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Use of Calderbank Offers in International Arbitration
A strategic tool to save costs

With the spread of Covid-19, global economy has taken a major hit. This has a direct impact on the companies' strategy in dealing with disputes as many companies are focusing on preserving cash rather than spending it during the downturn. Companies with potential or pending arbitration proceedings may want to consider strategies to reduce the costs associated with arbitration. If an amicable settlement is on the table, one possible way to reduce the costs of arbitration is through the use of a "Calderbank" or "sealed" settlement offer ("**Calderbank offer**"). Calderbank offer originates from English litigation and derives its name from the famous English Court of Appeal case of *Calderbank vs Calderbank* [1975] 3 All ER 333.

Although rarely used by Japanese parties, Calderbank offers are quite commonly used in disputes involving parties from common law countries such as England, Australia, Canada, Singapore and Hong Kong.

This article explains the nature, advantages and practical tips on the use of a Calderbank offer in the context of a potential and/or ongoing arbitration proceeding.

What is a Calderbank offer?

Calderbank offer also known as a sealed offer is a type of settlement offer that is made on a "*without prejudice save as to costs"* basis.

Marking the settlement offer as *"without prejudice"* indicates that the settlement offer is made without any detriment to the party's rights or claims in the arbitration, and cannot be submitted as evidence during the proceedings. What differentiates a Calderbank offer from other settlement offers is the exception of "*save as to costs*". The phrase "*save as to costs*" is used to identify that the settlement offer cannot be disclosed to the tribunal except when the issue of costs is being determined.

When and how to use a Calderbank offer?

Any party to an ongoing or potential arbitration proceeding ("**offeror**") may issue a Calderbank offer to the other party ("**offeree**"), indicating its intention and offer to make a full and final settlement of the dispute.

If the Calderbank offer is accepted by the offeree then the dispute or proceeding would end by amicable settlement in accordance with the terms of the Calderbank

offer.

If the offer is not accepted by the offeree, the offeror may disclose the existence and terms of the Calderbank offer to the tribunal in the event that the offeree's case prevails, and the tribunal awards the offeree an amount which is less than the offer.

The offeror may apply to the tribunal that the offeree, despite being the successful party at arbitration, should pay the offeror's costs incurred from the date of the Calderbank offer on the basis that

- the offeree should have accepted the Calderbank offer (which was an amount higher than the amount awarded) when it was made; and
- if the offeree had accepted the Calderbank offer, the parties could have saved the costs incurred from the date of the Calderbank offer.

The tribunal would then consider whether the Calderbank offer should be taken into account in relation to the costs, and if so, to what extent.

The following scenario will help understand how the Calderbank offer works[1]:

Company A initiates arbitration against Company B for a claim of USD 10 million. Four months after the proceedings started, Company B makes a Calderbank offer of USD 7 million to Company A. Company A rejects the offer. The proceedings continue and Company A and B, each incur costs of USD 1 million as calculated from the date of the Calderbank offer. The tribunal finds in favour of Company A and issues an award of USD 6 million. Company B reveals the Calderbank offer to the tribunal before the tribunal decides on the issue of costs. In view of the Calderbank offer, the tribunal orders Company A to bear both parties' costs incurred after the date of the Calderbank offer on the basis that Company A should have accepted the Calderbank offer.

In the above scenario, by using the Calderbank offer as a strategic cost management tool, Company B has successfully shifted the burden of costs (from the date of the Calderbank offer) to Company A and mitigated its losses.

Three major benefits of a Calderbank offer

a) **No prejudice for making a settlement offer**: While the parties may worry that a settlement offer may prejudice the tribunal's view towards their position, the confidential nature and non-disclosure of the Calderbank offer helps protect the parties' position in the arbitration.

[1] This is a best-case scenario in terms of the costs for Company B. The amount of costs awarded to the offeror based on a Calderbank offer is subject to the tribunal's discretion.

b) **Protection of costs**: As illustrated above, the party making the offer gets the opportunity to settle the dispute and protect itself against a substantial cost order.

c) **Incentive to settle**: The potential cost consequences arising from the rejection of the Calderbank offer may incentivize the offeree to seriously consider a settlement.

Rules governing the use of Calderbank offers in international arbitration

The concept of Calderbank offer originates from English litigation, but is now increasingly used in international arbitration. Although there is no expressed provision in the major arbitration rules regarding the use of Calderbank offer, arbitration institutions such as ICC allow tribunals to take into account the existence of unsuccessful negotiations and/or unaccepted offers between the parties when allocating costs in certain circumstances.[2]

There is also general consensus that the tribunal, who has broad discretion as to costs, can extend such discretion to consider whether cost consequences can follow from a Calderbank offer. Best case scenario would be for the parties to agree on the use of Calderbank offers at the first case management hearing and include it in the terms of reference. In the absence of an agreement between the parties, a party can still make a Calderbank offer during the course of the arbitration; whether the tribunal will accept it is subject to the tribunal's discretion.

Practical tips in using Calderbank offer

- In order to reap the benefits of a Calderbank offer, it is important that you seek legal advice before making a Calderbank offer.
- While considering whether to make a Calderbank offer, you should undertake an early assessment of your case. This would not only help to determine whether you should make an offer, but also how much should be offered.
- Parties should take care not to bring settlement offers to the attention of the tribunal prior to final determination on the merits, so as to avoid prejudice (usually against the offering party).

[2] ICC Commission Report – Decisions on Costs in International Arbitration (2015, Issue 2), paragraph 100

Summarizing the five "Ws" of a Calderbank offer

What	Settlement offer made on a "*without prejudice save as to costs*" basis
Where	Litigation (most common law countries) and international arbitration (subject to tribunal's discretion)
Who	Any party in dispute can make this offer
When	Make the Calderbank offer as early as possible to get maximum costs protection
Why	Offer to settle and save costs

Conclusion

At the end of the day, offering or rejecting a Calderbank offer will depend on careful assessment of the merits of the case and the likely legal costs of both parties. It will offer greater protection if made earlier in the proceedings, before significant costs are incurred. If utilized timely and strategically, Calderbank offers are definitely a useful cost management technique, which allows parties to protect their position on costs and help to achieve speedy amicable solutions to disputes.

** Mori Hamada & Matsumoto (Singapore) LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.*

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