[2025] NZLJ 298

Mediating between and with Asian parties in dispute

Mai Chen, Barrister and President of NZ Asian Lawyers, on the barriers to Asian litigants settling

> It is said that a fish cannot know what water is because it is all pervasive. Water is all the fish knows and the fish cannot distinguish water from the fabric of its existence. So it is with culture. Culture is so deeply ingrained within us by the processes of socialization that we often do not realize we are affected by it.
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> (Joel Lee "Culture and its Importance in Mediation" (2016) 16 Pepperdine Dispute Resolution Law Journal 317).

THE PROBLEM

This article reflects the thinking that came out of a conference held on 14 August 2025 by NZ Asian Lawyers on "Mediating Between and With Asian Parties in Dispute", in partnership with the Ministry for Ethnic Communities, the Ministry of Justice, the Arbitrators and Mediators Institute of New Zealand (AMINZ), The Law Association of New Zealand (TLANZ), the Borrin Foundation and Chapman Tripp, which spoke into the void of whether there are unique barriers to Asian litigants settling and what actions might encourage Asian litigants to settle, or to reach for alternative dispute resolution (ADR) as opposed to filing or continuing with court proceedings. The problem is complicated by the lack of reliable statistics on whether Asian parties approach litigation and settlement differently to other parties before the courts.

This article follows "Considering Possible Settlement: Asian Parties in the Court" [2025] NZLJ 149, concerning the first conference in May 2025, which highlighted anecdotal evidence from practitioners, given the lack of hard statistics, that Asian parties are not settling their cases and discontinuing proceedings in court as much as they could be.

The High Court (Improved Access to Civil Justice) Amendment Rules 2025, which come into force on 1 January 2026, will be the biggest game changer in years for encouraging litigants to settle before a full hearing. Those changes, well summarised in the Explanatory Note, front-end load the disclosure of evidence through initial disclosure (which must include all principal and adverse documents) to be filed with the first substantive pleading for both plaintiff and defendant, and factual witness statements and a draft chronology of events and facts to be filed soon afterwards to enable counsel for both parties to more accurately advise their clients on their chances of success. This is combined with more structured and muscular case management processes followed by a mandatory judicial issues conference to identify the issues, after filing a position paper and key documents. Also on the agenda for the judicial issues conference, unless a judge directs otherwise, is whether any steps should be taken to settle the case by means of facilitation, mediation or otherwise and if not, why not. This will incentivise all parties to settle disputes, if they can.

This agenda item in r 7.5A, together with the new overriding objective in r 1.2, which refers to "just resolution" of disputes (which contemplates resolution by settlement) may be used to ask for wasted cost orders for an unreasonable failure to mediate, as they do in the United Kingdom (Daniel Kalderimis KC's response to my question about costs where a party unreasonably refuses to mediate, by email of 14 September 2025).

Any other actions that can be taken to encourage parties to settle before a court hearing and judgment are needed, should also be welcomed. But is there a differential impact on parties from different cultures, in particular Asian cultures?

The recently released Chief Justice's Annual Report for 1 January 2024 to 31 December 2024 is a good reminder of the importance of increasing out of court settlement of disputes with "[t]imeliness in the courts" being recognised as a key priority and "the work underway to address delay and improve efficiencies in the courts" including a number of new initiatives in the High Court's civil jurisdiction (see examples at 49). The Chief Justice also comments on the amendments to the High Court Rules noting (at 69):

> The changes will require a culture change to the way litigation is managed. They emphasise the need for proportionality between the matters at issue in a proceeding, and the way the case is managed through the courts. They include a greater emphasis on identifying key issues earlier.

The changes to the High Court Rules do not, however, empower the Court to order mediation unlike the position with superior courts within Australia with very busy civil jurisdictions such as the Federal Court of Australia and also, for example, the Supreme Court of New South Wales. Other Australian courts also possess the same or similar powers.

Sydney mediator John West KC said in interview (Zoom, 9 September 2025) that his experience is that court ordered mandatory mediation works, the success rate being the same as in mediations voluntarily entered into by the parties. He also stressed the importance of cultural capability for mediators and lawyers assisting if the mediation is to succeed as Sydney's population is similarly superdiverse as New Zealand's.

