ASIAN LITIGANTS IN NEW ZEALAND COURTS AND POSSIBLE SETTLEMENT: INTERVIEWS CONDUCTED TO SCOPE A PROJECT COMMISSIONED BY THE BORRIN FOUNDATION

Mai Chen, Yvonne Mortimer-Wang and Eryanto Widjaya

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The interviews below are the first in a series with practitioners experienced in advising clients from various parts of Asia. They explore whether, in their experience, the different languages and cultures of clients impact the bringing of litigation proceedings and their potential settlement. There are a range of views; but of those practitioners who consider language and culture of clients relevant, the answers to these questions vary markedly depending on **which part of Asia** the client was born in or has spent significant time being influenced by in their formative years. This series also includes a brief interview with George Lim SC, former President of the Law Society of Singapore and Chairman of the Singapore International Mediation Centre.

The aim is to use the insights from these interviews to determine any issues and, if so, explore potential solutions to ensure that Asian parties only commence litigation and pursue it to hearing when it is in their best interests, rather than due to language or cultural misunderstandings about the legal process, including how New Zealand courts operate and the availability of alternative dispute resolution options.

INTERVIEWS

Catharina Chung, Senior Associate at Tompkins Wake

- **Caution against generalisation**: While cultural perspectives can influence litigation behaviour, it is important not to generalise, as personal attributes and relationships with opposing parties significantly shape a litigant's approach.
- **Litigation appetite between Korean and Chinese litigants**: Korean litigants are generally more risk-averse, preferring alternative dispute resolutions and carefully considering the cost-benefit of litigation. In contrast, Chinese litigants tend to have a higher litigation appetite, often driven by a belief in the strength of their case despite litigation risks.
- **Respect towards the legal profession**: Korean litigants tend to hold lawyers in high regard and are more likely to follow their advice, promoting settlement. In contrast, Chinese litigants may have a more sceptical view of lawyers. This scepticism, as well as a strong belief in the strength of their own case, can lead to a reluctance to accept settlement advice, potentially prolonging disputes.
- **Lack of Asian mediators**: The shortage of Asian mediators in New Zealand can complicate dispute resolution for Asian litigants. A mediator who lacks cultural understanding or language proficiency may struggle to connect with the parties, making it difficult for litigants to feel understood or trust the process. This disconnect can reduce the chances of reaching a settlement, as parties may be less likely to see the value in mediation or accept their lawyer's advice.
- **Language barrier:** Language barriers can hinder effective dispute resolution, particularly when interpreters are required. Interpreters may delay proceedings, increase costs, and introduce risks of mistranslation, leading to misunderstandings. Even fluent English-speaking Asian litigants may struggle to convey cultural nuances, complicating settlement discussions. It is not

uncommon for litigants to later inform their lawyers of misinterpretations during mediation or hearings.

- **Quality of legal representation**: A lack of culturally sensitive legal representation can hinder settlement. Lawyers need to understand their clients beyond the legal facts to appreciate cultural influences that may impact their decision-making. A failure to do so can lead to miscommunication, mistrust, and prolonged litigation.
- **Recommendations for the judiciary and practitioners**: Judges, mediators, and lawyers should be open to cultural issues and adopt a culturally sensitive approach, striving to understand the motivations behind a party's decision to litigate and the factors preventing settlement. Increasing the number of culturally competent Asian mediators and legal professionals can help bridge the gap.

Amarind Eng, Solicitor at Simpson Grierson

- **Preference for out-of-court resolution**: Southeast Asian parties generally favour private dispute resolution over public litigation to maintain confidentiality and avoid public exposure.
- **Mediation**: Cambodian litigants widely regard mediation as a primary method of dispute resolution. Informal, community-based mediation is particularly effective in fostering settlements, as it involves multiple interested parties and mediators who understands both the dispute and its cultural context. These mediators, though often without formal legal training, play a crucial role in resolving a broad range of disputes, including significant contract breaches and disagreements over the return of borrowed goods.
- **Nature of dispute**: The type of dispute influences litigation approaches. Cultural factors are less significant for corporate litigants compared to individuals, especially when disputes involve clear legal rules. Corporate litigants are also more likely to have legal representation, ensuring awareness of formal dispute resolution processes.
- **Trust in the legal system**: Many Southeast Asian litigants lack trust and/or confidence in legal systems where decision-makers do not share their cultural background, hindering settlement discussions.
- **Litigation costs**: While litigation costs influence Southeast Asian litigants' decisions, this is not unique to the region and is a universal consideration across cultures.
- **Cultural considerations**: Among other things, hierarchy, saving face, shame, and social status play crucial roles in how Southeast Asian litigants approach dispute resolution, including in pushing parties to take actions that would not usually play out (such as appealing through to the Supreme Court).
- **Cultural competency in legal practice**: A culturally competent legal profession is essential for effectively advising Asian clients. Simply increasing Asian representation in the legal field is insufficient without cultural awareness.
- **Community resources**: Enhancing public resources for Asian litigants will help them better understand the New Zealand legal system and manage expectations regarding court proceedings.

