2012 IL App (1) 103425-U

SIXTH DIVISION
May 11, 2012

No. 1-10-3425

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLEN S. MUSIKANTOW, AMY MUSIKANTOW, ASM DELAWARE TRUST, DONALD W. STRANG, JR., KAREN STRANG, DWS FAWNWOOD TRUST, DONALD W. STRANG, III, DAWN STRANG, DWS3 MOREWOOD TRUST, DAVID E. STRANG, MARILEE K. STRANG, DES PARKLAWN TRUST, PETER W. STRANG, JENNIFER STRANG, PWS AVALON TRUST, JOHN B. SHAW, ALLISON S. SHAW, AND AS SUNSTONE TRUST,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 10 CH 02070
DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES, INC. d/b/a DEUTSCHE BANK ALEX. BROWN, AND DAVID PARSE,	)	The Honorable LeRoy K. Martin, Jr. Judge Presiding.
Defendants-Appellees.	)	

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* Plaintiffs' claims against defendant investment strategists and tax professionals arising from fraudulent tax shelters were within the scope of the arbitration provision that the parties signed. The trial court properly granted the

professionals' motions to stay the case pending arbitration where the arbitration clause was neither substantively nor procedurally unconscionable.

¶ 2 The plaintiffs, Allen S. Musikantow, Amy Musikantow, ASM Delaware Trust, Donald W. Strang, Jr., Karen Strang, DWS Fawnwood Trust, Donald W. Strang, III, Dawn Strang, DWS3 Morewood Trust, David E. Strang, Marilee K. Strang, DES Parklawn Trust, Peter W. Strang, Jennifer Strang, PWS Avalon Trust, John B. Shaw, Allison S. Shaw, and AS Sunstone Trust (collectively, the Musikantows), appeal the trial court's grant of the motions to compel arbitration filed by Deutsche Bank AG, Deutsche Bank Securities, Inc., d/b/a Deutsche Bank Alex. Brown, and David Parse (collectively, Deutsche Bank). The Musikantows filed suit against Deutsche Bank for damages stemming from the admittedly fraudulent tax shelters Deutsche Bank devised for the Musikantows. The Musikantows claims, however, are within the ambit of the arbitration clause agreed to by the parties, which provides for arbitration of "*any* controversies which may arise" between the parties. (Emphasis added.) The purported lack of mutuality on the duty to arbitrate or the limitation on discovery during an arbitration proceeding does not render the arbitration provision substantively unconscionable. Nor is the arbitration agreement procedurally unconscionable when disclosure was made to the Musikantows, who are sophisticated business individuals and entities, and the arbitration clause states, in capital letters, above the signature line, that "THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 20." We affirm.

¶ 3 BACKGROUND

¶ 4 The Musikantows sold their company in 2001, and on March 6 of that year they spoke to

their advisors at Bank One about certain strategies to reduce their tax obligations resulting from the sale. They were introduced to the representatives of Deutsche Bank, who elaborated on the strategies and advised the Musikantows that an allegedly independent law firm, Jenkens & Gilcrest, P.C., would issue a formal opinion confirming the legal propriety of the recommended strategies. Jenkens & Gilcrest later issued such a letter. The Musikantows agreed to engage Deutsche Bank to implement the strategies in exchange for fees. On or about November 27, 2001, the Musikantows executed the Account Agreements, the pertinent portion of which contained an arbitration clause:

> "**20. Arbitration**
>
> I understand that (1) Arbitration is final and binding on the parties. (2) The parties are waiving their right to seek remedies in court, including the right to jury trial. (3) Prearbitration discovery is generally more limited than and different from court proceedings. *** (5) The panel of arbitrators would typically include a minority of arbitrators who were or are affiliated with the securities industry. I agree to arbitrate with you any controversies which may arise, whether or not based on events occurring prior to the date of this agreement, including any controversy arising out of or relating to any account with you, to the construction, performance or breach of any agreement with you, or to transactions with or through you, only before the New York Stock Exchange or the National

Association of Securities Dealers Regulation, Inc., at my election."

The clause appears in the same font as the rest of the Account Agreements.

¶ 5 Immediately above the Account Agreements' signature line, which bears a signature on behalf of the Musikantows, appears language in capital letters stating, "THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 20." Another provision states that "This agreement and My Account(s) shall be governed by, and construed in accordance with, the laws of the State of New York."

