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**WHERE TO DRAW THE LINE - IS YOUR FRANCHISE
AGREEMENT AN UNCONSCIONABLE, ILLUSORY
CONTRACT?**

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Table of Contents

	Page
I. INTRODUCTION.....	1
II. CONTRACT PRINCIPLES	4
A. Illusory Contracts	4
1. Common Law	4
2. Restatement.....	7
3. Uniform Commercial Code	8
B. Unconscionable Contracts	9
1. Common Law	9
2. Restatement.....	10
3. Uniform Commercial Code	11
III. HOW VULNERABLE ARE FRANCHISE AGREEMENTS?.....	14
A. Franchise Cases on Illusoriness	14
1. Hill-Harriss v. Gingiss Intern., Inc.....	14
2. Great Earth Int'l Franchising Corp. v. Milks Dev.	15
3. Smoothie King Franchises, Inc. v. Southside Smoothie & Nutrition Center Inc.	15
4. Druco Rests., Inc. v. Steak N Shake Enters.	16
5. Cases on “Agreements to Agree”	17
B. Franchise Cases on Unconscionability.....	18
1. Zapatha v. Dairy Mart	19
2. Stanley A. Klopp, Inc. v. John Deere Co.	19
3. Doebereiner v. Sohio Oil Co.	20
4. Piantes v. Pepperidge Farm	20
5. Kubis & Perszyk Associates, Inc. v. Sun Microsystems	20
6. Nagrampa v. MailCoups, Inc.	21
7. Faulkenberg v. CB Tax Franchise Systems, LP	22
C. Sample Franchise Agreement Provisions that May Be Vulnerable	22
1. Provisions Permitting Franchisor to Alter Operations Manuals and Otherwise Change Franchisee Obligations.....	23
2. Provisions Referring to Assistance Franchisor May Provide At Its Option	24

3.	Provisions That Make Opening Contingent on Franchisor’s Future Approval	25
4.	Provisions By Which Franchisor Provides Good and/or Services To Franchisees	25
5.	Buyback Provisions	26
6.	Provisions Regarding Renewal of the Franchise Agreement	27
7.	Provisions with Forum-Selection Clauses	27
8.	Fee-Splitting Provisions	28
9.	Indemnification Provisions	28
IV.	FRANCHISEE PERSPECTIVE	28
A.	The Duty of Good Faith and Fair Dealing Cannot Cure All	29
B.	Saving Franchise Agreements	30
V.	FRANCHISOR PERSPECTIVE	31
A.	Freedom of Contract/Benefit of the Bargain	31
B.	The Dynamic of Franchise Agreements	32
C.	The Role of the Implied Covenant of Good Faith and Fair Dealing	33
D.	The “Lesser” Evil?.....	34
VI.	CONCLUSION	35

WHERE TO DRAW THE LINE--IS YOUR FRANCHISE AGREEMENT AN UNCONSCIONABLE, ILLUSORY CONTRACT?*

I. INTRODUCTION

Franchise agreements have appropriately been characterized as long-term, relational contracts.¹ In the course of these agreements, it appears--to paraphrase Benjamin Franklin's comment about "death and taxes"--that nothing "can be said to be certain, except" change and conflict.

Change in the manner of operation of franchise businesses, and thus change in the relationship between franchisor and franchisees, for competitive and other reasons, is a constant. No franchise lawyers worth their salt will fail to recall new entrants into established markets, new innovations in operations, and other changes--let alone the advent of the internet and social media--that have occurred during the lifespan of franchise agreements and have affected the way business is done. Nor will they fail to recognize the conflicts that have arisen, and will continue to arise, in the franchise relationship as a result of changes that are made.

To be sure, there are plenty of examples of franchise chains that bring about change without conflict, or at least resolve potential conflict cooperatively without disputes that end up in litigation. Indeed, that may be true of most changes that are made. Nonetheless, there are also plenty of instances in which disputes over change (as well, of course, as over other issues) are played out in judicial or arbitral forums. Otherwise, the authors of this paper would have needed to find other means of earning a living.

Most issues in franchise litigation focus on the terms of the franchise agreement. There are, of course, other claims, including statutory and business tort claims, that are often made. However, the key claims, perhaps especially in cases involving change, are usually contract claims. Even though enforcement and interpretation of franchise agreements (and other long-term, relational contracts) may involve different and more complex issues than a court or arbitrator may face with respect to a "simple" contract, franchise agreements are still contracts.²

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¹For a thought-provoking discussion of relational contracts in franchising, see Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927 (1990).

²For a prescient discussion of the complexities arising as a result of "form" contracts, long before franchise agreements were the subject of study, see Friedrich Kessler, *Contracts of Adhesion--Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943).

Franchisors usually draft “their” franchise agreements and usually are not amenable to any, or much, negotiation of them. As a result, franchisees who have chosen to sign those agreements are frequently at a disadvantage in litigation that focuses on their terms.

One weapon franchisees have used successfully in some franchise cases is the “implied covenant of good faith and fair dealing.” There is no universally accepted definition or way of applying this covenant. Some authority considers the covenant to be a tool for interpreting a contract when it is ambiguous, although other authority allows for broader use as a curb on the exercise of discretion, even when the terms of the contract are clear.³

When franchisees have been successful in good faith and fair dealing claims, franchisors have proved relatively adept at “fixing” their agreements to avoid, or lessen, the impact of adverse rulings by revising the next iterations of those agreements to address the issue. In particular, when decisions have focused on ambiguity in provisions, franchisors have made revisions in their next “forms” of agreement to clarify the provisions. Thus, a judge, ruling against the franchisor in an early, leading case, suggested that “the problem [of an ambiguous provision] . . . is a readily remedied problem; rewrite the Franchise Agreement to more clearly, unequivocally and unquestionably grant to [the franchisor] . . . the specific rights which [the franchisor] . . . argues now exist under the present Franchise Agreement.”⁴ To a significant extent, franchisors have taken that advice to heart: when a court or arbitrator has found a gap in the agreement, they have filled it with more specific, unequivocal provisions, allowing them to adjust to change, and otherwise deal with their franchisees, in the manner explicitly provided by the franchise agreement.

Franchisors have, to some extent at least, also revised agreements to address broader decisions that have used principles of good faith and fair dealing to limit their exercise of discretion, even when the agreement specifies that the franchisor has “sole and absolute” discretion. In particular, many present-day agreements contain a form of “business judgment” rule that, while not necessarily seeking to foreclose judicial or arbitral review of the franchisor’s exercise of discretion, purports to establish standards that give the franchisor the “benefit of the doubt” with respect to decisions arguably made for the good of the system, as a whole, irrespective of their effect on particular franchisees.⁵

The ability of franchisors to undercut good faith and fair dealing claims by revising their franchise agreements has depended, in no small measure, on the bedrock principle of freedom of contract. If an agreement is clear, even if it proves disadvantageous to one party, courts and arbitrators traditionally uphold the “right” of parties to make whatever bargain they chose. In other words, in the world of franchise agreements, *caveat emptor* lives.

Nevertheless, despite the ability of franchisors to seek to weaken the impact of good faith and fair dealing claims by revising their franchise agreements--to be explicit about their rights to make changes unilaterally during the course of the agreement--franchisees will

³ See Section V. C., *infra*.

⁴ *Scheck v. Burger King Corp.*, 798 F. Supp. 692, 700 (S.D. Fla. 1992).

⁵ See generally Brian B. Schnell and Ronald K. Gardner, Jr., *Battle Over The Franchisor Business Judgment Rule And The Path To Peace*, Franchise Law Journal, Vol. 35, No. 2 (Fall 2015).

doubtless continue to make these claims. Even at their strongest, however, these claims tend to be addressed on an “as applied” basis. The claims (when franchisees are successful at trial or at least in avoiding summary judgment) are typically adjudicated based on the particular facts relating to the manner in which the parties have dealt with the key contract provisions, not in a more abstract examination of those provisions.

Franchisees appear not to have made arguments that their franchise agreements are illusory or unconscionable nearly as often as they have made good faith and fair dealing claims. Nor do franchisees appear to have been successful often in making claims that contracts, or provisions of them, are illusory or unconscionable, at least so far as our review of decisions addressing those arguments indicates.

Although apparently less-used and less-favored than good faith and fair dealing claims, arguments that franchise agreements are illusory or unconscionable, if successful, would potentially have greater impact. For these claims are more likely to be assessed on an “as written” basis. In other words, a detailed factual inquiry about how the franchisor has applied the provision, in practice, may not occur. Instead, a judge or arbitrator may decide, as a legal matter, that the contract, or provision, is unenforceable (or that he or she must “interpret” it to “save” it) because it is illusory and/or unconscionable, creating a much greater likelihood that the ruling will have systemic effect, rather than possibly being limited to facts in the relationship between one franchisee, or several franchisees, and the franchisor. Thus, it seems likely that these claims, if successful or perhaps if credibly asserted, could provide franchisees more leverage in the franchise relationship.

As is true with respect to good faith and fair dealing decisions, at least those that evaluate or limit franchisor conduct, even when expressly permitted, principles of illusoriness and unconscionability are essentially equitable. An illusory contract is generally defined as one in which performance by the promisor is optional and, therefore, for which there is no consideration.⁶ An unconscionable contract is generally defined as one that is grossly unfair, procedurally and/or substantively.⁷

Both definitions are vague, at least as vague as the phrase “good faith and fair dealing.” It is not difficult to imagine provisions in contracts that are illusory, in that there is no express requirement of performance, or unconscionable, in that the terms were imposed on a party who had little, or no, choice and are so one-sided that “no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other,” in the words of one early and often-quoted definition of unconscionable contracts.⁸ But applying these broad concepts, especially in the context of relational contracts like franchise agreements, will seldom be simple.

The modest use and success of claims that franchise agreements are illusory or unconscionable may be a reflection of the continuing strength of the principle of freedom of contract and a judicial tendency to save contracts, or provisions in them, when possible,

⁶ See Section II. A., *infra*.

⁷ See Section II. B., *infra*.

⁸ *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100, 2 Ves. Sen. 125, 155 (Ch. 1750).

notwithstanding equitable concerns. However, as franchisors have revised their agreements, and revised them again by “more careful drafting,” in light of claims or decisions in litigation that they believe may be avoided in the future in this manner, there is the possibility of a new, or renewed, effort to undermine franchise agreements, or provisions of them, that appear to make franchisor performance too discretionary and/or that appear unduly one-sided, by challenging them on the basis that they are illusory and/or unconscionable.

This paper first provides some background on these contract principles. It then discusses cases in which they have thus far been applied in franchise litigation and identifies types of provisions that may be vulnerable to a claim that they are illusory or unconscionable. Next, it sets forth, from the franchisee and franchisor perspectives, the arguments that may be made with respect to claims that franchise agreements, or provisions of them, are illusory or unconscionable. Finally, the paper concludes that, to the extent that these arguments gain greater traction in franchise litigation, franchisors may want to consider tempering their agreements to try to insulate them from such challenges.

II. CONTRACT PRINCIPLES

Claims that contracts are illusory or unconscionable have at least three aspects in common. First, they are essentially applications of equitable principles to contract law. Thus, they provide potential exceptions to the principle of freedom of contract. These claims do not challenge the fact that the parties entered into a contract. They assess the fairness of that contract. Second, the claims typically will attack the contract, as written, not as the parties may have applied it. Third, courts are prone, in attempting to make equitable determinations, to try to “save” the contract by interpreting (or, in the view of some, rewriting) it, rather than declaring it void.

A. *Illusory Contracts*

1. *Common Law*

An essential element of a contract is consideration, including promises of performance. An illusory promise is a promise in form only: one that its maker can keep without subjecting him, or herself, to any detriment or restriction.⁹ A classic example of an illusory promise is the statement that “I promise to do as you ask if I please to do so when the time arrives.”¹⁰ A promisor can keep that promise by either doing as the promisee asks or not, and so the promisor maintains total freedom to do as he or she wants. Since the maker of an illusory promise assumes no detriment or obligation, an illusory promise is not regarded as consideration.¹¹

Williston likewise explains that when an illusory promise is made, it cannot serve as consideration.¹² Such a promise imposes no obligation, since the promisor always has it within

⁹ *Devine v. Notter*, 753 N.W.2d 557, 559 (Wis. Ct. App. 2008).

