International Arbitration and Attorney-Client Privilege—A Conflict of Laws Approach

Susan D. Franck*

International arbitration is a lynchpin of international economic activity.[1] Yet concerns linger about the integrity of international arbitration and recent critiques cast doubt on whether it properly provides rule of law adjudication or whether arbitrators engage in improper decision-making.[2] Despite the

* Professor of Law, American University, Washington College of Law, Washington D.C. The author was grateful for an opportunity to present these remarks at the Annual Meeting of the College of Commercial Arbitrators and for the research support of Mariya Myroshnychenko and Samantha Lasley. The author appreciates thoughtful comments by Professors George Bermann, Stavros Brekoulakis, Catherine Rogers, Victoria Shannon Sahani, and Freddy Sourgens that aided in the evolution of this Essay. The author expresses thanks to the International Council for Commercial Arbitration / Queen Mary Task Force on Third Party Funding in International Arbitration for considering an earlier draft of this Essay in the Final Report addressing "Privilege and Professional Secrecy" in international arbitration.

1. *See, e.g.*, Christopher R. Drahozal, *Empirical Findings in International Arbitration: An Overview*, *in* OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION (Thomas Schultz & Federico Ortino eds.) (forthcoming), https://www.ssrn.com/abstract=2888552 [https://perma.cc/39C4-7HSV] (last visited Oct. 26, 2019); *see also* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 779–81, 826–42 (2012) (exploring the modern role of international adjudicative bodies and their value in providing enforceable decisions and describing the rise of international arbitration).

2. *The Arbitration Game*, ECONOMIST (Oct. 11, 2014), https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game [https://perma.cc/VK6D-TC6K]; *see also* Susan D. Franck, et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1119–29 (2017) (providing a primer on international arbitration and identifying controversies about international arbitration).

enhanced public scrutiny,[3] international arbitration is nevertheless on the rise for the resolution of commercial and investment disputes.[4]

Whether arbitration occurs in a commercial context between private parties involving conflicts under transnational commercial contracts or in a treaty context between investors and states involving investment disputes about the legality of government conduct, the core values of international arbitration involve ease of award enforcement, predictable rule of law-based adjudication, and procedural justice that provides party control over procedure.[5] As production of documents is a standard part of international procedure and can make or break a case, privilege determinations play a critical role in arbitration.[6] Yet assessments about what must be disclosed,

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3. *See, e.g.*, *Arbitrating Disputes, Denying Justice*, N.Y. TIMES (Nov. 7, 2015), https://www.nytimes.com/2015/11/08/opinion/sunday/arbitrating-disputes-denying-justice.html?ref=topics [https://perma.cc/M2GN-DME9]; *see also* Born, *supra* note 1, at 779–81, 826–42 (exploring the modern role of international adjudicative bodies and their value in providing enforceable decisions and describing the rise of international arbitration); Drahozal, *supra* note 1; *The Arbitration Game*, *supra* note 2 (discussing arbitration in connection with resolving international investment disputes); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1 [https://perma.cc/PR38-7LGC] (identifying challenges with private commercial arbitration); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?ref=topics [https://perma.cc/4WD8-D5YF] (same); David Simonds, *Why the European Union Should Not Ditch Bilateral Investment Treaties*, ECONOMIST (June 8, 2019), https://www.economist.com/leaders/2019/06/08/why-the-european-union-should-not-ditch-bilateral-investment-treaties [https://perma.cc/XP4D-PMKT] (discussing challenges with international investment dispute settlement and arbitration).

4. *See* S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533, 534 (2018) (noting "usage rates have also risen to unprecedented heights" and indicating "up to 90% of all international commercial contracts currently include an arbitration provision, with similar mechanisms in place in approximately 93% of the 3,000–5,000 international investment treaties now in effect.") (footnotes omitted); *see also* Drahozal, *supra* note 1 (discussing data reflecting increases in international arbitration); Andrew Myburgh & Jordi Paniagua, *Does International Commercial Arbitration Promote Foreign Direct Investment?*, 59 J.L. & ECON. 597, 597 (2016) (conducting empirical research on international investment and international commercial arbitration and finding that "access to arbitration leads to an increase in [foreign direct investment] flows").

5. *See, e.g.*, Diane A. Desierto, *Rawlsian Fairness and International Arbitration*, 36 U. PA. J. INT'L L. 939, 972–73 (2015) (discussing norms related to fairness and party-control).

6. *See, e.g.*, JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 553–83 (2003) (exploring procedural considerations regarding evidential issues and fact-gathering in international arbitration); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure,* 36 VAND. J. TRANSNAT'L L. 1313, 1325–30 (2003)

what must be withheld as privileged, and the basis for those assessments involve a classic cross-cultural and comparative law conflict.[7] The perennial problem of resolving privilege conflicts and document confidentiality is not theoretical. Privilege involves a practical and prevalent challenge affecting one of the most financially extensive elements of any dispute, namely gathering and disclosing one's own evidence and testing the evidence of the other side.[8] Those actively practicing in the area have posited that "the issue of attorney-client privilege is exceptionally significant and is exceedingly frequent in both international commercial and investment arbitration."[9]

(exploring the importance of procedures, including related to evidence and discovery, in international arbitration); *see also* Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COMP. L.Q. 345, 345–53, 371–72, 378 (2001) (discussing evidentiary issues, including issues involving attorney-client privilege).

7. *See, e.g.*, Clémence Prevot, *The Taking of Evidence in International Commercial Arbitration: A Compromise Between Common Law and Civil Law*, 71 DISP. RESOL. J. 73 (2016) (exploring evidence collection and comparative law approaches); Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 304–09 (2004) (discussing challenges with discovery, privilege, and evidence presentation in international arbitration).

8. *See, e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2375–76 (2d ed. 2014); Caroline Cavassin Klamas, *Finding a Balance Between Different Standards of Privilege to Enable Predictability, Fairness and Equality in International Arbitration*, 12 REVISTA BRASILERIA DE ARBITRAGEM 159, 160 (2015) (Braz.) (suggesting privilege can be "particularly delicate because if the rules concerning privilege turn to be unbalanced, then the award may be in jeopardy of being annulled or having its enforcement refused . . . because the equality of the parties and the fairness of the proceedings are important elements of due process"); Diana Kuitkowski, *The Law Applicable to Privilege Claims in International Arbitration*, 32 J. INT'L ARB. 65, 65–66 (2015) (U.K.) (identifying the importance of privilege issues yet observing "legal issues regarding privilege determinations in international arbitration are diverse, complex and often disputed due to several factors. First, the nature of evidentiary privileges varies between common law and civil law systems. Second, there are essential differences among legal systems in qualifying privileges as substantive or procedural. Third, there are no established conflict of laws rules for determining the law applicable to privilege claims in international arbitration"); Olaf Meyer, *Time to Take a Closer Look: Privilege in International Arbitration*, 24 J. INT'L ARB. 365, 365–66 (2007) (U.K.) (emphasizing that privilege and evidence issues are fundamental yet noting there is no consistent, uniform or predictable approach to privilege); Patricia Shaughnessy, *Dealing with Privileges in International Commercial Arbitration*, 51 SCANDINAVIAN STUDIES IN LAW [SC. ST. L.] 452, 452 (2007) ("[w]ithin the context of evidentiary issues, privileges pose the greatest challenge to arbitrators" because they "frequently have to balance the demand for promoting efficiency and controlling obstruction with the requirement of providing the right to be heard and equal treatment").

9. Ibrahim Shehata, *Attorney-Client Privilege and International Arbitration*, 20 CARDOZO J. CONFLICT RESOLUTION 363, 367 (2019); *see also* Kuitkowski, *supra* note 8, at 65–66 (discussing the breadth of privilege issues in international arbitration). The empirical claims are based upon an untested assumption, namely that non-public awards or procedural orders (if published) would elucidate the scope of the theorized problem. There are inevitably challenges when making inferences about parameters on the basis of the lack of non-public information.

In transnational disputes, privilege issues are particularly thorny, as stakeholders can easily bring different assumptions about their own national rules to the table and presume those apply.

Yet, in a dispute involving the United States, France, Iran, and China, each and every party (and their lawyers)—where documents, transactions, and communications transcend borders—it is not necessarily clear which national (or international) norms govern privilege and confidentiality. Experts like Klaus Peter Berger have remarked that, when it comes to privilege in international arbitration, the "only thing that is clear is that nothing is clear" with the law being "substantially unsettled" and with "very little authority addressing how international arbitrators should proceed" on privilege questions, including those related to attorney-client privilege.[10]

Yet the law and legal norms are fundamental, as they have the power to shape the type and form of legal communications lawyers undertake, impact counsel advice, inform parties' settlement opportunities, and affect downstream behavior about how to organize business activity and transnational legal advice.[11] While U.S. in-house counsel may presume their communications are privileged, they may be shocked to learn that their conversations with in-house counsel counterparts in Europe may not benefit from attorney-client privilege[12]—meaning internal conversations about

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10. Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion*, 22 ARB. INT'L 501, 501 (2006) (footnotes omitted); *see also* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 446 (2016) (identifying privilege difficulties in international arbitration); Rachel Reiser, Note, *Applying Privilege in International Arbitration: The Case for a Uniform Rule*, 13 CARDOZO J. CONFLICT RESOLUTION 653, 653–54, 659–62 (2012) (exploring challenges about the predictability of applicable privileges in international arbitration).

11. Law firms even solicit clients by focusing on how their law firm may be able to aid clients in navigating privilege issues in global investigations and transnational dispute settlement. *See, e.g.*, *Are We Speaking the Same Language? Privilege Issues in Cross-Border Litigation, Investigations, and International Arbitration*, GIBSON, DUNN & CRUTCHER LLP (May 16, 2017), https://www.gibsondunn.com/wp-content/uploads/documents/publications/WebcastSlides-Privilege-Issues-in-Cross-Border-Litigation-Investigations-and-International-Arbitration-16-May-2017.pdf [https://perma.cc/JP4J-X5VV]; Norton Rose Fullbright LLP, *Navigating Privilege in Global Investigations*, CORP. & COM. DISP. REV., Apr. 2016, at 8–12, http://www.nortonrosefulbright.com/knowledge/publications/138878/navigating-privilege-in-global-investigations [https://perma.cc/9V7X-JZPJ].

12. In the United States, for example, in-house counsel are attorneys for the purposes of attorney-client privilege. In many European jurisdictions, in-house counsel are not necessarily completely protected by privilege, and even the English version of attorney-client privilege (called legal professional privilege) has restrictions that may prevent attorneys or their direct representatives from securing legal privilege. Mosk & Ginsburg, *supra* note 6, at 349–53; *see also* Stephen A. Calhoun, *Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 238–47 (2008) (exploring European law on

strategy can be discoverable, put into evidence, and potentially become part of the public domain.[13] As one arbitrator observed, "it is absolutely mind boggling how the world's attorney/client privilege rules are so different, with many nuances that attach to each country."[14]

At its core, privilege issues[15] affect evidence admissibility, which impacts the facts tribunals can rely upon during adjudication, which can become outcome determinative and influence whether a party wins or loses a dispute. Although safeguards for attorney-client relationship and/or client

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privilege); Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide for American Attorneys*, 4 LOY. U. CHI. INT'L L. REV. 51, 63–71 (2006) (exploring differences in treatment of in-house and external counsel resulting from the seminal *Three Rivers* decision in England); *see also* RBS Rights Issue Litigation [2016] EWHC (Ch.) 3161 [196] (Eng.), https://www.bailii.org/ew/cases/EWHC/Ch/2016/3161.html [https://perma.cc/Z5MC-VGZ4] (last visited Sept. 4, 2019) (observing that documents may have been subject to U.S.-based attorney-client privilege where they were created during an internal investigation, but because of the narrow definition of a "client" and English precedent, the English High Court refused to find the documents were privileged); Serious Fraud Office (SFO) v. Eurasian Nat. Res. Corp. Ltd. [2018] EWCA (Civ) 2006 [91]–[109], [121]–[27], [138]–[40], [144] (Eng.), https://www.bailii.org/ew/cases/EWCA/Civ/2018/2006.html [https://perma.cc/A2W9-L3QL] (last visited Sept. 4, 2019) (articulating how the English Court of Appeal had a broader understanding of activity in "reasonable contemplation" of litigation to include internal investigations but upholding the narrow interpretation of the meaning of a client under English privilege law).

13. Professor Catherine Rogers offers the seminal review of ethics and professional conduct in international arbitration, providing a broad overview of the laws of ethics and privilege, identifying fundamental challenges that create a vacuum of regulation of attorney conduct. *See, e.g.*, CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 104–11, 115–20, 124–26 (2014); *see also* ANNABELLE MÖCKESCH, ATTORNEY-CLIENT PRIVILEGE IN INTERNATIONAL ARBITRATION (2017) (exploring the law of privilege in international arbitration, with a focus on different national law norms); Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 913–14 (1991) (discussing the shared Anglo-Saxon and Roman law policy interests underlying the history of conceptions of attorney-client privilege); Leah M. Christensen, *A Comparison of the Duty of Confidentiality and the Attorney-Client Privilege in the U.S. and China: Developing a Rule of Law*, 34 T. JEFFERSON L. REV. 171, 172–86 (2011) (comparing legal professional duties in China and the U.S.); Shehata, *supra* note 9, at 372–75 (exploring variations among attorney-client privilege in the U.S., England, Germany, and Switzerland).

14. Richard Levin, *Privilege and International Arbitration*, KLUWER ARB. BLOG (Aug. 14, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/14/privilege-international-arbitration/ [https://perma.cc/XC5Y-7MG2].

15. Privilege issues can be broad and cover a variety of topics. For example, privilege may focus on attorney-client privilege (called legal professional privilege in some jurisdictions), attorney work product (called litigation privilege in some jurisdictions), national security privilege (sometimes called crown prosecution privilege or state secrets privilege in some jurisdictions), or some other form of privilege. *See, e.g.*, FRÉDÉRIC G. SOURGENS, KABIR DUGGAL & IAN A. LAIRD, EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION 237–59 (2018). Given the need for focus and because of the dominance and importance of regulating lawyer-client relationships, this Essay focuses primarily on attorney-client privilege involving the confidentiality of communications between lawyers and clients.

confidences are recognized in many countries, its doctrinal basis and scope differs from jurisdiction to jurisdiction.[16] Legal professional privilege, often in the form of attorney-client privilege, is widely respected and applied in common law jurisdictions where the normative value of potentially relevant evidence is displaced in favor of the societal value on facilitating a full and frank discussion among lawyers, clients, and their agents to provide the best possible legal advice for contentious and non-contentious matters.[17] In civil law jurisdictions, the protections afforded to the attorney-client relationship are not necessarily so broad.[18] Perhaps due to a civil law preference for more limited discovery and evidence production generally, the doctrinal protection is more focused upon protecting client confidences[19] and, in some instances, only extends to the prosecution or defense of a claim.[20] While the purpose of different normative approaches may all ultimately involve enhancing the quality of and value in the legal representation of clients, the distinct doctrinal norms for accomplishing that objective create a patchwork of legal

16. *See, e.g.*, BORN, *supra* note 8, at 2377; MÖCKESCH, *supra* note 13, at 2–3, 123–35.

17. Mosk & Ginsburg, *supra* note 6, at 347; Craig Tevendale & Ula Cartwright-Finch, *Privilege in International Arbitration: Is It Time to Recognize the Consensus*, 26 J. INT'L ARB. 823, 825 (2009); *see also* Raiffeisen Bank Int'l AG v. Asia Coal Energy Ventures Ltd. [2019] EWHC (Comm) 3 (Eng.) https://www.bailii.org/ew/cases/EWHC/Comm/2019/3.html [https://perma.cc/36W3-D523] (last visited Sept. 4, 2019) (providing legal professional privilege in the context of transactions to protect confidential client instructions).

18. Some scholars, however, have suggested that in some instances civil law confidentiality obligations can be broader than common law attorney-client privilege. For example, in Germany, for external counsel, it is possible that confidentiality obligations may cover the provision of business and financial advice. *See* Shehata, *supra* note 9; Ibrahim Shehata, *The Standard of Attorney-Client Privilege in International Arbitration: Is the "Most Protective Law" the Right Answer?*, KLUWER ARB. BLOG (May 18, 2018), http://arbitrationblog.kluwerarbitration.com/2018/05/18/standard-attorney-client-privilege-international-arbitration-protective-law-right-answer/ [https://perma.cc/6VJ4-VSDF]; *see also* Ashley N. Ramm, Comment, *It's the End of Privilege as We Know It, and I [Don't] Feel Fine: The Deterioration of the Corporate Attorney-Client Privilege and Work Product Protection in the European Union, United Kingdom, and Germany*, 87 U. CIN. L. REV. 301, 307–08 (2018) (suggesting that in-house counsel may be capable of securing legal professional privilege in certain circumstances).

19. Audley Sheppard, *The Approach of Investment Treaty Tribunals to Evidentiary Privileges*, 31 ICSID REV. 670*,* 680 (2016); Kuitkowski, *supra* note 8, at 72.

20. *See* Case 155/79, AM & S Eur. Ltd. v. Comm'n, 1982 E.C.R. 1575, ¶ 21 (identifying a privilege in cases pending before the European Commission but limiting the privilege to communications with an external lawyer and only for a right of defense related to litigation); Case C-550/07, Akzo Nobel Chems. Ltd. & Akcros Chems. Ltd. v. Comm'n, 2010 E.C.R. I-8380 to I-8381, ¶¶ 40–41 (reaffirming a privilege but limiting it to communications connected to "the client's rights of defense"); *see also* MÖCKESCH, *supra* note 13, at 95–108 (analyzing the German approach to attorney-client privilege); ROGERS, *supra* note 13, at 124–25 (discussing civil law variations).

obligations that need not neatly match and, more likely, inject confusion and unpredictability.

Yet, as a geographical and doctrinal "half-way house," international arbitration must mediate between competing—but materially different—approaches to confidentiality obligations deriving from the goal of facilitating the attorney-client relationship. The transnational nature of international commercial and investment activities means that parties, counsel, and arbitrators likely come to the same arbitration with different expectations—whether from a common, civil, Islamic, or transnational law approach—about how to resolve privilege questions and document disputes. As a result, in highly complex international arbitration proceedings, the laws of multiple jurisdictions with different approaches, institutional rules, international law, soft law, and tribunal discretion all come to the fore in attempting to resolve something as practical, basic, and potentially expensive as conflicts about the communications and documents subject to disclosure.

In order to provide guidance to parties and international arbitrators about how best to resolve privilege determinations, this Essay explores the boundaries of privilege determinations by focusing on a critical—and under-analyzed—element related to privilege assessments, namely: identification of the applicable law that can be used to provide guidance and to enhance predictability. It first explores the challenge of identifying applicable law and the potential value of invoking a conflict of laws approach to analyzing the issues. Second, the Essay explores the straightforward conflicts approach about how to provide a rule of decision for privilege issues, namely in parties' choice either by express agreement or implied agreement from institutional rules. Third, it analyzes various national arbitration laws to explore how they may either provide guidance of conflicts-of-law rules or other rules of decisions to resolve privilege issues in international arbitration. Fourth, the Essay explores the International Bar Association (IBA) Rules on evidence, as the most precise exploration and the only soft-law instrument offering tribunals and parties some guidance about the resolution of privilege disputes. Fifth, it explores publicly available case law—both in investment treaty arbitration (ITA) and international commercial arbitration (ICA)—to identify how tribunals resolve privilege claims using the applicable legal framework.

As the present reality means that privilege issues function as the "wild west" of international arbitration, this Essay concludes that, whenever possible, parties should identify *ex ante* the rules applicable to legal privilege, or at a minimum, provide more express legal rules to guide tribunals about the conflicts of law methodology they must employ to identify the applicable law. The ultimate objective should be to enable, with some degree of certainty, identification of the law applicable to one of the most fundamental

legal relationships, both to enable parties to conduct their professional relationship in accordance with the applicable legal duties and to aid tribunals in carrying out their mandate in isolating the applicable law in a rational, predictable, and legitimate manner.

In the absence of party agreement, this Essay proposes that countries—either in national law or treaties—identify self-determined guidelines or adopt pre-existing guidelines, such as those in the IBA Rules on the Taking of Evidence or rules of the International Centre for Dispute Resolution, to guide tribunals and to reduce unpredictability by providing a meaningful opportunity to capture tribunal discretion and prevent party manipulation. Alternatively, to fill the void from lack of agreement or hard law guidance from states, this Essay advocates for tribunals adopting an approach similar to that championed by the conflict of laws luminary, Judge Robert Leflar.[21] Using a Leflar-like approach that rejects an artificial dichotomy between substance and procedure[22] and offers clear, pre-articulated "choice influencing considerations"[23] that permits tribunals to identify the applicable

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21. *See, e.g.*, ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977). For a general discussion of Leflar's contribution to conflicts law, *see Twenty-Fifth Anniversary Dedication to Robert A. Leflar*, 25 ARK. L. REV. 1 (1971); *Symposium: Leflar on Conflicts*, 31 S.C. L. REV. 409, 409–67 (1980); *see also* Ruth Bader Ginsburg, *Tribute to Robert A. Leflar*, 50 ARK. L. REV. 407, 408 (1997) (discussing Leflar's contribution to conflict of laws); Sagi Peari, *Better Law as a Better Outcome*, 63 AM. J. COMP. L. 155, 163–66 (2015) (discussing Leflar's importance); Ralph U. Whitten, *Improving the "Better Law" System: Some Impudent Suggestions for Reordering and Reformulating Leflar's Choice-Influencing Considerations*, 52 ARK. L. REV. 177, 177–78 (1999) ("Leflar was a pioneer in the development of modern conflicts law"); Henry Woods, *A Tribute* [The Eulogy at Robert A. Leflar's Funeral], 50 ARK. L. REV. 445, 446 (1997) ("[Leflar] became the principal architect of the modern theory of conflict of laws. By the middle of this century, he had become the preeminent authority in the world on the law of conflict of laws.").

