

USING CALDERBANK OFFERS TO PROTECT YOUR COSTS IN ARBITRATION PROCEEDINGS



OLSWANG

COSTS IN AN ARBITRATION

Costs in an arbitration typically comprise: (i) lawyers' fees; (ii) counsel's fees (if the lawyers are not doing their own advocacy); (iii) arbitrators' fees; (iii) experts' fees; (iv) arbitral institution fees (for administered arbitrations); and (v) disbursements / expenses (e.g. travel and expenses incurred by the lawyers, arbitrators and experts; the cost of renting hearing room facilities and transcript writers; photocopying; storage of documents and evidence; etc.). An arbitrator usually has full discretion when it comes to awarding costs in an arbitration. Costs are usually awarded to the successful party. This means that the unsuccessful party must bear its own costs and must pay all (or at least a significant portion of) the costs of the successful party as well as the arbitrator's fees and expenses.

PROTECTING YOUR POSITION ON COSTS

Parties looking to protect their position on costs as early as possible may do this in one of two ways.

In the arbitration agreement, parties may agree to bear their own costs regardless of the outcome of the arbitration.

Alternatively, in the course of the arbitration, a party may make one of the following three types of offers:

• Open offer:

An open offer is an offer made by the offeror (the party making the offer) to the offeree (the party receiving the offer) in open correspondence. Because it is made in open correspondence, the offeree may bring the offer to the arbitrator's attention at any time during the proceedings. There is therefore a risk that if the offer is brought to the arbitrator's attention before the arbitrator has decided on liability, this may prejudice the arbitrator's view of the merits or strengths of the offeror's case. We do not recommend open offers unless liability has been conceded and the arbitration addresses only the quantum of that liability.

• Without Prejudice offer:

A "Without Prejudice" offer is made in correspondence marked "Without Prejudice". Such an offer cannot be shown to the arbitrator at any stage of the proceedings. By marking the correspondence "Without Prejudice", parties are free to negotiate a settlement without any fear that the negotiations will affect or prejudice the arbitrator's view of the case. Since the existence and terms of the negotiations cannot be revealed to the arbitrator at any stage of the proceedings, the parties cannot refer the arbitrator to these negotiations when the arbitrator decides on the issue of costs in the arbitration - contrast this with "Calderbank Offers" or "Sealed Offers" described below.

• Calderbank / Sealed offer:

A "Calderbank" or "Sealed" offer is an offer which is made and marked "Without Prejudice Save As To Costs". The terms of the settlement are made to the other party on a without prejudice basis. However, if the offer is rejected or not accepted, the offeror may bring the existence and terms of the offer to the attention of the arbitrator if the arbitrator subsequently awards the offeree an amount which is less than the offer.

The offeror will reveal the terms of the Calderbank offer to the arbitrator when he decides on the issue of costs. The offeror will apply to the arbitrator for an order that the offeree pays the offeror's costs incurred from the date of the Calderbank offer on the basis that: (i) the offeree should have accepted the Calderbank offer (which was for an amount higher than the award) when it was made; (ii) had the offeree accepted the offer, the costs for the proceedings incurred by the offeror after the date of the Calderbank offer would have been saved; and (iii) hence the offeree should pay the offeror's costs even though the offeree succeeded in the arbitration.

This Guidance Note discusses the effective use of Calderbank offers in an arbitration.

¹Named after the decision in *Calderbank V. Calderbank* [1975] 2 All ER333

BENEFITS TO MAKING A CALDERBANK OFFER

Calderbank offers have received substantial judicial approval. Most arbitrators will usually be prepared to consider any Calderbank offer when awarding costs.

There are two main benefits to making a sensible Calderbank offer in an arbitration.

The first benefit is that it gives the parties an opportunity to settle the dispute and save further costs in the arbitration. The offeree will have to consider the risk that even if it 'wins' the arbitration and is awarded damages, the amount of damages awarded may not 'beat' the offer such that it must pay the offeror's costs. In some situations, this may even mean that any damages recovered by the winning party are substantially offset by the payment of costs to the losing party.

