Splitting the Baby

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Compromise outcomes in international commercial arbitration are widely derided as "baby-splitting." Yet it turns out to be surprisingly hard to articulate what it is that makes such outcomes problematic. In this Article, I first identify what makes an outcome a compromise and situate compromise outcomes in the intra-tribunal dynamics shaped by arbitrator selection, arbitration rules regarding awards, and concerns about the legitimacy of non-unanimous awards. I then argue that while the argument for compromise outcomes as an appropriate answer to hard cases is compelling, a strong norm against such solutions is still warranted to promote the quality of arbitral judging. The option to compromise interferes with individual and collective deliberation by solidifying early judgments and injecting strategic considerations into the tribunal's discussions. These flaws, in turn, taint the outcome and reasoning. Instead of providing an opportunity for continued assessment of the case, drafting the award becomes an exercise in justifying a result that none of the arbitrators believes to be correct. Even if a compromise award ends up being doctrinally coherent, much of the value that comes from multi-arbitrator judging will have been destroyed in the process.

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INTRODUCTION

The myth that arbitrators "split the baby" is only slightly more persistent than attempts to debunk it. In survey after survey, in-house

attorneys identify the likelihood of a compromise decision as a drawback of arbitration.[1] At the same time, arbitration institutions tout empirical studies showing that at least in commercial disputes, arbitral tribunals usually grant a clear win to one side over the other.[2] Many elite arbitrators confirm that the practice is frowned upon. According to these arbitrators, trying to broker a negotiated outcome in a three-arbitrator tribunal is a surefire way to lose credibility with other tribunal members and, over time, damage one's reputation within the international arbitration community.[3] The upshot is that while perceptions of whether arbitrators actually engage in baby-splitting differ, nearly everyone finds common ground in condemning the practice.

Yet it turns out to be surprisingly hard to pin down what makes an outcome a compromise. For purposes of this Article, I am concerned with outcomes in three-arbitrator arbitrations that reflect substantial concessions to accommodate disagreement. The essential characteristic of a compromise is *not* its location somewhere in the middle between the parties' positions—tribunals could arrive at such a resolution based on a careful review of the facts and the law—but rather that it is the result of bargaining between the arbitrators, whether overt or implicit. Take, for example, the scenario in which a tribunal splits 2-1 on liability, with the majority believing that the respondent is liable to the claimant for almost the entire claimed damages amount. To account for the disagreeing arbitrator's views, the tribunal rules in favor of the claimant, but finds a way to award only two-thirds of the claimed damages. Or consider the scenario of a three-way split between the positions that the respondent is not liable to the claimant; that the respondent is liable, and the claimant is entitled to full damages; and that the respondent is liable, but the claimant is entitled to only about half of the damages it claims to have suffered. The two arbitrators who agree on liability settle on an amount that is approximately 75% of the claimed amount. In both examples, the outcome is acceptable to all three tribunal members, but not favored by any of them.

It is even harder to articulate *why* the search for some sort of middle ground is objectionable. Compromise solutions tend to be equated with arbitrator bias in favor of the appointing party, which is problematic.[4] Yet bias is only one reason why a three-arbitrator tribunal may split over how to resolve a complex dispute. Arbitrators'

1. *See infra* notes 74–76 and accompanying text.
2. *See infra* notes 79–81 and accompanying text.
3. *See infra* notes 86–91 and accompanying text.
4. *See infra* notes 84–85 and accompanying text.

diverging views often stem not from improper motives, but from genuine disagreement about the assessment of the evidence, the interpretation of the agreements at issue, or the correct application of the law. Given the factual and legal complexity of many international commercial disputes, why wouldn't compromise solutions ever be an appropriate response to hard cases?[5] International commercial arbitration provides an especially suitable setting for exploring these questions because, compared to courts and tribunals that directly shape substantive legal norms, the public functions of awards rendered in commercial disputes are limited. Arbitrators in commercial disputes almost always apply the laws of countries or states (say, New York contract law), but their awards don't have precedential value in those jurisdictions.[6] When dispute resolution is the main or even the entire point, arguably an outcome that gives weight to each arbitrator's views is the best representation of a tribunal's collective wisdom.

In this Article, I argue that while the case for compromise awards in international commercial arbitration is too compelling to be shrugged off, a strong norm against such solutions is still warranted. My defense of this norm is grounded in its role in promoting the quality of arbitral judging. The option to compromise interferes with individual and collective deliberation in multiple ways. It introduces strategic considerations that cause the arbitrators' individual focus to shift from grappling with difficult questions to figuring out how to move the tribunal to a particular outcome, solidifying early judgments.[7] At the collective level, by turning joint deliberation into a negotiation, compromise undermines many of the benefits of collegial adjudication, including those derived from an open and honest exchange of views.[8] Additionally, reasoning backwards from a negotiated outcome interferes with the analytical integrity of the deliberation.[9]

The reduced quality of deliberation, in turn, taints the award. Rather than providing an opportunity to reassess the strength of the building blocks and inferences on which the tribunal's ruling is based, the drafting process is reduced to an exercise in creating a facially

5. Hard cases are hard because the facts or the law support different and irreconcilable inferences. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323 (1990) ("In the hard cases . . . the evidence points in different directions . . . ."); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 44 (1998) (describing hard cases as those in which "inferences, when made in isolation, point in different directions").

6. *See infra* note 109 and accompanying text.

7. *See infra* notes 121–133 and accompanying text.

8. *See infra* notes 134–142 and accompanying text.

9. *See infra* notes 143–146 and accompanying text.

coherent work product that masks the true reasons for the tribunal's decision.[10] An unsuccessful attempt diminishes the legitimacy of the award. Sophisticated parties and their counsel will easily sniff out the award as a compromise and—because of the lack of candor about how the tribunal arrived at the outcome—may well infer the existence of improper incentives with which baby-splitting is widely associated.[11] If the tribunal *does* succeed in covering its tracks, some of the very reasons why parties entrust disputes to a multi-arbitrator tribunal will have gotten erased in the process.

This Article explores the puzzles presented by compromise awards in international commercial arbitration in three parts. Part I analyzes how intra-tribunal agreement and disagreement may play out in voting configurations and in the awards a tribunal can issue. Part II defines compromise outcomes and distinguishes them from scenarios that are qualitatively different but can be hard to distinguish in practice. Part III assesses the desirability of compromise in international commercial arbitration.

I. DISAGREEMENT IN ARBITRAL TRIBUNALS

One reason to opt for three arbitrators is the idea that more minds are better than one because of their interactions with one another.[12] Often, the benefits of these interactions stem from the arbitrators' different views on the dispute before them.

Disagreement is especially likely in three-arbitrator arbitration because of the parties' roles in the appointment process. The most common method for constituting a three-arbitrator tribunal is one in which each party selects an arbitrator, and the presiding arbitrator is selected by either the party-nominated arbitrators or the arbitration institution.[13] One consequence of the direct party involvement in the

10. *See infra* note 166 and accompanying text.

11. *See infra* notes 171–173 and accompanying text.

12. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 15.08[FF][2] (3d ed. 2021) (noting that the deliberation process is "one of the reasons that parties select three-arbitrator tribunals: it helps ensure careful consideration of all issues and a sensible, 'correct' result"); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 227–28 (2003) (observing that arbitrators serving on a three-arbitrator tribunal "can discuss the case with each other which may improve the quality of the award and limit the possibility of erratic or eccentric awards").

13. In a survey conducted in 2012 by Queen Mary University of London and White & Case LLP, 76% of surveyed in-house counsel expressed a preference for two party-appointed arbitrators over institutional appointments. SCH. INT'L ARB., QUEEN MARY, UNIV. OF

selection of the adjudicators is that if each party succeeds in nominating an arbitrator who is favorably inclined to their side, the co-arbitrators are more likely to disagree than they would be if they had been randomly selected.[14] As a result, the presiding arbitrator is even more critical than one might expect based on the formal responsibilities that come with chairing a tribunal.[15] After all, the presiding arbitrator may well cast the decisive vote.[16] The arbitrator selection process, therefore, affects the deliberation dynamics and voting strategies within tribunals.

In this Part, I describe the framework within which three-arbitrator tribunals resolve disagreement. It is important to distinguish between how arbitrators vote, which is internal to the tribunal, and how they present their decision in the award. I first describe the different configurations in which a tribunal may find itself, using the term "voting" as a shorthand reference to the arbitrators' disclosure to one another of how they believe the tribunal should decide. I then discuss the awards tribunals can issue under the arbitration rules, which tend to permit awards signed by a majority of the tribunal or even the presiding arbitrator alone. Voting configurations and award signatories don't always correspond; as we will see, a unanimous or majority award may mask greater internal division.

A. Voting Configurations

At certain points in the deliberation process, three-arbitrator tribunals need to take stock of how each of them would resolve important legal questions, including jurisdiction, the merits of the dispute, and costs. Tribunals may take votes on discrete issues

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LONDON & WHITE & CASE LLP, 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS 5–6 (2012) [hereinafter 2012 INTERNATIONAL ARBITRATION SURVEY].

14. *See, e.g.*, Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 396 (1998) (noting that most parties follow the guideline that "'their' arbitrators can be generally predisposed to them personally or to their positions, as long as they can ultimately decide the case—without partiality—in favour of the party with the better case").

15. *See* BORN, *supra* note 12, § 13.07[A][2] (describing the role of the presiding arbitrator).

16. *See* Jennifer Kirby, *With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, 26 J. INT'L ARB. 337, 346–47 (2009) (arguing that there is no realistic scenario in a three-arbitrator tribunal where a party wins while losing the presiding arbitrator's vote).

(e.g., whether the respondent could legally terminate the contract, or whether the claimant's damage mitigation efforts were adequate) or on an overall outcome.[17]

For three-arbitration tribunals, there are three likely voting configurations. The first is unanimity. Easy cases do exist, even in international commercial arbitration, and sometimes it is immediately clear to all arbitrators (and perhaps even the losing party and their counsel) that one of the parties is fighting an uphill battle. Thus, arbitrators often agree with one another on how the tribunal should rule.[18] The second configuration is a 2-1 split. Typically, in this configuration the presiding arbitrator sides with one of the co-arbitrators.[19] It is also possible for the presiding arbitrator to land in the minority, but that situation is rare because party appointment increases the chances that the co-arbitrators are sympathetic to the appointing party's position.[20] The last configuration is a 1-1-1 split. This scenario could occur if, for example, each co-arbitrator adopts the position of their respective appointing party, and the presiding arbitrator lands somewhere in between those extremes.

Although positions will solidify at some point, configurations aren't static until the award is signed. Until then, arbitrators can change their minds, change their votes for strategic reasons, or overtly or covertly try to move the tribunal toward a compromise outcome.

B. Awards Issued by Three-Arbitrator Tribunals

Arbitral deliberation and voting take place within the framework provided by the applicable arbitration rules. Most critically, these rules affect power dynamics in three-arbitrator tribunals by either

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17. *See* Manuel Conthe, *Majority Decisions in Complex Arbitration Cases: The Role of Issue-by-Issue Voting*, 8 SPAIN ARB. REV. 1, 6 (2010) (advocating for voting issue-by-issue rather than for an overall outcome).

18. *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*, 29 ARB. INT'L 7, 25 (2013) (noting that "'unanimity' in a three-member tribunal does not necessarily result from 'compromise'" and that "[a]ll three arbitrators can—and, anecdotally, most often do—apply the law to the facts in a given arbitration in the same manner, thereby reaching the same result").

19. *Cf.* BORN, *supra* note 12, § 23.05[B] (noting the "prevalence of dissenting opinions by party-nominated co-arbitrators, typically supporting the position of the party that nominated them").

20. *Id.* ("[I]t is in no way surprising that co-arbitrators . . . would have views . . . that make each of [them] more likely to be responsive to the submissions of his or her nominating party.").

requiring a majority or empowering the presiding arbitrator alone to issue an award.[21] Concerns about the parties' acceptance of an award and the broader legitimacy of arbitration also inform arbitrators' decisions about how to vote and whether to register disagreement.

1. Unanimous Award

The overwhelming majority of arbitration awards in three-arbitrator tribunals are unanimous.[22] Unanimity may reflect true consensus, but that is not always the case. Even if a tribunal continues to disagree until the very end, the most common course of action is for the minority arbitrator to sign onto the award without registering disagreement.[23] One explanation for this practice could be that many arbitrators earned their law degrees in jurisdictions in which judges don't write separate opinions or otherwise indicate that they disagree.[24] Thus, as a practical matter, a 2-1 or 1-1-1 vote may not be discernable to anyone who did not serve on the tribunal, and a unanimous award could mask intra-tribunal disagreement that was never resolved.

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21. *See* David D. Caron, *Regulating Opacity: Shaping How Tribunals Think*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 379, 391 (David D. Caron et al. eds., 2015) [hereinafter PRACTISING VIRTUE] ("[V]oting rules can relatively empower the party-appointed arbitrators or the chair, thus strengthening either an image of three equal arbitrators or an image of the chair as first among equals.").

22. One study found that 23 out of 261 ICC awards rendered in 2006—293 awards approved by the International Chamber of Commerce (ICC) Court minus 32 awards by consent—and 2 out of 76 London Court of International Arbitration (LCIA) awards rendered in 2008 were not unanimous, amounting to dissent rates of, respectively, 8.8% and 2.6%. Peter J. Rees & Patrick Rohn, *Dissenting Opinions: Can They Fulfill a Beneficial Role?*, 25 ARB. INT'L 329, 330 (2009).

