Considering possible settlement: Asian parties in court

A conference led by **NZ Asian Lawyers** with support from the **Ministry of Justice**. **The Michael and Suzanne Borrin Foundation** has commissioned work to scope a project in this area. This conference is also in association with the **New Zealand Law Society** and the **New Zealand Bar Association.**

Date: 19 May 2025

Time: 5:00 for 5:15pm – 7pm.

Venue: Russell McVeagh Auckland

Chaired by Mai Chen, President of NZ Asian Lawyers and the speakers are:

- Justice David Goddard – Court of Appeal, and Chair of the Borrin Foundation
- Justice Sally Fitzgerald – Chief Judge of the High Court Professor
- Mindy Chen Wishart – Former Dean of Law, Oxford University, author of Oxford University Press Studies in the Contract Laws of Asia and author of ICLQ article on Legal Transplant and Undue Influence: Lost in Translation or a Working Understanding?
- Professor Andrew Godwin- Centre for Asian Law University of Melbourne
- Michael Taylor, Russell McVeagh, experienced practitioner advising Asian parties in construction, infrastructure, arbitration, and professional liability.
- Yvonne Mortimer-Wang – Barrister and Co-Chair of NZBA's Advocacy Committee and member of the Diversity and Inclusion Committee, NZBA
- David Campell – Law Society Vice President - consequences of the issues and challenges articulated by David Liu below and the regulatory and representative elements that the NZLS deals with

This event allows experts and interested parties to discuss unique issues, challenges and opportunities for settlement by Asian civil litigants in the New Zealand courts. It is needed because there appears to be an increasing number of Asian parties in the courts (a matter which is being numerically ascertained at present). At the same time, a significant number of these cases, which appear to be ripe for settlement, do not settle. Every litigant has a right to have their case heard and their day in court. But are there barriers and misunderstandings that result in matters going to a hearing when those Asian parties are unaware of settlement opportunities in their best interest? This is particularly important given the constraints on court time and resources.

There is little research and analysis in this area. Consequently, the issues to be explored by the experts include:

- Any barriers to settlement
    - Cultural differences
    - Understanding (or misunderstanding) of New Zealand's rule of law
    - English as a second language or no English at all

    - Self-representation
- How can judges assist?
- How can lawyers/counsel assist?
- How can court procedure assist?
- Can interpreters assist?

Those attending are invited to contribute to the kōrero in this area. Given the evolving nature of the problem and lack of research and analysis, it has been difficult to clarify who may have the relevant expertise, experience, and insights. A **briefing report** compiling the experience and insights of lawyers who advise Asian parties will be provided to all participants hopefully before the start of the conference as a basis for discussion, an example of which is below for Chinese Parties from David Liu. If you have experience and insights to contribute to the briefing report for parties from all parts of Asia, please contact Mai Chen (mai.chen@maichen.nz), Yvonne Mortimer-Wang (yvonne@ymw.co.nz) or Jae Kim (jae.kim@ymw.co.nz) This is an inclusive and not an exclusive one. We require all brains to illuminate any issues in this area.

The topic reminds me of what Palmer J said in his 2018 lecture: I had not realised, before living in Auckland, just how different these two cities are, in their populations, their publics, their cultures. And, of course, this shows up in the business before the courts. Of the four juries I have empanelled in Auckland, only one has had a Pākehā majority. The juries in Hamilton and Rotorua have looked quite different. Of the 188 judgments I have issued so far, 44 per cent of the 263 litigants whose ethnicity I could determine with reasonable confidence have been Pākehā; 14 per cent have been Māori; 10 per cent have been Pasifika; 13 per cent have been Chinese; and 14 per cent have been other Southeast Asian and Indian. I do not have equivalent numbers for Wellington but I suspect they would be different. And these differences show up in terms of cultural attitudes to law too. I have been struck by how often first-generation Chinese litigants are in court with each other over matters which most Pākehā or Māori usually settle without reaching the courts. Lawyers may contribute to that or perhaps there are cultural factors at play. I do not know. And, as far as I can tell, there appear to be different cultural views of what it means to tell the truth, how binding the law is and whether court orders need to be strictly followed or not. 5 These are somewhat adventurous impressionistic observations about culture. Auckland and Wellington are not as different from one another as New Zealand is from the United States. But the appreciable differences that do exist make me wonder just what New Zealand culture is and will be, which city's culture is closer to that future culture, and which is the more "provincial". I think the New Zealand legal system, including the profession, the academy and the judiciary, needs to give some conscious thought to the implications of the increasing cultural diversity of New Zealand

