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# News

## Dear Friends...

**A**s 2020 drew to a close, the usual hopes for a happy new year were replaced by profound wishes that 2021 would be slightly less ghastly. For those who have been seriously ill or lost loved ones in the pandemic, even that might grate.

At the same time, the horrors of recent times have forced people around the world to try harder to work out ways of making things better or just surviving what has been going on.

To me, this past year has been a huge eye-opener. I have always cherished having friends scattered around the world. The sudden increased use of remote communications has brought them closer. Speaking to people in Sydney, Transylvania, Geneva and New York in a single day has become relatively normal. This summer will mark 40 years since I helped vandalise an archaeological dig in Israel with New Yorkers, Esta Algava-Czik and Paul Hanau. Our regular zoom conversations this year have been a key part of maintaining my sanity.

I frequently bemuse people by suggesting that my friend Shahin Toosi plays Virginia Woolf to my George Bernard Shaw. Woolf and Shaw lived in the same building in Fitzroy Square, London, but at different times. Shahin lives in my old flat nearby. As part of Ramadan, last spring, he asked me how he could fulfil his obligation to feed the poor. Fortunately, I still receive the email version of the excellent Fitzrovia News. It has carried a number of appeals in the last year. So, I was able to point

Shahin in the direction of the American Church Soup Kitchen in Whitfield Street.

Under Lauren Everet's highly professional leadership, the Kitchen stayed open through the worst periods of the pandemic, handing out around 150 meals a day to those in real need. Jesse Scott and his colleagues on the door treat everyone as their favourite person or at least as a customer at their restaurant. Some of our banks and utility suppliers could do well to watch and learn!

At this point, though, we both encounter a cultural problem. Shahin and I believe in not boasting about our charitable activities. However, keeping quiet about the recipient organizations just deprives them of valuable publicity. So, I will just say that we both support the Soup Kitchen and then drink coffee together afterwards outside the Scandinavian Kitchen and Kaffeine in Great Titchfield Street.

As we approached the end of 2020, I found two other organizations to support. My younger sister told me about Feastwithus that provides meals for those in need across North London. Fitzrovia News again sent me in the direction of Fitzrovia Youth in Action for another admirable initiative in December aimed at showing young people how to feed local residents in difficulty.

At an individual level, for everyone, there will be people that played a special role in their survival of the past year. My friend and former colleague, Malachy McClelland and I have developed the art of drinking coffee outdoors in a socially distanced way in mid-winter to something



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approximating to a fine art although neither of us is good at remembering how cold one can become, sitting still.

Last April, I started doing a set walk regularly that took me past Karyl Nairn's home at the other end of West Hampstead where I live. Gradually, she started to come out and join me on these excursions, sometimes in the summer with her son. He persuaded me to do more Youtube videos for people of his age and interests. That triggered the efforts that appear on my "Videos for children of all ages" playlist on my



channel. As the lockdown tightened towards the end of the year, Karyl and my twice weekly late-night walks up into Hampstead Village became a vital release valve for both of us.

