



# AAA-ICDR Awards Do Not Split the Baby

## Countering Counsel Perception in Commercial B2B Arbitration Cases

**94.5% of AAA-ICDR® awards are in favor of one party or the other.** (See Table 1.) Whether one observes the Rules of Arbitration or the Rules of Civil Procedure, arbitrators, judge, or jury all are charged with rendering a distinct decision. As such, AAA-ICDR arbitrators do not “split the baby,” or compromise the amount of the award and deny 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 do not make anyone whole. However, 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 belief, it is important to recognize that it endures and why.

### The Perception: Arbitrators Split the Award

*Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel<sup>1</sup>* states that although data clearly show that splitting the difference is not standard practice in actual arbitration decisions, the perception persists that awards are compromises.

This study, issued 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% who felt that arbitrators did not split the difference (14% were neutral and 1% had no opinion) were the ones who used arbitration clauses most frequently, and
- Approximately 25% of the survey responders had never even attended an arbitration session, much less had any experience with receiving awards from arbitration.

This suggests that “*splitting the baby*” in arbitration awards is a myth dispelled by having actual experience with arbitration.



## A Dose of Reality: Responding to Flawed Beliefs

Below are three striking corporate counsel misperceptions reported in the RAND study regarding arbitrators' decisions, followed by refutations.

**Corporate Counsel 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:** 87% of the AAA Commercial Panel of Arbitrators is made up of attorneys and former judges—who also have industry expertise; the specialty AAA Judicial Panel is comprised of over 321 former state and federal judges located in 44 states plus the District of Columbia and Puerto Rico.

**Corporate Counsel Perception:** "...Arbitrators are interested in repeat business and do not want to upset either party."

**The Reality:** Since parties in arbitration generally do not want to compromise on the monetary worth of their claims, 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 they are currying favor with a party often ends up alienating both parties, exactly the opposite result that such baby-splitting is supposedly trying to achieve."<sup>2</sup>

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.'" 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."<sup>3</sup>

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

**Corporate Counsel Perception:** Neither party to an arbitration is likely to merit all—or none—of the financial remuneration because there is "enough blame to go around," and the issues of a commercial contract can be quite complex.

**The Reality:** However, 67% of respondents felt that an arbitrator is more likely than is a judge to understand the subject matter of the arbitration. Such a decision maker with expertise in the nature of the dispute can parse the issues and deliver a well-reasoned award.

## The Numbers: Arbitrators Render Decisive Awards

A 2018 study by the American Arbitration Association®-International Centre for Dispute Resolution® 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 2,547 AAA-ICDR-administered business-to-business (B2B) commercial arbitration cases with monetary claims awarded in 2017, as shown in Table 1 below.

