

the text of the FAA as well as Supreme Court precedent.

Put simply, the Court again made clear that delegation clauses must be strictly enforced.

This outcome was unsurprising to most who have watched the development of FAA jurisprudence in recent years, but still may offer insight into lingering legal issues.

The Court's emphasis in this decision is on the parties' agreement: it reasons that "a court may not decide an arbitrability question that the parties have delegated to an arbitrator."

THERE'S STILL A SPLIT

That could be read as a signal that the Court also favors arbitrators determining the availability of class arbitration. That is relevant because there is a circuit split on whether a delegation clause authorizes an arbitrator to decide that issue. Compare *Spirit Airlines v. Maizes*, 899 F.3d 1230 (11th Cir. 2018) (available at <https://bit.ly/2MNvPdu>) (holding that

Who Does What?

The issue: The severability doctrine in federal arbitration jurisprudence.

Why so much of this? The issue of delegation—that is, who decides whether the case may be arbitrated—has multiple levels.

The latest: Three cases on delegation in the past three months show severability is alive and well and a part of your arbitration work. Included: a re-visit to January's Supreme Court *Henry Schein* decision.

an arbitrator should decide the availability of a class action, when the parties incorporated American Arbitration Association rules) with *Catamaran Corp. v. Towncrest Pharmacy*, 864

F.3d 966 (8th Cir. 2017) (available at <https://bit.ly/2DbzLjG>) (holding that the issue of class arbitrability is for the court, regardless of the incorporation of AAA rules).

The Supreme Court, however, inserted a final paragraph in *Henry Schein* that leaves it some wiggle room on that question. It notes, "We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue."

In other words, if the Court is going to keep the decision regarding class arbitrability in courts, it will likely be because it finds that an incorporation of arbitral rules is not sufficient to "clear[ly] and unmistakably" delegate arbitrability to an arbitrator.

No matter what the Supreme Court does on the class arbitrability issue, it is clear that the severability doctrine is alive and well. Litigators, arbitrators, judges and parties need to be aware of its contours and employ it appropriately when drafting their arbitration agreements, as well as in arguments over compelling arbitration. ■

The Master Mediator

Whose Reality Is It?

BY ROBERT A. CREO

Ignorance more frequently begets confidence than does knowledge: It is those who know little, and not those who know much, who so positively assert that this or that problem will never be solved by science.

— Charles Darwin

The columnist is a Pittsburgh attorney-neutral who has served since 1979 as an arbitrator and mediator in the United States and internationally handling thousands of cases. He conducts negotiation and decision behavior courses that focus on neuroscience and the study of decision-making. He is annually recognized by Best Lawyers in America and was named in both 2017 and 2014 as Pittsburgh Mediator of the Year. He is the author of numerous publications, including "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is the principal of Happy Effective Lawyer LLC, an initiative focusing on lawyer contentment, core competencies, soft skills, and peak performance, which publishes *The Effective Lawyer* (<https://happyeffectivelawyer.org>) Blog. He is a longtime member of *Alternatives'* editorial board and of the CPR Institute's Panels of Distinguished Neutrals. His website is www.robertcreo.com.

Overconfident professionals sincerely believe they have expertise, act as experts and look like experts. You will have to struggle to remind yourself that they may be in the grip of an illusion.

—Daniel Kahneman, author,
Thinking, Fast and Slow

Confidence is contagious. So is lack of confidence.

—Coach Vince Lombardi

If you're presenting yourself with confidence, you can pull off pretty much anything.

— Singer/Songwriter Katy Perry

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The problem: Does confidence kill compromise?

The trend of counsel coming into the mediation room not as negotiators seeking compromise but rather as litigators and advocates has accelerated and will continued to do

so in the near future.

Whether this is the effect of mandatory court or contractual mediation provisions or the "legalization" of the mediation forum is not clear to me. In the litigated case, the procedural impact has been for advocates to discount a joint session for fear it will polarize the parties further. Litigators see the joint session as "a waste of time," since "everyone already knows" what the other participants are going to say or propose.

This distorts the process and creates a thriving environment for cognitive biases.

