Kabuki Bracketing*

Kabuki is the highly stylized Japanese form of drama that imposes harsh limitations on the playwright by requiring adherence to specific conventions of staging and action, with the use of particular devices to reveal a theme of revelation or transformation. Like iambic pentameter, the classical unities and haiku, the imposition of rigid rules in kabuki theater paradoxically unleashes creativity by forcing the author to work within them to achieve something new or unique. The can occur when using a rigid structure of bracketing in mediation in which the parties define by their own steps the range in which they will negotiate. Generally, the process brings about a revelation that the parties, while separated in their positions, are not where they might have thought they were.

What Is Bracketing?

Bracketing is a distributive bargaining tool in which parties who are unable to come to a specific agreement on the final figure on which they will settle agree to negotiate within a specified range that is narrower than the gap between their current positions. This is not a collaborative negotiation tool; it is designed for use in "zero-sum game" negotiations. Bracketing is designed to overcome the common problem of competitive negotiators who are unwilling to be the first to make a significant concession or who believe that their negotiating partner will not reciprocate if a concession is made.

When The Third Party Facilitator Selects The Bracket

For this reason, the "bracket," or pairing of high and low numbers between which the parties will agree to negotiate, has historically been chosen by the third party facilitating the

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negotiation. The neutral third party, the thinking goes, will select a reasonable pair of numbers and challenge the parties to come to the edges of the defined range.

The problem with this approach is that the third party is effectively delivering an early evaluation of the dispute and imposing the threshold of the settlement unilaterally. Because the technique is employed in a situation where the negotiating parties are typically being very cagey, concealing their true assessment of a "reasonable" settlement figure, the third party will be almost invariably select a range that does not reflect the center of gravity[†] between the negotiating parties. One side will, as a result, begin to feel overly encouraged and the other will become resistant to a facilitator who seems to be saying that they will have to accept disappointment if there is to be a settlement. This is not the facilitator's ideal role and uses up good will the neutral will need later on in the process. So having the mediator select the narrowed range in which to negotiate is not the optimal approach.

A Typical Bracketing Situation

To the negotiating party, the experience of the situation leading to a need to use brackets is frustrating and discouraging. I have come into the negotiation with an idea that a reasonable settlement would be in the range of, as an example, $50,000 to $75,000. I want to negotiate towards that range—if that is the settlement, I will feel I made a good deal and perhaps be praised back at the office for a great outcome. A six-figure settlement is something I would reluctantly consider, and $125,000 is out of the question.

I am confronted by a negotiating partner whose demands are exceptionally unreasonable, who is starting with a $600,000 demand. While I expect an inflated demand at the beginning,

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[†] As used here, the "center of gravity" does *not* mean the midpoint between the two sides' "bottom lines." It means the point at which they will arrive if they bargain their way to a deal from their respective "bottom lines," which is sometimes the midpoint, but usually some other figure, as the parties' ability to adjust to changed expectations are generally not symmetrical.

this one is inflated beyond all reason, I infer that the other side hopes to end at $300,000 and almost certainly will insist on obtaining a settlement well above six figures. As a result, my offers will be modest. I will constantly be thinking that this negotiation is likely headed nowhere. This will make me very reluctant to make any meaningful concession, as I know it will become the implied starting point for future negotiation. So perhaps I start at $10,000 and send a strong message that the other side needs to get into a realistic range if there is going to be any chance of a settlement.

My negotiating partner is similarly discouraged. Expecting a difficult negotiation with a law-balling, aggressive negotiator, she started at $600,000 because she wants to have plenty of room in which to negotiate. It is still less than the potential best outcome as she sees it, so she figures it is a reasonable place to start. She expects to end around $200,000, hopes to get $300,000 and will not consider anything as low as $150,000. She does not believe, based on the $10,000 offer, that the defense has any significant authority, so she counters at $590,000 and says that we need to put real money on the table.

