Opening Address Delivered by H.E. Prof. Dr. Kennedy Gastorn, Secretary-General of Asian-African Legal Consultative Organization, at the Kuala Lumpur International ADR Week 2017 (KLIAW 2017), 15 May 2017

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Datuk Professor Sundra Rajoo, Director of Kuala Lumpur Regional Centre for Arbitration

Li Yanbing, Deputy Director of Hainan Arbitration Commission,

Distinguished jurist Mr. Fali S. Nariman,

Distinguished Guests, Ladies and Gentlemen,

It is indeed my singular pleasure and privilege to address this august gathering of arbitrators and experts in arbitration law from across the world.

At the outset, let me convey my heartfelt appreciation to KLRCA and its director, Professor Sundra Rajoo for taking initiative to organize this grand programme, "Kuala Lumpur International ADR Week 2017".

This three day event provides an ideal platform for the exchange of ideas, sharing of operational experiences and best practices and networking with renowned lawyers and arbitrators.
I am sure that the discussions over these three days will provide us a new direction and input to effectively channelize the synergies created among the practitioners participating in the event.

Distinguished Guests, Ladies and Gentlemen,

Given that I am one of the first speakers and the current head of the Organization (AALCO) that sponsored the Regional Arbitration Centres in Asia and Africa including the KLRCA, I believe it is incumbent on me to briefly talk about how these Centres came into existence.

As some of you may know, the work of UNCITRAL forms an integral part of AALCO's agenda and the Organization has always attached considerable importance to the work of UNCITRAL and considers the Report of the Commission at its Annual Sessions regularly.

Outside the United Nations framework, AALCO was among the first to realize the potential of Arbitration and its importance to the Asian-African states. It started considering arbitration as a priority item since late sixties with the establishment of its relation with UNCTAD and UNCITRAL. During the period of 60's and 70's, there were hardly any permanent arbitral institutions in the Asian-African region.

The only alternative was the well established Western based arbitral institutions. The disadvantage of dependency over these institutions ranged from cultural disparity, institution and financial constraints and inability to afford best legal experts to represent them. The results were, therefore, often adverse to them.

It was an unsatisfactory situation, which needed to be improved that AALCO took upon this challenge. AALCO realized the need to develop and improve the procedure for international commercial arbitration, the necessity for institutional support, develop necessary expertise and create environment conducive to conduct arbitration in the Asian and African regions. This, it was expected, would process and guide the future of international commercial arbitration in a manner which would lead to improvement of the rules of arbitration, which took into account the needs and concerns of developing countries.

AALCO, during its Thirteenth Annual Session held in Lagos (Nigeria) in 1973, proposed that apart from follow-up of the work of the UNCITRAL in the field of International Commercial Arbitration, the Organization should also conduct an independent study on some of the more important practical problems relating to the subject from the point of view of the Asian-African region.

Accordingly, the Secretariat prepared an outline of the study, which received favorable response from the Member States. The Secretariat thereafter prepared a detailed and comprehensive study and the Trade

Law Sub-Committee considered this study during the Fifteenth Annual Session held in Tokyo (Japan) in 1974.

Pursuant to deliberations at the Tokyo Session and Kuala Lumpur Session in 1976, the Secretariat undertook a feasibility study for establishing Regional Arbitration Centres in the Asian-African region.

At the Eighteenth Annual Session, held in Baghdad (Iraq) in 1977, discussions were focused on the Secretariat study titled '*Integrated Scheme for Settlement of Disputes in the Economic and Commercial Matters'*. This study envisaged *inter alia,* the establishment of a network of Regional Centres for Arbitration functioning under the auspices of the AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Asian-African region could be minimized.

The Integrated Scheme also represented an effort on the part of the developing countries for the first time to evolve a fair, inexpensive and speedy procedure for settlement of disputes.

At the Nineteenth Annual Session, held in Doha (Qatar) in 1978, AALCO endorsed the Trade Law Sub-Committee's recommendations on the establishment of two Arbitration Centres for the Asian and African regions in Kuala Lumpur (Malaysia) and Cairo (Arab Republic of Egypt) respectively.

