



The small print for BIG IDEAS

Queen Mary University of London
Centre for Commercial Law Studies
67-69 Lincoln's Inn Fields
London
WC2A 3JB

qLegal@qmul.ac.uk
www.qlegal.qmul.ac.uk

Client Reference Number: Clio [Confidential]

27 February 2024

Privileged & Confidential

By email to: [Confidential]

Dear [Confidential]

Re: Your appointment with qLegal on 24 January 2024.

How we work

Thank you for attending your appointment with us and for using the services of qLegal at the Centre for Commercial Law Studies, Queen Mary University of London. Although we cannot provide you with representation in any proceedings and do not hold ourselves out to be a firm of solicitors, our advice is free and we aim to provide the same high standard of service expected in the practice of law. Please note that the legal advice provided is in relation to the laws of England and Wales only.

Summary of the facts and documents you have provided

You are currently at the start-up stage of your business under the name of [Confidential] the “**Company**”). The Company, a tech start-up who has developed a recruitment software (the “**Platform**”) and was incorporated as a private limited company [Confidential].

Currently in the testing phase with participation from [Confidential] Law School students, the Platform has attracted interest from law firms due to [Confidential]. To safeguard their confidential information, the Company has drafted a non-disclosure agreement (the “**NDA**”).

The primary individuals involved in the Platform are recruiters in law firms, with support from two individuals from a customer service background. In the future, you wish to work with investors, testers, and early adopters (the “**Third Parties**” or “**Third Party**”). To engage with these Third Parties, and protect your information, you need appropriate NDAs in place with them.

We have been provided with the following documents:

- Non-Disclosure agreement drafted by the Company (the “**Template NDA**”).

Scope of our advice

You want to understand the following:

- Is the Template NDA sufficiently robust to protect the Company's interests when discussing the Platform with Third Parties?
- What are the practical steps the Company should take when using NDAs with Third Parties, including how to negotiate and sign NDAs and how to monitor compliance?

Summary of advice

- The Template NDA incorporates some of the key elements required, however, it is missing key provisions such as the definition of confidential information, warranties, breaches and remedies. We have annotated the Template NDA's clauses to make them more robust and we also suggest clear additions to make the NDA more friendly to the Company rather than the receiver of the confidential information. We understand the Company's concern about making the NDA as short as possible but we believe that extending the length of the NDA is a necessary action to increase its robustness and provide greater protection to the Company's confidential information.
- In terms of practical steps, we suggest you do not approach investors together with a request to sign an NDA, due to the possibilities of limiting your investor pool. Investors are unlikely to bind themselves legally when they do not have any information regarding your Company. The Template NDA should be shared with the prospective investor only after an initial pitch has been made, rounds of talks have progressed and you are about to become involved in technical conversations. Be careful and remove all confidential information from your pitches and your talks with investors and add Company watermarks to your slides. Research and filter out investors that are potential competitors. Consider carefully what information you disclose orally.
- When you negotiate an NDA, try and obtain the widest possible definition of "Confidential Information" which will favour the Company. You should also consider negotiating a list of specific personnel (e.g. employees, professional advisers, consultants etc) who will have access to the confidential information.
- When negotiating your NDA, bear in mind the commercial realities of your technology. Insisting on the longer duration of the NDA might mean that you have to make concessions to the investors, while in reality, your technology might be easily accessible within two years instead of five which would lead you to make concessions unnecessarily. It is not uncommon for NDAs to have a duration between one-to-two years. Considering the early stages of the Company, we suggest that your default position should be between two-to-three years. However, you should assess each NDA independently and in light of the specific moment in the Company's lifecycle and the contracting party.
- Take care when you execute a deed, the requirements for a contract and a deed execution are different and you should abide by them to ensure the NDA is enforceable.

- To assist in monitoring compliance with the NDA, you should label the documents you send as confidential, keep a record of your communications and the documents forwarded and specify the receivers. You may consider encryption for your documents too.
- Beyond concluding NDAs, you should consider other ways through which you can protect your brand and your work. Intellectual property (the “IP”) rights are another way to maximise the protection of your work, such as copyright and patents. We are aware you have a pending patent application. qLegal can further assist you with your IP strategy.

Explanation

What are the NDA clauses and our suggested changes?

In this section, we adopt the defined terms used in the Template NDA. We have used red font to highlight our recommended changes to the Template NDA clauses.

