



Liability Provisions in the Negotiation Stage in Technology Transfer Contracts in Algerian Law

Nadia LAKLI

Lecturer "A" Faculty of Law,
University of Ain Temouchent, Algeria
Philosophy, Science and Development in Algeria, university
of Oran2

nadia.lakli@univ-temouchent.edu.dz
<https://orcid.org/0000-0002-2480-5351>

Amina CHENAA

Lecturer "A" Faculty of Law and Political Science,
University of Souk Ahras, Algeria
Philosophy, Science and Development in Algeria, university
of Oran2

a.chenaa@univ-soukahras.dz
<https://orcid.org/0009-0000-4073-2239>

Yahya Bey KHADIJA

Lecturer "A" Faculty of law and political science,
University of Oran 2

yahiyabey.khadidja@univ-oran2.dz

Abstract:

Technology transfer contracts are considered one of the most prominent contracts that contribute significantly to achieving economic development, especially in developing countries, as they are based on the transfer of technology of all kinds, especially when these contracts focus on world-famous industrial brands, which allows the revival of the national economy.

Due to the special nature of technology transfer contracts as well as their economic value, they go through a preliminary stage prior to the final contract between the two parties and are called the negotiation stage, through which the legal framework of the contractual relationship is determined before it is finalized. Although it is only a preliminary stage prior to the contract, it carries with it obligations that fall on the parties and must be respected, and in this case, they are called "negotiating obligations" under penalty of liability in case of breach of them.

However, we wonder about the nature of this liability in the preliminary stage, does it fall within the framework of tort liability for failure to conclude the final contract? Or is it a contractual liability?

Accordingly, we will learn through this study about the obligations of the parties (donor and recipient) in the preliminary stage of technology transfer contracts and then determine the nature of this responsibility, whether it is tort or contractual, to highlight at the end of the study the legal gaps in Algerian legislation in the field of technology transfer contracts, with some recommendations in the same context.

Keywords: *contracts, technology transfer, negotiation stage, responsibility*

Dispositions relatives à la responsabilité au stade des négociations dans les contrats de transfert de technologie en droit algérien

Résumé :

Les contrats de transfert de technologie sont considérés comme l'un des contrats les plus importants qui contribuent de manière significative au développement économique, en particulier dans les pays en développement, car ils reposent sur le transfert de technologies de toutes sortes, surtout lorsque ces contrats concernent des marques industrielles de renommée mondiale, ce qui permet la relance de l'économie nationale.

En raison de la nature particulière des contrats de transfert de technologie ainsi que de leur valeur économique, ceux-ci passent par une phase préliminaire avant la conclusion du contrat définitif entre les deux parties, appelée phase de négociation, au cours de laquelle le cadre juridique de la relation contractuelle est déterminé avant sa finalisation. Bien qu'il ne s'agisse que d'une phase préliminaire au contrat, elle comporte des obligations qui incombent aux parties



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et qui doivent être respectées. Dans ce cas, elles sont appelées « obligations de négociation » sous peine de responsabilité en cas de manquement.

Cependant, nous nous interrogeons sur la nature de cette responsabilité au cours de la phase préliminaire : relève-t-elle de la responsabilité civile pour non-conclusion du contrat final ? Ou s'agit-il d'une responsabilité contractuelle ?

En conséquence, nous allons étudier dans le cadre de cette étude les obligations des parties (donateur et bénéficiaire) au stade préliminaire des contrats de transfert de technologie, puis déterminer la nature de cette responsabilité, qu'elle soit délictuelle ou contractuelle, afin de mettre en évidence à la fin de l'étude les lacunes juridiques de la législation algérienne dans le domaine des contrats de transfert de technologie, avec quelques recommandations dans le même contexte.

Mots clés : *contrats, transfert de technologie, phase de négociation, responsabilité*

Introduction:

Technology transfer contracts are considered one of the most prominent contracts that contribute significantly to achieving economic development, especially in developing countries, as they are based on the transfer of technology of all kinds, especially when these contracts focus on world-famous industrial brands, which allows the revival of the national economy.

