OAKLAND-MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT, Plaintiff-Appellant, v RIC-MAN CONSTRUCTION, INC., and AMERICAN ARBITRATION ASSOCIATION, INC., Defendants-Appellees.

No. 314098

COURT OF APPEALS OF MICHIGAN

2014 Mich. App. LEXIS 204

January 30, 2014, Decided

NOTICE:

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

PRIOR HISTORY: [*1]
Oakland Circuit Court. LC No. 2012-129662-CK.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-It was proper to enforce the provisions of an arbitration agreement between a public sector drainage district and a construction company pursuant to *9 U.S.C.S. §§ 4* and *5* of the Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*, after the American Arbitration Association (AAA) repudiated it by failing to appoint a lawyer-member of the arbitral panel that had the specific, specialized qualifications set forth in the agreement because it was clear that the composition and selection of the arbitral panel were key provisions of the agreement.

OUTCOME: Judgment of trial court reversed; matter remanded for issuance of an order to the AAA.

COUNSEL: For OAKLAND-MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT, Plaintiff-Appellant: BARRY JENSEN, DETROIT, MI.

For RIC-MAN CONSTRUCTION INC, Defendant-Appellee: DAVID M ZACK, AUBURN HILLS, MI.

JUDGES: Before: SAAD, P.J., and SAWYER and JANSEN, JJ. JANSEN, J. (dissenting).

OPINION BY: Henry William Saad

OPINION

SAAD, P.J.

Plaintiff Oakland-Macomb Interceptor-Drain Drainage District ("Drainage District") is a public sector drainage district, and seeks to enforce provisions of its agreement to arbitrate with defendant Ric-Man Construction ("Ric Man"). The American Arbitration Association ("AAA") repudiated that agreement by failing to appoint a lawyer-member of the arbitral panel that had specific, specialized qualifications set forth in the parties' agreement.

I. NATURE OF THE CASE

Plaintiff's objection to the AAA's failure to comply with the contractual requirements of a specific, highly specialized arbitral agreement raises an issue of first

impression for a Michigan court's application of the Federal Arbitration Act ("FAA"). That is, will our courts enforce the conditions of an arbitral agreement before the arbitral award has been issued, when: (1) the underlying subject matter [*2] 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 said arbitrators.

Other courts that have looked at this narrow, but important, issue have made the following distinction which informs our analysis: courts will not entertain suits to address pre-award general objections to the impartiality or expertise of an arbitrator. But when suit is brought, as here, to enforce the key provisions of the agreement to arbitrate--i.e., when the criteria and method for choosing arbitrators are at the heart of the arbitration agreement--then courts will enforce these contractual mandates. To rule otherwise would essentially rewrite the parties' contract and rob the objecting party of this key contractual right to have a panel with the specialized qualifications necessary to make an informed arbitral ruling--which goes to the precise purpose and reason to arbitrate such technically and legally complex, major claims.

With this key distinction in mind and after a careful review of the comprehensive arbitration [*3] agreement,[1] we note that this is not the standard, garden-variety, simple arbitration case or arbitration agreement. To the contrary, every provision of this arbitration agreement reveals that this is a complex matter, both technically and legally. Indeed, the agreement was "tailor-made" to arbitrate a complex, large, public-sector sewer construction project, and was entered into only *after* the parties encountered multimillion-dollar disputes against each other, which they could not resolve. And the agreement provides for extensive discovery, contains unusual provisions for waivers, statute of limitations, res judicata and recorded proceedings, and mandates detailed findings by the panel, due to potential claims by and against vendors, consultants and other interested third parties.

1 The agreement is attached as an exhibit.

In addition, the arbitration agreement expressly modifies the already sophisticated complex construction rules of the AAA by mandating very specific qualifications for the three-member arbitral panel and outlining the precise manner in which the AAA must appoint these panel members. Again, the parties spelled out very particularized qualifications that the panel members [*4] must possess. Their specialized experience would make it more likely that the panel would understand the complexity of the technical and legal issues presented, and thus render an informed decision.

