



Continuing Challenges for International Studies

“Going Global” – forums for establishing and operating higher education programs in Europe

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PART 1 - EUROPEAN UNION FRAMEWORK AND HIGHER EDUCATION

BACKGROUND

Within 20 years, it is predicted that the economic paradigm of Europe will fundamentally change.

As a result of the shrinkage of the manufacturing sector, future economic growth will rely heavily on knowledge intensive industries.

Excellence in universities will be required to optimise the processes which underpin the knowledge society.

The European university landscape is primarily organised at national and regional levels and is characterised by a high degree of heterogeneity reflected in organisation, governance, operating conditions, conditions and status of employment.

The challenge of how to rearrange the public sector as a whole – with less state and more market involvement – is one of the biggest debates at the moment. In the UK the Conservative-Liberal Democrat Coalition Government is generally showing much support for the private sector and encouraging competition within the public sector.

The UK Landscape – and “Going Global”

Until relatively recently the international dimension of higher education in the UK has mainly been experienced through overseas student recruitment, the building of international research links and, in the case of some universities, by a more tangible presence in the “host” country (for example, through branch campuses and marketing offices).

During the past decade the growth of international activities along these lines has undoubtedly strengthened certain institutions and enhanced their rankings among world class universities, but has not fundamentally altered the shape of higher education.

According to two recently published reports in the UK (*“Developing future university structures: new funding and legal models”* September 2009 and *“The growth of private and for-profit higher education providers in the UK”* March 2010, both commissioned by Universities UK) the UK higher education landscape may be at the cross-roads of dramatic change. As many more players, both publicly and privately funded, emerge on the global market for higher education, universities will need to examine their international credentials more honestly and systematically than hitherto by asking

themselves what “going global” means in connection with their own activities and their relationships with other institutions and strategic partners.

The reports predict, or at least point to the possibility, that within the next 10 years in the UK there will be:

- A wave of mergers, federations and other “clusterings” between universities and non higher education institutions and providers;
- Many more overseas university branch campuses (on established or newly created “EduCity” sites or as standalone ventures) together with more joint ventures and other collaborations to teach students based wholly or mainly overseas;
- Greater private sector involvement particularly linked to more private providers acquiring degree awarding powers in the UK;
- Greater interest by US universities in the UK higher education market, especially after the cap on tuition fees has been raised by the Coalition Government (it is estimated that there are at present between 50 and 70 overseas universities, mainly from the USA, with bases in the UK);
- The private take-over of some publicly funded universities;
- The possible development of multi-jurisdictional universities, for example by the merger of two universities in different countries or by one university setting up a number of campuses and seeking degree awarding powers from some or all of the “host” countries; and
- It is not the purpose of this paper to examine the “Pros” and “Cons” of the possible developments outlined above, but simply to set within a European context the legal framework within which the challenges to higher education to “Go Global” might be addressed, and to indicate that the legal barriers to radical change in the manner in which “global” universities structure their activities may not be as significant as might at first glance seem to be the case.

Trends in European Universities

Across Europe we are already beginning to see radical changes taking place in the higher education sector. Governance of universities is undergoing reform in most European countries as a result of which universities appear to be gaining greater autonomy.

Trends include

- Less state regulation – with boards (e.g. boards of trustees or governing bodies of education institutions) becoming more autonomous;

- The academic profession losing a degree of self governance;
- The state retaining influence through funding;
- Increased co-operation with industry because:
 - all universities are active in search of public and private financial resources;
 - technology capabilities will continue to encourage global universities; and
 - international and national collaboration is encouraged by government;
- Student mobility increasing as a result of the growth in study abroad programmes, subject to price and visa eligibility; and
- The standardisation of degrees within the European Union (the “**EU**”).

1. **INTERACTION OF EUROPEAN AND NATIONAL LAWS**

1.1 **An overview**

European government and education institutions have been mindful that they need to create more comparable, compatible and coherent higher education systems, so that Europe becomes an attractive destination for overseas students, produces a workforce which can easily compete for jobs in the international market and also enables world leading research.

Generally the EU does not have the power to issue directly binding legislation regarding the harmonisation of education programmes or funding of students (“**hard law**”).

The EU, however, does have the power to encourage, support and facilitate initiatives which are not legally binding in principle and are based on inter-governmental and cross-European initiatives, such as the Bologna process (“**soft law**”).

1.2 **Limited powers of the European Union to create “hard law”**

Education does not fall within the core competencies of the EU so the EU cannot create hard law regulating this area.

However, the mobility and non discrimination of the European work force and service providers do fall within the core competencies, and accordingly the EU has legislated extensively in this area.

The **Key Treaty Provisions** are as follows:

Article 6: *"The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be ... education"*

Article 165: *"The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. ... The Union action shall be aimed at...encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study, promoting cooperation between educational establishments, developing exchanges of information and experience on issues common to the education systems of the Member States, encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe, encouraging the development of distance education,..... In order to contribute to the achievement of the objectives referred to in this Article: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, the Council, on a proposal from the Commission, shall adopt recommendations".*

1.3 **"Soft law" created pursuant to the Bologna Process**

In 1999 an intergovernmental initiative, known as the "Bologna Process" was launched to:

- remove the obstacles to student mobility across Europe;
- enhance the attractiveness of European higher education worldwide; and
- establish a common structure of higher education systems across Europe and for this common structure to be based on two main cycles, undergraduate and graduate.

As part of the process, the European Higher Education Area ("**EHEA**") was launched in March 2010 to promote the European system of higher education worldwide. EHEA now reaches far beyond the borders of the EU¹.

The Bologna Process and EHEA are seeking to harmonise undergraduate and postgraduate degrees throughout the EHEA.

Higher education institutions have been encouraged to issue to their students, free of charge, the European Diploma Supplement, in a standardised form throughout EHEA, which sets out the student's academic curriculum, competencies and, where appropriate, professional qualifications acquired while at such institution.

There is no international or supra-national legally binding legislation which would compel countries into participating in the Bologna Process or EHEA or implementing certain related initiatives, but:

- countries may legislate at a national level to force higher education institutions in their territory to take certain measures aiming at implementing certain targets of the Bologna Process; and
- in the UK there is no statutory obligation on universities to issue European Diploma Supplements but many higher education institutions comply with this suggestion as it is in the interest of student mobility and their own competitiveness in the international market.

There are other EU/EHEA wide initiatives, which aim at:

- promoting transparency in higher education;
- furthering mobility, access, lifelong learning; and
- promoting fair and informed judgments about qualifications throughout the EHEA.

Examples of such initiatives include:

- ECTS (European Credit Transfer System in higher education); and
- ECVET (European Credit System for Vocational Education and Training).

EHEA countries are not under a legal obligation to implement these initiatives or to force their national education institutions to do so.

¹ The current participating members are: all EU Member States plus Albania, Andorra, Bosnia & Herzegovina, Bulgaria, Croatia, Vatican City, Iceland, Liechtenstein, Norway, Romania, Russian Federation, Serbia & Montenegro, Switzerland, Macedonia and Turkey.

