

***Kanitz v. Rogers Cable Inc* - Time to rethink Article 4 of the proposed Hague Convention?**

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On the 22nd of February 2002, the Ontario Superior Court of Justice handed down its judgment in the dispute between Stefan Kanitz^[1] and Rogers Cable Inc (hereinafter referred to as Rogers).^[2] The defendant, Rogers, argued that the plaintiff, Kanitz, was prevented from taking action in court due to an arbitration clause in the service agreement between the plaintiff and the defendant. Justice Nordheimer, the judge in the case, agreed with Rogers and ordered a stay of proceedings. On its surface, such a conclusion seems justified; if two parties agree to settle a potential dispute by means of arbitration, it would not be fair to allow one of the parties to bluntly disregard the agreement and take the matter to a court of justice. However, as will be demonstrated below, we will find ourselves in an unreasonable situation unless non-negotiated standard clauses^[3] relating to a central issue, such as the means of dispute resolution, have to meet a certain standard.

The aim of this article is to illustrate the potential danger of an inappropriate application of Article 4 of the proposed Hague Convention on Jurisdiction and Enforcement of Foreign Judgments in Civil and Commercial Matters, by using the **Kanitz** case as an example.

Article 4 of the proposed Hague Convention

The **Kanitz v. Rogers Cable Inc** case is relevant to the ongoing negotiations of the proposed Hague Convention on Jurisdiction and Enforcement of Foreign Judgments in Civil and Commercial Matters as it illustrates what kind of standardised choice of forum clauses Article 4 might end up validating on a global level.^[4] At a meeting in The Hague (April 2002) it was decided that the Articles that deals with “core issues” of the proposed Convention would be redrafted.^[5] Article 4, dealing with choice of forum, falls into the category of provisions that have been granted the status of “core issues”.^[6] However, as it seems unlikely that the new draft will be significantly different in any fundamental respect, the current draft version of Article 4^[7] constitutes the point of departure for this article.

Article 4 states that (note that no consensus has been reached in relation to the text within square bracket and that the footnotes have been omitted):

Article 4 Choice of court

1. If the parties have agreed that [a court or] [the] courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, [that court or those] [the] courts [of that Contracting State] shall have jurisdiction[, provided the court has subject matter jurisdiction] and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates [a court or][the] courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the [court or] courts chosen have themselves declined jurisdiction. [Whether such an agreement is invalid for lack of consent (for example, due to fraud or duress) or incapacity shall depend on national law including its rules of private international law.]
2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into –
 - a) in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;
 - b) orally and confirmed in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;
 - c) in accordance with a usage which is regularly observed by the parties;
 - d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.
3. Where a defendant expressly accepts jurisdiction before a court of a Contracting State, and that acceptance is [in writing or evidenced in writing], that court shall have jurisdiction.

4. The substantive validity of an agreement conferring jurisdiction shall be determined in accordance with the applicable law as designated by the choice of law rules of the forum.]

5. [The parties cannot be deprived of the right to enter into agreements conferring jurisdiction.] [However,] [such agreements and similar clauses in trust instruments shall be without effect, if they conflict with the provisions of Article 7, 8 or 12.]

Some background facts of the *Kanitz v. Rogers Cable Inc* case

Rogers provides Internet access service in certain parts of Canada. The plaintiffs were all subscribers to that service, called “Rogers@Home”. However, some of them had become subscribers of Rogers@Home due to a “swap of territory” between another Internet service provider, Shaw, and Rogers, while others were “original” customers of Rogers’ services.

At the time of becoming a subscriber of Rogers’ services the “original” customer had to sign a service agreement,^[8] which amongst other things gives Rogers the right to amend the agreement at any time.^[9] The ones that became subscribers of “Rogers@Home” as a result of the swap, were advised by Rogers to consult “the Customer Support Site for important information regarding the service”^[10]. Nordheimer J further noted that also the service agreement signed between the other provider, Shaw, and its customers contained an amendment clause similar to the one in the contract between Rogers and its customers.^[11]

Rogers added an arbitration clause to the service agreement to the effect that when Kanitz took Rogers to court,^[12] Rogers could move to stay the action based on the arbitration clause.

The amendment clause

The amendment clause found in Rogers’ service agreement states that:

“Amendment. We may change, modify, add or remove portions of this Agreement at any time. We will notify you of any changes to this Agreement by posting notice of such changes on the Rogers@Home web site, or sending notice via email or postal mail. Your continued use of the Service following notice of such change means that you agree to and accept the Agreement as amended. If you do not agree to any modification of this Agreement, you must immediately stop using Rogers@Home and notify us that you are terminating this Agreement.”

