

# EMBRACING DIGITAL GESTURES: A REVIEW OF CANADA'S LANDMARK DECISION ON THE USE OF "THUMBS UP EMOJI 👍 AS A MODE OF ACCEPTANCE FOR A LEGALLY BINDING CONTRACT

## ARTICLE

## INTRODUCTION

In today's ever-evolving digital landscape, technology has not only transformed our communication and interaction but has also significantly impacted the fundamental aspects of legal agreements and what constitutes a binding contract. The importance of technology in commercial transactions and contract formation has revolutionized the traditional methods of negotiation, offer, consideration, and acceptance. With this era of technological innovation, the trending utilization of digital gestures as a means of contract acceptance has taken center stage as an emerging trend.

As virtual transactions, remote collaborations, and electronic devices define this era, the legal community continues to navigate uncharted territories in formalizing agreements. There has also been a rapid growth of businesses and commercial transactions from individuals and corporations using digital platforms. Consequently, we have started to witness non-conventional means of signing off on contracts as opposed to a paper-based contract-signing process. This shift, without a doubt, enhances efficiency and expediency, but not without its unique challenges which now call for legal adaptation and interpretation.

One notable development of this technological era is the growing prominence of digital gestures in contract formation. Traditionally, the binding nature of a contract, amongst other things was characterized by the signature of the contracting parties on a physical document. However, with the advent of digital gestures – encompassing actions and conducts such as clicking "**I agree**," "**yup**", tapping an icon, or even a virtual "**thumbs-up**" – appears to be sufficient modes of signing off on a contract.

In some jurisdictions, courts have upheld click-wrap contracts, where a customer clicks an '**I agree**' button to indicate acceptance. Another type of agreement is the "browse-wrap" agreement, where customers are prompted to scroll through terms and conditions located on a website, without needing to explicitly indicate acceptance. These terms and conditions in browse-wrap agreements have gained little support from courts because of the challenge of determining if the customer actually read them. Nevertheless,

if a website is consistently used, especially by a business customer, it's more likely to signify acceptance of the browse-wrap terms and conditions.

This emerging trend raises new questions regarding the validity and enforceability of gestures as a form of acceptance in an agreement. The Courts and legal scholars are saddled with the responsibility of determining the authenticity or otherwise of these digital expressions and their equivalence to traditional signatures.

## **BRIEF FACTS OF SOUTHWEST TERMINAL LTD. V ACHTER LAND & CATTLE LTD**

This intersection of technology and contract law came to the fore in the recent Canadian case of **Southwest Terminal Ltd. v Achter Land & Cattle Ltd 2023 SKKB 116 (CanLII)**. In this case, Southwest Terminal Limited ("SWT"), a grain and crop inputs company based in Saskatchewan Canada had engaged in the sale and purchasing of grains from Achter (Achter Land & Cattle Ltd (ALC), a farming corporation owned and operated by Chris Achter) through deferred grain contracts since 2012.

On March 26, 2021, a representative of SWT, Mr. Mickleborough sent a text message to producers, including Bob Achter and Chris Achter of ALC, regarding flax prices. The message stated a price of \$22.50/bushel for certain conditions, with specified delivery periods. After receiving the text, Mr. Mickleborough spoke with Bob Achter via phone call and concluded a contract for the sale of 86 metric tonnes of flax to SWT at \$17.00 per bushel. The representative of SWT signed the contract, took a photograph of it with his cell phone, and forwarded the same to Chris Achter along with a request to confirm the contract, to which Mr. Chris Achter responded with a "**thumbs-up**" emoji.

Achter failed to deliver the agreed 87 metric tonnes of flax to SWT within the specified delivery period. Consequently, SWT sued for breach of contract and damages of \$82,200.21 together with interest and costs. Achter on the other hand, denied ever entering a contract with SWT.

The question to be determined by the court among other things, was whether a valid contract was formed between SWT and Achter to deliver 87 tonnes of flax for a price of \$669.21 per tonne.

## **THE DECISION OF THE COURT**

The Court considered amongst other things, whether there was a consensus to form a valid contract between the parties as well as the certainty of terms of the contract. The Court found in favour of a valid contract between the parties which ALC breached and granted the application for summary judgment in favour of STW.

## THE RATIONALE FOR THE DECISION

### *a. Consensus to form a valid contract between SWT and ALC*

In deciding whether there was a consensus ad idem to form a valid contract, the Court noted that the test to be applied to the validity of the extant contract is the conduct of parties in the eyes of a reasonable man. The court stated as follows:

“The test for agreement to a contract for legal purposes is whether the parties have **indicated to the outside world**, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The question is not what the parties had in mind, but rather whether their **conduct was such that a reasonable person would conclude that they had intended to be bound**”.

### *Emphasis added*

From the facts and circumstances of this case, the Court was of the considered view that a reasonable bystander would conclude objectively and irresistibly that the parties had reached a consensus ad idem - a meeting of the mind.