¹⁰ See 2 Corbin § 5.28, at 142.

¹¹ *Devine*, 753 N.W.2d at 559.

¹² 4 Williston on Contracts § 7:7 (4th ed. 2015).

its power to keep his promise and yet escape performance of anything detrimental to itself or beneficial to the promisee.

Some examples of illusory promises are: (1) One party states that it has total discretion to award the other party an economic incentive under their agreement; (2) A party has a completely unrestricted power to cancel or not perform the contract; (3) The contract imposes an obligation in one provision, but negates that same obligation elsewhere in the document; and (4) A contract of sale contains an obligation to sell but no obligation for the buyer to purchase.¹³

Generally, courts seek to enforce contracts and to avoid, where possible, invalidating them for lack of consideration because a promise is illusory.¹⁴ One important tool that courts use to enforce contracts is to determine that a party's promise is conditional as opposed to illusory. An illusory promise differs from a conditional promise, which is a promise contingent on the occurrence of an independent event. An example of a conditional promise is that an insurance company may promise to pay benefits only if the insured property is damaged.¹⁵ A conditional promise can be valid consideration, but only where the promisor cannot properly decide to avoid supplying the consideration upon the happening of the contingency or where the promisor does not know at the time of contracting that the condition cannot occur.¹⁶ Thus, a contract is not deprived of mutuality simply because performance is contingent on the happening of a condition precedent.¹⁷

In a landmark case on illusory promises, *Wood v. Lucy*, plaintiff, a dress manufacturer, obtained exclusive rights to market dresses designed by the defendant, a prominent designer, in return for plaintiff's agreement to pay the designer one-half of its profits. The written contract, however, contained no express obligations on plaintiff's part.¹⁸ The designer endorsed fabrics and dresses of plaintiff's competitors and defended plaintiff's suit for damages by contending that the contract lacked mutuality because it did not require plaintiff to do anything. Then-Judge Cardozo, speaking for the New York Court of Appeals, rejected this argument, saying:

[The defendant insists] that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the

¹³ See, e.g., *Operations Management Intern., Inc. v. Tengasco, Inc.*, 35 F. Supp. 2d 1052, 1055 (E.D. Tenn. 1999); *In re Four Star Music Co., Inc.*, 2 B.R. 454, 460 (Bankr. M.D. Tenn. 1979) ("A contract of sale is . . . not mutual where there is an obligation to sell but no obligation to purchase") (internal citations omitted).

¹⁴ *Del Sontro v. Cendant Corp., Inc.*, 223 F. Supp. 2d 563 (D.N.J. 2002).

¹⁵ *Richardson v. Snipes*, 330 S.W.2d 381 (Tenn. 1959).

¹⁶ See *Del Sontro*, 223 F. Supp. 2d at 578 (determining that a promise is not illusory when the power to terminate the agreement is outside the promisor's control, such as the promisee's nonperformance, or the happening of some natural disaster).

¹⁷ *Richardson*, 330 S.W.2d 381 (Tenn. 1959).

¹⁸ *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. Ct. App. 1917).

sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. If that is so, there is a contract.¹⁹

Referring to the manufacturer's exclusive privilege to market the designer's creations, the court reasoned that absent the manufacturer's efforts, the designer would have had no right to market her own fashions. Judge Cardozo explained the significance of this factor: "We are not to suppose that one party was to be placed at the mercy of the other."²⁰

In *Sylvan Crest Sand & Gravel Co. v. United States*, another important case interpreting the application of illusory promises, a dispute arose over the interpretation of contract provisions permitting the government to request the delivery of rock or to terminate the contract at any time.²¹ The company sued when the United States refused either to request delivery or to terminate the agreement. In finding for plaintiff, the Second Circuit stated that the contract should not be interpreted to mean that the government was binding the other party to deliver rock but, at the same time, did not promise to either accept it or pay for it.

The reservation of a power to effect cancellation at any time meant something different from this. We believe that the reasonable interpretation of the document is as follows: 'We accept your offer to deliver within a reasonable time, and we promise to take the rock and pay the price unless we give you notice of cancellation within a reasonable time.' Only under such an interpretation is the United States justified in expecting the plaintiff to prepare for performance and to remain ready and willing to deliver. Even so, the bidder is taking a great risk and the United States has an advantage. It is not 'good faith' for the United States to insist upon more than this.²²

As a result, the government was bound to either accept the delivery or give notice of cancellation within a reasonable time.

In many other cases, courts have found ways to avoid declaring contracts unenforceable because they were illusory by interpreting them to impose obligations that were not expressly set forth in the contract. Thus, for example, where parties have conditioned their performance on their ability to obtain financing, the courts have generally concluded that the good faith performance of the contract requires the party to use due diligence in the pursuit of the financing.²³ Similarly, where one party to a contract may request additional collateral because

¹⁹ *Id.* at 214 (citations omitted).

²⁰ *Id.* at 214.

²¹ 150 F.2d 642 (2d Cir. 1945).

²² *Id.* at 644.

²³ *Ide Farm & Stable, Inc. v. Cardi*, 297 A.2d 643 (R.I. 1972).

of that party's discomfort with the other's financial situation, the party exercising discretionary rights must do so reasonably.²⁴

2. **Restatement**

The Restatement (Second) of Contracts defines an illusory promise as, "[w]ords of promise which by their terms make performance entirely optional with the 'promisor'..."²⁵ The Restatement further clarifies illusory promises in the context of consideration:

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless:

- (a) each of the alternative performances would have been consideration if it alone had been bargained for; or
- (b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.²⁶

The comments provide two illustrations of illusory promises. In the first, A offers to deliver to B at \$2 a bushel as many bushels of wheat, not exceeding 5,000, as B may choose to order within the next 30 days. B accepts, agreeing to buy at that price as much as he shall order from A within that time. B's acceptance involves no promise by him, and is not consideration. In the second, A promises B to act as B's agent for three years from a future date on certain terms; B agrees that A may so act, but reserves the power to terminate the agreement at any time. B's agreement is not consideration since it also involves no promise.²⁷

As clarified in the comments, a promise in the alternative may be made if each of the alternative performances is advantageous to the promisee. But if the promisor has an unfettered choice of alternatives, and one alternative would not have been advantageous to the promisee if separately bargained for, the promise in the alternative is not consideration.²⁸

The Restatement also addresses how to prevent contracts from being illusory when the satisfaction of the obligor is a condition in the contract:

When it is a condition of an obligor's duty that he be satisfied with respect to the obligee's performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an

²⁴ *James B. Berry's Sons Co. of Illinois v. Monark Gasoline & Oil Co.*, 32 F.2d 74 (8th Cir. 1929).

²⁵ Restatement (Second) of Contracts § 2 cmt. e (1981).

²⁶ Restatement (Second) of Contracts § 77 (1981).

²⁷ *Id.*, cmt. a.

²⁸ *Id.*, cmt. b.

interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.²⁹

The comments state that the exercise of judgment in employing a condition of satisfaction must be in accordance with the duty of good faith and fair dealing, and for that reason, the agreement is not illusory.³⁰

3. Uniform Commercial Code

Under the Uniform Commercial Code § 2-106, a “sale” consists in the passing of title from the seller to the buyer for a price. The absolute and unqualified right of a party to rescind all its obligations under contract of sale renders its promise illusory and inoperative as a consideration for a binding contract, and thus the transaction would not qualify as a “sale” under the UCC.³¹

Output contracts, in which the seller’s actual output constitutes the basic measure of quantity, are different.³² Although an output contract provides for a variable quantity, it is not invalid under the doctrine of mutuality of obligation because the party who will determine the quantity is required to operate his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure.³³ The essential test is whether the party is acting in good faith.³⁴ The UCC defines “good faith” as “honesty in fact in the conduct or transaction concerned.”³⁵

The UCC also addresses whether the common use of acceleration clauses in many transactions governed by the UCC grants the power to accelerate at the option of one party. The UCC states that “despite language that might be so construed and which further might be held to make the agreement void as against public policy or to make the contract illusory or too

²⁹ Restatement (Second) of Contracts § 228 (1981).

³⁰ *Id.*, cmt. a.

³¹ *In re Four Star Music Co., Inc.*, 2 B.R. 454, 460 (Bankr. M.D. Tenn. 1979) (“The Court finds that the absolute and unqualified right of [the buyer] to rescind all its obligations under the contract of sale and any collateral agreements renders its promise illusory and inoperative as consideration for a binding contract. Therefore, the transaction between [the parties] does not qualify as a sale under [Tennessee Commercial Code] § 47-2-106.”); see also *Lorenz Supply Co. v. Am. Standard, Inc.*, 358 N.W.2d 845, 852 (Mich. 1984) (citing *Division of Triple T Service, Inc. v. Mobil Oil Corp.*, 304 N.Y.S. 2d 191 (N.Y. 1969)) (finding a franchise agreement to be covered by the UCC).

³² UCC § 2-306.

³³ *Id.*, cmt. 2.

³⁴ *Cf. BRC Rubber & Plastics, Inc. v. Cont’l Carbon Co.*, 876 F. Supp. 2d 1042, 1052 (N.D. Ind. 2012) (holding that under Indiana law, if a buyer does not promise to buy exclusively from a seller, the requisite mutuality and consideration for a requirements contract is lacking and the seller’s promise amounts to nothing more than an invitation for orders).

³⁵ UCC § 1-201.

indefinite for enforcement, the option is to be exercised in the good faith belief that the prospect of payment or performance is impaired.”³⁶

The UCC expressly provides that parties may limit or alter the measure of damages recoverable, such as limiting the buyer’s remedies to return the goods, or limiting the replacement of non-conforming goods or parts.³⁷ However, the UCC notes that it is the very essence of a sales contract is that at least minimum adequate remedies be available.³⁸ A significant limitation of available remedies may eliminate the mutuality of obligation, making a sales contract illusory.³⁹

B. Unconscionable Contracts

1. Common Law

Since as far back as seventeenth century England⁴⁰ and late eighteenth century United States (through adoption of English law),⁴¹ the doctrine of unconscionability has been applied in various contexts.⁴² Throughout, decision makers and commentators have grappled with balancing the concept of fairness with contracting parties’ freedom to bargain as they see fit.⁴³ The evident tension is a direct result of the doctrine of unconscionability being squarely between freedom of contract and judicial reluctance to provide parties an escape mechanism for bargained-for contract terms.⁴⁴ Indeed, in favor of predictability, judges often cite to the doctrine of freedom of contract to avoid undoing bargained-for contract terms.⁴⁵

³⁶ UCC § 1-309, cmt. 1.

³⁷ UCC § 2-719.

³⁸ *Id.*, cmt. 1.

³⁹ See e.g., *Tandy Computer Leasing, a Div. of Tandy Elecs., Inc. v. A.T.C. Control Serv., Inc.*, 526 N.Y.S. 2d 327, 328 (N.Y. Sup. Ct. 1988) (“Since it appears that no direct action could be maintained, the remedy provided by the contract is illusory . . .”).

⁴⁰ *Emanuel College v. Evans*, 21 Eng. Rep. 494 (Ch. 1625).

⁴¹ See *Searight v. Calbraith*, 4 U.S. 325, 326 (C.C.D. Pa. 1796) (citing *James v. Morgan*, 1 Lev. 111 (1663) (dealing with an early incarnation of unconscionability)); *Maddox v. Simmons*, 31 Ga. 512, 530 (Ga. 1860) (citing *James v. Morgan* and stating “Equity abhorred unconscionable bargains; but before it would set contracts aside, two things must unite--incapacity of mind to make a contract, and gross inadequacy of consideration.”).