22. Judge Leflar both recognized that the characterization of issues as either substantive or procedural was often both a false dichotomy and a tool for manipulation. He therefore rejected the use of this distinction and instead integrated the functional concerns underlying procedural determinations into his primary methodology, thereby permitting a functional analysis using pre-identified factors to facilitate proper advocacy and predictable outcomes. *See, e.g.*, LEFLAR, *supra* note 21, at 240; Laura Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 MINN. L. REV. 363, 370–74 (1986); Robert L. Felix, *Leflar in the Courts: Judicial Adoptions of Choice-Influencing Considerations*, 52 ARK. L. REV. 35, 42–43 (1999).

23. Robert Leflar, having sat on the U.S. bench for multiple years, devised a choice of law methodology that requires the adjudicators who are identifying the law applicable to an issue to consider the factors of: predictability, interstate and international order, the simplification of the judicial task, the forum's governmental interest, and the better law that does justice in the individual case. *See, e.g.*, Robert A. Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) [hereinafter Leflar, *Choice Influencing Considerations*]; Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966) [hereinafter Leflar, *More on Choice-Influencing Considerations*]; *see Robert A. Leflar*

law of privilege in an honest and rule-of-law based manner enables stakeholders to advocate in a functional, effective, coherent, predictable, and legitimate manner. At a minimum, shifting the question from "what law applies" to the specific query of "what is the process for selecting the applicable law" injects clarity and enhanced predictability into a fundamental question of dispute resolution; and the shift in focus is preferable to the current void. Guiding adjudicative decision-making using pathways provided by *ex ante* factors both avoids leaving a fundamental legal question to unbridled discretion—which may generate disquiet among international arbitration stakeholders, including clients, lawyers, and arbitrators—and offers a more predictable system based upon rule of law values that nevertheless maintains a degree of flexibility for addressing individual issues in specific cases.

I. IN SEARCH OF APPLICABLE LAW

Privilege claims often arise in international arbitration. Tribunals attempting to resolve those issues, however, face a complicated and confusing challenge that could create variable—rather than predictable—outcomes. Meanwhile, parties and their counsel are left in the challenging position of attempting to manage their expectations and resources about what is protected and what may become part of the record, potentially entering the public domain.[24] The creation, existence, and scope of privilege is a matter of

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Symposium on Conflict of Laws, 52 ARK. L. REV. 1 (1999) (containing multiple articles reflecting on the "better law" approach to choice of law advocated by the former judge, Professor Robert A. Leflar). Leflar's approach was championed by noted comparative law scholar Konrad Zweigert and private international law scholar Friedrich K. Juenger. Friedrich K. Juenger, *Leflar's Contributions to American Conflicts Law*, 34 ARK. L. REV. 205, 206 (1980); Konrad Zweigert, *Some Reflections on the Sociological Dimensions of Private International Law or What Is Justice in Conflict of Laws?*, 44 U. COL. L. REV. 283, 283–99 (1973); *see also* Peari, *supra* note 21, at 163–70. *But see* Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 826–28 (2006) (suggesting Leflar's limited influence outside of some U.S. states); Amos Shapira, *"Grasp All, Lose All": On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 252–53 (1977) (identifying strengths and weaknesses of Leflar's approach).

24. While international arbitration was historically lauded for confidentiality, that is not necessarily always the case. In ITA, there are new transparency norms imported into a variety of treaties, particularly due to the adoption of the Mauritius Convention on Transparency. G.A. Res. 68/109, UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (July, 30, 2013), https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [https://perma.cc/Y935-YWJV]; G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Dec. 10, 2014), A/RES/69/116, https://www.uncitral.org/pdf/english/texts/arbitration/transparency-

law;[25] and the disclosure of communications and documents in an international arbitration holds a risk of downstream consequences, namely the production of confidential information in arbitration that could result in a privilege waiver. Unlike other legal questions—whether adjudicators strive to provide a clear, reliable, coherent, and determinate answer using applicable law—one interpretation might be that international arbitration seems less capable of or interested in resolving privilege questions as a function of applicable law. Yet, some scholars have theorized how legal privilege should be addressed in the transnational context.[26]

At present, there are no uniform rules on how to treat, identify, and apply privilege in international arbitration.[27] Likewise, there are not predictable conflict of law rules for assessing privilege in international arbitration. Institutional rules, for example, typically lack cogent rules for identifying the applicable law *ex ante*.[28] In the absence of party choice, the standard approach

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convention/Transparency-Convention-e.pdf [https://perma.cc/L58W-AAU4]. Meanwhile, in the national arbitration law of various states, there is a presumption *against* confidentiality, even in the commercial arbitration context. *Compare Esso/BHP v. Plowman* (1995) 128 A.L.R. 391 (Austl.) (holding that arbitrations in Australia are not confidential unless the parties so specify), *with* Ali Shipping Corp. v. Shipyard Trogir, [1999] 1 WLR 314 (Eng.) (determining that England has an implied duty of confidentiality). This underpins the seriousness of deciding privilege issues, as information confidential under one law could nevertheless become part of the public domain and possibly subject to waiver.

25. *See, e.g.*, BORN, *supra* note 8, at 2377 ("[I]ssues of privilege in international arbitration have generally been resolved, in the first instance, by reference to generally-applicable rules of privilege under national law. Virtually every developed jurisdiction provides for evidentiary privileges in some fashion, which entitle parties to withhold documents and/or testimony from disclosure in civil (and other) proceedings. These substantive rules of privilege provide the starting point for development of rules of privilege in international arbitration . . . ."); MÖCKESCH, *supra* note 13, at 1–4, 6–7 (noting the basis of privilege comes from national law and noting that "discrepancies in national attorney-client privilege law" likely creates "different expectations as to the applicable privilege standard, which are influenced by [stakeholder] experience in domestic litigation").

26. *See, e.g.*, BORN, *supra* note 8, at 2383–86; Henri C. Alvarez, *Evidentiary Privileges in International Arbitration*, *in* 13 ICCA CONGRESS SERIES, INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 663, 683–86 (Albert Jan Van den Berg ed., 2007); Javier H. Rubinstein & Britton B. Guerrina, *The Attorney-Client Privilege and International Arbitration*, 18 J. INT'L ARB. 587, 596–601 (2001). Students and practitioners have waded into the fray to offer their own recommendations. *See, e.g.*, Jennifer Kirby, *Evolution and the Discoverability of In-House Counsel Communications*, 35 J. INT'L ARB. 147, 147–50, 153–54 (2018); Kuitkowski, *supra* note 8, at 90–98; Reiser, *supra* note 10; Shehata, *supra* note 9; Tevendale & Cartwright-Finch, *supra* note 17, at 829–34; *see also* Ramm, *supra* note 18 (arguing about standards for the law applicable to privilege in transnational internal investigations).

27. *See infra* Sections III–V.

28. In theory, there are two different ways to approach identifying the applicable law in international arbitration. Using *voie directe*, tribunals choose the applicable law without delving into a conflict of law analysis and instead are guided by what they believe is "appropriate." A

largely leaves identifying the applicable law—including issues like the substantive law[29] applicable to privilege—to the subjective discretion of each tribunal, which assesses what is "appropriate" without further guidance.[30]

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second method, *voie indirecte*, involves tribunals focusing on a conflict of law analysis to explain their reasoning, whether by reference to conflicts-related principals from a state (such as the legal place of arbitration) or other reasoning. *Compare* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 76–78 (3d ed. 2017) (discussing the two methodologies but asserting that *voie directe* is dominant), *with* MÖCKESCH, *supra* note 13, at 195 (discussing the conflicts methods but suggesting *voie indirecte* is dominant). *See also* Shehata, *supra* note 9, at 368 (discussing the two methods). One commentator suggests, irrespective of methodology, the result is likely to be the same, and tribunals should in any event provide reasons for their assessment. Doug Jones, *The Substantive Rights of Parties in Arbitration:* Voie Directe *and* Voie Indirecte, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION § 18.02 (Neil Kaplan & Michael J. Moser eds., 2016); *see also* NIEK PETERS, THE FUNDAMENTALS OF INTERNATIONAL COMMERCIAL ARBITRATION 99–100 (2017).

29. This Essay treats the law of privilege as a substantive matter, as it impacts the scope of evidence presented to prove a claim or defense, can be outcome determinative, has a substantive impact on party conduct, and is not a pure mechanical or housekeeping matter. *See* Corina Gugler & Karina Goldberg, *Privilege and Document Production in International Arbitration: How Do Arbitrators Deal with Different Legal Systems' Approaches?*, 14 REVISTA BRASILERA DE ARBITRAGEM 63 (2017) (Braz.) (suggesting that the law applicable to privilege is a substantive issue in most civil law jurisdictions); Reiser, *supra* note 10, at 60–62 (noting the problematic substance-procedure distinction and "often the question is answered by saying it is both procedural and substantive"); *see also supra* note 22 and accompanying text (discussing the artificial nature of the substance procedure dichotomy); Kuitkowski, *supra* note 8, at 82–85 (discussing substance and procedure issues related to privilege in different legal regimes); Shehata, *supra* note 9, at 391 (noting the variation in whether jurisdictions treat attorney-client privilege as substantive or procedural). *But see* Graham C. Lilly & Molly Bishop Shadel, *When Privilege Fails: Interstate Litigation and the Erosion of Privilege Law*, 66 ARK. L. REV. 613, 615–17 (2013) (observing that some U.S. courts identify privilege as procedural and some as substantive and conducting a review of how different U.S. states use conflicts methodology to resolve privilege issues); Mosk & Ginsburg, *supra* note 6, at 345 (suggesting that "[e]videntiary rules are usually viewed as procedural in character" but acknowledging that privileges may be different, as they "exist to protect certain interests or relationships and thereby to advance goals of social and public policy" which can be "more important than the value of the evidence"). Characterization of issues as procedural or substantive is a perennial problem in conflict of laws analysis. *See, e.g.*, LEFLAR, *supra* note 21, at 126–27; EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 3.8, at 128 (4th ed. 2004) ("The distinction between 'substance' and 'procedure' has medieval origins: a court will apply foreign law only to the extent that it deals with the substance of the case, i.e., affects the outcome of the litigation, but will rely on forum law to deal with the 'procedural' aspects."); Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 408 (1941); Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Law*s*,* 42 YALE L.J. 333, 342–45 (1933); Walter Wheeler Cook, *'Characterization' in the Conflict of Law*s*,* 51 YALE L.J. 191, 197 (1941); H.L. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. PA. L. REV. 933, 947–49 (1930).

30. *See, e.g.*, ICC RULES OF ARBITRATION art. 21(1) (INT'L CHAMBER OF COM. 2017), https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-

The vacuum is not unique. There is minimal evidence that parties expressly address the applicable law for privilege (or rules for determining privilege) in arbitration agreements.[31] Several national laws are also silent on how to address privilege in international arbitration.[32] In the absence of firm legal guidance from parties, institutions, or national law, arbitrators have been left in a void with their discretion and intuition as primary guides. The inherent variance generates a situation where the resolution of critical privilege questions is far from predictable. Given the difficulty in prescribing precise *ex ante* rules for the wide breadth of international disputes, a degree of flexibility on evidence and privilege issues seems somewhat reasonable. Yet, failing to provide a rule-based solution to rule of law questions of legal privilege, means that there is room for improvement in addressing privilege questions in international arbitration. There are undoubtedly challenges in resolving privilege matters; and perhaps a one-size-fits-all solution is both an unlikely and impractical goal for international arbitration disputes, which are heterogeneous and multi-variate. Nevertheless, providing more predictable and clear paradigms for assessing privilege promotes the net value of international arbitration and its capacity to provide predictable, reasoned, and coherent dispute resolution.

Rules-english-version.pdf [https://perma.cc/3GYT-U8VD] (last visited Sep. 7, 2019) ("The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."); *ICDR International Arbitration Rules*, *in* INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 31.1 (INT'L CTR. FOR DISP. RESOL. 2014), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf [https://perma.cc/7VZT-ARAV] (last visited Sep. 7, 2019) ("Failing such an agreement by the parties [on the applicable law], the tribunal shall apply such law(s) or rules of law as it determines to be appropriate."); LCIA ARBITRATION RULES, art. 22.3 (LONDON CT. OF INT'L ARB. 2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [https://perma.cc/RH32-AWXS] (last visited Sep. 7, 2019) ("If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice [of the applicable law], the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate."); ARBITRATION RULES art. 27(1) (ARB. INST. STOCKHOLM CHAMBER OF COM. 2017), https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf [https://perma.cc/Z64Z-GM3X] (last visited Sep. 7, 2019) ("In the absence of such agreement [by the parties about applicable law], the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate."); *see also* CHINA INT'L ECON. AND TRADE ARBITRATION COMM'N (CIETAC) ARBITRATION RULES, art. 49(2) (CHINA INT'L ECON. & TRADE ARB. COMM'N 2015), http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en [https://perma.cc/BS8J-WJSE] (last visited Sep. 7, 2019) ("In the absence of such an agreement [of the parties on the applicable law] or where such agreement is in conflict with a mandatory provision of the law, the arbitral tribunal shall determine the law applicable to the merits of the dispute."); *infra* notes 62–63 and accompanying text (identifying the broad discretion to tribunals under the Singapore International Arbitration Rules to identify applicable law).

31. *See infra* notes 42–46 and accompanying text.

32. *See infra* Section III.

Choice of law issues are a perennial challenge in international arbitration. Yet any dispute involving multi-jurisdictional actors and facts inevitably faces the specter of how best to resolve issues of applicable law. Even domestically, United States' courts have struggled to identify what privilege applies to multi-jurisdictional disputes, particularly attorney-client privilege.

Wellin v. Wellin[33] offers a textbook example of how adjudicators could use conflicts to identify what law applies. The case involved a New York-based client that both called and emailed to seek advice from a South Carolina lawyer about South Carolina trust litigation that devolved from her grandfather's New York estate. To resolve the dispute about the scope and application of attorney-client privilege, the court used conflicts to explore *which* law should dictate privilege determinations. Focusing on South Carolina's conflicts rules,[34] the federal court used conflicts principles—namely the Restatement of Conflicts (Second)—to determine which jurisdiction had the "most significant relationship" with the legal privilege.[35] Using that methodology, the court concluded South Carolina law provided the substantive rule of law providing for the scope and application of the privilege,[36] and used that legal standard to assess attorney-client privilege.

Other courts have taken similar approaches. In *Wultz v. Bank of China*, the court required a conflict of laws assessment to identify the applicable law. The court's analysis used a unique New York conflicts test to determine that Chinese law applied, and as documents produced by the Bank of China in China were not privileged under Chinese law, those documents were discoverable in U.S. litigation.[37] Likewise, in *Veleron Holding v. BNP*

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33. 211 F. Supp. 3d 793 (D.S.C. 2016), *clarified by* 2017 WL 3620061 (D.S.C. Aug. 23, 2017).

34. As a result of Federal Rule of Evidence 501, the court first noted that the availability of an evidentiary privilege is based upon the choice of law rules of the forum state. *Id.* at 800–01.

35. *Id.* at 803–06.

36. *Id.* at 805–06.

37. Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479 (S.D.N.Y. 2013) analyzed the law applicable to privilege in a claim under the U.S. Antiterrorism Act and a request for production of documents involving the Bank of China. The court used an unusual conflicts test for ascertaining the law applicable to privilege, namely the "touch base" test, which required the court to consider the country that has the predominant or the most direct and compelling interest in whether communications should remain confidential, unless that foreign law is contrary public policy. *Id.* at 486, 489. *Wultz* said that one of two conflicts principles would form the basis of ascertaining the applicable law, namely either "'the place where the allegedly privileged relationship was entered into' or 'the place in which that relationship was centered at the time the communication was sent.'" *Id.* at 486. Noting that China was where the communications and documents were produced and that Chinese law neither provided for an attorney-client privilege nor for a work product justification to avoid document production, the court held there was no basis to prevent disclosure of documents produced by the Bank of China in U.S. litigation. *Id.* at

Paribas, the court held documents were not privileged and improperly withheld from U.S. discovery. In that case, the documents involving Russian attorneys were unprotected by Russian law (which did not protect attorney-client privilege or work-product by inside counsel) and materials involving Dutch lawyers were not protected by Dutch law (which did not provide attorney-client privilege to unlicensed lawyers).[38] While other courts, whether in the United States[39] or a foreign country,[40] may take different approaches to identify the applicable law, focusing on conflicts principles seems sensible, as choice of law principles can and should form the organizing principle to dictate the legal implications of a legal privilege.

To this end, the remainder of this Essay explores where—if at all—there is legal guidance on the conflict of laws principles that should guide an arbitration tribunal's choice of law assessments to drive the resolution of privilege disputes. In theory, multiple sources—contained in hard and soft law—could provide guidance about choice of law methods for resolving privilege issues. Given the current pernicious legal void, the subsequent sections address how different legal norms and standards could fill the gap to enhance the predictability of privilege assessments and to aid the legitimacy of international arbitration.

488–89, 490, 491–92. In a subsequent reconsideration decision, the court clarified that, "American privilege law applies to all communications that properly 'touch base' with U.S. legal matters, even if those matters are unrelated to the present litigation." Wultz v. Bank of China Ltd., No. 11 Civ. 1266 (SAS), 2013 WL 6098484, at *2 (S.D.N.Y Nov. 20, 2013).

38. Veleron Holding, B.V. v. BNP Paribas SA, No. 12-CV-5966 (CM)(RLE), 2014 WL 4184806, at *5–6 (S.D.N.Y. Aug. 22, 2014).

39. A Delaware bankruptcy court purported to conduct a conflict of laws analysis to determine whether U.S. or Canadian law had the most significant connection to the case to determine the applicable privilege law. Despite the fact that the party involved was Canadian and documents were prepared by outside and inside counsel at request of Canadian corporation for use in Canada, the court nevertheless held that Delaware law applied. Teleglobe Commc'ns Corp. v. BCE Inc., 392 B.R. 561, 595–96 (Bankr. D. Del. 2008).

40. In England and Wales, leaving aside European law in light of Brexit, the courts' common law conflicts methodology has often involved an assessment of the "proper law." *See, e.g.*, LAWRENCE COLLINS, ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS 394–96 (1994); PETER NORTH, ESSAYS IN PRIVATE INTERNATIONAL LAW 54–67, 73–75 (1993); Julius Stone, *A Court of Appeal in Search of Itself: Thoughts on Judges' Liberation*, 71 COLUM. L. REV. 1420, 1424–27, 1432–35 (1971); Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 963 n.182 (1996). Nevertheless, on issues of privilege, the English High Court held that, irrespective of whether transnational issues are involved, English privilege rules should apply, thereby treating the matter as procedural and requiring the application of *lex fori* (i.e., the law of the forum). RBS Rights Issue Litigation [2016] EWHC (Ch) 3161 [131]–[34], [170]–[77] (Eng.); *see also* MÖCKESCH, *supra* note 13, at 196 (noting how different national courts treat privilege as a procedural issue and apply *lex fori*). *But see supra* note 22 and accompanying text (observing how the procedure-substance distinction is artificial and subject to manipulation).

II. CHOICE OF LAW GUIDANCE: EXPRESS PARTY CHOICE AND IMPLIED CHOICE FROM INSTITUTIONAL RULES

In theory, parties can resolve core choice of law issues expressly by providing tribunals with clear guidance about the law that should govern their privilege determinations. Choice of law in international arbitration, however, is complex. Simply including a general choice of law provision in a contract for the substantive law for disputes involving the contract need not dictate the law applicable to privilege. Likewise, choosing the seat of arbitration does not necessarily expressly dictate that privilege issues will be determined using the law of the seat,[41] particularly for cases arising under the ICSID Convention when there is no legal "seat" of arbitration. For general provisions in investment or commercial contracts, which parties craft, the failure to precisely address what law governs privilege (or the standards by which privilege issues will be evaluated) injects ambiguity into tribunals' resolution of privilege disputes.[42]

Parties' freedom to agree on procedure, however, gives them the right to define the law applicable to privilege claims or scope of attorney-client privilege. The initial place to consider an express party agreement is while drafting the dispute resolution clause. Admittedly, minds may be focused upon the larger commercial and legal particulars of the transaction, with the applicable privilege law in subsequent disputes unlikely to garner much attention. Yet, by failing to address the matter early, parties lose the opportunity to provide an *ex ante* contractual solution to privilege disputes. A later arising agreement (i.e., a submission agreement) could provide contractual solution to privilege that permits parties to tailor privilege rules to their unique concerns or avoid unfair surprise; unfortunately, such subsequent agreements may prove challenging as a practical matter, as once a dispute arises, embedded interests, hostilities, and tactical positioning may prevent agreement. Even the International Bar Association (IBA) Guidelines for Drafting International Arbitration Clauses consider the attorney-client

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41. *See, e.g.*, JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 132–35 (1978); Ondřej Chvosta, *The Potentially Applicable Systems of Law in Commercial and Investment Arbitrations: A Comparative Perspective*, 22 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 2–16 (2014); Michael Pryles, *Choice of Law Issues in International Arbitration*, 63 ARB. 200 (1997); Jessica Thrope, Comment, *A Question of Intent: Choice of Law and the International Arbitration Agreement*, 54 DISP. RESOL. J. 16, 19–20 (1999); *see also supra* note 29 (identifying that privilege need not necessarily be a procedural issue and treating, for the purposes of this Essay, privilege as a substantive matter).

42. One strategic place where parties could impliedly agree to rules for addressing privilege would involve express incorporation of the IBA Rules on the Taking of Evidence in International Arbitration into an arbitration agreement or submission agreement. These IBA Rules are discussed in Sections IV and V(B).

privilege as a secondary element of drafting arbitration agreements.[43] The IBA recommends including principles to govern privilege only "when, in the rare instance, contracting parties can foresee at the contract drafting stage that issues of privilege may arise and be of consequence,"[44] and fails to recommend any standards to use in drafting arbitration clauses. As a partial solution, parties could consider expressly incorporating pre-articulated standards, including the IBA Rules on the Taking of Evidence in International Arbitration.[45]

While the most straightforward clarification would be an express party choice, there is little evidence that this is the solution that parties typically adopt.[46] It is standard, however, for parties to expressly adopt the arbitration rules of established international arbitration institutions or the ad hoc rules from the United Nations Commission on International Trade (UNCITRAL).[47] To the extent that these arbitration rules then become implied terms to the parties' agreement or otherwise stand as the rules of decision on evidentiary matters, these rules could provide express guidance as to how to resolve problems related to privilege.

