

Background Paper

Recruitment Agents: A Legal and Regulatory Overview

Chris Chang
Academic Services Directorate
Brunel University
June 2013

Contents

1. Introduction – the context
2. The Agency Relationship
3. The Agreement between the Principal and the Agent
4. Types of Agreement
5. Recruitment Agents
6. Obligations Arising from the Agency Relationship
7. Terms of the Agreement
8. Termination of the Agency Relationship
9. Recruitment Agents who are not Agents
10. Quality Assurance Agency - the Guidance on International Students studying in the UK and other Codes of Practice
11. UKBA requirements
12. Bribery Act 2010
13. Conclusion

- Appendix 1 Sample Clauses for Agency Agreements
Appendix 2 Guide to good practice for education agents
Appendix 3 The London Statement – Joint statement of seven principles by Education officials from UK, Australia, Ireland and New Zealand

The legal overview presented in this document is intended as a general guide and is not intended to, nor can it ever, replace legal advice from the institutions' legal advisers. If in doubt, please ensure that appropriate legal advice is taken before proceeding with any course of action. A guide of this nature cannot also cover all the issues to the depth that a legal text book or course may do. There will, therefore, be some gaps in the coverage of the issues. This will be dealt with by the workshops that are being organised by the British Council. The views presented here do not necessarily represent the views of the British Council or of the University which the author works for.

Recruitment agents – a legal overview

1. Introduction – the context

It is clear from feedback gathered from Higher Education institutions that apart from a very small number of Russell Group Universities, most institutions use agents as part of their marketing strategy for the recruitment of overseas students. An investigation by the Times Higher Education in 2012 indicated that more than 50,000 international students (out of a total of 174,225 non EU students enrolled in higher education courses in 2010-11) studying in the UK were recruited through commission based agents (Times Higher Education 5th July 2012). In Australia it is estimated that around 50% of international students are recruited through recruitment agents. It also suggested that the 100 Universities spent close to £60 million in commission payments in 2010-11. One University disclosed that in that year it had paid £2.2million in commission payments whilst another has recently disclosed it had paid £1.2 million. A University based in the South East of England has disclosed that it had enrolled 2,461 students through its agents. This indicates the scale in which recruitment agents are being used by institutions in the UK in supporting its marketing strategy to recruit international students in order to meet in some cases an ever increasing target.

As a result of the introduction of the £9000 tuition fees for home/EU students coupled with a reducing student number allocated to institutions by HEFCE under the SNC (Student Number Controls) there will be a continued pressure on institutions and its international recruiters to recruit more international students. As institutions continue to explore and use different recruitment strategies including more sophisticated use of social media, as well as increasing their market coverage, what remains constant since this legal overview was first published in 2003 is the continued use of recruitment agents by institutions.

The manner in which institutions are working with recruitment agents are becoming increasingly sophisticated whether in terms of how they work with them or in terms of the commission/incentives that are given to recruitment agents in order to deliver the required numbers. Will Archer the Chief Executive of i-graduate is quoted in the Times Higher Education article as saying that 'commission payments inevitably lead to conflicts of interest but agents could still fulfil an important role if they guided students towards the right course'. Vincenzo Raimo, the Director of the International Office at the University of Nottingham has however stated in his blog for the Universities UK (5th March 2013) that *'agents are incredibly important to [Universities]. We use them because they are effective in helping us to meet volume, income and other student recruitment related targets by, among other things, giving us access to markets that we find difficult to recruit from directly – places like Pakistan and Nigeria, for example. And because in some countries, like India and Taiwan, it is normal for prospective students to use an agent or educational counselling service.'* Further, Markus Badde CEO of ICEF GmbH (ICEF Monitor 22nd May 2013) has suggested that *'...for students and their parents, agents are important local advisors who provide support for the complex decisions and processes associated with study abroad. For institutions, agents represent a cost-effective way to recruit internationally and to establish a local presence in markets abroad. In many cases, they are also an important extension of institutional support services for prospective and incoming students.'*

Where agents are appointed, trained and managed in the right manner, the risk in using recruitment agents as part of an institution's marketing and recruitment strategy can be minimized and mitigated. Clearly it will never be possible to totally police or control human behavior but if appropriate operational and legal safeguards are put in place then at the very least the institution has discharged its obligation to its students and their parents. In fact the use of recruitment agents by institutions is recognized by the Quality Assurance Agency (QAA) in its Guidance for UK HE providers entitled 'International Students studying in the UK' and prescribes certain processes and procedures that UK HE providers should undertake as part of its duty to the students – see later.

The practice of using recruitment agents varies to a large extent with some institutions having a large number of agents in each of their markets and overall whilst some have a few or none at all. The

approach being taken by each institution is clearly dependent on a variety of factors including its international marketing strategy as may be appropriate for that institution.

As the use of agents for the recruitment of overseas students is a challenging activity it is clear that institutions would like some guidance on the legal and an increasing regulatory aspects of this type of relationship. Vincenzo Raimo has suggested in his blog that there is now a need for UK Universities to give greater scrutiny to their work with agents. It is in that context that this legal and regulatory overview is written.

In an increasingly litigious society it is important that institutions take such steps as are necessary to minimise exposure to liability. The fact that a particular practice may have developed in this area of work and appears to be the norm may not necessarily mean that it is legal nor that it would stand up to legal challenge. Institutions need to weigh the commercial benefits against the legal risks and decide whether the risk is worth taking. The purpose of this overview is to enable staff working in this area to assess whether such risks are appropriate for them to undertake on behalf of their institutions.

The overview provided is in the context of the law of England and Wales. Please be aware that Scotland and Northern Ireland have separate legal systems. Institutions should note that this general guidance is also subject to the laws of the market in which they operate.

2. The Agency relationship

The agency relationship has been defined as *'the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should so act as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts on his behalf'* – **Boustead and Reynolds on Agency (16th ed.)**.

It should be noted that whilst the basis of the relationship is normally based on the consent by one allowing the other to act for him, this is not necessarily true in all cases. There are situations, for example, in cases of apparent and presumed authority that an agency relationship arises where there is no consent and in some cases is in fact contrary to the wishes of the principal¹.

There are different types of agency relationships and as is apparent from the definition referred to above, in a normal case the agent usually has the authority to affect the legal position of the principal ie to enter into a contract on the principal's behalf. However, the ability to alter the legal position of the principal is not a prerequisite of the agency relationship. In fact there are some agency relationships that do not authorise the agent to alter the position of the principal or are not agents in law. Examples of these are as follows:

- Authorised car dealers – although these are often referred to as agents of the car manufacturers, the relationship is not an agency in the strict sense of the word. Car dealers would often buy the cars from the manufacturers which they then sell on to the consumer. In this situation the car dealer is actually selling as the principal to the consumer. Where the term 'sole agent' is being used, it is usually taken to mean a sole distributor rather than an agent in the strict sense.
- Estate Agents – estate agents are often only authorised to refer potential purchasers to the vendor/principal and are not usually authorised to enter into a contract of sale on behalf of the principal. The estate agent is an agent in law but has only limited authority in acting on behalf of the principal.
- Advertising agents – these are not usually regarded as agents when they place advertisements on behalf of its clients. This is because the agent is normally liable for the cost of the advertisement and will seek reimbursement from the client together with its fees.

The position of recruitment agents used by institutions would similarly fall in the category of agency relationships where the agent does not normally have the authority to alter the position of the principal (see below). Whilst both the estate agents and recruitment agents are described as agents in the commercial sense they are not agents in the legal sense as previously defined. The way to describe

this is that whilst they carry on the business of an agent they do not and cannot contract as an agent for example in the way that a forwarding agent would do so on behalf of its principal.