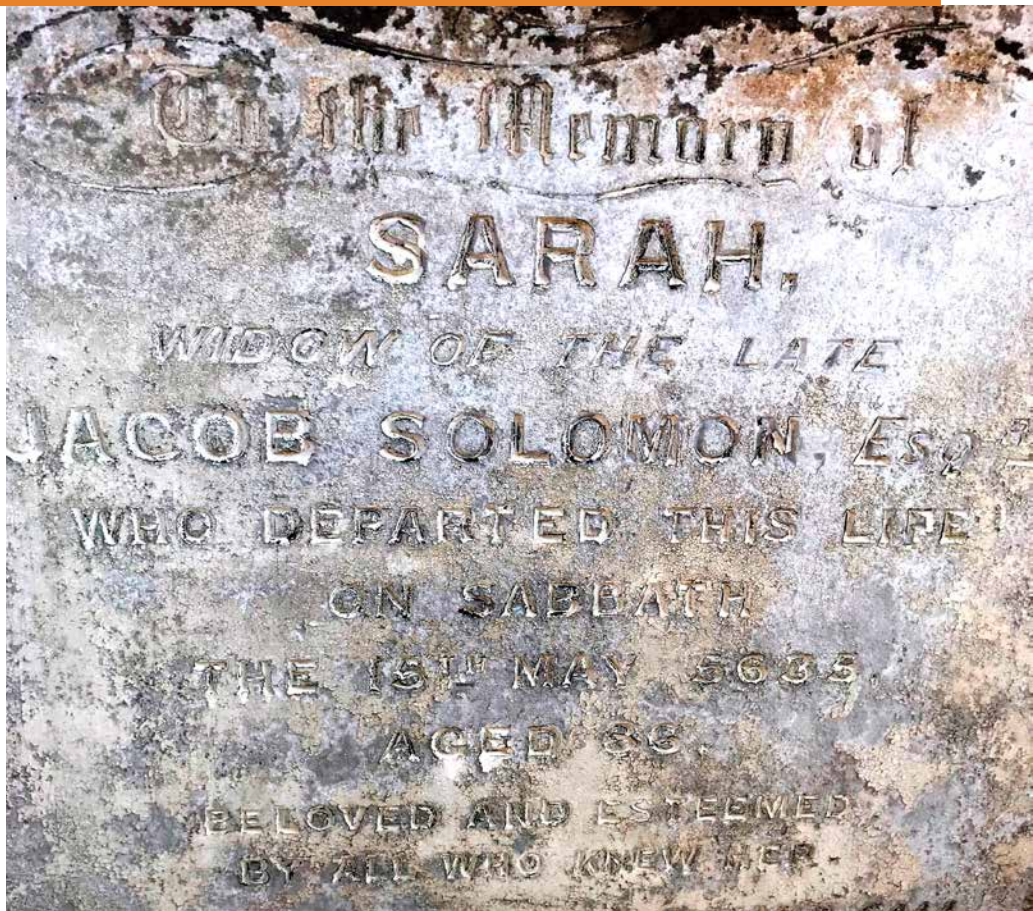
Although I have not left the UK since January 2019, my Swiss friendships, most going back to the late 1980s continue to sustain me. It fits the strange times in which we live for me to go for walks in the dark talking to Myriam Valette about our respective days. My regular Geneva lunchtime companions, Nicolas Ulmer and Doug Reichert now break bread with me across a screen.

The most crucial element of keeping body and soul together has been Michael Burgess' brilliant twice-weekly remote pilates classes for physical misfits of all shapes (and one or two ex-dancers). Before March last year, we enjoyed classes face-to-face in the University of Westminster gym. So, a solid group of us have known each other for some years. Meeting, doing our best to follow the instructions and working hard to keep each other going has contributed massively to everyone's wellbeing. It has also been fun to make friends with Cary Bigelow and Monica Burgess of Michael's extended family across the Atlantic. We look forward to welcoming them to the University when the pandemic is over.

More generally, 2020 saw a sprouting of free online seminars which would previously have been out of geographic or intellectual range for me. I have participated in a number of meetings of the Swiss Arbitration Association of which I have been a member since the late 1980s. It has been fun to meet old and new friends there and keep up-to-speed with technical developments.

Equally, I have listened in on some British Institute of International Comparative Law sessions on the removal of statues and the indifferent performance of the European Court of Human Rights (decisions are good but take an eternity and non-compliance has no effect). The first session renewed my campaign to have the BBC remove the statue on its London main building on the basis that 1) it is ugly and 2) the sculptor, Eric Gill, had an unusually horrid personal life.

2021 will hopefully be the year of the vaccination. I volunteered as a guinea pig on



one of the trials. The main reason for being proud of this is the 50% chance I gave myself of being vaccinated before anyone else! It just seemed smart. Then, having been "unblinded" and told that I had received a placebo, I promptly acquired a first "real" jab and an appointment in May for the second one.

Generally, the Samuel family seems to have had a pretty good lockdown. We all seem to have worked well together. In the process, I have discovered some fascinating things. My 90-year-old father is still working, running groups for medical students enabling them to discuss their relationships with their patients. He also has one of the best cvs I have seen in years. I have sent it to a number of jobhunters, as an example of how to present their experience in a punchy effective way. Having my niece Rosie working for me in the summer made me think that as a family we ought to do things where I am at my best (not family weddings!). This has led to some delightful socially distanced walks with my father and London-based sisters.

People think of my family as a London affair. However, some of my father's ancestors actually came from the South-West of England. My great-great-grandmother, Sarah Solomon was born with the surname Phillips in Plymouth

in 1789. On an autumn trip to Willesden Cemetery (the Westminster Abbey of Ashkenazi English Jews), I managed to find her grave. She died in 1875 two years after the opening of the cemetery, making her plausibly the oldest person in the place.