⁴² Some even contend that the concept of unconscionability finds its roots in Roman law under the doctrine of *laesio enormis*, which permitted the seller of land to rescind the contract if the sale price was less than half of the true or “just price.” See Dando B. Cellini & Barry Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 Tul. L. Rev. 193 (1967); David G. Epstein, et al., *Making and Doing Deals: Contracts in Context* 428 (2d ed. 2006).

⁴³ Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 Colum. L. Rev. 798, 799 (1958).

⁴⁴ See, e.g., *Rowe v. Great Atlantic & Pacific Tea Co.*, 385 N.E.2d 566, 569 (N.Y. 1978) (“There exists an unavoidable tension between the concept of freedom of contract, which has long been basic to our socioeconomic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system.”); *Ortelere v. Teachers’ Retirement Bd. of City of New York*, 250 N.E.2d 460, 465 (N.Y. 1969) (“There must be stability in contractual relations and protection of the expectations of parties who bargain in good faith. On the other hand, it is also desirable to protect persons who may

The doctrine of unconscionability was designed to fill in gaps where attempted application of other, more traditional concepts like fraud, duress, and mistake failed to achieve a “fair” result. Either by design or appropriate reluctance, “unconscionability” has, thus far, escaped proper definition. Thus, we, and more importantly, the courts, are tasked to “know it when we see it.”⁴⁶ The lack of a definition, and the necessary corollary that courts will interpret the concept as they see it, makes the doctrine of unconscionability a flexible concept that results in inherent uncertainty, and thus discomfort for business persons and drafters of contracts, who crave certainty.

Despite the lack of definitional clarity, this doctrine reminds us that contracting parties, in pursuing their self-interest, sometimes overstep ill-defined bounds. Thus, there are some contracts, or provisions of them, that are so egregious, which “no man in his senses and not under delusion would make on one hand, and as no honest and fair man would accept on the other,”⁴⁷ that judicial intervention may be necessary.⁴⁸

2. *Restatement*

Section 208 of the Restatement (Second) of Contracts, states:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.⁴⁹

The Restatement tries to provide a more precise definition of unconscionability. Despite the efforts of the eminent lawyers who crafted the Restatement, and comments on it, the picture is no clearer. The commentary states:

understand the nature of the transaction but who, due to mental illness, cannot control their conduct.”); *see also Ryan v. Weiner*, 610 A.2d 1377 (Del. Ch. 1992) (stating that “[t]he notion that a court can and will review contracts for fairness is apt to strike us as dangerous, subjecting negotiated bargains to the loosely constrained review of the judicial process. Perhaps for this reason, courts have evoked this doctrine with extreme reluctance and then only when all of the facts suggest a level of unfairness that is unconscionable.”).

⁴⁵ *See, e.g., S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1080 (Fed. Cir. 1993) (stating that predictable outcomes in contract disputes presumably allow the market to function efficiently).

⁴⁶ *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”) (Stewart, J. concurring).

⁴⁷ *Earl of Chesterfield*, 28 Eng. Rep. at 100.

⁴⁸ For a thorough examination of the doctrine of unconscionability as it applies in franchising, *see* Bethany L. Appleby, C. Griffith Towle & Carmen D. Caruso, *Unconscionability and Franchise Litigation* (29th Annual ABA Forum on Franchising) (October 2006).

⁴⁹ Restatement (Second) of Contracts § 208 (1981).

The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.... Particularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation.⁵⁰

Nor are the remaining comments in the Restatement any more helpful in providing guidance on where the line of unconscionability lies.

3. Uniform Commercial Code

The drafters of the UCC tried, but did no better, in their effort to codify a consistent standard. One of the most controversial drafting issues was how to define unconscionability.⁵¹ Section 2-302 of the UCC states:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.⁵²

Section 2-302's stated "test" is, thus, whether, "in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."⁵³ Yet, Section 2-302 fails to provide an actual definition of the word

⁵⁰ *Id.*, cmt. a.

⁵¹ See generally, 8 Williston on Contracts § 18:10 (4th ed.); Arthur Allen Leff, *Unconscionability and the Code--the Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967); Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code: 1949-54*, 49 BUFF. L. REV. 359 (2001); and Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940 - 49*, 51 SMU L. REV. 275 (1998).

⁵² UCC § 2-302.

⁵³ UCC, § 2-302, cmt. 1.

“unconscionable,” thus emphasizing, as at least one commenter has noted, that “the concept of unconscionability is one which is not capable of a precise and finite definition.”⁵⁴

Given the UCC’s failure to provide a clear definition, courts predictably have applied varying standards for what unconscionability is. Nevertheless, what is “clear” is that when a court perceives that unconscionability exists, it may protect a contracting party by voiding the contract or specific provisions of it.

A leading case on unconscionability is *Williams v. Walker-Thomas Furniture Co.*⁵⁵ In *Williams*, plaintiff, and other unsophisticated consumers, purchased household items on an installment plan from Walker-Thomas.⁵⁶ The sales contract stated that title of the items would remain with Walker-Thomas until the balance of the purchase price had been paid in full, and in the event of default, Walker-Thomas could repossess the items. The contract also included an unusual provision whereby the nature of the installment payments were such that there would always be a balance due and owing on each item until the entirety of the items’ balance was liquidated. Thus, each new item purchased, even if at a later date, became subject to the security interest arising out of previous purchases. Williams and the other appellants defaulted on their most recent purchases, which permitted Walker-Thomas to replevy *all* of the items purchased since the first purchase was made, dating back five or more years.⁵⁷ The D.C. Circuit, applying the UCC, wrote:

The court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. . . . Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain.

⁵⁴ Donald B. King, *The New Conceptualism of the Uniform Commercial Code*, 10 ST. Louis L.J. 30, 41 (1965).

⁵⁵ 350 F.2d 445 (D.C. Cir. 1965).

⁵⁶ 350 F.2d at 447. For a thorough review of *Williams v. Walker-Thomas Furniture Co.*, see Anne Fleming, *The Rise and Fall of Unconscionability As the “Law of the Poor”*, 102 Geo. L.J. 1383 (2014).

⁵⁷ 350 F.2d at 447.

But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered in the light of the general commercial background and the commercial needs of the particular trade or case. Corbin [on Contracts] suggests the test as being whether the terms are 'so extreme as to appear unconscionable according to the mores and business practices of the time and place. We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.⁵⁸

It is not difficult to conclude that the overreaching conduct in *Williams* was unconscionable. But the D.C. Circuit's language that "an absence of meaningful choice" combined with "contract terms which are unreasonably favorable to the other party" provides little guidance to parties seeking to understand "where to draw the line." Indeed, it has been suggested that the case has been more useful in the classroom than the courtroom.⁵⁹ Numerous other cases have been decided under Section 2-302, without providing significant guidance to drafters of contracts.⁶⁰ A better source, at least providing a more cogent analytical framework, is the seminal 1967 law review article by Professor Arthur Allen Leff.⁶¹

As first articulated by Professor Leff, though implicit in Section 2-302, every unconscionability analysis should involve, and distinguish between, an examination of procedural and substantive issues.⁶² Procedural unconscionability focuses on the circumstances of contract formation.⁶³ For example, some courts find a contract procedurally

⁵⁸ *Id.* at 448-450 (footnotes and internal citations and quotations omitted).

⁵⁹ See Fleming, *supra* note 56, at 1387 ("Williams has had far greater influence and staying power in the classroom than the courtroom.").

⁶⁰ See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 366 (N.J. 1960); *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948); and *Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971), among others.

⁶¹ See Leff, *Unconscionability and the Code--the Emperor's New Clause*, *supra* note 51.

⁶² See *id.* at 487 (describing two-pronged test requiring procedural unconscionability ("bargaining naughtiness") and substantive unconscionability ("evils in the resulting contract").

⁶³ See, e.g., *Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court*, 133 Cal.App.4th 396, 407 (Cal. App. 2005).

unconscionable when a party refuses to bargain.⁶⁴ Substantive unconscionability evaluates whether contract terms are so one-sided that they “shock the conscience.”⁶⁵

Although Professor Leff’s straightforward analytical framework has been frequently used, courts are split on whether to apply the unconscionability doctrine as a two-factor test or an unenumerated multi-factor balancing test. And, some courts who have used a two-factor analysis refuse to void a contract provision as unconscionable unless the claimant proves *both* substantive and procedural unconscionability, while others put the two issues on a sliding scale, thus coming closer to the multi-factor approach. As courts (and commentators) have not agreed on the test to be applied, let alone the manner of application, unconscionability remains a puzzling and unpredictable doctrine which surely does and should cause concern for drafters of contracts, especially those that are essentially offered on a “take-it-or-leave-it” basis.

III. HOW VULNERABLE ARE FRANCHISE AGREEMENTS?

A. Franchise Cases On Illusoriness

As discussed above, a contract may be voided as illusory when one party retains the sole and unilateral discretion to determine performance. Franchise agreements often expressly vest the franchisor with control and full discretion over key aspects of the franchise system. While arguably necessary to ensure uniformity, a hallmark of franchising, retention of control by franchisors may leave them vulnerable to claims of illusoriness. As a result of the consideration granted in the franchise relationship, including use of the trademarks and “system,” franchise agreements will usually survive challenges to the entire agreement as lacking consideration and, therefore, being illusory. Nonetheless, various provisions of franchise agreements that vest discretion in the franchisor, especially those relating to dispute resolution provisions, may be vulnerable, as reflected in the sample of discussed in chronological order below.

1. Hill-Harriss v. Gingiss Intern., Inc.

After the franchisor brought a motion to stay proceedings pending arbitration, the franchisee argued that the arbitration clause in the franchise agreement was unenforceable.⁶⁶ The franchisee argued that exceptions within the franchise contract allowing the franchisor, but not the franchisee, to bring claims for injunctive relief, specific performance, collection of unpaid royalties, advertising contributions, or other purchases or charges, in the event the agreement was breached, rendered the agreement to arbitrate illusory.

The Court ruled that the arbitration clause was unenforceable because the franchisees received no valid consideration in exchange for their promise to arbitrate their disputes. The court cited a 1985 Seventh Circuit case, *Hull v. Norcom, Inc.*, which stressed that “the consideration exchanged for one party’s promise to arbitrate must be the other party’s promise

⁶⁴ *Telecom Intern. America, Ltd. v. AT&T Corp.*, 280 F.3d 175 (2d Cir. 2001); *Desiderio v. National Ass’n of Securities Dealers, Inc.*, 191 F.3d 198 (2d Cir. 1999).

⁶⁵ See, e.g., *Mohamed v. Uber Technologies, Inc.*, 109 F. Supp. 3d 1185, 1206-1207 (N.D. Cal. 2015) (“Substantive unconscionability arises when a provision is overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided.”).

⁶⁶ No. 91 C 6682, 1992 WL 22705, *2-3 (N.D. Ill. Feb. 5, 1992).

to arbitrate at least some specified class of claims.”⁶⁷ The Court stated that an equitable relief exception to an arbitration provision, by itself, would not render an agreement to arbitrate illusory. However, the Court determined that the exceptions carved out of the arbitration provision for any and all contract actions that the franchisor may have against the franchisee that relate to “unpaid royalties, advertising contributions, or other purchases” necessarily included “virtually every imaginable cause of action that could arise between a franchisor and a franchisee,” making the promise to arbitrate “all disputes and claims” illusory.⁶⁸

2. Great Earth Int’l Franchising Corp. v. Milks Dev.

A franchisor of health supplement stores brought an action against a master franchisee and its subfranchisees, alleging breach of contract, trademark infringement, and related claims.⁶⁹ Defendants filed counterclaims, asserting *inter alia*, that the franchise agreement was a requirements contract that was illusory without a right to recover lost profits.⁷⁰ A federal district court in New York held that the franchise agreement was not illusory just because it did not provide for damages while obligating plaintiff to provide product.⁷¹ The court--applying a typical approach to claims of illusoriness in connection with limitations on damages--ruled that liability for lost profits was not fairly within the contemplation of the parties to the contract at the time it was made.⁷²

3. Smoothie King Franchises, Inc. v. Southside Smoothie & Nutrition Center Inc.

After termination of the franchise agreement, plaintiff franchisor discovered that defendant franchisees were operating several smoothie shops in violation of a non-competition clause, and it sued the franchisees.⁷³ The franchisees moved for summary judgment asserting, among other things, that the franchise agreement was illusory.⁷⁴ They argued that the agreement did not contain protected geographic areas, which constituted a lack of consideration.⁷⁵ In ruling that the agreement was not illusory, the Court stated that “Louisiana’s Civil Code requires only ‘cause,’ and not ‘consideration’ as a foundational prerequisite to the

⁶⁷ *Id.* at *3 (citing *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985)).

