E-Briefing – Detailed Version
(Covering the period from 8 July to 14 October 2008)

Company Law Committee

The Company Law Committee has been considering the FSA's consultation paper *"Disclosure of Liquidity Support"* (CP 08/13) (see http://www.fsa.gov.uk/pubs/cp/cp08_13.pdf) which proposes an amendment to the Disclosure Rules and Transparency Rules sourcebook ("*DTR*") within the FSA's Handbook. The proposed amendment would clarify that, in a limited set of circumstances, a financial institution admitted to trading on a regulated market (an 'issuer') that was in receipt of liquidity support from the Bank of England or another central bank may be able to delay the public disclosure of this fact.

The CLLS Company Law Committee responded to the report (see response at http://www.citysolicitors.org.uk/FileServer.aspx?oID=425&lID=0) and agreed with the proposed amendment that would allow firms to be able to take advantage of the ability to delay disclosure of information concerning liquidity support. However, the Committee did not believe that the FSA had gone far enough in its proposal in order to achieve this result. The Committee recommended extending the changes to include delaying the disclosure of information regarding the "*underlying circumstances that give rise to the need for (liquidity) support.*" It was also suggested that other forms of support, such as the FSA's steps to promote a takeover by another firm, should "*equally benefit from the ability to delay disclosure.*" Lastly, the Committee urged the FSA to provide formal guidance regarding when a delay in disclosure would constitute "*misleading the public.*"

Furthermore, the Financial Law and Company Law Committees have issued a joint memorandum entitled the *"Implications for Leveraged Transactions of the Repeal of the Statutory Prohibition of Financial Assistance by Private Companies"* (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=422&lID=0). The effect of the repeal of the financial assistance prohibition is that financial assistance transactions by private companies (in respect of the shares of a private company) are no longer unlawful per se. However, the document outlines some of the principles of company law that should still be taken into account: the transaction must be in the best interest of the company ("*likely to promote the success of the company for the benefit of its members*"), and the transaction must not breach the rules on distributions or otherwise constitute an illegal reduction in the capital of the company. In addition, the validity of the transaction may be called into question as a transaction at an undervalue for the purposes of s238 *Insolvency Act 1986*. The Committees concluded that the abolition on prohibition of financial assistance for private companies will not, by itself, create any problems additional to those which have always required consideration when dealing with cross guarantees, "*upstream*" loans and "*upstream*" security.

In addition, amendments to the Articles of Association for listed companies (a pro forma circular to shareholders describing changes to articles of association to reflect the provisions of the *Companies Act 2006* in force December 2007 and those coming into force in October 2008) were recently posted on the Company Law Committee's webpage (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=411&lID=0). This pro forma circular was developed by a number of firms represented on the Company Law Committee and the UKLA has confirmed that the changes described can be regarded as not containing unusual features (see List Issue No 17 and minutes of the meetings of the Committee on 19 October 2007 and 27 November 2007).

The Company Law Committee may also be commenting on the liability issues arising from the Davies Report (see http://62.164.176.164/d/davies_review_finalreport_040607.pdf). The review considers issuer liability to investors in respect of misstatements to the market and, in particular, the exercise of the powers conferred by the new section 90B of the *Financial Services and Markets Act 2000* (inserted by the *Companies Act 2006*).

Construction Law Committee

The Committee recently made a submission on the *Draft Construction Contracts Bill* (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=417&lID=0). The response stated, *inter alia*, that it disagreed with the proposal contained in the draft Bill to allow a party seeking payment to make an application for payment which would in certain circumstances be binding on the payer. The response stated that adjudication would provide a sufficient default mechanism where a certifier fails to certify a sum due. The response further stated that the binding application process would be extremely unfavourable to small companies and those who are one off clients of the construction industry.

The Committee also recently held a successful foundation level training programme mooted last Autumn. The sessions were held at Ashurst and Nabarro and were well attended (approximately 60 people per session). The training sessions were aimed at trainees and newly qualified construction lawyers and the attendees came from over 20 different firms.

Furthermore, Stephen Dennison QC of Atkin Chambers recently gave a talk to members of the CLLS Construction Law Committee and their guests on the subject of concurrent delay. Stephen is a leading construction silk with first hand experience of this complex area. He reviewed the relevant case law and focussed on recent developments.