¶ 6 In July 2004, the Internal Revenue Service (IRS) began auditing the Musikantows' 2001 federal tax returns. The IRS ultimately held the Deutsche Bank tax strategy was an illegal and abusive tax shelter, disallowed the losses it generated, ordered the Musikantows to pay back taxes, and assessed interest and penalties. In 2006, the Musikantows executed settlements with the IRS and paid the back taxes, interest, and penalties.

¶ 7 On June 23, 2009, the United States criminally indicted defendant David Parse, a Deutsche Bank employee involved in the design, marketing, sale, and implementation of the tax strategies used by the Musikantows. The indictment alleged Parse created false and fraudulent factual scenarios to generate tax savings for the tax shelter clients from which he earned substantial commissions. Jenkens & Gilcrest, Deutsche Bank, and other entities eventually entered into a non-prosecution agreement with the United States in which they agreed to pay substantial penalties. See *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 8 On December 21, 2010, defendant Deutsche Bank AG entered into a Non-Prosecution Agreement with the Office of the United States Attorney for the Southern District of New York

and the Tax Division of the Department of Justice, whereby Deutsche Bank AG agreed to pay the United States $553,633,153.00 for its role in implementing fraudulent tax shelters, including, evidently, the one in question. Deutsche Bank AG admitted in the agreement that it "participated in and implemented fraudulent tax shelters."

¶ 9 On January 15, 2010, the Musikantows filed the instant action, seeking damages for Deutsche Bank's involvement in the sale and implementation of the tax shelter that caused the Musikantows to owe back taxes, interest, and penalties to the IRS. Deutsche Bank AG and Deutsche Securities moved to stay the action pending arbitration pursuant to Section 3 of the Federal Arbitration Act (FAA), 9 U.S.C. § 3 (2006), on March 30, 2010; David Parse did the same on April 1, 2010. Each defendant argued the Musikantows' claims fell within the scope of the arbitration provision. The Musikantows contended the claims were outside that scope, and argued that the arbitration provision was procedurally unconscionable because it was part of a criminal fraud and because the provision was "buried in small print." They also contended the provision was substantively unconscionable because it did not impose mutual obligations on the parties to arbitrate and because the Financial Industry Regulatory Authority (FINRA's)[1] arbitration rules imposed "harsh, one-sided discovery limitations."

¶ 10 The trial court heard oral argument on November 3, 2010. Following argument, the court recessed to review the parties' submissions, the Account Agreements, and pertinent case law.

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[1] The Financial Industry Regulatory Authority was created through the merger of the regulatory functions of NASD and NYSE on July 30, 2007. FINRA is now the body that would arbitrate this dispute.

Judge LeRoy K. Martin, Jr. granted the motions to stay arbitration: "I'm not saying that I agree with every argument the defendants have put forth, but I do agree that there is this agreement to arbitrate. *** I believe there's an agreement there. The body of FINRA is well able to address some of the issues that the plaintiff has raised ***. I understand the issues regarding discovery. But that's, you know, that's in almost any arbitration agreement, there's a limitation of discovery that happens. That's part of the process." This timely appeal followed.

¶ 11 ANALYSIS

¶ 12 The Musikantows contend the arbitration provision covers only "accounts," "agreements," or "transactions" between the parties and their claims against Deutsche Bank do not fall within any of the three categories. They also challenge the arbitration provision as substantively unconscionable because of the limitations on discovery in an arbitration proceeding and because, they claim, the duty to arbitrate was not mutual. The Musikantows contend the provision is also procedurally unconscionable because it arose from a criminal fraud and was "buried in small print in the 'boilerplate' Account Agreements."

¶ 13 In separate but substantially similar briefs, Deutsche Bank AG and David Parse counter that the provision, quoting its language, covers "any controversies which may arise" between the parties; that discovery limitations are inherent in arbitration; that the parties were mutually bound to arbitrate and, in any event, mutuality is not a determining factor regarding the enforceability of an arbitration agreement; that any criminal activity did not affect the Musikantows' free choice to agree to arbitrate; and that the arbitration provision was anything but "buried" in the Account Agreements.

