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Beyond Baby-Splitting: Arbitrator Decision-Making Patterns in Employment Cases

Abstract

That arbitrators tend to “split the baby” by issuing compromise awards is amongst the hoariest of clichés in the dispute resolution field. While the idea of arbitrators as baby-splitters has been challenged by commentators and lacks support in empirical evidence, the idea is surprisingly persistent. More importantly, it may be continuing to influence the decisions of actors whether or not to use arbitration to resolve disputes. A 1997 survey conducted by David Lipsky, Ronald Seeber, and Richard Fincher found that 49.7% of general counsels of Fortune 1000 corporations reported that concerns about compromise decisions was one of their reasons for not using arbitration.

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BEYOND BABY-SPLITTING:
ARBITRATOR DECISION-MAKING PATTERNS
IN EMPLOYMENT CASES

*Alexander Colvin and Kelly Pike**

Introduction

That arbitrators tend to “split the baby” by issuing compromise awards is amongst the hoariest of clichés in the dispute resolution field. While the idea of arbitrators as baby-splitters has been challenged by commentators and lacks support in empirical evidence,¹ the idea is surprisingly persistent.² More importantly, it may be continuing to influence the decisions of actors whether or not to use arbitration to resolve disputes. A 1997 survey conducted by David Lipsky, Ronald Seeber, and Richard Fincher found that 49.7% of general counsels of Fortune 1000 corporations reported that concerns about compromise decisions was one of their reasons for not using arbitration.³

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¹ Christopher R. Drahozal, *Busting Arbitration Myths*, 56 KAN. L. REV. 663–76 (2008); Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not “Split the Baby”*: *Empirical Evidence from International Business Arbitrations*, 18 J. INT’L ARB. 573 (2001).

² Kenneth I. Juster, *The Santa Elena Case: Two Steps Forward, Three Steps Back*, 10 AM. REV. INT’L ARB. 371–81 (1999).

³ David B. Lipsky, Ronald L. Seeber, and Richard D. Fincher. *Emerging Systems for Managing Workplace Conflict*. Jossey-Bass: San Francisco, CA (2003) at p. 111.

Where does the idea of arbitrators as baby-splitters come from? One domain that may appear to give credence to this idea is the process of interest arbitration. In interest arbitration, the arbitrator is deciding on a contract that is likely to be somewhere between the final offers of each of the parties. This does not mean, however, that the arbitrator is simply “splitting the baby” by picking a point half way between the two parties positions. Rather, if we assume reasonably experienced and rational negotiators, the parties in bargaining will be moving towards final negotiating positions that are each close to what the most likely compromise outcome will be. In interest arbitration, it is the negotiating behavior of the parties, not the decision-making of the arbitrator, which drives the compromise outcomes.

What about in rights arbitration? Here we no longer have the same process of bargaining leading up to the final offers of the parties as in interest arbitration, but rather a process in which the arbitrator is adjudicating the rights of the parties under a contract or statute. The rationale for expecting baby-splitting here is the fear that arbitrators will want to satisfy both of the parties in order to receive selection as the arbitrator for future cases. This baby-splitting could occur by issuing a compromise decision in an individual case or a balancing of the win rates between the parties over multiple cases. It is important to recognize, however, that these arguments for baby-splitting behavior rest on a series of assumptions. One is that the parties in selecting an arbitrator are looking for someone who will favor their own side rather than looking for an arbitrator who will provide a fair decision. Another assumption is that the arbitrator will be equally concerned about satisfying each of the two parties and so will want to split the baby between them. A related assumption is that the arbitrator will be concerned about satisfying these two parties to the case rather than primarily being guided by professional norms and ethics or the interests of maintaining a more general reputation in the industry for integrity and fairness in decision-making. If these assumptions are not in fact correct, then it undermines the rationales for expecting baby-splitting behavior by arbitrators.

We examine empirically the question of whether arbitrators actually engage in baby-splitting or instead exhibit different pattern in their decision-making by analyzing claims and outcomes in a sample of employment arbitration cases administered by the American Arbitration Association (AAA).

Arbitral Decision-Making Patterns

We begin by considering what patterns we might expect to see in decisions if arbitrators were engaged in baby-splitting and then alternatively what other decision-making patterns may be evident in arbitration outcomes.

