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Restraint of Trade Clause in the Digital Economy: South African and Islamic Law Comparison

Carlos Joel Tchawouo Mbiada

University of Venda, South Africa. E-Mail: Carlos.Tchawouombiada@univen.ac.za

Abstract: A Restraint of Trade clause stands between employers to safeguard legitimate protectable interests and the employee's right to exercise a profession freely. Therefore, this research aims to conduct a comprehensive examination into enforcing restraint of trade agreements in South Africa, critically analyzing the judiciary's balance between the legitimate protectable interests of employers and the constitutionally enshrined right of employees to freedom in occupation and profession. A doctrinal review of key South African case law is carried out, where judicial enforcement depends on a value judgment between public policy and contractual freedom, particularly under section 22 of the Constitution. Furthermore, this research engages with the Islamic legal framework on restraint of trade, drawing on foundational concepts such as *hurriyat al-kasb* (freedom to engage in lawful trade), *gharar* (prohibition of uncertainty), and the ethical obligations embedded in *shurut* (contractual conditions). The results show that Islamic jurisprudence imposes strict moral limitations to ensure no clause unjustly inhibits a worker's right to earn a lawful livelihood while acknowledging the sanctity of contracts. Selected Islamic countries legally approach restraint of trade clauses within a legal system grounded in Sharia principles and statutory law as reported through a comparative analysis. The implications of restraint clauses are also assessed in the context of a digitalized economy, where traditional notions of geographic and jurisdictional limits become blurred. In the absence of precedent, South African courts can rely on territoriality (place of work) or nationality principles (parties' origin) to determine jurisdiction over cross-jurisdictional digital labor disputes. The contribution advocates for the creation of a robust legal framework to address restraint enforcement in virtual environments, striking a balance between innovation-driven business protection and the fundamental rights of workers under constitutional and Islamic legal traditions.

Keywords: constitutional rights; digital economy; *gharar; hurriyat al-kasb;* restraint of trade.

1. Introduction

The doctrine of restraint of trade operates at the intersection of contractual freedom and constitutional rights in South Africa. This principle permits parties to enter into agreements limiting specific actions during post-employment or upon termination of a contract as rooted in common law. The employee is prohibited from undertaking a similar job in competition with the former employer within a defined geographical area

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for a determined period.[1] Therefore, the geographical location is limited to all places where an employer conducts business and an employee performs duties.[2] In South Africa, restraints of trade clauses are valid and enforceable unless the concept is contrary to public policy.[3] The central stage is taken by the public policy when courts scrutinize restraint of trade clauses to ensure an individual's constitutional rights to work, trade, and dignity are not unjustifiably infringed upon.[4] However, the enforceability of restraints has been called into question by the rise of the digital economy. The development of remote work, global platforms, and borderless competition has rendered traditional geographic limitations increasingly obsolete.[5] Even though South African courts have developed a rich jurisprudence balancing the common-law principle of *pacta sunt servanda* with constitutional values, there is limited guidance on the application of restraint clauses within virtual or transnational digital contexts.

A parallel development is offered through the perspective of Islamic law. Islamic jurisprudence (*fiqh*), rooted in the Qur'an and Sunnah, recognizes the sanctity of contracts but imposes ethical constraints, primarily through concepts such as *hurriyat al-kasb* (freedom to trade)[6] and *gharar* (prohibition of uncertainty).[7] These doctrines prohibit unjust economic restrictions and promote fairness in commercial dealings. Therefore, this research aims to 1) examine the adjudication of trade dispute restraint

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[1] Andre Van Niekerk et al., *Law@work*, 5th Editio (LexisNexis 2018, 2019), 94; I.M. Rautenbach, "The Constitutional Status of Contractual Freedom," *Journal of South African Law*, no. 3 (2016), https://hdl.handle.net/10520/EJC-616861636.

[2] Musiiwa Mahangwahaya and Lonias Ndlovu, "The Economic Costs of Restraint of Trade Agreements: Modest Lessons for South Africa from Germany and Other Selected Jurisdictions," *International Journal of Private Law* 10, no. 1 (2021): 47, https://doi.org/10.1504/IJPL.2021.10044131.

[3] *Magnay Alloys & Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

[4] See in this regard section 22 of the Constitution of the Republic of South Africa, 1996 (Constitution) which provides that "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".

[5] Franziska Sucker, "Navigating Economic Inequalities Alongside African Digital Market Integration: The Role of the AfCFTA Competition Protocol," *Legal Issues of Economic Integration* 52, no. Issue 1 (January 1, 2025): 5–44, https://doi.org/10.54648/LEIE2025002; Mira Burri, María Vásquez Callo-Müller, and Kholofelo Kugler, "The Evolution of Digital Trade Law: Insights from TAPED," *World Trade Review* 23, no. 2 (May 4, 2024): 190–207, https://doi.org/10.1017/S1474745623000472; Chijioke-Oforji C., "The Untapped Potential of the African Continental Free Trade Agreement in the African E-Commerce Agenda," *International Trade Law and Regulation* 27, no. 2 (2021): 142–54.

[6] Valery V. Andreev et al., "Legal Regulation of Contractual Relations in the Hanafi Madhhab," 2023, 251–55, https://doi.org/10.1007/978-3-031-29364-1_49; Abdullahi Oyelekan Maruf, "Comparative Study of Islamic and Secular Economic Law in Nigeria: Implications for Policy Making," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 12, no. 1 (April 14, 2025): 33, https://doi.org/10.29300/mzn.v12i1.5340; Abdul Karim Munthe, "Penggunaan Perjanjian Buku Dalam Transaksi Bisnis Menurut Hukum Islam," *AHKAM : Jurnal Ilmu Syariah* 15, no. 2 (July 20, 2015), https://doi.org/10.15408/ajis.v15i2.2865.

[7] Yasushi Suzuki and Mohammad Dulal Miah, eds., *Dilemmas and Challenges in Islamic Finance* (Routledge, 2018), https://doi.org/10.1201/9781315105673; Nehad A and A Khanfar, "A Critical Analysis of the Concept of Gharar in Islamic Financial Contracts: Different Perspective," *Journal of Economic Cooperation and Developement* 37, no. 1 (2016): 1–24, https://jecd.sesric.org/pdf.php?file=ART14103001-2.pdf.

by South African courts and the evolution of the enforcement in the digital era, and 2) analyze Islamic legal perspectives on restraint clauses, drawing insights from selected jurisdictions in the Middle East. Different principles are proposed to guide future judicial reasoning and legislative reform through this comparative approach.

2. Methods

This research used a doctrinal legal methodology to examine the principles governing the restraint of trade in an employment. In this context, legal analysis was combined with comparative and normative inquiry. The approach included a detailed examination of primary and secondary legal sources to explore the conceptualization, interpretation, and enforcement of trade agreements restraint in South Africa and selected Islamic jurisdictions, particularly in the context of a digitalizing economy.

3. Results and Discussion

3.1. Established legal principles

A restraint of trade is an agreement that prevents the employee from engaging in any activity[8] prejudicing the employer after termination of employment. The purpose is to restrict an employee's freedom to conduct a trade, profession, or other economic activity within a geographical area and period that competes with the former employer.

