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Adam Samuel News

Dear Friends...

This Annual Newsletter was originally designed as a replacement for a New Year's card but in the last couple of years, it has turned into something of a "rite of spring".

This year, the reason for its timing is the second edition of my Consumer Financial Services Complaints book. In January, my publisher indicated that it was happy to print it but only if I cut out 25%. Since it did not indicate which 25%, I started 2017 buried in something of a verbal abattoir. I can barely admit it, but the publisher may have significantly improved my book as a result. The editing, teaching a University of Westminster LLM course on arbitration and my usual workload did not leave enough time for the usual travel tales, restaurant reviews and angst-ridden discussions that usually make up this publication.

In so many ways, 2016 was horrid. As my sister Claire pointed out on the night after the US Presidential Election, "democracy is great but it's not working very well at the moment". I am a descendant on every known side of economic migrants from places where they would have been turned into refugees or worse had they stayed. I am who I am because I have lived in three (arguably four) countries. Everywhere I have ever lived in the UK voted over 70% to remain in the European Union. The morning after the EU Referendum result, my local church/post office/café/nursery (it does all four) posted outside its doors the Pastor Niemoller poem "First they came..." Probably by accident, it pointed this towards the front doors of both the Czech club and Acol Bridge Club, the latter a home even now for refugees and exiles from various parts of the world.

The rising tide of xenophobia and ugly "isms", such as isolationism, protectionism and nationalism brings back memories of the 1930s, a time where the free movement of people was needed more than ever and too often denied. It all calls to mind John Arlott's response to the "what race are you?" question on entering apartheid South Africa: "human".

The pound's downward spiral has made previously trivial overseas revenue streams suddenly essential. Shortly after the referendum result, I wrote a piece for Compliance Monitor on the likely effects of Brexit on financial services regulation which expressed little confidence that our regulators would have the time and resources to supervise firms properly amid the resulting chaos. This is not good news for businesses like mine that try to keep people on the straight and narrow.

Personally, finishing my complaints book cast a pall on the year. It is not easy to write the second edition of the only book on a subject, eleven years after the first. New areas of concern that were unregulated when most of the first edition

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DEAR FRIENDS

was actually written, things that should have been included the first time and the ordinary developments since early 2005 have created a mountain of material. The book is due to come out in the summer.

2016 continued my roller-coaster relationship with academia. Having endured a lifetime of other people's urgings that I should do more University work, I started 2016 teaching at two universities and I almost ended up teaching in neither. I had significant problems receiving my modest pay at one University which changed its payroll system in mid-semester and failed to provide passwords for any visiting staff to claim their money! At the other, somebody tried to railroad me into launching a new course alongside my current one at pay-rates close to the national minimum wage (if one includes course development and preparation time). The University of Westminster rescued its relationship with me by giving me the share of an office in their superbly located premises in the West End of London. Since it is just around the corner from where I lived for eight years, it gives me a helpful base from which to "stalk" my old neighbourhood.

Most readers will be familiar by now with my range of coffee shops near the University. The Scandi (often called "my office") is where crucial meetings occur, while the smorgasbord, seriously evil semlor buns and coffee are being consumed. HT Harris, the oldest café on the block, does the best and cheapest espresso for miles. Kaffeine on the other side of Great Titchfield Street is my regular Sunday lunch and newspaper-reading spot as well as my meeting point with the occupants of my old flat! In my neighbourhood of West Hampstead, the coffee shops are less impressive. A walk to the other end of Priory Road, though, takes me to Hart & Lova, a Czech bakery that makes some of the most tempting (but un-French) croissants in London. Au Pain du Papy, opposite the Nose, Ear and Throat Hospital in Gray's Inn Road makes the best French ones.

Mr Christou's Golden Hind in Marylebone Lane has long been the best fish n' chips place in London. Italian classic restaurant, Fabrizio, has moved from St Cross Street to Grays Inn Road and changed its name to Luce e limoni. A meal at the new venue was the culinary highlight of the last 12 months. Whatever the name, the (gelatine-free) chocolate mousse is still the best I have tasted in Western Europe.

The "book" has kept my holiday travelling to a minimum. Even when not writing anything, I felt guilty enough not to book any trips. Cousin Viva persuaded me to meet her in Vienna in November. I had never slept a night in Austria before because of a dislike for the country's history and modern politics. Nonetheless, we had a great deal of fun walking the streets and nothing remotely bad happened. Shortly afterwards, the vote for the neo-Fascist Freedom Party in the re-run Austrian Presidential elections fell significantly compared to the previous result. In my work, I repeatedly tell people that where they are going to is much more important than where they have come from. Austria was probably the only country in Europe that became more liberal in 2016!

