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***New Challenges for International Study - Partnerships***

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## 1. Key Themes

### 1.1 International Partnerships - a growth area

Over the last 10 years universities on both sides of the Atlantic have experienced a growth in number, scale and complexity of international partnerships. In response to ever increasing competition for international students and the quest for global reputation, US universities and their UK counterparts are more familiar with setting up and running international partnerships than ever before. In 2008, for example, according to a survey conducted of UK university institutions by the Council of Validating Universities (CVU) each respondent university had on average 26 partners, of which 8 were based overseas. This ratio of overseas to total number of partners per institution has remained constant for UK universities over the preceding 3 years, while during that period the number of students enrolled on collaborative programmes in the UK has continued to show a steady growth.

The effect of the global recession on collaborative programmes with overseas partners remains to be seen, and may signal a period of more intensive competition for international students. This will challenge universities in the US and UK to operate in a more businesslike manner in order to address problems which are becoming increasingly complex as international partnerships become more sophisticated. Those responsible for international partnerships in a university need to have an up to date and realistic assessment of the university's appetite for and capacity to manage risks: it is vital to follow the maxim 'know thyself'.

### 1.2 The importance of international strategy

Whether a particular partnership is "right" will depend on its fit with the university's own international strategy. By now every university wishing to be involved in international partnerships (which is virtually every US and UK university) should have such a strategy. The strategy should be a living and working document and should be revised periodically in the light of experience with particular international partnerships.

### 1.3 Assessing risks and opportunities: the importance of process

International partnerships raise very starkly the need to assess risk and balance it against opportunity. Such risk/opportunity assessments should not be regarded as 'one off'. While an initial risk assessment prior to commitment of the university to a partnership is essential, if a partnership goes ahead the identified risks should be managed appropriately, particularly through proper documentation of the partnership through at least one and possibly more legally binding agreements; there should also be periodic reviews of the operation of

the partnership, culminating in a final review geared to the decision whether the partnership should be terminated or extended.

#### 1.4 Responsibilities and structures

Given the increasing complexity of international partnerships it is vital that universities establish clear lines of responsibility for the various tasks involved in establishing and running them. It is becoming increasingly difficult to see how international partnerships can be run on any scale if a university does not have a central unit for which international partnerships are a main responsibility. Typically this will be an international office, although there are other possible structures. In addition, it is important that the university uses the right skill sets for the task in hand having regard to the particular contribution that may be made by: -

- the governing body - in terms of settling the international strategy, receiving reports on its implementation and making key decisions e.g. as to whether to get involved in a partnership in a particularly hazardous area of the world.
- academic staff and key committees such as senate/academic board or equivalent and university committees.
- the university's quality assurance committee or similar body.
- the sponsoring department, school or faculty to which the necessary budget may be devolved.
- central administration including the relevant senior management team member responsible for external affairs, finance director or nominee etc.
- legal advisers, in-house lawyers (if available), external legal advisor (US/UK and where necessary overseas).
- Using good people for the wrong task, and/or failing to use appropriate professionals (whether internal or external) can lead to costly and avoidable mistakes.

#### 1.5 Methodology

This paper will therefore consider the practical steps which a contemporary university should take to meet the challenges of making an international partnership "work" in an increasingly demanding economic climate. "Work" will be given the meaning of being legally fit for purpose, and "practical steps" will be articulated in a checklist of "Do's" and "Dont's".

## 2. Challenges

### 2.1 Groundwork

#### Do

- Think why you would like to collaborate - revenue is probably not a good enough reason. Think also about sharing expertise, research, reputation, marketing opportunities, and cost cutting through the cooperative procurement of services.
- Ensure that the right team or person is empowered to carefully plan a collaboration. The team of people coordinating the collaboration is key to success.
- Get the right advice, on academic, administrative, legal, financial and tax issues. It is not only legal issues in the US which the institution must consider, an international collaboration entails international legal issues.
- Check that there are no legal or regulatory bars to a collaboration. Remember to check both universities constitutional documents to make sure that they possess the power to collaborate.
- Consider which structure and legal entities will work best for your collaboration. In the UK there are 3 common forms of legal structure for an international collaboration: the institutions may regulate the collaboration by way of contract; one or more of the institutions may set up a subsidiary company to enter into a contract with the other; or the institutions may choose to set up some form of joint venture company.

