Shape, icon, arrow

Description automatically generated **PLAYBOOK**

AGREEMENT: NDA’s

STATUS: APPROVED SUBJECT TO ANY CHANGES IN TRACK REQUIRING FINAL APPROVAL

| **CLAUSE #** | **CLAUSE** | **ISSUE** | **ACTION** | **REASON (INTERNAL)** | **COMMENT (EXTERNAL)** |
| --- | --- | --- | --- | --- | --- |
|  | **GENERAL** |  |  |  |  |
|  | TPICAP Entity | Request to add multiple entities | Reject | We should use whatever entity is/will be listed on the client’s MSA/MLA and advise the client that all Affiliates should be covered via affiliates provisions. |  |
|  | Request for inclusion of clause re IPR rights | Inclusion of clause along the lines of: “No licence of any trademark, patent, copyright or other intellectual property right of any kind, is either granted or implied by the disclosure of Confidential Information under this Agreement. Each party owns and shall retain ownership of its own intellectual property right. The Receiving Party agrees not to, and not to attempt to (and will not permit its Representatives to), reverse engineer or decompile any intellectual property rights provided to it by or on behalf of the disclosing party under this Agreement, unless it has obtained the Disclosing Party’s prior written Consent. | Reject | Point the client to clause 5.1 which entails either party retaining its rights in and to its Confidential Information which would include IPR.  If we are reviewing an NDA on client-paper, ensure that such a provision is included that effectively ensures no IPR is transferred through the agreement. |  |
|  | Regulatory compliance | Request to comply with regulations applicable to Subscriber | **Reject**  **Fallback:** Accept on a case by case basis provided the regulation is indeed applicable after having reviewed it and it has been escalated to ensure we can comply with it. | The terms of the NDA need to contain the terms relating to confidentiality, particularly where terms are containing in foreign legislation that we are not familiar with. We can agree to keep information confidential in accordance with the terms of this NDA (and GDPR), so if there is something over and above terms set out in the NDA (or GDPR), this needs to be agreed via the NDA. |  |
| **1** | **DEFINITIONS** |  |  |  |  |
|  | Affiliates | Request to expand the definition of Affiliates | **Reject** | Should not be permitted as the definition is very wide and should accommodate what is required. Clarify with the client what entities would need to be covered that aren’t already.  If their issue is with the “Control” aspect and they do not control an entity, how can they be sure that entity will keep the information Confidential? |  |
|  | Confidential Information | Request to remove “but is not limited to” | **Reject unless business approves** | Clarify with business what Confidential Information would be transferred and whether the definition can be narrowed in such a manner |  |
|  | Request to remove information disclosed before the Agreement date from the definition | **Reject unless business approves** | Clarify with business whether Confidential Information has already been transferred and if so, we cannot accept this. |  |
|  | Request to remove types of information from the definition of Confidential Information | **Reject unless business approves** | Pushing back is recommended in the first instance as this is a standard definition irrespective of whether all categories will be put to use. Clarify with business whether all the necessary has been included. |  |
|  | Representatives | Request to add contractors or subcontractors to the definition | **Reject unless business approves** | Clarify with the client who this is and then refer to that category specifically (if business approves). Contractors/ subcontractors is very broad so if we can include their request by referring to their IT supplier rather that would be preferrable. |  |
| **3** | **RETURN OF CONFIDENTIAL INFORMATION** |  |  |  |  |
| 3.1 | Obligation to Return/destroy information | Request to add a time limit as to when CI should be returned/destroyed | **Reject** | We should be wary of setting a time limit as it may be arbitrary and set us up for breach. |  |
| 3.1 | Request to remove the wording “At the written request of the Disclosing Party” | **Reject** | TPICAP does not have an automatic way of deleting any CI at the expiry point of NDAs and generally, it is initiated upon request by a party. |  |
| **4** | **EXCEPTIONS** |  |  |  |  |
|  | Exceptions to Confidential Information | Request to add wording concerning the proof of exceptions, e.g The obligations in paragraph 2 shall not apply to any Confidential Information *that it can be proved by documentary evidence (which shall be produced by the Receiving Party on written request of the Disclosing Party):* | **Accept on a case-by-case basis** | If the client has included such language make them aware that “publicly known” per (a) is self-evident so this would be irrelevant to add. When it comes to (b), we can include wording such as “as evidenced in writing”. (c) already includes such wording so also unnecessary to add. We can include it for (d) if the client pushes for it, however this is a rather sensitive topic. We should not be including any such wording to (e). |  |
| **5** | **FURTHER AGREEMENTS** |  |  |  |  |
| 5.2 |  | Request to make clause mutual i.e “Nothing in this Agreement shall prevent either party from independently creating…” | **Reject and escalate** | That will likely only be a request where a company is doing something similar to us. If we agreed to keep it confidential in such an instance it could prevent product development on our side. This clause really just elaborates on 4(b). |  |
| **6** | **GENERAL** |  |  |  |  |
|  | Term of NDA | Adding period for which NDA will apply | **Push for term of 2 years from effective date**  **Fallback:** Accept a term of maximum 5 years from effective date | Our position would generally be to set a term of 2 years from the date of the Agreement. We can agree to a period of 5 years from the date of the Agreement. We should be sure that we agree to period from the Effective Date of the NDA as opposed to a period from the termination of the NDA. |  |
| 6.8 | Enforcement of NDA by the parties’ Affiliates | Removal of Affiliate enforcement rights | **Accept** and include the following wording:  “Any losses or damages suffered by any Affiliate of the Disclosing Party under or in connection with this Agreement shall be recoverable or actionable by the Disclosing Party in accordance with the terms of this Agreement (as applicable) as if such losses or damages were suffered by the Disclosing Party.” |  | We’ve included this language to ensure that where an Affiliate suffers a loss as a result of the breach of the NDA by the other party, the loss will be recoverable or actionable by the Disclosing Party on behalf of its Affiliate. |
| **7** | **JURISDICTION AND GOVERNING LAW** |  |  |  |  |
| **7** | Governing Law | Request to have other type of governing law | **Reject** | Our logical starting point is that the law and venue should be the same as the MLA (if there is one). If there is, then push back on the basis that the client has already agreed to those laws, including in relation to the confidentiality provisions in the MLA, so logically there is no need to depart from the agreed position. |  |
| **7** | Arbitration Procedure | Request to add an arbitration procedure | **Reject**  **Fallback:** We could potentially agree to an EU centric arbitration provision. (see below) but then the governing law clause will need to be removed.  Any dispute arising out of or in connection with this Agreement, including any question regarding its ex-istence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitral proceedings shall be English. The governing law of the Agreement shall be the substantive law of England and Wales. |  | Although in practice, discussion around differing contractual interpretations, service or payment issues would of course take place, we see no benefit in either agreeing to a prescribed procedure or mandating a timetable to referral to arbitration. |