

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

MOTION TO COMPEL DENIED

Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC²

In a recent case, the Supreme Court of Texas held that forgoing an interlocutory appeal on the denial of a motion to compel arbitration did not constitute a waiver of challenging that ruling on appeal from a final judgment. Moreover, the Court held that the availability of arbitration was an issue of procedural arbitrability and deferred to the parties' arbitral institution on that issue.³

The plaintiff, Bonsmara National Beef Company, a cattle owning company, entered into an agreement with Hart of Texas Cattle Feeders, defendant (the "Agreement"). Bonsmara contracted with Hart's predecessor, to supply feed, vitamins, minerals, and medicine to the Bonsmara cattle at the cattle-feeder's yards.⁴ The Agreement contained an arbitration clause stating that any disputes would be resolved through arbitration in accordance with the arbitration rules of the Texas Cattle Feeders Association (TCFA).⁵

Five years into the Agreement, Bonsmara claimed that its cattle were performing poorly under Hart's care and that it had incurred "severe monetary losses."⁶ Bonsmara and its president, Chapman, sued Hart and its owners, James Hayes, Lynn Landrum, and Henry Pickett (the "Hart Defendants") for breach of contract and negligent care.⁷

In the trial court, Hart moved to dismiss the suit and compel arbitration. Bonsmara and Chapman argued that the arbitration clause was unenforceable because the TCFA only allowed

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 Dylan C. Campbell, a law student at Texas A&M School of Law, for his drafting assistance.

² *Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, No. 19-0263, 63 Tex. Sup. Ct. J. 1523, 2020 Tex. LEXIS 617 (June 26, 2020).

³ *Id.* at *4.

⁴ *Id.* at *5.

⁵ *Id.*

⁶ *Id.* at *6.

⁷ *Id.*

members to arbitrate. While some of the Hart owners were TCFA members, none of the signatories to the Agreement were members. The Plaintiffs argued that this meant the designated forum was unavailable.⁸ The trial court ruled in favor of Bonsmara and denied the Hart Defendants' motion to compel. Hart did not file an interlocutory appeal but instead filed a mandamus petition to the court of appeals to order the trial court to compel arbitration.⁹ The court of appeals denied relief on the grounds that Hart had an adequate remedy with an interlocutory appeal, but failed to pursue it.¹⁰ A jury trial on the merits found the Hart Defendants liable and awarded Bonsmara and Chapman damages and attorney's fees.

The Hart Defendants appealed the trial court's judgment and argued on appeal of the final judgment that the trial court erred in denying their motion to compel.¹¹ The Hart Defendants asked the court to decide whether the arbitration agreement was enforceable based on the TCFA membership requirement, and whether the non-signatory Hart owners could compel Bonsmara and Chapman to arbitrate. The court of appeals denied Bonsmara's issues and remanded the case to the trial court with instruction to order the parties to arbitration.¹² The Texas Supreme Court granted Bonsmara's petition for review.

The Court reviewed two issues. First, whether the Hart Defendants' failure to appeal the interlocutory order denying their motion to compel deprived the appellate court jurisdiction to overturn that order on appeal from a final judgment.¹³ Second, whether the court of appeals erred in reversing the judgment in Bonsmara's favor and remanding for arbitration because the non-signatories did not have the right to compel arbitration.

In addressing the jurisdiction issue, the Court held that the court of appeals did have jurisdiction to consider the trial court's denial of the Hart Defendants' motion to compel arbitration. The Court cited the merger doctrine stating, "When a trial court renders a final judgment, the court's interlocutory orders merge into that judgment and may be challenged by appealing that judgment."¹⁴ Citing *Hernandez v. Ebrom*¹⁵ and legislative intent, the Court found that there is "nothing in the interlocutory appeal statute's¹⁶ permissive text ["may"] or context to indicate that the losing party waived his right to challenge the order after final judgment by failing to pursue an interlocutory appeal."¹⁷

The Court also held that the TCFA forum was available and the non-signatory Hart owners could compel Chapman and Bonsmara to arbitration. The Court described the TCFA forum availability as an issue of procedural arbitrability and, therefore, for the arbitrator to decide.¹⁸ TCFA stated it was available and willing to arbitrate the matter because Landrum and Pickett are

⁸ *Id.* at *7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *8.

¹² *Id.* at *9 and *33.

¹³ *Id.* at *9-10.

¹⁴ *Id.* at *10.

¹⁵ *Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009).

¹⁶ Tex. Civ. Prac. & Rem. Code §51.016; 9 U.S.C. §16.

¹⁷ *Bonsmara* at *12.

¹⁸ *Id.* at *26.

TCFA members, and the parties to the Agreement agreed to submit their disputes to TCFA arbitration.¹⁹ Nothing in the parties' arbitration agreement suggested that the arbitrable institution selection was an "essential" contract term or that it constituted a bar to arbitration, as a matter of law.²⁰ The Court applied this *John Wiley & Sons* exception as authority to retain this "procedural arbitrability" question that otherwise should have gone to the arbitrator. The Court overruled the issues raised by *Bonsmara* and affirmed the judgment of the court of appeals.²¹

OBSERVATIONS

1. The interlocutory appeal of a court denial of a motion to compel creates a highly strategic question with both legal and practical implications for the unsuccessful moving party.
2. *Bonsmara* makes more difficult the cost-benefit and risk-benefit analyses regarding the interlocutory appeal question in this situation.
3. The Texas Supreme Court in *Bonsmara* admits that "procedural arbitrability" is for the arbitrator²² but the Court then discusses a "no rational mind" exception that reserves to the court the procedural arbitrability question citing with approval²³ a 2003 Fifth Circuit case that appears to apply the "wholly groundless" evidentiary test that the U.S. Supreme Court overruled in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529-30 (2019).
4. *Bonsmara* can be read to contribute to arbitration "gamesmanship" (e.g., interlocutory appeal versus appeal of final judgment; who decides "procedural arbitrability"—court or arbitrator) that defeats the policies supporting arbitration as flexible, efficient, inexpensive, and final.

¹⁹ *Id.* at *27 (citing *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 520 (Tex. 2015); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)).

²⁰ *Id.* at *28 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 543, 557-58 (1964); *Gen. Warehousemen & Helpers Union Local 767 v. Albertson's Distribution, Inc.* 331 F.3d 485, 488 (5th Cir. 2003)).

²¹ *Id.* at *33.

²² *Id.* at *26 ("...which courts must allow arbitrators to decide.") (citing *G.T. Leach Builders* and *Howsam*).

²³ *Id.* at *28-29.