2. RIGHTS OF GRADUATES OF AN EU INSTITUTE

2.1 EU Nationals

EU law protects the right for EU nationals to move around freely within the EU, and to work and live in Member States² without suffering any discrimination on the grounds of their nationality. This applies to education as follows:

- A national of a Member State who holds a professional qualification issued by one Member State (the "**Home Member State**") has the right to gain access to the same profession in any other Member State (a "**Host Member State**") as he or she is qualified to pursue in his or her Home Member State³, (provided that the activities covered by the professions in the two Member States are comparable);
- If access to or pursuit of a regulated profession in a Host Member State is contingent upon possession of specific professional qualifications, the competent authority of the Host Member State shall permit access to and pursuit of that profession under the same conditions as apply to its nationals to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access and pursue that profession on its territory; and
- These principles only apply for the benefit of nationals of EU Member States and apply whether or not they wish to pursue a certain profession in a self-employed or employed capacity.

EU law recognizes that Member States may wish to restrict access to certain professions in the general public interest of their country and so member states may impose restrictions on the ability of an EU national to invoke his or her professional qualification obtained in a Home Member State to access the same profession in the Host Member State, providing that such restrictions are reasonable and proportionate.

EU law on the recognition of qualifications is recognised to be of direct effect, so that EU nationals can invoke its benefit directly in the Member States (and their courts).

EU law also sets out minimum requirements for qualifications and training of medical doctors, nurses, midwives, dental practitioners, pharmacists and

² The current Member States of the EU are (in sequence of accession): Belgium, Germany, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland, Sweden, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Bulgaria and Romania.

³ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (the "**Directive**").

architects - requirements for access to these professions may vary from Member State to Member State.

EU law does not establish any differences in recognition or status depending on the delivery of a qualification or degree so students holding degrees or qualifications obtained through online courses or virtual learning environments benefit from the same treatment as students having studied on a physical campus of a university.

The EU has launched several initiatives (Erasmus, Socrates, Life Long Learning) under which EU nationals can access student mobility schemes allowing them to study part of their course or programs at other institutions and earn credit towards their degree.

2.2 **Non-EU Nationals**

Nationals of countries which are not members of the EU do not benefit from the recognition of their qualifications and training in the way that EU Nationals do.

Certain countries have entered into bilateral arrangements outside of the EU framework regarding the mutual recognition of degrees and professional qualifications.

Some countries treat degrees or qualifications obtained pursuant to online learning differently from degrees obtained by offline learning.

Certain EU student exchange programmes are only open to nationals of EU Member States but other programmes are open to or specifically aimed at non-EU nationals.

2.3 **Things to consider**

The EHEA recommends that institutes issue European Diploma Supplements which allow students (and potential employers) to compare qualifications easily with degrees issued by other education institutions worldwide.

Institutes may enter into student exchange programmes or bilateral arrangements with foreign universities allowing graduates of an institute to carry out all or part of their studies at such foreign higher education institution and/or receive credits towards their studies at an institute for modules studies abroad.

3. **RIGHT OF AN INSTITUTE TO OPERATE BRANCHES IN EU MEMBER STATES**

3.1 **Freedom of establishment and freedom to provide services**

The general principles of freedom of movement, freedom of establishment and freedom to provide services across the EU which the EU Treaties bestow on nationals of EU Member States, mean that an EU institute has the general right to operate and carry out its activities throughout the EU.

Consequently, an institute has the general right to:

- establish a branch campus (whether through a physical presence or a virtual/distance learning environment) in each EU Member State; and
- offer education through online or virtual learning environments in other EU Member States in the same conditions as a university physically established in such Member State.

3.2 **Possible restrictions**

These include:

- EU Member States have the right to restrict the general freedoms of EU nationals provided that doing so is a necessary and proportionate measure to protect the public security, health or safety in their respective jurisdiction. This possible constraint is, however, qualified by the rule that Member States do not have the right to restrict these general freedoms in order to protect their national businesses against international competition.
- Certain EU Member States may have some legislative or regulatory provisions in place which restrict the right of universities established in other EU Member States from operating a branch campus in their territory.
- If such restrictions are de facto discriminatory against nationals of another EU Member State and based on a protectionist motives which are not in line with the general freedoms set out above, an institute would have the right to request that any unduly discriminatory national rules be set aside.
- However, such claims are likely to lead to time and money consuming court actions so it is best to investigate the legal position prior to setting up a branch campus in any other EU Member State.

- Notwithstanding the above, an institute would have to comply with all generally applicable laws which apply in the chosen EU Member State e.g. mandatory tax, employment, immigration, and criminal laws.

3.3 Case Study - Britain - Establishing a branch legal framework

There are no legal or regulatory restrictions under English law which would prevent an institute from establishing a branch in the UK and awarding degrees to successful students.

European and non-European education institutions alike enrol students in the UK through their branch campuses and award their national degrees. Some institutions do so through a mere establishment or branch office in the UK, others have established a legal entity through which they operate, and others enter into joint or dual degree arrangements with English higher education institutions.

The UK has to recognise any qualifications obtained by EU nationals in another EU Member State in accordance with the principles set out above. It should also be noted that:

- Any overseas education institution entering into a collaboration agreement with an English university will have to assist its English partner in complying with its own quality assurance obligations (which are regularly audited by the Quality Assurance Agency (the "QAA")), and thus comply with certain minimum quality assurance requirements; and
- Overseas education institutions which do not enter into any academic arrangements with English higher education institutions and only award their overseas degrees in the UK will not be subject to any English quality assurance requirements.

NB: Certain provisions of English law are mandatory for any person established or offering services in England.

Unincorporated branch

If an institute decided to operate through an unincorporated branch office in the UK, it would probably need to:

- Register with Companies House that it has established such a presence in the UK;
- File its annual accounts with Companies House in England; and
- Inform Companies House of any changes to its board of

directors/trustees etc.

Campus - company structure

If an institute decided to establish a separate legal entity in England through which it would operate an English campus:

- The company would also need to be registered with Companies House; and
- The company would be an English company and as such subject to all English laws and regulations.

The records of Companies House can be consulted by any member of the public (for a modest administrative charge) and are meant to allow citizens to gather basic information on all legal entities operating in England. Similar compliance requirements for national and foreign companies exist in most other EU Member States.

Employment considerations

English law (like the law in all EU Member States) also sets out minimum employment and social security protection for people working in England - the level of such protection varies widely between EU Member States and it may thus be an important factor for an institute when considering in which country to establish a presence.

Immigration and work permits

Member States may also have varying rules applying to immigration and work permits for employees.

- Employees of an institute which are nationals of one EU country should not encounter any problems working in another EU Member State; and
- Employees who are not nationals of one EU country may find it difficult to be granted leave to enter and work in another EU Member State.

Britain recently underwent a complete overhaul of its immigration regime and it is currently putting into place an even stricter visa regime for non EU nationals.

If the English branch of an institute wishes to recruit students who are not nationals of another EU Member State, an institute will have to become a licensed student sponsor for immigration purposes.

- Immigration rules have been tightened considerably over the last 18

months; and

- Rules apply to English and overseas education institutions alike.

Foreign education institutions with a limited presence in the UK find it generally quite demanding to comply with the rules.

PART 2 - SETTING UP A CAMPUS IN EUROPE - LEGAL STRUCTURES

4. COMPANY -V- BRANCH

There are two options open to overseas education institutions to establish a presence in Europe.

The first option is to set up a **company** in Europe. Such company can either be incorporated under the laws of one particular European country (depending on where it wishes to operate) or under the regimes established by EU law, leading to a truly European company. The alternative is to register a **branch** in a European country.

Registering a branch would not involve setting up a separate legal entity but would simply be an extension (a brand) of the overseas education institution. Both options have their advantages and disadvantages.

