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Understanding obstacles in negotiation

Overconfidence — its theory and implications in dispute resolution

Nirvana Ma

A working definition of 'overconfidence' is 'an artificially inflated estimate or prediction of a past event or future outcome'. Many psychological and sociological studies have been conducted on this topic, and it is now a widely accepted phenomenon.¹ The trait appears most predominantly when difficult questions are posed, and least when questions are simplest.²

Many academics have hypothesised about the causes of overconfidence. In particular, Loewenstein and Korobkin have separately provided a total of six sound explanations for the trend.³ Their

results can be broadly categorised as cognitive factors on one hand, and cultural or environmental stimuli on the other. The manifestation of overconfidence in negotiation is likely to be due to a combination of the factors, rather than one exclusively.

Cognitive factors

The two main cognitive factors are 'differential attention' and the 'above-average effect'. These are both supplemented by a third factor known as the 'illusion of control'. Human beings typically utilise cognitive

shortcuts such as these to help manage the overload of information processed day-to-day.⁴ An unwelcome side effect of these shortcuts is that it becomes difficult or impossible to have wholly rational decision-making or entirely thought-out decisions.⁵ This leads to bias — in this case, the overconfidence bias.

Differential attention

The concept of 'differential attention' is that human beings naturally pay more attention to those facts which suit them.⁶ This is demonstrated by 'biased recall' which was most famously studied in the



1950s by Hastorf and Cantril.⁷ In that study, students from Princeton and Dartmouth were shown film of a football game between the two universities. Dartmouth was then accused of foul play, and the students were asked to recall how many penalties were committed by each team during the course of the game. Unsurprisingly, the Princeton students found the Dartmouth team to have committed more than twice as many infractions as the Princeton team, whereas the Dartmouth students thought the teams committed roughly the same number.⁸

The emphasis placed on positive facts, and the tendency towards bias in recalling those facts, suggests an obvious outcome. If positive facts are recalled more readily, subjects will ultimately have a positively skewed version of the world. An overconfident prediction of success follows.

Above-average effect

The 'above-average effect' refers to the tendency of human beings to calculate the potential outcome of a situation with reference to their control over it.⁹ That is, as most people tend to assess themselves as being better than the average, their participation in a scenario must equate to an 'above-average' chance of success.¹⁰ For example: 'because I am in control here, and I am better than the average driver, I have an above-average chance of winning this race'. Kramer and Pommerenke suggested that this is a way of protecting one's self-esteem and self-image.¹¹

This mentality leads to an over-optimistic outlook, and is particularly relevant to lawyers in negotiation. A lawyer who is assessing the chance of success should the dispute go to court might say: 'I'm a better barrister than the lawyer on the other side of the table. With my skill and luck, if we go to court, I'm sure I'll hit this one home'.¹² Again, the logical consequence of this effect is overconfidence.

Illusions of control

The final cognitive factor is the 'illusion of control', which refers to how much power human beings believe they have over their lives.¹³ A strong sense of control is described as internal 'locus of control'.¹⁴ It is likely this mentality

develops in each individual human being as a result of various environmental and genetic factors. It has also been suggested that culture is a determinative factor of the trait.¹⁵ For example, countries such as the United States and Norway have a culture of strong internal locus, where it is generally believed that one can achieve anything one desires.¹⁶

A study of this hypothesis found subjects valued lottery tickets they had personally chosen higher than ones which were randomly assigned to them.¹⁷ The subjects were also more likely to retain the tickets of their choosing, when given the opportunity to trade for a random ticket with better odds.¹⁸

The effect is a tendency of human beings to overestimate the amount of control they have over a situation they are facing. When this factor is combined with the 'above-average effect', it leads to a severely inflated prediction of success.

