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Restrictive covenant clauses Q&A: India

by Anshul Prakash, Abhinav Rastogi, Deeksha Malik and Kosheel Gupta, Khaitan & Co

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India-specific information concerning the key legal and commercial issues to be considered when drafting restrictive covenant clauses for use in the terms of employment between the employer and employee.

See Standard clauses, Restrictive covenant clauses: International, with country specific drafting notes and Standard document, Terms of employment: International.

Restrictive covenants

1. In your jurisdiction, can Standard document, Restrictive covenant clauses: International be used in the following documents:

- Terms of employment with the employee at the start of employment?
- A simple separate agreement?
- A deed?

In India, restrictive covenants are either incorporated in the terms of the employment contract or are stipulated in a separate agreement (specifically as regards obligations pertaining to confidentiality, non-solicitation and non-competition).

It is however advisable that restrictive covenant clauses form a part of the employment contract, to clearly impose the obligations on the employee.

If restrictive covenant clauses are included in a separate agreement, the agreement must refer to the employment agreement and must clearly specify that the obligations stipulated are in furtherance of the terms and conditions of service stipulated under the employment contract.

While some other jurisdictions recognise a deed as a binding document containing a promise that need not be supported by consideration, such a concept is not prevalent in India. The terms "deed" and "agreement" are often used interchangeably.

2. Is it possible in your jurisdiction for employers to use restrictive covenants to protect their business by restricting an employee's activities for a period of time after their employment has ended?

Any agreement which restrains a person from exercising a lawful profession, trade or business of any kind is, to that extent, void (*section 27, Indian Contract Act 1872* (ICA)). The only statutory exception to this rule applies to agreements involving the sale of goodwill, wherein the seller and the buyer may agree to certain reasonable restrictions on carrying out a similar trade or business within a certain geographic area.

In interpreting this provision, Indian courts have consistently held that while restrictive covenants operating during the term of the employment contract are valid, any clauses restricting an employee's activities post-employment would be in restraint of trade (*Percept D'Mark (India) Ltd v Zaheer Khan [(2006) 4 SCC 227]*).

There is, however case law recognising an exception to the rule covering restrictions aimed at protecting the employer's legitimate business interests, such as its business connections and trade secrets (*Desiccant Rotors International Private Limited v Bappaditya Sarkar & Another [(2009) 112 DRJ 13 (Del)]; Hi Tech Systems and Services Limited v. Suprabhat Ray [2015 SCC OnLine Cal 1192]*). Therefore, clauses relating to post-employment non-solicitation of employees or customers and protection of confidentiality with respect to trade secrets are not caught by section 27 of the ICA and have been enforced by the courts, albeit on a case by case basis.

Definitions

3. Is there any definition of confidential information in your jurisdiction that is required by law or standard practice in restrictive covenants?

There is no legal definition of confidential information. Employers have sufficient flexibility to define confidential information in a manner suited to the nature of their business. However, definitions that are excessively wide have not found favour with Indian courts, and it is therefore imperative that the definition is drafted with utmost care.

It is standard practice for the definition of confidential information to encompass trade secrets such as technical know-how, manufacturing and operating processes and strategies, financial data, client lists, and other similar proprietary information. It also exhaustively includes the different forms the information may take, such as graphic, written, electronic or machine readable forms, as well as information communicated orally.

The definition of confidential information expressly excludes:

- Any information that is accessible in the public domain.
- Any information previously known by the employee.
- General trade knowledge and skills acquired by the employee during the term of their employment.

This distinction between trade secrets and general knowledge acquired by an employee during daily operations was brought out clearly in *Niranjan Shankar Golikari v The Century Spinning and Manufacturing Company [AIR 1967 SC 1098]*, where the Supreme Court of India (Supreme Court) observed that a definition of confidential information which included "any and all information which may come to the employee's knowledge while in service" was unreasonably wide.

4. Is the term "group company" recognised in your jurisdiction? If so, please can you set out an appropriate definition for Standard document, Restrictive covenant clauses: International.

The term group company is recognised in India. Under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018, the term "group companies" is broadly defined to include such companies (other than promoters and subsidiaries) with which a company has entered into related party transactions during the period for which financial information is disclosed, and also other companies which are regarded as material by the board of directors of the company.

