

Global Engagement and Legal Issues

David Fleshler and Peter M. Poulos

Imagine the following scenarios. You hold a position of responsibility at your university—hypothetically named Prestigious U. A faculty member walks up to you on campus and proudly reports that she just signed a Memorandum of Understanding that obligates the university to accept students from an Afghan university after two years of study in Afghanistan, and the students then receive a diploma from your university. You find that the Afghan university does not have a position close to the academic standing of Prestigious U, and you are worried about academic reputation. Or you find out that Prestigious U has an employee in Israel, who has been terminated, and is now demanding a month of pay for every year that he worked for the university. Or you receive a call from the father of a study-abroad student that his son, who is studying abroad in Egypt, has been caught in the Arab Spring and demands that you get him out immediately.

These scenarios are all based on colleagues' real situations at universities in the United States and around the world. As leaders of increasingly international institutions, we must understand that there are a myriad of legal, moral, financial, security, communication, and other issues with serious consequences. A thoughtful preparation among those engaged in international activities—including faculty, administrators, and overseas partners and the Office of General Counsel at the university—is crucial to achieving the best-possible outcome when difficult situations arise.

Key Legal Issues and Considerations

While dealing with the intricacies of laws and regulations may be a daunting prospect for many institutional leaders and administrators, a basic understanding of relevant legal issues and considerations is an important part of responsible global engagement. Because failure to

comply with local and national laws and regulations can result in both civil and criminal penalties for those involved, the stakes are often considerable. Though not exhaustive, the following list outlines a number of these issues and considerations and can serve as the beginning of a conversation among campus stakeholders.

Licenses and registrations. If a university is conducting activity in a foreign location, it needs to determine if that activity requires a license or registration from the local or national government. Many countries have license and registration requirements that need to be satisfied, once the activity reaches a certain threshold—such as having a physical space or full-time employees in the foreign location or receiving compensation in the foreign location for its activities. Significantly, the licensing issue is intertwined with the corporate structure for the activity. For example, requirements may differ depending on whether the activity is conducted as a branch office of the university, in affiliation with a foreign institution, or as a separate legal entity formed by the university. Different structures will have tax and business consequences for the university, which need to be thoroughly evaluated.

Employment in a foreign location. If the university employs a foreign national in his or her home country or assigns a domestic employee to work overseas, then the labor laws of the foreign jurisdiction will generally apply. The university usually cannot contract around the application of foreign labor laws, nor should it assume that those are similar to the laws of the United States (e.g., the Israeli example). In addition, even if a university employee only works for a limited duration, or sporadically, in the foreign location, certain work-visa requirements may need to be addressed.

Export control laws. When asking university employees to travel or work abroad or when executing affiliation agreements, the university needs to make sure it—and its employees—comply with federal export control laws. These laws restrict and/or prohibit the export of particular kinds of information to certain countries. This is often the case, for example, with information related to technology that may have direct or indirect military applications. Universities may need to obtain a license if such information is to be disclosed to foreign nationals or may be completely prohibited from exporting such information. Moreover, universities should understand that the definition of “export control” is quite broad and far-reaching. For instance, an export can include merely carrying a laptop containing data overseas or allowing a foreign national to have access to controlled information, while visiting a university laboratory.

Intellectual property issues. When faculty engage in research or other

academic activities with foreign faculty, one of the central issues is how to handle the involved intellectual property. Therefore, it must be specified which country's laws will determine ownership and the use of any created intellectual property and also whether and how the foreign jurisdiction protects the intellectual property that the university already owns. The intellectual property at stake covers not only patent rights but also trademarks and copyrights. The failure of the university to adequately understand if and how foreign intellectual property laws will apply can lead to the university losing valuable assets.

Students studying abroad. When the university sponsors or supports study-abroad programs, applicable state law generally imposes an obligation upon the university, for reasonable steps to protect those students. As a result, universities need to have an established process that analyzes their study-abroad programs and includes a due diligence review of the risks involved and the steps being taken to address those concerns. Those issues may include, for example, potential political unrest in the foreign location, underage consumption of alcohol or other controlled substances—possibly legal in the foreign location but illegal if used on campus—and students who may face challenges participating because of a physical or mental disability.

Foreign Corrupt Practices Act (FCPA). The FCPA may apply whether a university is executing an affiliation agreement, sending an employee to work in an international location, or having students study abroad. This law has an antibribery provision that prohibits giving, offering, or promising a benefit to any foreign official, for the purpose of obtaining or retaining business. As a result, when signing an international affiliation agreement, business terms need to be reviewed, in order to ensure that they cannot be construed as violating the antibribery provisions of the FCPA. When a university has an employee overseas, the employee must also understand the FCPA and not mistakenly violate its provisions. When arranging for students to study abroad, it should be examined whether there is any illegal quid pro quo involved with that exchange.

Strategies for Managing Legal Risks

Because of their organizational complexity, universities are almost uniquely challenging institutions, with respect to addressing issues that require all personnel to follow rules. On most college campuses, governance and decision making are decentralized. Faculty, staff, and students work on an extensive body of disconnected work, and it is not always clear who represents the institution or has legal authority in any particular setting. The following strategies will help institutions gain a

robust international presence, while protecting students, faculty, staff, and the institution itself from legal harm.

Educate top leadership. As in almost any university activity, respected leadership is perhaps the key element. The independent thinkers on campus will only respond well to officials they respect. While the president, chancellor, and provost are perhaps the most relevant figures, faculty and staff will follow legal and administrative advice and rules if they feel other key administrators are knowledgeable and experienced—in particular, the chief administrative officer, the general counsel, and the senior international officer, or their staff.

Develop an international legal plan. To anticipate and resolve problems before they occur, faculty and administrators need to work together to develop a clear international legal plan with a well-articulated structure, clear lines of authority, and thoughtful methods of communication. For instance, a well-thought-out plan will specify whether faculty members are permitted to bind the university and, if not, will identify a clear process to approve a faculty project. The plan must distinguish between types of relationships. A research agreement made between one faculty member and a counterpart overseas and an institutional arrangement involving faculty and students should have quite different approval requirements. Any university-wide procedures should not only provide the university with a way to protect itself against liability but must also explicitly protect faculty and students. If faculty and students understand that the rules benefit them, they are much more likely to comply. It is also significant to determine whether there will be consequences for lack of compliance.

Focus on communication. Even if the university has a good plan, a well-articulated structure, and clear lines of authority, campus stakeholders can only comply with the procedures they are aware of and understand. In a decentralized institution, where so much depends on faculty, effective communication is particularly relevant. Administrators need to find ways to make faculty aware of the rules and the reasons behind them. Successful communication will differ from campus to campus. Newsletters, electronic periodicals, e-mail, and announcements at faculty meetings can all help. However, personal meetings with faculty and students—individually and in groups—are almost always the most effective approach. In addition to informing stakeholders of the procedures and the reasons behind them, such face-to-face discussions allow systems to grow and adapt, according to the people who work with the rules.

It is an exciting time for internationalization in higher education. Most experts are predicting increasing international engagement at many universities worldwide. With increasing engagement, however,

comes the need to recognize that staff and institutions as a whole have increased exposure. As a result, university leaders must establish well-articulated structures and procedures that are followed throughout the university—so that internationalization continues to thrive.