**E-Briefing – Detailed Version**
**(Covering the period from 22 August to 15 September 2009[1])**

## 1. Professional Representation

### 1.1 Professional Rules and Regulation Committee

The PR&RC responded to the SRA's consultation paper 18 *"Regulating alternative business structures: Legal Services Act: New forms of practice and regulation".* (See http://www.sra.org.uk/securedownload/file/2867 for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=638&lID=0 for the response.) The foreword to the SRA paper stated that *"This discussion paper sets out the [SRA's] proposals to deliver changes in the provision of legal services in the interests of consumers, and invites a wide debate. This paper should be seen as complementary to the Legal Services Board's discussion document Wider Access, Better Value, Strong Protection, [referred to above] which was published as we were finalising this."* The CLLS response to the consultation paper stated, in part:

- Re Section 2 (*"Starting Principles for the regulation of ABSs"*):
  - *"We agree with the starting principles set out by the SRA, namely that there is no need for the SRA to look to create additional restrictions for the purposes of regulating ABSs beyond those envisaged by the regulatory framework in the Legal Services Act 2007 (the Act)."*
  - The SRA should have an objective of introducing the regulatory framework for ABSs as soon as is prudent.

- Re Section 3 (*"What is an ABS?"*)
  - A regulatory approach involving principle based regulation and a high degree of interaction between the regulator and the regulated should be adopted.
  - The inadequacies of the definition of 'legal services' will be a far greater cause of regulatory complexity in the ABS era than theoretical conflicts between ABS investors and clients.

- Re Section 4 (*"The SRA's Broad Approach to the Regulation of ABSs"*), the response stated that *"We agree that the thoughts set out in Section 4 of the Consultation paper regarding the approach to the regulation of ABSs appear to be on the right track, but of course this section only looks at the issues at a very high level."*

- Re Section 5 (*"Issues Requiring Further Consideration"*), comments were made under the following headings:
  - Reserved/non-reserved legal services.
  - Prohibitions on ownership.
  - Access to justice and equality in diversity within the legal profession.
  - Fit and proper test.
  - Adverse interests.

[1] Except where indicated

## 2. Report re Specialist Committees & Working Groups

### 2.1 Company Law Committee

The Company Law Committee recently provided an updated pro forma circular describing the changes to articles of association to reflect (i) the changes to the Companies Act 2006 as a result of the implementation of the Companies (Shareholders' Rights) Regulations 2009 in August 2009 and (ii) provisions of the Companies Act 2006 coming into force in October 2009. The pro forma circular was developed by a number of firms represented on the CLLS and attention is drawn to the comments of the UKLA and ABI at the start of the document. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=641&lID=0 for the document.)

### 2.2 Financial Law Committee

In liaison with the CLLS Insolvency Law Committee (below), the Financial Law Committee responded to The Insolvency Service's consultation paper *"Encouraging Company Rescue – a consultation".* (See http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=643&lID=0 for the response). The consultation paper stated

> As part of our continuing review of insolvency matters, we are now proposing some changes. The measures detailed in this consultation are intended to give struggling, but viable, companies a greater chance to work their way through difficult times… These proposals look at enhancements to the legislation, to facilitate company rescues in order that the maximum economic value is rescued from companies that get into difficulties, and that the knock-on effects of company insolvencies on their creditors are minimised, thus saving jobs and providing better returns to creditors… .. specifically we would wish to see a greater use being made of Company Voluntary Arrangement (CVA) procedures as a route for the restructuring of a company's affairs. We would also like to encourage amongst banks and trade suppliers a willingness to extend credit to potentially viable businesses that have entered some form of insolvency procedure, to give them more chance of making a recovery. .. In particular, the proposals consider:
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> - extending to medium and large-sized companies the option of a moratorium against creditor action - currently only available to small companies - so they too can benefit from a "breathing space" in which they can seek to agree with their creditors a means of securing a company rescue by means of a Company Voluntary Arrangement;
> - the introduction of a new court-sanctioned moratorium available to all companies; and
> - providing greater security to repayment of monies loaned post CVA or administration, to allow firms in difficulties to access the funding they need to get back on track.

In its response, the Committee agreed that:

> the rescue culture should be encouraged while ensuring that UK corporate insolvency law continues to offer fairness and predictability and strikes the right balance between the interests of debtors and creditors.

It further stated that

> [a] UK solution needs to be found. This solution should build on and work with our existing laws (including European insolvency law that forms part of our laws) and maintain the existing finely struck balance between the interests of debtors and creditors. It would be a mistake, in our view, to attempt to adopt a model from another jurisdiction where the legal landscape is different (which might have unintended consequences), or to tip the balance too far in favour of debtors. Such a change of balance would adversely affect the UK financial markets, the use of English law in international transactions and the cost and availability of funds to UK businesses, while delivering potentially marginal benefits in relation to businesses in financial difficulty. The saving of viable businesses and the jobs that go with them is more important than saving the legal structures within which the businesses exist.

