

ANNEX A – CONSULTATION RESPONSE FORM

RCS

Question 1 – For the categories of case listed as suitable for an in-person hearing:

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer 1 – Broadly speaking we agree that the general presumption given is appropriate. We have particular concern as to the reason why commercial proofs are presumed to be remote, even where credibility and witness demeanour, which are the usual triggers for in person hearing of proofs, are issues. Please see our Answer 2 below.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer 2 – We consider there is a significant difference between video and telephone attendance and we have concerns that these are to be treated as synonymous in terms of hearings which can be "by electronic means". We appreciate the longer term aim of having Webex available for all hearings, but we consider that that distinction should be recognised in any new rules. The fact that only telephone is being offered may be a reason why an in-person hearing is appropriate in a way that may not always be the case if Webex was available.

We consider that all debates ought to be heard in-person and the test of whether they raise a point of law of general public importance/particular difficulty or importance is unhelpful. The very nature of a debate is that it must be capable of disposing of all or part of a party's case. As such, it will always raise a point of importance – and the test as drafted does not make it clear whether that means important to the parties or to the development of the law in a more objective sense.

The same applies to the rule for reclaiming motions and appeals which again, we consider, should usually take place in-person. For both of these, it could be for the parties to seek to depart from the normal practice and have the hearing electronically, however the starting presumption for in-person hearings ought to be broader than is currently drafted.

We consider, the current draft tips the balance between the importance of efficiency and the benefit of in-person hearings too far in the wrong direction.

In particular, we have significant concerns in regards to proposed rules for proofs. It is not always clear in advance whether there will be an issue of credibility in respect of a party/witness – this often only comes to light as a consequence of how they give their evidence. The gravitas of a court hearing in-person is key to that and parties should not be denied the opportunity to make these points if it is not clear that credibility is a significant issue in advance. The different treatment of commercial actions is also a serious concern. There appears to be no basis for treating a credibility issue any differently as between these two types of procedures.

We cannot see anything in the draft rules which addresses how certain hearings in insolvency applications ought to be dealt with, for example private examination of debtors. These appear to be clear instances where an in-person hearing is more appropriate, but it is not clear in the current drafting that this has been considered or addressed.

We also query whether Pre-service motions / interim interdicts / suspensions / s46 hearings / caveats / diligence on the dependence and similar are covered in the draft rules. In our view, these should all be default to remote hearings.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- Do you think lodging a motion is the right way to do that? Please explain your answer.

Answer 3 – Yes, our view is that this is a sensible way to deal with it.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- Do you agree that the court should have the final say? Please explain your answer

Answer 4 – No, our view is that this is a matter for the parties to decide. In the event both sides agree, the court should not have the option to depart from that agreement. There should be an express provision in the rules for this to be an election open to be made on joint motion. If the motion to change mode of attendance is opposed, the court should then make the decision.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

OCR

Question 6 – For the categories of case listed as suitable for an in-person hearing:

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer 6 – please see answer 1 above.

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer 7 – Our main concern with the current system of virtual hearings is that many courts issue a long timeslot during the court roll and your particular hearing can call at any point. It would be helpful if more specific timings could be provided.

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- Do you think lodging a motion is the right way to do that?
- Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

Answer 8 – please see answer 3 above.

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- Do you agree that the court should have the final say? Please explain your answer

Answer 9 – please see answer 4 above.

Question 10 – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?