Unfortunately, few institutional arbitration rules ever mention privilege, largely granting the arbitral tribunal with broad discretion to decide what information should be protected and to which degree. The breadth of discretion and lack of clarity means parties are left unable to determine *ex ante* which privilege rules will be applied.

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43. INT'L BAR ASS'N, GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES 30–31 (Oct. 7, 2010), https://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx [https://perma.cc/XG7N-DPGS].

44. *Id.* ¶ 57.

45. *Id.* ¶ 59 ("The following clause can be used if the parties wish to specify the principles that will govern issues of privilege with respect to document disclosure: All contentions that a document or communication is privileged and, as such, exempt from production in the arbitration, shall be resolved by the arbitral tribunal in accordance with Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration."); *see also* SOURGENS, DUGGAL & LAIRD, *supra* note 15 (discussing how the IBA Rules can affect privilege determinations); *infra* Section IV (discussing the IBA Rules on the Taking of Evidence).

46. Ruth Cowley & Yasmin Lilley, *Conflict of Privilege Rules in International Arbitration*, INT'L ARB. REP. 30 (2016), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-7.pdf?la=en&revision=2b95e882-b426-4aa1-952e-6270bebf896b [perma.cc/ZM23-NZKY].

47. *See* LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION 12 (2017), https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017 [https://perma.cc/2F7F-R4WH].

In an analysis of eighty-eight different international and regional arbitration rules,[48] 86% ($n = 76$) of the rules analyzed were utterly silent on the issue of privilege and determining the law applicable to privilege.[49]

By and large, for the massive cohort of institutions that failed to expressly address issues of privilege generally (let alone choice of law rules applicable to the privilege determination), the rules simply granted tribunals wide discretion to establish facts of the case and to determine the admissibility, relevance, materiality, and weight of any evidence. The rules did not address how tribunals should determine issues of evidence, such as admissibility, withholding of documents, or privilege. Many of the institutions that have taken this approach are market leaders in international dispute settlement.[50]

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48. This Essay's analysis of institutions and arbitration rules was initially conducted in August 2017 by Mariya Myroshnychenko and the author. The rules analyzed were the rules in force and effect at that time. Rules cited in this essay for their precise textual content were cross-checked for updates and are cited accordingly.

49. *See, e.g.*, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES 2006), http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partF.htm [https://perma.cc/NE3G-MZ7P] (there are no rules on privilege in the Rules of Procedure for Arbitration Proceedings).

50. The institutions surveyed included: the International Chamber of Commerce (ICC), UNCITRAL, International Centre for the Settlement of Investment Disputes (ICSID), American Arbitration Association (AAA), International Centre for Dispute Resolution (ICDR), Stockholm Chamber of Commerce (SCC), London Court of International Arbitration (LCIA), ADR Institute of Canada, World Intellectual Property Organization, Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), JAMS, Saudi Center for Commercial Arbitration, Dubai International Arbitration Centre, Abu Dhabi Commercial Conciliation and Arbitration Center, Addis Ababa Chamber of Commerce & Sectoral Associations, Albanian Commercial Mediation and Arbitration Center, Oslo Chamber of Commerce, Arbitration and Mediation Centre of Paris, Arbitration Association of the Republic of China, Arbitration Center of the American Chamber of Commerce São Paulo, Arbitration Centre of Mexico, Arbitration Centre of the Portuguese Chamber of Commerce and Industry Arbitration Court attached to the Economic Chamber of the Czech Republic and to the Agricultural Chamber of the Czech Republic, Court of Arbitration at the Bulgarian Chamber of Commerce and Industry, Arbitration Court of the Estonian Chamber of Commerce and Industry Arbitration Foundation of Southern Africa (2015 Rules), Arbitration Foundation of Southern Africa (2017 International), Arbitration Institute of the Finland Chamber of Commerce Association of Maritime Arbitrators of Canada, Australian Centre for International Commercial Arbitration, Association of Arbitrators (Southern Africa), Beijing Arbitration Commission, British Columbia International Commercial Arbitration Centre, Cairo Regional Center for International Commercial Arbitration, Câmara de Arbitragem Empresarial Brasil (CAMARB), Chamber of Commerce Brazil-Canada, Belgian Centre for Arbitration and Mediation, Swiss Chambers' Arbitration Institution, Chamber of Arbitration of Milan, Santiago Arbitration and Mediation Center, Centro de Mediación y Arbitraje Comercial de la Cámara Argentina de Comercio, International Center for Conciliation and Arbitration in Costa Rica, Court of Arbitration at the Polish Chamber of Commerce, Permanent Court of Arbitration, European Court of Arbitration, Latvian Chamber of Commerce and Industry Court of Arbitration, Council for

For example, the International Chamber of Commerce (ICC),[51] the London Court of International Arbitration (LCIA),[52] the Stockholm Chamber of Commerce (SCC),[53] the Hong Kong International Arbitration Centre

National and International Commercial Arbitration (India), Commercial Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce, Commercial Arbitration and Mediation Center for the Americas, China Maritime Arbitration Commission, China International Economic and Trade Arbitration Commission, Chicago International Dispute Resolution Association, Franco-Arab Chamber of Commerce, Court of Innovative Arbitration, Cyprus Arbitration and Mediation Centre, Cyprus Eurasia Dispute Resolution and Arbitration Center, Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, Delhi High Court Arbitration Centre, German Institution of Arbitration, Dubai International Financial Centre Arbitration Centre, International Commercial Arbitration Court at the Ukrainian Chamber of Commerce, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Indian Council of Arbitration, Indian Institute of Arbitration and Mediation, Indonesian National Board of Arbitration, Institute for the Development of Commercial Law and Practice Arbitration Centre (Sri Lanka), Institute of Arbitrators and Mediators Australia, Inter-American Commercial Arbitration Commission, Korean Commercial Arbitration Board, Kazakhstani International Arbitrage, Japan Commercial Arbitration Association, Italian Arbitration Association, Istanbul Chamber of Commerce Arbitration Center, Istanbul Arbitration Centre, Vienna International Arbitral Centre, Regional Centre for International Commercial Arbitration (The Lagos Centre), Qatar International Arbitration and Conciliation Center, Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia, Permanent Arbitration Court at the Croatian Chamber of Commerce, International Arbitration Chamber of Paris, Netherlands Arbitration Institute, National Commercial Arbitration Centre of Cambodia, Malta Arbitration Centre, Shenzhen Court of International Arbitration, Singapore Institute of Arbitrators, Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry, and the International Institute for Conflict Prevention and Resolution.

51. *See* ICC RULES OF ARBITRATION arts. 22, 25 (INT'L CHAMBER OF COMMERCE 2017), https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf [https://perma.cc/6BG9-8NJQ]; *see also id.* at app. IV (providing examples of case management techniques relating to evidence).

52. *See* LCIA ARBITRATION RULES art. 22.1(vi) (LONDON COURT OF INT'L ARBITRATION 2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [https://perma.cc/KD99-Q7WC] (granting tribunals authority "to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal").

53. *See* SCC ARBITRATION RULES art. 31(1) (STOCKHOLM CHAMBER OF COMMERCE 2017), https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf [https://perma.cc/SFJ5-WB8Y] ("The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine.").

(HKIAC),[54] the Swiss Chambers' Arbitration Institution,[55] the Cairo Regional Center for International Commercial Arbitration (CRCICA),[56] and the China International Economic and Trade Arbitration Commission (CIETAC)[57] all followed this "pure discretion" model. Likewise, the 2010 UNCITRAL Arbitration Rules failed to address privilege, instead only generally granting tribunals authority to determine the admissibility and weight of the evidence offered.[58] Interestingly, the International Centre for the Settlement of Investment Disputes (ICSID) historically had no rules that expressly addressed privilege issues;[59] and although ICSID is in the midst of a massive revision project,[60] ICSID has not made a material shift in its approach or used

54. The rules surveyed originally were the 2013 HKIAC Rules. *See* 2013 ADMINISTERED ARBITRATION RULES art. 22.2–.3 (H.K. INT'L ARBITRATION CTR. 2013), https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf [https://perma.cc/5YR8-4UBP] ("The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. . . . The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence."). The 2018 HKIAC rules on point are identical. *See* 2018 ADMINISTERED ARBITRATION RULES art. 22.2–.3 (H.K. INT'L ARBITRATION CTR. 2018), https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf [https://perma.cc/ENK2-J7KB].

55. *See* SWISS RULES OF INT'L ARBITRATION art. 24(2) (SWISS CHAMBERS ARBITRATION INST. 2012), https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf [https://perma.cc/K6NQ-SJKK] ("The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.").

56. *See* ARCICA ARBITRATION RULES art. 27(4) (CAIRO REG'L CTR. INT'L COMMERCIAL ARBITRATION 2011), http://crcica.org.eg/rules/arbitration/2011/cr_arb_rules_en.pdf [https://perma.cc/W4XF-YVE4] ("The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.").

57. *See* CIETAC ARBITRATION RULES arts. 41–43 (CHINA INT'L ECON. AND TRADE ARBITRATION COMM'N 2015), http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en [https://perma.cc/98QY-LM8S].

58. UNCITRAL ARBITRATION RULES art. 27(4) (U.N. COMM'N ON INT'L TRADE LAW 2013), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf [https://perma.cc/9ZAL-A3BK].

59. RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS r. 34(1) (INT'L CTR. FOR SETTLEMENT OF INV. DISP. 2006), http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/main-eng.htm [https://perma.cc/36KK-FH5Z] ("The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."); *see also id.* at rules 33–34.

60. *ICSID Rules and Regulations Amendment Process*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, https://icsid.worldbank.org/en/amendments [https://perma.cc/6KP5-TDNK] (last visited Sept. 20, 2019); *see also* Alexander G. Leventhal, *The 2018 Proposals for Amendments of the ICSID Rules: ICSID Enters the Era of Trump, Populism, and State Sovereignty*, ASIL INSIGHTS (Oct. 19, 2018), https://www.asil.org/insights/volume/22/issue/15/2018-proposals-amendments-icsid-rules-icsid-enters-era-trump-populism [https://perma.cc/3WPM-L8LH].

the opportunity to address how to identify to the law relevant to privilege assessments, instead it relies upon tribunal discretion.[61]

There was a micro-trend of institutions taking a more direct, rather than implicit approach, to privilege. Namely, about 10% (n = 9) of the analyzed rules expressly required arbitrators to take privileges into account when addressing issues of document production or exclusion. The Rules of the Singapore International Arbitration Center (SIAC) are a good example of this paradigm. Specifically, they provide an express mandate that empowers tribunals to "determine any claim of legal or other privilege."[62] Yet, in the exercise of its mandate, tribunals are "not required to apply the rules of evidence of any applicable law" in determining evidence admissibility.[63] The domestic arbitration rules of the American Arbitration Association (AAA)[64] and the Judicial Arbitration and Mediation Services (JAMS) similarly require tribunals to "take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client."[65] But both sets of rules lack guidance about how tribunals should

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61. Under the ICSID rules amendment project, tribunals retain the general power to determine admissibility and probative value of evidence without reference to any specific standard or law; and there is no reference to the applicable law of privilege (or standards for identifying such law) in connection with document production disputes, only a focus on scope and timeliness of the request, relevance and materiality, burden of production, basis of the objection, and other relevant circumstances. *Proposals for Amendment of the ICSID Rules—Consolidated Rules*, 35–36 (Int'l Ctr. For Settlement of Inv. Disputes, Working Paper No. 2, 2019), https://icsid.worldbank.org/en/Documents/VOL_2.pdf [https://perma.cc/MVV4-HMBL]. Three states, however, have identified concerns regarding the need to be more precise as regards privilege and confidentiality. Although it failed to identify a procedure through which a tribunal should make the final assessment, Canada requested that the rules permit parties to have "an opportunity to provide reasoned objections to the request, including on the grounds that the requested documents are protected from disclosure by applicable privileges and laws." INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, RULE AMENDMENT PROJECT—MEMBER STATE & PUBLIC COMMENTS ON WORKING PAPER # 2 OF MARCH 15, 2019 104 (2019), https://icsid.worldbank.org/en/Documents/compendium_wp2.pdf [https://perma.cc/4G3U-H3D2]. Australia made a general pronouncement suggesting "the rules should explicitly recognize exemptions from production for various types of confidential information," which was also an approach endorsed by Georgia. *Id.* at 103, 149.

62. SIAC ARBITRATION RULES r. 27(o) (SING. INT'L ARBITRATION CTR. 2016), http://www.siac.org.sg/our-rules/rules/siac-rules-2016 [https://perma.cc/SM7J-YSMD].

63. *Id.* at r. 19.2. The SIAC Rules also provide broad discretion to arbitrators in ascertaining the applicable law. *See id.* at r. 31.1 ("Failing such designation by the parties, the Tribunal shall apply the law or rules of law which it determines to be appropriate.").

64. AAA COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R–34(c) (AM. ARBITRATION ASS'N 2013) https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [https://perma.cc/AFB8-VBN5].

65. JAMS INT'L ARBITRATION RULES & PROCEDURES art. 25.4 (JAMS 2016), https://www.jamsadr.com/international-arbitration-rules/english#Evidence

identify and apply the applicable law governing the legal privilege.[66] Ultimately, this second paradigm effectively amounts to a "pure discretion" model for tribunals' privilege determinations, but at least it does so by expressly acknowledging the latent problem and alerting parties that they may wish to create enhanced certainty for privilege and confidentiality issues.

Ultimately, less than 5% (n = 4) of the institutional rules examined provided clear guidance as to how to address the law applicable to privilege. Those institutions exhibited wide variance in providing guidance as to how tribunals might resolve issues of privilege conflicts in international arbitration.

In a nod to the traditional *lex fori*[67] rules of applying only the law of the forum, one institution provided clear and predictable rules for identifying the law applicable to privilege disputes. The Arbitration Foundation of Southern Africa's Commercial Arbitration Rules,[68] which can apply to both domestic and international arbitration,[69] expressly require tribunals to apply the South African law of evidence.[70] This mandate, imposing the rules of the forum, means that the law of the South African forum necessarily governs evidentiary issues, including privilege claims.[71] While this *lex fori* rule is rigid

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[https://perma.cc/282Z-FF6U]; *see also* AAA COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R–34(c) (stating arbitrators "shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client" but failing to provide any guidance about how to exercise that mandate).

66. AAA COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R-34(b) ("The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."); *see also* JAMS INT'L ARBITRATION RULES & PROCEDURES art. 21.1 ("Subject to these rules, the Tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a reasonable opportunity to present its case."); *id.* at art. 21.4 ("Unless the parties at any time agree otherwise in writing, the Tribunal will have the power, on the application of any party or on its own motion, to identify the issues and to ascertain the relevant facts and the law or rules of law applicable to the arbitration, or to inquire into the merits of the parties' dispute.").

67. Albert A. Ehrenzweig, *The Lex Fori*: *Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960).

68. *See* AFSA DOMESTIC ARBITRATION COMMERCIAL ARBITRATION RULES art. 15.3 (ARBITRATION FOUND. OF S. AFR. 2015), http://www.arbitration.co.za/downloads/AFSA_Rules_2015_12_01.pdf [https://perma.cc/BAV4-FZ2S] ("The arbitrator shall apply the South African law of evidence . . . .").

69. On May 31, 2017, Arbitration Foundation of Southern Africa created International Rules for the Conduct of an Administered Arbitration that govern disputes which are international in character. *See id.* at art. 15.2.1.

70. AFSA DOMESTIC ARBITRATION COMMERCIAL RULES, *supra* note 68, at art. 15.3.

71. *See id.*

and potentially creates unusual results,[72] it has the benefit of offering predictability and certainty to both parties and tribunals. It does, however, run the risk that a dispute or parties otherwise unrelated to South Africa may find that South African law has been unexpectedly imported to their professional relationship or otherwise injected a degree of unfairness.[73] Perhaps this was why, when the Foundation drafted supplementary rules to address international arbitration, the new rules distanced itself from *lex fori*, taking an approach with similarities to SIAC. While expressly identifying the issue of privileged materials, the new rules granted tribunals discretion to exclude documents from the proceedings that are "protected from disclosure by virtue of legal impediment or privilege under the legal or ethical rules determined by the Tribunal to be applicable."[74] There was, however, unfortunately no guidance in the new rules that provides certainty or clarity as to how tribunals are to ascertain and apply that applicable law.[75]

One institution has functionally adopted the soft-law approach of the IBA's Rules on the Taking of Evidence.[76] In its 2016 rules revision, the Australian Centre for International Commercial Arbitration incorporated a reference to the IBA Rules into its own default rules.[77] As discussed later, the IBA Rules expressly address issues of privilege and provide a "factor dependent" model for evaluating privilege issues, but without providing a clear reliable baseline for tribunal decisions. Perhaps more importantly, the implicit approach of the Australian rules on assessing privilege is somewhat ambivalent, as the rules only state the tribunal: "shall have regard to, but is not bound to apply, the [IBA] Rules on the Taking of Evidence."[78] Put simply,

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72. One might imagine a hypothetical dispute involving the South African Commercial Arbitration rules that seeks the disclosure of documentation from U.S. counsel involving a U.S. multinational and its involvement with separate Mexican and German entities, which had a Mexican-German South African joint venture project. In a dispute about the disclosure of documents from the U.S. counsel in connection matters relevant to the Mexican entity, it would be somewhat surprising—perhaps to both the U.S. and Mexican entity—to apply South African attorney-client privilege law.

73. *See* Kirby, *supra* note 26, at 151–53 (discussing fairness considerations when making privilege determinations in international arbitration).

74. AFSA INT'L ARBITRATION RULES r. 30.4.1 (ARBITRATION FOUND. OF S. AFR.) https://arbitration.co.za/international-arbitration/international-rules/ [https://perma.cc/KH6K-9Q4L] (last visited Sept. 20, 2019).

75. For example, the most guidance the new rules provide is that, in the absence of an express choice, "the Tribunal shall apply the rules of law which it considers to be the most appropriate." *Id.* at r. 38.1.

76. *See infra* Sections IV, V.B (discussing the IBA Rules).

77. *See* ACICA ARBITRATION RULES art. 31.2 (AUSTRALIAN CTR. FOR INT'L COMMERCIAL ARBITRATION 2016), https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Arbitration-Rules-2016.pdf [https://perma.cc/39YD-VPCL].

78. *Id.*

under the Australian experiment, there is no firm mandate to use the IBA rules; and with no other express rule addressing privilege issues, broad discretion and unfettered decision-making is left in the hands of tribunals.

The final paradigm for how arbitration institutions address privilege involves the proverbial "race to the top." The Rules for the AAA's International Centre for Dispute Resolution (ICDR) do three core things. First, they shine a spotlight on the fact that tribunals must take a careful approach when addressing privilege issues by expressly making privilege an area of specific focus.[79] Second, the rules acknowledge that there may be varying levels of protection across jurisdictions.[80] Third, and most importantly, the rules set a clear baseline for how to deal with that divergence that requires equal treatment of all parties.[81] Namely, the ICDR Rules state that: "[w]hen the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection."[82]

Yet, this approach—while providing instructive, predictable, and balanced guidance as to which rules to follow—is arguably a statistical outlier. It would be wrong to presume that an emotionally salient or "sticky" example is representative of the whole.[83] Only one other institution has adopted the approach of the ICDR. Namely, the Rules of the Saudi Center for Commercial Arbitration mirror the text of the ICDR privilege rules nearly verbatim.[84] As an empirical matter, given the existing caseload of institutions such as the ICC, LCIA, SCC, and CIETAC—where there is no express mention of privilege and nearly unfettered tribunal discretion—this is the

79. *See ICDR International Arbitration Rules*, *supra* note 30, at art. 22.

80. *Id.*

81. *See id.*

82. *Id.*

83. *See, e.g.*, SUSAN D. FRANCK, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION 24, 25–56, 64, 337–38 (2019) (discussing cognitive illusions and how sticky examples can disrupt perceptions and inject error into assessments).

84. The 2016 Saudi Rules were originally analyzed. SCCA 2016 ARBITRATION RULES art. 22 (SAUDI CTR. FOR COMMERCIAL ARBITRATION 2016), https://www.acerislaw.com/wp-content/uploads/2018/01/Saudi-Center-for-Commercial-Arbitration-Rules.pdf [https://perma.cc/3N9T-C2SU]. The October 2018 version of the SCCA rules has retained the precise wording of article twenty-two. SCCA 2018 ARBITRATION RULES art. 22 (SAUDI CTR. FOR COMMERCIAL ARBITRATION 2018), https://drive.google.com/file/d/100NLqTesQi0lBBBkaV00DU9eTb8bFED_/view [https://perma.cc/HL4T-F33X].

approach ICDR likely legally codified into a small fraction of the world's international arbitration disputes.[85]

III. CHOICE OF LAW GUIDANCE: STANDARDS FROM NATIONAL LAW

Much like the analysis of institutional rules, few national laws expressly address the issue of legal privilege in international arbitration, let alone provide guidance as to identifying the applicable law and its potential application. Rather, much like the legal vacuum provided in institutional rules, many arbitration laws grant arbitral tribunals the power to decide procedural and evidentiary matters for themselves—but without providing any guidance or standards that they should use in exercising their discretion regarding privilege issues.

The UNCITRAL Model Law, which has been adopted by many countries, takes this approach.[86] Namely, the law suggests that, unless parties otherwise agree, the tribunal has the power to determine admissibility, relevance, materiality, and weight of any evidence.[87] While this highlights the possible opportunity of parties to make an express agreement, it nevertheless offers unfettered discretion and no guidance to tribunals as to the best practices for exercising their authority. Multiple civil law countries have tended to follow

85. Ironically, the "most protective privilege" approach has been applied by tribunals, even where the standard was not part of the applicable arbitration rules. The two publicly available decisions doing so have used standards in the IBA Rules on the Taking of Evidence. *See, e.g.*, *infra* Section V.B.1 (discussing the only two known cases, namely *Blanco* and *Poštová banka*, where tribunals have used the "most protective privilege" standard to resolve privilege issues); *but see infra* note 117 (noting one commentator suggested *GEA v. Ukraine* applied that standard as well but observing the authority provided did not support the conclusion).

