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THE ROLE OF NON-DISCLOSURE AGREEMENTS (NDAs) IN SAFEGUARDING BUSINESS SECRETS: LEGAL CONSIDERATIONS AND BEST PRACTICES

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ABSTRACT:

In today's competitive world of business, the preservation of confidential and proprietary information known as business secrets is critical for any organization. Non-disclosure Agreements (NDAs) are essential for protecting these valuable assets and maintaining a competitive edge. NDAs create legally binding agreements between the parties, by guaranteeing that confidential information is not disclosed to third parties. This article discusses the importance of NDAs in protecting corporate secrets and their application in various business environments. A well-crafted NDA can revolutionize the way a firm protects its business secrets with the correct strategy and expert negotiating. The article further emphasizes the importance of NDA when dealing with different stakeholders who may have access to sensitive corporate information. By engaging in this agreement, organizations can strengthen their confidentiality practices and protect their valuable assets in a dynamic and competitive business environment by recognizing the importance of NDAs and their purpose in providing company secrets. Thus the organization can preserve a competitive edge by using NDAs to prohibit the unauthorized use of confidential information and protect trade secrets, intellectual property, customer lists, data loops, and marketing ethics. Before entering into a legally binding agreement, organizations must understand the scope and limitations of NDAs to achieve comprehensive protection.

KEYWORDS- NDA, Non – Disclosure Agreement, Business secrets, Confidentiality

INTRODUCTION:

In the realm of the corporate world, numerous organizations are emerging with different purposes. In a highly competitive business world, it is crucial for every organization to maintain a competitive edge for its progress and growth. In that regard, confidential and proprietary information collectively called “business secrets” must be secured with high attention and caution. They are considered the most significant assets of any business or organization. The protection of business secrets yields the success of the business by reaching business targets without any undue usage. Business secrets may be trade secrets, proprietary technology,

customer lists, data policy, marketing tactics, and some other information that gives a corporation an advantage over its competitors.

In that regard, Non-Disclosure Agreements (NDAs) play a crucial role in safeguarding business secrets by creating legally binding agreements between the contracting parties. The name of the agreement itself states that non-disclosure.¹ The main objective of entering into this agreement is to keep and protect the confidential information of the parties without accessing such information to any other third party/parties. NDA is routinely utilized in a variety of business settings that includes merger and acquisitions, joint ventures, employment contracts, distributor agreements, and cooperation with third parties.

The present article has envisaged the critical role and significance of the NDA in maintaining corporate secrets. Further, highlighted the major components of the NDA, including introductory, operative, and boilerplate clauses. However, the very nature of the business requires interaction with different stakeholders, including, employees, contractors, partners, and potential investors, all of whom may have access to these valuable company secrets. In such circumstances, there is a need for a well-drafted NDA to protect business secrets associated with such transactions. It is important to be aware of the scope and limitations of the NDA while drafting for any organization. A well-crafted Non-Disclosure Agreement (NDA), combined with skilled negotiation, can transform the way a company protects its business's secrets.

MEANING OF THE NDA

Non-Disclosure Agreement is a legally binding agreement between two or more parties in which the receiving party has the obligation to protect the confidentiality of any information disclosed by the disclosing party.

The purpose of this agreement is to ensure receiving party shall not disclose the confidential information of the disclosing party.

SIGNIFICANCE OF NDA IN DIFFERENT COMMERCIAL AGREEMENTS

NDA plays a very important role in safeguarding the company's confidentiality. Almost every business transaction involves confidential information. Hence it is expedient to enter into NDA

¹ ADAM HAYES, How NDAs Work and Why They're Important, investopedia, (July. 02, 2023, 9:29 PM), <https://www.investopedia.com/articles/investing/041315/how-ndas-work-and-why-theyre-important.asp>

as a pre-contractual instrument. NDA plays a significant role in various commercial agreements that include –

- NDA in Merger and Acquisition

In merger and acquisition transactions that involve a wide range of sensitive information such as customer lists, financial data, proprietary technology, intellectual property, trade secrets, etc., This information remains confidential when parties enter into a well-drafted NDA. This contributes to the preservation of competitive advantage and protects the interest of both parties. An NDA also prevents the parties from using sensitive information for purposes other than specified in such agreement. This is especially important when it comes to the protection of intellectual property. In the absence of NDA the purchasing business may use the other party's intellectual property without their prior consent and compensation.² While entering NDA in merger and acquisition it is important to know about which type of NDA suits depending on the factual circumstances.

