COURT OF APPEAL FOR ONTARIO

CITATION: The Dominion of Canada General Insurance Company v. Unifund Assurance Company, 2018 ONCA 303
DATE: 20180327
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Strathy C.J.O., van Rensburg and Trotter JJ.A.

BETWEEN

The Dominion of Canada General Insurance Company

Applicant (Respondent)

and

Unifund Assurance Company

Respondent (Appellant)

D'Arcy McGoey, for the appellant

Eric K. Grossman, for the respondent

Heard: September 5, 2017

On appeal from the order of Justice Mario D. Faieta of the Superior Court of Justice, dated June 30, 2016, with reasons reported at 2016 ONSC 4337, 132 O.R. (3d) 588, allowing an appeal from the preliminary decision of Arbitrator Shari L. Novick, dated October 20, 2015.

van Rensburg J.A.:

A. OVERVIEW

[1] This appeal arises in the context of a dispute between insurers with respect to the payment of statutory accident benefits ("SABS"), and the determination by the arbitrator of a preliminary issue. In this case, the SABS claimant was not

notified of the priority dispute between the insurers until after arbitration proceedings had been commenced. The issue is whether the late notice to the claimant precluded the appellant from contesting its liability to pay SABS and from proceeding with the arbitration.

[2] The arbitrator determined the issue in favour of the appellant. This decision was reversed on appeal to the Superior Court of Justice. The appeal judge applied a correctness standard of review and substituted his own interpretation of the applicable regulation for that of the arbitrator.

[3] For the reasons that follow, I would allow the appeal and restore the decision of the arbitrator. As I will explain, the appeal judge ought to have applied a reasonableness standard of review to the arbitrator's decision. Typically, the decisions of SABS arbitrators respecting priority disputes are subject to review for reasonableness on appeal, even where the principal issue, as here, is a question of law. The arbitrator was a specialized decision-maker engaged in interpreting her home statute and regulation in the context of the determination of a preliminary issue in a priority dispute under the SABS regime. The arbitrator's interpretation of the requirements of the regulation was reasonable, as was her determination that the appellant's notice to the claimant only after the arbitration proceedings were underway did not bar the appellant from pursuing its priority dispute with the respondent.

B. FACTS

[4] The parties proceeded with the preliminary issue on the basis of an Agreed Statement of Fact.

[5] Jing Hua Fan, the SABS claimant, owns an automobile repair shop. On November 1, 2011 he was injured in an accident that occurred while he was test driving a customer's vehicle.

[6] The Dominion of Canada General Insurance Company ("Dominion") insured the repair shop under a garage policy of insurance. Mr. Fan was also a named insured under a motor vehicle liability policy issued by Unifund Assurance Company ("Unifund"), covering his personal vehicle.

[7] On January 4, 2012 Dominion received Mr. Fan's application for SABS and began paying him benefits. On January 24, 2012 Dominion delivered a notice to Unifund, asserting that Unifund was in higher priority to pay Mr. Fan's claim under s. 268(2) of the *Insurance Act,* R.S.O. 1990, c. I.8 (the "Act"). The notice was in the form of a Notice to Applicant of Dispute Between Insurers ("DBI Notice"). At the time, Dominion did not send a copy of the DBI Notice to the claimant or otherwise notify him of the priority dispute between the insurers.

[8] Dominion served Unifund with a Notice of Commencement of Arbitration on November 5, 2012, initiating arbitration proceedings to determine the insurer responsible for paying the claimant's SABS.

[9] After two pre-hearing conference calls with the arbitrator, Dominion notified Mr. Fan of the dispute between the insurers by letter dated June 23, 2014 that enclosed the DBI Notice. The notice informed Mr. Fan of his right to object to the transfer of his claim and, if he objected, of his right to participate in any proceeding that might take place to determine which insurer was responsible to pay SABS. Mr. Fan did not respond to the notice. He attended an examination under oath in July 2014. He continued to receive benefits from Dominion. He did not resolve his SABS claim with Dominion, and the claim remained open during these proceedings.

