KEYNOTE SPEECH

DELIVERED BY

THE RIGHT HONOURABLE
THE CHIEF JUSTICE OF MALAYSIA
TAN SRI DATO' SERI UTAMA
TENGKU MAIMUN BINTI TUAN MAT

ON THE OCCASION OF

THE 2019 CHINA-ASEAN LEGAL FORUM
ON COMMERCIAL DISPUTE RESOLUTION

DELIVERED AT

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KEYNOTE SPEECH

SALUTATION

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Brother & Sister Judges, members of the Bar, distinguished participants, ladies and gentlemen,

1. Assalamualaikum warahmatullahi wabarakatuh and a very good morning to everyone. I would like to begin by expressing my appreciation to the organisers for the distinct honour of delivering this keynote speech. To all guests from abroad, I would also like to bid you a very warm welcome to Malaysia.

2. Congratulations are also due to the Asian International Arbitration Centre ("**AIAC**"), the Hainan International Arbitration Court ("**HIAC**"), the ASEAN Law Association of Malaysia ("**ALA**"), and the China ASEAN Legal Cooperation Center ("**CALCC**") for co-organising this Forum.

INTRODUCTION

Distinguished guests,

3. Last week, we were privileged to have in our midst a distinguished jurist and Judge of the Supreme Court of the United Kingdom, The Right Honourable The Lord Briggs – who delivered the 33rd Sultan Azlan Shah Law Lecture entitled: 'International Commerce: Mapping the Law in a Borderless World'. Indeed, his lecture and now this Forum, are timely indicators and reminders of the crucial significance of commerce in an increasingly globalised world.

4. Lord Briggs cited an astute observation made by Chief Justice Mansfield some 250 years ago in *Pillans v Van Mierop* where he said: "*the law of merchants and the law of the land, is the same*".[1] In fact, the quote may be better attributed to Lord Mansfield's predecessor, Chief Justice Coke who in 1608 similarly proclaimed: "*the Law Merchant is the law of the realm*."[2]

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[1] *Pillans v Van Mierop* (1765) 97 ER 1035, at page 1038.

[2] Theodore Plucknett, *A Concise History of the Common Law* (5th edition, Little Brown and Company, 1956), at page 663.

5. The judges of the common law typically sat in circuits and they dispensed justice in accordance with the law and customs of the people in their society. *Stare decisis*, the doctrine of precedent, was conceived to enable judges to deliver justice in a consistent manner. The doctrine later gained a stronger foothold in England and that caused merchant custom and usage to dwindle in use.

6. Therefore, as I see it, the quotes by the two great English Chief Justices serve to remind all and sundry that justice is ultimately to be delivered by the Courts in accordance with the Rule of Law. The law of merchants was not what they say it was but what the Courts said it was. The ensuing result was twofold.

7. Firstly, judges of the common law courts developed the law in a manner consistent with commerce – as and where necessary. A good example of this was in the boom of commerce in England during the colonial era. Companies like the East India Company, were the main vehicles behind the growth of industry. The English Courts recognised the separate and artificial legal persona of companies to insulate their members from the litany of suits. The

locus classicus of this is of course the decision of the House of Lords in *Salomon v Salomon*.[3]

8. Be that as it may, the second and diametrically opposite effect was that merchants and litigants generally became opposed to the idea of filing suits in court.

9. One author writing in 1934 observed that the history of arbitration is generally cloaked in obscurity. However, records indicate that merchant guilds did in fact establish their own versions of what we now call commercial arbitration.[4] Common law courts are naturally nationalistic. That is understandably so because they derive their mandate from the Sovereign (in the case of the United Kingdom) and the Federal Constitution (in the case of Malaysia).

10. The said commercial arbitration guilds however were not so concerned with the law of the land, rather, they were more inclined to entertain practices of markets and deliver decisions in accordance with justice and conscience. Arbitral jurisdiction was

[3] *Salomon v Salomon* [1897] AC 22.

