
LAWS RELATING TO NON-DISCLOSURE AGREEMENTS IN INDIA AND USA

Arjun S, LLM (Commercial Law), CMRU School of Legal Studies

Prof Dr. Aarati Tyagi, CMRU School of Legal Studies

1. ABSTRACT

The modern business and employment relations are built on the Non-Disclosure Agreements (NDAs) as the primary tool which guarantees the safety of the confidential data, trade secrets, and commercial data. NDAs are widely applied within the context of all technology-related sectors, pharmaceuticals to finance and entertainment, there exists a wide gap concerning the legal frameworks of the enforceability of NDAs in India and the USA. The most prominent type of control on NDAs in India is the Indian Contract Act, 1872 and judicial interpretation wherein the court determines the scope between restraints that are permitted and restraints that are void under the Section 27. The US has a strong legislative base under the DTSA, 2016 and the Uniform Trade Secrets Act, which are backed up with rich state-wide case law. This paper will give a comparative analysis of the legal controls within the jurisdiction, their enforceability, judicial adjudication and remedies that can be used in legal NDA in both jurisdictions. It makes the comparison of landmark case law in the two countries, talks about the difference in doctrine between interpretation of reasonableness and extent performed by courts in either country, and talks about new aspects of digital commerce and artificial intelligence, and cross-border contractual structure. The article concludes that the United States possesses a more structured and coherent regime to enforce the NDA, however, the Indian courts have found a finer line between the interests of commerce and the constitutional worth of free trade of individual liberty.

Keywords: Non-Disclosure Agreements, Trade Secrets, Indian Contract Act, Defend Trade Secrets Act, Confidentiality

2. Introduction

Non-Disclosure Agreements, commonly referred to as NDAs or confidentiality agreements, contractual instruments in which parties agree that they will not disclose category of information which are specifically mentioned in the agreement to a third party.¹

They are deployed across virtually every sector of modern commerce: technology companies use them to protect source code and algorithms; pharmaceutical corporations rely on them to secure clinical trial data; financial institutions employ them to guard client information; and entertainment studios use them to shield scripts and production strategies. The ubiquity of NDAs in modern commercial life has made them one of the most litigated classes of contract in the world.

Despite the universal usage of NDA on commercial transaction and other matters is differs through jurisdiction. In America, NDAs have been backed by an established set of federal laws as well as state laws with a well-established body of common law jurisprudence that is very evident in the drafting, interpretation, and enforcement of NDAs.² In India NDAs are primarily governed by the Indian Contract Act, 1872, and their enforceability has been discussed primarily through judicial decisions.³

The Indian economy and its connection with Global market, and the rapid growth in the Indian technology including the commercial transaction led to the inadequacy of the legal framework with respect to NDA in India. In this regard, a comparative study of the legal regulation and enforceability of the NDA in India and the United States is beneficial to both scholars, practitioners, and policymakers.

This paper is divided as follows: Part II is a historical and conceptual overview of the origins of NDAs in either jurisdiction. Part III evaluates legal framework in terms of NDAs in India and the United States respectively. Part IV discusses how NDAs are judicially treated in the two countries and the standards that are put in place by the courts to determine whether they are enforceable. Part V reflects on the particular issues that occur as employee NDAs and labour rights. Part VI deals with the overlapping of NDAs and trade secret law, and digital

¹BLACK'S LAW DICTIONARY 1231 (11th ed. 2019).

²RESTATEMENT (SECOND) OF CONTRACTS § 186 (AM. L. INST. 1981).

³The Indian Contract Act, 1872, § 27 (India).

commerce. Part VII talks of remedies in case of breach of NDAs. Part VIII provides a comparative evaluation and suggestions. Part IX provides the conclusion.

3. Conceptual framework and historical foundation of non-disclosure agreements

The legal duty to keep a secret is an old concept, however the modern contractual tool of an NDA was developed mainly in the territory of industrialisation and the development of business enterprises that had commercially valuable information. It is possible to trace the initial awareness of confidential business information as an eligible property to English equity jurisprudence, especially the landmark case in *Saltman Engineering Co. v. Campbell Engineering Co.*,⁴ where the court held that the person who receive confidential information must not use it in an unfair manner against the person who give such information.

