UNIVERSITY OF TURKU
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Procedural Challenges in Arbitration: Non-Compliance with MDR Clauses and the Admissibility of Evidence

– Insights from the 32nd Willem C. Vis International Commercial Arbitration Moot

Faculty of Law, University of Turku

Bachelor's thesis

Author:
Suvi Harjunpää

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This bachelor's thesis examines the procedural challenges in arbitration, focusing on the enforceability of pre-arbitral mediation requirements and the admissibility of disputed evidence in the context of the 32nd Willem C. Vis International Commercial Arbitration Moot. Two key issues are addressed: (1) should a claim be rejected for lack of jurisdiction or inadmissibility; and (2) whether evidence should be excluded due to its acquisition, legal privilege or settlement privilege.

By analysing multi-tiered dispute resolution ("MDR") clauses, this thesis explores the jurisdiction-admissibility distinction and evaluates whether non-compliance with a mediation step constitutes a barrier to arbitration. It is suggested that while the tribunal in this case should retain jurisdiction, the claim is inadmissible until mediation is attempted, aligning with a pro-mediation approach.

Additionally, this thesis assesses evidentiary admissibility under international arbitration standards, particularly the IBA Rules on the Taking of Evidence. The analysis of Exhibit R3 – an internal legal communication allegedly obtained unlawfully – concludes that it is likely admissible, as its exclusion was not substantiated under illegal acquisition or legal privilege. Regarding Exhibit C7 – a contested settlement offer – the Tribunal may find it admissible due to ambiguity in its intent.

Tässä notaaritutkielmassa tarkastellaan välitysmenettelyn prosessuaalisia kysymyksiä ja keskitytään välitysmenettelyä edeltävien sovitteluvaatimusten täytäntöönpanokelpoisuuteen sekä kiistanalaisen näytön hyväksyttävyyden arviointiin 32. Willem C. Vis International Commercial Arbitration Moot -oikeustapauskilpailun kontekstissa. Tutkielmassa käsitellään kahta keskeistä kysymystä: (1) onko kanne hylättävä tai jätettävä tutkimatta toimivallan puutteen vuoksi; ja (2) onko näyttö todisteeksi kelpaamaton sen hankkimistavan tai asiakirjojen salassapitoon liitännäisen näkökohtien perusteella.

Tässä tutkielmassa tarkastellaan moniportaisia riidanratkaisulausekkeita analysoimalla välitystuomioistuimen toimivallan ja kanteen tutkittavaksi otettavuuden välistä suhdetta ja arvioidaan, muodostaako sovitteluvaiheen noudattamatta jättäminen estettä välitysmenettelylle. Analysoitavan oikeustapauksen kontekstissa ehdotetaan, että vaikka tuomioistuimen toimivalta säilyisikin tässä tapauksessa, kannetta ei voida ottaa tutkittavaksi ennen kuin sovittelua on yritetty.

Lisäksi tutkielmassa arvioidaan todisteiden hyväksyttävyyttä kansainvälisesti tunnustettujen normikehikoiden, erityisesti IBA:n todisteiden arviointisäännöstön mukaisesti. Tutkielmassa todetaan, että todisteen poissulkeminen laittoman hankinnan tai salassapitovelvoitteiden valossa on perusteltava riittävästi ja että sovintotarjouksen luonnetta tulee arvioida sen tarkoituksen perusteella.

Key Words / Avainsanat:

multi-tiered dispute resolution clause, jurisdiction, admissibility, evidence admissibility, privilege
moniportainen riidanratkaisulauseke, toimivalta, kanteen tutkittavaksi otettavuus, näytön arviointi

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List of Abbreviations

¶/ ¶¶	Paragraph/paragraphs
ADR	Alternative Dispute Resolution
Art.	Article
CLAIMANT	GreenHydro Plc
Ex. C	CLAIMANT's exhibit
Ex. R	RESPONDENT's exhibit
Et al.	Et alii; 'and others'
FAI	The Finland Arbitration Institute
FAI mediation	Mediation conducted under the FAI Mediation Rules
FAI Mediation Rules	Mediation Rules 2024 of the Finland Chamber of Commerce
FAI Rules	Arbitration Rules 2024 of the Finland Chamber of Commerce
IBA	International Bar Association
IBA Rules	Rules on the Taking of Evidence in International Arbitration
in casu	In the case; 'subject to the particular case'
MDR	Multi-Tiered Dispute Resolution
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958)
p./pp.	Page/pages
Parties	GreenHydro Plc and Equatoriana RenPower Ltd.
prima facie	At first sight; 'upon initial examination'
PSA	Purchase and Service Agreement
RESPONDENT	Equatoriana RenPower Ltd.
UML	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
v.	Versus; 'against'

1 Background

The Willem C. Vis International Commercial Arbitration Moot is an annual competition that unites law students worldwide to enhance their understanding of international commercial law and arbitration while refining their advocacy skills. Participants prepare legal memoranda for both the Claimant and the Respondent and present their arguments before tribunals of esteemed practitioners and academics. What distinguishes the Vis Moot is its realistic simulation of arbitration disputes, featuring cases crafted to reflect contemporary legal issues that remain unsettled in practice, challenging participants to research and argue from opposing perspectives.

Each Vis Moot case features a fictional dispute between parties operating within imaginary jurisdictions – referred to in the Vis Moot world as Equatoriana, Mediterraneo, and Danubia – rooted in established legal frameworks. These jurisdictions are Contracting States to the CISG, Member States of the NY Convention, and all three have adopted the UNCITRAL Model Law on International Commercial Arbitration, incorporating the 2006 amendments. Their general contract law is derived from the UNIDROIT Principles of International Commercial Contracts.

As this thesis explores the procedural challenges in the 32nd Vis Moot case, such as the enforceability of pre-arbitral provisions and evidence admissibility, these frameworks will serve as authoritative sources, guiding the assessment and supporting the arguments throughout.

1.1 Factual Context of the Dispute in the 32nd Willem C. Vis Moot

The 32nd Willem C. Vis Moot problem concerns a contractual dispute between GreenHydro Plc ("**CLAIMANT**"), an engineering firm based in Mediterraneo specialising in green hydrogen production plants, and Equatoriana RenPower Ltd. ("**RESPONDENT**"), a government-owned entity in Equatoriana operating independently within the renewable energy sector. The Parties entered into a Purchase and Service Agreement (the "**PSA**") for the construction and delivery of a green hydrogen production plant, including potential derivatives (the "**Project**"). However, a dispute arose after RESPONDENT's unilateral termination of the PSA, which CLAIMANT contested in seeking specific performance for continuing the Project as agreed pre-termination.

