

**Keynote Speech of Miss Ada Chen**  
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**Hong Kong Maritime Week 2019 Legal Forum**  
***Maritime Dispute Resolutions in Weak Market –***  
***Is mediation a feasible alternative resolution?***  
**19 November 2019 (Tuesday)**

**Introduction**

**Mr. Liu Chunhua<sup>1</sup>, Mr. Nick Chan<sup>2</sup>, Distinguished Guests,  
Ladies and Gentlemen,**

1. It is my great honour to be invited to deliver a keynote speech at today’s legal forum, which is graced with the presence of experienced maritime practitioners and legal professionals.

2. The title of today’s legal forum is “*Maritime Dispute Resolutions in Weak Market – Is mediation a feasible alternative resolution?*”

3. As many of you may be aware, international maritime market has been experiencing recession over the past decade. The Baltic Dry Index, which is issued daily by the London-based Baltic Exchange and serves as a proxy for dry bulk shipping stocks as well as a general shipping market bellwether, has the record low of 290 in February 2016. This represents a decline of 97.5% from the record high of 11,793

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in May 2008. As of 15 November 2019, the Baltic Dry Index was 1,357, which was still down 88.5% from the record high.

4. Further, according to the Review of Maritime Transport 2019<sup>3</sup> published in late October this year by the United Nations Conference on Trade and Development (UNCTAD), the global maritime trade lost momentum in 2018. Volumes expanded at a slower pace of 2.7% in 2018, which was lower than the 4.1% in 2017, and even lower than the historical averages of 3%.

5. The slowdown in maritime market does not mean that a search for effective means to resolve shipping-related disputes becomes any less important or imminent. Instead, it would warrant market players to adopt dispute resolution means that place emphasis on cost-effectiveness and maintaining long-term amicable business relationships.

6. Today's forum has come timely.

7. In today's panel session, there will be discussion on various topics such as the growing trend and advantages of mediation in resolving maritime disputes; market players' concern in using mediation, especially in the enforceability aspect; the challenges and opportunities facing mediators and shipping lawyers; and Hong Kong's position as a leading mediation centre etc.

8. Before I turn the floor over to the esteemed panel, let me talk a bit about the background on maritime dispute resolution and the advantages and growth of maritime

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<sup>3</sup> <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2563> (accessed on 18.11.2019)

mediation. Lastly, I wish to address Hong Kong's edge in providing mediation services to the maritime industry.

### **Background on maritime dispute resolution**

9. Maritime transactions are unique in that they often involve a large number of parties such as ship owners, cargo owners, vendors, buyers, charterers, crews, P&I clubs and in some cases, insurance companies.

10. The entire maritime industry also has to face with the unpredictability of the sea and uncertainties in the global trade environment. An unforgettable example would be the incident concerning the vessel Peak Pegasus last summer when it was stranded at sea for over a month carrying tons of soybeans after missing the tariff deadlines and the cargo owner refused to pay the costs. It was only eventually resolved when the Chinese buyer, Sinograin, agreed to pay the extra import tariffs<sup>4</sup>.

11. When trying to understand maritime law, which is a specialized area of law, it is inevitable to come across the taxonomy of maritime disputes. Colloquially, maritime disputes are divided into “wet” and “dry” disputes.

12. “Wet” disputes usually refer to those adverse events that happen on water. For example, accidents, ship sinking, ship collisions, salvage operations, loss or destruction of freight at sea etc. On the other hand, “dry” disputes usually refer to contractual claims among various parties. For example, claims relating to defective goods, late delivery of

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<sup>4</sup> <https://www.businessinsider.com/peak-pegasus-trade-war-ship-docks-in-china-after-two-months-drifting-at-sea-2018-8> (accessed on 18.11.2019)

goods, non-payment of charter hire, delay in shipbuilding, insurance matters, commissions and decommissions of vessels etc.

