

# Evidence Disclosure:

# Specification requirements

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# Outline

- Guiding principles of the IBA Rules for document production
- Art. 3.3(a) IBA Rules and its interpretation
  - Individual documents
  - Categories of document
  - Categories of electronic documents
- Aims of the specification requirements

# Specification requirements are the consensus

## Relevant guiding principles of IBA Rules

1. Expansive American- or English-style discovery is generally inappropriate in international arbitration.
2. Some level of document production is appropriate, also of internal documents.

# Specification requirements

## NOMA Rules of Evidence

~~IBA Rules~~ Art. 3.3. *A Request to Produce shall contain:*

(a) (i) *a description of each requested Document sufficient to identify it, or*

(ii) *a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist;*

*in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;*

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# Specification of individual documents

Article 3.3. *A Request to Produce shall contain:*

(a)(i) *a description of each requested Document **sufficient to identify it;***

E.g. "The entire revised draft SPA accompanying A's binding offer dated [specific date given]"

Ideally:

- Author or recipient
- Date or time period when the document was drafted, sent or received
- Content of the document
- Title, file number



# Specification of categories of documents

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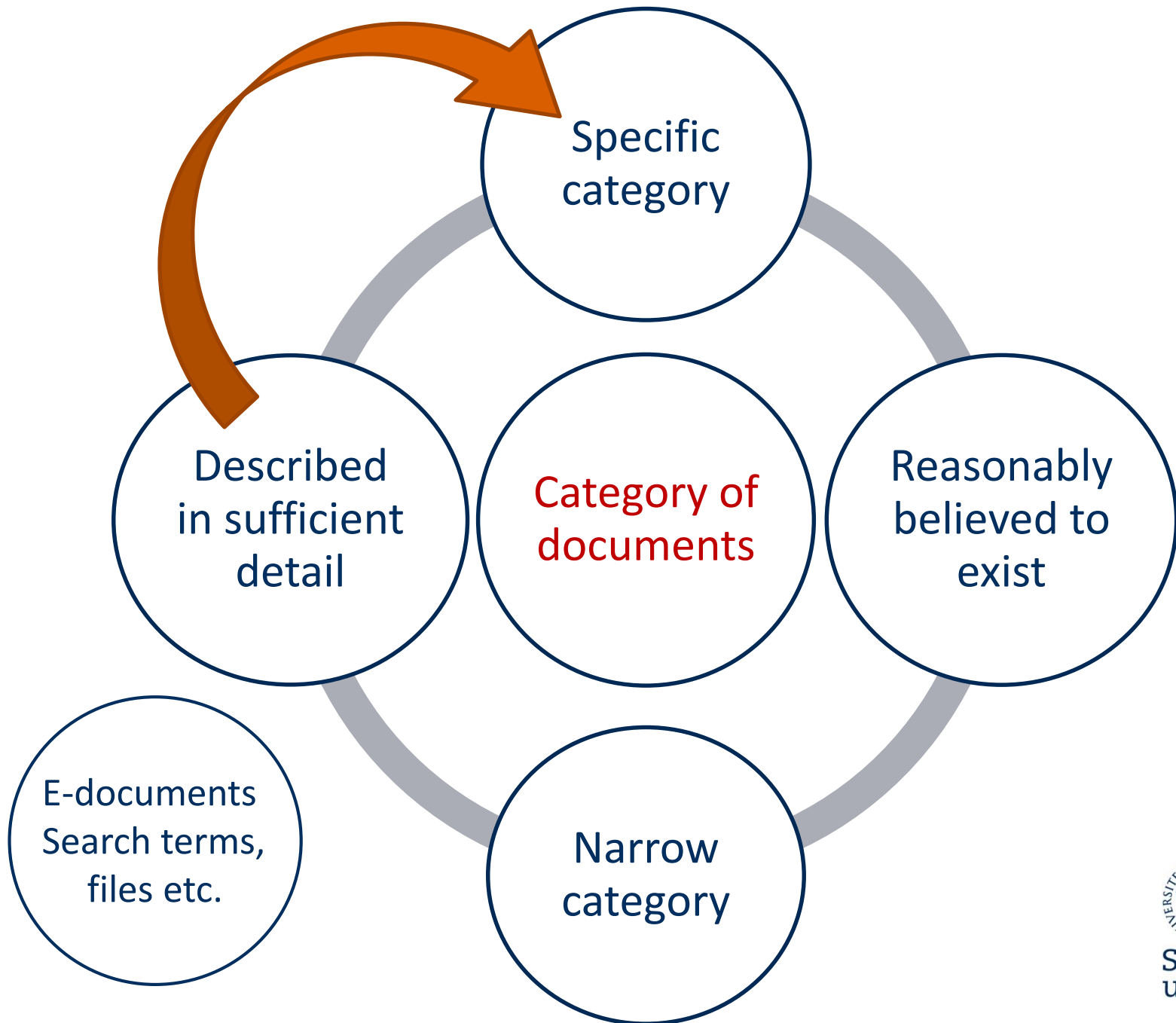
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# What is a specific category of documents?

- Specific **category** of documents:
  - Documents similar in type
  - Relate to the same issue that the requesting party wants to prove



# How to describe a category in sufficient detail?

*The requesting party cannot identify the dates or the authors of such documents, but nevertheless **can identify with some particularity the nature of the documents** sought and the **general time frame** in which they would have been prepared. (Commentary to 2010 IBA Rules)*

- **Subject matter**
- Nature of the documents
- Time frame
- Persons involved
- (Search terms for electronic documents)

# When is a category of documents narrow?

- Narrow – limited in extent
- Assessment depends on the circumstances of the case
  - Narrow time frame
  - Limited number of authors or addressees

Note: how many documents will be produced is hard to foresee

# Reasonably believed to exist

- To prevent “fishing expeditions” – mere hope that documents exist
- Often internal documents that the party can reasonably assume to exist

# Assessment - not in a vacuum

Relevance and materiality

Timing of the request

Bag and baggage

**Specification**

Circumstances

Amount in dispute

Remember: the request can be modified

# Examples

## Example 1:

”all letters of intent from potential buyers of Company A received by Respondent during due diligence process between time period X-Y[one year]”

- Specific category
- Narrow category
- Reasonably believed to exist

## Example 2:

”correspondence, reports, meeting minutes, notes, internal memoranda and emails relating to [twelve specified topics] and [a period exceeding six years].

- Specific category
- Narrow category
- Reasonably believed to exist

# Aims of the specification requirements

## Pragmatic

- Enables to produce the documents
- Enables tribunal to decide (yes/no/modify)

## Justice

- Support due process
- Avoid fishing expeditions

## Efficiency

- Avoiding lengthy document production
- Avoiding burdensome and costly searches

# Conclusion

A compromise with wiggle room  
for better or for worse.  
The choice is yours.