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GLAMIS GOLD, LTD. V. UNITED STATES OF AMERICA: A CASE STUDY ON DOCUMENT PRODUCTION AND PRIVILEGE IN INTERNATIONAL ARBITRATION

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I. INTRODUCTION

International arbitration continues to be increasingly appealing to parties engaged in international business transactions mainly because of its predictability, flexibility, confidentiality, relative time and cost efficiency,[1] and the enforceability of arbitral awards. One aspect of international arbitration that works against these objectives, however, is the determination of the applicable document disclosure procedure rules governing document production.

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[1] The efficiency of international arbitration, especially with respect to costs and time, is now contested. Arbitration generally remains more efficient in comparison to common law litigation due to more limiting rules of evidence and discovery. However, the efficiency, fairness and predictability of the arbitral proceedings may also be compromised if adequate disclosure procedures have not been predetermined. The ambiguity in arbitral procedural rules and the increasing involvement of U.S.-based parties, counsel and arbitrators has led to a growing concern that document production is leaning towards U.S.-style "fishing expeditions." *See* Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1325 (2003); *see also* Javier H. Rubinstein and Britton B. Guerrina, *The Attorney-Client Privilege and International Arbitration*, 18 J. INT'L ARB. 587, 589-91 (2001); Robert H. Smit, *Towards Greater Efficiency in Document Production before Arbitral Tribunals—A North American Viewpoint*, International Chamber of Commerce ("ICC") International Court of Arbitration Bulletin 2006 Special Supplement, at 6-7. The broad procedural rules underlying U.S. discovery processes are becoming widespread in international arbitration, and have had a tendency to defeat arbitration's purpose of efficiency and expediency. *See* Kaufmann-Kohler, *supra*, at 1325. While more extensive document production may be justified in certain circumstances, arbitral tribunals should seek to promote procedural efficiency and flexibility in arbitration proceedings.

In order to avoid procedural ambiguities where parties have failed to contract for set rules, this paper argues that finding an international consensus on procedural guidelines for determining document production would increase predictability and efficiency by providing clear default procedural rules. The problem of ambiguity in document disclosure procedures could be resolved (1) by expanding upon international arbitration institution rules,[2] as reflected in recent American Arbitration Association ("AAA") rules reforms, and/or (2) through further specifying a set of international guidelines, such as the International Bar Association ("IBA") Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules"). Such document disclosure procedures could be established by finding commonalities between the relevant rules of civil and common law jurisdictions and by gleaning standards from arbitral proceedings with publicly available procedural orders, such as *Glamis Gold Ltd. v. United States of America*.

Part II of this paper explores the reasons why so much time is spent establishing rules of procedure in most arbitral proceedings by looking at the differences between common law and civil law jurisdictions, the lack of specificity in international institution rules, and public policy considerations. Part III turns to *Glamis Gold* as a case study on how arbitral tribunals might address procedural issues with regard to document production and assertions of privilege when such rules have not been predetermined.

II. UNCERTAINTIES IN DOCUMENT PRODUCTION AND PRIVILEGE IN INTERNATIONAL ARBITRATION

The conflicts that arise when determining procedural rules governing document production[3] in international arbitration stem

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[2] William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion* (The 2002 Freshfields Lecture), 19 ARB. INT'L 279, 283 n.1 (2003).

[3] The authors note that there are various terms used to describe the procedures chosen to govern document production and privilege determinations in international arbitrations including, among others, "evidence taking procedures," "evidence procedure" and "disclosure procedures." Based on a review of academic and professional references, the authors have chosen to use the general term, "document disclosure procedures," to describe collectively these processes. In addition, the term "document production" in international arbitration is generally preferred over the term "discovery" because the term "discovery" connotes the often burdensome and costly document production rules prevalent in U.S, litigation; the authors have therefore also adopted the use of this term throughout this paper.

from the dramatically different approaches to litigation between common law and civil law systems, which influence the parties, counsel and arbitrators involved in the arbitration. Not only do document disclosure procedures between common law and civil law systems differ significantly, but procedures also vary between countries—as well as within countries, such as between jurisdictions within the United States.[4]

The confusion caused by these varying standards could be addressed quite simply if parties specified their preferred document disclosure procedure rules when drafting arbitration clauses. Parties, however, rarely include a provision in their arbitration agreement or underlying contract dealing expressly with document production.[5] In addition, many parties do not have an opportunity to discuss procedural aspects of an arbitration prior to its commencement, as in the investment treaty context. Of those that do have such an opportunity, however, seldom consider which document disclosure procedure rules will apply when drafting contracts aside from the selection of the governing international arbitration institution rules. Because these international institution rules only offer general guidelines for procedure, they typically do not provide clear procedural rules and exceptions for document production.

Parties might therefore assume that the laws of the country specified to govern the substantive issues will also be used to establish the rules governing document disclosure procedures.[6] This, however, is not always the case. Nor will the *lex loci arbitri*, or the laws of the place of arbitration, necessarily apply. If the parties fail to agree on a set of document disclosure procedures, tribunals might turn to a variety of sources to establish the procedural rules to follow, including the rules of the international arbitration institution governing the proceedings or transnational or intra-national consensus

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[4] *See generally* Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998) (distinguishing civil law from common law rules); Urs Martin Laeuchli, *Civil and Common Law: Contrast and Synthesis in International Arbitration*, 62-OCT DISP. RESOL. J. 81 (2007) (outlining the key differences between civil law and common law systems and the effects on international arbitration).

[5] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 470 (2d. ed. 2001).

[6] FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 632-33 (E. Gaillard and J. Savage, eds.,1999) (hereinafter "GOLDMAN").

rules.[7] In some instances, arbitrators determine arbitration procedures by a set of *ad hoc* procedural rules or a jurisdictional law selected by the parties or the law most closely tied to the evidence at issue, without regard to the laws of the seat of arbitration. This is particularly the case where parties have selected a particular place of arbitration out of mutual convenience rather than preference for local procedural rules. Several of the prominent arbitration institutions are also flexible in allowing the tribunals to use their own set of procedural rules without much regard to the procedural rules of the institution administering the case.[8] Because of the varying standards between jurisdictions and the numerous options available to arbitral tribunals, applicable document disclosure procedures remain largely unsettled.[9] As discussed further below, determining appropriate document disclosure procedure rules is particularly important as it may compromise the enforcement of arbitral awards by national courts.

When voluntary document disclosure procedures are not in place, arbitrators are often left to juggle a combination of factors. These factors might include the consideration of: civil versus common law rules; applicable institution rules; local public policy; the legal background and culture of the arbitrators and counsel; and the intent of the parties as expressed in the arbitration agreement or in the course of the arbitral proceedings.[10]

A. Civil versus Common Law Procedural Approaches

Differences between common and civil law systems add to the complexity of establishing adequate document disclosure procedures in international arbitration where neither civil nor common law

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[7] *Id.* at 632.

[8] *See* United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, Art. 19(1); International Centre for Dispute Resolution ("ICDR") International Arbitration Rules, Art. 16; ICC Rules of Arbitration, Art. 15.

[9] Park, *supra* note 2, at 283 (outlining reasons for harmonization of arbitral standards); *see also* Rubinstein & Guerrina, *supra* note 1, at 587, 589-91 (proposing solutions to the ambiguity of privilege standards in international arbitration); Nathalie Voser, Comment, *Best Practices in International Arbitration* (January 31, 2008), Extract from ASA Special Series No. 26, at 11-12 (July 2006) (outlining best practice standards in international arbitration).

[10] BORN, *supra* note 5, at 470.

practices govern the proceedings. Without dismissing the intricacies within each of the civil and common law systems, approaches to discovery differ greatly between them.

"U.S.-style" discovery, for example, is broad and includes any document which may lead to admissible evidence, even if such document is not material to proving the facts of the case.[11] Under the Federal Rules of Civil Procedure, a court may require the production of information that "appears reasonably calculated to lead to the discovery of admissible evidence."[12] According to the Federal Rules of Evidence, all relevant evidence is admissible;[13] "relevance" being defined as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[14] The requested document therefore need not be material evidence necessary to determining the outcome of the case. This approach often leads to a burdensome and costly discovery process.

Civil law countries, on the other hand, generally take a more restrained approach to discovery,[15] as it is often viewed as contrary to the expectations of privacy and confidentiality, particularly if a tribunal requires a party to produce internal documents which act against the party's interests.[16] Civil law jurisdictions dictate that documents are to be produced only when "relevant," which is defined by the fully outlined specifications of the claims and defenses in pleadings of the case.[17] In other words, a party is only required to produce those documents on which it intends to rely. Requested documents are rarely disclosed except under exceptional rules permitting parties to request document production in the opposing party's possession.[18]

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[11] FED. R. CIV. P. 26(b).

[12] *Id.*

[13] FED. R. EVID. 402.

[14] FED. R. EVID. 401.

[15] Hazard, *supra* note 4, at 1019.

[16] Kaufmann-Kohler, *supra* note 1, at 1325; Rubinstein & Guerrina, *supra* note 1, at 304.

[17] Hazard, *supra* note 4, at 1019.

[18] Kaufmann-Kohler, *supra* note 1, at 1326.

Both civil and common law jurisdictions have also taken varying approaches to privilege, particularly with regards to protecting the relationship that exists between attorney and client. Privilege has been defined as "a legally recognized right to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information."[19]

The United States and England, for instance, both approach attorney-client privilege as a rule of disclosure and evidence.[20] In civil law countries, attorney-client privilege has a broader definition under the notion of the "professional secret,"[21] which also permits a client to seek legal advice in full confidence that the information given to the lawyer will not be used against him. The principle, however, is usually included in the criminal code.[22] It is considered a matter of professional ethics rather than a rule of disclosure and evidence; and ethical violations for improper disclosure of privileged information may carry criminal sanctions.[23] Whereas attorney-client privilege is waived by the client's consent or implied actions in common law countries, civil law attorneys must follow ethics of discretion and rules of fiduciary duty to assess whether a communication falls within the definition of a "professional secret."[24]

Another highly contentious distinction in privilege law is that concerning the protection accorded to in-house counsel communications. In the United States and England, communications relaying legal advice between in-house counsel and outside attorneys are protected by privilege.[25] This is not the case in Switzerland, Italy and France, as well as in many other civil law countries.[26] This

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[19] Richard Mosk and Tony Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COMP. L.Q. 345, at 346.

[20] Rubinstein & Guerrina, *supra* note 1, at 590.

[21] *Id.*

[22] Michelle Sindler and Tina Wüstermann, *Privilege across Borders in Arbitration: Multijurisdictional Nightmare or a Storm in a Teacup?*, ASA Bulletin, Vol. 23, No. 4, 2005, at 611.

[23] Rubinstein & Guerrina, *supra* note 1, at 590.

[24] *Id*. at 590-91.

[25] *Id*. at 590.

[26] Voser, *supra* note 9, at 11.

position was recently reconfirmed in the *Akzo Nobel* decision by the European Court of First Instance, which excluded communications with in-house counsel from protection under privilege rules.[27]

Because of these and other differences, arbitrators face particularly complex issues when confronting privilege claims because privileges "exist to protect a certain interest or relationship … to advance goals of social and public policy."[28] Tribunals often take into consideration the interests of various jurisdictions to decide which has the strongest interest in the privilege.[29] The tribunal may consider where the communications or conflicts at issue took place or where the documents are stored.[30] The tribunal might have to look to the laws of the party raising the privilege protection[31] or, again, might look to the law of the seat of arbitration.[32]

The tribunal's approach regarding privileges might be further complicated by whether the privilege is regarded as substantive or procedural. The law of privileges is included in the procedural codes of many civil and common law jurisdictions and so, in this context, arbitral tribunals can follow their own rules, unless the privilege is mandatory under the procedural law of the local forum.[33]

In practice, however, the distinction between the substantive and the procedural is often blurred as rules governing privilege are not normally viewed as part of substantive law governing the transaction or even considered in parties' choices of substantive law. Nor do

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[27] Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of the European Communities, Joined Cases T-125/03 and T-253/03, Judgment of the Court of First Instance (First Chamber, Extended Composition), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML.

[28] Mosk & Ginsburg, *supra* note 19, at 345.

[29] Rubinstein & Guerrina, *supra* note 1, at 597.

[30] *Id.*, *see also* Mosk & Ginsburg, *supra* note 19, at 367.

[31] *Id*. at 368, 377; *see generally* Hans Smit, *The Role of the Arbitral Tribunal in Civil and Common Law Systems with Respect to the Presentation of Evidence*, in A.J. van den Berg (ed.), PLANNING EFFICIENT ARBITRATION PROCEEDINGS, ICCA Congress Series No. 7, 168 (1996).

[32] *Id.*

[33] Mosk & Ginsburg, *supra* note 19, at 376.

parties expect the choice of substantive law to govern privilege claims when the evidence is tied to another jurisdiction.[34] This makes finding common ground for establishing harmonized document disclosure procedures easier where public interests are not at stake.

B. Ambiguity in the Rules of International Arbitral Institutions

In many ways, the procedural ambiguities underlying the document disclosure process in international arbitration present an opportunity for arbitrators to strike a balance between common law and civil law traditions. The rules of major international arbitration institutions are therefore intended to be written loosely to allow arbitrators to resolve disputes without the procedural burdens of civil or common law litigation.[35] Each of the most prominent international arbitral institutions and international bodies empowers the arbitral tribunal to adjudicate evidentiary issues, but has little to offer on more challenging procedural issues, such as determining applicable principles of privilege:

- The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration provides that "the parties are free to agree on the procedure to be followed."[36] Absent such agreement, the UNCITRAL Arbitration Rules grant authority to tribunals to order the production of "documents, exhibits or other evidence."[37] However, the UNCITRAL Arbitration Rules and Model Law provide only skeletal guidance on how this authority must be exercised and make no mention of privilege as a basis for excluding evidence.
- Like the UNCITRAL Arbitration Rules, the International Centre for Dispute Resolution ("ICDR") International Arbitration Rules give arbitral tribunals the authority to determine the admissibility of evidence and provide that "the tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of

[34] *Id*. at 377.

[35] BORN, *supra* note 5, at 450-51.

[36] UNCITRAL Model Law, Art. 19(1).

[37] UNCITRAL Arbitration Rules, Art. 24.

communications between a lawyer and a client." [38] This rule does not specify what these principles of legal privilege might be, other than attorney-client privilege.

- The International Chamber of Commerce ("ICC") Rules of Arbitration provide that the arbitral tribunal "may take measures for protecting trade secrets and confidential information,"[39] but the rules do not address how the tribunal is to determine what constitutes confidential information or what privilege rules it should apply.
- The International Centre for the Settlement of Investment Disputes ("ICSID") Arbitration Rules provide that "the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value,"[40] but, as with the ICC Rules of Arbitration, these rules provide no guidance on the types of evidence and standards for probative value to use.
- The International Bar Association Rules provide that arbitral tribunals are to exclude requests for production that would present a "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable," without any instruction as to the bases on which privilege may be claimed.[41]

It should be noted, however, that there is an ongoing debate in the international arbitration community concerning the trade-offs between flexibility and specificity in institutional rules. For example, when the UNCITRAL Notes on Organizing Arbitral Proceedings sought to fill some of the gaps left by arbitration rules, observers severely criticized them for limiting the traditional flexibility of arbitration. Proposals to incorporate greater specificity in the rules themselves may provoke an even greater response. Although this article argues for greater specificity in international arbitration institution rules, flexibility will not be reduced because parties will still be able to contract around the institution rules. Specifying the procedural rules will work to bring the

[38] ICDR International Arbitration Rules, Art. 20(6).

[39] ICC Arbitration Rules, Art. 20(7).

[40] ICSID Arbitration Rules, Rule 34(1).

[41] IBA Rules, Art. 9(2)(b).

choice-of-law issues to the attention of counsel drafting arbitration clauses and will provide guidance in their selection of procedural rules.

This uncertainty surrounding the concept of privilege (and other challenging procedural issues not discussed here) in international arbitration has led tribunals and practitioners to seek answers in each of the common and civil law systems. However, subtle nuances between rules, even within systems, can cause substantial delays. And while tribunals will often seek to accommodate the different procedural cultures present in the proceedings,[42] arbitrators and practitioners are also likely to bring a subjective element to the proceedings as a result of their own legal background. This subjective element may add further complexities to the interpretation of the procedural rules to be adopted.

C. Public Policy Considerations

Regardless of the applicable procedural rules governing an arbitration, the tribunal must not ignore the mandatory provisions of law in the jurisdictions that may review the enforceability of an award.[43] Such mandatory provisions generally reflect public policy considerations of the reviewing jurisdiction.[44] A jurisdiction's fundamental principles of procedural law are most often addressed in general terms to include due process, provision of a fair hearing and equal treatment.[45] It is not hard to imagine a situation in which a procedural decision violates a jurisdiction's core privilege rules, thereby jeopardizing the arbitral award. This situation frequently arises in the bilateral and multilateral investment treaty arbitration context where there is a respondent state and a written or oral statement relates to an official inquiry or sensitive government policy.

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[42] Kaufmann-Kohler, *supra* note 1, at 1325; Samir A. Saleh, *Reflections on Admissibility of Evidence: Interrelations between Domestic Law and International Arbitration,* 15 ARB. INT'L 141, 155-56 (1999).

[43] GOLDMAN, *supra* note 6, at 643-44.

[44] Saleh, *supra* note 42, at 152; Kaufmann-Kohler, *supra* note 1, at 1320 (Under the ICSID Convention, de-nationalization of the arbitration has been fully achieved. The seat is located in Washington D.C., but the law of the seat has no influence over the arbitration. Instead, the arbitration is governed only by the ICSID Convention and Arbitration Rules. Here, annulment proceedings are not taken to local courts but before ICSID panels and ICSID awards are not enforced under the New York Convention, but similarly to local judgments in the member states.).

[45] GOLDMAN, *supra* note 6, at 643-44; Saleh, *supra* note 42, at 152-54.

D. International Standards

The practice of international arbitration has flourished in the past decade and, along with it, a growing consensus among national legal systems about general principles of arbitral procedure.[46] Most developed jurisdictions increasingly grant arbitral tribunals broad discretion in making evidentiary decisions, usually without reference to local evidentiary rules. Determining a default standard for document disclosure procedures is therefore becoming easier, particularly as investment arbitrations are leaning towards more transparency with the publication of procedural orders and awards.[47] Default standards would be beneficial to the practice of international arbitration to bridge the gap between different legal systems, while taking into consideration local public policy standards.[48]

Even though privilege rules have traditionally raised sensitive policy considerations, there are "core sets of common values"[49] or generally accepted standards among countries about what privileges should be protected. There are widespread privileges that may rise to the level of a "general principle of law" such as communications with lawyers, doctors and journalists, settlement discussions, national interest-related government studies and policy documents, and trade or business secrets.[50]

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[46] Kaufmann-Kohler, *supra* note 1, at 1318; JULIAN D. M. LEW, LOUKAS A. MISTELIS AND STEFAN M. KRÖLL, COMP. INT'L COM. ARB. 555 (2003); GOLDMAN, *supra* note 6, at 640-43; *see also* Indian Cement Co. v. Pakistani Bank, L.Y.B. COM. ARB. 128 (1976); Saudi Arabia v. Arabian American Oil Co. (ARAMCO), 27 INT'L L. REP. 117 (1963), Libyan American Oil Co. (LIAMCO) v. Libyan Arab Republic, 17 I.L.M. 1 (1978).

[47] *See generally* UNCITRAL Working Group II (Arbitration), *Revising the UNCITRAL Arbitration Rules to Address State Arbitration*s (February 2007).

[48] Park, *supra* note 2, at 283 n.1; Rubinstein & Guerrina, *supra* note 1, at 589-91; Voser, *supra* note 9, at 11-12.

[49] Mosk & Ginsburg, *supra* note 19, at 378-379.

[50] *Id*. at 349-358, 379, 382 ("General principles of law" is one of the sources of international law under Article 38(1) of the Statute of the International Court of Justice. The authors suggest that "there is no necessity that a general principle have exactly the same content in every application. For example, when the International Law Commission sought to codify the law of treaties, the Commission was willing to codify areas of law on which little or no customary practice existed. In doing so, the Commission did not require that a principle have the same scope or be found in every jurisdiction.").

The legitimate expectations of private parties may also form a general principle of international law. Scholars have pointed out that parties' legitimate expectations concerning privilege will be fulfilled, regardless of choice-of-law analysis, if arbitrators consider applying the privilege laws of the jurisdiction with the closest connection to the evidence.[51] This might be the law of the party receiving the document or the law under which the document was produced.[52] The duty to act in good faith is also a general principal of law applicable to matters of privilege. As such, arbitrators should take care to deny a privilege objection if made in bad faith.[53]

There has been tremendous scholarly effort to find commonalities between civil and common law jurisdictions and to increase procedural efficiency in international arbitration. The Report from the Swiss Arbitration Association is a step in the direction of establishing clear international rules of procedure in arbitrations.[54] The Report provides useful best practice tools for practitioners to follow to reduce costs and promote efficiency, which includes predetermining procedural rules.[55] The American Law Institute ("ALI") has also made valuable steps towards harmonizing procedural rules in the context of international litigation, by bringing together the commonalities of civil and common law traditions.[56] Similarly, the Transnational Rule of Civil Procedure[57] was an effort to merge

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[51] *Id*. at 382; *see also* P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration* in P. Sanders (ed.), COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA Congress, Series No. 3, 305-306 (1987); *see also* David Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990).

[52] GEORGE PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 221 (2004).

[53] Mosk & Ginsburg, *supra* note 19, at 384-385.

[54] *See generally* Voser, *supra* note 9 (outlining best practice standards in international arbitration and the need for clarifying international institution procedural rules).

[55] *Id.*

[56] The American Law Institute, *Principles and Rules of Transnational Civil Procedure—Proposed Final Draft* (March 9, 2004).

[57] *See* G. Hazard *et al*., *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 CORNELL INT'L L.J. 493 (1997).

elements of the common law and civil law systems, and includes specific privileges for certain professional relationships.[58] Finally, the Report from the ICC Commission on Arbitration also proposes document disclosure procedure techniques for controlling time and costs in arbitration.[59]

In particular, the AAA's ICDR is encouraging "the exchange of information in international dispute resolution proceedings" with the objective of promoting efficiency and economy in international arbitration.[60] Effective May 31, 2008, ICDR guidelines on document disclosure procedure clarify the arbitrators' authority in the document production process and "provide parties with tools to manage their own needs and expectations with regard to disclosure of information."[61] Drafted by the AAA Task Force on Exchange of Documentary and Electronic Materials, the task force carefully considered the differences between common law and civil law approaches to document disclosure. These rules will not only promote efficiency and economy in arbitrations before the ICDR, but will hopefully inspire other international arbitration institutions to craft more specific document disclosure procedure guidelines. The international arbitration community should applaud these efforts and encourage further exploration into the harmonization of procedural rules.

III. *GLAMIS GOLD*: DETERMINING PROCEDURAL RULES AND TOOLS IN INTERNATIONAL ARBITRATION

Glamis Gold, Ltd. v. United States of America [62] is a helpful example of how tribunals can approach issues that commonly arise in the context of document disclosure particularly with regard to

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[58] *Id*. (*see* Rule 20 of the transnational rules which enumerates several different types of professional privileges).

[59] *See generally* ICC, Report from the ICC Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, Preface, Peter Wolrich (2007).

[60] William K. Slate II, *New Disclosure Guidelines Are an ICDR First,* DISP. RESOL. J. (May-Jul 2008), *available at* http://findarticles.com/p/articles/mi_qa3923/is_200805/ai_n27899416.

[61] *Id.*

[62] *See generally* Glamis Gold Ltd. v. United States, Notice of Arbitration (Dec. 9, 2003), *available at* http://www.state.gov/documents/organization/27320.pdf (hereinafter "Notice of Arbitration").

document production and assertions of privilege.[63] On a practical level, *Glamis Gold* is one of a few publicly available arbitration proceedings that adopted and published numerous procedural orders. These orders illustrate how the Tribunal guided and encouraged the Parties to cooperate on issues of document production.[64] The document disclosure procedures were refined over a couple of months after the first document requests had been exchanged. Although the *Glamis Gold* Tribunal could have addressed document disclosure procedures at an even earlier stage, namely during the procedural meeting, the Tribunal nevertheless created a more predictable, more efficient, and less costly proceeding by determining the applicable procedural rules from the outset of the proceeding, rather than as issues arose. On a theoretical level, *Glamis Gold* shows how and why a general consensus on document disclosure procedures in international arbitration could and should emerge.

A. Case Background

In *Glamis Gold, Ltd. v. United States of America*, Claimant Glamis Gold, a publicly-held Canadian mining corporation, brought an action against the United States for alleged injuries relating to a proposed gold mine in the California desert.[65] Glamis Gold submitted its claim to arbitration under the UNCITRAL Arbitration Rules, administered by the International Centre for Settlement of Investment Disputes, with Washington, DC, as the place of arbitration.[66] The Claimant argued that the United States breached its obligations under NAFTA by expropriating its mining investment through the enactment and implementation of open-pit mining regulations in

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[63] *Glamis Gold* is an investment treaty arbitration, which raises particular concerns with respect to disclosure procedures relating to governments. This is reflected in the Tribunal's deliberative process on privilege discussed in the November 17, 2005 Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege. However, our analysis relates equally to international commercial arbitration. There are an increasing number of international commercial arbitrations that involve state instrumentalities and therefore, assertions of government-related privilege are likely to appear in this context.

[64] The *Glamis Gold* Tribunal issued six procedural orders, four decisions, and held one hearing relating to document production and privilege in approximately two years; s*ee generally Glamis Gold, available at* http://www.state.gov/s/l/c10986.htm.

[65] Notice of Arbitration, *supra* note 62, at ¶ 3.

[66] *Id*. at § F.

violation of Article 1110 and denying the investment the minimum standard of treatment under international law in violation of Article 1105.[67] The Tribunal is currently deciding the case on the merits.

B. Creating a Standard for Document Disclosure Procedures and Determining Privilege Rules in Glamis Gold

One way to establish the appropriate procedures in arbitration is for the parties and the tribunal to make a "conscious" decision at the outset of the proceedings to establish the procedures best suited to the dispute at hand.[68] Ideally, the *Glamis Gold* Tribunal would have established the procedures at the initial procedural meeting had it known the myriad of privilege issues that would arise. Instead, the Tribunal decided to formulate a set of procedures early on in its Decision on Parties' Request for Production of Documents Withheld on Grounds of Privilege. This decision was issued once the Tribunal received an introduction to the legal and factual issues of the case, and considered the Parties' preferences on procedures for evidence-taking in light of the Tribunal's duty to promote fairness between the Parties.[69]

In drafting this Decision, two primary considerations appear to have guided the Tribunal. First, the Tribunal aimed to avoid extensive document production despite it being an investment arbitration, where document production is generally more tolerated because the dispute lacks a contractual relationship between the parties.[70] Second, because the Parties requested a variety of documents, many of which each Party objected to as categorically privileged, the Tribunal needed to devise clear and fair standards for determining privilege.

To evaluate which procedural standards would apply, the *Glamis Gold* Tribunal turned to a variety of sources cited by the Parties in

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[67] *Id*. at § F.

[68] Report from the ICC Commission on Arbitration, *supra* note 59, at 7.

[69] *See generally* Glamis Gold Ltd. v. United States, Procedural Order No. 3 (June 21, 2005), *available at* http://www.state.gov/documents/organization/54153.pdf (scheduling a hearing on privilege objections) (hereinafter "Procedural Order No. 3").

[70] Glamis Gold Ltd. v. United States, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, n.1 (Nov. 17, 2005), *available at* http://www.state.gov/documents/organization/57342.pdf (hereinafter "Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege").

their pleadings, including: the UNCITRAL Arbitration Rules, the IBA Rules, and the standards common to most U.S. jurisdictions. The Tribunal first reviewed Article 24 of the UNCITRAL Arbitration Rules, which provides:

> 1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
>
> 2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
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> 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.[71]

As mentioned above, Article 24 is clear about the tribunal's authority to order the production of documents but is not clear with respect to how the tribunal is to exercise that authority.[72] The Tribunal also found the UNCITRAL Arbitration Rules to be silent on what privileges may be asserted and the applicable standards for evaluating these assertions.[73] Article 15(1) states that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[74] This rule, unfortunately, merely serves to provide the tribunal with direction to ensure due process and gives little specificity on how to conduct evidence taking. Due to the lack of precise guidelines, the Tribunal turned to the IBA Rules for further instruction.

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[71] UNCITRAL Arbitration Rules, Art. 24.

[72] UNCITRAL Arbitration Rules, Art. 24; *see also* Glamis Gold Ltd. v. United States, Decision on Objections to Document Production, ¶ 8 (July 20, 2005), *available at* http://www.state.gov/documents/organization/54365.pdf (hereinafter "Decision on Objections to Document Production").

[73] Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, *supra* note 70, at ¶¶ 17-18.

[74] UNCITRAL, Art. 15; *see also* Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, *supra* note 70, at ¶¶ 17-18.

Much like the UNCITRAL Arbitration Rules, however, the Tribunal found the IBA Rules to be similarly vague, indicating only that the document requests should be "narrow and specific."[75] The rules also state that the parties must reasonably believe the document "exist[s]" and is "relevant and material" to the outcome of the case.[76] Having reviewed the requirements of the UNCITRAL Arbitration Rules and the broad guidelines of the IBA Rules, the Tribunal focused primarily on the Parties' articulation of the materiality and relevance of a given document or category of documents to the claims asserted.[77]

C. Application of the Glamis Gold Standard to Assertions of Privilege

The *Glamis Gold* Tribunal applied the standards of specificity, relevance and materiality contained in the IBA Rules in deciding generally on document disclosure issues, but also searched for a more specific standard to fill the gaps as to the applicable privilege rules.[78] The Parties expressed their preference for United States privilege law, but disagreed on which state jurisdiction.[79] The Claimant expressed a preference for D.C. Circuit or federal common law while the Respondent argued for identifying the privilege rules

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[75] IBA Rules, Art. 3(3)(a)(i); Decision on Objections to Document Production, *supra* note 72, at ¶¶ 9-10. Although not cited by the *Glamis Gold* Tribunal, the IBA's *Supplementary Rules Governing the Taking of Evidence in International Commercial Arbitration* do limit document production in that parties cannot seek purely internal documents, which protects the business secrets privilege. The rules also include a provision stating that arbitral discretion on the admission of evidence is limited when a party requests exclusion of a document or statement that involved "[a] legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable." Other grounds for exclusion include "commercial or technical confidentiality" and "grounds of special political or institutional sensitivity (including evidence which has been classified as secret by a government)" that the arbitral tribunal determines to be compelling. Other rules have provisions allowing for the arbitrator to issue protective orders to protect trade secrets.

[76] Decision on Objections to Document Production, *supra* note 72, at ¶¶ 9-10; *see also* Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, *supra* note 70, at ¶ 8.

[77] Decision on Objections to Document Production, *supra* note 72, at ¶ 19.

[78] Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, *supra* note 70, at ¶ 19.

[79] *Id.*

common to U.S. jurisdictions as the claim arose from events in both California and Nevada.[80]

Considering these requests, the Tribunal found that U.S. Federal procedural laws were not directly applicable as the Parties had agreed to follow the UNCITRAL Arbitration Rules.[81] Rather than selecting the law that accords the broadest privilege protection (or the "most favored nation" rule as often followed many arbitration tribunals),[82] the Tribunal reviewed case law from a variety of U.S. jurisdictions and identified the rules common to U.S. jurisdictions. As such, the Tribunal defined what rules the Parties could reasonably have anticipated would be applied given the facts of the case, thus allowing the Tribunal to balance the requirements of the arbitration agreement with the Parties' expectations as to the applicable privilege rules.[83]

In one prominent example of the Tribunal's application of rules common to U.S. jurisdictions, the Tribunal considered the Claimant's request for certain government communications between the attorneys in the Office of the Legal Adviser and the United States government.[84] The Claimant argued that attorney-client privilege did not attach to government attorneys because the Office of the Legal Adviser provides policy advice and serves in the same capacity as in-house counsel. The United States argued that the Legal Adviser attorneys are not policy officers, but rather provide legal advice to the government. In contrast with most civil law jurisdictions that do not consider in-house counsel communications with the company as falling within the ambit of attorney-client privilege, the consensus in the United States is that the privilege does apply in these cases.[85] Citing to various state and circuit cases, the Tribunal sided with the United States, finding that attorney-client privilege did attach to communications between Legal Adviser attorneys and the government.[86]

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[80] *Id.*

[81] *Id.*

[82] Rubinstein & Guerrina, *supra* note 1, at 598.

[83] Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, *supra* note 70, at ¶ 19.

[84] *Id*. at ¶¶ 21-28.

[85] *Id*. at ¶¶ 24-25.

[86] *Id.*

The Tribunal's decision to adopt the rules most common to U.S. jurisdictions is an approach that could be further examined by members of the international arbitration community to help devise a set of harmonized procedural guidelines to expedite arbitral proceedings by looking at commonalities between legal systems.[87] As Craig, Park and Paulsson once observed in relation to document disclosure procedures: "whole hearted adherence [of the tribunal] to [common law procedure] will disappoint one of the parties and may in fact be unfair. In these circumstances, arbitrators may choose to apply procedures which are common to the two systems or adopt certain features of each system."[88] These guidelines would allow parties to think through the issues and/or adopt a rule more suitable to the case and the parties' interests. In either case, the tribunal and the parties would save time and money.

D. Controlling Procedural Efficiency: Narrowing Standards for Document Requests

The *Glamis Gold* Tribunal was proactive and gave "tailor-made" suggestions regarding documentary evidence and the extent to which document production was needed to properly address the issues in dispute.[89] Much like U.S,-style litigation, each of the Parties was required to give the Tribunal specific grounds for upholding or overturning a request for or objection to a set of documents and the opposing Party was given an opportunity to respond.[90]

As part of this effort, the Tribunal established a clear procedure for document exchange. The Tribunal directed the Parties to provide detailed explanations for the basis of their assertions of privilege, and, if applicable, the basis for an objection as to the materiality of the document requested.[91] The Tribunal required the Parties to explain

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[87] *Id.*

[88] George Burn and Zara Skelton, *The Problem with Legal Privilege in International Arbitration*, 72 J. of Chartered Institute of Arbitrators 124, 129 (2006) (citing *International Chamber of Commerce Arbitration*, 382 (Oceana, Dobbs Fury, 1990)).

[89] Report from the ICC Commission on Arbitration, *supra* note 59, at 25 (discussing the benefit of providing "tailor-made" suggestions regarding document production early in the arbitration).

[90] Procedural Order No. 3, *supra* note 69, at ¶¶ 8-9.

[91] Decisions on Parties' Request for Production of Documents Withheld on Grounds of Privilege, *supra* note 70, at ¶ 25 (In deciding on issues of privilege, the Tribunal

their reasoning in accordance with a specific form provided by the Tribunal[92] to create consistency, minimize ambiguity and increase fairness. These forms varied depending on the type of objection asserted. Where one Party insisted on the disclosure of a document marked as privileged, the requesting Party was required to specify why each entry on the privilege log was not a correct assertion of privilege or why the requesting Party's need was so great as to outweigh the refusing Party's interest in withholding the document.[93] These procedures allowed the Tribunal to maintain a certain level of fairness, while reducing the number of documents to be disclosed.[94]

As in most arbitral proceedings, the Arbitrators issued procedural orders to define the scope and mechanisms of document disclosure.[95] One particularity of *Glamis Gold* is in the frequency of procedural orders issued by the Tribunal. The Tribunal played an active role throughout the proceeding to help define the scope of privilege based on rules most common to U.S. jurisdictions and applicable institution rules. The Tribunal did so in part to facilitate cooperation between the Parties in the document disclosure production process.[96] Because of the frequency and number of procedural orders, the Tribunal could defer its

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borrowed from the Schedule of Document Production devised by Alan Redfern and often referred to as the Redfern Schedule, as recommended by the Report from the ICC Commission on Arbitration, *supra* note 59, at 32).

[92] *Id.* (As an example, where the United States asserted attorney-client privilege, the Tribunal ordered that the document be described as follows: "Confidential ____ (Communication/Email/Memo/etc.) dated _____between Attorney/Attorney's Representative ____, who was at the time acting as legal counsel and not primarily as a policymaker or corporate decision-maker, and Client/Client Affiliate _____ concerning legal advice on the subject of _____." Depending on the objection raised by the Claimant, the United States was required to state that "To the extent that this document was circulated to _____ , (a colleague from a different agency), such circulation is protected because there was substantial identity of legal interests between the two agencies with respect to the particular subject matter of the communications.").

[93] *Id.*; Glamis Gold Ltd. v. United States, Procedural Order No. 8 (January 31, 2006), at ¶ 10, *available at* http://www.state.gov/documents/organization/60322.pdf (hereinafter "Procedural Order No. 8").

[94] *Id.*

[95] BORN, *supra* note 5, at 485.

[96] *See, e.g.,* Glamis Gold Ltd. v. United States, Procedural Order No. 7 (Nov. 10, 2005), *available at* http://www.state.gov/documents/organization/56971.pdf

decision on assertions of privilege versus the need of the other party for the document requested, until it had reviewed the merits of the relevant claim.[97] The rationale for the Tribunal was to "not override privilege unnecessarily" and to "not order production without restriction."[98] Where there were no objections to document production, the Tribunal directed the Parties to produce documents on a continuing basis.[99]

As part of its endeavor to limit the "Americanization" of document production in this arbitration, the Tribunal decided to curb the Claimant's request for the production of all of the Respondent's unpublished documents relating to the matter. The Tribunal found it premature to require the United States government to produce all non-public documents up-front when the Claimant had not yet reviewed the publicly available documents and determined whether these were sufficient.[100] The Tribunal's holding differs greatly from a U.S. domestic proceeding where a court would require the production of information that "appears reasonably calculated to lead to the discovery of admissible evidence."[101] Under the Federal Rules of Civil Procedure, the "reasonably calculated" standard is more lenient and broad than that which was applied by the Tribunal which requires the requested document to be relevant and material evidence to the outcome of the case. The Tribunal in *Glamis Gold* applied an even stricter standard, requiring the Claimant to show that relevant and material evidence necessary to prove its case was not publicly available, before requiring the Respondent to produce the non-public documents.

The Tribunal responded in a similar fashion to the Respondent's request that the Claimant produce all documents relating to backfilling in their mining operations in other countries by setting limits to the amount of documents to be produced.[102] Rather than

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[97] Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, at ¶ 30 (April 21, 2006), *available at* http://www.state.gov/documents/organization/75784.pdf (hereinafter "Decision on Requests for Production of Documents and Challenges to Assertions of Privilege").

[98] *Id*.

[99] Procedural Order No. 3, *supra* note 69, at ¶ 8.

[100] Decision on Objections to Document Production, *supra* note 72, at ¶ 19.

[101] FED. R. CIV. P. 26(b).

[102] Decision on Objections to Document Production, *supra* note 72, at ¶¶ 26-29.

merely requiring the Claimant to produce documents because they could be "reasonably calculated" to lead to admissible evidence, the Tribunal formulated its own standard and held that the Respondent must be able to show a "substantial nexus" between the category of requested documents and the materiality of such documents to the outcome of the case. Applying this more stringent standard, the Tribunal ruled in favor of the Claimant.[103]

The Parties also raised the possibility of an *in camera* review of documents remaining in dispute. While such review is not uncommon in U.S. courts,[104] the Respondent was concerned with the risk of prejudicing the Tribunal.[105] The Tribunal considered the United States' concern, but was also interested in achieving efficiency and fairness. The number of disputed documents was such that it would have presented an enormous burden on the Tribunal and would have unnecessarily prolonged the proceedings. The Tribunal was, however, also reluctant to categorically grant or deny the requests to eliminate this document disclosure procedure obstacle. The Tribunal opted to "advance the arbitration" and considered the appointment of an independent special master,[106] whose role would have been to apply the Tribunal's guidelines in her review of documents. This solution would have addressed the United States' concerns and arguably increased efficiency by outsourcing the burden of document review. Such a procedure has its own set of complications, which will not be discussed here, but the Tribunal and the Parties ultimately did not proceed with this option.

The privilege issues in *Glamis Gold* were thus resolved through the Tribunal's categorical guidelines and by deferring several party requests until later in the proceedings when the Tribunal had determined the materiality of the documents in resolving the

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[103] *Id.*

[104] BORN, *supra* note 5, at 489 (citing Local Lodge 1746, International Association Of Machinists and Aerospace Workers, AFL-CIO v. Pratt & Whitney Division of United Aircraft Corporation, 329 F. Supp. 283 (D. Conn. 1971); Mineral & Chemicals Philipp Corp. v. Panamerican Commodoties, SA, 224 N.Y.S.2d 763 (Sup. Ct. 1962)).

[105] Procedural Order No. 8, *supra* note 93, at ¶ 5.

[106] *Id.,* at ¶ 11.

dispute.[107] For a particular document request that required balancing the Claimant's need for the documents against the Respondent's privilege interest, the Tribunal deferred that decision.[108] The Tribunal explained that its decision to defer some decisions until later was driven by two factors:

> The starting point for the Tribunal is that it should not override privileges unnecessarily. Simultaneously, the question of Claimant's need for a particular document cannot be assessed with accuracy at this early point in the arbitration. This is particularly the case given the fact that Claimant in many instances has other documents, or entirely different means of proof, available to it to establish a proposition. In deferring a decision, the Tribunal anticipates that such decision will not be made until, or following, the hearing on the merits of the claim. The Tribunal acknowledges that any later decision to order production would result in a limited extension of the proceedings.[109]

By doing so, the Tribunal did not require the Respondent to unnecessarily produce documents and further delay the proceeding.

These examples show how a compromise can be reached in document production to preserve fair treatment of the parties and limit excessive document production, while promoting fact-finding. By deferring the document requests until the Parties had exhausted other sources and more specifically identified why the documents were important to their case, the Tribunal created a more efficient proceeding. The Tribunal's tactics limited the amount of documents produced, which in turn reduced the amount of time and resources the Parties spent on producing, filtering through and reviewing documents. Following this approach, the Tribunal avoided adding an evidentiary procedural step, including not having to turn to an independent special master to review a new influx of documents.

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[107] Glamis Gold Ltd. v. United States, Procedural Order No. 10 (Feb. 22, 2007), at ¶ 2, *available at* http://www.state.gov/documents/organization/81042.pdf.

[108] Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, *supra* note 97, at ¶ 8(iii).

[109] *Id.*

Glamis Gold not only outlines helpful tactics for future arbitrations to expedite proceedings, but also shows how beneficial international procedural standards or more specific international institution rules would be in arbitration proceedings. Had the UNCITRAL Arbitration Rules and the IBA Rules been more specific, the Parties in *Glamis Gold* could have avoided the extensive debate on the applicable procedural rules, thus saving time and money. In fact, the first request for documents was made on May 10, 2005, and the last decision on objections on April 21, 2006. To provide an estimate of the cost, the Tribunal issued six procedural orders, four decisions and held one hearing on this issue over the course of eleven months. The production phase was so extensive that it also resulted in the delay of the final arbitral hearing. In addition, one objection was revisited by the Tribunal following the hearing, per its previous decision on deferment, and resulted in the production of six additional documents.[110] Based on this example, a harmonization of international arbitration rules would advance the goals of arbitration to make proceedings more predictable, time efficient, and cost efficient. Such rules would also preserve the flexible qualities of arbitration as parties would be able to borrow and contract around such international standard procedural rules to suit their interests and address the particular circumstances of their case.

IV. CONCLUSION

No clear international standard currently exists on document disclosure procedures in arbitration proceedings, nor does this paper suggest that strict rules of procedure should govern international arbitrations. Instead, *Glamis Gold* shows that establishing document production guidelines or default rules would strengthen the goals of international arbitration to improve fairness, predictability, and efficiency, while maintaining flexibility.

A set of default rules of procedure in international arbitration would allow and encourage contracting parties to anticipate and think through the applicable rules when drafting their contracts. These procedural approaches could be adopted without compromising the flexibility of arbitral tribunals to tailor proceedings to the needs of the parties and the case. Parties could decide whether to contract around

[110] Glamis Gold Ltd. v. United States, Procedural Order No. 13 (Mar. 21, 2008), at ¶ 2, *available at* http://www.state.gov/documents/organization/110307.pdf.

the rules to reflect their particular interests. Without such default rules or explicit procedural rule provisions in individual contracts, tribunals will continue to be forced to dedicate significant time and resources to determining the applicable procedural rules.

These default rules or guidelines could be established either by further specifying international institution rules, as demonstrated by the AAA in their recent rule reforms, and/or further clarifying international guidelines such as the IBA Rules. Such a norm could be established by finding commonalities between jurisdictions and international institution rules, as well as considering practical aspects of procedural rules used in publicly available arbitration proceedings that have novel and interesting procedural approaches to offer, such as *Glamis Gold*.

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