



# THE LEGAL ISSUES OF THE PRE-CONTRACTUAL PHASE -COMPARATIVE STUDY-

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**Abstract:** *This study addresses the pre-contractual phase, aiming to highlight the key legal issues that arise during this stage. Often lacking explicit legislative solutions, these issues raise many questions about their legal resolutions. The first section discusses the legal significance of defining the nature and timing of negotiations. The second section focuses on the legal obligations of the negotiating parties during the negotiation phase.*

**Keywords:** *Negotiation, pre-contractual phase, offer, contracts, liability.*

## INTRODUCTION:

It is very rare for a contract to be agreed upon directly, without discussion or negotiation. This is because individuals' interests—especially in reciprocal contracts—are different, conflicting and contradictory. What benefits one party simultaneously burdens another. Therefore, each party seeks to achieve the greatest possible gain through the contract, necessitating a phase of reflection, discussion and persuasion before an agreement can be reached.

Thus, the contract is usually preceded by a phase known in legal terminology as the 'pre-contractual phase', which is divided into two sub-phases: negotiation and offer. While details will be provided later, it is important to note that the timeframe of this phase raises other legal issues besides being a legal issue in itself. This study aims to shed light on these issues.

The aforementioned problem will be addressed through a dual structure consisting of two sections. The first section will define the timeframe and nature of the pre-contractual phase, while the second will discuss the legal acts that occur during this phase.

## SECTION ONE: LEGAL QUALIFICATION AND TEMPORAL FRAMEWORK OF THE PRE-CONTRACTUAL PHASE

The first issue to resolve in understanding the legal provisions of this pre-contractual phase is determining the nature of the negotiation. This will be addressed in the first subsection. Once this has been clarified, the timing of the negotiation phase must be accurately defined in order to apply negotiation rules within the correct temporal context. This is the subject of the second subsection.

### Subsection One: The Legal Nature of Negotiation

Negotiation refers to a series of dialogues and discussions aimed at reconciling viewpoints in order to reach a mutual agreement and conclude the final contract<sup>1</sup>. It should be noted that, despite amendments to Laws 05-10 (dated 20 June 2005) and 07-05 (dated 13 May 2007), which impacted many provisions of the Civil Code<sup>2</sup>,

<sup>1</sup>- Nasrallah Sadek Mohammad Ali Badr al-Din, "The Negotiation Phase and Its Impact on Achieving Contractual Security in International Investment Contracts," Journal of Law and Political Science, published by the Faculty of Law and Political Science, "Naama" University Center, Vol. 9, No. 1, 2023, p. 643.

<sup>2</sup>- The Algerian legislator has not regulated the negotiation phase prior to the contract or the legal actions occurring during this phase as a general rule, with the exception of one contract mentioned in the negotiation phase that has been legislatively organized in Articles 71 and 72 of the Algerian Civil Code, namely the "promise to contract," which will be addressed later in this publication.



Algerian legislation still does not regulate the negotiation phase. Algerian law does not address the regulation of pre-contractual obligations, leaving this matter to the judiciary.

In contrast, some legislators in comparative law do explicitly regulate the negotiation phase. For instance, Article 1104 of the French Civil Code, amended by Article 2 of Decree No. 2016-131 dated 10 February 2016, addresses the negotiation phase and states the principle of 'good faith negotiation' as a matter of public policy. The French legislator also emphasises this principle and adds two others: 'freedom of negotiation' and 'the independence of the negotiation phase from the contract phase'. According to Article 1112 of the Civil Code, errors made during negotiations cannot be compensated for by reducing expected profits from the potential final contract, nor can compensation be claimed for lost expected profits from an unexecuted contract<sup>3</sup>.

Fundamentally, negotiation is a material act that does not impose any obligations on negotiators or create legal effects. Therefore, legal responsibility cannot arise unless harm is caused to others in accordance with tort liability provisions (as per Article 124 of the Civil Code).

