2018 IL App (1st) 161908-U

FOURTH DIVISION
February 1, 2018

No. 1-16-1908

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TECNOMATIC, S. p. A.,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	16-L-50165
BRYAN CAVE, a Limited Liability Partnership,	)	Honorable LeRoy K. Martin, Jr. and Kathleen M. Pantle, Judges Presiding
Defendant-Appellee.	)	

JUSTICE McBRIDE delivered the judgment of the court.
Justice Ellis concurred.
Justice Gordon specially concurred.

O R D E R

Held: Plaintiff manufacturer waived almost all arguments on appeal by failing to first bring them in the trial court, and its attempt to void an agreement with its litigation counsel to arbitrate any disputes and conduct no discovery was rejected as the terms were not substantively unconscionable or otherwise contrary to public policy.

¶ 1 Tecnomatic, S.p.A. wants to sue instead of arbitrate claims against its former litigation counsel, Bryan Cave, LLP, regarding the services the law firm rendered and fees it charged in the defense and settlement of a lawsuit in Tecnomatic's favor in September 2014. Tecnomatic sought a judicial declaration that an arbitration clause in its attorney-client contract with Bryan

Cave was unenforceable as unconscionable and against public policy, because it barred discovery and required confidentiality of the proceedings. The trial court, however, granted Bryan Cave's motion for summary judgment. Tecnomatic appeals, contending that an arbitration clause in an attorney-client fee contract "containing a sentence barring discovery is unconscionable and against public policy if the agreement does not explain the effect of the provision or advise the client to obtain independent counsel to evaluate the clause."

¶ 2 Bryan Cave responds that the appeal relies in large part on a legal theory which Tecnomatic never pled and which the trial court expressly barred when it denied Tecnomatic leave to amend its complaint and limited the scope of the summary judgment arguments. An appellant is not permitted to raise new arguments on appeal. See *Haudrich v. Homedica, Inc.*, 169 Ill. 2d 525, 536, 662 N.E. 2d 1248, 1253 (1999). According to Bryan Cave, Tecnomatic's complaint was based on substantive unconscionability, Bryan Cave's motion for summary judgment on that pleading concerned substantive unconscionability, but Tecnomatic's appeal relies mostly on procedural unconscionability. Substantive unconscionability concerns the contents of a contract and procedural unconscionability concerns the contracting process. 12 Ill. Law and Prac. *Contracts*, § 59 (November 2017). A contract or contract language that is substantively unconscionable is objectively so one-sided as to oppress or unfairly surprise an innocent party, create an overall imbalance in the parties' obligations, or impose a gross disparity between price and value. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 22, 857 N.E. 2d 250, 264 (2006). "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power." *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 854 N.E.2d 607, 622 (2006) (citing *Frank's Maintenance &*

Engineering, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980)); and *Kinkel*, 223 Ill. 2d at 22, 857 N.E.2d at 264). A contract or clause may be declared unenforceable on the basis of either procedural or substantive unconscionability, or a combination of both. *Kinkel*, 223 Ill. 2d at 21, 857 N.E.2d at 263.

¶ 3 In order to determine whether Tecnomatic is relying on an argument which the trial court barred, we will review the allegations and procedural history that culminated in the summary judgment ruling on appeal. The relevant facts are taken from the record as a whole. *Founders Insurance Co. v. American Country Insurance Co.*, 366 Ill. App. 3d 64, 69, 851 N.E.2d 120, 125 (2006); 735 ILCS 5/2-1005(c) (West 2012).

¶ 4 Tecnomatic is an Italian corporation based in Corropoli, Italy that designs and manufactures automated assembly lines and electric motors. One of Tecnomatic's clients, Remy, Inc. (which sells under the brand names "Remy," "Delco Remy," and "World Wide Automotive"), filed suit in 2008 in federal district court in Indianapolis, Indiana alleging that a $3 million Tecnomatic assembly line installed in a factory in San Luis Potosi, Mexico was inefficient and unreliable. The automated equipment built electric drive motor assemblies for the powertrain of a General Motors' hybrid engine. Tecnomatic's president, Giuseppe Ranalli, had "a longstanding relationship" with a partner in the Chicago office of Bryan Cave, Nicola Fiordalisi, and asked him on September 28, 2008 to defend the Remy suit. Bryan Cave is an international law firm headquartered in the United States which has 27 offices and 1,000 lawyers on staff, 125 of whom are in the Chicago office. Fiordalisi agreed to handle the suit and the firm billed about $25,000 for services it provided during the course of the next month.

¶ 5 According to Bryan Cave, the parties "agreed at the inception of the engagement that the terms of Bryan Cave's representation would be documented, and subject to Bryan Cave's

standard terms and billing practices." When the two men met in Chicago on October 27, 2008, Fiordalisi proposed a five-page written fee agreement. Tecnomatic acknowledges that the contract language "appears to be routinely used by [the law firm]." The first two pages of the contract were a letter from Fiordalisi to Ranalli and the subject line read, "Re: Engagement of Bryan Cave LLP." Fiordalisi wrote in relevant part:

> "We are pleased that you have chosen to engage Bryan Cave LLP [to handle the Remy litigation] and such future matters that we mutually agree to undertake. Consistent with our normal practice, this letter and the attached Statement of Engagement Terms and Billing Practices (the 'statement') set forth the terms of our engagement. The Statement is important and is provided to our clients so that they understand in advance how various issues will be handled.
>
> Our fees for legal services are based on the time we spend on the engagement. *** We separately charge for expenses and other charges incurred in connection with rendering our services, all as described on the Statement.
>
> Our billing statements are normally rendered on a monthly basis and are due payable upon receipt. We endeavor to include expenses and other charges in the statement for the month in which they are incurred. On occasion, however, accounting for certain expenses and charges (*i.e.*, late-posted items or international charges), may be delayed, in which case late-posted items will be billed on the next regular statement. The Firm reserves the right to charge a late payment penalty in the form of interest on any statements not paid within 30 days of the statement date at the legal rate of interest.
>
> Our representation is conditioned upon receipt of the signed copy of this letter from you confirming your understanding and approval of these terms of our engagement,

accompanied by your deposit check or wire transfer for $10,000, which will be used in accordance with the Statement.

Our attorney-client relationship is one of mutual trust and confidence. We do our best to see to it that our clients are satisfied not only with our services but also with the fees charged for those services. Whenever you have any questions or comments regarding our services or fees, you should contact me or any other attorney in the Firm with whom you are working. We also encourage you to inquire about any matters relating to our fee arrangements or monthly statements that are in any way unclear.

We appreciate the confidence you have placed in us and look forward to working with you. If this letter and the Statement correctly set forth our mutual understanding, please sign and date the enclosed copy of this letter and return it to us with the attached Statement."

¶ 6 Below these paragraphs was Fiordalisi's signature, followed by two sentences in bold and all-capitalized font:

"**THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.**

THESE TERMS[,] INCLUDING THE ATTACHED STATEMENT OF ENGAGEMENT TERMS AND BILLING PRACTICES[,] ARE APPROVED."

