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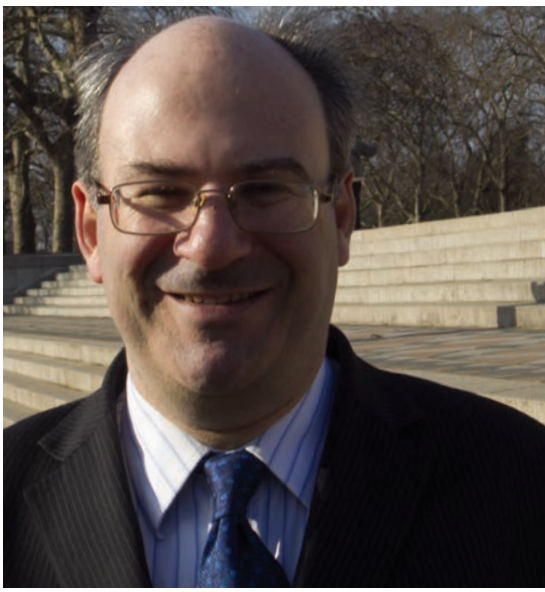
March 2014

as news

Dear Friends...



This annual newsletter is a report to those involved in my professional life and somewhat beyond: an attempt to tell people what I have been up to in the last year and cast some light on the world around me. Like its predecessors going back to 1999, it also continues to describe how some sort of catering seems to pervade every aspect of my working life.

ON THE ROAD IN 2013

After being frugal with holidays since 2010, I decided to head east and south for the end of August and most of September. I was moved by the welcome I received at my first stop in Hong Kong. Staff at the International Arbitration Centre there, led by Primrose Law, lined up to greet me and Dennis Cai and Paddy Tam took me out to discuss cybersquatting and other dispute resolution developments at the Centre. Jimmy Chan and Eugene Goyne of the Securities and Futures Commission then insisted on taking me to a Kosher restaurant in Hong Kong, one of the kindest gestures imaginable in a city where food is not a straightforward subject for me. Only the typhoon in September stopped me from speaking to Fan Yang's arbitration class at City University. Visiting her there in August brought back happy memories of the early 1990s when I delivered a lecture on arbitration theory for her predecessors at what was then the City Poly.

My next stop was Shanghai. There, Xu Guojian, with whom I rowed boats and wrote about private international law in Lausanne in the late 1980s and his wife Mei Qiong helped me enjoy my first experience of mainland China. Then it was onto Sydney to enjoy the Jewish New Year with my enormously welcoming family there. In Melbourne, I caught up with Andrew Christie, a fellow World Intellectual Property Organization cybersquatting panellist and Professor at Melbourne University for some architectural tourism and trademark law discussions.

