Learning resource: Sample client advice letter

Julian E. Thomas
julian.elliott.thomas@gmail.com

Follow this and additional works at: http://www.civiljustice.info/collab

Part of the Other Law Commons

Recommended Citation

http://www.civiljustice.info/collab/3

This Article is brought to you for free and open access by Civil Justice Research Online. It has been accepted for inclusion in Collaborative law by an authorized administrator of Civil Justice Research Online. For more information, please contact alan.shanks@monash.edu.
Dear Nick,

Thank you for attending my offices on Wednesday to discuss your dispute with Smart Jet. As I indicated in that meeting, I am writing to recap our discussion, confirm my understanding of the circumstances and to outline for you the options available. We talked about doing this in the context of an ‘interests-based’ approach to negotiation, using the Harvard model as a starting point. It’s important to remember that undertaking this preparation does not preclude you from going down any particular path, but it will assist you to make informed choices about which option is likely to go furthest toward satisfying your interests.

The model suggests doing some thinking in a number of key elements - you will recognise some of these as areas we focussed on during our conversation. In brief, it means:

1. Understanding your interests and those of Smart Jet
2. Considering alternatives to negotiating an outcome, and how well they will address your interests
3. Creatively exploring options that might enable Happy Systems and Smart Jet’s interests to be met
4. Identifying external standards that can be used to test and benchmark options you generate
5. Considering any issues around communication between Happy Systems and Smart Jet and how they might impact on negotiations
6. Explore any relationship issues between Happy Systems and Smart Jet that will impede or enable successful negotiation.
7. Finally, articulating what level and form of commitments you expect to achieve through negotiation.

Our first conversation focused on understanding your interests and some of the alternatives available to you. Before I explain the range of dispute resolution alternatives open to Happy Systems, I will recap what we discussed to be your main interests and the state of the relationship between the two companies. This is important, as my advice will be based on the dispute resolution option most likely to maximise your interests and which is most likely to achieve a solution given the state of your relationship.

At this stage, I will not address options (as these will be developed through the dispute resolution process selected) and I will not explore communication issues or commitments as they will be specific to the process you elect to pursue.
Happy Systems’ interests
Our conversation identified for me several key interests from Happy System’s perspective. Maintaining the business relationship with Smart Jet facilitates a key interest, providing the vehicle for Happy Systems to grow the market for its products. Specifically, the contract is enabling Happy Systems diversifying its product range, developing and proving your software’s capability in a new area that may open up further markets in the future.

*Maintaining Happy Systems’ industry reputation* is also important to you. The company has received local and national awards and has a reputation for dynamism. Termination of contract or a difficult and protracted dispute would cause damage to the company’s reputation that you are keen to avoid.

Similarly, you do not wish to see your market share eroded or diminished. This could occur indirectly as a result of reputational damage or potentially directly through Smart Jet executing a new agreement with another vendor.

From an operational perspective, *sustaining Happy Systems’ profitability* is also a fundamental interest. More particularly, positioning the company to deliver a dividend this financial year is also a priority for you. You have also indicated a preference for an outcome that may enable you to avoid laying off staff.

*Protection of your intellectual property* and industry secrets are also important to you, as Happy Systems has invested considerable expertise in developing what you have indicated are ‘cutting edge’ software solutions developed for Smart Jet.

Finally, you have also mentioned that you consider Smart Jet to have contributed to their own losses and to some of the problems with implementation, and it is important to you that there is an acknowledgement of shared responsibility for the issues.

These are some of the interests that you and I identified last week. Let me know if you think there is anything missing here, or if I haven’t quite captured your perspective.

You also provided me with some information about Smart Jet that suggests likely interests on their part, although it is probable that there are others we have not yet identified. I will briefly turn to these now.

Smart Jet’s Interests
There are two clear interests on Smart Jet’s part that are likely to be particularly significant. Understandably, they are likely to want to mitigate the overall commercial and financial impact of the issues with their booking system. This interest extends to the losses incurred to date as well as their anticipated future impacts - and to costs associated with resolving the present
dispute. Their advice that they expect compensation for losses incurred is consistent with this underlying financial interest.

Secondly, Smart Jet, which I understand is a publicly listed company, is also likely to have a key strategic interest in maintaining industry confidence in the company and market confidence in its share price. The booking system is a critical interface with Smart Jet’s key industry partners and is likely to contribute significantly to that relationship on an everyday level. A protracted dispute with Happy Systems may be contrary to these interests.

