Intellectual Property and Competition Act, 2002

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Abstract

Competition Law has been understood as a mechanism in curbing market distortion, discipline anticompetitive practices, preventing monopoly and abuse of dominance, including allocation of resources and benefiting consumer with fair price, wider choices and better quality. It focusses on regulation of concentration of economic power, anticompetitive practise provisions, consumer protection and regulates combination which may cause difference in competition within India. The relationship between Competition Law and Intellectual Property (IP) Rights policy promotes investments in dynamic competition by limiting static competition. It has also been found out that that both serve the common purpose of maximising consumer welfare, through innovation, industry and competition. The object behind this research is to study this complementary relationship in various IP fields such as restrictive trade practices, anti-competitive conduct, price fixing, exclusion dealing, mergers and acquisition, exploitation of IP, market power, resale price maintenance, research and development, joint venture and merchandising. The research finds out that the Indian Government is yet to indicate what policy approach it intends to adopt in drawing a fine line between monopoly rights and competitive advantage. It also focusses on the forms of IP that lead to the establishment or extension of new markets or that enable control of markets such as patents, copyright, design and know-how.

1.1 Anti-Competition Issues

The rationale for bestowing exclusive rights to the owner of intellectual property (IP) has been understood as a means of reward and incentive to foster innovation. The ability to include others from trading in a form of business activity has been a foul smell on the nose of legislators across the world. Legislators from many countries have recognised the benefits for economies and consumer flowing from competition between traders and introduced laws to prevent monopolistic behaviour. In India this is reflected in the Competition Act. The tension between these two legal and economic disciplines has been recognised for many years.

It has been noted by commentators and the courts that the ultimate objective of IP and anti-competition laws are complementary because both serve the common purpose of maximising consumer welfare through innovation, industry and competition. [1]

Khan's study (1999) indicates that patent holdings are associated with a higher likelihood of anti-competition conduct for medium and large firms. This supports the hypothesis that innovative, successful forms are more likely to garner anti-competitive attention. So a fine line needs to be drawn that balances both the objectives of promoting competition while encouraging innovation.

There have been United States studies which assert that in fact there is a weak link between IP protection and innovation in most industries. Rather, it is said, the incentive to invent is brought about by the existence of competition rather than monopoly reward although some commentators have acknowledged exceptions in certain industries such as pharmaceutical, agricultural and chemical. Applying a sanctity test to this discussion would be to ask whether the firm who has developed an innovation product and built a business around it falls away as the period of expiration of monopoly rights approached. In fact the enterprise seeks to develop further technologies in order to retain a competitive advantage.

The Indian Government is yet to indicate what policy approach it intends to adopt in drawing this fine line. It is more than just a theoretical argument. Ultimately there will be grey areas no matter what id decided. It is impossible to exhaustively identify the rule for determining when a transaction is anti-competitive or merely just a reasonable exercise of monopoly IP rights.

The debate has tended to focus on the forms of IP that lead to the establishment or extension of new markets or that enable control of markets such as patents, copyright, design and know-how. Trademarks are not so apparent in this discussion because it deals with product differentiation although the brand may be strong enough that it could be said that licensing conduct in respect of trademark rights may raise similar issues.

[1] Atari Games Corporation v Nintendo of America Inc (1990) 897 F 2d 1572 (Fed Cir 1990)

In any event licensing is recognised as the most common form of IP commercialisation. The conditions that are contained within an IP license will dictate the level of 'anti-competitive effect'. In order for entrepreneurs to confidently implement licensing strategies they should have clear minds on what may await them if they were to enter into the anti-competitive swamp.

1.2 Indian Restrictive Trade Practices

The area of restrictive trade practices contained within the law is a complex area and the source of much litigation. The purpose of this material is to give the reader an understanding of these restrictive trade practices principles as a foundation for more detailed discussion on the scope of the doctrine of restraint of trade.

At the risk of being too sweeping, the essential principles behind India's restrictive trade practices law are centred on the definitions of 'market' and whether an enterprise's conduct results in 'substantially lessening competition' of that market. Those provisions that prohibit conduct without requiring the test of substantially lessening competition are referred to as 'per se' provision.