23. Alan Redfern, *Dangerous Dissents*, 71 ARBITRATION 200, 204 ("An arbitrator who disagrees with the award will normally be expected to sign it."). Albert Jan van den Berg has expressed the view that the prospect of a dissenting opinion inhibits collective deliberation. 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 821, 829–30 (Mahnoush Arsanjani et al. eds., 2011).

24. Yves Derains, *The Arbitrator's Deliberation*, 27 AM. U. INT'L L. REV. 911, 921 (2012) (noting that the practice to refrain from indicating disagreement with the majority "is consistent with the tradition of some countries where the Tribunal is considered as an entity rather than a sum of individuals"); Ilhyung Lee, *Introducing International Commercial Arbitration and Its Lawlessness, by Way of the Dissenting Opinion*, 4 CONTEMP. ASIA ARB. J. 19, 27 (2011) (observing that "arbitrators from civil law jurisdictions may regard . . . dissenting opinions . . . as . . . lawless"); *see also* Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA BULL. 437, 439 (2008) (discussing common and civil law approaches to dissenting opinions).

2. Majority Award

Most, if not all, arbitration rules anticipate that a multi-arbitrator tribunal may not reach agreement. Codifying a longstanding and uncontroversial practice, these rules empower a tribunal's majority to make decisions and sign awards.[25] This allows a disagreeing arbitrator to refrain from signing an award, but also gives the majority the tools to prevent a single arbitrator from holding the tribunal hostage.[26] Additionally, most arbitration rules allow for dissenting or concurring opinions, or at least don't expressly prohibit them.[27] A minority arbitrator who wishes to voice objections can file a separate opinion.[28] Alternatively, the tribunal may present the minority arbitrator's views in the majority award and, if appropriate, respond to them.[29]

Although the reasons for allowing majority awards are sound, many arbitrators consider such awards to be suboptimal. Outward appearance of unity promotes the legitimacy of arbitration.[30] Conversely, majority awards are susceptible to challenges at the

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25. *See, e.g.*, INT'L CHAMBER COM. ARB. RULES art. 32(1) (2021) [hereinafter ICC ARB. RULES], https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ [https://perma.cc/F4LQ-X84H]; INT'L CTR. FOR DISP. RESOL. ARB. RULES art. 32(2) (2021) [hereinafter ICDR ARB. RULES]; LONDON CT. INT'L ARB. RULES art. 26.5 (2020) [hereinafter LCIA ARB. RULES], https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx [https://perma.cc/DJ8L-2SCP]. The power to decide by simple majority can be traced back to the early days of "modern arbitration" in the late eighteenth century. 1 J.H.W. VERZIJL, *Publicity or Secrecy of the Deliberations in the Permanent Court of International Justice?*, *in* THE JURISPRUDENCE OF THE WORLD COURT: A CASE BY CASE COMMENTARY 405, 405–07 (1965).

26. The LCIA arbitration rules go further by explicitly providing that if an arbitrator does not participate in deliberations, the other tribunal members can continue the arbitration without the absent or obstinate arbitrator, subject to the LCIA Court's approval. LCIA ARB. RULES, *supra* note 25, art. 12.1.

27. S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT'L L. 1, 23 (2015).

28. *See, e.g.*, CHINA INT'L ECON. TRADE ARB. COMM'N, CIETAC ARB. RULES art. 49.5 (2015) [hereinafter CIETAC ARB. RULES] (providing that a "dissenting opinion shall not form a part of the award").

29. *See* Humphrey Lloyd et al., *Drafting Awards in ICC Arbitrations*, 16 ICC INT'L CT. ARB. BULL. 19, 26 (2005) (the majority award "ought to take into account the grounds for the minority view and, if appropriate, provide reasons for rejecting them"); *see also* Arroyo, *supra* note 24, at 460 (counseling that a dissenting opinion that is incorporated or summarized in the award should be identified as a dissenting *opinion* rather than as a dissenting *award*).

30. *See, e.g.*, BORN, *supra* note 12, § 15.08[FF][3] (noting that "most presiding arbitrators will want to produce a unanimous award"); Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 335 (2014).

enforcement stage, especially if the dissenting arbitrator writes an opinion alleging irregularities in the arbitration or deliberation process.[31] Presiding arbitrators, and to some extent the co-arbitrators, therefore operate under pressure to issue a unanimous award.[32]

3. Award Issued by the Presiding Arbitrator

In addition to authorizing majority awards, arbitration rules often specify that in the absence of a majority, the presiding arbitrator alone can issue an award.[33] These rules aim to prevent deadlock in case of a three-way split. Without such a rule in place, a tribunal would, as Pieter Sanders has noted, be forced "to continue deliberations until a majority, and probably a compromise solution, has been reached."[34] A concurring opinion penned by Judge Howard Holtzmann in a case before the Iran-U.S. Claims Tribunal exemplifies the problem:

> I concur in the Award in this Case. The Award correctly holds that contracts of sale were formed, that the Respondents breached those contracts and that they are liable to pay damages. Unfortunately, however, the damages awarded are only about half of what the governing law requires.
>
> Why then do I concur in this inadequate Award, rather than dissenting from it? The answer is based on the

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31. Nael G. Bunni, *Personal Views on How Arbitral Tribunals Operate and Reach Their Decisions*, *in* INSIDE THE BLACK BOX: HOW ARBITRAL TRIBUNALS OPERATE AND REACH THEIR DECISIONS 123, 124 (Bernhard Berger & Michael E. Schneider eds., 2014) [hereinafter INSIDE THE BLACK BOX] (describing an enforcement challenge in the Cairo Appeal Court after one of the co-arbitrators objected to the award); Stipanowich, *supra* note 30, at 335 ("Arbitrators may consciously or subconsciously apply a 'norm of consensus' in order to speak authoritatively and lessen the likelihood of a successful motion to vacate their award.").

32. *See, e.g.*, Arroyo, *supra* note 24, at 458 ("It goes without saying that unanimous awards are preferable to majority awards with dissents. On this, all commentators agree."); Bunni, *supra* note 31, at 127 ("[I]t is always the preference to have a unanimous award.").

33. *See, e.g.*, CIETAC ARB. RULES, *supra* note 28, arts. 49.5, 49.6; ICC ARB. RULES, *supra* note 25, art. 32(1); H.K. INT'L ARB. CTR., 2018 HKIAC ADMINISTERED ARB. RULES art. 33 (2018), https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 [https://perma.cc/SJE4-CZ9W]; LCIA ARB. RULES, *supra* note 25, arts. 26.5, 26.6; ARB. INST. STOCKHOLM CHAMBER COM., ARB. RULES 2017 arts. 41(1), 42(3) (2017), https://sccarbitrationinstitute.se/sites/default/files/2022-11/arbitrationrules_eng_2020.pdf [https://perma.cc/42BE-YZXM]; SING. INT'L ARB. CTR., SIAC RULES 32.7 (2016), https://siac.org.sg/siac-rules-2016 [https://perma.cc/82CF-4FZK].

34. Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172, 208 (1977).

> realistic old saying that there are circumstances in which "something is better than nothing."[35]

Judge Holtzmann encountered this conundrum because arbitrations conducted by the Iran-U.S. Claims Tribunal are governed by the United Nations Commission on International Trade Law (UNCITRAL) Rules. These rules required, and still require, in the event of a three-arbitrator tribunal, that an award be made by at least a majority.[36] Because one arbitrator had decided to dissent due to disagreement with the majority's ruling on liability, Judge Holtzmann's refusal to join the presiding arbitrator would foreclose the issuance of an enforceable award.[37]

Rules that authorize presiding arbitrators to issue awards by themselves thus offer an escape route when both co-arbitrators adopt the appointing parties' positions and refuse to defer to the presiding arbitrator's judgment.[38] But an award issued by the presiding arbitrator alone is even more problematic than a majority award. Parties do not opt for a three-arbitrator tribunal—and pay the fees of three arbitrators—to obtain an award from the presiding arbitrator acting as, essentially, a sole arbitrator. Moreover, the fact that the outcome earned the support of only one arbitrator makes it appear arbitrary. As a result, an award that is signed by only the presiding arbitrator is especially vulnerable to challenges. It also raises concerns about the legitimacy of arbitration as perceived by the parties to the dispute and the broader business community.

For these reasons, awards issued solely by the presiding arbitrator are exceedingly rare.[39] Thus, the practical significance of this

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35. Econ. Forms Corp. v. Iran, 3 Iran-U.S. Cl. Trib. Rep. 42, ¶¶ 1–2 (1983) (Holtzmann, J., concurring).

36. U.N. COMM'N ON INT'L TRADE L., UNCITRAL ARB. RULES art. 31(1) (1976), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf [https://perma.cc/Z59C-33NS]; U.N. COMM'N ON INT'L TRADE L., UNCITRAL ARB. RULES art. 33(1) (2014) [hereinafter 2014 UNCITRAL ARB. RULES], https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf [https://perma.cc/BA27-P2J5]. The UNCITRAL arbitration rules only authorize decisions by the presiding arbitrator alone for procedural matters. *Id.* arts. 31(2), 33(2).

37. 2014 UNCITRAL ARB. RULES, *supra* note 36, art. 33(1). In another Iran-US Claims Tribunal case, arbitrator Richard Mosk filed a concurrence noting that he had agreed to a lower award of costs than he believed the claimant was entitled to "so as to end protracted deliberations." Granite State Mach. Co. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 442, ¶¶ 8–17 (1982) (Mosk, concurring).

38. Derains, *supra* note 24, at 919.

39. JASON FRY, SIMON GREENBERG & FRANCESCA MAZZA, THE SECRETARIAT'S GUIDE TO ICC ARBITRATION 316 (2012) ("Cases in which the arbitral tribunal fails to arrive at a majority decision, requiring the president to make the award alone, are exceptional.").

option lies primarily in the leverage it gives the presiding arbitrator in deliberations.[40]

II. COMPROMISE OUTCOMES

In this Part, I discuss what makes an outcome a compromise and why arbitrators who resolve international commercial disputes might explore such solutions. I then explain why compromise outcomes are permitted under the arbitration rules and the choice of law and arbitration agreements. Lastly, I summarize the available data about actual and perceived outcomes in commercial arbitration as well as market preferences.

A. Defining Compromise

Although many players in the international commercial arbitration world have strong opinions about compromise outcomes, the concept remains amorphous. This is perhaps unavoidable, as it can be hard to distinguish compromise from other scenarios. But line-drawing problems do not negate the existence of a difference.

1. Compromise as a Negotiated Outcome

The defining characteristic of a compromise is that it involves bargaining for major concessions, resulting in a resolution that gives weight to each arbitrator's preferred outcome. A compromise may involve a quid pro quo situation, in which an arbitrator agrees to sign the award on the condition that a major concession is given in return.[41] Of

40. BORN, *supra* note 12, § 13.07[A][3] (noting that "if the chairman can only produce an award by agreeing with one of the co-arbitrators, his or her relative autonomy and authority can be markedly diminished," but empowering the presiding arbitrator to decide alone "is usually sufficient to produce a unanimous or at least a majority opinion") (quoting Claude Reymond, *The President of the Arbitral Tribunal*, 9 ICSID REV.–FOREIGN INV. L.J. 1, 8 (1994)); Richard M. Mosk, *Deliberations of Arbitrators*, in PRACTISING VIRTUE, *supra* note 21, at 486, 489 (in discussing deliberation, noting that "[m]uch depends on whether the applicable rules require a majority for an award or allow the presiding arbitrator to render the award if there is no majority").

41. Paolo Michele Patocchi proposed defining "bargaining or concession" as involving "situations in which one arbitrator is amenable to concurring with another provided that a point is conceded and there is a kind of *quid pro quo* that takes place in the deliberation." Bernhard F. Meyer, *Structuring a Bargaining Process*, *in* INSIDE THE BLACK BOX, *supra* note 31, at 59, 66 (comment from Paolo Michele Patocchi).

course, such an exchange need not—and usually will not—be overt. Instead, an arbitrator may simply hold out on signing off on a major decision point, indicate indecision on whether to sign the award, or signal that they are considering writing a dissenting opinion. In turn, the other tribunal members (or at least, the presiding arbitrator) may suggest a meaningful concession in the hopes that this will bring the holdout arbitrator into the fold. Alternatively, a tribunal might explore compromise solutions without an explicit or implicit threat. Arbitrators could embrace an outcome-centered approach to arbitral judging in which they openly search for negotiated outcomes in appropriate circumstances.

Compromise is often understood—certainly in discussions about "baby-splitting"—to refer to solutions that affect the outcome. But arbitrators sometimes characterize adjustments to the reasoning in an award as a form of compromise. Such adjustments can sometimes appease arbitrators who feel strongly about the correctness of an alternative reasoning and have reputational concerns. While discussing compromise solutions at a conference, a participant described serving as the presiding arbitrator, when a co-arbitrator "basically threatened a dissenting opinion and for me I felt that would be a failure on my part . . . so we tried to get him back on board."[42] The presiding arbitrator did not budge on the outcome but achieved unanimity by adjusting the reasoning.[43] These types of adjustments, in which two tribunal members agree to take a different route to the outcome all arbitrators support, tend to be less controversial.