It was envisaged that the two Arbitration Centres would function as international institutions under the auspices of AALCO with the following objectives:

1. Promoting international commercial arbitration in the Asian and African regions;
2. Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the two regions;
3. Rendering assistance in the conduct of Ad Hoc arbitrations, particularly those held under the UNCITRAL Arbitration Rules;
4. Assisting the enforcement of arbitral awards; and
5. Providing for arbitration under the auspices of the Centre where appropriate.

In pursuance of this decision, an Agreement was concluded in April 1978, between the AALCO and the Government of Malaysia in respect of the establishment of a Regional Centre for Arbitration in Kuala Lumpur. A similar Agreement was concluded in January 1979 with the Government of the Arab Republic of Egypt with respect to the establishment of a Regional Centre for Arbitration in Cairo. The Agreements recognized the status of the Centres as intergovernmental organizations and conferred certain immunities and privileges for their independent functioning.

The Host Governments were kind to offer us suitable premises, financial grants and necessary staff to run the Centres. The Centres adopted UNCITRAL Arbitration Rules with suitable modifications and offered their services to any party whether within or outside the region for the

administered arbitration and facilities for arbitration whether *ad hoc* or under the auspices of any other institution.

The success of these two Regional Arbitration Centres prompted the Organization to facilitate the establishment of three new centres, one in Lagos (Nigeria) in 1989, the second in Tehran in 2003, and very recently, the third in Nairobi in 2016.

Distinguished Guests, Ladies and Gentlemen,

It is important to note that although in the beginning, the promotional activities of AALCO's Regional Arbitration Centres were primarily carried out by the Organization itself, in view of experience accumulated over the years and the contacts established by these Centres with Governments, governmental agencies and international institutions, such promotional activities are now completely handled by the Centres themselves.

It is a matter of great satisfaction that, over the years, there has been considerable increase in the number of cases, both international and domestic, referred to AALCO's Regional Arbitration Centres. The KLRCA is a leading example in this regard. I therefore salute the current leadership at the KLRCA and the government of Malaysia in this regard.

Also, it is a matter of immense pride that from that the Regional Arbitration Centres have expanded their footprint across the region they are based. Their role in providing institutional support as neutral, independent

international organizations for the conduct of domestic and international arbitration are invaluable.

The sheer range of activities they undertake is testimony of their commitment to fulfill the mandate entrusted on them. Their success is indeed the product of the visionary leadership of the successive directors of the Centres and the support lent by the Host Governments. They are model establishments to be emulated in regions of Asia and Africa which still do not have enough effective centres to facilitate international commercial arbitration.

In fact, this event at KLRCA, with representation from arbitrators, experts and lawyers across continents, itself is the evidence of the progress made thus far.

I would like to reiterate that the AALCO Secretariat is committed to promoting arbitration centres among the Member States and to working toward establishing arbitration centres in other Member States when and where necessary.

In this occasion, I would like to particularly congratulate Professor Sundra Rajoo for his inspired leadership that took the Centre to new heights.

Today, KLRCA is the premier hub for arbitration in this part of the world and provide a robust model for other AALCO Regional Arbitration Centres to emulate. I also thank the Government of Malaysia for its continuous support to the Centre.

Distinguished Guests, Ladies and Gentlemen,

In 1980s, when alternate dispute resolution mechanisms emerged, the legal and trade experts heralded arbitration as a sensible, cost-effective way to keep corporations out of court and away from the kind of litigation that financially takes a toll on both the litigating parties. Over the next few decades many large corporations included arbitration clauses in their agreements considering that it would be cost and time efficient.

The great hopes from arbitration are fading in some cases as a cost and time efficient mechanism.

In some cases, arbitration as currently practiced too often mutates into a private judicial system that looks and costs like the litigation it's supposed to prevent. At many institutions dealing with arbitration, it now typically include a lot of excess baggage in the form of motions, briefs, discovery, depositions, judges, lawyers, court reporters, expert witnesses, publicity, and damage awards beyond reason (and beyond contractual limits).

Moreover, since parties are free to choose upon the governing rules, the procedure is often allowed to become a litigation look-alike. Whenever that happens, the cost of Arbitration begins to approach the cost of the litigation that it's supposed to replace. The contending parties often waste prodigious quantities of time, money, and energy by reverting almost automatically to the habits of litigation. They pursue discovery, file motions,

and rely excessively on expert witnesses—exactly the way they would in a lawsuit.

