
Kluwer Arbitration Blog

Special Masters in International Arbitration

Roger Alford (General Editor) (Notre Dame Law School) · Friday, June 26th, 2009

As international arbitration becomes ever more sophisticated and complex, one wonders whether it will continue to have the institutional capacity to address its protean tasks. Claims in the billions of dollars are now common. Thousands of individuals are affected by the outcome of a single arbitration decision. And the complexity of the cases is such that even the most skilled arbitrator may excel in part of the case—such as determining liability—but flounder with respect to another part of the case—such as assessing damages.

Meanwhile the machinery of international arbitration struggles to cope with the pace of change. Although the landscape has changed dramatically in recent decades, the arbitration rules and practice remain largely the same. Arbitrators are authorized under existing rules to secure assistance through secretariats and tribunal-appointed experts, advisers, and assessors. But in practice those avenues of assistance are rarely pursued.

By contrast, judges before the World Trade Organization have a cadre of staff attorneys who assist in the drafting of opinions. Commissioners at the United Nations Compensation Commission have a permanent staff of financial experts to appraise damage claims. And federal judges have the procedural authority to appoint special masters to manage unusually difficult cases.

A strong case can be made that international arbitration has become a victim of its own success. If it is to continue to satisfy the demands placed upon it, it must be capable of adjusting to meet those ever-increasing demands. In a future post, I will consider other ideas to address this problem, but today I want to consider the possibilities of a tribunal-appointed special master.

In the United States, a federal judge can and often does appoint a special master. [FRCP Rule 53](#) provides that a judge may appoint a special master to (a) perform duties consented to by the parties; (b) in exceptional circumstances hold trial proceedings and make or recommend findings of fact; or (c) address pretrial or post-trial matters that cannot be effectively and timely addressed by an available district judge. Once the master has issued his report or recommendation, the court is required to give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

The traditional function of special masters has been ministerial, such as accounting or the calculation of damages, but as discussed [here](#), special masters have also been used for evidentiary purposes in complex or mass tort and commercial cases for the discovery of significant quantities of information. Recent ministerial permutations have expanded to include the distribution of

settlement assets in large class action civil litigation. Often the special master does not work alone, but has a staff assisting in the issuance of the report and recommendation to the judge.

A tribunal-appointed special master could resemble the tribunal-appointed expert, but there is no inherent reason why the role could not expand to encompass many of the traditional functions of a special master performed in the domestic context. Existing rules appear flexible enough to broaden the definition of a tribunal-appointed expert to include many of the functions of a special master.

Obviously recourse to a special master in international arbitration raises difficult issues. But I think it is an idea that deserves thoughtful consideration. If judges have the temerity to recognize that they can benefit from the assistance of a special master, why not international arbitrators?

Roger Alford


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