The only research we could find on these issues are as follows. Please let us know if we have missed anything:

- Mai Chen “Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study” (Superdiversity Institute for Law, Policy and Business, November 2019)

- Mai Chen and Andrew Godwin “Culturally and Linguistically Diverse Parties in Australian Courts – Insights from New Zealand” (Superdiversity Institute for Law, Policy and Business, 12 September 2022).
- Dr Leo Liao “Decoding the Puzzle: Chinese Culture, Familial Transfers, and Disputes in Western Courts” (International Journal of Law, Policy and The Family, 2022)
- Cam Truong KC and William Lye OAM KC “The Rise of Asian Litigants in Commercial Disputes” (Victoria, Australia, 15 March 2017)
- Mindy Chen-Wishart “Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?” (The International and Comparative Law Quarterly, January 2013)
- John L Graham and N Mark Lam “The Chinese Negotiation” (Harvard Business Review, 1 October 2003)

David Liu, Director, Heritage Law and NZ Asian Lawyer Board member

Face (面子) – This factor is particularly relevant when one party feels aggrieved by the other party’s failure to reciprocate past favours and/or when the other party’s conduct is considered socially/morally unacceptable from a cultural standpoint. Failure to navigate the “face” issue could lead to one party ignoring litigation risks altogether (adopting an all-out war/scorched earth approach) – or worse yet, demanding more than they are legally entitled – which makes settlement virtually impossible. It also becomes problematic when a party’s objective is not commercially driven but rather to use litigation to humiliate/torture the other party to regain face/cause loss of face (which is arguably an abuse of process for using litigation for an ulterior motive).

Relationship dynamic/*guanxi*（關係）between the litigants (and non-parties) – This factor could be significant when there is a substantial pre-litigation power imbalance between the parties due to their hierarchical relationship. The issue becomes more pronounced if the dominant party perceives legal action as a challenge to their authority or reputation, leading them to resist settlement negotiations, at least not from a position of compromise. While this factor intersects with “face” to a certain extent, as the desire to maintain the existing hierarchical structure and dictate settlement terms can be seen as a “face” issue, *guanxi* is not all about “face” as it could also involve relationships with non-parties, including concerns about how one may be perceived by non-parties if they agreed to settle (or refused to settle).

Distrust in the legal system and/or one’s own lawyer – This issue is not uncommon among elderly immigrants, who may harbour misconceptions that their own lawyer is colluding with the other party or otherwise acting against their interest. This scepticism can make settlement negotiations extremely difficult, as the litigant may second-guess legal advice from their own lawyer and/or resist reasonable compromises out of fear of being misled or taken advantage of.

Preconceived notions and unrealistic expectations of the legal process – Many Asian litigants underestimate the time, complexity and costs involved in litigation, often assuming that their claims can be determined by the courts within a matter of weeks/months and that they will be entitled to recover *all* of their legal costs from the opposing party at the end of the process. Without clear guidance at the outset to manage these expectations, they may become disillusioned and disenchanted when confronted with the reality of litigation, and this can lead them to blame their lawyers or the opposing party for the delay and cost blowout, making them more entrenched in their settlement positions and less willing to compromise.

Bad advice/not understanding advice – In some cases Asian litigants receive bad legal advice, or they simply misunderstand the advice given (due to language barriers), and this can lead to unrealistic settlement expectations. The latter problem is relatively easy to resolve, but in the case of the former, it becomes a *shared problem* between the litigants, as the party receiving sound legal advice must not only prepare their claim/defence in the usual way, but also convince the other party that their lawyer's advice is flawed. That said, this issue is by no means exclusive to Asian lawyers – there are bad lawyers across all ethnicities!

Opposing counsel's face and professional reputation – An Asian lawyer's sense of "face" and professional standing can sometimes become a barrier to resolution. If conceding an error is perceived by the lawyer as a loss of status – particularly in the presence of an important client or when dealing with opposing counsel they consider to be their junior – they may push forward with a weak case rather than risk perceived humiliation. While professional rivalry and one-upmanship exist across all cultures – managing and looking after the "face" of the Asian lawyer on the other side adds another layer of complexity/sensitivity that one needs to be aware of in order to achieve a negotiated settlement for their clients.