The Perception: Arbitrators Split the Award

Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel states that although data clearly show that splitting the difference is not standard practice in actual arbitration, the perception that awards are split persists.

This study, issued in 2011 by The RAND Institute for Civil Justice, a unit of the RAND Corporation—a not-for-profit organization studying policy and decision-making—reports on the results of a research study undertaken to shed light on corporate counsel’s views on arbitration.

The small sample size of 121 corporate counsel does not offer statistically significant data, but it is of interest qualitatively: more than 70% believe that arbitrators are less likely than a judge or a jury to decide strongly in favor of one side or the other.

However, what is significant is this:

- The 14% of responders who felt that arbitrators did not split the difference (another 14% were neutral and 1% had no opinion) were the ones who used arbitration clauses most frequently, and

More than 93% of AAA/ICDR awards are in favor of one party or the other. (See Table 1.) Whether it’s the Rules of Arbitration or the Rules of Civil Procedure, arbitrators, judge, or jury all are charged with rendering a distinct decision. And as such, AAA arbitrators do not “split the baby”—compromise in the amount of the award, thereby denying complete relief to either side.

The Biblical story of King Solomon’s decision to divide a baby and give half to each of two women claiming to be the mother is well known. Some believe that arbitrators simply split the monetary award between two parties and don’t make anyone whole. However, even King Solomon did not actually split the baby—but his tactic did tease out the truth! The skilled arbitrators of the AAA aim to uncover and weigh the facts of the dispute and make awards accordingly. The truth is that arbitral does not mean arbitrary.

In order to counteract this erroneous thinking, it is important to understand that this belief endures and why—the concept even pervades our popular culture (see box).

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Does Newman Split the Bicycle?

This “Solomon-like” decision process has found its way into our media culture, as epitomized in episodes of Seinfeld (in which Elaine advocates splitting a disputed bicycle—Newman, the “arbitrator,” ultimately awards it to Kramer, deemed the “true owner,” since he was willing to forgo ownership to keep the bike intact) and Special Victims Unit (in which a custody battle ensues for a child born from a stolen frozen embryo, implanted by an unscrupulous fertility doctor into the uterus of a second woman. After witnessing the distress of the child, now five, who has known only the birth mother, the biological mother drops her claim.)

So, even popular culture supports the conclusion that arbitration awards are not compromises to accommodate both parties to a claim but in fact produce clear winners.
• Approximately 25% of the survey responders had never even attended an arbitration session, much less had any experience with receiving awards from arbitration.

It would appear that “splitting the baby” in arbitration awards is a myth that is dispelled by actual experience with arbitration.

A Dose of Reality: Responding to Flawed Beliefs

The RAND study reported a range of misperceptions about arbitrators’ decisions. A selection appears below, with a counter response to each.

The Perception: “…Arbitrators who are ‘industry-experts,’ i.e., not lawyers or judges…were viewed as not being accustomed to making ‘hard decisions’ the way judges are.”

The Reality: 93% of the AAA Commercial Panel of Arbitrators is made up of attorneys and former judges; the specialty AAA Judicial Panel is comprised of over 280 judges in 42 states plus the District of Columbia.

The Perception: “…Arbitrators are interested in repeat business and do not want to upset either party.”

The Reality: Since parties in arbitration generally are not interested in compromising on the monetary award of their claim, offering middle-of-the-road awards may well damage arbitrators’ reputations and therefore their future business. An experienced arbitrator asserts “an arbitrator who inappropriately splits the baby thinking he/she is currying favor with a party often ends up alienating both parties, exactly the opposite result that such baby-splitting is supposedly trying to achieve.”[1]

A study analyzing the judicial behavior of arbitrators repeatedly appointed to arbitrate investment cases concludes that “repeat arbitrators display no biases and no tendencies to ‘split the difference’” and that furthermore “arbitrators’ incentive to maintain their reputations as experienced and unbiased experts may lead them to grant an award uninfluenced by the purported need to satisfy both parties or either one of them.”[2]

All AAA arbitrators must adhere to the high ethical standards of the codes of ethics for their fields, which would preclude any awards without thorough consideration of the merits. The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 and subsequently revised in 2003 by a special committee of the AAA and an American Bar Association Task Force.

The Perception: Commercial cases can be extremely complex with complicated underlying contracts. Consequently, “there was usually enough blame to go around…that neither party to arbitration was likely to be entitled to all or none of the claimed damages.”

The Reality: The RAND study cited the complex nature of commercial disputes as a potential reason for responders’ negative perceptions about arbitrators’ decisions. However, according to the survey, the fact that 67% of respondents felt that arbitrators are more likely than judges to understand the subject of the arbitration suggests otherwise. With arbitration, parties have the ability to select a decision maker with the background and experience tailored to the nature of the dispute.
The Numbers: Arbitrators Render Decisive Awards

The most recent study of awards by the American Arbitration Association in 2015 found no propensity for split decisions; in contrast, the study concluded that the arbitrator ruled clearly in favor of one side or the other in an overwhelming majority of cases. Research was conducted on 2,384 AAA-administered business-to-business (B2B) commercial arbitration cases with monetary claims awarded in 2015. The results for claims are shown in Table 1 below.

