

*The Foundation of the International Association of Defense Counsel*  
**SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE**

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# SCOTLAND

## **Responses submitted by:**

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### **1. Would your jurisdiction be described as a common law or civil code jurisdiction?**

Scotland is a mixed system, combining elements of both the civil law and the common law. Scots private law relating to persons, obligations and property is mainly civilian in origin and still retains significant civilian elements. Commercial law drew substantially on the law merchant of Continental Europe, although it has been increasingly harmonised with English mercantile law by statute. Scottish land law developed from a medieval feudal system and cannot be classified either with civil or common law systems. However, Scots law is not codified and accepts precedent as a source of law, as in common law jurisdictions.

### **2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?**

An adversarial method of adjudication is used by the Scottish courts.

### **3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?**

Judges are appointed in Scotland. The right to appoint judges is vested in Her Majesty the Queen and exercised by the Scottish Ministers after consultation with the Judicial Appointments Board for Scotland which provides the Scottish Ministers with a list of candidates recommended for appointment as a Judge of the Court of Session, Sheriff Principal, Sheriff or Part-Time Sheriff based on merit.

In general, judges are usually appointed only after having pursued a successful career as a court lawyer. To be appointed as a Sheriff in a Sheriff Court, local courts with wide civil jurisdiction, a candidate must have been an advocate or solicitor for at least ten years. (In practice, few are appointed with less than a couple of decades of experience.) To be appointed to the Court of Session, which has jurisdiction over most civil matters throughout Scotland, candidates must have been a Sheriff or Sheriff Principal of five years' standing or an advocate or solicitor with five years' right of audience in the Court of Session. In practice, most are appointed having first been appointed the title of Queen's Counsel (advocates typically with at least twelve years' right of audience in the Court of Session).

### **4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?**

There are special procedural rules in both the Court of Session and the Sheriff Courts for commercial actions, which are disputes which raise a "commercial or business" subject matter. Commercial actions provide an expedited route for commercial claims, with a much more active case management role for the court designed to encourage and promote the

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efficient focusing and resolution of disputes. Specialised procedures are also available in a number of other cases such as Personal Injury actions, Family actions, Intellectual Property actions and Admiralty actions.

There are several specialised courts of special jurisdiction in Scotland. For example, the Scottish Land Court and closely associated Lands Tribunal for Scotland which deal with disputes over agricultural tenancies and crofting lands and disputes over tenants' "right to buy", compensation for compulsory purchase and other such matters respectively. Various other tribunals including an Employment Tribunal, Immigration Tribunal and Tax Tribunal are available. Certain other tribunals such as the Competition Appeals Tribunal, which normally sits in London dealing with competition/antitrust challenges and damages actions, will sit in Scotland for Scottish cases.

### **5. Is arbitration an option and when? If so, what rules are typically used?**

Arbitration is an option open to parties in dispute. Parties can agree to refer the whole or any part of a dispute to arbitration. Contracting parties can insert an arbitration clause into a contract whereby they agree to refer any dispute which arises in the future to arbitration. Where there is already a pending litigation parties may, with the approval of the court, agree to refer the cause or part of it to arbitration.

Arbitration procedure in Scotland is governed by the Arbitration (Scotland) Act 2010 (the "2010 Act"), which is drafted to be consistent with the UNCITRAL Model Law and the UNCITRAL Arbitration Rules. Scotland is a party to the New York Convention for the recognition and enforcement of foreign arbitral awards.

### **6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?**

Entering into an arbitration agreement precludes other forms of litigation in relation to the dispute. Whilst it is difficult to challenge (appeal) an arbitral award in Scotland, there are three possible grounds for such a challenge: (a) jurisdiction - on the grounds that the tribunal lacked substantive jurisdiction (that may be because there is no valid arbitration agreement, the tribunal has not been properly constituted or the tribunal has dealt with matters that have not been referred to arbitration), (b) serious irregularity - on the ground that an irregularity of the kind specified in the 2010 Act has caused or will cause 'substantial injustice' to the appellant (this ground includes a failure to act fairly and impartially and a number of other technical and procedural failures) and (c) error of (Scots) law - this is a default rule, and parties may exclude challenges under this ground. The rule only applies where the error is one of Scots law, and will not therefore apply where another law is the law of the contract. Such a challenge can be brought only with the agreement of the parties or with leave of the court. The court will not grant leave unless (i) the point will substantially affect a party's rights, (ii) the tribunal was asked to decide the point and the tribunal's decision on the point was obviously wrong, or (iii) where the point is one of general importance and is open to serious doubt. All appeals under the 2010 Act are published with the parties identities anonymised to protect the confidentiality of the arbitration process.

