

APPLYING PRIVILEGE IN INTERNATIONAL ARBITRATION: THE CASE FOR A UNIFORM RULE

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INTRODUCTION

The one clear thing about privilege in international arbitration is that nothing is clear at all. In an arena where arbitrators possess almost unlimited discretion and the major international arbitral institutions and bodies provide minimal guidance, predicting which privileges will be recognized and which will be rejected is as daunting as it is fruitless. Clearly arbitrators and arbitral institutions alike recognize the importance of such privileges.¹ Nonetheless, they grapple with precisely defining their application and depth.² This ambiguity gives rise to the enduring debate over arbitral discretion, as well as how and when to acquiesce with the parties' privilege expectations.³

In order to understand the dispute it is imperative to comprehend that, currently, no uniform rule exists to determine which privileges to recognize.⁴ This fact can prove particularly troublesome where the parties, their lawyers, and the arbitration forum all rely on different national laws and privilege rules.⁵ Mix in the possibility that the parties never anticipated arbitration, and consequently did not prepare accordingly, and you have cooked up a situation all too common to the international arbitration world.⁶ In

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¹ Javier Rubinstein & Britton Guerrina, *The Attorney-Client Privilege and International Arbitration*, 18 J. INT'L ARB. 587, 593 (2001).

² *Id.*

³ See Jose Alvarez, *Evidentiary Privileges in International Arbitration*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 663, 665 (2006).

⁴ Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion*, 22 ARB. INT'L 501, 506 (2006).

⁵ Patricia Shaughnessy, *Dealing with Privileges in International Commercial Arbitration*, 792 PLI/LIT 257, 259 (2009).

⁶ See William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, in 19 MEALEY'S INT'L ARB. REPORT. 1, 10 (2004) (adapted from Freshfields Lecture, London, December 2002) (Usually arbitration clauses will be "cut and paste" jobs by transaction lawyers. Parties rarely consider procedural or evidentiary issues when drafting such arbitration

the face of such a lack of rules or standards, one question remains pervasive and unanswerable: what is the best practice for determining which privileges to recognize?

This Note will answer that question by exploring the available means of resolving privilege disputes, with special attention to challenges of attorney-client privilege, and analyzing their practicality and value. Part I will discuss the background of privilege in international arbitration by addressing arbitral discretion, choice of procedural and substantive law, and the multitude of issues surrounding the recognition of privilege. Part II will identify the principles of party expectation and equality and discuss their importance in resolving the privilege problem. It will also set out the competing viewpoints on the practicality of a transnational standard. Finally, Part III will investigate the various approaches an arbitrator may adopt in resolving privilege issues by assessing their advantages and disadvantages. In addition, it will propose a solution that takes into account the significant arbitration principles. Ultimately, this Note proposes to implement a default rule that would apply in all arbitration proceedings in the absence of a specified contractual provision. This default rule will incentivize parties to specify what arbitration rules should apply in their contracts, ultimately reducing the arbitrariness and unpredictability that plague arbitral proceedings.

I. APPLICABLE LAW IN INTERNATIONAL ARBITRATION

A. *Understanding the Problem*

1. A Hypothetical

Consider the following scenario:

A United States multinational corporation is involved in arbitration in Germany against a Swiss multinational corporation. The United States corporation claims breach of a contractual agreement. The parties specify that English law should govern the contract. Each requests production of various documents, which include communications between management and in-house counsel, as well as notes prepared by employees in regard to legal advice with outside counsel.

agreements, and any agreement concerning procedure and evidence will often have to be made after the dispute has already arisen.); Shaughnessy, *supra* note 5, at 259.

How should the arbitrator proceed? Which substantive and procedural laws should govern the conflict? Which communications should the arbitrator protect and which should be produced?

Providing adequate answers to these questions is far from simple. Further, because legal privileges do not fit neatly into either category, an arbitrator may need to consider both procedural and substantive law in determining which communications to protect. In practice, the arbitrator has significant discretion to settle each of these issues.

2. The Role of the Arbitrator

In the absence of specific guidelines or requirements, the arbitrator alone is tasked with deciding which law to apply and which privileges to recognize.⁷ Without an express choice of substantive, procedural, or privilege law by the parties, the arbitrator is not required to apply national rules of civil procedure or evidence.⁸ Unlike courts at the seat of arbitration, an arbitral tribunal is not obligated to apply general conflict of laws rules as part of their *lex fori* because arbitral tribunals have no *lex fori*.⁹

Thus, an arbitrator's discretion is only limited by the public policy requirements of the law of the place of arbitration and the general requirements of fair and equal treatment.¹⁰ It is important that the arbitrator "balance the demand for promoting efficiency and controlling obstruction with the requirement of providing the right to be heard and equal treatment."¹¹ Parties often enter arbitration due to its advantages, such as speed, informality, and party autonomy;¹² accordingly, the arbitrator has the responsibility of preventing inefficient, delayed, and confusing proceedings.¹³

In regard to privilege, an arbitrator that keeps in mind the relevant policy considerations can select the most appropriate domestic laws to resolve a dispute. Under modern arbitration laws and

⁷ Berger, *supra* note 4, at 508; Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COMP. L. Q. 345, 368 (2001).

⁸ Alvarez, *supra* note 3, at 663.

⁹ Berger, *supra* note 4, at 507. See *supra* Part A.

¹⁰ Alvarez, *supra* note 3, at 663-64. Equal treatment is discussed in more depth in Part IIA, *infra*.

¹¹ Shaughnessy, *supra* note 5, at 260.

¹² Rubinstein & Guerrina, *supra* note 1, at 597.

¹³ Shaughnessy, *supra* note 5, at 264 (Fairness requires some degree of efficiency, since "justice too long delayed becomes justice denied."); William W. Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in PERSVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141, 144 (L. Mistelis & J. Lew, eds. 2006).

rules, once evidence is admitted the arbitrator should determine its relevance, materiality and weight before considering an applicable law.¹⁴ When it comes time to select the proper law, arbitrators are inclined to take a comparative approach.¹⁵ In theory, an arbitrator unconstrained by regulations can “pick and choose” the most appropriate rule to solve a particular privilege issue.¹⁶ However, the benefits to this approach are undercut by its inherent unpredictability and potential for unfairness.¹⁷ Thus, while it is true that flexibility may enhance the arbitrator’s performance,¹⁸ it is also possible that flexibility impedes what could be a more efficient and predictable system.¹⁹

B. Choice of Procedural Law

Unlike a judge, an arbitrator confronts the preliminary question of what procedural law to apply.²⁰ In judicial proceedings, procedural law, or *lex arbitri*, is governed by the law of the forum.²¹ In both judicial and arbitral proceedings, parties are free to contractually specify the applicable law.²² But where such an agreement is absent, the arbitrator must select the appropriate law.²³

In general, the arbitrator first attempts to discern the parties’ implied intent.²⁴ Where extraction of intent is impractical, several alternatives exist. The arbitrator can apply: the law of the seat of arbitration, the law most connected to the dispute, or procedural rules under general principles of procedure or international rules

¹⁴ Shaughnessy, *supra* note 5, at 264 (“If arbitrators may deem that submitted evidence is so irrelevant, unreliable, or lacking probative value that they can chose to disregard it, then surely they can also refuse to admit it.”).

¹⁵ Berger, *supra* note 4, at 508.

¹⁶ Shaughnessy, *supra* note 5, at 267.

