



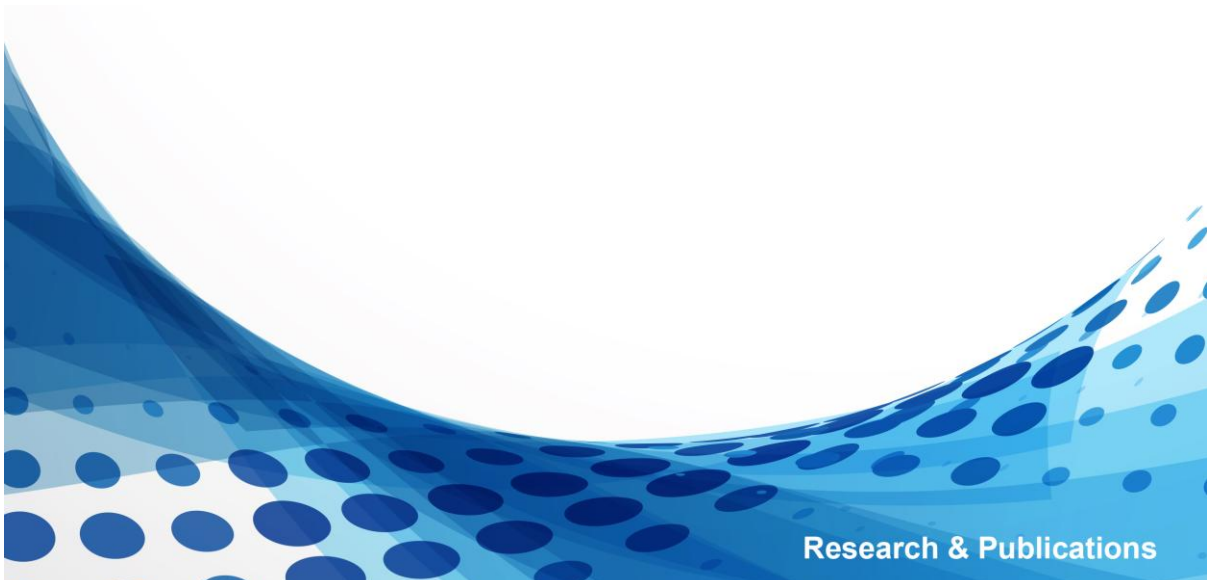
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IIMA
Working Paper

Non-Disclosure Agreements and Confidentiality Clauses

Practice Note Series on Indian Contract Law

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Research & Publications

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Practice Note Series on Indian Contract Law

M P Ram Mohan* Siddhartha Shukla** Julie Farley *** and Prem Vinod Parwani****

Background

This note aims to provide an overview of Non-Disclosure Agreements and Confidentiality clauses contrasting Indian law with key issues under English law. It examines the doctrinal framework protecting confidential information, which is a “patchwork of remedies” derived from contract law, intellectual property law, and common law. It defines and distinguishes the different forms of obligations to protect confidential information, outlines the remedies for breach and sets out some practical drafting considerations that are peculiar to the considerations of business parties in NDAs.

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INTRODUCTION

1. Non-disclosure agreements ('**NDAs**') or confidentiality agreements are staple commercial tools to protect the sharing of commercially sensitive information.¹ Fundamentally, these are contracts where the 'Recipient' is obligated to keep certain information disclosed by the 'Discloser' confidential. Depending on the context of the agreement and the information being disclosed, NDAs can provide for unilateral or mutual obligations.
2. NDAs are routinely used in several different contexts, such as in M&A and investments, employment agreements and commercial contracts. The confidentiality obligations may either form part of a larger contract or be a standalone agreement. Typically, a standalone NDA will include more detail than a confidentiality clause included in an agreement, but this note treats the two as the same, and for convenience, refers to both as an 'NDA'.
3. As is the case with most subjects of commercial practice, they remain undertheorised and scantily discussed in scholarship. This practice note covers both the doctrinal and the drafting considerations of such agreements and seeks to assist practitioners in drafting context-specific NDAs, focusing primarily on Indian law but with an overlay of international practices.
4. **Part I** examines the doctrinal considerations in Indian law. In particular, it examines the legal framework governing confidentiality obligations under contract and under common law. **Part II** examines the remedies that could result from a breach of such an NDA. In the context of the remedies and legal framework, **Part III** lays out and rationalises key sample clauses that demonstrate the commercial considerations and best practices of drafting NDAs, balancing both the Discloser's and the Recipient's perspective. Obviously, the perspectives of the Discloser and the Recipient will be very different, and a full consideration of their respective positions is beyond the scope of this note. **Part IV** sets out a brief summary of English law and practice in relation to NDAs.

¹ Law Commission of India, *Trade Secrets and Economic Espionage* (Law Com No 289, 2024) [2.20].

1. DOCTRINAL FRAMEWORK IN INDIAN LAW

5. In India, confidential information is protected by a “patchwork of remedies” – contract, intellectual property and equity² – each of which is explored below.

1.1. The Indian Contract Act 1872

6. In India, the jurisprudence on confidentiality obligations has developed by and large in the realm of employment law. Employers can use NDAs to prevent the leakage of any information obtained by an employee in the course of employment. The major point of litigation emerges when employers approach courts to restrain employees from joining competitors, given concerns that confidential information may be divulged.³
7. It is settled that prohibitions on the sharing of confidential information can operate both, during and after the termination of employment contracts.⁴ The Indian Supreme Court in *Krishan Murgai* cites an English case to comment that an employer “*cannot stipulate freedom from competition. But he can protect his trade secrets or his confidential information.*”⁵
8. Restrictions on sharing confidential information may be a part of non-compete agreements but these are legally different. Non-competes are agreements where the employee is prevented from joining a competitor for a certain period. It is well-established in Indian law that the enforceability of non-compete clauses depends on whether it is agreed to in a commercial relationship or in an employer-employee relationship. In commercial contexts, these are enforceable only if they are reasonable in protecting a legitimate business interest and are proportionate in scope, geography, and duration.⁶ Restrictions

² Law Commission of India, *Trade Secrets and Economic Espionage* (Law Com No 289, 2024) 98.