The legal framework governing the restraint of trade in South Africa is derived from Roman-Dutch law, which upholds the enforceability of agreements unless public policy or interest is contravened. However, any infringement or limitation of a person's rights is subject to scrutiny with the advent of the new constitutional era. This is because Section 22 of the Constitution of the Republic of South Africa, 1996 (the Constitution) entrenches the right to choose trade, occupation, or profession freely, subject to regulation by law. Courts have consistently balanced this right with the principle of *pacta sunt servanda*, recognizing the importance of contractual freedom in a market-driven economy. This maxim signifies that contracts entered into freely must be honored and complied with.[9] adeIn this context, an employee must fulfill a restraint of trade agreement that is voluntarily signed.

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[8] Brahm du Plessis and D. M. Davis, "Restraint of Trade and Public Policy." S. African LJ 101 (1984): 86-91. ;," *SALJ* 86 (1984): 86–91, https://www.unswlawjournal.unsw.edu.au/article/employee-non-compete-restraints-resolving uncertainty; Andrew Fell and Elizabeth Rudz, "Employee Non-Compete Restraints: Resolving Uncertainty," *Thematic Issue: Power, Workers and the Law* 46, no. 4 (2023): 1252–83.

[9] Joel Adelusi Adeyeye, "The Death of Queen Elizabeth Ii: Implications For The Principle of Pacta Sunt Servanda," *International Journal of Comparative Law and Legal Philosophy (IJOCLLEP)* 4, no. 3 (2022): 82–91, https://www.nigerianjournalsonline.com/index.php/IJOCLLEP/article/view/3263/3177.

The purpose of a restraint of trade is to protect the employer's proprietary interests, such as goodwill and customer connections after the employee has left employment.[10] In *Reddy v Siemens Telecommunications (Pty) Ltd (Reddy),*[11] Malan AJA stated that *Magna Alloys and Research (SA) (Pty) Ltd v. Ellis*[12] was a landmark case with a paradigm shift.

> "approach of the courts to agreements in restraint of trade by declining to follow earlier decisions based on English precedent that an agreement in restraint of trade is prima facie invalid and unenforceable … Magna Alloys reversed this approach and held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy…"

Reasonableness is the primary yardstick for assessing the consonant nature of a restraint of trade clause with public policy. Therefore, the former Appellate Division in *Basson v Chilwan (Basson)*[13] *building on Magna Alloys* elaborated several factors to consider when determining the reasonableness of the restraint of trade agreements as follows: (a) evaluating the claiming party's protectable interest, (b) determining when the other party's actions prejudice the interest, (c) balancing the interest against the other party to assess the reasonableness of the restraint in limiting economic activity when applicable, and (d) assessing the impact of external public policy considerations on the restraint's enforceability.

In *Reddy*, the Supreme Court of Appeal made a value judgment in determining reasonableness and reaffirmed the importance of balancing contractual freedom with public policy.[14] Additionally, public policy requires that parties comply with contractual obligations while maintaining a person's right to engage in trade, commerce, or profession. The court held that the considerations reflect common-law and constitutional values.[15] In *Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd,*[16] the restraint clause was calculated to be oppressive and against public policy. This prevented the former employee from being employed for one year by any company regardless of the business. Therefore, when a restraint passes under common law, the concept must not limit the right to exercise a trade or

[10] *Slo-Jo Innovation* (n 5) 51. The Labour Appeal Court upheld this judgment in *Beedle v Slo-Jo Innovations Hub (Pty) Ltd* (JA21/23; JA37/22) [2023] ZALAC 17 (17 August 2023).

[11] (2007) 28 ILJ 317 (SCA) (*Reddy*) at para 10. The court said in Magna that in English law, a party seeking to enforce such agreement has to show that the restraint is reasonable as between the parties while the burden of proving that it is contrary to public policy is incumbent on the party alleging it.

[12] 1984 (4) SA 874 (A) (*Magna Alloys*).

[13] 1993 (3) SA 742 767H.

[14] 14-15.

[15] 15.

[16] (2005) 26 ILJ 734 (D).

profession. The agreement must be justifiable and reasonable in terms of section 36 of the Constitution.

The established principles showed that a restraint of trade agreement must meet the following requirements, namely (a) protect a legitimate interest (b) be reasonable and not against the public interest.

3.2. Protected interests

Proprietary interests enforceable through a restraint agreement are divided into two categories. The first comprises all confidential information peculiar to the employer and is very important for conducting the business. This can be used by a competitor to gain a competitive advantage or trade secrets. The second comprises the relationships with customers and suppliers, which are referred to as trade connections. An interest warranting or deserving protection includes confidential information, trade secrets, and the business's goodwill.[17]

Concerning confidentiality of information, the court in *Hirt & Carter (Pty) Ltd v Mansfield*[18] reported that:

> "…for an employer to succeed in establishing that trade secrets and confidential information are an interest justifying protection by the restraint, it should demonstrate in reasonably clear terms that the information, know-how, technology or method, as the case may be, is something which is unique and peculiar to the employer and which is not public property or public knowledge, and is more than just trivial."

Trade secrets and confidential information warranting enforcement must be unique to the employer and not readily available to the public. In this context, all the information to which the employee is privy during employment is confidential. However, data lacks protection when the concept is not confidential, and information publicly available cannot be safeguarded or enforced. An employee's skills and expertise acquired during employment with the former employer cannot be considered protected interests related to confidential information. In *Automotive Tooling Systems (Pty) Ltd v Wilkens, the court ruled* that skills obtained while advancing profession are not the property of the employer. These elements do not establish an employer's proprietary claim but contribute to the employees' collective expertise and understanding. The court concluded that the employer possessed no proprietary interest warranting legitimate or lawful protection.[19] Therefore, employees are not

[17] C. J. Pretorius, "Covenants in Restraint of Trade: An Evaluation of the Positive Law.," *THRHR* 60 (1997): 6–20.
[18] 2008 (3) SA 512 (D); (2008) 29 *ILJ* 1075 (D) 57.
[19] 2008 (3) SA 512 (D); (2008) 29 ILJ 1075 (D) 57.

prohibited from utilizing experience, knowledge, or skills, even when acquired through employer-provided training. [20] Employees' skills and training are not protected under a restraint of trade agreement.

In *Aranda Textile Mills (Pty) Ltd v Hurn*,[21] the court ruled that skills and knowledge were an integral part of the employee. A restraint of trade cannot prevent the employee from using acquired skills and knowledge. In this context, an employer possesses no proprietary claim to an employee's knowledge or skills, even when enhanced through employer-sponsored development. The court recorded the following principle in *Aranda*:

> "Such know-how and skills in the public domain become attributes of the workman himself [and] do not belong in any way to the employer, and the use thereof cannot be subjected to restriction by way of a restraint of trade provision."[22]

The court ruled that the imposition of the restriction was considered unreasonable given the potential to impede the employee's equitable participation in the marketplace. Furthermore, confidential information needs to be valuable and objectively deserving of protection. The confidentiality of information relates to pricing, discount structures, client identities, contact persons, and customer purchasing patterns. The court enforces the restraint when these are not in the public domain.

3.3. Trade and Customer Connections

An employer has a legitimate protectable interest in customer and supplier connections.[23] Relationships with suppliers, customers, and potential customers are all part of the trade connection. Goodwill constitutes a significant component of assets legally recognized as property. Trade and customer connections hold significant importance for any business since the relationships directly contribute to the accretion of goodwill. These connections are more than just casual exchanges and are founded on trust, dependability, and constant service. The employer's legitimate protectable interest in the relationships signifies protection against unjust competition. This consists of safeguarding trade secrets, customer lists, and supplier agreements.