¶ 7 Ranalli signed the contract directly below the two emphasized sentences. The attached Statement of Engagement Terms and Billing Practices covered the next three pages. The arbitration clause appeared on the second page, after paragraphs addressing topics such as billing

rates and how the project would be staffed, but before paragraphs describing miscellaneous charges such as copying costs and messenger expenses. The paragraph stated in its entirety:

> "Arbitration of Dispute. Should any dispute arise concerning the services provided to you by us or the statements forwarded to you, as well as any alleged claims for legal malpractice, breach of fiduciary duty, breach of contract or other claim against the Firm for any alleged inadequacy of such services, the dispute will be settled by arbitration. The arbitration shall be heard in the City of Chicago by a panel of three arbitrators, all of whom must be practicing attorneys in that city, with one arbitrator to be selected by each party and the third to be chosen by the two arbitrators selected by the parties. The arbitrators may establish such rules for the conduct of the arbitration as they may choose, except that there shall be no discovery and any proceedings conducted shall be private and confidential and shall not be disclosed to the public by either the arbitrators or the parties to the arbitration. The award of the arbitrators must be by a majority vote and shall be final and binding, not subject to challenge by either party in any court of law. Each party shall bear its own costs of the arbitration and shall pay one-half of the costs of the proceeding."

¶ 8 Over the next six years, in addition to defending against Remy's allegations, Bryan Cave helped Tecnomatic sue Remy and others in federal court in Chicago alleging misuse of Tecnomatic's information, in violation of a confidentiality agreement. The numerous lawsuits were consolidated within the Remy action in Indiana. The upshot was a $32 million settlement in Tecnomatic's favor in September 2014. During the litigation, Bryan Cave billed Tecnomatic $12.8 million for legal services and costs, which we calculate to be 40% of the $32 million recovered. According to Bryan Cave, most of the fees and costs went unpaid for six years, the

firm received partial payment when Remy tendered the first of two settlement payments, and the remaining, disputed fees have been held in escrow since March 2015 when Remy made the second settlement payment.

¶ 9 In March 2015, Tecnomatic filed the instant declaratory judgment action. Bryan Cave contends Tecnomatic now attempts to go well beyond a complaint that relied on only substantive unconscionability, while Tecnomatic counters that it has not changed positions and that Bryan Cave's argument is a classic strawman approach. Tecnomatic alleged in paragraphs 7, 8, and 9 of its complaint:

> "7. On or about Oct. 27, 2008, Bryan Cave and Tecnomatic entered into a letter agreement providing for Bryan Cave's Chicago office to represent Tecnomatic in all aspects of the action Remy filed (the 'Fee Agreement'). ***
>
> 8. Bryan Cave's representation of Tecnomatic in the Remy lawsuit preceded the Fee Agreement by approximately one month, as Mr. Fiordalisi and other Bryan Cave attorneys provided and billed for services as early as September 30, 2008.
>
> 9. By the time the Fee Agreement was actually signed by Tecnomatic on or about Oct. 27, 2008, Bryan Cave had already begun legal work for Tecnomatic, performed services and billed Tecnomatic in excess of $25,000. As a result of this established attorney-client relationship between Bryan Cave and Tecnomatic, a fiduciary relationship existed between Bryan Cave and Tecnomatic when the Fee Agreement was presented to Tecnomatic for signature."

¶ 10 Tecnomatic expressed no concerns about Ranalli's execution of the contract and next alleged the following:

> "10. During the course of its representation of Tecnomatic in the Remy lawsuit,

Bryan Cave filed counter and cross claims for Tecnomatic against Remy and others. The entirety of the lawsuit, including Tecnomatic's various claims is hereafter referred to as the 'Remy Action.'

* * *

15. Tecnomatic has various claims against Bryan Cave, including claims for breach of fiduciary duty, overbilling in violation of Illinois Rules of Professional Conduct 1.5, and legal malpractice, all arising out of Bryan Cave's representation in the Remy Action. Tecnomatic wishes to assert and pursue all of these claims in a lawsuit that will seek compensatory damages for professional negligence and breach of fiduciary duty, equitable relief (in the form of rescission based on breaches of fiduciary duty) and will allege one or more causes of action for which punitive damages might or could be awarded.

16. An actual dispute and controversy presently exists between Tecnomatic and Bryan Cave over the validity and enforceability of the arbitration provision in the [Statement of Engagement Terms and Billing Practices]. Tecnomatic contends that the arbitration provision is unconscionable, void and invalid, and should not be enforced on the basis that the 'no discovery' rule within the arbitration provision causes severe detriment and prejudice to Tecnomatic. Not allowing for discovery effectively operates to thwart, blunt and defeat Tecnomatic's ability to carry its burden of proof because most of the information, documents and testimony needed by Tecnomatic to establish its claims are either uniquely and solely in the possession of Bryan Cave, or within the possession of third parties who need to be subject to the power of the subpoena to appear for depositions or produce documents.

> 17. The problems and difficulties created for Tecnomatic by the *** prohibition against discovery are compounded by the strict confidentiality requirement also set out in the arbitration provision. This requirement for confidentiality subjects Tecnomatic to claims that it breached the [Statement of Engagement Terms and Billing Practices] every time Tecnomatic attempts to interview a witness or informally attempts to acquire information in pursuit of its claims against Bryan Cave. Because of the overbroad wording of the confidentiality provision, and its potential for liability, the simple act of gathering information and evidence would subject Tecnomatic, its employees, attorneys and agents to claims of having breached the confidentiality provision."

¶ 11 Tecnomatic further alleged that the "no discovery" and confidentiality clauses were "functionally one-sided provisions" that were advantageous to Bryan Cave and left the client either deprived of information about the law firm's work or exposed to liability for breaching the privacy terms. Tecnomatic alleged that depriving a client of access to information was contrary to one of the Illinois Rules of Professional Conduct, Rule 1.8(h)(1), which concerns conflicts of interest with current clients and states a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Ill. S. Ct. R. 1.8(h)(1) (eff. Jan. 1, 2010). Based on its allegations, Tecnomatic sought a declaration that the arbitration agreement was void and that Tecnomatic could proceed against Bryan Cave in a court of law.

¶ 12 Bryan Cave answered the complaint and filed a motion for summary judgment in which it remarked in a footnote that Tecnomatic was alleging substantive unconscionability rather than procedural unconscionability. When the motion was presented on June 17, 2015 for scheduling, Circuit Court Judge LeRoy K. Martin, Jr. instead entered and continued the motion and ordered

the parties to return in two weeks "prepared to discuss [Tecnomatic's] need for discovery to respond to [the] motion." At the next court date, the court again entered and continued the motion and allowed Tecnomatic until July 28, 2015 (four weeks) to file "an affidavit under Supreme Court Rule 191(b) *** [regarding] the discovery it believes it needs to respond." The court gave Bryan Cave until August 4, 2015 (one week) to respond to Tecnomatic's affidavit, and indicated the court would rule when the parties convened for a status date on August 7, 2015 as to whether it would allow discovery.

¶ 13 Tecnomatic did not comply with the schedule for filing its affidavit and instead on the morning of August 7, 2015—the day the court was to rule on whether there would be discovery prior to the summary judgment ruling—Tecnomatic filed a motion for leave to amend its complaint. Tecnomatic directly acknowledged that Bryan Cave had already moved for summary judgment "on the bases for relief sought in the Complaint for Declaratory Judgment" but Tecnomatic proposed to "includ[e] the additional basis for invalidating the arbitration provision as a product of undue influence." The proposed amended pleading was peppered with the phrase "undue influence" and added allegations regarding the formation of the contract. For instance, one of the original allegations was: "Tecnomatic contends that the arbitration provision is unconscionable, void and invalid, and should not and cannot be enforced on the basis that the 'no discovery' rule within the arbitration provision causes severe detriment and prejudice to Tecnomatic." In the proposed amendment, the allegation was revised to read: "Tecnomatic contends that the arbitration provision is unconscionable, void and invalid, *and the product of undue influence by Bryan Cave subsequent to the formation of the attorney-client relationship*, and should not and cannot be enforced on the basis that the 'no discovery' rule within the arbitration provision causes severe detriment and prejudice to Tecnomatic." (Emphasis added.)