2. Avenues for Compromise

Devising compromise solutions to resolve international contract disputes is often no easy task. Many decisions arbitrators must make are of a binary nature. A contract is enforceable or unenforceable; a party either has or has not breached a contractual obligation; termination is valid or invalid under the contract's endgame provisions; a respondent is liable or not liable. These kinds of decisions don't lend themselves to finding a middle ground. It is also hard to

42. *Id.* at 64 (comment from Christopher Koch).

43. *Id.* Another arbitrator described a case in which one of the co-arbitrators, an English Queen's Counsel (QC), disagreed with the other two tribunal members about the standard used to determine costs. The arbitrator "was worried that the English courts would think that he did not understand the English rules on costs," which the other two arbitrators believed to be irrelevant. Philippe Capper, *Dealing with Bias and Obstruction*, *in* INSIDE THE BLACK BOX, *supra* note 31, at 43, 45. The other two arbitrators convinced the co-arbitrator to sign the award by "reflecting his observations" in the way they crafted an element of the award. *Id.*

split the difference on factual findings when, as will often be the case, the parties present irreconcilable versions of the facts that gave rise to the dispute. Thus, tribunals that want to broker a compromise solution must be creative in designing facially coherent outcomes.

Contract disputes offer several potential avenues.[44] Consider, for example, how counterclaims could be used. It is often logically impossible to rule in favor of claims on both sides. If a tribunal rules that Party *A*'s termination was permitted under the endgame provisions in the contract, then it may logically have to also rule against Party *B* on a counterclaim that Party *A* breached its contractual obligations when it stopped performing after the termination date. But sometimes, claims and counterclaims are sufficiently distinct to provide space for compromise. An example would be the situation in which Party *A* sues Party *B* for raising the price of Party *B*'s products in violation of the agreement, and Party *B*'s counterclaim states that Party *A* has sold Party *B*'s products outside the agreed territory.

Damages—in arbitration often referred to as quantum—is another area, perhaps the most natural one, that lends itself for compromise solutions. In a situation in which two of the three arbitrators believe Party *Y* is liable to Party *X* and the third arbitrator vigorously disagrees, the majority may try to pacify the disagreeing arbitrator by finding ways to reduce damages. For example, they could rule that Party *X* did not prove some of its damage categories, or did not prove some claimed damages fully, or that it could have mitigated a substantial portion.[45]

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44. As Markus Wirth put it, "if there is a bargaining process, what are the available bargaining chips, for instance a concession in quantum in return for a unanimous decision on liability? What kind of bargaining chip does the cost decision provide to the arbitrators?" Markus Wirth, *Conflict in the Deliberations: Dealing with Bias and Obstruction*, *in* INSIDE THE BLACK BOX, *supra* note 31, at 41, 42.

45. In a survey completed in 2013 by 134 arbitrators, 89.9% of the respondents indicated that they would at least sometimes "negotiate with other members of a tribunal respecting the quantum of damages to be awarded." Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Arbitrators*, 25 AM. REV. INT'L ARB. 395, 455–56 (2014). More significantly, the options "always" and "usually" were checked by 26.6% and 18.0% of the respondents, respectively. *Id.* at 455. However, survey respondents may have interpreted the word "negotiation" to include relatively minor concessions. It is also notable that the domestic disputes were the mainstay of most of the respondents' arbitration practice. Of the surveyed arbitrators, 84.4% had served in international disputes, but for about half of them international cases made up between 1–10% of their case load. *Id.* at 419, 421. Thus, their experiences may not translate to the international commercial arbitration setting.

3. Distinguishing Compromise from Other Scenarios

The bargaining aspect makes compromise outcomes qualitatively different from other situations that appear to be similar. But because the bargaining is often not done openly, a lot turns on the arbitrators' intentions. As a result, in practice it can be hard to distinguish between compromise and other scenarios.

To begin, a tribunal may land on a middle-ground outcome simply because all arbitrators believe that solution to be correct after a careful analysis of the issues presented by the case. Because a consensus outcome is the result of joint deliberation rather than a negotiation, it is not a compromise. But especially if a tribunal arrives at a middle-ground outcome after one or two arbitrators change their minds, the distinction between consensus and a veiled negotiation may not be clear.

Compromise also differs from the give-and-take on minor points that is part and parcel of collegial judging. If blatant quid pro quo is on one extreme of the spectrum, its opposite is the kind of extreme rigidity that prevents arbitrators from making minor concessions. Collegial judging requires the exercise of discretion on which battles to pick and when to let go. It also requires the humility to accept that it should not always be the others who yield, and the social intelligence to understand when and how to restore balance.[46] The distinction between a series of minor concessions and a compromise is one of degree rather than kind, and different arbitrators undoubtedly draw the line differently.

Lastly, compromise differs from strategic voting. Arbitrators could vote sincerely in the sense that their vote corresponds to their internal belief of what the right decision is.[47] But they may also vote strategically in favor of a decision that they believe to be suboptimal, thinking that this will ultimately help produce a less-bad overall outcome.[48] For example, an arbitrator who holds a minority position on liability may calculate that voting along with the other tribunal members on that point positions them better to convince their colleagues to budge on damages down the road. Or an arbitrator who realizes that

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46. *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many*: *Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 52 (1993) (noting that appellate judges on multi-judge panels "in deference to their colleagues . . . are expected to compromise or deflect their views to some extent").

47. Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2302 (1999) (defining sincere voting).

48. *Cf. id.* at 2315–17 (identifying circumstances in which judges might vote strategically to form majority coalitions).

a 1-1-1 split is likely could vote strategically to create a majority position. Confronted with the prospect of a three-way split, a presiding arbitrator may decide to vote with one of the co-arbitrators, believing that a second-best option supported by a majority is preferable over an award signed by a single arbitrator.[49] Alternatively, a co-arbitrator may vote in favor of a middle position to prevent the presiding arbitrator from moving over to the side of the other co-arbitrator. Judge Stephen Schwebel has defended the practice of strategic voting if it is necessary to obtain a majority, even when doing so results in an outcome that does not enjoy true majority support.[50] As he put it: "In a collective body, there is very frequently a process of accommodation of differing views, sometimes sharply differing views. The result may be the consecration of the least common denominator. That may not be a noble result, but it is a practical result. It is better than no result."[51]

Yet the line between compromise and strategic voting can be blurry. This is demonstrated by a provocative real-life scenario described by Bernhard Meyer, a Swiss arbitrator and attorney who has held numerous leadership positions in international commercial arbitration. During a conference on arbitral decision-making, Meyer explained how, as a presiding arbitrator, he maneuvered a tribunal toward consensus. The case was governed by Greek law, and both co-arbitrators were law professors in Greece.[52] Meyer concluded that the respondent had not proven the high threshold for termination under the agreement. He also believed that the claimant had failed to mitigate damages and that the claimed damages were grossly exaggerated.[53] The co-arbitrators landed on opposite sides, with one believing that the respondent had validly terminated the contract and owed no damages, and the other wanting to grant the claimant full damages.[54]

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49. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 501 (1997):

> The need to obtain a majority often leads to a process of negotiation and compromise, in which the neutral feels obliged to trim or adjust his position in the search for a coalition with one of his colleagues—and ultimately perhaps to concur, reluctantly, in an award different from the one he might have preferred.

50. Stephen Schwebel, *May the Majority Vote of an International Arbitral Tribunal Be Impeached?*, 13 ARB. INT'L 145, 153 (1997).

51. *Id.* In ruling on the validity of an arbitral award concerning a dispute between Guinea-Bissau and Senegal concerning a maritime boundary, the International Court of Justice observed that "it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution." Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. 53, ¶ 33 (Nov. 12). Judge Schwebel was one of the judges deciding the case.

52. Meyer, *supra* note 41, at 59.

53. *Id.* at 62.

54. *Id.* at 60.

To bring the tribunal together, Meyer used a decision tree that listed fork-in-the-road questions followed by more specific issues for each answer. After securing agreement on the internal logic of the decision tree, Meyer asked the co-arbitrators to fill out all lines of questions, not just the ones with which they agreed. As a result, he found out that the co-arbitrators' disagreement centered on the facts themselves, not on the legal consequences that would flow from different factual assessments.[55] Meyer described how he then worked "backwards" during deliberation, avoiding initially the issue of whether the contract had been validly terminated. Instead, he opened with the size of the damages claimed.[56] He soon realized that the arbitrator appointed by the respondent (who believed that the respondent had validly terminated the contract) "would be flexible on the termination issue" if the awarded damages "would not be excessively high."[57] The co-arbitrator appointed by the claimant, on the other hand, "was willing to compromise on the damage amount."[58] Moving on to termination, Meyer proposed the solution he had favored from the outset, namely to rule that the respondent had not validly terminated the agreement but to also reduce the damages claimed by the claimant.[59]

It is debatable whether the scenario described by Meyer is truly a compromise. Although the co-arbitrators decided to agree to sign the award despite disagreeing with the outcome, arguably no concessions were made by the tribunal as a whole. Possibly, the only difference is that instead of an award signed by only the presiding arbitrator, the parties received an award signed by the entire tribunal. This is, essentially, what Meyer suggested, when he concluded: "Is such process good or bad? I think we can have an interesting debate about this afterwards. What is clear for me is that we would have ended up with three different awards in this case had we not taken the described approach."[60]

B. Are Compromise Outcomes Permitted?

Before turning to normative positions, one might wonder about the legal validity of compromise outcomes. As an initial matter, arbitration rules are silent on how tribunals must convert the members'

55. *Id.* at 60–61.

56. *Id.* at 61.

57. *Id.* at 62.

58. *Id.*

59. *Id.*

60. *Id.* at 63.

positions into an award. Thus, the rules don't present an obstacle. Another potential concern, however, stems from the legality of compromise awards under the governing contracts. Compromise outcomes conceivably exceed the parties' agreement in two ways.

First, one could argue that such outcomes ignore the parties' choice of law agreements.[61] In almost all international commercial arbitration cases, the parties have selected the law governing the dispute in a choice of law provision in the contract at issue.[62] The rules of arbitration institutions instruct tribunals to apply the laws selected by the parties as well as applicable contractual terms.[63] Arbitrators take this obligation seriously.[64] Rusty Park equates compromise solutions with a failure to apply the contract provisions or the governing law.[65] A recurring theme in Park's scholarship is his insistence that arbitrators' first duty is to render "an accurate award," meaning one that is faithful to the "context and relevant bargain" between the arbitrating parties.[66] In describing what the accuracy obligation entails, he contrasts arbitrators with judges. While judges bear responsibility to their broader societies, and may overrule precedent, arbitrators are accountable to the parties who appoint them. Park contends that the

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61. *See* Sarah Rudolph Cole, *Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding the Powers Count*, 68 ALA. L. REV. 179, 204 (2016) (describing choice of law agreements as a device to constrain arbitrator authority).

62. *See, e.g.*, Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031, 1038–39, 1039 n.36 (2009) (presenting a table showing that the percentage of cases in which parties opted for national law was consistently around 80% in ICC cases filed between 2003–2007 and concluding that "international arbitrators generally apply national law, not some autonomous body of private commercial law").

63. For example, the ICC Arbitration Rules provide that "[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute." ICC ARB. RULES, *supra* note 25, art. 21(1). Additionally, arbitral tribunals must "take account of the provisions of the contract, if any, between the parties and of any relevant trade usages." *Id.* art. 21(2). A guide prepared by the ICC Secretariat warns more explicitly that "[w]here parties have agreed on a substantive law, the arbitral tribunal must respect that choice" and that disregarding a choice of law agreement could render an award unenforceable. FRY ET AL., *supra* note 39, at 220.

64. When asked how often they try to "ascertain and follow applicable law in rendering an award" in a 2013 survey among 134 arbitrators, 86.7% of the respondents selected "always" and 11.7% selected "usually." Stipanowich & Ulrich, *supra* note 45, at 455. The question was not limited to commercial arbitration.

65. William W. Park, *Rectitude in International Arbitration*, 27 ARB. INT'L 473, 519 (2011) (noting that "one sometimes hears complaints of 'splitting the baby,' a reference to awards not justified by facts or law").

66. William W. Park, *The Four Musketeers of Arbitral Duty: Neither One-for-All Nor All for One*, *in* IS ARBITRATION ONLY AS GOOD AS THE ARBITRATOR? STATUS, POWERS AND ROLE OF THE ARBITRATOR, ICC DOSSIERS 26, 27 (2011).

private foundation of arbitration constrains arbitrators' authority to apply law creatively: "As creatures of consent, arbitrators are law-appliers rather than law-makers, and must show special fidelity to the litigants' shared ex ante expectations as expressed in [their] contract."[67]

But others embrace the opposite position, arguing that the contractual basis of arbitration provides arbitrators with a measure of freedom. Laurence Craig notes that historically, international commercial arbitration was viewed as "a process that favors the application of the agreement of the parties, but also stresses compromise and the application of equitable and commercial principles to alleviate the strict application of law."[68] Similarly, Pierre Mayer reflects that even if the parties' expectations were all that matters, it isn't altogether clear what that means in the context of international commercial arbitration:

> Do parties expect a strict application of the law, since they have not conferred upon the arbitrator the powers of *amiable compositeur*? Do they expect a more practical and tailored assessment of the fair solution, as this may characterize, in their mind, the arbitral process? Do they expect from the arbitrator a more careful consideration of the contract, of which they could consider him to be a component, a regulating mechanism?[69]

In any event, a choice of law provision does not confer an obligation on arbitrators to manage intra-tribunal disagreement in the same way a panel of judges would.[70] By agreeing to arbitrate, parties

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67. William W. Park, *Truth-Seeking in International Arbitration*, *in* THE SEARCH FOR "TRUTH" IN ARBITRATION: IS FINDING THE TRUTH WHAT DISPUTE RESOLUTION IS ABOUT? 1, 23 (Markus Wirth, Christina Rouvinez & Joachim Knoll eds., 2011) [hereinafter THE SEARCH FOR "TRUTH" IN ARBITRATION].

