Published on 30 May 2024

RESTRICTIVE COVENANTS IN AN EMPLOYMENT RELATIONSHIP

An Indian and Singapore Comparative Perspective

[2024] SAL Prac 10

In the contemporary landscape of rapid job transitions and the consequent challenges faced by organisations in safeguarding their proprietary interests, the integration of restrictive covenants into employment contracts has emerged as a vital strategy. This article delves into the legal nuances surrounding the enforcement of restrictive covenants in both India and Singapore, with a focus on employment contracts. Through a comparative analysis, it explores the divergent approaches taken by the legal systems of these two countries. While India's legal framework scrutinises restrictive covenants within the ambit of s 27 of the Indian Contract Act 1872, Singapore relies on common law principles, especially in the employment context. The article elucidates the evolution of legal precedents and the key considerations influencing the enforceability of restrictive covenants, shedding light on the intricacies of protecting businesses' interests amidst a dynamic employment landscape. The article further explores evolving market practices regarding confidentiality, non-compete, and non-solicitation clauses in India and Singapore, particularly within the technology sector.

Veena **GOPALAKRISHNAN**
BSL, LLB (ILS Law College);
Partner, Trilegal.

Vinduja **MENON**
BBA, LLB (Karnataka State Law University);
Senior Associate, Trilegal.

Atishay **KUMAR**
BA, LLB (Guru Gobind Singh Indraprastha University);
Associate, Trilegal.

Aishwarya **MYSORE**
BA, LLB (Karnataka State Law University);
Associate, Trilegal.

TAY Yong Seng
BCL (Oxford), MA (Oxford);
Partner, Allen & Gledhill LLP.

Shjoneman **TAN**
LLB (Singapore Management University);
Associate, Allen & Gledhill LLP.

Kheshin **CHEONG**
LLB (Singapore Management University);
Practice Trainee, Allen & Gledhill LLP.

I. Introduction

1 We live in a time where employees often become the custodians of considerable confidential information during their employment tenure. In this era of fast-paced business evolution, a variety of opportunities beckons employees, leading to a phenomenon of swift job-hopping. This liberalised market, while invigorating, also confronts organizations with unique challenges: guarding business interests, protecting confidential data, and curbing employees from defecting to competitors.

2 Companies have devised a shield against these modern conundrums by integrating restrictive covenants into employment contracts. These covenants act as a compass, guiding the course of an employee's engagement, both during their tenure and beyond. Common protective measures adopted include preventing employees from joining rival firms, mandating the confidentiality of company information, and precluding employees from soliciting current employees, customers, vendors, or partners. Additionally, employees might find themselves restricted from undertaking other engagements while working with an organisation. These covenants, while vital safeguards for a company's interests, are subject to restrictions in the legal frameworks of different countries.

3 The above phenomena – job hopping and the use of restrictive covenants – take place not just domestically but also on a cross-border basis. This article examines the key legal principles related to the enforcement of such restrictive covenants, from the Indian perspective and with a view on the corresponding Singapore legal position.

II. Restrictive covenants in employment contracts

A. India

4 Under the Indian Contract Act 1872,[1] if a contract contains clauses that are a blanket prohibition against an individual from participating in a lawful profession, trade, or business, those specific terms cannot be enforced by law.

B. Singapore

5 In Singapore, the restraint of trade doctrine is not provided under legislation but is instead a principle developed from common law. In the context of employment contracts, restraint of trade clauses tend to be more strictly scrutinised by the Singapore courts. This stricter approach towards such clauses (in the context of employment contracts) is undergirded by the rationale of "an individual's freedom to exercise his skills as an employee as well as the benefit to wider society"[2] resulting from "the free flow of expertise".[3] Nonetheless, the courts recognise that an employer has legitimate proprietary interests (such as customer connections, trade secrets and a stable trained workforce) which merits protection.[4] Therefore, an employer cannot impose a blanket prohibition on an employee's right to work, but can impose restraints so long as it (a) protects a legitimate proprietary interest; and (b) is no wider than reasonably necessary to achieve such purpose.

1 Act No 9 of 1872.
2 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [45].
3 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [45].
4 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [94].

III. Different types of restrictive covenants and their applicability

6 The restrictive covenants usually used in India and Singapore come in various forms, each serving a specific purpose in safeguarding a company's competitive advantage and maintaining its market position. Key categories of restrictive covenants are discussed below.

A. Non-compete clauses

7 A non-compete clause in an employment agreement typically restricts employees from engaging with a competitor or initiating a business similar to that of their present employer. This prohibition may apply during the tenure of employment and/or extend for a defined period following the employee's cessation of employment. Such a limitation aids in safeguarding a company's trade secrets, proprietary information, and specialised know-how, preventing them from falling into its competitors' hands. By curbing an employee's potential to work for competitors, the company preserves its competitive advantage and circumvents potential harm arising from the leakage of vital information or loss of key personnel.

8 Typically, in employment agreements, a non-compete clause is only valid during the period of employment. It becomes unenforceable once the employment ends. Therefore, after the conclusion of the employment relationship, the employee is no longer restricted by this clause from participating in similar competitive activities.