A recent post to the business community by the Program on Negotiation at Harvard Law School on its *Daily Blog* (see link in the Sources and Additional Reading box at end) included the following about overconfidence:

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The Master Mediator

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To avoid the pitfalls of overconfidence, you need a clear understanding of how overconfidence is likely to affect your judgments and decisions (and those of your counterparts) at the bargaining table. ... Here are four pieces of advice that current negotiation research offers to reduce your overconfidence:

1. Collect information. ...
2. Consider the opposite. ...
3. Find a devil's advocate. ...
4. Don't be afraid to ask. ...

This is sound advice to business negotiators in bilateral transactional bargaining. My belief is that it also applied and was commonly accepted as a model in the earlier days of mediation use for claims and even transactional matters.

The core elements of basic mediation training are encompassed within the four tips, particularly the concept of the mediator being the "agent of reality" or playing the role of devil's advocate in a caucus model.

THE SCIENCE

In my experience, what are often considered or labeled as distinct cognitive bias points all interplay and blur in the mediation room. Common ones are confirmation bias, illusion of control, and overconfidence. Let's explore the dynamics using the catch-all "overconfidence effect."

For more than two decades researchers have studied cognitive bias and how it relates to decision making, negotiation and conflict resolution. Much of the research has made its way in popular culture and nomenclature with it being common for news commentators and other pundits to promote their point of view by citing overconfidence or confirmation bias. The higher the expressed rate of confidence, the greater the likelihood of error.

In other words, when an advocate says that they are 100% confident in their position or prediction, the error rate is higher than where someone opines that they are 75% confident. This is common sense.

Although much has been written about mediation and cognitive bias and most skilled mediators have a working knowledge of the psychology of human behavior and decision making, it is worthwhile to review and focus on the bucket of beliefs and actions scooped up in overconfidence bias.

Knowing It All

The subject: Negotiator overconfidence.

The mediation reaction: This is why evaluation has come into prominence. Hello, reality check.

The ADR role: Transparency and openness are truer to the process, but a neutral—on an average day!—may be the cure for the advocate's pitfalls into the three types of overconfidence.

Overconfidence arises from a miscalculation of risk, substitution of subjective probabilities, or personal abilities. Most researchers accept that overconfidence involves a three-prong effect:

1. Overestimation of one's actual or predictive performance;
2. Overplacement of one's performance relative to others; and

3. Overprecision in expressing unwarranted certainty in the accuracy of one's beliefs.

Overestimation

This classification focuses on the certainty one believes in his or her own ability, performance, level of control, or chance of success. This includes the illusion of control involving people acting if they might have some significant impact or control over events or decisions of others when in fact they have little or none.

Overplacement

Overplacement is common, with most professionals, thinking they are superior to their peers. This is sometimes called the "illusion of superiority" and is perhaps the most prominent manifestation of the overconfidence effect.

Overplacement is a mistaken belief that you are better than others, or "better-than-average," although it is impossible for everyone in a group to be better than the average when compared to their own peers. This has been called the "Lake Wobegon" effect, after Garrison Keillor's hypothetical community in which "all the children are above average."

Note, however, when faced with new challenges or difficult tasks, the effect reverses itself, and people without specialized knowledge or experience believe they are worse than others.

Overprecision

Overprecision is the excessive confidence that one knows the exact truth or can predict or estimate the outcome of future events.

Studies have shown that accuracy rates are often as low as 50% when people predict

SOURCES AND ADDITIONAL READING

- "Business Negotiation Skills to Curb Your Overconfidence," Program on Negotiation, Harvard Law School, Daily Blog (Dec. 17, 2018) (available at <https://bit.ly/2FTE7Qz>).
- "Are You an Overconfident Negotiator?" Program on Negotiation, Harvard Law School, Daily Blog (Dec. 5, 2012) (available at <https://bit.ly/2FMDzMh>).
- Kahneman, Daniel, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011).
- Kahneman, Daniel, "Don't Blink! The Hazards of Confidence," *N.Y. Times Magazine* (Oct. 19, 2011) (available at <https://nyti.ms/2xBMgm4>).

