a language or more than one languages according to the specific circumstances of each case. Furthermore, the arbitral proceedings may be conducted in multiple languages if the parties

have agreed upon the use of two or more languages. This change brings linguistic convenience to parties. (Article 72.) This is of particular importance for saving substantial time and costs in foreign or foreign-related arbitrations, where a counterparty may be English speaking and the documentary evidence may be produced in the English language only.

**iii Judicial Interpretation on the Civil Procedure Law of China (CPL Interpretation) on the recognition and enforcement of foreign arbitral awards**

The SPC promulgated its CPL Interpretation on 30 January 2015, which came into effect on 4 February 2015. It has been coined as one of the most comprehensive judicial interpretations in the history of the SPC. Containing a total of 23 chapters and 552 articles, the CPL Interpretation is a substantive update of the SPC's last Judicial Interpretation on the Civil Procedure Law of China in 1992. The CPL Interpretation seeks to implement the 2012 Civil Procedure Law of China.

At least 17 articles in the CPL Interpretation directly address aspects of the law related to arbitration. Among the articles that touch on areas such court jurisdiction, validity of arbitration agreements, interim measures, enforcement of arbitral awards, *ad hoc* arbitration and foreign arbitral awards, several in particular directly supplement and clarify the Law in relation to the enforcement of foreign arbitral awards.<sup>4</sup> These provisions instil confidence that such arbitral awards are enforceable in China.

***Recognition and enforcement applications may be simultaneous or separate***

Pursuant to Article 546 of the CPL Interpretation, it has been clarified, albeit not surprisingly, that a party seeking to enforce a foreign arbitral award must first apply to have the award 'recognised' by the court, and only after the court rules to recognise the award can it then grant enforcement. Furthermore, the application for the recognition or enforcement, or both, of a foreign arbitration award may be applied simultaneously or separately.

***Time limit***

Article 547 clarifies that there is a two-year time limit for applying for the recognition or enforcement, or both, of foreign arbitral awards, and in cases where an applicant only applies for recognition of a foreign arbitral award, but not its enforcement at the same time, the time limit for putting in an enforcement application must be re-calculated starting from the date when the recognition ruling is given.

***Review process***

Article 548 further clarifies the review process for the recognition or enforcement, or both, of foreign arbitral awards, which states that the court must form a collegiate bench to review any such application, and that the court must serve the application on the respondent and permit the respondent to state its opinions to the application.

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<sup>4</sup> *Certain important rules for recognition and enforcement of foreign arbitration awards set forth in new interpretation of the Civil Procedure Law by the Supreme People's Court*, Deming Zhao, Parry Zhou and Zhang Yan of HaoLiWen, Lexology, 16 July 2015.

### *Final effect of rulings*

Article 548 also provides that any ruling on the recognition or enforcement, or both, of foreign arbitral awards takes final legal effect once it is served on the respondent. Prior to the CPL Interpretation, there have been controversies among the Chinese courts as to whether these court rulings had final effect, and also as to whether parties dissatisfied with the outcome may appeal or apply for retrial on the recognition and enforcement matter. This timely clarification by the SPC removed the previous confusion among Chinese courts, and it is now certain that court rulings on the recognition and enforcement of foreign arbitral awards are final and are not subject to retrials.

### *Arbitral awards by ad hoc arbitration tribunals outside China*

In addition, Article 545 clarifies that the recognition and enforcement of an arbitral award made by an *ad hoc* tribunal outside China by a Chinese court can be sought on the principle of reciprocity and according to a treaty to which China has acceded. Again, this clarification is important, because arbitrations seated in China are required to be administered.

#### **iv Refusal to enforce foreign arbitral awards – the public policy ground**

Following on from the CPL Interpretation, on 10 March 2015, Gao Xiaoli, Senior Judge of the SPC, published the Report of the People's Republic of China on Public Policy as a Ground for Refusal of Enforcement of Arbitral Awards under the New York Convention (Report) for the International Bar Association's Sub-committee on Recognition and Enforcement of Awards. The Report relates to a comparative study in over 40 countries on 'public policy' as a ground for refusal to recognise and enforce an arbitral award under the New York Convention between 2014 and 2015.

According to the Report, neither Chinese law nor the CPL Interpretation offers an explicit definition for what 'public policy' entails. The SPC has so far interpreted and elaborated on the definition of public policy on a case-by-case basis. Nonetheless, Gao Xiaoli explained in the Report that, in China, the public policy ground will only be triggered if the foreign arbitral award is 'manifestly contrary to the principle of the law, fundamental interests of the society, safety of the country, sovereignty, or good social customs'. Further, there has only been one case, *Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd v. Jinan Yongning Pharmaceutical Co Ltd*,<sup>5</sup> in which the Chinese court had refused to recognise and enforce a foreign arbitral award based on the public policy argument. In that case, it was held that the award decided upon matters beyond the scope provided for in the arbitration agreement. Secondly, the tribunal decided on issues that were earlier already decided by a Chinese court, which interfered with China's judicial sovereignty and the jurisdiction of the Chinese courts, and was contrary to public policy.

