

STRIKING THE DIGITAL BARGAIN: RETHINKING THE POINT OF AGREEMENT IN CYBERSPACE CONTRACTS\*

**Abstract**

The digitalization of commerce has complicated the traditional principles of contract formation, raising the crucial question of when an online agreement becomes legally binding. This study, aims to critically examine the adequacy of Nigeria's legal framework on online contract formation in comparison with global standards. The objectives are to identify the precise point at which online contracts are deemed concluded, evaluate the strengths and weaknesses of existing Nigerian laws, and propose reforms to align with international best practices. Methodologically, the study adopts a doctrinal approach, drawing on statutory provisions, judicial precedents, and comparative analysis with global instruments such as the UNCITRAL Model Law on Electronic Commerce and the European Union's e-commerce directives. Data was collected primarily from legislation, case law, and secondary literature. The findings reveal that while Nigeria's legal regime, rooted in common law, recognizes electronic transactions, it lacks clarity on the moment of agreement and enforcement mechanisms, unlike more advanced jurisdictions. The study recommends legislative reform, harmonization with international instruments, and judicial activism to provide certainty and consumer protection in cyberspace contracts.

**Keywords:** Cyberspace contracts, Offer and acceptance, *Consensus ad idem*, Contract formation

**1. Introduction**

The advent of the internet has revolutionized contractual relations, enabling parties separated by vast geographical boundaries to negotiate, conclude, and perform agreements in real time. Traditional contract law, however, developed in an era of face-to-face dealings and written correspondence, is increasingly being tested by the peculiarities of online transactions. Central to this challenge is the question of *when* a binding contract may be said to have been formed in cyberspace—whether at the click of an 'I agree' button, the dispatch of an electronic acceptance, or upon confirmation by the offeror's server. In Nigeria, the legal framework governing contract formation remains rooted in common law principles, supplemented by statutory interventions such as the Evidence Act 2011 and the Nigerian Data Protection Act 2023. Yet, these provisions offer limited guidance on the mechanics of online contracting, leaving courts to grapple with uncertainties. Globally, jurisdictions such as the European Union and the United States have developed more comprehensive regimes, while international instruments like the UNCITRAL Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) seek to harmonise standards. This paper situates Nigeria within this global discourse, interrogating the adequacy of its laws and proposing reforms to ensure certainty, enforceability, and consumer protection in cyberspace contracts.

**2. The Importance of the Ingredients of Contract Formation: The Centrality of *Consensus ad Idem***

The law of contract, both in Nigeria and in comparative jurisdictions, is anchored on certain foundational ingredients: offer, acceptance, consideration, intention to create legal relations, capacity of parties, and legality of subject matter. These elements together ensure that a contract is not merely a casual promise but a binding legal instrument enforceable by the courts. At the heart of these elements lies the doctrine of *consensus ad idem*, the meeting of minds, which signifies that the parties must be in genuine agreement on the essential terms of the contract.<sup>1</sup>

**Consensus ad Idem: The Core of Contractual Validity**

The principle of *consensus ad idem* is universally acknowledged as the bedrock of contractual obligation. In Nigeria, courts consistently affirm that without such agreement, no binding contract exists. In *Union Bank of Nigeria Ltd v. Ozigi*<sup>2</sup>, the Supreme Court emphasized that contracts are formed where parties are *ad idem* on essential terms. Similarly, in *Okubule v. Oyagbola*<sup>3</sup>, the Court of Appeal held that there must be a clear offer and unqualified acceptance for *consensus* to be established. Globally, this principle finds resonance in *Smith v. Hughes*<sup>4</sup>, where Blackburn J stated that what matters is not subjective intent but outward agreement that demonstrates *consensus*.

**Offer and Acceptance:** An offer and its unqualified acceptance provide the objective evidence of *consensus*.<sup>5</sup> Nigerian law, following English common law, recognizes displays as invitations to treat rather than offers<sup>6</sup>. Yet, in the digital age, distinctions blur, particularly in e-commerce, where clickwrap agreements often operate as direct offers. Internationally, the

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<sup>1</sup> E Sagay, *Nigerian Law of Contract* (2nd ed., Ibadan: Spectrum Books Limited, 2000)

<sup>2</sup> (1994) 3 NWLR (Pt. 333) 385

<sup>3</sup> (1990) 4 NWLR (Pt. 147) 723

<sup>4</sup> (1871) LR 6 QB 597

<sup>5</sup> C A Ogbuabor, 'Contract Formation in Cyberspace: A Nigerian Perspective' (2012), *University of Nigeria Journal of Private and Comparative Law* 17(3)

<sup>6</sup> *Pharmaceutical Society v. Boots Cash Chemists* [1953] 1 QB 401

United Nations Convention on the Use of Electronic Communications in International Contracts (2005) clarifies the time and place of electronic communications, harmonizing standards for determining consensus in cyberspace<sup>7</sup>.