Any objective reading of this agreement to arbitrate makes this intention very clear. Neither party, nor the AAA--which agreed to act as the third-party entity to implement this arbitration agreement--could possibly misunderstand or miss the significance of having high-level, quality arbitrators to hear and render an informed arbitral ruling. Therefore, when AAA blatantly and inexplicably ignored these key provisions, plaintiff had only one course of action to ensure an arbitral hearing with the type of panel envisioned: it brought suit to enforce the contract. Notwithstanding the plain language of the agreement, defendant took the position that these provisions did not clearly call for the qualifications claimed by plaintiff. It also claimed that plaintiff's pre-arbitration suit to enforce said provisions was premature and contrary to the Federal Arbitration Act ("FAA") that, it says, disallows pre-arbitration litigation regarding the qualifications of an arbitrator.

We disagree with defendant [*5] on both points and with the trial court that ruled for defendant. Instead, we hold that it is abundantly clear that the agreement to arbitrate made the specialized qualifications of the panel central and key to the entire agreement to arbitrate. We also hold that when, as here, a provision to arbitrate is central to the agreement, the FAA provides that it should be enforced by the courts prior to the arbitral hearing.

The shibboleth that this approach would encourage delays is an artful and convenient dodge. It is quite obvious here that plaintiff strongly desires arbitration and, in fact, insists on an arbitral hearing, but only if it is meaningful, as contemplated by the contract between the parties. We also regard defendant's contention that the AAA followed the agreement as, at best, disingenuous.

For the reasons set forth in this opinion, we reject defendant's arguments, reverse the trial court's findings, and remand to the trial court to issue an order to the AAA consistent with this opinion.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a special-purpose public corporation established under the Drain Code, *MCL 280.1, et seq*. It owns the Oakland-Macomb Interceptor ("OMI"), which [*6] is part of an extensive sanitary-sewer system that delivers waste water from suburban areas to the Detroit Water and Sewerage Department for treatment. Defendant Ric-Man Construction, Inc. ("Ric-Man") is a construction company which entered into two contracts with plaintiff to build infrastructure needed to perform repairs on the OMI. These construction contracts include a brief dispute-resolution clause, which allowed each party the option to "agree with the other party to submit the Claim to another dispute resolution process." Because plaintiff and defendant asserted serious multi-million dollar claims against each other during the construction project, they implemented their contract right to amend their initial contract with a much more detailed arbitration agreement. The new arbitration agreement submitted the dispute to binding arbitration, to be administered by the AAA, and specified in § 1.3 that the arbitration panel needed to consist of two construction-industry professionals and one attorney with a "*background in construction litigation*" (emphasis added). The agreement also outlined a detailed set of requirements for the AAA to follow in an event that it, and not the parties, [*7] selected an arbitrator. In the relevant sections, the agreement states:

> § 1.3.4 Any selected arbitrator will be a member of the AAA Construction Panel. The arbitration panel shall include one construction lawyer and two construction professionals agreed upon by the parties or selected in accordance with the criteria set out below. If any arbitrators are selected by AAA, selection criteria shall be applied in the following order with the next level of criteria applied *only if no candidates are available who meet the preceding criteria* [emphasis added]:
>
> § 1.3.4.1 Construction Lawyer (1 member and 1 alternate)
>
> > A member of the Large Complex Construction Dispute ("LCCD") panel and at least *20 years of experience in construction law* with an emphasis in heavy construction. [Emphasis added.]
> >
> > At least 20 years of experience in construction law with an emphasis in heavy construction.
> >
> > A member of the LCCD panel and at least 10 years of experience with an emphasis in heavy construction.
> >
> > At least 10 years of experience with an emphasis in heavy construction.
> >
> > A member of the LCCD panel and at least 20 years of experience in construction law with some experience in heavy construction.
> >
> > At least 20 years of [*8] experience in construction law with some experience in heavy construction,
> >
> > A member of the LCCD panel and at least 10 years of experience with some experience in heavy construction.
> >
> > At least 10 years of experience with some experience in heavy construction.