[4] Earl Wolaver, 'The Historical Background of Commercial Arbitration' [1934] 83 University of Pennsylvania Law Review 132, at page 133.

grounded on contract, or some moral duty to refer the dispute to arbitration, or by virtue of a merchant's membership in a specific merchants' guild.[5]

11. The result was, and incidentally, the focus of my keynote speech this morning, is therefore the creation of the two dispute resolution mechanisms. The first is the conventional State-sanctioned mechanism before national Courts. The second is the alternative dispute resolution mechanism ("**ADR**") which has become the modern nomenclature for other processes (besides arbitration) such as mediation, and more recently, the adjudication scheme under the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**").[6]

12. I intend to narrow my observations on the dichotomy between the conventional and alternative dispute resolution mechanisms specifically within the context of commercial dispute resolution considering the purpose of this prestigious Forum.

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[5] *Ibid*.

[6] [*Act 767*].

THE BURGEONING OF COMMERCE

13. I think there is little value in stating the obvious phrase that commerce has now burgeoned by leaps and bounds from what it once was. I believe an example would put things into better perspective. I recall, for instance, the local case of *Lau Brothers & Co. v China Pacific Navigation*.[7] The suit, decided in 1964, was premised on breach of contract for failure to take delivery of logs. The plaintiff argued that there was a valid and binding contract in five letters exchanged via telegram.

14. The Court decided that where the formation of contract by an exchange of letters is concerned, the Court would have to interpret all the letters as a single document to determine whether a valid and enforceable contract had been formed. The facts of the case are sufficient illustration of how commerce is no longer what it was in 1964. We are now in the era of the Fourth Industrial Revolution where communication is nearly instantaneous.

[7] *Lau Brothers & Co. v China Pacific Navigation* [1965] 31 MLJ 1.

15. The context of this Forum is a laudable example of healthy and blooming relations between our two great nations – Malaysia and China. Our two nations have always enjoyed strong economic and cultural ties and have seen one of the most cordial and productive relationship in the Asia Pacific, one with implications beyond bilateral ties. It is my fervent hope that such camaraderie continues to flourish. In fact, Malaysia and China have been trade partners for at least the past 40 years. The commemoration of this bond in the year 2014, which was known as "Friendship Year", is another strong example of our warm ties and allegiance.[8]

16. Perhaps the more recent development in this field is the Belt and Road Initiative ('**BRI**') which is an ambitious worldwide endeavour by the People's Republic of China to collaborate with at least 152 nations on global development strategy. Malaysia is one of those nations joining hands with China in seeing that vision through. In essence, China has agreed to assist Malaysia in the development of certain key infrastructure foremost of which includes the East

[8] Dato' Abdul Majid Ahmad Khan, 'Reflections On Four Decades Of Malaysia-China Enhanced Friendship And Partnership' Malaysia-China Friendship Association <ppmc.com.my/en/?page_id=94>.

Coast Rail Link ("**ECRL**") Project.[9] By their very nature, BRI projects are complex, high value, high public interest, long term, capital intensive, multi-party, multi-contract and cross-border. The fact that this forum will be chaired by experts who have a deeper understanding of the BRI and Malaysian corporate culture may help dispel any misconception one may have on the BRI.

Distinguished guests, ladies & gentlemen,

17. Trade is a critical component of Malaysia's relationship with China. To this extent, the setting up of the HIAC is crucial to the facilitation of business and commerce. From what I gather, the HIAC, the second of such Courts in China after the Shenzhen Court of International Arbitration, was set up with the distinct purpose of providing services including preventing business disputes, mediation before arbitration and the drafting of valid and legal arbitration agreements.[10] This leads me to my next point.

[9] 'China, Malaysia Restart Massive Belt and Road Project After Hiccups' The Star Online (25 July 2019) <https://www.thestar.com.my/business/business-news/2019/07/25/china-malaysia-restart-massive-belt-and-road-project-after-hiccups>.