However, the Consolidated Foreign Direct Investment Policy 2020 defines "group company" as an enterprise which, directly or indirectly, is in a position to exercise 26% or more of voting rights in the company, or to appoint more than 50% percent of the members of the board of directors in the company.

5. Are the terms "subsidiary" and "holding company" defined and recognised under the laws of your jurisdiction? If so, please can you set out an appropriate definition for Standard document, Restrictive covenant clauses: International.

The Companies Act 2013 defines the terms "subsidiary company" and "holding company" as follows:

- The term "subsidiary company", in relation to any other company (that is, the holding company), means a company in which the holding company:
  - controls the composition of the board of directors; or
  - exercises or controls more than one-half of the total voting power either on its own or together with one or more of its subsidiary companies.
- The term "holding company", in relation to one or more other companies, means a company of which those companies are subsidiary companies.

6.In your jurisdiction, where an employer wrongfully dismisses an employee or the employee resigns in response to a repudiatory breach, is the employee released from any restrictive covenants?

The restrictive covenants of non-solicitation, confidentiality and misrepresentation would survive a repudiatory breach or wrongful dismissal and would

continue to be enforceable. Other restrictive covenants (such as non-compete clauses) are wholly unenforceable in India (see Question 8 and Question 9).

7. If the answer to the question above is "yes" can the employer attempt to get around this by stipulating that the restrictions apply on termination which includes in its definition "on termination howsoever caused", or "on termination whether lawful or not"? Would these be enforceable?

Not applicable.

Restrictions

8. Are all the restrictions in Standard document, Restrictive covenant clauses: International: clauses 2.1 (a) – (f) recognised in your jurisdiction?

It is common practice to include restrictions similar to Standard document, Restrictive covenant clauses: International: clauses 2.1 (a)–(f) in employment contracts. All these restrictions are enforceable if operating during the term of employment. However, the degree of enforceability of each of the clauses post-employment varies.

Covenants that prohibit the following actions post-employment are ordinarily valid and enforceable:

- Solicitation of customers.
- Solicitation of employees.
- Disclosure of confidential information.
- Misrepresentation as to being in a capacity other than a former employee.

The remedies that are available to the employer in case of a breach vary from case to case.

Covenants that prohibit the following actions are considered to be in restraint of trade and would not be enforceable:

- An existing employee joining a competing business.
- A competitor engaging employees without any solicitation.
- Customers entering into business dealings with a competing business of their own volition (that is, without any solicitation or allurement).

(*Section 27, ICA.*)

9. In your jurisdiction, is it common practice to include a restriction on the employee leaving the employer to work for a customer?

It is common practice to include a non-compete clause in employment contracts restraining employees from joining a customer or a competing business for a certain period of time after their exit. However, a number of judicial decisions have held these clauses, other than in certain exceptional circumstances, to be in restraint of trade, and therefore unenforceable, to the extent that they operate after the termination of employment (see Question 2).

It is however advisable to retain these clauses in employment contracts for the purpose of deterrence.

10. Specifically, is Standard document, Restrictive covenant clauses: International: clause 2.1(c) which restrains the employee from employing or facilitating the employment of their former colleagues usually included as a restriction in your jurisdiction? If so, is it likely to be enforceable?

While a clause prohibiting solicitation of an employer's employees is common, a blanket prohibition on the employment of those employees by a competitor that covers instances of employees moving of their own volition may not stand the test of reasonableness before the courts.

The courts have held that, since employees cannot be restrained from directly seeking the employment of a competitor, they cannot be restrained indirectly by preventing the competitor from employing them, and a clause purporting to do the same would amount to a restraint of trade under section 27 of the ICA (*Wipro Limited v Beckman Coulter International SA [2006 (3) ARBLR 118]*). The courts are therefore unlikely to enforce a clause restricting employees from joining a competitor when acting of their own volition.

Limitations on restrictions

11. In Standard document, Restrictive covenant clauses: International: clause 2.2, what percentage (%) shareholding is commonly inserted into a clause such as this clause in your jurisdiction?

Clauses like Standard document, Restrictive covenant clauses: International: clause 2.2 are not ordinarily included in employment contracts in India.

Ambit of the restrictions

12. In your jurisdiction, does Standard document, Restrictive covenant clauses: International: clause 2.3 have the effect of ensuring that the covenants apply when necessary, even if the individual is simply providing information to others in order to allow them to compete, rather than acting in breach of the covenants themselves?

