

Confidential Information, Non-disclosure and Non-compete clauses: A legal and practical perspective

STUDY CIRCLE - V.P. SHINTRE & ASSOCIATES

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- Confidential Information
- Subject matter
- Legal protection
- Confidentiality agreement
- Aspects
- Options
- Non-compete agreement
- Non-solicitation agreement

Information

- Examples
- Data
- Drawing
- Process
- Information about layout of premises
- Technical know-how
- Customers' details

Intellectual Property and Information

- IP protection
- The right to copy, unless restricted
- What does IP protect:
 - Excludes others : from what?
 - Private rights
 - Limited in time
 - The fence
- IP?
 - Data
 - Facts
 - Ideas
- Keep secret and protect

Transaction situations

- Employment
- M and A
- Buying business
- Selling or licensing technical knowhow
- Research
- Consultancy
- Obtaining finance for start-ups
- Creation of IP, viz. inventions
- Professionals : Lawyers, doctors, bankers

The Contract law applies!

- Formation : Stand alone or clause
- The principal provision in 37
- Steer clear of 27
- Remedies
- Compensation
- Liquidated Damages

Section 27 – Restraint of Trade

- Section 27 : Restraint of trade
- Void- whether general or partial
- Post-contract restraint is void
- Employment, other contracts
- Niranjana Shankar Golikari v Century Spg (SC 1967)
- Gujarat Bottling Co Ltd v Coca Cola Co (SC 1995)
- Pre-contract restraint does not attract 27.
- Reasonable

Section 27 – Restraint of Trade

Exception I - Saving of agreement not to carry on business of which goodwill is sold.

One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business.

Section 27 – Restraint of Trade

- Exceptions -
- Partnership Act
 - During partnership 11(2)
 - Outgoing partner 36(2) : reasonable
 - Dissolution of firm 54 : reasonable
 - Partner after dissolution and buyer of business 55(3) : reasonable

Section 27 – Restraint of Trade

- Protection of trade secrets and confidential information.
- Can use skill acquired during employment.

Contract law gives remedies

- Fences and locks
- Policies, security, responsibility
- Selective disclosure

How to protect?

- Depends on what you agree!
- Example : sale of products
- Aspects
- Sketchy or comprehensive

Confidentiality agreement : Essentials

- Define which information is confidential.
- State the scope for its use.
- Restrict its disclosure.

Parties

- Giver, Discloser, Giving Party
- Receiver, Recipient, Receiving Party
- Third parties
- Employees
- Advisers and consultants

Aspects

- Essential aspects
- The parties
- The Subject Matter : the confidential information
- Exceptions
- Purpose of supply
- Permissible disclosures
- Term

Aspects

- Obligations of Recipient
- Measures to take
- Responsible for unauthorised disclosure
- Indemnify for breach
- Acknowledge that disclosure will
- Cause loss to giver
- Return or destroy
- Non- solicitation

Aspects

- Other aspects
- Exclusivity to recipient
- No obligation to disclose
- Supplying CI \neq to Recipient
- Warranty about accuracy or completeness
- Not intended to be a transfer

Confidential Information

All information that the Giver will supply to the Receiver, whether oral, electronic, written, or otherwise, whether or not it is identified as such at the time of disclosure.

Any information in any form or medium made that the Giver supplies to the Receiver which is marked “Confidential”

Very exhaustive with a list of 100 items

Exceptions

- In the interest of the Receiver
- Already known to the receiver
- Public domain
- Received from third party
- Independently developed by Receiver
- Permissible disclosures : lawyers, advisers

- Further conditions
- If Receiver establishes with documents
- Within specified time
- Only to extent required for the purpose.

Purpose of Supply

- Limit use to the purpose

“To enable to evaluate business opportunities in future”

“Only for the purpose of deciding whether to purchase the business of ...” “not for any other purpose”

Term

- “Reasonable”
- As short as may be necessary
- Survive contract (viz. employment)

Keep Information Confidential

- Reasonable measures
- Prevent unauthorised access
- Not disclose to third parties

Measures

- Absolute
- Cannot ever be guaranteed
- Liable despite precautions

“The Receiver shall ensure that the information disclosed to the Receiver shall be kept confidential, and shall not be disclosed except as permitted in this agreement.”

Measures

“Take reasonable steps” :

- No liability
 - If steps are reasonable
 - Precautions are taken

“Same amount of care as the Receiver would take of his own information...”

Responsible for unauthorised disclosure

- Place responsibility on the Receiver for unauthorised disclosure by employees or advisers

Indemnity for Breach

“The Receiver shall indemnify and hold harmless the Giver against all damages, expenses, costs, losses which the Giver suffers because of unauthorised use or disclosure of the confidential information”.

- Which losses
- Direct, indirect, consequential losses
- Actions of Receiver or also third parties
- Limiting amount

Acknowledge : irreparable loss possible

- Acknowledge that disclosure will cause irreparable loss to Giver.
- Hence Giver will be entitled to injunction or specific performance.
- Assist in claim for liquidated damages.

Liquidated Damages

- Likely to affect claim for Injunction.

Return or Destroy

- Return on demand
- Destroy, and certify to Giver

Non-solicitation

- Time

“Not entice away or hire”

Other Aspects

- Exclusivity to Receiver ?? (sale of business)
- Giver will not talk to anyone else while talking with Receiver
- Giver not prevented from disclosing to anyone else
- No obligation to disclose
- Supplying CI \neq Offer

Other Aspects

- Warranty about accuracy or completeness
- Detail warranties can follow in later transaction
- No infringement of IP of third parties
- Disclosure will not infringe upon rights of third parties.
- Indemnity
- Not intended to be a transfer
- Giver reserves rights to himself in the CI
- Receiver acknowledges that all rights remain with Giver
- Disclosure does not create licence or transfer any right or property

Non- Compete

- Balancing two interests: protect information and personal freedom
- Post contract restrictions : void
- Interpretation
 - Language
 - “leaving service” = voluntary
Superintendence Co of India Pvt Ltd v Krishan Murgai (SC 1980)

Non-solicit agreements

- Non-solicitation agreement is one under which a party is prohibited from soliciting the other's clients, customers, employees, etc. during the term of the agreement.
- Employment: applies to the employee upon leaving the company.
- Partnerships, collaborations, franchise, agency, distributorship.
- “Not entice”, “not solicit”, “not hire”

Wipro Ltd vs Beckman International (Del 2006)

- Post termination restraint
- Exceptions:
 - general advertisement of positions will not be solicitation
 - Unsolicited applications of employees can be considered
- Employers are barred
- Employees are not barred

FI Smidth Pvt Ltd v Secan Invescast Mad 2013

- Solicitation is essentially a question of fact
- Not soliciting
 - Merely approaching customers
 - Giving quotations
- Orders must placed because of soliciting.

THANK YOU

Study Circle Session arranged by V.P. Shintre & Associates, Advocates

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