

MICHIGAN COURT OF APPEALS ALLOWS PRE-AWARD SUIT CONCERNING ARBITRATOR SELECTION

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Introduction

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc, ___ Mich App ___ (2014) (Saad and Sawyer [majority]; Jansen [dissent]), reflects the viewpoint that “[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision[.]” Elkouri & Elkouri, *How Arbitration Works* (7th ed), p 4-37, and “[c]hoosing an arbitrator may be the most important step the parties take in the arbitration process.” Abrams, *Inside Arbitration* (2013), p 37.

Background

In *Oakland-Macomb Interceptor Drain Drainage Dist*, the American Arbitration Association (AAA) did not appoint a member of the arbitration panel who had the specialized qualifications required in the agreement to arbitrate. The agreement modified the AAA rules by mandating qualifications for the panel and outlining the manner in which AAA must appoint the panel.

The agreement was specifically drafted to provide for arbitration of issues that might arise during a huge complex construction project. The agreement was entered into after the parties encountered multimillion-dollar disputes against each other which they were not able to resolve. The agreement mandated that, if available, the attorney-member of the three member arbitration panel had to (1) be an attorney with construction litigation experience; (2) have twenty years construction law experience with an emphasis in heavy construction; and (3) be a member of the AAA Large Complex Construction Dispute panel.

When the need for an arbitration panel arose, the parties could not agree on the attorney to be selected as the construction-litigator attorney arbitrator. This left that position to be selected by the AAA in accordance with the selection requirements of the agreement. The AAA selected a construction litigator arbitrator member of the panel who, according to the Court of Appeals majority decision, “unquestionably did not meet the qualification requirements of the” agreement. For example, he was not a Large Complex Construction Dispute panel member with at least twenty years of experience in construction law, and did have at least twenty years of experience in construction law with an emphasis in heavy construction. Plaintiff objected to the AAA’s deviation from the agreement, but the AAA reaffirmed its appointment of the non-construction background attorney.

Circuit Court Decision

Plaintiff brought suit against defendant and AAA to enforce the agreement’s requirements concerning AAA’s selection of the third arbitrator. The Circuit Court ruled in favor of defendant and AAA. The Circuit Court rejected plaintiff’s arguments, and held that the AAA’s arbitrator selection complied with the arbitration agreement.

Court of Appeals Majority Decision

The Court of Appeals reversed the Circuit Court in a two to one decision. According to the Court of Appeals majority, the arbitrator selection provisions confirmed the crucial importance and centrality of the qualifications of the arbitrators to the agreement to arbitrate.

The issue before the Court of Appeals was whether plaintiff could bring a pre-award lawsuit concerning the arbitrator selection process. This was an issue of first impression for a Michigan court’s application of the Federal Arbitration Act (FAA), 9 USC 1, *et seq.* Courts usually will not entertain suits to hear pre-award objections to arbitrator selection. But, according to the Court of Appeals majority, when a suit is brought to enforce essential provisions of the agreement concerning the criteria for choosing arbitrators, courts will enforce such mandates.

According to the majority, the agreement to arbitrate made the specialized qualifications of the panel central to the entire agreement; and, when such a provision to arbitrate is central to the agreement, the FAA provides that it should be enforced by the courts prior to the arbitration hearing. “If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed” 9 USC 5. Furthermore the FAA authorizes “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration” to “petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 USC 4.

In addition, according to the majority, under the FAA, 9 USC 4 and 5, courts have a duty to protect arbitration parties from abuse by the third-party arbitration administrator. The majority cited *Morrison v Circuit City Stores, Inc*, 317 F3d 646, 678 (6th Cir, 2003), which had held that “the proper remedy in such cases is an order, pursuant to 4 of the FAA, requiring that the arbitration proceedings conform to the terms of the arbitration agreement entered into by the parties.”

Furthermore, according to the majority, a party may petition a court before an award has been issued if (1) the arbitration agreement specifies detailed qualifications the arbitrator(s) must possess and (2) the arbitration administrator fails to appoint an arbitrator that meets these qualifications. Also a court may issue an order, pursuant to the FAA, 9 USC 4, requiring that the arbitration proceedings conform to the terms of the arbitration agreement. The majority awarded plaintiff its trial and appellate costs and attorney fees.

Court of Appeals Dissent

Judge Jansen’s dissent indicated that a party cannot obtain judicial review of the qualifications of arbitrators prior to an award. According to the dissent, there was no claim that the selection of the panel member involved fraud or any other fundamental infirmity that would invalidate the arbitration agreement, or any claim that the appointee had an inappropriate relationship with a party. Although the appointee might not have had the requirements for appointment set forth in the agreement, plaintiff was

required to wait until after issuance of the award in order to raise the issue in a proceeding to vacate. 9 USC 10.

In the dissent's viewpoint, the majority decision was inconsistent with *Gulf Guaranty Life Ins Co v Conn Gen Life Ins Co*, 304 F3d 476, 491 (5th Cir, 2002) ("a court may not entertain disputes over the qualifications of an arbitrator to serve merely because a party claims that enforcement of the contract by its terms is at issue, unless such claim raises concerns rising to the level that the very validity of the agreement be at issue."); *Aviall, Inc v Ryder System, Inc*, 110 F3d 892, 895 (2nd Cir 1997) ("a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award."); and *Cox v Piper, Jaffray & Hopwood, Inc*, 848 F2d 842, 843-844 (8th Cir, 1988) ("Appellants cannot obtain judicial review of the arbitrators' decisions about the qualifications of the arbitrators or other matters prior to the making of an award.").

Conclusion

In conclusion, the Court of Appeals majority decision held that Michigan courts will enforce the conditions of an arbitration agreement before the award has been issued, when (1) the subject matter of the arbitration involves complex technical and legal issues; (2) the arbitration agreement requires that the arbitrators possess a highly specialized professional background; and (3) the arbitration agreement specifically outlines a precise method to select the arbitrators.

The majority decision recognized the high deference that the courts have to give an award and it is very difficult to vacate an award. The Court of Appeals majority believed that the delaying of allowing a party to object to the arbitrator selection process until after there is an award "essentially robs the party of any opportunity to receive judicial relief"

It is interesting that the Court of Appeals two judge majority decision awarded plaintiff its attorney fees and costs in a case where a Circuit Judge and the dissenting Court of Appeals judge had ruled in favor of the defendants.

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About the Author

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