George Lim SC, former President of the Law Society of Singapore and Chairman of the Singapore International Mediation Centre

- **Global problem:** Global problem of getting parties in court that should settle, to settle, so it is not peculiar to Asian parties. Mr Lim SC has Just returned from assisting the courts in Costa Rica, where it takes 8 years to get a proceeding from filing to hearing.
- **Overseas jurisdiction:** Spain has recently passed a law mandating mediation before court action can be initiated, and other countries have cost sanctions – if a party does not mediate and they win, they cannot get costs awarded in their favour.
- **Encouragement to mediate:** In Singapore, parties are very highly encouraged to mediate.
- **Pool of mediators**: It is important to have a pool of judges trained in mediation. It is also beneficial to train a pool of non-lawyer mediators who are respected leaders within their ethnic communities. The Singapore International Mediation Centre has an equal balance of 50% lawyer mediators and 50% non-lawyer mediators.
- **Benefit of mandatory mediation:** Mandatory mediation overcomes cultural constraints, as no one loses face by *"having"* to engage in it.
- **Lawyers' involvement:** It is always important for the parties' lawyers to be involved in mediation to prevent settlements from failing, because when lawyers do get involved before it is finalised and signed, they say it is no good.

Pam Davidson, Barrister at Lambton Chambers, New Zealand Asian Lawyers Board Member

- **No generalised difference**: The perception that litigants of Asian backgrounds are less inclined to settle compared to those from other backgrounds may not be applicable as a generalised proposition. There is no perceptible difference in the rate of settlement in regulatory civil claims/claims with the government for example. Viewing settlement as a potential loss of face is not unique to Asian litigants but is seen across various cultures (but maybe described as a different concept). Personal animosity between parties can act as a barrier to settlement, regardless of cultural background.
- **Quality of legal representation**: The quality of legal representation is crucial in facilitating settlements for Asian parties. A lack of effective representation, particularly when parties lack knowledge of the New Zealand legal system, can be a significant barrier to settlement.
- **New Zealand-born Asians vs recent immigrants:** New Zealand-born Asians may approach litigation differently compared to recent immigrants, potentially influencing the settlement process.
- **Concentration of Asian litigants:** The overrepresentation of Asian litigants in New Zealand appears to be regional. Cases involving Asian parties are more common in Auckland, with fewer in Wellington, while Christchurch is seeing an increase due to its growing Chinese immigrant population.
- **Need to be cautious and apply nuance:** It is crucial not to assume ethnicity is the primary factor in barriers to settlement. A nuanced approach, considering cultural background, personal characteristics, and the nature of the transaction, is necessary.

Lynne Van, Partner at Anthony Harper, New Zealand Asian Lawyers Board Member

- **Cultural barriers:** Relationship dynamics and the importance of maintaining 'face' often act as barriers, preventing Asian parties from reaching settlement.
- **Involvement of decision-maker:** The absence of the 'actual' decision-maker (who is not necessarily a party to the litigation, e.g., parent) at mediation or settlement negotiations, particularly in Asian family investment disputes, adds complexity to settlement discussions.

Representatives must communicate with and seek instructions from the decision-maker who is not directly involved in the proceedings. The absence of the decision maker from the mediation may also exacerbate cultural barriers because direct conversations between the advisor and decision-maker are difficult (or non-existent).

