

# When 'I Pick, You Pick, They Pick' Goes Wrong

By **Angela Zambrano and Robert Velevis** June 12, 2017, 12:25 PM EDT

One of the most important factors to determine the outcome of any dispute is the question of who will be the decision maker. Parties litigating in court spend significant resources analyzing venue issues at early stages of litigation and jury selection at the end, believing that having the “right” decision makers often makes the difference in success or failure.

Parties engaged in arbitration spend similar efforts vetting potential arbitrators, such as those provided from a panel by an arbitral forum. And, even before a dispute arises, parties often go to great lengths to craft elaborate arbitration mechanisms dictating the arbitration rules, the required qualifications of arbitrators, and how those arbitrators are to be selected.

Spending time upfront analyzing how the arbitration will be conducted is critically important given the deferential standard of review for arbitral awards. Federal and state arbitration laws generally favor the enforcement of arbitral awards and make overturning them difficult. Often there is no meaningful way to appeal an arbitral award in the same way that a runaway jury can be checked by the trial and appellate courts.

This deferential standard is perhaps best articulated by the United State Supreme Court’s statement in *Oxford Health Plans LLC v. Sutter*, that “convincing a court of an arbitrator’s error — even his grave error — is not enough. So long as the arbitrator was ‘arguably construing’ the contract ... a court may not correct his mistakes under [Federal Arbitration Act] §10(a)(4). ... The potential for those mistakes is the price of agreeing to arbitration.”

The practitioner’s job, therefore, is to minimize the chances of an arbitral “mistake” that costs their clients. Often, this occurs through the contractual arbitrator selection mechanism.

On April 28, 2017, the Texas Supreme Court issued a decision in [Forest Oil Corp.](#) v. El Rucio Land and Cattle Inc., providing a cautionary tale for parties that employ one often-used arbitrator selection mechanism, the “I pick, you pick, they pick” selection method for a three-arbitrator panel. In *Forest Oil*, the Texas Supreme Court refused to overturn an arbitral award entered by a three-arbitrator panel.

Although the facts of the proceeding are colorful — including a claim that an oil and gas operator maliciously donated contaminated oilfield equipment for the construction of a holding pen for an endangered rhinoceros — it is not surprising that the Texas Supreme Court upheld a decision of an arbitral panel given this deferential standard of review.

*Forest Oil*, however, does demonstrate why the “I pick, you pick, they pick” selection method for a three-arbitrator panel often heightens rather than minimizes the chances of an arbitral mistake.

## **How the Mechanism Works and Why Parties Choose It**

The “I pick, you pick, they pick” method works by having each party select their own “party-appointed” arbitrator, and those two arbitrators are supposed to work together to select the third arbitrator. The ultimate decision will be rendered by a majority of the panel. In practice, the winner routinely becomes the side with which the “non-party appointed” arbitrator agrees.

Parties agree to such an approach for two principal reasons. First, parties often perceive that a three-arbitrator panel leads to better decision making. That is, having only one arbitrator creates the risk that he or she could go “rogue” and make a plainly wrong decision that cannot be overturned based on the deferential standard set forth above. Second, parties often believe that having the “party appointed” arbitrators choose the third arbitrator minimizes disputes over arbitrator selection.

On this point, the possibility of a stalemate between the parties — or worse, the possibility that one party could perpetually veto the selection of arbitrators to prevent the arbitration from proceeding — is often cited as creating the need for more “neutral” parties to make the arbitrator selection. The facts of Forest Oil, however, rebut the assumption that the “I pick, you pick, they pick” selection method solves these problems.

## **How the Mechanism Often Fails to Deliver Results**

In Forest Oil, each party selected a neutral arbitrator, and the neutrals were supposed to agree on a third arbitrator who was “knowledgeable in the oil and gas industry ... [and] an attorney with at least ten years’ experience in litigation.” According to Forest Oil’s briefing, Forest Oil’s appointed arbitrator suggested several neutrals who met this qualification and were well respected arbitrators within the state, including five former judges.

These arbitrator choices all were rejected by the plaintiff’s appointed arbitrator. According to Forest Oil, he instead proposed neutrals who did not meet the contract’s requirements. The two arbitrators, thus, were at a stalemate, resulting in the parties going to court to select their arbitrator. Again according to Forest Oil, the judge (allegedly fueled by campaign contributions from the plaintiff and his counsel) selected the plaintiff’s preferred candidate to chair the panel.

The result of the arbitration was a 2-1 four page decision in favor of the plaintiff. The panel awarded the plaintiff \$15.5 million in compensatory damages, \$500,000 in exemplary damages and more than \$5 million in attorneys’ fees. The defendant appointed arbitrator provided a 54-page “dissenting” decision.

No doubt, the plaintiff disputes the defendant’s account of the events. But whether the defendant’s view of the events is ultimately 100 percent accurate is beside the point; it was not even addressed by the Texas Supreme Court, likely based on the deferential standard of review.

