

Licensing

Contributing editors

Fiona Nicolson and Claire Smith



2018

**GETTING THE
DEAL THROUGH** 

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DEAL THROUGH 

Licensing 2018

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Fiona Nicolson and Claire Smith

Bristows LLP

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CONTENTS

| | | | |
|---|-----------|--|------------|
| Global overview | 5 | Mexico | 83 |
| Fiona Nicolson and Claire Smith Bristows LLP | | Ignacio Domínguez Torrado Uhthoff, Gómez Vega & Uhthoff, SC | |
| Australia | 7 | Netherlands | 88 |
| Darron Saltzman and Rodney de Boos Davies Collison Cave Law | | Tessa de Mönnink, Silvie Wertwijn and Micheline Don De Grave De Mönnink Spliet Advocaten | |
| Brazil | 16 | New Zealand | 94 |
| Philippe Bhering, Giuliano Maurer and Karlo Fonseca Tinoco Bhering Advogados | | Stewart Germann Stewart Germann Law Office | |
| Canada | 23 | Russia | 99 |
| Daniel R Bereskin and Paul Blizzard Bereskin & Parr LLP | | Sergey Medvedev Goroditsky & Partners | |
| Chile | 29 | South Africa | 107 |
| Claudio Magliona, Nicolás Yuraszeck and Carlos Araya García Magliona y Cia Abogados | | Kevin Dam KISCH IP | |
| China | 35 | Spain | 114 |
| Ningling Wang Finnegan Shanghai Representative Office Amy Pu Honeywell (China) | | Javier Fernández-Lasquetty Quintana, Alba Ma López and Martín Bello Castro Elzaburu, SLP | |
| Finland | 40 | Switzerland | 122 |
| Patrick Lindgren Advocare Law Office | | Lara Dorigo and Peter Ling Lenz & Staehelin | |
| France | 47 | Taiwan | 129 |
| Delphine Touboul and Emmanuel Schulte Bersay & Associés | | Simon Hsiao Wu & Partners | |
| Germany | 55 | Thailand | 136 |
| Christof Karl Bardhehle Pagenberg | | Alan Adcock, Siraprapha Rungpry and Kasama Sriwatanakul Tilleke & Gibbins | |
| India | 63 | United Kingdom | 142 |
| Safir R Anand and Swati Sharma Anand and Anand | | Fiona Nicolson, Sophie Lawrance, Claire Smith and Rob Powell Bristows LLP | |
| Japan | 71 | United States | 150 |
| Kozo Yabe and Takeshi Kanda Yuasa and Hara | | Bruce H Bernstein, Michael J Fink and P Branko Pejic Greenblum & Bernstein, PLC | |
| Korea | 77 | Vietnam | 160 |
| Dong-Hwan Kim and Myung-Cheol Chang Lee International IP & Law Group | | Linh Thi Mai Nguyen, Tu Ngoc Trinh, Son Thai Hoang and Chi Lan Dang Tilleke & Gibbins | |

Preface

Licensing 2018

Tenth edition

Getting the Deal Through is delighted to publish the tenth edition of *Licensing*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on South Africa, Thailand and Vietnam, and an updated global overview.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editors, Fiona Nicolson and Claire Smith of Bristows LLP, for their assistance with this volume. We also extend special thanks to Bruno Floriani of Lapointe Rosenstein Marchand Melançon LLP, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE 
DEAL THROUGH 

London
January 2018

New Zealand

Stewart Germann

Stewart Germann Law Office

Overview

- 1 Are there any restrictions on the establishment of a business entity by a foreign licensor or a joint venture involving a foreign licensor and are there any restrictions against a foreign licensor entering into a licence agreement without establishing a subsidiary or branch office? Whether or not any such restrictions exist, is there any filing or regulatory review process required before a foreign licensor can establish a business entity or joint venture in your jurisdiction?**

Foreign licensors are very welcome in New Zealand. If a foreign licensor wishes to establish a New Zealand company, it must comply with the Companies Act 1993 and the Financial Reporting Act 2013. In relation to the formation of a company, this can be done online and costs NZ\$10.22 for the name approval fee and NZ\$150 for the incorporation application fee. All companies incorporated in New Zealand must have a director who lives in New Zealand or lives in Australia and who is also a director of an Australian incorporated company, and all directors must provide their place of birth and date of birth.

