



# **Merits of Arbitration** *for* **Takaful Dispute Resolution**

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# Arbitration in Islamic Law



- Arbitration is known as al-Tahkeem
- Established by primary sources of Qur'an and Hadeeth/Sunnah and customs and practices of earlier generations of Muslims
- Qur'anic verses:
  - "Nay, by your Lord, they can not be believers, until they appoint you [O Muhammad] the arbitrator in all the disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission" (al-Nisa: 65)
  - "Verily! Allah commands that you should render back the trusts to those to whom they are due; and that when you arbitrate between people, you arbitrate justly. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer" (al-Nisa: 58)
- Arbitration was used for dispute settlement amongst the tribes of Quraish in the pre-Islamic era on the replacement of the Black Stone of the Holy Kaaba to its position after the reconstruction of the Holy Kaaba. The arbitrator in the case was the Holy Prophet Muhammad (peace and blessings be upon him)

# Arbitration Vs Litigation



## Comparison Chart

Basis	Arbitration	Litigation
Meaning	Non-judicial process where neutral 3 <sup>rd</sup> party is appointed for resolution of disputes	Formal judicial process where parties go to court for resolution of disputes
Nature	Civil	Civil or criminal
Proceeding	Private and confidential	Public
Place	Decided by the parties	Court
Decided by	Arbitrator chosen by the parties mutually	Judge appointed by the court
Cost	Low	Comparatively high
Appeal	Not possible	Possible

# General Principles



- The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense
- Parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest
- Regard is to be had to the international origin of arbitration and to the need to promote uniformity in its application and the observance of good faith

# Key Legal Frameworks



- Arbitration Act 1996
- United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (with 2006 amendments)
- International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration 2014
- Cofely Ltd v Bingham & Anor [2016] EWHC 240 (Comm)
- Sierra Fishing Company & Ors v Farran & Ors [2015] EWHC 140 (Comm)
- AIFC Arbitration Regulations 2017
- AIFC Arbitration and Mediation Rules 2018

# Arbitration Clause/Agreement



- “All disputes or claims arising out of or in connection with the present contract shall be finally settled under the AIFC Arbitration and Mediation Rules 2018 by one or more arbitrators appointed in accordance with the said Rules”
- “All disputes or claims arising from Islamic banking business, Islamic financial business, Islamic investment business, Islamic asset/fund management business, Islamic development financial business, Takaful/ReTakaful business, Islamic capital market products or services or any other transaction or business which is based on Shariah principles out of this agreement/contract shall be decided by arbitration in accordance with the AIFC Arbitration and Mediation Rules 2018”
- The Rules do not limit the parties’ free choice of the place and language of the arbitration or the law governing the contract which can be drafted into the clause

# Enforcement of Arbitral Awards



- Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) – **most Takaful, ReTakaful and Islamic Finance jurisdictions are signatories**
- UK is also a party to the Geneva Convention 1927 and has enacted:
  - The Foreign Judgments (Reciprocal Enforcement) Act 1933 (which provides for the enforcement of judgments and arbitral awards from specified former Commonwealth countries).
  - The Arbitration (International Investment Disputes) Act 1966 (which provides for the recognition and enforcement of International Centre for Settlement of Investment Disputes (ICSID) awards).
- Exceptions where recognition and enforcement can be refused:
  - A party to the arbitration agreement was under some incapacity.
  - The arbitration agreement was not valid.
  - A party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
  - The award deals with a dispute that did not fall within the terms of the arbitration, or deals with matters out of the scope of the arbitration.
  - The composition of the arbitral tribunal was not in accordance with the agreement of the parties or the law of the country of the arbitration.
  - The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which it was made.
  - The award is in respect of a matter not capable of settlement by arbitration.
  - Enforcement of the award would be contrary to public policy.
  - The award includes decisions on matters not submitted to the arbitration which can be separated.

# Suitability of Arbitration



- Freedom for parties to choose:
  - the law
  - the procedure
  - place
  - attendance in person or on video conference or other telecommunication
  - language
- Presence of Shariah Scholar and expertise on the arbitration tribunal bench
- Speedy and efficient
- Comparatively less costly
- Private and confidential (nothing disclosed or published)
- No jurisdictional rules
- No courts/court procedures
- No rigid formalities
- Enforceable globally

# International Arbitration Centre (AIFC IAC)



- Astana International Financial Centre (AIFC) is an international financial hub for global institutions and markets with preferential tax regime and an independent legal system with global jurisdiction
- AIFC is based on English common law and is guided by English legal principles, norms and precedents as well as standards of leading international financial centres
- Astana Financial Services Authority (AFSA) is the regulator for the financial services sector and has detailed specific rules and regulations for Islamic Finance and Takaful
- AIFC Court provides a common law court system that operates to the highest international standards to resolve civil and commercial disputes. It is separate and independent from the Republic of Kazakhstan judicial system. Its Chief Justice and judges are among the most experienced and distinguished judges from the common law world such as Chief Justice Lord Woolf, Justice Sir Robin Jacob, Justice Sir Rupert Jackson, Justice Sir Jack Beatson, Justice Sir Stephen Richards, Justice Lord Faulks QC, Justice Andrew Spink QC, Justice Thomas Montagu-Smith QC and Justice Patricia Edwards

# International Arbitration Centre (AIFC IAC)



- AIFC International Arbitration Centre (IAC) provides an independent, economical and expeditious alternative to court litigation, operating to the highest international standards to resolve civil and commercial disputes
- IAC offers parties maximum choice and flexibility in choosing the rules and procedures they wish to use for the solution of their disputes at the IAC
- Parties may agree for the IAC to:
  - 1. Administer their arbitration according to the IAC Arbitration and Mediation Rules. These rules include procedures for expedited arbitrations, the appointment of emergency arbitrators, and resolution of investment treaty disputes.
  - 2. Administer their arbitration according to UNCITRAL Arbitration Rules or **ad hoc arbitration rules**.
  - 3. Administer mediations according to the IAC Arbitration and Mediation Rules or ad hoc mediation rules.
  - 4. Provide other forms of alternative dispute resolution.
- IAC has its own panel of outstanding international arbitrators and mediators who are greatly experienced, independent, impartial and of the highest integrity
- IAC panel of arbitrators includes senior British and international judges and Queens Counsel such as Barbara Dohmann QC (Chairman of IAC), Justice Sir Robin Jacob, Justice Andrew Spink QC, The Lord Phillips, Michael Bloch QC, Michael Brindle QC, Dr Julian Lew QC, Gordon Nardell QC, Andrew White QC, Joe Tirado and **myself**

# Questions & Answers



Thank you

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