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## Case Comment: South West Terminal Ltd v Achter Land & Cattle Ltd: Thumbs-Up Emoji - A Unique way to Sign Contracts

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### INTRODUCTION

In the case of the *South West Terminal Ltd. v Achter Land & Cattle Ltd.*<sup>1</sup> the King's Bench of Saskatchewan in Canada ruled that the use of the Thumbs up Emoji in response to the contract constitutes a digital signature on a contract and both the parties to the contract are legally bound to it. Nowadays people use emojis to communicate their emotions and convey their messages. However, from the recent judgment, it can be interpreted that it also has legal weightage as it equally binds the party as a signature on a contract. Indeed, it's a step ahead in the legal arena and it is all because of the significant use of the emojis in the text. For most intents and purposes, a reasonable person, if they see a thumbs-up emoji, would think that the person who is giving the thumbs-up wants the contract. As Prof. Goldman said that although

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<sup>1</sup> *South West Terminal Ltd. v Achter Land & Cattle Ltd* [2023] SKKB 116

this case won't be able to resolve what's the actual meaning of the thumbs-up emoji it would remind people that there are legal consequences associated with its usage.<sup>2</sup>

## MEANING OF EMOJI AND ITS INTERPRETATION IN LAW

Emoji was discovered way back in the 1990s and during that period there were simple emoticons that either conveyed emotions or sarcasm, as per a report published by *Galvanize*. It's an amalgamation of two Japanese words picture and character, and is quite similar to the word 'emotion' which is an English word.<sup>3</sup> However, modern-day emojis are designed by the Shigetaka Kurita. Even though emojis can be funny or cute they can have legal consequences because of misunderstandings in their interpretation such as whether someone should be liable for sexual harassment or obligated by contract or sent to jail.<sup>4</sup> In 2015, an emoji was declared 'Word of the Year' by the Oxford Dictionary, especially the one with 'tears of joy on its face' and it happened because of the significant usage of the emoji in the modern era.<sup>5</sup> As per the report by Super Lawyers, an individual can genuinely experience an emotion on which that emoji is based while reading or posting it.<sup>6</sup> From criminal law to contract, the meaning of emoji will emerge in an extensive spectrum of legal doctrines. Also, the interpretation of several emojis should be carefully considered because it is not evident that the tools that interpret it would handle it in the way the sender or receiver thinks and due to various meanings of one single emoji the receiver and sender may understand it differently due to which there is a different interpretation of the same communication, having adverse effect on one or both the parties.<sup>7</sup> Also, one of the significant challenges it poses in the smooth

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<sup>2</sup> Michael Levenson, 'Canadian Court Rules 👍 Emoji Counts as a Contract Agreement' (*The New York Times*, 8 July 2023) <<https://www.nytimes.com/2023/07/07/world/canada/canada-thumbs-up-emoji-contract.html>> accessed 20 July 2023

<sup>3</sup> Vidushi Sagar, 'Use Your Emojis Carefully? Man Lands in Trouble Over 'Thumbs Up' Reply to Contract' (*News 18*, 09 July 2023) <<https://www.news18.com/explainers/use-your-emojis-carefully-man-lands-in-trouble-over-thumbs-up-reply-to-contract-explained-8288785.html>> accessed 13 July 2023

<sup>4</sup> Eric Goldman, 'Emojis and the Law' (2018) 93(1227) *Washington Law Review* <<https://ssrn.com/abstract=3133412>> accessed 13 July 2023

<sup>5</sup> 'Word of the Year 2015' (*Oxford Languages*, 2015) <<https://languages.oup.com/word-of-the-year/2015/>> accessed 15 July 2023

<sup>6</sup> Sagar (n 3)

<sup>7</sup> Eric Goldman, 'Surveying the Law of Emojis' (*Santa Clara University Legal Studies Research Paper*, 2017) <<http://dx.doi.org/10.2139/ssrn.2961060>> accessed 15 July 2023

functioning of the judiciary is how a judge will comprehend an emoji in his opinion and what is the best way to present emoji as evidence to fact-finders.<sup>8</sup> According, to a report around 92% online population is using emojis<sup>9</sup> and another report stated that in a single year approximately 2.3 Trillion mobile messages incorporated emojis.<sup>10</sup> As observed by Professor Evans, ‘emojis also reflect the cultural variation just as the languages do.’ Therefore, to decode emojis in conversation one needs the cultural understanding associated with that emoji and misunderstanding is likely to arise if both the sender and receiver have cultural variation.<sup>11</sup> Such as face mask in Japan depicts illness while bank robbery in the US. Also, the discrepancy can occur due to cross-platform depiction where neither sender nor recipient knows that the substitution has happened due to which misunderstandings are likely to arise.<sup>12</sup>