(1) India

(a) Restrictions on employees during their employment period

9 *Niranjan Shanker Golikari v Century Spinning and Manufacturing Company*[5] was one of the earliest cases that dealt

5 (1967) 2 SCR 378.

with the enforceability of restrictive covenants. In this case, the negative covenant restricted the appellant from performing similar or substantially similar work for any other employer during the period of his employment with the respondent company. The Supreme Court of India held that the negative covenant was limited in terms of time, nature of employment, and geographic area, making it appropriate for safeguarding the interests of the respondent. It concluded that negative covenants were generally not considered restraints of trade under s 27 if they operate *during* the employment period. The Supreme Court of India also reaffirmed that courts had the authority to issue a limited injunction to the extent it was necessary to protect an employer's interests.

10 Following this, the principle has been predominantly adhered to by the judicial system. Non-compete restrictive covenants have been held to be valid and enforceable *during* the employment period, as long as the restraint is not unconscionable, excessively harsh, unreasonable, or biased. The provision of relief in such scenarios also hinged on the unique facts and circumstances involved.

(b) Restrictions on former employees after their employment period

11 On the other hand, non-compete restrictive covenants have not often been held to be valid and enforceable *after* the employment period has ended.

12 For instance, in *Paramount Coaching Centre Pvt Ltd v Rakesh Ranjan Jha*[6] the plaintiff initiated legal action, seeking a permanent injunction against the defendant, a teacher previously employed by the plaintiff (a private student coaching centre), to enforce certain restrictions agreed in a memorandum of understanding ("MOU") between the parties. The High Court of Delhi, in this case, prohibited the defendant from providing private tuition to any student enrolled in the plaintiff's coaching institute or any other coaching institute until the expiry of term of the MOU. The

6 2017 (72) PTC 409 (Del).

court took into consideration that such restriction did not restrict the defendant from carrying out his profession. He was indeed permitted to instruct students who were not registered with either the plaintiff's institute or any other coaching institution and therefore had means to livelihood.

13 In *Chem Academy Pvt Ltd v Sumit Mehta*,[7] two petitions were filed by a coaching institute, against its former employees to enforce certain non-compete restrictions. The individuals, in this case, were initially appointed for a fixed term of three years and they could resign during this term by providing a prior notice of three months. However, they resigned during the term of the agreement without providing notice (due to alleged non-payment of salaries). Subsequent to their resignations, both individuals joined a competing enterprise. The petitioner requested injunctions to prohibit the ex-employees from participating in analogous activities with any of its competitors, for the balance unexpired duration of their agreements with the petitioner. In this case, the court refused to grant the requested injunctions as it would compel the respondents either to sit idle and be prevented from earning their livelihoods, or to serve the petitioner. The court observed that it cannot compel individuals against their will to perform a contract that is dependent on their personal qualifications. The court further held that the petitioner may seek monetary compensation for the respondents' failure to serve their notice period.

14 Therefore, among other considerations, the following factors were pivotal in the court's assessment of the non-compete restrictions: (a) whether such restrictions operated during or post-employment; and (b) whether such restrictions violate s 27 by imposing a restraint of trade on the concerned employee. To summarise, a non-compete restrictive covenant is enforceable during the employment period and is not considered a restraint of trade under s 27, provided the restriction is not excessively severe, unreasonable, unfair, or biased. Conversely, a non-compete restrictive covenant is typically unenforceable *after* employment has ceased.

7 MANU/DE/3082/2021.

(2) Singapore

15 Under Singapore law, the courts have permitted restrictive covenants such as non-compete clauses (a) during an employee's period of employment with their employer; and (b) after the employee's period of employment with their employer has ceased.

(a) Restrictions on employees during their employment period

16 Non-compete clauses are generally and necessarily accepted and upheld in Singapore *during* the period of employment. The rationale is that there is an implied duty of fidelity on an employee during the period of his employment.[8] In this regard, the Court of Appeal's observations in *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd*[9] on the distinction between negative covenants during employment (*viz*, during their garden leave period) and post-employment are instructive:[10]

> 73 This is unlike the garden leave situation, which is concerned with negative covenants during employment, rather than post-employment. As Alistair McGregor QC, 'Garden Leave & Post Termination Restraints: Their Interaction and the Legal Problems Generated' (available online at http://www.11kbw.com/articles/docs/PostTermsandGardenAMcG.pdf (accessed on 6 August 2012)) explains (at [15]):
>
> > That distinction is that during the currency of an employment contract, there is in existence an implied duty of fidelity on the employee that can be enforced by injunction restraining him working for rivals irrespective of the existence of any express contractual term to that effect. Once the contract comes to an end, however, that duty of fidelity or good faith disappears. Any post termination restraint must then satisfy the doctrine of restraint of trade as drawn and properly construed.

8 Ravi Chandran, *Employment Law in Singapore* (LexisNexis,6th Ed, 2019) at paras 5.34–5.38 (especially para 5.38).
9 [2012] 4 SLR 371.
10 *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] 4 SLR 371 at [73].

> *Post termination employment restraints are thus not assessed with the same level of flexibility as garden leave provisions.* Where it comes to post termination restrictions, we find that the relevant question is whether, how, and what effect the forfeiture provision has on the actions of the employee and his ability to exercise his skill and contribute to the market [post-]employment.
>
> [emphasis in original omitted; emphasis added in italics]

17 An issue, however, may arise where there is no express non-compete clause to prohibit an employee from engaging in other employment that is in direct competition with his employer, during the period of employment. This is where the courts have stepped in to imply a duty of good faith and fidelity as held in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*[11] ("*Man Financial*").