There is an anecdotal perception held by members of the profession that litigants from Asian ethnic backgrounds are appearing in court lists in disproportionate numbers compared to their percentage of the population. Even in Auckland where Asians now comprise one in three inhabitants, court lists often appear to have at least half of their parties with Asian sounding names. This anecdotal observation is all we

have to rely on presently, as the Ministry of Justice does not otherwise collect the ethnicity statistics of litigants/parties in civil cases, and hence more detailed analysis is not currently possible. Delays in the courts and wait times to have hearings set down remain an issue and if we are not to appoint many more judges and build more courthouses, then we need more cases to either not go to court at all or be settled prior to a hearing.

THE HISTORY OF MEDIATION IN ASIA

The CEO of the Ministry of Ethnic Communities, Mervin Singham (who was also a mediator of ten years standing in a past life), reminded us that the starting point is that:

> Many Asian cultures have for generations used mediation and other forms of dispute resolution mechanisms to resolve conflict because it is seen as more aligned with Asian collectivist cultures. Collectivist cultures place more emphasis on preserving the interests of the collective and preserving harmony of the group in any given situation. Mediation would naturally be a viable option for many Asian people, rather than the adversarial environment of a courtroom where one's dirty laundry gets aired publicly in a manner that can invoke shame and loss of face.

Mediating Across Cultures: Oceanic and Asian Approaches to Conflict Resolution (Morgan Brigg and Roland Bleiker eds, University of Hawai'I Press, 2011) corroborates those deep cultural mediation roots in Indonesia, Japan, China, and Korea. For the view that mediation has its roots in the Asian culture, see Teh Hwee Hwee "Mediation Practices in ASEAN: The Singapore Experience", ASEAN L Ass'n 8 (February 2012) <www.aseanlawassociation.org/11GAdocs/workshop5-sg.pdf>.

So why does the anecdotal evidence point to a disproportionate number of parties ending up in court and not settling via ADR?

Mr Singham suggests a combination of three factors. First, we have evidence that Asian communities have high levels of trust and confidence in New Zealand's judicial system. They regard our courts as respectable, fair and trustworthy to mete out justice to litigants irrespective of who they are. It is no surprise that choosing litigation would be a strong option given this factor (Ministry for Ethnic Communities *Ethnic Evidence Report* (2024) at 141 (Ethnic Evidence Report) and New Zealand Ministry of Justice *Key Findings: Kiwis give their verdict on the justice system*)

Second, newcomers (especially those immigrating from distant cultures and languages) do not have the same access to information and services as people who were born here. They may lack basic information on and understanding of mediation services for example and therefore do not choose this avenue for resolving their disputes.

This is borne out, albeit in a different context, by a survey done by Otago University on relationship property division in New Zealand which showed 84 per cent of people born in New Zealand know that after three years as a couple, all property becomes relationship property and is split 50:50 in a breakup. For those not born in New Zealand, that understanding was only 67 per cent (Megan Gollop and others *Relationship Property Division in New Zealand: The Experiences of Separated People* (University of Otago, October 2021)). The research informed a review of the Property (Relationships) Act 1976; see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 — Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019, discussed in Mai Chen and Alice Strang "Asian Parties and the Property (Relationships) Act 1976: Unique challenges and issues" (2025) 19(1) Otago Law Review 2025 (forthcoming).

Third, Mr Singham raised that even if Asian parties did know about ADR in New Zealand:

> ... they may choose not to use these services because they may not be culturally appropriate to Asian ways of resolving disputes. Asian values place a higher premium on face saving and preserving harmony as opposed to taking a more transactional approach to getting a settlement. People may simply not be able to find mediators who understand their culture, values, and ways of relating. For these reasons, it would not be surprising if Asian people in dispute simply choose the courtroom as the most straightforward and trustworthy way for dealing with their disputes

Geert Hofstede *Culture's consequences: Comparing values, behaviours, institutions, and organizations across nations* (2d ed, 2001) and Dale Bagshaw's paper "*Culture and Mediation in the Asia-Pacific*" (2017) similarly advocates for culturally intelligent mediation that privileges local ways of thinking and doing.

