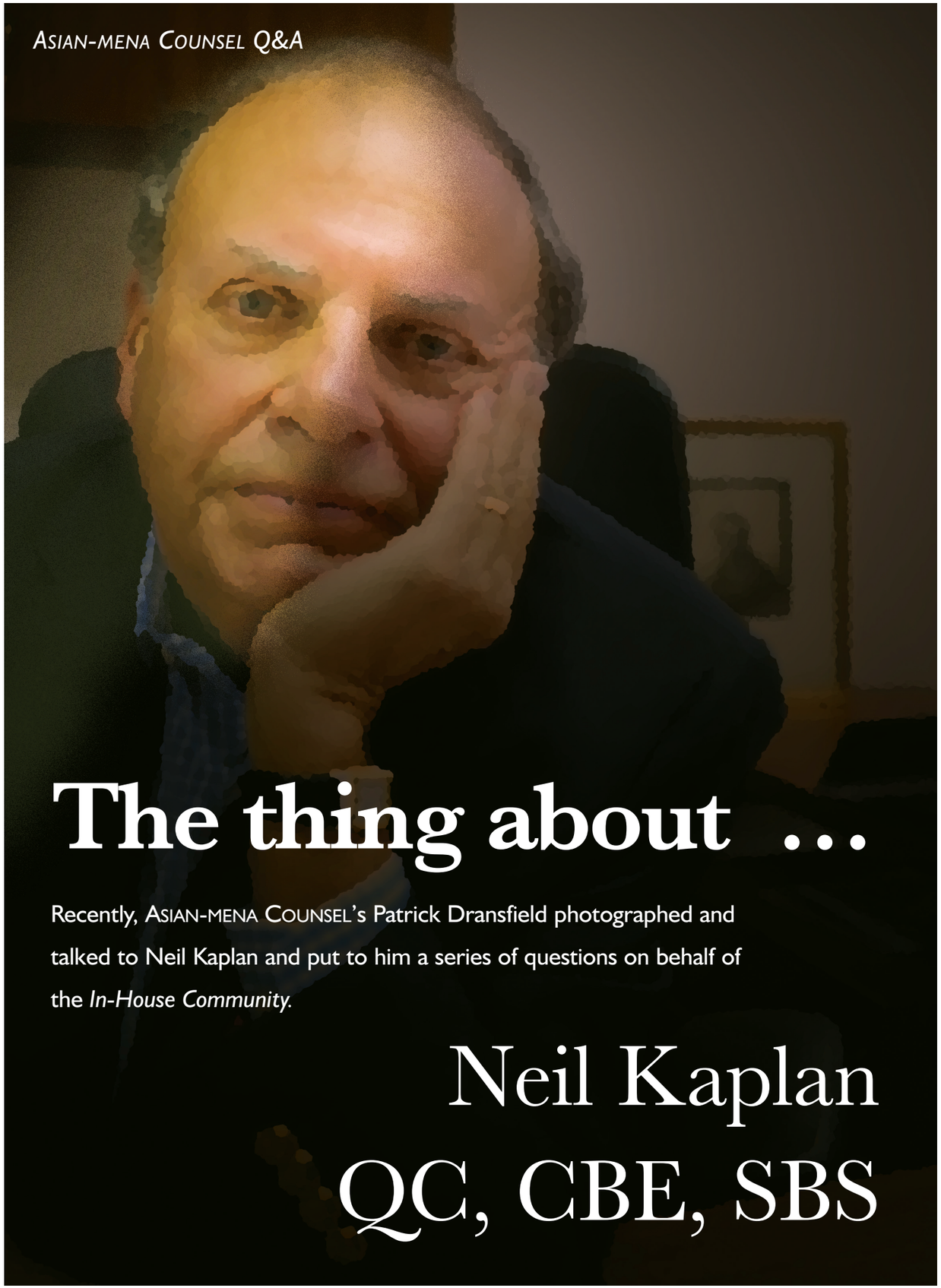


The thing about …

Recently, Asian-mena Counsel's Patrick Dransfield photographed and talked to Neil Kaplan and put to him a series of questions on behalf of the *In-House Community*.