³ *Niranjan Shankar Golikari v The Century Spinning and Mfg Co Ltd* [1967] SCR 2 378; *American Express Bank Ltd. v Priya Puri* (2006) 3 LLN 217 (Delhi High Court, 2006).

⁴ *Superintendence Co. of India v Krishan Murgai* (1981) 2 SCC 246 [22]; (1981) 2 SCC 246 (Supreme Court of India) [22]; *BLB Institute of Financial Markets Ltd v Ramakar Jha* (2009) OMP 241/2008 (Delhi High Court) [42]; *Bombay Dyeing and Manufacturing Co Ltd v Mehar Karan Singh* (2010) 7 Mah LJ 48.

⁵ *Superintendence Company of India (P) Ltd v Krishan Murgai* [1980] AIR 1717 [22]; *Polaris Software Lab. Limited Rep v Suren Khiwadkar* (2003) 3 MLJ 557 [26] – [27].

⁶ *Fl Smidth Pvt. Ltd. v Secan Invescast (India) Pvt. Ltd* (2013) SCC Online Mad 389 [10]; *Superintendence Co. of India v Krishan Murgai* (1981) 2 SCC 246 [22]; *Niranjan Shankar Golikari v The Century Spinning and Mfg Co Ltd* [1967] SCR 2 378.

beyond six months are often viewed as overly restrictive and difficult to enforce. Broadly, this position stands both — under Indian law and English law.⁷ Indian law, as we will see, requires a more detailed balancing test. However, confidentiality restrictions can continue to operate in perpetuity, even if the employee joins a competitor.⁸ This is because the Courts recognise a legitimate business interest in the life-long protection of confidential information – trade secrets are the foremost example of this. Under English law, trade secrets can also be protected in perpetuity. However, the position is less clear in respect of confidential information which does not meet the threshold to qualify as a trade secret. In these circumstances, the English Court of Appeal has stated that confidential information can only be protected if properly classified as a trade secret.⁹ However, there has been considerable judicial commentary on this judgment, with several cases casting doubt on this decision¹⁰. As such, employers should exercise care when drafting English law-governed confidentiality clauses which are intended to survive following the termination of employment.

9. However, it is important to be aware that public policy may, in certain circumstances, override a contractual duty of confidentiality, for instance where it serves to prevent disclosure of information in relation to criminal activity,¹¹ or where there is a danger to public health.¹² There is a risk that broadly drafted NDAs may fall foul of Indian public policy, and thus be declared invalid. This arises in a few situations: such as, where the NDA includes information that already exists in the public domain. If publicly available information is included in a clause defining confidential information, it would suggest that there is no real interest in protecting the information; rather, it is an attempt to unjustifiably

⁷ See *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, [2021] AC 1014 [45]–[47], [51] (Lord Wilson) for the ‘trading society test’ for noncompete clauses — namely, whether the clause has become an accepted norm of commercial transactions.

⁸ *RP Partners v Kumarpal*, O.A. Nos. 321, 322 and 326 of 2012 (Madras HC, 23 April 2012) (Vinod K Sharma J). [10], [19]; *Arun Rambhai Desai v Deepak Nitrite Ltd*, Cr A No 242 of 2024 (Guj HC, 10 June 2025) (Sanjeev J Thaker J) [62] – [64].

⁹ *Faccenda Chicken Ltd v Fowler* [1987] Ch 117

¹⁰ *Lansing Linde Ltd v Kerr* [1991] ICR 428; *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1997] IRLR 1131; *FSS Travel & Leisure Systems Ltd v Johnson* [1999] FSR 505.

¹¹ *Gartside v Outram* [1857] 26 LJ Ch (NS) 113.

¹² *Dixon v North Bristol NHS Trust* [2022] EWHC 1871 (QB).

restrain trade.¹³ Thus, even information contractually agreed upon as confidential will not receive such protection, since the nature of the information ceases to be confidential.¹⁴ For instance, in *Stellar Technology*, the employer sought to restrain disclosure of information by a former employee. However, the Court held that information of the employer's customers was publicly advertised on the website, and thus could not be classified as confidential information.¹⁵ As long as the information marked confidential in an NDA is a reasonable restraint which seeks to protect the employer's 'trade', it would not be a restraint of trade.¹⁶ To this extent, whether or not the information is already in the public domain affects the validity of the protection when tested against Section 27 of the Contract Act.

1.2. Protection of Intellectual Property

10. Even in the absence of a contractual relationship, intellectual property law has been used as a basis to protect certain information as confidential. In several cases, injunctions have been granted against copyrighted and trademarked material, oftentimes paired with the terminology of a freestanding duty of confidence. For instance, in *Zee Telefilms*, the Court held that Zee's creation of a television series based on copyrighted material amounted to a 'breach of confidentiality' because the plaintiffs disclosed their movie concept to Zee in circumstances that clearly imported an obligation of confidence.¹⁷
11. While an equitable claim for breach of confidentiality and an injunction for copyright infringement are analytically distinct, it is common to see the two are used in tandem.¹⁸ The next section explores this equitable claim of confidentiality.

¹³ Law Commission of India, *Trade Secrets and Economic Espionage* (Law Com No 289, 2024) [5.9]; *Stellar Information Technology Private Ltd. v Mr. Rakesh Kumar* (2016) 234 DLT 114.

¹⁴ *Narendra Mohan Singh and Manish Jha v Ketan Mehta* No 778 of 2015 (Bombay High Court, 2015) [14], [19].

¹⁵ *Stellar Information Technology Private Ltd. v Mr. Rakesh Kumar* (2016) 234 DLT 114 [9] – [14].

