

LHAG Insights



Special Alert!

International Arbitration



ABOUT THE AUTHORS



Dato' Nitin Nadkarni
Senior Partner

Energy, Infrastructure & Projects
and **International Arbitration**

E: nn@lh-ag.com



Anis Raihan Asmadi
Associate

Energy, Infrastructure & Projects
and **International Arbitration**

E: ara@lh-ag.com

12 NOVEMBER 2021

Revitalising Islamic Finance Arbitration: Launch of the AIAC i-Arbitration Rules 2021

On 1 November 2021, the Asian International Arbitration Centre (**AIAC**) launched its all new and improved AIAC i-Arbitration Rules 2021 ([2021 i-Rules](#)). The revised rules reflect the AIAC's continuous effort to promote greater efficiency to the Islamic arbitration framework, while remaining faithful to the ethos and principles of Shariah. Significant amendments have been made, including positive structural changes, enhanced reference mechanisms to the Shariah Advisory Council and Shariah Experts, and new provisions on Shariah-guided third party funding.

The key changes of the 2021 i-Rules are summarised below.

2021 i-Rules Revisions: Key changes

A centralised structure: Integrating the UNCITRAL Model Law and Fast Track procedure with revisions to the application of Shariah principles

Similar to the recently revised AIAC Rules 2021 which took effect on 1 August 2021 (**2021 Rules**), the 2021 i-Rules have been streamlined by merging the UNCITRAL Model Law (as revised in 2013) and the AIAC's standalone Fast Track Procedure.¹ The revised rules only consist of two parts, i.e., the 2021 i-Rules in Part I and the Schedules in Part II.

The amalgamation of the UNCITRAL Model Law and Fast Track Procedure with the AIAC's own revised rules ensures a comprehensive, harmonious and coherent set of procedural rules.

¹

2021 i-Rules, Rule 8.

Further, the 2021 i-Rules contain new provisions for implementation of Shariah governance in arbitration. These include, among others, the following:

- a. Rules 5.2(d) and 6.2(e), where parties are able to specify in their respective notice of arbitration and response to notice of arbitration, any preference on the application of Shariah principles in the conduct of proceedings.
- b. Rule 7.2(c), which enhances the requirements for arbitration registration. In particular, a party shall include in its registration request, any relevant Shariah certification or resolution of the contract.
- c. Rule 8.13 provides that the operation of the Fast Track Procedure shall not preclude reference to the Shariah Council.
- d. Rule 19.10 similarly provides that a party's request for summary determination shall not bar any reference to the Shariah Council.

The revised 2021 i-Rules not only provide for a more streamlined structure, but also promote a more effective Shariah-governed arbitration, in line with contemporary standards and international best practices. Further, the revisions to the application of Shariah principles as highlighted above, while straightforward, will encourage Shariah compliance among users around the world.

Enhanced qualification requirements for Shariah Councils, i-Arbitrators and Shariah Experts

The 2021 i-Rules have refined the definitions of a Shariah Council and a Shariah Expert, and also enhanced the qualifications required of both entities. Rule 2.4 of the 2021 i-Rules stipulates that a Shariah Council means any “*established and recognised*” council of accepted Islamic scholars or experts qualified to issue Shariah rulings. The provision for “*established and recognised*” provides better guidance as to the Shariah Councils which are competent to issue a ruling. This will enhance public confidence in the integrity and competence of authorised Shariah Councils in the 2021 i-Rules.

Additionally, the AIAC has issued a [Circular on the Empanelment Standards of i-Arbitrator and Shariah Experts \(Circular\)](#),² which stipulates the salient requirements for i-Arbitrators and Shariah Experts to be empanelled with the AIAC Panel.

Under the Circular, an i-Arbitrator must possess an academic degree, diploma or related professional certification in Islamic finance and banking or related subjects, with a minimum of five years of related professional experience. Higher standards apply to Shariah Experts, with at least six years of professional experience and a track record

² Circular on the Empanelment Standards of i-Arbitrator and Shariah Experts
<https://www.aiac.world/news/347/Circular-on-the-Empanelment-Standards-of-i-Arbitrator-and-Shariah-Experts>

of acting in the capacity of an adviser, auditor or any associated capacity related to Islamic finance and banking.

It is worth noting that the AIAC's empanelment standards for an i-Arbitrator and Shariah Expert are carefully calibrated based solely on academic qualifications and experience, and are religion-, gender- and ethnicity-neutral. With the rise of Islamic finance across the globe, this is a progressive and welcome measure to ensure the success of the 2021 i-Rules.