Environmental factors

The three types of environmental stimuli which affect conflict resolution are parties not being fully informed; parties only discussing the topic with like-minded people; and insufficient quantum of litigation.¹⁹

Not fully informed

When a party to a dispute lacks certain facts pertaining to same, it is impossible for them to accurately predict what outcome might be attained through litigation. In negotiations, it is a common tactic for parties to withhold certain facts, as there are no legal disclosure requirements or rules of evidence which apply.²⁰ The Priest-Klein selection hypothesis posits that where subjects possess incomplete or imperfect information, they incorrectly estimate the case's value.²¹ A prediction based on limited information would likely be overoptimistic, as it is doubtful that an opponent would reveal weaknesses in his or her case.

Discussions with like-minded people

Secondly, where a disputant discusses his or her case with like-minded people only, he or she is unable to assess the situation objectively. In the absence of external reasoning and doubt, the case's



strengths will be reinforced and the weaknesses will be underestimated. The consequences of this are obvious.

Not enough litigation

There are areas of law which have not been clearly pronounced by the judiciary, or an insufficient quantum of litigation exists to date.²² In this situation it will be difficult for a lawyer to advise his or her client with any degree of certainty. When combined with the 'above-average effect', a lawyer may conclude that the ambiguity in the law is more likely to be resolved in their favour, rather than their opponent's. This outlook has no basis, and is overconfidence in its purest form. It must be noted that the legal system itself encourages overconfidence, as each lawyer interviews only one client, thus selective information 'in' leads to incorrect initial advice 'out' or at least 'heard'.

How overconfidence is manifested

Behavioural examples

At the onset of negotiation, the aim is primarily to avoid litigation by reaching a mutual agreement. Notwithstanding participants sharing this common goal, it is inevitable that not every negotiation will reach settlement. To maximise the opportunity, a negotiation must be as effective as possible. Achieving this requires cooperation from all participants in employing a number of behaviours, such as: willingness to compromise, making of trade-offs, and readiness to negotiate.²³ A disputant will employ this type of conduct to an extent correlated to his or her assessment of the alternatives available.²⁴ Fisher and Ury name these the Best Alternative to a Negotiated Agreement (BATNA) and Worst Alternative to a Negotiated Agreement (WATNA).²⁵ A good BATNA and WATNA will take into account factors such as costs, time, values, and future plans, and must be realistic.

Theoretically, if a proposed agreement is superior to what a participant believes his or her BATNA to be, he or she should accept it.²⁶ It is likely that the participant will rely heavily upon his or her lawyer for advice and information in

this respect. Thus, the lawyer's level of confidence will be crucial to the behaviour of the participant. An overconfident lawyer will assess their client's BATNA as better than what it would be in reality. A client can be led to believe that if no agreement is reached, he/she can go to court and win. As Fisher and Ury state: 'The better your BATNA, the greater your power.'²⁷ Consequently, there is less incentive for the client to compromise or make concessions.²⁸ Reasonable and/or realistic offers may then be rejected.

In addition to developing a BATNA,

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each party must consider their 'bottom line', also known as the 'reservation point'.²⁹ This invisible line will depend upon the WATNA, and a careful calculation of costs involved in pursuing the alternatives to settlement. Costs refer not only to monetary costs, but also time costs, opportunity costs, and so on. The 'bottom line' is the minimum amount a seller will accept, and the maximum amount a buyer is willing to pay.³⁰ Where the 'bottom lines' of the participants overlap, a settlement/bargaining/contract zone of agreement is created (see Appendix 1).³¹ In theory, any figure or option which appears within this zone should be acceptable to the parties. The problem that overconfidence creates is that where the BATNA is inflated, the bottom line follows. Thus, the zone is diminished and the range of mutually acceptable outcomes is reduced.

