

February 2019



Perspectives

Legal updates for the world of higher education

Dear Colleague

It is a curious moment in time as we head towards the UK's scheduled departure from the European Union. For a little light relief from the political drama, as the 80 day count-down arrived, I was prompted to read one of those 'classic' books which fall into the category of being-almost-too-famous-that-you-never-think-actually-to-read-it. So started my mini-adventure with 80 Days Around the World by Jules Verne. In many ways, as I am sure you know, it provides a fascinating insight into that moment in history (published in 1873) in terms of attitudes and technological advancements (including the recent opening of the Suez Canal and railways across India and the United States). Did you know that Phileas Fogg didn't in fact use a hot air balloon as a mode of transport?

This month's edition of Perspectives has an international theme, which is timely following the Government's recent [announcement](#) that a new International Education Strategy will launch this year. Our first article is from Kevin Xu, a partner at [MHP Law Firm](#) which is based in Shanghai and Beijing. Kevin's article gives an analysis of changes in policy towards foreign investment in education in China. MHP Law Firm is a member of the international network of leading law firms [SCG Legal](#) along with Mills & Reeve and over 140 other law firms from around the globe. Experience has proved that working with local independent law firms is better for our clients than relying on the satellite office of an international organisation. We have consequently invested heavily

over the last 20 years in creating relationships with leading law firms across the globe. We have supported education clients in their international activities in over 75 jurisdictions through our extensive trusted network of international law firms who offer sector expertise needed for each project.

Graeme Menzies of Mills & Reeve was the Chair of SCG Legal in 2018 and it was a privilege that we could host law firms from around the world in our London office last year and facilitate an extremely successful SCG Legal mid-year conference. The baton has now passed to Alice van der Schee of [Van Benthem & Keulen](#) in the Netherlands as the 2019 Chair of SCG Legal. Conferences for our international network of law firms later this year are to be held in Mexico City and Washington DC. It was also my privilege to speak about global higher education issues at the SCG Legal conference in Boston in 2016 with a panel of lawyers from different jurisdictions.

For further information or advice about undertaking activities in other jurisdictions, the Gulf, South East Asia or continental Europe please contact our commercial partner [Martin Priestley](#) in the first instance (+(44)(0)113 388 8443) who has wide experience of advising on collaborative activities in other jurisdictions.

We also include details of key international contacts at Mills & Reeve and their respective jurisdictions in this edition of Perspectives. Do contact corporate partner [Tom Pickthorn](#) who is our Head of International, any of our [international leads](#) or your usual contact

at Mills & Reeve if you need assistance or advice in another jurisdiction – within Europe or elsewhere around the world.

Our second article is by [Jennifer Turner](#), one of our senior associates, who looks at some of the important considerations to be taken into account in managing contractual arrangements with international agents.

It would of course be remiss not to mention some significant developments closer to home. The new Universities Minister gave his first major higher education policy speech in which he set out on his vision for higher education. The Equality and Human Rights Commission published the long-awaited guidance on freedom of expression in universities following the work of the Parliamentary Joint Committee on Human Rights. You can read our summaries of both of those on our blog ['fusion'](#) which also includes ["Four key messages about EU employees and Brexit"](#) from Alex Russell our Head of Immigration. You can also read Alex's commentary on the Immigration White Paper in last month's edition of [Perspectives](#), and further material is available on our [Brexit hub](#).

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“China [will] continue to broaden market access, accelerating access in such areas such as telecommunications, education, medical services and culture. “

China Education Policy update

A summary of some of the changes in policy toward foreign investment in education in China

Market Access Threshold Expected to be Lower

The Special Administrative Measures (Negative List) for Foreign Investment Market Access (2018), effective on July 28, 2018, highlights foreign investment restrictions in the education sector:

1. Preschool, ordinary high school and higher education institutions are limited to Sino-foreign cooperative education, and must be led by the Chinese party (the principal or chief administrative officer shall have Chinese nationality, and Chinese members of the council, the board of directors or joint management committee shall not be fewer than 1/2).
2. Investment in compulsory education institutions or religious education institutions is prohibited.

The Special Administrative Measures (Negative List) for Foreign Investment Market Access in Pilot Free Trade Zones (2018), effective on July 30, 2018, provides a relatively broader market access:

1. Pre-school education, normal high schools and higher education institutions shall be limited to the form of Sino-foreign cooperative institution and led by the Chinese party (the principal or chief administrative officer shall be a Chinese national (and resident in China); Chinese members shall comprise not less than 1/2 of the council, board of directors or joint administrative committee. (Foreign education institutions, other organisations or individuals shall not solely establish schools or any other educational institutions whose enrolment targets are mainly Chinese citizens (excluding non-academic vocational skills training). However, foreign educational institutions may co-operate with

a Chinese educational institution to jointly establish educational institutions whose enrolment targets are mainly Chinese citizens).

