IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, s. 268 and Ontario Regulation 283/95 thereunder;
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17;
AND IN THE MATTER of an Arbitration

BETWEEN:

COSECO INSURANCE COMPANY

Applicant

- and -

LIBERTY MUTUAL GENERAL INSURANCE COMPANY and GMAC INSURANCE COMPANY

Respondents

AWARD

Counsel:

Coseco Insurance Company (Applicant): Daniel Strigberger

Liberty Mutual General Insurance Company (Respondent): Catherine A. Korte and Anthony H. Gatensby

GMAC Insurance Company (Respondent): Barry Marta

Issue:

The preliminary issue to be determined is whether I have jurisdiction under Ontario Regulation 283/95 and the *Arbitration Act*, 1991 to rule on my own jurisdiction to conduct this arbitration.

Result:

I conclude that I do have jurisdiction pursuant to Ontario Regulation 283/95 and the *Arbitration Act*, 1991 (Section 17 (1)) to rule on my own jurisdiction to conduct this arbitration. I have concluded I do have jurisdiction to conduct this priority dispute arbitration.

Background:

On July 4, 2015 Heerah Singh was a passenger in a vehicle insured by the Applicant, Coseco Insurance Company (hereinafter referred to as "Coseco"). The accident occurred in Ontario.

At the time of the accident Mr. Singh was a resident of New York State. However he applied to Coseco for statutory accident benefits pursuant to the Statutory Accidents Benefits Schedule for accidents on or after September 1, 2010 pursuant to the *Ontario Insurance Act* R.S.O. 1990 c. I.8, s. 268. In accordance with Regulation 283/95 (as amended by Regulation 38/10) Coseco accepted Mr. Singh's Application for Accident Benefits and commenced and continues to pay statutory accident benefits to Mr. Singh.

The Respondent, Liberty Mutual General Insurance Company (hereinafter referred to as "Liberty") insures Mr. Singh's spouse. Liberty's policy is one issued in New York State. GMAC Insurance Company (hereinafter referred to as "GMAC) insures Singh Hickley Glass Inc. Mr. Singh is the driver/owner of this company. GMAC's policy is not an Ontario policy.

Pursuant to Regulation 283/95 Coseco commenced an arbitration claiming that priority pursuant to Section 268 of the *Insurance Act* lay with either Liberty as the insurer of Mr. Singh's spouse or with GMAC. The latter claim appears to be based on Mr. Singh being either a named insured or a deemed named insured under the GMAC policy. Coseco claims that either of these policies would rank in priority to their policy pursuant to Section 268 of the *Insurance Act* as Mr. Singh would be a named insured and/or a deemed named insured under either of those policies which would rank higher than the Coseco policy under the priority rules.

A Notice to Participate and Demand for Arbitration was served dated April 26, 2016 proposing myself as the Arbitrator. Liberty accepted my appointment. GMAC appointed Mr. Barry Marta as counsel and in an email dated May 18, 2016 Mr. Marta advised that he had been retained by "New South Insurance Company (GMAC)." He advised and I quote "My client agrees with the appointment of Ms. Samworth as Arbitrator." Mr. Marta went on to ask that a prehearing be scheduled once a lawyer had been appointed for Liberty. The first prehearing took place on consent on September 23, 2016 by phone. Counsel provided me with information with respect to the nature of the claim and the background of the parties. Mr. Marta on behalf of GMAC raised a number of issues. The issue that is relevant with respect to this decision is that he claimed there were constitutional and jurisdictional issues that would constitute preliminary issues. Counsel agreed to exchange some documentation and a further prehearing was

scheduled for November 17, 2016. At that prehearing Mr. Marta confirmed that it was his position on behalf of his client that:

1. The Arbitrator in this matter had no jurisdiction to proceed with the arbitration as against his client; and

2. Coseco, the Applicant, has to apply to the court to determine whether it can proceed with an arbitration against Mr. Marta's client.

Counsel for Liberty and Coseco did not agree with the position of GMAC. I gave counsel some time to exchange arguments/factums. I was hopeful that counsel would be able to resolve the matter without further submissions. However that was not to be.

Subsequent to that prehearing I received some written submissions on behalf of Liberty and Coseco. Mr. Marta also provided me with the key case that he relies upon: *Insurance Corporation of British Columbia v Unifund Assurance Company* 2003 SCC 40.

On December 16, 2016 we reconvened the prehearing in order to allow counsel to make any further submissions they wished to make with respect to the jurisdictional issue. Mr. Marta on behalf of GMAC maintained his position that essentially I had no jurisdiction to deal with this matter at all and that the arbitration should either be dismissed or stayed pending an application to the court. Counsel for Liberty and Coseco argued that I had jurisdiction and should render a decision on the issue.

