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Franchising in Asia

Breaking the Curse Of Assumption

By David W. Koch

The new, three-towered Marina Bay Sands Resort looms over downtown Singapore like a giant Chinese character. It is a vast, eye-popping Las Vegas-style property with 2,500 rooms, daring architecture, a casino (controversial for Singapore), an enormous convention center, and a shopping mall for which the term "upscale" would be too timid. The hotel is topped by an outdoor Sky Park sporting an infinity pool that seems to threaten a 200-meter plunge to swimmers who venture too near the edge.

As a symbol of Southeast Asia's brimming economic confidence, the Marina Bay Sands was the perfect venue for the Franchising Licensing Asia 2010 ("FLAsia 2010") exposition, held on Oct. 21-23, and a concurrent International Symposium on Franchising organized by the International Franchise Association. FLAsia 2010 and the International Symposium both showcased the vibrancy of Asian franchising. Despite a modest number of exhibitors compared with franchise expos in the United States, one could not escape the impression that much of franchising's future lies in Asia.

The 'Curse of Assumption'

That future depends in part on overcoming what Rod Young, executive director of Australian

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Arbitrate? Litigate? Avoid Both Through Mediation

By Charles S. Modell

In the September 2010 issue of *FBLA*, Rupert Barkoff wrote a thought-provoking article on the merits of arbitration versus litigation of franchise disputes. His article reminded me of what I tell all prospective franchisors who are trying to decide between arbitration and litigation: "I hate them both, but duels are unlawful."

Unfortunately, our judicial system really does not provide any good alternative to either arbitration or litigation, both of which can be time consuming, costly, and uncertain. For that reason, a dozen years ago, we began recommending to our franchisor clients that they include a compulsory mediation provision in their franchise agreements. After more than 10 years of experience with these clauses, we find that while some people are disappointed by mediations that do not magically produce settlements, more often than not, they do produce resolutions that are preferable for both franchisee and franchisor (though maybe not for their lawyers) than results obtained in either litigation or arbitration.

Defining Mediation

Mediation is simply a procedure whereby two parties get together, with the assistance of a neutral third party, to work out their differences. Attorneys frequently attend, but they are not required to attend when no litigation has been initiated. The mediator may give his or her opinions to the parties, but the mediator does not make any decisions for them. Compulsory mediation requires the parties to meet, but nobody can force them to reach an agreement.

Franchisees are not always excited about mediating disputes. In some cases, that is because the mediation provision is one-sided and stacks the deck against the franchisee. Franchisees (and their lawyers) should be reluctant in this situation. There is no reason for a franchisor to try to control the mediation or otherwise stack the deck. In fact, doing so sets the wrong tone for the mediation. The purpose of mediation is not for one side to "beat down the other," but for the

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PERIODICALS

Mediation

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parties to find a mutually beneficial solution. (A cynic might argue that a "successful" mediation more often helps the parties cut their losses and find the least distasteful resolution. Either way, mediation can be beneficial for both parties.)

Drafting a Neutral Mediation Provision

A compulsory mediation provision typically provides that neither party can initiate litigation until it has offered to mediate. The provision should apply to both franchisor and franchisee. (While this article assumes that litigation is the dispute resolution method provided for in the franchise agreement, the same comments apply when arbitration is required.) Since there are certain circumstances that cannot wait for a mediation to be scheduled, a carve-out should allow both parties to redress situations that require injunctive relief to prevent irreparable harm.

In the provisions we draft, the franchisor does not select the mediator. Rather, if one party initiates a mediation request (thus letting the other party know that it refuses to accept the invitation to mediate, the next communication will be service of a complaint), the party receiving the letter then selects a mediation organization. It must be an organization (not their brother-in-law), and it must be one that provides mediation services to franchisors and franchisees.