¹⁷ See Park, *supra* note 13, at 146 (discussing equal treatment and the potential for biased decisions).

¹⁸ *Id.* at 149.

¹⁹ Park, *supra* note 6, at 3 (“[F]lexibility is not an unalloyed good; and arbitration’s malleability often comes at an unjustifiable cost.”).

²⁰ See Vitek Danilowicz, *Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT’L & COMP. L. REV. 235, 238 (1985-1986).

²¹ *Id.* at 238 (The law of the forum is otherwise known as the *lex fori*.).

²² *Id.* at 237.

²³ Alvarez, *supra* note 3, at 665. See also Danilowicz, *supra* note 22, at 251.

²⁴ Danilowicz, *supra* note 20, at 251 (“[W]hen the arbitration clause does not specify the *lex arbitri* or the place of arbitration, the *lex arbitri* has to be determined in conformity with the general principles of the conflict of laws, that is, in accordance with the implied will of the parties.”); Alain Hirsch, *The Place of Arbitration and the Lex Arbitri*, 34 ARB. J. 43, 44-45 (1979).

prepared by an international institution.²⁵ Choice of procedural law often requires a situation-specific examination, including what may be most suitable for the parties.²⁶

An arbitrator is also free to adopt the rules embodied by an international arbitration institution. These institutions promulgate codes on arbitration proceedings, including explicit guidelines on the choice of procedural and substantive law to be applied. For instance, the United States Commission on International Trade Law (“UNCITRAL”) promulgates rules for commercial arbitration in cooperation with the World Trade Organization. The Model Law on International Commercial Arbitration²⁷ provides that in the absence of party agreement on the procedure to be followed, all decisions are delegated to the arbitral tribunal to conduct the arbitration in the manner it deems “appropriate.”²⁸ Thus, the general consensus is that an arbitrator has significant discretion to determine the applicable procedural law.

In regard to the aforementioned hypothetical, if the parties supplied the procedural law in their contract, the arbitrator must comply with that specification. However, in the absence of a contractual clause and indication of the parties’ intent, the arbitrator will have to determine the appropriate procedural law. In practice, this is often the law of the seat of arbitration,²⁹ which in this circumstance is German law. However, other possibilities exist.

C. Choice of Substantive Law

An arbitrator must also select the substantive law to govern the arbitration proceeding. In choosing the substantive law, or *lex causae*, the presence of an arbitration clause specifying the applicable law will trump any arbitral decision.³⁰ However, in the absence

²⁵ Danilowicz, *supra* note 20, at 251-55.

²⁶ Alvarez, *supra* note 3, at 676-77. See generally Danilowicz, *supra* note 22.

²⁷ UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (2006).

²⁸ *Id.* at Art. 19(1), (2). Numerous other international institutions provide arbitral procedure. See, e.g., UNCITRAL ARBITRATION RULES (2010); THE RULES OF ARBITRATION, INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (2010); INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES CONVENTION, REGULATIONS AND RULES (2006). See also Bernard F. Meyer-Hauser & Philipp Sieber, *Attorney Secrecy v. Attorney-Client Privilege in International Commercial Arbitration*, 73 INT’L J. ARB. MEDIATION & DISPUTE MGMT. 148, 178 (2007); Rubinstein & Guerrina, *supra* note 1, at 592-93, for further discussion on the international arbitration rules available and the extent of their utility in practice.

²⁹ Alvarez, *supra* note 3, at 684.

³⁰ Danilowicz, *supra* note 20, at 238.

of such a clause, an arbitrator may rely on one of two approaches: he may apply the conflict of laws approach or choose the substantive law directly.³¹

In the first approach, the arbitrator must first choose a national system of conflict rules and then apply the substantive law following that system.³² Several options are available for determining which national system to apply: the rules of the seat of arbitration, the arbitrator's home state, the rules of the state which would have had jurisdiction in the absence of an arbitration clause, rules where the award will be enforced, and the rules of the state most closely connected to the dispute.³³ The Swiss Rules of International Arbitration³⁴ advocate a specific conflict of laws test. The Rules establish that in the absence of a choice of law provision, the tribunal shall decide the case "by applying the rules of law with which the dispute has the *closest connection*."³⁵

As to the second approach, the arbitrator may determine the law without resorting to conflict of laws rules, such as by applying the substantive rules of a national law it deems suitable.³⁶ Several of the international institutions support this discretionary approach to the choice of substantive law. For instance, the International Chamber of Commerce Rules of Arbitration³⁷ dictates that in the absence of party selection of the applicable rules of law, the arbitrator "shall apply the rules of law which it deems to be appropriate."³⁸ This is the same approach taken by the Arbitration Rules of the London Court of International Arbitration.³⁹

Due to the different methods of ascertaining the substantive law, the arbitrator's choice is often unpredictable.⁴⁰ In the posed scenario, the parties explicitly specified English law as the substan-

³¹ *Id.* at 258. See also, Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 402 (2002).

³² Danilowicz, *supra* note 20, at 258 (A judge need not consider the first step, selecting the national system, because a judge always applies the forum's conflict of laws rules.).

³³ *Id.* at 258-265.

³⁴ SWISS RULES OF INTERNATIONAL ARBITRATION (2006).

³⁵ *Id.* at Art. 33 (emphasis added). The "closest connection" test is an approach supported by many commentators as the appropriate test for deciding which rule of legal privilege to apply. See *infra*, Part II.

³⁶ See Rogers, *supra* note 33, at 402. See also Danilowicz, *supra* note 20, at 268-71.

³⁷ INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION (2008).

³⁸ *Id.* Art. 17(1).

³⁹ LONDON COURT OF INTERNATIONAL ARBITRATION, ARBITRATION RULES (1998). The rules state that in the absence of a choice of law provision to govern the merits of the dispute, the arbitrator may apply the law he deems most appropriate. *Id.* at Art. 22.3. The arbitrator may also order a party to produce copies of any documents in its possession. *Id.* at Art. 22.1(e).

⁴⁰ See Danilowicz, *supra* note 20, at 278.

tive law. However, if the clause had been absent from the contract, the arbitrator would be compelled to ascertain the appropriate law. For example, in determining a national system for a conflict of laws approach, the arbitrator could choose Germany, the seat of arbitration, or the United States, the place where the award will likely be sought.

D. *Choice of Law for Privileges*

Although arbitrators are generally dispensed from applying national rules of evidence or civil procedure, that does not mean the arbitrator can decide on a whim what privileges to protect.⁴¹ Most commentators agree that claims of privilege must be evaluated, largely due to the growing recognition that privileges are more than merely procedural in nature and, instead, are substantive.⁴² It cannot be said the parties waive their right to invoke privileges merely by entering arbitration.⁴³ To the contrary, privileges are extremely important to both parties, and both expect to retain them in any future dispute.

1. The Nature of Legal Privileges

Almost every legal system in the world recognizes some brand of privilege. Privileges are significant, as they often reflect the public policy of the legal system that created them.⁴⁴ Whether imposed judicially or by statute, “each privilege reflects a judgment that the social value of excluding evidence outweighs the influence such evidence may have in ascertaining truth in a particular case.”⁴⁵ Privileges vary considerably from country to country in substance, scope, breadth, and in ownership.⁴⁶ But no matter the variation, it is clear that a party uniformly expects that a privilege recognized in his country will be respected in any legal forum, whether at home or abroad.⁴⁷

⁴¹ Alvarez, *supra* note 3, at 676.

