Kaufmann-Kohler on facilitating settlements

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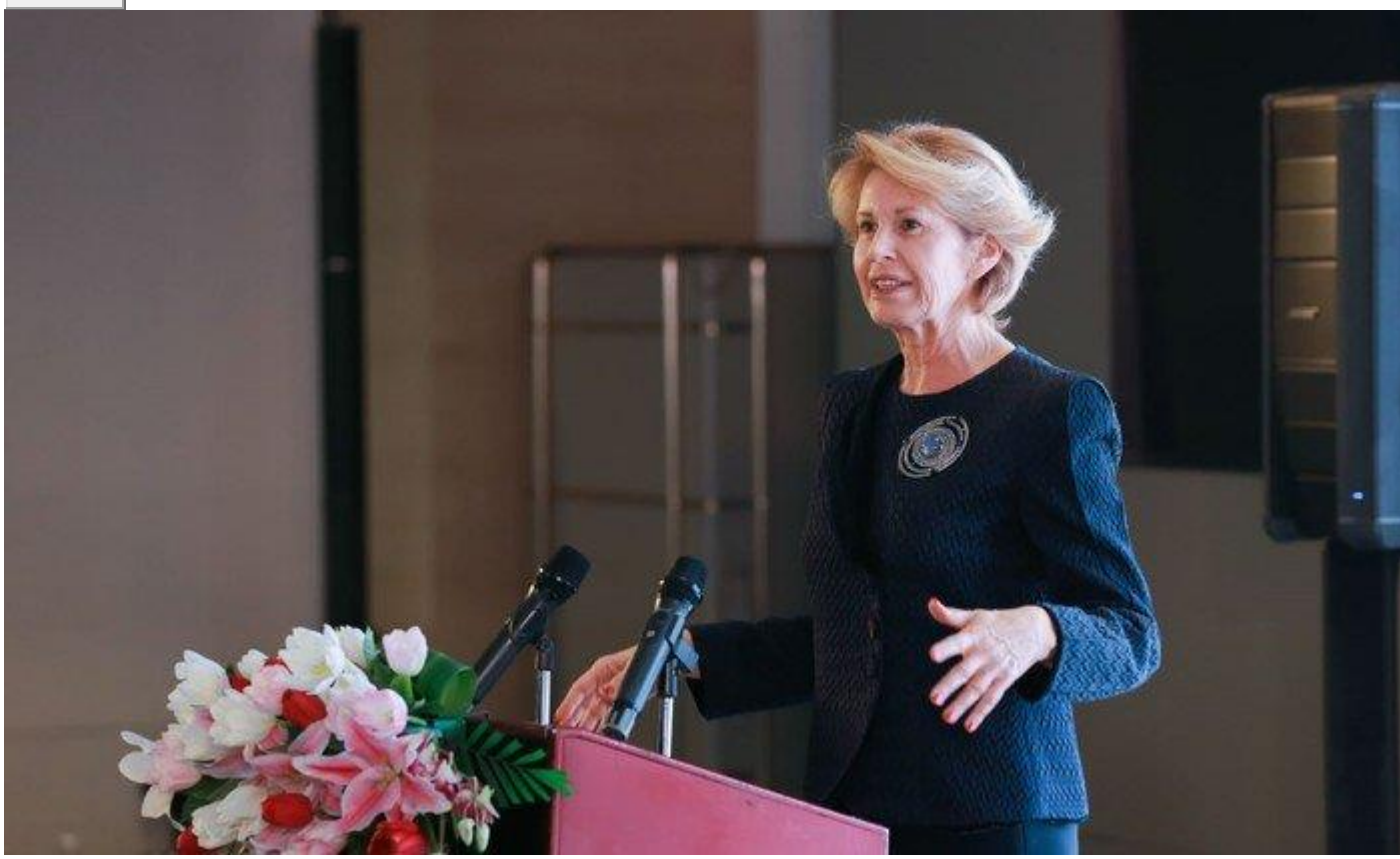

Kaufmann-Kohler delivering the inaugural HKIAC lecture

Delivering the inaugural HKIAC Annual Lecture in Beijing, ***Gabrielle Kaufmann-Kohler*** *proposed guidelines for settlement facilitation by arbitrators and considered Western and Eastern attitudes to the practice.* ***Weina Ye****, senior associate at Herbert Smith Freehills in Shanghai, reports.*

On 1 March, **Gabrielle Kaufmann-Kohler**, president of the International Council for Commercial Arbitration and partner at Lévy Kaufmann-Kohler in Geneva, delivered the inaugural HKIAC Annual Lecture, "In Search of Efficiency – When West Meets East", to an audience of over 100 people at the InterContinental hotel in Beijing. HKIAC secretary-general **Sara Grimmer** and deputy secretary-general **Ling Yang** hosted the lecture, which was introduced by HKIAC chair **Matthew Gearing QC** of Allen & Overy.