In our clauses, we leave the selection of the actual mediator to the mediation organization. However, it is critical, particularly for mediations that occur before the parties have gone through the pain of litigation, that the mediator be familiar with franchising, so that he or she can provide an educated, third-party analysis to both the franchisor and franchisee as to the merits of their positions. Thus, we require that the mediator have a certain minimum number of years of experience as a franchisor, as a franchisee, or in franchise law. Our franchisor clients often ask whether this might result in selection of a "franchisee-friendly" mediator. In many situations, we hope that it does; if our client's position is supported by the law and the contract, what better way to convince a franchisee that its position has little merit than by having someone well versed in franchise law, who is probably sympathetic to the franchisee's position, provide the franchisee a candid, confidential, and independent analysis of its position?

Many mediation provisions provide that the site of the mediation will be the office of the franchisor. There may be good reasons for a franchisor to want a local venue for its litigation, but requiring the franchisee to travel to the franchisor's office for mediation sends the message that this is not intended as an even-handed negotiation. In fact, we have found that if all parties are "invested" in the process, when negotiations are stalled in the first hour or two, as they inevitably are, everyone works harder to find a resolution than if we were sitting in the offices of one of the parties who could simply go back to their desk. Thus, we recommend leaving the decision of the venue of the mediation to the mediator, but with the proviso that absent the agreement of both parties, the mediation must take place at least 100 miles from the offices of either party. This

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Franchising

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Q&A with Misty Chally

Deputy Executive Director Discusses CFA's Mission, Future Plans

In 2007, several large franchisee associations formed the Coalition of Franchisee Associations ("CFA"), with the mission to "leverage the collective strengths of franchisee associations for the benefit of the franchisee community." One of CFA's greatest strengths became the ability to bring greater legislative and regulatory attention to issues that affect franchisees nationally and at the state level. Today, the CFA has grown to 10 member organizations that represent 14,000 franchise units that employ 1.2 million people. In this Q&A, Misty Chally, CFA's deputy executive director, discusses the mission of the organization and its future plans.

FBLA: Who are you guys?

Misty Chally: In 2007, the CEO of the National Franchisee Association ("NFA"), an association of BURGER KING® franchisees, thought that it would be beneficial to bring together franchisee associations to share ideas and best practices. I had recently been hired by NFA to create its government relations department, and I had worked on small business, tax, and political action committee ("PAC") issues for associations in the past. I soon started working on policy issues for CFA because the founding members realized it was a voice that was missing in Washington, DC.

The Independent Organization of Little Caesar's Franchisees just joined in October, making it our 10th member. The other members are franchisee associations made up of Buffalo Wild Wings, Burger King, Dunkin' Donuts, Hardee's, JD Byrider, Meineke, Pizza Hut, Subway, and Supercuts franchisees.

FBLA: All of those members are large or fairly large franchisee associations. Is that your target?

Chally: Not at all. We are reaching out to franchisee associations of all sizes, and we want all of them to be involved.

FBLA: What is your mission?

Chally: We have a couple of them. As I said, sharing best practices is one of them. We also want to provide members of Congress with the perspectives of franchisees, who are the ultimate community-based small-business owners. What we don't want to be is the place where a franchisee goes to complain about its franchisor; that's not our role.

FBLA: What issues have been your focus in government affairs?

Chally: First and foremost is the health care bill that passed earlier this year. No question it's been Number One for us because providing health care for employees is such a big issue for small-business owners. Another issue is controlling outrageous credit card interchange fees. This summer, Senator Richard J. Durbin (R-Illinois) worked with the merchant community to include important interchange fee language in the Wall Street Reform bill which passed this year. Reform was definitely needed in the area of credit card interchange rates because merchants were paying up to 2% per transaction. We also joined franchisors and many other business groups in opposing the Employee Free Choice Act, also known as Card Check. And we opposed cap-and-trade legislation because it was going to impose huge costs on businesses.