The Report supports China as a pro-arbitration jurisdiction, in particular by confirming that international arbitral awards would only be set aside on grounds of public policy in exceptional circumstances. On the other hand, domestic arbitral awards are more prone to be set aside on grounds of public policy. Given the trend towards globalisation and internationalisation, it is hoped that in the near future, standards would be harmonised and the same pro-enforcement treatment to international awards be accorded to domestic awards.

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5 Published on pp. 124–134, Guide Book on Foreign-related Commercial and Maritime Trial, Vol. 1, 2009, by People's Court Press, translation from New York Convention Guide.

v The 'One Belt One Road' Initiative (OBOR Initiative)

In 2013, the Central People's Government announced the strategic OBOR Initiative to foster closer economic cooperation with countries lying along two ancient economic corridors: the 'Silk Road Economic Belt' and the '21st Century Maritime Silk Road'. In March 2015, the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce jointly released the long-awaited blueprint for the OBOR Initiative, which included a series of plans to promote trade links, capital flows, infrastructural investment and policy coordination among different places across Asia, Europe and Africa. One of the more prominent plans of the OBOR Initiative is the plan to establish the Asian Infrastructure Investment Bank (AIIB) to provide financial support for the OBOR Initiative. Representatives from over 50 countries attended a signing ceremony for the articles of agreement of the AIIB held in Beijing on 29 June 2015.<sup>6</sup>

The OBOR Initiative brings immense cross-border trade potential for China and the 60-plus countries under the umbrella of the OBOR Initiative, and with it potential for cross-border contractual disputes. It is only natural that arbitration has since been promoted as a key dispute resolution mechanism. The SPC has, in its Opinion on Providing Judicial Services and Safeguards for the Building of One Belt One Road by People's Courts (OBOR Opinion) issued in July 2015, specifically indicated support towards the use of international commercial and maritime arbitration for resolving cross-border disputes arising from the OBOR Initiative, including expressing a clear indication that foreign arbitral awards relating to the OBOR Initiative shall be promptly recognised and enforced in accordance with the law.<sup>7</sup> The OBOR Opinion further signalled that the Chinese courts have on their agenda the development of the legal infrastructure for the judicial review of arbitrations involving foreign, Hong Kong, Macau and Taiwan parties. A unified system for determining rescission and refusal of enforcement of foreign arbitral awards involving parties from Hong Kong, Macau and Taiwan, so as to promote the popularity of arbitration for business partners in the OBOR Initiative, are being discussed.<sup>8</sup> It remains to be seen when and how these translate into tangible policies and laws. A unified system will undoubtedly promote greater certainty for parties from legally distinctive geographies in the region that are involved in dispute resolution, and ultimately will make it more attractive for parties in their commercial agreements to re-seed jurisdiction to those arbitral institutions operating in the region, which are then tasked with resolving these parties' differences when the same commercial agreements come to be scrutinised later on.

The OBOR Initiative is considered by many economists to be a real game changer for cross-border trade and economic activity. According to Thomson Reuters, China cross-border M&A activity hit US\$161.9 billion in 2015, a 61 per cent increase from the US\$100.8 billion accumulated in 2014.<sup>9</sup> As the number of China outbound investments surge in the future, so will disputes arising from those investments. As previously mentioned, it remains to be seen

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6 Opportunities and Challenges for Lawyers under the Mainland's 'Belt and Road Initiative', Keynote Speech by Mr Rimsky Yuen, SC, JP, Secretary for Justice at the ALB Hong Kong In-House Legal Summit 2015 on 22 September 2015.

7 Dealing with arbitration regimes in One Belt, One Road countries, Yao Qi, Vantage Asia, 3 December 2015.

8 See footnote 6.

9 Opportunity beckons, Kanishk Verghese, Asian Legal Business, 28 January 2016.

what the long term-implications are, what efficient dispute resolution mechanisms arise from the OBOR Initiative, and the seat, arbitral institutions and rules that will be preferred by trading parties, but certainly it must be expected that there will be a corresponding significant increase in arbitration cases.