As noted above I agree with Coseco and Liberty's position for the reasons that follow.

Analysis:

GMAC's position that I have no jurisdiction to either hear this arbitration or even to determine whether I have jurisdiction to hear this arbitration flows entirely from the decision of the Supreme Court of Canada in the *Insurance Corporation of British Columbia v Unifund Assurance Company* (supra). I find that that case is distinguishable.

That case dealt with Section 275 of the *Insurance Act*. Section 275 deals with cases involving loss transfer not priority. Regulation 283/95 does not apply to Section 275 of the *Insurance Act*. This case involves a determination of priority pursuant to Section 268 of the *Insurance Act* as opposed to Section 275.

In the *ICBC v Unifund* case the issue between the insurance companies flowed from a motor vehicle accident that occurred in British Columbia. The "insured" in that case while having been injured in British Columbia returned to Ontario. They applied for and collected statutory no-fault accident benefits from Unifund Assurance Company, an Ontario insurer. At the time of the

accident Unifund was licensed to carry on business in Ontario but not licensed to carry on business in British Columbia.

Unifund applied to the Ontario Superior Court of Justice to appoint an Arbitrator pursuant to Section 275 (4) of the *Insurance Act*. Unifund took the position that it had the right to pursue a loss transfer claim under Section 275 against the Insurance Corporation of British Columbia. This is a process as between two insurers whereby the insurer of a heavy commercial vehicle can be, in certain circumstances, obliged to make loss transfer payments to the insurer of an automobile if they are found responsible for the accident pursuant to the fault determination chart.

The ICBC took the position on the motion to appoint the Arbitrator that the application should be stayed or dismissed on the grounds that the loss transfer process was not applicable to the ICBC. ICBC took the position that Unifund had no cause of action against an out of province insurer on the facts of that case.

After proceeding through the motion, an appeal to the Court of Appeal and then finally up to the Supreme Court of Canada it was determined that on the facts of that case that Unifund Assurance Company did not have a cause of action in loss transfer against the Insurance Corporation of British Columbia. In other words the loss transfer provisions of the Ontario scheme did not apply to the Insurance Corporation of British Columbia. The Supreme Court of Canada held that as the accident occurred in British Columbia that there was no real and substantial connection with Ontario and the Ontario insurance law could not impose a civil obligation arising out of an accident within British Columbia. To do so would give the Ontario statute impermissible extraterritorial effect. It is important to note that in that decision arguments were made with respect to the effect of the Power of Attorney and Undertaking (PAU). The PAU is an interprovincial and interstate web of interlocking arrangements that allow for motorists who are traveling within other provinces and other states to ensure that their insurer will respond to claims for accidents that occur outside the insured person's home jurisdiction. Pursuant to a PAU an out of province motorist or out of province insurer can be required to defend an action in the jurisdiction where the accident occurred. Most importantly the PAU provides that a signatory will agree:

> "A. To appear in an action or proceeding against it or its insured in any province or territory in which such action has been instituted and of which it has knowledge.
>
> C. Not to set up any defence to a claim, action or proceeding under a motor vehicle liability insurance contact entered into by it, which might not be setup if the contract had been entered into in accordance with the law relating to the motor vehicle liability insurance contracts of the province of territory of Canada in which such action or proceeding may be instituted and to satisfy any final judgment rendered against it or its

> insured by a court in such province or territory, in the claim, action or proceedings...".

In the *ICBC v Unifund* decision it was acknowledged that at the time of the accident the Insurance Corporation of British Columbia was not a party to the PAU. The court noted that the PAU does not extend to all provinces and territories. It noted that British Columbia's name was crossed off the standard form.

In reviewing the decision in its entirety I see three reasons upon which to distinguish it from the present case:

1. The accident in that case occurred in British Columbia;

2. The Insurance Corporation of British Columbia was not a party to the PAU; and

3. The claim involved loss transfer pursuant to Section 275 of the *Insurance Act*

I also note in particular the court's comments at paragraph 101 where they note that the cases that had been presented to them by Unifund in support of their position all involved motor vehicle accidents that had occurred within the territorial jurisdiction of the court (in other words the accidents occurred in Ontario as opposed to out of province). The court noted that in those circumstances the territorial jurisdiction of the court harmonized the out of province policy with local rules pursuant to the terms of the PAU.

