
THE IMPORTANCE OF FORGING GOOD FRANCHISE RELATIONSHIPS

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FRANK ZAID – EXPERIENCE AND CONTACT

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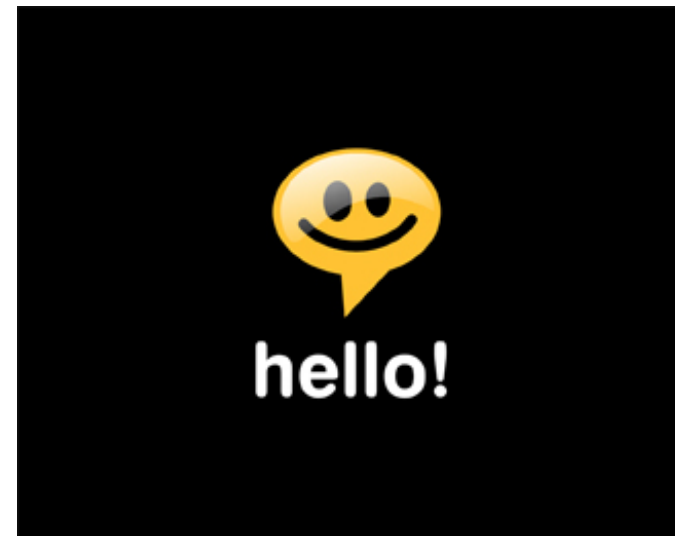


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A. INTRODUCTION

- Thank you for joining this session
- Questions at end of my presentation
- My experience – diverse, practical, efficient solutions
- Best practices for strong franchise relationships
- Why good communications are the gateway to franchising successfully
- Why conflicts arise
- Legislative response to franchise litigation and alternate dispute resolution (ADR)
- How franchise disputes can be avoided or resolved internally or externally without litigation
- Early Dispute Resolution (EDR)
- Franchise ombuds programs, mediation and arbitration
- **FUNDAMENTAL PRINCIPLE #1 - IFA Franchise Relations Committee Handbook -**
 - “Resolving disagreements to the satisfaction of both franchisors and franchisees has become the hallmark of successful franchise systems.”



B. THE IMPORTANCE OF GOOD COMMUNICATIONS

- Successful franchise systems are built on trust and good relationships
- Must expect variations in individual performance and among franchisees
- Lack of trust at times of stress or unrest
- Ongoing open communications help to build trust and avoid disagreements or disputes
- **FUNDAMENTAL PRINCIPLE #2 –**
 - CFA Code of Ethics: “resolve complaints, grievances and disputes through fair and reasonable direct communication...and mediation or other alternative dispute resolution mechanisms”



C. HOW TO COMMUNICATE AND SOLIDIFY RELATIONSHIPS



- Newsletters
- Email blasts
- Intranet (password controlled)
- Franchise advisory boards or councils
- Town hall meetings
- Conferences and conventions
- Independent ombudsman program
- CEO hotline
- Controlled social media
- Field visits
- Performance reviews
- Supplier announcements
- Training sessions
- Operations manual

D. LISTEN TO YOUR FRANCHISEES

- Encourage suggestions and recommendations
- Develop a system for receiving and responding
- Respect all suggestions
- Publicize results
- Timely and respectful responses
- Respond professionally to complaints
- Reward programs
- Incentive trips



E. ITEMS TO COMMUNICATE – KEEP FRANCHISEES INFORMED



- Management changes
- Succession
- New competition
- New franchisees and openings
- Consumer research or preferences
- Technology
- Regulations
- System standards and changes
- Franchisee advisory reports
- Milestones and successes
- Policies
- Graphics standards
- Social media program
- Crisis management program

