DOCKET NO. HHD CV 18 6099158 S	:	SUPERIOR COURT
EMPLOYERS INSURANCE CO. OF WAUSAU	:	J. D. OF HARTFORD
VS.	:	AT HARTFORD
THE HARTFORD	:	FEBRUARY 13, 2019

MEMORANDUM OF DECISION

Before the court are the plaintiff, Employers Insurance Co. Of Wausau (Wausau)'s petition to compel arbitration, and the defendant, The Hartford (Hartford)'s cross-motion to compel arbitration. The court heard oral argument on December 10, 2018. After consideration, for the reasons stated below, the defendant's motion is granted and the plaintiff's petition is denied.

I

FACTS AND PROCEDURAL BACKGROUND

Each party, Wausau, and Hartford, seeks to compel the other party to appoint an arbitrator pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq.

The facts are not in dispute. Around 1983, the parties entered into a Non-Obligatory Casualty Excess of Loss Reinsurance Agreement from January 1, 1983 to December 31, 1983 (Treaty 2736).[1] Treaty 2736 contained an arbitration provision that provides, in relevant part: "As a precedent to any right of action hereunder, if any dispute shall arise between [Hartford] and

[1] "A reinsurance treaty reinsures all policies in a defined block of an insurer's business, such as general liability. Under an excess of loss contract, the insurer retains liability for losses up to a specified threshold, known as the retention. If a loss exceeds the retention, the reinsurer is liable for all or an agreed part of the excess, up to the contractual limit of liability. Excess of loss contracts may consist of multiple layers, in which coverage under the first layer is triggered when the amount of the insurer's loss exceeds the retention, and each subsequent layer is triggered when the loss exhausts the limit of the layer below." *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 284 Conn. 744, 750 n.5, 936 A.2d 224 (2007).

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[Wausau] with reference to the interpretation of [Treaty 2736] or their rights with respect to any transaction involved, whether such dispute arises before or after termination of [Treaty 2736], such dispute, upon the written request of either party, shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two chosen. If either party refuses or neglects to appoint an arbitrator within thirty days after the receipt of written notice from the other party requesting it to do so, the requesting party may appoint two arbitrators. If the two arbitrators fail to agree in the selection of a third arbitrator within thirty days of their appointment, each of them shall name three, of whom the other shall decline two and the decision shall be made by drawing lots. . . . Said arbitration to be held in Hartford, Connecticut . . . ."

On May 25, 2018, Hartford demanded arbitration under Treaty 2736 and eighteen other contracts arising out of eight different reinsurance programs between the plaintiff and four companies: the defendant, First State Insurance Group (First State), Twin City Fire Insurance Company (Twin City), and New England Reinsurance Corporation (New England). First State, Twin City, and New England are subsidiaries of Hartford. The dispute arises from primary and excess insurance policies issued by Hartford and its affiliates to PPG Industries (PPG), which faced substantial asbestos-related liabilities based on its ownership stake in Pittsburgh Corning Corporation. After entering into an agreement with PPG to pay portions of the total settlement value, Hartford elected to satisfy its share of the settlement payment. It and its affiliates issued billings for reimbursement under nineteen different contracts with Wausau. Wausau denied that it owed any reimbursement.

On June 22, 2018, Wausau responded to Hartford's arbitration demand, arguing that each contract required separate arbitrators. However, to avoid such a scenario, Wausau proposed

consolidating the arbitrations into three separate proceedings against Hartford and its entities, naming a different arbitrator for each proceeding. Wausau appointed Joseph Pintagore as its arbitrator for disputes with Hartford.

On July 20, 2018, Hartford appointed Mark Wigmore as its arbitrator.[2] Shortly afterwards, on August 6, 2018, Hartford declined to proceed with Wausau's proposal, arguing that any consolidation was for the arbitrators to determine, not the parties, and demanded that the parties proceed with its single arbitration demand. On August 17, 2018, Wausau rejected Hartford's position and did not consent to submit the question of consolidation to a single panel, demanding the parties proceed with separate arbitrations for each reinsurance program at issue.

On that same day, Wausau filed its summons and petition with this court, demanding Hartford appoint an arbitrator under Treaty 2736. Wausau also filed an action in the United States District Court for the Central District of California, relating to two of the contracts at issue, and an action in the Massachusetts Superior Court, relating to sixteen of the contracts at issue.[3] All of these actions request the same relief: compel Hartford to appoint an arbitrator.