These positions will moderate during the day somewhat if the negotiation gets moving, both as a result of critical examination of issues and because a deal, while requiring an adjustment of expectations, is a real possibility. But at the start, I am highly skeptical that the other side will get below $200,000, much less to $100,000. My negotiating partner, on the other hand, may be thinking I will never get to $50,000, much less $100,000.

So we will be stuck before we start. A settlement conference judge might suggest a bracket to the parties of $100,000 and $300,000. I will surely balk at that, and my negotiating partner will be heartened. If I refuse outright, and my negotiating partner has agreed, then what will she think when the judge comes back with my refusal and wants to make a counter-

suggestion? She will feel that she is being asked to bid against herself. If the settlement judge instead suggests a pairing I might accept, like $50,000 and $125,000, my negotiating partner will be the one who balks and the shoe will be on the other foot.

The best that could be hoped for would be a bracket in which the two numbers are sufficiently within each range that the gap between the parties are not already outside their ranges. This requires some clairvoyance, but the judge will encounter resistance to the bracket even if it is, for instance, $75,000 and $225,000 or $50,000 and $250,000. I will resist because I will read the division of numbers as suggesting a settlement above my range, while my negotiating partner will see it as suggesting something outside her range. I'll be reluctant to agree to any bracket that has something over $200,000 as the high end simply because it implies an endorsement of the other side being at such an unreasonable place. Both sides may feel that we have to give up too much of our bargaining room to agree to the bracket and thus refuse to commit to it—or we might confront our choices and make real progress.

One problem is that, with both sides posturing aggressively as if the settlement should be near our starting point, how likely is the judge to find the bracket that will get everyone started? Having the third party suggest a bracket means that just when the mediator may be called upon to do reality-testing and encourage reconsideration of a party's view of the dispute, the third party has effectively lost neutrality by suggesting figures that the party views as hostile.

Exchanging Brackets

Another approach to bracketing is for parties to swap brackets, each suggesting a range in which the settlement discussion should be taking place. In our example, we would likely convey excessive aggressiveness in our proposed brackets. I might suggest a bracket between $30,000 and $95,000, and my negotiating partner might suggest a bracket between $100,000 and

$350,000. When parties initiate the bracketing process, they tend try to accomplish too much movement (by the other side) too fast. Now what should we do—propose new brackets. Each will feel as if we are negotiating against ourselves. What typically happens is that in recognition of how far apart we are, I'll decide that my first bracket has been trying to bring us too close, and so I might suggest $15,000 and $105,000, for instance. Note that my midpoint has moved from $62,500 to $60,000. This is not progress.

Moreover, each of us will draw the wrong conclusions from the proposals we have made. My negotiating partner will conclude that I will never go above $100,000 and I will conclude that she will never go below $200,000. We will each conclude that we are "just too far apart" to get a settlement done and give up on it. The natural reaction is for people to give up rather than get more engaged.

The Rules and Conventions of Kabuki Bracketing

What I refer to as Kabuki Bracketing is a form of bargaining game. The process begins with one party, usually but not always the defendant, making a conditional offer that creates a bracket, stating, for instance, "We will offer $X if your counteroffer is $Y." To this there are four, and only four, permissible responses:

1. "Yes"—in which case, the defendant has offered X, the plaintiff has responded with a counteroffer of Y, and the ball is back in the defendant's court.

2. "No"—as in, I do not wish to play this game. In other words, there will be no bracketing game played in this mediation.

3. Accept the conditional offer of X, but only if the response is something higher than Y, which must be proposed by the plaintiff in the response. In other words, "If you are only going to offer X, I am not going to counter with Y, but rather with Z (something higher than Y)

4. Reject the conditional offer of X, but offer to make the desired counteroffer at Y if the offer is something higher than X, which must be proposed by the plaintiff. In other words, "If you want me to come to Y, okay, but you will have t6o come to Z (something higher than X) to get me to do it."

You do not have to worry about anyone selecting response no. 1. You would not be doing this exercise if people were playing that nicely together. The second one must be accepted as a decision a party is permitted to make, and often, people find the approach sufficiently complicated and different that they are not comfortable doing so. Others will jump at the chance to play this game because they are fascinated by unraveling the complexities of it.

