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PRECONTRACTUAL LIABILITY UNDER THE NEW SAUDI CIVIL TRANSACTIONS LAW: A COMPARATIVE STUDY

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ABSTRACT

Objective: This paper critically examines the effectiveness of the regulation of precontractual liability by the 2023 Saudi Civil Transactions Law (SCTL) in preserving the interests of contract negotiators.

Theoretical Framework: The focus of analysis is the duty to negotiate in good faith in lights of judicial rulings, whether that refuse or recognize such duty.

Method: The paper discusses and assesses precontractual liability under Article 41 SCTL in comparison with some other civil codes. The paper adopts a desk research methodology to analyze and synthesize related academic writings and court rulings.

Results and Discussion: While most Arab civil codes do not directly regulate precontractual liability, Article 41 SCTL expressly provides essential legal protection of parties' interests during contract negotiations. However, Article 41 SCTL does not address all situations of bad faith negotiation. It also limits precontractual liability to negative interests. This paper identifies some areas for improvement, like enabling the court to order the interrupting negotiator to continue contract negotiations or to consider the intended contract as concluded.

Research Implications: These results encourage the legislature in Arab States to follow the Saudi model and directly regulate precontractual liability; they also offer the policy-maker in Saudi Arabia to reform the regulation of precontractual liability.

Originality/Value: This paper offers a unique study of the regulation of precontractual liability under the newly enacted SCTL. It also provides recommendations for improvements of Article 41 SCTL as well as other Arab civil codes.

Keywords: good faith, contract freedom, culpa in contrahendo, tort liability, arab laws.

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RESPONSABILIDADE PRÉ-CONTRATUAL SOB A NOVA LEI SAUDITA DE TRANSAÇÕES CIVIS: UM ESTUDO COMPARATIVO

RESUMO

Objetivo: Este artigo examina criticamente a eficácia da regulamentação da responsabilidade pré-contratual pela Lei de Transações Civis Sauditas (SCTL) de 2023 na preservação dos interesses dos negociadores de contratos.

Estrutura teórica: O foco da análise é o dever de negociar de boa-fé à luz de decisões judiciais, sejam elas que recusem ou reconheçam tal dever.

Método: O artigo discute e avalia a responsabilidade pré-contratual sob o Artigo 41 SCTL em comparação com alguns outros códigos civis. O artigo adota uma metodologia de pesquisa documental para analisar e sintetizar escritos acadêmicos e decisões judiciais relacionados.

Resultados e discussão: Embora a maioria dos códigos civis árabes não regulamente diretamente a responsabilidade pré-contratual, o Artigo 41 SCTL fornece expressamente proteção legal essencial dos interesses das partes durante as negociações contratuais. No entanto, o Artigo 41 SCTL não aborda todas as situações de negociação de má-fé. Ele também limita a responsabilidade pré-contratual a interesses negativos. Este artigo identifica algumas áreas para melhoria, como permitir que o tribunal ordene ao negociador que interrompeu a negociação do contrato ou considere o contrato pretendido como concluído.

Implicações da pesquisa: Esses resultados encorajam a legislatura nos Estados Árabes a seguir o modelo saudita e regular diretamente a responsabilidade pré-contratual; eles também oferecem ao formulador de políticas na Arábia Saudita a reforma da regulamentação da responsabilidade pré-contratual.

Originalidade/Valor: Este artigo oferece um estudo único da regulamentação da responsabilidade pré-contratual sob o SCTL recentemente promulgado. Ele também fornece recomendações para melhorias do Artigo 41 SCTL, bem como outros códigos civis árabes.

Palavras-chave: boa-fé, liberdade contratual, culpa in contrahendo, responsabilidade civil, leis árabes.

LA RESPONSABILIDAD PRECONTRACTUAL EN LA NUEVA LEY DE TRANSACCIONES CIVILES DE ARABIA SAUDÍ: UN ESTUDIO COMPARATIVO

RESUMEN

Objetivo: Este artículo examina críticamente la eficacia de la regulación de la responsabilidad precontractual por la Ley de Transacciones Civiles de Arabia Saudita (SCTL) de 2023 para preservar los intereses de los negociadores contractuales.

Marco teórico: El análisis se centra en el deber de negociar de buena fe a la luz de las sentencias judiciales, ya sea que rechacen o reconozcan dicho deber.

Método: El artículo analiza y evalúa la responsabilidad precontractual en virtud del artículo 41 de la SCTL en comparación con otros códigos civiles. El artículo adopta una metodología de investigación documental para analizar y sintetizar escritos académicos y sentencias judiciales relacionados.

Resultados y discusión: Si bien la mayoría de los códigos civiles árabes no regulan directamente la responsabilidad precontractual, el artículo 41 de la SCTL brinda expresamente protección

legal esencial de los intereses de las partes durante las negociaciones contractuales. Sin embargo, el artículo 41 de la SCTL no aborda todas las situaciones de negociación de mala fe. También limita la responsabilidad precontractual a los intereses negativos. Este artículo identifica algunas áreas de mejora, como la posibilidad de que el tribunal ordene al negociador que interrumpe que continúe las negociaciones del contrato o considere concluido el contrato previsto.

Implicaciones de la investigación: Estos resultados alientan a la legislatura de los Estados árabes a seguir el modelo saudí y regular directamente la responsabilidad precontractual; también ofrecen a los responsables de las políticas en Arabia Saudita la posibilidad de reformar la regulación de la responsabilidad precontractual.

Originalidad/valor: Este artículo ofrece un estudio único de la regulación de la responsabilidad precontractual en virtud de la recién promulgada SCTL. También proporciona recomendaciones para mejorar el artículo 41 SCTL, así como otros códigos civiles árabes.

Palabras clave: buena fe, libertad contractual, culpa in contrahendo, responsabilidad civil extracontractual, leyes árabes.

1 INTRODUCTION

The classic method of contracting (the consequence of offer and acceptance) is not consistent with contracts of great economic and financial value (Lekhdeir, 2017). To determine all legal and technical aspects of such contracts, the formation of same is generally preceded by long and difficult negotiations (Boukhatem, 2023). This precontractual phase includes a set of preliminary processes consisting of a serie of talks, exchange of views, letters, and proposals, and several endeavors between the negotiating parties with the aim of reaching an agreement on a particular bargain (El Ghitawy, 2019; Alnumani, 2023). This phase begins when a party gets in touch with another for the purpose of making a contract; it ends when the offer is refused or when the contract is formed (Novoa, 2005).

