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by M.E. Jaffe, J.T. Dulani and D.J. Stute

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Burden of Proof as a Prerequisite to Document Production Under the 2010 IBA Rules: An Obituary

by Michael Evan Jaffe, Jeetander Dulani & David Stute[1]

I. Introduction

Document production in international arbitration has been the subject of much debate since the adoption of the original IBA Rules in 1983.[2] Although it is firmly established that the IBA Rules allow for production of documents, the scope of production continues to divide scholars and practitioners alike.[3] Given the import of document production, it is no surprise that the parties have a vested interest in challenging the other side's requests.[4] But lawyers in arbitration proceedings, unlike other litigation, typically hail from different legal traditions,[5] bringing their respective local legal norms and preconceptions to the proceedings.[6] Thus, what may be par for the course in terms of document production in an English national court may well be outrageously intrusive in Germany. Indeed, legal literature is rife with references to the apparent overreach of respective national approaches—whether real or informed by popular stereotypes.[7]

Contributing to this debate, Yves Derains, a former Secretary of the International Court of Arbitration, in a 2006 article advocated for what he termed "greater efficiency" in document production under the 1999 IBA Rules (1999 Rules).[8] Advocating from a distinctly continental perspective by his own admission,[9] Derains suggested that the requesting party must bear the burden of proof as to any issue for which that party seeks document production from the opposing side.[10] In other words, whenever a party does not bear the burden of proof on the issue as to which it seeks documents, the tribunal is at liberty to deny the request.[11] This approach is necessary, according to Derains, to forestall an "avalanche"-like infusion of documents into the arbitral proceedings.[12] Though Derains implicitly acknowledged that the IBA Rules do not spell out his blanket rule in so many words, Derains concluded that the

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[1] Michael Jaffe is a partner and Jeetander Dulani is a counsel in the Washington, D.C. office of Pillsbury Winthrop Shaw Pittman, LLP. Both have extensive experience in international arbitration. David Stute is a litigation associate at the firm.

[2] *See, e.g.*, Nathan D. O'Malley, *Document Production under Article 3 of the 2010 IBA Rules of Evidence*, 13 INT'L. ARB. L.R., no. 5, 2010, at 186.

[3] TOBIAS ZUBERBÜHLER ET AL., IBA RULES OF EVIDENCE, COMMENTARY ON THE IBA RULES OF THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 33 (2012).

[4] ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 384 (2009) (noting that document production is especially important in international arbitration because decisions are fact-driven 70% of the time).

[5] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, Preamble 1 (2010).

[6] *See* G. Ahuilar Alvarez, *To What Extent Do Arbitrators in International Cases Disregard the Bag and Baggage of National Systems?*, ICCA CONGRESS SERIES, no. 8, 1998, at 139.

[7] REDFERN, *supra* note 4, at 385.

[8] Yves Derains, *Towards Greater Efficiency in Document Production before Arbitral Tribunals—A Continental Viewpoint*, ICC BULLETIN, SPECIAL SUPPLEMENT 83 (2006).

[9] *Id.* at 84 ("It is from a Continental standpoint that the following suggestions are made.").

[10] *Id.* at 87 ("[W]hen a document production request is disputed, the arbitrators have the responsibility of determining whether the request party actually needs the documents to discharge its burden of proof. If not, the request should be denied.").

[11] *Id.*

[12] *Id.*at 85, 87.

Rules' relevancy and materiality requirement should lead arbitrators to adopt his solution.[13]Lack of textual support aside, Derains' blanket rule[14] quickly garnered support.[15] And while the rule also received criticism,[16] its theoretical underpinnings largely eluded scrutiny. Such scrutiny is particularly apposite today, given the lack of official commentary on the Derains' blanket rule in connection with the 2010 codification of the IBA Rules (the "2010 Rules") or in the Subcommittee's accompanying Commentary.