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[20] *Labournet (Pty) Ltd v Jankielsohn* (2017) 38 ILJ 1302 (LAC) 43.

[21] [2000] 4 All SA 183 (E) (*Aranda*). In this case, the employer sought to enforce its restraint of trade against its employee who had resigned and to prevent him from taking up employment with a competitor company. It contended that the enforcement of the restraint would protect the employer's investment, money and training which had been expended on the employee.

[22] Aranda Case, 192.

[23] *Slo-Jo Innovation* 47.

The court in *Slo-Jo Innovation* ruled that the employer could reasonably expect the employee to use established connections when transitioning to employment with a competitor.[24] The employer had a legitimate protectable interest in customer and supplier connections.[25] Similarly, in *Waco Africa (Pty) Ltd t/a Form-Scaff v Sack,*[26] The Labour Court ruled that the employer's valuable customer connections necessitated protection against a former sales manager. This extensive knowledge presented a clear risk of exploitation for the gain of a new employer. In this context, an employee's exposure to an employer's goodwill, including trade secrets, pricing information, or customer contact details during the course of employment constitutes a proprietary interest. Subsequently, the employer is legally entitled to protect the interests used by the employee after joining a competitor. The employer must have a protectable interest, which may consist of confidential information and trade secrets.[27] The effect of a restraint of trade is obtained from the duty of good faith and trust that an employee owes to the employer.[28]

According to Botha, an employee is bound by a duty of good faith towards the employer, which includes an obligation to promote the business interests. [29] Employees owe a duty of trust and confidence toward the employers. This duty requires an employee to show good faith, constituting a common law fiduciary obligation that must be upheld. Therefore, an employer protects its business by inserting a restraint of trade in the employment contract covering both the periods of employment and post-termination.[30]

In *Vilakazi v Commission for Conciliation, Mediation & Arbitration*, [31] Snyman AJ stated that an employee had an obligation to protect the business interest of the employer. The fiduciary duty to act in good faith requires an employee to avoid undermining the employer's interests and to preclude any conflict of interest.[32] In this case, the employee had taken up employment with the third respondent on a full-time basis despite being employed permanently. The court upheld the commissioner's award

[24] *Slo-Jo Innovation* 99.

[25] *Slo-Jo Innovation* 99.

[26] (2020) 41 *ILJ* 1771 (LC) 37.

[27] Karin Calitz, "Restraint of Trade Agreements in Employment Contracts : Time for Pacta Sunt Servanda to Bow Out?," *Stellenbosch Law Review* 22, no. 1 (2011): 50–70, https://hdl.handle.net/10520/EJC54772.

[28] Marlize van Jaarsveld, "The Validity of a Restraint of Trade Clause in South Africa as a Contractual Term in an Employment Contract," *Texas Wesleyan Law Review* 10, no. 1 (October 2003): 171–99, https://doi.org/10.37419/TWLR.V10.I1.9.

[29] Monray Marsellus Botha, "Case Notes: Restraint of Trade Clauses: Anything New from the Courts?," *Industrial Law Journal* 44, no. 2 (2023): 734–46, https://doi.org/10.47348/ILJ/v44/i2a4.

[30] Botha, 734.

[31] (2024) 45 ILJ 369 (LC).

[32] At paras 53-59.

and held that moonlighting was unacceptable and a breach of an employee's fiduciary duties towards the employer.[33] The employee's fiduciary duty extends to a restraint of trade agreement that prohibits the furtherance of a competitor's business interest at the expense of the employer post-termination of employment. A court will only enforce a restraint of trade when the employer has a protectable interest, such as a connection or confidential information. However, this can be refuted when an employee shows that the restraint is unreasonable and contrary to public policy.

3.4. Reasonableness and public policy

A restraint of trade agreement designed solely to curb competition is not enforceable since the concept is contrary to public policy.[34] The key question for determining reasonableness is quantitative and qualitative reconciliation of the employer's interests with the employee to ensure economic engagement and productivity. This exercise is consistent with the consideration of public interest, which compels parties to fulfill the contractual duties and allows employees the opportunity to engage in trade and sustainable professional activities. The competing interests are 1) the principle that an agreement freely concluded should be honored, also known as *pacta sunt servanda*, and 2) the right to choose a trade or profession freely.[35] In determining the reasonableness of a restraint of trade, the court balances the contractual rights and the demands of public policy that give content to constitutional values.[36] The Supreme Court of Appeal restated the aforementioned principle in *Reddy* as follows:

> "A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires parties to comply with their contractual obligations, a notion expressed by the maxim 'pacta servanda sunt'. The second is that all persons should, in the interests of society, be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life."[37]

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[33] At para 59.

[34] See *Crazy Splash Swim School (Pty) Ltd v Nortje* (2023) 44 ILJ 2538 (WCC) 66 and *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff* (2009) 30 ILJ 1750 (C).

[35] See Davis J in *Ice Cream Franchise (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) 82H, where the learned judge observed that in deciding whether a restraint of trade is contrary to public policy, regard must be had to two considerations; first, agreements freely concluded should be honoured; secondly, each person should be free to enter into business, a profession or trade in the manner they deem fit.

[36] *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff* (2009) 30 ILJ 1750 (C); 2009 (3) SA 78 (C) 83.

[37] 15.

A restraint is unenforceable when the concept prohibits a party from engaging in trade or professional activities after leaving employment without a commensurate interest of the other party deserving protection. The enforcement of an unreasonable and unjust restraint would be contrary to public policy, considering the fundamental constitutional values that uphold the freedom to choose profession and trade.[38] Basson J in *David Crouch Marketing CC v Du Plessis*[39] ruled that enforcement of a restraint aimed at prohibiting a party from professional activities was deemed contrary to public policy when an employer lacked a protectable interest. Similarly, the Labour Appeal Court in *Sadan v Workforce Staffing (Pty) Ltd*[40] found unreasonable the restraint prohibiting an employee from practicing trade throughout the Republic of South Africa for two years. This is because the two years were found to be inordinately long and disproportionate, considering the restraint imposed on the whole country. Therefore, when the period within which the restraint should operate is long, the restraint would be found to be unreasonable.

The balancing exercise weighs more in favor of the employer even though there are two competing rights. To this effect, Calitz argues that a key impediment to the enforcement of restraint of trade clauses is the disproportionate emphasis placed on protecting the employer's interests at the expense of considering the welfare of the employee.[41] This observation raises two important issues which are discussed as follows. Firstly, the interpretation ignores the imbalance in the bargaining power between the employer and the employee. Bargaining power refers to the ability to negotiate a contract on equal terms with the other party to the contract.[42] In employment relationships, the employer is known to be in an advantageous position than the employee. In this context, Mishel argues against the assumption that employers and employees have the same bargaining power.[43] The damaging consequences are extensive given the widespread nature of the assumption, debilitating statutory and common law workplace protections.[44]

The result is the perpetuation of wage and income disparities in workplaces. This suggests that wage gaps in workplaces are due to inherent unequal bargaining power between employers and employees. The party autonomy, which is key for the validity

[38] *Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster* (2009) 30 ILJ 1762 (C) 31.

[39] (2009) 30 ILJ 1828 (LC) 20.

[40] (2023) 44 ILJ 2506 (LAC) 29.

[41] Mahangwahaya and Ndlovu, "The Economic Costs of Restraint of Trade Agreements: Modest Lessons for South Africa from Germany and Other Selected Jurisdictions," 2021, 53.

