Opinion issued March 22, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00800-CV

TAYLOR MORRISON OF TEXAS, INC. AND TAYLOR WOODROW COMMUNITIES-LEAGUE CITY. LTD., Appellants

V.

GARY S. CABALLERO, JR. AND KELLEY G. CABALLERO, Appellees

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 20-CV-0790

MEMORANDUM OPINION

Related to the construction of their new home, Gary and Kelley Caballero signed a contract containing an arbitration agreement. Among the arbitration agreement's terms was a provision delegating to the arbitrator the authority to determine gateway issues of arbitrability, including enforceability of the arbitration

agreement. The Caballeros sued homebuilders Taylor Morrison of Texas, Inc. and Taylor Woodrow Communities-League City, Ltd. alleging defective construction of their home. Pursuant to the Federal Arbitration Act (FAA) and the arbitration agreement's delegation provision, Taylor Morrison and Taylor Woodrow filed a motion to compel arbitration, seeking to arbitrate gateway questions of arbitrability.

The Caballeros responded by asserting that certain provisions in the arbitration agreement were unconscionable, including the delegation provision, thus rendering the arbitration agreement unenforceable. The trial court signed an order severing and modifying the language of the delegation provision, giving the trial court, rather than the arbitrator, the right to determine questions of arbitrability, including enforceability. Concomitantly, the trial court severed other provisions in the arbitration agreement based on the Caballeros' arguments that the provisions were unenforceable—a question that had been reserved for the arbitrator in the language severed from the delegation provision. One of the severed provisions required arbitration with the American Arbitration Association (AAA). Rather than with the AAA, the trial court ordered the parties to arbitrate with an arbitrator selected by the court.

Given its function when viewed in the context of the record, the trial court's order effectively denied Taylor Morrison's and Taylor Woodrow's motion to compel arbitration of gateway issues of arbitrability. In one issue, Taylor Morrison and

Taylor Woodrow (referred to jointly hereafter as Appellants) appeal the order. Because, as discussed below, the trial court abused its discretion in denying Appellants' motion to compel arbitration, we reverse the order and remand to the trial court.

Background

In February 2015, the Caballeros signed a purchase agreement for the purchase of a new home to be constructed by Taylor Woodrow in the Mar Bella subdivision. After moving in, the Caballeros discovered that their new home had mold issues. They sued Taylor Woodrow and Taylor Morrison, which the record reflects had an ownership interest in Taylor Woodrow. The Caballeros alleged that testing revealed elevated levels of mold and mold-related toxins in their home. They claimed that their home was defectively constructed, causing moisture problems, which led to mold growth. The Caballeros also alleged that Appellants had been aware of mold issues in other Mar Bella homes constructed by Taylor Woodrow before they purchased their home, but Appellants had failed to disclose the issues to them. The Caballeros' causes of action included negligent construction, breach of implied warranty, fraud in a real estate transaction, violation of the Deceptive Trade Practices Act, and breach of contract. They sought to recover actual damages and their attorney's fees.

In their petition, the Caballeros recognized that the purchase agreement contained an arbitration agreement. But they claimed that, "because of the fraud in the inducement of a real estate transaction, and other alleged prior knowledge, fraudulent activity and misrepresentations, the arbitration provision is void, voidable and/or unenforceable."

Appellants answered the suit, generally denying all the Caballeros' allegations. Based on the parties' arbitration agreement, Appellants also filed a motion to compel arbitration and abate the trial court's proceedings. The arbitration agreement, found in paragraph 11 of the purchase agreement, provides in relevant part as follows:

> 11) Dispute Resolution—Arbitration:
>
> Any and all claims, controversies, breaches or disputes by or between the parties hereto, arising out of or related to this Purchase Agreement, the property, the subdivision or community of which the property is a part . . . whether such dispute is based on contract, tort, statute, or equity, including without limitation, any dispute over [an (a)–(h) list of specific causes of action] or (i) any other matter arising out of or related to the interpretation of any term or provision of this Purchase Agreement, or any defense going to the formation or validity of the agreement, or any provision of this Purchase Agreement, including earnest money disputes, this arbitration agreement, allegations of unconscionability, fraud in the inducement, or fraud in the execution, whether such dispute arises before or after closing (each a "Dispute"), shall be arbitrated pursuant to the Federal Arbitration Act and subject to the procedures set forth as follows:
>
> a. This arbitration agreement shall be deemed to be a self-executing arbitration agreement. Any Dispute concerning the interpretation or the enforceability of this arbitration agreement, including

without limitation, its revocability or voidability for any cause, any challenges to the enforcement or the validity of the agreement, or this arbitration agreement, or the scope of arbitrable issues under this arbitration agreement, and any defense relating to the enforcement of this arbitration agreement, including without limitation, waiver, estoppel, or laches, shall be decided by an arbitrator in accordance with this arbitration agreement and not a court of law.

b. In the event that a Dispute arises between the parties, such Dispute shall be resolved by and pursuant to the arbitration rules and procedures of [the] American Arbitration Association in effect at the time the request for arbitration is submitted. In the event the American Arbitration Association is for any reason unwilling or unable to serve as the arbitration service, then the parties shall select another reputable arbitration service. If the parties are unable to agree on an alternative service, then either party may petition any court of competent jurisdiction in the county in which the property is located to appoint such an alternative service, which shall be binding on the parties. The rules and procedures of such alternative service in effect at the time the request for arbitration is submitted shall be followed.

c. The Buyer and Seller expressly agree and acknowledge that this Purchase Agreement involves and concerns interstate commerce and is governed by the provisions of the Federal Arbitration Act (9 U.S.C. §1 et seq.) now in effect and as the same may from time to time be amended, to the exclusion of any different or inconsistent state or local law, ordinance, regulation, or judicial rule. Accordingly, any and all Disputes shall be arbitrated—which arbitration shall be mandatory and binding—pursuant to the Federal Arbitration Act.

