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# news

# Dear Friends...

**My membership of a couple of Committees at the Chartered Institute of Arbitrators has provided a worldwide social network of delightful people and some fascinating intellectual challenges**

**It is that time again. Your celebrations of whichever or none of the standard festivals should be out of the way. This is the point at which I sit down and try to make sense of the previous year by writing the nearest thing that a self-employed person can manage to a report to shareholders!**

With the world descending into recession, 2008 was surprisingly good for me. However, I started the year under no illusions. 2009 was a horrid year for so many people. Half way through, I emailed a friend to suggest that, in the financial services compliance world, I now had "last-mover" advantage since everyone else seemed to be folding.

Anyway, as the Financial Ombudsman Service roared its disgust at the market and the Financial Services Authority said pious words about maintaining standards, the major UK financial institutions and quite a few minor ones more or less deleted their compliance budgets. "Hoping we don't get caught" replaced "treating customers fairly". This did not make for a comfortable 2009.

In the middle of it all, the first person ever to work for me in every sense, my mother, became ill and died at the end of October. I used to invite her over to "bollock" me over the state of my filing and accounts. Both tended to clear up surprisingly quickly as a result.

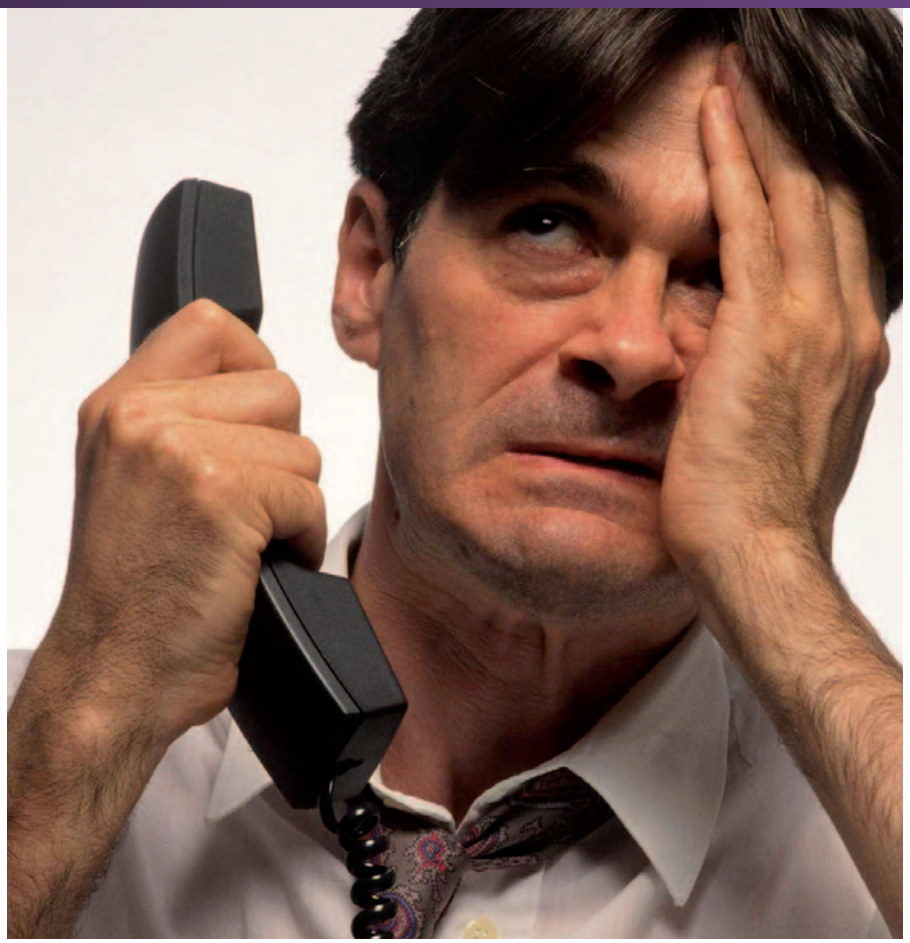
One positive compliance development did occur. I acquired two more national regulators as clients in 2009. A paper I wrote for another seems to have helped trigger the idea of developing an Ombudsman scheme for its financial services sector. In a different field, I also collected a foreign Government's agency as a customer, working with it for the first time since the 1980s.

