Circuit Court for Montgomery County
Case No. 484240V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 714

September Term, 2021

FLAUBERT MBONGO

v.

ROBINHOOD MARKETS, INC., *et al.*

Nazarian,
Leahy,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 3, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Flaubert Mbongo, Appellant (referred to hereafter also as "Mbongo"), filed, in the Circuit Court for Montgomery County, a civil complaint against Robinhood Markets, Inc., Robinhood Financial, LLC, and Robinhood Securities, LLC (collectively "Robinhood"). Robinhood responded by moving to compel arbitration, pursuant to the terms of a customer agreement (the "Agreement") entered into between Robinhood and Mbongo. Following a hearing, the court ordered that the action be dismissed and that Mbongo pursue his claims against Robinhood via arbitration. He filed this appeal, raising four questions, which we have rephrased and consolidated into a single question[1]:

> Did the circuit court err in dismissing Mbongo's complaint in favor of arbitration?

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[1] Mbongo phrased his questions as:

> I. When the language of the governing contract demonstrates that the unilateral arbitrator selection clause is unreasonably favorable to Robinhood; did the circuit court err in granting the Defendants' motion to compel arbitration?
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> II. Where a mandatory arbitration clause imposes plaintiff to pay excessive fees that are way above the filing fees in the circuit court that will deter plaintiff from pursuing valid claims under Maryland law, is that clause unconscionable?
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> III. When a mandatory arbitration clause effectively bars plaintiff from asserting his right to sue including seeking a trial by jury where the Defendants unilaterally have selected an arbitrator and the undisputed expert testimonies in arbitration cases established that under similar circumstances few if any plaintiffs will have any realistic remedy in arbitration, is that clause unconscionable?
>
> IV. Where a mandatory arbitration clause holds that Defendants reserved the right to amend the Agreement at any time; is that agreement lacks [sic] consideration?

For reasons to be explained, we hold that the circuit court did not err. Therefore, we affirm the court's judgment.

BACKGROUND

Robinhood is a company that provides an on-line platform through which individuals may trade various securities. In or around April 2020, Mbongo opened an account with Robinhood. In so doing, he agreed to the terms and conditions set forth in the Agreement. Those terms and conditions included the following:

> In consideration of Robinhood Financial LLC, Robinhood Securities, LLC, and their agents and assigns (collectively "Robinhood") opening one or more accounts on my behalf ("My Account(s)" or the "Account(s)") for the purchase, sale or carrying of securities or contracts relating thereto and/or the borrowing of funds, which transactions are cleared through Robinhood Securities, I represent and agree with respect to all Accounts, whether margin or cash, to the terms set forth below (the "Agreement"). When used in this Agreement, the words "I," "Me," "My," "We," or "Us" mean the owner(s) of the Account.
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> * * *
>
> **I UNDERSTAND THAT THE TERMS AND CONDITIONS OF THIS AGREEMENT GOVERN ALL ASPECTS OF MY RELATIONSHIP WITH ROBINHOOD REGARDING MY ACCOUNTS. I WILL CAREFULLY READ, UNDERSTAND AND ACCEPT THE TERMS AND CONDITIONS OF THIS AGREEMENT BEFORE I CLICK "SUBMIT APPLICATION" OR OTHER SIMILARLY WORDED BUTTON. … I UNDERSTAND THAT CLICKING "SUBMIT APPLICATION" IS THE LEGAL EQUIVALENT OF MY MANUALLY SIGNING THIS AGREEMENT AND I WILL BE LEGALLY BOUND BY ITS TERMS AND CONDITIONS. BY ENTERING INTO THIS AGREEMENT, I ACKNOWLEDGE RECEIPT OF THE ROBINHOOD PRIVACY POLICY AND PRIVACY AND SECURITY STATEMENT. I UNDERSTAND THAT THIS AGREEMENT MAY BE AMENDED FROM TIME TO TIME BY ROBINHOOD, WITH REVISED TERMS POSTED ON THE ROBINHOOD WEBSITE. I AGREE TO CHECK FOR UPDATES TO**

