

# Challenging the “Splitting the Baby” Myth in International Arbitration

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## Abstract

*International arbitrators have been criticized for purportedly engaging in a practice of compromise when rendering decisions (“splitting the baby” or “triangulating”), instead of adjudicating claims in accordance with proven facts and applicable law. Despite having been considered a myth and an outdated discussion, this concern has been recently revisited with great interest, and is still described as an often-prevailing point of view among a number of international arbitration players. It is therefore relevant to determine the possible causes behind the perception that arbitrators tend to “split the baby”, as well as to assess whether such causes justify its continuous reconsideration in the international arbitration community. This article aims to discuss the causes of the myth and, by relying on previous studies on the matter and on empirical data, determine whether the myth is after all justified.*

## 1. INTRODUCTION: THE “SPLITTING THE BABY” MYTH IN INTERNATIONAL ARBITRATION

International arbitrators have been criticized for purportedly engaging in a practice of compromise when rendering decisions, approaching the issues much like mediators or conciliators (with added powers), instead of adjudicating claims in accordance with proven facts and applicable law. This practice, which basically [page "719"](#) consists of “dividing monetary damages down the middle,”<sup>(1)</sup> has been referred to as “splitting the baby” (or “triangulation” in so-called polite international arbitration circles),<sup>(2)</sup> a metaphor alluding to the description found in the Old Testament (1 Kings 3:23–28) of King Solomon’s threat to physically split a child between two women who claimed to be its mother.<sup>(3)</sup>

This supposed practice in arbitration is said to originate in the United States,<sup>(4)</sup> where particular contexts, such as the resolution of labor and management disputes, are reported to present frequently split results.<sup>(5)</sup> In the context of international arbitration, on the other hand, studies refute the existence of such a practice, while also acknowledging a “myth” based on the perceptions of some arbitration practitioners, but with no solid evidence to support it.

Although this discussion is considered outdated by some,<sup>(6)</sup> it has been recently revisited with great interest, and is still described as an often-prevailing point of view “in the halls and cubicles of corporate legal departments.”<sup>(7)</sup> The resilience of the myth suggests that the argument has never been finally settled, possibly because it consists of an allegation that is extremely hard to prove (or disprove) in practice.

It is therefore a relevant time to review such studies and their conclusions (section 2) in order to determine the possible causes behind the perception that the “splitting the baby” approach is a reality, as well as to assess whether such causes constitute an accurate and reasonable justification for its continuous reconsideration in the international arbitration community (section 3). This article is the product of a collective research project conducted in light of these considerations, aiming to discuss the causes of the myth and, by also relying on empirical data, to determine whether the myth is after all justified.

[page "720"](#)

## 2. BABY-SPLITTING IN NUMBERS: RESEARCHES BASED ON THE ARBITRATION PLAYERS’ PERCEPTIONS AND ON ARBITRAL DECISIONS

Despite the assertion that arbitrators tend to take an inadequate route when deciding cases by splitting the award between claimants’ and respondents’ positions, various empirical studies have reviewed arbitral awards – in search of elements substantiating

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this belief – and concluded that it was not reflected in their samples. There is an apparent divergence between the perception of the arbitration players and the concrete results of the empirical studies based on the review of arbitral awards.

### **2.1. Research with arbitration players: the perception does exist**


In 2002, Richard W. Naimark and Stephanie E. Keer examined the “expectations and perceptions” of the players in international arbitration by requesting the participants in their study (counsel and their clients) to rank the various reasons for choosing arbitration over litigation. The result of this survey was that an overwhelming majority of the participants (81%) ranked the “fair and just result” as the most important feature of international arbitration.<sup>(8)</sup>

The Rand Institute for Civil Justice carried out a similar survey, which aimed to assess corporate counsels’ opinions on the alleged advantages of both arbitration and litigation “in an attempt to ascertain why arbitration is not used more frequently [in the United States].”<sup>(9)</sup> Following interviews conducted with in-house counsel, one of the key findings of the survey was precisely that “[a] large majority (71%) perceive professional arbitrators as tending to split awards, regardless of the merits of the case, rather than ruling strongly in favor of one party.”<sup>(10)</sup> The report, nevertheless, contained an express disclaimer that counsel and their clients “who used arbitration clauses most frequently tended to disagree with the view that arbitrators split decisions.”<sup>(11)</sup>

 [page "721"](#)

A survey conducted by the School of International Arbitration at Queen Mary, University of London and White & Case LLP in 2012<sup>(12)</sup> invited the arbitral community to answer a questionnaire on several controversial arbitration-related issues. The results were then compared from the perspective of the different categories of specialists who participated in the research, such as their legal background, role, geographic location and industry sector. One of the most common reasons for criticism identified by the survey was that arbitral tribunals unnecessarily “split the baby.”<sup>(13)</sup> However, while 17% of in-house counsel and private practitioners participating in the survey affirmed the existence of a practice of “splitting the baby”, only 5% of the interviewed arbitrators reported baby-splitting in their cases.<sup>(14)</sup> It is visible that the perception of the myth varies among different players in arbitration.