⁴² *Id.* at 676-77.

⁴³ *Id.* at 676.

⁴⁴ Mosk & Ginsburg, *supra* note 7, at 346.

⁴⁵ *Id.* at 346.

⁴⁶ *Id.*

⁴⁷ F. von Schlabrendorff & Sheppard, *Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution*, in GLOBAL REFLECTIONS IN INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 743, 765 (2005).

The true problem arises when these conflicting privileges converge. When one party's demand for documents is blocked by another party's objection, based on a claim of privilege, the arbitrator must decide whether to order production of the evidence or adhere to the asserted national privilege.⁴⁸ This inquiry is particularly complicated because privilege is categorized as neither substantive nor procedural, and because there are no established choice-of-law rules governing privileges in arbitral proceedings.⁴⁹ Consequently, international arbitration, by its nature, is constantly in a state of flux.⁵⁰

2. Is Privilege Procedural or Substantive?

On the one hand, the impact of any right to legal privilege in civil proceedings is procedural in that it limits the procedural possibilities for establishing truth.⁵¹ Moreover, legal privileges can have the effect of limiting discovery requests.⁵² Traditionally, if evidence rules are considered procedural in nature, the decision is within the scope of the arbitrators' discretionary power as "masters of their own procedure."⁵³ Questions of procedure are often determined through resort to the law of the place of arbitration.⁵⁴ Thus, if privileges are considered procedural, the tribunal need only grant privileges if the parties have agreed to a certain procedural law or if the procedural law of the forum compels their application.⁵⁵

On the other hand, although manifested in procedural law in certain jurisdictions because of their relation to evidence, privileges

⁴⁸ Shaughnessy, *supra* note 5, at 261 ("A party has the burden of proving the facts which support its claims and defences and without the necessary evidence, the party may lose on the particular claim or defence or even the entire case.").

⁴⁹ Berger, *supra* note 4, at 508; *see* Mosk & Ginsburg, *supra* note 7, at 345 ("There is very little authority addressing how international arbitrators should proceed when presented with a claim of privilege.").

⁵⁰ Shaughnessy, *supra* note 5, at 260.

⁵¹ F. von Schlabrendorff & Sheppard, *supra* note 47, at 764.

⁵² *Id.*

⁵³ *Id.* at 763.

⁵⁴ Alvarez, *supra* note 3, at 684 (However, the arbitrator is not necessarily compelled to adhere to the procedural law of the forum); Danilowicz, *supra* note 20, at 252 (Contrasting this practice with international judicial proceedings, whereby the law of the forum always governs procedure).

⁵⁵ Alvarez, *supra* note 3, at 684 (In most common law jurisdictions attorney-client privilege is grounded in professional ethics and thus implicates criminal sanctions. Thus, they are more likely to be considered procedural).

are arguably substantive in nature.⁵⁶ In practice, legal privileges affect party behavior outside the procedural setting.⁵⁷ Further, there are often public policy judgments that relate to the value of certain kinds of communications.⁵⁸ As indicated above, if privilege is determined to be substantive, the arbitrator must engage in a choice-of-law analysis.⁵⁹

Unfortunately, the international arbitration institutions fail to provide adequate guidance on legal privilege. For the most part, such institutional rules address largely general issues, such as appointment of arbitrators and basic requirements of filing,⁶⁰ as opposed to the less straightforward issues, like fact-finding and the proper methodology for applying legal privilege.⁶¹ Even those sets of rules that speak to privilege neglect to answer the real question. Perhaps the most useful source of authority is the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration.⁶² Article 9 provides that the arbitral tribunal may exclude from evidence any document due to "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal."⁶³ In considering issues of legal impediment or privilege, the tribunal may take into account: (1) the need to protect confidentiality in connection with obtaining legal advice, (2) settlement negotiations, (3) the expectations of the parties at the time of the legal impediment, and (4) the need to maintain fairness and equality between the parties.⁶⁴ Yet, even these rules fail to classify privilege as substantive or procedural or, in the alternative, advocate a certain approach to choosing a particular law to govern privilege.

Ultimately, there appears to be no consensus among practitioners, and often the question is answered by saying it is both pro-

⁵⁶ Berger, *supra* note 4, at 509 ("Focusing on the value of the relevant information or communication allows a substantive qualification irrespective of whether the privilege is a right of the client, as in common law, or a right of the attorney, as in civil law.").

⁵⁷ F. von Schlabrendorff & Sheppard, *supra* note 47, at 764; *see also* Meyer-Hauser & Sieber, *supra* note 28, at 168.

⁵⁸ Berger, *supra* note 4, at 509.

⁵⁹ *See infra* Section IA.

⁶⁰ Park, *supra* note 6, at 3.

⁶¹ *Id.*

⁶² INTERNATIONAL BAR ASSOCIATION ("IBA") RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010).

⁶³ *Id.* at Art. 9(2)(b).

⁶⁴ *Id.* at Art. 9(3)(a), (b), (c), and (d). *See* Meyer-Hauser & Sieber, *supra* note 28, at 181, for discussion of the rules' merits, as well as committee comments on the drafting of the rules.

cedural and substantive.⁶⁵ As the debate is unlikely to cease in the near future, it is futile to attempt to classify the nature of privileges in a general way.⁶⁶ Any realistic approach should focus more on the purpose of privileges and less on a technical and artificial qualification.⁶⁷

II. TOWARD A TRANSNATIONAL RULE

Crafting a realistic remedy to the problem of privilege requires understanding and incorporating several policy concerns that shape current international arbitration. A skilled arbitrator will take into account both parties' expectations upon entering arbitration and will balance their respective positions so he does not tip the scales in favor of one over the other.⁶⁸ Being mindful of these two interconnected values, and recognizing that there exists an unavoidable tradeoff between expectation and equality, is paramount to defining proper arbitral practice.⁶⁹

It is also important to consider what kind of solution is practical in the international context. At this time, no transnational standard exists. Therefore, the question is whether such a standard is appropriate and, if so, how to implement it without violating the competing concerns of party expectation and equality.

A. *Balancing Party Expectation and Equality*

A vital consideration in constructing a solution is how best, and to what extent, to comply with the parties' reasonable expectations.⁷⁰ Each party to a dispute has certain expectations upon entering arbitration. At the very least, each expects that privilege will continue to apply if a communication was privileged when it was

⁶⁵ Alvarez, *supra* note 3, at 683.

⁶⁶ Meyer-Hauser & Sieber, *supra* note 28, at 168.

⁶⁷ *Id.* (“[T]he question should be: what nature should evidentiary privileges have in international arbitration? How far should they be determined by the applicable procedural law, the law applicable to the substance of the dispute or any other law?”).

⁶⁸ See Craig Tevendale & Ula Cartwright-Finch, *Privilege in International Arbitration: Is It Time to Recognize the Consensus?* 26 J. INT'L ARB. 823, 828 (2009).

⁶⁹ *Id.* at 828.