1.2 Key Procedural Issues Arising from the Case

Following the post-termination dispute, CLAIMANT's Request for Arbitration ("**RfA**") and RESPONDENT's Answer to the Request for Arbitration ("**ARfA**"), the Tribunal issued its Procedural Order No. 1 to guide the Parties in addressing two key procedural issues: (**a**) Should

the Arbitral Tribunal reject the claim for lack of jurisdiction or admissibility or as part of its discretion?; and (**b**) Should the Arbitral Tribunal order the exclusion of Exhibits C7 and R3?

As such, this thesis examines the jurisdictional and procedural implications of non-compliance with pre-arbitral provisions and the principles guiding the assessment of evidence admissibility.

1.2.1 Interpretation and Enforcement of the MDR Clause

The PSA includes a multi-tiered dispute resolution ("**MDR**") clause, stipulating that all disputes be first submitted to mediation under the Mediation Rules 2024 of the Finland Chamber of Commerce ("**FAI mediation**") as an alternative dispute resolution ("**ADR**") mechanism, with arbitration as the final method of dispute resolution. The clause was based on the FAI Model Mediation Clause, but the Parties had modified its key provisions during the PSA negotiations:

Provision	**FAI Model Mediation Clause**	**Equivalent provisions in Art. 30 PSA**
Mandatory mediation	*"- - shall first be submitted to mediation in accordance with the Mediation Rules..."*	Identical text retained
Concurrent arbitration allowed	*"The commencement of proceedings under the Mediation Rules shall not prevent any party from commencing arbitration..."*	Omitted entirely

The interpretation and enforcement of this MDR clause is a key procedural issue in the case. RESPONDENT argues that CLAIMANT's initiation of arbitration without engaging in FAI mediation violates a mandatory condition precedent, warranting dismissal on jurisdictional grounds or, alternatively, seeks the claim being deemed inadmissible and rejected without prejudice. As a last resort, it requests a stay of the proceedings based on the claim's prematurity. Conversely, CLAIMANT contends that mediation is not a binding precondition and that non-compliance should not affect the Tribunal's jurisdiction. It also asserts that RESPONDENT's conduct and the futility of mediation justify excusing the pre-arbitral requirement, making the claim admissible and enabling the Tribunal to address the merits of the claim. This dispute demonstrates the ongoing debate over the distinction between jurisdiction and admissibility.

1.2.2 Issues Regarding Evidence Admissibility

Another key issue is the admissibility of evidence. CLAIMANT seeks to introduce Exhibit C7, a communication from prior settlement discussions, asserting that it is crucial to substantiate its

claims. However, RESPONDENT challenges its admissibility, invoking without-prejudice principles and settlement privilege to argue that such communications should remain confidential. On the other hand, RESPONDENT seeks to introduce Exhibit R3, CLAIMANT's internal email, raising concerns about the admissibility of allegedly illegally obtained evidence and the applicability of legal professional privilege across diverging jurisdictional standards.

1.3 MDR Clauses and Mediation

MDR clauses are contractual provisions in which parties agree to resolve disputes through a sequential process of escalating ADR mechanisms, resorting to arbitration only if earlier stages fail.[1] These clauses aim to provide a cost-effective and efficient resolution while fostering amicable relationships and offering a structured alternative for dispute management.[2] MDR clauses often incorporate various ADR techniques tailored to parties' needs. Mediation, a widely used method, involves an impartial third party assisting in amicably resolving disputes.[3] Parties seeking to resolve their disputes through mediation often opt for institutional rules, such as the FAI Mediation Rules. These rules offer a flexible framework with minimal procedural constraints, allowing parties to mutually fit the process to their preferences and *in casu* needs.[4]

Despite their advantages, mediation clauses may present enforceability challenges if they are not carefully drafted. Ambiguities or uncertainty in their terms can render them unenforceable, particularly if they lack clear procedural steps and defined obligations.[5] Furthermore, the legal effects of mediation clauses remain debated: while some argue that their consensual and non-determinative nature makes them inherently aspirational, others contend that explicit and unambiguous agreements to attempt mediation should be upheld as binding and enforceable.[6]

In this thesis, the discussion of MDR clauses and pre-arbitral provisions will be approached from the perspective of mediation, as it is, the focal point of the 32nd Vis Moot case. While this analysis may offer insights applicable to negotiation or conciliation clauses due to their similar nature, it should not be directly extended to other forms of ADR – such as expert determinations – which differ significantly in their structure, function, and underlying procedural framework.

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[1] Pryles, Michael at p. 159; Kayali, Didem at p. 551; Berger, Klaus Peter (2003) at p. 387.
[2] Pryles, Michael *ibid* at 1; Berger, Klaus Peter (2006) at p. 2; Carter, James at p. 447.
[3] Mironi, Mordehai at pp. 52–53.
[4] Kayali, Didem at p. 554; FAI Mediation Rules at pp. 5–6.
[5] Berger, Klaus Peter (2006) at p. 22.
[6] Carter, James at p.456; Jolles, Alexander at p. 72.

2 Jurisdiction v. Admissibility

In cases where parties fail to comply with the procedural sequence prescribed in MDR clauses, the primary question that arises is whether the ADR provision – such as a mediation clause – is enforceable and what procedural consequences follow from such non-compliance. Specifically, the central issue is whether non-compliance constitutes a matter of *jurisdiction* or *admissibility*.

Jurisdiction refers to the tribunals' legal authority to hear a case – whether it is competent to decide on the dispute at all.[7] If a tribunal finds it lacks jurisdiction, the claim cannot proceed, and the parties are precluded from resubmitting the same claim before that tribunal.[8] By contrast, admissibility pertains to whether a claim is procedurally ready for adjudication; and whether the claim should be heard at this stage or under the given circumstances.[7] If a claim is inadmissible, the claimant may cure the deficiency and resubmit the claim to the same tribunal.[8]

Since it is often difficult to confidently determine which is which and where one ends and the other begins, issues related to arbitral procedure and preconditions in MDR clauses have been characterised as falling under both categories, admissibility and jurisdiction.[9] This distinction, however, is critical because it affects the reviewability of the tribunal's decision. A ruling on jurisdiction may be subject to full judicial review by national courts, which may lead to the annulment of the arbitral award. Conversely, if the issue is deemed one of admissibility, the tribunal's decision is considered final, subject only to limited judicial scrutiny – such as in cases where the reasoning is insufficient, or fundamental procedural principles have been breached.[8]

The principle of competence-competence grants arbitral tribunals the authority to determine their jurisdiction, including whether a party's failure to adhere to an MDR clause constitutes a jurisdictional defect or a mere issue of admissibility.[10] However, this authority inherently derives from the arbitration agreement itself, which serves as the basis for the tribunal's jurisdiction.[11] Consequently, the principle cannot override preconditions established in the agreement. Determining whether an issue pertains to jurisdiction or admissibility requires careful interpretation of the MDR clause, taking into account its wording and the parties' intent.

