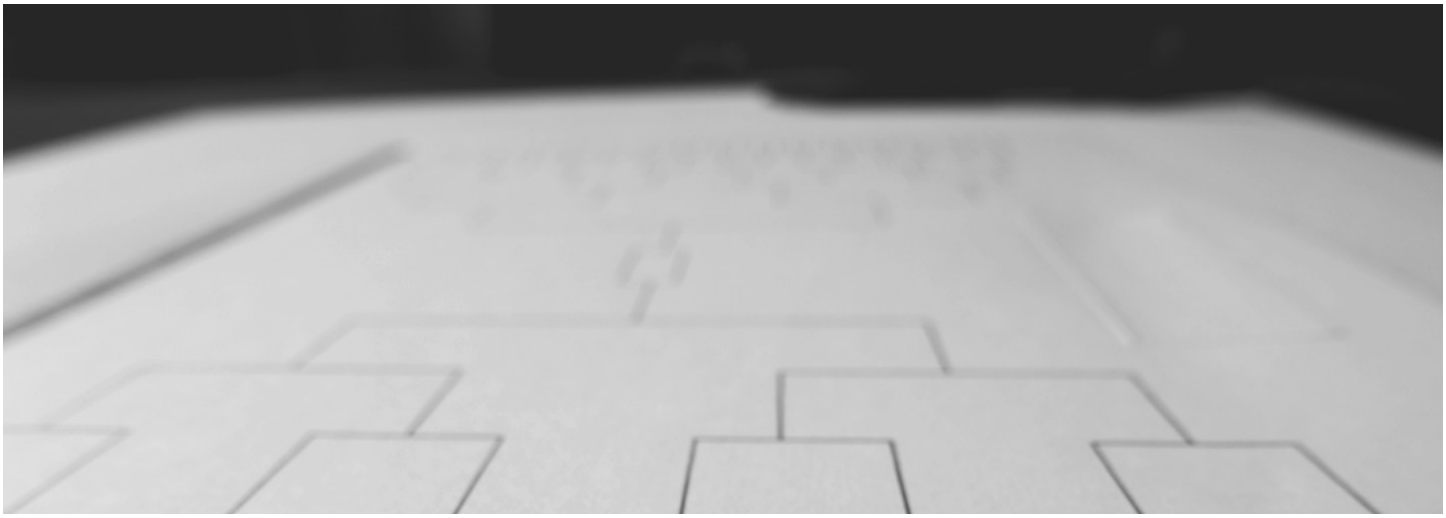
Bracketing in Negotiations and Mediations

By Theo Cheng



Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

Watching the Paris Olympic Games and the Grand Slam tennis tournaments this summer made me think about brackets. Sure, I first started thinking about those diagrams showing which team or player is competing against another team or player in the next round, incrementally working its way down to the Sweet Sixteen, Quarterfinals, Semi-Finals, and then the Finals. Then, as a mediator and negotiator, I quickly turned my attention toward the use of brackets as a way to get parties to make progress in a negotiation and avoid or break an impasse.

Starting with distinguishing between a "bracket" and "bracketing," a bracket is simply the range between the parties' respective positions at any given point in the negotiation. For example, in an employment discrimination suit, if the former employee has demanded $500,000, to which the employer has responded by offering $10,000, then the range $10,000 to $500,000 is known as the bracket between the two parties. One cardinal rule or convention in a traditional negotiation process is that, absent some material change in circumstances, the parties' subsequent proposals should both be within the two endpoints of that bracket. That is, the employee should demand something less than $500,000 (but, of course, greater than $10,000), and the employer should offer something more than $10,000 (but, of course, less than $500,000).

So, what constitutes a material change in circumstances? For example, if some time has passed since the last demand was made (because, say, either party took some time to develop its next proposal), the employee may have incurred additional legal fees arising from their attorney having to review documents produced by the employer, or perhaps the employee had to oppose a summary judgment motion. Or maybe, additional discovery revealed a factual predicate for a previously unasserted claim of failure to pay overtime wages. In those situations, the employee would potentially have a colorable basis to propose a demand that is greater than the $500,000 endpoint set by their prior demand, thereby falling outside of the prior bracket of $10,000 to $500,000. The employer could also experience a materially changed circumstance, such as an additional internal investigation revealing documentation (subsequently produced to the employee) supporting a previously unasserted affirmative defense. Again, in that situation, the employer would potentially have a colorable basis to propose an offer that is less than the $10,000 endpoint set by its prior offer. However, without some clearly articulable material change in circumstances, making a proposal outside of the prior bracket would, naturally, be viewed by the other party as failing to make progress and a step backwards in the negotiation process.

