Title:

Table of Contents:
Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law
   III. The Arbitrator’s Role in Resolving Discovery Disputes
       6. Privilege

Content:

Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law

[...]

III. The Arbitrator’s Role in Resolving Discovery Disputes

[...]

6. Privilege

[...]

Although arbitral rules generally do not explicitly contemplate evidentiary privileges, most national legal systems recognize some privileges. Indeed, certain privileges are so well established that they may be considered general principles of law or transnational public policy.78 As such, arbitrators cannot ignore well-founded, good-faith evidentiary privileges without frustrating the parties' justified expectations.79 Moreover, courts likely are more inclined to set aside awards where arbitrators have refused to recognize and protect privileges than they are in circumstances where arbitrators have excluded evidence on the basis of privilege.80 As a general principle, the less widely recognized the privilege, and the greater the party's need for the allegedly privileged evidence, the more inclined arbitrators will be to order the production of that evidence.

78 See Mosk & Ginsburg, supra note 76, at 378-81.
79 See id. at 382.
80 See id. at 376.

Referring Principles:

XII.5 - Settlement privilege