[10] At the commencement of the arbitration hearing, Unifund made a preliminary objection to the jurisdiction of the arbitrator. The objection was based on Dominion's failure to notify the claimant of the dispute between the insurers within 90 days of its receipt of the application for SABS. Unifund argued that such notice was a statutory precondition to Dominion's claim that Unifund pay the claimant's SABS.

C. REGULATORY PROVISIONS

[11] The determination of the payor of SABS in priority disputes is resolved in accordance with the rules set out in s. 268(2) of the Act. Section 275(4) of the Act requires insurers to refer any unresolved priority dispute to arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17.

[12] *Disputes Between Insurers*, O. Reg. 283/95, governs the procedures to be followed by insurers in a SABS priority dispute. The relevant sections of the regulation are as follows:

> 2.1(6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits.
>
> ...
>
> 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.
>
> ...
>
> 4.(1) An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Superintendent. [the approved form is in the form of the DBI Notice].
>
> ...
>
> 5.(1) An insured person who receives a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice.

(2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice.

(3) Subject to subsection 7(5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the *Arbitration Act, 1991*.

6. (1) The insured person shall provide the insurers with all relevant information needed to determine who is required to pay benefits under section 268 of the Act.

(2) Upon request by the first insurer that receives a completed application for benefits, the insured person shall submit to one examination under oath for the purpose of determining who is required to pay benefits under section 268 of the Act.

...

(4) The scope of the examination under oath is limited to matters that are relevant to determining who is required to pay benefits under section 268 of the Act.

...

7. (1) 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.

(2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and 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* initiated by the insured person.

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

D. THE ARBITRATOR'S DECISION

[13] The parties agreed to the arbitration of their priority dispute by Arbitrator Shari L. Novick. In her decision dated October 20, 2015 she determined Unifund's preliminary objection that Dominion was out of time to pursue the dispute. She concluded that Dominion was not precluded from pursuing its priority dispute even though it did not send the required notice to the claimant until after the arbitration proceeding had been commenced.

[14] The arbitrator accepted that s. 4 of the regulation imposes a mandatory obligation on the first insurer who receives a completed application to provide notice to the insured person of its intention to dispute its obligation to pay benefits.

[15] The arbitrator determined, however, that the requirement that the insurer "shall also" give notice to the insured person does not require such notice to be given within 90 days of receipt of the SABS application. She noted that the purpose of the section was for claimants to be notified of an ongoing priority dispute between insurers, and to be provided with the opportunity to participate in it. Nevertheless, the rights provided to claimants to participate in the process are entirely procedural. No determination of priority between insurers will affect a claimant's entitlement to accident benefits, nor would the claimant's position on the

dispute affect its determination, which depends on the provisions of s. 268(2) of the Act.

[16] More than two years after notice was provided to Unifund under s. 3 of the regulation, Dominion gave notice to Mr. Fan that it was disputing its obligation to pay benefits. This was approximately six months after the first arbitration pre-hearing teleconference was held. Mr. Fan received notice while the claim was still open, and as such he had the opportunity to participate in the process. The arbitrator acknowledged that insurers should ideally provide notice to claimants at the same time as notice is given to the other insurer. Even so, Dominion's very late notice to Mr. Fan satisfied the requirement in s. 4 of the regulation to "also" give notice of the dispute to the claimant. It provided him with the opportunity to participate in the process.

[17] The arbitrator refused to "read in" a 90 day time limit for notice to a claimant that was not spelled out explicitly in s. 4. There was a sensible rationale for the 90 day time limit set out in s. 3(1) (subject to an extension under s. 3(2)) for giving notice to the second insurer, as "various steps and investigations must be undertaken by that insurer in order to determine whether another insurer may be in priority." There was no such rationale for applying a 90 day time limit to the requirement to provide notice to a claimant under s. 4 of the regulation.

