


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

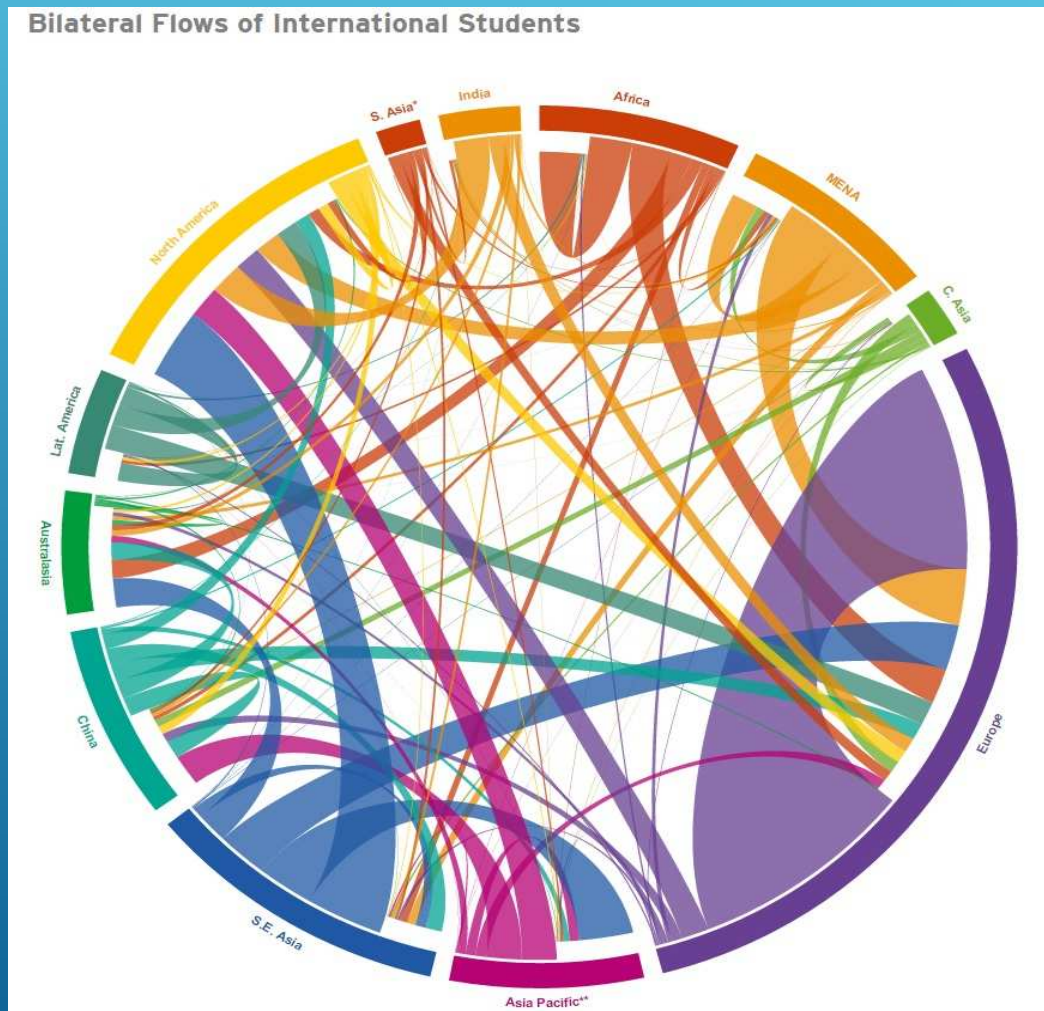
WORLDWIDE TRENDS IN HIGHER EDUCATION

- ▶ 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

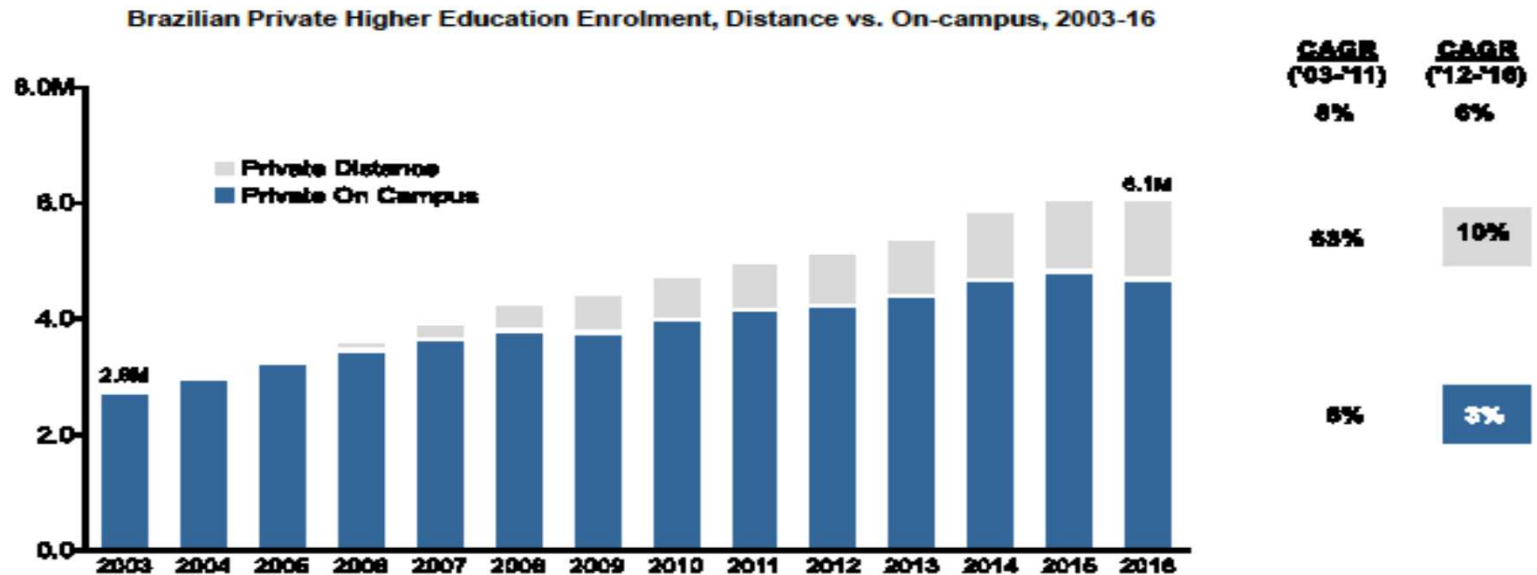
THE INTERNATIONAL HIGHER EDUCATION ENVIRONMENT: STUDENT MIGRATION



INTERNATIONAL HIGHER EDUCATION TRENDS: BRAZIL AS AN EXAMPLE

Context - Higher Education Market Dynamics

Distance education, long a staple of the US and some EU markets, is showing signs of growth in emerging markets



Strong online operations will be required across most to all geographies within the next five years

U.S. HIGHER EDUCATION ENVIRONMENT



