

## Making use of NADAP

Once a dealer signs a NADAP agreement, all disputes between that dealer and their automaker must be settled by arbitration, not in the courts. But commercial litigation lawyer Irvin Schein warns that arbitration should be the last resort.

“What the dealer is trying to do is protect their interest and avoiding poisoning the relationship,” Schein says. “There’s a delicate balance. It doesn’t mean that the dealer should roll over and ignore what’s going on to maintain good will. Be careful, cautious and subtle.”

In fact, while the dealer should seek legal advice when storm clouds gather on the horizon, that doesn’t mean the dealer should warn the automaker that they are consulting counsel.

“By all means, get legal advice at the earliest opportunity. But it’s not always wise to tell the manufacturer that you have counsel and that there is a dispute,” he says. “There are those (OEMs) who consider retaining a lawyer an aggressive act.”

And even when it’s necessary to advise the OEM that the dealer is represented by a lawyer, a diplomatically worded letter from the lawyer may still leave open the road to a settlement.

But when diplomacy fails, there is NADAP.

Schein says territorial disputes are a common cause for resorting to arbitration.

NADAP Rule 6 lets a dealer challenge an OEM’s decision to put another dealer within the eight kilometre boundary. The arbitrator must then balance the possible loss to the existing dealer against the interests of the OEM, the collective interests of the OEM and all its dealers and the interests of customers, Schein explains.

Placing a dealer within the boundary could be disallowed as an act of bad faith, but it could also be disallowed as a product of the balancing of the above interests. On the other hand, it could be permitted as a product of that balancing.

In short, there is no hard and fast answer, he says.

If the new dealer is beyond the boundary, the dealer can still challenge on the basis that the OEM is acting in bad faith.

“The difficulty is that it is much harder to prove bad faith ...” he says.

NADAP Rule 6 obliges the OEM to tell a dealer if it is planning to put a new store in the dealer’s territory, he says.

But what if the store is outside the eight kilometre limit, but close enough to the dealer’s territory that it might encroach?

“There is a NADAP decision that says that notice should be given, but it is not bad faith to refrain from doing so until ‘near the end of the decision-making process’ although the tribunal called that conduct an “astounding lack of business judgment and common sense.”

What can the dealer do if they only find out when the competitor’s store is being built? The decision can still be challenged.

“This should not make a difference in the NADAP decision although obviously it would make a big difference in any subsequent lawsuit between the OEM and the new dealer.”

Another area where disputes arise is the incentive program. Automakers will often argue that sales to a company owned by the dealer or to a dealership employee are not at arms length and don’t count as sales attracting incentives.

“Incentives programs are there to encourage dealers to dispose of aging inventory. The manufacturer wants them out the door not sold to the service manager’s son or the dealer’s other dealership. But unless it’s specifically prohibited under the agreement, it may not be technically incorrect,” he says.

Don’t look to the franchise agreement, he says. Most won’t catch this, he says. And so it’s off to NADAP.

The issue can be arbitrated within 90 days versus two years at the very least in a court.

Still before the issue goes to trial, there will be one last chance to mediate. Mediation is mandatory at NADAP. Dealers needn’t worry: the details of the effort are privileged.

Should mediation fail, both parties set about choosing an arbitrator – a retired judge or senior lawyer.

Arbitration yields a decision that is unique. Precedent does not apply, he says. That means an arbitrator’s decision in one case doesn’t, in theory, apply to another even if the facts are identical.

But he says that since arbitration is expensive, the OEM will not want to argue the issue again with another dealer. So the case has precedent value.

But how do dealers learn about NADAP decisions that might affect them? Arbitration hearings may be behind closed doors and closed to the public, but not to the industry.

“The decision and whatever documents are referred to in the decision are available to all dealers and manufacturers,” he says.

What about the dealer/OEM relationship after NADAP?

“This can be repaired. The doors at the head offices revolve and there is staff turnover. Often the dispute is the result of a personal relationship gone wrong and if there is a change in personnel, and where the dealer is successful in terms of sales, things get overlooked and the damage gets repaired.”

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