- **Nature of transaction/claims:** The nature of the transaction and the level of documentation often dictates the likelihood of settlement. Transactions involving formal contracts and highly commercial parties/matters tend to allow for more straightforward risk assessments and are less likely to be influenced by cultural factors. Conversely, transactions between parties with personal relationships are more likely to be influenced by cultural dynamics. Transactions of the latter kind are often poorly documented (such as those through WeChat or oral communication) and entered into by individuals without legal advice. In addition to those matters discussed above, these factors make risk assessment more difficult for all parties involved, including advisors, reducing the likelihood of settlement.
- **Understanding of legal concepts and processes:** A limited or lack of understanding of New Zealand legal concepts, especially when coming from a different legal system, can hinder settlement. Cultural overlay affects how parties interpret concepts such as *"trusts"* and *"fiduciary obligations"*. Also, they may not fully appreciate the implications of legal procedures and documents, such as an affidavit.
- **Quality of legal representation:** If a legal adviser cannot communicate effectively or is not sensitive to cultural factors, this can prevent settlement. Poor communication can lead to frustration for all parties involved, further reducing the chances of reaching a settlement. Lawyers must understand cultural dynamics and present options clearly to help their clients make informed decisions.
- **Information gaps:** Information gaps may exist for a number of reasons, including poor/incomplete document records, language barriers and culture. In some instances, lawyers may sense that key information is being withheld, creating gaps in understanding the full context of a dispute. As noted above, incomplete information affects the ability of advisors to undertake fulsome risk assessments and provide tailored advice (including in relation to alternative settlement proposals).

Kim J McCoy, Crown Prosecutor at Keyes Fletcher Walker

- **Trust in the legal system**: New Zealand has a high level of trust in its legal system, based on fairness and transparency, with litigation seen as a legitimate means of resolving disputes. In Hong Kong, litigants trust the judiciary, but concerns about judicial independence have recently influenced how parties view litigation.
- **Reputation**: Maintaining one's reputation and saving face are crucial litigation considerations. Litigation is often viewed as potentially damaging to one's reputation, leading to a preference for private settlements.
- **Language of the legal process**: In New Zealand, the predominant use of English can create challenges for Asian parties who may not be fluent, potentially resulting in misunderstandings due to poor translation. In contrast, in Hong Kong, where both English and Cantonese are official languages, the legal process is more accessible, increasing participation.
- **Alternative dispute resolution:** Hong Kong litigants prefer mediation and negotiation to resolve disputes to preserve relationships, reflecting Chinese cultural values. There is reluctance to engage in adversarial actions unless necessary to maintain social harmony.
- **Culture:** Chinese parties often prioritise maintaining *guanxi* (relationships) and tend to negotiate through personal connections. In New Zealand's more multicultural context, there is generally less emphasis on preserving *guanxi*.

- **Cost**: The costs of litigation in Hong Kong are higher than in New Zealand. The relatively lower litigation costs in New Zealand may make it more likely for Hong Kong parties to choose to litigate disputes in New Zealand.

Brent O'Callahan, Barrister at Brent O'Callahan Barrister

- **Limited legal advice & misrepresentation in underlying transactions**: Many of the disputes involving Chinese litigants arise from transactions that have not been documented at all or have been documented to reflect something different to the real agreement, often without legal advice or without telling the transactional lawyers the full story. Some will have deliberately misled their lawyers to retain flexibility or due to a lack of trust in legal confidentiality.
- **Complex fact-finding & litigation strategy**: These factors contribute to litigation that involves unclear or conflicting facts, making case investigations and legal strategy challenging. Litigants may adjust their positions based on current interests.
- **Litigation approaches**: No significant differences are observed between Chinese and non-Chinese litigants when litigating against non-Chinese parties. Indian litigants similarly show no discernible differences in their approach to litigation, settlement, or alternative dispute resolution. However, cases involving Indian litigants frequently exhibit appalling racism from non-Indian litigants.
- **Understanding settlement**: Chinese litigants, like others, require guidance on settlement processes but do not differ significantly in their approach once informed.
- **Language barriers & role of bilingual lawyers**: Settlement discussions are often hindered by language barriers, as senior litigators may lack Chinese language skills. Skilled bilingual lawyers help bridge this gap, though their availability is limited.
- **Settlement perception & rates**: The most common objection to settlement processes is the perception that suggesting settlement or making realistic offers will be seen as a sign of weakness. This objection is equally prevalent among both Chinese and non-Chinese litigants. The settlement rate among Chinese litigants is higher than with non-Chinese litigants.
- **Reluctance toward mediation**: Chinese litigants often avoid mediation due to a perception of high costs, the fact that mediators lack decision-making authority (involving a belief that mediators therefore have no value in the process), and confidence in their own negotiation abilities, sometimes with legal assistance.
- **Cost aversion**: Chinese litigants tend to be highly cost-conscious and generally avoid appeals.
- **Limited appellate cases**: Due to the high settlement rate, few first-instance decisions involving Chinese litigants proceed to appeal.