A tendency to engage in the splitting-the-baby approach to arbitral decision-making could manifest itself in two respects.⁴ One is to balance, over time, who wins each case, so that each side (e.g., employers and employees in employment arbitration) will win roughly half of the total number of cases. Here the argument is that since arbitrators depend on selection by both parties for future business, arbitrators will consider the proportion of decisions that favor each party. That is not to say that the arbitrator will make rulings that clearly depart from the merits of the dispute in question; however, this argument suggests that in marginal cases the arbitrator may tend to balance out who is favored in decisions over a period of time. A second manifestation of splitting the baby in decision-making could occur in situations where some amount of damages is awarded. A tendency to favor compromise decisions could be seen here in the awarding of some, but not all, of the damages claimed.⁵ Such compromise awards may be justified by the facts of the case, but the criticism is that arbitrators too often make compromise awards in an attempt to keep both parties reasonably satisfied.

On the other hand, if arbitrators are not engaging in baby-splitting, what alternative patterns in outcomes might we expect to see? An alternative starting point is to recognize that in rights arbitration, and particularly in employment arbitration, the arbitrator is acting as a type of private judge and so we might expect to see patterns of decision-making more similar to those of the courts. For example in adjudication in the courts, there is a clear division in the decision-making process between determination of liability and subsequently determination of remedies. So in employment litigation, we would see an outcome pattern where a common result is a denial of employer liability and therefore no award of any damages, producing a distribution with a clustering of zero dollar outcomes. In contrast, an alternative tendency sometimes claimed for arbitrators is that they will

⁴ For a good review and critique of the premises of the splitting-the-baby criticisms of arbitration, see Drahozal, *Busting Arbitration Myths*.

⁵ *Id.*; Keer & Naimark. *Arbitrators Do Not "Split the Baby": Empirical Evidence from International Business Arbitrations*.

be more likely to award some small amount of damages even when liability might not be supported under the relevant legal standard. Litigation in the courts is designed to be an all-or-nothing decision-making process on the issue of liability. For example, absent proof of discrimination, a court should deny any liability to an employee on a claim of employment discrimination, regardless of how the judge or jury may feel about the fairness of the employer's conduct. Arbitrators are not bound by the same rules of evidence as courts and may not be as narrowly constrained in the factors they consider in their decision-making. To the degree that fairness norms are incorporated into arbitral decision-making in addition to strict legal standards, employment arbitrators may tend to award at least some damages to an employee claimant in cases where there has been unfairness in the employer's action, even if it does not rise to the level of a statutory or contractual violation. If there is a tendency of employment arbitrators to award employee complaints some degree of recovery based on fairness norms, then this would make arbitration a more attractive process for employees and their representatives. Conversely, if there is a fear that arbitrators incorporate fairness norms into their decision-making and award claimants at least some amount even in the absence of liability, then this may lead some employers to disfavor arbitration.⁶ If this tendency is present, then empirically this would be observable in relatively fewer observations of zero damages being awarded.

We need to also consider whether there is likely to be a difference in how arbitrators respond to particular kinds of claims as compared to litigation decision-makers. A common complaint against litigation, particularly cited by businesses in justifying adoption of arbitration, is that juries are unpredictable, more sympathetic to consumers and employees than to businesses, and subject to emotional appeals that lead to extremely large damage awards not justified by the facts of the case.⁷ By contrast, arbitrators are professional neutrals who are less likely to be swayed by rhetoric or emotional appeals. Instead, as experts in the area, arbitrators may be offended by advocates who inflate damage claims. If this is the case, then we would expect to see a process in which arbitrators are much less likely to award most of

⁶ Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 115 (2008).

⁷ Christopher R. Drahozal, *Mandatory Arbitration: A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105–32 (2004); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637 (1996).

the amount claimed if there was a large initial claim. If accurate, this phenomenon could provide an important incentive for employers concerned about large damage awards from juries to adopt employer-promulgated arbitration procedures. Conversely, the assumption that employment arbitrators are less likely to make large damage awards may underlie some of the opposition to employment arbitration from plaintiff advocates.

So far, we have a series of competing explanations for what goes on in arbitrator decision-making, which suggest different patterns that we should see in the distribution of case outcomes. Next, we turn to our empirical analysis to consider which of these stories are more consistent with what we observe in our data.