¹⁶ *FLSmidth Pvt. Ltd. v Secan Invescast* (2012) SCC OnLine Mad 2516 [20].

¹⁷ *Anil Gupta v Kunal Dasgupta* (2002) 97 DLT 257 [90] – [91]; *Zee Telefilms Ltd & Film v Sundial Communications Pvt Ltd* (2003) 3 Mah LJ 695 [20].

¹⁸ Law Commission of India, *Trade Secrets and Economic Espionage* (Law Com No 289, 2024) [5.17]; *Tarun Wadhwa v. Saregama India Ltd* (2021) 88 PTC 423; *Burlington Home Shopping Pvt. Ltd. vs Rajnish Chibber* (1995) 35 DRJ 335.

1.3. Common Law Duty of Fidelity

12. While there is no statutory framework in India for protecting confidential information,¹⁹ judicial interpretations have borrowed from the common law duty of fidelity. The origin of the common law duty of fidelity lies in the landmark case of *Saltman Engineering*, where the English Court of Appeal held that it “would not matter in the least bit whether there was a contract”.²⁰ While some Courts commonly reference both equitable and contractual sources of confidentiality, it is important to note that these are different concepts.²¹

13. By and large, most such cases appear in the context of intellectual property infringement,²² though there is nothing in the nature of the duty that restricts its operation to such cases. The test that has been used in several such cases is:²³

(1) that the information was of a confidential nature;

(2) that the information was communicated in circumstances importing an obligation of confidence; and

(3) that there has been an unauthorised use of the information to the detriment of the person communicating it

14. These tests are explained as follows: under the first part of the test, two elements must be established. First, the information must be identified with precision. Vague and insufficiently developed information will not be eligible for protection.²⁴ Second, it must be established that the information, by nature, was confidential and not already publicly available.²⁵ In commercial contexts, confidential information has been judicially defined

¹⁹ While the government has mooted the idea of the Protection of Trade Secrets Bill 2024, this has not yet come to fruition. This Bill would codify and define a ‘trade secret’.

²⁰ *Saltman Engineering Co. v Cambell Engineering Co* (1948) RFC 203.

²¹ Prashant Reddy, ‘The “Other IP Right”: Is it Time to Codify the Indian Law on Protection of Confidential Information?’ (2020) 5(1) Journal of National University of Delhi 1.

²² *Zee Telefilms Ltd & Film v Sundial Communications Pvt Ltd* (2003) 3 Mah LJ 695; *Emergent Genetics India Pvt Ltd v Shailendra Shivam* (2011) 125 DRJ 173.

²³ *Talbot v General Television Corporation Pvt. Ltd* (1981) RPC 1

²⁴ Law Commission of India, *Trade Secrets and Economic Espionage* (Law Com No 289, 2024) [5.14]; *Anil Gupta v Kunal Dasgupta* (2002) 1 Del 250; *Tarun Wadhwa v Saregama India Ltd* (2021) 88 PTC 423; *Fraser v Thames TV* [1984] 1 QB 44.

²⁵ *John Richard Brady v Chemical Process Equipments (P) Ltd* (1987) SCC OnLine Del 236 [25] – [26].

as “information which, if disclosed to a competitor, would be liable to cause real or significant harm to the owner of the secret.”²⁶ An agreement between the parties that already establishes such information as confidential cannot be contested unless the information is already available in the public domain or subsequently becomes publicly available without any fault of the Recipient.²⁷ In the context of intellectual property, it has been held that commercially sensitive information such as technical drawings imparted in the course of employment would constitute ‘confidential information.’²⁸ In other instances, information such as “pricing policies, marketing strategies, customer lists and projected capital investments” has been held to be confidential by nature.²⁹

15. Under the second limb, the existence of a relationship ‘importing confidentiality’ must be established. This is often easily met in employment and intellectual property contexts. It is natural in these contexts that one party is placed in a relationship where sensitive information may be disclosed. In the employment context, it has been held that though the contract does not contain an express stipulation of confidentiality, an “implied duty of good faith” exists in employment contracts.³⁰ According to this, the employee would be prohibited from divulging confidential information. Moreover, the Indian regime also borrows from common law³¹ in extending a relationship of confidentiality to third parties (i.e., those who gain access to the confidential information of the Discloser, despite not being a direct Recipient).³² Thus, even third parties who disclose confidential information can be enjoined from doing so.

²⁶ *American Express Bank, Ltd. v Priya Puri* (2006) 3 LLN 21 7; Law Commission of India, *Trade Secrets and Economic Espionage* (Law Com No 289, 2024) 100.

²⁷ *VFS Global Services Pvt. Ltd. v Suprit Roy* (2007) SCC OnLine Bom 1083 [18].

²⁸ *John Richard Brady v Chemical Process Equipments (P) Ltd* (1987) SCC OnLine Del 236 [37].

²⁹ *Petronet LNG Ltd v Indian Petro Group* (2009) CS (OS) No 1102/2006 (Delhi High Court) [51]; *Hi-Tech Systems & Services Ltd vs Suprabhat Ray* (2015) AIR 2015 Cal 261.

³⁰ *BLB Institute of Financial Markets v Ramakar Jha* (2008) DLT 154 121 [38] – [39].

³¹ *AG v Guardian Newspapers Ltd* (1990) 1 AC 109, 260: “It is a general rule of law that a third party who comes into possession of confidential information which he knows to be such, may come under a duty not to pass it on to anyone else.” (per Lord Keith). For a similar position in EU law, also see Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1, art 14.

