E-Briefing – Detailed Version
(Covering the period from 31 December 2008 to 13 February 2009)

1. Professional Representation
1.1 Professional Rules and Regulation Committee

The Law Society has commissioned an independent review of the regulatory regime for law firms, to be conducted by the Rt Hon Lord Hunt of Wirral. As a distinct sub-strand of this, The Law Society has commissioned an independent review of whether the present arrangements for regulating law firms serving corporate clients are satisfactory. The Professional Rules and Regulation Committee responded to this review (the "Smedley Review"), in response to a call for evidence. (See http://www.legalregulationreview.com/corporatereview.html for the call for evidence and click here for the response paper).

1.2 Training & Education Committee

The Training & Education Committee recently responded to the SRA Consultation Paper on the Qualified Lawyers Transfer Scheme (see http://www.sra.org.uk/sra/consultations/1454.article for the SRA consultation paper and click here for the response paper). The response was broadly supportive of the approach described in the consultation paper, which would involve a substantial increase in the amount and depth of assessment of foreign lawyers seeking to qualify as solicitors in England and Wales, as well as the elimination of work experience. However, the support was qualified on several bases:

- That, in reality, lawyers coming from other jurisdictions would normally need work-based experience in England (or with an English firm) to function effectively as solicitors. The Committee was opposed to some form of work experience (either in England or in the country of qualification) being imposed as a requalification requirement; the response recommended that if work experience were to be required, then there be another consultation about this. The Committee further stated that if a work-based requirement was to be restored, then the overall assessment burden for requalification should be lessened.

- That the increased assessment obligation set out under the proposals would increase costs for Member Firms, and hence could reduce the number of foreign lawyers working in the Member Firms seeking to requalify.

- That overseas lawyers will be able to become partners of MDPs, and that it would be a pity if foreign lawyers in England & Wales chose to become registered foreign lawyers or registered European lawyers rather than doing any particular training in English law and practice. (It was thought the SRA could be more flexible by determining foreign lawyers' requalification requirements on the basis of the similarity of their home jurisdictions to England & Wales.)

- That barristers, who will also be able to join solicitors as partners within MDPs, may seek to avoid the requalification process if it is considered onerous.

The paper also commented on the detail of the SRA's proposals.

2. Specialist Committees & Working Groups

2.1 Commercial Law

The Commercial Law Committee recently responded to the Law Commission's Consultation Paper No. 188 "Consumer Remedies for Faulty Goods". (See http://www.lawcom.gov.uk/docs/cp188.pdf for the consultation paper and click here for the response paper.) The response made a number of detailed comments in regards to the paper. It also commented on the wider issues involved in the proposed EU Directive on Consumer Rights (2008/0196) (the "Draft Directive") and discussed in the BERR Consultation Paper of November 2008, by stating that:

- The Draft Directive is structured as a maximum harmonisation measure which would leave no scope for individual Member States to maintain what may, in many cases, be higher levels of protection. While maximum harmonisation may be justified in relation to those areas of the law which have a clear and immediate bearing on inter–state trade, and this is clearly arguable in the case of distance selling, the section on remedies will apply to face to face sales, the vast majority of which will be purely domestic. The response questioned the justification for maximum harmonisation in this case, particularly as this may result in a weakening of existing consumer rights, and urged BERR to resist this.

- It should also be borne in mind that legislation to implement the proposals is likely to be by way of amendments to the Sale of Goods Act which lies at the heart of wider contract law. There will inevitably be a "drag" factor which will impact on business to business sales, whether this is intended or not, and care needs to be taken properly to differentiate the special consumer remedies.

2.2 Company Law

The Company Law Committee recently developed a pro forma circular to amend the articles of association of a listed company with effect from 1 October 2009 to cater for CA 2006 changes coming into effect on 1 October 2009 and to cater for other items of business at 2009 AGMs. The pro forma circular was developed by a number of firms represented on the City of London Law Society and attention is drawn to the comments of the UKLA and ABI at the start of the document. To view a copy of the circular click here.

2.3 Competition Law

The CLLS & Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law (JWP) responded to the Office of Fair Trading's (OFT) consultation on the OFT Transparency Project. (Click here for the response paper). The response made a number of specific comments in regards to the consultation, and stated that:

- The Mergers Branch procedures were commendably transparent and generally enable parties and their advisers properly to plan for the various stages of a merger investigation. The quality of decision making in the Mergers Branch is also considered to be high notwithstanding the timetable constraints within which

it operates. Whilst it was accepted that non merger projects do not have the same timetable constraints, the requirement of good administration requires them to be dealt with efficiently, transparently, fairly and timeously.

