Spirit
Experience
Solutions
Expertise
Talent
Know-How
Thinking
Doing
Insight
Enthusiasm
Enterprise

Higher Education Bulletin

March 2018

AHUA

SHAKESPEAREMARTINEAU

Contents

Strategy, Students & Governance

The Regulatory Framework and registration: more questions than answers..... 3

Can India be the Philosopher's Stone for the UK's education market?..... 5

Commercial

Knowledge Exchange Framework – a progress report.....8

Estates

Managing protests.....10

New mandatory requirements for heads of terms in commercial leases.....11

Human Resources

Holiday pay.....12

The Regulatory Framework and registration: more questions than answers

OfS registration time is upon us and universities will be working towards registration deadlines of 30 April and 23 May. This is a tight timescale, particularly when the need to get governing body sign-off is factored in. It is after all the governing body that is ultimately accountable for the accuracy of the information provided to OfS.

The OfS documents stress that registration is not an automatic entitlement and advise that until registration is confirmed, providers need to display a notice to students that access to student finance for the 2019/20 academic year is not guaranteed. To be compliant with consumer protection law, this notice needs to be accessible to anyone researching 2019/20 entry. Given all the other threats to recruitment that exist over the next year or so, this is an additional unhelpful caveat, to say the least.

Applications from existing providers will need to include four new pieces of analysis/evidence: an access and participation plan; a consumer protection self-assessment; a student protection plan; and a management and governance self assessment. These documents will be assessed as part of the provider's compliance with the regulatory initial conditions of registration, but also relate to the ongoing conditions of registration. They are therefore important documents that need to be referred to and updated on an ongoing basis.

Consumer protection self-assessment

The condition is not intended to judge whether or not the provider is compliant with consumer protection law. Rather, the OfS wishes to see how the provider has given due regard to the CMA guidance for the sector in the following respects:

- in developing arrangements for ensuring applicants and students get accurate, timely and accessible information about their course and provider;
- in ensuring its contracts with students are fair and transparent; and
- in ensuring that its complaints handling practices are clear, accessible and fair

The self-assessment needs to cover not just the contract of study but also contracts for accommodation, the disability support package, scholarships, sports facilities and additional course costs.

Despite asserting that its role is not to assess compliance with the law, one of the first questions the OfS's suggested self-assessment template requires to be answered is whether providers consider themselves fully, partially or not at all "compliant".

There are clear risks in declaring non-compliance but indeed potentially also in declaring full compliance. This is because an underlying theme in the OfS's regulatory approach is that its appetite for intervention will depend on whether it trusts a provider's capacity to identify, notify and put right breaches of conditions. If a provider declares full compliance but that is not supported by the evidence, that may call into question this wider issue of trust-based regulation. This raises a wider question of who within a provider should assess the various risks and make the judgments required by the registration process, as these will impact on the university's compliance risks on an ongoing basis.

Based on the consumer protection work we have done with the sector, we see the biggest ongoing compliance challenges for universities as relating to:

- information management, in terms of making sure that all information provided is quality-assured, accurate and complete;
- the high levels of devolved autonomy that exist within universities, making a global assessment of compliance difficult; and
- non-compliance at localised levels and how quickly those responsible for identifying and correcting regulatory breaches become aware of it.

Student protection plans

The production of these plans raises an immediate and obvious question over how much detail and specificity needs to go into the plan. Too much, and providers risk revealing commercially confidential assessments about their viability and their planned activities which could in itself create instability and precipitate the need to invoke the plan. Too little, and the OfS may not consider the plan adequate. The OfS will also be judging the plan against its own (undisclosed) assessment of provider risk and financial sustainability.

There are other immediate "big" questions that arise:

How will the OfS's assessment of adequacy work? Will they consider, based on their assessment of sustainability, that it is highly likely that a provider will need to close a campus or that a mode of study looks unviable, and thus require the plan to be revised, and if so, how does that interact with institutional autonomy?

How are the measures in the plan expected to interrelate with consumer rights remedies?

Will students in future be able to rely on it directly and complain or sue on the basis the plan has not been invoked or complied with? If not, what is the point of it? If it is intended to be relied on by students, how does that fit with the obligation to update it?