The key elements an NDA should cover are the following: the parties; the definition of Confidential Information; the purpose of disclosure; the non-use/non-appropriation of Confidential Information; the return/destruction of Confidential Information; the ownership and no licence; no warranties clause; the term of the Agreement; the governing law and jurisdiction; the employee non-solicitation restrictions; and dealing with assignment. A few of these elements were not present in the Template NDA, so along with the changes we made, we have made certain additions to provide the Company with the greatest possible protection.

The Template NDA begins properly by putting a date to the Agreement and defining the parties. It identifies the Discloser; however, the Recipient must also be defined in the same section.

Definition of confidential information

Before establishing the purpose, the first clause should be to define the Confidential Information. However, this definition is missing from the Template NDA. A more “Discloser friendly” approach which favours the Company, would mean a wider definition of what is considered Confidential Information. We are aware that the Company wishes to protect the process used in its Platform and the [Confidential] software it developed too. Considering it is better to request the signing of an NDA on behalf of the investor following an initial pitch (see the Practical Aspects of NDAs section below), the definition of Confidential Information can include information disclosed before the signing of the NDA as a starting point for negotiations.

Sample Clause:

1. *The term “Confidential Information” means any information disclosed by the Company or its representatives to the Recipient before or after the Effective Date and which may include, but is not limited to: (a) patents and patent applications; (b) trade secrets, (c) proprietary information, ideas, processes and techniques, prototypes, designs and models, inventions, know-how, software programmes/algorithms and any documents and formulas related to past, current or future products and services; (d) financial information, information on business assets, contractual relationships and forecasts (e) any lists of clients/customers, investors, employees and suppliers and (f) any other*

information that the Recipient knew or should have reasonably known that was Confidential Information.

A further addition which can be made is the introduction of a “Permitted Disclosees” list. This list defines the parties which can receive the Confidential Information such as employees, consultants and/or professional advisers of the Recipient. The Company may even agree with the contracting party to a list of certain identifiable individuals which should be added here.

Information is not Confidential Information for the purposes of this definition if: (a) the information was publicly available at the time of disclosure to the Recipient; (b) it became publicly available after the disclosure to the Recipient for any reason which is not a breach of this Agreement by the Recipient; (c) the Recipient was lawfully in possession of the information before the disclosure was made; (d) it was developed independently by the Recipient who did not have access to the Confidential Information and this can be supported by written documentary evidence. For the avoidance of doubt, this is an exhaustive list and no further exceptions may give rise to a situation in which the relevant information is not confidential.

It is also important to have a provision which specifies certain customary exclusions from Confidential Information which would ordinarily be expected by any potential investor, as illustrated in the clause above.

We also suggest that you define the date the Agreement is signed as the “Effective Date”.

Purpose

The Template NDA identifies a purpose in clause 1. Bearing in mind the Company’s intention to use an NDA with venture capital and angel investors, early adopters/clients and testers, clause 1 should be amended as follows:

Sample Clause:

- 2. The Discloser intends to disclose information (the Confidential Information) to the Recipient for **the purpose of [evaluating or pursuing a business relationship with the Discloser]/[soliciting interest in the adoption of its products and services]/[testing the products and services of the Discloser]** (the “Purpose”).*

The Company can use the options interchangeably when it decides to deal with different parties.

Non-use and non-appropriation

We recommend: (i) combining the confidentiality obligations in clauses 2 and 3 in one clause; and (ii) limiting which employees have access to the Confidential Information and the methods of storing such information as set out below.

Sample Clause:

3. *The Recipient undertakes not to use the Confidential Information for any reason except the Purpose, without first obtaining the written agreement of the Discloser. The Recipient undertakes to keep the Confidential Information secure and not to disclose it to any third party except to its [employees [and professional advisers]]/[Permitted Disclosees] who need to know the same for the Purpose, who know they owe a duty of confidence to the Discloser and who are bound by the obligations of this Agreement as if they were the Discloser.*

The Recipient agrees to apply the same measures of security and degree of care to the Confidential Information as it would for the protection of its own confidential information from an unauthorised disclosure.

4. *The Recipient will immediately notify the Discloser in writing regarding any loss or unauthorised disclosure of Confidential Information.*
5. *Nothing in this Agreement will prevent the Recipient from making any disclosure of the Confidential Information required by law or by any competent authority. If any such disclosure is required, the Recipient must immediately inform the Discloser in writing.*

We suggest that you add clause 4 to promote better compliance with the Agreement on behalf of the Recipient, as it will be forced to monitor the use of Confidential Information. Additionally, clause 5 from the Template NDA would fittingly follow those added clauses.