18 In *Hivac Ltd v Park Royal Scientific Instruments Ltd*[12] ("*Hivac*"), the employees concerned were highly skilled workers and had access to manufacturing data of their employer. During their spare time, these employees had worked with the rival defendant company.

19 Even though there was no evidence that the employees had divulged the manufacturing data, there existed this potential that they could inflict significant damage on their employer. Therefore, the court granted an injunction in restraining the rival defendant company from employing the employees during their period of employment.

20 *Hivac* was cited in the case of *Nanofilm Technologies International Pte Ltd v Semivac International Pte Ltd*[13] ("*Nanofilm Technologies*").

21 The Singapore High Court held that:[14]

> 154 … an employee who 'moonlights' may be in breach of his duty of fidelity such as where his 'second job' (albeit outside

11 [2008] 1 SLR(R) 663.
12 [1946] 1 Ch 169.
13 [2018] 5 SLR 956.
14 *Nanofilm Technologies International Pte Ltd v Semivac International Pte Ltd* [2018] 5 SLR 956 at [154].

> of office hours) is for a competitor or another business wherein there is a real risk that confidential information of the employer may be disclosed or misused whether by accident or design: see [*Hivac*] at 172–174 … that the fact the work is done during spare time is not decisive. This may be especially true where there is a 'whole time' clause in the contract, as in the present case.

22 Whether the duty of good faith and fidelity is breached, one would thus have to look at the nature of the work involved by the employee in his other engagement and whether there is the presence of a "whole time" clause. Furthermore, the court in *Nanofilm Technologies* held that the ex-employee, by engaging in design work for the plaintiff's rival company, breached the duty of fidelity, even if the work was done after hours.

23 However, under Singapore law, where employees are placed on "garden leave" during their notice period, such employees may "buy-out" long term employment contracts, thus minimising the utility of restrictive covenants *during* their employment (*ie*, during their garden leave). This is provided under s 11 of Singapore's primary employment legislation – the Employment Act 1968 ("EA 1968")[15] which permits an employee to pay compensation to their employer in lieu of serving their notice period.[16]

(b) Restrictions on employee after their employment has ceased

24 However, as seen from the article thus far, the issue with such non-compete clauses comes after the period of termination, *ie*, the end of the employment relationship. Whichever the type of restraint of trade clause, the test applied would be that in *Man Financial*. The reasonableness of restrictive covenants as always, is measured by the three yardsticks – activity restriction, temporal restriction and geographical restriction.

15 2020 Rev Ed.
16 Employment Act 1968 (2020 Rev Ed) s 11(1).

25 The case of *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd*[17] ("*PH Hydraulics*") is a positive example where the court held that a non-competition clause was enforceable.

26 In *PH Hydraulics*, the employer designed and manufactured marine hydraulic and electrical installations. The employee entered into an employment agreement with a restraint of trade clause prohibiting the employee from engaging in "any activity or business which shall be in competition with the business of [the employer] and its associated company".[18]

27 The Singapore High Court held that the industry in which the employee was working, was a "relatively small and specialised one".[19] If protection was not given, it would allow employees of companies in such specialised industries to leave for its competitors soon after receiving free training.[20] Furthermore, the employee had "transferable skill sets" and an "ability to thrive in different industries and in different countries", so the restrictive covenant "would not have a seriously adverse impact to his livelihood".[21]

28 Another positive example where a restraint of trade clause was successfully upheld is the case of *Tan Kok Yong Steve v Itochu Singapore Pte Ltd*[22] ("*Itochu*"). In that case, the court upheld a two-year international non-compete clause in an employment contract.

29 In *Itochu*, the employee concerned was a cement trader and his employer's representative in certain markets such as Vietnam and the Philippines. The employee was in charge of

17 [2012] 4 SLR 36.
18 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [6].
19 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [64].
20 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [64].
21 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [68].
22 [2018] SGHC 85.

those markets and had spent four years in these markets. As a result, over time, the employee had built up a significant client base in these markets for his employer.

30 In this case, the Singapore High Court held that the legitimate proprietary interest to be protected is that of Itochu Singapore Pte Ltd's clients and trade connections.

31 The evidence in that case showed that given Mr Tan's knowledge and influence over the company's clients, he could easily have diverted business opportunities away to himself or his new employer.[23] As such, the Singapore High Court upheld a geographical restriction that extended to Vietnam and the Philippines.[24]

32 If the restraint of trade clause was "defined narrowly, such that the employee is only restrained from being involved in areas where he had previously had material and significant involvement in while employed by the employer, it can still be enforceable".[25]

B. Non-solicitation clauses

33 Within the framework of an employment relationship, a non-solicitation clause generally serves to restrict an employee from intentionally enticing or soliciting the employer's employees, clients, or business partners. Businesses typically embed non-solicitation obligations in employment contracts to safeguard their legitimate interests and to prevent any adverse impact on themselves or their operations once an employee's tenure concludes. In India, the constraints on the validity and

23 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [87].

24 See also *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [94], [95] and [98]; see also Tay Yong Seng, Ang Ann Liang & Alyssa P'ng, "Restrictive Covenants in Employment Law: When Are They Enforceable?" [2018] SAL Prac 17 at para 71.

