

Legal issues

The key legal issues to consider in the context of confidentiality agreements are set out below.

1) Limitations of confidentiality agreements

a. Remedies for breach and practical steps

i. The discloser should be aware that a confidentiality agreement cannot provide an absolute guarantee that the disclosed information will be protected. A confidentiality agreement has limitations, particularly where the recipient has little intention of complying with its obligations under the agreement. If a recipient uses or discloses confidential information in breach of the confidentiality agreement, it may be too late, or at the very least, prohibitively expensive, for the discloser to seek a meaningful remedy:

1. An injunction (to stop any unauthorised disclosure or use of the information) is the first choice of remedy if the discloser discovers the recipient's intentions before it breaches the confidentiality agreement. After the breach, an injunction may be of little or no use. Once the information has entered the public domain, there is no legal remedy that will make it secret again.

2. Damages for breach of contract (or a claim for an account of profits where the recipient has made use of the information) may not be an adequate remedy, especially where the confidential information has potential future value rather than value today.

3. Proving that there has been a breach of confidentiality agreement can often be difficult.

4. Even where the recipient is honest and acting in good faith, it will inevitably be influenced by the disclosed confidential information, whatever the terms of the confidentiality agreement.

Given these limitations, a discloser should, in addition to entering into the agreement, put practical measures in place to protect the information. For