

REHNQUIST, C. J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–634

GREEN TREE FINANCIAL CORP., NKA CONSECO
FINANCE CORP., PETITIONER *v.* LYNN W.
BAZZLE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH
CAROLINA

[June 23, 2003]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE
O’CONNOR and JUSTICE KENNEDY join, dissenting.

The parties entered into a contract with an arbitration clause that is governed by the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et seq.* The Supreme Court of South Carolina held that arbitration under the contract could proceed as a class action even though the contract does not by its terms permit class-action arbitration. The plurality now vacates that judgment and remands the case for the arbitrator to make this determination. I would reverse because this determination is one for the courts, not for the arbitrator, and the holding of the Supreme Court of South Carolina contravenes the terms of the contract and is therefore pre-empted by the FAA.

The agreement to arbitrate involved here, like many such agreements, is terse. Its operative language is contained in one sentence:

“All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding

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arbitration by one arbitrator selected by us with consent of you.” App. 34.

The decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts. See *Major League Baseball Players Assn. v. Garvey*, 532 U. S. 504, 509–510 (2001) (*per curiam*). The Supreme Court of South Carolina relied on this principle in deciding that the arbitrator in this case did not abuse his discretion in allowing a class action. 351 S. C. 244, 266–268, 569 S. E. 2d 349, 361–362 (2002). But the decision of *what* to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator. As we stated in *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 945 (1995):

“[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide.”

Just as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted. Those are the two provisions in the sentence quoted above, and it is difficult to say that one is more important than the other. I have no hesitation in saying that the choice of arbitrator is as important a component of the agreement to arbitrate as is the choice of what is to be submitted to him.

Thus, this case is controlled by *First Options*, and not by our more recent decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U. S. 79 (2002). There, the agreement

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provided that any dispute “shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member.” *Id.*, at 81 (internal quotation marks omitted). Howsam chose the National Association of Securities Dealers (NASD), and agreed to that organization’s “Uniform Submission Agreement” which provided that the arbitration would be governed by NASD’s “Code of Arbitration Procedure.” *Id.*, at 82. That code, in turn, contained a limitation. This Court held that it was for the arbitrator to interpret that limitation provision:

““[P]rocedural” questions which grow out of the dispute and bear on its final disposition’ are presumptively *not* for the judge, but for an arbitrator, to decide. *John Wiley [& Sons, Inc. v. Livingston]*, 376 U. S. 543, 557 (1964) (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’” *Id.*, at 84.

I think that the parties’ agreement as to how the arbitrator should be selected is much more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options*, than it is to “allegations of waiver, delay, or like defenses to arbitrability,” which are questions for the arbitrator under *Howsam*.

“States may regulate contracts, including arbitration clauses, under general contract law principles,” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U. S. 265, 281 (1995). “[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 474 (1989). But “state law may nonetheless be pre-empted to the

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extent that it actually conflicts with federal law—that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.*, at 477 (quoting *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)).

The parties do not dispute that this contract falls within the coverage of the FAA. 351 S. C., at 257, 569 S. E. 2d, at 355. The “central purpose” of the FAA is “to ensure that private agreements to arbitrate are enforced according to their terms.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 53–54 (1995) (quoting *Volt, supra*, at 479 (internal quotation marks omitted)). See also *Doctor’s Associates, Inc. v. Casarotto*, 517 U. S. 681, 688 (1996); *First Options, supra*, at 947. In other words, Congress sought simply to “place such agreements upon the same footing as other contracts.” *Volt, supra*, at 474 (quoting *Scherk v. Alberto-Culver Co.*, 417 U. S. 506, 511 (1974) (internal quotation marks omitted)). This aim “requires that we rigorously enforce agreements to arbitrate,” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213, 221 (1985) (internal quotation marks omitted)), in order to “give effect to the contractual rights and expectations of the parties,” *Volt, supra*, at 479. See also *Mitsubishi Motors, supra*, at 626 (“[A]s with any other contract, the parties’ intentions control”).

Under the FAA, “parties are generally free to structure their arbitration agreements as they see fit.” *Volt, supra*, at 479. Here, the parties saw fit to agree that any disputes arising out of the contracts “shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.” App. 34. Each contract expressly defines “us” as petitioner, and “you” as the respondent or respondents named in that specific contract. *Id.*, at 33 (“‘We’ and ‘us’ means the Seller *above*, its successors and assigns”; “‘You’ and ‘your’ means each Buyer *above* and

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guarantor, jointly and severally” (emphasis added)). The contract also specifies that it governs all “disputes . . . arising from . . . *this* contract or the relationships which result from *this* contract.” *Id.*, at 34 (emphasis added). These provisions, which the plurality simply ignores, see *ante*, at 5, make quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer.

While the observation of the Supreme Court of South Carolina that the agreement of the parties was silent as to the availability of class-wide arbitration is literally true, the imposition of class-wide arbitration contravenes the just-quoted provision about the selection of an arbitrator. To be sure, the arbitrator that administered the proceedings was “selected by [petitioner] with consent of” the Bazzles, Lackey, and the Buggses. *Id.*, at 34–36. But petitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well. Petitioner may well have chosen different arbitrators for some or all of these other disputes; indeed, it would have been reasonable for petitioner to do so, in order to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator. As petitioner correctly concedes, Brief for Petitioner 32, 42, the FAA does not prohibit parties from choosing to proceed on a class-wide basis. Here, however, the parties simply did not so choose.

“Arbitration under the Act is a matter of consent, not coercion.” *Volt, supra*, at 479. Here, the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen. It did not enforce the “agreemen[t] to arbitrate . . . according to [its] terms.” *Mastrobuono, supra*, at 54 (internal quotation marks omitted). I would

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therefore reverse the judgment of the Supreme Court of South Carolina.