Further data to that effect was provided in the 2013 International Arbitration Survey carried out by the School of International Arbitration at Queen Mary, University of London and PricewaterhouseCoopers LLP, entitled “Corporate Choices in International Arbitration.”<sup>(15)</sup> This survey placed particular emphasis on companies in the sectors of financial services and construction and concluded that 13% of interviewees found arbitration not well suited for their industry because “[a]rbitrators do not take clear-cut decisions and, instead, tend to ‘split the baby,’ compared with the alternatives available.”<sup>(16)</sup>

The mistrust does not seem to be limited to international commercial arbitration. It has been argued that ICSID tribunals, in assessing claims for damages, “seemed to have taken the ‘splitting the baby’ approach, where the arbitrator simply takes the middle ground of the numbers proposed by both sides.”<sup>(17)</sup> In fact, it was observed by Alex Lo that, even though tribunals are generally competent to decide legal issues, the complexity of valuation in modern  [page "722"](#) investor-state arbitration might arguably lead such tribunals to deal “parsimoniously” with the economic details with which they are presented.<sup>(18)</sup>


It is apparent from these findings that a number of players in international arbitration, predominantly but not only in the circles of in-house counsel and clients, express concern over the methods adopted by arbitral tribunals when deciding to grant a claim in full or in part. The reach of this concern seems to support the proposition that “splitting the baby” is a reality, as opposed to a myth, and brings into question the very legitimacy of international arbitration.

### **2.2. Researches based on arbitral decisions: it is possibly no more than a myth unproven in practice**

In 2009, Gary Born stated that “there is little evidence of overt ‘baby-splitting’...; rather, arbitral awards very frequently grant or reject claims in full or substantial part, with principled distinctions explaining other results.”<sup>(19)</sup> More recently, William W. Park similarly stated that “[n]o empirical data permits a firm conclusion

on the matter,” whereas “the contention that arbitrators render sloppy decisions with the hope of greater gain for themselves runs counter to logic as well as evidence, at least for complex international cases amongst sophisticated parties.”<sup>(20)</sup> These conclusions are in line with those of empirical research based on arbitral decisions.

One of the first studies dealing with the “splitting the baby” issue, albeit in the context of United States domestic arbitration, was carried out by Soia Mentschikoff in 1961.<sup>(21)</sup> This study reported that 50% of the awards reviewed were fully in favor of either the claimant’s or the respondent’s position (i.e., tribunals granted all or nothing).<sup>(22)</sup> The remaining 50%, in which the claims were only partially awarded, were “arrived at in a judicial manner since they result from the striking of particular items of damage that the arbitrators believe are not justified under the facts or law of the particular case,”<sup>(23)</sup> according to Mentschikoff.

A broader study was conducted in 1992 by the American Arbitration Association (AAA), which reviewed 4,233 domestic arbitration awards. According to this research:  [page "723"](#)

- (i) in 10% of the cases, the tribunal’s decision was roughly midway between the parties’ positions;
- (ii) in 40% to 60% of the cases, claims were fully accepted by the tribunal;
- (iii) in 25% of the cases, at least 80% of the claimant’s claims were awarded; and
- (iv) in 33% of the cases, claims were totally rejected.<sup>(24)</sup>

Based on these findings, James R. Deye and Lesly L. Britton reported that “arbitrators rarely award half of the claimed amount to each party.”<sup>(25)</sup>

The AAA returned to this subject in 2000, carrying out a similar study, but this time reviewing another 4,479 domestic arbitration awards. The new study concluded that split results are less likely to occur in commercial cases, based on the following findings:

- (i) in approximately 42% of the cases, 0% to 20% of the claimed amount was awarded; and
- (ii) in 30% of the cases, 81% to 100% of the claimed amount was awarded.<sup>(26)</sup>

In 2001, Stephanie E. Keer and Richard W. Naimark reviewed 111 AAA international arbitration awards issued between 1995 and 2000, in the first study to deal exclusively with international arbitral decisions.<sup>(27)</sup> Aiming to determine whether international arbitral tribunals engaged in the practice of “splitting the baby,” Keer and Naimark compared their samples by calculating the percentage of the claimed amounts which had been awarded in each case (that is, “claim amount minus award amount, divided by the claim amount.”)<sup>(28)</sup>

Their conclusions were that, out of 54 cases in the sample, (i) in 17 of the awards which were analyzed, 0% of the claimed amount was awarded, whereas (ii) in 19 of the awards, 100% of the claimed amounts was awarded.<sup>(29)</sup> Figure 1, prepared by Christopher Drahozal, illustrates these findings:<sup>(30)</sup>

 [page "724"](#)

