

as news

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Dear Friends...

One event overshadowed everything for me in 2017: the publication of the second edition of my book, "Consumer Financial Services Complaints and Compensation" in late July with the title that its 2005 predecessor should have had. It is the last big book I am ever going to write alone, at least during my conventional working life. In spite of having to remove 30% of the word-count in the early part of last year, at the publisher's insistence, which ate up much of January and February, it still came out at 905 pages. Proof-reading took a chunk of June and July. Writing this book was a much tougher assignment than I expected at the outset and the relief of unloading it is indescribable.

Anyway, once I had sent in the final manuscript in March, my thoughts turned to two things that I had largely put on hold: work and travel. To some degree, the two came together. In May, I did my first training courses in Cyprus for the European Institute of Management and Finance (EIMF). This was followed by two similar trips there in November.

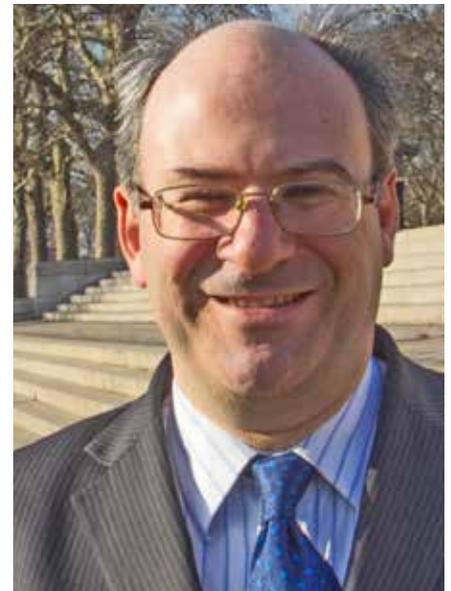
For the first of my November excursions, Marios and Giorgos of the EIMF also arranged for me to speak at the Limassol Chartered Institute of Securities and Investments (CISI) meeting. At the gathering, the number of North London accents, and more generally the warm welcome, made me feel totally at home. I have been a member of the Institute for quite a number of years and have

spoken at their events in Hong Kong and now Cyprus but never in the UK.

As a first time visitor, my impressions of Cyprus (which you might think naive, but here they are anyway) was of somewhere far less Greek and more both Middle-Eastern and English than I was expecting. The weather and plant life was majestic. At the same time, It was hard to miss the UK letter boxes painted over in yellow and I met plenty of people who once lived or worked near where I grew up in North London. More generally, the population is so diverse that I can end up speaking all four of my languages in an hour, for me a bit like being in the London Underground.

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After my Cypriot debut in May, my next three trips had more personal elements to them. In the same month, I headed to Israel for the first time in eight years. A cousin of my grandfather, Horace Samuel, wrote his memoirs, "Unholy Memories of the Holy Land", about his time there as a judge and barrister between 1918 and 1928. I used to be a great Jerusalem fan, relishing the opportunity to find mysterious



things that the guide books had yet to ruin. In my youth, Tel Aviv was a sticky, messy town where I never knew which bus to take. Things have turned around for me. In the last decade, I have acquired some pretty "unholy memories" of the "holy city" and increasingly relish the cleaned-up, Bauhaus-inspired Tel Aviv where people of all beliefs and none mingle almost randomly. This is the real Zionist dream I learned about while studying Hebrew as a teenager. With the help of a guidebook, though, I did find one of those Jerusalem Old City classics, the Church of St Anne, where people are encouraged to sing or just hum songs of any religion and allow the sensational echo to do the rest. "Amazing Grace" never resonated more astonishingly.

As part of my Israeli (or lawyers might say Syrian) excursion, I visited Yonathan, a moshav (the capitalist version of a Kibbutz) where I spent six months after finishing school, in the Golan Heights (the area

DEAR FRIENDS CONTD.



of Syria occupied by Israel since 1967). Staying with Ruti and Ephraim Gofbarg was enormous fun. I go back with Ephraim to 1979 and Ruti to 1983. The devastating natural beauty there and renewal of friendships that stretch back half a lifetime combined to overcome my disappointment at finding Golan Heights whisky, distilled in nearby Katzrin, not really quite good enough.

