Mediation

Nina Khouri*

I Introduction

The purpose of this review is to report on legal developments that are relevant and likely to be of interest to lawyers who represent clients in mediations and to mediators who practise in the civil litigation context.[1] This is the second review published in this journal; the first was in 2018.[2]

This review covers three broad topics. The second part outlines a suite of new statutes providing for mediation — the Farm Debt Mediation Act 2019, the Trusts Act 2019, Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 and the Canterbury Earthquakes Insurance Tribunal Act 2019 — and comments on what they demonstrate about the current place of the mediation process in New Zealand's civil justice framework.

The third part is an update on the current law relating to s 57 of the Evidence Act 2006 (privilege for settlement negotiations and mediation),

*Nina Khouri BA/LLB(Hons) (Auckland), LLM (NYU), Barrister of the High Court of New Zealand, Accredited Mediator CEDR (UK), NMAS (Aus/NZ), PRI (NZ) and Fellow of the International Academy of Mediators. Nina Khouri is a mediator specialising in the resolution of civil and commercial disputes and an Academic Fellow at Auckland Law School. She gratefully acknowledges the help of her research assistants, Jodie Llewellyn and Keeha Oh, and her colleague Tunisia Set Ārena in the preparation of this review and also the contributions of colleagues Mark Kelly and Maria Dew QC with whom she has worked on other research projects relating to the Farm Debt Mediation Act 2019 and the Singapore Convention on Mediation.

1 The focus of this review is the law relevant to mediation and mediation advocacy in New Zealand. For commentary and analysis of mediation processes and policy developments, including global trends, I refer readers to the (free) Kluwer Mediation Blog, Harvard Law School's Program on Negotiation newsletter and articles on <www.mediate.com>, alongside academic periodicals such as Conflict Resolution Quarterly, Civil Justice Quarterly and the Australasian Dispute Resolution Journal.

2 Nina Khouri "Mediation" [2018] NZ L Rev 101.

including the findings of the Law Commission in its second review of the Evidence Act 2006[3] and relevant High Court decisions.

The fourth part discusses the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention)[4] and its implications for mediation practice in New Zealand. This new international treaty entered into force on 12 September 2020.

For the purposes of this review I adopt the following definition of mediation provided by the United Kingdom's Centre for Effective Dispute Resolution:[5]

> Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

II Legislative Developments: Four New Statutes that Provide for Mediation

The Farm Debt Mediation Act 2019, the Trusts Act 2019, Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 and the Canterbury Earthquake Insurance Tribunal Act 2019 all make provision for certain disputes to be mediated. The key elements of each regime are summarised below, followed by a discussion of what this new suite of statutes indicates about the current place of mediation in New Zealand's civil justice framework.

A *Farm Debt Mediation Act 2019*

The Farm Debt Mediation Act 2019 was enacted on 12 December 2019 and entered into force fully on 1 July 2020. It requires secured creditors to engage in mediation before taking any debt enforcement action against farmers and eligible primary production businesses.

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3 Law Commission *The Second Review of the Evidence Act 2006/Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019).

4 *United Nations Convention on International Settlement Agreements Resulting from Mediation* GA Res 73/198 (2018) [*Singapore Convention*] or [*Convention*].

5 Centre for Effective Dispute Resolution "What is Mediation?" <www.cedr-asia-pacific.com/cedr/mediator/faq.php>.

The legislation was enacted in response to concerns about the scale of farm debt in New Zealand. Announcing the scheme, the Minister of Agriculture stated:[6]

> Total farm debt in NZ is $62.8 billion — up 270 per cent on 20 years ago. Farmers are especially vulnerable to business down-turns as a result of conditions that are often outside their control, like weather, market price volatility, pests and diseases like Mycoplasma bovis. … The failure of a farm business can lead to the farmer and their family losing both their business and their home. For many rural communities the failure of one farm can have a ripple effect through those communities and the regional economy. … Farmers who operate a family business often don't have the resources to negotiate their own protections when dealing with lenders. That's where this piece of legislation fits in.

In its submissions to the Primary Production Select Committee in support of the new Act, the Arbitrators' and Mediators' Institute of New Zealand explained:[7]

> [11] Farm debt is not just a number, for the farmer or the lender. For the farmer, the debt supports not just a business, but a way of family life, a passion, a history and a commitment to the whenua. For the lender it represents not merely a commercial transaction, but also a relationship on a personal level, and part of a vital connection to New Zealand's largest economic sector. A farm is often an integral part of the local economy and community.

In line with this, the purpose of the Farm Debt Mediation Act 2019 is:[8]

> … to provide parties to farm debt with the opportunity to use mediation to reach an agreement on the present arrangements and future conduct of financial relations between them before an enforcement action is taken in relation to farm property.

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6 Damien O'Connor "New scheme for financially distressed farmers" (17 June 2019) Beehive <www.beehive.govt.nz> .

7 Arbitrators' and Mediators' Institute of New Zealand Inc "Submission to the Primary Production Select Committee on the Farm Debt Mediation Bill (No 2) 2019".

8 Farm Debt Mediation Act 2019, s 3.

Farm debt mediation is not a new concept. Similar schemes have operated successfully in the United States, Canada and Australia for a long time.[9] For example, farm debt mediation in Iowa dates back to the 1930s, when farm values had increased dramatically following the export demand of the First World War. Farm mortgage lending had increased too, which left both farmers and banks exposed when the Great Depression hit. Farm mortgagor relief legislation included the establishment in early 1934 of a system of Farm Debt Advisory Committees consisting of local residents in each county who acted as mediators between farm debtors and their creditors. During their first three years of operation the Committees assisted in more than six thousand settlements.[10]

The New Zealand legislation is modelled on the New South Wales legislation. Under the Farm Debt Mediation Act 2019, a creditor cannot take enforcement action on a security interest in farm property (such as appointing a receiver, entering into possession, exercising a power of sale, seeking the appointment of a liquidator or applying for a farmer to be adjudicated bankrupt) unless an "enforcement certificate" is in force in respect of the relevant farm debt.[11] The Ministry for Primary Industries will only issue an enforcement certificate if the creditor has participated in a mediation in good faith or the farmer has declined to mediate.[12] Conversely, a farmer may obtain a "prohibition certificate" if the creditor declines to mediate or fails to participate in the mediation in good faith.[13] Such a certificate prevents the creditor from taking enforcement action for six months.[14]

The scope of the Act is broad: see the specific definitions of "farmer", "primary production business", "farm debt" and "farm property".[15] In general terms, the scheme covers primary production businesses that mainly produce unprocessed materials through agriculture, horticulture, aquaculture or apiculture. It includes sharemilkers. The debt may be secured against farmland, farm machinery, livestock or harvested crops and wool. The

9 See, for example, Agricultural Credit Act of 1987 Pub L 100–233, 101 Stat 1568 (1988); Farm Debt Mediation Act SC 1997 c 21; Farm Debt Mediation Act 2011 (Vic); Farm Debt Mediation Act 1994 (NSW) and Farm Debt Mediation Amendment Act 2018 (NSW); Farm Business Debt Mediation Act 2017 (Qld); and Farm Debt Mediation Scheme (WA).

10 Patrick B Bauer "Farm Mortgagor Relief Legislation in Iowa During the Great Depression" (1989) 50 The Annals of Iowa 23. Interestingly, while the Iowan Farm Debt Advisory Committees operated on a voluntary basis, the original legislation contemplated mandatory mediation (at 60, n 105).

11 Farm Debt Mediation Act, s 11(1).

12 Section 34. Once obtained, the enforcement certificate lasts for three years (s 42).

13 Farm Debt Mediation Act, s 11(2).

14 Sections 35 and 42.

15 Section 6.

scheme does not apply to lifestyle farmers, forestry, mining, wild harvest fishing or the hunting or trapping of animals.[16]

There are detailed provisions for how a mediation is initiated (anytime by the farmer; anytime by the creditor after "default"),[17] how a mediator is appointed (the farmer nominates three mediators from an approved list of accredited mediators and the creditor chooses one),[18] the negotiation of a procedure agreement for the conduct of the mediation,[19] how the costs of the mediation are to be met (by the parties themselves, with the farmer paying no more than $2,000 towards the costs and related expenses of the mediator and the creditor paying the balance)[20] and how long the mediation process will take.[21] Subject to whatever is agreed between the parties in the procedure agreement, the mediator is given broad discretion as to the conduct of the mediation:[22]

> (1) A mediator—
> (a) may, having regard to the purpose of this Act and the needs of the parties, follow any procedures (whether structured or unstructured) or do any things that the mediator considers appropriate to resolve the issues between the parties promptly and effectively; and
> (b) may receive any information, statement, admission, document, or other material, in any way or form the mediator thinks fit, whether or not it would be admissible in judicial proceedings.

There are certain particularly noteworthy provisions in the Act. For example, there is an express requirement for parties to participate in the mediation process in good faith.[23] Failing to participate in good faith will disentitle a creditor to an enforcement certificate and prevent any action to enforce the debt.[24] This requirement is likely to be contentious and has the potential to be used strategically by sophisticated parties. The Act does provide that declining to reduce or forgive a debt or to vary the terms of a debt does not, by itself, demonstrate that the creditor did not participate

16 Ministry for Primary Industries information "The Farm Debt Mediation Scheme" (16 November 2020) <www.mpi.govt.nz>.
17 Farm Debt Mediation Act, ss 15–17.
18 Section 21.
19 Section 22. This covers practical points such as authority to settle, who will attend the mediation, confidentiality and privilege and whether experts will be involved.
20 Section 23.
21 Section 25.
22 Section 24.
23 Section 26.
24 Sections 34 and 35. See also s 18. There is no corresponding provision for the consequences of a farmer failing to participate in good faith.

in the mediation process in good faith.[25] Anecdotally, Australian farm debt mediators with whom I have spoken about how the good faith requirement works in practice in Australia suggest that it is usually interpreted to require, for example, that the mediation not be used as a delaying tactic by a farmer, that the creditor provide any requested background information and documentation relating to the debt to the farmer in advance of the mediation, that the attendees for the creditor at the mediation have sufficient seniority and authority to settle, and that the parties genuinely engage in the process, listening to each other and considering possible solutions with an open mind.[26] We can expect litigation testing what "good faith" means under the Act in New Zealand.