The “U” shape of the graph demonstrates the greater incidence of arbitral awards in which one party clearly prevails over “split” awards. More than 93% (2,237 cases) were awarded outside the claim midrange (defined as 41-60% of their filed claim amount).

Here is the breakdown:

- Cases receiving 61-100% of their claimed amount: 46.90% or 1,118 cases.
- Cases totally denied or awarded up to 40% of their claim: 46.94% or 1,119 cases.
- Cases awarded in the midrange: 6.17% or 147 cases.

Table 1: 93%+ 2015 AAA/ICDR B2B Awards Are outside the Midrange of Claim Amount (as defined as 41-60% of their filed claim amount).

See the Appendix for a table on Counterclaims as well as a breakdown of certain subsets of the 2,384 commercial B2B cases by case type or field of industry: Large Cases, Construction, Executive Employment, Financial Services, Franchise, Healthcare, and Legal Services. Each one supports the facts that AAA arbitrators render decisive awards.
Conclusion

Although the myth persists that arbitrators “split the difference” or “split the baby,” this most recent research yields similar results to four previous studies conducted by the AAA over the past 15 years. In 2013, a survey of all AAA commercial cases awarded in 2012 found that only 5.34% of those awards were in the midrange; a 2011 survey of same determined only 8%. In 2007, research on International Centre for Dispute Resolution cases found that just 7% of awards rendered in 2005 were in the midrange, and in 2001, a survey of all domestic and international commercial cases awarded in 2000 documented 9% midrange claims. These numbers are quantifiable evidence that can be used to counter objections to using arbitration because of the fear of split awards; drawing on this and additional research provides answers to expressed misperceptions by corporate counsel.

Appendix follows on next page.

Footnotes


APPENDIX

Table 2: 95% of AAA/ICDR B2B Cases Awarded with a Counterclaim of at Least $500,000 Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed counterclaim amount).

\[(n=657)\]

The breakdown:
- Cases receiving 61-100% of their counterclaimed amount: 16.29% or 107 cases.
- Cases totally denied or awarded up to 40% of their counterclaim: 78.69% or 517 cases.
- Cases awarded in the midrange: 5.02% or 33 cases.

Table 3: 92% of AAA/ICDR B2B Cases Awarded with Initial Claim of at Least $500,000 Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).

\[(n=500)\]

The breakdown:
- Cases receiving 61-100% of their claimed amount: 22.00% or 110 cases.
- Cases totally denied or awarded up to 40% of their claim: 70.00% or 350 cases.
- Cases awarded in the midrange: 8.00% or 40 cases.
Table 4: 90% of 2015 AAA B2B Construction Awards Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).

(n=638)

The breakdown:

- Cases receiving 61-100% of their claimed amount: 41.11% or 262 cases.
- Cases totally denied or awarded up to 40% of their claim: 49.53% or 316 cases.
- Cases awarded in the midrange: 9.40% or 60 cases.

Table 5: 97% of AAA Executive Employment Awards Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).

(n=500)

The breakdown:

- Cases receiving 61-100% of their claimed amount: 18.37% or 18 cases.
- Cases totally denied or awarded up to 40% of their claim: 78.57% or 77 cases.
- Cases awarded in the midrange: 3.06% or 3 cases.
Table 6: 95+% of 2015 AAA/ICDR B2B Financial Services Awards Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).

The breakdown:
- Cases receiving 61-100% of their claimed amount: 56.00% or 112 cases.
- Cases totally denied or awarded up to 40% of their claim: 39.50% or 79 cases.
- Cases awarded in the midrange: 4.50% or 9 cases.

Table 7: 92+% of 2015 AAA/ICDR B2B Franchise Awards Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).

The breakdown:
- Cases receiving 61-100% of their claimed amount: 53.62% or 74 cases.
- Cases totally denied or awarded up to 40% of their claim: 38.13% or 54 cases.
- Cases awarded in the midrange: 7.25% or 10 cases.
Table 8: 97+% of 2015 AAA/ICDR B2B Healthcare Awards Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).

The breakdown:
- Cases receiving 61-100% of their claimed amount: 34.52% or 29 cases.
- Cases totally denied or awarded up to 40% of their claim: 63.10% or 53 cases.
- Cases awarded in the midrange: 2.38% or 2 cases.

Table 9: 91+% of 2015 AAA/ICDR B2B Legal Services Awards Are outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).

The breakdown:
- Cases receiving 61-100% of their claimed amount: 45.21% or 33 cases.
- Cases totally denied or awarded up to 40% of their claim: 46.58% or 34 cases.
- Cases awarded in the midrange: 8.22% or 6 cases.