¶ 14 We agree with the parties that our review of the trial court's contractual interpretation in this case is *de novo*. *Kinkel v. Cingular Wireless*, 223 Ill. 2d 1, 22 (2006). We also agree with the Musikantows' assertion, adopted by Deutsche Bank, that in light of the Account Agreements' choice of law provision, "the scope and enforceability of the arbitration provisions are analyzed under the Federal Arbitration Act as applied under New York law." See *Roubik v. Merrill Lynch, Pierce, Fenner & Smith*, 181 Ill. 2d 373, 378 (1998) (New York law properly applied in an arbitration case involving a choice of law provision nearly identical to the one before us); *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 381 n.6 (S.D.N.Y. 2002) ("Although the FAA is a federal statute, district courts have applied principles of state contract law to evaluate the validity of an agreement to arbitrate."); *Security Insurance Co. of Hartford v. TIG Insurance Co.*, 360 F. 3d 322, 326 (2d Cir. 2004). "The burden [is] on *** the party seeking arbitration[] to demonstrate a 'clear and unequivocal' agreement to arbitrate." *Gerling Global Reinsurance Corp. v. Home Insurance Co.*, 752 N.Y.S.2d 611, 616 (N.Y. Sup. Ct. 2002).

¶ 15 Section 3 of the FAA provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with

the terms of the agreement." 9 U.S.C. § 3 (2006).

The FAA evinces "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Under New York law, arbitration is a favored method of dispute resolution. *Hanover Insurance Co. v. Losquadro*, 600 N.Y.S.2d 419, 422 (N.Y. Sup. Ct. 1993).

¶ 16 Scope of Arbitration Provision

¶ 17 "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses*, 460 U.S. at 24-25. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Under New York law, "courts should 'construe arbitration clauses as broadly as possible' [citation], and any doubt or ambiguity as to the scope of the arbitration agreement should be resolved in favor of arbitration." *Verizon N.Y. Inc. v. Broadview Networks, Inc.*, 781 N.Y.S.2d 211, 214 n.4 (N.Y. Sup. Ct. 2004). The scope of the arbitration agreement is determined by " 'whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the [agreement].' " *City of Watertown v. Watertown Firefighters*, 775 N.Y.S.2d 637, 637 (N.Y. Sup. Ct. 2004) (quoting *In re Board of Education of Watertown City School District*, 93 N.Y.2d 132, 143 (N.Y. 1999)).

¶ 18 The Musikantows assert that the scope of the arbitration provision is delineated by its language to disputes relating to "accounts," "agreements," or "transactions" between the parties. The provision covers disputes between the parties, "including any controversy arising out of or relating to any account with you, to the construction, performance or breach of any agreement with you, or to transactions with or through you." The Musikantows find the use of the word "including," rather than the words "including, but not limited to," which is used elsewhere in the Account Agreements, reflects the intended limitation of the scope of the provision to only those three categories. In response, Deutsche Bank points out that "including" and "including, but not limited to" are expressions that "mean the same thing" according to Black's Law Dictionary. Black's Law Dictionary 766 (7th ed. 1999).

¶ 19 To the extent Deutsche Bank's argument is that the Musikantows read too much into the word "including," we agree. While it is clear that the arbitration provision is inclusive of accounts, agreements, or transactions, its scope extends to all disputes or controversies that may arise under any of the three categories. In actuality, it falls to the Musikantows to persuade us that the fraudulent tax shelter did not involve an account, agreement, or transaction with Deutsche Bank to trigger the arbitration clause. The case cited by the Musikantows, however, does not support their contention. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 264 (2002), is inapposite because the case does not interpret the term "including" in the context of an arbitration provision; the case determines the scope of the phrase "costs and expenses" in light of the use of the term "including" in a contingent attorney fees agreement. The different context that was involved in *Guerrant* renders it distinguishable.