Dispute resolution has continued to provide some entertaining diversions. My membership of a couple of committees at the Chartered Institute of Arbitrators has provided a worldwide social network of delightful people and some fascinating intellectual challenges. I also continued to judge domain name disputes for the World Intellectual Property Organization and the Hong Kong International Arbitration Centre. In the spring, I found myself being the secretary to a sole arbitrator and old friend in an entertaining International Chamber of Commerce case. I also taught arbitration classes at the Universities of Strathclyde and Westminster.

There are closer links between my dispute resolution and financial services work than one might think. For the Strathclyde classes, I stayed with a delightful financial adviser client in Carluke and saw my first curling game (his wife lost, but never mind). The vast majority of my business entertaining has been done at my friendly local café, the Scandinavian Kitchen. There is an intriguing gaggle of financial services specialists, broadcasters, advertisers and the odd musician and osteopath who meet and share mutual concerns and interests under Jonas' and Bronte's watchful eyes. The Golden Hind continued to be the fish n' chippie of choice for the international arbitration set – typically followed by singing to Tony Pearson's exquisite piano playing at the Golden Eagle pub. Yet again, though, the "best meal of the year" award goes to Fabrizio in St Cross Street, near Hatton Gardens.

Being self-employed makes good external help vital. Rhian at Ruby Design regularly wins plaudits for my website and helps me to keep it up to date. Dave at the nearby Watermill recently designed my first new business card in about a decade and subtly changed the overall "look" of my business. Richard Herman from Arta Creative Solutions again designed this newsletter.

# FINANCIAL SERVICES COMPLIANCE



**2009 started really well.** The London Branch of the Chartered Insurance Institute invited me to talk on the death of Treating Customers Fairly to a massive audience. Gradually, though, it became apparent that the regulator's decision to merge its initiative in this area with its ARROW risk assessment for firms was producing a peculiar unintended effect. An industry sprung up to train executives to answer TCF questions correctly on regulatory visits. However, efforts to improve customer treatment ended up in the "too difficult" box.

Financial promotions workshops continue to entertain me. For the conference company, Infoline, I do them using material that I have received in the post or cut out of newspapers. Sometimes participants ask me to consider their companies' websites. It is all about showing participants how to approach advertising material in a critical but not fanatical way.

I have continued to work with independent financial advisers (IFAs) who are keen to improve their advice standards. Many have become frightened, by what they wrongly perceive as the FSA's requirements, into preventing their suitability reports from performing their original function: explaining the advice. It continues to prove difficult to help advisers consistently to marshall the facts, circumstances, fears and aspirations of their clients and then present their recommendations on how to deal with them. The problem comes in a variety of areas. First, good advisers find it difficult to develop the habit of noting down their clients' circumstances – information that they often carry in their heads. Secondly, the relevant facts tend to be too detailed to be dealt with sensibly in the report. Finally, the advice letters become cluttered with irrelevant detail because of the adviser's obsession with providing risk warnings.

The solution lies in IFAs producing a comprehensive description of the client in one document and an explanation of the reason for the advice and the disclosure of the risks involved in another. These can be e-mailed together and constitute a suitability report without the customer having to read things that he or she already knows. It is vital to ensure that only relevant risk warnings apear. One still finds too many past performance statements where there is no reference to the past in the recommendation.

The adviser's need to understand the client's attitude to risk continues to dominate this area. I have written endlessly about the necessity of taking on board a whole range of different features of customers' wishes, fears and objectives without neglecting the pitfalls inherent in any investment or savings product chosen.

The advice scene in 2009, though, was dominated by the FSA's continuing efforts to re-model the advice process by banning product providers from influencing independent advisers' remuneration. One bi-product of these changes is that independent advisers will no longer have to offer clients a fee option. Anyway, the FSA seems to have given up trying to enforce this current requirement. The result is that advisers are charging fees and then keeping the various types of commission payable to them on top of that, leaving the client none the wiser. This is all coming out of their investments.