25 Tay Yong Seng, Ang Ann Liang & Alyssa P'ng, "Restrictive Covenants in Employment Law: When are They Enforceable?" [2018] SAL Prac 17 at para 75.

enforceability of non-solicitation clauses are primarily drawn from s 27 of the Indian Contract Act 1872.[26]

(1) India

34 Non-solicitation clauses in employment agreements in India are enforceable *during* the period of employment. However, their validity *beyond* the term of employment is limited to specific circumstances. A significant factor that influences the validity and enforceability of a non-solicitation covenant is whether the restrictive covenant reasonably intends to protect business interests and confidentiality.

35 In the case of *Embee Software Private Limited v Samir Kumar Shaw*,[27] the High Court of Calcutta threw light on what amounts to a breach of non-solicitation restrictions in an employment context. The court observed that if the act of soliciting by the respondents was in such active form that it induces the customers of the plaintiff to break their contract with the plaintiff and enter into a contract with the said respondents or prevents other persons from entering into a contract with the plaintiff, such act of soliciting cannot be permitted. Further, in *Desiccant Rotors International Private Limited v Bappaditya Sarkar*,[28] a former manager of Desiccant Rotors International Pte Ltd ("Desiccant") had signed an obligation agreement, which prohibited him from interfering with the relationship of Desiccant with its customers, suppliers, and employees for a period of two years after cessation of his employment. However, he joined Desiccant's competitor just three months after his resignation. The court upheld the injunction granted by the lower court, restraining him from approaching Desiccant's customers and suppliers for the purpose of soliciting business in direct competition with the business of Desiccant.

36 Courts in India have treated non-solicitation clauses differently in the case of commercial contracts, as opposed to

26 Act No 9 of 1872.
27 AIR 2012 Cal 141.
28 (2009) 112 DRJ 13 (Del).

employment contracts. In the landmark case of *Wipro Limited v Beckman Coulter International SA*[29] ("*Wipro*") the petitioner sought orders restraining the respondent from employing any person who is or has been employed with the petitioner, pending arbitral proceedings. Both the petitioner and respondent were commercial business parties; neither was an employer nor employee. The court evaluated the validity of the non-solicitation obligation arising out of a canvassing representative agreement executed between the parties, which prescribed that the employees of the petitioner will not be solicited by the respondent for two years after the termination of the agreement. Given the fact that the restriction was cast upon the contracting parties and not the employees of the contracting parties, it was viewed more liberally than a restriction in an employer-employee contract. The High Court of Delhi in this case held in the context of the non-solicitation clause in the canvassing representative agreement that "the non-solicitation clause does not amount to a restraint of trade, business or profession and would not be hit by Section 27 of the Indian Contract Act, 1872 as being void". Further, the court opined that the restriction, in this case, was only between the contracting parties (who were two businesses), and therefore, such a restriction was to be viewed more liberally than a restriction in an employment contract.

37 In another statement upholding the validity of restrictive covenants during the existence of a contract, the court in *Wipro* observed that negative covenants in contracts linked to positive covenants during the *subsistence* of a contract be it of employment, partnership, commerce, agency, or the like, would not normally be regarded as being in restraint of trade, business, or profession unless the same are unconscionable or wholly one-sided.

(2) Singapore

38 In Singapore, as mentioned above, the test applicable to all types of restraint of trade clauses is that set out in *Man Financial*. As stated in *Man Financial*, the maintenance of a stable,

29 2006 (131) DLT 681.

trained workforce is a legitimate proprietary interest that the employer is entitled to protect via a non-solicitation clause.

39 The case of *3D Networks Singapore Pte Ltd v Voon South Shiong*[30] ("*3D Networks*"), is a typical scenario which shows the importance and reason why employers insert such non-solicitation clauses in employment contracts. In *3D Networks*, a trusted former employee had resigned and collaborated with a competitor.[31] In doing so, the trusted former employee had swept up with him, a large swathe of his former employer's clients and other employees.[32]

40 The issue when it comes to many non-solicitation clauses as in the present case is the fact that it prevents the former employee from soliciting any employee. The Singapore High Court stated that:[33]

> As noted by the court in *Man Financial* (at [110]), 'it would generally be more difficult to justify a non-solicitation clause which covers the solicitation of just "any" employee'. Indeed, the court [in *Man Financial*] elaborated that:
>
> > … [I]f the non-solicitation clause concerned covers employees whose work entails very minimal (or even no) expertise and does not form an integral part of the employer's operations, it would (absent extraordinary circumstances) be extremely difficult for the employer to justify the reasonableness of that particular clause.

41 Furthermore, the court held that:[34]

> The notable questions that may be asked include the categories of colleagues over whom the employee in question had influence, and the ease with which the employer might replace departed employees.

42 Therefore, the non-solicitation obligation should go no further than what is necessary to protect the plaintiff's interest in having a stable, trained workforce.

30 [2022] SGHC 167.
31 *3D Networks Singapore Pte Ltd v Voon South Shiong* [2023] 4 SLR 396 at [1].
32 *3D Networks Singapore Pte Ltd v Voon South Shiong* [2023] 4 SLR 396 at [1].
33 *3D Networks Singapore Pte Ltd v Voon South Shiong* [2023] 4 SLR 396 at [37].
34 *3D Networks Singapore Pte Ltd v Voon South Shiong* [2023] 4 SLR 396 at [38].

