4A Candover Street
London W1W 7DJ

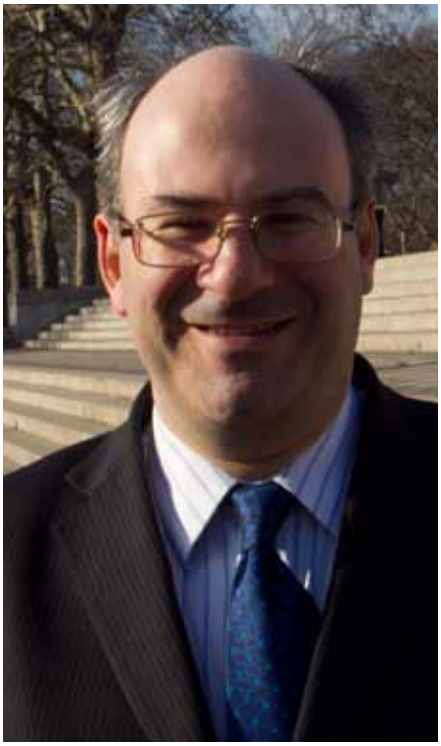
0207 323 9171
07900 248150
E: adamsamuel@aol.com
W: www.adamsamuel.com

February 2012

AS news

Dear Friends...

This newsletter is essentially an Annual Report to the nearest thing I have to a set of shareholders: a combination of friends, customers past and present, people I seek advice from and just those who might find it interesting.



2011 was the fourth consecutive year to end with the UK financial services industry and the economy generally either in serious difficulty or outright recession. During this extraordinarily difficult period for financial services compliance in which most of my competitors have been bought out or just disappeared and firms have kept budgets eye-wateringly tight, I have kept plugging along. Curiously, the even-numbered years have produced significant jumps in turnover for me followed by retrenchment the following year.

2011, though, like the much tougher 2009, had its highlights. If January 2012 is anything to go by, 2011 might have laid the ground-work for some good and fun times ahead.

In 1997, my second year of working for myself, I noticed on a television programme that, through Business Link, small businesses could acquire a free business review. The business adviser assigned to me, Bruce Clark, rang 16 of my customers and told me that he thought that I would survive. Since then, we have drunk many beers and eaten the occasional curry together since in and around Pinner where I grew up and near where Bruce is based. For some years, I have toyed with the idea of having him as a non-executive director of my non-existent company. This year, Bruce agreed to work with me again, helping me to understand my business. He is repeating the 1997 customer contact exercise and many of you have already been kind enough to tell him things that I never had the wit to ask myself. We have met regularly in the last few months in the Scandinavian Kitchen around the corner from where I live and work, adding smorgarsbord, cinnamon buns and coffee to the list of things that we have consumed together.

In early 2011, I faced up to the chaos I sometimes end up in with my paperwork by hiring my friend and fellow Thames Path walker, Jan Meek, to do a day a month, to help me with the office work. This has worked extremely well although It is a far cry from Jan's day-job as a motivational speaker and record-breaking transatlantic rower and polar explorer.

After gallivanting around the world in 2010, last year was based a little closer to home. I still made it to the Paignton Sandwich Bar, the best in Britain. I have had numerous business meetings over lunch in the Scandi and a few over breakfast at Kaffeine across the road from there. For more private occasions, I seek out coffee shops and restaurants where the echoes mean that I can discuss the unthinkable knowing that those on the next table cannot hear. The Place Below in Cheapside and the British Library downstairs café are old favourites for this. On a different note, solicitor, Polyanna Deane and the wonderful editor of my work for Butterworths Financial Regulatory Service, has dragged me (not reluctantly at all) to some of the best restaurants in London for lunch, notably Murano.

