

Committee Update (covering the period 8 April to 7 July 2008)

1. CLLS Committees

Commercial Law Committee

The Commercial Law Committee is involved in the project on the EU Contract Law/Common Frame of Reference. In addition, the Committee is also involved in the Law Commission's project "Consumer Remedies for Faulty Goods" (which commenced in December 2007 – a consultation paper is due out in summer 2008). An introductory paper can be viewed at http://www.lawcom.gov.uk/docs/consumer_remedies_introduutory_paper_0208.pdf

Company Law Committee

The Company Law Committee recently prepared a response to FSA DP08/1 ("A review of the Structure of the Listing Regime") (see http://www.fsa.gov.uk/pages/Library/Policy/DP/2008/08_01.shtml for the discussion paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=358&IID=0> for the response). The response stated, *inter alia*, that the concern that the existing listing regime has led to confusion on the part of market participants as to the standards applicable to different issuers could be best dealt with through disclosure, clear labelling and education of investors, financial advisers and investment managers.

Financial (Banking) Law, Insolvency Law and Insurance Law Committees

The Financial (Banking) Law and Insolvency Law Committees responded to the HMT, BOE and FSA consultation document entitled "Financial stability and depositor protection: strengthening the framework" (see http://www.fsa.gov.uk/pubs/cp/JointCP_banking_stability.pdf for the consultation paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=350&IID=0> and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=348&IID=0> respectively for the responses). While various views were expressed as to the merits of a special resolution regime, the Financial Law Committee's response stated, *inter alia*, that Proposals for the improvement of the compensation scheme should be taken forward, but that these need to be realistic and achievable. The Insolvency Law Committee's response expressed the view that the most significant concerns set out in the Consultation Paper could be addressed by focusing on the proposals set out in part 5 of the Consultation Paper with respect to the Financial Services Compensation Scheme (FSCS).

The Financial Law and Insurance Law Committees have responded to the Ministry of Justice's Consultation Paper CP05/08 on Rome I ("Rome I - should the UK opt in?") (See <http://www.justice.gov.uk/publications/cp0508.htm> for the consultation paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=384&IID=0> and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=338&IID=0> respectively for the responses.) Both submissions agreed with the UK opting into Rome 1, and with Rome 1 rules applying throughout the UK if the UK opts in to the Regulation.

The Insurance Law Committee has also prepared a response to the English and Scottish Law Commissions' Issues Paper 4 on Insurable Interest (see http://www.lawcom.gov.uk/docs/Insurance_Contract_Law_Issues_Paper_4.pdf for the issues paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=338&IID=0> for the response.) The response stated, *inter alia*, that the concept of insurable interest provides an important check and balance against the misuse of insurance for

purposes other than the protection of the policyholder; that it serves useful functions in relation to both the contractual and regulatory aspects of insurance law; and that it should be retained.

Land Law Committee

The Land Law Committee recently responded to the Law Commission's Consultation Paper No. 186 on Easements, Covenants and Profits à Prendre (see <http://www.lawcom.gov.uk/docs/cp186.pdf> for the consultation paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=388&IID=0> (and also <http://www.citysolicitors.org.uk/FileServer.aspx?oID=387&IID=0>) for the response). The paper from the Land Law Committee endorsed a submission on the issue which had been produced by the London Property Support Lawyers Group.

Litigation Committee

The Litigation Committee responded to the Civil Justice Council consultation paper "General Pre-Action Protocol and Practice Direction on Pre-Action Protocols" (see http://www.civiljusticecouncil.gov.uk/files/consult_paper_preaction_prot.pdf for the consultation paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=366&IID=0> for the committee's response). While the Committee welcomed the aims of clarity and accessibility behind the proposed introduction of a general pre-action protocol, it considered that care needed to be taken to ensure that the protocol was not more prescriptive than necessary, particularly given the range of different claims to which it was intended to apply.

The committee is also considering the SRA consultation paper entitled "Standards for solicitor higher court advocates and outline proposals for a new accreditation scheme" (see <http://www.sra.org.uk/securedownload/file/802>). The SRA is reviewing the compulsory qualification requirements to enable solicitors to exercise rights of audience before the higher courts of England and Wales. It has 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 consultation closes on 25 July 2008.

