

# [The common law doctrine of restraint of trade and its relationship with competiti...](https://assignbuster.com/the-common-law-doctrine-of-restraint-of-trade-and-its-relationship-with-competition-law/)

Introduction It is a well settled notion in common law that agreements which impose restraints on trade are not enforceable. This notion was developed further in the late 19th century and late 20th century and made applicable to what we call ‘ competition law’ in the USA. It is important to note that the enactment of the Sherman Anti-trust Act, 1890 was a reason for this development. What is the correlation between ‘ restraint of trade doctrine’ and ‘ modern competition law’? This article seeks to examine the relationship between the two by tracing back cases when the Sherman Act was newly enacted and the interpretation given by the US Supreme Court.

The article has two parts. Part I deals with the doctrine of restraint of trade in order to have a clear understanding of it before stepping into part II where the correlation between the doctrine and competition law is analysed. Part III discusses the various provisions in different legislations enacted in India which deal with agreements in restraint of trade. Part- I The Common Law doctrine of ‘ Restraint of Trade’ Limitations on freedom of contract: Public Policy imposes certain limitations on the freedom of persons to contract.

An ostensibly valid contract may be tainted with illegality. The source of the illegality may arise by statute or by virtue of the principles of common law. Agreements in Restraint of Trade: The doctrine of restraint of trade is a rule of public policy developed by the common law. It is a general principle of the common law that a person is entitled to undertake a lawful trade when and where he wishes.

The common law does not favour agreements that prohibit or restrain a person in the exercise of a lawful trade, employment or profession. It protects the right of individuals to work and prevents them from disabling themselves from earning a living by an unreasonable restriction by the doctrine of restraint of trade. A principal aim of this doctrine is to prevent agreements which unreasonably restrict competition. Defining agreements in restraint of trade: An agreement in restraint of trade has been defined as ‘ one in which a party (the convenantor) agrees with any other party (the convenantee) to restrict his liberty in the future to carry on trade with other persons not paries to the contract in such a manner as he chooses. Anson is of the opinion that “…today, when economic theory indicates that a competitive economy produces more beneficial results—from the point of view of the public—than a non-competitive economy, it is tempting to define a contract in restraint of trade as being one which is designed to restrict competition…” Also in Esso , it was said that the doctrine of restraint of trade: “ does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties’ services and not their sterilisation. ” Reasonableness as a test to justify restraints: All restraints of trade, in the absence of special justifying circumstances, are contrary to public policy and do not give rise to legally binding obligations, and in that sense are void.

It is a question of law for the decision of the Court whether the special circumstances adduced do or do not justify the restraint; and if a restraint is not justified, the Court does not enforce such agreements as they go contrary to public policy. A restraint can only be justified if two conditions are satisfied: a. The restraint has to be reasonable in the interests of the contracting parties b. The restraint has to be reasonable in the interest of the public.

The onus of showing that the restraint is reasonable between the parties rests upon the person alleging that it is so, that is to say, upon the covenantee. The onus of showing that, notwithstanding that a covenant is reasonable between the parties, it is nevertheless injurious to public interest and therefore void, rests upon the party alleging it to be so, that is to say, usually upon the convenantor. A covenant in restraint of trade is, prima facie, unenforceable at common law and is enforceable only if it is reasonable having regard to the interests of the parties concerned and the public. Unless the unreasonable part can be severed by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant or the entire contract unenforceable. Form and substance: When determining whether a contractual provision operates in restraint of trade, the courts will consider its effect in practice rather than its form on paper. On occasions, the courts have been prepared to treat as a sham a transaction or series of transactions which give the false impression that a covenantor is not restricting an existing freedom.

Reasonableness in the interest of the parties: Under this test the consideration would be twofold: what is it that the covenantee is entitled to protect, and how far can such protection extend. A covenant cannot be considered reasonable unless it is designed to protect the legitimate interests of the covenantee. While deciding whether a restraint is reasonable as among the parties, the Court will look into subject- matter and nature of the agreement, the extent of protection and whether the restraint is reasonable for both the parties or not. Reasonableness in the interests of the public: Even where cases are decided on the basis of reasonableness between the parties, it is ultimately on the ground of public policy that the Court will decline to enforce an unreasonable restraint. It is very rare that a restraint, though reasonable in the interests of the parties, has been held unenforceable because it involved some injury to the public. However, in relation to certain types of agreement like cartels and other forms of restrictive trading agreements, there has been a distinct shift of emphasis in favour of recognizing the importance of the interests of the public.

