

**IN THE MATTER OF AN APPLICATION  
FOR ACCIDENT BENEFITS OF  
SIVARAJAN SABARATNAM and ANUSOOYA SIVARAJAN**

**AND IN THE MATTER OF AN ARBITRATION  
THE ARBITRATION ACT, 1991**

BETWEEN:

**AXA INSURANCE COMPANY**

**Applicant**

- and -

**CO-OPERATORS INSURANCE COMPANY**

**Respondent**

**ARBITRATION AWARD**

**I. BACKGROUND**

This Arbitration is being held pursuant to Ontario Regulation 283\95 under the *Insurance Act* (hereinafter sometimes referred to as the "*Priorities Regulation* ").

The Arbitration involves a priority dispute between Axa Insurance Company ("Axa Insurance") and the Co-Operators General Insurance Company (the "Co-Operators") arising out of a claim for accident benefits made by Sivarajan Sabaratnam and his wife, Anusooya Sivarajan (the "insureds") as a result of a motor vehicle accident in which they were involved on February 20, 1996. Following the accident, the insureds applied to Axa Insurance for statutory no-fault benefits under the SABS - 1994, O. Reg. 776\93, as amended, the Statutory Accident Benefits Schedule - Accidents after December 31, 1993, and before November 1, 1996. Axa Insurance maintains that the Co-Operators insured Mr. Sivarajan and his wife at the time of the accident.

The parties exchanged sworn Affidavits of Documents. Examinations for Discovery of a representative of Axa Insurance and a representative of the Co-Operators were held on July 13, 1999.

**II. ISSUE**

The following issue is the sole issue to be determined by me:

- (1) Whether Axa Insurance is precluded from proceeding with this Arbitration on the basis that it did not give notice of a dispute to the Co-Operators within the time requirements set out in Regulation 283\95 made under the *Insurance Act*?

In the event that this issue is decided in favour of Axa, a two-day hearing has been tentatively scheduled to take place on October 11 and 12, 2000. At that Hearing, the Parties will address the issue as to whether there was a valid policy of insurance with the Co-Operators in force at the time of the loss on February 20, 1996, with respect to Mr. Sabaratnam and his wife.

### **III. FACTS**

The Parties filed an Agreed Statement of Facts. A copy of the Agreed Statement of Facts without the attachments is attached as Exhibit "A" to this Arbitration Award.

For convenience, I will repeat here some of the key facts. It is agreed that the insureds were involved in a motor vehicle accident which occurred on February 20, 1996. At the time of the motor vehicle accident, the insureds were occupants in a Dodge Caravan motor vehicle owned by Tilden Car Rental Inc. and insured under a policy of automobile insurance with Axa Insurance which was in full force and effect. The Co-Operators first issued a policy of automobile insurance to Mr. Sabaratnam under Policy No. 3452085 on May 18, 1994 ("the Co-Operators' Policy"). There is a dispute between the Applicant and the Respondent as to whether or not the Co-Operators' Policy was in force on February 20, 1996. (See paragraph 3 of the Agreed Statement of Facts).

On or about April 9, 1996, Lindsey Morden on behalf of Axa Insurance requested Mitchell and Associates to conduct investigations to determine if there was any other insurer and policy covering Mr. Sabaratnam and his wife. In furtherance thereof, Mitchell and Associates searched the Autoplus database with respect to Mr. Sabaratnam, which identified his previous insurer carrier as the Co-Operators under Policy No. 3452085. The investigator from Mitchell and Associates then telephoned a customer representative at the Co-Operators who indicated that the Co-Operators' Policy lapsed as of January 24, 1996. (See paragraph 4 of the Agreed Statement of Facts).

Mr. Sabaratnam and Mrs. Sivarajan submitted their completed applications for accident benefits, dated April 15, 1996, to Axa with respect to the motor vehicle accident. These applications were received by Axa Insurance on April 23, 1996. (See paragraph 5 of the Agreed Statement of Facts).

On May 1, 1996, Sarina Amatuzio of Axa Insurance spoke with Cathy Burgess of Marsh, McLellan Insurance Brokers, the agent/broker of Tilden Car Rental Inc. At that time, Ms. Burgess advised Ms. Amatuzio of the information that Mitchell and Associates had previously obtained. On that same day, Ms. Amatuzio spoke directly with Mitchell and Associates. At that time, they indicated that they were making further enquiries with respect to the insurance issue.

On June 11, 1996, Ms. Amatuzio received and reviewed reports from Mitchell and Associates dated April 12, 1996, and May 31, 1996, which contained the information set out in paragraph 4 of the Agreed Statement of Facts. (See paragraph 7 of the Agreed Statement of Facts).

On or about September 23, 1996, Ms. Amatuzio of Axa Insurance requested that Signum Corporate Services do a search to see whether Mr. Sabaratnam's sister owned a vehicle as he may have been financially dependent on her. (See paragraph 8 of the Agreed Statement of Facts). Signum Corporate Services provided Axa Insurance with a Report dated December 20, 1996, which indicated that no information relating to the sister could be located. (See paragraph 10 of the Agreed Statement of Facts).

