

February 2022

# AS news

## Dear Friends...

It is difficult to look back on 2021 with anything but pleasure at its passing. Like its predecessor, last year brought bereavement, illness and general misery to a variety of people who have not deserved it. However, the last 20 months have provided much food for thought. Hopefully, what follows reflects some of it.

Charity is best delivered anonymously but silence deprives generous organisations of much-needed publicity and recognition. So, while many others have done far more for the under-privileged these last few years, let me publicise a few worthy causes here.

In the first quarter of 2021, my friend and current occupant of my old flat in central London, Shahin Toosi, and I continued doing some of the shopping for the American Church Soup Kitchen in Whitfield Street, Fitzrovia. For a year, it was a highlight of my week to cycle there, see private chef, Lauren Everet who ran the kitchen and her team and then meet Shahin outside one of the local coffee shops. Watching Lauren and her people feed 150 people a day, during the worst part of the pandemic, as if they were customers at her restaurant will remain long in the memory. By April, charities were delivering all the fruit and vegetables that the kitchen needed. So, it was time for me to move on.

My sister Hope introduced me to Feastwithus in 2020 through a connection of her daughter, Meriel. A quick website check revealed that the founder's parents hiked, camped and were soaked through with me when I was a teenager. Work with Feast involves me driving around north London

and working out how to break into blocks of flats to deliver meals. Years of nipping into financial institutions unnoticed has come in handy! I call this activity "Marcus Rashfording" after the footballer who faced down the Government on free school meals in 2020.

In a way, the pandemic and the various charities delivering food to people has revealed a strange return to something resembling the 18th century system of outdoor relief. Nobody wants a return to the workhouses introduced by the Poor Law in 1834 (although the transformation of the Cleveland Street building, near the American Church Soup Kitchen of which Dickens wrote about in *Oliver Twist* into luxury flats leaves a strange taste). Nevertheless the difficulties facing the charities in locating those in need and the lack of any involvement by recipients in those organisations' activities remain a significant concern.

Keeping sane in a pandemic requires understanding friends. My old Insurance Ombudsman Bureau colleague from the early 1990s, Malachy McClelland, and I have met three and sometimes four times a week these last two years to drink coffee, share worries and work stories, talk about mainstream, Gaelic and rugby football, discuss his native Ireland and generally propose solutions to the world's ills.

From the international dispute-resolution end of my working life, Karyl Nairn, has regularly come out on walks around Hampstead with me these last few years. She recently urged me to join something So, I signed up for the Camden Historical Society



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whose publications I have long admired. This happily coincided with the appearance of its new *Streets of West Hampstead* book. The architectural historian Pevsner suggested that my neighbourhood "need only be visited by those in search of Victorian churches". I am walking my way through the chapters of the book and am struggling even to find Pevsner's churches of distinction at this point. However, on a rare visit in the autumn, I did at least see the magnificent interior of the listed Hampstead Synagogue which still has the strange devices into

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which my great-grandfather, Aaron Blashki, plugged his earphones in the late 1930s.

Michael Burgess' pilates classes for all levels of athletic ineptitude, went 'virtual' in March 2020 and continue to keep its members healthy in both body and mind. We used to meet at the University of Westminster before the pandemic. So, the remote sessions in 2020 and the first half of 2021 provided crucial help in confronting both isolation and physical inertia. We have also had the opportunity to co-opt Michael's old friend Cary Bigelow, from North Carolina, into both our classes and our culturally highly eclectic whatsapp group.

This past summer, my old running partner from the 2000s, Kathleen Sullivan and I finally finished the Capital Ring walk, a peculiar trail, mainly of footpaths, around the inner part of London suburbia. We started on this in 2018 and have done the sections in a leisurely fashion throughout the pandemic. Even in areas that I know very well, our excursions have taken me for the first time through nature reserves, rivers underneath major roads and boating reservoirs. We could probably have done the whole walk in four or five days but why rush?

The pandemic has been a catalyst for other good things. Early on, Ben Nathan organised a weekly bridge game, details of which my sister Hope passed onto me. Ben soon put the event on a video-based platform so that everyone could see and chat with each other between hands. Aside from my regular partner from 'before', I have only met three of the other players in person and I now know them far better through this group. Other participants have often joined as a result of knowing the organiser through several degrees of separation, some from Tel Aviv, Chicago, California, New York and even Cheadle. Regular pairings have occasionally never met in person. In that spirit, Ben has met all three of my sisters in person but not me.