Where Tecnomatic had previously alleged that a fiduciary relationship existed, Tecnomatic inserted a full page of allegations regarding the formation of the contract, such as that the arbitration clause had not been provided or discussed prior to October 27, 2008, and that Bryan Cave did not (1) properly disclose information to Tecnomatic regarding its rights, (2) provide additional consideration for entering into the written contract, (3) properly advise Tecnomatic to seek independent counsel, or (4) act as required as a fiduciary.

¶ 14 Bryan Cave argued in response that Tecnomatic's motion for leave to amend should be denied because (1) Tecnomatic was aware of the purported facts when it filed the original pleading and had no reasonable excuse for not including the new allegations, (2) Bryan Cave's pending motion for summary judgment on the complaint was based on the facts and legal theory actually alleged in the complaint, (3) Bryan Cave's motion had been pending for seven weeks spanning multiple court appearances without any indication from Tecnomatic that it intended to amend its complaint, and (4) Tecnomatic's proposed amendment was an improper attempt to circumvent the pending motion.

¶ 15 On August 19, 2015, Judge Martin denied Tecnomatic leave to amend the complaint and entered a briefing schedule on Bryan Cave's motion for summary judgment.

¶ 16 In its written response in opposition to the motion for summary judgment, Tecnomatic argued its theories that the contents of the arbitration clause were inordinately one-sided and against public policy, that is, substantively unconscionable. Tecnomatic further contended that the arbitration clause violated Rules 1.5(a) and 1.8(h)(1) of the Illinois Rules of Professional Conduct, which indicate "a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses" (Ill. S. Ct. R. 1.5(a) (eff. Jan 1, 2010)) and a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a

client for malpractice unless the client is independently represented in making the agreement," (Ill. S. Ct. R. 1.8(h)(1) (eff. Jan. 1, 2010)), and, therefore, was void as a matter of public policy. Tecnomatic also acknowledged that it had been denied leave to amend, but contended that it was fair to set out three pages of new "MATERIAL FACTS" and argue the theories of inadequate consideration to form a new contract after an attorney-client relationship already existed; and also undue influence, inadequate disclosure, inadequate advice, and possible "active concealment" of the arbitration clause, which were all variations of procedural unconscionability. Tecnomatic also introduced a discussion of the location and conspicuousness of the arbitration clause—another procedural unconscionability argument—even though Tecnomatic's complaint and its proposed, but rejected, amended complaint contained no mention of the placement or appearance of the clause. Tecnomatic contended it was fair to argue the additional theories because Bryan Cave's motion for summary judgment concluded with a request for the court to find the arbitration clause was "enforceable in its entirety or, alternatively *** enforceable, except that the procedures as to discovery and/or confidentiality are to be determined by the arbitration panel." Tecnomatic contended Bryan Cave's conclusion was a "tacit request for declaratory relief" regarding the contract and that questions of material fact existed as to both procedural and substantive unconscionability which precluded the summary resolution of Tecnomatic's complaint. In support of the arguments regarding the formation of the contract, Tecnomatic attached an affidavit from the company's president, Ranalli, concerning his meeting with Fiordalisi and execution of the contract. Tecnomatic also contended that the circuit court "[did] not have the power" to strike only the terms that Tecnomatic was disputing and enforce the remainder of the arbitration clause, because that would be rewriting the parties' contract. Tecnomatic also argued that even an arbitration action without the clauses was

untenable because an arbitration panel might impose the same "unconscionable" discovery parameters.

¶ 17 Bryan Cave replied that Tecnomatic's response went far beyond the allegations actually pled in its complaint. In addition, the documents that Tecnomatic asserted it required but could not obtain due to the arbitration provision, namely pleadings, discovery, and correspondence, had been made available to Tecnomatic before Tecnomatic filed its response brief, but Tecnomatic had not accepted the materials. Bryan Cave attached an affidavit and copies of correspondence and emails in July and August 2015 substantiating that its attorney, Peter A. Silverman, had made the documents available, and that Tecnomatic had acknowledged Silverman's email, but had not accepted the documents.

¶ 18 On Tecnomatic's motion for substitution of judge as a matter of right, the cause was transferred to the calendar of Circuit Court Judge Kathleen M. Pantle.

¶ 19 A good part of the summary judgment hearing before Judge Pantle concerned whether Tecnomatic would be permitted to argue procedural unconscionability. Judge Pantle told Tecnomatic that its response brief brought in new issues that were outside the facts and theories raised by the complaint, and she instructed Tecnomatic to confine its oral argument to the issues raised by its pleading. Tecnomatic contended that it moved to amend only to "clarify the complaint" and state the allegations in "a more easily and more comfortable way" for analysis, and that Judge Martin denied leave to amend because "there were already allegations to the effect that we were trying to clarify in the amended pleading, and that not having that amended pleading would not cause us any prejudice." Bryan Cave disagreed with Tecnomatic's recollection and characterized it as "not logical." Judge Pantle said that if she later decided procedural unconscionability had been raised by the complaint, she would order supplemental

briefing on that issue. The record reflects that no supplemental briefing was ordered.

¶ 20 In a subsequent memorandum opinion and order, Judge Pantle granted summary judgment to Bryan Cave. Judge Pantle found that Tecnomatic "fail[ed] to allege any facts in its complaint which would establish procedural unconscionability" and said that she limited her consideration to the issues raised by the complaint.

¶ 21 In our opinion, it is abundantly clear from this record that it is inappropriate for Tecnomatic to argue procedural unconscionability as grounds for reversing the summary judgment ruling. It is fundamental that the plaintiff's complaint frames the parameters of summary judgment proceedings. See *Kincaid v. Ames Dept. Stores, Inc.*, 283 Ill. App. 3d 555, 568, 670 N.E.2d 1103, 1112 (1996) (the plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in her complaint); *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911, 629 N.E.2d 569, 574 (1994) ("In ruling on a motion for summary judgment, the court looks to the pleadings to determine the issues in controversy."); *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 40, 24 N.E.3d 806 ("Because the plaintiffs' theory of the case, as pled in the sixth amended complaint, had always been that Audi withheld known information about specific defects in the Audi 5000 class vehicles, the plaintiffs were not entitled to summary judgment on a new theory–the tendency or propensity of unintended acceleration–that had never been pled.") Tecnomatic's complaint relied entirely on the theory of substantive unconscionability, and its passing reference to Bryan Cave's status as a fiduciary to its client (in paragraph 9 of the complaint) cannot be construed as a factual allegation that there was impropriety in the formation of the contract such that Tecnomatic was denied a meaningful choice. 12 Ill. Law and Prac. *Contracts*, § 59 (November 2017). When assessing procedural unconscionability, a court considers factors such as the

circumstances surrounding the transaction including the parties' negotiations, the manner in which the contract was entered into, whether there was a reasonable opportunity to understand the contract's terms, and whether important terms were inconspicuous or "hidden in a maze of fine print." *Frank's Maintenance & Engineering*, 86 Ill. App. 3d at 989, 408 N.E.2d 403; and *Kinkel*, 223 Ill. 2d at 22, 857 N.E.2d at 264. Tecnomatic's pleading, however, did not raise *any* issue regarding the formation of its contract with Bryan Cave.

