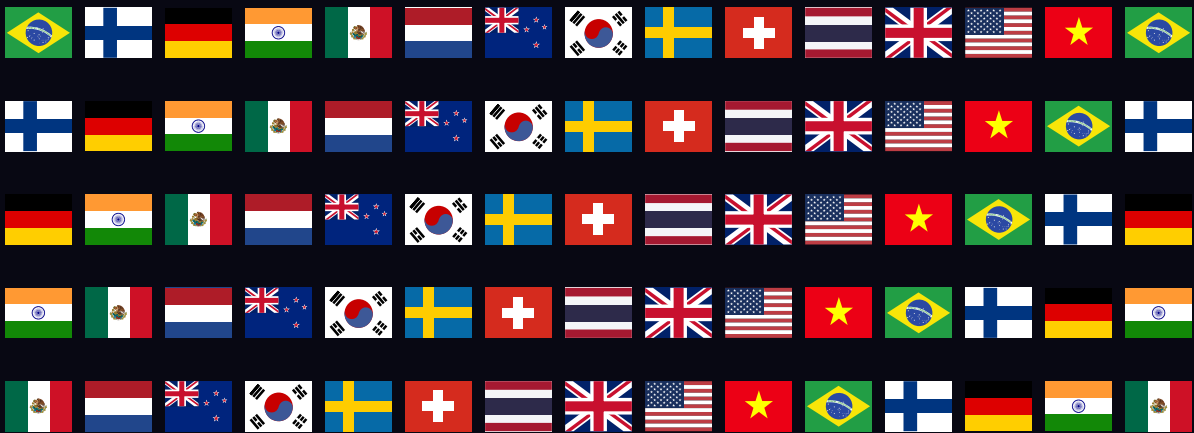


LICENSING

New Zealand



Licensing

Consulting editors

Colin Miller, Fiona Nicolson

Burness Paull LLP

Quick reference guide enabling side-by-side comparison of local insights, including into kinds of licences; law affecting international licensing; intellectual property issues; software licensing; royalties and other payments, currency conversion and taxes; competition law issues; indemnification, disclaimers of liability, damages and limitation of damages; termination of licensing agreements; bankruptcy; governing law and dispute resolution; and recent trends.

Generated 27 February 2023

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Table of contents

OVERVIEW

Restrictions

KINDS OF LICENCES

Forms of licence arrangement

LAW AFFECTING INTERNATIONAL LICENSING

Creation of international licensing relationship

Pre-contractual disclosure

Registration

INTELLECTUAL PROPERTY ISSUES

Paris Convention

Contesting validity

Invalidity or expiry

Unregistered rights

Security interests

Proceedings against third parties

Sub-licensing

Jointly owned intellectual property

First to file

Scope of patent protection

Trade secrets and know-how

Copyright

SOFTWARE LICENSING

Perpetual software licences

Legal requirements

Restrictions on users

ROYALTIES AND OTHER PAYMENTS, CURRENCY CONVERSION AND TAXES

Relevant legislation

Restrictions

Taxation of foreign licensor

COMPETITION LAW ISSUES

Restrictions on trade

Legal restrictions

IP-related court rulings

INDEMNIFICATION, DISCLAIMERS OF LIABILITY, DAMAGES AND LIMITATION OF DAMAGES

Indemnification provisions

Waivers and limitations

TERMINATION

Right to terminate

Impact of termination

BANKRUPTCY

Impact of licensee bankruptcy

Impact of licensor bankruptcy

GOVERNING LAW AND DISPUTE RESOLUTION

Restrictions on governing law

Contractual agreement to arbitration

Enforceability

Injunctive relief

UPDATES & TRENDS

Key developments of the past year

Contributors

New Zealand



Stewart Germann
stewart@germann.co.nz
Stewart Germann Law Office



OVERVIEW

Restrictions

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\$11.50 for the name approval fee and NZ\$136.55 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 and date of birth.

A company must be audited and must file group financial statements pursuant to the Financial Reporting Act 2013 if it is a large foreign business entity holding 25 per cent or more of the shareholding in a company and, at the balance date for the two preceding accounting periods:

- the total assets for the company and its subsidiaries were more than NZ\$20 million; or
- the total revenue was more than NZ\$10 million.

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.

Law stated - 19 January 2023

KINDS OF LICENCES

Forms of licence arrangement

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, such as trademarks, patents or technology, under defined conditions. There is no statutory definition of a licence in New Zealand.