68. W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 243, 245 (2010).

69. Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law*, 17 ARB. INT'L 235, 241 (2001).

70. It also may be hard to ascertain how judges in a particular jurisdiction would resolve disagreement. Moreover, some adjudication cultures may prioritize dispute resolution over the correct application of legal rules to facts. Teresa Cheng has suggested that arb-med, a dispute resolution form that incorporates aspects of arbitration and mediation, may be especially appropriate for some commercial disputes that involve a strong Asian component. She also points out that such hybrid processes are incorporated in the arbitration rules of CIETAC and expressly permitted by legislation in Hong Kong and Singapore. *Cf.* Teresa Cheng, *The Concept and Relevance of "Truth" in Dispute Resolution—the Asian View*, *in* THE SEARCH FOR "TRUTH" IN ARBITRATION, *supra* note 67, at 51, 55–57. *But see* Veronica L. Taylor & Michael Pryles, *The Cultures of Dispute Resolution in Asia*, *in* DISPUTE RESOLUTION IN ASIA 1, 15–16 (Michael Pryles ed., 2006) (noting that arbitration remains the default option in cross-

opt for adjudication by party-selected arbitrators who are often not trained in the jurisdiction whose laws they apply and who conduct a process that differs from litigation in the courts.[71] Given these characteristics, parties who agree to arbitrate sign up for, at most, an approximation of the application of the law they would receive in a domestic court.[72]

The second potential issue is whether compromise solutions exceed the scope of the parties' arbitration agreement. Here, the argument is that an agreement to arbitrate does not allow the party-appointed arbitrators to act as proxies for the appointing side. After all, if the parties wanted a compromise, they would have worked out a negotiated solution or opted for mediation.[73] This is a fair objection to a bargaining process in which co-arbitrators act as advocates. But it is not a persuasive argument against compromises that embody genuine disagreements about the interpretation of the law or the facts. Given the leeway accorded to arbitral tribunals in conducting deliberation and making decisions, the argument that compromise outcomes violate the parties' arbitration agreement is ultimately not convincing.

C. Data About Compromise Outcomes

Among attorneys whose exposure to international arbitration is primarily as counsel, the perception that arbitrators are likely to work out a compromise is widespread. In a 2012 survey that focused on international commercial arbitration conducted by Queen Mary University of London and the law firm White & Case, in-house and outside counsel estimated that unjustified baby-splitting had occurred in, respectively, 18% and 20% of their cases.[74] In a similar survey of in-house counsel conducted in 2011 by the RAND Institute for Civil Justice, more than 70% of the respondents agreed with the position that arbitrators in domestic business-to-business disputes "tend to 'split the baby,'" meaning that they would be "less likely than a judge or jury to

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border transactions in Asia because "[i]n most of Asia courts do not provide dispute resolution services that are market-responsive, reliable or reciprocal").

71. Mayer, *supra* note 69, at 238.

72. *Id.*

73. *See* Park, *supra* note 65, at 525 ("Business managers who want simply to reach a solution to their conflict can always agree to a decision that ignores the law and the facts.").

74. 2012 INTERNATIONAL ARBITRATION SURVEY, *supra* note 13, at 38. The Queen Mary-White & Case survey was completed by 710 respondents, 71% of whom had been involved in more than five international arbitrations during the preceding five years. *Id.* at 44.

decide strongly in favor of one side or the other."[75] The Institute reported that attorneys who frequently used arbitration clauses in their contracts tended to disagree with the statement that arbitrators are more likely to split the baby. Citing the small sample size, however, the Institute declined to weigh in on the significance of this finding.[76]

Contrary to the widespread perception that emerges from the surveys of counsel, the available data show that compromise awards are relatively rare in commercial arbitration, whether international or domestic.[77] A study conducted in 2018 by the American Arbitration Association-International Centre for Dispute Resolution examined 2,547 business-to-business disputes administered by the institution in which monetary claims had been awarded in 2017.[78] It found that 94.5% of the monetary awards were outside the "claim midrange," defined as 41% to 60% of the filed claim amount.[79] In the Queen Mary-

75. DOUGLAS SHONTZ ET AL., RAND CORP., INST. FOR CIV. JUST., BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL 11 (2011). The RAND survey was completed by 121 respondents. *Id.* at 29. Of these, 36% had "attended" more than five "arbitration sessions . . . in any capacity" over the course of their careers. *Id.* at 30. For in-house counsel with broad domestic arbitration practices, it may be hard to isolate their experience in business-to-business disputes from other arbitration contexts, such as labor disputes, that present stronger incentives to find compromise solutions. *See, e.g.*, Carter Greenbaum, *Putting the Baby to Rest: Dispelling a Common Arbitration Myth*, 26 AM. REV. INT'L ARB. 101, 110–11 (2015) (discussing the historical use of arbitration in labor disputes, "where unions and corporations used arbitration as a way to solve disputes, and not as a way to vindicate rights"); Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby" – Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573, 576 (2001) (explaining that in labor relations arbitration is often used for purposes of contract formation); Park, *supra* note 65, at 520 & n.217 (noting available studies' focus on experiences with arbitration in employment and consumer disputes and labor union grievance cases).

76. SHONTZ ET AL., *supra* note 75, at 11.

77. As noted by Paul Mason, who made the transition from in-house counsel to serving as an arbitrator:

> In my former life as in-house corporate counsel, this perception [of baby-splitting in arbitration] often prevailed in the halls and cubicles of corporate legal departments . . . . My own experience as arbitrator and counsel in arbitrations, however, has been the opposite—that rarely, if ever, has arbitration been decided this way.

Paul Eric Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28 J. INT'L ARB. 541, 543 (2011).

78. Ryan Boyle & Susan D. Lewin, *ADR Does* Not *Mean Splitting the Baby*, CORP. COUNS. BUS. J. 2 (Mar.–Apr. 2019), https://go.adr.org/rs/294-SFS-516/images/AAA%202019%200304%20Boyle%20Lewin.pdf [https://perma.cc/T5H9-8FR4].

79. *Id.* Specifically, almost 57% of awards granted 61–100% of claimed damages and more than 37% denied the claim or awarded damages up to 40% of the claimed amount. *Id.*

White & Case survey, arbitrators indicated that they "'unnecessarily' split the baby" in only 5% of cases in which they were involved.[80] Consistent with these findings, in an empirical project asking international commercial arbitrators how they would resolve a hypothetical case where the amount of damages was the only remaining issue, the most common response was to accept the valuation report of one of the parties.[81]

Whatever its merits, the perception that arbitrators are likely to seek compromise solutions gives arbitration a bad reputation in the business community. In a 1997 RAND survey, which had a sample size of more than 600 respondents, approximately half of the surveyed in-house counsel identified the likelihood of compromise awards as a reason not to use arbitration.[82] From an ex ante perspective, therefore,

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The publicly reported findings of this study do not distinguish between domestic and international disputes. *See also* Keer & Naimark, *supra* note 75, at 574 (finding, based on 85 questionnaires completed by arbitration parties, that 66% of the awards resulted in outright "wins" or "losses" and that the results in the remaining cases ranged from 10–90% of the claimed amount). In a study published in 2007, the American Arbitration Association reviewed arbitral awards in arbitrations administered by the ICDR in 2005. In more than half of the cases (12% and 41%, respectively), the tribunals awarded less than 20% or more than 80% of the claimed amount. The tribunals awarded between 61% and 80% in only 13.5% of the cases. Ana Carolina Weber et al., *Challenging the "Splitting the Baby" Myth in International Arbitration*, 31 J. INT'L ARB. 719, 725–26 (2014) (reporting on the results of the 2007 study); Christopher R. Drahozal, *Busting Arbitration Myths*, 56 U. KAN. L. REV. 663, 675–77 (2008) (declaring the "myth" that arbitrators split the baby "busted" based on the Keer-Naimark surveys and the 2007 follow-up study).

80. 2012 INTERNATIONAL ARBITRATION SURVEY, *supra* note 13, at 38. The survey does not explain the meaning of the word "unnecessarily." Carter Greenbaum noted that out of two dozen commercial arbitrators he had interviewed, only two admitted to ever having issued a compromise award. One recalled one such instance, the other admitted to having issued a compromise "[r]arely, if ever." Greenbaum, *supra* note 75, at 107. *But see* Kirby, *supra* note 16, at 348 ("While [compromise] decisions are, in my experience, not the norm, they are also far from unheard of.").

81. Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1143–46 (2017). Of course, the hypothetical scenarios used in this empirical project didn't involve real parties that could reappoint an arbitrator, removing a major incentive to appease one or both parties.

82. Specifically, 49.7% identified the likelihood of compromise decisions as a reason not to opt for arbitration. DAVID B. LIPSKY & RONALD L. SEEBER, CORNELL/PERC INST. ON CONFLICT RESOL., THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 26 tbl.22 (1998). This survey did not carve out commercial disputes from other types of arbitration, however, and it did not distinguish between domestic and international arbitration. *Id.*; *see also* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 53 tbl.P (2014) (comparing the reasons for not using arbitration provided by general counsel in the surveys

it appears that what parties want from arbitral tribunals is an attempt to reach a unanimous outcome through thoughtful deliberation.[83]

III. ASSESSING COMPROMISE OUTCOMES

Having clarified what compromise outcomes are and how they may come about, I will now explore normative implications. In this Part, I first analyze why a three-arbitrator tribunal might search for a compromise outcome, concluding that not all reasons are evidently objectionable. I then discuss how compromise outcomes, or the specter of such solutions, interact with deliberation and reason-giving in international commercial arbitration.

A. Reasons for Exploring Compromise

There are at least three reasons why a tribunal might work out a compromise outcome. First, compromise could stem from the lack of impartiality with which "baby-splitting" is often associated. Second, compromise may be instrumental to issuing an award that is signed by all or at least the majority of the arbitrators on the tribunal. Lastly, compromise can be defended on its own merits as an acceptable response to indeterminacy, disagreement, and uncertainty.

1. Partisan Motives

Objections to "baby-splitting" are often grounded, expressly or implicitly, in the notion that compromise solutions are motivated by a desire on the part of co-arbitrators to increase the chances of reappointment by appeasing the appointing party. The idea is that if "their" party turns out to be on the losing side, a co-arbitrator will salvage as much as possible, for example, by negotiating a substantial discount

conducted by the RAND Institute in 1997 and 2011). An empirical study conducted in 2007 found that of the nonconsumer contracts identified in their filings as material, only 6% included an arbitration provision. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 (2008). The data don't identify what percentage of the contracts with arbitration provisions have an international dimension.

83. *See* Park, *supra* note 65, at 520–21 ("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.").

on damages.[84] Jan Paulsson has suggested that in international commercial arbitration, the combination of party appointment and the pressure on the presiding arbitrator to issue a unanimous award promotes compromise solutions: "[U]nanimity is not always achieved in principled ways. The practice of unilateral appointments . . . implicitly militates in favor of compromise, and indeed may be said to endorse it."[85]

Plausible as it may seem, this argument overlooks considerations that complicate the co-arbitrators' incentives. While arbitrators who decide international commercial cases indisputably have an economic interest in reappointment, it is unlikely that blatant partisanship will further that goal. To begin, all arbitrators must comply with standards of impartiality and independence.[86] Renowned arbitrators insist that acting like an advocate for the appointing party is the fastest way to lose influence in a tribunal.[87] They sometimes characterize attempts to broker a negotiated outcome that is favorable to the appointing party

84. *See* Weber et al., *supra* note 79, at 727 (noting that because party-appointed arbitrators are not truly neutral, "'horse trading' is considered as a 'built-in' feature of arbitration" and "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"); *cf.* Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 459 (2005) ("[I]t [cannot] escape even the most ingenuous of arbitrators that he is rather more likely to be nominated again by someone who has already been willing to nominate him once."); Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, *in* COLUMBIA FDI PERSPECTIVES NO. 33, 1 (Karl P. Sauvant, Ken Davies & Amanda Barnett eds., 2010), https://academiccommons.columbia.edu/doi/10.7916/D8G167Q9 [https://perma.cc/W52E-4N3E] ("Once selected, an arbitrator's personal incentive is to secure reemployment by providing his or her party with a favorable outcome.").

85. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV.–FOREIGN INV. L.J. 339, 353 (2010).

86. For a summary of national laws and arbitration rules regarding impartiality and independence, see BORN, *supra* note 12, § 12.05.

87. *See, e.g.*, NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 4.74, at 266 (5th ed. 2009) ("Experienced practitioners recognise that the deliberate appointment of a partisan arbitrator is counterproductive, because the remaining arbitrators will very soon perceive what is happening and the influence of the partisan arbitrator during the tribunal's deliberations will be diminished."); Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 60 ("I have had the experience a number of times where my opposite number as party-appointed arbitrator seemed too zealous in defense of the party that nominated him, and thus lost credibility with the chairman . . . ."); *The American President: An Interview with Rusty Park*, GLOB. ARB. REV. (Mar. 11, 2011) ("The users should realize (as many smart ones do) that a partisan party-appointed arbitrator lacks credibility.").

as a rookie mistake.[88] Thus, transparent attempts to arrive at a compromise solution for partisan reasons will likely backfire.