[18] The arbitrator also rejected Unifund's alternative argument that the latest point at which notice could be provided to a claimant was one year after the notice was given to the other insurer under s. 3. According to Unifund, the failure to give notice to the claimant within that period would cause the claimant to lose the right to initiate an arbitration, which under s. 7(3) of the regulation must be commenced within one year of the s. 3 notice.

[19] The arbitrator accepted that the drafters of the regulation intended to provide a right to an insured to initiate an arbitration in a priority dispute between insurers (something the arbitrator described as "extremely rare – if not unprecedented"). The right to initiate arbitration is referred to in both ss. 5(3) and 7(3) of the regulation. The arbitrator noted the inconsistency between the s. 5(3) requirement that an insured who objects to a proposed transfer of a claim initiate arbitration within 14 days, and the provision in s. 7(3) that an insured may initiate arbitration no later than one year after the day the first insurer gives its notice to the other insurer under s. 3. She observed that insurers might agree to transfer a claim years after the s. 3 notice was given. It would not make sense for a claimant to be precluded from maintaining an objection if the insurers reached an agreement more than one year after the s. 3 notice was provided. She concluded that the language in s. 7(3) would not prohibit a claimant who was otherwise validly exercising the right to object to an agreement under s. 5(3) from initiating arbitration. The arbitrator rejected Unifund's argument based on s. 7(3) that a 90

day deadline for giving notice was necessary to protect the claimant's participation rights.

E. APPEAL DECISION

[20] The arbitrator's decision was appealed to a judge of the Superior Court. Faieta J. allowed the appeal, after applying a correctness standard of review. He concluded that Dominion's failure to give notice of the priority dispute to Mr. Fan within the same time period as notice was required to be given to Unifund was fatal to Dominion's priority dispute.

[21] The appeal judge interpreted the regulation as requiring notice to be given to the insured within the same time period that was required for notice to the other insurer under s. 3. First, he interpreted the word "also" in s. 4 to require that notice be given in a like manner to the notice provided under s. 3. According to the appeal judge, "also" would be meaningless and unnecessary if it did not reference and incorporate into s. 4 the only matter addressed in the giving of notice under s. 3 that was not otherwise specifically addressed in s. 4 (namely, the 90 day time limit).

[22] Second, the appeal judge noted that the claimant's right to initiate an arbitration must occur within one year of the s. 3 notice under s. 7(3). He concluded that this right would be lost if the claimant were unaware of the dispute until after the one year time limit had passed.

[23] Finally, the appeal judge rejected the claim that the arbitrator could have granted relief from forfeiture under s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 or s. 129 of the *Insurance Act*. He held that there was nothing in either the *Insurance Act* or the regulation that provides for relief from forfeiture in respect of a failure to comply with the time limits for the delivery of notice and the initiation of arbitration under the regulation.

F. ISSUES

[24] Dominion appeals to this court with leave. The first issue is whether the appeal judge applied the correct standard of review on the appeal of the arbitrator's decision. I will explain why the applicable standard of review is reasonableness. The second issue is, then, whether the arbitrator's decision was reasonable. In my view, the decision was reasonable and ought not to have been overturned by the appeal judge. I will address each issue in turn.

G. ANALYSIS

(1) Standard of Review

[25] The standard of review on the appeal to this court of the appeal court's determination of the standard of review is correctness: *Dr. Q. v. College of Physicians and Surgeons of British* Columbia, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 43. Accordingly, no deference is owed to the appeal judge's selection of the standard of review.

[26] Nor is this court bound by the parties' own agreement as to the standard of review. The parties' arbitration agreement provided for appeals on questions of law on a correctness standard of review and appeals on questions of mixed fact and law on a reasonableness standard of review. The fact that the parties agreed in the past, or agree at the hearing of an appeal, to a standard of review to be applied by a court, is not determinative. The applicable standard of review is a question of law to be decided by the reviewing court: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 6; *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609, 131 O.R. (3d) 625, at para. 22.

[27] The point of departure in determining the proper standard of review from the arbitrator's decision is the statement of this court that the presumptive standard of review for decisions of arbitrators determining SABS priority disputes, including where a question of law is engaged, is reasonableness: *Intact*, at para. 53.