The topic of the lecture was settlement facilitation by arbitrators, with a focus on international commercial arbitration. Kaufmann-Kohler began by noting that while the pursuit of efficiency is high on the agendas of all arbitral institutions, settlement facilitation, which is an important tool for enhancing the efficiency of arbitration proceedings, has yet to receive sufficient attention on the global scene. It is a well-established tool in the East, but still controversial in a number of jurisdictions in the West. With that in mind, she examined the values and cultures underlying that practice, its pros and cons and transnational trends, before providing guidance for practice and drawing her conclusion.

Different practices on settlement facilitation reflect different views on a question that goes to the heart of the arbitration: what is arbitration, and what is the arbitrators' mission? Is it simply to resolve a dispute or is it to resolve a dispute through a binding decision? As Kaufmann-Kohler pointed out, this question is answered differently across jurisdictions and no transnational consensus has yet emerged.

Kaufmann-Kohler noted that it is often said that Western and Eastern legal cultures have given rise to divergent views and practices. In simple terms, it is said that the Eastern culture is more inclined to embrace arbitrators' settlement facilitation, likely due to the popularity of conciliation in that part of the world, whereas in Western countries the legal culture is traditionally opposed to this practice. However, this is an over-simplification. Empirical research conducted by Kaufmann-Kohler on ICC consent awards showed that arbitrators from certain Western countries (Germany, Switzerland, Brazil and Argentina), where judges are empowered or even obligated to settle disputes, do engage in settlement facilitation.

Settlement facilitation certainly improves efficiency, according to Kaufmann-Kohler, because it may accelerate the end of the dispute. Also, an arbitrator acting as settlement facilitator already knows the file, compared to a third-party mediator with no prior knowledge of the matter. The arbitrator would also have more control to drive the settlement process, as he or she would know the most appropriate time to propose a settlement. The arbitrator also has the necessary authority to incentivise the parties to be reasonable and realistic. Another advantage of settlement facilitation by arbitrators is that the settlement agreement can be turned into a consent award that could then be enforced under the New York Convention. This advantage, however, will lose weight as a result of the soon to-be-signed Singapore Convention on Mediation, as well as certain arbitral institutions' ability to also convert mediated agreements into consent awards.

The perceived disadvantages of settlement facilitation include the risk of breach of due process, the risk of impact on the arbitrator's impartiality, and the risk that parties feel compelled to settle because of the arbitrator’s ultimate decision-making power. However, as Kaufmann-Kohler suggested, there are various ways of mitigating or eliminating the risks. The potential breach of due process relates more to ex parte meetings and information obtained by the arbitrator at those meetings. The arbitrator, however, could mitigate this risk by either disregarding the information should the settlement fail, or disclosing it to the other side, or – better by far – not having any ex parte meetings. The impartiality risk, which is linked, is more theoretical than actual. There are very few known cases where an award was successfully challenged on that basis, whereas in many cases (including the Hong Kong Court of Appeal case, *Gao Haiyan v Keeneye*) settlement facilitation practice was held to be admissible. That risk can also be addressed by proper waivers. As to the risk of the parties being coerced into a settlement, the arbitrator should eliminate the risk by handling the facilitation carefully to avoid putting pressure on the parties.

Despite the fact that, especially in common law jurisdictions, settlement facilitation is still not much used, Kaufmann-Kohler drew the audience's attention to an increasing trend toward what she calls "merging of the tracks". This is demonstrated by more Western institutions' acceptance of settlement facilitation, as is widely used in China especially. Ironically, at the same time, Eastern institutions adopt mediation as an independent alternative dispute resolution option. Yet, they continue to use settlement facilitation by arbitral tribunals.

Examples given by Kaufmann-Kohler in the Western world include the evolution between the 2012 and 2016 versions of the UNCITRAL Notes on Organising Arbitral Proceedings, the rules of the Centre for Effective Dispute Resolution (CEDR) and the Prague Rules. For example, the 2012 version of the UNCITRAL Notes is very restrictive, while the 2016 UNCITRAL Notes show a significant shift by recommending that, in appropriate circumstances, the arbitral tribunal "raise the possibility of a settlement" between the parties.

Kaufmann-Kohler proposed guidelines for settlement facilitation, with an aim of promoting a transnational practice, where West meets East. First, the arbitrators should of course review the *lex arbitri* and the institutional rules and comply with any mandatory rules on settlement facilitation they may find there. Second, the arbitrators should only initiate settlement facilitation under appropriate circumstances, having regard to the timing, expectations and cultures of the parties. Third and most importantly, they should ensure that certain safeguards are in place. For example, the arbitrators should obtain informed consent from the parties, including a waiver to challenge the arbitrators or the award, as well as an agreement on the procedures of the settlement process. Further, the facilitation process should be simple and short, preferably evaluative and without ex parte meetings.

Kaufmann-Kohler concluded that in the academic field and the soft law area, there has been significant understanding of and attention to settlement facilitation. However, there is much to be done at the practice level. In practice, arbitrators from the West should overcome the "obstacle" involved in merging the arbitration with the facilitation tracks, which is a psychological and practical hurdle more than a legal one. To make it happen, practitioners from the East and the West should work across cultures and regions to make dispute settlement more efficient.