

Consulting Contracts: What are the best Confidentiality Clauses?^{1, 2}

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ABSTRACT

The consulting profession is becoming more and more widespread in order to meet a growing demand from the companies all around the world. However, a central notion stands out in this area: confidentiality. Indeed, the consultants work directly with very sensitive data both on the company in which they operate but also on their employees. The fundamental aim of this research is to see if and how is it possible to protect as much as possible to avoid any leakage of private data. To do so, this paper establishes if there are key clauses to have in a non-disclosure agreement to reduce the probability of a breach. It also establishes if clauses can fully protect a company. The obtained results have shown that they are key clauses, however, if it can ensure you damages, it cannot ensure that there will be no leak at all.

Keywords: Confidentiality, consultant, consulting, clauses, contracts, nondisclosure agreement, secret data, secrecy agreement

INTRODUCTION

“The consulting profession is less than a century old, and yet, it is nowadays an indispensable and widespread occupation”.³“Consulting is the fact to provide an expert analysis to a client for a fee and using a contract.”² “As a consultant, you must be an expert and a strategist, the consultant seeks solutions to improve the functioning of companies, in areas such as organization, customer relations, human resources, information systems, the environment, etc.”³ Companies entrust more and more their development projects⁴ to consulting firms as it is good to have an expert and/or

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³ Confidentiality Sample Clauses. (n.d.). Retrieved from <https://www.lawinsider.com/clause/confidentiality>

² What is consulting? definition and meaning. (n.d.). Retrieved from <http://www.businessdictionary.com/definition/consulting.html>

³ What is consulting? definition and meaning. (n.d.). Retrieved from <http://www.businessdictionary.com/definition/consulting.html>

⁴ see table “Definition and example of key words” By Author

outside view or opinion. They therefore employ specialists in fields as varied as IT, e-commerce, organization, human resources, business development, taxation, logistics... This is why the greatest asset⁴ of a consulting firm is their employees. Indeed, as a service company, all your competencies rest upon the knowledge and expertise of your consultants. The consultant's work begins with the analysis of the existing (operation of services, information circuits, etc.). After making a diagnosis, he advocates solutions and monitors their application. In addition to his economic and technical skills, the consultant has many qualities: he listens, transmits his knowledge, persuades.

Knowing that you employ external companies and people, you have to make sure that the data of your own company and employees is safe. In return, as a consultant manager, you have to make sure that confidentiality is a key element in all portfolio of projects⁴. Indeed, when we are dealing with advisory companies, it is very common, if not essential, that they have access to sensitive data about the company and the employees. And this in order to better understand and comprehend the work environment of each company as well as its values, vision and general atmosphere. This same data could jeopardize the reputation of employees and the company. Similarly, these data may be of value to direct or indirect competitors of the company. Indeed, today, it is about always being at the forefront and innovative, whether on the IT aspect, but also managerial or corporate responsibility for instance. All this to both attract as numerous as employees and stakeholders possible, but also to ensure the sustainability of the company. In addition, the consultants you employ can work or work for competitors in your industry. It is therefore important to always make sure that your work and data are kept confidential so that no leak can occur.

In order to ensure a relationship of trust between the two parties, a contract must be used, and in this particular case a confidentiality clause must be included in the contract. Make sure that the contract has a strong confidentiality clause ensures that the project and the relationship between the two parties will go well. In this case, the company protects itself from any leakage or disclosure of sensitive and private information. The contract is a category of legal act intended by a person for the purpose of creating an obligation towards another person, who accepts it. It's an exchange of consents. In other words, a contract protects each party involved. This builds a sense of trust between the two parties and ensures that none of them will be harmed.

	DEFINITION	EXAMPLE (in consultancy field)
Project	an investment that requires a set of logically linked and coordinated activities performed over a finite period of time in order to accomplish a unique result in support of a desired outcome ⁴	Engagement for a client
Program	Strategic program: deliver assets and benefits that are directly linked to attaining the sponsoring organization’s future state ⁵	The establishment of consulting firms worldwide to diversify the customers and the area of expertise in order to gain in reputation and renown and therefore rise the profits and benefits
	Operational program: deliver assets and benefits that are critical to the sponsoring organization’s day to day operations	Update of the computers and software or the office and maintenance
	Multi-Project Program: achieve synergies from projects with common traits such as shared resources, similar clients or product technology. ⁶	Having different contracts for different issues with the same client
	Mega-Project: deliver a specific asset to the sponsoring organization. ⁷	BREXIT consultancy, Obamacare website
Portfolio of assets	Information Assets: controlled by functional groups like IT, engineering. ⁸	Business plans, IT systems or solutions, confidential data,
	Human assets: controlled by HR ⁹	Consultants, personnel assistants, managers, partners
	Physical Assets: controlled by either operations (“plant manager”) or other functional entities such as “heavy equipment shop” ¹⁰	As consultants mostly work at the clients', it would mainly be all the IT equipment (computer)

