Honorable Chairperson, Honorable Justices, Your Excellencies, My Lords,
Ladies & Gentlemen,

Assalamualaikum Warahmatullahi Wabarakatuh

I gather from the record that Malaysia was very fortunate to have had Mr. Justice Tassaduq Hussain Jilani, Judge of the Supreme Court of Pakistan deliver a paper entitled “The Maladies of Delayed Justice and Growth of ADR” at the International Islamic University Malaysia on 3rd and 4th December 2004 during the International Seminar on Recent Developments in ADR which was jointly organized by the Institute for the Study and Development of Legal Systems (ISDLS) and the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.

I fear that my text today pales in comparison to the candle light of such highly educated speakers and participants. Anyhow, I shall plod on to do my very best to inspire you all today.

The Importance of Alternative Dispute Resolution (ADR) as a Secondary Dispute Settlement

In any given modern civilization, we can see clearly that the Courts and Judges form the basic foundation of the justice system. This will remain as long as the high level of integrity and justice of the Courts and Judges is maintained and enjoys the confidence of the people. As stated by Lord Denning, “justice must not only be done but be seen to be done”

The idea of alternative dispute resolution will never substitute the Courts as the venue for justice. This basic point can be implied from the general mentality of the legal fraternity around the world. The idea of developing and introducing ADR is not new. It has been mooted, debated, practiced and “marketed” for more than a few decades. We can see a vast increase in ADR cases and yet, this has not reduced significantly the cases filed in the courts.
The Courts have traditionally been the only venue for people seeking justice. Being state organs, the court system has developed into a mechanism where governments aim to do justice between individuals. As time progressed, state courts became clogged with all kinds of cases including criminal matters. In that scenario, people involved in the commercial as well as maritime trade, began to look for alternative forms of dispute resolution. These merchants wanted to have some say in the selection of judges and process of justice outside the traditional court system.

When disputing parties opt for ADR, it does not mean that they have lost faith in the judicial system. Disputing parties understand the importance of courts and welcome their just decisions, whenever, necessary.

It is here that the judges and the courts ought to realize that ADR is a useful form of clearing the backlog of cases. This will mean that there will be more room and time for the courts to decide on criminal matters which are of public interest (as opposed to commercial matters which are by their very nature, of private interest). The courts can spend time to weigh, ponder and consider important legal questions and further develop the law.

The Reason to Develop ADR

Honorable Chairperson, Honorable Justices, Your Excellencies, My Lords, Ladies & Gentlemen,

There are many reasons why ADR was developed in recent years. The main reason is due to its different *modus operandi* as compared to litigation. According to Walter K. Olson:

“Older law makers and judges tended to recognize litigation as a wasteful thing, in its direct expense and in the demands it placed on the time and energy of people with better things to do. It was grossly invasive of privacy and destructive of reputation. It was acrimonious, furthering resentments between people who might otherwise find occasion to co-operate. It tended to paralyze productive enterprise and the getting on of life in general by keeping rights in a state of suspense. It corrupted its participants by tempting them to harass each other and to twist, stretch, and hide facts. It was a play ground for bullies, and an uneven battlefield where the trusting, scrupulous, and plainspoken were no match for the brassy, ruthless and glib. For all that, it was sometimes the least bad of the extremities to which someone might be reduced; but society could at a minimum discourage it where it was not absolutely necessary.”

This might be an unkind way of defining litigation but I do believe that it does carry some truth. Even in Pakistan, there have been instances where the significance of ADR has
been recognized. If I may quote Mr. Justice Tassaduq Hussain Jilani, Judge, Supreme Court of Pakistan from his paper:

"We (Pakistan) are a vibrant society in transition. There are strains of societal divide; cultural, economic, political, sectarian and ethnic. This divide feeds the downside of Adversarial Legalism. There is a need to promote consolidation, concord and search for alternatives in every arena of societal divide. This would require a mindset, a culture and institutional support. ADR is an attempt in the judicial and quasi domains to promote these values and these institutions. Not underestimating the need for more resources for the administration of justice, I am of the considered view that the problems of backlog and delayed justice cannot be tackled unless there is an attitudinal change in the main actors of the judicial process i.e. the Bench, the Bar and the litigant public. Case management and Alternative Dispute Resolution primarily aim at bringing about this attitudinal change. This process has to commence at the basic level i.e. at the subordinate judiciary level. The subordinate courts are the back-bone of the entire judicial hierarchy. It is here that the concept of rule of law confronts the first trial; it is here that more than 95 % of cases are filed and pending; it is here that the impressions and perceptions about the judiciary take shape; it is here that people in litigation suffer for months, years and decades and spend the best part of their lives waiting for that elusive Justice which at times is delayed, at times denied, and at times is bitter with expense it entails."