It is expected that providers will produce a plan for registration covering, presumably, a window of three to four years. Through this, students enrolling next year can in theory be assured that their own interests will be protected throughout the duration of their studies. However, the framework also requires the plan to be regularly updated as providers' judgments on the viability of activities change. Depending on how quickly viability changes (and given the wider volatility in the sector landscape, that could be quite quickly), these revisions could mean that the plan students relied on at the beginning is changed so that that it offers less protection to students.

Further points to note about the plan are that:

- It is intended to be produced in collaboration with students; and
- It is intended to be published.

Overall, the registration requirements have the potential to be onerous and far reaching. The unknown factor is how far the OfS's resources will permit it to scrutinise applications closely and forensically. The risk it runs is that if it registers providers and then pretty quickly problems with those providers emerge, its credibility will be damaged ab initio. Interesting times lie ahead.

Smita Jamdar
Partner & Head of Education
T: 0121 214 0332
E: smita.jamdar@shma.co.uk

Can India be the Philosopher's Stone for the UK's education market?

From Oxford to Hogwarts, the UK is undoubtedly home to some of the most iconic schools, colleges and universities in the world. Naturally, it attracts students from across the globe, who make a bee-line to get admission into the UK's top-notch institutes. However, just like getting across platform 9¾ requires 'special' skill, admission to UK institutes is not a small feat. The brick and mortar model of education is the front and centre of its success. This means that students have to personally come to the UK to study. However, recent events such as 'Brexit', a reduction in the number of scholarships and grants, tightening of visa norms and the like have made UK education a distant reality for non-UK students. This, coupled with the advent of Ed-tech (much like a modern day 'Portkey'), is literally transporting the classrooms of non-UK universities to students' houses. This means that even if the issues of grants, scholarships, visa et al. are resolved, the number of students who can get access to UK education in the UK would be far less than those who can enrol if the institutes, instead of waiting for students to come to them, venture outside the UK.

This raises some very critical questions – does it make sense for UK institutes to look at setting up bases outside the UK? If yes, when? If now, where? If where, how? The magic mirror's answer to all these questions lies within "India". Much like the 'room of requirement', it has something to offer to those who seek to find!

India and the UK have, since as long ago as the 'time-turner' could tell, shared excellent educational and cultural ties. With the world's largest young population and its ambition to become a truly global economic superpower, India today is in dire need of high quality higher education to get her people future ready. Unfortunately, the present education system in India is far from meeting this urgent need. Barring a few institutes, schools, especially higher education institutes, are scarce, curriculum is dated, infrastructure is poor and teachers don't have the skills to do justice to their job. This is in contrast with the availability of leading education institutes and skilled academicians in the UK. If only the UK and India join hands, India may potentially be able to meet its education needs, and the UK will be able to provide education to many more students, benefitting its education system and economy. While there is no wrong time, the imminent need of India demands that the time for UK institutes to enter India is now! The requirement exists primarily in the higher education and skills sector. Further, the Indian government is also receptive to private and foreign participation in higher education and skill development projects. This is an added benefit for foreign institutes.

Therefore, the only question to be answered is how should UK higher education institutes enter the Indian market?

The Indian education sector appears to be a 'chamber of secrets' for those who see it from the outside, but is actually quite navigable once on the inside. One just needs to know the right spell to enter!

To put it simply, the higher education and skills sector in India can be broadly categorised under two heads: regulated and unregulated. Degree and diploma programmes are regulated, whilst test preps, certificate courses, skill development programmes and tutorials are largely unregulated. The regulated sector operates through not-for-profit entities. For-profit entities are permitted and prevalent in the unregulated space.

Foreign universities are currently not allowed to set up an independent campus in the country to offer a degree or diploma programme. However, this does not mean that there are no options for foreign institutes at all! On the contrary, and much against popular belief and perception, there are many models which work well for foreign institutes looking at India.

One such model is collaborations or twinning arrangements with Indian institutes. Collaboration in the field of technical and non-technical education is regulated. The laws require that students of the Indian institute spend a certain duration of the tenure of their programme in the foreign institute, to ensure the legitimacy of intent of the collaboration. The degree granted on completion of programme is that of an Indian university. While joint degrees are not permitted, the credits earned by the students in the programme are recognised by the foreign institute. This could be used by foreign universities for granting degrees to such students from abroad.

