

# Damage control

Kate Matthews, partner at **Boddy Matthews Solicitors**, runs through what your options are in case of a dispute

The franchise relationship is a long-term business relationship where success for both franchisor and franchisee is interdependent. Clear and

effective communication is a key factor in that success. It is therefore all the more important to swiftly address concerns that arise during the course of this relationship, however big or small, to avoid potentially long-lasting damage to the relationship or, at worst, its ultimate termination.

It will be important for franchisees to understand the dispute resolution mechanism available in the event that simple communication cannot resolve matters for the parties.

A well-drafted and ethical franchise agreement, as promoted by the British Franchise Association (bfa) and the European Code of Ethics for Franchising, will contain a clear dispute resolution clause. This will set out how to resolve disputes on a step-by-step basis.

Such steps may include some alternative dispute resolution (ADR) procedures, of which there are many forms:

- Following written notice, the parties to seek to agree a resolution within a timeframe
- Decision makers meet on a without-prejudice basis during a specified period of time
- Negotiations in good faith and not arbitrary
- Expert opinion from an industry specialist, where the expert's decision is binding
- A formal mediation, whether using established schemes such as the bfa mediation scheme or an informal mediation
- A formal arbitration, appointing a single arbitrator or a panel of three using nominated arbitration rules, such as the bfa arbitration scheme or an ad hoc arbitration
- Court proceedings also known as litigation

Some types of dispute may be excluded from certain ADR steps. An example is where urgent interim action (known as an injunction) is required to protect the

franchisee or franchisor in the period of time before a substantive decision can be agreed or obtained. Such claims for urgent relief are brought before the court, but, even then, do not exclude or prevent engagement in the ADR steps suggested above, which can, in certain circumstances, run in parallel.

It is important, therefore, for the franchisee to know if the steps set out are obligatory and if they are to be taken in turn, consecutively or elective, or depend on the parties' agreement to enter into them.

Franchisees should also check that the governing law and jurisdiction, as set out in the franchise agreement and which will apply to the dispute resolution steps, are suitable for their business and where it is carried out, particularly as the applicable law and applicable jurisdiction can differ. This is particularly important, for example, for master franchisees or franchisees where the franchisor is not based in the country.

If you're ever in the position of wondering which ADR step is best for you, here's a breakdown of what you should know about each one.

## Communicate

Lack of communication may often be the root of a problem. While some disputes cannot be avoided, many could be avoided through clear, open and effective communication. A cost-effective solution may simply be to open that dialogue with your franchisor, and negotiate and work together towards a solution.

## Mediate

Mediation is a private, confidential and flexible form of ADR, facilitating the parties in reaching an agreement where possible. If the parties have agreed to mediate, discussions are carried out on a without-prejudice basis. Therefore, it is not binding unless the parties, with the help of a neutral third party mediator, reach an agreement, which is then recorded in writing and signed by all parties.

A mediation can include all aspects of the relationship and is not limited to the

legal issues. A facilitative mediation can, with agreement, become an evaluative mediation if the parties so choose, where the mediator can provide a solution that the parties agree to honour. In this case, the franchise relationship can be preserved and the process is cost effective. The bfa operates a mediation scheme.

## Arbitrate

Arbitration is more formal than mediation and an alternative to litigation. The parties agree to resolve their disputes through the arbitration, rather than court. While it tends to follow a similar structure to court proceedings, depending on the arbitration rules applicable, it is a private process, confidential and binding. The parties choose and pay for the process and the arbitrators and their expertise. Arbitration is usually less expensive than litigation. The bfa operates an arbitration scheme, which is being updated and will apply to all bfa members in 2018.

## Litigate

Litigation or court proceedings are often the last resort. The parties follow court rules and an independent impartial judge will make a binding judgment. Court fees apply but not for the judge or venue.

## So, where does that leave me?

Here are the top tips:

- Avoid communication breakdown
- Seek an informal solution
- Negotiate
- Check the ADR clause and steps
- Check the governing law and jurisdiction
- Seek a solution using ADR. **BF**

## About the author

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