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[7] Paulsson, Jan at pp. 616–17; Swissbourgh Case.
[8] Paulsson, Jan at pp. 601–03; Tweeddale, Andrew [2021].
[9] Kayali, Didem at pp. 4–5; SL Mining Case; C v. D Case.
[10] Art. 33(1) FAI Rules; ICC Award No. 16083.
[11] Bhatty, Saadia at ¶6; Girsberger, Daniel and Voser, Nathalie at ¶268.

2.1 Non-compliance with Mediation: Jurisdictional Aspects

Advocates for the jurisdictional view argue that the voluntary nature of arbitration necessitates treating pre-arbitral steps, such as mediation, as **conditions precedent** that must be satisfied before an arbitral tribunal can assume jurisdiction over a dispute.[12] These preconditions are interpreted as integral to a party's consent to participate in arbitral proceedings – effectively functioning as "conditions to consent".[13] Failure to comply with such conditions may result in the tribunal lacking the authority to hear the case. Consequently, courts and arbitral tribunals have, in various instances, enforced pre-arbitral requirements that clearly and unequivocally mandate compliance, and annulled arbitral awards where such steps have been disregarded.[14]

Ultimately, determining whether a mediation clause operates as a jurisdictional barrier hinges on several key considerations, including the parties' intent, the clarity of the clause's language, the specificity of the obligations imposed, as well as the principles of good faith and *effet utile*. It should be noted, though, that ambiguity generally precludes treating mediation as a condition precedent, as tribunals tend to prioritise procedural integrity over enforcing unclear pre-arbitral provisions, and they ultimately retain the authority to decide when the duty to arbitrate rises.

2.1.1 Intent

The validity, nature, and enforceability of pre-arbitration procedural requirements, as well as the consequences of non-compliance with their terms, are ultimately matters of contractual interpretation.[15] These interpretations depend on the specific terms of individual agreements and are guided by established principles of contract interpretation. For example, Art. 4(1) UPICC emphasises discerning the parties' shared intent through their statements and conduct.[16]

Accordingly, the enforceability of mediation as a jurisdictional condition precedent primarily hinges on determining the parties' mutual intent. Unless the parties have demonstrated a clear and unequivocal intention to mandate mediation before arbitration as a jurisdictional barrier, such provisions are treated as procedural mechanisms rather than conditions precedent affecting the tribunal's jurisdiction.[17] This principle is supported by legal authority, including

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[12] Kohl, Benoît and Rigolet, Alexandre at pp. 439–40; Berger, Klaus Peter (2006) at p. 1.
[13] Rosenfeld, Friedrich at p. 141.
[14] Coben, James and Thompson, Peter at p. 109; X v. Y.
[15] Born, Gary B. at §5.08.
[16] Born, Gary B. at §9.02 [C]; Jolles, Alexander at p. 336; Hooper Bailie Case.
[17] Santos, Mauricio at p. 5; C v. D Case; ICC Award No. 11490.

interpretations under Art. 19 UML, which stipulates that an unmistakable shared intent to make pre-arbitral steps binding preconditions is decisive for the enforceability of such provisions.[18]

2.1.2 Clarity of Language

The clarity of language in a mediation clause is the second critical factor in determining whether it constitutes a condition precedent to arbitration. To establish an enforceable obligation at this level, the clause must be unequivocal, precise, and reasonably certain in its terms.[19] Clear and mandatory wording is essential to demonstrate the binding nature of the parties' agreement and signal intent to make compliance with mediation a prerequisite to arbitration; such language increases the likelihood of courts and tribunals enforcing the obligation.[20] Conversely, clauses that lack such detail and merely outline steps without designating mediation as an explicit precondition are typically regarded as aspirational rather than enforceable – designed solely to promote mediation as a voluntary step rather than to create enforceable jurisdictional barriers.[21]

The question of what constitutes sufficiently explicit language is subject to debate. One position holds that a mediation clause cannot be enforced as a condition precedent without express language indicating the parties' intent to make mediation mandatory.[22] Proponents of this view argue that the term "shall" alone is insufficient; binding obligations require conditional phrasing like "if" or "only upon", explicitly precluding arbitration until mediation has been completed.[23]

In the context of the FAI Mediation Rules, Art. 11(1) underscores the importance of explicit and mutual agreement to treat mediation as a binding condition precedent. It states: "Unless otherwise agreed by the parties, an agreement on FAI [m]ediation does not constitute a bar to any [arbitral] proceedings". This provision reinforces the necessity of explicit expressions of intent to elevate mediation to a jurisdictional barrier. Moreover, the FAI Mediation Rules provide a flexible framework, allowing parties to tailor provisions to their specific needs and priorities.[24] Accordingly, any deviations from standard terms should be regarded as deliberate choices that reflect the parties' intent and should carry significant weight in interpretation.[25]

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[18] UNCITRAL Explanatory Note at pp. 32–33 ¶¶34–36; Salehijam, Maryam at p. 602 ¶8.
[19] Born, Gary B. and Šćekić, Marija at p. 249; HIM Case.
[20] Salehijam, Maryam at pp. 38–52; Santos, Mauricio at p. 11.
[21] Santos, Mauricio at p. 10; Schluep/van den Berg [2024]; NWA Case, ICC Award No. 9977.
[22] Kohl/Rigolet, pp. 442–43.
[23] Berger, Klaus Peter (2006) at p. 5; Savola, Mika at p. 133; Tyndall Case.
[24] FAI Mediation Rules, at p. 9.
[25] Channel Tunnel Case, Cable Case.

An opposing perspective suggests that a mediation clause becomes binding when it employs clear and imperative language, such as the use of "shall" to express a mandatory obligation.[26] Under this interpretation, mediation can be treated as an enforceable prerequisite to arbitration even without the explicit use of the term "condition precedent" to expressly signal this intent – provided the clause clearly mandates mediation as the dispute resolution process' initial stage.[27]

2.1.3 Specificity in Imposed Obligations

The third aspect to consider goes beyond the clarity of language and focuses on the specificity of the obligations imposed by the mediation clause. For a clause to constitute a condition precedent to arbitration, it must provide explicit guidance on the timing, quality, and process of the obligations it imposes.[28] For example, in *Sulamérica Cia. Nacional De Seguros v. Enesa Engenharia*, the mediation clause was not deemed a condition precedent because it "contained no unequivocal undertaking to enter into mediation, no clear provisions for the appointment of a mediator, and no clearly defined mediation process". Similarly, in *Wah v. Grant Thornton International*, the MDR clause was unenforceable due to its equivocal nature and the absence of any guidance regarding the quality or nature of the attempts required to resolve the dispute.