Neil Kaplan QC, CBE, SBS

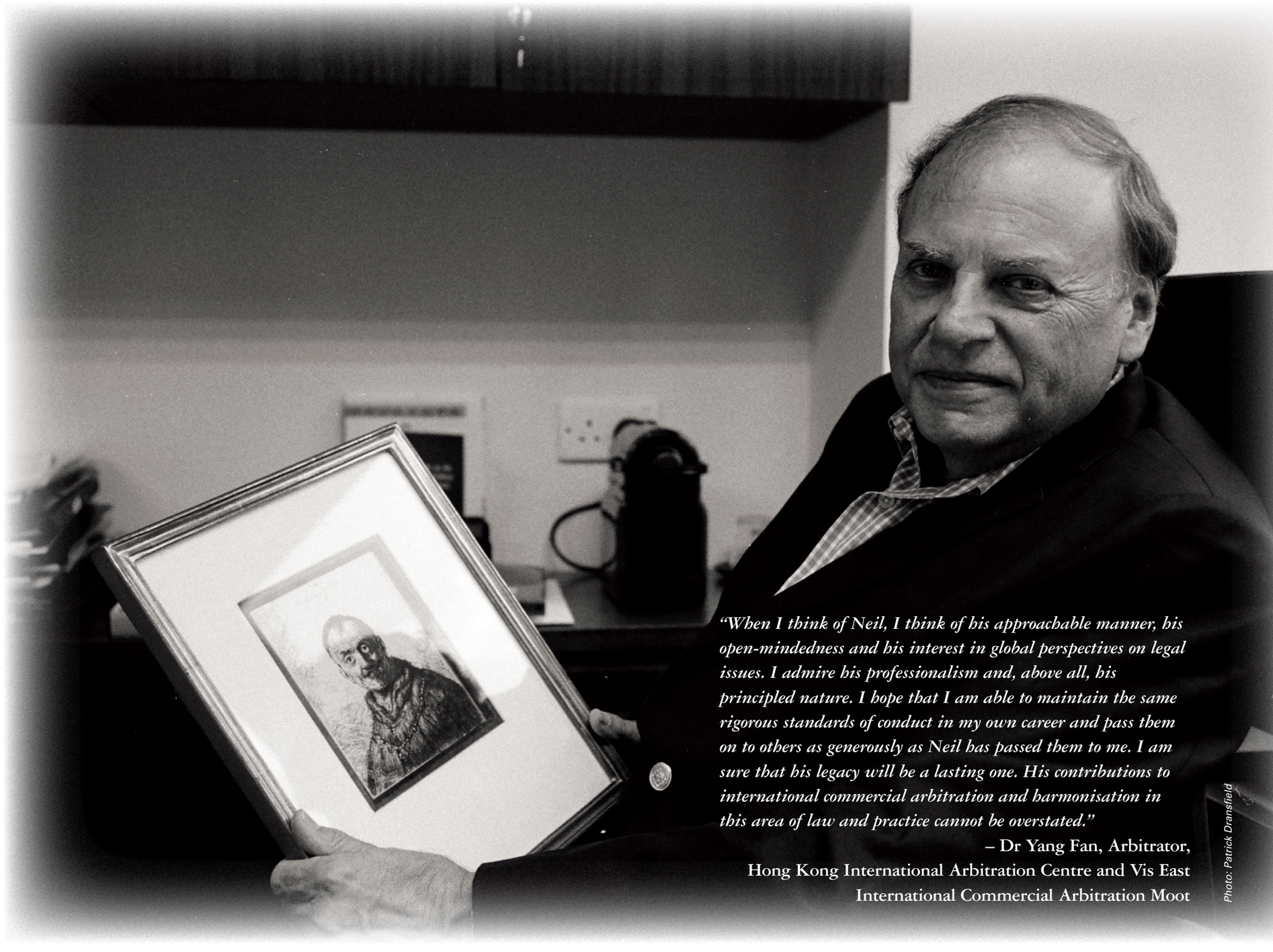
ASIAN-MENA COUNSEL: **In Henry S Fraser's article 'Sketch of the history of International Arbitration'*, he places international arbitration as one of the crowning glories of the European Enlightenment, citing Jean-Jacques Rousseau, Immanuel Kant, Jeremy Bentham and the earlier thinker Hugo Grotius as its true fathers. Grotius called for the creation of 'certain assemblages….where controversies might be settled by disinterested parties: and that steps even taken for compelling the disputants to accept peace in advance with just laws'. Has international arbitration lived up to the lofty ambitions of its intellectual creators? How relevant is it for present and future intra-Asian disputes, for example?**

Neil Kaplan: I would take issue with Henry Fraser's views. As my friend and colleague Professor Derek Roebuck (formerly Dean of Hong Kong City University's law faculty) has shown in his excellent series of books on the history of arbitration, arbitration goes back as far as the Assyrians, Egyptians, Romans and Greeks. There had to be a way to sort out disputes other than violence, and arbitration was the answer. It long pre-dated state courts which are a relatively new phenomena in the scheme of things. Roebuuck showed the importance of arbitration in England in the 17th Century as well as its importance in France in his volume The Charitable Arbitrator. Current work on the 18th Century will reveal that arbitration was commonplace to deal with all sorts of disputes and that newspapers of the day are replete with references to current arbitrations. Confidentiality must have come late to the party!