On the work front, I have either been extremely lucky or reaped the rewards of many years of hard struggle (you decide). I actually made slightly more money in 2020 than the previous year although 2019 was not a great one. Where I have done extremely well in both years is in acquiring customers that pay promptly. In a pandemic, this is a joy. Even when I suggested to a small firm that it make a charitable donation instead of paying me, it emailed me the credit card receipt the following day!

Finally, I will soon complete my first year as a non-executive director of the Financial Planning Standards Board. For obvious legal reasons, I cannot say a great deal about this. I have learned much about an enormous range of subjects, perhaps not least of which are the exciting developments in the remote supervision of exams.

As in previous years, this newsletter splits up into the main areas of my professional activities. Hopefully, though, the next section on training will be of general interest.



# TRAINING GENERALLY



**Even more challenging has been the way in which so many firms have not equipped their staff properly with laptops and cameras from which they can use Zoom.**

**M**ost of my 2020 work involved delivering training for two companies: Andrew Hilton's CTP in the UK and Marios Sciathas' EIMF in Cyprus. Both have carried on through the Covid storm using Zoom to deliver public and in-house training. So, to a lesser extent has UK Finance, the trade body for mortgages and consumer credit firms.

Remote training has a number of advantages, notably the ease with which the trainer can share examples on the screen. Each participant can see exactly what we are talking about when the text however small is right in front of their eyes. The same applies to rules and regulatory guidance. They can just be put up on the screen. This makes handouts far less important than they are in a face-to-face environment. In addition, running or attending a course in shorts and without shoes and socks on is physically rather liberating!

There have been ups and downs with lockdown training in both the UK and Cyprus. Initial enthusiasm for doing everything remotely dampened down sharply when larger firms realised that they were going to have to reshuffle their staff to cover gaps created by furlough schemes and redundancies. Hopes that having to do things remotely would only be temporary then created a further dip followed by the realisation that the world was not going to "get better" soon. These fluctuations do not make it easy to put on the right events at the right times.

Even more challenging has been the way in which so many firms have not equipped their staff properly with laptops and cameras from which they can use Zoom. The concerns about security issues with that software have long outlasted the weaknesses concerned. It is also curious that the other software providers have not sprung up to compete effectively in this area, notably by including an easy-to-use polling function and the

ability to see all the participants while screen-sharing. Andrew and Marios have been admirably steadfast in advocating the use of the correct equipment including cameras. UK Finance has now embraced Zoom which will dramatically improve the interactivity of their events.

All remote courses are limited to half-day units. Tackling a technical subject through a screen for longer than that is much too tough for both participants and trainer. This has taken me back to my old and much preferred way of working – in half-day blocks, typically mornings. A challenging comment that could be quite destructive on a one-day course becomes what everyone has to think about between the two sessions. It certainly gives me an opportunity to mull over the problem before the programme restarts.

Three hours in front of a screen sears both eyes and brain. So, one cannot put anything too serious in the diary for the afternoon. This is even odder for my Cyprus courses. With the two-hour time difference, a typical day for me "there" might start at 6am with the course going from 7-945 UK. time. After that, the rest of the day is theoretically free although preparation for other events is part of the job. However, the coffee required for early morning alertness does not make it easy to go back to bed. It is better to do something completely different, typically exercise-related, immediately afterwards.

# FINANCIAL SERVICES

**F**inancial promotions, product governance and complaints remain the core areas on which I have run training courses this year.

The Cypriot financial sector is still heavily focused on contracts-for-differences sold on a non-advised basis. As a result, I have run a number of short sessions and a webinar on appropriateness testing, for EIMF. The idea is that where customers buy complex products without receiving advice, they should be tested to see if their knowledge and experience makes them appropriate for what they are buying. A customer who fails the assessment only receives a risk warning. This raises some interesting issues as to whether a firm should do business with a customer that is "inappropriate". Neither the EU materials nor national regulators give a clear answer.

I handled a complaint about this subject for an elderly family friend. My first reaction was to ask for a copy of the appropriateness test since he seemed certain to have failed it. The Cypriot firm had never carried one out. After some nerve-jangling haggling, the firm paid up. Quite improperly the business insisted on a non-disclosure agreement before paying. So, I ensured that the complainant passed me all the papers before he signed it! I then passed the file to CYSEC, the Cypriot securities regulator.