Accordingly, the key provisions--and those provisions directly pertinent to this appeal--concern the composition and selection of the arbitral panel. If the parties could not agree on two construction professionals and one construction lawyer, then the AAA would choose

a panel member that met the parties' stipulated qualifications. And, in order to ensure that the most qualified available lawyer was chosen, the arbitration agreement specifies the declining, but minimal order of qualifications in the event a lawyer with all the desired qualifications is unavailable. Taken together,[2] these provisions obviously attest to the importance and centrality of the qualifications of the arbitrators to the parties' agreement to arbitrate. The central point of these provisions is that the parties agreed that, if available, the lawyer-member of the three-member arbitral panel must: (1) be an attorney with experience in construction litigation; (2) [*9] possess twenty years experience in construction law with an emphasis in heavy construction; and (3) be a member of the Large Complex Construction Dispute panel.

> 2 "We read contracts as a whole, giving harmonious effect, if possible, to each word and phrase." *Wilkie v Auto-Owners Ins Co, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003)*.

These portions of the arbitration agreement were triggered in January 2012, when the Drainage District filed its demand with the AAA for arbitration against Ric-Man. Both parties selected the two construction-industry-professional arbitrators from a list supplied by the AAA. But they could not agree on the construction-litigator arbitrator, thus leaving that position to be filled by the AAA in accordance with the procedures, methodology, and selection criteria specified in the arbitration agreement.

In August 2012, the AAA notified the Drainage District and Ric-Man that it had chosen Michael Hayslip as the construction litigator arbitrator member of the panel. Hayslip unquestionably did not meet the qualification requirements of the contract. Though Hayslip was admitted to the Ohio bar in 1994, and worked in the construction industry throughout his career,[3] he [*10] had no background in construction litigation--much less twenty years of experience with an emphasis in heavy construction, which is a key qualification required by the arbitration agreement--nor was he a member of the AAA's LCCD panel. The Drainage District immediately objected to the AAA's flagrant disregard of the arbitration agreement, but the AAA nonetheless reaffirmed its appointment of Hayslip.

> 3 After plaintiff brought suit, the AAA also chose Thomas Weiers as an alternate attorney arbitrator. At the time of his appointment, Weiers had 25 years' experience as a construction-industry attorney, with knowledge of both heavy construction and construction litigation, and was a member of the AAA's LCCD panel.

Plaintiff subsequently filed suit against Ric-Man and the AAA in October 2012 to enforce its contract right to have an attorney member of the panel with the aforementioned qualifications. Plaintiff sought: (1) a declaration that the AAA was required to appoint a lawyer with a background in construction litigation in compliance with the arbitrator-selection procedures specified in the arbitration agreement; (2) an injunction ordering the AAA to do the same; and (3) a judgment for summary [*11] disposition under *MCR 2.116(C)(10)*, stating that Hayslip lacked the necessary experience required by the agreement, and that any award issued by the current arbitration panel was void.

Plaintiff also alleged that the AAA failed to follow the arbitrator-selection process outlined in the agreement, pointing to Hayslip's relative lack of experience when compared to the alternate attorney-arbitrator, Weiers. Of course, as noted, in addition to his lack of experience in construction litigation, Hayslip's professional background did not meet the first two criteria the AAA was supposed to take into account when choosing arbitrators: (1) he was not a Large Complex Construction Dispute panel member with at least twenty years of experience in construction law; and (2) nor did he possess at least twenty years of experience in construction law with an emphasis in heavy construction. Whereas Hayslip did not satisfy either qualification, Weiers possessed both.

In response, Ric-Man says that a court cannot second-guess an arbitration decision, and that the AAA had followed the specified arbitrator-selection process. It contended that the arbitration agreement did not actually require the attorney-arbitrator [*12] to have construction-litigation experience, and that plaintiff sued simply because it was unhappy with the selected group of arbitrators.