The submission also stated that:

> Broadly, we consider that Proposals A [Extension of small company moratorium provisions to larger companies], B [Court sanctioned moratorium] and C [Super-priority of rescue finance in administration expenses] could be helpful in the sense of improving the choice of "tools in the tool box", although they may not frequently be easy to use for really large businesses. We make some suggestions for improvement of the processes. We do not believe that Proposal D [Greater ability to create new secured charges in an administration] is essential if Proposal C is implemented appropriately. Although we can see that the giving of security by a company in administration may provide a higher level of certainty and comfort in some cases, we cannot see (either in principle or practice) that a case is made out for allowing the creation of prior ranking security which may prejudice the recovery prospects of pre-existing specific or fixed security holders in the absence of a successful outcome, unless those lenders consent to their interests being deferred. We also do not support Proposal E [Greater ability to create new secured charges in a CVA] that super-priority security should be created without the consent of existing holders of fixed charges over the same assets in the context of a moratorium which might lead to a Company Voluntary Arrangement ("CVA"). Logic suggests that the adoption of these proposals would have an adverse effect for all UK businesses on the cost of secured borrowing across the market (hitting the real estate and projects sectors particularly hard), which would outweigh any benefits in individual cases of corporate failure. If Proposals D and E were adopted, they should not have retrospective effect and should not be capable of altering the priority of existing fixed security or overriding existing negative pledges. We believe that Proposal F is misconceived and unnecessary.

The submission also surveyed the existing tools for company rescue (i.e. multi-creditor work-outs, administration, company voluntary arrangements, and schemes of arrangement), stating:

> When assessing how best to promote the rescue culture, it is important to examine each existing UK method of achieving a rescue and to assess whether it needs to be improved or strengthened.

The submission also stated that the *"new legislation must not undermine the special statutory regime created to ensure certainty, efficiency and stability in the wholesale financial markets"* by the combination of the existing legislative provisions (i.e. Part VII of the Companies Act 1989 and its secondary legislation, the Financial Markets and Insolvency Regulations 1996, the Insolvency and Financial Markets (Settlement Finality) Regulations 1999, and the Financial Collateral Arrangements (No 2) Regulations 2003.

### 2.3 Insolvency Law Committee

In liaison with the Financial Law Committee (as above), the Insolvency Law Committee also responded to the Insolvency Service consultation *"Encouraging Company Rescue – a consultation"*. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=649&lID=0 for the response.) A working group of the Insolvency Law Committee drafted the Insolvency Law Committee's submission in response to the consultation paper.

- Re Proposal A[2], the submission mentioned that it supported the idea of extending the use of a moratorium process, including extending the CVA small moratorium provisions to larger companies.

- Re Proposal B[3], the submission stated*:*

[2] Extension of small company moratorium provisions to larger companies, as above
[3] Court sanctioned moratorium, as above

> We agree that larger companies are likely to have more complex affairs than smaller ones, and may therefore need additional time to ensure that a sufficient number of creditors are in agreement with the terms of any restructuring proposal. In principle, we are therefore supportive of Proposal B."

- Re Proposals C[4], D[5], and E[6], which together consider various proposals to improve the availability of funding either when a company is in administration or has proposed a CVA, the submission made a number of comments regarding the need for funding. The submission was critical of Proposal D (which is far reaching and seeks to incorporate parts of Chapter 11 (US Bankruptcy Code) relating to DIP financing[7] into a UK administration). The submission stated that

  > it will be a considerable challenge to incorporate elements of the US legal system into the UK given the scale of the differences between the two legal systems. We are also concerned that this is a fundamental change to the order of priority and may therefore affect lending decisions prior to administration.

  The submission was also critical of Proposal E, stating:

  > As discussed above, a CVA is of limited use as a restructuring tool because it does not bind secured or preferential creditors. It therefore cannot be used where there is a need to compromise secured debt and the secured lenders have not unanimously agreed to the restructuring. In addition, a CVA cannot be used to restructure the equity or implement a debt for equity swap without the consent of the relevant majority of shareholders.

- The submission did not comment on Proposal F[8].

### 2.4 Land Law Committee

The Committee produced a suggested form of Rent Deposit Deed (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=621&lID=0).[9] As the introduction to the document states:

> With a multiplicity of possible arrangements, the Land Law Committee considered that it would be helpful to produce a form of rent deposit deed that will hopefully assist practitioners… …The Committee has drafted the deed to cater for the majority of issues arising in a rent deposit situation, but without it becoming a complex banking document.