Planning and Environmental Law Committee

The Planning and Environmental Law Committee recently submitted a response to Defra's "Consultation on draft regulations and guidance implementing the Environmental Liability Directive 2004/35/EC with regard to the prevention and remedying of environmental damage" (see <http://www.defra.gov.uk/corporate/consult/env-liability-regs/index.htm> for the consultation document and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=367&IID=0> (and also <http://www.citysolicitors.org.uk/FileServer.aspx?oID=368&IID=0>) for the response). The CLLS adopted the comments made by the United Kingdom Environmental Law Association, and made some additional comments. These comments included the suggestion that several equitable factors should be considered in severally (but not jointly and severally) apportioning liability between operators who are jointly and severally liable for remediating indivisible environmental damage.

Professional Rules and Regulation Committee

The Society's Professional Rules and Regulation Committee recently responded to a large number of consultation papers emanating from the Solicitors Regulation Authority (SRA) regarding the implementation of the Legal Services Act 2007.

SRA Consultation Paper 2 ("Changes to "Framework of Practice" rules" - see <http://www.sra.org.uk/securedownload/file/525>) related to proposed amendments to the rules in the Solicitors' Code of Conduct 2007 (the Code) governing solicitors' business structures. (The "framework of practice" rules govern the composition and structure of solicitors' firms.) The CLLS response (see <http://www.citysolicitors.org.uk/FileServer.aspx?oID=342&IID=0>) was critical of the level of complexity introduced to the "framework of practice" rules, especially in relation to overseas offices of UK firms.

SRA Consultation Paper 3 ("Miscellaneous amendments to the Code of Conduct" - see <http://www.sra.org.uk/securedownload/file/437>) looked at amendments to the rules which would be consequential to changes proposed to the "framework of practice" rules. The CLLS response (see <http://www.citysolicitors.org.uk/FileServer.aspx?oID=343&IID=0>) offered detailed comments on the consequential amendments, and was again critical of the complexity of the proposed amendments.

SRA Consultation Paper 4 ("Changes to the Solicitors' Accounts Rules 1998" - see <http://www.sra.org.uk/securedownload/file/438>) dealt with amendments to the Solicitors' Accounts Rules 1998. The CLLS response (see <http://www.citysolicitors.org.uk/FileServer.aspx?oID=344&IID=0>) offered qualified support for some of the changes proposed in the paper.

SRA Consultation Paper 5 ("Changes to the Recognised Bodies Regulations" - see <http://www.sra.org.uk/securedownload/file/478>) set out proposed amendments to the Solicitors' Recognised Bodies Regulations 2007 (the Regulations). The Regulations govern the procedures for recognition of a recognised body. In the future all private practice firms will have to be recognised bodies, recognised sole practitioners or firms authorised and regulated by another approved regulator. The amendments relate to the SRA's development of a regulatory framework to:

- Facilitate firm-based regulation, and
- Allow LDPs, and participation by non-lawyers, as permitted under the Act.

The CLLS response (see <http://www.citysolicitors.org.uk/FileServer.aspx?oID=345&IID=0>) made a number of detailed comments in response to the specific proposals, and called for the SRA to introduce the concept of reasonableness into the regulations in several places (so as to allow for appeals to be made on the basis of "Wednesbury unreasonableness").

SRA Consultation Paper 6 ("Client financial protection" – see <http://www.sra.org.uk/securedownload/file/482>) asked how client financial protection policy should be developed to accommodate LDPs and other new regulatory arrangements under the LSA, such as the requirement for partnerships to become recognised bodies. The CLLS response (see <http://www.citysolicitors.org.uk/FileServer.aspx?oID=346&IID=0>) referred to the suggestion, contained in the consultation paper, that the SRA adopt the role of default regulator in some situations "to protect the public interest". The response noted that there was no reference in the consultation to the cost to SRA regulated persons of the SRA accepting the default regulator role (or indeed any quantitative

analysis at all). The response also suggested that the SRA should reject the role of default regulator in respect of firms that have not sought to be authorised by the SRA, and that for it to adopt this role would lead to regulated firms shouldering the costs of unregulated firms.

The proposals contained in SRA Consultation Paper 7 ("Information requirements from firms in the context of a risk-based approach to regulation" - see <http://www.sra.org.uk/securedownload/file/465>) emanated from the SRA's move towards regulating firms as well as individuals. The paper invited comments on the types of information the SRA proposed to collect from regulated firms. The CLLS response (see <http://www.citysolicitors.org.uk/FileServer.aspx?oID=347&IID=0>) stated that the proposals contained in the paper raised the difficulty that the SRA may be asking for more information than it can use, and possibly more information than it requires in order to regulate.