My next trip was to Basel in Switzerland. For many years, I have owned a German family tree that mentions the siblings of the first "Mr Samuel" who came to England from Poland in the mid-19th century. Messing around on a genealogy website led me to google one of my grandfather's second cousins. The Basel Kunstmuseum catalogue for its 2017 exhibition of his work summed him up:

"Otto Freundlich (1878–1943) knew everyone and everything. Hardly another artist of the first half of the 20th century had engaged with such passion and intelligence with all the

different movements of art...There was no lack of mutual influence. And yet in his paintings and sculptures, his mosaics and stained glass, Freundlich followed a path entirely of his own making."

Otto seemed in some way to be a man after my own heart, a typical Samuel. So, off I went to see the exhibition. Freundlich painted people mainly as swathes of colour, thinking that they belonged to movements or waves of humanity. Born Jewish, he had been brought up a Christian and ultimately became a Communist. He may even have coined the term "people of colour"; he entitled one of his paintings, "Peuples de couleur". However, the way Otto saw himself was notoriously different to the way that the Nazis saw him – as Jewish and a purveyor of "decadent art". They murdered him and his brother, Waldemar and sister, Helene. This all has unpleasant echoes in the xenophobia and nationalism now making its way across Europe. Otto refused efforts to help him emigrate to the US because it would have involved leaving his wife behind in France. In a pre-Brexit EU world, somebody would just have bought them a ticket for the ferry to Dover.

I liked Basel a great deal with its eccentric architecture, its Jean Tinguely museum and outdoor display in the town centre of strange machines spraying water around. From there, I took the train under the Alps and ended up in Sion, in Southern Switzerland, where a summer trip to write in the public library has become something of an annual event. There, I was able to put together some new chapters for the Butterworths Financial Regulatory Service while being entertained by Myriam Valette and her family in the evenings.

Finally, in September and October, I went on an Australian trip, stopping off to discover Singapore and see old friends in Hong Kong. The Sydney branch of my father's family laid on the customary welcome mat. Hong Kong gave me an opportunity to catch up with a range of old friends: people at the local CISI branch, a regulator without whom I would never have worked in the Asia-Pacific region, and friends connected to the Hong Kong International Arbitration Centre.

All this travelling might suggest a limited amount of time available for work or excursions within Britain. Running financial services training courses has taken me from Stirling to Cardiff and a number of points in between. Alan and Heather Patterson ensured that my one visit north of the border had an exuberant alcoholic flavour. I first met (and worked with) Alan in 1996.

Closer to home, the University of Westminster continues to make up for the "modest" pay for external teachers by giving me a half-share of an office. My boss there, Richard Earle, now also has to tolerate me as a peripatetic room-sharer. This helps me to continue haunting Fitzrovia, where I lived for eight years. The Scandinavian Kitchen nearby (the "Scandi" or just "my office") hosts regular meetings between me and a cast of characters, many work-related. Kaffeine, like the Scandi, in Great Titchfield Street, and down in Eastcastle Street has pumped large quantities of its title product and cake into me and various of the great and the good of the financial services industry over the years. HT Harris still supplies the cheapest and best espresso and macchiatos for miles.

In the past year, I have had a number of important meetings in the architecturally stunning head office building of the University of Westminster in Regent Street. Its Deep and Shallow End spaces recall the original presence of a swimming pool. It somehow makes sense to do financial services compliance at the bottom of the Deep End. Below there is the gym where Michael Burgess' fabulous Pilates classes for people of varying degrees of physical incompetence keeps body and soul broadly aligned. Jonathan and Josephine,

the legendary security staff in the Regent Street building, and their colleagues nursed me through the process of writing the book with boundless encouragement, good humour and a few memory sticks that I managed to lose around the place.