We've had a very warm reception on Capitol Hill. We have our annual "CFA Day" when we go on Capitol Hill and visit members. People on Capitol Hill see small-business issues very positively; everyone knows where the Dunkin' Donuts, Burger King, and Subway is in their neighborhood. Franchisees can speak with members of Congress about the impact of legislation on businesses in their district, and that is very powerful.

However, I'll admit that sometimes, members of Congress have trouble distinguishing the impact of legislation on the franchisee community. They tend to lump franchisors and franchisees together, as if the franchisee is part of a large national or international business.

FBLA: Judges sometimes have difficulty distinguishing franchisors and franchisees, too. What's the impact when that confusion occurs?

Chally: Some legislation or regulation that is written with franchisors in mind will have a big impact on franchisees that maybe even the franchisees are not aware of at first. One example would be the new menu-labeling requirements that were passed in the health care law [*see FBLA*'s October 2010 issue for coverage]. While these new rules are beneficial in that they provide a uniform standard across the country, they will cost franchisees a lot of money. Everyone assumes that franchisors will provide the new menus, but it's the franchisees who will be paying for it in the end.

We also can show when legislation that's designed to help small businesses might not have the expected impact. A few months ago, I went with NFA to meet with Senate Finance Chairman Max Baucus' (D-Montana) tax counsel about stimulus legislation. The staff was saying how the bill would be great because it would free-up capital for investment in new business. But we explained that with the uncertainty over the expiration of the Bush tax cuts, along with increased expenses and a spiraling economy, small-business owners are lucky to keep their existing businesses, let alone to re-invest in new stores. Many of the Bush tax cuts benefited small businesses, from the estate tax to the alternative minimum tax on income, to personal tax rates and capital gains rates.

FBLA: On the issues you named so far, the CFA's views probably matched those of most franchisors. Are there issues on which you have diverged?

Chally: First and foremost, we exist to protect the interests of franchisees. So, for example, we disagreed

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with groups like the International Franchise Association and the Chamber of Commerce on the Arbitration Fairness Act. We believe that mandatory arbitration requirements, which are in many franchise contracts, are not necessarily in the interests of franchisees. The Arbitration Fairness Act would void all binding predispute arbitration clauses in franchise agreements. We do not want franchisees to sign away their rights to sue.

FBLA: Tell us about the work you do to facilitate best practices.

Chally: There are a wide variety of issues on which franchisee associations can work together to learn how to become better associations and franchisees can become better operators. We've had presentations about how to improve an association's Web site design, and how franchisees can save on energy costs. We've worked on franchise association member recruitment, and, at our next meeting, we will be speaking with the Employer Partnership of the Armed Forces, which can help franchises recruit veterans as employees. Also, members have compared franchise agreements to determine which clauses are most hurtful and beneficial to franchisees.

FBLA: What's next for CFA?

Chally: As I said, we are reaching out more actively to independent franchisee associations of all sizes, as well as multi-unit operators. We also welcome the suppliers and companies that serve franchisees. And we are getting ready for our next major meeting and CFA Day Forum, which will be June 22-24, in Washington, DC. We have found that when franchisee association executives come to the meeting and see what we have to offer, they are eager to join the Coalition of Franchisee Associations.

Mediation

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assures that both parties will incur some expense to get to the mediation. Once again, the goal is not to have one party browbeat the other, but to reach a reasoned resolution of a dispute.

Convincing Everyone Not to Ignore the Mediation Provision

We quickly found that one party or the other, sometimes our own client, would often decide that mediation would be a waste of time, and would want to proceed directly to litigation. When courts were confronted with a complaint filed by a party that indicated that mediation would be fruitless because it would not settle under any circumstances, the courts were holding that there was no damage caused by the breach of the obligation to mediate. As a result, compulsory mediation clauses were not being upheld.

We had to address this problem. We began including a provision stating that if either party initiates litigation without complying with its obligation to mediate (other than if the other party fails to timely respond to a mediation demand), then upon petition of the party against whom the litigation was initiated, "the court will dismiss the litigation without prejudice, and award attorneys' fees and costs to the party seeking dismissal in an amount equal to the attorneys' fees and costs the party seeking dismissal incurred in the litigation."