1.2.1 Anti-Competitive Conduct

An enterprise is prohibited from entering into:

- A 'contract', 'agreement' or 'understanding' (where 'understanding' has been interpreted to be a meeting of two minds, although it may be possible that it includes a situation where one party is aware of a course of action and does not commit to it, although an expectation or hope will not be sufficient)
- That has the purpose of, effect or likely effect of 'substantially lessening competition' in the relevant market.
- Determining this second element involves a quantitative and qualitative assessment of the impact of the conduct. The court will take account of normal commercial practise and commercial realities. Some factors that are relevant include:
- The enterprise's market share;
- Market powers;
- Extent that the conduct keeps out competitors to the market;
- The barriers to entry;
- Extent to which the client's freedom of action or choice as supplier is restrained;
- Length of time of the restriction

The enterprise will also be prohibited from entering into a contract, arrangement or understanding that contains an exclusionary provision. An exclusionary provision is one which has the purpose of preventing, restraining or limiting the supply of goods or services to another person. The exclusionary provision must be part of a contract, arrangement or understanding between competitors.

1.2.2 Price Fixing

An enterprise is prohibited from fixing the price of goods of services with a competitor or potential competitor. This includes the controlling or maintaining of

price for a discount. Allowance or rebate under an agreement. Arrangement or understanding between competitors. Importantly, there need be only two parties to the arrangement who are competitors. Such conduct will automatically qualify as conduct that has the effect of substantially lessening competition. There are some exceptions to this. It will not capture the establishment of a joint venture where the conduct concerns provision of services, such as the supply of IP for purposes of the joint venture; unless the effect is to substantially lessen competition.

1.2.3 Exclusive dealing

An enterprise is prohibited from entering into an agreement or refusing to enter into an arrangement on the basis that restricts a client in a way it can deal with a competitor of the enterprise if there is an adverse effect on competition. This may entail restrictions on how a person acquires or resupplies goods or services or affects the acquiring and resupply of goods or services in good relation to a particular location. At the end of the day the arrangement must have the effect of substantially lessening competition in the relevant market.

1.2.4 Mergers and Acquisitions

The law prohibits and enterprise from acquiring share or assets if that acquisition has the effect of substantially lessening competition in the relevant market. In addition to the factors referred to above courts have also considered a likelihood of the enterprise being able to increase prices or profits, the availability of substitutes, market attributes such an innovation and growth product differentiation, the chances of removal of a vigorous and effective competitor and the extent of vertical integration. [2]

1.2.5 Exploitation of Intellectual Property

The la in essence provides that an enterprise may avoid contravention of the above provisions if that conduct relates to the exploitation of the IP.

1.2.6 Market Power

If an enterprise has a substantial degree of power in a market it is prohibited from misusing that power for the purpose of eliminating or substantially damaging a competitor, preventing entry of any person into a market or preventing or deterring any person from competing against the enterprise.

1.2.7 Resale Price Maintenance

An enterprise is prohibited from insisting that the purchaser of goods or services be resupplied at a price less than that specified by the enterprise.

The Competition Act, 2002 in its preamble[3] itself reaffirms the objective for which it has been drafted, enacted and enforced. The very striking feature of the Act is creating

[2]Halsbury's Law of India, para [420-1345]

[3] An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote an sustain competition in markets, to protect interest of consumer and to ensure freedom of

the office of a Competition Commission as a specialized agency instead of making the provisions of the Act to be entertained before any civil court. The act prohibits jurisdiction of the civil courts to entertain any suit or proceeding in respect of any matter which the Commission is empowered by the provision of the Act.[4] To further extend the powers of the Commission the Act has over riding effect therewith contained in ant other law of the land[5], which is further fortified by the provision of application of other laws[6]. The Act has an unparallel provision to restrict the disclosure of the information obtained by the Commission for any purpose of this Act[7]. The nation has felt empowered under the law by the Right to Information Act[8].

No law has the power to command without the teeth to bite the non-abiders. The Competition Act is a civil law and its violation should be considered only a civil wrong. The Act prescribes detainment in the civil prison and the liability to pay fine for non-compliance to the orders of the Commission or failing to pay the penalty imposed as per the provisions of the Act[9].

The orders passed under the provisions of the Act shall be enforced as if an order or decree made by a High Court[10].

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trade carried on by other participants in markets, in India, and connected therewith or incidental thereto.

[4] Section 61: No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the [Commission or the Appellate Tribunal] is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

[5] Section 60: The provision of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

[6] Section 62: The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

[7] Section 57: No information relating to any enterprise, being an information which has been obtained by or on behalf of[the Commission or the Appellate Tribunal] for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

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[9] (1) Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Commission, or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or fails to pay the penalty imposed under this Act, he shall be liable to be detained in civil prison for a term which may extend to one year, unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakh. (2) The Commission may, while making an order under this Act, issue such directions to any person or authority, not inconsistent with this Act, as it thinks necessary or desirable, for the proper implementation or execution of the order, and any person who commits breach of, or fails to comply with, any obligation imposed on him under such direction, may be ordered by the Commission to be detained in civil prison for a term not exceeding one year unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakh.