13. Arbitration has been widely adopted to resolve maritime disputes. Traditionally, the maritime industry considers that arbitration has more advantages than litigation. In arbitration, parties can freely choose their arbitrator. Parties can therefore appoint arbitrators with specialized skill and knowledge in the shipping area. Moreover, arbitration can take place at a neutral forum so that the parties do not need to submit to the national court of one party's place of business. Parties may also avoid conflict of jurisdictions and the difficulty in determining the competent court and applicable law. Further, the arbitral process is confidential and there is finality to the arbitral award. Convenience in global enforcement of arbitral awards under the New York Convention is another main attraction of arbitration.

14. Despite the perceived advantages of arbitration, modern international commercial arbitration, including maritime arbitration, is facing major issues on time and costs. There has been concern that modern arbitration is becoming more and more "judicialized" with sophisticated and regulated procedures. This in turn leads to procedural delay and increase in costs. It has therefore been observed that maritime arbitration is losing its appeal. It is in such context that mediation is finding renewed vigor in resolving shipping disputes.

## **Advantages and growth of maritime mediation**

### **Advantages of maritime mediation**

15. Mediation is a fast growing trend in the international dispute resolution landscape. It is a voluntary process in which a neutral third party assists the disputing parties to reach an amicable settlement that can cater their specific needs and interests.

16. Among the wide range of benefits of mediation, some of them are common to both mediation and arbitration. Similar to arbitration, parties have the freedom to choose the mediators who can be someone with expertise in the maritime industry. Mediation is also a neutral forum and parties do not need to bother about the competent jurisdiction and conflict of law issues, which often arise in international commercial cases and can complicate the whole process.

17. Mediation also has its own unique features and advantages which are not available in other conventional dispute resolution processes, such as litigation and arbitration.

18. Mediation is by nature interest-based, pro-communication and non-confrontational. The focus of mediation is not on adjudicating past wrongs or legal liabilities. Instead, mediators facilitate parties to identify viable and mutually acceptable solutions so that they can set aside their differences and move forward. This unique nature of mediation encourages parties to think beyond their legal rights and really go into the needs and interests of each other. It also enables parties to preserve or even repair damaged relationship.

19. As a party driven process, mediation allows parties to control the outcomes and helps mitigate risks and unpredictable judgments or arbitral awards which parties disagree or are unable to implement.

20. Among the other hosts of advantages of mediation, its time efficiency and cost-effectiveness are highly regarded by users. While litigation and arbitration may last for years, mediation may conclude within days or at most months, depending on the willingness of the parties, and help save substantial legal costs.

21. According to a 2010 chart from the International Chamber of Commerce (ICC) on comparative costs between arbitration and mediation<sup>5</sup>, for disputes worth US\$25 million, the total average costs of a commercial mediation was less than 5% of that of an arbitration. Further, for international arbitration, the hearing usually took 1-3 weeks and the overall resolution time ranged from 18-24 months. On the other hand, the hearing of an international mediation only took 1-2 days and the entire process could be concluded in 2-3 months.

22. Even if the parties cannot reach a settlement in mediation, the process can help parties narrow down their disputes. In practical terms, this translates into savings in time and costs of the subsequent arbitration or litigation proceedings.

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<sup>5</sup> As quoted in the article titled “*International Commercial Mediation: A Supplement to International Arbitration*” by Ricardo J. Cata, Esq (February 2015) (available at <https://www.uww-adr.com/zupload/wp-content/uploads/2015/03/International-Mediation.pdf>) (accessed on 18.11.2019)

23. In the past, lack of direct enforcement of mediated settlement agreement was seen as inhibiting the development of mediation. However, in the context of international commercial disputes, including maritime disputes, this will be overcome by the new United Nations Conventions on International Settlement Agreements Resulting from Mediation (Mediation Convention) which provides for direct enforcement of international mediated settlement agreements. So far, the Convention has been signed by 51 Contracting States and will come into force 6 months after deposit of third instrument of ratification, acceptance, approval or accession.