Law stated - 19 January 2023

LAW AFFECTING INTERNATIONAL LICENSING

Creation of international licensing relationship

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.

Law stated - 19 January 2023

Pre-contractual disclosure

What pre-contractual disclosure must a licensor make to prospective licensees?

Section 12A of the Fair Trading Act 1986 (FTA) prohibits any unsubstantiated representations to be 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.

Law stated - 19 January 2023

Registration

Are there any requirements to register a grant of international licensing rights with authorities in your jurisdiction?

There are no requirements to register a grant of international licensing rights.

Law stated - 19 January 2023

INTELLECTUAL PROPERTY ISSUES

Paris Convention

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)?

On 29 July 1931, New Zealand became party to the Paris Convention for the Protection of Industrial Property (1883), revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967), and amended in 1979 (Paris Union). The latest Act of the Convention that New Zealand became party was the London Act on 14 July 1946. There are also articles 13 to 30 of the Paris Convention Stockholm Act of 20 June 1984 . On 1 December 1992, New Zealand also became party to the Patent Cooperation Treaty 1970 . In addition, on 1 January 1994, New Zealand became party to the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 . New Zealand has been a member of these conventions and treaties since the early days of their promulgation and tends to support intellectual property rights (IPRs) worldwide.

Law stated - 19 January 2023

Contesting validity

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 precludes this; it would be prudent for such a clause to be included in any agreement.

Law stated - 19 January 2023

Invalidity or expiry

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, such as 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 its abuse 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.

Law stated - 19 January 2023

Unregistered rights

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 .

Law stated - 19 January 2023

Security interests

Are there particular requirements in your jurisdiction 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.

Law stated - 19 January 2023

Proceedings against third parties

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.

Law stated - 19 January 2023

Sub-licensing

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.

Law stated - 19 January 2023

Jointly owned intellectual property

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 on the types of intellectual property rights.

Law stated - 19 January 2023

First to file

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 backdated 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.

Law stated - 19 January 2023

Scope of patent protection

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 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.

Law stated - 19 January 2023

Trade secrets and know-how

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.

Law stated - 19 January 2023

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 simply too tough, they will be determined to be against public policy and be declared illegal pursuant to section 83 of 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.

Law stated - 19 January 2023

Copyright

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 for the Protection of Literary and Artistic Works 188 6, 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 judgement that has resulted in the copyright work.

Law stated - 19 January 2023

SOFTWARE LICENSING

Perpetual software licences

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.

Law stated - 19 January 2023

Legal requirements

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.

Law stated - 19 January 2023

Restrictions on users

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

The Consumer Guarantees Act 1993 (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, 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. Also, under section 18(4), the consumer may obtain damages for any loss or damage to the consumer resulting from the failure.

A licensor can 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.

Law stated - 19 January 2023

ROYALTIES AND OTHER PAYMENTS, CURRENCY CONVERSION AND TAXES

Relevant legislation

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.

Law stated - 19 January 2023

Restrictions

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 United Kingdom, the rate is 10 per cent. In relation to Fiji, Indonesia, Malaysia and the Philippines, the rate is 15 per cent.

Law stated - 19 January 2023

Taxation of foreign licensor

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 and it would certainly be taxed when if it tried 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.

Law stated - 19 January 2023

COMPETITION LAW ISSUES

Restrictions on trade

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 because the penalties for non-compliance are severe.

Law stated - 19 January 2023

Legal restrictions

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?

Regarding 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.

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

The Commerce (Cartels and Other Matters) Amendment Act 2017 applies to all licence agreements. This means 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. Alternative arrangements achieving the same or similar commercial outcome to a cartel clause should also be considered. Other considerations are whether the collaborative activity exemption and the vertical activity exemption would apply.

The Commerce (Criminalisation of Cartels) Amendment Act 2019 has introduced a new criminal offence for cartel conduct and the criminal sanctions reflect the covert nature of cartels and the harm they cause to consumers and the economy. The Commerce Act 1986 provides a number of statutory exceptions that would not constitute a cartel arrangement and may be pro-competitive. These exceptions relate to collaborative activities (for example, joint ventures or franchise arrangements), joint buying, vertical supply contracts and specified liner shipping arrangements. There are no defences for mistakes of fact relating to the elements of joint buying and promotion and vertical supply contracts. Therefore, it would be possible in the future for a director of a licensor company to be criminally liable under the act for a cartel offence.