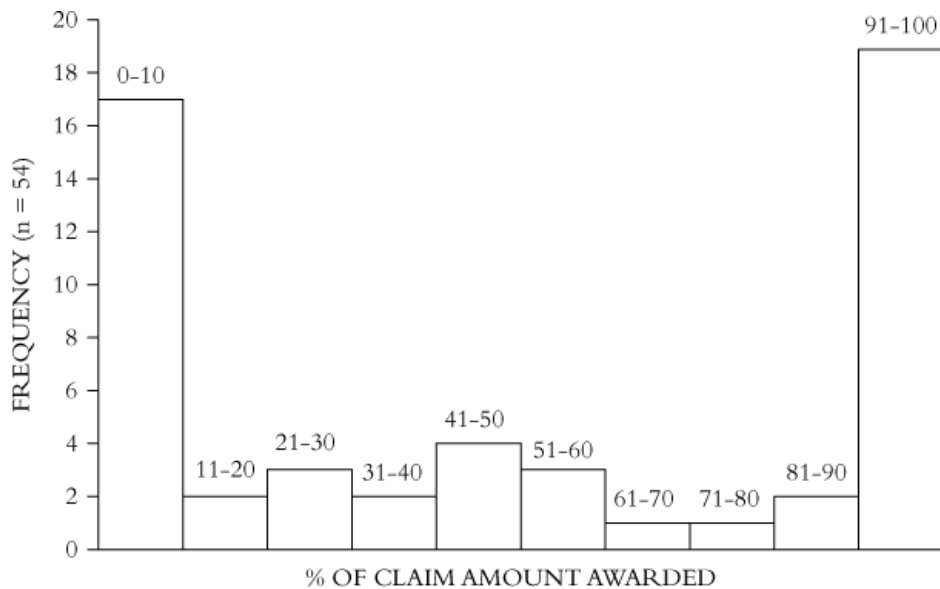


Figure 1 Keer & Naimark Results (2001)

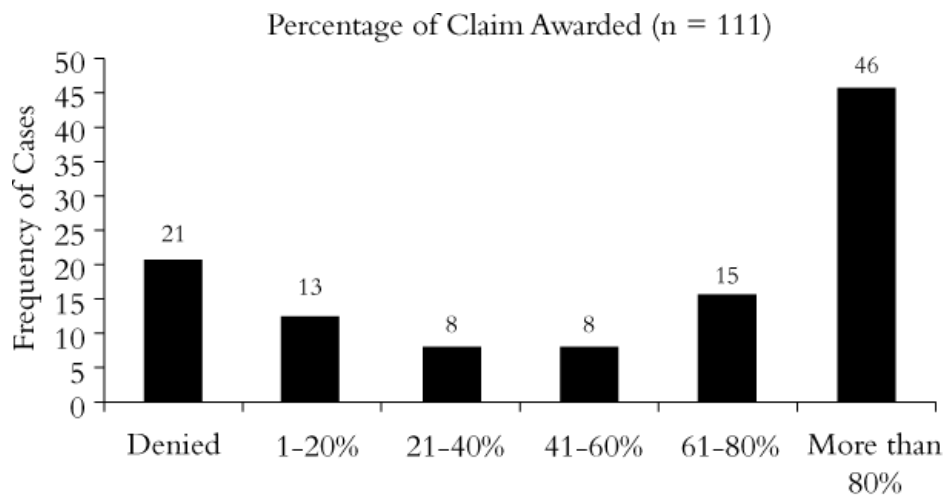
According to Keer and Naimark, the results of the study demonstrate that it was only in a few cases that international arbitrators engaged in a practice that could be considered as baby-splitting.<sup>(31)</sup> The majority of the awards resulted in outright “wins” or “losses” (66% of the time), and just in the remaining 34% of the cases the arbitrators had widely distributed results, with awards granting from 10% to 90% of the amount claimed. The conclusion, according to the authors of the study, was a confirmation that the arbitrators whose awards were analyzed do not engage in the practice of “splitting the baby” in their awards.<sup>(32)</sup>

“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’.”

In 2007, the AAA undertook a further study, which reviewed arbitral awards administered by the International Center for Dispute Resolution (ICDR) during the year of 2005. The conclusions were yet again contrary to the existence of a “splitting the baby” approach.<sup>(33)</sup>

[page "725"](#)

- (i) in 7% of the awards reviewed, the claimed amount was split in an approximate range of 41 to 60%;
- (ii) in 12% of the awards, up to 20% of the claimed amount was awarded;
- (iii) in 13.5% of the awards, between 61 and 80% of the claimed amount was awarded;
- (iv) in 19% of the awards, the claimed amount was rejected; and
- (v) in 41% of the awards, more than 80% of the claimed amount was awarded.



% of Claim Awarded Data from International Cases Awarded in 2005

Based on these numbers, the AAA concluded that “the split the baby myth is perpetuated because some observers of the arbitration process fail to see the complex nature of arbitral decision-making,

believing it arbitrary rather than carefully researched, the easy way to please everyone rather than a tough and studied pronouncement.”<sup>(34)</sup>

In sum, despite the fact that empirical evidence and other interdisciplinary studies based on the review of arbitral decisions seem to debunk the “splitting the baby” myth, the perception unequivocally survives in some circles of the business and legal community. The myth exists, yet the practice does not seem to correspond to that perception. This requires more rigorous consideration of the causes behind the myth in order to determine what is triggering the misconceptions and to address the issue more effectively.

 [page "726"](#)


### **3. POSSIBLE CAUSES BEHIND THE “SPLITTING THE BABY” MYTH: PROBABLE REASONS FOR THE MISTRUST**

As detailed above, it is necessary to investigate the causes behind the myth. Commentary has identified three possible causes for its creation and recurrent mention in the context of international arbitration (more than in judicial courts, for instance): (i) the influence of the unilateral appointing system in the arbitral decision-making process; (ii) the lack of or insufficient reasoning of arbitral awards; and (iii) the complexities in the determination of *quantum* issues. These possible causes and proposed solutions will be discussed below.