FINDING THE HOOK OR AN INCENTIVE

That said, successful mediators always must invest the time to get to know their parties beforehand, so they can tailor the process to be useful and appropriate to their circumstances and avoid making assumptions. Successful mediation also requires lawyers who know their clients and are willing to involve the mediator in discussions with their clients (Nina Khouri).

As the Hon Kit Toogood stated at the conference, some cases will require a third party decision, either because there is a genuine dispute about material questions of law and one or more of the parties wants a ruling as a precedent; one or more parties are not in a position to settle — the Crown is sometimes averse; or one party wants to make a public showing of its position, irrespective of the outcome.

However, as he also noted, most cases are capable of settlement, no matter how toxic the relationship, or how complex the problem, or how large the sums of money at stake *and* no matter how far apart the parties may seem at the outset. There is almost always a hook or an incentive for a litigant to settle — it is often just a matter of working out what it is.

In my experience there are common incentives for settlement regardless of culture, such as saving on lawyers' fees, court costs, time (instructing lawyers and deposing evidence), as well as avoiding the high stress from an uncertain outcome from the court. But there are also culture specific incentives such that high cultural intelligence (CQ) in the mediator and lawyers assists in getting the parties across the full and final settlement line. For example, the settlement must save face for all parties and vindicate the cultural expectations of the family and not contradict the Confucian hierarchy (Mindy Chen-Wishart in M Chen "Considering Possible Settlement: Asian Parties in Court" [2025] NZLJ 149 at 153).

In my experience, how important those cultural imperatives are to the parties in resolving adjudicative facts and issues and to settling depends on answers to five questions:

- Were they born in New Zealand? If not, what age were they on immigrating to New Zealand? This tells me about the culture they grew up with, and how settled their cultural framework is.
- Could they speak English before coming to New Zealand? If not, then English will always be a struggle, especially writing in English.
- Why did they/their family come to New Zealand? This explains the life journey they have had.
- What have they done (education/employment/achievements) prior to and since arriving in this country? This helps inform about their skills, experience and ability to comprehend the issues.
- Is their whole family here or just the individual? This tells me whether they have wider whānau they can draw on to help interpret or translate or assist them.

The pre-mediation meetings between the mediator and the parties with their lawyers/representatives is the place to ask these questions to better understand if there is "a mental red-flag cultural alert ... which gives them a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it" (Emilios Kyrou "Judging in a Multicultural Society" (2015) 24 JJA 223 at 226, cited by the Supreme Court in *Deng* v *Zheng*, [2022] NZSC 76 at [78(b)]).

Mr Toogood stated that in commercial mediation intended to settle litigation, it may be unnecessary for the mediator to do much more than meet with the parties on the day of the mediation, a short time prior to commencement. But in complex disputes or disputes involving estate/trust issues, relationship property, employment matters, or care of children, the parties are often not familiar with the mediation process or may be anxious about meeting the other party/parties in person. In those cases, spending much more time with the parties earlier, for example on the day before the mediation, is frequently a game-changer.

Culture may also play a part in what needs resolving and in what order, as well as who should be in the mediation room. Offence taken by an Asian party at the actions of the other side may affect their openness to successful settlement, especially if the dispute is with a pākehā party, and this may need to be addressed first to allow settlement. To prevent further offence, it may be best initially that just the lawyers meet with the mediator, without their clients present.

Mr Toogood asked whether there are issues that can be easily resolved? Are there issues that need to be resolved first, because of flow-on to other issues? Pleadings assist the identification of issues where they exist, but often there are issues between the parties that are not addressed in a legal proceeding and that will not be resolved by a judgment. These include the history of the relationship that underlies the dispute, although it may not be relevant in evidential terms; the need for, or prospect of, ongoing relationship; and why did the parties enter the relationship, and why did it go wrong?

Finally, Mr Toogood said that the mediator cannot give sound advice or discuss strategy/tactics unless the parties are fully and honestly informed. Thus, it is important for parties to speak freely and frankly to the mediator. Frank discussion needs care — the mediator should not be too keen to learn a party's bottom line too soon as it is almost certain they will have to revise that view, and this can undermine the obligation of a mediator to speak honestly to the other side.