It is common practice to provide for restrictive covenants to apply whether the restricted activity is carried out directly or indirectly. This would prohibit the employee from providing information to others to allow them to compete. Instead of evaluating the way in which the employee breached the restriction, the courts are more likely to assess whether the breach, however caused, resulted in any loss of the employer's legitimate business interests.

Enforceability

13. In your jurisdiction, are restrictive covenants void as an unlawful restraint of trade?

See Question 2.

14. In your jurisdiction are restrictive covenants only enforceable if they are narrowly drafted?

It is advisable that restrictive covenants are drafted narrowly to ensure their enforceability. However, even if restrictions are drafted broadly, the courts ordinarily use the principle of severability to invalidate the restrictions only to the extent that they are excessively broad. The courts can do this whether or not the contract contains a severability clause, although it is advisable to include such a clause in the interests of clarity.

An excessively broad restriction may not render the covenant unenforceable in its entirety. For example, it is common for contracts to include restrictive covenants protecting the business of group companies, but the courts will enforce such a clause only to the extent that the employer can demonstrate a reasonable nexus between its business and that of the company concerned.

Where restrictive covenants are drafted broadly, the employer should incorporate a well-drafted severability clause in the contract.

15. What terminology may be used in your jurisdiction in relation to the scope of the restrictions?

There is no specific terminology used to define the scope of the restrictions.

16. To increase the enforceability of restrictive covenants in your jurisdiction, is it beneficial for the covenants to explain why the employer needs to have the protection contained in the restrictions?

In interpreting restrictive covenants, the courts weigh the right of the employee to carry out their profession, trade or business in the manner that they desire against the right of an employer to protect its legitimate business interests. It would therefore be beneficial for the covenants to incorporate an explanation of why the protection is necessary.

For example, it is advisable to expressly state in the contract that the employee, by virtue of their position, will have access to the company's trade secrets or confidential information which have been developed over a long period of time, that those secrets or confidential information are critical to the employer's operations, and that the employee understands this value. It may also be beneficial to stipulate the consequences that are likely to ensue for the employer

in case of a breach, such as any potential irreparable damage, and any unfair advantage that might be given to competing businesses.

17. What legitimate business interests may be recognised in your jurisdiction as being capable of protection by restrictive covenants?

Indian law recognises, through judicial precedents, the following as legitimate business interests that may be protected by restrictive covenants:

- Protection of trade secrets and other confidential proprietary information.
- Protection of business connections, including client lists.

The mere protection of the employer against competition has not been recognised as a legitimate business interest capable of protection through restrictions operating post-employment.

18. To increase the enforceability of restrictive covenants in your jurisdiction, must they be limited in terms of the restricted activities?

The only restrictive covenants that are enforceable post-employment are clauses prohibiting solicitation of customers or employees, disclosure of confidential information, and misrepresentation by the ex-employee as acting in a capacity other than that of a former employee (see Question 8). In respect of these covenants, the restricted activity would be the act of solicitation, the disclosure of confidential information and the employee holding themselves out to being an employee post-employment. There is no need to limit these further.

19. To increase the enforceability of restrictive covenants in your jurisdiction, should any competitors be specifically listed? Are there any potential disadvantages or consequences of listing the competitors, that is, those not listed may not then be included?

It is not common practice to list the competitors with respect to which restrictive covenants apply. Ordinarily, non-compete clauses prohibit employees from being engaged, directly or indirectly, in any business which undertakes an activity that is competitive with the business of the company.

20. To increase the enforceability of restrictive covenants in your jurisdiction, must they be limited in terms of the restricted period of time? If so, what is this period likely to be in practice?

When deciding on the enforceability of restrictive covenants, courts consider a range of factors, including the reasonableness of the time period for which the restrictive covenants apply.

With respect to non-solicitation clauses, a reasonable time period would be 24 months from the employee's exit from the company. The reasonableness of this period may be affected by various other factors that the courts may take into consideration.

With respect to confidentiality clauses prohibiting disclosure of information which is learnt by the employee during or by reason of their employment, such an obligation ordinarily extends indefinitely (unless such information enters the public domain) and does not need to be limited in time for it to be enforceable. Accordingly, it may not be necessary to limit the time period for which a confidentiality obligation has effect.