43 In *3D Networks*, the court held that the non-solicitation clause was not valid or enforceable. This was due to the fact that:[35]

> … the first defendant's job scope during his employment with the plaintiff was carefully delineated in respect of sales employees only. The plaintiff has not shown that the first defendant possessed influence over all non-sales employees to any significant degree. The plaintiff has also not shown that all of its employees were integral to its operations or difficult to replace. [emphasis in original omitted]

C. Remedies for breaches of non-compete and non-solicitation clauses

(1) India

44 In cases where non-solicitation and non-compete restrictions have been held valid, the reliefs available to employers are in the nature of compensatory damages or injunctive remedies. When the damage is actual and quantifiable, and the party prays for damages, typically the courts in India award damages. In cases where actual damage has not occurred or the petitioner does not pray for awarding damages, the court grants an injunction restraining the respondent from future solicitation.

(2) Singapore

45 In Singapore, the primary relief for breaches of non-solicitation clauses is injunctive relief instead of damages.

46 In deciding whether to grant injunctive relief, the key consideration for the court is whether the employee demonstrated a proclivity for breaching the restrictive covenant, such that an injunction would be warranted so as to better enforce it.[36] In *Itochu*, the Singapore High Court granted the injunction as the employee had demonstrated a proclivity to breach his obligations under the non-competition undertaking. For example, the employee

35 *3D Networks Singapore Pte Ltd v Voon South Shiong* [2023] 4 SLR 396 at [40].
36 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [108], citing the decision in *Heller Factoring (Singapore) Ltd v Ng Tong Yang* [1993] 1 SLR (R) 495.

attempted to establish other client connections through his corporate vessel which he had set up when he left his employer.[37]

47 Damages are generally not awarded as a remedy for breaches of non-solicitation or non-competition clauses. This is because where there has been a breach of a non-competition or non-solicitation clause, the principal losses typically suffered by the employer would be client connections and loss of a stable trained workforce. Such losses have been recognised as difficult to quantify or potentially impossible to compensate in damages.[38]

48 However, the Singapore courts have recognised "*Wrotham Park* damages" as a head of damages which can be awarded for a breach of a restrictive covenant.[39] In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,[40] the defendant's land was subject to a restrictive covenant which provided that the defendant could only build on the land with the claimant's consent. In breach of this covenant, the defendant built 14 houses on the land without the claimant's consent. The claimant applied for a mandatory injunction for the houses to be demolished. However, the court declined to grant the mandatory injunction on the basis that it would be socially wasteful to demolish the houses. Therefore, the court awarded damages in lieu of the injunction, calculated on the basis of the sum that would have hypothetically been demanded by the claimant in exchange for relaxing the covenant. Hence, *Wrotham Park* damages are calculated on the basis of a hypothetical bargain between parties for the price to be charged in exchange for the relaxation of a restrictive covenant.

49 While it is theoretically possible for an employer to mount a claim for *Wrotham Park* damages for breaches of restrictive covenants, such a claim is often difficult to succeed. First, *Wrotham Park* damages is based on a hypothetical bargain between the parties and requires evidence on the sum which the breaching employee would have accepted in exchange for waiving the restrictive covenant. Second, *Wrotham Park* damages are often

37 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [109].
38 *Hi-P International Ltd v Tan Chai Hau* [2020] SGHC 128 at [11].
39 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [335].
40 [1974] 1 WLR 798.

awarded in lieu of an injunction. Where the court has granted an injunction in favour of the employer, it would generally not award *Wrotham Park* damages as it would be akin to allowing double recovery.[41]

D. Confidentiality or non-disclosure agreements

(1) India

50 Confidentiality or non-disclosure agreements obligate employees to maintain the confidentiality of any proprietary information, trade secrets, or sensitive data including customer lists, financial data, marketing strategies, and any other information not available to the public which the employee may have access to during the course of their employment. This information is crucial to the company's success. By requiring employees to keep such information confidential, businesses can protect their trade secrets and intellectual property from unauthorised disclosure or misuse. Employees are prohibited from using this information for their personal gain or for the benefit of a new employer, as this could result in significant business disruptions for the current organisation.

51 In India, restrictive covenants in the nature of confidentiality obligations are generally enforced during the term of an employment contract as well as post-termination of an employment contract. Courts in India have recognised the need to reasonably protect confidential information of employers and therefore, have usually upheld the confidentiality obligations in an employment contract as valid and enforceable.

52 In the case of *Homag India Private Ltd v Ulfath Ali Khan*,[42] the first defendant was an employee of the plaintiff company and had access to highly confidential and commercially sensitive information pertaining to the plaintiff's business, products, and operations, including the customer database and details of contracts. The plaintiff asserted that the first defendant, while

41 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [339].
42 MANU/KA/1569/2012.

being employed with the plaintiff, had sent e-mails containing the plaintiff's confidential information to the second defendant, who is a direct competitor. Before officially severing ties with the plaintiff's organisation, the first defendant had already commenced work with the second defendant, thereby further breaching the employment terms. In light of the same, the court issued a temporary injunction against the defendants and refrained them from carrying on business in India or carrying on business with, dealing with, or in any manner transacting with any of the customers of the plaintiff by utilising confidential information. The court relied on the principle that maintenance of secrecy plays an important part in securing to the owner of an invention the uninterrupted proprietorship of marketable know-how, which has been deemed a form of property, is enforceable at law.

53 In the case of *Tapas Kanti Mandal v Cosmo Films Limited*,[43] Tapas Kanti Mandal ("Tapas Kanti") had executed a "secrecy agreement" with Cosmo Films Ltd ("Cosmo Films"), which contained a provision that prohibited him from working for a competitor for three years after cessation of his employment with Cosmo Films. However, Tapas Kanti resigned from services at Cosmo Films and was to join a competitor. Cosmo Films argued that during the course of his employment, he acquired valuable knowledge and trade secrets, including information about products, manufacturing processes, projects, and future plans and due to which he should be bound by his contractual obligations to protect the intellectual property, confidential information and refrain from benefiting competitor companies. The Bombay High Court stipulated that a negative covenant is considered an inequitable, onerous, and oppressive term and, therefore, an employee seeking better employment opportunities would not be restrained on the basis that they have confidential information which, if disclosed, may adversely affect the interests of the employer.

43 2019 (1) MhLJ 386.

54 The court in the case of *Hi-Tech Systems & Services Ltd v Suprabhat Ray*,[44] upheld the operation of a post-termination confidentiality obligation. The plaintiff, in this case, was in the business of manufacturing, selling, and providing services for technologically advanced products and equipment in the power and process sector industries. The plaintiff filed an application before the court against its ex-employees, seeking an injunction to prevent them from disclosing or using the plaintiff's computer database containing confidential information and trade secrets. Post cessation of their employment with the plaintiff company, the ex-employees allegedly founded a competing company (one of the respondents in this case) in order to divert the plaintiff's business and clients. The plaintiff claims that the ex-employees' conduct violated their employment contracts, confidentiality agreements, and non-solicitation agreements. The court observed that in a *quia timet* action, it can order an injunction if there is an imminent danger of substantial injury. The respondents were barred from serving as sales agents or creating breaches in the plaintiff's contracts, but they were permitted to do similar operations without using the plaintiff's database or trade secrets. In this case, the court discussed what the respondents could and could not do. The court stated:

> A trade secret or a business secret may relate to financial arrangement, the customer list of a trader and some of the information in this regard would be of a highly confidential nature as being potentially damaging if a competitor obtained such information and utilized the same to the detriment of the giver of the information. Business information such as cost and pricing, projected capital investments, inventory marketing strategies and customer's list may qualify as his trade secrets. The Court needs to find out if the information that were acquired during the course of their employment are now being used as the spring board to enable the said respondents to exploit such database in the course of their business.
>
> Since [the court has] held that the said respondents have acted in breach and are in the process of utilizing such trade secrets and confidential information the said respondents are restrained from acting as a selling agent of Hora, Germany or Sales representatives for three years from January, 2014. The

44 AIR 2015 Cal 261.

> said respondents shall not procure any breach of any existing contract of the plaintiff with the third parties. This order, however, shall not prevent the respondents from carrying [on] any business, which may be [the] same and/or similar to the plaintiff without using and/or utilizing the database and trade secrets of the plaintiff in course of their business.

(2) Singapore

55 The "employer's trade secrets and confidential information, if disclosed, would be advantageous to the employer's competitors … Trade secrets have long been considered to be a legitimate proprietary interest of the employers".[45]

56 The Singapore courts have generally observed two ways to protect confidential information: the first being an express contractual duty of confidentiality and the other through the equitable doctrine of breach of confidence.

57 The interplay between an express contractual duty of confidentiality and obligations of confidentiality in equity was explained by the Singapore Court of Appeal in *Adinop Co Ltd v Rovithai Ltd*[46] ("*Adinop*"). The explanation in *Adinop* was summarised in *Asia Petworld Pte Ltd v Sivabalan s/o Ramasami*[47] ("*Asia Petworld*") as follows:[48]

> 36 …
>
> (a) An express contractual confidentiality obligation is to be construed in accordance with the usual principles of contractual interpretation to determine the extent of confidentiality obligations.
>
> (b) The express contractual obligation may be more extensive than an equitable duty, for example where certain information is agreed to be treated as confidential even though it would not be so treated if considered only under equitable principles.

45 Tay Yong Seng, Ang Ann Liang & Alyssa P'ng, "Restrictive Covenants in Employment Law: When are They Enforceable?" [2018] SAL Prac 17 at para 15.
46 [2019] 2 SLR 808.
47 [2022] 5 SLR 805.
48 *Asia Petworld Pte Ltd v Sivabalan s/o Ramasami* [2022] 5 SLR 805 at [36]–[37].

> (c) In general, where the express contractual obligation is more limited than that which may arise under equity, the court will not impose those additional or more extensive obligations in equity. Ordinarily, the parties will be viewed as having defined or limited the confidentiality obligations between them by agreement. However, this is not always the case, and there may be occasions where equity may still step in to impose a duty of confidence to give force to the demands of conscience.
>
> (d) Where there is no express term in the contract (or no contract at all), equity may impose a duty of confidence whenever a person receives information in circumstances importing an obligation of confidentiality. Three basic elements must be met:
>
> (i) The information must possess the necessary quality of confidence.
>
> (ii) The information must have been imparted or received in circumstances such as to give rise to an obligation of confidentiality.[49]
>
> (iii) There must have been unauthorised use and detriment to the party who disclosed the information to the recipient who misused it.
>
> 37 A modified approach is now adopted in respect of the third element, following *I-Admin* at [61] and *Lim Oon Kuin* at [40] to [42], namely that where confidential information has been accessed or acquired without a plaintiff's knowledge or consent, an action for breach of confidence is presumed and the legal burden is then on the defendant to prove that its conscience was unaffected, for example because it came across the information by accident, was unaware of its confidential nature or believed that there was a strong public interest in disclosing it. It is only where the acquisition of confidential information is unauthorised that the shift in the burden of proof is triggered …

58 Under the equitable doctrine of breach of confidence, *Asia Petworld* reaffirms the principle that information or knowledge acquired by an employee during his course of employment may not always be subject to protection. What is required is that such

49 The relationship of employer and employee, which entails good faith, loyalty and fidelity, establishes the circumstances required by this element.

information must be of a high degree as to amount to a trade secret.

59 Furthermore, it has been held that if the same legitimate proprietary interest, being the confidential information and trade secrets, is being adequately protected by a confidentiality clause concurrently with a restraint of trade clause, the Singapore courts will choose to uphold the confidentiality clause instead of the restraint of trade clause.[50] This is known as the *Stratech* principle as held in *Stratech Systems Ltd v Nyam Chiu Shin*[51] ("*Stratech*").

60 In *Stratech*:[52]

> … the employer tried to justify the imposition of a restrictive covenant on the basis of protection of confidential information alone. However, such information was already protected by a confidentiality provision. [B]eyond the alleged confidentiality of the information, the employer was unable to demonstrate any legitimate interest to justify the imposition of the restrictive covenant.

61 The Court of Appeal held that:[53]

> 49 Bearing in mind that Stratech already had the benefit of [the confidentiality clause], and as Stratech was unable to demonstrate any other legitimate interest that required protection by a restraint of trade clause, [it was] of the view that the main function of [the restraint of trade clause] was indeed to inhibit competition in business. …
>
> 50 Accordingly, [it was] of the view that [the restraint of trade clause] was not binding …

50 Tay Yong Seng, Ang Ann Liang & Alyssa P'ng, "Restrictive Covenants in Employment Law: When are They Enforceable?" [2018] SAL Prac 17 at para 17.

51 [2005] 2 SLR 579.

52 Tay Yong Seng, Ang Ann Liang & Alyssa P'ng, "Restrictive Covenants in Employment Law: When are They Enforceable?" [2018] SAL Prac 17 at para 18.

53 *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR(R) 579 at [49]–[50].

E. Remedies for breaches of confidentiality/ non-disclosure agreements

(1) India

62 Courts in India have recognised the need to reasonably protect confidential information of employers and therefore, have usually upheld the confidentiality obligations in an employment contract as valid and enforceable. In the case of *Anindya Mukherjee v Clean Coats Pvt Ltd*,[54] the court emphasised the need for a clear and stringent interpretation of confidentiality clauses when parties agreed to and acted on them during employment. Confidentiality agreements are critical in the competitive and commercial environment for preserving technological, business, commercial, and financial information, including trade secrets and market strategies. The court recognised the relevance of non-disclosure, trade secrets, and confidentiality notions, both in commerce and outsourcing. Since the petitioner violated the confidentiality clause by leaving and joining a rival, the respondent was entitled to damages based on actual losses suffered.

(2) Singapore

63 Under Singapore law, the court can award damages for breach of confidence.

64 The case of *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*[55] ("*I-Admin*") which involved a breach of confidence, is instructive in this regard. In *I-Admin*, Mr Hong was a former employee of I-Admin (Singapore) Pte Ltd and Mr Liu was a former employee of I-Admin (Singapore) Pte Ltd's subsidiary in Shanghai. I-Admin (Singapore) Pte Ltd was in the business of payroll and human resource information systems.

65 While employed, both Mr Hong and Mr Liu developed a payroll system and set-up a company called Nice Payroll. They then joined Nice Payroll on a full-time basis. It was later

54 2011(7) ALLMR 48.
55 [2020] 1 SLR 1130.

discovered that Mr Hong and Mr Liu had taken confidential documents in their possession and circulated the confidential documents to each other. An action was thus commenced by I-Admin (Singapore) Pte Ltd for breach of confidence by Mr Hong and Mr Liu. The Court of Appeal held that both Mr Hong and Mr Liu were in breach of confidence.

66 On the issue of remedies for breach of confidence, the Court of Appeal held that:[56]

> The law relating to breach of confidence encompasses a wide range of factual situations and this has produced a 'formidable armoury' of remedies which includes 'injunctions and delivery up, as well as monetary remedies, whether termed equitable compensation or damages' …

In that case, the court held that monetary remedies, *ie*, an account of profits and equitable compensation would not be appropriate as there has been no actual use of the confidential information by the former employees.[57]

67 However, the Court of Appeal awarded equitable damages. In this regard, the Court of Appeal held that the remedy of equitable damages is attractive because it affords the court the flexibility to determine the manner in which damages should be assessed.[58] On the facts of *I-Admin*, the Court of Appeal considered it appropriate to remit the issue of the assessment of damages to the High Court given that the judge in the lower court would be best placed to undertake such an inquiry having heard evidence on the manner in which the appellant's materials might have been exploited.[59]

56 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [56].
57 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [72].
58 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [77].
59 *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 at [79].

IV. Market practice

A. India

68 Confidentiality, non-compete and non-solicitation clauses are rapidly becoming a norm, notably within the technology sector. This evolution aligns with India's flourishing international commerce and intensifying competitive business scene. Such restrictions bear greater significance for senior management employees who hold access to substantial confidential information of an organisation. However, the question of enforceability remains intricate, as detailed above.