The Data

For this study, we analyzed all employment arbitration cases administered by the AAA in the year 2008. The AAA is the largest arbitration service provider in the employment arbitration field. Many employers explicitly designate the AAA as the service provider in their standard arbitration agreements with employees and incorporate the AAA's employment arbitration rules into their procedures by reference. Use of AAA employment arbitration case files has the advantage of providing a reasonably large data source for analysis. Given its size and prominence in the employment arbitration field, the AAA's cases can be taken as representative of a significant segment of employment arbitration activity.

At the same time, there may be some limitations on generalizing this data to the whole universe of employment arbitration. The AAA has played a prominent role in debates about employment arbitration and was represented in the task force that developed the Due Process Protocol to establish basic fairness standards for employment arbitration.⁸ The AAA's own rules for administration of employment arbitration cases reflect features of the Due Process Protocol. As an organization, the AAA has indicated that it will not administer arbitration cases under procedures that violate its own rules. However, employers are also free to craft procedures that designate their own arbitrators and rules and may not make use of any third-party arbitration service provider—what are commonly known as ad

⁸ *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 9A Lab. Rel. Rep. (BNA) No. 142 at 534:401 (May 9, 1995).

hoc arbitrations. It is unknown to what degree these ad hoc arbitrations do or do not operate under procedures incorporating due process protections similar to those provided by the AAA rules. As a result, it is certainly possible that our analysis is examining a segment of the employment arbitration field operating under relatively higher fairness protections.

We obtained basic data on all 440 employment arbitration cases administered by the AAA that were awarded and closed during the 2008 calendar year. This included information on claim and award amounts. We also coded additional information from a subset of 286 arbitration case files. This allowed us to gather more detailed data on these cases, such as the type of legal claim being made and characteristics of the employee involved. Our dataset includes both cases deriving from employer-promulgated procedures and cases deriving from individually negotiated agreements. Under employer-promulgated procedures, the employer presents the arbitration agreement to the employee, usually at the time of hiring, as a term and condition of employment. In this context, standard procedures are designed to cover employees as a group, similar to general work rules or benefit plans. This type of arbitration agreement is a classic adhesion contract. By contrast, under individually negotiated agreements, arbitration is included as a provision in an individual employment contract whose terms are subject to bargaining between the parties. The AAA determines whether each case involves an employer-promulgated procedure or an individually negotiated agreement. Where the case is determined to involve an employer-promulgated procedure, the AAA requires that it be administered under the AAA's standard employment arbitration rules that are not modifiable by the parties.

Arbitral Decision-Making Results

We begin by examining the issue of whether arbitrators are splitting the baby in employment arbitration. There are a number of potential indicators of such a tendency that we can test. First, we can look at whether plaintiff win rates suggest an attempt to approximate a 50/50 split between the parties over time. So, for example, an arbitrator hoping for future selection by both sides might tend to balance out over time how many cases are won by each side. However, if we examine the plaintiff win rates reported in Table 1, we see little evidence of this type of a split-the-baby approach by employment arbitrators. In cases under employer-promulgated procedures where

the employee was the plaintiff, employees won 24.7 percent of the time and employers won 75.3 percent of the time, which does not suggest an attempt to split the outcomes between the parties. Cases involving employer-promulgated procedures where the employer was the plaintiff were closer to an even split with employers winning 57.1 percent of the time and employees 42.9 percent of the time. When we look at cases deriving from individually negotiated agreements, we again see a lack of evidence of 50/50 splitting, with plaintiffs winning almost two thirds of the cases, whether brought by employees (64.6 percent win rate) or employers (66.7 percent win rate).