The recruitment agent is defined 'as an individual, company or other organisation providing services on a commercial basis to help students and their parents gain places on study programmes overseas' (*Education UK - Developing the UK's International Education Agent Network, Education UK, British Council, prepared by Jean Krasocki, 2002*). This is the definition that has been used by the QAA in its Guidance for UK HE providers entitled 'International Students studying in the UK' and will be used in this Overview.

Before we look at the agency relationship it is important to consider the basis upon which the legal relationship arises, namely the agreement between the parties.

¶ In this guide, the term principal is usually taken to refer to the institution and the agent refers to the recruitment agent appointed (or not as the case may be) by the institution.

3. The Agreement between the Principal and Agent

There should be a formal agreement signed between the principal and the agent. As a general principle, agreements should achieve three main objectives:

- To provide clear guidance for each of the parties involved regarding their expectations, roles, responsibilities and obligations.
- To set out the criteria for measuring the success of the relationship and the process of review.
- To deal with the situation when things go wrong with the agency relationship and there is a need to terminate the agency agreement.

An agreement represents a formal relationship between the parties, but will not replace the need to develop an effective working relationship with agents. Building trust is an important element of this relationship but must be based around sound business practices.

From the agents' perspective, the agreement may also be valued as confirmation of their position as a selected representative of an institution. Some institutions already provide certificates of representation to be displayed in Agents' offices. If institutions wish to do this, it would be advisable to include the dates and/or duration of the agreement. (see later section on length of agreements and review periods). The certificates of representation should be signed by the person authorised to sign such documents in the institution. Heads and Directors of International Offices should check whether they have such authority within their institution. In most institutions the official signatory is usually the Vice Chancellor/Principal/Rector/University Secretary and practices vary as to the authority of the Head/Director of International Office. The authority to sign such Certificates can of course be delegated to the respective Head/Director. If in doubt – check!

Care should be taken as to what is stated on the Certificate – most institutions state that the agent has the authority only to provide information on courses and assist the student with their application. However, some do not specify this clearly and as the certificate represents to others that the agent is an agent of the University it could be construed as giving the agents wider powers than was intended.

As the aim of an agreement is ultimately to achieve a successful partnership, it is in the interests of UK institutions to ensure that agents understand them properly. It would be inadvisable for the individual representing the institution to go through the details of the agreement with the agent. At most, the representative should do no more than to go through the general intent behind the agreement. Even where the representative may be legally qualified, it would be best to advise the agent to get independent legal advice so as to avoid any ambiguity or allegations of undue influence, misrepresentation or conflict of interest. Legal agreements are often drafted in terminology with

technical legal meaning. Although attempts are often made to draft the agreement in more user friendly language, technical legal language cannot be avoided. Hence, in order to avoid any ambiguity or confusion, it is better to place the onus on the agent to seek independent advice. Institutions should be advised to ensure that the agent does genuinely understand any critical issues contained in the agreement.

It is important to state the responsibilities of each party to the agreement so that each is clear what is expected of them. Clarity also helps institutions to monitor the operation of the agreement, and ultimately to measure its success.

4. Types of Agreement

Informal Agreements – As a general rule it is inadvisable to operate with informal agreements - the roles, responsibilities and duties are usually unclear. Agents representing institutions have the ability to expose institutions to liability and as they are the institution's agent, the institution would be responsible for the agent's acts or omissions. Hence informal agreements must be avoided. In an increasingly litigious society, it is inadvisable to rely on a gentleman's agreement. More importantly with the requirement of the UKBA for institutions to provide details of the agents they work with for the Tier 4 SMS system, institutions will need to have a formal agreement in place.

In addition the QAA Guidance makes clear that institutions should undertake proper due diligence and ensure that the agents are ethical and responsible. The use of informal agreements has been used in the past in order to assess the agent's suitability but this would be contrary to the guidance given above. As such if the due diligence etc has been carried out there is no reason to use an informal agreement.

Similarly, ad hoc arrangements should be discouraged, i.e. agents who have not been appointed as agents sending applications to the institutions – see later.

Interim agreements - Some institutions make use of interim agreements in situations where markets are new to UK education or to the institution, and reliable information is difficult to obtain. These offer the opportunity to test the potential of the market. As with other agreements, clear guidance regarding expectations, roles and responsibilities should be included. Institutions that have operated with interim agreements questioned the value of one year arrangements having found that this was not really enough time to evaluate a market properly. If both the market and the agent are new to the institution, additional effort is likely to be required to ensure a successful outcome. A review during the first year, rather than at the end, may be more effective.

As an alternative to interim agreements, institutions could use their normal agency agreement that contains a termination clause in the agreement. This will enable the institution to evaluate its position in the market from time to time and withdraw from the arrangement or the market if it so decides.

Exclusive, Selective or Non-restrictive Arrangements - Exclusive agreements, where an agent acts only for that institution, may be used. This may be more appropriate where the agent is involved in additional activities such as supporting distance or remote teaching, or in a high level of promotional activity. In such cases a retainer, or retainer plus commission, is likely to be paid rather than commission only. Most institutions seem happy to operate on a non-exclusive basis for recruitment but with some say as to the overall portfolio of the agent i.e. a broad spread enables the agent to operate a successful business while minimising the likelihood of conflicts of interest. In some cases agreements will require agents to seek approval before entering new partnership arrangements. It may be advisable to word these sections so that agents need to reveal discussions with potential competitors as soon as initial contact is made, rather than later on in the process. This allows the agents some flexibility to expand their business while protecting the position of the existing partners.

There is also a variation in practice regarding exclusivity for agents, with some institutions operating with a number of agents recruiting on their behalf in any market whilst others choose to work with one or a very small number of agents. Ultimately, the decision whether to work with one or multiple agents is a matter for each institution in the context of their marketing strategy for that market. There are indications from the survey that institutions are now taking a more strategic approach to the use of agents, with a number already going through some degree of rationalisation.

5. Recruitment agents

In the majority of cases, recruitment agents used by educational institutions are given very limited authority to act on its behalf. Normally, the agency agreement does no more than to authorise the agent to provide information on the institution and to assist the student in making an application to the institution for a place on its courses (together with collateral matters such as assisting the student with the accommodation application, completion of airport meeting service and orientation programme forms). The contract is made between the institution and student through the offer letter issued by the institution and the acceptance by the student with the recruitment agent acting in no more than an intermediary role.

In essence, the type of agency that arises is analogous with the estate agency and therefore a number of the principles applicable in the estate agency situation can be applied to recruitment agents. As mentioned earlier whilst they are agents in the commercial sense they are not agents in the legal sense.

The scope of the agent's authority

The scope of the agent's authority is derived from the authority that the principal vests in the agent or by operation of law. There are different aspects of the agent's authority. These are as follows:

Actual Authority

Express Authority

[a] Usually derived from the contract between principal and agent;

[b] Can be in writing or orally (unless agent authorised to execute deed on behalf of principal (which must be granted by deed) and no particular form is required. Important point to note is that the agency agreement can arise orally hence institutions should exercise caution when negotiating with potential agents to ensure that an agreement has not been reached if one is not at that stage intended.

The extent of the agent's express authority will depend on the interpretation of the agreement between the parties and in the case of an oral agreement, evidence of the existence of the agreement, its terms, and the interpretation of what was said. Where there is an ambiguity the court will apply various rules of construction including construing the deed/agreement against the maker of the deed/agreement, which in most cases would be the principal, in favour of the agent. The court may also imply terms into the agreement/deed in appropriate cases.