#### **3.1. Influence of the unilateral appointing system in the arbitral decision-making process**

The possibility to appoint an arbitrator has long been described as one of the most attractive and distinctive features of arbitration, with the positive aspect of enabling the selection of arbitrators with certain qualities and background. However, the unilateral nomination system also has its drawbacks, especially if one considers the expectations—whether correct or incorrect—that it creates in the users of arbitration.

The resilience of the “splitting the baby” myth can be explained from the perspective of a businessperson or a practitioner not acquainted with international arbitration. Some of them may not perceive a party-appointed arbitrator as a fully independent adjudicator and, as a consequence, expect some degree of sympathy or deference towards their case.<sup>(35)</sup> This implies that “horse trading” is considered as a “built-in” feature of arbitration by some of its users, a context in which it would be logical to conclude that the outcome of the proceedings is the fruit of the bargaining endeavors of the members of the tribunal—a conclusion that is reinforced when disputes are not decided entirely in favor of or against one of the parties.

The vast majority of arbitration laws and institutional rules provide that the decisions of arbitral tribunals shall be made by a majority,<sup>(36)</sup> while not all of them provide for a fallback result in case a majority cannot be reached (the most common of which is the prevalence of the presiding arbitrator’s opinion). As a result, when the time to deliberate comes, the arbitrators are forced to continue  [page "727"](#) the deliberations until a majority (and probably a compromise solution) is reached.<sup>(37)</sup> This was described by W. Michael Reisman as “the dynamics of compromise,”<sup>(38)</sup> explaining that the decision-making process in arbitral proceedings is the result of a compromise between arbitrators, who occasionally bargain during the deliberation process espousing, explicitly or implicitly, the position of the party that appointed them.

Ordinarily, the only “compromise” that arbitrators are supposed to adopt during the deliberations is understood as the agreement of one arbitrator with the reasoning offered by one or more arbitrators to form a majority. This is a regular persuasive process and, as such, does not bear a negative connotation; on the contrary, it is inherent to the dialectics of the deliberation process, in which the arbitrators are expected to discuss their positions among themselves, with regard to the way in which the law should be applied to the case, a mutually acceptable language and a coherent solution that is reflected in the reasoning of the award.<sup>(39)</sup>

On the other hand, and what is more relevant for the purposes of this study, compromise can also be understood as a bargaining process between the possible outcomes of the dispute in order to give each of the parties in the arbitration the reassurance of a partial victory.<sup>(40)</sup> In this particular case, the troubling reasons are self-evident, since the award will not be the result of sound and careful application of the law, based on the arguments and facts presented


by the parties, but rather of an accommodative resolution,<sup>(41)</sup> which is the epitome of “splitting the baby.”

This other form of bargaining is the product of the conduct of arbitrators who act as partisans, thus violating their duty to remain impartial throughout the proceedings, and, by so doing, undermine the deliberation process, which is supposed to be a collaborative effort of the arbitral tribunal as a whole. Compromise in this context may lead to decisions with which not all of the arbitrators agree in full, as long as their understandings are proportionally accepted by the other members.

 [page "728"](#)

Some authors consider that compromise awards are a direct result of an uncalled-for influence on arbitrators<sup>(42)</sup> and even a moral hazard<sup>(43)</sup> resulting from the unilateral appointing system. Taking into consideration that arbitrators are selected and paid by the disputing parties, it could be argued that they — consciously or not — may wish to guarantee the goodwill of all the parties in order to ensure future appointments.<sup>(44)</sup> That is, as players in a competitive market, the “market forces” could encourage the arbitrators to favor both parties’ satisfaction with the proceeding results.<sup>(45)</sup> As William W. Park emphasizes, “[o]ne strain in US legal literature suggests that arbitrators are pushed toward unprincipled decisions in order to attract business through reappointment.”<sup>(46)</sup>

The issue of unilateral appointments has drawn considerable attention in academia over the past years. Some authors, particularly Jan Paulsson and Albert Jan van den Berg, have pointed out that it might be time to change and leave unilateral appointments behind. However, their proposal has not gained unanimous support, and has been criticized by other authors.<sup>(47)</sup>

Although this scenario of bargaining is not common in international arbitration, in the event that it occurs, it will considerably diminish the position of the partisan arbitrator *vis-à-vis* the rest of the members of the tribunal,<sup>(48)</sup> and might possibly harm the arbitrator’s credibility before the arbitration community.<sup>(49)</sup> Conversely, as discussed above, there is no empirical or behavioral evidence in support of the myth and, despite the fact that it might have occurred in isolated  [page "729"](#) cases, there is no significant trend in international arbitration in this direction; there is not sufficient evidence of a “monetary” submission of arbitrators to the parties who appoint them that could lead to a partial decision or a tendency to unduly split the award.

### **3.2. Lack of or insufficient reasoning of the award**

The vast majority of national laws and arbitration rules provide that, absent agreement of the parties to the contrary, the award shall state the reasons upon which the decision is based.<sup>(50)</sup> The basic notion behind the reasoning requirement is that it shows the rationale behind the arbitrator’s decision to the parties. However, some believe that this does not imply that the arbitrators should meticulously consider each and every aspect brought by the parties in the proceedings; in other words, that the arbitrators would be free to focus only on the elements of fact and law that they consider to be relevant to their decision.

