

## FROM CONTRACT MANAGEMENT TO ARBITRATION: COMPLIANCE WITH ESCALATION CLAUSES IN CONSTRUCTION ARBITRATION



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By the time lawyers are asked to assess the contractual steps that must be completed before arbitration, the project is rarely proceeding in ordinary conditions. A payment may have been withheld, the programme may have slipped, responsibility for a technical failure may be disputed, or one party may already be considering suspension, a call on a guarantee or formal proceedings. Communications have become more guarded, commercial discussions may have lost momentum, and contractual deadlines continue to run.

It is often at that stage that an escalation clause negotiated months or years earlier becomes critical. The contract may require discussions between project representatives, referral to senior management, mediation, expert determination, or a dispute board process. What initially appeared to be a straightforward sequence must now be applied to an evolving dispute, often on the basis of incomplete information and within increasingly constrained timeframes.

In our experience of construction disputes, the practical questions arise immediately. Has a dispute crystallised? Were the required steps properly initiated? Were the appropriate representatives involved? Can arbitration be commenced while discussions remain ongoing? What happens where a contractual time bar, limitation period, or urgent need for interim relief leaves insufficient time to complete the agreed procedure?

These questions illustrate the gap that may arise between the apparent simplicity of an escalation mechanism and the realities of a project under pressure. This article examines how such clauses operate in practice, the procedural objections to which they may give rise, and the steps that parties can take to ensure that they facilitate, rather than obstruct, the effective resolution of construction disputes.

### **I. The problem is not escalation, but unworkable escalation**

The difficulty described above does not mean that escalation clauses are inherently problematic. On the contrary, they respond to a legitimate contractual objective. In long-term construction contracts, it is usually sensible to encourage the parties to attempt an internal or amicable resolution before initiating formal proceedings. Not every disagreement justifies arbitration. Operational teams may resolve technical misunderstandings. Senior executives may restore a commercial dialogue. A mediator may help the parties identify a settlement range before positions harden. In contractual relationships

intended to continue over time, the parties' shared economic interest will often favour avoiding the premature judicialisation of conflict.

In construction projects, this logic is particularly compelling. The parties (employer, main contractor, subcontractors, operators, consultants, and financiers) are interdependent, the factual record is constantly evolving, and disputes often arise before their final financial or technical consequences can be fully assessed. A well-designed escalation mechanism can therefore help preserve the project, avoid premature confrontation, and prevent every disagreement from immediately becoming a formal claim.

However, a clause that is sensible in theory may be ineffective, or even dangerous, if it cannot be implemented under the pressure of a live dispute. Many clauses require an "amicable settlement attempt", a "meeting between representatives", or "discussions between senior management" without identifying who must act, when, how, and with what consequences. Others impose multiple sequential steps but fail to say what happens if one party remains silent, refuses to participate, or uses the process only to delay the inevitable.

The key drafting question is therefore not how sophisticated the clause appears on paper, but whether compliance can be objectively demonstrated when the dispute later reaches a tribunal. A clause that cannot be evidenced is a clause that invites argument. The parties may then spend time debating whether a meeting was properly convened, whether the right representatives attended, whether the waiting period expired, whether a mediation was genuinely initiated, or whether the process had become futile.

In that situation, the escalation clause no longer reduces conflict. It adds a preliminary dispute to the main dispute.

## **II. From settlement mechanism to admissibility objection**

### **A. From Amicable Step to Procedural Precondition**

Once arbitration is commenced, escalation clauses often give rise to a threshold objection. The respondent may argue that the claimant has failed to comply with a mandatory pre-arbitral step and that the claims are therefore premature, inadmissible, or procedurally defective.

The first issue is one of characterisation. Is the clause merely an undertaking to attempt settlement in good faith? Or does it create a true condition precedent to arbitration? The answer depends primarily on the wording of the clause, but also on the applicable law and on the conduct of the parties.

Where the clause is drafted in mandatory and sequential terms, the argument that arbitration could not be commenced before completion of the prior steps becomes much stronger. By contrast, where the wording is aspirational, vague or non-sequential, tribunals are less likely to treat non-compliance as a bar to the examination of the merits.

Depending on the case, that objection may be framed in terms of admissibility, maintainability, or prematurity of the proceedings. The distinction matters because it affects who decides the objection, the intensity of the tribunal's review, the possibility of curing the defect during the proceedings, and, more generally, the defence strategy.

International case law generally tends to treat compliance with pre-arbitral procedural steps as a question of admissibility rather than jurisdiction. In *BG Group plc v. Republic of Argentina*, the U.S. Supreme Court treated the relevant pre-arbitral requirement as a procedural precondition to arbitration, generally for the arbitrators to assess.<sup>1</sup> In *Republic of Sierra Leone v SL Mining Ltd*, the English Commercial Court held that non-compliance with a multi-tier dispute resolution provision was a matter of admissibility rather than jurisdiction and is a procedural matter which falls within the competence of the tribunal rather than the English Court to determine.<sup>2</sup> In *NWA v NVF*, the English High Court similarly considered that compliance with a prior mediation clause concerned admissibility rather than jurisdiction<sup>3</sup> and emphasised the relevance of the parties' conduct, including refusal to mediate or waiver.<sup>4</sup> The Hong Kong Court of Final Appeal adopted the same broad distinction in *C v D*, confirming that pre-arbitration conditions are ordinarily matters for the arbitral tribunal unless the arbitration agreement clearly provides otherwise.<sup>5</sup>

French arbitration case law follows a comparable logic. In the *Todini* decision, the Paris Court of Appeal held that alleged non-compliance with the prior Dispute Board procedure did not concern the arbitral tribunal's jurisdiction, but the admissibility of the claims, which was not a ground for annulment under Article 1520 of the French Code of Civil Procedure.<sup>6</sup> This is consistent with the broader French approach to mandatory conciliation clauses, under which non-compliance is generally treated as a *fin de non-recevoir* rather than as a defect affecting the existence or validity of the arbitration agreement.<sup>7</sup>

The important point for arbitration practitioners is that the debate is rarely purely formal. Tribunals and courts will usually look at three elements: the clarity of the clause, the reality of the steps taken, and the procedural fairness of relying on non-compliance.

<sup>1</sup> *BG Group plc v. Republic of Argentina*, 572 U.S. 25 (2014), available at <https://www.italaw.com/sites/default/files/case-documents/italaw3115.pdf> (last accessed May 21<sup>st</sup>, 2026).

<sup>2</sup> *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), available at <https://www.bailii.org/ew/cases/EWHC/Comm/2021/286.html>; see also C. Caher, M. Angelini, "Republic of Sierra Leone v SL Mining Ltd: The English Commercial Court Rules On The Effect Of Non-Compliance With A Multi-Tier Dispute Resolution Provision", WilmerHale (2021), available at <https://www.wilmerhale.com/en/insights/blogs/international-arbitration-legal-developments/20210224-republic-of-sierra-leone-v-sl-mining-ltd>.

<sup>3</sup> *NWA and another v NVF and others* [2021] EWHC 2666 (Comm), available at <https://www.judiciary.uk/wp-content/uploads/2022/07/NWA-another-v-NVF-Ors-Judgment-8.10.21.pdf>, §77: "The dispute is an arbitrable dispute, but the issue is whether it is not yet arbitrable because of the mediation clause. The issue is whether the arbitrator should exercise the power that he has to determine the dispute, where mediation has not yet taken place. The arbitrator is not having to determine what matters have been submitted to arbitration in accordance with the arbitration agreement."

<sup>4</sup> *Ibid*, §80: "All that I would add is that even if clause 10.2(a) contains a legally enforceable condition precedent, I have no doubt that (and I would have found that) by reason of the matters set out in paragraphs 12-26 above, the Claimants are in breach of the alleged condition precedent by failing to first seek settlement of the dispute by way of mediation and they cannot rely upon their own breach to now contend that the Defendants have failed to comply with it; alternatively, compliance with the alleged condition precedent was waived by the parties".

<sup>5</sup> *C v D* [2023] HKCFA 16, available at [https://www.uncitral.org/res/clout/clout/data/hkg/clout\\_case\\_2163\\_300623\\_html/FACV000001\\_2023.pdf](https://www.uncitral.org/res/clout/clout/data/hkg/clout_case_2163_300623_html/FACV000001_2023.pdf).

<sup>6</sup> Paris CA, 4 June 2024, No. 22/14963, *Todini*: "recourse to the Dispute Board determines whether a claim may be considered by the arbitral tribunal at a given time, without calling into question the arbitral tribunal's ability to exercise its power to adjudicate the dispute in preference to any other forum. [...] This issue does not relate to the jurisdiction of the arbitral tribunal but to the admissibility of claims, which does not fall within the grounds for bringing an action for setting aside; accordingly, the complaint that the proceedings before the Dispute Board and the arbitral tribunal temporarily overlapped is not such as to deprive the arbitral tribunal of its jurisdiction" (free translation); see also: P. Duprey, D. Astakhova, 'Le respect du recours au Dispute Board préalablement à l'arbitrage : une question de recevabilité de la demande d'arbitrage en dehors du périmètre du contrôle du juge de l'annulation', *Revue de l'Arbitrage* (2025), pp. 241-250.

<sup>7</sup> *Cour de cassation*, Combined Ch., 14 February 2003, No. 00-19.423, available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007047169/>; see also *Cour de cassation*, 1<sup>st</sup> Civ. Ch., 1 February 2023, No. 21-25.024, *HD Holding*: "non-compliance with a mediation clause is a matter of admissibility and not of jurisdiction" (free translation).

## B. Counterclaims, set-off, and additional claims

The same difficulty may arise not only where the claimant commences arbitration, but also where the respondent raises counterclaims or relies on set-off, and, more generally, where either party seeks to introduce new claims after the arbitration has commenced. This point is often overlooked in construction disputes, where the respondent's answer may itself contain substantial monetary claims arising out of the same project chronology.

Under French law, the starting point is favourable to the counterclaimant. In *Biogaran*, the *Cour de cassation* held that, where proceedings are already pending, the admissibility of a counterclaim is not, unless otherwise stipulated, subject to the prior implementation of a contractual mediation procedure before bringing the matter before the court.<sup>8</sup> The solution is important, but it should not be overstated. It turns on the wording of the clause and on the procedural fact that the proceedings have already been commenced.

In arbitration, and especially in construction arbitration, the result may be less automatic. If the escalation clause is drafted broadly enough to apply to “any dispute”, “any claim”, “counterclaim”, “set-off”, or “additional claim”, a tribunal may have to decide whether the respondent's claim is itself premature or inadmissible. The risk is particularly acute where the contract requires each dispute to pass through a dispute board, engineer's decision, or other project-level mechanism before being referred to arbitration.<sup>9</sup> The drafting lesson is therefore simple: the clause should state expressly whether pre-arbitral steps apply to counterclaims, set-off defences, and post-commencement claims, or whether those requirements are deemed satisfied or waived once arbitration has been validly commenced.

## III. The hidden risk: escalation clauses and timing conflicts

The most acute practical difficulty is often timing.

Escalation clauses require time: time to notify the dispute, organise meetings, exchange positions, negotiate, and sometimes initiate mediation or constitute a dispute board. Construction contracts, however, often impose strict contractual deadlines for notifying claims, preserving rights, challenging an engineer's decision, or commencing proceedings. Statutory limitation periods or contractual time bars may add another layer of pressure.

This creates a structural tension. A party may have to choose between complying fully with the escalation sequence and acting quickly to preserve its rights. If it waits, it may face a time-bar argument. If it commences arbitration immediately, it may face an admissibility objection.

The problem becomes critical where the project is deteriorating rapidly: delays, non-payment, suspension threats, calls on guarantees, operational disengagement, or increasing tension with the

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<sup>8</sup> *Cour de cassation*, Com. Ch., 24 May 2017, No. 15-25.457, available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000034815769/>; see also N. Peter, ‘Escalation Clauses - Where Do They Leave the Counterclaimant?’, Kluwer Arbitration Blog (2017), available at <https://legalblogs.wolterskluwer.com/arbitration-blog/escalation-clauses-where-do-they-leave-the-counterclaimant/>: “the court ruled that the defendant could nevertheless pursue a counterclaim that had not been submitted to mediation”.

<sup>9</sup> N. Peter, ‘Escalation Clauses - Where Do They Leave the Counterclaimant?’, Kluwer Arbitration Blog (2017), available at <https://legalblogs.wolterskluwer.com/arbitration-blog/escalation-clauses-where-do-they-leave-the-counterclaimant/>.

employer or operator. In such cases, an inflexible escalation clause may delay access to relief at the very moment when protection is most needed.

This is why escalation clauses should include express carve-outs. The parties should preserve the right to seek urgent interim or conservatory measures, to commence proceedings to avoid the expiry of a limitation period or time bar, and to bypass preliminary steps where the other party refuses to engage or where the process has become manifestly futile.

Without such carve-outs, the clause may be used not to resolve the dispute, but to trap the claimant between prematurity and lateness.

#### **IV. Escalation Clauses as a tactical weapon**

Escalation clauses may also be misused strategically and become a tool for delay, pressure, or tactical repositioning.

A party facing a strong claim may invoke alleged non-compliance with the clause to buy time, delay the proceedings, shift the discussion to a level with no real decision-making power, or create the appearance of cooperation while avoiding the merits. Conversely, a claimant may seek to create a paper trail of formal compliance, without any genuine willingness to resolve the dispute.

The risk is not merely that the clause fails. The risk is that it succeeds in the wrong way: instead of creating a meaningful opportunity for settlement, it becomes a tool of procedural obstruction.

Tribunals are usually alert to this. An objection based on non-compliance will be more persuasive where the clause is clear, the claimant made no serious attempt to comply, and the respondent can show that the agreed process had a real purpose. It will be less persuasive where the respondent itself refused to participate, remained silent, or relied on the clause only after the dispute had already become irreversibly contentious.

Good faith therefore matters. So does prejudice. A tribunal is unlikely to be receptive to a purely tactical objection where the respondent cannot explain what realistic opportunity was lost as a result of the alleged non-compliance.

#### **V. How Arbitral Tribunals tend to approach Escalation Clauses**

There is no single arbitral approach to escalation clauses. Courts and arbitral tribunals generally assess the issue by reference to the wording of the clause, the parties' conduct, and the practical consequences of non-compliance.

A more formal approach gives full effect to party autonomy. If the parties agreed that negotiation, mediation, or dispute board proceedings must occur before arbitration, the tribunal may consider that sequence binding and require compliance. This approach is particularly likely where the clause is clear, mandatory, time-limited, and objectively verifiable.<sup>10</sup>

A more pragmatic approach focuses on the purpose of the clause. The tribunal may ask whether the parties genuinely attempted to engage in the agreed process, whether compliance was prevented by the

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<sup>10</sup> ICC Case No. 6276, Partial Award of 29 January 1990, in A. Jolles, 'Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement', *The International Journal of Arbitration, Mediation and Dispute Management* (2006), p. 333; see also B. M. Cremades, *Multi-tiered disputes resolution clauses*, CPR Institute for Dispute Resolution (2004).

other party, whether the process had become futile, whether urgent relief was required, and whether the respondent suffered any real procedural prejudice.<sup>11</sup>

In substantial construction disputes, tribunals are often reluctant to prevent examination of the merits solely because a preliminary step was imperfectly completed, especially where the dispute had already crystallised or where no real prejudice is shown. But that pragmatism should not be overstated. A party that simply ignores a clear escalation mechanism assumes a real procedural risk.

Recent State-court decisions illustrate the same tension. On the one hand, courts may sanction a party that has taken no meaningful step to implement a mandatory conciliation mechanism. On the other hand, they may reject an inadmissibility objection where the preliminary process was actually initiated, remained unsuccessful, and a sufficient period elapsed before proceedings were commenced.

In a judgment of 24 February 2026, the Paris Court of Appeal recalled that “*a party cannot evade a contractual conciliation mechanism by arguing [...] that the initiative for implementing that mechanism rested solely with the designated intermediary*”, where the claimant had not shown any steps on its part to initiate the prior procedure.<sup>12</sup> By contrast, on 5 March 2026, the Bordeaux Court of Appeal held that, even where the prior steps had not succeeded, the fact that they had actually been initiated and that the initiating party had waited a “*sufficient*” period before seizing a court was enough to defeat the plea of inadmissibility.<sup>13</sup>

The lesson is not that escalation clauses will always be enforced strictly, or that they can safely be ignored. The lesson is that the outcome will depend on the clause, the chronology, the evidence, and the parties’ conduct.

## **VI. Practical Management: turning escalation into arbitration readiness**

For in-house counsel, project teams, and arbitration practitioners, the challenge is not only to include escalation clauses in construction contracts. It is to ensure that they can be used effectively when a dispute arises.

The management of escalation clauses should therefore begin long before arbitration is filed.

At the drafting stage, an escalation clause should be precise, realistic, and aligned with the rest of the contract. It should answer basic operational questions: what event triggers the mechanism? Who must give notice? In what form? Which representatives must attend? Do they need settlement authority? What documents must be exchanged? How long does each step last? When is the process deemed to have failed? What happens if one party refuses to participate? Can urgent proceedings be commenced in parallel? The ICC’s model dispute resolution clauses make the same point: unclear wording creates uncertainty and delay and may compromise the dispute resolution process.<sup>14</sup>

<sup>11</sup> In the *Todini* case for instance (Paris CA, 4 June 2024, No. 22/14963, *Todini*), the arbitral tribunal seemingly took into account the urgency of the claim to hold it was admissible in spite of non-compliance with the procedural preconditions to arbitration.

<sup>12</sup> Paris CA, P. 5, Ch. 16, No. 24/06659 (free translation).

<sup>13</sup> Bordeaux CA, 2<sup>nd</sup> Civ. Ch., No. 25/03249 (free translation).

<sup>14</sup> ICC, ‘Mediations Clauses’, available at <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/mediation/mediations-clauses/>: “Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process”.

A useful escalation clause is not necessarily the most elaborate one. It is the clause that can still be implemented when the project is under pressure, the relationship has deteriorated and the parties are preparing for arbitration.

Coordination with the contract's other mechanisms is equally important. In construction contracts, escalation clauses often operate alongside notice provisions, claims procedures, engineer's decisions, dispute board mechanisms, contractual time bars, limitation periods, and interim relief provisions. A clause that appears workable in isolation may fail in practice if it conflicts with the contract's procedural architecture.<sup>15</sup>

Finally, the clause should include appropriate carve-outs. The parties may wish to preserve the right to seek urgent interim or conservatory measures, to commence proceedings in order to avoid the expiry of a limitation period, or to bypass preliminary steps where the other party refuses to engage or where compliance has become impossible or manifestly futile. These carve-outs reduce uncertainty and limit later disputes about access to arbitration.

The clause should also address the position of counterclaims, set-off, and additional claims. If the parties intend the escalation sequence to apply to such claims, they should say so expressly and provide a workable timetable. If they do not, the clause should equally say whether the commencement of arbitration satisfies the pre-arbitral requirement for all claims arising out of the same dispute or project.

During performance of the contract, traceability is essential. Invitations, agendas, meeting minutes, written positions, mediation proposals, refusals to engage, and reservations of rights should be preserved. This evidence may later determine whether the tribunal considers that the clause was complied with, waived, frustrated, or legitimately bypassed.

In construction disputes, this documentation must be coordinated with claims management. Notices of claim, engineer correspondence, payment applications, delay analyses, expert reports, and escalation communications should not be handled in separate silos. The escalation record should be built as part of the broader dispute record.

At the pre-arbitral stage, counsel should make an early strategic assessment. If the clause is mandatory and precise, the safest course may be to complete the required steps on an accelerated basis while expressly reserving all rights. If urgency, limitation periods, or the other party's conduct make compliance impossible or unreasonable, the claimant should document why immediate arbitration is justified.

Respondents should be equally careful. An escalation objection should not be raised reflexively. It is strongest where the claimant ignored a clear mechanism and where the respondent can show that the process had a genuine purpose. It is weakest where the respondent obstructed the process or suffered no identifiable prejudice.

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<sup>15</sup> B. Kohl, M. Magliana, 'Mechanisms for Resolving Construction Disputes', in P. Baeten, O. Caprasse, *et al.* (eds), *Construction and Arbitration: The Essential Building Blocks Reports from the CEPANI Colloquium held on 15 November 2024* (2024), p. 141, §135.

## Conclusion

Escalation clauses remain valuable in construction disputes. They can preserve commercial relationships, structure negotiations, and create an opportunity for early resolution, before arbitration becomes necessary.

Their value and effectiveness, however, depend less on their existence than on their operational discipline. A vague clause creates uncertainty. An over-engineered clause creates delay. A clause invoked tactically creates satellite litigation.

Conversely, a clause that is clear, workable, and properly documented can help the parties to manage conflict without compromising access to arbitration.

For construction practitioners, the point is practical. Escalation clauses should not be treated as boilerplate dispute resolution language. They should be drafted, documented, and managed as part of the project's arbitration-readiness framework.

Properly used, an escalation clause is not a barrier to arbitration. It is a controlled procedural pathway. Poorly used, it becomes the first dispute the parties must arbitrate.