# Different types of documents in M&A Disputes

<table>
<thead>
<tr>
<th>Category</th>
<th>Documents</th>
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<tbody>
<tr>
<td>Claims based on flawed PPAs or breach of financial warranties</td>
<td>Accounting records, Transaction records</td>
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<tr>
<td>Claims based on balance sheet manipulation</td>
<td>Emails, SMS, Meeting minutes</td>
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<tr>
<td>Breach of exclusivity / confidentiality</td>
<td>Emails, Instant messaging services, Internal communication</td>
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Asymmetry of information

Evidence Asymmetry in M&A disputes

Pre-closing
- Seller still owns the target
- Has more information
- Evidence asymmetry generally in seller’s favour

Post-closing
- Buyer has acquired the target
- Has more information
- Evidence asymmetry generally in buyer’s favour
Cases of asymmetry favouring the seller

- Post-closing claim that the seller intentionally breached its representations / warranties
- Post or pre-closing claim that the seller inflated the target company’s past performance

Cases of asymmetry favouring the buyer

- Post-closing claim to increase the purchase price in light of the target company’s positive performance
- Post-closing claim due to the target company’s hidden liabilities
Steps to take during the deal to secure documents

**Seller**

- Negotiate temporary, partial and reasonable access rights to the target company’s information after the closing
- Document the status quo of the target company at key dates to “crystallise” the situation
- Negotiate a document retention policy
- Redact confidential business information

**Buyer**

- Strictly limit the seller’s access right to documents for the purpose of the dispute
- Limit the scope and length of access right
- Document the status quo of the target company at key dates to “crystallise” the situation
How best to use document production requests

- Document production request under IBA Rules Article 3(3)
  - Specifically identify document or group of documents
  - State how the documents are relevant and material to the case
  - State that the documents are believed to be in the requested party’s possession

- Specificity – identify document, format, subject matter, location, identity of author

- Relevant and material – make reference to the written submission
Document production: issues of confidentiality

- IBA Rules Article 3(13) protects confidentiality erga omnes

- However if the dispute involves direct competitors, as in the M&A field, no guaranteed protection of confidentiality
  - Confidential documents could be disclosed to opposing counsel alone and not its client
  - Appoint an independent expert bound by confidentiality to review confidential documents and report to the tribunal