

TYPES NOT MAPPED YET November 25, 2024 | TTR not mapped yet | Matthew I. Hafter

## Beware the Emoji



Caution!

Do you like using emojis for efficient communications (and because they're fun)? Be careful that your thumbs up doesn't result in you being bound to an enforceable contract.

Emojis were introduced into the modern lexicon in 1999 as a pictorial expression of words, to facilitate efficient communications where the author was limited in the number of characters their message could contain. Emojis can convey a legal requirement, much like a traffic sign or an Egyptian hieroglyph. In fact, the word "hieroglyph" derives from the Greek "the sacred engraved letters." Although possibly not "sacred," emoji's used in commercial activities should be regarded with appreciation for their legal consequences.

The legal analysis of emojis in contract formation is fairly straightforward. One of the essential features of a legally binding contract is the existence of a promise. A promise is an expression by one party of its intent to do (or not do) an act, made in a way that would justify another party understanding that a commitment has been made.

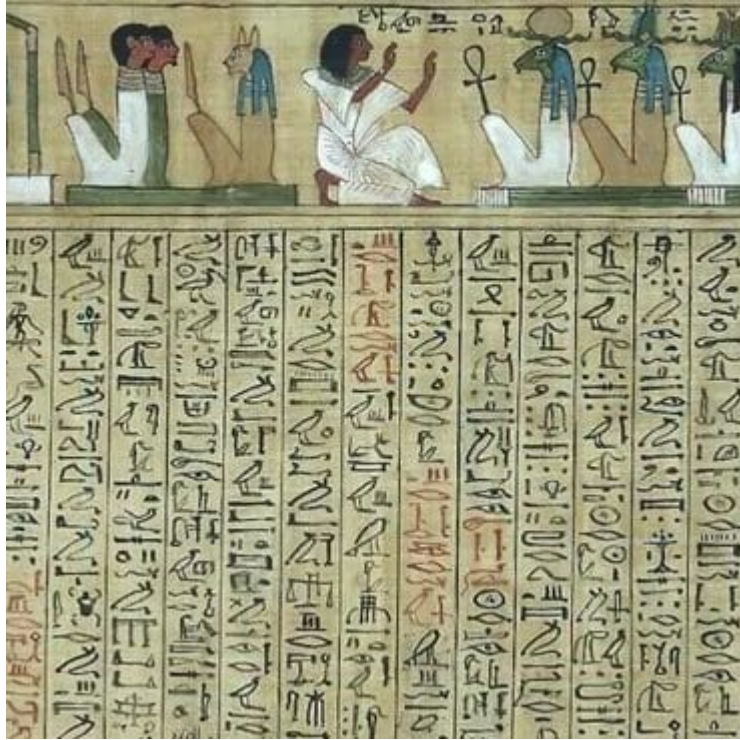
"A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."<sup>[1]</sup> An illustration provided by the authoritative sources is that Adam - on passing a market where he has an account - sees a box of apples marked "25 cts. each." Adam picks up an apple, holds it up so that a clerk of the market sees the act. The clerk nods, and Adam passes on with the apple. By doing so, Adam has promised to pay twenty-five cents for the apple.

In a 2023 opinion from Canada,<sup>[2]</sup> the court held that a thumbs up emoji ("👍") was sufficient for a reasonable person to conclude that, under the circumstances, the party sending the emoji intended to enter into a binding contract rather than (as the defendant contended) simply to acknowledge receipt of the contract terms. The parties in that case often entered into contracts by means of text message, with one party asking the other to "confirm terms of ... contract" and the other party doing so by succinctly texting "looks good", "ok" or "yup". This time, the other party replied with "👍", leading the court to conclude that parties understood that these curt responses were meant to be confirmation of the contract and not a mere acknowledgement of the receipt of the contract.<sup>[3]</sup>

Digital communication will continue to evolve with new uses and new users, but certain timeless principles of contract formation endure. Prohibiting employees from using emojis is not realistic, but here are some thought-starters to address the challenge:

- Inform personnel about the basics of contract formation.
- Sensitize personnel to the kinds of words and symbols, and courses of dealing, that can lead to contract formation.
- Raise awareness among personnel on how to avoid inadvertent contract formation (e.g., "we don't enter into contracts by exchanging emails; legal obligations will arise only if the parties execute mutually agreeable written agreements").
- Adopt internal processes about when to involve legal or executive oversight before certain types of contracts (e.g., non-disclosure agreements, intellectual property licenses, transactions involving more than \$10,000, etc.) can be accepted.

It's increasingly important to raise awareness in your team of the possible consequences of emojis and other informal wording in the context of contract discussions.



*Hunefer's Judgement in the presence of Osiris, Book of the Dead of Hunefer, 19th Dynasty, New Kingdom, c. 1275 B.C.E., papyrus, Thebes, Egypt (British Museum)*

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[1] See Restatement (Second) Contracts §4, including Illustration 2 to §4.

[2] *South West Terminal Ltd v. Achter Land*, 2023 SKKB 116(CanLil), at [1] accessible at [<https://perma.cc/ETE7-US26>].

[3] See, also, *Sewell v. Daniel*, No. 1:19-CV-5790-TCB, 2020 WL 1800935, at \*2 (N.D. Ga. Mar. 4, 2020) (issue of material fact existed regarding breach of contract where “[seller] inquired [via text] whether [buyer] was prepared to purchase; [buyer] responded affirmatively; [seller] replied with a thumbs’ up emoji; and [seller] then requested a purchase contract from [buyer] after the option had expired.”).

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