In the United States, the trade secret law has been formed through judicial decisions and doctrines that were put forwarded, The Restatement (Second) of Contracts explains that the covenants present which are used in employment must be reasonable and there must be a consideration that is salary.⁵ The Uniform Trade Secrets Act of 1979 was not there before as states were having different rules with respect to trade and further its subsequent adoption by forty-eight states marked a significant codification effort, before the enactment of Defend Trade Secrets Act, 2016 a person can only file a case before state court but after it is a company can file suit before federal court.

During British Rule India adopted British rule so with respect to that there is doctrine of breach of confidence so after independence also India did not discard this principle but retained the same in legal framework for protecting confidential information. The Indian Contract Act, 1872, which was passed under the British colonial rule offers the main legislative framework on which the enforcement of contractual obligations such as those that come forth as a result of NDAs are enforced.⁶ The absence of specific law for the protection of Trade secret and the judges in order to decide any dispute in it need to rely on Contract law, Intellectual property law, tort principles as a result there is mix of different decision and statements.

The concept of NDA basically has two concepts one is Freedom to contract and other one is

⁴*Saltman Engineering Co. v. Campbell Engineering Co.*, (1948) 65 RPC 203 (UK).

⁵RESTATEMENT (SECOND) OF CONTRACTS § 186 (AM. L. INST. 1981).

⁶The Indian Contract Act, 1872, §§ 10, 23 (India).

Freedom to Trade or profession , so any person can enter into a valid contract which are enforceable but such contract should not restrain any person from doing any trade.⁷ The manner in which India and USA has resolved this has a difference with respect to their Constitution, policies and labour laws.

4. Statutory framework governing non-disclosure agreements

A. India

The main section that deals NDAs in India is Section 27 of Indian Contract Act 1872 that explains that any agreement that is causing restraint of trade is void and is not enforceable.⁸ While the provision was used to prevent restriction of trade and employment but court used to strictly use the meaning and even restrict reasonable restriction, creating significant doubt for NDA drafters and their clients.

The obligation of confidentiality that exist so long as there is a subsistence of an employment or other commercial relationship are normally enforced against as part of the contract of employment or the underlying commercial relationship, without implicating the bar of Section 27.⁹ The Indian courts usually allow that a person should not disclose trade secret after termination but does not allow non-compete clause that restrain the person from doing work somewhere or trade thus we can understand that view of the court is restrictive.

Besides the Indian Contract Act, the NDAs in India must meet with the provisions of Section 10 and 23 whereby they should be backed by a lawful consideration and an object that is legally acceptable respectively.¹⁰ Moreover the Indian court is also restrained from granting injunction to a person from professing lawful profession as such restriction are barred by section 41 of the statute with respect to Specific relief Act enacted on 1963.¹¹ Section 42, however, permits the grant of injunctions to prevent breach of a negative covenant where a party has contracted to render services of a special or unique character.¹²

NDA framework is complemented with the Information Technology Act, 2000 that was

⁷ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 80.10 (Joseph M. Perillo ed., rev. ed. 2003).

⁸The Indian Contract Act, 1872, § 27 (India).

⁹Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd., AIR 1967 SC 1098, 1105 (India).

¹⁰The Indian Contract Act, 1872, §§ 10, 23 (India).

¹¹The Specific Relief Act, 1963, § 41 (India).

¹²Id. § 42.

amended with the Information Technology (Amendment) Act, 2008 in the area of electronic information and data protection.¹³ Section 43A of this Act does not directly link to NDA but it defines that company should be responsible for protecting sensible data and a compensation is allowed if they failed to do so.

It is interesting to note that India lacks specific trade secret laws. This is a critical legislative loophole which has been in sharp contrast with the United States and has been repeatedly cited by theorists and actors as a major obstacle to successful implementation of NDA especially when transacting technology over cross-border.¹⁴

B. United States of America

The most important aspect of US is that they have a law that govern both in federal as well as state, the act which is enacted on 2016 helps the companies to file a case easily in federal court and thus the Defend Trade Act protects trade secret through injunction and other reliefs.

With respect to DTSA act gives protection to variety of trade information such as financial, business, technical etc as long the owner reasonably take measures to keep it as secret and such information must have an economic value.¹⁵ The act covers wide variety of information that can be covered under NDA so a company can rely on this Act if any person uses their trade secret that is confidential to the company.

