**Consultation Question 1:-** Do you have any comments on the approach taken to splitting the simple procedure rules in to two sets of rules?

Answer: - We see attractions in the proposed split of rules, but suggest further consideration should be given as to the form of that split. Might for example arrangements for submitting bulk payment actions be covered under specific rules?

**Consultation Question 2:-** Are you content with the use of the following terms in the rules?

- Claim – for a standard simple procedure case
- Claimant – for pursuer
- Responding party – for defender
- Freeze – for sist

Answer:- We are content that a claim is an appropriate term for a standard simple procedure case, that claimant should be used instead of pursuer, we consider defender should be referred to as respondent rather than responding party. We are content that a freeze be used for a sist.

**Consultation Question 3:-** Do you have any comments in relation to updating hard to understand terminology in simple procedure rules?

Answer: We approve of and welcome this approach.

**Consultation Question 4:-** Is there any terminology remaining in the draft simple procedure rules which you think is unfriendly or difficult to understand and if so what alternatives would you suggest?

Answer:- We are not attracted to the use of responding party and would recommend simply respondent to match with claimant. We suggest that the meaning of "recall" is well understood and suggest this be retained rather than using the term "revoke."

**Consultation Question 5:-** Do you have any comment on the numbering and layout of the rules?

Answer:- We approve of the logical approach of dividing the rules into parts. We consider the numbering should incorporate the part number so that for example the decision section Part 12 3.1 should be numbered 12.3.1.

We welcome the suggestion that consideration be given to how the rules should be presented on the internet and suggest that a mock-up of the rules should be prepared so that their operability can be evaluated and commented upon meaningfully.

**Consultation Question 6:- Do** you have any comments about how, and where, the rules should be presented on the internet?

Answer:- It seems logical that they should appear on the Scotcourts site. It will be desirable that a search engine enquiry for a *low value* claim directs the enquirer to an introductory page before the contents of the rules to assist users in navigating the rules. We commend the logical approach taken but suggest a brief introduction would be of significant assistance to the occasional or first time user.

We think it would be helpful if the forms replicate their on-screen layout. We anticipate that many parties will complete them online and submit them electronically to the Court, therefore also facilitating their recording in ICMS.

**Consultation Question 7**:- Do you have any comments on the approach to the headings in the rules?

Answer: We agree that headings are helpful.

**Consultation Question 8:-** Do you have any comments on the approach taken to minimising the number of hearings?

Answer: We approve of the approach taken to minimising the number of hearings.

**Consultation Question 9:-** Do you have any comments on the approach taken to alternative dispute resolution?

Answer: We are generally supportive of the approach taken to alternative dispute resolution in the rules.

We note 3.3.5 requires the claimant to set out in the claim form what steps have been taken to resolve the dispute prior to commencing proceedings. We wonder whether the respondent should be required in the response form to indicate their view of the prospect for a resolution through ADR. See answer 34 below.

This could inform the sheriff's initial consideration of the papers and there may be merit in the first standard direction should requiring / encouraging steps be taken for alternative dispute resolution (unless the sheriff is satisfied that such efforts have been undertaken to date and have proved fruitless and considers there is little prospect of a resolution through ADR.) This could be added in the paragraph Settlement and Negotiation.

**Consultation Question 10:-** Do you have any comments on the proposed principles of simple procedure as set out in part 1 rule 2.1-2.5.

Answer: 1.2.2 We suggest either "importance" is deleted or that some expansion is given to the reference to importance. We suggest that parties will generally consider their case to be important to them. If importance is construed in terms of wider significance, that might support assessment of whether a case is suitable to be remitted.

1.2.5. We suggest this should be reworded to make clear that the sheriff shall determine whether it is necessary for parties to come to court. We suggest that the rule should read as follows "Parties should normally only have to come to court when the sheriff determines it is necessary to do so to progress resolution of their dispute**."**

**Consultation Question 11:-** Do you have any comments on the proposed duties on sheriffs and parties' representatives in relation to what parties must do and what representatives must do which might well bring benefit in establishing a sanction provision? For the sheriff this would be inserted in the sheriff's powers in section 7 of part 1.

