

## Thumbs up or thumbs down for the use of emojis in contract formation

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Emojis have come a long way. What started as a fun way to informally communicate stuff in the smartphone era have become tools employed in the business world as well. Like anything that starts being used in one way but is then picked up for other uses there are risks arising from this transition. This is particularly so in relation to commercial contract formation, where emojis can have unintended consequences.

### Can a contract be formed / accepted by use of an emoji?

The simple answer to this question is – yes! A more nuanced answer requires a brief review of the history of the emoji.

### The history of the emoji

Emojis were first created in 1999 by a Japanese artist employed to create a new way to quickly impart information in the digital age. They rapidly gained popularity in Japan and by 2007 were being developed and promoted by Apple, Google and other big players. By 2010 they were standardised by Unicode and hundreds of new emojis added to the lexicon. Since then the number of emojis has continued to expand, with new ones added to, for example, address issues being raised in society such as race, gender and culture.

Fast forward to today and emojis are on their way to being a new lingua franca, a way that the world can communicate without traditional text. Essentially a new visual language that allows simple concepts to be



imparted without the need for words and allows emotional subtext to be added to a written message.

## Emojis in the business world

Emojis were slower to find their way into the business world. My personal experience is that their predecessor – the emoticon – made an appearance in internal communications in the 2000's. You could for example express sarcasm by adding ; -) at the end of a message. When I typed this combination into a Word document whilst writing this article Word automatically converted this combination into the emoji 🙄. I even had my own version of this emoticon ?;-) with the question mark referencing my hairstyle. This required a knowledge of me and my humour and sometimes caused confusion in recipients. This is the problem with emoticons, and now emojis, they can mean different things to different people. Whilst this might be embarrassing in a social context, it can be more serious in a business context.

The infiltration of emojis into the business world is more recent, but suddenly they became commonplace. One reason that emojis found it harder to break into the business world was that this world was wedded to email as the main form of communication and that format did not offer easy access to emojis. However, the standardisation of emojis and increased availability of them on any keyboard or channel meant that they started to appear in all forms of communication. Even stuffy lawyers now communicate internally using them and in communications with clients who have adopted them. Not only that, but complex contractual negotiations are now happening on WhatsApp and other communications channels where emojis are baked in.

I suspect that many lawyers, particularly those of my generation, would never envisage using an emoji in a formal context, but the same cannot be said in the business world more generally. New generations have grown up with emojis as part of their language and feel entirely comfortable using them in a formal business context. This use of a new language carries risks though and to understand this risk you first need to understand a bit about contract law.

## Creating a contract

A contract requires various things to be valid, which lawyers recite as offer, acceptance, consideration, intention to create contractual relations and certainty of terms.

It does not require a formal written agreement to be in place if these requirements are satisfied, so a binding contract can be created by, for example, an exchange of emails.

One of the key requirements is "acceptance" and this was traditionally indicated by the signature of what amounted to the offer. Once upon a time this was an ink signature on a piece of paper, but the courts have long recognised the validity of electronic signatures.

The courts have reached the stage where an "x", typed initials or an automatically generated email signature have all been accepted as valid signatures in particular contexts. What about emojis?

## The risk of using emojis

A Canadian case from 2023 was the first widely reported case on the use of an emoji to form a contract. The party in question habitually used the thumbs up emoji to signify agreement. However, the effect of the use of this emoji in relation to a particular contract that was claimed to have been accepted by email was challenged. The analysis by the court accepted that there were different interpretations of what this emoji could mean. This could range from the simple acknowledgement of the email in question all the way up to a confirmation that all the terms were accepted.

In this case it was held that because of the way that the person had used the emoji previously, including in relation to agreeing contractual matters, it amounted to an acceptance of the contractual terms and hence a binding contract was formed.

Since then the English courts have also grappled with the issue, in particular in relation to the creation of contracts via WhatsApp messages. It is clear from these cases that if the other contractual elements are present then the use of the thumbs up emoji is perfectly capable of being not just an electronic signature but a positive affirmation as to agreement of the contractual terms.

However, what is clear is that context is everything. Emojis mean different things to different people. What if somebody sends a smiley face emoji? Does this indicate acceptance? Or does a sad face indicate non-acceptance?

The risk is that one party thinks it means one thing whilst the other something else. That is a recipe for a commercial dispute.

## Summary

Emojis are effectively a new language and open to different interpretations. This is easily illustrated by the meaning that has been applied in certain contexts to the humble aubergine emoji.

This means that their use in a formal context is fraught with risk. On that basis the legal recommendation is to avoid the use of emojis in any context where certainty of meaning is required.

Commercial disputes lawyers are likely to see the consequences of not following this advice in two scenarios:

- First, where somebody has accidentally created a contract by the use of an emoji, or
- Second, where somebody has decided after the event that they did not want to enter the contract and want to challenge that there was in fact an acceptance of the terms.

## How we can help

If you think you have accidentally created a contract or unsure whether one has come into force then we can look at the wider legal context and advise you where you stand. Contact our [commercial disputes team](#).



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