Another noteworthy provision is that the Act prescribes what might be colloquially referred to as a "cooling off" period for farmers following the mediation. A farmer may cancel an agreement resolving the dispute by giving written notice of the cancellation to the creditor within 10 working days after that agreement is signed. If that happens, the agreement is treated as if it had never been entered into. Cancellation of a mediation agreement does not, by itself, demonstrate that the creditor did not participate in the mediation process in good faith.[27]

There is provision for tikanga Māori-based mediation where the parties consider it appropriate. This is an emerging speciality of mainstream mediation practice in New Zealand. (It should also be understood in the context of Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, discussed below.) Tikanga-based mediation will vary depending on circumstances and location and will be tailored to the needs of the particular parties and whenua. It may incorporate, for example:[28]

(a) traditional practices such as karakia, pōwhiri, hākari and waiata;
(b) consensual decision-making, based on kōrero, prioritising the preservation of the mana of the parties;
(c) collective or communal decision-making; and
(d) multi-party participation in and attendance at mediation.

25 Section 26(2).
26 Interview with George Fox AM, mediator (the author, Arbitrators' and Mediators' Institute of New Zealand and Resolution Institute Farm Debt Mediation training day, 17 February 2020). I have also had informal discussions with Doug Murphy QC and George Fox AM.
27 Section 32.
28 Ministry for Primary Industries *The Farm Debt Mediation Scheme* (August 2020).

The mediator accreditation process under the Act provides for mediators to be accredited as tikanga-certified mediators. Such mediators will be capable of facilitating discussion using tikanga and te reo Māori; be able to consider options from a Māori world view and to structure the mediation process to suit the parties in accordance with this view; and have an in-depth knowledge of tikanga and kawa.[29] The underlying philosophy is encapsulated in the phrase:[30]

> Mahia kia tika … Mahia i te huarahi tika … Mahia hoki kia hangai mo nga take tika.
>
> Doing things right … Doing things the right way … Doing things for the right reasons.

Finally, the mediator has certain powers and obligations under the Act that are different from those they typically have in a non-statutory context.

First, the mediator may appoint an expert with the agreement of the parties.[31] In other contexts, experts are usually appointed by the parties, not the mediator, and are utilised for advocacy purposes. Having the mediator appoint an expert, such as a farm consultant, an accountant or a valuer, may enable the expert to be regarded as a neutral resource for all parties.

Secondly, the mediator is required to discuss with the parties the advantages and disadvantages of a multi-party mediation if appropriate.[32] Multi-party mediation may be appropriate, for example, in cases involving multiple secured creditors, related-party lending or guarantors who have an interest in how the dispute is resolved. Failing to include appropriate parties in the mediation may undermine the efficacy of any settlement. For example, a settlement between a bank and the farmer that sets in place a plan for restoring the viability of the farm business may be frustrated if creditors with second-ranked securities do not cooperate.

Thirdly, s 30 provides that the mediator must prepare a draft settlement agreement setting out the main points of agreement between the parties (called a "mediation agreement").[33] Anecdotal evidence to date suggests that mediators are in fact delegating the drafting of the settlement agreement to the parties' lawyers. This is standard industry practice, since the lawyers are best placed to understand what is required to document the particular settlement effectively, especially where the transaction is financially or

29 Above n 28.
30 Above n 28.
31 Section 22(3)(d).
32 Section 24(2).
33 Section 30.

legally complex. Mediators are often concerned to avoid being seen as providing legal advice to the parties.[34] It would be more appropriate for s 30 to require the settlement agreement to be prepared under the supervision of the mediator.

Finally, the mediator must provide a report to the chief executive of the Ministry for Primary Industries following the mediation. That report must also be provided to the parties and may be used as evidence that a party has not participated in the mediation process in good faith.[35] This requirement has proved controversial with mediators, who are concerned not to undermine the confidentiality of the mediation process and to protect the expectation of the parties that sensitive details about the dispute not enter the public domain. Initial drafts of the mediation report template were considered to require too much information.[36] There remain calls for the report to require the bare minimum necessary to comply with s 27.

It will be interesting to see how these provisions work in practice. At the time of writing,[37] the Act has been in force for approximately six months. Twelve mediations have been completed under the Act, with more under way. Of those, five were requested by the farmer and seven by the creditor. In terms of the value of the farm debt in question, four mediations concerned debts in the $1m to $5m range, three in the $5m to $10m range and five mediations concerned debts of greater than $10m. Four enforcement certificates and one prohibition certificate have been issued so far.[38]

B *Trusts Act 2019*

The Trusts Act 2019 enters into force on 30 January 2021. It repeals the Trustee Act 1956[39] and aims to restate and reform the law of trusts in New Zealand by:[40]

(a) setting out the core principles of the law relating to express trusts; and
(b) providing for default administrative rules for express trusts; and

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34 Note the exclusion of liability set out in s 48 for mediators performing any of their functions under the Act.

35 Section 27.

36 The current template is available at Ministry for Primary Industries "Mediation Report" (October 2020) <www.mpi.govt.nz>.

37 February 2021.

38 Ministry for Primary Industries "Farm Debt Mediation Trends" (presentation to AMINZ and Resolution Institute, webinar, 10 February 2021). (Slides on file with author.)

39 Trusts Act 2019, s 162(a).

40 Section 3.

(c) providing for mechanisms to resolve trust-related disputes; and
(d) making the law of trusts more accessible.

Sections 142 to 148 provide for "alternative dispute resolution"[41] of trust disputes. This part of the Act:[42]

> … makes it clear that alternative dispute resolution, such as arbitration or mediation, is generally available for trusts disputes even if the trust deed is silent on this matter and supports people to resolve disputes outside of the courts in appropriate cases.

"ADR process" is defined as "an alternative dispute resolution resolution process (for example, mediation or arbitration) designed to facilitate the resolution of a matter".[43] For present purposes we will focus on mediation. A settlement agreement arising from mediation is called an "ADR settlement".[44]

The Act draws a distinction between an "external matter" and an "internal matter".[45] An "external matter" is a court proceeding or dispute that is not yet a court proceeding to which the parties are a trustee and one or more third parties. Trustees have always had the power to settle such claims, including through mediation.[46] An "internal matter" is a court proceeding or dispute between a trustee and one or more beneficiaries or between a trustee and one or more other trustees of the trust; such matters have historically posed more difficulty. Such difficulties include the challenge of achieving agreement between all beneficiaries, including unascertained or incapacitated beneficiaries, and limits on the ability of trustees[47] to fetter their discretion

41 Readers should be aware that the term "alternative" is controversial. Many ADR practitioners and academics argue that, given that most disputes are resolved outside of the courtroom, litigation is more properly regarded as the alternative dispute resolution process. Accordingly, the acronym "ADR" is sometimes interpreted to mean "appropriate", "assisted", "affirmative" or even "amicable" dispute resolution. There is also a move towards the term "primary dispute resolution", especially in Australia. See further Tania Sourdin *Alternative Dispute Resolution* (4th ed, Thomson Reuters, 2012) at [1.10].

42 Hon Andrew Little (Minister of Justice), First reading of the Trusts Bill (5 December 2017) 726 NZPD 708.

43 Trusts Act, s 142.

44 Section 142.

45 Section 142.

46 Greg Kelly and Kimberly Lawrence "New Trusts Act — Disputes" (New Zealand Law Society seminar, 2020) at 21.

47 In the absence of express authorisation in the trust deed.

by, for example, commiting the trust to a future course of action.[48] The new Act helps. Section 143 empowers a trustee to refer an external or an internal mattter to a mediation if all parties to the dispute agree, even if there is no provision for mediation in the trust deed. Section 145 empowers a court, at the request of a trustee or beneficiary, to enforce any mediation provision in the trust deed or *otherwise submit a matter to a mediation*. The court has the power to require each party to the matter to participate in the mediation, to appoint a mediator, and to order that the costs of the mediation be paid out of the trust property.[49] This is a significant power not otherwise available to the court in its jurisdiction over civil disputes generally.[50] It is predicted to be useful, for example, in situations where all but one of multiple beneficiaries are willing to mediate.[51]

Similarly, s 146 empowers trustees to give binding undertakings in relation to their future actions as trustee for the purpose of an ADR settlement. Section 147 protects trustees against claims by beneficiaries in relation to ADR settlements so long as the trustee acted honestly and in good faith and not in breach of any specifically applicable duty in the trust deed relating to settlements.[52] A trustee will not be liable to a beneficiary by reason only that the settlement agreement is inconsistent with the terms of the trust.[53]

Finally, s 144 provides a pathway for resolving through mediation internal matters involving unascertained beneficiaries or beneficiaries who lack capacity. The court may appoint a representative for such beneficiaries in the mediation. That representative can agree to an ADR settlement on behalf of the beneficiaries, so long as the representative acts in the best interests of the beneficiaries on whose behalf they have been appointed, with that ADR settlement then being submitted to the court for approval.[54]

It will be particularly interesting to monitor how often the High Court exercises the power under s 145 to compel parties to participate in mediation. It could be that the existence of the power will be sufficient to encourage parties into the process. If that proves to be the case, then the main benefit of this legislative provision may be rhetorical and educational in that it alerts

48 See Trusts Act, s 33 (duty not to bind or commit trustees to future exercises of discretion). See further Kelly and Lawrence, above n 45, at 21; and Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts* (NZLC IP28, 2011) at [5.5] and following.