³² *Petronet LNG Ltd v Indian Petro Group* (2009) CS (OS) No 1102/2006 (Delhi High Court)

16. Under the final part of the test, a party must show cogent evidence (at the very least, to a prima facie standard) of the disclosure of confidential information.³³ Broadly, a Court conducts a form of balancing analysis. In one instance, the Delhi High Court has refashioned the common law test, referring to the need for a proportionality exercise in upholding a claim for breach of confidence. It held that a court must balance “*competing claims for right to confidentiality and the need for publication of the information, in the given circumstances of individual cases.*”³⁴ In another instance, the Court simply applied the balance of convenience test in granting an injunction.³⁵ Broadly, however, a form of harm or detriment must be established to claim a breach of confidence under the common law.

2. REMEDIES FOR BREACH

2.1. Injunctive Relief

17. An injunction is the primary remedy against a breach of confidential information, since a confidentiality obligation is only of value if the Discloser is able to prevent the Recipient from breaching the obligation prior to any disclosure; once the information has been disclosed in breach of the obligation the damage has already occurred. However, injunctions may be of limited use if the Discloser does not know that the Recipient is about to breach its obligations to keep the information confidential.³⁶ On the other hand, while damages can be sought concurrently, these serve a compensatory purpose.³⁷ Injunctions more directly address leakage and breaches of confidential information. For this reason, as we will see, drafting should reflect the parties' wish that injunctive relief should be available. Though the parties would continue to retain this as a statutory right (by virtue of the Civil Procedure Code and Specific Relief Act), the prima facie case to have an injunction granted is more easily established where there is a contractual agreement of

³³ *Sandhya Organic Chemicals P. Ltd. v United Phosphorous Ltd* (1997) AIR 1997 Guj 177 [16].

³⁴ *Petronet LNG Ltd v Indian Petro Group* (2009) CS (OS) No 1102/2006 (Delhi High Court) [56].

³⁵ *John Richard Brady v Chemical Process Equipments (P) Ltd* (1987) SCC OnLine Del 236 [37] – [38].

³⁶ Mitchell C Shelowitz, ‘What Every In-House Lawyer Should Know About Non-Disclosure Agreements: Protecting Company Intellectual Property and Strategic Non-Public Business Information’ (Paper presented at the Global Corporate Counsel Association Ninth Annual Conference, Versailles, 24–25 June 2002) 8.

³⁷ Indian Contract Act 1872, ss.73.

confidentiality between the parties.³⁸ To obtain an injunction, a party must establish a prima facie case, the likelihood of irreparable injury and show that the balance of convenience lies in their favor.³⁹ The English courts have also been known to grant injunctions in order to prevent disclosure of confidential information, both by means of interim and permanent injunctions.⁴⁰ They have also been known to order the destruction of confidential information.⁴¹

2.2. Request for In-Camera Proceedings & Establishment of Confidentiality Clubs

18. In disputes involving NDAs, parties may seek protective mechanisms such as confidentiality clubs and in camera proceedings to safeguard commercially sensitive information.⁴² These proceedings would be held privately, and thus protect the confidential nature of the subject matter. While Indian procedural law does not explicitly codify these devices,⁴³ courts have repeatedly affirmed their inherent jurisdiction to limit publicity where it is necessary for “the fair administration of justice” or where publicity would itself operate as an “instrument of injustice.”⁴⁴

2.3. Damages or Account of Profits

19. General damages can be claimed where a breach of contract is established, regardless of whether or not the agreement stipulates damages.⁴⁵ Any provision for Liquidated Damages will be enforceable only to the extent that the sum stipulated represents a genuine pre-

³⁸ *Escorts Const. Equipment Ltd. v Action Const. Equipment P. Ltd* (1998) AIR 1999 Del 73 [22] - [33].

³⁹ Code of Civil Procedure 1908, O XXXIX rr 1–2; *Gujarat Bottling Co. Ltd. v. Coca Cola Co* (1995) 5 SCC 545, 550.

⁴⁰ *Sectrack NV v Satamatics Ltd* [2007] EWHC 3003; *Penwell Publishing (UK) Ltd v Ornstein* [2007] EWHC 1570 (QB).

⁴¹ *Arthur J Gallagher (UK) Ltd v Skriptchenko* [2016] EWHC 603 (QB).

⁴² Confidentiality clubs are agreements that restrict the dissemination of confidential information only between an authorized group of parties (i.e., a club). This is used frequently in competition and intellectual property proceedings — see for instance *Telefonaktiebolaget LM Ericsson v Xiaomi Technology* (2017) SCC Online Del 11069, where a confidentiality club was constituted to protect the plaintiffs information regarding patents in the course of litigation.

⁴³ Code of Civil Procedure 1908, s.151.

⁴⁴ *Naresh Shridhar Mirajkar v State of Maharashtra* (1966) AIR SC 1; *Janaki Ballav v Bennet Coleman and Co Ltd* (1989) AIR 1989 Ori 216.

⁴⁵ Indian Contract Act 1872, ss. 73 and 74.

estimate of loss and passes the test of reasonableness.⁴⁶ On the other hand, if the confidential information is misused, any profits derived from the disclosure of confidential information can be disgorged.⁴⁷

2.4. Indemnities

20. The Recipient may agree to indemnify the Discloser for any loss arising out of a breach of the confidentiality obligations. This approach has two advantages over a claim of damages. Firstly, the claim crystallises on loss – one does not need to wait for litigation to claim an indemnity, whereas one must wait for a Court to award damages to have a monetary claim.⁴⁸ A breach is not required to be proved either, though parties can draft indemnities such that even a breach of contract triggers an indemnity claim. Secondly, the Discloser is not required to prove that a loss has occurred. Thus, establishing the claim is less onerous.⁴⁹ However, indemnities are not standard in NDAs, and unlikely to be agreed by the Recipient.⁵⁰ Moreover, the Discloser should be aware that under English law, indemnities are treated as debt claims. The effect of this is that even if the Recipient does agree to the indemnity, they can negotiate a cap on their liability which could be far lower than the loss sustained by the Discloser, meaning it may not be a very satisfactory remedy.