Otherwise, I started the initial revision of my complaints book in the public library of the Alpine city of Sion. Strangely, it holds a copy of my 1989 arbitration tome. It was, as ever, a delight, to stay with Myriam Valette and hang out with her family and friends.

A ski trip at the end of the year culminated in me doing a series of presentations on the nature of "Britishness" for Myriam's classes at the College de la Planta. I carefully presented the leading lights in Northern Irish politics as Arlene Foster and Martin McGuiness.

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By the end of the afternoon, however, McGuiness had resigned and the Assembly had collapsed. On the same trip, I persuaded my old employers, the Swiss Institute of Comparative Law, in Lausanne, to let me deliver a lecture on financial services compliance and complaint handling, UK-style.

The Braendlin family, who usually provide me with a place to stay in Lausanne, came to London last summer so that their son, Geoffroy, could run the Serpentine 5K race. Needless to say, he did it a bit more quickly than my three efforts some years ago. It remains a magnificently organized event in Hyde Park on the last Friday of every month.

To keep in some sort of shape, I am wildly over-reliant on the wondrous Pilates teacher at the University of Westminster, Michael Burgess. His total dedication to our bunch of physical misfits keeps body and soul in broadly similar alignment.

THE FINANCIAL SERVICES WORLD

The Brexit cloud hangs heavily over my financial services compliance work. On the customer-facing side of retail business, the EU has done nothing but good. It has shortened our conduct-of-business rulebook for investments, life assurance and pensions spectacularly. It imposed regulation on the cowboy-like activities of non-investment insurance salesmen, leading to massive PPI payouts. At the same time, the EU has given Britain a real voice in the development of compliance and complaint handling standards worldwide.

Already in 2017, one likely effect of the Brexit vote seems to have been a reduction in the amount of compliance project work around for my contractor friends. Whispers of potential re-structurings of businesses reliant on overseas earnings could lead to significant cuts in compliance spending. Re-organizations of businesses almost invariably result in much-reduced compliance spending until everyone has worked out which roles they are going to be filling in the future.

This seems to have inspired the FCA to regulate with a lighter touch. The last fine for a bad financial promotion dates back to 2014. The regulator has yet to use the powers given to it in 2013 to "name and shame" firms for issuing bad promotions. I regularly sample newspapers, check tube trains and study twitter and the internet generally and have found plenty of firms worthy of such public censure.

In 2016, the FCA spent a great deal of time messing around with complaint handling. Its proposals which originally appeared in 2014 caused great chunks of alterations to the rulebook, in July 2015 and June last year. In 2015, the regulator also turned its attention to the "Plevin" problem. In that case, the Supreme Court ruled in 2014 that the addition of an undisclosed commission of 71% of the premium to a consumer loan agreement made the credit transaction unfair. Unfortunately, the court was not asked to rule on the remedy. Mrs Plevin ended up recovering all the comission plus interest on top of her Financial Services Compensation payout for the bad sale. In the past, FOS has declined to find credit agreements unfair, reserving that power to the courts - on the basis that it is only entitled to award compensation for losses suffered by the customer.

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In PS 17/3, the regulator finally ended two years of consultation, by ordering consumer credit firms to pay complainants any undisclosed commission or profit-share that they had received from the insurer to the extent that it exceeded 50% of the premium. The firm had to add interest payable on this excess commission until the end of the loan and then 8% simple annually till payment. Profit-share amounts are payments commonly made by insurers to loan providers to represent the low levels of successful claims made under these policies.

This Plevin redress is not payable if any firm has previously upheld a misselling complaint and paid redress on the basis that the customer would not have bought the policy concerned. Nothing more will be paid even if the firm that sold the policy has miscalculated the redress or used the inappropriate method of working out the compensation that assumes that the customer would have bought a regular premium policy.

Firms paying Plevin compensation must not deduct amounts paid to meet claims and can only take refunds paid on early cancellation of the PPI policy into account to the extent that they relate to the proportion of commission and profit share over 50%.