On January 7, 1997, Jim Thompson of Axa Insurance spoke to Sandra of the Co-Operators, who advised that Mr. Sabaratnam currently had three vehicles insured with the Co-Operators. (See paragraph 11 of the Agreed Statement of Facts).

Pauline Alton of Axa Insurance took over handling of the accident benefits files relating to Mr. Sabaratnam and Mrs. Sivarajan on or about September 11, 1997. On September 12, 1997, Ms. Alton was advised by the insured's case manager that Mr. Sabaratnam was driving a Toyota vehicle with plate number 184 VRM. On September 12, 1997, Ms. Alton then telephoned and spoke to Fran of the Co-Operators, who indicated that the Co-Operators' Policy was not in effect for the period January 24, 1996, to June, 1996. (See paragraph 12 of the Agreed Statement of Facts).

Ms. Alton wrote to the Co-Operators by letter dated October 15, 1997, advising of her understanding that Mr. Sabaratnam was holding a policy of insurance with the Co-Operators. Ms. Alton requested documentation with respect to the Co-Operators' Policy to determine whether or not the Co-Operators was the primary insurer at the time of the motor vehicle accident. (See paragraph 13 of the Agreed Statement of Facts). In the letter from Pauline Alton to the Co-Operators dated October 15, 1997, Ms. Alton requested

complete disclosure of the Co-Operators' Policy including a copy of the agent's file and all notes to determine whether or not the Co-Operators was the primary insurer at the time of the accident. (See paragraph 13 of the Agreed Statement of Facts).

Pauline Alton wrote to the Co-Operators on November 25, 1997, requesting a response to her letter dated October 15, 1997. (See paragraph 14 of the Agreed Statement of Facts). In her letter dated November 25, 1997, to the Co-Operators, Ms. Alton enclosed a copy of the Auto Plus Underwriting Inquiry dated November 24, 1997, which indicates that the Co-Operators was the insurer of Mr. Sabaratnam from May 1994, to July, 1997. A copy of the Auto Plus Underwriting Inquiry dated November 24, 1997, was filed as Exhibit I to the Arbitration. This document indicates that the Co-Operators may have been Mr. Sabaratnam's automobile insurer from May, 1994, to July, 1997.

Kathryn Anderson of the Co-Operators wrote to Ms. Alton by letter dated December 11, 1997, advising that it was the Co-Operators' understanding that the policy had lapsed on January 24, 1996, and remained in lapsed status until it was reinstated on June 7, 1996. (See paragraph 16 of the Agreed Statement of Facts). In that letter, Ms. Anderson enclosed copies of the computer screens relating to the Co-Operators' Policy.

On February 5, 1998, a Notice to Applicant of Dispute Between Insurers dated February 5, 1998, with respect to the payment of statutory accident benefits to Mr. Sabaratnam and Mrs. Sivarajan was sent by Axa Insurance's counsel to the Co-Operators and to counsel for Mr. Sabaratnam and Mrs. Sivarajan. (See paragraph 17 of the Agreed Statement of Facts). Axa Insurance has been paying statutory accident benefits to Mr. Sabaratnam and Ms. Sivarajan pending determination of this priority dispute. (See paragraph 18 of the Agreed Statement of Facts).

In addition to the facts contained in the Agreed Statement of Facts, counsel agreed that I may accept as a fact that there were two different Auto Plus database searches, the first being the one referred to in paragraph 4 of the Agreed Statement of Facts and the second one being the one referred to at Tab 6 of the Agreed Statement of Facts and filed as Exhibit I to the Arbitration.

Counsel also filed as Exhibit "2" to the Arbitration the Reports from Mitchell and Associates dated April 12, 1996, and May 31, 1996, respectively, which Reports are referred to at paragraph 7 of the Agreed Statement of Facts. Exhibits 1 and 2 were filed as Exhibits on the basis that they are not subject to the

agreement set out in paragraph 5 of my letter to counsel dated September 3, 1999, that is, that they are not necessarily admissible at the Hearing scheduled to take place on October 11 and 12, 2000. Also, it should be noted that the original Auto Plus database search referred to in Exhibit "2" was not available to be produced as an Exhibit.

#### IV. SUBMISSIONS OF COUNSEL FOR AXA

Counsel for Axa concedes that Axa did not give written notice within ninety (90) days of receipt of a completed application for accident benefits in accordance with Section 3(1) of Regulation 283\95. However, counsel for Axa Insurance states that the facts of this case fit within the exception contained in Section 3 (2) of the Regulation.

With respect to Section 3(2)(a), counsel for Axa Insurance submits that ninety (90) days was not a sufficient period of time to make a determination that the Co-Operators was an insurer of Mr. Sabaratnam at the time of the accident and therefore liable under Section 268 of the Act because:

- (a) They relied upon the representations made to their agents by the Co-Operators' agents that the policy was not in force on the date of loss;
- (b) Co-Operators' denial of a valid policy should extend the time before the ninety (90) day period begins to run; and
- (c) It was not until the fall of 1997 that Axa Insurance received the Auto Plus Underwriting Inquiry dated November 24, 1997, which disclosed that coverage was in force on the Co-Operators' Policy on the date of the loss.