Due to the special nature of technology transfer contracts as well as their economic value, they go through a preliminary stage prior to the final contract between the two parties and are called the negotiation stage, through which the legal framework of the contractual relationship is determined before it is finalized. Although it is only a preliminary stage prior to the contract, it carries with it obligations that fall on the parties and must be respected, and in this case, they are called "negotiating obligations" under penalty of liability in case of breach of them.

The importance of this study is reflected in the effective role played by technology transfer contracts in economic development, especially for developing countries, as they are based on the transfer of technology of various kinds from developed countries.

This study aims to highlight the legal framework for the preliminary stage in technology transfer contracts, specifying the obligations and responsibilities of both parties in these contracts, as well as identifying the nature of the responsibility that exists during this negotiating period, especially since the Algerian legislator has paid attention to investments transferring technology under the law despite



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22-18 on investment¹, without specifying the legal framework for them.

Based on the above, the following problem arises: What is the nature of liability in the preliminary stage of technology transfer contracts?

To answer this problem, this study will divide this study into two main axes: in the first axis, we will identify the obligations of the parties (donor and recipient) in the preliminary stage of technology transfer contracts, and then determine in the second axis the nature of this responsibility, whether it is tort or contractual, and we will follow the analytical approach.

1. Obligations of the parties in the preliminary stage in technology transfer contracts

Technology transfer contracts are characterized by the existence of a preliminary stage preceding the final stage of the conclusion of the contract due to the economic value of these contracts, as the latter focuses on industrial property rights that cannot be exploited by third parties except under certain conditions that require preliminary agreement on the contractual terms.

It should be noted that the preliminary stage requires the availability of the same elements of the contract, which are consent, capacity, place and reason.

This stage entails obligations on both the grantor and the recipient of the industrial right, and is called "negotiating obligations" because it is located in the preliminary stage prior to the final contract, and this will be elaborated.

¹ of July 24, 2022, O.J of July 28, 2022, p. 50.

1.1. Basic Obligations in the Negotiation Phase of Technology Transfer Contracts

Both the grantor and the recipient have common core obligations in the preliminary stage as the basis for reaching the final contract, and these obligations are as follows:

1.1.1. *Obligation to commence negotiations*

Starting negotiations is the first key stage that assumes a joint discussion between the parties, especially when it comes to complex contracts that are somewhat complex compared to simple contracts.

During this stage, the contractual needs and conditions are determined by presenting the outline before the final contract, after taking the necessary procedures for negotiation and meeting the two parties and their legal advisors with the possibility of using some experts in the field, and views are exchanged in the meeting and feasibility study to obtain sufficient and necessary information related to the contract and its elements².

Negotiation is considered as an exchange of bargains, as well as proposals between the two parties, reports, documents, technical and technical studies related to the movable industrial right, as well as legal advice so that each of them is aware that enables him to choose the appropriate legal forms for his economic interest³.

The national laws of the two countries, especially in the field of investment, competition, export and import, and the potential risks of the project are also identified.

² Walid Ali Maher, *Insight into Technology Transfer Contracts*, Center for Arabic Studies for Publishing and Distribution, Egypt, 2018, p. 53.

³ Dergham Mahmoud Kazim, *The Legal Status of the Recipient in the Technology Transfer Contract (An Analytical Study)*, Al-Halabi Human Rights Publications, Lebanon, 2017, p. 56.



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Negotiations often take place in physical meetings, and if they are held remotely, each party sends its correspondence related to the negotiation and records the date of dispatch, as a means of proving the existence of a preliminary deadline for fear of the second party disclosing negotiating secrets⁴.

1.1.2. *Obligation to negotiate in good faith*

Both parties are obligated to enter into negotiations in good faith and with all sincerity, cooperation and desire to reach the final contract, and the parties are also obligated to continue the negotiation, as one of the parties has the right to withdraw from the negotiation unless there is a serious and objective justification that requires the interruption of the negotiation, such as if the preliminary contract includes an arbitrary clause against one of the parties, in which case he can withdraw from the negotiation⁵.