⁴ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

⁵ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

⁶ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

⁷ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

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⁹ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹⁰ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

	Financial Assets: controlled by accounting or finance ¹¹	Funding of the pay, travel and other expenses waiting to receive the client’s payment
	Intangible assets: Difference between a company’s book value and market capitalization value. ¹²	Hu man capital, competencies, contract, customers lists, technology (patents, processes, schematics)
Portfolio of projects	Fact of minimizing of the risk and maximizing the return. Any organization, be it owner or contractor has a portfolio of assets available to dedicate to projects, with the objective being to develop the best “mix” of projects which will generate the most favorable return on those “assets”. ¹³	While the request of proposals, in order to minimize the risks, it is better to have a mix of clients from different sectors, and from different size companies

TABLE 1: Definition and example of key words¹⁴

Root cause analysis

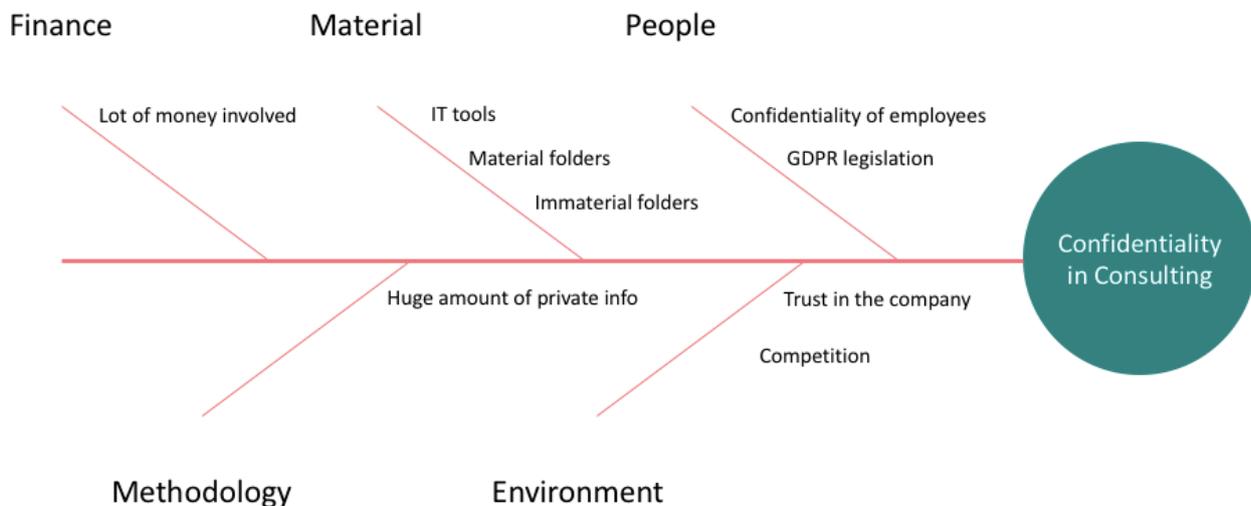


FIGURE 5’s - Root Cause Analysis Using Fishbone Diagram¹⁵

¹¹ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹² Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹³ Guild of project controls compendium and reference (car). (2015, November 2). Retrieved November 16, 2018, from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹⁴ By Author

¹⁵ By Author

The aim of this article is to comprehend, explore and understand the confidentiality clauses, or non-disclosure agreement, or secrecy agreement of a contract in consultancy and to compare it to the following references: FIDIC, EJCDC, Consens Doc and, AIA and finally CSI.

STEP 1: Problem definition

As described in the first part of this paper, the idea is to find the best confidential clauses within the consulting field. To do so, we need to determine if there are key clauses to have in a non-disclosure agreement to better protect both of the parties (discloser and recipient).

- What are the key clauses to have in a non-disclosure agreement?
- Can you be a hundred percent protected by confidentiality clauses?