SRA Consultation Paper 8 ("Changes in regulatory processes for firms and individuals" - see <http://www.sra.org.uk/securedownload/file/486>). The paper proposed that recognised bodies would have to renew their recognition annually. The paper also called for an improvement in the SRA's online capability as a means of offsetting extra administrative costs. The CLLS response (see <http://www.citysolicitors.org.uk/FileServer.aspx?oID=356&IID=0>) disagreed that there should be two annual renewal processes (i.e. one process for individual practising certificates and one process for firm recognition). It also disagreed with the idea of each solicitor being responsible for renewing his/her practicing certificate, due to the administrative burden that this would impose on solicitors and on the SRA.

SRA Consultation Paper 9 ("Draft SRA Practising Regulations [2009]" – see <http://www.sra.org.uk/securedownload/file/665>) invited comment on the draft SRA Practising Regulations, which the SRA hopes to introduce in July 2009. The regulations have been drafted to implement a number of changes made by the Legal Services Act (the Act). They deal with practising certificates for solicitors and registration of European and foreign lawyers, authorisation of solicitors and European lawyers who are sole practitioners, and associated processes. The CLLS's response (<http://www.citysolicitors.org.uk/FileServer.aspx?oID=371&IID=0>) stated, *inter alia*, that it would not be appropriate to include the requirements for solicitors, RELs and RFLs together in the same set of regulations (on the basis of the unwieldy nature of the combined regulations); and that it would be helpful if the SRA were to explain (and provide in the regulations or guidance) how the 'fit and proper' test regarding the suitability of the person concerned to practice in the UK would be applied.

Furthermore, the Committee also drafted a submission in response to the Legal Complaints Service consultation "Exploring the publication of solicitors' complaint records" (see <http://www.legalcomplaints.org.uk/documents/Solicitors%20complaint%20record%20short%20form%20consultation.pdf> for the short form consultation, and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=349&IID=0> for the response). The submission, in response to the Legal Complaints Service (LCS) proposed scheme to publish complaints records, offered qualified support for the proposal, which seemed to have taken into account some of the comments made by the CLLS during the pre-consultation process. The response questioned whether it was appropriate to introduce the proposed changes, considering that the Office for Legal Complaints would supersede the LCS in 2010.

Regulatory Law Committee

The Regulatory Law Committee recently responded to FSA DP 08/2 (“Transparency, disclosure and conflicts of interest in the commercial insurance market”) (see http://www.fsa.gov.uk/pages/Library/Policy/DP/2008/08_02.shtml for the FSA discussion paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=391&IID=0> for the response). The response dealt with one statement made in paragraph 2.5 of the discussion paper (i.e. “if the principal pays a fee to the agent, any undisclosed commission (so-called ‘secret commission’) paid to the agent by a third party could be taken as evidence of corruption”).

The Committee also responded to FSA CP 08/6 (“Review of the Client Assets sourcebook (CASS)”) (see http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_06.shtml for the consultation paper and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=392&IID=0> for the response). The response opposed the removal of a number of provisions from CASS, and argued for the need for transitional provisions, in order to assist firms operating under the current arrangements.

Training Committee

The Training Committee recently responded to the SRA consultation on “Requirements for lawyers qualifying as solicitors in England and Wales” (see <http://www.sra.org.uk/sra/consultations/471.article> for background on the consultation, and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=354&IID=0> for the response). While the response agreed that the current overall experience requirement of two years of common law practice should be retained, it was critical of the proposal to require that 12 months of that experience must be gained in English law under the supervision of an English solicitor.

EU Working Group

In addition, a CLLS delegation recently travelled to Brussels to meet with the European Commission regarding City issues. A more detailed report on this visit will be set out in the next edition of *City Solicitor*.

2. Other matters

As mentioned in the Policy & Committees Coordinator’s report in *City Solicitor*, a working party of the CLLS has been involved with others including the CBI and LIBA, in the drafting of a statement of suggested “Principles of Good Practice for the Handling of Inside Information”, as part of the Financial Services Authority’s efforts to eliminate misuse of inside information in the capital markets.

The Principles, which are not legally binding or intended to be used by any regulator, are aimed at unregulated organisations (including PR and Printing firms) and do not apply to the legal profession. Solicitors are of course already subject to duties of confidentiality under the solicitors’ Code of Conduct, which requires solicitors and their firms to keep client affairs confidential. The Principles may be of interest to solicitors and their clients and can be found on the FSA’s website at http://www.fsa.gov.uk/pages/About/What/financial_crime/market_abuse/library/index.shtml

Robert Leeder
Policy & Committees Coordinator