¶ 20 The provision before us expressly provides that the Musikantows "agree to arbitrate with [Deutsche Bank] *any* controversies which may arise." (Emphasis added.) Consistent with this broad coverage, the agreement emphasizes that "[t]he parties are waiving their right to seek remedies in court" and states that "[a]rbitration is final and binding on the parties." The Musikantows urge that "any controversies" language should not include their claims for damages caused by Deutsche Bank's fraudulent tax shelter. Pertinent case law is to the contrary. See *Financial Network Investment Corp. v. Becker*, 741 N.Y.S.2d 837, 838 (N.Y. Sup. Ct. 2002) (where provision called for arbitration of " 'any dispute between you and us,' " court held "the broad arbitration clause must be enforced"); *Marks v. Prisant*, 567 N.Y.S.2d 146, 146-47 (N.Y. Sup. Ct. 1991) (arbitration properly compelled where "[t]here [was] a broad arbitration clause in the parties' contract providing that 'any disputes, claims, differences or controversies arising out of' the agreement be submitted to arbitration"); compare *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 406 (1967) (agreement to arbitrate "[a]ny controversy or claim arising out of or relating to this Agreement" was "easily broad enough to encompass" the plaintiff's claim that a consulting agreement was procured by fraud), with *Khan v. BDO Seidman*, 404 Ill. App. 3d 892, 913-14 (2010) (clause calling only for arbitration of controversies arising "in connection with the performance" of the agreement "contemplates the arbitration of a narrower class of claims," to the exclusion of the plaintiff's claims not related to "performance"). Though it is not binding authority, we note the unpublished decision of the Northern District of Illinois in *Wilson v. Deutsche Bank AG*, No. 05 C 03474, 2006 U.S. Dist. LEXIS 94847, at *11 (N.D. Ill. Mar. 20, 2006), which stayed an action pending arbitration pursuant to a verbatim

arbitration clause in a dispute over the same tax shelter as that before this court.

¶ 21 Nor do the Musikantows present us with a persuasive argument that their claims are not implicated by the arbitration provision that covers accounts, agreements, and transactions. It is undisputed that the Musikantows' brokerage accounts with Deutsche Bank were a key component of the tax strategies, thus falling within the "accounts" language of the provision. Options trades were also performed using those accounts, which plainly qualify as "transactions" as provided by the provision. The Musikantows fail to persuade us that a fraudulent tax shelter involves something other than accounts, agreements, or transactions with Deutsche Bank. It is also clear that the arbitration provision was written to cover the resolution of all controversies between the parties. The unavoidable conclusion is that the scope of the arbitration provision extends to the Musikantows' claims for damages arising from the fraudulent tax shelter devised by Deutsche Bank.

¶ 22 Unconscionability

¶ 23 The Musikantows argue that even if their claims are within the scope of the arbitration provision, the provision itself is unconscionable. "An agreement is unenforceable when it is unconscionable." *Brennan,* 198 F. Supp. 2d at 381 (citing *Gillman v. Chase Manhattan Bank,* 73 N.Y.2d 1, 10 (N.Y. 1988)). The parties dispute whether an arbitration clause must be both unconscionable in its formation (procedurally unconscionable) and in its content (substantively unconscionable) to be deemed generally unconscionable. It is true that "unconscionability generally requires both procedural and substantive elements." *Brennan*, 198 F. Supp. 2d at 382. Substantive unconscionability alone may be sufficient in "exceptional" circumstances. *Gillman*,

73 N.Y.2d at 12. Put another way, "it can be said that procedural and substantive unconscionability operate on a 'sliding scale'; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa." *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (N.Y. Sup. Ct. 1983). We address the Musikantows' unconscionability challenges to the arbitration provision on substantive and procedural grounds separately.

¶ 24 *A. Substantive Unconscionability*

¶ 25 The Musikantows contend the arbitration provision is substantively unconscionable because it lacks mutuality and because discovery is substantially limited in arbitration proceedings. An arbitration clause is substantively unconscionable "where its terms are unreasonably favorable to the party against whom unconscionability is claimed." *Brennan*, 198 F. Supp. 2d at 382 (citing *Desiderio v. National Ass'n of Securities Dealers*, 191 F. 3d 198, 207 (2d Cir. 1999)). To be invalidated it must be "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." *Gillman*, 73 N.Y.2d at 10.

¶ 26 The Musikantows contend the arbitration provision lacks mutuality because it "attempt[s] to impose a duty to arbitrate on the Musikantows ***, but not on the Deutsche Defendants." The Musikantows rightfully concede in their reply brief, however, that "mutuality is not always required" under New York law, but rather is simply "a factor to be considered in addressing the unconscionability of an arbitration provision." Indeed, "[m]utuality of remedy is not required in arbitration contracts. If there is consideration for the entire agreement that is sufficient; the

consideration supports the arbitration option, as it does every other obligation in the agreement." *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 137 (N.Y. 1989).

