Contract by Emoji? A New Risk of Doing Business in the Digital Age

by Michael B. Kent, Jr.

Can the use of an emoji indicate a legally binding agreement? In ***South West Terminal Ltd. v. Achter Land & Cattle Ltd.***, a Canadian judge answered that question in the affirmative, finding that a contract was formed when one party texted a "thumbs up" emoji to the other. The case illustrates the risks associated with doing business in the digital age and serves as a reminder that care should be taken in the use of electronic messages.

The case arose out of a series of communications between South West Terminal Ltd. and Achter Land & Cattle Ltd. regarding the purchase and sale of flax. After South West texted a group of farmers that it was looking to buy the crop, a representative of Achter contacted a representative of South West to discuss the opportunity. Following a few telephone calls, the South West representative had a contract drafted, signed it, and took a photograph of it. He then texted the photograph to his contact at Achter, along with the message: "Please confirm flax contract." The Achter representative texted back a "thumbs up" emoji. When Achter subsequently failed to deliver the flax, South West sued, claiming Achter breached the contract.

Achter defended the suit on two grounds. First, it argued that it had never accepted the contract. According to Achter, the "thumbs up" emoji simply constituted an acknowledgment that it had received the flax contract, not that it agreed to the terms of the contract. Second, Achter argued that the contract was invalid under a statute rendering certain contracts unenforceable unless they were signed. Even if the emoji constituted an acceptance, Achter maintained, it did not constitute a signature.

The court saw things differently. Pointing to the parties' prior course of dealing, the court noted that South West and Achter had completed four previous contracts in a similar manner. In each instance, South West's representative texted a photograph of the contract in question accompanied by a request for Achter to confirm the terms. Each time, Achter's representative texted back an affirmative message—"Looks good," "Ok," "Yup," and "Ok," respectively. And on each of those occasions, Achter delivered on the contract as written.

In light of this pattern, the question was whether the "thumbs up" emoji constituted a sufficiently similar message of affirmation. The court found that it did. Quoting an online dictionary, the court indicated that the "thumbs up" emoji "is used to express assent, approval or encouragement in digital communications." The emoji thus demonstrated that Achter "okayed or approved" the offer contained in the photographed contract sent by South West, and "a reasonable bystander knowing all of the background would come to the objective understanding that the parties" had formed a contract. Additionally, the court found that the emoji was sufficient under the circumstances to

qualify as an “electronic signature.” Although the case was admittedly “novel,” the court indicated that it reflected “the new reality” of electronic communications to which courts must adjust.

Although the decision of a Canadian court is not binding on parties doing business in North Carolina, our law is similar in several important respects. North Carolina courts have likewise indicated that assent to a contract “is judged by an objective standard”[1] and that “acceptance may be manifested by words or conduct showing that the offeree means to accept.”[2] Additionally, North Carolina law allows for electronic signatures, which can include a “symbol … logically associated with a record and executed or adopted by a person with an intent to sign the record.”[3] The North Carolina courts have not yet applied these principles to the use of emojis, but the *South West Terminal* decision provides a warning of what can happen when these rules meet the “new reality” of digital communications.

Envisage attorneys help businesses plan, structure, negotiate, and document a variety of transactions across numerous industries and professions. If you have questions about this alert or think we might be of assistance to you, you may contact us at (919) 755-1317.

[1] Schwarz v. St. Jude Medical, Inc., 254 N.C. App. 747 (2017).
[2] T.C. May Co. v. Menzies Shoe Co., 184 N.C. 150 (1922).
[3] N.C.G.S. § 66-312(9).