This fact pattern can easily play itself out any time the “I pick, you pick, they pick” selection method is employed. And, under the deferential standard of review, there may be nothing that a party can do to “stop the train” once it is already running away.

As to the belief that having three neutrals leads to better decision making than one neutral, while this assumption is logical and shared by many practitioners, it should not serve as the basis for employing the “I pick, you pick, they pick” selection mechanism. This is because that method does not result in three neutral arbitrators. In fact, quite the opposite.

As can be seen from the apparent “partisanship” engaged in by the neutrals in the selection process in Forest Oil, when parties choose this kind of selection method, they may not be contracting for three neutral arbitrators, but rather for another high paid advocate to persuade the single “true neutral” of their side’s position. Thus, the parties are back to having effectively one arbitrator and are spending even more money to do so.

As to the second justification for this arbitrator selection method — that it reduces the opportunities for disputes between the parties over arbitrator selection — the flaws in this assumption can best be seen by the facts of Forest Oil. The venue for disputes concerning arbitrator selection was simply shifted from the parties themselves to their party-appointed arbitrators, which appeared to take positions beneficial to their respective appointers.

Put differently, if party-appointed neutrals can (and often do) act as advocates for their party’s cause, then the same disputes that would exist if parties made the selection are likely to play out when their appointed neutrals are given that task.

The worst-case scenario then becomes the arbitral selection is taken out of the parties’ hands and placed into the hands of someone else; in Forest Oil, it was the court who picked the third arbitrator and was accused of being biased and at the very least of selecting an arbitrator that Forest Oil never would have chosen. Such a result undermines confidence in arbitration and heightens the likelihood of a decisional mistake.

### **Alternative Mechanisms For Selecting Arbitral Panels**

If the lesson from Forest Oil is that the parties should critically evaluate employing the “I pick, you pick, they pick” method, the question becomes whether there are replacement selection mechanisms that minimize arbitral mistakes, while also minimizing the potential for disputes between the parties during arbitral selection.

While forums like JAMS or the AAA offer default rules for arbitrator selection that purport to solve these problems, these rules too should be carefully reviewed to ensure that they do not result in undesirable effects.

For instance, the default commercial rules of the AAA for two-party arbitration result in a list of arbitrators being offered by AAA that ostensibly satisfy the criteria of the parties (i.e., former judges, or practitioners with a certain amount of subject matter expertise).

While these forums attempt to match the qualifications contracted for by the parties, parties should be careful that their chosen qualifications are not so onerous that few or no potential arbitrators may exist. If the arbitral forum cannot find enough qualifying arbitrators, the parties

may be in front of a court to determine how the arbitration should proceed.

Assuming that a list can be compiled with qualified arbitrators, the parties must “strike and rank” their arbitrator selections. If there is a match after the striking and ranking, then the highest ranked arbitrator is selected. If there is no match, unless the parties’ agreement provides otherwise, the AAA may unilaterally appoint an arbitrator from its national roster without the submission of additional lists.

Similarly, the AAA’s default rules allow for the AAA unilaterally to select an arbitrator when there is more than one claimant or more than one respondent. In both situations, the ability for an arbitral forum unilaterally to pick the arbitrator may result in an arbitrator that no party finds acceptable. Suffice it to say, having the arbitral forum select an arbitrator that neither party necessarily wanted is not a recipe for creating confidence in arbitration or minimizing arbitral mistakes.

Parties can (and probably should) disable the forum’s ability to unilaterally select arbitrators in the arbitration agreement. Doing so ensures that the arbitrator will at least be minimally acceptable to both parties, but it does not eliminate the possibility of deadlock where one party vetoes most or all arbitrators on the panel.

To account for this possibility, parties should consider requiring a minimum number of arbitrators to be selected on each “strike and rank” round. For instance, the JAMS rules adopt such a mechanism by requiring that parties may only strike a minority of the number of arbitrators offered to the parties.

For a single arbitrator, JAMS provides 5 names, and the parties may only strike 2. For a tripartite arbitration, JAMS provides 10 names, and the parties may only strike 3. In either case, JAMS ensures that there will be at least the minimal number of arbitrators that no party has been able to strike.

JAMS rules still provide that JAMS may select an arbitrator in the event that the process does not succeed (for instance, if the sole remaining arbitrator cannot serve for some reason). Like the AAA’s ability to unilaterally select arbitrators, this power probably should be disabled by the parties, but overall, the JAMS selection method increases the likelihood of a minimally acceptable arbitrator to both sides.

While even careful attention to arbitral selection mechanics does not eliminate the ability for arbitral mistakes, giving the parties rather than the court (in the case of Forest Oil) or the arbitral forum (in the case of AAA and JAMS default rules) the power to choose the arbitrator increases the chances that the parties will have confidence that the arbitration will result in a fair process in which the likelihood of mistakes is minimized.

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