

## ANNEX B CONSULTATION QUESTIONNAIRE

### Consultation question 1

*Do you have any comments on the approach taken to splitting the Simple Procedure Rules into two sets of rules?*

Comments One comment on the principle – I have not had time to investigate the policy background to this decision however the question arises as to why this is considered necessary if as a matter of principle the policy behind the two sets of rules is similar in seeking a more case managed approach with simplification and reduced numbers of court hearings. However if there are reasons therefor perhaps these could inform an approach for the second set of rules whereby elements of the simple procedure form the basis with variations as necessary in the other rules. Also there are other common issues like the need for negotiation and Mediation – actions for recovery of heritable property lend themselves to ADR techniques.
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### Consultation question 2

*Are you content with the use of the following terms in the rules?*

- Claim – for a standard simple procedure case

Content x

Not content

No Preference

- Claimant – for pursuer

Content x

Not content

No Preference

- ***Responding party – for defender***

Content x       Not content       No Preference

- ***Freeze – for sist***

Content       Not content x  see comments below      No Preference

**Consultation question 3**

*Do you have any comments on the approach taken to updating hard to understand terminology in the simple procedure rules?*

I agree with the general approach to the use of normal – or simplified - language which consolidates the moves made in the 1990's in the preparation of the last reforms made to the Summary Cause and Small Claim rules. Care has to be taken however that the new rules do not go too far in emptying the language of content as regards the procedures involved.

To replace esoteric language with metaphorical language is however maybe not a good plan; to use 'freeze' instead of 'sist' and 'unfreeze' instead of 'recall the sist' implies something rather negative whereas in the context of the rules the decision to suspend the procedure is designed primarily as a positive idea to support efforts at negotiation and settlement.

Furthermore it is marginally misleading as the epithet 'freeze' is used in the context of diligence notably in relation to arrestment on the dependence and equivalent procedures where there is mention of the 'freezing' of assets in general and bank accounts in particular. Indeed the expression is used in England and Wales to denote the successor to the 'Mareva' order. It is also used in relation to the seizure of assets forming the proceeds of crime.

As an alternative I would suggest use of language such as 'suspension' and 're-start' of procedure with applications to 'suspend' and 're-start'.

#### Consultation question 4

*Is there any terminology remaining in the draft simple procedure rules which you think is unfriendly or difficult for the lay user to understand and, if so, what alternatives would you suggest?*

Yes

No

Comments

I had not noted many but have not had time to do a complete trawl. It occurs to me to wonder if the expression 'citation of witnesses' will be readily understood.

**Consultation question 5**

*Do you have any comments about the approach taken to the numbering and layout of the rules?*

Comments

Seems logical and clear. Only thing is in reading through the rules it is not always easy to see in which part the rules are - even though that is given at the foot - and so a system in which the first number is the number of the part might be helpful - also for cross referencing within the rules. Example - in Part nine paragraph 3.5 could be numbered 9.3.5 and so in - maybe - combined paragraphs 2.1 and 2.2 ( see response 25 below) in that part there could be a cross reference to paragraph 9.3.5 thus -

'A claimant and a responding party may bring to a hearing any document or other evidence listed respectively in their Claim or Response Form and lodged with the court within the time mentioned in paragraph 9.3.5.'

**Consultation question 6**

*Do you have any comments about how, and where, the rules should be presented on the internet?*

Comments

The rules should be available on an interactive basis for electronic use in the completion and the transmission of the forms. On-line procedures should be available for all stages. See comments in Response 8 on E-Justice application.

**Consultation question 7**

*Do you have any comments on the approach to headings in the Rules?*

Comments

The use of questions indicates the intention to combine procedural content with advisory. This is fine and a colloquial style ought to be easier to understand and is more accessible but care should be taken that it does not mislead in this sense that the rules are still to be followed - see Rule 4.2 in Part One for example - and ought to be taken seriously by all so this should be reflected in the headings.

One example - in the set of rules headed 'What must the parties do?' there is no statement that the parties should follow the rules and paragraphs 5.1 to 5.7 contain what amount to rules of best practice rather than a guide to action as to how parties can use the procedure. More appropriate might be 'What are the duties of the parties' or 'How should the parties behave?'

To hold a hearing on evidence.

**Consultation question 8**

*Do you have any comments on the approach taken to minimising the number of hearings?*

Comments

I am in favour of minimising the number of hearings and indeed would go further and look at inserting provisions for dealing with Small Value cases on paper only and only exceptionally, in the Sheriff's discretion, would a hearing be held. See in this respect the European Small Claims Procedure Regulation (Reg (EC) no 861/2007) at Article 5.1 as amended by Article 1.2(4) of the amending Regulation (EU) 2015/2421.