Closer to home, I still see a gaggle of old Insurance Ombudsman Bureau friends with whom I worked in the early 1990s. Malachy McClelland and I regularly share work problems and copious teas and coffees. This year, Elisabeth Bingham and I have widened our range of lunch venues in the Vauxhall area. One of her daughters, or “cherubs” as she likes to call them, helped me with the first 100 pages of the book’s proof-reading.

The Golden Hind, now owned by the son of an old friend, Mr Christou, may look a little different but it still serves the best fish n’ chips in London. Luce e Limoni, on the Grays Inn Road, probably supplies as good an Italian meal as any. Hart & Lova in Belsize Road is my preferred croissant

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supplier if you like your bakery Czech. For a more authentic flavour, aux Pain de Papy, opposite the Throat Ear and Nose Hospital (also in Grays Inn Road) almost makes up for having to attend the hospital.

The inspiration for most of my writing, Chris Hamblin, still occasionally comes over to my place in West Hampstead to “re-constitute” the compliance factory. Working in different rooms, we goad each other into finishing our writing assignments.

This sense of light-heartedness conceals some real worries about the future. Last year’s newsletter says most of what I want to say here about Brexit. It is already having

a negative impact on financial services compliance enforcement work and firms’ spending in that area. More importantly, it is making respectable levels of xenophobia and racism that I once thought were disappearing from Britain. Major financial institutions and regulators in parts of the country with high levels of ethnic diversity whose senior management’s visual appearance would have qualified them to play sport for South Africa during the 1960s are still very much a feature of UK life. (I encountered both in 2017!) It is also no comfort to watch countries like Austria, Switzerland and Germany producing serious votes for neo-Fascist candidates with the first two having Government ministers from far-right parties.

As ever, the rest of this newsletter is divided into sections, broadly representing what I do workwise. The divisions are roughly the same as appeared in my first newsletter in 1999. Do, though, feel free to dip into parts that you normally leave for another day.

ISSUES, ISSUES, ISSUES

The last twelve months have been a very odd time for financial services compliance. The big event, the introduction of the Markets in Financial Instruments Directive (MiFID) 2, on 3rd January 2018, resulted in a major re-writing of rulebooks that govern the conduct (buying, selling and other things) of investment business rulebooks in much of Europe. This is expected to be reinforced in October when the Insurance Distribution Directive (IDD) has a similar effect on insurance. Some of the problems with the two directives relate to their implementing regulations, in whose drafting the UK played little or no part because of its Brexit referendum result. The difficulties already experienced in integrating these regulations into the already congested UK rulebook may well result from this.

Curiously, both European directives draw heavily from the UK rulebook, notably by introducing provisions to govern the process of manufacturing financial services products. These almost certainly stem from the British Responsibilities of Product Providers and Distributors (RPPD) Guide of 2008 and the vast literature on this subject here that goes back to 2001. The MiFID product governance rules are already in the new Product Intervention and Product Governance Sourcebook (PROD for short!) and effectively replace RPPD for non-insurance investment business. In October or whenever the Insurance Distribution Directive finally comes into force, the Financial Conduct Authority (FCA) will add to PROD the IDD material on insurance product governance. After that, the RPPD guide will only apply to consumer credit, mortgages, bank deposits and anything else that the FCA supervises.

The idea of regulating the way we do business but not the underlying products (an idea that, in the UK, stems from the

design of the 1986 Financial Services Act) has always seemed absurd. The correction of this error may prove to have been the UK's last contribution to Europe before Brexit.

The FCA's performance as regards the rest of MiFID 2 and the IDD is curious. Its drafting of provisions to incorporate the various directives into the UK rulebooks is an outstanding achievement. Other European countries have just thrown the directives and regulations at their firms in the hope that businesses will just work out what to do next. Some would do well to consult the UK rulebook for an excellent synthesis of the various provisions. When suddenly asked to add some material on best execution to a course I ran in November in Cyprus, I knew that it would be easier to master the subject if I looked at the UK COBS 11.2A rules rather than the various EU materials that they incorporated.