This emphasises the importance of the parties' trust and confidence in the mediator. That trust and confidence may be cultivated by top mediators who are legally trained but also by mediators who are not lawyers but respected and trusted leaders of the ethnic communities from which the Asian parties come.

MAKING MEDIATION MORE ATTRACTIVE

Although, as the conference identified, there is a need for better data and research into the question of whether Asian parties are less inclined to use mediation, if that is the case, then the following options were identified to assist the uptake of mediation amongst Asian parties.

MORE MEDIATORS WITH DIVERSE SKILLS

As George Lim SC, Chairman of the Singapore International Mediation Centre (SIMC) — which focuses on cross border disputes — told me in an interview in March 2025 that half of the mediators at the Singapore Mediation Centre (SMC) — which focuses on court annexed mediation — were not lawyers but respected and trusted community leaders, engineers, architects, accountants, contractors and doctors. He suggested that NZ Asian Lawyers should encourage more Asian lawyers to train as mediators since they had cultural and language advantages but also that respected leaders from Asian ethnic communities, as well as engineers, architects, accountants, contractors, and doctors who were not lawyers, should be encouraged to train as mediators to increase use of ADR and successful settlements.

NZ Asian Lawyers and the CEO of the Ministry of Ethnic Communities have sent out invitations to train as mediators to respected and trusted leaders from ethnic communities they considered met suitability criteria to do the job well. The General Criteria sent out to potential candidates were as follows:

- Genuine interest in dispute resolution and desire to contribute to dispute resolution within the community.
- High EQ — demonstrated ability to manage interpersonal dynamics, build trust, and handle sensitive matters with empathy and cultural awareness.
- High IQ — strong critical thinking, problem-solving, and analytical skills with ability to understand and work through complex issues in a clear and practical way.
- Bilingual ability preferred — fluency in English and at least one Asian language (for example, Mandarin, Cantonese, Korean, Japanese, Hindi, Punjabi, Vietnamese and so on) is highly desirable to assist parties in communicating in their native language.
- Cultural competence — deep understanding of Asian cultural values and norms.
- Integrity and professionalism — demonstrated ability to act impartially, uphold confidentially and engage with parties in a respectful and ethically responsible manner.

Additional Criteria for Lawyers:

- At least 7 years PQE unless significant pre-qualification experience in relevant fields.
- In-depth experience in dispute resolution; and/or subject-matter expertise (for example, commercial, employment, family).

- Ability to distil complex legal or factual issues and guide parties to resolution.

Additional Criteria for Non-Lawyers:

- Respected standing within the community, including holding or having held public or political office or leadership roles in community, professional, religious or cultural organisations; or
- Subject-matter expertise — possessing expertise in a relevant field where disputes commonly arise (for example, construction, manufacturing, logistics); and
- Experience in facilitating discussions, negotiations, or consensus-building.

Many of the Asian leaders invited attended the conference, and some are now training, or considering training to become mediators.

MORE INFORMATION ON COURT WEBSITE

The Ministry of Justice sent Moana Ieremia, Regional Manager, Northern, Courts and Tribunals to listen to the Conference and report back on whether more information about ADR needs to be added to the Courts website. Improving ADR guidance would help ensure that a lack of information is not the barrier to more mediated settlements out of court in New Zealand amongst Asian parties.

UNIQUE ISSUES?

Professor Joel Lee, who co-pioneered the teaching of negotiation and mediation in Singapore Universities and is Professor of Professional Practice at NUS (after completing his undergraduate law degree at Victoria University of Wellington), stated in interview (12 September 2025) that "assuming all factors remain the same and only taking into account culture, the cultural makeup of a Vietnamese or a Thai, is quite different from that of a Chinese. A Chinese from PRC will also be different from a Malaysian or Singapore Chinese. So a deeper dive into an analysis of each culture is needed for greater accuracy".

Even then, a shrinking world means that (Joel Lee, "Culture and its Importance in Mediation," above at 320):

> The lines between cultural communities and groupings are blurring. It is now increasingly possible for a Chinese person to be born in Singapore, grow up in New York, be educated in the United Kingdom, and end up living and working in Hong Kong. It would be a mistake then, to assume that one was dealing with a Singaporean Chinese person. This individual may not manifest any characteristics of what it might mean to be Singaporean Chinese. Further, exposure to movies, music, and other forms of media could also mean that any individual that we look at may manifest different sub-cultures depending on the context he or she is put in. In the context of business, the person may manifest characteristics of typical "western" business values. ... Put simply, the illusion of sameness is gone.