Return/destruction of Confidential Information

Clause 6 of the Template NDA identifies that the Recipient, upon the Discloser's request, must promptly return all copies and records of the Confidential information and refrain from keeping any copies or records. However, for enhanced clarity and comprehensiveness, the clause could be more specific by identifying that the Recipient is obligated to return or destroy all tangible and electronic materials containing the Confidential Information. The Recipient must certify compliance with this obligation in writing, except in cases where retention is necessary by law or regulatory requirements, allowing for the lawful retention of evidence while ensuring the ongoing application of the Agreement to retained documents and materials.

Sample Clause:

6. *Upon request from the Discloser, the Recipient will:*
 - (a) immediately return to the Discloser or destroy all documents and other tangible materials (and any copies) containing, reflecting, incorporating or based on the Confidential Information;*
 - (b) erase all Confidential Information from its computer systems or which is stored in electronic form;*
 - and*

(c) certify in writing to the Company that it has complied with the requirements of this clause, provided that the Recipient may retain documents and materials containing, reflecting, incorporating, or based on the Confidential Information to the extent required by law or any applicable governmental or regulatory authority. The provisions of this Agreement shall continue to apply to any documents and materials kept by the Recipient in accordance with this clause.

The refinement of this clause aims to ensure clarity, compliance, and legal adequacy, allowing for lawful retention when mandated by law or regulatory obligations, thereby reinforcing the effectiveness of the NDA.

No ownership and no licence clause

Clause 7 in the Template NDA currently clarifies that the Recipient receives no licence, interest, or rights in the intellectual property of the Discloser, except for the specific right to copy Confidential Information for the agreed-upon purpose. However, we suggest enhancing the clarity and comprehensiveness of this clause by incorporating a more detailed and expansive provision.

Sample Clause:

7. *Confidential information ownership and usage:*

7.1 Ownership:

Confidential Information is and shall always remain the exclusive property of the Company. The Recipient acknowledges and agrees that nothing in this Agreement shall be construed as granting any rights, by license or otherwise, to any Confidential Information disclosed under this Agreement.

7.2 Intellectual Property Rights:

The Recipient further acknowledges that no invention or any patent, copyright, trade mark, or other intellectual property right (including any rights that have issued or may issue in the future) shall be deemed granted, either explicitly or implicitly, based on the Confidential Information.

7.3 Usage Restrictions:

The Recipient expressly agrees not to make, have made, use, or sell, for any purpose, any product or item utilising, incorporating, or derived from any Confidential Information disclosed under this Agreement.

7.4 Business relationship and further obligations:

This Agreement and the disclosure of Confidential Information hereunder does not create any obligation on either party to enter into any subsequent agreement, license products or services to the other, or compel the Company to disclose specific Confidential Information. No partnership, joint venture, or agency is intended or deemed to be established between the parties by virtue of this Agreement.

This clause provides clearer ownership terms, more extensive coverage of intellectual property rights, explicit prohibitions on the Recipient's actions, and a more comprehensive understanding of the limited nature of the disclosed information.

No warranties clause

In the Template NDA provided, there is no explicit warranties clause outlining specific assurances regarding the accuracy or completeness of the disclosed information. We recommend you include this clause which clarifies that the Discloser assumes no responsibility for the accuracy, authenticity, efficacy, or performance of the data shared. It emphasises that the disclosing party does not make any guarantees about the information's quality, thus fostering transparency and allocating risk between the parties, while protecting the Company from any misrepresentation claims.

Sample Clause:

- 8. The Company is providing Confidential Information on an "as is" basis for use by the Recipient at its own risk. The Recipient accepts that the Discloser nor any other person gives any warranty or makes any representation as to the accuracy or otherwise of the Confidential Information.*

Term of the Agreement

Clause 8 of the Template NDA currently designates a one-year term for the Agreement, which may not align realistically with the prolonged discussions and collaborations anticipated with future investors. To better accommodate the dynamic nature of business negotiations and foster enduring relationships, it is strongly recommended to extend the term. It is not uncommon for NDAs to have a duration between one-to-two years. Based on the current state of the Company, a term between one-to-three years seems reasonable, however, each NDA must be assessed based on the stage in which the Company is and the relevant contracting party. For example, if the Company is concluding an NDA with a tester of the Platform, it means that it is closer to rolling out the Platform and that even a term of one year might be reasonable. Consequently, we have provided you with a sample clause where you can add the term depending on the circumstances.