The trial court rejected plaintiff's arguments, and held, erroneously, that the AAA's selection of Hayslip complied with the plain language of the arbitration agreement. In so doing, it ruled that there was no language in the arbitration agreement requiring the AAA to appoint a construction lawyer with ten to twenty years

of construction-litigation experience. The trial court denied plaintiff's motion for summary disposition and dismissed the case.

Plaintiff filed an appeal in January 2013, and claims that the trial court erred when it denied the motion for summary disposition and dismissed the complaint. Specifically, plaintiff requests that our Court order the AAA to comply with the arbitration agreement.

III. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm, 298 Mich App 311, 315; 826 NW2d 753 (2012)*. "In reviewing a motion under *MCR 2.116(C)(10)*, this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light [*13] most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor, 263 Mich App 618, 621; 689 NW2d 506 (2004)*. "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co, 480 Mich 105, 111; 746 NW2d 868 (2008)*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp, 469 Mich. 177, 183; 665 N.W.2d 468 (2003)*.

The interpretation of a contract presents a question of law that is reviewed de novo. *Kloian v Domino's Pizza, LLC, 273 Mich App 449, 452; 733 NW2d 766 (2006)*. "Arbitration agreements are generally interpreted in the same manner as ordinary contracts. They must be enforced according to their terms to effectuate the intentions of the parties." *Bayati v Bayati, 264 Mich App 595, 599; 691 NW2d 812 (2004)*, lv den *475 Mich. 884, 715 N.W.2d 865 (2006)* (citations omitted). See also *EEOC v Frank's Nursery & Crafts, Inc, 177 F3d 448, 460 (CA 6, 1999)* ("[b]ecause courts [*14] are to treat agreements to arbitrate as all other contracts, they must apply general principles of contract interpretation to the interpretation of an agreement covered by the [Federal Arbitration Act (FAA), *9 USC § 1, et seq*]").

IV. ANALYSIS

Because both the Drainage District and Ric-Man agree that this case involves materials shipped through interstate commerce and is thus is governed by the FAA,[4] *9 USC § 1, et seq*, we begin our analysis with the plain language of the applicable statute. *Section 5 of the FAA*, which governs the appointment of arbitrators, states: "*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* (emphasis added). Significantly, to implement the mandate of *§ 5*, the use of the term "shall" indicates that compliance with the methods specified in the agreement is mandatory.[5] Further, to give life to *§ 5*'s mandate, *§ 4 of the FAA* permits "[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 [*15] proceed in the manner provided for in such agreement." *9 USC § 4*.

> 4 See *Burns v Olde Discount Corp, 212 Mich App 576, 580; 538 NW2d 686 (1995)* ("[t]he [FAA] governs actions in both federal and state courts arising out of contracts involving interstate commerce"). "State courts are bound under the *Supremacy Clause, U.S. Const, art VI, § 2*, to enforce the substantive provisions of the federal act." *Id*.
>
> 5 "The word 'shall' is generally used to designate a mandatory provision . . ." *Old Kent Bank v Kal Kustom, Enterprises, 255 Mich App 524, 532; 660 NW2d 384 (2003)* (citations omitted).

Therefore, under *§§ 4* and *5* of the FAA, courts have a statutory obligation to protect arbitral parties from abuse by the third-party agency conducting the arbitration. See *Morrison v Circuit City Stores, Inc, 317 F3d 646, 678 (CA 6, 2003)*. If courts refuse pre-arbitration relief, arbitration agencies could ignore with impunity the specific terms of the arbitration agreement, thus effectively modifying the agreed-upon terms without each party's consent. See *Id. at 678-680*; *Farrell v Subway Int'l, BV, 2011 U.S. Dist. LEXIS 29833, 2011 WL 1085017, at *4 (SDNY Mar 23, 2011)* ("federal law directs that the Court enforce the selection of the arbitrator [*16] in accordance with the terms of the [parties'] Agreement") (citing *9 USC § 5*); and *Jefferson-Pilot Life Ins Co v LeafRe Reinsurance Co, 2000 U.S. Dist. LEXIS 22645, 2000 WL 1724661, at *2 (ND Ill Nov 20, 2000)* ("[t]he [FAA] clearly states that contractual provisions for the appointment of an