In answering the question whether culture has a significant impact on mediation, Professor Lee states that there has always been a tension between the "Universalists" and the "Culturalists." The "Universalists" believe that all conflicts are fundamentally universal in nature. Humans manifest universal patterns of behaviour, and a general and universal model of conflict resolution applies by recognising universal human needs and addressing them. Culture plays a minimal, if not non-existent, role in the resolution of disputes. The "Culturalists," on the other hand, believe that we are more different than we are similar. While group characteristics and traits do exist, culture is complex, dynamic, and multi-dimensional. It is personal to the individual and any model of conflict resolution can only be a generalisation, which is at best, a guide.

Professor Lee says the key is to have a framework to create our own generalisations when we meet situations that do not fit with the generalisations we have been presented with, and that is what he offers in his article on "Culture and its Importance in Mediation," as applied to (direct and indirect) communication and "face" concerns (save one's own face or give the other person face).

PRACTICAL WISDOM FROM THE COALFACE

Professor Lee says that while it can be generally said that Asians are collective and value harmony, what is sometimes missed is that this is relational. Put another way, I might feel part of a collective and value harmony with any person if there is an ongoing positive relationship with them, or it happens within a larger context where the relational web is strong. When there is no such relationship (and this can be as between Asians, or between an Asian and a Pakeha), then the assumptions of collectivism and harmony may not apply.

Asians may come from jurisdictions where their experience and understanding of mediation is quite different from what New Zealand offers. Their experience of it might be more authoritative (or authoritarian) and may not even be mediation at all (even if it is called that). In addition, they may come from jurisdictions which are corrupt. Therefore, greater education and information is important.

The hierarchical nature (Hofstede's Power Distance Index (PDI)) of many Asian societies may also play a role. A high PDI culture may mean that parties look to someone with status and authority to make the decision for them. As such, they do not see themselves as having agency, and look to their lawyer, the judge, the government and the legal system to do the right thing. Interestingly, this might also impact on how they expect their mediator to act. A typical "western" approach to mediation might not fit with their sense of what they expect of a mediator. Professor Lee juxtaposes below the "western" cultural assumptions with those appropriate to the context of Singapore. See J Lee and HH Teh (eds) *An Asian Perspective on Mediation* (Academy Publishing, 2009) for a more general discussion on this.

Resulting Features/Strategies of the Interests-based Model — Western Assumptions	Resulting Features/Strategies of the Interests-based Model — Asian Assumptions	Tensions Created in the Asian Context due to Incompatible Cultural Characteristics

Western-oriented assumption puts disputing parties first and in the center. Mediator is an external neutral party who facilitates the process and has low substantive authority. Parties know best and therefore most well placed to decide on form of mediation process and shape of mediated outcome. Interactions are kept informal to encourage parties to negotiate and take decisions.	Asian-oriented assumption requires mediator to be at the heart of the mediation. Mediator has high social status and is expected to lead and guide. Parties expect guidance from mediator, and are expected to value and respect his opinions. Interactions with an authority figure in the form of mediator may be expected to be formal.	A party-centric process may leave mediator and parties feeling out of place. A mediator who does not assume position of authority may be deemed ineffective. A mediator who holds back on giving guidance may be viewed to have abdicated his responsibilities. Individuals not accustomed to being the sole locus of decision-making. They may be frustrated if prompted to take decisions without any assistance in the form of inputs from an authoritative source. Interactions with the mediator on egalitarian terms may be a breach of social etiquette and cause discomfort.
Western-oriented assumption gears mediation processes towards helping parties maximize and satisfy individual interests. Interests include those of self and immediate family members and these take priority above all else.	Interests include those of self, immediate family members, and wider groups and group interests may have priority, especially in a dispute with another in-group member.	Satisfying and maximizing individual interests may not be considered "proper conduct."
Open debate and confrontation acceptable. Explicit expression of feelings, views and concerns encouraged to "air" grievances. Joint sessions perceived to be beneficial as flow of information may create new levels of understanding and create options for settlement. Mediator facilitates process by asking questions to surface underlying interests and hidden emotions and turn them into issues for joint discussion.	Disputants may be more reserved and reticent, and prefer to communicate through non-verbal cues or in more subtle ways. Unearthing issues that should be left unspoken may lead to embarrassment and disengagement from the process.	Pursuit of individual rights and search for collaborative solution to problems do not justify open confrontation. Open confrontation disrupts harmony. Joint sessions for open discussion may be perceived as face threatening. There may be a preference for private sessions.
Cultivation and maintenance of good relations to secure a good outcome or facilitate future dealings. In view of objective, same approach to relationship building generally taken for one and all.	Cultivation and maintenance of good relations with in-group members a matter of priority and an end unto itself. Any interest in cultivating or maintaining relationships with out-group members is similar to the original Western interests based model. Nature of relationship (in group/out-group) dictates appropriate approach to issues of relationship.	Requiring a one-size fits all approach to relationships is a blunt instrument with no nuance. Requiring parties to build a relationship where none is valued can cause discomfort Not recognizing that the relationship is the substance can give rise to a conflict of expectations between the mediator and the parties.

