

Overview of Fixed Recoverable Costs on Cross-Border Claims Under the New Rules

I. Summary of the new fixed recoverable costs regime in general:

The new fixed recoverable costs regime entered into force on 1 October 2023 and applies to all cases with a value up to £100,000 issued on or after 1 October 2023, subject to some exceptions. For example, on PI cases, the new fixed recoverable costs regime applies where the cause of action occurred on or after 1 October 2023.

The new fixed recoverable costs do not apply to multi-track cases valued at £100,000 and beyond.

The creation of a new intermediate track for cases with a value from £25,000 to £100,000 is a significant change. For intermediate track cases, there will be no budgeting at the beginning of the claim or detailed assessment at the end. Four complexity bands have been introduced for the fast and intermediate tracks with associated grids of costs for the stages of the claim.

The application of fixed recoverable costs is now entirely dependent on allocation and NOT dependent on Pre-Action Protocols.

II. Fixed recoverable costs regime on cross-border claims

a) Fast track and intermediate track claims

Fast track cross-border claims were generally excluded from the old fixed recoverable costs regime, which meant that costs were recoverable on the standard basis. In summary, under the old costs regime:

- There was no intermediate track, as this has been introduced under the new rules.
- Fast track claims arising from a road traffic accident abroad caused by the use of motor vehicles outside of the jurisdiction of England and Wales were specifically excluded under the Pre-Action Protocol. Also excluded were those claims where the defendant's vehicle was registered outside the United Kingdom.
- The situation with fast track EL and PL claims with a cross-border element under the old regime was similar to that of the road traffic accident claims. This is because the EL and PL Pre-Action Protocol specifically excludes claims for personal injury arising from accidents occurred outside the jurisdiction of England and Wales.

- Claims brought under the Athens Convention or Montreal Convention were equally excluded from the old fixed recoverable costs regime on the basis that they couldn't be brought under the low value protocols. Indeed, they are expressly excluded from the Pre-Action Protocol for Package Travel Claims.
- Holiday illness claims under the Pre-Action Package Travel Protocol were subject to fixed recoverable costs equivalent to Portal costs for EL& PL claims.

Under the new regime, the position has drastically changed. This means that, essentially, cross-border claims which are allocated to the fast track or the intermediate track are now subject to the new fixed recoverable costs regime without the requirement of having been through any of the various portals and protocols.

Exceptions to the fast and intermediate tracks are set out at the new CPR r26.9(10). Importantly, the new rules provide no exceptions for cross-border claims or claims brought under the Athens Convention or Montreal Convention, which means that if such claims were allocated to the fast or intermediate track, the applicable fixed recoverable costs under Practice Direction 45 would apply. This is of course a very different outcome from that under the old scheme, where mid-value claims (i.e. now on the intermediate track) were subject to costs on the standard basis in the multi-track.

As to holiday illness claims, these are no longer subject to Portal costs but instead fixed recoverable costs under complexity band 2. However, if the claim were allocated to the fast track outside the Protocol, a higher complexity band could potentially be argued.

In fact, the new costs regime reclassifies package travel claims, so they are now in line with RTAs rather than EL and PL claims (meaning a decrease in fixed recoverable costs when compared to the old regime).

The complexity band attribution in cross-border cases allocated to the fast track and the intermediate track will depend on the number of issues in dispute and the actual complexity of the claim. Until we have some relevant case law, it will be difficult to predict what will be considered as 'less complex' (complexity band 2), 'more complex' (complexity band 3) or 'any claim which is unsuitable for assignment to complexity bands 1 to 3'. It is therefore a question of checking the relevant factors under the new Part 26.13 and applying them to the specific facts of the case.

b) Multi-track claims

Cross-border multi-track claims arising before the new rules are still subject to the old costs regime with costs recovered on the standard basis.

Cross-border multi-track claims subject to the new rules will still be outside of the scope of the fixed recoverable costs regime and will continue to be subject to costs budgeting and costs on the standard basis. This will be applicable to cross-border cases that:

(a) are valued at more than £100,000 or
(b) of lower values, but which feature elements of complexity rendering them unsuitable for either of the other two court tracks.

Therefore, multi-track claims are the only ones that guarantee the application of costs on the standard basis in any event.

Author:

Simon Ball, Partner

Email: simon.ball@weightmans.com