The Court deduced from the affidavit evidence and the nature of an uncontested pattern of contract formation between the parties. In Mr. Mickleborough’s affidavit, he had stated that he had conducted business with Mr. Achter in a similar manner as he had done on the 21st March by discussing on the phone and sending the contract to Mr. Achter to confirm, to which Mr. Achter would either answer yes, ok or looks good at least fifteen times. The Court used this to deduce that there was an uncontested pattern of contract formation between the parties. The Court also disagreed with ALC’s argument that the emoji was merely an acknowledgment of the contract and not an acceptance of it and that an actual signature is essential because it confirms the person’s identity and conveys a message of acceptance.

This conduct was clear from other prior engagements where they had confirmed the terms of the contract through gestures such as “**looks good**”, “**ok**”, or “**yup**”. On this basis, the Court ruled that STW and ALC had intentions to create a legally binding contract vide their conduct. The texting of a contract and seeking approval was consistent with the previous conduct.

By this holding, the Court contextualized the thumbs-up emoji as a term that is used to express assent, approval, or encouragement in digital communications, especially in Western cultures. The Court noted that “it is an action in electronic form” that can be used to express acceptance as contemplated under the **Electronic Information and Documents Acts (EID), 2000**.

Contrary to the defense by ACL, the Court ruled that a contract is not only created by actual signatures and that the signature requirement was met by the thumbs-up👍emoji originating from the ACL.

Apart from the express intention of the parties to create a binding contract and their conduct, the Canadian Court heavily relied on section 18 of the EID Act to arrive at the decision. Section 18 of the EID Act, among other things, provides that an offer or acceptance of a contract may be by an action in an electronic form, including touching or clicking on an appropriately designated icon placed on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

### ***b. Certainly of terms of contract***

ALC contended at the trial that the contract was void for uncertainty of terms on two grounds: First, that the contract did not contain the general terms and conditions, and secondly, that the delivery period was stated as “Nov” and therefore vague.

The court refused this argument and posited that the absence of the terms and conditions boilerplate does not invalidate the contract, as the essential parts were contained on the first page of the contract document. The court ruled that there were no missing links or unascertainable essential terms in the contract as the parties were crystal clear.

On whether the term “Nov”. was vague and uncertain, the court noted that from the previous dealings, parties knew or ought to know that “Nov” meant November and to this extent, the contract was not void.

## **THE IMPACT OF THE DECISION ON E-COMMERCE AND TECHNOLOGY LITIGATION**

This decision underscores the significance of technology in the form of digital gestures, symbols, and emojis as an approved style of modern communication to seal contractual agreements. The decision has also opened issues of different interpretations and meanings of emojis and other gestures when used in a contract. Therefore, the definition sections of a contract should be all-encompassing to envisage such situations.

The recognition of digital gestures as a mode of acceptance in contracts is remarkable and reflects the evolving nature of electronic communication in the digital age, which will invariably shape the interaction between individuals and corporates (users, customers, and partners).

The decision will lead to a more seamless reliance on digital platforms, applications, and online services as users can now enter into contractual relationships and agreements without the usual traditional extensive paperwork or physical signatures.

While this novel decision presents opportunities for efficiency and convenience in e-commerce, recognizing digital gestures as a valid means of contract acceptance brings with it several potential disadvantages.

For instance, there may be a dispute over the authenticity or intent of a gesture, and to determine this, the courts may need to consider the prior conduct of parties (if any) or in the alternative, rely on other available pieces of evidence and testimonies, to ascertain the intention of parties and validity of the contract. This could set the stage for the development of rules and standards for presenting and evaluating such evidence.

With the acceptance of contracts through digital gestures, issues relating to authentication, data privacy, and security could become prevalent and Courts may require evidential proof to resolve the knotty issues as to whether the digital gesture was made by the actual party intending to accept the contract.

With these possible downsides, it becomes imperative to ensure the reliability and genuineness of contract formation processes on digital platforms through a combination of legal and technological measures to enhance user acknowledgement and confirmation of intent as a way of protecting the interests of both parties. Contracts presented on digital platforms should include explicit language indicating that specific digital gestures such as animations, color changes, or other visual cues that indicate successful acceptance constitute acceptance or other meanings as may be mutually agreed. This minimizes the uncertainties that may arise and reinforces the user's understanding of their actions.

The development of a minimum standard for the recognition of digital gestures across jurisdictions could also address issues of authentication, user comprehension, and data security.

The recognition of digital gestures in the law of contract is likely to lead to various developments in technology litigation. These developments are intertwined with the increasing reliance on technology in contract formation and the potential for disputes arising from such interactions.

## **CONCLUSION**

As technology evolves, the intersection of law and digital interactions will continue to shape how contracts are formed, understood by parties, and interpreted by courts. The ongoing development of case law, regulations, and the ensuing disputes from such contracts will play a crucial role in determining the future landscape of technology litigation across jurisdictions.

This decision brings to the fore the novelty in the world of technology and legal system. This was alluded to when the Court admitted thus:

*"...The case is novel but it cannot attempt to stem the tide of technology and common usage and that courts will be ready to accept this new reality and be ready to meet the challenges that may arise from the use of emojis".*

As laudable as this landmark decision may appear, it is our view that the judgment only has a persuasive effect in Nigeria unless our laws are amended to give the legal backing for the use of gestures and other nonverbal communication in our jurisdiction.

This is a call for action for the legislature to amend the Sale of Goods Act, to incorporate the use of gestures as one of the acceptable means of concluding a legally binding and enforceable contract in Nigeria.

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