

## Confidentiality Q&A: Japan

by Daisuke Morimoto and Toshihiko Hamano, Nishimura & Asahi

Status: Law stated as at 31-Jul-2020 | Jurisdiction: Japan

This document is published by Practical Law and can be found at: [uk.practicallaw.tr.com/w-027-0037](http://uk.practicallaw.tr.com/w-027-0037)  
Request a free trial and demonstration at: [uk.practicallaw.tr.com/about/freetrial](http://uk.practicallaw.tr.com/about/freetrial)

Japan-specific information concerning the key legal and commercial considerations in relation to confidentiality

This Q&A provides jurisdiction-specific commentary on [Confidentiality: Cross-border overview](#), and forms part of [Cross-border commercial transactions](#).

### Confidentiality

#### 1. How frequently do you find that confidentiality agreements are put in place in your jurisdiction for a general commercial purpose?

Confidentiality agreements are frequently used when a party needs to disclose sensitive information to the other before executing a commercial agreement, regardless of whether the parties to the transactions are incorporated in Japan. In addition, confidentiality agreements are commonly entered into by employees who will access sensitive information.

Confidentiality agreements or confidentiality provisions are commonly used in the following transactions:

- Mergers and acquisitions.
- Joint ventures.
- Transactions that require intellectual property, data and other sensitive information to be disclosed.

#### 2. Would contractual obligations set out in a confidentiality agreement which is governed by the law of your jurisdiction be additional to legally-imposed obligations of confidence, or would they replace them?

A confidentiality obligation is imposed on persons doing certain jobs, such as public servants, lawyers, doctors and dentists. In addition, a person who discloses information which falls under the definition of a "trade secret" or "data for limited provision" can be penalised under the Unfair Competition Prevention Act (see Question 3). A person who falls under the definition of a "Personal Information Handling Company" is prohibited from

disclosing personal information to third parties, except in certain situations. Contractual obligations set out in a confidentiality agreement are additional to these legally imposed obligations of confidence under Japanese law.

[Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 3](#) contains the typical contractual provisions of confidentiality agreements used in Japan.

#### 3. What is the definition of confidential information in your jurisdiction? What types of information (i) cannot, under the law of your jurisdiction, be protected by a confidentiality agreement or (ii) are usually excluded from the definition of Confidential Information contained in a confidentiality agreement governed by the law of your jurisdiction?

There is no clear definition of confidential information under Japanese law, but there are statutory definitions of "trade secret", "data for limited provision" and "personal information".

The Unfair Competition Prevention Act defines the terms "trade secret" and "data for limited provision".

"Trade secret" means technical or business information useful for business activities, such as manufacturing or marketing methods, that is kept secret and that is not publicly known (*Article 2 (6), Unfair Competition Prevention Act*).

"Data for limited provision" means technical or business information accumulated or managed in significant volume by electronic or magnetic means as information provided to certain persons (such as a business) on a regular basis. It does not cover data

which constitutes a trade secret or is provided to non-specified persons free of charge. (*Article 2 (7), Unfair Competition Prevention Act*).

Trade secrets and data for limited provision are protected from acts of wrongful acquisition, disclosure and use, and a subsequent acquirer can also be penalised for those acts. Note that a subsequent acquirer who was not aware, due to a serious mistake, that wrongful acquisition or the like was involved in the subsequent acquisition can be penalised for wrongful acquisition or the like of trade secrets but not for data for limited provision.

The Act on the Protection of Personal Information defines the term "personal information". "Personal information" means information relating to a living individual which:

- Contains a name, date of birth or other description which can identify a specific individual (including information which can be readily collated with other information to identify specific individuals).
- Contains an individual identification code. An "individual identification code" means an identification code prescribed by a cabinet order in the form of any character, letter, number, symbol or other code:
  - which is assigned to services or goods provided to an individual, or is stated or electromagnetically recorded on a card or other document issued to an individual (such as a driver's licence number) to identify them as a specific user or purchaser, or recipient of the issued document; or
  - into which a partial body feature of a specific individual has been converted in order to be used by computers and which can identify that specific individual.

(*Article 2 (1), Act on the Protection of Personal Information*.)

However, confidentiality agreements usually define confidential information more broadly than the definitions of "trade secret", "data for limited provision" and "personal information".

**Standard document, Confidentiality agreement (commercial):** Cross-border: [clause 2.2](#) is a typical confidential information exclusion clause.

#### **4. Is information which is held electronically treated differently from information on paper under the law of your jurisdiction?**

Information on paper is not protected as data for limited provision (see Question 3), because it is not managed by electronic or magnetic means.

Except for data for limited provision, the relevant Japanese laws do not expressly treat electronic

information and information on paper differently for the purpose of stipulating confidentiality obligations.

#### **5. Can findings, data or analysis derived from confidential information itself constitute confidential information under the law of your jurisdiction?**

Any findings, data or analysis derived from confidential information may constitute confidential information under Japanese law. Whether those findings, data or analysis are protected under a specific confidentiality agreement will depend on the agreement between the relevant parties.

**Standard document, Confidentiality agreement (commercial):** Cross-border: [clause 2.1\(d\)](#) is acceptable under Japanese law.

#### **6. Is it possible to extend the parties' obligations in the agreement so as to capture information that was disclosed prior to the confidentiality agreement being entered into and signed? Is an undertaking by a recipient not to disclose the fact that a confidentiality agreement has been entered into, or the fact that confidential information has been made available, enforceable in your jurisdiction?**

It is possible to extend the parties' obligations in the confidentiality agreement so as to capture information that was disclosed before the confidentiality agreement was entered into and signed.

It is also possible to enforce the parties' obligation not to disclose the fact that a confidentiality agreement has been entered into, or the fact that confidential information has been made available.

**Standard document, Confidentiality agreement (commercial):** Cross-border: [clause 2.1\(a\)](#), [clause 2.1\(b\)](#) and [clause 3.1\(a\)](#) are typical clauses in Japan.

#### **7. Is it necessary for "consideration" (that is, value of some kind) to be given by a discloser for a confidentiality agreement to be binding on a recipient under the law of your jurisdiction? If so, does agreement by the discloser that it will provide confidential information after a confidentiality agreement has been entered into constitute such consideration?**

It is not necessary for any consideration to be given for a confidentiality agreement to be binding under Japanese law.

[Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 3.1 \(first two lines\)](#) is acceptable under Japanese law.

### **8. What are the remedies available in your jurisdiction for a breach, or an anticipated breach, of (i) obligations set out in a confidentiality agreement, or (ii) confidentiality obligations imposed by the general law of your jurisdiction?**

The general remedies (such as damages, injunctions and so on) due to a breach of a contractual term are available even if the information falls under the definition of a “trade secret” or “data for limited provision”.

In addition, in the event that the information constitutes a trade secret or data for limited provision under the Unfair Competition Prevention Act (see Question 3), and the trade secret or limited provided data is infringed, a claim for injunction, a claim for damages and a request to take the necessary measures to restore a business reputation can be made separately.

In the event of an infringement of a trade secret or data for limited provision the innocent party can apply for an injunction.

### **9. Is it common in your jurisdiction for an indemnity to be requested by the disclosing party from the recipient for any loss or damage arising from the misuse or unauthorised disclosure of the confidential information disclosed?**

It is common for a disclosing party to request indemnity from the recipient for any loss or damage arising from the misuse or unauthorised disclosure of confidential information.

### **10. Does the law of your jurisdiction impose a limit on the time during which the obligations set out in a confidentiality agreement may continue to apply?**

There are no particular provisions of Japanese law that impose a limit on the time during which obligations set out in a confidentiality agreement may continue to apply. In practice, the parties may agree on the time during which confidentiality obligations will continue to apply.

[Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 2.1\(a\), clause 2.1\(b\) and clause 3.1\(a\)](#) could be amended so as not to impose a time limit on the obligations.

### **11. Is a clause requiring the return or destruction of the confidential information, on the request of the disclosing party, permitted in your jurisdiction?**

It is common for a disclosing party to request the return or destruction of confidential information in Japan. [Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 6](#) is a typical clause in Japan.

### **12. In your jurisdiction, who would be the typical list of permitted representatives of the recipient in a confidentiality agreement who could receive the confidential information?**

Officers, employees, certified public accountants, licensed tax accountants or other professionals are usually included in the list of permitted representatives. [Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 4](#) is acceptable under Japanese law.

### **13. Where the information is particularly sensitive, would it be possible in your jurisdiction for the disclosing party to require that the recipient enters into a separate undertaking with each of its representatives?**

This is possible. The disclosing party often insists on having a separate written confidentiality agreement with each of the receiving party's representatives.

### **14. What would be the typical list of situations under the law of your jurisdiction in which a party might be compelled to disclose confidential information supplied by the other party (and which should therefore form express exceptions to an undertaking to keep them confidential)?**

The receiving party may be compelled to disclose confidential information by:

- A judicial, government or regulatory body or agency with competent jurisdiction.
- Any applicable law or regulation.
- Rules of the relevant stock exchange.

[Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 5.1](#) includes a typical list of situations where a recipient might be compelled to disclose confidential information in Japan. [Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 5.2](#) is acceptable under Japanese law.

### **15. Might any additional undertakings be considered in certain scenarios, for example, undertakings not to entice away officers or employees or not to solicit customers of the disclosing party?**

It is possible to include undertakings not to entice away officers or employees or not to solicit customers of the disclosing party. Some confidentiality agreements include such undertakings. There are no restrictions in the competition law on these undertakings.

### **16. Could a third party, for example, members of a party's group enforce a confidentiality agreement, without being a party to the agreement?**

Only the parties to a confidentiality agreement may enforce it. Therefore, a third party could not enforce it unless otherwise specifically agreed.

A third party may be able to sue a party that infringes trade secrets and data for limited provision under the Unfair Competition Prevention Act (see Question 8).

### **17. Could a party to the confidentiality agreement enforce any of its provisions against a third party under the laws of your jurisdiction. For example, against a permitted representative of the recipient, without that representative being a party to the agreement?**

Only the parties to the confidentiality agreement may be bound by its terms. Therefore, a party could not enforce any provisions of the agreement against a third party unless otherwise specifically agreed.

### **18. What are the formal requirements for executing a valid confidentiality agreement in your jurisdiction?**

There are no formal requirements for executing a valid confidentiality agreement under Japanese law.

If an offer of a confidentiality agreement and an acceptance of the offer match, the confidentiality agreement is valid.

If a party is a company, the agreement must be executed by the representative director or person who is authorised to execute the agreement. No written agreement, notarisation, witnessing or filing with a government authority is required, and a confidentiality agreement may be entered into in any language.

### **19. Does the law of your jurisdiction dictate which governing law and jurisdiction will apply to this agreement?**

There is nothing dictating the governing law and jurisdiction that will apply to a confidentiality agreement.

### **20. Under the law of your jurisdiction, can the law chosen as the governing law of a confidentiality agreement restrict the parties' choice of law in respect of any subsequent transaction documents?**

No. The law chosen as the governing law does not restrict the parties' choice of law in respect of any subsequent transaction documents.

### **21. Are there any clauses in the confidentiality agreement that would not be legally enforceable or not standard practice in your jurisdiction?**

[Standard document, Confidentiality agreement \(commercial\): Cross-border](#) has no clause that would not be legally enforceable. Similar agreements are common in Japan.

### **22. Are there any other clauses that it would be usual to see in a confidentiality agreement and / or that are standard practice in your jurisdiction?**

No.

**23. Does the United Kingdom's departure from the European Union (Brexit) raise any issues that should be considered by the parties or affect the drafting of [Standard document, Confidentiality agreement \(commercial\): Cross-border](#) in your jurisdiction, especially for transactions or matters that present a connection to the UK (for example, because one of the parties is a UK-incorporated entity or has assets or carries on business in the UK)?**

No.

### Contributor details

#### Daisuke Morimoto, Partner

**Nishimura & Asahi**

T +81 3 6250 6274

F +81 3 6250 7200

E [d\\_morimoto@jurists.co.jp](mailto:d_morimoto@jurists.co.jp)

W [www.jurists.co.jp/en](http://www.jurists.co.jp/en)

**Areas of Practice:** Corporate, M&A, Crisis Management.

#### Toshihiko Hamano, Associate

**Nishimura & Asahi**

T +81 3 6250 6561

F +81 3 6250 7200

E [t\\_hamano@jurists.co.jp](mailto:t_hamano@jurists.co.jp)

W [www.jurists.co.jp/en](http://www.jurists.co.jp/en)

**Areas of Practice:** Intellectual property, data protection, technology.

#### Legal solutions from Thomson Reuters

Thomson Reuters is the world's leading source of news and information for professional markets. Our customers rely on us to deliver the intelligence, technology and expertise they need to find trusted answers. The business has operated in more than 100 countries for more than 100 years. For more information, visit [www.thomsonreuters.com](http://www.thomsonreuters.com)