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### **7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?**

Mediation is not mandatory in any court proceedings in Scotland.

### **8. What is the process for pre-hearing fact discovery (if any)?**

#### *(a) Are there provisions for mandatory document disclosures?*

In Scotland, there is no mandatory document disclosure; document disclosure rules are fairly restrictive. Parties seeking documents during the course of proceedings must apply to the court specifying the document or category of documents that they require if these are not disclosed voluntarily. The document or category of documents must be precisely defined and an order will not be granted unless the documents requested are directly relevant to the action.

#### *(b) Is there provision for oral examinations of the parties or others?*

It is usual practice for solicitors to take statements (precognitions) from potential witnesses prior to a hearing. These are entirely private documents and have no status as evidence in their own right. Their purpose is to give the solicitor for a party some prior knowledge (hence “precognition”) of what the witness is likely to say when giving evidence in court. However, there is no procedure to compel parties or other potential witnesses to participate in oral examinations prior to Proof (the civil equivalent in Scotland of a Trial).

#### *(c) Are there limits on the length of oral examinations?*

Where parties or others submit to a precognition being taken there are no time limits on how long such an oral examination can take.

#### *(d) Are witness statements or summaries to be provided before the hearing?*

In general, there is no requirement for witness statements or summaries to be provided before a hearing. However, under the case management powers of the judge in commercial actions (and certain other specialised procedures), parties can be ordered to lodge signed witness statements or affidavits before the hearing. In practice, this is very common and the witness statements are normally accepted as the evidence in chief of the witness.

### **9. What is the process for pre-hearing expert disclosure (if any)?**

#### *(a) Are expert reports or written summaries required to be exchanged?*

If an expert report is to be referred to at a hearing then, generally speaking, it need be lodged only 14 days prior to the hearing. In many types of action (commercial actions, personal injury etc.) there are particular rules requiring parties to exchange reports at a much earlier stage. In commercial actions, for example, judges have case management powers to

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order disclosure of expert reports almost right at the outset of litigation.

*(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?*

There are no rules entitling pre-hearing oral examination of an opposing expert.

*(c) Are there provisions requiring experts to meet and narrow issues before the hearing?*

There are no rules requiring experts to meet but, in certain proceedings, judges do have the power to ordain experts to meet and for a record of the points agreed and points still in dispute to be lodged.

### **10. Are there other notable discovery rules?**

There is an order available from the court in Scotland, known as a “Section 1 Order” for parties contemplating litigation who want to see relevant information to assist with the proper preparation of their case before raising a court action. It is the only formal legal option available for recovery of documents before a Court action is raised. The term “Section 1 Order” comes from section 1 of the Administration of Justice (Scotland) Act 1972, which gives the Court of Session and the Sheriff Courts the power to order inspection and preservation of documents, property etc. A Section 1 Order can be requested without advance notice being given to the other party, on the basis that evidence is likely to be destroyed or concealed. This effectively becomes a “dawn raid”.

### **11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?**

Pre-trial hearings are common in a variety of proceedings in Scotland. These are conducted by the Judge or Sheriff. The purpose of such hearings is to ascertain those elements of a case still in dispute and to check that the practical arrangements for the hearing (including the length of hearing required) are still in order. In other procedures (e.g. personal injury) parties' solicitors and counsel must meet with a view to settlement or at least narrowing the focus of a case. A formal record of that meeting is then lodged with the court. The timing of the pre-trial meeting or hearing can be anything from 2 months to 2 days prior to the hearing.