49 Trusts Act, s 145(2).

50 The High Court Rules 2016 provide that any order to engage in mediation can only be made with the consent of the parties: r 7.79.

51 Kelly and Lawrence, above n 45, at 21.

52 Trusts Act, ss 25 and 147.

53 Section 147(3).

54 Sections 144(1) and 144(2).

trustees and beneficiaries to the possibility and utility of mediation as a tool for resolving their dispute.

C *Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020*

This Act (the Amendment Act) amends Te Ture Whenua Maori Act 1993/ Māori Land Act 1993 (the Principal Act), which empowers the Māori Land Court to promote and assist in the retention by Māori of land owned by Māori and the the effective use, management, and development of that land.[55] This reform is part of the Government's Whenua Māori programme, co-led by the Minsistry of Justice and Te Puni Kōkiri, which aims to "support the sustainable development of whenua Māori, increase the knowledge and skills of Māori landowners, generate wealth and strengthen the connection between Māori and their whenua".[56]

At its first reading, the Amendment Act was described as having at its heart "small and targeted reforms which will reduce the compliance and complexity Māori land owners encounter when they engage with Te Ture Whenua Maori Act and the Māori Land Court".[57] The amendments entered into force on 6 February 2021 (Waitangi Day).

One of the reforms is provision for tikanga Māori-based mediation of disputes relating to the current and future use, ownership, occupation or management of Māori land.[58] The goal is:[59]

> … a new free mediation service to speed up dispute resolution for whānau in accordance with their own tikanga and in a way that helps protect whānau relationships for the long term.

The new provisions comprise a new pt 3A of the Principal Act, titled "Dispute resolution". The purpose of pt 3A is:[60]

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55 Te Ture Whenua Maori Act 1993/Maori Land Act 1993, s 17.

56 See Te Puni Kōkiri — Ministry of Māori Development "Whenua Māori" (27 November 2020) <www.tpk.govt.nz/en/whakamahia/whenua-maori>.

57 Hon Nanaia Mahuta (Minister For Māori Development), First Reading of the Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (15 October 2019) 741 NZPD 14273.

58 Refer the discussion of tikanga Māori-based mediation around n 28 above.

59 Hon Nanaia Mahuta (Minister For Māori Development), Third Reading of the Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (22 July 2020) 748 NZPD 19967.

60 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters)

> … to assist the parties to a dispute (including owners of Maori land) to quickly and effectively resolve any disputed issues—
> (a) between themselves; and
> (b) in accordance with the law; and
> (c) as far as possible, in accordance with the relevant tikanga of the whanau or hapu with whom they are affiliated, for both the process and the substance of the resolution.

Part 3A applies to all matters over which the Māori Land Court has jurisdiction except certain matters related to the Maori Fisheries Act 2004, the Maori Commercial Aquaculture Claims Settlement Act 2004 and matters relating to representation of classes or groups of Māori. These types of matters have their own dispute resolution provisions.[61]

The process for mediation is set out in the new pt 3A of the Principal Act. If there are court proceedings already, the Māori Land Court may refer any issue arising from the matter to a mediator on its own initiative or upon request by a party to the proceedings.[62] If the matter is not the subject of court proceedings, any party may apply to the Māori Land Court to have the issue referred to mediation. The Registrar may refer the issues to a mediator (if satisfied that mediation is likely to be effective) or to a Judge to decide whether to refer it to a mediator.[63]

In contrast with the Farm Debt Mediation Act 2019 and the Trusts Act 2019, mediation under this Act is entirely voluntary. An issue may be referred to mediation and mediated only if all parties agree to mediation and any mediation may only continue if all parties still agree to the mediation.[64] Some submitters suggested that the Court be given the power to propose or compel mediation and insist that a good faith effort be made to attempt mediation before any hearing. This was not accepted.[65]

The mediator is selected and appointed through agreement by the parties in the first instance. If they cannot agree, the Court or Registrar appoints the mediator after consulting with the parties.[66] There is provision for one or two mediators to be appointed, to ensure the skills and experience needed

Amendment Act 2020, s 22 (new s 98I of Te Ture Whenua Maori Act 1993/Maori Land Act 1993).

61 Te Ture Whenua Maori Act 1993/Maori Land Act 1993, new s 98H.

62 New s 98L(1).

63 New s 98L(3).

64 New s 98J.

65 Toni Love "Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill — Dispute Resolution" (2020) August Maori LR.

66 Te Ture Whenua Maori Act 1993/Maori Land Act 1993, new s 98M.

to mediate the issues referred to them.[67] (This could be useful, for example, where one mediator has particular technical skill and experience in the mediation process or formal legal training to ensure that any resolution will be accepted by the Court[68] and the other mediator has special knowledge and understanding of the substantive issues involved. A kaumātua with particular tikanga expertise or mediators with iwi or hapū affiliations to the different parties may also be appropriate.) There will be a list of approved mediators. Any appointment beyond that list must be approved by the chief executive of the Ministry of Justice and the Judge or Registrar who referred the issues to a mediator.[69] The mediation will be publicly funded, with changes to the Māori Land Court Fees Regulations to reflect that.[70]

A new s 98O governs the conduct of the mediation. The Judge or Registrar will advise the mediator of the issues to be addressed at the mediation. The parties and their representatives may attend; anyone else must obtain permission from the Court. The mediator is given broad discretion in the conduct of the mediation. They may:[71]

(a) follow those procedures (structured or unstructured) and do those things the mediator considers appropriate to resolve the issues referred to the mediator promptly and effectively; and
(b) receive any information, statement, admission, document, or other material in any way or form the mediator thinks fit, whether or not it would be admissible in judicial proceedings.

There is no specific requirement to conduct the mediation in accordance with tikanga Māori principles, other than that the mediator "must try to give effect to the purpose of this Part in mediating the issues".[72] As set out above, the purpose of the new pt 3A provisions is a quick, effective resolution of disputed issues between the parties, in accordance with the law, and *as far as possible* in accordance with the relevant tikanga of the whānau or hapū with whom the parties are affiliated. Some submitters on the Bill pushed for tikanga Māori to feature more prominently in the prescribed conduct of

67 New s 98M(1).
68 Love, above n 64.
69 Te Ture Whenua Maori Act 1993/Maori Land Act 1993, new s 98M. The requirement that any appointment beyond the approved list be approved by the chief executive of the Ministry of Justice was controversial. See Love, above n 64.
70 Love, above n 64.
71 Te Ture Whenua Maori Act 1993/Maori Land Act 1993, new s 98O(3).
72 New s 98O(4).

the mediation.[73] It will be interesting to see how mediation under the Act evolves in practice.[74]

There is no specific provision for the confidentiality of any mediation. As with mediation under the Farm Debt Mediation Act 2019, the mediator must report to the Court on the outcome of the mediation. It remains to be seen how detailed this report is required to be in terms of the substance of the mediation.

The terms of any settlement or agreed resolution may be incorporated into an order of the Māori Land Court.[75] If resolution is not achieved, the Court has a broad discretion as to how to proceed, which includes referring the matter for further mediation (including with a different mediator) or proceeding to hear and determine the unresolved issues.[76]

Overall, the hope is to provide a mediation process that can deal appropriately with the complexity and sensitivity of Māori land disputes. Ideally it will be:[77]

> … meaningful in retaining relationships within the community that need to continue to have access to and to cooperate together in managing land and leaving a legacy for descendants that will then succeed to that land.

D *Canterbury Earthquakes Insurance Tribunal Act 2019*

The last statute to discuss is the Canterbury Earthquakes Insurance Tribunal Act 2019. The purpose of this Act is:[78]

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73 See, for example, Chapman Tripp "Submission to the Māori Affairs Select Committee on the Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019".

74 See the discussion of tikanga-based mediation above in the discussion of farm debt mediation. See further Nin Tomas and Khylee Quince "Māori Disputes and their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Oxford, 1999) 205; and Te Reo O Te Omeka Hau "To What Extent are Principles of Kaupapa Māori Reflected in the Current Practices of Māori Mediators in Aotearoa?" (Master of Business Studies in Management, Massey University, 2018).

75 Te Ture Whenua Maori Act 1993/Maori Land Act 1993, new s 98P.

76 New ss 98Q and 98R.

77 Golriz Ghahraman (Green): First Reading of the Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (15 October 2019) 741 NZPD 14273.

78 Canterbury Earthquakes Insurance Tribunal Act 2019, s 3.

> … to provide fair, speedy, flexible, and cost-effective services for resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury earthquakes.

This Act provides a process for the resolution of disputes between insured homeowners and the Earthquake Commission or a private insurer arising from the Canterbury Earthquake sequences of 2010 and 2011. It established a Tribunal which is an alternative to the Christchurch High Court's Earthquake List[79] and which is modelled on the Weathertight Homes Tribunal established to resolve leaky-building claims under the Weathertight Homes Resolution Services Act 2006.

The Tribunal is a judicial body with all the usual powers one might expect, including case management powers,[80] powers to convene an expert conference[81] and the power to determine the dispute.[82] It also has the power to direct the parties to mediation.[83]

The mediation process under the Act is publicly funded and administered by the Ministry of Business, Innovation and Employment (MBIE). (MBIE also administers the mediation service under the Weathertight Homes Resolution Services Act 2006.) It is conducted by mediators appointed by MBIE. Mediation can take place at any time in the Tribunal process after the first case management process. Parties remain free to engage in a private mediation process instead.[84]

The mediation process is confidential[85] and flexible. The mediator:[86]

> (a) may, having regard to the purpose of this Act and the needs of the parties, follow any procedures, whether structured or unstructured, or do any things that the mediator considers appropriate to resolve the claim promptly and effectively; and

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79 For a discussion of the High Court Earthquake List and the use of private mediation to resolve disputes between owners of earthquake-damaged homes and insurers see Nina Khouri "Civil Justice Responses to Natural Disaster: New Zealand's Christchurch High Court Earthquake List" (2017) 36 CJQ 316.