The FCA has still not banned either the charging of excessive non-investment insurance commission or the failure to disclose this type of remuneration to customers. Regardless, firms should always tell their customers of any commission or profit-share amounts that they are going to receive or pay. I always check that non-investment firms understand the need to do this. A pair of Court of Appeal cases, Hurstanger and McWilliam, make any undisclosed commission taken by an intermediary acting as the customer's agent the property of the client. Failure to disclose commission in this area is madness, regardless of what the regulator says.

The big change to my financial services work in recent times has been a vast increase in training courses. I have always regarded training as a form of educational consulting with often more beneficial effects than a dry report. This is even more the case when the course is private and one can use the company's own materials. This takes me back to 1996 when I started out doing this type of work. Although I still receive direct approaches from companies, the big change in recent times has been a significant increase in referrals from training companies.

Originally, this was almost entirely from Infoline, an organization whose first complaints conference I helped put together in 1997. That continues but has been overtaken in volume this year by CTP, run by Andrew Hilton, whom I met

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through his work for Infoline. He has developed a range of compliance training courses with my friend and fellow cricket-nut, Charles Meade-King whose retirement has given me a pleasant opportunity. A combination of CTP's programmes and one of my own led me to "play" Bournemouth, Northampton, Belfast and London in six days. This year, I have also trained people in Cardiff and Nottingham. CTP has also had me running public courses in Leeds to move away from the traditionally London-centric choice of venues for financial services events.

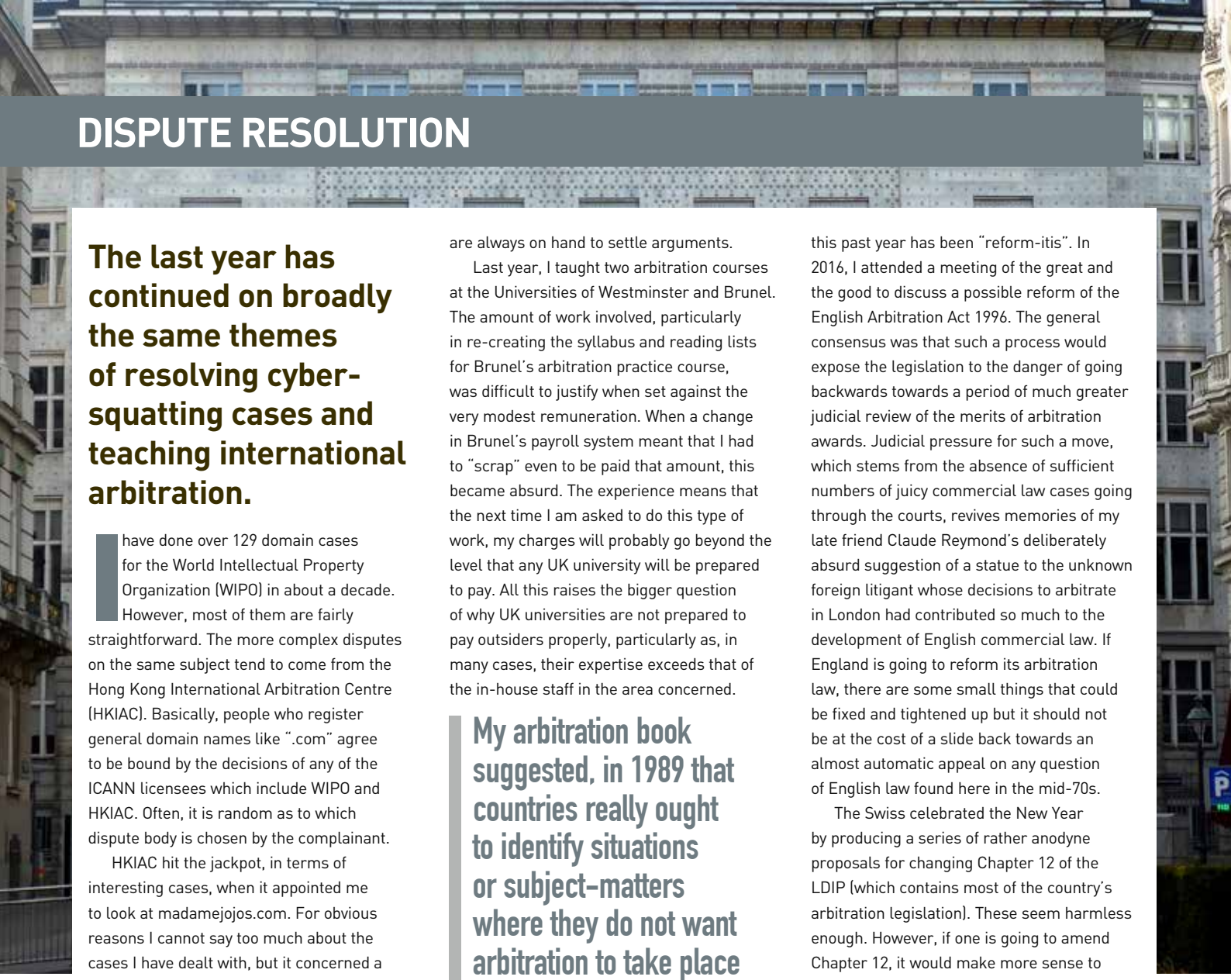
The CTP courses I ran were originally about the compliance-related aspects of financial promotions, digital media and product development. At my suggestion, we have added complaints, a subject on which I also ran an Infoline workshop in March to go with their annual complaints conference. At the conference, I decided to move away from my usual thing of giving fairly technical lectures to telling the story of how consumer financial services complaint handling and consumer protection developed. In essence, my Lausanne lecture in January was something of a "dry run".

