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Confidentiality Agreements: What, When, Who?

This brief toolkit provides a general understanding of confidentiality agreements, their purpose and the typical contexts in which they are used. It also gives a list of key provisions to include in such agreements, and limitations to their use. Finally, it covers cases of breaches of confidence.

What are confidentiality agreements?

Confidentiality agreements, also known as Non-disclosure Agreements (hereinafter referred to as NDAs), are agreements which require the persons who have received confidential information to keep such information secure and confidential.

What is the purpose of NDAs?

NDAs are necessary or recommended in situations where parties are sharing sensitive, non-public information which might affect the individuals or the entities involved. Confidentiality supports legitimate business activities that would be harmed by premature public disclosure of such sensitive information. The purpose of NDAs is to protect the confidential information by restricting the recipient's use of such information, and to avoid opportunistic behaviours such as insider trading and personal enrichment.

When are NDAs usually necessary or recommended?

- **Suppliers and Business Partners:** Suppliers and business partners (e.g. in a joint venture) often need to share confidential information, such as information about how a product is made or other trade secrets. Therefore, it is advisable to adopt an NDA.
- **New Product Development:** When developing a new product in partnership with other individuals or entities, an NDA covering the information about the production is certainly recommended, as the value of such product lies in its novelty (e.g. patentability requirements).

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- **Employees:** Employees owe a duty of loyalty to their employer, which includes protection of the employer's confidential information such as any acquired specific knowledge about the company that would be valuable to a competitor. NDAs put that duty into writing and make it legally binding and enforceable.
- **Mergers and Acquisitions:** Negotiations on a merger or acquisition are usually kept confidential, as a premature disclosure could lead to the operation being called off. In such context, an NDA would give the parties the opportunity to examine the financial and business records of each company, and the space needed to come to a mutually beneficial outcome, safe from market and public pressure.

What are the key provisions to include in an NDA?

- **Parties clause:** Identifies the parties involved in the transaction.
- **Definition of Confidential Information:** Identifies the information the parties wish to protect as confidential.
- **Purpose clause:** States the purpose of the transaction which can be defined by the parties and the broad purpose in relation to the business of the individuals and entities involved.
- **Non-use / non-appropriation clause:** Obligates the parties not to use the confidential information as defined for any other purpose apart from the one mentioned in the NDA itself.
- **Return / Destruction of confidential information:** Obligates the parties to return to the discloser any confidential information previously shared in material form, or to destroy it when returning is not possible.
- **Ownership and no license clause:** Ownership of the disclosed information shall always remain with the discloser and there is no transfer of title to the recipient by virtue of any disclosure made by the discloser.
- **No warranties clause:** States that any information disclosed is disclosed on an 'as is' basis and as such the discloser does not take any responsibility for the accuracy, authenticity, efficacy or performance of such data.
- **Term of the agreement:** Refers to the duration of the NDA.
- **Governing law and jurisdiction clause:** Identifies the law which governs the contract, and the courts and jurisdiction for enforcing the NDA.
- **Employee solicitation clause:** Obligates the recipient to not approach the employees of the discloser in an attempt to recruit them.
- **Assignment clause:** Obligates the recipient to not assign the NDA to any third party without the prior consent of the discloser.
- **Miscellaneous clauses:** Consist of standard provisions usually found at the end of the NDA, including among others remedies for breach of the NDA itself.

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When does a breach of confidence occur?

The English courts have identified three requirements to identify a breach of confidence, namely that:

- the information was of confidential nature;
- it was communicated in such circumstances that any reasonable person in the recipient's position would realise it was given in confidence; and
- there was an unauthorised use of the information.

What are the remedies to a breach of confidence?

- **Damages:** The most commonly used remedy, usually included in a specific clause within the NDA. The amount of compensation for any loss incurred is usually measured by assessing the profits a claimant could have earned if such claimant would have used the information himself to earn profits / if such claimant sold or licensed the information to others.
- **Injunctions:** Granted by the courts to prevent any misuse of confidential information from entering the public space.
- **Destruction of information:** Comes as a court order for the destruction or delivery up of the confidential information to prevent such information from entering the public space.
- **Account of profit:** In the event of infringement to intellectual property rights, in case the recipient has made a profit, the discloser is entitled to receive any profits received from such an infringement. Once it is come to light that the recipient is liable, the discloser can opt for either damages or account of profits as a remedy for such breach.

What are the limitations of NDAs?

- Even though the discloser would want the NDA to be as comprehensive as possible, the recipient might not accept too detailed terms, causing delays to closing and execution.
- It may be difficult to prove a breach of confidence by the recipient.
- There is always a risk of the information being misused and the discloser's sensitive information being exposed in the event of the transaction not going through.

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