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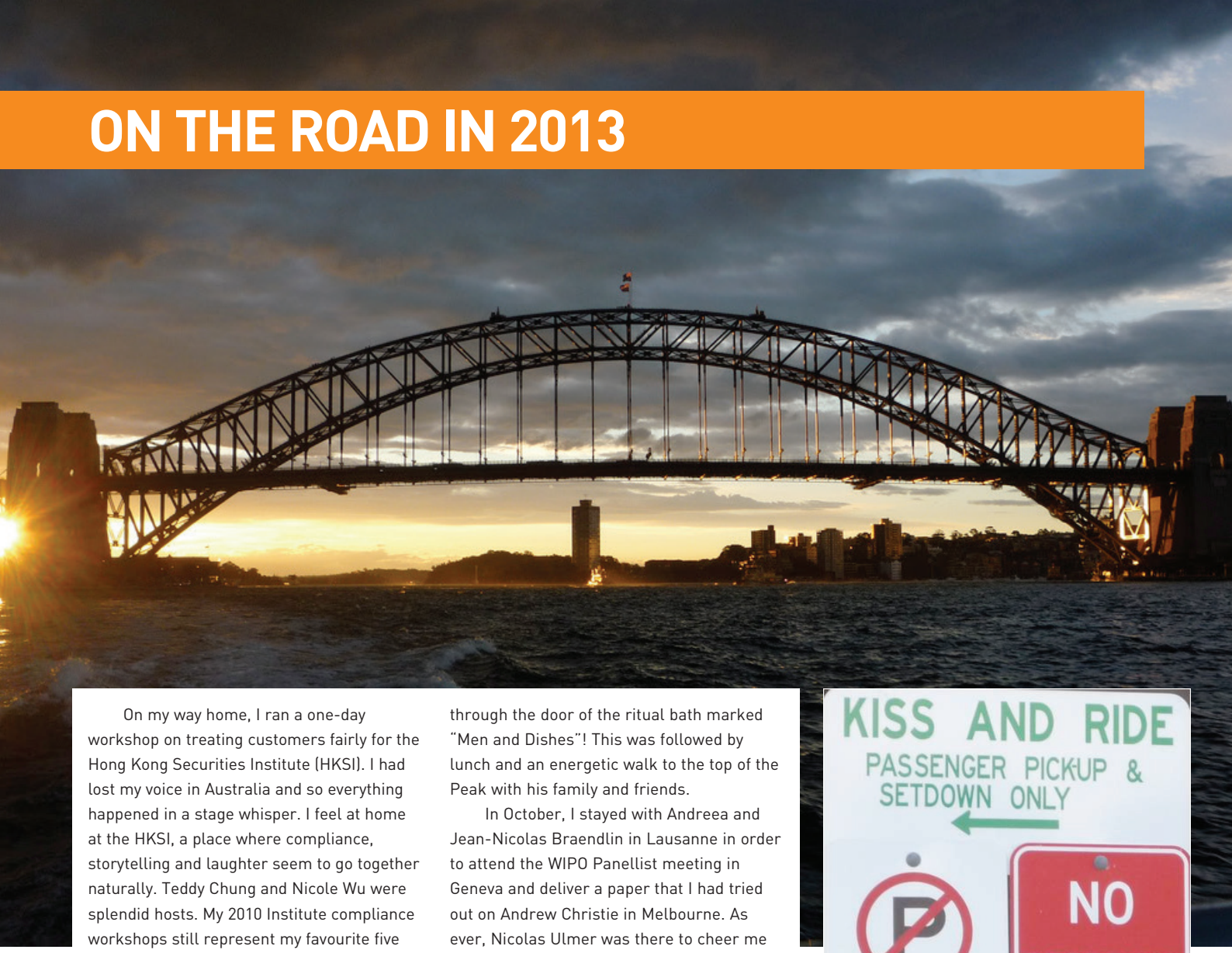
ON THE ROAD IN 2013



On my way home, I ran a one-day workshop on treating customers fairly for the Hong Kong Securities Institute (HKSI). I had lost my voice in Australia and so everything happened in a stage whisper. I feel at home at the HKSI, a place where compliance, storytelling and laughter seem to go together naturally. Teddy Chung and Nicole Wu were splendid hosts. My 2010 Institute compliance workshops still represent my favourite five days of financial services compliance. It was lovely, before I left for London, to have dinner with SF Wong, now Professor Wong of Hong Kong University, with whom I ran those workshops.

I spent most of my last day in Hong Kong with Russell Davidson, a member of a youth group I ran in 1970s London suburbia. Our exploration of the architecturally memorable Hong Kong Synagogue took us through the door of the ritual bath marked "Men and Dishes"! This was followed by lunch and an energetic walk to the top of the Peak with his family and friends.

In October, I stayed with Andreea and Jean-Nicolas Braendlin in Lausanne in order to attend the WIPO Panellist meeting in Geneva and deliver a paper that I had tried out on Andrew Christie in Melbourne. As ever, Nicolas Ulmer was there to cheer me on and take me out to lunch the following day with Doug Reichert, something he has been doing for the last 25 years. I finished the year in the Swiss Alps on my first proper skiing holiday for about five years. Both Swiss trips involved seeing Inès Wyler, one of my oldest friends in Lausanne, and the purchase of fabulous chocolates at Angehrn, a shop my mother discovered there in the late 80s.

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2013: THE BIG PICTURE

2013 was the year when the UK economy finally emerged from its longest recession since the 1930s. I have been lucky to have come out of it in rather better shape than in 2007. In fact, only two of the years of 2008-2013 were worse than 2007 (one only marginally) and two were significantly better. The last couple of years have been solid and well above 2007 levels.

During the recession, though, the business changed significantly, away from regular topical writing on financial services compliance developments and towards heavier legal writing in the same area. I am doing more compliance training and consulting than I used to do. The revival of the former gives me sentimental pleasure since that is what I was doing in 1996 when I started working on my own.

One big difference in recent years is the curious way in which intermediaries, such as conference organizers and software companies, are selling my compliance services. My relationship with the conference company, Infoline, goes back to 1997 when I helped it plan its first complaint-handling conference. In the last year, I have run more workshops for them and their customers, principally staff at major UK financial services institutions. The participants enjoy the opportunity to learn with people from other companies and share experiences. Infoline also provides the facilities and support for company-specific training of which I have done more than ever in the last twelve months.