As before, I have continued to write a monthly column for Compliance Monitor. Esther Martin, its editor, pushes me to go into the really dark corners of what I do. A piece I found difficult to write concerned the steps that one can take to handle a compliance melt-down. It is based on experience of helping firms cope when the proverbial roof falls in. The key is to distinguish short-term jobs required to stabilise things quickly from equally essential longer-term activities to rebuild after the disaster.

Gabby Stephenson at Wolters Kluwer's Compliance Resource Network commissions regular compliance pieces from me, which hopefully this year I will be able to produce more consistently. At the company I still call Complinet, Alex Robson, occasionally buys something and will hopefully receive more from me this year on commercial insurance. Lexis-Nexis has asked me to write new commentaries for their Butterworth Financial Regulation Service (BFRS) on COCON, the Code of Conduct for approved persons and employees of deposit takers and major investment firms and FINMAR, the rulebook covering restrictions on short-selling. I already handle complaints and approved persons and chunks of COBS (conduct of business for life, pension and investment business) that nobody else wants. Twice yearly, I update my commentary on large chunks of the Financial Services and Markets Act for Lexis-Nexis' related online service.

Firms of all sizes still ask me for help in setting up their agreements and processes and handling the odd complaint. Occasionally, something genuinely esoteric crosses my path, such as the question of whether a canal boat breakdown service is insurance and, if it is, whether it comes within the exemption in the Regulated Activities Order for vehicle breakdown services. Is a canal boat a vehicle? Two statutes passed around the time of the Financial Services and Markets Act 2000 expressly define "vehicles" as including boats. There has been at least one conviction for being drunk in charge of a vehicle when steering a boat. Carrying on regulated activities without the relevant authorisations is a criminal offence and it would be harsh to criminalise behaviour on the basis of such an ambiguous word as "vehicle".

Universities remain something of an elusive target for my financial services expertise. My involvement in the University of Westminster's proposed MSc programme on banking regulation faded away when nobody was prepared to pay me properly for it.



DISPUTE RESOLUTION

The last year has continued on broadly the same themes of resolving cyber-squatting cases and teaching international arbitration.

I have done over 129 domain cases for the World Intellectual Property Organization (WIPO) in about a decade. However, most of them are fairly straightforward. The more complex disputes on the same subject tend to come from the Hong Kong International Arbitration Centre (HKIAC). Basically, people who register general domain names like ".com" agree to be bound by the decisions of any of the ICANN licensees which include WIPO and HKIAC. Often, it is random as to which dispute body is chosen by the complainant.

HKIAC hit the jackpot, in terms of interesting cases, when it appointed me to look at madamejojos.com. For obvious reasons I cannot say too much about the cases I have dealt with, but it concerned a dispute between the two grand-daughters and heirs of Paul Raymond (who owned large chunks of Soho) and the ex-manager of a well-known transvestite night club.

The club, partly created by Mr Raymond, operated on premises owned by his property empire but the police had closed it down by the time of the case. While preparing my decision. I uncovered much of the fascinating history and dynamics of the neighbourhood, near which I had lived for eight years. I barely managed to resist the temptation to walk around the area and talk to its most famous characters to verify my findings of fact. Anyway, the decision can be found at http://www.adndrc.org/diymodule/docUDRP/HK-1600851_Decision.pdf.

