



Global Legal Solutions®

NDA Checklist

GLS Checklists – Knowledge Leverage Tools



PART A: INTRODUCTION

1. INTRODUCTION

- 1.1 In Part B of this checklist, we outline some of the key legal risks and issues that you should check when reviewing a non-disclosure agreement / confidentiality agreement (an “**NDA**”).
- 1.2 Once your review of the NDA has been completed using this checklist, you can:
- 1.2.1 be confident in the agreement that you are looking to sign;
 - 1.2.2 ensure that your exchange of confidential information (“**Info**”) with third parties is protected; and
 - 1.2.3 proceed with the discussions / commercial project that you needed an NDA to facilitate.

2. FURTHER SUPPORT

- 2.1 If you would like any further assistance or support, you can:
- 2.1.1 create your own NDA for free using: [GLS Free NDA](#);
 - 2.1.2 discuss the results of this Checklist or any other legal issue relevant to your upcoming project with GLS by booking a free consultation with a GLS legal expert: [Free Consultation](#)
 - 2.1.3 obtain a more comprehensive NDA checklist for US\$99 here: [GLS NDA Checklist](#).

3. RELATED ASSUMPTIONS

- 3.1 In preparing this checklist, we have made the following assumptions:
- 3.1.1 our checklist is based on English law principles; and
 - 3.1.2 the Contracting Parties are assumed to be corporations.
- 3.2 Please remember that this checklist does NOT replace the need for independent legal advice.

PART B: CHECKLIST

4. NON-DISCLOSURE AGREEMENT / CONFIDENTIALITY AGREEMENT CHECKLIST

4.1 Issues Overview

You should look at:

Parties	Notification Obligations
Reciprocity of Obligations	Remedies for Breach
Definition of “Confidential Information”	Indemnities
Recipient’s Obligations	Commencement & Term
Authorised Recipients	Return/Destruction of Confidential Information

4.2 Parties

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.2.1 Are the correct Parties signatories to the NDA?	N	(a) Ensure that the party/parties that will receive your Info are the party/parties specified in the NDA.
	Y	(b) Confirm that their contact details (e.g. address and company number) are correct.
4.2.2 Will either Party’s affiliates receive Info?	Y	(a) Ensure that the signing party i) is responsible for ensuring its affiliate’s compliance with the NDA



		and ii) is jointly and severally liable for the actions of its affiliates.
	N	(b) No further action is required.
4.2.3 Are you exchanging Info with more than one counterparty?	Y	(a) Ensure an NDA is signed with each counterparty with whom Info is being exchanged.
	N	(b) No further action is required.

4.3 Reciprocity of Obligations

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.3.1 Are the obligations pertaining to non-disclosure of Info reciprocal?	N	<p>(a) Ask why. Your Info is as valuable/important to you as your counterparty's Info is to them.</p> <p>(b) Even if you do not expect to be disclosing Info, no reasonable counterparty should be working on the assumption of unilateral protection of an NDA <u>unless</u> you are signing the NDA (for example) to access a data room, etc.</p> <p>(c) Even then, it would be good/recommended practice to have an NDA in place to govern any Info exchanged in any dialogues pertaining to a potential business arrangement on the back of any Info that you have accessed.</p> <p>(d) If your counterparty is unwilling to sign a reciprocal NDA, ensure you do not inadvertently disclose Info to them in your dealings with them.</p>
	Y	(a) No further action is required.

4.4 Definition of “Confidential Information”

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.4.1 Check whether the definition of “Confidential Information” is wide enough to cover all information to be exchanged.	C	<p>(a) Consider whether the definition limits the Info protected to that “<i>marked as confidential</i>” or covers “<i>all information disclosed</i>”.</p> <p>(b) It is better to have ALL Info deemed as confidential rather than just material marked “confidential” to avoid inadvertent disclosure of Info not marked confidential which is then not subject to the NDA.</p>
4.4.2 Consider in what form/medium Info is to be exchanged.	C	<p>(a) Check whether the definition includes Info disclosed “<i>in writing</i>” or “<i>in any form</i>”.</p> <p>(b) Be mindful that you may disclose Info orally (in discussions), in writing, and electronically (e.g. email) as well as in hard copy form.</p>
4.4.3 Consider whether Info disclosed prior to signing of NDA is covered.	C	<p>(a) Parties often enter into confidential discussions and share Info prior to signing an NDA.</p> <p>(b) You should seek to ensure that all disclosure of Info is covered by the NDA – whether such</p>



disclosure was before or after the signing of the NDA.