#### Don't

- Allow staff to enter into collaborations without institutional approval. They may bind the institution into an agreement that it doesn't wish to be part of.
- Underestimate the time, commitment and costs needed to make a collaboration successful. Understanding this at the outset will help you to make realistic plans.
- Be afraid not to collaborate - it will harm an institution less to decide not to participate in an unattractive collaboration than it would if the institution were to participate in an unsuccessful collaboration.

## Do

By the end of this stage the institution should have done the following:

- satisfied itself that the proposed partnership is consistent with its international strategy;
- be confident that a joint venture rather than a solo project is appropriate for delivering the planned operations, be clear as to the outcomes which the operations are to achieve and the timescales involved and have identified a short list of potentially suitable partners;
- have completed an initial risk assessment confirming that there are no aspects of delivery of the proposed partnership in the country concerned and with the likely partner or partners provisionally identified which would be either wholly impracticable or manageable only at disproportionate expense; and
- have produced a plan setting out the steps still to be taken to establish the partnership with timescales, responsibilities and resource implications clearly identified.

## Don't

- Simply accept the assurances of any individual in the institution, however senior, that the proposed collaboration should go ahead without further investigation.
- Allow yourself to be swayed by the apparently enticing prospect of working with a high profile partner institution or of producing substantial income for the institution or of delivering a project which has government backing either at home (within the US or UK) or overseas.
- Proceed at such speed that an initial risk assessment has not been undertaken or that proper investigation and documentation of what will be involved will not be practicable.

## 2.2 Knowing your partner - due diligence

### Do

- Start the Due Diligence exercise as soon as your institution is seriously considering a collaboration with an overseas partner. Results may have an impact on the feasibility, structure and content of your partnership.
- Ensure that the results of the academic, financial and legal Due Diligence are translated into formal binding partnership arrangements.

Communicate them to your colleagues and/or legal advisers drafting the partnership arrangements.

### Don't

- Rely solely on the word of your potential collaborative partner but carry out your own background checks. Your potential partner may not be aware of all local rules which may have an adverse effect on the partnership.
- In case of doubt, hesitate to get lawyers involved. Only overseas lawyers can give you the necessary comfort regarding applicable regulations and background checks on your proposed partner.

## 2.3 Documenting the partnership

### Do

- Use a Memorandum of Understanding document to map a collaboration before significant costs are incurred and consider using Agreements to prevent a partner breaching confidentiality, poaching staff or entering into similar collaborations.
- Discuss with your legal adviser which legal agreements you need, one size does not fit all. Decide which partner will draft documents then task a manager and a lawyer to do this together.
- Be careful whom you contract with. A weak subsidiary may require guarantees from a parent to make it a safer legal bet.

### Don't

- Lose sight of the basics. Who are we contracting with? To do what? Who pays? For how long? How can we get out of this? These are the fundamental issues at the heart of every collaboration.
- Use the same Agreement as last time, irrespective of whether or not it is appropriate. Particularly, don't assume that an overseas partner will automatically comply with US legal requirements.
- Expect a manager to deal with legal risks or a lawyer to deal with management risks. Allocate tasks to those qualified to deal with them.
- Consider legal documents as side issues, an Agreement should envisage the potential risks and deal with them appropriately. Good risk management at the outset will help to deal with any issues that arise in the future.

## 2.4 Staff issues

### Do

- Establish what the employee's employment rights and obligations will be as regards contractual issues and statutory rights. Consider in particular what local laws will apply and may affect the employee, and ensure the employment contract covers all relevant issues specific both to the move overseas and any eventual return home.
- Ensure risk assessments are carried out to protect the employee's health and safety (including checking that all relevant insurance is in place), all immigration requirements and obligations are complied with and check the taxation and pensions position and ensure appropriate arrangements are in place.
- Ensure that no data protection principles are breached.

### Don't

- Rely on an existing contract of employment. The contract will need to be tailored to cover the work overseas and may assume that the US law will be the relevant law.
- Underestimate the support required by the employee, a move overseas can be a overwhelming experience for some employees and support should be offered at every stage.

## 2.5 Student issues

### Do

In order to ensure that the institution/student relationship is managed effectively, the home university should:

- identify precisely at the outset what legal and regulatory obligations each university will owe to which institution's students;
- identify whether it will have a contract with students of the overseas university even where the home university's obligations to those students will be limited (for example, in relation simply to the awarding of degrees);
- ensure that students with whom it will have a contract are informed at the outset with which institution(s) they will need to register and will have a contract; and



- ensure that it documents succinctly and disseminates from the outset the respective entitlements and obligations of each party to each other - home university, overseas university and students.