Given the patchy state of many judiciaries around the world, arbitration has rightly become the normal method of resolving most international commercial disputes. It may have become more of a profession in its own right than the people you mentioned might have liked, but this is in part because arbitration is now being conducted as a mirror image of state court litigation and has lost some of its original aura. But on the whole the system works well. That is not to say that improvements are not necessary but they will come because consumers will demand them

AMC: Following public spats regarding the perceived conflict between sovereignty and democracy and the Transatlantic Trade & Investment Partnership and the Trans-Pacific Partnership, for example, how do you see the role and neutrality of International Arbitration in this context?

NK: I am somewhat surprised that by now we have not introduced the rule that no arbitrator can be of the same nationality as any of the parties. This rule applies to the chair and I fail to see why it should not apply to the whole tribunal, unless of course the parties agree otherwise. I would like to see a situation arrived at where the party appointed arbitrators did not know which party nominated them. This should not be hard to achieve in institutional arbitrations but I accept is harder in ad hoc cases. As to impartiality generally it is the chair which is crucial in the majority of cases. I don't think there is less impartiality in arbitration than in the courts. Judges are human too and have prejudices, patent or latent.



"When I think of Neil, I think of his approachable manner, his open-mindedness and his interest in global perspectives on legal issues. I admire his professionalism and, above all, his principled nature. I hope that I am able to maintain the same rigorous standards of conduct in my own career and pass them on to others as generously as Neil has passed them to me. I am sure that his legacy will be a lasting one. His contributions to international commercial arbitration and harmonisation in this area of law and practice cannot be overstated."

– Dr Yang Fan, Arbitrator,
Hong Kong International Arbitration Centre and Vis East International Commercial Arbitration Moot

Photo: Patrick Dransfield

"Neil should be known as the father of arbitration in Asia. He provided people in Asia Pacific with his insight and vision, and encouraged the young generation to move forward toward new fields. Personally he is a gentleman. He never loses his kindness and considerate hospitality. He is very flexible and never had any difficulties to overcome any differences in age, culture and any other gaps among us."

– Kevin Kim, Head and Founder, Bae, Kim & Lee's International Arbitration & Litigation Practice Group

"Neil is well known as a leading international arbitrator; the father of arbitration in Hong Kong; and the founder of Des Voeux Chambers: Hong Kong's largest commercial set. Neil attracted to his chambers many leading lights at the bar, and from the Attorney General's chambers where he had worked. He is a mentor to many and has had a huge impact on the rule of law and the Hong Kong bar."

– Chua Guan Hock, Senior Counsel, Des Voeux Chambers

"His 'go-get-it-ness' is infectious and, through the generations, the Hong Kong arbitration community has grown in strength and quality. Neil also serves as a reminder that no one is too busy to explore their interests. This curiosity has brought him the fullness of life that many wish for but end up having their head too much in the sand to do anything about. Having a mentor like Neil has meant for me a drive to keep that curiosity engaged, even in the face of an overbrimming plate."

– Chiann Bao, Secretary General, Hong Kong International Arbitration Centre

AMC: David Rivkin, in his opening remarks for the Hong Kong Arbitration Week in October 2015, called for "a new contract between arbitrators and the parties that will establish (the expectations of the tribunal) from the start". Do you agree with his view?

NK: Only partly. I have great admiration for David with whom I have worked several times, but I feel that he is only dealing with one side of the problem. Of course arbitrators should not delay unnecessarily in delivering awards. But putting aside the few rogue cases where there is no excuse save perhaps 'writers' block' it is crucial to see why there is a delay. In most cases it is not appropriate to count from the end of the hearing until the date of the award. Sometimes tribunals have to wait two to three months for detailed closing submissions and possibly reply submissions too. In some cases, both sides then insist on an oral hearing to articulate their written closings. Sometimes the tribunal will need to raise specific points with the parties which have not been adequately dealt with to date. All this takes time as does scrutiny where applicable.

Another cause of delay is the consequence of the kitchen sink approach. No triage is practised with the result that the tribunal has to deal with far too many points and this takes time. Then there is the issue of experts. If they don't agree on important issues, the tribunal needs to find a way to resolve the impasse and this may involve using the experts to help them. This all takes time.

What if one counsel has employed guerilla tactics throughout the case? This will make the award harder to write. Who knows about this apart from the parties themselves. Thus looking at the raw data – the start and end date – can and usually does leave a false impression.

The other aspect of Davids 'contact' is it is very light on the obligations on the parties. What are their obligations to each other and to the tribunal? I would need to see parties agree to carry out the arbitration with cooperation and courtesy to each other and to the tribunal. That all reasonable good faith steps be taken to agree document production, scheduling issues and any other procedural issues without having to trouble the tribunal. That all decisions of the tribunal should be accepted without reservation of rights (which can be agreed at the outset) and it should be assumed that the tribunal understands the due process requirement. Furthermore the parties should agree to focus their arguments on the important points and present their submissions with as much brevity as possible. Unnecessary citation of authorities should be avoided. No case can be submitted unless counsel explains which issue it relates to and the relevant passages must be highlighted.