On the state level, NDAs of trade secrets and confidential information may receive additional statutory protection through the Uniform Trade Secrets Act (UTSA), which was promulgated by the Uniform Law Commission in 1979 and later adopted by almost all states.¹⁶ Thus UTSA gives protection to a person or company not only from disclosing an information but also protects from theft.¹⁷

The role of state law in establishment of enforceability of NDAs is also critical especially in employment area. The Business and Professions Code of California, Section 16600 deserves a mention in particular: it states that all the contracts with the help of which any person is

¹³The Information Technology (Amendment) Act, 2008, § 43A (India).

¹⁴Apoorva Mandhani, India's Trade Secret Regime: Need for a Sui Generis Legislation, BARANDBENCH (Mar. 14, 2021, 9:30 AM), <https://www.barandbench.com/columns/indias-trade-secret-regime>.

¹⁵Id. § 1839(3).

¹⁶Uniform Trade Secrets Act § 1(4) (UNIF. L. COMM'N 1985).

¹⁷National Conference of State Legislatures, State Trade Secret Statutes (2022), <https://www.ncsl.org/research/financial-services-and-commerce/uniform-trade-secrets-act-state-statutes.aspx>.

prohibited to enter into the action of a lawful occupation, trade or business of any kind, are to that extent invalid,¹⁸ the California court has different rule with respect to NDA because different state in US has different rules so the company in multiple states face problems with respect to this matter.

5. Judicial treatment and enforceability standards

A. Indian Courts

The way NDAs are treated in India has been described as a tension between extreme literalism in Section 27 on the one hand, and the understanding that commercial confidentiality rules are in the legitimate interests of the law. The Supreme Court of India has resolved this conflict by contriving a difference between restraints that are ancillary to a lawful contract in general, which is possibly valid, and restraints that are merely covenants in restraint of trade, which is invalid.

The SC in *Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd.*¹⁹ It was held that a promise never to serve a competitor in the course of the employment was a valid restraint of trade, which could be enforced with an injunction. The Court found the covenant of such a nature to be reasonably necessary to safeguard the lawful business interests of the employer and that it was not a void restraint as per Section 27. The ruling raised the general rule of jurisdiction that NDAs and other related confidentiality covenants in existence under employment are enforceable.

However, the SC in *Superintendence Co. of India v. Krishan Murgai*²⁰ adopted a more restrictive treatment of post-termination restraints, and believed that any restraint upon the liberty of an employee in seeking employment with an opponent following the conclusion of his employment was void under Section 27, unless it was statutorily authorised. The case has received much scholarly criticism, in that it fails to make a distinction between non-compete and confidentiality obligations, which has a direct impact on trade, and trade restrictions, which has an indirect effect on trade.

¹⁸Cal. Bus. & Prof. Code § 16600 (West 2023).

¹⁹*Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd.*, AIR 1967 SC 1098 (India).

²⁰*Superintendence Co. of India v. Krishan Murgai*, AIR 1980 SC 1717 (India).

The Delhi High Court in *Pepsi Foods Ltd. v. Bharat Coca-Cola Holdings Pvt. Ltd.*²¹ accepted that the injunction can be adopted by the court to enforce negative covenants contained in employment contracts such as confidentiality agreement but only on the basis that they are within reasonable scope and time frame. The Court made it clear that in courts of equity it is incumbent upon them to weigh between the legitimate interest of the employer in safeguarding confidential information and the right of the employee to make a livelihood.

A particularly significant development in Indian NDA jurisprudence was the Delhi High Court decision in *Desiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar*,²² in which case it was decided by the court that a post-termination NDA clause prohibiting the disclosure of trade secrets was valid, despite Section 27. The court made a difference between a covenant not to compete and a covenant not to disclose- the former denies the employee the right to exercise his result in the job, the latter only restrains the employee in regard to the specific confidential information that had been obtained in the course of his employment.²³ This distinction has been influential in subsequent Indian NDA litigation.

In *Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh*,²⁴ the Bombay High Court synthesised the existing jurisprudence and held that confidentiality clauses in employment contracts would be enforceable to the extent that they protected genuine trade secrets, even after the termination of employment, provided they were not framed so broadly as to prevent the employee from using general skills acquired during the employment. The court noted that the line between protectable confidential information and an employee's general skill and knowledge is often difficult to draw, requiring a fact-specific inquiry in each case.²⁵

Most recently, the Madras High Court in *Cygnus Astrex Inc. v. Ajith Babu*²⁶ upheld a broad NDA in the context of a technology company, holding that the obligation not to disclose technical specifications and client data was enforceable post-termination, given the sensitive and commercially valuable nature of the information involved.²⁷ This decision reflects a growing judicial willingness in India to enforce post-termination NDAs in the technology

²¹*Pepsi Foods Ltd. v. Bharat Coca-Cola Holdings Pvt. Ltd.*, 1999 SCC OnLine Del 462 (India).