With that, I hope we can now understand the reason for ADR to develop within these few decades.

The Major Types of ADR

Some scholars have indeed distinguished several types of ADR.

In view of the fact that during the last two or three decades, certain modes of ADR have become universally popular, these may rightly be called ‘primary’ processes, while, as Professor Syed Khalid Rashid said “those which are derived from primary sources after tailoring them into accordance may be called ‘hybrid’ process”. He further divided ADR as follows:

A. Primary ADR Processes:
   i. Negotiation
   ii. Mediation / conciliation
   iii. Arbitration
B. Secondary ADR Processes
   i. Adjudication / Private Judging
   ii. Mini Trial

C. Hybrid ADR Processes:
   i. Expert Determination
   ii. Med-Arb (Mediation – Arbitration)
   iii. Ombudsman
   iv. Summary Jury Trial

In this paper, I will only delve a little bit into negotiation, mediation, adjudication and arbitration since the rest of the processes are not widely practiced in many countries.

Negotiation

“Negotiation is a basic means of getting what you want from others. It is back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.”

Negotiation is an informal method adopted before and / or after a dispute arises. The best part about negotiation is that there is no third party appointed to determine the final outcome. More often than not, if the parties really wish to settle a dispute, they will do so during negotiation.

In Malaysia, according to section 107(3) of the Consumer Protection Act, the Tribunal for Consumer Claims has the power to approve and record a settlement based on the parties’ negotiation and the settlement shall then take effect as if it is an award of the Tribunal.

Mediation or conciliation

Mediation or conciliation is a voluntary process in dispute resolution whereby a neutral third party (who is independent of the disputing parties) assists them to reach an agreement. The mediator develops options or offers some guidance or ‘light path’ towards a mutually satisfying objective.

Conciliation is a term which one comes across frequently when dealing with disputes arising out of family and industrial relations. Mediation on the other hand is a term more generally associated with disputes arising out of commercial relations. At the Kuala Lumpur Regional Centre for Arbitration (KLRCA), Conciliation and Mediation are terms which are used interchangeably.

KLRCA provides administrative and support services and complete facilities for those using our premises for international domestic and ad hoc matters. Mediation at KLRCA is conducted in accordance with our rules which are the United Nations Commission on
International Trade Law (UNCITRAL) Conciliation Rules and the Centre can assist in the selection or appointment of the conciliator/mediators.

We are mindful of the needs of the end-users whose claims may be small. We fix the registration fee at US$50 (or RM190) plus a deposit of US$500/RM1900. Other costs include the fees for the mediator, his/her travel and other expenses as well as those for witnesses and experts. Such costs are usually borne by the parties.

Being a no-profit, international organization, KLRCA provides mediation consistently through the publication of our newsletters in and outside Malaysia.

The confidentiality of all matters in relation to conciliation/mediation proceedings is protected under the Conciliation/Mediation Rules of KLRCA.

Let me quote here:

Rule 11: Disclosure of Information

“When the Conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the Conciliator subject to a specific condition that it be kept confidential, the Conciliator does not disclose that information to the other party.”

As for admissibility of evidence in other proceedings, this is clearly stated in Rule 21. I need not stress too strongly that mediation is indeed a non-confrontational method of resolving a dispute or disputes.

Let us take ourselves on a global journey for a while.