### **12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?**

Where a defender to an action fails to lodge defences the pursuer may apply to the court by motion for decree (judgment) in absence. The court must be satisfied that it is competent to grant the decree, for example, that the court has jurisdiction to deal with the case; the court has a discretion as to whether to grant such a decree but in practice will normally do so. However, there are special rules that deal with recalling a decree in absence that avoid having to appeal the decree to a higher court to give the defender an opportunity to put forward a legitimate defence.

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A pursuer (claimant) also has the option to apply to the court by motion for summary decree in any case after defences have been lodged. However, the test for obtaining summary decree is high. A judge will grant summary decree only if he is satisfied that there is no valid stateable defence. This means that even if the defender succeeds in proving the substance of his defence at a hearing on the evidence, his case must fail. So, if the judge can say no more than that the defender is unlikely to succeed at proof, summary decree will not be appropriate.

### **13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?**

There is no process in Scotland for obtaining pre-hearing rulings with respect to evidence admissibility. Such questions would be questions for the judge to consider at the hearing itself.

### **14. What is the standard for admissibility of expert evidence?**

There are no detailed rules as to who may testify as an expert in Scottish courts. Whether a witness is sufficiently qualified to do so is a question for the judge. Study or practical experience of the subject under examination is normally essential and the witness's qualifications and experience are matters upon which he may be cross-examined. The courts require of expert witnesses the highest standards of accuracy and objectivity. Where conflicting expert evidence has been led, it is for the court to decide which evidence, if any, it prefers.

### **15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?**

The appointment of an independent court expert is very rarely resorted to in Scotland. Such conflicts of evidence as may arise between expert witnesses generally fall to be resolved by the judge or jury.

However, there is provision for the court to obtain information from assessors on matters which require some specialised knowledge or experience. The function of assessors is similar to that of expert witnesses, both being sources of information on matters concerning their own particular skill. Likewise they provide the technical or scientific knowledge necessary to enable the judge to reach an informed conclusion on matters which would otherwise be outside his ordinary knowledge and experience. Such an assessor is neither a judge nor a witness, and there is no obligation on the court to accept his view. Usually, the advice of the assessor is sought and given in private and disclosed to parties only at the court's discretion; but in the Court of Session the judge must note the questions submitted to the assessor and his answers thereto and these must be lodged in process.

In the Court of Session, the court may summon an assessor at its own instance or at the joint request of the parties, but if it considers doing so at its own instance, it must hear parties before making a decision. Where an assessor is sitting, the leading of expert witnesses is subject to limitation. In the Sheriff Court, statutory provision is made for the appointment of assessors in certain types of actions.

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**16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?**

In Scotland legal advice privilege, litigation privilege and settlement discussions (often known as “without prejudice” discussions) are all protected.

**Legal Advice Privilege:** In Scotland, there is no distinction between the position of a solicitor in private practice and that of an in-house lawyer regarding legal privilege (excepting of course matters of European competition law). Privilege stems from the duty of confidentiality owed by the lawyer to his client. Both the solicitor’s client and in-house lawyer employer are therefore entitled to invoke privilege. Legal advice privilege covers advice and assistance relating to public law rights, liabilities and obligations as well as private law rights. It is not to be confined to situations of solely telling the client the law, but instead covers all confidential advice and communications as to what should prudently and sensibly be done in the relevant legal context. The purpose of the communication is the determining factor, and so a communication does not become privileged simply by being copied to a solicitor if it would not otherwise have attracted privilege.

**Litigation Privilege:** Communications which do not fall within the strict ambit of solicitor-client confidentiality will often fall within the related doctrine of litigation privilege. This doctrine confers privilege on any document prepared for the purposes of or in contemplation of litigation (including internal reports, communication with non-legal advisers etc). An important limitation of client-attorney privilege exists in relation to investigations undertaken by the European Commission on competition matters. In-house lawyers are unable to claim that privilege attaches to communications between themselves and employers when faced with the demand for disclosure. In contrast with the position at EU level, under UK domestic law enacted to mirror European competition provisions, the Competition Act 1998 expressly provides in Section 30 that communications between a professional legal adviser and his client are privileged. Under UK competition law therefore in-house lawyers’ communications with their client attract privilege. The Courts focus on the substance of what is being communicated between the lawyer and the client to determine whether it attracts privilege or not.