This form of "intermediation" is not restricted to one company. Two software providers in this field have brought me in to train their staff or work with them in solving their customers' compliance problems. The combination is enjoyable for me since it lessens the loneliness of 'the long-distance' compliance adviser. These companies can also ask me to obtain answers to fiddly questions that their clients ask them without the identity of the company really asking the question ever being revealed to the regulators.

Since 2007, my traditional lawyer-work has remained broadly the same. The World Intellectual Property Organization (WIPO) in Geneva has sent me a constant stream of cybersquatting cases to arbitrate, including recently my first French one. The Hong Kong International Arbitration Centre has punctuated this with some similar cases of its own. Beyond that, use of my lawyer's lawyer service has been as erratic as ever with sudden bursts of activity from my old employer in Switzerland and lawyers and arbitrators around the world .

There have, though, been two big changes in my more traditional "legal" work in since 2007. First, I am starting to pick up appointments as an expert witness on financial services compliance standards here and abroad. Secondly 2014 marked the fourth year in which I have taught my comparative arbitration law LLM course at the University of Westminster.

More generally, though, the big difference between 2007 and today is the increasingly collaborative way in which I work. Bruce Clark who is still trying to live down the fact that he told me that my business would not fail in 1997 continues to act as my eyes and ears and business adviser generally. His attendance at some of the workshops I run introduces an element of industrial experience to subjects such as investment product manufacturing and complaints. Our highly diverting meetings at the Scandinavian Kitchen provide me with an important opportunity to let off steam, talk through issues in the business and discuss a whole variety of subjects that do not relate to any of these things! Jan Meek regularly comes in to cajole me into doing my filing and has made a huge difference to my credit management.

During 2013, Chris Hamblin, long-time editor of this newsletter and the inventor of my writing business, started regularly coming to work in my sitting room on his freelance writing on financial crime and other compliance problems. He still does that in time away from editing Compliance Matters and Offshore Red for Clearview. The jokes about my place being the Compliance Factory started to have a ring of truth about them. It is now reflected in a trademark registration.

There is a community of people that in various ways support my work. Malachy McClelland, with whom I used to work at the Insurance Ombudsman Bureau twenty years ago, turns up regularly to check on me and discuss the anti-money laundering projects he manages and works on. Although I see them less frequently, I am still very much in touch with Elisabeth Bingham, Catie Keynes, Chris Hamer and Neil Munro from those IOB days. Dave and Bertie from the nearby Watermill share design ideas with me in the various coffee shops around here. They insist on my bi-monthly compliance tips being sent out with a sports question. Derek Adams who was so central to the early years of my business uses my place as his London base and takes advantage of this to see Chris Hamblin, in the process reminding us how we all met at his excellent pension review forums.

The background to all this is the excellent lunches and coffee at the Scandinavian Kitchen and regular breakfasts at the nearby Kaffeine. Mr Christou still serves up the best fish n' chips in London at the Golden Hind in Marylebone Lane. You can encounter our own version of the "wall of sound" when joining in the regular renditions of "Old Man River" at the Golden Eagle pub around the corner from there on Tuesdays and sometimes Thursdays. The best restaurant of the year was in Bristol - Meluah, a surprisingly classy if slightly Masterchef-like Indian place. Thank you, Karl, Jon and Simon for taking me there in the autumn.

FINANCIAL SERVICES COMPLIANCE AND LAW

The two big events in financial services compliance were the entry into force of the new rules created by the Retail Distribution Review (RDR) on 1 January and the Financial Services Act 2012 on 1 April. The RDR primarily involves a ban on product providers from determining the remuneration received by intermediaries for selling their products. The 2012 Act has split he old Financial Services Authority into the Prudential Regulatory Authority and Financial Conduct Authority.

THE RETAIL DISTRIBUTION REVIEW (RDR)

Most of my work on the RDR was completed last year. I advised a fund manager not to do the type of distribution agreement from which the regulator has spent most of this year telling similar companies to extricate themselves. As expected, most of my clients adapted smoothly to the new world where providers do not set commission rates. The changes did make advisers focus more on the cost of giving advice, particularly on existing investments. Some of the industry's traditional approach to transfer value analysis needs re-calibrating to take into account the cost of advice on existing as opposed to new funds, particularly when advisers are recommending transfers to self-invested personal pensions (SIPPs).