21. To increase the enforceability of restrictive covenants in your jurisdiction, must they be limited in terms of the restricted geographical area? If so, what is this geographical area likely to be in practice?

Restrictive covenants need not be limited in terms of geographical area, and it is not common practice to do so.

22. In your jurisdiction, is it necessary for the restriction to reflect the employee's role and job level?

It is not necessary for the restriction to reflect the employee's role and job level. However, doing so may increase the likelihood that the restriction is enforceable.

When deciding on the enforceability of a confidentiality restriction, the courts will evaluate whether the

employee, by virtue of their position, had access to any confidential information. An express stipulation stating that the employee, by reason of their job level, would be in a position of confidence and would have access to certain specific kinds of information such as trade secrets may persuade the court of this.

Indian courts scrutinise restrictive covenants in an employment contract more heavily than those in a contract for the sale of a business. This is because of the perceived inequality in bargaining power between the employer and the employee. A contract containing employee-specific information can be used to indicate that the contract is not a standard form contract and has been negotiated on a more equal footing.

23. Will the reasonableness of any restraints be considered more by reference to the status of the employee at the time of entering into the restraint as opposed to on termination of their employment?

The reasonableness of a restriction is considered by reference to the status of the employee at the time the restriction is entered into.

Garden leave

24. Can an employee be placed on garden leave prior to termination in your jurisdiction, that is a period during which the employee remains employed and bound by their employment terms but is released from their duties, usually prior to termination (see Standard document, Restrictive covenant clauses: International: clause 2.4)?

An employee can be placed on garden leave before termination. The Bombay High Court has reiterated the position that these covenants, when operating during the term of the employment contract, are valid and enforceable (*VFS Global Services Private Limited v Suprit Roy [2008 (2) BomCR 446]* (*VFS*)). However, in *VFS* garden leave was held to be unenforceable as it was intended by the employer to apply post-termination of employment.

25. If the answer to question above is "yes", will the inclusion of a clause such as Standard document, Restrictive covenant clauses: International: clause 2.4 (which reduces the period of the restriction by the garden leave period) increase the likelihood for the restriction to be enforceable?

In India, the time period for which an employee is placed on garden leave prior to termination of their employment typically ranges from three to six months, whereas restrictive covenants such as non-solicitation and confidentiality ordinarily extend to two to three years. While there are no judicial precedents in this regard, it is unlikely that the courts will take a garden leave clause into account in determining the enforceability of such restrictive covenants. Further, non-compete clauses operating post-employment are wholly unenforceable and the question of determining their enforceability would not arise (see Question 2).

Potential future employer

26. Is the requirement for the employee to give any person making an offer to them a copy of these restrictions, as set out in Standard document, Restrictive covenant clauses: International: clause 2.5, permitted and enforceable in your jurisdiction?

To the extent that the restrictive covenants are permissible in India (that is, during employment and for a specific period post-employment in certain cases), the employee may be required by the employer to give any person making an offer to them a copy of the restrictions. As indicated in Standard document, Restrictive covenant clauses: International: clause 2.5, this may help the employer in a situation where the new employer has induced the employee to breach their employment contract.

The Calcutta High Court has observed that interference with the performance of a contract is an actionable offence unless there is a justification for interfering with the legal right, and that one of the conditions to

establish a case of interference is that the defendant must be shown to have knowledge of the relevant contract (*Lindsay International Private Limited v Laxmi Niwas Mittal [C.S. Number 2 of 2017]*).

27. Is the requirement for the employee to tell their employer the identity of any person and business concern making an offer to the employee, as set out in Standard document, Restrictive covenant clauses: International: clause 2.5, permitted and enforceable in your jurisdiction?

There is no judicial precedent which clearly addresses this question. Having said that, an employer may contractually require the employee to disclose the identity of the person and business concern making the offer. However, strict enforceability of this obligation would be difficult because the information would be personal to the employee. Courts only uphold restrictions that are aimed at protecting the employer's legitimate business interests. While requiring employees to communicate the acceptance of a new offer of employment to their current employer may be considered necessary to protect the employer's business interests, a similar requirement regarding a mere offer received by an employee would not directly affect their current employment or hamper the legitimate business interests of the current employer. Thus, such a requirement may be held to be unenforceable by the courts.