**The Without Prejudice rule:** The Without Prejudice rule prevents statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before the court as evidence of admissions against the interest of the party which made them. In determining whether or not a communication falls within the ambit of the WP rule, the court will apply an objective test taking into account all the facts of the case. This means that the court will objectively analyse the communication in its context and even if the words “without prejudice” are not stated on the face of the communication, it may still benefit from the without prejudice rule. Significantly, in Scotland, unlike the rest of the UK, part of (but not all) of a communication can attract the benefit of the WP rule. This is because - even if a letter is marked 'without prejudice' - a statement which represents an unequivocal admission of a fact can still be put before a Court.

**17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?**

Not applicable.

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**18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?**

Any documents which come within the scope of a specification of documents (i.e. disclosure) and would have to be provided to the opposing party but for the protection offered by privilege must still be lodged with the court in an envelope marked “confidential”. The party seeking the document must then make a motion to the court to have the sealed envelope opened up which will be intimated to the party claiming privilege. A hearing will then be convened at which a procedural judge will determine the question of privilege (if necessary by the judge examining the documents).

**19. Briefly describe the trial process?**

(a) *Are there opening submissions, in what form and of what length?*

Opening submissions are not generally made at Proof. The court may be advised of certain preliminary matters, for example, that parties have agreed a joint minute of admissions (reducing the scope of the facts in dispute), but there is no speech explaining to the judge what the case is about and what the respective parties are proposed to prove. The written pleadings, which the judge will have already considered, will disclose that. Therefore, once any preliminary matters have been dealt with, the parties commence the proof (trial) by the pursuer leading his evidence.

(b) *What is the order of presentation of witnesses?*

Ordinarily, the pursuer’s witnesses will be examined first, followed by the witnesses for the defender. It is entirely in the hands of the pursuer’s solicitor/counsel (advocate) to decide in what order to call his witnesses. Even where a list of the witnesses cited has been provided to the court there is no obligation on a party to call all or any of those witnesses. It is a matter of judgment for the solicitor/counsel to decide how to deploy his witnesses.

(c) *Who conducts examination and in what order?*

When witnesses are giving evidence, the witness will first be put on oath by the judge. The witness will then be examined by the counsel or solicitor for the party calling him, cross-examined by the opponent or opponents and then (if appropriate) re-examined by the examiner in chief. At examination in chief, leading questions (questions which suggest an answer) are not permitted where they relate to the facts in issue.

(d) *What is the process for closing submissions?*

Closing submissions can be given immediately after the evidence has been heard, although, typically, a short adjournment is sought to give parties time to prepare what they are proposing to say. However, sometimes a case is adjourned for longer in order to allow for shorthand notes of evidence to be transcribed. The submissions might involve going through the evidence of the witnesses which were led, encouraging the judge to accept your witnesses in support of the other party’s witnesses, pointing out consistencies or inconsistencies in the evidence and arguing about the credibility and reliability of individual witnesses. Written submissions are often used and supplemented by oral submissions.

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**20. Please identify any other notable trial procedures.**

None.

**21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?**

In civil cases, the pursuer bears the burden of proving those of his averments in his written pleadings which are not admitted by the defender. Therefore, if the defender has not admitted liability, or causation and the amount of damages has not been agreed the pursuer will bear the onus of proving all of these. However, if the defender makes positive or substantive averments which are not admitted by the pursuer, such as averments of contributory negligence in a personal injuries action, the defender bears the burden of proving these. Generally, the party who bears the persuasive burden of proof must discharge that burden on a balance of probabilities.

**22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?**

Compensatory damages are recoverable in Scotland but punitive damages are not. A wrongdoer is liable to make good all loss caused naturally and directly by his wrongful act and an award of damages should, as nearly as possible, amount to the sum of money which will put the injured party in the position which he would have occupied had he not sustained the wrong.

