

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF AIKEN
SECOND JUDICIAL CIRCUIT

Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2022-000546
Circuit Court Case No. 2021-CP-02-1306

REGIONS BANK.....Respondent,

v.

CDIC DEVELOPMENT COMPANY, LLC.....Appellant.

APPELLANT’S PETITION FOR REHEARING

Arbitration is not “special.” It is a matter of contract, and arbitration agreements are to be enforced like any other contract. But this Court’s Opinion mistakenly elevates generalized common law principles over these parties’ express, contractual agreement that the Federal Arbitration Act (“FAA”) is to control their relationship—both procedurally and substantively. By overlooking the import of the parties’ agreement, this Court gave to the Respondent Bank an “extension” beyond the FAA’s clear one-year limitations period, which the parties did not bargain for, and to which Appellant CDIC did not agree. As set forth herein, CDIC respectfully requests that this Court would reconsider and rehear its Opinion No. 2024-UP-153 (the “Opinion”).

I. This Court misapprehended that the contract controls over common law.

In deciding to apply the procedural provisions of the South Carolina Uniform Arbitration Act (“SCUAA”) to this action to confirm an arbitration award, this Court wrongfully overlooked that the contract plainly states that the Federal Arbitration Act (“FAA”) “**shall apply**” to the enforcement of the arbitration provision, including the arbitration provision’s procedural mechanism allowing that “[j]udgment upon any award rendered by an arbitrator may be entered in any court having jurisdiction.” (R. p. 27). To justify its decision, the Opinion mistakenly relies on the case of *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 748 S.E.2d 221 (2013)—rather than on the plain language of the contract—to arrive at a generalized conclusion that (generally) state procedural law applies to arbitration. First, this is backwards—the parties’ agreement trumps generalized common law principles. Second, *Henderson* is distinguishable in two important respects: (a) the contract in *Henderson* limited the application of the FAA to the arbitration proceedings themselves (and not to subsequent confirmation of the award), and (b) there was ultimately no difference, as between the SCUAA and the FAA, in the outcome of the *Henderson* case, a reality which bore significantly on the *Henderson* Court’s decision to apply the SCUAA.

1. The parties’ agreement controls over generalized common law.

Our State Supreme Court has bent over backwards to instruct that agreements to arbitrate are no different than any other contract. “[O]ur statements that the law ‘favors’ arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as [they] respect[] and enforce[] all contractual provisions.” *Sanders v. Savannah*

Highway Auto. Co., 440 S.C. 377, 892 S.E.2d 112 (2023), *quoting Palmetto Construction Group, LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021). The plain language of a contract always determines its force and effect. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011). The contract here is the Regions Bank Note, which was drafted by Respondent. (R. p. 25). The Note’s arbitration provision is not ambiguous: it plainly says that the arbitration provision (which includes an entry of judgment clause for confirmation of the award) is to be (1) construed, (2) interpreted, and (3) enforced in accordance with the FAA. (R. p. 27). This means – plainly – that the entry of judgment clause is to be construed, interpreted, and enforced in accordance with the FAA. The FAA requires a party to seek entry of judgment “within one year after the award is made.” 9 U.S.C. § 9. **If the entry of judgment clause in the Note’s arbitration provision is “construed, interpreted, and enforced” under the FAA (as the agreement requires), then Respondent was unambiguously obligated to confirm its arbitration award “within one year after the award was made.”**

The Note does not say that the FAA applies . . . but except it doesn’t apply to the entry of judgment clause. The Note does not say that the FAA applies . . . but except that the SCUAA applies for procedural matters. However, this Court has mistakenly read those words into the contract and thereby elevated the “general rule” of *Henderson* over the parties’ clear intent that the FAA is to govern all aspects of the parties’ arbitration agreement. It is well-established that parties may contract to terms as they see fit, even if those terms are contrary to the “general rules” that otherwise would apply. Regions Bank is a sophisticated entity that wrote the contract at issue – and Regions Bank agreed

that the FAA would apply to all aspects of the provision. Contracting parties are free to select the law by which they agree to be bound. See *Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011) (“Choice of law clauses are generally honored in South Carolina.”), citing *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) (“Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law.”).

Regions Bank could well have written the contract to carve out an exception for the FAA’s application, as to the entry of judgment clause or for procedural issues, but it did not do so. This Court should therefore have bound Regions Bank to its own terms, requiring application of the FAA, even if those terms limit the bank’s ability to bring an enforcement action beyond one year. See *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 373 S.C. 14 (2007) (“this Court acknowledges that parties are always free to contract away their rights”); *Hardee v. Hardee*, 355 S.C. 382, 585 S.E.2d 501 (2003) (parties to an agreement “may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably. . . .”) (internal citations and quotations omitted); *S. S. Newell & Co. v. American Mut. Liability Ins. Co.*, 19 S.E.2d 463, 199 S.C. 325 (S.C. 1942) (“judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. It is not the province of the courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended.”) (citing *Guarantee Co. v. Mechanics’ Sav. Bank & Trust Co.*, 183 U.S. 402, 22 S.Ct. 124, 46 L. Ed. 253).

In sum, the parties expressly contracted for the FAA to apply to all aspects of their relationship in arbitration. This Court's decision wrongly thwarts the parties' express agreement, and CDIC respectfully asks that the Opinion be withdrawn and corrected. As discussed next, the *Henderson* case does not justify a change to the parties' agreement.

2. This Court overlooked that the *Henderson* Court punted.

This Court overlooked that the contract and the issues in *Henderson* – which drove the outcome of that case – were markedly different from the arbitration provision and issues here. The *Henderson* Court ultimately shrugged its shoulders, because whether the FAA or the SCUAA governed made no material difference to the outcome of the issues in that particular case. In doing so, the Court indicated that such a difference – if it existed – would have mattered, as it does here.

A. The FAA specifically applies to the entry of judgment clause here.

The arbitration clause in *Henderson* was quite narrow. As opposed to the provision at issue here (the entirety of which unambiguously is to be governed by the FAA), the *Henderson* agreement was very clear that the FAA applied only to the arbitration proceeding itself (and not the enforcement or construction of the arbitration provision). *Henderson*, 748 S.E.2d at 223, 226 (“The sales contract prepared by Dealer contained an arbitration provision that required any disputes to be submitted to binding arbitration that ‘shall be governed by the [FAA].’ . . . the arbitration agreement stated the FAA would apply **to the arbitration.**”) (emphasis added).

This Court misapprehended the significance of this difference. The *Henderson* Court's decision to apply the SCUAA hinged on its determination that the parties'

contract was silent on the question of which law applied to the confirmation of the arbitration award and—in any event—that it did not matter. Therefore, *because the contract did not speak to it*, the Court applied the “general rule” that state law applies to procedural issues in arbitration proceedings:

although the arbitration agreement stated the FAA would apply to the arbitration, it did not expressly state the FAA would apply to the subsequent procedure for confirmation once a final award was made. However, this is not a concern because the outcome would be the same . . . [A] state’s procedural rules apply in state court unless they conflict with . . . the FAA.

Henderson, 748 S.E.2d at 226-227. In other words, if: (1) the contract is silent on governing law, and (2) so long as state procedural rules are consistent with the federal rules, then (3) *Henderson* says that state procedural rules apply. This Court has misapprehended these three components of the *Henderson* ruling.

There is an important procedural difference between FAA and the SCUAA, which *matters* here: the FAA has a one-year statute of limitations, whereas the SCUAA has none. This Court overlooked that Regions Bank and CDIC deliberately contracted to have the FAA apply to the enforcement of their arbitration provision, including the FAA’s swift mechanism for summary confirmation “within one year.” Arbitration is a creature of contract, wherein the parties agree to be bound by their own rules for the resolution of disputes—outside of the court. This is more efficient, less expensive, and it also has the benefit of being predictable: parties to an arbitration agreement are governed by the rules that they have themselves chosen. Rather than slogging through a years-long court process, parties to an arbitration agreement can have their disputes decided promptly. This Court has overlooked the parties’ express intent for swift resolution by applying the

prolonged procedural limitations period in the SCUAA.