[10] Section 39: Every order passed by the Commission under this Act shall be enforced by the Commission in the same manner as if it were a decree or order made by a High Court or the principal civil court in a suit pending therein and it shall be lawful for the Commission to send, in the event of its inability to execute it, such order to the High Court or the principal civil court, as the case may be, within the local limits of whose jurisdiction,—(a) in the case of an order against a person referred to in sub-clause (iii) or sub-clause (vi) or sub-clause (vii) of clause (l) of section 2, the registered office or the sole or principal place of business of the person in India or where the person has also a subordinate

With this background of the powers vested within the Commission, it would be prudent to look for the business of the Commission in the domain of IP. As stated earlier, IP is a time bound monopoly which is considered bad for the open market system but the TRIPS does not curtail the private monopoly and advices the members to ensure that the rights in IP are not going to become barriers to the trade. IP is considered as the property of the new millennium and the business environment can be imagined without IP. So it's a kind of limitation to go with the IP monopoly which apprehensions of being counterproductiveto the trade facilitation if left unchecked. The objective of the Competition Commission is to curb the agreements having the potential to adversely effect on competition and abuse of dominant position in the open market place. The agreements include written and oral agreements, arrangements, understanding between or among two or more parties/persons. The Competition Act has also included the most vital player of the open market place without whom the market cannot exist, the consumer. India is a country in which Government both at Central and State level is engaged in non-governing commercial activities. The Government holds monopoly in some areas like railways. Electricity, arms and ammunition manufacturing and atomic energy and in most of the cases acts as the sole entity. The existence of Government owned commercial entities have been covered under the scanner of the Act as the definition of the entity[11] word in the Act covers the Government run enterprises. So the Competition Act is another step in democratization of business and commercial aspects of India without compromising the sovereign power of the nation. There is no doubt in the name of creating a market regulator to curb the anticompetitive practices sovereignty of the nation cannot be compromised. But in the name of sovereign power, the decision makers should not be permitted to act like sovereigns enjoying all rights without any responsibility. To ensure the same is the responsibility vested with the Commission. It is unfortunate that in dealing with the issues in which a statutory body is involved the powers of the Commission have been curtailed to make it virtually meaningless. The provisions of the Act in this respect says that in the course of any process before any statutory authority if an issue is raised by a party about foul play in contravention to the provisions of the Act, the concerned statutory authority may make a reference to the issue to the Commission[12], Firstly, it is left at the sweet will of the statutory authority

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office, that subordinate office, is situated; (b) in the case of an order against any other person, the place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated, and thereupon the court to which the order is so sent shall execute the order as if it were a decree or order sent to it for execution.

[11] Section 2(h): "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

[12] Section 21(1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or

to make a reference to the Commission to the raised issue. Secondly, the Commission has been left with the option to provide an opinion after hearing the parties involved in the issue. Once again it is left at the sweet will of the statutory authority to pass an order at its will against the issue raised by a party. Then, what is the value of the opinion of the Commission and the time consumed in the opinion delivery process? No law permits to a party to decide an issue arbitrarily and in this case the stator authority has been vested with right to ignore the opinion the ignore the opinion of the Commission. Even the provision of citing a reason in the order delivered by the statutory authority, when the order is contrary to the opinion of the Commission, has not been incorporated. The time bar for the Commission to provide the opinion within sixty days of receipt of such reference request once again makes a statutory authority, which is a necessary party in the issue, not even to bother the opinion of the Commission to pass an order in the issue raised after the expiry of sixty days timeline. The logic fails before section 21[15] of the Act to establish a justified relation between sovereignty and equity. The inclusion of Government departments in the definition of enterprises is as good as the eyewash of section 21 of the Act to let a party decide the issue herself to the exclusion of the other party and non-binding opinion of the Commission, if it was sought by the issue deciding statutory authority party at all.

The provisions which provide contours for scanning the handshakes between the business entities by the Commission for the sake of ensuring the healthy competition in the market have got strength from the following three postulates of the competition law which is also known as antitrust law:

1. Prohibiting agreements or practices that restrict free trading and competition between business entities. This includes in particular the representation of cartels;
2. Banning abusive behaviour by an entity influencing a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in the said way may include price gouging, refusal to deal, predatory pricing, tying, and many others; and
3. Supervising the mergers and acquisitions of large corporations, including some joint ventures. Transactions that are considered to pressurize the competitive process can be prohibited altogether, or approved subject to redressal such as an obligation to divest part of the merged business or to offer licenses or access to facilities to enable other businesses to continue competing.

The reflections of these postulates are found in the Competition Act, 2001 with special reference to section 3, 4, 5 and 6.