Pre-judgment interest at a rate of 8% can also be awarded at the discretion of the court on sums of money awarded as damages between the date on which the right of action arose and the date of decree (judgment).

**23. If punitive damages are available, what is the threshold for recovery, and range of awards?**

Not applicable.

**24. Are there time limits for bringing claims? Responding to claims? Please describe.**

There are certain time frames fixed by the Prescription and Limitation (Scotland) Act 1973. An action raised in any of the civil courts in Scotland must be warranted by the court and served on the defender within these timescales. Any action raised after the expiry of these limits (unless with agreement between the parties) will be incompetent.

Personal Injury actions must be raised within three years from (i) the date on which the injuries were sustained, (ii) if the act/omission causing the injuries was continuous, the date on which this act/omission ceased, (iii) the date on which the pursuer became aware of the injuries, or (iv) in the case of injury to a child, the 16<sup>th</sup> birthday of the child.

For claims not involving injury, the general prescriptive period is five years from the date when the loss, injury or damage occurred.

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In Sheriff Court actions, once the Initial Writ has been served on the defender, the defender has 21 days in which to respond to the claim. In Court of Session actions, on receipt of the service copy Summons the defender does not require to do anything but has 21 days in which to consider the terms of the Summons. After the period of notice of 21 days has expired the pursuer can lodge the principal summons at the Court of Session for calling. "Calling" means calling on the rolls of court, which are the list of cases in the Court of Session in respect of which some procedure is due to take place. If the pursuer serves the summons but for some reason decides not to lodge it for calling then the case will not call. A pursuer has one year and one day from the date on which the Summons is "signed" (i.e. warranted by the Court for service on the defender) to call the summons, otherwise the case will fall. However, assuming that the case has been lodged for calling and appears on the calling list the defender then has 3 days in which to formally intimate he is entering an appearance in the action. The defender then has 7 days from the calling date to lodge written defences.

**25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?**

Parties can contract to choose the exclusive/ non-exclusive jurisdiction of the Scottish courts (or, indeed, a particular Scottish court). If parties to a dispute have not elected a particular jurisdiction then the normal basis of establishing jurisdiction in Scotland is that the defender is domiciled within Scotland. The Scottish courts have exclusive jurisdiction to hear proceedings concerning (i) immovable property situated in Scotland or (ii) which have as their object the validity, constitution, nullity or dissolution of companies or associations domiciled in Scotland. Other than cases where the parties have expressly elected the exclusive jurisdiction of the Scottish courts or where the subject matter of a case determines that the Scottish courts have exclusive jurisdiction, it is always open to a defender to argue that another forum would be more convenient.

European Regulation 44/2001, known as the "Brussels I Regulation", (soon to be replaced by Regulation 1215/2012) is applicable in Scotland. It provides a harmonised approach to determining which EU Member State court should have jurisdiction over a dispute within the European Union. Scotland is also a party to the Lugano Convention through the United Kingdom.

**26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.**

There is a third party procedure in Scotland whereby when a defender in a case considers that responsibility for payment of the pursuer's claim lies ultimately in whole or in part with another person, he may introduce that person into the action as a third party. The procedure is available when a defender claims: (i) a right of contribution, relief or indemnity against a third party, or (ii) that the third party is either solely liable or jointly or jointly and severally liable with him to the pursuer.

In terms of process, the requisite averments regarding the responsibility of the third party in the action are normally made in the written defences which are lodged with the court. The defender then enrolls a motion with the court for an order for service on the third party of a "third party notice". It is a matter for the discretion of the court whether a motion to introduce a third party is granted or not. A third party brought into the proceedings has the opportunity to lodge answers

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with the court in the same form as defences.

**27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).**

The general rule in litigation in Scotland is that expenses follow success. This means that where a party is successful they will normally be able to recover from the other side the expenses they have incurred in bringing the action. The actual amount of expenses a party is entitled to recover, known as “judicial expenses”, is calculated with reference to a set scale and do not reflect costs actually incurred by a party in engaging solicitors. Typically, counsel’s fees are recoverable in full.