[28] The issue in *Intact* was whether the SABS claimants, a mother and her two children, were principally dependent for financial support on the mother's new partner at the time of the accident. Intact argued that the arbitrator committed an extricable legal error by importing a permanence requirement into the question of dependence.

[29] In determining the standard of review, LaForme J.A. noted that, while the issue in that case could be characterized as one of mixed fact and law and therefore subject to review for reasonableness, the same standard of reasonableness would apply assuming the issue was an "extricable" legal question. He observed that there is a presumption that the reasonableness standard applies where the decision-maker is interpreting its home statute or statutes closely connected to its function. He also observed that SABS priority disputes are adjudicated by arbitrators with relevant expertise. Finally, he noted that the regulation has put in place a distinct regime that efficiently resolves priority disputes between insurers while ensuring that beneficiaries receive their benefits promptly, and that the arbitrator in this case was a specialized decision-maker: *Intact*, at paras. 29-30, 47. LaForme J.A. stated at para. 53 of *Intact* that:

> In the unlikely scenario that the issue before the insurance arbitrator is an "exceptional" question [of law] (one of jurisdiction, a constitutional question, or a general question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise), a correctness standard of review may be applicable.

[30] Unifund contends that the proper standard of review of the arbitrator's decision on what was essentially a question of interpretation of a regulation is correctness. Unifund seeks to distinguish *Intact* on the basis that the case involved an arbitrator's decision on dependency, which was a question of mixed fact and law that depended on the factual matrix. Unifund also asserts that the decision of

the Supreme Court of Canada in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, which was released after *Intact*, supports its argument for a correctness standard of review for all questions of law.

[31] Both of these arguments were considered and rejected in this court's recent decision in *Belairdirect Insurance v. Dominion of Canada General Insurance Co. (Travelers)*, 2018 ONCA 101, 64 C.C.L.I. (5th) 74 ("*Belairdirect*"). In that case, Roberts J.A. rejected the characterization of *Intact* as a fact-driven dependency case, at para. 36. She noted, at para. 38, that "[t]he decision in *Intact* focussed on the nature of the decision-maker and, next, on the question of whether the decision in issue required the application of the specialized expertise of the decision-maker." She referred to this court's conclusion, at para. 53 of *Intact*, that "even a question of law regarding SABS will generally involve a reasonableness standard of review because it requires the application of the specialized insurance arbitrator's expertise for determination": *Belairdirect*, at para. 44.

[32] Unifund refers to the statement in *Teal Cedar Products*, at para. 47, that "a question of statutory interpretation is normally characterized as a legal question." This is not however determinative of the standard of review. In the *Belairdirect* case, at para. 37, Roberts J.A., referring to *Teal Cedar Products*, stated:

> [W]hile the nature of the question (whether legal, factual, or mixed) is dispositive of the standard of review applicable to appeals from civil litigation judgments by courts, it is not dispositive in the context of commercial

> arbitral awards by specialized arbitrators: "[T]he mere presence of a legal question does not, on its own, preclude the application of a reasonableness review in a commercial arbitration context".

[33] I agree that there is nothing in the *Teal Cedar Products* case that would overtake the reasoning in *Intact* and the presumptive standard of review of reasonableness for a decision that engages a question of law by a SABS arbitrator.

[34] Indeed, the *Belairdirect* case applied the reasonableness standard of review of *Intact* to a question that could be characterized as one of statutory interpretation by a SABS arbitrator in a priority dispute: whether a person who was listed as an "excluded driver" was an "insured person" under s. 3 of the SABS regulation. Roberts J.A. concluded that "[t]here was no reason to displace the deference owed to the arbitrator, who was applying his home statute and his specialized expertise to the policy language": *Belairdirect*, at para. 58.