Implied Authority

This authorises the agent to do all collateral and incidental acts in order to carry out his duties under the agency agreement.

[a] Usual authority – this refers to such authority as is normal for the particular type of agents.

[b] Customary authority – this is authority which is derived from business usage or the locality/market.

An example of implied authority would be where the recruitment agent has only been authorised to assist the student in applying for a place at a institution in the agreement, the agent would have the implied authority to assist the student with the application for accommodation etc.

Apparent or ostensible authority

Apparent authority arises where the principal by his actions or words have given a third party the impression that the agent is authorised to do certain acts, then the principal is bound by those actions even though the principal has not authorised or has expressly prohibited the agent from so acting.

This type of authority arises where the agent is acting outside his authority as well as in cases where there isn't any agency agreement between the principal and the agent. The principle that operates here is intended to protect the innocent third party. In order for such an authority to arise, the following must be satisfied:

- [a] some representation, either expressly or by conduct, that the agent has authority to act on the principal's behalf;
- [b] representation is made by the principal to the third party;
- [c] the third party has relied on the representation – this is often evidenced by the fact that the third party has entered into the agreement with the principal.

For example, it is the practice in some markets for agents to send applications from students to institutions with which they have no agreement. If the institution accepts the application and makes an offer to the student that is accepted, this could give rise to the 'agent' having apparent authority to act on behalf of the institution. There is an exposure to liability in this instance, as the 'agent' may not have adequate knowledge about the institution, its policy and procedures etc and by accepting the application, the institution may be bound by representations made by the 'agents' which the student has relied on.

Some institutions have accepted such adhoc referrals from these 'agents' in the past. However, with the requirement of details of agents being put on the Sponsorship Management System of the UKBA under Tier 4, most institutions are taking a cautious approach to such adhoc referrals and not recognising the agent involved. In most cases it will not pay any commission to such agents in order to avoid the inference that it is working with the agent without a formal agreement (see QAA Guidance, below, which advises institutions to ensure that it has a formal agreement with the agent).

Essentially it is up to each institution whether they are prepared to take a risk in accepting such applications.

Ratification

Ratification arises where the agent has exceeded his authority to enter into a contract on the principal's behalf and the principal subsequently confirms the contract. The effect of the principal's action is to render the contract enforceable as if the agent was properly appointed and authorised. In most instances, this scenario would rarely arise with recruitment agents in this context. If it did most institutions would normally distance themselves from the actions of such agents.

6. Obligations arising from the agency relationship

[i] Duties of the agent

Compliance with Contractual terms: The agent is under an obligation to ensure that the contractual obligations are complied with. For example, if there is a clause ensuring that the agent keeps certain information confidential, any disclosure would be a breach of contract apart from a possible breach of its fiduciary duties (see below).

This duty would also encompass a duty to follow the lawful instructions of the principal even though they may be foolish unless they are illegal or unlawful. If the instructions are ambiguous then the agent has the option of choosing one interpretation over another – the principal will have to live with the consequences of his imprecision.

Duty of care: A duty of care is imposed on agents to ensure that they undertake their duties and obligations with due diligence. Even if this is not expressly stipulated, such a term will be implied by the courts into the agreement. The duty of care in this type of situation is an objective one, namely that the agent is under a duty to take such care and exercise such skill as may be reasonably expected under the circumstances of the case.

An example of the duty of care in the recruitment agency area would include the duty to ensure that proper references are supplied by the student in support of their application to study and would require the agent to inform the principal if the former had knowledge that the reference was fraudulent. Similarly, if the agent is aware that the applicant for a place at an institution is not genuine then, in the circumstances, such information should be disclosed to the principal.

The duty of care is to take 'such care as may be reasonably expected of it'. The issue would be whether the agent is under a duty to inform the principal if the agent merely has a suspicion that the references are fraudulent or the applicant is not a genuine applicant. The answer would be dependent on whether the agent has any evidence to support his suspicions. If all that the agent has are merely suspicions, then the argument is that the agent will not be under a duty to disclose this to the principal. If he does so and it turns out to be false, arguably the agent may be liable for defamation. If the agent has the appropriate evidence then the duty of care requires him to disclose the relevant information to the principal.

Ultimately, whether the agent has breached its duty of care will be a question of fact in each case. For those interested in looking up some law reports on this area of the duty of care, please see *Keppel v Wheeler [1927] 1 KB 577* and *Chaudhry v Prabhakar [1988] 3 All ER 718*.

Fiduciary Relationship: The agent is regarded as being in fiduciary relationship with the principal and as such fiduciary duties are imposed on the agent, beyond that which are imposed as a result of the terms of the agreement between the agent and the principal. These are usually duties that may or may not be stipulated in the agreement but are regarded as a normal part of the agency relationship. The fiduciary duties include:

- the duty to act in good faith;
- the duty not to delegate;
- the duty not to be in a position where the agent's duties conflict with his own personal interest;
- the duty not to be subject to bribes;
- the duty not to make secret profits from his position;
- the duty to account to the principal for any benefits received.

Duty to act in good faith: One of the fiduciary duties imposed on the agent is a duty to act in good faith. Hence, the agent is liable to disclose to the principal any information that may be relevant in influencing the principal in deciding whether to offer a place to a student or not. This is also linked with the general duty of care discussed above.

The question that arises in the recruitment agency context is whether the agent is under an obligation to disclose to the principal that the student has been referred to other institutions that the agent works with as well. Some agents would normally refer an application from a student to more than one institution. Anecdotal evidence suggests that this could be to eight or more institutions at any one time.

A relevant case is the case of *Kelly v Cooper [1993] AC 205* where an estate agent was appointed by A to see his house. Unbeknown to A, the same estate agent was also appointed by A's neighbour to sell his property. Both properties were subsequently sold to the same purchaser. A sued the estate agent claiming that the estate agent should have disclosed that the latter was also acting on behalf of

his neighbour and that a sale was being negotiated with the same purchaser so that he could have asked for a higher price. The court decided that although the estate agent owed a duty to A, the former also owed a duty to A's neighbour. Hence, the information relating to the sale and the price of the neighbour's property was confidential and the estate agent was not obliged to disclose this to A.

The difference between *Kelly v Cooper* and the recruitment agency scenario is that the same student's application is being sent to several institutions. It is argued that as an agent, the agent has a duty of good faith and this would include the agent informing the principal that the application is being referred simultaneously to other institutions although this would not extend to disclosure about the decisions made by the other institutions, the latter being confidential. Although most principals are aware that the student's application is being referred to other institutions, it is often unclear as to how many institutions the application is being referred to. Whilst the fact that the agent has helped the student to apply to numerous institutions this however cannot be the basis for rejecting the application as this would be contrary to most institutions' fair admissions policy. This is an area where institutions may have to work collectively to ensure proper disclosure by their agents. The reality is that most institutions would not have a problem with multiple referrals as this is recognised by institutions as being common practice in international student recruitment.

Linked to the issue of multiple referrals and the duty of good faith is the principle that the agent should ensure that it does not advise the student to accept all the offers it receives but only to accept one (except in the context of an UCAS application where the student can accept two offers – firm and insurance choice). In some instances it has been discovered that there was a practice where students accept multiple offers and institutions should work with their agents to ensure that the applicant is aware of the consequences of accepting more than one of the offers – namely that the student is in breach of contract if he or she does not subsequently take up the other offers. The agent who encourages the applicant to accept multiple offers could be liable in tort for inducing a breach of contract apart from also being in breach of the duty of good faith it owes to the other institutions. Fortunately this is not as common now as it used to be due to the regulations and codes of practice which now apply to this area of work and the professionalism in which international recruiters and agents now carry out their obligations.