Relationships
On Wednesday we also discussed the significance of Happy Systems’ present contract with Smart Jet is both in terms of its financial value and because it represents a new market space for Happy Systems. Consequently, the commercial relationship between the two entities is one that you have indicated you wish to sustain and develop in the longer term. Ideally, a cordial and respectful outcome to the dispute would allow that relationship to continue.

You also mentioned that you have previously had quite a good, almost friendly relationship in with Smart Jet’s Vice President of Legal Affairs, although there are some tensions evident now. You negotiated the initial contract directly with him - there is an important history there which suggests that the two of you have managed to reach agreement in the past.

However, you have also indicated that you don’t really know where Smart Jet (or the Vice President of Legal Affairs) stand on this, particularly given their letter to you indicating that they were considering unilateral termination of the contract.

Given what I understand to be your interests and the state of your relationships, in the sections following I will set out each of the alternative options available to you to resolve the dispute, focusing on how likely your interests (and potentially those of Smart Jet) are to be met.

Alternatives

Direct negotiation
Negotiation directly between the parties is of course an option and I understand that this is what initially occurred (unsuccessfully) before the lawyers became involved. Direct negotiation the best of circumstances has the potential to be relatively low cost and may be reasonably efficient in terms of timeframe. It can be a good option for simple disputes where relationships are intact, or where both parties are experienced or sophisticated negotiators.

However, without an objective party having a hand in managing the process, there is a very real possibility that the parties will become bogged down in specific aspects of the dispute, relational issues or communication failures. This can cause timeframes to extend or prevent resolution altogether. In many cases, parties may require legal and other advice in the background which has the potential to add significant cost.
Given the financial value of the dispute, its complexity and the significant relational interests that Happy Systems and Smart Jet have, it is my view that a return to unaided negotiation is not likely to be fruitful.

**Litigation**

The litigation process is one option open to you, but I would suggest that going to court should be the choice of last resort. As you are no doubt aware, litigation can be expensive and time consuming. Costs for solicitors and barristers vary between $200 and $600 per hour, with disbursements and court costs in addition. Estimates of costs are difficult to make, but to give you an idea, a few years ago the average total cost (inclusive of lawyers’ fees, court fees and disbursements) to civil applicants in the Federal Court was estimated at $111,000.¹ A lower cost alternative which may be open to you is the Victorian Civil and Administrative Tribunal (VCAT). VCAT is less formal than a court, costs are lower and generally matters are resolved more quickly.

While the court or tribunal will generally deliver you certainty in terms of a final result (subject to appeal of course), their determination will be made on the basis of legal principles in a ‘rights-based’ framework. This means that while your specific interests may guide how your lawyer runs the case, they are not really relevant to the decision. The determination is on the basis of your legal rights only and as a result litigation outcomes may not represent the best solution in terms of your broader interests. Another important factor to consider is that adversarial litigation takes ultimate control over the outcome out of your hands.

I would also observe that you have indicated that the contractual arrangements as they stand are probably slanted in Smart Jet’s favour, that Happy Systems has not entirely fulfilled its obligations and that Smart Jet has suffered losses as a result. I note that you believe the estimated losses are exaggerated and that Smart Jet has contributed to those losses. I would anticipate that these issues will be the focus of a legalistic process.

Reflecting on the interests we discussed, going to court is unlikely to provide a process or an outcome that will be entirely satisfactory. In terms of process, the open nature of court proceedings means that the allegations made by both parties in the adversarial context will be made in what is an essentially public setting. Given the importance you have placed on maintaining reputation (and I understand this is also an interest for Smart Jet), the airing of Happy Systems’ and Smart Jet’s grievances about each other’s contractual performance is unlikely to be a desirable outcome.

Similarly, both Happy Systems and Smart Jet are likely to prefer a speedier resolution than will be realistically available through a court process. By way of example, the Commercial Court of the Victorian Supreme Court is presently indicating on its website that it can take up to nine

---

months after the issuing of proceedings before a trial date is set; to this timeframe you can add preliminaries, the trial itself and issuing of judgement and then any subsequent appeals.

You have indicated that if product development ceases while litigation is on foot, this will increase the risk that what is now a ‘cutting edge’ product will lose its competitive advantage if you cannot get it completed and out to market before your competitors continue to improve their own products. From Smart Jet’s perspective, protracted litigation may leave them with a problematic booking system for an extended period of time.

There is also the matter of costs; in a best case scenario, even were you to win the case with costs awarded to you, it is likely that you would be significantly out of pocket (court-awarded costs rarely cover the actual full cost of conducting litigation). Other scenarios, including a win with costs born by the parties, or a loss will leave you with a significant legal bill in addition to any damages awarded against you.