. . . .

e. In the event any Dispute arises under the terms of the Purchase Agreement or in the event of the bringing of any arbitration action by a party hereto against another party hereunder by reason of any breach of any of the covenants, agreements or provisions on the part of the other party arising out of this

Purchase Agreement, then all fees and costs shall be borne separately between the parties, including but not limited to all attorneys' fees and expert witness costs resulting from the Dispute. The foregoing provision does not modify any provision of any contract between Seller and any third-party requiring indemnification or establishing a different allocation of fees and costs between Seller and such third party. In the event Buyer is an entity and not a natural person and Seller is the prevailing party the individual signing this Purchase Agreement on behalf of such entity shall also be personally liable for Seller's fees and costs as aforesaid notwithstanding any indication that such individual is signing in a corporate capacity. The provisions of this paragraph shall survive closing or termination of this Purchase Agreement.

f. The Arbitrator shall be authorized to provide all recognized remedies in law or in equity for any cause of action that is the basis of the arbitration.

. . . .

h. To the extent that any state or local law, ordinance, regulation, or judicial rule is inconsistent with any provision of the rules of the arbitration service under which the arbitration proceeding shall be conducted, the latter rules shall govern the conduct of the proceeding.

. . . .

l. If any provision of this arbitration agreement shall be determined to be unenforceable or to have been waived, the remaining provisions shall be deemed severable therefrom and enforceable according to their terms.[1]

[1] In the purchase agreement, portions of the arbitration agreement contained in paragraph 11 appeared in all capital letters and boldface, but we have normalized the capitalization and omitted the boldface for readability.

In their motion to compel, Appellants asserted that they had "an enforceable arbitration agreement" with the Caballeros "subject to the Federal Arbitration Act." Appellants sought "to compel [the Caballeros] to initiate arbitration to resolve their claims and, specifically, to submit the determination of the arbitrability of their claims to an arbitrator." Appellants relied on subparagraph (a) of the arbitration agreement, which contained a delegation provision, delegating to the arbitrator, among other things, the authority to determine threshold issues of arbitrability, including enforceability of the agreement and defenses to enforcement. Appellants also asserted that the Caballeros' claim that the arbitration agreement was unenforceable based on fraudulent inducement was "a classic contract defense," which must be decided by the arbitrator.

The Caballeros responded to the motion to compel, opposing it. They contended that certain provisions of the arbitration agreement were substantively unconscionable for three reasons. First, they contended that the delegation provision was unconscionable because it "contract[ed] away the authority" of the trial court "to decide gateway issues."

Second, the Caballeros asserted that, because subparagraph (b) of the arbitration agreement required them to arbitrate with the AAA, the agreement "forces [the Caballeros] to litigate in an inaccessible and prohibitively expensive forum." Because their claimed damages were over $1 million, they asserted that they

would be required to arbitrate under the AAA's "Construction Industry Arbitration Rules and Mediation Procedures." They attached the AAA's rules and procedures to their response, which included the fee schedule for filing arbitration. The fee schedule showed that, for claims over $1 million, the initial filing fee totaled $14,700. They asserted that the filing fee was "on top of the $400–$500 hourly fee of the arbitrators." The Caballeros offered the affidavit of their attorney to show that, in two other suits filed against Appellants on behalf of Mar Bella homeowners, those homeowners had been assessed arbitration fees of $20,475.00 and $24,327.19, respectively, to arbitrate the merits of their claims.

The Caballeros also offered Gary Caballero's affidavit. He testified that the cost of arbitration—that is, the AAA filing fee and the $20,000 to $25,000 arbitrator's fees incurred in similar cases—had not been disclosed to him when he signed the purchase agreement. He stated that he was "shocked and surprised" when he learned of the cost. Gary testified that, "[i]f we have to pay these costs to start the arbitration and pay the arbitrators fees as they are incurred, it could force us to drop our claim."

And third, the Caballeros asserted that the arbitration agreement "attempts to strip [them of their] statutory rights and remedies." Subparagraph (f) of the arbitration agreement states that "the arbitrator shall be authorized to provide all recognized remedies available in law or in equity for any cause of action that is the

basis of the arbitration." In their petition, the Caballeros asserted causes of action—including breach of contract, statutory real estate fraud, and violation of the Deceptive Trade Practices Act—for which they could recover attorney's fees if they prevailed. Their pleading also referenced the Residential Construction Liability Act, which allows recovery of attorney's and expert's fees if a plaintiff pleads and successfully proves a cause of action for which those fees are recoverable.

The Caballeros complained that subparagraphs (e) and (h) in the arbitration agreement are substantively unconscionable because Appellants have cited those same provisions in other cases to limit the homeowners' statutory rights to recover attorney's fees and expert's fees. Subparagraph (e) provides that "all fees and costs shall be borne separately between the parties," and subparagraph (h) provides that, "[t]o the extent that any state or local law, ordinance, regulation, or judicial rule is inconsistent with any provision of the rules of the arbitration service under which the arbitration proceeding shall be conducted, the latter rules shall govern the conduct of the proceeding." Because the arbitration agreement did not allow the award of fees and costs, the Caballeros asserted that the Appellants may argue at arbitration that the award of fees and costs to the Caballeros is not allowed. The Caballeros offered the affidavits of their attorneys in which they testified that Appellants had made this argument in other suits brought by homeowners who had already been to arbitration.

