IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

UNICA INSURANCE COMPANY INC.

Respondent

AWARD
WITH RESPECT TO PRELIMINARY ISSUE

Counsel:

Security National (Applicant): Sonya Katrycz

Unica Insurance Company Inc. (Respondent): Mark H. Fonseca

Introduction:

This matter came before me pursuant to the *Arbitration Act*, 1991, to arbitrate a dispute as between two insurers with respect to a priority issue pursuant to the *Insurance Act* and its Regulations: specifically Regulation 283/95 as amended.

However the parties indicated that prior to proceeding to the actual priority dispute that there was a preliminary issue to be determined.

The parties have identified the preliminary issue pursuant to their Arbitration Agreement as follows:

(a) Did Security National Insurance Company (hereinafter called "Security") initiate the arbitration within one year of serving the Notice to Applicant of Dispute Between Insurers?

(b) If there was a breach of a limitation period, what is the appropriate consequence?

Result:

Security did not initiate arbitration no later than one year after the day the insurer paying benefits first gave notice under Section 7 (3) of Regulation 283/95. With respect to issue (b) I find that the only consequence that can flow from a breach of a limitation period is that Security has lost its right to pursue a claim for priority as against Unica Insurance Company (hereinafter called "Unica") and accordingly the arbitration is dismissed.

Facts:

This matter proceeded to a hearing on October 18, 2016. Counsel filed Statements of Fact and Law and an Arbitration Agreement marked as Exhibit 1 and a Book of Documents marked as Exhibit 2.

The essential facts of this case are not in dispute insofar as the preliminary issue is concerned and the facts can be summarized as follows.

On June 2, 2012 Jonathan Sehl was a pedestrian when he was struck by a motor vehicle insured with Security. At the time of the accident Unica insured Mr. Sehl's parents.

An Application for Accident Benefits (OCF-1) was sent to Security on or about May 30, 2014. The OCF-1 was signed on that same date.

By letter dated June 13, 2014 Security sent a letter to Mr. Sehl copied to Unica serving a Notice to Applicant of Dispute Between Insurers. Security took the position in their Notice of Dispute that as Mr. Sehl was a full time student who did not work and was living with his parents that Unica was the priority insurer.

By letter dated June 25, 2014 Unica wrote to Security acknowledging receipt of the Notice to Applicant of Dispute Between Insurers and noted that they were unable to accept priority pending further investigation.

By letter dated July 10, 2014 Security wrote to Unica enclosing a transcript of a recorded statement from Mr. Sehl which, according to Security, confirmed that Mr. Sehl would be dependent on his parents. Security requested that Unica review the statement and then confirm their acceptance of priority.

By letter dated August 6, 2014 Unica wrote to Security requesting a copy of the OCF-1. There was no mention of having received the letter of July 10, 2014 or the enclosed statement.

On October 2, 2014 Security wrote to Unica:

> "Should we not hear from you regarding priority by November 7, 2014 we will have no alternative but to refer our file to legal to pursue arbitration."

By letter dated October 8, 2014 Unica replied to Security essentially repeating what had been in their letter of August 6, 2014. They acknowledged receipt of the Notice to Dispute, they asked for the Application for Accident Benefits and also stated that they were unable to accept priority pending further investigation. There was no reference in that letter to the October 2, 2014 letter.

By letter dated December 3, 2014 Unica wrote to Security. This letter is identical to the letters of October 8 and August 6, 2014.

By letter dated February 5, 2015 Ms. Katrycz, who had by then been retained by Security National, wrote to Unica. She confirms that she has been retained by Security to advance a claim for priority. She provides a summary of what the priority dispute is about. She states:

> "I am confident we may resolve this issue without proceeding to an arbitration, given the clarity of the situation. I ask that you contact me at your earliest convenience to discuss this file, and look forward to hearing from you."

By letter dated February 23, 2015 Ms. Katrycz sent a copy of the OCF-1 to Unica. This was the first time Unica had been provided with a copy of the OCF-1 and thus confirming that the Notice to Applicant of Dispute Between Insurers had been served within the requisite 90 day period after the receipt of the OCF-1.