This does, however, provide an explanation for another rule of the game. When a party makes a conditional offer, ask them also to make an *unconditional* offer, one that will require the plaintiff to respond with a new number in the event that the plaintiff does not want to play the game. The span between the two offers can be an important carrot to induce people to decide to play the same. If my X is considerably higher than my counteroffer, then the plaintiff may see the conditional offer as the best way to go.

It is emphatically *not* an option for the plaintiff to change *both* numbers. Doing so would ruin the game and prevent it from working its magic, although I must confess to have bent on this in one mediation and had things come out okay just the same. But the rule should be clear from the word go that the responding party cannot change both the top and bottom numbers.

Once the plaintiff has selected the number over which to bargain, the defendant's response to the pairing may not change the number the plaintiff did not try to change. The bargaining is thus done on just one side of the bracket, the side that the plaintiff has chosen to alter. The usual rules of bargaining are in force. No one is required to move at all, but if people do not move, we do not get anywhere. You can make a best-and-final proposal if you like, and you may get a counter-offer to test your mettle.

The parties go back and forth in an effort to reach a pair of numbers on which the can agree, and when they do, an official offer and counteroffer are declared. At this point, the parties

usually go back to regular, unconditional offers and counters. But I have had people go through several rounds of Kabuki bracketing to reach a settlement.

Why Kabuki Bracketing Works

There are a number of reasons why this process works, and the most important one is that the bracket is determined by the actual give-and-take between the parties, which is the most reliable indicator of where the "correct" range is in which they should negotiate. The mediator can participate in the consideration of their choices and should offer insights about how this process works so that they do not make an unwitting error or misunderstand the rules. But the authority for every number comes from the parties themselves.

Here are some other things that happen when Kabuki Bracketing is used:

- ✓ The ranges in which the parties have to negotiate are reduced, usually considerably, from the gap in actual settlement numbers. This is because we will only be negotiating one side of the pair of numbers. It is less daunting to get to an agreement where the numbers are closer to one another.
- ✓ Another benefit of this approach is that the numbers are not the final settlement numbers, but only a stopping-off point along the way. There are times when it is wise to encourage parties to take the chance of going beyond their comfort zone with the assurance that a movement to one point does not imply a movement the rest of the way. The point where people begin to get outside their comfort zone is the point at which they must discuss making compromises and changing their expectations, which can mean that they are drawn into the bargaining game and may discard the emotional baggage they brought to the table with them.

- ✓ It is perfectly permissible, and not uncommon, to have a bracket in which one side's next move is a small one to a best-and-final offer, on the theory that the numbers have been brought as close as possible, thereby ensuring the greatest chance that the best-and-final offer that follows will receive fair consideration.
- ✓ The bracket offers themselves communicate a great deal about each party's expectations and where they may hope the bargaining will be when an agreement is reached. That information may make an agreement seem more within reach to both parties, or at least clarify how wide the gulf that separates them might really be. This is something that cannot happen with normal bargaining, where only one number is communicated.
- ✓ Since the offers are conditional and the bracket is not reached until both sides have agreed, there is less of a concern about the possibility that an offer becomes a floor or ceiling (depending on which side you are on) for the future.

Explaining Kabuki Bracketing To Parties & Attorneys

There is even more, as we shall see, but there is a more urgent problem to address first: how to explain this somewhat complicated process. Experience teaches that people do not quickly grasp the concept and structure. I suggest first explaining the rules just as is done above, and then illustrating them with a neutral example.

Beware the temptation to illustrate with what would be the most effective illustration—using the numbers presently in play or under consideration. You cannot possibly do this without putting ideas in people's minds, and they will only pick up on the ideas that are harmful to your objective of bringing them closer together. Indeed, if you try to make an illustration, perhaps with the idea of planting what would be a constructive move in people's heads, they will chime

in, changing the numbers you use, so powerful is the suggestion that you are telling them how to make or respond to a Kabuki Bracketing conditional offer.