**Some of the illustrations are:**

**Grinning Face with Smiling Eyes:** Due to cross-platform depiction, this emoji also has the potential to create trouble. A grinning face emoji has a different appearance on the platforms like Google and Apple. For a Google user, it means ‘blissfully happy’ while an Apple user interprets the same as ‘ready to fight’ and accordingly, he may think of it as a physical threat to him.<sup>13</sup>

**Pistol:** Its appearance on all the platforms is alike except at Apple’s because they intentionally change it with a water pistol. As observed by Prof. Jonathan Zittrain, the substitution of a firearm pistol with a water pistol breaks the conceptual compatibility that Unicode is meant to establish.<sup>14</sup>

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<sup>8</sup> *Ibid*

<sup>9</sup> ‘2015 Emoji Report’ (*Emoji Research*, September 2015) <[https://emojiresear.ch/wp-content/uploads/2023/07/emogi-2015\\_emoji\\_report.pdf](https://emojiresear.ch/wp-content/uploads/2023/07/emogi-2015_emoji_report.pdf)> accessed 14 July 2023

<sup>10</sup> ‘2016 Emoji Report’ (*Emoji Research*, 16 November 2016) <[https://destinationthink.com/wp-content/uploads/2018/10/2016\\_emoji\\_report.pdf](https://destinationthink.com/wp-content/uploads/2018/10/2016_emoji_report.pdf)> accessed 14 July 2023

<sup>11</sup> Eric Goldman (n 4)

<sup>12</sup> *Ibid*

<sup>13</sup> Hannah Miller et al., “‘Blissfully happy’ or “‘ready to fight’”: Varying Interpretations of Emoji’ (International AAAI Conference on Web and Social Media, Minneapolis 2016)

<sup>14</sup> Jonathan Zittrain, ‘Apple’s Emoji Gun Control’ (*The New York Times*, 16 Aug 2016)

<<https://www.nytimes.com/2016/08/16/opinion/get-out-of-gun-control-apple.html>> accessed 14 July 2023

**Astonished Face:** Its interpretation is different at Google, Facebook Messenger, and Samsung. As for Google users, it's unlikely to interpret it as astonished and a Facebook Messenger user can think of it as a threat because it has Xs-as-eyes.<sup>15</sup>

Each emoji is defined by Unicode, which briefly describes it and suggests an outline image. Also, its interpretation differs with the change in the platform. Platforms generally present the emoji in their own way because of the intellectual property rights and branding therefore, the difference due to the change in the platform might be minor but it completely changes its implementation. In addition to this, the platform regulates its emoji keeping in mind the preferences of its users or preventing unjust use of it, like Apple changed the firearm pistol to green water pistol in 2016.<sup>16</sup>

## CASE LAWS

**Dahan v Shacharoff:**<sup>17</sup> In this case, a suit was filed against a couple in 2017, who showed great enthusiasm by sending a text containing the following emojis (smiley, a dancing woman, a couple dancing, a bottle of champagne, a comet) to the landlord for renting the apartment. Although the message texted by the defendant didn't bind the parties to the contract relying on the message of the defendant, the plaintiff removed the ad from the website and started negotiating. Also, at the end of the negotiation, the defendant again texted Smiley emojis and those smileys deceived the plaintiff because he believed that until now the defendants were interested in renting his apartment. Ultimately, the defendants stopped communicating with the landlord. The Israeli court ruled that during the negotiation 'the defendants acted in bad faith' because the symbols used by them conveyed great optimism and hence, awarded damages of \$2,200 to the landlord.

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<sup>15</sup> Eric Goldman, (n 7)

<sup>16</sup> Edwina Oliver, 'Emojis in law: Making a mess of messaging' (*Lawyers Weekly*, 19 April 2018) <<https://www.lawyersweekly.com.au/wig-chamber/23089-emojis-in-law-making-a-mess-of-messaging>> accessed 15 July 2023

<sup>17</sup> *Dahan v Shacharoff* [2017] File No 30823-08-16

**Lightstone RE LLC v Zinntex LLC:**<sup>18</sup> In this case, the plaintiff was seeking summary judgment but this demand was rejected by the court because the material facts of the case were in dispute. The plaintiff argued that the thumbs-up emoji texted by the defendant constituted a valid signature on the contract but the defendant stated that earlier he made it clear to the plaintiff that any document about this deal would not be signed by him. Also, the previous messages between the parties didn't make it clear that there was a meeting of the minds.

## FACTS OF THE CASE

The South West Terminal Ltd. (plaintiff) and Achter Land & Cattle Ltd. (defendant) had a long business relationship since 2012. Kent Michleborough is a representative of SWT while Chris Achter is of Achter's and by the way of the Deferred Delivery Contract, SWT has brought grain from Achter numerous times since 2012.

