Cangene Corp. v. Octapharma AG, 2000 MBQB 111 (CanLII)

Date:	2000-06-30
Docket:	CI00-01-17044
Parallel citations:	[2000] 9 WWR 606; 147 Man R (2d) 228
URL:	http://canlii.ca/t/4vtk
Citation:	Cangene Corp. v. Octapharma AG, 2000 MBQB 111 (CanLII), <http://canlii.ca/t/4vtk> retrieved on 2011-12-01
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Decisions cited

- Kaverit Steel and Crane Ltd. v. Kone Corporation, 1992 ABCA 7 (CanLII) — 87 DLR (4th) 129 • [1992] 3 WWR 716 • 40 CPR (3d) 161 • 85 Alta LR (2d) 287
- Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd., 1995 CanLII 2084 (BC CA) — 129 DLR (4th) 181 • [1996] 2 WWR 144 • 13 BCLR (3d) 41
- Quintette Coal Ltd. v. Nippon Steel Corporation, 1991 CanLII 5708 (BC CA) — [1991] 1 WWR 219 • 50 BCLR (2d) 207

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Indexed as: Cangene Corporation v. Octapharma AG

Cited as: 2000 MBQB 111

(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

CANGENE CORPORATION,	)	For the applicant:
	)	G. Patrick S. Riley and
applicant,	)	John A. Myers
	)	
- and -	)	
	)	For the respondent:
	)	Jamie A. Kagan and
OCTAPHARMA AG,	)	Shane I. Perlmutter
	)	
respondent.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	June 30, 2000

MORSE, J.

[1] The applicant ("Cangene") applied for an order that a certain distribution agreement had been terminated. Other relief was requested in the notice of application but not pursued.

[2] The respondent ("Octapharma") has moved for an order that the parties be referred to arbitration by the Arbitration Court of the International Chamber of Commerce ("ICC") in Paris with respect to all matters set out by Cangene in its notice of application and that the notice of application be stayed. Octapharma has also brought a motion for an order striking out the notice of application on the ground that it is not for any form of relief authorized by Queen's Bench Rule 14.05(2) in that there are material facts in dispute.

[3] Cangene is a pharmaceutical company based in Winnipeg. Octapharma is an international conglomerate which specializes in the manufacture and sale of plasma based pharmaceuticals.

[4] The parties entered into a series of agreements – the original distribution agreement dated March 10, 1997 ("the agreement") and two amendments – under the terms of which Octapharma was given the exclusive right to distribute in Europe a plasma based product manufactured by Cangene. The relationship between the parties was clearly commercial in nature.

[5] The agreement contained the following arbitral clause:

15(d) In the event of any controversy or claim arising out of or relating to any provision of this Agreement or the breach thereof, the parties shall try to settle the problem amicably between themselves. Should they fail to agree, the matter in dispute shall be settled by the Arbitration court of the International Chamber of Commerce (ICC) in Paris. Applicable law shall be the law of Switzerland.

The amendments to the agreement do not affect this clause.

[6] *The International Commercial Arbitration Act,* S.M. 1986-87, c. 32, Cap. C151 ("the ***Act***"), s. 1(1), makes applicable in Manitoba both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York

on June 10, 1958, as set out in Schedule A to the *Act* ("the Convention"), as well as "the International Law", which means the Model Law On International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule B to the *Act* ("the Model Law").

[7] By reason of ss. 2(1) and 4(1) of the *Act*, both the Convention and the Model Law apply in Manitoba.

[8] Section 10 of the *Act* provides that:

Where, pursuant to article II (3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

[9] Article II(3) of the Convention reads:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[10] Article 8(1) of the Model Law reads:

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[11] As the Convention applies to the recognition and enforcement of foreign arbitral awards, and as the issue in the present case is whether the parties

should be referred to arbitration pursuant to their agreement, article 8(1) of the Model Law is, in my opinion, the applicable provision.

[12] By letter dated January 21, 2000, Cangene gave formal notice to Octapharma terminating the agreement, alleging a breach of clause 11(c)(iv) which reads as follows:

> (c) Cangene shall be entitled to terminate this Agreement by written notice having immediate effect if Octapharma:
>
> . . .
>
> (iv) fails to meet the annual purchase quotas referred to in Annex "B" for any year during the Term, except if the failure is caused by a default of Cangene or if Cangene fails to supply Product ordered by Octapharma, pursuant to 7(e);

[13] Generally speaking, Canadian courts, as well as the courts of other countries bound by the Convention and the Model Law, have upheld arbitration clauses such as the arbitral clause in this case, holding that the clauses requiring a referral to arbitration are mandatory in the absence of a finding that the agreement is null and void, inoperative, or incapable of being performed. Counsel for the respondent referred to the following authorities:

- *Kaverit Steel and Crane Ltd. v. Kone Corp.*, [1992] A.J. No. 40 (Alta. C.A.)
- *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, [1992] B.C.J. No. 500 (B.C.C.A.)
- *Automatic Systems Inc. v. Bracknell Corp.*, [1994] O.J. No. 828 (Ont. C.A.)