THIS AGREEMENT. I UNDERSTAND THAT BY CONTINUING TO MAINTAIN MY SECURITIES BROKERAGE ACCOUNT WITHOUT OBJECTING TO ANY REVISED TERMS OF THIS AGREEMENT, I AM ACCEPTING THE TERMS OF THE REVISED AGREEMENT AND I WILL BE LEGALLY BOUND BY ITS TERMS AND CONDITIONS. IF I REQUEST OTHER SERVICES PROVIDED BY ROBINHOOD THAT REQUIRE ME TO AGREE TO SPECIFIC TERMS AND CONDITIONS ELECTRONICALLY (THROUGH CLICKS OR OTHER ACTIONS) OR OTHERWISE, SUCH TERMS AND CONDITIONS WILL BE DEEMED AN AMENDMENT AND WILL BE INCORPORATED INTO AND MADE PART OF THIS AGREEMENT. I ALSO UNDERSTAND THAT BY CLICKING "SUBMIT APPLICATION" I HAVE ACKNOWLEDGED THAT THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE IN SECTION 38 HEREIN.

* * *

38. Arbitration.

A. This Agreement contains a pre-dispute arbitration clause. By signing an arbitration agreement, the parties agree as follows: (1) All parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed. … B. Any controversy or claim arising out of or relating to this Agreement, any other agreement between Me and Robinhood, any Account(s) established hereunder, any transaction therein, shall be settled by arbitration in accordance with the rules of FINRA Dispute Resolution, Inc. ("FINRA DR"). I agree to arbitrate any controversy or claim before FINRA DR in the State of California. C. This agreement to arbitrate constitutes a waiver of the right to seek a judicial forum unless such a waiver would be void under the federal securities laws.

* * *

ACCEPTED AND AGREED: I acknowledge that I have read the preceding terms and conditions of this Agreement, that I understand them and that I hereby manifest my assent to, and my agreement to comply with, those terms and conditions by accepting this agreement. **I ALSO UNDERSTAND THAT BY ACCEPTING THIS AGREEMENT I HAVE**

ACKNOWLEDGED THAT THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE IN SECTION 38 HEREIN.

In December 2020, Mbongo filed a civil complaint in the circuit court against Robinhood. He alleged that, in October 2020, he executed a trade through his Robinhood account that should have brought the account's cash balance to $6,916.57. When he checked his balance soon thereafter, he discovered that Robinhood had placed his account in "deficit status." Mbongo contended that Robinhood had "used all of $6,903.55, [save] $81.92, to illegally purchase securities," without his knowledge. He asserted that Robinhood's actions had created a "false margin" that required him to borrow funds. Therefore, Robinhood's actions constituted a breach of the Agreement, a breach of implied warranty of merchantability, tortious interference with contract and prospective advantage, and civil conspiracy.

Shortly after the filing of Mbongo's complaint, Robinhood filed a motion to compel arbitration. Robinhood asserted that all of his claims were subject to the agreed-upon arbitration clause in the Agreement.

Mbongo opposed Robinhood's motion, arguing that the arbitration clause was unconscionable, and thus unenforceable, because he did not have a meaningful choice in accepting the Agreement, because the Agreement's terms and conditions were "excessively long," and because Robinhood was "attempting to invoke the protection of its arbitration clause to prevent [him] from obtaining any recovery." He argued also that the Agreement itself was unenforceable because Robinhood retained the right to amend the terms of the Agreement at any time.

Following a hearing, the circuit court granted Robinhood's motion and dismissed Mbongo's complaint in favor of arbitration. This timely appeal followed.

STANDARD OF REVIEW

"An order compelling arbitration is a final and appealable judgment of the trial court." *Ford v. Antwerpen Motorcars Ltd.*, 443 Md. 470, 476 (2015). "Generally, a trial court's finding that a dispute is subject to arbitration is a conclusion of law, subject to review *de novo* by this Court." *Gannett Fleming, Inc. v. Corman Construction, Inc.*, 243 Md. App. 376, 391 (2019). "When reviewing a trial court's decision compelling arbitration, our role extends only to a determination of the existence of an arbitration agreement." *Ford*, 443 Md. at 476 (citations and quotations omitted).