On November 5, 2018, Hartford filed its crossmotion to compel arbitration in this action, and objected to Wausau's motion, accompanied by a memorandum of law and exhibits. On December 6, 2018, Wausau filed its objection to Hartford's motion, accompanied by a

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[2] According to Treaty 2736, at this point, both arbitrators should have decided on a third. But, it appears neither made such a decision due to the dispute between the parties.

[3] On November 29, 2018, the Massachusetts Superior Court ruled for Hartford, ordering Wausau to appoint an arbitrator. *Employers Ins. Co. of Wausau* v. *New England Reinsurance Corp*; No. 1884CV02583, slip op. at 12 (Mass. Supp. November 29, 2018). On December 3, 2018, the federal district court ruled for Wausau, ordering Hartford to appoint an arbitrator. *Employers Ins. Co. Of Wausau v. The Hartford*, United States District Court, Docket No. 2:18CV07240 (CAS) (C.D. Ca. December 3, 2018).

memorandum of law and exhibits. Both parties filed replies to the respective objections. On December 10, 2018, the court heard oral argument.

II

DISCUSSION

"[A]rbitration is a creature of contract. . . . It is designed to avoid litigation and secure prompt settlement of disputes . . . . [A] person can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, he has agreed so to do. . . . No one can be forced to arbitrate a contract dispute who has not previously agreed to do so." (Internal quotation marks omitted.) *Nussbaum* v. *Kimberly Timbers, Ltd.*, 271 Conn. 65, 72, 856 A.2d 364 (2004). "The arbitration act; 9 U.S.C. §§ 1 through 16; governs written arbitration agreements that pertain to contracts involving interstate commerce." (Internal quotation marks omitted.) *Hottle* v. *BDO Seidman LLP*, 268 Conn. 694, 702, 846 A.2d 862 (2004). "[T]he arbitration act is to be applied by state courts as well as by federal courts." (Internal quotation marks omitted.) Id.

"When a dispute that is covered by an arbitration agreement arises, and a party to the arbitration agreement fails, neglects or refuses to submit to arbitration, the party seeking arbitration may petition a federal or state court for an order compelling arbitration. . . . Section 4 of the arbitration act provides that the court shall hear the parties, and, upon being satisfied that neither the making of a covered arbitration agreement, i.e., a written arbitration agreement pertaining to a contract involving interstate commerce, nor the defendant's failure to comply with that agreement is in dispute, the court shall issue an order directing the parties to proceed to arbitration in accordance with the terms of their arbitration agreement." (Internal quotation marks omitted.) *Hottle* v. *BDO Seidman LLP*, supra, 268 Conn. 703-704.

"As a result, prior to compelling arbitration, the [trial] court must first determine two threshold issues that are governed by state rather than federal law: (1) Did the parties enter into a contractually valid arbitration agreement? and (2) If so, does the parties' dispute fall within the scope of the arbitration agreement?" (Internal quotation marks omitted.) *Hottle* v. *BDO Seidman LLP*, supra, 268 Conn. 705. If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms. See *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

"Whether a particular dispute is arbitrable is a question for the court, unless, by appropriate language, the parties have agreed to arbitrate that question, also. . . . The intention to have arbitrability determined by an arbitrator can be manifested by an express provision or through the use of broad terms to describe the scope of arbitration . . . ." (Citation omitted; internal quotation marks omitted.) *Welch Group, Inc.* v. *Creative Drywall, Inc.*, 215 Conn. 464, 467, 576 A.2d 153 (1990).

Nevertheless, "procedural questions which grow out of the [parties'] dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." (Emphasis in original; internal quotation marks omitted.) *Dept. of Transportation* v. *White Oak Corp.*, 287 Conn. 1, 7 n.8, 946 A.2d 1219 (2008); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 592, 154 L. Ed. 2d 491 (2002). This includes the issue of whether to consolidate arbitration proceedings. See *Certain Underwriters at Lloyd's London* v. *Westchester Fire Ins. Co.*, 489 F.3d 580, 587-88 (3d Cir. 2007); *Certain Underwriters at Lloyds* v. *Cravens Dargan & Co.*, 197 F. App'x 645, 647 (9th Cir. 2006); *Dockser* v. *Schwartzberg*, 433 F.3d 421, 427 (4th Cir. 2006); *Employers Ins. Co. of Wausau* v. *Century Indemnity Co.*, 443 F.3d 573, 577

(7th Cir. 2006); *Shaw's Supermarkets, Inc.* v. *United Food & Commercial Workers Union, Local 791, AFL-CIO*, 321 F.3d 251, 254 (1st Cir. 2003); see also *Anwar* v. *Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462, 476 (S.D.N.Y. 2010) ("[f]ederal courts generally consider consolidation to be a question of procedure").