Another aspect of the duty of good faith is the duty not to disclose any confidential information or documents that the principal may have entrusted to the agent. In essence the agent must not act to the detriment of the principal's interest. In the context of the recruitment agency situation, an example of this duty would include a duty on the agent not to disclose to a third party, the plans or negotiations of another of its principals nor to use this information for his own benefit and interest (see below).

Duty not to delegate: The agent is under a fiduciary duty not to delegate its office to another party. The reason for this is that the agency relationship is essentially built upon the trust that the principal has in the agent and hence in principle the agent cannot delegate his duties to another party nor to appoint subagents. *Lord Justice Theisiger* has stated that 'an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil...'.

However, there are exceptions to this rule. Delegation may be allowed where the delegation is of an act that is merely ministerial in nature and does not include delegation of discretion or confidence.

Similarly delegation is allowed where the appointment of a subagent is a usual practice in the trade in which the agent is engaged provided that this is not contrary to the terms of the agreement.

Delegation to a subagent is also permitted where at the time of the agreement, the principal was aware that the agent intended to delegate his office and the principal does not object to it. Other situations where the agent can delegate to a subagent include the situation where the circumstances of the case are such that it can be presumed that the agent was to delegate his office.

The question that arises in the recruitment agency scenario is whether agents are allowed to appoint subagents and if they do what the consequences are. In a number of countries, it would appear to be the normal practice to appoint subagents and institutions do not appear to object to this. Some of the standard agency agreements specifically prohibit the agent from delegation to a subagent and hence to allow it would be a breach of the agreement. If the employees of the institution are aware of this

and allows the delegation then it could be argued that institution may have waived its right to pursue a claim against the agent for unlawful delegation and breach of the agency agreement. However, the question is whether the employee who allowed the agent to delegate is authorised to do so. If not then the employee could be exposing himself to disciplinary action from his employer.

Where the delegation is unauthorised then by analogy with the position of estate agents, the recruitment agent will not be able to claim the commission as the recruitment was done by the subagent (see the case of *John Mccann & Co v Pow [1975] 1 All ER 129*). However some institutions may decide to waive the breach and nonetheless pay the commission to the agent. It is clear that there is no legal relationship between the institution and the subagent, and if the institution so chooses it may refuse to recognise the actions of the subagent. One consequence of this is where the agent appoints a subagent and subsequently the agent ceases to operate but for example, the subagent has taken a deposit from the student. The question would be whether the subagent is liable to account to the institution for the moneys received. As the subagent is an agent of the agent and not of the institution, then the argument is that the subagent owes no obligation to the institution and does not have to account for the deposit received (*Stephens v Badcock (1832) 3 B & Ad 354*).

If the institution decides that it wishes to allow the agent to delegate then this should be reflected in the agency agreement and appropriate undertakings and indemnities should be obtained from the agent to ensure that the subagent complies with similar obligations as that of the agent. This does not alter the fact that there is still no direct legal relationship between the principal and subagent. The possibility arises that there could be some liability for negligence against the subagent – however there is yet to be any authoritative ruling on this in English jurisprudence.

Duty not to be in a position where the agent's duties conflict with his own personal interest

As an agent is in a position of trust, there is therefore imposed on the agent an obligation not to be in a position where his interest conflicts with his duty to the principal. This could occur in the recruitment agency situation where the agent receives payment from both the institution and the student. Some institutions recognise this and it is reflected in the agreement between them. However it is dependent on the amount charged and the circumstances of such charges. Small amounts charged by the agents to the students to cover administrative costs are unlikely to be challenged on the basis of conflict of interests. However, in some countries it is the practice that agents charge a commission to the institution for the referral but at the same time would collect a fee from the potential student. In some cases the latter could be more than the commission payment. By analogy with estate agents, the latter is not allowed to claim payment from both the vendor and purchaser precisely because of the conflict of duty and interest. Similarly the argument in the recruitment agency situation is that institutions should refuse to work with agents who receive payments from both parties. The danger of working with such agents will be whether it would be possible to rely on bona fides of the application given the conflict involved. If the degree of trust is not present in the relationship, can there really be a true agency situation given that the basis of the relationship is founded upon trust. This type of situation makes fraudulent applications more likely and institutions should attempt to distance themselves from such a situation. To restate a point made earlier – the fact that it is the practice and appear to be the norm in a particular country does not necessarily mean that it is legal and may not stand up to legal challenge. More importantly if institutions cannot rely on the bona fides of the application it is then questionable as to why institutions are paying commission to the agent concerned.

Some agents regard the payment from the student as payment for visa consultation/advice. This would not negate the conflict and more problematic would be the danger that the agent is giving immigration advice to the student – institutions need to be cautious of the immigration legislation which prohibits the giving of immigration advice where the adviser is not properly authorised to do so. As the principal is responsible for the actions of the agent the issue would be whether the institution concerned would technically be regarded as being in breach of the immigration regulations where the agent gives immigration advice. It must be noted that the law is very strict in fiduciary situations – it presumes that there is conflict even if in fact there is none.

Duty not to accept bribes

This is obvious and need no explanation save that the agent is under a duty to pay over to the principal any such moneys received from third parties with whom they deal on behalf of the principal. The principal can in such circumstances instantly terminate the agency agreement and sue to recover the moneys (with interest) as well as any commissions paid to the agent arising out of the transaction that was the subject of the bribe. There will also be criminal liability on the part of the agent, the person offering the bribe and possibly the institution itself for failing to prevent such bribes – see later section on the ***Bribery Act 2010***.

Duty not to make secret profits from his position

The agent is under a duty not to make any profit beyond that it receives from the commission or other remuneration paid by the principal. Hence the agent is liable if it makes a profit as a result of property that has been given to him by the principal or from its position or from information or knowledge acquired whilst acting for the principal.

Where the agent makes a secret profit, the principal has the following remedies:

- Recover the secret profit from the agent;
- Refuse to pay the agent its commission or other remuneration;
- Dismiss the agent without notice and repudiate the contract;

Where the secret profit amounts to a bribe, the principal, in addition to the remedies mentioned above, can also recover the bribe or sue for damages for fraud – but the principal has to opt for which of these it wishes to claim, it cannot claim for both. It should be noted that the agent holds the bribe and any profits arising from it on a constructive trust for the principal.

[ii] Duties of the principal

The duties of the principal include:

To pay the agent its commission or other agreed remuneration.

Current levels of commission for commission vary from 10% to as high as 25% (and sometimes more in the ELT sector). So far only one institution (University of Nottingham) has publicised its commission rates. Although for some time the FE and HE sectors were relatively consistent in terms of rates, with 10% of the first year fees being most typical (although some are starting at around 12%), pressure on targets and competition between institutions has meant that it is now quite common for commission rates to be much higher than 10% or 12%. In some instances, the institution has offered commission rates similar to that being paid by Boarding schools i.e. that the agent will get commission for every year the student is with the school. Hence some institutions are paying a 10% commission in the first year of their undergraduate studies with a smaller percentage for the following two years. In other instances the institution may offer tiered commission to pay higher commission rates once the numbers recruited by the agent exceeds a specific number.