The case raises a more important general question. In a community, like Soho, there is a good argument for organizing a dispute resolution entity to deal with local problems. A combination of arbitration, mediation and even adjudication (for building disputes), perhaps in the form of a near-permanent dispute resolution board (DRB), could ensure that people who understand the area, its history and slightly odd dynamics are always on hand to settle arguments.

Last year, I taught two arbitration courses at the Universities of Westminster and Brunel. The amount of work involved, particularly in re-creating the syllabus and reading lists for Brunel's arbitration practice course, was difficult to justify when set against the very modest remuneration. When a change in Brunel's payroll system meant that I had to "scrap" even to be paid that amount, this became absurd. The experience means that the next time I am asked to do this type of work, my charges will probably go beyond the level that any UK university will be prepared to pay. All this raises the bigger question of why UK universities are not prepared to pay outsiders properly, particularly as, in many cases, their expertise exceeds that of the in-house staff in the area concerned.

> **My arbitration book suggested, in 1989 that countries really ought to identify situations or subject-matters where they do not want arbitration to take place and list them clearly in their arbitration legislation**

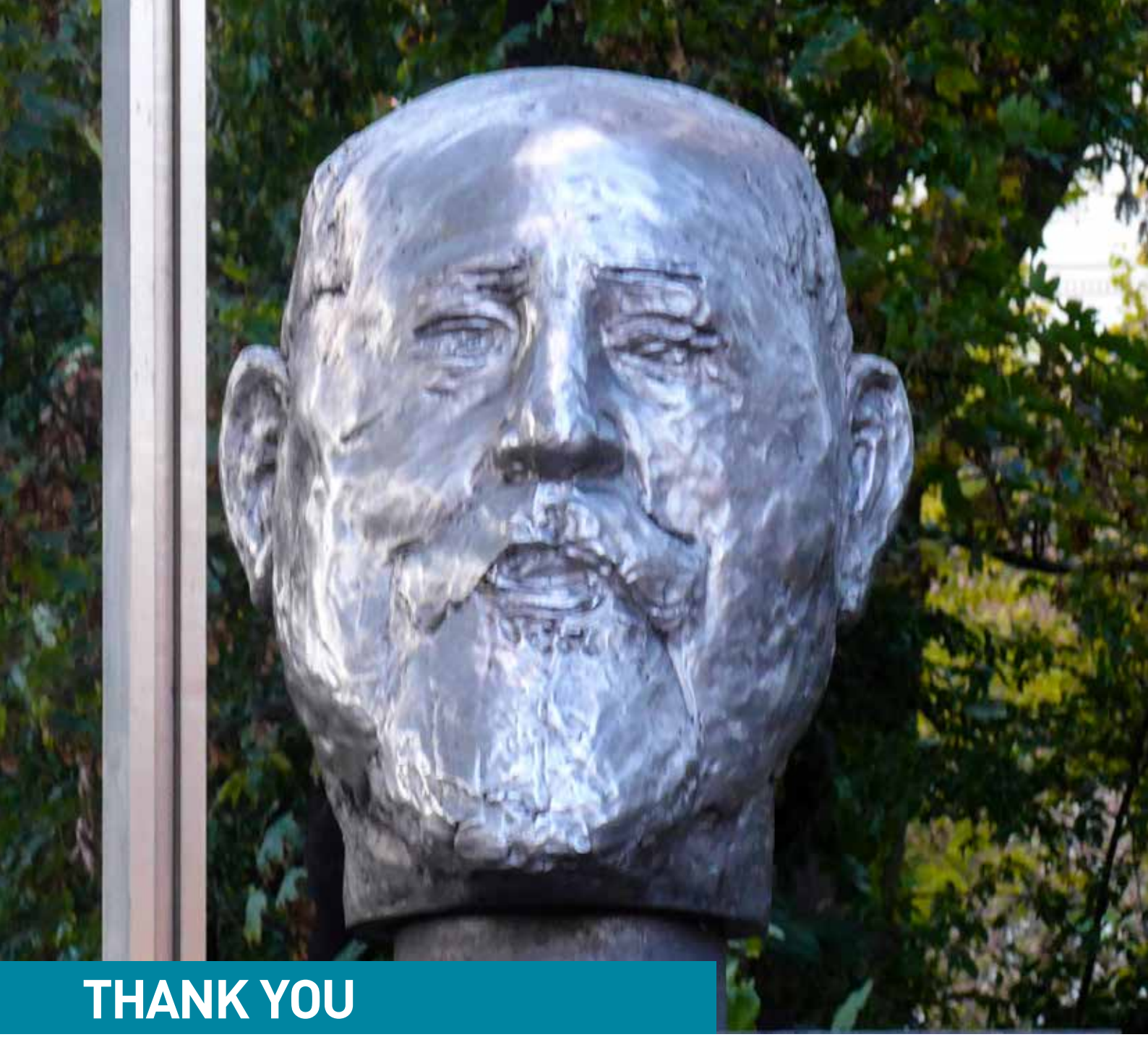
The Westminster LLM team, under Simon Newman's leadership, suspects that it may have spoilt me. Richard Earle, my arbitration (and so much else) teaching colleague, continues to garner fan-club-like comments from students. Simon and Richard allowed me again to run an arbitration evening, this time a lecture on how to re-draft the UNCITRAL Model Law, last February. A search on youtube for "Adam Samuel dispute" will flush out some of the videos that I did to support the occasion. They also contain some short answers to questions put to me by the person doing the recording.

