

Use of Non-Disclosure Agreement as Legal Protection in Trade Secrets to Investment Security

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The world of investment and business is growing very rapidly. These developments occur both in Indonesia and internationally. Many investment actors want to keep the secrecy of the products or services they trade. Most of the things that these investors have are a novelty, but there are also not necessarily new things but not many people who understand and understand how to get the results obtained. For that reason, things like this need to be protected so that the creators of those things remain protected. To develop this secret business needs to be protected without being registered, in Indonesia, it is known as a trade secret. In practice, however, sometimes the secret trade-trafficker must share this secret with others in order for the undertaken business to flourish. The protection of this secret shall be made by making a nondisclosure agreement in which this Agreement is required not to notify anything contained in the business of either the business or the investment and the contents of the agreement to the other party.

Keywords: trade secrets, non-disclosure agreement, investment

Introduction

Indonesia has a significant economic improvement. This economic improvement is driven by many factors. One of the major economic improvements is a large number of investments in Indonesia. Capital investment is a very large amount due to the flow of globalization.



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In the implementation of the human economy are interconnected with each other. This is because humans are social beings. Humans are social beings so that humans cannot live without others and also make these humans interconnected with each other. Relationships that arise and are created between people can occur with various forms. The relationship is made from family, relationships between neighbours, friendships, to business relationships that can be mutually beneficial to each human being both spiritually and physically. This relationship will gradually cause problems because of frequent dissent. In the case of any disagreements in any activity, this matter must be resolved immediately. Solving this problem is done with the making of regulations so that can be completed properly.

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In carrying out the investment required a rule to ensure the legal certainty of the parties so that the parties do not do things that could harm the other party. In addition to the arrangements issued by the competent government, as well as the parties involved in the matter of such investments may create their own rules of action among the parties by making agreements. The covenant is defined as the rules of the game that are made private among themselves.

In the Civil Code of the Republic of Indonesia article 1338, it is stated that All agreements made legally in accordance with the law shall apply as a law to those who make it. In article 1338 it is stated that it becomes law so as to be a *lex specialist* in the inner arrangement to keep individuals or parties involved in arrangements or agreements made in the agreement so that the parties do not disagree or disagree in interpreting something. Agreements can also resolve disputes that occur to make business or investment work well.

Agreements are formed of various types. There are several agreements that already exist in the Indonesian Civil Code, the law in Indonesia refers to the agreement as a named agreement because it is regulated in the Indonesian Civil Code. In addition to the named agreement, there is also an unnamed agreement. An unnamed agreement is where this agreement is not mentioned in the Indonesian Civil Code.

One of the things that are agreed upon in the cooperation agreement is on the issue of intellectual property. Intellectual property is something very valuable. Increasingly, intellectual property is increasingly valuable. Where the value of this intellectual property can increase the value of one's company. Many of these types of intellectual property are an added value to a business.

One of intellectual property is trade secrets. Trade secrets are the most unique intellectual property of all kinds of intellectual property. The owner of this trade secret never registered his trade secrets. The law also does not regulate the registration of trade secrets. This is done because all trade secrets are confidential. It is the nature of this secret that is protected by the owner of a trade secret so that no other party knows it.

In the business process, trade secrets are not always kept confidential. This is done because, in its implementation, the owner of the trade secret must share this trade secret with his business partner. Whether it's opening a new branch or opening a franchise unit. This whole can pose legal problems. The legal problem that arises is about the legal protection of these trade secrets. Legal protection from trade secrets is to guarantee the continuity of investment in business because the owner of this trade secret has given all business both capital and mind to create this trade secret.

Method

In this study using normative juridical research method in which this research uses the legislative rules as the main ingredients analyzed with various literature as support to examine the legal protection in using trade secrets in investment to protect business actors so that the data continue to develop his business.

Trade secrets in Indonesian legal arrangements

Trade secrets were not new to the business world, before the nineteenth century, the issue of secrecy, especially with regard to company secrets, had received not less significant attention by the courts, but this had not been specifically regulated. Where the arrangement is generally regulated in the law of confidential. The law of secrecy relates to the protection of the secrets of the secrets of the trade, private secrets or of the state government.