The Caballeros urged, "[I]n the event [the trial court found] that the arbitration clause [was] not unconscionable in its entirety, the [trial court] should strike and sever those above-mentioned portions of the arbitration agreement from the contract as unconscionable." The Caballeros pointed out that subparagraph (l) of the arbitration agreement provided, "If any provision of this arbitration agreement shall be determined to be unenforceable or to have been waived, the remaining provisions shall be deemed severable therefrom and enforceable according to their terms." They cited case law[2] indicating that the proper course of action for the trial court was to sever the provisions of the arbitration agreement that they had previously assailed as rendering the arbitration agreement unenforceable—which by implication included the delegation provision—from the remainder of the arbitration agreement and order the parties to arbitrate with an arbitration service less expensive than the AAA.

Appellants filed a supplemental motion to compel in which they replied to the Caballeros' response. They re-emphasized that they sought to compel arbitration under the delegation provision to determine gateway questions of arbitrability, such as enforceability of the arbitration agreement and defenses to enforceability. They asserted that a delegation provision must be enforced unless it is specifically

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[2] *See In re Poly-Am., L.P.*, 262 S.W.3d 337, 360 (Tex. 2008) (orig. proceeding) (applying principle that "[a]n illegal or unconscionable provision of a contract may generally be severed so long as it does not constitute the essential purpose of the agreement" in dispute involving arbitration agreement).

challenged and shown to be unenforceable, which the Caballeros had not shown. Appellants also asserted that whether other provisions in the arbitration agreement, such as subparagraphs (e) and (h), were substantively unconscionable were threshold questions of arbitrability—that is, defenses to the enforcement of the arbitration agreement—that must arbitrated by the arbitrator under the delegation provision.

On November 6, 2020, the trial court signed an order finding that "the arbitration provision results in the overall costs of arbitration to be excessive compared to litigation in this Court." The trial court also found that "portions of the arbitration clause contained in the parties' purchase agreement contain[] provisions that are vague, ambiguous, misleading, internally inconsistent and in conflict with each other, purport[] to invalidate or waive substantive rights and remedies authorized by statute and [are] unconscionable." The trial court then determined those provisions were "unenforceable" and "severed" them from the arbitration agreement by striking through them as follows:

11) Dispute Resolution—Arbitration:

[. . . .]

> (a) This arbitration agreement shall be deemed to be a self-executing arbitration agreement. Any dispute concerning the interpretation or the enforceability of this arbitration agreement, including without limitation, its revocability or voidability for any cause, any challenges to the enforcement or the validity of the agreement, or this arbitration agreement, or the scope of arbitrable issues under this arbitration agreement, and any defense relating to the enforcement of this arbitration agreement,

including without limitation, waiver, estoppel, or laches, shall be decided by ~~*an arbitrator in accordance with this arbitration agreement and not*~~ a court of law.

b. ~~*In the event that a dispute arises between the parties, such dispute shall be resolved by and pursuant to the arbitration rules and procedures of [the] American Arbitration Association in effect at the time the request for arbitration is submitted. In the event the American Arbitration Association is for any reason unwilling or unable to serve as the arbitration service, then the parties shall select another reputable arbitration service. If the parties are unable to agree on an alternative service, then either party may petition any court of competent jurisdiction in the county in which the property is located to appoint such an alternative service, which shall be binding on the parties. The rules and procedures of such alternative service in effect at the time the request for arbitration is submitted shall be followed.*~~

[. . . .]

(e) ~~*In the event any dispute arises under the terms of the Purchase agreement or in the event of the bringing of any arbitration action by a party hereto against another party hereunder by reason of any breach of any of the covenants, agreements or provisions on the part of the other party arising out of this Purchase agreement, then all fees and costs shall be borne separately between the parties, including but not limited to all attorneys' fees and expert witness costs resulting from the Dispute.*~~ The foregoing provision does not modify any provision of any contract between Seller and any third-party requiring indemnification or establishing a different allocation of fees and costs between Seller and such third party. In the event Buyer is an entity and not a natural person and Seller is the prevailing party the individual signing this Purchase agreement on behalf of such entity shall also be personally liable for Seller's fees and costs as aforesaid notwithstanding any indication that such individual is signing in a corporate capacity. The provisions of

> this paragraph shall survive Closing or termination of this Purchase agreement.

[. . . .]

> (h) ~~*To the extent that any state or local law, ordinance, regulation, or judicial rule is inconsistent with any provision of the rules of the arbitration service under which the arbitration proceeding shall be conducted, the latter rules shall govern the conduct of the proceeding.*~~

(Italics added to highlight specific language severed by trial court.) The trial court also selected an arbitrator, ordering the parties "to arbitrate with Alice Oliver Parrott."

In sum, the trial court's November 6 order (1) granted arbitration but did not limit arbitration to questions of arbitrability as requested by Appellants in their motion to compel; (2) severed and modified the language of the delegation provision, giving the trial court, rather than the arbitrator, the right to determine questions of arbitrability, including enforceability; (3) eliminated the contemplated and agreed manner and procedure of how arbitration would proceed—that is, eliminated arbitration with the AAA pursuant to AAA rules and procedures, and (4) granted the Caballeros' request to order arbitration of the merits of their claims with another arbitrator, who was selected by the trial court.

Appellants now appeal the November 6 order.

Motion to Compel Arbitration

In one issue, Appellants contend, "The trial court abused its discretion by denying Appellants' motion to compel arbitration of the gateway question of arbitrability of the Caballeros' claims pursuant to the delegation clause within the Paragraph 11 arbitration agreement." But, before we address this issue, we note that, in *Taylor Morrison of Texas, Inc. v. Skufca*, Appellants (Taylor Morrison and Taylor Woodrow) raised the identical issue, challenging an identical order involving an arbitration agreement with identical language. No. 01-20-00638-CV, — S.W.3d — , 2021 WL 6138979 (Tex. App.—Houston [1st Dist.] Dec. 30, 2021, no pet.). The appellees in *Skufca* were also Mar Bella homeowners who had sued Appellants because of mold problems in their home. *Id.* at *1.