If a foreign business entity holds 25 per cent or more of the shareholding in a company, the company must be audited and must file financial statements pursuant to the Financial Reporting Act 2013. In relation to foreign investment, there are no barriers for funds coming into New Zealand. If a foreign entity wishes to buy land in New Zealand and the land is greater than five hectares in area, an application must be made to the Overseas Investment Office for consent to the purchase before it can proceed.

Kinds of licences

- 2 Identify the different forms of licence arrangements that exist in your jurisdiction.**

In New Zealand there are many types of licence arrangements, including product licensing, trademark or service mark licensing, software licensing, patent and know-how licensing, and technology transfer licensing. The term 'licensing' means the granting of permission to use intellectual property rights (IPRs), such as trademarks, patents or technology, under defined conditions. There is no statutory definition of a licence in New Zealand.

Law affecting international licensing

- 3 Does legislation directly govern the creation, or otherwise regulate the terms, of an international licensing relationship? Describe any such requirements.**

There is no legislation governing the creation of an international licensing relationship and there is no legal requirement for registration of a licence with local authorities in New Zealand. There are no limitations on royalty rates or other fees that may be charged by a licensor.

- 4 What pre-contractual disclosure must a licensor make to prospective licensees? Are there any requirements to register a grant of international licensing rights with authorities in your jurisdiction?**

Section 12A of the Fair Trading Act 1986 (FTA) prohibits any unsubstantiated representations made in trade. While there is no explicit

requirement imposed on a licensor to make pre-contractual disclosure to its prospective licensees, a licensor must be able to substantiate any representation it makes in relation to its name and brand by documented research or other proof at the time of making the representation. There are no requirements to register a grant of international licensing rights with authorities in New Zealand.

- 5 Are there any statutorily or court-imposed implicit obligations in your jurisdiction that may affect an international licensing relationship, such as good faith or fair dealing obligations, the obligation to act reasonably in the exercise of rights or requiring good cause for termination or non-renewal?**

Changes to the FTA and the Consumer Guarantees Act 1993 (CGA) affect the licensing relationship in a minor way in some areas. The FTA contains new rules about business to business contracting out of certain provisions and new obligations and restrictions that relate to unfair contract terms in standard form consumer contracts. The FTA and the CGA should be checked carefully in relation to any proposed franchising in New Zealand as the penalties for contravening the FTA are up to NZ\$200,000 for individuals and NZ\$600,000 for companies.

Except for the comments above, there are no statutorily or court-imposed implicit obligations in relation to good faith or fair dealing.

- 6 Does the law in your jurisdiction distinguish between licences and franchises? If so, under what circumstances, if any, could franchise law or principles apply to a licence relationship?**

There are no laws that distinguish between licences and franchises.

Intellectual property issues

- 7 Is your jurisdiction party to the Paris Convention for the Protection of Industrial Property? The Patent Cooperation Treaty (PCT)? The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?**

New Zealand is a party to the Paris Convention for the Protection of Industrial Property. The Convention began with the Paris Convention, London Act of 14 July 1946. There is also a Paris Convention Stockholm Act, articles 13 to 30, dated 20 June 1984. New Zealand is also a party to the PCT, from 1 December 1992. In addition, New Zealand is a party to the Trade-Related Aspects of Intellectual Property Rights, from 1 January 1995. New Zealand has been a member of each of these since the early days of their promulgation and tends to be a supporter of IPRs worldwide.

- 8 Can the licensee be contractually prohibited from contesting the validity of a foreign licensor's intellectual property rights or registrations in your jurisdiction?**

Yes, the licensee can be contractually prohibited from contesting the validity of a foreign licensor's IPRs or registrations, and there does not appear to be a law that would preclude this; it would be prudent for such a clause to be included in any agreement.