86. U.N. COMM. ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, at art. 19, U.N. Sales No. E.08.V.4 (2008), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [https://perma.cc/6XXU-EF9H].

87. *Id.*

this approach. French,[88] Swiss,[89] Canadian,[90] Mexican,[91] Brazilian,[92] and Chinese[93] arbitration laws give arbitral tribunals wide discretion regarding

88. CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1464 (Fr.); GARY B. BORN, INTERNATIONAL ARBITRATION: DOCUMENTARY SUPPLEMENT 146 (2d ed. 2015) ("Unless otherwise agreed by the parties, the arbitral tribunal shall define the procedure to be followed in the arbitration. It is under no obligation to abide by the rules governing court proceedings.") (quoting art. 1464); *id.* at 147 ("The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters, unless the parties authorise it to delegate such tasks to one of its members. . . . If a party is in possession of an item of evidence, the arbitral tribunal may enjoin that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such injunction.") (quoting art. 1467).

89. SCHWEIZERISCHES BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL CODE ON PRIVATE INTERNATIONAL LAW] Dec. 17, 1987, SR 291, art. 182 ¶ 2 (Switz.) ("If the parties have not regulated the procedure, it shall be fixed, as necessary, by the arbitral tribunal either directly or by reference to a law or rules of arbitration."); *see also* Bernhard F. Meyer-Hauser & Philipp Sieber, *Attorney Secrecy v Attorney-Client Privilege in International Commercial Arbitration*, 73 ARB. 148, 149–53 (2007) (discussing the attorney secrecy law of Switzerland).

90. Canada Commercial Arbitration Act, R.S.C. 1985, c 17 (2d Supp.), sched. 1, art. 19 ("Subject to the provisions of this *Code*, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of this *Code*, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.").

91. Código de Comercio [CCom], art.1435, Diario Oficial de la Federación [DOF] 07-10-1889, últimas reformas DOF 02-05-2017 (Mex.) ("Subject to the provisions of this title, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of this title, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.").

92. Lei No. 9.307, de 23 de Setembro de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.11.1996 (Braz.) art. 21 § 1 ("In the absence of any provisions on the procedure, the sole arbitrator or the arbitral tribunal shall conduct the arbitration in such a manner it considers appropriate.") (alterada pela Lei No. 13.129/15).

93. *See* Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1994) arts. 43–46 (China), http://www.cietac.org/index.php?m=Article&a=show&id=2415&l=en [https://perma.cc/EQ9Q-GZGQ] (failing to provide any mention of or guidelines related to privilege and instead providing general rules about the provision of evidence to substantiate claims and defenses); *see also supra* note 37 and accompanying text (identifying the lack of attorney-client privilege and work product protection in China); Qifan Cui, *Document Production in Chinese Litigation and International Arbitration*, 6 J. CAMBRIDGE STUD. 69, 74 (2011), https://www.repository.cam.ac.uk/bitstream/handle/1810/255487/201123-article6.pdf?sequence=1&isAllowed=y [https://perma.cc/S8KD-KHL7] (observing that there is a legal professional duty of confidentiality in China which has similarities to the U.S. law of attorney-client privilege, and suggesting that such a privilege is "admitted in civil litigation and arbitration" but that "the issue of privilege is not paid so much attention in China"); *see also* Pierre Heitzmann, *Confidentiality and Privileges in Cross–Border Legal Practice: The Need for a Global Standard?*, 26 ASA BULL. 205 (2008) (discussing attorney-client privilege and work product doctrines in China and other countries).

how it should conduct proceedings—including evidentiary considerations—but without addressing the issue of privilege.

The decision to "punt" to arbitrator's discretion—without providing boundaries or guidance—appears to be favored by common law countries. The English Arbitration Act,[94] for example, grants tribunals a broad power to determine procedures of evidence in arbitration. The Act gives tribunals power to decide "whether any and if so which documents or classes of documents should be disclosed between and produced by the parties,"[95] but it stops there. There is no further guidance on how the tribunal shall make such decisions on document production or what it should do when confronted with conflicting party expectations about the confidentiality or required disclosure of documents.

In the United States, the Federal Arbitration Act (FAA) is even more vague.[96] There is no textual provision granting arbitrators express discretion to conduct proceedings,[97] yet where the parties have not otherwise agreed, it is common to grant arbitrators this implied discretion.[98] For U.S. states adopting the UNCITRAL Model Law,[99] presuming it is not preempted by the

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94. Arbitration Act of England and Wales 1996, c. 23, http://www.legislation.gov.uk/ukpga/1996/23/contents [http://perma.cc/L9YK-6L6V].

95. *Id.* § 34(2)(d).

96. 9 U.S.C. §§ 1–16 (2018).

97. *See, e.g.*, BORN, *supra* note 8, at 2147 ("The FAA does not contain provisions addressing the subject of arbitral procedures or providing a basic procedural framework for arbitrations; rather, the FAA effectively leaves all issues of procedure entirely to the parties and arbitrators. The FAA does so by providing for the validity of agreements to arbitrate, including their procedural terms, in §2, and by providing for orders to compel arbitration, in accordance with the provisions of the parties' arbitration agreement, in §4; both provisions require giving effect to the parties' agreed arbitral procedures and, in the absence of any such agreement, leaving the arbitral procedures by default to the arbitrators' general adjudicative authority, without imposing any statutory limitations on that authority.").

98. *See, e.g.*, Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co., 232 F.3d 383, 389 (4th Cir. 2000) ("An arbitrator typically retains broad discretion over procedural matters . . . ."); Nat'l Post Office Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985) ("Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing."); Laminoirs-Trefileries-Cableries de Lens, S. A. v. Southwire Co., 484 F. Supp. 1063, 1067 (N.D. Ga. 1980) ("[A]rbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant, and that barring a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or the lack of proper evidence.").

99. UNCITRAL has identified that eight states within the U.S. have adopted the UNCITRAL Model Law, namely California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas. *See* U.N. Comm'n on Int'l Trade Law, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [https://perma.cc/52DH-7YFC] (last visited Sept. 18, 2019).

FAA, even those states offer unbounded discretion to tribunals without articulating rules, standards, or conflict of laws principles to help resolve questions of privilege.

Historically, the South African arbitration law, as a mixed common and civil law system, was one of the few countries to expressly reference tribunal authority to address matters related to legal privilege, albeit it did so in an unusual way. As a general rule, the South African Arbitration Act[100] generally provides leeway in terms of how tribunals can gather evidence including the right to administer oaths, summon witnesses, and otherwise gather information relevant to the dispute.[101] Nevertheless, while the Act fails to address how tribunals can and should identify the law applicable to privilege issues, it implicitly acknowledges that tribunals must assess privilege issues but without providing any guidance as to how to perform that task. Namely, certain provisions within Article 14 permit evidence collection "subject to any legal objection"[102] and a later provision detailing "offenses" that can occur during the arbitration proceedings identifies that a person who "willfully insults any arbitrator . . . or willfully interrupts such proceedings or otherwise misbehaves" is guilty of an imprisonable offense but also identifies that "the law relating to privilege" for witness conduct nevertheless applies.[103] In October 2017, the South Africa National Assembly passed a new law incorporating the UNCITRAL Model Law on International Arbitration, meaning South Africa has become a jurisdiction with even less guidance and more discretion for tribunals resolving privilege issues.[104]

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100. The Act, which was originally codified in 1965 and amended in 1996, neither makes a distinction between domestic and international arbitration. *See* Arbitration Act 42 of 1965 (S. Afr.) (updated through 1996), https://www.environment.gov.za/sites/default/files/legislations/arbitration_act42of1965.pdf [https://perma.cc/W83Q-P9H6] (last visited Sept. 18, 2019). *But see infra* note 104 (identifying that in October 2017, South Africa modified its law to expressly adopt the Model UNCITRAL International Arbitration law).

101. Arbitration Act 42 of 1965, *supra* note 100, at arts. 14, 16.

102. *Id.* at arts. 14(1)(b)(iii), 14(1)(b)(iv).

103. *Id.* at art. 22(1)(f).

104. *National Assembly Passes International Arbitration Bill*, PARLIAMENT REPUBLIC S. AFR. (Oct. 24, 2017), https://www.parliament.gov.za/press-releases/national-assembly-passes-international-arbitration-bill [https://perma.cc/5VFV-6J9H]; *see also* International Arbitration Bill of 2017 art. 19(2) (S. Afr.) http://www.justice.gov.za/legislation/bills/2017-InternationalArbitrationBill-150517.pdf [https://perma.cc/869M-VMFE] ("The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.").

IV. THE IBA RULES: GUIDANCE FROM SOFT LAW

Parties sometimes expressly incorporate the IBA Rules on the Taking of Evidence in International Arbitration[105] into their arbitration agreement before a dispute arises. Even after the fact, parties and tribunals can agree to be bound by the IBA Rules, either through a submission agreement or a procedural order.[106]

The IBA Rules are highly unusual—and proactive—in offering guidance to tribunals about privilege issues and managing party expectations. First, the Rules start out granting tribunals a standard power to "determine the admissibility, relevance, materiality and weight of evidence."[107] The Rules then address issues of privilege and confidentiality head on, granting arbitrators the power to "exclude from evidence or production any [d]ocument [because of] legal impediment or privilege under the legal or ethical rules determined by the . . . [t]ribunal to be applicable."[108]

It then sets up a major innovation—which has yet to be replicated by any institution or national law—namely, it offers factors that tribunals *may* address when analyzing issues of privilege. Specifically, the IBA identifies multiple factors for tribunal consideration, including: (a) the need to protect confidentiality in order to receive legal advice or in connection with settlement negotiations, (b) party expectations when the privilege was created, (c) possible waiver of privilege, and (e) the need to maintain fairness and party equality, "particularly if they are subject to different legal or ethical rules."[109] In other words, the IBA Rules do the best job of any public document of highlighting privilege issues and identifying factors for tribunal assessment to aid the determination of the law applicable to privilege.[110]

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105. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L ARBITRATION (INT'L BAR ASS'N 2010), https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx [https://perma.cc/5MQC-T57B].

106. The Australian Centre for International Commercial Arbitration suggests that tribunals should "have regard to" the IBA rules, but tribunals are "not bound to apply" those same rules. ACICA ARBITRATION RULES, *supra* note 77, at art. 31.2.

107. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L ARBITRATION, *supra* note 105, at art. 9.1.

108. *Id.* at art. 9.2(b).

109. *Id.* at art. 9.3.

110. The approach has, as one scholar argues, the benefit of offering a subject matter specific approach. *See* Bradford, *supra* note 13, at 911 ("Part of the problem is that scholars are viewing the problem too broadly. Most conflicts scholars are searching for a single, grand theory acceptable for all cases. The result is a broad, vaguely worded standard that provides little guidance in particular cases."). Bradford advocates a return to state territoriality to ascertain privilege. *Id.* at 913 ("A territorial rule works best for the attorney-client privilege; in fact, a territorial rule is the only approach that works, given the purpose of the privilege."); *id.* at 948–

And yet, in terms of predictability and clarity, while creating a "nudge" for arbitrator consideration, the Rules neither create a duty to use the factors in decision-making nor enhance the predictability of how to use those factors to resolve concerns about the applicable privilege or resolution of specific privilege disputes. While there is a suggestion of a need to maintain fairness between parties with different expectations, the Rules do not set the baseline that the ICDR promotes—namely the "race to the top" in using the most protective privilege. Rather, it sets up the possibility that the IBA Rules could create a "race to the bottom," where only the lowest common denominator and the smallest mutual scope of legal privilege applies, meaning that more matters will be disclosed and possibly subject to waiver elsewhere.[111] There is also little practical guidance as to how these multiple factors should apply, particularly if factors point in different directions about what is privileged.

Finally, the IBA Rules still offer no guidance as to how tribunals should ascertain the applicable law of privilege. This opens up a privilege vortex, wherein it provides tribunals with indicators of legitimacy—namely reference to soft law principles promulgated by experts—that nevertheless permits them to bypass a conflicts analysis and skip directly to cherry-picking IBA factors that appeal to the lures of intuitive decision-making.[112] Given the wide discretion implicitly granted by the silence and lack of guidance in the applicable law—in parties' agreements, institutional rules, and national laws—such an outcome would be justified. Yet, the trade-off of delegating broadly and without bounded discretion creates a risk that tribunals will make unpredictable decisions that genuinely surprise parties and generate serious downstream externalities. While the IBA Rules are a major step forward from unbridled discretion and provide tribunals with some *ex ante* legal guidelines to follow and offer some direction for parties managing their expectations, the Rules nevertheless fail to address the problems of predictability of the law applicable to issues involving privilege. These guidelines are, however, a better alternative than a complete vacuum.[113]

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49 (proposing that, for predictability and certainty, the most relevant territories are the law of the state of the attorney's practice or the client's location and arguing that the state of attorney's practice is preferable).

111. This is, for example, the approach the European Commission adopted in its review of legal professional privilege in the context of competition law. *See supra* note 20 and accompanying text.

112. *See also* Reiser, *supra* note 10, at 673 (cautioning about a potential race to the bottom).

113. When drafted, the IBA Rules were an effort to balance competing expectations of parties from different legal backgrounds and cultural traditions by articulating flexible, but acceptable (i.e. tried and tested in practice), guidelines. IBA RULES ON THE TAKING OF EVIDENCE IN INT'L ARBITRATION, *supra* note 105, at 2 ("The IBA Rules of Evidence reflect procedures in use in

As a practical matter, the scope of uncertainty created by the guidelines of the IBA Rules and other sources of law were perhaps both understandable and less problematic in a different era of international arbitration,[114] which had less transparency[115] and arbitral pronouncements had a narrow sphere of influence, binding only the parties and with little public impact.[116] We are

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many different legal systems, and they may be particularly useful when the parties come from different legal cultures."); *id.* at pmbl., at 4 ("These IBA Rules . . . are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions."). In ICA, where arbitrations were often confidential and the adjudicative record was not necessarily in the public domain, a more practical and less formal approach that omitted detailed discussion of legal reasoning was perhaps an efficient, cost-effective way of managing the process and containing costs related to discovery.

114. Historically, major challenges of international arbitration tended to involve issues like finding a proper balance between civil and common law traditions or identifying the proper neutrality for parties from democratic market-based economies and communist non-market economies. *See, e.g.*, Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 434 (2015); *see also* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 63–69 (1996); ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 171–72 (2017); Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law–Civil Law Divide in Arbitration*, 18 ARB. INT'L 59 (2002); Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1336–38 (2003); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, *in* 4 CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION 31 (Stefan N. Frommel & Barry A.K. Rider eds., 1999); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 427–30 (2000). The modern sphere of concerns about international arbitration in an era of resurging nationalism, populist backlash, social fragmentation, and social media are different.

115. As previously noted, transparency and confidentiality of international arbitration (including its proceedings, documentation, procedural orders, and awards) was historically standard. Yet, the paradigm is shifting towards a greater emphasis on transparency and making public documentation in international arbitration—including documentation that may be privileged. *See supra* note 24 and accompanying text; Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006); *see also* Robert D. Argen, Note, *Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration*, 40 BROOK. J. INT'L L. 207 (2014); Avinash Poorooye & Ronán Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275 (2017).

116. With awards being generally confidential (not necessarily appearing in court records when recognition and enforcement was sought), awards and other pronouncements by arbitral tribunals had limited precedential value. International arbitration awards have limited (sometimes no) *de jure* value as a source of precedent; nevertheless, particularly on novel matters of international law (as compared to matters of domestic law, which are best settled by the legislatures and judges of the domestic state), awards can have *de facto* effect as precedent and can influence other tribunals. *See, e.g.*, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND

now in an era when tribunals' pronouncements of legal matters, which can include privilege issues, are subject to enhanced public scrutiny. This means that the previous status quo will benefit from a re-assessment and privilege determinations warrant enhanced consideration of their effect both upon the evolution of law and the legitimacy of international dispute settlement. It is therefore helpful to have an understanding—based upon broad data, rather than unconfirmed reports or potentially unrepresentative experiences—of how tribunals assess the law applicable to privilege and use that feedback to improve the legal structure for managing issues of legal privilege that are central to the attorney-client relationship and trust in the system of law.

V. DIVINATION OF THE APPLICABLE STANDARDS AND APPLICATION OF THE APPLICABLE LAW

Thus far, this Essay has explored the doctrinal gap in the hard law (and soft law) for guiding tribunals in the exercise of their mandate and delegated discretion. Nevertheless, privilege conflicts are a regular and inevitable source of tension among parties in international arbitration. This means that tribunals must wrestle with these challenging issues and may do so in disparate ways.

In many respects, identifying patterns of how tribunals use their delegated discretion is an empirical question.[117] Yet, some have made sweeping

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FUTURE OF THE DISCIPLINE 265, 272–73 (Colin B. Picker et al. eds., 2008); Committee on International Commercial Disputes of the Association of the Bar of the City of New York, *Publication of International Arbitration Awards and Decisions*, 25 AM. REV. INT'L ARB. 1, 34 (2014); Franck et al., *supra* note 2, at 1126; David M. Howard, *Creating Consistency Through a World Investment Court*, 41 FORDHAM INT'L L.J. 1, 35 n.247 (2017); Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418, 436–45 (2013); *see also* Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47 (2019) (discussing precedent and influence of arbitration awards in ITA).

117. One survey begins the classification process, exploring forty-four potential decisions, although sometimes without benefit of the text of the actual decision or relying upon press reports. *See, e.g.*, Shehata, *supra* note 9, at app. II at 403. *Compare id.* at 409 (discussing an April 6, 2010 decision but only citing the March 31, 2011 award in *GEA v. Ukraine* and classifying the case as using a "most protective" law approach and analysis of international rules set out in the OSPAR arbitration), *with* GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (Mar. 31, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0356.pdf [https://perma.cc/3B26-FTEV] (making no reference to a decision from "April 6, 2010" or "6 April 2010" and failing to use any of the terms "privilege," "legal advice" or OSPAR arbitration in the cited award); *compare* Shehata, *supra* note 9, at app. II at 404 (discussing a case involving a German and Cypriot party and citing Möckesch), *with* MÖCKESCH, *supra* note 13, at 228–20 (discussing the case and noting the tribunal's procedural order is unpublished, preventing

suggestions about the practice and tradition of international arbitration but without providing systematic analysis—or otherwise acknowledging that a perceived practice could be a statistical outlier and unrepresentative of a broader pattern of behavior. Particularly in international commercial arbitration (ICA), there is a dearth of data.[118] While there is a broader swathe of publicly available investment treaty arbitration (ITA) awards, which can provide information about how tribunals wrestle with privilege issues, the privilege analysis offered in ITA awards runs the risk of being systematically different; and ITA disputes may not be sufficiently similar to ICA to draw strong inferences about arbitration more generally.[119] While there will be inevitable methodological challenges, rather than doing nothing, it is worthwhile exploring the available public case law to benchmark potential patterns about how tribunals exercise their adjudicative mandate on matters of legal privilege, particularly attorney-client privilege. This can, in turn, inform debates about the relative merits of balancing tribunal discretion in an specific case (which can lead to unpredictable results but may reflect a "fair" result) against the use of firm *ex ante* rules (which can lead to more predictable results but may not do "justice" in the individual case).

This section seeks to understand and classify the existing arbitral decisions about how, in practice, tribunals identified, used, and applied the law of attorney-client privilege in international arbitration. In primarily exploring ITA and ICA disputes, it first starts with the classic point of conflicts of law analysis, namely party agreement—whether express or implied—of the applicable law about how tribunals should adjudicate attorney-client privilege issues. Second, it explores how tribunals have used the IBA Rules to divine the content of applicable law, analyzing the small number of cases that actively use the IBA Rules and the somewhat larger set of tribunals offering passing references to the Rules, with varying results. Next, the Essay

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interpretations of the award from being confirmed independently); *compare* Shehata, *supra* note 9, at app. II at 404 (referring to a New York case based ICC arbitration and citing Heitzmann), *with* Heitzmann, *supra* note 93, at 229–30 n.73 (providing a factual background around a purported case involving adjudication of a privilege issue but failing to provide information to permit verification of the facts or tribunal analysis). Shehata makes an effort at identifying the "standard" for tribunal assessment, yet the classification schema is neither clear nor operationalized to permit replication. Shehata may have been using concepts from Meyer-Hauser and Sieber. *See* Meyer-Hauser & Sieber, *supra* note 89, at 183–85; Shehata, *supra* note 9, at app. II at 403 n.191. Scientific classifications should be precise, transparent, and valid to enhance their inferential value. *See, e.g.*, Susan D. Franck*, The Promise and Peril of Empiricism and International Investment Law Disputes*, *in* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (Andrea Bjorklund, Franco Ferrari & Stefan Kröll eds., forthcoming 2020).

118. Franck et al., *supra* note 114, at 435–36.

119. *Id.* at 439–40.

explores tribunals' more regular use of "international law" and its ambivalent interaction with national legal concepts for identifying privilege law, where tribunals have used three different techniques to divine the applicable law, often with problematic results. Fourth, the section turns to those limited number of cases where tribunals identified a specific national law as the law applicable to attorney-client privilege, identifying whether and how tribunals opted to apply that law. Finally, the section identifies the set of cases where there was a "grab bag" of approaches, with tribunals making *ad hoc* decisions about the law of attorney-client privilege in international arbitration. As the review demonstrates, there is broad variance in how tribunals address and resolve matters. As attorney-client privilege is a perennial concern that is likely to be central to adjudication in most international arbitrations,[120] the variance in reasoning, outcome, and quality of decisions suggest that—for something as critical to the integrity and conduct of the legal profession—it is well worth taking a more considered, analytical, transparent, and predictable approach.