There, Appellants moved to compel arbitration of gateway issues of arbitrability under the same delegation provision. *Id.* at *3. In the trial court, the parties raised the same arguments as the parties raise here. *Id.* at *4–6. Like here, the trial court ruled in favor of the homeowners. *See id.* at *6–7. And, like here, the trial court's order struck and severed the same provisions from the arbitration agreement, including the delegation provision, and ordered arbitration before the same arbitrator. *Id.* at *7. On appeal, the parties presented essentially the same arguments they present here. *See id.* at *11–16.

We held that, when it severed the delegation provision, severed the other challenged provisions, and ordered arbitration with an arbitrator it selected, the trial court abused its discretion by effectively denying Appellants' motion to compel arbitration of gateway issues of arbitrability. *Id.* at *17. We reversed the order and remanded to the trial court for the court to sign an order compelling the parties to arbitrate pursuant to the delegation clause and staying the proceedings. *Id.*

We decide this interlocutory appeal in accordance with *Skufca*.

A. Jurisdiction

We note that we have jurisdiction over this interlocutory appeal. The FAA applies to the arbitration agreement because the parties expressly agreed to arbitrate under the FAA. *See In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011). Civil Practice and Remedies Code section 51.016, which authorizes appeals in matters subject to the FAA, provides that a party may appeal an interlocutory order "under the same circumstances that an appeal from a federal district court's order or decision would be permitted" by the FAA. TEX. CIV. PRAC. & REM. CODE § 51.016. Under the FAA, a party may immediately appeal an order denying a motion to compel arbitration. *See* 9 U.S.C. § 16(a)(1)(B).

In *Skufca*, we analyzed whether we had jurisdiction over an order that is identical to the order here. *Id.* at *10. We concluded that, "[w]hen viewed in the context of the record, the order served to deny Appellants their contractual right

pursuant to the delegation provision to arbitrate threshold issues of arbitrability, including enforceability." *Id.* We held that we had jurisdiction because "[the] order functioned to deny Appellants' motion to compel arbitration." *Id.* For the same reason, we hold that we have interlocutory appellate jurisdiction over the November 6 order in this case. *See id.*

"Even if we do not have jurisdiction, mandamus relief remains potentially available to Appellants because 'mandamus is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal, as when a party is erroneously denied its contracted-for arbitration rights under the FAA'"[3] *Id.* at *11 (quoting *CMH Homes v. Perez*, 340 S.W.3d 444, 452 (Tex. 2011)). For the reasons discussed below, our resolution of the issues would be the same whether determined in an appeal or in an original proceeding seeking a writ of mandamus.[4] *See id.*

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[3] In their briefing, Appellants requested that we consider their appellate brief as a petition for mandamus, if necessary. *See CMH Homes v. Perez*, 340 S.W.3d 444, 447–52, 454 (Tex. 2011) (holding court of appeals correctly determined it lacked jurisdiction to hear interlocutory appeal from trial court's order appointing arbitrator, but remanding case back to court of appeals to consider mandamus relief that was alternatively requested).

[4] A party is entitled to mandamus relief to correct a clear abuse of discretion for which the remedy by appeal is inadequate. *Walker v. Packer*, 827 S.W.2d 833, 839. 842 (Tex. 1992). A trial court abuses its discretion regarding factual issues if it could reasonably have reached only one decision and failed to do so. *Id.* at 840. However, a trial court has no discretion regarding questions of law. *Id.* Thus, "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Id.*

B. Standard of Review

"We review a trial court's order denying a motion to compel arbitration for abuse of discretion." *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo." *Henry*, 551 S.W.3d at 115. A trial court has no discretion in determining what the law is, which law governs, or how to apply the law. *Okorafor v. Uncle Sam & Assocs., Inc.*, 295 S.W.3d 27, 38 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

C. Legal Principles

Federal law requires the enforcement of valid agreements to arbitrate. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 121 (Tex. 2018). "Section 2 of the FAA states arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 892 (Tex. 2010) (orig. proceeding) (quoting 9 U.S.C. § 2). "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Wegner v. Apache Corp.*, 627 S.W.3d 277, 283 (Tex. 2021) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

Arbitration agreements are on equal footing with other contracts and must be enforced according to their terms. *Id.*

When, as here, an arbitration agreement is contained within another contract, the arbitration agreement is severable from the contract. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2005) (holding that "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract"); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). Because an arbitration agreement is severable, questions about the validity of the larger contract, in which the arbitration agreement is embedded, are determined by the arbitrator. *See Buckeye Check Cashing*, 546 U.S. at 445–46.

But simply because arbitration agreements are severable "does not mean that they are unassailable." *Rent-A-Ctr.*, 561 U.S. at 71. If a party challenges the validity of an arbitration agreement—rather than challenging the validity of the larger contract—then the trial court must consider the challenge to the arbitration agreement before it orders the parties to arbitration. *See id.* Under the FAA, courts presume that parties to an arbitration agreement intend that courts rather than arbitrators decide issues regarding the validity, scope, and enforceability of the arbitration agreement. *See Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 631–33 (Tex. 2018) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938,

944 (1995)). However, because parties have the right to contract as they see fit, they may delegate to the arbitrator gateway questions of arbitrability, such as the validity or enforceability of an arbitration agreement. *See Rent-A-Ctr.*, 561 U.S. at 69–70; *RSL Funding*, 569 S.W.3d at 121; *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, — US —, 139 S. Ct. 524, 527 (2019) ("The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.").