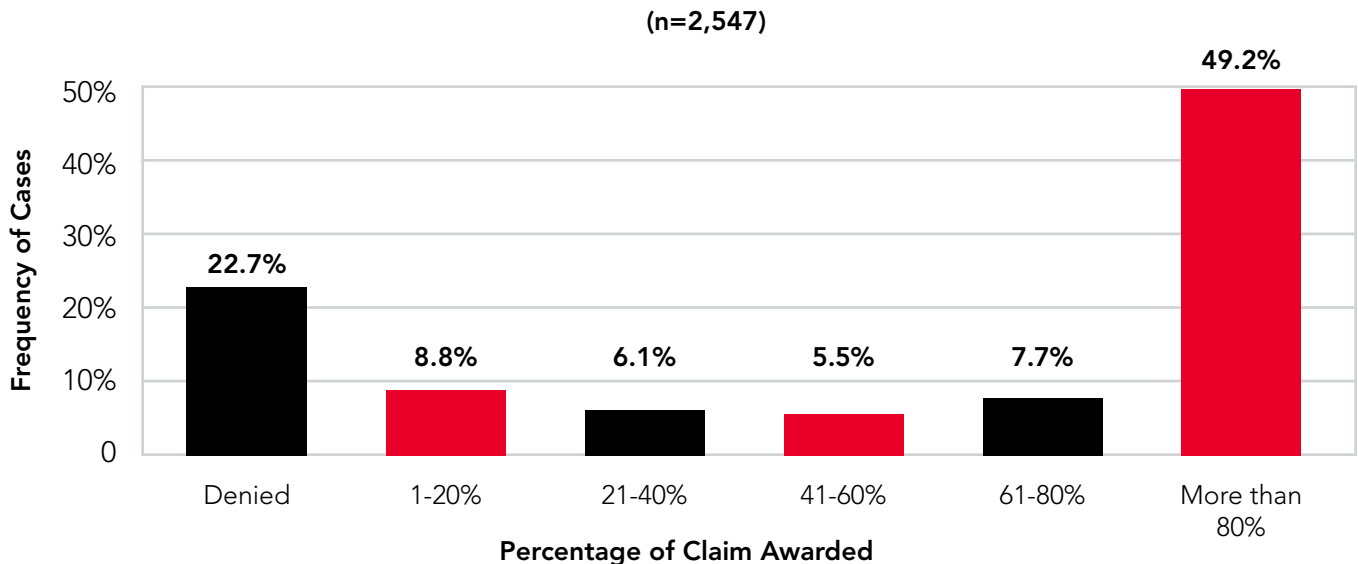


The “U” shape of the graph demonstrates the greater incidence of arbitral awards in which one party clearly prevails. More than 94% (2,406 cases) were awarded outside the claim midrange, which is defined as 41-60% of the filed claim amount.

Here is the breakdown:

- Cases receiving 61-100% of their claimed amount: **56.9% or 1,449 cases**
- Cases totally denied or awarded up to 40% of their claim: **37.6% or 957 cases**
- Cases awarded in the midrange: **5.5% or 141 cases**

**Table 1: 94.5% of 2017 AAA-ICDR B2B Initial Claim Awards Are Outside the Midrange of Claim Amount (as defined as 41-60% of their filed claim amount).**



Research on counterclaims as well as on subsets of commercial B2B cases by case type or field of industry supports the fact that AAA arbitrators render decisive awards. **See the Appendix for tables on B2B Counterclaims, Large Cases, Technology, Healthcare, Financial Services, and Construction.**

## Conclusion

Although the myth persists that arbitrators “split the baby” or “split the difference,” this most recent research yields similar results to the five previous studies conducted by the AAA-ICDR over the past 18 years. In 2016, a survey of all AAA commercial cases awarded in 2015 found that only 6.75% of those awards were in the midrange; a 2013 survey of same determined only 5.34%, and a 2011 survey, 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 counters objections to using arbitration because of the fear of split awards; drawing on this and additional research provide responses to expressed misconceptions by corporate counsel.

*Appendix follows on next page.*

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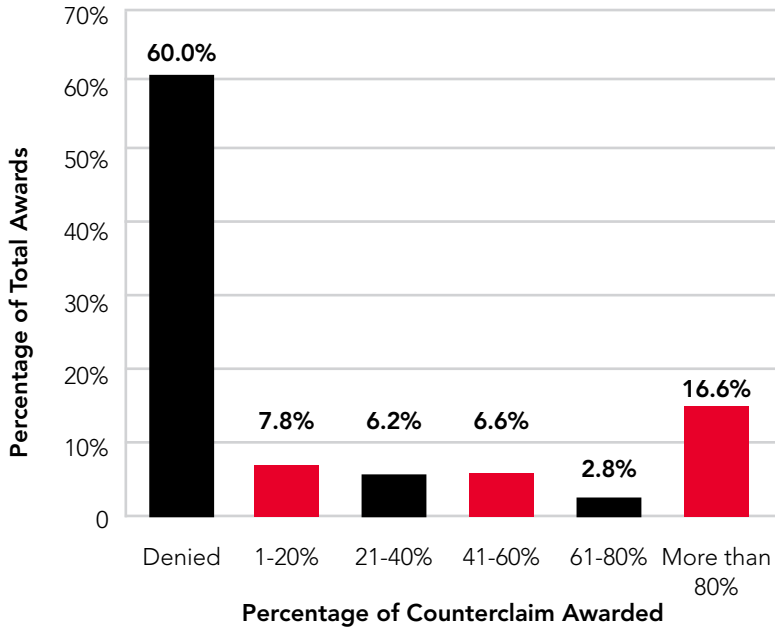
## Footnotes

- <sup>1</sup> The RAND Institute for Civil Justice. 2011. *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*. Santa Monica: The RAND Corporation
- <sup>2</sup> Jeffrey T. Zaino. “Do Labor Arbitrators ‘Split the Baby’ in NYC Teacher Cases?,” *NYSBA Labor and Employment Law Journal* Summer 2012 Vol. 37 No. 2 P. 14
- <sup>3</sup> Daphna Kapeliuk. “The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators,” *Cornell Law Review* Vol. 96:47 2010

**APPENDIX**

**Table 2: 93.4% of 2017 AAA-ICDR B2B Counterclaims Awarded Are Outside the Midrange of Counterclaim Amounts (as defined as 41-60% of their filed counterclaim amount).**

(n=579)