5. COMPANY STRUCTURES

5.1 Establishing a company in one European country -v- Establishing an European company under EU laws

5.1.1 Establishing a company in one European country

Company **laws will vary** between the different European countries and some countries have more flexible company laws, more advantageous structures and tax requirements which would need to be investigated and explored prior to setting up a campus in Europe.

Consents may also be required from the **relevant authorities** to set up an education institution in Europe and some countries may offer **concessions/investment incentives** for doing so.

Taking as an example the UK, an overseas provider could either set up as a company limited by shares or as a private company limited by guarantee or register as a branch. A share company is considered to be the more commercial model as there are easier mechanisms to get money out of the company.

5.1.2 Establishing an European company under EU laws

EU Directives and Regulations have created several types of legal vehicles which can be established under EU law. While such companies will effectively have their seat/registered office in one EU Member State, these companies can easily transfer their seat/registered office

to another EU Member State and thus benefit from the freedom of movement within the EU, in the same way as individuals holding a passport of one EU Member State have the right to establish their residence and operate in other EU Member States without material restrictions. This principle of 'European passport' for companies is opposed to the general principles of law which requires a company set up under the laws of one EU Member State (as opposed to EU Law) to be wound up in one EU Member State and re-incorporated in another EU Member State if it wishes to transfer its seat/registered office to another Member State.

The following legal forms are available under EU laws:

- 5.1.2.1 Societas Europaea (or "**SE**"). SEs are effectively European public limited companies. An SE may be created on registration in any one of the Member States of the European Economic Area.
- 5.1.2.2 Societas Cooperativa Europaea (or "**SCE**"). The SCE is a European cooperative type of company. This legal form was created to remove the need for cooperatives to establish a subsidiary in each Member State in which they operate.
- 5.1.2.3 European Economic Interest Grouping (or "**EEIG**"). The EEIG is designed to make it easier for companies in different countries to do business together, or to form a consortia to take part in EU programmes. An EEIG cannot be formed with the object of making a profit, although it may do so as a consequence of its normal operations.

There are still relatively few SEs, SCEs and EEIGs throughout the EU. This is due to the fact that the formalities and conditions for establishing such vehicles are perceived to be more onerous than for many national legal entities and that many multi-national groups had already established a corporate presence in many EU Member States and put into place complex corporate groups which they do not wish to restructure entirely further to the implementation of these new EU structures. However institutions looking at getting established in the EU, will be more interested in setting up such vehicles from the start.

5.2 **Advantages of company structure**

- Liability of the company owners would normally be limited so that any liability arising would be "ring fenced" in the company - unless

personal guarantees were given by the provider in which case the American provider itself would be “on the hook”.

- The subsidiary would be a self contained legal entity distinct from the overseas entity.
- The ability of the company itself would be able to enter into contracts in its own name, raise funds and employ its own staff. It would also be able to sue and be sued in its own name.

5.3 **Disadvantages of company structure**

- Some countries have requirements relating to the use of “University” in the title. England is one of these countries and specific criteria must be met (also in relation to “business” names which include “University”).
- In some countries the actual process of setting up a company can be quite time consuming as the constitutional documents have to be agreed and approved by the relevant authorities. There are also set up costs and ongoing regulatory costs such as company secretarial services to factor in.
- The subsidiary company would also be subject to the compliance requirements (such as company law) relating to keeping of accounting and other records, the maintenance of statutory registers and filing of returns.
- The establishment of a company may generate tax liabilities in certain countries and tax advice should be sought in order to ensure that the preferred structure fits into the groups wider tax and accounting arrangements. For this purpose, it may sometimes be preferable to set-up a non-profit entity (such as a charity in England or an *association* in France).

6. **BRANCH**

A branch would not be a separate legal entity but rather an extension of the American Provider.

6.1 **Advantages of branch structure**

- It is often quicker in terms of procedure and less costly as there are often no set up costs or any ongoing company requirements; and
- Permission to use “University” in title or name may be easier as it is an extension of the overseas parent provider.

6.2 Disadvantages of branch structure

- **Liability** - an overseas provider would be exposed to liability as there would be no limited legal entity to “ring fence” risk. Therefore an overseas provider would need to consider the level of risk that it may be exposed to and the activities which it is seeking to conduct before embarking on such a route;
- As the branch office would be the same legal entity as the foreign body, it would therefore be liable for the debts and obligations of the branch. This could be advantageous from a **tax perspective** if losses are able to be offset against tax relieves, depending on the tax laws in that country relating to double taxation and tax relief; and
- However, some countries such as France do not necessarily acknowledge the not for profit nature of some foreign entities, and therefore may subject such foreign not for profit entities to the same taxations as for profit entities. Separate tax advice should be obtained in this respect.

PART 3 - COUNTRY PROFILE – UK/England - HIGHER EDUCATION FRAMEWORK

7. DEGREE AWARDING POWERS

An education institution established in England but without degree awarding powers can apply to the Privy Council, which is part of the UK Government, for the grant of such powers. Granting (and the renewal) of degree awarding powers is a prerogative of the Crown. Its exercise is political in nature and, like all things political, unpredictable.

All existing English universities have degree awarding powers under their Charters or by or under an Act of Parliament, e.g. the Further and Higher Education Act 1992. There are two kinds of degree awarding powers: taught-degree awarding powers and research-degree awarding powers.

Taught-degree awarding powers are defined as “awards granted to persons who complete an appropriate course of study and satisfy an appropriate assessment”.

Research-degree awarding powers are defined as “awards granted to persons who complete an appropriate programme of supervised research and satisfy an appropriate assessment”.

Degree awarding powers are usually not limited to any particular programmes or fields of study but can apply to any course of study or programmes.

Organisations in the publicly-funded higher education sector will be granted degree awarding powers on an indefinite basis. All remaining organisations will be granted degree awarding powers for a fixed term period of six years with the possibility to renew their degree awarding powers for further fixed periods of time.

In order to obtain degree awarding powers, education institutions have to follow a certain procedure. The Government has produced a set of criteria against which applications for the grant of degree awarding powers in England and Wales are considered.

Applications for taught or research degree-awarding powers must be made to the Privy Council and forwarded to the relevant Government Minister (in the case of universities, to the Secretary of State for Business, Innovation and Skills). Each application is then sent to the QAA for advice, and for that purpose the QAA will instruct an Advisory Committee on Degree Awarding Powers (“**ACDAP**”), which comprises independent reviewers, to scrutinise the candidate institution and produce a report setting out whether the candidate complies with

the relevant criteria (the Institutional Assessors' Final Report). The Final Report will be submitted to QAA, which will then issue a recommendation to the Privy Council, which the Privy Council is not bound to follow when considering the institution's application for degree awarding powers.

The criteria for obtaining taught-degree awarding powers currently include in particular the requirements that:

- The institution be **governed, managed and administered effectively**, with clear and appropriate lines of **accountability** for its academic responsibilities. Its financial management must be sound and a clear relationship must exist between its financial policy and the safeguarding of the quality and standards of its higher education provision;
- The institution has in place an appropriate **regulatory framework** to govern the award of its higher education qualifications;
- The institution has in place clear and consistently applied mechanisms for defining and securing the **academic standards** of its higher education provision;
- The **staff of the institution will be competent to teach**, facilitate learning and undertake assessment to the level of the qualifications being awarded;
- The institution had **no fewer than four consecutive years' experience**, immediately preceding the year of application, of delivering higher education programmes at a level at least equivalent to Level H of the Framework for Higher Education Qualifications for England, Wales and Northern Ireland ("**FHEQ**") published by QAA; and
- **The majority of the institution's higher education students** enrolled on study programmes which are recognised as being at Level H or above of the FHEQ.