DISCUSSION

Mbongo does not dispute generally the enforceability of arbitration clauses, nor does he dispute that he entered willingly into the Agreement upon opening his account with Robinhood. Rather, he claims that the arbitration clause is unenforceable because it is "unconscionable" and "lacks consideration." We disagree with both of his claims.

A.

Mbongo advances four arguments why the arbitration clause is unconscionable. First, the clause did not provide him with a realistic opportunity to receive the same remedies that would be available via a court action. Second, the clause deprived him of his right to a trial by jury. Third, the clause was "impermissibly one-sided" because

Robinhood had "complete control" in selecting the arbitrator. Lastly, the clause required him to pay "excessive fees" that were not disclosed in the Agreement.

Robinhood counters that all of Mbongo's arguments were waived because they were not raised in the circuit court. Robinhood argues further that, its waiver argument notwithstanding, the circuit court's decision to compel arbitration should be affirmed because the arbitration clause was neither procedurally nor substantively unconscionable and was supported by consideration.

Under both the Maryland Uniform Arbitration Act ("MUAA") and the Federal Arbitration Act ("FAA"), an agreement to arbitrate is considered valid, irrevocable, and enforceable. *Walther v. Sovereign Bank*, 366 Md. 412, 423-25 (2005). Since the enactment of the MUAA, both this Court and the Court of Appeals have recognized "the legislative policy favoring enforcement of arbitration agreements." *Doyle v. Finance America, LLC*, 173 Md. App. 370, 381-82 (2007). Thus, "arbitration agreements enjoy 'favored' status in Maryland." *Id.* at 382.

That said, an arbitration agreement may be deemed unenforceable where "grounds exist that would render the arbitration agreement revocable as a contract." *Id.* at 381. That means that certain contract defenses, such as unconscionability, may be asserted to invalidate an arbitration agreement. *Rankin v. Brinton Woods of Frankford, LLC*, 241 Md. App. 604, 621 (2019). The burden of proving unconscionability rests with the party disputing the validity of the arbitration agreement. *Id.*

"An unconscionable bargain or contract has been defined as one characterized by extreme unfairness, which is made evident by (1) one party's lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party." *Walther*, 366 Md. at 426 (citations and quotations omitted). The doctrine of unconscionability contains both a procedural component and a substantive component. *Doyle*, 173 Md. App. at 383. "The prevailing view is that both procedural and substantive unconscionability must be present in order for a court to invalidate a contractual term as unconscionable." *Freedman v. Comcast Corp.*, 190 Md. App. 179, 207-08 (2010).

"Procedural unconscionability 'deals with the process of making a contract' and 'looks much like fraud or duress.'" *Id.* at 208 (citing *Walther*, 366 Md. at 426-27). "It includes concerns such as the use of 'fine print and convoluted or unclear language,' and 'deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms' and 'one party's lack of meaningful choice.'" *Id.* (citing *Walther*, 366 Md. at 426-27).

"Substantive unconscionability, on the other hand, refers to contractual terms that are unreasonably or grossly favorable to the more powerful party and includes terms that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law." *Rankin*, 241 Md. App. at 622 (citations and quotations omitted). Substantively unconscionable contract terms may also "impair the integrity of the bargaining process or otherwise contravene the public interest or public policy" and may include "fine-print terms or provisions that seek to negate the reasonable expectations of the non-drafting

party, or unreasonably and unexpectedly harsh terms having nothing to do with price or other central aspects of the transaction." *Walther*, 386 Md. at 426 (citations omitted).

Where, as here, the contract is one of adhesion, our scrutiny is somewhat heightened. Id. "A contract of adhesion is drafted unilaterally by the dominant party and then presented on a take-it-or-leave-it basis to the weaker party who has no real opportunity to bargain about its terms." *Freedman*, 190 Md. App. at 209 (citations and quotations omitted). Such contracts are looked at "with some special care," and any ambiguities are construed against the drafting entity. *Walther*, 386 Md. at 430-31 (citations omitted).