Since initially including this attorneys' fee provision in our clients' agreements, we have had two experiences with franchisees, both in California, who brought litigation without first going through the mediation process, each having a different reason for not complying with the mediation clause. In *Brosnan v. Dry Cleaning Station, Inc.*, No. C-08-02028EDL, 2008 WL 2388392 (N. D. Cal. June 6, 2008), the plaintiff argued that mediation would be a "hollow exercise," but that if the court disagreed, it should simply stay the action while the parties completed mediation. Instead, the court dismissed the action and granted leave to the franchisor to file its petition for attorneys' fees.

Earlier this year, in *Delamater v. Anytime Fitness, Inc.*, No. 1:09-CV-2025 AWI-SMS (E. D. Cal. June 28, 2010), the plaintiff franchisee argued that it should not be required to attend mediation because the mediation would require the plaintiff to travel outside California, and that such a requirement was contrary to California law. He also argued that the provision was invalid for public policy reasons. The court disagreed with both positions, found that the mediation clause was enforceable, and dismissed the plaintiff's lawsuit "without prejudice because it is premature." Further, the court ruled that "Anytime Fitness is entitled to seek attorneys' fees for having to defend against Delamater's [claims] because Delamater violated the mediation provision." *Id*. at 16.

Similar rulings in Kansas and in Florida have enforced differing compulsory mediation clauses. However, because my law firm was involved in the two cited California actions, we know the end of those stories. In both situations, mediations were held within three months of the issuance of the court's ruling. In the first one, after a frustrating 10-hour mediation, the parties left mediation without a settlement, but two weeks later, a settlement was negotiated based on the last offer the franchisor made at the mediation. In the second one, a settlement was reached and signed at the end of the mediation. Thus, in both instances mediation was successful in saving the parties the expense and burden of a trial.

Conclusion

Arbitration and litigation both have their pitfalls. The best advice

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COURT WATCH

By Cynthia M. Klaus
and Meredith A. Bauer

No Affirmative Duty on Franchisor to Enforce Territory Restrictions

A recent case out of the district court in Michigan highlights the tensions that can arise when disputes occur among franchisees. Although not directly involved, a franchisor can unwittingly be pulled into a lawsuit or be subject to a claim based on a franchisee's frustration that it is failing to do enough to resolve the dispute. *Cottage Inn Carryout & Delivery, Inc. v. True Freedom Investments, LLC et al.,* 2010 U.S. Dist. LEXIS 113170 (E.D. Mich. Oct. 20, 2010), began with a dispute among two franchisees related to sales outside of their protected territories, but it ended with a claim against the franchisor for its failure to stop one of its franchisees from encroaching on the protected territory of the other franchisee.

In this case, the franchisee, True Freedom Investments, LLC ("True Freedom") discovered shortly after acquiring a franchise from Cottage Inn Carryout & Delivery Inc., a pizza franchisor ("Cottage Inn"), that another franchisee in the Cottage Inn system was delivering pizzas and other food items within the protected territory granted to it under the franchise agreement. True Freedom notified Cottage Inn of the issue, and the franchisor subsequently conducted an audit that confirmed the allegation. True Freedom subsequently defaulted on the franchise agreement and ceased operating as a Cottage Inn franchisee.

The court action arose when Cottage Inn made a claim against True Freedom for breach of franchise agreement and demanded payment of amounts due under the agreement. True Freedom responded with a counterclaim alleging that Cottage Inn breached the franchise agreement by failing to take action to stop the other franchisee from making deliveries within its protected territory. Cottage Inn then moved to dismiss the counterclaim for failure to state a claim upon which relief could be granted.