The U.S. Supreme Court has explained that an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr.*, 561 U.S. at 70. In other words, "[a] delegation provision is itself a separate and severable arbitration agreement."[5] *Berry Y&V Fabricators, LLC v. Bambace*, 604 S.W.3d 482, 487 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (citing *Rent-A-Ctr.*, 561 U.S. at 72). Thus, a delegation provision is severable from the remainder of the arbitration agreement, and a party's challenge to another provision of the contract [i.e., the arbitration agreement], or to the larger contract as a whole, does not prevent a court from

[5] As one federal circuit court explained, "Think of a delegation provision as a mini-arbitration agreement within a broader arbitration agreement within a broader contract, 'something akin to Russian nesting dolls.'" *MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 402 (3d Cir. 2020) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 85 (2010) (Stevens, J., dissenting)).

enforcing a specific agreement to arbitrate, such as a delegation provision. *See Rent-A-Ctr.*, 561 U.S. at 70.

If there is a delegation provision, "the court must then compel arbitration so the arbitrator may decide gateway issues the parties have agreed to arbitrate." *RSL Funding*, 569 S.W.3d at 121. "When faced with [a delegation provision], courts have no discretion but to compel arbitration unless the clause's validity is challenged on legal or public policy grounds." *Id.*; *see Rent-A-Ctr.*, 561 U.S. at 72 (holding that, unless party opposing arbitration challenges delegation provision specifically, courts must treat it as valid and enforce it, leaving any challenge to validity of entire arbitration agreement for arbitrator); *Darling Homes of Tex., LLC v. Khoury*, No. 01-20-00395-CV, 2021 WL 1918772, at *8 (Tex. App.—Houston [1st Dist.] May 13, 2021, no pet.) (mem. op.). ("Because there is a valid agreement to arbitrate that delegates arbitrability to the arbitrator, the trial court should have compelled arbitration and allowed the arbitrator to decide the questions relating to unconscionability of the . . . arbitration agreement."); *Berry Y&V Fabricators*, 604 S.W.3d at 487 (recognizing that when agreement "delegates to the arbitrator questions of validity or enforceability of that agreement, a court may not intervene in evaluating those questions unless the party opposing arbitration challenges the delegation provision specifically on legal or public policy grounds").

D. Analysis

In their motion to compel, Appellants sought to enforce the delegation provision, which was an antecedent agreement to arbitrate threshold issues concerning the arbitration agreement, including enforceability and defenses to enforceability like unconscionability. *See Rent-A-Ctr.*, 561 U.S. at 70; *Skufca*, 2021 WL 6138979, at *11. The Caballeros responded that the arbitration agreement was unconscionable because (1) the delegation provision improperly required the arbitrator to determine gateway issues, like enforceability, rather than the trial court; (2) subparagraph (b) of the agreement required arbitration with the AAA, which the Caballeros asserted was "prohibitively expensive"; and (3) subparagraph (e), which provided that "all fees and costs shall be borne separately between the parties," and subparagraph (h), which provided that, "[t]o the extent that any state or local law, ordinance, regulation, or judicial rule is inconsistent with [the AAA rules], the latter rules shall govern the conduct of the proceeding," operated to deny the Caballeros their statutory rights and remedies, such as their right to recover attorney's fees.

The Caballeros requested the trial court to review the enforceability of the arbitration agreement and either sever it from the purchase agreement or, pursuant to the arbitration agreement's severability clause, sever the complained-of provisions. The trial court did the latter, severing the offending provisions, including the operative language of the delegation provision. The trial court found in its order

that the severed provisions were, inter alia, unconscionable and that "the overall costs of arbitration [were] excessive compared to litigation in [the trial court]."

As discussed, if, as here, there is a delegation provision, "the court must then compel arbitration so the arbitrator may decide gateway issues the parties have agreed to arbitrate." *RSL Funding*, 569 S.W.3d at 121. "When faced with [a delegation provision], courts have no discretion but to compel arbitration unless the clause's validity is challenged on legal or public policy grounds." *Id.*; *see Rent-A-Ctr.*, 561 U.S. at 72; *Darling Homes of Tex.*, 2021 WL 1918772, at *8; *Berry Y&V Fabricators*, 604 S.W.3d at 487.

Appellants assert that, under these principles, the trial court had no discretion to sever the delegation provision's operative language and concomitantly decide questions of enforceability regarding the arbitration agreement itself, a decision the parties had expressly given to the arbitrator. They contend that the trial court abused its discretion in effectively denying their motion to compel arbitration of gateway issues pursuant to the delegation provision.

Appellants acknowledge that the Caballeros specifically challenged the delegation provision as being unconscionable, an issue the trial court was permitted to decide. *See RSL Funding*, 569 S.W.3d at 121. But they contend that the Caballeros failed to show that the delegation provision was unconscionable.

Whether relating to arbitration or not, unconscionable contracts are unenforceable. *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (orig. proceeding). "[T]he theory behind unconscionability in contract law is that courts should not enforce a transaction so one-sided, with so gross a disparity in the values exchanged, that no rational contracting party would have entered the contract." *Olshan Found. Repair*, 328 S.W.3d at 892. "Generally, a contract is unconscionable if, given the parties general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *Id.* (internal quotations marks omitted).

Arbitration agreements may be either substantively or procedurally unconscionable, or both. *See In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002) (orig. proceeding). Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision. *In re Palm Harbor Homes*, 195 S.W.3d 672, 677 (Tex. 2006) (orig. proceeding). Because an arbitration agreement functions as a forum-selection clause, *see Poly-Am.*, 262 S.W.3d at 352, the "'crucial inquiry' in determining unconscionability [is] 'whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, a forum where the litigant can effectively vindicate his or her rights.'" *Venture Cotton*

Co-op. v. Freeman, 435 S.W.3d 222, 231 (Tex. 2014) (quoting *Olshan Found. Repair*, 328 S.W.3d at 894). As the party asserting the defense, the Caballeros had the burden to prove the delegation provision was unconscionable. *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 500 (Tex. 2015).

The Caballeros raised the issue of the delegation provision's unconscionability in their response to the motion to compel, asserting:

> Despite statutory and judicial authority for the proposition that Courts decide gateway matters such as the validity and enforceability of arbitration clauses, [Appellants have] written into [their] contracts a provision which attempts to take that authority away. This is an example of the substantive unconscionability of the contract's arbitration clause.