Essentially, withdrawal from the negotiation does not entail responsibility on the part of the withdrawal, but in the absence of a legitimate justification for withdrawal, the withdrawer bears responsibility. The reason for the responsibility for interrupting the negotiation without legitimate justification is due to the confidentiality and importance of the information received by the parties during the negotiating meeting, which requires a serious and

⁴ Hani Sarie El-Din, *International Commercial Negotiations and Contracts, A Comparative Study in Egyptian and English Law*, Dar Al-Nahda Arabic, Egypt, 2007, p. 31.

– With the development of technology, parties can meet remotely by various means such as Zoom or Google Meet and record meetings as a means of proof.

⁵ p. 183, *Ibid*

objective justification for withdrawing. The parties are also obliged to exercise care in the success of the negotiation⁶.

1.2. Subsidiary obligations in the negotiating phase of technology transfer contracts

In addition to the basic obligations, the parties to the technology transfer contract have subsidiary obligations in the negotiating phase, namely the obligation to inform, the obligation to maintain confidentiality and the obligation not to enter into parallel negotiations.

1.2.1. Obligation to inform

This obligation is a general obligation on both parties, but it emphasizes more on the grantor to protect the recipient as the weak party in this contractual relationship⁷, as the grantor is obligated to provide the recipient with all information, data and documents related to the movable right due to the complex nature of these contracts, especially when it comes to complex contracts⁸.

The obligation to inform means notifying one of the parties, who is in the strongest position over the other party, of all information and data related to the contract and its elements, which contribute to the formation of free and informed consent of the weak party⁹.

The obligation to inform aims to protect the consent of the recipient in order to contract with proper and complete

⁶ M.B. MERCADAL and P.H. JANIN, *The cooperation contracts undertaken*, Dalloz, France, 1974, p. 42.

⁷ Technology transfer contracts are classified as compliance contracts because of the donor's economic power position relative to the recipient's position

⁸ J. GILBERT, *Contracts and corporate law*, Lamy, France, 1999, p. 123.

⁹ Said Saad Abdel Salam, *Obligation to Disclosure in Contracts*, Dar Al-Nahda Arabic, Egypt, 1999, p. 08.



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consent, as the consent and desire of the recipient to contract depends on the information provided to him by the recipient. The recipient is also obliged to advise and warn the recipient about everything related to the transferred right¹⁰.

1.2.2. Obligation to maintain confidentiality of information

The obligation to maintain confidentiality is among the most important obligations of the grantor and the recipient, but it emphasizes more on the recipient due to his receipt of important technical and technical information related to the transferred right, as it is not reasonable for the grantor to disclose his secrets about himself while the disclosure of information can be expected by the recipient to one of the grantor's competitors¹¹.

The parties to the contract must determine the scope of the obligation to maintain confidentiality in terms of place and time, as well as in terms of the persons entitled to access to the content and secrets of the technology transferred¹².

1.2.3- Obligation not to enter into parallel negotiations

This obligation is also called the " minors clause" or "exclusion clause", through which the parties agree not to negotiate with third parties on the same subject matter of the transaction and this is done either under a clause included in the contract or under a separate contract. That is, limiting negotiations to the parties only.

¹⁰ Hossam Issa, *Technology Transfer: A Study in the Legal Mechanisms of International Dependence*, Dar Al-Mustaqbal Al-Arabi, Lebanon, 1986, p. 310.

¹¹ Dergham Mahmoud Kazim, *ibid.*, p. 180.

¹² *Ibid.*, p. 183

This obligation falls heavily on the recipient to protect the economic interest of the grantor, as the recipient is prohibited from entering into parallel negotiations on the same industrial right with a company that directly competes with the grantor¹³'s company.

2. The effects of breach of negotiating obligations

It is well known that breach of obligations entails liability on the breach of its obligations, but the problem arises in technology transfer contracts about the nature of the liability existing at the negotiation stage, whether it falls within the framework of contractual liability or tort liability.

The views of jurists were divided between considering negotiating liability as tort and considering it a contractual liability.

2.1. Tort liability as an effect of a breach of negotiating obligations

As is well known, liability generally arises when there are elements of fault, damage and a causal relationship between them. A party to technology transfer contracts may breach one of its obligations, such as a breach by the grantor of its obligation to inform, or by the recipient depositing secrets received by the grantor, which constitutes an error that causes harm to one of the parties.