Nevertheless, adhesion contracts are not *per se* unconscionable. A reviewing court should not "simply excise or ignore terms merely because, in a given case, they may operate to the perceived detriment of the weaker party." *Id.* at 431 (citations omitted). Rather, a court must examine the substance of the arbitration clause contained in the adhesion contract before it may declare the clause unconscionable. *Id.* "To that end, we must consider whether the terms of the arbitration clause are so one-sided as to oppress or unfairly surprise an innocent party or whether there exists an egregious imbalance in the obligations and rights imposed by the arbitration clause." *Id.*

Against that backdrop, we hold that the arbitration clause in the instant case was not unconscionable. The Agreement presented the arbitration clause in a conspicuous manner, which included the use of bold lettering and a separate numbered paragraph. The Agreement contained also multiple other references (and cross-references) to the arbitration clause, presented in capital and bold lettering. Mbongo agreed to be bound by

the terms of the Agreement. We must presume that he read and understood those terms, including the agreement to arbitrate. *See id.* at 429 ("[T]he law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms.") (citations and quotations omitted). He even sought to enforce the terms of the Agreement through his breach of contract action. Mbongo cannot now disavow the arbitration provision of the Agreement simply because he no longer wishes to be bound by that part of the Agreement. *See Id.* at 444 ("[W]e are loath to rescind a conspicuous arbitration agreement that was signed by a party whom now, for whatever reason, does not desire to fulfill that agreement.").

More to the point, there is nothing in the language of the arbitration clause that could be considered "so one-sided as to oppress or unfairly surprise an innocent party," nor is there anything that constitutes "an egregious imbalance in the obligations and rights imposed by the arbitration clause." *Id.* at 431. The terms of the arbitration clause are mutual, as both Robinhood and Mbongo are subject to the same terms and conditions throughout the arbitration process. Appellant presented no evidence to suggest that those terms and conditions create an imbalance, much less an egregious one, in favor of Robinhood. The terms of the arbitration clause allow ostensibly for essentially the same remedy as would be available in a court of law, albeit in a different forum. Mbongo presented no evidence to explain how enforcing the arbitration clause would deprive him of an adequate remedy. Indeed, nothing about the arbitration clause, aside from the fact that it was crafted by Robinhood and presented in a contract of adhesion, could be

considered unconscionable. Were we to hold otherwise, such a holding would render essentially all such arbitration clauses *per se* unconscionable and would be contrary to the established case law and the strong public policy in favor of the enforcement of arbitration agreements. *See Doyle*, 173 Md. App. at 382 ("We are keenly aware of the opposition to arbitration agreements taken by consumers and consumer-advocates. Nonetheless, arbitration agreements enjoy 'favored' status in Maryland.").

As noted earlier, Appellant argues that the arbitration clause is unconscionable because: it did not allow for an adequate remedy; it deprived him of his right to a trial by jury, it gave Robinhood complete control over the arbitrator-selection process; and it imposed excessive fees. As Robinhood notes correctly, however, none of those arguments was raised in the circuit court. Therefore, none of those arguments was preserved for our review. Md. Rule 8-131(a).

Had Appellant's arguments been preserved properly, they are without merit in any event. As to his first argument regarding the lack of an adequate remedy, he failed to present evidence or argument to indicate with any precision what remedy he was unable to pursue in arbitration. We could find nothing in the language of the Agreement to suggest that Appellant was deprived of any remedy or that the arbitrator lacked the power to provide him with the relief to which he may have been entitled by law. In short, Mbongo's claim that the arbitration agreement denied him meaningful relief appear baseless.