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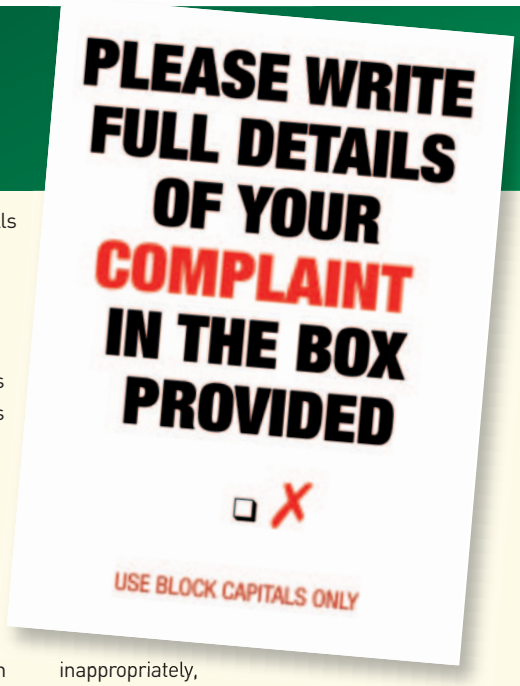
The regulator is rightly trying to force the industry to raise its academic standards. One keeps running into IFAs who bullishly say that they are not going to do any more exams. This attitude alone suggests a lack of enthusiasm for staying up to date with product, legal or regulatory developments. Since most investment advice results in the provision of a suitability report, a written test is a reasonable test of an adviser's ability to write under pressure about these matters. Exams are far from ideal assessment tools. They are a bit like democracy, the least bad way to benchmark knowledge standards.

With that in mind, my continuing professional development programme for 2009 led me to do the Chartered Securities Institute's Diploma in Compliance which I passed with merit. I am rather ashamed to admit that I did not know about this qualification until 2008. Although much of it relates to the wholesale markets in which I only occasionally dabble, it seemed important to have the only compliance qualification available.

In 2009, I had three interesting excursions into the Financial Services Authority's conduct of business rulebook. First, I found myself working with a European foreign regulator, advising and training staff on how to apply that country's equivalent provisions. That country's much shorter rulebook made the UK version appear in need of selective pruning. Second, Lexis-Nexis commissioned me to write commentaries on the second half of the UK rulebook. That took me into territory in which I do not normally find myself. One thing that became apparent was that some of the less exciting rules had not been used a great deal because the level of grammatical errors and unclear sentences was fairly high. A good contact in the FSA rulebook area received a string of e-mails which hopefully will be reflected in some regulatory changes. This in turn led to a pleasant meeting at the FSA and the creation of the "re-drafting COBS group", a small informal gathering centred around me and my old friend, Nick Smith. Essentially, we work through the rules in the Pillars of Hercules pub over a few beverages and then send in our re-drafts with comments. It is actually an excellent way to learn a rulebook. This time we just did COBS 4 and 5. We could go further in the coming year.

# COMPLAINTS




**This has been an odd and troubling year for complaint handling.** Walter Merricks, the outgoing Chief Ombudsman at the Financial Ombudsman Service (FOS), indicated what he really felt about the financial services industry. He spent his last few months pleading with the Financial Services Authority to do something about payment protection insurance misselling and complaint handling generally. The regulator consulted the industry seeking a solution. The percentage of complaints upheld by the FOS went through the roof to an extraordinary 57%.

In the autumn, the FOS finally did what I have been advocating for years. It published the numbers of complaints referred to it against its most common respondents, generally banks and major insurers. Alongside these numbers appeared the proportion of cases that each of these companies lost, broken down into different subject areas. The figures made surreal reading. People wanted to know how one bank managed to lose 99% of its insurance cases; what happened to the other 1%? Somehow, the FSA regarded this as acceptable, levying no fines against the major institutions with uphold rates above 90%, let alone the managers who must have overseen such an appalling approach to complaint handling.

Finally, the barrier burst with CP 09/23, a consultation paper proposing a proactive review of past rejected complaints about payment protection insurance (PPI). It also tells the public about some limited reviews of past sales to be done"voluntarily" by certain institutions. With the multiple involvement of lenders, credit brokers and insurers in selling or providing this type of insurance, some of us are having to dust down our training handouts on handling joint liability cases originally developed for the pension review.

One of the more interesting legal issues involved is whether a broker can argue that the lender and insurer are jointly liable as being engaged in a joint venture to promote misselling on the lines of ICS v. West Bromwich Building Society. This is an old case about home income plans where the lender was found to be a "joint venturer".

**The FSA has gone back on its strict deadline for consultation having discovered that it may have opened a larger can of worms**

The FSA has gone back on its strict deadline for consultation having discovered that it may have opened a larger can of worms than it first appreciated. Unsurprisingly, I have already taken bookings for training sessions on PPI complaints.

I also ran sessions last year on a bigger and more frightening complaints issue which tends to flow from PPI complaints: bad lending cases. These divide into three general categories. Some customers should simply never have been allowed to borrow anything. Others trying to consolidate existing debt were wrongly recommended to borrow unnecessary extra amounts. Finally, one is starting to see cases where firms have handled mortgage arrears inappropriately, leading to repossessions. The GMAC fine last year was an early indication of trouble in this last area.