¶ 27 The provision provides that "[a]rbitration is final and binding on the *parties*" and that "[t]he *parties* are waiving their right to seek remedies in court, including the right to jury trial." (Emphasis added.) Thus, the finality and binding nature of the arbitration proceedings applied to both the Musikantows and Deutsche Bank. The Musikantows contend, however, that under their reading of the agreement, Deutsche Bank had no "duty to arbitrate." They contend that because "there is no duty on the part of the Deutsche Defendants to arbitrate, the arbitration provisions lack mutuality and are *per se* unconscionable and unenforceable." The Musikantows fail to provide a citation to authority for this broad claim as required by Supreme Court Rule 341(h)(7) and thus we conclude the claim is forfeited. See Express Valet, Inc. v. City of Chicago, 373 Ill. App. 3d 838, 855 (2007) (challenges forfeited where "no analysis [offered] as to why the fines imposed are excessive and unconstitutional") (citing Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008). Nor are we persuaded that had the Musikantows elected to arbitrate their claims, the arbitration agreement permits Deutsche Bank to negate that election. In any event, even if complete mutuality were lacking, this would not be sufficient to establish substantive unconscionability under New York law. *Sablosky*, 73 N.Y.2d at 137.

¶ 28 The Musikantows also point to a provision in the agreement to support their contention that mutuality does not exist. They contend the provision of the Account Agreements that gives Deutsche Bank the right to "amend [the] Agreement at any time" makes the claim of mutuality illusory. The Musikantows fail to explain, however, why existence of this provision, which the

record fails to disclose was ever invoked, should render the arbitration provision substantively unconscionable. The cases cited by the Musikantows do not support their contention. *Deutsche v. Long Island Carpet Cleaning Co.*, 158 N.Y.S.2d 876 (N.Y. Sup. Ct 1956), involved a provision requiring any claim by the plaintiff to be arbitrated while the defendant's claims were "at its sole option litigable in the courts." *Hanover*, 600 N.Y.S.2d at 423, involved an insurance policy provision that gave an insurer the exclusive right to file an action in court if an arbitrator issued damages exceeding a certain amount. Thus, *Deutsche* and *Hanover* involved arbitration provisions that explicitly favored one party over another. The arbitration provision in our case presents no such favoritism. Nor does the language quoted by the Musikantows render the arbitration agreement unconscionable based simply on the *possibility* that the terms *could* be modified in the future. Without deciding this issue, we find it unlikely that Deutsche Bank could have revised the agreement to remove its obligation to arbitrate had the Musikantows elected to arbitrate against the wishes of Deutsche Bank. The FINRA Code of Arbitration Procedure that binds Deutsche Bank provides, "Parties must arbitrate a dispute under the Code if: arbitration under the code is either (1) Required by a written agreement, or (2) requested by the customer." We have no reason before us to find that the duty to arbitrate did not also bind Deutsche Bank.

¶ 29 The federal district court case of *Brennan* is an example of an unconscionable arbitration agreement, as the Musikantows assert. However, the arbitration agreement in *Brennan*, which allowed an employer to unilaterally modify the employee plaintiff's agreement at any time, was found unconscionable for a host of reasons beyond the mere unilateral right to modify the agreement. The agreement in *Brennan* denied the employee the right to proceed in court on a

pending sexual harassment claim against the employer, there was a considerable bargaining power disparity between employer and employee, the employee was given inadequate time to review the agreement, the employees were not informed of their right to review the agreement with an attorney, and the employees were told refusal to sign the agreement would preclude promotion. *Brennan*, 198 F. Supp. 2d at 383-84. None of these factors that supported a finding of unconscionability in *Brennan* apply in this case; nor does *Brennan* support the proposition the Musikantows appear to assert, that the unilateral right to modify an agreement is, *by itself,* sufficient to render an arbitration clause unconscionable.