In assessing arbitrators' incentives, it is also worth noting that their colleagues on the tribunal are as promising a source of future appointments as the appointing party. Arbitrators usually practice as counsel as well, meaning that they are involved in arbitrator selection decisions on behalf of their clients.[89] The international commercial arbitration world is small, and reputations are built over time.[90] So, arbitrators have an incentive to impress their fellow tribunal members. This creates an additional incentive to refrain from conduct, including pushing for a negotiated outcome, that can come across as advocacy for the appointing party. As noted by an anonymous arbitrator, "I would never be appointed again if I developed a reputation for splitting."[91]

In the international arbitration context, therefore, the immediate consequences and the long-term reputational risks align to reduce incentives for arbitrators to try to "split the baby" for partisan reasons. As a result, the partisan motives that give compromise outcomes a bad reputation likely play a smaller role than tends to be assumed.

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88. *See* Greenbaum, *supra* note 75, at 110 (quoting statements from interviewed arbitrators drawing a connection between baby-splitting and lack of experience); *cf.* Derains, *supra* note 24, at 913 (contrasting arbitrators who are "known to be assistants to the party that appointed them" with the "elite corps of international arbitrators whose reputation and independence is established already").

89. *Cf.* UGO DRAETTA, BEHIND THE SCENES IN INTERNATIONAL ARBITRATION 2 (2011) ("[A]rbitrators and outside counsel often switch roles in the course of their arbitration practice.").

90. ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 19 (2017) ("[E]ven in the consensual world, sanctions—social provisions that stigmatize those who refuse to comply with existing norms or decisions issuing from [third-party dispute resolution]—can be effective.").

91. Greenbaum, *supra* note 75, at 109; *see also* Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARB. BLOG (Oct. 5, 2010), http://arbitrationblog.kluwerarbitration.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/ [https://perma.cc/7HK9-MHSC] (noting that parties select arbitrators "more for their reputation of impartiality and integrity than for their supposed willingness to support their appointing party's thesis" because they want to ensure the arbitrator is respected by the other tribunal members); *cf.* Daphna Kapreliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 90 (2010) ("In order to promote their reputation, arbitrators may choose to increase accuracy and to counter any real or perceived biases rather than to cater to any particular interests.").

2. Forging Unanimity or a Majority

A tribunal may also search for a compromise outcome to secure unanimity or, at least, a majority. As we have seen, the rules permitting non-unanimous awards give the presiding arbitrator useful tools to handle intransigent co-arbitrators. But arbitral tribunals nonetheless operate under pressure to issue an award that is signed by all tribunal members or at least by a majority. This pressure particularly affects the presiding arbitrator, who is responsible for managing the arbitration process and guiding the deliberations.

The preference for unanimity gives co-arbitrators some leverage to try to bargain (overtly or implicitly) for concessions in exchange for their signatures on the award. Yet in the case of a 2-1 voting configuration, the minority arbitrator's leverage is limited. While majority awards aren't ideal, the legitimacy and enforceability issues they pose often won't outweigh the drawbacks of giving in to an arbitrator who is outvoted. Discussing this exact situation, the eminent French arbitrator Yves Derains cautions arbitrators who find themselves in an impasse to check their "desire to find at any price a solution that will satisfy all the members of the Tribunal."[92] Instead, "[i]f two arbitrators are unable to convince the third of the validity of the solution proposed by them and the error of his or her position, the majority must prevail and no haggling to reach unanimity is acceptable. The deliberation is not a negotiation."[93]

A three-way split presents a much more precarious situation for the presiding arbitrator. Consider the story of how Bernhard Meyer, acting as a presiding arbitrator, found himself in the predicament of favoring a middle position while the co-arbitrators landed on the positions taken by their appointing parties.[94] Imagine, however, that instead of falling in line with Meyer's position, the co-arbitrators stick to their guns. Meyer now has three options. First, he can issue an award that is signed only by himself. But as we have seen, an award that is signed by only one of three arbitrators comes across as arbitrary and is vulnerable to enforcement challenges. Second, Meyer could vote strategically with the co-arbitrator whose position he finds the least objectionable. Meyer did not indicate what he would have done had he been forced to choose, but let's say that he concludes there is no way to defend the position that the respondent validly terminated the agreement. So, he could side with the co-arbitrator appointed by the claimant, and award damages that he believes are twice the amount

92. Derains, *supra* note 24, at 921.

93. *Id.*

94. *See supra* notes 52–60 and accompanying text.

to which the claimant is entitled. The third option is to try to negotiate an outcome with the claimant-appointed arbitrator, under which the claimant is awarded 75% of the claimed damages.

If one could isolate the outcome itself from other aspects of arbitral judging, it is hard to argue that the second outcome is better than the third. The second outcome gives the decisive vote to an arbitrator who has been selected by a party intent on picking someone who is favorably inclined to their case.[95] The compromise solution, on the other hand, moves the outcome closer to the one favored by the arbitrator who, by design, is best positioned to exercise independent judgment. Thus, if the goal is to issue an enforceable award that provides an outcome that comes closest to the "right" one, it is hard to reject compromise outcomes out of hand when a tribunal finds itself in a three-way split.

3. Compromise as a Response to Indeterminacy

Lastly, one could make a broader case for compromise as a defensible response to hard cases. Here too, the premise is that unanimity is better than the alternatives. But instead of being animated by the desire to avoid an unattractive situation, this third reason presents an affirmative argument for compromise as a valid way to resolve disagreement. Put differently, while the second reason for exploring compromise is concerned with external effects—acceptance by the parties and the likelihood that an award will hold up in enforcement litigation—the third reason is rooted in a philosophy of three-arbitrator adjudication as a search for a resolution that gives weight to each arbitrator's views.

Disputes that make it to an arbitration hearing before three arbitrators tend to be complex.[96] Consequently, they often lend themselves to a range of correct answers, rather than a single right answer.[97]

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95. *See supra* notes 13–16 and accompanying text.

96. *See* SHONTZ ET AL., *supra* note 75, at 12 (noting the "complexity of the underlying contracts and the cases that arise" as factors that contribute to baby-splitting).

97. *See* Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1, 13 (2010) ("[M]any a complicated case is like a jigsaw puzzle with multiple solutions, often as to reasoning and sometimes as to outcome, none being inevitable."); Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 630 (1992) ("Reasonable judges will inevitably come out differently on close questions of law."); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950) (noting the mistaken "idea that the cases themselves . . . provide one single correct answer to a disputed issue of law").

This is not to imply that accuracy has no meaning.[98] In discussing American Legal Realism, Brian Tamanaha points out that while they are best known for their analysis of law's indeterminacy, Legal Realists also offered pragmatic insights in why and how judges narrow down the range of acceptable answers.[99] Karl Llewellyn, for example, posits that judges are subject to several "stabilizing factors," including shared indoctrination in legal traditions, agreement on accepted doctrinal methods, and a common understanding of their mission.[100] As a result, even in hard cases, many potential interpretations can be easily eliminated.[101]

While this reality will often hold true in arbitration, commercial disputes can be especially messy. During an interview conducted in connection with a survey, an anonymous in-house counsel opined that "there [is] usually 'enough blame to go around' in commercial disputes."[102] The implication is that neither party is entitled to a clear win.[103] Additionally, arbitrators often must decide in the face of competing interpretations of facts, contract provisions, and legal sources. Given the factual and legal indeterminacy inherent in at least some—perhaps most—international commercial disputes, it isn't evident that an outcome that has the vote of a majority or only the presiding arbitrator is always superior to a compromise that is acceptable to all tribunal members. A solution that adds up the outcome each arbitrator would reach and then divides it by the number of arbitrators arguably is the best expression of the tribunal's will.

Moreover, disagreement within an arbitral tribunal can take different forms.[104] Sometimes all arbitrators acknowledge that the

98. *Cf.* Cheng, *supra* note 70, at 51 ("There is no absolute truth in the context of contentious proceedings; there is only relative truth.").

99. Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 764–70 (2009) (discussing Legal Realists' commitment to the law).

100. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19–50 (1960).

101. Karl Llewellyn stated that "while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly*. . . . Already you see the walls closing in around the judge." KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 77 (Oxford Univ. Press, 11th prtg. 2008) (1930).

102. SHONTZ ET AL., *supra* note 75, at 12 (quoting an anonymous interview participant).

103. *Id.*

104. This Article addresses scenarios in which arbitrators disagree about what the outcome should be under the applicable law. It is not concerned with the situation in which arbitrators might be tempted to consciously set aside the result compelled by the law in favor of an outcome they perceive as more just. *Cf.* Daniel Kalderimis, *International Arbitration in*

case presents a close call, even though they land on opposite sides.[105] Sometimes two arbitrators who constitute a majority acknowledge that there are strong arguments for the other side, but the minority arbitrator strongly believes in the rightness of their position. Sometimes disagreeing arbitrators all believe the answer is clear; they just don't agree on what it is. Reflecting on this last situation, Bernhard Meyer said:

> I personally think that a bargaining process, as long as it is based on facts and leads to a result acceptable to all members of the Arbitral Tribunal, is the best way to deal with a situation where the opinions of the arbitrators go far apart. The negotiation process leads to a better and more convincing result than a decision with one or even two dissenting opinions, leaving the parties at a loss of what the correct outcome of the case should be.[106]

The baby-splitting analogy has rightly been criticized as not being particularly apt. Most saliently, King Solomon never followed through on his threat to split the baby, using it instead as a device to identify the true mother. Arbitrators, on the other hand, are accused of brokering actual compromises.[107] Setting this discrepancy aside, the moral for which Solomon has come to stand—that compromise decisions are unsatisfying—also does not fully translate to the arbitration context. A decision resolving a commercial dispute is not inherently indivisible. And many a losing party might prefer an outcome that accounts for disagreement or uncertainty.[108] In light of these realities, one might wonder whether Bernhard Meyer's tactical approach to brokering unanimity is an outlier, or whether he is simply more honest than others in describing a common but secretive practice.

The private nature of international commercial arbitration makes the argument for compromise as a valid response to indeterminacy especially forceful. Judges who serve on domestic or

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a Brave New World, 34 ARB. INT'L 533, 553 (2018) (describing as a central notion of Rusty Park's "philosophy of arbitration" that it is "a process devoted to attaining law; not necessarily justice or other good things").

105. *Cf.* Piero Bernardini, *Organisation of Deliberations*, *in* INSIDE THE BLACK BOX, *supra* note 31, at 15, 19 (noting that compromise "is an acceptable solution" if there is "a genuine uncertainty by an arbitrator what should be the right solution").

106. Meyer, *supra* note 41, at 63.

107. Drahozal, *supra* note 79, at 673–77.

108. *See* Park, *supra* note 65, at 525 n.235 (2011) ("In practice, of course, a corporate officer may decide to resist compromise under the assumption that his company has a stronger position than the adversary, coming to regret that decision only when the arbitral tribunal finds for the other side.").

international courts and arbitrators who resolve investor-state disputes must be mindful of their public-facing functions, including the role their decisions play in developing substantive law. In international commercial arbitration, on the other hand, precedential effects of awards are much more limited.[109] This is not to say that such awards are relevant only to the arbitrating parties. Alec Stone Sweet and Florian Grisel have convincingly argued that international commercial arbitration has undergone a process of "judicialization" in which "many [arbitrators] are devoted to building the systemic coherence and authority of the arbitral order itself."[110] They point out that arbitration's effectiveness depends on the existence of general principles governing arbitral authority, and that there is a large amount of coordination through the award review processes at major international arbitration institutions like the International Chamber of Commerce (ICC).[111] The recent push toward greater transparency—as shown by the trend to provide more information about arbitrations and to publish awards, albeit in redacted form—further supports the position that a purely contractual model no longer adequately captures what international commercial arbitration is about.[112] But all of this leaves unchanged that an arbitration award that applies Norwegian contract law has no authority in the Norwegian courts.

Arguably, therefore, the private nature of commercial arbitration provides room for incorporating uncertainty, disagreement, and depth of conviction of each tribunal member into the outcome. If accepted, this argument holds true regardless of whether disagreement takes the form of a majority-minority configuration or a three-way split. Indeed, although many in the international commercial arbitration community reject compromise awards out of hand, a few arbitrators have argued that such solutions can be defensible and even desirable in disputes that aren't cut and dried. As the late professor and arbitrator Hans Smit observed: "Many cases are not simply black or

109. *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 362–63 (2007) (reporting that out of 190 ICC awards, only about 15% cited other arbitral awards, mostly on jurisdiction or procedure); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1909–10 (2010) (characterizing the use of precedent in international commercial arbitration as weak compared to investor-state arbitration).

110. STONE SWEET & GRISEL, *supra* note 90, at 5–6.

111. *Id.* at 173–74.

112. *Id.* at 121–25. After publication of Stone Sweet and Grisel's book, the ICC adopted an opt-out approach to publication of awards, taking another major step in the direction of increasing transparency. *See* INT'L CT. OF ARB., NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION ¶¶ 46–66 (Jan. 1, 2021).

white, and the flexibility that arbitration affords may lead to solutions that constitute acceptable compromises."[113]

B. Effects on Deliberation

Stripped of the nefarious motives that play an outsized role in condemnations of "baby-splitting" practices in arbitration, the argument for exploring compromise under appropriate circumstances is quite compelling. But it is not without dangers, and the main downsides are the effects the availability of compromise will have on the tribunal's deliberation.