**28. Are contingency fees allowed?**

At present, contingency fees are not available in Scotland. However, solicitors and advocates may undertake work on a speculative basis. Speculative fee arrangements (SFAs) are arguably a form of contingency fee. Under such arrangements, the lawyer only receives their fee if successful and an uplift of up to 100% on this fee is permitted.

**29. Is third party funding of claims permitted? Under what circumstances?**

There are no restrictions in Scotland to prevent third party funding of claims, unless the third party funding of a claim could be considered an abuse of process. The English concept of maintenance and champerty (which prevent the improper support of litigation in which the supporter has no legitimate concern, i.e. where a third party funds litigation) does not exist in Scotland.

**30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?**

Class or multi-party actions are not permitted in Scotland.

**31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?**

In general, claims cannot be commenced by consumer associations or other representative organisations. However, a recent decision of the United Kingdom Supreme Court, *AXA General Insurance v Lord Advocate* [2011] UKSC 46, has held that in judicial review proceedings (proceedings that review the legality of decisions taken by public bodies) a party only requires to show “sufficient interest” to be entitled to bring proceedings. This is a substantial departure from the previous position in Scotland, where parties were required to show title and interest, and although a relatively novel development in Scottish administrative law, may mean that it is easier for claims to be commenced by representative organisations.

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### **32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?**

In general terms, it usually takes around 12 months for a case to reach a final hearing. It can, however, be dramatically shorter or even longer. A very large number of factors can influence this. Commercial actions (and certain other specialist procedures) are usually quicker. There is, though, flexibility built into the system. If a case requires an urgent evidential hearing then the court will convene that as soon as reasonably practicable if it can be established that the ends of justice would otherwise be compromised. Appeal hearings can also be convened at very short notice if the case demands it. The factor which will usually lead to a case taking substantially longer than average is if a very long period is required for hearing evidence. Securing a Proof (trial) for longer than 8 days can mean very lengthy delays between the date on which a hearing is fixed and the date of the hearing itself.

### **33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?**

Yes, an appeal process is available. Appeals from the Sheriff Court are made to the Sheriff Principal or to the appeal court in the Court of Session (the Inner House). Appeals from the court of first instance in the Court of Session (the Outer House) are made to the Inner House of the Court of Session. Appeals from the Inner House of the Court of Session are made to the United Kingdom Supreme Court.

Generally speaking, leave to appeal is not required to appeal a final order whereas leave is required to appeal an interlocutory/ procedural order. Leave is not required for an appeal to the United Kingdom Supreme Court (unlike the other jurisdictions of the UK) but an appeal must be certified as "reasonable" by two advocates or solicitors with rights of audience in the Court of Session.

Judges in the Inner House of the Court of Session and the United Kingdom Supreme Court are amongst the most senior judges in Scotland and the United Kingdom. There are 12 judges in the United Kingdom Supreme Court including representation from the Scottish judiciary, currently 2 Scottish judges. Those who have held "high judicial office" (been a judge of the Court of Session or its equivalents in England and Wales, and Northern Ireland) for at least two years or who have been a "qualifying practitioner" (been an advocate or a solicitor with a right of audience in the Court of Session) for at least fifteen years are eligible for appointment as a judge in the Supreme Court. So far, all, bar one, of the appointees have previously held judicial office. Appointment to the Inner House of the Court of Session is made by the Lord President and Lord Justice-Clerk (the two most senior judges in the Court of Session) with the consent of the Scottish Ministers. Judges tend to be appointed to the Inner House from amongst existing judges in the Court of Session but occasionally they are appointed straight from the Bar.

### **34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?**

Yes, hearing rooms are available for electronic trials or appeals. It is preferable if witnesses can testify in person but cases are assessed on a case by case basis and arrangements can be made for this to be by video conference.

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**35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?**

If a case demands it, the use of all available technology, including graphics, computer animation, power point and the like, is generally endorsed by the court. However, it is in no way standard procedure to make use of such technology.