To reduce the regulatory bottleneck, the process of seeking approvals for collaborations is also being eased (and in some cases removed) by Indian education regulators, for world-ranking institutes. As per recent policy changes, the soon to be set up "Institute of Eminence' in India (i.e. 20 world class institutes of international standing) will be able to academically collaborate with top-ranking foreign higher education institutions without the need to obtain approval from the Indian education regulators. An Institute of Eminence will have complete flexibility in fixing curriculum and syllabus, and can also offer inter- disciplinary courses in emerging areas. These institutes are also required to develop teaching and research collaborations with a reasonable number of global universities featuring in the global rankings.

Similarly, universities which are graded as Category-I Universities in India (the standards for which are extremely high) can also engage in academic collaborations with top ranking foreign education institutions without the approval of the education regulatory bodies in India. They may also open research parks, incubation centers and university society linkage centers, in self-financing mode, either on their own or in partnership with private partners, without the approval of education regulatory bodies.

These policy changes open a plethora of opportunities for UK institutes, for whom their own brand reputation and the reputation of their collaborating partners is of prime importance. UK institutes can therefore associate with Indian institutes which are designated the best in the country by regulators, without regulatory issues.

This is not all.

1 - University Grants Commission (Categorization of Universities (only) for Grant of Graded Autonomy) Regulations, 2018.

2 - Featuring in top 500 of Times Higher Education World University Rankings or QS Rankings or top 200 of discipline specific ranking in Times Higher Education World University Rankings or QS Rankings.

The unregulated sector in India has way more to offer. To begin with, because these courses are not regulated, it is possible to decide the course structure, duration, fee etc. as per the requirements of the foreign institute. Secondly, the brand name of the foreign institute attracts students, and student enrolment is easy. Further, it is possible to find a local partner to facilitate marketing, admissions, buildings and other support functions to make the process of implementation in India stress-free.

A common model used in this space is that the foreign institute grants a license of its brand, curriculum and know-how to the Indian institute/service provider. The programme is controlled by the foreign institute, which enrols students as per its policy. Courses are taught by the teachers of the foreign institute from outside India (using technology), or on the ground through their teachers being present in India. Sometimes, teachers in India are trained to provide education through Indian institute, using licensed curriculum. The foreign institute grants a degree, diploma or certificate to the student only after being satisfied of the results. This model not only helps the foreign institute earn royalties and service fees from the Indian institute, but also helps the foreign institute establish its brand and presence in India. The Indian institute benefits from the use of the brand name and curriculum of the foreign institute, thus resulting in a win-win situation for both.

In addition, independent research centers, executive education programmes and specialised training sessions conducted by well-known foreign institutes are also very popular in India and see good enrolments. Since this also falls within the ambit of the unregulated sector, it gives foreign institutes the freedom to offer these programmes in the way they want and to exercise control over them.

To sum up, India can definitely be the charm for UK institutes looking at cross border expansion. With correct market analysis, and sound legal and regulatory advice, the UK may find a Philosopher's Stone in India, which can infuse new life in its dynamic education market.

Aarushi Jain and Vivek Kathpalia
Nishith Desai Associates
Legal & Tax Counselling Worldwide
Mumbai, India
www.nishithdesai.com

Knowledge Exchange Framework – a progress report

The government published the Industrial Strategy White Paper "Building a Britain Fit for the Future" on 27 November 2017. It announced that the government had committed to increasing the Higher Education Innovation Fund to reach £250m a year by 2020-21. HEFCE was asked to lead on developing the Knowledge Exchange Framework as set out in the White Paper.

In September 2016, Professor Trevor McMillan (Vice Chancellor of Keele University and Chair of the McMillan Research Group) had already reported on university approaches to supporting the exploitation of intellectual property rights that had been developed as a result of university-based research by staff and students, commonly known as "technology transfer".

The September 2016 report focused on technology transfer, but noted that this was only a small part of the Knowledge Education Framework.

