

NON DISCLOSURE AGREEMENTS

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Reasons for the Seller to keep Confidentiality

Information about a potential sale of business may frustrate:

- Employees
- Distributors and agents
- Trading value of listed shares
- Debtors
- Creditors

- If the deal fails and the prospective purchaser withdraws, this may cause further adverse effects

- Necessity to protect trade secrets which must be revealed to a prospective purchaser

- The situation is even more sensitive if the prospective purchaser is a competitor; he may not really be interested to purchase the business, but only to learn its trade secrets so as to compete against it more effectively
 - Key employees
 - Key providers
 - Key clients

Concerns against NDAs

- An NDA may be a disguised restriction of competition
- An NDA may establish a broader protection for exclusive IP rights

KEY CLAUSES IN AN NDA

Not to disclose the transaction, its price, its negotiations

Not to disclose Confidential Information

Definition of Confidential Information (C.I.)

Definition of what is NOT C.I.

An obligation to use CI for the purpose of the transaction only

An obligation of the purchaser to accept a record of CI provided, mentioning the person to whom it is provided. A record is necessary to create reliable evidence as to what has been disclosed. Without such a record a NDA is not much of an enforceable agreement.

An obligation to return or destroy all CI either on demand, or upon termination, or if the transaction has not been completed by a specific date.

- does this apply to DD reports that have been produced?

An undertaking not to solicit key employees for a specific duration

- how about not soliciting clients / providers

(may be considered restrictive of competition)

An undertaking that injunctive relief and specific performance will be available.

Duration & termination clause

Applicable law clause

Jurisdiction / Arbitration clause

Extending the NDA to all companies of the same group.

Some disclosure is inevitable

Disclosure to key employees and professional advisers

- Limited number of identified employees / advisers
- Employees / advisers must be contractually bound to confidentiality

Disclosure required by law or court order

- This may be material in listed companies where company law and investor protection law oblige parties to disclose info about major transactions

DISCLOSURE OF INFORMATION MAY BE PROHIBITED BY LAW OR CONTRACT

The seller may understand that he has to disclose certain agreements like distributors or agents agreements, but such agreements may include confidentiality clauses.

Data protection laws may prohibit disclosure of information i.e. about employees, terms of payment, clients, etc.