- ➢ *BWV Investments Ltd. v. Saskferco Products Inc.*, [1994] S.J. No. 629 (Sask. C.A.)

- ➢ *Bab Systems, Inc. v. McLurg*, [1994] O.J. No. 3029 (Ont. Gen. Div.)

- ➢ *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] B.C.J. No. 1474 (B.C.C.A.)

- ➢ *Duferco International Investment Holding (Guernsey) Ltd. v. Pan Financial Insurance Co.*, [1996] O.J. No. 549 (Ont. Gen. Div.)

- ➢ *Nutrasweet Kelco Co. v. Royal-Sweet International Technologies Ltd.*, [1997] B.C.J. No. 332 (B.C.S.C.)

- ➢ *NetSys Technology Group AB v. Open Text Corp.*, [1999] O.J. No. 3134 (Ont. S.C.J.)

- ➢ *Turnbridge (c.o.b. Turnbridge & Turnbridge) v. Cansel Survey Equipment (Canada) Ltd.*, [2000] B.C.J. No. 333 (B.C.S.C.)

I need refer only to certain of these cases because, in the main, they set forth similar principles.

[14] In *Gulf Canada Resources Ltd.* (*supra*), Hinkson, J.A., for the majority, in dealing with a provision of s. 8(1) of *The International Commercial Arbitration Act* of British Columbia which contains, in part, wording similar to that of article 8(1) of the Model Law to which I have referred, stated:

Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[15] ***Automatic Systems Inc.*** (*supra*) was a case involving a contract between a Missouri company and an Ontario company which provided for arbitration. Austin, J.A., who delivered the judgment of the court, in discussing the principles underlying ***The Commercial Arbitration Act*** of Ontario ("ICAA"), stated (at p. 9):

Legislation similar to the ICAA, adopting the Model Law, was enacted by the other provinces, providing for a uniform and universally consistent method of recognizing and enforcing commercial arbitration agreements between contracting parties in Canada and other countries adhering to the Convention. The purpose of the United Nations conventions and legislation adopting them is to ensure that the method of resolving disputes, in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: Kaverit Steel & Crane Ltd. v. Kone Corp. 1992 ABCA 7 (CanLII), (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).

[16] In ***BWV Investments Ltd.*** (*supra*), Gerwing, J.A., speaking for the court, dealt with an arbitral clause in a contract and an application for arbitration under ***The International Commercial Arbitration Act*** of Saskatchewan, pursuant to the contract. Gerwing J.A. said (at para. 16):

While new in Saskatchewan, international commercial arbitration is an important and growing area of the law. Although arbitration has existed as an alternative to litigation for hundreds of years, it has increasingly found favour among parties to commercial transactions in the latter half of this century. There are several obvious reasons for this trend, including the desire for greater certainty and for the participation of specialized professionals in the decision-making in the resolution of disputes that are becoming increasingly complex.

[17] In the course of her reasons, Gerwing, J.A. made references to commercial arbitration in England, France, and, in particular, the United States. She said (at para. 25):

The last 20 years have shown the United States Supreme Court and other high courts to stand squarely in favour of arbitration on the well-trodden ground of freedom of contract: … This approach favours holding parties strictly to their agreements to arbitrate, with little room for judicial intervention to the contrary.

[18] And (at para. 32), referring to the judgment in ***Quintette Coal Limited v. Nippon Steel Corporation***, 1991 CanLII 5708 (BC CA), [1991] 1 W.W.R. 219 (B.C.C.A.), she stated:

In a unanimous decision, the British Columbia Court of Appeal upheld the decision at trial. Drawing on the approaches taken in other countries to international commercial arbitration, the Court held that judicial interference in the process would be kept to a minimum. Referring to the judgment of Esson C.J.Q.B. at trial, Gibbs J.A. (speaking for the Court on this point) stated (at 227-28):

> At p. 204 of his judgment Chief Justice Esson drew attention to the relationship between the domestic law of arbitration and the law which applies to international arbitrations and he referred to a 'world-wide trend toward restricting judicial control over international commercial arbitration awards'. Perhaps the strongest expression of that trend is to be found in the majority judgment of the Supreme Court of the United States in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). At p. 629 Blackmun J. said:
>
> > . . . we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement,

> even assuming that a contrary result would be forthcoming in the domestic context.