80 Section 27.

81 Section 27(1)(g). This is important because earthquake insurance disputes often involve disputes about the nature of earthquake damage and the appropriate repair methodology, which involve evidence of experts such as structural and geotechnical engineers, builders and quantity surveyors.

82 Section 45.

83 Section 29.

84 Section 30(2).

85 Section 33.

86 Section 32.

(b) may receive any information, document, or other material, in any way that the mediator thinks fit, whether or not it would be admissible in judicial proceedings.

The mediator may not, however, determine any matter, even if asked to do so by the parties.[87]

If a claim is settled at mediation the mediator must provide a copy of the agreed terms of settlement to MBIE and to the Tribunal.[88] The Tribunal must record the agreed terms as a decision of the Tribunal.[89] That decision is then enforceable in the same way as a decision of the District Court.[90]

Readers should also be aware of the Greater Christchurch Claims Resolution Service established in 2019. This publicly funded service provides legal advice, engineering advice and a dispute resolution process for homeowners with insurance claims. The dispute resolution process includes a facilitation process which is very similar to mediation.[91]

E *What does this tell us about the place of mediation in New Zealand's civil justice framework?*

The four new statutes described above all prescribe mediation with varying degrees of compulsion and funding support. Mediation is mandatory under the Farm Debt Mediation Act 2019 and paid for privately by the parties, can be ordered by the court under the Trusts Act 2019 and paid for privately out of trust funds, can be ordered by the Tribunal under the Canterbury Earthquakes Insurance Tribunal Act 2019 and publicly funded, and is entirely voluntary and publicly funded under Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020. All four statutes highlight and promote the mediation process as valuable in the resolution of disputes.

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87 Section 32(4).

88 Section 34. It will be interesting to see the extent to which parties and mediators comply with this requirement. Section 34 is similar to s 86(1) of the Weathertight Homes Resolution Act 2006. That process also requires the mediator to sign the settlement agreement, however, and sometimes also to provide a statutory declaration that the mediator has explained the effect of the settlement agreement to the parties (s 85(3)). In my experience the parties do not wish their settlement agreement to be provided to MBIE and so the lawyers find "workaround" solutions such as using privately drafted settlement agreements instead of the templates provided by MBIE.

89 Section 35.

90 Section 52.

91 See Greater Christchurch Claims Resolution Service "Resolving disputes and claims" <www.gccrs.govt.nz>.

New Zealand is notable for being a jurisdiction with strong legislative support for mediation in particular types of dispute[92] while leaving the process voluntary and largely unregulated in civil and commercial disputes generally. The High Court of New Zealand has jurisdiction to convene a judicial settlement conference[93] but no jurisdiction to compel parties to engage in mediation or any other private settlement process. Any order to engage in mediation can only be made with the consent of the parties.[94] The High Court has no court-annexed mediation programme and will not award costs against a party for failure to engage in mediation.[95] In *Body Corporate 198900 Ltd v Bhana Investments Ltd*,[96] a costs decision following a proceeding under the Unit Titles Act 2010, the High Court declined to order an uplift in costs in favour of the defendants on the basis that the plaintiffs had unreasonably refused to engage in mediation.[97] Noting that refusal to attend mediation is not one of the matters referred to in r 14.2 (Principles applying to determination of costs) or rr 14.6(3) and (4) (Increased costs and indemnity costs) of the High Court Rules, Toogood J commented:[98]

> … the reasons why a party might reasonably decline an invitation to engage in pre-trial alternative dispute resolution are infinitely various and not necessarily related to an unreasonable attitude on the part of a litigant. In this case, for example, the precedent value of having binding determinations by the Court on the scope of the body corporate's powers and the manner in which the body corporate carries out its business would have been lost by a mediated settlement.

His Honour was also concerned that "[u]plifting a costs award in order to penalise a party for a refusal to mediate would come close to asserting" a "power to direct the parties to litigation to attempt alternative dispute resolution"[99] and that:[100]

92 Mediation is referred to in 73 New Zealand statutes: Grant Morris and Annabel Shaw *Mediation in New Zealand* (Thomson Reuters, Wellington, 2018) at 365–367.

93 High Court Rules, r 7.79.

94 Rule 7.79.

95 See, for example, *Body Corporate 198900 Ltd v Bhana Investments Ltd* [2015] NZHC 2787.

96 *Body Corporate 198900 Ltd v Bhana Investments Ltd*, above n 95, applied recently in *Couteur v Norris* [2019] NZHC 2075.

97 *Body Corporate 198900 Ltd v Bhana Investments Ltd*, above n 95, at [9].

98 At [10].

99 At [11].

100 At [11].

> … if the Court was to identify a refusal to attend mediation as a ground for increased costs per se, parties to litigation might be tempted to attend mediation without any genuine commitment to a negotiated resolution, simply to avoid a costs sanction. … Even good faith participation in mediation does not guarantee a resolution of disputed issues so there is no merit in the Court's assumption of a power to impose costs sanctions of the kind sought here.

This approach can be contrasted with the prevailing judicial approach in the United Kingdom in which courts will take an "unreasonable" refusal to mediate into account when considering costs. The factors considered relevant to the question of whether a party has unreasonably refused to mediate include: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of mediation would be disproportionately high; (e) whether any delay in setting up and attending the mediation would have been prejudicial; and (f) whether the mediation had a reasonable prospect of success.[101] Singapore has a similar system encouraging mediation through the threat of cost sanctions.[102] Other jurisdictions promote early mediation of general civil disputes in different ways. For example, the Canadian province of Ontario has operated a mandatory mediation programme in its Superior Court of Justice (the equivalent of the New Zealand High Court) since 1999.[103] In 2019 the state of New York introduced a presumption that civil

101 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 and subsequent cases, including *Burchell v Bullard* [2005] EWCA Civ 358; *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21 (Costs); and *Wales v CBRE Managed Services Ltd* [2020] EWHC 1050 (Comm). For a recent example of a case where a refusal to mediate was deemed reasonable see *Beattie Passive Norse Ltd v Canham Consulting Ltd* [2021] EWHC 1414 (TCC) (Costs). For recent commentary on whether the *Halsey* principles of costs awards in respect of an unreasonable refusal to attend mediation would apply in respect of an offer to mediate online using a videoconferencing platform such as Zoom see Michel Kallipetis QC "Is this the time for a new Halsey?" Independent Mediators Limited <http://www.independentmediators.co.uk/wp-content/uploads/2020/06/Is-this-the-time-for-a-new-Halsey-Independent-Mediators.pdf>.

102 Dorcas Quek Anderson "Supreme Court Practice Directions (Amendment No 1 of 2016): A Significant Step in Further Incorporating ADR into the Civil Justice Process" (2016) March Singapore Law Gazette.

103 Rules of Civil Procedure, r 24.1, RRO 1990, reg 194. For a review of the first 20 years of the programme see Jennifer Egsgard "Mandatory Mediation in Ontario: Taking Stock After 20 Years" (16 July 2020) Ontario Bar Association <https://www.oba.org/Sections/Alternative-Dispute-Resolution/Articles/Articles-2020/July-2020/Mandatory-Mediation-in-Ontario-Taking-Stock-After>.

cases across its entire court system would be referred to mediation as the first step in the case proceeding to court.[104]

By declining to make mediation a presumptive first step in proceedings or to make a refusal to attend mediation a relevant consideration in determining liability for costs, the New Zealand courts are prioritising the values of voluntariness and self-determination in the mediation process and leaving any mandatory prescription of mediation for Parliament. This is what we are seeing with these new legislative provisions for mediation.

Will COVID-19 change this? The pandemic has prompted calls around the world for more systemic encouragement of mediation in anticipation of a surge of COVID-19 litigation. This litigation is expected to range from cases about the interpretation of business interruption insurance policies,[105] to disputes about the doctrines of frustration and force majeure in contract law, to claims against health authorities for inappropriate treatment or against governments for mishandling lockdowns.[106]

In April 2020 (during our first national lockdown) leading New Zealand mediator Geoff Sharp called for more judicial encouragement of mediation to ease anticipated pressure on the courts:[107]

> COVID fallout will be severe, we can all agree on that. Disputes will flourish, not straight away but in the months, and in some cases years, after restrictions end. The pressure on our civil courts will come from a surge of cases resulting from global and domestic economic activity falling off a cliff and the recession widely tipped to follow.
>
> Unlike the two previous surges — the leaky building crisis and Canterbury earthquakes — the deluge of cases this time will not be issue-specific — it won't be water ingress and it won't be physical damage — it will be a time-compressed range of commercial issues like we have not seen before — from leases to insurance claims and coverage disputes to construction to disrupted supply chains and more, and COVID legal issues will be remarkably similar around the globe.

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104 New York State Unified Court System "Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases" (press release, 14 May 2019).

105 See, for example, *The Financial Conduct Authority v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1.

106 See, for example, *Borrowdale v Director-General of Health* [2020] NZHC 2090; and Tony Allen "Mediation Law During the COVID-19 Pandemic" Centre for Effective Dispute Resolution <www.cedr.com>, opining: "Who knows how far COVID-related litigation will reach, given the forensic imagination of the legal profession and its determination to find new avenues of business?" See also Alan Limbury "Could COVID-19 see the end of Halsey?" (22 June 2020) Kluwer Mediation Blog <http://mediationblog.kluwerarbitration.com>.

107 Geoff Sharp "How Mediation Will Help Flatten the Curve in New Zealand's Civil Courts" (29 April 2020) LawFuel <www.lawfuel.com>.

