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The Arbitration Practitioner's Series by MKBAC: Calderbank offers - an effective method to make settlements work in India

The Calderbank offer can be a highly effective method as it comes with meaningful cost consequences for a party that unreasonably refuses to settle.



Abhisaar Bairagi

Ausaf Ayyub

Abhisaar Bairagi, Ausaf Ayyub

Abhisaar Bairagi, Ausaf Ayyub

Published on: 11 Mar 2026, 11:47 am · 5 min read

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The Indian legal system has long suffered from excessive litigation which results in delays, inefficiencies and a significant burden on courts. Despite initiatives to encourage alternative dispute resolution mechanisms, such as mandatory pre-suit mediation under Section 12A of the Commercial Courts Act, 2015, promotion of mediation through a dedicated legislation and promotion of settlements through schemes like *Vivad se Vishwas (Dispute To Trust)*, parties still remain reluctant to settle their disputes.

At the heart of this reluctance lies a perception that there are no consequences when one party unreasonably refuses to settle, thereby dragging the dispute into years of litigation.

While Calderbank offers are well-recognised internationally, they have witnessed little to no adoption in India despite having statutory foundation under both the Code of Civil Procedure, 1908 (CPC) and the Arbitration and Conciliation Act, 1996 (A&C Act).

This article attempts to briefly cover the origin of Calderbank offers, their global application and their statutory recognition in India. It advocates for their actual enforcement as an instrument to reduce judicial burden, encourage settlements and promote business efficiency.

What is a Calderbank offer?

Calderbank offers find their origin in the famous English case of *Calderbank v. Calderbank*, wherein the Court of Appeal ruled that an offer made on a “without prejudice, save as to costs” basis could be considered by the court at the stage of costs determination. The essence of the principle is as follows:

- The offeror sends a written settlement offer to the counter-party, clearly marked “without prejudice, save as to costs.”
- The offeree can either accept or reject the offer. However, it cannot be disclosed to the court/tribunal before the conclusion of the hearing on merits.
- If the offer is rejected and the offeree secures a less favourable outcome, the court/tribunal would take the offer into account while determining the costs allocation for the matter. In most cases, the offeree with a less favourable outcome is made to bear the costs of the offeror from the date of the order till completion of proceedings.

Calderbank offers shifts the general “costs follow the event” rule by introducing an element of accountability in settlement negotiations.

Statutory basis in India

Interestingly, although Indian courts have not actively applied the Calderbank principle to determination of costs, a strong statutory recognition exists for the same. As per Section 35(3) CPC, while determining costs, courts must have regard to “any reasonable offer to settle made by a party and unreasonably refused by the other party.”

Similarly, Section 31A(3)(d) of the A&C Act provides for an identical provision empowering arbitral tribunals to take into account the offer made by the losing party while deciding on cost allocation.

Therefore, the foundational legislative framework to enforce Calderbank-like offers is already present under the Indian cost allocation mechanism. What is lacking is judicial enforcement and awareness among litigants and practitioners.



After *Calderbank v. Calderbank*, the UK Civil Procedure Rules (Part 36) later codified the principle into an official regime in settlement offers, providing for automatic cost consequences when offers to settle are unreasonably denied.

Australia

The courts in Australia have also adopted Calderbank offers while determining costs. In [Hazeldene's Chicken Farm Pty Ltd v. Victorian WorkCover Authority](#), the Court held that unreasonably refusing a Calderbank offer would justify a departure from the normal costs rule, especially when the offeree ends with a less favourable outcome.

Singapore

The courts in Singapore have also applied Calderbank offers to award costs in favour of losing party. In *Navigator Aries v. Leo Perdana [2023]*, it was reiterated that Calderbank offers should be given due weight and rejection of a genuine Calderbank offer would have significant cost implications.

United States of America

Rule 68 of the Federal Rules of Civil Procedure provides for settlement offers both before and during the trial. It allows the defending party to make an offer to the opposing party 14 days prior to the commencement of trial. If the responding party accepts the offer within 14 days, then parties can obtain a judgment on such offer. The offer can also be made during trial once the liability has been determined, but the offer must be made at least 14 days before the date fixed for such determination. In both cases, if the responding parties gets a less favourable outcome than the offer made by the defending party, the responding party has to bear the costs.

International arbitration

Major arbitral institutions, including the ICC, LCIA and SIAC, have applied Calderbank offers while awarding costs. The [2015 ICC Commission Report on Costs in International Arbitration](#) stated that ICC tribunals have taken into consideration settlement offers made by the losing party while determining the cost allocations.

Why India needs Calderbank offers

- **Judicial pendency:** India has more than 5 crore pending cases. Serious enforcement of Calderbank offers would promote settlements and eventually lead to reduction in pendency.
- **Encouraging settlements:** ADR tools like mediation/conciliation often fail due to lack of binding consequences. Enforcement of Calderbank offers would ensure that a winning party which unreasonably denied an offer of



(construction, mining, PPP contracts) want dispute resolution mechanisms that prioritise continuity. Calderbank offers provide a balance between asserting rights and encouraging compromise, which is beneficial for uninterrupted continuation/completion of project work.

- **Alignment with global practice:** India hopes to be a global arbitration hub. Embracing Calderbank offers supports Indian arbitration with international best practices.
- **Complementing Section 12A of Commercial Courts Act:** The mandatory pre-suit mediation under Section 12A often fails due to lack of consequences for failure to reasonably settle. Calderbank enforcement ensures that unreasonable refusal to settle will have financial repercussions even after proceedings commence.

Practical considerations

- **Timing of offer:** Calderbank offers are most effective once disputes crystallise, but before the proceedings reach an advanced stage. It should be a genuine attempt to settle and save costs and time and should not be made when things don't look good for the offeror.
- **Form:** The offer must be clear, unequivocal and explicitly state it is made "without prejudice save as to costs."
- **Judicial/tribunal discretion:** Courts/tribunals must examine the reasonableness of both the offer and its rejection. They often take into consideration whether the offer provided for a clear method of payment, a reasonable time to accept and the stage at which it was made.

Challenges in India

- **Judicial reluctance:** Indian courts have been reluctant in departing from the general principle of cost allocation.
- **Lack of awareness:** Both litigants and counsel rarely invoke Calderbank provisions.
- **Cultural resistance:** Parties often equate settlement with weakness - a mindset that needs reorientation.

Conclusion

Calderbank offers symbolise a simple but powerful principle: parties who make reasonable efforts to settle should not be punished with excessive costs if the other side unreasonably declines their settlement offers.



educated on strategic use of Calderbank offers as part of ADR strategies.

Doing so would not only reduce judicial backlog, but also strengthen the culture of compromise and improve business relations and efficiency, which will lead to greater project success, and bring Indian dispute resolution practices closer to international best standards.

Abhisar Bairagi is a Partner and Ausaf Ayyub is an Associate at [Khaitan & Co.](#)

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