²²*Desiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar*, 2008 (38) PTC 543 (Del) (India).

²³*Id.* at 12.

²⁴*Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh*, 2010 SCC OnLine Bom 986 (India).

²⁵*Id.* at 18.

²⁶*Cygnus Astrex Inc. v. Ajith Babu*, 2023 SCC OnLine Mad 1201 (India).

²⁷*Id.* at 9.

sector, where the economic value of confidential information is particularly high.

B. United States Courts

American courts have developed a sophisticated and multi-layered jurisprudence on NDA enforceability, informed by common law principles, state statutes, and federal legislation. The general approach of US courts is to apply a reasonableness standard to NDAs, asking whether the restrictions are no greater than reasonably necessary to protect the legitimate interests of the party seeking enforcement.

The leading federal appellate decision on NDA enforceability in the employment context is *PepsiCo, Inc. v. Redmond*,²⁸ decided by the Seventh Circuit Court of Appeals. The court upheld an injunction restraining a senior employee from taking up employment with a competitor, on the basis that the inevitable disclosure of trade secrets — even without any deliberate breach — justified the enforcement of the confidentiality and non-solicitation provisions of the NDA.²⁹ The 'inevitable disclosure' doctrine recognised in *PepsiCo* has been adopted by several state courts, though it has also attracted criticism for its potential to unduly restrict employee mobility

In *Whyte v. Schlage Lock Co.*,³⁰ the California Court of Appeal rejected the inevitable disclosure doctrine, holding that it would permit employers to use NDAs as a vehicle to prevent employees from working for competitors, in violation of California's strong public policy favouring employee freedom to contract.³¹ This decision illustrates the significant interstate variation in NDA enforcement standards in the United States and the difficulty of enforcing NDAs across state lines.

*Cont'l Group, Inc. v. Kinsley*³² established the principle that courts will not enforce NDAs that are broader than necessary to protect the legitimate interests of the employer. In that case, the court refused to enforce a broadly drafted NDA that would have prevented the employee from using general skills and knowledge acquired during employment, distinguishing between protectable trade secrets and general professional expertise.

²⁸*PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

²⁹*Id.* at 1270.

³⁰*Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443 (Cal. Ct. App. 2002).

³¹*Id.* at 1455.

³²*Cont'l Group, Inc. v. Kinsley*, 422 F. Supp. 838 (D. Conn. 1976).

The historical development of the NDA in American law can be traced to *Eastman Kodak Co. v. Powers Film Products, Inc.*,³³ one of the earliest reported American decisions to enforce a confidentiality obligation in a commercial context. The court upheld the obligation not to disclose trade secrets on the basis that the disclosure would cause irreparable harm to the plaintiff's commercial interests — a principle that continues to underpin NDA enforcement in the United States

6. Employee non-disclosure agreements and labour rights

The tension between the employer's interest in protecting confidential information and the employee's right to freedom of employment is particularly acute in the context of employee NDAs. In both India and the United States, courts have had to grapple with the question of how far employers may go in restricting the post-employment activities of their employees by way of NDAs.

In India, the enforceability of employee NDAs is complicated by the constitutional guarantee of the right to practice any profession or carry on any trade or business under Article 19(1)(g) of the Constitution of India. While this right is subject to reasonable restrictions under Article 19(6), courts have generally been reluctant to uphold post-termination NDAs that effectively prevent employees from using their general skill and knowledge in their chosen profession.³⁴

The distinction drawn by Indian courts between protectable confidential information and general skills is of considerable practical importance. An employee who has, in the course of employment, acquired knowledge of a trade secret or confidential process is obliged not to disclose that information even after leaving the employment. However, an employee is entitled to use the general professional skills and experience acquired during employment in any subsequent employment.³⁵ The difficulty lies in identifying, in any particular case, whether the information in question falls on the protectable side of this line.

In the United States, the enforceability of employee NDAs varies significantly by state. California, with its constitutional and statutory provisions strongly favouring employee

³³*Eastman Kodak Co. v. Powers Film Products, Inc.*, 189 A.D. 556 (N.Y. App. Div. 1919).