The EU approach of using a major directive and its off-shoots has been around for many years. It does not, though, make it a good idea. The use of a single document

would make everything a great deal easier to follow and reduce the risks of good big ideas being followed by detail that does not work.

By contrast, the FCA's decision not to integrate the MiFID 2 rules with the rest of the conduct-of-business sourcebook (COBS) has been less impressive. In 2007, when the original version of the directive came into force, the Financial Services Authority did the opposite and as a result produced a much-improved and considerably shorter sourcebook. Now, with MiFID 2, large chunks of COBS have essentially been recited twice over, once for MiFID and again for non-MiFID business with sometimes barely discernible differences in the text. It would have been better if the regulator had used its 2007 approach, indicating the places where it wanted the rules to differ for non-MiFID business.

On complaint handling, the FCA chose to create a completely new set of provisions for MiFID cases handled by MiFID firms. These are now found in DISP ("Disputes" or just the "complaint rules") 1.1A. The regulator published its final version of these rules the week before my book came out, necessitating an urgent supplement on the subject that you can find on my website. Most of the new provisions are identical in effect to the non-MiFID provisions. They just have different wording and numbering. On top of this, the second version of the Payment Service Directive (PSD 2) generated some slightly alternative provisions, also published as the book was being printed. My website thus had two supplements on it almost before the book came out. It is astonishing to think that I only embarked on the second edition when the FCA assured the public that no fundamental changes to the complaint

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rules were planned. The regulator has not been helped by some clumsy drafting in both the Alternative Dispute Resolution Directive which came into force in July 2015 and the subordinate MiFID legislation on complaints. As with COBS, though, the regulator would have been far wiser to create an integrated complaints rulebook, indicating where necessary any lower or different standards that it wanted to apply to cases unaffected by the European directives concerned.

In early 2018, in CP 18/3, the FCA finally responded to a 2013 Parliamentary Commission for Banking Standards recommendation to extend the definition of "eligible complainant" to cover small businesses. The cost of litigation and absence of technical understanding in the courts makes this change obviously sensible. The idea stems from the regulator's experience with its programme for resolving disputes between businesses and those banks that sold them various derivatives while lending to them or re-financing their existing loans in the late 2000s. Many of the complainants were too big to be classified as "micro-enterprises", the only type of business customer able to bring cases on their own account to the Financial Ombudsman Service (FOS). A small hotel or farm typically employs more than ten people, something which prevents an enterprise from being "micro" for these purposes. The FCA's solution was to force firms to review cases and have the results vetted by the big four accounting firms, which either did business with the lenders concerned or, more importantly, wanted to do so.

In the last year, the regulator has turned away from this approach in favour of ordering firms such as RBS and HBOS to do reviews and then allowing the customer an "appeal" against the outcome to a retired High Court judge. Such a system depends enormously on the quality of

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the individual judges and their ability to master seriously complex transactions.

On top of that, some of these disputes do not relate to activities regulated by anyone - commercial lending is a good example. So, there are no regulatory provisions that banks, regulators or dispute resolution professionals can use as benchmarks for unacceptable behaviour. Often there are no established legal principles and the regulator and the public would in any case prefer to see major institutions following more ethical rules than the law requires.

People are gradually realising that small-to-medium sized businesses are actually just consumers in their dealings with major banks. The Government needs to reflect this by making these relationships subject to mainstream regulation. This would at least compel the regulated firms concerned to apply concepts found in the FCA Principles, such as "due skill, care and diligence" or "clear, fair and not misleading".

CP 18/3 raises the more general question of how business disputes with the financial services industry should be resolved. Some form of institutional arrangement would be far better than a simple arbitration scheme. What one needs is an organization that knows how banks treat their customers and can develop appropriate solutions that make sense in that context. A type of Ombudsman scheme operating from a wing of FOS' building would make obvious sense.