Also I suggest that the rules should include provision to encourage the use of E-Justice methods such as on-line service and transmission of documents, remote meeting possibilities such as tele and video conferencing for hearings and the taking of evidence and generally on-line dispute resolution techniques. In this respect also the rules could pave the way for gradual development of such techniques as is the case with the European Small Claim procedure and other e-Justice developments such as E-Codex.

See also Articles 4.1, 8 and 13 of the Regulation on the European Small Claims Procedure as amended.

**Consultation question 9**

*Do you have any comments on the approach taken to alternative dispute resolution in the rules?*



Comments

I would favour a more active role of the Sheriff in referral to ADR, in particular mediation, given the availability of in-court and other mediation services. So a rule in which the Sheriff may at any stage of the case refer a case which she/he considers suitable to in-court or other mediation and for this purpose to suspend the procedure could be included. This could usefully supplement Rule 7.2.

**Consultation question 10**

*Do you have any comments on the proposed principles of simple procedure as set out in Part 1 Rules 2.1 – 2.5?*

Comments

It might be useful to add that the rules are to be interpreted having regard to the principles. Otherwise they seem to reflect the policy aims adequately.

**Consultation question 11**

*Do you have any comments on the proposed duties on sheriffs, parties and representatives?*

Comments

Sheriffs:- See above at Answer Nine for comments about the duty of the Sheriff as regards ADR and Mediation.

I am wondering what the Sheriff should do about jurisdiction issues. In cases in particular where there is an international element the establishment of the competence of the court may be an issue to be decided as a preliminary point. In cases involving another EU Member State or a State party to the Second Lugano Convention the Sheriff will have to decline ex proprio motu to exercise jurisdiction if another court is competent under the rules set out therein. See in this regard Article 27 of Regulation no 1215/2012 (Brussels I recast).

This applies also as regards jurisdiction under Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 – see paragraph 14 – and this can be of importance in relation to the intra-UK jurisdiction rules for instance on Consumer Contracts.

I have other comments about jurisdiction issues elsewhere.

Representatives:- Representatives should be under the duty of considering with the party whom they represent as to whether the case may be resolvable by negotiation or ADR/Mediation and should support the party whom they are assisting in any such process .

**Consultation question 12**

***Do you have any other comments on the approach taken in Part 1: The simple procedure?***

Comments

General Comments:- I appreciate that the aim of the new rules is to make the procedure as accessible as possible to parties who do not have any legal knowledge or support and so the rules are set out more as a guide or handbook. The downside is that the document is very long so when it comes to be finished I suggest that some way be found to break the text up into manageable parts so that the reader is not put off by the volumes of text.

I do appreciate the relative simplicity as well as shortness of the individual rules which is helpful. I also think that that the interlinking of the rules with the forms as they are apposite in the sequence of the procedure could work in the advantage of the user.

Finally although the presentation of the rules indicates a less legal approach to the drafting the procedure itself is still rather traditional and I wonder if it might be possible to adopt some more innovative practice. See for example comments later re the use of E-Justice techniques.

**Consultation question 13**

***Do you have any comments on the approach taken in Part 2: Representation and support?***

Comments

I refer to comments elsewhere in response 11 about the role of representatives in ADR and Mediation.

I wonder whether there should be a statement which makes clear that a party may choose not to be represented. See in this regard Article 10 of the European Small Claim Regulation (ESCREg) (Reg (EC) no 861/2007.

See also Article 11 of the ESCREg as amended by Article 1.2(7) of Regulation (EU) no 2015/2421 as regards assistance for parties .

**Consultation question 14**

*Do you have any comments on the proposed timetable for raising a simple procedure claim?*

Comments

The timetable is OK if both/all parties are in Scotland; question about the situation if the defender is elsewhere in uk or outside the uk?

In general a timetabled approach is very necessary to achieve the aim of expedition.

**Consultation question 15**

*Do you have any other comments on approach taken in Part 3: Making a claim?*

Comments

I like the proto interactive approach adopted with advisory and regulatory material interlinked; as stated elsewhere if this could lead to on-line interactive use of the forms that would be good.

Two details:- is it really necessary for the Sheriff Clerk to return the form for the claimant to rectify any of the points specified in rule 4.1? Can the court not adopt a more flexible approach as hinted at in Part One para 2.1? In this respect see also the Rule in Article 4.4 of the ESCReg, as amended. At the very least a form could be sent asking for the supplementary information or material.