It is interesting to note that Colman J in his decision in C v RHL ordered mediation. In matters such as anti-suit injunctions, mediation comes in as an alternative to injunctive relief. I shall not bore you with the details of the case except to say this concerned a share purchase agreement with an arbitration clause. There was an allegation that one party had initiated proceedings in Moscow. The Judge’s, rationale for this approach is:

“Having considered the background to the collapse of this transaction and the nature of the issues likely to arise both at the hearing of this application and at the hearing of substantive claims in the arbitration, as well as the various peripheral proceedings relating to the underlying transaction, including the pending proceedings in the Moscow Arbitrazhnye Court, I have no doubt that the overall interests of all parties, including RHL’s associated
companies and beneficial owners, would be best served if the whole group of disputes between C and RHL was referred to mediation before any further substantial costs are incurred either in pursuing or defending satellite litigation such as this application or in pursuing the claim in the arbitration both for injunctive relief and for damages. In many respects this series of disputes with its particular commercial background is the paradigm of a case which is likely to be settled by mediation. The procedure provides scope for the kind of commercial solution to these disputes which it is beyond the power of this court or of the arbitrators to engender.”

Adjudication

Adjudication was first introduced in the UK via the Housing Grant and Construction Regeneration Act (HGCRA) 1996 pursuant to Sir Michael Latham’s report “Constructing the Team” of 1994 which reported the woes of the UK’s construction industry.

Lord Denning, in his famous judgment in the Court of Appeal in Dawnay v Minter, said about construction disputes.

“There must be cash flow in the building trades. It is the very lifeblood of the enterprise.”

In his usual vintage style, Lord Denning did not mince words in criticizing the frustrating effects of a long-drawn dispute resolution process, unfortunately common in construction disputes:

“One of the greatest threats to cash flow is the incidence of disputes. Resolving them by litigation is frequently lengthy and expensive. Arbitration in the construction industry is often as bad or worse.”

The obvious attraction of the process of adjudication is that it is a fairly quick process in comparison to arbitration and the decision can be enforced summarily thus unblocking the cash flow problems in the interim.

I have elaborated on adjudication in my paper titled “Appointing Bodies and Adjudication Rules and Procedures” during an International Forum on the Construction Industry Payment Act and Adjudication held in Kuala Lumpur on 13th and 14th September 2005 and I would be delighted to provide you with a copy of this paper should you wish to delve deeper into this particular method of dispute resolution.
Arbitration

Arbitration is regarded as the best alternative to litigation. Bingham J had this to say about arbitration:

“In electing to have disputes tried by the process of arbitration, litigants achieve various advantages. For example, they invest themselves with the luxury of choosing their own tribunal and no doubt take advantage of that opportunity in order to select a tribunal fitted by experience and knowledge to solve the dispute in question. They can also protect themselves against the risk of a tribunal whose judgment is liable to be perverted by excessive legalism. Litigants further achieve the benefit of conducting their proceedings in private and of avoiding certain formalities such as the giving of evidence on oath which ordinarily attend the conduct of court proceedings. There are other advantages such as speed and the saving of expense which may or may not be achieved depending upon the will of the parties and the arrangements which they choose to make. But those are additional advantages bought at a price and the most obvious price which a litigant pays is that he loses the extensive powers of review which the appellate courts enjoy over the factual and legal decisions of judges sitting at first instance.”

In arbitration, parties may choose the person whom they hold in high respect and consider in possession of expertise in the subject-matter in dispute.

In the courts, delay is something which the merchants can ill-afford. Decisions are withheld from parties for years. However, there are in some countries, like the United Kingdom, special courts which have been established to deal principally with:

a) Maritime or Admiralty Matters;
b) Construction and Technology matters &
c) Commercial matters.

Such courts are staffed by judges who have experiences in the discipline and so can expedite hearings and make timely decisions. One drawback however in such a system is that the decision of the court is subject to appeals. In arbitration, it is the general expectation of the parties in commercial transactions that the arbitrator’s decision is not appealable.

Allow me to reproduce a standard arbitration clause which reflects that general expectation of the parties:-

“The arbitration shall be held under the auspices of the Kuala Lumpur Regional Centre for Arbitration and conducted in accordance with the Rules for Arbitration of the Kuala Lumpur...
Regional Centre for Arbitration. Such arbitration shall be presided by one (1) arbitrator who shall be appointed by the Parties. Should the Parties be unable to agree to the appointment of an arbitrator, the Director of the Kuala Lumpur Regional Centre for Arbitration shall appoint the arbitrator. The decision of the arbitrator shall be final and binding on the parties. As far as applicable, any award rendered shall be enforceable in accordance with Malaysian law. Notwithstanding the foregoing, judgment upon the award rendered may be entered in any court having jurisdiction or application may be made to such a court for judicial acceptance of the award and an order for enforcement (as the case may be).”