My main exposure to the RDR this year came from my membership of the Institute of Financial Planning's Ethics Committee. As part of the review, the Financial Conduct Authority now requires professional bodies that it recognises to issue statements of professional standing (SPSs). A new member of our committee pointed out that we needed a procedure to cope with the situation where a member challenges the Institute's refusal to grant or renew one of these statements. This led to a quick review of our complaints procedure which has been cleaned up and adapted to cope with challenges to decisions by the Institute on SPSs.

One slightly accidental effect of the RDR has been to make everyone read the rules against inducements more carefully. These were tightened up significantly in 2007 to deal with the implementation of the Markets in Financial Instruments Directive (MiFID). That and its Implementing Directive outlawed inducements (apart from commission) that could not be said to enhance the quality of service to the ultimate customer. The guidance in COBS 2.3.15G is now the subject of FCA guidance in FG 14/1 and prohibits the type of unnecessary expenditure on entertainment and training that used to be part of product providers' stock-in-trade. The RDR, with its removal of product-provider- fixed remuneration for advised retail investment business, has shone a light on some longstanding practices which at times come worryingly close to corporate bribery. In January this year, two conferences organized outside the UK for British firms were cancelled because of the rather obvious concerns in this area. Others look likely to follow.

Chris Hamblin and I found ourselves speaking and running a round-table session on this at the Incisive Media Fund Management Conference on this in October. Between us, we have developed a reasonable comparative law resource on this whole subject around the world.

> **Some of the industry's traditional approach to transfer value analysis needs re-calibrating to take into account the cost of advice**

The retail distribution review is unlikely to remain a purely UK phenomenon. Australia already has a version of it in its Future of Financial Advice (FOFA) reforms which came into force in mid-2013 although the new Government there is already threatening some form of retreat from FOFA. Article 25 of the proposed MiFID 2 Directive applies a form of RDR at least to the independent sector.

In the UK, increasing numbers of scandals in the protection and general insurance area suggests that an RDR for general insurance and probably mortgages should but will not necessarily be just around the corner.

THE FINANCIAL SERVICES ACT 2012
INTRODUCING THE FINANCIAL CONDUCT AUTHORITY (FCA) AND THE PRUDENTIAL REGULATORY AUTHORITY (PRA)

The PRA

The PRA regulates the solvency of the banks, insurers and major investment firms. In the run-up to the legislative change, the Financial Services Authority and the Bank of England had been running a dummy version of the new organization. Consequently, we could see how effective the new changes are likely to be when, during 2013, the Co-operative Bank's finances and leadership disintegrated as it bid for branches of Lloyds Bank being sold off for competition law reasons.

In the first half of the year, the Parliamentary Commission on Banking Standards issued a pair of reports highly critical of past regulation. The second led the Government to replace the current regime for holding senior managers personally accountable, at least for banks, by hastily amending the Financial Services (Banking Reform) Act 2013 as it was going through Parliament. The new statute will amend FSMA when it comes into force in 2014. The core idea is that senior persons will be responsible for identified areas of their business and, in the event of a compliance failure in their area, will be accountable for that problem unless they can prove that they acted with reasonable care.

Senior management responsibility

The Parliamentary Commission observed that bank senior executives protected themselves from enforcement action by a strange combination of the "accountability firewall", a tendency to entrust crucial tasks to individuals not senior enough to be accountable to the regulator, and the "Murder on the Orient Express defence", the notion that if everyone is guilty, nobody can be responsible. The Commission berated the regulator for letting this happen. It will be interesting to see if the new legislation changes anything. I doubt it.

THE FCA AND TREATING CUSTOMERS FAIRLY

The Financial Conduct Authority (FCA), stripped of its role of maintaining bank solvency, has unsurprisingly set itself up as the "treating customers fairly" regulator. This, though, is not just a UK phenomenon. The interest of the participants in my Hong Kong workshop on the subject, which also covered financial promotions, advice standards, product manufacturing and complaints, made sense a few weeks later when the Monetary Authority (HKMA) there unveiled its treating customers fairly charter.

I spend a great deal of time helping firms comply with the requirement to be "clear, fair and not misleading" in their client communications. In recent years, the UK regulators have stressed the need to describe the risks involved in a transaction or in using a service in the context of the actual message, rather than by creating a "risk sandwich". I did not really know what this new catering concept was until I saw one: a web page with a risk warning at the top, a great deal of positive unbalanced material in the middle and a risk warning at the end.