69 In addition to the restrictive covenants already discussed, companies, particularly regarding senior management employees, have been implementing restrictive covenants in various ways. These include:

(a) *Garden leave clauses*: Garden leave refers to a period when an employee, post-termination or resignation, is not allowed to work for either the current employer or another employer during the notice period. While on garden leave, employees receive their regular salaries and other benefits. In limited circumstances, such as when the garden leave is linked with the protection of confidential information, courts have deemed garden leave clauses as valid.

(b) *Exclusivity clauses*: Exclusivity clauses require that employees work solely for their current employer, prohibiting them from seeking or accepting any other employment or freelance work during their tenure with the company. The aim is to ensure undivided attention, loyalty, and commitment to their current role, thereby boosting productivity and efficiency. Additionally, this clause aids in preserving confidential information and trade secrets, as the potential for information leaks to competitors diminishes when employees are focused solely on their current position. The advent of "moonlighting" (the practice of holding a second job or work) has brought exclusivity clauses under renewed scrutiny. While some

companies accommodate moonlighting, others are strictly monitoring and prohibiting such practices.

70 Further, in India, the active involvement of government officials in matters relating to employee restrictions remains relatively uncommon. For instance, it was only last year that a noteworthy incident occurred when the Ministry of Labour and Employment instigated discussions with one of India's top technology companies. This followed as a result of a petition by a Pune-based labour organisation seeking the removal of a non-compete clause from the company's employment agreement. This controversial clause prohibited employees from directly joining specified competitors or any of the company's clients for a six-month span after leaving their roles. Nevertheless, no significant developments have been reported subsequent to these discussions.

B. Singapore

(1) Restrictions during employment

71 Similar to India, in Singapore, employers have relied on garden leave and exclusivity clauses to prevent employees from working for a competitor during the period of their employment. As stated above,[60] restrictive covenants are easier to enforce during the employee's employment due to the existence of the implied duty of good faith and fidelity, which prohibits the employee from engaging in competitive activity and the solicitation of their employer's other employees.

72 However, the effectiveness of garden leave and exclusivity clauses in Singapore has been watered down.[61]

(2) Restrictions post-employment

73 As for post-employment restrictive covenants, while the courts have upheld such clauses, these clauses are increasingly

60 See paras 20–27 above.
61 See para 27 above.

being regulated in Singapore. In response to a parliamentary question on regulating non-compete clauses in employment contracts, the Minister for Manpower, Dr Tan See Leng, stated amongst other things, that "the tripartite partners' position is that employers should only include restraint of trade clauses (also known as non-compete clauses) in their employees' contracts only if there is a genuine need for such clauses to protect business interests"[62] and that such clauses "must be reasonable in terms of scope, geographical area, and duration".[63] In this regard, it has been reported that the Ministry of Manpower and the tripartite partners are developing a set of guidelines on the reasonable use of clauses in employment contracts – targeted to be released in the second half of 2024.[64]

74 In light of the above, it appears that non-compete clauses will be subject to greater scrutiny by the courts. Although the courts have in fact upheld such clauses (such as in the case of *Itochu*), many subsequent cases have since been unsuccessful. For instance, in the recent decision of *Shopee Singapore Pte Ltd v Lim Teck Yong*,[65] the employer was unsuccessful in its attempt in enforcing the restraint of trade clauses against its employee to stop him from working for a competitor. With respect to the non-competition restriction, the Singapore High Court held that there were serious doubts as to whether the restriction was valid given the lack of a legitimate proprietary interest and the reasonableness of the geographical restraint (which extended to markets which the employee did not have any duties or have any specific information about).[66] With respect to the non-solicitation restrictions, the court found that there was no evidence that the employee was about to breach those restrictions, notwithstanding

62 Singapore Parl Debates; Vol 95, Sitting No 101; Col 29 [21 April 2023] (Tan See Leng, Minister for Manpower).
63 Singapore Parl Debates; Vol 95, Sitting No 101; Col 29 [21 April 2023] (Tan See Leng, Minister for Manpower).
64 Ovais Subhani, "MOM Set to Issue Guidelines on Restrictive Employment Clauses: Tan See Leng", *The Straits Times* (6 February 2024) <https://www.straitstimes.com/singapore/politics/mom-set-to-issue-guidelines-on-restrictive-employment-clauses-tan-see-leng> (accessed 22 March 2024).
65 [2024] SGHC 29.
66 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [71].

that he refused to provide an undertaking to not breach the restrictions.[67]

V. Conclusion

75 Contracts incorporating secrecy, non-compete and non-solicitation clauses, extending anywhere from a few months to several years post-employment, are gaining traction among organisations. Businesses contend that these constraints are indispensable for protecting their confidential information and proprietary rights. In India, restrictive covenants serve as formidable shields for securing commercial interests and preserving trade secrets. However, the legal landscape governing the validity and enforceability of such covenants remains in flux. As businesses grapple with emerging challenges and technologies, courts continually reassess the enforceability and breadth of these agreements. In this ever-evolving scenario, striking a delicate balance between safeguarding corporate interests and promoting individual rights remains paramount. Thus, navigating the complexities of restrictive covenants requires an adept understanding of the continuously changing legal framework and business environment.

67 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [74].