In the FE sector agents sometimes receive commission on a second year of study where students progress from EFL to A levels. Rates above 10% are sometimes used, either due to pressures in certain countries or, more positively, where agents are performing well. The ELT sector also offers rates between 10 – 20%, but with variation depending on the course of study. Rates of 15% are not unusual as the sector is very competitive. For Schools, 10% of the first year fee is also used, although this fee covers accommodation and other expenses, not just tuition. In cases where the agent continues to be involved during the child's attendance at the school, and acts as a liaison point for the parents, they also receive a 5% fee on subsequent years of study.

There are some concerns that a limited supply of good agents is putting upward pressure on commission rates. It can be argued that with ever increasing commission rates there is a danger that use of agents to support recruitment may become too expensive to justify.

It is worth stating here that UK institutions traditionally have had a poor reputation when it comes to payment of commission, and compare badly with, for example, Australian institutions. This has improved in recent years and institutions should continue to consider the ease and timing of payments, not just the amount.

Another development in this area has been the extension of the payment of commission to recruitment agents based in the EU as institutions face continued pressure to achieve its targets both international and home/EU. It is however clear that the institution has to ensure that any commission payments do not come from the HEFCE block grant but from its other sources of income. The practice in a number of institutions that use EU based recruitment agents to recruit EU and non EU students is to pay a fixed fee for the EU students typically between £600 – £900 depending on the course and level of study and the normal commission for non EU students. Given the increasing number of international students in some EU countries, having EU based agents may be advantageous.

Some institutions allow agents to collect fees on their behalf and deduct their commission at source. In most cases agents are expected to invoice institutions to claim commission for registered students. Where students pay fees by instalments, some institutions will only pay commission once the full fee is received. Some agents are paid their commission in instalments in line with the student payment by instalments. Although more cumbersome administratively, this does seem to be a more equitable arrangement. Ultimately, the amount of commission payable and the circumstances under which it is payable is dependent on the agreement between the parties. Generally, the court will not interfere and vary the terms of the agreement between the parties unless there is ambiguity in the terms of the agreement. The courts are reluctant to override the agreement between the parties.

Where the agreement is silent as to the commission payable, the court may infer such a term into the agreement depending on the circumstances of the case. However, before the court will infer such a term it will need to be satisfied that the parties must have intended that the agent be paid a commission for its work. In such circumstances the rate of commission that will be inferred will be what appears to the court to be reasonable on the facts of the case. The court may impose the customary rate of commission relevant to the particular trade or profession provided it is satisfied that it is certain and reasonable.

It is a general rule that for the agent to be able to claim the commission, the agent must not only have completed what he was appointed to do but must also have been the **effective cause**. This means that the agent must have been directly responsible for achieving the necessary result. Whether that has occurred in any particular case is a question of fact. The difficulty that arises is where agents are acting in competition with each other in the same transaction and the question is which of the agents is the effective cause for completing the transaction. In ***John D Wood & Co v Dantata [1987] 2 EGLR 23*** the court stated that it had to determine objectively whether either of the agents had by its introduction been the effective cause of the sale of a house. In that case, the court decided that the first agent had been the effective cause as it had effected the original introduction to the purchaser and later had managed to persuade the purchaser to raise his offer that the vendor accepted. In most of these cases, the first agent will usually have the upper hand and the second agent will be able to defeat the first agent's claim only where it can prove that there had been a true break in the negotiations.

Institutions should also be clear about whether they would allow their agents to claim for commission payments for students which the agent referred to prior to execution of the agency agreement i.e. whether they would allow retrospective claims. Apart from the fact that by doing so the institution would have ratified the actions of the agent, the difficulty is that the guidance from the QAA suggests that institutions should have completed the due diligence before working with the agent formally and as such the question is whether allowing agents to claim retrospective commission is evidence that the institution have been working with the agent prior to the completion of the due diligence or formal training has been provided? Although the QAA guidance is merely guidance only, it may be prudent for institutions to follow the spirit in which the guidance is given in order to avoid any possible issues in the future. However some institutions may take a risk based approach to this and decide the risk is one in which they are prepared to take as a commercial decision. That is a decision for the institution itself.

Although unusual, there could be a situation where two agents are entitled to be paid commission arising from one transaction. The courts then prefer to find the one effective cause for a transaction but as was suggested in ***Lordsgate Properties Ltd v Balcombe [1985] 1 EGLR 20***, the court may find that both agents were instrumental in the sale or where two agents were simultaneously

appointed but on different terms both of which were subsequently fulfilled. The first situation is often unlikely to occur given the court's predilection towards finding a single effective cause. The second situation is more likely as was demonstrated in **Balcombe** itself. There, the first agent was appointed to 'introduce an applicant who purchases' the property whilst the second was appointed to be 'instrumental in negotiating a sale'. Although the first agent introduced the purchaser, the second persuaded the purchaser to increase his offer resulting in the sale. In the circumstances the court held that both were entitled to their commission as they had complied with the respective terms of their agreement. These principles would clearly apply to the recruitment agency scenario and it is therefore important for institutions to be able to determine whether a particular agent has been the effective cause for the student to enrol at the institution concerned. This would be a question of fact in most cases and may be difficult in cases where two competing agents are claiming their commission in respect of a particular situation.

Agent is entitled to reimbursement for expenses and an indemnity for loss and liability incurred whilst acting within its authority.

Where the agent is acting within the scope of its authority it can claim reimbursement for expenses and indemnity against loss and liabilities from the principal. In most cases the obligation to do so will be expressly provided in the agreement. In the event that such a clause is absent from the agreement, the court can infer such a term in order to give the agreement business efficacy. If the parties so wish they can exclude the right of the agent to be indemnified against loss, expense and liability. This would also normally cover situations where the agent is acting within his implied authority.

7. Terms of the Agreement

The terms of the agreement in most cases are quite standard covering issues such as duties of the agent, payment of commission etc. However institutions should also ensure that the agency agreement covers the following matters:

Licences and compliance with local laws

It is unlikely that institutions will have in-depth knowledge of political, legal or financial systems in the countries where the agents are operating. The agreement should therefore stipulate that it is the responsibility of the agent to ensure that they are operating legally, and that they are responsible for payment of any local taxes. However, there is an obligation on institutions to ensure that they themselves are operating legally within a market vis a vis the agent. Some countries have regulated the way agents operate in the market. For instance, in China, only agents approved by the government can legally operate in the market, hence institutions are obliged to work with such agents only and have to be registered with the Chinese Embassy in the UK. There is currently a practice of approved/licensed agents working with 'subagents' in this market and institutions forming agency agreements with the subagents. The legal position on this is unclear and institutions who do so take the risk that such an arrangement could be rendered illegal by the relevant authorities. Institutions are advised to proceed with caution when dealing with such 'sub-agents'.

Where a UK institution is registered for certain local activities WHICH INVOLVE THE AGENT, the onus can be placed on the agent to comply with local laws etc and for the agent to advise and indemnify the institution. However there should be an obligation on the institution to provide all the necessary information and documentation for the former to be done. Agreement would need to be reached regarding who should be responsible for any costs involved.

Duration of the agreement

It would be unwise to enter into any agreement that does not have a fixed duration, and does not clearly stipulate a review period and expected outcomes, where there is no termination clause. A termination clause allows the relevant party to terminate the agreement by giving appropriate notice. It is always advisable to have a termination clause even in agreements that specify that the agreement is for a specific duration of time. If there is no termination clause, then the ability to terminate the agreement depends on being able to establish a breach of the agreement. This requires the institution to have appropriate evidence of a breach, which is serious enough to give the institution a right to

terminate the agreement. The risk in such cases is that if the evidence is insufficient, then the institution itself will be in breach of the agreement and be liable for damages and/or other appropriate remedies. A termination clause allows the institution to end the agency arrangement, for example, where it wishes to rationalise its agents in a specific market or its marketing strategy has changed such that it may no longer wish to be associated with the agent concerned.