Separate legal advice

28. Is it common practice to include the wording of Standard document, Restrictive covenant clauses: International: clause 2.6 in restrictions in your jurisdiction (that is, stating that the parties have entered into the restriction having obtained separate legal advice) so as to increase the likelihood for the restriction to be enforceable?

In India, contracts of employment do not usually provide that the parties have entered into the restriction having obtained separate legal advice.

Such a provision may not help the employer's case, because the courts take a strict stand regarding restrictive covenants in employment contracts, irrespective of their contents and whether the employee has expressly acknowledged their implications. The Delhi High Court has expressed the general view of the courts that the employer has an advantage over the employee, and that it is quite often the case that an employee must choose between signing a standard form contract or not being employed at all (*Stellar Information Technology Private Limited v Rakesh Kumar [234 (2016) DLT 114]*).

Therefore, a clause akin to Standard document, Restrictive covenant clauses: International: clause 2.6 will not increase the likelihood of the restrictions being enforceable.

Severability

29. Is a severability clause as set out in Standard document, Restrictive covenant clauses: International: clause 2.7 likely to be valid and enforceable in your jurisdiction?

Yes, a severability clause such as the one set out in Standard document, Restrictive covenant clauses: International: clause 2.7 will be valid and enforceable in India. The courts have, more often than not, held that if a contract is in several parts, some of which are legal and enforceable, the lawful parts can be enforced if they can be severed from the unenforceable ones (*Shin Satellite Public Company Limited v Jain Studios Limited [AIR 2006 SC 963]*).

Transfer of a business

30. Is Standard document, Restrictive covenant clauses: International: clause 2.8 (requiring the employee to enter into a corresponding agreement with any new employer on the transfer of the employer's business) common practice and likely to be enforceable in your jurisdiction?

The requirement set out in Standard document, Restrictive covenant clauses: International: clause 2.8 is not standard practice in India and is unlikely to be enforced.

31. On the transfer of a business in your jurisdiction, will any agreement (containing restrictive covenants) entered into between the original employer and the employee transfer to the new employer automatically?

If a business is proposed to be transferred to another entity, employees categorised as workmen under the Industrial Disputes Act (that is, employees who are mainly engaged in performing non-managerial or non-administrative roles) and who have completed 240 days of continuous service will only transfer their employment to the new entity subject to their consent (*Industrial Disputes Act* (ID Act)). The transferred employees must be employed on no less favourable terms and conditions than the ones they enjoyed with the transferor employer, and their continuity of service must be maintained (*section 25FF, ID Act*).

If these conditions are met, the transfer may be effected by executing a tripartite letter among the workman, the transferor employer and the transferee employer. The tripartite letter will contain the terms and conditions of the transfer and should be accompanied by a draft of the appointment letter which will be executed with the workmen at the time of closing the transaction. The appointment letter may retain the restrictive covenants entered into between the original employer and the employee. A similar procedure may be followed for employees categorised as non-workmen (that is, persons who are employed in a managerial or administrative capacity or who are engaged in a supervisory capacity and draw a salary above INR10,000).

Therefore, restrictive covenants do not get transferred to the new employer automatically, but by way of a fresh appointment letter entered into between the new employer and the employee.

32. If the answer to the above question is "yes", will any post termination restrictions that automatically transfer continue to relate to the original employer/the transferor's business (that is, because this was the entity that the subject matter of the restrictions applied to at the time the agreement was entered into)?

See Question 31. Any post termination restrictions entered into between the new employer and the employee will relate to the new employer's business if that is what is contained in the appointment letter.

Group companies

33. At the start of Standard document, Restrictive covenant clauses: International: clause 2.1, is the inclusion of wording that the employer is taking the benefit of the restrictive covenants "for and on behalf of any Group Company" likely to enable the interests of group companies to be protected in your jurisdiction?

It may be difficult for an employer to enforce a provision in an employment contract seeking to extend the benefits of restrictive covenants to its group companies. This is because there is generally no connection between the contract of personal service executed between the employer and the employee and the group companies of the employer.

However, it is not uncommon for employers to refer to group companies in restrictive covenants relating to non-solicitation, confidentiality and non-competition. To enforce such a provision against the employee, the employer would need to prove that any breach committed by the employee against the group company also affected the business interests of the employer.

34. If a clause seeking to include the interests of group companies in relation to any restrictions is permitted in your jurisdiction, would the interests of the following entities be protected:

- Subsidiaries?
- Parent company?
- Other companies in the group?