[35] The two recent decisions of this court, *Intact* and *Belairdirect*, accordingly provide for a presumptive reasonableness standard of review for a question of law determined by an arbitrator within the SABS regime. This is subject to an "exceptional" question of law that may require a correctness standard. This brings us to Unifund's final argument - that the question here, which requires an interpretation of the requirements in the regulation for notice to a claimant, is a "general question of law" because the 90 day period operates as a type of limitation period that would exclude the priority dispute if it is not met.

[36] I disagree. Although there was a question of statutory interpretation at the heart of the arbitrator's decision on the preliminary issue, the question before her involved the interpretation of her "home statute" (the priority regulation) in the context of the overall SABS regime. The question also involved the specific facts of the case, including when notice was given to Mr. Fan and his failure to object to the transfer of the claim. No general question of law was engaged here.

[37] While Unifund seeks to characterize the 90 day period as a type of "limitation period" in default of which an arbitration cannot be commenced, it is a time limit that exists within a statutory scheme. Its interpretation only affects those who have rights and obligations under that scheme. This is not a general question of law that transcends the specific regime, or "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise": *Intact*, at para. 53. To the contrary, the interpretation issue engages a reading of s. 4 in the context of other sections of the regulation, and has regard to the objectives of the notice requirement in the context of the SABS regime. There is every reason to accord deference to the reasonable interpretation of the priority regulation by an arbitrator who has specialized knowledge and expertise working within that regime. It is a question of law arising specifically in the context of that scheme.

[38] Accordingly, I conclude that the standard of review of the arbitrator's decision in this case is reasonableness. The appeal judge erred in applying a

correctness standard and in substituting his own interpretation of the regulation for that of the arbitrator. He ought to have determined whether the arbitrator's decision was reasonable, that is, whether it fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47; *Belairdirect*, at para. 56.

(2) Was the Arbitrator's Decision Reasonable?

[39] The arbitrator rejected Unifund's preliminary motion to dismiss the priority dispute on the basis of late notice of the dispute to the claimant, Mr. Fan. The arbitrator concluded that, while Dominion was required to give notice of the priority dispute with Unifund to the claimant, there was no prescribed time limit for notice. The notice that was given, albeit very late, satisfied the requirement. It permitted the participation by Mr. Fan in the proceedings to the extent contemplated by the regulation.

[40] I have set out above a summary of the arbitrator's analysis. In arriving at her conclusion, the arbitrator considered the specific sections of the regulation, the context of the regulation as a whole, the interests protected by the SABS regime, as well as the specific interests of the insurers and claimant involved in the dispute.

[41] Unifund asserts that the arbitrator's interpretation of s. 4 was unreasonable because it does not give effect to the two policy objectives behind the regulation. Those objectives are the advancement of the consumer protection ends of the

SABS legislation, and to provide certainty in the determination of priority disputes between insurers.

[42] I do not agree that the arbitrator's decision ignores the policy objectives of the regulation. First, the most important right of the claimant, not to be prejudiced or delayed in the receipt of benefits by the priority dispute between insurers, is specifically protected by s. 2. That section requires the first insurer to continue paying benefits to the insured pending resolution of the priority dispute. The timing of notice to the claimant does not affect this important right.

[43] As for the insured's participation rights, they are limited to a right to object to the transfer of the claim, to be party to proceedings respecting any transfer, and to approve or object to any settlement of the dispute. The resolution of the dispute depends on s. 268(2) of the Act, and not on any objection or position taken by the claimant.

[44] The arbitrator reasonably characterized the claimant's rights as procedural. It was reasonable for the arbitrator to conclude that a 90 day time limit was not essential to protect the claimant's rights to object and participate, which could be protected in other ways. In this case for example, the claimant's rights were protected by ensuring that he received notice and had the opportunity to object before the arbitration hearing to determine the priorities dispute was underway.

[45] As for the policy objective of ensuring certainty for insurers in the dispute resolution regime, Unifund points to Sharpe J.A.'s observation in *Kingsway General Insurance Company v. West Wawanosh Insurance Company* (2002), 58 O.R. (3d) 251, at para. 10, that, "clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records."