The Financial Services Bill, currently going through Parliament, provides for collective proceedings: a form of class action, much favoured by Walter Merricks. My concern here is that nobody knows who would want to fund such litigation apart from the Financial Services Authority or, perhaps in extreme cases, the Financial Ombudsman Service. A benevolent multi-millionaire could possibly have a go at this but it is unlikely. It would be better if the FSA just ordered an old-fashioned pro-active review of past regulated business in areas like PPI. Until the Bill becomes law (the proposal itself has cross-party support) and somebody tries to initiate a collective proceeding, it is hard to see how things will work out. It is clear that an Ombudsman scheme receiving over 120,000 cases a year is not sustainable.

# DISPUTE RESOLUTION

**I continue to have enormous fun as a member of the Chartered Institute of Arbitrators Practice and Standards Committee and Arbitration Sub-Committee.** We talk, discuss, eat and even occasionally sing together.

The Sub-Committee's Practice Guidelines became available to non-members on the Institute's website for the first time this year. This has opened up our work to a much wider audience and hopefully exposed it to a broad range of criticism. I am running a programme to update the guidelines and enjoy receiving brickbats on them, however forceful. Many are concerned that the guidelines could be used in court to attack an award or remove an arbitrator. The introduction to the guidelines makes it very clear that this is not the intention; hopefully, a court would notice that.

**With the 50th anniversary next year of the famous Paris arbitration conference on the autonomy of arbitration clauses, watch this space.**

The Sub-Committee, though, has undergone a fair number of personnel changes. Two members had to leave when they became Institute trustees. One result is that Houston Lowry and I have ended up as co-chairmen of the sub-committee.

On the Practice and Standards Committee, I have been enjoying developing the members' side of the Institute's Learned Society activities. The idea of a Learned Society is complex enough. However, the thinking is that while the Institute staff develop events, activities, scholarships and the like, my job on the Committee is to enable the Institute's huge worldwide membership to share information amongst itself and with academic institutions in the UK and worldwide.

I feel strongly that too many arbitration experts do not know the origins and reasons for the concepts that they espouse in conferences, classrooms and arbitrations. I flew to Geneva to attend a Swiss Arbitration Association conference just to hear my friend, Claude Reymond ,talking on this subject. I tried to do my bit at the British Institute of International Comparative Law meeting on the 1996 Arbitration Act by looking at the different aspects of separability. With the 50th anniversary next year of the famous Paris arbitration conference on the autonomy of arbitration clauses, watch this space.

On the Practice and Standards Committee, I also worked with Tom Halket, Alan Limbury and others on a major revision to the Institute's Code of Ethics. Our primary task was to make it workable. In the future, we will perhaps tackle the question of what should be in such a Code.

2009 saw me move more back towards the mainstream of arbitration with a steady stream of domain name cases for WIPO and the odd one for the Hong Kong International Arbitration Centre. I enjoyed being Nicolas Ulmer's secretary on an ICC case of some technical complexity. We first worked together in the 1980s! I am keen to do more of this.

Finally, dispute resolution and financial services link up again in my work in one unusual way. I help the Chartered Insurance Institute with its work on contract certainty in the wholesale insurance market. I write chunks of the textbook, mainly the parts on contract law and interpretation and the dispute resolution provisions recommended for every insurance policy.

# WRITING & BROADCASTING


**2009 was generally a pretty awful year for the commercial writing market at least in the financial services compliance arena.** The trade press became thinner due to falling advertising revenue. In the online market, there was a general exit from quality towards using free copy from press agencies and law firms. My retainer arrangement with Complinet came to an end in May although, towards the end of the year, that organization began commissioning articles on a one-off basis again. One constant has been Compliance Monitor for which I write 10 pieces a year and sit on the editorial board. (It really does meet over a pleasant lunch!) As already mentioned, I do an increasing amount of rulebook and legislation commentary writing for Lexis-Nexis on the Conduct of Business rules and the Financial Services and Markets Act.

**I wrote less but appeared on radio and television far more often as a financial services compliance expert on Money Box and Working Lunch.**

Last year, I wrote less but appeared on radio and television far more often as a financial services compliance expert on Money Box and Working Lunch. After one interview on structured products, a bank paid up £200,000 and the provider of the product subsequently went into administration. Oh and you can now find me on YouTube!

## To finish...

So, good riddance to much of 2009. It has been a tough year for many. In the circumstances, never have good friends around the world been more vital. I am grateful to you and as ever to my good friend, Chris Hamblin, who has edited this newsletter since its earliest days.