⁷⁰ Gabrielle Kaufmann-Kohler & Phillippe Baertsch, *Discovery in International Arbitration: How Much Is Too Much?*, 2004 SchiedsVZ 13, 20. See also Berger, *supra* note 4, at 508; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1878-1922, 1891 (2004).

first made.⁷¹ Parties also expect that the same rules of privilege will apply to both parties, regardless of the forum of the dispute or the kind of dispute resolution procedure applied.⁷² If these expectations are not met, parties may express themselves less openly, or refrain from seeking legal advice at all.⁷³

These assumptions are elevated to the level of “legitimate expectation” by application of the principle of equal treatment,⁷⁴ otherwise known as “equality of arms.”⁷⁵ Equality of arms is one of the most fundamental requirements to which an arbitral tribunal must adhere when implementing procedural rules.⁷⁶ Indeed, each of the international codes discussed in Part I reference equality and fairness to parties in some respect. For instance, the UNCITRAL Arbitration Rules ordain that “the arbitral tribunal must guarantee that the parties are treated with equality,”⁷⁷ while the IBA Rules on the Taking of Evidence in International Arbitration specify that the tribunal may exclude evidence based on considerations of “fairness or equality of the [p]arties” that the tribunal deems “compelling.”⁷⁸

Clearly, applying equal treatment does not mean the parties need always be granted absolute equality in quantitative terms.⁷⁹ No two parties are equal in every respect.⁸⁰ One may have a greater burden of proof than the other, have more facts to establish, or need more witnesses.⁸¹ Parties may also possess different resources, legal representation, and legal rights.⁸² Arbitrators must

⁷¹ Tevendale & Finch, *supra* note 68, at 828. See generally Park, *supra* note 13, at 153.

⁷² Tevendale & Finch, *supra* note 68, at 828.

⁷³ *Id.* See also Park, *supra* note 6, at 15:

In considering parties’ expectations, the relevant time is contract signature, when neither side is informed about any specific litigation strategy. These expectations are quite different from postdispute inclinations to see virtue in whatever rules serve their strategic ends. In the latter case, during arbitration, lawyers’ procedural preferences will depend on what might be called the ‘ouch test’ in which a particular rule is objectionable if it hurts the client’s case.

⁷⁴ Tevendale & Finch, *supra* note 68, at 828 (defining equal treatment and a fair and reasonable opportunity for a party to present its case as “core arbitral principles”).

⁷⁵ F. von Schlabrendorff & Sheppard, *supra* note 47, at 766.

⁷⁶ *Id.* See also Berger, *supra* note 4, at 516 (noting guarantee of equal treatment and the right to be heard as the Magna Carta of arbitral procedure.).

⁷⁷ UNCITRAL ARBITRATION RULES (2010), *supra*, note 30, at Art. 15(1).

⁷⁸ INTERNATIONAL BAR ASSOCIATION RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, *supra* note 64, at Art. 9(2)(g).

⁷⁹ Shaughnessy, *supra* note 5, at 271.

⁸⁰ F. von Schlabrendorff & Sheppard, *supra* note 47, at 767.

⁸¹ Shaughnessy, *supra* note 5, at 271.

⁸² F. von Schlabrendorff & Sheppard, *supra* note 47, at 767.

be provided discretion to conduct proceedings,⁸³ since it is not their duty to correct natural inequalities.⁸⁴

In reality, completely acceding to the parties' expectations would hardly generate equality since there are innate differences between parties and the laws of their respective countries. The substance and scope of claims of privilege differ between nations, especially between those that adopt a common law approach and those that adopt a civil law approach. In common law countries, the attorney-client privilege protects all aspects of the relationship between the lawyer and the client.⁸⁵ In civil law countries, information given to the attorney is protected but information coming from him is not.⁸⁶ Consequently, the ability to waive the privilege is enjoyed by the client in common law countries and the attorney in civil law countries.⁸⁷

Consider the scenario in Part IA. In the United States, attorney-client privilege is available to in-house counsel, whereas in Switzerland, the privilege is available exclusively to outside counsel.⁸⁸ Accordingly, the United States corporation expects the communications with its in-house counsel will be privileged; the Swiss corporation does not. If the arbitrator allows the United States corporation to view the Swiss corporation's communications, but not the reverse, he will violate equality of arms in the most basic sense. The key to resolving this issue is striking a balance. Any practical solution to the privilege problem needs to factor in the parties' legitimate expectations without violating the principle of equality of arms.⁸⁹

⁸³ Shaughnessy, *supra* note 5, at 271.

⁸⁴ F. von Schlabrendorff & Sheppard, *supra* note 47, at 767.

⁸⁵ Alison M. Hill, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 *CASE W. RES. J. INT'L. L.* 145, 157-58 (1995).

⁸⁶ *Id.* at 158.

⁸⁷ Berger, *supra* note 4, at 503-04 (In common law countries the justification for attorney-client privilege centers on protecting the client from the comprehensive discovery rights, so the client holds the ability to waive. In civil law countries the concerns are different.). *See generally* Hill, *supra* note 85, at 158-59.

⁸⁸ Berger, *supra* note 4, at 504 (The legal situation in Europe is quite diverse. England follows the same rule as the United States. France, Sweden, and Italy align with Switzerland. And in countries like Belgium, Denmark, the Netherlands, and Spain, privilege extends to outside and in-house counsel).

⁸⁹ *Cf.* Alvarez, *supra* note 3, at 696 ("the successful development of any such rules will require movement away from the notion of the 'legitimate expectations' of a party based on its national rules of privilege towards the *common expectations of the parties* as to what constitutes fair treatment in an international arbitration.") (emphasis added).

It is clear that the options available to an arbitrator are numerous. Further, not only must he adopt a particular approach to handling claims of privilege; he must also be mindful not to tip the scales in favor of one party.⁹⁰ There is an unavoidable tradeoff between party expectation and equality of arms. Realistically, devising any solution will inevitably require discerning the proper balance.

B. *The Practicality of a Transnational Standard*

Given the difficult task of the arbitrator and the plethora of criticism surrounding the current system, it is unclear why something akin to a uniform standard has yet to be seriously considered. Arbitration has always been valued for its flexibility and ability to mitigate differences between domestic systems.⁹¹ Arbitrators are constantly faced with situations compelling them to reconcile conflicting standards of protection under different laws.⁹² Commentators argue that enabling any arbitral discretion leads to the “dark side of [arbitral] discretion,” whereby arbitrators are free to make up their own rules as they see fit, unconstrained by any pre-determined procedural canons.⁹³

Many commentators have long suggested that a global standard would remedy the arbitrariness in the application of privileges.⁹⁴ But this suggestion is often met with criticism, as critics respond with the proverbial, “if it ain’t broke, don’t fix it.”⁹⁵ In other words, if a need for more specific rules existed, wouldn’t the market have reacted by now?⁹⁶ Those wary of such an approach also note that any new system may potentially lead to arbitrariness itself.⁹⁷ Arguably, application of a domestic law of one of the parties, or any law for that matter, contravenes the notion of neutrality.⁹⁸

Critics also argue that flexibility is the key to international arbitration, and any set of rules may end up being too prescriptive

⁹⁰ See, e.g., *supra* notes 45-47.

⁹¹ *Id.* See also Tevendale & Finch, *supra* note 68, at 837.

⁹² Berger, *supra* note 4, at 513.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Park, *supra* note 6, at 9.

⁹⁶ *Id.*

⁹⁷ Berger, *supra* note 4, at 512.