Certain Underwriters at Lloyd's London v. *Westchester Fire Ins. Co.*, supra, 489 F.3d 580, is particularly instructive. In that case, the defendant demanded arbitration involving two treaties covering eight reinsurance contracts. See id., 582. The plaintiffs brought an action, arguing that each contract required a separate arbitrations. See id., 583. The Third Circuit rejected that argument, stating "[w]hether requiring the [plaintiffs] to select an arbitrator for each program is consistent with the contractual language will be appropriately resolved by the arbitrators once the panels are convened." Id., 588.

Similarly, in *Employers Ins. Co. of Wausau* v. *Century Indemnity Co.*, supra, 443 F.3d 573, the plaintiff (the same one as in this action) brought an action for a declaratory judgment, arguing that the two reinsurance agreements it had with the defendant required separate arbitrations. See id., 574. The court rejected that argument, holding that consolidation was a procedural question for the arbitrator. See id., 577.

Lastly, in *Dockser* v. *Schwartzberg*, supra, 433 F.3d 421, the parties quarreled over whether one or three arbitrators should be appointed. The Court held that "the question of the proper number of arbitrators is for arbitral rather than judicial decision." Id., 427. The court also rejected the plaintiffs "chicken and egg" argument that the arbitrators decide how many of them should decide the underlying dispute. Id. The plaintiffs "claim that if x number of arbitrators decide that there ought to be y number of arbitrators, the decision becomes ipso facto invalid. But

many procedural questions exhibit this supposed bootstrapping problem, and accepting plaintiffs' argument would nullify the rule that these questions are arbitrable. Under plaintiffs' view, an arbitrator could not, for example, determine whether an arbitration agreement required arbitration in Boston instead of California . . . without succumbing to paralysis as to where to hold the proceedings necessary to decide the issue. *A similar conundrum would arise regarding whether the permissibility of consolidating separate arbitration proceedings is an issue for a single arbitrator or a host of different ones*. . . . We need not countenance such a result, which would defy both the Supreme Court and the congressional policy favoring arbitration. By presumptively remitting procedural questions to the arbitral body, the FAA necessarily recognizes that decisionmaker's authority to answer them." (Citations omitted; emphasis added.) Id.; see also *Shaw's Supermarkets, Inc.* v. *United Food & Commercial Workers Union, Local 791, AFL-CIO*, supra, 321 F.3d 254 ("[l]eaving the decision whether to consolidate the three proceedings in the hands of the arbitrator comports with long-standing precedent resolving ambiguities regarding the scope of arbitration in favor of arbitrability").

In sum, "[w]hether an arbitration proceeding should be consolidated with one or more other arbitration proceedings is a question that can be resolved only after it is determined that arbitration between two particular parties is proper. Furthermore . . . it is a question properly addressed by the arbitrator." *Blimpie International, Inc.* v. *Blimpie of the Keys*, 371 F. Supp. 2d 469, 473 (S.D.N.Y. 2005); *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444, 452-53, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003) ("the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures . . . . It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question" [Citation omitted; Emphasis in original.]).

In the present case, the parties do not dispute that they entered into a valid arbitration agreement and that their dispute falls within the scope of that agreement. Thus, the court need not and cannot proceed with any further analysis. The procedural question of consolidation is for the arbitrators, not for the court, to decide. See *Green Tree Financial Corp.* v. *Bazzle*, supra, 539 U.S. 452-53; *Certain Underwriters at Lloyd's London* v. *Westchester Fire Ins. Co.*, supra, 489 F.3d 588. All the court must do here is determine (1) whether the parties entered into a contractually valid arbitration agreement, and (2) if so, does the parties' dispute fall within the scope of that agreement? See *Hottle* v. *BDO Seidman LLP*, supra, 268 Conn. 705. Both parties agree that there is a valid agreement and this dispute falls within the scope of the agreement. Thus, the court's analysis is complete and the court must enforce the agreement. See *Dean Witter Reynolds, Inc.* v. *Byrd*, supra, 470 U.S. 218.