Firms often say that their compliance departments insist on lists of risk warnings typically positioned at the bottom of the page. This is not what the FCA wants. By leaving the description of the risks involved in the body of the text, one can use a much lighter and more attractive touch with far greater impact. "Our financial planning service is designed to help you cope with the ups and downs of the market" is far more attractive than "funds may go down as well as up".

Last summer, I checked and suggested improvements for about 250 past or proposed web pages for a new website. My immediate colleagues were an excellent group of young compliance, project management and web design people. They rather charmingly told me that my report on the original 235 pages was internally known as "the Bible". They not only reinforced my faith in financial services compliance people but introduced me to two decent coffee shops near our standard meeting place at the Kindertransport statue outside Liverpool Street Station.

In January 2014, Infoline asked me to deliver two days of financial promotions training for an insurance and mortgage intermediary firm. A message emerged from the 20 examples provided by the company. Promotions with too much information on them are much more likely to be inaccurate. Brands, not technical detail, impress the public.

> **One final consequence of the new regulatory structure has been the re-allocation of consumer credit regulation**

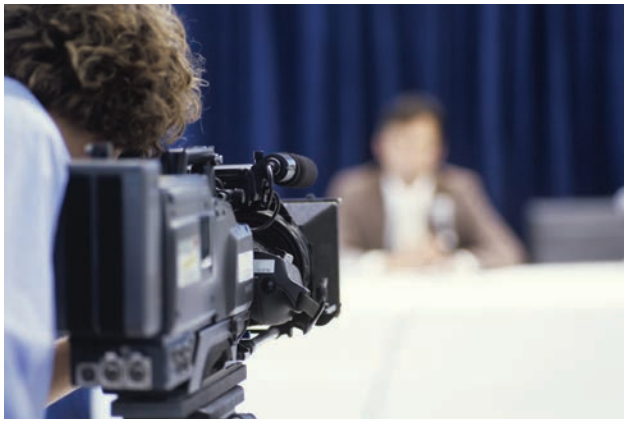
Responsible product manufacturing is another of the Financial Conduct Authority's key areas. I ran both public and private workshops on this on a number of occasions in 2013. Firms need to review their product and market research, stress testing, marketing material and methods and above all else their corporate governance in this area. The crucial task is to encourage widespread challenges to potentially defective products from throughout the business and outside before , during and after their launch. The continued availability of packaged bank accounts, against the background of increasing complaints at the Financial Ombudsman Service shows that this is not being done effectively at least in some of the UK's largest institutions. Some might benefit from the systems and controls and product workshops I am running for Infoline this year.

One final consequence of the new regulatory structure has been the re-allocation of consumer credit regulation from the Office of Fair Trading (OFT) to the Financial Conduct Authority from 1 April 2014. The new rules ("CONC") are already worrying consumer credit firms. The key tasks for them before 1st April are to implement proper procedures for doing creditworthiness checks on their customers before giving them credit, handling arrears and checking their promotional material. These must track the new rulebook.

Most consumer credit (and many other) businesses will need to train their call centres and other staff on how to identify complaints and ensure that they have been properly resolved and a root cause analysis of them has been undertaken. Excessive enthusiasm for closing cases by the end of the next business day so that they do not have to be reported to the FCA (after it has completed the authorisation process) is likely to end in bad case handling and worse analysis of what went wrong. In February, I ran workshops for Infoline on both complaint handling and root cause analysis.

A MULTI-MEDIA FIRM?

I never set out to provide compliance services through multiple platforms but I seem to be doing that now. I am starting work now on the second edition of my book on financial services complaint handling. I have also written (and regularly update) chapters of the Butterworths Financial Regulatory Service looseleaf book, on complaints, the approved persons code (APER) and substantial parts of the Conduct of Business Sourcebook (mainly the really fiddly parts).



In hard copy form, I write a monthly column for Esther Martin's Compliance Monitor on everything from the mechanics of the retail distribution review to a socialist view of financial regulation. I write an occasional piece for Financial Adviser and am going to be providing a regular compliance column later in the year for Money Marketing, both traditional trade papers. Ever since 2002, I have been supplying commentaries for online compliance news services, currently mainly for Wolters Kluwer's Compliance Resource Network with the occasional piece for Thomson Reuters' Complinet. A search on youtube for "Adam Samuel Hong Kong" gives you the good, the bad and the downright ugly of my public speaking in one of my 2010 Hong Kong lectures on financial advice.