The question before the court in deciding whether to grant the motion to dismiss was whether the franchisor could be affirmatively required to monitor and police its franchisees to ensure that they did not encroach upon each other's protected territories. The court considered the provisions of the franchise agreement in order to determine the franchisor's affirmative obligations, specifically the paragraph granting True Freedom its protected territory. The provision in question provided: "[Cottage Inn] will not establish, or grant a franchise to another person to establish, another Cottage Inn store the physical premises of which are located within the area described in Exhibit B as the 'Protected Territory Area.'"

The court interpreted this provision according to its plain language in order to give effect to the parties' intentions, and it found True Freedom's argument without merit. It rejected True Freedom's argument that the language was ambiguous as to the duties of the parties, and instead found that no language existed in the agreement which imposed an affirmative duty on the franchisor to take action to monitor a franchisee's territory and stop any infringing activity. Rather, it simply stated that the franchisor would not itself establish or grant someone else a franchise within the Protected Territory Area. No further implicit promises could be read into the agreement. Further, an integration clause and a no-oral-modification clause in the franchise agreement made any alleged oral promises or representations between the parties inadmissible.

Notably, the franchisee also argued that the franchisor breached the covenant of good faith and fair dealing, which prohibits any party to a contract to do anything that interferes with the right of the other party to receive the fruits of the contract. This claim was necessarily rejected, as Michigan law does not recognize a cause of action for the breach of the implied covenant of good faith and fair dealing.

This case highlights the importance of the wording of the protected territory provision in a franchise agreement. If a franchisor does not in practice police its franchisees to ensure that they are not making sales outside of their protected territories, the franchisor should review its agreements to ensure that no duty can be found to exist, or is implied in the language, requiring it to take affirmative action to ensure that its franchisees do not encroach on each other's territories.

Class Certification Denied In McDonald's Obesity Case

In the latest decision in the famous case by consumers against McDonald's Corporation, the federal court for the Southern District of New York denied class certification (*Pelman v. McDonald's Corp.*, 2010 WL 4261390 (S.D.N.Y. Oct. 27, 2010)). After a series of dismissals and amended complaints, the plaintiffs alleged that McDonald's engaged in deceptive trade practices prohibited by New York General Business Law § 349, by representing that its food products were healthier than they actually were. The plaintiffs claimed that the nutritional misrepresentations resulted in adverse medical conditions. The putative class consisted of New York residents who "were exposed to Defendant's deceptive business practices and, as a result thereof, purchased and consumed the Defendant's products in New York State stores/franchises, directly causing economic losses in the form of the financial costs of the Defendant's goods, causing … detrimental and adverse health effects and/or diseases."

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Court Watch

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The plaintiffs argued that the class should be certified under Federal Rule of Civil Procedure 23(b), which requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members. … " To analyze the predominance argument, the court considered whether the elements of the deceptive trade practices claim could be decided through class-wide, rather than individual, proof. To prevail on a deceptive trade practice claim, a plaintiff must show that: 1) the defendant made misrepresentations that were likely to mislead a reasonable consumer; 2) the plaintiff was deceived by those misrepresentations; and 3) as a result, the plaintiff suffered injury.

As part of the third element, the plaintiffs must show that the deceptive practice caused an actual injury. Thus, the plaintiffs in this case must show that the representations by McDonald's caused the alleged medical conditions. According to expert testimony, the cause of a person's medical condition depends on a range of individual factors. Because the causation element required individual inquiries, common questions of fact did not predominate, and the court decided that the case was not appropriate for class treatment. Similarly, whether an individual consumer chose to eat McDonald's food based on the nutritional representations by McDonald's, the second element of the deceptive trade practices claim, also was deemed an individual inquiry.

