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A thumbs up to seal the deal? Lessons from SWT v Achter

A Canadian court has found that the use of a 👍 emoji in contract negotiations constituted valid acceptance of the contract.

This case acts as a timely illustration of the importance of clear communication in the rapidly moving world of international commodities trading where the use of informal language is commonplace. This article focuses on aspects of the case that may influence English courts should a similar question come before them.

Background

South West Terminal Ltd ("**SWT**") agreed to buy, and Achter Land & Cattle Ltd ("**Achter**") agreed to deliver, 87 metric tonnes of flax for a price of CAN\$669.26 per tonne with delivery between 1 and 30 November 2021 (the "**Contract**").

SWT sent a tender by text message to Achter and others, and Achter confirmed their interest in the contract by phone call. Following the phone call, SWT signed the contract, took a picture of it, and sent it to Achter's representative asking them to "*please confirm flax contract*". Achter responded with a 👍 emoji.

Achter failed to deliver the flax within the delivery period, arguing that the use of the 👍 emoji was merely an acknowledgement of receipt of the message, and did not amount to acceptance of the Contract. SWT argued that the use of the 👍 emoji amounted to acceptance of the contract, which was then breached for failure to deliver.

The court, when reaching its decision, looked at the principles of contract formation; namely whether the conduct between the parties amounted to a consensus *ad idem* (a meeting of the minds) from the viewpoint of an objective reasonable bystander, and whether there was certainty of terms. This broadly accords with how English law courts would approach this question.

Decision

In deciding to grant SWT summary judgment, the court held the following:

1. There was a consensus *ad idem* between the parties. SWT and Achter had a long-standing relationship going back to at least 2015 during which they entered into multiple deferred delivery purchase contracts (mainly in relation to durum). Each time, SWT would take a photo and text it to Achter asking them to "*please confirm terms of durum contract*". Achter would reply with "*looks good*", "*ok*" or "*yup*", following which the contract was performed. The parties therefore clearly understood these brief words to be confirmation of the contract, rather than simply an acknowledgement of receipt. The court found that the Contract in question was very similar to the durum contracts, save that this time instead of using "*looks good*", "*ok*" or "*yup*", Achter replied with a 👍 emoji to signify their confirmation.
2. The court did not agree with Achter that the Contract failed for certainty of terms. Although SWT did not text a photograph of the "General Terms and Conditions" found at the back of the Contract, the terms and conditions in the parties' previous contracts were standard boiler plate terms that did not change, and therefore Achter would have known by virtue of the previous course of dealing that these terms were incorporated. The court also found that there

were no missing or unascertainable essential terms in the Contract as the parties, property and price were "crystal clear".

Commentary

Although the outcome of this case rested heavily on the previous course of dealings between the parties, the court was careful to accept that it could not "*attempt to stem the tide of technology and common usage*". As emojis are likely to become more rather than less prevalent with the increase in the use of instant messaging to agree contracts, courts globally will need to be ready to deal with similar questions.

This will not be limited to the use of the 👍 emoji and will require them to take into consideration cultural nuances in interpretation. For example, the use of the 🙏 emoji could have multiple meanings (thank you, hoping/praying for an agreement, or a request).

Therefore, while this decision is not binding on English courts, it is one of the first cases to deal with the use of emojis in contract negotiations and highlights the dangers of using them when negotiating or agreeing contracts.

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