[10] 'China's new arbitration court to boost maritime trade, island construction' Global Times (30 July 2018) <www.globaltimes.cn/content/1113038.shtml>

THE RULE OF LAW, THE JUDICIARY AND ALTERNATIVE DISPUTE RESOLUTION

18. The occurrence of disputes is something inescapable as far as large-scale international commerce is concerned. And by this, I mean that even in the warmest of relationships, the need for clarification or sometimes resolution is bound to arise. The question is how best do we resolve these disputes amicably, justly and swiftly; and what role does the relevant adjudicatory bodies play to achieve these ends.

19. Now, the resolution of disputes in any given circumstance is underscored by one significant concept: the Rule of Law. It is a concept which, in all its many facets, primarily requires that all persons are equally subject to and protected by the law. Hence the phrase: “justice without fear or favour”. In this respect, no one can claim to be above the law or entitled to preferential treatments in our courts. This is indeed the cornerstone of the rule of law and is the catalyst for good governance.

20. In this context it is worth repeating what Justice Eusoffe Abdoolcader in the *Merdeka University* case said: *fiat justitia, ruat caellum* – let justice be done though the heavens should fall.[11]

21. In the same case, his Lordship aptly described the role of the Judiciary as follows:[12]

> *"[T]he courts constitute the channel through which His Majesty's justice is dispensed to his people and are accordingly the bastion of their rights and the courts must therefore necessarily be the ultimate bulwark against the excesses of the executive…"*

22. The above quotation, in my humble view, is Justice Eusoffe's rendition of the instructive words of Raja Azlan Shah Ag. CJ (Malaya) who had previously held in the *Sri Lempah* case that:[13]

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[11] *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356, at page 357.

[12] *Ibid*.

[13] *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, at page 148.

"[T]he Courts are the only defence of the liberty of the subject against departmental aggression".

23. As stated earlier, the Courts owe their existence to and draw their judicial power from the Federal Constitution. And, recently, the Federal Court reaffirmed in both the *Semenyih Jaya*[14] and *Indira Gandhi* cases,[15] that judicial power is exercisable only by the Superior Courts to the exclusion of all other branches of Government and, *a fortiori*, all other bodies.

24. Article 8 of the Federal Constitution guarantees all persons the equal protection of the law. Article 5 in turn protects their rights to life and personal liberty. Collateral to both rights, is the right to access to justice and in turn the rights to (i) access the Courts and (ii) an effective remedy.[16]

25. Indeed, the Malaysian Judiciary remains acutely aware of its important and onerous constitutional duty of upholding access to

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[14] *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561

[15] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

[16] *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, at paragraph 9; and Bryan Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buffalo Law Review 181, at pages 184-185.

justice and safeguarding the Rule of Law. In the context of commercial law specifically, our Courts are making every effort to ensure that cases are dealt with efficiently and expeditiously. We have specialised Commercial Courts in place including Admiralty, Intellectual Property and Construction Courts. These Courts are catered towards dealing strictly with commercial cases to ensure that specific and maximum attention is given to them. The outcome of our decision will ultimately depend on the law, but no matter the decision, parties ought to leave the Court feeling that they had been given their "day in Court". After all, judicial legitimacy and independence are rooted in public confidence.

26. Having said that, the Judiciary also recognises the crucial role of arbitration and other alternative dispute resolution mechanisms. Mediation for example is a process which has become ingrained in our Court process. You will find High Court Judges as well as Subordinate Court judges conducting mediation in specific cases to enable parties to resolve their dispute to avoid unnecessary litigation.

27. Some of the key benefits of arbitration are as follows. Firstly, and admittedly, it is more fluid than the traditional litigation process. It is

consent-based and parties are free to draw up their own rules or even select their own governing law or seat of arbitration. In Malaysia, the AIAC has done a tremendous job in establishing its own set of rules that parties may feel free to adopt. These rules, as I understand it, are largely modelled after the UNCITRAL Model Rules. The drafting of rules aside, the AIAC constantly undertakes efforts to ensure that our arbitration laws remain up to date. The various and recent ADR reforms in Malaysia, such as the 2018 Amendments to the Arbitration Act, Ratification of the Singapore Convention on Mediation by Malaysia earlier this year and released of the 2018 AIAC Arbitration Rules, the 2018 AIAC Fast Track Arbitration Rules, AIAC Mediation Rules, are significant strides towards placing Malaysia among the preferred hearing seats not only in Asia but also internationally.