⁶⁸ *Hill-Harris*, 1992 WL 22705, at *3.

⁶⁹ 311 F. Supp. 2d 419 (S.D.N.Y. 2004).

⁷⁰ *Id.* at 435.

⁷¹ *Id.* (“The contract is not illusory; it simply declines to provide for expansive damages, and the fact that it obligates plaintiff to provide product does not require an interpretation that allows plaintiff to be sued for lost profits stemming from a breach.”).

⁷² *Id.* at 436.

⁷³ No. 11-2002, 2012 WL 1698365 (E.D. La. May 15, 2012).

⁷⁴ *Id.* at *3.

⁷⁵ *Id.* at *11.

formation of a contract.”⁷⁶ The Court explained that cause is the reason a party obligates itself to an agreement. Although the right to a protected territory was important, it was not the only cause for entering into the franchise agreement.⁷⁷ The franchisees also obtained the right to use Smoothie King’s proprietary marks, to access to confidential materials and recipes, and to specialized training and assistance. Therefore, the Court found that the parties had cause to obligate themselves to the contract, and the franchise agreement did not fail as an illusory contract.⁷⁸ Although the decision relies on a state law distinction between “cause” and “consideration” that is not generally used in decisions applying common law contract concepts, the decision is consistent with traditional rulings in non-franchise cases that decline to rule that an agreement is unconscionable when there is some consideration given by the party defending the agreement.

4. *Druco Rests., Inc. v. Steak N Shake Enters.*

In a recent Seventh Circuit case, three franchisees of seven restaurants sued their franchisor, seeking a declaration that under the terms of their franchise agreements, they could set their own prices and were not required to participate in corporate promotions.⁷⁹ The franchisor then, consistent with the franchise agreement, adopted an arbitration policy requiring the franchisees to engage in nonbinding arbitration at the franchisor’s request, and moved for a stay and an order compelling nonbinding arbitration of the disputes. The district court denied the franchisor’s motion, concluding that the arbitration clause, which “reserve[d] the right to institute at any time a system of nonbinding arbitration or mediation” was illusory and unenforceable.⁸⁰

The Seventh Circuit affirmed, relying principally on two prior cases applying Indiana law (the law selected by the parties)--*Wolvos v. Meyer*⁸¹ and *Penn v. Ryan’s Family Steak Houses, Inc.*⁸² In *Wolvos*, the Indiana Supreme Court recognized that enforcing an incomplete or ambiguous writing created a substantial danger that a court would enforce something neither party intended.⁸³ The Indiana Supreme Court concluded that, while parties might expect that more minor items would be left to the discretion of one party or to customary practice, uncertainty in important contract terms might indicate that the parties did not intend to be bound.⁸⁴ Similarly, in *Penn*, the Seventh Circuit ruled that, when an arbitration contract was

⁷⁶ *Id.* at *8.

⁷⁷ *Id.* at *9.

⁷⁸ *Id.* at *11 (“Defendants have introduced no evidence to suggest that [grant of a protected territory] was the *sole* reason that they undertook the obligations set forth in the Franchise Agreements, and as noted above, the undisputed record suggests otherwise.”) (emphasis in original).

⁷⁹ *Druco Rests., Inc. v. Steak N Shake Enters.*, 765 F.3d 776 (7th Cir. 2014).

⁸⁰ *Id.* at 779.

⁸¹ 668 N.E.2d 671 (Ind. 1996).

⁸² 269 F.3d 753 (7th Cir. 2001).

⁸³ *Druco Rests., Inc.*, 765 F.3d at 784.

⁸⁴ *Wolvos*, 668 N.E.2d at 675.

“hopelessly vague and uncertain as to the obligation ... undertaken” and performance was entirely optional, the contract was illusory.⁸⁵

The *Druco* Court concluded that the franchise agreements left to Steak n Shake’s sole discretion the very important issues of whether and how any claims would be arbitrated, as well as which disputes would be subject to arbitration.⁸⁶ Thus, the agreement to arbitrate was illusory because the promisor’s performance was entirely optional and the terms of the clauses were so vague and indefinite that the material terms could not be ascertained.⁸⁷

A number of other cases have addressed claims, in the franchise and other contexts, in which arbitration provisions have been challenged as illusory. The results have been mixed.⁸⁸

5. Cases on “Agreements to Agree”

A close conceptual cousin of illusoriness is the concept of an “agreement to agree.” Both are species of incomplete contracts. A contract is incomplete and unenforceable when, as to some essential term, there has been no agreement but only an agreement to agree in the future.⁸⁹ One court has stated that “[i]n such cases the legal effect, or lack of effect, is the same as if the parties had left blanks in the writing, to be filled in later when their minds should meet.”⁹⁰ Rather, to be enforceable, “an agreement must be sufficiently certain and definite in all of the essential terms so that a court may ascertain whether and when it has been performed.”⁹¹ As with cases involving claims of illusoriness, courts may seek to interpret franchise agreements to salvage incomplete agreements to agree, but they may also simply treat these “agreements” as unenforceable.

⁸⁵ *Penn*, 269 F.3d at 759-60.

⁸⁶ *Druco Rests., Inc.*, at 784.

⁸⁷ *Id.* at 782.

⁸⁸ See *See Morrison v. Amway Corp.*, 517 F.3d 248, 254–55 (5th Cir. 2008) (finding an arbitration clause illusory and unenforceable when the party seeking to enforce it retained the right to unilaterally amend the policy); see also *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (joining “other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement’s existence or its scope is illusory”); *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (concluding that unfettered discretion in choosing the nature of an arbitral forum renders a promise to provide an arbitral forum illusory). But see *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173–74 (5th Cir. 2004) (declining to follow *Dumais* where the contracts in question gave the defendant companies the right to change the terms upon notice to the customer of the proposed changes); *Khoja v. DPD Sub, Inc.*, No. 15-CV-00258-WYD-KMT, 2015 WL 5697336, at *4 (D. Colo. Sept. 29, 2015) (concluding that arbitration provision was not illusory where limitation on ability to modify the provision without notice was evident in franchise agreement); *Hancock v. American Telephone and Telegraph Company, Inc.*, No. CIV-10-822-W, 2011 WL 3626785, at *6–7 (W.D. Okla. 2011) (rejecting a challenge to an arbitration provision as illusory after noting that the service provider was required to give customers advance notice of any material changes and that customers could reject any proposed change by terminating their service); *Lumuenemo v. Citigroup, Inc.*, 2009 WL 371901, at *5 (D.Colo. 2009) (holding that an arbitration agreement was not illusory where it gave the drafting party the right to modify the agreement under certain restrictions).

⁸⁹ See *May Metro. Corp. v. May Oil Burner Corp.*, 49 N.E.2d 13 (N.Y. 1943).

⁹⁰ *Id.* at 15.

⁹¹ *Druco*, 765 F.3d at 783.

Although not often addressed in franchise litigation, agreements to agree may be especially pertinent to renewal issues. *In Re Vylene*⁹² addressed whether a franchise agreement's renewal provision was an agreement to agree. The provision stated that the franchisee, if not in default, would have "a right of first refusal to extend [the] franchise at the termination date for an additional eight years on terms and conditions to be negotiated within said sixty (60) days." The Court ruled that the provision was enforceable because it was supplemented by a duty of good faith and fair dealing. Similarly, in *May Metro. Corp.*, the Court enforced a renewal provision that appeared to be an "agreement to agree." The provision stated that the franchisee "shall automatically have the right of renewing this contract from year to year providing he shall sign a new quota agreement for each year which shall be in excess of the previous year's quota and to be mutually agreed upon."⁹³ When the parties came to an impasse regarding the quota to be "mutually agreed upon," the Court declined to invalidate the provision, and required the parties to present parole evidence to establish the standard of reasonableness by which to evaluate their compliance with the provision.

In *McDonald's Corp. v. Markim, Inc.*, by contrast, the Supreme Court of Nebraska found that a renewal provision placed no obligation upon the franchisor where the renewal provision stated "Licensee will be given first consideration for an additional franchise period of five years..."⁹⁴ Because the franchisor submitted evidence that it did consider the franchisee's request to renew, the Court found that it did not breach the renewal provision. The Court, therefore, essentially refused to enforce the provision as an agreement to agree, although it did not expressly refer to that phrase.

B. Franchise Cases on Unconscionability

As discussed above, a court may refuse to enforce an agreement, or a provision of it, if the court determines that the agreement, or the provision in question, is unconscionable. In the franchise context, if not elsewhere, the analysis often begins, but does not end, with consideration of the issue whether the franchise agreement is a contract of adhesion. "An adhesion contract is a standardized contract that is imposed and drafted by the party of superior bargaining strength and that relegates to the subservient party only the opportunity to adhere to the contract or reject it."⁹⁵ Since franchise agreements are often offered on a "take-it-or-leave-it" basis, the key issue in determining whether franchise agreements are contracts of adhesion that are procedurally unconscionable is whether prospective franchisees have a viable alternative of "leaving it," which negates procedural unconscionability. As reflected in the sample of franchise cases, discussed chronologically below, the courts have not provided clear guidance on unconscionability.⁹⁶

⁹² *In re Vylene Enterprises, Inc.*, 63 B.R. 900 (Bankr. C.D. Cal. 1986), *rev'd* (June 25, 1987).

⁹³ *May Metro. Corp.*, 49 N.E.2d at 14.

⁹⁴ 306 N.W.2d 158 (Neb. 1981).

⁹⁵ Gundzik, *How The Unconscionability Defense Applies to Franchise Agreements*, 8 No. 1, at 2, LJN's Franchising Business and Law Alert 3 (October, 2001).

⁹⁶ For an additional discussion of franchise cases concerning unconscionability, see Bethany L. Appleby, C. Griffith Towle & Carmen D. Caruso, *Unconscionability and Franchise Litigation* (29th Annual ABA Forum on Franchising) (October 2006).

1. ***Zapatha v. Dairy Mart***

Although the UCC is limited to the sale of goods, the unconscionability standard of Section 2-302 influences non-sale cases, including those involving franchise agreements.⁹⁷ In *Zapatha*, the franchisor unilaterally ended its franchise agreement following a franchisee's refusal to enter into a new one. The franchisee claimed that Dairy Mart's ability to terminate him without cause, despite 90 days written notice during which time the parties could discuss potential resolution, was unconscionable.⁹⁸ The franchisee argued that, although the termination provision was specifically discussed and explained to him during an initial conversation with a representative of the franchisor, and he understood "every word" of the "straightforward" provision, he interpreted it to mean that the franchisor could only terminate the agreement for cause.⁹⁹

The *Zapatha* Court, on appeal, reversed a lower court's decision ruling that the termination without cause was an unfair and deceptive act. The Court upheld the contract, noting, among other things, that: (1) a provision permitting termination without cause is not *per se* unconscionable; (2) the 90 days notice period was not unreasonable; (3) because the termination provision was pointed out specifically to the franchisee, who did not take the agreement to a lawyer to review (despite opportunity and, indeed, specific advice from the franchisor to do so), there was no potential for unfair surprise; and (4) "[t]o find the termination clause oppressive merely because it did not require cause for termination would be to establish an unwarranted barrier to the use of termination at will clauses in contracts in this Commonwealth, where each party received the anticipated and bargained for consideration during the full term of the agreement."¹⁰⁰ Since that decision, the bar for meeting unconscionability in franchise cases has been quite high, especially in the Seventh Circuit.¹⁰¹

2. ***Stanley A. Klopp, Inc. v. John Deere Co.***

The Third Circuit affirmed a district court decision in *Klopp*, upholding a provision in a franchise agreement that limited damages recoverable by a franchisee on termination of the agreement.¹⁰² The provision at issue stated that "neither party shall be entitled to any compensation or reimbursement for loss of prospective profits, anticipated sales or other losses occasioned by the termination of the relationship."¹⁰³ The district court held that the provision

⁹⁷ *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1376-77 (Mass. 1980) (concluding that the doctrine of unconscionability applied "to all aspects of the franchise agreement, not by subjecting the franchise relationship to the provisions of the sales article [of the U.C.C.] but rather by applying the stated principles by analogy.").