⁹⁸ *Id.*

and damaging to the overall arbitral process.⁹⁹ The absence of precise procedural rules is said to allow creation of norms appropriate for each individual dispute.¹⁰⁰ As noted by Tevendale and Cartright-Finch, “[i]t would be a Herculean task to prepare specific but concise rules which could ever hope to cater for all the possibilities.”¹⁰¹ Creating detailed, harmonized privilege rules will most likely fail to address the myriad situations in which privilege may emerge and are thus unlikely to be workable in practice.¹⁰²

However, a transnational standard that does not impose burdensome or situation-specific rules on arbitrators can function to enhance party expectation and equality. Application of a uniform standard does not necessitate the creation of an exhaustive set of rules covering every possible scenario. Such a set of rules would hardly cater to party expectation and equality and would more likely be cookie cutter in nature.¹⁰³ Essentially, the less detail-heavy the transnational standard is, the more useful it will be in practice.¹⁰⁴

The growing consensus among practitioners and commentators is that some policy should be implemented to address these issues.¹⁰⁵ Commentators that support a uniform rule argue that flexibility and unbridled arbitral discretion are overrated.¹⁰⁶ The ad hoc imposition of procedure risks damaging an arbitrator’s legitimacy and puts the parties on unequal footing.¹⁰⁷ Parties enter arbitration with the shared expectation that they will be treated

⁹⁹ See generally, Tevendale & Finch, *supra* note 68, at 837. See Park, *supra* note 13, at 148 (“The prevailing orthodoxy . . . says that flexibility strengthens arbitration, and that arbitrators should have wide discretion to do what best fits each individual case.”).

¹⁰⁰ Park, *supra* note 6, at 3.

¹⁰¹ Tevendale & Finch, *supra* note 68, at 837 (“It should, however, at least be possible to identify the best options that are commonly agreed to be available.”).

¹⁰² Alvarez, *supra* note 3, at 696-97.

¹⁰³ See generally, Park, *supra* note 13 (Classifying two sets of procedural law: procedural “soft” law and procedural “hard” law. Soft law is defined as “non-national instruments,” which are guidelines set forth by non-governmental groups relating to evidence, ethics, and organization of arbitral proceedings. In contrast, hard law is imposed by arbitration statutes and treaties, as well any procedural framework adopted by parties through selection of pre-established arbitration rules.).

¹⁰⁴ See Park, *supra* note 6, at 7 (The starting point should be specific rules, not a blank page.).

¹⁰⁵ Tevendale & Finch, *supra* note 68, at 838. See Park, *supra* note 6, at 3 (Suggesting that arbitral institutions should adopt provisions with more precise procedural protocols that would serve as default rules for how arbitrators should conduct proceedings. These rules should cover questions of “documentary discovery, privilege, witness statements, order of memorials, allocation of hearing time, burden of proof and the extent of oral testimony.”).

¹⁰⁶ Park, *supra* note 13, at 153.

¹⁰⁷ Park, *supra* note 6, at 4.

fairly.¹⁰⁸ For Western parties, this is perhaps because an essential element of law is that similar cases should be treated similarly.¹⁰⁹ Law would hardly be law absent the objective of according similar treatment to parties in similar situations.¹¹⁰ A transnational rule achieves this goal by guaranteeing some level of predictability; it eases concerns about arbitrariness and puts parties on notice of at least a basic level of protection.¹¹¹

In reality, it is less likely that a pre-set rule will detract from the parties' sense of fairness than the absence of any rule at all.¹¹² The absence of fixed standards, while concededly less cumbersome in some instances, can generate feelings of unfairness.¹¹³ Accordingly, established norms that institute a customary method of handling issues reduces the risk that one party may perceive the arbitrator as favoring the other party.¹¹⁴ If equal treatment really is a goal of arbitration, it is difficult to argue that implementation of a standard which augments such equality is improper.

III. FORMULATING A PRACTICAL AND WORKABLE SOLUTION

The current setting of privilege in international arbitration is far from established. While some perceive this lack of clarity as a detriment, others accept the inherent flexibility of the system as merely part of the process.¹¹⁵ Indeed, both arguments have their merits. Yet, no matter whether one thinks a predetermined procedure, a relaxed free-for-all, or anything in between is the best practice, it is obvious that the arbitrator must ultimately adopt some approach to tackling claims of privileges. In practice, many options exist, and it is important to understand the nature of these options and the advantages and disadvantages they encompass.

If a transnational standard is to be imposed, one option must necessarily be chosen. It is imperative to consider how to imple-

¹⁰⁸ See Berger, *supra* note 4, at 516.

¹⁰⁹ Park, *supra* note 13, at 146.

¹¹⁰ *Id.* at 149.

¹¹¹ Alvarez notes that movement away from legitimate expectations toward "common expectations" is what constitutes fair treatment, and that this is necessary going forward in international arbitration. See Alvarez, *supra* note 3.

¹¹² *Id.* at 157. See also Park, *supra* note 6, at 8 (noting pre-set rules would increase each side's sense that procedural decisions were made in a principled fashion).

¹¹³ Alvarez, *supra* note 3, at 150.

¹¹⁴ *Id.*

¹¹⁵ Alvarez, *supra* note 3, at 695-96.

ment such an approach and the benefits and detriments of applying it to every dispute.

A. *Approaches Available to the Arbitrator*

While some of the available approaches to resolving privilege issues are impractical and would likely result in two disgruntled parties, others have substantial value and are significantly more functional in practice. The best approach will coincide with crucial arbitral considerations, namely: administrative ease,¹¹⁶ treating the parties equally,¹¹⁷ conforming to the parties' reasonable expectations upon entering arbitration,¹¹⁸ and providing parties with a predictable, as opposed to arbitrary, system of selecting the applicable privilege law.¹¹⁹ The following discussion examines the most commonly presented alternatives through a critical lens.

1. Substantive Law of the Contract

Written agreements between parties, whether entered into nationally or internationally, often specify a governing substantive law. Accordingly, applying the law of the contract to govern privileges may seem like an obvious solution to the privilege question.¹²⁰ Concededly, the parties did initially agree to the law and, thus, knew its prospective application was possible. Therefore, this option provides a simple, straightforward way of resolving the issue.

However, in practice, it is questionable whether the parties, when agreeing on a substantive law in their contract, gave any thought to the rules of privilege available under that country's law.¹²¹ It is often true that the parties and their lawyers do not pay a great deal of attention to arbitration details when contracts are drafted.¹²² Nor do they likely imagine the tribunal will select the

¹¹⁶ Tevendale & Finch, *supra* note 68, at 832.

¹¹⁷ *Id.* at 828. See also *supra* Part IIA.

¹¹⁸ Kaufmann-Kohler & Baertsch, *supra* note 70, at 20. See also Berger, *supra* note 4, at 508; Born, *supra* note 72, at 1891. See also *supra* Part IIA.

¹¹⁹ See Park, *supra* note 13, at 146.

¹²⁰ See Alvarez, *supra* note 3, at 684 (Noting issues of substantive law in international arbitration are resolved by application of the law of the contract, or in the absence of such, determined by the tribunal).

¹²¹ Berger, *supra* note 4, at 509 (Stating that an arbitrator will almost never take this approach). See also Meyer-Hauser & Sieber, *supra* note 28, at 184.

¹²² Park, *supra* note 6, at 7. See also, accompany text to Park, *supra* note 6.

substantive law to govern the application of privilege,¹²³ since privileges are perceived as much more personal in nature than other questions of procedural or substantive law.¹²⁴ Furthermore, privileges are not categorically substantive,¹²⁵ and thus application of the substantive law to privileges is arguably not expected.