A typical termination clause will allow either party to terminate the agreement subject to giving either 30 days or more notice. It is also usual to agree to pay the agent commission for students referred to the institution prior to the termination even though the student may only enrol some time after the termination of the agency agreement. Most agency agreements are typically for periods between one to three years. One or two year agreements may be used where an agent or market is being tested, but otherwise three years, with an annual review and rolling cycle of renewal, may be appropriate.

However as suggested earlier, so long as there is a termination clause by giving notice in the agreement there is nothing wrong with an agreement which is for an unlimited duration. The agreements should go through an annual review in order to assess the effectiveness of the agent and the effectiveness of the institution's systems to support their activities. This may also help to highlight any significant changes in the market relevant to the institution.

Other costs and expenses

As additional costs may be incurred by the agent, it is advisable to stipulate what can and cannot be recovered from the institution. A common practice is to state that no other costs or expenses will be covered except by prior written approval.

Choice of Law and Jurisdiction Clause

It is important to stipulate in the agreement that the agreement is subject to, for example, the law of England and to the exclusive jurisdiction of, for example, the English Courts. The reason is that litigation in some countries can be expensive or uncertain and the remedies available may be far in excess of what would be granted in an English or Scottish court. If the agreement is silent on this then it can give rise to an issue relating to the jurisdiction where the case ought to be tried and the applicable law. This could be based on a number of factors including the nationality of the parties, where the contract was made etc. For example, imagine the situation where the institution from the UK, the agent is a Malaysia registered company and the agency agreement allows the agent to recruit in Malaysia and Indonesia. If a dispute arises over a student recruited in Indonesia the question then is whether the English, Malaysian or Indonesian courts have jurisdiction. This is a complicated issue with no easy solution. To avoid this ambiguity most will have a choice of law and jurisdiction clause in the agreement particularly in cases where the institution appoints a global agent or agent with offices in multiple jurisdictions.

Intellectual Property rights

The agreement should also contain a term where the institution retains the intellectual property rights over its materials as well as any material published by the agent in relation to the institution concerned. For instance, if the agent translates a prospectus or prepares a leaflet or brochure in respect of the institution, provision should be made as to who retains the copyright in the material ie whether it is the agent or the institution. Disputes have arisen where this has not been made clear and there has been litigation between two agents in one particular country over the copyright of some translated publicity material. The use of the logo and name of the University should also be strictly controlled to ensure that it is used correctly. Most agreements do stipulate that the agent cannot use the logo or name of the institution unless there is prior approval in writing. Also stipulation in the agreement should be made as to the prior approval of any publicity material.

Notification of student complaints

Whether or not it should be included in a formal agreement, institutions would be advised to follow the practice of one institution in setting out a procedure for the handling of complaints. This puts the onus on the agent to advise of any difficulty at the earliest possible stage. As any unresolved problems are

potentially damaging to the reputation of the institution, a speedy response should be made once a problem is highlighted.

Termination of agreement where agent faces financial difficulties

In some instances, institutions include a clause that the agreement would be terminated where serious financial difficulties were encountered (ie not payment of debts, bankruptcy, receivership, etc).

Change of ownership of agency

Some protection is needed in the event of an agency changing hands. Specific reference may be made to the agency being sold to a party involved with competitors, or to a person/persons with whom they did not wish to associate as a basis for the termination of the agreement.

Criminal activity

The agreement should also contain a clause protecting the institution in the event of an agent, or an employee of the agent, being involved in criminal activity.

Data Protection and Freedom of Information Act 2000

As the agent will be processing data covered by the Data Protection Act 1998 and regulations it is important that the agreement contains appropriate safeguards to ensure that the agent complies with the law. Appropriate indemnities should also be obtained in the event of any breach.

In addition some provision for disclosure of information on receipt of Freedom of Information Act 2000 (FOI) applications should be included in the agreement. This is so that the agent is aware that institutions in the UK are subject to the FOI and hence will need to disclose information if the reasons for non-disclosure do not apply in that instance.

Visiting the UK

Institutions may require agents to visit the UK for familiarisation. If organised well, this can be a very effective way of developing agents' understanding of how the institution operates, and the range of 'products' available. If this is a requirement, then it should be included in the formal agreement. There should also be clear understanding as to who is responsible for meeting the costs involved.

Practice does seem to vary, with some agent visits being fully supported, while others receive a contribution to costs or are expected to fund the trips from their commission.

8. Termination of the agency relationship

The agency agreement can be terminated by the operation of law in the following circumstances:

- Becoming an enemy of the state – the relationship ceases because the law prohibits any dealings with an enemy.
- Where the agency is an individual or a partnership, on the death, bankruptcy or mental incapacity of the individual.
- Where the agency is a company, on the winding up of the agency.

The agency relationship can be terminated by the parties by mutual agreement. It can also be terminated by the revocation of the authority of the agent by the principal. If this revocation is in breach of the agreement then the principal would be liable to pay damages or be subject to other remedies.

9. Recruitment agents who are not agents

In order to avoid the possibility that the recruitment agent is an agent of the institution some institutions stipulate in the agreement that the recruitment agent is not an agent of the institution at all. The advantage of such an arrangement is that the actions of the agent will not bind the institution or principal. The disadvantage is that as the 'recruitment agent' is not an agent then the law will not imply the appropriate fiduciary duties as they are not in a fiduciary relationship. Institutions can impose such fiduciary obligations by contractual means ie by including the various duties as a term of the agreement between them. A breach of the term would be a breach of contract giving rise to appropriate remedies for the institution.

At this stage, it is unclear if the differences between the two types of arrangements are appreciated by the parties.

10. Quality Assurance Agency - the Guidance on International Students studying in the UK and other Codes of Practice

As mentioned in the Introduction, the Quality Assurance Agency has issued guidance to Higher Education institutions in respect of its activities in the recruitment of international students (http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/International_students_guidance.pdf). Whilst this does not form part of the QAA Quality Code it would be prudent for institutions to ensure that its activities match with the Guidance that has been provided. The key aspects of the Guidance in respect of the use of recruitment agents by Higher Education institutions are as follows:

Where an education agent acts on behalf of the institution, the ... onus is considered to rest on institutions to satisfy themselves that agents and representatives working on their behalf are acting ethically and responsibly.

Institutions contracting the services of external agents should ensure that due diligence is undertaken during the selection process and that all reasonable effort is undertaken to ensure that the agency is reputable and competent in UK higher education advising. Institutions may wish to consider incorporating the British Council Guide to good practice for education agents as part of their legal contracts with agencies.

Institutions should regularly review, support and train their appointed representatives.

Institutions are encouraged to reflect regularly on the service and support provided by agents and appointed representatives and, in recognising the significance of the role played by third parties acting on behalf of the institution, should actively manage these relationships in support of students' experiences.

Institutions may wish to consider making publicly available an up to date list of all accredited representatives used by the institution and provide signposted information on appointed agents for international applicants.

Institutions should seek feedback from students who have engaged with external agents prior to enrolling at the institution and have in place means of acting on this feedback where appropriate.

The QAA guidance makes it clear that agents are subject to the same principles as are set out in the Guidance as they apply to Higher Education institutions. Hence it imposes an obligation on institutions to ensure that proper due diligence is undertaken and that the agency is ethical responsible. The manner in which the due diligence is undertaken will vary from institution to institution but best practice indicates that the following steps are undertaken:

- Completion of a detailed agency questionnaire and verification of the information contained in the response;
- References from two or more institutions verifying the agent's activities;

- Visit to the agency's office in-country to meet with the staff concerned to ensure the bona fides of the operations;
- Checks with the local British Council or alumni or partner institutions to determine the reputation of the agency in particular whether they are an ethical, responsible and knowledgeable agency able to promote the institution in the proper manner in accordance with the guidance set out in the QAA Guidance;
- Regular visits to the agent and vice versa to provide training and monitoring of the agent's performance;
- Sampling of feedback from students recruited by the agent to assess if the agent is continuing to maintain the appropriate standards of behaviour and discharging its obligations under the agreement and the code of conduct.

In addition it should be noted that the QAA Quality Code for Higher Education has produced a draft Chapter B2 Recruitment and admission to higher education for consultation (May 2013). In this draft Indicator 2 states that *'Each stage of the recruitment and admissions cycle is conducted in a professional manner by duly authorised and competent representatives of the higher education provider'*. This would mean that institutions have to ensure that their recruitment agents are properly trained and are kept updated. Arguably this is can be demonstrated by having agents familiarisation training in the UK or training in the agent's offices when visiting the country and possibly by regular email updates and newsletters. The latter may be more difficult to use to establish Indicator 2. The issue is where the institution has a large number of agents and how the institution will be able to prove that they had provided appropriate training to the agents such that it can be assured that the agents are competent representatives of the University. Although this is only for consultation at this stage it is likely that the Indicator will not face substantial change. Hence, institutions should consider how they ensure the agents' competency in the lead up to their institutional review in the event this is examined during the review.

British Council Guide to good practice for educational agents: The QAA Guidance also suggests that the institution incorporates the British Council Guide to good practice for educational agents into its agreement with its agents – the Guide is appended herewith as Appendix 2. It has always been the case that the Guide did not provide any sanction and it was never the intention of the British Council to sanction or police the activities of recruitment agents. However by incorporating it into the agreement it becomes part of the terms of the agreement between the parties and is enforceable by the institution against the agent. As a result of this guidance institutions are now beginning to use the British Council Guide in both their agreements and as part of the resources it provides to its agents.

UKCISA Code of Ethics: Some institutions use the UKCISA Code of Ethics for those advising international students and require their recruitment agents to follow this code instead of the British Council Guide. They broadly achieve the same purpose in instilling a certain set of expected behaviours and conduct on the part of their recruitment agents and staff. The details of the code can be found at: <http://www.ukcisa.org.uk/files/pdf/join/code-of-ethics.pdf>.

The London Statement: In addition it should be noted that following talks in London in March 2012, education officials from UK, Australia, Ireland and New Zealand have issued a joint statement of seven principles for ethical international student recruitment. They are acting to improve the integrity of education recruitment agents and the statement is appended herewith as Appendix 3. The aim is to restore confidence in agents, who can be individuals, companies or other organisations, known by various titles such as student advisor, education consultant or representative.

It remains to be seen how the respective countries will implement this Joint Statement. It was said at the time that the countries will each work towards implementing the principles with the agents that they use and share information about their efforts at another international forum in 2013. In terms of how the countries will implement the principles, this will be decided by each country but is likely to be incorporated into training and communications with agents. At present there does not appear to have been any further development since the statement was issued.

11. UKBA requirements

The introduction of Tier 4 Points Based System and its subsequent changes in the regulations and guidance have had an impact on how institutions work with recruitment agents. In particular the risk of

using unethical and unscrupulous agents who recruit students to institutions but subsequently do not enrol or disappear after enrolment would put the institution's sponsorship status at risk. With most institutions having Highly Trusted Sponsor status and the risk that the licence to sponsor students under Tier 4 could be suspended or revoked, as in the case of London Metropolitan University, most institutions are tightening their appointment, management and supervision of its recruitment agents. In a large number of cases the institutions are only relying on their own properly appointed agents and not using ad hoc agents as well as being more cautious in working with new agents. Where students are referred to the institution by counsellors or non-appointed agents then usually no commission is paid in order to avoid being regarded as working with that particular agency.

The UKBA also requires the institutions to put on the Sponsor Management System, the details of agents it works with and as such institutions will only do so where the agents are properly appointed in order to avoid putting their institutional sponsor licence at risk.

This approach is similar to that being applied in Australia where Australian institutions have been using agents effectively for many years. However the change in their immigration laws with the Streamlined Visa Processing (SVP) will mean that Australian institutions will be similarly cautious when working with agents ensuring that they work only with ethical and competent agents. New agents will find it difficult to enter into the Australian market as Australian institutions will view new agents with caution.

12. Bribery Act 2010

Higher Education institutions are expected to conduct their affairs in a responsible manner, having regard to the principles established by the Committee on Standards in Public Life (formerly known as the Nolan Committee). As a result of this most if not all institutions will have a policy or code of conduct which covers the standards of behaviour expected of staff at all levels and would in most cases cover conduct such as probity and propriety; selflessness, objectivity and honesty. In their dealings with recruitment agents, staff would therefore be expected to maintain this standard of behaviour and to adhere to the policies or code of conduct as set out by their employer.

In most institutions this policy would also cover the acceptance of gifts and hospitality and the need to declare or seek approval before receiving hospitality over a specified value from any external organisation or individual and this would include the recruitment agent and its staff. It is very common for recruitment agents to host staff from the institution during their visits and this would often include going out for meals or other entertainment. Staff would need to be conscious that an expensive gift or lavish entertainment may be perceived as and used as bribes, and possibly made with the deliberate intention of improperly gaining a business. However, it should be remembered that this has to be balanced against reasonable gifts and entertainment offered openly in the normal course of business to promote good relations and mark special occasions and are not regarded as bribes nor in contravention of the institution's policy. In addition the cultural aspects of gifts in the countries that institutions work in need to be considered as the refusal of gifts in some instances can offend. A balance needs to be maintained and part of the skills needed to work in this area is the ability to be diplomatic without offending the other party.

An example of such a policy is an extract taken from an existing policy of an institution which has been published on the web:

A member of staff must not, either directly or indirectly, accept any gift, reward or benefit from any member of the public, educational establishment or other organisation with whom he/she has been brought into contact by reason of their duties, with the following exceptions:

- a. occasional gifts of a trivial character or inexpensive seasonal gifts (such as calendars);*
 - and,*
 - b. conventional hospitality, provided it is normal and reasonable in the circumstances.*
- In considering what is normal and reasonable, regard should be had to:*

- *The degree of personal involvement;*

There is no objection to the acceptance of, for example, an invitation to the annual dinner of a large trade or college association or similar body with which staff have day to day contact; or of working lunches (provided the frequency is reasonable) in the course of official visits;

- *The usual conventions of returning hospitality - The occasional acceptance of, for example, a meal would not offend the rule, whereas acceptance of frequent or regular invitations to private lunches, dinners or sporting or other events might give rise to a breach of the standard of conduct required; and,*
- *The total cost of hospitality - For example, the acceptance of travel or overnight accommodation in addition to the event itself should be taken into account.*

Valuable items [such as gold jewellery, expensive watches or airline tickets] received as gifts will be returned, or disposed of as agreed by the Director of Finance. Where the declining of a gift may give offence [e.g. at a public event] it may be accepted, but returned later with a letter of explanation or donated to charity. The giver should be told what has been done and why, to avoid gifts of value being presented on other occasions

Under the **Bribery Act 2010** it is an offence to:

- Bribe another person – Section 1;
- be bribed - Section 2;
- bribe foreign public officials - Section 3;
- fail to prevent bribery – Section 7.