As part of a private course for an EIMF client, I found myself teaching advice standards to a Cypriot private bank. I used to do a great deal of this in the UK. However, this has broadly disappeared in recent years despite concerns expressed by the Financial Conduct Authority (FCA) about the standards of wealth managers. EIMF also asked me to run some introductory courses towards the end of the year for their UK clients, including a new one on the Code of Conduct which has applied to the vast majority of the staff of businesses here since 31 March as part of the Senior Management Regime.

The main development in my financial services training is the gradual breaking up of some of the courses into specific product areas, investments and pensions, insurance, mortgages and consumer credit. The difficulty in using a chatroom on zoom when participants may not have cameras



prevents the use of break-out sessions to ensure that everyone has something to contribute in their particular area. This process led me to run a fun new half-day course for CTP on UK general insurance promotions. There are very few applicable rules but enormous numbers of weird and wonderful non-compliant examples.

I enjoy the mix of the UK and Cyprus. Brexit does not change anything significant in the areas where I operate. So, our rules will continue to be aligned for many years. The UK, though, has always taken a different approach to presenting things. The Financial Conduct Authority has always tried to incorporate the European Directives,

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subordinate legislation and guidance from the European Super-Regulators (the three levels of EU materials) into our rulebooks as if they were a single entity. By contrast, like other EU countries, Cyprus just expects regulated firms to read and apply the three levels of rules and guidance.

However, one disappointing feature of my Cyprus experience is the absence of participants from other parts of the EU. EIMF's pricing would make it much cheaper for a German or Dutch participant with decent English to buy their continuing professional development from it than to purchase a local course. Some UK participants on the Cyprus courses have told me how much they enjoyed seeing how another country tackles the same issues using an almost identical rulebook. Pan-European remote training should work but right now seems to be a step too far.

I have tried to embrace the new media scene in a variety of ways, notably by recording some Youtube short talks and interviews, the latter mainly conversations on money laundering issues with Malachy McClelland. He specialises in remediation projects usually instituted when the regulator has found major issues with the firm. Usually, it would be much cheaper to do things correctly in the first place. Much of what we have been talking about concerns the Fourth and Fifth Money Laundering Directives. In one of our more graphic efforts, we showed how to find all the key material in the financial crime area. In any event, our set of Compliance Factory AML talks could provide helpful training for both senior management and new recruits to anti-money-laundering teams.

I have recorded my own talks straight to camera on complaint handling, financial promotions and advice standards. There should be more on the way shortly, notably on navigating the relevant provisions of the FCA rulebook and the Financial Services and Markets Act (FSMA).

Much of the rest of last year's work concerned writing. My regular column for Esther Martin and Compliance Monitor goes back 17 years. The average article length is currently about 4,000 words. Esther tends to commission me to write seriously in-depth



pieces, often on topics where she thinks that other contributors will fear to tread.

I also continue to update large chunks of Butterworths Financial Regulatory Service's loose-leaf, adding a new commentary this year on product governance both under the FCA PROD rulebook (investments and insurance) and RPPD (the regulator's guidance which covers the rest). I regularly upgrade chapters on complaints, investment financial promotions, investment advice, pensions, approved persons and the code of conduct applicable to SMCR firms and some other bits of the COBS (conduct of business sourcebook) rules for investment firms.

Every six months, I refresh my commentary for Lexis-Nexis on large chunks of the UK Financial Services and Markets Act. Much of this deals with subjects that most people would expect me to cover: complaints, authorisation, Upper Tribunal challenges to the regulators' decisions, discipline and investigations. I also tackle the listing and prospectus provisions of Part 6 and other parts on auditors, actuaries and insolvency. Recently, I added all the Schedules to my list. This last task took me into some very unusual areas for me. I had to learn all about passporting in the EU knowing that the end of the Brexit transitional period would result shortly afterwards in its disappearance from the UK legislation. Still, historians will be able to find an account of how the rules were supposed to work at the bottom in the relevant commentaries.