In most cases, applying the law of the contract would violate the parties' legitimate expectations.¹²⁶ While a party might acknowledge that, for example, English law will apply substantively to a contract, that does not also mean they expect to forego their domestic privileges in favor of those of English law.¹²⁷ This is especially true where, for example, neither party is from England and is not familiar with English attorney-client privilege. Ultimately, there is a lack of connection between the substantive law of the contract and what law the parties may expect for the application of privilege.¹²⁸

2. Law of the Place of Arbitration

Another seemingly sensible suggestion is applying the domestic law of the place of arbitration. Since the law at the seat of arbitration often controls the procedural aspects of arbitration,¹²⁹ it is reasonable to conclude that it would also control the privilege issues. One advantage to this approach is that it requires an even-handed application of privilege – both parties will be subject to the same rule of law¹³⁰ – which is important to maintaining fairness and equality. Further, both parties may have agreed on the place of arbitration, and thus can be said to have anticipated the application of that law.

However, much like with the law of the contract, parties are unlikely to anticipate that by choosing a particular arbitration venue they would be sealing their privilege fates.¹³¹ Parties agree

¹²³ F. von Schlabrendorff & Sheppard, *supra* note 47, at 770. *See also* Alvarez, *supra* note 3, at 684.

¹²⁴ Alvarez, *supra* note 3, at 684.

¹²⁵ *See supra* Part ID2.

¹²⁶ Meyer-Hauser & Sieber, *supra* note 28, at 184 (“May choice of law clauses be interpreted to cover evidentiary privileges? In general not, because that would hardly be consistent with the parties’ intentions at the time of concluding the clause and would in most cases violate the parties’ legitimate expectations.”).

¹²⁷ *See* Alvarez, *supra* note 3, at 684.

¹²⁸ F. von Schlabrendorff & Sheppard, *supra* note 47, at 770.

¹²⁹ *See supra* Part IB.

¹³⁰ F. von Schlabrendorff & Sheppard, *supra* note 47, at 769.

¹³¹ Alvarez, *supra* note 3, at 684.

on a place of arbitration for many reasons,¹³² but the privilege laws of the country are unlikely to be one of them.¹³³ Moreover, this approach fails to take into consideration important substantive policy aspects of privilege.¹³⁴

Ultimately, the question is whether there is a link between the arbitral site and the communications between a lawyer and his client.¹³⁵ Oftentimes the answer will be that there is no link. If the application would cause shock to the parties and defy their reasonable expectations, the selected law is likely improper.

3. Law of the Place of the Professional Domicile of the Lawyer

Applying the law of the lawyer's professional domicile is both practical and valuable. Lawyers are clearly more familiar with the law of their home nation as opposed to the law of a foreign one.¹³⁶ From the perspective of predictability and conforming to the parties' expectations, this is perhaps one of the most rational approaches.¹³⁷ This option is also functional given concerns about adhering to national rules of professional ethics.¹³⁸ Lawyers are bound to comply with the ethical rules of the legal community where they were admitted to practice.¹³⁹ Legal ethics can create problems since the place of arbitration and the lawyer's respective home nations often impose different professional responsibility requirements on practitioners.¹⁴⁰ Applying the law of the professional domicile largely obviates this quandary. The lawyer will be

¹³² For example, neutrality, convenience, or applicable mandatory or non-mandatory procedural rules. F. von Schlabrendorff & Sheppard, *supra* note 47, at 769.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Born, *supra* note 70, at 1914.

¹³⁷ *Id.*

¹³⁸ See Michelle Sindler & Tina Wuestemann, *Privilege Across Borders in Arbitration: Multi-Jurisdictional Nightmare or Storm in A Teacup*, 23 ASA BULL. 610 (2005) (discussing the role of ethical and professional responsibility in regard to application of privilege standards). See also von Schlabrendorff & Sheppard, *supra* note 49, at 771.

¹³⁹ Sindler & Wusterman, *supra* note 138, at 13.

¹⁴⁰ See Rogers, *supra* note 31, at 354-58:

Attorneys show up believing that they are still bound by the ethical obligations imposed by their home jurisdictions, or at least they come with advocacy techniques and professional habits formed by practicing in accordance with those rules. The problem, of course, is that the ethical regulations of various countries are often significantly different, and when attorneys adhering to these different rules are thrust into the same proceedings, attorneys for one party may feel compelled to do what the attorneys for the opposing party feel prohibited from doing.

See generally, *id.*, for a discussion on the absence of uniform ethical rules in international arbitration and proposed solutions to the problem.

alert to issues of privilege, will prepare for arbitration accordingly, and will be able to assure his client that the communications will in fact be protected.¹⁴¹

However, there are two main problems with this approach. First, parties, particularly multinational corporations, may be represented by multiple attorneys who reside in different countries.¹⁴² The question then becomes: which attorney's law should apply?¹⁴³ Second, to fully reap the benefits of this approach, the arbitrator would have to apply the rule separately to each party.¹⁴⁴ In other words, each party would likely be subject to a different law of privilege since the lawyers are unlikely from the same country.¹⁴⁵ The result of this approach would be to treat the parties differently, which once again raises issues of equality and fairness.

4. Law of the Place Where the Document is Located or Created

Two other possible solutions are to apply the law of the country where the relevant document is located or the law of the country where such document was created.¹⁴⁶ Neither of these solutions is entirely realistic or appropriate. In regard to where the document is located, there may be no link between the place of storage and the transaction at issue.¹⁴⁷ Further, the location of the document may have no relation to the parties or the lawyers.¹⁴⁸ The place where the document was created arguably has closer ties to the dispute when compared with other approaches since it relates directly to where the claimed privilege began.¹⁴⁹ However, due to advances in modern technology, including the use of laptops and cellular phones, the place of production may be difficult to determine.¹⁵⁰

Additionally, both of these approaches assume all the evidence at issue is tangible, and neither suggests how to proceed if the evidence is intangible. If the arbitrator reads the doctrine more expansively, so as to include oral communication, such as that be-

¹⁴¹ Born, *supra* note 70, at 1914.

¹⁴² *Id.*

¹⁴³ *Id.* (Born suggests that of the senior attorney.).

¹⁴⁴ F. von Schlabrendorff & Sheppard, *supra* note 47, at 771.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 770.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ F. von Schlabrendorff & Sheppard, *supra* note 47, at 770.

tween a lawyer and client, the problem becomes even more complex. Communications are not “located” somewhere, nor is it simple to determine where they originated.

5. Closest Connection Test

Many commentators contend that in the absence of a choice of law by the parties, the arbitrator should apply the “closest connection test.”¹⁵¹ In essence, the test requires the tribunal to apply the law of the jurisdiction with which the document or communication is most closely connected.¹⁵² In reaching the decision, the arbitrator may consider several factors, such as the nature of the evidence, where it was created or occurred, and whether the parties expected a particular rule of privilege to apply to that specific communication.¹⁵³ Commentators suggest that this approach is most likely to give effect to the expectations of the parties.¹⁵⁴ It also has the advantage of being based upon legal privileges that will be familiar to international lawyers.¹⁵⁵ Finally, it has some potential support in the major international arbitral institutions, which advocate this approach in determining substantive law.¹⁵⁶

However, the closest connection test also has several shortcomings. First, a case-by-case examination will likely be burdensome for the arbitrator.¹⁵⁷ Second, unless the number of disputed documents is small, the approach will cause practical difficulties.¹⁵⁸ For one, it is likely there will be a number of different closest connections.¹⁵⁹ Different communications will vary in their origins and connections and, consequently, this approach may result in the application of multiple laws within a single arbitral proceeding.¹⁶⁰ Further, it can be difficult to determine which country a document

¹⁵¹ Berger, *supra* note 4, at 510-11 (This test is the approach used by international arbitrators when deciding applicable substantive law and in United States courts in diversity cases); *see also* F. von Schlabrendorff & Sheppard, *supra* note 47, at 768.