Sharp called for a combination of judicial encouragement of mediation during case management and cost consequences where a party unreasonably refuses to engage in mediation (similar to the United Kingdom approach discussed above).[108]

In May 2020 the Chief Justice, Helen Winkelmann, was interviewed by the president of the New Zealand Law Society. The Chief Justice indicated that the courts had not yet "seen a significant upswing in any category of work, as a result of the pandemic or emergency".[109] When asked about the suggestion that mediation could "flatten the curve" of COVID-related litigation, her Honour replied:[110]

> The courts have always encouraged people to mediate in appropriate cases but on the other hand, we don't sanction people for exercising their legal rights. By that I mean we do not impose cost consequences for a failure to mediate. We keep a close eye on what goes on in other jurisdictions and I am aware that some jurisdictions require mediation. That approach has however been criticised as creating a barrier to access to justice. It's just another cost that then becomes associated with the court process.

Only time will tell whether our courts experience a surge of COVID-19 litigation. At the time of writing the High Court filing statistics for 2020 are not yet public. Worth noting generally, however, is a new consultation paper issued by the Rules Committee in May 2021. This paper proposes various civil procedure amendments to improve access to justice. One proposal is to introduce an "issues conference" early in every High Court civil proceeding to be held with a judge, lawyers and (importantly) party representatives for each party.

A similar process was adopted by the Christchurch High Court in the early years of the Christchurch High Court Earthquake List. The experience in that context was that, although the conference required additional time and effort by the Court and the parties (with the attendant costs) it streamlined subsequent case management and also set the stage for effective mediation or bilateral settlement negotiations.[111]

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108 Sharp, above n 107.

109 Interview with Helen Winkelmann, Chief Justice of New Zealand (Tiana Epati, President of the New Zealand Law Society): "The courts and the lockdown: Looking for transformational opportunities" (2020) 939 LawTalk 9 at 10.

110 At 10.

111 For discussion and analysis of the substantive issues conference in the Christchurch High Court Earthquake List see Nina Khouri "Civil justice responses to natural disaster: New Zealand's Christchurch High Court Earthquake List" (2017) 36 (3) CJQ 316 at 330-332. For detail of the issues conference proposed in the consultation paper see The

Having an early issues conference for general High Court civil proceedings is a good idea. It would promote early and comprehensive engagement with the substantive issues and (where appropriate) judicial encouragement of mediation without compromising access to justice and the values of voluntariness and self-determination that underpin the mediation process.

The statutes discussed above also raise questions about the mediation process and the role of the mediator generally. Each statute grants broad flexibility to the mediator as to how the process is conducted but there are subtle and important differences in the statutory framework. For example, the Farm Debt Mediation Act 2019 and the Canterbury Earthquakes Tribunal Act 2019 both contain express provisions that matters covered in the mediation are confidential,[112] whereas neither the Trusts Act 2019 nor Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 mention confidentiality of the process. Both the Farm Debt Mediation Act 2019 and Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 require the mediator to submit a report to an external party following the mediation. As mentioned above,[113] farm debt mediators have expressed concern about the compatability of this reporting requirement with the confidentiality of the process. Will the same concern be expressed by mediators under Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 or might the mediation process contemplated under that Act involve some lesser confidentiality requirement in appropriate cases, consistent with the collective decision-making principles of tikanga Māori? Granting the mediator power to appoint an expert,[114] providing that the court may appoint a mediator and define the issues to be mediated,[115] and requiring the mediator to be responsible for drafting the settlement agreement[116] all indicate different conceptions of the mediation process and the role of the mediator (including the mediator's obligations and to whom they are answerable). It is well settled, of course, that mediation practice and conceptions of the role of the mediator vary widely between legal contexts and between mediators,[117] but these statutes highlight that variability anew

Rules Committee "Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community" (14 May 2021) at [70] <www.courtsofnz.govt.nz>

112 Farm Debt Mediation Act, s 28; and Canterbury Earthquakes Insurance Tribunal Act, s 33.

113 See text accompanying nn 35–36.

114 Farm Debt Mediation Act, s 22(3)(d).

115 Te Ture Whenua Maori Act 1993/Maori Land Act 1993, new s 98O(1).

116 Farm Debt Mediation Act, s 30.

117 See, for example, John H Wade "Mediation — The Terminological Debate" (1994) 5 ADRJ 204.

and possibly also some evolution in thinking. Either way, they are a reminder of how important it is for lawyers to understand what is contemplated by "mediation" in any given case and to prepare their clients effectively for that.

III Privilege for Settlement Negotiations and Mediation: s 57 of the Evidence Act 2006

Confidentiality is a cornerstone of the mediation process. The privilege for settlement negotiations and mediation under s 57 of the Evidence Act 2006 is the principal legal mechanism by which that confidentiality is protected in the context of litigation. Its purpose is to encourage and facilitate the settlement of disputes out of court. It achieves this by enabling disputing parties exploring the possibility of settlement to speak with candour, secure in the knowledge that anything said in settlement negotiations is without prejudice to the speaker's right to pursue or defend litigation as if the statement had not been made.[118] Section 57 provides:

> **57 Privilege for settlement negotiations, mediation, or plea discussions**
>
> (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
>
> (a) was intended to be confidential; and
>
> (b) was made in connection with an attempt to settle or mediate the dispute between the persons.
>
> (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.
>
> (2A) A person who is a party to a criminal proceeding has a privilege in respect of any communication or document made or prepared in connection with plea discussions in the proceeding.
>
> (2B) However, the court may order the disclosure of the whole or any part of a communication or document privileged under subsection (2A) if the court considers that—

118 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.34]. The Court in *Goodwin v Rensford (of Auckland as executors of the estate of Rensford)* [2015] NZFC 2156 at [30] expressed this elegantly: "Parties need to be free to discuss matters knowing they will not be held to account for their position during that delicate period of negotiation."

(a) the disclosure is necessary for a subsequent prosecution for perjury; or
(b) the disclosure is necessary to clarify the terms of an agreement reached, if the terms are later disputed or are ambiguous; or
(c) after due consideration of the importance of the privilege and of the rights of a defendant in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it.

(3) This section does not apply to—
(a) the terms of an agreement settling the dispute; or
(b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or
(c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—
(i) is expressly stated to be without prejudice except as to costs; and
(ii) relates to an issue in the proceeding; or
(d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.

Section 57 was amended by the Evidence Amendment Act 2016, which came into force on 8 January 2017. The key changes were discussed in the 2018 subject review of mediation in this journal.[119] For a detailed exposition of s 57 and its operation in practice, I refer readers to my commentary on s 57 in *Mahoney on Evidence*.[120] The law stated in that text is current to 1 March 2018. Relevant legal developments since then are set out below.

A *There must be a "dispute"*

The privilege is available when there is a "dispute of a kind for which relief may be given in a civil proceeding" and a communication is made or a

119 Above, n 2.
120 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (Thomson Reuters, Wellington, 2018) [*Mahoney*].

confidential document is prepared in an attempt to settle or mediate that dispute (s 57(1) and s 57(2)):[121]

> Litigation need not have been commenced, but there must be some underlying difference between the parties that could give rise to litigation, the result of which could be affected by admissions made during negotiations to resolve the difference.

The Court of Appeal considered the meaning of "dispute" in *Morgan v Whanganui College Board of Trustees*, stating:[122]

> The word "dispute" is not a term of art; its use was not meant to be exclusive. And, as noted, "negotiations" or the broader term "difference" will suffice. None of these phrases warrant a narrow construction where something has arisen between the parties which must be resolved and they have expressly agreed their communications should be protected for that purpose.

Whether a "dispute" exists is a fact-specific question.[123] Thus, the High Court in *Miah v AMP Life Ltd* denied a claim to privilege under s 57(2) where the defendant life insurer sought to protect from disclosure certain deliberations of its claims review committee.[124] The Court found that there was not yet a dispute between the insured and the insurer because the insurer had not yet declined the insured's claim and neither the insured nor the Official Assignee had threatened proceedings if the claim were declined.[125] In *Minister of Education v James Hardie New Zealand*, a product liability claim in relation to allegedly leaky school buildings, the High Court was required to determine claims to privilege under s 57 in respect of certain correspondence between users of the product Shadowclad and Carter Holt Harvey Ltd (the third defendant).[126] The Court applied the above passage from *Morgan* to assess the factual context of each document, allowing some privilege claims and denying others based on whether there was an underlying "difference" or "negotiations" between the relevant parties.[127]

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121 At [EV57.02] citing *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713 at [14]–[19], rejecting the narrower definition of dispute applied by the Employment Court in *Bayliss Sharr v McDonald* [2006] ERNZ 1058 (EmpC). See further Scott Optican "Evidence" [2015] NZ L Rev 473 at 539–540.

122 *Morgan v Whanganui College Board of Trustees*, above n 121, at [17] (footnotes omitted).

123 At [19].

124 *Miah v AMP Life Ltd* [2018] NZHC 1964.

125 At [40].

126 *Minister of Education v James Hardie New Zealand* [2019] NZHC 3487.