On March 4, 2015 Mark Fonseca was retained on the priority dispute by Unica.

On March 5, 2015 a telephone conversation took place between Mr. Fonseca and Ms. Katrycz. Ms. Katrycz 's note with respect to that conversation is as follows:

> "Mr. Fonseca advised of a letter from our client to the claimant of March 28, 2014 re: seeking benefits from Unica instead. Has asked that we determine when our client was first aware of this claim. Points out that the notice is dated June 11, 2014 and was received June 18, 2014. Looking to make a limitation argument. Unica is getting a statement from its insured to determine dependency issue."

By letter dated June 19, 2015 Mr. Fonseca wrote to Ms. Katrycz confirming his retention. The letter notes that when they spoke that Ms. Katrycz had agreed to review her client's file with them and to determine when they were first notified of the accident how they responded. Mr. Fonseca requested a complete copy of the Security file.

On March 31, 2016 I sent out a letter confirming a request to act as Arbitrator and indicating a prehearing would be scheduled. It is an accepted fact that my appointment as Arbitrator was initially unilateral by Security/Katrycz with no input or request from Unica/Fonseca.

The final fact that counsel agree upon is that the date by which the arbitration would have to be initiated in accordance with Regulation 283/95 is June 13, 2015.

Parties Positions:

Security relies upon the entirety of the communication as set out in the various letters between Unica and Security and/or their counsel to support their position that the requirements of both the *Arbitrations Act* and Regulation 283-95 have been met. However the 2 key letters Security puts forward are the letters of October 2, 2014 and February 5, 2015.

Security submits that it is not arguing that any of these letters standing alone would meet those requirements. Security's position is that the letter of October 2, 2014 is the starting path towards arbitration. The remaining letters and in particular the letter of February 5, 2015 result in it being abundantly clear to Unica that Security was commencing an arbitration and that all that remained to be done was to decide who the Arbitrator would be. Security submits that it relied upon the failure of Unica to respond to its communications and in particular to respond to the information provided in the statement with respect to dependency. Security submits that it was clear to Unica that if they did not accept priority based upon the information in the statement that Security would be proceeding to appoint counsel and pursuing arbitration. Security submits that the fact that after their counsel's letter of February 5, 2015 that Mr. Fonseca was promptly retained is an indication that Unica was aware of and was gearing up for an arbitration. Security submits that the tenor of the letters and the behaviour of both insurers make it clear that an arbitration had been initiated by March of 2015. Finally Security submits that the totality of the communication makes it abundantly clear that the process had gone past any discussion stage and had reached the arbitration stage.

Although not pressed before me during oral submissions in their written Statement of Fact and Law Security also submitted that if I found that they had not met the one year limitation period that I should consider remedies other than dismissing the arbitration. They submitted other remedies included costs, suspension or denial of prejudgment interest or imposing strict timelines for the remainder of the dispute.

Unica on the other hand takes the position that neither the letters of October 8, 2014 or February 5, 2015 separate or combined, or the totality of the communications, result in the requirements of Section 23 of the *Arbitration Act* being met. Unica submits that in order for Section 23 of the *Arbitrations Act* to have been met that there must be some overt step taken toward the arbitration process. The letter or combination of letters must signal a clear intention to start the arbitration and that that process will end with a determination of rights by the Arbitrator.

Unica submits that the letter of October 2, 2014 while making reference to "pursuing arbitration" does not initiate an arbitration. All that letter does is indicate that Security will be retaining counsel to pursue arbitration if certain timelines are not met.

With respect to the letter of February 5, 2015 Unica submits that that letter also does not alone or together with any other letters result in an initiation of arbitration. Unica also submits that that letter does not support that there has been an overt step taken towards arbitration. Rather the letter seems to indicate that no arbitration has been commenced as yet and will not yet be commenced. Unica points to the last paragraph of that letter indicating that the author is confident that the case can be resolved "**without proceeding to arbitration**".