This raises the question, "**is Arbitration since an ADR mechanism or has it become another litigation-like process**?"

Indeed, there are certain characteristics in the arbitration mechanism which shows that despite of resembling the litigation process, arbitration possess features which distinguishes the two.

Arbitration is a private method of dispute resolution in which the parties select the individual or individuals who will finally decide the matters in issue following a process agreed upon by the parties, with no or a minimum of court intervention.

Like in all ADR mechanisms, in arbitration as well parties have considerable flexibility and autonomy. Court litigation is largely controlled by statutory and procedural rules. Through provisions set forth in a construction agreement or upon mutual agreement of the parties once arbitration has commenced, the parties have the opportunity to establish rules and limits for pre-hearing exchange of documents or interrogation of witnesses, the manner in which an arbitration hearing will be conducted and the level of detail to be included in an arbitration award.

Moreover in the arbitration process, the parties are free to select their own arbitrator(s). Any pre-hearing disputes between the parties are decided by the same arbitrator(s) that ultimately decide the case. In contrast, in many

courts, no individual judge is assigned to a case and, therefore, multiple judges may be involved in adjudicating pre-trial disputes. The judge is assigned by the court without input from the parties. Thus, arbitration affords the parties the ability to select the decider, whereas court litigation does not.

Arbitrators can be selected from a pool of professionals, typically with experience in the particular industry regarding which the matter is concerned and, therefore, may provide a greater level of expertise than a judge. Such persons should have a greater capability to comprehend technicalities and peculiarities related to the field than a trial judge.

Most importantly, arbitration is an attractive method of alternate dispute resolution since like all the other ADR mechanisms it involves active participation of the parties in dispute. Parties are made to sit together in a room, in much more relaxed and formal atmosphere than a courtroom. Parties discuss the areas of dispute, present their side of cases along with evidences, if any. Therefore, parties have a greater control over the process.

Ladies and Gentlemen,

The success of the Regional Arbitration Centres, especially KLRCA, is a testament to the inherent qualities of this method of ADR. This prompts me to urge you to look into a pertinent issue in commercial arbitration that ought to be resolved to keep arbitration as a viable option—rising costs.

Besides the large measure of autonomy offered to the parties to a dispute, the lower assumed cost of arbitration compared to litigation is often touted as one of arbitration's top advantages over traditional court litigation. Still, with the rise in popularity of this dispute resolution alternative, especially among sophisticated parties in complex international matters, many of those having gone through an arbitration procedure can attest that this is more of a myth than a reality and that arbitration may not be so inexpensive after all.

In fact, the arbitration community is increasingly concerned with reducing the costs of arbitration so it can continue to serve as a financially viable and attractive alternative to litigation.

Owing to the exorbitant amounts of fee charged by individual arbitrators or institutional arbitrators, the cost of arbitration proceeding present a sorry state of affairs only catering to a certain section of the society which is able to afford it. The best way to truly control the cost of arbitration is to identify the areas where cost quickly accrues and then design ways to monitor and rein in such cost. This event can be used as a forum to discuss the best practices and novel methods to reduce the cost of arbitration.

It is no secret that developing countries often see international arbitration as a process administered, to a large extent, by nationals of the developed countries, mostly in cases of institutional arbitration. Statistics of ICSID reveal that, in practice, the parties to disputes rarely choose arbitrators from developing countries.

This may be due to lack of trained persons in developing countries to serve as arbitrators and as a result, very few get empaneled. In India, for instance, majority of arbitrators are retired judges of the High Courts and the Supreme Court in domestic arbitration and the number decreases further in matters related to international commercial arbitration.

A special effort should be made to train persons, particularly lawyers, in matters concerning the settlement of transnational disputes, so as to represent developing countries in international institutes related to arbitration. I urge the KLRCA to lead in this endeavor.