⁹⁸ *Id.* at 1375.

⁹⁹ *Id.* at 1373.

¹⁰⁰ *Id.* at 1377-78 (upholding the contract due to the absence of both unconscionability prongs).

¹⁰¹ See, e.g., *We Care Hair Development, Inc. v. Engen*, 180 F.3d 838, 843 (7th Cir. 1999), *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992).

¹⁰² *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 810 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982).

¹⁰³ *Id.* at 808.

was not unconscionable because the language of the clause was clear and precise and was not one-sided.¹⁰⁴

3. *Doebereiner v. Sohio Oil Co.*

In *Doebereiner*, the Eleventh Circuit affirmed a ruling that a minimum hours requirement in service station franchise agreement was reasonable, such that the franchisee's termination for failure to comply with requirement was neither arbitrary nor discriminatory.¹⁰⁵ The franchisee brought suit alleging wrongful termination after the franchisor terminated the franchise agreement for the franchisee's failure to comply with the hours provision in the franchise agreement.¹⁰⁶ The franchisee objected to the hours provision based on his assessment that it was both unprofitable and unsafe to operate the station between 10 p.m. and midnight. The district court ruled that the provision in the franchise agreement, which required the franchisee to remain open from 6 a.m. until midnight, for seven days a week, was "based on common sense and experience and was not unconscionable, and that Gulf included the provision in the franchise agreement in subjective good faith and in the normal course of business."¹⁰⁷ The Eleventh Circuit, in affirming, adopted the district court's language, concluding that the provision was not unconscionable and therefore the termination was permissible because the provision was both reasonable and materially significant to the franchise relationship.¹⁰⁸

4. *Piantes v. Pepperidge Farm*

In *Piantes v. Pepperidge Farm*, a Massachusetts district court rejected the franchisee's unconscionability challenge to the franchise termination provision.¹⁰⁹ The franchisee had refused to agree to the franchisor's re-organization plans for its distribution channel. Subsequently, the franchisor unilaterally terminated the franchise agreement. The *Piantes* Court, citing *Zapatha*, found nothing oppressive about the termination clause at issue.¹¹⁰ In fact, the Court noted that the franchisee received far greater contractual protections for his business than the *Zapatha* franchisee.¹¹¹

5. *Kubis & Perszyk Associates, Inc. v. Sun Microsystems*

In *Kubis*, the Supreme Court of New Jersey held that forum-selection clauses, in franchise agreements subject to the New Jersey Franchise Practices Act (NJFPA), "are

¹⁰⁴ *Id.* at 810.

¹⁰⁵ *Doebereiner v. Sohio Oil Co.*, 880 F.2d 329 (11th Cir. 1989).

¹⁰⁶ *Id.* at 331.

¹⁰⁷ *Id.* at 332.

¹⁰⁸ *Id.* at 334-335.

¹⁰⁹ *Piantes v. Pepperidge Farm, Inc.*, 875 F.Supp. 929, 936 (D.Mass. 1995).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 937.

presumptively invalid, and should not be enforced unless the franchisor can satisfy the burden of proving that such a clause was not imposed on the franchisee unfairly on the basis of its superior bargaining position.”¹¹² The Court concluded that such clauses are presumptively invalid because they fundamentally conflict with the basic legislative objectives of protecting New Jersey franchisees from the superior bargaining power of franchisors.¹¹³ It reasoned that a forum-selection clause tends to place the franchisee at a disadvantage because it requires the franchisee to assert rights in an unfamiliar and distant forum, with out-of-state counsel, while bearing the added expense of litigation in the franchisor’s designated forum.¹¹⁴ Accordingly, the Court held that, absent such things as “evidence of specific negotiations over the inclusion of the forum-selection clause and that it was included in exchange for specific concessions to the franchisee . . . or other similarly persuasive proof demonstrating that the forum-selection clause was not imposed on the franchisee against its will,” forum-selection clauses in franchise agreements that are subject to the NJFPA are to be presumed invalid.¹¹⁵ Contrary to the ruling in this case, it is generally true that forum selection clauses in franchise and other agreements will be enforced.¹¹⁶ Still, as *Kubis* suggests, there may be situations in which a court will analyze whether a forum selection clause is unconscionable.

6. *Nagrampa v. MailCoups, Inc.*

The Ninth Circuit held that, under California law, an arbitration clause in a franchise agreement was unenforceable on grounds of unconscionability in *Nagrampa*.¹¹⁷ The arbitration provision required the franchisee to arbitrate any controversy related to the franchise agreement, “or any breach thereof, including without limitation, any claim that this Agreement or any portion thereof is invalid, illegal or otherwise voidable or void,” while reserving the franchisor’s prerogative to seek any provisional remedy “including, without limitation, injunctive relief from any court of competent jurisdiction, as may be necessary in MailCoups’s (franchisor) sole subjective judgment to protect its Service Marks and proprietary information.”¹¹⁸ The Ninth Circuit concluded that, despite “minimal” evidence of procedural unconscionability--even though the court found that MailCoups had the overwhelming bargaining power, drafted the contract, and presented it to the franchisee on a take-it-or-leave-it basis--that evidence was sufficient to require the court to move to the second prong of the unconscionability analysis (substantive unconscionability) and analyze the provision under California’s sliding-scale approach.¹¹⁹ The Ninth Circuit concluded that the arbitration provision was substantively unconscionable because MailCoups had restricted the franchisee to an arbitral forum, but reserved for itself the ability to

¹¹² *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176, 195 (1996).

¹¹³ *Id.* at 193.

¹¹⁴ *Id.* at 194.

¹¹⁵ *Id.* at 195.

¹¹⁶ See, e.g., *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. Of Texas*, 134 S. Ct. 568 (2013); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

¹¹⁷ *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1287 (9th Cir. 2006).

¹¹⁸ *Id.*, at 1286.

¹¹⁹ *Id.* at 1284.

seek redress in either an arbitral or judicial forum, as well because of other one-sided provisions regarding arbitration.¹²⁰ Accordingly, the Ninth Circuit found the arbitration provision to be “clearly one-sided,” lacking in mutuality and, therefore, substantively unconscionable.¹²¹ It concluded further that the evidence of substantive unconscionability is strong enough to tip the scale and render the arbitration provision unconscionable¹²² Other courts in California have found arbitration clauses that appeared “tilted” to the benefit of the franchisor to be unconscionable.¹²³

7. *Faulkenberg v. CB Tax Franchise Systems, LP*

The Seventh Circuit held arbitration clauses requiring out-of-state arbitration are not unconscionable. The franchise agreement contained a broad arbitration provision requiring that “any claim, controversy or dispute arising out of or relating to the franchise, ... including, but not limited to, any claim ... concerning the entry into, the performance under or the termination of the agreement ... shall ... be referred to arbitration” in Houston, Texas.¹²⁴ The court concluded that such arbitration provisions are standard features in franchise agreements, and unless there is a showing that the particular arbitration provision is unconscionable, standard arbitration provisions are not.¹²⁵

C. *Sample Franchise Agreement Provisions that May Be Vulnerable*

One might be tempted to conclude, from a review of cases that have addressed arguments about illusoriness and unconscionability, that these concepts do not pose a serious threat to franchise agreements, except perhaps with respect to certain arbitration provisions (and then perhaps only in California). It certainly is understandable that a court might be more willing to rule that arbitration provisions, or portions of them, are illusory or unconscionable because doing so merely shifts the dispute resolution process procedurally, and does not embroil a court in decisions about the substance of how a franchise system operates. However,

¹²⁰ See *id.* at 1286-87; see also *Martinez v. Master Prot. Corp.*, 118 Cal.App.4th 107, 115 (Cal. App. 2004) (holding that an arbitration agreement requiring employees to arbitrate all claims, but reserving the right of employer to obtain injunctive or other equitable relief in a judicial forum for certain causes of action, lacks mutuality).

¹²¹ *Nagrampa*, 469 F.3d at 1286.

¹²² *Id.* at 1293-1294.

¹²³ See, e.g., *Independent Association of Mailbox Center Owners v. Superior Court*, 34 Cal. Rptr. 3d 659, 672-73 (Cal. Ct. App. 2005) (holding a ban on arbitration damage limitations and group arbitration unconscionable); *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 911 (Cal. App. 4th 2001), as modified on denial of reh'g (Mar. 30, 2001) (invalidating an out-of-state arbitration forum requirement); *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931, 940 (9th Cir. 2001) (applying Montana law and concluding that because the arbitration clause in a franchise agreement “required binding arbitration of the weaker bargaining party’s claims, but allowed the stronger bargaining party the opportunity to seek judicial remedies to enforce contractual provisions” the arbitration clause was unconscionable). However, California law on franchise agreement arbitration provisions remains unclear, because courts use conflicting legal standards. See, e.g., *Perdue v. Crocker National Bank*, 702 P.2d 502, 511 n.9 (Cal. 1985); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981) (holding that there were two “pathways” to defining unconscionability in California).

¹²⁴ *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 805 (7th Cir. 2011).

¹²⁵ *Id.* at 811.

given the small sample size of franchise cases in which claims of illusoriness or unconscionability have been put in issue and the inherent uncertainty of how these difficult-to-define concepts may be applied, it would probably be imprudent to dismiss these potential claims as inconsequential.

Some types of provisions that may be vulnerable to claims that they are illusory or unconscionable, depending on their specific terms, are discussed below. Especially if drafters of franchise agreements, in their effort to protect and enhance the contract rights of their franchisor clients, write provisions that may be perceived as overreaching, the result may be that those provisions will be subject to credible challenge as illusory or unconscionable.

1. Provisions Permitting Franchisor to Alter Operations Manuals and Otherwise Change Franchisee Obligations

Typically, franchisors provide, in one or more ways, that they may “change the system.” Frequently, this is done by a provision in the franchise agreement that, in substance, states: “Franchisor may modify or designate unilateral changes to the Operations Manual from time to time.” Or, the agreement may provide that franchisees must “adhere and agree to prompt adoption and adherence to Franchisor’s comprehensive format and operating system.”¹²⁶

Such provisions, on their face, give the franchisor unlimited discretion to alter the operations manual, or otherwise change the “system,” and to impose new, and possibly onerous, obligations on the franchisee. Arguably, by definition, permitting one party, without further consideration, to change the terms of the contract, renders the contract, or at least the offending provision of it, illusory. Moreover, the unbridled power such “rights” confer arguably renders these types of provisions unconscionable. There is nothing in the provisions, themselves, to prevent a franchisor from mandating expensive changes to operations, or taking other steps, including imposing new financial obligations on the franchisees, which may imperil their investments.