With respect to Section 3(2)(b), counsel for Axa submits that Axa made reasonable investigations within the ninety (90) day period by promptly retaining an investigator, having investigator conduct the necessary searches, including the Auto Plus database search and identifying Co-Operators as a possible insurer of Mr. Sabaratnam.

Counsel for Axa asks me to distinguish the case of *Unifund v. Simcoe & Erie* on the basis that the representations upon which Axa relied in the present case were the representations of the Co-Operators

that the policy had lapsed.

Counsel for Axa also submits that I should reply upon Section 31 of *the Arbitration Act* in interpreting Section 3 of Ontario Regulation 283\95.

#### **V. SUBMISSIONS BY COUNSEL FOR THE CO-OPERATORS**

Counsel for the Co-Operators submits that Axa has the burden of proof to satisfy that it meets the two-fold test in Section 3(2) of the *Priorities Regulation*. Counsel for the Co-Operators submits that Axa has not satisfied either of the tests set out in Section 3(2) of this Regulation.

Counsel for the Co-Operators submits that the *Priorities Regulation* is designed to assist the insured by making sure that the insured is not put in the middle of a dispute between two insurers. The submission of a completed Application for Statutory Accident Benefits triggers the duty to pay accident benefits. If an insurer claims that it is not the insurer that should be paying accident benefits, the insurer must promptly deal with the priority dispute between the two (or more) insurers. Counsel for the Co-Operators submits that the ninety day period began to run on April 23, 1996.

Counsel for the Co-Operators states that on June 11, 1996, when Axa Insurance received the Reports from Mitchell and Associates dated April 12 and May 31, 1996, it should have put the Co-Operators on notice at that time. The essence of the submissions of counsel for the Co-Operators is that an insurer that receives a completed Application for Accident Benefits need not determine with certainty that there is another automobile policy that has priority before putting this other insurer on notice. Rather, the insurer that receives a completed Application for Accident Benefits need only determine if another insurer may be liable before putting that other insurer on notice.

With respect to paragraph 3(2)(b) of the *Priorities Regulation*, counsel for the Co-Operators submits that the investigation conducted by Axa within the 90 day period was not responsible because it never requested the underwriting file from the Co-Operators notwithstanding it knew that the insured's policy with the Co-Operators lapsed about 28 days before the accident.

#### **VI. RESULT**

- (1) Axa Insurance did not give notice of a dispute to the Co-Operators within the time

requirement set out in Regulation 283\95 made under the *Insurance Act*.

- (2) Axa Insurance has not complied with Section 3(2) of Regulation 283\95 made under the *Insurance Act*. Accordingly, Axa Insurance is precluded from proceeding with this Arbitration.
- (3) In accordance with the agreement of the Parties, the Co-Operators shall be entitled to recover from Axa its party and party costs. If the Parties cannot agree within thirty days of the date of this Award as to the amount of costs to be paid, I may be spoken to in order to fix those costs. In addition, Axa shall be responsible to pay the costs of the Arbitrator.

## VII. HEARING

This matter was heard at the City of Toronto in the Province of Ontario on February 1, 2000. As noted above, the Hearing proceeding on an Agreed Statement of Facts. Following the Hearing on February 1, 2000, I received from counsel copies of two additional Decisions with Written Submissions of the Applicant and Respondent with respect to these two additional Decisions.

## VIII. PRESENT AT THE HEARING

- (1) David F. Murray, for the Applicant, Axa Insurance.
- (2) Philippa G. Samworth, for the Respondent, the Co-Operators.

## IX. ANALYSIS

### 1. The legislative and regulatory scheme

Section 268(1) of the *Insurance Act* provides that every motor vehicle liability policy shall be deemed to provide for the statutory accident benefits contained in the Schedule. Sections 268(2), (4), (5), (5.1) and (5.2) set out rules that apply for determining which insurer is liable to pay statutory accident benefits.

Ontario Regulation 283\95 made under the *Insurance Act* provides in part as follows:

- “1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation.
2. The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.
- 3 (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed

application for benefits to every insurer who it claims is required to pay under that section.

- (2) An insurer may give notice after the 90-day period if,
  - (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
  - (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.
- (3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7".

Section 7(1) of Ontario Regulation 283\95 provides as follows:

7.(1) "If the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991*."

The Financial Services Commission of Ontario Bulletin No. A-5\95 dated May 29, 1995, was referred to by counsel for the Co-Operators. This Bulletin provides, in part as follows:

"Section 268 of the *Insurance Act* sets out a priority ranking for determining which insurer is liable to pay for accident benefits in situations where more than one insurer may be liable to pay for benefits." (emphasis added)

This Bulletin also attaches to it an approved form entitled "Notice to Applicant of Dispute Between Insurers".

The Bulletin states that Ontario Regulation 283\95 provides protection to injured accident victims who may be entitled to benefits and are caught in the middle of disputes between insurers. Insurers that first receive an Application for Accident Benefits will be required to pay benefits pending the resolution of these disputes. The Bulletin goes on to state that Regulation 283\95 outlines a private arbitration process to resolve these inter-company disputes.