[42] Mahangwahaya and Ndlovu, 52.

[43] Lawrence Mishel, "Centering Unequal Bargaining Power in Workplaces," *Perspectives on Work* 24 (2020): 16–21, https://www.jstor.org/stable/48600694.

[44] Mishel, 16.

of a contract, may be tainted. Therefore, the Constitutional Court in *Barkhuizen v Napier,*[45] acknowledges the common law principle of *pacta sunt servanda* since the inequality of bargaining power may lead to potential injustice. A prominent injustice concerns the wage disparities prevalent among employees since individuals with superior bargaining power can secure more advantageous remuneration. Employees with reduced bargaining power may agree to restrictive covenants such as restraints of trade. Generally, the imbalance of the bargaining power negatively affects the validity of a restraint of trade.

The onus is on the employee to show the unreasonableness of the restraint. In line with Calitz's perspective, this research shows that the employer is obligated to present evidence substantiating the restraint's adherence to public policy, establishing reasonableness. This view is premised on the constitutional right to freedom of trade vested in the employee under Section 23 of the Constitution. Furthermore, the Constitution is the supreme law of the country, and any law inconsistent is invalid.[46] In this context, a restraint of trade is a limitation of the employee's constitutional right to free trade. These shortcomings are acceptable only in terms of Section 36 of the Constitution.[47] On this basis, the burden of proof should lie with the employer. Davis J in *Advtech Resourcing (Pty) Ltd T/A Communicate Personnel Group v Kuhn* advocated for the proposition. The learned judge argues that an employer must explain the limitation of the right to work.[48]

Secondly, the enforcement of restraint of trade renders the employee economically inactive for a defined period without compensation. South Africa should adopt the German stance on restraint to the effect that the employer compensates employees during the period.[49]

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[45] 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) 59.

[46] See section 172 of the Constitution South Africa.

[47] Section 36 termed the limitation clause reads as follows:

1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose;, and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[48] 2008 (2) SA 375 (C) 28.

[49] See Mahangwahaya and Ndlovu, "The Economic Costs of Restraint of Trade Agreements: Modest Lessons for South Africa from Germany and Other Selected Jurisdictions," 2021.

3.5. Selected cases

The purpose of reviewing the selected cases is to determine the various outcomes and analyze the established legal principles. A particular characteristic of the chosen cases is the current absence of formal law reports. Other reported cases are subject to commentary, and this research avoids reiterating previously established literature.

3.5.1. *Jones v Compendium Group Investment Holdings (Pty) Ltd* (DA20/2023; DA11/2024) [2024] ZALAC 49 (11 October 2024)

In this case, Compendium Group sought to enforce a restraint of trade agreement signed on February 20, 2015, with Jones, a former founder. From the inception, Jones held a majority shareholding in Compendium Group and Compendium Insurance, serving as CEO for up to 30 years. Bidvest Insurance Group acquired Jones' shares for about R120 million but remained CEO under a restraint of trade agreement signed in 2015.

The restraint primarily prohibited Jones from engaging in any competitive activities with Compendium for 36 months after termination of employment, from using or disclosing trade secrets, and returning any company records. In addition, the restraint prevented Jones from contacting any of Compendium's clients or staff.

Due to health-related issues, Jones resigned in 2021 and entered into a consultancy agreement with Compendium through iRisk but refused to sign a direct consultancy contract because of tax incentives. The consultancy contract between Compendium and iRisk had a three-month restraint clause binding iRisk and Jones after termination. After terminating the consultancy agreement in April 2023, Jones had some connections with TIB Insurance Brokers, a direct competitor. On this basis, Compendium sought to enforce the 2015 restraint-of-trade agreement.

In the Labour Court, Jones stated that the consultancy contract novated the 2015 restraint of trade agreement but the court rejected the contention. The court ruled that there was no intention to substitute the 2015 restraint of trade agreement after concluding the consultancy agreement. On appeal, Jones followed a similar line of argument. The Labour Appeal Court upheld the judgment since the restraint was reasonable and enforceable.

3.5.2. *Esmarie Dreyer Physiotherapy Incorporated v Shuab Omar t/a Omar Physiotherapy* (2024/126905) [2024] ZALCCT 64 (12 December 2024)

In this case, E. Dreyer's Physiotherapy Practice (EDP) enforced a restraint of trade clause against the former employee, Omar, aiming to prohibit competition with the operations at Rondebosch Medical Centre (RMC). Omar was a substitute before the permanent employment with EDP in January 2023. The contract included a restraint

of trade clause preventing the provision of physiotherapy services at RMC for one year after the termination of employment with EDP. After resignation on October 1, 2024, Omar established his practice and proceeded to offer physiotherapy treatments at RMC, including Integrated Cardiac Care (ICC), constituting half of EDP's referrals. EDP contented that Omar contravened the restraint by using connections built during employment. In contrast, Omar reported that the restraint of trade clause was unenforceable prohibiting independent practice.

After analyzing the legal principles developed over the years in *Basson* and *Reddy*, the restraint legitimately protected EDP interests and reasonably prohibited Omar's competitive activities at RMC. Furthermore, Omar violated the restraint by operating a competing practice on RMC premises. The court prohibited Omar from providing physiotherapy services at RMC premises for one year.

This case shows the enforceability of restraint of trade agreements that protect genuine business interests. The court struck a balance between contractual freedom and individual freedom to pursue any economic activities, emphasizing the need to safeguard employer trade connections while ensuring that both the scope and length of the restraints are reasonable and in conformity with public policy.

3.5.3. *Select PPE (Pty) Ltd v Holmes* (2024/115703) [2024] ZALCJHB 484 (3 December 2024)

On an urgent basis, Select PPE (SPPE) sought to enforce a restraint of trade agreement against the former employee, Holmes. SPPE also prohibited Holmes from working for the new employer, USP, and sharing confidential information. The court's determination focused on the validity and reasonableness of the restraint and the presence of a protectable interest held by SPPE in justifying the enforcement.

Regarding the alleged breach of the restraint, the evaluation determined the compliance of Holmes' employment with USP against the restraint agreement, emphasizing the competitive status of USP and SPPE. The existence of SPPE's legitimate interests in confidential information or trade connections affected by Holmes' work with USP was also considered. In this context, USP and SPPE had different business operational models. Therefore, the court ruled that USP did not compete with SPPE. This was because USP was a manufacturer and supplier of products to retailers, including SPPE, while SPPE was simply a retailer. There was no evidence to support the claims that USP had changed the business model to compete directly with SPPE.

In considering the reasonableness of the restraint, the balancing test outlined in *Basson* was applied to determine the reasonableness of enforcing the restraint and the

protection of legitimate business interests. The court conceded that SPPE's systems, including the *ppe365.net* platform, are a protectable interest. However, Holmes' knowledge of the systems would be of no assistance to USP because of the fundamental distinction in the businesses. There was no evidence indicating Holmes had cultivated customer connections with SPPE that could benefit USP. This was because the role at SPPE precluded direct customer contact. In this context, the enforcement of the restraint, which prohibited Holmes from working at USP, was unreasonable. The employment did not threaten SPPE's protectable interests and Holmes could not be unreasonably restricted from pursuing economic opportunities.

This case emphasizes the need to establish clear evidence of competitive threats and protectable interests when seeking to enforce restraint-of-trade agreements. Given the unique nature of the businesses, Holmes' employment at USP did not pose any threat, even though SPPE's systems and confidential information were valuable. The judgment upheld the principle that restraints of trade must strike a balance between contractual obligations and the constitutional right to economic activity.

3.5.4. *Waco Africa (Pty) Ltd v Ahmed* (2024/109219) [2024] ZALCJHB 505 (11 December 2024)

In this case, Waco sought the enforcement of a restraint of trade agreement against the respondent, Ahmed, a former employee. The restraint prohibited Ahmed from working with competitors, using confidential information, or poaching clients for a 12-month period post-employment. Ahmed joined a direct competitor, Battalions, in contravention of the restraint agreement.

The court determined the reasonableness and enforceability of the restraint. Waco reported that the customer connections and confidential information, particularly concerning pricing and business strategies, constituted a protectable interest. Ahmed's long-standing relationships, spanning over 16 years with clients, provided a competitive advantage to Battalions. In this context, there was undisputed evidence that Ahmed had access to Waco's pricing and operational details.

The extent to which the enforcement might unreasonably affect Ahmed's ability to earn a livelihood was analyzed, while simultaneously balancing against Waco's right to protect the business interests in evaluating the restraint's reasonableness and balance with public policy. The court found the duration unreasonable and limited the restraint to six months. The restraint of the trade agreement was upheld while reducing the duration, emphasizing Waco's right to protect the business interests. The decision emphasizes the importance of striking a balance between contractual obligations, business interests, and public policy in disputes including restraint of trade agreements.

3.5.5. *Epic Outdoor Media Sales (Pty) Ltd v Terrance Paterson and Network X (Pty) Ltd* (2024/024081) [2024] ZAGPJHC 254 (18 March 2024)

The Gauteng Division of the High Court addressed the enforceability of a restraint of trade clause between Epic Outdoor Media Sales (Pty) Ltd (Epic Outdoor) and the former employee, Terrance Paterson (Paterson). The employment of Paterson contract included a restraint of trade clause, prohibiting him from divulging any confidential information about the employer and seeking employment with a business partner or competitor. Additionally, the period of the restraint clause was one year and applied nationwide. After Paterson resigned to join Network X Ltd, Epic Outdoor enforced the restraint based on breaching contractual obligations by joining a competitor.

The court restated the long-standing principle that the enforcement of any restraint of trade clause requires striking a balance between two competing rights. In this context, a court must weigh the importance of the sanctity of contracts against an individual's right to choose a trade, occupation, or profession freely.

In weighing the conflicting or competing rights, the court restated the principle developed in *Magna Alloys* that restraint was enforceable when the concept was reasonable and balanced with public policy. Furthermore, enforcing the restraint clause would render Paterson jobless for a year after leaving Epic Outdoor.

Restraining Paterson from disclosing confidential information accessed during the employment with Epic Outdoor to Network X was reasonable. However, a prohibition against working for any of Epic Outdoor's competitors would be unreasonable given the acquisition of unique skills and knowledge during the employment.

To prevent Paterson from disclosing any private information about Epic Outdoor, the court issued an injunction. Furthermore, Network X was prohibited from obtaining, holding, using, or sharing any of the private information provided through Paterson. Lastly, Network X notify Epic Outdoor of the nature of the disclosures and the actions taken when Paterson offers to give any of Epic Outdoor's proprietary information.

The general trend from the above cases is that courts apply a careful balancing exercise in determining the enforcement of a restraint of trade agreement. This situation necessitates a judicial value judgment between two competing fundamental rights, namely 1) the company's right to enforce employee agreements in the principle of *pacta sunt servanda* to safeguard the business interests, and 2) the employee's constitutional right to engage in the chosen profession and pursue economic activity. However, the balancing exercise safeguards the employer's business interests rather

than the right of the employee to engage freely in a trade.[50] Therefore, the common law principle of *pacta sunt servanda* prevails over the constitutional right to free trade.

3.6. Islamic jurisprudence related to the restraint of trade

Islamic jurisprudence (*fiqh*) derives the normative framework from legislative statutes and divine sources including the Qur'an, Sunnah (Prophetic traditions), *ijma* (consensus), and *qiyas* (analogical reasoning). [51] Fiqh represents the human understanding and practice of Sharia, the divine law, as reported in the Qur'an and Sunnah. [52] The primary source of Islamic law is the Qur'an, which is considered the true word of God (Allah) delivered to the Prophet Muhammad (PBUH). This contains specific commands, instructions, and principles applicable to all aspects of life, including worship, morality, and social justice. Many legal decisions in Islamic jurisprudence are based on the Qur'an's legal verses (ayat al-ahkam).[53]

The Sunnah (Prophetic Traditions) comprises the sayings, actions, and endorsements of the Prophet Muhammad (PBUH). As documented in Hadith collections, the Sunnah provides practical interpretations and applications of the Qur'an's teachings. The tradition is crucial for comprehending and determining legal decisions when the Qur'an is unclear or silent.[54]

Fiqh (Islamic jurisprudence) refers to the human understanding and interpretation of Sharia (divine law). Even though Sharia is considered perfect and immutable, fiqh is the practical application developed by jurists through various methodologies and principles. This Islamic jurisprudence addresses the specifics of legal issues, providing detailed rulings applied to everyday life.[55] Fiqh has evolved and has been influenced by the socio-political contexts of Muslim societies. The concept adapts to the changing

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[50] Michelle van Eck and Marthinus van Staden, "The Protection of Confidential Information in Restraint of Trade Agreements," *Industrial Law Journal* 45, no. 4 (2024): 2187–2210, https://doi.org/10.47348/ILJ/v45/i4a3.

[51] Hafiz Falak Shair Faizia and Hafiz Sfarish Alib, "The Core Principles of Islamic Jurisprudence within Legal Theory: A Comprehensive Analysis.," *Online Journal of Research in Islamic Studies* 11, no. 2 (2024): 57–72, https://doi.org/10.22452/ris.vol11no2.4.

[52] Faizia and Alib, 58.

[53] Faizia and Alib, 64.

[54] Faizia and Alib, "The Core Principles of Islamic Jurisprudence within Legal Theory: A Comprehensive Analysis."; see also Latifah Abdulmohsen Alabdulqader, "Contractual Justice under English and Shariah Law of Contract: The Case of Consumer Protection" (Brunel University London, 2018), https://bura.brunel.ac.uk/bitstream/2438/15941/1/FulltextThesis.pdf. For the author, and relying on Al-Shafi, the Sunna is of three types: (1) texts of the Sunna that prescribe what is revealed in the Quran, (2) texts of the Sunna that explain the general principles of the Quran and clarify the will of God; (3) where, in the Sunna, the Messenger of God has ruled on a matter about which nothing can be found in the Book of God. The first two types are integral to the Quran, but scholars have differed regarding the third.

[55] Faizia and Alib, "The Core Principles of Islamic Jurisprudence within Legal Theory: A Comprehensive Analysis.," 64.

nature of human beings to remain relevant across different times and places.[56] The comprehensive legal system provided covers various aspects of life, including worship, transactions, family and criminal law, as well as international relations. Therefore, employment contracts, including restraint of trade provisions, must conform to Shariah's holistic vision of justice, freedom, and ethical conduct. According to Islam, elements leading to the well-being of an individual or society are morally good, and anything harmful is bad.[57] This signifies that the system prescribed in Islam is eternally divine and forms the cornerstone of an Islamic society.[58] In this context, a restraint of trade clause must conform to Sharia law. The question that arises is the extent to which Sharia permits the clauses. Therefore, this research analyses key doctrinal concepts such as *hurriyat al-kasb*, *gharar*, and the ethical foundations of contracts to determine the position of Islamic law vis-à-vis restraint of trade clauses.