¶ 22 Moreover, two trial judges expressly barred Tecnomatic from pleading or arguing procedural unconscionability. The first trial judge denied Tecnomatic leave to amend its complaint with allegations that Bryan Cave partner Fiordalisi exerted "undue influence" over Tecnomatic president Ranalli to obtain his signature on the contract. Tecnomatic included the first judge's ruling in its notice of appeal, but then abandoned its challenge to Judge Martin's ruling by failing to address the order in its opening brief. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Tecnomatic has not argued on appeal that it was entitled to discovery prior to Judge Martin's ruling or that the denial of leave to amend was otherwise an abuse of discretion. In fact, Tecnomatic omits nearly all the procedural history of this case from its appellate brief, makes no mention of the first trial judge, the fact that he twice entered and continued Bryan Cave's motion for summary judgment because Tecnomatic said it needed to conduct discovery, or the fact that he later denied Tecnomatic leave to amend in order to add procedural unconscionability. Furthermore, as we noted above, roughly half of the subsequent summary judgment hearing before Judge Pantle was about whether she should permit Tecnomatic to argue procedural unconscionability. Because of the first trial judge's ruling and the extensive argument regarding that ruling, the second trial judge instructed Tecnomatic to limit its oral arguments to the theory of substantive unconscionability. The second trial judge also said that she would give

Tecnomatic's complaint further scrutiny and that if she determined the pleading did effectively raise procedural unconscionability, she would order supplemental briefing on the topic. She did not order supplemental briefing. Instead, she expressly stated in her order granting summary judgment to Bryan Cave that "Tecnomatic fails to allege any facts in its complaint which would establish procedural unconscionability" and she found that Tecnomatic's pleading had limited her consideration to the theory of substantive unconscionability.

¶ 23 On appeal, Tecnomatic minimizes what occurred after its complaint was on file, by telling us only: "Bryan Cave moved for summary judgment. R. C46. Plaintiff answered (R. C265), and the firm replied. R C335. The court granted summary judgment. R. C395; App. at A1. Tecnomatic appealed. R. C404." Also, despite the importance of the complaint in this appeal from the entry of summary judgment, Tecnomatic does not include its pleading in the appendix to its brief. Instead, Tecnomatic included and repeatedly cites to the Ranalli affidavit which was attached to the rejected proposed amended complaint.

¶ 24 Thus, Tecnomatic has not provided the court with the relevant procedural history of this case; has not acknowledged the significance of the first judge's ruling denying Tecnomatic leave to amend with procedural unconscionability; and has not acknowledged the second trial judge's ruling refusing to allow Tecnomatic to argue procedural unconscionability. Tecnomatic now argues procedural unconscionability, but uses the terminology of substantive unconscionability, by arguing the *contents of the written contract* that should have "explain[ed] the clause or [told] the client it was advisable to obtain independent counsel to evaluate it." Tecnomatic's attempt to introduce the barred theory of procedural unconscionability is ineffective. The contention that the written contract should have been more explanatory or given advice to consult with independent counsel is a procedural unconscionability argument phrased in the terms of

substantive unconscionability. The contention is a collateral attack on two rulings which Tecnomatic did not appeal: Judge Martin's denial of leave to amend and Judge Pantle's ruling that she would not hear certain arguments in opposition to summary judgment. We find that Tecnomatic's procedural unconscionability argument cannot be considered for the first time on appeal, and is waived. *Haudrich*, 169 Ill. 2d at 536, 662 N.E. 2d at 1253.

¶ 25 What remains for our consideration, however, are the arguments which Tecnomatic has presented in both the trial and appellate courts. Tecnomatic alleged its attorney-client contract with Bryan Cave was unenforceable as unconscionable and against public policy, because it barred discovery and required confidentiality of the proceedings, but on appeal, it argues only the discovery issue and has abandoned its challenge to confidentiality. *Haudrich*, 169 Ill. 2d at 536. Accordingly, our review is limited to whether the bar on discovery is substantively unconscionable and against public policy.

¶ 26 We reiterate that when a contract or contract language is substantively unconscionable it is objectively so one-sided as to oppress or unfairly surprise an innocent party, create an overall imbalance in the parties' obligations, or impose a gross disparity between price and value. *Kinkel*, 223 Ill. 2d at 22, 857 N.E. 2d at 264. The determination of whether a contract or part of a contract is unconscionable is a question of law, which we review *de novo* without any deference to the trial court. *Razor*, 222 Ill. 2d at 99, 854 N.E.2d at 622. The *de novo* standard is also applicable because we are reviewing the entry of summary judgment. *Founders Insurance Co.*, 366 Ill. App. 3d at 69, 851 N.E.2d at 125. Summary judgment is a drastic but efficient way of disposing of a case and is properly granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Founders Insurance*, 366 Ill. App. 3d at 69, 851 N.E.2d at 125; 735 ILCS 5/2-1005(c) (West 2012) (summary judgment is to be granted

"without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

¶ 27 Also relevant is the principle that courts sparingly exercise the power to invalidate part or all of an agreement on the basis of public policy. *Kleinwort Benson*, 181 Ill. 2d at 226, 692 N.E.2d at 275; *H&M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill. 2d 52, 57, 805 N.E.2d 1177, 1180 (2004) (courts are reluctant to declare a private contract void as against public policy). This reluctance is due to the strong public policy that parties are to have the freedom to make their own contracts. *H&M Commercial Driver Leasing*, 209 Ill. 2d at 57, 805 N.E.2d at 1180; *Schumann-Heink v. Folsom*, 328 Ill. 321, 330, 159 N.E. 250, 254 (1927) ("Courts must act with care in [saying] that a given contract is void [as] against public policy, since, if there be one thing more than any other which public policy requires, it is that [competent persons] shall have the utmost liberty of contract, and *** contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts.").

¶ 28 Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case. *Kleinwort Benson*, 181 Ill. 2d at 226, 692 N.E.2d at 275. We are to employ a strict test in determining when an agreement violates public policy. *Kleinwort Benson*, 181 Ill. 2d at 226, 692 N.E.2d at 275. Contracts will not be declared void on public policy grounds unless they are "clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy or unless they be manifestly injurious to the public welfare." *H&M Commercial Driver Leasing*, 209 Ill. 2d at 57, 805 N.E.2d at 1180 (quoting *Schumann-Heink*, 328 Ill. at 330, 159 N.E. 250); *Kleinwort Benson*, 181 Ill. 2d at 226, 692 N.E.2d at 275 (an agreement violates public policy when it is so capable of producing harm

that its enforcement would be contrary to the public interest); *In re Estate of Feinberg*, 235 Ill. 2d 256, 265, 919 N.E.2d 888, 894 (2009) (a contract provision violates public policy if it is contrary to an established societal interest, violates statutory law, tends to interfere with the public safety or welfare, or is in conflict with the morals of the time). In these instances, the interests of the general public outweigh the interests of the contracting parties. *Schnackenberg v. Towle*, 4 Ill. 2d 561, 565, 123 N.E.2d 817, 819 (1954). The Illinois Rules of Professional Conduct, which includes the rule regarding excessive attorney fees which Technomatic cited in its complaint, is also a strong indicator of public policy. *Marvin N. Benn & Associates, Ltd. v. Nelsen Steel & Wire, Inc.*, 107 Ill. App. 3d 442, 447 (1982); *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 62, 66, 866 N.E.2d 85, 93 (2006).