Accordingly, specificity refers to the inclusion of defined timeframes and procedural milestones. A commitment to mediation should be limited in time, with the tiered mechanism clearly outlining when efforts are considered exhausted and the pre-arbitral requirement fulfilled, allowing arbitration to commence. Mediation clauses that clearly articulate procedural obligations – such as well-defined failure mechanisms – are more likely to be enforced as a precondition, this ensures that a party is not indefinitely precluded from accessing arbitration.[29]

Especially in the context of FAI mediation, the absence of concrete details may suggest a general intent to mediate rather than a strict obligation, as the FAI Mediation Rules regulate the process only lightly and do not prescribe specific timeframes.[30] Consequently, to impose binding obligations to mediate beyond aspirational intent, parties should be advised to explicitly agree on key elements such as timelines and procedural milestones in drafting such provisions.

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[26] Figueres, Dyalá at p. 72; Born, Gary B. and Šćekić, Marija at p. 238; Philip Morris Case.
[27] HIM Case; Cable Case.
[28] Born, Gary B. and Šćekić, Marija at p. 249.
[29] Kayali, Didem at p.573; Berger, Klaus Peter (2006) at p. 10; Aiton Case.
[30] FAI Mediation Rules at pp. 5–6.

2.1.4 The Principles of Good Faith and Effet Utile

Finally, the principle of good faith plays a crucial role in assessing whether mediation clauses may be enforced as conditions precedent. This principle softens the rigid application of the considerations discussed earlier, acknowledging that the enforceability of mediation clauses should be assessed on a case-by-case basis.[31] For instance, in the Vis Moot case, the inclusion of the modified FAI Model Mediation Clause may strongly signal the Parties' intent to establish mediation as binding and enforceable, even if the clause lacks absolute precision or specificity.

To that effect, the principle of good faith obliges parties to interpret the clause's unclear terms as a reasonable person in the other party's position would and to actively cooperate in fulfilling the purpose of the arbitration clause.[32] This means that if a pre-arbitral provision reflects a clear intention to create binding obligations, tribunals should uphold that intention and may supply reasonable terms where necessary, even if certain aspects of the provision remain unsettled.[33]

Non-compliance with mediation clauses may also be seen as undermining jurisdiction and violating the principle of effet utile, which requires that all contractual provisions be given meaningful effect in alignment with their wording and purpose.[34] This principle ensures that clauses are interpreted in a way that upholds their functionality, preventing parties from rendering key provisions ineffective through non-compliance or overly technical arguments.[35]

2.2 Non-compliance with Mediation: Admissibility Considerations

Once a tribunal confirms the validity of the arbitration agreement – either by determining that a mediation clause is not a jurisdictional barrier as a condition precedent or by finding that it does not raise a jurisdictional issue – the next step is to assess the claim's admissibility. Advocates of the admissibility approach argue that absent explicit contrary wording, mediation clauses should generally be seen as unenforceable agreements to agree, imposing only limited and non-mandatory obligations. Under this view, non-compliance should be excusable and its consequences non-jurisdictional, because the consensual as well as non-determinative nature of mediation makes its success entirely dependent on the voluntary participation of both parties.[36]

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[31] Born, Gary B. at §5.08[A][2] and at §5.08[A][3]; Mocca Case.
[32] Art. 4(2)(2) UPICC; Weber, Simon and Martinez, Julie at p. 112; Suad Case.
[33] Alexander, Nadja at p. 192; Fletcher Case.
[34] Meija-Lemos, Diego at p. 129; Reinisch, August and Braumann, Céline at p. 48.
[35] United Group Case.
[36] Kayali, Didem at p. 552; Pryles, Michael at p. 161.

However, even within the admissibility framework, a tribunal may still deem a claim premature and respond accordingly. It may either reject the claim without prejudice, allowing the claimant to refile after fulfilling the mediation requirement, or order a stay of the proceedings, enabling the non-compliant party to remedy the procedural deficiency and render the claim ripe for arbitration. This approach aligns with the jurisdictional perspective to the extent that, where the parties have agreed on a binding well-defined MDR process, the tribunal may still find the claim for arbitration inadmissible until the prescribed procedures have been fulfilled and exhausted.[37]

This evaluation involves determining whether the claim is premature due to procedural deficiencies arising from non-compliance with mediation, and it falls within the discretionary powers of the tribunal to determine. This discretion is guided by considerations of judicial propriety and the due administration of justice.[38] Ultimately, admissibility assessments hinge on whether non-compliance was justified, accounting for a range of *in casu* factors. In many cases, tribunals emphasise procedural efficiency, frequently invoking the futility argument advanced by a non-compliant claimant seeking to justify bypassing pre-arbitral procedures.[39]

2.2.1 Rationale Behind the Futility Argument

A key consideration in the admissibility assessment is whether the tribunal should uphold the MDR procedure despite mediation not constituting a jurisdictional barrier. This largely depends on whether adhering to the pre-determined dispute resolution sequence remains practical and meaningful – provided the clause is sufficiently clear. Accordingly, the core question is whether forcing unwilling parties to mediate would be futile given that the process relies on cooperation.

