Nicholas Andreatidis QC (NA): Good afternoon, evening or morning to everyone that is joining us. Welcome to our discussion on 'Privilege in International Arbitration: Procedure and Pitfalls'. I am joined by three panellists who I will introduce to you shortly. Just a couple of very quick things before I do. We are being joined by viewers from Europe, Asia and all over Australia, it would help drastically with bandwidth and quality if all of you lovely participants could, not the panellists, could please keep cameras and mics off, at least for the moment. At the end of our chat, if we have time, I will be inviting questions. Again, if we have time. If you want to ask a question, if you could turn your video and mic on and direct the question to whoever you would like to ask the question to.

If I can now move on to our panellists. I have had the pleasure of presenting with and chatting to these three gentlemen on numerous occasions. Their experience, the quality of the work they do, is quite extraordinary. Simon Bellas is from Jones Day. He had been practicing out of the Singapore office, playing in the Asia Pacific market for quite some time. He has returned to Melbourne. He is very, very excited about the borders reopening all over the world and particularly here in Australia because his love for airports, lounges and planes can be reconnected with. So he is very, very excited about that, as I am sure we all will be.

Cameron Sim is from Debevoise & Plimpton. He joins us from fabulous Hong Kong. In terms of both Simon and Cameron, the detail of their CVs, you can of course look at that online. But Cameron has written a book which has recently been published by Oxford University Press, 'Emergency Arbitration'. I have ordered a copy, it still has not come. I have lodged a complaint and I expect to receive it reasonably soon, hopefully. Now, in addition to being an amazing advocate and an author, he is also the collector of very, very cool and groovy art. If you ever get to talk to Cameron when he is Zooming or Teamsing, or one of those other things from his home office, you will get to see what I mean.

Finally, and certainly not least, Angus O'Brien. Angus is a very experienced counsel who has practiced and continues to practice in complex commercial, regulatory and public law and banking matters. He has practiced in London and Sydney before he came back to Brisbane. In a prior life, he was associate to the now Chief Justice of our High Court Chief, Justice Kiefel.

If I can start with what we are all talking about this afternoon, or this afternoon here in Brisbane at least. Arbitration, as our listeners will all know, works in the context of a contractual promise to submit to the arbitral process if there is a dispute. Arbitration can occur domestically and internationally. Different jurisdictions, I have to confess this surprised me a little bit when I first found out about this, but different jurisdictions approach the question of legal professional privilege very differently, both in terms as to whether or not it even exists and even in some jurisdictions whether the question is one of status or one of simply procedure. All of these things can make questions of legal professional privilege very complicated and contentious in the

context of arbitration in circumstances where the arbitration agreement does not in terms deal with what is to occur with questions of legal professional privilege in circumstances where the parties from different jurisdictions where the rules about those things are, and the law about those things, are entirely different. That is what we are going to be discussing. Hopefully you will find it as interesting as I have.

Cameron, if I can start with you. The general topic we are going to discuss is the availability of privilege in arbitrary international arbitration. Cameron, what laws govern these issues?

WHAT LAWS GOVERN PRIVILEGE IN INTERNATIONAL ARBITRATION?

CS: Thank you very much Nicholas. Thank you to you and Angus and Level Twenty Seven Chambers for inviting me to speak today. It is a pleasure to be with you. And thank you to all of those who have joined as well.

This is not a straightforward issue. As Nicholas has touched on, when privilege comes up in arbitration, if you have not encountered this before, especially if you have been dealing mostly with Australian or privilege, it might come as quite a surprise. I think at the outset, I would like to highlight four key complicating factors when it comes to the law governing privilege in international arbitration.

The first complicating factor Nicholas has just touched on. This is there is no universal approach to privilege, there is no uniform approach. Privilege, it is broadly understood internationally, is the right to defend against the compulsory disclosure of documents. But who has that right, when it might be invoked, when it might be waived, is understood widely differently between jurisdictions. Even within common law jurisdictions there are some nuances. Civil law jurisdictions tend to take a much narrower approach. Some jurisdictions do not even recognise privilege. Then in others, the function of the lawyer giving the advice really makes an impact. In house legal counsel, for example, may not even be protected. That is the first complicating factor.

