



Validity of Agreements in the Digital era: Study of Electronic Contracts, Cryptocurrencies and Non-Fungible Tokens

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Abstract

Introduction: E-commerce transactions that develop, of course, bring changes to agreements that have been carried out conventionally, the digital era has finally brought about a new world called the metaverse with a number of assets in the form of objects such as Non-Fungible Tokens (NFT) and Crypto Currency that only exist in cyberspace.

Purposes of the Research: The purpose of this research is to examine how the validity of agreements in the digital era, especially regarding electronic contracts and the purchase of Crypto Currency and NFT from Indonesian law perspective.

Methods of the Research: This research is descriptive analytical with a normative juridical type using primary, secondary and tertiary data from literature studies, both legislation and legal literature and other documents.

Results of the Research: Both electronic contracts and electronic signatures used in e-commerce already have a legal basis so that their use is not something that is prohibited. Talking about the validity of an agreement will not be separated from Article 1320 of the Civil Code which requires 4 points that must be fulfilled in order for an agreement to be valid in the eyes of the law. This also applies to buying and selling crypto and NFT. Crypto is actually a currency, not recognized by the state. However, crypto can be traded and recognized as a trading commodity. NFT does not yet have special regulations, but the legal requirements for buying and selling NFT are still met even if the transaction uses crypto.

1. INTRODUCTION

Information technology has become an inseparable part of human life in carrying out its activities. Starting from learning activities, working to shopping is very dependent on information technology. In the beginning, information technology was still in analog form, such as letters, newspapers and magazines. The analog era was then replaced by the digital era. This new era begins when computer and internet technology is present and available to the public. Mass media are starting to switch to new media or the internet because there is a cultural shift in the delivery of information.¹ Thus, public interest in analog information is decreasing. The new era certainly brings new habits. The digital era is slowly but surely affecting the legal and economic fields.

E-commerce is a form of trade that has its own character, namely trade that crosses regions and even national borders, the meeting of buyers and sellers is not met, done

¹ W. Setiawan, "Era Digital Dan Tantangannya. Seminar Nasional Pendidikan," *Seminar Nasional Pendidikan*, 2017, 1-9.

anywhere and anytime, using internet media. This condition on the one hand is very beneficial for consumers, because they have many choices to get goods and do not need to move from their place of residence, but on the other hand violations of consumer rights are very risky because of the distinctive characteristics of ecommerce.² E-commerce transactions that develop, of course, bring changes to agreements that have been carried out conventionally. Electronic contracts or digital contracts have become commonplace in social life. Not only electronic contracts, the digital era has finally brought about a new world called the metaverse with a number of assets in the form of objects such as Non-Fungible Tokens (NFT) and Crypto Currency that only exist in cyberspace.

Cryptocurrency is decentralized digital money that's based on blockchain technology³. In contrast to the currency issued by the government through the central bank. Crypto is a digital currency that is not regulated by a central bank or government. Until now, there have been various types of cryptocurrencies that can be used in transactions, there are approximately hundreds of choices⁴. This encryption technique of digital currency or cryptocurrency aims to be able to control every new currency unit in circulation and to be able to verify every transaction that runs independently without any 3rd party interfering.

There are many types of crypto but the famous ones are Bitcoin, Ethereum, Litecoin and Ripple. Indonesia is the country with the highest interest rate in 2021 with an estimated 7.3 million crypto owners in Indonesia.⁵ Unfortunately, the large number of crypto owners in Indonesia, has not been followed by public understanding of crypto itself.

Unlike crypto, NFT is a digital token that is linked to a large blockchain system. NFT is not much different from crypto, it's just that NFT cannot be exchanged but can still be traded⁶. In contrast, NFT is unique which cannot be exchanged like-for-like (equivalently, non-fungible), making it suitable for identifying something or someone in a unique way⁷. Each NFT has its own value. In crypto or physical money, the value of IDR 10,000 still has the same value even though it has been exchanged for a smaller fraction value. With today's technological advances, many people are starting to look at crypto and NFT as an investment vehicle in order to earn profits by buying Crypto and NFT assets.

According to Salim HS, an agreement is "a legal relationship between one subject and another in the field of assets, where one legal subject is entitled to achievements and so are other legal subjects who are obliged to carry out their achievements in accordance with what has been agreed upon."⁸ In other words, an agreement is an agreement between two or more parties to bind themselves and create legal consequences.

The agreement, which was originally known to be only in written or oral form, has now developed into a digital form that is easily accessible by means of a computer or

² Andi Aina Ilmih and A. Zulkarnain, "Ideal Electronic Contract Model As a Form of E-Commerce Disputes Settlement," *Jurnal Pembaharuan Hukum* 6, no. 1 (2019): 77–87.