9 What is the effect of the invalidity or expiry of registration of an intellectual property right on a related licence agreement in your jurisdiction? If the licence remains in effect, can royalties continue to be levied? If the licence does not remain in effect, can the licensee freely compete?

If a trademark or patent (or any other IPR capable of registration, like a registered design) expires in relation to its registration or is declared invalid, then the legal effect would be to take away the protection of such IPR that may lead to abuse of it by a licensee. However, the tort of passing off would assist any licensor should a renegade licensee try to take advantage of the situation, but a licensee who is not the subject of a legally binding licence agreement would be free to compete.

10 Is an original registration or evidence of use in the jurisdiction of origin, or any other requirements unique to foreigners, necessary prior to the registration of intellectual property in your jurisdiction?

There is no such registration or evidence of use necessary, but any New Zealand registration of intellectual property would certainly be expedited if the intellectual property were registered in an overseas jurisdiction. Any new registration in New Zealand must go through the Intellectual Property Office, which is based in Wellington. There is always a time lapse for objections and legal requirements.

11 Can unregistered trademarks, or other intellectual property rights that are not registered, be licensed in your jurisdiction?

An unregistered trademark may be licensed and is a matter of contract, and there is no statute that would preclude this. However, trademarks should always be registered to enable full protection for the owner. The two main grounds to claim a right in an unregistered trademark are under the common law of passing off or a claim under the Fair Trading Act 1986.

12 Are there particular requirements in your jurisdiction: for the validity of an intellectual property licence; to render an intellectual property licence opposable to a third party; or to take a security interest in intellectual property?

In relation to the validity of an intellectual property licence, the relevant law or statute in New Zealand must be complied with. The subject matter of the protection sought must not be illegal or offensive and the legal procedures must run their course. As to whether an intellectual property licence could be opposable to a third party, it would depend on the circumstances of the particular case and whether a third party has any legal rights to object. As for taking a security interest in intellectual property, the Personal Property Securities Act 1999 (PPSA) allows for the registration of a security interest in 'personal property', which is defined in the PPSA as including intangibles. Intangible property includes intellectual property such as trademarks, patents, designs and copyright.

13 Can a foreign owner or licensor of intellectual property institute proceedings against a third party for infringement in your jurisdiction without joining the licensee from your jurisdiction as a party to the proceedings? Can an intellectual property licensee in your jurisdiction institute proceedings against an infringer of the licensed intellectual property without the consent of the owner or licensor? Can the licensee be contractually prohibited from doing so?

A foreign owner may institute proceedings in such a manner without joining the licensee, although it would be normal for the foreign owner or licensor of intellectual property to consult with the New Zealand licensee, who may be very helpful in providing information for the attack on the infringing third party. In relation to proceedings against an infringer of the licensed intellectual property without the consent of the owner or licensor, it would depend upon the exact wording of a clause in the relevant agreement. Normally, however, an agreement should preclude a local licensee from attacking an infringer without the consent of the owner or licensor.

14 Can a trademark or service mark licensee in your jurisdiction sub-license use of the mark to a third party? If so, does the right to sub-license exist statutorily or must it be granted contractually? If it exists statutorily, can the licensee validly waive its right to sub-license?

A trademark or service mark licensee could only sub-license the use of that mark to a third party if the agreement provided such a right. It would be unusual in our opinion, and such agreement should preclude any right to sub-license.

15 If intellectual property in your jurisdiction is jointly owned, is each co-owner free to deal with that intellectual property as it wishes without the consent of the other co-owners? Are co-owners of intellectual property rights able to change this position in a contract?

The answer depends on the type of intellectual property right, but it appears that you could enter into an agreement with other joint owners of an intellectual property right. In New Zealand there is the Patents Act 2013, the Trade Marks Act 2002 and the Copyright Act 1994, and various sections of those Acts impact upon the types of intellectual property rights.

16 Is your jurisdiction a 'first to file' or 'first to invent' jurisdiction? Can a foreign licensor license the use of an invention subject to a patent application but in respect of which the patent has not been issued in your jurisdiction?

