

# Implied obligations of good faith in contracts in Romanian law: the Dispute escalation clause



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It is often the case that in commercial contracts the parties provide for a dispute escalation clause as a precondition for litigation requiring parties to make a good faith attempt at negotiating the disputes before going to court.

The dispute escalation clause poses no challenges if adhered to. As long as the parties act in good faith and follow the specific contractual procedure, the precondition of attempting an amicable resolution of the dispute is fulfilled, regardless of the outcome of the negotiation.

But what happens when one party breaches the contract and bypasses negotiation by going straight to court? What effect do national courts give to this clause? Can the national courts intervene against the parties' contractual agreement and proceed to litigation?

These are the questions we aim to address below. Note that we are not considering the alternative dispute resolution procedure under FIDIC contracts, an issue which is also debated in the Romanian case law, and which should be considered even more cautiously by the national courts.

## **On the admissibility of the claim lodged with the national courts without observing the dispute escalation clause**

Until 2013, the former Civil Procedure Code included a mandatory pre-litigation procedure for resolving monetary contractual disputes between professionals before proceeding to the courts, known as preliminary conciliation procedure.

The Constitutional Court of Romania was presented with numerous challenges asserting the unconstitutionality of this pre-litigation procedure, alleging it impeded or



constrained unhindered access to justice. Consistently, the Constitutional Court asserted that the preliminary procedure did not pose a barrier to unhindered access to justice. Rather, it served as an efficient means to curb the misuse of the right to access justice to the detriment of the individuals with similar safeguarded rights. In the perspective of the Constitutional Court, the rationale behind this mandatory procedure was to translate into practice the principle of expeditiously disposing of cases and alleviating the caseload burden on the judicial system.

Considering these pivotal considerations stressed out by the Constitutional Court, the requirement to observe the pre-litigation procedure with the opposing party before proceeding to court cannot be categorized as an impediment to unrestricted access to justice or the right to an effective remedy.

With the enactment of new Civil Procedure Code, the conciliation procedure applicable to professional relationships has been rescinded.

However, the new Civil Procedure Code states, under article 193, that the



referral to the court can be made only after a preliminary procedure has been completed, if the law expressly provides for this procedure.

A prevalent approach has been to construe the term “law” expansively, encompassing not only the statutory law but also the contract.

This interpretation remains valid as long as the Civil Code upholds, under art. 1270, para. 1, that a contract stands as the law for the contractual parties.

However, the legal precedent on this matter has affirmed that the dispute escalation clause is an optional procedure, allowing parties the freedom to seek recourse in the courts. The courts have argued that deviating from this standpoint would unduly restrict access to justice, surpassing the boundaries stipulated by law.

While we strongly advocate for unhindered access to justice, we find ourselves in partial disagreement with this standpoint.

On one hand, given that the Civil Procedure Code refers to “law”, we argue that this term should encompass also

contractual agreements, recognizing the contract as the governing law between the parties. This interpretation aligns with the parties’ understanding expressed in the contract and acknowledges the binding force of the contract.

Moreover, a pre-litigation procedure should not be perceived as hindering access to justice. Rather it temporarily defers this recourse, especially considering that the duration between filing a claim and the scheduling of the first hearing often allows the plaintiff to concurrently pursue amicable conciliation.

Lastly, the non-acknowledgment of the mandatory nature of the dispute escalation clause freely agreed upon by the parties does not align with the fundamental principles outlined by the Constitutional Court: the principle of expeditiously disposing of cases and the alleviation of the caseload burden on the judicial system.

We hold the opinion that these principles are fully applicable nowadays.

We assess that even if the dispute escalation clause is considered optional, its disregard should not be devoid of

consequences. The court, endowed with discretionary authority over specific facets of the case, could sanction the violation of this clause by withholding bad faith or abuse of procedural rights.

So far, we have not come across any legal precedent wherein the court has sanctioned bad faith and abusive exercise of the right of access to justice for violating the dispute escalation clause.

To sum up, the dispute escalation clause epitomizes the contractual freedom, expressed in good faith by the parties at the time of the contract’s conclusion. Any groundless violation of this clause can only be construed as an act of bad faith and a breach of the contract.

The dispute escalation clause lays the foundation for safeguarding both individual and general interest, facilitating the enhancement of the judiciary system, by easing the caseload burden on the judicial system.

In the context of an overburdened legal system, we believe it would be worthwhile to reassess the courts’ stance on the optional nature of the dispute escalation clause.