24. I am sure that our panel of speakers will explore in further details with you the benefits of mediation.

### *Growth of Maritime Mediation*

25. Now I wish to turn to an important observation that attitudes in the maritime industry has changed in the choice of ADR. In recent times, we start to see the use of mediation in the maritime industry. Insurers who gave the FD&D policies and who are often seen as the ultimate driving force in handling maritime disputes, are now calling for another, more cost-effective way to settling maritime disputes. Some traders who use ocean services are also trumpeting this call. There is an increasing trend in incorporating mediation clauses in standard shipping contracts, e.g. charterparties, insurance policies etc.

26. One example is the Baltic and International Maritime Council (BIMCO), the well-established international shipping organization. It recognizes the value of mediation and has

incorporated mediation clauses into the BIMCO Dispute Resolution Clause 2017, which provides, *inter alia*, that parties may refer any dispute to mediation at any time, even after commencement of an arbitration proceedings. It also provides that refusal to mediate may be brought to the attention of the arbitral tribunal and may attract costs consequences.

27. Another example of mediation being incorporated into dispute resolution clauses is the SCMA Arb-Med-Arb Clause drafted by the Singapore Chamber of Maritime Arbitration (SCMA).

28. In addition to mediation clauses, specific mediation rules for maritime disputes have been developed by international maritime organizations. For instance, the Society of Maritime Arbitrators of New York (SMA) has published the SMA Rules for Mediation 2016.

29. Apart from the promotion of mediation by maritime industry players, there has also been judicial support for mediation. In a 2014 English Commercial Court case<sup>6</sup>, which concerned two sets of inconsistent arbitration clauses contained in charterparties, the Court made the remarks that “*Mediation is now a well-accepted adjunct to both litigation and arbitration. One would expect commercial parties to value the benefits of a mediation...*”

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<sup>6</sup> *Transgrain Shipping BV v. Deilemar Shipping SpA & Another (Eleni P)* [2014] EWHC 4202 (Comm)



## **Hong Kong's edge in providing mediation services to the maritime industry**

30. With these latest developments, how can Hong Kong capitalize on the new opportunities? I am going to highlight 5 key points.

### *(i) Hong Kong government's mediation policy*

31. Firstly, it is a long term and overall policy of the Hong Kong government to promote the use of mediation in Hong Kong. More than a decade ago, the Hong Kong government was already aware of the importance of mediation as an alternative dispute resolution process and had set up a working group and subsequently a task force to study and implement plans for the overall development of mediation in Hong Kong in handling commercial disputes as well as domestic disputes.

32. In present days, we have the Steering Committee on Mediation chaired by the Secretary for Justice. The Steering Committee consists of members from different sectors, including legal, medical, academia and other key stakeholders. The key function of the Steering Committee is to advise on and assist in the further promotion and development of mediation in Hong Kong.

33. With a proactive attitude, we make sure that Hong Kong keeps abreast of the latest world developments on legal and dispute resolution services so that Hong Kong can maintain to be a leading international legal and dispute resolution centre.

(ii) Comprehensive institutional framework relating to mediation

34. Secondly, Hong Kong has a comprehensive institutional framework relating to mediation, including the Mediation Ordinance (Cap.620) and the Apology Ordinance (Cap.631).

35. The Mediation Ordinance came into effect on 1 January 2013. The Mediation Ordinance provides a proper legal framework for the conduct of mediation without hampering the flexibility of the mediation process. It confers statutory protection on the confidential nature of mediation communications and preserves parties' legal position by prohibiting use of mediation communications in subsequent proceedings without leave of the court.

36. The Apology Ordinance, which is the first in Asia, came into operation on 1 December 2017. The main objective of the Apology Ordinance is to promote and encourage the making of apologies with a view to preventing escalation of disputes and facilitating their amicable resolution. Statements of fact accompanying an apology do not constitute admission of legal liability and are not admissible as evidence in relevant proceedings unless a decision maker exercises the discretion to admit such statements in very exceptional circumstances.

37. Apart from the Mediation Ordinance and the Apology Ordinance, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 provides that third party funding of mediation is permitted under Hong Kong law and is not prohibited by the common law doctrines of maintenance and champerty. The Hong Kong government

is in active process to bring the relevant provisions relating to mediation to come into operation as soon as possible.