The second one, and this is tied to the first, is the transnational nature of international arbitration. I think it is helpful if I illustrate this with a scenario and it is not an uncommon one for those practicing in international arbitration. Say there is a dispute concerning a JV with operations in Vietnam. The JV has an English law governed contract. There is an Australian claimant represented by Australian and Vietnamese counsel. There is a Japanese respondent represented by Japanese and US counsel. The arbitration itself is seated in Hong Kong and the arbitrators are from France, Singapore and South Korea. Now a straightforward question, what law governs privilege in these proceedings will not lend itself to a straightforward answer. It is an absolute minefield. Should it be based on the parties and their counsel? So Australian,

Vietnamese, Japanese, US law? Should it be Hong Kong law as the seat of arbitration if privilege is seen as a procedural not a substantive question? And what impact will the understanding of the arbitrators have on privilege? Here, they hail from France, South Korea and Singapore. As you can see from this scenario, it throws up many different issues. Everyone frankly, as Nicholas touched on before, will be influenced by their own legal backgrounds and what they understand privilege to be. These discrepancies really can lead to different expectations as to how privilege should be dealt with.

The third complicating factor is the legal framework, or rather I should say, the absence of a legal framework. I will come on to this in a little more detail but national arbitration laws, institutional arbitration rules, do not tend to contain any guidance on choice of law rules for privilege or what law should govern privilege in arbitration. There is really an absence of a framework.

The final complicating factor is, in international arbitration, there is also a lack of precedent. Arbitral awards are confidential, not many of them make their way into the public domain, so there is no standard approach to these issues. Frankly, the academic commentary on privilege is all over the place. There are a lot of different approaches which are advocated. Again, those are influenced by the background of the writer. So, when these issues do arise in proceedings, it can be quite difficult for tribunals to find the best way forward.

I guess I have started on quite negative news, identifying a lot of complications. How do these then resolve? Well, the starting point really is the dream scenario, which is the parties may have agreed on the law governing privilege and in arbitration. Then there is party agreement, the principle of party autonomy tends to prevail. But realistically it is very unlikely the parties at the time of contracting will have agreed on what law governs privilege in the event that a dispute arises. I have never seen that. Another instance where it may be agreed is at the outset of a dispute but at that point parties will be focused on quite different things. So, when it might be agreed is in what is called, many of you will know, is procedural order number one. So that is the first order that the tribunal issues which sets out the procedural parameters of the arbitration, sometimes you will see privilege dealt with then, but the difficulty the counsel will have is it can be difficult to know what law will be most advantageous to your client. So you might be hesitant to agree on what law should govern privilege in procedural order number one.

If in the likely event that there actually is no agreement, what then do tribunals do? As I mentioned, national arbitration laws do not take matters any further. Arbitration rules, with limited exceptions, they do not take matters any further. The Singapore rules (the SAIC rules), they do mention privilege and they just provide the tribunals are empowered to determine any claim of legal or other privilege - not particularly helpful either.

There is also a very popular soft law instrument in arbitration. Many of you will know the International Bar Association Rules on the taking of evidence in arbitration (the IBA Rules), they do mention privilege, but what they just provide is that the tribunal can consider privilege in excluding documents from production. Again, no guidance on what choice of law rule applies or should be applied by the tribunal to determine whether privilege actually attaches.

The issue then that we face is if we simply rely on privilege based on say the location of the counsel. So if Australian lawyers are involved, just apply Australian law, or if Hong Kong lawyers are involved apply Hong Kong law. The difficulty we have is it can create a real uneven playing field between parties and it can really create unfairness. I will come to touch on that very, very shortly.