The commission is to look into the agreements which are anticompetitive in nature and if decided anticompetitive would be void as prescribed in section 3. In short, the

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would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.
(2) On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit: Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference.

agreements which bring a person or an association of persons into the dominant position are to be considered anticompetitive to the exclusion of IP rights for either protection or to restrain infringement. Although the section 3 defines anti-competitive agreements, the Act leaves the floor open to define and interpret an anti-competitive de novo in respect of each case.

The second in the check list of the anti-competitive trade practise is abuse of dominant position to assure the existence of small fish in the sea of open market. The section 4 defines the abuse of dominant position and prohibits it out rightly. The section 4 literally says that monopoly is bad and defines what is bad in reference to enjoyment of monopoly in the market. There are a few important points to ponder upon in reference to the misuse of the dominant position in market. Firstly, the section 4 of the Act contrary to the previous section does not come to exclude the dominant position acquired by IP monopoly. Secondly, the dominant positions is to be examined not only in reference to the consumers. Thirdly, the section 4 also includes the misuse of dominant powers of an enterprise to use the poison of predatory price to wipe of the competitors of the market. There is a complete chapter 16 in the Patent Act, 1970 to check the malpractices of dominant position due to patent monopoly in the form of compulsory licensing. The special attention has been given in the Patent Law to ensure the availability of medicine at an affordable price. Similar is the provision in the Copyright Act, 1957 under section 32 for granting license is given after seven years. These provision of section 4 of the Competition Act, 2002 to leave little room for the abuse of dominant positions to sustain.

The third set of issues at the scanner of the Commission, as provided in the Section 5 of the Act, are related to maintain the competitiveness in the market is to keep a tab on the mergers, acquisition and amalgamations of the enterprise and have been very aptly named as combinations to exploit the more dominant position in combination of major players. The section 5 prescribes the threshold limits for the joint assets or turnover resulting from handshakes of enterprise and the Commission has the role of a watchdog to ensure that the provisions of the Act have been complied with in forming the combinations of powerful market players. Section 6 defines regulations to adhere with to the extent of declaring the combination void if the combination causes or there are apprehensions of appreciable adverse effect on competition within the Indian market. There is a provision under 6 of the Act for the parties involved in combination to approach the Commission within seven days from the approval of the merger or amalgamation or execution of the of any agreement for acquisition to take the approval of the Commission for forming the combination. The Commission as prescribed in the Section 30 shall inquire about the declaration made about forming the combination and the effect of the combination on competition. The consent of the commission is to become an integral part of the due diligence procedure in the mega deals in the Indian corporate world to face the danger of getting declared a void deal in the time ahead. There is also a provision under section 19 for making an inquiry into certain agreements and dominant position of enterprise for which the Commission may either take suo moto cognizance of a deal or may entertain a complaint as prescribed or take a reference made by the Central government to inquire into a deal. The Commission is duty bound by the Section 18 to eliminate practices

having adverse effect on competition, promote and sustain competition, safegaurd the interest of consumers, and ensure freedom of trade carried on by other participants, in market in India. If the commission disapproves a combination then the other legal authorities are duty bound under the provision of section 31(13) to disprove the combination.

The market would remain uneven of the position of any of the constituents remains weak. This thought always remained in the mind of policy makers and to make the constituents at equal footing and to ensure the balance the special emphasis was given to the consumers in almost all legal instruments at both domestic and international level. The objectives and principles of the TRIPS Agreement have been defined in Article 7[13] and Article 8[14] of the Agreement; both the articles shoe the concern for the consumers. The market places makes no sense without consumers. The consumers do not compete in the market place with the producers and services providers; even then they have been rightly safeguarded in the Competition Act[15].

The existence of the provision for curbing the anti-competitive trade practices with reference to the TRIPS agreement is not a co-incidence. The blur at the border line of the domains of the IP laws and the competitive law makes the anti-competitive issue related to IP very complex. The most of the top hundred global enterprises have a major share in their assets in the form of IP. The section 3 is virtually defunct for the IP agreements in the name of restraining any chance of infringement and protection of IP rights. If the patent licensing agreements are carefully studied it would not be difficult to point out anti-competitive conditions in them. Even in the service agreements are carefully studies it would not be difficult to point out anti-competitive conditions in them. Even in the service agreements to the goods under IP monopoly all means are tried to manage the IP within the control of the owner leaving virtually no chance for infringement. The chances for infringement are always there in IP as it has to enter into market for its own existence. There is no bank locker or manual lock to keep IP safe. It sustains on just legal provisions and non-existence of its physical properties makes the task more arduous to manage it in in the market while exploiting it commercially. Hence the pro monopolistic approach is a must to exploit an IP throughout its life. Therefore the exclusion of the IP agreements from the Section 3 of the Act is justified. The fine line demarcating the anti-competitive agreements and

[13] Article 7: The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

[14] Article 8: (1) Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
(2) Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

[15] 2002

justified IP agreements is to be traced on case to case bases in the light of the section 4 of the Act which does not exclude IP while investigating the abuse of the dominating position.