3.7. Hurriyat al-Kasb (Freedom to Engage in Trade)

The freedom to engage in lawful trade or economic activities and earn a livelihood is an important cornerstone of Islamic economic theory. This freedom to engage in a trade or h*urriyat al-kasb* is rooted in the Qur'anic vision of human agency and financial responsibility. The Qur'an affirms this right as follows: *"It is He Who made the earth manageable for you, so traverse through its tracts and enjoy of the sustenance which He furnishes…"* (Qur'an 67:15). The verse emphasizes that earning a living is a permissible and a divinely sanctioned activity.

In Islamic jurisprudence (*fiqh*), the right to work is more than a legal entitlement viewed as a spiritual and ethical duty. This shows that earning a living in Islam has a sacred connotation. The pursuit of lawful (*kasb* Halal) sustenance serves two purposes, namely 1) the necessity of life and, 2) profoundly spiritual responsibility viewed as the greatest form of worship (*'ibadah*).[59] The exercise of a trade must be carried out in

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[56] Faizia and Alib, "The Core Principles of Islamic Jurisprudence within Legal Theory: A Comprehensive Analysis."; Iyad Zahalka, *Shari'a in the Modern Era* (Cambridge: Cambridge University Press, 2016), https://doi.org/10.1017/CBO9781316335321; Waskito Wibowo, Rusli Hasbi, and Ahmed Abd Raziq Ali Madi, "Balancing Orthodoxy and Flexibility: Substantive and Accommodative Approaches to Women's Rights in Qaradawi's Fiqh," *AHKAM : Jurnal Ilmu Syariah* 24, no. 2 (December 31, 2024): 311–26, https://doi.org/10.15408/ajis.v24i2.34134; Ahmad Annizar, Zainul Fuad, and M. Syukri Albani Nasution, "Identity Politics and Prospective Leader Selection: A Perspective from Fiqh Siyasah," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 11, no. 1 (April 30, 2024): 150, https://doi.org/10.29300/mzn.v11i1.3445.

[57] Jawed Akhtar. Mohammed, "The Ethical System in Islam – Implications for Business Practices," in *Handbook of the Philosophical Foundations of Business Ethics* (Dordrecht: Springer Netherlands, 2013), 874, https://doi.org/10.1007/978-94-007-1494-6_3.

[58] Mohammed, 873.

[59] "International Workers' Day: An Islamic Tribute to Lawful Work," *International Friday Bulletin* 2, no. 18 (2025), https://fridaybulletin.co.uk/hadith-of-the-week-volume02-issue18/. .

a manner that enhances lawfulness and spirituality. The freedom to engage in trade must be consistent with the teachings of the Prophet Muhammad as outlined in the Qur'an. Therefore, the pursuit of an economic activity is consistent with holiness. There is a connection between the freedom to work and spirituality, particularly since the concept relates to material and metaphysical dimensions. This embedded duality shows the lenses through which an individual understands Islamic perspectives on freedom of trade. Individuals should diligently pursue livelihoods since the provision facilitates the ability to perform acts of devotion and solicit divine aid.[60]

In exercising the freedom to trade, an employee must enter into a contractual agreement governed by Shariah law. Additionally, parties have the liberty to enter into any form of agreement, but Shariah applies automatically.[61] This shows that Shariah law recognizes the sanctity of contracts. Concomitant to the sanctity of the contract is the freedom parties have to insert *shurut* or ancillary conditions into the agreements. *Shurut* refers to any clause which has the consequence of adding or removing a certain effect accorded to the contract by the law.[62] Alabdulgader argues that the four schools of thought have divergent views. However, the Shafi, Hanafi, and Maliki schools accept certain freedoms for individuals to arrange the effects of contractual relations.[63] This research shows that the conditions include restraint of trade clauses.

The question that arises is the extent to which Islamic law permits a restraint of trade clause as a limitation of *hurriyat al-Kasb*. Alabdulgader reports that the Hanbali school accepts the right of individuals to enter into any contractual relationship without contradicting the general principles and the spirit of Shariah law.[64] The Hanbali school holds that only conditions inconsistent with morality or expressly prohibited by the Qur'an or Sunnah are null and void. Transposing this principle to the restraint of trade, any contractual clause that is not consonant with the Qur'an and Sunnah will be invalid. In this context, the doctrine of *gharar* finds expression in the case of an inconsistent clause.

3.8. The Role of Gharar

Another core principle that shows Islamic contract law is the prohibition of *gharar,* namely uncertainty or ambiguity. *Gharar* means "uncertainty, danger, opportunity, or

[60] Ismail Ya'u Abubakar, Tatiana Dasinova, and Suleiman Mohammed Hussien Boayo, "Earning a Living and Its Position in the Sacred Law: An Exposition of Shaybani's Doctrine," *ICR Journal* 8, no. 4 (October 15, 2017): 522–38, https://doi.org/10.52282/icr.v8i4.163.

[61] Latifah Abdulmohsen Alabdulqader, "Contractual Justice under English and Shariah Law of Contract: The Case of Consumer Protection" (Brunel University London, 2018), 107.

[62] Alabdulqader, 108.

[63] Alabdulqader, 108.

[64] Alabdulqader, 110.

risk." Islam prohibits uncontrolled risk or obligation due to the potential to engender speculation.[65] *Gharar* invalidates contracts where one or both parties face substantial uncertain outcomes of conflict. Ambiguity about the scope of the restriction, such as the industries covered, the length of the restraint, or the geographical sphere, may constitute *gharar*. For instance, a clause that prohibits an employee from working for an unspecified period could be invalid due to the vagueness.[66]

Islamic law encourages freedom of trade within the precepts of the Qur'an and Sunnah. The sanctity of a contract permits parties to agree subject to the principles of Sharia. Parties are permitted to insert *shurut* or ancillary conditions, such as a restraint of trade, into contracts. The conditions must adhere to the principles of justice. This is because Islamic law integrates moral values into the legal framework, particularly in contracts, ensuring that each party benefits equitably and is not coerced into unjust terms. The question considered is the extent to which each Islamic country applies the restraint of trade clause.

3.9. Restraint of trade clause in selected Islamic countries

3.9.1. United Arab Emirates (UAE)

The United Arab Emirates (UAE) recognizes restraint of trade clauses under Article 127 of the Labour Law (Federal Law No. 8 of 1980) and Ministerial Resolution No. 297 of 2016. The clause must be expressly stated in writing and enforced in terms of time, geographic scope, and the nature of the work. However, UAE courts analyze and enforce the clause only when legitimate business interest is protected without imposing an undue restriction on the employee's right to work. Only individuals above the age of 21 may be bound by the clauses. Enforcement depends on demonstrable harm and a reasoned proportionality test. The Ministry of Human Resources may also enforce restraint of trade by restricting work permits for employees who breach the clause.[67] The employer bears the burden of proof to show the necessity of the clause and the harm caused by the breach.

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[65] Ian Alfian, Muhammad Ramadhan, and Muhammad Yafiz, "Unraveling Gharar Practices: A Literature Study on Islamic Economic Transactions in the Global," *Proceeding Of the International Conference on Economic and Social Sciences (ICESS)* 2, no. 2 (2024): 707–15, https://icess.uin-suska.ac.id/index.php/1/article/view/139.