**36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?**

It is certainly preferable to have the same lawyer dealing with the case throughout the course of an action. In the Court of Session this will usually be a team of lawyers including solicitors and counsel (barristers, in Scotland “advocates”), both junior and senior. In the Sheriff Court a single solicitor would typically deal with all but the most complex cases from start to finish.

**37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?**

Contributory negligence is a creature of statute in Scotland. Under the Law Reform (Contributory Negligence) Act 1945, a defender's liability can be reduced when the pursuer's injuries have been caused by the fault of the defender and also partly by the fault of the pursuer, which has acted as a cause in contributing to his own injury. In theory this reduction can be up to 99%, but may not be as much as 100% and in that sense liability for negligence can be reduced but not entirely eliminated.

If there is more than one defender a judge will apportion liability amongst those defenders based on their degree of culpability.

**38. Is service of a complaint issued outside your country permitted in your country by “informal” means, or must the Hague Convention be followed?**

European Regulation 1393/2007 governs the 'service of documents' in civil justice proceedings within the European Union.

However, there are no informal means by which service of a complaint issued outside of the European Union can be made in Scotland and the provisions of the Hague Convention must be followed for service to be validly effected.

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**39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)**

There is no blanket rule prohibiting the export of relevant documents from Scotland for the purposes of litigation in another jurisdiction. However, the normal rules regarding privilege will apply. Issues of Data Protection law will also apply which prohibit the export of personal data outside of the European Union subject to certain conditions.

**40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.**

None.

**41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?**

One area that requires to be addressed in Scotland is the extent to which parties are able to recover a significant portion of their costs (solicitors' fees in particular) incurred in successfully pursuing or defending litigation in the Scottish courts. This is particularly so for defenders who will frequently have to take a view on the extent to which irrecoverable costs might be better deployed in attempting to procure an early settlement. This can mean many cases in which a robust line of defence is available are nonetheless settled on economic grounds. A comprehensive review of civil justice in Scotland, including a review of the rules in relation to costs, is currently being undertaken.

**42. Are there legislative efforts under way that address any of the litigation practices in your country?**

As mentioned above, at question 41, a comprehensive review of civil justice in Scotland is currently being undertaken and new legislation is before the Scottish parliament. The Courts Reform (Scotland) Bill implements many of the recommendations of the review undertaken by Lord Gill, a member of the senior Scottish judiciary, now the most senior judge, as Lord President. Lord Gill recommended substantial changes to modernise and improve the structure and operation of the courts, which he described in the review as 'slow, inefficient and expensive'. The Bill also proposes modernising Scotland's courts by introducing greater specialisation and enabling more user-friendly procedures. Key provisions in the bill include:

- Increasing the threshold under which the Sheriff Court can exclusively deal with civil cases from £5,000 to £150,000 - freeing up the Court of Session to deal with the most challenging civil disputes. This is expected to strengthen the role of the sheriff court, while reducing costs and delays for litigants. This threshold is expected to decrease as the Bill progresses through parliament.
- Creating a new national personal injury Sheriff Court, where such cases will be heard by specialist Sheriffs.
- Creating a national Sheriff Appeal Court to deal with civil appeals from Sheriff Court to help avoid the need for some civil appeals to be heard in the Court of Session.

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Practice in Scotland will also be affected the UK Government and the European Commission (“the Commission”) legislation to reform civil litigation procedures to facilitate follow-on damages actions in competition cases by remedying the difficulties faced by claimants. In the UK, the Consumer Rights Bill (“the Bill”) is being considered by Parliament and is presently heading to the final stages of the parliamentary process. At the EU level, the Commission has adopted a non-binding Recommendation on Collective Redress (“the Recommendation”) and on 17 April 2014, the European Parliament approved the draft Antitrust Damages Directive (“the draft Directive”). To address the current ineffectiveness of ‘opt-in’ actions, the Consumer Rights Bill will introduce a new ‘opt-out’ collective action regime, as a complement to existing ‘opt-in’ actions, with the Competition Appeal Tribunal (“CAT”) having jurisdiction to hear such collective claims and to approve collective settlements. In parallel and in anticipation of the Bill becoming law, the CAT has published draft procedural rules for such collective actions.