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:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINTSER OF FINANCE
(MOTOR VEHICLE ACCIDENT CLAIMS FUND)

Applicant

\- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Lorraine E. Takacs for the Applicant

Lee Samis for the Respondent

ISSUES:

1. Should these proceedings be stayed to allow the matter to be dealt with in another forum?

DECISION:

1. The matter should not be stayed. The arbitration should proceed.

HEARING:

The hearing in this matter took place in the city of Toronto in the province of Ontario on January 29, 2007. The matter proceeded on the basis of an agreed statement of facts plus documents filed at the hearing.

FACTS AND ANALYSIS:

This priority dispute arises out of a single motor vehicle accident that occurred on April 5, 2003. At that time Ms. Noor Sahr was a passenger in a car owned and operated by a Mr. El-Haj Daoud. At the time of the accident Mr. El-Haj Daoud had a policy of insurance with State Farm Mutual Automobile Insurance Company ("State Farm"). Following the accident a dispute arose as to whether Mr. El-Haj Daoud's policy was for comprehensive coverage only, or whether it also covered liability and therefore statutory accident benefits. In any event, Ms. Sahr was apparently injured in the accident and made a claim for statutory accident benefits from the Motor Vehicle Accident Claims Fund ("The Fund"). The Fund commenced payment of the accident benefits to Ms. Sahr however on September 15, 2004 the Fund advised State Farm that it was bringing a notice of application before the courts to appoint myself as arbitrator in an arbitration pursuant to Ontario Regulation 283/95 and the Arbitration Act, 1991. State Farm subsequently agreed both to the arbitration and my appointment. On January 20, 2005, I wrote the parties and confirmed my willingness to act as arbitrator in this matter. On February 2, 2005 I conducted a teleconference pre-hearing in this matter at which time the issues in dispute were agreed upon, as well as documentation to be produced, appeal rights, examinations for discovery etc.

At the same time as the accident benefit matter was proceeding, Ms. Sahr also commenced a tort action against Mr. El-Haj Daoud. The statement of claim was issued on October 26, 2004. Subsequent to that date, State Farm brought a motion to be added to the tort action as a statutory third party pursuant to section 258(14) of the Insurance Act. On January 31, 2005, State Farm was added as a statutory third party to Ms. Sahr's tort action.

The Fund now takes the position that this arbitration should be stayed in order to allow the courts to deal with the issue of whether there was comprehensive or full liability insurance under the State Farm policy at the time of the accident. It is this stay issue rather then the question of the type of policy of insurance that was in place at the time of the accident that I will deal with at this time.

The first issue to be determined is whether the Fund has the right to resile from an arbitration that it commenced in a situation where the respondent, State Farm, opposes the stay request.

The arbitration agreement itself is slient as to the right to abandon, stay or terminate the arbitration. Section 5(5) of the Arbitration Act states that:

> An arbitration agreement may be revoked only in accordance with the ordinary rules of contract.

Section 17(4), (5) and (6) of the Arbitration Act are also of some relevance in this matter and state:

(4) the fact that a party has appointed or participated in the appointment of an arbitrator does not prevent the party from making an objection to jurisdiction.

(5) a party who has an objection that the arbitration tribunal is exceeding its authority shall make the objection as soon as the matter alleged to be beyond the tribunal's authority is raised during the arbitration period.

(6) despite section 4, if the arbitral tribunal considers the delay justified, a party may make an objection after the time limit referred to in subsection (3)4(5), as the case may be as expired.

In addition, section 43(3)(b) states that:

An arbitral tribunal shall make an order terminating the arbitration if,…….

(b) the arbitral tribunal finds the continuation of the arbitration has become unnecessary or impossible.

The first submission put forward by the Fund to stay or terminate the arbitration relates to jurisdiction. The Fund takes the position that the real issue before me is simply a legal issue of whether there was comprehensive or full liability insurance in place with State Farm at the time of the accident. Strictly speaking, they submit, this then is not a priority dispute, but a simple question of law. Depending on how the legal question is answered, priority will follow. I am unable to agree with counsel's submission in this regard. It is, of course, open to an arbitrator to make decisions regarding questions of law. Section 31 of the Arbitration Act give the arbitrator the power to:

Decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable relief.

Section 1 of Regulation 283/95 states:

> 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.

Section 7(1) of the Regulation states:

> 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 then the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the Arbitration Act 1991.

