# AVAILABLE RELIEF IN ARBITRATION

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APRIL 10-12, 2003

ARIAS - U.S. 2003 SPRING CONFERENCE
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Paget, Bermuda

## I. The Arbitration Clause is the Starting Point for Determining the Scope of the Panel's Authority to Afford Relief

In considering the scope of an arbitration panel's authority to afford relief, the starting point is the arbitration agreement. Thus, where an arbitration clause did not limit the remedies that could be imposed, and specifically provided that the panel could render its decision based on "custom and usage in the insurance and reinsurance business" the court in *Unigard Security Insurance Co. v. Cigna Reinsurance Co*., 82 F.3d 423, 1996 WL 162435 (9th Cir. 1996), held that because the evidence supported a finding that the panel could afford equitable relief, the arbitrators did not exceed their powers when they took equitable considerations into account in interpreting the contract. *See also Advest, Inc. v. McCarthy*, 914 F.2d 6, 10-11 (1st Cir. 1990) ("[A]rbitrators' remedial choices are not restricted to the array of anodynes proposed during the hearing. In actuality, the opposite is true: subject to the terms of the empowering clause, arbitrators possess latitude in crafting remedies as wide as that which they possess in deciding cases.")

In addition to looking to the arbitration agreement, courts will look to the submissions by the parties in determining the scope of the arbitrators' authority to grant relief. *E.g., Mutual Fire, Marine & Inland Insurance Co. v. Norad Reinsurance Co.,* 868 F.2d 52, 56 (3d Cir. 1989); *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991). Further, "courts have, consistent with the federal policy favoring arbitration, been hesitant to find that the arbitrator exceeded his authority where the arbitration agreement fails to affirmatively or otherwise clearly limit the arbitrator's authority." *Rhone-Poulenc, Inc. v. Gould Electronics, Inc.*, 1998 WL 704420, *3 (N.D. Cal. 1998); *Michigan Mutual Insurance Co. v.*

*Unigard Security Insurance Co.,* 44 F.3d 826, 831 (9th Cir. 1995) (where reinsurance agreement provided for arbitration of "any" dispute and did not place limits on the types of relief the panel could grant, "the panel had the authority to settle and determine the dispute appropriately").

## II. Equitable Relief

"It is beyond question that the arbitrator may have broad equity powers if the rules under which he is operating provide for equitable relief." *Brown v. Coleman Co.*, 220 F.3d 1180, 1183 (10th Cir. 2000). Thus, where an arbitration was conducted under an AAA rule that gave the arbitrators the power to "grant any remedy or relief that the [panel] deems just and equitable," the panel's power to grant such relief was not limited by the scope of the parties' agreement. *See id.*

In *Executive Life Insurance Co. of New York v. Alexander Insurance Ltd*., 999 F.2d 318 (8th Cir. 1993), Alexander reinsured Executive under three contracts for which Executive paid a one-time premium of $4.6 million. After the contracts were prematurely terminated, Executive sought a refund of unearned premium. Alexander refused to refund the premium and the dispute was submitted to arbitration. The arbitration clause provided that:

> A dispute or difference between the parties with respect to the operation or interpretation of this Agreement on which an amicable understanding cannot be reached shall be decided by arbitration. The arbitrators are empowered to decide all questions or issues and shall be free to reach their decision from the standpoint of equity and customary practices of the insurance and reinsurance industry rather than from that strict law.

*Id.* at 319. Following the hearing, the panel issued a written decision noting that the reinsurance agreements did not contain provisions for refund of premiums, and "the 'customary practices of the insurance and reinsurance industry' that do exist are not sufficiently specific to the issue here presented to dictate a result." Accordingly, the Panel stated that they sought "an equitable disposition [that] serious and determined negotiating efforts of the parties might have produced" and in order to "give recognition to the equities in favor of each party," the panel awarded Executive a refund of $333,000. *Id.* at 319-20.

The district court vacated the award, holding that the panel had exceeded its authority because neither the reinsurance agreements nor industry custom and practice provided for refunds. On appeal, however, the court noted that in determining whether the arbitrators exceeded their authority, the contract would be broadly construed and all doubts would be resolved in favor of the award. The court further noted that the arbitration agreements allowed the panel to use equity as well as industry custom and practice to resolve the dispute, and it was

clear that the panel had considered custom and practice even though the industry customs and practices were not decisive. Accordingly, the appellate court held that it was error to vacate the award.

### A. Reformation and Rescission

Under a broadly worded arbitration clause, arbitrators have the power to reform a contract. *Mutual Fire, Marine & Inland Insurance Co. v. Norad Reinsurance Co.,* 868 F.2d 52, 56 (3d Cir. 1989) (panel did not exceed authority in reforming contract); *see also Michigan Mutual Insurance Co. v. Unigard Security Insurance Co.,* 44 F.3d 826, 832-33 (9th Cir. 1995) (confirming award that excused reinsurers from future performance, although award put reinsurers in better position than if contract had been rescinded).

