

# Legal fees: to cap or not to cap?

By [Nikita Lalla](#)

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Inundated with news of economic turmoil, businesses are trying to cut back in as many areas as possible, critically analysing costs in uncertain conditions. In the race between affordability and excellent service, companies are taking a long, hard look at legal fees. In particular, legal fees incurred in disputes - always a grudge purchase regardless whether you are the claimant or defendant. In response to demands for greater predictability and the necessity to control legal costs more effectively, it has become essential for law firms to remain innovative by introducing non-hourly billing strategies. There is escalating pressure on law firms to provide clients with better value and to prove constantly that they are worth the investment.



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Alternative fee arrangements have become vital in ensuring better allocation of risks and alignment of incentives in ways that best suit the client's goals for a particular case or portfolio of work. Doing so requires an understanding of how alternative fee structures shift financial risks between the client and their attorney and potentially affects the incentives of the law firm in how it utilises resources and manages a case. Of course, this is only possible if lawyers are subject matter experts able to ascertain the risk/complexity ratio and understand their clients strategic and financial goals.

Properly structured and implemented, value-based alternative fee arrangements should nurture a long-term partnership built on creating and maintaining value for the client.

These alternative fee arrangements should be mutually beneficial for both the client – who wants cost certainty and better value – and the law firm – which wants to remain profitable, despite no longer being assured of payment for every hour invested in the engagement.

Internationally, law firms have widely adopted flexible fee structures viz fixed or capped fees has become quite commonplace in relation to disputes.

But what are capped fees and what are fixed (or flat) fees?

Capped fees are based on the number of hours multiplied by the hourly rates of the lawyers involved, so the eventual fee may be less than the agreed cap, but never more.

Flat or fixed fees are instances where the attorney earns a specified mutually agreed fee, whether the work gets done in 50 or 100 hours to resolve the matter.



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Alternative fees, be they fixed or capped, are well-suited for a few instances, being:

- A large portfolio of litigation matters, where risk of under-budgeting or over-budgeting can be diversified, other than being inherent in any single litigation eg debt review applications in terms of the National Credit Act.
- A phased-billing approach, where it is easier to estimate phases of the disputes than it is to estimate at the outset the total investment needed to resolve the entire case.
- Where disputes involve common issues and a common life cycle, reducing variability in dispute costs eg specialised sector disputes like construction.

With the cost of litigation becoming unsustainable for businesses, capped or fixed fee structures makes sense in disputes. Great lawyers will continue to attract business in the context of giving their clients realistic and succinct cost estimates.

Of course, there is no one size which fits all. In some cases, a fixed fee quote could just simply be unaffordable. In other cases, a client might present a matter that is so unique that an hourly estimate is not possible or some firms might find no value benefit from a scope of services offered under the flat-fee arrangement and prefer to engage with ad-hoc advice billed on an hourly fee base, which is more practical and affordable.

In South Africa, notwithstanding the imminent implementation of those sections of the Legal Practice Act, we are lagging behind in offering affordable and predictable alternatives to our clients. In my opinion, fear regarding profitability is only one of the reasons why SA law firms do not cap or fix fees. Legal spend in SA is often relationship based so despite tough economic times, there is little incentive on lawyers to focus on alternative fee structures for disputes – the ubiquitous discount on an hourly rate or an invoice when a client complains isn't "alternative"!

It also takes a deep understanding of the sector and your clients' business so that fixed or capped fees are not a gamble but a model based on expertise, experience and acumen.

Until clients start demanding this level of expertise and innovation from their lawyers, law firms are not incentivised to offer any other solution.

## ABOUT THE AUTHOR

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