Advantages and disadvantages of over confidence

In order to classify the products of overconfidence, the objective of negotiation must be defined. Success in negotiation has been described by Korobkin as: 'a settlement ending the dispute' or should there be auxiliary reasons involved other than just the facts, then 'an impasse'.³² Other

academics use measures of success such as the parties' satisfaction, the sustainability of the outcome, and whether adversarial relationships improved.³³ For the purposes of this essay, negotiation success is defined as 'reaching the best possible resolution which satisfies all parties' interests'. Where overconfidence reduces the likelihood of disputants reaching an agreement the trait must be seen as a disadvantage. However, looking ahead of the outcome, the bias may have additional effects on participants, which in turn influence the negotiation result.

Disadvantages

As discussed above, overconfidence reduces the range of mutually acceptable outcomes that may be created in a negotiation. By doing this, overconfidence makes it more difficult to reach a resolution, and in this way is a disadvantage. However, the trait has other negative effects. Pruitt and Kim describe four basic strategies used in negotiation as *contending*, *problem-solving*, *yielding* and *avoiding*.³⁴ The use of one of these strategies generally rules the others out, and so a choice must be made about which strategy to use.³⁵ Pruitt and Kim list four sets of theoretical notions which affect choice — one of which is related to overconfidence, named the *perceived feasibility perspective*.³⁶ This notion evaluates the four strategies by the extent to which the strategy is capable of achieving the party's goals. If a participant exhibits overconfidence, keeping all other variables constant, the feasibility of using contentious tactics will increase. Use of contentious tactics can be risky as it may alienate the other disputant/s and start a conflict spiral. Other risks involve developing a reputation for contentious behaviour, or triggering third party censure.³⁷



Advantages

Alternatively, overconfidence can prove an advantage if a negotiator has difficult aspirations.³⁸ The definition of 'aspiration' is 'the particular target level of benefit a negotiator strives to achieve at any given time'.³⁹ A working definition is 'an ambition, an objective, a goal'. Difficult aspirations, compared to easily attainable aspirations, are those which cannot be easily accomplished, or that the opposing negotiator is unlikely to agree to readily.⁴⁰ While not being unrealistic, these aspirations reflect attainable goals but may require a little extra work to be realised.

With difficult aspirations in mind, it is easy to imagine that in such a negotiation, particularly if time constraints were imposed, participants may feel pressured to 'give up' or settle for a less than ideal outcome. However, Lim posits that overconfidence may actually encourage persistence, being an advantage for those negotiators. Being more persistent may push parties to work harder and justify to themselves more strongly that their continued effort will end in success.⁴¹

To conclude, where a participant has easily attainable aspirations, overconfidence can be a disadvantage where it leads to realistic offers being rejected. In cases of difficult aspirations, overconfidence can be an advantage where it encourages persistence in achieving those aspirations.

How a mediator can add value

The first method of overcoming lawyer and/or client overconfidence is raising awareness of the trait. Bazerman and Neale found that educating negotiation participants about overconfidence increased the accuracy of their BATNA and WATNA assessments, increased concessionary behaviour, and increased the success of the outcomes.⁴² Korobkin terms this 'help parties de-bias themselves'.⁴³ While Bazerman and Neale's study arrived at positive results, other evidence suggests that merely explaining that overconfidence exists does little to alter peoples' thinking.⁴⁴ This is because the characteristic of the trait itself is to believe that good things are more likely to happen to you, and conversely bad things are less likely to happen to you. So, while a participant

may be aware that the overconfidence bias exists, they are prone to believing that they themselves are less likely to suffer from the bias, as compared to their opponents.⁴⁵

The second method is to ask each party to 'step into the one another's shoes'. This can be done either by asking the participants to list possible weaknesses in their case, or asking the legal representatives to consider the arguments which might be presented by the opposition in court.⁴⁶ The reason why this method is less effective on litigation lawyers is because most legal professionals are skilled and trained in anticipating potential counter-arguments. In fact, it would be incompetent for any lawyer not to do so. Thus, this exercise is really asking the lawyer to repeat a task they have already undertaken. Furthermore, during the course of identifying counter-arguments, the lawyer will almost certainly have generated rebuttals to same. The task of verbalising these to the mediator may actually increase overconfidence. Nonetheless, this method may be useful for unrepresented participants.