F. WHY FRANCHISE DISPUTES ARE ON THE RISE

- Franchise legislation in 6 provinces
- Delivery of franchise disclosure document (FDD): non-compliance = misrepresentation and rescission
- FDD disclosure of litigation, mediation, arbitration and ADR procedures
- Duty of fair dealing: damages
- Right of franchisees to associate: damages
- Common law remedies preserved: contractual disputes; duty of good faith and fair dealing; negligence; misrepresentation; fraud
- Franchisee non-waiver of rights
- Political interest and education
- Franchise law: more specialized area of practice
- Class action laws in 9 provinces
- Lawyers' contingency fee arrangements
- Media interest
- Social media = increased publicity, accessibility and resources



G. WHY CONFLICTS ARISE – MY EXPERIENCE

1. Franchisee unprofitability

- Business issues
- Systemic issues
- Find solutions

2. Diversity of franchise relationships and challenges

- Complaints – systemic problem?
- Do franchisees have differing expectations than the franchisor?
- Did the parties discuss the relationship and responsibilities at the outset?
- Do franchisees understand the time and effort to be successful?



G. WHY CONFLICTS ARISE – MY EXPERIENCE

3. Franchise system growth

- Undercapitalized franchisor
- Changes in relationships
- Acquisition of franchisor
- New brand(s)
- New management
- Withdrawal of original founders
- Generational change
- Venture capital investors
- Purchase of new system
- International expansion

4. Market conditions and new competition

- Technology changes
- Redundancy of products or services
- New competitors
- Store refresh
- New signage
- Suppliers
- Failure to give full disclosure

G. WHY CONFLICTS ARISE – MY EXPERIENCE

5. Inconsistent treatment of franchisees

- Rationale
- Financial assistance program
- Unexpected or unpredictable circumstances
- Do not allow extended system non-compliance

6. Failure to disclose

- Advertising and marketing funds, budgets, costs
- Supplier arrangements
- Rebates and allowances
- Corporate stores
- Material information

H. HOW TO RESOLVE DISPUTES INTERNALLY WITHOUT LITIGATION

I. EDR – Early Dispute Resolution

- Low cost
- Quick solutions
- Maintain the relationship
- Minimize disruption
- Lawyers often not required
- Business solutions
- **FUNDAMENTAL PRINCIPLE #3** - 2011 USER GUIDE / PLANNED EARLY DISPUTE RESOLUTION (“PEDR”)
- | AMERICAN BAR ASSOCIATION | DISPUTE RESOLUTION SECTION - Parties generally do best when they and their lawyers jointly determine what is needed to resolve a dispute at the earliest reasonable time and in the most efficient manner. Businesses should tailor their PEDR systems to fit their needs.



H. HOW TO RESOLVE DISPUTES INTERNALLY WITHOUT LITIGATION

2. Contractual agreement to negotiate disputes

Not common but why not?

- May be in franchise agreement, separate document, operations manual, policy
- First level negotiations
- Second level negotiations
- Without prejudice
- Confidential
- If no agreement?



H. HOW TO RESOLVE DISPUTES INTERNALLY WITHOUT LITIGATION

3. Franchisee mentor programs

You are the teacher. Your franchisees are the students. That's why they signed up with you.

- New franchisee/experienced franchisee
- Questions
- How and who
- Operations
- Misunderstandings



I. HOW TO RESOLVE DISPUTES INTERNALLY WITHOUT LITIGATION

4. Peer groups/peer review panels

Useful for inter-franchisee disputes.

- Prefer formal rules and procedures
- Mixture of franchisor/franchisee reps on panel
- Must be supported by senior management
- In franchise agreement or operations manual?
- May be a subcommittee of FAC
- Confidential process
- Precedents
- Publication of decisions?
- Decision making authority vs. recommendations



I. HOW TO RESOLVE DISPUTES INTERNALLY WITHOUT LITIGATION



5. CEO hotline

Leadership comes from the top.

- Direct contact
- Confidentiality
- Personal response
- No repercussions
- System change

I. HOW TO RESOLVE DISPUTES INTERNALLY WITHOUT LITIGATION



6. Franchisee Advisory Council (FAC)

A must, but only when the time is right.