The criteria for obtaining research-degree awarding powers include in particular the following:

- Having secured taught-degree awarding powers;
- The requirement that the institution's supervision of its research students, and any teaching it undertakes at doctoral level, are informed by a high level of professional knowledge of current research and advanced scholarly activity in its subjects of study;

- The institution needs to satisfy relevant national guidance relating to the award of research degrees;
- The institution must have achieved more than 30 Doctor of Philosophy conferments, awarded through partner universities in the UK.

When an institution applies for degree awarding powers, QAA's remit is to offer confidential guidance on the application, through the appropriate Minister with higher education responsibilities, to the Privy Council.

Applicants are mainly assessed on the following criteria:

- Organisational governance and management;
- Quality assurance and academic standards;
- The arrangements for supporting student learning;
- Staffing;
- Administrative infrastructure;
- In addition, the applicant will need to demonstrate that it has had no fewer than four consecutive years' experience, immediately preceding the year of application, of delivering higher education programmes; and
- Ownership of the institution is not as such a criteria for obtaining degree awarding powers.

7.1 **Can Degree Awarding Powers be revoked?**

No official guidance is available but the Privy Council could revoke any order granting degree awarding powers at any time. Any such decision to revoke could be challenged by interested parties (such as the institution) in the courts through judicial review proceedings (whereby a court would be asked to review whether the decision to revoke was reasonable and lawful).

7.2 **Can Degree Awarding Powers be extended?**

Private higher education institutions which have been awarded degree awarding for a fixed period (as opposed to publicly funded higher education institutions with unlimited degree awarding powers) need to reapply for degree awarding powers periodically. The renewal procedure formally starts about 12 months before the previously granted degree awarding powers expire with an audit by the QAA.

8. **UNIVERSITY TITLE**

Higher education institutions may apply to the Privy Council to be granted the right to use the word "University" in their name.

The procedure for obtaining university title are very similar to the application procedures for taught or research-degree awarding powers and they also involve the intervention of the QAA. However the QAA will not carry out a full audit, but will only make a short, targeted, visit to the institution through a small team of assessors, to test the institution's claims and the evidence upon which they are based.

An institution applying for university title currently has to comply with the following criteria:

- It has been granted powers to award taught-degrees;
- It normally has at least 4,000 full time equivalent higher education students, of whom at least 3,000 are registered on degree level courses (including foundation degree programmes); and,
- It will be able to demonstrate that it has regard to the principles of good governance as are relevant to its sector.

These criteria are currently under review.

9. **QUALITY ASSURANCE AGENCY**

The Quality Assurance Agency is an independent body whose mission it is to provide independent assessment of how higher education institutions in the UK maintain their academic standards and quality.

The primary responsibility for academic standards and quality rests with individual institutions. QAA reviews and reports on how well the institutions meet those responsibilities, and encourages continuous improvement in the management of the quality of higher education.

The QAA does this by:

- issuing guidelines of best practice;
- conducting external reviews of universities and colleges;
- publishing reports on the confidence that can be placed in an institution's ability to maintain standards and quality;
- offering expert guidance on maintaining and improving the quality of higher education;

- advising the Government on applications for degree awarding powers and university title, and carrying out audits on collaborative provision partnerships between UK higher education institutions and international organisations that lead to the award of a UK degree.

QAA is funded by subscriptions from universities and colleges of higher education, and through contracts with the main higher education funding bodies, such as the Higher Education Funding Council for England (“**HEFCE**”).

10. **FRAMEWORK FOR HIGHER EDUCATION QUALIFICATIONS**

The QAA has developed the Framework for Higher Education Qualifications in order to describe the achievement represented by higher education qualifications. They apply to degrees, diplomas, certificates and other academic awards granted by a higher education provider with degree awarding powers. In ascending order, these are the Certificate, Intermediate, Honours, Masters and Doctoral levels.

The FHEQ has been put into place in order to further public confidence and understanding in the achievements represented by higher education qualifications.

The main purposes of the FHEQ are to:

- provide important points of reference for setting and assessing academic standards to higher education providers and their external examiners;
- assist in the identification of potential progression routes, particularly in the context of lifelong learning; and
- promote a shared and common understanding of the expectations associated with typical qualifications by facilitating a consistent use of qualifications titles across the higher education sector.

QAA auditors and reviewers use the FHEQ as a reference point when auditing or reviewing the establishment and management of academic standards by higher education providers. In particular, auditors and reviewers look at how institutions align the academic standards of their awards with the levels referred to in the FHEQ. They also ascertain whether institutions have means of ensuring that awards and qualifications are of an academic standard at least consistent with the standards referred to in the FHEQ. Similarly, the FHEQ is an important tool for Professional Statutory and Regulatory Bodies (“**PSRBs**”) in defining and using qualifications in the context of their accreditation processes.

The QAA is also working towards harmonising the FHEQ in line with the Bologna Process by 2010.

11. **ACADEMIC COUNCIL**

There is no express mandatory legal or statutory requirements which would oblige a higher education institution to have in place an Academic Council.

All institutions need to make sufficient internal arrangements to guarantee their academic standards and internal quality controls in order to comply with QAA guidelines.

It is common for publicly funded higher education institutions to have in place a body or committee (often called "Senate") to carry out these functions.

There are no express mandatory legal or statutory requirements (outside an institution's own Charter or constitution) setting out the composition of such academic body, its powers, remit or functions.

12. **CHANGE OF CONTROL**

There are no express legal or statutory provisions which would prevent a UK higher education institution from being owned and controlled directly or indirectly by a foreign entity.

Similarly there is no express legal or statutory provisions which would require the consent of any UK authority or Government Department prior to such change of control taking place, provided that the institution continues to comply with the criteria for having degree awarding powers outlined above.

13. **PUBLIC FUNDING**

The UK Government provides certain education institutions in England, through HEFCE, with public funding to provide degree and other programmes to UK and EU students.

It does not provide funding to students from outside the EU even if they are on courses for which EU students receive funding.

In order to receive such Government funding, the institution needs to be "a designated institution" under the relevant Act of Parliament (section 129 of the Education Reform Act 1988), that is to say an institution which receives a designation by virtue of an Order from the Privy Council.

In order for an institution to be designated as such, it needs to fulfil the following main criteria (having a clean record with the QAA): its full-time equivalent

enrolment number for courses of higher education has to exceed 55 per cent of its total full-time equivalent enrolment number of students.

There are no statutory or regulatory provisions preventing a private sector education institution obtaining such status.

There are also some controls over the types of companies being capable of being designated institutions. The law is targeted around companies incorporated as companies limited by guarantee rather than companies limited by shares.

It is an open question whether a company limited by shares could become a designated institution. It does not appear that there are any express statutory or regulatory provisions preventing a share company from obtaining such designated status.

Once an institution has obtained HEFCE designated status, it receives as a matter of practice, an agreed student number. Those student numbers are not broken down by reference to particular courses but are institutional numbers.

Government funding is generally available for degree courses at undergraduate level. In some instances, there may be some Government funding for post-graduate students as well.