127 At [53].

In *Wynyard v Bremner* the High Court held that certain correspondence was not privileged because there was no underlying dispute. Rather, the correspondence was written to *avoid* a dispute arising in the context of the breakdown of a business relationship.[128] This is a subtle distinction, which the Court recognised by acknowledging that a dispute may have arisen as the correspondence ensued.[129] Finally, in *Tempest Liquidation Funders Ltd v Kamal* the High Court declined a claim to s 57 privilege in respect of an e-mail that was marked "[w]ithout prejudice".[130] The e-mail suggested that its author (Mr Kamal, a liquidator) would not call on a deposit paid by the recipient of the e-mail (Tempest Litigation Funders Ltd, a creditor) if the creditor withdrew its claim for a creditors' meeting under s 314 of the Companies Act 1993.[131] The Court held that the privilege was not available because there was no underlying dispute; both parties to the communication appeared to accept that the recipient was entitled to call a meeting of creditors and "[t]he most that [could] be said in relation to this is that the parties had different wishes".[132]

B *"Without prejudice"/"Without prejudice save as to costs"*

It is settled law that the words "without prejudice" on a document are neither necessary nor sufficient to invoke privilege under s 57; the requirements of s 57 must still be met.[133] Thus, the fact that Mr Kamal had marked his e-mail to Tempest Litigation Funders Ltd "without prejudice" did not make the document privileged.[134] Conversely, in *Panhuis v Cooke* the Court found that 20 pages of letters and e-mails were privileged under s 57 despite not being marked "without prejudice".[135]

In contrast, the Court in *Ballantyne v Queenstown Lakes District Council* held that the words "without prejudice save as to costs" must be used expressly if a party wishes to rely on a settlement offer as a Calderbank

128 *Wynyard v Bremner* [2020] NZHC 1589 at [52]–[54], citing the pre-Evidence Act case of *City Realities (Rural) Ltd v Wilson Neil Ltd* (1996) 9 PRNZ 164 (HC) at 170.

129 *Wynyard v Bremner*, above n 128, at [54], but then finding that any privilege that may have arisen had been waived.

130 *Tempest Liquidation Funders Ltd v Kamal* [2020] NZHC 827 at [2].

131 *Tempest Liquidation Funders Ltd v Kamal*, above n 130.

132 At [9]–[14].

133 *Mahoney*, above n 120, at [EV57.05].

134 *Tempest Liquidation Funders Ltd v Kamal*, above n 130, at [14]. See also *Wynyard v Bremner*, above n 128, at [52].

135 *Panhuis v Cooke* [2019] NZHC 563 at [6]–[7].

offer[136] in support of an argument for increased costs after trial.[137] This is what is required by s 57(3)(c).

C *Section 57(3)(d): exception "in the interests of justice"*

Section 57(3)(d) was introduced on 8 January 2017 by the Evidence Amendment Act 2016. The amendment was in response to controversy over whether s 57(3) was an exhaustive statement of the exceptions to the s 57 privilege or whether the common law exceptions to "without prejudice" privilege continued to apply alongside the Act.[138]

The established common law exceptions, enumerated by the United Kingdom Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*[139] and summarised by the Court of Appeal in *Sheppard Industries Ltd v Specialized Bicycle Components Inc*,[140] include:

- "when the issue is whether the communications resulted in a settlement agreement";
- "to show that a settlement agreement should be set aside on the ground of misrepresentation, fraud or undue influence" (or, in New Zealand, breach of the Fair Trading Act 1986);
- "where something said in the course of the settlement discussions is said to give rise to an estoppel";
- "where the exclusion of the evidence would act as a cloak for perjury, blackmail or other serious impropriety";
- "to explain delay or apparent acquiescence";
- "where there is an issue as to whether a party has acted reasonably to mitigate loss";
- "where an offer has been made 'without prejudice save as to costs'";
- "where rectification is sought in respect of a settlement agreement"; and

136 Commonly known as Calderbank offers, after *Calderbank v Calderbank* [1975] 3 WLR 586 (CA). See further *Mahoney*, above n 120, at [EV57.06(2)].

137 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2020] NZHC 49 at [21]–[25] citing *Blakesfield Ltd v Foote (No 2)* [2016] NZHC 1354, [2016] NZAR 1112.

138 For a discussion of this controversy see *Mahoney*, above n 120, at [EV57.06(3)] and the cases cited therein.

139 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 at [30]–[46]. The judgment of Lord Clarke reviews the common law history of the privilege in the United Kingdom.

140 *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [22]–[27]. See also *Minister of Education v Reidy McKenzie Ltd* [2016] NZCA 326 at [19]–[26].

- an interpretation exception relating to "objective facts" which emerge during negotiations and which assist the court to interpret a settlement agreement in accordance with the parties' true intentions.

The 2018 subject review of mediation in this journal predicted that these common law exceptions would inform the court's exercise of the discretion in s 57(3)(d). That has proved to be the case so far. This approach is justifiable on the basis that the common law exceptions — worked out through the rigours of the judicial process over time — represent examples of situations where the interests of justice favour disclosure, notwithstanding the particular benefit of protecting communications in settlement negotiations or mediation. Thus, in *Body Corporate 212050 v Covekinloch Auckland Ltd (in liq)* one of the reasons that the Court declined to order disclosure of without prejudice documents exchanged by the parties in an earlier proceeding was that the claim for disclosure did not fall within any of the common law exceptions set out in *Oceanbulk Shipping*.[141]

Turning to more recent cases, in *Smith v Shaw*, a relationship property and trusts dispute, the applicant sought to set aside privilege in a "without prejudice save as to costs" offer made by the respondent on the basis that the contents of the offer disclosed unlawful conduct on the part of the respondent and was relevant to an assessment of his fitness to remain as a trustee of the trust in question.[142] The Court considered the application in light of the common law exception to the privilege in *Oceanbulk Shipping* where "the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'".[143] The Court reviewed two New Zealand Court of Appeal cases in which the exception had been considered. These two cases, decided post-Evidence Act 2006 but before the introduction of s 57(3)(d), are *Bradbury v Westpac Banking Corporation*[144] and *Morgan v Whanganui College Board of Trustees*.[145] In *Bradbury* the High Court and Court of Appeal both disallowed a claim to privilege in respect of a letter headed "without prejudice" in which Mr Bradbury referred to "creating a PR nightmare for Westpac" unless it acceded to his demands, on the basis that this threat constituted unlawful conduct.[146] In *Morgan* the Court of Appeal

141 *Body Corporate 212050 v Covekinloch Auckland Ltd (in liq)* [2017] NZHC 2642 at [94]. This case was discussed in more detail in Khouri, above n 2.

142 *Smith v Shaw* [2020] NZHC 238 at [5]–[8].

143 *Unilever plc v The Procter and Gamble Co* [2000] 1 WLR 2436 (CA) at 2444 as cited in *Smith v Shaw*, above n 142, at [37].

144 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.

145 *Morgan v Whanganui College Board of Trustees*, above n 121.

146 *Smith v Shaw*, above n 142, at [39] citing *Bradbury v Westpac Banking Corp*, above n 144, at [81].

was asked to disallow privilege in respect of without prejudice discussions that Mr Morgan alleged evidenced constructive dismissal, threats and blackmail. None of these allegations was accepted by the Court.[147]

In light of these two decisions, the Court in *Smith v Shaw* held that only "unambiguous impropriety" or the "clearest cases" of abuse will satisfy the requirements of s 57(3)(d).[148] Alleged unlawful conduct or even prima facie proof of unlawful conduct will not suffice. According to Fitzgerald J, while a "broad and flexible approach on the facts of any given case" is required, "it would be rare for a Court to set aside settlement privilege unless there was a very clear or at least very seriously arguable case for doing so".[149] That threshold was not met.[150]

The issue was brought before the Court again by the same parties in *Smith v Shaw (No 2)*.[151] In the intervening period they had attended a mediation to resolve the division of relationship property but the mediation did not result in settlement. The applicant sought again to set aside privilege under s 57(3)(d), this time in respect of statements made by the respondent at the mediation about his intentions for the trust. The applicant wished to rely upon those statements in her application to have him removed as a trustee because if that intention were carried out, it would place the respondent in a position of conflict of interest between his personal interests and his duties as trustee.[152]

Walker J "gratefully" adopted the principles set out by Fitzgerald J in the first judgment, noting "[t]he importance of the [s 57] privilege is such that its boundaries should 'not be lightly eroded'".[153] Her Honour declined to set aside the privilege, finding that the statements evinced only an intention at a particular point in time and that "the mere potential for a conflict of interest" did not meet the threshold of an "unambiguous impropriety".[154] The statements were insufficiently strong to meet the "necessarily high" threshold for setting aside protection "in the 'interests of justice'".[155] The Court was also influenced by the fact that the applicant remained free to

147 *Morgan v Whanganui College Board of Trustees*, above n 121, at [32]–[36] as cited in *Smith v Shaw*, above n 142, at [41]–[42].

148 *Smith v Shaw*, above n 142, at [45].

149 At [45]–[47].

150 Large parts of the judgment are redacted, so the facts considered by the Court in reaching this conclusion are not available.

151 *Smith v Shaw (No 2)* [2020] NZHC 1229.

152 At [23].

153 At [19] citing *Oceanbulk Shipping*, above n 139, at [30].

154 *Smith v Shaw (No 2)*, above n 151, at [23].

155 At [25] citing *Smith v Shaw*, above n 142 , at [46].

ask "open-ended" questions about the respondent's intentions vis-à-vis the trust at trial.[156]

The High Court also considered s 57(3)(d) in *Minister of Education v James Hardie New Zealand*.[157] Fitzgerald J dismissed the application to set aside the without prejudice privilege, noting "[t]here is nothing particular or special about these proceedings, other than, of course, their sheer size, which would warrant that".[158] Finally, in *Commissioner of Police v Cotton* Palmer J approached s 57(3)(d) by considering whether the relevance of the privileged evidence to the interpretation of a disputed settlement agreement outweighed the need for the privilege.[159]

Section 57(3)(d) is also being used as a back-up argument to support the application of the other exceptions in s 57(3). In *Intelact Ltd v Fonterra TM Ltd*, a claim for breach of a mediated settlement agreement, the plaintiffs sought to produce evidence of discussions at mediation in response to strike-out and summary judgment applications brought by the defendants.[160] Venning J considered that the evidence was admissible under s 57(3)(a) on the basis that the communications and discussions provided evidence of objective facts necessary to assist the Court to interpret the settlement agreement in accordance with the parties' true intentions (applying *Oceanbulk Shipping*).[161] His Honour also considered, however, that s 57(3)(d) would permit admitting the evidence if there were "any residual doubt" about whether s 57(3)(a) applied.[162] Similarly, in both *Rapid Labels Ltd v Excel Digital Ltd*[163] and *Drummond v O'Rorke*[164] the High Court admitted evidence of privileged communications because the evidence was necessary to prove the existence of an agreement settling the dispute (the exception in s 57(3)(b)) and also because the interests of justice outweighed the need for the privilege in the circumstances (s 57(3)(d)).