³⁴Madhavi Goradia Divan, *Facets of Media Law*, 45 J. INDIA L. INST. 112, 118 (2003).

³⁵Pradeep S. Mehta, *Employee NDAs in India: Enforceability and Emerging Trends*, 12 NLSIU L. REV. 88, 95 (2019).

mobility,³⁶ has been the most resistant to enforcement of broad employee NDAs. Other states, such as New York and Illinois, apply a more flexible reasonableness standard that gives greater weight to employers' interests. The inevitable disclosure doctrine, recognised in *PepsiCo v. Redmond*,³⁷ has been seen as tipping the balance in favour of employers, allowing courts to enjoin employment relationships even in the absence of any proven disclosure, on the basis of the risk of inevitable disclosure.

A critical issue in the enforcement of employee NDAs in both jurisdictions is the adequacy of consideration. In India, the consideration for an NDA executed at the commencement of employment is generally the offer of employment itself, which courts have consistently held to be sufficient.³⁸ However, where an NDA is imposed on an existing employee without any additional consideration, its enforceability may be questioned on grounds of lack of consideration. In the United States, courts have generally held that continued employment constitutes adequate consideration for an NDA entered into by an at-will employee, though some states require independent consideration such as a bonus or promotion.

The Restatement (Second) of Contracts addresses the enforceability of post-employment restraints, observing that a covenant ancillary to an employment contract will be enforceable if the restraint is no greater than is needed to protect the employer's legitimate interest, the employee's hardship is not disproportionate, and the covenant is not injurious to the public.³⁹ The three part test developed in US helps Indian court to decide matter with respect to NDA.

7. Non-disclosure agreements, trade secrets, and digital commerce

In modern NDA jurisprudence, the intersection of NDAs and trade secret law along with the digital commerce offers some of the most problematic issues. The fast development of the digital economy has changed not only the character of confidential information but also the manner in which it can be revealed, posing new problems to the drafters of NDA, litigants, and courts.

³⁶Cal. Bus. & Prof. Code § 16600 (West 2023).

³⁷*PepsiCo, Inc. v. Redmond*, 54 F.3d at 1270.

³⁸S.B. Maskay, Reasonable Restraint and Section 27 of the Indian Contract Act, 9 DELHI L. REV. 44, 52 (1980).

³⁹RESTATEMENT (SECOND) OF CONTRACTS § 187 (AM. L. INST. 1981).

The Act which is enacted on 2016 with respect to trade secret in US with respect to trade secret helps in protecting information in the digital age.⁴⁰ The generalized definition of trade secrets proposed by the DTSA, which includes all types of digital information that has an economic benefit to its secretive preservation, virtually adds federal protection to much of the information that would normally be encompassed by the NDAs in the technology industry. Ex parte seizure orders are also available under the DTSA in exceptional cases to permit courts to restrain the disclosure or utilization of trade secrets prior to any notification being given to the defendant, a relief specifically helpful in the dynamic digital setting.⁴¹

Indian Law partially has a law to protect digital information that is IT Act but this act does not address anything about NDA and thus there is a gap in enforcement of legal framework for NDA,⁴² it lacks an extensive model of the protection of trade secrets or the implementation of NDAs in the online environment. This framework has had to be built out gradually by the common law case courts of India so that any case law for which it has been built is substantial but not as clear and predictable as the American statutory regime.⁴³

The framework of NDA enforcement across the two jurisdictions has been made more difficult by the development of cloud computing, artificial intelligence, and cross-border data flows. In the case of storing the confidential information in the cloud or artificial intelligence systems, the existing ideas of the disclosure and use have to be changed. Courts in the United States have started to consider the problems in both the DTSA and the state trade secret law contexts, making rulings that the transmission of confidential information to cloud storage vendors can amount to disclosure under an NDA unless covered specifically in the contract.⁴⁴

The digital aspect of NDA enforcement has been brought to the fore in India in the context of software firms and technology startups. They have turned to both the Delhi High Court and Bombay High Court who have been asked to decide whether the access of confidential information via electronic devices such as use of personal email account, USB drive, and cloud service providers amount to a violation of the NDA duties. Generally these courts have ruled

⁴⁰Defend Trade Secrets Act, 18 U.S.C. §§ 1836–1839 (2016).