A. The Possibility of Party Agreement

First, as previously indicated, parties are generally free to agree on aspects of the arbitration process, including the process of applying evidentiary privileges or the law applicable to legal privilege claims. Finding cases where the parties address this issue in their arbitration agreement is a major challenge, as parties presumably either fail to make express agreements on privilege *ex ante* and instead let matters be addressed by tribunals *ex post*.

There is, however, some authority demonstrating that tribunals have honored party agreements regarding privilege determinations, particularly in *ex ante* agreements in investment treaty disputes under NAFTA.[121] These

120. While attorneys from different cultures may have different legal traditions about the availability or scope of document production (whether through discovery or disclosure), in international arbitration, disclosure and document exchanges are not unusual, meaning disputes about the scope of disclosure are inevitable. As a practical fiscal manner, the profitability of law firms is affected by document production and disclosure, which means firms arguably have a financial interest in having more document review and disclosure. While some of the financial incentives may change as third-party funding evolves, it is reasonable to anticipate that disclosure—and disputes about what must be produced or withheld—will be a component of international arbitration for the foreseeable future.

121. There was one NAFTA case where, with strong guidance of the tribunal in an order, the parties apparently agreed *ex post* to confidentiality obligations for a series of documents (some of which were potentially privileged) and the agreement clarified that exchanges did not result in a waiver of privilege. Merrill & Ring Forestry L.P. v. Gov't of Can., UNCITRAL (ICSID Administered Case), Confidentiality Order, ¶¶ 13, 22 (Feb. 18, 2008),

cases reflect that international arbitration tribunals have been willing to apply the privilege law to which the parties agree. This has primarily relied upon express party agreement as to domestic law, implied party agreement on domestic law, or express party agreement for the use of principles deriving from international sources.

1. Parties' Express Agreement for National Law

Glamis Gold v. United States is one of the clearer examples of a tribunal following parties' agreement to apply the specific national law that both parties agreed was applicable. The *Glamis Gold* tribunal acknowledged that the parties had jointly stipulated that the tribunal should look to the U.S. law of privilege to guide decisions about privilege and evidence admissibility.[122] The parties disagreed, however, about *which* state's law within the United States governed privilege determination.[123]

Rather than an open-ended analysis of the potential applicable law, *Glamis Gold* followed the parties' will and the tribunal focused its analysis on legal principles emanating from law within the United States.[124] The tribunal explained that it "reviewed the case law of numerous United States jurisdictions—including California and the District of Columbia, neither of which were found to be outliers—and attempted to identify general consensus between courts that might be helpful in defining what the parties would reasonably expect to apply in this situation,"[125] presumably to more accurately reflect the parties' agreement as to applicable law. The tribunal then analyzed multiple U.S. sources—including case law and treatises—that established basic elements of attorney-client privilege and work product protections.[126]

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https://www.italaw.com/sites/default/files/case-documents/italaw8320.pdf [https://perma.cc/9XLK-TX73].

122. Glamis Gold, Ltd. v. United States, Decision on the parties' request for production of documents withheld on the grounds of privilege, ¶ 19 (Nov. 17, 2005), http://www.naftaclaims.com/disputes/usa/Glamis/Glamis-Evidence_Ruling_01.pdf [https://perma.cc/6NM8-5NNL] [hereinafter Glamis Gold v. USA]. The tribunal also indicated that the parties referred to the IBA Rules, but primarily as regards issues of materiality rather than legal privilege. *Id.* ¶ 18.

123. *Id.* ¶ 19.

124. *Id.* ¶ 20.

125. *Id.*

126. The tribunal did not, however, cite a basic source, namely the *Ethics Restatement*, which contains basic and fundamental standards for professional obligations including attorney-client privilege and work product protection. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–93 (AM. LAW INST. 2000). Instead, the tribunal discussed cases identified on its own

2. Parties' Implied Agreement for National Law

Beyond express party consent on the applicable law, one tribunal found implied party consent to an applicable law of privilege. Specifically, one party's express assertion that the applicable law was the national law of Canada and the other party's failure to contest that law (and cited Canadian law in their responsive brief) created an implied agreement.[127]

In *Niko*, which involved a commercial arbitration at ICSID, the tribunal placed extensive reference upon Canadian domestic law.[128] In the contract-based dispute, the tribunal decided to use Canadian privilege law to assess legal privilege.[129] The tribunal observed that Niko Canada had conducted an investigation in Canada in order to "provide advice to [Niko Canada] concerning and to defend against allegations arising from alleged corruption in civil, criminal or regulatory forums"[130] in connection with corruption allegations by the Bangladesh Anti-Corruption Commission and the Royal Canadian Mounted Police involving potential improper payments by either Nikko Canada or its subsidiary, Niko Bangladesh.[131] In short order, the tribunal stated documents related to an internal investigation "were generated by an investigative service provider in Canada to a Canadian law firm retained by a Canadian company related to a Canadian investigation. The issue of privilege thus is clearly linked to Canada."[132] Observing that there was a Canadian law firm and Canadian client involved, the tribunal simply stated that "legal privilege thus clearly is subject to Canadian law."[133]

While focusing on "clearly" intuited principles, that may not have been so clear to other adjudicative bodies,[134] *Niko* failed to use any conflicts principles (or even the IBA Rules) to dictate its conclusion or otherwise explain why investigation with ties to other jurisdictions (possibly with different or less

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(primarily under federal law), cases submitted by the parties, and one source quoting *Moore's Federal Practice*. Glamis Gold v. USA, *supra* note 123, at ¶¶ 23–24, 28–32, 34–37.

127. Niko Res. (Bangl.) Ltd. v. Bangl. Petroleum Expl. & Prod. Co. Ltd., ICSID Case Nos. ARB/10/11 and ARB/10/18, Procedural Order No. 22, (July 27, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9247.pdf [https://perma.cc/A334-RXH7] [hereinafter Niko v. Bangladesh Petroleum].

128. *Id.*

129. *Id.* ¶ 22.

130. *Id.* ¶ 15.

131. *Id.* ¶¶ 1, 15.

132. *Id.* ¶ 22.

133. *Id.*

134. Recall that a Delaware court in a similar context involving Canadian privilege decided instead to apply the Delaware law of attorney-client privilege. *See* Teleglobe Commc'ns Corp. v. BCE Inc., 392 B.R. 561, 595–96 (D. Del. 2008).

protective privilege regimes) was irrelevant.[135] Instead, the tribunal's real analytical innovation was to imply that both parties had consented to Canadian law, using the express assertion by one party and the failure to reject the assertion (or provide an alternative) by the counter-party. The tribunal's primary explanation was:

> The Parties, too, in their argument on the question of privilege rely on Canadian law. The Claimant asserts specifically that the issue is governed by Canadian law. The assertion is not contested by the Respondents who rely on Canadian jurisprudence. The Tribunal[] therefore consider[s] the issue under the law of Canada.[136]

In other words, parties should be cautious in how they argue issues of attorney-client privilege, lest a tribunal deem the failure to object to an applicable law constitute implied consent to be bound by the law proffered by a counter-party.

3. Parties' Express Agreement for International Legal Sources

Beyond national law, international arbitration tribunals have been willing to consider other forms of legal obligations to identify the content of attorney-client privilege. This is particularly interesting as there is no international

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135. One commentator provides a *post hoc* effort to classify this approach, suggesting that the tribunal used the "Most Closely Connected Law Approach," even though the tribunal never identified this as their guiding legal principal. Shehata, *supra* note 9, at 413. If the tribunal had used this methodology, which has similarities to U.S. conflicts approaches focusing on the "Most Significant Relationship" or "Center of Gravity," Swiss approaches like "Characteristic Performance," or European "Closest Connection" tests, this would have been preferable; it was not, however, what the tribunal expressly did. Luo Junming, *Choice of Law for Contracts in China: A Proposal for the Objectivization of Standards and Their Use in Conflicts of Law*, 6 IND. INT'L & COMP. L. REV. 439, 448 (1996) (discussing different conflicts methodology including most significant relationship, center of gravity, and characteristic performance); Alan Reed, *The Rome I Regulation and Reapprochement of Anglo-American Choice of Law in Contract: A Heralded Triumph of Pragmatism over Theory*, 23 FLA. J. INT'L L. 359, 371–74 (2011); Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329 (1997) (discussing multiple U.S. based approaches to conflicts analysis). Cognitive psychology demonstrates the danger in *post hoc* justification and problems inherent in hindsight bias. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009) (testing the influence of hindsight bias on administrative law judges); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (discussing hindsight bias and its implications for legal systems).

136. Niko v. Bangladesh Petroleum, *supra* note 128, at ¶¶ 23–24.

convention on the topic of attorney-client privilege,[137] and there is no clear suggestion that there is sufficient evidence to demonstrate attorney-client privilege forms part of customary international law.[138]

In this vein, some tribunals have been content to honor the parties' choice about applicable law—but do so without reference to pre-existing national law. Rather, with parties' consent, tribunals instead rely upon international sources to justify their determinations of the law applicable to privilege and its application to specific cases. Perhaps unsurprisingly, as the law underpinning the claim and consent derives from a treaty, the tribunals taking this categorical and international-based approach to attorney-client privilege

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137. While there is a treaty on the international taking of evidence, the treaty only regulates the procedures for collecting evidence rather than dictating and identifying the substantive law of privilege or attorney-client confidentiality. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 744, 478 U.N.T.S. 231; David S. Jones, *The Privilege Stops at the Border, Even If A Communication Keeps Going*, 8 S.C. J. INT'L L. & BUS. 297, 318 (2012); *see also* Tulip Computs. Int'l B.V. v. Dell Comput. Corp., 254 F. Supp. 2d 469, 475 (D. Del. 2003) (noting different laws may apply to Hague Convention evidence requests and stating that parties must "take the most restrictive view of privilege applicable, whether it be under United States or Netherlands' law."); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 519 n.17 (N.D. Ill. 1984) (discussing how parties can assert privileges in connection with the Hague Convention but noting that there could be one or more applicable substantive laws that apply); Alan M. Anderson & Bobak Razavi, *The Globalization of Intellectual Property Rights: Trips, BITs, and the Search for Uniform Protection*, 38 GA. J. INT'L & COMP. L. 265, 287 (2010) ("WIPO recently issued findings noting that no international intellectual property treaty regulates attorney-client privilege.").

138. There is not clear evidence that attorney-client privilege is a customary international law right. *See* Case 155/79, AM & S Eur. Ltd. v. Comm'n of the Eur. Cmtys., 1982 E.C.R. 1577, 1608–09 (suggesting that European Community law has some standards that may incorporate some protection of attorney-client communications, but not relying on principles of international law); Stephen A. Calhoun, *Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235 (2008) (arguing that transnationally, attorney-client privilege is being eroded); Kuitkowski, *supra* note 8, at 100–01 (noting "it is difficult to see how any international standard [of attorney-client privilege] would be developed and enforced" and "[c]ommentators generally do not look favourably on such suggestions, arguing that transnational rules are very difficult to formulate"); Andrea E. K. Thomas, *Nongovernmental Organizations and the International Criminal Court: Implications of Hobbes' Theories of Human Nature and the Development of Social Institutions for Their Evolving Relationship*, 20 EMORY INT'L L. REV. 435, 455 (2006) (noting that "ICTY Rule 97 which grants a privilege to attorney-client communications" but not discussing the attorney-client privilege as a matter of international custom); *see also* Reiser, *supra* note 10, at 662 ("At this time, no transnational standard [of attorney-client privilege] exists."); Mosk & Ginsburg, *supra* note 6, at 378–79 (stating "[i]t has not been determined whether certain privileges can be considered a general principle of law that ought to be applied by international tribunals in international arbitration" and noting, generally, how difficult it is to ascertain the scope and content of "general principles" in international law). *Compare infra* note 178 (noting that, although one commentator suggests there is now an international law of attorney-client privilege in international arbitration, the merits of that claim are far from certain).

derive from disputes arising from investment treaties, rather than national law or commercial contracts.

In *Bilcon v. Canada*, both parties agreed that the tribunal should apply a four-part test about the existence of lawyer-client privilege, as identified by a previous arbitral tribunal.[139] The earlier tribunal, *Vito Gallo v. Canada*, created a test for privilege purportedly on the basis of "international law"[140]—although *Vito Gallo*'s exercise in identifying the content of the elements of privilege primarily focused on Canadian precedent, a procedural order in a 1930s case against the Bank for International Settlements, a law review article, and IBA Rule Article 9.2.[141] Even though the *Vito Gallo* test was not a binding rule, *Bilcon* used the parties' agreement on the test for assessing privilege issues; and it then used its considerable discretion under the UNCITRAL rules to apply the parties' agreement.[142]

The *Bilcon* tribunal is not alone in its willingness to adopt party agreement as to the applicable law. *Lone Pine* took a similar approach, with the tribunal honoring party agreement. Rather than engage in its own assessment of the applicable law—whether derived from international law, national law, or soft law—the tribunal applied the *Vito Gallo* test, as both parties agreed it was the proper standard for assessing legal privilege in their case.[143] For parties that wish to agree on the content of privilege law using the test from *Vito Gallo* and its progeny,[144] creating party agreement that those principles provide the binding standards for attorney-client privilege seems a sensible way to reduce

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139. Clayton v. Gov't of Can. (*Bilcon*), PCA Case No. 2009-04, Procedural Order No. 12, ¶ 21 (May 12, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1163.pdf [https://perma.cc/D2B7-XQF4] [hereinafter Bilcon v. Canada].

140. Vito Gallo v. Gov't of Can., PCA Case No. 55798, Procedural Order No. 3, ¶ 47 (Apr. 8, 2009), http://www.naftaclaims.com/disputes/canada/gallo/procissues/gallo-23.pdf [https://perma.cc/V5Z5-W3ZX] [hereinafter Vito Gallo v. Canada].

141. *Id.* at ¶¶ 41–42, 47, 49-50; *see also infra* notes 142, 211 (discussing the use of *Vito Gallo v. Canada*).

142. Bilcon v. Canada, *supra* note 139, at ¶ 29 ("Accordingly, the Tribunal decides that solicitor-client privilege attaches to communications containing legal advice from any government lawyer if and to the extent that the lawyer acts as legal counsel in the manner intended under the *Gallo* standard.").

143. Lone Pine Res. Inc. v. Gov't of Can., ICSID Case No. UNCT/15/2, Procedural Order on Withheld and Redacted Documentation, ¶ 5 (Feb. 24, 2017), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4406/DC10040_En.pdf [https://perma.cc/3ZY9-K58Y]. Similarly, although it involved parliamentary rather than attorney-client privilege, *Windstream* applied Canadian law to privilege issues, where both parties agreed Canadian Law applied. Windstream Energy LLC v. Gov't of Can., PCA Case No. 2013-22, Procedural Order No. 4, ¶¶ 3.2–3.3 (Feb. 23, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4277.pdf [https://perma.cc/W2PC-32XB0]. The tribunal ultimately disagreed with Canada's interpretation about the scope of Canadian privilege law. *Id.* ¶¶ 3.4–3.5.

144. *See infra* Section V.C.1.

risk of conflict (and minimize costs by identifying a clear set of principles) that tribunals have been willing to honor.

*B. "*Pirates of the Caribbean*"*[145] *and the IBA Rules: More Like Guidelines*

Most of the publicly available decisions adjudicating issues of attorney-client privilege in international arbitration have not been fortunate enough to secure party agreement about the applicable legal standards to guide tribunal assessments. Instead, tribunals are left in a vacuum, making privilege assessments using a variety of bases and methods, which generates large variance in the application of legal principles and arbitral discretion.

One of the only common denominators' in tribunal conduct is their reliance on the soft law guidance offered in the IBA Rules to assess privilege claims. While reference to the IBA Rules is by no means universal and tribunals also act without relying upon the *ex ante* guidance, there have been multiple cases where tribunals cited the IBA's soft law principles, but often with different levels of focus and analysis.

1. Detailed Analysis of IBA Rules to Guide Identification of Applicable Law

At one end of the scale are those tribunals that, for whatever reason, have determined that it was appropriate both to analyze the law applicable to attorney-client privileges and to use the IBA Rules to assist them in that task.

Apotex v. United States[146] is arguably one of the most detailed analyses, exploring privilege issues in a 19-page order. In that case, the tribunal made extensive and detailed reliance on the IBA Rules, making those guidelines (rather than a conflict of laws analysis) the primary basis for privilege assessment. The focus in that case was not upon the factors more generally, but on two core conceptions in the IBA rules, namely party expectations and maintaining fairness and equality among parties. *Apotex* rejected the use of national law for supplying the substantive standard for decisions of

145. In the classic Disney film, *Pirates of the Caribbean*, the "Pirate Code" is explained to be "more what you call 'guidelines,' than actual rules." *Pirates of the Caribbean: The Curse of the Black Pearl*, WIKIQUOTE, https://en.wikiquote.org/wiki/Pirates_of_the_Caribbean:_The_Curse_of_the_Black_Pearl [https://perma.cc/3VYD-5MPF] (emphasis omitted) (last visited Sept. 17, 2019).

146. Apotex Holdings Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs, (July 5, 2013), https://2009-2017.state.gov/documents/organization/214055.pdf [https://perma.cc/S236-KA640] [hereinafter Apotex v. USA].

privilege.[147] Instead, the tribunal focused on its authority and discretion granted by the IBA Rules.[148] Noting both parties used aspects of U.S. law to make arguments about the availability of privilege to a U.S.-based consultant working with U.S.-based external legal counsel for a Canadian client, the tribunal relied upon IBA Rule 9.3(c) and (e), with a particular focus on party expectation of privilege.[149] Although not expressly applying U.S. national law, the tribunal functionally applied U.S. privilege principles,[150] which many U.S. states follow,[151] through its analytical decision to focus on "the critical question" of "whether the principal purpose of the third-party communications was to provide for legal advice" from the attorneys to the clients.[152] Observing the primary focus of the communication with a third-party was in pursuit of legal advice for a client seeking regulatory advice on dealing with a U.S. government agency, the *Apotex* tribunal determined that the communications were privileged and not subject to waiver.[153]

Two other tribunals expressly used the IBA Rules in a unique way and shared unusual commonalities, namely both tribunals were adjudicating ITA disputes, used the IBA Rules to apply a standard the most protective privilege standard available, were chaired by the same Columbian arbitrator,[154] and ultimately identified that the applicable privilege derived from national law.

Namely, *Poštová banka v. Greece*, exhibited a strong reliance on the IBA Rules (and its commentary) to dictate the determination of the applicable law.[155] Although not as detailed in its reasoning as *Apotex*, *Poštová banka* used Article 9(3) to identify the applicable law of privilege, with a strong focus on party expectation and the need to ensure fairness and equality between the parties.[156] The tribunal made the effort to cite a specific portion of the Commentary on the IBA Rules, namely "that in such cases [involving questions about the scope of variations in attorney-client privilege] 'applying

147. *Id.* ¶ 14.

148. *Id.*

149. *Id*. ¶¶ 14, 20–21, 45.

150. *Id.* ¶¶ 33, 38, 40–42.

151. Many states follow the same type of common law elements regarding the creation of attorney-client privilege, as reflected by the *Ethics Restatement*. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 126, at §§ 68–93.

152. Apotex v. USA, *supra* note 146, at ¶ 32.

153. *Id.* ¶¶ 32–37.

154. *See infra* notes 155, 160.

155. Poštová banka, a.s. v. Hellenic Republic, ICSID Case No. ARB/13/8, Procedural Order No. 6, ¶¶ 2, 11–12, 14, 16 (July 20, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4051.pdf [https://perma.cc/2C7P-EBAB] [hereinafter Poštová banka v. Greece]. The president was Eduardo Zuleta. *Id.* at 1.

156. *Id.* ¶¶ 11–12.

different rules to the parties could create unfairness by shielding the documents of one party from production but not those of the other.'"[157] In one of the only two surveyed cases that applied the "most protective privilege" standard,[158] the tribunal opted to apply the national law that provided the broadest privilege and denied Greece's document requests.[159] While it would have been helpful to understand how the tribunal applied that privilege, *Poštová banka* was one of the more specific, analytical, and transparent analyses of applicable privilege.

The second case, *Blanco v. Mexico*, focused its analysis on the IBA Rules, namely Articles 9(2)(b), 9(3), and associated commentary.[160] Although a traditional conflicts analysis was absent, the tribunal thoughtfully explored the factors that were vetted by the international community and relevant to the substance of privilege. In an effort to avoid disclosure of information, the two U.S. citizen claimants objected to document production on grounds of both U.S. attorney-client privilege (and work-product) and Mexican confidentiality law.[161] The tribunal ultimately applied "the highest standards on protection" to both parties, namely the law of the United States.[162] When doing so, the tribunal focused on its concerns about party expectations[163] and the need to promote balance and, within a single arbitration, treat parties with fairness and equality of treatment.[164] Intriguingly, in applying the "US law" of attorney-client privilege, the tribunal failed to recognize that, within the

157. *Id.* ¶ 14 (citing Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 25).

158. *See supra* note 85 and accompanying text.

159. Poštová banka v. Greece, *supra* note 155, at ¶¶ 16–17.

160. Blanco v. United Mexican States, ICISD Case No. UNCT/17/1, Procedural Order No. 5, (Feb. 13, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9557.pdf [https://perma.cc/X9K7-3E8J] [hereinafter Blanco v. Mexico]. The chair of the tribunal was Dr. Eduardo Zuleta. *Id*. at 1.

161. *Id.* ¶¶ 5, 14–16.

162. *Id.* ¶ 19.

163. The tribunal noted the two U.S. nationals—Josh Nelson from Iowa and Jorge Blanco from Florida—were likely to have U.S.-based expectations about the nature of their relationship with their counsel, explaining that as "nationals of the United States of America . . . their expectations on privilege could have been formed by the approach to privilege prevailing in their home country. If that was the case, their expectations should not be frustrated." *Id.* ¶ 18; *see also id.* ¶ 19 (referring to claimants' expectation at the time the legal advice was provided).

164. The tribunal explained it was "concerned that applying different standards on the matters of privilege could affect the balance and equality of treatment of the Parties. Such difference in treatment could result, on the one hand, in Claimants not having to produce communications between them and their US legal counsel while Respondent, in a subsequent rounds of Claimants' document production requests, being obliged to produce communications with Mexican legal counsel; but on the other, could result in Claimants having to produce documents not subject to confidentiality in Mexico, but which production may result in violation of applicable US law. This would create a clear imbalance in the treatment of the Parties in these proceedings." *Id.* ¶ 17.