In this article we propose to consider the advisability of Derains' blanket rule by examining its possible origins and considering its merits along with its shortcomings. Ultimately, this analysis concludes that the blanket rule: (1) lacks a textual basis in the 2010 IBA Rules (or prior iterations); (2) tilts the scale too far in favor of continental jurisprudence rather than adopting the balanced approach that the IBA Rules were intended to achieve; (3) and opens arbitral awards to due process challenges while also depriving the arbitral proceedings of necessary transparency. Accordingly, the blanket rule should be rejected in favor of a more balanced approach that is rooted in the text of the current IBA Rules.

II. Background on IBA Rules

For decades, the IBA—with 2500 members from some 90 countries—has worked to harmonize evidentiary rules in international arbitration, as well as supplement *ad hoc*, institutional, and other rules applicable to international arbitration.[17] Starting with the adoption of the first set of rules in 1983 (1983 Rules),[18] the IBA recognized that agreement on the production of documents would be hard to achieve in international arbitration, given divergent national practices.[19] The 1983 Rules only allowed document production requests in very limited circumstances.[20] But the IBA moved away from these notably restrictive production rules in adopting a revised set of Rules in 1999.[21] The 1999 Rules were a noted success, lauded for their balanced treatment of various perspectives.[22] Recognizing that international arbitral practice was changing—reflecting the globalization of business and the

[13] *Id.* at 87 ("Unfortunately, too many arbitrators do not see [the relevancy and materiality] requirement in the context of the burden of proof, despite the fact that the IBA Rules point out the need to do so.").
[14] JEFF WAYNCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 857 (2012).
[15] O'Malley, *supra* note 2, *and* Bernard Hanotiau, *Document Production in International Arbitration: A Tentative Definition of 'Best Practices'*, ICC BULLETIN, SPECIAL SUPPLEMENT 113 (2006).
[16] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2363 (2d ed. 2014), *and* WAYNCYMER, *supra* note 14, at 859 (2012).
[17] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, Preamble 1 (2010); *see also* IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 2 (2010).
[18] IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 2 (2010).
[19] Judith Gill, Guido Tawl & Richard Kreindler, *The 2010 Revisions to the IBA Rules on the Taking of Evidence in International Arbitration*, PARIS J. ARB., no. 1, 2011, at 23, 25.
[20] IBA RULES GOVERNING THE PRESENTATION AND RECEPTION OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION Art. 4(4) (1983) **("**A party may by Notice to Produce a Document request any other party to provide him with any document relevant to the dispute between the parties and not listed, provided such document is identified with reasonable particularity and provided further that it passed to or from such other party from or to a third party who is not a party to the arbitration. If a party refuses to comply with a Notice to Produce a Document he may be ordered to do so by the Arbitrator.")
[21] IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 2 (2010).
[22] Gill, Tawl & Kreindler, *supra* note 19, at 25.

acceptance of international arbitration as a viable alternative to national courts—the IBA in 2008 set out to revise the Rules,[23] adopting its revisions in 2010.

Throughout, the IBA has had the express objective of harmonizing procedures from civil and common law systems.[24] This balance is particularly difficult to achieve in the area of production of documentary evidence to an opposing party, where local norms and practices tend differ markedly.[25] Thus, despite the noted success of the 1999 Rules,[26] the IBA Subcommittee tasked with the 2010 revisions (Subcommittee) chose to pay particularly close attention to this topic.[27]

III. The Burden-of-Proof Threshold

A. Origins

Writing about the 1999 Rules, Derains noted "the extent to which arbitrators are swamped with documents."[28] To address what he saw as an impediment to efficient arbitral practice, he argued that greater efficiency could be secured by restricting production of documents to "a core bundle that [the parties] eventually use as evidence."[29] In particular, Derains pointed out that production of documents in the possession of the opponent—or what is commonly referred to as discovery in the United States and international arbitration generally—led to delays in the proceedings and mounting costs to the parties.[30]

Derains attributed this lack of efficiency to the "loose interpretation" of the 1999 Rules, rather than the 1999 text itself,[31] which required "a description of how the documents requested are relevant and material to the outcome of the case."[32] He asserted that

