

THE USE OF EMOJIS IN BUSINESS COMMUNICATIONS: EXPLORING EMOJIS & ACCEPTANCE IN CONTRACTS

In modern-day communication, the evolution of communication platforms like WhatsApp, WeChat and Telegram has heralded a new era. These platforms have transcended traditional text-based interaction, integrating graphical elements, which now play a pivotal role in conveying thoughts, emotions and information.

Gone are the days when short message service ("**SMS**") was the primary mode of text-based interaction. The emergence of these messenger applications has introduced a new era of communication, redefining our conversations beyond mere words to include an array of graphical elements such as graphics interchange format ("**GIFs**") and emojis.

In this digital age, emojis have evolved to be more than just embellishments, they now serve as potent tools for conveying information, emotion and in some instances, even contractual intent. This evolution has redefined not only our daily communications, but it has also transformed the way businesses operate. What was once confined to emails and formal meetings has now transitioned into real-time, agile conversations where parties can efficiently exchange ideas, address issues and make contemporaneous informed decisions. This shift in our communication style nowadays beckons us to explore the landscape of communication where words are interwoven with images, transforming our dialogue into dynamic exchanges.

The Case of South West Terminal Ltd v Achter Land & Cattle Ltd

In the landmark Canadian case of ***South West Terminal Ltd v Achter Land & Cattle Ltd***^[1], the Court's interpretation of a "thumbs-up" emoji as a valid acceptance in a contract highlighted the emerging legal relevance of emojis. Before looking into the facts, it is noteworthy that Canadian case law is not binding in the Malaysian legal context but merely persuasive.

In this case, the Plaintiff, South West Terminal Ltd ("**SWT**") claimed to have entered into a deferred delivery contract for flax with Achter Land & Cattle Ltd ("**ALT**") on 26th March 2021. SWT agreed to buy and ALT agreed to deliver the flax in November. However, ALT disputed the validity and enforceability of the contract, citing the absence of a written or signed note or memorandum of contract. Up to this stage, the facts of the case portray an ordinary contract dispute about its validity and enforceability.

However, the crux of this case lies in the fact that the contract discussions and agreement were conducted via WhatsApp messages and images. After a phone conversation with ALT's representative, SWT drafted a contract for ALT for the sale of 86 metric tonnes of flax for November.

SWT's representative applied his ink signature to the contract, took a screenshot of the same and sent it to ALT's representative along with the text message "*Please confirm flax contract*". This was replied to by ALT's representative with a thumbs-up emoji. Within the array of issues dealt with by the Court, the meaning of the thumbs-up emoji used was discussed to determine whether ALT accepted the contract. In concluding, the Court's consideration included the fact that the parties entered into numerous transactions of a similar nature (contracts for the delivery of durum, previously) approximately since the year 2012.

The only distinguishing element on this occasion was that ALT replied to SWT's message with a thumbs-up emoji. As such, the Court was of the view that "*a reasonable bystander knowing all of the background would come to the objective understanding that the parties had reached consensus ad item*"[2]

Further on, the Court examined whether a thumbs-up could be allowed to express acceptance under the **Canadian Electronic Information and Documents Act 2000**. Justice Timothy Keene expressed the view that a signature in the classic presentation "*does not prevent the use of a modern day emoji*"[3] when concerning the element of denoting identity and confirmation of agreement of the parties.

Acceptance of WhatsApp Messages in Malaysia

The Federal Court case of ***Yam Kong Seng & Anor v Yee Weng Kai***[4], established a critical legal standpoint in Malaysia - SMS, the "predecessor" of WhatsApp messages, has been recognised as admissible evidence in courts. This position was further reinforced in the case of ***Mok Yii Chek v Sovo Sdn Bhd & Ors***[5], where it was affirmed that printouts of WhatsApp messages fall within the meaning of "document" for purposes of the Evidence Act 1950.

Additionally, in the case of **Shen Yong Engineering Works Sdn Bhd v Damai Residence Sdn Bhd & Ors**[6], the High Court has noted that "*WhatsApp messages constitute contemporaneous and reliable evidence ...*" where the Defendant had been held to have acknowledged and admitted its indebtedness through the WhatsApp messages exchanged between the parties. Specifically in terms of a contract, the case of **Shamsudin bin Mohd Yusof v Suhaila binti Sulaiman**[7] concluded that an agreement was made between the parties even where part of it was executed in the form of writing partly through WhatsApp messages and part orally.