[66] Suzuki and Miah, *Dilemmas and Challenges in Islamic Finance*; Mohd Shahid Mohd Noh, Suffian Haqiem Nor Azelan, and Muhammad Izzul Syahmi Zulkepli, "A Review on Gharar Dimension in Modern Islamic Finance Transactions," *Journal of Islamic Accounting and Business Research* 16, no. 5 (May 29, 2025): 976–89, https://doi.org/10.1108/JIABR-01-2023-0006; Rohaya Md Noor, Rashid, and Nor'azam Mastuki, "Zakat and Tax Reporting: Disclosures Practices of Shariah Compliance Companies," in *2011 IEEE Colloquium on Humanities, Science and Engineering* (IEEE, 2011), 877–82, https://doi.org/10.1109/CHUSER.2011.6163862.

[67] Slayde Baker and Luma Ghaleb, "A Guide to Non-Compete Clauses in the Middle East 2018-2019," *Court Uncourt* 2, no. 6 (2015): 8–11, https://www.stalawfirm.com/public/uploads/downloads/A_Guide_to_Non-compete_Clauses_in_the_Middle_East.pdf; see also Yassir Ahmed and Surbhi Veer, "Non-Compete," *Court Uncourt* 2, no. 6 (2015): 8–11.

3.9.2. Bahrain

Bahrain's Labour Law No. 36 of 2012, specifically Article 73, provides a clear framework. Non-compete clauses are enforceable when the employee is 18 years old and has access to trade secrets or confidential client data. The restriction must be limited to one year, relevant in scope, and cannot apply when the termination is unjust or without cause. The law seeks to balance business protection with fair labor practices.[68]

3.9.3. Oman

Oman lacks specific statutory language on non-compete clauses and indirectly supports the protections under Royal Decree No. 50/90 (Commercial Code) and Royal Decree No. 35/2003 (Labour Law). Article 50 prohibits luring employees to misuse trade secrets while Article 27(4) enforces post-contractual confidentiality. Non-compete clauses are not formally codified but are treated as valid when deemed necessary and reasonable.[69]

3.9.4. Kuwait

Kuwait does not explicitly regulate non-compete clauses in labor legislation but addresses anti-competitive conduct under Law No. 10 of 2007 (Competition Law). Generally, courts uphold non-compete clauses contractually agreed upon in line with public policy. Remedies for breach include damages or specific performance under Civil Law No. 67 of 1980 (Article 284). Judicial discretion plays a key role in determining enforcement and the extent of compensation.[70]

3.9.5. Saudi Arabia (KSA)

In Saudi Arabia, Article 83 of the Labour Law allows non-compete clauses when provided in writing and limited to a maximum of two years. The clause must be justified by the need to protect the employer's confidential information or commercial interests. However, courts tend to favor employee mobility, and enforcement is rare unless a breach causes demonstrable harm.[71]

Certain commonalities exist even though the legal environment in the Middle East regarding restraint of trade clauses varies. Most jurisdictions require clauses to be agreed upon and reasonably limited but must be justified by a legitimate business. The dominant theme is to strike a balance between the employer's business interest and the employee's freedom.

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[68] Baker and Ghaleb, "A Guide to Non-Compete Clauses in the Middle East 2018-2019," 23.
[69] Baker and Ghaleb, 24.
[70] Baker and Ghaleb, 22.
[71] Baker and Ghaleb, 25.

3.10. Comparative Analysis: South Africa and Islamic Countries on Restraint of Trade

In South Africa, restraint of trade agreements is governed primarily by common law principles rooted in Roman-Dutch law by constitutional considerations. The principle of *pacta sunt servanda* serves as the legal starting point for understanding the restraint. However, the principle is tempered by section 22 of the Constitution, which guarantees the right to choose a profession or trade freely. South African courts apply a balancing test derived from *Magna Alloys* to weigh the employer's legitimate proprietary interests against the employee's constitutional freedom to choose a profession or trade.

Islamic countries operate under a pluralistic legal tradition, often blending Islamic law with influences from civil or common law, depending on the jurisdiction. In Islamic jurisprudence, the foundational principle relevant to the subject is *hurriyat al-kasb*, considered both a legal and spiritual imperative. However, the sanctity of contracts and the permissibility of inserting *shurut* (ancillary conditions) allow restraint of trade clauses within limits. These clauses must comply with justice and public interest to avoid *gharar*.

Concerning the enforcement of restraint of trade, South African courts determine enforceability based on (i) the existence of legitimate protectable interest, such as trade secrets, and client connections, (ii) The restraint is reasonable in scope (duration, geography, and activity) and (iii) the balance with public policy considering constitutional rights. In Islamic jurisdictions, particularly in the UAE, Saudi Arabia, and Bahrain, enforceability depends on the clause being explicitly incorporated into the contract, showing reasonableness concerning temporal, geographical, and subject matter scope. This establishes a connection to legitimate interests such as confidential information or trade secrets, and avoids conflict with ethical norms. Several Islamic countries, including UAE, Saudi Arabia, and Bahrain also require minimum age thresholds for enforceability and explicit ministerial intervention.

South African and Islamic jurisdictions value contractual autonomy with different emphases. In South Africa, the doctrine of *pacta sunt servanda* is a common law principle constrained by constitutional rights. In Islamic jurisprudence, contracts are considered sacred but must conform to Sharia principles, especially *hurriyat al-kasb*. Restrictions on trade are permissible only when harm is prevented and proportionate to the benefit gained. Therefore, Islamic law provides a more ethically infused evaluative angle, emphasizing moral legitimacy and legal formalism. South Africa's reliance on value judgments based on constitutional principles may allow for more

flexibility but Islamic countries' religious-ethical frameworks offer better protection against exploitative activities.

3.11. Restraint of trade in the digital economy

This contribution examined the method used by a court to determine the enforceability of a restraint of trade agreement against an employee operating within a digital marketplace. The issue is yet to be served before any court in South Africa and Islamic countries. The jurisdictions face new challenges in applying traditional restraint principles to the digital economy. Based on the description, this research proposes the framework used to adjudicate disputes since the existing legal principle predates the era of technological advancements or innovations. The question pertains to the methodology used to adjudicate the enforceability of a restraint of trade that transcends geographical boundaries and jurisdictions. This contribution does not intend to examine the impacts[72] of the Fourth Industrial Revolution on labor but sufficiently establishes the widespread acknowledgment of transforming all facets of life. [73] Consumers have greatly benefited from the digital economy, enjoying increased convenience and accessibility to a broader range of products and services.[74] Today's business practices show the slow decline of past practices, characterized by conducting business from a physical location where customers are attended to onsite. Business is conducted through platforms and virtual space with no boundaries. E-commerce is increasingly popular and has gained momentum with the introduction of rapid network connections. In this context, companies such as Amazon and Alibaba, world leaders in e-commerce, operate globally. The digital market's global nature poses the dilemma of delimiting enforceable parameters for restraint of trade agreements due to the dissolution of competition's confinement to physical locations.

A reasonable restraint preventing an employee from engaging with a direct competitor within a specified geographical area is a recognized and effective method of safeguarding an employer's legitimate interests. However, the applicability and enforceability of the clauses within a digital market require further consideration.