Experienced Civil/Commercial Barrister

- **Response to legal advice:** South Asian clients often have preconceived notions of the advice they expect to receive. When the legal advice does not align with their expectations, they may express disappointment or question the lawyer's competence and loyalty. In contrast, government clients tend to be more receptive to legal advice, even when it is not what they anticipated.
- **Selective disclosure:** Asian clients frequently disclose only the information they believe is relevant or is useful to their view, rather than providing a full and candid account. Inconvenient

facts are often omitted, particularly in the early stages of a case. Similar challenges arise in the discovery process, where incomplete disclosure can create barriers to settlement discussions.

- **Trust building challenges:** Building trust takes time with Asian clients, especially with one-off matters where there's no established relationship, which needlessly increases costs as the full story only emerges after several rounds of discussion.
- **Cultural face-saving:** The concept of *"saving face"* manifests differently among Asian clients. Indian clients are more likely to want to ensure that their lawyer thinks well of them, while Chinese clients focus on maintaining face in relation to the opposing party.
- **Western exposure effect:** Asian clients behave similarly to western clients if they have spent time in assimilating to Western business practices.
- **Documentation perception:** A lot of fact patterns where Asians are involved, particularly in Asian vs Asian situations, involve a suggestion that the formal (signed) documents are only part of the overall agreement. They often rely on oral agreements or informal *"side deals"* not reflected in writing. This is a hot bed of disputes, and settlement is difficult without findings of fact on who is telling the truth. Hence, a lot of cases involved lot of text messages, WhatsApp, WeChat, etc.
- **Settlement patterns:** Once Asian parties reach the settlement table, they settle at the same rate as parties from other cultural backgrounds. The challenge is getting them to the settlement table in the first place.
- **Bench diversity recommendation:** Greater diversity on the bench may help Asian parties feel a stronger sense of ownership in the legal system. Advice that is adverse to the client's position (such as recommending settlement) is often put down to the lawyer not understanding them. The same for Court decisions – the Judge did not understand what counsel was *really* saying.
- **Face-to-face interaction:** Forced in-person meetings, such as Judicial Settlement Conferences, may offer the opportunity for a breakthrough. The opportunity to vent is not to be underestimated and once that is out of the way, settlement discussions in the conventional way can follow.

Kai Ling Chiu, Senior Solicitor at Meredith Connell

- **Lawyers' reluctance to advise settlement**: Some lawyers hesitate to suggest out-of-court settlement for fear that their clients may perceive them as favouring the opposing party. This can result in incomplete or misguided legal advice, leading to prolonged litigation.
- **Litigation as a matter of principle and deterrence**: Wealthy Asian litigants may pursue litigation to publicly expose perceived wrongs or to serve as a warning to others. They may see it as a form of punishment or a way to reinforce their reputation for taking legal action without compromise.
- **Reluctance to initiate settlement**: Asian plaintiffs, viewing themselves as the aggrieved party, may resist making the first settlement offer, believing that doing so implies weakness. Similarly, defendants may fear that initiating settlement discussions could be seen as an admission of guilt.
- **Unwillingness to compromise**: Many Asian litigants may not fully appreciate that settlement requires compromise. Instead, they may take an all-or-nothing approach, making it difficult to reach an agreement even when settlement proposals are made.
- **Misconceptions about judgment enforcement**: Some litigants may assume that a court judgment in New Zealand will be easily enforceable, similar to enforcement mechanisms in

China, where the state actively facilitates compliance. Conversely, defendants may believe they can evade enforcement by leaving New Zealand.

- **Different expectations regarding evidence assessment**: Chinese litigants may expect New Zealand courts to assess evidence in the same way as Chinese courts, where societal norms and cultural context can influence judicial decisions. However, New Zealand courts may not give the same weight to such factors and may find unsupported claims to be implausible.
- **Role of lawyers in managing expectations:** Lawyers play a crucial role in educating Asian litigants about the realities of litigation, including time, costs, and evidentiary standards. Early guidance can help manage expectations and encourage more pragmatic decision-making.

