

Remember, remember.....Residuals clauses in NDAs – risks and how to manage them

Non-disclosure agreements (NDAs) are an established part of business life. In an age of increasing information mobility and value, individuals and businesses often use NDAs to prevent unauthorised use and disclosure of business-critical confidential information.

NDAs are often viewed as generic, boilerplate agreements but parties often miss the fact that **all NDAs are not equal; often they contain provisions which are weighted in favour of either the discloser or recipient of information. An example of the latter, which businesses either miss or ignore at their peril, is the so-called 'residuals' provision.**

Particularly common in the NDAs provided by big tech and big pharma, a 'residuals' clause operates to allow a party receiving confidential information to keep and use [residual] knowledge gleaned during the course of the relevant matter/discussions and retained in the memory of those employees working on it. The logic behind these clauses is that the employees of the receiving company will, while undertaking the contracted-for activity, also develop useful skills, techniques and know-how. It could be seen as both unfair and unrealistic that they would be expected to forget those developments, so a residual provision operates to allow the recipient to use any such skills which are remembered 'unaided' – without any form of notes or records. At least, that is the argument from the (normally large industrial) companies who include these clauses in their NDAs.

For the party disclosing confidential information, these 'residuals' clauses are potentially toxic and undermine the integrity of the confidentiality undertakings in the NDA: what if the confidential information relates to a particular market opportunity, for example, or a secret "inventive step", capable of patent protection? Such items are potentially easily remembered and a 'residuals' clause potentially allows the recipient of the information to use such information at will.

Watch out for these clauses in the NDAs you are asked to sign (unless it's your NDA and you are hoping to use one to your benefit). Ideally just say no – strike it through!

If you have no option but to agree to a residuals clause, there are steps you can take to minimise your risk of information loss:

- Limit the extent of the clause. Define what constitutes 'unaided' memory so that use of notes and intentional memorising are excluded.
- Highlight specific types of information that are extremely sensitive and demand special exclusions for those.
- Provide only the information you need to disclose and nothing else – so far as this is possible.
- Limit the number of individuals in the recipient's organisation who have access to the confidential information (ideally to individuals who do not have photographic memories!)
- Ensure that the wording of the clause makes it clear that the residuals provision does not operate to grant a licence to any intellectual property rights you own.

If you require further information on anything covered in this briefing please contact [David Copping](mailto:david.copping@farrer.co.uk) (david.copping@farrer.co.uk; 020 3375 7560) or Charlie Fikry (charlie.fikry@farrer.co.uk; 020 3375 7244) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the [Intellectual property & technology](#) or [Property](#) pages on our website.

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