- When
- Constitution, composition
- Meetings
- Not for individual complaints
- Subcommittees
- Reporting
- Regional FACs
- Franchisor and franchisee support

J. HOW TO RESOLVE DISPUTES EXTERNALLY WITHOUT LITIGATION

I. CFA Franchise Ombudsman Program

How do I contact the CFA Ombudsman?

Telephone Toll-Free: 1-866-443-8255

Toronto area: 416-928-1697

This is a secure line with confidential voice mail which can only be accessed by the Ombudsman.

E-mail: ombudsman@cfa.ca

- On CFA website - Every franchisor and their franchisees should be aware of this program
- Funded by CFA
- Accessible
- Independent
- Informal
- Not require both sides
- No lawyers
- Arm's length
- Normal and best practices in industry
- Time limited

J. HOW TO RESOLVE DISPUTES EXTERNALLY WITHOUT LITIGATION

2. Independent Franchise System Ombudsman Program

Used by major franchisors in the US but not common in Canada? Why not? Should be!

Ombudsman From Wikipedia, the free encyclopaedia. The organizational ombudsman works as a designated neutral party, one who is high-ranking in an organization, but who is not part of executive management. Using an alternative dispute resolution (ADR) or appropriate dispute resolution approach, an organisational ombudsman can provide ... shuttle diplomacy... and mediation for conflicts; track problem areas; and make recommendations for changes to policies or procedures in support of orderly systems change.

- Funded by franchisor
- Need commitment and acceptability
- Integrity and value
- Full-time or as-needed
- Objectivity
- No cost
- Efficient and timely
- Clear process
- No repercussions
- Lawyers not required
- Periodic reports
- Gaining popularity
- Credible ombudsman with franchise industry experience and ADR skills
- Ombudsman knowledge about franchise system

J. HOW TO RESOLVE DISPUTES EXTERNALLY WITHOUT LITIGATION

3. Third Party Mediation

An absolute must today in franchise disputes, disagreements, and litigation. Be pro-active and include it in your documents at the outset.

thelawdictionary.org/mediation

- Definition of MEDIATION: Intervention; interposition; the act of a third person who interposes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute.

When does it occur

- Mandated = franchise agreement or operations manual
- Can be voluntarily agreed at any time
- Pre-condition to litigation or arbitration
- ON ADR in AWA cases
- BC, NB and ULCC party initiated mediation
- Some provinces require mediation before trial

J. HOW TO RESOLVE DISPUTES EXTERNALLY WITHOUT LITIGATION

Advantages of mediation

- High success
- Negotiated solutions
- Non-binding process
- Confidential
- Easier to maintain an existing relationship
- Reduced cost
- All parties participate
- Appropriate at any stage
- Independent facilitator trained in mediation procedure
- Ability to craft a solution
- Opponent's case

Third party mediator

- ADR organizations
- Formal or informal
- Facilitative and/or evaluative
- Best mediator with franchise experience and understanding

J. HOW TO RESOLVE DISPUTES EXTERNALLY WITHOUT LITIGATION

Mediation mechanics

- Commitment
- Structured process
- Lawyers
- Confidential
- Mediation briefs
- Client decision makers have authority to settle
- Open process and private caucus
- Analyze the issues, goals, options
- Negotiation/settlement strategy – BATNA
- Minutes of settlement

J. HOW TO RESOLVE DISPUTES EXTERNALLY WITHOUT LITIGATION

4. Arbitration

Highly recommended as an alternative to litigation.

Definition of Arbitration - Chartered Institute of Arbitrators

- Arbitration is a non-judicial process for the settlement of disputes where an independent third party - an arbitrator - makes a decision that is binding. The role of an arbitrator is similar to that of a judge, though the procedures can be less formal and an arbitrator is usually an expert in their own right.