I could go on but if this contract has to have any traction it needs to be more synallagmatic.

AMC: Referring again to Hong Kong Arbitration Week 2015, much time was spent discussing third party funding for arbitrations. Do you have strong views either way on this issue?

NK: Given the soaring cost of litigation and arbitration and the reduction of legal aid, third party funding is the only way to ensure that some cases will ever see the light of day. Much depends on the detail and this involves the role of the funder during the proceedings. I think we need to see how it works in practice before making rules for eventualities that may not occur. The present funders are responsible. However we have to beware if other entrants do not display such high standards. An important issue is whether the existence of a funder needs to be disclosed to the tribunal. My gut answer is yes, but I would be open to the contrary argument.

AMC: How does the drive of technology and use of Big Data affect the way that international arbitration is evolving? Are you now seeing people with different skills being called upon to be arbitrators, for example?

NK: Not really. But we are becoming more tech savvy. I use Magnum a lot now and so have all documents on my laptop which saves using and carting all those bundles.

AMC: W H Auden refers to 'the dyer's hand' when engaging with other writers on the craft: in the same token, are there any techniques that you would care to share with the legal community on the actual advocacy of arbitration?

NK: You bet! I think I have already told you that I think we have gone too far towards written advocacy and ignored oral advocacy. In my time in the law I have seen the full circle. When I started at the bar, everything was oral. No opening written submission, no skeletons and no written closings. The judge often had not had the papers too long so the crucial part of the case was the oral opening. This allowed you to put your case at the highest. You got the judge to mark the passages you wanted him to remember and you were able subtly to attempt to destroy the other side's case.

There then came a time when arbitration moved towards more written advocacy and then the courts in England followed suit. So now we have a situation where you can open the case for say an hour and then you call the first witness who then immediately gets cross-examined. This is not satisfactory because it is based on a false premise, namely, that all members of the tribunal have read and understood ALL the written material served. So in my view we have to find a better way.

AMC: What is your hinterland?

NK: I am surprised that many people with whom I have worked have little in the way of hinterland. I think this reduces their effectiveness as human beings. I have no objection to hard work and dedication, but there must be more than just work. Most lawyers are well educated and there is no excuse in not having other interests. That is of course in addition to family, which takes on more significance the older you get.

What has kept me sane? I love reading and art. I love sport, having fenced and played squash at a reasonable level. I enjoy golf although I find it takes up too much of the day now. When I started, golf was not as popular and we could get round so much quicker. I love the theatre and cinema. I collect Rembrandt etchings which has been quite a focus for the last 31 years. I enjoy travel but as I have done so much for work I enjoy going back to places I know and enjoy like the house in Umbria we have rented for last six years. But at the end of the day it is family and friends that are crucial. Grandchildren are a special joy.

Neil Kaplan CBE QC SBS has been a full-time practising arbitrator since 1995. During this period he has been involved in several hundred arbitrations as co-arbitrator, sole arbitrator or chairman. These arbitrations have included a wide range of commercial, infrastructure and investment disputes, under the auspices of the ICC, HKIAC, LCIA, UNCITRAL, SIAC, SCC, ICSID and CIETAC. Kaplan's investment treaty cases under ICSID and UNCITRAL both as presiding arbitrator and co-arbitrator have involved Hungary, Croatia, Vietnam, Cambodia, Ecuador, and Iran.

Called to the Bar of England and Wales in 1965, Kaplan has practised as a barrister, Principal Crown Counsel at the Hong Kong Attorney General's Chambers, and served as a judge of the Supreme Court of Hong Kong in charge of the Construction and Arbitration List.

From 1991 to 2004, he was Chairman of the HKIAC, and in 1999–2000, he was president of the Chartered Institute of Arbitrators. Since 1995, he has been a council member and now governing board member of the International Council of Commercial Arbitration, and in 2012 he became a member of the ICC International Court of Arbitration. He is a chartered arbitrator and a fellow of the Chartered Institute of Arbitrators, the Hong Kong Institute of Arbitrators, and the Singapore Institute of Arbitrators. He is a panelist of several other arbitral institutions including CIETAC.

In addition to conducting arbitrations in England and Hong Kong, Kaplan has conducted arbitrations in the USA, France, Germany, Croatia, The Netherlands, Malaysia, Australia, Denmark, Sweden, Indonesia, and South Africa.

Footnote:

* 'Sketch of the history of International Arbitration' by Henry S Fraser, Cornell Law Review, Vol. II, 1926.