Nevertheless, business contract practice, especially in the case of international contracts, shows that negotiations can take the form of legal actions (contracts). In such cases, negotiation becomes a legal act and the resulting liability is contractual (according to Articles 106 and subsequent articles of the Civil Code). Contracts commonly concluded during the negotiation phase include negotiation contracts (sometimes referred to as letters of intent), framework agreements and preference contracts, among others<sup>4</sup>.

Whether or not a contract governs the negotiation phase, this phase is subject to the general principle of 'good faith negotiation'. Comparative legislation differs in its recognition of this principle during the pre-contractual phase, as well as during contract execution. Some legislation explicitly affirms this principle, including German, Italian and Dutch law, as well as the Quebec Code<sup>5</sup>. Recently, French legislation in Article 1104 acknowledged this principle following extensive legal discourse on the necessity of enforcing good faith in the pre-contractual phase. Some scholars, such as J. MESTERE<sup>6</sup>, argue that the principle should apply even without an explicit statutory reference. They note that the French Civil Code draft initially specified that agreements should be made and executed in good faith. However, for formal reasons only, the final text of Article 1134 was limited to execution.

### **The Expansion of the Principle of Good Faith in Negotiation**

This scholar's extensive interpretation of Article 1134 of the French Civil Code is justified by the view that the contract is a unified whole. This implies that good faith is required during both the formation and execution phases. Therefore, even if legislation states that contracts must be understood, interpreted and executed in good faith, this principle should apply not only during execution, but also during creation and formation.

In this context, Jacques Gissant<sup>7</sup> argues that 'there is no benefit in imposing the principle during the execution phase if it is not enforced during the formation of the contract. The contract forms a single entity, and it is vital that good faith permeates the entire contract.'

In response to criticisms from French legal scholars regarding the omission of the negotiation phase in contracts, the French legislator amended the Civil Code to emphasise that contracts are subject to

<sup>3</sup>- Article 1104 of the French Civil Code modified by Ordinance 2016-131 of February 10, 2016, Article 2: "Contracts must be negotiated, formed, and executed in good faith. This provision is of public order."

<sup>4</sup>- Article 1112 of the French Civil Code modified by Law 2018-287 of April 20, 2018, Article 3:

"The initiative, conduct, and termination of pre-contractual negotiations are free. They must necessarily comply with the requirements of good faith."

<sup>5</sup>- Mohamed Khaydar Nashmi, "The Legal System of Preliminary Negotiations for Contracting," Master's Thesis, Middle Eastern University, Jordan, 2013-2014, pp. 66-67.

<sup>6</sup>- The text of the Civil Code of the Quebec district explicitly states in the new civil code enacted in 1994, Article 1375, that the parties must act in good faith during the formation, execution, or termination of the contract.

<sup>7</sup>- J. Mester, "The Requirement of Good Faith in Contract Conclusion," R.T.D.C., 1989, p. 739.



negotiation and should be concluded and executed in good faith as a matter of public policy. Furthermore, Article 1112/1 of the French Civil Code<sup>8</sup> states that individuals are free to negotiate in the pre-contractual phase, provided that it meets the requirements of good faith.

The French legislator's stance reflects the prevailing scholarly opinion on this matter. Additionally, Article 1114 clarifies that if an offer contains all the essential elements<sup>9</sup>, acceptance expresses the offeror's intent; otherwise, it is merely an invitation to negotiate.

In contrast, Algerian legislation restricts the application of the principle of good faith to the execution of the contract, as per Article 107 of the Algerian Civil Code.

By contrast, Algerian legislation limits the application of the principle of good faith to the execution of the contract, as set out in Article 107 of the Algerian Civil Code. Abdel Halim Al-Qouni<sup>10</sup> justifies the imposition of the principle in the pre-contractual phase, stating that the intended purpose cannot be realised unless the contract is based on good faith from the outset. If the parties' intentions are flawed during the pre-execution phases, the contract cannot be rectified later if formed under such conditions.