My experience, though, of working (and being a consumer) outside the UK tempers any criticisms I have of our Ombudsman arrangements and complaint-handling rules. We have reasonably sensible and easy-to-find complaint rules and an Ombudsman scheme that publishes vast amounts of material about what it thinks. This compares very favourably with financial centres both in Europe and elsewhere. It is, nevertheless, frustrating when problems emerge here over quite trivial drafting errors with no political significance that take up enormous amounts of discussion time which ought to be spent on handling complaints properly.

Take DISP 1.5.1R which allows firms not to apply the time-limit rules (which mainly require a personalised final response letter) and to report in a separate category "a complaint that is resolved by a respondent by close of business on the third business day following the day on which it is received". Sensibly, DISP 1.5.3G used to explain that a complaint that has come in on a non-business day is deemed to have been received at the start of the next business day. However, this was deleted in 2016 without discussion. Anyway, the word "business" does not appear in front of "the day on which it is received". Is this a calendar day? What is a "business day" anyway? Some firms offer 24 hour helplines. Should this be regarded as part of the day (an old consultation paper suggests a positive answer to that)? The answers to these questions affect the numbers of cases that firms have to report to the regulator as having been resolved by the end of the next three business days and the computer software required to generate those reports. What is needed here is an FCA committee of complaint handling practitioners who can straighten these problems out by using the Quarterly Consultation process which covers most minor regulatory changes. I will happily volunteer to chair it!

OUT AND ABOUT DOING FINANCIAL SERVICES COMPLIANCE

The book aside, my financial services work has not been hugely different in the last 12 months from that of ten years ago although the volumes of different things has fluctuated over time.

Last year, training (the activity with which I started out in 1996) was my primary activity. In the UK and Cyprus, this amounted to a combination of private and public sessions that covered financial promotions, complaints, product governance and digital media. Some of the private bookings came directly to me; the rest stemmed from Andrew Hilton at CTP, whom I have known since the late 1990s, and EIMF, a Cypriot financial services training company that discovered me early last year. Both have booked me to do things with them again in 2018. For a number of years now, I have run a complaints workshop for Infoline and spoken at its conferences on that subject and other topics.

Most of my consulting work has consisted of handling complaints, dealing with compliance crises and sorting out agreements and procedures. Complaint cases often turn up too late for me to affect the outcome. Once a firm has received a draft decision against it from the Ombudsman, I find it very difficult to make FOS look at the problem in a different way.

One of the ways of handling a major compliance disaster is to promise the regulator an independent review of the firm's procedures. When I do these reviews, I often find either that such procedures never existed or that they have become disconnected from what happens in practice. It is not helpful to buy off-the-shelf here. Some clients do not wait for crises and ask me to help them redraft their client agreements and make other changes. This allows everything to evolve in a way that is much more sensitive

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to the firms' business objectives.

Besides the consulting and training I do, my work involves a considerable volume of commercial writing. I have been producing a regular column for Compliance Monitor since 2003. This involves essentially ten articles a year for the scrutiny of its current editor, Esther Martin. On top of that, in November, during a seven-week period when I had little or no voice, Esther persuaded me to record a video for her on the financial services senior management regime. Unfortunately, I do not believe that the new set-up has any greater chance of succeeding than its predecessor, the approved persons approach (contained in APER). In both cases, a lack of gumption on the part of the regulator usually allows senior managers to sleep too easily. It is not the rules that make a difference here but whether the regulator has the determination and staying-power (or, as legendary football broadcaster, John Motson, put it, in his last radio match commentary, the "Co-Jones"!), to take on some of the rogues that run UK financial services. Most of the evidence suggests that these commodities are limited at the FCA and its

fellow regulator, the Prudential Regulatory Authority. The new rules merely add a layer of bureaucracy to the UK banking system without which it could function quite happily.

Every six months, I update my Lexis-Nexis commentary on chunks of the Financial Services and Markets Act. Some of the parts I cover are unsurprising: complaints, business reviews, the authorisation process, disciplinary proceedings and Upper Tribunal powers. I still, though, tackle Part 6 on the listing, transparency and prospectus rules, the parts on auditors, actuaries and insolvency, and the rather splendid Part 30 on Supplemental Matters.