4.5 Recipient's Obligations

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.5.1 Is the recipient of Info (" Recipient ") obligated to keep the Info confidential for the duration of the NDA Term?	Y	(a) No further action is required.
	C	(a) Check the Term of the NDA and check to whom and in what circumstances disclosures are permitted. (b) See section 4.6 below for further checks/consideration around " <i>Authorised Recipients</i> ".
	N	(a) The NDA should include a primary obligation on the Recipient to keep Info confidential for the duration of the Term. (b) Without a general obligation to maintain confidentiality, the NDA serves no purpose.
4.5.2 Check the " <i>purpose</i> " for which the Recipient may use the Info received.	C	(a) Ordinarily, we would expect to see the Recipient's use of the Info to be limited to a specific purpose – e.g. to consider a proposed business arrangement. (b) Try and limit the " <i>purpose</i> " to a specific use case – this limits the basis upon which the Info can be used by a Recipient.
4.5.3 Check to whom (if anyone) the Recipient is permitted to disclose the Info (commonly defined as " <i>Authorised Recipients</i> ")	C	(a) Check any definition of Authorised Recipients (or equivalent definition in the NDA) and consider whether it is appropriate that the Recipient may disclose your Info to these people/parties. (b) See section 4.6 below for further checks/consideration around " <i>Authorised Recipients</i> ".

4.6 Authorised Recipient

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.6.1 Does the NDA include a definition of whom the Recipient may share/disclose your Info with (for the purposes of this checklist, referred to as " Authorised Recipients ").	Y	(a) Check whether you are happy that the Recipient of your Info may share/disclose your Info with the defined group of people/parties. (b) We would commonly expect to see the following included in the definition of Authorised Recipients (or equivalent): (i) a Recipient's advisors (legal, accounting etc.); (ii) a Recipient's personnel. (c) A Recipient may also require that it is permitted to share your Info with its affiliated companies. If this



is the case, consider carefully whether this is appropriate and necessary.

- (d) Ordinarily, we would expect to see disclosure to Authorised Recipients should be on a “*need to know*” basis – i.e. no general disclosures should be allowed. Each Authorised Recipient’s use must also be linked to/in conjunction with the defined “*purpose*” (see section 4.5.2 above).

	N	<ul style="list-style-type: none"> (a) Consider whether it is required/necessary that you define a limited group of persons/parties to whom the Recipient may share Info. (b) We would commonly expect to see the following included in the definition of Authorised Recipients (or equivalent): <ul style="list-style-type: none"> (i) a Recipient’s advisors (legal, accounting etc.); (ii) a Recipient’s personnel. (c) A Recipient may also require that it is permitted to share your Info with its affiliated companies. If this is the case, consider carefully whether this is appropriate and necessary. (d) Ordinarily, we would expect to see disclosure to Authorised Recipients to be on a “<i>need to know</i>” basis – no general disclosures. Each Authorised Recipient’s use must also be linked to/in conjunction with the defined “<i>purpose</i>” (see section 4.5.2 above).
<p>4.6.2 Does the NDA require that the Recipient to ensure that the persons / parties to whom they disclose Info to, is aware of and must comply with the terms of the NDA?</p>	C	<ul style="list-style-type: none"> (a) Check whether the Recipient is obligated to procure that each Authorised Recipient is made aware of the existence of the NDA and complies with the NDA. (b) We would expect to see the Recipient to be expressly obliged to procure the compliance of each Authorised Recipient with the NDA. (c) We would also expect a Recipient to be liable for any disclosure of Info by an Authorised Recipient contrary to the provisions of the NDA.

4.7 Notification Obligations

Primary Query	Y/N/C	Secondary Query / Comment / Action
<p>4.7.1 Does the NDA specify what must happen in the event of unauthorised disclosures of Info and/or a breach of the NDA?</p>	Y	<ul style="list-style-type: none"> (a) Check whether you are happy with the provisions dealing with notification, including i) timing of notice; ii) what the Recipient is required to provide by way of information pertaining to the disclosure; and iii) to whom and where notices must be sent. (b) Ordinarily, we would expect to see a Recipient obliged to provide notification of any disclosure of Info/breach of an NDA as soon as reasonably practicable and to provide as much information as is reasonably possible and/or as may be reasonably requested for the Discloser to understand the full nature and extent of the unauthorised disclosure/breach of the NDA.
	N	<ul style="list-style-type: none"> (a) We would expect to see clearly set out provisions in an NDA explaining what must happen (and by



when) in the event of an unauthorised disclosure/breach occurring.

- (b) This includes acting in a timely manner and providing all information as reasonably possible/reasonably requested.

