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# AS news

## Dear Friends...

**T**wenty years ago, I wrote the first of these newsletters. Since then, their purpose has remained broadly the same: an attempt to explain what I have been doing in the past year while always remembering the main comment on the first effort, "keep the restaurant and cafe reviews in". So, with that all in mind...

2018 was the year when, as the UK descended into Brexit madness, I slipped back into normality after spending much of the previous three years, struggling with the second edition of my book about complaint handling. Notably, I re-discovered the idea of travelling for pleasure and visited a range of my favourite people in Switzerland (my home in 1985-9), the USA and Israel. In the last year, I have also done four trips to Cyprus to run financial services compliance training courses.

At times, my connections to these four countries "merged" into each other. Twice, I was able to carve out weekends in Israel while working in Cyprus. My US end-of-summer excursion was full of visits to people I know from Switzerland. Trips to that country have not seemed complete since the early 1990s without lunch with two Americans, Nicolas Ulmer and Doug Reichert. I also try to look up their compatriot, Karen Druckman, who essentially does my old Lausanne job.

In Switzerland, I stay mainly in two places. In Sion, in the heart of the Alps, I go skiing and, when snow and flexible knee joints are in short supply, catch up on my work-related writing in the public library, the Mediatheque. Myriam Valette and her family live there and have been entertaining

me during these trips since the birth of this newsletter. Lausanne, my home for four years, brings me back into contact with the friends I made during that time, the Swiss legal scene and chocolate. The Braendlin family, there, have been putting me up for much more than 20 years, a massive undeserved reward for playing monopoly with Andreea B rather too competitively in the late 80s.

My late mother discovered the Angehrn's home-made chocolates in Lausanne in the late 1980s. The shop is old-fashioned but the couple who own it produce fabulous mixed truffles which my family have been enjoying for over thirty years.

People often ask me how my four years living in Switzerland went. The strange answer is that they improve every year. This is not rose-tinted retrospection. During the late 80s, I made friendships that have flourished over time in ways that I never expected. This last year, I have enjoyed lovely times with old colleagues at the Swiss Institute of Comparative Law, such as Anne-Sophie Rieben, Christiane Serkis and (my first running partner) Martine Do-Spitteler, not to mention Andreea Braendlin. These are my friends, not just ghosts of my past.

My Swiss connections played a powerful role in my first trip back to the US in almost a decade. Since 1987, my New York bolt-hole has been the flat of the wonderful Kent McKeever. He came on an exchange visit to Lausanne in 1986. I remember buying him a couple of beers and failing miserably to answer his questions about the availability of local horse racing. Kent



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taught me the intricacies of baseball when I spent a summer at his place, preparing for the New York Bar exam in 1990. We had a wonderful time together at Yankee Stadium at the end of last August, by way of a recap. He is a fan of the New York Mets and I follow the Redsox, both for different reason sworn enemies of the home team.

After a weekend in upstate New York with childhood friend Rob Norman and his partner, Dee Salomon, in their palatial country home, I went off to join up another link to my Swiss past. Two students from Kansas City,

# DEAR FRIENDS CONTD.



Shelly Tierney and Dee O'Hair, met me in a Lausanne University café in the late 1980s. Dee did some of the proof-reading for my 1989 arbitration book. Shelly, her twin sons and her partner, Jeff Forker, gave me a royal re-introduction to all things Kansan in my first visit there in more than a quarter of a century. This included Shelly taking me to the Negro Leagues Museum and Jazz Museum housed in the same building. The former enabled me to catch up with my knowledge of such greats (with names to match) as Satchell Paige, Cool Papa Bell and Josh Gibson. Jeff's question to me about when UK soccer became racially integrated is of particular interest in the light of recent racist incidents in football stadiums here and in other European countries. (There was never a colour bar and Arthur Wharton was the first minority professional player in the 1880s, with a couple of amateur predecessors.) From Kansas, I headed to Chicago to meet up with Dee O'Hair. She has worked as a Securities and Exchange Commission lawyer for some years. So, we shared some stories of Switzerland and Kansas and talked a little "shop" while enjoying the stunning views that the Windy City has to offer.