The founder of precontractual liability was the German scholar Rudolf von Jhering. In his paper titled "*Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen"*, published in *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 4, 1861, p. 1 ff, von Jhering described this legal institution as "*culpa in contrahendo*", i.e. fault in contract negotiations (Gezder, 2016; Chantladze, 2024). Accordingly, precontractual liability controls act and behavior of the parties during contract negotiations. Precontractual liability aims at preventing any unfair or deceptive practice during this phase (Quagliato, 2008) that might result in harm to the other party and cause the contract to fail (Alhajri, 2017). Eventually, this legal

institution works as a limitation to the principle of contract freedom (Ikonomi & Zyberaj, 2013), but "in the interest of its own preservation" (Kessler & Fine, 1964).

Precontractual liability, that resembles the duty to act in good faith during the contract negotiations phase (Alnumani, 2023), is now an integral part of the Saudi law. Similar to other national laws (e.g. Article 1112 of the French Civil Code; Articles 1337 and 1338 of the Italian Civil Code; Article 197 of the Greece Civil Code; and Article 422 of the 2002 Brazilian Civil Code) and international instruments (e.g. Article 2.1.15 of the UNIDROIT Principles of International Commercial contracts; and Article 2:301 of the Principles of European Contract Law), Article 41 of the 2023 Saudi Civil Transactions Law (SCTL) expressly governs the duty to negotiate in good faith. Any violation of such duty will result in civil, precontractual liability. Article 41 SCTL states that,

"1- Contract negotiations may not oblige the parties to conclude the contract; however, a party who negotiates or breaks off negotiations in bad faith shall be liable for any loss caused to the other party, excluding the expected profit which would have resulted had the contract under negotiation been concluded;

2- Entering bargaining with no intention of reaching an agreement, as well as the deliberate non-disclosure of any material term of the contract, shall be deemed acts that constitute bad faith."

In the same sense, Article 16(1) bis of the 2001 Mauritanian Law on Obligations and Contracts adopts good faith as a principle controlling all phases of a disposition. It expressly states that, "All actions shall be controlled by the principle of good faith."

In line with the classic method of contract conclusion by offer and acceptance, other Arab civil codes do not include an express provision on good faith in the precontractual phase. Nevertheless, the civil codes in most Arab States (e.g. Article 148(1) of the 1948 Egyptian Civil Law; Article 107(1) of the 1975 Algerian Civil Law; Article 246(1) of the 1985 UAE Civil Transactions Law; Article 129 of the 2001 Bahraini Civil Code; and Article 172(1) of the 2004 Qatari Civil Code), including Saudi Arabia (Article 95(1) SCTL) and Mauritania (Article 248 of the 2001 Mauritanian Law on Obligations and Contracts), generally require the parties to execute the contract in accordance with its content and in a manner consistent with the requirements of good faith.

Courts in some Arab States interpreted this principle of good faith literally; the ambit of the principle of good faith is limited to the contract execution phase. In other

Arab States, courts hold a broad interpretation of the principle of good faith. Such principle governs all aspects of a contractual relationship, namely the contract negotiations, conclusion and performance.

As a new provision, Article 41 SCTL has not been yet applied by courts in Saudi Arabia. To understand the application of the principle of good faith in the precontractual phase, this paper will analyze all related statutory provisions and court rulings in other Arab States that applied (or refused to apply) precontractual liability. The aim of this paper is twofold: First, to draw the borderline between two important principles in the precontractual phase, namely the freedom to contract and good faith. Second, in light of the divergence of opinions in Arab States with regard to precontractual liability, the paper aims to show the benefit and importance of Article 41 SCTL.

After presenting the position of Arab courts on precontractual liability (part 2), this paper will explain the principle of good faith in the newly enacted SCTL, as well as its application during the contract negotiations phase (part 3). In part 4, the paper will elucidate liability for negotiating in bad aith in terms of the situations in which precontractual liability may arise and the legal nature and consequences of that liability. The conclusion summarizes the important results and introduces some recommendations.

2 PRECONTRACTUAL LIABILITY IN ARAB STATES

The principle of the contract freedom is well-recognized by Arab civil codes (e.g. Article 147(1) of the 1948 Egyptian Civil Law; Article 106 of the 1975 Algerian Civil Law; Article 243(2) of the 1985 UAE Civil Transactions Law; Article 128 of the 2001 Bahraini Civil Code; Article 247 of the 2001 Mauritanian Law on Obligations and Contracts; and Article 171(1) of the 2004 Qatari Civil Code), including SCTL (Article 94(1)). The parties are free not only to make (or not to make) a contract, but also to determine its content, or to amend or terminate it (Kessler & Fine, 1964).

In addition, Arab civil codes (except the Omani one) generally require the observance of good faith in contract execution. However, most of them does not expressly impose a duty of good faith during contract negotiations. Arab courts and jurists have different opinions concerning the expansion of the ambit of the good faith principle to cover the precontractual phase (Al-Darari, 2022. Bellaoui & Gsassi, 2020).

In some Arab States (like Oman), there is no onus on the parties to initiate contract negotiations or continue such negotiations in good faith. Courts consider negotiations preceding the contract conclusion just a material act with no legal effect. Based on the principle of contract freedom, any party is free to cut off negotiation without being held liable or even asked for justification.

In other Arab States (like Egypt and UAE), courts view the principle of good faith as governing all aspects of a contractual relationship (i.e. the contract negotiations, conclusion and performance). It is well submitted that, to interpret the contract by determining the parties' common intent, the court should consider the letters exchanged between the parties (El Shobary, 2019; Lekhdeir, 2017) and the negotiations preceding the contract (Egypt Court of Cassation, decision no 46 for the judicial year 3, dated 21 December 1933; UAE United Supreme Court, decision no 351 and decision no 518 for the judicial year 23, dated 9 May 2004; and UAE, Abu Dhabi Court of Cassation (Commercial District), decision no 784/2011, dated 14 June 2012, https://www.eastlaws.com/). Indeed, how would a contract be executed in good faith while the requirements of same were not complied with during the negotiations preceded the contract conclusion (Al-Darari, 2022)?!

The requirement of observance of good faith in the precontractual phase limits the parties' liberty to make or not to make the contract. Each negotiator should consider its partner's interests (Alhajri, 2017); any act in bad faith in this phase will result in civil liability (Al-Darari, 2022).

Although negotiations are nothing more than a material act, they entail a legal duty to behave in good faith. Truly, negotiations may not lead to formation of a contract (Miloud, 2022. El Ghitawy, 2019). Nor will the mere interruption of negotiations without achieving an agreement have a legal effect (El-Ahwany, 1996). However, a wrongful negotiation or interruption of negotiation may result in liability; none of the parties is allowed to cause harm to the other party by commencement of negotiations or by interruption of same without a due reason (Al-Fahd, 2017; Vora, 2023).

2.1 ARAB COURT RULINGS REFUSING PRECONTRACTUAL LIABILITY

Like many other Arab civil codes (e.g. Article 148(1) of the 1948 Egyptian Civil Law; Article 107(1) of the 1975 Algerian Civil Law; Article 246(1) of the 1985 UAE

Civil Transactions Law; Article 129 of the 2001 Bahraini Civil Code; Article 248 of the 2001 Mauritanian Law on Obligations and Contracts; Article 172(1) of the 2004 Qatari Civil Code; and Article 95(1) SCTL), Article 156 of the Omani Civil Transactions Law requires the parties to execute the contract in accordance with its content. However, contrary to the aforementioned Arab civil codes, this Article 156 does not expressly state that the parties should perform the contract in a manner consistent with the requirements of good faith.

Accordingly, the Omani Supreme Court (Civil District), in its decisions no 6/2004 and 10/2004, dated 21 April 2004 (https://www.eastlaws.com/), ruled that:

> "Negotiation does not in itself have any legal effect. Negotiations, correspondences and letters exchanged between the parties prior to the signing of the contract is nothing more than a mere preparation for the contract. What matters here is only the result of the negotiations. Each negotiator is free to interrupt the negotiations at the time it wants without being subjected to any liability; it does not need to state a justification for its interruption of negotiations; the contract is not concluded."

Similarly, the Bahraini Court of Cassation refused to apply precontractual liability. In its decision no 569/2008, dated 18 January 2010 (https://www.eastlaws.com/), this court found that, the Appellant Company filed a lawsuit before the High Civil Court requesting a judgment obligating Respondent to pay an amount of 90,000 dinars plus interest. Alternatively, Appellant requested the referral of the lawsuit to investigation to prove the contract conclusion, by virtue of which Respondent rented the property for a monthly rent of 5000 dinars for a period of ten years. Respondent and Appellant negotiated the lease of an area of 405 square meters. After completing discussions on the rent (5000 dinars per month), the duration of the contract (ten years), and the structural modifications and decorations that suit its activity, Appellant sent to Respondent, for the purpose of signature, a copy of the lease contract proposed by Appellant. Although all the terms of the contract were already approved by the parties, Respondent refused to sign the contract. Thus, Appellant filed the lawsuit asking for damages pursuant to the provisions of contractual liability. The Court referred the case for investigation and after hearing the witnesses, it ruled to dismiss the case. Appellant appealed that judgment by Appeal No. 1020 of 2008, in which the Supreme Court of Appeal upheld the appealed judgment. In its decision no 569/2008, dated 18 January 2010, the Court of Cassation in Bahrain (https://www.eastlaws.com/) indicated that:

> "Negotiations prior to the contract are nothing more than a material act that does not in itself have any legal effect. Either negotiator is free to interrupt the negotiations at the time it wants without being held liable; besides, it is not bound to state a justification for its interruption of negotiations."

The Court was right in refusing to apply contractual liability provisions because the parties did not make the lease contract. However, the Court should instead apply precontractual liability to sanction the interruption of negotiations at a time in which the contract was in sight, and without any due reason.

Notably, the same Court changed its position later. Truly, in its decision no 48/2022, dated 4 July 2022 (https://www.eastlaws.com/), this Court affirmed that "negotiation is only a material act that does not entail in itself a legal effect. Every negotiator is free to cut off the negotiation."

> In the same ruling, however, the Court expressly indicated that "interruption [of contract negotiation] will result in tort liability if it is accompanied by a fault of the interrupting negotiator that caused damage to the other party. The burden of proving this fault and damage lies on the shoulders of the other negotiator. Therefore, it is not permissible to consider the mere interruption of the negotiation as fault; rather, for the establishment of tort liability, the fault must be entailed in other facts associated with this interruption."

2.2 ARAB COURT RULINGS RECOGNIZING PRECONTRACTUAL LIABILITY

Since negotiation is just a material act that does not entail in itself any legal effect (Egypt Court of Cassation, decision no 8240 and decision no 8296 for the judicial year 65, dated 23 June 1997, https://www.eastlaws.com/), interruption of negotiation does not *per se* result in civil liability (UAE Dubai Court of Cassation, decision no 145/2007, dated 7 October 2007, https://www.eastlaws.com/). To be sanctionable, such interruption must be accompanied by something unlawful (UAE Dubai Court of Cassation, decision no 145/2007, dated 7 October 2007, https://www.eastlaws.com/), such as, *inter alia*, non-disclosure of a material information, absence of a firm intention to make a contract, or continuing the negotiation after realizing that it is impossible to reach a final agreement (Novoa, 2005).

In Egypt, in its decision no 12935 for the judicial year 88, dated 24 January 2021 (https://www.eastlaws.com/), the Court of Cassation concluded that:

> "In principle, each party is completely free - at this stage [precontractual stage] - to withdraw from concluding the contract, without being asked about the reasons for interrupting negotiations. However, if this retraction is accompanied by a specific incident, independent of the fact of retraction itself, it shall be considered a fault on the part of the retracting party that results in its liability for damages."

In Abu Dhabi, UAE, the Court of Cassation (Commercial District), in its decision no 784/2011, dated 14 June 2012 (https://www.eastlaws.com/), concluded that,

"It is established that the negotiations, demands and letters exchanged between the contracting parties prior to contract conclusion are only material acts that do not have legal effect; such acts are nothing more than a mere preparation for the contract. … There is no obligation on the parties to continue the negotiations; either party may cut off these negotiations. However, the party interrupting the negotiations may be held liable if this interruption is accompanied by a fault of that party resulting in damage to the other party. The source of this tort liability is not the interruption of the negotiations itself; rather, it is the fault committed by the party interrupted the negotiations. The burden of proving this fault and damage rests with the party who suffered damage."

The UAE United Supreme Court (e.g. decision no 312 for the judicial year 19, dated 12 January 1999) and the UAE Dubai Court of Cassation (e.g. decision no 267/2016, dated 11 August 2016, https://www.eastlaws.com/) hold the same position.

In the Islamic Republic of Mauritania, unlike other Arab civil codes (except SCTL), Article 16(1) bis of the 2001 Mauritanian Law on Obligations and Contracts consider good faith as a principle controlling all phases of a disposition. Accordingly, in its decision no 28/2013, dated 27 October 2013, the Mauritanian Chamber of Commerce (https://www.eastlaws.com/) ruled that:

> "The existence of negotiations *per se* is not enough to say that liability arises once negotiations are interrupted. Liability is determined according to the existence of negotiations and the assessment of the extent to which there is tangible progress for negotiation. This progress is shown by the existence of agreement between the parties on the essential elements of the contract. The regression of one of the parties after long negotiations and agreement on the substance of the contract can cause harm to the other party, who took the trouble of negotiating and hoped on gaining some profit out of it, but prevented from achieving this goal due to an arbitrary, not justified interruption of negotiations by the negotiator. … If the availability and progress of the negotiations are ascertained, the facts must show that one of the parties has arbitrarily interrupted the negotiating relationship, and this must be done by proving unjustified conduct that indicates bad faith, such as the negotiations being interrupted shortly before signing a contract that has

> become almost ready in such a way that the other party no longer has any doubt that it will take its final form. Thus, the tort liability resulting from the negotiations is determined."

3 GOOD FAITH PRINCIPLE IN SCTL

3.1 GOOD FAITH IN SCTL IN GENERAL

Before the enactment of the SCCL in 2023, Saudi law, based on Islamic law (Sharia principles) recognized the overriding principles of contract freedom and good faith (Almihdar & Chedrawe, 2023). Many prophetic traditions and Quranic verses establish and confirm the principle of contract freedom (Almihdar & Chedrawe, 2023); thus, each party is free to contract or not to contract.

However, such party should act in good faith. "Actions are but by intentions" (Prophet tradition, reported in *Sahih al-Bukhārī* (1)). In addition, Articles 2 *Mejella* (*Majallat Al-Ahkam Al-'Adliyah*, i.e. the Ottoman civil code) states that, "A matter is determined according to intention; that is to say, the effect to be given to any particular transaction must conform to the object of such transaction." Therefore, any act shall be judged according to the purpose for which it is taken. If the intended purpose was legal, then the act would be legal, whereas if it was illegal, then the act would be illegal, (At-Treky, 2017). Accordingly, under Saudi law, the principle of good faith was recognized to govern all successive stages of a contract, namely negotiation, formation, interpretation and finally performance (Al-Thiaby, 2014).

SCTL expressly acknowledges the principle of contract freedom; each party is entitled to make or not to make a contract. Article 41(1) SCTL expressly states that "Contract negotiations may not oblige the parties to conclude the contract". However, such freedom is clearly limited by the requirements of good faith. In accordance with Article 41(1) SCTL, "a party who negotiates or breaks off negotiations in bad faith shall be liable".

SCTL does not define good faith. However, it may be said that good faith in contract negotiations resembles the realization of the principles of honesty, openness and integrity (El Shobary, 2019; Quagliato, 2008). Good faith precludes each party from fraud or cheating in the negotiations (Ikonomi & Zyberaj, 2013), or acting in such manner that would spread false hopes that inspire false confidence in the other party to conclude the

contract (El Ghitawy, 2019; Ikonomi & Zyberaj, 2013). In this regard, Article 16(2) bis of the 2001 Mauritanian Law on Obligations and Contracts expressly states that, "Good faith imposes on every person the obligation of honesty in acting towards its partner, especially informing it properly of the facts that may be reflected in their relations and not causing it undue harm." Likewise, §1-201(20) of the USA Uniform Commercial Code defines good faith as, "honesty in fact and the observance of reasonable commercial standards of fair dealing."

Good faith has subjective and objective senses. The subjective sense of good faith requires honesty, while the objective one requires reasonable commercial standards of fair dealing (Quagliato, 2008; Ikonomi & Zyberaj, 2013). Parties are therefore supposed to enter into negotiations and discussions of the contract details with a spirit of good faith and fair dealing (Vora, 2023); none is authorized to cut off negotiations after having caused the other party to believe that the contract is forthcoming (Mustafaraj, 2019). Article 720(40) SCTL states that, "If any person seeks to disavow any act performed by himself, such attempt is entirely disregarded."

Beside all provisions on good faith in Saudi laws, like the 1964 Saudi Commercial Papers Law (Articles 8, 16, 118, 119) and the 2003 Saudi Anti-Money Laundering Law (Articles 21 and 25), SCTL expressly recognizes good faith as a general principle governing all kinds of dispositions (Articles 60, 64(1), 65(1), 86(1), 360 and 339(1)).

3.2 DUTY TO NEGOTIATE IN GOOD FAITH IN SCTL

Article 41 SCTL expressly governs the duty to negotiate in good faith. This duty does not mean that a party is obligated to accept the other party's position. Nor does it mean that the parties must make the contract under negotiation (Al-Darari, 2022). It just means that negotiators have honest, genuine and sincere intentions to reach agreement (Alhajri, 2017), regardless whether they eventually reach agreement or not (El Ghitawy, 2019; Bellaoui & Gsassi, 2020). Negotiations that have no hope of reaching an agreed-on result should be promptly cut off.

The duty to negotiate in good faith aims to prevent any behavior incompatible with the requirements of honor and integrity (Al-Fahd, 2017); it protects the parties from abuse in exercising the contract freedom (Miloud, 2022). Such duty has many forms (Boukhatem, 2023), including a duty to negotiate transparently, a duty to inspire trust, a

duty of cooperation and a duty of secrecy between the parties. The breach of such duties will result in civil, precontractual liability for the loss incurred by the aggrieved party.

3.2.1 Transparent negotiations

Each negotiator has the right to know all facts and circumstances necessary to negotiate and make the related contract (Bellaoui & Gsassi, 2020). Therefore, negotiations require transparency; each negotiator should inform the other party about any material matter that would affect the negotiated contract (Al-Darari, 2022). The disclosure of such information, to which the other party does not have access (El Shobary, 2019), could change the course of the negotiations (Kessler & Fine, 1964). On the other hand, a party is not obligated to disclose any (material) facts if the other party knew or ought to know such facts (Gezder, 2016) if it had conducted properly (Novoa, 2005).

The disclosure by one party to the negotiations of material information will avoid the other party from accepting the conclusion of the contract, without being fully aware of the object and content of this contract. Thus, intentional silence by the contract party as to the facts, or as to the accompanying circumstances in relation to the contract, entitles the other party to annul the contract so long as that contract would not have been concluded by the other party had he had knowledge thereof (Article 61 SCTL). Likewise, where the sale was concluded, the purchaser will have the right to annul the contract if the seller did not fully inform the purchaser about the condition of the sold thing (Article 308 SCTL).

The need for such material information would be more obvious if one of the parties to the negotiations is a consumer, weak party. Under Articles 7 and 8 of the Qatari Law on Consumer Protection no 8/2008 (https://www.almeezan.qa/LawPage.aspx?id=2647&language=en), where a supplier displays any commodity for trading, it shall clearly indicate on the packaging or container the type, nature, ingredients, price and other information relating to the commodity. Similarly, under Article 11 thereof, the supplier shall indicate in a clear manner the information concerning the service he provides as well as its features, characteristics and prices.

Article 41 SCTL makes it clear that, the negotiator will be acting in bad faith if it intentionally withholds a critical information to the other party. Such party shall be liable to redress the other party for certain losses suffered.

3.2.2 Inspiration of trust

Each party to the negotiations should, on one hand, refrain from all actions that spread false hopes or inspire excessive confidence on the other party in the seriousness of the negotiations (El Shobary, 2019). On the other, it should take any action that removes the doubts concerning its creditworthiness. Each party should trust that, if the contract is made, the other party will perform its part of that contract.

Accordingly, Article 41 SCTL expressly requires each party to refrain from negotiating without a real intention to contract. If a party dodges to keep his partner away from negotiating with others (Boukhatem, 2023), or if it negotiates only for publicity, market survey or to uncover its partner's technical and commercial secrets, such party will be acting in bad faith (Krawi, 2021).

Likewise, each negotiator should not unilaterally revoke what has been agreed. In its decision no 28/2013, dated 27 October 2013, the Chamber of Commerce in Islamic Republic of Mauritania (https://www.eastlaws.com/) indicated that, "the regression of one of the parties after long negotiations and agreement on the substance of the contract can cause harm to the other party".

A party may not also interrupt negotiation in a sudden, arbitrary manner (Krawi, 2021), especially when agreement seems in sight (El-Ahwany, 1996). The Mauritanian Chamber of Commerce, in its aforementioned decision, ruled that:

> "If the availability and progress of the negotiations are ascertained, the facts must show that one of the parties has arbitrarily interrupted the negotiating relationship. This must be done by proving unjustified conduct that indicates bad faith, such as the negotiations being interrupted shortly before signing a contract that has become almost ready in such a way that the other party no longer has any doubt that it will take its final form. Thus, the tort liability resulting from the negotiations is determined."

In the same sense, the negotiator should not, with regard to the same transaction, conduct parallel negotiations with others to the detriment of the other negotiator (Al-Fahd, 2017). Like negotiations without a real intention to contract, negotiations with

others (without the knowledge of the other party to the negotiated contract) will make the negotiator acting in bad faith (El Shobary, 2019).

3.2.3 Cooperation between negotiators

In general, parties enter into negotiations intend to reach an agreement that benefits both sides. Thus, cooperation between them is needed to get mutual benefits.

Negotiations are based on the principle of bargaining (Bellaoui & Gsassi, 2020), in order to bring different points of view closer (El Ghitawy, 2019). The parties submit conflicting offers and proposals and make concessions (Al-Fahd, 2017), with the aim of reaching a kind of balance between reciprocal interests. This makes negotiated contracts different from adhesion contracts in which the acceptor just concedes to the unnegotiable conditions pre-drafted by the offeror (Article 40 SCTL).

Negotiations enable parties to plan their transactions and resolve disputes (Quagliato, 2008). Through negotiations, the parties determine the specific goal and purpose of the negotiated contract (Al-Fahd, 2017); each explores the extent of the other party's ability to complete the contract (Bellaoui & Gsassi, 2020).

Cooperation requires each negotiator to do every thing possible to continue the negotiation process. Each negotiator should be committed to the negotiation sessions (El Ghitawy, 2019); it should also take the other party's proposal seriously (Ikonomi & Zyberaj, 2013). A cooperative negotiator may not unjustifiably refuse to hire an expert if necessary.

3.2.4 Secrecy between negotiators

Secrecy does not mean that negotiations shall take place in private (Al-Fahd, 2017); rather, secrecy lies in all confidential information exchanged during the precontractual phase (El Ghitawy, 2019).

Each negotiator shall keep secr*et al*l confidential information that may be provided by the other party (Al-Fahd, 2017), especially with regard to commercial, industrial and other information of a confidential nature in the field of technology (El Shobary, 2019). To avoid causing harm to the other party, the negotiator shall not avail

itself of such information or pass it on to others (El Ghitawy, 2019; Alnumani, 2023), unless the other party authorizes it to do so (Bellaoui & Gsassi, 2020).

4 LIABILITY FOR NEGOTIATING IN BAD FAITH

Good faith is a general principle that should be observed in all contract phases, including negotiations. The duty to negotiate in good faith is a legal principle separated from the contract. The breach of such duty should therefore result in civil liability.

In general, good faith is difficult to determine. Therefore, SCTL (Article 675) presumes good faith, unless the concerned party proves otherwise. The negotiator who insists on the lack of good faith in the other party must provide evidence of the latter's bad faith (Alhajri, 2017). Only in the absence of all forms of prohibited bad faith could a negotiator be deemed to act in good faith (Almihdar & Chedrawe, 2023; Nedzel, 1997).

Accordingly, each negotiator should exert the degree of care and effort that would be expected of a reasonable prudent person in the same circumstances (El-Ahwany, 1996; Vora, 2023); otherwise, liability will arise. A reasonable negotiator may not infringe any of its duties derived from the duty to act in good faith (prescribed in part 3.2). For example, a reasonable negotiator may not take a rigid, non-negotiable position (Krawi, 2021) or refuse to sign the final form of the contract which was under negotiation (El Shobary, 2019).

In the following, some practical applications of precontractual liability will be provided. In addition, the legal nature of such liability and its legal consequences will be discussed.

4.1 PRACTICAL APPLICATIONS OF PRECONTRACTUAL LIABILITY

Article 41(2) SCCL provides two examples of negotiating in bad faith, namely lack of sincerity in negotiations and withholding of essential information. However, these are just illustrative examples of bad faith during precontractual negotiations. By applying the reasonable person test, courts enjoy a wide discretion power to identify bad/good faith in other situations according to the given circumstances of each case.

4.1.1 Lack of sincerity in negotiations

A party is considered to be acting in bad faith if it negotiates without having a real intent to contract (At-Treky, 2017), yet creates a reasonable expectation in the other party that a contract will be formed (Nedzel, 1997). Therefore, if a party continues negotiations without any genuine intention of making a contract, it shall be liable for any loss suffered by the other party as a result of relying on the contract. Likewise, liability will arise if a party, although contract negotiations are well advanced, interrupts negotiations without any valid reason (Miloud, 2022).

In this sense, the Egypt Court of Cassation, in its decision no 11706 for the judicial year 78, dated 10 May 2018 (https://www.eastlaws.com/), concluded that:

> "The fault accompanying formation of the contract, or the fault occurred on the occasion of its conclusion or in the preliminary stages of its conclusion, may result … in liability for damages. For example, this would be the case if a party induces contractual negotiations, without having a serious intention to contract, or if he else acts in bad faith or recklessly."

4.1.2 Non-disclosure of an essential information

A party is deemed to be negotiating in bad faith if it intentionally withholds a material information that impacts on the potential contract's conclusion (El-Ahwany, 1996). Non-disclosure of such material information does not consist with the duty to negotiate transparently. In this sense, in its decision no 267/2016, dated 11 August 2016, the UAE Dubai Court of Cassation (https://www.eastlaws.com/) concluded that:

> "There is no lease contract between the parties because negotiations between them stopped at the stage of making remarks to the draft contract. However, based on the report of the delegated expert, Appellant breached its duty to complete the negotiations with Respondent by leasing the property under negotiations to another person, without even notifying Respondent. This leads to Appellant's tort liability."

In cases of essential mistake and fraudulent misrepresentation, if a party knew of a mistake pertaining to the conclusion of the contract and refrained from disclosing it to the other party, the former shall be considered to be acting in bad faith. Such an act is not consistent with the duty to cooperate with the other party. The Egypt Court of Cassation,

in its decision no 514 for the judicial year 37, dated 10 February 1973 (https://www.eastlaws.com/), indicated that:

> "Appellant was not serious in the negotiations; it never intended to reach the purpose of negotiations with Respondent, i.e. making a company contract. Rather, Appellant deluded Respondent of its desire to form this company just to get the idea of the company's project that will enable it to choose the necessary machines for the intended factory. Appellant wanted to implement that idea through a company actually formed by Appellant with another who accepted to contribute to the company's capital with a large share, half of the company's capital. This Appellant's conduct towards the negotiations, in addition to its failure to notify Respondent of the interruption of negotiations in a timely manner, shall be considered a fault by Appellant that results in tort liability."

Similarly, if a party becomes aware that it will not be possible to conclude the contract, but nevertheless continues negotiations, it shall be liable for any loss caused thereby to the other party (Gezder, 2016; Novoa, 2005). The former clearly violates its obligation to inform the latter.

4.1.3 Induction of contractual negotiations

Article 136 of the draft Egyptian civil code stipulated that "the person to whom the offer is addressed may reject it, unless it has called for that offer, in which case it may not refuse the contract unless it has legitimate reasons". This text was deleted on the ground that the general rules of tort liability give the same legal effect. Article 163 of the Egyptian Civil Code states that "Any person who commits a fault that causes damage to another party shall be liable to indemnify such damage."

The party induces contractual negotiations generates a legitimate confidence in the other party in the formation of the contract. If a party calls another to make an offer, where the response to this invitation is the one that is considered a binding offer, the addressee may not reject the offer unless for a legitimate reason (Krawi, 2021). Indeed, this is a logic result of the situation established by the author of the invitation to make an offer. Besides, it is an application of the principle of abuse of the right (Krawi, 2021). The arbitrary rejection by a party of an offer invited by the same will undoubtedly result in liability of that party.

When a party withdraws from the contractual negotiations after having caused the other party to believe that the contract will be concluded, then the former shall be deemed

to have violated the obligation of good faith. It is not required that the withdrawing party has an internal intention of bad faith; rather, this party's unintentional behavior which has produced that result would suffice.

In this sense, the Egypt Court of Cassation, in its decision no 11706 for the judicial year 78, dated 10 May 2018 (https://www.eastlaws.com/), concluded that:

> "If a party invites another to contract, and assures the completion of the contract conclusion, or confirms the desire to conclude it, and if the former's retraction is accompanied by a fault, then the former shall be obliged to compensate in accordance with the provisions of tort liability, provided a reasonable person under the same conditions would not consider the cause for retraction a fair one. In such case, the inviting, retracting party would have violated the legitimate trust generated by its invitation in the other party, especially if the nature or circumstances of the contract or the personality of the inviting party generate a kind of confidence in the conclusion of the contract for the other party."

4.1.4 Abuse of right

Abuse of right may realize in many forms, e.g. where the sole purpose of exercising the right is to harm another party. Thus, abuse of right and forbidden bad faith are two sides of the same coin (Almihdar & Chedrawe, 2023; Al-Darari, 2022). The negotiator acting in bad faith is in reality abusing its freedom to make (or not to make) the contract (Miloud, 2022). Because the intention is the soul and body of an act, that act would be considered wrong if the intention is wrong.

In this sense, in its decision no 152, dated 4 June 1992, the Beirut Court of Appeals, Lebanon (Krawi, 2021), concluded that:

> "While one is free not to contract, i.e. to cut off contractual negotiations, such freedom should be practiced within limits and conditions; the person interrupted negotiations should not do so arbitrarily after the conclusion of the contract becomes in sight."

4.2 LEGAL NATURE OF PRECONTRACTUAL LIABILITY

The breach of any duty implied by the principle of good faith during contract negotiations will result in precontractual liability. If the parties have agreed, in this stage, to an agreement to negotiate or other type of preliminary agreement, such as letters of intent, memorandum of understanding … etc., liability for the breach of such agreements,

including the non-observance of the requirements of good faith, will lead to contractual liability.

However, where the parties to contract negotiations do not have preliminary agreements, and either of them breached its duty to negotiate in good faith, the classification of precontractual liability may not be that easy. Although it looks like a *sui generis* liability (Mustafaraj, 2019), the comparative laws either expand the meaning of contractual liability or the meaning of non-contractual, tort liability.

This problem of classification plays an important role with regard to, *inter alia*, the period of prescription and the ambit of damages. In Saudi Arabia, if precontractual liability is classified as a contractual one, the claim of damages shall generally prescribe after the lapse of a period of ten years (Article 295 SCTL); damages will cover foreseeable harm only (Article 180 SCTL). If it is classified as tort liability, in contrast, the claim of damages shall prescribe after the lapse of a period of three years from the date on which the aggrieved party became aware of the harm (Article 180 SCTL); damages will cover both foreseeable and unforeseeable injuries (Articles 136 and 137 SCTL).

In Austria and Switzerland, precontractual liability is separated from tort liability (Chantladze, 2024). Similarly, the German Civil Code considers precontractual liability as (quasi-) contractual liability (Article 311). Indeed, this is in line with Jhering's classification of the *culpa in contrahendo*.

> According to Gezder (2016) "Jhering was of the opinion that the close relation between the negotiating parties during the formation of a contract, which arose from the "intended" and "outwardly seemingly concluded" contract, gave the culpa in contrahendo liability a nature of contractual liability."

In Italy, although precontractual liability is traditionally classified as tort liability, the Court of Cassation changed direction.

> According to Mustafaraj (2019), this court concluded in 2016 that "... The liability for damage caused to one party from the other, while deriving from the violation of specific obligations (trust, defense, information), precedents deriving from the contract, even if it is to be concluded, does not come by causing damage (*neminem laedere*); cannot qualify but as a contractual liability."

In Arab States, except Saudi Arabia (and Mauritania), because there is no specific statutory provision on the duty to negotiate in good faith, jurists are divided on the legal

nature of precontractual liability. In line with von Jhering, the first author of the "*culpa in contrahendo*" doctrine, some Arab jurists classify precontractual liability as contract liability (Bellaoui & Gsassi, 2020; Krawi, 2021). However, the prevailing opinion considers such liability as tort liability (e.g. El-Ahwany, 1996; El Ghitawy, 2019; Bellaoui & Gsassi, 2020; Krawi, 2021; Miloud, 2022; and Alnumani, 2023).

The present writer endorses the prevailing opinion. Truly, negotiation *per se* is nothing more than a material act; negotiation may not lead to formation of a contract (Miloud, 2022). Nor will the mere interruption of negotiation without achieving an agreement have a legal effect (El-Ahwany, 1996). However, a wrongful negotiation or interruption of negotiation may result in liability (Alnumani, 2023). Such liability derives from the harmful act of the party during the stage of contract negotiation.

Each party is obligated to negotiate in good faith in order to avoid possible harms. But if a party, by commencement of negotiations or by interruption of same without a due reason, causes harm to the other party, it shall be held liable (Al-Fahd, 2017; Vora, 2023). Since the parties did not establish amongst themselves a contractual relationship yet, such liability shall be a tort liability. The aggrieved party should establish that the fault of the (interrupting) negotiator was the instrumentality of the harm.

Arab judicial rulings adopt this opinion, too. For example, in its decision no 11706 for the judicial year 78, dated 10 May 2018, the Egypt Court of Cassation (https://www.eastlaws.com/) concluded that:

> "The fault accompanying formation of the contract, or the fault occurred on the occasion of its conclusion or in the preliminary stages of its conclusion, may result - in some forms - in damages, if it prevents the formation of the contract. If the retraction of the contract is accompanied by a fault committed by one of the parties that caused damage to the other, only the provisions of tort liability shall apply."

The UAE United Supreme Court, in its decision no 312 for the judicial year 19, dated 12 January 1999 (https://www.eastlaws.com/), concluded that:

> "Interruption of negotiations, when accompanied by a fault of the interrupting negotiator, results in tort liability, so long as such fault causes damage to the other party to negotiations and, it meets the elements of fault necessary for the establishment of tort liability."

In Abu Dhabi, UAE, the Court of Cassation (Commercial District), in its decision no 784/2011, dated 14 June 2012 (https://www.eastlaws.com/), affirmed that:

> "The party interrupting the negotiations may be held liable if this interruption is accompanied by a fault of that party that cause harm to the other party. The source of this tort liability is not the interruption of the negotiations itself; rather, it is the fault committed by the party interrupted the negotiations. The burden of proving this fault and harm rests with the party suffered the harm."

In its aforementioned decision no 28/2013, dated 27 October 2013, the Mauritanian Chamber of Commerce in Islamic Republic of Mauritania (https://www.eastlaws.com/) ruled that tort liability in the precontractual stage shall be determined based on the existence and progress of contract negotiations.

4.3 LEGAL CONSEQUENCES OF PRECONTRACTUAL LIABILITY

Precontractual liability is enforceable by damages or particular performance (Vora, 2023), i.e. consideration of the related contract as concluded.

Damage may be divided into negative damage and positive damage (Nedzel; 1997). The former includes negative, reliance interest (Gezder, 2016), i.e. the losses and expenses incurred based on the belief that the intended contract is forthcoming; the latter includes the positive, expectation interest (Gezder, 2016), i.e. the full profit that would be achieved should the contract had been made (Mustafaraj, 2019).

Article 41 SCTL limits damages to the negative interest. Damages may cover loss of time and money spent pursuant to the anticipated contract (Nedzel, 1997). The time lost by bad faith negotiations, whether hours, days, weeks, etc. should be recovered (Slaiha, 2014). Material and immaterial losses suffered should be redressed (Alhajri, 2017).

Material loss includes all wasted costs incurred during the contract negotiations, such as costs incurred for feasibility studies, legal fees, mediators' or counsels' honoraria, rent of stores, and costs of site surveys or equipment inspection (Lekhdeir, 2017). Such costs must have been incurred in expectation of making the contract. Costs incurred before the commencement of the negotiation, as well as costs spent after learning of the withdrawal of the other negotiator, may not be recovered (Slaiha, 2014).

The UAE Dubai Court of Cassation, in its decision no 267/2016, dated 11 August 2016 (https://www.eastlaws.com/), concluded that:

> "There is no lease contract between the parties because negotiations between them stopped at the stage of making remarks to the draft contract. However, based on the report of the delegated expert, Appellant breached its duty to complete the negotiations with Respondent by leasing the property under negotiations to another person, without even notifying Respondent. This resembles a fault by Appellant that caused damage to Respondent represented in the advance payment of AED 423.989 as the insurance value and commission. Appellant is obligated to refund Respondent as compensation, the source of this obligation is the unlawful act."