The court then considered an alternative proposed by the plaintiff: an Issue Class to determine liability on a class-wide basis. This proposal could have led to certification of a limited class for purposes of determining the first element of the deceptive trade practices claim only. The court found that the commonality and typicality requirements of Rule 23(a) and the predominance requirement of Rule 23(b)(3) were met with respect to the liability issues. However, the plaintiffs failed to satisfy the numerosity requirement of Rule 23(a) because they had not shown that there were any other persons who had not reached the age of 21 when the case was commenced, were exposed to McDonald's marketing scheme in New York, ate regularly at McDonald's restaurants, and developed the same medical conditions as the named plaintiffs. Therefore, the court declined to certify the proposed issue class.

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Asia

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consultancy DC Strategy, calls the "curse of assumption" in international franchising. He and other speakers at the International Symposium stressed the danger to brand owners of making assumptions about how new markets will perceive their products and services. According to Young, the curse of assumption has undermined more franchising opportunities than any other single factor.

Young shared a panel with Ned Lyerly, executive vice president of global franchise development for CKE Restaurants, Inc. Lyerly used his company's brands, Carl's Jr. and Hardee's, as cases studies on analyzing new markets and adapting U.S. franchise concepts to them. Keynote speaker Winston Tang, regional executive of V-KOOL International, a franchisor of heat-absorbing window film products, offered another case study from the perspective of a Singapore-based concept that has expanded to 600 units in 30 countries.

Universal Truths

The stories of these and other franchisors at the symposium confirmed that certain truths of franchising are universal. No matter the country of origin, the principal business challenges are: 1) finding good franchise candidates; 2) managing franchisees' compliance with brand standards, especially from a distance; and 3) finding ways to maintain franchisor leadership of the brand by continuously adding value for franchisees.

To an American lawyer sitting in the audience, two observations stood out. First, none of the franchisor business executives who spoke complained about the burden of franchise laws, despite facing a presumably sympathetic audience that was almost devoid of lawyers. They spoke of franchising in China, Indonesia, and Vietnam with the same relish as franchising in Singapore, Thailand, and India — though the former three countries regulate franchise sales, while the latter three do not. This is not to presume that the speakers did not consider franchise laws a burden, only that the business factors seemed to dwarf the legal.

Second, a subtle but significant theme emerged from the remarks about managing a franchise network. Michael Cha, director of business development for Korea-based franchisor Genesis BBQ, listed four basic elements for strong franchise relationships: respect, communication, acceptance (of cultural differences), and trust. Western franchisors, of course, might list the same elements as keys to business success. But in Singapore, these elements seemed to be invested with cultural meaning, not just business advantage. The result was a different emphasis (or different instinct or philosophy — it was hard to pin down the right term) in managing franchise system disputes. As Imeelia Ismail, COO of Cherie Hearts Group International, a Singapore-based system of 125 childcare centers, put it: "We understand that [franchisees] make mistakes; we don't punish them, we support them." The Western instinct, by contrast, is often to reach for the default letter.

Away from the conference, a visit to the Singapore International Arbitration Centre ("SIAC") offered a different slant on potential franchise disputes. The SIAC is housed in Maxwell Chambers, the beautifully renovated former Customs House building, which also contains offices of the American Arbitration

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NEWS BRIEFS

Weak Economy Changes Franchisors' Legal Equation

Nearly every economic outlook for the U.S. economy suggests that the recovery from the recession will be slow and inconsistent. Credit remains tight, unemployment remains high, and consumers are spending cautiously. An industry as widespread as franchising reflects the macro trends that have engulfed the economy generally.

With that macro picture in mind, Darrell Johnson, CEO of FRANData Corp., provided a measured, but not negative, outlook for the franchise industry in his presentation, "2011 Economic Forecast for Franchising" at the Franchise Leadership and Development Conference, sponsored by Franchise Update. Johnson said that the credit squeeze and tough economic times have tied together the fortunes of franchisor and franchisee more closely than ever before, and this has implications for how franchisors' operations and legal teams must work together.

