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Contextuality of Negative Confirmation in E-Commerce Sales and Purchase Agreements

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Abstract

Transactions through digital platforms have become indispensable due to their diverse features. Nevertheless, based on the law of engagement, most e-commerce companies apply standard contracts in transactions. E-commerce typically safeguards consumer rights, including complaints, returns, and ratings. Consumer ratings, particularly in transactions of minimal economic value, do not influence the safeguarding of consumer rights. It is interesting to investigate whether a negative assessment or rating of goods receipt constitutes a default agreement or a reason for the cancellation of the agreement. This research aims to examine the implementation of *pacta sunt servanda* in sales and purchase agreements within e-commerce and to analyze its implications regarding negative confirmation in contractual relationships. The method used in this research was normative juridical with legislation and a conceptual approach. The results highlight that the principle of *pacta sunt servanda* in Indonesia is implemented strictly and cannot be intervened by anyone as long as it fulfills legal requirements and does not violate statutory regulations, satisfying legal certainty. The principle of *pacta sunt servanda* has binding status on the agreement entered into, carried out between sellers and consumers. Nevertheless, it is not based on the assessment given by consumers regarding dissatisfaction with transaction results, in which regulations do not guarantee complete legal protection for consumers for dissatisfaction with transactions through the features provided. Consequently, a substantive approach is needed in assessing agreements. Legal validity and legal certainty of contracts are also necessary, but the value of proportional justice is important.

Keywords: Agreement; E-commerce; Negative Confirmation

1. Introduction

Expectations often do not match what is desired, likewise for the hope of realizing the orientation of justice (material justice) that is genuinely for the parties involved. In the *das sein* order, justice can often only be achieved through formal (procedural) justice [1], especially regarding contractual relationships that are situationally closest to the sustainability of community life.

Fundamentally, legal certainty is crucial in contracts. This is called the principle of *pacta sunt servanda* in contract law, and the binding force and legality of its application based on the agreement have the same legal consequences for the agreement. The contractual relationship is binding on the parties as the law applies. It has significant legal consequences because it is considered equal to the law for the parties. Hence, one party's violation of the agreement has legal consequences for enforcement and settlement. The essence of *a quo* principle is to guarantee the value of legal certainty within the framework of contractual relationships. Another term in the principle of *pacta*

sunt servanda is the principle of legal certainty, which is closely related to obligation. Third parties, even law enforcement, cannot intervene in the contents of the contract between the parties that have been legally agreed upon [1].

Assessing the validity of a contract has legal consequences for legal conclusions regarding the binding force of a contract. A valid contract can be ascertained through a methodological process and legal instruments completed through a contract law system stipulated in various civil law provisions, namely Article 1320 of the Civil Code. In addition, there are valid conditions for a contract that are regulated outside Article 1320 of the Civil Code, namely Article 1335, Article 1339, and Article 1347 of the Civil Code [2].

In this sense, the principle of *pacta sunt servanda* can cause injustice in the contract. The balanced bargaining position of the contractual parties will better guarantee the purpose of the principle, i.e., achieving a contractual relationship that produces the best interests. On the other hand, the weak bargaining position of one party can cause material losses, which are carried out through a process/method of cooperation that is not adequately regulated in legal provisions, to obtain unilateral benefits. Another thing that happens in a contractual relationship violates the values of justice and the feasibility of contracting. The inequality of one party's position in a contract can be found in one of the most popular types of contracts, namely the type or type of commercial contract that uses standard clauses in articles that balance rights and obligations [3].

The parties involved in an electronic contractual relationship (contracting) are entrepreneurs and consumers [4]. In this digital era, the contractual relationship between the seller and the buyer carried out online will continue to follow the standard contract that has been provided by e-commerce and the owner of the online store catalog. Although consumers can provide an assessment of the purchase of goods/services on an e-commerce platform, the receipt of products from the online store, which is responded to through negative assessments or low ratings (negative confirmation), has not yet received maximum legal protection so that the principle of *pacta sunt servanda* seems to be a boomerang for consumers in accepting products that have been purchased even though they are not satisfied with the expectations of the product (Figure 1).

"*Translation of comment: No water container provided; the packaging is not covered in plastic, as if it had been opened.*" (source: Shopee, 2023)

Figure 1. Example of negative confirmation that does not receive legal protection

Legal provisions, specifically in Article 4 of Act Number 8 of 1999 concerning Consumer Protection, state that "consumer rights include the right to choose goods and/or services and to obtain goods and/or services following the exchange rate and

conditions and guarantees promised; the right to correct, clear, and honest information regarding the conditions and guarantees of goods and/or services; the right to receive compensation, damages and/or replacement if the goods and/or services received do not comply with the agreement or are not as they should be" [5].