STEP 2: Feasibility alternative

In order to answer the two questions above, a comparison of several confidentiality clauses in consultancy need to be conducted. This comparison will help determine whether:

- Some clauses are mandatory in non-disclosure agreement
- Having a non-disclosure agreement ensure there will be no leak of information
- The American Institute of Architects (AIA) document ¹⁶
- The Engineers' Joint Contract Document Committee (EJCDC) document ¹⁷
- The Consensus Docs ¹⁸
- The International Federation of Consulting Engineers (FIDIC) document ¹⁹
- The CSI documents ²⁰

STEP 3: Development of the outcomes

- **The definition of confidential information**²¹; Without a doubt, the most important element in confidentiality clauses is defining confidential information. This clause clearly and exhaustively specifies the information that should not be disclosed. Unfortunately, as simple as it may seem, far too many agreements have ambiguous definitions that are less

16 American Institute of Architects. (2009). The American Institute of Architects official guide to the 2007 AIA contract documents. Hoboken, NJ: John Wiley & Sons. General Conditions of the Contract for construction

17 Engineers' Joint Contract Documents Committee, Professional Engineers in Private Practice, American Consulting Engineers Council, American Society of Civil Engineers, & Construction Specifications Institute. (1996).

18 Consensus Docs Standard Agreement and General Conditions Between owner and constructor Retrieved from <https://www.consensusdocs.org/Downloads/Preview/629d61cb-ff79-494c-9b10-d7f231761e01?Initials=yI>

19 International Federation of Consulting Engineers (1999). The Global Voice of consulting Engineers.

20 Construction Specifications Institute. (2005). The project resource manual: CSI manual of practice. New York: McGraw-Hill.

21 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

resilient in the courts. This type of clause should include details on what constitutes "privileged" information, as well as an explanation of the formats covered. In other words, cover all your databases and specify that information shared through documents, emails, spoken conversations, handwritten notes, letters, etc. are all included. If you are the disclosing party in the contract, you want to build an unbreakable wall.

- **The parties**²²; In addition to the obvious need to define the two main parts (discloser and recipient), the contract must also contain a clause specifying to whom else the receiving party may disclose the confidential information during the project. For example, the receiving party may have its own accountants and lawyers who may need to review the information. They may also use suppliers to do certain work, (graphic designer, publisher, developer, etc.) These third parties are essential to the execution of the project and must be included in the non-disclosure contract.
- **The terms and duration**²³; Each nondisclosure agreement should have a clearly defined timetable, meaning: when does the agreement end and for how long should the confidential information be kept confidential? There is no standard period, it depends on the sector and the company. Regarding this type of clause, it is important to know that most jurisdictions will not impose unrealistic time limits as part of a legal agreement, and this applies to non-disclosure. business and information that you are about to disclose, however, you must also be pragmatic and fair to the party that receives it.
- **Legal obligation to disclose**²⁴; The discloser can be as careful as possible, it is possible that he is legally obliged to disclose the information he has agreed to keep confidential under this type of agreement. This request may come from a government agency, the courts, or an administrative entity. To protect both parties (discloser and receiver) in this type of situation, your non-disclosure must include a clause recognizing that a legal obligation to disclose does not constitute a violation of the agreement. However, the disclosing party may also include that the receiving party, while required to disclose the information, will only disclose information that is absolutely necessary and will inform you if such request occurs.
- **Remedies**²⁵; The contract should also include a clause specifying acceptable remedies for breach by the receiving party. The costs of a violation are difficult to calculate or to prove, because it is intangible, and why a mutual agreement on what constitutes a fair remedy will save you a long legal battle. This clause must include the consequences and possible damages of a breach of contract and preserve your right, as a disclosing party, to seek equitable solutions. Remember that this clause must be accepted by both parties, so do not

²² 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

²³ 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

²⁴ 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

²⁵ 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

be too specific or excessive in the recourse requirements. An overuse clause can lead to the non-signing of the agreement.

15. **INJUNCTIVE RELIEF.** Recipient understands and agrees that any use or dissemination of Confidential Information in violation of this Agreement will cause Accuride irreparable harm, and that monetary damages may not be a sufficient remedy for unauthorized use or disclosure of Confidential Information, and that Accuride may be left with no adequate remedy at law; therefore, Accuride shall be entitled, without waiving any other rights or remedies, to such injunctive or equitable relief as may be deemed proper by a court of competent jurisdiction. Such remedies shall not be deemed to be the exclusive remedy for any breach of this Agreement but shall be in addition to all other remedies available at law or in equity.

*Example of a remedy clause*²⁶

- **Responsibilities over legal fees**²⁷; In general, lawyers disagree with clauses that provide punitive damages or legal fees to the disclosing party, if they prevail in the event of breach of contract. The argument is that such a clause makes this type of agreement too much of an incentive for the disclosing party to sue for even the most insignificant cases. In fact, it is a question of finding a mutually acceptable clause that clearly defines who will be responsible for the legal costs if a lawsuit is brought. Even though this clause simply states that each party will be responsible for its own expenses, regardless of the outcome. The goal is to have this discussion in advance to make sure everyone agrees from the start.
- **Permitted use of information**²⁸; This clause permits you to clarify what will be the use of the shared information. You need to be very specific in order to make sure the recipient only uses information that he absolutely need for its project.