Anna Fuiava (AMINZ 2023 Determinative Scholar) chaired a panel of New Zealand lawyers with experience in mediations with Asian parties at the 14 August 2025 Conference. Dr Heida Donegan agreed that mediation with and between Asian parties is effective when it recognises the primacy of relationships, the need for respect especially of seniors, and the essential nature of preservation of reputation. Preparation should focus not only on legal arguments but also on cultural awareness, expectation management, and ensuring that the process allows for dignity and face-saving on both sides.

Dr Donegan stated that in many Asian contexts, the ultimate decision-maker may not be the person present at the table. Many Asian parties value consensus-building, consultation, and respect for hierarchy. Time may be needed, including during the mediation, for caucus and consultation with senior figures who are not visibly present. Senior decision-makers may be reluctant to appear to compromise. This means decision-making may be slower, but it also tends to lead to more durable settlements.

In hierarchical cultures, decisions are often expected to flow from the top. Mediators can reinforce self-determination by ensuring that solutions reflect *both* senior leadership's authority and the needs expressed by those at the table. The key is to empower parties to craft solutions that fit their context, without being imposed externally.

Communication styles differ: aome Asian parties may be less direct, relying on nuance, silence, or intermediaries. Lawyers may prepare their clients to listen carefully, to read between the lines, and to avoid forcing "yes or no" answers prematurely. It is important to avoid direct confrontation, to show respect to (senior) counterparts, and to allow space for silence (which is often strategic, not a sign of weakness). Some Asian parties may value patience and gradual consensus-building over attempts at rapid resolution.

Overly adversarial tactics that might be accepted in Western mediations like take it or leave it ultimatums may be

counterproductive, as they may cause loss of face and entrench positions. Rehearsing how to frame positions in constructive, non-blaming language helps avoid loss of face and keeps dialogue open.

A mediator who understands Asian cultural norms (face, hierarchy, collectivism, and indirect communication) can bridge gaps between parties and avoid misunderstandings.

Given the importance of hierarchy, Asian parties may often look to authority figures for guidance. A mediator must carefully balance neutrality while still being seen as a trusted facilitator. In practice, neutrality means not favouring either side, but it also means being sensitive to how impartiality is demonstrated — for example, giving equal respect to senior representatives of both parties.

The mediator may from time to time need to slow the process, allow indirect messaging, and reframe issues in a way that avoids blame.

Asian parties may sometimes feel pressured to "go along" with a proposal to avoid confrontation. Mediators should reinforce voluntariness, making clear that no party is bound unless they choose to be. This aligns with Asian values of autonomy and respect, and reassures parties that participation is not a loss of face but a sign of good faith.

Fairness in many Asian contexts is often about balance and mutual respect, rather than strict legal entitlement. Mediators can help shape outcomes that feel equitable, even if they depart from a purely legalistic correctness or standard. Mediators could help craft solutions that allow both sides to preserve dignity and avoid visible concession. This may involve reciprocal gestures, joint statements, shared responsibility, or forward-looking commitments.