It may also be the case that certain professional courses which follow on from an undergraduate degree also receive Government funding. The Government policy has been to steadily withdraw Government funding from all but undergraduate degree courses and then if only that is the first degree taken by an individual. Government funding is at a maximum level but the institution is free to charge a higher fee than the Government funded level for all courses except full time undergraduate courses where there is a maximum fee (called a "**top up fee**") which can be charged although that top up fee is currently around £3,500 per annum but is likely to increase under radical reforms introduced by the Coalition Government. Under those reforms the top up fee will increase to £6,000 per annum from 2012 and up to a maximum of £9,000 per annum in exceptional circumstances. In practice, therefore, many Government funded courses are unregulated in terms of the fees charged and it is common for non-EU students to be charged higher fees than EU students for exactly the same course.

Students enrolled at designated institutions are able to obtain loans from the student loan company to make up any shortfall against government funding and to pay for their living costs. The student loan company is only open to students of the UK and other EU countries. The repayments of loans start on the student being employed and earning income. The amount of the repayments vary depending on the income received by the student. Commercial banks also provide student loans.

14. **STUDENT UNIONS**

Higher education institutions which receive public funds, such as HEFCE designated institutions, do not have to establish and maintain students' unions by law.

However, if any association is set up with the intention of promoting the general interest of students or representing students in relation to academic or disciplinary matters, such association will need to be organised and managed in accordance with the provisions of the relevant Act of Parliament (the Education Act 1994). For example, the education institution must ensure that the students' union has a written constitution in place, operates in a fair and democratic manner and is accountable to the governing body/board of trustees of the university for its finances.

PART 4 - THE ACQUISITION OF A UNIVERSITY IN THE UK/SPAIN/France - FACTORS TO CONSIDER

15. POTENTIAL ACQUISITION OF A UNIVERSITY IN ENGLAND

| | | Acquisition possible? (Yes/No/Not applicable) |
|---|-----------------------|--|
| “University” | Private Sector | Not applicable |
| | Public Sector | Yes, but very difficult |
| Higher Education Institution with Degree Awarding Powers | Private Sector | Yes, but there are only 4 at present |
| | Public Sector | Yes, but very difficult |
| Listed Body | | Yes |

15.1 Potential Acquisition of a private sector higher education institution with the title “university”

There is currently no private sector higher education institution in England which is authorised to use the word “university” in its title. However, BPP, owned by the Apollo Group, has recently been permitted to change its name to “BPP University College of Professional Services Limited”.

An English higher education institution may only use the word “university” in its title (i) with the consent of the Privy Council provided that it (ii) if it has taught degree awarding powers, (iii) has normally at least 4,000 full time equivalent higher education students of whom at least 3,000 are registered in degree level courses (including foundation degree programmes) and (iv) is able to demonstrate it has regard to principles of good governance as are relevant to its sector.

15.2 Potential Acquisition of a public sector higher education institution with the title “university”

No acquisition of a public sector higher education institution by a private sector investor has taken place in the UK so far. Although such acquisition would not be impossible, it would be difficult under current laws and regulations and it would need to be fully supported by Government.

Under this route, an existing publicly funded higher education institution will have its assets, undertaking and agreed liabilities transferred to a new legal vehicle (“**acquirer**”) in which a private sector partner is an investor, owner or controller. The private provider would enter into an agreement with the Secretary of State whereby the private provider would pay to the Secretary of State the market value of the higher education institution in return for the Secretary of State agreeing to pass an order vesting the assets, undertaking and liabilities of that institution to the private provider. Such transfer raises issues regarding the transfer of employees (who, under English law, are entitled to maintain their employment and pension benefits) and property (which may be subject to specific charity law restrictions, so that the Charity Commission may also need to be approached for consent).

15.3 Potential Acquisition of a private sector higher education institution with Degree Awarding Powers

Such acquisition is possible under English law. However there are currently only four private higher education institutions with degree awarding powers, BPP University College of Professional Services Limited, the College of Law, the University of Buckingham and Ashridge Business School.

15.4 Potential Acquisition of a public sector higher education institution with Degree Awarding Powers

The same consideration apply here as set out under section 15.2 above.

15.5 Acquisition of a Listed Body

A listed body is an education institution which does not hold degree awarding powers itself, but delivers courses that lead to degrees awarded by an institution which holds degree awarding powers.

Listed bodies exist under different legal forms and acquisitions of listed bodies are possible and are taking place. However a listed body is not a university in its own right nor can it issue degrees in its own name.

15.6 In carrying out its due diligence exercise the University should address the following:

- Evidence of the University’s degree awarding powers;
- Have the University’s degree awarding powers been granted for a definite or unlimited period of time? If definite, how can they be renewed/extended?
- Would a change of control in the University have an impact on its degree awarding powers?

- Does the University have the power under the laws of the country it is situated in to award degrees abroad or through distance/online learning facilities?
- Are any third party (regulatory or other) consents required prior to a change of control in the University taking place?
- Could the University qualify for public funding and, if so, how?
- Do University students qualify for any financial support from public authorities?
- Does the University have any collaboration, accreditation or validation agreements in place with other education institutions? If so, would a change of control in the University have an impact on such agreements?
- Does the University have any joint or dual degree arrangements in place? If so, would a change of control in the University have an impact on such agreements?
- What quality assurance processes govern the University's programmes?
- Does the University offer any professional qualifications? If so, who accredits these qualifications and would a change of control in the University have an impact on the validity of the current arrangements?

This is not an exhaustive list of the due diligence questions which need to be addressed, but any due diligence report should at least cover these main points.

16. **POTENTIAL ACQUISITION OF A UNIVERSITY IN FRANCE**

| | | Acquisition possible? (Yes/No/Not applicable) |
|---|-----------------------|--|
| "University" | Private Sector | Not applicable |
| | Public Sector | No |
| Higher Education Institution with Degree Awarding Powers | Private Sector | Yes |
| | Public Sector | No |
| Private sector education institution | | Yes |

16.1 Potential Acquisition of a private sector higher education institution with the title “university”

Under French law, private education institutions cannot use the word ‘university’ in their title in any circumstances.

16.2 Potential Acquisition of a public sector higher education institution with the title “university”

To the extent that such acquisition would turn the education institution into a private sector institution (see restriction under section 16.4), no such acquisition is possible under French law.

16.3 Potential Acquisition of a private sector higher education institution with Degree Awarding Powers

A French private sector higher education institution school must not issue certificates to students under the titles of *baccalauréat*, license or doctorate (the main degrees issued by public higher education institutions). However, French law allows public establishments with scientific, cultural and professional character to conclude agreements of cooperation among themselves or with private establishments. Such agreements of cooperation can in particular be designed to enable students of private institutions to undergo the necessary checks to obtain a national diploma.

In addition, the French system is characterised by a two-tier system where the top students can access *Grandes Ecoles* (for 3 years programs), through competitive entrance exams following two years of preparation after graduation from high school. These *Grandes Ecoles* are often semi-public institutions (but sometimes fully private) which grant degrees generally equivalent to Master’s degrees in liberal arts, business or science. Although most *Grandes Ecoles* have mutual recognition agreements in place with universities, the value of the diploma they grant is often quite superior to the degrees over which universities have a monopoly. In case of fully private *Grandes Ecoles*, an acquisition could be considered under the conditions of Point 16.5 below.

16.4 Potential Acquisition of a public sector higher education institution with Degree Awarding Powers

While such an acquisition would be possible with the support of the French Government and Parliament, politics do not seem to be looking favourably upon

privatisation of education and political support would first need to be raised for such project.

16.5 **Private sector education institution without Degree Awarding Powers**

The French Education Code allows any French, EU or EEA national to provide courses or operate a private education institution in France provided that the person (i) is at least 25 years old, (ii) is in full possession of its civil rights and (iii) has never been convicted for acting contrary to honesty or morals. Programmes in medicine or pharmacology must also comply with profession specific regulations which may be issued from time to time. Regulations may set out from time to time additional requirements. Foreigners who are not nationals of a EU or EEA Member State may be allowed to open or direct private higher education institutions after consulting the Academic Board of Education. The private education institution must be administered by at least three natural persons fulfilling these conditions. The institution needs to inform on a regular basis the relevant education authorities of the courses which it offers and the teachers it employs.

It is possible for a third party to acquire a controlling stake in a private sector education institution, provided that the owners/managers continue to comply with the conditions set out under the previous paragraph. However as noted above, a private sector institution cannot operate under the title of university nor issue the 3 degrees mentioned in Point 16.3 in its own name.

17. **PART 3 - POTENTIAL ACQUISITION OF A UNIVERSITY IN SPAIN**

17.1 **Executive Summary**

| | | Acquisition possible? (Yes/No/Not applicable) |
|--|-----------------------|--|
| "University" | Private Sector | Yes |
| | Public Sector | No |
| Higher Education Institution with Degree Awarding Powers | Private Sector | Yes |
| | Public Sector | No |
| Private sector education institution without Degree Awarding Powers | | Yes |

17.2 **Potential Acquisition of a private sector higher education institution with the title “university”**

Such acquisition is possible under Spanish law but is subject to administrative controls. The Autonomous Community (“AC”) where the University is established will review whether the acquiring institution complies with the legal requirements applicable and can discharge the undertakings entered into by the previous owner with the Educational Authorities of the AC; and whether the Centre or University is still complying with the regulations of incorporation. Specifically:

17.2.1 As regards legal requirements these include the following:

- (a) Requirements fixed by both the AC and the Spanish National Authorities. Under the Spanish Constitution basic regulations will be passed by the National Government, and will be developed and complemented by regulations made by the AC. Therefore the relevant AC may have issued additional legislation and any specific takeover bid would need to be carefully considered in light of the regional requirements - see Andalusia, Aragon, Catalonia and Basque Country on acquisitions – in addition to any general requirements.
- (b) Promoters of the acquiring institution will be prevented from such acquisition if they have outstanding criminal records, have been subject to administrative disciplinary measures in connection with their professional activity, or if they have a relevant connection with a Public Educational Service. These prohibitions apply also to managers, administrators and owners of more than 20% of the acquiring institution’s shares.

17.2.2 Maintenance of undertakings by previous owners;

17.2.3 Centre or University compliance with incorporation regulations.

These administrative controls are less complicated and extensive than those that apply to the incorporation of a new University or Centre. However this does not mean that the acquisition of a Centre or University will be straightforward. Most likely, compliance with the requirements by the acquiring institution will be closely analysed by the AC, especially in relation to the promoter's undertakings and guarantees, and even more so when the target is a University.

17.3 **Potential Acquisition of a public sector higher education institution with the title “university”**

A private company can only buy a Private University or a Private Centre affiliated to a Private or Public University; but can never buy a Public University (Public Universities may only be acquired due to a previous privatization process undertaken by the executive and legislative authorities).

17.4 **Potential Acquisition of a private sector higher education institution with Degree Awarding Powers**

See comment under 17.2 above.

17.5 **Potential Acquisition of a public sector higher education institution with Degree Awarding Powers**

See comment under 17.3 above.

17.6 **Private sector education institution without Degree Awarding Powers**

It is possible under Spanish law to establish an education institution which does not have the powers to grant official national degrees. The rules governing the acquisition of such institution are less stringent than those set out under 17.2 above.

PART 5 - CHOICE OF LAW - DISPUTE RESOLUTION - RISK MITIGATION

18. CHOICE OF LAW

One of the most common issues in disputes involving parties located in different countries includes the interpretation of choice of law and jurisdiction clauses.

Choice of law and jurisdiction clauses set out the parties' election of the law that is intended to apply to the contract and the location where disputes under the agreement will be settled. These clauses are relevant in contractual joint ventures, collaboration agreements with overseas partners, recruitment agents, and possibly even students.

These clauses play a part in most professionally drafted agreements and should be considered carefully as a separate system of law may apply to the agreement, with unintended results.

Factors that are relevant in making a choice for a neutral governing law include:

- The preferred method of dispute resolution. Though there is no difficulty in choosing the law of one territory and electing for arbitration in another, if arbitration is not seen as the appropriate dispute mechanism, the parties will clearly need to be comfortable about the court system in the jurisdiction whose law is chosen. Issues here include:
 - the perceived independence of the judiciary;
 - the efficiency of the litigation process; and
 - whether appropriate recognition of judgments is given in any territory where enforcement may be necessary.
- The flexibility of the law in permitting the partners to regulate their affairs precisely as they wish (rather than leave matters to uncertain notions of fairness) and also in providing appropriate remedies if necessary. For example, the ability to obtain an injunction to stop damaging behaviour rather than be left to seek financial redress afterwards.
- The chosen language of the documentation. If the parties wish to regulate their legal relations in one particular language there is likely to be some logic in adopting the governing law of the territory where that is the mother tongue.

In any event, there will normally be good reasons for the parties to settle on a single choice of law and elect for this to be exclusive to any other.

19. **PRELIMINARY CONSIDERATIONS**

When a case has a foreign element, it will be necessary to consider issues relating to jurisdiction, that is, the jurisdictional competence of a court to resolve a dispute.

Such issues will include the following:

- Whether, as a matter of law, the courts can hear the matter;
- Whether the courts of some other country may also be able to hear the matter and how proceedings are conducted in the alternative jurisdiction (for both of those questions advice on local law and procedure will be necessary);
- Whether either or any of the potential jurisdictions have particular advantages or disadvantages for one or other party;
- Whether there are rules which give the courts of one jurisdiction priority over another; and
- What action should be taken.

20. **WHY DOES IT MATTER WHERE THE CASE IS HEARD?**

Where a case is heard may have a significant impact on the cost, conduct and even the ultimate outcome of the proceedings.

The following considerations may be relevant:

- Where are the potential witnesses and evidence located? If they are overseas, bringing them to court will be expensive and may require extensive translation. Will it be necessary to compel production of documents or attendance of witnesses?
- Will either party need pre-trial disclosure or depositions from witnesses, and will it be available?
- Will pre-emptive interim measures be required, such as freezing orders or orders to preserve evidence, and will they be available?
- Will judicial assistance from foreign courts to obtain evidence be necessary and are such measures available in the relevant jurisdiction?

- Is there any issue about the competence of the foreign courts or their local lawyers, especially in large or technical matters, or their integrity?
- How long will the proceedings take in the different forums? Will there be delay and what will be the consequences of the delay?
- Does the claimant or defendant need public funding for their legal costs, in which case will it be available?
- Can the court make an adverse costs orders?
- Where are the assets located, against which a judgment will be enforced? Will a foreign judgment be readily enforceable in that jurisdiction?
- What final remedies are available, including the level of damages and punitive damages?

21. **MITIGATING RISK**

The demand for effective solutions to deal with the increasing number of agreements that organisations maintain, as well as the growing complexity of contracts, has risen dramatically over the last few years.

Mounting contract volume and intricacy, coupled with intense regulatory pressure to shore up corporate governance, have resulted in vast concerns regarding contract compliance, as well as the adoption of technology to help monitor and manage compliance issues.

A contract is the cornerstone to any business transaction. It represents a binding relationship between contracting entities; defining the terms and conditions for the products and services provided. In order to mitigate risk:

- Consistently using the latest terms and conditions in every new contract;
- Ensuring the correct terms and conditions are used with each different contract type; and
- Requiring appropriate reviews and approvals to any changes to terms and conditions.

22. **DISTINCTION BETWEEN CIVIL LAW AND COMMON LAW**

Any American provider coming to England will need to bear in mind that there are two really radically different legal systems which operate here: common and

civil law jurisdiction. Most countries in Europe are based upon a civil law system. However, England and Wales use a common law system (like America).

In a **civil law system**, the primary source of law is a codification, contained in a constitution or statute, passed by the legislature. Amendments to the law are made by the legislature. In these systems, judicial precedent is not generally legally binding and the role of the judge is to interpret the legislation, rather than to create and develop the law. Most of the civil law systems in Europe have their origin in Roman law but have also been influenced by canon law.

By way of contrast, in **common law systems**, the primary source of law is case law - the decisions of the judges. Common law systems also have a legislature that pass new law and statutes, however, judges play a fundamental role in shaping the law. The precise role of the judge will vary between different jurisdictions. In some jurisdictions such statutes may overrule judicial decisions or codify the topic covered by several contradictory or ambiguous decisions. In some jurisdictions judicial decisions may decide whether the jurisdiction's constitution allowed a particular statute or statutory provision to be made or what meaning is contained within the statutory provisions.

Although the two systems may reach the same result in a novel situation, the process of **judicial reasoning** will differ markedly. Typically, the judgement of the court in a civil law system will be very brief - setting out the relevant provision of the code and then detailing the judge's decision. However, in a common law system, the judgement of the court will often be much longer with detailed reasoning, based in part on previous case law.

The **European Court of Justice** takes a mixed approach. The treaties are of fundamental importance in reaching decisions, however, case law is also relevant.

Examples of civil law systems include:

- France;
- Germany;
- Spain;
- Switzerland;
- Portugal; and
- Italy.

Examples of common law systems include:

- England and Wales;
- United States;
- Australia;
- South Africa; and
- Canada (excluding Quebec)

23. **METHODS OF DISPUTE RESOLUTION**

There are three primary methods of commercial dispute resolution:

- Court;
- Mediation; and
- Arbitration.

There are many other methods which are beyond the scope of this paper, including:

- Med-arb;
- Mini-trials;
- Structured settlement procedures;
- Expert appraisal;
- Early neutral evaluation;
- Judicial appraisal;
- Expert determination; and
- Final offer arbitration.

Most of these methods are really variations on the three primary methods mentioned above.

23.1 **Courts**

This is the method of dispute resolution that people think of most commonly when they consider legal disputes. The parties submit to court procedure and must comply with the court rules.

23.1.1 **Advantages:**

- A court judgement may be more widely enforceable, particularly at an international level;
- Where an injunction is sought, because these carry the sanction of imprisonment for non compliance, a reference to the court is required; and
- Where there are complex points of law court proceedings may be preferable as an arbitration may be appealed on a point of law;

23.1.2 **Disadvantages:**

- Court proceedings can take some time;
- Court proceedings may be very expensive;
- The initial decision may go to the appeal courts;
- Courts are limited in the powers they have to award judgements and may not be able to offer a commercial solution that suits the parties;
- Where there are sensitive matters for discussion, the public nature of court proceedings may be wholly inappropriate as the negative publicity may be highly damaging for both parties; and
- Where there is an ongoing business relationship between the parties, court proceedings may be unduly formal and may cause the parties to entrench their positions, rather than seek resolution.

For these main reasons commercial bodies are increasingly looking to alternative methods of dispute resolution.

23.2 **Mediation**

23.2.1 **Process:**

- A third party is appointed as a mediator by the parties;
- Typically, a mediator will have written statements from both parties;
- Following receipt of these statements, the mediator will discuss the case with the parties - Mediation is often carried out through a face to face meeting with the mediator but can take place over the telephone or through written correspondence;

- Each party will tell the mediator what they think about the case on a without prejudice basis; and
- The mediator will not pass on to the other party information which is confidential, unless he is given permission to do so.

The theory behind mediation is as follows:

- The parties speak openly and honestly with the mediator;
- The mediator is able to identify the real areas of disagreement between the parties and the issues that are most important to the parties; and
- The mediator can then move towards constructive solutions to the problems.

Generally, mediation is one of the least confrontational methods of dispute resolution and therefore assists in maintaining and preserving relationships between the parties.

23.2.2 **Advantages:**

- A mediator is not bound by court procedure;
- Mediation can be flexible; and
- Commercial solutions may be reached by the parties.

23.2.3 **Disadvantage:**

- The decision reached by a mediator is not binding, although the parties may enter into a contractual agreement regarding the decision of the mediator.

23.3 **Arbitration**

Arbitration can be either **voluntary or mandatory** and can be **binding or non-binding**. Non-binding arbitration is, on the surface, similar to mediation. The principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable.

Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration.

23.3.1 **Advantages:**

23.3.1.1 **Neutral forum**

- Arbitration can provide neutrality where parties come from different countries, particularly countries with different legal cultures.

23.3.1.2 **Expert “judge”**

- A judge will always be first and foremost an expert in the national laws and procedures of his or her own country, although specialist courts do exist in some jurisdictions; and
- Arbitration gives the parties scope for appointing an arbitrator with particular expertise in the subject-matter of the dispute.

23.3.1.3 **Flexible procedure**

- The arbitration laws of most countries allow a more flexible procedure in arbitrations than is available in the courts;
- The parties usually have considerable freedom to agree, and the arbitrator considerable freedom to order, a procedure tailor-made for the dispute and the parties in question;
- A judge, on the other hand, will be constrained by the procedural rules of the relevant legal system;
- The flexibility of arbitration can be invaluable - particularly when parties come from very different backgrounds and compromises need to be found which are fair to both parties in relation to, for example, disclosure, examination on oath, rules of evidence, or the form of any pleadings. With arbitration, there is also more geographical freedom and greater freedom of representation; and
- There is usually no requirement for the parties to be represented at the hearing by a locally qualified lawyer, and the absence of a formal national procedure diminishes the need for local procedural expertise.

23.3.1.4 **Confidentiality and privacy**

- Most national court procedures require that a trial be accessible to the public;
- The contrary is true of arbitrations, as it is generally accepted that all arbitration hearings should be held in private; and
- However, the question of whether arbitration proceedings are confidential is far less clear.

23.3.1.5 **Finality**

- In many jurisdictions, an international arbitration award will not be subject to an appeal on the merits, and a party may only apply to have it set aside for a fairly limited number of reasons; and
- This is an advantage in that it prevents a losing party delaying enforcement of the award by pursuing unmeritorious appeals through the courts, but there is a risk of unfairness if a party is unable to challenge an award that is plainly wrong.

23.3.1.6 **Enforceability**

- If enforcement is likely to be required in a country other than that which is to play host to the litigation or arbitration, enforcement will be easier if there is a treaty between the two countries for the mutual recognition and enforcement of judgments or awards;
- There is no worldwide mutual enforcement treaty for court judgments which compares to the New York Convention on Enforcement of Arbitral Awards 1958 for the enforcement of arbitral awards; and
- There are, however, numerous regional and bi-lateral treaties, the most important in Europe being the Brussels and Lugano Conventions, which provide for mutual recognition and enforcement of judgments throughout the EU and EFTA countries.

23.3.1.7 **Speed**

- Ultimately, the time and cost of proceedings, whether litigation or arbitration, depend heavily on the attitude of the parties;
- If all parties wish a dispute to be heard quickly and efficiently, both arbitration and litigation (depending on the court and country where the proceedings are issued) can meet this requirement;
- In an international commercial context, however, arbitration has the benefit of being in most instances final (ruling out appeals on the merits), and any award may also be more easily enforceable abroad under the New York Convention;
- It may also be possible to choose an arbitrator who has time available to proceed quickly with determining the dispute; and
- On the negative side, if the parties to an arbitration opt for a panel of three well known arbitrators with busy diaries, finding a hearing date convenient for the arbitrators and each party may result in as much delay as would have been incurred in waiting for a trial.

23.3.1.8 **Costs**

- It is often possible to reduce costs by following the arbitration route provided that the arbitration is conducted expeditiously;
- However, one has to take into account the additional costs that arbitrations incur, which have to be borne by the parties, namely:
 - the arbitrators' fees; and
 - the administrative expenses of the arbitration (for example, the cost of hiring a hearing room); and
- Recovery of costs in arbitrations is less predictable as the norm is for the arbitrators to have complete discretion over the apportionment of costs between the parties.

23.3.1.9 **Coercion**

- A national court will usually be in a stronger position to prevent obstructive tactics from a difficult opponent than an arbitrator, who lacks the penal sanctions of a judge and who must also take great care to be seen to be acting fairly so as to prevent a subsequent challenge to his or her award.

23.3.1.10 **Multi-party**

- National courts have the power to join third parties to litigation proceedings, whereas arbitrators very rarely have such power in relation to arbitration proceedings without the consent of all concerned;
- The presence of a party to a dispute who is outside the arbitration agreement may enable a court to seize jurisdiction over the whole dispute and override an agreement to arbitrate; and
- Where there is the potential for there to be multiple parties to a dispute, litigation is likely to be a more satisfactory solution than arbitration unless complex back-to-back arbitration clauses are incorporated into all the relevant contracts.

23.3.1.11 **Certainty**

- Arbitration awards have no formal “precedent” value as regards non-parties;
- A judgement on a standard supply contract, for example, may be more useful in the long run than an endless series of arbitrations against many trading partners; and
- The lack of a precedent system also makes it more difficult to predict the result of an arbitration.

23.3.2 **Disadvantages:**

One of the key disadvantages of arbitration used to be a difficulty in enforcing judgements. However, increasingly arbitration agreements are upheld regardless of jurisdiction and may be easier to enforce than court proceedings.

In an arbitration, the parties agree to submit to a particular arbitration procedure and set of rules. Commonly used procedures include:

- Chartered Institute of Arbitrators;
- International Chamber of Commerce; and
- London Court of International Arbitration.

Parties must also choose the substantive law that they wish to apply to the dispute. This may be determined by the contract between the parties or may be decided at the time of the dispute.

PART 6 - TERRITORIAL JURISDICTION - US PRINCIPLE OF EXTRA TERRITORIAL JURISDICTION

Extraterritorial jurisdiction ("ETJ") is the legal ability of a government to exercise authority beyond its normal boundaries.

Any authority can, of course, claim ETJ over any external territory they wish. But for the claim to be effective in the external territory (except by the exercise of force) it must be agreed either with the legal authority in the external territory, or with a legal authority which covers both territories.

Extraterritorial jurisdiction can apply internationally.

Many countries have implemented laws which allow their nationals to be prosecuted by their courts for crimes such as war crimes even when the crime is committed extraterritorially.

Extra-territoriality is the state of being exempt from the jurisdiction of local law, usually as the result of diplomatic negotiations. Extraterritoriality can also be applied to physical places, such as military bases of foreign countries, or offices of UN. The three most common cases recognized today internationally relate to the persons and belongings of foreign heads of state, the persons and belongings of ambassadors and certain other diplomatic agents, and public ships in foreign waters.

As far as the territorial scope of business activities are concerned, state borders are more or less diminishing to become almost borderless; as for legal regimes, however, sovereign states retain in principle exclusive jurisdiction over their territories and nationals under international law.

Business activities are regulated by the domestic laws of sovereign states or by international agreements concluded among sovereign states.

The pertinent question is how to coordinate "borderless" business activities within the existing legal regimes governed by sovereign states.

Serious jurisdictional conflicts have transpired in the last several decades between the United States and other states over the so-called extraterritorial application of U.S. antitrust laws on anticompetitive conducts abroad.

The conflict between international law and national sovereignty is subject to vigorous debate and dispute in academia, diplomacy, and politics. Certainly, there is a growing trend toward judging a state's domestic actions in the light of international law and standards.

Numerous people now view the nation-state as the primary unit of international affairs, and believe that only states may choose to voluntarily enter into commitments under

international law, and that they have the right to follow their own counsel when it comes to interpretation of their commitments. Certain scholars and political leaders feel that these modern developments endanger nation states by taking power away from state governments and ceding it to international bodies such as the U.N. and the World Bank, argue that international law has evolved to a point where it exists separately from the mere consent of states, and discern a legislative and judicial process to international law that parallels such processes within domestic law. This especially occurs when states violate or deviate from the expected standards of conduct adhered to by all civilized nations.

Though the European democracies tend to support broad, universalistic interpretations of international law, many other democracies have differing views on international law. Several democracies including the US take a flexible, eclectic approach, recognizing aspects of public international law such as territorial rights as universal, regarding other aspects as arising from treaty or custom, and viewing certain aspects as not being subjects of public international law at all.

Examples of Extraterritoriality

- Status of Forces Agreement
- Diplomatic immunity
- Official visits of heads of state
- Extraterritorial Properties of the Holy See such as the papal summer residence, Castel Gandolfo
- Headquarters of the Sovereign Military Order of Malta in Rome.
- United Nations headquarters in New York, United Nations offices in Geneva, Vienna, Nairobi, The Hague (International Court of Justice), Hamburg (International Tribunal for the Law of the Sea), Copenhagen and elsewhere.
- The International Bureau of Weights and Measures at the Pavillon de Breteuil in Sèvres.
- The NATO (political) headquarters in Brussels and the headquarters of Allied Command Operations, SHAPE near Mons, Belgium.
- CERN (European Organization for Nuclear Research)
- Santa Maria di Galeria Vatican Radio transmitter
- Guantanamo Bay Naval Base
- International Free Port of Trieste
- European Central Bank in Frankfurt
- European Patent Office in Munich, Berlin and The Hague

Abbreviations Used

| | |
|----------------|---|
| "AC" | the Autonomous Community |
| "ACDAP" | the Advisory Committee on Degree Awarding Powers |
| "EEIG" | European Economic Interest Grouping |
| "EHEA" | the European Higher Education Area |
| "ETJ" | Extraterritorial Jurisdiction |
| "EU" | the European Union |
| "FHEQ" | the Framework for Higher Education Qualifications |
| "HEFCE" | the Higher Education Funding Council for England |
| "PSRBs" | the Professional Statutes Regulatory Bodies |
| "QAA" | the Quality Assurance Agency |
| "SCE" | Societas Cooperativa Europaea |
| "SE" | Societas Europaea |

Final Notes

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