28. Secondly, further adding credence to the notion that arbitration is very flexible, is the fact that parties may select their own arbitrators. This enables them to even appoint non-lawyers including experts in the subject-matter of the dispute such as construction or shipping.

29. Thirdly, arbitration is largely private and confidential. As the process, in any given case, owes its existence substantially to an

arbitration agreement, parties may choose to keep their dealings, disputes and even the arbitration award itself private. This is crucial especially in large-scale commercial disputes where parties intend on resolving their problems without having to soil their public image. For large companies, any negative perception may negatively affect their corporate image. And, in the context of international commercial disputes, negative publicity could risk straining friendly relationships. The confidential nature of arbitration – or even any other ADR process for that matter – substantially mitigates such eventualities.

30. Perhaps one downside to the arbitration process is that greater flexibility and party autonomy comes at a higher cost. The process is not of course meant for everyone – especially if increased cost hampers access to justice. Further, arbitrators may only decide cases on the facts, and not being courts of law, are incapable of deciding, definitively, points of law. In the past, arbitral awards were merely contracts and only enforceable in that capacity. But since Malaysia's ratification of the New York Convention, and its

revamping of the Arbitration Act 2005, arbitral awards may now be enforced through the High Court.[17]

Ladies & gentlemen,

31. Judicial and legislative intervention have in recent times shown greater support for ADR particularly in the field of arbitration. On the legislative side, section 10 of the Arbitration Act 2005 is one example where, in the face of a valid arbitration agreement, Courts are statutorily required to respect parties' freedom of contract to have the dispute referred to arbitration than be litigated before them. The threshold question as far as section 10 is concerned is whether the party applying for a statutory stay of proceedings has taken "any steps in the proceedings" such that he is taken to have waived his contractual right to arbitrate.

32. The Federal Court in *Sanwell Corporation v Trans Resources Corporation Sdn Bhd & Anor*,[18] in my humble view, adopted a practical approach when it held that the determination of that question must depend on the facts of the case, the nature of the

[17] Chapter 8, sections 38 and 39 of the Arbitration Act 2005 [*Act 646*].

[18] *Sanwell Corporation v Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213

action and whether there was an unequivocal intention to proceed with the suit. At the end of the day, Courts remain cognisant of the fact that they should not be too quick to deny a party the right to arbitrate.

33. The Judiciary is also taking a purposive approach as far as legislative innovation is concerned. Under section 37 of the Arbitration Act 2005, a party to an arbitration may apply to the High Court to set aside an arbitral award on the grounds set out in that section. In *Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*,[19] the Federal Court advised that, in the context of section 37, the Court intervene sparingly. The Federal Court also emphasised the notion that the courts need to recognise the autonomy of the arbitration process by encouraging finality and that its advantage as an efficient alternative dispute resolution mechanism ought not to be undermined.[20]

34. In my view, the present scheme is concomitant with the Rule of Law where the Courts' role is more supervisory. Affording parties greater

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[19] *Jan De Nul (Malaysia) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1, at paragraph 55.

[20] *Ibid*., at paragraph 57.

autonomy in how they choose to resolve their disputes enables them to attain a remedy more speedily and effectively. As I stated earlier, this accords with the right of access to justice.

35. However, it ought to be acknowledged that the present scheme is far from perfect and that the Courts will have to step in to prevent injustice or to uphold the Rule of Law. An example of this is a very recent decision of the Federal Court in *Jaya Sudhir a/l Jeyaram v Nautical Supreme Sdn Bhd & Ors*.[21] The question in that case was whether a third-party being non-party to an arbitration agreement may injunct arbitration proceedings. The 3rd party claimed that the outcome of those proceedings will adversely affect him. The Federal Court, after considering the entirety of the scheme and spirit of the Arbitration Act 2005, and with the view of doing justice, held that the Arbitration Act 2005 did not preclude the 3rd party from seeking an injunction.