arbitrator 'shall be followed'") (quoting *9 USC § 5*). To prevent such a material alteration of the contract, in cases where the "parties have agreed to arbitrate, but disagree as to the operation or implementation of that agreement," a court can remove an arbitrator before an award has been granted. *B/E Aerospace, Inc v Jet Aviation St Louis, Inc, 2011 U.S. Dist. LEXIS 73621, 2011 WL 2852857, at *1 (SDNY July 1, 2011)* (citations omitted).

Accordingly, a party may petition a court for relief before an arbitral award has been made if: (1) the arbitration agreement explicitly specifies detailed qualifications the arbitrator(s) must possess; and (2) the third-party arbitration administrator fails to appoint an arbitrator that meets these specified qualifications. Therefore, a court may issue 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." *Morrison, 317 F3d at 678*.

To [*17] hold otherwise under these facts would negate the purpose of arbitration: parties make arbitration agreements with the expectation that the third-party arbitral agency will honor important provisions of the agreements. If that agency disregards the explicit terms of the arbitration agreement--terms that were central to the initial contract between the parties--the disadvantaged party must have some access to judicial relief, and relief can be effective only before the arbitral hearing.

In such cases--as here, and contrary to defendant's argument and the trial court's ruling--it is not premature to give the disadvantaged party access to judicial relief before an arbitral award has been made.[6] Essentially, this is the only opportunity the objecting party has to demand an arbitration panel that conforms to the arbitration agreement. If the objecting party waits until the award has been made, it is very improbable that a court will offer relief. See *Bell v Seabury, 243 Mich App 413, 421-422; 622 NW2d 347 (2000)* ("arbitral awards are given great deference and courts have stated unequivocally that they should not be lightly set aside"); and *Dawahare v Spencer, 210 F3d 666, 669 (CA 6, 2000)* ("[a]n [*18] arbitration decision must fly in the face of established legal precedent for [a court] to find manifest disregard of the law") (citations and internal quotation marks omitted). Thus, to prevent the party from receiving such relief would undermine the very purpose of an arbitration agreement, which is to ensure swift, extra-judicial resolution of a dispute under bargained-for terms. See *City of Bridgeport v The Kasper Group, Inc, 278 Conn. 466; 899 A2d 523, 535 (Conn 2006)* ("the primary goal of arbitration . . . is to provide the efficient, economical and expeditious resolution of private disputes") (internal quotation marks omitted). And, here, contrary to the trial court's ruling, the agreement to arbitrate made it very clear that the lawyer member of the panel must have specific and substantial experience in construction litigation--and yet the AAA chose a lawyer with no such experience.

6 Our ruling conflicts with *Gulf Guaranty*, a Fifth Circuit decision which holds that parties generally may not challenge the appointment of an arbitrator before an arbitral award is issued. *Gulf Guaranty Life Ins Co v Conn Gen Life Ins Co, 304 F3d 476, 489-490 (CA 5, 2002)* ("the FAA does not expressly provide for [*19] court authority to *remove* an arbitrator prior to the issuance of an arbitral award. . . . [T]he FAA does not expressly endorse court inquiry into the capacity of any arbitrator to serve prior to issuance of an arbitral award") (emphasis original). As the Fifth Circuit explained, this narrow interpretation of a court's authority in the pre-award stages of an FAA dispute prevents "endless applications [to the courts] and infinite delay," and also stops overly litigious parties from bringing lawsuit after lawsuit to delay arbitration. *Id. at 492* (citations omitted).