- NDA in joint ventures and partnerships

In joint venture agreement, it is an arrangement between two or more parties co-operate in order to run a business or to achieve a commercial objective.³ A partnership is a legally binding arrangement formed by two or more people who agree to share responsibility, ownership, and management of a business. Partnerships are frequently formed when individuals or organizations wish to pool their resources and expertise to pursue a common business goal.⁴ Before entering into joint ventures agreement and partnership agreements NDA is required to protect the confidential information exchanged between two or more collaborating parties. Through NDA it is feasible to establish trust, open communication, and prevent unauthorized usage.

- NDA in supplier and vendors relationships

Non-Disclosure Agreements are essential in supplier and vendor transactions to protect sensitive information such as pricing structures, product specifications, and strategic goals.

² Pravien Raj, The Role of Non-Disclosure Agreements in Mergers and Acquisitions, Vakeelsearch (June 10, 2023, 4.15 PM), <https://vakilsearch.com/blog/the-role-of-non-disclosure-agreements-in-mergers-and-acquisitions/>

³ Nishithdesai, https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Joint%20Ventures%20in%20India.pdf (last visited on Jun. 11, 2023).

⁴ Jessica Hinkle, Definiton of Partnership: How They Work, Taxation and Types, indeed (June 11, 2023, 5.00 PM), <https://www.indeed.com/career-advice/career-development/definition-of-partnership>

NDA encourages trust and confidentiality, by allowing firms to preserve a competitive advantage and keep vital information out of the hands of competitors.

- **NDA in Marketing and Distribution**

Before entering into a final agreement with distributors agreement manufacturer and distributor need to protect confidential information which involves, trade secrets, marketing standards, and any other marketing gigs. For this purpose, NDA plays a crucial role by imbibing proper terms and conditions on receiving party either manufacturer or distributor to protect the confidentiality of such trade secrets from outsiders or competitors.

Other than these commercial agreements there are many other agreements like employment contracts, sponsorship agreements, franchise agreements, research and development collaborations, and many other agreements that require NDA to safeguard the confidential information of the business or organization.

MAJOR COMPONENTS OF NDA

A well-drafted NDA can be a protective shield for a company or any organization. To create a legally binding agreement drafted agreement must be legally enforceable to reap the benefits of such an agreement. While drafting NDA it is important to consider every component/clause carefully to avoid future ambiguities. The major clauses include-

- **Introductory Clauses**

The introductory clauses are very important as they are considered the preamble to the agreement. It consists of the essential information of the agreement. It provides precise and clarity to the parties of the agreement. Major clauses include:

1. **Title and Date** – In any agreement the title is very important to identify the nature of the agreement. In the NDA agreement, it must be titled as Non-Disclosure Agreement to avoid any ambiguity regarding the title of the agreement. The date of the agreement must be specified by considering the effective and execution period of the agreement.
2. **Parties** – This clause states who are the parties to the agreement. It consists of the legal name and the legal address of the parties. This enables the parties to execute and enforce the agreement without any further confusion. This clause gives a clear picture of who is the Receiving Party and Disclosing Party under NDA. In case if recipient party consists of

Auditors, lawyers, or any third-party contractors who require access to confidential information it should be covered by the Non-Disclosure agreement to protect such confidentiality.⁵

3. Recitals – This clause start with the common word called ‘Whereas’. This clause provided a brief background about the nature, purpose, and relationships between the parties. In the NDA agreement, these clauses be drafted by highlighting the relationships and nature of confidential information to be protected and also about the reasons for retiring into Non-Disclosure Agreement.

- Operative clause

The operative clauses are crucially rafted after making necessary negotiations between the parties. The negotiation must create win-win situations for both the party. the important operative clauses of the NDA agreement are as follows-

1. Confidential Information- This clause should be considered the definition of confidential information to be protected under NDA. This clause consists of a list of confidential information. Thus this clause highlights the scope of the confidential information involved in the agreement.

2. Obligation – This clause specifies the obligations of the Receiving Party to protect such confidential information. Obligations include depending on the actual circumstances of each agreement. This clause includes the authorizes way of using confidential information and also implements the provisions for unauthorized use

3. Exceptions- Along with these obligations, this clause is to be drafted by providing exceptions in which the party is permitted to reveal such confidential information without incurring any liability.

4. Term and Terminations -This clause includes the duration of the agreement and specifies the termination grounds for the agreement. That may include termination by mutual consent, material breach for termination, and survival of confidential information even after termination of the agreement.

5. Remedy and Enforcement – The clause highlights the remedy for the breach of the agreement. It may consist of injunctive relief, monetary compensation, or specific performance depending on the prior negotiation period between parties.