⁴¹ELIZABETH ROWE & SHARON SANDEEN, *TRADE SECRET LAW IN A NUTSHELL* 143 (2d ed. 2017).

⁴²The Information Technology Act, 2000, § 43A (India).

⁴³Vineeta Dwivedi, *Non-Disclosure Agreements and Trade Secrets: A Comparative Study of Indian and American Jurisprudence*, 6 *RGNU L. REV.* 77, 89 (2020).

⁴⁴Roger Ford & W. Nicholson Price II, *Privacy and Accountability in Black-Box Medicine*, 23 *MICH. TELECOMM. & TECH. L. REV.* 1, 8 (2016).

that mode of disclosure does not bear any relevance on the issue of breach and that any kind of communications or use of confidential information in any manner that does not comply with the NDA constitutes a breach, whether arbitrated electronically or physically.⁴⁵

8. Remedies for breach of non-disclosure agreements

A. India

Indian law provides a range of remedies for breach of NDA obligations, although their availability and efficacy have been subject to debate. The primary remedy is an injunction, which may be granted either in advance of or following the breach. The grant of an interim injunction in NDA cases is governed by the principles laid down by the Supreme Court in *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*,⁴⁶ requiring the applicant to demonstrate a prima facie case, the balance of convenience in its favour, and the likelihood of irreparable harm if the injunction is not granted.

Damages for breach of NDA are available under Section 73 of the Indian Contract Act, which entitles the innocent party to recover compensation for any loss or damage that naturally arose from the breach or which the parties knew, when making the contract, to be the likely result of breach.⁴⁷ Proof of damages in NDA cases can be challenging, particularly where the confidential information is of a technical or strategic nature and its commercial value is difficult to quantify. Courts in India have in some cases awarded nominal or notional damages where actual loss could not be precisely quantified.⁴⁸

The Specific Relief Act, 1963 permits the grant of a permanent injunction to restrain the breach of a contract or the repetition or continuance of a breach.⁴⁹ However, Section 41(e) of the Act prohibits the grant of an injunction to prevent the breach of a contract, the performance of which would not be specifically enforced, a provision that has occasionally been invoked to resist the enforcement of NDA obligations where the underlying contract is one of personal service. Section 42 of the Act provides a more targeted remedy by permitting the enforcement of a negative covenant in a contract of service, allowing the court to restrain the breaching party

⁴⁵Rahul Narayan, Confidentiality Clauses in Commercial Agreements under Indian Law, 14 NLIU L. REV. 33, 41 (2017).

⁴⁶*Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545 (India).

⁴⁷The Indian Contract Act, 1872, § 73 (India).

⁴⁸*Supervisory Engineering Pvt. Ltd. v. Prashant Bhimrao Jagtap*, 2012 SCC OnLine Bom 1101 (India).

⁴⁹The Specific Relief Act, 1963, § 41 (India).

from performing elsewhere.⁵⁰

B. United States

American law provides a more comprehensive and flexible range of remedies for NDA breach. Injunctive relief is the most commonly sought remedy, and courts have shown considerable willingness to grant both interim and permanent injunctions in NDA cases, particularly where the risk of irreparable harm is established. The DTSA expressly authorises the grant of injunctions to prevent the actual or threatened misappropriation of trade secrets.⁵¹

Under the DTSA, a successful claimant may recover actual damages for the misappropriation of trade secrets, or alternatively, the unjust enrichment caused by the misappropriation. In cases of wilful and malicious misappropriation, the court may award exemplary damages of up to two times the actual damages, and may also award reasonable attorney's fees.⁵² Thus the law allow court to punish people who purposefully tries to disclose confidential information thereby other people will not do such because of the punishment.

The State courts not only stops a person from misuse of confidential information but the court can make a person to pay compensation for the profit that he got in that breach.⁵³ So if a person gets a profit from breach of NDA then the court can ask the person to give back the money that he obtained.

The Act of 2016 has provision to restrict a person without giving notice to the opposite party with respect to NDA breach that is not available in India thus through this Act the court has also the power to seize.⁵⁴ As there is no availability of such a remedy in India like that of Act of 2016 the opposite party can destroy the confidential information.

9. Comparative assessment and recommendations

Comparative evaluation of the NDA regime of India and the United States shows that there are

⁵⁰Id. § 42.

⁵¹Defend Trade Secrets Act, 18 U.S.C. §§ 1836–1839 (2016).