The basic reasons for the establishment of this law of confidentiality may prevent a person from leaking information provided to him in confidence, with a firm or covert understanding that the information should not be leaked to other parties or misused by the recipient of the information. It is also the basis for the need to protect the Trade Secret itself. Modern secrecy laws began to develop in the early nineteenth century, in which they have been able to produce special

rules about secrets or information about trade and the interests of the State.^{1,2,3,4}

Consideration of the formation of Law of the Republic of Indonesia No. 30 of 2000 on Trade Secrets are:

- a. that in order to promote an industry that is able to compete in the scope of national and international trade it is necessary to create a climate that encourages the creation and innovation of society by providing legal protection to the Trade Secret as part of the Intellectual Property Rights system;
- b. that Indonesia has ratified the Agreement Establishing the World Trade Organization which includes Agreements and Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) with Act Number 7 of 1994 so that it is necessary to stipulate provisions concerning Trade Secrets;

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Non-Disclosure
Agreement as
Legal Protection*

At the cassation examination, in the case of Lindenbaum vs. Cohen, Lindenbaum was won. Where Hoge Raad declares that the act of Cohen can be included as an unlawful act in accordance with Article 1365 of the Indonesian Civil Code, for having raped a legal right of another person in contradiction with propriety or morality or with propriety in society with no regard for the interests of others.

The verdict of Hoge Raad The Netherlands dated January 31, 1919, has provided a broad understanding of the unlawful act, namely that the disclosure of the information turned out to be a disclosure that could cause a loss (commercially) against the owner of the information.^{5,6,7,8}

The Big Indonesian Dictionary explains what is meant by trade secrets, i.e., the secret is something that is deliberately hidden so that no one else knows, whereas trade means work related to selling and buying goods for profit. Trade secrets are information that is unknown to the public in the field of technology and or business, has economic value because it is useful in business activities, and kept confidential by the owner of trade secrets.⁹

Trade secrets in foreign terminology are referred to by various terms, including trade secret, know-how, or undisclosed information. The amount of mention of the term trade secret because there is no single unity in defining trade secrets.¹⁰

The Government of Indonesia shall make arrangements concerning its trade secrets which are regulated separately; the arrangements can be found in the Law of the Republic of Indonesia Number 30 the Year

2000 on Trade Secrets. The definition of trade secret is stipulated in Article 1 Sub-Article 1 of Law Number 30 the Year 2000 which states that “trade secrets are information that is not publicly known in the field of theology and/or business, has economic value because it is useful in business activities, and is kept confidential by the owner of trade secrets

A trade secret shall be protected if such information is:¹¹

- a. Confidential, meaning that the information is only known by certain parties or not publicly known by the public. Based on this, the owner of a trade secret must be able to prove that the information is only known by the company and not information that is of a general nature.
- b. Having economic value means that the nature of confidentiality of information can be used to run business activities that are commercial or can increase economic benefits.
- c. Information is deemed to be kept confidential, the owner of a trade secret must maintain confidential information from other parties that can harm his interests. The trade secret law provides an explanation of the owner of a trade secret who has maintained his trade secrets if he has taken appropriate and appropriate steps. But the law does not elaborate on that.

The most important thing of the case is that the court declares that action is deemed to have violated the Trade Secret if it meets the following elements:¹²

1. That information has a confidentiality value.
2. The parties have an obligation to keep the information confidential.
3. The existence of an element of action in the form of the act of using the information against the law that is detrimental to the owner of the information. The Defendant, in this case, was declared to have violated the Trade Secret for violating his obligation to maintain the confidentiality

Trade secrets cover several things, namely: confidential data, information, or compilation of information used in research, business, trade or industry. This information can be in the form of confidential technical and scientific data, as well as business, commercial or financial information that is not known to the general public and is useful for a company and provides a competitive advantage for someone who has the right to use it. The following scope in trade secrets:¹³

- a. The subject of trade secrets is the owner of trade secrets. The owner of a trade secret has the right to:
 1. Using his own trade secrets.
 2. Licenses to other parties or prohibits other parties from using trade secrets or disclosing trade secrets to third parties for commercial purposes
- b. The object of the scope of trade secrets. According to the Law of the Republic of Indonesia Number 30 of 2000 concerning Trade Secrets Article 2, the object of the scope of trade secrets includes production methods, processing methods, sales methods or other information in the field of technology and / or businesses that have economic value and are not known by the general public.
- c. Length of protection, protection of trade secrets does not have a protection limit. In Article 4 of the Law of the Republic of Indonesia, Number 30 of 2000 Concerning Trade Secret The Trade Secret Owner has the right to:
 1. using his own Trade Secret;
 2. grant a License to or prohibit other parties from using the Trade Secret or otherwise disclosing the Trade Secret to a third party for commercial purposes.

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Article 5 of the Law of the Republic of Indonesia Number 30 the Year 2000 Concerning Trade Secrets is stipulated in several ways in which the right of trade secrets in which its redemption shall be accompanied¹⁴ by documents of transfer of rights¹⁵. Ways to be able to switch trade secret rights are by:

- a. inheritance is the *Nomina* (noun) process, manner, the act of inheritance or inheritance¹⁶
- b. grant;
Etymologically the word grant is the *masdar* form of the word *wahaba*, which means gift.¹⁷ While the grant by the term is the principal contract of the matter, the giving of another's possessions while he is still alive without reward.¹⁸
- c. will;
The definition of a will can be known from Article 875 BW, which states that "a will is a statement that contains a statement about what he wants or happens after he dies and can be revoked by him."¹⁹
- d. written agreement;

The term agreement is often referred to as the consent, which comes from the Dutch language *overeenkomst*. According to Article 1313 of the Civil Code (Civil Code), the meaning of the agreement is: “An act by which one or more persons commit themselves to one or more persons.”

- e. other causes justified by legislation such as court decisions pertaining to bankruptcy

Non-disclosure agreements as protection of trade secrets

R. Subekti^{19,20} explained that the agreement is an event where a person promises to one person or where two people promise to do something.²¹ According to M. Yahya Harahap, the agreement means legal relations concerning the law of wealth between 2 (two) or more people, which gives rights to one party and obligations to another about an achievement.²²

In detail, the agreement contains the following elements:²³

- a. *Essentialia* is an element that must absolutely exist for an agreement to occur. This element must absolutely exist so that the agreement is valid, is a legal requirement for the agreement. The *essentialia* element in the treaty represents the provisions of achievements that must be performed by one or more parties, reflecting the nature of the agreement, which distinguishes them principally from other types of agreements. This *essentialia* element is generally used in providing formulation, definition, or understanding of an agreement.
- b. *Naturalia*, the element typically attached to the covenant, is an element which is not specifically agreed upon in the covenant by itself is considered to be in the covenant because it is inherent or inherent in the covenant. The *naturalia* element must be in a certain agreement after the *essentialia* element is known for certain. For example, in the agreement that contains the element of buying and selling *essentialia*, there will be *naturalia* element of the obligation of the seller to bear the material sold from hidden defects. In connection therewith, the provisions of Article 1339 of the Civil Code shall apply: The treaties shall not be binding only for things expressly stipulated therein, but also to all things which by nature of the treaty are required by decency, custom, or law invite.²⁴
- c. *Accidentalialia*, which is a complementary element in a treaty, which are provisions which can be regulated in a distorted man-

ner by the parties in accordance with the will of the parties, is a special requirement specified jointly by the parties. Thus, this element is essentially not a form of achievement that must be carried out or fulfilled by the parties.