Throughout the pandemic, Zoom and its competitors have enabled me to remain in touch with people in parts of the world I have never visited and perhaps never will. Over the last two years, I have been able to see glimpses of Australia, Hong Kong, Cape Town, Transylvania, Belgrade, Israel, USA, Brazil, New Zealand, Belize, France, Switzerland, Holland, Austria, Cyprus and

many other places. Seeing someone over a screen is different from both a telephone call and a face-to-face meeting and can sometimes operate better than both, notably a one-to-one conversation where occasional resort to books on either person's shelves or the internet enriches the exchanges.

Olga Sekulic and her husband Brian Derdowski welcomed me to their home on my last trip to the US in 2019. I have been able to return and see them in both their Newark, New Jersey back garden and the apartment they took in Belgrade half-way through the pandemic. Since spring 2020, Anca Baciu who I once walked half-way across the north-western part of central London (and is still talking to me!) has been having regular cultural slugfests on Zoom with me (she is much more cultured than I will ever be) in our respective sitting rooms in Transylvania and West Hampstead.

A compulsory feature of this newsletter is the café review, something inherently tricky during a pandemic. Shahin Toosi and I still hang out in the threesome on Great Titchfield Street: the Scandinavian Kitchen, Kaffeine and HT Harris. Westminster Council gave the first two licenses to add tables up to the edge of the pavement, something the third already had before 2020. With the congestion charge being extended to 11PM and weekends, the area was really delightful last summer: an oasis of calm and goodwill during some of the worst periods of lockdown.

Malachy McClelland and I fluctuate and often differ in our coffee shop taste in South and West Hampstead. Hart and Lova, in Belsize Road, near Kilburn High Road Station, sells the best Czech-style croissants I know and much cake worth coveting. The two best outdoor coffees probably come from Wired in Broadhurst Gardens and Roni's cafe, next to his bakery in West End Lane, one of the best suppliers of bagels in London. For evening walks in the northern part of West Hampstead, the Nautilus Fish 'n' chippy on Fortune Green Road supplies guiltily snapped-up chips and memories of their excellent fried fish.

Bruce Clark has been keeping a benevolent eye on my business for many years. I was able to reciprocate modestly by being an unconvincing mystery shopper at the Bentley Priory Battle of Britain

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Museum in Stanmore where Bruce is an influential volunteer. Although these places can always improve, I enjoyed the exhibition and the garden was delightful.

I managed one trip in 2021 to Plymouth, the birthplace of my triple great-grandmother, Sarah Solomon (née Phillips) and Little Harford, nine miles west of Exeter, the home of my cousin Rachel Samuel. In Plymouth, I stayed with Penelope Welbourne, whose sister Rachael Hoose, now Craufurd-Smith was my first new friend at university in 1979. The Hoose and Samuel families have been trading hospitality since the late 1970s when my sister Hope went on a school field trip to Kilve Court in Somerset which Penelope's parents used to run. I had a further try at locating the 18th century Phillips family with the help of the extraordinary custodian of the Plymouth Synagogue, Jerry Sibley. He showed me some Phillips graves in the old Jewish cemetery but I still have plenty of work to do to link them to my ancestors.

From Plymouth, I headed to the other side of Dartmoor, to the beautiful house (pictured above) that Rachel Samuel's late parents, David and Margot bought and restored in the 1960s. The garden with its managed wildness has always been a joy and Rachel is now running an Airbnb operation in the house and a camping facility in one of the fields. Rachel and her niece, Hannah McInerney (the DJ, "Mina" professionally)

entertained me magnificently. Three miles away, our cousin, Janet Samuel and her family have a farm which has become a third Devonian home away from home for me. In January 2022, I returned for a few days with Rachel, her sister Judith and Janet.

From a work point of view, 2021 looks quite good, about 9% growth on the previous year which itself was better than its predecessor. That is slightly deceptive because 2019 was not very productive. Nevertheless, with almost nothing on which to spend the proceeds, these last two years have passed reasonably smoothly from a professional point of view and I am thankful for that.

Remote working, with its lack of pressure to clean shoes or even wear them, suits me personally. Moreover, training and teaching using a Zoom pro account make it so much easier to share examples and the text of rules than face-to-face sessions and the massive multiple handouts I need to deliver them. Half-day training, usually on consecutive mornings also allows me and the participants time to think in between sessions and avoids 3PM fatigue.

