

THE LEGAL LOWDOWN ON GOING GLOBAL

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With an ever increasing emphasis on becoming more international, Adrian Powell, of Proelium Law LLP, assesses the legal perspectives which the higher education sector must first consider

Globalisation

The effects of globalisation, be they positive or negative, have touched almost every aspect of our lives and almost all sectors, and the higher education sector is no different.

Globalisation has driven university expansion in the advancement of scientific research, technology and the harmonisation of expertise in parallel to introducing change in the form of the competition introduced by tuition fees and Brexit.

While you may be only too aware of these subjects and a whole host of other issues concerning the pursuit of an international agenda, you may not be as familiar with the pertinent legal issues that are raised by universities going global, and the pitfalls that must be avoided.

Legal Risks to International Expansion

The range of potential legal and regulatory risks in the internationalisation of a university is extremely broad, but it may be useful to consider those risks in light of the following 11 themes:

Theme 1: Corporate structures and responsibilities, including memorandum of association, articles of association and shareholders agreements

When a university goes global by such means as opening a campus in another country, admitting international students or sending any of their students abroad, it needs to consider two vital points: higher education values; and a memorandum of understanding.

Higher education values

Recognised by UNESCO on 11th November 1997, the Recommendation concerning the Status of Higher Education Teaching Personnel, as it is formally known, includes such values as 'fair access, institutional autonomy, academic freedom, accountability and social responsibility¹, amongst other things. These values place higher education outside the realm of such areas as politics and religion and are thus crucial to a university's DNA. These values are the cornerstone of a university and lay the foundations for the following point: the memorandum of understanding. A lack of values makes it difficult for universities to go global, as it is the values, first and foremost, that are the common interest between universities worldwide.

Memorandum of understanding (MoU)

Once the values are established and taken into account, a framework is then constructed, allowing universities to have a 'frank conversation about their concerns about values². This framework lays out the relationship between the entities involved and it may be as detailed as desired, though creating a comprehensive MoU is highly advisable, particularly when setting out collaborative work. MoUs may set out such topics as the work the universities will be doing together, student staff exchange, the development of research, time-sensitive matters such as funding etc; real issues that require discussion, pragmatism and co-operation.

From a legal standpoint, a memorandum of understanding is not legally binding and

Scholars at Risk suggest that is how they should remain. Furthermore, MoUs are voluntary. The combination of these two factors “encourage the continuing development of cross-border partnerships”³ and are successful in doing so.

Theme 2: Policies, including (for instance): day-to-day functioning; anti-money laundering; anti bribery and corruption; third party suppliers

An institution should always be aware of its policies, and should be diligent in both preventing illegal activity as well as ensuring compliant activity. Robust policies are important when a university operates campuses overseas in order to maintain high standards across the board, and to comply with the laws of the host and home nations. One example of a university proactive in maintaining such high standards is the Hult International Business School, with locations in London, Dubai, Shanghai and three in the US. They work to counter corruption through governance (embracing anti-corruption initiatives), advocacy (promoting the business case against corruption), education (anti-corruption training and ethics courses), and citizenship (supporting collective actions against corruption)⁴.

Theme 3: Commercial contracts

Universities operating in jurisdictions other than their home one must stipulate which legal system and law they are following in their commercial contracts: that of the home state or the host state. Commercial contracts in overseas campuses will not be unusual but can get a university into trouble if they are not legally relevant and sound. Universities dealing in scientific research in particular must have water-tight clauses, when a high number of expensive items of equipment may be the subject of a commercial contract.

Theme 4: Succession planning

Though succession planning is not as engrained in the higher education psyche as it is in a corporate environment, it has slowly but surely begun to stick. “Modern succession planning is constantly evolving in response to a rapidly changing environment where the future is uncertain. It must be linked with business strategy if it is to be of value.”⁵ This is particularly true for universities that plan to go global, as the investment of time and money in successfully going international should not be undone through a key member of staff moving on or becoming incapacitated.

ARMED SECURITY HAS IN THE PAST BECOME AN ISSUE FOR HIGHER EDUCATION INSTITUTIONS AND SO SHOULD PRUDENTLY BE CONSIDERED AT THE OUTSET

Theme 5: Staff/consultant contracts, their rights to work and visas

When opening a campus abroad or sending employees overseas to work, this theme becomes crucial for a university. Depending on the jurisdiction, the university may need to consult in order to get the requisite legal understanding upon which to base contracts and to overcome visa issues. Higher education institutions should not overlook the nature of the work that their people are being asked to do: note the example of Andrew Ross, a New York University professor, who was stopped from boarding a plane to Abu Dhabi, due to his research on migrant labour issues.⁶

Theme 6: Host nation and local laws for overseas projects, extra-territorial laws and compliance with them

With regard to overseas projects, those representing the university must not only comply with the local laws of the host nation, but are also still bound by the laws of their home nation. Acting in their official capacity, any activity that contravenes the law of the host nation may also have a knock-on effect for the university itself. As seen in the duty of care in-focus on Giulio Regeni (above), though a different scenario, the home nation of the international university, or its staff and students, may find itself amidst tensions with the host nation. The values recognised by UNESCO, and most likely incorporated into an MoU, do not outline any political values, however the result of any act contravening the law of the host nation may be entirely political. Considering the MoU is not legally binding, the international nature of a university is not set in

stone and campuses abroad may be closed down by the host nation or partner university.