¹⁵² Berger, *supra* note 4, at 511.

¹⁵³ Tevendale & Finch, *supra* note 68, at 831.

¹⁵⁴ Alvarez, *supra* note 3, at 685. *See also* F. von Schlabrendorff & Sheppard, *supra* note 47, at 768. Ultimately, this analysis typically leads to the application of the law of the jurisdiction in which the attorney-client relationship was created. Tevendale & Finch, *supra* note 68, at 831.

¹⁵⁵ Alvarez, *supra* note 3, at 685.

¹⁵⁶ *See, e.g.*, SWISS RULES OF INTERNATIONAL ARBITRATION (2006); ROME CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (1980); AMERICAN LAW INSTITUTE’S RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

¹⁵⁷ Tevendale & Finch, *supra* note 68, at 832.

¹⁵⁸ *Id.*; Alvarez, *supra* note 3, at 685.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

is most closely connected to. For example, a phone call or an email is not reasonably connected to just one location. Finally, the parties will in almost all cases receive different treatment.¹⁶¹ If one party's evidence is most closely related to a law that is less protective than the law most closely connected to the other party's evidence, issues of fairness and equality will undeniably arise.¹⁶² Accordingly, it is likely that use of this approach will produce different results in marginally different situations, clearly running counter to the aim of predictability.¹⁶³

6. Least Favored Nation Approach

An alternative test available is the "least favored nation" approach. This approach requires the tribunal to assess the standards and privileges asserted, extract the law with the least protective standard, and apply it evenly to both parties.¹⁶⁴ As a consequence, application of this rule would tend to compel the admission of evidence.¹⁶⁵ The benefit of the approach is that both parties would receive the same treatment.¹⁶⁶ However, the disadvantages far outweigh the advantages. For one thing, counsel for the parties may be asked to sacrifice their ethical duties by participating in a process where they are unable to protect what they are bound to protect.¹⁶⁷ Further, the approach runs the risk of upsetting a party who would normally be entitled to broader privilege, which clearly runs counter to the party's expectations.¹⁶⁸

7. Most Favored Nation Approach

The companion to the "least favored nation" approach is the "most favored nation" approach, which requires the tribunal to apply the law with the most protective standard to both parties.¹⁶⁹

¹⁶¹ Tevendale & Finch, *supra* note 68, at 832. This will occur if one party's evidence is most closely related to a law that is less protective than the law most closely related to the other party's evidence. Alvarez, *supra* note 3, at 685.

¹⁶² Alvarez, *supra* note 3, at 685 (Thus, even if this approach is beneficial in that it gives effect to the parties' distinct expectations, it may inevitably result in unfairness. Tevendale & Finch note that while it may be true that *different* treatment does not necessarily equal *unequal* treatment, in practical terms it raises equality concerns.) See Tevendale & Finch, *supra* note 68, at 832.

¹⁶³ Tevendale & Finch, *supra* note 68, at 832.

¹⁶⁴ *Id.* at 834.

¹⁶⁵ Alvarez, *supra* note 3, at 686.

¹⁶⁶ See Tevendale & Finch, *supra* note 68, at 834.

¹⁶⁷ *Id.*

¹⁶⁸ Alvarez, *supra* note 3, at 686.

¹⁶⁹ *Id.*

The law applied is the law of the jurisdiction where the party has its residence, not the law where counsel is admitted to the Bar.¹⁷⁰ Thus, in the hypothetical posed in Part I, since the United States' standard of privilege is more protective than Switzerland's, the tribunal would allow the Swiss corporation to protect those documents that would be privileged under United States law. Moreover, if the law of one jurisdiction would prevent disclosure of evidence for ethical reasons, while the law of the other jurisdiction would not, such evidence would be immune from disclosure.¹⁷¹

The most favored nation approach has the benefit of meeting the parties' legitimate expectations, meaning there are no pro-disclosure surprises.¹⁷² A party can enter arbitration confident that it will not be asked to produce a document that would be privileged under its own laws.¹⁷³ This approach has the effect of leveling the playing field and protecting the parties' reliance interests. It also provides the essential ingredients of fairness and equality.¹⁷⁴ Accordingly, any difficulties encountered in trying to enforce the award will be avoided as much as possible.¹⁷⁵ Further, this approach has the benefit of discouraging forum shopping, unlike some of the other approaches.¹⁷⁶

There are a few drawbacks to adopting this approach. First, it raises the issue of whether a party which had no expectation of a stricter standard of privilege, and thus was not induced into making confidential communications because of such an expectation, should be able to claim the privilege.¹⁷⁷ Similarly, the argument can be made that a party who waived its privilege by subsequent conduct should not be able to rely on the privilege.¹⁷⁸ An equally legitimate fear is that this approach may favor the exclusion of relevant and important evidence.¹⁷⁹ Therefore, adopting this approach could prove problematic since the tribunal has a duty to

¹⁷⁰ Berger, *supra* note 4, at 518.

¹⁷¹ Rubinstein & Guerrina, *supra* note 1, at 598-99.

¹⁷² *Id.* at 599 (It might be more accurate to say the party with the lower standard of privilege has "reasonable aspirations" instead of "legitimate expectations."); Tevendale & Finch, *supra* note 68, at 834.

¹⁷³ *Id.* (However, a party from a jurisdiction with very low protection cannot be said to have had a legitimate expectation that its documents would be protected in a way it did not expect.).

¹⁷⁴ F. von Schlabrendorff & Sheppard, *supra* note 47, at 771.

¹⁷⁵ *Id.*

¹⁷⁶ Berger, *supra* note 4, at 518.

¹⁷⁷ Shaughnessy, *supra* note 5, at 278.

¹⁷⁸ *Id.*

¹⁷⁹ Alvarez, *supra* note 3, at 686 (Suggesting that in order to offset this concern, the tribunal should adopt a healthy degree of skepticism when considering privilege claims.).

establish all the facts of a case and allow the parties a fair opportunity to present their case.¹⁸⁰

B. *Crafting a Solution*

The most practical solution to the application of privilege is the adoption of a transnational standard. In order to best comply with party expectations and equality, a default rule should apply in the absence of a contractual party agreement to the choice of privilege law. Such a rule integrates policy considerations while remedying many of the problems inherent in international arbitration. Not only will a default rule maintain the values of arbitration, it will improve the arbitration process.

1. Application of a Default Rule

In the absence of a contractual provision stipulating the law to be applied for privileges, a pre-set default rule would govern the contract and any forthcoming proceedings. Such a default rule encapsulates the benefits of a transnational standard while also adhering to the parties' expectations.

