NON-POACHING CLAUSES IN B2B CONSULTANCY CONTRACTS: ARE THEY ENFORCEABLE UNDER INDIAN CONTRACT LAW?

Mohak Jotwani, O.P. Jindal Global University, Jindal Global Law College

ABSTRACT

This article critically examines the enforceability of non-poaching clauses in Business-to-Business (B2B) consultancy contracts within the Indian legal framework. While such clauses are commonly employed to protect business interests—particularly against the loss of trained personnel and leakage of trade secrets—they raise significant concerns under Section 27 of the Indian Contract Act, 1872, which renders agreements in restraint of trade void. The analysis highlights how these clauses, though contractual arrangements between firms, effectively restrict the employment rights of third-party employees, thereby implicating constitutional guarantees under Articles 19(1)(g) and 21. Through doctrinal analysis and case law including *Wipro Ltd. v. Beckman Coulter*, *Hi-Tech Systems v. Nikhil Ghosh*, and *Desiccant Rotors v. Bappaditya Sarkar*, the paper underscores the inconsistency in judicial interpretation and the need for legislative clarity. It argues that the indirect use of liquidated damages as a backdoor restraint must be scrutinized, and advocates for a Trade Secrets Protection Act to balance proprietary business concerns with individual employment freedoms. The article concludes by urging courts to adopt a purposive interpretation of Section 27 that prioritizes labor mobility, economic equity, and constitutional values.

Keywords: Non-Poaching Agreements, Section 27 of Indian Contract Act, Anti-Competitive Agreements

I. Introduction

Non-poaching agreements—also referred to as no-hire or no-solicitation clauses—are increasingly found in contracts between consultancy firms and client businesses. These clauses generally prohibit one party from soliciting or employing the employees of the other during or after the contractual period. Their primary justification lies in the protection of business interests, including client relationships, confidential information, and trade secrets.

Such clauses are especially prevalent in the Indian IT and outsourcing sectors, where staffing firms routinely deploy personnel to client sites on temporary contracts. These deployed employees often build close working relationships with clients, making them attractive lateral hires. To prevent circumvention of staffing firms, client contracts frequently include non-poaching provisions. Globally, similar trends are visible in jurisdictions like the United States, where firms in Silicon Valley, including Apple, Google, and Intel, were found to have engaged in anti-competitive no-poach arrangements.[1] In high-skill, high-mobility industries like technology, these clauses are increasingly standard in Master Services Agreements (MSAs), prompting regulatory scrutiny.[2]

However, under Indian law, such clauses raise pressing concerns, particularly in light of Section 27 of the Indian Contract Act, 1872, which declares void "every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind."[3] Unlike in common law jurisdictions like the UK or US, where courts evaluate the reasonableness of restraints, Indian courts have interpreted Section 27 more strictly[4].

This issue is further complicated by the constitutional guarantee of the right to practice a profession under Article 19(1)(g) of the Constitution of India.[5] When non-poaching clauses indirectly restrict an employee's freedom to seek employment—despite being between firms—

[1] U.S. v. Adobe Sys. Inc., No. 1:10-cv-01629, 2010 WL 11515714 (D.D.C. 2010); Orly Lobel, *Talent Wants to Be Free: Why We Should Learn to Love Leaks, Raids, and Free Riding*, 106 YALE L.J.F. 1, 12–14 (2013).
[2] Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, BROOKINGS INST. (2018), https://www.brookings.edu/articles/a-proposal-for-protecting-low-income-workers-from-monopsony-and-collusion/.
[3] Indian Contract Act, No. 9 of 1872, § 27, India Code (1872).
[4] Avinash Govindjee & Sairam Bhat, *Restrictive Covenants in Employment Contracts: A Comparison Between the Legal Positions in India and South Africa*, 20 NLSIR 1 (2022).
[5] INDIA CONST. art. 19(1)(g).

they may infringe this constitutional protection. Additionally, Article 21's guarantee of livelihood can be implicated where the clause restricts labor mobility.[6]

Furthermore, these clauses intersect with the goals of Indian competition law. Though the Competition Commission of India (CCI) has not yet ruled on a non-poaching agreement, the U.S. Department of Justice has previously held that no-poach agreements between employers amount to collusion and suppress labor market competition.[7]

The increasing reliance on these clauses reflects the insecurity of businesses regarding trade secret leakage by departing employees. As Govindjee and Bhat argue, such fears must be addressed through robust confidentiality protections and sector-specific legislative reforms rather than restrictive employment covenants.[8]

II. Indian Jurisprudence on Section 27 and Non-Compete Clauses

Indian courts have historically drawn a distinction between restraints during employment and post-employment restraints. In *Niranjan Shankar Golikari v. Century Spinning*, the Supreme Court upheld a clause preventing a technical trainee from working elsewhere during the period of employment.[9] However, in *Superintendence Co. v. Krishan Murgai*, the Court struck down a post-employment restraint.[10]

Post-termination non-compete clauses have been consistently invalidated unless they are narrowly tailored and justified by a legitimate business interest. In *Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan*, a restraint preventing Zaheer from endorsing rival brands post-contract was struck down.[11] The Court emphasized that freedom of trade could not be curtailed through contractual devices.