### 2.5 Litigation Committee

As mentioned in the extended version of the August e-briefing, the Litigation Committee responded to the Lord Justice Jackson's Preliminary Report on Civil Litigation Costs dated 8 May 2009 (the "Preliminary Report"). (See http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm for the Preliminary Report and http://www.citysolicitors.org.uk/FileServer.aspx?oID=624&lID=0 for the response.) The submission stated that:

> In this response we address the points insofar as they concern commercial litigation, including litigation in the Commercial Court but keeping in mind that commercial cases also take place in

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[4] Super-priority of rescue finance in administration expenses, as above
[5] Greater ability to create new secured charges in an administration, as above
[6] Greater ability to create new secured charges in a CVA, as above
[7] Debtor-in-possession financing
[8] Cessation of certain asset backed lending (ABL) arrangements on administration or CVA
[9] Document placed on CLLS website 29 July 2009

> other parts of the High Court including the Chancery Division and the general Queen's Bench Division
> ... It is important in our view to keep at the forefront of this review that London is a popular venue of choice for international business clients for the resolution of their disputes. Any recommendations for reform of the civil justice regime in this jurisdiction should therefore be designed to ensure that this jurisdiction remains attractive to such clients for the resolution of their disputes.

The submission also commented on the specific issues raised in the preliminary report. (Refer to the Chair's article regarding this submission in the upcoming edition of *City Solicitor*.)

**2.6 Planning & Environmental Law Committee**

The Planning & Environmental Law Committee also recently responded to the Food and Environment Research Agency (DEFRA)/Welsh Assembly Government consultation on the possible release of a biocontrol agent (a psyllid species *Aphalara itadori*) to control Japanese knotweed. (See http://www.defra.gov.uk/corporate/consult/japanese-knotweed/ for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=645&lID=0 for the response.) The consultation document noted that

> The cost of eradication [of Japanese knotweed], were it to be attempted nationwide, was estimated at more than £1.5 billion in 2003. This plant is most renowned for its ability to damage drainage, concrete and foundations in the built environment..

The Committee's response:

- Argued that biocontrol would be unsuitable for development sites (as the psyllid would only affect the plant above ground);
- Highlighted that while the consultation paper suggested that Japanese Knotweed would be suppressed below an *"economic or environmental threshold"*, there was the potential environmental problem that the psyllid may turn to another food source;
- Questioned whether the introduction of a non-native biocontrol could encourage the formation of further hybrid knotweed species and exacerbate the spread of Japanese Knotweed; and
- Cautioned that there will need to be a native species that keeps the non-native psyllid in balance.

The Committee also recently responded to the DEFRA consultation *"Adapting to Climate Change – ensuring progress in key sectors: Consultation on the Adaptation Reporting Power in the Climate Change Act 2008".* (See http://www.defra.gov.uk/corporate/consult/climate-change-adapting/index.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=644&lID=0 for the response.) The consultation paper stated that

> we already face continued global warming over many decades to come that will impact on the UK. So we must be prepared for a changing climate. The new UK Climate Projections provide us with the best evidence yet of how our climate will be changing over the 21st Century.
>
> Changing our behaviour to respond to the impacts of climate change is known as 'adaptation'.

Adaptation needs to be built into planning and risk management now to ensure the continued and improved success of businesses, Government policies and social and environmental operations.
The Climate Change Act 2008 gave the Government a power to ask public sector organisations, and statutory undertakers (such as energy and water companies) to report on their assessment of the risks climate change poses to them, and the actions they are going to take in response. This power is known as the Adaptation Reporting Power.

This consultation covers the main questions about the proposed use of the new power, and seeks your views on:

**who should report?** : the proposed strategy for using the reporting power including the proposed list of priority reporting authorities;
**what needs to be done?** : a draft Direction to authorities;
**how should it be done?:** draft Statutory Guidance to reporting authorities; and
**what are the costs and benefits?:** an Impact Assessment, forecasting the costs and benefits associated with the proposals.

The response addressed the specific questions in the consultation paper, and suggested in conclusion that Defra consider:

- providing an explanation as to what will constitute a 'larger' and a 'smaller' water/sewerage undertaker;
- whether asking smaller sewerage/water undertakers to report in conjunction with larger undertakers places an unfair additional burden on larger undertakers;
- whether asking independent electricity distribution network owners to report in consultation with distribution network owners places an unfair additional burden on distribution network owners;
- explaining why only 11 of the 15 harbour authorities identified as handling over 10m tonnes per annum will be required to report and the rationale behind selecting the 11 which will be directed [to] report;
- whether similar considerations to those detailed above should be given in relation to other sectors (e.g. the emergency services) to ensure that they are as clear, transparent and fair as possible;
- various minor amendments to the draft Direction and accompanying note – to include specific reference to the possibility of enforcement proceedings for both failure to report and producing an unsatisfactory report;
- clarifying what is meant by the requirement in section 63(3)(c) of the CCA and paragraph 1 in Annex A of the draft Guidance to "have regard" to the Guidance in developing risk assessments and programmes for adapting; and
- reiterate in the Guidance that it remains open to each reporting authority to determine the approach it takes in delivering against the Guidance.

The Committee also commented on two draft statutory instruments (The Town and Country Planning (General Development Procedure) (Amendment No. 3) (England) Order 2009 and The Planning (Listed Buildings and Conservation Areas) (Amendment) (England) Regulations 2009).[10] (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=642&lID=0.)

[10] Letter dated 14 August 2009