Generally, parties expect (perhaps in error) that their privileges will be protected in international arbitration. If the parties know they will be forced to arbitrate under a certain law that may weaken or call into question these privileges, they may be persuaded to draft a clause to safeguard their communications. If parties took time to discuss the possible approaches to privilege rules and agreed to a confidentiality standard, the problems associated with defining privilege would be largely eradicated.¹⁸¹ This is because a party agreement on the rules to be applied in arbitration is binding upon the arbitral tribunal¹⁸² and prevails over non-mandatory international arbitration rules or statutory provisions.¹⁸³

¹⁸⁰ *Id.* (“When a party has been given a privilege which it didn’t have or expect, it may well mean that the evidence is excluded while the same material is freely disclosed outside of the arbitration.”). Shaughnessy, *supra* note 5, at 278.

¹⁸¹ Meyer-Hauser & Sieber, *supra* note 28, at 183. Meyer-Hauser & Sieber note that this practice may be contrary to the civil law principle of *iura novit curia*, but that such practice can be justified on arbitration’s inherent flexibility. See also John Uff, *Predictability in International Arbitration*, in *INTERNATIONAL COMMERCIAL ARBITRATION: PRACTICAL PERSPECTIVES* 151, 151 (2001) (stressing that since predictability trumps flexibility, fundamental procedural decisions should be made at the time the contract is concluded).

¹⁸² Meyer-Hauser & Sieber, *supra* note 28, at 183.

¹⁸³ *Id.*

Ultimately, application of a default rule would not only enhance arbitral proceedings, but incentivize the parties as well. In other words, with knowledge that a certain rule will apply in the absence of a contractual provision, the parties will be encouraged to contract around the rule and devise their own standard.

A counterargument to this assertion is that parties rarely take advantage of their inherent power to designate the applicable law,¹⁸⁴ whether due to lack of anticipation of forthcoming arbitration, laziness, fear of conflict, or some other rationale.¹⁸⁵ Further, the lawyers who write contracts are often unaware of the procedural mishaps that may occur or how their arbitration clauses will be interpreted.¹⁸⁶ Thus, critics argue that it is unclear whether the application of a default rule would really change anything.

However, the purpose of the rule is to provide a safeguard against arbitrary decision-making and to protect reasonable expectations. In application, the rule provides clear notice, meaning at the time of contracting the signing parties know what law will apply. Therefore, parties who ignore this warning do so at their own expense, and will not be afforded any sympathy for asserted “lack of knowledge” during the arbitration process.

Of course there will always be initial drawbacks caused by the shift to a new rule. The application of a default rule requires lawyers to learn something new.¹⁸⁷ In addition, bargaining about the rules may add costs during contract negotiations and parties might be counseled against arbitration.¹⁸⁸ Further, even if the parties consider privileges, a consensus can be difficult to reach.¹⁸⁹ In practice the parties might be unable to agree on a single law and, even if they did, they would likely apply the law of a third country.¹⁹⁰

Ultimately, the question is not whether costs will be incurred, but whether the return on the investment outweighs the potential drawbacks.¹⁹¹ It is true that parties may be unwilling to spend too much time discussing arbitration rules due to the risk of extra billable hours.¹⁹² However, the alternative to negotiating during con-

¹⁸⁴ Danilowicz, *supra* note 20, at 237.

¹⁸⁵ See Shaughnessy, *supra* note 5, at 279. See also Park, *supra* note 6, at 10.

¹⁸⁶ Park, *supra* note 6, at 10.

¹⁸⁷ *Id.* (Park terms this a shift from “procedure light” to “procedure heavy.”).

¹⁸⁸ *Id.* at 10.

¹⁸⁹ Meyer-Hauser & Sieber, *supra* note 28, at 183.

¹⁹⁰ *Id.*

¹⁹¹ Park, *supra* note 6, at 10.

¹⁹² *Id.*

tract proceedings is the incursion of hundreds of billable hours to fight procedural arguments during later litigation.¹⁹³ A carefully drafted arbitration clause allows parties to take full advantage of the benefits of international arbitration, while providing a quick and easy way to resolve privilege disputes.¹⁹⁴ And in the absence of party negotiation, parties will at least know which approach the arbitrator will apply as a default.

2. Incorporation of the Most Favored National Approach

The most practical and suitable choice for a default rule is the most favored nation approach. Thus, in the absence of a contractual clause agreed upon by the parties, the arbitrator would apply the law of the most favored nation. In other words, the arbitrator would examine both parties' domestic laws and determine which has the stricter standard of privilege. This privilege would then apply evenly to both parties' communications with their attorneys, regardless of whether one party would not normally enjoy that level of protection.

It is imperative to adhere to the twin aims of upholding party expectation and applying equality of arms. The clear advantage of the most favored nation approach is that it meets both of these goals. The parties benefit from assured protection of most of their reliance interests and legitimate expectations.¹⁹⁵ At the very least, a party is assured it will never be compelled to produce information that is privileged under its own laws.¹⁹⁶ This approach also fulfills the tribunal's duty to treat both parties equally and fairly by applying the same standard to both parties and treating similar pieces of evidence the same.¹⁹⁷

Clearly, adoption of the Most Favored Nation approach will not completely comply with each party's expectations upon entering arbitration. A Swiss party likely expects to obtain certain attorney-client communications from its United States counterpart. Application of the most favored nation approach may bar production of such communications, so in practice its expectations are not wholly satisfied. Consequently, application of the approach requires the parties to renounce some of their expectations in favor

¹⁹³ *Id.*

¹⁹⁴ Danilowicz, *supra* note 20, at 237 ("The parties can get on to the 'important' parts of their negotiations and avoid haggling over details of the proceeding which they believe will never occur.").

¹⁹⁵ Park, *supra* note 6, at 10. See also *supra* Part IIA.

¹⁹⁶ Berger, *supra* note 4, at 518.

¹⁹⁷ Tevendale & Finch, *supra* note 68, at 834.

of equality. This tradeoff is necessary in order to provide the parties with the highest possible degree of fairness at the least possible cost.

Of course any remedy will have its downsides, but adoption of the most favored nation approach as a default standard is a simple solution that promotes compliance with party expectations without sacrificing equality of arms. This model also reduces the unpredictability of international arbitration – one of the prevailing criticisms of current arbitral discretion. Parties will be aware of the default rule before entering into contracts with arbitration clauses. Cognizant that a certain law will apply, they can be confident they will not sacrifice important privilege ideals. In the alternative, they can bargain with one another for an alternate law or method to settle privilege disputes. Either way, the result is twofold: more structure and safeguards and less confusion and arbitrariness.

CONCLUSION

The appropriate method for applying privileges in international arbitration is a thorny, widely debated topic. Privilege is a significant consideration in any dispute. It is particularly troublesome in international arbitration where the arbitrator has almost unlimited discretion to determine which communications and documents are protected and which must be produced.

At present, there is no articulation of mandatory guidelines to which arbitrators must adhere. Although some commentators argue that the current system is sufficient, given the need for flexibility in arbitral proceedings, these arguments are undermined by the confusing and often unfair nature of the process.

Accordingly, most commentators agree that a uniform standard is appropriate at this time. Upon examination of the available choices and the weighing of their advantages and disadvantages, a default rule is the most practical way to adhere to the twin concerns of party expectation and equality. The most viable and functional approach is the most favored nation standard, which should be applied in the absence of a contrary contractual privilege provision. This approach augments predictability while reducing confusion, and, in the process, complies with the parties' expectations and notions of equality.