I. Introduction

The manner in which arbitrators arrive at awards is sometimes misunderstood. There is a school of thought or concern that arbitrators may split the award—“split the baby”—between the disputants in what would essentially be a compromise result. Literature expressing this viewpoint is most likely to derive from the area of labour and management disputes, (1) although the belief has spread and may arise in a variety of arbitration settings. Several authors have asserted the occurrence of a “split the baby” result, (2) although the scant empirical record illustrates contrary results. (3)

To date, the “split the baby” theory persists in some circles. This may be partially explained by the nature of some written awards, which, in certain jurisdictions, are frequently brief renditions consisting of the specifics of the award, without further explanation. There is also literature which calls into question the ability of some arbitrators to make written awards in terms the parties understand, (4) although other studies focusing on the arbitrators themselves demonstrate arbitral confidence in their own ability to adequately explain their decision-making. (5) The idea has also been proffered, that rather than using a “split the baby” norm, arbitrators might use an anchoring norm when deciding disputes. (6) This is a theory in which arbitrators focus on a reference point to begin their thinking and only make minor adjustments from their starting point as the means to arrive at a final decision. (7) The concern is that if arbitrators use the anchoring norm, the results will be biased by the initial values, or reference points, that serve as an anchor. (8)

II. Methods

Data for this study was taken from international business arbitration cases that were awarded through the American Arbitration Association (AAA) during the years 1995-2000. The cases included in this study were those where the parties had completed a questionnaire exploring their perceptions of the arbitration process. Of the 85 questionnaires completed, analysis of claim amounts and award amounts was possible in 54 cases. The remaining 31 cases were not included because of the incompleteness of the records of these cases. In order to analyse whether arbitrators split the award, the percentage of the claim amount that was awarded to claimants was derived by the following formula: claim amount minus award amount, divided by the claim amount. Statistical analyses were done using STATVIEW 5.0.1.

III. Results and Discussion

We found that the mean percentage of claim amounts awarded was 50.53% and the median percentage was 46.66% (Figure 1A). Theoretically, the similar values of the mean and median imply that the data might be normally distributed. However, careful examination of the frequency distribution of cases revealed a bimodal distribution (Figure 1B), in which 17 of the 54 claimants (31%) were awarded 0% of their claim amount while 19 of the 54 claimants (35%) were awarded 100% of their claim amount. In this sample, the arbitrators rarely arrived at an award amount that could be interpreted as “splitting the baby”. In fact, the majority of awards resulted in outright “wins” or “losses” (66% of the time). Of the remaining 34% of the cases, the results were widely distributed, with awards from 10% to 90% of the amount claimed. This would imply that arbitrators, as a rule, make decisive awards and do not “split the baby”.

A separate study had similar results with evidence that split awards do not occur in arbitrations between disputants involved in
commercial cases going to an award. \(^{(9)}\) Of 4,479 cases analysed in that study, approximately 42% of those cases were awarded 0-20% of their original claim amount and 30% were awarded 81-100% of their original claim amount. \(^{(10)}\) If the facts show a very low likelihood of a split result, then why the persistent myth about arbitrators “splitting the baby”? We think this is the convergence of several factors.

First and foremost is the influence of the party-appointed system in international commercial arbitrations. Historically, most cases have involved selection of party-appointed arbitrators who served a partial advocacy role for the party that appointed them. In other instances, where the precise predilection of the arbitrator was less clear, there was often the concern or fear that each party-appointed arbitrator might have a bias toward their appointing party. From this initial vantage point, it is a small step to the conclusion that the only way in which a panel of one neutral and two party-appointed arbitrators could reach a decision is through compromise or “splitting the baby.” It matters little that there is scant empirical evidence of panels using this decision-making methodology; it is enough that there is a widespread concern of the likelihood of this pattern to keep the “split the baby” perception in circulation.

Next is the effect of U.S. domestic arbitration practice on the field. The sheer volume and prominence of labour and commercial arbitration in the U.S. has had an impact beyond the borders of the United States. For the split the baby scenario, this is most prevalent in the area of labour relations. Labour and management practitioners engage in two types of dispute resolution processes: grievance and contract formation. Grievances are disputes under the
positions in the hope of eventually slanting the arbitration award in
offs of good faith bargaining


negotiated settlement, they will have an incentive to avoid the trade-
anticipates that it will get more from the arbitrator than from a
positions when arbitrating, which results in a "chilling effect" on
the participants. Some authors argue that belief in the arbitral
potential impact of split awards goes beyond issues of satisfaction
making of arbitrators. The literature in the field points out that the
term, low-level, non-factual, persistent myth about the decision-
Putting all these factors together builds an explanation for a long-
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else apportioned the award amounts according to cause,
claim or counterclaim and driving the arbitrator toward a more
problems that arose under the contract, leading to a mitigation of the


Last, the case that does appear to be evenly split between the
parties may add to the mythology of award making. As can be seen
from this sample, 17% of the award amounts were within 20% of the
midpoint between the claimed amount and zero. Are these split
awards? The question may be answered either through a direct
numerical reading (yes, they are evenly split between award
amounts argued by the parties) or by delving into the content of the
case and the reasoning process of the arbitrator. While it is possible
that a very small number of awards represent thoughtless splits
between positions, we take note of the fact that many of the
disputes presented to arbitrators are quite difficult matters to
resolve. They are difficult because both parties contributed to the
problems that arose under the contract, leading to a mitigation of the
claim or counterclaim and driving the arbitrator toward a more
nominally split award. The important factor under this scenario would
be whether the arbitrator made a thoughtless split in the award or
else apportioned the award amounts according to cause,
responsibility and blame. For those few cases that fall into this
middle range, either reasoning could provide a possible explanation.

Putting all these factors together builds an explanation for a long-
term, low-level, non-factual, persistent myth about the decision-
making of arbitrators. The literature in the field points out that the
potential impact of split awards goes beyond issues of satisfaction
of the participants. Some authors argue that belief in the arbitral
tendency to split the awards induces the parties to take extreme
positions when arbitrating, which results in a "chilling effect" on
settlement negotiations. The argument is that if either party
anticipates that it will get more from the arbitrator than from a
negotiated settlement, they will have an incentive to avoid the trade-
offs of good faith bargaining and will stick to extreme
positions in the hope of eventually slanting the arbitration award in
their favour. Further, if disputants believe that the arbitrator may blindly split the award, then they may feel less responsible for the settlement process, having a decreased incentive to bargain.\(^{(13)}\)

From this study, we can say that there seems to be little factual support for the idea that arbitrators thoughtlessly split award amounts. It also suggests that there is work to be done on the decision-making processes utilized by arbitrators. This is a difficult topic to explore objectively and speculation is as likely to create new mythology as it is to be enlightening. Nevertheless, the results from this study show emphatically that arbitrators do not engage in the practice of “splitting the baby.” \(^{(13)}\)

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7. See supra note 5.

8. See supra note 5.


11. Id.