**Consideration:** Consideration, provides the quid pro quo that transforms mere promises into enforceable bargains. Nigerian courts, in *Adehin v. Wema Bank Plc*<sup>8</sup>, reiterated that consideration need not be adequate, only sufficient. Globally, while common law systems insist on consideration, civil law jurisdictions prioritize the principle of cause or reliance<sup>9</sup>. In both systems, however, consideration functions as a safeguard against enforcing agreements lacking genuine consensus or reciprocity.

**Intention to Create Legal Relations:** The presumption of legal intent differentiates social agreements from commercial contracts. In Nigeria, as elsewhere, the courts apply an objective test to ascertain whether the parties intended legal consequences. This aligns with global jurisprudence such as *Balfour v. Balfour*<sup>10</sup>, where domestic agreements were held non-binding absent intention. In cyberspace transactions, intention is especially critical where agreements are automated or generated by programmed systems.

**Capacity and Legality:** Consensus ad idem cannot exist where parties lack capacity or where the subject matter is illegal. Nigerian law, through statutes such as the Infants Law<sup>11</sup> and provisions of the Nigerian Labour Act<sup>12</sup>, restricts contractual capacity in certain instances. Similarly, the Cybercrime (Prohibition, Prevention, Etc.) Act 2015 renders illegal contracts involving cyberfraud unenforceable. Globally, capacity and legality remain universal prerequisites, ensuring that consensus is not undermined by incapacity or illegality.

*Consensus ad idem* is the golden thread running through the various ingredients of contract formation. Without it, the scaffolding of offer, acceptance, consideration, and intention collapses into unenforceable promises. Nigerian jurisprudence, while grounded in English common law, faces new challenges in cyberspace transactions where determining consensus is less straightforward. International instruments such as the UNCITRAL Model Law on Electronic Commerce and judicial innovations in other jurisdictions provide useful models. Ultimately, for Nigeria and the global community alike, strengthening clarity around consensus ad idem is indispensable to ensuring certainty, fairness, and enforceability in modern commerce.

### 3. The Point of Contract Formation in Cyberspace: A Nigerian and Global Perspective

The determination of the precise moment when an online contract can be said to have been concluded has remained one of the vexed questions of modern commercial law. Unlike traditional contracts where the rules of offer, acceptance, consideration and intention to create legal relations are firmly settled under both common law and statutory regimes, cyberspace presents unique challenges in identifying when a valid agreement crystallizes into enforceable rights and obligations<sup>13</sup>.

#### Contract Formation under Nigerian Law

In Nigeria, the general principles of contract law apply equally to online transactions. Section 84 of the *Evidence Act 2011* recognizes the admissibility of electronic records, while sections 153–160 confirm that electronic signatures and data messages can have legal effect. Similarly, section 17 of the *Cybercrime (Prohibition, Prevention, etc.) Act 2015* validates electronic signatures and provides that contracts shall not be denied enforceability merely on the ground that they are in electronic form. These provisions establish a legislative foundation for recognizing the validity of online contracts. Judicial authorities have further affirmed the evidential status of electronic communications. In *Kubor v. Dickson*<sup>14</sup>, the Supreme Court confirmed that electronic documents are admissible, while in *Olawole v. Olawole*<sup>15</sup> the Court of Appeal accepted email exchanges as capable of evidencing contractual obligations. Although Nigerian courts are yet to pronounce directly on the *precise moment* of online contract formation, these cases demonstrate judicial willingness to align with the statutory recognition of electronic dealings. Applying orthodox principles, an online contract in Nigeria is concluded when the offeror receives the electronic communication of acceptance. For instance, in the case of a ‘clickwrap’ transaction where a consumer clicks ‘I agree’ or ‘place order’, the binding contract arises at the moment the system records the consumer’s assent and the offeror acknowledges receipt, consistent with section 17 of the Cybercrime Act.

<sup>7</sup> O O Onakoya, ‘E-Contracts in Nigeria, Legal Issues, Challenges and Prospects’ (2021) *University of Ibadan Institutional Repository*. accessed 13 September 2025 <<http://ir.library.ui.edu.ng/handle/123456789/7774>>

<sup>8</sup> (2004) 13 NWLR (Pt. 890) 409

<sup>9</sup> I Iloinso, ‘Formation of Electronic Contracts: Melding the Traditional Contract Law with Contemporary Electronic Commerce’ (2016) *University of Lagos Institutional Repository*. accessed 13 September 2025). <<https://ir.unilag.edu.ng/handle/123456789/8276>>

<sup>10</sup> [1919] 2 KB 571

<sup>11</sup> The Infants Law in Nigeria is a statutory enactment in some states (not Federal) that regulates the contractual capacity of minor, example, the Infants Law, Cap. 50, Laws of Ogun State 1978 is a common citation.

<sup>12</sup> Cap. L1, Laws of the Federation of Nigeria (LFN) 2004

<sup>13</sup> U Obuka, ‘Regulation of Electronic Contracts in Nigeria and South Africa: A Comparative Analysis’ (2021) 2(2) *Nigerian Journal of Legal Studies* 121. <https://www.nigerianjournalonline.com/index.php/NJLS/article/view/4668> accessed 13 July 2025.