The approved form entitled "Notice to Applicant of Dispute Between Insurers" is dated February 5, 1998, and was prepared by counsel for Axa Insurance. The first paragraph of this approved form states, in part, as follows:

"This notice is to inform you that the insurer to whom you have applied for accident benefits claims that another insurer is responsible for paying these benefits. You may be required to assist the insurers in resolving their dispute by providing them with any information that may be needed to determine which insurer should be paying your accident benefits claim."

### 3. The Case Law

I was referred to the case of *State Farm Mutual Automobile Insurance Company v. Abdillahi Jama Mohamed* (Appeal P99-00022), an Appeal Decision of David R. Draper dated December 1, 1999. Although the case is not directly on point, the Reasons for Decision contain some helpful observations with which I agree.

Page 2 of the Reasons for Decision state, in part, the following:

"Accident benefits were introduced for a number of reasons, but one was to address perceived weaknesses in the traditional tort system. In tort, injured persons were often left without compensation for long periods while questions of liability were resolved. By relying more heavily on compensation through statutory accident benefits, the legislation emphasized the prompt payment of benefits to meet the injured person's immediate needs, regardless of fault.

"The legislation also makes accident benefits available whether or not the injured person has automobile insurance. ... This is done through the priority rules in s.268 of the *Insurance Act* ("the *Act*"), clarified by the definition of "insured person" in s. 1 of the *SABS-1994*, O.Reg. 776\93, as amended, the *Statutory Accident Benefits Schedule - Accidents after December 31, 1993, and before November 1, 1996* and the specific rules about company automobiles and rental automobiles in s.91 of the *SABS-1994*.

...

However, this system did not solve the problem of delayed payments. If the insurers disagreed about which one had priority, the insured person could be left waiting for benefits until that dispute was resolved. The *Priorities Regulation* was meant to address this problem. The *Priorities Regulation* was made under the authority of s. 121(1)10.4, allowing the Lieutenant Governor in Council to make regulations "governing the procedure for determining who is liable to pay statutory accident benefits under section 268, including requiring insurers to resolve disputes about liability through an arbitration process established by the regulations and requiring interim payment of benefits pending the determination of liability." As the then Commissioner of Insurance explained, the "new Regulation provides protection to injured accident victims who may be entitled to benefits and are caught in the middle of these disputes." Bulletin No. A-5\95, "Priority of Payments," dated May 29, 1995.

...

Payment pending the resolution of any priorities dispute was addressed by making "the first insurer that receives a completed application for benefits" responsible for paying....

If that insurer believes it is not the priority insurer under s.268 of the *Act*, it must give notice of its objection to every other insurer it claims is required to pay benefits and to the insured person. The *Priorities Regulation*, s.3(1) and s.4. This notice must be given within 90 days of receiving the application for benefits, or longer if 90 days was not sufficient time to determine that another insurer be responsible. The *Priorities Regulation*, s.3. The insured person is given a chance to object to the transfer of the claim to another insurer. The *Priorities Regulation*, s.5. If the insured person objects, or the insurers cannot agree which company is responsible, the dispute is resolved by an arbitration under the *Arbitrations Act, 1991*, initiated within one year of the insurer's initial notice of objection, the *Priorities Regulation*, s. 7. " (emphasis added)

Later in his Reasons for Decision, Director's Delegate Draper states:

"It is ironic that legislation meant to simplify matters for insured persons has created such confusion. In my opinion, however, the following observations can be made:

- *The Priorities Regulation* creates a distinction between "the first insurer to receive a completed application for benefits" ("the first insurer") and the insurer with priority under s.268 of the *Act* ("the priority insurer").
- The first insurer must pay accident benefits under the *SABS-1994* even if it believes it is not the priority insurer.
- To contest its obligation to continue paying benefits, the first insurer must give written notice, according to the procedures established in the *Priorities Regulation*, that it is not the priority insurer. If it does not give notice, it cannot argue that another insurer is the priority insurer, subject to getting an extension under s.4 of the *Priorities Regulation*.
- The first insurer is only obliged to pay benefits if the insured person has established his or her entitlement. If it refuses any part of the claim, however, the insured person has a right under the *Act* to contest that decision through the dispute resolution system. It would defeat the purpose of the *Priorities Regulation* if that process had to wait for the outcome of the priorities dispute.
- The first insurer, or any other insurer, cannot defend a claim in the dispute resolution system by arguing that it is not the priority insurer. The *Priorities Regulation* has moved that jurisdiction to arbitrators acting under the *Arbitration Act, 1991*."

Three Arbitration Awards were brought to my attention dealing with the issue of whether an insurer has complied with the notice provision contained in Section 3 of Ontario Regulation 283/95. The three cases are: *Canadian General Insurance Company v. Axa Insurance Company*, a Decision of the Honourable P.T. Galligan, Q.C. dated December 19, 1996, *Unifund Insurance Company v. Simcoe & Erie General Insurance Company*, a Decision of Arbitrator Bruce Robinson dated May 1, 1997, and *Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company*, a Decision of Arbitrator Stephen M. Malach, Q.C. dated August 5, 1999.