The futility argument asserts that MDR clauses are designed to encourage settlement, not obstruct arbitration. Therefore, obligations to mediate should be excusable where compliance serves no legitimate purpose, such as when neither party is willing to modify its position, or no agreement is possible even if pre-arbitral procedures were pursued.[40] This principle of efficiency is reinforced by Art. 30(2) FAI Rules, which mandates that proceedings be "expeditious and cost-effective" and Art. 26(3) FAI Rules, which requires proceedings to be

[37] Jolles, Alexander at p. 336; Berger, Klaus Peter (2006) at p. 6.
[38] Rosenfeld, Friedrich at pp. 146–152.
[39] Born, Gary B. at §5.08[B][3]; Kayali, Didem at pp. 560–61; Paulsson, Jan at p. 617.
[40] Born, Gary B. and Šćekić, Marija at p. 230; VEB Award; ICC Award No. 8445.

conducted efficiently. Consequently, where compliance with pre-arbitral steps undermines efficiency and serves no legitimate purpose, the provisions may be regarded as unenforceable.[41]

Courts and tribunals have excused non-compliance due to futility, reasoning that a party faces no disadvantage in being denied participation in a process that offers no realistic prospect of resolution.[42] Additionally, non-compliance may be waived if the party invoking inadmissibility is responsible for the futility of mediation, thereby defeating its intended resolution function.[43]

Advocates of the futility argument further emphasise that whether amicable settlement efforts have been exhausted depends on *in casu* considerations and the parties' good faith. If a party has made genuine efforts to negotiate and reasonably concluded that discussions are at an impasse, the tribunal should deem the mediation requirement satisfied and allow arbitration to proceed even without full adherence to the MDR clause.[44] Moreover, without evidence of ongoing negotiations, some argue that a request for arbitration may itself be a sufficient signal of an amicable resolution being no longer viable.[45] Forcing mediation in such cases is a futile formality, serving only to delay proceedings, raise costs, and obstruct the right to arbitration.[46]

2.2.2 The Futility Argument as a Weak Justification?

Critics of the futility argument contend that when parties agree to an MDR clause, they reasonably expect arbitration to commence only after pre-arbitral steps are completed. As such, when the clause establishes an unambiguous procedural sequence, each step should be enforced, regardless of its consensual nature.[47] The rationale is that what is enforced is not cooperation and consent, but participation in a structured process from which they are designed to emerge.[48]

Opponents further argue that excusing mediation should be reserved for exceptional cases, where clear evidence demonstrates that mediation is futile or where a party's conduct has rendered the process untenable.[49] Even in cases where settlement proves unattainable, mediation still serves important functions, such as narrowing down the scope of conflict as well

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[41] Born, Gary B. at §5.08[B][3]; File, Jason at p. 34.
[42] Cumberland Case; ICC Award No. 16083.
[43] George, Anya at p. 122; BG Award.
[44] Berger, Klaus Peter (2006) at pp. 12–15; ICC Partial Award 6276; Walford Case.
[45] SCC Award No. 2018/097.
[46] Berger, Klaus Peter (2006) at p. 14; Santos, Mauricio at p. 14; Halsey Case.
[47] Jolles, Alexander at p. 336; Carter, James at p. 456.
[48] Kayali, Didem at p. 569; Salehijam, Maryam at p. 608; Halsey Case.
[49] Suter, Erich at pp. 35–37; Elisabeth Bay Case; Cable Case.

as providing parties with insight into the strengths and weaknesses of their positions and claims.[50] Furthermore, mediation – especially when facilitated by a professional mediator – frequently achieves success even when parties initially exhibit hostility or reluctance to settle.[51] By promoting open dialogue and collaboration, mediation helps preserve amicable business relationships and expedite commercial transactions, while minimising costs and animosity.[52]

Ultimately, some argue that the futility argument is inherently flawed, as claiming that settlement is impossible contradicts the reality of dispute resolution. ADR mechanisms are specifically designed to facilitate resolution even amid hostility, fostering dialogue and encouraging compromise where direct negotiations may have failed. Thus, a low threshold for futility risks undermining the very purpose of MDR clauses.[53] To prevent abuse, a party invoking futility should be required to substantiate its claim by demonstrating genuine efforts to engage in mediation rather than merely asserting that the procedure would be ineffective.[54]

2.3 Assessing Jurisdiction and Admissibility in the Vis Moot Case

Based on the applicable legal principles and the factual matrix of the case, the Tribunal should find that it has jurisdiction over the claim. The mediation clause in Art. 30 PSA lacks the clarity and specificity required to constitute a binding condition precedent, particularly in the absence of explicit language making mediation a precondition to arbitration. Under Art. 11(1) FAI Mediation Rules, mediation is not automatically a jurisdictional barrier unless expressly agreed, and the absence of conditional phrasing, defined procedural steps, and failure mechanisms supports the conclusion that the Tribunal retains jurisdiction. Given the ambiguity of the clause, it is more consistent with jurisprudence to interpret it as aspirational rather than a strict barrier.

However, the Tribunal should find the claim inadmissible until the Parties have at least attempted mediation. While CLAIMANT contends that the mediation clause is merely aspirational and that compelling mediation would be futile, it seems logical to find this argument inherently flawed. The very purpose of MDR clauses is to ensure that Parties engage in pre-arbitral dispute resolution before resorting to arbitration. Accordingly, declaring mediation futile without even attempting it would undermine the function of ADR mechanisms,

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[50] Salehijam, Maryam at p. 308; Beukering-Rosmuller, Ellen and van Leynseele, Patrick at p. 38; Idoport Case.
[51] Salehijam, Marya at pp. 607–08; Schmitz, Amy at pp. 64–65; Lee, Joel (1999) at p. 241; Halsey Case.
[52] Babaie, Atie at pp. 172–74; FAI Mediation Rules at p. 5.
[53] Lee, Joel (1999) at p. 241; Shirley, Melinda at pp. 40–41; Copylease Case.
[54] George, Anya at §8.03[B]; Lee, Joel (2001) at p. 85; Hooper Bailie Case.

particularly in a case where the clause, despite some ambiguity, was drafted based on the model clause of an established institution such as the FAI. Furthermore, the subsidiarity of arbitration was explicitly addressed during the PSA's drafting history, suggesting that – even if the clause does not rise to the level of a jurisdictional condition precedent – it still represents a mutually agreed procedural commitment that should not be dismissed as a mere "agreement to agree".

In evaluating the effects of non-compliance, the Tribunal should consider the good faith obligations of both Parties and whether mediation had a realistic prospect of success. Neither Party has categorically refused to continue the Project, and their willingness to negotiate – despite contentious positions – suggests that mediation could still serve as a viable resolution pathway. Unlike typical contractual disputes over financial compensation, this case concerns the continuation of a cooperative project, rendering mediation sensible and practical to pursue.

Furthermore, allowing mediation to proceed aligns with the principles of judicial efficiency and procedural fairness. CLAIMANT argues that rejecting the claim would simply delay arbitration, but this overlooks the possibility that mediation could resolve the dispute altogether, eliminating the need for arbitration. If mediation fails, arbitration remains fully available, and a temporary stay of the proceedings does not permanently bar CLAIMANT from pursuing its claims. This approach would align with established jurisprudence that prioritises giving effect to agreed dispute resolution mechanisms unless they are demonstrably unworkable and futile.