The use of this proposed discretion in choosing the arguments to address in the reasoning of the award may be detrimental to the legitimacy of the arbitral process. For example, the lack of sound reasons regarding a particular aspect of fact or law presented by the parties during the proceedings gives rise to conjectures by the parties and their counsel, simply because there are no elements to judge the cognitive process behind the arbitral decision — the decision-making lacks an objective factor, which is crucial for legal certainty. One of the most common conjectures behind an unreasoned award is the assumption of compromise between the arbitrators on the unreasoned element of the dispute, thus feeding the perception of baby-splitting.

In cases under the administration of the International Chamber of Commerce (ICC), as an example, the Secretariat and the International Court of Arbitration attempt to avoid this defect in awards by drawing the arbitral tribunal’s attention to the duties provided for in Articles 21(3) and 31(2) of the 2012 ICC Rules of Arbitration.<sup>(51)</sup> The scrutiny of ICC arbitration therefore constitutes a safety net to avoid the detrimental practice, ensuring that arbitrators render a satisfactorily reasoned award and exercise some sort of discretion merely when the applicable law allows them to do so.

 [page "730"](#)



In the case of determining and allocating the costs of arbitration and legal costs, however, arbitrators arguably enjoy a wider discretionary power. For example, Article 37 of the 2012 ICC Rules of Arbitration, Article 43 of the 2010 Stockholm Chamber of Commerce (SCC) Arbitration Rules and Article 31 of the 2009 International Center for Dispute Resolution (ICDR) Arbitration Rules all grant the arbitral tribunal the power to determine and/or allocate the costs of the arbitration and legal fees incurred by the parties as it deems necessary, taking into consideration the relevant circumstances of the case. Article 42 of the 2010 UNCITRAL Arbitration Rules and Article 28.4 of the 1998 London Court of International Arbitration (LCIA) Rules are not substantially different and seem to adopt an objective, albeit not mandatory, standard: both rules emphasize the possibility of allocation at the arbitral tribunal's discretion.

This discretion does not—or, at least, should not—necessarily translate into an unfettered freedom, although one author argued that there remains “the suspicion that resolution of the costs issues, coming as it does at the very end of a case, may become part of discussions or bargaining among arbitrators about the overall result in the case.”<sup>(52)</sup> Arbitral tribunals are under a duty to provide reasons (unless agreed otherwise by the parties and allowed by the applicable law) even in cases where they enjoy a discretionary power. For instance, they are also under an obligation to consider the applicable standard of cost allocation under the substantive law governing the case before them: in France, Canada and Australia, the applicable standard is the “costs follow the event”; on the other hand, the general rule in the United States is that each party should bear its own costs. This also means that, absent the agreement of the parties, the arbitral tribunal has to engage in a complex analysis of substantive and procedural rules in order to determine the applicable standard.

In any event, it is the possibility of an unpredictable exercise of discretion<sup>(53)</sup> that may cause the perception that arbitrators “split the baby” when it comes to costs allocation. A good example of how the arbitration community is addressing this risk is the creation by the ICC Secretariat of a Task Force on Decisions as to Costs, which is likely to address such problematic, among many others.<sup>(54)</sup> Furthermore, this cause of the myth may be addressed by the careful exercise of the broad discretion given to arbitral tribunals, keeping in mind that such exercise can significantly reduce misconceptions affecting international arbitration. [page "731"](#) Discretion should only be admitted and exercised by the arbitrators when duly authorized by the applicable law and/or rules.

### **3.3. Complexities in the determination of quantum issues**

Another cause closely related with the one analyzed above is the obscurity that seems to surround the arbitral decisions on determination of damages. Considering that “valuation can be a sophisticated exercise going beyond the expertise of the legal profession,”<sup>(55)</sup> “requiring knowledge of financial analysis and economic models,”<sup>(56)</sup> an arbitral tribunal may find it particularly difficult not only to reach a decision, but also to state in a clear, reasoned and coherent manner the criteria used to arrive at a particular amount. For instance, the solution found by the arbitrators in *Sistem Mühendislik v. Kyrgyz Republic*<sup>(57)</sup> to identify the compensation sum for an expropriation was arguably “to follow an ‘exercise in the art of the possible’ rather than ‘engage in a search for the chimera of a sum that is a uniquely and indisputably correct determination’ of what the claimant lost,” as asseverated by Mark Kantor in 2012.<sup>(58)</sup>

That is possibly why, especially in investment arbitration, there is a relatively recurrent perception that there is baby-splitting.<sup>(59)</sup> While the arbitrators might find solace in arbitration rules and laws allowing them to calculate and estimate damages,<sup>(60)</sup> the truth is that laconic reasoning in their quantum determinations is nothing but detrimental. This practice contravenes the general duty of arbitrators to provide reasons for their decisions, including the rulings on cost allocation. Moreover, as mentioned above, the lack of sufficient reasoning gives rise to all kinds of conjectures about the rationale behind the decision, which only feeds the perception of baby-splitting and, as a consequence, “undermin[es] the legitimacy of tribunal’s awards.”<sup>(61)</sup>