Answer: - We consider that further consideration should be given to the terms of 1.7.7 and do not think it will assist a party and it should simply be expressed as "The

sheriff may decide the dispute without a hearing." We consider complications might arise if that decision is restricted to only matters of law and question whether the sheriff should only be empowered to do so only if parties agree**.**

1.7.8 We suggest that consideration be given to changing this from a permissive arrangement to an obligatory one whereby the sheriff will dismiss a case at hearing if a claimant fails to attend.

1.7.9 We suggest further consideration be given to this clause and whether it should be permissive. Our suggestion is that it should be obligatory (as with 1.7.8) to reinforce to both parties the essential requirement that they attend at a hearing.

1.7.10 We suggest this is expanded to make clear that decree may be granted if no defence is disclosed.

**Consultation Question 12:-** Do you have any other comments on the approach taken in part 1: The simple procedure?

Answer: No

**Consultation Question 13**:- Do you have any comments on the approach taken in part 2: Representation and support?

Answer: Does further consideration require to be given to the representative of a non-corporate persona: for example is it acceptable for a company director or employee of a company to represent his company? In these circumstances they will presumably be receiving remuneration directly or certainly indirectly for acting as the lay representative which is in contravention of 2.4.2.

Lay representation. We have noted that neither the Act of Sederunt Sheriff Court (Lay Representation Rules) 2013 nor the forms contained therein require the signature of the party certifying their authority for the lay representative. This is also found in the simple procedure lay representation form. We would suggest that further consideration be given to this issue and consider that it is desirable that the party should formally authorise the lay representative and seek approval for their appointment. There may be practical difficulties if for example the lay representative attends the hearing in the absence of a party, and it may be that the sheriff should have a discretion to allow the lay representative to appear, if absent

the authorisation of the party, it appears appropriate for the lay representative to be authorised.

In relation to 2.4.3 and 2.4.4 we consider that 2.4.3 might be usefully expanded to cover the situation where the lay representative form might be submitted otherwise than when the claim form and response form is sent to Court, for example if the sheriff makes certain case management orders which require documents to be produced or expanded pleadings.

In relation to 2.4.4 perhaps it would read more appropriately as "otherwise if a person seeks to be represented by a lay representative at a hearing then the lay representative must complete the lay representation form and bring it with them to Court on the day of the hearing."

**Consultation Question 14:-** Do you have any comments on the proposed timetable for raising a simple procedure claim?

Answer:- We have some concerns in relation to the proposed timetable steps as follows:-

1. The claim is received by the court

2. The court registers the claim

3. The Sheriff Clerk or agent will then serve claim form. In terms of 3.4.4 and 3.4.6 the Sheriff Clerk is to set out the date for first consideration of the claim. The date for first consideration equates to the insertion of the calling date. But as this step will be dealt with in chambers the date need not be fixed. We wonder whether in preference the clerk should only select the date for service and by which the response is due. Further procedure, i.e. the date of first consideration then being either 14 days after the date for response or 14 days after the response is received, whichever is the earlier. This will involve consequent changes to 5.8.2 which should also specify a new date for a response and to 5.7.4.

   Provision should also be made for intimation to the claimant, where the clerk is serving, of the last date for responding. This is in order that the claimant may ascertain whether a response has been given timeously should they wish to make an application for a decision.

We also note the timetable is somewhat vague, possibly recognising there may be variance between courts, depending on their size and sitting patterns and there may be substantial variation between the shortest possible period, the likely period and the potential longest period between a claim being registered and first consideration. It is suggested this is not optimum and supports the suggestion outlined above that first consideration could be tagged back to the date on which the response form is received thus avoiding any need for a first consideration date to be provided at all. Rather it will be at latest, 14 days after the last date for lodging the response form. This would be in line with the Ordinary procedure where actions follow from the lodgement or failure to lodge a notice of intention to defend.

We suggest further consideration be given as to whether interim diligence should be available in simple procedure rules.

