

# Mattersmith

## Does your NDA align with market practice?

### 1. INTRODUCTION

Many businesses will have at least one non-disclosure agreement in their template bank, some may have different versions depending upon the legal entity or even the particular team which is looking to disclose or receive information.

Difficulty may arise when your counterparty raises questions about certain provisions, arguing that their position accords with market practice, which may not be consistent with your own view of what is acceptable.

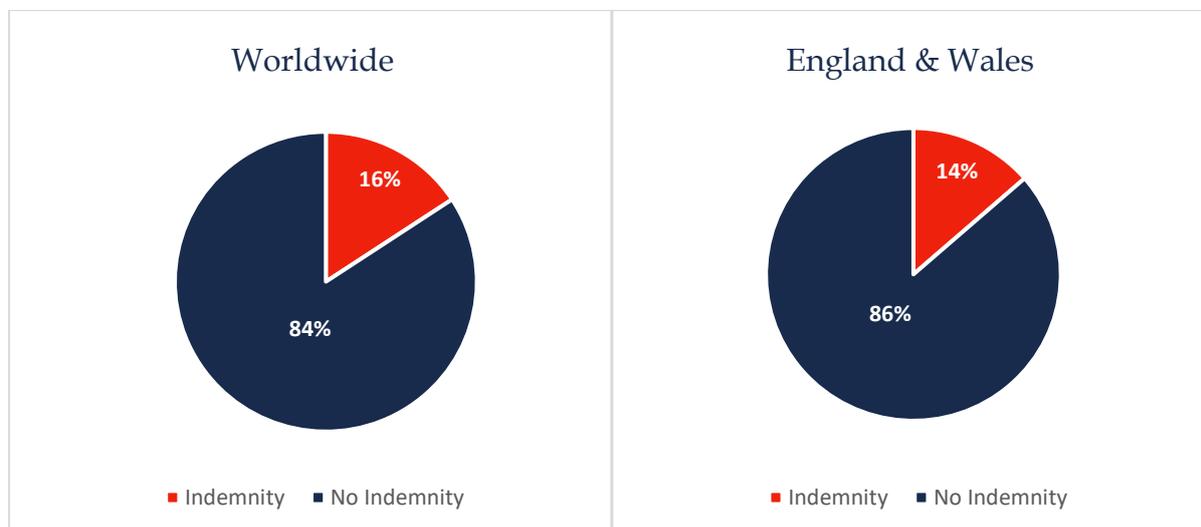
Forming an informed view of what is likely to be acceptable before putting pen to paper in relation to your template NDAs or when considering whether to re-work them is likely to save you and money by avoiding unnecessary or prolonged negotiations, and improving the efficiency of the process.

Set out below are the results of our monitoring of a few typically contentious provisions in confidentiality agreements. The data are based on the first drafts we receive, and not the agreed form. At the time of writing, the survey covers 2,895 NDAs in our core sectors of technology, banking, and financial services.

### 2. INDEMNITIES

We'll start with what is often amongst the most-contentious provision in any agreement, not just in an NDA: the dreaded indemnity.