"Because of all the litigation and case law in the last 10 or 15 years, the legal community has rightly said to franchisors [that] in order to protect yourselves, you can't do this, you can do that, you need to stay away from that, you can't say that. But we know that the tide has gone out from an operational standpoint for franchisees," said Johnson. "There are things that you [franchisors] know that you could do to help your franchisees, but you can't from a legal standpoint. It's a roadblock that has to be resolved."

Johnson said that he is starting to see franchisors "challenge the legal community to find ways to … effectively help franchisees in ways you know will work. This is not only on the front end in attracting franchisees and finding financing, but also in supporting them over time."

As an example, Johnson said that banks are considering the attractiveness and strength of entire franchise systems when deciding whether to extend credit to a prospective or operating franchise unit. "It's not just about the individual borrower," he said. "The preferred-lender model isn't there anymore." Given this scrutiny, franchisors need to support struggling franchisees because a failure of a franchise unit will be a mark against the system that will make it more difficult for all other franchisees to get credit, Johnson said. Also, since community banks are receiving a large share of federal support for the banking system (including the $30-billion Small Business Lending Fund created this fall), franchisors will need to explain franchising to bankers who are probably unfamiliar with the industry.

Johnson also pointed out that franchisors' co-branding ventures and the desire by multi-unit franchise operators to operate different franchise brands as a way to protect themselves if one franchise system does poorly are raising the complexity of franchise operations and contractual issues.

Revised Proposed Business Opportunity Rule Published for Comment

In October, the Federal Trade Commission ("FTC") published a report that proposes amendments to the Interim Business Opportunity Rule that was published in 2006. The new rule, referenced as the Revised Proposed Business Opportunity Rule ("RPBOR"), would include a Revised Proposed Disclosure Document to streamline the amount of information that sellers of business opportunities would have to provide to prospective buyers, remove multilevel marketing programs from coverage under the rule, and extend the rule to cover sellers of at-home businesses. Public comments on the rule are due on Jan. 18, 2011.

The RPBOR would retain the proposal from the interim rule for an exemption from the business opportunity rule for any business that is covered by the Franchise Rule, while leaving as ineligible for the exemption businesses that are exempt from the Franchise Rule due to factors such as being fractional franchises or not charging franchise fees.

Adoption of the RPBOR would continue the divorce of business opportunity regulation from franchise regulation that began in 1995 when the Original Franchise Rule underwent regulatory review, while maintaining the FTC's mission to protect consumers from fraudulent business opportunity sales activities. "The Commission's law enforcement experience in conducting numerous sweeps of the business opportunity industry demonstrated that fraud in the sale of business opportunities is not only prevalent but persistent," the Commission wrote in its report.

To read the report, go to www.ftc.gov/os/fedreg/2010/october/101028businessopportunitiesstaffreport.pdf.

Mediation

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any attorney can give his or her clients about dealing with disputes is to avoid them. Unfortunately, disputes cannot always be avoided. Sending those disputes to mediation does not guarantee they will be resolved. When they are not, both parties will complain about the additional cost of mediation. However, statistics show that the majority of mediated disputes are settled, either through the mediation, or within a few weeks thereafter. Any statistics major, or gambler, would tell you that if you have a better than 50/50 chance of getting a result through the expenditure of several thousand dollars in mediation, which will save probably 10 times that amount in litigation, this is a good bet. Perhaps not for the lawyers, but certainly for their clients.

Movers & Shakers

Atlanta-based **Kilpatrick Stockton LLP** and San Francisco-based **Townsend and Townsend and Crew LLP** will be merging effective January 2011, with the combined 640-lawyer firm to be known as Kilpatrick Townsend & Stockton. It will have offices in 14 U.S. cities, as well as in Stockholm, Dubai and Tokyo. "This is very exciting. It's a great opportunity that broadens the platform for both firms," said Rupert Barkoff, head of the franchise practice at Kilpatrick Stockton and a member of this newsletter's Board of Editors. Townsend has a very strong reputation for its work in intellectual property, trademarks, and patents, and Barkoff observed that "a trademark license is usually no more than one step from being a franchise." Geographic reach is a motivation for the merger, as Townsend is focused on major U.S. cities in the West and Tokyo, whereas Kilpatrick Stockton is strong in the U.S. East Coast. The full-service practice depth of Kilpatrick Stockton will enable Townsend to retain franchise work that had previously been farmed out to other firms, Barkoff added. The combined firm will rank among the 70 largest law firms in the United States.