The Caballeros claimed that "[u]nder the FAA, absent unmistakable evidence that the parties intended the contrary, it is the courts rather than arbitrators that must decide 'gateway matters' such as whether a valid arbitration agreement exists." However, as discussed, both the U.S. Supreme Court and the Supreme Court of Texas have recognized the validity of delegation provisions.

In *Rent-A-Center*, the Supreme Court explained, "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." 561 U.S. at 68–69.

More recently, in *Henry Schein*, the Supreme Court reiterated, "Under the [FAA] and this Court's cases, the question of who decides arbitrability is itself a question of contract. The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." 139 S. Ct. at 527. In *Henry Schein*, the party opposing arbitration argued, as the Caballeros do here, "that a court must always resolve questions of arbitrability and that an arbitrator never may do so." *Id.* at 530. To that argument, the Supreme Court responded, "But that ship has sailed. This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence."[6] *Id.* And, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id.* at 531.

The Supreme Court of Texas in *RSL Funding* also recognized that parties may agree to delegate questions of arbitrability to the arbitrator: "But as parties have a

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[6] As mentioned, the delegation provision provides that "[a]ny dispute concerning the interpretation or the enforceability of this arbitration agreement, including without limitation . . . any defense relating to the enforcement of this arbitration agreement . . . shall be decided by an arbitrator in accordance with this arbitration agreement and not a court of law." The Caballeros did not dispute in the trial court nor do they dispute on appeal that the delegation provision is clear and unmistakable evidence that the parties agreed that threshold issues were delegated to the arbitrator. To the contrary, by arguing that the delegation provision is unconscionable because it delegates the right to decide threshold issues to the arbitrator, they implicitly acknowledge that it is clear and unmistakable in that function.

right to contract as they see fit, they may agree to arbitral delegation clauses that send gateway issues such as arbitrability to the arbitrator." 569 S.W.3d at 121 (citing *Rent-A-Ctr.*, 561 U.S. at 68–70). There, the supreme court held that the court of appeals had erred by refusing to send an issue of arbitrability to the arbitrator when the parties' arbitration agreement contained a delegation provision. *Id.* at 123.

In short, both the U.S. Supreme Court and the Supreme Court of Texas have made clear that parties may contract to delegate questions of arbitrability to the arbitrator. Thus, the Caballeros failed to show that the delegation provision was unconscionable because it delegated the authority to decide the arbitration agreement's validity and enforceability to the arbitrator. *See Skufca*, 2021 WL 6138979, at *13; *see also Taylor Morrison of Tex., Inc. v. Klein*, Nos. 14-20-00520-CV, 14-20-00532-CV, 2021 WL 5459222, at *5 (Tex. App.—Houston [14th Dist.] Nov. 23, 2021, no pet.) (mem. op.) (rejecting—in case involving same delegation provision—homeowners' assertion that arbitrators are not qualified to determine threshold issues of arbitrability).

The Caballeros' arguments in the trial court can also be fairly interpreted to challenge the delegation provision as being unconscionable based on the cost of arbitration. They asserted that the cost of arbitrating their claims with the AAA was "prohibitively expensive" as compared to litigating their claims in the trial court or

utilizing an alternative arbitration service. The Caballeros tied this assertion specifically to the delegation provision:

> [A] Plaintiff can be forced to sign th[e] arbitration clause in order to purchase [a] home, then if there is a dispute, should bypass [the trial court],” despite clear statutory requirement for [the court] to determine unconscionability, immediately file for arbitration with the AAA and pay $14,700.00 to have an arbitrator determine whether or not the fee to use the AAA is unconscionable, only then to have to split the costs of the arbitrator and never have the ability to recoup those costs[.]

(Footnote omitted.) In other words, the Caballeros complained that they should not be required to pay what they termed “exorbitant costs” to arbitrate threshold issues of enforceability under the delegation provision.

Excessive arbitration costs may render contractual arbitration unenforceable if the costs prevent a litigant from effectively vindicating his or her rights in the arbitral forum. *Olshan Found. Repair*, 328 S.W.3d at 893. A party opposing arbitration based on the defense of unconscionability must supply “specific proof in the particular case of the arbitral forum’s inadequacy.” *Venture Cotton Co-op.*, 435 S.W.3d at 232. When a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 81 (2000). The complaining party must present “*some evidence* that [it] will likely incur arbitration costs in such an amount as to deter enforcement of statutory rights in the arbitral forum.” *Poly–Am.*, 262 S.W.3d at 356.

To determine whether the arbitral forum is an adequate and accessible substitute to litigation, courts consider the following factors: (1) the claimant's ability to pay the arbitration fees and costs, (2) the actual cost of arbitration compared to the amount of damages, and (3) the expected cost differential between arbitration and litigation in court and whether that cost differential is so substantial as to deter the bringing of claims. *Olshan Found. Repair*, 328 S.W.3d at 893–95. "[A] comparison of the total costs of the two forums is the most important factor in determining whether the arbitral forum is an adequate and accessible substitute to litigation." *Id.* at 894–95.

Speculation about possible harm is insufficient to establish unconscionability. *Venture Cotton Co-op.*, 435 S.W.3d at 232. Rather, the party opposing arbitration must offer evidence such as invoices, expert testimony, reliable cost estimates, and affidavits to prove the likelihood of incurring expected costs. *Olshan Found. Repair*, 328 S.W.3d at 895.