Another scholarly<sup>11</sup> view posits that imposing the principle is self-evident and does not require proof, relying on the notion of 'a fortiori'. This type of reasoning falls within the realm of self-evident truths, where denial is viewed as a refusal to engage in argumentation<sup>12</sup>.

The obligation to negotiate in good faith requires negotiators to avoid deceit and to act with honesty and integrity in accordance with customary practices. However, it is important not to confuse this obligation with the principle of freedom to contract. The obligation to negotiate in good faith does not compel negotiators to conclude the final contract – they are free to decide whether or not to do so. They may terminate negotiations provided their reasons are legitimate and do not violate the principle of good faith, which requires fairness, honour, objectivity and honesty<sup>13</sup>.

### **Subsection Two: The Temporal Framework of the Pre-Contractual Phase**

The pre-contractual phase is of significant importance and is divided into two sub-phases: the negotiation phase, which concludes with the issuance of an offer; and the offer phase, which ends either with the formation of the contract upon receipt of an appropriate acceptance, or with the offer expiring for reasons specified by law (e.g. lack of matching acceptance, withdrawal of the offer before it reaches the offeree, or expiration of the specified offer period).

From this perspective, the offer serves as the dividing line between the negotiation and contract formation phases. Once an offer has been made (i.e. a definitive proposal containing all the essential elements of the contract), the negotiation phase ends. Conversely, if no offer is made, both parties remain in the negotiation or discussion phase regarding the contract<sup>14</sup>.

<sup>8</sup> Jacques Gustin, translated by Mansour Al-Qadi, *The Comprehensive Civil Code*, 1st ed., University Publishing House for Studies and Distribution, Lebanon, 2000, p. 920.

<sup>9</sup> Article 1112/1 C. civ. F: "The initiative, conduct, and termination of pre-contractual negotiations are free. They must necessarily satisfy the requirements of good faith."

<sup>10</sup> Article 1114 C. civ. F: "The offer, made to a specific or unspecified person, includes the essential elements of the proposed contract and expresses the will of its author to be bound in case of acceptance. Otherwise, it is merely an invitation to enter into negotiations."

<sup>11</sup> Abdel Halim Al-Quni "Good Faith in Transactions in Islamic Jurisprudence and Civil Law," University Press, Alexandria, Egypt, 2010, p. 373.

<sup>12</sup> Haldir Asaad Ahmad, presented by Muhammad Suleiman Al-Ahmad, "The Theory of Fraud in Contracts," Comparative Analytical Study in Civil Law, Scientific Books House, Beirut, Lebanon, 2011, p. 32.

<sup>13</sup> Belhaj Al-Arabi, "The Legal Aspects of the Pre-Contractual Phase," A Comparative Jurisprudential and Judicial Study in Light of the Algerian Civil Law, Homa House, Algeria, 2014, p. 71.

<sup>14</sup> Zitouni Fatima Zahra, "The Principle of Good Faith in Contracts: A Comparative Study," Doctoral Thesis in Private Law, Faculty of Law and Political Science, Tlemcen University, 2017-2018, p. 69.



In temporal terms, the negotiation phase concludes at the moment an offer is made<sup>15</sup>. If the offer is a step towards the contract, then negotiation is a step towards the offer.

In the negotiation phase, we encounter the terms 'invitation to negotiate' and 'offer'. Are these two terms synonymous, or does each carry a distinct meaning?

An 'invitation to negotiate' is defined as a proposal directed to a specific or unspecified person with the intent of entering into discussions aimed at concluding a contract. During this period, each party attempts to define the terms of the contract according to their interests, exerting their best efforts and skill. An invitation to negotiate is merely one party's proposal to another to sit at the negotiation table with the goal of potentially reaching a final contract if agreement is achieved. Accepting the invitation does not result in the formation of a contract.