The one thing missing from remote training is the ability to speak during breaks. If something goes wrong in a remote session, it is much more difficult to fix things than in a face-to-face environment where I can try to talk through the issue during an interval or lunch.

The quality of UK Wifi remains a major concern, aggravated by firms giving their staff the wrong equipment and software. Businesses around Europe have used the relaxation in the lockdown rules to pull their staff into the office, when they are supposed to be learning without distraction. It would be much better for most course participants to join a morning training session from home. Besides, it is usually much easier and safer to travel into the office at lunchtime than in the morning rush-hour.

After some years of dithering, I finally had my website redesigned. It has lost its pretty but slightly dated look and become more utilitarian in appearance and functionality. More importantly, it is much easier for me to update. The role of these things has changed enormously since I took my first steps in this area, when not having a site could be fatal to a business' prospects. Now, in a multi-channel communication world, it would be useful to know what people would like to see on [www.adamsamuel.com](http://www.adamsamuel.com).

As usual, this newsletter breaks up into sections that represent the different parts of my working life: financial services and dispute resolution. What each section has always had in common is a neat division into training, writing, consulting and doing, although the balance between both subjects and the four activities has changed a great deal over the years.

# FINANCIAL SERVICES

In financial services, training has dominated the lockdown period. The vast majority of this has been done in Britain, for CTP and the trade body, UK Finance (UKF) and in Cyprus, the European Institute for Management and Finance (EIMF).

CTP's Andrew Hilton and I go back to the 1990s. In 2020, Andrew instinctively grasped the remote training challenge, encouraging participants to keep cameras on at all times and log on early so that any technical glitches could be fixed without holding up start times. My Cypriot friends at EIMF dived in with similar enthusiasm. Nick West at UK Finance has spent the pandemic building an increasingly formidable team with whom he can increasingly leave me just to do the job.

For all three organisations, I do broadly similar things, focusing on customer-facing compliance. Financial promotions, product governance and complaint handling dominate the agenda. However, these topics come with different twists.

In Cyprus, I have to handle the EU and Cyprus regime in which my background as a comparative lawyer stands me in good

stead. The predominance of contracts-for-differences firms there means that I spend much more time with EIMF dealing with the complicated special advertising regime for such products. I also teach participants how to handle appropriateness testing, a peculiar requirement for those selling complex leveraged products to retail customers on a non-advised basis.

At UK Finance, I leave complaints to Caroline Wells (who introduced me to the organisation and helped me enormously with the first edition of my complaints book). Towards the end of 2021, I ran a new well-attended course for UKF on product governance and how it would feel if the regulator extended the investment and insurance rules to the rest of the regulated sector. The UK will almost certainly do this in 2023.

This all raises the question of where next my training work can go. The Financial Conduct Authority (FCA) may have delivered the answer with its consultation paper on rules that it considers make up a "consumer duty". They actually consist of a new unnecessary Principle for business, three general rules of behaviour (the "cross-cutting" rules) and four blocks of outcomes which are really requirements presented under four headings.

The four sets of "outcome" provisions take the form of some reasonably specific rules on product governance, value-for-money assessments, client communications and customer service. These will extend obligations that currently apply in specific areas to the treatment of retail customers across the entire spectrum of FCA regulation. So, assuming that the regulator goes ahead with its proposals, the insurance and

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investment product governance regime will apply to mortgages, consumer credit, deposits, payment services and e-money from 2023. Similarly, all businesses dealing with retail clients will have to do value for money assessments, something insurers and authorised fund managers already need to carry out. The "communication outcome" just restates the existing requirement to communicate at all times with customers in a clear, fair and not misleading way and is just unnecessary. Finally, the "customer service outcome" lays down some imprecise rules in what is a first-time attempt at rule-making in that area.

The extension of product governance and value measures across the regulatory scene and the attempt to introduce some rules on customer service makes sense. The rest of the regulator's proposals is either badly drafted, unnecessary duplication or incoherent. By proposing all this as a single extra chapter of the PRIN rulebook alongside a meaningless proposed new Principle 12, the FCA is poised to do a great deal of damage to the fabric of a handbook that it has spent many years diligently creating. The product governance, value measures and customer service material belongs in PROD (the product governance rulebook) which already covers the first two topics. The regulator might have thought through the communication outcome properly if it had tried inserting the rules on the subject in the relevant conduct of business provisions. It would have realised how much of what it wants to deliver already exists.