### Don't

- Enter into contractual arrangements with overseas partners which hinder or prevent the US university partner from discharging its legal and regulatory obligations to students.
- Omit to carry out appropriate risk assessments of the activities and environments in which students will engage or be placed particularly in respect of students on placement or based at the overseas university - students out of sight should never be out of mind.
- Omit to inform students from the outset which institutions' procedures apply to them and when (for example, in respect of discipline, fitness to practise, complaints and academic appeals).

## 2.6 Managing the partnership

### Do

In order to manage international partnerships effectively the home university should:

- adopt a proactive and holistic approach to monitoring the operation of international partnerships, putting in place a systematic process for regular review of the operation of the partnership during its lifetime and not waiting until close to the expected date of termination; the process should involve not only the academic lead department but also central departments of the university concerned with academic quality, finance and legal advice. Effective sharing of information across the university is therefore essential;
- be constantly on the lookout for opportunities to extend successful partnerships so as to maximise the return on what is likely to be substantial investment by the home university;
- ensure that issues identified by the regular monitoring process are properly addressed and opportunities for developing the partnership appropriately planned and taken forward; and
- ensure that there is a fundamental review of the partnership in good time before the expected termination date, in conjunction with the international partner but also the university's own departments, and with the benefit of relevant external sources of information and advice (e.g.

any report from quality assurance or relevant professional or other accrediting bodies).

### Don't

- Assume that once the partnership agreement has been signed the operation of the partnership can be left to the academic department which instigated it.
- Allow partnership agreements to roll on from year to year without periodic systematic review of the whole of their operation and not just the financial schedule.
- Regard the involvement of legal advisers (whether from the institution's internal legal office or suitably experienced external advisers) as a defensive or negative step, since advice delivered promptly in response to a request for guidance in the early days of a potential problem (or opportunity) may save the institution considerable time and money.

## 2.7 What to do if things go wrong

### Do

- Check the contractual documentation which exists - what dispute resolution mechanisms have been agreed? What are the timeframes for bringing a claim? What jurisdiction/arbitration provisions are likely to apply? What governing law is likely to apply to the dispute (this may be established by agreement or by operation of law)?
- Consider whether emergency steps (eg injunction/preservation order) need to be taken to preserve the status quo. Take legal advice at an early stage of the dispute in order to establish if any of these remedies are available to you.
- Notify your insurers as soon as possible, it may affect the terms of your insurance if you fail to do so.
- Collate and preserve relevant documentation and ensure that all those involved in the matter understand the need to preserve relevant documentation and not to create unnecessary/prejudicial documentation in relation to the dispute, which might later have to be disclosed.
- Consider whether staff, students and/or third party contractors/partners are involved or likely to be affected by the dispute, and what communications need to be put in place to keep them informed.

- Consider whether any other interests of the institution are likely to be involved or affected, for example, there may be wider reputational issues and it may be necessary to consider whether it is appropriate to communicate to the press.

### Don't

- Act in haste - in particular, be prepared to spend a good deal of time working through the consequences of termination before any action is taken; careful planning is crucial to developing an appropriate strategy for dealing with individual problems.
- Allow satellite disputes to arise, e.g. as to whether there is a 'Dispute' which triggers the dispute resolution provisions under the agreement. Hopefully the provisions will be clear, but if not, try escalating the issue to senior management to try to reach agreement on the way this particular issue will be dealt with.
- Become entrenched in a particular strategy. This can be a particular problem where individuals within the organisation may feel morally aggrieved by what has happened. There are many different factors which should influence your choice of strategy for a particular dispute and some of these points may only come to light during the course of the dispute.
- Take anything for granted - expect the unexpected! Especially where there are cultural differences involved. Don't assume you understand why your international partner has suddenly become uncooperative. There may be very complex political or financial motivations which are worthy of further investigation.

## 2.8 Ending a partnership and beginning again

### Do

- Be clear which of the various grounds for termination the university is going to rely on and make it clear to the other party. Is it under a notice clause, for breach of the agreement, or for an unsatisfactory review result?
- Use the termination procedures set out in the collaboration agreement properly giving the 'party in breach' the appropriate period of notice of the decision to terminate which has been made by the authorised individual or committee within the "innocent" university.
- Put together an implementation plan, if possible agreed between the partners. Achieving effective termination of the collaboration should be

considered a medium-term project, much in the same way as establishing the partnership. The interests of the staff, students and the long-term interests of the institutions should be the priorities.

- Ensure the termination process is managed in such a way that potentially prejudicial effects on students are avoided or minimised, that students are kept informed of developments and that every effort is made to assist students to complete their programmes.
- Provide in secondment agreements for the eventuality that staff of the US university may have to return to the US on termination of the agreement.
- Undertake the necessary consultations where employees may become redundant following termination of the agreement, or where staff are to be transferred to another employer.
- Ensure that appropriate thought is given when negotiating the partnership arrangements as to the treatment of information and records following termination of the agreement in order to preserve confidentiality and comply with data protection requirements on the one hand but also meet expectations of quality assurance and accrediting bodies of reasonable transparency.
- Ensure the final review of the partnership agreement is considered by the central body within the university with responsibility for international partnerships in order to assess the lessons for the university arising from the partnership, and be prepared to share those lessons more widely with the sector where possible.

#### Don't

- Regard termination of an international partnership as a fate worse than death: not all partnerships can last forever. It must be accepted that a significant proportion of partnerships which seemed a good idea at inception may no longer seem attractive 3 or 5 years later.
- Allow your institution to be wrong-footed, even though the other party is more in the wrong, by making procedural mistakes in ending a partnership, it could lead to you being taken to court even though you had ample cause for wishing to bring the agreement to an end.
- Allow the termination process to deteriorate into an unseemly squabble which is likely to discredit the name of both universities and of higher education of the US. Both institutions should consider the long-term impact on their reputation over settling old scores.

- Forget the over-riding responsibilities of both partners to protect the position of students and staff. The partnership agreement should provide a mechanism for dealing with the student-related implications of termination.
- Forget to keep quality assurance and accrediting bodies, both in the US and the overseas country concerned, informed of developments. Students must be able to complete their studies leading to the award.
- Allow your partner to appropriate valuable intellectual property belonging to your university through failure adequately to protect such rights through the partnership documentation, or through failing to enforce rights protected by that documentation.
- Fail to ensure adequate arrangements for preservation of information and records following termination. Personal data must be protected in particular.
- Refuse to talk about terminated partnerships - provided confidentiality obligations are complied with the collective knowledge and experience of international partnerships can only increase if institutions are willing to share their less happy experience of partnerships as well as their successes.

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### 3. Case Studies

#### 3.1 Knowing your partner - due diligence

**Q:** During a visit to its Tokyo campus one of your professors has entered into a mutual student exchange agreement with an institute operating under the abbreviation 'ILSCT'. The agreement will allow the small group of post graduate students for which she is the PhD supervisor or co-supervisor to spend their final year of studies in Tokyo and to submit their PhD thesis for a dual award of your university and of ILSCT. The document was counter-signed by a director of ILSCT. Your Vice-Chancellor (President) is not in favour of this collaboration and does not wish to endorse the Agreement. Is your university already bound by the terms of the Agreement?

**A:** Had legal due diligence been carried out it would have transpired that the university was not in favour of entering into the agreement. Determining whether the university will be bound will depend on whether the professor had authority to bind the university, and establishing this will itself depend on what governing law and jurisdiction applies to the agreement. Under US law an agreement may be unenforceable if it is made by a person or persons who lacks the requisite authority, however in certain circumstances the other party (eg ILSCT) may have the right to enforce the agreement against the university if it entered into the agreement in good faith and believing that your professor had the necessary authority to bind your university. Consequently, it is always essential for all contracting parties to check that the necessary authority has been properly delegated and exercised.

#### 3.2 What to do if things go wrong

**Q:** A US institution enters into a partnering arrangement with a Malaysian higher education provider for services to be provided in Malaysia. The arrangements are recorded in an agreement, which provides that the law of the United States governs it, and that the courts of the United States have exclusive jurisdiction to determine disputes under it.

A dispute arises between the two institutions but the US institution decides to try to negotiate a solution, rather than rushing to court proceedings in the US courts. The Malaysian institution is slow to respond to the US institution's overtures, but the US institution continues to try to open discussions with the Malaysian institution. However, whilst those efforts are still in process, to its surprise, the US institution is served with court papers relating to a claim issued by the Malaysian institution in the courts of Malaysia.

**A:** As soon as it becomes clear that a dispute has arisen, the US institution should have sought legal advice, both US law advice and Malaysian law advice. Where a party to a contract is based abroad, there is always a risk that, no matter what a written agreement provides, that party may try to secure a tactical advantage, and put the US institution to disadvantage, by starting a claim in its own home court or the courts of a third jurisdiction.

The US institution should seek US law advice on whether it can obtain an order from the US courts preventing the Malaysian proceedings from continuing (known as an 'anti-suit injunction') or requiring the Malaysian entity to abide by the terms of the agreement and start any claim in the courts of the United States. The timing of making such an application may be critical, in view of any procedural time limits which may apply in the Malaysian proceedings.

The US institution should very promptly seek Malaysian law advice on whether:

- there are steps it can take in Malaysia to challenge the jurisdiction of the Malaysian courts
- there are any precautions it should take to avoid being deemed to have accepted that the Malaysian courts have jurisdiction (whilst taking care to avoid penalties imposed by the Malaysian courts for not taking steps to contest the claim).
- under Malaysian law, the courts recognise legal professional privilege and without prejudice privilege.

#### 4. Conclusion

International partnerships have to date been a success story. But overseas universities will increasingly look beyond countries with whose universities they had traditionally partnered (such as the UK and USA) to other countries such as in Australia and Canada and others outside the English speaking world. US and UK universities will have to constantly raise their game and use more sophisticated business tools as well as continuing to offer partnerships of high academic standing in areas attractive to potential students and research collaborators.

This paper is based on the Guide 'International Partnerships - A Legal Guide for UK Universities', which Eversheds prepared at the request of the UK Higher Education International Unit. If you require any further information on any of the issues raised by this paper, please contact John Hall, Chair of the Education Group, on + 44 0845 497 3811 or email him at [johnhall@eversheds.com](mailto:johnhall@eversheds.com).

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## APPENDIX – Further Reading

Becker R, Olcott D, Middlehurst R, *et al* (2009) *UK Universities and Europe: Competition and Internationalisation*, UK Higher Education International Unit  
[www.international.ac.uk](http://www.international.ac.uk)

Council for Industry and Higher Education: *Global Horizons for UK Universities* Summary only, full report only available in hard copy  
[www.cihe-uk.com/docs/PUBS/07111IntHEsumm.pdf](http://www.cihe-uk.com/docs/PUBS/07111IntHEsumm.pdf)

Council of Validating Universities: *Handbook for Practitioners*  
[www.cvu.ac.uk](http://www.cvu.ac.uk)

Fielden J, (2008) *The Practice of Internationalisation: Managing International Activities in UK Universities*, UK Higher Education International Unit  
[www.international.ac.uk](http://www.international.ac.uk)

Middlehurst R, Woodfield S, (2007) *Research Project Report 05/06: Responding to the Internationalisation Agenda: Implications for Institutional Strategy*, Higher Education Academy  
[www.heacademy.ac.uk/assets/York/documents/ourwork/research/web0582\\_responding\\_to\\_the\\_internationalisation\\_agenda.pdf](http://www.heacademy.ac.uk/assets/York/documents/ourwork/research/web0582_responding_to_the_internationalisation_agenda.pdf)

Quality Assurance Agency for Higher Education, *Code of Practice for the Assurance of Quality and Academic Standards in Higher Education*  
[www.qaa.ac.uk/academicinfrastructure/codeOfPractice](http://www.qaa.ac.uk/academicinfrastructure/codeOfPractice)

Summers E, Boothroyd K, (2009) *Getting to Grips with Risk*, Leadership Foundation for Higher Education/Committee of University Chairs  
[www.lfhe.ac.uk/governance/aboutgovernance](http://www.lfhe.ac.uk/governance/aboutgovernance)

Universities and Colleges Employers Association/Universities Safety Association (1998), *Health and Safety Guidance When Working Overseas*  
[www.international.ac.uk/resources/UCEAHealthandSafety.pdf](http://www.international.ac.uk/resources/UCEAHealthandSafety.pdf)

Woodfield S, Middlehurst R, *et al* (2009) *Universities and International Higher Education Partnerships: Making a Difference*, Million+  
[www.millionplus.ac.uk/documents/INT\\_PARTNERSHIPS\\_summaryReportfinal\\_003.pdf](http://www.millionplus.ac.uk/documents/INT_PARTNERSHIPS_summaryReportfinal_003.pdf)