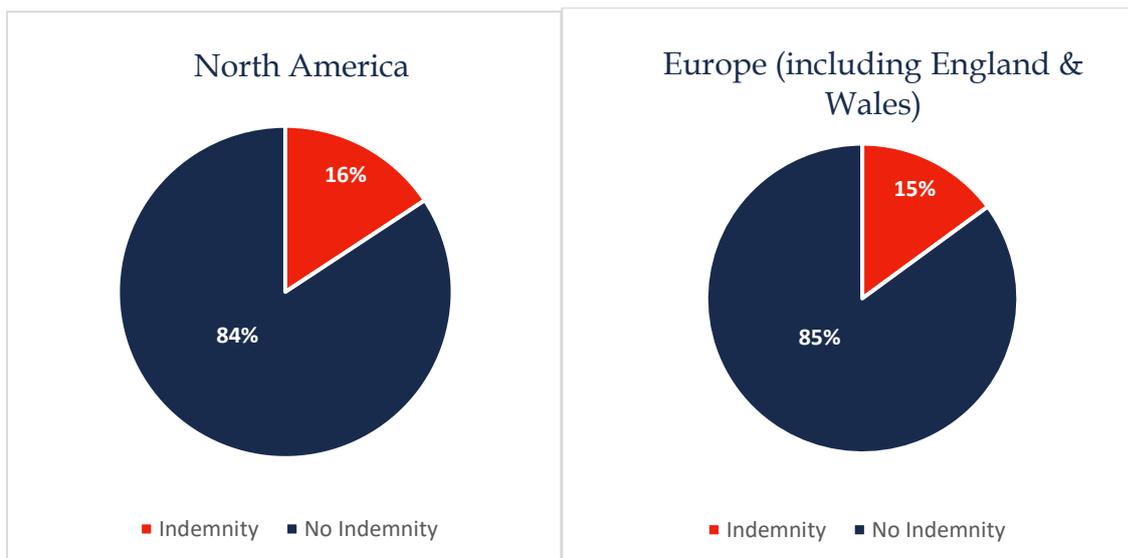
Our data sample suggests only 16% of NDAs include an indemnity. If the field is narrowed down to those NDAs which are governed by the law of England & Wales, the number drops to 14%:



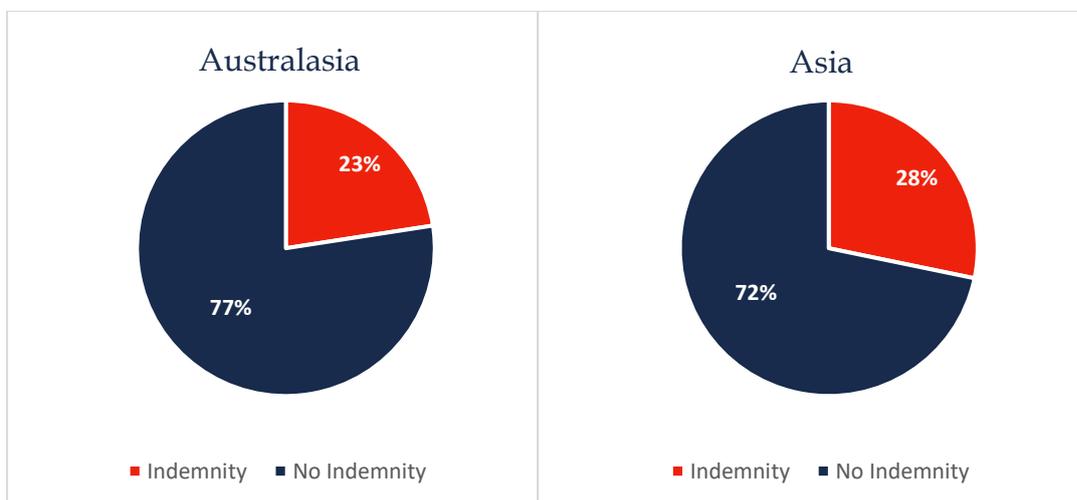
The data for North America is in line with the global position, with 16% of the NDAs we considered including an indemnity. When our results for England & Wales are pooled with those for the rest of Europe, the frequency of indemnities rises by 1%, to 15% of the sample:

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**Law matters. Technology helps.**



Interestingly, the incidence rate of NDAs in Australasia (23%) and Asia (28%) is much higher:



As a note of caution, we would need to expand our sample size to identify with greater confidence the incidence of indemnities in NDAs governed by the laws of countries in Asia. However, the result in Hong Kong (the jurisdiction whose laws govern the majority of NDAs in our sample for this region) is 16% with a whopping 31% in Singapore.

In our Australasian sample, 22% of NDAs governed by the laws of New South Wales (the jurisdiction whose laws govern the majority of the Australasian NDAs we looked at) contained indemnities, yet the incidence rate was only 6% in NDAs governed by the laws of New Zealand (the second most prevalent Australasian jurisdiction in our sample).

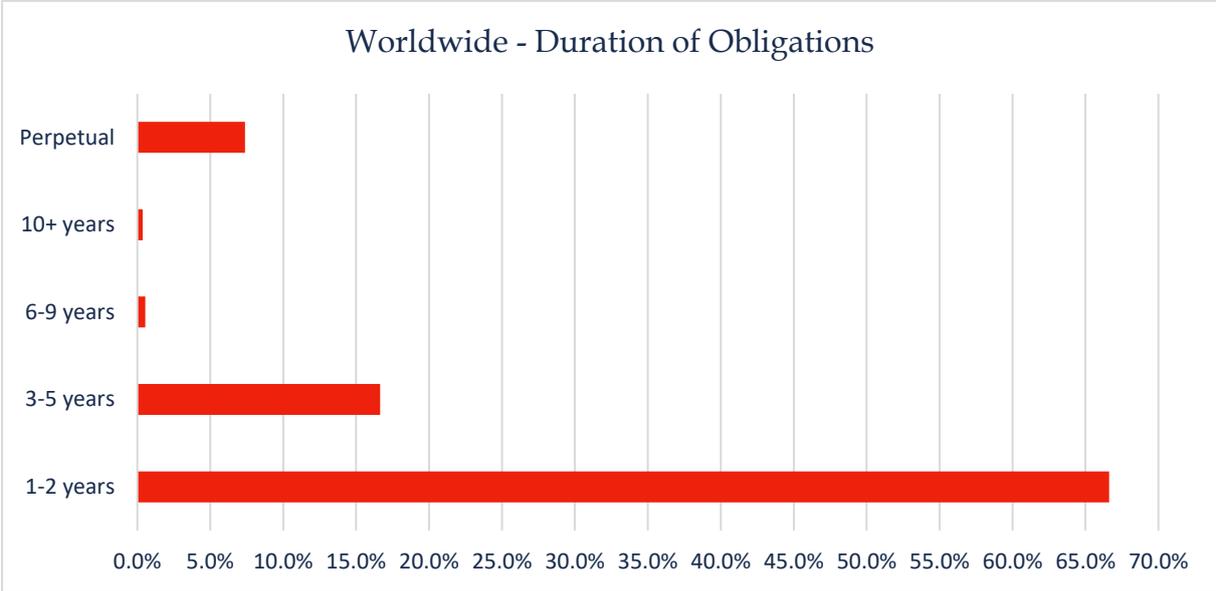
If your NDA is governed by a jurisdiction in Asia or Australasia, whether or not indemnities in NDAs are considered to be market practice depends upon the specific jurisdiction governing the agreement, with global and regional influences having less of an effect in individual jurisdictions than in the other regions we have considered.

### 3. DURATION OF THE NDA

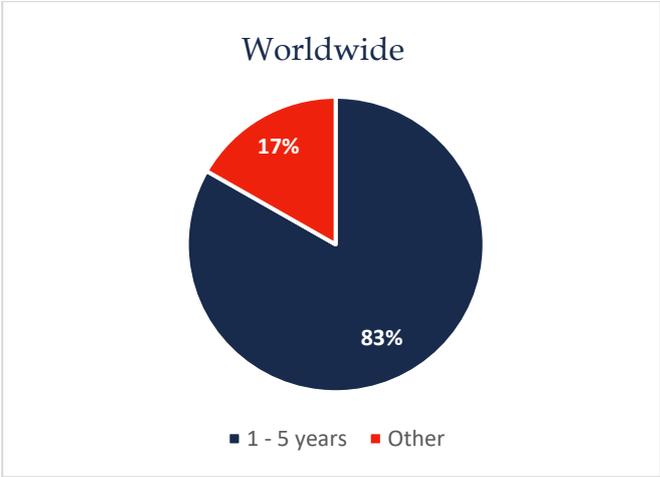
The disclosing party has a legitimate interest in ensuring that the receiving party is bound by obligations of confidence for as long as legally possible to protect the value of the information.

However, the confidential quality of information may be denuded over time and questions of an unenforceable restraint of trade may arise (at least under English law) where the duration of the confidentiality obligations is excessive.

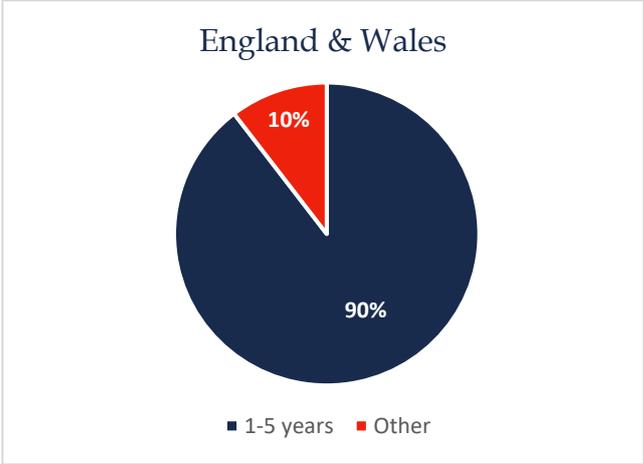
Any period of between one and five years is representative of the market:



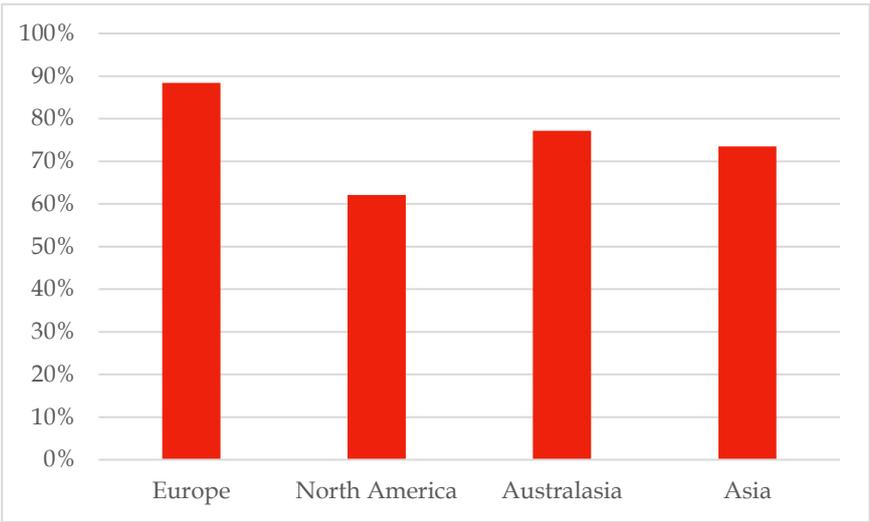
The above graphic demonstrates that the confidentiality obligations in 66.6% of the NDAs we looked at carried a term of just 1-2 years, and the chart below shows that 83% provide for a duration of up to 5 years:



By contrast, only 10% of NDAs governed by the laws of England and Wales contain a duration clause of longer than 5 years:



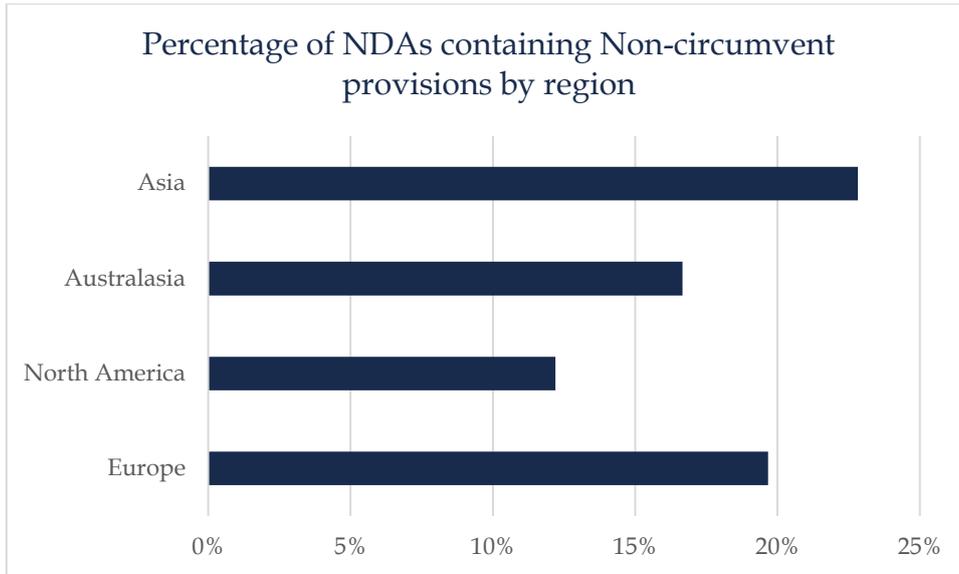
The data indicate that duration clauses exceeding 5 years are region-dependant, with 12% of European (including England & Wales) NDAs and 40% of North American NDAs being subject to a duration of over 5 years:



**4. NON-CIRCUMVENT**

These clauses prohibit the receiving party from dealing with another person or entity involved with the relevant transaction or the purpose of the agreement.

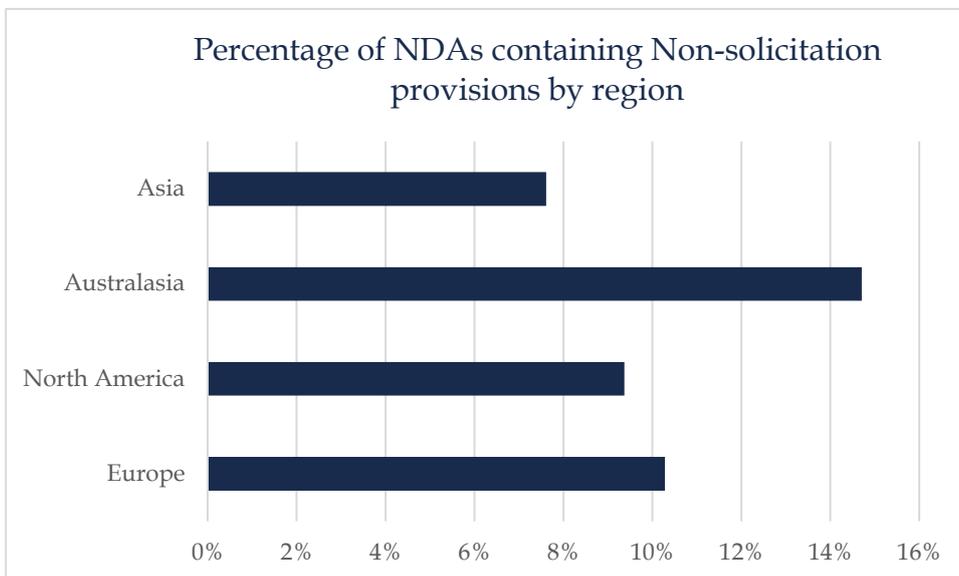
Our sample suggests that they are not routinely included in NDAs, appearing in less than 25% of the NDAs in each region we considered, with NDAs originating in Asia and Europe being the most likely to include a non-circumvent provision:



**5. NON-SOLICITATION**

A non-solicitation provision prohibits a person from hiring or attempting to hire certain people (usually the employees of the other party but they can be much broader).

Perhaps unsurprisingly, our data suggest that non-solicitation provisions are less common in NDAs than non-circumvents, with a prevalence of approximately 10% in the regions we considered, increasing to nearly 15% in Australasian NDAs:



Stewart Cook  
 Manager  
 Mattersmith Limited