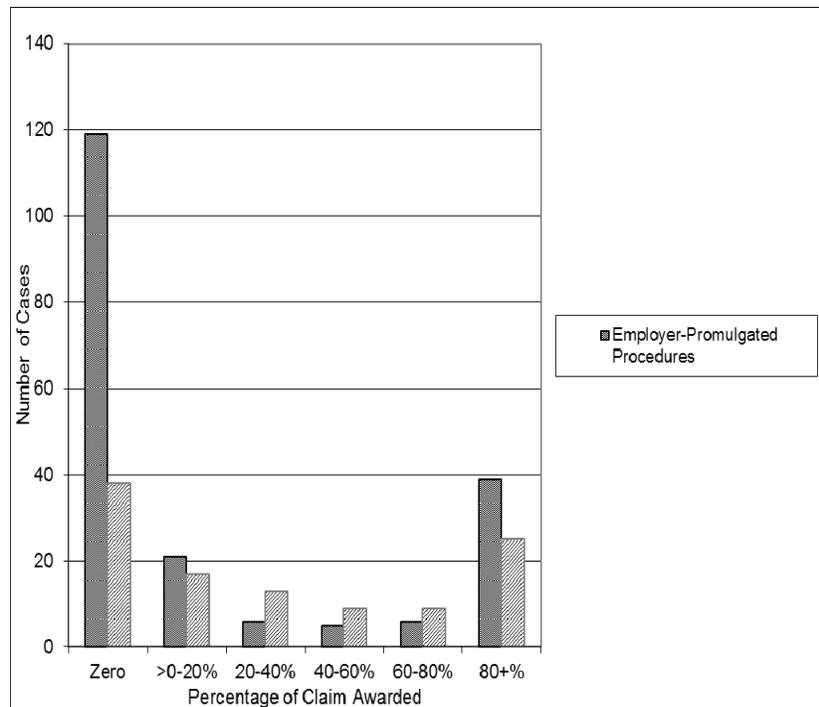
Table 1. Summary Statistics for Full Sample and by Plaintiff and Agreement Type

	Full Sample	Employer-Promulgated: Employee Plaintiff	Individually Negotiated: Employee Plaintiff	Employer-Promulgated: Employer Plaintiff	Individually -Negotiated: Employer Plaintiff
# of Cases	440	294	99	28	19
Claim Amount (Mean)	\$1,201,640	\$833,884	\$1,775,970	\$198,800	\$3,037,819
Claim Amount (Median)	\$190,000	\$167,880	\$233,427	\$10,521	\$833,433
Plaintiff Win (%)	37.5%	24.7%	64.6%	57.1%	66.7%
Award Amount (Mean, wins only)	\$137,869	\$81,835	\$220,376	\$39,002	\$152,947
Award Amount (Median, wins only)	\$47,384	\$36,609	\$75,000	\$10,000	\$36,014
Award Amount (Mean, all cases)	\$51,344	\$19,967	\$142,465	\$21,668	\$101,964
Partial Award (20–80% of claim)	15.6%	7.9%	26.0%	16.7%	40%

Second, we can investigate whether the amounts awarded in cases tend to reflect compromise awards. To analyze this question, we looked at the relationship between claim amounts and award amounts in the cases in our dataset. We calculated the percentage of the initial claim that the plaintiff received in the award. For simplicity of presentation, we grouped the percentages of claims received into six

categories: 0%; >0–20%; >20–40%; >40–60%; >60–80%; and >80%. We then tabulated the numbers of cases in each of these categories and graphed the results (see Figure 1). If the arbitrators were splitting the baby, we would expect to see a more normal shaped distribution with most of the cases clustering in the middle categories. We find instead a U-shaped distribution in the data, with most of the cases clustering at either end of the distribution. For cases brought under employer-promulgated procedures, the largest category is 0% of claim awarded, but the second-largest category is award of over 80 percent of the amount claimed. The most sparsely populated categories are those where the plaintiffs recovered between 20 percent and 80 percent of the amount claimed. Only 17 of 196 cases (or 8.7 percent) fell into these categories. The distribution of percentages recovered in cases deriving from individually negotiated agreements also form a U-shaped distribution (see Figure 1), with the lowest and highest percentage recovery categories containing the largest number of cases. The categories between 20 percent and 80 percent recovered are also the most sparsely populated in this distribution.