Franchisors, on the other hand, surely have a legitimate interest in maintaining the competitiveness of the system by requiring operational changes. There should be no serious argument, for example, that a restaurant chain cannot add a new menu item or ensure that its point-of-sale system is up-to-date. Yet many, if not most, provisions conferring discretion on franchisors with respect to their operating systems do not place limits on how that discretion may be exercised. To the contrary, franchisors appear often to have taken pains, as they have revised their agreements, to try to ensure that their discretion will not be subject to challenge in litigation. Thus, many, if not most, agreements state that the franchisor has “full,” or “unilateral,” discretion, or other words or phrases to that effect, some going so far as expressly provide that the franchisees “waive” any claims that the implied covenant of good faith and fair dealing in order to try to ensure that the granting of unfettered discretion to the franchisor is not undercut by such claims. Ironically, these approaches may make claims that the contract, or the provisions at issue, are illusory or unconscionable more viable. That may lead to a worse result for the franchisor than if a court examined the conduct, using good faith and fair dealing principles, because it could lead to the court’s declaring the provision unenforceable, rather than

¹²⁶ All sample provisions have been taken, or adapted, from actual franchise agreements, but franchisors have not been identified.

examining how the provision was used in practice, thus perhaps saving “reasonable” conduct that might otherwise be swept out by a broader ruling.

These “system-altering” provisions in franchise agreements may be vulnerable, as well, on other arguments that are at least partly based on similar “equitable” considerations. For example, in *Bird Hotel Corp. v. Super 8 Motels, Inc.*,¹²⁷ the franchisor attempted to use a provision in a franchise agreement--which stated “Franchisor may, from time to time, make revisions in or amendments to such rules of operation which Franchisor shall apply uniformly . . . and Franchisee agrees to comply with all such revisions and amendments”--to require its franchisees to participate in a new rewards program, effectively requiring them to pay an additional fee of five percent of gross room sales, which was required to participate in the program.¹²⁸ The franchisee objected to the new fee and filed a class action in federal court. The franchisor argued that the franchise agreement permitted the changes since the provision allowed it to unilaterally alter its rules of operation. The federal district in South Dakota agreed with the franchisee and held that the use of the provision to implement a new fee was impermissible. According to the Court, the unilateral imposition of additional fees, not contemplated by the franchise agreement, was not merely a revision of the rules of operation, but due to its significant burden on the franchisee, amounted to a revision of the terms of the contract.¹²⁹

The Sixth Circuit, in *La Quinta Corp. v. Heartland Properties LLC*,¹³⁰ rejected an argument similar to that made by the franchisee in *Bird*. In *La Quinta*, a hotel franchisor decided to upgrade its computer system by revising its operating guidelines, thereby imposing costs of purchase, installation, and training on the franchisees.¹³¹ One franchisee objected and refused to upgrade the computer system. Ultimately, its franchise agreement was terminated. The franchisee argued that the franchisor committed an anticipatory breach of the contract since the new system was not part of the initial agreement and “effected significant changes,” imposing new burdens and demands on the franchisee.¹³² The Sixth Circuit, however, rejected the argument and found that the agreement gave the franchisor the “right to add, amend, and/or delete Systems Standards, including the reservation system.”¹³³

2. Provisions Referring to Assistance Franchisor May Provide At Its Option

¹²⁷ *Bird Hotel Corp. v. Super 8 Motels, Inc.*, No. CIV 06-4073, 2010 WL 572741 (D.S.D. Feb. 16, 2010).

¹²⁸ *Id.*, at 3.

¹²⁹ *Id.* at *8.

¹³⁰ *La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327 (6th Cir. 2010).

¹³¹ *Id.* at 332.

¹³² *Id.* at 335.

¹³³ *Id.*, at 336. For a fuller discussion on “system changes” and the cases discussed in this section, see David A. Beyer; Himanshu M. Patel; John Dent, *Changes in System Standards - What is the Extent of the Franchisor's Latitude?* (35th Annual ABA Forum on Franchising) (October 2012).

Most franchisees enter into a franchise relationship, in part, to receive the benefit of the franchisor's established business model and experience. This decision is nearly universally made with the expectation that opening a franchised business is a more certain investment than starting a business "from scratch." A franchisor's obligations, therefore, generally include a certain amount of training, guidance, and assistance. However, when these obligations are not properly defined, the franchise agreement or pertinent provisions may be subject to a claim that they are illusory and/or unconscionable.

One major fast-food franchise agreement states: "Franchisor shall provide, as Franchisor deems advisable, pre-opening and opening supervision and assistance, which may include, at Franchisor's sole discretion, having a representative of Franchisor present at the opening of the Restaurant." The same agreement also states: "Franchisor may make available, from time to time, bulletins, brochures, and reports regarding the System, and operations under the System." Similarly, a mid-sized dessert store chain's franchise agreement provides: "The Company shall provide such on-site pre-opening and opening supervision and assistance as the Company deems advisable." Under this language, these franchisors thus appear to have virtually unlimited discretion to provide, or refuse to provide, such assistance.

Even though the above-cited language may create a situation in which a franchisee, who has no prior business experience, technically has no right under the franchise agreement to receive the training and assistance that it needs to successfully run its business, courts have generally upheld such discretionary practices.¹³⁴ Nevertheless, if enough provisions in a franchise agreement render a franchisor's responsibilities "optional," that franchise agreement, or the particular provisions in question, may be vulnerable to attack on the grounds of illusoriness and/or unconscionability.

3. Provisions That Make Opening Contingent on Franchisor's Future Approval

A common provision in franchise agreements is similar to the following provision from a mid-sized chain: "[i]f, at the time of execution of this Agreement, a location for the Shop has not been both obtained by Franchisee and approved by the Franchisor, Franchisee shall lease or acquire a location, subject to the Franchisor's approval." Some franchisors provide general criteria by which a site will or will not be approved, with legitimate reasons supporting such a clause, in their FDDs. However, where the franchisor fails to qualify this language, there is a danger of the provision being deemed illusory.

4. Provisions By Which Franchisor Provides Good and/or Services To Franchisees

Many franchisors, in addition to charging an initial fee and ongoing royalties, separately provide goods and/or services to their franchisees, such as food items for restaurants or rent of the franchised location, for additional payments. The contracts, or provisions of them, regarding these separate transactions are, of course, subject to the same analysis of validity, including

¹³⁴ See, e.g., *Burger King Corp. v. Hinton, Inc.*, 203 F. Supp. 2d 1357, 1362 (S.D. Fla. 2002) ("Defendants' allegations that BKC failed to provide a package of support, including merchandising, marketing, and advertising research data and advice, are misplaced as such services were at the discretion of BKC. This is clearly indicated in plain language in the Franchise Agreements.").

analysis of claims that they are illusory or unconscionable, as the franchise agreement and its provisions are.

Supply issues may extend to affiliates of the franchisor. In *JM Vidal, Inc. v. Texdis USA, Inc.*,¹³⁵ for example, a court analyzed a supply provision in a retail clothing store franchise agreement. The provision at issue stated “Distex [an affiliate of the defendant] will deliver Merchandise ... to the Store to replenish Store inventory, add new Merchandise to the product mix and make available at [franchisee’s] expense branded supplies.”¹³⁶ The agreement also required Distex to ship “noncommercial goods” such as window displays and in-store fixtures, again, at the franchisee’s expense.¹³⁷

The franchisee claimed that Distex repeatedly delivered clothing the franchisee’s store had in surplus, for seasons that had passed, and for the new season in small deliveries spread out over several weeks, leaving sparsely supplied clothing displays, and that it otherwise failed to support the franchisee’s business, resulting in its failure.

The *JM Vidal* Court in New York denied the franchisor’s motion for summary judgment on several of the franchisee’s claims. The Court determined that evidence that the franchisor allowed the supplier to make untimely, incomplete, and inaccurate deliveries, which had the effect of driving the franchisee out of business and permitted the franchisor to offer to buy it back for less than 10 percent of the amount of money the franchisee had invested in the business, created enough genuine factual issues to preclude summary judgment. Although the franchisee did not claim that the agreement was illusory or unconscionable, the facts as alleged, or similar ones involving discretionary contract provisions, which would permit overreaching behavior by a franchisor, may support claims of illusoriness or unconscionability.

At earlier times, franchisees frequently sought to challenge alleged overreaching by franchisors in connection with their providing goods or services to the franchisees by raising tying claims pursuant to the antitrust laws. Because of changes in antitrust jurisprudence, tying claims are now more difficult to pursue.¹³⁸ As a result, today, contract claims, including possible claims of illusoriness or unconscionability, appear to be more important in efforts to challenge alleged franchisor overreaching on issues relating to providing goods and services to franchisees for additional fees.

5. Buyback Provisions

Franchise agreements that provide for a franchisor’s unqualified right to purchase the franchised business upon termination or expiration of the agreement may be vulnerable as illusory and/or unconscionable, depending on the circumstances. Many agreements contain an option upon termination to purchase that specifies that the franchisor has the sole discretion to exercise the option, without establishing a formula or appraisal process for determining the

¹³⁵ 764 F. Supp. 2d 599 (S.D.N.Y. 2011).

¹³⁶ *Id.* at 608.

¹³⁷ *Id.*

¹³⁸ See, e.g., *Queen City Pizza, Inc. V. Domino’s Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997).

price. While the business's future valuation cannot be predicted at the time the agreement is executed, a franchisor could provide guidelines for the valuation. Where this is not done, the buyback provision may be an unenforceable agreement to agree, and thus illusory.

Under different circumstances, the buyback provision, combined with others, could potentially be unconscionable. Where a franchisor has the option of re-purchasing the franchised business, and is in a superior bargaining position upon termination to set the price, the franchisor's incentive to act in good faith throughout its relationship with the franchisee may be seriously undermined. In extreme situations where a contract is set up to allow for such abuse, that contract may be subject to a finding of unconscionability.¹³⁹

6. Provisions Regarding Renewal of the Franchise Agreement

Renewal provisions are extremely important to franchisees. They may invest significant resources in their franchised businesses on the assumption that they will be able to continue operations beyond the initial term of the agreement, even though the agreement expressly provides otherwise. At least when the franchise agreement is for a relatively short period such that it is difficult, if not impossible, to get a return on the franchisee's investment, there may be a credible argument that the renewal provision, if there is one, is illusory or unconscionable.

Some franchise agreements permit renewal on terms of the "then current form of agreement," referring to the updated form of agreement being entered into by new franchisees at the time of the future renewal. This requirement can create difficulties for franchisees that may have to make substantial changes to their businesses after running them a certain way for a significant time period, especially if their original franchise agreements did not contain provisions requiring them to make operational changes during the course of the agreement. Courts have found such provisions to be unambiguous and enforceable.¹⁴⁰ Although there may be little serious issue about the franchisor's right to enforce an appropriately drafted provision, allowing it to condition renewal on the franchisee's acceptance of materially different terms when that provision is considered separately, an argument can be made that the provision may be unconscionable, when taken together with other provisions, such as a post-termination non-competition requirement, that will effectively cause the franchisee to abandon its business if it does not sign the new form of agreement.

7. Provisions with Forum-Selection Clauses

Forum selection clauses are generally enforceable, in franchise and other agreements, as discussed above. However, there may be situations in which a court will conclude, on the particular facts, that it will not enforce a forum selection clause that places undue hardship on the franchisee. In addition, while many franchise agreements will include

¹³⁹ Cf. *W. L. May Co. v. Philco-Ford Corp.*, 543 P.2d 283, 287 (Or. 1975) ("Although Philco presented no evidence to explain its inclusion of the repurchase election, we are not persuaded that it is unreasonable per se for a manufacturer to reserve the right to refuse to repurchase at least portions of a distributor's inventory upon termination. It may be that Philco was able to insist upon this particular allocation of risks only because of its superior bargaining power. However, under the Code, a bona fide allocation of risks will not be disturbed merely because one party had a superior bargaining position.").