*In Canadian General Insurance Company v. Axa Insurance*, Sandra Santos was injured in a motor vehicle accident that occurred on December 14, 1993, when she was seventeen years of age. She was an occupant in her boyfriend's motor vehicle when it was involved in an accident resulting in very serious injuries to her. Axa insured the boyfriend's vehicle. Canadian General insured a motor vehicle owned by Sandra Santos' father. A completed Application for Statutory Accident Benefits was received by Canadian General on or about December 17, 1993. If Sandra Santos was a "dependent" of her father at the time of the accident, she would be an insured person within the meaning of Section 268 of the *Insurance Act* and Canadian General would be liable to pay her benefits. If she was not "a dependent" of her father, Axa would be liable to pay accident benefits to her because it was the insurer of the automobile in which she was an occupant at the time of the accident.

Canadian General did not give notice to Axa within 90 days of December 17, 1993. It argued that it should be relieved from the 90 day prohibition because of the provisions of Section 3(2) of Ontario Regulation 283/95.

In his Arbitration Award, the Honourable P.T. Galligan concluded that Axa must succeed on the preliminary point of law. He held that Canadian General was prohibited by Section 3 of the *Priorities Regulation* from disputing its obligation to pay accident benefits to Ms. Santos.

At page 4 of his Award, Arbitrator Galligan states:

"My interpretation of Section 3 of the Regulation is made in the light of the fact that accident benefits can often amount to very substantial claims and that insurers, required to pay those benefits, are entitled to have an early opportunity to investigate the claim and to manage the performance of the insurers' obligations to the injured person. It seems to me that when the regulatory authority chose a 90 day period for notice it did so in recognition of the importance of the right of the insurer, who will ultimately be responsible for payment, to have control of the claim from a very early stage.

As I read section 3, in order for an insurer to escape the rigours of subsection (1), it must comply with the provisions of subsection (2). The plain words of subsection (2) lead me to the view that the insurer must establish both of two things:

1. that 90 days was not a sufficient time to make a determination that another insurer was liable and,
2. that it made reasonable investigations within the 90 day period to determine if another insurer was liable." (emphasis in original)

*In Unifund Insurance Company v. Simcoe & Erie General Insurance Company*, Mr. Henry Shedletzky was involved in a motor vehicle accident on July 15, 1995. At that time, he was operating a taxi cab owned by a numbered company, which vehicle was insured by Simcoe & Erie General Insurance Company. Mr. Shedletzky was a deemed named insured under that policy. He was also a named insured under a personal automobile policy which he held with Unifund Insurance Company. Mr. Shedletzky applied to Unifund Insurance Company for accident benefits on August 8, 1995. On July 23, 1996, Unifund's solicitors provided Simcoe & Erie General Insurance Company with a formal written notice of a dispute with regard to the priority of payment between the two insurers.

Arbitrator Robinson concluded that Unifund did not give proper notice to Simcoe & Erie General Insurance Company pursuant to Section 3 of the *Priorities Regulation* and therefore Unifund is required to pay statutory accident benefits to Mr. Shedletzky.

In his Arbitration Award, Arbitrator Robinson states:

"The onus under section 3(2) of Ontario Regulation rests with the first insurer, in this case Unifund Assurance Company, who received an application for accident benefits to establish that (a) the time period of ninety days is not a sufficient period of time to make a determination that another insurer is liable, and (b) that the first insurer has made reasonable investigations necessary to determine if another insurer. (sic) The facts in each case will always determine this issue. I find that the evidence put forward by Unifund Assurance Company in this case does not meet the onus in either situation.

I have found that all the relevant information was available in July, 1995, had reasonable steps been taken by Unifund Assurance Company to do a full investigation. In order shift the loss exposure to another insurer, the first insurer must proceed with due diligence and dispatch. It is not sufficient nor reasonable to conduct a very circumspect investigation in the first instance and at a much later stage complete the investigation and then seek relief under section 3(2). The legislation has a clear purpose. It enables injured persons to seek their accident benefits from an insurer without being caught up in any dispute between insurers as to which insurer must pay those benefits. It similarly sets out a specific course of action for insurers to sort out their priority disputes in a timely manner."

With respect to Unifund's argument that equitable relief should be granted under, Section 31 of the *Arbitration Act*, this section provides as follows:

S. 31 "An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies."

Arbitrator Robinson states at page 9 of his Award:

"Unifund Assurance Company further submits that the Arbitration Act would supercede the provisions of the Insurance Act, and the Ontario Regulations. I do not accept that proposal. I find that section 31 of the Arbitration Act does not apply to this case. The issue of equitable relief does not supercede section 3(2) and the onus set up in that Regulation."