¶ 30 The Musikantows persist in their contention that the discovery limitations imposed by FINRA's arbitral body renders the arbitration agreement unconscionable. But as the trial court correctly pointed out, discovery limitations are inherent in any arbitration. Indeed, they constitute an attractive element of arbitration that often motivates those who select arbitration over litigation. Reliance on the discovery limitation to argue in favor of unconscionability has been soundly rejected by New York courts. "The suggestion that an arbitration clause is unconscionable because discovery either is unavailable or more limited in arbitration than in litigation is preposterous." *Stewart v. Paul, Hastings, Janofsky & Walker, LLP*, 201 F. Supp. 2d 291, 292 (S.D.N.Y. 2002); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("Although [arbitration discovery] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' ") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In this case, the

FINRA Discovery Guide allows for arbitrators to order additional discovery at their discretion if necessary. The notion urged by the Musikantows that the arbitration provision is unconscionable based on limited discovery is wholly without support in arbitration jurisprudence. See *MLDX Investments, Inc. v. Parse*, No. 2:06-CV-00121 PGC, 2006 WL 1579597, at *6 (D. Utah June 1, 2006) (in case involving the same tax fraud as this case, finding claims involving "fraud and breach of fiduciary duty *** are quintessentially reasonable claims to bring before a NYSE or NASD arbitration panel," and "the fact that the NYSE and NASDR arbitrations are held in accordance with certain rules does not demonstrate substantive unconscionability").

¶ 31 The Musikantows make a cursory reference to a due process violation stemming from enforcement of the arbitration provision, but they do not develop the argument. Accordingly, the argument merits no consideration by this court. *Vancura v. Katris*, 238 Ill. 2d 352, 373 (2010) (claim forfeited that is undeveloped) (citing Ill. S. Ct. R. 341 (eff. July 1, 2008)).

¶ 32 *B. Procedural Unconscionability*

¶ 33 The Musikantows contend the arbitration provision was procedurally unconscionable because it was "part of a criminal fraud" and because of the "circumstances surrounding the adoption of the arbitration provisions." "As to the procedural element, a court will look to the contract formation process to determine if in fact one party lacked any meaningful choice in entering into the contract, taking into consideration such factors as the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used 'high-pressured tactics' and any disparity in the parties' bargaining power." *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (N.Y. Sup. Ct.

1998) (citing *Gillman*, 73 N.Y.2d at 10).

¶ 34 To the extent the Musikantows' argument is that the arbitration provision is unenforceable because the agreement as a whole was fraudulently induced, they cannot prevail. " '[C]ourts look only to whether the arbitration clause itself was induced by fraud or duress; the question of whether the overall agreement is invalid is for the arbitrators' to decide." *Tong v. S.A.C. Capital Management, LLC*, 835 N.Y.S.2d 881, 888 (N.Y. Sup. Ct. 2007) (quoting *Zurich Insurance Co. v. R. Electric, Inc.*, 773 N.Y.S.2d 560 (N.Y. Sup. Ct. 2004)); *Prima Paint*, 388 U.S. at 402 (the FAA "does not permit the *** court to consider claims of fraud in the inducement of the contract generally," but rather only claims of fraud in the inducement of the arbitration clause itself). The Musikantows' reliance on *Contemporary Mission, Inc. v. Interstate Computer Services, Inc.*, 671 F.2d 81, 83 (2d Cir. 1982), is misplaced as that case addressed whether a contract's alleged connection to an illegal act invalidated the contract as a whole. We therefore leave for the arbitration panel the question whether the Account Agreements as a whole were fraudulently induced.

¶ 35 The Musikantows also contend Deutsche Bank "included the arbitration provisions in the Account Agreements in an attempt to limit their liability for their wrongful, fraudulent and illegal conduct." Arbitration provisions like the one in question are quite standard. See, *e.g.*, *Becker*, 741 N.Y.S.2d at 838; *Marks*, 567 N.Y.S.2d at 146-47; *Prima Paint*, 388 U.S. at 406; *Khan*, 404 Ill. App. 3d at 913-14 (all containing arbitration provisions similar to the one before us). We note nothing in the record supports the Musikantows' suggestion that the inclusion of the arbitration provision was fraudulently motivated; the trial court here made no finding that

Deutsche Bank deliberately included the arbitration provision to limit liability for their fraudulent conduct, and we see no evidence in the record before us to support such a claim. See *Khan*, 404 Ill. App. 3d at 892 (compelling arbitration over the same tax fraud at issue here where there was no finding that the arbitration provision was merely an attempt to limit liability for the fraudulent conduct). Absent such evidence, we will not say the Musikantows were deprived of a meaningful choice in consenting to the arbitration provision.