By contrast, an 'offer' is a definitive proposal expressing a clear intention to enter into a contract, addressed to a specific person or group, and including all the essential elements of the contract. A proposal cannot be considered an offer unless it includes all the elements of the aforementioned definition. For a contract to be formed, an offer requires matching acceptance. Therefore, invitations to negotiate and offers differ in concept and legal consequence.

## SECTION TWO: LEGAL ACTS IN THE PRE-NEGOTIATION PHASE

As previously mentioned, negotiation is generally considered to be a material act; however, there may be exceptions to this principle. Negotiating parties may prefer to formalise their negotiations legally, resulting in legal act during the negotiation phase.

A legal act is any behaviour aimed at producing a legal effect<sup>16</sup>. One of the most significant legal acts during the negotiation phase is the negotiation contract (see Subsection One). Less common contracts in this phase include preference contracts, framework agreements, promises to contract and consultancy contracts (see Subsection Two).

### Subsection One: The Negotiation Contract

The negotiation contract is an unnamed contract that initially emerged in Anglo-American countries and later spread to Latin countries<sup>17</sup>. Sometimes referred to as a 'letter of intent', the negotiation contract organises the negotiation process. The negotiating parties aim to organise the negotiation phase, which includes:

- Specifying the time and place of negotiations.
- Agreeing on confidentiality conditions.
- establishing exclusivity conditions (i.e. not engaging in parallel negotiations).
- defining liability for unjustly terminating negotiations;
- Clarifying who will bear the negotiation costs.

The negotiation contract imposes contractual obligations on the parties involved, who must adhere to its terms. However, it is important to note that the negotiation contract does not include an obligation to conclude the final contract.

<sup>15</sup>- Belhaj Al-Arabi, "The Legal Aspects of the Pre-Contractual Phase," A Comparative Jurisprudential and Judicial Study in Light of the Algerian Civil Law, *Ibid.*, p. 27.

<sup>16</sup>- An offer, in the legal sense of the word, must be made to conclude the negotiation phase, meaning that a definite proposal directed to a specific person or group must include all essential matters for contracting. Any offer lacking these defining elements is not considered a legal offer; rather, it may be an invitation to negotiate or similar, and such an offer does not conclude the negotiation phase.

<sup>17</sup>- Younes Salah al-Din Ali, "Preliminary Contracts," Legal Books House, Shatat Publishing and Software, Egypt, 2010, p. 47 and onwards.



Clearly, a negotiation contract only exists if the three essential elements of a contract – consent, subject matter and cause – are present. Although the form requirement is often documented in written form in practice, it is not one of its essential elements.

### **Subsection Two: Other Contracts That May Arise During the Negotiation Phase**

Although the negotiation contract is the most common agreement during this phase, other contracts may also be relevant. These include:

#### **First: The preference contract**

This may be established when the parties cannot reach an agreement on the final contract, but do not wish to lose the deal entirely. In this case, they choose to enter into a preference contract.

This is an agreement whereby one party commits not to enter into a contract with a third party until they have offered the outcome of their negotiations with that third party to the other contracting party. If the other party accepts, they will enter into a contract with that party, which takes precedence over the third party<sup>18</sup>.

As a fully-fledged contract, the preference contract requires the presence of the essential elements of consent, subject matter, and cause for its validity.

#### **Secondly, the framework agreement:**

A framework agreement outlines the basic terms that both parties commit to following in any subsequent contracts, known as ‘application contracts’ in this context. Clearly, the framework agreement serves as a foundation for potential future contracts, organising how these contracts will be formed and specifying the elements that must be included when they are established.

The framework agreement remains separate from the application (final) contract. It determines the subject matter of the parties’ relationships and the main conditions they commit to in subsequent contracts. The goal of the framework agreement is to facilitate the conclusion and execution of application contracts. However, it does not necessarily encompass all the essential elements of the application contract. However, both the framework agreement and the application contracts form a contractual group linked by a common economic objective<sup>19</sup>.