*In Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company*, Suleyman Adiyaman was injured in a motor vehicle accident which occurred on October 19, 1996. Mr. Adiyaman applied for statutory accident benefits by way of an Application for Accident Benefits received by Guardian Insurance Company on November 28, 1996. Guardian insured P & S Auto Collision. In order for the Guardian policy to cover a loss, a vehicle involved in an accident would have to be owned by P & S Auto Collision with the dealer plate attached at the time of the accident. An independent adjuster retained by Guardian learned on November 4, 1996, that Mr. Adiyaman's wife's car was insured by Wawanesa. The adjuster also knew or should have known as at November 22, 1996, that Guardian did not insure the vehicle operated by Mr. Adiyaman at the time of the motor vehicle accident. In a Report from the adjuster to Guardian dated January 30, 1997, the adjuster reported that the vehicle involved in the accident was not registered in the name of P & S Auto Collision. The adjuster also reported that Mr. Adiyaman had several of his own vehicles insured through Wawanesa under a specific policy number. The adjuster advised Guardian that the vehicle involved in the accident was not insured by Guardian. The Arbitrator found that Guardian was

mislead by Mr. Adiyaman.

The Arbitrator reviewed the Decisions in *Canadian General Insurance Company v. Axa Insurance Company* and in *Unifund Assurance Company v. Simcoe & Erie General Insurance Company*. Arbitrator Malach distinguished those two cases on the basis that in those two cases, both of the insurers that received the initial Application for Statutory Accident Benefits were potential payors. In both cases, there were two insurers that potentially could have been called upon to provide accident benefits coverage to the person insured in the motor vehicle accident. In the case before Arbitrator Malach, no person who qualified as an insured person was entitled to benefits under the SABS from Guardian as a result of the subject accident.

At page 13 of his Decision, Arbitrator Malach states:

"What makes this case different than the other two cases referred to, is the fact that Adiyaman did not qualify as an insured person under the Guardian policy unless he was the regular user of a vehicle owned by P & S Auto Collision. He did not qualify as an insured person under the Guardian policy since the vehicle involved was not owned by P & S Auto Collision. Those facts make this case different than the other two cases.

I am being asked by Wawanesa to make a literal and strict interpretation of s. 3(2) in a case in which Guardian should never have been called upon to pay benefits at all.

The true fact is that Wawanesa, in equity, should be the insurer that ultimately pays the benefits."

Although Arbitrator Malach was critical of the course of action taken by Guardian, he extended the time for providing notice beyond the 90 days time frame under section 3(2) of Ontario Regulation 283/95. At page 14 of his Decision, Arbitrator Malach states as follows:

"If I did not extend the time for notice by invoking s. 3(2), that would mean that an insurer that ultimately had absolutely no responsibility to pay benefits would wind up paying the benefits nonetheless. That result would not be an equitable one. Nonetheless, by reasons of the provisions of s. 3(2), 1 have not had to apply provisions of s. 31 of the *Arbitration Act, 1991* which allows me to decide a dispute in accordance with the law, including equity."

In my opinion, the facts in the present case are distinguishable from the facts in *Guardian Insurance Company of Canada v Wawanesa Insurance Company*. In the present case, there is no doubt that the insureds were properly insured under the Axa Insurance policy at the time of the accident. Axa takes the position that the insureds may also have been insured under a valid policy of insurance issued by the Co-Operators which was in force at the time of the accident, in which case, the Co-Operators' policy should respond under Section 268 of the *Insurance Act*. From my reading of Arbitrator Malach's Decision, if he had found that Guardian insured Mr. Adiyaman at the time of the accident, it is unlikely that he would have extended the time for giving notice under Section 3(2) of the *Priorities Regulation*.

**X. APPLICATION OF THE LEGISLATION, *PRIORITIES REGULATION* AND CASELAW TO THE PRESENT FACTS**

Axa Insurance received the insured's completed Application for Accident Benefits on April 23, 1996. The 90 day period started to run at that point in time. Based upon the legislation, *Priorities Regulation* and caselaw, I am of the opinion that Axa has satisfied the onus on it under Section 3(2)(b) of the *Priorities Regulation*. It conducted reasonable investigations necessary to determine if another insurer was liable within the 90 day period. Evidence of the reasonable investigations conducted by or on behalf of Axa Insurance is contained in paragraphs 6 and 7 of the Agreed Statement of Facts.

However, despite the persuasive argument of Mr. Murray, Axa did not satisfy the onus on it under Section 3(2)(a) of the *Priorities Regulation*. In my opinion, ninety days was a sufficient period of time to make a determination that another insurer is liable under Section 268 of the *Act*.

In coming to this conclusion, I note that the *Priorities Regulation* makes it clear in Section 1 that all disputes as to which insurer is required to pay benefits under Section 268 of the *Act* shall be settled in accordance with the Regulation. Section 7(1) of the *Priorities Regulation* provides that if the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an Arbitration under the *Arbitration Act, 1991*. Accordingly, in the absence of an agreement between Axa Insurance and the Co-Operators that the Co-Operators is liable to pay benefits under Section 268 of the *Act*, the dispute must be resolved through an Arbitration.

The use of the word "is" in Section 3(2)(a) of the *Priorities Regulation* must be interpreted in a manner consistent with Section 7(1) of the *Priorities Regulation*. In the absence of an agreement between insurers as to who is required to pay benefits, the determination that another insurer is liable under Section 268 of the *Act* can only be made by an Arbitrator following an Arbitration held pursuant to Section 7(1).