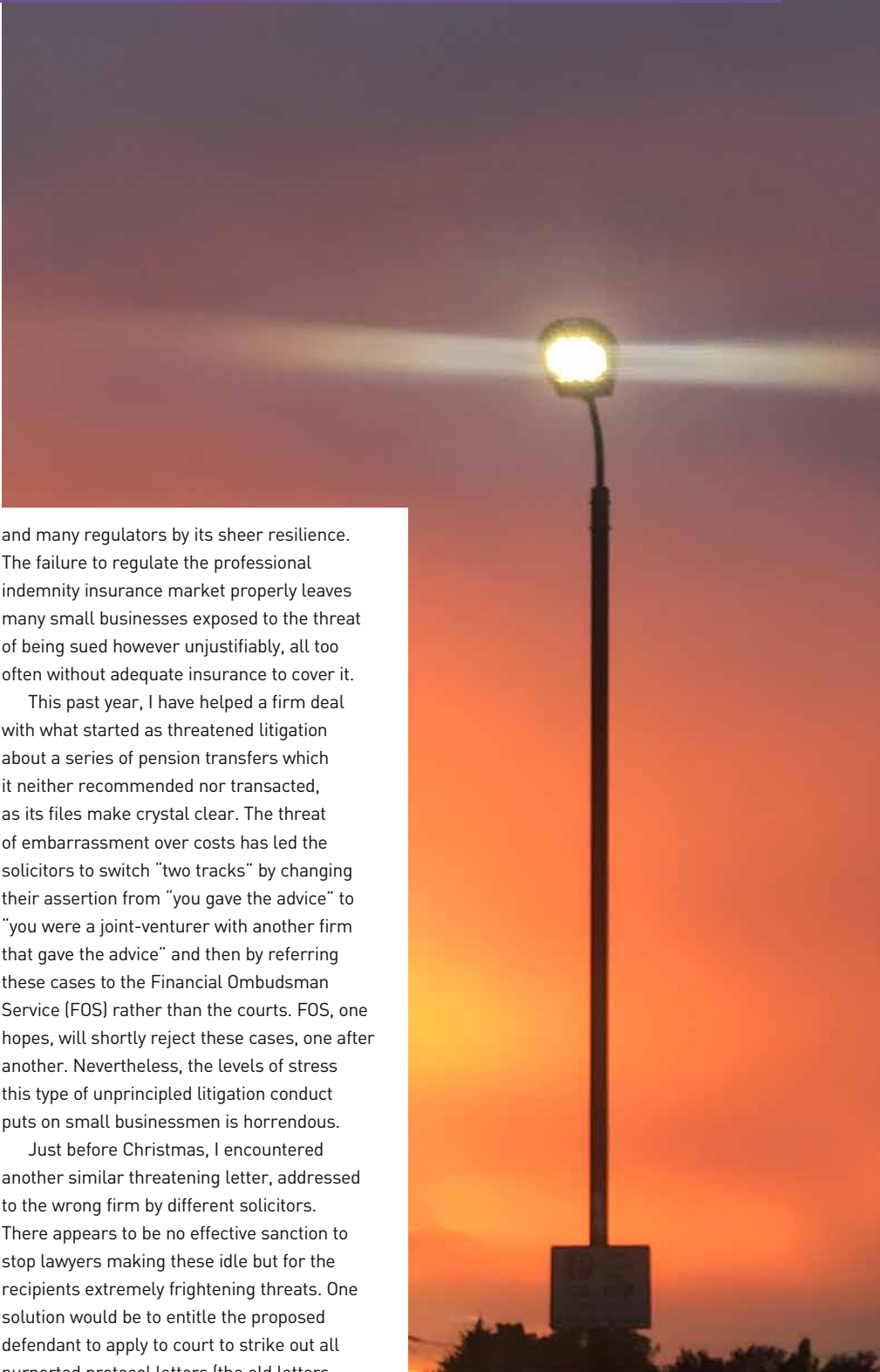
This leads naturally to the UK's real departure from Europe at the end of last year. In 2020, a good part of my work on updating my loose-leaf chapters and FSMA commentary has involved painstakingly working through the often quite trivial Brexit changes to both the Act and the rulebook. The UK has committed itself to retaining virtually all of the customer-facing EU materials. Since the trade deal with Europe appears to exclude financial services, it would be good to see the FCA removing some of the less appealing rules from our current regime, a number of which are the result of the UK misunderstanding EU materials.

Almost all of my other financial services work has involved keeping small financial adviser firms out of trouble. The UK independent sector continues to astonish me

and many regulators by its sheer resilience. The failure to regulate the professional indemnity insurance market properly leaves many small businesses exposed to the threat of being sued however unjustifiably, all too often without adequate insurance to cover it.