Back in New York, my Swiss past in both law and radio caught up with me. Richard Gearhart and I wrote one of the first articles on the Court of Arbitration for Sport in the late 1980s. He later borrowed a suit from me in January 1990 to wear while being sworn in as a member of the Massachusetts bar when

I was studying in Boston. Now he runs his own intellectual property law firm and he and his wife, Elizabeth, kindly invited me to join them on their radio programme "Passage to profit", promoting local businesses offering new inventions. My interaction with their "Credit Doc", Juan Anderson, generated a "your friend's done radio before" comment from the studio manager. I first broadcast on Lausanne socialist radio station, Radio Acidule, in the late 80s with Christiane Jacquet, John Peterson and Françoise Becker.

My time in New York gave me a chance to catch up with friends from other bits of my past. In 1980, I shifted a fair amount of mud at an archaeological dig in Israel with Esta Algava and Paul Hanau. Seeing them in New York thirty-eight years later alone justified that experience. I taught Olga Sekulic on a University of San Diego arbitration summer programme in the late 1990s and she and her husband Brian have been taking excellent care of me in New York and Newark ever since. Finally, it was splendid to encounter the exciting if predictable rise in the NYC compliance world of Louise Coleman who used to corral me into running compliance workshops and conferences for Infoline in London.

I made more visits to Israel last year than in any single year before. My Cyprus clients, the European Institution of Management and Finance (EIMF), twice booked me to run training courses on either side of the weekend. This gave me the opportunity to make two short trips to stay with cousins in the Holy Land, the Dalnekoffs in Jerusalem and the Nevos in a kibbutz in northern Israel. Last April, a large chunk of my immediate family headed to Tel Aviv and Jerusalem to attend a barmitzvah of an Australian cousin.

My sister, Claire (the sporty one!) organized daily beach volleyball in Tel Aviv. There was no scoring and participation - not talent - was the only thing being valued. This led to one of my more unusual publications.

Geoffroy Braendlin, the son of my Lausanne friends, Andreea and Jean-Nicolas, has a sports journalism website for which he has been nagging me to write for some time. I think that he expected something erudite about the nature of cricket. Instead, I wrote a piece for him on the peculiar connection between the Samuel family, beach volleyball and the de Coubertin principle (it is taking part not the winning that matters).

More recently, this March, I attended a conference at Haifa University on collective redress without being invited to speak or do anything else. The organizers could not have been more welcoming and the conference was of excellent quality. The highlight for me came with the discovery that one of the speakers was Claudia Lima Marques. She and I had adjoining offices for a very loud six-month period at the Swiss Institute of Comparative Law in the late 1980s in Lausanne. (Neither of us is known for having a shy, retiring personality.)

Work has taken me to a variety of exotic and not so exotic locations. In Cyprus, Marios Siathas and his EIMF team have made enormous efforts to welcome me as I to try to understand the complexities of this divided European / Middle Eastern island. In Nicosia, my two favourite tourist venues are the Cyprus Museum (a miniature and slightly chaotic version of the British Museum) and the motorcycle museum. I am not particularly interested in motorbikes. However, if the owner of that museum finds you interesting, he makes you a free coffee and tells you more about Cyprus from an insider's point of view that you can learn from a guidebook. It was a fascinating coffee with a few antique motorcycles thrown in.

Business has always led me to explore bits of Britain that I would never otherwise reach. I recently spent a delightful 24 hours in Barrow, waving at the Refreshment Room at Carnforth (built for the film Brief Encounter) on the way there. My sister Claire and her husband Julian have kindly put me up and/or fed me on various trips to Leeds.

I also had a delightful trip to Plymouth and Exeter to follow in the footsteps of some of my early 19th century ancestors and some 21st century cousins, courtesy of Penelope Wellbourne and Rachel, Margot and Janet Samuel. Thanks to Janet, I can now say politely that I have fed a row of Samuel family cows.