Should there not be a rule about what happens if the claim is not within the scope of the simple procedure? See also comments later about counterclaim.

**Consultation question 16**

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

Comments

Helpful - see comments elsewhere about the treatment of preliminary issues such as jurisdiction and lis pendens.

**Consultation question 17**

*Do you have any other comments on the approach taken in Part 4: Responding to a claim?*

Comments

Response:- The responding party should have some opportunity of challenging the jurisdiction of the court; also there is a question as to how other preliminary issues should be dealt with as for example of a case between the same parties with the same subject matter is pending before another court (lis alibi pendens). Although these are technical matters they are significant and some way should be found to allow them to be voiced. This is not just an issue for cases involving other EU Member States; it can arise in intra-uk situations as well as in other international contexts. The only mention at present as far as I can find is a side note about challenging jurisdiction opposite section B3 on the Response form and I think that there should be something in the rules to help users on these points

Counterclaim:- it is not clear what the rules are to be as regards the threshold of £5000 in considering whether a counterclaim is on scope. Is the value of the counterclaim considered separately or to be aggregated. It should be specified into which procedure the claim and counterclaim will fall if the case falls outside the simple procedure. This needs to link to the rules in Part 13 paragraphs 2.1/2.

See the corresponding provisions in the European Small Claims Procedure at Article 5.7.

**Consultation question 18**

*Do you have any comments on the approach taken in Part 5: Sending and service?*



Comments

Has consideration been given to using the social media for service /notification? This is being addressed elsewhere in Europe in connection with application of E-Justice.

As regards formal service whilst there are provisions for service outside Scotland elsewhere in the uk there seems to be no provision for service in other EU countries or even those States party to the Hague Service Convention and I wonder why not. Is it the intention that the procedure should not be available for cases where a party is in another EU or Hague Service Convention State?

If the scope of the procedure is not to be so restricted maybe it would be possible to include provisions for service in appropriate terms. In this regard the provisions in the European Small Claims Procedure at Article 13 as amended by the amending Regulation - at Article 2(8) – might be borne in mind.

**Consultation question 19**

*Do you have any comments on the proposed procedures for settlement and for undefended actions?*

Comments

I would like to see more emphasis on the court's role in encouraging settlement whether in court or by use of ADR/Mediation.

Also could it be that the Responding party might be invited to consider ADR in the response??

**Consultation question 20**

*Do you have any comments on the proposed model for case management conferences?*

Comments

Can these be done on line or by Skype/tele-conference? Para 6.1 seems to rule this out. Remote meeting techniques would be appropriate for a procedural hearing where evidence is not being taken especially if a party has to come from a distance. See principles 2.1 and 2.5 in this connection.

**Consultation question 21**

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

Comments

See above as to case management. As for the general propositions

I am not sure why the claimant has to make a separate application for a decision and the terms of paragraph 4.3 in so far as I understand them – seem a little draconian

‘4.3 If the claimant does not send an Application for a Decision to the court before from the date of first consideration, then the sheriff must make a decision dismissing the claim.’

It should be possible to build in to the procedure a provision that the claimant is deemed to make application for a decision in the event that no appearance is entered by or for the responding party?

**Consultation question 22**

*Do you have any comments on the approach taken in Part 7: Orders of the sheriff?*

Comments

Apart from the points regarding preliminary issues and transfer where the claim or counterclaim is out of the scope of the procedure I have no comments the orders which seem to be collected as forms in Part 16 and which I do not have time to read before submitting this response.

**Consultation question 23**

*Do you have any comments on the proposed model for freezing and unfreezing cases?*

Comments

See the linguistic point made at Response Three. Otherwise I have not had time to look at the forms.

**Consultation question 24**

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

Comments

It seems quite formal especially as regards amendments and it is not clear how it fits within the timetable – could be a recipe for delay so maybe something more informal and practical could be devised such as on-line communication.

**Consultation question 25**

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

Comments

**2.1** A claimant may bring to a hearing any documents or other evidence listed in their Claim Form and which has been lodged with the court.

**2.2** A responding party may bring to a hearing any documents or other evidence listed in their Response Form and which has been lodged with the court.

Is it necessary to have two paragraphs for this – maybe they could be combined as follows:-

‘A claimant and a responding party may bring to a hearing any document or other evidence listed respectively in their Claim or Response Form and lodged with the court **within the time mentioned in paragraph 3.5.**’

These last words inserted as it may be necessary to say when the document or other evidence should have been lodged with the court.