It is clear that an arbitrator, in order to determine which company is in priority to pay accident benefits will on some occasions have to make findings of fact, law or both. If it is necessary for an arbitrator to decide a legal question in order to arrive at a conclusion as to which insurance company is in priority, then that is simply a part of the process for determining priority. It would make no sense to force the parties to go the courts each time a legal issue arises and thus leave essentially only factual issues to be dealt with at the arbitration. I see nothing in the legislation or Regulation that takes away the power of the arbitrator to decide issues of law as they relate to priority disputes and accordingly this argument fails. To allow it would result in an almost total emasculation of the Regulation.

If the arbitration agreement is to be revoked or stayed it would be in accordance with section 5 of the Arbitration Act, "In accordance with the ordinary rules of contract law."

The Fund argues that the situation has changed fundamentally since it initiated the arbitration. It takes the position that while it knew generally when it commenced the arbitration that State Farm was claiming it did not insure Mr. El-Haj Daoud, it did not know the particulars of State Farm's position.

When the Fund initiated the arbitration process, Ms. Sahr had not yet commenced a tort action. The tort statement of claim was issued on October 26, 2004. State Farm was made a statutory third party pursuant to section 258(14) of the Insurance Act on January 31, 2005. This was done by State Farm because they were taking the position that there was no motor vehicle liability insurance on the Daoud vehicle at the time of the accident.

It is not clear, on the facts before me, exactly when the Fund became aware of State Farm's position that there was only comprehensive rather then full liability insurance available at the time of the accident.

A teleconference pre-hearing was held in the priority dispute on February 2, 2005, at which time the issues to be dealt with at the arbitration were agreed upon. It would appear, however, that the Fund was not aware, at the time of the pre-hearing, that State Farm had obtained an order making it a statutory third party in the tort action. It is the essence of the Fund's position, as I understand it, that if it had this knowledge at the time of the arbitration pre-hearing, it would not have proceeded with the arbitration but allowed the issue of what insurance existed at the time of the accident to be determined by the courts in the tort action. The action of becoming a statutory third party, in the Fund's submission, changes things substantially. This, the Fund submits, will create a multiplicity of proceedings, potentially result in inconsistent findings and put State Farm in a conflict of interest position. The arguments overlap somewhat so I will deal with them all at this time.

I am prepared to accept, for the purposes of this arbitration, that in the appropriate circumstances, a multiplicity of proceedings, a danger of inconsistent findings and a conflict of interest are all potentially valid reasons for staying the arbitration. The facts of this particular case do not, however, in my view, warrant staying the arbitration.

In considering the issue of a multiplicity of proceedings and also the possibility of inconsistent findings, it is important to consider what results from State Farm having been added as a statutory third party in the tort action. In the Sahr tort action, the plaintiff, Noor Sahr, who is also the claimant in the accident benefits case, has sued El-Haj Daoud. To date, Mr. El-Haj Daoud has not put in a statement of defence and State Farm has therefore had itself added as a statutory third party pursuant to section 257(14) of the Insurance Act, which states:

> Where an insurer denies liability under a contract evidenced by a motor vehicle liability policy, it shall, upon application of the court, be made a third party and any action to which the insured is a party and in which a claim is made against the insured by any party to the action in which it is or might be asserted that indemnity is provided by the contract, whether or not the insured enters an appearance or defence in the action.

The Fund argues that this creates a situation where the court, in the tort action, will end up making a decision regarding the type of insurance that was on the El-Haj Daoud vehicle at the time of the accident, just as I will in this arbitration. The Fund also notes that in our case, the decision of the arbitrator may be appealed on a question of law to a single judge. Accordingly, in the Fund's submission, it makes more sense to have the question determined by the courts initially.

The difficulty I have with this position is that when an insurer is made a statutory third party pursuant to section 258(14), they are made so only for a very limited purpose. The pleadings in the tort action have not raised the issue of the existence or non-existence of insurance. State Farm's third party defence is basically challenging the plaintiff to prove liability and damages. Indeed, by being made a statutory third party, they are essentially precluded from dealing with the insurance issue at the initial tort trial. The court, in Merrill vs. Somerville (1993) 11 O.R. (3rd) 444 dealt with a situation where an insurer was made a statutory third party pursuant to section 258(14). In that case Mr. Justice Cavarzan stated:

> The case law establishes clearly that the purpose of third proceedings pursuant to section 226(14)(now section 258(14)) of the Insurance Act is limited. It is not to enable the question of the right of indemnity as between the insured and insurer, this case between Somerville and Zurich, to be determined in those proceedings. Nor is it for the purpose of avoiding multiplicity of proceedings.