The Caballeros supported their assertion that arbitration was prohibitively expensive by offering the AAA's "Construction Industry Arbitration Rules and Mediation Procedures," which included the fee schedule for filing arbitration. The schedule showed that, for claims over $1 million, such as the Caballeros' claims, the filing fee totaled $14,700. The Caballeros also offered the affidavits of their attorneys, who represented Mar Bella homeowners in other suits filed against

Appellants. One of the attorneys testified about two of the other suits in which arbitration with Appellants had already resolved the merits of the plaintiffs' claims, resulting in arbitration awards to the plaintiffs for damages, attorney's fees, and expert's fees. The Caballeros relied on the attorneys' testimony about the cost of arbitrating the other suits as a basis to argue that arbitrating the merits of the Caballeros' claims would be prohibitively expensive.

At this point, we turn to an argument raised by Appellants relating to the cost of arbitration. In the trial court, Appellants countered the Caballeros' assertion that they would be required to pay $14,700 in filing fees by pointing out that the relief requested in Appellants' motion to compel had been limited to seeking arbitration under the delegation provision of threshold issues of arbitrability. Appellants emphasized that they did not seek arbitration of the merits of the Caballeros' claims under the provisions of the arbitration agreement. Because they requested arbitration of only threshold issues, Appellants asserted that the $14,700 filing fees for claims over $1 million would not apply to arbitration limited to deciding only questions of arbitrability under the delegation provision. Appellants offered the fee schedule for "Non-Monetary, Undetermined, or Specific Performance Claims" contained in the AAA's "Home Construction Industry Arbitration Rules and Mediation Procedures." Appellants asserted that was the applicable fee schedule for arbitrating threshold arbitrability issues. Under that schedule, Appellants pointed out that the Caballeros'

filing fees would total only $2,300 because arbitrating arbitrability would involve arbitrating a non-monetary claim.

It is unclear which fee—$2,300 or $14,700—would be required by the AAA to arbitrate only threshold issues of arbitrability. However, regardless of which fee applies, Appellants' position that the relevant consideration at this juncture is the cost of arbitrating arbitrability and enforceability pursuant to the delegation provision and not the cost of arbitrating the merits of the Caballeros' claims finds support in the Supreme Court's opinion in *Rent-A-Center*. There, Rent-A-Center sought to enforce an arbitration agreement against its former employee, Jackson, who had sued Rent-A-Center for employment discrimination. 561 U.S. at 65. Jackson opposed arbitration, asserting that the arbitration agreement was unenforceable because it was unconscionable. *Id.* at 66. "Rent-A-Center responded that Jackson's unconscionability claim was not properly before the court because Jackson had expressly agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the Agreement." *Id.*

The Supreme Court ultimately ruled in favor of Rent-A-Center because Jackson had challenged the entire arbitration agreement as being unconscionable but had not specifically challenged the delegation provision as unconscionable. *Id.* at 73–74. Jackson asserted that the arbitration agreement was substantively unconscionable because it limited discovery and required the parties to split the

arbitration fees. *Id.* at 74. The Supreme Court explained what Jackson would have needed to have shown in order to have established that the delegation provision was rendered unconscionable based on "common procedures":

> To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination.

Id. Applying the Supreme Court's reasoning here, to show that the cost of arbitration rendered the delegation provision unconscionable, the Caballeros needed to demonstrate the unfairness of the cost of arbitrating the threshold issues of arbitrability and enforceability under the delegation provision, not the cost of arbitrating the merits of their claims to an award under the arbitration agreement. *See id.*

In challenging the delegation provision, the Caballeros offered evidence regarding the costs of conducting the entire arbitration of their merits-based claims under the arbitration agreement. They did not offer evidence showing the cost of arbitrating only threshold issues under the delegation provision. And they offered no evidence of their ability to pay other than Gary's testimony that they would be "unfairly burdened," and "[i]f we have to pay [the] costs to start the arbitration and

pay the arbitrator's fees as they are incurred, it could force us to drop our claim." Thus, we conclude that the Caballeros did not meet their burden to show that the cost of arbitrating threshold issues rendered the delegation provision substantively unconscionable. *See id.*; *Skufca*, 2021 WL 6138979, at *16 (holding that homeowners had failed to show delegation provision was substantively unconscionable because they had not offered evidence to show cost of arbitrating questions of arbitrability under delegation provision); *Darling Homes of Tex.*, 2021 WL 1918772, at *10 (holding that homeowner opposing arbitration did not show arbitration agreement was substantively unconscionable due to excessive arbitration costs where homeowner offered evidence of amount of arbitral filling fee but failed to offer evidence of "total costs" of arbitration (or litigation) and record contained no evidence "about the individual homeowners' ability to pay the arbitration fees and costs"); *see also Madgrigal v. AT&T Wireless Servs., Inc.*, No. 1:09-cv-0033-OWW-MJS, 2010 WL 5343299, at *7 (E.D. Cal. Dec. 20, 2010) (rejecting plaintiff's claim that fee-splitting provision in arbitration agreement rendered delegation provision unconscionable because plaintiff offered only evidence that "the total cost of conducting the *entire arbitration*, including resolution of the substantive merits of the parties' disputes, could exceed $60,000.00," but "[n]othing in the record reveal[ed] the cost of arbitrating Plaintiff's claim of unconscionability").

The record also provides an additional basis to conclude that the cost of arbitrating threshold issues failed to render the delegation provision substantively unconscionable. In its motion to reconsider, Taylor Woodrow offered to pay the Caballeros' arbitration costs for arbitrating threshold issues. Appellants represented to the trial court that Taylor Woodrow would "*pay the AAA the $2,300.00 and additional amount[s], if necessary, charged to [the Caballeros] . . . for an arbitrator's determination of arbitrability of [the Caballeros'] claims*." (Emphasis in original.)