¶ 29 Tecnomatic argues that the language barring discovery renders the agreement to arbitrate unconscionable because it denies access to information about the underlying litigation which is required to sustain a claim against the lawyers who handled that case, such as documents produced in discovery, answers to discovery, deposition transcripts, letters, and billing details. At appellate oral arguments, Tecnomatic clarified that it perceives a need for correspondence between Bryan Cave and opposing counsel in the underlying action, internal correspondence at Bryan Cave, and the opportunity to depose Bryan Cave attorneys, in order to question its former attorneys' litigation strategy and monthly billing statements.

¶ 30 Although Tecnomatic contends the arbitration clause is unconscionable, it is well established under both Illinois law and the Federal Arbitration Act that agreements to resolve disputes through arbitration, rather than litigation, are favored. *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶¶ 14-15, 968 N.E. 2d 696; *Williams v. Jo-Carroll Energy, Inc.*, 382 Ill. App. 3d 781, 784, 890 N.E.2d 566, 569 (2008) ("Illinois courts favor using arbitration as a means of

settling disputes."); *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 681, 456 N.E.2d 889, 902 (1983) (Illinois public policy favors arbitration); 9 U.S.C. § 2 (West 2010) (section 2 of the Federal Arbitration Act providing that any written contract involving commerce which shows an intent to arbitrate any controversies arising between the parties "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); 710 ILCS 5/1 (West 2014) (Illinois Uniform Arbitration Act provision containing almost identical language). Thus, Tecnomatic must overcome not only the strong public policy in favor of the freedom to contract, but also the strong public policy in favor of enforcing arbitration contracts as written. *Kinkel,* 223 Ill. 2d 47, 857 N.E.2d at 277. In disregard of these well-established principles, Tecnomatic wants to litigate its arbitrable claims, because the parties contracted to exclude discovery in any arbitration action.

¶ 31 Arbitration is not intended to be equivalent to litigation. In arbitration, for instance, the usual rules of evidence are not controlling and the rights and procedures that are common to civil trials, such as discovery, cross-examination, and testimony under oath, "are often severely limited or unavailable." *Colmar Ltd. v. Fremantlemedia North America, Inc.*, 344 Ill. App. 3d 977, 984-85, 801 N.E.2d 1017, 1023 (2003) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974)); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 259, n. 18 (1987) (arbitration limits the choice of venue and the possibility of extensive discovery available in the courts); *Hodges v. Reasonover*, 103 So. 3d 1069, 1075 (La. 2012) (arbitration "generally provides for streamlined discovery, little to no motion practice, and flexible procedures"). Although arbitrators may choose to use the familiar rules and procedures, they are required only to conduct the arbitration in a manner that is not inconsistent with the Illinois statute regarding arbitration. *Colmar*, 344 Ill. App. 3d at 985, 801 N.E.2d at 1023. See *Eljer Manufacturing, Inc.*

v. Kowin Development Corp., 14 F.3d 1250, 1253 (7th Cir. 1994) (indicating arbitration "is a private system of justice offering benefits of reduced delay and expense"); *Bell Aerospace Co. Division of Textron v. Local 516,* 500 F.2d 921, 923 (2d Cir. 1974) (an arbitrator need only conduct a proceeding that is fundamentally fair); *Bowles Financial Group., Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1013 (10th Cir. 1994) (a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument, and that the decision maker not be biased). Moreover, an action for judicial confirmation of an arbitration award is a straightforward, summary proceeding which turns an award into a judgment, and only limited grounds for vacating, modifying, or correcting the award are permitted. *City of Chicago v. Chicago Loop Parking,* 2014 IL App (1st) 133020, ¶ 52, 23 N.E.3d 453; *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805, 808 (2d Cir. 1960) (the court's function in confirming or vacating an arbitration award is severely limited, otherwise, the ostensible purpose of arbitration, *i.e.*, avoiding litigation, would be frustrated). Even a serious legal or factual error on the part of the arbitrator would not, standing alone, justify a court's vacatur of an arbitration award. *Garver v. Ferguson*, 76 Ill. 2d 1, 10-11, 389 N.E.2d 1181, 1184 (1979); *Johnson v. Baumgardt*, 216 Ill. App. 3d 550, 556, 576 N.E.2d 515, 518 (1991).

¶ 32 By giving up the formality and safeguards of litigation, parties can obtain quick, final, and less costly resolution of their disagreements. *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 71, 697 N.E.2d 727, 730 (1998) (arbitration is a favored alternative to litigation because of its speed, lack of formality, and relative lower costs); *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 220 (1985) (" 'costliness and delays of litigation *** can be largely eliminated by agreements for

arbitration' "); Paul D. Georgiadas & Paul A. Sinclair, *Legal Fees—A Question of Trust*, Ariz. Att'y, Apr. 1997, note 41, at 42-43 (arbitration dispenses with the "expense, delay, and acrimony" of litigating attorney fee disputes).

¶ 33 Furthermore, attorney fee disputes are common. Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. Rev. 2005, 2007 n. 7 (1993) (Texas survey indicated 86% of the state's firms with greater than 10 attorneys had experienced a recent fee dispute); Matthew J. Clark, *Note: The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 Iowa L. Rev. 827, 831 (1999) (fee disputes are the most frequent type of complaint against attorneys); Robert J. Kraemer, *Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 St. Mary's L.J. 909, 917 (2002) ("fee disputes comprise the vast majority of attorney-client disagreements"); 26 A.L.R. 5th 107 §2[a] (1995) (attorney-client disputes, particularly fee disputes, are "a fact of life").

¶ 34 Also, the use of arbitration clauses to resolve attorney fee disputes has become "commonplace" (Robert J. Kraemer, *Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 St. Mary's L.J. 909, 917 (2002)), due to the number of fee disputes; the parties' ability to select their own "judges;" the potential drawbacks of litigation such as expense, frustration over the longevity of a lawsuit, loss of privacy, difficulty in finding an attorney willing to sue a fellow attorney, and the impact which fee disputes have on the reputation of the legal profession (Matthew J. Clark, *Note: The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 Iowa L. Rev. 827, 833-38 (1999) ("virtually all analysts recognize that arbitration provides a method for resolving fee disputes that has advantages for both attorneys and

clients")). In fact, according to the American Bar Association's Standing Committee on Client Protection, some jurisdictions *require* that disputes over attorney fees be arbitrated, including districts or counties in Alaska, California, District of Columbia, Georgia, Maine, Montana, New Jersey, New York, North Carolina, Ohio, South Carolina, and Wyoming. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/fee_arb_chart.authcheckdam.pdf (last visited Nov. 15, 2017)).

¶ 35 It should come as no surprise, then, that numerous courts have rejected the contentions that retainer agreements that require the arbitration of fee disputes are contrary to public policy and unenforceable. In a case of first impression, a New Jersey court could find no reason for excluding attorney fee disputes from that jurisdiction's strong public policy favoring arbitration of a wide range of disputes. *Kamaratos v. Palias*, 821 A.2d 531, 535 (N.J. Super. 2003) ("it would strike us as somewhat anomalous to conclude that parties may not agree in advance that arbitration will be the sole remedy for a dispute about legal fees"). See also *Daly v. Komline-Sanderson Engineering Corp.*, 191 A.2d 37 (N.J. 1963) (indicating there is nothing inherent in the attorney-client relationship which would justify precluding fee disputes from arbitration and even stating "we should encourage arbitration of disputes between attorney and client"). Additional cases are collected in Restatement (Third) of the Law Governing Lawyers § 42 (2000) and Jane Massey Draper, Annotation, *Validity and Construction of Agreement Between Attorney and Client to Arbitrate Disputes Arising Between Them*, 26 A.L.R. 5th 107 (1995). This authority indicates there is nothing inherently wrong about attorneys and their clients agreeing to fee arbitration, but that agreements must "meet standards of fairness, particular as regards designation of arbitrators." Restatement (Third) of the Law Governing Lawyers § 42, comment b(iv) (2000). We have no opinion as to whether this latter requirement is an accurate expression

of Illinois law; but assuming *arguendo* that it is, we reiterate that the agreement at issue specified, "The arbitration shall be heard in the City of Chicago by a panel of three arbitrators, all of whom must be practicing attorneys in that city, with one arbitrator to be selected by each party and the third to be chosen by the two arbitrators selected by the parties." Thus, each side could select an arbitrator it perceived as favorable and those two would select the neutral third.

