

# Using NDAs to protect confidential information

Confidentiality agreements (sometimes called Non-Disclosure Agreements (NDAs) or Information-Exchange Agreements) should be signed at an early stage in negotiations, ideally before any information is exchanged.

In this article the descriptions Confidentiality agreement and NDA both mean the same agreement.

The agreement confirms that both exporter and Asian importer will keep confidential the terms of the negotiations, any sensitive product or service information and the terms of the eventual export contract.

It is often the first document entered into, before the document setting out the principles is signed – often called Heads of Agreement or Heads of Terms or Memorandum of Understanding. See our article

## What legal protection do NDAs give an exporter?

An NDA ensures that information disclosed during negotiations remains confidential and is not used other than for the purpose disclosed. A confidentiality agreement creates a contractual right as well as helping to establish a relationship of confidence on which an action under general law can be based.

However if the exporter has any doubt that the information will not be kept confidential, then the information should only be disclosed by reference or in stages in return for information required from the Asian importer as the two-way trust during the negotiations is built up.

## Can I include commercial terms in NDAs?

Yes.

It is possible to include commercial terms in NDAs if they are distinct and clear and do not prejudice the negotiations in the future. For example the NDA might say that the UK Exporter and Asian importer will share costs for attending a trade exhibition.

## When does a duty of confidence arise when exchanging confidential information?

A duty of confidence may arise even in the absence of an agreement if the person receiving the information knows it is confidential, but an agreement helps to establish and define this relationship.

Database protection rights may protect confidential information contained in databases and supplement the protection gained by an agreement.

## What are the limitations of confidentiality agreements?

Confidentiality agreements are difficult to enforce. Practical measures to keep information confidential are much more important than the ability to sue for damages for wrongful use or disclosure or seeking an injunction.

But in a negotiation, psychologically it is important to have NDAs signed at the start of the negotiations. This means that the UK exporter knows that the person it is dealing with has authority to sign the Non-Disclosure Agreement and the UK exporter can ask for two signatures with the second signature being a Board or equivalent director or President. This will show that the Asian importer has raised the project with the top decision-making body at the importer.

Confidentiality agreements are restrictive and will be construed against the party seeking to rely on them. Most jurisdictions will not enforce agreements if the information covered is already public information confidential. Jurisdictions may (but rarely) require the duration of the agreement to be reasonable.

### **What are the legal restrictions on disclosure of confidential information?**

Legal restrictions may prevent the disclosure of certain information by the parties. For example:

A company director or employee may be in breach of his duty of good faith (where this is implied in the employment relationship) or (where applicable) his fiduciary duties, if he discloses confidential information without authority.

Parties who are government contractors may be subject to restrictions under relevant official secrecy laws.

Data protection legislation in respect of personal data.

The supply of information to competitors under competition or antitrust laws.

### **What are the duties applicable during NDA negotiations?**

Various duties usually apply to negotiations under general law and take different forms from country to country. They include:

General duties to negotiate in good faith in the US and many continental European jurisdictions. If in doubt then a paragraph can be written into the Confidentiality agreement requiring both parties to negotiate in good faith.

General rules relating to pre-contractual misrepresentations.

Specific rules relating to the marketing of financial securities.

It is not usually possible to contract out of these rules completely (and in some cases, at all).

The country where negotiations take place will determine which duties apply. Where negotiations take place in the country of the Asian importer it is important to take direct "in-country" advice.

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### **What law should govern NDAs?**

The UK exporter will need to plan for the worst case if it has to enforce the Confidentiality agreement in the country of the importer. This will mean as a minimum checking to ensure that the courts of the country where the Asian importer is based will enforce a judgment under the chosen law in the NDA.

Contact us if you need advice from our partner law firms in China (PRC), Singapore or Malaysia.

For more information or for an example NDA please speak to Richard Mullett on 0208 334 8049