> **If January 2012 is anything to go by, 2011 might have laid the ground-work for some good and fun times ahead**

Nevertheless, the old "favourites" remain. The Golden Hind has been feeding me and my friends and clients excellent fish

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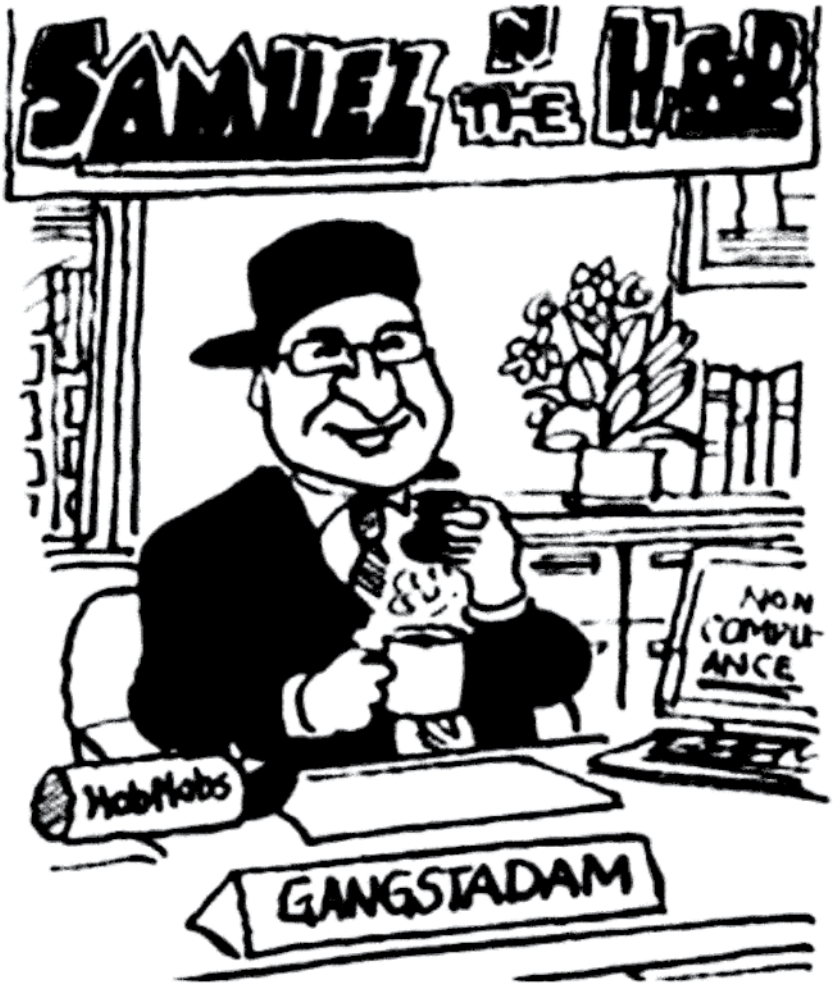
n' chips for years. Tony Pearson continues to provide the best piano-playing in town for those who like singing songs from musicals and music-hall alike in the Golden Eagle around the corner. (That is for as long as he does not play stuff by a Pinner pub-pianist called Reg!)

Otherwise, work has taken me to Swansea where I received a lovely tour of the Gower Peninsular after running a course on bad mortgage lending. Near Exeter, cousins, David, Margot and Chris always provide me with a warm welcome, great wholesome food mainly from the garden and an excellent atmosphere for working. Financial services training and consulting have also taken me to Leeds, Bristol, Reading, Glasgow and remote Leicestershire.

The wonderful hospitality of my extended 'family' in Lausanne, Andreea and Jean-Nicolas Brändlin, Andreea's mum Rodika and their children, Arthur and Geoffroy, have enabled me to keep in touch with my increasingly significant Swiss dispute resolution and comparative law client-base. Nicolas Ulmer and Doug Reichert have been arranging delightful lunches for and with me in Geneva since the 1980s, a regular source of delight and inspiration. Professor Llamas entertained me and Julio-Cesar Betancourt of the Chartered Institute of Arbitrators royally in January in the Spanish architectural masterpiece, Salamanca. Changes seem to have put the Institute's programme there on hold for the time-being which may be an intellectual shame but is definitely a culinary disaster!

In March, for the umpteenth time, I "crashed" at Kent McKeever's flat in New York. Kent, the head of the Law Library at Columbia is the source of endless vital information on US arbitration law, quite apart from teaching me most of the basics of baseball in 1990. Through his hospitality, I was able to meet up with two New York editors who have published my dispute resolution writing recently. Russ Bleemer takes occasional spiky columns from me on dispute resolution in the CPR's Alternatives magazine. Susan hiring my friend and my fellow Thames Path walker Zuckerman



Money Marketing 9 February 2012 used with permission

this year turned an article on three US Supreme Court decisions on arbitration into something publishable for the legendary Dispute Resolution Journal (originally the Arbitration Journal) of the American Arbitration Association.

The official reason for the US trip was a family event hosted by my cousin, Viva Hammer. Viva combines an astonishing understanding of the taxation of credit default swaps (CDSs) with a brilliantly written if quite hair-raising column in the Jerusalem Post on anything other than CDSs. Perhaps, though, the most moving part of the trip came on the last evening when Richard Gearhart met me at Newark station. Richard and I wrote an article on sporting arbitration and the Court of Arbitration for Sport in 1989 (reprinted in a book in 2006) but we had not seen each other since I lent him my suit so that he could look vaguely respectable when being sworn in as a member of the Massachussets bar in 1990. We had a lovely evening with Olga Sekulic and her husband Brian, Olga having taken an arbitration summer course with me in London in the late 1990s.

SF Wong, the wonderful Chief Executive of the Hong Kong Securities Institute came to London in the summer. He was talking about raising the funds for a private banking version of the 2010 compliance workshops we did together. At the same time, over an admittedly fairly boozy lunch, a client of mine raised the possibility of opening up contacts for me with the financial services regulators in the Caribbean. It would be good to add to my collection of four different financial services regulators and one foreign Government as clients.

FINANCIAL SERVICES REGULATION

This whole subject has been overshadowed by two connected events: one in the past and the other very much in the future.

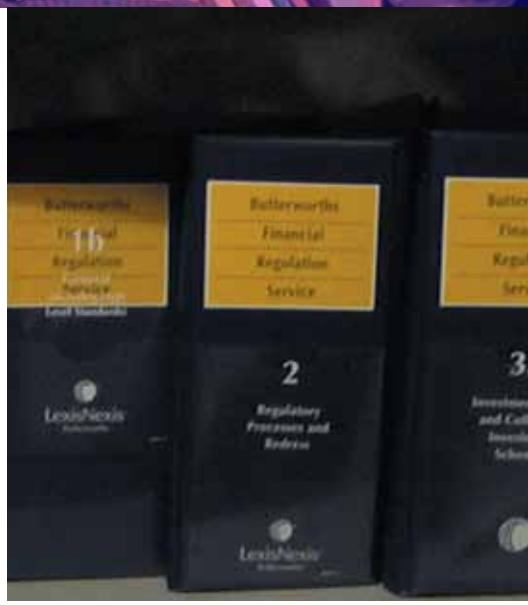
The documentaries and books on the banking crisis of 2007-9 came to a head in December. The Financial Services Authority published its report on the collapse of RBS, its own role in it and why it did not propose to take enforcement action against anyone at that bank. The future development is the Government's ferociously complicated, expensive and intellectually muddled plans to reform financial services regulation by distributing the Financial Services Authority's many responsibilities among the Bank of England, Prudential Regulatory Authority (PRA) and the Financial Conduct Authority (FCA).

The two points are interconnected because the FSA's failure to combine conduct of business regulation with prudential supervision, graphically reported in its own report on RBS, is the only thing that justifies splitting responsibility for the two areas. This report and a couple of recent RBS fines on complaint handling emphasises the fact that the regulator was not very effective in either area.

Failing to intervene to stop RBS' major debt-financed hostile acquisition of ABN-AMRO, based on almost no due diligence, just after discovering that the UK bank had breached its liquidity requirements for over a year damns the FSA for posterity. Of course, all that will happen is that some FSA staff will move to the Prudential Regulatory Authority which will be headed by the current FSA Chief Executive. The rest will stay with the pointlessly renamed Financial Conduct Authority.

I attended an FSA conference on the new regulator which showed that the Government's proposals were making the regulator's staff spend much of their time attending pointless meetings instead of regulating the financial services industry. Afterwards, I could not bring myself to eat the lunch provided in spite of the comment or plea made by an old FSA friend: "you know we didn't actually make the food ourselves!"

Having said all that, a disoriented regulator can occasionally be dangerous as a variety of firms (none of which are my clients) have found in the last year. Firms and regulators alike often ask me for my list of the compliance disasters in the pipeline. So, I might as well include it here. Some relate predominantly to products, others more to processes:



Unregulated collective investment schemes are the current regulatory flavour of the month with fines being levied regularly.

Products

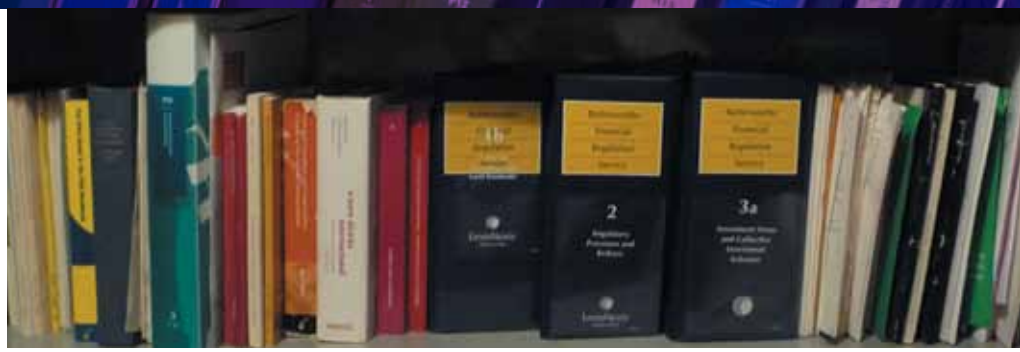
- income drawdown;
- transfers to Self Invested Personal Pensions (SIPPs) done without taking into account the likely future cost of investing the money;
- SIPPs being sold to people who don't need them;
- structured products of all types but particularly those where the provider or a derivative provider is essentially betting against the customer;
- unit-linked onshore investment bonds (frequently missold by banks in particular),
- over -50s life assurance (a serious reason not to watch commercial daytime TV!),
- any deposit special offer, (I'll volunteer to take FSA staff on a trip to any local high street in search of duff promotions);
- a new generation of quasi-payment protection insurance products being developed;
- unregulated collective investment schemes (UCIS) and weird and not very wonderful funds generally; and
- pension and ISA mortgages (the FSA should have dealt with them the same way that it did with mortgage endowments)

Processes

- know your product generally (advisers not understanding the products that they recommend),
- continued problems that firms have in understanding customers' attitudes to risk and making fund recommendations that match it;
- product providers and advisers mis-describing funds and products generally;
- bad lending and rotten arrears-handling (the two tend to go together); and
- the mishandling of complaints as part of a conscious strategy

As this list shows, "there is nothing new under the sun". All, though, depends enormously on whether and how seriously the FSA approaches these topics. Pension mortgages and drawdown have been widely sold to the wrong people and/or in the wrong way for well over a decade. The misuse of unit-linked onshore bonds goes back to their creation before I ever knew about the UK financial services industry (let's say 1984). Yet, only recently, the Financial Ombudsman Service (FOS) has taken up the cudgels in this area and the recent HSBC fine on the subject seems to be placing the whole topic clearly on the agenda.

FINANCIAL SERVICES REGULATION CONTD.



The FOS uphold rate for investment complaints at around 60% is eye-wateringly high.

The FSA seemed to be concentrating on over-50s life assurance when it fined AXA and Foresters Life in the middle of the previous decade but has since fallen into a deep slumber over this pernicious product.

Unregulated collective investment schemes are the current regulatory flavour of the month with fines being levied regularly. The problem stems from fund managers selling funds to advisers who then pass them onto the customer. The firms' justification for recommending many of these investments is a startling distortion of the Nobel-Prize-winning theory that a portfolio of non-correlated asset types reduces risk. What the winner of the prize did not argue was that the recommendation of any old rubbish as long as it did not correlate with the rest of the portfolio would have this desirable effect.

I regularly have dinner and occasionally work with a compliance consultant with whom I share the "honour" of having advised a major lender not to sell payment protection insurance and being completely ignored. If firms want to avoid trouble, they do need to have their products pre-market checked for future signs of trouble. The two of us could have avoided billions of losses for the industry. There is a new generation of payment protection products coming onto the market. As yet, neither of us has been asked to look them over!

In early 2011, a bank asked me to do a financial promotions course covering the regulations in two Channel Islands, the UK, the Isle of Man and Gibraltar, a challenge with which my comparative law background helped me enormously. The rules are broadly similar anyway. A re-run is planned for 2012. I also gave the Jersey Compliance Officers Association a talk on financial promotions in the autumn, giving me a chance to enjoy the charming company of its chairman, Keith Hood, for the first time since I ran a complaints course for him in the Isle of Man in the late 1990s.

I help firms with client agreements, many of which need to be re-drafted to cope with changes to be brought about at the end of the year by the retail distribution review changes. The technical compliance side of this work is actually not as difficult as putting in writing a broadly accurate description of the service being offered and the remuneration expected by the business.

Firms regularly use me to have a look at their advisers, their files generally, suitability reports in particular and their overall competence. This can be scary. Nobody wants to tell a client that one of its advisers is not competent to work unsupervised.

During 2011, I ran workshops on fact-finding and suitability reports for Infoline, the conference company. Businesses who are not otherwise my clients repeatedly send their staff to these types of occasions knowing that I will be running them. These workshops proved very popular and are going to be repeated in 2012. They enable participants to share views and experiences with people from other companies. Their drawback is that delegates cannot work on real case files except where I was the client. Infoline is also offering an exciting new workshop that I will be running on product manufacture and the compliance issues involved. This is due at least partly to a suggestion from someone who came to the suitability workshop.

A general issue in areas that have not been the subject of much published material, is how to establish the equivalent of protocols for competent safe financial advice. In the last few years, I have run into a few problems with Qualifying Recognised Overseas Pension Schemes (QROPS). This is a highly technical area where a good understanding of the pension and tax regimes of countries to which clients may emigrate in the future is of huge importance. Nevertheless, there is a singular lack of authoritative guidance in this area, creating an unpleasant vacuum into which non-compliant advisers are likely to cause significant damage to their clients and themselves. Professional bodies need to sponsor some cross-border research here to avoid tears in the future.

A great deal of my advisory work, though, comes when it is all too late, typically when an adviser has received a complaint or has taken on a new client who has been mistreated elsewhere. I am usually only brought in when things became difficult. Nevertheless, the painful process for all parties involved of having cases going all the way through to the Financial Ombudsman Service procedures never ceases to amaze me. Yet again, FOS recently found in favour of a client and ordered the firm that had already been fined by the FSA for something similar to do the compensation calculation. Fortunately, I can use contacts in the life assurance industry to ensure that the numbers are crunched correctly. Still, the FOS promised the Independent Assessor not to make awards in this way some years ago and Lord Hunt made a similar recommendation in his report on that organisation.

In 2011, I enjoyed working with a software company providing complaint handling solutions. Helping its clients face-to-face to ensure that the system produced compliant and efficient results was fun. It is a little startling that firms often design software in these areas without compliance support.

I spoke at the very first Infoline Complaints Conference in the 1990s and I have had fun chairing the event on the last few occasions. I am doing it again this year along with a workshop on how to handle complaints, the following day. There is a risk that complaint handling becomes about how to develop a false intimacy with the firm's dissatisfied client which just annoys the customer. On the way back from chairing the 2011 Complaints Conference, I was thinking about an insurance claim I had made on behalf of a family member, a week before, that had yet to be acknowledged. When I arrived home, I found a cheque for the amount and a simple calculation of how it had been reached. My relative was delighted and neither of us had to read any phoney expressions of sympathy from the insurer. I do not know whether she is continuing to insure with this company but I do know that I am.

In the last year, I have had to handle two sets of complaints against the same insurer concerning their travel policies. This firm has tried to avoid paying claims on a whole range of different and bizarre bases. The argument that the customer's decision to fly directly to the USA rather than back to the UK on the occasion of his father's death there invalidated his claim was a bit much, considering the fact that the claim only covered the cancelled holiday and not the transatlantic flight. The FSA really ought to look at travel-claims-handling in general and the company concerned in particular. It has a copy of my papers!

FINANCIAL SERVICES ORGANISATIONS AND CONFERENCES

I have already mentioned the Infoline complaints conference. I volunteered to speak at its conference on bank regulation, only realising afterwards that talking about complaint handling in that context might not present me in the most positive light. So, I volunteered to chair the event. It was fun and reduced the amount of fidgeting that I usually do at such events. All the conferences I chaired in 2011 reached the "luncheon interval" and ended, ahead of schedule.

The Institute of Financial Planning does me the honour of having me on its Ethics Committee in spite of or perhaps because I am not an Institute member. I provide advice, notably on handling disciplinary matters. The committee recently asked me to produce a list of 5-10 things to know about the Code of Ethics which I am afraid came out as 33!

As a consequence of my Ethics Committee role, the Institute invites me to speak on this subject at Institute events. At one, I realised that the man offering to fill up my glass of water was a fellow speaker. I thought that I had better read his name badge, only to realize that I was sitting next to the delightful and fascinating, Chris Keeble, who essentially won the battle of Goose Green in the Falklands War.

A little less happily, I attended two of the Lord Mayor's sessions on restoring confidence in the City and was fairly horrified at the refusal amongst many city leaders to look back at what had led to that loss of confidence in the first place. The reliance by some participants on ethics declarations by companies with "ethically unaligned" public track records was rather disheartening. After one of these meetings, I wandered down to the St Pauls demonstrations afterwards and felt tempted to offer the participants my help in organizing them properly!

In December, I received the type of telephone call that most people dread: "The good news is that you are invited to come to the Property Professionals Breakfast Club next week; the bad news is that you're the speaker." Actually, the meeting in the St Johns Wood branch of Richoux from which my grandmother used to run much of her social life, was delightful. I had to speak for 15 minutes and received about 20 minutes of questions, all intelligent and positive. I chose to speak about the strange intersections between financial services compliance and property developing, including the risk of accidentally creating unregulated collective investment schemes, making illegal promotions and handling the types of financial services issues that a wide variety of small businesses encounter. It was heartening that a number of people told me afterwards (one by phone a few hours afterwards) that they had received the same legal advice as I had been giving on the collective schemes point.

WRITING

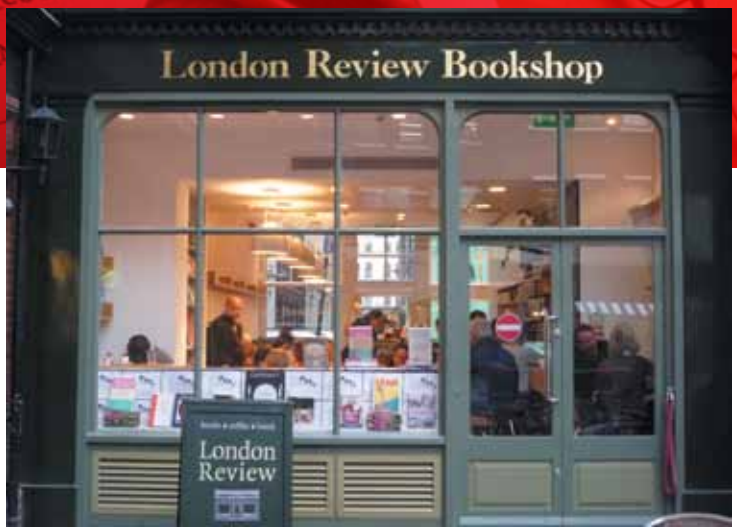
This year I have kept on doing the unusual double-act of writing for both the major online compliance news and analysis services: Complinet and Wolters Kluwers' Compliance Resource Network.

I have also continued filling my monthly column for Compliance Monitor and being an active member of the Editorial Board (well singing at the Golden Eagle with the editor sounds pretty active to me!). Melanie Tringham and Hal Austin at Financial Adviser commission me to write the occasional feature and their opposition, Money Marketing fuel me with coffee and try to pick my brains about the compliance issues of the day: hence the cartoon earlier in this newsletter.

However, the big expansion in my writing business in 2011 came from Lexis-Nexis (formerly the legal publishers Butterworths). My commentary on large chunks of the Financial Services and Markets Act for its online service expanded further this year with the addition of the part of the Act relating to the solvency of firms. On this work generally, I cover some fairly obvious things, such as the process of authorising and varying the authorisation of financial services firms, the Financial Ombudsman Service, the role of the Upper Tribunal, investigations including the evil section 166 with its skilled persons reports and the FSA's power to punish firms generally. However, I also do the monumental Part 6 which covers listing, prospectus, market disclosure and transparency rules. At the very least, it is mind-broadening.

Some years ago, I became involved in Butterworths Financial Regulatory Service (BFRS), writing commentaries for this huge looseleaf on those parts of the Conduct of Business Sourcebook (COBS) that nobody else wanted to touch. After much haggling, in 2011, I rewrote the commentaries on both DISP and APER, covering complaint-handling and the responsibilities of approved persons respectively. The former is now the most up-to-date commentary that I have written on complaints now that my complaints book is entering its seventh year (even though there is a 2008 update on my website). Writing about a rulebook makes one appreciate all the problems with it. The lack of clear thought and quality in the drafting of APER became starkly obvious when I was putting together the chapter on that, only for it to be reinforced when the FSA report on RBS came out. Parts of that document felt like a desperate effort to justify the regulator's inertia.

ARBITRATION



2011 saw me become the sole chairman of the Arbitration Sub-Committee of the Chartered Institute of Arbitrators. I have never done that before for any committee. The sub-committee has become an interestingly balanced team. We have also embarked on the process of producing three different versions for every guideline: looking at the subject from an international perspective, an UNCITRAL Model Law and rules one and a purely English, Welsh and Northern Irish one. The first seven of these three-headed monsters have already appeared on the Institute website.

I also sit on the Practice and Standards Committee of the Institute as both the chairman of the sub-committee and as the person principally responsible for learned society activities. This second role has given me an excuse to meet a fair number of those who teach arbitration law at least in England, forging good friendly relations with people like Jan Kleinheisterkamp at the LSE and above all else, Richard Earle at the University of Westminster. I also work closely with Julio-Cesar Betancourt and Alison Sweeney at the Institute itself on a variety of learned society initiatives, notably on accrediting courses, presenting and improving the introduction to arbitration course and handling member queries. The fact that many of the problems involved tend to be sorted out in the bookshop café behind the Institute building has created the attractive institution of the "bookshop luncheon club". A lunch with visitors from the Hong Kong City University at Julio's favourite local Thai place led to me coaching a training session for that University's arbitration and moot teams via Skype.

Last year, Richard Earle finally persuaded me to teach a full LLM module on comparative international arbitration for the University of Westminster (whose law faculty is about 100 metres from my front door). This year, registration numbers have put the course on a more stable footing. Richard has done what nobody else in Britain has achieved, namely to put me in a classroom teaching real comparative law to students from around the world. The library card I receive as a result helps me with other work I do, notably for my former employers from the 1980s at the Swiss Institute of Comparative Law.

I also continue to do real-live arbitrating and sitting on "quasi-arbitral" panels. The Hong Kong International Arbitration Centre and World Intellectual Property Organizations appoint me to do cyber-squatting cases. It is always fun to attend the WIPO annual panellist meeting. The Hong Kong-based lawyer sitting next to me at the October meeting said to me at the start of the last session: "Well it's the last session, only an hour and half to the drinks: One more time... with feeling". I am not sure that she knew the connection between what she had just said and the last verse of the original version of Alice's Restaurant ("let's sing it the next time it comes around on the guitar... with feeling"). Either way, it was a splendid way to approach the last session of a conference.

2011 saw me expanding my knowledge of Nigerian and Benin company law, answering awkward queries from abroad about how English law dealt with various landlord-and-tenant and a whole range of consumer law issues.

And finally...

SOME THANKS TO FINISH WITH

As ever, there are a string of people to thank who have sustained me during the past year. Client confidentiality, though, prevents me from naming most of them. Rhian of the wonderful Ruby Design helps me keep my website sparkling and reasonably up-to-date. Failures on that front are invariably due to me lacking the time to do the necessary work. Dave and Bertie from the Watermill, in the slightly improbable location for such a thing of London's Great Portland Street, designed my business cards a few years ago and lift occasionally sagging morale at crucial moments in our mutual local coffee shops. Richard Herman originally designed my logo and has done the design work for most of these newsletters. Last but never least, Chris Hamblin has edited this newsletter for most of its history and annually refuses to allow me to pay him for this except in fish-n-chips at the Golden Hind.

Wishing you the very best in 2012!