Mr. Mickleborough texted producers i.e. Bob Achter and Chris Achter on March 26, 2021, at 1:01 PM, a text message in which he stated the flax price and the delivery date. After sending the message the plaintiff received a call from Bob Achter then Mr. Mickleborough called Chris Achter and following the phone call plaintiff drafted a contract for Achter to sell 87 metric tonnes of flax to South West Terminal for \$ 17 per bushel and also listed the delivery period between 01 November 2021 to 30 November 2021. Then, the plaintiff applied his signature to the contract and then he sent the photo of the contract to the defendant i.e. Chris Achter, and along with this Mr. Mickleborough texted to Achter 'Please Confirm Flax Contract'.

Chris Achter replied to this text message with a 'Thumbs-up' emoji and the plaintiff interpreted it as the confirmation of the contract. As per the delivery period listed in the contract Achter failed to deliver 87 metric tonnes of flax SWT on time. The Market price of the flax increased on 30<sup>th</sup> November 2021 and it was \$41 per bushel. Ultimately, SWT sued Achter for the breach of contract and demanded \$82,200.21 as damages.

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<sup>18</sup> *Lightstone Re LLC v Zinntex LLC* [2022] NY Slip Op 32931

## **LEGAL ISSUES INVOLVED**

1. Whether a 'Thumbs up' emoji is equivalent to a signature on a contract.
2. Whether there was a consensus ad idem.
3. Whether the requirement under section 6 of the Sales of Goods Act was fulfilled.
4. Whether the general 'terms & conditions' of the contract were certain.

## **ARGUMENTS ADVANCED FROM THE PLAINTIFF'S SIDE**

Mr. Kent contended that he had executed around 15-20 contracts with the Achter while he was the representative of SWT and they just had a conversation regarding the price and volume of grain for that either they meet in person or talk over the phone, then Chris would ask him to send the contract. However, since March 2020, the sales team of the SWT stopped meeting the producers in person due to the COVID-19 pandemic. Instead, they usually started doing the contract via email or text message and during that period, SWT and Achter had executed four contracts via text message. The first one was carried out on July 14, 2020, when Mr. Kent sent the photo of the contract to Chris, he texted back "Looks good" and the contract was concluded between them. Similarly, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> contract was completed after Chris Achter texted back to Mr. Mickle borough: "Ok", "Yup" and here curt words show the confirmation of the contract by Chris. Accordingly, on March 26, 2021, the plaintiff sent the photo of the contract to the defendant with the title in the bold letter 'Deferred Delivery Contract' and he also texted to him, 'Please confirm flax contract' to which Chris texted back with a Thumbs-Up emoji and considering his way of giving assent to the contract, Mr. Mickleborough understood that Chris was affirming with the contract and the essential terms of the flax contract mentioned on the first page of the contract.

## **ARGUMENT FROM THE DEFENDANT'S SIDE**

Chris Achter argued that in the last few years, he had entered into numerous contracts with the plaintiff to sell grain because he knew that he would deliver the grain on the stipulated time as grains had been harvested or would be ready till the delivery period. He contended that in the past he never emphasized the Act of God clause because the grain was already

harvested and there was no requirement of the written agreements because once the price and the volume of the grain had been confirmed then he would deliver it within the next few weeks. But he always insisted on the Act of God clause in the contract where the grain still needed time to be produced because there may be any circumstance out of his control due to which the grain could not be produced. Also, he argued that he was expecting the Flax Contract to be a production contract with a clause of the Act of God, which would protect him if the crop got damaged and subsequently, he failed to deliver it. He further contended that the Thumbs Up emoji texted by him was merely a confirmation that he had received the contract not that he had also accepted the terms and conditions of the Flax Contract and Chris was hoping that he would receive a complete contract containing full terms and condition via email or fax. So, that he could go through and sign it and he had no intention to enter into the flax contract without the Act of God clause. According, to the defendant ‘An actual signature is essential because it confirms the identity of a person and also conveys a message i.e. the acceptance of the contract’. Achter also relied on section 6(1)<sup>19</sup> contending that any contract is not enforceable because there was no note or memorandum of the contract made or signed by the parties. Further, he argued that the Flax Contract is void due to uncertainty of the terms because Kent did not send him the back side of the contract where the General Terms and Conditions were mentioned. Achter’s Counsel raised a concern that ‘allowing a Thumbs Up emoji to denote the acceptance and identity may open up the flood gates seeking the interpretation of all kinds of emojis’.

## **COURT’S EVALUATION AND FINDINGS**

In the case of *South West Terminal Ltd. v Achter Land & Cattle Ltd*<sup>20</sup>, the court stated that the way acceptance was conveyed in this case was quite abnormal. So, now the court had to decide whether there was a valid contract between the parties or not. In this case, the court found that there is no genuine issue that requires a trial so the court will resolve the dispute by way of a ‘Summary Judgment Process’.