The legal terms of the agreement can be found in the provisions of Article 1320 of the Civil Code which states that: For the legal requirements of the agreement, four (4) conditions are required:

- a. Agree to those who commit themselves
- b. The agreement means the conformity of the statement of intention between one person or more with the other party that entered into an agreement. According to Subekti¹⁹, what is meant by agreeing is that the two subjects who entered into the agreement must agree, agree or agree on the main matters of the agreement.²⁰
- c. Skills in which the person is required to be authorized, adult and not under control
- d. A certain thing is there is a thing that is agreed
- e. Causa is halal wherein the causa does not violate the law, public order, and decency

As for more specific trade secrets, trade secret protection in cooperation agreements for investment can be done by entering a clause of the confidentiality agreement or non-disclosure agreement in the Cooperation Agreement as legal protection for trade secrets.

Protection of confidential information provided and what is obtained must also be protected by confidentiality. Secret information is information that is not open to the public, in the sense of an outsider and is not secret to those who are directly involved with the existence and use of the information itself, which in many terms is categorized as an insider. The nature of the confidentiality contained in such information is entirely subject to the agreement of the parties based on the negotiations made, as well as on the object or subject matter to be arranged by both parties.²⁵

Non Disclosure Agreement is a black-and-white cooperation agreement containing a statement that it is not allowed to cite or notify the contents of a job to an unrelated party to the agreement. So, if we accept a job that includes NDA, we are strictly forbidden not to share stories about the work with others.²⁶

To find out whether information is a confidential information, the information can be tested through the following measures:²⁷

- a. Level of Confidentiality
First of all the information must be measured to what extent the information is known by the outside. Here, the owner of the confidential information must be able to prove that the information is only known by him and not general information and to what extent and how the information is known to others related to his or her business activities.
- b. Engagement with Employees
To what extent the information is known by employees within the company and how it affects the company's business and to what extent this information will benefit the other party if it is leaked to a third party. The size of a third party is possible to make a profit if the secret falls into his hands is a condition that the information can be qualified as confidential information.
- c. Actions to Maintain Confidentiality
The extent to which the information owner seeks to maintain the confidentiality of the information. Efforts to maintain this confidentiality are mandatory because acts that are negligent can cause the secret owner to lose his rights.
- d. Value Information For Competitors
The extent to which the information affects competitors if leaked, whether the information will provide the possibility of competitors to gain more profits or may cause the owner will lose the proper profits.
- e. Level of Protection and Commercial Value of Information
The extent to which efforts or funds are spent to develop and maintain that information. A person who claims to be the owner of a trade secret must also be able to prove that the information is the result of his or her thinking and indicate an attempt to keep his secrecy.
- f. Difficulty in obtaining information
To what extent is the difficulty of obtaining and possessing that information and to what extent is the difficulty if based on that information others are doubling the outcome of the information. Should be, the information is very difficult to be tapped or duplicated because of the sincerity of the owner to keep the information confidential.

Conclusion

Implementation of the cooperation agreement is very important in investment. Within investment, there are many things that must be regulated to protect both parties. This protection is intended for the parties in the cooperation agreement to obtain profit and comfort in conducting investment. One that needs to be protected is about trade secrets. There are so many things that include trade secrets in a business deal. Protection in an agreement for this trade secret is to create a non-disclosure agreement. In this non-disclosure agreement, parties can ensure good security upon termination until the agreement is finalized that the parties to which the treaty agrees shall not be informed of this matter.

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Notes

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- 12 Ahmad M. Ramli, *HAKI Teori Dasar Perlindungan Rahasia Dagang*, Bandung, Mandar Maju, 2000, p.31

- 13 Muhammad Djumhana dan R. Djubaedillah, *Hak Milik Intelektual*, Bandung: PT Citra Aditya Bakti, 2014, p. 354.
- 14 The “shall be registered” with the Directorate General shall be only the administrative data of the rights disposal document and does not include the substance of the Trade Secret to which it has been contracted
- 15 What is meant by “documents on transfer of rights” means documents showing the transfer of Trade Secret rights. However, the Trade Secret itself remains undisclosed.
- 16 <https://kbbi.kata.web.id/pewarisan/>
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