1.3 Collaborative Research and Development

The collaborative R&D projects that involve independent parties joining together for the purpose of developing a particular technology in a specific field have been common in recent times in India principally driven by the Co-operative Research Centres program. This involves the sharing of ownership of future IP and cross-licensing of future IP and each party's background IP.

If the licensing of the background IP is non-exclusive, as it usually is, it is likely to fall within section 51(3) provided the license concerns the subject matter of the IP and not the end result of the IP such as a patented product.

The license of future IP will not fall within section 51(3) so Pt IV of the TPA will apply. However, the license of future IP is often confined to internal research and this is unlikely to give rise of Pt IV difficulties. If the license extends to commercial purposes then the terms of hat license become all important for determining whether any section of Pt IV applies.

1.3.1 Establishment of Incorporated Joint Venture for Commercialisation

If independent enterprises pool their IP technology into one incorporated vehicle that will be responsible for commercializing that technology then an exclusive license to that incorporated vehicle would, on its face, fall within section 51(3). However, much depends on the conditions contained in that license arrangement and the effect of the pooling of that technology. If technology is significant in its field it may well present market power issues or it may be construed as trying to fix prices for the product.

1.3.2 Merchandising

To the extent that the license conditions go beyond quality, kind of goods and standard then section 51(3) would not apply.

1.4 Approach of other Jurisdictions

It is instructive to look at how other jurisdictions approached the tension between anti-competition and maintenance of monopoly IP rights. The United States Fair trading Commission, the Japan Fair Trading Commission and the European Union have issued guidelines the likelihood of certain conditions falling foul of anti-competition laws. None of them, however, have issued practical guidelines that are equivalent to the 'relates to' test.

1.5 Restraint of Trade

Irrespective of any concerns arising under the Trade Practices Act, the enterprise that imposes conditions in its license that has the effect of restraining the other party from carrying on part or all of its business must read carefully to ensure that the agreements

will not be an enforceable on the basis that it constitutes an unreasonable restraint of trade.

This doctrine exists in Indian law in all stated and Territories as a matter of common law although New South Wales has specified legislation dealing with it.

The law does not prevent the restraints being imposed. It merely requires that the restraint is not unreasonable. This involves balancing the legitimate aim of protecting the interest of the enterprise. So an enterprise that gives a license to a distributor to access the database of clients bear a risk that the distributor may use that know-how and information to compete against the licensor. The imposition of a condition that restraints the licensee from competing against the licensor prevents the licensee from spring boarding and getting a free ride on the efforts undertaken by the licensor in developing that know-how. If court finds that the restraint is unreasonable then all of the restraint will be held unenforceable.

An enterprise that requires a party to enter into confidentiality agreements must be aware of this potential difficulty. An obligation to keep information confidential can in essence be another form of restraint of trade if the restriction on using the information prevents the recipient from carrying on business. The period of the restraint will be critical and any restraint that imposes a perpetual obligation will attract closer scrutiny from the courts. This was the case in *Maggbury Pvt Ltd v Hafele India Pvt Ltd*[16]. In the novel Foldaway Ironing board hinge, Maggbury had taken steps to obtain patent protection but required Hafele to sign a confidentiality agreement before disclosing the innovation to it. Eventually negotiations broke down and Hafele began distributing its own version to the invention. Maggbury had disclosed the confidential information to the public through various trade fairs and through the patent application process. The confidentiality agreement did not address whether the obligation of confidence lapsed one the information became public. The High Court found that the confidentiality agreement would have prevented Hafele from carrying on its business and to the extent that it imposed the obligation confidence beyond the time from when the information was made public it was unreasonable and should not be enforced.

The most common mechanism used by drafters of document to guard against a restraint being held as unenforceable is to frame the restraint clause in a cascading fashion as follows:

- Maximum desired period of restraint:
- Next best desired period of restraint
- Minimum desired period of restraint
- Maximum territory in which the restraint applies
- Next best desired territory in which the restraint applies
- Minimum desired territory in which the restraint applies

[16] (2001) 185 ALR 152

It is important that any agreement which contains a restraint clause also contains a clause that enables any unenforceable clause to be severed from the agreement without affecting the remainder of the agreement unless such restraints is a fundamental term of the bargain.