Again, I have been speaking for a few minutes now, I have not really provided much guidance other than to say that there is not much. What you see in practice is a few tests that tribunals might employ. I think the most popular, and for those conflict of law gurus out there, you will have come across this quite frequently, is the closest connection test. That is really a fundamental test that is used to determine applicable law in many national conflict of law codifications. It has really become a general principle of private international law. Under that test, what tribunals will look to try to work out what law should govern privilege is various factors. This includes the law of the seat of the arbitration, the law governing the merits of the dispute - the governing law of the contract, typically - the law where the relevant communication took place, or where the document was created or received, even sometimes the law of the place where the documents are stored, or the law that is applicable by virtue of the engagement letter between counsel and their clients. Sometimes you see the law of the place where the lawyer was when the communication took place, or where the lawyer is admitted, sometimes, more rarely though, the domicile of the party claiming the privilege. When tribunals apply this multi factor test, no single factor tends to be determined, they look at everything in the round and decide what law should be applied to all questions of privilege that arise in proceedings.

The second test, and this is less frequent but you do see it, is the most favoured nation, or most protective role approach. Conversely, the least favoured nation approach, which is quite unpopular, or the lowest common denominator. I will explain why. The MFN approach, most favoured nation, or most protective rule, I mentioned there can sometimes be unfairness created, an uneven playing field created by different privileges applying to different parties. The most favoured rule really tries to even this out by identifying what the most favourable law on privilege is that might be applicable, so by reference to some of the different laws that I have touched on, and then applying that to everything. That really does remove the issue of unequal treatment. But there is a problem with this approach, which is it does not really have a satisfactory analytical basis because the thing about privileges is it only actually applied

because it arises by virtue of national law. So, like most rights, privilege only exists because national law says it exists. So where the most favoured nation approach is applied, you are then bestowing rights on a party that they actually did not have. Sometimes you can see complaints about unfairness arising from that as well.

Conversely, there is also the lowest common denominator approach (the LCD approach), that is where documents are only accorded protection if they are privileged under the laws of both parties, which would probably alarm Australian lawyers, that again can establish formal equality between the parties. But one party may then lose a privilege it thought it had. Obviously, Australian law is quite advantageous on privilege, the privilege belongs to the client. It might be quite a shock if suddenly a tribunal applies the lowest common denominator approach and determines Australian privilege is gone. I have seen this attempted once, by civil law lawyers against us. Civil law protections are much less significant. It did not go down so well with the tribunal and we obviously handed in protest about the attempt.

The third approach really is an autonomous code which is where you just see a tribunal creating something that it thinks is suited to the circumstances of the case. But that leaves a lot of discretion with the tribunal and sometimes the answer they come out with might be surprising.

I should probably stop it there. If you can take from that, that exposition of privilege in arbitration, the main point is all quite unclear. You really need to pre-empt it at the outset of the case. You should also be prepared for surprises along the way, and the documents you may have thought were privileged instinctively, you might be faced with an order to produce those documents. I will hand back over to you Nicholas.

NA: Thank you. A question without notice to all of the panellists. For the front-end lawyers, they are confronted with quite a difficult choice, depending on what the law of privilege is, from the jurisdiction that their client or their firm comes from because there are both advantages and disadvantages in dealing with it upfront because you might be giving up something. Conversely, it might be an advantage to if you are from a jurisdiction that jealously protects legal professional privilege and the other party is someone that has no concept of legal professional privilege. So clients and lawyers, it seems to me, have difficult choices to make if they decide to try and grapple with it in the commercial phase of the transaction.

Simon Bellas (SB): I could jump in and say something quickly about that. One option would be, as an imperfect option, to agree to apply the IBA guidelines that Cameron mentioned. You could do that in your contract. Whilst that would certainly not solve all of the complexities it would at least resolve some of them. The alternative would be to choose very few and exceptional rules that Cameron alluded to that actually do deal with privilege. I think largely

some of the American rules are more likely to do that. But I, like Cameron, have not actually seen that done in practice.

CS: Just to add to what Simon said, the difficulty is, as you identify Nicholas, is that you do not know if documents you may be excluding from production may have been particularly helpful to you. Definitely at the contractual stages, particularly even at the outset of the disputes, when arbitration is commenced, you do not really know what is going to be most advantageous. In my experience, unless you are nervous because you have seen documents yourself at your client's and you know what might be out there, it is less frequent that parties pre-empt the issue of privilege. The way that it tends to be done, as Simon mentioned, is incorporation of the IBA rules. They provide some guidance but they do not go all the way. They leave a lot of discretion to the tribunal. So Nicholas, I agree with your observation entirely.

NA: We will deal with an additional complication, which is the question of enforcement of any award that touches on documents that someone has asserted a privilege either that the arbitrator disagrees with, but we will deal with that later on in our chat.

PRACTICAL ISSUES DURING ARBITRAL PROCEEDINGS

NA: Back to you Simon, if I could, following on from Cameron's discussion. Do you have any general observations that you can share with us as to common, practical issues during the course of proceedings and how tribunals resolve them when issues of legal professional privilege arise.

SB: Certainly Nicholas. Again, thank you very much for having me on board. It is always a pleasure to join Level Twenty Seven, yourself, Angus, and also Cameron. We have delivered a few sessions together now which has been great and I noticed that there are a lot of familiar faces that have tuned in which is also good to see.

Much of what I will say now very much builds upon the foundation that Cameron has laid. In terms of practical issues, I think this situation often arises at the point where the arbitration is well and truly on foot. We have parties that are ordered to hand over various documents according to a Redfern Schedule and one party will object to the provision of documents on the basis of a claim for privilege and the opponent, unsurprisingly, challenges that claim for privilege. As Cameron mentioned, there are many different laws and very different expectations across international arbitrations where the parties take a diametrically opposed view on claims for privilege.

We have mentioned that most of the time the arbitration agreement will be silent, rules, if any have been selected, are silent in almost all cases. And then there is no established and accepted way forward for the tribunal to proceed, or at least no one way forward. There are various sources of law with conflicting outcomes that Cameron has mentioned. Obviously, there will be differences in the application of civil law and common law, laws of the seat, laws of the contract, and of course the law's domicile for the parties, but also differing laws in terms of the origination of the privilege. So, in one of the examples Cameron gave you had a party from a particular country advised by lawyers from different legal backgrounds and jurisdictions. So you could almost take a case by case breakdown of the documents. If you apply the approach that he mentioned around closest connection, there would be a different outcome on privilege for almost every document, or at least lots of different categories of documents within the arbitration.

How does an arbitrator deal with that in practice? The first thing is, Cameron mentioned, is party autonomy which I think is largely sort of the golden rule of arbitration. You look to the agreement of the parties. If there is no agreement, which we have mentioned is likely to be the case, a tribunal will lean on the parties to make an agreement at the time that the issue arises. So there will be an encouragement of the parties to confer and come up with a practical solution. In cases where there is sensible counsel that would be meaningfully engaged with we often know that that is not always the case. Where there is no agreement, an agreement could be on what rules apply or how documents might be reviewed. There could be an agreement as to whether or not the IBA rules should be applied, all sorts of opportunities for contemporaneous agreement when the issue arises. Failing agreement, there will be submissions, so the tribunal will call for submissions and that would go to what each party thinks ought to be the approach taken and what their reasonable expectations are with respect to privilege. At that point, I think it is fair to say the second golden rule for any arbitration is that an arbitrator will have wide discretion to determine the point.

However, in terms of another golden rule, that will always be the overriding consideration of fairness. The number one on any arbitrator's mind is that not only do they want to deliver a correct award, they want to deliver an enforceable award. So they will always be thinking about the basis upon which the decisions that they make along the course of the arbitration, how that might affect its enforceability.

An overriding consideration, we all know, will be equal treatment and fairness. We heard from Cameron about some of the different approaches in terms of the closest connection test and the most favoured nation test. I think what often would happen is that there will be submissions made as to how the question of privilege ought to be dealt with for a particular set of documents. The tribunal will consider those and then will apply a test where there will be equal treatment across the arbitration and across the parties. That is, I think, the most likely outcome

that you might not get an answer that matches up to your specific expectations as to your rights with respect to a specific document and where it arose. That may be an area of concern for some, however, if the same rules are applying across the arbitration and across all

parties, you at least have a position where I think the arbitrator has done what they can to avoid leaving the award open to challenge.

NA: Thanks, Simon. You talked about, quite rightly of course, the arbitrator's focus on making sure that whatever award they make is enforceable. I will again deal with enforcement later, but in that context, what is the source of the power of an arbitrator or arbitration panel to determine questions of legal professional privilege?

WHAT IS THE SOURCE OF POWER OF AN ARBITRATOR TO DETERMINE PRIVILEGE?

SB: Where the arbitration agreement is signed, that would be the best source of any power for an arbitrator. In the absence of that you look then at the *lex arbitri* or the law of the forum. If the *lex arbitri* is a civil law arbitration then the question of privilege is seen to be one of procedural nature of law and that perfectly aligns with great tribunal discretion. So, if it is a civil law *lex arbitri* it will be considered to be procedural and therefore the tribunal will have discretion.

Under the common law traditions the question of privilege is considered to be a part of substantive law. That takes us into the wonderful world of conflicts of law that we heard Cameron touch on earlier and that would be the conflict of law rules at the seat. When you are engaging with the conflict of law question at the seat you look at the law of the seat, the law of the contract, the laws of the parties and also the law at the origination of the privilege where the document was created, or where the advice was given. From that, we have touched upon the various tests that can be applied against closest connection, most favoured nation, least favoured national test that can be applied.

NA: If there is a question of privilege that arises in say a common law nation, where that is the law of the forum, should the advocate or the legal team generally turn their mind to whether or not they want to run the application in front of the arbitrator, as opposed to going off to say here in Queensland, the Supreme Court or the Federal Court, are they questions the legal team should consider?

SB: Absolutely. In my view, it would be sensible to defer to the arbitrator and take the question to the arbitrator. If you do not like that decision you can always consider appeal or referring that to the courts. But I think in general it is something that is sort of germane for the arbitrators to deal with. It would only be an extreme circumstance you would consider going off to the courts with. That said, if we are talking about a review of the document that is being claimed

as privileged, that is a different question and there is obviously some practical nuance around that.

NA: That is a nice segue into the next question, which is, can and should an arbitrator look at a document in respect to which applying for privilege has been made? Because again in the common law jurisdictions judges cannot look at it and make that determination without generally causing a problem for themselves.

CAN AND SHOULD AN ARBITRATOR LOOK AT A DOCUMENT THAT IS BEING CLAIMED AS PRIVILEGED?

SB: You won't find any hard and fast determination against an arbitrator's ability to do that. The answer is, yes, they can review those documents. But different people have different views as to whether or not that is a good idea and how risky that is.

Another option would be for either of the parties to agree or for the tribunal to decide that those documents will be reviewed by a neutral expert, which I think takes out the risk for the arbitrator in that sense. However, if in some cases, if it is procedural in nature, then the tribunal needs to turn their mind to the content of the document. It does require, where the tribunal looks at the document, for them to do what you mentioned happens in the Supreme Court which is to put the content of that document out of mind if it is determined to be privileged in terms of potential challenges that could come from an arbitrator considering documents over which privilege is claimed. I personally think that the risk is fairly low. There is obviously a general position where it is difficult to challenge arbitrator decisions. In my experience, parties are generally happy to accept and comply with orders of discovery. Where a document, for example, is determined to not be privileged and has to be provided, if the party does not go ahead and provide that document still on the basis of a claim for privilege then it is open to have a negative inference drawn.

NA: I suppose in one sense it might depend very much on the nature or the content of the document that the arbitrator has been exposed to.

SB: Absolutely. That is always the case.

NA: Thank you very much. Angus, have you got any observations in the context of the discussions we have had about any differences within the context of Australian commercial arbitration legislation and the model rules?

Angus O'Brien (AO): Thanks very much, Nic. The short answer is no. In Australia, in the context of international arbitrations, the UNCITRAL model law applies for arbitration. That is an

international instrument and one that you would expect an international arbitral institution in Australia to apply in a fairly transnational way. In the context of domestic arbitrations, under the state commercial arbitration acts, many of the provisions which govern these sorts of procedural issues and the extent to which you can have recourse to the courts to assist effectively replicate what is in the UNICTRAL model law, subject to some modifications. I think the position that Simon has just described is one that you would expect the tribunal here to apply.

HOW TO ENFORCE AN ORDER TO PRODUCE DOCUMENTS

NA: Thank you Angus. Still with you. An arbitrator has had an application made to her or him for the production of documents that, let us say an American law firm claimed legal professional privilege over, there is a French law firm on the other side who are very keen to get the documents. The Americans do not want the documents produced, how do the French enforce the order of the arbitrator? I will let you pick the jurisdiction in which the arbitration is being heard.

AO: Sure. I will mainly make observations about the position in Australia but the position is likely to be similar in other jurisdictions. Certainly, gathering from the discussion, Gary Born's book 'International Commercial Arbitration' which is a leading text in this area it seems like the options available to a party are broadly similar however wherever the arbitration occurs. In that circumstance there are really two options available to a party seeking to get their hands on documents which have not been produced. One is to try to do something about it before the tribunal and the other is to try and run off to court.

If we focus firstly on trying to do something about it before the tribunal. The difficulty with that is that the tribunal, of course, has fairly limited coercive powers. The best, probably, that you could expect out of the tribunal would be that they would draw some adverse inference against the party who fails to produce. That is something that Simon has just touched on. So there is a decision to be made by the party who wants the document as to whether it might be in its interest just to take an adverse inference or whether it actually wants to press for production of the documents. I would suggest that in most cases it is going to be fairly risky just to rely on an adverse inference rather than pressing for production, if you think an issue is important. The reason for that is it is always going to be difficult to convince the tribunal at the end of the day to draw an adverse inference. Even if you can do so, there is no guarantee that the inference will be as adverse as you would like it to be. Those from Australia would be familiar with Jones v Dunkel inference which is that if a party fails to call a witness in their camp there is an assumption that their evidence would not have assisted them. It is fairly well known that that is a limited inference. It is not an inference that is positive in the sense that it establishes that the evidence would have been positively unhelpful to the party that called

the witness. If that is as far as you can convince the tribunal to go it might not help you very much.

In most cases, you might want to think about whether you can effectively try and enforce the order to produce in front of a court. In Australia there are broadly three procedural avenues open to try to do that. The first is that both the *International Arbitration Act* and the state commercial arbitration acts have a specific provision that allows the court to deal with parties to an arbitration who are in default of orders of their tribunal, including orders to produce. So it is possible to make an application pursuant to that provision. Then the provisions, in fact, specifically provide the court with the power to make orders for the transmission of documents once they are produced to the tribunal.

The second procedural option available is to make an application under the more general statutory provisions which provide the court with powers to assist the tribunal with the taking of evidence. In the context of international arbitration that derives from article 27 of the UNCITRAL model law, it is also incorporated in s 27 of the *State Commercial Arbitration Act*.

The third option would be you apply to the court to issue subpoenas to produce documents. Again, there is a provision that facilitates that both in the *International Arbitration Act* and the state commercial arbitration acts.

With all three of those things that I have just mentioned there are two fairly significant limitations. One is that all three of those avenues are only available with the permission or sanction of the tribunal. So, it will be important if an issue arises that the possibility of an application to court to try to enforce an order to produce is managed in front of the tribunal has such in such a way as to keep the tribunal onboard and to convince them that the other party is doing the wrong thing and not producing documents that they ought to produce because that is effectively a prerequisite for invoking the court's powers.

The second limitation to note is that, at least in two of the three options I mentioned, the statutory provisions specifically provide that the court cannot compel production that it could not compel in a proceeding before the court. So, if the reason why a party is not producing documents is that it says it has a valid privilege claim, that privilege claim will have to be resolved before the court before it can make orders enforcing the order to produce. In a sense, that might not be a bad thing because then at least the privilege issues are dealt with in a fairly conclusive way.

CS: I might just chime in here. I agree entirely with Angus' approach. One point I would make though is that with these sorts of issues, rushing off to court, is generally not something that you see occur all that frequently. For example, the tribunal's determination on privilege is not

generally something that could be challenged in a court. For parties to go to court, even on a question of privilege arising in arbitration it is not something you will see often.

One thing which is available in many jurisdictions is what is called a peremptory order, that is set out in arbitration law. That is the equivalent of an unless order. What we see quite often is if a party fails to produce the other side will apply for a peremptory order. The tribunal will issue it and say unless you produce these are the consequences. One of the consequences may be that the party is then permitted to go to the courts of the seat or somewhere else to seek an order for production of the documents. That is a fairly well trodden path. But I agree, as Angus says, generally relying on adverse inferences is riskier.

One thing which is not set out in rules or arbitration laws is the prejudicial effect. Generally, tribunals do not write about the prejudicial effect in their awards. But if a party has failed to produce and failed to comply with the peremptory order the prejudicial effect on the tribunal's decision making will probably be quite significant. That was just as a short observation.

NA: Thank you very, very much Cameron. Simon, any observations you would like to chip in?

SB: I have been thinking about what everybody else has said and the comment that we received also from Albert Monichino QC on Article 19 giving power to the tribunal and it not being a matter for the court. I suppose a recontextualisation of this question could be not where a party seeks to challenge a particular finding on privilege but seeks to use a finding on privilege as a basis to try and claim bias or to set aside the award itself. Of course, I think we would all agree that that would be an extreme and exceptional case and perhaps unlikely to apply, especially where you have a competent tribunal. I think circumstances where a finding on privilege or an issue of privilege could give rise to have an argument of bias or a basis to set aside an award for a lack of fairness, for example, would be where a tribunal acts differently to the arbitration agreement or something that has been set out in the arbitration agreement, where perhaps there has been a failure to provide equal treatment, or some sort of manifest lack of fairness. If the content of a document has manifestly not been pulled out of an arbitrator's mind, so if an arbitrator was to mention a document as being probative that had been considered privileged, or something like, it would potentially give rise or even this one, I think would be difficult. But if privilege was not allowed and a privilege document was allowed in and it was able to be shown to be of critical importance, those are areas where somebody may look to challenge the award or the tribunal. But again, I think it would be extreme.

NA: Just on your last point, as a matter of practice, assume you are the advocate and the other side have demanded the production of a document. You think it is privileged. As a matter of practice, is it best and safer for your client to raise the question of privilege to at least

preserve the argument that you have just raised? Let's say you do not raise the point, the arbitrator gets the document and, as you talked about, the arbitrator might in the award say "Well, this is a really probative and critical document in my findings." If you do not take the point in the hearing, do you lose your opportunity to complain about it later? Should the advocate take the point in the arbitration to preserve the position, just in case?

SB: I do not believe you absolutely have to and that it would be fatal not to, but I think it would be it instructive and recommended to take the point. As Cameron alluded to, you would do that without wanting to put the tribunal offside. I think tribunals do not like it when we lay a trail of breadcrumbs for an appeal later. But in a respectful way, I think you ought to make the submission. But before you get to the point of actually losing the point on privilege, I think from a practical standpoint, you would seek the opportunity to be heard about your client's legitimate interest and legitimate claim for privilege. You would look at all the close connection tests we have talked about, why this would be a right that your client would have expected to have privilege over this document and then applying that most favoured nation approach. You would have a situation of fairness where not only is your client protected from the provision of that document, the same rules will apply to your opponent.

NA: Simon, am I right in thinking that your advice will be to use forensic judgment in deciding whether to take the point or not? If there are fifty documents that you have claimed privilege over and forty-nine of them are marginal, pick the fight with the one that matters not all fifty.

SB: Of course.

NA: Thank you.

Cameron, based on your experience in Europe, are there any differences that you would like to highlight for us?