Closer to home, I rely on an endless stream of coffee shops and bakeries. A beneficial side-effect of some ear problems in recent years has been the discovery of Aux Pains de Papy, and its appropriately exquisite croissants, situated opposite the Royal Nose, Ear and Throat hospital near Kings Cross,. My friend and colleague, Malachy McClelland, and I discuss financial crime and other compliance-related subjects at Hart & Lova, a Czech equivalent just around the corner from Kilburn High Road Station. Since I still have a half-share of an office in the University of Westminster in my old neighbourhood of Fitzrovia, the three coffee shops in Great Titchfield Street - the Scandinavian Kitchen (often called "my office"), Kaffeine and HT Harris - have provided extensive crucial coffee and nosh to me, colleagues from the University of Westminster and a variety of financial services compliance visitors. Luce e

## Amidst all this light-hearted stuff is the gloom of Brexit which hangs over me, London and my main sources of work.

Limoni at the southern end of Grays Inn Road has supplied most of the heavy work-related eating of the year. There should also be a shout-out to the Sea Shell near Marylebone Station for a delightful fish n' chips with my old school friend, Rob Norman, earlier this year.

Amidst all this light-hearted stuff is the gloom of Brexit which hangs over me, London and my main sources of work. The UK's financial services regulators have a complete defence to any argument that they are not doing their job properly, namely that they having to do an absurd amount of work to manage the Brexit process. Uncertainty breeds a lack of investment. Service businesses like mine are always going to find it difficult to realise their potential in this febrile environment.

It is also increasingly embarrassing to have to explain abroad why Britain has chosen

to put the clock back to 1955, damage its trading relations with its largest trading partners on the basis of recovering a sovereignty that it lost almost 2,000 years ago. I find it equally difficult to comprehend what appears to be a connected increase in race-based crimes in the UK and a pathological outbreak of antisemitism in the party that might end up ruling Britain after the next election. My ancestors were economic migrants to the UK and Australia but their migration saved them or their descendants, from annihilation.

It is not just the UK's bizarre behaviour since 2016 that is worrying. Central and Eastern Europe has seen a rise of the acceptability of ultra-nationalist, borderline fascist politics. A polarised nationalist world, with trade wars and tariff barriers breaking out, resemble the 1930s too strongly for comfort.

As usual, with this newsletter, the next sections cover my activities in the two main areas in which I work: financial services compliance and dispute resolution. There is, though, an increasing overlap between the two. The last part of the newsletter should bring everything back together.



**In some ways, the type of financial services work I has not changed since 2003 although the balance between the various types of activities and the subject-matters involved fluctuates all the time. I still advise, fix problems, train and write.**

**T**hose of us who can sometimes extract firms and individuals from unpleasant problems constantly regret that people do not ask us to prevent them from ending up in the scrapes concerned. This old lament took on a new meaning in the middle of 2018.

A firm that was in serious trouble persuaded the regulator to allow it to keep going by asking me to review its procedures. The compliance manager may have taken my suggestion that I interview some advisers a little more seriously than I intended it. He arranged for seven of the firm's nine consultants to explain to me how they started client relationships, provided financial advice and charged for it. This was fascinating. The advisers' different approaches to their job and charging for their efforts affected the procedures and documents I drafted. Their enthusiasm for learning about and discussing compliance surprised both me and the firm's senior management. This type of procedural review would benefit all firms and makes nonsense of the choice of many to use standard off-the-peg procedures and client agreements. While regulators often express concern about the fairness of advisers charges, I worry almost as much about whether firms know what they are charging and why. These concerns extend well beyond financial services.

When firms encounter difficulties, commissioning a proper independent review of procedures and client agreements seems to come within what Financial Conduct Authority's calls "mitigation" of the problem. Experience suggests that this type of promise encourages the regulator (rightly) to direct its limited resources to other businesses.

In recent years, much of my revenue has

come from a standard suite of compliance training courses that deal with the way firms interact with their customers: handling complaints, product governance, financial promotions and digital media. The variety comes from the different types of businesses that send participants along to the public courses I run or book me for private sessions.