> [a]rbitrators all too often grant requests for document production as soon as they appear to relate to facts that are relevant and material to the outcome of the dispute, and disregard the *additional requirement* that the party making the request actually has the burden and the need to prove these facts in order to succeed.[33]

But it is unclear where Derains found this "additional requirement." Indeed, neither relevance nor materiality is naturally tied to the allocation of the burden of proof. In addition, neither term is defined in the 1999 Rules, and the concept of linking document requests to the burden of proof is not found in the text of the 1999 Rules, either. Moreover, neither the 1999 Rules nor the accompanying Working Party's Commentary suggest such an "additional

[23] *Id.*
[24] IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 3 (2010).
[25] O'Malley, *supra* note 2, at 186.
[26] *Id.*; Gill, Tawl & Kreindler, *supra* note 19, at 24; IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 1 (2010).
[27] O'Malley, *supra* note 2, at 186; for an in-depth discussion of all the pertinent changes, *see* Gill, Tawl & Kreindler, *supra* note 19.
[28] Derains, *supra* note 8, at 85.
[29] *Id.*
[30] *Id.* at 86.
[31] *Id.* at 86.
[32] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION 3.3(b) (1999).
[33] Derains, *supra* note 8, at 87 (emphasis added).

requirement."[34] Rather, it seems that the "requirement" may be a product of Derains' civil law perspective.

Without any textual support for the notion of an "additional requirement," Derains nonetheless invoked the 1999 Rules' goal of efficiency.[35] The Preamble states that it is the intention of the Rules to govern the taking of evidence in arbitral disputes in an "efficient and economical manner."[36] But the leap from seeking efficiency to limiting document production to only those issues for which a party bears the burden of proof is not called for by the Rules. In fact, neither of the relevant Articles—Article 3 on criteria for document production or Article 9 on reasons for excluding documents from production—make any mention of the burden of proof.[37] In short, taken as a whole, it is fair to conclude—whether from a textualist or a purposivist perspective [38] —that the Rules do not endorse Derains' "additional requirement."

B. Subsequent Reception

Derains' blanket rule, however, was quickly endorsed by other commentators. For instance, relying on Derains' article exclusively, Bernard Hanotiau—who is, like Derains, a civil law-trained advocate and a distinguished international arbitrator and commentator—stated that, where the requesting party does not carry the burden of proof, the "request should in *most cases* be dismissed."[39] While perhaps suggesting a softening of the blanket rule by allowing an exception in some cases, Hanotiau went no further than admitting the possibility of an exception. To a like result, but without citing Derains, Nathan D. O'Malley read a burden-of-proof requirement into the IBA Rules.[40] With Hanotiau and O'Malley's endorsement, Derains' burden-of-proof requirement remained unchallenged for some time .

C. The Derains Suggestions and the 2010 Rules

Derains repeatedly refers to his observations, including the burden-of-proof requirement, as simply "suggestions." [41] These suggestions were made on the eve of the IBA's decision to consider revising the IBA Rules, and the Subcommittee could have incorporated Derains' burden-of-proof requirement into the 2010 Rules. It did not. Rather, like the 1999 Rules, the 2010 Rules contain no reference to the burden of proof in Articles 3 or 9. Nor is there such a reference in the 1999 Working Party's Commentary or in the Commentary of the 2010

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[34] *See* IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (1999); *see also* IBA Review Working Party, Commentary on the New IBA Rules of Evidence in International Arbitration 21 (1999) (noting that the "rules concerning requests for production of documents from other parties represent a well-balanced compromise between the broader view generally taken in common law countries and the more narrow view held generally in civil law countries").

[35] Derains, *supra* note 8, at 87.

[36] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, Preamble 1 (1999); IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, Preamble 1 (2010) (slightly altering the 1999 Rules by adding "and fair").

[37] *See* IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (1999); *see also* IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION XX (2010).

[38] These words come from Judge Katzmann's book *Judging Statutes* (cited in Jeffery Rosen, *Judge Roberts, the Umpire in Chief,* N.Y. TIMES SUNDAY REVIEW, June 28, 2015, at 4).

[39] Bernard Hanotiau, *Document Production in International Arbitration: A Tentative Definition of 'Best Practices'*, ICC BULLETIN, SPECIAL SUPPLEMENT 113, 116 (2006).

[40] O'Malley, *supra* note 2, at 189.

[41] *See, e.g.*, Derains, *supra* note 8, at 84.

Subcommittee. In fact, and at odds with the Derains suggestions, the Working Party and the 2010 Subcommittee endorsed a more expansive view that "arbitral tribunals are to establish the facts of the case 'by all appropriate means,'" which encompasses "the competence of the arbitral tribunal to order one party to introduce certain documents, including internal documents, into the arbitral proceedings upon request of the other party."[42] This choice of words suggests that the IBA saw tribunals having broad arbitral authority to order the production of documents—free of the sort of confines that would accompany a Derains-like blanket rule.

If Derains' burden-of-proof requirement were critical to ensuring efficiency, the IBA could have easily made the burden-of-proof requirement a part of the 2010 Rules. To give an example, Article 3(2) could have been amended to read: "Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce *on any issue for which the requesting party carries the burden of proof*."[43] Alternatively, Article 3(4) could have been amended to read: "Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession custody or control as to which it makes no objection, *and as to which the producing party carries the burden of proof*."[44] Along the same lines, Article 9's grounds for objections could have been included a burden-of-proof safety valve. But the Subcommittee made no such changes, nor did it discuss a burden-of-proof requirement in its Commentary.

This leads to the likely conclusion that the IBA Subcommittee elected not to adopt the approach advocated by Derains.[45] After all, Article 3 received considerable attention in the Subcommittee's revisions,[46] making it unlikely that its members would have failed to address an aspect they considered important.[47] Incidentally, while Derains' rule received endorsements prior to the 2010 revisions,[48] it has been questioned since. As Gary Born observed:

> There is no basis for [Derains'] approach in either the IBA Rules, the ICC Task Force's report, or sound arbitral procedures. The fact that a party bears the burden of proof on an issue does not make a document it has requested any less relevant or material, nor any less important to the tribunal's fact-finding mandate. Moreover, the fact that a party bears the burden of proof on an issue does not suggest that it will, absent the requested document(s), be able to discharge that burden: it is both illogical

[42] IBA Review Working Party, Commentary on the New IBA Rules of Evidence in International Arbitration 21 (1999) (citing ICC Rules, Art. 20(1) and LCIA Rules, Art. 22.1(c)) (also noting that, even in civil law countries, courts are "entitled to order the production of internal documents" on the motion of a party or *sua sponte*); *see also* IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2010).

[43] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010) (italicized words added).

[44] *Id.* (italicized words added).

[45] To be sure, it is of course possible that the Subcommittee was unaware of Derains' suggestions or the comments of Hanotiau. Given the prominence of Derains and Hanotiau in the world of international arbitration and the breadth of experience of the members of the Subcommittee, it is highly unlikely that the Derains and Hanotiau views fell below the Subcommittee's radar.

[46] O'Malley, *supra* note 2, at 186.

[47] To the knowledge of the authors, no Subcommittee member has published an endorsement of the blanket rule to date.

[48] *See, e.g.*, O'Malley, *supra* note 2.

> and unfair to deny a party disclosure of documents otherwise subject to disclosure, merely because it does not bear the burden of proof with respect to the underlying issues to which the document is relevant.[49]

D. Continental Norms as a (Misguided) Explanation of the Blanket Rule

The text of the IBA Rules is the clearest expression of the IBA's intentions and should therefore be considered first in analyzing the Rules. On that score, *supra*, the Rules impose no burden-of-proof requirement on a party making a request for the production of documents. Beyond that, the Derains suggestion fails on two additional scores: it ignores the balance between civil and common law traditions envisioned by the IBA, and it is informed by an antiquated reading of both civil and common law discovery rules.

It is well established that—in most circumstances[50]—countries, such as Germany or France, have document production laws that are more circumscribed than, for instance, the Federal Rules of Civil Procedure in the United States, or English Civil Procedure Rules. Yet, even if some jurisdictions considered the proper allocation of the burden of proof a requirement for document production, the IBA—as its Working Party and Subcommittee made plain—intended to strike a balance between legal systems across the globe.[51] In doing so, the Rules do not choose one approach over another, but seek out a middle ground. For instance, the drafters of the 1999 Rules stated that they did not intend to create a discovery system in the Anglo-American style.[52] The same is true of the 2010 Rules, which explicitly guard against "fishing expeditions."[53] Conversely, neither the 1999 nor 2010 Rules adopted narrow civil law document production rules.[54] Instead, the Rules provide for limited document production, which includes the opportunity to test the assertions of the other side. Thus, even if Derains' suggestions were an accepted norm under other national legal systems, that would not define the parameters of the 2010 Rules.[55]

Moreover, traditional hallmarks of civil versus common law document production only tell part of the story. There has been considerable movement within national legal systems away

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BORN, *supra* note 16, at 2363; *see also* WAYNCYMER, *supra* note 14, at 859 ("There would be problems in applying [Yves's rule] as a blanket rule. It is certainly the case that in many instances, a tribunal can rely on the party with the burden of proof having to produce documents, otherwise they fail. But to deny the opposing party the opportunity to make targeted requests, removed an ability to easily identify selective presentation by the party with the burden and makes it harder for adverse inferences to be drawn where this has occurred. . . . In addition, a blanket rule would put undue pressure on the tribunal itself if it is not clear whether the other party has presented sufficient evidence to succeed under its burden. The opponent should not have to rely on the tribunal holding that the burden was not satisfied. This will commonly be a problem when incomplete evidence is presented on quantum or when quantum claims are based on hypotheses or tabulations that are potentially open to challenge.").

[50] Gabrielle Kaufmann-Kohler & Philippe Bärtsch, *Discovery in International Arbitration: How Much Is Too Much?*, GER. ARB. J. 2003, no. 1, 2004, at 13, 20 (noting that the U.S. Federal Rules of Civil Procedure are less permissive when it comes to privileged documents, for instance protecting communications between a company's legal department and its outside counsel where German law provides no protection).

[51] ZUBERBÜHLER, *supra* note 3, at 40.

[52] O'Malley, *supra* note 2, at 187.

[53] O'Malley, *supra* note 2, at 187; IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 8 (2010).

[54] O'Malley, *supra* note 2, at 187.

[55] ZUBERBÜHLER, *supra* note 3, at 40.

from the extremes of all-out discovery versus virtually no document production.[56] For instance, in Germany, it is recognized that a court "is entitled to order the production of internal documents either upon request of one party or because it sees the need for these documents itself."[57] Indeed, Germany's procedural statute (*Zivilprozessordnung*) was amended in 2002 to allow courts to order the production of documents that are in the possession of a party.[58] And should the party fail to produce the documents, the court may draw an adverse inference and deem the factual allegations by the requesting party as true.[59] Notably, the production of documents is not tied the burden of proof on the issue to which the documents pertain.[60]

On the other end of the spectrum, English Civil Procedure Rules have become a bit less permissive. Prior to 1999, the requirement of "relevance" rendered any information "directly or indirectly enabling a party to advance its own case or to damage the case of its adversary" subject to production.[61] This effectively made any document discoverable.[62] But the 1999 Woolf Reform limited discovery, *inter alia*, by introducing a proportionality requirement into the document production process.[63] And, similarly, in the United States, the most recent version of the Federal Rules limits discovery to what is "proportional to the needs of the case."[64]

In light of these developments, what has historically been seen as a chasm, is today a gap that is much more easily bridged. In short, the middle ground of the 2010 IBA Rules fits much more comfortably in both civil and common law jurisdictions.

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[56] Kaufmann-Kohler & Bärtsch, *supra* note 50, at 17 ("It is striking that German law expands the duty to provide documents at the very time English law proceeds to narrow the scope of discovery. Obviously, the two systems are still far apart, but they seem to recognize that the better solution lies somewhere in the middle.")

[57] Hilmar Raeschke-Kessler, *The Production of Documents in International Arbitration—A Commentary on Article 3 of the New IBA Rules of Evidence*, 18 ARB. INT'L 411, 415 (2002); *see also* IBA Review Working Party, Commentary on the New IBA Rules of Evidence in International Arbitration 21 (1999) and IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 7 (2010) (both mentioning the German example and citing ICC Rules, Art. 20(1) and LCIA Rules, Art. 22(1)(c) for further support).

[58] Kaufmann-Kohler & Bärtsch, *supra* note 50, at 17 (quoting Article 142(1) of the German *Zivilprozessordnung*) ("Das Gericht kann anordnen, dass eine Partei oder ein Dritter die in ihrem oder seinem Besitz befindlichen Urkunden und sonstigen Unterlagen, auf die sich eine Partei bezogen hat, vorlegt. Das Gericht kann hierfür eine Frist setzen sowie anordnen, dass die vorgelegten Unterlagen während einer von ihm zu bestimmenden Zeit auf der Geschäftsstelle verbleiben.").

[59] *Id.*

[60] *Id.*

[61] *Id.* (internal citations omitted).

[62] *Id.*

[63] *Id.*

[64] FED. R. CIV. P. 26(b)(1) ("(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).")

E. The Dreaded Slippery Slope Toward Fishing Expeditions

Practitioners advocating for narrower production in arbitration often invoke a slippery slope toward "American-style" discovery and "fishing expeditions" to assert that a given request will bring the proceedings perilously close to the precipice of freewheeling American-style discovery practices.[65] But the reality is that under the balanced approach of the IBA Rules, document production is no free-for-all.

First, it is important to realize that the IBA Rules have multiple safeguards to protect against "American-style" discovery or "fishing expeditions. Article 3.3 of the 2010 Rules spells out formal requirements that must be met by the requesting party. Next, categories of requested documents must be "narrow and specific."[66] And with the adoption of the 2010 Rules,[67] if the documents are in electronic form, the tribunal may require the requesting party to "identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner."[68] What is more, the documents must also be "relevant to the case and material to its outcome."[69] Even if the requesting party meets all these requirements, the other party has a series of grounds for objection under Article 9, including privilege, overly burdensome requests, as well as "procedural economy, proportionality, fairness" and "equality of the Parties."[70] According to the Subcommittee, the latter provision is to "ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing."[71]

In other words, the 2010 IBA Rules—without Derains' suggested burden-of-proof requirement—provide ample protection against runaway use of document production requests. To be sure, the Rules' safeguards are only effective to the extent that tribunals are willing to enforce those safeguards. But that caveat is true of any legal rule that depends on interpretation, application, and enforcement whether in a court of law or by an arbitral tribunal. While arguably objective, the Derains' "on/off" approach in effect says the tribunal cannot be trusted to make good judgments about the scope of document production, while that very tribunal is empowered to decide the merits of the matters in dispute. The logic of it is illusory – if there is any logic at all.

F. Transparency & Due Process

It is generally accepted that "[j]ustice is almost always best served by a degree of transparency, which brings the relevant facts before the arbitrators."[72] The 2010 Rules, along with "the weight of contemporary arbitral practice and academic authority," reflect this

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[65] JULIAN LEW, LOUKAS MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 556 (2003) (stating that scholars exploit cultural clichés in literature); interestingly, some 68 years ago, the Supreme Court exposed the "time-honored cry of 'fishing expedition'" as a tool that had been used "to preclude a party from inquiring into the facts underlying his opponent's case." Hickman v. Taylor, 329 U.S. 495, 507-08 (1947).

[66] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 3.3(a)(ii) (2010).