<sup>14</sup> (2013) 4 NWLR (Pt. 1345) 534

<sup>15</sup> (2014) LPELR-23144(CA),

### **Comparative Global Perspectives**

The Nigerian position is broadly consistent with international standards. In English law, the locus classicus is *Entores Ltd v. Miles Far East Corporation*<sup>16</sup>, where the Court held that in instantaneous communications, such as telex, the contract is formed where and when acceptance is received by the offeror. This reasoning has been applied by analogy to emails and other forms of electronic communications<sup>17</sup> In the United States, the *Uniform Electronic Transactions Act 1999 (UETA)* and the *Electronic Signatures in Global and National Commerce Act 2000 (E-SIGN Act)* provide that electronic signatures and records are valid, and that a contract is formed when acceptance is electronically communicated in a manner retrievable by the offeror. Judicial application of these principles can be seen in *Specht v. Netscape Communications Corp.*<sup>18</sup>, where the court upheld the enforceability of clickwrap agreements provided the user had adequate notice and manifested assent. Similarly, the European Union's *Directive 2000/31/EC on Electronic Commerce* provides in Article 11 that a contract is concluded once the recipient of an offer has received the acknowledgment of order from the service provider. On a broader scale, the *UNCITRAL Model Law on Electronic Commerce 1996* and the *UN Convention on the Use of Electronic Communications in International Contracts 2005* harmonize these rules by stipulating that contracts are not to be denied validity merely for being electronic, and that acceptance is effective when it enters the information system of the offeror. The Nigerian legal position, though not yet tested in direct judicial pronouncements, harmonizes with the prevailing global approach: an online contract is formed when the acceptance is communicated electronically and received by the offeror in a retrievable form. Whether through email confirmation, electronic signature, or the clicking of an 'I agree' button, the critical moment is the receipt of acceptance, consistent with both local statutory provisions and global best practice.

### **4. Conclusion and Recommendations**

The determination of the precise moment when a contract can be said to come into existence on the internet, thereby giving rise to enforceable rights and obligations between the parties, remains one of the most vexed issues in e-commerce law. Unlike traditional commercial transactions, which are regulated by elaborate common law doctrines and statutory provisions, cyberspace transactions present unique challenges that unsettle settled principles of offer and acceptance. Thus, the Nigerian position is at a crossroads: while common law principles provide a foundation, the uncertainties inherent in cyberspace transactions necessitate statutory reform to align domestic law with international standards, ensuring both consumer protection and commercial certainty. While Nigerian law has laid a foundational framework for recognizing electronic contracts, several gaps remain that warrant reform and judicial clarification.

**Judicial Development of Case Law:** Nigerian courts have not yet pronounced decisively on the precise moment of online contract formation. They have not directly resolve whether acceptance is complete upon dispatch by the acceptor or upon receipt by the offeror. It is recommended that Nigerian courts adopt the principle in *Entores Ltd v. Miles Far East Corporation*<sup>19</sup>, which anchors acceptance at the point of receipt, thereby providing certainty in electronic transactions.

**Legislative Clarification:** The Cybercrime (Prohibition, Prevention, etc.) Act 2015 and the Evidence Act 2011 validate the enforceability of electronic contracts but stop short of defining the precise moment of contract formation. The National Assembly should consider amending the Cybercrime Act to explicitly codify the rule that online contracts are formed at the point of receipt of acceptance. This would harmonize Nigerian law with the UNCITRAL Model Law on Electronic Commerce 1996 and the UN Convention on the Use of Electronic Communications in International Contracts 2005.

**Strengthening Consumer Protection:** A recurring problem in cyberspace is the imbalance of bargaining power between service providers and consumers, especially in standard form contracts such as clickwrap or browsewrap agreements. Nigerian law should, in line with the Federal Competition and Consumer Protection Act 2018, impose clearer obligations on online vendors to ensure transparency of terms. This could be achieved by mandating that essential terms be displayed in a conspicuous manner and that consent mechanisms be explicit, as recommended in *Specht v. Netscape Communications Corp.*<sup>20</sup>

**Adoption of Global Standards:** Nigerian law should more fully incorporate global best practices, particularly from the European Union and the United States, where legislation and case law provide greater clarity. The EU model, which requires acknowledgment of receipt of acceptance before a contract is binding, offers a consumer-friendly approach that could enhance confidence in Nigerian e-commerce.

**Capacity Building and Judicial Training:** Finally, given the technical nature of e-contracts, continuous training of judges, lawyers, and regulators on the dynamics of digital commerce is essential. Without adequate expertise, the interpretation and enforcement of online agreements may remain inconsistent, undermining Nigeria's efforts to develop a robust digital economy

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<sup>16</sup> [1955] 2 QB 327

<sup>17</sup> M P Furmston, *Law of Contract*. 2017 17th ed. London: Oxford University Press

<sup>18</sup> 306 F.3d 17 (2d Cir. 2002)

<sup>19</sup> [1955] 2 QB 327

<sup>20</sup> 306 F.3d 17 (2d Cir. 2002)