A bracket sounds almost self-evident in a negotiation process. By contrast, bracketing is not. Bracketing is a specific technique designed to both help a party move from its current position and also convey a message (or signal) to the other party about where the first party believes a likely resolution lies. In essence, instead of proposing a firm demand or offer, the technique entails a party proposing a bracket to the other

party. Although parties can utilize bracketing by themselves in a direct, party-to-party negotiation, it almost always works better when there is an intermediary like a mediator involved who can assist a party in both formulating the proposal and transmitting it to the other party.

For example, assume that the parties in the above employment dispute have exchanged monetary proposals to the point that they are now at $25,000 (employer) and $435,000 (employee), namely, a bracket of $25,000 to $435,000. As evidenced by how they arrived at those endpoints, the parties have only reluctantly moved to those positions and seem unable to make more progress to close this gap. Instead of trying to tease out another monetary proposal from either party, a mediator might ask one party where it sees a reasonable negotiating range that spans a smaller gap. The employee might respond with something like "$125,000 to $355,000." Sometimes, a party will ask the mediator for assistance in formulating the bracket, in which case a mediator might suggest a bracket for the party's consideration (also known as a "mediator's bracket"). In either situation, the mediator might then suggest to the employee that they consider proposing a bracket to the employer framed in this fashion: "If the employer will come up to $125,000, I will come down to $355,000." Proposing a possible bracket to the employer repositions the negotiation to a range that is smaller (thereby advancing progress in the negotiation process), while also still being realistic from the employee's perspective (thereby being consistent with their interests). It also reframes the discussion away from the possibility of the parties having reached an impasse, thereby affording the parties additional hope for a possible resolution.

Notably, proposing a bracket using the foregoing language is tantamount to a conditional demand. That is, in proposing this bracket, the employee is not conveying that they have already moved from their position of $435,000 down to $355,00; rather, they are conveying that they would move down to $355,000 only if the employer moves up to $125,000. Thus, they have not, in merely proposing the bracket, actually changed positions at all. At the same time, however, and perhaps more importantly, the employees have also conveyed to the employer that they believe a reasonable negotiating range is one that spans the endpoints of that bracket, namely, $125,000 to $355,000.

More specifically, the employee may also be conveying that they would like to resolve this matter in or around the midpoint of that range (i.e., $240,000). This is where a mediator's assistance can be helpful. A mediator can underscore that point, either explicitly or by implication, thereby messaging or signaling the employee's desired outcome. The employer can then consider that additional information in not only deciding what its next move will be, but also whether the parties could (eventually) find themselves in the same negotiating range (what I like to refer to as determining whether the parties are negotiating within the same sandbox). Sometimes, however, the bracket is accompanied by an explicit instruction from the mediator not to look at or infer anything from the midpoint because that is not the message intended to be conveyed by the proposing party. Either way, the proposed bracket provides some level of information exchange in the context of a negotiation process that the receiving party will find helpful, because it changes the nature of the discussion away from a potential stalemate.

What are the employer's possible responses to this proposed bracket? The most obvious one is that the employer believes that the proposed range is, in fact, reasonable and accepts the bracket. The employer's acceptance of the employee's conditional offer then changes the endpoints of the negotiation to the new bracket, namely, $125,000 to $355,000, and the employee would then respond with their next move. Although such an outcome would represent significant progress in the negotiation process, in the nearly 15 years I have been a practicing mediator, I have yet to encounter a situation where the other party simply accepts the proposing party's bracket.

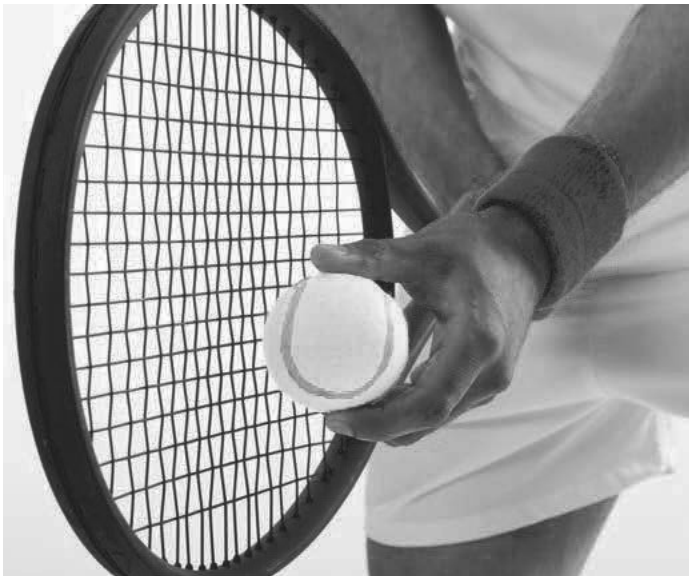
More often than not, the employer will not perceive the proposed bracket as being aligned with its interests. Specifically, it will likely view the endpoints as not reflecting sufficient movement downwards by the employee and too much movement upwards by the company. One possible response then is for the employer to propose its own bracket – a counter-bracket – but created in such a manner (perhaps with the help of the mediator) so as to better reflect a reasonable negotiating range from its perspective, but also one that spans a smaller gap than the original bracket of $25,000 to $435,000. For example, the employer might propose a bracket to the employee like this: "If they will come down to $225,000, then we will come up to $55,000." As with the employee's bracket, proposing this possible bracket to the employee repositions the negotiation to a range that is smaller (thereby advancing progress in the negotiation process), while also still realistic from the employer's perspective (thereby being consistent with its interests). It also continues the dialogue about a possible resolution rather than fixating on a potential impasse.

