


## E-contract Consensus in Indonesian Contract Law

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### Abstract

**Introduction:** In the era of Society 5.0, the use of IT in implementing agreements in Indonesia is inevitable. The development of e-contracts, becoming increasingly necessary in society, is demanding the business world's attention. Particularly in Indonesia's Treaty Law, the concept of consensual e-contracting emerged, suggesting that even in the absence of direct meetings, parties could still realize an agreement through the e-contract.

**Purposes of the Research:** This study aims to analyze and describe the existence of e-contract consensus in contract law in Indonesia from the point of view of contract theory.

**Methods of the Research:** This specific type of investigation is doctrinal law research, which endeavors to uncover the truth by employing legal principles, foundational doctrines, and doctrinal law as supporting material. This work utilizes an inductive methodology, first presenting specific assertions and then drawing a general conclusion from them.

**Results of the Research:** One of the legal prerequisites for an agreement is consensus. The study's findings indicate that legislative regulations in Indonesia have incorporated e-contract consensus into contract law. We apply Uitings theory, Verzending theory, and Ontoangs theory as agreement theories to determine the existence of e-contract consensus. The legislation contains provisions that specifically address the maintenance of electronic transactions. In general, it establishes that an electronic transaction has taken place when the parties to an electronic contract (e-contract) issue a statement of acceptance of an offer.

**Keywords:** Agreement; Consensus; E-contract.

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## INTRODUCTION

The progression of digital technology, from a philosophical standpoint, not only enables contractual agreements between legal entities and individuals or organizations in person but also streamlines their implementation electronically via computers, the Internet, and other media based on information technology. Using information technology as an alternative option gives users boundless capacity and flexibility to conduct a diverse range of commercial operations.

Electronic business transactions, also known as electronic contracts, streamline the agreement process by eliminating the need for in-person meetings and enabling the execution of contracts based on an agreement. These electronic contracts are gaining popularity among the public because they are considered more effective and efficient. This is also in line with the progress made in enforcing electronic contracts, which was agreed upon by everyone in the UNCITRAL forum. In 1996, UNCITRAL released the Model Law on Electronic Commerce, which says that information or the existence of electronic

documents should be recognized as having legal value.<sup>1</sup> In addition, UNICITRAL has issued the UNCITRAL Model Law on Electronic Signatures in 2001,<sup>2</sup> which is expected to be a guideline for any country developing its national legal system in accommodating the dynamics of electronic trade and also in terms of setting up electronic signatures as one of the measures of the validity of a transaction or contract.

The recognition of e-contracts as a form of agreement in the Civil Code remains a rather disturbing issue. The provisions of the Civil Code clearly do not cover electronic contracts. According to Article 1313 of the Covenant, an agreement is defined as an act that binds one or more parties against each other. An electronic contract is generally referred to as a legal relationship in which there are also parties that are mutually bound, even if the means of implementation are through the electronic system. In practice, the freedom of contract allows for both written and unwritten agreements. The current implementation of written agreements is expanding, encompassing both paper-based contracts and electronic media. The Indonesian Contract Law does not provide its own regulation for the implementation of these electronic contracts, particularly in the Civil Code. However, the presence of the Republic of Indonesia Act No. 11 of 2008 on Electronic Information and Transactions indirectly provides recognition of the course of electronic contracts and transactions. The provisions of Republic of Indonesia Act No. 19 of 2016 on Amendment of Law No. 11 of 2008 on Electronic Information and Transactions (hereinafter referred to as the ITE Act) have subsequently amended this law.

Electronic contract execution generally doesn't differ significantly from conventional execution. In terms of terminology, the meanings of contracts and agreements are identical. Dogmatically, the legal product of Dutch colonial heritage contracts, The Civil Code, uses the terms *overeentkomst* and *contract* for the same meaning, as evident from the title of Book III of Title II on 'Bindings arising from Contracts or Treaties.' Therefore, we can deduce that the agreement bears the same significance as the contract. Commercial contracts, including this electronic contract, use both terms in business practice. Electronic contracts primarily rely on the fundamental principles of agreement execution, which are widely recognized in the field. The foundations of this agreement form the basis for the implementation of contract enforcement. Some of the treaty foundations that form the basis for contract execution are consensual, freedom of contract, *pacta sunt servanda*, good faith, and personality. The parties' obligations to execute a contract reflect the five basic principles of the agreement. The contract should already be based on freedom of contract between the parties executing it.

