

▶ EMOJIS AND BREACH OF CONTRACT: PHONES 4U LIMITED V EE LIMITED

In January 2018, the Commercial Court handed down the first UK judgment to consider the use of emojis in a commercial context.

Phones 4u Ltd v EE Ltd [2018] EWHC 49 (Comm) (16 January 2018) involves the termination of a contract. In 2014, EE informed Phones 4U that it would not be renewing the trading agreement between them, which was due to expire on 30 September 2015. By then, operators such as Three, O2 and Vodafone had already made similar decisions to terminate their contracts and Phones 4U was in difficulty. On 12 September 2014, the board of Phones 4U met and resolved to appoint an administrator. Three days later, on 15 September, Phones 4U's shops did not open for business and online trading ceased.

The agreement between EE and Phones 4U entitled EE to terminate in the event of Phones 4U's insolvency, which was typical for contracts of this type. EE sent a termination letter invoking this clause on 17 September 2014. However, both parties brought claims for sums they said were due to them under the agreement.

The judgment of Mr Justice Andrew Baker in the Commercial Court was concerned with a counter-claim from EE for loss of bargain resulting from the termination, which they estimated at over £200 million. Phones 4U applied for summary judgment to dismiss that counterclaim, and was successful.

However, EE have also pleaded a counterclaim based on a statement on the Phones 4U website referring to both EE and Vodafone in explaining why Phones 4U were offline. The statement promised customers an update as soon as possible and concluded with a sadface emoji. EE claimed that, in doing so, Phones 4U had made unauthorised, false or misleading statements in breach of their trading agreement. This part of the claim is yet to be decided but, if it is maintained by EE, this may offer the court at trial an opportunity to consider the use of the sadface emoji as creating a breach of contract.

This is something to consider for those who have become used to using emojis as part of their text, IM or email exchanges with their counterparties, all of which are potentially disclosable in the event of a dispute. Chartering brokers in particular might use this kind of communication frequently. For example, what might a *thumbs up* emoji mean? "I agree" or "confirmed", or merely "I understand"? What about a smiley face? No doubt it will depend on context. As always in any contractual negotiation or discussion, clarity is key.

If you don't want to become embroiled in a dispute about what was meant or agreed by your emoji, we would suggest sticking to text, at least until the Commercial Court has ruled on what a sadface emoji means 😞.