This past year, I have helped a firm deal with what started as threatened litigation about a series of pension transfers which it neither recommended nor transacted, as its files make crystal clear. The threat of embarrassment over costs has led the solicitors to switch "two tracks" by changing their assertion from "you gave the advice" to "you were a joint-venturer with another firm that gave the advice" and then by referring these cases to the Financial Ombudsman Service (FOS) rather than the courts. FOS, one hopes, will shortly reject these cases, one after another. Nevertheless, the levels of stress this type of unprincipled litigation conduct puts on small businessmen is horrendous.

Just before Christmas, I encountered another similar threatening letter, addressed to the wrong firm by different solicitors. There appears to be no effective sanction to stop lawyers making these idle but for the recipients extremely frightening threats. One solution would be to entitle the proposed defendant to apply to court to strike out all purported protocol letters (the old letters before action) with an automatic right to costs on a full or indemnity basis if successful. The threat of this might make some lawyers think twice before making some of their more specious allegations. The real solution, though, would be for an effective Solicitors Regulatory Authority to appreciate the harm that solicitors do by misusing their headed notepaper and strike off some solicitors for making idle threats to ordinary members of the public.



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# DISPUTE RESOLUTION

**S**ince last May's newsletter, I have been doing my usual mix of actual dispute resolution, teaching, lecturing and writing.

Since I joined its domain name panel in 2005, I have decided 156 cases for the World Intellectual Property Organization (WIPO). As usual, this last year's caseload has been mixed in with an occasional dispute from the Hong Kong International Arbitration Centre.

My bi-monthly column in *Alternatives*, the journal of the US International Institute for Conflict Prevention and Resolution (CPR), mixes both mainstream arbitration law viewed from Europe with a look at some of the more alternative ways of resolving disputes generally. So, an article on the UK Supreme Court decision in *Halliburton* followed a discussion of neighbourhood justice, based on experiences friends and I have had of this in a variety of countries. *Alternatives'* editor, Russ Bleemer drives me on with his boundless enthusiasm and encouragement.

One of my *Alternatives* article was picked up early last year by Larry Newman of the International Arbitration Club of New York. He invited me to talk to the club on the judicial review of the merits of arbitration awards, the subject of my first academic publication in 1985. He then kindly agreed to me to talking to the Club's December meeting about *Halliburton* and bias in English law. The Club is a mixture of old friends from the past, contacts of contacts

and just new people for me to meet.

My University of Westminster teaching is well underway as I write. My boss at the University, Richard Earle, allowed me to speak to his International Commercial Arbitration in England class on the *Dallah* case. I decided to bring the talk up to date by covering the abysmal English Court of Appeal decision in the *Kabab-Ji* case about a Lebanese takeaway chain and the unimpressive UK Supreme Court judgements in the *Enka v Chubb* case.

On each of these occasions, the English courts have made fools of themselves internationally by either misapplying a foreign law (*Dallah*) to the scope of the agreement or by actually (*Kabab-Ji*) or threatening to apply the law chosen to govern the merits to the arbitration clause rather than that of the place of arbitration (*Enka*). We now have to teach students that an arbitration clause that could end up being discussed in the English courts should have a clear stipulation as to which law governs that clause and it should always be the seat of arbitration. Various arbitration rules probably need to be

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amended to reflect this and avoid these tortuous arguments in the English courts.

Finally, this March, I repeated last year's delightful experience of helping to judge the *Vis East* Moot. This competition for budding arbitration lawyers was set up by my friend, Louise Barrington whom I first met singing in a pub many years ago. Louise uses as arbitrators, an intriguing gaggle of former participants and coaches and friends of hers from the arbitration scene. The result is a friendly unstuffy atmosphere and my exposure to people half my age and probably twice my competence.





THIS SHOULD BE IN MY YOUTUBE VIDEO  
"THE END OF THE LINE!"

## AND FINALLY...

It remains only to thank a string of people that cannot be named in full. Kevin Sheridan stepped up and sorted out a difficult mess with my websites. Bruce Clark continued to watch over what I do, admittedly at something of a distance this year. I remain grateful to a community of ex-Insurance and PIA Ombudsman people with most of whom

I worked in the early 1990s. They keep in touch with me in a variety of ways, sharing important information about our old colleagues, playing the odd remote hand of bridge and occasionally sharing socially distanced remote coffees and urban hikes. Chris Hamblin has edited this newsletter from the very start in exchange typically for fish and chips which I will not be able to

give him, one fears, for many months yet. It remains only to wish everyone a very much better year than the last one. To all of you, thank you,