The best illustration to use is a case where one side is at $10,000 and the other side is at $100,000. Suggest that the defendant might make a conditional offer to go to $25,000 if the counteroffer is $60,000. Then walk through the four possible responses, using the second to explain why you need to take some specific offer along with the conditional offer. Then you can illustrate by walking through how the plaintiff might respond:

> Suppose the plaintiff wants to bring up the lower number. He might say that to get me to respond at $60,000, you would need to be at $45,000. Okay, now we are negotiating over what the offer will be—whether it is $25,000, $45,000 or something in between. All the normal rules of negotiating apply. You just have to understand when you make your conditional offer, you are going to get a response that might try to move that conditional offer up, and that is what you will be bargaining over. But there can be no bargaining over what the plaintiff's counteroffer will be, in the event you agree on a number—it will be $60,000, no matter what. We are now working from that premise and no one can decide to start bargaining over that side of the equation.
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> On the other hand, the plaintiff might say that if you are only offering $25,000, he is only moving to $90,000. This means that the offer, should you end up coming to an agreement, will be $25,000, come hell or high water. The counteroffer is the only thing in play, and the question is whether it will be $60,000 or $90,000 or something in between. That's what you will be negotiating over until you come to an agreement on what the counteroffer will be.
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> Notice that you have gone from bargaining between $10,000 and $100,000—a $90,000 spread—to something in the $20,000 or $30,000 range. This is just a lot less scary, there is less at stake and no one has to make concessions without getting a concession in return.

There are some additional points worth noting, and you can share them with the negotiators or not. One is that the thing that the case moves closer to ultimate resolution faster if the plaintiff chooses the lower number to negotiate over. If each sub-bargaining process ends up in the middle (which rarely actually happens) the parties will be at $35,000 and $60,000 where the plaintiff chooses to negotiate over the conditional offer. If the plaintiff chooses to negotiate

over the counteroffer, the parties will end up at $25,000 and $75,000. So picking the conditional offer number effectively brings the parties twice as close at the end.

There is a good reason for the plaintiff to choose that number as well. Each move in the conditional offer is additional cash on the table, which is something that advances the ball in a meaningful way for the plaintiff side. The downside is that the plaintiff side has to be willing to swallow the ceiling number, which will usually be lower than they are comfortable with. Because of this, I counsel defendants making conditional offers not to get too ambitious, to try to just shave off some excess, because the plaintiff will typically give up a large demand only in small chunks.

It is not a problem if the plaintiff decides to move up the counteroffer number, however, as this is revealing in itself. It tells the defendant unmistakably that their high end is below where the plaintiff wants to end up, or too close to comfort. It is important to reassure the defendant that the plaintiff's reluctance at that point to agree to the counteroffer does not mean that the case will ultimately wind up below that point—the evaluation of the case and the allure of immediate payout can certainly make that happen—it just means that they are not there yet. Yes, they might never get there, but no, it's not a certainty that they will not.

One other phenomenon is worth sharing with the parties as well. Because Kabuki Bracketing is focused on just one side of the bargain, one side is going to get the feeling that they are "bidding against themselves." They need to be warned that this feeling will come over them. You tell the defendant that this is the price of getting that ceiling on the plaintiff's ambitions in place, and that they need to remember that when it is over, it is the defendant's turn again. You warn the plaintiff about the same thing, using it as one more reason to work on the conditional offer rather than the counteroffer, and let them know that they are being brought down but have

avoided that ceiling on their recovery and still got what is likely to be the most substantial offer of the day to that point.

The more sophisticated and aggressive the lawyers are as negotiators, the more likely it is that they will have a good idea of what is required to reach an agreement and that this process will propel you quickly into the closing stage. People can always give up on the process, too, and lacking a bracket on which they agree, start back on the horse-trading approach. This may happen when one side has miscalculated what might happen with this complicated and rigid structure. If so, do not despair, because so much about ultimate numbers will have been communicated during the process that the road to settlement will now be well-paved.