Other aspects should be considered when analyzing the determination of damages in arbitral awards. There are also factors related to party representative practices that influence the scenario of quantum valuations, such as the inflation of [page "732"](#) the relief sought, or the application of improper methodology when assessing damages in order to ensure a higher amount awarded in the worst case scenario. The conclusions of Mark Kantor are very

precise in this regard:

The lessons to be learned by practical counsel are clear. First, a tribunal faced with evidence that is not a complete foundation for an award will nonetheless seek to find a “rational and reasonable” value rather than abdicating its role to compensate the injured claimant. Second, that tribunal will approach the compensation computation through a conservative “worth at least” approach, placing on the claimant the consequences of the less-than-adequate evidence. As a result, the tribunal will avoid triangulating, reject the chimera of certainty, and protect itself from arguments that it overcompensated the claimant.<sup>(62)</sup>

Considering the plausibility of this explanation of the myth, a possible solution seems to reside in arbitrators attempting to exercise their powers more cautiously when arriving at damages quantifications, which implies providing more consistent and rigorous reasoning. Another practical and effective way to address this issue may be to rely (again, with reasons, and not blindly) on the opinion and advice of a qualified expert before reaching a decision on amounts of damages and attribution of costs; this could be achieved through the appointment by the tribunal of an independent financial expert.<sup>(63)</sup>

#### **4. CONCLUDING REMARKS**

The empirical research discussed above demonstrates that the numbers do not reinforce anything more than the existence of a myth. Practically all the research under consideration came to the conclusion that arbitral tribunals very often grant claimant or respondent the full or almost the full amount claimed; awards in the mid-range are the exception and not the rule. In addition, the discrepancies between the numbers arising from the surveys relying on perceptions, on one side, and those relying on arbitral decisions, on the other, make it clear that partially granting a claim does not imply an intention of the arbitrators to avoid full awarding.

That notwithstanding, as a matter of concept, the “splitting the baby” scenario must be assessed on a case-by-case basis and not as a trend or a characteristic of the international arbitration system. Simply looking at the amounts awarded compared to the claim evidently does not answer the question of whether the baby has been split—this is an assessment that fails to take into consideration a number of other relevant factors. Monetary judgments that award equal (or proportionally equivalent) compensation to both parties do not necessarily arise out of an arbitral [page "733"](#) tribunal's disregard of either the facts or the applicable law, let alone their specific preference for a compromise solution, as opposed to reaching that same conclusion through a careful examination of facts and law, with reasoned and detailed explanation in the award.

Therefore, to assess whether the award was unduly split by the arbitrators, it is necessary to analyze more than the values involved and granted; the reasoning and content of the award should be scrutinized in depth.<sup>(64)</sup> “Splitting the baby” is therefore not a matter of statistics; instead, it is an issue concerning social and psychological aspects of the deliberations and decision-making by the arbitrators. Rather than looking at the numbers, it seems that a thorough analysis of the issue should necessarily focus on the causes behind this supposed practice.

Finally, the possible causes behind the myth that were discussed in this study appear to apply in a relatively small pool of cases that do not represent the status of the general practice in the field, but this does not solve the problem. It may be true that the existence of a “splitting the baby” approach is nothing more than a myth in the current time, but the mere fact that this misconception has not been definitely buried after all these years is a clear sign that a sound and responsible answer must come from the arbitration community.

Accordingly, with the aim of dealing with the causes that allow the myth to subsist, two paths must be followed: (i) emphasizing to the legal community that decisions reached by way of compromise are the exception and not the rule in common practice; and (ii) promoting a more responsible and consistent use of the discretion of the arbitral tribunal, so as to dissipate the doubts and conjectures to which it gives rise. This is a way of thinking that arbitrators and party representatives in arbitration should adopt.



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<sup>1</sup> Splitting the Baby: A New AAA Study (Mar. 9, 2007), available at [www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_014038](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_014038) (accessed Mar. 28, 2014).

<sup>2</sup> Mark Kantor, Avoiding Triangulations and Chimeras Alike, *Global Arbitration Rev.* (Jul. 31, 2012), available at <http://globalarbitrationreview.com/journal/article/30729/money-column-avoiding-triangulation-chimeras-alike/> (accessed Mar. 28, 2014).

<sup>3</sup> Christopher Drahozal, Busting Arbitration Myths, 56(3) *U. Kan. L. Rev.* 673–74 (April 2008).

<sup>4</sup> Gary B. Born, *International Commercial Arbitration: Commentary and Materials* 615–52 (2d ed., Kluwer Law International 2011). See also Robert H. Smit, *The Newly Revised CPR Rules for Non-Administered Arbitration of International Disputes*, 18(1) *J. Int'l Arb.* 59–100 (2001).

<sup>5</sup> In such contexts, a diversity of factors, such as high costs as a filter for unfounded claims in arbitration, or jury sympathy distorting the amounts of damages in court litigation, could explain the frequently split results. See Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not 'Split the Baby' – Empirical Evidence from International Business Arbitrations*, 18(5) *J. Int'l Arb.* 573–78 (2001). See also William W. Park, *Rectitude in International Arbitration*, 27(3) *Arb. Int'l* 473–526 (2011).