36. In this vein, the significant role of the AIAC cannot be understated. The work it has done in the past has greatly improved the arbitration scheme in Malaysia. But, there still remain challenges that require

[21] *Jaya Sudhir a/l Jeyaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1.

solutions. In that sense, this Forum is a step in the right direction. Open discourse and critical discussion are the breeding grounds for new ideas. The friendships fostered with our counterparts from other countries such as the HIAC also make for opportunities for us to further learn from one another. As case law has shown, the Judiciary is committed towards the success of ADR subject to the limits the law imposes on all of us.

CONCLUSION

Distinguished guests, ladies & gentlemen,

37. In an increasingly globalised world, perennial methods may no longer be the answer to new problems. In this sense, the Judiciary and the various ADR institutions will need to continue working hand-in-hand to resolve them.

38. I cited earlier the example in *Lau Brothers (supra)* in regards the exchange of telegrams and whether they manifested a contract. Closer to our decade, some years ago, the Federal Court was required to decide whether an SMS could legally qualify as a lawful

acknowledgment of a debt time-barred by section 27(1) of the Limitation Act 1953.[22] This is the case of *Yam Kong Seng v Yee Weng Kai*.[23]

39. Acknowledgement would only be valid if it is in writing and signed. The Federal Court took a purposive interpretation of section 27(1), and in harmonising it with the Electronic Commerce Act 2006,[24] held that the SMS was in writing and that the debtor's phone number (which the debtor accepted was his) did in law amount to a valid signature. The SMS therefore was taken to constitute a valid acknowledgment of the debt.

40. The facts of the case disclose two important things. Firstly, commerce and technology dance to the same tune. Both are evolving at a rapid pace and tremendous efforts have to be made to keep the law up to speed. In fact, the case concerned an SMS, which I argue, have largely fallen out of use with the advent of WhatsApp and other messaging platforms. It appears that in a few years' time, when the law will have finally caught up with WhatsApp

[22] [*Act 254*].

[23] *Yam Kong Seng v Yee Weng Kai* [2014] 6 CLJ 285

[24] [*Act 658*].

and other similar platforms, technology and commerce themselves would have progressed to a new level leaving us right back where we started.

41. Thus, whether it be conventional dispute resolution or ADR, the challenge we both have in common is technological advancement. I echo Lord Briggs' concern when he posed the question: will we soon be taken over by Artificial Intelligence ("**AI**")?

42. I have been informed that the AIAC and the HIAC, apart from using each other's premises for hearings or events, are also planning to devise joint educational programs and courses. I hope that both the AIAC and the HIAC will include the subject of technology as part of their discourse. This is also something in which the Judiciary is taking a keen interest in.

43. I think this collaboration between the AIAC and the HIAC is a big leap in the right direction and I am certain their partnership will spark new ideas and solutions to take us to greater heights. This Forum is of course one such effort. In this regard, I would like to congratulate Mr. Vinayak Pradhan and his colleagues at the AIAC for initiating and collaborating with the HIAC, which was developed

shortly after Hainan was designated as a free trade zone and empaneled both Chinese and overseas arbitrators. Looking at the growth of trade, investments, cross-borders commerce and constructions in these regions, it is undeniable that ADR mechanisms play a pivotal role when disputes arise. The signing of the Memorandum of Understanding (MOU) between the AIAC and HIAC will undoubtedly strengthen and promote the use of ADR as well as the development of joint ADR customize mechanisms for Asian businesses, particularly those between China and Malaysia in their capacities as trading partners.

44. I look warmly to the future of ADR in Malaysia and I am confident that the ADR services will continue to grow not only in Malaysia but also worldwide. With that, I wish you a fruitful Forum.

45. Thank you.