Sample Clause:

- 9. This Agreement will automatically terminate [•] ([•]) years after the Effective Date.*

This adjustment provides a more pragmatic and reasonable timeframe, ensuring continued protection and confidentiality throughout an extended period of potential engagements and discussions with investors.

Governing law and jurisdiction

The Template NDA stipulates that the Agreement is governed by and construed under English law. However, considering the Company's intent to engage with potential investors beyond the UK, it is essential to ensure the English courts have exclusive jurisdiction and that the Agreement is binding in all countries.

Sample Clause:

10. *This Agreement shall be governed by and construed in accordance with English Law and the parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales in respect of any claim, dispute or difference arising out of or in connection with this Agreement.*

Employee solicitation

It is advisable to contemplate the inclusion of a non-solicitation provision within the confidentiality agreement to explicitly restrict the other party from engaging in activities such as poaching employees, luring away clients, or disrupting relationship with contractors, which would hinder the business and its operation stability.

Sample Clause:

11. *During the term of this Agreement, the Recipient agrees not to engage in any form of solicitation, directly or indirectly, aimed at the employees, contractors, customers, or vendors of the Discloser. This includes but is not limited to recruiting, enticing, or encouraging employees to leave their employment with the Discloser and soliciting business from the Discloser's customers or vendors. This non-solicitation obligation applies to the Recipient and its representatives, including third-party contractors, who may have direct or indirect interactions with the Discloser's personnel, clients, or business associates.*

This clause is particularly relevant for third-party contractors who, due to their specialised roles, may have frequent interactions with the Company's employees, customers, or vendors. Implementing a non-solicitation Agreement helps safeguard the Company's employees/consultants as well as its business relationships from any potential solicitation.

Assignment

We recommend including an assignment clause to safeguard the interests of the Discloser. This clause ensures that the Recipient cannot transfer or delegate its rights and obligations under the Template NDA to any third party without obtaining the prior written consent of the Discloser.

Sample Clause:

12. *The Recipient shall not assign, transfer, or delegate its rights or obligations under this Agreement to any third party without the prior written consent of the Discloser. Any attempt to assign, transfer, or delegate in violation of this provision shall be null and void.*

Breach and remedies

We suggest that the Template NDA includes a robust breach and remedies clause to explicitly outline the consequences of any breach or transgression of the Template NDA by the Recipient.

Sample Clause:

13. In the event of any actual or threatened breach of this Agreement by the Recipient, the parties agree and acknowledge that the Discloser may seek equitable relief, including injunctive relief. The Recipient agrees to indemnify the Company and/or the Discloser against all liabilities, costs, expenses, damages, and losses arising from any breach of this Agreement by the Recipient or any person that has received Confidential Information from the Recipient in accordance with this Agreement.

This clause asserts that damages alone may not suffice in case of a breach, empowering the Company (Discloser) to seek equitable relief, including injunctive relief, for actual or threatened breaches. Additionally, the Recipient's obligation to indemnify the Company against various losses stemming from any breach by itself or any party to which it provided Confidential Information further reinforces the importance of this clause. In essence, the inclusion of such a provision is essential to provide a clear legal recourse, ensuring the protection of the Discloser's rights and interests in the event of non-compliance.

What are the practical aspects of using NDAs?

In this section, we provide you with a comprehensive checklist of the practical steps related to using an NDA and we also discuss how you can monitor compliance. Considering the importance of investors and the complexity of asking them to sign an NDA, the checklist will primarily focus on them and less so on [Confidential].

Issue	Steps
How do you ask for an NDA?	<p>Asking a potential investor to sign an NDA is tricky and there is a plethora of investors who say to never ask an investor for one.</p> <p>DO NOT ask for an NDA before making an initial presentation or pitch to investors. They will be unwilling to take up legal liabilities and obligations just to hear a pitch or an idea. In a sense, we understand that the Company's idea and the process described in the interview would need to be communicated to investors without an NDA.</p> <p>DO provide the Template NDA when discussions with investors have increased and talks must divert to technical due diligence, sensitive information, suppliers/developers and proprietary intellectual property. Make sure that the potential investor has shown interest in actually investing in the Company prior to disclosing this information and asking for the NDA.</p>
How should you conduct a pitch without an NDA and still protect your Confidential Information?	<ul style="list-style-type: none"> • Professional investors like venture capital funds will not require details on the technical aspects of a business. • Be careful what pieces of information you disclose orally.