In New Zealand it is the 'first to file' who wins a patent application. There is an arrangement between New Zealand and Australia that if a company lodges a trademark application in one jurisdiction on a particular date and later files the same trademark application in the other, then in relation to the second jurisdiction the date of filing will be back-dated to the original date of filing in the first.

A foreign licensor may license the use of an invention subject to a patent application for which the patent has not been issued in New Zealand.

17 Can the following be protected by patents in your jurisdiction: software; business processes or methods; living organisms?

The Patents Act 2013 provides for the appointment of an office and place for the purpose of communications to and from the public on matters arising under the Act, the power to appoint a Maori Advisory Committee, appointment of the Commissioner and Assistant Commissioners of Patents, and regulation-making powers.

A number of exclusions are included in the new Act and they include:

- an invention is not patentable if the commercial exploitation of the invention is contrary to public policy or morality;
- computer programs;
- plant varieties;
- human beings and biological processes for their generation;
- inventions of methods of treatment of human beings by surgery or therapy; and
- inventions of methods of diagnosis practised on human beings.

The most significant changes include a tougher examination of patent applications, stricter deadlines, subject matter exclusions, more challenge options and annual renewal fees.

18 Is there specific legislation in your jurisdiction that governs trade secrets or know-how? If so, is there a legal definition of trade secrets or know-how? In either case, how are trade secrets and know-how treated by the courts?

There is no specific legislation that governs trade secrets or know-how, but there are common law principles that would apply and give protection. In particular, there are laws covering breach of confidential information, which includes know-how, business data, trade secrets, product and process inventions.

19 Does the law allow a licensor to restrict disclosure or use of trade secrets and know-how by the licensee or third parties in your jurisdiction, both during and after the term of the licence agreement? Is there any distinction to be made with respect to improvements to which the licensee may have contributed?

New Zealand law allows a licensor to restrict disclosure or use of trade secrets and know-how by the licensee or third parties, and it is a matter of contract. There are no restrictions except in the area of restraint on competition or restraint of trade, both during the term and after the expiration of the term or termination of a licence agreement. If restraints on competition are too wide and basically too tough, they will be determined to be against public policy and be declared illegal pursuant to the Contract and Commercial Law Act 2017. There is no distinction to be made with respect to improvements to which the licensee may have contributed.

20 What constitutes copyright in your jurisdiction and how can it be protected?

The law relating to copyright in New Zealand is contained in the Copyright Act 1994. There is no registration system for copyright, although, as a signatory to the Berne Convention, it is possible to register copyright works internationally. In essence, copyright is inherent, but it is not the ideas that are protected by copyright: it is the tangible evidence of skill, labour and judgment that have resulted in the copyright work.

21 Is it advisable in your jurisdiction to require the contractual assignment of copyright by the licensee to the licensor for any artwork, software improvements and other works that the licensee may have contributed to?

Such a provision is advisable, but not essential.

Software licensing

22 Does the law in your jurisdiction recognise the validity of 'perpetual' software licences? If not, or if it is not advisable for other reasons, are there other means of addressing concerns relating to 'perpetual' licences?

Yes, New Zealand law recognises perpetual software licences. However, very explicit wording would be required before a court would conclude that an agreement was intended to be perpetual.

23 Are there any legal requirements to be complied with prior to granting software licences, including import or export restrictions?

There are no restrictions in relation to software licences unless the subject matter is offensive or against public policy. There are no prohibitions in relation to parallel importing and there are no restrictions, as far as we are aware, on the import or export of software.

24 Who owns improvements and modifications to the licensed software? Must a software licensor provide its licensee bug fixes, upgrades and new releases in the absence of a contractual provision to that effect?

Unless the contract provides otherwise, the licensor would own any improvements and modifications to the licensed software. In relation to a software licensee obtaining bug fixes, upgrades and new releases from the licensor, there must be a suitable provision in the contract or such would be unenforceable against the licensor.

25 Are there any legal restrictions in your jurisdiction with respect to the restrictions a licensor can put on users of its software in a licence agreement?

The CGA includes computer software in the definition of 'goods' and that suppliers guarantee that the goods will (among other things) be fit for a particular purpose. Section 8 of the CGA states the following:

- that the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier for the purpose for which the goods are being acquired by the consumer; and
- that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.

Section 16 in Part 2 of the CGA gives the consumer a right of redress against the supplier where the goods fail to comply with any guarantee in section 8, and section 18 provides remedies including requiring the supplier to remedy the failure. In addition, under section 18(4) the consumer may obtain damages for any loss or damage to the consumer resulting from the failure.

In my opinion it is possible for a licensor to include a contractual restriction prohibiting its licensees from carrying out any form of reverse engineering or decompiling of a software program, or from making backup copies.

26 Have there been any legal developments of note in your jurisdiction concerning the use of open source software or the terms of open source software licences?

The New Zealand government recently announced a new policy framework and guidance to public agencies on the licensing of open source software. This is seen as a step to allow future government web services to be developed using open source code and allowing external parties to copy, adapt or integrate their features. At this stage this is only a proposed policy and is not law.

As far as we are aware, the courts have not restricted the enforceability or applicability of the terms and conditions of public licences for open source software. There have been no legal developments concerning the use of open source software in New Zealand.

Royalties and other payments, currency conversion and taxes

27 Is there any legislation that governs the nature, amount or manner or frequency of payments of royalties or other fees or costs (including interest on late payments) in an international licensing relationship, or require regulatory approval of the royalty rate or other fees or costs (including interest on late payments) payable by a licensee in your jurisdiction?

There are no laws affecting royalties in such a manner.

28 Are there any restrictions on transfer and remittance of currency in your jurisdiction? Are there any associated regulatory reporting requirements?

Although there are no restrictions on the transfer and remittance of currency from New Zealand to an overseas jurisdiction, the tax laws of New Zealand must be complied with. In relation to the payment of royalties, dividends or interest, non-resident withholding tax (NRWT) must be deducted by the payee (or licensee) before the funds are remitted to the overseas licensor. The tax deduction must be paid by the New Zealand licensee to the New Zealand Inland Revenue Department (IRD), but a tax credit would be available to the overseas licensor. The rate of tax varies depending on the country involved, and New Zealand has double taxation treaties with a large number of countries. For example, in relation to Australia, Japan, Singapore and the United States, the rate of NRWT is 5 per cent in relation to royalties, and in relation to Canada, China, Taiwan and the UK, the rate is 10 per cent. In relation to Fiji, Indonesia, Malaysia and the Philippines, the rate is 15 per cent.

29 In what circumstances may a foreign licensor be taxed on its income in your jurisdiction?

A foreign franchisor may be taxed on its income in New Zealand, but it will certainly be taxed when it tries to move that income offshore. NRWT must be deducted by the New Zealand paying entity and paid to the New Zealand IRD, and the net amount available would be remitted by the licensee to the foreign licensor.

Competition law issues

30 Are practices that potentially restrict trade prohibited or otherwise regulated in your jurisdiction?

Such practices would be governed in New Zealand by the Commerce Act 1986, and great care must be taken by any foreign licensor to comply with that Act, as the penalties for non-compliance are severe.

31 Are there any legal restrictions in respect of the following provisions in licence agreements: duration, exclusivity, internet sales prohibitions, non-competition restrictions and grant-back provisions?

In relation to duration, exclusivity and grant-back provisions, there are no legal restrictions. However, if any agreement is deemed to be in perpetuity (in relation to duration) then that can have some inherent problems as the courts have ruled that nothing lasts forever and, in relation to one party wishing to terminate the arrangement or contract, the courts may allow a reasonable period of notice (six or 12 months) to be given, after which the agreement could be legally terminated.