A clause seeking to include the interests of group companies in relation to a restriction may only be enforced if the employer can demonstrate that the breach committed by the employee against the group company also had a bearing on the business interests of the employer (see Question 33). This may be easier to prove if the group company in question is the subsidiary of the employer.

35. Is Standard document, Restrictive covenant clauses: International: clause 2.9 (requiring the employee to enter into a separate agreement with any group company in respect of the restrictions) common practice and likely to be enforceable in your jurisdiction?

It is not common for employers to require employees to enter into separate agreements with the employer's group companies.

36. Is there any third-party rights legislation in your jurisdiction that would enable any group company to enforce restrictive covenants that are entered into:

- In the initial contractual terms of employment between the employer and the employee; or
- In a separate agreement containing the restrictions between the employer and employee (for example, a termination or settlement agreement)?

India does not have any third-party rights legislation to protect the interests of the employer's group company from a breach of a restrictive covenant by an employee.

Consideration

37. In your jurisdiction, at the time of entering into these restrictions, does the employer need to provide consideration to the employee?

For the purpose of entering into restrictive covenants, employers do not need to provide any consideration to employees over and above the remuneration for the contract of personal service.

In certain cases (such as the employment of senior executives), the employer may provide for a restrictive covenant to be operative during employment and for a certain period post-employment. The employer may agree to pay an additional fee to the employee in return for this.

38. If consideration is required, what can this consideration be in your jurisdiction?

Consideration is not required.

39. If it is permissible in your jurisdiction for the restrictions to apply to any group company, will that entity need to provide separate consideration from that provided by the employer when the employee entered into the restrictions?

It may not be possible for restrictions to apply to any group company (see Question 34).

40. What are the consequences in your jurisdiction if the employer does not provide any consideration to the employee when they enter into restrictive covenants (for example, will the restrictive covenant be void and unenforceable)?

Consideration is not required.

Compensation

41. In your jurisdiction, is the employer required to provide compensation to the employee in relation to the restrictive covenants (for example, payments for the period of restriction)?

Since the restrictive covenants are enforceable in India only to the extent they are reasonably necessary to protect the interests of the employer, the employer does not have to provide compensation to the employee for entering into these covenants.

42. If the employer is required to pay compensation to the employee, how much is payable?

The employer does not have to pay compensation to the employee.

43. If the employer is required to pay compensation to the employee, when is the compensation payable?

The employer does not have to pay compensation to the employee.

44. Is the employer able to waive any restriction on termination in your jurisdiction? If so, how can the employer do this?

Yes, the employer can waive any restrictive covenant at the time of termination. The Bombay High Court has observed that, once the terms of an arrangement have been accepted as contractual, it will be open to the parties to alter the original contract or its terms by a subsequent contract (*K Haridas L Shenoy v Johnson and Johnson Limited [2005 (2) MhLj 455]*).

An employer may provide in a termination or resignation acceptance letter that the employee will be released from certain restrictive covenants.

45. Will the employer still have to pay the compensation during the post termination period of the restriction even if the employee finds alternative employment that does not breach the restrictive covenants with the employer?

The employer does not have to pay compensation to the employee.

46. If the employer is able to waive the restrictive covenants, what amounts may be payable to the employee (for example, is the compensation still payable to the employee in full or a reduced sum)?

The employer does not have to pay compensation to the employee.

Execution and other formalities

47. Do restrictive covenants have to be in writing in your jurisdiction to be valid and enforceable?

Restrictive covenants are not generally considered to be implied terms in a contract of employment. It is therefore advisable that the restrictive covenants are expressly provided in the contract.

As regards restrictive covenants which are valid post-termination, the employer may have to provide a specific, reasonable time period for which the covenant has effect. This necessitates an express restriction.

An express restriction that clearly delineates the scope of the restriction may also be beneficial where the employer is of the view that any breach in relation to its subsidiaries or associate companies will have an impact on its own business interests.

48. What are the execution and other formalities that are required for restrictive covenants to be valid and enforceable in your jurisdiction?

There are no execution formalities specific to employment contracts in general or to restrictive covenants in particular.

49. In your jurisdiction do the restrictive covenants need to be registered or require any formal approval?

There is no requirement for restrictive covenants to be registered or approved. Restrictive covenants typically form part of an employment agreement, which is generally stamped of appropriate value, depending on the state where it is executed.