A relevant judicial observation on restrictive post-employment covenants can be found in *Desiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar*, where the Delhi High Court upheld a non-solicitation clause that restrained the defendant from approaching former clients

[6] INDIA CONST. art. 21.
[7] U.S. Dep't of Justice, *Antitrust Guidance for Human Resource Professionals* (2016).
[8] Govindjee & Bhat, supra note 4.
[9] Niranjan Shankar Golikari v. Century Spinning & Mfg. Co., AIR 1967 SC 1098.
[10] Superintendence Co. of India v. Krishan Murgai, AIR 1980 SC 1717.
[11] Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan, AIR 2006 SC 3426.

and employees of the plaintiff.[12] The Court held that such clauses, particularly those tailored to prevent direct solicitation and unfair advantage, could be seen as protective rather than restrictive. However, the judgment also emphasized that enforcement would depend on the reasonableness of the clause and whether it extended beyond the duration of the contract. The court cautioned against blanket restrictions that may amount to a restraint on trade under Section 27.

Notably, Indian courts have largely dealt with such clauses in the context of employer-employee relationships, and have not directly ruled on their applicability to B2B non-poaching clauses where no employee privity exists. This omission leaves a significant interpretive gap, especially in determining whether non-solicitation obligations between firms can survive after the underlying consultancy agreement has expired. In addition, they also don't comment on if non-hire agreements that go a step further than non-solicitation agreements should be void ab-initio in B2B consultancy. As Govindjee and Bhat observe, this legal ambiguity raises constitutional and contractual questions when third-party employee mobility is indirectly curtailed.[13]

In the absence of judicial consensus, businesses often rely on broad contractual language and liquidated damages clauses to deter poaching, leading to inconsistent enforcement and potential misuse. This has created a patchwork regime where enforceability often turns on the drafting of the clause rather than its substantive fairness or proportionality.

III. The Wipro Case and Its Legal Implications

In *Wipro Ltd. v. Beckman Coulter International SA*, the Karnataka High Court in a rare case related to B2B non-solicitation contracts was asked to decide whether a non-hire clause in a Master Services Agreement (MSA) could be enforced after the agreement ended.[14] The clause prohibited Beckman Coulter from hiring or soliciting employees who had worked on Wipro's projects, either during or after the contract term. When Beckman Coulter later hired a former Wipro employee, Wipro invoked the clause and claimed liquidated damages.

[12] *Desiccant Rotors Int'l Pvt. Ltd. v. Bappaditya Sarkar*, 2008 SCC OnLine Del 730.
[13] Govindjee & Bhat, supra note 4.
[14] *Wipro Ltd. v. Beckman Coulter Int'l SA*, (2012) 1 AIR Kant R 300.

The Court upheld the clause, reasoning that it was a valid commercial agreement between two business entities instead of a contract that directly affected employee mobility and in restraint of trade. By treating the matter as a contractual breach rather than engaging with public policy concerns, the ruling bypassed an opportunity to clarify the application of Section 27 to B2B non-solicitation and non-hire agreements. Instead, it allowed for far less scrutiny of B2B agreements that, in essence, worked to limit the opportunities available to the workers.

As noted by legal scholar Shivansh Shukla, non-poaching agreements in India are often informal "gentlemen's agreements" between firms to avoid hiring each other's employees and setting wages.[15] Such agreements are typically unenforceable under Section 27 if they significantly restrict employee mobility or wage competition. However, when drafted in formal contracts like the one in *Wipro*, courts have yet to critically examine them under Section 27, creating doctrinal confusion.

Moreover, *Wipro* sidesteps an important issue—namely, how such clauses affect third-party employees, who are not party to the agreement. This omission is significant: while between firms, the clause arguably restrains employee rights under Article 19(1)(g) and Article 21.

Consequently, the *Wipro* ruling presents a legal anomaly: an inter-firm no-hire clause can be enforced in a private contract, even though labor restraints of this nature have historically been voided as public-policy violations. Courts have yet to reconcile this tension, leaving open whether Section 27 applies to formal B2B arrangements designed to restrict employment.

IV. Effect of Non-Poaching Clauses on Third Parties Without Privity

Even though non-poaching clauses are executed between firms, their enforcement affects third-party employees who are not party to the agreement. This raises an issue of privity. In *M.C. Chacko v. State Bank of Travancore*, the Supreme Court held that a contract cannot impose obligations or restrictions upon non-signatories.[16]

Yet, in practice, non-poaching clauses function as gatekeeping tools preventing individuals from being hired by a contracting party. Krueger and Posner note that such practices function

[15] Shivansh Shukla, *Handshakes on Headhunting? The Legality of No-Poach Agreements*, Iccrl (Jul. 30, 2023), https://www.irccl.in/post/handshakes-on-headhunting-the-legality-of-no-poach-agreements.
[16] M.C. Chacko v. State Bank of Travancore, AIR 1970 SC 504.

as de facto wage suppression mechanisms.[17] Lobel similarly argues that such restraints harm innovation by preventing the free movement of talent.[18]

In India, where job markets are highly competitive and formal worker protections are weak, these clauses risk becoming instruments of labor market distortion. The Constitution's Article 21, as interpreted in *LIC v. Consumer Education & Research Centre*, mandates the State and its organs (including courts) to protect the livelihood of citizens.[19] A clause that indirectly prevents a person from being hired arguably violates this protection.