Article 1111 of the French Civil Code refers to the framework<sup>20</sup> agreement as an agreement in which both parties agree on the general characteristics of future contractual relationships. Consequently, any breach of the terms of the framework agreement results in contractual liability<sup>21</sup>.

Like the preference contract, the framework agreement is also considered a legal contract; thus, its validity requires fulfilment of all the necessary conditions for forming a contract in accordance with the general rules (consent, subject matter and cause).

<sup>18</sup>- Ibid., p. 48.

<sup>19</sup>- Younes Salah al-Din Ali, Ibid., p. 49.

<sup>20</sup>- Claire Poitevin, "The Pre-Contract in Copyright Law," Doctoral Thesis, University of Avignon, 2011, p. 63. Article 1111 C. civ. F: "The framework contract is an agreement by which the parties agree on the general characteristics of their future contractual relations. Application contracts specify the terms of execution."

<sup>21</sup>- This also leads us to question whether it is required in a framework contract to agree on all essential elements, including the price, for the contract to be valid? In this regard, French jurisprudence has stated in a famous decision on December 1, 1995, that the lack of price specification in the initial agreement does not affect its validity. Quoted from: Yunis Salah al-Din Ali, Ibid., p. 209.

In this context, Belhaj Al-Arabi argues that if the parties reach an agreement outside any contractual framework on the essential elements of the final contract under negotiation, leaving other elements for future agreement, such a partial agreement creates a contractual obligation on both parties to negotiate the deferred elements.

Belhaj Al-Arabi, Ibid., p. 135.



### **Third: the promise to contract.**

This involves one or more parties committing to enter into a specific contract within a certain timeframe and under defined conditions<sup>22</sup>. This is regulated by the Algerian legislator in Articles 71 and 72 of the Civil Code.

Essentially, a promise to contract constitutes a binding agreement, formed through an offer from the promisor and acceptance from the promisee. However, in this context, both the offer and the acceptance pertain solely to the promise to enter into the final contract rather than to the final contract itself.

For a promise to contract to be valid, it must include all essential issues related to the future contract, the timeframe for its conclusion and, if applicable, the legal form required for the final contract. For it to take effect, it is sufficient for the promisee to express their desire for the final contract to be concluded. If the promisor fails to fulfil the promise to contract after the conditions have been met, the promisee can seek a judicial ruling that takes the place of the contract.

### **Fourth: the consultancy contract**

The negotiation phase may also involve a consultancy contract. This contract involves an expert or specialist conducting a feasibility study for one of the negotiating parties regarding the proposed transaction, in exchange for compensation<sup>23</sup>.

Despite being part of the negotiation phase, it is clear that the consultancy contract is entirely independent of the final contract. Rather than binding the negotiators together, it is entered into between the negotiator and the expert to obtain professional insight or advice in order to achieve the most economically beneficial deal.

Thus, it is evident that the negotiation phase can include legal acts manifested as contracts. In such cases, breaching a contractual provision may result in contractual liability.

### **CONCLUSION:**

This research has clarified that, from a legal perspective, the negotiation phase begins with the first communication between the negotiators and ends with an offer being issued. Negotiation remains a material act unless specific legal act occurs during it.

Contracts are not necessary during the negotiation phase; many negotiations occur without them. However, having contracts that regulate the negotiation phase can have a positive impact on the smooth conduct of negotiations. For example, entering into a contract that organises the negotiation phase clarifies matters, minimises ambiguity and reduces the 'expectation gap' between negotiators. Significant disagreements often arise due to vast differences in expectations regarding the negotiation process, language, costs and other factors, potentially jeopardising negotiations. Therefore, it is advisable to establish a contract that regulates the negotiation phase in order to avoid hindrances at the outset.

Conversely, if a contract exists during the negotiation phase, its parties must execute it. Each party is bound by the obligations stated in the contract and benefits from the rights it confers.