The OBOR Initiative not only brings about opportunities within China, but also in Hong Kong. The Hong Kong government has announced plans to seize the opportunities of the OBOR Initiative and to enhance Hong Kong's capabilities in specialised areas of arbitration. These include the following:

- a* in the category of state-investor arbitrations, an arrangement was reached with the Permanent Court of Arbitration (PCA) based in the Hague to facilitate PCA-administered arbitrations in Hong Kong;
- b* with Hong Kong's rich experience in maritime business and law, the Hong Kong government has stressed that it will continue to capitalise on its geographical and institutional merits to develop high-level value-added maritime legal and dispute resolution services; and
- c* the Hong Kong government also plans to introduce legislative provisions to clarify the legal position on the arbitrability of intellectual property rights, which, if successful, will encourage the use of arbitration to resolve intellectual property disputes.

### **III OUTLOOK AND CONCLUSIONS**

With the establishment of representative offices by international arbitration institutions in the Shanghai FTZ, progressive enhancements in the bridging of Chinese and international arbitral law, practices and norms are expected. These representative offices may indeed play a pivotal role in opening up cross-border arbitration practice in China, fuelled by increasing demand for arbitral administration services as a result of the OBOR Initiative. China is experiencing a real transformation into a global, internationalised arbitration market, with the continuing harmonisation of its practices and procedures being consistent with its wider evolution towards emerging as a leader in the global market economy.

## Appendix 1

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# ABOUT THE AUTHORS

### **KEITH M BRANDT**

*Dentons Hong Kong*

Keith M Brandt is the managing partner of the Dentons Hong Kong office. He is a commercial dispute resolution partner specialising in heavyweight dispute resolution, including high court and commercial court litigation, domestic and international arbitration, expert determinations, ADR and mediations, with particular experience in the energy, construction and financial services sector.

Keith was educated at the University of Warwick (BA (Hons) law and sociology).

He qualified as a solicitor in England and Wales in 1985, in Hong Kong in 1985 and in Australia in 1990, and as a solicitor and barrister at the Supreme Court of the Australian Capital Territory in 1990.

He is a member of the Law Society of England and Wales and the Law Society of Hong Kong, and has various professional memberships including the International Bar Association and ICC Hong Kong.

Keith has been widely recognised for his expertise. *Chambers Asia-Pacific* 2016 states that he is known for his work on significant commercial litigation in the High Court. He specialises in finance, construction and energy issues, in which he is ranked in band 5. *Chambers Global Asia-Wide Rankings* places Keith Brandt of Dentons Hong Kong as being known for his broad experience representing clients in the finance, energy and construction sectors on a range of commercial litigation. He is also skilled at advising on a variety of ADR procedures. *Chambers Asia-Pacific* 2015 identifies him as ‘effective and experienced’ and *Chambers Global* 2015, ranking him in band 4, remarks that he is known for his broad disputes practice, encompassing ADR, litigation and international arbitration. *Chambers Asia-Pacific* 2014 stated that Keith ‘is tenacious and always available to provide urgent advice’, adding that he is ‘very responsive and a good guide to the differences between Hong Kong and US procedure’. Fellow lawyers greatly respect his extensive experience in the Hong Kong market. Both *Chambers Global* and *Chambers Asia-Pacific* 2012 and 2013, in the category of dispute resolution China international firm, states that Keith ‘earns praise for his calm and considered approach’. Placed in ‘The Experts’ category, Keith appears in the 2011 *Asian Legal Business*

'Hot 100' list of Asia's Leaders, Movers and Shakers. Additionally, the 2011, 2012, 2013 and 2014 editions of the *Chambers Global Clients' Guide* place Keith in band 3 for Asia-Pacific China (international firms) dispute resolution. Chambers and Partners has also certified Keith as a leading lawyer in dispute resolution (international firms) 2011. His experience has led him to advising clients in locations as diverse as Malaysia, Thailand and the Middle East. Clients are quick to underline Brandt's 'upbeat approach and effective interpersonal skills'. In *Chambers Asia-Pacific – a Client's Guide to Asia-Pacific's Leading Lawyers for Business* 2011, Keith is named in tier 3 of dispute resolution leading individuals: 'Having been in Asia for over 20 years, Keith Brandt of Brandt Chan & Partners affiliated with SNR Denton is well versed in a range of commercial disputes', notes the guide.

### **MICHAEL K H KAN**

#### *Dentons Hong Kong*

Michael K H Kan is a counsel at Dentons Hong Kong. Michael has led a diversified practice on both the contentious and non-contentious sides, in private practice and as in-house legal counsel at the Hong Kong Hospital Authority. Michael has particular experience in commercial disputes, contractual disputes, shareholders disputes, SFC investigations, fraud, corruption, and bankruptcy and insolvency matters. He also has experience defending judicial review applications and advising on product liability and recall issues.

Michael formerly served as a solicitor in the Hong Kong offices of Hammonds, Kennedys and as in-house legal counsel at the Hospital Authority (Hong Kong).

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