"When the party seeking arbitration offers in court to pay the arbitration costs of the party opposing arbitration, both Texas state courts and federal courts have held that the offer moots the opposing party's argument that the arbitration provision is substantively unconscionable because of prohibitive arbitration costs." *Skufca*, 2021 WL 6138979, at *16 (citing *Ensign Grp., Inc. v. Mammen,* No. 02-14-00317-CV, 2015 WL 2266406, at *3 (Tex. App.—Fort Worth May 14, 2015, no pet.) (mem. op.) (rejecting plaintiff's claim that arbitration agreement's cost-splitting provision was substantively unconscionable, in part, because in trial court defendants offered to pay fees if plaintiff could not afford them) (mem. op.); *D.R. Horton, Inc. v. Brooks*, 207 S.W.3d 862, 870 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("We reject Brooks' substantive unconscionability argument as moot because D.R. Horton has agreed to pay all costs associated with the arbitration of their dispute."); *Carter*

v. Countrywide Credit Indus., Inc., 362 F.3d 294, 300 (5th Cir. 2004) (acknowledging that law recognizes that prohibitive costs may preclude party from vindicating rights at arbitration but determining that court need not reach question on whether fee-splitting provision was unconscionable because issue was mooted by defendant's representation to district court that it would pay all arbitration costs); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1026 (11th Cir. 2003) ("[A]ny problem involving whether the plaintiff can afford the cost of arbitration is no problem in light of the defendant's stipulation to pay the plaintiff's costs of arbitration . . . ."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (holding defendants' agreement to pay all costs associated with arbitration "foreclose[d] the possibility that the [plaintiffs] could endure any prohibitive costs in the arbitration process")).

Because the Caballeros did not successfully challenge the delegation provision, the trial court improperly severed the language in the provision authorizing the arbitrator to decide threshold issues. Without a proper severance of the delegation language, the trial court was not permitted to decide whether the other provisions complained of by the Caballeros rendered the arbitration agreement unenforceable, requiring the provisions to be severed. *See Rent-A-Ctr.*, 561 U.S. at 72; *RSL Funding*, 569 S.W.3d at 121.

On appeal, the Caballeros also contend that they were fraudulently induced to sign the arbitration agreement by Appellants' silence regarding the cost of arbitration and the unavailability of statutory remedies under the arbitration agreement. They assert that this renders the arbitration agreement, and more specifically, the delegation provision unenforceable. The Caballeros pleaded fraudulent inducement of the arbitration agreement in their original petition, but they did not specifically relate their claim to the delegation provision. Nor did the Caballeros raise the defense of fraudulent inducement when they responded to the motion to compel in the trial court.

In their response, the Caballeros indicated that the arbitration agreement was procedurally unconscionable because the agreement did not "advise" them "of the exorbitant filing fees or arbitration costs," and Gary Caballero stated in his affidavit that he was "shocked and surprised" when he learned of the potential cost of arbitrating their claims. But they did not specifically challenge the delegation provision in the trial court by arguing that it was unconscionable because the cost of arbitrating the merits of their claims had not been disclosed to them. Rather, their challenges were directed to the arbitration agreement as a whole. In *Rent-A-Center*, the Supreme Court explained that "unless [the plaintiff] challenged the delegation provision specifically," the Court must treat it as valid and leave "any challenge to the validity of the Agreement as a whole for the arbitrator." 561 U.S. at 72. Thus,

the trial court had no discretion to determine whether the arbitration agreement was procedurally unconscionable or fraudulently induced. *See id.* Instead, the trial court had no discretion but to compel arbitration as requested by Appellants to permit the arbitrator to decide gateway issues of arbitrability, including enforceability and defenses to enforceability such as substantive and procedural unconscionability and fraudulent inducement.[7] *See Skufca*, 2021 WL 6138979, at 17 (citing *RSL Funding*, 569 S.W.3d at 121; *Darling Homes of Tex.*, 2021 WL 1918772, at *4); *Klein*, 2021 WL 5459222, at *5.

Conclusion

Because the parties' arbitration agreement contained an enforceable delegation provision, we hold that the trial court abused its discretion by effectively denying Appellants' motion to compel arbitration of threshold issues of arbitrability

[7] The Caballeros cite federal cases in which courts have determined that, "[i]n specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration provisions." *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 338 (4th Cir. 2020) (quoting *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226–27 (3d Cir. 2018)); *see Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020). But, in those case, unlike here, the plaintiff raised the challenge in the district court not only to the arbitration agreement as a whole but also specifically raised the same challenge to the delegation provision. *See Williams*, 965 F.3d at 237 ("Plaintiffs contested the delegation clause in their opposition to the motion to compel, and they challenged the clause based upon arguments they made concerning the enforceability of the entire arbitration agreement."); *Gibbs*, 967 F.3d at 338 (observing that "borrowers argued that the 'delegation clause[s] [are] unenforceable for the same reason as the underlying arbitration agreement—the . . . wholesale waiver of the application of federal and state law[.]'") (alterations in original); *MacDonald*, 883 F.3d at 227 ("MacDonald specifically challenged the delegation clause.").

pursuant to that provision, and we sustain Appellants' sole issue.[8] Accordingly, we reverse the trial court's November 6 order and remand to the trial court for the court to sign an order compelling the parties to arbitrate pursuant to the delegation clause and staying the proceedings.

Richard Hightower
Justice

Panel consists of Justices Hightower, Countiss, and Guerra.

[8] We need not address other arguments raised by Appellants challenging the November 6 order. *See* TEX. R. APP. P. 47.1. We also note that, in their brief, Appellants request that we decide whether Taylor Morrison—which the record indicates has an ownership interest in Taylor Woodrow—may enforce the arbitration agreement along with Taylor Woodrow, even though Taylor Morrison is a non-signatory to the agreement. However, the record does not reflect that the Caballeros disputed Taylor Woodrow's ability to enforce the agreement in the trial court nor that the trial ruled on this issue. Therefore, we do not address it. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 147 (Tex. 2012) (recognizing that courts lack jurisdiction to render advisory opinions).