As noted, we do not find this analysis applicable to or persuasive under the specific circumstances of our case. See *Truel v City of Dearborn, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010)* ("[d]ecisions from lower federal courts are not binding but may be considered persuasive"). As noted, requiring an objecting party to wait until an arbitral award has been issued before bringing a claim related to the composition of the arbitral panel, when said expertise is critical to a fully informed arbitral hearing, essentially robs the party of any opportunity to receive judicial relief. *Guaranty* also evinces an unwarranted lack of [*20] faith in the competence of our judiciary to distinguish between real and serious objections, as here, and frivolous developing tactics. We trust that in most cases, as here, the distinction is clear and obvious, and that courts should provide relief under the

FAA.

Accordingly, the AAA obviously ignored the arbitration agreement when it made Hayslip the attorney arbitrator. The AAA could have easily corrected its failure to comply with the arbitration agreement when the Drainage District protested Hayslip's selection, but it did not. Evidently, there were attorneys available to serve as arbitrators who met all the conditions of plaintiff and defendant's contract, as demonstrated by the AAA's decision to make Weiers--a lawyer with a "background in construction litigation"--the alternate attorney-arbitrator.[7] The AAA's refusal to comply with the arbitration agreement's stated terms robbed the Drainage District of its bargained-for terms, and AAA's repudiation of its obligation cannot be sanctioned by this Court.

7 As noted, Weiers was appointed as an alternate attorney-arbitrator *after* this litigation began. Our analysis might be different if, on appointing Hayslip, the AAA had told plaintiff [*21] and defendant Ric-Man that it was unable to find any arbitrators that satisfied the contract terms. The AAA did not do so, however, and Ric-Man does not make this allegation on appeal--in fact, Ric-Man continues to maintain that Hayslip was qualified to serve as an arbitrator under the terms of the arbitration agreement, which he clearly is not.

V. CONCLUSION

Pursuant to *FAA §§ 4* and *5*, plaintiff may enforce the precise language of the arbitration contract relating to the qualifications of the arbitrators and the method of choosing the arbitrators. Accordingly, we reverse, and remand to the trial court to issue an order to the AAA requiring it to appoint an arbitral panel member who meets the criteria called for in the arbitration agreement, so that any subsequent arbitration will "proceed in the manner provided for in such agreement." *9 USC § 4*; *Morrison, 317 F3d at 678*. We also award plaintiff its costs and attorney fees to be assessed by the trial court upon remand, which shall include the costs and attorney fees at both the trial and appellate level.

Reversed and remanded. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

DISSENT BY: Kathleen Jansen

DISSENT

JANSEN, J. (*dissenting*).

Because [*22] I conclude that the circuit court reached the correct result in this case, albeit for the wrong reason, I must respectfully dissent.

The circuit court dismissed plaintiff's complaint for declaratory and injunctive relief, concluding that defendant American Arbitration Association (AAA) had fully complied with the plain language of the arbitration agreement when it selected Michael Hayslip as the lawyer-member of the arbitral panel. The circuit court ruled that plaintiff was "reading into the arbitration [agreement] a requirement that does not exist."

The circuit court reached the correct result by dismissing plaintiff's complaint, even though it did so for the wrong reason. For purposes of this appeal, it actually makes no difference whether the arbitration agreement required AAA to appoint a lawyer-member with a particular number of years of construction litigation experience. Irrespective of the exact requirements set forth in the arbitration agreement at issue in this case, it is well settled that "[a]ppellants cannot obtain judicial review of . . . decisions about the qualifications of the arbitrators . . . prior to the making of an award." *Cox v Piper, Jaffray & Hopwood, Inc, 848 F2d 842, 844 (CA 8, 1988)*. [*23] The Federal Arbitration Act (FAA), *9 USC 1 et seq.*, "does not provide for pre-award removal of an arbitrator."[1] *Aviall, Inc v Ryder System, Inc, 110 F3d 892, 895 (CA 2, 1997)*. Indeed, "'it is well established that a . . . court cannot entertain an attack upon the qualifications . . . of arbitrators until after the conclusion of the arbitration and the rendition of an award.'" *Id.*, quoting *Michaels v Mariforum Shipping, SA, 624 F2d 411, 414 n 4 (CA 2, 1980)*. "The [FAA] does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service." *Florasynth, Inc v Pickholz, 750 F2d 171, 174 (CA 2, 1984)*; see also *Gulf Guaranty Life Ins Co v Connecticut Gen Life Ins Co, 304 F3d 476, 490-491 (CA 5, 2002)*.