CDIC respectfully requests that this Court would withdraw its Opinion, and correct it to honor the parties' express agreement that the FAA would apply—both to procedural and substantive matters—because there is a material difference between the two statutes. Under *Henderson*, this is the right outcome.

II. Regions Bank failed to apply for confirmation “within one year,” but this Court mistakenly extended the Bank’s bargained-for deadline by applying the SCUAA.

This Court misapprehended the parties' contract and thus applied the SCUAA. But the FAA, which the parties identified as controlling, contains a one-year limitations period in which a party may seek summary confirmation of an award. 9 U.S.C. § 9. Because Regions Bank went outside the one-year period, the Respondent bank's petition for confirmation of the award should have been dismissed.

There is no South Carolina precedent on the interpretation of the 9 U.S.C. § 9 limitations period, but because the parties agreed that it applied, this Court should have addressed this a novel question. “Determining the proper interpretation of a statute is a question of law” *Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41. This Court reviews questions of law de novo. *Id.* In interpreting a statute, the Court is to “read the contract or statute to determine if its meaning is clear and unambiguous.” *Id.* **There is no ambiguity in the FAA’s requirement that a party seek confirmation of an arbitration award “within one year.”** 9 U.S.C. § 9.

Initially, there is no dispute that Regions Bank waited two years to petition the

lower court for confirmation of its arbitration award against CDIC.¹ The question for this Court was simply whether the FAA's unambiguous "within one year" requirement rendered Regions Bank's petition untimely. While the arbitration clause within the Note permits Regions Bank to apply to a court for confirmation of its arbitration award against CDIC, the FAA (incorporated by reference in the arbitration clause) plainly provides that a party to an arbitration has one year within which to seek summary confirmation of an arbitration award:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then **at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award**, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9 (emphasis added).

The lower court wrongly found that this one-year statute of limitations within the FAA is "permissive," rather than mandatory. (R. p. 14). This Court should reconsider its Opinion and reverse this error. Among other problems, the lower court's order wrongly relied on a disfavored 30-year-old decision by the Federal Fourth Circuit, *Sverdrup Corp. v. WHC Constructors Inc.*, 989 F.2d 148, 156 (4th Cir. 1993).² This Court is not bound by outdated, disfavored federal law. It can come to its own conclusion as to what the FAA's

¹ Regions Bank's Petition to Confirm Arbitration Award states in Paragraph 8 that the award was issued on June 21, 2019. Regions Bank filed the Petition on June 22, 2021, more than two years later. (R. p. 22).

² For preservation purposes, CDIC incorporates by reference herein its briefing on the statutory construction of 9 U.S.C. § 9, including its Final Brief and its Reply Brief, filed with the Court on January 17, 2023.

unambiguous language means. A plain reading of the statute requires a party to apply for confirmation of any arbitration award “**at any time within one year after the award is made.**” 9 U.S.C. § 9 (emphasis added). CDIC urges this Court to read and interpret the FAA as it is plainly written, to impose a one-year statute of limitations on parties who wish to apply for summary confirmation of an arbitration award. Pursuant to this clear construction, Regions Bank’s application—filed two years after the award at issue was made—was untimely.

CDIC respectfully submits that this Court misapprehended the parties’ agreement, which clearly manifests their intent to be governed by the FAA, including as to confirmation of the arbitration award. This Court should withdraw its Opinion, apply the FAA, and reverse the lower court because Regions Bank filed its petition to confirm its arbitration award two years after the award was rendered, in contravention of the FAA’s one-year limitation period.

CONCLUSION

For the reasons set forth above, and in CDIC’s briefs to this Court, Appellant CDIC respectfully asks this Court to withdraw and correct its Opinion, which misapprehended the clear language of the parties’ agreement, misunderstood the *Henderson* decision, and therefore erroneously applied the SCUAA instead of enforcing the FAA’s one-year limitation on confirmation of arbitration awards.

[signature appears on the next page]

Respectfully submitted,

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SC Court of Appeals

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PROOF OF SERVICE

I certify that on May 31, 2024, I have served *Appellant's Petition for Rehearing* by sending the same to Respondent's attorneys of record, Jonathan Klett and Sarah Spruill, at their email addresses of record with AIS.

s/ Ainsley Tillman
Attorney for Appellant