Law stated - 19 January 2023

IP-related court rulings

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

Some cases suggest New Zealand courts have not held certain uses (or abuses) of intellectual property rights as anticompetitive.

Law stated - 19 January 2023

INDEMNIFICATION, DISCLAIMERS OF LIABILITY, DAMAGES AND LIMITATION OF DAMAGES

Indemnification provisions

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. Insurance coverage for the protection of a foreign licensor is usually available in support of an indemnification provision.

Law stated - 19 January 2023

Waivers and limitations

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?

Indemnification provisions are commonly used in New Zealand and they are generally enforceable. Insurance coverage for the protection of a foreign licensor is usually available in support of an indemnification provision.

Law stated - 19 January 2023

TERMINATION

Right to terminate

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?

New Zealand's laws do not impose conditions regarding 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. It appears that the New Zealand courts have not extended to licensing relationships the application of commercial agency laws that contain such rights or remedies or provide such indemnities.

Law stated - 19 January 2023

Impact of termination

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.

Law stated - 19 January 2023

BANKRUPTCY

Impact of licensee bankruptcy

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 regarding 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.

Law stated - 19 January 2023

Impact of licensor bankruptcy

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 usually 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. Regarding any steps that 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.

Law stated - 19 January 2023

GOVERNING LAW AND DISPUTE RESOLUTION

Restrictions on governing law

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

There are no such restrictions.

Law stated - 19 January 2023

Contractual agreement to arbitration

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. Regarding 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.

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

Law stated - 19 January 2023

Enforceability

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.

Law stated - 19 January 2023

Injunctive relief

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 that 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.

Law stated - 19 January 2023

UPDATES & TRENDS

Key developments of the past year

Please identify any recent developments in laws or regulations, or any landmark cases, that have (or are expected to have) a notable impact on licensing agreements in your jurisdiction (including any significant proposals for new legislation or regulations, even if not yet adopted). Explain briefly how licensing agreements might be affected.

The Fair Trading Amendment Act 2021 (Amendment Act) extends the existing prohibition on unfair contract terms in consumer contracts to standard form small trade contracts worth less than NZ\$250,000 (including GST). The Amendment Act also introduced a new prohibition on unconscionable conduct and licence agreements will be caught by the new laws.

These changes came into force on 16 August 2022 and affect standard form small trade contracts. A contract is a standard form small trade contract if it falls within the following definition:

- each party is engaged in trade (ie, two businesses);
- it is not a contract between a business and a consumer; and
- the relationship between the two parties in trade in relation to the goods, services or interest in land provided does not exceed the annual value threshold of NZ\$250,000 (including GST) per annum for goods, services or an interest in land when the relationship first arises (ie, when you first sign the contract).

The unfair contract terms previously only applied to contracts between a consumer and a business, for instance, gym membership agreements. The new amendments will ensure that small businesses also receive protection against any unfair contract terms.

The following is taken into consideration when assessing whether a term is unfair:

- whether the term would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- whether the term is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- whether the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or

relied on.

The new laws will not apply to the following contractual terms:

- definition of the main subject matter of the contract;
- setting the upfront price payable under the contract, so long as the price term is clear and unambiguous; and
- any terms that are required or expressly permitted by any legislation.

The unconscionable conduct in trade provisions are much broader as they apply to all conduct, not just contractual terms. The term 'unconscionable conduct' is not defined but the Amendment Act states that a court can take the following into consideration:

- the relative bargaining power of the parties;
- the extent to which the parties acted in good faith;
- whether the affected person was reasonably able to protect their interests; and
- whether unfair pressure or tactics were used.

It may be that New Zealand will take guidance from Australian cases but at this stage no guidance or comment has been provided by the Commerce Commission.

Law stated - 19 January 2023

Jurisdictions

	Brazil	Bhering Advogados
	Finland	ADVOCARE Law Office
	Germany	Bardehle Pagenberg
	India	LexOrbis
	Mexico	Uhthoff, Gómez Vega & Uhthoff SC
	Netherlands	Parker Advocaten
	New Zealand	Stewart Germann Law Office
	South Korea	Lee International IP & Law
	Sweden	Cirio Advokatbyrå AB
	Switzerland	Schellenberg Wittmer
	Thailand	Tilleke & Gibbins
	United Kingdom	Burness Paul LLP
	USA	Greenblum & Bernstein plc
	Vietnam	Tilleke & Gibbins