CS: Sure. Just before I do, I would agree with what Simon has just said on setting aside an award on the basis of the tribunal's privileged decision. One thing that could come up, the New York Convention has very limited grounds to defend against recognition and enforcement of an award but one of them is that a party was denied a reasonable opportunity to present its case there could be an argument that the failure to allow or the refusal to exclude a privileged document in the proceedings led to a denial of the reasonable opportunity to present a case. I think it is a fair stretch but the argument is made and it depends on the place of enforcement and their own perceptions of privilege.

BS: Cameron, there was that example in Singapore where an award was set aside on the basis that a tribunal had prevented certain witnesses from giving evidence. This is perhaps a step or two below that but there is that precedent.

CS: Another convention around could be public policy. Enforcement can be resisted on the basis that enforcement would be inconsistent with the public policy of the place of enforcement. There might be an argument that maybe privilege ties into public policy but I think again it is a fair stretch. But I digress.

Coming back to Nicholas, the question you actually asked. A couple of points on that. I have practiced in both Europe and now in in Asia. Starting with Asia, especially for those of you in Australia whose clients are conducting any business with Chinese counterparties, you may well already be aware, the PRC does not have legal privilege. There is no legal privilege in China so any documents, any advice you are giving to clients based in China, or when they are in China, there may be privilege issues that arise. We face this quite often in Hong Kong arbitrations. But we have a question as to whether Hong Kong law, which obviously follows a common law approach to privilege, applies in the arbitration when Chinese advices are involved, it is a real difficulty. That really caught me by surprise when I started practising in Hong Kong that PRC does not have privilege.

What I have seen it in Europe, I have had some bad experiences on this front, which is in common law jurisdictions, the privilege belongs to the client. In civil law jurisdictions the privilege tends to belong to the lawyer. So, it is only the lawyer that can invoke privilege to resist either giving evidence before a court or producing a document in court proceedings. But the client is not protected in that way. Third parties are protected in that way. For example, a career learning experience for me was if you were dealing with in house counsel in a civil law jurisdiction who was instructing an expert, even though it was a London seated arbitration, an issue arose as to whether communications between the in house counsel and the expert were privileged because it was a an expert based in that jurisdiction, they spoke that language, it was just easier. But it came to my horror when I realised when the other side made an argument that actually those communications were not privileged a) because it was in house counsel in that jurisdiction, b) because the privilege attaches to the lawyer and not the client and that was not a lawyer so privilege was not attached. It can really take you by surprise if you have not looked at looked at these points.

NA: Are you allowed to tell us the outcome of that fight?

CS: We got out of jail on that one fortunately but it was a real learning experience. One other thing I would say is, I know we have touched on how complex this is and how uncertain it is, it is the same for everyone involved in an arbitration. What you will sometimes is both sides

closing their eyes, gritting their teeth, hoping this issue is not raised by the other side. On many occasions, you kind of trundle through the arbitration without this ever actually being dealt with by the tribunal. Sometimes you wonder where documents withheld that should not have been withheld. But depending on what documents you have, and as long as you have a legitimate basis for withholding those and it is not challenged you can do it. Sometimes that is actually what eventuates. I am not sure Simon if you have experienced that as well but it can be a relief once you got through a disclosure that nothing came up.

SB: Perhaps it is more common for there just to be submissions made in final submissions around negative inferences. We might all have complaints about what has and has not been provided and we might encourage the tribunal to look upon that favourably for our client and unfavourably for our opponent.

CS: That is the sort of point which I always think should be raised live because if you leave it to the end of the case and a complaint has not yet been made the tribunal will ask "Why didn't you raise this earlier?" And if they then issue the award on that basis they might be nervous that the other side will say "Well, hang on. We didn't have the reasonable opportunity to be heard on that point." And why actually it is a non-issue. So, it is better to bring these points up as early as you can, I think.

NA: I notice the time. We have in fact used up the time for our chat. Can I thank, once again, Simon, Cameron, Angus. Thank you all very, very much for your time. As always, it is a great pleasure talking to you all.

To our audience, thank you very, very much. I will dob everyone in and if you want to ask a question, feel free to send an email to my chambers and we will pass it on and when we have time we will respond.

A huge thank you to all of you. Stay safe.