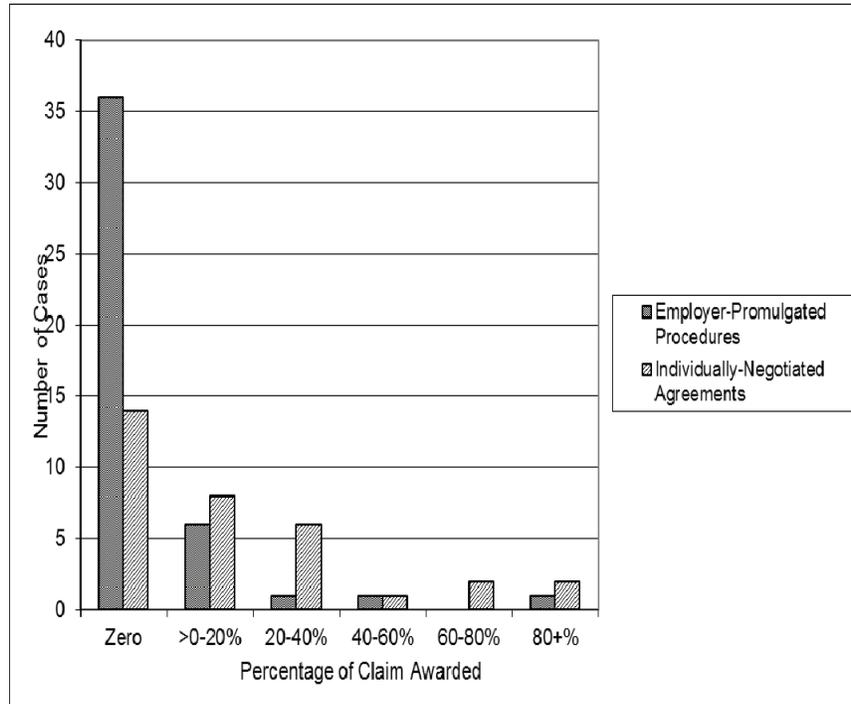
Figure 1. Percentage of Claims Awarded in Employment Arbitration Cases



What these results indicate is that there is a lack of any evidence that employment arbitrators favor compromise awards. The results comport with what would be expected in traditional litigation. Judicial decision-making generally involves two distinct phases, determination of liability and determination of damages. Initially the court determines whether there is any legal liability by applying the appropriate legal standard. If there is determined to be liability, then a separate determination is made of what damages were suffered and an appropriate award is made. In neither of these stages is there a process of balancing the positions of the two parties as is alleged to occur with split-the-baby arbitral decision-making. This produces a distribution like that in our data where the most common outcome is full denial of liability and no damages awarded. Thus the picture we have seen in the data of employment arbitration decision-making much more closely resembles this judicial model than the proposition that arbitrators look to compromise between the positions of the two sides.

An alternative story about arbitral decision-making is that employment arbitrators will disfavor very large damage claims. We tested this argument by examining separately the distribution of percentages recovered for cases with large claims. Figure 2 presents the same categories of percentages recovered limited to those cases where the plaintiff claimed more than \$500,000 in damages. Unlike the U-shaped distribution of overall recoveries, for cases with large damage claims we find a skewed distribution tapering off at the higher categories. The largest category is still zero recovery, but for both the employer-promulgated procedure and the individually negotiated agreement distributions, the second largest category of awards is where the plaintiff recovered more than 0 but less than 20 percent of the amount claimed. Whereas employment arbitrators do not appear to split the baby, this evidence suggests that they are less likely to grant the full amount on larger damage claims.

Figure 2. Percentage of Claims Awarded in Employment Arbitration Cases where the Plaintiff's Claim was More Than \$500,000



An alternative story about arbitrator decision-making was that employment arbitrators will tend to make some small award in favor of many claimants rather than fully denying liability. Put alternatively, the idea here was that if you go to arbitration, the arbitrator will give you something rather than entirely rejecting your claim. Our results do not support this proposition. There are relatively few small award cases. For example, the 25th percentile of the distribution of awards in cases brought by employees under employer-promulgated procedures was \$12,770, meaning that only one-quarter of awards were smaller than that amount.

Conclusion

Our results indicate that contrary to persistent stereotypes, there is a lack of empirical evidence that employment arbitrators engage in split-the-baby type decision-making. Employment arbitrators do not tend issue compromise awards and do not appear to be engaging in a process of balancing outcomes across the parties in hopes of receiving approval from both sides for selection in future cases. Our finding of

a U-shaped pattern in the distribution of outcomes where the most common results are complete denial of claims, with the next most common being awarding of most of the damages claimed, is striking and inconsistent with baby-splitting assumptions.

When we look at decision-making processes in employment arbitration, we see more resemblance to a legal process of determining liability and damages than to a process of balancing the positions of the parties through compromise decisions and evening out of the success rates of each side. To the degree that there is a particular effect in employment arbitration decision-making, we find it is one of denying or reducing large claim amounts rather than one of splitting the baby between the two sides. In addition, we find little evidence that arbitrators tend to issue small token awards in cases rather than simply denying liability.

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