Furthermore, Article 1338(1) of the Civil Code establishes a *pacta sunt servanda* (legal certainty) that what is stated in the contract's contents is legally binding on the parties. This basis pertains to the agreement's consequences, requiring the judge or third party to uphold the substance of the parties' contract as if it were law. They must not interfere with the substance of the parties' contracts. The adagium *pacta sunt servanda* is recognized as the rule that all promises made by man in reverse are in fact intended to be fulfilled and, if necessary, enforceable, so that they are legally binding. In other words, a lawful agreement is valid because the law is valid for the parties, which means they must obey what they have

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<sup>1</sup> Emmy Latifah, "E-Contract Dalam Perspektif," no. 5 (2007): 232–47.

<sup>2</sup> Glenn Biondi, "Analisis Yuridis Keabsahan Kesepakatan Melalui Surat Elektronik (E-Mail) Berdasarkan Hukum Indonesia," *Tesis*, 2016, 1–163.

agreed to together. Article 1338, paragraph (3) of the Covenant defines the basis of good faith as the execution of a treaty in good faith. This is the basis on which the parties, i.e., the debtor and creditor, shall execute the substance of the contract on the basis of the parties' faith, firm conviction, or good ability.

The basis for the implementation of the treaty is the good faith set out in Article 1338(3) of the Civil Code. In fact, the Dutch language refers to good faith as *te goeder trouw*, which accurately translates to "carrying out an agreement on the basis of good faith." This term distinguishes two types of good faith: (1) good faith during the agreement-making process, and (2) good faith during the exercise of rights and obligations arising from the agreement. Despite the subjective nature of human beings' good faith in the implementation of the covenant, we can objectively measure it. Article 1340 of the Covenant lists a personality basis, stating that an agreement is valid only between the parties involved. An agreement shall not cause harm to a third party; no third party may benefit from it, except in the circumstances provided for in Article 1317."

Electronic contracts, as a form of agreement in general, remain bound to comply with the principles that are guidelines in the terms of the agreement. The execution of a contract indicating the existence of a legal relationship between two or more mutually binding parties can indicate that the parties have reached a consensus. Consensualism refers to the parties' agreement, which is also a condition for the treaty's validity in accordance with Article 1320 of the Civil Code. "The agreement of those who are bound" means that in making the agreement, there must be an agreement or agreement on the substantive things or material things to be promised. Article 1321 of the Code stipulates that we must reach and conclude such an agreement without any coercion, fraud, or fraud. Although the law doesn't define an agreement, we can study its emergence through the lens of existing and evolving theories. According to consensus theory, an agreement emerges as soon as two parties reach a consensus. When electronic contracts are executed, there is no meeting between the parties, but they can reach an agreement in their relationship. The deal is an agreement between the two sides. If a person desires what they have agreed to, they are considered to have given their consent. If the parties make an agreement based on force, it will not be valid, implying that no agreement will exist in the presence of force. Such an agreement means that the parties have the freedom of will to decide what to promise and with whom to make a deal.

According to the principle of consensualism, an agreement or contract is concluded when the parties reach a consensus on the substantive matters pertaining to the agreement's object. This principle states that an agreement between two parties suffices without a formal conclusion. An agreement is an agreement of will and a declaration made by the parties to the agreement.<sup>3</sup> An agreement is an agreement of understanding and will between the two parties. What one desires is what the other desires. Next, what about the existence of an electronic contract? How does that deal happen when the parties to the contract only execute their contract through electronic media without meeting each other? Could we achieve that deal by viewing it from a consensual perspective, which is one of the fundamental foundations of contract execution?