²⁶ 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

²⁷ 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

²⁸ 10 Key Clauses to Have in Non-Disclosure Agreements. (2017, November 16). Retrieved from <https://everynda.com/blog/10-clauses-have-non-disclosure/>

STEP 4: Selection of criteria

	FIDIC vs baseline document	EJCDC vs baseline document	Consens Doc vs baseline document	AIA vs baseline document	CSI vs baseline document
Definition of the confidential information	equal	better	better	better	better
Parties	better	equal	worse	better	better
Term and Duration	better	worse	equal	equal	equal
Legal obligation to disclose	equal	equal	better	worse	better
Remedies	worse	better	equal	better	better
Responsibilities over legal fees	better	equal	worse	better	equal
Permitted use of information	equal	worse	worse	equal	better
<i>Dominance ?</i>	<i>equal</i>	<i>worse</i>	<i>worse</i>	<i>equal</i>	<i>better</i>

TABLE 2: Multi-Attribute Decision Making²⁹

This method leads us to choose and analyze which approach contains the best attributes.

According to these comparisons, we can conclude that CSI contains the most of "best" criteria compared to our baseline document.

AIA is almost as good as CSI and FIDIC and CSI are also good compared to Consens Doc and EJCDC. In fact, ConsensDoc and EJCDC are almost the same so we are going to eliminate both of them as they present almost the same comparison to narrow down our choice.

²⁹ By author

STEP 5: Analysis and comparison of the alternatives:

According to the MADM, we have four feasible solutions to improve our initial contract. In fact, the feasible solutions are FIDIC, EJCDC, AIA and CSI document. We already eliminate one solution and now we need to narrow down our choice by eliminating one solution in order to find the best solution.

To do so, we will use the Consensatory Model Technique 2: Additive Weighting Technique. Regarding this technique we are going to compare the four feasible solutions cited above. The additive weighting technique will allow us to complete the next table. The three different statements used In the Multi Attribute Decision Making “Better, Equal, and worse “will be changed in numbers in the following table.

Attributes/Comparison	FIDIC	AIA	CSI
Definition of the confidential information	0,67	1	1
Parties	1	1	1
Term and Duration	1	0,67	0,67
Legal obligation to disclose	0,67	0,33	1
Remedies	0,33	1	1
Responsibilities over legal fees	1	1	0,67
Permitted use of information	0,67	0,67	1
TOTAL	5,34	5,67	6,34

TABLE 3: Additive relative technique³⁰

better = 1 equal = 0,67 worse = 0,33

³⁰ By author

Now that we have the table of the additive relative technique, we have to know the ordinal ranking by comparing the attributes to form a basic design decision, using the Non Compensatory Model technique 3: Pair wise Analysis. It is a comparison that will guide us to decide which attributes are the most relevant.

	Definition of the confidential information	Parties	Term and Duration	Legal obligation to disclose	Remedies	Responsibilities over legal fees	Permitted use of information	Total	Ordinal Ranking
Definition of the confidential information		1	1	1	1	1	1	6	1st
Parties	1		1	1	1	1	0	5	2nd
Term and Duration	1	0		1	1	0	1	4	3rd
Legal obligation to disclose	1	0	0		1	0	0	2	5th
Remedies	0	1	0	0		0	0	1	6th
Responsibilities over legal fees	1	1	0	1	0		0	3	4th
Permitted use of information	0	0	1	0	0	0		1	6th

TABLE 4: *Compensatory Model Technique 3: Pair wise analysis*³¹

1: Row of the more important objective
 0: Row of the less important objective

Thanks to this analysis, we are able to rank the different criteria in the following order:

1. Definition of the confidential information
2. Parties
3. Term and duration

³¹ By author

4. Responsibilities over legal fees
5. Legal obligation to disclose
6. Remedies and permitted use of information

After using *Pair-Wise Comparison* by comparing each feasible alternative, we can use *Compensatory Model Technique 2: Additive Weighting Technique* to finalize our analyze and narrow down our result to a final and unique contract document.

