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Confidentiality agreement

outline

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abstract

From time to time, an exporter may wish to divulge information that it considers confidential. Confidential information may be market related, such as an exporter's pricing strategy, margins and costs. It may be technology related, such as an exporter's intellectual property, know-how and trade secrets.

A confidentiality agreement gives an exporter a measure of security when it divulges confidential information.

An exporter should only use a confidentiality agreement when absolutely necessary. As with a good medicine, overuse can have detrimental side effects.

A confidentiality agreement may cause needless delays as lawyers sort out the various legal issues. Some large companies are extremely hesitant to sign confidentiality agreements and for good reason. They fear receiving information that is already known to them. This is so even though 'prior knowledge' is a standard exception in a confidentiality agreement.

An exporter should not place excessive reliance upon a confidentiality agreement. Confidentiality agreements are notoriously difficult to enforce. Rarely do judges impose harsh penalties for the breach of a confidentiality agreement. Except in the case of a most flagrant breach, a defendant is likely to get off with just a rap on the knuckles.

However, just because a confidentiality agreement may be difficult to enforce does not mean that an exporter should not enter into one in the right circumstance. A confidentiality agreement imposes a powerful psychological restraint upon the recipient of confidential information and therein lies its true benefit. If you start with the premise that most people will honour their commitments, then a confidentiality agreement serves a useful purpose.

Experience has shown that the specific wording of a confidentiality agreement is less important than its general intent. It's not so much what the agreement says as what it does. As the saying goes: 'It's the thought that counts!'

A confidentiality agreement serves more as an ethical restraint than a legal restraint. Should the recipient be motivated to examine the printed terms for a loop hole, chances are that the recipient will violate the agreement whether or not a loop hole is found.

The confidentiality agreement outline describes all issues that an exporter should consider, whether the exporter is on the disclosing end or the receiving end. For example:

- Is the agreement unilateral or bilateral?
- What is the purpose of the agreement?
- Define what information is confidential and what information is not confidential.
- What is the term of the Agreement?
- To what uses may the recipient put the confidential information?
- How will the recipient protect the confidential information from unauthorised disclosure?

Finally, here are some words of caution to an exporter seeking to commercialise technology. More budding relationships get off on the wrong foot because of confidentiality agreements.

Do not toss a form across a desk or even worse, fax a form and demand that the other party sign it....or else. That's no way to treat a potential customer! Confidentiality agreements should be as

much a marketing tool as a legal tool. They should be a negotiated document, not a standard, 'take it or leave it' form.

What most distinguishes a good confidentiality agreement from the standard form in common use is that a good confidentiality agreement establishes specific goals and milestones for both parties to achieve. A good confidentiality agreement should make the receiving party feel an active participant in an exciting new venture.

1. parties to the agreement

- 1.1. Specify the name, address, telephone and facsimile numbers of each party.
- 1.2. Specify which party is the donor of confidential information and which party is the recipient.

2. purpose of the confidentiality agreement

- 2.1. State the purpose for which the confidential information is being shared.
 - 2.1.1. What are the expectations of the donor and the recipient?

3. description of the product or process

- 3.1. Specify in as much detail as possible the product or process to which the confidential information pertains.

4. description of confidential pertaining to such product or process

- 4.1. Specify whether the confidential information includes:

Business Plans	Know-How
Computer Systems and Software	Patent Applications
Demonstrations	Results of Research
Designs	Samples
Devices	Specifications
Drawings	Technical Information
Financial Data	Trade Secrets
Formulas	Other [Specify]

Strike out those items above which do not apply.

- 4.2. The information described in clause 4.1 above shall hereinafter be referred to as the "Confidential Information".

5. information not subject to the confidentiality agreement

5.1. These are standard exclusions. Strike out those which do not apply.

5.1.1. Information in the public domain or which subsequently enters the public domain through no fault of the recipient.

5.1.2. Information received in good faith by the recipient from a third party, which party is lawfully in possession of the same and had the right to disclose the same.

5.1.3. Information that the parties agree in writing to release from the terms of the Confidentiality Agreement.

5.1.4. Information that, as of the date of the Confidentiality Agreement, can be demonstrated by written record to have been previously known to the recipient (i.e. prior knowledge).

5.1.5. Information that is developed independently by an employee or consultant of the recipient who has not had access to information received under the Confidentiality Agreement.

5.2. The recipient must advise the donor of information falling within one of the exceptions enumerated under clause 5.1 above within 30 days from receipt of any such information.

5.2.1. Failure to so advise the donor shall be deemed acceptance by the recipient of the confidential nature of such information.

6. term of agreement

6.1. Length of term.

6.2. What happens during the term?

6.2.1. In other words, what is the recipient doing with the Confidential Information. This should be spelled out in as much detail as possible.

6.2.2. Set milestones for measuring progress.

6.2.3. Provide for meetings between donor and recipient.

6.2.4. Describe any other activities or events that will be occurring during the term.

6.3. Establish a procedure for the return or destruction of Confidential Information at the expiration of the term.

7. consideration

7.1. Will the recipient pay the donor for the Confidential Information?

7.2. Will there be anything else of value passing between or among the parties in consideration for the exchange of Confidential Information?

8. permissible uses of confidential information

- 8.1. For further research and development.
- 8.2. For technical evaluation.
- 8.3. For the purpose of ascertaining the commercial viability of the product or process.
- 8.4. Other permissible uses [specify].

9. permissible disclosures of confidential information

- 9.1. To employees.
- 9.2. To others.

10. maintenance of confidentiality

10.1. Specify any special precautionary steps to be undertaken by either or both parties to protect the confidentiality of the information.

- 10.1.1. Restrictions on photocopying.
- 10.1.2. Limitations upon disclosure, such as disclosure to a few trusted employees.
- 10.1.3. Non-disclosure undertakings by employees.
- 10.1.4. Maintenance of the Confidential Information under lock and key.

These, and other safeguards, shall be left to the recipient's discretion.

11. special clauses generally found in confidentiality agreements

Strike out, if inapplicable:

11.1. The receipt of Confidential Information shall not be deemed an admission by the recipient of the novelty or patentability of the product or process to which such confidential information pertains.

11.2. The Confidential Information shall be deemed held in trust by the recipient for the donor's benefit.

11.3. No license or any right respecting the Confidential Information, other than as expressly set out in this Confidentiality Agreement, is granted to the recipient, by implication or otherwise.

11.4. The Confidentiality Agreement does not constitute a representation, warranty or guarantee to the recipient by the donor with respect to the infringement of patents or other rights of third parties.

11.5. The donor shall not be liable for any errors or omissions in the Confidential Information conveyed nor does the donor make any representations or warranties regarding the use of such Confidential Information or the results to be obtained there from.

12. non-assignability

12.1. Can either party assign its rights under this Confidentiality Agreement? If so, under what circumstances?

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