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



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-US 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 (particularly 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.

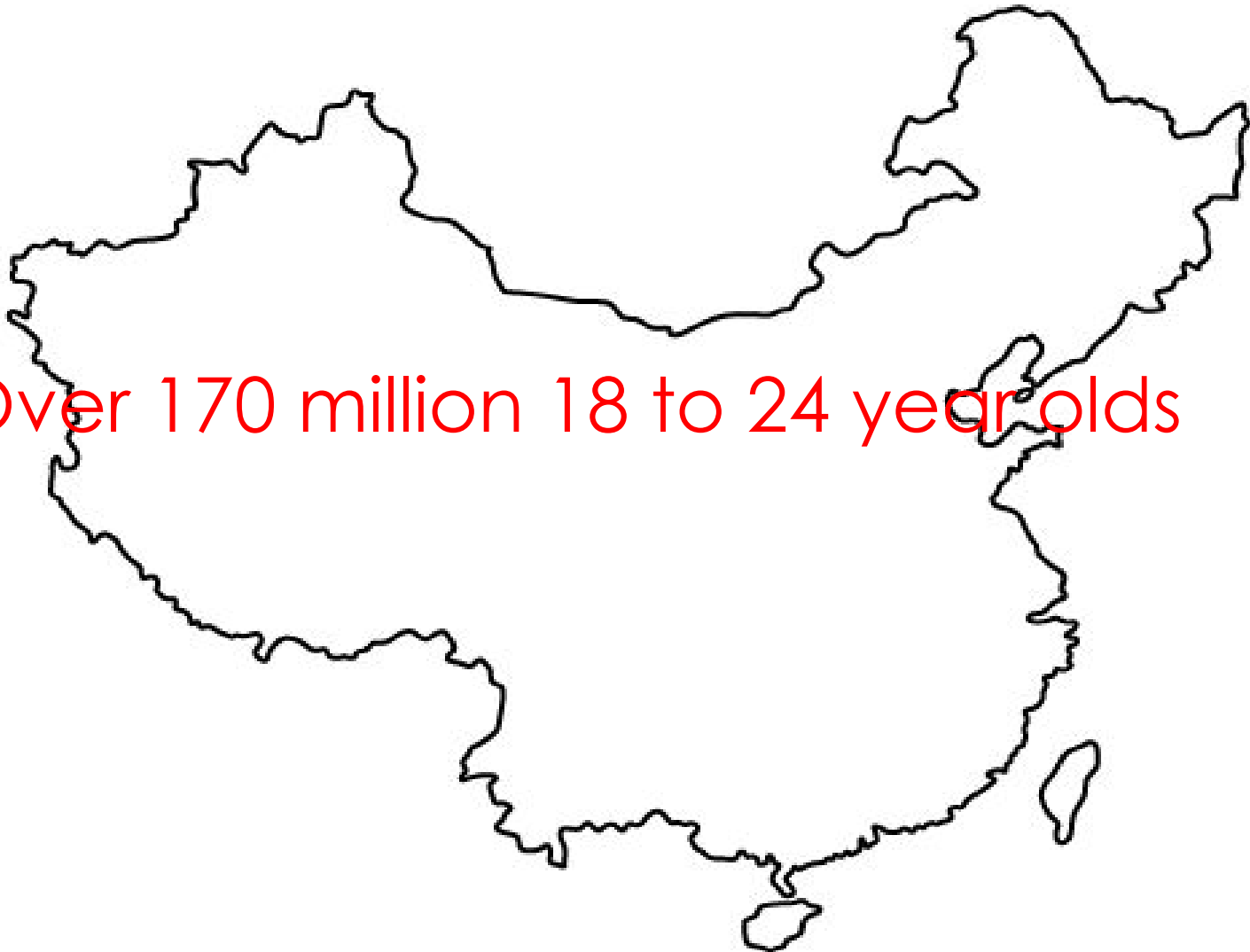
- ▶ Data protection laws vary significantly from country to country
 - ❖ U.S. institutions must obtain prior written consent from students to collect and maintain personal information on U.S. servers
 - ❖ EU's strict privacy regime (GDPR) effective May 2018
- ▶ Many countries tax students and institutions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