Accordingly, an insurer that receives a completed Application for Accident Benefits need not determine with certainty that there is another insurer with a policy that has priority before putting this other insurer on notice. Rather, the insurer that receives a completed Application for Accident Benefits need only determine if another insurer may be liable before putting that other insurer on notice.

My conclusion is buttressed by the wording of Section 3(1) of the *Priorities Regulation* which provides that "no insurer may dispute its obligation to pay benefits under Section 268 of the Act unless it gives written notice within ninety days of receipt of a completed Application to every insurer who it claims is required to

pay under that Section." My interpretation of the word "is" in Section 3(2)(a) is consistent with the wording in Section 3(1) of the *Priorities Regulation*.

In the present case, Mr. and Mrs. Sabaratnam were insured while driving the rental vehicle insured by Axa Insurance. By virtue of the fact that the insureds were in a rental vehicle when injured in the accident, Axa Insurance should have recognized that there could be another insurer that might be liable for the insureds' statutory accident benefits. It knew or should of known that there was the potential for a priority dispute between insurers if it could identify the other insurer.

Based upon the facts, by virtue of the investigation conducted on its behalf by Mitchell and Associates, Axa Insurance knew as early as April 12, 1996, and once again on May 31, 1996, (the dates of the two Reports from Mitchell and Associates filed as Exhibit 2) that the insureds might have been insured with the Co-Operators at the time of the accident and accordingly that the Co-Operators might be the priority insurer. Axa knew for certain that the insureds were insured with the Co-Operators within one month before the accident.

In my opinion, notice by Axa Insurance to the Co-Operators should have been made immediately after it received the Reports from Mitchell and Associates dated April 12 and May 31, 1996. Thereafter, in the absence of an agreement by the Co-Operators that it insured Mr. and Mrs. Sabaratnam at the time of the accident, and in the fact of the information received from representatives of the Co-Operators that the Co-Operators' policy had lapsed, the only way for Axa Insurance to resolve the issue would be to proceed to an Arbitration. The Arbitrator would then decide which insurer is liable to pay benefits under Section 268 of the *Insurance Act*. Axa Insurance did not have to initiate the Arbitration until one year from the time that it gave notice under Section 3 of the *Priorities Regulation*. Ninety (90) days was a sufficient period of time to make a determination that the Co-Operators might be liable under Section 268 of the *Insurance Act*. By not giving notice within ninety (90) days of receipt of a completed Application for Accident Benefits, Axa Insurance is precluded from disputing its obligation to pay benefits.

With respect to Section 31 of the *Arbitration Act*, I am of the opinion that Section 31 of *the Arbitration Act* does not assist Axa Insurance in this case. My decision is being made in accordance with the law and my interpretation of Section 3(2) of *the Priorities Regulation* does not lead to an inequitable result.

**XI. ORDER**

- (1) Axa Insurance did not give notice of a dispute to the Co-Operators within the time requirement set out in Regulation 283\95 made under the *Insurance Act*.
- (2) Axa Insurance has not complied with Section 3(2) of Regulation 283\95 made under the *Insurance Act*. Accordingly, Axa Insurance is precluded from proceeding with this Arbitration.
- (3) In accordance with the agreement of the Parties, the Co-Operators shall be entitled to recover from Axa its party and party costs. If the Parties cannot agree within thirty days of the date of this Award as to the amount of costs to be paid, I may be spoken to in order to fix those costs. In addition, Axa shall be responsible to pay the costs of the Arbitrator.

May 1, 2000

J. J. Rudolph

J. Jay Rudolph, Arbitrator

**EXHIBIT "A"**

**IN THE MATTER OF AN APPLICATION  
FOR ACCIDENT BENEFITS OF  
SIVARAJAN SABARATNAM AND ANUSOOYA SIVARAJAN**

**BETWEEN:**

**AXA INSURANCE COMPANY**

**Applicant**

**and**

**CO-OPERATORS INSURANCE COMPANY**

**Respondent**

**AGREED STATEMENT OF FACTS**

1. Sivarajan Sabaratnam and his spouse, Anusooya Sivarajan were involved in a motor vehicle accident which occurred on February 20, 1996 (the "motor vehicle accident") (See Tab 1: Motor Vehicle Accident Report).
2. At the time of the motor vehicle accident, Sivarajan Sabaratnam and Anusooya Sivarajan were occupants in a Dodge Caravan motor vehicle owned by Tilden Car Rental Inc. and insured under a policy of automobile insurance with Axa Insurance Company ("Axa") under policy number TRC ONT 6103032 which was in full force and effect. (See Tab 2: Certificate of Automobile Insurance of Axa and endorsements).
3. Co-operators General Insurance Company ("Co-operators") first issued a policy of automobile insurance to Mr. Sabaratnam under policy number 3452085 on May 18, 1994 ("the Co-operators' policy"). The Co-operators' policy was

continuously in force from July 24, 1995 to January 24, 1996. There is a dispute between the applicant and the respondent as to whether or not the Co-operators' policy was in force on February 20, 1996.