Also available through the same search on youtube is a lecture I did for the Property Department of the University on solving construction disputes. The organizer of this class, a former student of my Westminster LLM arbitration course, Angelica de Freitas Silva is building up a series of online talks on construction problems.

The big issue in international arbitration this past year has been "reform-itis". In 2016, I attended a meeting of the great and the good to discuss a possible reform of the English Arbitration Act 1996. The general consensus was that such a process would expose the legislation to the danger of going backwards towards a period of much greater judicial review of the merits of arbitration awards. Judicial pressure for such a move, which stems from the absence of sufficient numbers of juicy commercial law cases going through the courts, revives memories of my late friend Claude Reymond's deliberately absurd suggestion of a statue to the unknown foreign litigant whose decisions to arbitrate in London had contributed so much to the development of English commercial law. If England is going to reform its arbitration law, there are some small things that could be fixed and tightened up but it should not be at the cost of a slide back towards an almost automatic appeal on any question of English law found here in the mid-70s.

The Swiss celebrated the New Year by producing a series of rather anodyne proposals for changing Chapter 12 of the LDIP (which contains most of the country's arbitration legislation). These seem harmless enough. However, if one is going to amend Chapter 12, it would make more sense to clean up or at least have a grown-up argument about some of the more fundamental concerns about the text. In recent years, amendments to Belgian, French and Dutch arbitration laws have followed in close succession. In a period of change like this, it would be better if there was a more profound discussion, perhaps in the form of people gathering from all over the world to discuss how legislation can be improved overall, rather than a series of piecemeal changes.

My arbitration book suggested, in 1989 that countries really ought to identify situations or subject-matters where they do not want arbitration to take place and list them clearly in their arbitration legislation. The world is still waiting for a single country to produce one. Bankruptcy, patent validity, employment matters and consumer cases would all benefit from a proper description of what can and cannot be done in all the major arbitration centres. The EU Directive 93/13 presumes that all consumer arbitration clauses are unfair and so unenforceable against consumers. The USA has yet to address this problem coherently, a problem which has plagued the Supreme Court's "in-tray" in recent years.



THANK YOU

I am always aware of how difficult most of what I do would be without a gallant band of supporters. Some of the more trying times, when I was trying to finish my book, were lightened by the reception staff in both the Law School and the stunningly beautiful main building of the University of Westminster. Jonathan and Josephine on the main building's front desk have been more supportive to me than any writer could wish. Jonathan asked me whether I was invited to a party in the lobby and when I said no, replied in a classic echo of Sunset Boulevard: "That party is either too big or too small for you". Bruce Clark has kept an eye on me and my activities during a pretty difficult year. It is not easy to help someone with a business when that individual is trying desperately to overcome writers' block. Regular coffees with my old Insurance Ombudsman Bureau colleague, Malachy McClelland have kept me going. Chris Hamblin persuaded me to start writing for a living and remains the editor of this letter, remunerated at his insistence only by fish and chips at the Golden Hind.

Further afield, my Swiss adopted families, the Valettes of Sion and the Braendlins of Lausanne have provided invaluable hospitality. The Nicolas Ulmer/ Douglas Reichert lunch team have been entertaining me in Geneva for almost thirty years.

It remains only to wish everyone a peaceful ride through the rocky times ahead.