The same publisher recruits me to write about uncharted areas in its Butterworths Financial Regulatory Service, essentially a regularly updated looseleaf on different parts of the FCA's rulebook. Here, I write much of the Conduct of Business Sourcebook chapters and all the commentary on complaints (DISP), approved persons (APER), the senior management code of conduct rules and guidance (COCON) and the almost extinct FINRA rulebook. Last year, I wrote a few pieces for Thomson Reuters' Compliance Complete (I still call it Complinet) which started my commercial writing business and rather more articles for Compliance Resource Network and the delightful Gabby Stephenson and, after her departure in the summer, Mary Stevens.

In October, I visited some old friends at the Hong Kong Securities Institute: Ruth Kung and Daisy Lo. Daisy remembers me doing my week of compliance lectures and seminars there in 2010. We talked about organizing some webinars on compliance for the coming year. The compliance world is actually very small, with regulators stealing each other's ideas all the time. So, a series of remote sessions on compliance subjects worldwide could be a development for the future.

My activities in the arbitration area remain centred around my role as a domain name panellist for both the World Intellectual Property Organization (WIPO) and the Hong Kong International Arbitration Centre (HKIAC) and my University of Westminster international arbitration teaching.

managed to visit some good arbitration friends in Hong Kong in October. Dennis Cai and I had a delightful lunch. This revived memories of when we worked together on HKIAC's domain name cases and helped me learn about his domain-name activities since he left the Centre. At HKIAC itself, Mandy Wong welcomed me delightfully and is part of the team that appoints me occasionally. Gavin Denton of the Arbitration Chambers provided splendid entertainment there and the Chambers ended up, as a result, as the recipient of my last "cricket as explained to foreigners" tea-towel, a classic gift from an Englishman to an Australian in the light of this winter's Test Series between the two countries.

Later the same month, the WIPO annual panellists meeting in Geneva gave me an excellent opportunity to meet the staff and other panellists there. As of 1 January 2018, I had decided 139 WIPO cases. It is a source of much pride that I have never heard any of my decisions mentioned at the panellists meetings. I try very hard not to lay down new rules and principles unless the facts really need them.