As Gary Born has noted, deliberation is "a key, if often overlooked, aspect of the arbitral process."[114] While arbitration rules don't expressly require deliberation, such a requirement exists as "a general principle of international arbitration practice."[115] Indeed, failure to allow a tribunal member to participate in deliberations can render an award unenforceable.[116] Tribunals enjoy a great amount of freedom on how to deliberate. The timing, structure, and level of formality vary widely depending on the case, the presiding arbitrator's practices, and the relationship between the tribunal members.[117] What is important

113. Hans Smit, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice,* 11 AM. REV. INT'L ARB. 429, 430 (2000) (book review).

114. BORN, *supra* note 12, § 15.01[FF].

115. *Id.*; *see also* FRY ET AL., *supra* note 39, at 317.

116. BORN, *supra* note 12, § 15.01[FF][1]. However, tribunal members can't abuse the right to participate in deliberation by demanding continued discussion after they have received sufficient opportunity to express their views. In *CME v. Czech Republic*, the Swedish Court of Appeals famously refused to set aside an award on the basis of a claim that a party-appointed arbitrator, who ultimately resigned from the tribunal, was excluded from the deliberations. Svea Hovrätt [Svea HovR] [Swedish Court of Appeals] 2003-05-15 Ö T 8735-01, https://jusmundi.com/en/document/decision/en-cme-czech-republic-b-v-v-the-czech-republic-challenge-of-arbitral-award-judgment-of-svea-court-of-appeal-published-at-42-ilm-919-thursday-15th-may-2003 [https://perma.cc/AE85-V9SL]. The court concluded that the arbitrator had requested "unreasonably long" deadline extensions without providing reasonable explanations. *Id.* ¶ 274. The court expressed its suspicion that the complaining arbitrator's "feeling of having been excluded is probably . . . connected to the fact that he did not meet with support for his opinion in the case." *Id.*

117. *See* BORN, *supra* note 12, § 15.01[FF][2] (describing different approaches to deliberation); *see also* FRY ET AL., *supra* note 39, at 317 ("[T]he extent of the deliberations varies enormously depending on the type of decision being made and the preferences and personalities of the individual arbitrators.").

is that each tribunal member receives a meaningful opportunity to express their views.[118]

For three-arbitrator tribunals deciding international commercial disputes, individual and collective aspects of deliberation work in tandem as the arbitrators process the evidence, arguments, and each other's insights. Arbitrators deliberate in some form throughout the arbitration process, from the time they are selected all the way through the finalization of the award.[119] This Article's concern is with the individual and collective deliberation that takes place during and especially after conclusion of the hearings. At that time, arbitrators have heard the evidence and reviewed the parties' submissions, and their task is to try to reach agreement on how to resolve the issues they must decide in an award.[120]

1. The Deliberative Mindset

As we have seen, law's indeterminacy, coupled with the private nature of many disputes and the limited public functions of any awards, provides a compelling argument for permitting compromise in international commercial arbitration. If there is no clearly right answer to the question at issue, then why wouldn't a tribunal be allowed to search for a solution that reflects the lack of clarity? One response is to examine whether there are benefits to forcing arbitrators to try to gain clarity. Put differently, we should ask what is lost if arbitrators approach deliberation as a search for compromise. A key concern is how the option to compromise affects each arbitrator's individual deliberation process as they try to cut through the parties' positions and make up their minds about how to resolve the dispute.

The tension between the indeterminacy of law and the clarity required in adjudication has been a subject of fascination in American scholarship on judging. American Legal Realists forcefully critiqued the certainty and inevitability expressed in syllogistic reasoning as concealing the uncertainty that is inherent in deciding hard cases.[121]

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118. BORN, *supra* note 12, § 15.01[FF][1] ("[I]t is essential that all arbitrators be permitted a fair opportunity to express their views.").

119. Derains, *supra* note 24, at 911 ("The term deliberation is broad; it does not indicate any specific stage of the proceedings."); *see also* Bunni, *supra* note 31, at 123, 125.

120. This includes final awards as well as, in the case of bifurcated proceedings, partial awards that provide a final resolution of some of the issues. *See* FRY ET AL., *supra* note 39, at 330 (distinguishing between final and partial awards).

121. Simon, *supra* note 5, at 7–9 (discussing critiques of logical reasoning by Oliver Wendel Holmes, Benjamin Cardozo, Jerome Frank, Karl Llewellyn, and others); *see also*

As put by Karl Llewellyn, judges present their decisions as "simply inevitable, whatever doubts the panel may have had in arriving at it."[122] In a seminal article published in 1998, Dan Simon sought to reconcile the confidence judges project in their opinions, which often present the outcome as the only correct answer, with law's indeterminacy.[123] To explain this phenomenon, Simon developed what he termed the "psychological model" of judging.

Grounded in psychology and phenomenology, Simon's psychological model characterizes judicial decision-making as a journey "from conflict to closure."[124] Simon describes the mental process of deciding hard cases as one in which judges continually assess competing sets of inferences.[125] Once a set of inferences gains dominance, the "coherence bias" solidifies that status.[126] For at least some judges, strong subjective conviction can coexist with a lack of belief in absolute truths. Reflecting on the judging process, Justice Cardozo recognized that the certitude he would experience after settling on an outcome was entirely consistent with the existence of alternative—and equally defensible—answers:

> I have gone through periods of uncertainty so great, that I have sometimes said to myself, "I shall never be able to vote in this case either one way or the other." Then, suddenly the fog has lifted. . . . I know in a vague way that there is doubt whether my conclusion is right. . . . I cannot quarrel with any one who refuses to go along

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RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 16–17 (1961) (observing that in Anglo-American court systems "regardless of the way in which a given decision is actually reached, the judge apparently feels it necessary to make it appear that the decision was dictated by prior rules applied in accordance with canons of formal logic").

122. Karl N. Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 992 (Paul Gewirtz ed., Michael Ansaldi trans., 1988).

123. Simon, *supra* note 5, at 3, 10–11, 17, 19.

124. *Id.* at 20; *see also* BENJAMIN N. CARDOZO, THE PARADOXES OF THE LEGAL SCIENCE (1928), *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 251, 254 (Margaret E. Hall ed., 1947) ("The reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the great problems of the law.").

125. Simon, *supra* note 5, at 79–81.

126. In Simon's words:

> [T]he judge's mental representation of the dispute evolves naturally towards a state of coherence. . . . [T]he cognitive system *imposes coherence* on the arguments so that the subset of arguments that supports one outcome becomes more appealing to the judge and the opposite subset, including arguments that previously seemed appropriate, turn less favorable.

Id. at 20.

> with me; and yet, for me, however it may be for others, the judgment reached with so much pain has become the only possible conclusion . . . .[127]

Empirical research supports the notion that judging, whether by judges or arbitrators, involves a combination of conscious and subconscious processing. Chris Guthrie, Jeffrey Rachlinksi, and Andrew Wistrich developed and empirically tested the "intuitive-override model" of judging.[128] Combining the insights of formalist and realist models, they hypothesized that judges form initial intuitive judgments that they can, and sometimes do, override after deliberation.[129] They tested this model by collecting responses from 252 Florida trial court judges to cognitive reflection tests (CRTs)—in which the answers that seem most intuitive are objectively wrong—and to hypothetical legal scenarios.[130] The data suggest that while judges rely heavily on intuition, they sometimes overcome these initial responses.[131] A few years later, Susan Franck and other arbitration experts teamed up with Guthrie and Rachlinski to replicate some of the earlier research with a group of arbitrators.[132] Based on the responses of 548 participants, they found that the arbitrators performed slightly better than the Florida judges on the CRTs, indicating a stronger ability to override initial intuitive judgments.[133] Thus, at least some of the time, arbitrators corrected their inaccurate, intuitive judgments through critical thinking—even without discussing these initial assessments with others.

An inquisitive and corrective mindset is a critical asset for the adjudication of complex disputes, including by arbitrators. Arbitrators will inevitably form initial impressions, often strong ones, after reviewing the party submissions and then again after the hearing. But the value of deliberation is premised on arbitrators' willingness to

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127. CARDOZO, *supra* note 124, at 302. Judge Posner, on the other hand, has indicated that judges' subjective confidence may not match their writing: "Judges decide cases with greater confidence than the nature of judicial decisionmaking permits, and they write with more confidence than they feel." Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 873 (1988).

128. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007).

129. *Id.* at 8–9.

130. *Id.* at 13.

131. *Id.* at 27–29.

132. *See generally* Franck et al., *supra* note 81.

133. *Id.* at 1137–39. These results are consistent with the results of a smaller survey conducted at a conference for commercial arbitrators in the United States in 2013, in which eighty arbitrators answered the CRT questions. *See* Rebecca K. Helm, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Are Arbitrators Human?*, 13 J. EMPIRICAL LEGAL STUD. 666, 672–73 (2016).

revise their positions, which in turn relies on an openness to the possibility of being wrong. Judging calls for the mental flexibility to seriously consider alternative sets of inferences, as described by Simon, and to override incorrect initial assumptions even if they are strongly felt. This requires that arbitrators approach the evidence, the parties' arguments, and points made by their colleagues with a willingness to listen, question the basis of one's own assumptions, and reassess if there is reason to do so.

The option of compromise is likely to short-circuit the mental processes that allow for reflection and correction. Instead of maintaining an open mind and coming into the deliberation prepared to actively question one's initial responses, arbitrators will be incentivized to commit to early positions and ready themselves for a negotiation. Bernhard Meyer's story about how he managed to get his co-arbitrators to join his middle position demonstrates this mindset. The way in which he relates the story makes it hard to disagree with his assessment that the tribunal reached the right result. But this is true only if you take at face value Meyer's claim that the outcome he favored was the correct one. You would also have to accept that none of the tribunal members were open to changing their minds based on a discussion. Indeed, the strategic plan Meyer executed precluded the possibility that he himself would retreat from his initial impression. In sum, by inducing reliance on early impressions and encouraging a negotiation mindset, the possibility of a negotiated resolution fundamentally changes how individual arbitrators deliberate.

2. Collective Deliberation

The option to compromise also affects a tribunal's collective deliberation dynamics. One of the main reasons to opt for a three-arbitrator panel rather than a sole arbitrator is the belief that the arbitrators' interactions improve the quality of decision-making. In his authoritative treatise on international commercial arbitration, Gary Born notes that the repeated and persuasive expression of disagreement in deliberations is beneficial, positing that "tribunals often arrive at better, more careful and more nuanced decisions precisely because different arbitrators have different perspectives and different (initial) views of the evidence and the law."[134] He opines that "[a]wards produced through the give-and-take of three intelligent and diligent

134. BORN, *supra* note 12, § 15.01[FF][4].

tribunal members are almost always substantially better than awards produced by a sole arbitrator."[135]

Arbitrators describe the best version of collegial deliberation as a process in which arbitrators engage in an open and robust exchange of their impressions and analyses as they attempt to come to a collective understanding of the facts and the law. Yves Derains defines a "harmonious deliberation" as one in which "the arbitrators do not hesitate to share their views of the case," stating that "[t]hese exchanges are extremely rich because they allow each member's views to form and become stronger."[136] When arbitrators know and trust each other, such exchanges will take place from the outset. But when they are new to each other, "harmony . . . develops gradually, just as the sound of an orchestra is formed only after each musician plays a few isolated musical syllables to tune his or her instrument to that of others."[137] Nael Bunni contributes another metaphor, characterizing fruitful deliberation as "an interaction between the minds of the arbitrators" that would produce "the most appropriate way forward just like when charged clouds collide producing lightening that could show the way forward in an illuminated manner."[138]

These discussions allow arbitrators to overcome initial biases and gain deeper insight in the case.[139] Learning about other viewpoints

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135. *Id.* Elsewhere, Born notes that the "give-and-take" that takes place in some tribunals "might look like 'negotiation,'" and that it "sometimes derives from a purely-objective assessment of the merits of different issues and sometimes from other factors (including personal egos, general adjudicative philosophies, non-neutral co-arbitrators and the like)." *Id.* § 15.01[FF][3].

136. Derains, *supra* note 24, at 920; *see also* Stephen Jagusch, *Starting Out as an Arbitrator: How to Get Appointments and What to Do When You Receive Them*, 71 ARBITRATION 329, 335 (2005) (stating that three-arbitrator tribunals allow for "true deliberation—the sharing of ideas, perspectives, reasoning and drafting").

137. Derains, *supra* note 24, at 920. As an amateur cellist who plays often in ensembles and orchestras, I must note that this analogy is not particularly apt. A more convincing counterpart in music would be a chamber music ensemble that starts playing string quartets or perhaps piano trios on a regular basis.

138. Bunni, *supra* note 31, at 126. More pragmatically, Albert Jan van den Berg notes that when acting as a presiding arbitrator, he often convenes the tribunal at the end of each hearing day and asks his co-arbitrators to weigh in on what the tribunal learned that day. He continues: "While some initially react 'Nothing!', the ensuing exchange of views assists in seeing where the arbitrators are in their thinking about the case, what needs further study and reflection, and what questions they may wish to explore with the parties." Van den Berg, *supra* note 23, at 830.