38. Hong Kong's judiciary also supports mediation. As part of the Civil Justice Reform, the judiciary promulgated Practice Direction 31 ("PD 31"), which came into effect on 1 January 2010. PD 31 applies to most civil proceedings in the Court of First Instance and the District Court of Hong Kong. Under PD 31, all litigants of applicable proceedings are required to make genuine attempts to settle their disputes through mediation unless there are strong justifications. Failure to attempt mediation without any reasonable explanation may result in adverse costs consequences.

(iii) Well-developed mediation sector

39. Thirdly, the mediation sector in Hong Kong is well-developed with extensive network of professional mediation institutions and a wide pool of high-quality mediators under a sound and regulated accreditation system.

40. The Hong Kong Mediation Accreditation Association Limited (HKMAAL) is currently the largest accreditation body for mediators in Hong Kong. It discharges both accreditation and disciplinary functions. Mediators with HKMAAL accreditation have all received not less than 40 hours of training on mediation. As of 15 November 2019, there are over 2,000 accredited General Mediators under HKMAAL.

41. Currently, there are about 30 organizations providing mediation and training services in Hong Kong. These organizations are separate and independent of the Hong Kong

government.

42. Hong Kong has been a cosmopolitan city where the East meets with the West. Mediators in Hong Kong are familiar with both cultures and are equipped with international vision. They stand ready to provide professional and quality mediation services to the maritime industry.

(iv) *eBRAM – online dispute resolution platform*

43. Fourthly, the Hong Kong government supports the development of an online dispute resolution platform – eBRAM (Electronic Business Related Arbitration and Mediation Platform). It is designed to make use of the latest technology to provide an efficient, cost-effective and secured online platform for resolving disputes between parties in any part of the world. The dispute resolution means will cover negotiation, mediation and arbitration. In addition, the platform can provide services for deal-making.

44. As maritime disputes are by nature international, and parties are often located in different parts of the world, such online dispute resolution platform, when it comes into operation, will no doubt greatly facilitate market players to access dispute resolution services administered in Hong Kong.

(v) *Unique status under the Belt and Road Initiative and the Greater Bay Area*

45. Last but not least, Hong Kong is situated in a strategic geographic location and has been included as part of the Belt and Road Initiative and the Greater Bay Area development.

46. In the 2016 Government Work Report, Mr. Li Keqiang ostensibly expressed the desire to capitalise on Hong Kong's unique advantages to enhance China's economic development and further opening up. Among the "Three Joints" and "Five Areas of Connectivity" announced under the Belt and Road Initiative, adoption of mediation to resolve Belt and Road disputes best reflects the people-to-people bond element.

47. The Outline Development Plan for the Guangdong-Hong Kong- Macau Greater Bay Area published in February this year clearly supports Hong Kong to establish itself as a leading legal and dispute resolution centre.

48. The Greater Bay Area has the feature of one country, two systems and three jurisdictions. To promote mediation in the three regions, there has been suggestion to set up a Greater Bay Area Mediation Platform. In this regard, the legal authorities of Guangdong, Hong Kong and Macau have set up joint meetings to discuss the above proposal. A related task group may also be formed to follow up with the implementation details.

49. With China emerging as a major maritime nation, the Belt and Road Initiative and the Greater Bay Area development, it is foreseeable that maritime disputes involving Mainland parties may increase. Our mediation sector is in the best position to offer mediation services to the maritime industry in this region and beyond.

## **Closing**

50. Mediation, as a means of dispute resolution, is evidently becoming increasingly popular both in Hong Kong

and internationally. Its unique advantages and benefits are appreciated and recognized by commercial parties, legal professionals and even the judicial sector. The interest-based approach of mediation is even more valued in a weak market when it is imperative for market players to maintain amicable business relationships with one another.

51. I hope today's forum will help dispel many skepticism about mediation that the maritime industry may have and open the door to greater awareness of the value of mediation and its use.

52. On this note, I wish you all a very fruitful discussion at today's forum. Thank you.