In twelve December days, I ran two in-house financial promotions courses in England, one on stakeholder pensions and the other on contracts for differences, alongside two public courses on investment promotions and a building societies product governance course. That month had started with the tail-end of six days training in Cyprus that covered digital media and other promotions, product governance and complaint handling from the perspective of the EU in general and Cyprus in particular.

The more promotions courses I run, the more I become aware of the rules of the advertising standards authorities. The two UK codes area help to supplement and explain much of what is in the FCA's rulebook. Its Cypriot sister organisation sent me an English version of its code which operates in a very similar way.

In the last year, the vast majority of my training work in the UK has been done through the training company, CTP. My main contact there, Andrew Hilton, and I go back to the late 1990s.

My Cyprus work has required me to learn a great deal about the effectiveness of the European Securities and Markets Authority's (ESMA's) measures to deal with contracts for differences. ESMA requires firms to disclose in all marketing material in this area the percentage of retail accounts that lose money (a figure that that should always

exceed 70%). This has proved stunningly ineffective. There seems to be a number of reasons for this. First, customers in this strange gambling area expect to be among the lucky few who will profit. Secondly, most of the disclosures are not correctly spaced and boxed, as required by ESMA, and so can easily be missed. One firm cheekily noted under the warning about investment losses that "past performance is not a reliable indicator of future performance" and still avoided having its authorisation removed!

After years of having my brains picked about financial crime issues, I decided to pass some exams in that area: the CISI's Certificate of Financial Crime and the international CAMS (Certified Anti-Money-Laundering Specialists) exam. Malachy McClelland and I have also put together a course on this subject.

A surprising amount of my work involves writing. My almost monthly Compliance Monitor column is fifteen years old now, having started under the editorship of Timon Molloy now continues under Esther Martin's eagle eye. Mary Stevens at Wolters Kluwer takes my more newsy "Compliance Report". These, though, pale behind the huge amount of writing and updating I do for the Butterworths Financial Regulatory Service and its associated commentary on the Financial Services and Markets Act. My writing here covers the subjects that one might expect me to tackle: the authorisation regime, the operation of the Upper Tribunal, financial promotions, complaints and the codes of conduct for approved persons and those subject to the senior management regime. I also handle some of the more abstruse topics such as the listing, auditor, actuary and insolvency parts of the Act.

# DISPUTE RESOLUTION

**There are two distinct parts to what I do in the area of dispute resolution. Financial services complaints training, consulting and case handling typically involve quite different activities from my international dispute resolution work.**

**O**n the financial services side, firms use me to help them deal with complaints and present cases on behalf of their clients. I also try to resolve problems within organisations, often when advisers retire or leave firms.

To prevent these issues going out of control, I also draft complaints procedures and occasionally become involved in straightening out agreements between firms and their advisers.

There are enough ambiguities in the UK DISP rulebook to generate a steady stream of enquiries both inside and outside training courses. These, and a never-ending stream of changes to those rules, have kept me usefully occupied, advising, training and writing about the subject for the various publications mentioned in the previous section.

My complaints training in Cyprus is based largely on the ESMA/European Banking Authority (EBA) Guidelines with some help from the Cypriot Law on the Ombudsman. The Guidelines are silent, though, whenever an important issue arises, such as how to deal with incredibly minor complaints or the standards to be used when assessing cases. Sometimes the results are surprising. In Cyprus, all regulated financial services firms have to deliver a final response to every complaint of whatever seriousness. However, they can do so orally. With the modern tape-recording of telephone calls, this makes some sense but can lead to chaotic record-keeping. The low maximum Ombudsman award limit of €50,000 in Cyprus and lack of any obligation on the part of the firm to comply with decisions are issues that the UK put behind itself in 2001.