[46] Strict compliance with the time limit for notice between insurers is mandated by the provision in s. 3 that, where notice to the other insurer(s) is not given in time, the first insurer is precluded from disputing its obligation to pay benefits. If there is a dispute about whether an extended time limit was required, that issue will be the subject of arbitration: s. 3(3). In this case, the rights of the second insurer, Unifund, in the priority dispute resolution process were protected by its having received timely notice of the SABS claim from the first insurer - giving it time to properly evaluate Mr. Fan's claim.

[47] Unifund seeks to read into s. 4 not only the time limit for notice between insurers, but also the consequence for the failure to give timely notice – the prohibition of the dispute. Section 4 contains no such time limit or consequence. Whether a claimant is given notice of a priority dispute within 90 days of submitting an application for SABS will have no impact on the rights of the second insurer. While notice to the second insurer serves the important function of permitting it to evaluate the SABS claim, notice to the insured serves no function at all in the

determination of the priority dispute or rights between the insurers. Unifund's preliminary objection based on the lateness of the s. 4 notice is not based on any prejudice to its own position in the priority dispute arising out of late notice to the claimant. Indeed, this interpretation would provide Unifund with a windfall, if, under s. 268(2), it was the proper insurer to respond to Mr. Fan's SABS claim.

[48] The overriding objective of the regulation is to provide a procedure to determine priority disputes. That objective would not be furthered, and may well be undermined, by importing a requirement that has nothing to do with the determination of the dispute or the rights of the parties.

[49] Unifund also contends that the arbitrator's decision fails to give effect to the express wording of s. 7(3), which requires an arbitration to be commenced by a claimant within one year of the s. 3 notice. Unifund's argument, which was accepted by the appeal judge, is that the claimant's participation rights would be meaningless if the claimant was unaware of the dispute until after the one year time limit on initiating arbitration of the dispute had passed.

[50] The arbitrator dealt with this submission in some detail. She noted the inconsistency between s. 5(3), which imposes a 14 day time limit to the insured for commencing an arbitration, after the agreement between insurers, and s. 7(3). Giving the claimant notice within 90 days would not solve the apparent problem of the one year delay expiring after the s. 3 notice, but before a settlement was

reached. If that were the case, the insured could be prevented from commencing an arbitration if he or she objected to the settlement. The arbitrator reasonably concluded that the language of s. 7(3) would not prohibit a claimant, who was otherwise validly exercising his or her right to object to an agreement in accordance with s. 5(3), from initiating arbitration.

[51] The prescribed DBI Notice form appears to anticipate that notice will be given to the claimant at or around the same time as it is given to the other insured. There is no practical reason why notice could not be given at the same time. The question however is whether the failure to give such notice in a timely way should preclude the priority claim altogether, or whether it should be up to the arbitrator to determine the consequences of late notice. The arbitrator in this case concluded that, while there is no time limit for notice to be given to a claimant, it will be up to the arbitrator to determine whether the notice required by s. 4 has been given too late to permit the claimant to exercise the participation rights afforded by the regulation. This is a reasonable approach as the arbitrator is well-positioned to safeguard those rights and to address any prejudice.

[52] Here, the insured did receive notice before the arbitration hearing commenced, and did not object to the transfer of the claim. He was therefore not entitled to further participation in the insurers' priority dispute. There was no prejudice. The arbitrator reasonably concluded that, while the notice was late, the lateness was not an impediment to the insurers' arbitration of the dispute.

[53] For all of these reasons, the arbitrator's decision was reasonable, and ought not to have been overturned on appeal.

H. DISPOSITION

[54] I would therefore allow the appeal and restore the decision of the arbitrator on the preliminary issue in the arbitration of the parties' priority dispute. I would award costs to the appellant in the agreed amount of $10,000, inclusive of applicable taxes and disbursements.

Released: MAR 2 7 2018

Kiran Rehmar J.A.

I agree. G.R. Strathy C.J.O.

I agree. Jocelyn Tulloch J.A.