To the extent that Mbongo is claiming that he was barred effectively from obtaining an adequate remedy as a result of the imposition of "excessive fees," which he claims were

not disclosed, we remain unpersuaded. Although the arbitration clause did not include any express language as to the exact amount of the related fees, the clause clearly stated that all claims "shall be settled by arbitration in accordance with the rules of FINRA Dispute Resolution, Inc. ("FINRA DR")." Those rules, while not included in the Agreement itself, were readily ascertainable via FINRA's publicly accessible-website. Mbongo could have obtained that information when he entered into the Agreement.[2] https://www.finra.org/arbitration-mediation/arbitration-rules (last visited February 15, 2022). Appellant, in fact, included some of that information in his record extract here, demonstrating his ability to access that information at all relevant times. Had he done so at the time he entered into the Agreement, he would have discovered the existence of the fees. He cannot claim now that the fees were undisclosed given that, had he read the agreement and exercised due diligence, he could have discovered that information prior to entering into the Agreement. *See Walther*, 386 Md. at 442-45 (noting that a party's failure to read a conspicuous contract term is not a defense to enforcement of that term).

As to the amount of fees, Mbongo asserts that, according to the rules posted on FINRA's website, he will be required to pay a $325.00 filing fee and an additional fee of $250.00 per hearing session to bring his claims via arbitration. He argues that those fees

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[2] FINRA is a non-profit organization that works under the supervision of the Securities and Exchange Commission. https://www.finra.org/about/what-we-do (last visited February 15, 2022). "FINRA is authorized by Congress to protect America's investors by making sure the broker-dealer industry operates fairly and honestly." https://www.finra.org/about (last visited February 15, 2022).

we excessive given that "the fee for filing this action in the circuit court was about $165.00."

Appellant's claims are without merit and are not supported by the record. As the Court of Appeals explained in *Walther*, fees imposed pursuant to an arbitration agreement, even those not disclosed expressly by the terms of the agreement, do not render automatically the agreement unconscionable. *Walther*, 386 Md. 439-42. Rather, such fees are assessed on a case-by-case basis, with a "focus upon a claimant's expected or actual arbitration costs and his ability to pay those costs, measured against a baseline of the claimant's expected costs for litigation and his ability to pay those costs." *Id.* at 440 (citations omitted). The significance of those fees must be considered also in conjunction with certain mitigating factors, such as "whether the arbitration agreement provides for fee-shifting … based upon the inability to pay." *Id.* (citations omitted). Finally, the party resisting enforcement of the arbitration agreement has the burden of showing the likelihood of incurring those fees and the extent to which the fees would be unduly burdensome. *Id.* at 441-42; *see also Doyle*, 173 Md. App. at 391.

Appellant's argument fails in every respect. First, FINRA's rules state that the $250.00 session fee is charged to both parties, not just Mbongo, and that the arbitrator determines what percentage of the session fee that each party will pay at the time the arbitrator issues an award. As for the filing fee of $325.00, FINRA's rules allow a party to file a request to have those fees waived upon a showing of financial hardship.

Even were we to assume that Mbongo would have been required to pay the entire $575.00, we fail to see how that fee was unduly burdensome. He claims that the fee was excessive in comparison to the circuit court filing fee of $165.00, yet he offers no explanation as to why that difference was significant in relation to his ability to pay. Moreover, in drawing that comparison, he ignores completely all the other costs associated with pursuing a circuit court action, which could exceed the cost of arbitration. *See Walther*, 386 Md. at 440 (noting that "parties to litigation in court often face costs that are not typically found in arbitration, such as the cost of longer proceedings and more complicated appeals on the merits") (citations omitted). As such, Appellant's complaint of "excessive fees" is purely speculative and cannot be considered unduly burdensome in comparison to the fees associated with a circuit court action.

As to Mbongo's claim that the arbitration clause was unconscionable because it deprived him of his right to a jury trial in the circuit court, we disagree again. The Court of Appeals made clear that a jury trial waiver in an arbitration agreement is enforceable if the waiver provision is conspicuous and the party enters into the agreement in a "knowing and intelligent" manner. *Id.* at 442-45. Here, the waiver was included conspicuously in the arbitration provision. It stated that "all parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed." It is undisputed that Appellant agreed to the terms of the Agreement, including the arbitration clause, in a knowing and

intelligent manner. Thus, the jury trial waiver was enforceable and did not render the arbitration agreement unconscionable.