⁴⁶ See M P Ram Mohan, Gaurav Ray, Promode Murugavelu & Jeeri Sanjana Reddy, 'Liquidated Damages in India: Concepts, Enforceability, and Drafting Considerations' (IIMA Working Paper, December 2024) 1, 11.

⁴⁷ *E-Merge Tech Global Services (P) Ltd v M.R. Vidhyasagar* (2024) CS (Comm Div) No 258 of 2020 (Mad HC) [6].

⁴⁸ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri* (1942) 44 Bom LR 704, 706.

⁴⁹ *Ultratech Cement Ltd v Sunfield Resources Pty Ltd* (2016) Appeal No 881 of 2005 (Bom HC) [58] – [59]. The Bombay High Court discussed this distinction extensively – in *Ultratech Cement*, the issue before the Court was whether the claim for demurrage in a charterparty was in the nature of indemnity or liquidated damages. This would affect whether proof of loss would be required. Where the claim is damages, the claiming party would have to demonstrate the occurrence of a loss. On the other hand, an indemnity could be claimed as long as the existence of a liability in the scope of the contracted indemnity can be demonstrated – one need not even incur loss to bring a claim of indemnity. The Court examined the substance and commercial intent of Clause 10(v), which entitled the charterer to demurrage payments from the charterparty contractor. It held that the demurrage was in the nature of damages, since the transaction demonstrated that it was a pre-agreed sum aimed at compensating for delays, and the documents required to invoke the clause showed that there was no requirement to demonstrate the existence of a loss.

⁵⁰ Investment Property Forum, *Non-Disclosure Agreement & Exclusivity Agreement: Guidance Notes* (IPF, 2019) cl 6.2 <<https://www.ipf.org.uk/resourceLibrary/non-disclosure-agreement---exclusivity-agreement.html>> accessed 25 August 2025.

2.5. Anton Piller orders

21. A plaintiff may apply for an Anton Piller order, also known as a search order, which permits it to enter the premises of the defendant without prior notice to search for and seize confidential information.⁵¹ By nature, it is a drastic preventive remedy, and thus, a high threshold must be satisfied to successfully claim such an order.⁵² In order to be successful, the plaintiff must prove that they have "an extremely strong prima facie case", that the defendant's actions have resulted in very serious damage to the applicant's interests, and that there is clear evidence of "incriminating documents or things" that are in the possession of the defendant, combined with a real possibility of destruction or disposal of that material before an application can be made on notice. The plaintiff must further prove that the harm likely to be caused to the defendant and its affairs by the granting of the order is not excessive or out of proportion.⁵³ These orders are commonly granted for infringement of trademarks and copyrights.⁵⁴ For instance, in *Vestergaarden*, an Anton Piller order was granted against a defendant who was suspected of gaining access to manufacturing trade secrets.⁵⁵ Notably, there is no requirement for a contractual relationship of confidentiality for such orders to be granted.

3. DRAFTING NDAS

22. At the heart of negotiating and drafting NDAs is a balance between adequately protective disclosure norms and unduly burdensome disclosure obligations.⁵⁶ As we have seen above, NDAs must be drafted to reflect the delicate balance between the Discloser and Recipient's interests. This section will endeavour to lay out the practical commercial considerations that play a role in drafting select key elements of confidentiality agreements.

⁵¹ *Anton Piller KG v Manufacturing Processes Limited* [1976] 1 All ER 779.

⁵² *Bucyrus Europe Ltd v Vulcan Industries Engineering Co* (2005) 30 PTC 279 (Cal) [19]–[20]. There must be a prima facie case, high actual or potential damage and evidence that there is a real possibility that the documents would be destroyed.

⁵³ *Anton Piller KG v Manufacturing Processes Limited* [1976] 1 All ER 779.

⁵⁴ Prashant Reddy, 'A Critical Analysis of the Delhi High Court's Approach to Ex-parte Orders in Copyright and Trademark Cases' (2011) 3 Manupatra Intellectual Property Reports 171.

⁵⁵ *Vestergaard Frandsen v M Sivasamy & Ors* CS (OS) No. 599 of 2007 (Delhi HC) (Order 2 April 2007).

⁵⁶ Copenhagen Business School; Bhumes Verma, *Practical Guide to Drafting Commercial Contracts* (OakBridge Publishing Pvt Ltd 2023) 99.

3.1. How to Define ‘Confidential Information’?

23. The definition of confidential information lays out the scope of the agreement. Merely because certain information falls within the agreed definition of confidential’ information, does not mean that it will be protected in Court.⁵⁷ If it is found to be available in the public domain, Courts will refuse to grant it protection despite contractual stipulations.

24. Confidential information can be defined conceptually, or certain forms of information (for instance, intellectual property or pricing data) can be specified as confidential. Any definition must balance the Discloser’s intent to protect as much information as possible with the Recipient’s administrative burden in undertaking to protect a more expansive set of information. While the Discloser would define confidential information as broadly as possible, the Recipient would push back on a broad definition and instead insist that specific categories be delineated. Generally, a combination of both these approaches (tailored to the context of the NDA) can balance both parties’ interests:

“Confidential Information” means all non-public, proprietary or sensitive information, in any form (oral, written, electronic or otherwise), disclosed or made available by the Discloser to the Recipient in connection with the evaluation, negotiation or consummation of a potential transaction between the Parties.