In many Asian contexts, mediation is still seen as a step towards settlement only if litigation has failed, not as a respected process in itself. That said, younger Asian business leaders and professionals, who are often educated and/or have worked overseas, tend to be more open to mediation as a pragmatic and efficient tool. Lawyers need to work harder to facilitate appreciation by (Asian) litigants of the paradigm shift that mediation should be considered a preferred early step, and not the last resort. Yvonne Mortimer-Wang stated that reframing mediation as strength (in that it promotes parties' autonomy as to a tailored process and substantive outcome) and as a matter of normal expectation within the dispute resolution framework are effective means through which that message can be communicated to clients who are not familiar with the New Zealand legal system. The High Court Commercial List, commencing in October 2025, provides one example of this approach, requiring counsel to advise the Court whether parties have engaged in mediation and whether they are willing to participate at an appropriate time. While mediation is not compulsory, there is an expectation that parties undertake this process unless there is a good reason not to.

Margaret Chen said that having mediation at an early point with some legislative backup is helpful in areas of dispute. She cites the Family Dispute Resolution system for family matters involving children. Margaret Chen said that although lawyers are the best positioned to advise clients about whether and when to mediate as clients seldom suggest mediation themselves, her experience is that this can be difficult if Asian clients expect their lawyer to be "tough" and "aggressive", as suggesting mediation can be perceived as a sign of weakness.

Margaret Chen referred to "the use of hostages to gain bargaining power" drawn from Sun Tsu's *The Art of War* ("孙子兵法"). Removing power has been a historically recognised tactic in battle. To remove power from clients, such as by letting them understand the weaknesses in their case, potential delay, cost and risk of litigation, and then instilling power again by repackaging mediation as a means for clients to control their own destiny, can help address the issue of perceiving mediation as a weakness.

Daniel Kalderimis KC drew on his article on "Mediation as Access to Justice" [2023] NZLJ 369, which states:

> We can all recognise, from our experience, examples of those whose anger is initially justified, according to a precise assessment of the nature of the wrong done to them, but then leads further into acts of retribution, blame and anger. Which then leads to more litigation in order, vainly, to set the world to rights. Sometimes the more intensely you seek justice, the harder it is to find.

He said that we can see reflections of this motif in Taoism (Lao Zhu at 31: "Victory is never sweet. / Those for whom victory is sweet / Are those who enjoy killing. / If you enjoy killing, you cannot gain the trust of the people") and also in Confucian philosophy, which made jen or "human-heartedness" a higher virtue than i or "righteousness". As philosopher Alan Watts explained (*Nature Man and Woman* (Wildwood House, London, 1973) at 176):

> ... Confucius felt that in the long run human passions and feelings were more trustworthy than human principles of right or wrong .... Principles were excellent, and indeed necessary, so long as they were tempered with human-heartedness and the sense of proportion or humor that goes with it.

Mr Kalderimis went on to say that "achieving justice requires working with emotions, sentiments and attitudes of participants in the justice system, as well as arriving at an abstractly correct answer." He said that mediation is not compromise and a loss of big face but an understanding of the other side's case. He said we need an "untranslation" process from legal terms and to disaggregate what needs to be settled from the parties' own, unvarnished, sense of what they really want".

Mark Kelly said disputes are inevitable when Asian parties are engaged in high levels of entrepreneurialism in New Zealand, but ADR is needed to prevent greater backlogs in courts. Mr Kelly also contends, in his 2024–5 research project, ("Mediation and the Senior Courts" 14 February 2025) that stronger encouragement to mediate by legislation and by the courts is needed because of the backlog in the courts.

The TLANZ CEO Clayton Kimpton concluded the conference by speaking about the importance of the gap we are speaking into and the exploration of how our culture shapes the way disputes are approached and resolved. "We've been reminded that language — both spoken and unspoken — carries meaning that can either build bridges or create barriers. And we've discussed how, as mediators and lawyers, we can adapt our approaches to ensure fairness, respect, and effective outcomes". "By offering a flexible, cost-effective alternative to litigation that can navigate cultural and linguistic nuances," he said, "mediation not only averts the adversarial risk, cost and delays of court, it also reinforces trust in a way that reflects the evolving diversity of New Zealand". ❐