

## Global Advisory Board Interview Series

Featuring our Hong Kong based GAB Members Neil Kaplan, QC and Chiann Bao



Interview by: Jennifer Permesly, *Skadden Arps, Chair of NYIAC GAB Relations*

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We interviewed Neil Kaplan and Chiann Bao via video-conference to learn more about how Hong Kong achieved its prominence as an arbitration seat, best tips for case management, and their views on how the COVID-19 crisis will impact international arbitration.

**Jennifer Permesly (JP):** You are an American and an Englishman who have chosen to make your career in Asia. How did you end up practicing international arbitration in Hong Kong ("HK")?

**Neil Kaplan (NK):** I started my career in 1978 when I signed an application to become a Fellow of The Chartered Institute of Arbitrators, without knowing much at all about arbitration. Shortly thereafter, someone I knew at the English bar became Attorney General ("AG") in Hong Kong. He wanted to build up the AG's chambers and was recruiting from the English bar. I was interested. I had never been East of Athens before, but taxes and inflation were astronomical in England, and I convinced my wife

we should make the move. We planned to be there for 3 years – that was 40 years ago now. I helped to set up the Hong Kong International Arbitration Centre ("HKIAC") and in bringing the UNCITRAL Model Law to Hong Kong, which was the first country to adopt it in Asia. I was eventually appointed a judge of the high court in charge of the arbitration and construction list. With China opening in the early 80s and Hong Kong positioning itself as an international financial center, Hong Kong was well placed to be a leading seat for arbitration – and this has been borne out.

**Chiann Bao (CB):** In 2000 I received a Fulbright Scholarship and moved to Hong Kong from New York to pursue a Masters in Arbitration Dispute

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Resolution at the City University of Hong Kong, the only dispute resolution masters program in Asia at the time. I met Neil when he guest-lectured in one of my classes. A year or two later, he was looking for an arbitration assistant and advertised in the Vis Moot Alumni Association newsletter. I wrote in. A few months later, I moved to London to work with Neil. I returned to the US to study and work for a few years and then in 2010, Neil contacted me to tell me about the HKIAC opportunity. Soon thereafter, I returned to Hong Kong, where I've been ever since.

### **JP: What makes HK such a popular seat for international arbitration?**

NK: The HKIAC has the best premises in the world and has a very efficient Secretariat. The legislature in Hong Kong is always ensuring that the law is cutting edge and up to date, and judges are terribly supportive of arbitration and have always been. But perhaps most of all, there is a very dynamic arbitral community in Hong Kong. So you have the infrastructure, you have the law, you have the experience, you have all the experts you need. It all fits together pretty well.

CB: The presence of two significant arbitration seats in Asia, HK and Singapore, has driven both jurisdictions to become stronger. In addition to the features Neil has mentioned, Hong Kong

harnesses its energy from the local community and has established an excellent homegrown arbitration culture, with both its local and its international legal communities.

NK: In terms of the courts, and other matters involving arbitration there is still of course a specialist arbitration court in Hong Kong, which handles enforcement of arbitration awards, interlocutory decisions involving arbitrations, etc. Generally speaking, awards are enforced, cases are sent to arbitration if there is an arbitration clause, and the merits are never really at issue.

CB: The reputation of arbitration is also not tainted by the consumer arbitration issues that the United States faces - the domestic arbitration and international arbitration regimes in Hong Kong are very much integrated.

### **JP: Neil, what is your number one piece of advice as an arbitrator to counsel?**

NK: I would say that we don't see enough triage in argumentation, instead we see a lot of poor arguments thrown in with the good ones. Counsel must be more selective with the arguments they make. I know why it happens - there is this notion of one shot, no appeal. But I think we have to work very hard to re-focus and be much more economical, both in our argumentation and our awards. That's one of the reasons why I use the early opening procedure (the "Kaplan Opening"), I feel it really focuses the tribunal and the parties on the main issues in the case. It's a snapshot of what the case is really about, and it really informs your subsequent case preparation. It's particularly useful where there is complicated expert testimony, as you can ask the expert for a "teach-in" of their expertise and the points with which you will have to grapple. It's a way to get the experts to realize early on that their role is really to be part of "team tribunal," rather than an advocate for one party.