4. On or about April 9, 1996, Lindsey Morden on behalf of Axa requested Mitchell and Associates to conduct investigations to determine if there was any other insurer and policy covering Mr. Sabaratnam and Mrs. Sivarajan. In furtherance thereof, Mitchell and Associates searched the Autoplus database with respect to Mr. Sabaratnam, which identified his previous insurance carrier as Co-operators under policy number 3452085. The investigator from Mitchell and Associates then telephoned a customer representative at Co-operators who indicated that the Co-operators' policy lapsed as of January 24, 1996.
5. Mr. Sabaratnam and Mrs. Sivarajan submitted their completed applications for accident benefits, dated April 15, 1996, to Axa with respect to the motor vehicle accidents. These applications were received by Axa on April 23, 1996,
6. On May 1, 1996, Sarina Amatuzio of Axa Insurance spoke with Cathy Burgess of Marsh, McLellan Insurance Brokers. At that time Ms. Burgess advised Ms. Amatuzio of the information that Mitchell & Associates had previously obtained. On that same day, Ms. Amatuzio spoke directly with Mitchell and Associates. At that time they indicated that they were making further inquiries with respect to the insurance issue.
7. On June 11, 1996, Ms. Amatuzio received and reviewed reports from Mitchell and Associates, dated April 12, 1996 and May 31, 1996, which contained the information set out in paragraph 4 of this Agreed Statement of Facts above.
8. On or about September 23, 1996, Ms. Amatuzio of Axa requested that Signum Corporate Services do a search to see whether Mr. Sabaratnam's sister owned a vehicle as he may have been financially dependent on her.
9. Jim Thompson of Axa took over handling of the accident benefits files relating to Mr. Sabaratnam and Mrs. Sivarajan on or about September 24, 1996. (See Tab 3: Axa's Contact Sheets, dated

September 23 and 24, 1996).

10. Signum Corporate Services provided Axa with a report dated December 20, 1996, which indicated that no information relating to the sister could be located.
11. On January 7, 1997, Mr. Thompson spoke to Sandra of Co-operators, who advised that Mr. Sabaratnam currently had three vehicles insured with Cooperators. (See Tab 4: Axa's Contact Sheet, dated January 7, 1997).
12. Pauline Alton of Axa took over handling of the accident benefits files relating to Mr. Sabaratnam and Mrs. Sivarajan on or about September 11, 1997. On September 12, 1997, Ms. Alton spoke to Mr. Sabaratnam's case manager, Rosemary Whyte, who advised that Mr. Sabaratnam was driving a Toyota vehicle with plate number 184 VRM. On September 12, 1997, Ms. Alton then telephoned and spoke to Fran of Co-operators, who indicated that the Co-operators' policy was not in effect for the period from January 24, 1996 until June, 1996.
13. Ms. Alton wrote to Co-operators by letter, dated October 15, 1997, advising of her understanding that Mr. Sabaratnam was holding a policy of insurance with Co-operators. Ms. Alton requested documentation with respect to the Cooperators' policy to determine whether or not Co-operators was the primary insurer at the time of the motor vehicle accident. (See Tab 5: Letter from Pauline Alton to Co-operators, dated October 15, 1997).
14. Pauline Alton wrote to Co-operators on November 25, 1997, requesting a response to her letter of October 15, 1997. (See Tab 6: Letter from Pauline Alton to Co-operators, dated November 25, 1997, without enclosures).
15. Kathryn Anderson of Co-operators wrote to Ms. Alton by letter, dated December 8, 1997, confirming their telephone conversation of December 3, 1997, wherein Ms. Anderson advised that the Co-operators' policy was not in force at the time of the motor vehicle accident. Ms. Anderson also indicated that Co-operators would not accept the claim as it was well beyond the 90 day time limit for a priority dispute. (See Tab 7: Letter from Ms. Anderson to Ms. Alton, dated December 8, 1997),

16. Ms. Anderson of Co-operators wrote to Ms. Alton by letter, dated December 11, 1997, advising that it was Co-operators' understanding that the policy had lapsed on January 24, 1996, and remained in lapsed status until it was reinstated on June 7, 1996. (See Tab 8: Letter from Ms. Anderson to Ms. Alton, dated December 11, 1997, without enclosures).
17. On February 5, 1998, a Notice to Applicant of Dispute Between Insurers, dated February 5, 1998, with respect to the payment of statutory accident benefits to Mr. Sabaratnam and Mrs. Sivarajan was sent by Axa's counsel to Co-operators and to counsel for Mr. Sabaratnam and Mrs. Sivarajan. (See Tab 9: Notice to Applicant of Dispute Between Insurers, dated February 5, 1998 and covering letters from Enfield, Adair, Wood & McEwen to Co-operators and Mr. Bogoroch, dated February 5, 1998).
18. Axa has been paying statutory accident benefits to Mr. Sabaratnam and Mrs. Sivarajan pending determination of this dispute.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

28-1-2000  
Date

David F. Murray  
David F. Murray  
Enfield, Adair, Wood, Lichty  
& McEwen  
Solicitors for the Applicant Axa

Jan. 31, 2000  
Date

S. Dagen for P. Samworth  
Philippa G. Samworth  
Fireman, Regan, Samworth  
Solicitors for the Respondent  
Co-operators