United States, attorney-client privilege is generally a matter of state law (rather than the law of a country as a whole) and contains variations in content and application. Rather than conducting its own analysis—or consulting the *Restatement on the Law Governing Lawyers*,[165] which compiles the general law in the U.S. on attorney-client privilege and confidentiality—the tribunal relied on submissions about the content of law from the claimants.[166]

2. Passing References to the IBA Rules to Guide Identification of Applicable Law

Other tribunals have likewise used the IBA Rules to guide their adjudicative power, but engaged in lighter substantive analysis.[167] It is possible that tribunals may be attempting to engage in cost effective decision-making for potentially non-dispositive issues.[168] Nevertheless, the loose analytical approach for such fundamental questions begs the question of whether tribunals use IBA guidelines as "legal cover" for intuitive decision-making, random outcomes, or the creation of a *lex mercatoria* of attorney-client privilege.

Some cases are particularly light in their use of the IBA Rules to address attorney-client privilege, including those cases that drop a footnote to refer to the Rules or make a passing reference to the Rules' existence.[169] In these cases, it is not necessarily clear how the IBA Rules have contributed to

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165. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 126, at §§ 68–93.

166. Blanco v. Mexico, *supra* note 160, at ¶ 20 n.4.

167. Other parts of this Essay also identify tribunals that make brief references to the IBA Rules but without material analysis of or reliance upon them. *See, e.g.*, *infra* notes 215–16, 222.

168. *See infra* note 268 and accompanying text.

169. *See, e.g.*, Bilcon v. Canada, *supra* note 139, at ¶¶ 18–20 (stating the IBA Rules were guidelines but acknowledging that Article 9.2(b) provides broad discretion and the applicable law in NAFTA and UNCITRAL Rules are otherwise silent on privilege); Vito Gallo v. Canada, *supra* note 140, at ¶¶ 38, 41 (noting the IBA Rules are applicable to the dispute and those Rules "leave it to the Arbitral Tribunal to determine the legal rules applicable to privilege"); Gramercy Funds Mgmt. LLC v. Republic of Peru, ICSID Case No. UNCT/18/2, Procedural Order No. 3, 6 (July 12, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9834.pdf [https://perma.cc/329S-LCQV] [hereinafter Gramercy v. Peru] (referring to IBA Rule Article 9.2 in a footnote); Lion Mexico Consol. LP v. United Mexican States, ICSID Case No. ARB(AF)/15/2, Procedural Order No. 6, 5 (Sept. 3, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9920_0.pdf [https://perma.cc/QAH5-W2T5] [hereinafter Lion Mexico v. Mexico]; Pawlowski AG & Projekt Sever s.r.o. v. Czech Republic, ICSID Case No. ARB/17/11, Procedural Order No. 2, 6 (Aug. 14, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9896.pdf [https://perma.cc/MRM5-HHLF] [hereinafter Pawlowski v. Czech Republic].

identifying the applicable law of attorney-client privilege.[170] Other cases, although still somewhat unclear as to how the IBA Rules have functioned, provide some detail about how those guidelines might apply in specific cases.

In *Philip Morris v. Australia*, the tribunal relied both upon its discretion under the UNCITRAL and IBA Rules as "a guideline" to justify its approach to privilege analysis—which involved rejecting reliance on existing ITA awards, ignoring standards from national law, and instead making its own determinations given "its own specific factual and legal circumstances" of the case and little else.[171] Stating that it had the discretion to determine the applicable law and assess what it "determines to be compelling," the tribunal simply commented favorably on each party's efforts at producing documents and then made privilege determinations on a document-by-document basis without further explanation.[172]

Tidewater v. Venezuela likewise used the IBA Rules to provide the guidelines for assessment of document production and exclusion.[173] The tribunal failed, however, to make a substantial decision as regards the applicable law of privilege or the application of any standards—whether from the IBA, national law, or conflicts of law—but the tribunal instead acknowledged that legal privilege may attach to communications soliciting legal advice and required the claimants "to prepare a schedule of all the documents . . . and the basis for the privilege claimed in respect of each."[174]

Eli Lilly v. Canada, however, simply explained that the IBA Rules of Evidence were applicable, initially in its Procedural Order No. 1[175] and later reiterated the use of procedures for making objections to disclosure on the

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170. Although not an attorney-client privilege case, *Biwater* cited the IBA Rules to bolster its assessment of privilege regarding state secrets. Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Procedural Order No. 2, 9 (May 24, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0088.pdf [https://perma.cc/VR5V-9R8T] [hereinafter Biwater v. Tanzania].

171. Philip Morris Asia Ltd. v. Commonwealth of Austl., PCA Case No. 2012-12, Procedural Order No. 12 Regarding the Parties' Privilege Claims, ¶¶ 4.4–4.10 (Nov. 14, 2014), https://www.pcacases.com/web/sendAttach/1483 [https://perma.cc/44AJ-E7U5] [hereinafter Philip Morris v. Australia]. The decision speaks generally of privilege, but not specifically about attorney-client privilege, solicitor-client privilege, or legal professional privilege.

172. The decisions on a document-by-document basis were made in a separate document (Annexes 1 and 2), which were not made publicly available. *Id.*

173. Tidewater Inc. v. Bolivarian Republic of Venez., ICSID Case No ARB/10/5, Procedural Order No. 1 on Production of Documents, ¶ 33 (Mar. 29, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0861.pdf [https://perma.cc/FF28-UFCY].

174. *Id.* ¶¶ 34–35.

175. Eli Lilly & Co. v. Gov't of Can., Case No. UNCT/14/2, Procedural Order No. 1, ¶¶ 7.2, 12.7 (May 26, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3212.pdf [https://perma.cc/3A6P-2N6X].

basis of privilege.[176] Unfortunately, the annexed Redfern schedules (identifying the specific areas of disclosure disagreement) were not made public and the bases for the tribunal's ultimate privilege assessment is unknown.[177]

One might wish that these tribunals were, perhaps, not so economical with their explanations as to how to identify the applicable law of privilege, the content of that law, and its application. What is available, however, offers a relatively important window into understanding how tribunals have been willing to use (or not use) the soft law guidance that is available to them in guiding their decisions.

C. International Legal Authority and Its Ambivalent Relationship with National Law

In an effort to ascertain the law of privilege, some tribunals have opted to develop an ad hoc "international law" law of privilege. Yet they do so using different methodologies. The variations reflect both tribunals' uneasy interaction with how the national law of privilege intersects with international arbitration and tribunals' failure to use conflicts methodologies to identify the applicable law. Particularly for ITA disputes,[178] public decisions contradict the suggestions of commentators that use of national law is the "standard"

176. Eli Lilly & Co. v. Gov't of Can., Case No. UNCT/14/2, Procedural Order No. 2, ¶¶ 3–4, 14(d) (Apr. 6, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7198.pdf [https://perma.cc/6YV4-APTL].

177. *See id.* ¶ 14(a) (indicating the Redfern schedules were part of the decision but failing to include them in the public document). As the tribunal spoke of privilege generally, it is possible that attorney-client privilege was not involved.

178. One commentator argues that "attorney-client privilege in all likelihood exists as a general procedural rule of public international law" and notes "there is significant authority supporting the view that attorney-client privilege has been accepted as a rule of procedure applicable to international arbitration"; but those observations fail to recognize that the majority of cases cited involve ITA (rather than commercial) cases, and this Essay discusses most of those decisions in greater detail. NATHAN D. O'MALLEY, RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE 291, 294 (2019). The creation of an international law rule requires evidence. In the case of attorney-client privilege, there is no applicable treaty or convention on point; there is insufficient evidence of custom given the relatively small and recent number of cases; and identification of a sufficient "general principles of law recognized by civilized nations" is problematic. *See* Statute of the International Court of Justice, art. 38(1) (1945). At best, the decisions (and academic commentary, such as the book written by the practitioner and this article by a professor) are "judicial decisions and the teachings"; but it is an open question as to whether those are from "the most highly qualified publicists of the various nations" and, in any event, they are a "subsidiary means for the determination of rules of law." *Id.* at art. 38(1)(d).

approach to resolving privilege issues in international arbitration.[179] The *Philip Morris* tribunal made this point bluntly, stating that "while the home rules of either Party might provide useful analogies, they cannot provide the basis for the tribunal's decision or can be otherwise determinative in the case."[180]

In doing so, these tribunals exhibited a somewhat ambivalent relationship with national law, primarily doing so in three different ways. A first set of cases essentially has created a free-floating, delocalized, self-declared content of attorney-client privilege. With three of the five decisions available from 2018 adopting the delocalized test from *Vito Gallo,* one might suggest that approach is the emerging norm,[181] although others might observe that

179. *See* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 118, 120–35 (2018), https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf [https://perma.cc/H3AB-BXRC] [hereinafter QUEEN MARY TASK FORCE] (discussing national law and noting "[m]ost commentators are of the view that the weight of authority and the better view is that domestic privileges should apply, rather than international standards" and "commentators have suggested that consensus exists regarding the factors to take account of in determining applicable national law that relies considerably on national law"); *see also* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, DRAFT REPORT FOR PUBLIC DISCUSSION OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, 93, 95–101 (2017), http://www.arbitration-icca.org/media/10/14053115930449/submission_version_for_public_comment_finalversion.pdf [https://perma.cc/5DMH-DH6R] ("As a practical matter, arbitrators often look to national rules and standards to determine the existence of a privilege, either as a category or as applied to particular documents. Many commentators are of the view that the weight of authority and the better view is that domestic privileges should apply, rather than international standards."); Berger, *supra* note 10, at 514–15 (discussing the "pragmatic consensus" to focus on national law); *supra* note 25 (discussing Gary Born's assessment of the use of the national law of privilege).

180. Philip Morris v. Australia, *supra* note 171, at ¶ 4.6; *see also* Biwater v. Tanzania, *supra* note 170, at 7–9 (refusing to use Tanzanian law, including its Constitution and Evidence Act, to create public interest immunity preventing disclosure); United Parcel Serv. of Am., Inc. v. Gov't of Can., ICSID Case No. UNCT/02/1, Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege, ¶ 7 (Oct. 8, 2004), https://www.italaw.com/sites/default/files/case-documents/italaw8434.pdf [https://perma.cc/3CXM-X7Y] [hereinafter UPS v. Canada] (determining the scope of Crown privilege, i.e. state secrets would not be resolved under Canadian or other national law but under the "law governing the Tribunal"). *But see infra* note 210 (discussing *UPS v. Canada* and noting the tribunal focused on case law from several common law jurisdictions to ascertain the scope of privilege). Although *Philip Morris* did not involve express assessment on attorney-client privilege, the tribunal used the IBA Rules to assess whether documents were privileged. Philip Morris v. Australia, *supra* note 171, at ¶¶ 4.4, 4.6; *see supra* notes 172–73.

181. Identification of reliable trends, however, is a quantitative statistical question that this Essay does not analyze. It is possible, as many awards analyzed in this Essay derive from ITA decisions that became public, that a case selection effect may overweight the impact of ITA privilege determinations that have become public or underweight decisions that are either non-public ITA decisions or ICA disputes. *See infra* note 182 (noting that *Vito Gallo* and the three 2018 decisions all involved the same presiding arbitrator).

Vito Gallo and the three 2018 decisions share the same chair.[182] Irrespective of the hesitation to use national law directly, tribunals sometimes might use national law to serve as another "guide" about how to independently divine the law applicable to privilege. This second group of decisions use what is essentially a comparative approach, by focusing upon commonalities of attorney-client privilege across different national cultures. A third minority methodology has involved a determination that the "international law" of attorney-client privilege requires reliance upon national law.

1. *Vito Gallo* and Progeny: Free Floating "International Law"

While many tribunals have expressed a straightforward declared preference for international law when ascertaining the applicable law of privilege, sadly those tribunals have not offered a clear indication of the source or content of that "international law" of privilege. Many of these cases, initially, were in the context of NAFTA.

Vito Gallo v. Canada is a classic case on privilege, serving as a core basis for reasoning in later tribunals, including *Bilcon*[183] and three others in 2018.[184] In *Vito Gallo*, the tribunal referred to legal authorities from Australia, Canada, England, and the United States; but it then quickly dispensed with these national authorities and failed to rely upon them. Instead, in a move akin to the infamous *Swift v. Tyson*[185] decision that opened the floodgates for creating a general federal common law that existed independently of state law and a Congressionally or constitutionally authorized mandate, the tribunal declared that there were four criteria for evaluating attorney-client privilege

182. Juan Fernández-Armesto, a Spanish national, was the presiding arbitrator in *Vito Gallo*. Vito Gallo v. Canada, *supra* note 140, at 1. He was also the presiding arbitrator in the three 2018 decisions. *See infra* notes 196, 202. This perhaps suggests that the decision may not be a function of international law but instead derives from having a particular presiding arbitrator. *See supra* notes 154, 155, 160 and accompanying text (noting that the only two tribunals applying the "most protective privilege" standard were also chaired by the same presiding arbitrator).

183. Bilcon v. Canada, *supra* note 139, at ¶¶ 21, 25–26. In *Bilcon*, the tribunal held that international law governed the resolution of the dispute, even though NAFTA is silent on privilege and the contours of any privilege-related right. *Id.* ¶¶ 17, 19. Rather, given parties' agreement that *Vito Gallo* should apply to the case, *Bilcon* used the reasoning from other NAFTA arbitration awards—which technically are not *de jure* precedent—to evaluate privilege. *Id.* ¶¶ 21, 25–26; *see also supra* notes 140–43 and accompanying text (noting the tribunal applied a legal standard reflecting party agreement).

184. *See infra* notes 198–205 (discussing three decisions referring to *Vito Gallo* to underpin the articulated standard of privilege).

185. 41 U.S. 1 (1842).

issues in international arbitration.[186] There is no indication from where these elements derive.[187] The tribunal's failure to explore conflict of laws or more clearly derive the legal authority for the identified criteria is noteworthy, as a tribunal member was a professor who wrote the leading Canadian work on conflicts.[188]

In *St. Marys v. Canada*, the tribunal outsourced the adjudication of privilege issues to a neutral third party.[189] The neutral (Justice James Spigelman) then used NAFTA caselaw—which had involved determination of the applicable law through party agreement, particularly *Bilcon*[190] and *Glamis Gold*[191]—and used those decisions to create factors to identify waiver of attorney-client privilege.[192] While the *St. Marys* decision was laudable in its effort to rigorously analyze the factors that it self-identified,[193] ultimately, the outcome was decided by one criteria, namely the "overriding interests of justice."[194] This emphasis on justice is similar in flavor to Judge Leflar's

186. The four criteria articulated by the tribunal for establishing privilege were: (1) the communication must be drafted by a lawyer acting in his or her capacity as lawyer; (2) an attorney-client relationship must exist between the lawyer and the client; (3) the communication must be for the purpose of obtaining or giving legal advice; and (4) both the lawyer and the client, in the giving and receiving of advice, must have acted in expectation that the advice would be kept confidential in a contentious situation. Vito Gallo v. Canada, *supra* note 140, at ¶ 47.

187. In identifying its four criteria—which are sensible from a common law perspective—the tribunal provided no authority for why "[i]n general, a document needs to meet [the four criteria] in order to be granted special protection under solicitor-client privilege." *Id.* One commentator attempted to resuscitate *Gallo*'s reasoning by claiming *post hoc* that these criteria line up under the *Bank for International Settlements* consolidated cases that will be discussed *infra* notes 210–11. O'MALLEY, *supra* note 178, at 294. But that author acknowledges that *Vito Gallo* added an extra element; and if it had been following the *Bank for International Settlements*, the tribunal could have easily cited it, particularly as the chair from *Vito Gallo* often includes footnote citations to cases to justify attorney-client privilege decisions. *See infra* notes 203–04. If *Bank for International Settlements* was the ratio driving the tribunal's decision, as a matter of legitimacy, integrity, and rule of law, it would have been beneficial to include that justification and reference.

188. J. G. CASTEL, CANADIAN CONFLICT OF LAWS (4th ed. 2002).

189. St. Marys VCNA L.L.C. v. Gov't of Can., Report on Inadvertent Disclosure of Privileged Documents (Dec. 27, 2012), http://www.naftaclaims.com/disputes/canada/stmarys/stmary-06.pdf [https://perma.cc/C3EK-4R3E] [hereinafter St. Marys v. Canada].

190. *See supra* notes 139–42, 184 (discussing *Bilcon* and noting that party agreement to international principles articulated by *Vito Gallo* formed the basis of the decision).

191. *See supra* notes 122–26; *infra* note 211 (discussing *Glamis Gold* and noting how party agreement to national principles formed the basis of the tribunal's determination and looking for common standards of privilege within the United States).

192. St. Marys v. Canada, *supra* note 189, at 13–14.

193. *Id.* at 14–16.

194. *Id.* at 16.

conflicts methodology for identifying applicable law, which requires analysis of the better law that does "[j]ustice in the individual case."[195]

In 2018, the *Gramercy* tribunal,[196] with a sharp nod to *Vito Gallo*, likewise articulated its own freestanding standard of attorney-client privilege, which was devoid of a connection to national law or conflicts analysis.[197] Rather than explaining how the tribunal identified the applicable standard, the tribunal announced a case-related privilege (to prevent disclosure), provided that four criteria[198] were established, namely: the document was created by or for a lawyer in connection with legal capacity, the relationship was based upon trust (i.e., which the tribunal stated covered in-house and external lawyers), the communication involved the purpose of giving or obtaining legal advice, and both counsel and clients acted "with the expectation that the advice would be kept confidential in a contentious situation."[199] There was also a separate privilege for documents prepared by a party or counsel in anticipation of either litigation or arbitration.[200] Given the nature of the decision, which set out the procedure for addressing privilege, there were no specific assessments of how the privilege might apply in the particular case.[201]

Other tribunals—namely *Lion Mexico* and *Pawlowski* that were chaired by the same arbitrator who presided over *Gramercy* and *Vito Gallo*[202]—took

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195. Leflar, *Choice Influencing Considerations*, *supra* note 23, at 296; *see also supra* notes 21, 23 (discussing Leflar's approach to "better law"); *infra* notes 267–69 (discussing Leflar); Joseph William Singer, *Pay No Attention to that Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659, 660 (2000) (arguing that "substantive justice should be a crucial factor in conflicts law, alongside considerations of multistate justice" which is assisted by the consideration of "better law"). Admittedly, neither the tribunal nor Judge Spigelman ever referred to Judge Leflar or a conflicts methodology for resolving the privilege issue.

196. Prof. Juan Fernández-Armesto was the presiding arbitrator in *Gramercy*. Gramercy v. Peru, *supra* note 169, at 1.

197. *Id.* ¶¶ 23–25. There was also a brief, but disconnected, reference to IBA Rules Art. 9.2. *See id.* at 6 n.5.

198. Shehata rightly notes that this test appears to be "heavily influenced by the standard of attorney-client privilege in common-law jurisdictions." Shehata, *supra* note 9, at 413. Interestingly, the arbitrators on the tribunal were composed of a Spanish (chair), a co-arbitrator from France, and a Canadian co-arbitrator who was trained in both civil and common law, which makes the preference for a more common law approach intriguing. *See* Gramercy v. Peru, *supra* note 169, at 1 (identifying the three arbitrators).

199. Gramercy v. Peru, *supra* note 169, at ¶ 24.

200. *Id.* ¶ 25. The procedural order also set out a standard for privilege involving settlement discussions. *Id.* ¶ 26.

201. Intriguingly, the tribunal took a unique approach and indicated that it would consider cost allocation in connection with document production, including the use and objection to privilege. *Id.* ¶¶ 49–50.

202. The common presiding arbitrator (or president) of all three 2018 panels—and the *Vito Gallo* tribunal—was Juan Fernández-Armesto. *See supra* notes 183, 197; *see also* Lion Mexico v. Mexico, *supra* note 169, at 1; Pawlowski v. Czech Republic, *supra* note 169, at 1.

a similar approach to privilege, using nearly identical language and a citation to *Vito Gallo*.[203] The one material difference was that both *Lion Mexico* and *Pawlowski* failed to provide a separate work-product-like protection for documents prepared in anticipation of adjudication.[204]

Vito Gallo and its progeny, by contrast, was more precise than *ACP Axos Capital*.[205] Without reference to any national or international standard (or another source, including academic commentary), the tribunal announced what was functionally the law of the case, namely that "legal advice provided by external legal counsel is covered by privilege and does not need to be justified"[206] and later clarified that "sending correspondence in copy to counsel does not suffice to create legal privilege. The document in question must contain legal advice or seek legal advice in order for privilege to attach to it."[207] While these insights map well with the established privilege law of common law nations,[208] the authority for or justification of these assessments

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203. There were minor textual variations among the three decisions in the scope and standards of attorney-client privilege, all pointing to *Gramercy* being slightly broader in scope. *Gramercy* and *Lion Mexico* both referred to documents "pertaining to the provision of legal advice" whereas *Pawlowski* only referred to documents "containing" legal advice. Lion Mexico v. Mexico, *supra* note 169, at ¶ 20; Pawlowski v. Czech Republic, *supra* note 169, at ¶ 22; Gramercy v. Peru, *supra* note 169, at ¶ 23. *Gramercy* had the broadest standard, referring to materials "drafted by a lawyer acting in his or her capacity as a lawyer, or addressed to a lawyer, seeking, discussing or concerning his or her legal advice." Gramercy v. Peru, *supra* note 169, at ¶ 24. In contrast, *Lion Mexico* omitted the terms "discussing or concerning" and focused solely on "seeking." Lion Mexico v. Mexico, *supra* note 169, at ¶ 21. *Pawlowski* excluded that material and only used the phrase "drafted by a lawyer acting in his or her capacity as lawyer." Pawlowski v. Czech Republic, *supra* note 169, at ¶ 23.