Theme 7: Duty of care, essential to avoid claims of negligence

A university, in its official capacity, has a duty of care to its students and staff wherever they may be in the world, but particularly to those deemed vulnerable. Staff are generally deemed vulnerable when they travel from their home nation to a host nation, particularly to a State that either is or is geographically located next to a politically unstable country. Further, vulnerable students and staff fall under the following categories:

- Children (under 18). This includes university students who begin their courses early in their academic life
- Young persons
- People with disabilities
- New and expectant mothers; and
- Lone workers.

If a university has in its constitution and its MoU a structure and process in place that actively looks after the health and safety of its staff and students, it may have a defence against a negligence claim.

Theme 8: Insurance and whether it is adequate or not

It is most important for a university to be insured, particularly when it goes global. This is not only because it may find itself the subject of arbitrary lawsuits but also, as has been the case recently, a university may be located in the midst of a country or city affected by natural disasters or war. International students coming to the UK, for example, must organise their own insurance. Insurance must be reviewed periodically to check it provides the right type of cover for an ever-changing risk landscape.

Theme 9: Accreditations, whether you would be ready and their usefulness

Gaining accreditation for courses is the cherry on top of the cake for recognised universities⁷. Going global, a recognised university may attract more students and accreditation would also encourage foreign universities to partner with universities looking to become international, potentially supporting the foundation of a strong and long-lasting MoU. This would be useful for any university’s long-term goal of becoming and remaining international, and making a mark in particular areas such as scientific research. With the cherry on top of the cake, the cake is ready.

Theme 10: Dual-use goods and armed security

This is not a theme that most universities find themselves thinking about but, in more recent times, it is something that should be considered. The list of dual-use goods – those that may have a military application and are therefore subject to end user controls – is surprisingly broad and can include software and some items of research equipment (lasers, night vision goggles); if in any doubt, universities must be aware of dual-use goods and potential limitations on their export internationally. Armed security has in the past become an issue for higher education institutions and so should prudently be considered at the outset. This was an issue during the Arab Spring. When the revolution that overthrew Hosni Mubarak broke out, staff and students from the American University in Cairo found themselves in an unusual and dangerous position that required armed security to be deployed.⁸

Theme 11: Data protection, to conform to the Data Protection Act and the forthcoming GDPR

The forthcoming General Data Protection Regulation will become directly binding and applicable on the 25th May 2018. It aims to harmonise data protection laws within the EU, making it easier for citizens to access their data. It also applies to foreign companies processing the data of all EU citizens. UK universities looking to go global should construct a framework in their MoUs in line with this regulation in preparation for Britain leaving the EU. It should be noted, however, that whether they operate in the EU or outside of it and admit EU citizens to their courses, the GDPR will still apply, as it is attached to EU jurisdictions and to EU citizens. Constructing a framework in an MoU, in line with this regulation, makes it clear that the university agrees to honour the law that applies to EU citizens.

Conclusion

Higher education institutions that go international elect for additional complexity, and therefore potentially risk. The risk is far from insurmountable but it does need to be addressed, and an understanding developed that time, consideration and constant review are required. Nonetheless, if the above themes are taken into account and reflected in a MoU or similar agreement, stepping onto the international stage could be a highly successful move. ■

¹ <https://www.britishcouncil.org/voices-magazine/universities-global-without-losing-their-values>

² <https://www.britishcouncil.org/voices-magazine/universities-global-without-losing-their-values>

³ <https://www.caie.org/blog/mou-on-values/>

⁴ <https://www.weforum.org/agenda/2017/03/5-ways-universities-can-join-the-fight-against-corruption/>

⁵ <https://www.southampton.ac.uk/hr/services/succession-planning/index.page>

⁶ <https://www.insidehighered.com/news/2015/03/18/nyu-professor-denied-entry-uae-where-university-has-campus>

⁷ In the UK, a recognised university is one that can offer degrees by virtue of their own degree awarding powers. The UK authorities recognise those institutions which have been granted degree-awarding powers by either a Royal Charter, Act of Parliament or the Privy Council. <https://www.gov.uk/guidance/recognised-uk-degrees>

⁸ <https://www.timeshighereducation.com/features/maintaining-ordinariness-through-egypts-arab-spring-turmoil#survey-answer>



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