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The Application of Non-Disclosure Agreements In Protecting The Trade Secrets of Micro, Small, and Medium Enterprises In Indonesia

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A B S T R A C T
This research examines the legal standing of the Non-Disclosure Agreement (NDA) in protecting the trade secrets of Micro, Small, and Medium Enterprises (MSMEs) in Indonesia. Employing normative legal research with statutory and conceptual approaches, this research analyzes Law Number 30 of 2000 on Trade Secrets together with the Indonesian Civil Code. The results show that although the NDA has no explicit statutory basis as a named contract, its enforceability derives from Articles 1320 and 1338 of the Civil Code as an unnamed agreement (onbenoemde overeenkomst). Law Number 30 of 2000 supplies the substantive elements of confidentiality, economic value, and reasonable protective measures that shape NDA clauses. The NDA functions as a preventive legal instrument and as evidentiary support in disputes, provided it is drafted proportionally and accompanied by concrete confidentiality practices suited to MSME capacity.

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INTRODUCTION

Micro, Small, and Medium Enterprises (MSMEs) occupy a strategic position in Indonesia's economy, contributing significantly to employment and to the national Gross Domestic Product. Alongside this role, MSMEs increasingly rely on intangible assets product formulas, customer databases, pricing structures, and production methods that constitute trade secrets and provide a competitive edge.

Trade secret protection under Indonesian law is governed by Law Number 30 of 2000 concerning Trade Secrets, which grants recognition to information that is not publicly known, has economic value, and is kept confidential through reasonable measures, without requiring formal registration. In practice, business actors frequently rely on the Non-Disclosure Agreement (NDA) as a contractual instrument to bind employees, partners, or investors to confidentiality obligations. However, Indonesian legislation does not regulate the NDA as a specifically named contract, so its legal force is drawn from the general law of contract rather than from a dedicated statutory framework. Academic observation further indicates that NDA drafting in Indonesia is often conducted unilaterally, without adequately balancing the rights and obligations of the contracting parties, which weakens its effectiveness as a protective instrument.

This normative gap is particularly consequential for MSMEs, which typically possess limited legal literacy and bargaining power compared to larger business partners or investors. Reports on trade secret enforcement in Indonesia note that legal protection in this field remains comparatively weak, leaving many business owners uncertain about how to secure their confidential information. Against this background, this article addresses two questions: first, how the NDA is positioned within Law Number 30 of 2000 and Indonesian civil law; and second, how the application of the NDA can provide legal certainty for the protection of MSME trade secrets.

The urgency of this issue is further reinforced by the intensifying competition accompanying globalization. MSMEs that depend on distinctive products, unique marketing strategies, or proprietary customer databases stand to lose their competitive advantage the moment such information reaches a rival without any protective mechanism in place. The NDA is not confined to a single type of agreement; it may be embedded as a confidentiality clause within an employment, partnership, investment, or licensing agreement, or it may be executed as a standalone agreement prior to the formation of any principal legal relationship. This flexibility makes the NDA a potentially valuable instrument across the diverse business relationships MSMEs commonly enter into, yet its actual uptake among MSME actors remains limited.

Where a dispute does arise, Law Number 30 of 2000 allows the owner of a trade secret to file a claim for damages and to demand the cessation of unauthorized use before a district court, provided the elements of trade secret protection confidentiality, economic value, and reasonable protective measures can be established. In practice, however, MSME actors without a written agreement often struggle to prove these elements in court, leaving many disputes to be pursued through repressive criminal or civil remedies rather than resolved preventively. This gap between the statutory possibility of legal recourse and the practical difficulty of proving a claim underscores why the presence, and the proper drafting, of an NDA matters as much as the existence of the underlying statutory protection itself.

LITERATURE REVIEW

Trade Secrets and Intellectual Property

A trade secret is a form of intellectual property that, unlike patents or trademarks, is protected not through registration but through the continuous maintenance of confidentiality. Under Indonesian law, information qualifies as a trade secret when it is undisclosed to the public, carries economic value because it is useful in business activity, and is actively safeguarded by its owner. Within the broader taxonomy of intellectual property, trade secrets fall under industrial property rights alongside patents, trademarks, and industrial designs.

The Concept of the Non-Disclosure Agreement

The NDA is a civil agreement obliging the receiving party to safeguard confidential information obtained through an employment, partnership, or business relationship. Because Indonesian law does not name the NDA as a specific contract type, its validity is grounded in the freedom-of-contract principle recognized under the Civil Code, which permits parties to create binding agreements so long as the general requirements of contract formation are met.

MSMEs and the Need for Preventive Protection

MSMEs are commonly defined as productive businesses owned by individuals or small entities that satisfy statutory size criteria. Their contribution to absorbing labor and sustaining local economic activity is well documented, yet their capacity to negotiate or enforce formal legal instruments remains comparatively limited. This gap between economic importance and legal preparedness underlies the argument that preventive instruments such as the NDA deserve closer scholarly and policy attention.

Theoretical Framework

Four theories inform the analysis. First, the theory of legal protection, associated with Hadjon (1987), distinguishes preventive protection mechanisms established before a violation occurs from repressive protection, which operates after a violation has taken place; this study treats the NDA as an instrument of preventive protection. Second, the theory of legal certainty, drawing on Radbruch (1950), Kelsen as cited by Mertokusumo (2007), and Otto (2003), holds that certainty requires not only written norms but also consistent enforcement and social acceptance applied here, it explains why the absence of explicit NDA regulation creates a normative gap for MSMEs. Third, contract theory, anchored in Articles 1320 and 1338 of the Civil Code, supplies the doctrinal basis for assessing the validity and binding force of the NDA as an unnamed agreement. Fourth, the theory of contractual justice, requires that confidentiality clauses avoid imposing disproportionate burdens on the weaker party, a concern especially relevant where MSMEs contract with larger, better-resourced counterparts.

Working Proposition and Conceptual Framework

Building on this theoretical foundation, the study advances the following working proposition, consistent with the interpretive character of normative legal research: the absence of an explicit statutory framework for the NDA does not negate its legal force, but it does weaken the legal certainty and protective balance available to MSMEs unless the agreement is drafted with reference to the substantive standards already embedded in Law Number 30 of 2000 and the Civil Code.

The conceptual framework proceeds in four linked stages. It begins with the statutory basis, comprising Law Number 30 of 2000 on Trade Secrets and Articles 1320 and 1338 of the Civil Code. This statutory basis establishes the legitimacy of the NDA as an unnamed agreement, which in turn shapes its substantive elements identification of confidential information, the parties bound, permitted use, duration, and consequences of breach. Those substantive elements are then evaluated against the four theories described above legal protection, legal certainty, contract theory, and contractual justice to assess whether a given NDA is adequate. The framework concludes with the intended outcome: legal certainty and preventive protection for MSME trade secrets, achieved through NDAs that are proportional, comprehensible, and supported by concrete confidentiality practices.

METHODOLOGY

Type of Research

The type of research employed in this study is normative legal research. This research focuses on analyzing legislation, legal principles, legal doctrines, and court decisions related to trade secret protection and the application of the Non-Disclosure Agreement (NDA).

Problem Approach

The problem approach used in this research consists of the statute approach and the conceptual approach. The statute approach is applied by examining all legislation related to trade secrets, contract law, and MSMEs, in order to identify the legal norms governing trade secret protection and to assess any normative gaps, ambiguities, or weaknesses concerning NDA regulation. The conceptual approach is applied by examining the views and doctrines of legal scholars relating to the theory of legal protection, the theory of legal certainty, the principle of freedom of contract, and contractual justice, in order to build a conceptual framework for analyzing the position of the NDA as an unnamed agreement and its role in providing legal protection for MSMEs.

Legal Materials

a. ***Primary Legal Materials***

Primary legal materials are authoritative legal materials with binding force and serve as the main basis for analyzing the legal regulation of trade secret protection and the application of the NDA. The primary legal materials used in this research consist of:

1. The Indonesian Civil Code;
2. Law Number 30 of 2000 on Trade Secrets;

3. Law Number 20 of 2008 on Micro, Small, and Medium Enterprises;
4. Other legislation related to legal protection, contracts, and business activities.

b. ***Secondary Legal Materials***

Secondary legal materials provide explanation and understanding of the primary legal materials. These consist of legal textbooks, scientific journals, research findings, theses, dissertations, and scholarly articles discussing trade secrets, NDAs, and legal protection for MSMEs.

c. ***Tertiary Legal Materials***

Tertiary legal materials are used as supplementary sources, consisting of legal dictionaries, encyclopedias, and other reference sources that help clarify the terms and legal concepts used in this research.

Legal Material Collection Technique

The collection of legal materials in this research was conducted through library research. Library research was carried out by tracing, reading, and systematically examining the primary, secondary, and tertiary legal materials relevant to the research problem, obtained through libraries, national scholarly journals, and legal sources accessible online, with the aim of acquiring a comprehensive normative and conceptual foundation related to trade secret protection and the application of the NDA.

Analysis of Legal Materials

The analysis of legal materials in this research was conducted qualitatively, by interpreting the legal norms, legal principles, doctrines, and court decisions that had been collected. All of the collected legal materials were then analyzed systematically and linked to the theory of legal protection, the theory of legal certainty, contract theory, and the theory of contractual justice in order to answer the research problems.

Conclusion Drawing

Conclusions in this research were drawn using the deductive method, namely by drawing conclusions from general legal norms toward specific legal issues. Conclusions were obtained based on the results of the analysis of legal materials relevant to the research issue, so as to provide an argumentative answer to the research problems that have been formulated.

RESEARCH RESULT

The Position of the NDA under Law Number 30 of 2000 and Indonesian Civil Law

The research finds that the validity of the NDA in Indonesia is not derived from a dedicated statute, but from the general requirements for a valid agreement under Article 1320 of the Civil Code: the consent of the parties, their legal capacity, a specific object, and a lawful cause. Article 1338 paragraph (1) of the Civil Code further provides that a validly formed agreement binds the parties as though it were law, giving the NDA its practical enforceability as an unnamed agreement (*onbenoemde overeenkomst*).

Law Number 30 of 2000 on Trade Secrets supplies the substantive standards relevant to NDA drafting. Article 1 defines a trade secret as information in the field of technology or business that is not known to the public, has economic value because it is useful in business activity, and is kept confidential by its owner. Article 3 requires that protection depends on the owner having taken reasonable and proper steps to preserve confidentiality. Article 4 grants the trade secret owner the exclusive right to use the information and to authorize or prohibit its use or disclosure by others. Article 13 recognizes that a breach of trade secret protection occurs when a party discloses information in violation of a written or unwritten confidentiality undertaking, and Article 11 allows the trade secret owner to seek damages or the cessation of unauthorized use.

NDA Models across MSME Business Relationships

The research identifies five recurring types of legal relationships in which MSMEs disclose confidential information, each requiring a different emphasis in NDA design:

1. **Employment relationships**: protecting recipes, processing techniques, standard operating procedures, customer lists, or supplier data from workers who obtain direct access to core operations.
2. **Partnership and distribution relationships**: restricting the use of disclosed information (supply systems, marketing strategy, product composition) to the agreed cooperation only.
3. **Pre-investment relationships**: using the NDA as a standalone agreement to bind prospective investors before any formal investment agreement exists, covering recipes, cost structures, margins, supplier lists, and expansion plans.
4. **Production partnerships**: prohibiting use beyond the agreed order and production for competitors without authorization when a partner receives a formula, design, or specification.
5. **Suppliers and distributors**: restricting the sharing of sales volume, pricing, and market strategy data with competitors.

The research also finds two supporting mechanisms: a need-to-know principle limiting access to those who require the information to perform their duties, and a clause restricting informal communication (e.g., sharing photographs, screenshots, or files through personal channels).

Relevant NDA Clauses for MSMEs

The research formulates eleven principal clauses that an MSME-oriented NDA should contain: (1) parties clause; (2) definition of confidential information; (3) purpose of disclosure clause; (4) recipient's obligations clause; (5) exceptions clause; (6) duration clause; (7) return or destruction clause; (8) ownership and no-license clause; (9) sanctions/consequences clause; (10) dispute resolution clause; and (11) general provisions clause. The research further finds that in practice, the NDA takes one of two forms: a confidentiality clause embedded within a principal agreement (employment, partnership, licensing, investment, or distribution), or a standalone agreement executed before any principal legal relationship is formed, most relevant during pre-contractual investment discussions.

Barriers to NDA Implementation among MSMEs

The research identifies five recurring barriers: (1) perceived high cost of legal drafting, which discourages written agreements; (2) bargaining power imbalances, allowing stronger counterparts to impose one-sided or overly broad non-competition clauses; (3) difficulty proving loss, since damage from a leak rarely appears as an immediate, quantifiable figure; (4) an informal business culture built on verbal communication and personal trust, which resists abrupt formalization; and (5) uneven access to technology, with confidential information often stored on personal devices without adequate security measures.

Strengthening Measures Identified

The research identifies strengthening measures at two levels. Internally, MSMEs benefit from a minimal but complete clause model, supported by a concise internal SOP governing access, storage, and return of information. Externally, government agencies, the Directorate General of Intellectual Property, universities, and legal aid institutions can provide model clauses, training, and consultation, addressing the finding that the primary obstacle is not only the absence of documents but also low legal literacy regarding how to draft, use, and enforce an NDA.

DISCUSSION

Interpreting the NDA's Legal Standing

The research result showing that the NDA relies on the general law of contract rather than a dedicated statute confirms the operation of contract theory in this context: because the NDA qualifies as an unnamed agreement, its binding force depends entirely on satisfying Article 1320's four conditions, with no sector-specific safeguards to fall back on if one condition is contested. This has a direct bearing on legal certainty theory as articulated by Otto, who argues that certainty depends not only on the existence of written norms but also on consistent application and social acceptance. Because Law Number 30 of 2000 does not name the NDA explicitly, MSMEs are left to infer its protective function indirectly primarily through Article 13's reference to "breach of agreement" rather than finding direct guidance in the statute itself. This indirectness is precisely the normative gap identified in the literature review: the law recognizes the consequence of breaching a confidentiality undertaking without regulating the instrument that creates that undertaking.

At the same time, the finding that Article 3's "reasonable steps" requirement can be satisfied through an NDA supports the theory of legal protection, particularly Hadjon's distinction between preventive and repressive protection. The statute itself, through Articles 11 and 13, is oriented toward repressive protection remedies available after a violation has occurred. The NDA fills the preventive half of this framework, meaning the two protective mechanisms are complementary rather than redundant: the NDA reduces the likelihood of a dispute arising, while the statute provides recourse if prevention fails.

Interpreting the Relationship-Specific Models

The variation found across employment, partnership, pre-investment, production, and supply relationships suggests that a single uniform NDA template would be inadequate for MSMEs, despite the practical appeal of simplicity. This finding qualifies the theory of contractual justice discussed earlier: proportionality cannot be achieved merely by shortening a contract, but by aligning its emphasis with the actual risk profile of each relationship. For example, the emphasis on duration and access restriction in employment relationships reflects the sustained, ongoing access workers have to operational information, whereas the emphasis on purpose limitation in pre-investment disclosure reflects a single, time-bound exposure to sensitive data before any binding relationship exists. This distinction matters because it shows that "simplicity" and "adequacy" are not in tension, provided the clause selection not necessarily its length is matched to the relationship type.

Interpreting the Barriers in Light of Contractual Justice

The barriers identified particularly bargaining power imbalance and the risk of overly broad non-competition clauses directly illustrate the concern raised by Rahardjo's theory of contractual justice: that formal validity under Article 1320 does not guarantee substantive fairness. An MSME accepting a large company's unilaterally drafted NDA may technically satisfy all four validity conditions while still being bound by disproportionate restrictions on future livelihood. This suggests that legal certainty and contractual justice do not always move in the same direction an NDA can be certain in its enforceability while still being unjust in its distribution of obligations. Addressing this tension requires attention not only to whether an NDA exists, but to how its terms are negotiated, reinforcing the recommendation that external institutions assist MSMEs at the drafting stage rather than only after a dispute has occurred.

Interpreting the Strengthening Measures

The finding that low legal literacy, rather than the absence of a legal framework, is a central obstacle indicates that the normative gap identified in the introduction is only part of the problem; an equally significant gap exists between available legal instruments and MSMEs' capacity to use them. This reframes the practical implication of the study: strengthening trade secret protection for MSMEs is not purely a legislative task of naming the NDA as a specific contract type, but also an institutional task of translating existing legal standards Articles 1320, 1338, and the relevant provisions of Law Number 30 of 2000 into accessible templates, training, and documentation habits. In this sense, the eleven-clause model and the internal SOP recommendation function as a bridge between normative recognition and practical enforceability, addressing both the legal certainty and legal protection dimensions of the theoretical framework simultaneously.

CONCLUSIONS AND RECOMMENDATIONS

The NDA has no explicit regulation as a named contract under either the Civil Code or Law Number 30 of 2000 on Trade Secrets. Its validity instead rests on Articles 1320 and 1338 of the Civil Code, which establish the conditions for a valid agreement and the binding force of freely made contracts, while Law Number 30 of 2000 supplies the substantive standards confidentiality, economic value, and reasonable protective measures that shape enforceable NDA clauses.

Article 13 in particular gives the NDA implicit statutory recognition by treating the breach of a written or unwritten confidentiality undertaking as a form of trade secret violation.

The application of the NDA provides meaningful legal certainty for the protection of MSME trade secrets by functioning as both a preventive instrument and evidentiary support in the event of a dispute. The research shows that a properly drafted NDA built around eleven principal clauses covering the parties, definition of confidential information, purpose, obligations, exceptions, duration, return or destruction of information, ownership, sanctions, dispute resolution, and general provisions helps MSMEs define what is protected, determine who may access it, limit its use, set a defined duration for confidentiality, and establish clear consequences for breach. Its effectiveness, however, depends on adapting the model to the type of relationship involved (employment, partnership, pre-investment, production, or supply/distribution) and on overcoming practical barriers such as drafting costs, bargaining power imbalances, difficulty proving loss, informal business culture, and uneven technological access.

Based on the conclusions above, the following recommendations are proposed MSME owners are encouraged to prepare simple NDAs before disclosing economically valuable information to employees, partners, investors, suppliers, or distributors. Such agreements should avoid overly general language and instead specify the type of information protected, its intended use, restrictions on disclosure, the duration of the confidentiality obligation, and the legal consequences of breach, supported by internal records documenting who received the information, when, and for what purpose, as well as a concise internal SOP governing access, storage, and the return of confidential materials.

Government bodies, universities, professional organizations, and legal aid institutions should provide MSMEs with accessible, easily understood model NDA clauses, along with practical training in completing them and guidance on preserving evidence of protective measures. Such support should extend beyond general awareness of intellectual property to concrete assistance sample documents, hands-on drafting workshops, and ongoing consultation so that trade secret protection becomes genuinely accessible to MSME actors rather than remaining a resource available primarily to larger, better-resourced businesses.

ADVANCED RESEARCH

Building on these findings, several directions merit further investigation. Empirical research examining how MSMEs in specific regions or business sectors actually draft, sign, and enforce NDAs would complement the doctrinal analysis presented here, particularly given the gap this study identifies between normative recognition of the NDA and its limited practical adoption. Comparative research with jurisdictions that regulate confidentiality agreements more explicitly such as the United States or the European Union could identify regulatory models that Indonesia might adapt to strengthen certainty for MSMEs. Further work could also develop and pilot a standardized, MSME-oriented NDA template in collaboration with business associations or the Directorate General of Intellectual Property, followed by an evaluation of its actual use and effectiveness. Additional studies might examine the evidentiary role of digital documentation and notarization in strengthening the enforceability of NDAs, particularly for MSMEs that manage information through digital devices and messaging platforms. Finally, research into alternative dispute resolution mechanisms mediation and arbitration in particular could assess whether these avenues offer MSMEs a more accessible and cost-effective path to enforcing confidentiality obligations than conventional civil litigation.

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