The first obstacle facing the digital market is defining the geographical scope of the restraint of trade agreements. Businesses are conducted virtually and the traditional notion of national or regional competition has mainly become moot. For example,

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[72]For an overview of the consequences of the Fourth Industrial Revolution, see Veronika Bikse et al., "Consequences and Challenges of the Fourth Industrial Revolution and the Impact on the Development of Employability Skills," *Sustainability* 14, no. 12 (June 7, 2022): 6970, https://doi.org/10.3390/su14126970; Petra Maresova et al., "Consequences of Industry 4.0 in Business and Economics," *Economies* 6, no. 3 (August 9, 2018): 46, https://doi.org/10.3390/economies6030046.

[73] Klaus Schwab, *The Fourth Industrial Revolution* (Geneva: Penguin Books Limited, 2016), 19.

[74] Trade United Nations, *Global Competition Law and Policy Approaches to Digital Markets* (United Nations, 2024), 1.

an employee of a Cape Town-based software company can easily join a competitor in New York, Paris, or Sydney without the need for relocation. This raises questions of the scope or extent of the restraint of trade. How would the court enforce a restraint when the alleged competitor is located miles away from the court?

This raises an additional problem of the enforceability of restraint clauses across jurisdictions**.** Digital businesses often operate in multiple countries, and employees may work in one location while providing customer service to customers worldwide. This leads to conflicts between legal systems since the interpretation of restraint of trade clauses may differ. For instance, in the United Kingdom, the Court of Appeal in *Quantum Actuarial LLP v Quantum Advisory Limited*[75] restated the principle that a restraint of trade clause is *prima facie* unenforceable unless reasonable. The approach to interpreting restraint of trade in the United Kingdom's courts stands in contrast to Roman-Dutch law. The restraints are enforceable unless contrary to public policy or unreasonable. In the United Kingdom, the applicant must prove the reasonableness of the restraint. In countries influenced by Roman-Dutch law, such as South Africa, the applicant must show that the restraint is unreasonable. A jurisdictional conflict may arise from these two approaches to enforcing a restraint of trade in a country with a different legal tradition.

In Sudan, similarly to South Africa, restraint of trade agreements is considered valid and enforceable, provided the enforcement does not conflict with public interest. A court will enforce a restraint of trade agreement or clause when the employer possesses a proprietary interest entitled to legal protection, such as trade secrets or customer relationships.[76] This divergence arises from the unique confluence of Islamic, English common, and civil law traditions within Sudanese legal frameworks, which have collectively influenced the contract law. Sudan applies the Hanafi school of Islamic law in Shari'a courts and most Sudanese follow the Maliki school in religious life. Meanwhile, the 1974 Sudan Law of Contract reflects English common law principles inherited from the Anglo-Egyptian Condominium period. The legal landscape is a hybrid system, balancing Islamic jurisprudence, common law traditions, and civil law influences, offering a different lens on contractual freedom, enforcement, and relief in cases of hardship or injustice.[77]

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[75] [2021] EWCA Civ 227.

[76] Musiiwa Mahangwahaya and Lonias Ndlovu, "The Economic Costs of Restraint of Trade Agreements: Modest Lessons for South Africa from Germany and Other Selected Jurisdictions," *International Journal of Private Law* 10, no. 1 (2021): 47, https://doi.org/10.1504/IJPL.2021.120431; Gerhard Smit, "Understanding Restraints of Trade in South Africa: Legal Position and Practical Insights" (Miller Bosman Lereoux, 2024).

[77] Abd El-Wahab Ahmed El-Hassan, "Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law," *Arab Law Quarterly* 1, no. 1 (1985): 51–59, https://www.jstor.org/stable/i276424.

Abd El-Wahab Ahmed El-Hassan Ahmed argues that Islamic contract law treats each type as distinct with defined legal incidents. In contrast, English contract law is underpinned by a unified theory emphasizing mutual assent, freedom of contract, and the sanctity of agreements. Under Sudanese law, restraint of trade agreements is enforceable due to the sanctity of contracts rooted in English common law and French legal influence.

The evolution of the digital economy has presented both opportunities and challenges. In the context of restraint of trade, the jurisdictional and geographical complexities require particular attention. In the absence of a definitive legal framework to direct litigants, the court is presently compelled to apply the principle of territoriality, which was articulated in *Monare v SA Tourism*[78] and restated in *Sorrell v Petroplan Sub-Sahara Africa (Pty) Ltd*[79] regarding foreign jurisdiction in labor disputes. The territoriality principle emphasizes the location of the work. The critical element is the geographical point at which the employee performs duties, rather than the employer's business location. Therefore, the rendering of services by the employee establishes the relevant jurisdiction. Drawing from this principle, an employee living in Johannesburg but rendering services in Doha would be subject to Qatari jurisdiction when the employer seeks to enforce a restraint of trade.

As mentioned earlier, a robust legal framework is necessary to address the challenges of the digital economy. In addition to the territoriality principle, which must be legislated, the contribution suggests the application of nationality as developed under international law. The nationality principle allows a state to exercise jurisdiction over crimes committed abroad when nationals are the perpetrators. This shows that the nationality of the perpetrator is a key factor in determining the relationship between the state and the crime.[80] Under an employment contract subject to a restraint of trade clause, the nationality of the employer or the employee must determine the jurisdiction of the court. The law must ensure that the issue of jurisdiction is mandatory to avoid endless litigation. Therefore, there is a need to enact reforms capable of sustaining the digital economy and preserving the liberty of employees to select a profession or trade.

4. Conclusion

In conclusion, restraint of trade agreements remains a critical component of South African labor law. Even though the insertion of the clause into a contract of employment

[78] (2016) 37 ILJ 394 (LAC).

[79] (2023) 3 BLLR 271 (LC).

[80] Hennie Strydom, ed., *International Law* (Oxford, 2020), 250.

is justifiable because the concept protected legitimate proprietary interests, the enforcement depends on the balancing of contractual freedom with constitutional rights. Recent case law confirms earlier decisions that restraint of trade clauses are *prima facie* enforceable unless reported to be unreasonable. The determination of unreasonableness consists of striking a balance between two competing rights, namely 1) the employer's common law right to protect the business interests through the *pacta sunt servanda* maxim and 2) the employee's constitutional right to choose a trade or profession freely. Since technological progress reshapes the nature of work, South African courts are expected to ensure that restraint of trade agreements remain relevant and equitable. Islamic legal traditions, while affirming contractual autonomy, offer a normative framework grounded in justice, equity, and ethical values. The Qur'anic affirmation of *hurriyat al-kasb* elevates spiritual and moral obligation, cautioning against contractual provisions unjustly constraining economic freedom. In this context, the doctrine of *gharar* prohibits vague or extensive restrictions, advocating for legal clarity and fairness.

A comparative analysis of Islamic jurisdictions, such as the UAE, Bahrain, and Saudi Arabia, shows cautious and structured enforcement of restraint clauses, often requiring demonstrable harm, a limited scope, and procedural safeguards. These jurisdictions shaped by hybrid legal systems reflects a balanced approach within Sharia and international best practices. The following policy initiatives are recommended to prepare for future disputes in the digital economy, offering a choice depending on the parties' will and preferences. The choice are clearly stated in the restraint of trade clause and the parties are mandated to indicate selection from the following options. (1) The territoriality principle is developed by courts, as examined above. (2) The nationality principle necessitates a clear declaration by the parties as to which nationality shall govern. The implementation of the policy is instrumental in harmonizing the enforcement of restraint of trade agreements in the digital economy with the broader public interest. This reports the importance of maintaining respect for contractual agreements and protecting employees' constitutional liberty to participate in economic activities for sustenance.

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