Deriving from the above, it is clear that the Malaysian courts have recognised the admissibility of WhatsApp messages as evidence, including their contents which could constitute the acknowledgement of an agreement by a natural person. This recognition extends to the nuances of digital communication, potentially including emojis, signifying their growing legal significance.

Emojis, Electronic Messages and Electronic Signatures in Malaysia

The essential elements of a contract include offer, acceptance, consideration, intention to create legal relations, and certainty. In the context of contracts, an offer denotes an expression of willingness to enter into an agreement on specified terms whereas acceptance indicates the willingness to be bound by the terms and conditions outlined in that offer. Each element plays a crucial role in forming a legally binding agreement.

Under the Malaysian **Electronic Commerce Act 2006 ("Act")**, there is explicit recognition of contracts formed and expressed through electronic messages.[8] This includes "*the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication*". Given this framework, an emoji, when used as part of an electronic message, could potentially constitute a form of acceptance, contributing to the formation of a valid and enforceable contract as mentioned in the Act.

Further, the possibility of contracting through WhatsApp messages, leads to an intriguing legal question - Can emojis be considered as electronic signatures in the Malaysian context?

Section 9 of the Act provides the framework for electronic signatures. According to this section, a legally recognised electronic signature must be (i) attached to or logically associated with the electronic message; (ii) adequately identify the person; (iii) express their approval of the related information; and (iv) be reliable based on the purpose and circumstances.[9] The reliability of such a signature relies on it being under the sole control of the person where any alterations are detectable.[10]

An electronic signature is broadly defined under **Section 5 of the Act** as "*any letter,*

character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature". Considering this definition, it seems that as long as the emoji (being a symbol created in an electronic form) fulfils the requirements under Section 9, it may constitute a legally recognised electronic signature. Thus, it leaves room for legally recognising emojis as a form of acceptance in contractual arrangements.

Challenges in the Recognition of the Use of Emojis in the Legal Context

Having considered the potential for legally recognising the use of emojis, it is crucial to address the challenges that this pursuit may face. Majority of reported Malaysian cases involving emojis have centred around defamation. This prevalence might be so as emojis are often used to convey personal thoughts. The incorporation of emojis in legal contexts brings forth challenges, primarily due to their inherent ambiguity. Emojis are often interpreted diversely and subjectively as they lack a universally standardised interpretation. This ambiguity is further influenced by context and even cultural differences between users. For example, the "smiling face with tears" emoji could indicate embarrassment or, conversely, tears of joy depending on the context. Further, variations in emojis appearance across different devices add another layer of complexity.

In the case of **SWT v ALT**, the Court's acceptance of a thumbs-up emoji as contractual agreement raises questions about the future of emoji interpretation in legal scenarios. This decision could potentially lead to an influx of cases seeking clarification on the meanings of various emojis. Consequently, there is a growing concern about whether emojis can effectively and accurately convey the thoughts and intentions of the parties, given the ambiguities and the potential for diverse interpretations.

Conclusion

In conclusion, as highlighted by Justice Timothy, the legal industry must adapt to the burgeoning role of technology in communication. The "*Court cannot (nor should it) attempt to stem the tide of technology and common usage - 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 ...*" he noted.[11]

The digitalization surge, particularly post-COVID, underscores the imperative for the Malaysian legal framework to address the intricacies of electronic communication, including emojis. While addressing the evolution of technology, the nature and inherent ambiguity that accompanies it should not be overlooked. This is pivotal for ensuring a robust and adaptive legal framework is established in Malaysia.

1. 2023 SKKB 116.
2. South West Terminal Lid v Achter Land & Cattle Ltd 2023 SKKB 116, at [36].
3. Ibid. at [39].
4. (2014) 4 MLJ 478.
5. (2015) MLJU 2374.
6. (2023) MLJU 104.
7. (2017) MLJU 2236.
8. Section 7 of the Electronic Commerce Act 2006.
9. Section 9(1J) of the Electronic Commerce Act 2006.
10. Section 9(21) of the Electronic Commerce Act 2006.
11. South West Terminal Lid v Achier Land & Cattle Ltd 2023 SKKB 116, at (40).

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