Confidentiality

Although the degree of confidentiality afforded by the arbitration law of different jurisdictions (absent express provision by the parties) varies, there can be no doubt that arbitration provides greater privacy and confidentiality than litigation (which is often public). Further, parties can provide for the required degree of confidentiality in their arbitration agreement (at least until such time, if ever, when enforcement through courts becomes necessary, when confidentiality might be put at risk by the court process).

Rule 9 of the KLRCA Rules of Arbitration provides the following:-

“Unless the parties agree otherwise, the arbitrator and the parties must keep confidential all matters relating to the arbitration proceedings. Confidentiality extends also to the award, except where its disclosure is necessary for purposes of implementation and enforcement.”

There would be no public gallery where lawyers might want to show their adroitness in the use of law, and their prowess in the use of word. Here, in the coolness of the hearing rooms and the congenial atmosphere generated by the non-confrontational approach of both parties, confidence is reposed by a steady and knowledgeable arbitrator.

Parties are afforded a full opportunity to be heard under Article 15 of UNCITRAL Arbitration Rules. There must also be a contemporaneous exchange of all documents or information between the parties to the arbitration.

Moving forward with ADR

ADR can be a system that helps generating better success in dispute settlement. However, ADR as a system requires time to be moulded and adapted to suit each country differently. ADR needs time, support and a good administrative body. This however, could not be achieved instantly.
I quote Justice Mustafa Kamal, former Chief Justice of Bangladesh, when His Lordship made the following observations:

"First, like innovative exercises, ADR needs a motivator or an army of motivators throughout the country. For practical reasons, it is not possible for a sitting Judge to spare the time, energy and effort to assume this role. Retired Judges who are respected by both the Bar and the Bench should come forward to give leadership. That will be paying back to the Bar and the Bench a small part of the debt they owe to the Bar and the Bench for the honour given to them during their working life. The same goes for elderly senior lawyers. Nothing can take root by sporadic effort of a few years. At least two or three generations of lawyers and Judges must give their sustained labour to make ADR an integral part of their judicial system.

Secondly, a well thought-out action plan is necessary to make ADR a success. It is not desirable that an avalanche of mediation should descend upon the Courts all at a time. The Courts should refer relatively simple cases first to the mediators. A simple case is one that requires the least judicial effort to adjudicate upon facts and law. A relatively complex case is one that requires a little more judicial effort to ascertain facts and law. Following this criterion, simple cases should be referred first. With experience gained, relatively complex cases can be referred to mediation. It should not be the aim of anyone to achieve anything overnight."

History of arbitration at KLRCA

KLRCA, in its nature, is a neutral venue for conducting arbitration hearings. Established under the auspices of the Asian-African Legal Consultative Organization (AALCO) in 1978, we serve 47 members states of AALCO. Pakistan became a member of AALCO in 1958.

The Government of Malaysia has been gracious in providing necessary facilities to KLRCA in order to carry out our role as a regional centre for AALCO. KLRCA presently has 4 hearing rooms, the biggest of which is able to accommodate up to 60 people, a coffee terrace, a large and spacious arbitrators’ lounge, a meeting room and access to a large, green tropical garden.

There is ample parking space which is free (rare nowadays in Kuala Lumpur) and a library cum resource centre with a sizeable collection of books, materials and papers on international commercial arbitration. KLRCA also provides secretarial, translation and interpreters’ services where requested.
As KLRCA is under the auspices of AALCO, it operates independently from the Government of Malaysia. On 29th February 1996, the Minister of Foreign Affairs Malaysia, in exercise of the powers conferred on him by section 3(1) and 4(1) of the International Organizations (Privileges and Immunities) Act 1992, made the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996. In Regulation 2, the Minister declared that the Centre is an international organization to which section 4 of the Act applies. Section 4 deals with privileges and immunities of certain international organizations and persons. Regulation 3 provides that the:

“Centre shall have juridical personality and such legal capacities as are necessary for the exercise of its powers and the performance of its functions and shall also have the privileges and immunities specified in the First Schedule to the Act.”

