

The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.¹

Texas Vacatur for “Exceeded Powers”

D.R. Horton–Texas, LTD. v. Bernhard,
423 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)

The Texas Supreme Court recently denied a petition to review the Fourteenth Court of Appeals holding that an arbitrator did not exceed his authority by awarding attorney’s fees to a prevailing party on a Residential Construction Liability Act (“RCLA”) claim.² Applying the Texas Arbitration Act (“TAA”), the Court of Appeals held that despite the arbitration agreement’s language stating “each party shall bear the fees and expenses of its counsel,” the arbitrator had authority to award the prevailing party attorney’s fees since such relief is authorized by RCLA.³ Additionally, the Court of Appeals reemphasized that the “exceeded powers” vacatur ground⁴ is a high threshold, not applicable even where an arbitrator may have misinterpreted the arbitration agreement or misapplied the law.⁵

The sales contract between the Bernhards and D.R. Horton–Texas, LTD. (“D.R. Horton”) for a home the Bernhards purchased from D.R. Horton also contained an arbitration clause. After discovering a construction defect in the home, the Bernhards sued D.R. Horton under RCLA. The trial court referred the case to arbitration where the arbitrator eventually entered an award for the Bernhards in the amount of \$144,477.45 in damages.⁶ The damages included \$31,027.93 in attorney’s fees as RCLA “economic damages.”⁷

¹ Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader’s independent legal counsel. My thanks to Nicole Muñoz, third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

² *D.R. Horton–Texas, Ltd. v. Bernhard*, 423 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

³ *Id.* at 535-36 (citing TEX. CIV. PRAC. & REM. CODE § 171.048(c)).

⁴ See TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A).

⁵ *D.R. Horton*, 423 S.W.3d at 534.

⁶ *Id.* at 533.

⁷ *Id.*; see TEX. PROP. CODE ANN. § 27.004(g)(6) (allowing a claimant to recover reasonable and necessary attorney’s fees as economic damages).

D.R. Horton moved to vacate the arbitrator's award of attorney's fees since the arbitration agreement expressly provided: "Each party shall bear the fees and expenses or [sic] counsel, witnesses and employees of such party, and any other costs and expenses incurred for the benefit of such party."⁸ The trial court denied D.R. Horton's motion to vacate and confirmed the award; however, the trial court further awarded appellate attorney's fees to the Bernhards, not provided for in the parties' arbitration clause.⁹ In its appeal, D.R. Horton asserted the trial court erred on two issues: (1) confirming the attorney's fees portion of damages in the arbitration award; and (2) awarding additional attorney's fees for appealing the arbitration award.¹⁰

On the first issue, D.R. Horton asserted that "the trial court erred by enforcing the arbitrator's award of attorney's fees because the arbitrator exceeded his power under the Texas Arbitration Act (TAA)."¹¹ "Exceeded powers" vacatur ground occurs under the TAA when "an arbitrator... disregards the contract and dispenses his own idea of justice."¹² The proper inquiry for this vacatur ground is "not whether the arbitrator decided an issue *correctly*, but instead whether she had the authority to decide the issue *at all*."¹³ An arbitrator does not exceed his or her powers "by committing a mistake of law, but instead by deciding a matter not properly before her."¹⁴

Concluding that the arbitrator had not exceeded his authority, the Court explained that the issue of attorney's fees was in Bernhards' original petition—never timely objected to by D.R. Horton—and was clearly submitted to the arbitrator, causing the arbitrator to consult both the parties' arbitration agreement and RCLA statute concerning attorney's fees to reach his decision.¹⁵ The Court further held that the arbitrator did not exceed his authority since the TAA explicitly authorizes an arbitrator to award attorney's fees "if the fees are provided for: (1) in the agreement to arbitrate; or (2) by law for recovery in a civil action in the district court on a cause of action on which any part of the award is based."¹⁶ Since RCLA authorizes an award of attorney's fees to the prevailing party,¹⁷ and the Bernhards were the prevailing party, the arbitrator had the power to include these fees as RCLA "economic damages" in his final award. In addition, the Court found that the arbitrator's decision was not "merely dispensing his own idea of justice," since he reasonably relied on the language in the parties' contractual agreement stating that it was "subject to" RCLA.¹⁸

⁸ *D.R. Horton*, 423 S.W.3d at 533.

⁹ *Id.*

¹⁰ *Id.* at 534.

¹¹ *Id.*; Just as in the Federal Arbitration Act, the TAA specifies that a court shall vacate an award if the arbitrator exceeded his or her powers. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(A), with 9 U.S.C. §10(a)(4).

¹² *D.R. Horton*, 423 S.W.3d at 534.

¹³ *Id.* (quoting *LeFoumba v. Legend Classic Homes, Ltd.*, No. 14-08-00243-CV, 2009 Tex. App. LEXIS 773 at *3 (Tex. App.—Houston [14th Dist.] Sept. 17, 2009, no pet.).

¹⁴ *Id.* (citing *LeFoumba*, 2009 Tex. App. LEXIS 773 at *3).

¹⁵ *Id.* at 535.

¹⁶ *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 171.048(c).

¹⁷ TEX. PROP. CODE ANN. § 27.004(g)(6); see *D.R. Horton*, 423 S.W.3d at 535.

¹⁸ *D.R. Horton*, 423 S.W.3d at 535; see *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.).

The Court of Appeals reversed the trial court's grant of appellate attorney's fees, agreeing with *D.R. Horton*.¹⁹ The Court explained that "when an arbitrator decides the issue of attorney's fees, a trial court ordinarily may not modify the award to include additional appellate attorney's fees."²⁰ Relying on numerous cases, the Court held that unless an arbitration agreement provides otherwise, "the award of additional attorney fees for enforcing or appealing the confirmation of the award" is not permitted.²¹ There was no TAA authority for the trial court's grant of appellate attorney's fees.²²

OBSERVATIONS

1. If a contract containing an arbitration agreement indicates that the contract is subject to a specific statute, drafters of the arbitration agreement should examine the types of relief available under that statute.
2. *D.R. Horton* does not answer the question of: can parties limit by agreement attorney's fees authorized by statute? *Gilmore v. Interstate/Johnson Lane Corporation* makes it clear that for employment discrimination claims, arbitration agreements cannot limit statutory relief.²³
3. The "exceeded powers" vacatur ground is a high threshold to meet and will not be established simply by showing an arbitrator made an error of law or fact.²⁴
4. Since the TAA authorizes arbitrators to award attorney's fees if either of two conditions is met, drafters of arbitration agreements must carefully consider what arbitration law—TAA or FAA—is to govern the arbitration.
5. If parties intend to include appellate attorney's fees in the relief a party may recover for appeals of arbitration awards, it must be explicitly stated in the arbitration agreement.

¹⁹ *D.R. Horton*, 423 S.W.3d at 536.

²⁰ *Id.* (citing *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 532. But in the employment context, the arbitration agreement drafter must not limit federal statutory remedies available to employees. See *Gilmore v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991).

²⁴ *D.R. Horton*, 423 S.W.3d at 534; see also *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 830 (Tex. App.—Dallas 2009, no pet.) ("Thus, improvident, even silly interpretations by arbitrators usually survive judicial challenges.").