A clause like this strikes me as simply amazing. If it turns out that this kind of clause is widely accepted by the courts, I encourage absolutely everyone that is in a favourable enough position to make the other party “agree” to it, to include such a clause in their contracts. There really are no limits to the usefulness of a clause such as the one above. However, it seems rather unlikely that anyone (be it businesses or consumers) would willingly make an informed decision to agree to a contract, which the seller/provider could alter in any way it sees fit, at any time it sees fit, even without directly informing the other party of the changes made. Thus, the fundamental issue of the actual value of a clause, as the one used by Rogers, is directly dependent on the power balance between the parties. That is; only an uninformed party, or a party with no other options would agree to be bound by a contract provision as the amendment clause used by Rogers.

The conclusion I draw from this, is that, a clause that no reasonable person would willingly make an informed decision to agree to, must be seen as unjust and unenforceable; at the very least in cases of non-negotiated business to consumer (B2C) agreements. Justice Nordheimer did not reach such a conclusion, and indeed, did not even discuss the reasonableness of the clause in question.^[13]

The issue of notification

The amendment clause stated that Rogers would notify the customers of changes made to the original agreement. This could, in accordance with the clause, be done by “posting notice of such changes on the Rogers@Home web site, or sending notice via email or postal mail”. As Nordheimer J choose not to discuss the reasonableness of the clause in general, nor was the reasonableness or suitability of these forms of notification discussed. In fact, Nordheimer J happily accepted that the only issue that should be taken into account in assessing whether notification took place, is whether the

notification was in a form provided for in the contract:

“While I accept that one can fairly assert that the defendant could have done more to highlight the fact that the agreement had been amended, that is not the issue. The issue is whether there was notice given of the amendments as contemplated by the terms of the user agreement.”^[14]

This is a dangerous way of thinking and the danger of it can easily be illustrated by an absurd example of what could have been included in the clause in question:

Notification can also be given by notes scribbled on any toilet door of Rogers Cables Inc’s staff toilets or by messages called out from the rooftop of Rogers Cables Inc’s office facilities.

If this procedure for notification had been part of the clause, and Rogers had, for example, called out the changes from their office facilities in accordance with the clause, would Rogers’ action then have constituted a valid notification? Hopefully not, but it would indeed have met the requirements of Justice Nordheimer’s test (i.e. that the notification was given as contemplated by the terms of the agreement). Although a ridiculous example, it illustrated the importance of assessing the reasonableness of the forms of notification stipulated for in the contract. One simply cannot ignore that step, as Justice Nordheimer chose to do.

In addition to the fact that, arguably, the amendment clause in general and the notification part in particular were unreasonable, other factors should be noted in the context of the notification. Rogers added the disputed arbitration clause in November 2000. However, the first steps to inform existing customers of the changes were taken in January 2001 when the “updated” version of the service agreement was posted on the defendant’s website.^[15] Considering that Rogers demanded that the customers “immediately” stopped using the service and notified Rogers if they did not agree upon the changes made to the service agreement, it appears reasonable that also Rogers should have informed the customers “immediately” upon making the changes; doing so two months later does not seem like a very fair practise. I would go even further and argue that, if Rogers reserves the right to make changes to the original agreement as it sees fit, the customers should be notified about the changes *before* the changes come into effect, not after. Such procedure would give the customers time to consider the effects of the changes, and then make an informed decision whether they wish to remain a customer of Rogers Cable Inc or not.

Bearing in mind that a customer is bound by the changes made to the original contract, if he/she does not immediately stop using the service, it is extremely disturbing to see that Rogers chose to only post the updated version of the service agreement on one of its webpages; no e-mails^[16] or postal mails^[17] were sent out in order to inform the customers of the changes made. Thereby an unreasonably onerous burden was placed on the customers, who were forced to regularly check for changes on the defendants website. In this context one might also question how frequently the customers reasonably should check for changes? A strict interpretation of the amendment clause would mean that the customers should check for changes every single time they wanted to use the service; otherwise they risk using the service after the changes had been made and thereby be bound by the changes.^[18] That is obviously an unworkable outcome.^[19]

Notification of what?

