Legal Considerations in Offering Online Programs Outside the United States

Greg Ferenbach
Hogan Lovells LLP
Paul Thompson
Cooley LLP
Joan Bouillon
Pearson

WORLDWIDE TRENDS IN HIGHER EDUCATION
► Greater internet access
► Rising household incomes: new middle class
► Rapidly growing demand for higher education
► Perceived economic opportunities with U.S. degrees
WORLDWIDE TRENDS IN HIGHER EDUCATION

- Potential lower costs associated with online programs
- Generally benign regulatory environment
- Rise of “Pathway” programs and international for-profit educational organizations (e.g., Laureate)

WORLDWIDE TRENDS IN HIGHER EDUCATION

- Increase in English language programs
- Increase in use of local recruiters
- Increase in “shared services” model to deliver at scale (e.g., OPM’s)
- Physical migration of students around the world

THE INTERNATIONAL HIGHER EDUCATION ENVIRONMENT: STUDENT MIGRATION
INTERNATIONAL HIGHER EDUCATION TRENDS: BRAZIL AS AN EXAMPLE

U.S. HIGHER EDUCATION ENVIRONMENT
- Decreasing US student enrollments, especially among traditional age students
- Decreasing support for public institutions
  - International students provide full-pay revenue
- Increasing competition in domestic online program offerings
U.S. HIGHER EDUCATION ENVIRONMENT

- Increased physical presence of U.S. institutions
  - International programs and on-ground campuses export institutional “brands”
- New technologies and new pedagogies (e.g., competency-based; AI; “micro-degrees”)

U.S. HIGHER EDUCATION ENVIRONMENT

- More robust and “scalable” online infrastructure
  - Contracts with local recruiters
  - Contracts with third-party providers
  - Increased internet marketing and advertising capabilities
  - English language programs
  - Online business programs

U.S. HIGHER EDUCATION ENVIRONMENT

- New federal state authorization rules only require licensure of additional campus locations
- Limited U.S. regulations governing U.S. institutions’ international online educational activities (with some exceptions)…
U.S. REGULATIONS

- Foreign Corrupt Practices Act (FCPA)
  - Prohibits indirectly offering or providing improper payments to non-U.S. government officials and employees of state-owned entities, public hospitals or universities, political parties and others

U.S. REGULATIONS

- Foreign Corrupt Practices Act (FCPA)
  - Companies are expected to implement risk-based compliance programs and investigate and disclose FCPA violations
  - Companies may face FCPA liability if its consultants, distributors, or joint venture partners make improper payments
U.S. REGULATIONS

- U.S. export control laws and regulations
  - Prohibits virtually all transactions (including enrolling students) with the Crimea region of Ukraine, Cuba, Iran, North Korea, Sudan, and Syria
  - Institutions must implement protections to verify and limit student enrollment by location

U.S. REGULATIONS

- The U.S. regulates non-U.S. institutions via
  - Institutional accreditation restrictions
  - Programmatic accreditation restrictions
  - SARA membership
  - State regulations
  - ED regulations permit foreign institution’s access to Title IV but favor U.S. institutions (no Title IV access for non-U.S. online programs)

REGULATIONS OUTSIDE THE U.S.

- Online education is usually regulated at the national/federal level
- Some is provincial (Canada, for example)
- Many jurisdictions do not require approval for 100% online degree programs (yet)
  - However, physical and other business presence (particular on-site faculty) usually triggers requirements and approvals
REGULATIONS OUTSIDE THE U.S.

► Many countries do not recognize credentials earned online (China, for example)
► A credential or certification may be subject to local country requirements
  ❖ Less so with regard to non-degree or technology programs (coding)
  ❖ More so with regard to traditional degrees/services (medical professions)

REGULATIONS OUTSIDE THE U.S.

► Data protection laws vary significantly from country to country
  ❖ U.S. institutions must obtain prior written consent from students to collect and maintain personal information on U.S. servers
  ❖ EU’s strict privacy regime (GDPR) effective May 2018
► Many countries tax students and institutions
  ❖ Many countries require students to withhold taxes on tuition payments to U.S. institutions

REGULATIONS OUTSIDE THE U.S.

► Many countries regulate and/or restrict cross-border transactions involving educational services
► Education is included in the General Agreement on Trade and Services (GATS)
  ❖ No actual provisions have been agreed upon
  ❖ Possibility of pushback against U.S.
CASE STUDY: CHINA

Over 170 million 18 to 24 year-olds

CASE STUDY: CHINA

- Technically not “open”
  - But there has been no effort so far by the Chinese government to prohibit offering online courses to Chinese residents
  - Online degrees issued by non-Chinese universities are not officially recognized

CASE STUDY: CHINA

- U.S. institutions physically operating in China are subject to data privacy and other country laws
- Restrictions on how much currency can be sent outside of China
  - Current limit is $50K
CASE STUDY: INDIA

- Currently no laws or regulations governing online courses offered by non-Indian institutions
- Like China, no physical locations allowed without a local partner for degree programs
- Foreign degrees earned online are not recognized in India

CASE STUDY: INDIA

- Data protection laws generally don’t apply if servers are in the U.S.
- Non-Indian institutions are subject to a 10% tax on tuition fees and online courses may be subject to a 14% service tax
  - Each to be remitted by students
CASE STUDY: UNITED KINGDOM

Over 4 million 20 to 24 year olds

CASE STUDY: UNITED KINGDOM

- Online courses that do not lead to a UK credential need not be licensed
- It is possible to obtain voluntary validation of quality assurance
- Foreign degree recognition at local institution’s discretion or through application to National Recognition Information Centre

CASE STUDY: UNITED KINGDOM

- Strict rules about protection of student data (UK and then EU starting May 2018)
- Local faculty require certification
WHAT SHOULD U.S. INSTITUTIONS DO?

Initiate a compliance program!

WHAT SHOULD U.S. INSTITUTIONS DO?

Key elements of a compliance program
- Understand your school’s international footprint
- What activities abroad could create a business presence in a given country?
- Audit existing online offerings
- What is already being offered outside the U.S.?
- Identify target countries

WHAT SHOULD U.S. INSTITUTIONS DO?

- Establish a protocol for interested departments to launch online programs abroad. Key stakeholders include:
  - Academics
  - Tech/IT
  - Legal/Compliance
WHAT SHOULD U.S. INSTITUTIONS DO?

- Develop enrollment agreements with appropriate disclosures
- Data privacy/consent to transfer of data
- Taxes
- Degree Recognition
- English Language proficiency

WHAT SHOULD U.S. INSTITUTIONS DO?

Additional Considerations

- Research whether online enrollments are permissible with or without approvals
- Obtain any required approvals prior to advertising or marketing
- Create partnerships with local institutions where necessary

WHAT SHOULD U.S. INSTITUTIONS DO?

- Implement strict policies and procedures for local recruiters and third party vendors
- Obtain any required approvals prior to advertising or marketing
- Limit marketing and advertising to approved countries
WHAT SHOULD U.S. INSTITUTIONS DO?

- Implement strict procedures to verify student location
  - From initial enrollment and during the entire program
- Obtain signed acknowledgements of disclosure receipt
- Notify accreditors and state regulators

gregferenbach@gmail.com
ptthompson@cooley.com
Joan.bouillon@pearson.com

THANK YOU