Employment Law Committee

The Committee is currently considering a Department for Business, Enterprise and Regulatory Reform (BERR) document which sets out a proposal to recast the European Works Council Directive (94/45/EC) (see http://www.berr.gov.uk/files/file47617.pdf). The Commission is under a duty to review the Directive, and, after identifying a number of problems with the practical application of the Directive, has published a legislative proposal to amend the Directive and deal with those problems. The Commission's stated objectives for amending the directive are:

- To improve the effectiveness of information and consultation of employees in existing European Works Councils (EWC);
- To increase the number of EWCs being established;
- To improve the legal certainty in the setting up and the operation of EWCs (for example during mergers and acquisitions); and
- To enhance the coherence between EWCs and other national level procedures for informing and consulting employees.

The Committee recently responded to the Advisory, Conciliation and Arbitration Service (ACAS) consultation on its Draft Code of Practice on discipline and grievance (see http://www.acas.org.uk/CHttpHandler.ashx?id=880&p=0 for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=408&lID=0 for the response). The draft code is a proposed amendment to the ACAS's existing Code of Practice, and is designed to take into account changes that are expected to be

introduced by the *Employment Bill 2007*. The Code is designed to come into operation in April 2009, to coincide with the Government's plan to introduce the changes to workplace dispute resolution. The response stated, *inter alia*, that the code should state clearly that the ACAS guidance for the code does not form part of the code; that the code is solely to be used to determine whether an adjustment should be made to an award; and that the code is *"principles based"*.

Financial Law Committee

Please refer to the comments above (re the Company Law Committee) with regards to the joint memorandum entitled the "*Implications for Leveraged Transactions of the Repeal of the Statutory Prohibition of Financial Assistance by Private Companies*".

As a result of recent market events, the Treasury, Bank of England, and Financial Services Authority (together, the Authorities) along with the Financial Services Compensation Scheme (FSCS) have been working to develop the UK's response. In July of this year, the Authorities released *Financial stability and depositor protection: further consultation (*http://www.fsa.gov.uk/pubs/cp/jointcp_stability.pdf) which sought to consult on the latest government proposals to strengthen the stability and resilience of the UK financial system. The Authorities also released a more detailed, technical explanation of the special resolution regime for banks (SRR) which is outlined in "*Financial stability and depositor protection: special resolution regime*" (see http://www.bankofengland.co.uk/publications/other/financialstability/financialstabilitydepositorprotection080722.pdf). The paper proposed that the special resolution regime could be used in the case of real or likely bank failures measured by reference to FSA's Threshold Conditions (within the meaning of section 41(1) of the *Financial Services and Markets Act 2000*) (provided that certain other conditions were satisfied).

Among other things, the proposals cover the SRR objectives, the roles of the Treasury, Bank of England and Financial Services Authority (together, the "*Authorities*"), governance arrangements, powers for the Bank of England to transfer all or part of the failing bank to a private sector purchaser or to a publicly-controlled bridge bank, a special bank administration procedure to facilitate partial transfers to a bridge bank, powers for the Treasury to take a failing bank into temporary public sector ownership, powers to set up compensation arrangements for failing banks, their creditors and shareholders, and powers for a bank to be put into a bank insolvency procedure. The paper stated that "*the Authorities recognise that the measures and tools included in their proposals for a SRR include significant new powers, marking important changes in the institutional, legal and insolvency arrangements for banks operating in the UK*." The paper also stated that there will have to be considerations made for the implications regarding property rights contained in the *Human Rights Act 1998* and European Community law (in particular, the rules relating to State aid).

Separate responses to the *Financial stability and depositor protection: special resolution regime* paper were issued by the CLLS Financial Law (http://www.citysolicitors.org.uk/FileServer.aspx?oID=431&lID=0), Insolvency Law (http://www.citysolicitors.org.uk/FileServer.aspx?oID=432&lID=0), and Regulatory Law Committees (http://www.citysolicitors.org.uk/FileServer.aspx?oID=433&lID=0). Some of the principal common concerns included the uncertainty that the proposals could create, and the extent to which they would permit interference with contractual relations. **It should be noted that, since the above submissions were submitted, the Banking Bill has been published and the areas of greatest concern are now**

to be dealt with by statutory instrument, which it is hoped will enable these concerns to be effectively addressed. The CLLS has offered to assist the Government in any way it could.