[67] O'Malley, *supra* note 2, at 187.

[68] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 3.3(a)(ii) (2010).

[69] *Id*. at 3.3(b), 3.7.

[70] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 9.2 (2010).

[71] IBA Review Subcommittee, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 26 (2010).

[72] BORN, *supra* note 16, at 2345-46.

consensus.[73] Concomitantly, the critical ingredient of transparency finds expression in what is termed the right to procedural due process in the United States or the right to be heard in Switzerland.[74] Applicable international treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in turn, provide grounds for vacating an award where a party was "unable to present his case,"[75] or where enforcement "would be contrary to the public policy of that country."[76] Indeed, Derains himself recognized this reality when he discussed the significance of the right to be heard, stating that "the refusal to order document production 'may, in certain circumstances, constitute a breach of a party's opportunity or right to be heard.'"[77] This is especially so where one of the parties has much more of the documentary record in its possession. For example on a construction project, typically the contractor's project records are much more extensive than the owner's. If the matter in dispute is focused on the contractor's entitlement to a time extension, the contractor will often have better access to documents that will bear on that topic than the owner. Denying the owner access to the documents in the contractor's possession because the contractor (as the claimant) has the burden of proof, all but ensures that the owner's right to be heard will be compromised.

What is more, a blanket burden-of-proof rule runs counter to transparency and a party's right to be heard, if the right to be heard includes—as it must—an opportunity to prepare a defense. Derains' burden-of-proof rule prevents a requesting party from being able to probe the assertions of its opponent by requesting documents whenever the opponent carries the burden of proof on a particular claim. If the allocation of the burden would itself be a ground for refusing disclosure, the IBA's relevance and materiality standard would be eviscerated. Instead, by authorizing the tribunal to assess relevance and materiality, and allowing the requesting party to explain the relevance and materiality of particular documents, the interests of transparency and fairness (a party's ability to present its case) are furthered, and the plain language of the IBA Rules is respected.

To be precise, the blanket rule suffers from three interrelated shortcomings that render it inherently flawed in terms of safeguarding the parties' due process rights. First, the only safeguard against abuse under this approach appears to be honorable behavior by the parties. This—at least in some instances—may be an overly optimistic baseline assumption. Second, even with all best intentions by professionals of great integrity, the party at whom the request is addressed will, as noted above, be unlikely to be able to view its own documents through the prism of the requesting side. For this reason, courts have long recognized that "[m]utual knowledge of all the relevant facts *gathered by both parties* is essential to proper litigation."[78] Third, the blanket rule's categorical denial of transparency, which would allow one side to probe the evidentiary assertions of its opponent, forecloses any built-in incentives to guide behavior.

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[73] *Id*.
[74] Gisela Knuts, *Jura Novit Curia and the Right to Be Heard—An Analysis of Recent Case Law*, 23 ARB. INT'L 669, 675 (2012).
[75] Art. V(1)(b).
[76] Art. V(2)(b); *see also* UNCITRAL Model Law Arts. 18 & 34(2)(a)(iv).
[77] Derains, *supra* note 8, at 87 (citing Gabrielle Kaufmann-Kohler, *Globalization of the Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1327 (2003)).
[78] Hickman v. Taylor, 329 U.S. 495, 507-08 (1947) (emphasis added).

IV. Conclusion

The IBA Rules seek efficiency as well as truth, not one or the other. The question is what procedural mechanism is most adept at achieving efficiency without unduly sacrificing fairness. The 2010 IBA Rules are based on a common ground positioned between common law notions of discovery and the limitations on probing an opponent's files in civil law jurisdictions. Respectfully, it is submitted that the narrowly cabined areas in which the IBA Rules allow a party to probe strike a reasonable balance.

In contrast, Derains' blanket rule lacks textual support and runs counter to the compromise that the IBA Rules were intended to strike. Moreover, the blanket rule forecloses a robust mechanism for parties to meaningfully test their opponents' contentions. There is, to be direct, no need for Derains' "additional requirement."