

Non-disclosure agreements: an effective tool during negotiations

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Introduction

To a large extent, the security and success of a transaction depends on the correct execution of the process preceding its finalisation. At the pre-contractual stage, a non-disclosure agreement (NDA) is the first agreement that regulates the mutual relationships of the parties involved in the negotiations.

The conclusion of such an agreement:

- facilitates negotiations;
- reinforces the parties' trust; and
- allows for the protection of information which they consider to be significant.

However, in Polish law, even if parties do not conclude an NDA, they must still keep information to which they are granted access in the course of negotiations confidential under Article 72¹(1) of the Civil Code. Under this article, if a party discloses confidential information during negotiations the other party must not:

- disclose or transfer such information to other parties; or
- use such information to its own ends, unless the parties have agreed otherwise.

It is assumed that this provision is an autonomous source of liability for the disclosure of confidential information, whereas the liability is contractual in nature. Article 72¹ of the Civil Code broadens the scope of protection of an injured entity, since it also applies to violations of the confidentiality obligation in a situation in which the negotiated deal has been concluded.

NDAs – basic obligations

An NDA should, above all else, contain the parties' obligation to keep confidential any and all information obtained as a result of contact between the parties (eg, in the course of the due diligence process or during negotiations). It is also possible to impose a non-use obligation regarding information obtained for purposes other than the conclusion or performance of the contract being negotiated. In most cases, NDAs provide that the disclosed information may be used only in the framework of analysis and negotiating a potential transaction.

An NDA may be:

- unilateral – that is, binding for the entity (eg, a potential investor) to which confidential information is disclosed; or

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- bilateral – that is, binding for both parties to the negotiations (eg, regarding a joint venture or investment).

The scope of the parties' obligations must be defined so that the agreement protects a party or parties against the disclosure of confidential information. Therefore, the most significant factor is an appropriately broad definition of 'confidential information', including any and all information of substance for a given party recorded in any form. The type and scope of confidential information will depend on the specificity of a given transaction. A clear definition of this scope should constitute the core of an NDA.

Polish law provides no general definition of confidential information, but Article 11(4) of the Act on Combating Unfair Competition can be used for auxiliary purposes. It introduces a definition of 'company confidentiality', encompassing technical, technological organisational or other information of commercial value which is not disclosed to the public and for which a company has taken the necessary steps to maintain its confidentiality. However, in practice, such an approach can prove to be excessively narrow for parties and agreements may introduce broader definitions.

Defining in the agreement which information will not be protected as confidential is equally important. Exclusions may, in particular, pertain to information which the parties must disclose under public law regulations or in the event of a variety of auditing operations carried out by public bodies. It is worth defining in the agreement how parties should behave in such situations (eg, by introducing a proviso stipulating the need to disclose public information and determining the scope of such a disclosure).

Defining the scope of confidentiality obligations is also recommended. In particular, defining to whom confidential information can be disclosed without violating an NDA is advised. This pertains to representatives and consultants of parties taking part in transactions (ie, the so-called representative clause). Such a clause will be of particular importance if an NDA is concluded in connection with due diligence.

Other elements that should be included in an NDA depend on the parties' intentions and the extent to which they wish to define violations of such an agreement.

Contractual penalties

A stipulation of damages for violating an NDA is of particular importance. Depending on the law governing a given agreement, it is worth considering whether a contractual penalty or general regulations on compensatory liability work best. Under Polish law, providing for a contractual penalty in an NDA is admissible, but a court may find an excessively high contractual penalty to be disproportionate and, in certain cases, contradictory to the principles of community life (which may result in the invalidity of the clause providing for such a penalty).

However, making provisions for a contractual penalty substantially facilitates the pursuit of damages first and foremost due to the lack of an obligation to demonstrate the damage, which is all the more difficult where obligations subject to an NDA have been violated. The clause should also indicate that stipulating a contractual penalty does not exclude the creditor's title to seek repair of the damages in full – especially in cases where the value of the damage may exceed the contractual penalty provided for. This enables the creditor to seek compensation in full, as the scope to exceed the contractual penalty will be in keeping with general principles (therefore demonstrating the scope of the damages suffered).

Arbitration or mediation clause

It is also worth including a clause detailing the resolution of disputes that might arise between the parties to an NDA. Arbitration will enable the settlement of a dispute which may arise between the parties while maintaining the confidentiality required in such cases. Mediation is even better, as it is less expensive and allows the relationship between the parties to be preserved.

Applicable law clause

An NDA should also contain a clause regarding the selection of applicable law. This is an important issue, especially against the background of various legal orders in which the scope of liability for the violation of an agreement or the possibility of stipulating and pursuing a contractual penalty may be shaped differently. These issues should be analysed before selecting the law applicable to an agreement. Finally, the applicable law clause should also apply to the arbitration clause in order to eliminate any doubts regarding its scope.

Comment

Concluding an NDA allows parties to:

- define clearly the status of information disclosed in the course of negotiations;
- specify the meaning and significance of such information; and
- provide for a contractual penalty in the event of the violation of the agreement's obligations.

Concluding an NDA in Poland is of substantial significance as, in the case of a violation, it enables a party to seek damages to the fullest extent possible.

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