The Financial Law Committee is also contributing to the review and updating of Part 7 of the *Companies Act 1989*. It may be putting forward comments on the practical difficulties and legal issues connected with the introduction of a separate form of floating charge with different priority rules in Scotland under the *Bankruptcy and Diligence (Scotland) Act 2007* (the *"BAD Act").* Furthermore, it may also be commenting on the effect of proposed changes to the EU Capital Requirements Directive 2006/48/EC, in particular the new Article 122a, on the syndicated loan market.

The Committee also recently responded with detailed comments on the European Commission's Proposal for amendments to Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements. (The directives are the two main Community instruments in the area of clearing and settlement and financial collateral.) A copy of the Committee's response can be found at http://www.citysolicitors.org.uk/FileServer.aspx?oID=401&lID=0

Insolvency Law Committee

Please refer to the comments above (re the Financial Law Committee) with regards to the *Financial Stability and Depositor Protection: Special Resolution Regime* consultation paper.

Insurance Law Committee

The Insurance Law Committee recently responded to FSA CP08/11 ("*With-profits funds - compensation and redress*") (see http://www.fsa.gov.uk/pubs/cp/cp08_11.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=416&lID=0 for the response). The FSA's proposed changes to the FSA Handbook rules COBS 20.2.24R and 20.2.25R were proposed on the basis that they would rectify:

- The possibility that policyholders are affected unfairly by a firm's retention of assets in the inherited estate as working capital; and
- The lack of a sufficient incentive for proprietary firms to address failures of systems and controls.

The Insurance Law Committee challenged the above propositions, on the basis that they would effectively remove the problem from the with-profits fund and impose it instead on shareholders' interests. The Committee stated, *inter alia*, that the Consultation Paper contained no evidence to suggest that reallocating the cost of compensation and redress to shareholders is likely to have the desired effect. Furthermore, it was noted that the proposals leave in place the rules that the FSA has identified as inadequate (those addressing potential failings) and instead extend the contractual rights of policyholders at the expense of the proprietary interests of shareholders.

The Committee will be reviewing, and if appropriate responding to, further papers likely to be issued by the Law Commission in the context of its work on insurance contract law, including papers on post-contractual good faith which are expected in late autumn 2008. The Committee is also intending to review various aspects of the FSA's regulation of the insurance industry, having regard in particular to the development by the EU of a new insurance solvency directive (Solvency II).

Land Law Committee

The Land Law Committee recently added a note entitled *"Important note to qualify the VAT provisions of the CLLS Certificate of Title 6th edition"* (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=413&lID=0). As the beginning of the note states:

> Following recent changes in VAT legislation, some of the VAT provisions of the CLLS Certificate of Title in paragraph 19 of schedule 3 and paragraph 22 of schedule 4 are out of date.
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> The CLLS will seek the necessary Law Society/SRA approvals to change the form of the Certificate to update those VAT provisions, the updated paragraphs being set out below. In the interim until those approvals have been obtained, the current paragraphs 19 and 22 themselves cannot be changed. Instead, providers of the Certificate may wish to make qualifications to those paragraphs in schedule 5 to the Certificate to reflect the VAT changes. Providers of the Certificate may wish to make such qualifications by incorporating the revised paragraph 19 set out below in part 7C of schedule 5 and the revised paragraph 22 set out below in Part 8C of schedule 5, provided of course that the statements set out below can be made.

Litigation Committee

As stated in the Committee Chairman's report in City Solicitor:

> At its recent meeting in September the Committee discussed the current consultation by the Civil Procedure Rules Committee in relation to the proposed amendments to CPR Part 44 to introduce powers in relation to cost capping, and the Committee will be submitting a response later this month.
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> One of the major issues affecting commercial litigation this year is the current Commercial Court pilot of the procedural changes recommended by the Commercial Court long trials working party in their report of December 2007. The trial period runs until the end of November. The Committee will be holding an open meeting towards the end of November or early December to provide an opportunity for practitioners across the City to discuss the reforms and give feedback to the commercial judges. Details of this event will be available shortly.

The Litigation Committee recently responded to the SRA consultation paper entitled *"Standards for solicitor higher court advocates and outline proposals for a new accreditation scheme"*. The SRA had developed proposals:

- For changes to the *Solicitors' Code of Conduct 2007*; and
- For the operation of a new accreditation scheme for solicitors who wish to obtain SRA recognition of their higher courts advocacy competence.

