

negotiations involving both price and volume. The customer needs to decide whether having exclusive access to this ingredient or product will bring sufficient economic return to justify the price and conditions being asked for. Laws aimed at protecting consumers and encouraging competition may set limits on the extent or duration of exclusivity agreements.

“Contracts of employment” are used to agree such things such as wages, hours of work and notice periods between a company and its employees. They may also explicitly state that the employee must keep his employer’s information confidential, during and after employment. Employment contracts also commonly assign the ownership of any intellectual property that the employee may invent to their employer. Some employment contracts contain restrictive covenants which prevent an employee taking a job with a competitor. As with all legal contracts, professional advice is required to ensure such covenants are valid. For example in common law countries, the principle of “restraint of trade” means that a person is entitled to undertake a lawful trade when and where he wishes. Any restrictive covenant has to be shown to be reasonable for both parties (and the public). Often, restrictive covenants are agreed in return for extra payment and are limited in duration. In most countries there are laws which govern the duties and responsibilities of employees and employers in addition to those written in an employment contract (see Section 29.7).

Contracts are often established between companies and organisations that are based in different countries. Written contracts will usually state under which country’s law they should be interpreted. A change in legal jurisdiction can make a significant difference to the way the contract will be interpreted, especially moving between “Civil Law” and “Common Law” countries (see Section 29.3.2). This is another area where professional legal advice is likely to be required.

29.7 Trade secrets

Trade secrets are information that companies keep secret to give them an advantage over their competitors. The formula for the COCA-COLA® beverage is famous for being protected by a trade secret. The recipe is supposedly a closely guarded secret kept in a bank vault. More common examples of information that may be kept as a trade secret include customer identities and preferences, supplier lists, the prices paid for goods, marketing strategies, company finances and manufacturing processes.

Keeping your important information secret has advantages over other types of protection such as patents as there are no fees to pay and the protection does not run out after a fixed number of years. The major disadvantage however, is the practical difficulty of keeping the information secret. You need to take great care to keep the secret and be sure that everyone involved does the same.

It may seem surprising, but in a large organisation, it requires excellent communication to keep a secret.

Another risk with the strategy of keeping a technical invention secret is that someone may independently have the same idea and decide to file a patent. Despite the fact that you have known this idea for a long time, the knowledge was not made public so they will be entitled to the patent.

In chocolate manufacture, secrets are best used to protect technical insights and understanding, process settings and in some cases the process itself. Clearly, if competitors can analyse your product and determine what ingredients were used and how the product was made, there is no point trying to keep that information as a trade secret. One approach for keeping recipes and processes secret when working with co-manufacturers is to use different companies to produce different parts of the product. For example, a fat blend could be made by one company, while the milk components are made by a second. All the components are then combined in yet another location. This avoids sharing the knowledge of the overall process, but is likely to add cost.

It makes sense to control who visits your factory and to avoid showing secret aspects of your process to those who do not need to see them. Visitors may not intend to pass on confidential information, but may do so inadvertently. Asking visitors to sign a secrecy agreement helps to remind them of their obligations. Some companies take great care not to allow any outsiders into their factories. Processing equipment is delivered to the door of the factory, and the supplier is not involved in the installation and may not even know exactly what the equipment is being used for, or whether further modifications are being made after delivery. This approach is not one to be taken lightly, as you lose the benefit of the supplier's expertise in specifying and maintaining the equipment and may limit your options regarding warranty. A good trusting relationship with your suppliers can be very valuable.

Most countries have laws to protect confidential information. This is required under the terms of the TRIPS agreement (WTO, 1994). The exact legal position and terminology varies from country to country, but there are three common factors. To be protected, information must:

- Be secret (not generally known to the public);
- Have commercial value because it is secret;
- Have been subject to reasonable steps to keep it secret.

An example of "reasonable steps" is the shredding of confidential information. Although, with a great amount of effort, someone might be able to piece together the shredded material and discover your secrets, you would be considered to have taken reasonable steps to protect your confidential information.

Legal obligations of confidentiality are not always as a result of a contract. Confidentiality may be expressly stated, but it can also be implied. In many countries certain relationships are presumed to be confidential, such as between a husband and wife, or a solicitor and client.