- Larrick, Richard P., Burson, Katherine A. & Soll, Jack B., "Social comparison and confidence: When thinking you're better than average predicts overconfidence (and when it does not)," 102:1 *Organizational Behavior and Human Decision Processes* 76 (January 2007) (available at <https://bit.ly/2TbNcXS>).
- Moore, Don A. & Schatz, Derek, "The Three Faces of Overconfidence," 11 *Social and Personality Psychology Compass*, No. 8 (August 2017) (available at <https://bit.ly/2DAXc7t>).

outcomes despite responding that they are at least 90% confident in the outcome.

MEDIATION AS AN ANTIDOTE?

Attorneys are educated to project confidence and to show no doubt on the force of their argument or the justness of their positions.

Mediation is designed as an *alternative* process to litigation and an aid to the resolution of disputes. As it has evolved more and more to just another forum to advocate, to

debate, and to prevail, the prominence of confidence, and overconfidence, of representatives has grown. The erosion of positions in favor of the pursuit of principled interests is impeded by the zealous and overconfident counsel.

The mediation process has adapted by empowering the mediator to become less passive and more evaluative and directive. It is difficult, and time consuming, to move an overconfident advocate from an entrenched position by only facilitative questioning. This thrusts the role of devil's advocate to the forefront since, ironically, the effective devil's

advocate must have some level of confidence in the positions being advanced by forceful and pointed questioning and comments!

When coupled with what I believe is the better view propounding mediator transparency and openness over tactics and disguised strategy, mediators may by necessity become more evaluative despite their protestations to the contrary. Whether this is a good thing or a bad thing lies within the choice of the mediator—all of us who are average on many days, below average on some days, and, perhaps occasionally even masterful!

International ADR / Part 2 of 2

A Protocol for Being Heard: Invoking a New Right for an Open Arbitration Hearing in Europe

BY PIOTR WOJTOWICZ

Last month, author Piotr Wojtowicz analyzed in detail the holding of European Court of Human Rights in *Mutu and Pechstein v. Switzerland*, No. 40575/10 and No. 67474/10, Eur. Ct. H.R. (Oct. 2, 2018) (available in French at <https://bit.ly/2DLPVDR>) (English language press release available using the search at <https://bit.ly/2s9RLG9>), in a combined appeal of arbitration matters, from Switzerland's highest Court but originally before the Court of Arbitration in Sports. See "You Will Be Heard: The European Court of Human Rights Clarifies the Arbitration Right to a Public Hearing," 37 *Alternatives* 27 (February 2019) (available at <https://bit.ly/2MSJJuQ>). The ECHR decision found that in one of the two athlete's appeals, because facts in issue were disputed and the competitor's professional reputation was at stake, the particularity of the proceedings called for a public hearing at an arbitration on discipline. This month, the author discusses a potential protocol for request-

ing a hearing, which traditionally have been presumed closed, as well as the implications for commercial arbitration.

The European Court of Human Rights judgment bears witness of a global trend: a rising public interest in arbitration, which is also due to the successful rise of arbitration use.

That prompts a conflict between the principle of confidentiality seen as germane to arbitration, and the call for more transparency. This conflict calls for well-crafted solutions. Transparency and confidentiality ought to be balanced to preserve arbitration's fitness for its purpose: an efficient and neutral (international) dispute resolution tool.

CAS Code Article R43 (the full code is available at <https://bit.ly/1ipJp5w>) provides for confidentiality in CAS arbitrations by default. It states:

R43 Confidentiality

Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS.

Awards shall not be made public unless all parties agree or the Division President so decides.



Correspondingly, Article R44.2, on hearings, in its second paragraph, still subjects a public hearing to the consent of both parties ("... Unless the parties agree otherwise, the hearings are not public. ...").

So did former Article R57 para. 2 of the CAS Code, the provision at issue in *Mutu and Pechstein v. Switzerland* ("... At the hearing, the proceedings take place in camera, unless the parties agree otherwise.").

Conversely, the European Court has established a party's right to request a public hearing in mandatory CAS arbitrations that is not contingent on the other party's consent, while it has carved some limits and exceptions to that right.

The judgment, described in detail in last month's article, provides for some presumably indicative, and not exhaustive, ground rules' requests to be met for a hearing to be granted. They require further interpretation.

Accordingly, the revised Article R57 para. 2—as of Jan. 1; see the box

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