In relation to non-competition restrictions, if such restrictions are unreasonable or unfair, then the courts will not enforce them, so great care must be taken in drafting. Australia commonly has 'sprinkler clauses' under which one party will try to restrict the other party for different periods in relation to different geographical restrictions. The New Zealand courts are unimpressed by such clauses and will normally strike them out, with the end result that there may be no restriction on competition. It is always essential to obtain a local counsel's advice in relation to this area.

The Commerce (Cartels and Other Matters) Amendment Act 2017 came into law on 14 August 2017. For current licence agreements and licensing generally, the Act will not apply until 14 May 2018, but should a new licence agreement be issued now then the new Act will apply immediately. What this means is that some additional clauses must be inserted into licence agreements, plus there must be explanations in plain language of why some of the clauses are necessary.

Consideration must be given as to whether a licence agreement contains a cartel clause. For example, clauses that set or influence prices, restrict output or allocate markets will be caught. You should also consider whether there are alternative arrangements that can achieve the same or similar commercial outcome to a cartel clause. Another consideration is whether the collaborative activity exemption would apply and also whether the vertical activity exemption would apply. Expert legal advice should be obtained in relation to the new Act.

32 Have courts in your jurisdiction held that certain uses (or abuses) of intellectual property rights have been anticompetitive?

Having looked at recent cases, we are unaware whether the courts in New Zealand have held that certain uses (or abuses) of intellectual property rights have been anticompetitive. There is some discussion on this topic in Gault on Commercial Law, but there do not seem to be any court decisions.

Indemnification, disclaimers of liability, damages and limitation of damages

33 Are indemnification provisions commonly used in your jurisdiction and, if so, are they generally enforceable? Is insurance coverage for the protection of a foreign licensor available in support of an indemnification provision?

Indemnification provisions are commonly used in New Zealand, and they are generally enforceable. As far as we are aware, insurance coverage for the protection of a foreign licensor is available in support of an indemnification provision.

34 Can the parties contractually agree to waive or limit certain types of damages? Are disclaimers and limitations of liability generally enforceable? What are the exceptions, if any?

Yes, parties may agree to waive or limit damages. Such disclaimers and limitations of liability should be generally enforceable. However, if the purported limitation of damages is unreasonable then the relevant party would most likely not sign the agreement.

Update and trends

The most important update to note is the new Cartels legislation described in some detail in question 31. An important aspect to note is that if a licensor is not in competition with its licensees then there should be no problem with the cartels legislation. However, that is often not the position, in which case there must be full compliance of the Commerce (Cartels and other Matters) Amendment Act 2017.

Termination

35 Does the law impose conditions on, or otherwise limit, the right to terminate or not to renew an international licensing relationship; or require the payment of an indemnity or other form of compensation upon termination or non-renewal?

More specifically, have courts in your jurisdiction extended to licensing relationships the application of commercial agency laws that contain such rights or remedies or provide such indemnities?

To the best of our knowledge, New Zealand's laws do not impose any conditions in relation to the right to terminate or not to renew an international licensing relationship, or require the payment of an indemnity or other form of compensation upon termination or non-renewal. As far as we are aware, the courts in New Zealand have not extended to licensing relationships the application of commercial agency laws that contain such rights or remedies or provide such indemnities.

36 What is the impact of the termination or expiration of a licence agreement on any sub-licence granted by the licensee, in the absence of any contractual provision addressing this issue? Would a contractual provision addressing this issue be enforceable, in either case?

The normal rule would be that any sub-licence arrangement would fail and be terminated should the (head) licence agreement be terminated or expire through the effluxion of time. However, any licensor would probably want to continue with a sub- licensee, but there would be no obligation to do so if there was no contractual provision. If a suitable contractual provision was included and acknowledged by both parties then that provision would be enforceable.

Bankruptcy

37 What is the impact of the bankruptcy of the licensee on the legal relationship with its licensor; and any sub-licence that the licensee may have granted? Can the licensor structure its international licence agreement to terminate it prior to the bankruptcy and remove the licensee's rights?