¶ 36 The Musikantows contend the arbitration provision was "buried in small print in the 'boilerplate' Account Agreements" and therefore procedurally unconscionable. This contention is devoid of merit. The arbitration provision appears in the same font as the rest of the Account Agreements, and contains a bold heading that reads "**20. Arbitration.**" If this was not sufficient to apprise the Musikantows of the arbitration clause, the following appears in capital letters above the signature line (which contains the signature of a Musikantow representative): "THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 20." See *Gillman*, 73 N.Y.2d at 12 ("While the location and the size of print may, in a proper case, be factors bearing on procedural unconscionability, they have no bearing where, as here, the existence of the security agreement was clearly noted in bold-face print directly above the signature line."). The Musikantows admit they were "successful business people"; they clearly had sufficient expertise to read and understand the four or five page Account Agreements before signing them. See *Brower*, 676 N.Y.S.2d at 573 (no procedural unconscionability where the agreement consisted of "only four pages and 16 paragraphs, all of which appear[ed] in the same size print").

¶ 37 The Musikantows argue the arbitration clause is procedurally unconscionable because it does not "set forth the FINRA rules relating to discovery in arbitration, nor did the Deutsche Defendants attach the FINRA rules to the Account Agreements." The arbitration clause did, however, inform the Musikantows that "[p]rearbitration discovery is generally more limited than and different from court proceedings." In any event, "in commercial transactions among sophisticated business entities, under terms that are standard in the trade, there is a presumption that unconscionability is legally inapplicable." *Wachovia Securities, LLC v. Joseph*, 836 N.Y.S.2d 496, 2007 WL 419366, *2 (N.Y. Sup. Ct. 2007)[2]; *Chrysler Credit Corp. v. Kosal*, 518 N.Y.S.2d 162, 164 (N.Y. Sup. Ct. 1987) ("this is a commercial transaction by business people in a commercial setting, under terms that are standard in the trade, which factual predicate gives rise to a presumption of lack of unconscionability").

¶ 38 Given the sophistication of the Musikantows and the standardized nature of the arbitration clause, we find nothing to support their claim that unconscionability stemmed from the absence of the FINRA rules as an attachment to the Account Agreements. In the absence of such evidence, the "presumption of lack of unconscionability" fully applies in the absence of evidence marshaled by the Musikantows to rebut it. *Chrysler Credit Corp.*, 518 N.Y.S.2d at 164. In an effort to overcome the presumption, the Musikantows cite two non-biding extra-jurisdictional cases, *Harper v. Ultimo*, 7 Cal. Rptr. 3d 418 (2003), and *Dunham v. Environmental Chemical Corp.*, No. C 06-03389 JSW, 2006 WL 2374706, at *11 (N.D.Cal. Aug. 16, 2006), for the distinguishable proposition that arbitration rules should have been attached to agreements

[2] Unpublished slip opinion referenced in a table in the New York Supplement.

binding an employee and a consumer, respectively. They cite no cases involving two sophisticated business entities.

¶ 39 Accordingly, the trial court did not err in finding the arbitration provision not procedurally unconscionable.

¶ 40 Finally, we reject the Musikantows' assertion that section 4 of the FAA supports their claim that a jury trial be held to resolve alleged remaining questions of fact. We reject this contention based on our review of the record that discloses no such questions of fact, consistent with the Musikantows' concession that "[t]here are no fact issues with respect to the questions presented in this appeal." See *Moses*, 460 U.S. at 29.

¶ 41 CONCLUSION

¶ 42 The Account Agreements signed by the parties contained a provision that "any controversies which may arise," would be resolved by arbitration. The circuit court properly concluded that the instant controversy over Deutsche Bank's tax shelters fell within the scope of the arbitration provision. Nor was the provision substantively unconscionable for lack of mutuality or for imposing discovery limitations. The provision was also not procedurally unconscionable, as a clear notification of its existence appeared in capital letters above the Account Agreements' signature line, and there is no evidence the provision was deliberately drafted to shield Deutsche Bank from liability stemming from the fraudulent tax shelters.

¶ 43 Affirmed.