Where to Draw the Line

The Potential For Disputes Regarding Whether Franchise Agreements, Or Provisions Of Them, Are Illusory Or Unconscionable
Definitions

• Illusory: no consideration because the promisor has discretion whether to act.

• Unconscionable: no man in his senses and not under delusion would make, and no honest and fair man would accept.

• Good Faith and Fair Dealing: gap filler? curb on discretion and opportunistic behavior?
Judicial Approach

• Illusory/Unconscionable--Review Contract As Written, Rewrite?
• Good Faith and Fair Dealing--Review Contract As Applied
Franchise Decisions On Claims Of Illusoriness Or Unconscionableness

- Arbitration At Franchisor Option Illusory
- One-sided Arbitration Provisions Unconscionable
- No Significant Decisions Rejecting Substantive Provisions
Franchise Agreement Provisions That May Be Vulnerable

Changing The System: "Franchisor may modify, or make unilateral changes to, the System through the Operations Manual from time to time."
Franchise Agreement Provisions That May Be Vulnerable

Franchisor Assistance: "Franchisor may make available opening and ongoing operational assistance to the Franchisee."
Franchise Agreement Provisions That May Be Vulnerable

Purchases From Franchisor: "Franchisor may require Franchisee to obtain goods and services for operation of the business from Franchisor or its designee."
Franchise Agreement Provisions That May Be Vulnerable

Renewal: "Franchisee may renew its franchise upon signing Franchisor’s then–current form of agreement, which may have materially different financial and other terms."
Franchise Agreement Provisions That May Be Vulnerable

Buybacks: "Franchisor may buy back the Franchise at any time for the greater of net sales in the trailing 12-month period or the depreciated net asset value of the Franchise."
Franchise Agreement Provisions That May Be Vulnerable

Arbitration: "Franchisor may require arbitration of any dispute, to take place in the jurisdiction where it has its principal place of business, but may alternatively seek injunctive or other relief in the courts where it has its principal place of business."
Franchise Agreement Provisions That May Be Vulnerable

Fees and Costs--"In any dispute between Franchisor and Franchisee, Franchisor shall be entitled to payment from Franchisee of its attorneys' fees and costs to the extent Franchisor prevails."
Franchise Agreement Provisions That May Be Vulnerable

Indemnification--"In the event Franchisor is sued for acts or omissions taking place at on in the conduct of Franchisee's business, including without limitation, claims for monetary or other relief from alleged torts or violations of law (including liability as joint employer or for data breaches), Franchisee shall fully indemnify Franchisor."
Franchise Agreement Provisions That May Be Vulnerable

Others That Occur To You
Franchisee Perspective

- The duty of good faith and fair dealing cannot cure all
- Saving franchise agreements?
Franchisor Perspective

• Freedom of contract is still the rule; illusoriness/unconscionability are recognized exceptions

• Careful what you wish, or draft, for: pigs get fed, hogs get slaughtered

• The lesser evil? Embracing a limited duty of good faith and fair dealing?
Your Perspective