<sup>6</sup> Michael McIlwraith & John Savage, *International Arbitration and Mediation: A Practical Guide* 93–115 (Kluwer Law International 2010).

<sup>7</sup> Paul E. Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28(6) *J. Int'l Arb.* 543 (2011).

<sup>8</sup> Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People: A Forced-Rank Analysis*, 30 *Int'l Bus. Law.* 203 (reprinted in Christopher R. Drahozal & Richard W. Naimark, *Towards a Science of International Arbitration: Collected Empirical Research* 43, 45 (2005)). The researchers further concluded that “[p]articipants in arbitration care about justice in the grand sense.” *Ibid.*, at 203–204.

<sup>9</sup> Douglas Shontz, Fred Kipperman & Vanessa Soma, *Business-to-Business Arbitration in the United States*, (RAND Institute for Civil Justice 2011), available at [www.rand.org](http://www.rand.org), at 2-3 (accessed Mar. 28, 2014).

<sup>10</sup> *Ibid.*, at IX. The answers to the question “Do arbitrators tend to ‘split the baby?’” were the following: (i) 28% strongly agreed; (ii) 43% agreed; (iii) 11% disagreed; (iv) 3% strongly disagreed; (v) 1% had no opinion; and (vi) 14% were neutral. *Ibid.*, at 11–12.

<sup>11</sup> *Ibid.*, at 11.

<sup>12</sup> School of International Arbitration at Queen Mary, University of London and White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (2012), available at [www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf](http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf) (accessed Mar. 28, 2014).

<sup>13</sup> *Ibid.*, at 3–38.

<sup>14</sup> *Ibid.*, at 38. See also Mason, *supra* n. 7: “In my former life as in-house corporate counsel, this perception often prevailed in the halls and cubicles of corporate legal departments, especially in litigation groups where in-house counsel are more familiar with U.S. style litigation and cite ‘splitting the baby’ to justify objecting to arbitration and favouring litigation instead. My own experience as arbitrator and counsel in arbitrations, however, has been the opposite—that rarely,

if ever, has arbitration been decided this way.”

<sup>15</sup> School of International Arbitration at Queen Mary, University of London and PricewaterhouseCoopers LLP, 2013 International Arbitration Survey: Corporate Choices in International Arbitration, Industry Perspectives (2013), available at [www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf](http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf) (accessed Mar. 28, 2014).

<sup>16</sup> *Ibid.*, at 9.

<sup>17</sup> Alex Lo, Determining Damages in ICSID Arbitration: A Problem of Uncertainty, 6(1) *Contemp. Asia Arb. J.* 96–97 (May 2013).

<sup>18</sup> *Ibid.*, at 96 (quoting Sergey Ripinskiy & Kevin Williams, Damages in International Investment Law, *British Institute of International and Comparative Law* 191 (2008)).

<sup>19</sup> Gary B. Born, Legal Framework for International Arbitration Agreements, B. Definition of ‘Agreement to Arbitrate’ in *International Commercial Arbitration* 250 (Kluwer Law International 2009).

<sup>20</sup> Park, *supra* n. 5, at 518–19.

<sup>21</sup> Soia Mentschikoff, *Commercial Arbitration*, *Colum. L. Rev.*, LXI 846 (May 1961).

<sup>22</sup> *Ibid.*, at 861.

<sup>23</sup> *Ibid.*

<sup>24</sup> See J. Kirkland Grant, *Securities Arbitration for Brokers, Attorneys and Investors* (Greenwood Publishing Group 1994). See also Carl F. Ingwolson, Jr., Dispelling Arbitration Myths, Utah State Bar 2011 Summer Convention, San Diego, California.

<sup>25</sup> James R. Deye & Lesly L. Britton, Arbitration by the American Arbitration Association, 70 *N.D. L. Rev.* 287–288 (1994).

<sup>26</sup> See Richard Fullerton, Searching for Balance in Conflict Management: The Contractor’s Perspective, 30(1) *AAA, Dispute Resol. J.* (2005).

<sup>27</sup> Keer & Naimark, *supra* n. 5, at 573.

<sup>28</sup> *Ibid.*, at 574.

<sup>29</sup> See also Drahozal, *supra* n. 3, at 663–78.

<sup>30</sup> *Ibid.*, at 676.

<sup>31</sup> *Ibid.*, at 574.

<sup>32</sup> *Ibid.*, at 577–578. See also Christopher R. Drahozal, Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration, 22(2) *Arb. Int’l* 304 (2006).

<sup>33</sup> Splitting the Baby: A New AAA Study (Mar. 9, 2007), available at [www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_014038](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_014038) (accessed Mar. 28, 2014).

<sup>34</sup> *Ibid.*

<sup>35</sup> Nigel Blackaby & Constatine Partasides with Alan Redfern & Martin Hunter, Redfern and Hunter on International Arbitration 573 (Oxford University Press 2009).

<sup>36</sup> See United Nations Commission on International Trade Law (UNCITRAL) Model Law (2006), Art. 29; UNCITRAL Arbitration Rules (2010), Art. 33; ICC Rules of Arbitration (2012), Art. 31(1); 2010 Stockholm Chamber of Commerce Arbitration Rules (2010), Art. 35(1).

<sup>37</sup> Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, II *Y.B. Com. Arb.* 208 (1977).