Bankruptcy in New Zealand only applies to a person, and normally a licensee would be a company. However, if the licensee is a person who is adjudicated bankrupt, then that would be a ground for the licensor to terminate the licence agreement. If the licensee is a company and it becomes insolvent and goes into receivership or liquidation then, again, that event would give the licensor the right to terminate the licence agreement. Upon termination all of the rights of any licensee would cease, but the liability of the licensee would continue in relation to any unpaid monies owed to the licensor. If the licensee is a company and has only one director and that director is adjudicated bankrupt then the agreement would normally trigger an event of termination, which would allow the licensor to terminate the licence agreement.

38 What is the impact of the bankruptcy of the licensor on the legal relationship with its licensee; and any sub licence the licensee has granted? Are there any steps a licensee can take to protect its interest if the licensor becomes bankrupt?

If the licensor is a person he or she can go bankrupt, but more often the licensor would be a company in which case the company could go into liquidation. If a person as licensor goes bankrupt then the Official Assignee would be involved and he or she can disclaim the licence agreement. If a company as licensor goes into liquidation then the liquidator could do the same – either disclaim or affirm the agreement. In relation to any steps which a licensee could take, the answer would depend upon the subject matter of the licence agreement. If there are

many other licensees in the jurisdiction then they could get together and purchase the brand or trademarks from the Official Assignee or liquidator, but what would actually happen in the end will depend upon the facts of any particular case.

Governing law and dispute resolution

39 Are there any restrictions on an international licensing arrangement being governed by the laws of another jurisdiction chosen by the parties?

As far as we are aware, there are no such restrictions.

40 Can the parties contractually agree to arbitration of their disputes instead of resorting to the courts of your jurisdiction? If so, must the arbitration proceedings be conducted in your jurisdiction or can they be held in another?

It is recommended that the parties contractually agree to arbitration of any disputes instead of resorting to the courts, but any agreement should provide for the right of either party to seek injunctive relief if the matter is very serious and an injunction is the right remedy. In relation to arbitration, the relevant statute in New Zealand is the Arbitration Act 1996. However, arbitration proceedings can be conducted in any jurisdiction, provided the parties agree at the outset and there is a relevant clause in the agreement covering the matter. A foreign licensor could issue proceedings in New Zealand and sue a particular licensee, but the courts may require an attempt to settle any dispute by way of mediation. The governing law in any licence agreement is important and most foreign licensors require the governing law to be that of their home country. The parties cannot agree to preclude collective (or class action) arbitration.

In relation to arbitral bodies, popular ones for international arbitration are the Singapore International Arbitration Centre and the Australian Disputes Centre.

41 Would a court judgment or arbitral award from another jurisdiction be enforceable in your jurisdiction? Is your jurisdiction party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

A foreign judgment has no direct operation in New Zealand. However, some foreign judgments may provide the basis upon which a New Zealand court will grant a judgment, which will then be enforced in the same way as any New Zealand judgment. At common law, a New Zealand court may grant judgment to enforce a money judgment given against a defendant by a foreign court whose jurisdiction over the defendant is recognised by New Zealand's Rules of Private International Law, provided the judgment is for a debt or definite sum of money other than a sum payable in respect of taxes or other charges of that nature, or in respect of a fine or other penalty, and the foreign judgment is final and conclusive. There are certain types of judgments given in foreign courts which, as a matter of public policy, a New Zealand court will decline to enforce. Examples are attempts to enforce foreign revenue and penal law, judgments obtained by fraud and judgments given overseas in breach of the rules of natural justice as applied in New Zealand.

42 Is injunctive relief available in your jurisdiction? May it be waived contractually? If so, what conditions must be met for a contractual waiver to be enforceable? May the parties waive their entitlement to claim specific categories of damages in an arbitration clause?

Injunctive relief is available and, in our opinion, all agreements should contain an injunctive relief provision to protect the parties should one party 'go off the rails'. It would be highly unusual for the vulnerable party to waive contractually the injunctive relief provision, but if they did it would be enforceable. Any conditions which must be met must be a matter of contract as the court is unlikely to imply any provisions. The parties may waive their entitlement to claim specific categories of damages in an arbitration clause, but it would be unusual to have such a provision.

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Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
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