ReSolution:In Brief

The discontinuance of LIBOR and arbitration

Globally, LIBOR (London Inter-bank Offered Rate) is the most widely used benchmark interest rate. It is used primarily in financial contracts but also commercial contracts and at times it may be specified in arbitration clauses as a benchmark rate for interest on any award.

With the FCA (Financial Conduct Authority) confirming that it will no longer compel banks to provide quotes for LIBOR after 2021, the global financial markets are preparing to phase out the use of LIBOR as well as other Inter-bank Offered Rates. This will clearly affect those contracts and instruments which make reference to the rate.

It is inevitable that disputes will arise out of the discontinuance of LIBOR, particularly in light of (a) the increasing use of arbitration for cross-border banking and finance disputes; and (b) the current uncertainty surrounding what the replacement for LIBOR will be.

Particularly where there is such uncertainty as to what the replacement will be for LIBOR, contracting parties will need to take care when formulating dispute resolution clauses to minimise the attendant risks both in terms of substantive disputes as well as where the rate of interest of any award is reference to LIBOR.

Singapore Convention adopted by General Assembly

On 20 December 2018, the UN General Assembly adopted the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).

The Singapore Convention is open for signature in August 2019 and will likely enter into force in early 2020 (so long as at least three states ratify the Convention).

The Singapore Convention provides for the enforcement of agreements "resulting from mediation and concluded in writing by parties to resolve a commercial dispute" save for in specific and limited circumstances. The Singapore Convention essentially provides parties to a mediated settlement with the same enforceability protections that parties to an arbitral award have under the New York Convention.

The Singapore Convention is not UNCITRAL's first attempt at formulating comprehensive rules to govern the delivery of mediation or conciliation processes and enforcement of agreed outcomes arising out of those processes. Work in this area can be traced back to 1980 with the promulgation and adoption of the UNCITRAL Conciliation Rules.

The Conciliation Rules set out a framework for the conciliation process. However, they did not provide any enforcement mechanism which left settling parties to rely on general principles of contract, in the context of the applicable law, to enforce any settlement agreement resulting from such a conciliation process.

In 2002, a Model Law on International Commercial Conciliation developed by UNCITRAL followed. However, there was still no concrete resolution to the question of enforceability.

By concluding the Singapore Convention, UNCITRAL has now given states the opportunity to sign up to a regime which would obviate the need for parties to rely on principles of domestic contract law to enforce any rights they might have

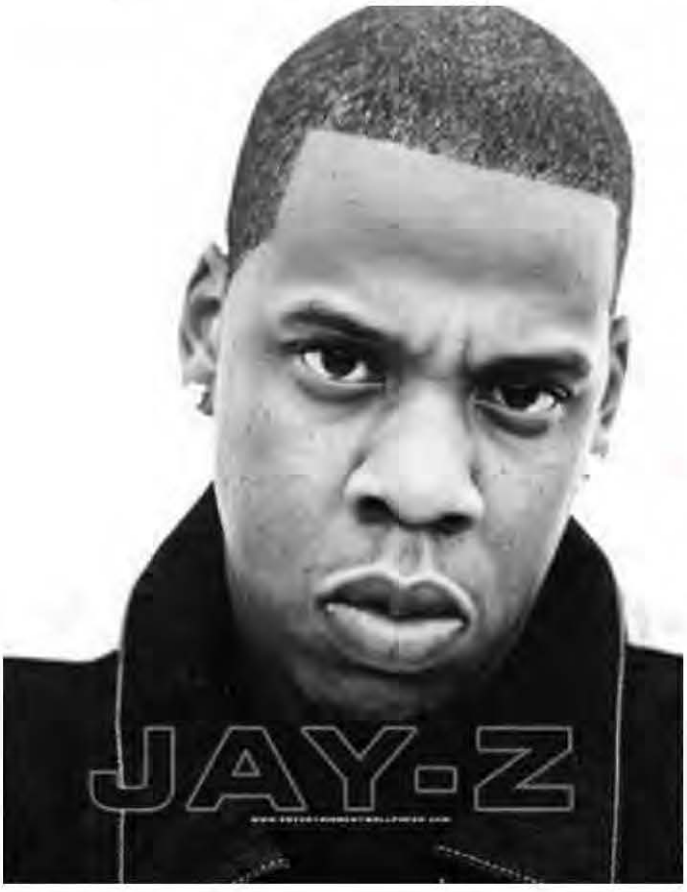
A win for Jay-Z

Jay-Z made headlines in the arbitration world last year with his application to halt arbitration proceedings relating to the 2007 sale of the Rocawear clothing brand to Iconix. His complaint was that arbitration would be unfair because only two of the over 200 arbitrators proposed by the AAA (American Arbitration Association) identified as African-American and were free of conflicts.

Jay-Z argued that the lack of diversity in the candidate pool left him with no real choice and constitute racial discrimination under New York law voiding his agreement to arbitrate with Iconix.

AAA has now allowed the dispute to proceed before a three person arbitral tribunal instead of a single arbitrator and have offered five African-American candidates. AAA has also agreed to consider a list of 11 African-American candidates put forward by Jay-Z.

The case is a timely reminder of the continuing need to increase diversity in the field of arbitration in all respects.



Hong Kong welcomes Third Party Funding

The amendments to Hong Kong's Arbitration Ordinance permitting funding of Hong Kong arbitrations have now come into force (as of 1 February 2019) alongside a Code of Practice for third party funders.

This development is the product of a public consultation process launched by Hong Kong's Law Reform Commission six years ago in 2013 and follows Singapore's earlier legislative endorsement of third party funding in 2017.

Distinguishing itself from Singapore's approach, Hong Kong's definition of third party funder is not limited to professional funders but also include any "person who is a party to a funding agreement…and who does not have an interest recognized by law in the arbitration other than under the funding agreement".

Amendments to Thai Arbitration Act

On 25 January 2019, the Secretary of the Cabinet confirmed the National Legislative Assembly's bill amending the Thai Arbitration Act B.E. 2545 (2002) to allow foreign arbitrators and representatives to act in Thai arbitration proceedings.

Following Royal endorsement, the Amendment will come into force the day after its publication in the Government Gazette.