³ Kate Ashford, "What Is Cryptocurrency?," 2022.

⁴ Agustina AMBORO, Yudhi Priyo; CHRISTI, "Prospek Pengaturan Cryptocurrency Sebagai Mata Uang Virtual Di Indonesia (Studi Perbandingan Hukum Jepang Dan Singapura)," *Journal of Judicial Review* 21, no. 2 (2019), <https://doi.org/http://dx.doi.org/10.37253/jjr.v21i2.665>.

⁵ coinformant, "Crypto Interest Index," n.d.

⁶ Geordi Oswald, "Pengertian NFT, Cara Buat, Jual Dan Belinya," 2022.

⁷ Qin Wang et al., "Non-Fungible Token (NFT): Overview, Evaluation, Opportunities and Challenges," 2021, 2.

⁸ Salim HS, *Hukum Kontrak, Teori & Tekriik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 2008), 27.

smartphone. The agreement, which is written on several pieces of paper, can be replaced with 1 digital document either in pdf form. or in other digital forms. Buying and selling through e-commerce, which at first only traded objects that could be touched directly, has now started to trade objects that cannot be touched by hands.

Meanwhile, the arrangement regarding the agreement is still based on the Civil Code which is derived from Burgerlijk Wetboek which is hundreds of years old. This is ironic considering that the Dutch-owned Burgerlijk Wetboek in its home country has been repeatedly revised⁹. This certainly raises the question of how the validity of agreements in the digital era, especially regarding electronic contracts and the purchase of Crypto Currency and NFT.

2. METHOD

Legal research is a process to find the rule of law, legal principles and legal doctrines in order to answer the legal issues faced.¹⁰ This research is descriptive analytical with a normative juridical type using primary, secondary and tertiary data from literature studies, both legislation and legal literature and other documents.

3. RESULTS AND DISCUSSION

3.1 Overview of Agreements Based on the Civil Code

Before reviewing the validity of digital agreements. It is better if we discuss agreements in general based on the Civil Code. The agreement is something important because this legal action is directly related to the rights and obligations of the parties as a result of the agreement. An agreement based on Article 1313 of the Civil Code is "an act by which one or more people bind themselves to the one or more person". The definition of agreement from the Civil Code did not get a positive response from experts because it was considered incomplete and too broad. Subekti stated that an agreement is an event that a person promises to another person or the two people promise to carry out something, from this event an engagement arises¹¹ What is meant is all promises that have legal consequences and not promises that only cause moral consequences. In addition to Subekti, Abdul Kadir Muhammad also gave a definition of an agreement, which is an agreement in which two or more people bind themselves to each other to carry out something in the field of wealth.¹² The agreement can be in the form of a promise to do something or not to do something depending on the wishes of the parties.

Article 1320 of the Civil Code lists 4 legal conditions for an agreement as follows:

1) Agreed;

The agreement of the parties bound in an agreement is very important considering the agreement is an event that has legal consequences for the parties. In the agreement, the parties must be free from pressure, error, and fraud and are willing to enter into an agreement.

2) Skills;

A person is considered incompetent by law to enter into an agreement if that person is not yet 21 years of age, unless he has been married or has been married before being

⁹ RIA, "Belanda Berulang Kali Revisi, Indonesia Masih Gunakan KUHPer 'Usang,'" 2015.

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2016).

¹¹ R Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 2002), 1.

¹² Abdul Kadir Muhammad, *Hukum Perikatan* (Bandung: Citra Aditya Bakti, 1992), 78.

21 years old. On the other hand, every person aged 21 years and over, is considered competent by law, unless for some reason he is placed under guardianship such as dark eyes, stupid, memory ill, or extravagant.

3) A certain thing

The third condition is that an agreement must be regarding a certain matter, meaning what is agreed upon the rights and obligations of both parties if a dispute arises. A certain thing can be interpreted as an achievement which is the object of the agreement itself.

4) A lawful cause.

Article 1320 of the Civil Code does not explain a lawful act (orzaak) but in Article 1337 it is stated that an act is prohibited if it is against the law, decency and public order. The agreement made still does not violate the law, nor the norms that live in society.

These four conditions are conditions for the validity of an agreement, both oral and written agreements, both conventional and digital agreements. Based on the four legal conditions, the terms "agree" and "skills" are subjective conditions, while the terms "a certain thing" and "conditions" are objective conditions. The consequence is that if the subjective conditions are not met, the agreement can be canceled, meaning that the party who objected can file a cancellation of the agreement, while if the objective conditions are not met, the agreement is null and void. Cancel by law means the agreement is considered never existed.