Moving on to a deeper analysis of the text in the amendment clause, we find that the exact meaning of at least one part of it is ambiguous and can be interpreted in more than one way. The clause states that Rogers will notify the customers *of any changes* to the agreement. This could be interpreted to mean that Rogers will notify the customers *of the changes*, and thus, the mere notification of the updated version of the agreement, without specifically bringing the customers attention to *what has been changed*, is not enough.^[20] Relying on the firmly established and widely adopted rule of *in dubio contra stipulatorem*^[21] I argue that the broadly formulated amendment clause should be interpreted in the manner suggested here, in favour of the plaintiff. Such interpretation would lead to the conclusion that no notification was made, which obviously would render the arbitration clause invalid.

The arbitration clause

Justice Nordheimer noted that: “if it is found that there is an arbitration agreement, it is clear that the disputes raised in this action would fall within its scope”^[22]. Looking at the extremely broad wording of the arbitration clause, such a conclusion is hardly surprising:

“Arbitration. Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future) arising out of or relating to: (a) this Agreement; (b) Rogers@Home; (c) oral or written statements, advertisements or promotions relating to this Agreement or to

Rogers@Home or (d) the relationships which result from this Agreement (including relationships with third parties who are not signatories to this Agreement) (collectively the "Claim"), will be referred to and determined by arbitration (to the exclusion of the courts). You agree to waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us.

If you have a Claim you should give written notice to arbitrate to us at the address specified in Section 6. If we have a claim we will give you notice to arbitrate at your address. Arbitration of Claims will be conducted in such forum and pursuant to such rules as you and we agree upon, and failing agreement will be conducted by one arbitrator pursuant to the laws and rules relating to commercial arbitration in the province in which you reside that are in effect on the date of the notice to arbitrate.”

It would, indeed, be hard to picture a dispute that falls outside the scope of this very broad provision.

In discussing whether this clause is invalid or unenforceable because it is unconscionable, Nordheimer J cites a range of older cases and based on one of them^[23], adopts a three-step model. The first step relates to the balance of parties' bargaining power. In this context Nordheimer J correctly concludes that:

“There is clearly an inequality of bargaining power between a single consumer and a corporation the size of the defendant here. The reality is that there is no bargaining at all. The defendant decides on the terms of the agreement and the consumer's sole choice is either to accept the agreement if he or she wants the service or to reject the agreement and forego the defendant's service as a consequence. It is very much a "take it or leave it" form of contract. The first element for a finding of unconscionability [sic] is therefore met.”^[24]

The second step of the model requires that the difference in bargaining power have been misused^[25]. Justice Nordheimer points out that the arbitration/no class action clause is not the equivalent of an exemption clause and states that:

“I do not believe that the mere act of inserting an arbitration provision in a consumer contract must inevitably lead to that conclusion [i.e. that the bargaining power have been misused]”.^[26]

Having established that the three-step test fails in step two, Nordheimer J had no real reason to examine the third step, but did so anyhow. The third step requires a finding that “the resulting contractual arrangements are improvident”^[27]. In relation to this, the plaintiff argued that: “the arbitration clause amounts effectively to a waiver of any remedy by the customers because, they say, no customer would pursue arbitration for the amounts that are involved here on an individual basis.”^[28]

Justice Nordheimer rejected this argumentation, as there was no evidence to support the plaintiff's claim. In this context Justice Nordheimer makes the remarkable observation that “[t]here is no evidence that any customer has tried to arbitrate a claim and been put off from doing so because of the expense”^[29]. In my view this is an extremely unfortunate and ill-thought-through statement. The very fact that there is no evidence of customers attempting, but getting put off, arbitration, can in itself be an indication of a reluctance to arbitrate, due to the low amounts involved in the case. Most reasonable people would make an attempt to balance the pros and cons of going to arbitration *before* making the decision to take the matter to arbitration; not go to arbitration and *afterwards* realise that they have nothing to gain.

How does the *Kanitz* case relate to Article 4?

The **Kanitz** case contains several elements that distinguish it from the situations Article 4 of the proposed Hague Convention sets out to regulate. Firstly, the choice of forum clause in the **Kanitz** case was an arbitration clause. Article 4 only regulates choice of court provisions, and as a matter of fact, the Hague Convention as such does not deal with arbitration.^[30] Secondly, it appears that Kanitz was a consumer and as such would fall outside the scope of Article 4. Indeed, depending on what approach the redrafting group takes, consumers might very well fall outside the scope of the proposed Convention in whole.^[31] Finally, the **Kanitz** case is obviously a domestic dispute, and would thus not be regulated by the proposed Hague Convention.