Writing has represented a substantial part of my income since 2002. My publishers generally appreciate that good quality writing has to be paid for. Every so often, budgets tighten and the companies concerned go back to third-rate free copy . Readers deserve the real stuff.

Recently I have done most of my public media work for radio, notably Radio 4's Money Box. That programme seems to summon me when its listeners spot any large company breaking its contracts. Pet insurers and internet suppliers have paid up as a result. In the autumn, I had a delightful evening with a group of my old colleagues from Radio Northwick Park in the early 1990s: Ian Daborn, Keith Chilvers and the Lorraine "the Brain" McBride. Twenty years later, we are all involved in some form of broadcasting or journalism.

COMPLAINT HANDLING

My complaint handling work alternates between helping firms defend cases and then assisting their clients to pursue complaints. Sometimes, the skills required are more those of Sherlock Holmes than an Ombudsman. My desperate search for proof that a firm (long since taken over) really had agreed to give a customer two widows' pensions, one for his wife and another for his partner, ended in the successor insurer giving way to everyone's general satisfaction. I also helped an IFA cope with a former adviser having forged customer signatures, by gently telling the product provider that the forgeries (some of which were not very good anyway) were nullities unless the forger is acting on the customer's instructions.

DISPUTE RESOLUTION

I did two main dispute resolution things in 2013: deciding cyber-squatting cases for the World Intellectual Property Organization (WIPO) and the Hong Kong International Arbitration Centre (HKIAC) and teaching at the University of Westminster.

Most of my Panellist appointments come from WIPO. So, I was delighted when Erik Wilbers, who runs that organization's dispute resolution centre, succumbed to years of nagging from me and allowed me to present a paper to the October Panellist's meeting. Richard Lyon and I both talked about the need and how to draft more concise decisions without any loss of analysis and thought on cases. Only controversial points, such as those relating to unregistered trademarks need a detailed discussion.

Simon Newman of the University of Westminster asked me to teach a class with him on cybersquatting for his e-commerce course. We had a good-natured argument on the subject in the Scandinavian Kitchen which we then reproduced for the students. I then took about 16 students and Simon on a walking tour of Fitzrovia, the University's (and my) neighbourhood. Since then, I have run a couple more of these walks, an insight into my post-retirement profession perhaps.

For the fourth year running, I am teaching my comparative international arbitration course at the University of Westminster. I also gave a talk to Richard Earle's international arbitration class at the end of last year on how arbitration agreements really work.

Karyl Nairn of the law firm, Skadden Arps, invited me to deliver my "This train still runs" talk on "SEEE v. Yugoslavia, the most pathological arbitration case of the 20th Century and its good and bad progeny". Largely on her advice, I am doing an updated version of that presentation at the University of Westminster on 13th March. Do please come to what will be the first such occasion in the University's recent history. It will be a great opportunity to meet some of the delightful people I work with and check out some of the local hostelries before and afterwards. The event is free but if you can make it, please e-mail me in advance.

I delivered a paper on "Competence-competence" at the BIICL conference in October. It appears in the February issue of the Chartered Institute of Arbitrator's journal, "Arbitration".

After years of sitting on the Institute's Practice and Standards Committee and Arbitration Sub-Committee including four years as the latter's chairman, I took a back seat in that organization's activities in 2013. I still have the Arbitration Sub-Committee's Practice guidelines done for an English, an International and an UNCITRAL Model Law audience that have never been adopted by the Practice and Standards Committee. They will have to be updated to take into account the new Belgian arbitration statute but can otherwise be obtained by e-mailing me.

The Belgian reform brought back happy memories of helping my old colleague, Bermadette Demeulenaere, when she was writing her book on the previous legislation in the late 1980s. Its dedication "to those who turned this book into an adventure" is one of the best of its type.

And finally... A FEW THANKS

I must thank those who in various ways have contributed to my 2013, notably Bruce Clark, Jan Meek, Chris Hamblin and Malachy McClelland who, in their different ways, have toiled away at the metaphorical Compliance Factory. Rhian Wheeler of Ruby Design has helped keep my website sharp and at the same time has designed a lovely new website for the Compliance Factory. Richard Herman of Arta Creative has been designing this newsletter since its early days. Bronte and Jonas at the Scandi and Pete at Kaffeine have supplied much of the necessary fuel. Richard Earle of the University of Westminster has been a constant guide to me through the complexities of academia.

It remains only to wish you a fabulous 2014!