Whether the Tribunal adopts a pro-mediation or pro-arbitration stance would likely influence its decision in a real-world setting. In pro-arbitration jurisdictions, tribunals tend to excuse non-compliance, prioritising procedural efficiency over strict enforcement of MDR clauses. On the contrary, pro-mediation jurisdictions are more likely to require mediation before arbitration proceeds. Given the procedural design of the PSA and the FAI Mediation Rules, the Tribunal would likely adopt a pro-mediation approach, treating mediation as a mandatory procedural step, though not a jurisdictional barrier precluding arbitration entirely. Accordingly, the Tribunal should find the claim inadmissible at this stage and direct the Parties to fulfil their agreed mediation procedure. If mediation proves unsuccessful, arbitration may proceed, ensuring that Art. 30 PSA's procedural integrity and the Parties' right to arbitrate are upheld.

3 Admissibility of Evidence

The admissibility of evidence in arbitration involves determining whether the tribunal should exercise its discretion to include or exclude disputed evidence presented by either party. This assessment is crucial in maintaining procedural fairness and ensuring only relevant and reliable evidence is considered. In this context, each party seeks to justify the admission or exclusion of specific evidence, often invoking legal principles such as confidentiality, privilege and procedural fairness. The tribunal must weigh these arguments while adhering to applicable evidentiary rules and the overarching goal of achieving a just and efficient dispute resolution.

3.1 Legal Framework for Evidence Admissibility in Arbitration

In most national arbitration statutes, the admissibility and scope of evidence disclosure are primarily governed by the agreement of the parties and the discretion of the tribunal, as implemented through procedural rules and orders.[55] This reflects the principle that courts should not interfere in arbitration proceedings, ensuring flexibility in evidentiary assessments.[56]

Accordingly in the Vis Moot case, the FAI Rules serve as the main procedural framework, granting the tribunal discretion in assessing evidence but providing little substantive guidance on admissibility criteria.[57] As a result, tribunals exercise this discretion on a case-by-case basis. To supplement these rules and ensure a consistent as well as fair approach, tribunals frequently look to internationally recognised standards – most notably the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**").[58] These best practices provide guidance where institutional rules – such as the FAI Rules in the Vis Moot case – offer only broad discretion. Thus, each disputed exhibit will be assessed based on these combined criteria.

3.2 Admissibility of Exhibit R3

In the Vis Moot case, RESPONDENT seeks to introduce Exhibit R3 as evidence, while CLAIMANT challenges its admissibility over its potentially unlawful acquisition as well as on the grounds of legal professional privilege. The Tribunal must therefore assess whether the document meets the requirements for admissibility under the applicable procedural framework.

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[55] Born, Gary B. at §16.02[B] and §16.02[E].
[56] Born, Gary B. at §15.06.
[57] Art. 34 FAI Rules; Savola, Mika at p. 238.
[58] Redfern/Hunter at §6.93; Savola, Mika at pp. 246–47.

3.2.1 Illegally Obtained Evidence

Tribunals typically have broad discretion to admit or exclude evidence in most international arbitration proceedings – constrained only by vague standards of procedural fairness and natural justice.[59] This discretion becomes particularly complex when assessing the admissibility of illegally obtained evidence, as tribunals find themselves in a conundrum of balancing their fact-finding mandate against the fundamental principle of not encouraging unlawful fact-finding.[60]

A key guiding framework in this regard is Art. 9(3) IBA Rules, which grants tribunals the discretion to exclude illegally obtained evidence. Several factors guide this discretion, including the presenting party's complicity in the unlawful acquisition, the severity of the wrongdoing and the extent to which the evidence is outcome-determinative.[61] Once evidence is *prima facie* shown to have been unlawfully or criminally obtained, the burden shifts to the presenting party to justify its admissibility.[62] These considerations align with the "clean hands" doctrine and the principle of *ex turpi causa non oritur actio* (a right cannot arise from a wrong), preventing a party from benefiting from its own misconduct – especially when it is not a disinterested party.[63]

Despite these principles, international arbitration does not categorically prohibit the admission of illegally obtained evidence: ultimately, admissibility remains within the discretion of the tribunal and no universal rule mandates the exclusion of such evidence.[64] The prevailing view in jurisprudence is that the admissibility of such evidence depends primarily on two factors: whether the offering party was complicit in the illegality and whether the evidence is outcome-determinative.[65] Given this broad discretion, tribunals must exercise caution in applying these criteria, as they have faced criticism for excluding evidence on vaguely defined subjective grounds – often relying on principles such as good faith or equality of arms as "conclusory labels" without consistently and unambiguously established evidence admissibility standards.[66]

Given the wide range of circumstances in which potentially illegally obtained evidence arises, a crucial distinction must be drawn between evidence directly obtained through illegal means by the presenting party and evidence that may have been unlawfully acquired but without the

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[59] S. Ng, Nicole at pp. 474–770.
[60] Singh, Natasha at p. 1.
[61] Zuberbühler, Tobias et al. at p. 220; Singh, Natasha at pp. 93–95; IBA Task Force (2021) at p. 30.
[62] Methanex Award; EDF Award.
[63] Blair, Cherie and Vidak-Gojkovic Ema at p. 256; Amianto, Lodovico at pp. 14–20; Nicaragua Case.
[64] Derains, Yves and Sicard-Mirabal, Josefa at §8.05[B][6]; Ashford, Peter (2019) at pp. 83–83&337.
[65] IBA Task Force (2021) at p. 30; Zuberbühler, Tobias et al. at p. 220; FIFA Award.
[66] Singh, Natasha at p. 87.

presenting party's complicity. For instance, in the *Methanex Award*, the tribunal excluded such evidence after finding that the presenting party had trespassed onto the opposing party's premises to obtain it. Conversely, the fact-finding mandate of arbitral tribunals may make them generally more reluctant to exclude evidence when the offering party had no demonstratable role in its unlawful acquisition – especially when the evidence holds substantial probative value.

In this regard, another key factor in determining admissibility is the materiality or outcome-determinative nature of the evidence, wherein jurisdictional approaches vary significantly. For instance, in English legal practice, admissibility is generally determined by the relevance and reliability of the evidence even if it was unlawfully obtained.[67] By contrast, U.S. jurisprudence takes a stricter approach, often barring the admission of illegally obtained evidence outright.[68] This divergence underscores the inherent tension in admissibility assessments – while admitting key evidence may contribute to a fair, well-informed and fact-based resolution, the implications of doing so risk tribunals setting a dangerous precedent of incentivising unethical fact-finding.