It is worth noting that the most common type of contract used during the negotiation phase is the negotiation contract previously discussed. If negotiators conclude a mandate that regulates the negotiation phase, they must adhere to all obligations contained within it. In this case, negotiations transform from a material act into a binding legal action.

Despite the absence of a specific legal text governing the negotiation contract in Algerian law, it remains a form of unnamed contract.

Despite the absence of a specific legal text governing negotiation contracts under Algerian law, they remain a form of unnamed contract. An Algerian judge can recognise it under Article 106 of the Civil Code, which

<sup>22</sup>- Younes Salah al-Din Ali, *Ibid.*, p. 52.

<sup>23</sup>- Mohamed Abd Al-Zaher Hussein, "The Legal Aspects of the Pre-Contractual Phase," *Journal of Rights*, No. 2, Kuwait University, 1998, p. 356.





states: 'Contracts are the law of the parties; they may not be revoked or modified except by mutual consent or for reasons provided by law.'

Consequently, establishing a negotiation contract has numerous legal implications, creating various obligations for both parties involved in the negotiations. These include the obligation to enter into negotiations and to continue them in good faith, as well as other obligations that may not be explicitly stated in the contract.

## REFERENCES

### *In Arabic:*

#### **First: Legal Texts**

- [1] *Algerian Civil Code*
- [2] *Civil Code of the Quebec Province issued in 1994.*

#### **Second: Books**

- [1] Belhaj Arabi, *The Legal Aspects of the Pre-Contractual Phase: A Comparative Juridical Study in Light of the Algerian Civil Code*, Dar Houma, Algeria, 2014.
- [2] Jacques Gissant, translated by Mansour Al-Qadi, *The Comprehensive Civil Law*, 1st ed., University Foundation for Studies, Publishing, and Distribution, Lebanon, 2000.
- [3] Abdel Halim Al-Qouni, *Good Faith in Transactions in Islamic Jurisprudence and Civil Law*, Dar Al-Matbou'at Al-Jami'iyya, Alexandria, Egypt, 2010.
- [4] Haldir As'ad Ahmed, introduction by Muhammad Suleiman Al-Ahmad, *The Theory of Fraud in Contracts: A Comparative Analytical Study in Civil Law*, Dar Al-Kutub Al-Ilmiya, Beirut, Lebanon, 2011.
- [5] Younes Salah El-Din Ali, *Preliminary Contracts*, Dar Al-Kutub Al-Qanuniya, Dar Shatat for Publishing and Software, Egypt, 2010.

#### **Third: Theses and Dissertations**

- [1] Zaitouni Fatima Zahra, *The Principle of Good Faith in Contracts: A Comparative Study*. PhD thesis in Private Law, Faculty of Law and Political Science, University of Tlemcen, 2017-2018.
- [2] Mohammad Khaidar Nashmi, *The Legal System of Preliminary Negotiations for Contracting*, Master's thesis, Middle East University, Jordan, 2013-2014.

#### **Fourth: Articles**

- [1] Muhammad Abdel Zahir Hussein, *The Legal Aspects of the Pre-Contractual Phase*, *Journal of Law*, No. 2, University of Kuwait, 1998.
- [2] Nasrallah Sadiq, Muhammad Badreddin, *The Negotiation Phase and Its Impact on Achieving Contractual Security in International Investment Contracts*, *Journal of Law and Political Science*, published by the Faculty of Law and Political Science, University Center of Naama, Vol. 9, No. 1, 2023.

### *In French:*

#### **First: Legal Texts**

- [1] *French Civil Code modified by Ordinance 2016-131 of February 10, 2016.*
- [2] *French Civil Code modified by Law 2018-287 of April 20, 2018.*

#### **Second: Books**

- [1] J. MESTER, *The Requirement of Good Faith in Contract Conclusion* R.T.D.C; 1989.

#### **Third: Theses**

- [1] Claire Poitevin, *The Pre-Contract in Author Contract Law*, PhD thesis, University of Avignon, Faculty of Law, 2011.