One subject on which I ran training on in 2021 is well-established. I found myself running a session for a CTP client on how not to give insurance advice while selling. The short answer is that it is extremely difficult although the FCA does give some reasonable guidance on the subject. This issue frequently arises also when looking at contracts-for-difference sales in Cyprus and the role of helplines and other customer nudges. It all brings back painful memories of the allegedly execution-only pension transfers that were recommended in the UK in late 1980s and early 1990s. When these came to be reviewed in the late 1990s, regulators invariably and correctly told firms to treat them as advised.

The world has moved on since then but not as much as one might think. Selling a non-mainstream product without giving advice or communicating in a unclear, unfair and misleading way remains seriously challenging.

In the last year, I have also done some mini-training-sessions on individual accountability and the COCON rulebook for EIMF's UK clients. Since the FCA extended the rules far beyond the departmental heads for which the Government intended the provisions to go, huge numbers of staff members have needed to learn what applies to them. Recent incidents at major financial institutions suggest that the major firms negotiate exemptions for their senior people as part of agreeing to massive fines. Lower-level employees and staff at smaller less systemically significant entities seem to be far more exposed to risk here than those for whom the senior management regime was originally invented.

I have been writing about many of these topics in my Compliance Monitor monthly column which stretches back to 2003. It has always tried to tackle the big compliance issues of the day. In 2006, the title (almost certainly written by Timon Molloy, the editor at the time) of one of my pieces asked "when should resurrection be acceptable?"! For over a decade, his successor, Esther Martin, has indulged my tendency to dive intensely into topics that inspire my fascination, horror and fury.

Two other writing jobs occupied many of the quiet moments in my 2021 diary. I keep updated regularly a long string of chapters in the Butterworths Financial Regulatory Service and six-monthly the same publisher's commentary on large chunks of the Financial Services and Markets Act (FSMA). Some of the chapters and subjects are obvious: complaints, promotions, product governance, individual accountability, the Upper Tribunal, business reviews, advice standards, pension problems and with-profit funds. Others involve me in areas where others fear to tread, such as the notoriously long Part 6 of the Act on corporate listing, prospectuses and market disclosure and the other sections on insolvency, actuaries, auditors and regulatory investigations. This has provided much innocent entertainment and hard work for



my slightly questionable boredom threshold.

Sadly, all good things must end. 2021 marks the end of fourteen years' work on the FSMA commentary. I have learnt an enormous amount doing the job. When I started, two rival publishers were putting out this type of work. Now, nobody is doing it. This is a shame, if nothing else, because of the enormous volume of references collected for each update.

Doing pandemic consulting is not easy. I have continued to nurse financial advisers through unpleasant and often quite unwarranted complaints. When I joined the Insurance Ombudsman Bureau in 1991, some staff were working from home because we desperately needed office space. The experience then, with its productivity drop-offs, showed that complaint handling is an activity best done with other people around. The stresses and need to consult colleagues stop it from being something that people can do safely alone. In the last two years, the Financial Ombudsman Service has suffered enormously from this in the form of a significant fall in cases closed.

This has led to some horrendous delays in rejecting unjustified complaints causing similar levels of strain on the firms affected.

On the more productive side, I found myself helping keen staff members entrusted with embedding the new value measures rules into an insurer. The big problem is that nobody knows what constitutes value except that it involves comparing the price paid with the benefits and service delivered. The idea is hugely important. However, the calculation involves the comparison of utterly dissimilar things. The easy solution may be to insist on an actuarial sign-off here. That is at least until the actuarial profession reaches the conclusion that it is being asked to do a completely unscientific calculation.

Finally, it seems hypocritical to promote adult learning without doing some myself. In the last year, I have passed two exams, the CISI Level 6 Certificate in Advanced Financial Planning (one step away from the CFP licence) and the Compliance Exam for the Certificate in Corporate Finance. For the latter, my years of writing about listing and prospectuses proved extremely handy.

# DISPUTE RESOLUTION



**F**or the last decade I have taught my Comparative Commercial Arbitration course at the University of Westminster, in my old stomping ground of Fitzrovia. This earns me a half-share of an office with my boss, Richard Earle, in one of the most delightful parts of London. Since the University opened its doors in the summer of 2020, I have used it as a very superior place to park my collapsible bicycle.

