

# Fixed Costs in Litigation





It is likely that from October this year a new fixed costs regime (FCR) will apply to the litigation of disputes valued at up to £100k, including construction disputes. If that happens, it will impact on the attractiveness of taking these construction disputes through the Courts, as opposed to dealing with them elsewhere, for example via adjudication or arbitration. That is because a FCR limits the sums in costs that a successful party can potentially recover from an opponent. It limits them to modest fixed sums per stage of the litigation. Often though those sums fall far short of the sums that the successful party must pay its own lawyer, expert etc and so there is a significant shortfall for the client.

With that fact in mind, a party and its lawyer must consider this reality closely when looking at starting a claim in Court or having to defend one, and if proceedings do get under way, they must remain alert to the risk of this shortfall on costs as they plan their litigation strategy.

The question of a shortfall is not new though. Even without a FCR, a successful party can expect a shortfall because a Court will rarely award it 100% of its costs. A more realistic amount is 60%-70%. However, a FCR is an additional form of costs shortfall.

Depending on the strength of your claim or defence, obviously these costs restrictions are a positive or a negative.

The basic rationale of a FCR is to try to make litigation more efficient via the threat of a costs shortfall and also make litigation more accessible to all, since a party's risk of paying its opponent's costs is less frightening.

Of course by contrast, in adjudication there is almost always no costs recovery between the parties. Only the adjudicator's fees are up for grabs. In Arbitration there is costs recovery but it is not based on fixed costs. Therefore, from October, these 3 regimes will all be different in this respect. If there is a choice of forums in which to bring the dispute at hand, costs recovery will become an even bigger point of contrast than it is already.

The detail of these new FCR rules is not yet available to look at, but it should appear fairly soon now. When it does, we will produce more detailed commentary on the new FCR.



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