

THUMBS UP FOR EMOJIS – THE CAUTIONARY CASE OF SOUTH WEST TERMINAL LTD V ACHTER LAND AND CATTLE LTD

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INTRODUCTION

In the recent Canadian judgment of *South West Terminal Ltd v Achter Land and Cattle Ltd* [2023 SKKB 116], the Court accepted a thumbs up emoji as a valid electronic signature to a contract.

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BACKGROUND AND RELEVANT FACTS

This was a summary judgment application brought by South West Terminal Limited ("SWT") for judgment against Achter Land and Cattle Ltd ("Achter"). It was SWT's position that the parties entered into a deferred delivery purchase contract on 26 March 2021, whereby SWT agreed to buy, and Achter agreed to deliver, 87 metric tonnes of flax for a contracted price of CAN\$669.26 per tonne (the "Cargo") with delivery to take place between 1 to 30 November 2021 (the "Contract"). Achter failed to deliver the Cargo within this period and SWT subsequently sued for breach of contract and damages.

Following a phone call between the parties, SWT drafted the Contract, which included the key terms detailed above. SWT applied an ink signature to the Contract and texted a photo of the same to a representative of Achter, Mr Chris Achter, asking that he, "please confirm flax contract". Mr Achter texted back a thumbs up emoji. In his evidence, Mr Achter argued that the emoji was nothing more than an acknowledgement that the message from SWT had been received.

In reaching its decision, the Court considered the principles of contract formation, in particular, the concept that a contract is only validly formed where there is an offer by one party that is accepted by the other with the intention of creating a legal relationship and supported by consideration. The question before the court was not what the parties *subjectively* had in mind but rather whether their conduct was such that a reasonable person would conclude that the parties had intended to be bound.

The Court also considered section 6 of the Canadian Sale of Goods Act 1978 (the “SGA”) which states that a contract is not enforceable unless, *“some note or memorandum in writing of the contract is made and signed by the party... or his agent in that behalf”*. This provision is more stringent than the provisions of section 4(1) of the English Sale of Goods Act 1979, which provides that, *“a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties”*.

DECISION

In granting SWT’s application for summary judgment, the Court considered several factors, including the following:

1. Mr Achter, deemed by the Court to be Achter’s acting mind, had a long-standing relationship with SWT going back several years. Four contracts were completed with Achter executing the contract by text messages reading, for example, *“looks good”*, *“ok”* and *“yup”*. Achter delivered under those contracts. The use of a thumbs up emoji was therefore similar to how contracts had previously been entered into by way of short form acceptances from Achter;
2. the Court found that a thumbs up emoji is an *“action in electronic form”* that can be used to express acceptance as set out in section 18(1) of the Canadian Electronic Information and Documents Act 2000; and
3. in relation to the written and signed requirement under section 6 of the SGA, the Court found that the signature requirement was met by the emoji sent by Achter – there was no issue with the authenticity of the text message, which the Court noted was the purpose of the requirement of section 6. The texting of a contract, followed by the seeking and receipt of approval was consistent with the previous contract formation processes used by SWT and Achter.

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OUR THOUGHTS

In its judgment, the Court noted that while this case was novel, *“this Court cannot... attempt to stem the tide of technology and common usage – this appears to be the new reality...and courts will have to be ready to meet the new challenges that may arise from the use of emojis and the like”*.

It is not uncommon in the fast-moving world of international commodity trading for traders to propose contract terms via informal channels, such as WhatsApp, Telegram and WeChat. In the course of scrutinising such correspondence where disputes have arisen, we have also commonly seen the use of colloquial terminology by both parties’ personnel, including acronyms, slang and emojis.

In view of this, we entirely agree with the Court that similar cases to that canvassed in this article will be seen in future, namely whether contracts have been validly formed by way of informal means.

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As such, we strongly recommend that companies put in place clear policies as to how their personnel may communicate with counterparts. Caution is advised in this regard; we suggest that informal communication methods such as those listed above be minimised to the extent possible. Furthermore, personnel should be regularly reminded of the fact that informal language may be interpreted by the courts to constitute valid acceptance of a contract/specific contract terms.

Where, however, such communication methods cannot be avoided, we recommend that safeguards be put in place. For example, that personnel expressly communicate to counterparts at the outset of discussions via informal channels that agreements are not to be considered concluded unless and until they are formally confirmed/issued by way of company email.

Please do get in touch if you would like to discuss any of the issues canvassed in this article further.

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