Given the competing considerations arising from this legal conundrum, tribunals assessing the admissibility of evidence disputed on illegal acquisition grounds generally consider several key factors. First, they evaluate whether the evidence is credible and probative, as unreliable evidence may be excluded outright regardless of how it was obtained. Second, they assess the offering party's complicity in the unlawful acquisition, in line with the "clean hands" doctrine. Third, if the presenting party actively participated in serious misconduct to obtain the evidence, exclusion may be warranted. Finally, if the information could have been lawfully accessed and was already publicly available, exclusion based on these grounds becomes less justifiable.[69]

Notably, while these factors provide a structured framework for admissibility determinations, their application remains highly fact-dependent and therefore subject to *in casu* considerations.

3.2.2 Legal Professional Privilege

The assessment of whether Exhibit R3 falls under legal professional privilege must be conducted separately from the prior discussion on its acquisition and materiality. Legal professional privilege – also referred to as attorney-client privilege or simply legal privilege – protects communications between a legal professional and their client when made for the

[67] Zuckerman, Adrian at pp. 55–70.
[68] Peiris, G.L. at p. 309.
[69] Singh, Natasha at pp. 85–96.

purpose of obtaining or providing legal advice.[70] This privilege is one of the oldest and most frequently invoked protections, recognised in various forms across most jurisdictions.[71] However, its application in international arbitration is complex due to differing interpretations across legal frameworks. Common law jurisdictions have recognised legal privilege since the 17th century, while civil law systems, although offering comparable protections, do not explicitly recognise the concept in the same manner.[72] These differences result in significant variations regarding the nature, scope and applicability of privilege in different legal traditions.

In the context of the Vis Moot case, the key issue is whether communications and documents prepared by in-house legal counsel fall under legal privilege – a question that frequently arises in international arbitration. Proponents of privilege for in-house counsel argue that it should apply to any legal advice provided by a qualified lawyer, regardless of their employment status, provided the counsel was acting in a legal capacity and the communication pertains to legal rather than business matters.[73] Denying this privilege – they contend – would discourage documented legal advice, undermining the expectations of confidentiality of corporate clients.[74]

Conversely, opponents argue that in-house counsel are not independent due to their employment relationship with the company, which distinguishes them from external counsel.[75] Accordingly, privilege is lost if the advice is amended or influenced by the in-house counsel, as their functional and structural integration within the firm distinguishes them from external counsel.[76] Further, granting privilege to in-house counsel would lead to excessive protection, restrict disclosure of relevant evidence and impede the fact-finding mandate of the tribunal.[77]

While both perspectives offer compelling arguments, the application of privilege ultimately depends on the tribunal's interpretation of the governing legal framework. Art. 9(4)(b) IBA Rules grants tribunals discretion to exclude evidence if it was "made in connection with and for the purpose of providing or obtaining legal advice". However, IBA Rules do not resolve whether in-house counsel communications fall under this protection, leaving the determination open to interpretation. Given the absence of uniform international standards, tribunals often rely

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[70] Zuberbühler, Tobias et al. at p. 503.
[71] Born, Gary B. at §16.02[E][8][c]; Henriksen, Søren et al. at p. 138.
[72] Henriksen, Søren et al. at p. 135; Berger, Klaus Peter at pp. 503–04.
[73] Zuberbühler, Tobias et al. at p. 209; Born, Gary B. at §16.02[E][8][c]; Lex Mundi at pp. 146–47.
[74] Zuberbühler, Tobias et al. at pp. 209–10; Heitzmann, Pierre at pp. 210–12.
[75] Guerrina, Britton and Rubinstein, Javier at p. 595; Kuitkowski, Diana at pp. 73–74.
[76] Akzo Case; Hilti Case.
[77] Henriksen, Søren et al. at p. 155.

on national privilege rules, as legal privilege is inherently tied to the legal systems under which it arises.[78] Thus, a choice-of-law analysis is necessary to determine the applicable framework.[79]

Tribunals have frequently applied the "closest connection" test (also known as the "centre of gravity" test) to establish the governing privilege rules, typically aligning with the jurisdiction where the lawyer is qualified. This approach is favoured for its predictability and consistency with party expectations, as lawyers are naturally attuned to the privilege rules of their own legal systems.[80] However, some scholars argue that this method does not fully ensure fairness between the parties, advocating instead for the "most-favourable" rule, which applies the privilege standard that offers the highest protection available to any party involved in the arbitration to address unequal treatment and unfair disadvantage of restrictive privilege rules.[81]

Critics of the most-favourable rule contend that it may lead to arbitrary and inconsistent outcomes, potentially extending rights beyond those granted under a party's domestic legal framework.[82] In practice, a balanced approach has emerged, where tribunals combine the closest connection and most-favourable tests – first determining the applicable privilege rules for each party based on the closest connection test, and then applying the most protective rule to all parties in seeking to balance predictability, fairness and the expectations of the parties.[83]

3.2.3 Assessing the Admissibility of Exhibit R3 in the Vis Moot Case

In the Vis Moot case, Exhibit R3 is an internal email from CLAIMANT's head of legal to its senior officers, analysing potential misrepresentation issues related to negotiations concerning the Project and the PSA. RESPONDENT seeks to introduce this exhibit to demonstrate that CLAIMANT was planning to engage in misrepresentation, which could affect the legitimacy of the PSA's formation. Moreover, it reveals that CLAIMANT initially operated under the assumption that the CISG would not apply – an argument inconsistent with its current position. However, the origins of Exhibit R3 remain unclear, with strong indications that it was leaked during a police investigation instigated by RESPONDENT, which has close ties to the police.

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[78] Born, Gary B. at §16.02[E][8][e]; Zuberbühler, Tobias et al. at pp. 210–11.
[79] Berger, Klaus Peter at p. 508.
[80] Born, Gary B. at §16.02[E][8][e]; Berger, Klaus Peter at p. 510.
[81] Berger, Klaus Peter (2022) at pp. 316–17.
[82] Born, Gary B. at §16.02[E][8][e].
[83] Zuberbühler, Tobias et al. at pp. 121–13.

CLAIMANT has advocated for the exclusion of Exhibit R3 on the grounds that it was most likely obtained illegally. However, CLAIMANT has failed to substantiate this claim with concrete evidence. In international arbitration, the threshold for proving illegal acquisition is high, and mere speculation is unlikely to meet this standard – especially given that the burden of proof rests on the party seeking exclusion. Even if the exhibit were unlawfully obtained through the police investigation, the lack of direct evidence implicating RESPONDENT in its initial acquisition would likely be insufficient for exclusion. Tribunals have generally required a stronger nexus between the presenting party and the unlawful acquisition to order exclusion.