	<ul style="list-style-type: none"> • Remove sensitive, Confidential Information from the slides. • Add a disclaimer into the presentation that the information is confidential and that it is the property of the Company. Cover your slides with a Company watermark. • Research the investors you are contacting and filter out the potentially problematic ones.
<p>What should you negotiate in the NDA?</p>	<p>Essentially, every aspect of an NDA can be negotiated. The amended provisions we have provided you are very pro-Discloser. Make the following considerations when negotiating an Agreement:</p> <ul style="list-style-type: none"> • Have a clear definition of what constitutes Confidential Information and a clear purpose of what it can be used for. The Company will have greater protection where the definition of Confidential Information is wide and the scope is narrow. As the Discloser, you need to make sure that the Agreement classifies information disclosed before the date of the signing as Confidential Information too. • Bear in mind the Recipients of the information. To protect the Confidential Information, the Company may ask for a list of employees and advisers and conclude separate NDAs too. • The duration of the Agreement will always be negotiated. Longer confidentiality periods are advantageous for Disclosers since they ensure extended protection of the Confidential Information. However, keep in mind the commercial aspects and whether the information the Company has will go stale soon. Do not insist on an extended time period if the commercial realities do not require it.
<p>How do you execute a NDA?</p>	<p>An NDA may be executed as either a contract or a deed. There are a few differences.</p> <ul style="list-style-type: none"> • Contract: A contract will have an offer, an acceptance, intentions to create legal relations between the parties and will have consideration too, which is essentially a “bargain for exchange”. The consideration must be sufficient but it does not mean it must be adequate. When the Company is sharing information with the Recipient to allow them to determine whether they should invest or not, then there is valid consideration. • Deed: A deed is again a written Agreement which creates rights and/or obligations but does not need consideration like a contract.

	<p>However, deeds have more stringent formalities compared to contracts. They must be in writing, it must be clear that they are viewed by the parties as deeds and they must be signed and witnessed.</p> <p>Both are perfectly valid and enforceable ways to sign an NDA. If you decide to execute the NDA as a deed, be mindful of the strict formalities with which it needs to comply and make sure your contracting party has understood that the document is to be viewed as a deed.</p>
<p>How do you monitor compliance of the Recipient with the NDA?</p>	<p>NDA's are notoriously hard to enforce due to the evidence issues that arise when trying to prove that a Recipient misappropriated information provided to them. There are also fears of information misappropriation in case a deal does not go through.</p> <p>Here are a few things you can do to monitor information during the term of the NDA:</p> <ul style="list-style-type: none"> • Keep a record of the information you have disclosed to the Recipient. This will also help identify possible sources if they occur. • Provide only hard copies of information that is extremely sensitive. • Specify named Recipients of the information. • Label the documents you provide as "Confidential". • Consider encrypting the shared documents.
<p>Further Protections</p>	<p>NDA's have the aforementioned weaknesses. We are aware of your current pending patent application. Other ways you can protect your business include the use of IP rights. You might want to familiarise yourself with copyright law and make sure that, as you are working with independent developers, the copyright vests with the Company through valid licences.</p>

Next Steps

- We suggest that you adapt the changes made to the Template NDA, this will ensure greater protection of your Confidential Information when the Company discloses it to potential investors.

- Please consult and bear in mind the considerations outlined in the “Practical Aspects of the NDA” section above when dealing with investors and when you are considering requesting the signing of an NDA.

We hope that the advice provides you with a comprehensive understanding of the legal questions you asked us to address. Should you require any assistance in any future matters, please do not hesitate to contact qLegal.

We look forward to receiving your prompt feedback on the service received (as required under the terms our engagement letter) via this short form:

<https://qlegal.eu.cliogrow.com/intake/96a0a71c35ef40cdda77d55a571f8a72>. Your feedback is important to our educational development and the development of our free services for start-ups and entrepreneurs.

Yours sincerely,

[Confidential]
Student Adviser

[Confidential]
Student Adviser

On behalf of qLegal