The big news in Britain on the Ombudsman front in 2018 was the increase in the size of small businesses that can refer complaints to the Financial

Ombudsman Service and a major lift in the maximum award limit to cope with this. The regulator has firmly opted for an Ombudsman approach to small and medium sized enterprises' problems. The FCA previously relied, in this type of situation, on the major accounting firms to verify decisions made by banks, as part of a pro-active review of their sales of certain interest rate hedging products to commercial borrowers. In another case, where banks were mistreating their business customers, the regulator used a pair of retired High Court judges to look at the banks' decisions. All of these approaches have their problems. The Ombudsman, though,

**... dispute resolution involves rather softer skills and a gentler touch, particularly complaints made by long-standing customers...**

is by far the least worst answer because of the way in which it can acquire institutional technical expertise of financial services wrongdoing in a way foreign to most legal systems, accountants and retired judges.

The recent Haifa conference I attended on collective redress brought it home to me that lawyers and academics consider the handling of mass financial services complaints in the UK to be quite a separate subject from class action or collective redress litigation. The key difference is that with financial services problems, customers and products rarely have a one-size-fits-all feature, making it much more difficult to create an umbrella settlement arrangement for all complainants. Having said that, the arrangements for resolving the effects of environmental catastrophes might learn something from the slightly messy but often effective British combination of business reviews backed up by an Ombudsman service and regulatory enforcement. A combination of both approaches would work well. The levels of compensation actually received

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by victims in the UK mass complaints environment compare highly favourably with their class action counterparts.

Sometimes, though, dispute resolution involves rather softer skills and a gentler touch, particularly dealing with expressions of dissatisfaction by long-standing customers or reluctant complainants. In 2015, the Financial Conduct Authority expressed concerns that consumers who did not want to complain were being put through a heavy, formal process. There is no need for firms to do this. They just have to avoid the word “complain” or “complaint” and other unnecessary formalities, when communicating with customers who do not want a formal process but have expressed dissatisfaction with the business.

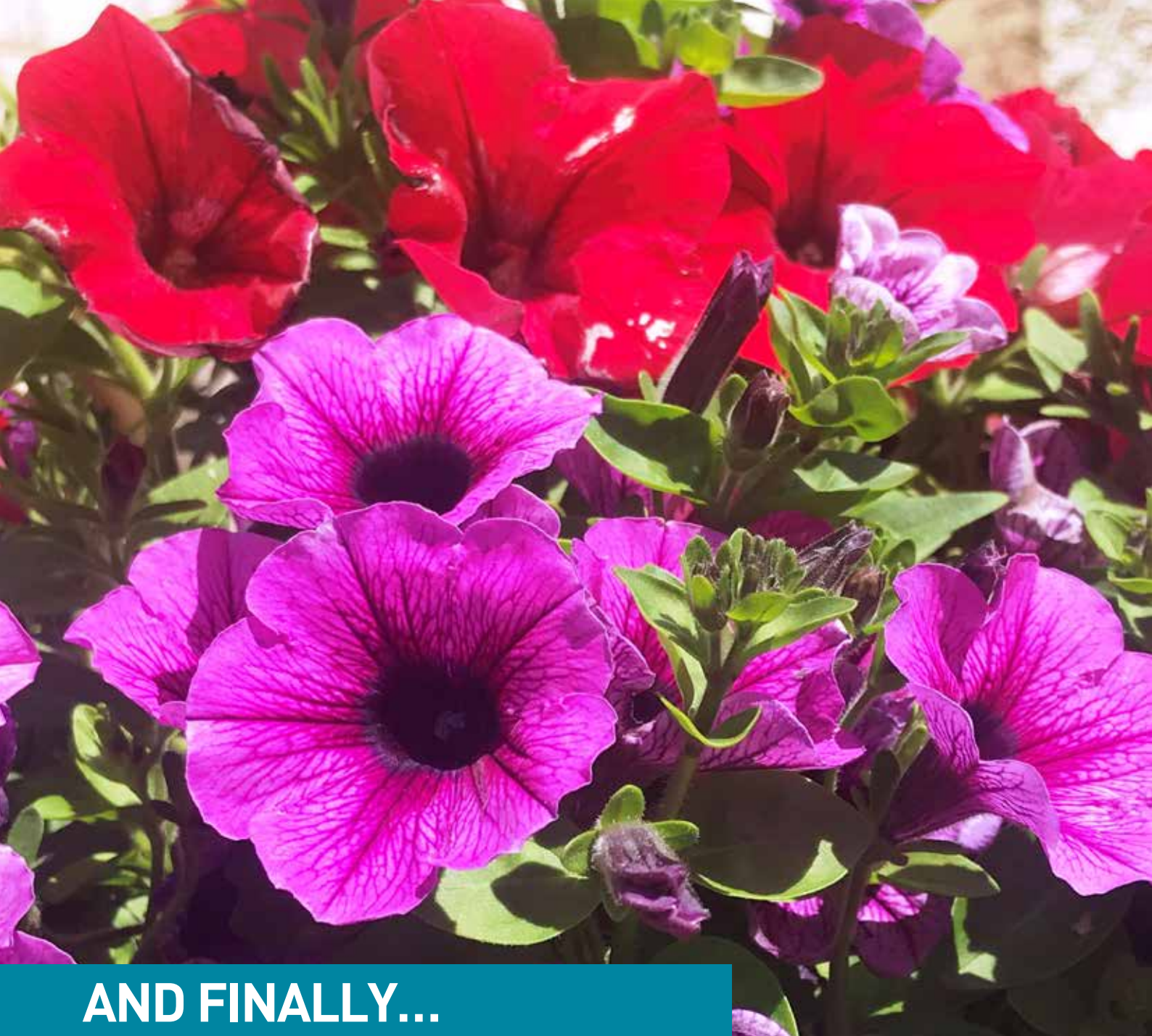
Often, my work involves helping people make the most of relationships that may have gone sour for a range of reasons. This is not a subject covered by the FCA’s or any other rulebook and led me to write an article for Alternatives, a journal edited by Russ Bleemer in New York, suggesting that “wisdom” was an important undocumented form of alternative dispute resolution. The neutrality requirements applicable to an arbitrator or mediator do not necessarily apply here. A wise person instructed by one