Two categories of agreement have long been recognized as ‘ in restraint of trade’. First, agreements between employers and employees, whereby the employees covenant not to set up business on their own account on leaving the employers’ service or to enter into employment with a rival firm. Secondly, agreements between the buyer and seller of a business together with its goodwill, whereby the seller covenants not to carry o a business which will compete with that of a buyer. However, the concept has been extended by legislation or by judicial pronouncement to cartel agreements, exclusive dealing agreements, trade unions and monopolies. This is dealt in detail in the next part.

Part IIRelationship between the common law ‘ restraint of trade’ doctrine and modern competition law: Tracing the interpretative history of the Sherman Act The first piece of legislation in the world which was enacted with the object of regulating competition was USA’s Sherman Anti-trust Act 1890. In order to appreciate the correlation between the common law principle of ‘ restraint of trade’ and modern competition law, the interpretation given to the provisions (mainly Section 1 of the Act) of the Act by the US Courts The American Sherman Act 1890 is taken as the starting point of modern competition (or in America, ‘ antitrust’) law but the roots of competition law lie much deeper. Senator Sherman himself told the Senate that his bill did ‘ not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government’. Section 1 of the Sherman Act prohibits ‘ every contract, combination .

. . or conspiracy in restraint of trade’ at a federal level. With respect to this provision, there were different views taken by American judges. The views related to two broad aspects.

The first aspect was whether the use of the term ‘ restraint of trade’ in the Act was in the same sense as the common law prohibition on ‘ unreasonable restraint of trade’ or was it broader than what ommon law contemplates, thereby bringing within its fold all kinds of restraints of trade irrespective of whether they are reasonable or not. The second aspect with respect to which there were diverse opinions was whether the scope of the Act was to regulate competition or whether preserving competition was completely beyond the scope of the Act. THE DIVERGENT OPINIONS ON WHETHER ‘ RESTRAINT OF TRADE’ IMPLIED PRESERVATION OF COMPETITION: A. The Holmes’ view: During most of the nineteenth century, the law of cartels and mergers was not part of the law of contracts in restraint of trade. Few American decisions before 1870 dealt with price-fixing and even fewer dealt directly with the competitive consequences of mergers. In 1891 the Minnesota Supreme Court chided a lawyer who had “ confounded” his argument by indiscriminately mixing cases involving contracts in restraint of trade with cases involving “ combinations between producers or dealers to limit the production or supply of an article so as to acquire a monopoly of it and then unreasonably enhance prices.

” The law of contracts in restraint of trade and boycotts expressed the classical meaning of “ competition,” with its emphasis on liberty and freedom from coercion. A voluntary price-fixing agreement was not “ anticompetitive” in the sense that anyone’s freedom to act was restrained artificially. At common law price-fixing agreements might be unenforceable, but they were almost never actionable by nonparticipants. Beginning in the 1890s, however, the law of cartels and mergers became the quintessential expression of neoclassical price theory, particularly its emerging theory of competition.

The Northern Securities Case and Holmes’ Dissenting Opinion The Northern Securities case, in which Holmes’s dissent appeared in 1904, condemned a merger between parallel railroad lines that effectively created a monopoly of east-west railroad traffic over a large section of the United States between the Mississippi River and Puget Sound. The merger was accomplished by means of a holding company. Shareholders of the participating railroads transferred a controlling interest in their companies to a new corporation created under a New Jersey law that permitted holding companies. The merger was completely voluntary. No effort was made to coerce unwilling outsiders to participate, nor to keep them from practicing their trade. Holmes explained at some length why the two things forbidden by the Sherman Act, contracts or combinations “ in restraint of trade” in section 1, and “ monopolization” in section 2, really had nothing to do with competition, and thus did not condemn this particular merger.

The common law defined “ contracts in restraint of trade” as “ contracts with a stranger to the contractor’s business … which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would,” and the trade restrained “ was the contractor’s own. ” Combinations or conspiracies in restraint of trade,” Holmes continued, “ were combinations to keep strangers to the agreement out of the business.