Having said all this, it is not difficult to imagine cases with essentially the same background facts that *would* be regulated by Article 4. Let us, for example, say that Kanitz was a citizen of, and habitually residing in, Poland, and that the amended choice of forum clause nominated a Canadian court as the selected forum. Further, we can say that Kanitz operated a small business and that he, in representing the company, subscribed to some sort of online service from Rogers. Taking the example further, we can say that the original service agreement contained a choice of forum clause nominating a Polish court as the appropriate forum. In such a situation Kanitz might have felt rather safe in entering into

a contract with a company located on the other side of the Atlantic Ocean. However, if Rogers then changes the selected forum, based on the right to do so found in the amendment clause, Kanitz has arguably been deceived and might “be stuck with” a forum clause he did not want or could reasonably foresee. To my understanding, the current version of Article 4 would uphold the validity of such a choice of forum clause.

Conclusions

Having examined the **Kanitz** case closer it is obvious that it would be undesirable to have this sort of fundamentally unfair judgments enforced on a global level. Starting with the arbitration clause itself, and working our way backwards we can note that:

- the arbitration clause is very broad and was a result of an inappropriate use of the power imbalance between the parties. Furthermore, it arguably prevents the plaintiff from effective remedies. Based on that, the arbitration clause should be held to be invalid, especially if the plaintiffs are consumers;
- the customers were not notified about the changes in an appropriate manner, especially since the changes related to the means of dispute resolution, which has to be seen as a fundamental part of the agreement;
- arguably, the notification did not even conform to the procedure stipulated in the amendment clause; and
- the amendment clause was extremely broad and clearly favours Rogers in an disproportional manner.

If standard contracts are to be misused to the degree we have seen above, I find the current draft of Article 4 highly undesirable. However, that is not to say that Article 4 as such, is undesirable – quite the contrary. It is my opinion that a provision like Article 4 is not only desirable, but constitutes a vital part of the proposed Hague Convention. The right to *agree* upon in which forum a potential dispute is to be resolved, can be seen as a cornerstone of international trade. The parties must be able to rely on that such an agreement is binding and will be respected by the courts. The aim of this article has merely been to illustrate that there is a potential risk for misuse of Article 4. That risk calls for extra caution in the drafting of the Convention text.

Returning to the **Kanitz** case, I acknowledge that the use of standard clauses in contracts between parties of unequal strength is not undesirable in itself. Any other conclusion would be absurd, and would mean the end of B2C contracts and individual employment agreements. However, if it becomes a general practise amongst the business community to use standard contracts in such an abusive manner as was illustrated in this case, it will be a very short-term “victory”^[32] for the businesses.

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[1] And four other subscribers of the defendant’s Internet access service (hereinafter referred to only as Kanitz).

[2] *Kanitz v. Rogers Cable Inc* [2002] O.J. No. 665

[3] And the manner in which such clauses are introduced into the agreement.

[4] The *Kanitz* case suits this purpose although it was a domestic case involving an arbitration clause in a business to consumer (B2C) relation.

[5] See further: <http://www.hcch.net/e/workprog/genaff.html>

[6] Arguably, it appears that the decision on whether or not a certain provision was deemed a “core issues”, depended more on the likelihood of reaching an agreement on that provision, than on the actual importance of the provision in question. For example, the issues of jurisdiction in consumer contracts and over “digital torts” were not deemed to be “core issues”.

[7] Draft of the Hague Convention produced by the First Diplomatic Conference, June 2001.

[8] “When prospective subscribers first order the service, they are told that a technician must attend at their home to install the service, at which time they will be required to sign the user agreement. When the technician arrives at the customer's home, he or she is required to explain the installation process, remove the user agreement from the "Welcome Kit" provided to the subscriber, and have the subscriber execute the user agreement. The technicians are instructed not to commence the installation process until the subscriber has executed the user agreement. Subscribers are given a copy of the executed user agreement to retain for their records.” (para 5). One might wonder how many of Rogers customers that actually takes the time to read the conditions of the agreement carefully enough to make an informed decision while the technician is waiting to start the installation. The whole situation does not seem to allow for much consideration on the customer's behalf. Perhaps it would be better if Rogers sent out the agreement in advance to allow the customer to make his/her decision before the technician arrives. However, it has to be noted that Rogers' practise, in this sense, is no different from many other businesses'. Finally, one might also wonder what the actual value of giving the customer a copy of the agreement is, since the agreement can be altered at any time. In a way, such a procedure can even be seen as deceptive.

