

* V. Michelle Obradovic, Esq.

Some think rock; paper; scissors is no more than a child's game of chance.

Sometimes it is not.

*Paper covers rock.
Rock smashes scissors.
Scissors cut paper.*
じゃんけん

Last year, the 74 year old leader of a Japanese company had to decide how a valuable collection of classic Impressionist art should be sold. Christie's and Sotheby's had been locked for months in bitter competition for the job.

After suggesting that the rivals should come to an understanding between themselves - without result - representatives from both auction houses were told on a Thursday that they should prepare to choose a weapon for 'janken' on the following Monday in Tokyo.

- Forbes called it “bizarre” and “weird”.
- The New York Times called it an “ancient method of decision-making.”
- The Wall Street Journal called it the result of “fiendish” competition over a dwindling supply of art.

Upon arrival, the two representatives of the auction houses were shown to a conference room with a long table and told to sit facing one another. Instead of using actual weapons or even the traditional hand signals which substitute for them, the representatives were asked to write the Japanese character for rock or paper or scissors on a card.

Christie's chose scissors. Sotheby's chose paper. In doing so, Christie's won the right to auction the collection for roughly a 12% commission; an auction that in May, raised \$17.8m.

The leader of the Japanese company that owned the art had felt that both companies were equal, and not wishing that either representative should be put at odds with their bosses, and thus bear a grudge against him, janken would mean that the loser had been ‘unlucky’ as opposed to ‘unworthy’.

So, was Sotheby's unlucky, or did it somehow fail to think strategically?

Strategic thinking is an inner dialogue about possibility. The more attention you give to thinking strategically and observing your counterpart carefully, the more informed your strategic and tactical choices will be, whether it be in matters of negotiation or battle.

Janken, on the surface though, appears to be a matter of chance. After all, each of the three weapons is equal in that each defeats one and loses to one. Is there room for strategic thinking here?

Consider for a moment what each auction house did in preparation for the match:

The Sotheby's representative from Los Angeles said of his preparations, "There was some discussion, but this is a game of chance, so we didn't really give it that much thought. We had no strategy in mind."

The Christie's representative spent her weekend researching the psychology of the game and talking to friends. One of those friends had 11-year old twin girls who were very familiar with the game. "Since they [Sotheby's] were beginners, scissors was definitely the safest," the girls said, because "Rock is way too obvious, and scissors beats paper." They further explained that beginners think rock 'feels' strong, so they expect you to go for rock, so they choose paper to beat you. Sure enough, the beginners went for paper.

So even here, just as in any situation where people must make decisions with imperfect information and have subjective preferences and tendencies, what might otherwise be equally probable outcomes, become predictable depending upon how well you know your counterpart.

Given Christie's and Sotheby's longstanding bitter rivalry and mutual preference for all or nothing results, it would have been unlikely that the dynamic give and take scenario of a negotiation would have produced a mutually acceptable solution, particularly without the assistance of a 3rd party resolutionist.

Janken, on the other hand, did produce a solution through a static process requiring simultaneous decisions from the parties. Janken is widely accepted in Asia as a method of allocating scarce resources, and can resolve anything from who gets the last finger sandwich to who gets fired. Culturally, the misfortune is easier to accept if no bad motive can be attributed to a necessary arbitrary decision, thus creating harmony.

This idea of 'simultaneous moves' should be familiar to negotiators as a technique that mediators use to prevent or break impasse in difficult mediations. For example:

Imagine a scenario where the plaintiff and the defense rooms are both frustrated by the lack of 'good faith' offers coming from the other side and both agree that everyone is posturing and that neither side is where they should be to 'actually begin negotiating'. Once the parties have put themselves in this posture, impasse is imminent if the mediator does not take some action to manage the process.

Accordingly, the mediator may ask each room to consider and write down what would be their hypothetical 'reasonable' response, if the other side were to give them a 'reasonable' offer. Remember, each room is assigning both the value of the reasonable offer and the value of the reasonable response, without interacting further with the other side. It is a 'what if' kind of exercise.

Simultaneous moves are valuable because they allow for the possibility of simultaneous compromise in a way that can not happen with continued back and forth exchanges. While it is unlikely that the numbers produced will be the same or even very close, they should more accurately reflect how each side has objectively valued the case for settlement and should open the door for a conversation about the case, rather than continued posturing.

Usually, the mediator will ask that the numbers formulated in each room be confidentially shared with the mediator only. If agreeable to everyone, the mediator would privately look at the numbers and then give some indication back to both rooms as to whether the mediator thinks it would be fruitful to continue working toward resolution, based on what has been learned from the exercise.

If the parties agree to continue in this manner, the mediator may then encourage the parties to share their 'reasonable' responses with each other outright, or may orchestrate a series of conditional moves – the if you were at “x” we would be at “y” scenario – to reveal the true bargaining zone. Once that point is reached, a more traditional dynamic back and forth negotiation would resume and the case would typically resolve.

Having said that, I ask you, is rock; paper; scissors a game of chance or, is it a game of strategy? Well, of course the answer is both (depending on what the participants think it is).

* V. Michelle Obradovic, Esq. is the owner of Wise Resolution, LLC. She is a mediator and is the Director of the Jefferson County Alabama District Court Mediation Project and is an Associate Adjunct Professor at Samford University, Cumberland School of Law.