” The objection to them was not “ to their effect upon the parties making the contract,” but rather “ to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. ” As such, they “ were regarded as contrary to public policy because they monopolized, or attempted to monopolize some portion of the trade or commerce of the realm. ” Holmes argued that the Sherman Act’s words “ in the form of trust or otherwise,” referred not to price-fixing agreements, but rather to “ exclusionary practices” directed by the large combination against its competitors. According to him, Congress’ concern was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared.

Implication of the Holmes’s view: Holmes’s Northern Securities dissent adopted the classical position that the Sherman Act, like the common law, must be concerned with artificial restrictions placed on the individual’s freedom to act. It should not care about purely voluntary arrangements, such as cartels or mergers, that simply ad the effect of raising prices. Holmes was correct about the historical meaning of the common law. The classical doctrine of contracts in restraint of trade had little or nothing to do with the emerging neoclassical doctrine of competition. Arthur J.

Eddy observed in his 1901 treatise on combinations that “ the law governing contracts in restraint of trade has no direct connection with the law governing combinations. ” Nevertheless, “ nearly every decision against a combination assigns as one of the reasons for its illegality that it is ‘ in restraint of trade. ’ This involves a misapprehension and misapplication of the law governing contracts in restraint of trade. A cartel agreement, for example, “ is in no sense a contract in restraint of trade, unless it directly seeks to prohibit some one from again embarking in business. ” Some of the earliest Sherman Act decisions read the common-law approach into the Act.

Following Holmes, courts refused to condemn cartels or mergers unless the defendants also had made contracts in restraint of trade at common law. In Corning , an 1892 decision, the court refused to condemn a merger by asset acquisition because the sellers had not been required to enter non-competition agreements. In Terrell, the court found price fixing among liquor dealers legal under the Sherman Act, because there were no contract terms requiring buyers to deal exclusively with the cartel. Likewise in the Whiskey Trust case of 1892 , Judge Jackson interpreted the term “ monopolize” to mean either, following the historical meaning of monopoly, an exclusive control of some \*1035 market; or, following the historical doctrine of contracts in restraint of trade, contractual obligations to exclude others from the market. The whiskey trust controlled only three-quarters of the liquor sold.

Nor could Judge Jackson find any efforts by the trust to curtail the production of others. On the other hand, in the Cash Register Trust case of 1893, the court had no difficulty condemning the defendants for employing coercive methods against others in creating and maintaining their “ trust. ” They had used spies, threats, and intimidation, and had even beaten and bribed employees. The mere attempt to control all of the cash register business did not violate the statute, Judge Putnam concluded, but the coercive methods employed did. B. Taft’s View: Even though, Taft J.

id not directly deal with the question as to whether the Sherman Act’s ‘ restraint of trade’ clause was related to ‘ competition’, his judgment in the Addyston Pipe case set the trend for considering ‘ restraint of trade’ provision in the Sherman Act as one related to competition law as well. In other words, his judgment fused the common law notion of restraint of trade and anti-competitive practices. Antitrust scholars have often praised Judge Taft’s opinion in Addyston Pipe & Steel Co. for its expression of the relationship between the Sherman Act and the common law.

The great brilliance of the opinion, its admirers argue, is that Taft was able to show that the common law had always adopted a distinction between “ naked” and “ ancillary” restraints, condemning the former automatically, but subjecting the latter to further analysis for reasonableness. This aspect has been discussed in detail below. But the relevance of his judgment lies in the fact that Taft relied on several recent decisions reflecting the emerging neoclassical view that price-fixing itself was a bad thing, whether or not third parties were coerced, the defendants had market power, or the prices fixed were unreasonable. As a result of this, one of the great accomplishments of Taft’s Addyston Pipe opinion was to fuse the neoclassical model of competition with the legal doctrine of combinations in restraint of trade.

In the process Judge Taft created the illusion that the law of combinations in restraint of trade had always been concerned with “ competition,” neoclassically defined. The result was a thoroughly neoclassical Sherman Act. Taft’s analysis so overwhelmed future antitrust case law that Holmes’s dissenting position in Northern Securities , six years later, although historically more correct, was all but forgotten. THE VIEWS ON THE SCOPE OF SECTION 1 OF THE SHERMAN ACT: A. Peckham’s View in the Trans-Mussorie case: When the Sherman Act was enacted, it was largely felt that Section 1 was a codification of the common law principle of ‘ restraint of trade’.