The court went on to point out that by being made a statutory third party, the status is much more limited then if one were made a full third party pursuant to Rule 29.01 of the Rules of Practice. The court stated:

> In my view Rule 29.01 cannot operate to bring in an insurer as a full fledge third party, where an insurer has already obtained the special limited party status confirmed by section 266(now 258) of the Insurance Act. This would not be a rule supplementing the Insurance Act provisions, rather it would a rule nullifying it.

The courts also dealt with this matter in Chapman vs. Chapman (1999) 39 O.R. (3rd) 687 and came to a similar conclusion. The importance of these cases is that the insurance issue cannot be dealt with in the existing tort action. All that can be dealt with is the defendant's liability, if any,

and the quantum of the plaintiff's damages. Once State Farm was made a statutory third party, there could not be an amendment of the pleadings by the plaintiff or defendant to raise the insurance issue. Any determination of the insurance issue in the tort matter will have to await the liability and quantum trial. The facts before me suggest that the tort action has not progressed very far, and there is, of course no guarantee that the tort matter will ever progress to the point of finally dealing with the insurance issue. While there certainly is an issue of multiplicity of proceedings, it is, at this point, somewhat hypothetical and will not likely occur for some time, if ever. That possibility is not sufficient in my view to stay this arbitration.

There is also, in the Fund's view, a possibility of inconsistent findings by the court and the arbitration. That possibility does exist, however, it is not sufficient in my opinion, to stay the proceeding. Regulation 283/95 clearly sets out a mechanism for resolving the exact type of dispute that we are dealing with here. It brings together the two parties who will potentially have to pay for the statutory accident benefits. The claimant, Ms. Sahr has also apparently been put on notice as to whether she wants to participate in the arbitration.

Potentially different findings in two different forums are obviously not desirable, however, that possibility is not an unusual circumstance and is not an absolute reason to stay the proceedings. One must look at other factors, such as time frames involved (delay etc.) interest of the various parties etc. In this particular case, at this time, the chances of such an occurrence is still quite remote. The tort action has not progressed very far, and the action will not even deal with the insurance issue.

The final submission by the Fund is that by being made a statutory third party in the tort action, and a respondent in the priority arbitration, State Farm in a conflict of interest situation. The Fund points out that in the priority dispute State Farm will cross-examine Mr. El-Haj Daoud on the insurance issue, with a view to obtaining information that would result in a finding of him having no accident benefit coverage from State Farm in the priority dispute. The Fund points out that Mr. El-Haj Daoud is unrepresented in the tort action and is not even a party in the priority dispute. The Fund also points out that the findings regarding insurance in the priority dispute may have some impact on the eventual tort insurance dispute. They also point out that in the tort action State Farm is, in effect, representing the same interest as Mr. El-Haj Daoud, but are adverse in the priority dispute.

It is certainly true that the interests are different in the two actions. In the tort action at the moment, State Farm and Mr. El-Haj Daoud's interests are similar. They both would question the plaintiff's position regarding liability and quantum. It is only later, in the possible second tort action, relating to insurance, where their interests would differ.

In the priority dispute, Mr. El-Haj Daoud is not even a party. It is strictly a dispute between State Farm and the Fund. The arbitration decision when given will not be binding upon Mr. El-Haj Daoud or upon the court in the possible second tort action. The Fund expressed some concern that Mr. El-Haj Daoud's interests regarding insurance may be effected in the priority arbitration in that he may be subject to cross-examination when he is not even represented at the arbitration. While this may be a very real concern, it may be dealt with by offering certain protections to Mr. El-Haj Daoud, such as allowing him to be represented at the arbitration

discovery or hearing by a lawyer and limiting the use to which any evidence that he may give at the hearing, is to be put. These safeguards can be put in place as the need develops and I may be spoken to if the parties cannot agree between themselves in this regard.

For the above reasons I am of the view that this arbitration should not be stayed and that the arbitration should proceed.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated this ______ day of March 2007 in Toronto, Ontario.

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M. Guy Jones
Arbitrator