1 It is undisputed that the FAA applies in this

case.

Of course, a court would have the authority to remove a particular arbitrator prior to issuance of the arbitral award if the dispute concerning the arbitrator's qualifications implicated "grounds . . . at law or in equity for the revocation of [the] contract." *9 USC 2*; see also *Aviall, 110 F3d at 895*. [*24] However, it is appropriate for the court to make such a pre-award removal "only when there is a claim, for example, that there was 'fraud in the inducement' or some other 'infirmity in the contracting process' regarding the parties' establishing arbitral qualifications, which ground would invalidate the agreement to arbitrate." *Gulf Guaranty, 304 F3d at 491*, quoting *Aviall, 110 F3d at 896*. Similarly, pre-award removal may be permissible under *§ 2 of the FAA* when "the arbitrator's relationship to one party was undisclosed, or unanticipated and unintended, thereby invalidating the contract." *Id*.

In the present case, there is no claim that AAA's selection of Hayslip as the lawyer-member of the arbitral panel involved fraud or any other fundamental infirmity in the contracting process that would completely invalidate of the arbitration agreement. See *9 USC 2*; see also *Gulf Guaranty, 304 F3d at 491*. Nor is there any claim that Hayslip had an inappropriate relationship with either party. See *Aviall, 110 F3d at 896*. It may well be that Hayslip did not meet the specific requirements for appointment set forth in the arbitration agreement. But plaintiff was required to wait until after issuance [*25] of the arbitral award and raise this matter in a proceeding to vacate. See *9 USC 10*; see also *Gulf Guaranty, 304 F3d at 490-491*; *Florasynth, 750 F2d at 174*.

Because the dispute over Hayslip's qualifications to serve as the lawyer-member did not constitute a sufficient ground to warrant the entire revocation of the arbitration agreement, the circuit court was without authority to reach the issue at this stage of the proceedings. See *9 USC 2*; see also *Gulf Guaranty, 304 F3d at 491* (noting that "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"). The dispute regarding Hayslip's qualifications to serve, although framed by plaintiff as a request to enforce the arbitration agreement according to its terms, "is not the type of challenge that the [circuit] court was authorized to adjudicate pursuant to the FAA prior to issuance of an arbitral award." *Id. at 492*.[2]

2 As the majority opinion correctly observes, "[d]ecisions from lower federal courts are not binding but [*26] may be considered persuasive." *Truel v Dearborn, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010)*. At the same time, however, the *Supremacy Clause* precludes this Court from applying any state law or policy that is inconsistent with the FAA. See *Abela v Gen Motors Corp, 257 Mich. App. 513, 524-525; 669 N.W.2d 271 (2003)*, aff'd *469 Mich 603; 677 N.W.2d 325 (2004)*. Both our Supreme Court and this Court have looked to the decisions of lower federal courts when interpreting and applying the FAA. See, e.g., *Abela v Gen Motors Corp, 469 Mich. 603, 607; 677 N.W.2d 325 (2004)*; *Scanlon v P&J Enterprises, Inc, 182 Mich App 347, 351; 451 NW2d 616 (1990)*.

In my opinion, the circuit court reached the correct result, albeit for the wrong reason, when it dismissed plaintiff's complaint. "It is well settled that we will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason." *Hare v Starr Commonwealth Corp, 291 Mich App 206, 225; 813 NW2d 752 (2011)*. I would affirm the circuit court's dismissal of plaintiff's complaint.

/s/ Kathleen Jansen