But the Supreme Court of USA took a different view and ascribed a broader meaning to the term ‘ restraint of trade’ used in Section1 than the meaning normally contemplated under common law. This came to light for the first time in the famous Trans-Missouri Freight Association case . Justice Peckham, in the case, took the explicit position that the Sherman Act went beyond the common law: whereas the latter proscribed only unreasonable restraints, the act in so many words prohibited every restraint. During the next six years, Peckham was the Court’s chief spokesman in antitrust cases, and the doctrine he announced generally prevailed. In the Trans-Missouri case, once it was determined that the Sherman Act applied to railroads, the only question was whether the Freight Association violated it.

The answer depended, according to the defendants, on whether the Association was illegal at common law, and they supported their view by pointing to the title of the act, which reads, “ to protect trade and commerce against unlawful restraints and monopolies. But Peckham, speaking for the majority of the Court, maintained that the title did not refer to restraints and monopolies that were illegal by common-law principles but to those that were “ made unlawful in the body of the statute. ” Contracts in restraint of trade, Peckham reasoned, were a familiar category at common law, and had come to be divided into two classes. “ Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law.

” But the Sherman Act had erased this distinction. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc. , the plain and ordinary meaning of such language is not limited to that kind of contract which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. Although the “ plain language” of the act decided the issue at trial as far as he was concerned, Peckham went on to discuss the hypothetical question of whether the Association would have violated the act had the statutory prohibitions been construed as being no broader than those at the common law. The common law, he asserted, had come to tolerate contracts that included a restraint of trade collateral to the sale of a business–the sort of arrangement by which the seller of a shop might agree not to open a competing business in the same neighborhood.

And then, surprisingly, Peckham added that such contracts “ might not be included, within the letter or spirit of the statute. ” His next sentence explained this apparent contradiction by implying that judges may carve exceptions from the letter of the law in order to bring its effect closer to the legislators’ intent. But Peckham, unlike some other judges, would not go so far as to assert that all reasonable restraints should be excepted on the same principle. He turned now to the merits of the arguments by which the defendants tried to show that the Association constituted a reasonable restraint and was formed to achieve purposes which Congress could not have meant to declare illegal. They urged that competition among railroads is always excessive and, if unrestrained, would lead to bankruptcy and ruin. A combination designed to prevent this result by restricting excess competition and establishing reasonable rates could not be supposed contrary to public policy.

Peckham was inclined to agree that railroads always stood in danger of ruinous competition, but he rejoined that many commentators took the opposite view–that full competition not only benefited the public but, in the long run, did not injure the railroads. Moreover, he asserted, it would be impossible to determine whether rates set by a combination were reasonable, and recognition of this difficulty might well have prompted Congress to prohibit all agreements in restraint of trade, whether reasonable or not. It might even be true, he conceded, that the Association was valid at common law. The argument to the contrary was “ not entirely conclusive. ” But, in any event, Congress had refused to distinguish in the body of the act between reasonable and unreasonable restraints, and the Court would decline “ to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government. ” Thus, every inquiry led Peckham back to the same essential rule, that the act must be given its literal meaning.

At the end of the first decade of the twentieth century the federal courts since 1897 had consistently required that the Sherman Act be regarded as having superseded the common law with respect to restraints of trade and monopoly insofar as the critical distinction between reasonableness and unreasonableness was concerned. Although the Supreme Court remained sharply divided over this construction of the Sherman Act, nevertheless, as Commissioner of Corporations Herbert Knox Smith pointed out, “ one of the few propositions upon which the entire court agreed was on the common-law distinction between reasonable and unreasonable restraint of trade. ” B. The rule laid down in the Standard Oil Case- Return to common law interpretation: By 1911, the stage had already been set for the return to the common-law construction of the Sherman Act that the Supreme Court, in the Standard Oil and American Tobacco cases, was to declare. Not only had many federal judges expressed dissatisfaction with the public policy embodied in the prevailing construction of the Sherman Act, but also public criticism of that construction had been building throughout the period 1897-1911. The criticism came from economists, such political leaders as Theodore Roosevelt and William Howard Taft, capitalists, labor leaders, farm leaders, and not least of all from the Bureau of Corporations, established in 1903 as a “ progressive” measure intended as a first step toward a more effective federal regulatory policy.