And at pp. 638-39 he said:

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration'. Kulukundis Shipping Co. v. Amtorg Trading Corp. 126 F.2d 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration. …

[19] The position of Cangene is that the arbitral clause [article 15(d) in the agreement] is "inoperative" and that the matter should not, therefore, be referred to arbitration. Article 15(d) of the agreement, it is submitted, does not and was not intended to operate in circumstances where Cangene was entitled to terminate the agreement by written notice having immediate effect. The arbitral clause, it is argued, does not contemplate arbitration where the agreement is terminated by a party. Cangene contends that the arbitral clause requires the parties to try and settle problems amicably. Only in the case where "they fail to agree", is the matter to be settled by arbitration.

[20] Cangene adduced evidence that Octapharma failed in 1999 to purchase the required quota of product. And Cangene contends that there is no evidence to show that this failure was caused by any default on its part under the agreement. Thus, it is contended that under article 11(c)(iv) of the agreement, Cangene had the right to terminate the agreement immediately.

[21] Cangene also submits that to apply the arbitral clause in the circumstances of this case would be inconsistent with the express terms of the agreement. Cangene's right to terminate with immediate effect, it is said, could easily be frustrated by arbitration, which might take up to three years. However, it does not seem to me that the length of a possible arbitration is any reason to thwart the intention of the parties to refer disputes to the very arbitration process which they have chosen. And, of course, in the event of an appeal of my decision, particularly if the Supreme Court of Canada should agree to hear any appeal, a number of years would inevitably elapse.

[22] The submissions of counsel for Cangene have a superficial attraction, but, in my view, they do not reflect the real intention of the parties that "any controversy or claim arising out of or relating to the agreement" should be arbitrated if the parties are unable to agree. I am not persuaded that the agreement is "inoperative" for any of the reasons advanced by Cangene. Article 11 of the agreement permits termination of the agreement for a number of reasons. It reads in full as follows:

Article 11. Termination

(a) If either party is in material breach of any of their obligations under this Agreement the other party may give written notice of such breach to the defaulting party and request the latter to remedy the same. If the party in breach fails to remedy said breach within thirty (30) days after the date of giving such notice or if such breach is not remediable, then this Agreement may be terminated immediately by written notice of termination given by the complaining party.

(b) Either party shall be entitled to terminate this Agreement by written notice having immediate effect if the other party:

(i) becomes bankrupt or makes an assignment for the benefit of creditors, has bankruptcy or insolvency proceedings instituted against it or if the other party ceases or threatens to cease to carry on business or to wind up its business; or

(ii) transfers substantially all of its assets or business to a third party, without the prior written consent of the other party or if there is a change in control of a party, without the prior written consent of the other party.

(c) Cangene shall be entitled to terminate this Agreement by written notice having immediate effect if Octapharma:

(i) fails to make a payment of money, when due and such default continues after 15 days written notice of default given by Cangene to Octapharma stating the particulars of the default;

(ii) ceases to make the Product available in the Territory for more than sixty consecutive days, except if the failure is caused by a default of Cangene or if Cangene fails to supply Product ordered by Octapharma, pursuant to 7(e);

(iii) states in writing that it intends to cease marketing the Product;

(iv) fails to meet the annual purchase quotas referred to in Annex "B" for any year during the Term, except if the failure is caused by a default of Cangene or if Cangene fails to supply Product ordered by Octapharma, pursuant to 7(e);

(v) fails to apply for the Registrations or to use its best efforts to obtain the Registrations referred to in Section 6(a).

[23] If Cangene is correct in its submission, then it would appear that in any of these instances involving termination, arbitration would not be possible, even though there was a dispute between the parties as to the right to terminate the agreement.

[24] As well, it is the position of Octapharma that the words "default of Cangene" in article 11(c)(iv) of the agreement were not meant to apply to a contractual default. Octapharma points to the additional words "or if Cangene fails to supply Product ordered by Octapharma". These latter words, it is submitted, relate to a contractual breach, whereas the prior use of the word "default" was meant to have a broader meaning than a default under the agreement. If it were otherwise, the parties would, it is argued, have used words such as "default under the agreement".

[25] Octapharma has introduced evidence of a number of instances where it is alleged that acts or omissions of Cangene made it impossible for Octapharma to obtain registration of the product in the United Kingdom and thus to market the product as contemplated by the parties when they entered into the agreement. Octapharma does not concede that it failed to purchase the minimum quota of product in 1999, but, if I understand correctly, it alleges that if it did fail to do so, this was due to a "default" on the part of Cangene which was separate and apart from the contractual obligations of the parties.

[26] Whatever the merits of this argument, there is, in my opinion, clearly a "controversy or claim arising out of or relating to a provision of the agreement or

the breach thereof", and, in my judgment, the matters in dispute must, as the parties agreed, be settled by arbitration. They are not matters to be decided by this court.