Another important concern in international commercial arbitration is the recognition and enforcement of an arbitral award since recognition and enforcement can ultimately ensure a successful recovery of monies due. It is therefore critically important for parties to be certain that if an award is made in their favour that the award will not be refused recognition and enforcement in the country where they will ultimately seek enforcement of the award. But the recognition and enforcement of an award may be refused if the award is contrary to the public policy of that state. This is recognized in both New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and UNCITRAL Model Law.

This is reflected in the domestic legislations of many nations. For instance, Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (South Africa) recognize the power of domestic courts to set aside an arbitral award on public policy grounds. In India, the Arbitration Act

provides ‘public policy’ as one of the grounds to set aside the arbitral award.Public policy is one of the most popular grounds commonly used by parties to international arbitration to resist enforcement of arbitral awards. Till today, it remains a highly debated, controversial and complex subject. This is because of the diverse approach taken by national courts in relation to the concept of public policy in international arbitration.

The jurisprudence of Indian courts gives is a typical example. In *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd*, the Supreme Court of India in the year 2001 held that courts of law may intervene to permit a challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. The contention was that public policy does not remain and may vary from generation to generation and public policy would be almost useless if it were to remain in fixed moulds for all time.

The general policy in India prior to this judgment as evidenced by the case of-*Renusagar Power Co. Limited v General Electric Cox* was that “in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India”. While not overruling that decision, the Supreme Court of India in the *Saw Pipescase* distinguished the case on the basis that “It can be held that the term ‘public policy of India” is required to be interpreted in the context of the jurisdiction of the Court where the validity of the award is challenged before it becomes final and executable.

After *Saw Pipes case*, although the Supreme Court of India has attempted to expand the concept of public policy now and then, the decision has been

met with criticism. The end result of such criticism was an amendment to the Indian Arbitration Act of 1996 by including a definition of public policy as an explanation. The definition as set out in the Bill as follows: “Public policy of India” or “Contrary to public policy of India” means contrary to (i) fundamental policy of India, or (ii) interests of India, or (iii) justice or morality.”

Ladies and gentlemen,

the Indian jurisprudence clearly illustrates problems associated with the application of such a vague concept as “public policy”. It should be borne in mind that when trying to resist the enforcement an international commercial arbitration award on the basis that enforcement of the award will be against public policy, then the applicable public policy is not the domestic public policy but the international public policy of the relevant country. Domestic public policy means those moral, social or economic considerations which are applied by courts as grounds for refusing enforcement of a domestic arbitral award. The term international public policy, on the other hand, indicates those considerations which are applied by the enforcing courts when enforcing foreign arbitral awards rather than domestic awards. International public policy is understood to be narrower than domestic public policy.The application of an international public policy in the enforcement of international commercial arbitration awards is what was envisaged by the authors of both the New York Convention and the UNCITRAL Model Law.

Furthermore, cross-cultural differences that may affect arbitral proceedings remain in such areas as examination of witnesses; the active or passive role of the tribunal; use of written pleadings and oral submissions; use of expert evidence; and, proof and application of foreign law and transnational commercial law. Further harmonization may be useful, and common law and civil law arbitral practitioners would benefit from study of competing legal traditions.

Herein lays the significance of closer cooperation and coordination among AALCO Regional Arbitration Centres to effectively cater to the increasing demand for arbitration in developing economies of Asia and Africa. The network has been further strengthened with the operationalization of the Nairobi Centre of International Arbitration. AALCO Member States had called upon Regional Arbitration Centres to organize biennial meetings of the Centres by rotation primarily to share best practices and experiences in conducting arbitration proceedings. Tehran Regional Arbitration Centre (TRAC) took the lead in organizing the first meeting of the Centres in Tehran in 2016. This is indeed a definitive step in further cooperation among our Centres. I would like to use this occasion to urge KLRCA to actively consider organizing the next meeting of Regional Arbitration Centres here in Kuala Lumpur or elsewhere.

As the most successful Regional Arbitration Centre, KLRCA can certainly lead the way in pursuit of harmonizing practices and procedures and proactively guide and help other AAALCO Regional Arbitration Centres, especially the recently established Nairobi Centre, by sharing its best practices and operational experiences.

To conclude, I would like to thank KLRCA for inviting me to participate in this event and speak as the Chief Guest in its opening session. I wish all success to this event.

Thank you.