139. *Cf.* Derains, *supra* note 24, at 922 (contrasting the three-arbitrator deliberation dynamics with service as a sole arbitrator and noting that in the latter situation, "[t]he absence of confrontation does not only entail the risk of prejudging but also the risk of being superficial").

may cause an arbitrator to conclude that the outcome favored by one or both of their fellow tribunal members is, in fact, the correct one. Describing deliberation as a duty of the arbitral tribunal, Derains observes:

> The confrontation of ideas, even with a partial Arbitrator, is always beneficial. Most times, it gives the President an opportunity to reinforce the motivation he or she wished to adopt in view of opposite considerations. Sometimes, the deliberation [leads] to the change of his or her initial position on certain points, especially when one of the co-arbitrators is truly independent; that is to say, in most cases.[140]

A few arbitrators, however, deviate from these lofty descriptions and openly characterize joint deliberation as a strategy game. Bernhard Meyer's story provides an example of that approach. While it is true that he managed to get his co-arbitrators to move away from their initial positions—an impressive feat of diplomacy—his story also provides a prime example of a presiding arbitrator who consciously steers the tribunal toward the resolution he prefers. Instead of an open exchange in which the co-arbitrators could try to convince Meyer (and each other) to view the case from their perspective, and in which Meyer might try to convince at least one of the co-arbitrators of the correctness of his view, the outcome in his telling was a foregone conclusion.[141]

Ugo Draetta, who has written candidly about the arbitration process based on his experience as an arbitrator and in-house counsel, similarly advises arbitrators to approach the deliberation process like a negotiation, adding that he does not use that term "in the pejorative sense of 'horse trading,' but in the more noble sense . . . of a quest for a unanimously acceptable solution that does the greatest possible

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Similarly, Judge Edwards posited that collegiality requires that adjudicators (in his case, appellate judges) "overcome their individual predilections." Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1639 (2003).

140. Derains, *supra* note 24, at 919. Judge Edwards expressed similar sentiments about collegial judging, noting that "judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached." Edwards, *supra* note 139, at 1646. Derains contrasts what he terms the "harmonious" deliberation with the "pathologic" version, in which a party-appointed arbitrator sabotages the proceedings by, for example, failing to participate in deliberation. Derains, *supra* note 24, at 913, 915; *see also* Kirby, *supra* note 16, at 344–45 (describing obstructive conduct she has encountered while overseeing countless arbitrations as an administrator at the ICC).

141. *See supra* notes 52–60 and accompanying text.

measure of justice to the parties."[142] It isn't clear whether the disclaimer about horse trading would exclude major concessions of any kind or only those that aren't motivated by "noble" intentions. But like Meyer, Draetta takes the view that effective arbitrators use strategy in the service of achieving unanimity.

A norm against compromise is intended to curb such strategic conduct and to create conditions conducive to approaching deliberation as a joint undertaking. Conversely, the prospect of hammering out a compromise encourages gamesmanship. For example, it may cause arbitrators to exaggerate their positions, or to project greater confidence than they feel. In both cases, the arbitrators' conduct deprives the tribunal of information that could lead to a more searching inquiry. Even if arbitrators don't engage in this kind of strategic conduct, the incentives to dig in can easily lead to stagnation, and tribunals don't have unlimited time. Working out a compromise will often be complicated enough that it is tempting to abort the effort to try to achieve genuine consensus if the arbitrators' positions appear to be far apart.

In sum, the availability of a compromise option reduces the likelihood that arbitrators approach their task with unity of purpose. Instead of an interactive process in which tribunal members take each other's thoughts, questions, and concerns seriously, it sets up deliberation as a game in which arbitrators try to outsmart each other—listening and talking while simultaneously running calculations on how far the other tribunal members are willing to go. As a result, many of the benefits associated with multi-arbitrator judging are lost.

3. Analytical Integrity

Another concern is how the availability of compromise affects the structure of deliberation, including the order in which the tribunal addresses distinct issues. The resolution of commercial disputes consists of building blocks that are discrete yet stand in a sequential relationship to one another. Contract disputes typically involve two distinct inquiries: whether there is liability, and what damages are owed. In addition, parties may raise jurisdictional issues that could be dispositive, for example, that the arbitration is invalid or that the dispute is outside its scope. Depending on the seat of the arbitration and the parties' agreement, a tribunal may also need to rule on costs. Tribunals may hold a single hearing and prepare one award that addresses all issues. But they could also bifurcate the proceedings into separate

142. Ugo Draetta, *The Dynamics of Deliberation Meetings in Arbitrations: Some Personal Considerations*, 3 INT'L BUS. L.J. 219, 220 (2011).

phases, most commonly jurisdiction and liability, or liability and damages.[143]

Regardless of whether an arbitration is bifurcated, one would expect that tribunals structure the deliberation in a sensible order. Often, the assignment of liability logically precedes the determination of damages. Thus, a tribunal may make an initial determination on liability, then review damages. There could sometimes be reasons to deviate from the most straightforward order. For example, if a respondent submits strong evidence indicating that the claimant did not suffer any damages, it may make sense to review the damages question first. Sometimes, evidence that is considered when assessing damages turns out to also bear on liability, spurring a tribunal to revisit that subject. But these instances don't negate the point that the decisions a tribunal must make tend to be sequential.

It is intuitive that once a tribunal has ruled that it has jurisdiction to hear a dispute, disagreement between the arbitrators on that issue should not factor into the assessment of the parties' positions on the merits or on damages. Jurisdiction is a procedural threshold question, and it is easy to view it as separate from other issues, even if there is substantial overlap in evidence. But liability and damages are similarly distinct. Liability (and the breach of contract claims that tend to be central to the issue) is often a yes / no proposition. Once the evidentiary standard is met, the relative strength of the parties' claims and defenses does not matter. All that remains to be done is determine damages. Allowing disagreement or uncertainty about liability to bleed into the assessment of damages prevents the tribunal from carefully considering the law and evidence on that issue. Conversely, reasoning back from a predetermined outcome precludes a real consideration of foundational legal issues.

Three-arbitrator tribunals can consciously or subconsciously bypass the distinctness of these inquiries by taking votes on the outcome of the case as a whole, rather than issue by issue.[144] Once again,

143. Lucy Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28 J. INT'L ARB. 105, 105 (2011).

144. Lewis Kornhauser and Lawrence Sager mention the example of a contract dispute that calls for decisions regarding the validity of the contract and whether there was material breach, with the plaintiff's ability to recover damages depending on the ability to prove both validity and breach. *See* Lewis A. Kornhauser & Lawrence G. Sager, *The Many as One: Integrity and Group Choice in Paradoxical Cases*, 32 PHIL. & PUB. AFFS. 249, 250–51 (2004). Logically, even if only bottom-line votes are taken, each judge would have to reach a decision about both issues. But Kornhauser and Sager note that it is possible that "the views of the judges will be such that tallying their votes on salient issues will produce a different outcome than will tallying their votes on the case as a whole"; in other words, which voting protocol is used can be outcome-determinative. *Id.*

Bernhard Meyer's story demonstrates how aiming for a compromise outcome affects the analytical integrity of deliberation. Meyer expressly noted that in structuring discussions with the co-arbitrators, he decided to "start[] 'backwards'" rather than address first the foundational issue of whether the respondent had validly terminated the contract, because he believed the tribunal would never reach agreement on termination.[145] Christoph Liebscher, an Austrian arbitrator who participated in the conference at which Meyer related his story, appeared to take issue with Meyer's strategy precisely because of how it alters the decision-making sequence. While stopping short of characterizing Meyer's scenario as an inappropriate compromise, Liebscher indicated that he was "not in favor of mitigating" and that in most circumstances, once an issue is decided "that box would be closed and then we start from scratch for the next issue."[146] Indeed, Meyer never explained why he was convinced that he could not have achieved the same result by structuring a two-part deliberation process and making clear from the outset that after taking a vote on liability, a full discussion on damages would be on the table.

In addition to affecting the individual arbitrators' mindsets and interfering with collective deliberation dynamics, the search for a compromise outcome can cause a tribunal to disregard the analytical distinctness of the issues presented by a dispute, as well as the logical relationship between these issues. Taken together, the effects of compromise on deliberation profoundly alter the nature of arbitral judging.

C. Effects on the Award

Reaching for compromise solutions also affects arbitrators' approach to drafting an award in ways that interfere with benefits associated with reason-giving. The rules of all major international arbitration institutions require that tribunals prepare reasoned awards.[147] They don't require any particular format, perhaps in recognition of the different legal traditions from which arbitrators hail and the individual styles they have developed.[148] Yet it has become conventional for

145. Meyer, *supra* note 41, at 61.

146. *Id.* at 64 (comment from Christoph Liebscher).

147. *See, e.g.*, ICC ARB. RULES, *supra* note 25, art. 32(2) ("The award shall state the reasons upon which it is based."); ICDR ARB. RULES, *supra* note 25, art. 33.1 (requiring that an award state reasons unless the parties provide otherwise); LCIA ARB. RULES, *supra* note 25, art. 26.2 (same).

148. *See* Lloyd et al., *supra* note 29, at 19–20, 23.

tribunals to produce lengthy awards that provide extensive reasons for the outcome.[149]

Reason-giving is costly, placing it in tension with other values of adjudication, especially efficiency.[150] It is not self-evident that these costs outweigh the benefits in private adjudication, where many of the rationales that are traditionally provided for a reason-giving requirement or norm are not present. In cataloguing justifications for reason-giving requirements, Stacie Strong identifies "structural" and "non-structural" rationales.[151] Structural rationales involve the function of reason-giving in a legal regime, including the role of decisions in lawmaking and in permitting subsequent review.[152] While not irrelevant to international commercial arbitration, the structural rationales lose much of their force compared to courts and tribunals that play a key role in creating and refining substantive law.[153]

Non-structural rationales, on the other hand, concern the intrinsic benefits of reason-giving. Most importantly for our purposes, a requirement to provide reasons is thought to "improve[] the quality of the decision-making process and consequently of the decision itself."[154] Reason-giving also increases the likelihood that the parties who are bound by a decision perceive it as fair, which in turn enhances the legitimacy of the relevant dispute resolution method.[155] Unlike their structural counterparts, the non-structural rationales apply fully in the international commercial arbitration context.

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149. Awards in international commercial arbitration awards thus are closer to "the longer, more discursive models seen in the common law" than to the "very brief, highly deductive opinions" that satisfy the reason-giving requirement in France. Strong, *supra* note 27, at 14. *But see* Lloyd et al., *supra* note 29, at 31 ("The extent to which reasons are given varies.").

150. *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 522–25 (2015).

151. Strong, *supra* note 27, at 15–20. Similarly, Chad Oldfather recognizes three functions performed by reasoned judicial opinions: improving the quality of decision-making, developing precedent, and enhancing the legitimacy of the (often unelected) judiciary. Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1317 (2008).

152. Strong, *supra* note 27, at 15–18.

153. *Cf. id.* (discussing the limited role of reasoned arbitral awards in lawmaking, enforcement in national courts, and arbitral appeals).

154. *Id.* at 19.

155. *Id.* at 20; *cf.* Simon, *supra* note 5, at 15–16 (describing the common perception that deductive judicial opinions promote acceptance and legitimacy). Strong also analyzes the role of reasoned awards in safeguarding essential procedural values. Strong, *supra* note 27, at 19.

1. The Drafting Process

Arbitrators and judges, as well as scholars, have written extensively about the process of drafting opinions or awards. Much of the American literature about judging treats deciding and opinion-writing as distinct stages, with the latter focusing on justifying the decision a judge has reached.[156] Dan Simon posits that his psychological model of judging explains why judicial opinions tend to strike a tone of certainty, presenting the result as inevitable. The coherence bias causes judges to experience the outcome on which they have landed as singularly correct.[157] Additionally, once the choice is made, a process of "rationalization" takes effect, in which the adjudicator searches for additional support to solidify the outcome.[158]

Others, however, describe the preparation of opinions or awards as a dynamic process in which writing and thought interact with and transform one another. The act of writing provides an opportunity to think more deeply about knotty aspects of the dispute. As Judge Richard Posner famously put it: "Reasoning that seemed sound when 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react."[159] The arbitrator Piero Bernardini similarly observed that "the deliberation process continues even during the drafting of the award. It appears sometimes that when you try to write down what was decided during the deliberation process you may discover that it does not work and that you have to re-think it."[160] Chad Oldfather suggests that, at least as applied to hard cases, decision does not precede justification, but "is instead an ongoing process," and that "the decision is not complete until the justification is complete."[161]

When multiple adjudicators cooperate to draft a decision, the writing process becomes an opportunity not just for individual

156. *See, e.g.*, RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 548 (2d ed. 1996) ("[T]he judicial resolution of a legal dispute implicates two separate processes: (1) deciding, or the process of discovering the conclusion, and (2) justifying, or the process of public exposition of that conclusion."); Oldfather, *supra* note 151, at 1298–99.

157. Simon, *supra* note 5, at 83–84.

158. *Id.* at 84.

159. Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447–48 (1995); *see also* Oldfather, *supra* note 151, at 1284–85 (discussing instances of judges invoking the phrase, "[i]t won't write").