Agus Suwandono et al. [7], in their study entitled "*Negative Warranty Reviews Void in E-Commerce Perspective of Consumer Protection Law,*" emphasize the context of standard contracts in e-commerce, which require providing positive reviews as a condition for granting or claiming a warranty. Another study by Made Citra, Sutrisni, and Dewantara [8] entitled "*Legal Protection for Business Actors in Electronic Transactions (E-Commerce) for Bad Consumer Assessments Arising from Consumers' Own Mistakes*" focuses on legal protection for business actors as subjects who are harmed by negative reviews due to consumer errors. The two studies are certainly not the same as this study, which focuses on legal protection for consumers who are harmed, which occurs due to negative confirmation, for which no legal instrument provides legal protection for consumers.

Doctrinally, it is evident that every consumer receives legal protection. However, in the transaction aspect of giving negative assessments, no legal impact can provide legal protection for consumers, which, of course, is detrimental to consumers. Related to that, the rapid growth of e-business in Indonesia needs to help build a legal foundation and legal culture for Indonesian people to enter and be e-business actors by utilizing the sophistication in the field of information technology with the hope of technological development with a specific legal framework [9]. Therefore, it is vital to conduct this legal research to measure the binding strength of the *pacta sunt servanda* principle in contractual relationships in online buying and selling, which will later have implications for legal protection for consumers who are dissatisfied with their expectations regarding the receipt of a product through the rating or product assessment feature, which until now has no legal consequences.

2. Research Method

The legal research method is special in the discipline of law that analyzes legal issues, aiming to find legal rules, legal principles, and doctrines that are useful for finding answers to legal issues [10]. Related to the definitive meaning, to answer legal issues in the researchers' article, the use of the type of legal research by the researchers in this article was normative or doctrinal. This research examines statutory regulatory documents and library materials [11]. This type aims to explain its systematic preparation in detail, which is related to legal rules that regulate specific issues and analyzing the implications between regulations [11].

In addition, the researchers employed several approaches to the problems: the statute approach and the conceptual approach. This research consisted of two legal materials and non-legal materials. Primary legal materials covered laws and regulations related to legal issues, secondary legal materials comprised articles and similar research results related to the issue, and non-legal materials could be in the form of instructions for this research [10]. The implementation of legal material collection was carried out by adjusting the approach to this research, i.e., the legislative and conceptual approaches. After collecting legal materials, the researchers conducted an inventory through library

research. Analysis of legal materials discussing the methods used to determine answers to legal issues was carried out by identifying related legal facts, collecting sources of related legal materials, focusing on the research reviewed based on legal materials, concluding with the form of arguments, and finally providing prescriptions [12].

3. Results and Discussion

3.1 Application of the *Pacta Sunt Servanda* Principle in E-commerce Sales and Purchase Agreements

The definitive meaning of an agreement can be found in Article 1313 of the Civil Code. Legal experts interpret the basis as having the same meaning as the principle. An important principle in contract law that is the basis for movement is the principle of *pacta sunt servanda* [13]. An agreement occurs from the start because of differences or dissimilar interests of the parties who are trying to find common ground. An agreement can accommodate differences in interests and, in the next stage, be packaged through legal instruments, which have implications for having binding power for each party. This denotes that the parties should implement the agreement based on the clauses stated in the contract because the agreement made by both parties creates a legal relationship.

The provisions related to Indonesian agreements are regulated by Book III of the Civil Code, containing provisions on mandatory power (*winged*, mandatory) and having an optional nature (*annulled*, optional) for provisions with mandatory power that can minimize contract violations by the contracting party. However, it differs from the provisions of the law, which are optional, namely that the parties are given the freedom to deviate by making their terms and conditions adjust to the wishes of the parties [14]. A contract is seen as a sacred legal event, adopted in conventional contract law theory as an impact of freedom of contract. The sanctity of the obligation to carry out the contents of the contract is none other than a form of existence of the principle, which states that the contract is made freely and voluntarily, so it becomes a sacred value in contracting [14].

In this case, the context of the sale and purchase agreement carried out in e-commerce is essentially not much different from the conventional one. The difference lies in the modern business model, which is non-face or does not present business actors physically and non-sign (does not use direct signatures) [9]. Electronic transaction activities result in electronic legal obligations or relationships by combining computer-based networks with communication systems, which are then facilitated by the internet or global network [15]. The principle of *pacta sunt servanda* is present so that the parties who agree can comply with the agreed clauses. The principle of *pacta sunt servanda* provides legitimacy for the existence of the formulation of lawmakers and judges. Therefore, based on that, the law has a role as a ratifier, legal influence, and binding power for the parties to the agreement. Article 1233 of the Civil Code states that the sources of law on agreements are divided into law (statutes) and agreements/contracts [16].