**Consultation question 26**

*Do you have any comments on the approach taken in Part 10: Witnesses?*

Comments

Citation – perhaps unavoidable to use this term but maybe a mention could be made in Part 17.

Whilst noting the very extensive provisions dealing with child and other vulnerable witnesses I have no comment to make on these

**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?*

Comments

Ideally this could all be dealt with much more informally but certain measures are needed if the structure of the procedure is to be maintained. The line between an imprecatory or regulatory approach and a more informal approach needs to be flexible so if a rule could be written which allows the sheriff to adopt a more flexible approach that would be perhaps an option. More generally there is a policy question about who has control of the procedure when it comes to the hearing,

This set of rules suggest that the traditional approach is maintained namely that the parties decide what evidence to lead and so may arrange it. Another approach reflected in the European Small Claims Procedure gives that responsibility and so control to the court – see Article 8 and 9 as amended. Maybe the Scottish simple procedure could adopt this whilst retaining a more flexible approach for leading of evidence within an organised timetable.

Finally there seems to be no room for use of E-Justice techniques for taking leading of evidence; can this not be accommodated even if the techniques and procedures have yet to be made available. Again reference is made to the ESCReg especially the provisions of Article 8 as amended.

**Consultation question 28**

*If you think that any of this provision could be dispensed with (or any additional provision is necessary), please identify that provision.*



Comments

Not sure that I understand this question; in so far as it relates to the hearing of evidence see comments in response 27

**Consultation question 29**

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

Comments

See Above at Response 27

**Consultation question 30**

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

Comments

The approach seems logical though I am wondering if the word 'Decree' is one of the technical words which should be expunged - is order maybe better? I am not too bothered myself as I think that Decree gives an appropriate degree of authority.

Further I do not understand from the paragraphs in this part how a counterclaim – especially one which is successful – is to be dealt with. This depends to a degree as to whether the descriptive terminology of the parties is reversed such that the responding party becomes the claimant in the court claim and *vice versa*; I have not in the time available been able to find out of this is dealt with elsewhere but it does not seem so in the counterclaim form – at least from a cursory glance.

Revocation -what about reponing in the case of a decree in absence where the responding party can show cause for being reinstated in the procedure. Is it intended to allow for this and if so should it not appear here?

**Consultation question 31**

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

Comments

Is this the place for something about preliminary matters?

See responses about dealing with cases falling outside scope and counterclaims.

Is there need for provision to deal with third parties or is that intended to lead to the case coming out of the procedure?

**Consultation question 32**

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

Comments

Sensible use of the Sheriff Appeal Court – again is there room for E-Justice applications?

**Consultation question 33**

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

Comments

I have had little time to read the forms so will only reiterate the point that they should be interactive as far as possible.

**Consultation question 34**

*Do you have any comments on any individual forms?*

Comments

See above

**Consultation question 35**

*Do you have any comments on the proposal to include standard orders in the rules?*

Comments Seems sensible.
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**Consultation question 36**

*Do you have any comments on the terms of the standard orders included in the draft rules?*

Comments None in the time available.
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**Consultation question 37**

*Do you have any comments on the approach taken in Part 18?*

Comments Don't seem to have Part 18
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**Consultation question 38**

*Do you have any other comments on the draft Simple Procedure Rules?*

Comments

General Comment:- it should be considered in general how these rules should mesh with the provisions of the European Small Claim procedure Regulation. The amending instrument comes into effect on 14<sup>th</sup> July 2017

It would seem sensible to include a Part dealing with the interaction between the two sets of rules especially given that the ESCP threshold will rise to €5000 from that date.

One other point is the link between the European Payment order procedure and the ERSCP and domestic national procedures. In Article 2 of the Amending instrument - Reg 2015/2007 – the EOP Regulation is amended to provide that where a statement of opposition is lodged to an EOP application the case will fall into the ESCP when it is within the scope of that procedure. In new article 17.2 where the EOP application is not in scope of the ESCP it falls into ‘the appropriate national civil procedure’.

It might be a good plan to insert a provision that an EOP application in Scotland which falls outside the ESCP scope but inside the simple procedure scope should be transferred to the simple procedure.

There is an issue to be decided about how to value the claim for the EOP where it is stated in a currency other than the £ sterling but that exists as an issue irrespective of the position specific to the rules; the calculation for the ESCP will have to be made at the date of commencement of the procedure and the same I suggest for the EOP