[9] para 5

[10] para 10

[11] para 7

[12] Kanitz argued that Rogers had not provided the standard of service agreed upon (the connection had been unduly slow and occasionally unavailable), and thus, the plaintiff argued, Rogers had breached the agreement. See further para 15

[13] It strikes me as peculiar that Justice Nordheimer did not apply the same three-step test in relation to the amendment clause as was done in relation to the arbitration clause.

[14] para 22. See also para 25 “As long as the defendant uses one authorized method, it cannot be faulted for not having used another.”

[15] It was noted that after accessing the defendant's website, the customers had to view “only five screens” before getting to the service agreement. para 28. Justice Nordheimer appears to see this as an indication of that the service agreement was not hidden from the customers. I find such a conclusion disturbing for two reasons. Firstly, if Rogers insists on this form of notification, an effort should be made to simplify the customer's access to the service agreement (having to go through five webpages is unreasonable). Secondly, the judge's focus should not be on whether the service agreement was *hidden* or not, but on whether it was *obvious* or not.

[16] On the 21st of February 2001 Rogers did send out an e-mail bulletin, but not for the express purpose of informing their customers about the amendments made to the service agreement. “Among other things, this Bulletin welcomed the former Shaw customers to Rogers@Home, and included a section titled "Important Information for Former Shaw@Home Customers". This section specifically asked *former Shaw customers* to visit the Customer Support Site, which contains the user agreement.” para 10 (emphasis added). As only former Shaw customers were advised to review the service agreement, it can rightfully be said that this e-mail bulletin did nothing to draw the “original” customers attention to the amendments made.

[17] “In June 2001, Rogers mailed an "iToolbox" kit to all Rogers@Home subscribers, which included a CD containing software and information resources [...] Before distributing these kits, the defendant sent an email to all of its subscribers advising them of the iToolbox and the important service information contained in it. The iToolbox CD included a copy of the Customer Support Site which, as previously noted, contains the user agreement. Moreover, the User Guide urged subscribers to visit the Customer Support Site for important information.” para 11. Surely it would be absurd to argue that this “iToolbox” kit was an attempt to notify the customers of fundamental changes made to the service agreement no less that seven months earlier? It is also interesting to note that Rogers found the distribution of the “iToolbox” kit important enough to be preceded by an e-mail, while no e-mail was sent out to promote the changes made to the service agreement.

[18] When accessing the service agreement online, the customers were encouraged to keep checking back in order to

obtain the latest version of the agreement. However, the purpose of the updates was, arguably, portrayed in a deceptive manner: “To provide you with the best Internet services possible, we update the EUA [End User Agreement] on a periodic basis.” Based on that statement one would hardly expect to be deprived of the right to take a potential dispute to court. I certainly fail to see how the arbitration clause possibly can be seen as a step taken to *provide the best Internet services possible*.

[19] Especially so considering that the customers actually have to use the service in order to view the changes made to the contract.

[20] Kanitz did make some arguments in this direction, but did not follow it through. “[W]hile the amended user agreement was posted on the web site, the plaintiffs say that no notice of the amendments was posted. In other words, while the defendant posted the amended user agreement itself, it did not post a notice to advise customers that the agreement had been amended such that customers would be alerted to go and look for and review the amended agreement. The plaintiffs assert that the defendant has therefore failed to provide the required notice.” para 20. This argument was easily defeated since Rogers *had* posted information about the fact that the agreement had been amended. However, since Rogers had not posted information about *what* had been changed, that would not make the argument I raised in the text above less valid.

[21] In doubt, the provision shall be interpreted in the way that is less favourable to the party that chose the wording. (Also known as “*contra proferentem*”)

[22] para 15

[23] *Rosen v. Rosen* (1994), 18 O.R. (3d) 641 (C.A.)

[24] para 38

[25] i.e. that one party has “used its greater bargaining power to prey upon or take advantage of” the other. para 39

[26] para 39

[27] para 41

[28] para 41

[29] para 42

[30] See Article 1(2) of the proposed Hague Convention.

[31] At the time of writing, Article 7 appears to be off the Hague Convention agenda. However, it is unclear whether all B2C relations are to be excluded from the scope of the Convention. It is also unclear exactly how such limitations would be made.

[32] I am very reluctant to see this issue as a struggle between the business community on one side and the consumers on the other. I believe that whatever increases the parties’ possibility to enter into trade relations with the other will be beneficial for both in the long run. Similarly, since the abuse of standard clauses is likely to decrease the consumer’s interest in doing business, it will be damaging to both consumers and businesses, in the long run.