As with the employee's proposed bracket, proposing a bracket using the foregoing language is tantamount to a conditional offer. That is, in proposing this bracket, the employer is not conveying that it has already moved from its position of $25,000 up to $55,000; rather, it is conveying that it would move up to $55,000 only if the employee moves down to $225,000. Thus, the employer has not, in merely proposing the bracket, actually changed positions at all. Yet at the same time, the employer has also conveyed to the employee that

it believes a reasonable negotiating range is one that spans the endpoints of that bracket, namely, $55,000 to $225,000. The employer is also conveying that it would like to resolve this matter in or around the midpoint of that range (*i.e.*, $140,000). Again, the mediator can be helpful by underscoring that point, and the employee can consider that additional information in not only deciding what their next move will be, but also whether the parties could (eventually) find themselves in the same sandbox.

Alternatively, instead of proposing a counter-bracket, the employer could simply propose a new monetary offer greater than $25,000 that takes into consideration (to whatever degree the employer believes is helpful) the information that the employee has conveyed through their bracket, with the hope that this new offer will spur the employee to continue negotiating towards a resolution. The information conveyed by the employee through their bracket could also cause the employer to conclude that a resolution is not likely to be achievable (at least today) and, thus, it would make sense to cease negotiating, at least for now. The mere exchanging of one or more brackets, however, would have advanced the negotiation process by allowing for information exchange, thereby providing insight into the parties' negotiating postures.

Assuming that the employer does, in fact, convey the $55,000 to $225,000 bracket, the employee then has a number of options in response. First, the brackets themselves – (1) $125,000 to $355,000 (employee) and (2) $55,000 to $225,000 (employer) – actually overlap. That is, the bottom portion of the employee's bracket overlaps with the top portion of the employer's bracket. Thus, one possible outcome from having exchanged bracket is for the parties (perhaps with the help of the mediator) to realize that an acceptable negotiating range could comprise that overlap, namely, the range $125,000 to $225,000. If the parties accept this range, they will have moved the endpoints of their negotiations to these new endpoints, thereby representing significant progress. Moreover, the midpoint of this range is $175,000, which suggests that a resolution might be acceptable in or around that number.



Another way to look at the two brackets is to consider the "midpoint of midpoints." That is, as discussed above, the midpoint of the employee's bracket is $240,000 and the midpoint of the employer's bracket is $140,000. These midpoints could also serve as the new endpoints of the parties' negotiations, thereby representing significant progress. Moreover, the midpoint of this range is $190,000, which suggests that a resolution might be acceptable in or around that number.

As the examples above illustrate, the technique of bracketing works best (and easiest) for those portions of a negotiation that are distributive in nature. That is, if the dispute is only (or principally) about money, then bracketing can be a useful technique for closing a large gap. However, if there are portions or terms of a complicated resolution that are also distributive in nature – for example, agreeing upon the proper royalty rate for a copyright license – bracketing can be used to reach an agreement on just that term, leaving the remaining terms and conditions to be negotiated separately.

So, the next time you find yourself at an actual or potential impasse in a negotiation or mediation, try your hand at bracketing. You may find that it helps to change the parties' perspectives by reframing the discussions in a different direction altogether.

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and employment disputes. He is a AAA Master Mediator, a Fellow of the College of Commercial Arbitrators, a member of the National Academy of Distinguished Neutrals, and a former chair of the New York State Bar Association Dispute Resolution Section. Mr. Cheng is also an adjunct professor at New York Law School where he teaches two ADR-related courses. He has nearly 25 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com and he can be reached at theo@theocheng.com.