¶ 36 In short, the Illinois public policies which favor freedom to contract, judicial enforcement of contracts as written, and preference for arbitration over litigation all oppose Tecnomatic's contention that its arbitration clause with Bryan Cave should be invalidated as oppressive and unfair.

¶ 37 We also point out that the parties' arbitration clause essentially governs the forum and procedures for resolving disputes (the where, when, and how) and does not attempt to limit the substance of any dispute or prospectively absolve Bryan Cave from liability for its conduct (the what). The contract does not waive or prospectively release any claim regarding Bryan Cave's billing or services—it only specifies that any dispute will be resolved through arbitration, including "any alleged claims for legal malpractice, breach of fiduciary duty, breach of contract, or other claim against the Firm for any alleged inadequacy of such services." In other words, the agreement to arbitrate instead of litigate does not curtail Tecnomatic's purported claims and in no way implicates the professional rule which Tecnomatic cited in its complaint which prohibits counsel from prospectively limiting its liability for attorney malpractice. See Ill. S. Ct. R. 1.8(h)(1) (eff. Jan. 1, 2010); *McGuire, Cornwell, & Blakey v. Grider*, 765 F. Supp. 1048, 1051 (D. Colo. 1991) (addressing analogous Oklahoma rule of professional conduct and stating that arbitration clause in modified fee agreement with attorney "merely shift[s] determination of the malpractice claim to a different forum"); *Monahan v. Paine Webber Group, Inc.*, 724 F. Supp.

224, 227 (1989) (noting that New York courts have referred malpractice claims to arbitration, and ruling that arbitration clause was not contrary to model rule of professional conduct prohibiting counsel from "attempting to exonerate himself from or limit his liability to his client for his professional malpractice"). One State's ethics panel reasoned:

> "Perhaps if a particular forum had rules that themselves limited liability, then selection of such a forum could fairly be said to limit liability indirectly. Or if the arbitration agreement were a sham, such as an agreement to arbitrate before the lawyer's partner, then one could argue that its practical effect was to limit liability. Mutually agreed upon arbitration pursuant to the state and federal acts entail no such liability limiting rules. Nor is an agreement to arbitrate before a fair arbitrator selected at the time of the dispute, or appointed by the court, a sham. The arbitrator to whom resort would be made pursuant to the proposed agreement thus remains as unlimited as any judge or jury, and perhaps more so, in his or her freedom to find the lawyer liable, and to award any and all compensation or other damages that a court could award." *Hodges*, 103 So. 3d at 1074 (*quoting* Maine Professional Ethics Commission Opinion 170).

¶ 38 Nevertheless, Tecnomatic alleged the discovery exclusion rendered the arbitration clause one-sided and unfairly prejudicial to Tecnomatic's ability to meet its burden of proof because the necessary information, documents, and testimony needed to support its claims are in Bryan Cave's sole possession or with third parties who must be subpoeaned. However, when questioned at appellate oral arguments, Tecnomatic had to concede that Tecnomatic ignored Bryan Cave's repeated offer to release an estimated 10 boxes of client files and an additional one million discovery documents from the underlying Remy action. The Illinois Rules of Professional Conduct ensure the client has access to its own files, specifically Rule 1.4(a)

requires counsel to promptly comply with reasonable requests for information and Rule 1.15(b) requires counsel to promptly deliver to the client any property that the client is entitled to receive. See also Restatement (Third) of the Law Governing Lawyers § 46 (2000) (indicating a lawyer must take reasonable steps to safeguard documents relating to the representation of the client or former client, and upon request generally must allow a client or former client to inspect and copy documents). These files would include most of the correspondence Tecnomatic says it needs to prove its claims. Thus, as a former legal client, Tecnomatic has an extraordinary advantage which it would not have in a typical commercial dispute with another party. Also, although the discovery ban prevents Tecnomatic from deposing its former attorneys, Tecnomatic is still free to call counsel to the witness stand (unless it is prohibited by the arbitrators) to elicit confirmation of any factual allegations of impropriety.

¶ 39 Furthermore, the fee agreement indicates Tecnomatic was to receive monthly invoices from Bryan Cave and it appears from the record that Tecnomatic did not express any concerns about Bryan Cave's work and the charges that Tecnomatic was incurring during the six years of litigation that settled in its favor in 2014. Discovery is not meant to determine if there could be a cause of action. *Allen v. Peoria Park District*, 2012 IL App (3d) 110197, ¶ 14, 968 N.E.2d 1199. Nevertheless, nearly a decade after the first legal work was performed and invoiced in 2008, Tecnomatic argues it is appropriate to finally "ask the former attorney what factors entered into a decision to bring or not bring a motion, to take certain depositions or not take others, or when to bring claims," so that Tecnomatic may be compensated for counsels' "malpractice." Tecnomatic also argues that now is the time to ask "the managing attorney *** to explain why the file was staffed as it was or [whether there might have been] alternative ways of handling issues or discovery in the underlying case," so that Tecnomatic can correct "misconduct in fees."

Tecnomatic argues that the billing statements it accepted every month, for years, "show nothing more than what the attorney claimed was done, usually in a cryptic and shorthand manner, and how long he or she billed for that work." Tecnomatic unpersuasively contends that it is "only in discovery that the client could have the attorney explain the work in detail." We are confident that a company with the capacity to negotiate multi-million dollar contracts for the design, production, and installation of custom assembly line equipment in a foreign country was capable of requesting more detail in the monthly invoices it was receiving from its own litigation counsel and to also negotiate fee reductions where it deemed warranted. Moreover, the fee agreement encouraged Tecnomatic to communicate about the monthly invoices. Fiordalisi noted on the second page of his cover letter: "We do our best to see to it that our clients are satisfied not only with our services but also with the fees charged for those services. Whenever you have any questions or comments regarding our services or fees, you should contact me or any other attorney in the Firm with whom you are working. We also encourage you to inquire about any matters relating to our fee arrangements or monthly statements that are in any way unclear."