2. Investment in compulsory education institutions and religious education institutions is prohibited.

The Ministry of Education expressly requires in its policy issued in 2012 that foreign funding of any Sino-foreign cooperative institution shall be lower than 50%.

Notwithstanding the above, Chinese President Xi Jinping announced in his keynote speech at the opening ceremony of the first China International Import Expo in Shanghai on November 5, 2018 that China would continue to broaden market access, accelerating access in such areas such as telecommunications, education, medical services and culture. In particular, the foreign equity caps are going to be raised in the education and medical service sectors, where there is both huge interest among foreign investors and shortage in domestic supply. President Xi emphasized that in the coming 15 years, China's import of goods and services are expected to exceed USD 30 trillion and USD 10 trillion respectively.

It remains to be seen whether there will be any revision of the foreign equity restriction in Sino-foreign education in 2019.

Vocational Training Grows Slowly

Commercial Vocational Training

The Negative List of Pilot Free Trade Zones allows foreign investors to set up wholly owned commercial vocational companies. Since November 2013, foreign investors have been allowed to set up Sino-foreign commercial vocational training institutions with their Chinese partners in the Shanghai Pilot Trade Zone, and starting from 2016 they have been able to invest



in their wholly owned subsidiaries to provide commercial vocational training services.

- The Shanghai government announced in its 100 Opening up Measures dated July 10, 2018 that it would remove access restrictions on foreign investment in commercial vocational training. Although we have not yet seen any specific follow-ups to that announcement, other steps have been taken by the Shanghai government to attract foreign investment in the vocational training sector. So far there are several vocational training companies in the form of WFOE (wholly foreign-owned enterprise) including vocational training companies invested in by PwC, the Institute for Financial Planning and Chefinary Group.
- Jiangsu Province announced its policy for the first time in May 2018 to allow the establishment of Sino-foreign commercial vocational training joint ventures in several selected development zones.

Non-profit Vocational Training

While Shanghai and Jiangsu have paved the way for foreign investment in commercial vocational training, other cities and provinces still focus their efforts on non-profit vocational training institutions, slowly streamlining the government examination and approval requirements and procedures. Under the current non-profit Sino-foreign vocational training rules, only foreign educational institutions are qualified to cooperate with their Chinese counterparts to offer such non-profit vocational training services in China.

Qualified Private Education Growth

Private education (non-government funded education) has been clearly categorised into for-profit and non-profit since 2016. People are debating how to balance maintaining non-profit education provision whilst attracting more capital funding. It seems that a newly published version of the Implementation Regulation of Private Education Promotion Law for public comment would break the unachieved balance, by prohibiting any foreign investment enterprises registered in China and other social organisations ultimately controlled by foreigners from investing, participating in or acquiring actual control over, any private schools for compulsory education.

However, currently many listed education groups, especially those providing compulsory education, circumvent foreign investment restrictions by using the “Variable Interest Entity” (“VIE”) mode when launching an IPO overseas. The prohibition of actual control, once enacted, would undoubtedly bring significant uncertainty to both the education and capital markets.

Universal Preschool Education

China’s State Council promulgated its latest preschool education policy in November 2018, underscoring the following key policy changes:

- To expand universal preschool education and by 2020, 85% of eligible children shall be enrolled into kindergartens with 80% of kindergartens providing universal preschool education;
- Private kindergartens (non-government funded kindergartens) are to be categorised as either for-profit or non-profit;
- To restrict social capital investment in public kindergartens:
- Social capital shall not control kindergartens run by state-owned assets or other non-profit kindergartens by methods including merger and acquisition, trust or franchise arrangements, VIE or other contractual control;
- For-profit kindergartens shall file with local educational authorities their legal documents relating to mergers, acquisitions and franchises;
- Private kindergartens shall not go public, and public companies shall not use stock market financing to invest in for-profit kindergartens or acquire their assets by cash or by issuing shares.



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International education agents

Investigating some key questions

Higher Education Statistic Agency statistics for the academic year 2017/2018 were released last month. Despite the political uncertainty surrounding Brexit the statistics show that the total number of international students studying in the UK increased by around 4%. However, the competition is stiff; it is reported that international student enrolment in Australia increased by 12% over a similar period.

In this environment, international education agents are a useful tool that can help educational institutions gain a competitive edge, but they also come with significant risks. This article looks at some common questions that our clients raise in relation to contracting with international education agents and some examples of ways to manage the risks.

“What is an ‘agent’ anyway?”