Part one of the First Schedule to the Act (section 4) provides for the,

“Immunity of the organization, and of the property and assets of, or in the custody of, or administered by, the organization, from suit and from other process.”

**Court support of arbitration**

Not only can parties to an arbitration conducted under the Rules of KLRCA be assured of non-interference by the Malaysian Government, the courts in Malaysia are equally supportive of KLRCA arbitrations. The Court of Appeal in a case titled *Sarawak Shell Bhd. V. PPES Oil & Gas Sdn. Bhd. & Ors* ruled that KLRCA Rules of arbitration constitute:

“…..a comprehensive framework for the resolution of all disputes within their ambit.”

It is also now well-established that interim measures of protection will be granted by the courts in Malaysia to support arbitrations conducted under the Rules of KLRCA. The Court of Appeal in *Thye Hin Enterprises Sdn. V. Daimler Chrysler Malaysia Sdn. Bhd* gave, *inter alia*, the following important ruling:

“It is to be noted that s.34 of the Act only excludes interference with the arbitration itself. It has no application to cases where interim relief is urgently required. In our judgment, the grant of interim relief pending the outcome of an arbitration held at the KLRCA is not prohibited by s.34 of the Act.”

I am therefore, pleased that the Right Hon. Tun Dato’s Sri Ahmad Fairuz Bin Dato’ Sheikh Abdul Halim, Chief Justice of Malaysia in his clarion call, stated that:
“…..the Malaysian courts have been supportive in granting interlocutory relief in arbitration conducted under the auspices of the KLRCA. In the case of Thye Hin Enterprises Sdn. V. Daimler Chrysler Malaysia Sdn. Bhd. (2004) 3 CLJ 591, the Court of Appeal held, inter alia that section 34 of the 1952 Act only excludes interference with the arbitration process itself and has no application to cases where interim relief is urgently required to maintain the status quo of the parties pending the resolution. Consequently the grant of interim relief pending the outcome is not prohibited by section 34 of the Act.”

Institutional arbitration under the auspice of KLRCA

KLRCA Rules of Arbitration are essentially the UNCITRAL Arbitration Rules, with only slight modifications made in respect of the role, duties and responsibilities of the Director of KLRCA, costs and expenses of arbitration (including the arbitrators’ fees) and the facilities and infrastructure made available at KLRCA for parties to an arbitration. I have touched on the facilities and infrastructure of KLRCA earlier in this paper so I shall now proceed to elaborate on the following two distinct features of KLRCA arbitration.

1) Role, duties and responsibilities of KLRCA Director

The principle of party autonomy is encapsulated in Article 6 and 7 of the UNCITRAL Arbitration Rules when it comes to the appointment of the arbitral tribunal. Article 6 provides for the appointment of the sole arbitrator and Article 7, for the appointment of a three-member arbitral tribunal. However, KLRCA Director steps into the picture as the appointing authority where parties fail to agree on the arbitrator (or arbitrators) in question. Most developed arbitration laws require that all the arbitrators be impartial. KLRCA arbitrators, for instance, have to sign a Declaration of Impartiality and Independence which remains in effect throughout the entire duration of the arbitration proceedings. A breach of this Declaration may see a challenge being instituted against the arbitrator in question under Article 9 to 12 of the UNCITRAL Arbitration Rules.

A party can use its choice or input into the selection process to ensure that as far as possible, the tribunal will understand the commercial context, the relevant issues and the party’s procedural preferences. The parties may agree upon certain criteria for the arbitrators, or for the presiding arbitrator, although care should be taken not to narrow the field so far that there are difficulties in identifying potential candidates.

In arbitrations with more than one party on either side, or where other parties might be joined in to the proceedings, maintaining the parties’ right to chose the arbitrators (rather than simply delegating the choice to an institution) can be particularly challenging. For example, if one party has the right to select an arbitrator but two parties on the other side cannot agree upon a joint selection, the latter could claim that they were not being treated
equally. Careful consideration as to the means of appointing the arbitrators is therefore required in such multiple-party scenarios.