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<sup>3</sup> Kurnarso Kurnarso and A Djoko Sumaryanto, "Eksistensi Perjanjian Ditengah Pandemi Covid-19," *Batulis Civil Law Review* 1, no. 1 (2020): 33, <https://doi.org/10.47268/ballrev.v1i1.423>.

## METHODS OF THE RESEARCH

This type of research is a doctrinal law study that seeks to uncover the truth by using the prescriptions of the law, doctrine, and underlying doctrines as evidence. The goal of this research is to solve a problem that requires a critical and in-depth analysis of library materials, along with the use of relevant literature and references. This study's analysis is inductive, starting with the presentation of specific statements and then drawing a generalization of a general conclusion.

## RESULTS AND DISCUSSION

### A. E-contract in Indonesian Contract Law

The growth of e-contracts in the cyber world in today's digital age demonstrates the significant impact of technological developments on the global economic system, including Indonesian law, particularly in the area of contract law. As previously explained, the UNCITRAL Model Law on Electronic Commerce introduced and agreed upon the e-contract regulation, which Indonesian law later adopted under the Information and Electronic Transactions Act (ITE Act). Many people understand that an agreement, whether in the form of a digital document, soft copy, or disk, qualifies as an e-contract. Then it is necessary to clarify exactly how the e-contract concept works so as not to cause a misperception in understanding the concept. In recognizing the concept of e-contracts, reference can be made to the UNCITRAL Model Law on Electronic Commerce, which can be said to be a recommendation against the recognition of the existence of an electronic contract: *"as between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement"*

The article translates the essential information between the parties involved in producing, sending, receiving, storing, or processing data messages. Unless otherwise specified, the provisions of Chapter III may vary through agreement. The UNCITRAL Model Law does not explicitly define the term 'e-contract'. According to the article's understanding, an agreement refers to a relationship of agreement between the parties, and its form can vary based on their mutual agreement. Although e-contracts are in the form of an electronic system, they are actually the same as conventional contracts. The difference lies in the loading of electronic contracts into electronic systems, rather than their written form.

The implementation of e-contracts in the Contract Law in Indonesia actually also refers to the provisions of the UNCITRAL Model Law in general. However, Indonesia's regulations have incorporated the model into the legislative provisions that govern the execution of electronic contracts. Therefore, even when e-commerce transactions issue contracts in the form of electronic contracts, the fulfillment of legal conditions must still refer to both the Civil Code and conventional contracts.<sup>4</sup> In Indonesian legislation, Act No. 11 of 2018 on Electronic Information and Transactions, as amended by Act No. 19 of 2019 on the Amendment of Act No. 11 of 2018 on Electronic Information and Transactions, regulates e-contracts (also known as the ITE Act). In addition, there is a more detailed enforcement

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<sup>4</sup> Ridwan Romadhoni and Budi Dona Kharisma, "Aspek Hukum Kontrak Elektronik (E-Contract) Dalam Transaksi E-Commerce Yang Menggunakan Bitcoin Sebagai Alat Pembayaran," *Jurnal Privat Law* 7, no. 1 (2019): 49, <https://doi.org/10.20961/privat.v7i1.30098>.

regulation for the implementation of e-contracts in Indonesia, namely in Government Regulation No. 71-Year 2019 on Government Regulations No. 71-Year 2019 on Electronic System Maintenance and Transactions. Both of these rules can now serve as the legal basis and validity for e-contract enforcement under the current Indonesian Treaty Law.

## **B. In Indonesian Contract Law, Consensulism is Applied to E-Contracts.**

Consensulism is derived from the word "consensus," which means a deal.<sup>5</sup> If the parties reach the word "agreement," it signifies that they have achieved an agreement, implying a harmony of will between them. This suggests that without agreement among the parties, an agreement cannot occur, highlighting the importance of the arrangement principle in the creation of a treaty. According to Abdulkadir Muhammad, an agreement or agreement of will is an agreement as long as there is agreement between the parties concerning the object of the agreement and the terms of the agreement.<sup>6</sup> Therefore, we can say that the agreement has reached a stable state and is no longer subject to negotiation.<sup>7</sup> When two parties confront each other and fulfill their individual wishes in accordance with the agreement's original purpose, it becomes a logical condition for concluding the agreement. We assume that an agreement represents the mutual will of both parties, where one fulfills the wishes of the other at the outset of the agreement's drafting. The next step involves "meeting" and expressing the will of the two parties. In essence, the element of an agreement must be seen from the existence of the conformity of the will of the parties with which the will must be expressed by each party bound by the agreement.

Article 1320 of the Civil Code generally states that the agreement is a valid condition. According to Subekti, in consensulism, the parties that entered into the agreement must agree, agree, and agree on the substantive matters contained in that agreement. When one party expresses a desire, the other will reciprocate, ensuring that their desires align. In addition, Riduan Shahrani gives the view that the agreement of those who bind themselves contains the meaning that the parties who make a treaty have agreed, or there is a conformity of wills or agreed wills of each other, which is born by the parties without coercion, confusion, or deceit. (*bedrog*). Explicit or tacit expression of any agreement is impossible. Simply put, an agreement/consensus contains agreements that can be made by the parties, either orally or in writing in the form of an act on the basis of the wishes of the parties to the agreement.

J. Satrio, in his book *The Law of Alliance*, writes that when someone makes a deal by giving his consent to the will they had agreed to at the beginning of the agreement.<sup>8</sup> However, Sudargo Gautama insisted that in order for the contract to become valid, the parties must agree on everything in the agreement.<sup>9</sup> Likewise, Mariam Darus Badruzaman also gives the meaning of the word "agreement" as an agreed-upon will condition (*overeenstemende wilsverklaring*) between the parties. An offer statement is an offer statement,

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<sup>5</sup> Diah Anggraeni Ndaomanu, "Kesepakatan Perjanjian Jual Beli Melalui Mesin Jual Otomatis (Vending Machine) Ditinjau Dari Aspek Hukum Perjanjian," *Jurnal Ilmu Hukum: ALETHEA* 5, no. 1 (2022): 55–72, <https://doi.org/10.24246/alethea.vol5.no1.p55-72>.

<sup>6</sup> Abuyazid Bustomi, "Kekuatan Mengikat Isi Dari Perjanjian Baku (Standard Contract) Bagi Para Pihak Yang Membuatnya," *Jurnal Fakultas Hukum* 15 (2017): 376–81.

<sup>7</sup> Nanang Hermansyah, "Analisis Yuridis Eksistensi Asas Kebebasan Berkontrak Dalam Perjanjian Dewasa Ini (Standar Kontrak) Di Masyarakat.Pdf," 2020.

<sup>8</sup> Siti Nurwulan and Hendrik Fasco Siregar, "Aspek Normatif Asas Konsensualisme Dalam Penambahan Klausula Kontrak Tanpa Persetujuan Para Pihak," *Rechtsregel: Jurnal Ilmu Hukum* 2, no. 1 (2019): 494–509, <https://doi.org/10.32493/rjih.v2i1.2957>.

<sup>9</sup> Natasya Yunita Sugastuti, "Formasi/ Terjadinya Hubungan Kontraktual Menurut Sistem Hukum Inggris," *Jurnal Hukum PRIORIS* 4, no. 2 (2016): 175–203, <https://doi.org/10.25105/prio.v4i2.383>.

and an acceptance statement is an acceptance statement. (*acceptatie*). Thus, the word "agreement" mentioned in the agreement clause can be expressed by the parties in various ways, i.e., orally by direct contact, or also written with a sign understandable to the parties by including symbols that have been understood, or even by silently submitting to the agreed clause, or by direct concrete action.

Observation reveals that the agreement consists of two elements: the offer and the acceptance. (*acceptance*). When the offer and acceptance align, it signifies the formation of an agreement between the parties. According to Van Dunne, the contract should consider prior acts, both pre- and post-contractual, in addition to the contractual phase.<sup>10</sup> The pre-contractual stage is the offer and acceptance phase. Y Sogar Simamora also explained that, in general, the process of forming up to the execution of the contract consists of three stages, namely the pre-contractual stage, the stage of closing the contract, and the contract execution stage. Meanwhile, in terms of form, the parties are free to decide.<sup>11</sup> Whatever the method by which a deal is made, the most important thing is how the offer and acceptance can be understood by both parties until the deal is done. According to the provisions of Article 1321 of the Civil Code, an agreement shall have no binding force and may result in legal defects. If the parties make the agreement based on fraud, misconduct, or coercion, the new agreement, if delivered freely between them, will be binding on them.

A bargain is a declaration of will between the parties involved in a deal. There are two elements in the process of reaching an agreement: offer (*offer, offerte, aanbod*) and acceptance (*aanvarding, acceptatie, acceptance*). According to the principle, an agreement only materializes when one party extends an offer and the other accepts it, signifying the offer as a declaration of intent or an invitation to The party who has previously obtained the offer can freely express their acceptance, unless otherwise specified by the offerer.<sup>12</sup> In the covenant's birth, there is a statement of will, which consists of two elements: the will and the statement. Correct expression of the will ensures that the statement aligns with the will, and in general, the statement reflects the will.<sup>13</sup> Thus, theories have emerged to analyze the emergence of consensualism based on will or statement:<sup>14</sup>

1) The theory of will (*wilsleer; wilstheorie*):

According to this theory, there is a bond between the parties if and to the extent that a statement is based on a judgment of the will that truly corresponds to it. The principle that this theorem considers an agreement that is not based on true will to be invalid means that the consequences arise if a person makes a statement that does not correspond to his will. The statement will not be binding to him, and the agreement will not arise on the basis of a declaration that the parties do not want, so binding must be based on will.

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<sup>10</sup> Oleh Rahmani and Timorita Yulianti, "Asas-Asas Perjanjian ( Akad ) Dalam Hukum Kontrak Syari ' Ah" II, no. 1 (2008): 91-107.

<sup>11</sup> Mohammad Zamroni, "Penafsiran Kontrak Dalam Perspektif Hermeneutik," *Yuridika* 31, no. 3 (2017): 522, <https://doi.org/10.20473/ydk.v31i3.4830>.

<sup>12</sup> Mersetyawati C. M. Lamber, "Legalitas Transaksi Penjualan Melalui Internet Ditinjau Dari Hukum Perdata," *Lex Privatum* VI, no. 8 (2018): 110-19.

<sup>13</sup> Ilham Akbar, "Akibat Hukum Cacat Kehendak Terkait Hakikat Benda Pada Perjanjian Jual Beli Batu Akik Bongkahan," *Syariah Jurnal Hukum Dan Pemikiran* 16, no. 2 (2017): 97, <https://doi.org/10.18592/sy.v16i2.1020>.

<sup>14</sup> R Juli Moertiono, "Perjanjian Kerjasama Dalam Bidang Pengkayaan Dan Jasa Tenaga Kerja Antara Pt. Sinar Jaya Pura Abadi Dan Pt. Asianfast Marine Industries," *Jurnal Hukum Kaidah: Media Komunikasi Dan Informasi Hukum Dan Masyarakat*, 2019, <https://doi.org/10.30743/jhk.v18i3.1329>.

2) Statement Theory (*verklaringsleer; verklaringstheorie*):

According to this theory, a new agreement occurs when it encounters a statement of what the parties want to be stated, so the agreement will bind the parties. However, the theory has a weakness if the parties' statements do not conform to their will.

3) The theory of belief (*vetrouwensleer; vertouwens theorie*):

This belief theory is actually there to complement the existence of will theory and statement theory. In the understanding of the theory of belief, the agreement of will between the parties in making a statement arises from the belief. The agreement occurs when both parties have expressed their wishes, resulting in a mutual belief that the other party's statement is the basis for the belief.

Furthermore, J. Satrio presented several theories about the formation of an agreement: the first is the theory of the statement (*Uitings theorie*), which holds that two parties form an agreement when they make a statement of acceptance and offer. The second theory, known as *verzending*, asserts that two parties reach an agreement when one accepts the other's offer. Third, *the Vernemings theorie* states that a contract occurs when one side makes an offer, is aware of the presence of an acceptance, but does not receive it in person. The reception theory, also referred to as *the Ontvangs theorie*, establishes agreements when the offering party receives a direct response from the receiving party. Therefore, the legal condition remains unfulfilled, as the agreements did not exist prior to receiving an offer response.

When it comes to consensualism in the execution of e-contracts, it's important to remember that the implementation of these electronic contracts, even when done electronically, relies on the agreement of the parties who share the same will for action. This willfulness constitutes the final element of an e-contract. We can infer the emergence of consensualism in e-contracts from a theoretical analysis of the parties' consensus. In the Indonesian Agreement Law, the e-contract regulation still refers to the provisions of KUH Perdata but relates to the use of information technology as a means of contract execution, so it is necessary to also refer to the terms of the ITE Act. Article 20 of the ITE Act states that related electronic transactions take place when the recipient approves or accepts the sender's transaction offer, unless the parties specify otherwise. An electronic acceptance statement must accompany any further agreement on such an offer. The article's provisions lead us to the conclusion that the consensual execution of this e-contract, when linked to the agreement theory, involves the application of the statement theory (*uitings theorie*), the delivery theories (*verzending theorie*), and the acceptance theory (*ontvangs theorie*).

An offer in an electronic transaction initiates the formation of an electronic contract, which both parties accept through mutual agreement, thereby establishing legal force between them (Article 1, No. 17, ITE Act). The Electronic Transaction and System Maintenance Act, specifically Article 46, paragraph (1), underscores the parties' ability to conduct electronic transactions through electronic contracts or other forms of contractual agreements. In accordance with their respective e-contract theories, the parties reach an agreement or consensus. Further analysis can be conducted on the "*uitings theorie*" in the second paragraph, which specifies that the fundamental nature of the agreement can be established when the recipient accepts and approves the transaction offer transmitted by the sender. It is compatible with the notion that the birth of an agreement in a contract happens when it issues a statement of acceptance of an offer. Upon closer examination,

paragraph (3) clarifies the agreement within this electronic contract. This is due to the fact that the electronic system user can carry out the e-contract agreement through an act of acceptance, indicating assent, or by receiving and using the object. The sentence provides an example of the acceptance theory, also known as *Ontvang's theory*. According to this theory, an agreement occurs when the offer's recipient gives their consent to a reply.

The consensual execution of e-contracts also illustrates the *verzending* theory. There are two ways to realize the real agreement: through the offer and acceptance. The provisions in Article 8 paragraph (4) of the ITE Act shed light on the execution of the e-contract. "In the case of two or more information systems used in the transmission or receipt of electronic information and/or electronic documents, then: a. *time of delivery* is when the electronic information and/or electronic document enters the first information system that is outside the control of the sender; b. *time of receipt* is when electronic information and/or electronic documents enter the last information system that is under his control." According to the article's provisions, the "*time of delivery*" and "*time of receipt*" refer to the application of the theory of delivery in the context of e-contract consensualism, which holds that the agreement begins at the moment of the "delivery of the answer of acceptance," giving people a relatively clear sense of when such an agreement occurs.

## CONCLUSION

Consensus is one of the legal conditions of an agreement. This study's analysis reveals that Indonesian legislative regulations have implemented e-contract consensus in contract law. The agreement theories used in determining the existence of e-contract consensus are the *uitings* theory, the *verzending theorie*, and the *ontvangs theorie*. Specific provisions of the legislation pertain to the upkeep of electronic transactions and state, in general, that when the parties to an electronic contract (e-contract) issue a statement of acceptance of an offer, an electronic transaction has occurred. Certain provisions of the legislation, specifically pertaining to the maintenance of electronic transactions, broadly state that an electronic transaction occurs in an e-contract when the parties involved issue a statement of acceptance of an offer.

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