V. Indirect Use of Liquidated Damages as a Backdoor Restraint

One of the most significant concerns with non-poaching clauses in consultancy contracts is the **insertion of liquidated damages provisions** that penalize a party for hiring employees of the other. While facially framed as pre-agreed compensation for breach, these clauses often serve a deterrent purpose, operating as a **de facto restraint on trade**. The question then arises: **can liquidated damages clauses be used to bypass Section 27 of the Indian Contract Act, 1872**?

The Supreme Court in *Kailash Nath Associates v. Delhi Development Authority* made it unequivocally clear that **Section 74 of the Indian Contract Act** does not permit the automatic enforcement of stipulated damages unless there is proof of breach and **either actual loss or a reasonable pre-estimate of damage**.[20] The Court stressed that compensation cannot be recovered simply because a contract provides for it. Instead, it must be shown that the clause reflects **a genuine attempt to quantify foreseeable loss**, not a disguised penalty intended to coerce performance or inhibit legitimate conduct.

In the context of non-poaching clauses, if the primary objective of a liquidated damages provision is to deter a client from employing a former consultant—not to compensate for demonstrable business loss—it assumes a **punitive character**. Such clauses, even though crafted within a B2B framework, **subvert the protections of Section 27** by disguising a restraint on trade as a financial remedy. Viewed functionally, they may inhibit third-party

[17] Alan B. Krueger & Eric A. Posner, BROOKINGS INST. (2018).
[18] Orly Lobel, 106 YALE L.J. F. 1 (2013).
[19] LIC v. Consumer Educ. & Research Ctr., AIR 1995 SC 1811.
[20] Kailash Nath Assocs. v. Delhi Dev. Auth., (2015) 4 SCC 136.

employment, raise costs of hiring, and indirectly pressure employees not to switch roles—without offering any procedural safeguards or avenues of challenge.

Thus, unless a company can demonstrate that the hiring resulted in quantifiable harm, such as the loss of proprietary information or disruption of services, the clause should be unenforceable. The judiciary must assess whether these clauses serve a compensatory or deterrent purpose, as the latter runs counter to the statutory limitation under Section 27 and the principle of reasonableness in contractual penalties outlined by *Kailash Nath*.

VI. Conclusion: Toward Doctrinal Clarity and Legislative Reform

The current legal framework governing non-poaching clauses in India remains underdeveloped and inconsistent. Section 27 of the Indian Contract Act, 1872, which renders agreements in restraint of trade void, has not been adequately interpreted in the context of business-to-business (B2B) employment restrictions. While judicial pronouncements have touched on related issues, courts have yet to provide a coherent standard for evaluating no-hire provisions that, though inter-firm in form, substantially restrict the employment opportunities of third-party individuals. There is an urgent need for the judiciary to explicitly recognize that such clauses—despite occurring between sophisticated commercial entities—can amount to employment restraints that implicate both statutory and constitutional protections.

In practice, many firms seek to bypass Section 27 by structuring non-poaching obligations as "non-solicitation agreements" or liquidated damages clauses, obliging a fixed monetary penalty if a client hires an employee from the consultancy firm. While these provisions are framed as compensatory mechanisms, they often function as deterrents, chilling employment mobility. The Supreme Court's judgment in *Kailash Nath Associates v. Delhi Development Authority* confirms that courts will not enforce predetermined damages unless they reflect a genuine pre-estimate of loss and are not punitive in effect. Where such clauses serve primarily to restrict post-contract hiring, they risk operating as indirect restraints on trade and should be invalidated accordingly.

Addressing these issues requires a two-pronged legislative reform:

1. Statutory clarity on the enforceability of B2B non-solicitation clauses, particularly where they affect third-party employee rights and are enforced beyond the term of the

contract.

2. A comprehensive Trade Secrets Protection Act, which would provide targeted remedies for businesses seeking to prevent misappropriation of proprietary information—without the need to impose overbroad contractual restraints on employment.

As commentators have noted, permitting narrowly tailored confidentiality obligations while prohibiting expansive restraints on employment would offer a more constitutionally compliant and economically equitable solution.[2] In the absence of such clarity, the right of an individual to seek employment—a core component of Article 19(1)(g) of the Constitution—must take precedence over inter-firm arrangements that attempt to privatize control over labor markets. Unless an employee has knowingly and voluntarily contracted to such a restriction, and been adequately compensated for it, firms should not be permitted to achieve indirectly what the law does not allow directly.