Nevertheless, Wausau makes three arguments against Hartford's motion. First, Wausau argues that, by granting Hartford's motion, the court would be rewriting the parties' agreement. The court does not agree. Treaty 2736 provides in relevant part: "[I]f any dispute shall arise between [Hartford] and [Wausau] with reference to the interpretation of [Treaty 2736] or their rights with respect to any transaction involved . . . such dispute, upon the written request of either party, shall be submitted to three arbitrators, one to be chose by each party, and the third by the two chosen." Hartford demanded arbitration and Wausau named three arbitrators instead of one, failing to comply with the agreement. By ordering Wausau to arbitrate, the court is merely enforcing the terms of the agreement.

Second, Wausau argues that the court is deciding the question of consolidation by granting Hartford's motion. Again, the court does not agree. It is merely enforcing the agreement as the parties drafted it. If Wausau sought separate arbitration for each contract, it could have

drafted such a provision in each agreement. Because it did not, the court is bound by the parties' agreement. See *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 392, 142 A.3d 227 (2016). Moreover, Wausau's argument is the same "chicken and egg" argument that the Fourth Circuit rejected. See *Dockser* v. *Schwartzberg*, supra, 433 F.3d 427. The Massachusetts Superior Court also rejected Wausau's argument. See *Employers Ins. Co. of Wausau* v. *New England Reinsurance Corp*; No. 1884CV02583, slip op. at 12 (Mass. Supp. November 29, 2018) (Massachusetts decision).[4] The reasoning in those cases is sound and the court agrees with it.

Third, Wausau argues that adopting Hartford's approach would decide other procedural questions, such as methods of umpire appointment, venues, and choice of law provisions. Once again, the court makes no such determinations, which are for the arbitrators.[5]

In sum, Hartford made a demand for arbitration under Treaty 2736 on May 25, 2018. Wausau did not comply, naming three arbitrators instead of one while Hartford named one. The court may compel Wausau to comply with Treaty 2736 and appoint an arbitrator.

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[4] Wausau relies on *Employers Ins. Co. Of Wausau v. The Hartford*, supra, United States District Court, Docket No. 2:18CV07240 (CAS). The court in that action, involving the same dispute and the same parties as this one, concerning Treaty 2718, granted Wausau's motion to compel arbitration and denied Hartford's motion to compel arbitration. As stated above, the court finds the analysis in the Massachusetts decision to be persuasive.

[5] Wausau further argues that the court should not grant Hartford's motion because it failed to comply with Connecticut's procedural arbitration laws, General Statutes § 52-408 et seq. No decisional authority is cited to support this argument. The court declines to address this argument because it is inadequately briefed and, therefore, considers it to be abandoned. See *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003).

CONCLUSION

For the reasons stated above, Hartford's motion to compel arbitration is granted, Wausau is directed to appoint a single arbitrator in response to Hartford's demand, and to proceed with forming a panel. The court denies Wausau's petition.

BY THE COURT

Robert B. Shapiro

ROBERT B. SHAPIRO
JUDGE TRIAL REFEREE

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HHD-CV18-6099158-S — EMPLOYERS INSURANCE COMPANY OF WAUSAU v. THE HARTFORD

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Case Type: C30 - Contracts - Specific Performance
Court Location: HARTFORD JD
List Type: No List Type
Trial List Claim:
Last Action Date: 02/06/2019 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party		No Fee Party	Category
P-01	EMPLOYERS INSURANCE COMPANY OF WAUSAU		Plaintiff
	Attorney: GERBER CIANO KELLY BRADY LLP (439912) File Date: 12/10/2018 175 CAPITAL BOULEVARD 4TH FLOOR ROCKY HILL, CT 06067		
	Attorney: PHV PALAZZOLO HILARY L 11/27/18 (440199) File Date: 12/10/2018 LARSON KING LLP 30 EAST 7TH ST STE 2800 ST PAUL, MN 55101		
D-01	THE HARTFORD		Defendant
	Attorney: ALLISON SUE ERCOLANO (439060) File Date: 09/19/2018 TWO INTERNATIONAL PLACE BOSTON, MA 02110		
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