- It would be helpful if the OFT website could clearly set out who works for the OFT and what they do.

- Interested parties should be provided with contact details for the OFT's team that is working on any particular project, and that such details should be updated if the composition of the team changes over time.

- Caution should be exercised in assuming that transparency is achieved simply by publishing regular press releases setting out the OFT's "latest achievements" in a case e.g. publication of a statement of objections, conclusion of settlement agreements.

- The OFT website, while it contains useful information, is difficult to navigate and could be made clearer.

2.4 Financial Law

The Financial Law Committee recently commented on clause 48(1) of the Banking Bill (as amended in the Public Bill Committee of the House of Commons and ordered to be printed on 18 November 2008). For a copy of the CLLS's response click here. The response made a number of technical suggestions regarding the drafting of the provision, and stated that:

- The proposed amendments are technical, but deal with two fundamentally important distinctions in the financial law of the United Kingdom, namely:
  - between a security interest and a title transfer arrangement; and
  - between set-off and netting;

- It is important that the Banking Bill not undermine these distinctions, first to protect the integrity of the Banking Bill itself and of the safeguards under clause 48 and to protect the integrity of these concepts more generally under English financial law; and

- The proposed amendments to the definitions in clause 48(i) are designed to achieve this and also to ensure consistency with the definitions used in the Financial Collateral Arrangements (No. 2) Regulations 2003. The redraft of "security interest" and the new definitions of "close-out netting provision" and "title transfer collateral arrangement" are based on similar definitions used in those Regulations.

The Committee also drafted a supplemental note on recommended amendments to clause 48(1) of the Bill, which made a series of further technical points regarding the drafting of the clause. To view a copy of the note click here.

2.5 Land Law

The Land Law Committee has recently published a form of rent deposit deed, which can be viewed by clicking here. The Committee recognised that a number of different deposit

arrangements were possible, but adopted as the basis for the deed the arrangement where the tenant's money is charged in the landlord's favour (as this was judged to be likely to be the most common arrangement). The deed attempts to cover the majority of issues arising in a rent deposit situation.

2.6 Regulatory Law

The Regulatory Law Committee recently responded to the public consultation by the Committee of European Securities Regulators ("CESR") on a draft Third set of Level 3 guidance on the operation of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (the "Market Abuse Directive"). (See http://www.cesr-eu.org/index.php?page=consultation_details&id=121 for the consultation and click here for the response. The paper responded to a number of specific questions, including with regards to:

- The safe harbour principle;
- One member state's regime;
- Sell side trading during stabilization period;
- Refreshing the greenshoe;
- Third country stabilization regimes;
- Reporting mechanisms;
- Mechanism for public disclosure; and
- Specific consultation question on the two-fold notion of inside information.

The Committee also recently responded to a European Commission consultation concerning hedge funds. (See http://ec.europa.eu/internal_market/consultations/2008/hedge_funds_en.htm for the consultation paper and click here for the response.) The response stated, *inter alia*, that:

> As you recognise in your consultation paper, there is a wide variety of actors within the hedge fund sector. Often, in practice, this diversity has caused confusion over what is actually intended by the term 'hedge fund'. On occasions it is used to mean the manager, on others, the fund itself and sometimes it is simply intended as the other players involved in the hedge fund industry. This lack of clarity should be borne in mind and care taken in articulating any regulation of the hedge fund industry.
>
> Currently, many European-based hedge fund managers are already regulated by MiFID and the Capital Requirements Directive. We consider it imperative that any potential future regulation takes account of the current legislation and is suitably interlinked with it. Failure to do so risks creating a new regulatory regime for hedge fund managers which conflicts with the current systems. The problems such conflicts can cause is highlighted by the difficulties practitioners face in resolving the inherent conflicts caused by the divide between the UCITS and MiFID regimes. A repeat of this situation should be avoided if at all possible.
>
> In addition, implementing new regulation for this industry sector would necessitate increased supervision requirements and it should be considered whether the authorities would have adequate monitoring tools at their disposal to monitor them effectively.
>
> We note that the MiFID regime is aimed at investor protection and wonder whether regulation in the hedge fund sector would be of any further benefit to investors? Further, it seems to us that attempts to tighten controls on hedge funds in respect of short selling in certain circumstances seems inappropriate given that short selling by hedge funds should not be distinguished from short selling by other (non-hedge fund) individuals or entities.

Robert Leeder
Policy & Committees Coordinator