The second benefit is that it enables the offeror to protect its position on costs if the offeree rejects or does not accept the offer and the amount of damages awarded ultimately fails to 'beat' the offer. The offeror may then proceed to incur reasonable costs in the arbitration knowing that if the damages awarded fail to exceed the Calderbank offer, then it can bring the Calderbank offer to the attention of the arbitrator and apply to the arbitrator for an order that the offeree pays the offeror's costs incurred from the date of the Calderbank offer.

HOW TO MAKE A CALDERBANK OFFER?

We recommend that you seek legal advice before making a Calderbank offer. It is important for Calderbank offers to be properly drafted. Both the offeree and the arbitrator may ignore ambiguous, incomplete or conditional offers on the basis that the offer was defective.

An arbitrator may assess the following factors in deciding whether a Calderbank offer was properly made:

- The offer should be in writing and state that it is "without prejudice save as to costs".
- The offer should identify the claims, causes of action and counterclaims covered by the offer.
- The offer should be in clear terms and immediately acceptable without the need for further clarification.
- The offer should be clear as to its monetary value and be a full and final settlement inclusive of any ancillary matters such as interest and expenses, legal costs, arbitrator's costs, and costs for experts and witnesses.
- The offer should be an unconditional and genuine attempt by the offeror to settle the dispute.
- The offer should include an offer to pay the costs of the other party up until at least the time of the offer.
- The offer should remain open for acceptance for a reasonable period of time.

A sample Calderbank offer is attached to this Guidance Note as **Appendix 1**.

STRATEGY IN MAKING THE CALDERBANK OFFER

• When To Make The Offer?

A party looking to settle a claim should make a Calderbank offer as early as possible so that it can obtain maximum costs protection in the arbitration.

• How Much To Offer?

The offered amount should be sensible and enough to beat the amount of damages which the arbitrator is likely to award. It is always tempting to make a low offer. However, an offeror must consider that if the award exceeds the offer, then the offer is ineffective and will not protect the offeror from having to pay its own costs as well as the costs incurred by the other party. Getting the balance correct requires the offeror to undertake an early assessment of its case together with lawyers.

Worked examples of the above Calderbank offer strategies in operation are set out at **Appendix 2**.

CONCLUSION

A well-made and well-timed Calderbank offer not only protects the position on costs, but may also help to quickly and effectively resolve disputes.

FURTHER INFORMATION

No part of this Guidance Note should be taken as legal advice. If you would like to receive more information about protecting your costs in an arbitration, or on arbitration in general, please contact **Jonathan Choo**, Partner and Head of Arbitration & Dispute Resolution at Olswang Asia LLP: +65 6720 8278, or email jonathan.choo@olswang.com.

APPENDIX 1

SAMPLE CALDERBANK OFFER LETTER

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WITHOUT PREJUDICE SAVE AS TO COSTS

Dear Sirs

IN THE MATTER OF AN ARBITRATION BETWEEN: ABC COMPANY AND XYZ COMPANY.

We refer to the above arbitration.

We are instructed by our clients, XYZ Company, to propose the following offer to your clients in full and final settlement of all the claims in the above arbitration:

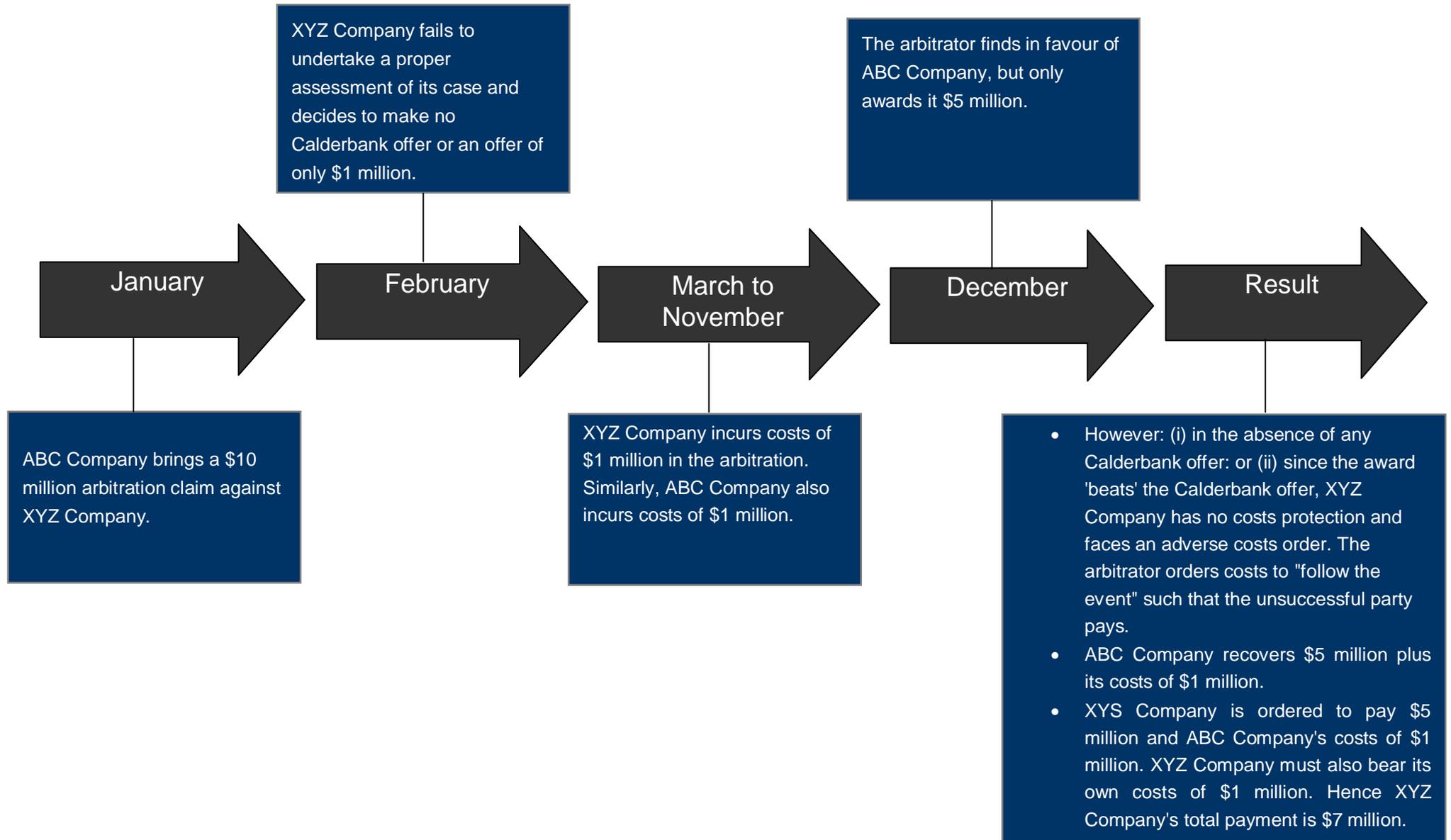
- i) Parties shall not disclose the existence or contents of this offer to the arbitrator until he has determined all issues of liability and quantum on the substantive claims and counterclaims in these proceedings.
- ii) Our clients offer your clients the sum of \$X (inclusive of interest) plus their reasonable costs incurred up to the date of this letter in consideration for settling all claims and counterclaims in these proceedings.
- iii) Our clients will pay the arbitrator's fees and expenses.
- iv) This offer will remain open for acceptance at any time until the start of the substantive hearing, provided that if it is not accepted within 21 days from the date of this letter, your clients will pay our clients' reasonable costs and the arbitrator's fees and expenses incurred after the expiry of that period.
- v) If your clients do not accept the above offer and recover less than its value in the award as to substantive issues, our clients reserve the right to bring this letter to the attention of the arbitrator when determining liability for, and the quantum of, the costs of these proceedings. At that stage, our clients will contend that they are entitled to their reasonable costs of these proceedings from the date when the 21-day period (referred to in paragraph (iv.) above) expired and that your clients must bear their own costs as well as the arbitrator's fees and expenses.

For the avoidance of doubt, the above offer is made without prejudice save as to costs. Our clients reserve all rights in this matter.

Yours Faithfully,

APPENDIX 2

EXAMPLE 1: NO CALDERBANK OFFER OR POORLY MADE CALDERBANK OFFER



EXAMPLE 2: SENSIBLE CALDERBANK OFFER