¹⁴⁰ *Test Servs., Inc. v. Princeton Review, Inc.*, No. 05-CV-01674-MSK-CBS, 2005 WL 3211594, at *11 (D. Colo. Nov. 29, 2005).

forum-selection clauses where the franchisee must adhere to a specific venue, many agreements will at the same time include a provision stating that the franchisor “may bring the action in any competent jurisdiction.” Such provisions may be vulnerable to claims of unconscionability, as similar provisions in arbitration provisions have been.¹⁴¹

8. Fee-Splitting Provisions

Franchise agreements, often in the context of arbitration clauses, contain “fee-splitting” provisions, including, for example, that “the costs of arbitration shall be borne equally by the parties unless the arbitrator concludes that a different allocation is required by law” or that the franchisor will pay fees and costs up to a certain maximum. Franchisees have asserted, with some success, that some such provisions are unconscionable “barriers to justice.”¹⁴²

9. Indemnification Provisions

Franchise agreements often provide that the franchisee must indemnify the franchisor with respect to certain claims, most frequently claims that the franchisor is vicariously, or otherwise, liable for injuries to patrons at franchisee establishments. Often, such provisions are not reciprocal: they do not likewise provide for indemnification of the franchisee by the franchisor, even when the fault for injury arguably lies with the franchisor. Such indemnification provisions may already extend, or be revised on renewal to extend, to liability to putative employees in cases in which franchisors are alleged to be joint employers with their franchisees. Imposing liability where it arguably does not belong, especially if there is no reciprocal provision potentially balancing the allocation of responsibility, may be argued to be sufficiently unfair to warrant a conclusion that it is unconscionable.

IV. FRANCHISEE PERSPECTIVE

Though, historically, there has been a strong presumption against invalidating a contract, especially where parties have already partially or fully performed under those contracts, courts are willing to make exceptions, especially where there is a significant discrepancy in bargaining

¹⁴¹ See Note 123, *supra*; but see *Captain Bounce, Inc. v. Bus. Fin. Servs., Inc.*, No. 11-CV-858 JLS WMC, 2012 WL 928412, at *10 (S.D. Cal. Mar. 19, 2012) (“Although hardship to Plaintiffs in traveling to North Carolina is certainly one circumstance to be considered, the Court finds that Plaintiffs have not made a sufficient showing that the forum selection provision is unduly oppressive, or has the effect of shielding the stronger party from liability. Where, as here, Plaintiffs must make a particularly strong showing of substantive unconscionability because of the slight degree of procedural unconscionability found, the Court concludes this burden has not been met.”).

¹⁴² *Kairy v. Supershuttle Int'l, Inc.*, 2012 WL 4343220, at *8 (N.D. Cal. Sept. 20, 2012); *Jacobson v. Snap-on Tools Co.*, No. 15-CV-02141-JD, 2015 WL 8293164, at *5 (N.D. Cal. Dec. 9, 2015) (severing fee-shifting provision and requiring Snap-On to pay all AAA fees and costs); *Independent Association of Mailbox Center Owners v. Superior Court*, 34 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005) (concluding that franchisees were entitled to advance fee allocation before arbitration commenced); but see *Singh v. Choice Hotels Int'l, Inc.*, No. CIV.A. 307CV0378D, 2007 WL 2012432, at *8 (N.D. Tex. July 11, 2007) (dismissing franchisee’s challenge to arbitration clause as unconscionable); *Doctor’s Associates, Inc. v. Jabush*, 89 F.3d 109, 113 (2d Cir. 1996) (denying unconscionability challenge stating “[a]s purchasers of a Subway sandwich franchise, the Spearses [were] not vulnerable consumers or helpless workers. They [were] business people who bought a franchise. We simply cannot conclude that, in deciding to purchase their franchise, the Spearses were forced to swallow unpalatable terms.”) (citing *The Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir.1992)).

power.¹⁴³ There has also been a historical presumption that the franchisor-franchisee relationship is one between sophisticated parties, which would appear to be evidenced by the extremely complex business arrangements that they enter into.¹⁴⁴ However, any lawyer who has litigated cases involving this relationship knows that this is not always the case.

Despite airtight integration clauses and the clear obligation to read and understand contracts that one enters into, the unfortunate reality is that some franchisors, and now, business brokers, create an environment where a franchisee, who often has little to no business experience, can be induced to believe representations that are contrary to what is contained in the actual franchise agreement. This is seen with many first-time business owners who rely on a franchisor's business experience, and take it for granted that the franchisor will provide a certain degree of training and assistance to help the franchisee become successful. An unsophisticated new franchisee, without the benefit of experience or a legal education, does not read the term "at the franchisor's discretion" attached to apparent promises about training and assistance to mean that the franchisor does not actually have a responsibility to provide any of the things described.

It is this type of situation where courts may be willing to go even further than applying the duty of good faith and fair dealing, because it is clear that the franchisee's reasonable expectation was that they were going to purchase and operate a "business in a box." Franchisees are led to believe that they are paying a franchisor for the benefit of bypassing the effort and risk that it takes to formulate a unique business on one's own. It is often their understanding that they can instead rely on a franchisor's established business model and experience to get their business off the ground and become profitable in an accelerated time frame.

It is this expectation that has made some courts take the view that franchisees are more like consumers than sophisticated parties to a business contract.¹⁴⁵ If this view proliferates, it is likely that we will see more and more situations where courts will be willing to entertain arguments that certain franchise agreements or provisions may be unconscionable, illusory, or unenforceable agreements to agree.

A. The Duty of Good Faith and Fair Dealing Cannot Cure All

¹⁴³ *Kubis & Perszyk Associates, Inc.*, at 182 (finding forum selection clause invalid where there is a disparity in bargaining power).

¹⁴⁴ See *PostNet Intern. Franchise Corp. v. Americis Intern., Inc.*, 2006 WL 1775599, at *3 (D. Colo. 2006); *Everett v. Paul Davis Restoration, Inc.*, 771 F.3d 380, 386 (7th Cir. 2014); *Fowler v. Cold Stone Creamery, Inc.*, CA 13-662 S, 2013 WL 6181817, at *2 (D.R.I. 2013).

¹⁴⁵ *Postal Instant Press, Inc. v. Sealy*, 43 Cal. App. 4th 1704, 1715–16, 51 Cal. Rptr. 2d 365, 373 (1996) ("Although franchise agreements are commercial contracts, they exhibit many of the attributes of consumer contracts. The relationship between franchisor and franchisee is characterized by a prevailing, although not universal, inequality of economic resources between the contracting parties. Franchisees typically, but not always, are small businessmen or businesswomen or people like the Sealys seeking to make the transition from being wage earners and for whom the franchise is their very first business. Franchisors typically, but not always, are large corporations. The agreements themselves tend to reflect this gross bargaining disparity. Usually they are form contracts the franchisor prepared and offered to franchisees on a take-or-leave-it basis.").

A recurring theme in franchisor-franchisee relationships is that they are symbiotic--when a franchisee does well, the franchisor, in turn, does well.¹⁴⁶ This injects an expectation that franchisors will act fairly, but it discounts certain realities that can render this expectation a fantasy. Certain franchises, especially those with very high initial fees and low royalty payments, do not have an incentive to help franchisees succeed. Once they have profited from the initial sale of the business to the franchisee, it can even be more profitable to buy back and re-sell that business at a rate that is driven down by the franchisee's inability to make a profit.¹⁴⁷ Though it can be hard to detect, it is possible for a franchisor to structure its franchise agreements to make this situation more likely. A truly predatory buyback provision, for this reason, and under the right circumstances, could potentially be held to make the entire agreement illusory and/or unconscionable.

Another area where this is seen is where provisions that give complete discretion to the franchisor lie dormant for years before being used to default a franchisee with whom the franchisor is unhappy for unrelated reasons. Though "capricious" behavior like this has been dealt with in the past by application of the duty of good faith and fair dealing, this does not seem to be the appropriate solution for provisions that were intended for this purpose from their inception. It is one thing to change an operating manual, which can be done for legitimate business purposes. It is another thing to do so by creating a rule that is clearly not intended to benefit the franchise, but rather to catch disfavored franchisees breaking a rule, or even to drive them out of business. Provisions which have only been used for such malicious purposes, and never for legitimate business reasons, should be subject to invalidation, rather than given a second life by applying the duty of good faith and fair dealing on a case-by-case basis.

Where a contract was never intended to give a franchisee the benefit of the bargain, but rather, set up in order to take advantage of the franchisee's good faith, it makes no sense to inject the duty of good faith and fair dealing. That duty is much better applied where the contract, at its inception, was meant to give both parties their reasonable expectation interests, but something went wrong down the line. Where there is a pattern of bad faith by a franchisor, and it can be reasonably deduced from the contractual terms that they were drafted with the intention to facilitate and protect this behavior, it makes more sense for courts to use a stronger hand and invalidate those provisions based on principles of unconscionability and/or illusoriness. In other words, where good faith was never intended, a franchisee's expectations are, in effect, illusory from the inception of the contract.

B. Saving Franchise Agreements

Though the phrase "saving franchise agreements" implies a goal of preserving them as written, there is something to be said for calling out the bad in order to save the good. If courts take the bold step of invalidating agreements that were clearly intended to take advantage of weaker parties, well-intentioned franchisors may get the benefit of more security in their contracts. By looking at agreements as a whole and, in extreme circumstances, holding that the

¹⁴⁶ *Schlotzsky's, Ltd. v. Sterling Purchasing & Nat. Distribution Co.*, 520 F.3d 393, 407 (5th Cir. 2008) ("[A] franchise relation is a symbiotic one. The success of franchisor and franchisee are interrelated . . .").

¹⁴⁷ *JM Vidal, Inc.*, 764 F. Supp. 2d at 620 ("JMV has presented evidence from which a reasonable jury could conclude that Texdis (1) failed to market and otherwise support JMV, and other U.S. franchisees, and thus denied JMV a fair chance at success, and (2) was content to see JMV's Store fail, and then attempt to repurchase it at a significantly lower price.").

franchisee's expectations under the contract were illusory or the contract was unconscionable, franchisors who act in good faith will thereafter be able to structure their contracts accordingly and avoid unfair litigation.

V. FRANCHISOR PERSPECTIVE

There is good reason why arguments that franchise agreements are illusory or unconscionable have had little success in franchise disputes. Given the way in which franchise opportunities are offered--with mandated disclosure in a competitive environment--courts should not abrogate traditional principles of freedom of contract to alter the bargain reflected in franchise agreements. Many broad franchisee concerns, such as those about renewals or terminations, may be appropriate issues for legislative consideration, but not for judicial or arbitral interference.

To the extent there are examples of provisions in franchisor-drafted agreements that may appear to overreach, there are better ways to address them than by either declaring the entire agreement unenforceable or rewriting the agreement, based on an abstract consideration of its terms. Virtually all franchise agreements have severability clauses and, as to many provisions, simply severing terms that are deemed illusory or unconscionable should solve any perceived problem without damaging the fabric of the agreement. Moreover, at least in circumstances in which the agreement is ambiguous, the implied covenant of good faith and fair dealing is a better tool for courts or arbitrators to use, as it permits evaluation of a long-term, relational agreement, or provisions of it, in the context of the manner in which the parties have acted, rather than in the abstract context of the words of the agreement alone. The only situation in which concepts of illusoriness or unconscionability may become pertinent is when other contract principles, including good faith and fair dealing, do not suffice to address instances in which a franchisor's exercise of discretion, or retention of the right to do so, is deemed by courts or arbitrators to be inappropriate.

A. *Freedom of Contract/Benefit of the Bargain*

Freedom of contract is deeply rooted in the traditions of this nation and "springs from a higher source: from those great principles of universal law, which are binding on societies of men as well as on individuals."¹⁴⁸ As a result, with few restrictions, parties are free to contract as they see fit, and courts will, almost universally, uphold that right:

This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. . . . The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our

¹⁴⁸ *Ogden v. Saunders*, 25 U.S. 213, 222 (1827).

fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens.¹⁴⁹

Similar cases are legion.¹⁵⁰ Put simply, freedom of contract is the rule. While illusoriness and unconscionability are established concepts in contract law, they are exceptions.