204. For *Lion Mexico*, the totality of the tribunal's analysis focused on attorney-client and settlement privileges. Lion Mexico v. Mexico, *supra* note 169, at ¶¶ 20–23. For *Pawlowski*, the entirety of the privilege law focused on attorney-client and settlement privileges. Pawlowski v. Czech Republic, *supra* note 169, at ¶¶ 22–25. There were separate provisions in both orders to address concerns regarding: either technical or commercial confidentiality and/or political or institutional sensitivity. Lion Mexico v. Mexico, *supra* note 169, ¶¶ 26–27; Pawlowski v. Czech Republic, *supra* note 169, at ¶¶ 29–34.

205. ACP Axos Capital GmbH v. Republic of Kos., ICSID Case No. ARB/15/22, Procedural Order No. 2 (Mar. 6, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8520.pdf [https://perma.cc/Q9RC-76GB].

206. *Id.* at 2.

207. ACP Axos Capital GmbH v. Republic of Kos., ICSID Case No. ARB/15/22, Procedural Order No. 3, ¶ 11 (July 5, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9221_0.pdf [https://perma.cc/6VK5-M6FR]; *see also id.* ¶¶ 18, 26–27.

208. *See supra* notes 15–20 and accompanying text (discussing various laws establishing the elements of privilege or confidentiality); *see also* Protiva v. Gov't of the Islamic Republic of Iran, IUSCT Case No. 316, Chamber Two, Award No. 566-316-2, ¶ 35 (July 14, 1995), https://jusmundi.com/en/document/decision/pdf/en-edgar-protiva-and-eric-protiva-v-the-government-of-the-islamic-republic-of-iran-award-award-no-566-316-2-friday-14th-july-1995

was lacking. While a practical solution for the case, one can only guess at the scope and applicability of the privilege.

2. Divining International Law Through Commonalities Across National Law

Vito Gallo and its progeny were not alone in a free-wheeling approach to identifying the law applicable to attorney-client privilege. Rather than creating a general international law disconnected from existing legal principals, other tribunals were more focused upon exploring and integrating direct conceptions from different national laws.

The cases in this category covered many different types of international arbitrations. First, in a set of consolidated disputes against the Bank of International Settlements at the Permanent Court of Arbitration, a procedural order from a U.S. law professor failed to conduct an express conflict of laws analysis. Instead, the order focused on how attorney-client privilege is "widely applied in domestic legal systems" and also "recognized in public international and international commercial arbitration rules and arbitral awards."[209] Focusing on "the core of the attorney-client privilege in both domestic and international law," the tribunal generally looked at principles of privilege that were common to various types of national laws on privilege with a focus on common law, and only cited one U.S. federal court decision as authority.[210]

There were also multiple ITA cases that took a comparative law approach to identify the law applicable to attorney-client privilege. *Glamis Gold*, an early ITA award addressing privilege, designed its own standard for defining U.S. privilege law, but which the parties had agreed was applicable. That tribunal's methodology then required ascertaining common principles of

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[https://perma.cc/2M4Q-C5HU] (stating that "under no rule of law known to the tribunal" is there a law protecting non-confidential information "because the attorney-client privilege protects only information an attorney has gained from his client in confidence").

209. Reineccius v. Bank for Int'l Settlements, PCA Case No. 2000-04, Procedural Order No. 6, 180 (June 11, 2002), http://legal.un.org/riaa/cases/vol_XXIII/169-182.pdf [https://perma.cc/HT84-8XYM].

210. *Id.*; *see also id.* at 180–82 (applying the privilege standard to the disputed disclosure requests); UPS v. Canada, *supra* note 180, at ¶¶ 7–13 (determining that the scope of Crown privilege by looking at case law from the United States, Australia, New Zealand, and Canada to identify the scope of privilege before concluding there was insufficient public interest to justify the existence of a privilege).

different states' approaches to privilege and applying those commonalities—but without directly applying the actual law of any single state.[211]

Caratube v. Kazakhstan is another intriguing ITA case where the tribunal demonstrated an ambivalent relationship with national law. In an unpublished decision (but discussed in the media), commentators reported that the *Caratube* tribunal simultaneously rejected the use of a specific national law to address privilege questions, but instead looked at multiple national laws (and other sources) as guidance.[212] *Caratube* purportedly rejected the Republic of Kazakhstan's request to apply the French law of attorney-client privilege to documents hacked from the government's computer network that were later published online. Even though ICSID hearings were held in Paris and the government's counsel was admitted to Paris bar, the *Caratube* tribunal held the Paris connections were irrelevant.[213] Instead, despite finding the parties' nationalities (namely U.S. claimants suing the state of Kazakhstan) of greater interest, the tribunal nevertheless focused on generally accepted principles of lawyer-client privilege. Specifically, the tribunal said that it would be guided by the IBA rules and, more importantly, principles common to French, U.S. and Kazakhstan laws which have a "close connection" to the case.[214] Ultimately, using this transnational standard that served as a functional hodge-podge of privilege law, the tribunal admitted the non-privileged hacked documents, but held attorney-client privilege existed for other documents involving attorney-client communications.[215]

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211. Glamis Gold v. USA, *supra* note 122, at ¶¶ 19–20; *see also* Apotex v. USA, *supra* note 146, at ¶¶ 32–33 (failing to apply any specific national law, but instead exploring the law of multiple common law jurisdictions to decide the scope and application of the attorney-client privilege).

212. Alison Ross, *Tribunal Rules on Admissibility of Hacked Kazakh Emails*, GLOBAL ARB. REV. (Sept. 22, 2015), http://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails [https://perma.cc/JQ96-4VSC]; Brigitta John, *Admissibility of Improperly Obtained Data as Evidence in International Arbitration Proceedings*, KLUWER ARB. BLOG (Sept. 28, 2016), http://kluwerarbitrationblog.com/2016/09/28/admissibility-of-improperly-obtained-data-as-evidence-in-international-arbitration-proceedings/ [https://perma.cc/MVM9-NHAB].

213. Ross, *supra* note 212.

214. *Id.*

215. In reaching this conclusion, the tribunal focused on neither party having argued about the applicable law of privilege waiver, instead exercising its discretion to find attorney-client privilege was retained because of the material's confidential nature and the entry into the public domain against the state's will. According to the news article, the tribunal focused on the "universal 'sanctity' of the lawyer-client legal privilege – held by the House of Lords to be stronger than the privilege attached to other confidential communications . . . [and] the European Court of Justice in the *Akzo Nobel* case, which called the protection of written communications between witness and client 'an essential corollary to the effective exercise of the rights of the defence.'" *Id.*

There have also been ICA disputes where, in attempting to resolve privilege questions, tribunals initially referenced national law but ultimately abandoned the exercise in favor of creating a privilege concepts that focused upon commonalities shared across legal cultures.

In a case reportedly before the Austrian Federal Economic Chamber, a tribunal focused on national law—but only the national law of civil law jurisdictions.[216] The case involved a distributorship dispute between two continental European parties. At issue were two letters written by the respondent's legal representative (a common-law-trained attorney) that the counsel had sent to its client. When the claimant attempted to submit those two letters into evidence—despite the lack of clarity about how the claimant had managed to secure access to the respondent's attorney-client correspondence—the tribunal refused to use any reference to common law principles of privilege. As reported, the tribunal's opinion instead suggested common law was irrelevant as there was "no connection to common law in this case other than that counsel of [the respondent] has been trained in a common law system."[217] Instead, in what appears to be a controversial choice,[218] the tribunal admitted the documents and decided not to apply the law of any specific country but relied on "general principles developed by civil law and in civil law arbitrations."[219]

In a second ICA dispute, *ICC Case No. 13176*, the tribunal similarly decided that the privilege "should be constructed according to the criteria prevailing in the civil law countries," but the tribunal used a different process. Rather than focusing on shared legal principles common to all parties, the tribunal instead focused upon factors such as the parties' nationality and the Paris seat of arbitration.[220] Ultimately, what all these cases share in common

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216. Meyer-Hauser & Sieber, *supra* note 89, at 169–71. Shehata, *supra* note 9, at 404, refers to this as a "Vienna Arbitration" and cites the Heitzmann article, *supra* note 93, as authority; a review of the Heitzmann article on page 236 n.81, however, refers back to the Meyer-Hauser and Sieber article. *See also* MÖCKESCH, *supra* note 13, at 222–23 (reporting on the case as it was reported by Heitzmann).

217. Meyer-Hauser & Sieber, *supra* note 89, at 170.

218. *See* MÖCKESCH, *supra* note 13, at 223 ("[T]his is not a clear-cut case in which the arbitral tribunal should have relied only on general principles.").

219. Meyer-Hauser & Sieber, *supra* note 89, at 170; Heitzmann, *supra* note 93, at 236.

220. Procedural Order in Case No. 13176 (ICC May 2006), *reported in* 25 INTERNATIONAL CHAMBER OF COMMERCE, SPECIAL SUPPLEMENT: PROCEDURAL DECISIONS IN ICC ARBITRATION 10–11 (2014), ¶ 16. Ultimately in that case, and without reference to a specific national law, the tribunal determined that the privilege had been waived because of subsequent disclosure of the document (containing portions of legal advice) to the European Commission and the Commission's subsequent failure to object to disclosure on the basis of legal professional privilege, meant that any privilege for the embedded advice from civil law lawyers from two different countries (i.e. respondent's state and Swiss lawyers) had been waived. *Id.* ¶¶ 17–24.

is the tribunals' willingness to look to common principles shared across national regimes deemed to be relevant to the decision and a utilization of those common standards to make attorney-client privilege determinations.

3. International Law as National Law

One tribunal took a rather unusual approach to identifying the applicable law of privilege. Rather than setting out the principles to guide their identification of the applicable law, *Cambodia Power* made a declaration which, in several respects, created a confusing interplay between national and international law. Specifically, the *Cambodia Power* tribunal stated, "that International Law governs the question of the admissibility of [a witness statement and in] applying International Law, the Tribunal finds that questions of impediment, privilege, agency, confidentiality and fiduciary duties . . . are governed by Californian law."[221] How the tribunal made that assessment that international law dictates the application of a national law remains somewhat mysterious. This minority position may largely be a function of the peculiarities of that case, as the tribunal repeatedly referred to exigencies affecting its deliberations on privilege,[222] suggesting the approach need not be followed by future tribunals.

D. The Sporadic Use of Pure National Law to Determine Privilege Issues

There have been a limited number of tribunals, both in ICA and ITA disputes, that expressly identified national law applied to resolve attorney-client privilege disputes. These cases were sporadic in the methodology used for ascertaining which national law applied and the content of the identified law.

Several cases that decided a national law of privilege applied were discussed earlier. Specifically, *Niko* permitted Canadian law to be applied to attorney-client privilege issues from an internal investigation in Canada due to implied party choice.[223] Meanwhile, two other tribunals did so, not via a

221. Cambodia Power Co. v. Kingdom of Cambodia, ICSID Case No. ARB/09/18, Amended Decision on the Claimant's Application to Exclude Mr. Lobit's Witness Statement and Derivative Evidence, 2 (Feb. 14, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw6348.pdf [https://perma.cc/7YHC-X4CH].

222. The tribunal indicated the decision was done "as a matter of urgency" and articulated concerns about "further delay." *Id.* The tribunal did, however, refer in passing to the IBA Rules of Evidence, as agreed by the parties, but without providing any explanation for how those rules influenced their assessment. *Id.*

223. *See supra* notes 127–36.

conflict of laws analysis, but through using the IBA rules.[224] In *Poštová banka*, Greece requested documents that reflected communications from the Slovak claimant's in-house counsel.[225] The tribunal focused on two potential applicable national laws, namely Slovak law or Greek law. In one of the more well-reasoned decisions that is publicly available, the tribunal noted that Greek law offered broader protection than Slovakian law for attorney-client privilege and in-house counsel[226] and primarily focused on the potential unfairness and imbalance from applying different legal standards within the same dispute.[227] Similarly, in *Blanco v. Mexico*, the tribunal applied the "US" law of attorney-client privilege after using the IBA Rules to address concerns about party equality of treatment, unfairness, and the need to protect the expectations of U.S. based parties who likely expected U.S. law to apply to attorney-client privilege.[228]

Pope & Talbott, one of the earliest NAFTA cases, also resolved an issue of attorney-client privilege by reference to national law. While the tribunal ultimately used Canadian domestic law exclusively and held the privilege applied, it failed to provide a conflict of laws analysis or otherwise explain its assessment.[229] This may partially explain why other tribunals have rejected the use of national law in the context of crown privilege and state secrets.[230]

Although they did not address issues of attorney-client privilege, one ITA tribunal did determine that national law applied to a disclosure dispute.[231]

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224. Poštová banka v. Greece, *supra* note 155, at 4, ¶ 1; *see also supra* notes 155–59 (discussing the tribunal's use of the IBA Rules).

225. *Id.* at 2–3, ¶¶ 5, 7.

226. *Id.* at 6, ¶¶ 13, 15.

227. *Id.* at 6, ¶ 16.

228. Blanco v. Mexico, *supra* note 160, at ¶¶ 18–20, 22.

229. Pope & Talbot Inc. v Gov't of Canada, NAFTA (UNCITRAL Rules), Decision on Crown Privilege and Solicitor-Client Privilege, ¶¶ 1.9–1.10 (Sept. 6, 2000), http://www.naftaclaims.com/disputes/canada/pope/pope-11.pdf [https://perma.cc/PK2W-P7BU].

230. *See* UPS v. Canada, *supra* note 180 (determining the law of Canada was not applicable to decide issues of crown privilege); Biwater v. Tanzania, *supra* note 170, at 8–9 (preventing the use of Tanzanian law to determine whether the state could withhold government documents from disclosure in arbitration). Although not in the context of attorney-client privilege, *Biwater* was particularly detailed about the international law implications. *Id.* at 8 ("[I]f a State were permitted to deploy its own national law in this way, it would, in effect, be avoiding its obligation to produce documents in so far as called upon to do so by this Tribunal . . . [and] stifle the evaluation of its own conduct and responsibility . . . this would be to undermine the well-established rule that no State may have recourse to its own internal law as a means of avoiding its international responsibilities." (citations omitted)).

231. Gionvanna A. Becarra et al. v. Argentine Republic, Procedural Order No. 3, Confidentiality Order, ¶¶ 41, 124–25 (Jan. 27, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0002.pdf [https://perma.cc/2WKQ-Y636]. After Argentina requested access to the Italian claimants' database that was maintained in Italy, the tribunal decided that the

Abaclat did so, however, in a way that lacked a solid explanation of why the Italian law applied. Given the importance the tribunal appeared to place upon Italian data protection law, however, a conflicts of law analysis would have been useful, as arguably the Italian domestic law (following principles required by the EU Data Protection Directive) could have been deemed a mandatory rule from which the tribunal could not deviate.[232]

Lest the light reference to national law be considered a byproduct of ITA disputes, it is important to remember both that *Niko* was a contract dispute and other ICA cases touched on national law briefly. While commentary and academic literature might suggest that a national law approach is standard,[233] extensive research on public materials unfortunately failed to reveal regular reference to national law or conflicts analysis. Specifically, there was only one identifiable case where the tribunal referred to national law and did so in a way that approximated a conflict of laws approach.

In *ICC Case 13054*, the tribunal had to decide whether two documents must be withdrawn from the arbitration because they were protected by attorney-client privilege.[234] In resolving the issue, the tribunal first attempted to use conflict of laws principles to identify the applicable law by searching for the country with the "closest connection" to the arbitration.[235] This was a quite rare (but laudatory) effort, as it provided clear rule-of-law based reasoning to the parties about the basis of the tribunal's legal assessment on a critical issue. In a move somewhat similar to the comparative law approach, the tribunal analyzed three different jurisdictions that might legitimately claim to have the "closest connection," namely England (the place where the document in dispute was created or the domicile of the lawyer), Switzerland

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disclosure question required assessment under national law as "the Claimants have the Italian nationality and that the online Database is established under Italian law, [and therefore] this issue is to be examined under Italian law." *Id.* ¶ 123; *see also id.* ¶ 72 ("[T]ransparency considerations may not prevail over the protection of information which is privileged and/or otherwise protected from disclosure under a Party's domestic law." (citing Christina Knahr & August Reinisch, *Transparency Versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise*, 6 LAW & PRAC. OF INT'L CTS. AND TRIBUNALS 97, 102 (2007))). In its interpretation of the EU Directive and Italian law, however, the tribunal nevertheless interpreted the law as permitting the transfer of data in this instance to Argentina. *Id.* ¶¶ 129–32.

232. *See, e.g.*, Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319 (1996) (explaining the application of mandatory rules). *But see* Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?*, 18 AM. REV. INT'L ARB. 103 (2007) (expressing some skepticism about the application of mandatory rules in international arbitration).

233. *See, e.g.*, QUEEN MARY TASK FORCE, *supra* note 179, at 95; *supra* note 25 (discussing commentary by Gary Born).

234. Procedural Order in Case No. 13054 (ICC 2006), *reported in* 25 INT'L CHAMBER OF COM., SPECIAL SUPPLEMENT: PROCEDURAL DECISIONS IN ICC ARBITRATION 14 (2014).

235. *Id.* ¶ 6.

(the place of arbitration), and Lebanon (the law governing the substance of the commercial dispute).[236] The tribunal determined that, irrespective of which national law it selected, all three countries would impose a privilege. Since all three countries would hold that a client seeking advice from an external lawyer would expect their communications to be privileged, the tribunal reasoned that, irrespective of which nation had the closest connection, all three national laws prevented disclosure of the privileged documents.[237]

E. The "Grab Bag": Bypassing Attorney-Client Privilege Analysis

While the preceding sections have focused upon more traditional conflicts-related ways to assess and identify the legal standards applicable to privilege, a final set of cases are more challenging to classify. At the more attractive end of the scale are cases where the tribunal used its traditional procedural powers to set up systems for determining whether to exclude or admit evidence when attorney-client issues have been raised—but without an explanation of *how* assessments are made. At the less attractive end are those cases which lacked an explanation. These tribunals share a common trait, namely they bypass questions about the substantive law applicable to privilege.

One common approach these tribunals used to address privilege issues was: a reliance upon their procedural authority and discretion to focus on mechanisms for process management to resolve attorney-client privilege questions. These tribunals created procedures in consultation with the parties or upon their own initiative.

Chagos Marine Protected Area addressed how tribunals can use party agreement on procedural mechanics to create an opportunity to make assessments on attorney-client privilege. Specifically, the UNCLOS tribunal at the PCA used the parties' agreed procedures for assessing privilege (and the acceptability of redactions) for issues of legal professional privilege and national security.[238] In that case, the United Kingdom submitted a pleading with various redactions, which caused Mauritius to raise concerns about improperly redacted materials; this led the tribunal to invite the U.K. to remove all redactions "'not strictly required on grounds of irrelevancy or

236. *Id.* ¶ 6.

237. *Id.* ¶ 10.

238. *In re* Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03 (UNCLOS), Award (Mar. 18, 2015), https://pca-cpa.org/en/cases/11/ [https://perma.cc/ML3H-4PD6].

legal professional privilege' and to indicate the basis for each redaction."[239] After submitting a revised pleading that maintained "a number of redactions 'principally on the grounds of legal professional privilege, relationships with third countries and national security,'"[240] Mauritius suggested, and the U.K. agreed, to having a document master review an unredacted document master to confirm non-disclosure was justified.[241] The tribunal then proposed, and the parties agreed to, having the presiding arbitrator make a preliminary review of unredacted documents at the British consulate on an *ex parte* basis.[242] The presiding arbitrator subsequently found each redaction was justified, but failed to offer either legal authority or rationale for the determination.[243] The tribunal's assessment ultimately provides little guidance about applicable legal standards that guided the decision.

While *Chagos* involved procedures created through party agreement, *Libananco v. Turkey* resolved attorney-client privilege issues without referring to substantive law via tribunal-created procedures.[244] In *Libananco*, Turkish criminal prosecutors had intercepted around 1,000–2,000 emails with claimants' external counsel in an ICSID case, and those emails involved attorney-client communications (including emails containing attachments that included claimants' draft memorials marked "privileged") that involved counsel's arbitration strategy and advice for the arbitration.[245] Although primarily focusing upon claimants' freedom to advance their case without interference by the Turkish government,[246] the tribunal acknowledged the importance of legal privilege and confidentiality.[247] It never identified the law applicable to privilege, however.[248] Instead, the tribunal opted for procedural

239. *Id.* ¶ 38.

240. *Id.* ¶ 40.

241. *Id.* ¶¶ 42–43.

242. *Id.* ¶¶ 47–48. The agreement also provided that unredacted versions may be reviewed "by the Tribunal as a whole, 'unless considered unnecessary in light of the Presiding Arbitrator's preliminary review.'" *Id.* ¶ 46.

243. The totality of the publicly available analysis was: "the Tribunal wrote to the Parties, confirming the President's finding that each redaction was justified and conveying the Tribunal's decision that the redacted passages should not be subject to disclosure" *Id.* ¶ 49. The April 22, 2014, letter referenced in the award is not publicly available.

244. Libananco Holdings Co. Ltd. v. Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (June 23, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf [https://perma.cc/PXV8-SPE5] [hereinafter Libananco v. Turkey].

245. *Id.* ¶¶ 19, 43, 72.

246. *Id.* ¶¶ 72–74, 77–81.

247. *Id.* ¶¶ 78–80 (discussing the basic principles impacting the tribunal and noting the "Tribunal attributes great importance to privilege and confidentiality").

248. The record does not reflect that claimants identified a specific law was applied to privilege. Rather they made general references to "privileged and confidential emails sent to and

mechanisms to address the problem, ordering Turkey to destroy all intercepted emails relating to the arbitration and requiring Turkey to ensure criminal investigators with access to the emails did not provide copies to or communicate the information from the intercepted emails with anyone defending Turkey in the arbitration. The tribunal also ordered that privileged material (or any information deriving from the privileged material) that was intercepted by the Turkish government would be excluded from evidence.[249]

Similarly, in *Ballentine v. Dominican Republic*, privilege issues only arose during the hearing.[250] The final question posed during the cross-examination of a claimant revealed that the claimants were receiving third-party funding.[251] When the Dominican Republic sought information about the funding, claimants responded the information was covered by attorney-client privilege.[252] Without an assessment of the applicable law or its application to third-party funding, the tribunal required claimants provide a copy of the funding agreement to the tribunal.[253] Upon receipt, tribunal members indicated they had no conflict of interest with the funder, and only required claimants disclose both the name of the funder and the date of the funding agreement.[254] In other words, a privilege conflict led to the tribunal making a procedural decision with substantive implications but without detailed explanation.