In essence the Court ruled definitively that the Sherman Act prohibited unreasonable restraints of trade and monopoly as defined at common law. Unreasonable restraints of trade or monopoly thus defined meant (1) unfair, oppressive methods designed to eliminate, damage, or destroy competitors; and (2) business practices, the purpose or necessary effect of which was to enhance or depress prices unduly, or affect trade or distribution or transportation unduly, that is, to the detriment of the public interest. Consistent with common-law doctrine, the Court, moreover, made it explicit that freedom of contract and the right to compete (“ the legitimate purpose of reasonably forwarding personal interest”), as distinguished from nrestricted competition, or the obligation to compete, constituted the controlling desideratum under the Sherman Act. By corollary, the Court went on to state that to compel unrestricted competition must necessarily infringe free trade, liberty of contract, and rights of property, precisely which, it insisted, the Sherman Act had been designed to protect: “ The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

” In this connection, in the American Tobacco case , the Court, reaffirming its Standard Oil decision, elaborated its view: “ Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words “ restraint of trade” at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly obstructing the due course of trade or which, either because of the evident purpose of the acts, etc. , injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance…. In other words, .

.. the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce–the free movement of which it was the purpose of the statute to protect…

. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is … lainly required in order to give effect to the remedial purposes which the act ..

. contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, …

thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve. ” In subsequent cases, the Supreme Court followed through consistently with concrete applications of the meaning of its Rule of Reason decisions. Part III Indian position related to Restraint of Trade India has adopted the common law principle of restraint of trade. It has been incorporated in the Indian Contract Act, 1872. The law provided in the Contract Act was modified by the Indian Partnership Act, 1932, which makes specific stipulations regarding agreements in restraint of trade, which finds mention in four sections i.

e. Sec. 11 (2), 36 (2), 54 and 55 (3). Further, Sec. 19 of the Trade Unions Act, 1926 AND Section 57 of the Specific Relief Act, 1963 provides for provision similar to Contract Act. There is an ongoing debate to introduce the aforesaid provision in the Intellectual Property Law.

The Indian Contract Act, 1872: In India Agreements in Restraint of Trade are governed by Sec. 27 of the Indian Contract Act, 1872, which is enunciated as follows: Section 27- “ Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Exception 1- 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. The Acts envisages such contract at various stages of the partnership i. e.

while it is commenced, while it is continuing, upon anticipation of the dissolution or at the time of dissolution. Therefore all agreements in restraint of trade will be valid provided, they are reasonable in the interests of the parties and in the public interest. The Precedents: The doctrine of restraint of trade was introduced in Indian Courts by the celebrated decision of Sir Richard Couch, C. J. in Madhub Chunder v.

Rajcoomar Doss where the scope of section 27 of the Contract Act, 1872 was extensively discussed. Let us discuss more recent and pertinent judgments: In M/s. Gujarat Bottling Co. Ltd. & ors. v.

Coca Cola Company & ors. the Hon’ble Supreme Court of India discussed the scope of section 27 of the Contract Act and opined that: “ A covenant in restraint of trade must be reasonable with reference to the public policy and it must also be reasonably necessary for the protection of the interest of the covenantee and regard must be had to the interests of the covenantor. Contracts in restraint of trade are prima facie void and the onus of proof is on the party supporting the contract to show that the restraint goes no further than is reasonably necessary to protect the interest of the covenantee and if this onus is discharged the onus of showing that the restraint is nevertheless injurious to the public is on the party attacking the contract. The court has to decide, as a matter of law, (i) whether a contract is or is not in restraint of trade, and (ii) whether, if in restraint of trade, it is reasonable. (10)” In Superintendence Company of India (P) Ltd.

v. Sh. Krishan Murgai the Hon’ble Apex Court observed that “ the doctrine of restraint of trade does not apply during the continuance of the contract for employment and it applied only when the contract comes to an end. While during the period of employment, the Courts undoubtedly would not grant any specific performance of a contract of personal service, nevertheless; Section 57 of the Specific Relief Act clearly provides for the grant of an injunction to restrain the breach of such a covenant, as it is not in restraint of, but in furtherance of trade. ” The above observation of the Supreme Court was relied upon in several cases and upheld in Percept D’Markr (India) Pvt.