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156 *Smith v Shaw (No 2)*, above n 151, at [23]–[26]. For a discussion of recent United Kingdom decisions considering the "unambiguous impropriety" exception to without prejudice privilege see Allen, above n 106, citing *Motorola Solutions, Inc v Hytera Communications Corp Ltd* [2020] EWHC 980 (Comm), *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm), and the earlier decision of *Ferster v Ferster* [2016] EWCA Civ 717 involving a mediator who was involved in conveying threats by one party to the other.

157 *Minister of Education v James Hardie New Zealand*, above n 126.

158 At [55].

159 *Commissioner of Police v Cotton* [2018] NZHC 2577 at [15]–[17].

160 *Intelact Ltd v Fonterra TM Ltd* [2017] NZHC 1086.

161 At [18].

162 At [19].

163 *Rapid Labels Ltd v Excel Digital Ltd* [2019] NZHC 2522 at [11]–[14].

164 *Drummond v O'Rorke* [2020] NZHC 2123 at [45]–[48].

In sum, the new s 57(3)(d) exception is being used in practice and the boundaries of the s 57 privilege are being tested as a result. The courts are imposing a high threshold for setting aside the privilege. This is consistent with the wording of s 57(3)(d) and also its underlying policy rationale to create a safe environment for settlement discussions, for "[p]arties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers … sitting at their shoulders as minders".[165]

D *Waiver*

When two parties have a dispute and one of them communicates with the other within the terms of s 57(1), *both* parties become privilege-holders with respect to that communication. This is because the communication is, per s 57(1), "between" the two parties. Where a mediator communicates with one or both parties, and the communication otherwise fits the criteria set by s 57(1)(a) and (b), the mediator and the recipient(s) of that communication are all privilege-holders. In contrast, under s 57(2) the person who prepares the privileged document is the sole privilege-holder. Section 65(5) of the Evidence Act requires that, to be effective, a waiver of privilege conferred by s 57 must be made by all of the privilege-holders. In *MacDonald v Tower Insurance Ltd* the High Court permitted one party to call evidence of its own without prejudice settlement offers without the consent of the other party.[166] This created some doubt about the application of waiver in the context of without prejudice privilege.[167] That uncertainty has now been resolved. It is clear that the privilege is held by both the communicating parties, or by both the mediator and the parties with whom the mediator communicates, and cannot be waived unilaterally.[168]

165 *Unilever plc v The Procter and Gamble Co*, above n 143, at 2449 as cited in *Smith v Shaw*, above n 142, at [35].

166 *MacDonald v Tower Insurance Ltd* [2014] NZHC 2876, (2014) 22 PRNZ 490 at [56]–[58].

167 See further *Mahoney*, above n 120, at [EV57.09].

168 See, for example, *Soma v Nath* [2019] NZHC 2119 at [13]; *Li v 110 Formosa (NZ) Ltd* [2019] NZHC 1083 at [65]–[69]; *Wynyard v Bremner*, above n 128, at [54]–[57]; and *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, above n 137, at [25].

E *Termination of the privilege*

There is some uncertainty at law as to whether the privilege for settlement negotiations and mediation continues beyond the end of the litigation with which it is connected. The issue was considered in some detail (albeit obiter) by the High Court in *NZH Ltd v Ramspecs Ltd*.[169] Peters J reviewed the New Zealand authorities and noted the maxim "once privileged, always privileged".[170] Her Honour observed that:[171]

> … most if not all of the "privilege" provisions in the Act — ss 54, 56, 57, 58, 59 and 60 — provide that a party "has" a privilege in the subject matter and s 53, which provides for enforcement, does not suggest that the privilege ceases.

The Law Commission considered the issue in its second statutory review of the Evidence Act, released in February 2019.[172] The Commission accepted that parties may be more reluctant to make certain offers or concessions if there is a risk they will subsequently be made public.[173] Accordingly, it has recommended that the privilege should not terminate with its associated litigation. It has not, however, recommended any amendment to the Evidence Act, noting that "the status quo does not appear to be causing issues in practice" and that s 57(3)(d) can be used to provide for disclosure in appropriate cases.[174]

IV The United Nations Convention on International Settlement Agreements Resulting from Mediation

This final part discusses the Singapore Convention on Mediation.[175] This convention was adopted by the General Assembly of the United Nations on 20 December 2018 and opened for signature at a signing ceremony in Singapore on 7 August 2019. At the time of writing,[176] 53 states have signed

169 *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396 at [27] and following.

170 At [31].

171 At [32].

172 Law Commission, above n 3.

173 At [16.35] citing *Mahoney*, above n 120 , at 460 (EV57.10).

174 At [16.35]–[16.37]. Litigators should note that the Law Commission has recommended that litigation privilege under s 56 terminate at the end of the litigation with which it is connected (see [16.19]–[16.30]).

175 *Singapore Convention*.

176 February 2021.

the Convention, including China, the United States and India. Six countries have ratified it so far.[177] The Convention entered into force on 12 September 2020. New Zealand is not yet a party.

A *Background*

The Singapore Convention is the product of a working group of the United Nations Commission on International Trade Law (UNCITRAL) that has been meeting twice-yearly since 2014.[178] The initiative arose from a recognition of the value of mediation for resolving cross-border disputes: its ability to provide parties engaged in such disputes with a cost- and time-effective, flexible and certain solution tailored to their commercial realities, and its potential to sidestep complications associated with a plurality of applicable laws, jurisdictional complications and mistrust of foreign courts.

UNCITRAL also identified, however, that concerns about the enforceability of any mediated settlement agreement was having a chilling effect on the willingness of parties to engage in mediation.[179] In theory, difficulties with enforcement in this context should be rare, since by definition the parties are content with and accept their obligations under the settlement agreement (in contrast to an arbitral award, which is imposed on the parties by the arbitrator(s), albeit with the parties' prior consent). But circumstances change — settler's remorse is as possible in the international context as the domestic — and a party may renege on an obligation that they were previously willing to perform. The insolvency of one contracting party is another common scenario where enforcement issues arise.

While a properly drafted settlement agreement is a legally enforceable contract, enforcing it can require the very cross-border litigation — often

177 For an up-to-date list of the state parties to the Singapore Convention see Singapore Convention on Mediation "Status" <www.singaporeconvention.org>.

178 For "work in progress" reports of the UNCITRAL project in 2016 and 2017 see Nina Khouri and Maria Dew "International commercial mediation under the spotlight at UNCITRAL" [2016] NZLJ 322; and Maria Dew and Nina Khouri "International commercial mediation and the UNCITRAL initiative" [2017] NZLJ 21.

179 See, for example, International Mediation Institute "IMI survey results overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements" <https://imimediation.org> describing the results of a survey of in-house counsel and corporate managers conducted by the International Mediation Institute in October and November 2014. Of the respondents, 92.9 per cent said they would be either "probably" or "much more likely" "to mediate a dispute with a party from another country if [they] knew that country ratified a UN Convention on the Enforcement of Mediated Settlements and that consequently any settlement could easily be enforced there".

an ab initio proceeding to enforce a contract in a foreign jurisdiction where assets are located — that the parties were hoping to avoid by engaging in mediation. The Singapore Convention elevates that settlement agreement from a mere contract to a legal document with special enforcement status.

When the final text of the Convention was adopted by the General Assembly, UNCITRAL announced:[180]

> Until the adoption of the Convention, the often-cited challenge to the use of mediation was the lack of an efficient and harmonized framework for cross-border enforcement of settlement agreements resulting from mediation. In response to this need, the Convention has been developed and adopted by the General Assembly.
>
> The Convention ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified and streamlined procedure. The Convention provides a uniform and efficient international framework for mediation, akin to the framework that the New York Convention has successfully provided over the past 60 years for the recognition and enforcement of foreign arbitral awards.
>
> The Convention has been designed to become an essential instrument in the facilitation of international trade and in the promotion of mediation as an alternative and effective method of resolving trade disputes. It also contributes to strengthening access to justice, and to the rule of law.

The reference to the New York Convention is to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[181] In 1958 the New York Convention created a streamlined international regime under which the awards of international arbitral tribunals could be recognised and enforced in the domestic courts of signatory states in the same way as judgments of those courts. The New York Convention has since been credited as a key factor in the growth and acceptance of international arbitration. Ten countries signed the New York Convention at its signing ceremony in June 1958. At the time of writing, it has 165 state parties.[182]

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180 United Nations Commission on International Trade Law "General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation" <https://uncitral.un.org>.

181 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (signed 10 June 1958, entered into force 7 June 1959).

182 The latest country to accede to the New York Convention is Sierra Leone, which deposited its instruments of accession to the New York Convention on 28 October 2020: United Nations Commission on International Trade Law "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention')" <https://uncitral.un.org>.

(New Zealand acceded to the New York Convention in 1983. Giving effect to New Zealand's obligations under the New York Convention is one of the express purposes of the Arbitration Act 1996.[183])

B *Purpose and effect of the Singapore Convention*

The purpose of the Convention is to facilitate international trade and to promote the use of mediation for the resolution of cross-border commercial disputes.[184] The preamble records:[185]

> *The Parties to this Convention*,
> *Recognizing* the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,
> *Noting* that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,
> *Considering* that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,
> *Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,
> *Have agreed* as follows:

Article 3 of the Singapore Convention provides:

> 1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.
> 2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance

183 Arbitration Act 1996, s 5(f).

184 Singapore Convention on Mediation "What is the Singapore Convention on Mediation?" (12 September 2020) <www.singaporeconvention.org>.