In this case the accident occurred in Ontario. GMAC is a signatory to the PAU. This is a priority dispute which in accordance with Regulation 283/95 is specifically required to be determined by an Arbitrator. Regulation 283/95 as amended by Ontario Regulation 38/10 provides under Section 7 (1) the following:

> "If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act,* 1991 initiated by the insurer paying benefits under Section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed.

In the decision of *Primmum Insurance Company v ING Insurance Company of Canada* (2007 Carswell ON 616 [207] Justice Brown commented that Section 7 (1) gives broad jurisdiction to an Arbitrator to deal with questions related to a priority dispute. He noted no restrictions are placed on the types of questions that an Arbitrator may consider in the course of dealing with the dispute.

An Arbitrator appointed pursuant to Regulation 283/95 is bound to conduct the arbitration pursuant to the *Arbitration Act*, 1991. Section 17 (1) provides as follows:

"An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence of the validity of an arbitration agreement."

Section 8 (2) of the *Arbitration Act* provides that an Arbitrator may "determine any question of law that arises during the arbitration".

Justice Brown in the *Primmum v ING* decision (supra) concluded that when one combines the powers given to the Arbitrator under the *Arbitration Act* and Regulation 283/95 that an Arbitrator appointed to deal with a SABS priority dispute possesses the jurisdiction to decide any question regarding the dispute including any question of law or mixed law and fact and if any party disagrees with the Arbitrator's determination it can appeal to the Superior Court. The issue in *Primmum v ING* was whether or not the Arbitrator could make decisions relating to her own jurisdiction.

I also found the decision of the Ontario Court of Appeal in *Healy v Interboro Mutual Indemnity Insurance Company and Guardian Insurance Company of Canada* 1999 Carswell ON 1451 [1999] of assistance. In that case Mr. Healy was a resident of New York State. In 1996 he was a passenger in a motor vehicle involved in an accident in Thunder Bay, Ontario. The vehicle he was in was insured by Guardian Insurance Company. Guardian was licensed to provide automobile insurance in Ontario. Mr. Healy was the named insured under a policy of automobile insurance issued by Interboro Mutual Indemnity. Interboro was licensed to provide automobile insurance in New York State but not in Ontario. However Interboro was a signatory to the Power of Attorney and Undertaking (PAU). The dispute was whether or not Mr. Healy's statutory accident benefits should be paid for by Guardian or by Interboro. In essence this was a priority dispute. Interboro took the position that its policy did not provide for the payment of statutory accident benefits and therefore it was not obliged to pay. The Court of Appeal concluded that Interboro should pay statutory accident benefits. It noted that the PAU precluded Interboro for asserting a defence that its policy does not include SABS coverage given that that coverage was mandated by Section 268 of the *Insurance Act* to be part of the standard Ontario policy. The PAU which precluded Interboro from asserting that defence resulted in making a level playing field as between the insurers.

I have difficulty in understanding that if in accordance with *Healy v Interboro* GMAC would have had the obligation to pay statutory accident benefits to Mr. Singh had he applied to them for those benefits but at the same time GMAC would be excluded from any priority dispute brought by an insurer in Ontario who claims that they were not the highest ranking insurer pursuant to Section 268 of the *Insurance Act*. It would seem that if Mr. Singh had applied to GMAC for statutory accident benefits, they would have been obliged to pay those benefits and would equally (should they have thought that they did not rank in priority under Section 268 of the *Insurance Act*) have the right to bring an arbitration in Ontario to have that issue determined.

I find in all the circumstances of this case considering the *Insurance Act*, the Regulations and the broad jurisdiction provided to me under the *Arbitration Act* that I do have jurisdiction to hear this arbitration. I further find that I have the right to determine whether I have that jurisdiction.

I do note that there was no signed arbitration agreement provided to me. In the circumstances I understand based on GMAC's position that they would decline to enter into any such arbitration agreement that may purport to give me the jurisdiction which they argued I did not have. However I was satisfied that at my initial appointment that all counsel/parties accepted my appointment thus giving me the authority to conduct the prehearings and render this decision.

I appreciate that based on GMAC's argument that an appeal will be launched from this decision. Accordingly I will not schedule any further prehearings to proceed with the actual priority dispute until the jurisdictional issue has been resolved through the appellate process.

Expenses:

As there is no arbitration agreement that specifies who shall pay the expenses as a result of this jurisdictional argument I therefore find that expenses shall follow the event and costs, if asked, are payable by GMAC to Coseco and Liberty. If there is any dispute with respect to the quantum of costs the parties can address this once any appeals are heard and/or a further prehearing is scheduled.

DATED THIS 22nd day of December, 2016 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP