

# STUDY ABROAD PROGRAMS IN EUROPE

Tim Kaye

## Waivers (and why not to use them)

When inviting students to embark on an off-campus activity, the common practice for many years in the United States has been for institutions to require that participating students - and sometimes faculty and staff too - sign some form of waiver. As is well known, the purpose of such a document is to have the signatory waive his or her right to bring a legal action against the individual in case s/he should sustain some harm or loss while engaged in the activity in question. Whether this remains good practice in the U.S. itself is, however, becoming increasingly questionable. Many states have rules that such waivers are void for reasons of public policy when drawn up by public bodies in an attempt to avoid liability for death or personal injury, and some states seem to be moving towards a position where even private colleges and universities will not necessarily be able to rely on waivers as automatically excluding civil liability for such harm.<sup>1</sup>

But whatever the position within the U.S., it is clear that ostensible waivers regarding death and personal injury are not only unenforceable within Europe, they may often be counter-productive. The European Union's Unfair Terms in Consumer Contracts Directive, issued in 1993, lays down the basic legal principles.<sup>2</sup> Its significance is that, under Article 6(1):

“Member States [of the E.U.] shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, **not be binding on the consumer** ...” (my emphasis).

There are, however, two exceptions to the wide-ranging provisions of Article 6(1). Terms which specify either the main subject-matter of the agreement, or its price, cannot be challenged as being unfair, but only if those terms are expressed in “plain, intelligible language”.<sup>3</sup> This means that colleges and universities remain free to determine for themselves both the nature of any study abroad program and how much they should charge students who participate in it, provided that they avoid unnecessary legalese and inaccessible small print.

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<sup>1</sup> See e.g. the decision of the Wisconsin Supreme Court in *Atkins v Swimwest Family Fitness Center aka Swimwest School of Instruction, Inc* 691 N.W. 2d 334 (2005).

<sup>2</sup> 93/13/EEC:L 95/29.

<sup>3</sup> Art 4(2).

Any other terms contained in the agreement between institution and student are, however, fair game to the Directive, as will be the case with terms regarding price and the main subject-matter of the contract if they are not written clearly.

So let us take each of the elements in Article 6(1) in turn. First, the law under which a legal action might be brought against an American higher education institution (H.E.I.) would not be E.U. law as such (because this normally applies only to public bodies of European origin) but would be the law of the particular Member State in which an individual allegedly suffered harm, loss or damage. The function of the Directive is to order governments of Member States to implement the provisions of the Directive as part of their own domestic law. Some countries have chosen to do this by writing laws which use rather different terminology. Many countries, including the United Kingdom, have preferred simply to adopt the wording of the Directive almost *verbatim*.<sup>4</sup> The effect is the same either way and so, for ease of explanation, it will be the Directive which is discussed at length here.

Article 6(1) talks of a contract between a “seller or supplier” and a “consumer”. It might not be readily apparent from this terminology that the Directive applies to higher education, but the fact is that it does. In fact, for the purposes of the Directive:

“*consumer* means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;  
*seller or supplier* means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.”<sup>5</sup>

It is thus clear that all educational bodies, including colleges and universities, are caught by the definition of ‘sellers and suppliers’ when associated with study abroad programs because they are acting for purposes related to their business (and whether they are public or private institutions explicitly makes no difference). They therefore come within the ambit of the Directive. Similarly, students are undoubtedly ‘consumers’ for the purposes of the Directive because study is a purpose outside any trade, business or profession in which they might be engaged. Although faculty and staff cannot be classed as ‘consumers’ (since, on study abroad

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<sup>4</sup> The relevant UK legislation is called the Unfair Terms in Consumer Contracts Regulations 1999 (S.I. 1999, No. 2083), which replaced the regulations originally issued in 1994.

programs, they are obviously acting for purposes connected with their trade, business or profession), it will be seen that this makes little practical difference to the rights which they enjoy against their employer.

Moreover, it should be noted that U.S. institutions cannot effectively avoid the Directive by inserting a clause into the study abroad contract with the student that the agreement is governed solely by the law within a specified American jurisdiction. This is because Article 6(2) specifically excludes the possibility of the consumer's losing the protection of the Directive if the contract "has a close connection with the territory of the Member States".

Having established that a college or university is a 'seller or supplier', and that a student is a 'consumer' for the purposes of this Directive, the next step is to identify what is meant in Article 6(1) by 'unfair terms'. This is addressed by Article 3(1), which says that:

"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

The "requirement of good faith" prior to the formation of a contract may appear strange to many American lawyers since it is not required in any common law jurisdictions. Indeed, some American judges have been strongly opposed to the incorporation of such a requirement into American law. Interestingly, many British judges formerly took the same view<sup>6</sup> but, with only the United Kingdom and Republic of Ireland representing the common law tradition within the E.U., the requirement of good faith was included in the Directive as a recognition of the position throughout continental Europe. So far as the U.K. and Ireland are concerned, this means simply that the existence of an unfair term within a contract between seller or supplier and consumer is conclusive evidence of bad faith. However, the requirement of good faith is perhaps not as strange to American eyes as it may at first appear, since the Uniform Commercial Code is unique among common law jurisdictions in imposing

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<sup>5</sup> Art 2(b), (c).

<sup>6</sup> In *Walford v Miles* [1992] 2 WLR 174 (HL), Lord Ackner declared in the House of Lords (at p. 181) that "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations.... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party."

such a requirement on the parties once they have actually formed a contract,<sup>7</sup> a requirement subsequently reinforced by the Restatement (Second) of Contracts.<sup>8</sup>

Any requirement that a student sign a waiver document before taking part in a study abroad program will be caught by Article 6(1), especially since Article 3(2) provides that:

“A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”

It is important to emphasize that this European approach to standard-form contracts is very different from the typical American approach, which seeks to draw a distinction between standard-form contracts and contracts of adhesion, where only the latter are presumed suspect.<sup>9</sup> Allowing students to negotiate slightly different wording to the waiver, for example, will demonstrate to an American court that there is no contract of adhesion since the student is clearly not forced to ‘take it or leave it’ when faced with the initial written document. But granting a student an opportunity to make minor alterations to a proposed written contract would make no difference under European law, since this focuses on substance and not form. Moreover, it does not matter whether each student is initially presented with a document which is worded differently from that offered to his or her peers. European law looks at the ability of the particular consumer to influence the substance of the terms in the particular contract offered to him or her; whether or not others are bound to the same terms is completely irrelevant. Any insistence that a student signs a waiver is thus an instance of a term which has not been “individually negotiated”.

It should also be noted that allowing the student to negotiate over other terms in the contract regarding study abroad will not render any waiver clause immune from the effect of Article 6(1) because Article 3(2) goes on to state explicitly that:

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<sup>7</sup> Section 1-203 provides that “every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement”.

<sup>8</sup> Section 205 says that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement”. See, more generally, R.S. Summers, ‘The Conceptualization of Good Faith in American Contract Law: A General Account’ in R. Zimmerman and S. Whittaker (eds.), *Good Faith in European Contract Law* (New York: Cambridge University Press, 2000).

<sup>9</sup> See e.g. W.D. Slawson, ‘Standard Form Contracts and Democratic Control of Law Making Power’ 84 *Harv.*

“The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.”

Indeed, the burden of persuasion is always on the institution to show that any particular term was individually negotiated.<sup>10</sup>

Finally, the issue of whether or not the waiver will cause “a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” is addressed in the Annex to the Directive, which sets out “an indicative and non-exhaustive list of the terms which may be regarded as unfair”.<sup>11</sup> Paragraph 1(a) deals the fatal blow to the use of waivers, since the example it contains is of terms:

“which have the object or effect of excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier”.

There is therefore absolutely no doubt that such waivers are void throughout the European Union. Indeed, contractual terms purporting to exclude liability for death or personal injury resulting from negligence had been void in the UK long before the E.U.’s Directive by virtue of section 2(1) of the Unfair Contract Terms Act 1977. In both cases the rest of the contract with the student remains in force “if it is capable of continuing in existence without the unfair terms”.<sup>12</sup> This means, so far as study abroad programs are concerned, that an institution will remain liable to provide the program advertised even though any waivers signed by the participating students have no effect.

In addition, it should be noted that terms which purport to exclude or limit claims for financial loss may also be rendered void on the grounds of unfairness if they have the object or effect of:

“inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or

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*L. Rev.* 529 (1971).

<sup>10</sup> Art 3(2).

<sup>11</sup> Art 3(3).

<sup>12</sup> Art 6(1).

inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him”.<sup>13</sup>

Fifteen other examples of unfair terms are included in the Annex to the Directive. While by no means all of them will be applicable to study abroad programs, it should be borne in mind that this list is intended to be illustrative and not exhaustive, so that other terms may also be found to be unfair when all the circumstances of the agreement are taken into account.<sup>14</sup> Moreover, it is likely that other unfair terms will be analogous to those on the list. For this reason, the full list is attached as an appendix to this paper.

### **Proactive scrutiny**

In addition, it is important to realise that Article 7(1) of the Directive requires that, “in the interests of consumers and competitors”, each Member State must ensure that “adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers”. In the U.K., this has been implemented by enabling the Office of Fair Trading (O.F.T.) proactively to scrutinise unfair terms with a view to having them amended or deleted.<sup>15</sup> If not satisfied by an organisation’s response, the O.F.T.’s dedicated Unfair Contract Terms Unit can initiate legal proceedings leading to an injunction against the offending body. It is worth noting that the O.F.T. announced in its regular *Bulletin* in April 1999 that one of the major ‘problem sectors’ involved educational institutions.<sup>16</sup>

Since the *Bulletin* is also used to ‘name and shame’ offending organisations (as was done with South Bank University in that particular *Bulletin*), this announcement sent shock waves through universities and private schools. Many chose voluntarily to amend their standard student contracts before they came under the scrutiny of the O.F.T., while those which did not pay sufficient heed to the O.F.T.’s warning probably regretted this oversight. In 2000 both Keele University and Derby University were named and shamed.<sup>17</sup> Two years later, so was Kingston University, which was forced to amend eight of the terms used in its standard

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<sup>13</sup> Annex para 1(b).

<sup>14</sup> Art 4(1).

<sup>15</sup> Unfair Terms in Consumer Contracts Regulations 1999, regs. 10-15.

<sup>16</sup> *Unfair Contract Terms: A Case Report Bulletin* (London: O.F.T., 1999) para. 1.15.

student contract.<sup>18</sup> In 2003, the O.F.T. required 25 substantive changes to the student contract used by the University of Durham - and demanded an incredible 41 changes to that used by the University of Southampton!<sup>19</sup> Later the same year, this total was nearly matched by the University of the West of England, when the O.F.T. required 40 significant amendments.<sup>20</sup> In 2004, the University of Surrey was obliged to make 37 major changes.<sup>21</sup> There is clearly no sense in attempting to utilize terms in student contracts relating to trips to Europe when the regulatory bodies charged with upholding the Directive are already so sensitive to the issue.

There is, however, an amusing footnote to the O.F.T.'s investigations. In 2003 the U.K. government's own Department for Education and Skills was found to have inserted unfair terms into an agreement which it required parents to enter into before allowing school children to go on school trips off campus!<sup>22</sup>

### **Waivers as an admission of fault**

It was said at the beginning of this paper that including waivers in an agreement with a student prior to embarking on a study abroad program could be not just ineffective at law but also counter-productive. The reason for this is simple. If an injured student brings a claim against a college or university, one of the documents which is bound to be entered as evidence is the written agreement including the waiver. Since the waiver has no effect (or, in the case of financial loss, is potentially of no effect) the court will apply standard negligence principles. No matter in which country the case is being heard, these work in a fashion very similar to American tort law. As is well known, these mean that a plaintiff student needs to prove – on a balance of probabilities or according to the preponderance of the evidence – all of the following four elements in order to succeed in a claim of negligence or malpractice:

- (a) That the institution owed him/her a *duty of care*;
- (b) That the institution was at fault in that it breached its duty by behaving unreasonably (or because one or more employees behaved unreasonably);
- (c) That s/he suffered some form of *harm or loss*; and

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<sup>17</sup> *Bulletin 13* (London: O.F.T., 2000).

<sup>18</sup> *Bulletin 21* (London: O.F.T., 2003).

<sup>19</sup> *Bulletin 23* (London: O.F.T., 2003).

<sup>20</sup> *Bulletins 24 and 25* (London: O.F.T., 2003).

<sup>21</sup> *Bulletins 27 and 28* (London: O.F.T., 2004).

<sup>22</sup> *Bulletin 23* (London: O.F.T., 2003).

- (d) That such harm or loss was *caused* by the unreasonable behaviour of the institution (or an employee).

It is obvious that an institution which runs a study abroad program owes some sort of duty to the students who participate. The first significant question to be addressed in any litigation would therefore be the issue as to whether the H.E.I. behaved reasonably. But the existence of a waiver clause will make this an almost impossible task for the H.E.I. to accomplish, since the court will inevitably take the waiver as indicating, if not an actual abdication of responsibility on the specific occasion when injury allegedly resulted, then certainly a desire to abdicate responsibility if at all feasible. It is difficult to see how such literally irresponsible behaviour – which may well be characterized in continental Europe as evidence of bad faith – can be considered reasonable. The existence of a waiver clause is therefore effectively almost an admission of fault by the institution in question. The H.E.I.'s only remaining defences would thus be to argue that the student suffered no harm at all – an unlikely proposition, given that the student (or student's family) will be going to considerable trouble to bring a legal case in a foreign country – or that the H.E.I.'s fault did not cause the injury. Clearly this is not a recipe for success.

### **An alternative approach: accepting responsibility and avoiding harm**

Since waivers are at best ineffective and often counter-productive, an alternative approach is required. Rather than denying responsibility, the best approach in Europe is to assume responsibility. This may be anathema to some American lawyers, who are used to advocating that institutions should take the approach of 'see no evil, hear no evil'. But, as we have seen, that approach simply does not work in Europe – and increasingly it does not work in the U.S. either.<sup>23</sup>

But two other differences between European and American law work mitigate this duty to some extent. First, whereas the age of majority in the U.S. varies significantly according to the nature of the activity and the particular state in which that activity takes place, the European approach for the purposes of the law of negligence is that a person becomes an adult upon turning eighteen. This means that all students participating in a study abroad program in Europe will be treated by the law as adults. Secondly, the paternalism and

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<sup>23</sup> See e.g. *Stanton v University of Maine System* 773 A.2d 1045 (Me. 2001), where the Supreme Judicial Court

Puritanism which is occasionally evident in some judicial opinions in the U.S. is almost totally absent in Europe.<sup>24</sup> The fact that study abroad students are adults is therefore not diluted by any legal requirement that they be treated as, for example, 'young adults' who are still in need of an element of special protection.

Instead, the European approach is based, just like the Unfair Terms in Consumer Contracts Directive, on regulating imbalances of power and control. Those who have the power to avoid causing injury to others are encouraged by the law to do so – and it will hold them to account when they have no good reason for not doing so. This is actually somewhat analogous to the approach taken in the U.S. and many European countries<sup>25</sup> regarding automobile accidents, where the fact that an adult is driving or walking along a road does not prevent him or her being owed a duty of care by other road users. Thus students (and staff and faculty) are owed a duty of care by the H.E.I. running the study abroad program in which they are participating. In particular, the H.E.I. will have – or will have access to – considerably more knowledge about the venue and the customs and culture of the locality in which it stands than most of the individuals taking part in the program. To ensure that the responsibility that accompanies this power is not abdicated, the law in most European countries requires that every employer carry out what is known as a risk assessment for each place of work.

### **Risk assessments**

In many ways, the process of risk assessment runs parallel to the doctrines of tort law. Underlying two of the four required elements of the tort of negligence is a notion of foreseeability. First, a duty of care is owed to someone who can be identified as a foreseeable victim. Secondly, whether or not that duty is breached is determined by the reasonableness or otherwise of the conduct of the defendant. Since the question of reasonableness is judged not with hindsight but through the eyes of the parties at the time, it follows that a potential defendant institution is expected to have guarded against what were then reasonably foreseeable hazards which posed reasonably significant degrees of danger. The process of risk assessment simply seeks to have employers think more self-consciously and

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of Maine held that there was a duty to protect an adult female in a residential facility.

<sup>24</sup> See e.g. *Woodbridge School v Chittock* [2002] EWCA Civ 915 (C.A.).

<sup>25</sup> Some European countries hold motorists strictly liable whenever they are involved in an accident with a pedestrian.

systematically about what is foreseeable so as to ensure that the appropriate steps are taken to address the hazards involved.

The precise requirements for each risk assessment inevitably differ from country to country, and the issue is complicated further by the fact that certain European Union Directives prescribe specific forms of risk assessment for certain activities. However, these niceties can safely be glossed over so far as study abroad programs are concerned because they really come into play only when the use of unusually hazardous substances such as dangerous toxins or radioactive materials is involved. In such cases specialist advice must of course be sought. The advice given here is intended for risk assessment relating to any ‘standard’ study abroad program.

Perhaps the most important piece of advice concerns institutional mindset. In the U.S. it is common to hear advice given and accepted on the basis that it will help to minimise liability. Taking that approach in Europe – and, probably in the U.S. as well<sup>26</sup> – is likely to end in tears. No-one can guarantee that taking any particular steps will prevent someone from initiating litigation. Even in the best-regulated institutions, mistakes will inevitably occur and liability may well follow. That is what insurance is for. Indeed, embarking on a particular course of action simply to minimise liability will often look to a court like evidence of bad faith or an attempt to evade responsibility, and so will frequently be counter-productive. Risk management should instead be treated as the best way not of avoiding liability, but as the best way of avoiding harm. This approach benefits not only the participants but also the institution itself in the long run. No-one wants to be associated with a study abroad program where a student or member of staff or faculty suffered mishap; a program which finds itself saddled with a bad reputation will be very short-lived.

### **(1) Appointing the assessors**

While carrying out a risk assessment is not a particularly specialized activity, it should on no account be allocated to the most junior member of staff or faculty. On the contrary, the task should always be allocated to a fairly senior individual or team of individuals who have some experience of study abroad programs. Not only are they more likely to be more aware of the issues involved, but they are also being entrusted to some degree with the health and safety of

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<sup>26</sup> See e.g. R. Bickel & P. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the*

all those taking part in the program and it is important to show that the H.E.I. is taking its responsibilities seriously.

How the assessors go about their assessment will largely depend on the structure of the program. If it is not being run by the H.E.I. directly, but is in fact being entrusted to some other body – whether American or European – then the risk assessment need not be as extensive as it must be where the H.E.I. retains control throughout the program. Essentially the assessment needs to focus on two factors:

- (a) The *bona fides* and experience of the institution running the program; and
- (b) The arrangements for transferring the students to the other institution.

There should normally be little difficulty in establishing the *bona fides* of a college or university running the program where the institution is well established. However, it will still be necessary to check what experience that institution has of operating programs for American students – even if it is hosting the program on its own premises – because this will inevitably involve very different requirements from those associated with programs run for students of the host country. The easiest way to assess this is to ask the institution to provide a copy of the information it supplies to participating students both before and during the program. If the experience of the institution with American students is limited, a more extensive assessment will be required. In any event, it will always be important to check on the arrangements put in place to enable the students to arrive safely to register at the appropriate venue.

If the more limited risk assessment concentrating on these two factors is all that is required, then it can generally be carried out on paper in an office on the H.E.I.'s own campus, since all that is really required is effectively an audit trail. However, a 'brainstorming' session on the home campus will not be sufficient where H.E.I. is running the study abroad program under its own auspices. In such circumstances, there is really no substitute for at least having the program leader go on a 'dummy run'. This will enable him or her to assess travel, accommodation and cultural issues as well as things more directly associated with the curriculum. But just as this risk assessment should not be assigned to a very junior person, neither should it be seen as a 'freebie' to be enjoyed by a more senior individual who will not

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*Risks of College Life?* (Durham, N.C.: Carolina Academic Press, 1999).

in fact be taking any responsibility for running the program. A risk assessment conducted by someone who will not have to put any of it into practice can sometimes be worse than useless.

## **(2) Identify potential hazards**

Whoever is/are appointed as assessor(s) must make a list of all the potential hazards (or dangers) that might arise during the course of the program. A hazard is simply anything or anyone who might cause harm. At this stage it is important not to ignore or fail to list a hazard simply because it seems unlikely. Overlooking something that was obvious will not look good if someone is later injured as a result of just such a hazard. Only silly or fanciful hazards should therefore be ignored.

For example, although it may seem odd to talk of a person as a ‘hazard’, this would undoubtedly be the case where there is known to have been a number of thefts or serious assaults in the vicinity of the intended study abroad location. Similarly, any student or member of staff who is prone to – or taking medication to control – anti-social behaviour must also be classed as a hazard.

Hazards associated with a study abroad program can usefully be grouped into different types, according to the activity with which they are associated, such as:

### *(a) Travel*

- Not having correct travel documents such as passport, visa and/or ticket
- Getting lost
- Having items impounded by airport security, police or customs officials
- Missing connections
- Different time zones
- Driving on other side of road (depending on countries visited)
- Disreputable taxi drivers
- No local currency and/or disreputable money changers
- Access for people with disabilities (including to lavatories)
- Hotel claims no knowledge of reservations
- Unsafe areas (often close to bus and railway stations)
- Being recognised as American(!)

### *(b) Language and culture*

- Difficulty speaking or understanding foreign language or dialect
- Locals’ attitude towards Americans
- Potential racism?

- Alcohol – can be purchased and consumed by anyone over the age of 18 (and Europeans tend to consume far larger quantities than Americans). Also risk of ‘spiking’ of drinks.
- Sex – generally much more relaxed attitudes in Europe than in the U.S.
- Food – type, quality and availability for particular groups (e.g. vegetarians)
- Attitudes regarding service (especially in bars and restaurants)
- Tipping
- Potential for causing offence, such as through exposure to nudity and swearing (especially on TV)

*(c) Premises and accommodation*

- Safety of location, especially at night
- Distance between living accommodation and premises for teaching
- Hygiene
- Unsafe electrical or gas installations?
- Access for people with disabilities (including to upper floors and lavatories)

*(d) Individuals with special concerns*

- Availability of prescription medication
- Known allergens
- Participants with behavioural problems

### **(3) Evaluate the risks**

Having identified the potential hazards, the next step in the risk assessment process is to evaluate the level of risk which each hazard poses. This means working out both how likely it is that someone could be harmed and what degree of severity would then result. The easiest way in which to do this involves use of the matrix in Table 1 below, which requires that both likelihood and severity of harm be categorized as low, medium or high risk.

Every hazard should be allotted a place in the matrix. Normally the nature of the hazard will make it clear what type of harm might result, but it is often a good idea to record this explicitly too. Hazards which are evaluated as being of minimal risk can be safely recorded as requiring no further action. Hazards which are identified as high risk in terms of both likelihood and severity of risk – such as electricity outlets hanging off the walls in student accommodation – demand immediate attention. The hazards which fall anywhere else in the matrix will need to be addressed once those assessed as very high risk have been considered.

**Table 1: Risk assessment matrix**

LIKELIHOOD OF HARM	SEVERITY OF HARM		
	HIGH	MEDIUM	LOW
HIGH	Very high risk: urgent action required		
MEDIUM			
LOW			Minimal risk: no action required

**(4) Managing or eliminating risk**

Hazards which are evaluated as being high risk in terms both of likelihood and severity are unlikely to be tolerable on a study abroad program and must therefore be eliminated. However, it is important to remember that European law is not paternalistic towards adults, and that the law of torts requires not that an H.E.I. takes all possible steps to keep people safe, but to take only those steps which are reasonable. As a result, most of the hazards which are assessed as having more than minimal risk but less than very high risk will not need to be eliminated but do need to be managed appropriately. There is no need to over-complicate things. In many cases, nothing more than a clear warning to program participants will be required, although it may need to be given on more than one occasion (e.g. in a handbook for the program distributed before travel and orally at an orientation session on arrival). The final risk management chart should look something like the sample one in Table 2 below (although it will be much longer).

**Table 2: Sample risk management chart**

<b>HAZARD</b>	<b>RISK ASSESSMENT</b>	<b>ACTION PLAN</b>
<b>Electricity outlets hanging off walls in rooms A1, A2 and A4</b>	Likelihood: High Severity: High (electrocution)	Arrange for proper installation or removal
<b>Incomplete or inadequate travel documents</b>	Likelihood: Medium Severity: Medium (delay, extra expense)	Prepare handbook for students in advance of program, detailing documentation required
<b>‘Spiking’ of drinks</b>	Likelihood: Low Severity: High (assault, rape)	Warn students in handbook and on arrival abroad that drinks should not be left unattended, and should be poured in view
<b>Anti-American sentiment</b>	Likelihood: Low Severity: Low (verbal abuse)	No action required

**(5) Dissemination and review**

Once completed, the mistake that must not be made is to file the chart away and forget it. On the contrary, since the purpose of compiling it is to ensure that reasonable steps are taken to keep everyone safe, it is imperative that the completed chart is circulated to all senior personnel involved in the program. During the course of the program, lack of human omniscience means that it is almost inevitable that some of the risk assessment and/or risk management plans for action will turn out to have been inaccurate. Even if harm results in a manner not originally foreseen, this will not normally make the H.E.I. in question legally liable unless something obvious was overlooked. The fact that the original risk assessment was not perfect does not mean that it was negligent; it just proves how difficult it is to foresee every eventuality.

However, failure to amend an assessment which is known to be inadequate would mean that the risk assessment could no longer be said to be sufficient and would be clear evidence of negligence. If some aspects of the risk assessment turn out in practice to have been faulty

(e.g. because it was impossible to implement certain steps, or because other measures would have been preferable), it is essential that the risk assessment or action plan is modified for future use. For this reason, it is important that records are kept not only of any accidents that occur while on a trip, but also of any 'near misses'.

### **Insurance**

Listing all the hazards which might arise during the course of a study abroad program is likely to make everyone involved feel particularly mortal! While it is certainly not the case that European law requires that H.E.I.s arrange insurance for all those participating in a program, it is clearly good practice to warn everyone that all insurance which they already carry may not offer coverage in Europe, and that they should consider taking out extra insurance.

© 2006 **Dr. Tim Kaye**  
Visiting Professor  
Stetson University College of Law  
1401 61st Street South  
Gulfport  
Florida 33707  
USA

Email: [tkaye@law.stetson.edu](mailto:tkaye@law.stetson.edu)

## **Appendix: Indicative and non-exhaustive list of unfair terms under the E.U. Directive**

### 1. Terms which have the object or effect of:

(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

(Paragraph 2 has been omitted since it refers essentially to the provision of financial services.)