Ltd. v. Zaheer Khan and Anr. and it was observed that: “ The doctrine of restraint of trade does not apply during the continuance of a contract of employment and it applies only when the contract comes to an end. Accordingly, a restrictive covenant will apply during the period of the contract but will be hit by Section 27 of the Indian Contract Act and be void, after the contract is ended.

” In the landmark case of Niranjan Shankar Golikari v. The Century Spinning and Mfg. Co. Ltd.

the Court drew a distinction between a restriction in a contract of employment, which is operative during the period of employment, and one, which is to operate after the termination of employment. After referring to certain English cases where such distinction had been drawn, the Court observed: “ A similar distinction has also been drawn by the Courts in India and a restraint by which a person binds himself during the term of his agreement directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against Section 27 of the Contract Act. ” The Indian Partnership Act, 1932The Indian Partnership Act, 1932 has laid down certain exceptions to the rule that “ All agreements in restraint of trade are void”. These exceptions are as follows: a.

As a partner in the firm: Under S. 11(2) of the Act, a partner shall not carry on any business other than that of the firm while he is a partner. This provision is notwithstanding anything contained in S. 27 of the Contract Act. b.

As an outgoing partner: Under S. 36 (2) of the Act, a partner is allowed to make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits. Even this provision is notwithstanding anything contained in S. 27 of the Contract Act. However, it is subject to the condition that the restriction imposed is reasonable.

c. In case of dissolution of the firm: Under S. 54 of the Act, Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits. Even this provision is notwithstanding anything contained in S.

27 of the Contract Act. As in the case of S. 36(2), however, it is subject to the condition that the restriction imposed is reasonable. d. In case of sale of goodwill of the firm: As per S.

55(3) of the Act, notwithstanding anything contained in S. 27 of the Contract Act, any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits. This is, however, subject to the condition that the restriction imposed is reasonable. The Competition Act, 2002: The Competition Act does not specifically use the term ‘ agreement in restraint of trade’ anywhere.

However, it has to be noted that the scheme of the Competition Act is different from that of the Sherman Act of the USA. Whereas, the Sherman Act merely provides for agreements in restraint of trade, leaving ample scope for the Court to interpret the provision, the Competition Act is a very detailed Act legislated with the sole intention of regulating competition. We therefore, find the different subsets of restraint of trade enumerated and dealt with, instead of a single provision sweeping over all possible forms of restraint of trade. Section 3 of the Act deals with Anti-competitive agreements, which by its name itself suggests that it deals with agreements which restrain trade. Section 4 of the Act deals with ‘ abuse of dominant position’, which envisages cases where a dominant player restrains others from carrying on their trade by abusing his position. The third and final limb of the Act pertains to another form of trade restraint, one concerning ‘ combinations’ (covered in sections 5 and 6).

These three limbs of the Competition Act make the Act one comprehensive piece of legislation dealing with the major types of restraints on trade. Conclusion The common law concept of restraint of trade is based on the philosophy that no contract shall be made enforceable which has the effect of preventing a person from carrying on a particular trade or profession whereby he earns his livelihood. Further, it is also said that the larger public interest will suffer if a person is not allowed to carry on his business. The modern competition law clearly finds its roots in the common law doctrine of restraint of trade. The relationship is evident in the object that the two aspire to fulfill.

The object is basically to allow every person to carry on his trade in the manner he wants while at the same time preserving every other’s right to do the same. Further, both competition law and the doctrine of ‘ restraint of trade’ leave scope for businesses to impose reasonable restraints on others provided some benefit accrues to the public and it is justified for both the parties in question as well ass the public at large. The American Courts, which were faced with the task of determining the relationship between the previously disjoint concepts finally came to a conclusion based on sound reasoning. This has led to a gradual appreciation of the relationship between competition law and the trade restraint doctrine and has made future applicability of the latter to the former’s development possible. From the analysis of the Indian legislations, it clearly comes to light that there is a close relationship between the doctrine of restraint of trade and competition law. The three limbs of the Competition Act are clearly inclusive of the major types of agreements in restraint of trade.

The Act clearly incorporates the per se rule and the rule of reason that were expounded by the American Courts while interpreting the restraint of trade provision of the Sherman Act. Undoubtedly, the evolution of competition law can be traced back to the common law doctrine of restraint of trade.