

SUPERIOR COURT OF JUSTICE - ONTARIO

**IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c. I.18, s. 275 and Ontario Regulations 664 & 668 thereunder;**

**AND IN THE MATTER of the *Arbitration Act*, 1991,
S.O. 1991, c.17**

RE: GORE MUTUAL INSURANCE COMPANY

Applicant

- and -

**JOHN DEERE INSURANCE COMPANY and
SENTRY INSURANCE COMPANY**

Respondents

BEFORE: Justice A. Hoy

COUNSEL: Mark K. Donaldson, for the Applicant

Jamie R. Pollack and Angela S. James, for the Respondents

DATE HEARD: June 24, 2008

E N D O R S E M E N T

[1] The applicant, Gore Mutual Insurance Company, seeks an order appointing an arbitrator to resolve its claim for reimbursement, pursuant to the loss transfer provisions contained in section 275(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act"), from the respondent, Sentry Insurance Company.

[2] The dispute arises out of a January 2005 accident in the State of New York involving a bus and a tractor/trailer combination. The bus was registered in Ontario, the tractor was registered in Pennsylvania, and the attached trailer was registered in Maine. Members of two Ontario families who were passengers on the bus claimed no-fault statutory accident benefits from Gore under standard policies of automobile insurance issued in Ontario by Gore on their personal vehicles. Gore seeks reimbursement of the benefits paid by it from Sentry, the insurer of the tractor/trailer, pursuant to section 275(1) of the Act.

[3] That section, in combination with the related regulation, essentially provides that the insurer responsible under the Act for the payment of no-fault benefits is entitled to

reimbursement from the insurer of a heavy commercial vehicle involved in the accident, according to the degrees of fault of their respective insured, determined in accordance with rules established by the legislation. The section further provides for disputes regarding indemnification to be determined by arbitration.

[4] The tractor/trailer, a heavy commercial vehicle, is insured by Sentry pursuant to a policy issued pursuant to the laws governing the sale of the insurance in Pennsylvania. Sentry has not carried on business selling insurance in Ontario at any time, and is not licensed to do so. Sentry is, however, a signatory to a Power of Attorney and Undertaking (a “PAU”), the nature of which is discussed further below, filed with the Canadian Council of Insurance Regulators.

The Issue

[5] Should this Court, or an arbitrator, determine whether s. 275(1) applies to an insurer which does not carry on business in Ontario where the motor vehicle accident triggering the reimbursement claim occurred outside of Ontario, and if this Court should make the determination, does s. 275(1) apply to such an insurer?

The Parties’ Positions

[6] Gore submits that whether s. 275 applies to Sentry should be determined by the arbitrator whom it asks me to appoint. Sentry argues that s. 275 has no application to it, because it is not an Ontario insurer and the accident did not occur in Ontario, and submits that I should so determine and decline to appoint an arbitrator.

Conclusion

[7] For the reasons that follow, s. 275 does not apply to Sentry, and Gore’s application for the appointment of an arbitrator is accordingly dismissed.

Key Statutory Provisions

The Act

275(1) Indemnification in certain cases - The insurer responsible under subsection 268(2) for the payment of no-fault benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the no-fault benefits arose.

(2) **Idem-** Indemnification shall be made according to the respective degrees of fault of each insurer's insured, as determined under the fault determination rules.

...

(4) **Arbitration-** If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

[8] Section 9(3) of Ontario Regulation 664 imposes indemnification obligations under section 275 of the Act on insurers of heavy commercial vehicles.

Arbitration Act, 1991, S.O. 1991, c. 17:

17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

Analysis

[9] In support of its position, Gore refers me to s. 275(4) of the Act and s. 17(1) of the *Arbitration Act*. Gore also relies on three decisions of this Court, reviewing decisions of arbitrators appointed under the Act: *Liberty Mutual Insurance Co. v. The Commerce Insurance Co.*, [2001] O.J. No. 5479 (S.C.J.); *Royal & SunAlliance Insurance Co. of Canada v. Wawanesa Mutual Insurance Co.* (2006), 84 O.R. (3d) 449 (S.C.J.) and *Economical Mutual Insurance Co. v. Liberty Mutual Fire Insurance Co.*, [2008] O.J. No. 1072 (S.C.J.).

[10] Sentry relies on *Unifund v. ICBC*, [2003] 2 S.C.R. 1022 (S.C.C.), to argue that this application should be declined.

[11] *Unifund* arose out of an accident in British Columbia involving two vehicles registered in British Columbia, a heavy commercial vehicle and a rental car. The occupants of the rental car, residents of Ontario, claimed statutory benefits from Unifund, the Ontario insurer under their own vehicle policies, issued in Ontario. They also brought a successful action for damages in the Supreme Court of British Columbia. In that action, the Court ordered the statutory benefits paid by Unifund deducted from the damages award, even though ICBC, the British Columbia insurer of both the rental car and the heavy commercial vehicle, contributed nothing to the payment. Unifund sought reimbursement under s. 275 from ICBC in respect of the statutory benefits paid and ICBC opposed the appointment of an arbitrator under the Act.