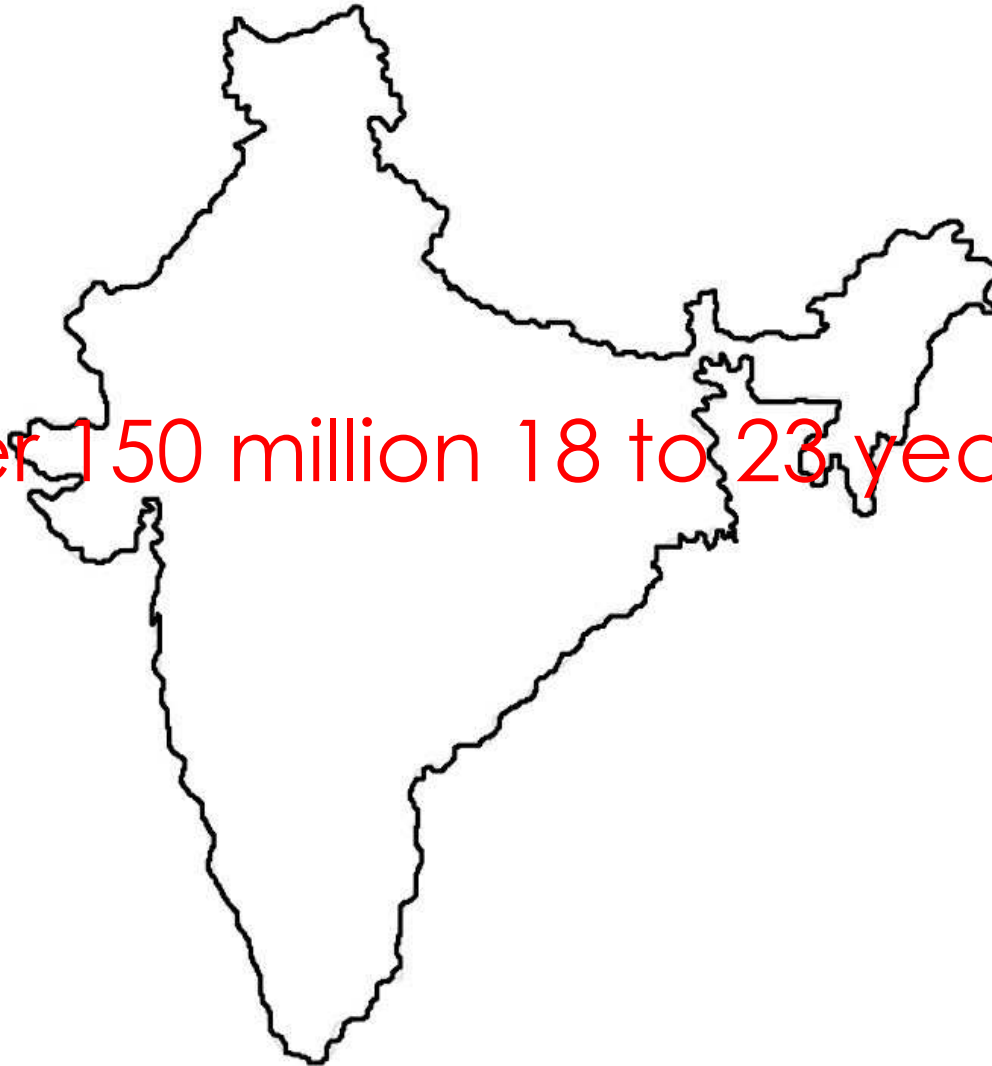
- ▶ Technically not “open”
 - ❖ But there has been no effort so far by the Chinese government to prohibit offering online courses to Chinese residents
- ▶ Online degrees issued by non-Chinese universities are not officially recognized

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

Over 150 million 18 to 23 year olds



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

greg.ferenbach@hoganlovells.com

pthompson@cooley.com

Joan.bouillon@pearson.com

THANK YOU