

LEGAL ISSUES ARISING FROM JOINT/DUAL AWARDS AND SIMILAR COLLABORATIVE PROJECTS

Introduction

Whilst there are many practical/academic issues affecting joint/dual awards (marking criteria etc), equally important can be the legal consequences.

Such awards are a growth area, particularly at PG level. They may also often involve international partnerships, potentially bringing in different legal frameworks (as if our own were not complicated enough!)

Therefore it is important to **consider the legal implications at an early stage**. An outline of major issues to be kept in mind, when setting up courses and awards, is set out below.

1. Internal Regulations, Policies and Procedures

How these are to apply – and which ones - is of vital importance and needs to be agreed **at the outset**.

Certain areas could prove deal-breakers e.g. equality, harassment etc. In EU countries, similar criteria will usually apply, derived from Human Rights legislation, but in non-EU areas, there could be cultural sensitivities and an absence of similar law.

Bear in mind that a UK HEI could be liable for contraventions by a partner institution elsewhere, and that an overseas student might be able to take a complaint to the **Office of the Independent Adjudicator for Higher Education (OIA)**, who will above all look at whether students have been treated fairly.

Adverse OIA decisions can have **financial and reputational implications** for an HEI (especially as OIA are seeking to adopt a form of 'name and shame' in future). It will of course be very difficult to enforce such matters with some non-EU partners. Seeking to incorporate provisions in the main contract (flagging these up as conditions, breach of which will entitle immediate termination) may help.

Apart from student regulations, agreement upon **support functions** is relevant, for example, to which institution could a student apply for scholarships or a grant from a hardship fund. Similarly, there is need to consider how **allegations against members of staff**, such as for academic misconduct will be dealt with.

Example: a tutor forms an inappropriate relationship with a student on a joint award course. The student later complains on lines of undue influence. One partner institution has a protocol governing staff/student relationships but the other does not. Could there be a different result, depending on whether or not the tutor is employed at the HEI with the protocol? If so, how fair is that to a student? (And how fair would OIA view this?)

Issues can also arise relating to **custom and practice**, often important to academics within internal culture, especially at older universities.

Example: One partner HEI in a joint award has a custom to permit resits only in autumn, whereas the other partner allows these earlier in the summer. This can cause problems where students are required to have passed in order to proceed to the next stage. Therefore modules chosen and taken with one partner HEI allow a student to be able to redeem themselves at resit in time, but with the other would not. Again how fair is that to a student? (And how fair would OIA view this?)

Modularisation (and increased competition/commoditisation as currently promoted) may help iron out such inconsistencies, but it is wise to pre-empt problems by looking at the effect of particular practices in advance.

Never overlook the obvious. In particular ensure there is no confusion over which institution is **registering the student, doing the statutory returns and charging the fees**. What seem minor points can cause chaos if mishandled. There have been anecdotal instances of both partner institutions registering the same students and returning them in returns (which technically could constitute fraud). This can lead to problems with **funding contracts** because one or the other has admitted too many or too few students and/or then create statistically the impression that entire degree programmes seem to have a very high failure rate, because students left part way through to be registered at the other institution.

2. Student appeals and complaints

There must be clarity about whose/which appeals and complaints procedures will be followed.

Where an appeal (e.g. against a classification awarded) is unsuccessful, the letter giving notification of this should normally also form a '**Completion of Procedures**' (**CP**) letter for OIA purposes, pointing out that the student has **three months** to lodge their case with OIA. Similarly, if a complaint brought separately from any appeal (e.g. as regards alleged poor supervision), then if this is not upheld/settled by the University, a CP letter should also be issued.

In considering cases, OIA are keen to see that **procedures were made clear and accessible**. Inconsistencies can prejudice an HEI's position. Therefore dual and joint awards must operate within a pre-agreed framework, with students' attention drawn to relevant procedures. This raises questions of:

- whose procedures are followed;
- whether those operated by partner HEIs need to be harmonised (with changes sometimes difficult to implement, depending on the respective constitutions involved, and with chartered universities in particular probably having to put forward proposals to their respective senates, introducing **timing issues** in relation to when they meet);

- whether it is appropriate to devise new procedures applying specifically to such awards.

Again consistency will be an important factor, not to mention the usual imperatives of incorporating **rules of natural justice** into any procedures (no bias, opportunity to make representations/question evidence and receive reasons for any decision etc).

3. OIA (See <http://www.oiahe.org.uk>)

Since it took over from the old visitor scheme from Jan 2005, OIA has had significant influence on the sector and the question of what ranks as good practice. Its future is less certain, but it seems safe to assume that whatever changes are to come, its functions will continue to be exercised by an appropriate body (particularly as it is financed by the sector not central government, so any cuts in its powers would not lessen the deficit).

Students are becoming increasingly aware of their right to take a complaint to OIA, **free of charge** for them, and this is an area **set to put increased demands on an HEI's resources**. Dual/joint awards are not a topic it has yet considered a great deal. However, based on its approach in other matters e.g. fitness to practise, OIA are unlikely to care much about what is/is not feasible in running such courses and will expect **high standards of student care**.

4. Resolving Disputes

Mediation schemes are likely to become of great practical importance in relation to the problems/challenges that can arise with joint/dual awards. Although OIA has promoted the use of 'campus ombudsmen', this is unlikely to be practical for joint/dual awards. However, **training** particular staff in mediation skills could prove of benefit.

An external trained mediator can also be employed where appropriate. Some universities do 'lend out' mediators to assist each other in this respect (which can be more cost-effective than say an external lawyer-mediator and also provide a mediator with closer understanding of the sector).

5. The Student Contract

Some universities have already adopted a formal student contract i.e. a single written document signed by the student and setting out the rights//obligations of both parties.

However many have remained on the sidelines in this, relying on a looser arrangement where the contract is evidenced by several documents such as **the formal offer, the prospectus, website details about the course etc**.

Currently there is a move towards a general form of **Student Charter**, which may hasten a sector standard template for a student contract, particularly when coupled with **key**

information criteria, which universities must provide to students. However, a 'one size fits all' approach is not advisable and HEIs will probably add to this their own bespoke terms.

In relation to dual/joint awards, there may be need to tailor contracts to cover particular issues that apply. In particular, it needs to be made absolutely clear to students what conditions apply to their specific course.

Student contracts may prove useful vehicles in which to ensure legal criteria are met and student expectations are managed.

6. International Partnerships

These can lead to issues of whether different legal frameworks apply. A **UK jurisdiction** clause, which is so important to most international contracts, will be vital in any partnership agreement.

However, often partners are resistant to this being included. With other contracts, a compromise can often be found, which might involve a mediation clause acceptable to both parties or sometimes leaving the legal jurisdiction unstated (with often the first to sue, in any dispute, being able to bring it within their home courts). Such compromises are less likely to help with agreements for joint/dual awards and wrangles over jurisdiction may increase, as provision of such awards grows.

7. Practical steps

The overall message has to be to **get to grips with legal implications right from the start**. In this, a **risk analysis** operation may be a useful starting point.

Unfortunately this may sometimes mean finding a factor on which no compromise can be reached but which represents such **legal (and therefore financial/reputational) risk** to a university, that the best thing to do is walk away and look for a different opportunity. At least, this is better than having to disentangle yourself further down the line, when heavy resources have been expended – and possibly messy litigation incurred.

Seek to **agree upfront what provisions will apply between partner institutions, and to staff and students**, documenting this with **formal agreements** as appropriate. It may be impossible to foresee all hiccups that could arise, but thinking through the different levels of the relationships involved can help address those most likely and most troublesome.

Whilst there can never be any 'one size fits all', devising a simple **checklist** based on how your own HEI operates and incorporating factors like those set out above, can help. Prevention is of course always better than cure.

Helen Shay, In-house solicitor, University of York, June 2011 (Please note that the above is not intended as a substitute for legal advice and separate tailored advice should be taken on specific instances.)