

The Commercial Arbitration – The Single Arbitrator versus the Tri-Panel

By: Hon. John P. DiBlasi, J.S.C. (Rtd.)

Over the years, I have had the opportunity to preside over numerous commercial arbitrations of all types. I have done so as the sole arbitrator and also as a member of a tri-panel. The decision to use a single arbitrator versus a tri-panel is a critical one.

The decision as to the use of a single arbitrator or a tri-panel depends on, to a great extent, the type of case being presented. Having served as a Presiding Justice of the Commercial Division of the New York State Supreme Court, it is my belief that the majority of commercial cases are ill-suited for disposition by a jury due to the complexities involved. One of the significant advantages of arbitration over a trial is that the parties have the opportunity to select the trier of facts and the judge of the law. In a case that is not appropriate for a jury, this is a distinct advantage for both sides. Further, the goal of the arbitration is to save the greater associated with a trial. The parties have the opportunity to do research with respect to the prospective arbitrator/arbitrators and to do an extensive conflict check in advance. Concurrent with this part of the process is the determination as to whether a single arbitrator or a tri-panel would be more appropriate to decide the case. Both have their advantages and disadvantages. Two factors should be considered: efficiency and minimization of cost and single vs. collective judgment. Given the finality of the arbitrator's(s') decision, a careful decision should be made.

With respect to the first factor of cost and efficiency, it is easier for one arbitrator to streamline the process without the necessity of consulting with two other panel members who may agree or disagree with his/her opinion regarding discovery, motions, and scheduling. This saves significant time and money. With a tri-panel, while almost always collegial, different views concerning all of the foregoing issues may be presented which then, in turn, may cause delay. From my experience, accommodating the schedules of three arbitrators can be daunting and can delay the process. One option is for the parties to select a single member of the panel to deal with some or all of the foregoing issues and evidentiary rulings at trial, thereby creating a hybrid process.

There is also the issue of who will decide the case. From the single arbitrator's perspective, as Mel Brooks would say, "It's good to be king." From the litigant's perspective, it may or not be good to be a subject of the sovereign. The parties in this scenario are placing all of their proverbial eggs in one basket. It may also be difficult for a single arbitrator to make what may be perceived as a draconian decision by one side so there may be a tendency on the part of some arbitrators to do substantial justice by taking a middle of the road approach.

The perceived advantage of a tri-panel is that there is a greater likelihood of a more balanced approach to the decision-making process. With three well-vetted panel members, the opportunity to give and take during the deliberation process is an excellent way to ensure a fair result. To maximize the foregoing, the parties may opt to mutually agree to all three panel members or may each select one with a mutual consensus as to the third. While the perceived advantage in this process may be good in theory, sometimes this may not be the reality. Often tri-panels become juries where there is a disagreement among the members as to the disposition of the matter and therefore compromises are made. Much like the single arbitrator, the panel may render a decision that metes out substantial

justice. Another aspect to consider is that a tri-panel may more easily deal with difficult situations since the decision is written as a group rather than as an individual. For instance, they may tend to render verdicts fully in favor of one party over the other. This may make the tri-panel a good choice for an all or nothing case.

In summary, deciding upon a single arbitrator vs. a tri-panel of arbitrators is an important consideration when resolving commercial cases. When making this decision, it is essential to look at the complexities of the case, timing, cost and profiles of the arbitrators to be selected. Although there is no right or wrong answer, this choice will most certainly affect the outcome of your case.

Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Westchester County, Commercial Division. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. For the third straight year, Judge DiBlasi was voted the #1 mediator in the United States in the 2016 National Law Journal Annual Reader Rankings Survey. He was also named a National Law Journal 2016 Alternative Dispute Resolution Champion, as part of a select group of only 48 nationwide. Judge DiBlasi was voted one of the Top 10 mediators in the 2016 New York Law Journal Annual Reader Rankings Survey for the seventh year in a row. Additionally, he has been designated a Super Lawyer for the fourth consecutive year (2016, 2015, 2014 & 2013) and he holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.

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