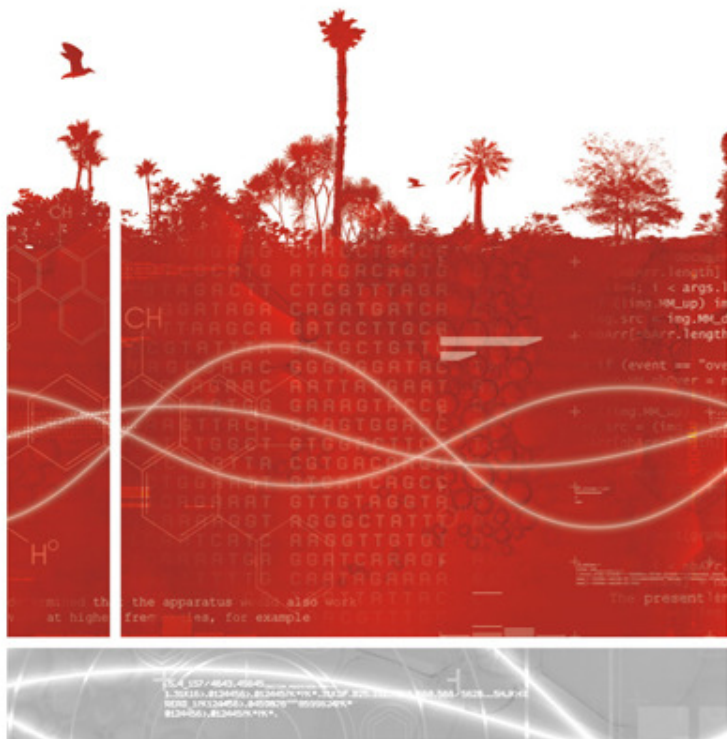


# Confidentiality Agreements

## A User's Guide



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- © Types of agreement
  - © One-way in
  - © Two-way (mutual)
  - © One-way out
  - © Non-confidential disclosure
  - © Non-analysis
  
- © Clauses to watch out for
  
- © Advantages and disadvantages, risks and pitfalls
  
- © Summary

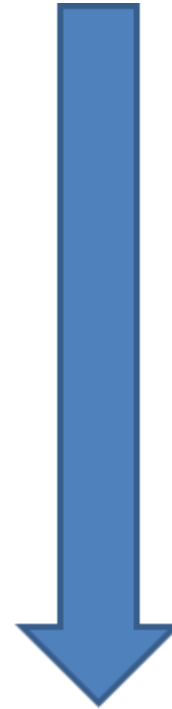
- © Confidential Disclosure Agreement (CDA)
- © Sometimes known as “Confidentiality Agreement”, “NDA”
- © Agreement between parties that certain information will be kept confidential
- © Does not protect information as such, only offers a means of redress
- © Not telling anyone is still the best policy!
- © Only disclose on a “need to know basis”

## Simple Summary – Party Perspective

One-way out

Two-way/mutual

One-way in



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- © One disclosing party
- © Typically used at the beginning of commercial negotiations or to disclose information to be included in a patent application, or used during product testing
  - © Advisable to file patent application **before** disclosure
- © Lowest risk of conflict as no information received
- © Risk is entirely the burden of the other party keeping information “secret”

- © Both parties disclose information
- © May be in related or separate fields, business and/or technical
- © Risk increases due to likelihood of conflict
- © Risk is balanced by both sides receiving and disclosing
- © Typically used during commercial negotiations or as a prelude to other agreements, eg JDA, licence or settlement agreement

- © One receiving party
- © Highest risk of conflict
- © No balance of mutual risk
- © Typically used if asked to carry out testing, evaluation or give other feedback

- © CDA and NDA are used interchangeably
- © BEWARE!
- © In some circumstances NDA is used to describe an agreement that both sides sign to ensure that NO confidential information is exchanged
  - © Non-Confidential Disclosure Agreement
- © Used in commercial negotiations, particularly for some tenders
- © Also used if a third party wishes to submit an idea to a company for evaluation



- © Replaces a one-way in agreement
- © Binds the receiving party to not carrying out specific analysis, usually chemical
- © Allows certain testing to take place
- © May be included as a clause in a CDA

## IN

- © Broad definition of disclosed information
- © Narrow definition of received information
- © Exceptions to confidentiality
- © Judicial access
- © Terms and termination (trade secrets?)
- © Parties – affiliates/subsidiaries
- © Jurisdiction/governing law
- © Non-analysis
- © Site visit/audit
- © Marking, 30 day rule

## OUT

- © Limitation of use
- © Vague “purpose”
- © Commercial terms and payments
- © Jurisdiction/governing law
- © IP ownership
- © Anything written on the back of an access badge or sign in sheet

- © Information may include (although may not be limiting)
  - © Business and/or technical information
  - © Drawings, specifications, other documentation in electronic or paper form or otherwise
  - © Samples, tests and results of any tests performed by recipient on such samples
  - © Prototype products, manufacturing processes, site visits, material received during a visit, sales predictions, market data

- © CDAs can be beneficial before patent filings and during priority year product testing
  - © Particularly since Nestec SA & Ors v Dualit Ltd & Ors [2013] EWHC 923 (Pat)
- © Policing disclosed and received information is a burden
- © Need a rigorous system to store and file information
- © Can be misused easily – not a comfort blanket
- © Not a substitute for an assignment

- © Be aware of the level of risk in receiving any information considered confidential
- © Understand the relevance of clauses
- © Understand the alternatives
- © Make sure disclosures are within scope and agreement is still in force
- © Beware of disclosures with regard to patentability and in the priority year





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