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<sup>19</sup> Sale of Goods Act 1978, s 6(1)

<sup>20</sup> *South West Terminal Ltd. v Achter Land & Cattle Ltd* [2023] SKKB 116

By citing the case of *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*<sup>21</sup>, Keene J. opined that ‘A contract is formed when the offer is accepted by one of the parties to the contract to create a legal relationship accompanied by consideration’. To examine whether there was a valid contract between the parties or not it has to determine ‘whether the conduct of parties was such that a reasonable person would conclude that they had the intention to be bound by the terms and condition of the contract’. Both SWT and Achter Ltd. had a long-term business relationship and each time Mr. Mickleborough texted a message i.e. “Please confirm terms of durum contract” Chris always texted back with words like “looks good”, “ok” or “Yup” and here curt words were understood as the confirmation by both the parties to a contract instead of the mere acceptance of contract’s receipt by Chris. In this case, Chris texted back with thumbs up emoji which Kent understood from the previous experience as the confirmation of the terms of the contract but as per Chris it was mere confirmation of the contract receipt When Chris was cross-examined about the use of thumbs up emoji he stated according to him meaning of thumbs up emoji was the confirmation of the receipt not the acceptance of Flax Contract. However, the court stated that it is not about how Chris interpreted thumbs up emoji it’s about how a reasonable person would interpret it. The dictionary meaning of using thumbs-up emoji is to give assent and approval. So, Keene J. opined that after examining previous contracts here Chris used a thumbs-up emoji to approve the Flax Contract. In addition to this under Section 18,<sup>22</sup> the Thumbs Up emoji is ‘an action in electronic form’ and relying on the case *Quilichini v Wilson’s Greenhouse & Garden Centre Ltd. And Velocity Raceway Ltd.*,<sup>23</sup> the court stated that Section 18<sup>24</sup> doesn’t prevent the use of emoji as a way to give assent to a contract. The court here agrees that this case is rare but they cannot set it aside because of the new emerging technology and its common use also stated that ‘This appears to be the new reality in Canadian society and courts will have to be ready to meet the new challenges that may arise from the use of emoji’. Also, the essential term of the Flax Contract was already mentioned on the first page of the contract that Chris received so he cannot claim that the terms of the contract were uncertain because the price, volume and the parties were

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<sup>21</sup> *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga* [2021] SCC 22

<sup>22</sup> Electronic Information and Documents Act 2000, s 18

<sup>23</sup> *Quilichini v Wilson’s Greenhouse & Garden Centre Ltd. and Velocity Raceway Ltd* [2017] SKQB 10

<sup>24</sup> Electronic Information and Documents Act 2000, s 18



evident. Hence, the Flax Contract was not void because of uncertainty. The court also acknowledges that there is no doubt that the use of thumbs-up emoji to signify a signature is a 'non-traditional way' but the same is valid under the present circumstance because it conveys the two purposes of a 'signature' i.e. the identity of a person (Chris) and the message he wants to convey through it that is the acceptance of the contract.

## DECISION

The court ruled that there was a valid contract between SWT and Achter Ltd. and the defendant is liable to pay the damages of \$ 82,200.21 to the plaintiff because he failed to deliver the flax on the stipulated time.

## CONCLUSION

*"A remarkable sign of the new world of communication when an emoji can work to snap the trap of creating a contract."<sup>25</sup>*

Emoji is a way to convey emotions, jokes, etc. that are not possible with text. As the technology is evolving, our judicial system requires time to interpret the emoji effectively as their interpretation changes with the change in the platform, and due to this discrepancies arise between the parties as both of them interpret it differently. Therefore, while using or texting emoji one should be extra careful because it can have legal consequences. There are various cases where emojis were used as evidence be it the Silk Road Case where the court ruled that the text which is submitted to the fact finder should have emojis or Israeli contract case or the Bercow defamation case and even in some of the cases people were charged due to the use of emojis like gun, bomb, knife etc. in the text as it served the purpose of criminal threat. A precedent has been set by the recent case for the disputes that will arise in the future about emojis and also signify the importance of emojis in legal issues. The decision of the court, caveat the individuals to use emojis vigilantly while communicating with someone, as in the recent case use of Thumbs-Up emoji costs \$ 82,000 to the defendant. Also, digital technology is continuously evolving so, it is evident that the court will face similar issues in the future which

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<sup>25</sup> Levenson (n 2)

revolve around the interpretation of emojis in legal matters. As per legal experts, although the recent decision by the Canadian Court doesn't sort out the interpretation of the Thumbs-Up emoji but indeed serves as a reminder that its use can have grave legal consequences.