¶ 40 In addition, whether an agreement is contrary to public policy depends on the particular facts and circumstances of a case (*Kleinwort Benson*, 181 Ill. 2d at 226, 692 N.E.2d at 275), and Tecnomatic has failed to provide any facts whatsoever or even an affidavit suggesting that its former litigation counsel committed any professional impropriety in obtaining the $32 million settlement in the underlying action, at a cost of $12.9 in legal fees and costs. Despite arguing that it is oppressive to enforce a bar on discovery in an arbitration provision between an attorney and client, Tecnomatic is proposing that we decide this case in the abstract. When questioned at oral arguments about the lack of factual allegations, Tecnomatic had no real response. We are mindful that Tecnomatic may have been cautious in its allegations in this declaratory judgment

action in order to comply with the fee agreement's confidentiality provision. Nevertheless, there is no indication in the pleading as to why Tecnomatic believes it "has various claims against Bryan Cave, including claims for breach of fiduciary duty, overbilling in violation of Illinois Rules of Professional Conduct 1.5, and legal malpractice, all arising out of Bryan Cave's representation in the Remy Action." Tecnomatic alleged it was billed $12.8 million, which is approximately 40% of the $32 million settlement it agreed to accept from Remy. Although Tecnomatic alleged Fiordalisi acted as lead counsel while "having little or no experience in handling major litigation," plainly, inexperience is inexperience and not incompetence, "breach of fiduciary duty," or "overbilling." An Illinois plaintiff must possess a minimum level of information indicating the defendant is liable to him before he fairly commences litigation and forces the defendant to participate in discovery. *Yuretich v. Sole*, 259 Ill. App. 3d 311, 316-17, 631 N.E.2d 767, 772 (1994) (a "fishing expedition" is a recognized form of litigation abuse). We emphasize that the Remy action did not go to trial and that Tecnomatic, not Tecnomatic's litigation counsel, made the calculated decision in September 2014 to compromise Tecnomatic's claims in exchange for a $32 million settlement from the various defendants. See *Blutcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131, 136-37, 746 N.E.2d 863, 868 (2001) (authority of an attorney to represent a client in litigation is separate from the authority to compromise or settle a lawsuit and the attorney must receive the client's express authorization to do so). In September 2014, Tecnomatic would have been fully aware of the strength of its claims and the defenses in the Remy action. More importantly here, Tecnomatic would also have been fully aware of the legal work done on its behalf and the amount of attorney fees it incurred in order to receive the settlement offer. Tecnomatic would need to know about the strength of its claims and defenses relative to its legal bills in order to determine whether the $32 million offer was fair and

adequate compensation and a better option than continuing to litigate. And yet, six months later, in March 2015, on the eve of receiving its last settlement payment, Tecnomatic took a contrary position regarding its legal services and expenses, by seeking a judicial declaration that the arbitration clause in its fee agreement is invalid so that Tecomatic may sue its own litigation counsel for its professional judgment and billing in the Remy action. Tecnomatic did not allege and does not argue, however, that any new facts or circumstances came to its attention between September 2014 and March 2015 which caused Tecnomatic to believe it had been materially harmed by counsels' conduct. Despite failing to show that the facts and circumstances are in its favor, Tecnomatic asks us to conclude the appeal in its favor.

¶ 41 Furthermore, the contract terms indicate that both sides of the agreement are bound by the prohibition on discovery. The prohibition is not a one-sided requirement or surprising to an innocent party to the contract, nor is there an overall imbalance in the parties' contractual rights and obligations. The fact that the discovery exclusion may have a greater effect on the plaintiff in an action concerning the invoices or services does not make it substantively unconscionable, even in the context of an attorney-client fee agreement. Without discovery, it may be more difficult for a party to prove its case or defense, but the lack of discovery makes the arbitration process even simpler, faster, and cheaper. In addition, the right to conduct discovery could arguably give Bryan Cave the upper hand over Tecnomatic in any dispute, because a large law firm can cost-effectively conduct its own discovery and thus force its non-lawyer opponent to either comply with lengthy interrogatories and extensive depositions or bear the burden of persuading the arbitrator that the law firm's discovery is unnecessary or improper. In other words, because lawyers have an economic advantage in litigation with their former client, the prohibition on discovery arguably levels the playing field, and allows the parties to proceed most

directly and expediently to an airing of their dispute.

¶ 42 Tecnomatic also lacks legal support for its position. Tecnomatic bases its appeal almost entirely on two foreign cases which it did not cite in the trial court and which are not relevant, controlling in this jurisdiction, or persuasive to us. See *Draper & Kramer, Inc. v. King*, 2014 IL App (1st) 132073, ¶ 31, 24 N.E.3d 851 (decisions of foreign courts are not binding, but the use of foreign decisions as persuasive authority is appropriate where Illinois authority on point is lacking). Tecnomatic's key allegations were "the arbitration provision is unconscionable, void and invalid, and should not and cannot be enforced on the basis that the 'no discovery' rule within the arbitration provision causes severe detriment and prejudice to Tecnomatic;" "[n]ot allowing for discovery effectively operates to thwart, blunt and defeat Tecnomatic's ability to carry its burden of proof;" and "functionally one-side provisions violate public policy;" because "they deny Tecnomatic access to information needed to sustain a claim of legal malpractice or breach of fiduciary duty by permitting Bryan Cave to maintain exclusive access to evidence." Neither case indicates an arbitration clause which bars discovery between attorney and client is *per se* unfair or oppressive. The cases concern disclosures counsel is expected to make regarding the potential effects and benefits of an arbitration clause so that the client may make an informed decision so to whether to agree to the inclusion of the arbitration language. Tecnomatic thus, is attempting to shift our attention back to the contracting phase and the concepts of procedural unconscionability which Tecnomatic did not include in the complaint at issue in this summary judgment review.

¶ 43 The clients in the first foreign case, *Hodges*, were software developers who sued their litigation counsel for malpractice after the complaint the attorneys filed against a software buyer did not survive a summary judgment motion. *Hodges*, 103 So. 3d at 1072. Citing a mandatory

arbitration clause in their retainer agreement, the attorneys challenged venue and subject matter jurisdiction. *Hodges*, 103 So. 3d at 1072. The trial and appellate courts deemed the clause invalid. *Hodges*, 103 So. 3d at 1072. However, on further appeal, the Supreme Court of Louisiana indicated mandatory arbitration clauses in attorney-client fee agreements are generally enforceable. *Hodges*, 103 So. 3d at 1072. A majority of the seven members of the Supreme Court of Louisiana first found that the parties' clause was consistent with Louisiana's version of Rule 1.8(h), because the arbitration language did not attempt to limit counsels' liability, it provided for a neutral decision maker, and it was otherwise fair and reasonable to the clients. *Hodges*, 103 So. 3d at 1076.

¶ 44 The majority also found, however, that the clients could not have given their informed consent because the attorney had not adequately explained, either orally or in writing, the scope of the clause and the potential consequences of agreeing to binding arbitration, such as waiving the rights to a jury trial, broad discovery, and an appeal. *Hodges*, 103 So. 3d at 1077. The attorneys never mentioned malpractice while negotiating the contract and the client testified that he believed the written clause was intended to cover only fee disputes and not malpractice. *Hodges*, 103 So. 3d at 1078.

¶ 45 The written clause consisted of just two short sentences and did not provide the explanatory details that were included in the lengthy arbitration paragraph in Tecnomatic's contract with Bryan Cave. In fact, other than stating broadly that the parties would rely on arbitration, the *Hodges* clause only chose the arbitrators and location: " 'Any dispute, disagreement or controversy of any kind concerning this agreement, the services provided hereunder, or any other dispute of any nature or kind that may arise among us, shall be submitted to arbitration, in New Orleans, Louisiana. Such arbitration shall be submitted to the American

Arbitration Association.' " *Hodges*, 103 So. 3d at 1071.

¶ 46 The majority took the opportunity to impose an unprecedented list of requirements on Louisiana lawyers, even going so far as to require attorneys to tell the client that the upfront costs of the alternative dispute resolution may be higher than litigation. *Hodges*, 103 So. 3d at 1077. Regardless of what counsel disclosed during negotiations, the court specifically held that their written agreement "must explicitly list the types of disputes covered by the arbitration clause, *e.g.*, legal malpractice, and make clear that the client retains the right to lodge a disciplinary complaint." *Hodges*, 103 So. 3d at 1077. The majority then held that because the various disclosures of the potential consequences of the arbitration clause had not been made to the client orally or in writing, the arbitration clause was not enforceable. *Hodges,* 103 So. 3d at 1078.