In making an agreement there are basic principles that become a reference for the parties, known as the principles of the agreement. As part of the engagement, the agreement has many principles, but in this research we will only explain the 4 legal principles of the agreement which are often considered as the general principle of the agreement, namely:

a) Consensual Principle;

This principle is reflected in Article 1320 in Number 1 of the Civil Code as the first condition of an agreement, namely an agreement. Agreement is defined as a conformity of will between the parties involved in an agreement.

b) Principle of Freedom of Contract

Everyone is allowed to make agreements about anything with anyone as long as it does not violate the laws and norms that live in society. This principle can be seen in Article 1338 Paragraph 1 of the Civil Code

c) Principles of Pacta Sund Servanda

This principle is often referred to as the principle of legal certainty. Sourced from Article 1338 paragraph 1 of the Civil Code. The principle of pacta sund servanda has the understanding that every agreement made legally will apply according to the law for the party who made it. This is because the agreement has legal consequences if it is violated by the parties.

d) Good Faith Principle

The principle of good faith is contained in the formulation of Article 1338 paragraph (3) of the Civil Code which reads: "Agreements must be carried out in good faith." This principle has the understanding that the parties must make and carry out the contents of the agreement in good faith from each other. At the time of making an agreement, it must be made with honesty in negotiating while good faith when carrying out the agreement means that the parties are aware of fulfilling their obligations as stipulated in the agreement. By using good faith in the agreement, the parties will really feel the benefits and advantages of the agreement that has been made.

The principle of the agreement above serves to maintain legal rules in the formation of an agreement. By paying attention to legal principles in the formation of an agreement, a good agreement can be obtained and an agreement that has legal legitimacy.

3.2 Electronic Contract Validity.

Law No 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions (UU ITE) states in Article 1 Number 17 that an electronic contract is an agreement between parties made through an electronic system. This electronic contract becomes an obligation when the parties will conduct electronic transactions. Electronic transactions are defined as legal actions carried out with technological devices through internet access. Every electronic contract does not require hardcopy or printed on paper, but every transaction that involves execution is assigned a number or code that can be stored or recorded on a computer or printed. Thus, electronic signatures are used to replace ordinary signatures, considering that electronic agreements are not printed on paper.

Electronic signature is a sign consisting of certain information entered and associated with electronic information that has verification and authentication functions. Digital signatures are made using cryptography techniques, and public key cryptography, where the algorithm uses two keys, the first is the key to form a digital signature, and the second key is used to verify the digital signature or return the message to its original form. This concept is also known as asymmetric cryptosystem (non-symmetric cryptographic system).¹³

Both electronic contracts and electronic signatures used in e-commerce already have a legal basis so that their use is not something that is prohibited. Talking about the validity of an agreement will not be separated from Article 1320 of the Civil Code which requires 4 points that must be fulfilled in order for an agreement to be valid in the eyes of the law. Article 1320 of the Civil Code does not require the media used in making an agreement so that it does not become a problem if an agreement is made and signed electronically. The electronic agreement made is still valid and binding on the parties so that it becomes law for those who make it.

3.3 Validity of Cryptocurrency Purchase Transactions

Crypto can be obtained by accessing the website or application of the exchange platform and registering and making a deposit. After that, crypto can be bought or sold through the platform according to the desired amount and type. With a fluctuating value, crypto is indeed being hunted by many people who want to make a profit. Among the many platforms for crypto trading, Coinbase Pro, Kraken, Binance, US, Bittrex are some of the platforms that are considered the best.¹⁴ Law Number 7 of 2011 concerning Currency requires the use of rupiah as a payment instrument that must be used in transactions with the purpose of payment or other transactions that are filled with the value of money. So that crypto is not a legal currency even the use of crypto as a currency is a violation of the law.

¹³ Husnul Hudzaifah, "Keabsahan Tanda Tangan Elektronik Dalam Pembuktian Hukum Acara Perdata Indonesia," *Katalogis* 3, no. 5 (2015): 197.

¹⁴ Reni Lestari, "Mau Investasi Aset Kripto? Ini 4 Platform Terbaik Jual-Beli Cryptocurrency Artikel Ini Telah Tayang Di Bisnis.Com Dengan Judul 'Mau Investasi Aset Kripto? Ini 4 Platform Terbaik Jual-Beli Cryptocurrency', Klik Selengkapnya Di Sini: <https://Ekonomi.Bisnis.>" 2021.

Crypto is actually recognized as a trading commodity by the government so as to provide legal certainty for crypto asset trading business actors. Recognition of crypto as a trading commodity provides convenience for trading activities in Indonesia because it is supervised by the Indonesian CoFTRA (Commodity Futures Trading Regulatory Agency). Thus, crypto is actually used as a currency abroad but is only considered a trading commodity in Indonesia because of its fluctuating price.

In Europe Nation (EU), crypto known as “stablecoin” can already be used for payment in selected cases and even pegged to fiat currencies, for example Tether is pegged to the US dollar¹⁵. However, the EU still has gaps in cryptocurrency regulation which results in a legal vacuum and weak legal protections for investors such as fraud and other illicit activities. Unlike the EU, China blocked crypto activities in their country and at the same time the Central Bank of China started to initiate a central bank digital currency. In October 2019, China passed a cryptography law, which, while still banning cryptocurrency trading, aims to answer regulatory and legal challenges in commercial cryptography and encourage the research and development and promotion of coherent blockchain industry standards.¹⁶ What China does is clearly different and includes courage when compared to other countries.

3.4 Validity of NFT Transactions

NFT can be bought or sold through a marketplace platform and transactions are made using cryptocurrencies such as Ethereum. When viewed from its nature, NFT is included in intangible objects. Because NFT can be reproduced by copying but the rights attached to the NFT cannot be changed. NFT purchases are made by accessing the NFT market platform which generally accepts certain types of cryptocurrencies for transactions. Purchases are made by first creating a Crypto Wallet. Then the Wallet is linked to the NFT Market platform account.

If you look at the process of buying and selling NFT and it is connected with the legal terms of the agreement regulated by Article 1320 of the Civil Code, then the sale and purchase is legal. The first condition is that the agreement is fulfilled because the buyer has agreed to the terms and prices listed on the NFT platform. The requirement for proficiency in entering into an agreement can be considered to have been fulfilled when a person creates a crypto wallet account. The terms of agreement and competence are subjective conditions, which means that if these conditions are not met, the agreement can be canceled. Can be canceled implies that there must be a party who proposes to cancel the agreement first, in contrast to null and void, which means that the agreement is considered to never exist.

The third and fourth conditions are objective conditions in the form of conditions for a certain thing and a lawful act. A certain matter implies the object of the agreement which is the NFT itself and its inherent rights. This is because NFT is an intangible object. While the latter is a condition for a lawful cause where the issue is whether the use of crypto as a means of payment is actually prohibited by law. Analyzing the use of crypto as a transaction tool itself is actually reasonable considering that currently there are no NFT market platforms originating or based in Indonesia. So that the purchase of NFT using crypto itself

¹⁵ Agata Ferreira and Philipp Sandner, “Eu Search for Regulatory Answers to Crypto Assets and Their Place in the Financial Markets’ Infrastructure,” *Computer Law and Security Review* 43 (November 2021): Hlm. 2, <https://doi.org/10.1016/J.CLSR.2021.105632>.

does not violate the law or norms of decency and decency in society and does not cause the sale and purchase agreement to be canceled.

In the United States, the NFT Rule of Law is still relatively new. There are two sets of literature worth noting. First, there is a moderately-developed literature on smart contracts, the programs that run on blockchains and execute transfers of NFTs. Second, there is a nascent literature on the potential property uses of blockchain technology, beginning with articles on bitproperty and culminating in a very limited selection discussing NFTs.¹⁷ The following will be explained in general. Smart contract are the programs that create and convey NFTs. The idea behind calling a blockchain program a smart contract was that the program would replace the legal instrument, that law would no longer be needed if the programs were automatically executable. Contracts are bargaining, conveying wills and not codes so Smart Contracts are considered a mistake because its executing program automatically.

Meanwhile, There is a developed legal literature on first-generation cryptocurrencies, which focuses on finding the right legal characterization of blockchain-based activities and assets. The overarching theme of that literature is that legal regulation of blockchain depends not on the technology, but on how humans are using it.¹⁸ If the blockchain is being used to transfer value, it is treated as a money substitute under the Bank Secrecy Act. If a coin is issued to help raise money to start a business (a "security coin"), it is treated by the SEC as an equity, and the CFTC and IRS treat cryptocurrency tokens as commodities when they are used as such,¹²⁷ while privacy laws apply when a distributed ledger is used to store and process personal information.

4. CONCLUSION

Electronic contracts have special regulations regulated in Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Electronic Information and Transactions but the validity of an electronic contract still depends on Article 1320 of the Civil Code which regulates the legal requirements of an agreement. This also applies to buying and selling crypto and NFT. Crypto is actually a currency, not recognized by the state. However, crypto can be traded and recognized as a trading commodity. NFT does not yet have special regulations, but the legal requirements for buying and selling NFT are still met even if the transaction uses crypto.

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¹⁷ Joshua Fairfield, "Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property," *Indiana Law Journal*, 2021, Hlm. 48.

¹⁸ Ethan D. Trotz, "The Times They Are a Changin: Surveying How the Howey Test Applies to Various Cryptocurrencies," *ELON. L. REV* 11 (2019): Hlm 201.

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