

**IFN SAUDI ARABIA 2012**  
**RESOLVING SHARIAH-BASED  
COMMERCIAL DISPUTES THROUGH  
ARBITRATION**

**13<sup>TH</sup> NOVEMBER 2012**  
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# Concept

- ❖ KLRCA i-Arbitration rules apply to any commercial activity that is premised on principles of Islamic/Shariah Law.
- ❖ Currently no such rules have been offered by any other dispute resolution institution be it in the domestic or international realm.
- ❖ The rules is an expansion of the previous KLRCA Islamic Banking and Financial Arbitration Rules 2007.
- ❖ The previous rules were restrictive and only applies to agreement / business transaction that relates to Shariah principles and where the procedure for reference were limited to issues on Shariah aspect as defined under the Central Bank Act and Capital Market and Services Act.

# Concept

The KLRCA i-Arbitration Rules will apply when parties to an agreement specifically agree to a dispute resolution clause which states



**‘Any dispute, controversy or claim arising out of a commercial agreement which is based on Shariah principles or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA i-Arbitration Rules’.**

# The Need

- ❖ There is an expansion globally in terms of commercial transactions based on Islamic/Shariah principles.
- ❖ Expansion in Islamic finance services results in various financial product innovation commercially and more businessmen internationally are receptive to transactions based on Islamic principles.
- ❖ However, Shariah law is not exactly a law that one can neatly codify or find in a textbook. It is based on various religious texts and principles.
- ❖ There are four main schools of differing Islamic thoughts and the application heavily depend on the interpretation of the principles by an Islamic scholar or expert in the Islamic field.

# The Need

- ❖ To be a successful instrument and survive the thriving commercial arbitration platform internationally, the KLRCA i-Arbitration Rules has to assure that awards produced or delivered with the application of the rules will be recognised and enforceable internationally.
- ❖ For international recognition and enforceability, the KLRCA i-Arbitration Rules follows closely the UNCITRAL Arbitration Rules which effectively complies with the requirements of New York Convention.

The convention on the recognition and enforcement of Foreign Arbitral Awards (10 June 1958), is one of the key instruments in international arbitration. It applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.



Malaysia became a signatory to the New York Convention in 1985 which means that Malaysia recognises arbitral awards made in the other member states and that arbitral awards made in Malaysia are also recognised and can be enforced in the other member states.



There are currently 146 member states to the New York Convention.

# KLIRCA i-Arbitration Rules

It is a set of procedures to cater for both domestic and international commercial arbitration that relates to commercial transactions premised on Shariah principles.

It is presented in 2 parts:-

Part 1: is based on Part 1 of the current KLIRCA Arbitration Rules (2<sup>nd</sup> edn. 2012) with modification to provide for specific procedure for reference to Shariah Advisory Council or Shariah expert including necessary changes to provide for clarity and definitions of Shariah related terminologies.

Part 2: adopts the most current UNCITRAL Arbitration Rules 2010. [when conflicted, the Part 1 will supersede part 2]

# KLIRCA i-Arbitration Rules - [Part II]

## UNCITRAL Arbitration Rules

KLIRCA has incorporated the UNCITRAL Rules 2010 in its entirety as Part II of its Arbitration Rules and the modification to the rules is retained in Part I.

UNCITRAL Rules 2010 is a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship.

It is widely used in ad hoc arbitrations as well as administered arbitrations.

The rules have been formulated for the harmonisation of arbitration practice worldwide. By incorporating the rules, it will assure parties to arbitration a well established and time tested procedure. It is in line with the requirements under the New York Convention.



# KLIRCA i-Arbitration Rules - [Part II]

## UNCITRAL Arbitration Rules

The Rules cover all aspects of the arbitral process, providing a model arbitration clause and setting out procedural rules regarding:-

the issuance of notice of arbitration and reply to the notice;

the appointment of arbitrators;

The role of appointing authority;

Challenge of arbitrators;

The fixing of fees and deposit collections;

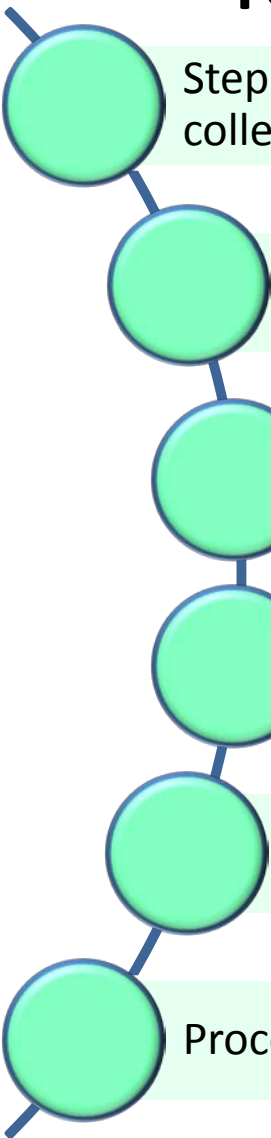
The conduct of the arbitral proceedings from submission of statement of claim, defence, set-off and counter claim;