¶ 47 Two dissenting justices pointed out that the requirements were not specified in any existing State law or rule of professional conduct. *Hodges*, 103 So. 3d at 1077. The first dissenting justice remarked, "While I think the Rules of Professional Conduct could be amended to include such requirements, I do not believe the rules pronounced by the majority should apply retroactively to an attorney who has no prior notice of such disclosure requirements." *Hodges*, 103 So. 3d at 1077. The other dissenting justice also criticized the expansion on counsels' duties and concluded, "To essentially enact new disclosure rules to apply retroactively in this case is unfair and unnecessary." *Hodges*, 103 So. 3d at 1077.

¶ 48 *Castillo* is a New Mexico case which, like *Hodges*, considered contract negotiations and a written arbitration clause that was overly succinct and "unusually broad." *Castillo*, 368 P.3d 1249; *Hodges*, 103 So. 3d 1069. The client's complaint alleging legal malpractice and other issues was met with a motion to compel arbitration. *Castillo*, 368 P.3d at 1252. The contract provision at issue in *Castillo* stated, in its entirety, "ARBITRATION CLAUSE: Should any

dispute arise, Client and Attorney agree to submit their dispute to arbitration." *Castillo*, 368 P.3d at 1252. There was no contract language that explained the scope or meaning of the lone sentence. *Castillo*, 368 P.3d at 1252. The court cited *Hodges* with approval for the proposition that counsel needed to have made " 'full and complete disclosure of the potential effects of [the] arbitration clause, including the waiver of a jury trial, the waiver of the right to appeal, the waiver of broad discovery rights, and the possible high upfront costs of arbitration.' " *Castillo*, 368 P.3d at 1257 (quoting *Hodges*, 103 So. 3d at 1071). There were conflicting affidavits as to whether the parties had discussed these details before the client signed the contract. *Castillo*, 368 P.3d at 1252. The New Mexico court deemed *Hodges* to be "particularly instructive," but for some reason, it did not adopt the Louisiana court's specific holding that a written arbitration clause must always state the types of disputes it covers and "make clear" that the client may also file a disciplinary complaint. *Hodges*, 103 So. 3d at 1077. Although the *Castillo* clause regarding "any dispute" did not expressly encompass "malpractice" as *Hodges* would require, the New Mexico court found that the written wording was sufficient to apply to malpractice claims. *Castillo*, 368 P.3d at1252. Even so, the written language was not enough to adequately inform the client of the " 'material advantages and disadvantages' " of arbitration. *Castillo*, 368 P.3d at1252 (quoting *Spencer v. Barber*, 2013-NMSC-010, ¶ 34, 299 P.3d 388). In light of the conflicting affidavits about the parties' communications prior to signing the contract, the New Mexico court remanded the matter for an evidentiary hearing as to whether counsel had sufficiently disclosed the meaning and scope of the arbitration language, but specified that the hearing need only concern the client's waiver of three rights: "the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits." *Castillo*, 368 P.3d at 1259. Thus, *Castillo* only generally followed *Hodges*, reduced the Louisiana court's list of

requirements to only three, and indicated all of them could be satisfied in the pre-contract phase of the parties' relationship, rather than requiring that some of them be included in the written document.

¶ 49 Tecnomatic urges us to reverse the trial court on the basis of *Hodges* and *Castillo*, but we do not find that argument convincing, primarily because the concepts addressed in those cases were not included in the complaint at issue and the opinions do not support Tecnomatic's premise that a bar on discovery between these parties is untenable.

¶ 50 Additionally, both cases indicate that at least some of the attorney disclosure requirements may be accomplished during contract negotiations, and we know little about the current parties' contract negotiations. The Louisiana court adopted a list of disclosure requirements which may be made to the client during negotiations or in the subsequent written agreement, and indicated only two of the disclosures must be included in the contract itself. *Hodges*, 103 So. 3d at 1077. We know little about the current parties' contract negotiations because Tecnomatic omitted this phase of the relationship from the complaint at issue, was denied leave to subsequently amend or argue the subject of procedural unconscionability, and then abandoned any challenge to those rulings on appeal by failing to address them in its appellate brief. We have no way of knowing, for instance, whether emails were exchanged prior to the contract's presentation or whether Fiordalisi made any disclosures verbally when he met with Ranalli in Chicago. Accordingly, we have no way of soundly applying *Hodges* or *Castillo* here and determining whether Bryan Cave adequately informed its client of the " 'material advantages and disadvantages' " of agreeing to arbitration.

¶ 51 Also, while the Louisiana court acted with the laudable intention of protecting the client, the disclosure list the court adopted in *Hodges* was not required by any particular rule or law of

that jurisdiction, and the court's retroactive imposition of those requirements does not strike us as particularly fair in this instance. Then there is also the fact that *Castillo* followed *Hodges* only somewhat and did indicate why it was adopting only part of the *Hodges*' list of disclosures. Tecnomatic does not explain this discrepancy, provide a rationale for us to pick and choose from the list of disclosures, or justify our retroactive application of a disclosure requirement which was never pled.

¶ 52 Thus, on the one hand are strong public policies which favor freedom to contract, enforcement of arbitration agreements, and alternative dispute resolution, and on the other hand are the facts that Tecnomatic has an extraordinary advantage to its own client files, and that Tecnomatic has failed to provide facts and authority in favor of its appeal. We are not led to conclude that the trial court erred.

¶ 53 Briefly, Tecnomatic also argues that, in addition to being unconscionable, the arbitration clause is void as against the public policy stated in the Illinois Rules of Professional Conduct. Tecnomatic contends that the arbitration clause violates Rule 1.4(a) of the Illinois Rules of Professional Conduct which provides that the lawyer must inform the client of any circumstances requiring the client's informed consent, and explain the matter to the extent reasonably necessary to permit the client to make an informed decision. Tecnomatic also relies on Comment 14 to Rule 1.8 as an indication that lawyers may enter into an agreement to arbitrate malpractice claims but only if the agreement is enforceable and the client is fully informed of the scope and effect of the agreement. Tecnomatic included Rule 1.8(h)(1) in its complaint, but for the proposition that the confidentiality language and discovery exclusion were one-sided obligations that "deny Tecnomatic access to information needed to sustain a claim of legal malpractice or breach of fiduciary duty." Here, however, both of Tecnomatic's public policy arguments concern

the formation of the contract, and Tecnomatic waived our consideration of procedural unconscionability by failing to plead the issue in the trial court.

¶ 54 None of Tecnomatic's arguments provide grounds for reversing the trial court's judgment in favor of Bryan Cave. Accordingly, we affirm the summary judgment order on appeal.

¶ 55 Affirmed.

¶ 56 JUSTICE GORDON, specially concurring:

¶ 57 I would also affirm the judgment of the circuit court of Cook County, but I must write separately. At oral argument, counsel for Bryan Cave indicated that it is willing to give Tecnomatic discovery and will not enforce the written bar to discovery as contained in the attorney-client retainer agreement. As a result, the issue of discovery should be removed from this case.

¶ 58 There is no question in my mind that barring discovery in a client's retainer agreement without appropriate disclosures is procedurally unconscionable and wrong. However, we need not address the technicalities of Tecnomatic's failure to plead procedural unconscionability when Bryan Cave has agreed to provide discovery in this matter contrary to its written agreement with Tecnomatic. That issue has been resolved by Bryan Cave's agreement in open court.