Beyond the question of acquisition, the Tribunal would likely assess Exhibit R3's relevance and materiality. Given that the CISG's applicability to the PSA is a central substantive issue in the dispute and the exhibit directly undermines CLAIMANT's current position, the document is highly probative. Weighing its importance in achieving a fact-based resolution against the unsubstantiated allegations of illegal acquisition, the Tribunal would likely deem it admissible.

A more complex issue arises regarding whether Exhibit R3 should be excluded on grounds of legal professional privilege. This determination depends on the law the Tribunal applies, as Equatoriana recognises privilege for in-house counsel communications, while Mediterraneo – where CLAIMANT is domiciled and its in-house counsel is admitted to the bar in – does not offer comparable protections. The Tribunal should therefore conduct a choice-of-law analysis.

The presumable approach the Tribunal would adopt is the closest connection test, which has been widely supported in legal scholarship and jurisprudence for its predictability and alignment with party expectations. While the alternative – most-favourable privilege rule – may seem appealing from a fairness perspective, tribunals also have a duty to render predictable and legally sound awards. In this case, none of the parties involved in the email would have reasonably expected Equatorianian privilege rules to govern. Most notably, the head of legal, admitted to the bar in Mediterraneo, would have been more attuned to the privilege rules applicable in that jurisdiction and would not have expected the communication to be protected.

Accordingly, applying the closest connection test would lead the Tribunal to favour Mediterranean jurisprudence, under which Exhibit R3 as an in-house counsel communication would not be privileged. Therefore, in light of both the initial illegal acquisition analysis as well as the legal privilege considerations, the Tribunal would most likely find Exhibit R3 admissible.

3.3 Admissibility of Exhibit C7

In the Vis Moot case, RESPONDENT challenges Exhibit C7's admissibility due to settlement privilege. The Tribunal must therefore determine whether the exhibit meets the criteria for admissibility, weighing its probative value against the privilege for settlement communications.

3.3.1 Scope of Settlement Privilege

Art. 9(4)(b) IBA Rules protects the confidentiality of settlement communications, safeguarding statements "made in connection with and for the purpose of settlement negotiations". This principle reflects a transnational principle that such communications should be inadmissible in later proceedings if no agreement is reached.[84] The rationale behind settlement privilege is to encourage parties to engage in candid negotiations to reach an amicable settlement without fear that their concessions could be used against them in subsequent arbitration or litigation.[85] However, this protection applies only when parties act in good faith and genuinely seek to resolve their dispute.[86] Tribunals must therefore assess based on *in casu* considerations whether a statement was genuinely made in furtherance of a settlement or whether it was simply an independent communication made only during – but not because of – the settlement process.[87]

Scholars widely recognise that a "without-prejudice" label strongly indicates an intention to maintain confidentiality and invoke settlement privilege.[88] Some have argued that admitting such documents in later proceedings – when a party has reasonably relied on their privileged nature – would result in unfair surprise and undermine procedural fairness.[89] However, a label alone cannot confer privilege; a document must reflect a genuine intent to settle the dispute, as parties cannot mark any communication "without-prejudice" and assume it will be excluded.[90]

Thus, tribunals must go beyond formal labels and assess the content of the communication. That is, if a document was specifically created to facilitate an amicable resolution, it falls within settlement privilege and should not be admitted as evidence.[91] Ultimately, the determining factor of privilege is whether the communication's primary purpose was to resolve the dispute,

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[84] Zuberbühler, Tobias et al. at p. 213; Berger, Klaus Peter (2008) at pp. 269–72; Ashford, Peter (2013) at p. 158.
[85] Born, Gary B. at §16.02[E][8][d]; Fry, J.A. at p. 209.
[86] Berger, Klaus Peter (2008) at pp. 239&273–74; Zuberbühler, Tobias et al. at pp. 213–14.
[87] Haller, Heiko at p. 316.
[88] Khodykin, Roman et al. at §12.184; Haller, Heiko at p. 314; Berger, Klaus Peter (2008) at p. 267.
[89] Mosk, Richard and Ginsburg, Tom at p. 382.
[90] Khodykin, Roman et al. at §12.182; Haller, Heiko at p. 317; Hong Kong Court of Appeal Justice Case.
[91] Haller, Heiko at p. 314; Berger, Klaus Peter (2008) at pp. 265–66; Khodykin, Roman et al. at §12.174.

not how persuasive or fair it appears in hindsight or to its recipient.[92] By contrast, purely commercial discussions regarding settlement do not generally fall under settlement privilege.[93]

3.3.2 Assessing the Admissibility of Exhibit C7 in the Vis Moot Case

In the Vis Moot case, Exhibit C7 is a written offer made by RESPONDENT to CLAIMANT, labelled as a "Without-prejudice Offer". However, the nature of this document is contested. CLAIMANT, seeking its admission, argues that the document does not qualify for settlement privilege as it was not communicated with the genuine intent of resolving the dispute, but rather as a disguised commercial offer. CLAIMANT contends that RESPONDENT's termination of the PSA was strategically followed by this offer in an attempt to secure a lower project cost and more favourable contract terms. Moreover, the document includes a statement that "any further discussions between the Parties only make sense" if CLAIMANT accepts the terms of the offer.

Conversely, RESPONDENT seeks the exclusion of Exhibit C7 on the sole ground of settlement privilege, arguing the document represents a concession made during settlement negotiations and should therefore be protected. The Tribunal's assessment of admissibility in this case is particularly challenging, as it hinges on the intention behind the document rather than its label alone. While the "Without-prejudice" heading serves as an initial indicator, it does not directly confer privilege, calling for an examination of the document's language, context and purpose.

The key issue is whether Exhibit C7 was genuinely made in furtherance of settlement or if it was only a commercial offer masked as a privileged settlement offer. RESPONDENT's stance for exclusion rests entirely on protecting its concessions, while CLAIMANT's reasoning for admission is broader and arguably more persuasive. CLAIMANT does not seek to challenge the precise settlement terms but rather introduces the exhibit as evidence of RESPONDENT's possible ulterior motives in terminating the PSA, as well as its assertion of mediation's futility.

Ultimately, the Tribunal must balance protecting good faith settlement discussions against the need to ensure that relevant and material evidence is not unjustifiably excluded. Given the ambiguity of the purpose of Exhibit C7 – whether it was a legitimate settlement effort or a strategic commercial manoeuvre – the Tribunal could reasonably find it admissible on the grounds that its contents do not evidently establish it as a privileged settlement communication.

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[92] Player, Jane and Morel de Westgaver, Claire at p. 337; Rush Case.
[93] IBA Task Force (2024) at p. 3; WH Holding Case.