IN THE MATTER OF THE INSURANCE ACT, 1990,
c. I. 8, and Regulation 283/95;

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION,

BETWEEN:

ROYAL AND SUNALLIANCE INSURANCE COMPANY

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Derek Greenside for the Applicant

Gregory Bailey for the Respondent

ISSUE:

1. Should the " saving provisions" of section 3(2) of Regulation 283/95 be invoked, allowing the extension of the 90 day notice period provided to serve the respondent with a Notice of Intension to Dispute Between Insurers?

DECISION:

1. An extension is not granted and therefore Royal and Sunalliance may not proceed with the arbitration.

HEARING:

1. The hearing in this matter was held in the city of Toronto, in the province of Ontario, on October 18, 2006. An agreed statement of facts was filed as well as a joint document brief. Oral evidence was called.

FACTS & ANALYSIS:

This priority dispute arises out of a motor vehicle accident that occurred on October 21, 2003. On that date Mr. Alexander Tchatoulov was involved in a motor vehicle accident in the state of Kentucky. At the time of the accident Mr. Tchatoulov was a named insured under a policy of motor vehicle liability insurance with Royal and Sunalliance Insurance Company ("Royal"). At the time of the accident Mr. Tchatoulov was driving a tractor-trailer that was owned by Frantx Transport Ltd. Mr. Tchatoulov was injured in the accident and submitted a completed application for accident benefits to Royal. The application was received by Royal on December 16, 2003. Royal takes the position that on March 22, 2004 it sent a Notice of Intention to Dispute between Insurers to Kingsway General Insurance Company ("Kingsway"), that Kingsway was higher in priority than Royal and therefore responsible for payment of accident benefits pursuant to section 268 of the Insurance Act.

Kingsway disputed that the Notice of Dispute was forwarded to Kingsway on that date and in any event takes the position that the notice, even if served on that date, was beyond the 90 days as required by section 3 of Regulation 283/95. It also takes the position that the saving provisions of section 3(2) of the Regulation ought not to apply.

Section 3 of Regulation 283/95 states:

> 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.
>
> 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.

Since the completed application for accident benefits was received on December 16, 2003, the 90 day notice period expired on March 15, 2004. Since it is Royal's position that it gave notice on

March 22, 2004, it is necessary that the saving provisions be invoked if Royal is to be allowed to proceed with the arbitration. In order to determine if it is appropriate to invoke those provisions, it is necessary to briefly review the facts of this case.

After receiving the completed application for accident benefits, Royal retained CGI Adjusters Inc. to obtain a statement from Mr. Tchatoulov. CGI Adjusters made two appointments to meet with Mr. Tchatoulov at his lawyer's office, on January 19 and 27, 2004, but Mr. Tchatoulov cancelled both of these meetings on short notice. On February 3, 2004 a CGI representative was finally able to meet and get a statement from Mr. Tchatoulov. Prior to that time, at some point prior to or on January 15 2004, Royal received the Kentucky Uniform Police Traffic Collision Report. The police report indicated that Kingsway was the insurer of the truck, which was owned by Frantx Transport and driven by Mr. Tchatoulov at the time of the accident.

It should be noted that in the application for accident benefits Mr. Tchatoulov indicated that there was no other insurance available other than with Royal. More specifically, when asked if there was a policy that listed him as a driver or whether there was other insurance under his employer's policy Mr. Tchatoulov indicated "no". In his written statement to CGI, Mr. Tchatoulov indicated that he was driving the tractor-trailer owned by Frantx Transport and that he was employed by Frantz Transport at the time of the accident. He stated that he was not a listed driver on any other policy.

During this time frame, the Royal adjuster responsible for the file continued to look for other possible insurance. On January 20, 2004 CGI conducted an Auto Plus search, using Mr.

Tchatoulov's name and driver's license number. This revealed only the Royal policy on Mr. Tchatoulov. That search also produced the name of Jana Volkchkova as an operator of Mr. Tchatoulov's personal automobile, all be it in a time frame prior to the accident. Thinking that this might be Mr. Tchatoulov's spouse, the adjuster did a further Auto Plus search using her name. This search produced no other valid applicable insurance.