General

50. Are any of the restrictive covenant clauses set out in Standard document, Restrictive covenant clauses: International not legally valid and enforceable or not standard practice in your jurisdiction?

The restrictive covenants as set out in Standard document, Restrictive covenant clauses: International will remain valid during the term of the contract of employment. However, some of the restrictive covenants may not be enforceable post-termination (see Question 8).

Similarly, the stipulations contained in Standard document, Restrictive covenant clauses: International requiring the employee to execute a similar agreement with a new employer in the event of a business transfer (Standard document, Restrictive covenant clauses: International: clause 2.8) and to enter into a separate agreement with any group company for similar restrictive covenants (Standard document, Restrictive covenant clauses: International: clause 2.9) may not be enforceable. Whether or not these stipulations are enforceable will depend on whether the relevant employees are employed on no less favourable terms and conditions than they enjoyed before the transfer.

51. Are there any other clauses that would be usual to see in restrictive covenant clauses and/or that are standard practice in your jurisdiction?

The restrictive covenants set out in Standard document, Restrictive covenant clauses: International are exhaustive and cover the restrictions which are typically included in employment contracts in India.

Remedies for breach

52. What remedies are available for breach of restrictive covenants? How long will each remedy take to obtain in your jurisdiction?

As a breach of a restrictive covenant constitutes a breach of contract, the following remedies are available to the employer for breach of covenants which are valid and enforceable:

- **Where a breach has occurred but the employer has not suffered a loss**. Where the contract provides a pre-estimate of the loss (in the form of liquidated damages) which might be incurred due to breach of contract, the employer may claim this amount (to the extent the court determines it to be a genuine pre-estimate of the loss) irrespective of any actual loss being caused (*section 74, ICA*).

  Where the contract does not provide for a pre-estimate of the loss, the courts would typically grant an injunction restraining the current or former employee from continuing with the breach. The Supreme Court has held that an injunction may be granted in case of a breach of a valid and enforceable covenant (*Niranjan Shankar Golikari v Century Spinning and Manufacturing Company Limited [AIR 1967 SC 1098]*).

- **Where a breach has occurred and the employer has suffered a loss**. Where the employer has suffered an actual loss irrespective of whether the employer has stipulated a pre-estimate of the loss in the contract, it can claim unliquidated damages for the loss caused which the parties knew would be caused as a result of the breach (*section 73, ICA;* and *Super Cassettes Industries v Singla Property Dealer Limited [(2016) 181 PLR 84]*).

53. Would a successful party be able to recover its costs from the losing party for any successful action for breach of restrictive covenants?

The successful party may be able to recover its costs associated with the action. However, the award of costs falls largely within the discretion of the court. The court would not award the successful party costs to cover all the expenses it incurred. Instead, it would determine the quantum of costs which, in its opinion, represents sufficient compensation for the trouble the party has been put to. The courts will also look at the conduct of all the parties, as well as whether a party that has not been wholly successful has nevertheless succeeded in part of its case.

54. If there are no restrictive covenants with the employee, can the employer rely on any other actions or remedies to protect its business, clients, customers or confidential information in your jurisdiction?

An employer may seek a remedy of injunction or unliquidated damages in case of a breach of confidentiality, even if there is no relevant restrictive covenant. The Bombay High Court has observed that terms such as obedience, fidelity and confidentiality are implied terms of an employment contract (*Dattatraya Shankarrao Kharde v Executive Engineer, Chief Gate Erection Unit No. 2, Nagpur [1994 MhLJ 776]*).

Contributor profiles

Anshul Prakash, Partner

Khaitan & Co

T + 91 22 6636 5000
E anshul.prakash@khaitanco.com

Areas of Practice: Employment, labour and benefits.

Abhinav Rastogi, Principal Associate

Khaitan & Co

T + 91 22 6636 5000
E abhinav.rastogi@khaitanco.com

Areas of Practice: Employment, labour and benefits.

Deeksha Malik, Associate

E deeksha.malik@khaitanco.com

Areas of Practice: Employment, labour and benefits.

Kosheel Gupta, Associate

Khaitan & Co

T + 91 22 6636 5000

E kosheel.gupta@khaitanco.com

Areas of Practice: Employment, labour and benefits.