B. The Dynamic of Franchise Agreements

Franchise agreements are entered into by parties who have had ample opportunity to consider the nature of the bargain. Apart from the ability, independently, to do due diligence on the potential franchise investment, prospective franchisees must be provided a detailed disclosure statement, pursuant to the FTC Rule on Franchising, as well as various state regulations. Franchising, moreover, is a highly competitive environment. This is important for two reasons.

Franchisors are in competition for franchisees. Prospective franchisees, thus, have a choice among different franchise opportunities, if they explore their alternatives. A franchisee always has the ability to walk away from a franchise agreement, prior to executing it, if he or she feels the terms are unreasonable. Franchisees often argue that they had no choice but to accept the “unfair” terms of a franchise agreement because it is offered on a “take it or leave it” basis. That argument, however, fails. As one court aptly responded, “Plaintiffs lament that their only choice was to accept the franchise agreement as written. This argument overlooks an obvious second option: to decline the franchise and walk away.”¹⁵¹ Indeed, the franchisee’s

¹⁴⁹ *Wilkie v Auto-Owners Ins. Co.*, 664 NW2d 776, 782 (Mich, 2003).

¹⁵⁰ See, e.g., *Brisbin v. Superior Valve Co.*, 398 F.3d 279, 290 (3d Cir. 2005) (“Sympathy aside, it is axiomatic that a court may not rewrite the clear provisions of a contract to make it more reasonable or to protect a party against an unwelcome result.”); *Farmers Ins. Co. v. Pierrousakos*, 255 F.3d 639, 644 (8th Cir. 2001) (“We shall neither pervert language nor exercise inventive powers for the purpose of creating an ambiguity when none exists.”); *Am. Cent Ins Co of St Louis, Mo. v. McHose*, 66 F.2d 749, 751 (3d Cir. 1933) (“It is true that the parties had the right to make any kind of contract that they desired to make. The court may not inject anything into a contract which it does not include either expressly or by necessary implication, and in construing a contract, the court cannot make a better one for either party than they themselves have made. . . . [T]he judicial function of a court of law is to enforce a contract as it is written. It is true that the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement.”) (citation and internal quotations omitted); *Jiffy Lube Int’l, Inc. v. Weiss Bros.*, 834 F. Supp. 683, 689-90 (D.N.J. 1993) (“That the immediate termination of the Jiffy Lube franchise may work a forfeiture does not alter Jiffy Lube’s right to terminate. Although it is true that equity abhors a forfeiture, equity’s jurisdiction in relieving against a forfeiture is to be exercised with caution lest it be extended to the point of ignoring legal rights. Thus, if the parties choose to contract for a forfeiture, a court of equity will not interfere with that contract term in the absence of fraud, accident, surprise, or improper practice.”) (internal citation omitted); *Interstate Fire & Cas. Co. v. Washington Hosp. Ctr. Corp.*, 758 F.3d 378, 389 (D.C. Cir. 2014) (“Where the parties have a contract governing an aspect of the relation between themselves, a court will not displace the terms of that contract and impose some other equitable duties not chosen by the parties.”) (citations and quotations omitted); *Dunkin’ Donuts of Am., Inc. v. Middletown Donut Corp.*, 495 A.2d 66, 74 (N.J. 1985) (“We have uncovered no equitable maxim or other guiding principle that would support the court’s disregard of the terms of the franchise agreements and modifications of the general body of franchise law discussed above. Although the remedy imposed by the court was undoubtedly well-intentioned, naked references to ‘equitable considerations’ are not sufficient support for the type of ‘creativity’ unleashed here. We are not disposed to put all contractual rights at risk in the name of equity.”).

¹⁵¹ *Fowler v. Cold Stone Creamery, Inc.*, No. CA 13-662 S, 2013 WL 6181817, at *2 (D.R.I. Nov. 25, 2013) (declining to find that a franchise agreement’s terms, including specifically, the forum selection clause, were unconscionable); see also *Bonanno v. Quizno’s Franchise Co., LLC*, No. CIV.A06CV02358CMAKLM, 2009 WL 1068744, at *18 (D. Colo. Apr. 20, 2009) (“Plaintiffs did not have to enter in the franchise agreement with Quiznos. They were free to

ability simply to reject the deal and look elsewhere--*i.e.*, freedom *from* contract--has frequently been a key factor in a courts' rejection of unconscionability arguments by franchisees.

Franchisors are also in competition for customers. In order to meet, or beat, their retail competition, franchisors must be nimble and able to alter their offerings. For this reason, it is imperative for franchisors to be able to make changes in their systems during the course of the long-term relationship with their franchisees and when agreements are subject to renewal.

It is true that contracts, including franchise agreements, sometimes are signed by parties without careful thought as to the ramifications of certain provisions (this is, of course, despite provisions requiring acknowledgment that a party thoroughly read the agreement and understood its terms, which, ironically, are also often overlooked). Nevertheless, the parties are expected to understand the import of each of the provisions in the agreement and the effect it may have on their business and business relationship.¹⁵² As Judge Richard Posner stated, in a franchise case, "[c]ontract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper. That philosophy may animate the law of fiduciary obligations but parties to a contract are not each other's fiduciaries."¹⁵³

C. The Role of the Implied Covenant of Good Faith and Fair Dealing

In view of the strength of longstanding principles of freedom of contract, courts traditionally have been reluctant to declare contracts void. Instead, they have typically, although not always, used various means to "fix" the questionable contract or provisions of it. In the franchise context, a primary means of "saving" contracts has been the implied covenant of good faith and fair dealing. The covenant has been invoked: (1) when a franchise agreement, or, more specifically, one of its provisions, is perceived to be ambiguous;¹⁵⁴ and (2) when the discretion to act is vested with the franchisor.¹⁵⁵ The basis for imposing the implied covenant of good faith and fair dealing is to protect the "fruits of the contract" for each of the parties by ensuring that a party acts in good faith, consistently with the parties' reasonable expectations.¹⁵⁶

There is controversy over the second approach, applying good faith and fair dealing to conduct that the franchise agreement expressly reserves to the franchisor in its sole discretion.

purchase a different franchise or invest their money elsewhere without any financial repercussions to themselves or Quiznos."); *Siemer v. Quizno's Franchise Co. LLC*, 2008-1 Trade Cases P 76215, 2008 WL 904874, at *9 (N.D. Ill. Mar. 31, 2008) (dismissing claims based, in part, on franchisee's ability to "walk away and pursue another business opportunity" if it did not like the terms of the franchise agreement).

¹⁵² See, e.g., *Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699, 710 (Cal. 1979) ("[O]ne who assents to a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument.") (en banc).

¹⁵³ *Original Great Am. Chocolate Chip Cookie Co.*, 970 F.2d at 280.

¹⁵⁴ See, e.g., *Chang v. McDonald's*, 105 F.3d 664 (9th Cir. 1996) (covenant guides construction of explicit terms to determine the interest of the parties when terms are ambiguous).

¹⁵⁵ See, e.g., *Carvel Corp. v. Baker, et al.*, 79 F Supp. 2d 53 (D. Conn. 1997) (covenant applies even when discretion is absolute).

¹⁵⁶ See, e.g., *Kirk LaShelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (Ct. App. N.Y. 1933).

Some, but not all, courts have ruled that franchisor still must “exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.”¹⁵⁷

D. The “Lesser” Evil?

The express language used in reserving rights within a franchise agreement often is critical in a court’s analysis of contract issues. Generally speaking, the more specific the reservation of rights, the more likely it is that a court will determine that the franchisor complied with the franchise agreement, including the implied covenant of good faith and fair dealing. However, the greater the discretion franchisors seek to retain, the greater the prospect that a court may rule against them. Historically, franchisors have prevailed, more often than not, in disputes where arguments were made by franchisees that franchise agreements or provisions in them are illusory or unconscionable. Yet, as franchisors draft or revise franchise agreements to become more detailed, more explicit in seeking to assure franchisor control and protect its discretion, they may increase the risk that arguments that the provisions, if not the entire agreement, will be deemed illusory or unconscionable.

To the extent franchisors are concerned that they will face effective arguments that provisions of their contracts are illusory or unconscionable, they have two fundamental choices: tough it out, or provide some limit on their discretion. Neither is an especially palatable choice for them. By toughing it out, adding even more language intended to ensure that the franchise agreement allows them to do what they regard as necessary, without allowing any franchisee, arbitrator, judge, or jury to “second guess” them, franchisors raise the stakes that a court will invalidate the contract, or entire provisions of it, thus “throwing the baby out with the bath water,” resulting in a huge mess in franchisee/contract relations. But to the extent franchisors acknowledge that their exercise of discretion may be limited, especially on issues going to the “core” of the way they design their systems and seek to have them operated uniformly, they subject themselves to defiant behavior by “free-riding” franchisees and “meddling” by arbitrators and courts. Thus, this path may also lead to a huge mess in franchise/contract relations.

There is no easy answer. The best approach may be for franchisors to look very carefully at what aspects of their systems they truly need to be able to change, unilaterally, and what ones they do not, and to craft provisions of the contract to reflect the difference, holding firm to their unilateral discretion over the “core,” while limiting themselves to “reasonable” changes outside the “core.” Such an approach will certainly leave loose ends, but it is probably safer than asserting that no franchisor conduct may be challenged as unreasonable and, at least, should give courts and arbitrators standards, to which the parties have, after all, agreed in their contracts, to guide them.

Franchisors, ironically, may thus find themselves better off by embracing broader applicability of the implied covenant of good faith and fair dealing--perhaps essentially modified, or defined, by inclusion of a “business judgment” rule in their agreements--than by exposing

¹⁵⁷ *Burger King v. Agad*, 941 F.Supp. 1217, 1221 (N.D. Ga. 1996); *but see Flight Concepts Ltd. P’ship v. Boeing Co.*, 38 F.3d 1152, 1157 (10th Cir. 1994) (“The doctrine [of the duty of good faith and fair dealing] comes into play where a contract gives one party some discretion to implement a contract provision. Although the doctrine is generally implied for all contract provisions, it is irrelevant where the contract is drawn so as to leave a decision to the uncontrolled discretion of one of the parties. In such a case, the parties contracted to allow one of them the unconditional right to act, and an implied promise to deal fairly has no purpose.”) (internal quotations and citations omitted).

themselves to claims that contracts or their provisions are illusory or unconscionable. For franchisors, this may be perceived as a choice among two evils. But, the potential applicability of doctrines of illusoriness or unconscionability, and the consequent voiding or judicial rewriting of agreements may be the greater evil, while accepting, if not embracing, a broader obligation to act fairly and in good faith, may be the lesser.

VI. CONCLUSION

Claims that contracts, or provisions of them, are illusory or unconscionable have long been available to litigants challenging the fundamental fairness of agreements. Because these concepts are essentially equitable and heavily dependent on the particulars of the contracts at issue, they have never been defined in a clear way, allowing for certainty in their application.

These claims have not often been made in franchise litigation and have been less often successful. There is no reason, however, why they cannot be made. Especially to the extent franchisors write agreements that contain provisions that arguably give them too much unbounded discretion or provisions that may appear to be unduly opportunistic and one-sided, claims that the provisions, if not the entire agreement, are unenforceable because they are illusory or unconscionable may pose a systemic threat. Nor is it necessarily easy to avoid these possible claims. On the one hand, franchisors have legitimate reasons for offering agreements that give them rights and flexibility to ensure that, over the course of long-term, relationship contracts, they will be able to manage their systems in a way to try to ensure that they remain competitive, innovative and profitable. On the other hand, there is no bright line that will define the points at which an agreement, or a provision of it, become illusory or unconscionable. The best course, for franchisors and those who draft agreements for them, is to “think twice” before pushing too near, if not over, the shadowy line and including provisions in those agreements that may be perceived, by a neutral observer, as unnecessary to achieving their legitimate goals and unfair or unreasonable in the maintenance of a long-term, hopefully mutually beneficial, relationship with their franchisees.

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