Unica submits that the totality of the communications and in particular the 2 letters referred to above not only do not support that an arbitration had been initiated but in fact are clear evidence that an arbitration had not been commenced as of February 5, 2015.

Finally Unica submits that as of June 13, 2015 (the limitation date) that in reviewing all the communications that were submitted as evidence in this arbitration that the following had not yet occurred (all of which would be indicia of an arbitration having been initiated):

(a) No clear overt step had been made indicating arbitration had been initiated.

(b) No clear demand for arbitration had been made either orally or in writing.

(c) The letters indicate that the priority dispute was in the discussion stage.

(d) There had been no discussion with respect to the appointment of an Arbitrator.

(e) There was no clarity or certainty in the mind of Unica (or Security) that they should be diarizing their file for 2 years to meet the deadline under Section 9 (2) (5) of Regulation 283/95. Section (9 (2.5) states that unless consented to be all parties, the hearing of the arbitration must be completed within 2 years after the commencement of the arbitration).

On the second issue before me and Unica submits that Section 7 (3) of Regulation 283/95 creates an absolute limitation period once notice has been served. If a company misses the one year limitation period the only consequence to flow from that is that the insurer cannot proceed to arbitration at a later date even though there may be equitable circumstances that arguably might warrant an extension.

In my view neither the letter of October 2, 2014, the letter of February 5, 2015, those letters combined nor the totality of the communication between Unica and Security is sufficient for me to conclude that an arbitration had been initiated as required under the *Arbitrations Act* Section 23 and Regulation 283/95. With respect to the consequences that flow I agree with Unica that the limitation period is an absolute one and where a company misses the one year limitation period the only consequence is that it loses the right to proceed to arbitration.

Analysis and Findings:

1. **Was this arbitration commenced within the time limit pursuant to Ontario Regulation 283/95?**

Many Arbitrators have observed that Regulation 283/95 does not provide any definition or direction as to what constitutes the initiation of an arbitration. Section 7 (3) is reproduced below:

> "The arbitration may be initiated by an insurer or by an insured person no later than one year after the day the insurer paying benefits first gives notice under Section 3."

In this case it is agreed that the notice referred to in Section 7 (3) was given on June 13, 2014 and therefore the one year runs to June 13, 2015.

Absent any direction in the Regulation as to what constitutes the initiation of an arbitration case law has established that Section 23 of the *Arbitrations Act* sets out the methodology to be applied in making a determination as to when and how an arbitration proceeding is initiated. That Section provides as follows:

> "23 (1) An arbitration may be commenced in any way recognized by law, including the following:
>
> 1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an Arbitrator under the agreement.

2. If the arbitration agreement gives a person who is not a party power to appoint an Arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties.

3. A party serves on the other parties a notice demanding arbitration under the agreement."

Other Arbitrators have pointed out that this allows some flexibility about what steps might be taken to start or initiate an arbitration.

In this particular case the parties agree that Section 23 (1) sub 1 and 2 are not applicable. I must therefore determine whether the various letters submitted in this arbitration constitute a "notice demanding arbitration". Counsel provided a host of helpful decisions of previous Arbitrators and judges who have looked at this issue. I draw from those cases the following criteria that I have applied in my decision making process in this case:

1. Insurers who are subject to Regulation 283/95 are sophisticated litigants who deal with these disputes on a daily basis. These parties find themselves regularly involved in disputes with each other and therefore clarity and certainty of the process are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting there is little room for creative interpretation or for carving out judicial exceptions designed the deal with the equity of particular cases.

   Kingsway General Insurance Company v West Wawanosh Insurance Company 2002 CanLII 14202 (ON C.A.)

2. Section 23 of the *Arbitrations Act* requires some overt step towards an arbitration process that will potentially lead to an award resolving the controversy between the parties. Whatever that document may be the substance of that communication must set the wheels in motion for the arbitration process and there should be no uncertainty in the mind of the recipient about whether or not that process is being invoked. However the *Arbitrations Act* (Section 23) allows some considerable flexibility about the precise steps that may be taken in order to commence the arbitration.