The absolute law for the party has the right to carry out the agreed obligations. The agreement is easily interpreted using the principle of *pacta sunt servanda*, which only

requires conformity between the clauses in the agreement and its implementation. This principle guarantees protection based on legal certainty. In theory, a contract or agreement essentially contains three stages, namely the pre-contract stage, the contract stage, and the post-contract stage. At the pre-contract stage, the process of supply and demand is not explicitly regulated in the Civil Code. Meanwhile, unlike the common law system, which recognizes the doctrine of acceptance, it must conform to the offer (the mirror image rule) [17].

As a common consequence in an agreement that a consensus is born by the parties, the principle of *pacta sunt servanda* automatically applies as the main basis for legal certainty. The focus of attention on the contract is to carry out one's obligations (self-imposed obligation) [18]. In the provisions of the Civil Code, there is no detailed explanation of the momentum of the contract occurring. The provisions of Article 1320 of the Civil Code simply state that the parties' consensus is the basis for the contract's validity. However, there is literature stating that there is a special theory to determine the achievement of a consensus in a contract, as follows [19]:

1. Statement theory

   The statement theory states that an agreement (Westerning) occurs when the party receiving the offer has stated their acceptance of the other party's offer.

2. Delivery theory

   The delivery theory states that an agreement occurs when the offer recipient has sent a telegram. However, there is criticism of *a quo* theory, namely that the way to find out is quite difficult.

3. Theory of knowledge

   The theory of knowledge states that consensus occurs when the offeror knows there is an *acceptance* (acceptance), but the acceptance has not been received (not directly known). There is also criticism of *the quo* theory, especially in identifying methods to know about the substance of acceptance while acceptance has not yet taken place.

4. Acceptance theory

   The acceptance theory states that *toestemming* is said to occur if the offeror has accepted the direct response from the other contracting party.

A person's or party's statement regarding a legal relationship is said to be law for that party (*cum nexum faciet mancipiumque, uti lingua mancuoassit, ita jus esto*). This principle is the basis for the power of the agreement that is equal to the law (*pacta sunt servanda*). This principle has a strong binding force in the agreement; no one can intervene unless there is a new agreement between the parties. It is not only a moral obligation but must be implemented because of the binding force in law (Budiwati, 2019). In principle, the binding force and enforceability of a contract that has legal force to influence others is a vital interest in any ancient and modern legal system. The Indonesian legal system combines the existence of this principle with Article 1338 section (1) of the Civil Code, where agreements that have been ratified are binding and are equated as laws that bind the parties who have reached a consensus [20].

The continuity of a business, whether making a profit or loss, can depend on a jointly drafted contract; thus, the basis cannot be intervened by anyone regarding the built clauses. It is necessary to be cautious when drafting contract clauses. The making

of an agreement should be carried out by people with special competence in the field of obligations so that they can understand and analyze each article in the agreement clause [21]. In agreements, it is common to find the following elements: 1) the essential element as the core part, and 2) the Naturalia and accidental elements as the non-core parts [22].

1. The essential element is a fundamental element whose presence becomes an obligation in an agreement, and conversely, the absence of this element causes an agreement not to be created.
2. Statutory regulations label the Naturalia element as an element with a regulatory nature. A *quo* element has a legal impact on the parties to the agreement made, which may not have binding power on the rules in Book III of the Civil Code, where the parties are allowed to set aside these regulations and regulate themselves by the agreement of the contracting party. If the parties have regulated together, the provisions of Article 1338 section (1) of the Civil Code apply, as this becomes a binding obligation at the level of law for the parties. In addition, it is like the risk rules in the provisions of Article 1460 of the Civil Code or related to the delivery of products based on Article 1477 of the Civil Code.
3. Accidentalia is an element where statutory regulations do not specifically regulate, but this can be added at the will of the contracting party in the contract clause.

The validity of an electronic agreement does not lie in the form of the contract made but rather in the subjectivity and objectivity of the contract. A contract can be considered invalid or null and void, which usually occurs if the contract does not meet the terms of the agreement [15]. The strict application of Article 1338, section 1 of the Civil Code is actually a form of legal certainty. In an agreement, there is a strong special principle of obligations as agreed upon in an agreement, thus giving rise to legal consequences for the parties. This is seen as automatic and makes other parties not wonder about the contract's clauses that have been agreed upon.

3.2 Analysis of the *Pacta Sunt Servanda* Principle Against Negative Confirmation in Contractual Relations

The implementation of commercial transactions and inequality is carried out based on the proliferation of standard contracts, which causes an imbalance in contractual relations due to differences in the interests of the parties, so it requires a reaction and direction in providing a "proper" means. Even though the principle of legal certainty needs to be implemented, the principle of *pacta sunt servanda* is sufficient to guarantee recognition of the law. However, the existence of the principle of good faith and compliance at the stage of making or implementing it is a process that cannot be separated.

The assessment of an agreement's validity is conducted by fulfilling the valid requirements of the agreement that are specifically regulated in Article 1320 of the Civil Code, which gives rise to legal consequences for the parties to clauses containing rights and obligations. Consensuality carried out consciously by the contracting party cannot cancel only one party, and the agreement is required to be implemented through good faith (cannot be intervened).

The validity of an agreement, according to Satrio [23], has the following legal consequences:

1. The agreement is binding on the parties.

The binding of the contractual consensuality has been stipulated through Article 1338 section (1) of the Civil Code that if the making of an agreement is done legally, it will have legal consequences as a law for the contracting party who made it. The most important thing in a contract is the article or clause contained therein. The agreement's substance is the result of an agreement by the parties. This implies that the contractual consensuality of the agreement's substance creates a binding force for him, and unilateral cancellation is a form of agreement violation.

2. Agreements must be executed in good faith.

Good faith in an agreement is an act that is mandatory to implement, as regulated in Article 1338 section (3) of the Civil Code. It should be noted that *a quo* article relates to this principle at the stage of implementing the agreement consensus. The principle of good faith is categorized into subjective good faith and objective good faith. Subjective good faith means a form of honesty of the party when carrying out legal acts, namely regarding the issue of a person's inner attitude when agreeing to a legal act. Meanwhile, objective good faith is a form of implementation of an agreement based on compliance with societal norms or customs.

3. The agreement is not canceled unilaterally.

The provisions of Article 1338 of the Civil Code section (2), Article *a quo*, explain the issue of being bound by the consequences of an agreement. Parties cannot take actions outside the agreement or withdraw from the impact of an agreement made legally and cannot be canceled unilaterally; it requires the parties' agreement. The legal certainty regulated in Article 1338 of the Civil Code will also focus on legal protection. Moreover, in this era, electronic contracts use more standard contracts so that consumers seem to be "imprisoned," and determining the contract's contents will directly impact them.

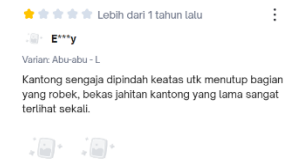
Specifically, the basic provisions of the agreement that have been stipulated in the Civil Code, looking at the context of Article 18 of Act Number 11 of 2008 concerning Information Technology and Electronics (ITE), have the same substance as the provisions in the Civil Code, namely having legal and binding validity and only differing in the electronic and conventional realms. In addition, in terms of consumer protection, it is also regulated in Article 4 of the UUPK, which provides various rights, including the right to comfort, trade protection, and security, the right to choose, the right to accurate information, the right to hear their complaints and other rights.

Electronic contracts have technically been regulated in Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions. Article 47 section (1) of *a quo* Government Regulation describes an electronic contract as a form of agreement between the parties and is considered valid according to section (2) if they have agreed, are competent in a certain thing, and are lawful. Although the law attempts several legal approaches to protect consumers, there are legal loopholes that revolve around uncertainty in the law itself, namely that the issue of negative confirmation in giving a value to the seller has no other meaning except

the seller's rating. The assessment is based on consumer dissatisfaction with the goods/services purchased. It is as if the seller would obtain legal certainty only on the pretext that negative confirmation implies acceptance of the consequences of the agreed contract.

This is something novel, and it must be remembered that negative assessments of agreements can be taken into account when terminating a contract. Sometimes, the problem is that the dispute cannot be resolved because the costs claimed exceed the purchase price, so the consumer decides to accept the contract even though the consumer is at a loss. Negative confirmation differentiates buying and selling activities between conventional and modern, where consumers can assess transactions carried out publicly on consumer purchasing decisions. E-commerce provides a seller assessment feature. Specifically for negative assessments (negative confirmation), consumers only get a forum to respond to sellers for transactions made but do not get legal protection as for losses experienced by consumers [24]. To make it easier to understand negative confirmation, here are some examples in e-commerce that shows in Table 1.