The third method is to ask the lawyer to place himself in the role of a 'disagreeable adjudicator'. The lawyer must explain to the mediator the reasoning behind his or her case being unsuccessful. By doing this, the lawyer will be forced to take a negative view of the dispute, and concede there is some possibility that his or her case will not conclude as expected. Studies have found that subjects have more belief in an outcome occurring if they explain why it might occur, also known as the 'explanation bias'.⁴⁷ The aim of the action is to increase the plausibility of the undesired outcome, in the lawyer's mind, thereby creating doubt and reducing overconfidence.

The fourth method is for the mediator to 'facilitate a process by which the participants de-bias each other'.⁴⁸ This method involves both parties agreeing to a form of 'mini hearing', whereby both sides' arguments would be presented, and evidential documents made available to all parties. Giving the disputants and their lawyers the opportunity to hear the strength of the opposing case has been seen to be effective in reducing overconfidence.⁴⁹



However the hurdle in instigating this method lies in obtaining the consent of the lawyers to carry out the process. It is human nature to prefer to maintain secrecy when involved in a dispute and particularly in negotiation where judicial rules of discovery do not apply. Lawyers in particular are trained to create fog and legal mystery. Only excellent lawyers can say 'I will set out my three best arguments ...' without hesitation.

The fifth and final method of overcoming lawyer and/or client overconfidence is for the mediator to directly de-bias the parties. To do this the mediator would 'play devil's advocate' with each side by bluntly challenging their positions and evaluations.⁵⁰ By explaining the weaknesses in each party's case to them, this forces the disputants to reconsider their prediction of success. The aim is to shock the client and/or lawyer enough to assuage their confidence. While this may be an effective tool, there are ancillary issues regarding the use of this method. Parties may react to this method by 'shooting the messenger' and rejecting the mediator's assertions, or manner. As a result, the mediator may be rendered useless for future meetings. The mediator may additionally become branded by gossip as negative and unaccommodating.

Mediation theory describes two main types of mediation — *facilitative* and *evaluative*. A facilitative mediator has no advisory or determinative role in the outcome and merely aids in the process of mediation whereby a resolution is attempted. An evaluative mediator will take a more active role in guiding the parties towards a settlement in accordance with rights and entitlements, and in view of possible court outcomes.⁵¹ To use this fifth method would be entering the boundaries of evaluative mediation, which some practitioners believe is a contradiction in terms.⁵² The writer offers no advice in this respect except to note that it is Korobkin's belief that a 'firm hand' and 'active participation' are critical to overcoming impediments to settlement.

Conclusion

Overconfidence is a psychological bias which will never be eradicated from the human psyche. It serves a purpose in

promoting emotional and mental wellbeing. In the legal domain, the overconfidence bias is something lawyers are not taught in law school, or alerted to during their professional lives. If they do become aware of it, it is only through extensive working experience, combined with self-reflection. Thus in assisted negotiation, it may often be an impediment to achieving a resolution.

The appearance of overconfidence in one or more disputants can diminish the zone of agreement, and consequently reduce the possibility of the parties reaching an agreement. Overconfidence can also lead to the use of contentious tactics, which carries its own risks. On the other hand, the mentality can also breed persistence where it is sought to achieve difficult aspirations. As such, overconfidence can prove to be both a disadvantage and an advantage in dispute resolution.

Overcoming a simple divergence of interests requires cooperation, patience, skill and motivation. Where overconfidence is exhibited, a mediator must possess an awareness of the bias, and knowledge of how to surmount the trait if need be. ●

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Endnotes

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4. Rodney G Lim, 'Overconfidence in negotiation revisited' (1997) 8(1) *International Journal of Dispute Management* 52 at 53.