An ‘agent’ in the strict legal sense can enter into discussions with potential students and can create, change or terminate the legal relations of an institution without that institution’s involvement. However, in our experience, education institutions usually want to retain control over the ultimate student contract such that no contract is formed without the institution’s involvement. The type of relationship created between institutions and agents will ultimately depend on the substance rather than the form of the contract, but it is preferable to use the term ‘Advisor’ or ‘Representative’ rather than ‘Agent’ and to include a ‘no partnership or agency’ clause in the contract to help ensure the University retains control over the conclusion of the contract with the student. In this article we will refer to ‘agents’ as they are commonly referred to in the sector, rather than in the strict legal sense.

Due diligence – “it’s just not practical”

Before entering into a contract with an agent it is essential to carry out a thorough due diligence exercise. This helps to mitigate risk and reduce the likelihood of damage to the institution’s reputation. There should also be arrangements for refreshing due diligence at appropriate intervals, linked with contractual provisions entitling the institution to terminate the contract if the appropriate requirements are not met.

Agents often sub-contract to sub-agents. In an ideal world no sub-agent would be appointed without the institution’s consent and that consent wouldn’t be given until the institution has carried out the same rigorous due diligence process on that sub-agent. Some institutions protest that this is just not practical given the large number of sub-agents that some main agents works with. There are other, less strict, controls and protections that can be added to the contract with the main agent, but whether these are acceptable is a question of risk for the institution.

Commission – “is it acceptable...”?

Much time will be spent agreeing rates of commission and more specific financial terms including details around any bonus system relating to numbers, what happens if students transfer to other agents and what happens if students drop out. However institutions must also consider whether the commission structure itself is acceptable. In certain territories, such as the US, it may not be possible to pay agents on a commission basis and institutions need to ensure that the contract including the financial terms is drafted accordingly.

Charges to students - “we can’t restrict this”

In some countries it can be common practice for agents to charge students as well as the institutions they represent. However this could cause a conflict of interest and increase the risk of fraudulent applications. While commercially an institution may not want to restrict what an agent can charge, it is prudent for the contract to provide (at the very least) that any charge the agent does make to a potential student does not duplicate anything that the institution is going to charge (for example the course fees).



Intellectual property - lost in translation

Protection of intellectual property, particularly the institution's brand, is crucial when entering contracts with international agents. Strict controls are needed around how the agent can use the institution's name and branding and how they can use the institution's materials; any such rights should end immediately at the end of the relationship. Institutions should also ensure that intellectual property rights in any promotional materials (including any translations) rests with the institution.

“But the agent is in India. Does it really have to comply with the GDPR?...”

When institutions work with agents they are usually receiving and transferring large amounts of personal data from and to foreign countries. The GDPR applies to institutions' processing of personal data of individuals who are outside the EU as well as those inside it and therefore it is important that contracts contain appropriate data protection provisions. There are hefty fines for non-compliance. As a practical point, institutions may want to cover data protection compliance in training for their international agents.

“...surely it doesn't have to comply with UK consumer protection legislation?”

Consumer protection remains a hot topic in the education sector following the CMA's advice, which outlines the impact of UK consumer laws and is relevant to both home and international students that study here. As well as the reputational risks attached to not complying with consumer protection legislation, violation of consumer law can also lead to civil or criminal proceedings being brought against an institution. It is therefore extremely important that institutions provide complete and accurate information to their agents and ensure that any changes comply with consumer law. The contract should also require the agent to comply with relevant obligations, and institutions should review whether agents' staff are appropriately trained as part of their due diligence processes.

Tier 4 – “what can an agent say?”

Institutions should make clear what agents are expected to say to applicants about the visa system and ensure that they stay up to date with any changes. Institutions should also be aware of relevant provisions and requirements in UKVI sponsor guidance. For example, UKVI states that past immigration abuse by agents is a factor that will be considered during the renewal of an institution's CAS allocation. It is therefore important that this is explored during the due diligence phase and institutions may also want to require agents to disclose any issues around immigration compliance on an ongoing basis.

Conclusions

Using education agents to recruit international students can help institutions keep enrolment numbers up during uncertain and competitive times. However, as this article has highlighted, their use entails significant risks. Contractual protections and the ability to terminate the contract without having to give reasons can help protect institutions using international agents. Together with due diligence and practical measures, such as training, institutions can gain the benefits of using agents while managing the risks.

Any questions?

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About Mills & Reeve

Mills & Reeve offers a deep knowledge of the higher education sector and the commercial strength of one of the UK's leading national law firms.

Our multi-disciplinary team is ranked in tier 1 in the UK legal directories for advising the higher education sector.

We have supported our clients in over 75 jurisdictions through our international network of law firms around the world.

The Sunday Times has recognised us as a Top 100 Best Employer for the last 15 consecutive years; the only UK law firm to have achieved this. We work hard to create a culture where everyone feels that they contribute and can make a difference, delivering outstanding service to our clients.

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