Table 1. Negative confirmation on some e-commerce

No.	Negative Confirmation	Legal Responsibility
1.	 *"Comment translation: The dress did not match when it arrived and was beyond my expectations. I was disappointed, and the stitching was also not neat."*	Seller did not take legal action [25].
2.	 *"Comment translation: The pocket was intentionally moved up to cover the torn part. The old pocket stitching marks are very visible."*	There was product damage, but the seller did not provide any response or legal responsibility [26].
3.	 *"Comment translation: How is this? The clothes are torn. I regret it. I give it a bad rating."*	The seller ignored product damage, so consumers' interests were not protected [27].

This context is undoubtedly detrimental to consumers. The absence of a legal path that can accommodate consumer interests against seller defaults has resulted in the fact that until now, there has been no legal protection for the agreement between the seller and the consumer. Normatively, it is clear that consumers receive protection, such as in the Civil Code, Act Number 8 of 1999 concerning Consumer Protection, and Act Number

19 of 2016 concerning Information and Electronic Transactions. Subekti [28] argues about the absoluteness of the provisions of Article 1338 section (1) of the Civil Code that the creation of an agreement that is legally made in the sense that it does not conflict with applicable laws and regulations has binding legal consequences as per the law. In general, an agreement that has been agreed upon cannot be canceled unilaterally, except for a re-agreement of the parties or based on legal reasons through laws and regulations.

Commercial agreements essentially have risks that may not be visible when the contractual relationship is carried out and have the potential for the agreement not to be appropriately implemented, resulting in disputes. Several factors cause an agreement to be invalid, whether due to coercion, error, or fraud. It has been firmly regulated, as stated in Article 1321 of the Civil Code, that an agreement cannot be valid if the process of establishing the contractual relationship is through negligence, coercion, or even fraud. However, in the context of negative confirmation in e-commerce, this is rather difficult to prove based on Article 1321 of the Civil Code, as this is clearly visible in the product/service and cannot be interpreted as coercion in the contract.

Online transactions involving receiving benefits from goods or services post-contract may result in substantial consumer losses. Moreover, Article 1342 of the Civil Code states that it is not permitted to interpret phrases in a contract that are clear in meaning and mutually understood by the parties. Clarity of substance in the clauses or articles in the contract made by the parties will positively impact the legal certainty that the contractee will receive. Clarity of meaning over the substance or phrases contained in the contract is called the principle of *sens clair* or the doctrine of clarity of meaning (plain meaning rules) [29].

There is an urgency to regulate contracts in commercial contract practices as a guarantee of the exchange of rights and obligations so that they run proportionally to the contractee, where this has the aim that the establishment of the contract can be felt as a value of justice and benefit for the parties. Current contractual issues are no longer limited to discussing the issue of unbalanced or unfair contracts in a conventional order. However, they must focus enough on the combination of interests to regulate the value of proportionality (fairness) [30]. Contractual relationships that are not balanced and contract results that are often disproportionate occur in e-commerce transactions. Studies on fair contracts should include a combination of the concept of equal rights *quid pro quo* (achievement-counter-achievement), which is understood in the context of commutative justice and the concept of distributive justice as a basis for contractual relations between the parties [30].

There are two approaches to ensure the realization of the value of justice. First, the procedural approach emphasizes the parties' free will when entering into a contract. Second is the substantive approach that focuses on the contract's substance or content until the contract implementation stage. The substantive approach also pays attention to the differences in the interests of the contracting parties [30]. In the context of negative confirmation, the values of balance in the context of post-contract benefits must be prioritized so that the contract's fair value can be appropriately implemented. Until now, negative confirmation has only been a means of bad assessment to consumers; there are

no legal consequences for consumer dissatisfaction, and negative confirmation only affects the seller's rating but is not legal protection for consumers.

4. Conclusion

Entanglement in commercial contracts, especially e-commerce transactions, is difficult to avoid in the digital era. Most agreements made by parties in e-commerce transactions use standard contracts, which technically do not involve consumers in preparing the contract. This makes some consumers feel disadvantaged. In addition, on the platform, some features essentially facilitate transactions and provide efforts to minimize losses. However, the validity of standard contracts that have been agreed upon at the beginning of the transaction in e-commerce has strict legal force. No one can intervene unless the parties revise the contract. Additionally, post-contract assessments are an interesting context in contracts made on digital platforms. For consumers, however, those who provide bad feedback (negative confirmation) are unable to pursue substantial legal recourse to achieve justice within the contract. This needs to be considered to obtain proportional justice in the contract so that no one is harmed in the implementation of the contract.

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