Bradley: Contracts Spring 2013
Liquidated Damages Question

A sells franchises to run a business under A's brand name and according to its system. The contract provides:

If Franchisee ceases to operate Business under the System for any reason Franchisee shall pay to A within 30 days following such an event, as Liquidated Damages (to compensate A for lost revenues in an amount difficult to ascertain, and not as a penalty) an amount equal to an amount calculated by reference to the following formula:

1. All sums then currently due and owing from Franchisee to Franchisor PLUS
2. The average annual Franchise Fees paid by or due from the Franchisee during the immediately preceding 36 full calendar months
MULTIPLIED BY THREE

Is this provision valid as a liquidated damages provision or unenforceable/void as a penalty?

How would the following facts change your opinion?

A is a new Franchisor and has had no experience of the termination of Franchises.

A is a corporation which has been in the business of selling its very popular Franchises for 30 years and the market for its Franchises is stable and predictable.

A is a corporation which has been in the business of selling its very popular Franchises for 30 years and the market for its Franchises is unpredictable.

A is a corporation which has been in the business of selling its very popular Franchises for 30 years; the market for its Franchises has for years been stable and predictable but a Franchisee terminates its Franchise in the middle of a financial crisis.

Would it make a difference if Franchisor added the words "a reasonable estimate of the probable damages that Franchisor would suffer for the loss of prospective Franchise Fees and other amounts payable" after "not as a penalty"?