It was generally felt that the ability for technology transfer to generate additional revenue for universities is a difficult path to follow. This is because it tends to be expensive and very few universities worldwide make money from technology transfer. It was seen as a cost to universities rather than a source of additional revenue.

The US was highlighted as having a high level of business R&D, more high-technology R&D and more venture capital with a strong focus on national policies on entrepreneurship and technology transfer. The emphasis in Europe, including the UK, was seen as being different, with a wider focus on a broader range of routes to exploitation (of which technology transfer is only one).

Whilst the Macmillan Group felt that the UK university system does operate at world-class standards of practice, there are varying levels of engagement in relation to technology transfer across the country. There is certainly no one consistent route. It was stressed in the report that there is no single answer to the question of how to improve technology transfer, because it does depend on the facts of any given circumstances. The report highlighted the need to ensure that university leadership steps up to the plate in order to overcome any governance charges, the need to understand how diverse "bio-systems" can be nurtured, and to explore whether different approaches to commercialisation are needed according to the different sectors involved. Finally, how to engage and support academic and professional staff who are engaging or being involved in entrepreneurial activity?

Following the report of the McMillan Group, a consultation was launched calling for evidence to the KEF Metrics Advisory Group in order to consider the value of the KEF Metrics exercise to describe and compare institutional levels of performance in knowledge exchange. It closed on 13 January 2018. A further report by the McMillan Group will now be prepared.

It should also be noted that from 1 April 2018, the implementation of KEF policy will be managed by Research England.

The responses that I have seen so far (in university publications) that comment on the White Paper and the call for evidence suggest that many feel that they are already far along the path towards establishing a successful KEF strategy, with many voicing concerns about how fair the proposed metrics will be. This echoes the McMillan Group report, which reiterated that a one-size-fits-all approach would not work. Therefore, the metrics framework needs to take account of a broad range of activities in order to be truly reflective of UK universities across the board.

It will be interesting to see what the next report says and to see how universities react. Will the metric be fair and allow for a broad enough range of activities to be measured? Do we need the metric in the first place? Are universities doing enough on knowledge transfer? It will take some time for questions like these to be answered/debated.

Martin Noble
Partner, Commercial & IP
T: 0116 257 4472
E: martin.noble@shma.co.uk

Managing protests

With many universities presently facing continued disruption from industrial action - and in some cases now finding their buildings occupied by student protestors - it is perhaps worth reminding institutions of their rights and responsibilities as landowners.

Faced with an occupation or sit-in protest, unless there is evidence that a crime has been committed (eg criminal damage or aggravated trespass) then it is unlikely that a call to the police will secure any help to remove the protestors.

It is not possible for universities to exercise any self help remedies here. They will first need to obtain a court order before steps can be taken to lawfully remove any protestors. In most cases, as landowners they will be required to take action themselves through the courts in order to obtain a Possession Order, and this can be done very quickly.

Some key points to bear in mind:

- As well as obtaining a Possession Order against the particular building which is subject to a sit in protest, always consider whether it is also possible to obtain a wider Order - for example, extending to and including all surrounding land and buildings on campus. This sort of Order makes it easier to deal with removal of the protestors;
- In some cases it is possible to obtain an injunction restraining trespass by specific groups or individuals;
- A very recent High Court case has also now shown that it is possible to obtain an injunction to pre-empt a protest occupation occurring in the first place – i.e. to prevent a sit-in protest taking place on your land at all.

In these ways, it is possible for universities to obtain appropriate court orders very quickly in order to protect their buildings and to limit disruption to their operations. It is also possible to prevent protestors simply relocating their sit-in from one building to another part of the university estate.

So if you are facing sit-in protests, bear in mind that standing back for a day or two (however well-intentioned that may be) will not generally assist the university if it subsequently finds that it needs orders from the court and must first persuade the judge as to the urgency of the situation. Note also that if you have identified a "real and immediate threat" of an occupation which is about take place, then by acting immediately the institution as landowner may be able to nip it in the bud before it starts.

Martin Edwards
Partner, Real Estate Disputes
T: 0121 214 0340
E: martin.edwards@shma.co.uk

New mandatory requirements for heads of terms in commercial leases

With universities continuing to regularly grant commercial leases, it is important that they understand that their in-house surveyors and external surveyors will need to act in accordance with the intended replacement for the Code for Leasing Business Premises 2007 when agreeing heads of terms.