[27] There was a reference during argument to the provision [s. 6(a)] in the second amendment to the original agreement that "Octapharma and Cangene shall cooperate and use their best efforts to complete the submission for said European Mutual Recognition Procedure on or before September 30, 1999, and in this respect Cangene, at its own cost, shall use its best efforts to provide all data requested by the Paul Ehrlich Institute (PEI) on or before August 30, 1999 to ensure submission in time". This provision has reference to obtaining registration of the product in Europe. The Paul Ehrlich Institute is a German regulatory authority.

[28] It is the position of Cangene that this provision required it only to provide all data requested by the Paul Ehrlich Institute and that it did so. This may be so, but it might be argued that the provision is more general than this and that it requires Cangene to use its best efforts to complete the submission for registration with respect to the whole European Mutual Recognition Procedure and not merely to supply data to the German authority. It is the position of Octapharma that Cangene failed to use its best efforts to complete the submission for registration of the product in the United Kingdom.

[29] Here, again, it is my view that this is a matter to be decided by the arbitral tribunal chosen by the parties.

[30] Counsel for Cangene also argues that Octapharma, by filing the notice of motion to strike Cangene's notice of application, attorned to the jurisdiction of the Manitoba court and that, for this reason, Octapharma is precluded from relying on the arbitral clause in the agreement. Counsel relied on the decision of the British Columbia Court of Appeal in *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.* 1995 CanLII 2084 (BC CA), (1995), 129 DLR (4th) 181. The headnote summarizes the decision:

The plaintiff brought an action against the defendants in Ohio for breach of contract, unjust enrichment, fraud and conversion. The defendants filed a motion to dismiss the action, disputing the jurisdiction of the court and pleading alternatively that the complaint failed to state a cause of action known to Ohio law and that the pleading of fraud was insufficiently particular. The motion was dismissed, the defendants' counsel withdrew, and default judgment was entered. In an action in British Columbia on the judgment, the trial judge found that the defendants had not attorned to the jurisdiction of the Ohio court.

On appeal to the British Columbia Court of Appeal, **held**, allowing the appeal, the application to strike out the plaintiff's claim for want of particularity, and the application to dismiss for failure to state a recognized cause of action amounted to attornment to the jurisdiction of the Ohio court.

[31] In ***Mid-Ohio*** (*supra*), the court applied the domestic law of British Columbia. The court was not, however, required to consider an agreement to arbitrate disputes nor to consider the applicability of International Commercial Arbitration Law. In my view, the case is not authority for the proposition that arbitration is precluded in the present case by the actions of Octapharma in filing the notice of motion to strike Cangene's notice of application.

[32] In my judgment, the imperative "shall", in article 8(1) of the Model Law, requires the court to refer the parties to arbitration once that is requested by a party with respect to a matter subject to an arbitration agreement, provided the agreement is not null and void, inoperative, or incapable of being performed. I have said that, in my opinion, the agreement is not "inoperative" and there is no suggestion that Octapharma submitted any "first statement on the substance of the dispute" before filing its motion to refer the parties to arbitration.

[33] My conclusion on this point is supported by the decision in ***Bab Systems, Inc.*** (*supra*). In that case, the applicant commenced an application in which it sought extensive relief, the principal relief sought being a declaration that the

applicant had lawfully terminated a certain contract between the parties. The applicant also sought injunctive relief. Subsequently, the applicant filed a Demand for Arbitration pursuant to the contract and then amended its notice of application by deleting all of the relief originally claimed except for the interlocutory injunctive relief, and requested an order referring the dispute to arbitration. Borins, J. referred to article 8(1) of the Model Law and held it provides that a court must refer the parties to arbitration if the conditions in that article are met (para. 8 of the judgment). Although it was not contended that the applicant, by what it had done, had attorned to the jurisdiction, it was argued that, in placing the disputes before the court by issuing a notice of application, the applicant had waived its right to have them resolved through arbitration. Borins, J. rejected this submission based primarily on the facts of the case, although he said he doubted that a party to a contract could unilaterally waive compliance with a fundamental term of the contract.

[34] In ***Kaverit Steel and Crane Ltd.*** (*supra*), Kerans, J.A. gave his opinion that, "[t]he power to grant or withhold a reference under the International Commercial Arbitration Act is very limited …" (p. 7). And (at p. 2) he said, "… I am of the view that the statute commands that what may go to arbitration shall go …". With respect, I am of the same view.

[35] For the foregoing reasons, I have concluded that the parties are bound by article 15(d) of their agreement to have their dispute settled by arbitration. I order that:

1) the dispute between the parties be settled by the Arbitration Court of the ICC in Paris and that, for such purpose, the dispute be submitted to that court; and

2) pursuant to s. 10 of the ***Act***, the proceedings commenced by the applicant be stayed with respect to the matters submitted to arbitration.

[36] Octapharma is entitled to its costs.

_____J.