⁵²Id.

⁵³Neel v. Harding, 572 S.W.2d 55 (Ky. Ct. App. 1978).

⁵⁴Earthbound Farm, LLC v. Gibson, No. CV 11-04114 CRB (N.D. Cal. Feb. 2, 2012).

not only great differences in structure but also places of convergence of doctrines. The greatest difference is the legislative framework the United States has a full statutory regime, including the DTSA on the federal, and the UTSA on the state, which contains predictable and understandable guidelines on the enforcement of NDA, whereas India depends more on the principles of the general contract law, complemented by judicial decisions.⁵⁵

The lack of specific trade secret laws in India may also be the greatest loophole in the enforcement system of the NDA. These laws would serve a number of purposes: they would give a clear legal definition of confidential information and trade secrets that can be protected; they would create a legal basis that the post termination NDAs can be enforced; they would give a legal basis on what penalties would be awarded in case of breach; and they would simply bring the NDA regime in India in line with global best practices, allowing confidentiality obligation to be enforced across borders.⁵⁶

The second area that needs reform is the interpretation of Section 27 of the Indian Contract Act with regard to post-termination NDAs. The existing Indian law, whereby the enforceability of any post-termination confidentiality obligation is unclear and varies depending on a body of case law, provides unnecessary transactional costs and deters commercial relationship development. Legislative clarification- in the form of an amendment to Section 27, or in the form of a special exception to reasonable confidentiality obligations- would greatly increase the predictability and effectiveness of the Indian NDA law.⁵⁷

The United States is the country where the most important issue is the absence of consistency between states in relation to NDA enforcement standards. The almost blanket difference between the refusal of the State of California to impose any restraints on post-employment of its participating parties and the more liberal stand of the other States poses a serious dilemma to the multi-jurisdictional employers and business entities. The federal law that sets minimum requirements on the enforceability of NDA - without interfering with the state freedom to implement more protective measures - may help mitigate this issue to some extent.⁵⁸

⁵⁵Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 80 *FORDHAM L. REV.* 2207, 2215 (2012).

⁵⁶Ananya Singh, *Regulating NDAs in India: Legislative Gaps and Judicial Responses*, 18 *NUJS L. REV.* 1, 14 (2023).

⁵⁷The Indian Contract Act, 1872, § 27 (India).

⁵⁸Rowe & Sandeen, *supra* note 42, at 143.

The two jurisdictions could be better advised on how NDA enforcement principles can be applied to the digital sphere. The suitability of current legal regulations to enforce NDAs in the digital society is going to be an increasingly acute issue as the economic field increasingly digitalises and the importance of data and algorithms as a source of commercial value increases. In both the United States and India, courts and legislatures ought to come up with clear regulations of how digitally stored and transmitted confidential information is treated, liabilities of an entity that provides cloud service of the release of confidential information, and the enforceability of NDAs in relation to artificial intelligence and machine learning systems that can process or generate confidential information.

10. Conclusion

The Non-Disclosure Agreements hold the centre-stage in the design of contemporary commercial and employment relations, being the main legal instrument, by which the secrets of the knowledge economy are safeguarded. This paper has shown that even though India and United States understand the significance of NDA enforcement, the legal foundations upon which they manage to realize this goal have significant differences.

The NDA regime as established in India, which is founded on Indian Contract Act, 1872 and has been established over a comprehensive history of judicial decisions, offers some form of safeguarding to confidential commercial information. Nevertheless, the lack of special trade secret laws, the narrow-minded understanding of Section 27 and the scarcity of the remedial framework posed a great ambiguity in the realm of NDAs that diminishes their practical use. There has been growing sophistication of Indian courts in dealing with NDAs cases, especially in the technological fields, and judicial evolution is incapable of replacing clear and predictable statutory frameworks.

The comparative analysis, which is offered in this article, leads to the three main recommendations. First of all, India needs to implement specific trade secret laws, partially based on the DTSA and the UTSA that would give the country a more thorough statutory foundation of safeguarding confidential information and the application of NDAs. Second, Section 27 of the Indian Contract Act ought to be revised in a bid to acknowledge a firm exception of the presence of reasonable post-employment confidentiality terms and conditions that do not exceed what is required to guard the presence of actual trade secrets. Third, the jurisdictions must establish specific regulations on the enforcement of NDA in the digital space

and overcome the specific issues of cloud computing, artificial intelligence, and cross-border exchange of information.