Likewise, arbitrators have the power to grant rescission of a contract. *E.g., ACE Capital Re Overseas Ltd. v. Central United Life Insurance Co*., 307 F.3d 24, 33 (2d Cir. 2002) (holding that broad arbitration clause "must be held to encompass a claim of fraudulent inducement of the contract in general").

### B. Temporary Equitable Relief

Arbitrators can generally afford temporary equitable relief in order to make the arbitration meaningful. Thus, in *Pacific Reinsurance Management v. Ohio Reinsurance Corp*., 935 F.2d 1019 (9th Cir. 1991), the court upheld a lower court decision confirming as final an interim award that required the members of a reinsurance pool to place in escrow sums that might be due to pool manager after a decision on the merits. In confirming the award, the court noted that "[t]emporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful . . . are final orders that can be reviewed for confirmation and enforcement."

Likewise, in *British Insurance Co. of Cayman v. Water Street Insurance Co.*, 93 F. Supp.2d 506, 516 (S.D.N.Y. 2000), the court noted that "courts in [the Second] Circuit have firmly established the principle that arbitrators operating pursuant to [provisions relieving the panel of judicial formalities and permitting them to abstain from following strict rules of law] have the authority to order interim relief in order to prevent their final award from becoming meaningless." Accordingly, the *British Insurance* court confirmed a prehearing security award in the amount of $1.7 million, while expressing some concern with panel's issuance of the award before it heard any evidence on the merits. *See id.* at 518.

While courts generally uphold awards of prehearing security designed to protect a future award on the merits, courts may not confirm awards requiring payment of outstanding claims or balances pending a hearing and decision on the merits. Thus, in a recent decision, the court in *TIG Insurance Co. v. Security Insurance Co. of Hartford*, No. 3:02cv2206 (D. Conn. decided Jan. 21, 2003), refused to confirm, and vacated, an interim award requiring the reinsurer to pay outstanding balances pending a hearing on the merits. In reaching its decision, the court rejected the cedent's argument that the award merely resolved the question of whether the reinsurer was obligated to continue to perform under the contract during the arbitration, noting that the issue of the reinsurer's defenses (rescission) and its obligation to pay could not be independently resolved. The court also noted that the panel's award did not merely maintain the status quo during the arbitration; it altered the status quo. *But see Island Creek Coal Sales Co. v. City of Gainsville, Florida*, 729 F.2d 1046 (6th Cir. 1984) (confirming interim final order issued after the hearing on the merits, which directed city to continue accepting coal shipments under contract pending further order of the panel), *abrogated on other grounds by Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000).

## III. Partial Final Awards

If the parties agree that the arbitrators can render a final decision as to only part of a dispute, the panel has the authority to do so. *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991). Once that issue has been resolved, however, the panel becomes "'*functus officio*' meaning that their authority over [that issue] is ended." *Id.*

## IV. Prejudgment Interest

As a general matter, courts hold that arbitrators have the authority to award pre-judgment interest as part of their award. *E.g., Rhone-Poulenc, Inc. v. Gould Electronics, Inc.*, 1998 WL 704420 (N.D. Cal. 1998) (rejecting argument that panel exceeded its authority in awarding prejudgment interest); *see also J.A. Jones Construction Co. v. Flakt, Inc*., 731 F. Supp. 1061, 1064 (N.D. Ga. 1990) (denying motion to vacate arbitrators' award of pre-judgment interest).

## V. Advisory Opinions/Declaratory Relief

In general, courts hold that arbitrators may not render advisory opinions. *See Alpha Beta Co. v. Retail Store Employees Union, Local 428 AFL-CIO*, 671 F.2d 1247 (9th Cir. 1982) (denying motion to compel arbitration of the meaning of contractual provision). However, where there is a ripe dispute between the parties with respect to the construction of a treaty as applied to a specific claim, at least one court has recently ruled that arbitrators have the power to render declaratory relief. Thus, in *Hartford Accident & Indemnity Co. v. Swiss Reinsurance America Corp*., 246 F.3d 219 (2d Cir. 2001), the court permitted arbitration of the question of:

> [W]hether an Environmental Claim that is allocated by Hartford to two or more underlying Hartford policy periods must be allocated

> and billed to the [treaties] on the basis of one limit and retention per occurrence for each such underlying policy period, one limit and retention per occurrence for all such underlying policy periods, or on some other basis.

*See id*. at 222, 224. In so ruling, the court rejected the argument that Hartford was seeking an advisory opinion in arbitration, noting that "a difference or dispute exists over the construction of the [treaties] and their application to billed and unbilled pollution claims." *Id.* at 225.