5. Above note 4.

6. Korobkin, above note 3 at 285.

7. Korobkin, above note 3 at 286.

8. Korobkin, above note 3 at 286.

9. Korobkin, above note 3 at 287.

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12. Korobkin, above note 3 at 293.

13. Korobkin, above note 3 at 288.

14. Julia Ann Gold, 'ADR through a cultural lens: how cultural values shape our disputing processes' (2005) *Journal of Dispute Resolution* 289 at 301.

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17. Korobkin, above note 3 at 288.

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26. Above note 24 at 401.

27. Above note 25 at 106.

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31. Above note 20.

32. Korobkin, above note 3 at 283.

33. Sandra Kaufman & Barbara Gray, 'Using retrospective and prospective frame elicitation to evaluate environmental disputes' <<http://urban.csuohio.edu/~sanda/papers/eval01.pdf>> accessed 26 November 2007 at 1.

34. Dean G Pruitt & Sung H Kim, *Social Conflict: Escalation, Stalemate, and Settlement* (3rd ed, 2004) at 38.

35. Above note 34 at 39.

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37. Above note 34 at 52.

38. Above note 4 at 56.

39. Pruitt's definition as stated by Lim, above note 4 at 55.

40. Lim, above note 11 at 56.

41. Lim, above note 11 at 56.

42. Above note 28 at 50.

43. Korobkin, above note 3 at 294.

44. Korobkin, above note 3 at 294.



45. Korobkin, above note 3 at 295.
 46. Korobkin, above note 3 at 295.
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Book announcement

Clearing the brush from the olive trees

Joshua Underhill

**Giuseppe De Palo and
 Mary B Trevor (Eds)**
***Arbitration and Mediation
 in the Southern
 Mediterranean Countries***
(Kluwer Law International, 2007)

Following on from the comprehensive *Global Trends in Mediation* comes the second instalment of the Global Trends in Dispute Resolution Series from Kluwer International. As described by series editor Nadja Alexander, the books offer readers a rich garden of ideas and insights into the contemporary theory and practice of dispute resolution in an increasingly globalising world.

Arbitration and Mediation in the Southern Mediterranean Countries was borne out of a 2005 European Commission funded project on the promotion of international commercial arbitration and other ADR techniques in MEDA countries. A European Union term, MEDA comprises the Southern Mediterranean states of Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, Turkey and the West Bank and Gaza Strip, and is a region of increasing economic (as well as political) importance for the EU.

Arbitration and Mediation in the Southern Mediterranean Countries has successfully cleared the 'brush from the grove of olive trees', in the hitherto unexplored Southern Mediterranean jurisdictions. Addressing all of the aforementioned MEDA states in turn, the text analyses contemporary practice and recent developments concerning the resolution of commercial disputes, arbitration, mediation and other ADR issues such as education and traditional indigenous settlement methods. The book boasts an impressive list of

contributors comprising attorneys, mediators, arbitrators and academics across a wide range of practice areas, all of whom practice within the MEDA states.

The region is painted as one of diversity in terms of sophistication and specialisation of legal systems, however the editors point out that regardless of this, all of the jurisdictions are largely unable to effectively handle the ever increasing numbers of commercial disputes. Furthermore, *Arbitration and Mediation in the Southern Mediterranean Countries* depicts how pan-regionally arbitration is at a far greater level of development than that of mediation. This is particularly true with respect to the presence of legislative frameworks. Existing traditional dispute resolution processes are also discussed, but the use of such methods are uniformly limited to certain sections of society and rarely applied within the commercial realm.

Despite the existence of general regional trends, each nation has its own idiosyncratic legal traditions, history and culture, and thus flavour of ADR, and a comprehensive overview of each is provided by the book. The region is made particularly accessible by the presence of a general overview of each locale, and most contributors offer their own suggestions for the promotion of ADR in their country, and prospects for the future. The Southern Mediterranean is a fascinating region, at a significant point in the development of its alternative dispute resolution systems and norms. ●

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