Enhanced reference mechanisms to Shariah Council and Shariah Expert

Under the former AIAC i-Arbitration Rules 2018 ([2018 i-Rules](#)), the reference mechanisms to the Shariah Council and Shariah Expert appeared in the same Rule 11.³ While the Tribunal could, at its discretion, “*refer the matter to a Council or Shariah expert for its ruling*” on a point under the Shariah jurisdiction, the 2018 i-Rules did not sufficiently distinguish between Shariah Councils and Shariah Experts, with both seemingly equally eligible to issue a “*ruling*”.⁴

The 2021 i-Rules now provide separate procedures for reference to a Shariah Council and to a Shariah Expert, with more sophisticated provisions being introduced for each reference mechanism.⁵ Previously, where parties failed to jointly agree on a Shariah Council or Expert to decide on a Shariah aspect which did not specifically fall under its purview, the Tribunal could proceed to appoint an independent expert to render his or her opinion on the Shariah-related matter.⁶ There appeared to be no express requirement that the independent expert had to be a Shariah Expert. While the Tribunal's choice of independent expert should normally be respected, confidence in the process would be undermined if there were concerns about the chosen expert's expertise, or if the expert failed to convincingly and exhaustively address the Shariah-related issue.

Under the new rules, the reference procedure when a Shariah aspect is not within the scope of a specific Shariah Council has changed. An Arbitral Tribunal, pursuant to Rule 29.3(a), shall first refer the Shariah-related matter to a Shariah Council jointly appointed by parties. If the parties fail to agree a Shariah Council within 30 days from the Tribunal's direction, the Tribunal shall then refer the Shariah matter to a Shariah Expert in accordance with Rule 30.11.⁷ This re-arrangement of the reference mechanism has the benefit of maintaining party autonomy at first instance, coupled with a practical default mechanism by empowering the Tribunal to appoint Shariah Experts of its own volition.

³ 2018 i-Rules, Rule 11.

⁴ 2018 i-Rules, Rule 11.1.

⁵ Prior to the reference to Shariah Councils or Shariah Experts, it is to be noted that pursuant to Section 56 of the [Central Bank of Malaysia Act 2009](#), an arbitrator shall take into consideration any published rulings of the Shariah Advisory Council (**SAC**) or refer such questions relating to Shariah to the SAC. The SAC is the highest Shariah authority in Islamic finance in Malaysia and its rulings prevail over any inconsistent ruling issued by other Shariah bodies or committees — see Section 58 of the Central Bank of Malaysia Act 2009.

⁶ 2018 i-Rules, Rule 29.

⁷ 2021 i-Rules, Rule 29.3(b).

Head Office

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office

Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office

18-33-A3 Gurney Tower
Persiaran Gurney
10250 Georgetown
Pulau Pinang
Tel: +604 299 9668
Fax: +604 299 9628

Email

enquiry@lh-ag.com

Website

www.lh-ag.com

Third-party funding guided by Shariah principles

Like the AIAC's 2021 Rules, the 2021 i-Rules have followed the lead set by the International Chamber of Commerce (ICC)⁸ in introducing new provisions relating to third-party funding. Under Rule 13.5(e) of the 2021 i-Rules, the Tribunal may enquire and direct parties to disclose any third-party funding arrangements, including any guidance on the application of Shariah principles in respect thereof.

While third-party funding is not yet recognised by the Malaysian courts, the inclusion of these provisions in the 2021 i-Rules, in a manner that is Shariah-compliant, is a welcome innovation. Third-party funding is fast growing in international arbitrations, and the impact of the pandemic will only add to its popularity as a means of managing the costs of the arbitration. Third-party funding arrangements have similar features with some Islamic finance transactions, such as *Mudarabah*, where the funder provides the means to finance the claim. In fact, this financing arrangement is consistent with the overriding objective of Shariah law, *Maslaha*, i.e. to serve the public interest of the Muslim community, by providing everyone, including those who are financially stricken, access to justice.

So long as the third-party funding arrangement is not tainted by *riba* (interest), *gharar* (excessive speculation), *maisir* (gambling) and anything related thereto, a third-party funding arrangement is permitted in Shariah.

Onward and upward

The revisions to the AIAC i-Arbitration Rules 2021 represent a significant advance from the previous rules, and stand as a conscious response in modernising and streamlining arbitration proceedings to meet the expectations of the global Islamic finance sector. With these new rules, Malaysia's position as a prominent global hub for Islamic finance can only be enhanced.

Anis Raihan Asmadi (ara@lh-ag.com)

If you have any queries, please contact the author or team partner, **[Dato' Nitin Nadkarni](mailto:nn@lh-ag.com)** (nn@lh-ag.com).

⁸ See [ICC's Rules of Arbitration 2021 \(ICC 2021 Rules\)](#), which came into force on 1 January 2021. The rules relating to third-party funding can be found in Article 11(7) of the ICC 2021 Rules.