Rayhan Langdana, Associate at Quinn Emanuel Urquhart & Sullivan

- **Settlement trends in litigation:** Indian litigants appear no more or less likely to settle disputes than other clients. Cases suitable for settlement before trial tend to resolve at that stage, while those better suited for trial typically proceed to court.
- **Deference to lawyers**: Indian clients may show deference to their lawyers, which could lead to a reluctance to seek clarification, admit confusion, or question or challenge legal strategies. Clients may fear that doing so is inappropriate or could irritate their lawyer.
- **Reluctance to show weakness**: Indian clients who do not show particular deference to their lawyers may also hesitate to ask questions. They may fear that seeking further explanation signals a lack of knowledge, which could be perceived as a weakness.
- **Language barriers and pride**: Indian clients may face additional challenges if English is not their first language. Admitting difficulty in understanding legal concepts may make them feel exposed or vulnerable, which in turn could make them less likely to seek clarification.
- **Role of lawyers in ensuring understanding**: Lawyers should take proactive steps to ensure that their clients understand legal advice by explaining concepts clearly, offering clarifications without waiting to be asked, and observing non-verbal cues to assess comprehension.
- **Family involvement in decision-making**: Even when representing an individual client, lawyers should be aware that legal decisions may involve input from the client's wider family, including spouses/partners, children, or other relatives. Recognising this group decision-making dynamic is crucial for effective communication and strategy development.

Anitesh Govind, Director at Resolute Lawyers

- **Differences in litigation approaches**: Chinese clients are more likely to pursue litigation to completion, driven by a strong belief in their claim's merits. They may also adopt a retaliatory approach, viewing litigation as a means of counterattack. In contrast, Indian clients tend to be more risk-averse and receptive to advice on litigation risks. They generally prefer to avoid court proceedings unless necessary, often due to concerns about reputational risk in a public forum.
- **Perception of legal advice and alternative dispute resolution**: Indian clients are equally receptive to advice from both Indian and non-Indian lawyers. Their primary consideration is the lawyer's seniority and expertise rather than ethnicity. They are also open to alternative dispute resolution as a viable means of settling disputes.
- **View on settlement**: Indian clients perceive settlement as a practical way to achieve resolution, allowing them peace of mind. They are generally receptive to settlement if it aligns with their best interests and place importance on understanding the opposing party's

perspective. They also prioritise preserving relationships where possible and are cost-conscious, so they may view settlement as a financially prudent option.

- **Impact of cultural and language factors:** Cultural, social, and language factors do not significantly shape Indian clients' approach to litigation and settlement. If they believe their lawyer is providing sound legal advice in their best interests, they are likely to accept and act upon it.
- **Increase in Asian legal practitioners:** Simply increasing the number of Asian lawyers and judges will not necessarily resolve cultural barriers in the legal system. While these practitioners may share an Asian ethnicity, they may lack the cultural knowledge and lived experiences relevant to their Asian clients. Improving cultural competency among legal professionals is a step in the right direction, though the ultimate solution remains a complex challenge.

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- **Growing Asian population:** The increasing Asian population in New Zealand is likely a contributing factor to the rise in Asian litigants appearing before New Zealand courts.
- **Selection of lawyer:** South Asian litigants do not necessarily select lawyers based on ethnicity. Rather, their choice is driven by recommendations, expertise, and seniority, regardless of the lawyer's cultural background.
- **Settlement challenges:** Chinese litigants may be reluctant to settle due to cultural factors beyond financial considerations, perceiving compromise as a sign of weakness. Additionally, Asian clients may resist standard litigation procedures, such as conferring with opposing counsel, to avoid the appearance of backing down. This can complicate even routine procedural matters.
- **High Court Judicial Settlement Conference:** Effective use of judicial settlement conferences in the High Court may improve settlement rates and optimise court resources. For Asian parties, these conferences should ideally take place after discovery, allowing judges — who are respected as figures of authority — to reference specific evidence and emphasise litigation risks. Judges should also take a more active role in these conferences to encourage meaningful participation from the parties
- **Information gaps:** Asian clients may not always disclose all relevant facts in the early stages of litigation. Consequently, post-discovery settlement conferences are often more effective, as most, if not all, relevant information may be available.