In many cases the court will order parties to participate in alternative dispute resolution before allowing a matter to proceed to trial; consequently it is not unlikely that if you were to proceed down the litigation path, you would be essentially ordered back to attempt mediation or some other form of alternative dispute resolution. You may need to produce a document certifying that you have undertaken reasonable and genuine steps attempting to resolve the matter out of court.

Finally, but importantly, it is rare for court disputes to lead to improvement in relationships between the parties. Considerably more likely is the prospect of a significant deterioration, making it more difficult to work together in future.

For all of the reasons I have set out above, I would not recommend that you proceed immediately down the litigation pathway, at least until we have ascertained a little more about Smart Jet’s perspective on the dispute and their receptiveness to alternatives.

For more information about the process of going to court or to VCAT, you might consider taking a look at the Victorian Law Handbook, an excellent resource produced by the Fitzroy Legal Service. The relevant section on consumer law (which includes business-to-business transactions in its scope) is at:

http://www.lawhandbook.org.au/handbook/ch12s04s03.php

**Arbitration**

Arbitration is essentially a ‘private’ determinative process where both parties agree to be bound by the decision of a mutually agreed arbitrator. Usually, the arbitrator would be a person with particular knowledge or expertise in the subject matter of dispute - many specialise in particular fields.
Arbitration differs from a court process in that it generally less formal and the parties together with the arbitrator can generally set the parameters (variations to the rules of evidence etc) with greater flexibility than in court or tribunal process. This includes agreements to maintain the confidentiality of the process.

However, while arbitration is generally faster and cheaper than court process, the determinative process shares the key characteristics. This means it will generally remain one that is ‘rights-focused’ and takes the decision making aspect out of the hands of the parties. This means that similarly to a court process, arbitration may deliver a result which is ultimately unsatisfactory to one or both parties.

For reasons similar to those given in my earlier advice against litigating at this stage, I would suggest that your dispute has not yet reached the point where arbitration is required. It may be preferable for Happy Systems and Smart Jet to retain control over a negotiated ultimate outcome.

**Lawyer negotiation**

Having the negotiation conducted by lawyers acting for each of the parties can act as a buffer to remove some of the emotional and interpersonal content from negotiations. This approach may also reduce some of the costs associated with going to court, but can still be relatively expensive - as noted earlier, lawyer costs vary between $200 and $600 per hour. As they are not dependent on court dates, lawyer negotiations can proceed considerably more quickly and more flexibly than litigation.

Legal representatives involved in lawyer negotiation will often (although not necessarily always) adopt an adversarial, positional bargaining approach to negotiating a settlement. The emphasis on positional bargaining in many lawyer negotiations can also lead to a series of “zero-sum” compromises on specific issues, rather than providing an opportunity to explore and assess creative options that might be able to satisfy both parties’ interests.

Additionally, while the lawyers themselves will generally be professional in the way these negotiations take place, the adversarial context means there is a risk that the process is ultimately detrimental to the ongoing relationship between the Happy Systems and Smart Jet.

I should point out that positional bargaining is not the inevitable outcome of engaging lawyers. A significant number of lawyers are practitioners of the interest-based approach, and careful selection of your representative can see the benefits of this process realised in your negotiations. While it is clearly beneficial to have both lawyers operating in the same framework, a skilled practitioner of interest-based negotiation can work effectively with opposing parties who begin from different perspectives.

One benefit of lawyer negotiation is that the decision to accept a negotiated settlement remains with the parties, so you have more control over the outcome than you do in litigation. On the flip side, the absence of a third party adjudicator also means that you may expend a lot of energy
and resources only to end up in a ‘stalemate’ situation - although you are likely to have at least narrowed the range of issues in dispute.

Lawyer negotiation may be a realistic option for you to resolve your dispute, if Happy Systems and Smart Jet are not too far apart and the fundamental issues and interests are reasonably clear, notwithstanding their complexity. If you did elect to pursue this option, I would advise you to consider engaging a lawyer who is a skilled practitioner of ‘interest-based’ negotiation, as this approach may be more likely to develop more creative and sophisticated solutions to meet your underlying interests.

Ultimately, however, my advice would be to pursue mediation in preference to direct negotiation, in the first instance. This is because from what you have advised, negotiations between Happy Systems and Smart Jet have been unsuccessful to date, and a third party assisted process is likely to be beneficial in breaking the present deadlock and moving things toward a resolution.