185 *Convention*, preamble.

> with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

The basic idea is to make settlement agreements arising from international commercial mediations enforceable sui generis — in their own right — in every country that is a party to the Singapore Convention. Consider, for example, a dispute between an American company and a Chinese company concerning a joint venture infrastructure project in India. If that dispute were settled at mediation then the resulting settlement agreement (assuming it otherwise met the eligibility criteria set out in the Convention and described below) would have special enforcement status in all three countries.[186] The agreement could be enforced in accordance with its terms and could also be used as a defence to an action, as proof of full and final settlement of the dispute. Its enforceability would not be contingent on the particular substantive and procedural rules for the enforcement of commercial contracts in each jurisdiction. The Convention contemplates an international network of enforceability that will enable parties to choose to enforce settlement agreements at the place of business of a contracting party, where its assets are located, where the settlement agreement is to be performed or where the subject matter of the settlement agreement is most closely connected.

C *Criteria for enforceability of mediated settlement agreements under the Singapore Convention*

(1) Scope of application

The Singapore Convention provides special enforcement status for settlement agreements arising from international commercial mediation. Mediation is defined as:[187]

> … a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

The settlement agreement must be in writing and be "international". A settlement agreement is "international" if at least two parties to it have

186 Once the United States of America, China and India have ratified the Singapore Convention. All three countries signed it on 7 August 2019.

187 *Singapore Convention*, art 2(3).

their places of business in different states or if the state in which the parties to the settlement agreement have their places of business is different from either (a) the state in which a substantial part of the obligations under the settlement agreement is to be performed; or (b) the state with which the subject matter of the settlement agreement is most closely connected.[188]

The dispute must be "commercial". The Convention does not apply to settlement agreements relating to consumer transactions (transactions for personal, family or household purposes) or settlement agreements relating to family, inheritance or employment law.[189]

Settlement agreements that are already enforceable as an arbitral award or as a judgment (for example, where the agreement has been approved by a court or concluded in the course of proceedings before a court) are also excluded.[190] The purpose of this carve-out is to avoid overlap in the Convention's relationship with the existing legal framework for court judgments and arbitral awards.[191]

(2) Does the Singapore Convention apply automatically?

Yes, by default. A controversial issue in the drafting of the Convention was whether it should apply automatically to international settlement agreements unless the parties specified otherwise (an opt-out process) or whether parties should have to confirm its application in each case (an opt-in process). On the one hand, an opt-in process would be more consistent with the principles of party autonomy and freedom of contract underlying the mediation process. On the other hand, requiring parties to agree to incorporate the expedited enforcement process contemplated by the Singapore Convention every time, on an ad hoc basis, would likely constrain the impact and significance of the whole regime.

Ultimately the opt-out process was chosen. That is, the Convention generally applies to all settlement agreements arising from international

188 Article 1(1).

189 Article 1(2).

190 Article 1(3).

191 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (signed 10 June 1958, entered into force 7 June 1959) and the various conventions developed by the Hague Conference on Private International Law such as the Convention on Choice of Court Agreements 44 ILM 1294 (opened for signature 30 June 2005, entered into force 1 October 2015) and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (opened for signature 2 July 2019, not yet in force). A table showing the various Hague Conventions and their legal status is available at Hague Conference on Private International Law "Status of signatures, ratifications and accessions" (4 November 2020) <www.hcch.net>.

commercial mediation, except where the parties have in their settlement agreement expressly excluded its application.[192] However, a state party is permitted to declare that the Convention shall only apply in its jurisdiction to settlement agreements where the parties expressly agree to its application.[193] So lawyers will need to check in every case (preferably in advance of the mediation itself) whether the state in which enforcement is sought operates an opt-in or an opt-out regime.

(3) Grounds for refusing to grant relief

Typically one party will resist enforcement of a mediated settlement agreement on the grounds that the agreement is defective in some respect. Jurisdictions differ widely on the requirements for a valid and enforceable agreement, so the challenge for drafters of the Convention was to find a middle ground that guaranteed some minimum standards of integrity for settlement agreements without becoming mired in detail. (This was, of course, the same challenge faced by the drafters of the New York Convention.)

The grounds upon which a court where enforcement is sought may refuse to grant relief are set out in art 5. They include: where a party to the settlement agreement was under some incapacity at the time of signing; where the settlement agreement is null and void, inoperative or incapable of being performed under the applicable law of the settlement agreement;[194] where the settlement agreement is not binding or final according to its terms or has subsequently been modified; where the obligations in the settlement agreement have already been performed or are uncertain; or where granting relief would be contrary to the terms of the settlement agreement (for example, when the parties have provided for an alternative enforcement process).[195] Relief may be refused in cases of mediator misconduct or where a mediator has failed to disclose a conflict of interest.[196] Finally, relief may be refused where the subject matter of the dispute is not capable of settlement by mediation under the law of the country where relief is sought (traditional examples of this are tax disputes and anti-competitive arrangements) or where granting relief would be contrary to the public policy of that country.[197] This provision is comparable with art 5 of the New York Convention. That provision is responsible for generating the most litigation and academic

192 *Singapore Convention*, art 5(1)(d).

193 Article 8(1)(b).

194 Either the law chosen by the parties to the settlement agreement or, failing that, the law deemed applicable by the court where enforcement is sought.

195 *Singapore Convention*, art 5(1)(a)–(d).

196 Article 5(1)(e) and (f).

197 Article 5(2).

commentary about the interpretation and application of the New York Convention. Article 5 of the Singapore Convention will likely generate litigation and academic commentary to the same degree. For example, there is already discussion as to whether the public policy exception in art 5(2) means that parties seeking to enforce settlement agreements in the Middle East and North Africa region will need to ensure that the agreement complies with any shari'a law requirements of the particular country where enforcement may be sought.[198]

D *Implications for New Zealand practitioners*

New Zealand lawyers and mediators engaged in mediation of commercial disputes involving international parties or where enforcement may be sought overseas must be aware of the Singapore Convention. Prudent lawyers will check the status of the Singapore Convention in every jurisdiction with a connection to the parties or to the subject matter of the dispute.

Where the Convention is not in force, lawyers must ensure that the settlement agreement complies with the requirements for a binding commercial contract in every jurisdiction where their client might seek enforcement. (Usually the home jurisdiction of the other contracting party or a jurisdiction where that other contracting party holds assets.) The contract can then be enforced in the usual ways through litigation (or arbitration, depending on the dispute resolution provisions built into the agreement), accepting the limitations of each of these processes. Lawyers might consider building into the settlement agreement self-help remedies such as performance bonds to minimise the likelihood of needing to resort to litigation. It may also be possible to convert the settlement agreement into a court order or arbitral award by consent.[199]

New Zealand must decide whether to become a party to the Convention. It is difficult to see any disadvantage to New Zealand doing so. Indeed, New Zealand risks undermining its status as a progressive and user-friendly jurisdiction for the resolution of disputes if it does not.[200] By hosting the

198 David Lutran and Josephine Hage Chahine "Singapore Convention Series: The 'Sharia-Compliance' Requirement to Safeguard Enforcement Of Mediated Settlements In The MENA Region" (30 September 2020) Kluwer Mediation Blog <http://mediationblog.kluwerarbitration.com>.

199 See further Khouri and Dew "International commercial mediation under the spotlight at UNCITRAL", above n 177; and Dew and Khouri "International commercial mediation and the UNCITRAL initiative", above n 178.

200 For further discussion of the Convention and its implications for New Zealand and the region see Interview with Grant Morris, Victoria University (Jesse Mulligan, Afternoons

signing ceremony and giving its name to the Convention, Singapore is establishing itself as the centre of dispute resolution in the Asia-Pacific region and, arguably, in the world. There are real political and economic benefits to be gained by joining this initiative.

For now, the significance of the Singapore Convention may lie in what it represents about global attitudes towards mediation as a valuable and mainstream dispute resolution process. As one leading United Kingdom mediator said recently: "Now that you have matured you can have your own convention, just like your big brother arbitration."[201]

V Conclusion

The legal developments discussed above demonstrate an increasingly sophisticated awareness of the benefits of mediation in New Zealand and internationally. It is a flexible and efficient dispute resolution process and, as such, an essential tool for lawyers focused on smart problem-solving for their clients.

with Jesse Mulligan, RNZ, 21 November 2019); Catherine Green "The Singapore Mediation Convention: A Panacea for Trade in the Trans-Pacific Region or Just One Piece of the Puzzle: Part One: An Introduction" (2 August 2019) The New Zealand International Arbitration Centre <www.nziac.com>; Catherine Green "The 'Trans-Pacific' Experience: Part Two in a Series on the Singapore Mediation Convention" (9 August 2019) The New Zealand International Arbitration Centre <www.nziac.com>; Catherine Green "Facilitation of Trade and Investment: Part Three in a Series on the Singapore Mediation Convention" (30 August 2019) The New Zealand International Arbitration Centre <www.nziac.com>; Catherine Green "Addressing Diversity and Culture in International Mediation: Part Four in a Series on the Singapore Convention" (20 September 2019) The New Zealand International Arbitration Centre <www.nziac.com>; Catherine Green "The Singapore Mediation Convention: The Dual Questions of Cost and Time. Part Five in a Series on the Singapore Mediation Convention" (5 November 2019) The New Zealand International Arbitration Centre <www.nziac.com>; and Catherine Green "The Singapore Mediation Convention: Concluding Remarks. Part Six in a Series on the Singapore Convention" (23 December 2019) The New Zealand International Arbitration Centre <www.nziac.com>.

201 Interview with William Wood QC (Who's Who Legal interview, 2020) transcript available at Who's Who Legal "William Wood QC" <https://whoswholegal.com>.