On February 9, 2004, Royal instructed CGI to obtain a statement from a representative of Frantx Transport. On March 1, 2004, the CGI adjuster obtained a signed statement from Frank and Tina Colalillo, the owners of Frantx Transport. In that statement they confirmed that Mr. Tchatoulov was driving the truck for the company at the time of the accident and also that he was insured as a listed driver on the motor vehicle liability policy that Frantx Transport carried at the time of the accident.

CGI advised Royal that Mr. Tchatoulov was a listed driver under Frantx Transpot's policy with Kingsway by way of a letter dated March 22, 2004. CGI took a further statement, this time from Mr. Sam Elliott, the operations manager of Frantx Transport, on March 4, 2004. Mr. Elliot confirmed that Mr. Tchatoulov was a listed driver on the Kingsway policy held by Frantx Transport at the time of the accident.

There is no doubt that CGI was aware in early March, 2004 that Mr. Tchatoulov was apparently a listed driver on the Kingsway policy and they communicated that fact to Royal shortly thereafter. On March 13, 2004, the Royal adjuster noted in her file:

> Rec'd. IA's statement from employer-clmt was a listed driver on their police (sic)-dispute/insurer's to be sent ASAP.

The adjuster testified at the hearing and confirmed that she had received the above noted statement and as of March 13, 2004 at the latest, was aware that Mr. Tchatoulov was a listed driver under the Kingsway policy and that Notice of Intention to Dispute had to be sent out "ASAP". She indicated that she was extremely busy at that time, dealing with many complex matters and the earliest she was able to get the notice out was March 22, 2004. She testified that she sent the notice out on that date. In support of that position a copy of her letter to Kingsway, dated March 22 2004 was filed at the hearing.

Kingsway takes the position that they did not receive the March 22, 2004 notice letter and the first notice they received was a letter from Royal dated August 30, 2004 which stated:

> Please find enclosed a copy of the Notice to Applicant of Dispute between Insurers and our correspondence dated March 22, 2004……

In support of their position, Kingsway pointed out that the Royal log notes do not state that a notice was sent on March 22, 2004 and that the claimant's solicitor did not receive notice of the dispute until approximately March 31, 2005. The notes of the Kingsway employee adjusting the file were filed at the hearing and there is no reference to the March 22, 2004 notice in that file.

The Royal adjuster testified at the hearing. She is an experienced and capable accident benefit adjuster. She testified in a straightforward and forthright manner. I found her to be honest and forthcoming in her testimony. I have no hesitation whatsoever in finding that she sent the notice to Kingsway on March 22, 2004. An adjuster cannot be expected to put every last detail of their claims handling in their notes and the letter speaks for itself.

While counsel for Kingsway pointed out that the Kingsway notes made no reference to the March 2004 notice being received, I note that the Kingsway notes also failed to mention the

receipt of the August 30 2004 letter from Royal to Kingsway and that letter was undoubtedly received by Kingsway.

Section 3(2) of Regulation 283/95 requires that the insurer "give" notice. I find as a fact that such notice was given on March 22, 2004.

Having made this finding, the question then becomes whether it is appropriate to extend the time for service when the adjuster's notes, two days before the running of the notice, indicate that they were aware of Mr. Tchatoulov being a listed driver with Kingsway and notice should have been sent " ASAP".

There is no doubt but that Royal and their agent, CGI Adjusting, made considerable efforts to locate another insurer. In addition, it would appear that Mr. Tchatoulov, both in his application for accident benefits and in his statement to Royal, apparently innocently misstated that he had no other source of motor vehicle liability insurance. It is also clear to me that the Royal adjuster is an experienced and competent accident benefit adjuster who handled the file in a very professional manner. Having said that, one must look at the requirements of section 3 of Regulation 283/95 when considering whether or not to extend the notice period section 3(2) states:

> 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.

The difficulty that I have with Royal's position is that it is clear that 90 days was enough time to make a determination that another insurer was liable, because Royal did find this out as early as

March 1, 2004, when they took the statement from the owners of Frantx Transport. Having obtained the information within the 90 day notice period, Royal cannot therefore meet section 3(2)(a) of the test and accordingly the notice period cannot be extended.

My findings in this case should not be taken to mean that here cannot be an occasion where the necessary information is obtained within the 90 days, but notice is given outside the 90 days, and the saving provisions would not be extended. However, it would be a very rare case indeed.

For the above reasons I decline to extend the notice period and accordingly the arbitration cannot proceed.

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

Dated at Toronto this _____ day of January 2007.

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M. Guy Jones
Arbitrator