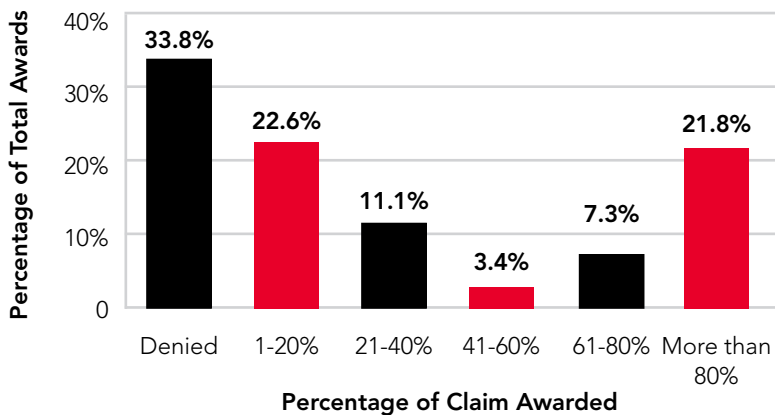


The breakdown:

- Cases receiving 61-100% of their counterclaimed amount: **19.4% or 112 cases.**
- Cases totally denied or awarded up to 40% of their counterclaim: **74.0% or 429 cases.**
- Cases awarded in the midrange: **6.6% or 38 cases.**

**Table 3: 96.6% of 2017 AAA-ICDR B2B Cases Awarded with Initial Claim of at Least \$1,000,000 Are Outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).**

(n=234)

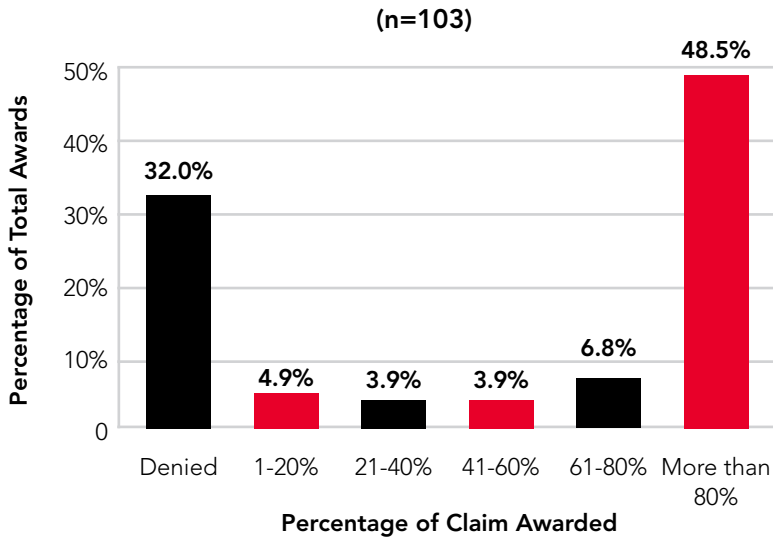


The breakdown:

- Cases receiving 61-100% of their claimed amount: **29.1% or 68 cases.**
- Cases totally denied or awarded up to 40% of their claim: **67.5% or 158 cases.**
- Cases awarded in the midrange: **3.4% or 8 cases.**



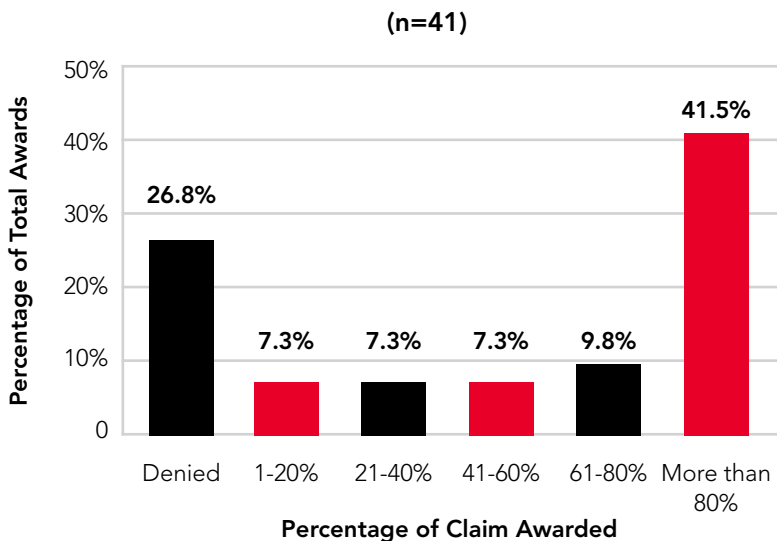
**Table 4: 96.1% of 2017 AAA-ICDR Technology Initial Claim Awards Are Outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).**



The breakdown:

- Cases receiving 61-100% of their claimed amount: **55.3% or 57 cases.**
- Cases totally denied or awarded up to 40% of their claim: **40.8% or 42 cases.**
- Cases awarded in the midrange: **3.9% or 4 cases.**

**Table 5: 92.7% of 2017 AAA-ICDR B2B Healthcare Initial Claim Awards Are Outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).**



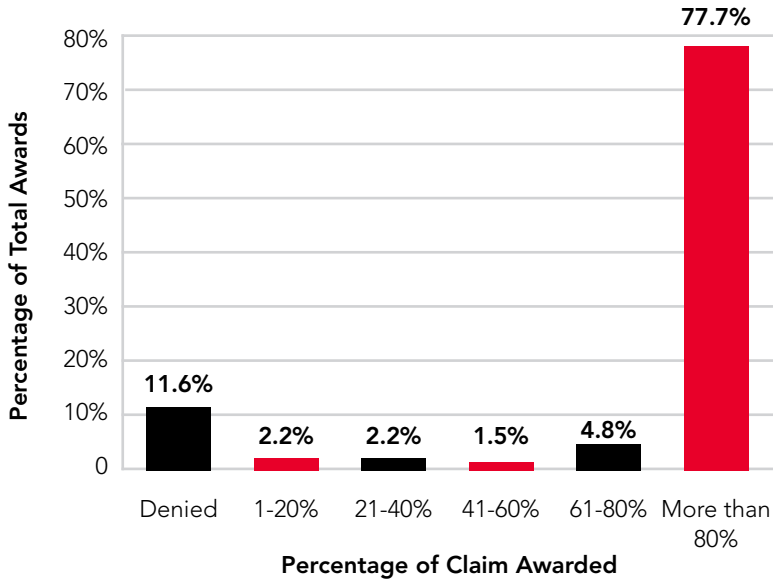
The breakdown:

- Cases receiving 61-100% of their claimed amount: **51.3% or 21 cases.**
- Cases totally denied or awarded up to 40% of their claim: **41.4% or 17 cases.**
- Cases awarded in the midrange: **7.3% or 3 cases.**



**Table 6: 98.5% of 2017 AAA-ICDR B2B Financial Services Initial Claim Awards Are Outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).**

(n=269)

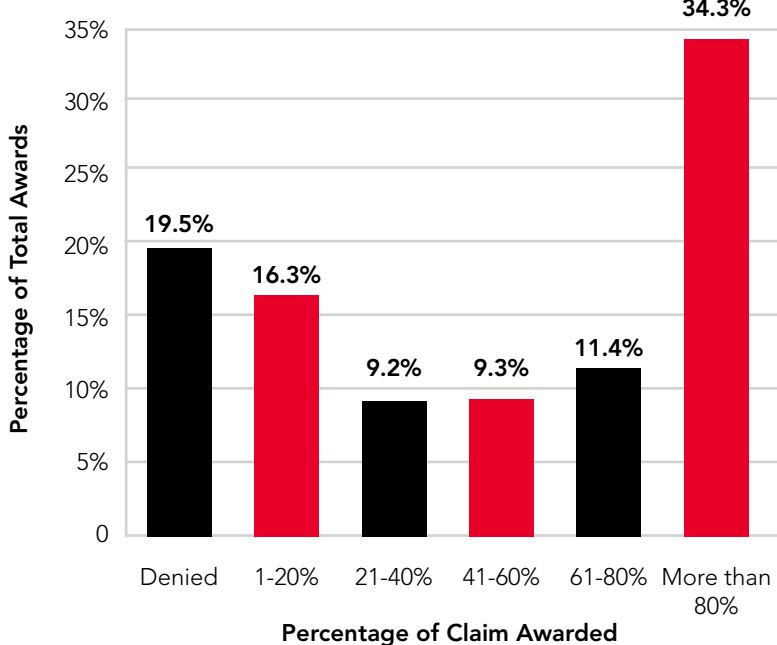


The breakdown:

- Cases receiving 61-100% of their claimed amount: **82.5% or 222 cases.**
- Cases totally denied or awarded up to 40% of their claim: **16.0% or 43 cases.**
- Cases awarded in the midrange: **1.5% or 4 cases.**

**Table 7: 90.7% of 2017 AAA-ICDR B2B Construction Initial Claim Awards Are Outside the Midrange of Claim Amounts (as defined as 41-60% of their filed claim amount).**

(n=686)



The breakdown:

- Cases receiving 61-100% of their claimed amount: **45.7% or 313 cases.**
- Cases totally denied or awarded up to 40% of their claim: **45.0% or 309 cases.**
- Cases awarded in the midrange: **9.3% or 64 cases.**