   Markel Insurance Company v Co-operators General Insurance Company and Lombard Canada Ltd. (Arbitrator Lee Samis March 31, 2011)

3. Letters with statements such as "if no response is received we will proceed to arbitration" have been found not to constitute an adequate notice for a demand for arbitration under Section 23 (3) of the *Arbitration Act*. Similarly phrases such as "we are now proceeding to arbitration" does not constitute a notice demanding arbitration under the Regulation but is evidence of an intention that such a process will be commenced at some point.

   State Farm Mutual Insurance Company v Echelon Insurance Company (Arbitrator Shari Novick December, 2008)

4. There is no requirement under Section 23 of the *Arbitrations Act* that the "notice" must propose specific Arbitrators in order for the letter to be considered as the initiation of an arbitration.

   The Co-operators v Perth Insurance (Arbitrator Bialkowski February 3, 2015)

Taking into consideration the summary of the case law above I find that the communications between Security (its counsel) and Unica do not constitute "a notice demanding arbitration". I do not find that any of the letters, combination of the letters or the totality of the letters show that Security made an overt step towards an arbitration process that would have left no uncertainty in the mind of Unica that the arbitration process had been invoked.

It is very important in my view taking into consideration the requirements under Section 9 (2) (5) of Regulation 283/95 that it be abundantly clear what the date is that initiated the arbitration in order for the parties to work forward to ensure that the arbitration is completed within 2 years. The industry should be encouraged to provide clarity in this area by not relying on various letters and communications to initiate arbitration but rather to ensure that a formal "demand to submit to arbitration" or "initiation of arbitration" is served in these priority disputes. As the courts have pointed out, insurers are sophisticated litigants who deal in this area and as sophisticated litigants these types of standardized forms should by now have become more commonly in use.

While Section 7 (3) of Regulation 283/95 does not specify how arbitration is to be initiated Section 8 (2) makes reference to a "notice to initiate arbitration being delivered". It also makes reference to the "Arbitrator proposed in the notice". This certainly suggests that the Regulation contemplates a more formal document. While I appreciate that the case law to date has made it clear that such formal documentation is not the only way that an arbitration can be initiated, the industry should certainly be encouraged to make use of such formal notices so that arbitrations such as this become few and far between. Therefore on the first issue I conclude that Security did not initiate arbitration within one year after the day that Security gave notice to Unica.

2. If Security did not initiate arbitration within the required timeframe what is the appropriate Repercussion?

I do not find that I have any jurisdiction in this matter having concluded that the limitation period was not met to do anything other than find that Security has no right to proceed with the arbitration.

I agree with Arbitrator Bialkowski in his decision, *State Farm Mutual Automobile Insurance Company v Co-operators General Insurance Company* (decision March 26, 2013) that Section 7 of the Regulation creates an absolute limitation period once the required notice has been served. Once that notice has been served the first party insurer has one year to commence its arbitration. That limitation runs from that date of notice and unlike Section 3 of the Regulation (which deals with the notice) there are no saving provisions under Section 7. I agree with Arbitrator Bialkowski that when a company misses that one year period the only consequence that flows is that it cannot then proceed to arbitration at all. Even if there are some equitable circumstances that might warrant an extension, the Court of Appeal in *Kingsway General Insurance Company v West Wawanosh Insurance Company* 2002 CanLII 14202 (Ontario Court of Appeal) had made it very clear that under this particular regulatory scheme Arbitrators are not to look at creative interpretations, carve out judicial exceptions or look at the equities of particular cases.

I am satisfied that neither the Regulation nor any case interpreting the Regulation allows me to do anything other than dismiss the arbitration and find that Security has lost its right to proceed with its priority dispute as against Unica and I so find.

Order:

I therefore order that the arbitration herein be dismissed. I find that costs are payable on a partial indemnity basis by Security National to Unica. I further order that Security National Insurance pay the Arbitrator's costs.

DATED THIS 31th day of October, 2016 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP