भारतीय प्रबंध संस्थान अहमदाबाद
INDIAN INSTITUTE of MANAGEMENT AHMEDABAD
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IIMA
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Non-Compete and Non-Solicitation Clauses

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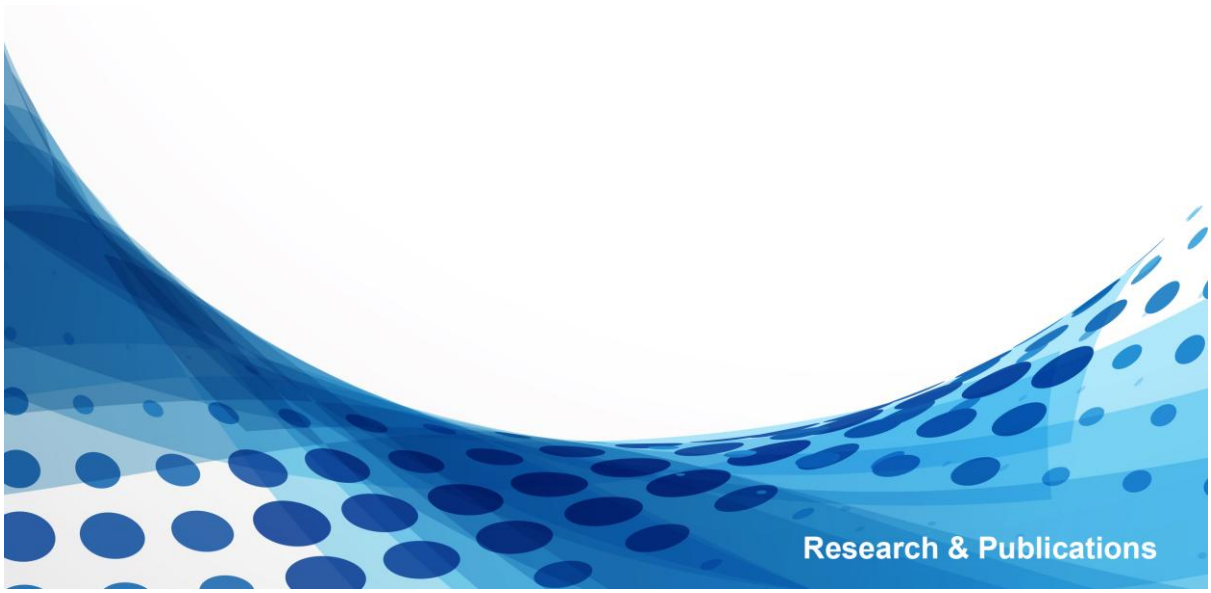

Research &
Publications

W. P. No. 2026-05-04

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May 2026

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Non-Compete and Non-Solicitation Clauses

Practice Note Series on Indian Contract Law

M.P Ram Mohan* Siddhartha Shukla** Tom Lyle*** Prem Vinod Parwani****

Background:

This note provides an overview of non-compete and non-solicitation clauses, contrasting Indian law with key principles and considerations under English law. It examines the doctrinal framework under Section 27 of the Indian Contract Act, 1872, on the restraint of trade. It shows how there are differing thresholds of enforceability of non-compete and non-solicitation clauses, depending on whether they appear in employment or commercial contexts. It then compares India's doctrinal framework with other common law jurisdictions, with a particular focus on the English common law "reasonableness" framework that governs the enforceability of non-compete and non-solicitation clauses in the UK. The article concludes by demonstrating litigation and enforceability challenges of these types of clauses, along with suggestions for practitioners to strategically address them.

Keywords: Indian Contract Law; Non-Compete Clause; Non-Solicitation Clause; Restrictive Covenants

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Acknowledgements: The note is part of the Herbert Smith Freehills Kramer (HSF Kramer) LLP and Indian Institute of Management Ahmedabad (IIMA) research project aimed at developing Indian Contract Note Series that academically illuminates key contractual and commercial issues relevant to Indian businesses.

Cite as:

M. P. Ram Mohan, Siddhartha Shukla, Tom Lyle, Prem Vinod Parwani, *Non-Compete and Non-Solicitation Clauses*, Practice Note Series on Indian Contract Law (HSF Kramer & IIMA, 2026).

I. INTRODUCTION

1. Non-solicitation and non-compete clauses are key tools commonly inserted in commercial agreements that are designed to protect a business's legitimate interests and competitive advantages (such as clients, employees, or other sensitive information). While they are most frequently found in employment contracts, such clauses are also commonly found in commercial contexts such as mergers, acquisitions, joint ventures, and franchise agreements. By their very nature, these clauses have a restrictive effect on the parties that they bind (the '**restricted party'**). Firms typically introduce such clauses where they perceive a commercial risk to their competitive advantages, client relationships or employee retention.

2. **Non-solicitation** clauses prevent the restricted party from soliciting (i.e., inducing or poaching) one's employees or clients. On the other hand, **non-compete** clauses are undertakings by the restricted party to refrain from engaging in a competing business or joining a competitor for a specified period. Given the restrictive nature of these clauses, both non-solicitation and non-compete clauses are subject to public policy restrictions across jurisdictions. Thus, their drafting must be tailored accordingly. Specifically in India, these clauses face unique legal, statutory and constitutional hurdles.

3. This practice note adopts a practitioner-oriented approach to restrictive covenants under Indian contract law. It undertakes a doctrinal analysis of Section 27 of the Indian Contract Act, and situates Indian jurisprudence alongside English restraint-of-trade case law and other common law jurisdictions. Finally, it blends its doctrinal analysis with practical guidance for the drafting and enforcement of these clauses.

4. **Part II** lays down the doctrinal foundations of the Indian law on restrictive covenants under Section 27 of the Indian Contract Act. It examines how the enforceability of non-competes depends on whether the restrictions operate during or after the term of the contract, and shows that, for terms during the contract, the judicial evolution for these restrictive covenants differs depending on whether they are placed in an employment or commercial context. **Part III** explores the comparative legal positions in the UK and analogous common law regimes and draws parallels and comparisons with the Indian regime. **Part IV** takes stock of litigation and enforcement challenges arising from these restrictive covenants and ties together a set of practitioner-oriented strategic considerations for drafting these covenants.

II. DOCTRINAL FOUNDATIONS IN INDIAN LAW

5. Non-solicitation and non-compete clauses (collectively referred to as **'restrictive covenants'**) in India are governed by Section 27 of the Indian Contract Act, 1872, which embodies the doctrine of restraint of trade. Under Section 27, restrictive covenants are governed negatively, i.e., the provision only stipulates what kinds of restrictive covenants are not enforceable rather

than setting out a general test of enforceability. Accordingly, this section explores the foundations of Section 27 and its context-specific judicial interpretation.

a. Common Law Foundations of Restrictive Covenants

6. Restrictive covenants have their origins in the common law doctrine of restraint of trade, under which a contractual term that restricted a person's freedom to work or trade was presumed void as contrary to public policy. The common law doctrine of restraint of trade has its roots in *Mitchel v Reynolds* (1711),[1] which distinguished general restraints on trade and partial restraints; the former were void as contrary to public policy, and the latter were enforceable where they were supported by good consideration and reasonableness in scope and duration.

7. This distinction was further established such that, by the mid-nineteenth century, even a partial restraint required justification by reference to the circumstances of the particular case. In *Leather Cloth Co v Lorsont*, Kelly CB articulated the emerging position in terms recognisable to the modern lawyer: "*parties may make any bargain they please ... unless ... it is injurious to the public ... or unless it goes further than is necessary for the protection of the covenantee*."[2] In short, English courts were applying a proto-reasonableness test.

8. It is against this backdrop that Section 27 can be understood: when the Indian Contract Act was drafted, English common law had not yet produced a unified reasonableness standard applicable to all restraints of trade (including restrictive covenants), and the distinction between general and partial restraints of trade remained the primary analytical framework. As will be seen, Section 27 represented a departure from the English common law approach, adopting a markedly stricter default position.

b. The Origins of Section 27 of the Indian Contract Act

9. Section 27 prohibits any agreements which are in restraint of trade. It reads:

> "Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."
>
> *Exception 1*. **Saving of agreement not to carry on business of which good-will is sold**.

10. Section 27 finds its roots in Section 833 of the draft New York Civil Code (where ironically, it was never applied).[3] The 1866 British-Indian Law Commission thought it fit to use the New York Code as inspiration for the drafting of the Contract Act.[4] Even today, the provision is

[1] *Mitchel v Reynolds* (1711) 1 P Wms 181t.
[2] *Leather Cloth Co v Lorsont* (1869) LR 9 Eq 345.
[3] *Gujarat Bottling Co. Ltd. v Coca Cola Co,* (1995) 5 SCC 545 [23]; The modern-day position in New York mimics the English legitimate interest test. *See BDO Seidman v Hirshberg* (1999) 93 N.Y.2d 382.
[4] Law Commission of India, *Thirteenth Report: Contract Act, 1872* (September 1958) [55]; The 1866 commission drew up the initial draft of the Contract Act. The Law Commission refers to the New York Code as the "evil genius"

not without its critics. Since the provision prohibits all forms of restraint (with only one exception), the Allahabad High Court criticised the provision for its stringency, stating that it "*seriously trenches upon the liberty of the individual in contractual matters affecting trade*."[5] Given its language, it has been recognised as a clear departure from English common law, which, as examined further below, is more accommodating of parties' commercial autonomy to agree to restrictive covenants.[6]

11. Despite the text's stringency, Section 27 has an exception.[7] It permits reasonable restrictions when the goodwill of a business is sold; i.e., the seller of goodwill may agree with the buyer to refrain from engaging in a similar business within reasonable limits. The cases that rely specifically on this exception are few and far between. In *Affle Holdings,* the Delhi High Court found that a three-year non-compete in the share purchase agreement was reasonable since the agreement undertook to acquire the business and goodwill of the seller.[8]

12. The inclusion of this single, standalone goodwill exception suggests that the legislature framing the Contract Act in 1872 did not intend to allow any other exceptions, such as 'reasonable' restraints. Any restraint, whether partial or complete, was to be held a restraint of trade.[9] In the Supreme Court's terms, "*neither the test of reasonableness nor the principle that the restraint being partial was reasonable are applicable to a case governed by Section 27 of the Contract Act*."[10] The Supreme Court has endorsed this position on several occasions, and some High Courts have done so even in 2025.[11]

13. Sir Frederick Pollock, the foremost commentator on Indian contract law, commented on Section 27: "*the law of India is tied down by the language of the section to the principle … of a hard and fast rule qualified by strictly limited exceptions*."[12]

14. At the time of drafting Section 27, trade in India was thought to be in its infancy and as such the legislature adopted a stringent policy to protect the freedom of trade.[13] In 1958, the 13th

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of the Contract Act. For more context on the constitution and functions of this law commission, *see* Shivprasad Swaminathan, *A Historical Introduction to Indian Contract Law* (Taylor & Francis 2025) 16.

[5] ibid; *Bholanath v Lachmi Das* (1930) 53 All 316, 322.

[6] ibid.

[7] There is also another exception in Indian Partnership Act 1932, s.54; Section 54 of the Partnership Act 1932 (introduced sixty years after the Contract Act) allows a firm's partners to agree on restrictions in carrying on businesses notwithstanding Section 27.

[8] (2015) SCC OnLine Del 6765.

[9] This is evident when read with Section 28, which prohibits "absolute" restraints on legal proceedings. The absence of similarly strong language in Section 27 suggests that Section 27 was intended to apply to partial restraints as well. *See Madhub Chunder v Rajcoomar Doss* (1874) 07 Cal CK 0003 [6].

[10] *Superintendence Company of India (P) Ltd v Krishan Murgai* [1981] 2 SCC 246 (SC); *Percept D'Mark (India) Pvt Ltd v Zaheer Khan* [2006] 4 SCC 227 (SC).

[11] *See Varun Tyagi v Daffodil Software (P) Ltd*. (2025) SCC OnLine Del 4589.

[12] *Gujarat Bottling Co. Ltd. v Coca Cola Co,* (1995) 5 SCC 545 [23].

[13] Law Commission of India, *Thirteenth Report: Contract Act, 1872* (September 1958) [55]; *Oakes & Co v Jackson* (1876) ILR 1 Mad 134, 145. "*Trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained*."

Law Commission recognised this outdated historical context, noting that "*today, trade in India does not lag far behind England and the United States*." Accordingly, it recommended that the provision be suitably amended to permit reasonable restraints.[14] However, no such amendment has been made to date. This historical context serves as a useful starting point for understanding the position of law in India today.

c. The Doctrinal Position on Section 27

15. The prevailing judicial interpretation of Section 27 reflects its origins. The first authoritative pronouncement on Section 27 was by the Supreme Court in *Niranjan Shankar Golikari.*[15] The Court held that the rule against restraint in Section 27 would apply only to restrictions operating *after* the term of the contract ends.[16] Restrictions operating *during* the contract would continue to be enforceable.[17]

16. The logic of this distinction between restraints during and after the contract was to ensure that the employee is not 'idle' and can freely pursue a profession of their choice.[18] Elaborating on this, the Bombay High Court in *Taprogge v IAEC India* held:

> "…the restraints which operate during the term of the contract have to fulfil one kind of purpose viz. furthering the contract. On the other hand, the restraints operative after the termination of the contract strive to secure freedom from competition from a person who no longer works within the contract."[19]

17. The next authoritative pronouncement by the Supreme Court was the *Krishan Murgai* case. The Court affirmed this position and reinforced the stringency of Section 27 by holding that it would be irrelevant whether the restraint was partial or absolute.[20] After all, the plain text of Section 27 does not differentiate between degrees of restraint. Though the Court in *Krishan Murgai* lamented the historical roots of the provision and its deviations from the common law, it was compelled to follow this interpretation because of the plain text of the provision. Amending Section 27 would have to be left to the Parliament.[21] Thus, a 'two-fold' rule emerged:

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[14] ibid [56].
[15] *Niranjan Shankar Golikari v Century Spinning* (1967) SCC Online SC 72.
[16] ibid [17].
[17] This applies to both, to the terms of employment contracts, and to commercial contracts. *See Aakarshan Hitesh Harlalka v Vikrant Ravikant Paraskar* (2024) SCC OnLine Bom 1331. Moreover, where an employee resigns and the resignation is accepted, the contract ceases to operate, and the rule against restraint in Section 27 would apply to any restrictions thereafter. For this proposition, *see Weiler International Electronics Private Ltd. v. Punita Velu Somasundaram* (2002) SCC OnLine Bom 1006 [12].
[18] *Varun Tyagi v Daffodil Software (P) Ltd*. (2025) SCC OnLine Del 4589 [66].
[19] *Taprogge Gesellschaft MBH v IAEC India Ltd* (1988) AIR 1988 Bom 157 [10].
[20] *Superintendence Company of India (P) Ltd v Krishan Murgai* [1981] 2 SCC 246 (SC) [51].
[21] ibid [50].

i) Section 27 does not apply to restrictions that operate *during* the contract. It applies only to restrictions operating *after* the term of the contract, and

ii) for restrictions operating *after* the term of the contract, it is irrelevant whether the restraint is partial or absolute; *any* restraint is void.

18. The Supreme Court affirmed this in *Gujarat Bottling* and *Zaheer Khan*,[22] and ample High Court authorities have followed this dictum.[23]

19. However, this raises the question: will *all* restrictions which operate during the contract be upheld as long as they subsist during the term of the contract? Courts have said no — and this is where a reasonableness analysis has crept into Section 27. Here, though there is no structured test, a kind of 'reasonableness' analysis akin to that in English law (as is examined below) is used to test the validity of restrictions *during* the contract. The Supreme Court in *Krishan Murgai* holds:

> Restrictions … during [the contractual] period are normally valid, and indeed may be implied by law by virtue of the servant's duty of fidelity. **In such cases, the restriction is generally reasonable, having regard to the interest of the employer, and does not cause any undue hardship to the employee**... But if the covenant… **is too widely worded**, the Court may refuse to enforce it.

20. In *High Polymer Labs,* the Bombay High Court quoted the following lines by the Supreme Court in *Golikari* to articulate a similarly unstructured reasonableness test:

> "14. To my mind, the law laid down by the Supreme Court clearly is that any contract in restraint of trade after the period of employment of service is void as violative of Section 27 of the Contract Act, but that such **a restrictive covenant during the period of employment is binding unless it is unconscionable, unreasonable, excessively harsh or one-sided."**[24]

21. The use of the words "harsh", "unconscionable", "unreasonable" and "one-sided" suggests that the Court must conduct a form of reasonableness analysis when it comes to restrictions operating *during* the term of the contract. Indeed, in *VD Deshpande,* the Court upheld a non-compete clause since it operated during the term of the contract and was not "*unreasonably wide [regarding] the nature of the agreement, the qualifications of the employee and the*

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[22] *Gujarat Bottling Co. Ltd. v Coca Cola Co,* (1995) 5 SCC 545; *Percept D'Mark (India) Pvt Ltd v Zaheer Khan* [2006] 4 SCC 227 (SC).

[23] Wei Zhang and Umakanth Varottil, 'Restraint of Trade' in Shivprasad Swaminathan, Niranjan Venkatesan and KV Krishnaprasad (eds), *Foundations of Indian Contract Law* (Oxford University Press 2024) 247, where the following case law are cited: *M/s Interlink Services Pvt Ltd v Shri SP Bangera Sole Prop* 65 (1997) DLT 228; *Iec School of Art & Fashion v Mr Gursharan Goyal 72* (1998) DLT 833; *Weiler International Electronics Private Ltd v Punita Velu Somasundaram* (2003) 3 ALLMR 577; *VFS Global Services Private Limited v Suprit Roy* 2008 2 BomCR 446; *SVF Entertainment Pvt Ltd v Mr Anupriyo Sengupta* (2018) LNIND Cal 1851; *Avantika Elcon Private Limited v Miraenan Tech Co Ltd* (2018) LNIND Del 3425; *Navigatothers Logistics Ltd v Kashif Qureshi* (2018) LNIND Del 4110.

[24] *Niranjan Shankar Golikari v Century Spg. and Mfg. Co. Ltd*. (1967) SCC OnLine SC 72 [16].

service he [had] to tender."[25] This kind of analysis (among other reasons) leads Zhang and Varottil to argue that despite the plain text of Section 27 and the judiciary's stringent approach of invalidating all post-contractual restraints, reasonableness continues to have a (limited) place in the jurisprudence on Section 27.[26] They demonstrate that several cases implicitly perform a reasonableness analysis, even if they do not use the word 'reasonable.' However, this note will not venture to make a comprehensive normative case for reading in the reasonableness standard in the text of Section 27.[27]

22. In sum, the doctrinal position in India (viewed through the lens of the two-fold test) can be mapped as follows:

[25] *V.M. Deshpande v Arvind Mills Co. Ltd.* (1945) AIR 1946 Bom 423 [5].
[26] Wei Zhang and Umakanth Varottil, 'Restraint of Trade' in Shivprasad Swaminathan, Niranjan Venkatesan and KV Krishnaprasad (eds), Foundations of Indian Contract Law (Oxford University Press 2024) 239.
[27] For more, *see* Shantanu Shravan Naravane, 'The Place of Reasonableness in the Restraint of Trade - Just How Much Does India Depart from the Common Law?' (Social Science Research Network, 5 November 2009) <https://papers.ssrn.com/abstract=1500192> accessed 8 November 2025.

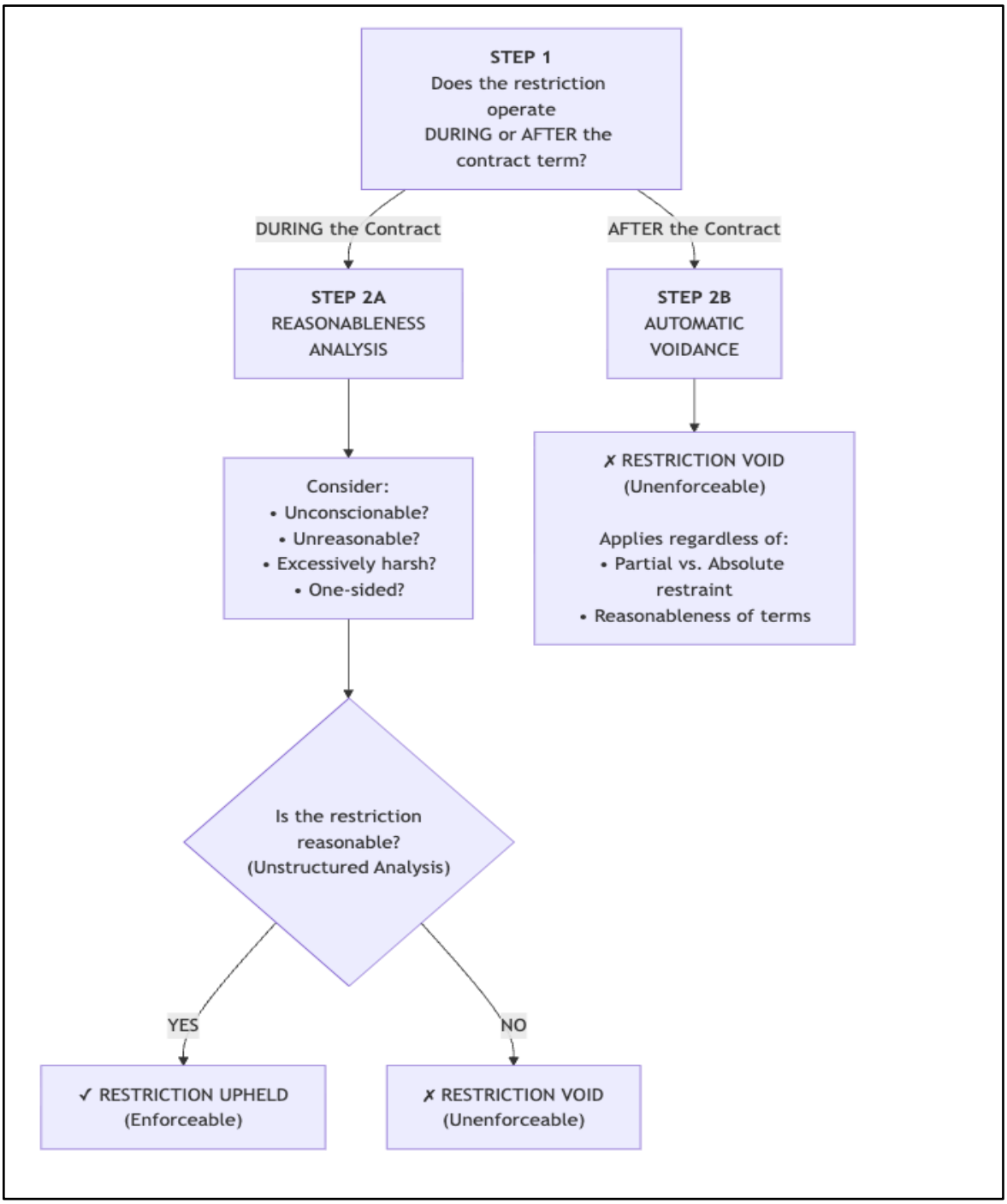

Illustration of the Two-Fold Rule under Section 27

d. Distinctions in the Operation of Non-Solicitation and Non-Compete Clauses

23. Non-solicitation and non-compete clauses are both forms of restrictive covenants aimed at protecting commercially sensitive advantages. As we have seen, only those restrictive covenants that operate during the term of the agreement are enforceable under Indian law, subject to a form of reasonableness analysis. The rest of this section explores the enforceability of non-solicitation and non-compete agreements *during* the term of the agreement. While there is no watertight distinction between non-solicitation and non-compete clauses, Courts have treated the permissibility of the two types of agreements differently under Section 27. As such, the following section extrapolates the broad trends in the treatment of these clauses, along with principled reasons for such treatment.

24. Broadly defined, **non-solicitation** agreements prohibit other parties from soliciting a firm's employees or clients. In *Wipro Limited,* the Delhi High Court was concerned with an agreement between Wipro Limited and Beckman Coulter that barred each party from soliciting the other's employees.[28] The Court held that the restriction was on employers, not employees, and therefore did not impinge on employee freedom of trade. Thus, the non-solicitation agreement here was viewed more liberally against the requirements of Section 27. Ultimately, this agreement was held valid. The Madras High Court upheld similar reasoning.[29]

25. On the other hand, **non-compete** agreements restrict employees or other businesses from engaging in competing activities, whether by joining rival enterprises, carrying on a similar trade, or otherwise competing with the legitimate business interests of the party imposing the restriction.[30] The Madras High Court has held that it broadly includes "*the protection of goodwill, exclusive dealing contracts, and agreements whereby prices are fixed*."[31] In *Dessicant,* the Delhi High Court held that the non-compete preventing an employee from competing for two years after his employment ended was invalid.[32] As we will see below, this reflects the strict approach Indian courts adopt towards non-compete clauses in the context of employment relationships.

26. Thus, while the subject matter and the method of protection differ between non-solicitation and non-compete clauses, there are finer legal differences depending on the context in which they operate (i.e., employment or commerce). For ease of understanding, we identify the trends and illustrate them with the following table:

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[28] *Wipro Limited v Beckman Coulter International* (2006) 131 DLT 681 [1] – [2].
[29] ibid [48]; *FL Smidth Pvt Ltd v Secan Invescast (India) Pvt Ltd* (2013) 1 CTC 886 (Mad).
[30] *See Department for Business Skills and Innovation, Non-Compete Clauses: Call for Evidence (Gov.UK, 2016),* which defines non-competes as "a. Restrictions to an ex-worker's ability to work for a competing business. b. Restrictions which prevent an ex-worker from having dealings with the employer's customers or clients. c. Restrictions preventing an ex-worker from hiring workers of the former employer. d. Restricting a worker from setting up a business in a geographical location that would disadvantage their ex-employer"
[31] *FL Smidth Pvt Ltd v Secan Invescast (India) Pvt Ltd* (2013) 1 CTC 886 (Mad) [30].
[32] *Desiccant Rotors International Private Limited v Bappaditya Sarkar & Another* (2009) 112 DRJ 13 (Del)] [14].

	Employment Context	Commercial/Transactions Context
Non-Solicitation Agreements	Non-solicitation agreements in the employment context are treated more liberally, since they do not impose a blanket prohibition on employment.	Non-solicitation clauses in commercial contexts are generally enforceable when aimed at protecting sensitive and proprietary commercial information.
Non-Compete Agreements	Non-compete agreements in the employment context in India operate strictly, prohibiting any competitive constraint if it operates after the term of employment.	Non-compete agreements in commercial transactions are treated more liberally, since parties are assumed to operate at arm's length in mutual pursuit of legitimate business interests.

e. Differential Treatment of Employment and Commercial Contexts under Section 27

27. Employment contexts are often treated differently from commercial contexts since the underlying principle of regulation here is to promote the freedom of trade, commerce and employment. The Supreme Court in *Golikari* affirmed this in explicit terms:

> "… the underlying principle governing contracts in restraint of trade is the same, and as a matter of fact, the Courts take a more restricted and less favourable view in respect of a covenant entered into between an employer and an employee as compared to a covenant between a vendor and a purchaser or partnership agreements."[33]

28. To determine which context operates (whether employment or commercial), the Supreme Court examines the inequality of bargaining power between the parties. For instance, in *Vijaya Bank,* a restraint in a standard form employment contract was scrutinised more keenly for its restriction on the employee's freedom of trade.[34] The Court justified its scrutiny by referring to the dynamic between an employer and an employee, where the employee "*may have given little thought to the restriction because of his eagerness for a job*".[35] It held that standard form

[33] *Niranjan Shankar Golikari v Century Spg. and Mfg. Co. Ltd*. (1967) SCC OnLine SC 72 [12].
[34] *Vijaya Bank v Prashant B Narnaware* (2025) SCC OnLine SC 1107 [20-21].
[35] ibid [20].

contracts from employers were *prima facie* evidence of unequal bargaining power.[36] Such contracts do not allow employees to consent freely.[37]

29. However, such employment contracts cannot be equated with commercial contracts.[38] In the words of the Delhi High Court, "*the social and economic implications are vastly different"* for these two contexts.[39] In employment relationships, restrictive covenants are subject to close scrutiny because Section 27 is a tool of public policy meant to protect the individual's freedom of trade and livelihood against abuse of bargaining power. In commercial contexts, such as the sale of a business or partnership, parties are presumed to negotiate as equals. This has allowed courts to adopt a more liberal approach to restrictive covenants in commercial agreements, in contrast to employment relationships, which typically entail dependency and subordination. In the words of the Delhi High Court:

> "Courts take a stricter view in Employer-Employee Contracts than in other contracts, such as Partnership Contracts, Collaboration Contracts, Franchise Contracts, Agency/Distributorship Contracts, Commercial Contracts. The reason being that in **[commercial] contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in Employer-Employee contracts, the norm is that the employer has an advantage over the employee**…"[40]

30. With this backdrop, we will now explore the evolution of restrictive covenants in each of the employment and commercial contexts.

f. Judicial Evolution of Restrictive Covenants in the Employment Context

31. Restrictive covenants applying during the term of a contract are tightly regulated by Section 27 in the employment context, since there is a natural imbalance of power in employment relationships. Indian courts are mindful of this difference and have accordingly articulated the threshold for unlawful restrictive covenants in employee-employer relationships differently. The Delhi High Court has even grounded freedom of trade in the constitutional right to life and trade under Articles 19 and 21.[41]

32. This issue has proved significant in sectors such as Information Technology services, where the validity of non-compete clauses has been particularly controversial. One such example is Infosys, where a six-month non-compete clause after employment ended for most employees

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[36] ibid [21].
[37] *Central Inland Water Transport Corpn v Brojo Nath Ganguly* (1986) 3 SCC 156 [89].
[38] ibid [101].
[39] *KD Campus v Metis Eduventures* (2018) SCC Online Del 13366 [61].
[40] *FL Smidth Pvt Ltd v Secan Invescast (India) Pvt Ltd* (2013) 1 CTC 886 (Mad) [38].
[41] *Neosky India Ltd. v Nagendran Kandasamy* (2025) SCC OnLine Del 53962025 [84]; *Independent News Service (P) Ltd. v Sucherita Kukreti* (2019) SCC OnLine Del 6756.

was publicly criticised and called into question, although no court action was taken.[42] Similarly, in 2024, Wipro brought enforcement proceedings against its former executives for having joined Cognizant and ultimately settled for approximately USD 500,000.[43]

33. With regard to non-solicitation agreements, Indian authorities have looked upon their validity favourably as long as they operate during the term of the contract.[44] As we have seen above in *Wipro Limited,* the Delhi High Court held that a non-solicitation agreement was not onerous or restrictive as long as it did not restrain the employee — the non-solicitation agreement was between two companies to prevent one another from taking their employees.[45] In this way, non-solicitation agreements between employers can remain effective even after employees have resigned. Further, the Calcutta High Court in *Embee* held that a non-solicitation clause would be permissible even against employees since solicitation would be a "tort" and "damage the business of an ex-employer."[46] Thus, non-solicitation clauses by and large pass the filter of Section 27 as long as they operate only during the term of the contract.[47]

34. Whether an act is 'solicitation' is a question of fact.[48] To prove the solicitation of customers, it must be shown that customers were influenced by the solicitation to purchase goods/services.[49] In the employment context, the Delhi High Court has held that solicitation even includes the publication of an advertisement for positions of employment which targets the covenantee's employees.[50]

35. With regard to non-compete clauses, and as we have examined above, it is settled law that non-competes cannot operate beyond the term of the service stipulated in the contract. A contract can come to an end when the agreement terminates or expires (including by resignation of the employee[51] or termination of the contract).[52]

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[42] 'Explained | Infosys's controversial clause' (The Hindu, 12 June 2022) <https://www.thehindu.com/sci-tech/technology/explained-infosys-controversial-clause/article65518471.ece> accessed 8 January 2026.
[43] 'Wipro settles non-compete lawsuits against former execs, Cognizant pays $505k for settlement' (Moneycontrol, 9 July 2024) <https://www.moneycontrol.com/technology/wipro-settles-non-compete-lawsuits-against-former-execs-cognizant-pays-505k-for-settlement-article-12765367.html> accessed 8 January 2026.
[44] *FL Smidth Pvt Ltd v Secan Invescast (India) Pvt Ltd* (2013) 1 CTC 886 (Mad) [38].
[45] *Wipro Limited v Beckman Coulter International* (2006) 131 DLT 681 [59].
[46] *Embee Software Private Limited v Samir Kumar Shaw* (2012) SCC OnLine Cal 3094 [17].
[47] *FL Smidth Pvt Ltd v Secan Invescast (India) Pvt Ltd* (2013) 1 CTC 886 (Mad) [17].
[48] ibid [40].
[49] ibid [41] – [43]. Here, there was insufficient proof of solicitation.
[50] *Wipro Limited v Beckman Coulter International* (2006) 131 DLT 681 [21]. Here, Beckman Coulter and Wipro had agreed not to solicit each other's employees. It is important to note that the advertisement was for a specific category of employees — those that had experience with "Beckman Coulter" products. Though several candidates who were not from Wipro were also shortlisted from this advertisement, many were also former employees of Wipro. This was held to amount to solicitation.
[51] *Interlink Services (P) Ltd. v S.P. Bangera* (1997) SCC OnLine Del 23; *Ambiance India (P) Ltd. v Naveen Jain* (2005) SCC OnLine Del 367.
[52] *Aakash Educational Services v Sahib Sital Singh Bajwa* (2020) SCC Online Del 1719; *KD Campus v Metis Eduventures* (2018) SCC Online Del 13366 [18].

36. However, even non-competes that operate during the term of the contract can be void if they are found to be unconscionable, too wide, or unreasonable.[53] For instance, in *Jet Airways,* the Court held that a seven-year employment lock-in imposed on pilots was unreasonable and unconscionable, since it gave disproportionate weight to the interests of the employer. The Court here was also swayed by the fact that the pilots had financed their own training, and the lock-in was thus not justified.[54] By contrast, in *Golikari,* the restraint was upheld not only because it was during the term of the contract, but because it was geographically confined to India and the employee had received specialised and confidential training in continuous-spinning technology from the employer.[55] A further point of comparison is *Star India,* where an employee with salesmanship skills was permitted to work in any other field – despite a non-compete clause. The Bombay High Court distinguished this case from *Golikari* on the ground that no specialised trade secrets were involved.[56] Taken together, these decisions illustrate the application of an unstructured form of reasonableness analysis, in which courts weigh the employer's legitimate business interests against the degree of restriction on the employee. Overall, the dominant trend in case law tends towards protecting the employees' freedom of trade.

37. In circumstances where the restrictions are on an employee's acts both during and after employment, courts are willing to sever the time periods and partially strike down the restrictions on acts after employment.[57]

38. Another crucial issue in this context is the distinction between non-compete and confidentiality clauses. Employers often try to masquerade non-competes as confidentiality agreements, which can continue to operate in perpetuity even if the employee joins a competitor.[58] They argue that, because a former employee had access to confidential information, a non-compete is necessary to prevent such information from leaking. However, courts have recognised this distinction and cautioned against collapsing the two. For example, in *American Bank* the Delhi High Court held that the employee's right to freely seek employment could not be curtailed under the guise of confidentiality agreements.[59] It cannot be presumed from the employee's mere employment by another party that confidentiality obligations are breached. Thus, merely because the employee has access to confidential information would not lead to the enforcement of a non-compete agreement[60] — rather, this is covered by the common law remedies for breach of confidentiality (covered in another note

[53] *Jet Airways (I) Ltd v Mr. Jan Peter Ravi Karnik* (2000) 4 Bom CR 487 [11].
[54] ibid [17].
[55] *Niranjan Shankar Golikari v Century Spinning* (1967) SCC Online SC 72 [2].
[56] *Star India Pvt. Ltd. v Laxmiraj Seetharam Nayak* (2003) 3 Bom CR 563 [15].
[57] *The Brahmaputra Tea Co. Ltd. v Scarth* (1885) ILR 11 Cal 545.
[58] *RP Partners v Kumarpal*, O.A. Nos. 321, 322 and 326 of 2012 (Madras HC, 23 April 2012) (Vinod K Sharma J). [10], [19]; *Arun Rambhai Desai v Deepak Nitrite Ltd,* Cr A No 242 of 2024 (Guj HC, 10 June 2025) (Sanjeev J Thaker J) [62] – [64].
[59] *American Express Bank, Ltd. v Priya Puri* (2006) 3 LLN 217 (Delhi High Court, 2006) [46] – [47].
[60] *Varun Tyagi v Daffodil Software (P) Ltd*. (2025) SCC OnLine Del 4589 [71].

in this series).[61] After all, employees are not prevented from gaining knowledge, which makes them "*better employees for future employment — [they are] only prevented from divulging information received from their former employer*."[62]

39. The position of restrictive covenants in employment contexts can thus be summarised as follows:

Type of Restriction	Legal Validity (Employment Context)
Non-Solicitation Agreements	Generally Valid / Favourably Viewed: Indian courts generally uphold these, provided they operate during the term of the contract.
Non-Compete (During Employment)	Valid & Enforceable: Restrictions operating *during* the term of the contract are generally valid.
Non-Compete (Post-Employment)	Void / Strictly Regulated: Restrictions extending *beyond* the term of service are treated as restraints of trade and are generally void.
Important Note: Confidentiality agreements cannot be disguised as non-compete agreements. The two are functionally different. For instance, employment restrictions on disclosing confidential information cannot be used to restrict employees from joining competitors. Courts recognise the distinction between the two. They may subject such confidentiality restrictions to scrutiny under Section 27 and refuse to enforce them.	

g. Judicial Evolution of Restrictive Covenants in Commercial Contexts

40. As we have seen above, Indian courts have been more liberal in allowing restrictive covenants in commercial contexts compared to employment contexts. The Bombay High Court remarked:

> "The law enacted by S. 27 of the Act is founded on the public policy which disapproves and negates the restraints on trade, business or profession. **Though this is the general rule of law, all corners are not alike, and the restraints imposed by them are varied in their nature and effect.** The contracts between the **vendor and purchaser of a**

[61] *See* M P Ram Mohan, Siddhartha Shukla, Julie Farley and Prem Vinod Parwani, 'Non-Disclosure Agreements and Confidentiality Clauses' (2025) IIMA Research & Publications Working Paper No 2025-12-01.
[62] *V.M. Deshpande v Arvind Mills Co. Ltd.* (1945) AIR 1946 Bom 423.

business are generally marked by equality of strength and bargaining power. In the contracts between Master and servant, this may not be so."[63]

41. For instance, non-competes in commercial contexts, such as partnerships or franchise agreements, are viewed more liberally. The Bombay High Court remarked:

> "…. sole selling or franchisee agreements … necessarily contain a negative stipulation that the sole selling agent or franchisee shall not sell the competitor's products...It is too late in the day to contend that such [a] negative covenant contained in the sole selling agency or franchisee agreement….is void."[64]

42. The language used by the Supreme Court in *Gujarat Bottling* clearly illustrates this differential treatment. The court upheld the covenant as valid because it was "*a commercial agreement whereunder both the parties have undertaken obligations for promoting the trade in beverages for their mutual benefit*."[65] Building on this reasoning, the Bombay High Court went on to hold that a right of first refusal between an advertising agency and a celebrity cricketer did not violate Section 27.[66] In doing so, the court emphasised the relative equality of bargaining power between the parties, noting that "*it is a matter of common knowledge that celebrity endorsement of a product has a great commercial value, and admirers of the celebrity and many people buy a product endorsed by the celebrities based on such endorsement*."[67]

43. When it comes to non-solicitation agreements, courts have adopted a similarly business-friendly stance. In *Embee Software,* the Calcutta High Court held that the non-solicitation clause was crucial to protect client information since former employees may attempt to induce the former employer's clients.[68] The Delhi High Court has similarly granted an injunction preventing former employees from soliciting customers.[69] Even in 2025, the Delhi High Court in *Varun Tyagi* held that the non-solicitation of clients is a valid restriction.[70]

44. The Madras High Court in *Fl Smitdh* articulated an indicative set of factors to consider under Section 27 (note that this is in the context of business between a manufacturer and supplier). It held:

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[63] *Taprogge Gesellschaft MBH v IAEC India Ltd* (1988) AIR 1988 Bom 157 [10].
[64] *Percept D'Mark (India) Pvt Ltd v Zaheer Khan* (2004) 1 ALL MR 384 [13].
[65] *Gujarat Bottling Co. Ltd. v Coca Cola Co,* (1995) 5 SCC 545 [31].
[66] *Percept D'Mark (India) Pvt Ltd v Zaheer Khan* (2004) 1 ALL MR 384 [9].
[67] ibid.
[68] *Embee Software Private Limited v Samir Kumar Shaw* (2012) SCC OnLine Cal 3094 [17].
[69] *Vogueserv International Pvt. Ltd. v Rajesh Gupta* (2012) CS(OS) 1436/2012 (Del); *Desiccant Rotors International Private Limited v Bappaditya Sarkar* (2009) 112 DRJ 13 (Del) [15]; *Also see generally* Varun Srinivasan, 'Restraint of Trade: Emerging Trends' (2015) 7 Madras Law Journal 49 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683982> accessed 8 January 2026.
[70] *Varun Tyagi v Daffodil Software (P) Ltd*. (2025) SCC OnLine Del 4589 [70]. "It is settled law that the negative covenant post termination of the employment can be granted only to protect the confidential and proprietary information of the employer or to restrain the employee from soliciting the clients of the employer."

"As per various judicial pronouncements, the reasonable restraint is permitted and does not render the contract void ab initio. Reasonable restrictions can be placed in the following ways:

1. **Distance**: suitable restrictions can be placed on employee to not practice the same profession within a stipulated distance, the stipulation being reasonable.

2. **Time limit**: if there is a reasonable time provided in this clause then it will fall under reasonable restrictions.

3. **Trade secrets**: The employer can put reasonable restrictions on the letting out of trade secrets.

4. **Goodwill**: There is an exception under Section 27 of the Indian Contract Act on the distribution of goodwill."[71]

45. These are sound commercial considerations that parties must consider while drafting restrictive covenants in commercial contexts. All in all, it is seen that despite the strict text of Section 27, courts have been willing to read in a more lenient approach to non-compete clauses in commercial contexts by comparing the parties' bargaining power.

46. Thus, the position in the commercial contexts can be summarised as follows:

Category of Restriction	**Legal Validity (Commercial Context)**
Non-Compete Agreements	Valid & Liberally Interpreted: These covenants are viewed as obligations for "mutual benefit" to promote trade, rather than restraints. Parties are assumed to have an equality of bargaining power.
Non-Solicitation Agreements	Valid & Liberally Interpreted: Courts generally allow these restrictions to protect business interests.
Factors under Reasonableness Analysis (Non-Exhaustive) 1. **Distance:** Restriction must be within a stipulated, reasonable geographic radius. 2. **Time Limit:** The duration of the clause must be reasonable. 3. **Trade Secrets:** Restrictions on leaking trade secrets are valid. 4. **Goodwill:** Falls under the statutory exception to Section 27.	

[71] *FL Smidth Pvt Ltd v Secan Invescast (India) Pvt Ltd* (2013) 1 CTC 886 (Mad) [20].

h. Non-Compete Agreements in Indian Competition Law in the M&A Context

47. Non-compete agreements are standard commercial tools in the M&A context. They can form part of the preliminary stages of a transaction, such as in the term sheet (the preliminary document of intent before due diligence), as well as in the transfer at the final stage of the M&A transaction. At the preliminary stage, non-competes are often used to regulate the exchange of competitively sensitive information during negotiations. More generally, in M&A transactions, non-compete provisions are structured to ensure that the value of the business is preserved and to restrict the seller from competing with the transferred enterprise. Non-competes are a mainstay of several publicly available M&A transactions: for instance, in the 2007 Holcim-Ambuja acquisition that consolidated the cement sector, the promoters were paid an additional 16% per-share premium as a non-compete fee.[72] More recently, in the 2025 MUFG-Shriram Finance investment, MUFG paid a flat, upfront fee of USD 200 million to the promoters as consideration for a non-compete covenant.[73] Notably, as explored below, this consideration is important to ensure the validity of these covenants.

48. As we have seen, the enforceability of non-competes is viewed more liberally in commercial contexts. The Delhi High Court has held that "*non-compete clauses are an essential part of mergers and acquisitions*" and restricting them "*would be a serious impediment and run counter to the thrust on inviting investments*."[74] However, non-competes in M&A are also regulated by competition law, which this section explores.

49. The Competition Commission of India ('CCI') has dealt with such a situation only in a handful of cases. In *Orchid Chemicals*,[75] two pharmaceutical companies agreed to merge. The companies signed a non-compete agreement that stipulated a restriction on the promoters, preventing them from conducting business activities for eight years.[76] Moreover, there was an absolute prohibition on the research and development of certain medical formulations.[77] The CCI held that the restraints in this case were beyond what was reasonably necessary:

    a. It held that in drafting non-competes, the following factors are relevant to ensure the clauses are appropriately narrow:

        "(a) the duration over which such restraint is enforceable; and

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[72] 'Deal makes Guj Ambuja most valuable cement co' The Economic Times (10 May 2006) https://economictimes.indiatimes.com/newet/business-of-brands/deal-makes-guj-ambuja-most-valuable-cement-co/articleshow/1393501.cms?from=mdr accessed 10 May 2026.

[73] MUFG deal may test rules on non-compete fee for promoters' The Economic Times (10 May 2024) https://economictimes.indiatimes.com/industry/banking/finance/shriram-mufg-deal-may-test-rules-on-non-compete-fee-for-promoters/articleshow/126491405.cms?from=mdr accessed 10 May 2026.

[74] *Dr. Lal Pathlabs (P) Ltd. v Arvinder Singh* (2014) SCC OnLine Del 7718 [40].

[75] Competition Commission of India, *Orchid Chemicals and Pharmaceuticals Ltd / Hospira Healthcare India Pvt Ltd, Combination Registration No C-2012/09/79*, Order under s 31(1) Competition Act 2002.

[76] ibid.

[77] ibid.

(b) the business activities, geographical areas and person(s) subject to such restraints, to ensure that such obligations do not result in an appreciable adverse effect on competition."[78]

b. Following the CCI decision, the parties agreed to limit the time span of the non-compete to four years and allowed Orchid Chemicals to continue the research and development of the medical formulation, which was previously restricted.[79]

50. In *Re Mylan Inc,* the CCI similarly accepted the validity of a non-compete only after the parties agreed to narrow its applicability to select products in the relevant market and to reduce the duration for which it applied.[80] A non-compete in the M&A context must therefore be in respect of the product/services concerning the merger, and only if it is 'ancillary' to the merger proposed (i.e., it is done in furtherance of the transaction, and not beyond what is necessary for it).[81] Thus, the validity conditions of non-competes in Indian competition law are analogous to those in contract law. An important caveat is that in these cases, the validity of the non-compete clauses was tested for anti-competitive effects in the market, not restrictions on an individual's freedom of trade.[82]

Non-Competes in M&A Transactions

Parties inserting non-compete clauses in M&A transactions ought to be cognisant of:

(a) the subject matter of the non-compete in respect of the merger,

(b) its applicability in relation to the products/services concerning the merger

(c) the duration of its applicability, and,

(d) the geographical area to which it extends.

[78] ibid.

[79] Competition Commission of India, *Orchid Chemicals and Pharmaceuticals Ltd / Hospira Healthcare India Pvt Ltd, Combination Registration No C-2012/09/79*, Order under s 31(1) Competition Act 2002.

[80] Competition Commission of India, *Order under Section 31(1) of the Competition Act 2002 in the matter of Mylan Inc* (Combination Registration No C-2013/04/116) (20 June 2013) [21].

[81] Competition Commission of India, *Power and Energy International (Mauritius) Ltd, In Re Combination Registration No C-2016/06/404* (27 July 2016) [11]; The Ambiguous Treatment of Non-Compete Covenants in Joint Venture Agreements' (IndiaCorpLaw, 28 November 2017) <https://indiacorplaw.in/2017/11/28/ambiguous-treatment-non-compete-covenants-joint-venture-agreements/> accessed 27 November 2025. Interestingly, these cases formed the basis of a Guidance Note on Non-Compete Restrictions issued by the CCI in 2017. But in 2020, the CCI withdrew this Guidance Note to move towards a "self-assessment" regime—meaning parties now must decide for themselves if their non-compete is "reasonable" without the CCI pre-clearing it. Still, the principles from Orchid (like the 3-4 year limit) remain industry standard.

[82] It is possible that these determinations will overlap.

III. COMPARATIVE PERSPECTIVES FROM COMMON LAW

a. English Common Law

51. As in Indian law, English common law on restrictive covenants has been articulated through the doctrine against restraint of trade. However, English common law places a more explicit and structured emphasis on the reasonableness of the restraint and the legitimate business interests warranting its enforcement. The leading authority on non-competes in English common law is the case of *Nordenfelt v. Maxim Nordenfelt Guns,*[83] where a wide non-compete connected to the sale of a business was upheld, and reasonableness was established as the governing test, assessed both as between the parties and in the public interest. On the sale of an armaments business, the seller agreed not to carry on such a business for twenty-five years, except on behalf of the buyer. This restriction was held to be valid. Lord Macnaghten held that "*the only true test in all cases, whether of partial or general restraint, was the reasonableness of a restriction in the interest of both parties, and in the interests of the public*."[84] Since then, several cases in English law have settled that there must be a legitimate interest warranting a restrictive covenant, and the covenant is no wider than required for that purpose.[85]

52. Over time, the reasoning in *Nordenfelt* became firmly embedded in English common law as the governing framework for analysing restraints of trade. In *Mason v. Provident Clothing and Supply,* the employee had agreed not to work for the employer's competitors within twenty-five miles of London. The appellate committee held that Lord Macnaghten's proposition was a correct statement of law and upheld the principle of reasonableness. In this case, the court concluded that the covenant was wider than necessary and therefore unenforceable.[86]

53. In *Herbert Morris,* Lord Atkinson noted that "*two principles or views of public policy come into conflict in such cases as this, namely, freedom of trade and freedom of contract*."[87] The House of Lords held that an employer cannot prevent an employee from using their skill, knowledge and experience acquired in the course of employment ('subjective knowledge') but can prevent them from using trade secrets and trade connections acquired in the course of employment ('objective knowledge').[88]

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[83] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.
[84] ibid.
[85] Sandra Booysen, 'What Is a Restraint of Trade? Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland); Quantum Actuarial LLP v Quantum Advisory Ltd' (2022) Singapore Journal of Legal Studies 202, 203; See *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 710 (HL); *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] 1 AC 269, 297, 301, 303, 312 (HL).
[86] *Masons v Provident Clothing & Supply Co Ltd* [1913] AC 724; *Stenhouse Australia Ltd v Phillips* [1974] AC 391, 400; *TFS Derivatives Led v Morgan* [2004] EWHC 3181 (QB).
[87] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 699.
[88] Ibid, 713 – 715.

54. Synthesising this evolution, the English position today is that restrictive covenants are in restraint of trade "*unless [they are]: (a) designed to protect legitimate business interests; and (b) no wider than reasonably necessary*."[89] In *Credit Suisse Asset Management Ltd v Armstrong*, the Court of Appeal found that an employer cannot "double-stack" protection through sequential garden leave and a non-compete period: instead, garden leave already served should be taken into account in the reasonableness assessment.[90] Though a reasonableness standard cannot be expressed in exhaustive terms, some indicative factors are:

    - The job and the influence of the worker
    - The geographical area of any restriction
    - The length of time of the post-termination restriction
    - The type of interest and nature of the business being protected.[91]

55. These factors are not examined in isolation. For instance, a relatively short duration of restriction may be considered unreasonable where the geographical restriction is very wide.[92] In *Thomas v Farr*, a CEO's 12-month, worldwide non-compete was found reasonable by the Court of Appeal, given his seniority, the confidential client relationships he controlled, and the global nature of the Lloyd's market.[93] To illustrate how these factors are relevant in applying the reasonableness standard, the High Court of England and Wales noted:

    > "A period of 9 ½ years is not a long one in the context of a defence project using and developing cutting-edge technology…A decade in the pop music business, by contrast, is a very long time indeed."[94]

56. It is also important to keep in mind that restrictions that are disproportionate to the employer's interests are likely to be declared void in court.[95] However, there is no absolute bar on the nature of the restrictions (whether in terms of area or duration).[96] The ultimate guiding principle here is the reasonableness of the employer's interest in relation to the restriction. This has been further consolidated by *Tillman v Egon Zehnder Ltd*, the UK's most recent UK Supreme Court decision on post-employment non-compete covenants, where the Supreme Court found that the non-compete was too wide by preventing Ms Tillman from being

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[89] Department for Business Skills and Innovation, *Non-Compete Clauses: Call for Evidence* (Gov.UK, 2016) 6.
[90] *Credit Suisse Asset Management Ltd v Armstrong* [1996] ICR 882 (CA).
[91] ibid 7.
[92] *See HT SRL v Wee Shuo Woon* [2019] SGHC 96 [83], where the Singaporean High Court holds in the context of a non-compete restriction on an employee that "…the clause is far wider than necessary to restrain [the employee] from affecting the trade connection which [has] been built up. Given the lack of any geographical constraint, the duration of one year is also excessive." Though this is in the Singaporean context, the law applied is nearly identical to English common law.
[93] *Thomas v Farr plc* [2007] EWCA Civ 118.
[94] *Societa Esplosivi Industriali SpA v Ordnance Technologies (UK)* Ltd [2004] 1 All ER (Comm) 619 [146]; Edwin Peel (ed), *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) [11-097].
[95] *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724.
[96] It is highly unlikely (and unprecedented) that a perpetual non-compete would be reasonable.

"interested in" a competitor (which would technically prevent even minor share ownership). However, the court removed that wording under the severance doctrine, and the rest of the covenant was enforceable.[97]

57. Though reasonableness is the guiding principle in determining the enforceability of restrictive covenants, judicial approaches have articulated a threshold question that precedes the reasonableness analysis. For instance, the UK Supreme Court in *Peninsula Securities* adopted the 'trading society' test — holding that agreements which have "*passed into the accepted and normal currency of commercial or contractual relations*" do not engage the restraint of trade doctrine at all.[98] This was further refined by the Court of Appeal in *Quantum Actuarial,* which acknowledged that some situations may lack the guidance of a 'normal currency' of practices against which to measure the restriction.[99] In such cases, the court must revert to a first-principles analysis of balancing the competing considerations of the freedom of contract and the freedom of trade. Taken together, *Peninsula Securities* and *Quantum Actuarial* confirm that the threshold question of whether the doctrine applies, and the substantive reasonableness assessment that follows once it does, are distinct analytical steps — though in practice, the English position affords courts considerable flexibility at both stages.

58. Unlike India, in the UK, the reasonableness standard applies to both non-compete agreements and non-solicit agreements in the same manner. However, since non-solicitation restrictions are generally less onerous than non-compete restrictions, in practice, they are subject to lesser scrutiny.[100]

59. In many significant respects, the law on restraint of trade in India is much narrower than the English common law. The stringency of the Indian statute, though significantly diluted by Courts in commercial contexts, continues to influence an all-or-nothing interpretation of the doctrine in India.[101] This approach has been criticised as outdated, both by different courts and,[102] notably, by the Law Commission of India.[103]

60. In the UK, it is remarked that there are "very few restrictions" on employers from including non-compete clauses in employment contracts, whether enforceable or not.[104] However, it is worth noting that legislative reform of non-compete clauses has specifically been under active consideration in the UK for several years. The previous government considered several options (including even an outright ban on non-competes – however, this was rejected as too

[97] *Tillman v Egon Zehnder Ltd* [2019] UKSC 32.
[98] *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] 3 WLR 521 (UKSC).
[99] *Quantum Actuarial LLP v Quantum Advisory Ltd* [2021] EWCA Civ 227.
[100] For more on this, *see Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) [11-075].
[101] *See* Part II of the paper on the 'absolutist approach'. *Superintendence Company of India (P) Ltd v Krishan Murgai* [1981] 2 SCC 246 (SC); *Percept D'Mark (India) Pvt Ltd v Zaheer Khan* [2006] 4 SCC 227 (SC).
[102] *See* Part I(a) above.
[103] Law Commission of India, *Thirteenth Report: Contract Act, 1872* (September 1958) [55].
[104] Department for Business and Trade, *Non-Compete Clauses: Response to the Government Consultation on Measures to Reform Post-Termination Non-Compete Clauses in Contracts of Employment* (UK Government Department for Business and Trade, 12 May 2023) 2.

restrictive), and proposed to introduce a three-month statutory limit on non-compete clauses, though this was never enacted.[105] The current government has since reopened the question, consulting on five options directed at non-compete clauses, ranging from a statutory length limit to an outright ban to a ban below a salary threshold.[106]

61. By contrast, non-solicitation and confidentiality clauses are left untouched by the mooted reform — consistent with the lesser judicial scrutiny already applied to them under English common law, and mirroring the more permissive approach taken in India towards non-solicitation agreements.

The Modern English Law Position on Restrictive Covenants

A restraint is valid if:

(a) It is designed to protect legitimate business interests.

(b) It is no wider than reasonably necessary (industry-specific determination).

Indicative Factors:

- Position/Job influence of Employee
- Geography of Restriction
- Duration of Restriction.
- Nature of Interest Protected.

Non-compete and non-solicitation clauses are subject to the same reasonableness framework, however in practice non-solicitation clauses are subject to less scrutiny.

b. UK Competition Law and the M&A context

62. As in India, restrictive covenants in commercial agreements in the UK are subject to another layer of scrutiny that is independent of and additional to the common law restraint of trade doctrine. The Chapter I prohibition of the Competition Act 1998 renders void any agreement between undertakings that has as its object or effect the prevention, restriction or distortion of competition within the UK.[107] A restrictive covenant that satisfies the common law reasonableness test may nonetheless fall foul of Chapter I if it restricts competition to a degree that cannot be justified.

63. The primary mechanism for justifying a commercial non-compete under competition law is the ancillary restraints doctrine – a concept functionally analogous to the Indian CCI's

[105] Department for Business and Trade, *Working Paper on Options for Reform of Non-Compete Clauses in Employment Contracts* (UK Government Department for Business and Trade, 19 February 2026).
[106] Ibid.
[107] Competition Act 1998, Chapter I Prohibition.

requirement that a non-compete be "ancillary" to the transaction in which it appears. A covenant that is directly related to and objectively necessary for the implementation of a legitimate transaction will not infringe the Chapter I prohibition, even if it restricts competitive conduct. The UK's Competition and Markets Authority (CMA) guidance specifies that, on the sale of a business, non-compete obligations are generally permissible for up to two years where goodwill is transferred, and up to three years where customer loyalty is also included in what is transferred.[108] Beyond those periods, or where the scope of the restriction exceeds what is necessary to protect the transferred value, competition law exposure arises.

64. The UK competition law regime also addresses a distinct concern in employment contexts: anti-competitive behaviour in labour markets between competing employers. No-poaching arrangements, where businesses agree not to recruit or solicit each other's employees, are treated as cartel conduct and may infringe the Chapter I prohibition. Wage-fixing, where competing employers agree to fix pay, benefits or other terms of employment, is similarly prohibited.[109] The CMA demonstrated the seriousness with which it treats such conduct in March 2025, when it issued an infringement decision against four businesses involved in the production and broadcasting of sports content, imposing fines totalling over £4 million in respect of unlawful sharing of sensitive pay information of freelance staff.[110]

65. This aspect of competition law is focused on employers' conduct in labour markets, rather than on the terms of individual contracts, and represents a practical enforcement risk for businesses operating in the UK.

c. United States and Australian Jurisdictions

66. The law in Australia shares close similarities with the English law on the subject, while US law is more fragmented.

United States

67. While the United States has inherited the same restraint of trade tradition from English common law, there is no federal statute governing the application of non-compete agreements. Their enforceability is determined by state laws, which are fragmented and at times inconsistent with one another.[111] Across the US states, the legal framework splits into two divergent approaches: one stringent, and another more liberal.

68. At one end of the spectrum is California's Business and Professions Code, which declares void "*every contract by which anyone is restrained from engaging in a lawful profession,*

[108] CMA, Mergers: Guidance on the CMA's jurisdiction and procedure (2025), Appendix C.
[109] CMA, Competing for Talent: What Businesses Need to Know When Recruiting Workers and Setting Pay and Other Working Conditions (2025).
[110] ibid.
[111] For a comprehensive cross-state survey, see Beck Reed Riden LLP, 50 State Noncompete Survey (updated 21 January 2026) <https://beckreedriden.com/50-state-noncompete-chart-2/> accessed 10 May 2026.

trade, or business of any kind."[112] The California Supreme Court has confirmed that this prohibition is narrow and absolute: all post-employment restrictions are void, regardless of how reasonably they are tailored.[113] However, this strict restriction applies only to employment agreements and not commercial agreements, which are evaluated under a 'rule of reason' approach (examining the covenant's actual effect on competition in the market).[114] Other US states, such as North Dakota, Oklahoma, and Minnesota follow a similarly prohibitionist approach.[115] Notably, this provision most closely mirrors the text of Section 27 of the Indian Contract Act, though in contrast, Indian courts have interpreted it more liberally.

69. At the other end of the spectrum is the more permissive approach to restrictive covenants: in Texas, the Covenants Not to Compete Act requires a non-compete clause to be "*ancillary to or part of an otherwise enforceable agreement*" and contain reasonable time, geography, and scope limitations.[116] Most other states follow a similar approach, typified in the New York Court of Appeals' landmark three-prong test,[117] which stipulates that a restraint is reasonable if it:

    a. is no greater than is required for the protection of the legitimate interest of the employer;

    b. does not impose undue hardship on the employee; and

    c. is not injurious to the public.

70. This test is drawn from the Restatement (Second) of Contracts treatise, which invalidates ancillary restraints "*greater than is needed to protect legitimate interests*."[118] As under English law (and indeed, in commercial contexts in Indian law) the analysis is more deferential in commercial contexts than in employment contexts. In New York, for instance, courts apply only the first prong of the three-prong test to ordinary commercial agreements, omitting the other two prongs that govern employment covenants.[119] In summary, these US states mimic the English law interpretive approach insofar as they adopt the 'reasonable' and 'ancillary' thresholds to test the restraint of trade. However, in employment contexts, in addition to these

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[112] California Business and Professions Code s.16600(a).

[113] *Edwards v Arthur Andersen LLP* (2008) 44 Cal 4th 937, 946-948.

[114] *Ixchel Pharma, LLC v Biogen, Inc* 9 Cal 5th 1130 (2020). Also *see* similar commercial exceptions in California Business & Professions Code s.16601 (sale of the goodwill of a business or of all of an owner's interest in a business entity), s.16602 (dissolution of, or dissociation from, a partnership), and s.16602.5 (dissolution of, or termination of a member's interest in, a limited liability company).

[115] North Dakota Century Code s.9-08-06 (North Dakota); Oklahoma Statutes, Title 15, s.217 (Oklahoma); Minnesota Statutes s.181.988 (Minnesota, effective 1 July 2023). Each statute renders post-employment non-competes void subject to narrow exceptions (most importantly, for non-competes entered into in connection with the sale or dissolution of a business).

[116] Texas Business and Commerce Code ss15.50-15.52 (the Covenants Not to Compete Act).

[117] *BDO Seidman v Hirshberg* (1999) 93 NY 2d 382, 388-389.

[118] *See* ss 186 and 188 of the Restatement (Second) of Contracts s 188 (American Law Institute 1981).

[119] See, eg, *DAR & Associates, Inc v Uniforce Services, Inc* 37 F Supp 2d 192, 196-197 (EDNY 1999); *Steelite International USA, Inc v McManus* No 21-CV-2645, 2021 WL 1648025 (SDNY 27 April 2021).

overlapping thresholds, the test in these US states also requires proof of "undue hardship" and "public injury".

71. When it comes to remedies for offending clauses, the diversity across US states is stark. While Indian and English codes may sever offending words but refuse to redraft a covenant altogether, a majority of US states permit a form of judicial modification either through the traditional 'blue pencil' approach (examined below) or through a more interventionist 'reasonable modification' approach, where courts actively rewrite the temporal, geographic, or scope limits to render the covenant enforceable; Minnesota, Illinois, New Jersey and Pennsylvania are examples of this.[120] Texas goes even further by mandating that Courts reform covenants to render them reasonable.[121] In contrast, a handful of states, such as Virginia and Wisconsin, even follow an "all-or-nothing" approach where the entire covenant is struck down if any part is unreasonable.[122]

Australia

72. The position in Australia mirrors the common law position in the UK, having adopted the reasonableness analysis as the guiding principle. Just as in English common law, restraints on trade are presumed to be void unless it can be shown that the test of reasonableness is met.[123] This requires an examination of whether the restraint is 'reasonably necessary' to protect the legitimate interests of the employer. However, a unique feature of Australian law, specifically in New South Wales (NSW), is the statutory modification of the common law via the *Restraints of Trade Act 1976*.[124] Unlike the strict "blue pencil" rule applicable in India and the UK (as we will see below), where courts can only delete invalid words but not rewrite the clause, the NSW legislation empowers courts to "read down" or modify a restraint to the extent necessary to make it valid.[125] This grants NSW courts a remedial flexibility which is absent in other jurisdictions. As a result, the risk of total invalidity is significantly mitigated for agreements governed by NSW law.

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[120] For a blue-pencil approach as in English law, *see Valley Medical Specialists v Farber* 982 P.2d at 1286 (Arizona law). *See* Pivateau Griffin Toronjo Pivateau, 'Unjust and Contrary: The Unworkable Blue Pencil Doctrine' (2023) 38(1) ABA Journal of Labor and Employment Law 1, 15-17, citing *inter alia Klick v Crosstown State Bank of Ham Lake, Inc* 372 NW 2d 85 (Minn Ct App 1985); *Chapman & Drake v Harrington* 545 A 2d 645 (Me 1988).
[121] Texas Business and Commerce Code s 15.51(c).
[122] For an overview of the US law on remedies for restrictive covenants, see Griffin Toronjo Pivateau, 'Unjust and Contrary: The Unworkable Blue Pencil Doctrine' (2023) 38(1) ABA Journal of Labor and Employment Law 1,12-13.
[123] *Just Group Ltd v Peck* (2016) 344 ALR 162, 173–178 [30] – [39] (Peck J); *2nd Chapter Pty Ltd v Sealey* (No 2) [2024] VSC 672 [112]; *Kingdom Animalia LLC v Mecca Brands Pty Ltd* (2023) 170 IPR 399, 403 [21].
[124] Restraints of Trade Act, 1976 (New South Wales). These statutory modifications will prevail over the English common law. *See Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 [51].
[125] ibid s.4.

IV. LITIGATION AND ENFORCEMENT CHALLENGES – JUDICIAL & PRACTICAL PERSPECTIVES

a. Litigation Challenges in Enforcing Restrictive Covenants

73. Restrictive covenants are challenging when litigated, since they are often time-sensitive and involve sensitive commercial information. This section traces judicial perspectives on some of the key challenges that crop up during litigation, particularly when it comes to remedies and enforcement.

74. **Injunctive Relief Standards:** Most remedies involving cases on restrictive covenants in India concern injunctive relief. [126] This is because a full trial would often outlast the very period of the restrictive covenant. As such, injunctive relief becomes the primary remedy sought.

    a. Indian civil procedure provides for a straightforward *balance of convenience test* to determine whether an injunction should be granted.[127] Notably, the employees' freedom of trade is given due weightage in this examination.[128] While not strictly relevant at the stage of an injunction, courts will inevitably deal with the enforceability of the clause at the injunctive stage itself. Though an employer can argue that the balance of convenience may lie in favour of protecting their 'confidential information', a non-compete cannot be enforced unless evidence is adduced to prove that the confidential information is affected by such competition.[129] While difficult, this has been done at least in once before.[130]

    b. In English law, the leading authority for granting injunctions is found in the principles laid down by the House of Lords in *American Cyanamid*.[131] These are only slightly different from the Indian test. They are:

        (1) Is there a "serious issue to be tried"?

        (2) Would damages be an adequate remedy for the claimant if the injunction were refused? and

        (3) Where does the "balance of convenience" lie?

    c. However, when it comes to restrictive covenants, since they may often expire before the trial is completed, the English Court of Appeal has held that the Courts must engage in a

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[126] *See Superintendence Company of India (P) Ltd v Krishan Murgai* [1981] 2 SCC 246 (SC); *Percept D'Mark (India) Pvt Ltd v Zaheer Khan* [2006] 4 SCC 227 (SC); *Desiccant Rotors International Private Limited v Bappaditya Sarkar & Another* (2009) 112 DRJ 13 (Del).

[127] Code of Civil Procedure, 1908, Order XXXIX r 1; The 'balance of convenience' test requires the court to compare the hardship faced by the parties. The court weighs whether if the injunction is refused, the injury to the plaintiff outweighs the injury to the defendant. See *Dalpat Kumar v. Prahlad Singh* (1992) 1 SCC 719.

[128] *Desiccant Rotors International Private Limited v Bappaditya Sarkar & Another* (2009) 112 DRJ 13 (Del)] [13].

[129] *Varun Tyagi v Daffodil Software (P) Ltd*. (2025) SCC OnLine Del 4589 [72]; *VFS Global Services Pvt. Ltd. v Suprit Roy* (2007) SCC OnLine Bom 1083 [18].

[130] *Hi-Tech Systems & Services Ltd vs Suprabhat Ray* (2015) AIR 2015 Cal 261.

[131] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

preliminary merits assessment at the interim stage itself. [132] Thus, the thresholds for injunctions in Indian and English law are considerably different.

d. For completeness, where the restrictive covenant is contained in an employment contract with an arbitration clause (i.e., that the parties agree to refer disputes to arbitration), the employer may choose to seek injunctive relief from the arbitration tribunal (if one is constituted) or from an emergency arbitrator (if the tribunal is not constituted and an emergency arbitration mechanism is available). Most institutional rules used by parties (e.g., the LCIA Rules, the ICC Rules, the SIAC Rules) expressly provide for the power of an arbitration tribunal to grant injunctive relief, and also for an emergency arbitrator to deal with applications for urgent injunctive relief. This power also exists as a matter of the domestic law governing the arbitration. Section 17 of the (Indian) Arbitration and Conciliation Act, 1996, sets out the arbitration tribunal's power to grant injunctive relief. Compared to court proceedings, an application to the arbitration tribunal preserves confidentiality, making this an attractive option in sensitive disputes. Arbitration tribunals have wide discretion in relation to the grant of injunctive relief but, typically, they would apply a test similar to that applied under English law. Where an arbitration is seated in India (i.e., the law governing the arbitration is Indian law), the tribunal may also be guided by the approach of Indian courts.

75. **Evidentiary Burden:**

a. Indian law and English law differ significantly on the evidentiary burdens faced by parties enforcing restrictive covenants. In India, the onus of proof is on the plaintiff (i.e., the employee or party claiming a violation of the covenant) to demonstrate that the restraint is void. This is evident when reading the text of Section 27 alongside the general principle of evidence — that claimants must prove the facts they assert.[133]

b. In English law, a restraint is presumed to be prima facie void.[134] In other words, the burden of establishing the reasonableness of the restraint rests with the party seeking to enforce the contract.[135] This burden is non-trivial, and an employer whose covenant is drafted in overbroad terms will face an uphill task at trial. As a matter of adducing evidence, this may also impact the strategic considerations adopted by parties.

76. **Blue Pencil/Severance:** When challenged under the doctrine against restraint of trade, a non-compete clause that offends public policy may be struck down in its entirety, or the

[132] *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251.
[133] Indian Evidence Act 1872, s 101.
[134] *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) [11-063].
[135] *Herbert Morris Ltd v Saxelby* [1916] A.C. 589, 700, 706–707; *Attwood v Lamont* [1920] 3 K.B. 571, 587–588; *Kores v Kolok Manufacturing Co Ltd* [1959] Ch. 108, 120; Harcus Sinclair LLP v Your Lawyers Ltd [2021] UKSC 32 [72].

offending portion may be severed and struck down. In other words, the judge acts like an editor as he runs a "blue pencil" over the offending words of the clause.

77. In English law, courts have generally attempted to balance judicial interference with the unfairness of terms. On the one hand, striking down terms altogether would be extremely stringent, and on the other hand, only selectively removing the offending parts of restrictive covenants would be outside the court's scope of interference. [136] This is why severance is generally discouraged.[137]

78. The modern position for severance was laid down by the English Court of Appeal in *Beckett Investment Management Group Ltd v Hall.*[138] It authoritatively stated the three criteria to determine whether a restrictive covenant can be severed:

    i. the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains (also known as the blue-pencil test)[139]

    ii. the remaining terms continue to be supported by adequate consideration (Note, however, that this applies only where the employee seeks severance. In the usual situation where the employer seeks it, this requirement can be ignored).[140]

    iii. the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'; i.e.,

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[136] The starting point in the evolution of the law on severance can be traced to *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, 745, where Lord Moulton holds: "It would in my opinion be [a bad example] if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master"; *Also see Tillman v Egon Zehnder Ltd* [2019] UKSC 32 [58] – [60]. This stringent position meant to serve as a deterrent to employers who "deliberately" frame a restraint in unreasonably wide terms, and as an aid to employees who undergo the risk and expense of litigation. In other words, courts would not modify an overbroad restraint to make it more palatable to public policy; rather, they will strike it down altogether. 64. However, in subsequent cases, the stringency of this "clearly severable" test for severance was considered "unsatisfactory." *See Tillman v Egon Zehnder Ltd* [2019] UKSC 32 [83]. Thus, it was refined and liberally developed following the landmark pronouncements in Sadler v Imperial Life Assurance Co of Canada [1988] IRLR 388 and *Marshall v NM Financial Management* [1995] 1 WLR 1461.

[137] *Attwood v Lamont* [1920] 3 KB 571, 595.

[138] [2007] EWHC 238 (Ch).

[139] *Tillman v Egon Zehnder Ltd* [2019] UKSC 32 [85].

[140] For more, *see* ibid [86]: "It goes without saying that an employer who sues on a covenant made otherwise than under seal must show that he provided consideration for it. But why is it said to be a prerequisite of his ability to sever? The answer is surely to be found in the unusual circumstances of the Sadler and Marshall cases, which generated the criteria adopted in the Beckett case. In those two cases it was the claimant employee who secured severance of unreasonable obligations cast by the contract upon himself. In that situation the court needed to satisfy itself (and in each case it did so) that, were his unreasonable obligation to be removed, there would nevertheless remain consideration passing from him under the contract such as would support the obligation which he was seeking to enforce. In the usual postemployment situation, however, the need to do so does not arise."

whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract[141]

All in all, practitioners dealing with English law would need to keep in mind these guiding criteria of severance at the time of drafting.

79. Indian law does not articulate a similarly structured test. Rather, the "blue pencil" rule may be applied where courts sever the 'trivial' and 'technical' parts of an agreement while retaining the 'main' or 'substantial' part of the contract.[142] In *Texco Marketing,* the Supreme Court referenced the "blue pencil" rule to delete the offending clause altogether, since it 'offended the main contract'.[143] However, judicial practice suggests that a structured test (as is in English law) does not prevail in the context of Section 27 — Courts have instead referenced the basic rule and 'read down' clauses to preserve their enforceability.[144] In *Bhavesh Bhatt,* the Bombay High Court read down a clause prohibiting a teacher from teaching in "any other coaching classes" to cover work for another competitor, but not the establishment of another institute.[145] In *Paramount Coaching,* the Delhi High Court interpreted an ambiguous non-compete clause narrowly, ruling that a teacher was prohibited only from holding multiple positions, but not from engaging in a competing business afterwards.[146] Thus, where restraints are drafted ambiguously, Indian judicial practice suggests that courts would read them narrowly to render them inapplicable.

80. **Compensation and Employment Bonds:** One subset of enforcement litigation is concerned with employment bonds, where employees agree to serve employers for a fixed period for a fixed sum upon exit. While these are not technically post-term restraints, Indian courts subject these to keen scrutiny to protect the freedom of trade. In *Vijaya Bank v Prashant Narnaware,* the Indian Supreme Court upheld a minimum service clause of three years, requiring the employee to compensate the employer if they resigned. The Court found it to be a reasonable and fair restraint.[147] It used the principle of public policy in Section 23 of the Contract Act (i.e., preventing unfair and unreasonable contracts in the backdrop of unequal bargaining power).[148] When it comes to employment bonds in the private sector, Courts have treated them as liquidated damages clauses and awarded

[141] *Tillman v Egon Zehnder Ltd* [2019] UKSC 32 [87].
[142] *Shin Satellite Public Co. Ltd. v Jain Studios Limited* (2006) AIR 2006 SC 963.
[143] *Texco Marketing (P) Ltd. v TATA AIG General Insurance Co. Ltd* (2023) 1 SCC 428 [24] – [26].
[144] Wei Zhang and Umakanth Varottil, 'Restraint of Trade' in Shivprasad Swaminathan, Niranjan Venkatesan and KV Krishnaprasad (eds), Foundations of Indian Contract Law (Oxford University Press 2024) 253 – 254.
[145] *Bhavesh J Bhatt v Cyrus N Baxter* (2016) 2017 Del 5649.
[146] *Paramount Coaching Centre Pvt Ltd v Rakesh Ranjan Jha* (2017) LNIND Del 3077.
[147] 2025 INSC 691.
[148] ibid [19]. Arguably, this case turned on the fact that the bond was owned to a Government body, a bond to whom the Court perceived to be necessary and reasonable. For this point, *also see Assn. of Medical Superspeciality Aspirants & Residents v. Union of India,* (2019) 8 SCC 607. For public policy generally, *see Central Inland Water Transport Corpn v Brojo Nath Ganguly* (1986) 3 SCC 156.

'reasonable compensation' where the employer has suffered a loss.[149] Thus, employment bonds protecting legitimate business interests (such as employee training costs)[150] will be upheld.

81. On the other hand, English law differentiates between 'disincentives to resign' and 'disincentives to compete'. Financial penalties which incentivise retention are permitted, but those which restrain the employee from joining a competitor are prohibited. The High Court of England and Wales in *Steel v Spencer Road LLP* held that claw-back provisions (requiring the repayment of a bonus if the employee resigned within three months) were not in restraint of trade, as they did not directly restrict the employee's ability to work for a competitor.[151] In other words, the claw-back was only a disincentive to resign, not a disincentive to compete. In any case, where the disincentive is excessive, it may be hit by the English rule against penalties.[152]

82. The litigation challenges in Indian and English law can thus be summarised as follows:

No.	Issue	Indian Position	English Position
1	**Injunctive Relief**	● The 'balance of convenience' standard is applied. ● The employer must prove that the confidential information is at risk	Preliminary merits assessment on the three prongs: a) Whether a serious issue is to be tried. b) Whether damages would be adequate. c) Balance of convenience.
2	**Evidentiary Burden**	The claimant/employee who claims that the restraint is unreasonable must demonstrate it.	A restraint in prima facie presumed void, and the employer (enforcing party) must prove that it is reasonable.
3	**Severance & The 'Blue Pencil'**	● No structured test exists. ● Courts often "read down" ambiguous clauses to make them valid rather than striking them out.	The *Tillman* three-part test: Severance is allowed if:

[149] *Ledalla Ravichandar v Satyam Computer Services Limited* (2011) City Civil Court Appeal No.259 of 2002 (Telangana High Court) [18]; *Sicpa India Ltd v Shri Manas Pratim Deb* (2011) RFA No. 596/2002 (Delhi High Court) [2] – [3].
[150] *Sicpa India Ltd v Shri Manas Pratim Deb* (2011) RFA No. 596/2002 (Delhi High Court) [2] – [3].
[151] *Steel v Spencer Road LLP* [2023] EWHC 2492 (Ch).
[152] *Giraud UK Ltd v Smith* [2000] IRLR 763 (Employment Appellate Tribunal).

			a) the words can be removed without adding/modifying words. b) the remaining terms are supported by consideration. c) removing the words does not change the contract's 'character'.
4	**Employment Bonds**	If the compensation stipulated serves legitimate aims, it is likely to be upheld (under Section 23 in case of public sector contracts and Section 74 in case of private sector contracts).	Financial penalties that disincentivise *joining a competitor* are considered void. Mere disincentives to resign are not invalid.

b. Practical Strategic Tools to Protect Competitive Advantages

Given the legal position on restrictive covenants, practitioners may utilise the following tools to protect their competitive interests while also ensuring that the covenants are enforceable in Court.

83. **Garden Leave vs Non-Compete:** Practitioners can utilise the carefully drawn distinction between 'garden leave' arrangements and non-competes. While they have a similar end result (i.e., preventing the employee from working for a competitor or competing for a certain period), their enforceability has some judicial support. In *Kuoni Travel v Ashish Kishore,* the Bombay High Court held that a garden leave clause during the employee's notice period was valid, since the employee was still on the company's rolls and receiving full remuneration.[153] In this situation, the garden leave was merely a 'term of service' as opposed to a post-term covenant. However, in *VFS Global v Suprit Roy,* the Bombay High Court declared a garden leave clause to be in restraint of trade since it operated *after* the termination or resignation of the employee.[154]

    a. For practitioners, the takeaway is to structure covenants to run concurrently with the employment term, for instance, (as in *Kuoni*), during a long notice period where the employee does not work. Practitioners in India have suggested that garden leaves are usually used for a period of 3-6 months.[155] However, it must be kept in mind that the employee must stay on the employer's roll and be compensated during this period. Otherwise, the covenant may be declared invalid.

[153] *Kuoni Travel (India) (P) Ltd. v Ashish* Kishore (2007) SCC OnLine Bom 1604 [5].
[154] *VFS Global Services Pvt. Ltd. v Suprit Roy* (2007) SCC OnLine Bom 1083 [13].
[155] Anshul Prakash and others, 'Restrictive covenant clauses Q&A: India' (Practical Law, 31 January 2021) <uk.practicallaw.tr.com/w-023-5588> accessed 8 January 2026.

b. In English law, garden leave is also treated as a lawful device and, importantly, the existence of paid garden leave may reduce the period for which a court will enforce a separate post-termination non-compete — courts will credit the time already served on garden leave against the non-compete period.[156]

84. **Provide Consideration in Exchange for Covenants**: In English law, the quantum of consideration offered in exchange for a restrictive covenant is a relevant factor in the reasonableness assessment.[157] In other words, a court is more likely to uphold a covenant where the covenantor has received substantial commercial benefit in exchange for accepting the restriction.[158] While there is no Indian precedent squarely addressing this issue, the fact that the Bombay High Court in *Kuoni* upheld a fully paid garden leave during the notice period suggests that the payment of consideration factors into the reasonableness of a restriction.[159]

85. **Document the Legitimate Interests in Question:** We know that in English law, and in commercial contexts in Indian law, the existence of the employer's legitimate interests in preventing competition is a primary factor in determining the reasonableness of the restraint. Since the validity of a covenant is judged at the date of its signing,[160] a contemporaneous record of the protected interests would be useful during litigation. Though not determinative (and ultimately subject to judicial determination), an express acknowledgement of the interests may reduce the risk of the court viewing the covenant as an overbroad restraint.

86. **Define the Covered Methods of Solicitation:** Even if non-solicitation clauses are held enforceable, parties enforcing restrictive covenants have the burden of proof to show that an alleged breach meets the definition of 'solicitation.'[161] Thus, contractually specifying the methods of covered solicitation covers indirect forms of solicitation such as targeted advertisements, social media communication and other such instances which have been a source of litigation in the past.[162]

87. **Anchor the Covenant in a Commercial Agreement (if Any):** As explored above, in India, non-compete and non-solicitation agreements are invalid if they operate beyond the term of the agreement. Thus, restrictive covenants continue to operate as long as the

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[156] *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251; *Provident Financial Group Plc v Hayward* [1989] IRLR 84.
[157] *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) [11-063] ; *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 318, 323; *Alec Lobb (Garages) Ltd v Total Oil* (Great Britain) Ltd [1985] 1 W.L.R. 173, 179.
[158] *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269.
[159] *Kuoni Travel (India) (P) Ltd. v Ashish* Kishore (2007) SCC OnLine Bom 1604 [5].
[160] *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) [11-064]; *Commercial Plastics Ltd v Vincent* [1965] 1 Q.B. 623, 644; *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308, 1309; *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1203.
[161] *FL Smidth Pvt Ltd v Secan Invescast (India) Pvt Ltd* (2013) 1 CTC 886 (Mad) [41] – [43].
[162] ibid; *Towry EJ Ltd v Bennett* [2012] EWHC 224 (QB); *Also see for instance, Planet Fitness Pty Ltd v Brooke Dunlop & Ors* [2012] NSWSC 1425.

agreement is not terminated. In certain situations, it is possible to embed the restrictive covenants in agreements where the parties share a commercial relationship rather than one of only service/employment. An illustrative case is *Paul Deepak Rajaratnam,*[163] where a non-compete and non-solicit covenant on the directors of a company was contended to be invalid. This non-compete was embedded in the shareholders' agreement. The Delhi High Court held that the covenants were valid because, although the directors ceased to perform managerial/operational functions (as employees), they continued to be directors by virtue of the shareholder agreement, which had not been terminated.[164] Since the non-compete was in the shareholder agreement, the covenants operated *during* the term of the contract, and the non-compete and non-solicitation clauses were enforced. [165] This could be extended to other situations where the parties have a commercial relationship — the Bombay High Court held in *Novartis Vaccines* that the contractual obligations arising from the joint venture continued to subsist.[166]

a. In such situations where the restrictive covenants are anchored in commercial agreements, the party seeking to escape the covenants would have to terminate the commercial agreement altogether (for instance, a shareholder's agreement, partnership deed, or joint venture). The termination of such agreements may have its own formal procedure, and they operate independently of employment agreements, which can be terminated unilaterally. Moreover, parties may be hesitant to terminate commercial agreements since this would deprive them of the benefits arising from them. For this reason, anchoring restrictive covenants in a commercial agreement may increase the chance that they are enforced, since the agreement would continue to be operative.

88. **Assess Competition Law Risk in Commercial and M&A Contexts:** Practitioners operating in the M&A context must conduct a competition law assessment in parallel with the common law analysis. In India, the CCI has demonstrated that it will scrutinise non-compete provisions for anti-competitive effect, focusing on duration, geographic scope, and the range of products and persons covered. The industry benchmark that has emerged from CCI practice is roughly three to four years for post-closing restrictions. In the UK, competition law applies independently of the common law reasonableness analysis, and the CMA's ancillary restraints guidance indicates that protection is available for up to two years (where goodwill is transferred) or three years (where customer loyalty is also transferred) for non-competes on a business sale.

[163] *Paul Deepak Rajaratnam v Surgeport Logistics (P) Ltd*. (2025) SCC OnLine Del 5062.
[164] ibid [58].
[165] ibid [76].
[166] *Novartis Vaccines & Diagnostics Inc. v Aventis Pharma Limited* (2009) SCC OnLine Bom 2067 [37].

Practical Strategic Tools to Protect Competitive Advantages	
1	**Garden Leaves:** Maintain employees on employment rolls for a limited period while continuing to provide the employment benefits. This can be used to protect time-sensitive information, without being affected by the enforceability challenges of non-compete covenants.
2	**Provide Consideration in Exchange for Covenants:** Compensation/other considerations may increase the likelihood that a covenant is held to be reasonable.
3	**Document Legitimate Interests for Covenants:** Instead of relying on circumstantial evidence at the litigation stage, clearly document all legitimate interests behind the restrictive covenant to demonstrate its enforceability.
4	**Contractually Specify Covered Methods of Solicitation:** To overcome evidentiary issues during litigation regarding non-solicitation clauses, define the covered methods of solicitation to include indirect methods of solicitation.
5	**Anchor the Covenant in a Commercial Agreement:** Commercial agreements operate independent of employment agreements. Anchor restrictive covenants in a subsisting commercial instrument that requires a formal dissolution process, unlike employment agreements which can be terminated unilaterally. This keeps the covenants valid since they operate during the subsistence of the agreement in which they are embedded.
6	**Conduct a Parallel Competition Law Assessment:** In M&A contexts, assess duration, scope, and product/geographic coverage against CCI practice norms (India) and CMA ancillary restraints guidance (UK). Ensure no-poaching arrangements or wage-information sharing between competitors does not amount to cartel conduct.

V. CONCLUSION

Drafting restrictive covenants, especially in India, requires careful balancing between commercial needs and statutory restrictions. This note has attempted to lay down the doctrinal position on non-compete and non-solicitation clauses in India by tracing their enforceability under Section 27 across employment and commercial contexts. It finds, on a comparative analysis, that the Indian position on Section 27 is more stringent than the English position, and thus deserves special doctrinal attention, particularly in operationalising restrictions only during the term of the agreement. Moreover, the Indian position also presents unique enforcement challenges — from evidence to severance and employment bonds. Though the jurisprudence in some of these fields

may be underdeveloped, a comparative analysis of other common law jurisdictions gives us first principles insight into how such situations may unfold. Taking account of these challenges, practitioners can strategically draft covenants to protect their competitive advantages while also ensuring that they are enforceable.