The ground rules during hearing, tendering evidence, interim measures and appointment of expert by the tribunal;

Set out rules in relation to the form, effect and interpretation of the award.



# KLIRCA i-Arbitration Rules [Part I]



Step by step guide on commencement, appointment of arbitrator, fixing of fees, collection of deposits and issuance of award.

The Director of KLIRCA confirms appointment of arbitrator(s) and will decide on challenge of arbitrator.

More regulated process of deposit collection for fees and administrative costs to ensure sufficient fund at all times.

Detailed steps for the disbursement claims by arbitrator(s) and other expenses.

Award to be delivered within the period of 3 months from the closing of submission. Any extensions shall be subject to approval of Director of the KLIRCA.

Procedure for reference to Shariah Advisory Council or Shariah Expert

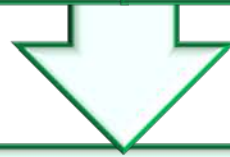
# Rule 8:

# Procedure for reference

When an arbitrator needs to:-

Form an opinion on a point related to Shariah Principles;  
and

Decide on a dispute arising from the Shariah aspect of  
any commercial agreement based on Shariah principles.



The arbitrator will refer to the relevant Council for its decision.



Council : Shariah Advisory Council of either the Central Bank or  
Securities Commission established under the respective Central Bank  
Act 2009 and Capital Market and Services Act 2007

The arbitrator will set out information relevant to Council in order to form opinion which includes

[procedure for reference produced by the respective to SAC will be observed]

Questions or issue so referred;

Relevant facts;


Issues and question to be answered by Council.



**What if the arbitration relates to dispute beyond purview of Council? (relevant for arbitration between international parties)**

- Arbitrator will refer the matter to Shariah expert or council to be agreed between the parties. This is especially in cross border disputes which involves international arbitration in another sovereign nation or between 2 nations. It may just be the Shariah Advisory Council of another country, for e.g Philippines or a Sharia scholar which parties prefer.

**What if parties can't agree to an expert or council?**

- The provisions relating to experts appointed by the arbitral tribunal under Article 29 (Experts appointed by the Arbitral Tribunal) of the UNCITRAL Arbitration Rules will apply.
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Upon reference, the arbitrator will adjourn the proceedings until the ruling is given and may proceed to deliberate the other areas of dispute which is independent of the said ruling.



The Council or Shariah expert may only rule on the issue or question submitted by the arbitral tribunal and have no jurisdiction in making discovery of facts or in applying the ruling or formulating decision on the facts of the case.



It is solely for the arbitrator to apply the ruling on the facts.



The ruling of the Council or Shariah expert, will be final and binding and not subject to appeal.

# Benefits of arbitrating under the KLRCA i- Arbitration Rules

Cases are heard in privacy and confidentiality is maintained.

Avoid distraction and litigation related hassle.

Award is final and binding.

Award is enforceable in the 146 countries who had ratified the New York Convention

Arbitrator is appointed within 48 hours and confirmation of appointment within 7 days.

Fees and costs are capped and the scale is reasonable.

Parties will benefit from the facilities and services provided by the KLRCA.

# The KEYPOINT to refer a dispute to arbitration is to ensure the existence of an **ARBITRATION AGREEMENT**.

An Arbitration Agreement constitutes the heart of any arbitration and therefore a detailed and satisfactory form of the same is VITAL.

Without an agreement to arbitrate between the parties will consequentially turn the parties to opt for litigation instead.

Therefore, when a dispute has already arisen, only a MUTUAL agreement by the parties to resolve the dispute by arbitration, can confer competence on the arbitral tribunal.



**If parties wish to settle their dispute by way of KLRCA i-Arbitration Rules, they must EXPRESSLY do so in their arbitration agreement by incorporating KLRCA's model clause.**



**“ Any dispute, controversy or claim arising out of a commercial agreement which is based on Shariah principles or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA i-Arbitration Rules.”**



**Thank you**

<http://www.klrca.org.my>

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