<sup>38</sup> W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* 95–96 (Duke University Press 1992). “The dynamic of compromise is almost forced upon a chairman of a tribunal when his two colleagues are party-appointed. The party-appointed arbitrator, under several codes of arbitral ethics, may espouse the views of the party that appointed him.” For a detailed analysis of cases in which compromises were reached in international adjudication tribunals see Stephen Schwebel, The Majority Vote of an International Arbitral Tribunal, 2(4) *Am. Rev. Int’l Arb.* 402–10 (1991).

<sup>39</sup> David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 702 (Oxford University Press 2013). See also Philippe Fouchard, Emmanuel Gaillard & Bertold Goldman, *International Commercial Arbitration* 747 (Kluwer International 1999).

<sup>40</sup> Stavros Brekoulakis, Systemic Bias and the Institution of International Arbitration, 4(3) *J. Int’l Disp. Settlement* 566 (2013).

<sup>41</sup> Caron & Caplan, *supra* n. 39.

<sup>42</sup> Albert Jan van den Berg, Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 834 (Mahnoush Arsanjani et al. eds., Brill 2011).

<sup>43</sup> Jan Paulsson, Moral Hazard in International Dispute Resolution, Inaugural Lecture as holder of the Michael R. Klein’s Chair at the Miami University, April 2010.

<sup>44</sup> Brekoulakis, *supra* n. 40. See also Alan Scott Rau, Integrity in Private Judging, 38 *S. Tex. L. Rev.* 488, 523 (1997); Alexis Moure, Are Unilateral Appointments Defensible? *Kluwer Arbitration Blog* (May 10, 2010), available at <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral->

[appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/](#) (accessed Mar. 28, 2014).

<sup>45</sup> See Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 47 *Cornell L Rev.* 60 (2010).

<sup>46</sup> Park, *supra* n. 5, at 519–520. The author, on the other hand, stated that it is unlikely that successful arbitrators would adopt such an attitude: “Successful arbitrators gain reputations by rendering awards that reflect fidelity to the parties’ shared ex ante expectations, establishing track records for understanding difficult factual and legal matrices. Moreover, arbitrators sitting on three-member tribunals have far more to gain from demonstrating intellectual integrity to each other (thus enhancing positive references for future cases) than in urging disregard of the right result.”

<sup>47</sup> See Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 6(3) *World Arb. & Mediation Rev.* (2012).

<sup>48</sup> van den Berg, *supra* n. 42, at 830.

<sup>49</sup> Richard Posner, *Judicial Behavior and Performance: An Economic Approach*, 32(4) *Fla. St. Univ. L. Rev.* 1260–61 (2004–2005): “an arbitrator who gets a reputation for favoring one side or the other in a class of cases...will be unacceptable to one of the parties in any future dispute, and so the demand for his services will wither.”

<sup>50</sup> See UNCITRAL Model Law (2006), Art. 31(2); UNCITRAL Arbitration Rules (2010), Art. 34(3); ICC Rules (2012), Art. 31(2); SCC Rules (2010), Art. 36(1). See also Fouchard, Gaillard & Goldman, *supra* n. 39, at 761–64.

<sup>51</sup> ICC Rules (2012), Art. 21(3) provides: “The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.” ICC Rules (2012), Art. 31(2) reads: “The award shall state the reasons upon which it is based.”

<sup>52</sup> James H. Carter, *Emerging Issues in International Commercial Arbitration: A Kiss for Arbitrating Cost Allocation*, 23(3–4) *Am. Rev. Int’l Arb.* 477 (2012).

<sup>53</sup> Robert H. Smit & Tyler B. Robinson, *Cost Awards in International Commercial Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 30(3) *Am. Rev. Int’l Arb.* 268 (2009) (citing Bühler, Bom & Park).

<sup>54</sup> See [www.iccwbo.org/about-icc/policy-commissions/arbitration/current-task-forces/](http://www.iccwbo.org/about-icc/policy-commissions/arbitration/current-task-forces/) (accessed Mar. 28, 2014).

<sup>55</sup> See *Amoco Int’l Fin. Corp. v. Gov’t of Islamic Republic of Iran*, 15 Iran-U.S. C.T.R. 189, Partial Award No. 310-56-3, Jul. 14, 1987, para. 190.

<sup>56</sup> Ripinsky & Williams, *supra* n. 18, at 122.

<sup>57</sup> *Sistem Mühendislik İnşaat Sanayive Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Judgment of Sep. 9, 2009 para. 155.

<sup>58</sup> Kantor, *supra* n. 2.

<sup>59</sup> Joshua B. Simmons, *Valuation in Investor State Arbitration: Toward a More Exact Science*, 30(1) *Berkeley J. Int’l L.* 196 (2012), available at <http://scholarship.law.berkeley.edu/bjil/vol30/iss1/5> (accessed Mar. 28, 2014).

<sup>60</sup> Albert Jan van den Berg, *Splitting the baby: Reality, Myths and Ethics*, ICC Conference, Miami, Nov. 5, 2013.

<sup>61</sup> Simmons, *supra* n. 59, at 211.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, at 248.

<sup>64</sup> See Quentin Tannock, *Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards*, 21(1) *Arb. Int’l* 79 (2005).

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