In litigation, on the other hand, the vagaries of the court lists may result in any action being heard after a long delay by a judge with no experience in the field to which the dispute relates. In some parts of the world it is clear that the court system is quite unable to cope with modern commercial disputes and not infrequently there are difficulties caused by corruption and lack of independence of judiciary.

I need to emphasize on the expertise of arbitrators as this is where it helps to speed up hearings. In one celebrated case which concerns a banking dispute between a contractor and a lender, the witness was telling the court about a “bridging” loan. At that point, the judge (not versed in banking law and practice) quickly asked “How long is the bridge?” This would not have occurred and time would not have been wasted explaining to the judge had the matter been arbitrated before an arbitrator who is well-versed in banking, finance and such related disciplines.

2) **Costs and expenses of arbitration**

Let me say it again that arbitration can never replace the courts. Some judges are fearful that their standing and worth in the community may be affected. However, their standing can be affected or reduced only by their performance and the results they produce in the courts. Their reputation hangs on the judgments they issue.

But I can add, and this is secret, that those who are knowledgeable of arbitration and its value prefer not to go on the bench. The fees in arbitration can be huge. In one case, and there are thousand others, an arbitrator’s fees enabled him to buy an apartment in UK and a large piece of land in an Asian country. I share this with you because the majority here are judges and so look forward to retiring and getting into their second retirement.

But my caution is this: if the judge(s) has/have been a bad decision-maker on the bench or if he/she was poor at human-relations, then the chances are bleak that any party, much less any counsel or solicitor will engage him/her as an arbitrator. People love a good judge and a good judge is honest, fair and respectful. Friendly, but not corrupt. People know and can smell.

Coming back to the topic, the other quality is that he/she must not overcharge! Start at a reasonable fee which both parties can accept. Then as your standing as an arbitrator grows, your fees can grow! But be warned, at a certain stage (I avoid using age!) the fees may have to come down.

I can tell you of one case (which happily is not a KLRCA matter because we have a scale and we religiously stick to it). The subject claim was for 1.3 million. No need for me to specify the currency. The old (retired judge) arbitrator heard the claims for 5 to 6 hours daily at the start after receiving a big kick-off (or start-up) fee. Then he reduced the daily
hours to 3 on ground he was not well. Everything slowed down and finally the parties found that they had to pay him 750,000. He handed down or rendered an award (not a judgment as we must realize) of 1 million to the claimant. One of the parties decided to go bust (or "insolvent" in legal terms) so as to avoid paying the balance of the fees! And the arbitrator no longer gets any new invitation to arbitrate. All these matters took place in the Asian region.

There is also an interesting case that was reported in the Malaysian papers, the excerpt of which is published in the January 2006 newsletter of KLRCA. Suffice it to say that this again was NOT a KLRCA arbitration. The arbitration award amounted RM 740 million which consisted of the principal claim of RM 669 million, an additional RM 61.5 million that represented interest at 8% per year and RM 3.1 million of arbitration costs and the remaining RM 6.8 million being the legal fees. KLRCA did a rough calculation based on the figures reported in the papers and discovered that had the arbitration been registered with KLRCA, the maximum arbitration costs (tribunal of three and the Centre's administrative charge) would amount to RM2.3 million (and not RLM3.1 million!).

There is a Schedule of Fees for Arbitrators and a separate Schedule for the Administration Costs of KLRCA where arbitrations are conducted under the Rules of the KLRCA. The application of these Schedules depend on the classification of the arbitration as either domestic (payment of fees and costs would be in RM) or international (payment of fees and costs would be in USD).

Conclusion

The general commercial society has realized that ADR offers a win-win situation which is more lucrative than the "winner takes all" system that litigation has to offer.

Roscoe Pound was of the opinion that law was created and designed to satisfy human (individual and social) wants. In other words, law is a social engineer that ensures that the needs and wants of the society are satisfied. Since not every social problem could be cured via legal action, ADR is indeed a creature of law that will be engineered continuously as an alternative to legal action. Justice should consider ADR as an ally rather than a competitor. Judges should embrace ADR as a partner instead of as an adversary; courts should accommodate ADR as a friend rather than a foe or a suspect! But most importantly, ADR should respect justice, judges and the courts.