Confidential Information includes, without limitation:

- *financial statements, projections, budgets and other financial data;*
- *pricing policies, sales data, marketing strategies and distribution channels;*
- *details of contracts, leases, licences and other commercial arrangements and;*
- *information concerning employees, consultants, directors and compensation structures.*

25. An additional approach to defining confidential information is to distinguish between information depending on its sensitivity. As opposed to commercial know-how or business models, certain categories, such as personally identifiable information of employees or

⁵⁷ *American Express Bank, Ltd. v Priya Puri* (2006) 3 LLN 217 (Delhi High Court, 2006) [46] – [47].

customers, are intrinsically more sensitive, and may therefore attract higher contractual protections. From the Discloser's perspective, classifying such information could allow it to designate higher protections (for instance, restricting disclosure only to a small group of pre-approved personnel or requiring additional protective measures such as encryption and secured storage). Some NDAs refer to this as "Strictly Confidential" or "Trade Secrets", where applicable:

In addition to the foregoing information [Confidential Information as defined in Para 24], Confidential Information shall include two categories:

- (i) Personally Identifiable Information relating to employees, officers, directors, customers or other individuals;*
- (ii) Sensitive personal data or information as defined under applicable law;*

The requirements of data protection laws should also be taken into account.

26. The definition of confidential information should exclude information that is already public when the Discloser discloses it to the Recipient or becomes public (other than as a result of breach of the agreement by the Recipient) after the Discloser discloses it to the Recipient.⁵⁸ Ordinarily, four such exceptions are market-standard:

Confidential Information shall not include information which the Recipient can demonstrate:

- (i) is publicly available or becomes publicly available through no action or fault of the Recipient,*
- (ii) was already in the Recipient's possession or known to the Recipient prior to being disclosed or provided to the Recipient by or on behalf of the Discloser, provided, that, the source of such information or material was not bound by a contractual, legal or fiduciary obligation of confidentiality to the Recipient or any other party with respect thereto,*
- (iii) was or is obtained by the Recipient from a third party, provided, that, such third party was not bound by a contractual, legal or fiduciary obligation of*

⁵⁸ Ken Adams, 'Exploring Two Exceptions to the Definition of Confidential Information' (Adams on Contract Drafting, 27 October 2018) <<https://www.adamsdrafting.com/exploring-two-exceptions-to-the-definition-of-confidential-information/>> accessed 27 August 2025.

confidentiality to the Discloser or any other party with respect to such information or material, or

(iv) is independently developed by the Recipient without reference to the Confidential Information.⁵⁹

As we saw above, irrespective of drafting, information present in the public domain will not be able to claim confidentiality protections.

27. The definition of confidential information should also address the mode of disclosure and will typically cover information expressly marked as confidential as well as having a catch-all category that would cover information communicated in any mode.

Confidential Information further includes (i) information expressly identified in writing as confidential at the time of disclosure; and (ii) any information, communicated or observed through any mode (including oral, graphic, electronic or written) which by their nature or context, a reasonable person would understand to be confidential.

28. As oral disclosures present a practical difficulty an NDA may provide for oral disclosures to be confirmed as confidential in writing within a defined period. Without a written record of oral disclosures, confidentiality obligations for such information would become unduly onerous and uncertain.

Any Confidential Information disclosed orally shall be identified as confidential at the time of disclosure and treated as such, provided that the Discloser confirms its confidential writing in written communication to the Recipient within [X] business days from the time of disclosure.

⁵⁹ Exar Corporation, ‘Confidentiality and Non-Disclosure Agreement’ (Exhibit 99(E), SEC EDGAR, 10 September 2008) <<https://www.sec.gov/Archives/edgar/data/1065246/000119312509046323/dex99e8.htm>> accessed 26 August 2025.

3.2. Duration of the Confidentiality Obligations

29. The NDA should clarify how long the duty of confidentiality lasts for any information disclosed.⁶⁰ The appropriate length of time will depend on the nature of the confidential information, but usually ranges between six months and three years.

Without prejudice to any rights or liabilities accrued prior to such termination, the obligations in this agreement shall terminate and shall have no further force or effect on the date which is [three] years after the date of this agreement.

In relation to NDAs entered into in contemplation of an M&A transaction it is common to see provisions such as:

Without prejudice to any rights or liabilities accrued prior to such termination, the obligations in this agreement shall terminate and shall have no further force or effect:

- *upon completion of the Transaction; or*
- *if completion of the Transaction has not occurred by the date which is [specified number] months after the date of this agreement, on that date.*

30. As we have seen, it is theoretically permissible for information to be confidential in perpetuity. Practically, however, the key issue is how long the disclosed information retains its confidential character. Furthermore, parties are unlikely to agree to obligations in perpetuity, since the Recipient would need to take on liability and administrative burdens for an indefinite period.⁶¹ As such, only specifically identified categories of information (such as trade secrets)⁶² are likely to be protected in perpetuity.

⁶⁰ For the distinction between termination of confidential agreement and survival of confidentiality obligations, See *Campbell v Frisbee* [2002] EWCA Civ 1374 [20] – [21].

⁶¹ Ken Adams, ‘How to State the Duration of the Obligation to Keep Information Confidential’ (*Adams on Contract Drafting*, 2 January 2012) <<https://www.adamsdrafting.com/how-to-state-the-duration-of-the-obligation-to-keep-information-confidential/>> accessed 30 August 2025.

⁶² ‘Commercial Agreement - Mutual Non-Disclosure and Confidentiality Agreement (Annotated)’ <<https://www.bloomberglaw.com/external/document/X1FG0UQ8000000/commercial-agreement-mutual-non-disclosure-and-confidentiality-a>> accessed 25 August 2025.

Duration of confidentiality: *The Recipient shall continue to keep the Confidential Information secret:*

In the case of Confidential Information that constitutes [Trade Secret/Strictly Confidential Information], for as long as it remains a [Trade Secret/Strictly Confidential Information]; in the case of any other Confidential Information, for [specified duration].

3.3. To Whom Confidential Information is Disclosed

31. Where the Recipient is a corporate entity, disclosure will be to the Recipient's employees and directors, and Recipients will typically want to be able to share the disclosed information with their advisers. The NDA needs to provide a framework for such further permitted disclosure and will generally include a definition of the Representatives of the Recipient as:

the “directors, officers, employees, agents, consultants, advisors, shareholders or other representatives, including legal counsel, accountants and financial advisors.”⁶³

The Recipient will be required to ensure that its Representatives observe the same restrictions on the use of confidential information. In some cases, the NDA will provide for the Recipient's Representatives to enter into NDAs directly with the Discloser or alternatively the Recipient will retain liability for a breach by its Representatives. Depending on the sensitivity of the information, parties may restrict the disclosure of Trade Secrets or Strictly Confidential Information only to top-most executives or legal counsel.

(i) *The Recipient shall disseminate Confidential Information only to those employees, officers, directors, affiliates, professional advisors, investors, agents, licensees or other persons acting on its behalf (“Representatives”).*

(ii) *The Recipient shall maintain Confidential Information in a secure place with access limited to those of the Recipient’s Representatives who (a) require such material for*

⁶³ Byron Egan ‘Confidentiality Agreements: How to Draft them and What they Restrict’, Annual Advanced Business Course (2013, Jackson Walker LLP) Appendix A, 3.

the purpose of evaluating the Transaction and (b) are informed by the Recipient of the confidential nature of the Confidential Material and the obligations of this agreement.

(iii) *The Recipient shall be responsible for any breach of the provisions of this agreement by its Representatives.*

or

*The Recipient shall procure that each of its Representatives enters into confidentiality agreements with the Discloser on terms no less strict than those contained in this agreement.*⁶⁴

3.4. No Representation or Warranty

32. The Discloser will want to ensure that it is not liable to claims from the Recipient based on the information disclosed pursuant to the NDA. The NDA will therefore commonly contain a clause acknowledging that the Discloser makes no representation or warranty as to the accuracy or completeness of the confidential information and that the Discloser shall have no liability to the Recipient resulting from the use of the confidential information.

3.5. Retention, Return and Destruction Policies

33. It is customary for parties to agree provisions dealing with the return and destruction of the confidential information shared, and to provide certificates to that effect.⁶⁵ The Recipient may be required to, upon the Discloser's written request, return all confidential materials (including copies, notes, and summaries) or permanently destroy them, along with any derivative materials created by the Recipient or its representatives. If destruction is directed or agreed, the Recipient may be required to provide written certification by an authorized officer within the specified timeframe, including a general description of the materials destroyed if requested.

⁶⁴ *ibid* 6.

⁶⁵ Rebecca Myers, 'Confidentiality, Nondisclosure and Secrecy Agreements' (*Lexis Nexis*, 2015) <<https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/confidentiality-nondisclosure-and-secrecy-agreements>> accessed 24 August 2025.

A Recipient should ensure that it is able to comply with the return and destruction provisions before agreeing to them. In particular, it should exclude any information which is retained electronically pursuant to automatic archiving and any information that it needs to retain pursuant to law, regulation or the rules of any regulatory body. In practice, this can cause some difficulty, for instance in situations where the Recipient is legally required to retain certain records which contain confidential information, such as board minutes. Complications can also arise in respect of confidential information stored on automatic electronic backup systems, which can be difficult to purge without causing potential issues for business continuity. For this reason, it is often prudent to include carve-outs to these clauses, such that these situations are less likely to arise.

3.6. Drafting for Remedies

34. **Injunctions:** As we have seen, an explicit provision might assist the Discloser in seeking an equitable remedy from the Court. Clauses that would perform this function are as follows:

The Recipient acknowledges that damages alone may not be an adequate remedy for any breach of its obligations under this agreement and, accordingly, without prejudice to any other rights or remedies that the Discloser might seek, the Discloser shall be entitled to the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach of the provisions of this agreement.

...the Discloser shall be entitled to seek, in addition to any other legal or equitable remedies it may have in connection therewith (including any right to damages that it may suffer), temporary, preliminary and permanent injunctive relief restraining such breach or threatened breach. The Recipient expressly acknowledges that the harm which might result to the Discloser's business as a result of any such breach would be irreparable.

35. **Indemnities:** The Discloser may seek an indemnity, since it provides for the easiest route of recovery if a breach occurs.⁶⁶ However, indemnities are generally not considered market standard in NDAs.⁶⁷ Despite this, and depending on the needs and bargaining power of the parties, they may be included when tailored to specific harms (such as breach of Strictly Confidential Information, or reputational harm) and accompanied by appropriate limitations. For instance, the parties may be particularly concerned about a specific piece of information falling into the wrong hands.⁶⁸

3.7. Takeover Regulations and Confidentiality

36. In M&A, takeover laws around the world significantly influence the scope and drafting of confidentiality agreements. In Indian law, parties are mandated to sign a non-disclosure agreement in respect of Unpublished Price Sensitive Information for any transaction which triggers a mandatory bid offer under the SEBI Takeover Regulations, 2011.⁶⁹ The objective of this is to prevent insider trading before the acquisition of a target.

37. Similarly, once a takeover triggers an open offer, the target board must ensure that all material information is equally disseminated. This means that any NDA preventing the target from disclosing deal details in the offer documents would fall foul of this regulation and be unenforceable.⁷⁰

38. In the UK, under the Takeover Code, there is a blanket prohibition on deal protection measures and inducement fees which extends to any 'offer related arrangements'.⁷¹ The objective of the prohibition is to strengthen the position of the target company. The definition of an 'offer-related arrangement' is very wide and includes any agreement, arrangement or commitment proposed to be entered into between the target (and persons

⁶⁶ Peter Watts, Philipp Grzimek, Marco Berliri, Alex Dolmans, Winston Maxwell, Lorig Kalaydjian and Ellie Pszonka, 'Non-disclosure agreements: Key issues in international deals' (2013) PLC Magazine 25, 33.

⁶⁷ Investment Property Forum, 'Non-Disclosure Agreement & Exclusivity Agreement' (IPF, 2019) <<https://www.ipf.org.uk/resourceLibrary/non-disclosure-agreement---exclusivity-agreement.html>> accessed 28 August 2025.