party, sometimes even his or her family member, can help everyone agree to sensible fair solutions to actual or potential disputes. The resolution of a problem that works and that creates no sense of grievance is a victory that can be shared by all sides involved.

Regarding the more classic forms of dispute resolution, I continue to do my share of domain name panellist work, mainly for the World Intellectual Property Organization (WIPO). This also involves an annual meeting in Geneva most Octobers at which panellists discuss issues of pressing concern and meet old friends. In the last decade I have done over 150 of these cases for a combination of WIPO and the Hong Kong International Arbitration Centre.

Between January and April each year since 2010, I have taught a comparative commercial arbitration law and practice course for the University of Westminster, in my old Central London neighbourhood of Fitzrovia. My course leader, Richard Earle, also tolerates me sharing his office. This provides a convenient base in a fabulous location and regular access to Richard’s considerable wisdom. His unending patience, kindness, good sense and understanding of how to handle difficult students and me are a marvel.





## AND FINALLY...

**M**ost people who work on their own need a band of helpers of various types to keep going, maintain a sense of perspective and sanity and just drink coffee. My old friend and former Insurance Ombudsman Bureau colleague from the early 90s, Malachy McClelland shares my compliance and financial crime problems and we keep each other going through thick and thin. Another ex-IOB-nik, Elizabeth Bingham, has been sharing lunches with me for the last 28 years, in the last few of them, mainly at the vegan Bonnington Cafe in Vauxhall. Bruce Clark has been watching over my business in some form for a mere 21 years. I ignore his advice on pricing at my peril. Michael Burgess' wondrous pilates classes at the

University of Westminster keep a fascinating group of physical misfits in condition and stitches most of the time. Richard Herman has designed most of these newsletters, in recent times using photographs either taken by me or of me and still manages to make them look good. Finally, Chris Hamblin, who first made me into a professional writer, has been helping me with this newsletter for at least 15 years in exchange for fish n' chips and a vast supply of tea-bags when he comes up to London to write with me.

To all of you, thank you,