Whilst this is still at consultation stage, once finalised the new requirements will be mandatory and will seek to improve transparency in negotiations and to encourage more comprehensive terms to be agreed.

The landlord (or its agent) will be responsible for ensuring the compliant heads of terms are in place before a draft lease is circulated.

The requirements are anticipated to include the following:

- **Mandatory requirements**

As a broad overarching principle, the parties are obliged to approach negotiations in a constructive manner that displays integrity and respect.

In terms of recording the agreement reached, the terms must be recorded in written heads of terms containing what was agreed in respect of the following:

- **Premises**

The identity and extent of the premises being let (and any special rights e.g. car parking)

- **Length of term, renewal rights and break rights**

The length of the term, whether the lease will have security of tenure and whether either party will have break rights

- **Rent deposits and guarantees**

Any requirements for rent deposits or guarantees

- **Rent and rent review**

The rent and frequency of payments (e.g. quarterly) and the basis of review; whether VAT is payable on rent; any rent free periods.

- **Alienation**

The tenant's right to assign, sublet, charge or share the premises

- **Service charge**

Any requirement on the tenant to pay a service charge

- **Repair**

The repairing responsibilities on all of the parties

- **Use and alterations**

The range of uses permitted and any restrictions on alterations

- **Insurance**

The tenant's responsibility to contribute towards insurance

Conclusion

Whilst it is good practice to approach the negotiation of heads of terms as set out above in any event, the new mandatory guidelines should serve to reinforce positive behaviours and reduce the risks of surprises down the line.

James Fownes
Associate Partner
T: 0121 214 0647
E: james.fownes@shma.co.uk

Holiday pay

The Employment Appeal Tribunal recently considered whether the employer of a visiting music teacher on a "zero hours" contract was entitled to calculate holiday pay on a pro-rated basis (12.07% of hours worked in a term) or whether holiday pay should be based on the Employment Rights Act 1996 (ERA) whereby the teacher would be paid based on her average earnings over a 12-week period immediately before holiday was taken.

Brazel (B) v Harpur Trust (School) (UKEAT/0102/17)

B was a visiting music teacher who worked on a zero-hours contract predominately during school term-times (between 32-35 weeks of the year). She was entitled to 5.6 weeks' of paid annual leave under her contract and current legislation, which the School specified had to be taken during the school holidays.

The School argued that her holiday pay should be pro-rated based on the number of weeks she actually worked, which was less than the normal working year. This meant that B's holiday pay was capped at 12.07% of annual earnings. B argued that her holiday pay should be calculated in accordance with the ERA which would have meant that her holiday pay would amount to a higher percentage of annual earnings, equating to 17.5% of annual earnings.

ET decision

The Employment Tribunal upheld the School's argument that B's holiday pay should be calculated on a pro-rated basis, such that the current statutory regime should be "read down" and part-time workers who work fewer than 46.4 weeks per year should have their holiday pay capped at 12.07% of annualised hours.

EAT decision

B appealed against the tribunal's decision and her appeal was upheld. The Employment Appeal Tribunal gave weight to the overriding principle in the Part-time Workers Regulations 2000 which state that part-time workers should not be treated less favourably than full-time workers. It was held that there was no principle to the opposite effect and that part-time workers could be treated more favourably. Further, it was held that there was no basis to amend the existing statutory regime under the ERA and that holiday pay would therefore have to be calculated in accordance with the ERA.

What does this mean for universities?

Historically, universities have been able to use the 12.07% accrual rate to calculate annual leave entitlement based on 5.6 weeks annual leave, which provided a shortcut to the regime in the ERA. However, this case highlights that universities should review any set holiday percentages they have in existing staff contracts, particularly for part-time staff and lecturers who work fewer weeks than the normal working year, to establish whether they would benefit from a more generous interpretation of holiday pay under the ERA. If they would, then part-time employees would potentially have a claim for any underpayment as a result of this case and universities should therefore consider whether to amend holiday payments accordingly.

Rupi Chandla
Trainee Solicitor, Employment
T: 0121 631 5312
E: rupi.chandla@shma.co.uk