The Committee's response can be viewed at http://www.citysolicitors.org.uk/Default.aspx?sID=924&lID=0. The response stated, *inter alia*, that the SRA's proposals were sufficient to protect the public interest; that the proposed standards would adequately cover the knowledge and skills that should be expected of a solicitor advocating in the higher Courts; that the proposed standards were set at the appropriate level of a competent solicitor higher Courts advocate (and may perhaps exceed the level required); and that the proposed assessment process appeared to be adequate to establish the competence of the applicant. However, the response raised doubts as to the value of the introduction of an accreditation scheme for advocacy, and did not agree with the suggestion that higher Courts accreditation should be revalidated every five years (as opposed to relying on a CPD-type continuing accreditation system).

Planning & Environmental Law Committee

The Committee has prepared a submission in response to a consultation by Communities and Local Government regarding the "*Proposed Changes to Planning Policy Statement 6: Planning for Town Centres*" (see http://www.communities.gov.uk/publications/planningandbuilding/pp6consultation for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=434&lID=0 for the response). The consultation paper sought to refine the policy approach to planning for town centres as set out in the policy statement, rather than to make significant policy changes, and to strengthen the Government's policy on positive planning for town centres. The main proposed changes related to how some planning applications should be considered and tested. The proposals would remove the requirement for an applicant to demonstrate "*need*" for a proposal which is in an edge of centre or out of centre location and which is not in accordance with an up to date development plan strategy. The policy would replace the existing impact assessment with a new impact assessment framework which applicants for proposals outside town centres would need to undertake in certain circumstances.

The Planning and Environmental Law Committee criticised the proposal for not providing a clear and concise statement of national policy. It stated that the competition issues examined by the Competition Commission and Planning Policy Statement 6 ("*PPS6*") must be reconciled. The Committee supported the proposed removal of the need test, but stated that it should be recognised that removal of the test was only likely to be helpful where there would have been an open and shut case against an edge of centre or out of centre proposal. The Committee also stated that *"The holistic assessment advised by PPS6 introduces the identity of the occupier as a material consideration. This is a major departure from the fundamental planning law principle that use rather than ownership is relevant to the application."*

The Committee is continuing to monitor the progress of the *Planning Bill* and the *Climate Change Bill*.

Regulatory Law Committee

Please refer to the comments above (re the Financial Law Committee) with regards to the "*Financial Stability and Depositor Protection: Special Resolution Regime"* consultation paper.

Furthermore, as stated in the Committee Chair's report in City Solicitor:

> A response to CP08/10 and DP08/3
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> The Committee expressed serious concerns about the FSA proposals in relation to Own Initiative Variations of Permission ("**OIVoP**s"), which are intended as a move to bring about greater transparency. The Committee took the view that the proposals risk sacrificing fairness and it would not be a legitimate use of an OIVoP to 'name and shame' firms without following due process, nor indeed would it be a particularly effective method of publicising FSA concerns about particular conduct. The FSA appears to intend to use OIVoPs not just for supervisory purposes but also as an enforcement tool and the Committee expressed concern that this potentially would be ultra vires. In addition if OIVoPs were to be used as a tool of public censure, the Committee was concerned that they could be used as a way of circumventing the FSA's established disciplinary powers under FSMA. The Committee requested further clarity from the FSA on how it intended a 'streamlined' investigation of public censure cases to operate and noted deep concern over the FSA's intention to publicise confidential information received from firms.

See http://www.fsa.gov.uk/pubs/cp/cp08_10.pdf for CP 08/10, http://www.fsa.gov.uk/pubs/discussion/fs08_03.pdf for DP 08/3 and http://www.citysolicitors.org.uk/FileServer.aspx?oID=414&lID=0 for the Committee's response.

Professional Rules and Regulation Committee

The Professional Rules and Regulation Committee (PR&RC) has been considering the SRA's responses to the consultation responses it received in relation to the implementation of the *Legal Services Act 2007.*

The PR&RC is also in discussions with the SRA with regards to its proposed amendment of rule 4.02 of the amended Code of Conduct. The Committee has pointed out to the SRA the difficulties with the application of the rule as it is proposed to be amended, which would include an extension of the scope of the duties imposed by the rule to support staff.

Training Committee

The Training Committee will be holding a seminar in December with regards to the SRA's further consultation on the changes to the QLTR provisions.