Attributes	Step 1	Step 2			FIDIC		AIA		CSI	
	Relative Rank	Normalized Weight (A)			(B)	(A)x(B)	(D)	(A) x (D)	(D)	(A) x (D)
Definition of the confidential information	1	1/27	=	0,037	0,67	0,025	1	0,037	1	0,037
Parties	2	2/27	=	0,074	1	0,074	1	0,074	1	0,074
Term and Duration	3	3/27	=	0,111	1	0,111	0,67	0,074	0,67	0,074
Legal obligation to disclose	5	5/27	=	0,185	0,67	0,124	0,33	0,061	1	0,185
Remedies	6	6/27	=	0,222	0,33	0,073	1	0,222	1	0,222
Responsibilities over legal fees	4	4/27	=	0,148	1	0,148	1	0,148	0,67	0,099
Permitted use of information	6	6/27		0,222	0,67	0,149	0,67	0,149	1	0,222
SUM	27	1		1	5,34	0,704	5,67	0,766	6,34	0,914

TABLE 5: *Compensatory Model technique 2 : Additive Weighting Technique*³²

³² By author

STEP 6: Selection of an alternative:

Using the tables above, the additive technique and the pair wise analysis, we can now locate the best alternative and decide which is a much better options compared to the others. In the additive relative technique in Table 3 we can see that CSI is $6,34/5,34 = 1,187 \times 100 = 118,7\%$ better than FIDIC and $6,34/5,67 = 1,118 \times 100 = 111,8\%$ better than AIA. This result means that CSI is a better recommendation to improve our baseline document.

Also, we can see in the Table 5, using the additive weighting technique that CSI is $0,914/0,704 = 1,298 \times 100 = 129,8\%$ better than FIDIC and $0,914/0,766 = 1,193 \times 100 = 119,3\%$ better than AIA. Meaning these techniques enable us to conclude that CSI document is the best solution to enhance our baseline document and now we can rank the 5 different options in the following order:

1st: The CSI documents

2nd: The American Institute of Architects (AIA) document

3rd: The International Federation of Consulting Engineers (FIDIC) document

4th: The Engineers' Joint Contract Document Committee (EJCDC) document

5th: The Consensus Docs

However, the best option would be to combine clauses from the different contracts so that the final contract would be the perfect and solid wall we need.

STEP 7: Performance monitoring and post evaluation of results:

This paper has been designed to answer the following question: what are the best confidentiality clauses for consulting contract? First of all, we learnt that there are some key clauses any consulting contracts should have in order to make sure it confidentiality is respected and secured. Knowing this, you can find the information in the different following contracts: FIDIC, EJCDC, Consensus Doc, AIA and CSI. However, to make sure to write a perfect contract regarding the confidentiality clauses for consultancy, it is better to mix those five contracts and only take the best clauses in each of them. Thanks to this, you could have a perfectly secured contract, that would ensure your company and your employees a perfect confidentiality or the fees fixing any kind of breach.

CONCLUSION

This paper has assessed the use of different confidentiality clauses in consultancy contracts to make sure the company is fully protected. To fulfill the aim of this research, the following research questions were answered.

✓ **What are the key clauses to have in a non-disclosure agreement?**

The key clauses to have in a non-disclosure agreement are the following: the **definition of confidential information** that clearly and exhaustively specifies the information that should not be disclosed; the **parties** to make sure no additional parties can be forgotten; the **terms and duration**, to clearly define the beginning and the end of the contract; the **legal obligation** to disclose only absolutely necessary information will be disclosed; the **remedies**, to specify acceptable remedies for breach by the receiving party; and finally, the **responsibilities over legal fees** to define who will be responsible for the legal costs if a lawsuit is brought.

✓ **Can you be a hundred percent protected by confidentiality clauses?**

By making sure you have the clauses stated in the previous question, you minimize your chances of knowing a breach. However, it can always happen; for legal obligation, this is why you have to make sure to give only and strictly the very necessary information needed, but also if the recipient decides to give the information away. In other words, you cannot be a hundred percent protected by confidentiality clauses as there is always an aspect that no one can control which is the free will and the human error. However, you can make sure to have damages if this case happens.

FOLLOW ON RESEARCH

The aim of this research was to assess if it is possible to write a perfectly protective non-disclosure agreement to make sure there is no leak possible. It is indeed possible to write this kind of agreement; however it is impossible to avoid the leak. However, to reinforce your contract, you can add a non-concurrency clause to reduce even more the probability of a breach.

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Lise Bouley is a graduate student in Project and Program Management and Business Development at Skema Business School. Since her youngest age, she has had a strong entrepreneurial mindset and a desire to work worldwide. Her numerous international experiences (internships and exchange semester) gave her the opportunity to develop adaptability and to become a confident problem solver. Being open-minded and world-oriented increased her innovative skills. Highly interested in project management and its main upcoming challenges, she is getting certified by PRINCE2 and AgilePM.

Lise is not only defined by professional experiences. She has also several hobbies, cooking and oenology, she has been president of the oenological club of her business school. She loves to travel the world and discover new fields.

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