- Boilerplate Clauses

⁵ Staff Desk, What Are The Important Clauses Of NDA?, Vakeelsearch (June 15, 2023, 2.50 PM), <https://vakilsearch.com/blog/important-clauses-of-nda/>

This clause is also called a miscellaneous clause. The clause where there is no such scope for negotiations. Under NDA the Dispute resolutions, governing law, severability, waiver, and notices are commonly considered as the Boilerplate clause. This clause highlights the flag; and administration of the NDA. This clause also ensures the clarity, consistency, and proper enforcement of the NDA. It is very dependent on each agreement.

TYPES OF NDA

NDA can be broadly classified into two categories that include Unilateral or One-way NDA and Bilateral or Two way NDA.

- Unilateral or One-way NDA- In this type of NDA in which one party i.e., Receiving Party has the obligation to protect the Confidential Information of the other party called Disclosing Party. This type of NDA is often used in commercial transactions. Such as seller-buyer agreements, employee-employer agreements, manufacture – distributor agreement, etc.,
- Bilateral or two-way agreement- in this type of agreement both parties of the agreement are to disclose confidential information and both parties have the obligation to safeguard the confidential information of the NDA. This type is commonly used in mergers and acquisitions and in some corporate takeovers.⁶
- Multilateral NDA- this type of agreement is used where more than two parties share and protect the confidential information of each other. Business involves various complex transactions or collaborating with multiple parties this type is used in such circumstances.

While drafting a particular NDA it is expedient to consider the type of the NDA by considering its nature and purpose of such agreement.

ENFORCEABILITY OF NDA

In India, Non-Disclosure Agreement is primarily governed under Indian Contract Act 1872.⁷ To enforce the NDA it must be drafted in a precise manner and the language used must be clear. By following basic things NDA needs to be stamped under the state stamp act accordingly. Payment of stamp duty is made compulsory to admit NDA before the court as

⁶ Types of Non Disclosure Agreements (NDAs), <https://ironcladapp.com/journal/contracts/types-of-nda/> (last visited June 17 , 2023, 5.00 PM).

⁷ KRITI SAKUJA, Non-Disclosure Agreement, [Indian Law Portal](https://indianlawportal.co.in/non-disclosure-agreement/) (June18, 2023, 2.00 PM), <https://indianlawportal.co.in/non-disclosure-agreement/>

evidence. The registration of the NDA adds more credibility to the existing Non-Disclosure Agreement.

NDA AND SECTION 27 OF THE INDIAN CONTRACT ACT 1872

Section 27 of the Indian Contract Act, agreement unrestraint of trade is void.⁸ Accordingly, the clause prohibiting restriction on trade secrets in commercial transactions is not considered under the ambit of section 27 of the ICA. Moreover, these restrictions are reasonable and do not violate Article 19 (1) (g) of the Constitution.

JUDICIAL APPROACH

In VFS Global Service Pvt Ltd v/s Suprit Roy⁹, the Bombay High Court held that the clause prohibiting an employee from disclosing commercial or trade secrets is not a violation of section 27 of the Indian Contract Act.

In Ambiance India Pvt. Ltd. vs Shri Naveen Jain,¹⁰ the court has defined trade secrets that include, “a trade secret is some protected and confidential information which the employee has acquired in the course of his employment and which should not reach others in the interest of the employer. However, routine day-to-day affairs of employers which are in the knowledge of many and are commonly known to others cannot be called trade secrets. A trade secret can be a formula, technical know-how, or a peculiar mode or method of business adopted by an employer which is unknown to others.”

CONCLUSION:

Though NDA is a pre-contractual instrument it is legally binding and enforceable before the court. It plays a very crucial role in the protection of the company's trade secrets and any other confidential information. NDA plays a significant role in various kinds of agreements. While drafting NDA it is required to craft the scope and limitations of such agreement to avoid any future ambiguities. The information which is already in the public domain is not considered confidential information under NDA.

In consideration of international parties, NDA has to be drafted by considering different jurisdictional laws and governing laws. By implementing well-drafted NDA and conducting effective negotiations, organizations can significantly enhance their ability to protect their business secrets and also maintain a competitive advantage. These agreements ensure that parties involved in transactions, collaborations, or any employment relationships understand

⁸ Indian Contract Act, 1872, s 27, No. 9, Acts of Parliament, 1872 (India).

⁹ VFS Global Service Pvt Ltd v/s Suprit Roy, 2008 (2) BomCR 446, 2007 (2) CTLJ 423 Bom

¹⁰ Ambiance India Pvt. Ltd. vs Shri Naveen Jain, 122 (2005) DLT 421, 2005 (81) DRJ 538

their obligations regarding the handling of confidential information. Therefore a well-drafted NDA can act as a protective shield for the company or any organization.