With the world economy becoming more knowledge-based, it is only the proper legal regulation and enforcement of NDAs that will gain in prominence. The insights that are compared in this analysis can guide the further evolution of the law of NDA in India and the United States, and the wider project of harmonisation of trade secret and confidentiality law between India and the United States.

Bibliography

A. Primary Sources

I. Cases — India

Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh, 2010 SCC OnLine Bom 986 (India).

Cygnus Astrex Inc. v. Ajith Babu, 2023 SCC OnLine Mad 1201 (India).

Desiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar, 2008 (38) PTC 543 (Del) (India).

Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545 (India).

Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd., AIR 1967 SC 1098 (India).

Pepsi Foods Ltd. v. Bharat Coca-Cola Holdings Pvt. Ltd., 1999 SCC OnLine Del 462 (India).

Saltman Engineering Co. v. Campbell Engineering Co., (1948) 65 RPC 203 (UK).

Superintendence Co. of India v. Krishan Murgai, AIR 1980 SC 1717 (India).

Supervisory Engineering Pvt. Ltd. v. Prashant Bhimrao Jagtap, 2012 SCC OnLine Bom 1101 (India).

II. Cases — United States

Cont'l Group, Inc. v. Kinsley, 422 F. Supp. 838 (D. Conn. 1976).

Earthbound Farm, LLC v. Gibson, No. CV 11-04114 CRB (N.D. Cal. Feb. 2, 2012).

Eastman Kodak Co. v. Powers Film Products, Inc., 189 A.D. 556 (N.Y. App. Div. 1919).

Neel v. Harding, 572 S.W.2d 55 (Ky. Ct. App. 1978).

PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995).

Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443 (Cal. Ct. App. 2002).

III. Statutes — India

The Indian Contract Act, 1872 (India).

The Information Technology Act, 2000 (India).

The Information Technology (Amendment) Act, 2008 (India).

The Specific Relief Act, 1963 (India).

IV. Statutes — United States

Cal. Bus. & Prof. Code § 16600 (West 2023).

Defend Trade Secrets Act, 18 U.S.C. §§ 1836–1839 (2016).

Uniform Trade Secrets Act (UNIF. L. COMM'N 1985, amended 1986).

B. Secondary Sources

I. Books

ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS (Joseph M. Perillo ed., rev. ed. 2003).

BLACK'S LAW DICTIONARY (11th ed. 2019).

ELIZABETH ROWE & SHARON SANDEEN, TRADE SECRET LAW IN A NUTSHELL (2d ed. 2017).

RESTATEMENT (SECOND) OF CONTRACTS (AM. L. INST. 1981).

II. Journal Articles

Ananya Singh, Regulating NDAs in India: Legislative Gaps and Judicial Responses, 18 NUJS L. REV. 1 (2023).

Madhavi Goradia Divan, Facets of Media Law, 45 J. INDIA L. INST. 112 (2003).

Pradeep S. Mehta, Employee NDAs in India: Enforceability and Emerging Trends, 12 NLSIU L. REV. 88 (2019).

Rahul Narayan, Confidentiality Clauses in Commercial Agreements under Indian Law, 14 NLIU L. REV. 33 (2017).

Roger Ford & W. Nicholson Price II, Privacy and Accountability in Black-Box Medicine, 23 MICH. TELECOMM. & TECH. L. REV. 1 (2016).

S.B. Maskay, Reasonable Restraint and Section 27 of the Indian Contract Act, 9 DELHI L. REV. 44 (1980).

Shyamkrishna Balganes, The Pragmatic Incrementalism of Common Law Intellectual Property, 80 FORDHAM L. REV. 2207 (2012).

Vineeta Dwivedi, Non-Disclosure Agreements and Trade Secrets: A Comparative Study of Indian and American Jurisprudence, 6 RGNUL L. REV. 77 (2020).

III. Internet Sources

Apoorva Mandhani, India's Trade Secret Regime: Need for a Sui Generis Legislation, BARANDBENCH (Feb. 28, 2025, 9:30 AM), <https://www.barandbench.com/columns/indias-trade-secret-regime>.

National Conference of State Legislatures, State Trade Secret Statutes (2022), <https://www.ncsl.org/research/financial-services-and-commerce/uniform-trade-secrets-act-state-statutes.aspx>.