**Question 15:- Do you have any comments on the approach taken in Part 3: Making a claim**

Paragraph 44 of the consultation anticipates the claimant "beginning an action by sending it to his local Sheriff Court". This follows the approach of the current Summary Cause and Small Claims Rules but given the aim to have all information included within the rules might some replication of part 3 of the Civil Jurisdiction and Judgments Act 1982 be helpful.

How is this to operate with electronic submission of a claim form? If electronic lodgement will SCTS allocate the case to the court which has in their view jurisdiction? Formerly the website had a facility to identify a sheriff court on the basis of a post code but that does not necessarily equate to the basis for jurisdiction.

**Consultation question 16:-** Do you have any other comments on the flowchart (at Part 4 Rule 2.4) setting out options available to the responding party when responding to a claim?

Answer:- In relation to the flowchart, we believe it would be helpful if this was expanded to deal with the further procedure which will follow the completion of the form B1 and the respondent indicating they will settle the claim before the response form is lodged. We are not clear there is any provision for how this is to be

acknowledged by the claimant. Is it the case that settlement at this stage will not give rise to any payment of expenses? If not how are expenses to be identified? Likewise in relation to B4 option for a counterclaim, we believe it would be helpful to explain what further procedure will follow the lodging of a counterclaim. It is not specifically stated in the rules but it seems likely that where a counterclaim is lodged first consideration would involve a standard order requiring the claimant to respond to the counterclaim within 14 days, in advance of what effectively would be a second, first consideration. Might consideration also be given to a form for the response to a counterclaim?

4.4.1 We suggest this should not follow the current position but should simply provide when the court receives a response form it shall be added to the case record.

4.4.2 If our suggestions above are adopted this should be tied to a reference to the date for the response.

Service 5.3.1(c) There is provision here for online submission to the Court. It should be clarified with the ICMS team as to how this can be most effectively achieved.

Part 6 First Consideration of a case

See above

**Consultation question 17:-** Do you have any other comments on approach taken in Part 4: Responding to a Claim

4.3.2 Might this formulation be preferred?

"The Response form must set out the matters in the claim form with which the respondent agrees. It should also set out the essential factual background to the dispute and anything in the claim form with which the respondent disagrees."

**Consultation question 18:-** Do you have any comments on the approach taken in Part 5: Sending and Service?

5.3.1 Anticipates sending by email to the court. Initially the claim form will be completed online. How will the court e-mail address be intimated to the party? Is a generic email to be sent up for simple procedure claims in each court?

5.4.4. Will require modification if our proposals for timetabling are driven by the response. Likewise 5.7.4.

Provision requires to be made for re-service.

**Consultation question 19:-** Do you have any comments on the proposed procedures for settlement and for undefended actions?

Answer: - We refer to our suggestions below about first consideration of a case. If our approach is accepted it is appropriate to deal with first consideration of the case in terms of Part 6. This we think reinforces the argument that a date should not be specified for first consideration of the case as such but rather a date derived with reference to the response. This should see actions progressed more promptly.

6.3.1 Is better expressed as "Order" not "Orders" as being an order by the sheriff which made a number of component parts.

Proceedings should be informative as appropriate taking into account the nature and complexity of the dispute. Notes on part 3 – 3.2.1 step one should also make reference to payment of the correct fee and query whether this section requires complete online instruction also.

**Consultation question 20:- Do** you have any comments on the proposed model for case management conferences?

Answer: - 6.6.3. (a) Would benefit by also expressing the sheriff will focus the issues which are in dispute and clarify which aspects of evidence may be agreed.

6.6.3. (c) and 6.6.4 do not appear to be correctly expressed.

**Consultation question 21:-** Do you have any other comments on the approach taken in Part 6: the first consideration of a case?

Answer:- With reference to what we say above about the timetable being driven by the response to the claim we would favour the deletion of 6.2.1 We would suggest this should read :-

"The sheriff will undertake first consideration of a case following the receipt of the response form. Not before 5 days after receipt of a response and not later than 14 days after the final date for response."

6.4.2 Should be amended to make this date tied to the date for a response and require an Application for a Decision to be lodged within 5 days of the date for a response form being received.

**Consultation question 22:- Do** you have any comments on the approach taken in part 7: Orders of the Sheriff?

Answer: - should 7.2.5 (c) read "give parties an order bespoke to their case."