Damages should also redress the loss of any serious and certain chance (Slaiha, 2014), like the chance of making a contract with another should the negotiator did not engage in the negotiations with its (bad faith) partner (Slaiha, 2014). However, the judge should determine the amount of compensation depending on the surrounding circumstances (Krawi, 2021). Thus, damages might increase if the opportunity to make an alternative contract was really available and attainable without obstacles. On the contrary, damages would decrease if such opportunity was difficult to achieve.

Immaterial loss may be in the form of loss of the other party's commercial reputation (El-Ahwany, 1996). In its decision no 514 for the judicial year 37, dated 10 February 1973 and decision no 219 for the judicial year 31, dated 27 January 1966), the Egypt Court of Cassation (https://www.eastlaws.com/) found that:

> "Appellant was not serious in the negotiations; it never intended to reach the purpose of negotiations with Respondent, i.e. making a company contract. … Appellant also failed to notify Respondent of the interruption of negotiations in a timely manner. Appellant shall be considered at fault that results in tort liability in accordance of Article 163 of the Civil Code. This fault resulted in damage to Respondent represented in the loss incurred due to the close of its business in the period spent abroad to choose the necessary machines for the intended factory, as well as the loss suffered by Respondent as a result of Appellant steeling and implementing the idea of the company's project, in addition to the moral damage suffered by Respondent as a result of showing it as easily deceived and untrustworthy, which undermines its reputation and consideration in the commercial market."

On the other hand, damages may not be based upon expectation damages (Alhajri, 2017) because that would demand speculation as to the terms of a non-existent contract

(Al-Darari, 2022) and would, thus be against the will of the parties (Nedzel, 1997). Article 41 SCTL excludes the compensation for loss of profits from the intended contract. It expressly states that, damages do not cover "the expected profit which would have resulted had the contract under negotiation been concluded."

As for specific performance, some legal writers exclude such remedy. According to them, because negotiations require cooperation between the parties, the one acted in bad faith may not be compelled to continue the negotiations against its will (Slaiha, 2014); it would also be an infringement of personal liberty to consider the negotiated contract as concluded (Bellaoui & Gsassi, 2020).

Other legal writers, in contrast, say that negotiations give both parties the opportunity to conclude the negotiated contract; the more the negotiations progress, the more this opportunity becomes real and serious. Therefore, where the contract under negotiations is in sight, if one of the parties interrupted the negotiations recklessly or without a due reason, it would have missed the other party a real opportunity to conclude the intended, final contract. This is a damage that should be redressed (Krawi, 2021).

> Quagliato (2008) says that "If during the negotiation process a party takes advantage of the other, negligently and/or fraudulently creating an expectation in another party, although he knows or should have known that the expectation could not be realized, the defaulting party may be punished *by having to perform the agreement*". (*Emphasis added*.)

According to Article 42(1) SCTL, as well as most Arab civil codes (e.g. Article 195 of the 1948 Egyptian Civil Law; Article 65 of the 1975 Algerian Civil Law; Article 141(2) of the 1985 UAE Civil Transactions Law; Article 43 of the 2001 Bahraini Civil Code; and Article 79(1) of the 2004 Qatari Civil Code), if the contracting parties have agreed on all the essential terms of the contract and have left certain details to be agreed later, the contract shall be deemed to have been concluded despite the interruption of negotiations by either party, unless the parties have stipulated that, failing agreement on these details, the contract shall not be concluded.

SCTL does not entitle the court to order the interrupting negotiator to a particular performance, or to continue contract negotiations. However, the court should be allowed to do so in certain cases (Ikonomi & Zyberaj, 2013). The court may consider the contract, whose negotiations were cut off, as concluded, regardless of the negotiator's expressed will. For example, the arbitrary rejection by a party of an offer invited by the same will

result in precontractual liability of that party. The judge may, in some cases, consider the intended contract as concluded, particularly when the conclusion of that contract was really very close (Ikonomi & Zyberaj, 2013). In this sense, the Egypt Court of Cassation, in its decision no 11706 for the judicial year 78, dated 10 May 2018 (https://www.eastlaws.com/), concluded that:

> "If a party invites another to contract, and assures the completion of the contract conclusion, or confirms the desire to conclude it, and if the former's retraction is accompanied by its fault, then the former shall be obliged to compensate in accordance with the provisions of tort liability. … In some cases, the judge may go further, and consider that the contract has been concluded as compensation, if the circumstances so require".

5 CONCLUSION

Through imposing a duty to negotiate in good faith, Article 41 SCTL gives precontractual liability a legal basis. It provides a mechanism to seek redress for any harm caused by the bad faith, deceptive or fraudulent acts of the other party. Eventually, precontractual liability helps to ensure negotiations are made honestly and fairly, and that a negotiator can bank on the representations made by the other party. Accordingly, despite precontractual liability, the freedom to contract is still maintained; each party still has the liberty to contract (or not to contract) with whomever it pleases. To evade precontractual liability, a party is just obligated to initiate, conduct and terminate contract negotiations in good faith.

The lack of an express codification concerning the parties' rights and duties and eventually, the way of protection against harm at the precontractual phase in many Arab States caused uncertainty. The doctrinal and jurisprudential opinion is divided as regards the recognition of precontractual liability. Furthermore, those who adopt precontractual liability are in conflict concerning the legal nature of such liability, whether it is a contract or tort liability. The legislature in such States is advised to follow the Saudi model on precontractual liability and expressly obligates the negotiator to act in good faith.

By doing so, certainty and clarity of the duty to negotiate contracts in good faith would be achieved. Each negotiator shall maintain the liberty to make, or not to make, a contract. However, such negotiator should negotiate transparently, inspire trust, cooperate with the other party, and keep confidential all essential information obtained during

negotiations from the other party. Otherwise, the negotiator will be held liable for the harm incurred by the other, aggrieved party.

Article 41 SCTL, as well as the majority of the related Arab court rulings, limits precontractual liability to negative interests. Only the Egyptian Court of Cassation considered the enforcement of precontractual liability by a particular performance, i.e. consideration of the contract at issue as concluded. Indeed, in some situations and under certain conditions, the court may find that the fairest remedy might be to order the interrupting negotiator to continue contract negotiations or to consider the intended contract as concluded. The legislature in Arab States, including Saudi Arabia, is advised to consider such remedy for precontractual liability.

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