A final set of cases involves tribunals making attorney-client privilege assessments but without clarity on the legal justification. This "grab bag" approach is perhaps best exemplified by *Loewen*.[255] In that case, the tribunal held that attorney-client communications among the claimants were

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received from Claimant's counsel" and nearly "all of the emails accessed by Respondent were legally privileged." *Id.* ¶ 44; *see also id.* ¶ 72. This may be reasonable as, under the laws discussed in this Essay, the emails and attachments sent between attorneys and clients to prepare for and prosecute the arbitration would likely have been privileged and/or prevented from disclosure, whether under concepts of attorney-client privilege, work product protection, litigation privilege, and/or attorney-client confidentiality obligations from various common law and civil law traditions. *See, e.g.*, *supra* notes 13–20 and accompanying text (discussing various approaches to attorney-client confidences).

249. Libananco v. Turkey, *supra* note 244, at ¶ 82.

250. Ballentine v. Dominican Republic, CAFTA-DR (UNCITRAL Rules), PCA Case No. 2016-17, Procedural Order No. 16 (Oct. 2, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9984.pdf [https://perma.cc/H7QX-STM3].

251. *Id.* ¶ 3.

252. *Id.* ¶¶ 4–5.

253. *Id.* ¶¶ 6–7.

254. *Id.* ¶¶ 8–9.

255. Loewen Group Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (Jan. 5, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0469.pdf [https://perma.cc/5NBC-7YQ4] [hereinafter Loewen v. USA].

discoverable on the issue of duress.[256] There was, however, no indication in the public record explaining that assessment.[257] Other arbitration tribunals have made assessments of attorney-client privilege[258] or other privilege claims,[259] but the tribunal's justification for those determinations is unclear.

256. *Id.* ¶ 27 (discussing tribunal privilege assessment that granted disclosure requested by the United States in connection with the claimant's attorney-client communications).

257. One might theorize, to the extent that the claimants put duress at issue in pleading their primary case, perhaps this was part of the basis of the assessment. Without access to the tribunal's December 9, 1999, decision, it is impossible to say for certain. On July 12, 2019, that document was not available on ita.law.com, naftaclaims.com, ICSID, the United Nations policy hub, or even the U.S. Department of State website. *See Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3*, ICSID CASE DETAILS (2019), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/98/3 [https://perma.cc/E9PH-7CS3]; INVESTMENT POLICY HUB, *Investment Dispute Settlement Navigator, Known Treaty-Based ISDS Cases* (July 2019), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/24/loewen-v-usa [https://perma.cc/5QS2-6C6B]; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3*, ITALAW (2015), https://www.italaw.com/cases/632 [https://perma.cc/X8HC-475E]; NAFTA CLAIMS.COM, *Disputes with USA* (2013), http://www.naftaclaims.com/disputes-with-usa.html [https://perma.cc/3USB-MCJQ] (select "Loewen" hyperlink); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, https://2009-2017.state.gov/s/l/c3755.htm [https://perma.cc/46UP-QBXA]. The tribunal's failure to explain the assessment in the record and the challenge of locating the information may derive from the case being an early NAFTA dispute decided before transparency norms in ITA became more commonplace, perhaps suggesting that the tribunal did not anticipate a need to be more clear in its analytical reasoning. The *Loewen* tribunal had three arbitrators, one was a famous D.C. circuit judge and former University of Chicago professor (Abner Mikva), one was the former Chief Judge of the Australian Supreme Court (Sir Anthony Mason), and one had been Canada's ambassador to the United Nations (Yves Fortier), suggesting that these three individuals had the capacity to provide legal reasoning. Loewen v. USA, *supra* note 255, at 23.

258. In *CME v. Czech Republic*, the tribunal's award discussed its assessment of privilege—which forbade disclosure of claimants' "in-house or external legal advisors to the extent that such legal advice is related to legal proceedings or disputes"—in a procedural from June 3, 2002; but the underlying 2002 order is not publicly available for consideration. CME Czech Republic B.V. v. Czech Republic (Neth. v. Czech), UNCITRAL, Final Award, ¶ 64 (March 14, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf [https://perma.cc/67JD-LBLM]. One commentator suggested that attorney-client privilege was likewise assessed in *Methanex*. Shehata, *supra* note 9, at 407. Review of *Methanex*, however, reveals that the word "privilege" was only used once and that the tribunal's assessment of the admissibility of evidence was, instead, a function of whether the documents were illegally (perhaps even criminally) obtained. Methanex Corp. v. United States (Can. v. U.S.), ICSID (UNCITRAL Rules), Final Award of the Tribunal on Jurisdiction and Merits, Part II, Chapter 1, at 3, 23–29 (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf [https://perma.cc/7N3M-AGC6].

259. *See* Canfor Corp. v. United States, UNCITRAL, Procedural Order No. 5, ¶¶ 9, 19 (May 28, 2004), https://www.italaw.com/sites/default/files/case-documents/italaw8687.pdf [https://perma.cc/NL5Q-6QS2] (determining internal NAFTA negotiation history created by the U.S. was privileged as the "Tribunal accepts the Respondent's position and considers that the internal materials of an individual NAFTA Party established solely for that Party and not communicated to the other Parties").

Ultimately, this final category of cases is perhaps the most extreme in the "wild west" landscape of privilege decisions in international arbitration.

VI. THE WAY FORWARD: TOWARDS A CONFLICT OF LAWS APPROACH

The preceding sections have demonstrated serious legal gaps and methodological uncertainty in the law applicable to privilege. With institutional rules largely silent, often granting tribunals unfettered discretion without guiding principles, and failing to manage parties' expectations, privilege has been left to the "wild west" of adjudication. Likewise, national laws have failed to provide determinative guidance. Meanwhile party agreement is not standard practice. With the massive gap in clear and binding legal rules, it would hardly be surprising that, in practice, tribunals' own approaches to attorney-client privilege might run the gamut. The publicly available evidence about tribunals' exercise of discretion revealed, in reality, that there was a lack of a uniform approach and the decisions exhibited broad variance as to both *how* the applicable law was ascertained and *what* the applicable law ultimately was.

One might observe that each dispute (and privilege question) is unique, and in an *ad hoc* arbitration system with heterogeneous issues, the variation may be warranted. While an important and reasonable assessment, that observation overlooks a fundamental point, however. Namely, in the current historical moment, international arbitration must have a degree of care in how it provides basic adjudicative services. International arbitration is supposed to provide a clear framework for dispute settlement with procedural guidance on issues of fundamental importance. Privilege—as it can affect the nature of attorney-client relationships, public trust in lawyers and the arbitration process, and possibly the outcome—is material; and it requires further elucidation so that parties can have faith and trust in the dispute resolution process. With international arbitration's willingness to promote rule of law norms and enhance legitimacy in the spotlight, a more exacting focus is warranted for an issue that goes to the heart of public confidence in the transnational legal system.

As regards *how* tribunals ascertained the applicable law, the process remains, in many respects, mysterious and shrouded in a degree of confusion and inconsistency. Perhaps, by elucidating the process by which applicable law is ascertained, international arbitration can begin to improve its predictability and, at a minimum, offer enhanced clarity to stakeholders. Providing the underlying conflicts methodology—rather than cherry picking a result with minimal (or no) justification or permitting arbitrators to create (rather than apply) international law—could serve the purpose of both

identifying *what* is the applicable law and offering reasoning that explains variations from other tribunals. Put another way, a conflicts-based approach kills two birds with one stone.

The existing public decisions demonstrated that several tribunals applied general principles of law—with a focus on international law—when attempting to identify the scope of attorney-client privilege and its application to international arbitration. While this approach may have an initially intuitive appeal—as a transnational solution to a transnational problem—it nevertheless means that tribunals are solving legal privilege claims (that emanate from legal relationships created by national law) without reference to national law. This sidestep has serious downsides. First, it means that concepts grounded in national law—where there are broad variations—do not necessarily obtain the respect which stakeholders (particularly states) might reasonably expect and may raise concerns related to international comity. In addition, if arbitrators are unbound from actual law when making privilege decisions and relying on nebulous and self-defined international law standards, they risk being seen as shaping international law without the consent of states and otherwise upsetting parties' expectations.

Yet, the cases showed that some tribunals were intuitively engaging in a comparative law analysis, where they divined privilege by identifying commonalities of privilege principles from potentially interested states. This approach is somewhat less problematic. Where privilege considerations from those jurisdictions implicated by the contested item (i.e. a communication or document) are very similar, focusing on comparative commonalities can provide legitimacy to tribunals and simultaneously honor party expectations. Nevertheless, a comparative law approach is likely only effective when all relevant legal systems have similar privilege rules. The more likely alternative is, with wide variation in rules and the lack of a treaty on attorney-client privilege, some tribunals will engage in a "race to the top"[260] and apply the most protective privilege rules, while others might engage in a "race to the bottom."[261] Functionally, this means, that issues of international privilege exhibit some of the worst characteristics of the "wild west" of international dispute settlement.

Irrespective of whether tribunals are *de facto* creating their own international law standards for privilege or intuitively conducting a comparative law analysis, core problems remain. Aside from the potential

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260. *See supra* notes 155–164 and accompanying text (discussing *Poštová banka* and *Blanco*).

261. *See supra* note 20 and accompanying text (discussing *AM&S* and *Akzo*); *see also* Kuitkowski, *supra* note 8, at 95–99 (discussing the problems of a "most favoured" (i.e., a race to the top) or the "least favoured" (i.e., a race to the bottom) approach).

democracy deficit in such an approach, the wide variation risks upsetting parties' settled expectations, creating uncertainty in the scope of privilege, and otherwise creating an unpredictable dispute resolution process. Parties—be they states or private parties—need certainty about applicable privilege standards while organizing their communications, obtaining legal advice, and preparing for dispute settlement. If legal privilege is to serve its purpose of facilitating open and honest communication and creating high quality legal advice to serve the public, counsel and their clients must be able to predict which privilege rules arbitral tribunals are likely to apply, lest an uncertain privilege become practically the same as no privilege at all. While some might argue that establishing more specific guidance will undermine arbitration's flexibility (which is one of its main advantages), the importance of privilege predictability and legitimacy provides strong justification for enhanced precision.

The best course of conduct would be for parties to take matters into their own hands and expressly identify the privilege law(s) that may be applicable. To impose the "law of agreement" onto the "wild west" serves parties, counsel, and arbitrators. Irrespective of whether the agreement is expressly contained in a commercial contract or in an international treaty offering the right to arbitration, an express choice promotes expectation management and offers clarity. Alternatively, parties should use those arbitration institutions—such as the ICDR—that provide clarity, incorporating those institutional rules expressly to provide a rule for identifying the applicable law of privilege.

In the absence of party agreement, states should consider either modifying their national law or treaties to offer guidelines for the resolution of transnational privilege issues. While the position of South Africa's domestic *lex fori* rule could create absurd results in the international context,[262] there are reasonable alternatives. For example, one might imagine that countries might require (rather than permit) tribunals to use the guidelines promulgated in the IBA Rules on the Taking of Evidence for determining the appropriate law of privilege.

There is, however, inevitably some tension between hard rules and doing justice in the individual case.[263] Perhaps because of the wide variation in privilege law, international arbitration has eschewed making firm *ex ante* rules that might create odd or unjust results in the individual case. Yet the value of flexibility and *ad hoc* approaches is inevitably a question of degree.

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262. *See supra* note 71 and accompanying text.

263. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

Perhaps this is why others have also identified the time is ripe for a "privilege rethink."[264]

International arbitration is on the cusp of having a "Leflar moment" regarding attorney-client privilege where there is an opportunity for profound change. There is value in learning from the lessons of Judge Robert Leflar to create an alternative approach to resolving privilege-related conflicts.[265]

During the United States' "choice of law" revolution in the 1950s and 1960s, Professor Robert Leflar—who had been a sitting judge—wrote a groundbreaking article about how judges actually identify the applicable law. Historically, Judge Leflar explained, conflict of laws analysis amounted to a judicial "hide the ball" rule, whereby a legally exacting formalist model of identifying the applicable law became a tool of manipulation. By contrast, Judge Leflar posited that there were *real* factors affecting judicial decision-making, but those were being obscured by doctrinal concepts that judges manipulated to identify the applicable law. As he persuasively argued, over-reliance on mechanical rules served as "cover-ups for the real reasons that underlay the decisions."[266] To permit effective advocacy and reflect the actual rationale behind judicial decisions, Judge Leflar advocated for transparency in conflicts analysis to identify the applicable law, and permitting those genuine factors to form the basis of actual advocacy, argument, and decision-making. He therefore articulated the genuine factors that, in his view, reliably affected adjudicative decision-making and the ascertainment of applicable law. These five "choice influencing considerations" formed the real divination rod for identifying applicable law. Those factors were: predictability, interstate and international order, the

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264. *See* Douglas Thomson, *White & Case Partner Calls for Privilege Rethink*, GLOBAL ARB. REV. (Apr. 27, 2017), https://globalarbitrationreview.com/article/1140753/white-case-partner-calls-for-privilege-rethink [https://perma.cc/39M7-U8WA] (discussing keynote by Philip Capper where "Capper went on to call for consideration of rules on an additional area, telling his audience, 'We haven't fixed privilege.'"); Levin, *supra* note 14 ("I tend to very much agree with the eminent Phillip Capper that privilege is an area that needs more guidance in an international arbitration context.") (citation omitted); *see also* Reiser, *supra* note 10, at 653–54, 666, 675–78 (identifying the challenge of predictably identifying the applicable law of privilege when no uniform rules exist, noting a growing consensus of a need to address the problem, and arguing for the use of a default rule to fill the gap).

265. Other commentators have identified types of conflicts methods that tribunals might use. Michelle Sindler & Tina Wüstemann, *Privilege Across Borders in Arbitration: Multi-Jurisdictional Nightmare or Storm in a Teacup?*, 23 ASA BULL. 610, 613 (2005) (indicating a variety of different choice of law rules, many of which focus upon the law of the place—including the seat of arbitration or residency of the attorney or client—as well as general principles); Kuitkowski, *supra* note 8, at 72; *id.* at 91–92 (suggesting other conflicts analyses might involve the "closest connection" or "center of gravity" test). The commentators have, however, paid insufficient attention to the insights from Judge Leflar.

266. Leflar, *More on Choice-Influencing Considerations*, *supra* note 23, at 1581.

simplification of the judicial task, the forum's governmental interest, and the better law.[267]

International arbitration has a corollary problem to that identified by Judge Leflar. Rather than a problematic overly formalized approach, international arbitration is underly formal, lacking pre-articulated and clear legal rules to guide discretion. Nevertheless, the result of the void creates a similar mischief to the one that Leflar identified, namely the choice-of-law divination dilemma creates an opportunity for adjudicative manipulation and mismatched party expectations. This suggests that tribunals struggling with how best to identify the law applicable to privilege may find Leflar's conflicts analysis insightful. If tribunals are concerned about factors of predictability and party expectations in the creation of potential privilege, these factors can (and should) be melded into identifying the applicable law of legal privilege. Likewise, consideration of state interests—namely the interstate and international order that are fundamental to a successful and legitimate international arbitration system—could play a role in the identification of privilege law. From Leflar's perspective, simplification and streamlining analysis is also a potent consideration.[268] Meanwhile, to the extent that one decision has already used a Leflar-like approach to consider issues of justice,[269] other tribunals might usefully identify what law is preferable due to the transnational implications and party expectations at stake.

It is correct that the application of Leflar's factors may vary in the individual case—as these factors may weigh up differently depending upon the considerations of each heterogeneous dispute.[270] Yet providing clear,

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267. *Id.* at 1586–88; *see also supra* notes 21–23, 195 (discussing Leflar and "better law"). *Jepson* and *Milkovitch* are classic examples of Leflar analysis in practice. Jepson v. General Cas. Co. of Wisconsin, 513 N.W.2d 467 (Minn. 1994); Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973).

268. It is possible that tribunals may avoid issues of applicable law to save costs. To the extent that it takes time to have parties' brief, deliberate, and write an analysis in an order (or award) on conflicts of law detailing privilege determinations, there will inevitably be fiscal implications for counsel and tribunals (particularly arbitrators at ICSID or the LCIA, who work on an hourly rate). *See generally* FRANCK, *supra* note 83 (discussing time and costs). In any event, part of Leflar's insight from his "choice influencing considerations" was the identification that the simplification of the task is also a real criterion influencing the decision-making of adjudicators. *See supra* note 267.

269. *See supra* notes 189–95 (discussing *St. Marys* and its theoretical link to Leflar analysis).

270. While there is an inevitable risk of some unpredictability, predictability is a question of degree, as no prediction is perfect given risks of embedded error. *See* Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 520 (2015) (identifying factors that can affect error in predictions). Legitimacy, however, is fostered by promoting adjudication that fosters determinacy and coherence, which can in turn beget predictability. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration:*

direct *ex ante* standards to provide guidance on the process for helping parties to identify the applicable law injects a degree of predictability into dispute resolution. It also aids counsel to advocate on an effective and honest manner; and it permits tribunals to be transparent, candid, and clear about those factors that are the most fundamental to their adjudicative decisions, rather than glossing over the matter or engaging in intuitive adjudication. Providing such a structured framework, governed by Leflar's tried and tested principles, has the benefit of being tailored to *actual* factors affecting decision-making, rather than using approaches that may mask the outcome-determinative factors. Leflar's approach has the value of intellectual honesty that offers some constraints on adjudicative discretion while offering pre-existing factors to enhance clarity. While no solution will be perfect—particularly in the absence of a treaty or harmonization of national standards applicable to attorney-client interactions—providing some guidance around conflict of laws is an opportunity to re-insert legal norms into rules affecting a primary legal relationship, namely interactions between attorneys and their clients.

Ultimately, providing a set of standards that tribunals *must* use to guide their decisions should minimize unbridled discretion and offer a legally-based nudge (to parties, their counsel, and to arbitrators) about how to identify the law of attorney-client privilege. It also provides an opportunity *ex ante* for parties involved in transnational commercial activity to have some notice of the process by which adjudicators may evaluate their legal rights *ex post*. While infusing a conflict of laws approach inevitably injects a degree of flexibility to deal with unique considerations of specific disputes, it does so in a way that is grounded in clear standards with a historical pedigree. Particularly in an era of backlash against globalization and concerns as to international arbitration's unfettered discretion—for something as critical as the law applicable to privilege and client confidentiality—providing more clarity about the standards influencing privilege assessments is a fundamental step towards promoting rule of law values and ensuring that international arbitration serves its core purpose: providing a legitimate, enforceable, and sustainable dispute resolution process.

VII. CONCLUSION

There is not a regular, predictable methodology for resolving attorney-client privilege questions in international arbitration. When

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Privatizing Public International Law Through Inconsistent Decisions, 73 FORD. L. REV. 1521, 1584–86 (2005) (discussing indicators of legitimacy, including determinacy, coherence, and predictability).

tribunals are handed actual disputes, the legal vacuum has similarities to those navigating the unsettled territory of the "wild west." Yet, over time, even a lawless territory can gain a semblance of order and predictability, while retaining the flavor that comes from historical experience and culture. Given the prevalence of privilege disputes in international arbitration and the fundamental value of having trust in an attorney-client relationship, it is vital to find ways to move beyond the current model that prioritizes discretion and instead offer clearer, *ex ante* factors to help resolve questions of privilege.

As a thought experiment, this Essay has advocated for encouraging stakeholders to explore a conflicts-based approach. This first means—to the extent that parties have agreed expressly or impliedly (whether by incorporation of institutional rules or otherwise)—the party choice of applicable law should be honored. To the extent that states provide, either through national law or a treaty, a legal default to address the absence of party choice, that solution too respects a conflicts-based approach. Yet, when neither of those solutions is available, it becomes necessary for adjudicators to fill the void. In international arbitration, tribunals should look towards conflict of laws principles as their divination rod for resolving quandaries about the law applicable to attorney-client privilege. Choosing amongst applicable laws—rather than creating their own—is inherently a conflicts problem and requires a conflicts-based solution.

This Essay observes that, although the IBA Rules are an important tool for managing the conflicts challenge, they are not the exclusive instrument available. Rather, to guide tribunals in the process of selecting the applicable law, the Essay encourages tribunals to move beyond simple declarations about what law applies—whether national or international—to promote transparency norms and demonstrate how the results are derived. By benefitting from the insights of Judge Leflar, who encouraged the use of "choice influencing considerations" as a method for resolving conflicts, tribunals can gain pre-articulated, tried and tested factors to guide their divination of the applicable law of privilege. Leflar's factors, gained from his own experience as a judge, are designed to promote transparency, aid counsel in crafting arguments about real adjudicative influences (rather than theoretical or formative methods), and offer a clear set of pre-articulated principles to guide tribunal decision-making and promote rule of law.

As harmonized national laws, a treaty, or clear international law on the content of attorney-client privilege is unlikely in the foreseeable future, international arbitration should now strive to inject enhanced clarity and predictability into the process of ascertaining what law applies. What is part of the foreseeable future is the serious public focus upon and scrutiny of international arbitration that is scrutinizing whether arbitration can provide

value as a rule-of-law (rather than lawless) adjudication system. By shifting the resolution of privilege disputes towards a conflicts analysis and adding Leflar's insights, stakeholders can benefit from a methodology that retains the flexibility to address the unique needs of each dispute, focuses on the importance of predictability of party expectations about the confidentiality of communications with counsel, and comports with rule of law norms by offering grounded factors and transparent analysis. While there will inevitably be more work to do in flushing out how these preliminary ideas may work in practice, the larger point is to push forward the broader dialogue to find ways to ensure that assessment of privilege issues aids, rather than detracts from, the integrity of international arbitration.