**Consultation question 23:- Do** you have any comments on the proposed model for freezing and unfreezing cases?

Answer: - Standing the terms of 8.5.1 and the draft standard order (Frozen case unless order) is it contemplated that at the end of 6 months such an order as anticipated in 8.5.2 shall be made. Should this not be made clear as being the expected position where there is no further progress in the case it having been frozen for 6 months?

**Consultation question 24:-** Do you have any other comments on the approach taken in Part 8: Applications by the parties?

Answer: - 8.2.1 With reference to the previous answer might benefit from the addition of "the case will usually be frozen to a specified date".

8.3.2 Might this also specify the proposed date to which the case will be frozen?

8.3.3 Or frozen for the period proposed?

8.5.3 The standard frozen case, unless ordered, appears in conflict with this section. We understand that where an "unless ordered" is used, which is a practice we support, non-compliance will result in a dismissal order being made.

If that interpretation is correct we consider 8.5.3 should be obligatory and perhaps in these circumstances 8.5.2 should make reference to the fact that it involves an "unless order".

8.6.4 We suggest that consideration be given to in addition to setting out the proposed amendment the party seeking to make the amendment should provide a clean version of the response form incorporating the proposed amendments.

8.7.3 Given that we anticipate the scale of expenses will be set, this appears a cumbersome procedure for a step which should be capable of expeditious calculation.

8.8. The word "draft" should be deleted.

8.8.4 Likewise delete the word "draft". This means that in 8.8.5 the sheriff will then grant or freeze the application and in the event of the application being granted, allow the response form to be received.

**Consultation question 25:- Do** you have any comments on the approach taken in Part 9: Documents and other evidence?

Answer:- We suggest that consideration be given to a specification of a fixed maximum number of documents which can be produced by a party. The maximum being set by number of A4 sized pages using a specified font size. A party would then require to make application to the court to demonstrate, on cause shown, whether any documents in excess of that maximum are required. We suggest that provision be made for documents to be received electronically, or alternatively scanned, which would avoid any need for a party to borrow documents or inspect them in court. Permission might still be required for inspection of non-documentary evidence which is lodged in court. Electronic retention of the documents would result in a need for some modification in 9.5.1 and 9.5.2. Provisions will still be required in relation to non-documentary evidence.

Critical consideration must be given to the implication for such rules in relation to "best evidence."

**Consultation question 26:- Do** you have any comments the approach taken in Part 10: Witnesses?

Answer: - Citation of witnesses: greater clarity could be given to the consequences of non-appearance as witness. "If a witness has not been cited and fails to appear the court is likely to determine the case without hearing evidence from that witness."

**Consultation question 27:-** Do you have any comments on whether the detailed provisions on documents, evidence and witnesses are necessary in the Simple Procedure Rules?

Answer: - We think setting out the position regarding documents; evidence and witnesses are helpful to give clarity to parties. We therefore conclude that a more detailed provision is required regarding instructions for the numbering of documents as productions, we suggest that this should be that each page or document is numbered sequentially and a list of those documents is provided which is un-numbered but will be headed "List of Claimant's Documents" or "List of Respondent's Documents".

**Consultation question 28:- Do** you think that any of this provision could be dispensed with (or any additional provision is necessary), please identify that provision?

Answer: - Under reference to Answer 27, we do not propose that any provision be dispensed with. Neither do we suggest any additional provisions as being necessary.

**Consultation question 29:- Do** you have any comments on the approach taken in Part 11: The hearing?

Answer:- Might there be a benefit in a provision to constrain the time for a hearing for a fixed period except when varied by the sheriff "on cause shown". Alternatively might a standard order be for the sheriff to fix a set period for the hearing which could be varied by the sheriff "on cause shown" if required at a hearing?

We suggest that further consideration be given to the layout of the decree form, or alternatively perhaps it ought to be clarified that the Order of the Sheriff shown at pages 83 – 87 should be stated to be inserted in box B.1 of the decree form.