Finally, as to Appellant's claim that the arbitration agreement was "impermissibly one-sided" because Robinhood retained the right to select the arbitrator, that claim is not supported by the record. There is nothing in the Agreement to indicate that Robinhood had unilateral control over the selection of the arbitrator (or any other procedure associated with the arbitration process). To the contrary, the Agreement states that the arbitration process was governed solely by FINRA's rules. According to those rules, both parties participate in the arbitrator-selection process.

B.

Mbongo claims next that the arbitration agreement was unenforceable because the Agreement lacked consideration. He points to the following language in the Agreement: "I understand that this Agreement may be amended from time to time by Robinhood, with revised terms posted on the Robinhood website." He asserts that Robinhood's ability to alter unilaterally the terms of the Agreement rendered the Agreement "illusory for lack of consideration." He relies on two cases, *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 378 Md. 139 (2003) and *Caire v. Conifer Value Based Care, LLC*, 982 F.Supp. 2d 582 (D. Md. 2013).

Robinhood argues, and we agree, that Mbongo's claims are without merit. First, his reliance on the aforementioned cases is misplaced. In *Cheek*, the disputed arbitration agreement included language that allowed the drafting party to modify the agreement at

any time, even after arbitration was invoked, and without notice to the other party. *Cheek*, 378 Md. at 149. The Court of Appeals held that such language rendered the arbitration agreement unenforceable because the drafting party's promise to arbitrate disputes was "entirely illusory, and therefore, no real promise at all." *Id.* In *Caire*, the disputed arbitration agreement included similar language. The United States District Court for the District of Maryland, relying on *Cheek*, held that the agreement constituted a "'nonexistent' promise." *Caire*, 982 F.Supp. 2d at 593-94.

The language of the arbitration agreement in this case is distinguishable from the language of the agreements in *Cheek* and *Caire*. Although the arbitration agreement here states that Robinhood retains the right to change the terms of the Agreement "from time to time," it also states that any changes will be "posted on the Robinhood website." The Agreement states further that the non-drafting party "agree[s] to check for updates to this Agreement" and "understand[s] that by continuing to maintain [a] securities brokerage account without objecting to any revised terms of this agreement," the party is "accepting the terms of the revised agreement" and "will be legally bound by its terms and conditions." The plain meaning of that additional language may be construed as providing that, while Robinhood retains the right to change the terms of the Agreement, the non-drafting party will be notified of that change and be given the right to accept or reject those new terms. The language does not, however, give Robinhood the right to change the terms of an agreement to which the parties have agreed already. For that reason, Robinhood's

agreement to arbitrate Mbongo's claims is distinguishable from the agreements at issue in *Cheeks* and *Caire*.

A more analogous case to the present one is *Holloman v. Circuit City Stores, Inc.*, 162 Md. App. 332 (2005). In that case, we considered whether an arbitration agreement contained in an employment contract entered into between an employee and an employer was supported by consideration. *Id.* at 337. The employee, relying on *Cheek*, argued that the agreement was not supported by consideration because the employment contract included language that permitted the employer to terminate or modify the contract at any time. *Id.* We disagreed, holding that the arbitration agreement was enforceable. *Id.* at 338-40. We noted that the employment contract included a provision whereby the employer was required to notify the employee of any termination or modification of the agreement, a fact that "materially distinguish[ed] the present case from *Cheek*." *Id.* at 338-39. We explained that "because [the employer] agreed to be bound to give [the employee] notice before altering the terms of the arbitration agreement, and [the employee] would then have had an opportunity to decline to continue her employment under [the employer's] new terms, … their agreement was supported by consideration." *Id.* at 340.

Here, although Robinhood did not promise to provide notice prior to altering the terms of the Agreement, as was the case in *Holloman*, Robinhood did promise to notify Mbongo of any changes. Importantly, Appellant was provided an opportunity to review those changes and to decide whether to continue to be bound by the Agreement's terms. Thus, Robinhood's agreement to arbitrate was not illusory because, had Robinhood

decided to alter the Agreement, Mbongo could choose not to be bound by the revised Agreement's terms.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.