CHAPTER TWO
LITERATURE REVIEW

A. Contract

Contract is an act in which one or more people attach themselves to one or more other people.[5] Article 1313 of the Civil Code states that a contract is an act by which one or more people cause themselves to be against one person or more. In other words, a contract is an act in which a person promises to another person or two people promise each other to do something or so-called an obligation. Contract may take form in a series of words contains the rights and obligations that are spoken or written.[6] Then, contract itself is a source of agreement besides other sources. Since long time ago, a contract serves as a form of human interaction that has always evolved. Conventionally, contract law was born as a tool for minimizing uncertainty and presenting the parties' attitudes.[7]

In Indonesia, contract is regulated in Book III of the Civil Code, where the nature of this book is open and acts as a supplementary rule (*aanvuflendrecht*). The establishment of a contract takes place through direct or indirect actions of both parties who each play a role and or act for on behalf of themselves or those who they represent. In this case, the first party as an offeror and accepted by the second party as an offeree with clear legal conditions and aims to create a legal relationship (*rechtsbetrekking).* A

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[5] Subekti and Tjitrosudibio, 2006, *Kitab Undang-Undang Hukum Perdata*, Jakarta, Pradnya Paramita, p. 338.
[6] Subekti, 1996, *Hukum Perjanjian*, Jakarta, Intermasa, p. 1.
[7] Mathias Salle, 2002, *Electronic Contract Framework: an Overview*, United States, Allen Institute for Artificial Intelligence, p. 4.

contract consider to be valid if it meets the legal requirements of a contract, this in accordance with Article 1320 of the Civil Code stipulates that the contract will be valid if it meets 4 specific requirements, as follows:[8]

a. Consensus

The parties must agree on any terms contained in the agreement. All parties shall show their consent if the offeree and offeror agreed. The inclusion of words of agreed is very important in a contract. The consent shall be carried out with full awareness among the makers, which may be expressed verbally and or in writing. Three things that may establish an unfair contract, namely:

1) Coersion (*dwang*), including actions or threats or mental intimidation.[9]
2) False (*dwaling*), that one of the parties has a wrong perception of the subject and object of the agreement. in other words, the subject is called error in persona.[10]
3) Fraud (*bedrog*), is misconduct that carried out by one of the parties, for example not informing the existence of hidden defects.[11]

b. Capability

Article 1329 of the Civil Code states that everyone is competent to enter a contract, except the law says contrary. Then in Article 39 on

[8] *Ibid*.
[9] Article 1324 of the Civil Code.
[10] Article 1322 of the Civil Code.
[11] Article 1328 of the Civil Code.

the Law Number 2 of 2014 on Public Notary states that there are some people who are not capable to enter a contract. The incapable persons, are who are not yet an adult (under 18 years and not yet married), and based on the Law Number 1 of 1974 on Marriage states that those who are put under authority (curatele or conservatorship) is also not capable.

c. Object

Article 1333 of the Civil Code stipulates that a contract must have the principle of an object (*zaak*) of which at least the type can be determined.

d. Halal Clause

Based on the Article 1335 in conjuction to 1337 of the Civil Code states that a cause is declared prohibited if it is contrary to the law, decency, and public order.

In addition to the principle of freedom of contract Article 1338 of the Civil Code, allows electronic contracts to have a legal basis in our legal system. Minter Ellison Rudd Watts defines electronic contracts as a contract that is formed by transmitting electronic messages between computers.[12] Edmon Makarim and Deliana defined an electronic contract as a binding or legal relationship conducted electronically by combining networking from a computer-based information system with a communication system which

[12] Minter Ellison Rudd, *Electronic Contract: Some Important Issue*, Oxford, Oxford Press, p. 89.

facilitated by the existence of a global internet computer.[13] In this case, the difference between an ordinary contract and an electronic contract is the existence of an electronic mediary, which is a contract made through a series of electronic devices and procedures.[14] The emergence of electronic contract (e-contract) was introduced by the United Nations Commission on International Trade Law (UNCITRAL) in the 1985 Recommendation on the Value of Electronic Records Law and then in its Model of Electronic Trade Law in 1996. In the same year, the UNCITRAL model has issued a law on E-commerce which is a follow-up to the existence of e-contracts.