160. Bernardini, *supra* note 105, at 18.

161. Oldfather, *supra* note 151, at 1302.

reflection but also for continued dialogue. For three-arbitrator tribunals, a common practice is for the chair to prepare the first draft. Alternatively, the chair may divide the work between the three arbitrators if they have reached unanimity, or split it with one co-arbitrator in case of a majority award.[162] No matter how the work is divvied up, arbitrators are expected to review and comment on their colleagues' drafts.[163] This exchange between the arbitrators provides an opportunity to refine and adjust the reasoning.[164] More so than in the case of a sole arbitrator engaging in an inner monologue while reviewing and editing their own writing, the joint process gives tribunal members who may not have fully bought into the solution another opportunity to press their case by pointing out defective analysis or weaknesses in the factual support. Sometimes, the back and forth can result in genuine agreement.[165]

Compromise solutions change the goals of award-writing. Instead of trying to explain to the parties an outcome that one or more arbitrators believe to be right, the arbitrator's mission now is to search for the best route to an agreed-upon outcome. This change in purpose has profound consequences for the activity itself. An arbitrator whose goal is to draft a watertight award in support of a pre-ordained position will tackle the task much like an advocate. Such an approach forecloses honest engagement with strengths and weaknesses in the reasoning. It also discourages discussions among tribunal members about whether reassessment is needed. As Jan Paulsson put it, a compromise solution "is likely to contaminate the reasoning of the tribunal, transforming it into something more like a ritual than a record of genuine ratiocination."[166] If a tribunal sets its sights on producing an adequate justification of a compromise solution without revisiting the merits of

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162. Lloyd et al., *supra* note 29, at 21, 25. Of course, this assumes that the presiding arbitrator is in the majority. *Id.* at 21 n.14.

163. *Id.* at 21, 26.

164. In the words of Judge Edwards:

> When a judge disagrees with the proposed rationale of a draft opinion, the give-and-take between the commenting judge and the writing judge often is quite extraordinary—smart, thoughtful, illuminating, probing, and incisive. . . . If one's reasoning or writing admits of ambiguities that one did not intend or legal consequences that one did not foresee, these can be cured through the give-and-take of collegial deliberation.

Edwards, *supra* note 139, at 1650.

165. Responding to the objection that truth-seeking can be overly time consuming, Rusty Park acknowledges that "[i]t takes time to write awards explaining the decision, particularly when three arbitrators disagree on the reasoning." Park, *supra* note 67, at 37. But he then notes that this painstaking process is preferable over issuing an award "with a minority dissent pointing to flaws that might have been resolved in good-faith deliberations." *Id.* at 37–38.

166. Paulsson, *supra* note 85, at 353.

the steps leading up to the outcome, the writing process is hollowed out.

2. Coherence and Legitimacy

A three-arbitrator tribunal's joint drafting efforts must, of course, result in a cogent award.[167] This is important not just for its own sake, but also because patchwork awards that are facially incoherent damage the credibility of the tribunal in the parties' eyes and ultimately hurt arbitration's standing in the broader international business community. Compromise can interfere with cogency; indeed, Piero Bernardini has voiced opposition to compromise on the basis that it "negatively affect[s] what should be the tribunal's common objective: a coherent and well-reasoned award."[168]

One would expect that experienced arbitrators, much like competent attorneys, possess the skills to craft an award that hangs together, even if it is written to justify a compromise between the arbitrators. But there is still a risk that doctrinal incongruities sneak in. Bruce Gailey, an experienced arbitration practitioner based in London, described serving as counsel in a dispute in which a party claimed to have terminated a contract for cause. The tribunal held that neither party was in breach, which according to Bailey is logically impossible under contract law: "[W]hen you terminate for cause, someone is in breach. Either you are entitled to terminate because the other party is in breach or you got it wrong . . . and your termination is in breach."[169] He suspected that "there was a horse trade" and noted that "[h]orse trading on the principles" could result in enforceability problems.[170]

Even if a tribunal succeeds in coming up with a facially adequate doctrinal explanation, it can be hard to fully disguise that a compromise was struck. To arrive at the solution, the tribunal may need to come up with factual findings that are in tension with each other; for example, deeming a witness credible with regards to some facts but not to others without a credible reason for the distinction. Similarly, awarding some damage categories and rejecting others could be internally inconsistent or even appear to be arbitrary. Parties and their counsel will likely take a close look at damages that end up being close

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167. *Cf.* Lloyd et al., *supra* note 29, at 26 ("A final draft may have to use wording that is acceptable to all or to the majority but the wording ought to be free from doubt or ambiguity.").

168. Bernardini, *supra* note 105, at 19.

169. Pierre Mayer, *Dealing with Dissenting Opinions*, *in* INSIDE THE BLACK BOX, *supra* note 31, at 67, 71 (comment from Bruce Gailey).

170. *Id.* at 72.

to the middle, especially when the explanation for the amounts contains gaps or is poorly reasoned.[171] They will also be sensitive to decisions on cost allocation.[172] Sophisticated insiders will likely sniff out a compromise solution, no matter how artfully the award is written. As put by Jennifer Kirby, who reviewed more than one thousand arbitral awards while administering arbitrations at the ICC Court of International Arbitration: "Where there is horse-trading and baby-splitting to reach a unanimous result, it is often evident on the face of the decision. What the decision gains in compromise, it generally loses in intellectual rigor, the compromise section often standing out like a sore thumb."[173]

The reduced legitimacy of awards that are identified as reflecting a compromise reveals a paradox. Parties want to maximize the likelihood that their party-appointed arbitrator is supportive of their position, but they resist the consequences of the incentives created by the appointment of a tribunal in which two arbitrators have been selected based on the expectation that they are sympathetic to the appointing party. Tribunals should be mindful that parties who believe they are harmed by "baby-splitting" will scrutinize awards for weak reasoning.

3. Reasons for Reason-Giving

In thinking about the reason-giving requirement in international commercial arbitration, one key point is the question of what reasons should represent. In the literature addressing reason-giving in American courts, scholars have written extensively about how much judges must disclose when stating the reasons for their decisions. In trying to answer this question, two central concepts are sincerity and candor. Sincerity is susceptible to different meanings, but it generally refers to a notion of truthfulness. Micah Schwartzman, for example, defines sincerity as "correspondence between what people say, what

171. *See* Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30 BERKELEY J. INT'L L. 196, 200 (2012) (discussing "perceptions that arbitrators merely 'split the baby' between the parties' proposed valuations [in investor-state arbitrations], particularly when awards are poorly explained"); Weber et al., *supra* note 79, at 731 (arguing that "laconic reasoning" on damages gives rise to speculation that the tribunal split the baby).

172. *See* James H. Carter, *A KISS for Arbitration Costs Allocation*, 23 AM. REV. INT'L ARB. 475, 477 (2012) (noting that "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").

173. Kirby, *supra* note 16, at 348.

they intend to say, and what they believe."[174] Sincerity must be distinguished from the broader notion of candor, which Schwartzman defines as requiring that adjudicators provide *all* the reasons that motivated a decision.[175] Schwartzman argues that judges owe a duty of judicial sincerity, meaning they must believe that the reasons provided are sufficient to justify the decision, and that they must state those reasons.[176]

The ICC takes a similar approach to reason-giving, requiring that awards state adequate reasons but cautioning against providing a full accounting of how a tribunal came to its conclusion. A report prepared at the request of the ICC notes that the reason-giving requirement in international arbitration should not turn award-drafting into "an exercise in self-justification in which the arbitral tribunal demonstrates to its satisfaction that it has overcome its internal wrangling."[177] Rather, the ICC Court, which reviews awards before they are issued, "will wish to understand the logic of the reasoning so that it can find the real reasons for a decision."[178] Failure to meet this standard can be grounds for withholding approval.[179]

While a sincerity requirement does not entail an obligation of comprehensiveness, it does require that the stated reasons did in fact motivate the decision they support. In a different reason-giving context, Mathilde Cohen provides the example of an agency administrator who denies a construction permit for a well, providing as a reason that the well would contaminate groundwater. If the real reason for the denial is aesthetic impact, but the administrator picks contamination because it is easier to prove, the stated reason is deceptive. This is true even if the contamination explanation would, in fact, hold up.[180] Richard Fallon similarly posits that any conception of judicial reason-giving should, at a minimum, prohibit "lies and deliberate efforts to mislead."[181]

Of course, the literature concerning reason-giving in the American legal system does not fully translate into the private judging

174. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 992 (2008).

175. *Id.* at 996–97, 1016–17.

176. *Id.* at 1014–15.

177. Lloyd et al., *supra* note 29, at 28.

178. *Id.* at 31.

179. *Id.*

180. Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1130 (2010).

181. Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2282 (2017).

context.[182] But its insights provide a key to understanding what it is that makes compromises on outcomes so problematic, even in a private dispute resolution context like international commercial arbitration. The issue is that such outcomes require the concoction of reasons that none of the arbitrators believes to be correct. The trickery that is needed to pull them off places compromise outcomes squarely in conflict with the aims of any meaningful reason-giving requirement. Consider again the scenario in which two arbitrators believe the respondent is liable to the claimant and is entitled to full damages. The third arbitrator believes there is no liability and that the claimant is not entitled to damages for that reason alone. An award that rules in favor of the claimant on liability but reduces damages based on inadequate mitigation efforts is deceptive. This is because none of the arbitrators actually believes that the claimant's mitigation efforts were inadequate; instead, the "real reason" for reducing damages is that the tribunal wants to provide a concession to the minority arbitrator. In sum, the reasons provided do not correspond to the actual beliefs of any of the arbitrators; they are merely a fig leaf.

The concepts of sincerity and candor also help explain why compromises on reasoning are often not as problematic. Sincerity requires merely that arbitrators believe that the reasons that are communicated in the award are sufficient. There is no requirement to provide a complete account of reasons that motivate the tribunal's decision, nor is there even a requirement that the "best" reasons are provided. So, if two arbitrators on a three-arbitrator tribunal believe that R1 is the best reason for the outcome and R2 is a sufficient but suboptimal reason, it is not wrong for the tribunal to state only R2 in the award to satisfy the minority arbitrator.[183] After all, in this scenario all three arbitrators agree that R2 sufficiently justifies the outcome, and at least one of them holds the belief that R2 is the best reason. Moreover, even if candor is not required, it could still be instructive to consider how parties would respond to full disclosure of the reasons for the outcome.

182. For example, the decision of whether to join an opinion or write separately is different in the American legal system, in which separate opinions are common, and international commercial arbitration, where tribunal members will often sign an award in deference to the majority or the presiding arbitrator. *Cf. id.* at 2292–93 (positing that judges should not "join majority opinions that lack what they believe to be arguments capable of sustaining the conclusions that they reach").

183. *Cf.* Schwartzman, *supra* note 174, at 995 (explaining that when a judge who favors a broader rule selects a narrower rule that is acceptable to two other panel members, the judge is still sincere); Fallon, *supra* note 181, at 2294 (noting that a judge does not violate her obligations if she includes "arguments that other judges endorse, but that she thinks would be inadequate to sustain the judgment standing alone, as long as the opinion includes arguments that she regards as legally sufficient").

An award that provides alternative—even irreconcilable—routes to the same outcome does not present the same legitimacy issues as an award that explains that the tribunal substantially adjusted the damages amount in deference to an arbitrator who disagreed on the analytically separate question of liability.

International arbitration experts who oppose compromise solutions often express a sense that the legitimacy of arbitration depends on reason-giving being something more than an intellectual exercise to come up with a superficially coherent explanation. Jan Paulsson, for example, argues that the practice of party appointment invites compromise, which in turn "militates against . . . sincerely motivated awards."[184] He continues: "Since the requirement of reasons is intended to serve as a check on arbitrariness, it follows that the subversion of this requirement carries the risk that awards fail to fulfil their important legitimating function."[185] A reasoned award is, in a sense, the end product of an arbitration (or a bifurcated portion of it): the document in which a tribunal presents its decision and the reasons for it to the parties. As such, it has an external focus. But reason-giving also serves inward-facing purposes, by serving as a check on a tribunal's collective and individual deliberation practices. A norm against compromise outcomes helps ensure that the reason-giving requirement can fulfill this disciplining function. As such, it promotes the quality of private judging.

CONCLUSION

At the heart of the biblical baby-splitting story lies a horrible truth that is so obvious it does not need to be voiced, namely that following through on Solomon's threat would destroy the baby. Less obviously, and much less cruelly, the search for a workable compromise destroys what is most valuable about three-arbitrator arbitration. It substantially reduces the individual and collective struggle with hard questions, inconsistencies, and ambiguities, replacing it with deliberate manipulation of the law and the facts to justify an outcome that is untethered from any individual arbitrator's convictions. In turn, such awards are less likely to be accepted as legitimate by the parties who opt for a three-arbitrator tribunal. The arbitrators' mandate is to work

184. Paulsson, *supra* note 85, at 353; *see also* Kirby, *supra* note 16, at 348 ("Whatever their pragmatic merits may be . . . compromise decisions are generally considered to undermine the integrity of the arbitral process and the quality of arbitral awards—the exact opposite of what having three arbitrators is supposed to do.").

185. Paulsson, *supra* note 85, at 353.

through hard questions and decide them to the best of their ability, not to search for an escape route.[186] Whether or not one believes that right answers exist as a philosophical matter, the legitimacy of international commercial arbitration depends on arbitrators trying to find them. The strong norm against compromise is a statement about what arbitration is and what it should aspire to be.

186. *Cf.* Park, *supra* note 65, at 524–25 ("In choosing arbitration, the parties have not sought simply to make peace, noble as that goal might be. Rather, they have committed to a decision-making process founded on a search for an accurate portrayal of the facts and the law.").