

Both contracts require arbitration of any disputes. Initially, the plaintiff commenced a single arbitration proceeding against both defendants. Acres originally objected to the consolidated proceeding and, as a consequence, the plaintiff was forced to initiate a second proceeding against Pizzagalli alone. Acres has since indicated that it no longer objects to a consolidated proceeding involving all three parties. Pizzagalli, however, does object to consolidation.

The Acres contract is silent on the issue of consolidation. By contrast, the Pizzagalli contract specifically addresses consolidation as follows:

16.4 No arbitration arising out of or relating to the Contract Documents shall include by consolidated, joinder or in any other manner any other person or entity (including [Acres, its] agents, employees or consultants) who is not a party to this Agreement unless:

16.4.1 the inclusion of such other person or entity is necessary if complete relief is to be afforded among those who are already parties to the arbitration,

16.4.2 such other person or entity is substantially involved in a question of law or fact which is common to those who are already parties to the arbitration and which will arise in such proceedings, and

16.4.3 the written consent of the other person or entity sought to be included and of [plaintiff] and [Pizzagalli] has been obtained for such inclusion, which consent shall make specific reference to this paragraph; but no such consent shall constitute consent to arbitration of any dispute nor specifically described in such consent or to arbitration with any part [sic] not specifically identified in such consent.

Pizzagalli Agreement & 16.4 (attached to Complaint). There appears to be no dispute that the conditions contained in && 16.4.1 and 16.4.2 have been satisfied.

The plaintiff argues in behalf of its motion that separate arbitrations will require substantial duplication of resources of all parties and present the possibility of inconsistent awards. It asserts that, despite the Act's silence on the issue of consolidation, the court has the authority to order consolidation, citing *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988),

and several cases decided by inferior courts outside of the First Circuit. Pizzagalli contends that it is entitled to the benefit of its bargain with the plaintiff, including the specific condition attaching to the arbitration provision which requires its express consent before any consolidation may be ordered.

It is undisputed that the Act applies to the underlying disputes. The Supreme Court has stated that "the purpose behind the [Act's] passage was to insure judicial enforcement of privately made agreements to arbitrate" and, in doing so, rejected "the suggestion that the overriding goal of the . . . Act was to promote the expeditious resolution of claims." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Thus, even when enforcement of an arbitration provision results in piecemeal litigation, as when one of two related disputes is adjudicated in court and the other in arbitration, the arbitration agreement of the parties is to be given effect. *Id.* at 221; *see also Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (Act preempts California statute which requires that litigants be provided a judicial forum for resolving wage disputes and therefore compels enforcement of private agreement to arbitrate); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (Act requires piecemeal resolution when necessary to give effect to arbitration agreement). Here, the plaintiff and Pizzagalli unmistakably agreed that no arbitration of a contract dispute would be consolidated with any related dispute absent Pizzagalli's express consent. To compel Pizzagalli to arbitrate its dispute with the plaintiff in a consolidated proceeding involving the plaintiff's dispute with Acres would undermine and conflict with the agreement Pizzagalli negotiated with the plaintiff, rather than enforce it according to its unambiguous terms. This the court may not do.

First Circuit caselaw is not to the contrary; indeed, it supports Pizzagalli's position. In *New England Energy Inc.*, an action filed in state court seeking consolidation of two arbitrations pursuant to the Massachusetts Uniform Arbitration Act and subsequently removed to federal court, the Court of Appeals ordered consolidation where the arbitration provisions in the parties' agreements were both

silent on the issue of consolidation and where the Massachusetts act provided that a party aggrieved by the refusal of another to agree to consolidate may apply to the superior court for a consolidation order.

The court repeatedly limited its holding to circumstances where the agreement between the parties is silent on consolidation and the pertinent state law specifically provides for the entry of a consolidated order. *New England Energy Inc.*, 855 F.2d at 3, 5, 7. In doing so, the court expressly noted the federal act's primary purpose of insuring the enforcement of privately negotiated arbitration agreements, *id.* at 4, and emphasized that a state's efforts at enhancing the arbitral process should not be hampered "so long as the state procedure does not directly conflict with a contractual provision," *id.* at 7. Indeed, in *Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc.*, 878 F.2d 5 (1st Cir. 1989), the court reversed, as an abuse of discretion, a consolidation order entered by the district court because it found that the order would force one or the other of two of three parties to forego the arbitration locale mandated by their separate contracts, both of which were silent on consolidation. It acknowledged that separate arbitrations presented the risk of inconsistent and duplicative awards affecting the common third party, but concluded that that party had no one to blame for such consequences except itself since it should have foreseen the problem and negotiated for a contractual clause authorizing consolidated arbitration. *Id.* at 9. The plaintiff here is entitled to no greater consideration, especially in view of the fact it acceded to Pizzagalli's condition affecting consolidation. The plaintiff must now live with the consequences of its agreement.

Accordingly, the plaintiff's motion to compel consolidated arbitration is **DENIED**.¹

Dated at Portland, Maine this 13th day of August, 1990.

¹ The plaintiff requests that the court at least order that the same panel of arbitrators be used for the two arbitrations. I decline to do this. Both agreements provide that arbitration is to be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. The plaintiff is free to seek the same consideration from the AAA which is the appropriate authority to consider such a request.

David M. Cohen
United States Magistrate