SPEECH BY

THE CHIEF JUSTICE OF MALAYSIA

THE RIGHT HONOURABLE TUN ARIFIN BIN ZAKARIA

AT THE SEMINAR AND BOOK LAUNCH

CRITICAL ISSUES ON INTERNATIONAL AND DOMESTIC ARBITRATION: JUDGES PERSPECTIVE

17TH JUNE 2016

BISMILLAHIRRAHMANIRRAHIM

YABhg. Tun Dato' Seri Zaki bin Tun Azmi
Former Chief Justice of Malaysia,

The Right Honourable Tan Sri Dato' Sri Md Raus Sharif
President of Court of Appeal,

The Right Honourable Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin Chief Judge of Malaya,

The Right Honourable Tan Sri Datuk Seri Panglima Richard Malanjum Chief Judge of Sabah and Sarawak,

Honourable Judges,

Y.Bhg Datuk Professor Sundra Rajoo
Director for the Kuala Lumpur Regional Centre for Arbitration,

Members of the Malaysian Bar,

Distinguished Guests, Ladies and Gentlemen,

ASSALAMUALAIKUM AND A VERY GOOD AFTERNOON

1. I would like to thank the organisers for inviting me and giving me the honour and privilege to deliver the opening remarks at this seminar titled **"Critical Issues on International Arbitration: Judges' Perspective"**. This seminar is also held in conjunction with the launch of the book by the Yang Arif Datuk Dr. Haji Hamid Sultan Abu Backer, a Judge of the Court of Appeal who has published a book on International Arbitration.

2. Arbitration has been increasingly used as a method of dispute resolution in Malaysia. Originally used in construction disputes, it is becoming increasingly popular

for commercial dispute resolution. The enactment of the Model Law in the form of the 2005 Arbitration Act, which replaced the outdated 1952 Arbitration Act, has increased public confidence in, and adoption of, the arbitral process.

3. The positive growth of arbitration in Malaysia may be attributed to several factors, including the increased inter-dependence between countries in global trade, the Malaysian government's initiatives in passing the Arbitration (Amendment) Act 2011, which addressed the lacunas in the Arbitration Act 2005, as well as the arbitration supportive stance demonstrated by the judiciary.

4. The recent trend has seen that arbitration is more consistently relied upon than litigation as a means of resolving cross-border disputes. Some of the advantages of resorting to international arbitration include avoidance of the other party's home court system, confidentiality and suitability for international disputes.

5. International arbitration has indisputably gained traction as a dispute resolution route of choice in most Commonwealth and other jurisdictions as well. Malaysia is no exception. Some of the challenges which have been identified as common in the practice of international arbitration are cross-cultural difficulties in arbitral practice and choice of law in International Arbitration Agreements. Yet, despite the hurdles, nowadays, international arbitration has become the norm rather than the exception. This is largely due to the core benefits of arbitration which are the finality and swiftness of the process as opposed to the more complicated court litigation. Court proceeding not only may take longer to dispose of, but its decision is also subject to appeal to the higher courts. Given the above factors, I have to say that in some aspects, arbitration has an edge over court proceedings.

6. There has been unsubstantiated claims that arbitration occasioned a usurpation of judicial powers. The statement could not be further from the truth as we are now in the new the globalised age where judges no longer view arbitration as a form of 'competition' but rather as a method of dispute resolution mechanism which complements the judicial process. I can say that the approach of the Malaysian Judiciary towards arbitration process is one of respect for party autonomy and the sanctity of the parties' choice to resolve their disputes in the manner of their choice.

7. Reported cases show that the Malaysian judiciary have been supportive of arbitration. The lack of judicial intervention by the Malaysian Judiciary of the arbitral awards are clearly illustrated in the Federal case of **Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 CLJ 743** where it was held that "An arbitrator's award is final, binding and conclusive, and may only be challenged in exceptional circumstances". In a more recent case of **The Government Of India v Cairn Energy India Pty Ltd &**

Anor [2012] 3 CLJ 423, the Federal Court reiterate the same non-intervention principle whereby it held; "where a specific matter is referred to arbitration for consideration, it ought to be respected in that "no such interference is possible upon the ground that the decision upon the question in law is an erroneous one".