However, some jurisprudence is of the view that in the event of a breach of a party's negotiating obligations, there is tort liability, and this view is based on the absence of a final

¹³ For example, Renault recipients cannot enter into parallel negotiations with Peugeot due to direct competition between them



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contract between the parties and that it is a preliminary stage that is not binding on the parties¹⁴.

According to this view, the negotiation phase is merely an exchange of views between the parties on the terms of the contract, and the parties may not agree on these contracts, leading to the termination of the negotiation without the conclusion of the final contract. Thus, the parties in this case cannot be called contractors, but both are considered aliens from the contractual relationship, which entails only tort liability that does not amount to contractual liability, since negotiation is a material act and not a legal act¹⁵.

2.2. Contractual liability as an effect of a breach of negotiating obligations

Despite the validity of the argument of the proponents of tort liability for breach of negotiating obligations, part of the jurisprudence believes that although the final contract was not concluded between the two parties and the matter was limited to a preliminary stage in which the broad outlines of the contract are determined, the importance of technology transfer contracts and the economic value of their place, represented by the industrial right, requires tightening of liability in the event of a breach by one of the parties of their negotiating obligations¹⁶.

Proponents of this view consider that liability in the preliminary stage of technology transfer contracts is contractual rather than tort, since once such negotiation has been entered into and the exchange of information between

¹⁴ M.B. MERCADAL et P.H JANIN, *ibid*, p. 120.

¹⁵ *Ibid*, p. 123.

¹⁶ J. GILBERT, *ibid.*, p. 154.

the parties constitutes an implicit binding agreement, and they also rely on the obligation of good faith to enter into the negotiation, which is the essential element of any contractual relationship¹⁷. It is therefore suggested that there should be a model version of preliminary contracts for technology transfer contracts¹⁸.

Despite the different opinions on the nature of liability in the preliminary stage of technology transfer contracts, most jurists and some jurisprudence have unanimously agreed on a unified solution that satisfies the rest of the opinions, and according to them, in the event of a letter of guarantee or a written undertaking signed by the parties during the preliminary period and one of them breaches his obligations, in this case there is a contractual liability to consider this undertaking as an express and written prior agreement. In the event that the parties negotiate without signing any undertaking or letter Guarantee, in this case, we are in tort liability because there is no express agreement between them¹⁹.

Conclusion:

Technology transfer contracts are one of the most prominent contracts that contribute significantly to the development and revival of the national economy because of their advantages in the transfer of industrial rights, whether through simple contracts or composite contracts for

¹⁷ J. GILBERT, *ibid.*, p. 156.

¹⁸ Dergham Mahmoud Kazim ,*ibid.*...p. 184

¹⁹ A. BERTIN, *Industrial Property: Trademark and Patents, Designs and Models*, Dalloz, France, 1995, p. 204.



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technology transfer, which requires a preliminary stage in which the most prominent elements of the final contract are negotiated.

However, despite the importance of these contracts, they have not yet received the proper importance in Algerian legislation, as this type of contract has not been codified, unlike some Arabic legislation, which pays great attention to them due to their importance.

We find that the Algerian legislator has enshrined legal rules for the protection of intellectual and industrial property rights without specifying the contractual framework for contracts that focus on these rights, and he also addressed technology transfer contracts modestly in Law No. 22-18 on investment, as we find that this law encourages investments that transfer technology without regulating them contractually at all stages, which leads to the fear of foreign investors to invest in Algeria in the field of technology transfer.

From this point of view, we can propose the following recommendations:

- The need to legalize technology transfer contracts in Algeria by amending the Investment Law and including a complete chapter that frames the contractual relationship between the two parties at all stages, starting from the negotiation stage as one of the most important stages in concluding technology transfer contracts.
- The need to give importance to technology transfer contracts in various administrative and institutional bodies in Algeria, through the training of administrators as well as legal advisers in various

companies in the field of technology transfer contracts, given the specificity of these contracts and the ignorance of some of their legal framework related to the conditions of their formation and the obligations of their parties. In particular, Algeria is moving around opening the way for foreign investment that transfers technology in Algeria, which will lead to the provision of jobs for young people and law students, and this requires intensifying training courses in this field.

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