[12] The Supreme Court held that ICBC was not required to arbitrate Unifund's claim under the Act.

[13] At para. 9, Binnie J., writing for the majority, describes s. 275 of the Act as providing, “a statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of SABs under the Ontario Act” and notes, at para. 12, that if ICBC were an Ontario insurer, there is no doubt that it would be required to arbitrate Unifund’s claim. Binnie J. wrote, at para. 17, “If the Ontario insurance scheme is wholly inapplicable to the appellant on the facts here, an arbitrator appointed under the Ontario Act is without any statutory or other authority to decide anything in this case.”

[14] Binnie J. concluded, at paras. 38 and 41, that the Act and the *Arbitration Act* do not confer exclusive jurisdiction on the arbitrator to determine the constitutional application of the Act. At para. 43, he wrote, “when the authority of the court is invoked to appoint an arbitrator under a statute which one of the parties contends cannot constitutionally apply to it, the court should deal with the challenge.” And, at para. 50, “It is well established that a province has no legislative competence to legislate extraterritorially.”

[15] An advantage of my “dealing with the challenge” is the possibility of appeal to a higher Ontario court.

[16] At para. 83, Binnie J. wrote that, “the fact the Ontario legislature has chosen to attach legal consequences in Ontario to an event (the motor vehicle accident) taking place elsewhere does not extend its legislative reach to a resident of ‘elsewhere.’” He concluded, at para. 91, that under ordinary constitutional principles the Act was inapplicable to ICBC.

[17] As Gore points out, *Unifund* involved insurers in different provinces, and this case involves an Ontario insurer and a foreign insurer. In my view, where the “elsewhere” is a different sovereign state, rather than a different province within this country, the position of the out-of-province insurer in contesting the reach of section 275 is, if anything, stronger.

[18] Counsel for Gore argues that *Unifund* should be distinguished, because it appeared that the PAU signed by ICBC specifically did not extend to British Columbia, and, in this case, there is no evidence that the PAU signed by Sentry contained any territorial limitations. The form of PAU signed by Sentry was not before me. Both parties conceded that it would be in the form before Binnie J. in *Unifund*, except for the territorial limitation referred to.

[19] This is not a basis for distinguishing this case from *Unifund*.

[20] Binnie J. explains at para. 92 that, “The PAU system is an interprovincial (and interstate) web of interlocking arrangements for substitutional service and undertakings designed to ensure that travelling motorists are financially responsible for their actions in other provinces and participating states, by confirming that their insurers will respond to claims in respect of an accident which occurs outside of the insured’s home jurisdiction.” He adds at para. 100 that, “The PAU is about enforcement of insurance policies, not about helping insurance companies, which have been paid a premium for the no-fault coverage, to seek to recover in their home jurisdictions their losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction and

where the claims arising out of the accident were litigated there.” [emphasis original]¹ Binnie J. concludes, at para. 105, that there is nothing in the PAU that would prevent the appellant from contesting the purported extraterritorial jurisdiction of the Act. Given that conclusion, the PAU signed by Sentry, in my view, similarly does not prevent it from contesting the extraterritorial jurisdiction of the Act.

[21] The three cases relied upon by counsel for Gore do not assist it.

[22] The first, *Liberty Mutual*, was decided before *Unifund* and, in any event, involved a car accident in Ontario.

[23] The facts in the second case, *Royal & SunAlliance*, are quite different from the facts in this case. While the motor vehicle accident in *Royal & SunAlliance* occurred in the State of Vermont, both insurers were Ontario insurers, both policies were issued in Ontario and the vehicles in respect of which the policies were issued were licensed and registered in Ontario. Newbould J. relied on the statement of Binnie J. in *Unifund*, referred to above, that there was no doubt that if the appellant were an Ontario insurer, it would be required to arbitrate Unifund’s claim, to conclude that the Ontario insurers were bound by s. 275, notwithstanding the fact that the accident occurred outside of Ontario.

[24] The third case, *Economical Mutual*, involved a motor vehicle accident which occurred in Ontario and is distinguishable on that basis alone. Moreover, *Economical Mutual* turned solely on the statutory interpretation of the word “insurer” in s. 275 of the Act²; while decided after *Unifund*, *Unifund*, and the territorial limitations of the Act, were not argued before the arbitrator or on the appeal to this Court.

Costs

[25] The parties agreed at the hearing that the successful party would be entitled to costs of \$2,500, all inclusive. Sentry is accordingly entitled to costs of \$2,500.

Hoy J.

DATE: July 3, 2008

¹ The application record does not indicate where the claims arising out the accident at issue are being, or will be, litigated. I note that as a result of the accident 3 occupants of the bus and the driver of the tractor/trailer died.

² Arguments regarding statutory interpretation were not made by Gore or Sentry on this application.