4.8 Permitted Disclosures

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.8.1 Does the NDA include specific permitted disclosure scenarios – e.g. for mandatory disclosures required by law?	Y	<p>(a) Consider whether the permitted disclosure scenarios are reasonable and appropriate.</p> <p>(b) Common permitted disclosure scenarios may include (without limitation):</p> <ul style="list-style-type: none"> (i) mandatory disclosures – e.g. as required by law or to comply with regulatory or court requests; (ii) disclosures of Info which is already in the public domain (other than by way of breach of the NDA); or (iii) where the Discloser expressly permits. <p>(c) Consider if a permitted disclosure occurs, whether the owner of the Info needs to be notified prior to such disclosure (applicable law permitting).</p>
	N	<p>(a) Consider if there are scenarios in which a party may disclose Info and not be in breach of the NDA.</p> <p>(b) Common permitted disclosure scenarios may include (without limitation):</p> <ul style="list-style-type: none"> (i) mandatory disclosures – e.g. as required by law or to comply with regulatory requests or court orders; (ii) disclosures of Info which is already in the public domain (other than by way of breach of the NDA); or (iii) where the Discloser expressly permits.

4.9 Indemnities

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.9.1 Does NDA include indemnification for breach?	Y	<p>(a) Generally speaking, we do not commonly see indemnities for breach of an NDA, albeit we have seen such provisions required, particularly by large corporate entities.</p> <p>(b) Ordinarily, we would recommend rejecting giving an indemnity for a breach of an NDA as a breach might be inadvertent/accidental and, even then, not cause loss to a Party.</p> <p>(c) For a complete review of the issues relating to indemnities in contracts see:</p> <p>GLS Checklist - Indemnities</p>



- N
- (a) No further action is required if you are the Recipient of Info.
 - (b) If you are the Discloser of Info, consider the appropriateness of an indemnity request noting that your counterparty will likely push-back / the request will cause a delay in negotiations/signing.
 - (c) Lack of indemnification provision does not remove your ability to sue for breach.

4.10 Commencement & Term

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.10.1 Does the NDA have a clearly defined commencement date and duration (the “Term”)?	Y	<ul style="list-style-type: none"> (a) Consider whether the specified Term is sufficient appropriate to permit the parties to fulfil the Purpose. (b) Ordinarily, we would expect to see the Term of an NDA extend for <u>at least</u> 1 or 2 years to prevent use of Info which may be commercially sensitive. (c) The appropriate duration for the Term of an NDA will be determined by reference to the circumstances the Parties find themselves in. (d) See section 4.4.3 regarding whether an NDA should be specified to include Info exchanged prior to the commencement date of the NDA (this is permissible).
	N	<ul style="list-style-type: none"> (a) All commercial agreements, including NDAs require a defined commencement date and duration (ie. .a “Term”) to be effective. (b) Ordinarily, we would expect to see the Term of an NDA extend for <u>at least</u> 1 or 2 years to prevent use of Info which may be commercially sensitive. (c) The appropriate duration for the Term of an NDA will be determined by reference to the circumstances the Parties find themselves in. (d) See section 4.4.3 regarding whether an NDA should be specified to include Info exchanged prior to the commencement date of the NDA (this is permissible).



4.11 Return/Destruction of Confidential Information

Primary Query	Y/N/C	Secondary Query / Comment / Action
4.11.1 Does the NDA specify that the Info must be returned or destroyed at a given time and/or upon the request of the discloser?	Y	(a) If there is a choice, check that it is the Recipient that can choose whether to destroy or return the Info. (b) Consider the practicality (time, cost and logistics) of the mechanism specified. (c) It may be cheaper to destroy/delete Info than return it. (d) If Info is to be returned, who will pay for this? (e) If Info is to be destroyed, how does a Party demonstrate compliance?
	N	(a) Consider what you want to happen with the Info at the end of the Term and/or once the specified Purpose has been met/passed.

PRACTICAL TIPS

- When used correctly, NDAs are useful tools to protect each party's confidential information.
- Careful consideration must be given to what information is being exchanged and for what purpose.
- Effective NDAs limit the use of confidential information to specific use cases by limited recipients.
- Care must be taken to ensure all confidential information exchanged is captured by an NDA.
- If you are a non-lawyer do not assume that because an NDA is a commonly used document it is not without risk. Getting an NDA wrong can expose you and your business to significant risk, loss & liability.
- Never assume you can sign an NDA without carefully reviewing it and understanding the interpretation and application of the defined terms.
- Your confidential information is a valuable proprietary asset and it is appropriate you protect yours, and accommodate others in protecting theirs.
- If you would like any further assistance simply book a [Free Consultation](#) with a GLS legal expert.