Mediation

A mediation involves an independent and impartial mediator who works with both of the parties in a dispute to keep the process on track, clarify issues and assists them to achieve mutually acceptable agreements. Mediators do not make decisions or determination, so the onus remains on the parties to achieve a resolution. Mediators may assist the parties to formulate their agreement in writing at the end of the process.

Protracted mediation can be expensive, but is usually considerably less so than a court process. In general, you can expect to pay for the mediator’s time as well as for any additional advice or preparatory assistance that is necessary for you before and during mediation. Mediators are often (but not always) legally trained, and their fees for commercial disputes are generally similar to those of lawyers. In many mediations, particularly those involving commercial disputes, the parties will have a participatory role with legal representatives also closely engaged as your advisor and advocate in the process.

As a private and voluntary process, mediation also protects the confidentiality of the participants and the content of their discussions. There are usually ground rules agreed to as part of the process that are moderated by the mediator, and these assist to keep things moving along and help to manage interpersonal or communication issues that can arise during disputes. Because the outcome remains in the hands of the parties, and because the process is safeguarded by the mediator, there is a good chance that mediation can open up effective communication and have a positive effect on the relationship between the parties, even if it does not ultimately achieve resolution.

Where direct negotiation has failed, mediation is often a very good next step. It is often required in any case before a court will agree to hear your dispute, and has a relatively high success rate.
The Institute of Arbitrators & Mediators Australia (IAMA) provides a useful summary of mediation and other alternatives to court on their website:


Collaborative practice
Finally, while I recommend that you attempt mediation at this stage, there is another approach I would suggest you also consider which has been used widely to resolve family disputes, but is increasingly finding application in other settings. Collaborative practice is a facilitative approach to resolving disputes that is grounded in principles of openness and transparency. A key difference between this process and others is that the collaborative approach is expressly non-adversarial, to the point where lawyers working in a collaborative way will withdraw from representation if the matter eventually reaches court. Information, including legal advice, is shared by the parties in an open and transparent manner consistent with the underpinning conception of the dispute as a jointly owned problem to be jointly solved.

The collaborative approach requires that lawyers on both sides are specifically trained in collaborative law. It also seeks to bring in appropriate expertise to facilitate the process - financial expertise for example. However, this expert advice is shared advice; the expert does not act for one or the other of the parties as might occur in a more adversarial context.

Collaborative practice takes the form of a series of meetings, usually no longer than 2 - 2.5 hours in which the parties, their lawyers and experts are present. Agendas are agreed in advance and all of the discussion, information sharing and negotiation occurs in these meetings. A point of difference in collaborative practice is that all of the substantive work is done collectively; there are no ‘outside’ negotiations between lawyers for example, meaning that the clients enjoy complete transparency over what is occurring and a degree of control that is sometimes not present in other dispute resolution settings.

Considering a collaborative approach would provide greater control over timelines and costs than litigation, and the openness of the process means it is facilitative of workable future relationships between the parties to a greater extent than some other processes that remain inherently adversarial. It would appear that sustaining a workable relationship between Happy Systems and Smart Jet is in both organisation’s interests; given your specific interest in the Smart Jet contract providing opportunity to grow your product. You would, for example, have flexibility to identify an external subject matter expert IT systems implementation to support your discussions about the degree of contribution to the present difficulties - but would still have to reach a mutual agreement without having an expert arbitrator making a determination that might leave one party feeling hard done by.

Finally, being a private process, your discussions will remain confidential - also important to Happy Systems and Smart Jet, both of whom have industry reputations to protect.
I suggest collaborative practice to you as an alternative to my first recommendation, which is mediation. My reasoning for preferring mediation is that the use of collaborative practice in commercial disputes in Australia is still in its infancy. While I have outlined significant benefits to collaborative practice, there are some risks attached to embarking on what is still a relatively novel process in this setting. These risks may include the degree to which the practitioners of collaborative law (lawyers and experts) have experience in applying its techniques to the commercial setting. Having said that - if the approach sounds like one which would work within your relationship with Smart Jet, a collaborative approach is worthy of serious consideration.

Summary

In this correspondence, I have briefly recapped our discussion on interest-based negotiation, and have endeavoured to set out what I understand to be your interests and those of Smart Jet (so far as they are known). I have summarised some of the advantages and disadvantages of the key dispute resolution processes open to you. While it is my recommendation that you first attempt mediation, I draw your attention to the relational benefits of a collaborative approach and suggest that you also give this due consideration.

I look forward to hearing from you about how you would like to proceed. If you have any questions about this letter, you are welcome to contact my office to make an appointment to discuss things further.

Sincerely,

Collaborative Lawyer XYZ