⁶⁸ Peter Watts, Philipp Grzimek, Marco Berliri, Alex Dolmans, Winston Maxwell, Lorig Kalaydjian and Ellie Pszonka, 'Non-disclosure agreements: Key issues in international deals' (2013) PLC Magazine 25, 33.

⁶⁹ Prohibition of Insider Trading Regulations 2015, reg 3(4).

⁷⁰ 'Disclosures under Non-Disclosure Agreements?' (*IndiaCorpLaw*, 27 November 2015) <<https://indiacorplaw.in/2015/11/27/disclosures-under-non-disclosure/>> accessed 3 November 2025.

⁷¹ The City Code on Takeovers and Mergers, r 21.2 ('Offer-related arrangements') (UK Takeover Panel, 2024).

acting in concert with it) and a bidder (and persons acting in concert with it) in connection with an offer, during an offer period or when an offer period is reasonably in contemplation, subject to certain limited exceptions.

39. There is a specific exception for a commitment by the target to maintain confidentiality, provided that such an arrangement does not contain provisions which would otherwise constitute "offer-related arrangements" including, for example, exclusivity clauses and break fees. So, when preparing a mutual confidentiality undertaking, it is important to ensure that it does not breach the relevant Takeover Code provision.
40. In India however, the SEBI Takeover Code does not define offer related arrangements in the manner that the UK Code does. Rather, the Insider Trading Regulations and disclosure rules indirectly limit the confidentiality obligations that the parties can agree to. The practical effect of the two regimes is the same — that NDAs must be restricted strictly to sensitive information without contravening the rules that could prejudice the target, or market transparency at large.

3.8. The role of Artificial Intelligence and technological tools in the NDA process

41. Document automation has been used for several years to draft NDAs but more recently we are seeing technological tools and Artificial Intelligence (AI) play an increasing role in the process of reviewing and negotiating NDAs. Various tools are available to carry out a clause-by-clause review against playbooks and, by using a combination of large language models and contract analytics, are able to classify clause variants, flag deviations from risk tolerances, and perform dynamic risk scoring informed by counterparty, jurisdictional, and transaction context. In practice, the best results are reliant on the AI having sufficient data to effectively progress negotiations. Where there is only a playbook, while this can be useful in preparing a first markup of a document, there is a risk that reliance on AI can lead to protracted negotiations, as the AI often repeatedly pushes for only the playbook positions that it has been programmed to accept. And, as with all AI, there is also still an important role for lawyers to review the AI output, from a commercial and common-sense perspective as well as a legal one.

4. INTERNATIONAL PRACTICE POINTS

42. The structure of an NDA is widely standardised across jurisdictions, so English and international forms are similar to Indian law documents. The foundation is a carefully drafted definition of Confidential Information with standard exclusions such as information in the public domain or information already known by the Recipient. Whistleblowing, illegality, and public interest carve-outs are also standard features of English NDAs. English law will not enforce agreements that prevent disclosures to regulators, law enforcement, or legal advisers.
43. In addition to core protections, a standalone English-law NDA agreed at the outset of an M&A transaction may also include provisions dealing with standstill, non-solicitation and exclusivity. In some circumstances, these cannot be included and in other circumstances it would not be appropriate to include these provisions, for example, when a short-form NDA is required.
44. Parties need to be conscious of the general prohibition on sharing competitively sensitive information with actual or potential competitors. In order to regulate the sharing of such information in the M&A context the parties may enter into a clean team arrangement, as well as an NDA. Under the clean team arrangement only members of a specified clean team will have access to the relevant information and will be subject to obligations over and above those set out in the original NDA. Ideally the clean team will consist of external advisors, who report back to the prospective buyer at a more aggregated level or on a summarised basis. If it is essential for certain people within the prospective buyer to have access to relevant information, then it may be possible to widen the clean team to include specified internal individuals, who are not involved in certain aspects of the day-to-day operations of the competing business (such as sales, R&D and recruitment).
45. It is common to see a mutual confidentiality undertaking where both parties are receiving confidential information even if one party is the principal recipient. For example, although the bidder on a takeover will be the principal recipient, the target company may receive limited confidential information about the bidder as part of the process of negotiating a recommended offer particularly if the offer is a share offer, and the fact of the transaction

should still be mutually confidential. A mutual NDA is also often easier to negotiate and prevents delays arising if a second one-way NDA has to be put in place at a later stage in the transaction.

46. Data protection provisions are now common in English law NDAs where the Confidential Information being shared includes any personal data, and there is no separate data sharing agreement between the parties. Such provisions require the Recipient to comply with its obligations under the relevant data protection laws.

47. Export controls and sanctions compliance are equally critical where the information has potential defence, dual-use, or sensitive technology applications, especially when US parties or content are involved. NDAs cannot authorise transfers that would be unlawful under export control or sanctions regimes, and the drafting should reflect that illegality overrides any contractual confidentiality obligation.

48. In relation to remedies, English law NDAs often contain no express provisions other than an express acknowledgement that damages alone would not be an adequate remedy for breach of the confidentiality undertakings. Indemnities are occasionally included in relation to the Recipient's breach of its obligations, although in commercial agreements the more common position is that the Discloser's proper recourse should be a claim for breach of contract.

49. English law NDAs occasionally provide for arbitration under well-known rules, such as LCIA, ICC and SIAC, in order to facilitate cross-border enforceability.

CONCLUSION

50. This note has attempted to lay down the doctrinal position on confidentiality agreements in Indian and English law, tracing its position in contract and in equity. We find that while India lacks a unified statutory framework, there is a broad scope for protecting confidential information and adequate tools for legal recourse. English law, on the other hand, follows a broadly similar track, with some important differences.

51. From a commercial perspective, safeguarding confidential information is essential to preserving competitive advantage and protecting intellectual property. When drafting NDAs, the parties should carefully consider the definition of confidential information and disclosure, setting appropriate durations, identifying permitted recipients and practical enforcement mechanisms.