8. In short, the Courts are there to provide a supporting role with minimal intervention strictly as provided for and circumscribed under the Arbitration Act 2005. Hence, the Malaysian legal and judicial system serves to augment and support arbitration, be it domestic or international arbitration.

9. As I have stressed above, Arbitration is now one of the most important methods of dispute resolution in international commerce. It is the predominant dispute resolution procedure in international trade. It has conquered new territories in the area of investment protection. But we cannot rest on our historic laurels. The world is changing

at terrifying speed, and international arbitration can only exist if it is the preferred solution chosen by companies and states.

10. The challenge is to turn Malaysia into the preferred seat of international commercial arbitration centre for the region and also in time, the rest of the world. Hopefully, with the right statutory framework and infrastructure in place and with the support of the Judiciary, Malaysia is poised to becoming a destination of choice for international arbitration. I anticipate more international arbitrations being conducted in Malaysia in the near future.

11. Having said that, in order to operate effectively in the field of international business and trade, lawyers must understand how international arbitration works. An effective and credible method of dispute resolution is an important, indeed critical, element in the negotiation of any international commercial transaction. Therefore, the parties to such a transaction will best serve their interests by arriving at a clear understanding of dispute resolution.

If one theme could accurately depict the unifying element of the current issues occupying international arbitration theory and practice, that theme is this: international commercial arbitration is an important feature of the globalization phenomenon.

12. To phrase the theme another way, one might observe that the process of international commercial arbitration has been affected by the increasingly globalized nature of international commercial activity.

13. In fact there is a trend towards a greater adoption of international arbitration in regions experiencing increased investments in manufacturing and technology-related businesses, which may be related to the recent rule amendments that are specifically designed to provide inexpensive access to international arbitration. Within these trends are opportunities for small, medium, and large businesses to take advantage of the increased access

to international arbitration if the parties are aware of general caveats in choosing one institution over another.

14. With all the above in mind, it becomes imperative and necessary that all stakeholders be up to-date with the current jurisprudence relating to international arbitration and be equipped with the requisite technical knowledge for this purpose.

15. Therefore, it is timely that a book entitled, "International Arbitration-with a commentary on Malaysian Arbitration Act 2005" has been written by a well-known Malaysian judicial personality who has produced several reputable books on civil procedure, evidence, criminal law and procedure, Islamic Banking and others.

16. I should also take the opportunity to mention that Justice Datuk Hamid Sultan has made a suggestion in Chapter 5 of the book that there be compulsory arbitration for all Islamic finance and banking disputes inclusive of *sukuk*. There are many standard form of contracts like building

contracts which comes with an arbitration clause. It is also encouraging to note that Dana Gas Sukuk issued on May 2013 has an arbitration clause. There is no reason why Islamic finance facilities should not have a compulsory arbitration clause as arbitration is the preferred mode for dispute settlement within the parameters of Islamic jurisprudence.

17. This will no doubt require much thought and consideration. It definitely warrants stakeholder discussions and legislative amendment to relevant statutes. I hope that the KLRCA, the Attorney Generals Chambers, Bank Negara Malaysia and other agencies and regulatory bodies will look into this and take the necessary steps to bring all Islamic finance and banking disputes within the scope of Islamic arbitration which will have its own jurisprudence and procedures for the attainment of justice within the context of Syariah law and jurisprudence.

18. Indeed, KLRCA can be the protagonist for arbitration for all Islamic finance and banking disputes as they will be the main beneficiary if this is implemented particularly since they already have in place Rules for Islamic Arbitration or "i-Arbitration Rules".

19. On a final note, I am happy to see that there are several judges from the High Court and Court of Appeal who are participating in the discussion panel on the topic of international arbitration. This augurs well for the judiciary and the arbitration community as a whole.

20. I trust that there will be more such discussions and participation of judges in the future so that the judiciary is constantly kept in the loop of knowledge and developments on arbitration law and practice, which will translate into judges with stronger skill sets and which in turn will benefit all stakeholders.

Thank you

TUN ARIFIN BIN ZAKARIA

CHIEF JUSTICE

MALAYSIA