The UNCITRAL model law on electronic commerce stated that any information generated, sent, received or stored by electronic, optical or similar means including, but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.[15] Recognition of data messages stated that information (in the contract) shall not be denied legal effect, validity or enforceability solely in the grounds that it is in the form of a data message.[16] In the context of contract formation, unless otherwise agreed by both parties, an offer and an acceptance can be expressed through data messages.[17] Article 1 Paragraph 1 Law Number 19 of 2016 on the amendment of Law Number 11 of 2008 on Information and Electronic

[13] Edmon Makarim, 2005, *Pengantar Hukum Telematika, Suatu Kompilasi Kajian*, Jakarta, PT Raja Grafindo Persada, p. 215-246.
[14] Timothy K L Tobing, "Perlindungan Hukum Terhadap Konsumen Transportasi Berbasis Aplikasi Menurut Undang-Undang Nomor 11 Tahun 2008", *Lex Crimen,* Vol. VI/No.5 (Juli, 2017), p. 124.
[15] Chapter I Article 2 Paragraph (a) of UNCITRAL Model Law on Electronic Commerce 1996.
[16] Chapter II Article 5 of UNCITRAL Model Law on Electronic Commerce 1996.
[17] Chapter II Article 11 of UNCITRAL Model Law on Electronic Commerce 1996.

Transaction defines electronic transactions as legal actions that carried out using Computers, Computer networks, and/ or other electronic media. Its Article 1 Paragraph 17 defines electronic contracts as parties agreements made through electronic systems. Meanwhile, an electronic system is a series of electronic devices and procedures that function to prepare, collect, process, analyze, store, display, announce, send and/ or disseminate Electronic Information.[18] For contracts that are born on the internet, some legal thinkers call them online contract.[19]

A contract occurs when acceptance is communicated to the offeror, by the offeree of the offer made.[20] Meanwhile, acceptance is the final and absolute approval of the contents of an offer and generally must be submitted or communicated to the offeror.[21] The establishment of e-contract is the same as a conventional contract, where the offer and acceptance can be given orally or in writing, even can be done by doing.[22] The Differentiate factor between offer and acceptance in e-contracts is the media used. In analyzing the electronic contract there are several important things to be a concern. first, related to the validity of the electronic contract, proof of its originality, signature and when there is acceptance of the offer made. Therefore Julian Dinga said that e-contracts occur if:

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[18] Article 1 Paragraph (5) of the Law Number 11 of 2008 on Information and Electronic Transaction.

[19] Thomas J.smedinghoff, 1999, *Electronic Contracts and Digital Signatures and Overview of Law and Legislation*, Prague, Law Instititute, p. 125-135.

[20] Rosa Agustina, 2008, "Kontrak Electronik dalam Sistem Hukum Indonesia" *Gloria Juris*, volume 8 number 2, Januari-April, p. 10.

[21] Mariam Darus Badrulzaman, 2001, *E-commerce Tinjauan dari hukum kontrak Indonesia*, Hukum Bisnis, p. 33.

[22] S. Blount, 2015, "Electronic Contracts: Principles from Common Law", *LexisNexis Butterworths*, Sydney, p. 22.

a. An offer is considered to be occur when the offer is known by the offeree.
b. An offer has been accepted only when the offer has been sent and opened or read.
c. An offer considerably accepted if it is known based on the offeree knowledge.

However, acceptance is usually carried out in a manner that has been determined by the offeror or by other reasonable means. In the provisions regarding electronic contracts within the European Union, 2 legal methods of acceptance, first, acceptance must be following the terminology conveyed in the offer.[23] Second, the offeree carries out a counter-offer to the clause submitted. The acceptance or counter-offer must be declared as long as the offer is still valid. Forms of offer and acceptance in electronic contracts occur through various methods, but the following 2 methods are the most frequently used, namely:

a. Click-wrap

The Click-wrap is terms call for an explicit manifestation of assent, usually by clicking on an "I agree" icon or in a small box next to the statement "I agree to the Terms and Conditions".[24] Clicking the ‘I accept’ or ‘I agree’ icon in order to confirm the intention to enter a contract electronically is now a very popular method of demonstrating

[23] Mari Carmen Martinez Lopez, 2017, “Electronic Contract within the European Union”, *European Journal of Political Research*, 2017, vol. 2, p. 99.
[24] Christina L. Kunz, Maureen F. Del Duca, Heather Thayer, Jennifer Debrow, 2001, *Click-Through Agree ments: Strategies for Avoiding Disputes on Validity of Assent*, Boston, Bussines Law press, p. 401.

intent.[25] Professor Preston notes that 'wrap' contracts are now considered to be enforceable without further inquiry and the Courts then assume enforceability because "everyone is doing it" without performing a thorough analysis of the earlier opinions and distinguishing the facts.[26]

b. Browse-wrap

The Browsewrap is where one party aims to impose terms of use on another party where a visitor demonstrates assent by using the website. This method do not call for an explicit manifestation of assent, and those terms are usually accessible through a hyperlink.[27] The potential offeree is not required to indicate acceptance of any terms by any positive action, but must have had actual or constructive knowledge of the terms and conditions for them to be effective.

Both of click-wrap and browse-wrap are derived from 'shrink-wrap' a term used to describe paper terms included in the box containing a purchased product.[28] There are another theories on the occurrence of agreements where the parties did not meet directly, namely: Speech Theory (*Uitingstheorie*), Delivery Theory (*Verzendingstheorie*), Knowledge Theory (*Vernemingstheorie*), and Receipt Theory (*Ontvangsttheorie*). Because this

[25] Stephen Mason, 2016, *The 'I accept' and 'wrap' methods of indicating intent, Electronic Signatures in Law,* School of Advanced Study, London, University of London press, p. 8.
[26] C. B. Preston, 2015, "You Have Waived Everything: Can Notice Redeem Online Contracts?", *American University Law Review*, Washington D.C, p. 543.
[27] Christina L. Kunz, JohnE. Ottaviani, ElaineD. Ziff, JulietM. Moringiello, KathleenM. Porter & Jennifer C. Debrow, 2003, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, Boston, Business Law Press, p. 279.
[28] Mo Zhang, 2008, "Contractual Choice of Law in Contracts of Adhesion and Party Autonomy", *Akron Law Review*, Ohio, p. 126.

form of agreement is not specifically regulated in the Civil Code, the e-contract is an on-thespot contract.

B. Legal Protection and Legal Effort

Legal protection is the protection of dignity and the recognition of human rights possessed by legal subjects based on legal provisions from arbitrariness or as a collection of regulations or rules that may protect one thing from another. In the *Kamus Besar Bahasa Indonesia* (KBBI), what is briefly referred to as is what is meant by protection is the processes and actions to protect. Whereas, the law is a regulation made by the government or whose data applies to all people in society (the state).[29] Therefore, legal protection is a narrowing of the meaning of protection, in this case only protection by law. The protection provided by law is also related to the existence of rights and obligations, in this case, which is owned by humans as legal subjects in their interactions with fellow humans and their environment. As subjects of human law, they have the right and obligation to take legal action.[30]

Legal protection not only shall be adaptive and flexible but also be predictive and anticipatory. The adaptivity and flexibility of legal protection shall be according to situational conditions and developments. The Predictivity and anticipatory obliged the law to be able to reveal the

[29] Alwi, Hasan, 2017, *Kamus Besar Bahasa Indonesia (KBBI*), Jakarta, Balai Pustaka, p. 864.
[30] CST Kansil, 2004, *Pokok-pokok Hukum Pidana*, Jakarta, Pradnya Paramita, p. 102.

possibility of providing protection if action is caused by one of the parties.[31] There are two kinds of legal protection tools, namely:

1. Preventive Legal Protection

   In preventive legal protection, legal subjects are given the opportunity to raise their objections or opinions before a government decision gets a definitive form. The aim is to prevent disputes. Preventive legal protection means a great deal of governmental action based on freedom of action because with preventive legal protection the government is driven to be careful in making decisions based on discretion. In Indonesia, there are no specific arrangements regarding preventive legal protection.

2. Repressive Legal Protection

   Repressive legal protection aims to resolve disputes. The legal protection by the General Courts and Administrative Courts in Indonesia falls into this category. The principle of the legal protection of the government actions rests and comes from the concept of recognition and protection of human rights. Historically, this comes from the west, as the birth of the concepts of the recognition and protection of human rights is directed at limiting the restriction and placement of community and government obligations. The second principle that underlies legal protection against

[31] Sholahudin Ranggawuni Hardipo Widyaputra, Pujiyono, 2018, *"Enforcement of Simple Claim Process as a Role Model of Credit Agreement Conflict Resolution in Bank Perkreditan Rakyat (BPR)", International Journal of Multicultural and Multireligious Understanding, Vol 5, No.4,* Hamburg, August 2018.

> governmental acts is the principle of the rule of law. Associated with the recognition and protection of human rights, the recognition, and protection of human rights takes first place and can be linked to the goals of the rule of law.[32]

Meanwhile, legal Effort is an attempt for any person who feels his rights or interests have been impaired to obtain justice and protection / legal certainty, according to the methods stipulated in the law.[33] Before legal remedies are taken, there must be disputes first. In the Indonesian dictionary, a dispute is a conflict or controversy. Conflict means the existence of opposition or conflict between groups or organizations against an object of problem.[34] Disputes Theory is also called the Conflict Theory. Dean G. Pruitt and Jeffrey Z. Rubin defines that, conflict is a perceived divergence of interest or a belief that the aspirations of conflicting parties are not achieved simultaneously.[35] Pruitt and Rubin saw conflicts as different interests or the agreement of the parties. The different interest may be defined as the different needs of each party.[36] The other factors causing the dispute are the dissatisfaction of other parties, forceful circumstances and negligence.[37]

Conventionally, dispute resolution is done in litigation, where the position of the parties is in oppose to each other. Litigation is a mechanism

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[32] *Ibid.*
[33] Prof. R. Subekti, 1977, *Hukum Acara Perdata,* Jakarta, Bina Cipta, p. 155.
[34] Departemen Pendidikan Nasional, 2002, *Kamus Besar Bahasa Indonesia*, Jakarta, Balai Pustaka, p. 183.
[35] Salim HS, 2010, *Perkembangan Teori Dalam Ilmu Hukum*, Jakarta, Raja Grafindo Persada, p. 82.
[36] *Ibid*, p. 85.
[37] Abu Sopian, 2016, *Penyelesaian Sengketa Kontrak Pengadaan Barang/Jasa Pemerintah*, Jakarta, Raja Grasindo Pratama, p. 2.

for dispute resolution through the court. Settlement of disputes through the courts is usually the last resort in resolving a dispute after prior negotiations between the parties to the dispute, either directly or by appointing their legal counsel to produce an agreement that benefits both parties. Another approach as an alternative dispute resolution (ADR) which done through non-litigation.[38] Non-litigation is a way to settle disputes outside the court.

There are fundamental differences between the forms of dispute resolution through the court and the resolution of disputes outside the court. The similarity between the two forms of legal dispute resolution is the rule of law (*regelen recht*). The first difference is that not all legal rules contain sanctions (*santie-recht*). Second, dispute resolution through the court has autonomous legal sanctions, while dispute resolution outside the court, the sanctions are heteronomous. It is autonomous, because of forced efforts if the court's decision is not carried out by the parties, it is the judiciary. Settlement of disputes outside the court is heteronomous in law enforcement because the arbitration and the alternative dispute resolution requires further strengthening through the judiciary. There are other parties who have helped strengthen the legal force for arbitration and alternative dispute resolution.

C. Overview on Gojek Application

Gojek Application is an apps that sell services to the customerrs.[39] Meanwhile, Gojek is a corporation that maintain the Gojek Application.[40] The

[38] Suyub Margono, 2004, *ADR & Arbitrase: Proses Pelembagaan dan Aspek Hukum*, Bogor, Ghalia Indonesia, p. 65.
[39] Article 1 Point (b) of the Partnership Contract of PT Aplikasi Karya Anak Bangsa, taken from https://www.go-jek.com/app/driver-contract/, accessed on 1 July 2019, at 19.00 pm.

establishment of Gojek is by PT Aplikasi Karya Anak Bangsa (AKAB) based on Law Number 40 of 2007 on Limited Liability Companies,[41] so that Gojek becomes a company that has a legal entity. PT Aplikasi Karya Anak Bangsa is registered to Ministry of Law and Human Rights as an application service company. The permits and requirements of PT Aplikasi Karya Anak Bangsa are Trading Business License (SIUP) and Company Registration Certificate (TDP) which create a condition for foreign investors who have shares in the company, will be subjected to the licensing regime under Capital Investment Coordinating Board (BKPM) by taking into account the Negative Investment List, therefore PT Aplikasi Karya Anak Bangsa as an application company only has the status of a liaison business actor.

PT Aplikasi Karya Anak Bangsa applies e-contract as the forms of partnership Contract for its partner-candidate.[42] The partnership contract consists of several parties, which are individuals (partners), PT Paket Global Semesta (PGS), PT Aplikasi Karya Anak Bangsa (AKAB), and PT Dompet Anak Bangsa (DAB). AKAB is the owner of the Application that is used by consumers who have registered to obtain goods and/ or people shuttle service, delivery services or other services with two-wheeled or four-wheeled motorized vehicles or other services.[43] PT. DAB or PT Dompet Anak Bangsa is a company that cooperates with PGS and AKAB that conducts electronic

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[40] Article 1 Paragraph (e) of the Partnership Contract of PT Aplikasi Karya Anak Bangsa, taken from https://www.go-jek.com/app/driver-contract/, accessed on 1 July 2019, at 19.00 pm.
[41] Law Number 40 of 2007 on Limited Liability Company.
[42] Article 1 of the Partnership Contract of PT Aplikasi Karya Anak Bangsa, taken from https://www.gojek.com/app/driver-contract/, accessed on 1 October 2019, at 18.00 pm.
[43] Article 1 of Paragraph (c) of the Partnership Contract of PT Aplikasi Karya Anak Bangsa, taken from https://www.gojek.com/app/driver-contract/, accessed on 1 July 2019, at 19.00 pm.

money system business activities.[44] Meanwhile, the Partner is the party that carries out the transfer of goods and / or people, orders of goods that have been previously ordered by consumers, or other services through the application using two-wheeled motor vehicles owned by the Partner himself.[45] Partner is a party that carries out the transfer of goods and / or people, orders of goods that have been previously ordered by consumers, or other services through the Application using two-wheeled motor vehicles owned by the Partner himself.[46]

As a intermediary business, PT Aplikasi Karya Anak Bangsa does not need to have permission to trade services that it connects through application technology.[47] PT Aplikasi Karya Anak Bangsa Indonesia does not have a business license in the field of transportation but has a Trading Business License and for that matter it does not have the characteristics of a Public Transport Company which in accordance with Law Number 22 of 2009 concerning Road Traffic and Transportation (LLAJ) and Government Regulation Number 74 of 2014 on Road Transportation, namely:

1. Article 139 Paragraph (4) of Law Number 22 of 2009 on Road Traffic and Transportation (LLAJ), providers of public transportation services

[44] Article 1 Paragraph (d) of the Partnership Contract of PT Aplikasi Karya Anak Bangsa, taken from https://www.gojek.com/app/driver-contract/, accessed on 1 July 2019, at 19.00 pm.
[45] Article 1 Paragraph (f) of the Partnership Contract of PT Aplikasi Karya Anak Bangsa, taken from https://www.gojek.com/app/driver-contract/, accessed on 1 July 2019, at 19.00 pm.
[46] Article 1 Paragraph (f) of the Partnership Contract of PT Aplikasi Karya Anak Bangsa, taken from https://www.gojek.com/app/driver-contract/, accessed on 1 October 2019, at 18.00 pm.
[47] Tri Jata Ayu Pramesti, "Perusahaan Aplikasi Ojek Harus Berizin Perusahaan Angkutan Umum", taken from http://www.hukumonline.com/klinik/detail/lt56739f735626d/apakah-perusahaan-aplikasi-ojekharus-berizin-perusahaan-angkutan-umum, accessed on 22 March 2019 at 21.35 pm.

are carried out by State-Owned Enterprises, Regional Government-Owned Enterprises and / or other Legal Entities in accordance with the provisions of the law.

2. Article 141 Paragraph (1) of Law Number 22 of 2009 on Road Traffic and Transportation (LLAJ), Public Transport Companies must meet minimum service standards which include security, safety, comfort, affordability, equality and order determined based on service which is given.
3. Article 39 Paragraph (3) letter b of the Republic of Indonesia National Police Regulation Number 5 of 2012 stated that the sign of a motorized public motor vehicle is a yellow base with black writing.
4. Article 23 Paragraph (3) and Article 43 Paragraph (2) Government Regulation Number 74 of 2014 on Road Transportation, vehicles used for service Transportation of people both on routes and not on routes is by cars and buses.