After three years at **Snell & Wilmer L.L.P.**, **Mike Drumm** has started **Drumm Law, LLC**, in Denver. "Franchising has become a fundamental aspect of small business," he said, adding that, as a small-business owner himself, he has "focused on cutting our overhead to the bare minimum, and we pass the saving on to our clients." Drumm observed that "things are definitely looking up for lower cost investments but until the banks free up capital, higher cost investments such as restaurants will struggle."

Rupert Barkoff, partner at **Kilpatrick Stockton LLP** (Atlanta), and **Andrew Selden**, shareholder at **Briggs and Morgan** (Minneapolis), were named the recipients of the second **Lewis G. Rudnick Award** at the **ABA Forum on Franchising** in October. The award honors Lewis Rudnick, a founding member of the Forum and senior partner of Rudnick & Wolfe, now **DLA Piper**; Rudnick died in January 2009.

In their 30-plus year careers, Barkoff and Selden, both members of this newsletter's Board of Editors, have been leaders in the development of programs to educate attorneys about franchise law, and they have contributed numerous articles and chaired conferences and presented at many sessions for the ABA and the International Franchise Association. Together, Barkoff and Selden created the ABA's "Fundamentals of Franchising" seminar to acquaint attorneys with franchise law, which has become one of the signature programs of the Forum on Franchising. Barkoff and Selden each have been chair of the Forum, and they are co-editors of *Fundamentals of Franchising*, now in its third edition.

The Forum also recognized two attorneys as the 2010 Future Leaders: **Dawn Newton** of **Fitzgerald Abbott & Beardsley LLP** (Oakland, CA), and **Jayne Edmonds** of **Cassels Brock & Blackwell LLP** (Toronto).

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Asia

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Association's International Centre for Dispute Resolution and the International Chamber of Commerce's International Court of Arbitration. Maxwell Chambers provides state-of-the-art hearing room facilities and support to all of these organizations, including an arbitrators' lounge that would be the envy of any Red Carpet Club denizen. The hearing rooms offer a variety of configurations in a sleek modern architecture, but one of them bucks the style of the others and features ornate furniture that formerly served the Supreme Court of Singapore.

With no disrespect to the other organizations mentioned above, the SIAC has developed a solid reputation as a dispute resolution administrator of choice in Southeast Asia. The SIAC, in a refreshing nod to transparency, even provides an "Estimate Your Fees" calculator on its Web site. Its caseload — about 160 cases so far this year — is dominated by commercial and maritime disputes, which is no surprise for a city-state that serves as one of the world's major container ports and finance centers. Intellectual property disputes, which would include franchise disputes, is a much smaller category. However, for a franchisor that is seeking a neutral site to designate in its contracts for disputes with, say, a Chinese franchisee, the SIAC (and the alternative providers at Maxwell Chambers) is worthy of consideration. Coincidentally, Maxwell Chambers also happens to house the offices of the Franchising and Licensing Association (Singapore), the sponsor of the FLAsia 2010 exposition.

Conclusion

For a Western franchisor considering a regional office to oversee its operations in Southeast Asia, Singapore would be a logical base. As a former British territory, English is one of its four official languages and generally serves as the language of business, and Singapore's laws are based on the British model. The government is stable and friendly to business. The handsome airport is a non-stop flight away from most major cities in the region. Lastly, it is a multi-cultural society and a crossroads for visitors. Anyone laboring under the curse of assumption would likely find that Singapore helps to shatter those assumptions and ease the entry of a franchise brand into other parts of the region.

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