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**JP: Chiann, you are increasingly sought after as an arbitrator. What are you learning about the process, and what could we be doing better?**

CB: I think the global pandemic will be known as the great disrupter of our generation and I expect to see real change and innovation as a result. Over the years, we as a community have fallen somewhat complacent with the process (a good example being the standardized PO (Procedural Order) No. 1) and the associated issues regarding cost and time (despite the many conference programs and guidelines to tackle these issues). As we are now forced to move the process forward without the traditional constructs, we are more at liberty to pick and choose useful case management tools that we have at our disposal, including existing technology and ADR tools. This is the time to highlight and ensure that we maintain our reputation as the benefits of arbitration that go beyond confidentiality and enforceability and in a way, defend our turf as efficient dispute resolvers and a proper alternative to litigation.

NK: I completely agree. There's a reluctance on the part of counsel to let experienced tribunals case manage, they don't want to be taken out of their comfort zone. You've chosen an experienced tribunal, why not let them run the case the way they know how.

**JP: As Chiann has already alluded to, we're conducting this interview during this terrible [COVID-19] pandemic. Are you seeing any impact on your arbitrations yet, and how will this change arbitration going forward?**

NK: So far, I see some parties protesting against video hearings. But we have to push forward and insist that we continue to resolve disputes, including by video conferencing where necessary. I had a hearing during the SARS outbreak,

***“[The post-COVID world] is the time to highlight the benefits of arbitration that go beyond confidentiality and enforceability and . . . defend our turf as efficient dispute resolvers and a proper alternative to litigation.”***

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I chaired a tribunal and did it by video. This was 17 or 18 years ago, and it worked very well. I think at the end of all this, there will no longer be a psychological barrier to using video conferencing for certain disputes. Many tribunals are under a statutory duty to proceed with dispatch and efficiency and if a video hearing is all that is possible then so be it.

CB: As the COVID cloud lifts, pent-up disputes or post-COVID disputes will likely emerge. This will put the arbitration and dispute resolution community in the “front lines” and we will have the responsibility of resolving them quickly and efficiently in order to move disputes off the books and allow companies get back to business.

**JP: To what extent does your practice involve New York or U.S. parties, seat, or law? What do you like or dislike about those cases?**

NK: You know, I've only done three cases that were seated in the United States, one of them in New York. One of the issues is that insurance providers don't like you to practice in the United States, they think the litigious culture makes it way too risky. But, I've done many, many cases

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under New York law seated outside the United States. I'm admitted to the New York bar, many years ago I took advantage of a reciprocal arrangement where a UK barrister could be admitted in New York. And, I also see U.S. counsel an awful lot – more than English barristers.

CB: There are a large number of U.S.-qualified lawyers in East Asia and China. With this natural flow between Korea, Japan, China, Taiwan and the U.S., I regularly see New York (and sometimes California qualified) counsel in arbitrations in Asia. Of the New York law governed agreements in Asia I see, most of them involve corporate matters, such as private equity disputes or shareholder disputes but also technology and IP-related disputes.

NK: What I like most about New York lawyers is how strong their written submissions are – they are often a lot better than their oral submissions. With UK counsel, it's often the other way around. I much prefer the New York writing style, it's punchy. When drafting make sure you are going to keep the arbitrators awake!

CB: NYIAC has done such a great job of becoming a hub for arbitration community in New York, it is really seen as a “port of entry” to the arbitration world there, just as HKIAC has been for HK.

### JP: **Favorite thing to do when visiting NYC?**

NK: The Metropolitan Opera and the Frick Museum.

CB: I always run the six-mile loop around Central Park, and, if I can get up to Harlem (where I once lived), I will try to make a stop at Make My Cake, a red velvet cake bakery up there.

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### JP: **Neil, you've been a mentor for Chiann for so many years. Any advice you'd give her today?**

NK: I would say to anyone, when acting as an arbitrator, you should be efficient, but also make sure you deal with everything the parties raise, and deal with it fairly. Then even the party who loses will say, okay, I lost, but I had a fair crack of the whip— I was not taken by surprise and the procedure was fair and even handed. Someone has to win, someone has to lose, but they both have to have a fair opportunity of presenting their case.

CB: One of the most important things Neil has taught me by example is to “pay it forward” in that if someone does something nice for you, then to pay them back, you do something nice for someone else. He gave me and many others access to the arbitration world we might not have had otherwise, and I now try to do the same for others. ■