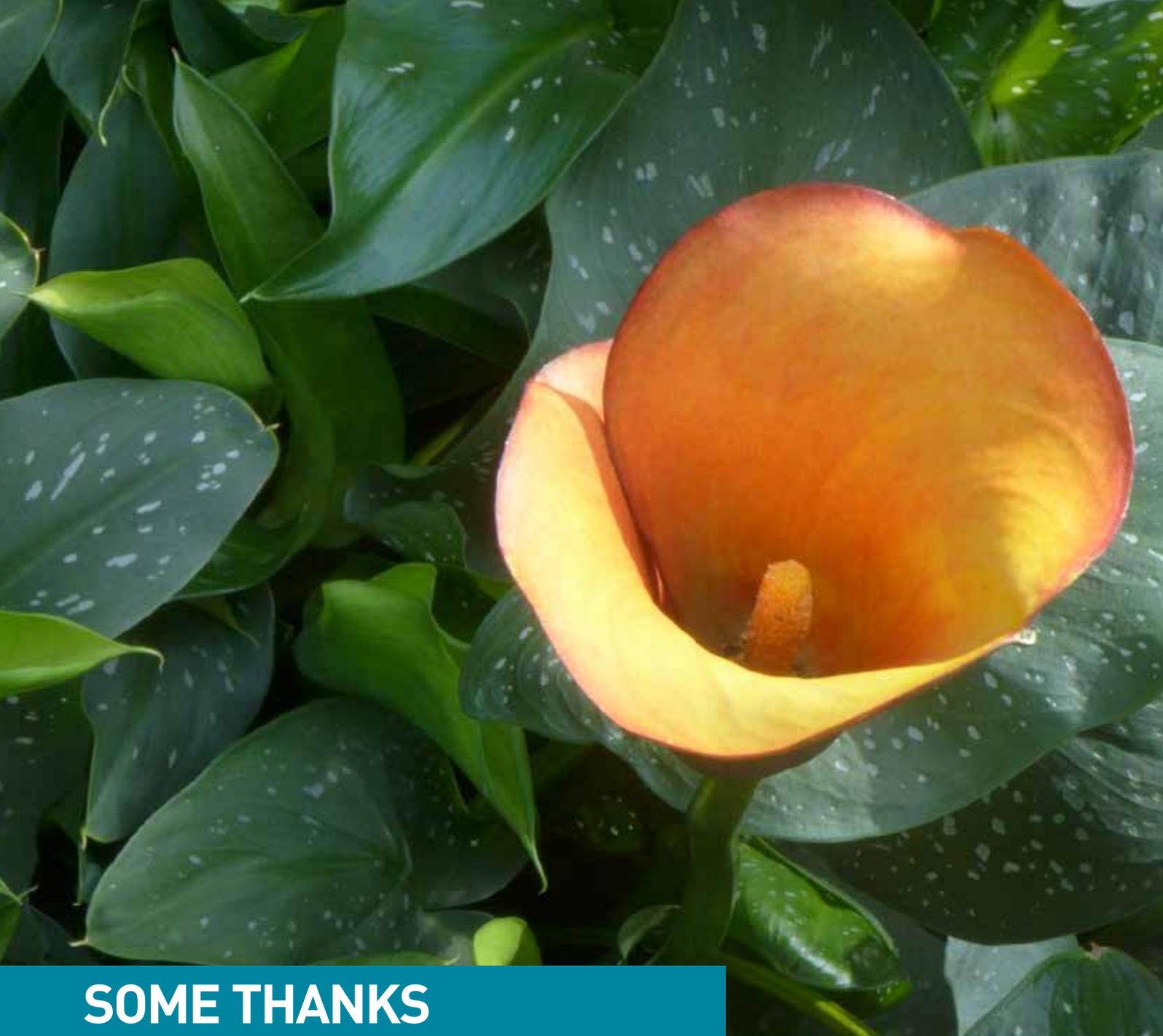
At the University of Westminster, I continue to teach my one course, on

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Comparative Commercial Arbitration. I can only aspire to the levels of student adoration that my boss, Richard Earle, generates. He also tolerates my legendary bumptiousness (and has provided crucial last minute corrections to this and last year's newsletter) while fighting the really challenging battles with University bureaucrats and irresponsible students. His ability to handle the latter is legendary. With Simon Newman, Richard heads up an extraordinary team of great law and dispute resolution teachers.

Students notoriously find reading books more difficult than watching videos. So, I have recorded some talks on the New York Convention which you should be able to find on youtube.





SOME THANKS

A theme of these newsletters which go back to 1999 is the resilience of the friendships on which I rely enormously. Nicolas Ulmer and Doug Reichert have been feeding me regularly when I go to Geneva since the late 1980s. My home from home in Lausanne is Andreea and Jean-Nicolas Braendlin and their family. I used to work and play monopoly with Andreea thirty years ago. She then lived up the road from (and studied with) Myriam Valette, my Sion home along with her family. In the early 1990s, Malachy McClelland and Elisabeth Bingham worked with me at the Insurance Ombudsman Bureau. They are still an important part of what keeps me going. Bruce Clark who, as I refuse to allow

him to forget, told me in 1997 that my business was unlikely to fail, still keeps a watch over me. Rhian Wheeler has been designing and updating my website for over a decade. This makes her something of a beginner compared to Richard Herman who designed his first newsletter for me in 2000. Finally, Chris Hamblin has been editing this newsletter for almost as long, having introduced me to writing for a living in late 2002. There are many others I ought to thank but that is enough for a while. It remains only to wish you all the very best of what remains of 2018.