In 2021, I taught my first start-to-finish remote course. When the rules were relaxed a little afterwards, I offered my students a walking tour of the neighbourhood. On seeing me in person for the first time, one greeted me with: "Oh Adam, you have legs", not very paralympically correct but curiously reflective of how remote teaching works. Like its competitors, the University has not embraced the world of Zoom. With its easy facility for allowing screen sharing and the viewing of all participants at the same time, the "Z" word has to come to British Universities if we are not to fall spectacularly behind in our teaching.

For the third year running, I am participating this winter and spring as a marker and tribunal member on Louise Barrington's Vis East Moot. We originally met singing in a London pub. Louise has created an arbitration advocacy competition to run alongside the original Vienna-based event. Sometimes, the quality of both written and oral submissions is in inverse proportion to the reputation of the University concerned.

Throughout the pandemic, I have continued to judge domain name disputes for the World Intellectual Property Organisation (WIPO) and Hong Kong International Arbitration Centre (HKIAC). I have decided 166 WIPO cases since I joined the panel in 2005. As one would expect, all panelists complete the usual declaration about neutrality before being appointed. The

complainant in one of my WIPO efforts was Her Majesty's Revenue and Customs to whom I pay a certain amount of money every year! The Centre, nevertheless, appointed me as the panellist. It took a different view when I told WIPO that I ran a couple of training courses for a subsidiary of a complainant more than twenty years ago. Since there are plenty of panelists and cases to go around and it helps to have judges who know how the parties work, WIPO's decisions make sense. Having said that, the two cases raise some fun questions for students and others about the real nature of dispute resolution bias.

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About once a year, lawyers bring me in to help them do their jobs. In 2020, an arbitrator friend pulled me into help him with an esoteric arbitration issue with serious practical implications. Last year, I was helping a major law firm deal with a complex arbitration and litigation problem. For obvious legal reasons, I cannot say much more about this except that it was fun to be working with a lawyer whose career has criss-crossed with many of those with whom I have worked or sat on committees over the years.

Since 2018, I have been writing a regular column for Russ Bleemer's Alternatives, on dispute resolution as viewed from outside US where its main readership lives. This mixes

pieces on different types of disagreements and ways of resolving them with some technical arbitration law writing. Between these extremes came a two-article work on the confused history of English arbitration as it has impacted on the US. Inspired by several late-night walks with Karyl Nairn in Hampstead and the memory of two friends and arbitration history enthusiasts, Derek Roebuck and Johnny Veeder, this looked at Derek's last book on arbitration in the long 18th Century and examined how developments and misconceptions of English arbitration law during that time have influenced modern developments on both sides of the Atlantic.

Last year's newsletter railed about the awful decision of the English Court of Appeal in the Kabab-Ji case. When predictably, the Supreme Court upheld that decision, I wrote a piece for Alternatives on it and gave a lecture on the subject to Richard Earle's International Commercial Arbitration course at the University of Westminster. Parties will now have to insert in their contracts a choice of law to govern the arbitration agreement, if the agreement selects a law to govern the main contract which is different from that of the 'seat of arbitration'. It is fun to speculate on what Francis Mann (who I knew in his later years and rather liked and whose *Lex facit arbitrum* essay made him the unofficial "high priest" of the 'seat of arbitration' school) would have said about this. I think that he would have been astonished by the an English court's refusal to enforce an award valid in the place of proceedings selected by the parties, based purely on a choice of English substantive law. I have read the full set of conflicting English and French court decisions in both *Dallah* and *Kabab-Ji* and increasingly think that the French were right and the English were wrong on both occasions.



## AND FINALLY...

**N**ot many would count 2021 as their favourite year. The stop-start nature of the pandemic and Government controls around it made it difficult to settle into any sort of rhythm of life and much of the time to know how to behave and what to expect of other people. Many of us have switched the way we live into a more remote, more physically distanced one. That, though, requires the presence of strong close friends with whom one can

exchange moments of doubt and worry, not just the fun stuff. I have been very fortunate in that respect these last two years.

As ever, it remains for me to thank Chris Hamblin who has edited this newsletter for many years and is now owed an indigestible quantity of Fish 'n' chips for doing this and a member of my family who refuses to be identified but did the first tidy-up of the manuscript. In addition, Bridget Colloby who worked for one of my clients many years ago has joined the editorial team.

Richard Herman has done the design work for over a decade and tolerates the fact that, in recent years, I have insisted on using entirely my own photographs except the one of me (My father took this year's version.)

All I can hope is that 2022 is a much better year for everyone.