- Domestic arbitration
- International arbitration
- Enforcement of international arbitration awards
- Bias
- Discretion
- Arbitration organizations

J. HOW TO RESOLVE DISPUTES EXTERNALLY WITHOUT LITIGATION

5. Pros of Arbitration

- Private and confidential
- Arbitrator with specific expertise (e.g., franchising)
- Cost effective
- Arbitration agreement customized
- Quicker, efficient process
- Exclude certain matters/issues
- Class action franchise arbitration
- Choice of rules
- Institutional arbitration services
- Determination of bias
- Grounds of appeal
 - Appeal on questions of law only
 - Contract interpretation a question of mixed fact and law
- Remedies enforceable in court

K. PRACTICAL CONSIDERATIONS IN DRAFTING AN ARBITRATION AGREEMENT FOR FRANCHISE DISPUTES

- What is an “arbitration agreement”?
 - Separate document or in franchise agreement
 - Severability
- Scope of arbitration
- Qualification of arbitrator
- Selection of arbitrator
- Number of arbitrators
- Rules
 - Do not adopt Rules of Civil Procedure
 - Evidence
- Joinder of claims
- Discovery
- Confidentiality
- Privacy
- Location
- Applicable law
- Timelines
- Evidence
- Exchange of documents
- Available remedies
 - Interim awards
- Jurisdiction issues
- Limitations on liability and damages
- Final monetary award options
- Costs and expenses
- Written or oral decision
- Rights of appeal



L. KEY TAKEAWAY - ALWAYS REMEMBER THE FUNDAMENTAL PRINCIPLES

#1 - CFA CODE OF ETHICS: “resolve complaints, grievances and disputes through fair and reasonable direct communication...and mediation or other alternative dispute resolution mechanisms”

#2 - IFA FRANCHISE RELATIONS HANDBOOK: “Resolving disagreements to the satisfaction of both franchisors and franchisees has become the hallmark of successful franchise systems.”

#3 - AMERICAN BAR ASSOCIATION | DISPUTE RESOLUTION SECTION – “Parties generally do best when they and their lawyers jointly determine what is needed to resolve a dispute at the earliest reasonable time and in the most efficient manner. Businesses should tailor their PEDR systems to fit their needs.”

APPENDIX - SAMPLE MEDIATION AND ARBITRATION AGREEMENT

Mediation and Arbitration

[SAMPLE ADR CLAUSE FROM ADR CHAMBERS WEBSITE www.adrchambers.com]

If any dispute or controversy occurs between the parties relating to the application, interpretation, implementation, breach or validity of this Agreement, the parties agree to seek to resolve the dispute or controversy through mediation with ADR Chambers before pursuing any other proceedings. Nothing herein shall preclude any party from seeking injunctive relief in the event that the party perceives that without such injunctive relief, serious harm may be done to the party. Any party to the dispute may serve notice pursuant to this Agreement on the others of that party's intention to resolve a particular dispute by mediation. The mediator shall be appointed by agreement between the parties or, if the parties cannot agree within seven (7) days after receipt of the notice of intention to mediate, the mediator will be appointed by ADR Chambers. The mediation will be held at Toronto, Ontario. The parties agree to attempt to resolve their dispute at mediation. The costs of the mediation shall be shared equally by the parties. If the dispute has not been resolved within thirty (30) days of the notice of intention to mediate, any party may terminate the mediation and proceed to arbitration as set out below.

Subject to the mediation provisions set out above, if any dispute or controversy occurs between the parties relating to the application, interpretation, implementation, breach or validity of any of the provisions of this Agreement, the dispute will be resolved by arbitration at ADR Chambers pursuant to the general ADR Chambers Rules for Arbitration. Any party may serve notice pursuant to this Agreement of its intention to refer a dispute to arbitration. The arbitration shall be conducted by a single arbitrator. The arbitration shall be held in Toronto, Ontario. The arbitration shall proceed in accordance with the provisions of the Arbitration Act (Ontario). The decision arrived at by the arbitrator shall be final and binding and no appeal²⁷ shall lie therefrom. Judgement upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The costs of the arbitration shall be divided equally between the parties or as the arbitrator may otherwise direct.

THANK YOU FOR ATTENDING AND PARTICIPATING