**Consultation question 30:- Do** you have any comments on the approach taken in Part 12: The decision?

Answer:- 12.3.2 rather than referring to a "brief note" is should state "the note of the reasons for sheriff's decision"

12.5 We suggest the term "recalled" be used rather than "revoked"

**Consultation question 31:- Do** you have any comments on the approach taken in Part 13: Other matters?

Answer: - We have no comments.

**Consultation question 32:- Do** you have any comments on the approach taken in Part 14: Appeals?

Answer: - We suggest 14.1.1 for completeness should indicate that this part is not applicable where a decision is made in the absence of a party where an application to revoke (recall) in terms of part 12 should be made.

14.3.2 Add: "It shall also set out the questions which the Sheriff Appeal Court is required to answer."

14.3.4 We suggest this should more closely follow the procedure currently provided for in the Summary Cause Rules, whereby the appellant and the respondent to the appeal must within 14 days send to the court and the other party any proposed adjustments to the report, following which the sheriff may fix hearing on adjustments or provide for such further procedure prior to the hearing for the appeal as the sheriff thinks fit.

14.3.5 If the expansion to 14.3.4 is accepted 14.3.5 can be deleted.

14.4.2 We consider 14.4.2 should be deleted. We consider it problematic to allow new legal points to be raised at the hearing. If this is to be permitted we suggest the rule should make clear this will only be permitted in an exceptional situation where there is some good reason why the new legal point was not raised previously.

14.4.1 We consider that provision should be made for a case to be placed before more than one appeal sheriff where the matter raises a novel or complex point of law. We suggest this could be addressed by the following modification i.e. after appeal sheriff insert "or more than one appeal sheriff where the Clerk of the Sheriff Appeal Court [on the instruction of the President or Vice President] shall so determine"

Consideration requires to be given as to whether an appeal to the Sheriff Appeal Court from a claim under the Simple Procedure shall be final or whether there

should be provision for certification that a case is suitable for appeal to the Court of Session.

**Consultation question 33:-** Do you have any comments on the approach taken in Part 15: Forms?

Answer:- We commend the approach taken to setting out forms. We suggest that these should be adjusted to reflect how they will appear on the website.

See the comments above in relation to the Decree Form and Decisions forms

**Consultation question 34:- Do** you have any comments on any individual forms?

Answer: - The claimant is required to set out steps taken to seek to achieve pre litigation settlement. We suggest the response form should require the respondent to indicate if they consider there is a prospect of settlement through alternative dispute resolution.

**Consultation question 35:-** Do you have any comments on the proposals to include standard orders in the rules?

Answer:- We consider this to be helpful

**Consultation question 36:- Do** you have any comments on the terms of the standard orders included in the draft rules?

Answer:-

**Ordering a hearing**: this might usefully give more specification of how documents are to be numbered and should provide for two copies to be lodged with the Sheriff Clerk one for the Sheriff and one for the use of witnesses. Might it also prescribe a more fixed time for the hearing?

**Application to freeze:** might this be for a fixed period?

**Application to unfreeze:** might this if refused extend the period of the case being frozen for a fixed period?

**Frozen case unless order:** reference the comments above on a fixed period this appears to anticipate a case frozen for more than 6 months shall automatically have an order made requiring parties to advise the court of the current position. This might be the default but should provision also be made for other periods.

Might there be a standard order for a continuation for a fixed period to either permit further opportunity for parties to settle the dispute or to allow for settlement to be effected.

**Consultation question 37:- Do** you have any comments on the approach taken in Part 18?

Answer: - ? The draft rules appear to end at part 17.

**Consultation question 38:- Do** you have any other comments on the draft simple procedure rules?

Answer:- In relation to 1.2.2 we would suggest deletion of the word “importance”, we doubt that the probably subjective view of a party to the dispute of its importance is relevant and suggest that this word be deleted.

We believe consideration should be given to including the fees payable in the rules. This is not current practice but it would in our view be desirable to include this within the one document party litigants will require to reference. This view is reinforced as ICMS is likely to require a payment arrangement to be made before permitting an action for which a fee is payable to be completed.

We suggest the reference to the Register of Simple Procedure Claims be removed, and reference simply made to registration, to reflect the reality of how cases are being recorded on ICMS.