The first three were already offences prior to the Bribery Act 2010 and do not require any further explanation. However the Act introduces a new offence in respect of an organisation which fails to take steps to prevent bribery and this would apply to educational institutions and its obligations to take steps to ensure that its recruitment agents do not take part in any practices which could be an offence under the Bribery Act. Section 7 of the Act states as follows:

7. (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending— .

(a) to obtain or retain business for C, or .

(b) to obtain or retain an advantage in the conduct of business for C. .

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

The steps required of an educational institutional in discharging this obligation would be to do such as is necessary to ensure that its recruitment agents are aware that they are not to be involved in any actions which would amount to bribery. Such an obligation can be included as one of the terms of the agreement or where the agreement has already been signed prior to the coming into force of the Act to incorporate this in its training to its agents and a formal notice being sent to the agents concerned. In order to be able to prove that it has taken appropriate steps to discharge its obligations, a record of the steps taken and who had been notified should be maintained.

The offences under the Bribery Act 2010 as stated above are corporate offences but also could incur personal liability. A Higher Educational institution found to have committed a bribery offence under the Act could face unlimited fines. More importantly the institution could come under scrutiny from the QAA and HEFCE. In respect of personal liability the individuals would be subject to a maximum of a ten year prison sentence and an unlimited fine.

13. Conclusion

Although there appears to be a myriad of regulations, rules and procedures to follow in working with agents, compliance with them collectively by institutions will ensure that the agents and institutions work in a professional manner and deliver an appropriate level of support and service to students and parents. From experience, where the relationship is managed professionally and boundaries are clearly understood by both parties, this tends to lead to an effective recruiter for the institution concerned. More importantly, professional agents tend to be in this for the long term and can be a positive promotional and cost effective marketing tool for the institution.

Appendix 1

Sample Clauses for Agency Agreements

These sample clauses are provided for your guidance only and you should always seek independent legal advice on the drafting of the agency agreement. The British Council and the authors hereby exclude all liability resulting from any use whatsoever of any of the clauses provided here. Usages of these clauses are at your own risk.

Appointment of agent clause

The Institution hereby appoints the agent to advise potential students on course entry requirements and on their applications generally and shall, if requested by the Institution, administer aptitude or such other tests as from time to time be required and carry out other investigations into the ability of applicants to benefit from, and succeed on, the courses for which they are applying subject to the terms and conditions herein contained. The agent shall not have any authority whatsoever, whether express or otherwise, to make any offer of a place to any student or students or to suggest to the student or students that the Institution will offer a place to the student. For the avoidance of doubt, the agent shall have no authority whatsoever to enter into any agreement or contract which may bind the Institution. The Institution is under no obligation to make any offers to applications referred to it by the agent and shall be entitled to reject any or all of the applications.

Confidentiality clause

The agent agrees that it will at all times (both during the term of this Agreement and after its termination) keep confidential, and will not use (other than strictly for the purposes of this Agreement) and will not without the prior written consent of the Institution disclose to any third party any confidential information as defined herein.

Confidential information is defined as information of a confidential nature (including trade secrets and information of commercial value) known to the Institution and concerning the Institution and the Products and communicated to the agent by the Institution.

Acting in good faith clause

The agent shall at all times act towards the Institution conscientiously and in good faith and comply with all reasonable and lawful instructions of the Institution and not to allow its interests to conflict with the duties that it owes to the Institution under this Agreement and the general law.

Payment of commission clause

In respect of each student registered on a full time course at the Institution, who pays the full time overseas students' fee, following an introduction to the Institution via the agent, the Institution shall, upon receipt from the student of the first year's tuition fee, pay to the agent 10% of such fee. In the event that the student's fee is reduced by reason of a fee waiver, scholarship or otherwise, the commission payable shall be calculated on the reduced amount paid by the student. The commission shall only be payable upon the provision of an invoice by the agent providing details of the students recommended by the agent to the Institution and the Institution shall thereafter endeavour to process the invoice for payment as soon as possible. The institution shall only be obligated to pay the commission once it has received the tuition fees from the relevant student.

Intellectual property clause

The agent acknowledges that the Institution's rights to the intellectual property used on or in relation to the Institution business and the goodwill connected with that are the Institution's property. The agent accepts that it is only permitted to use the intellectual property for the purposes of and during the term of this Agreement and only as authorised by the Institution and that it will not use any trade mark or tradenames or get-up which resemble the Institution's trade marks or trade names or get-up and which would therefore be likely to confuse or to mislead the public or any section of the public.

Deemed Termination clause

This Agreement shall be deemed to be terminated with immediate effect upon the occurrence of any one or more of the following events:

[i] The agent ceases or threatens to cease, to carry on business or there is a change in ownership or control of the agent with whom the Institution deems there to be a conflict of interest.

[ii] an order is made or a resolution passed for the winding up of the agent's business or an administrator or receiver is appointed by order of court or otherwise, or the agent takes or suffers any such action in consequence of debt.

[iii] a serious breach of any of the terms of this agreement has been committed by the agent and in particular any breach of confidentiality imposed herein shall be regarded as a serious breach for the purposes of this agreement.

[iv] The agent purports to assign any or all of this agreement to a third party.

Compliance with local laws and regulations

The agent shall ensure that it complies with the laws applicable to the (state countries or territory) and shall obtain all necessary permits, licences, permissions or approvals necessary and advisable for its business in the (state countries or territory). The Institution shall provide such assistance as is reasonable to assist the agent to obtain the necessary approvals, licences, permits or permissions.

Entire Agreement clause

This Agreement constitutes the entire agreement and understanding between the parties and no variation of it shall be effective unless in writing signed by or on behalf of both parties.

Waiver clause

The waiver by any party of any breach of any term of this Agreement shall not prevent the subsequent enforcement of that term and shall not be deemed to be a waiver of any subsequent breach.

Jurisdiction and choice of law clause

This Agreement shall be governed by English Law and the parties hereto hereby submit to the jurisdiction of the English Courts.

Replacement of previous agreements or arrangements clause

This Agreement supersedes and replaces all previous agreements, arrangements and understanding (if any) between the parties but shall not prejudice any rights which may already have accrued thereunder to any party

Service of Notice clause

All notices hereunder shall be served personally or by airmail post to the address given at the head of this Agreement for the party to be served or such other address as may be given by such party to the other for the service of notices. Any such notice shall be deemed sufficiently given if it is proved that the same has been duly committed to the post in a properly addressed and prepaid envelope. Notices sent by airmail post shall be deemed served five days after posting. Notices served personally shall be deemed served forthwith upon delivery.

Non agency or partnership clause

Nothing in this Agreement shall constitute or be deemed to constitute a partnership between the Institution and the representative or to constitute the representative as an agent of the Institution and accordingly the representative have no power to enter into any contract on behalf of the Institution nor issue any offers whether in writing or orally to potential students or applicants and shall indemnify and keep the Institution indemnified against any loss or damaged suffered as a result of any breach of this clause whether arising directly or indirectly.

Note: If the Institution does not wish to appoint the recruitment company as an agent then the phrase agent can be replaced by the name of the company or refer to it as 'the representative' or 'the adviser'.

Appendix 2



Guide to good practice for education agents

1. Agents shall at all times conduct themselves with integrity and in a manner that will reflect positively on the image of their profession and of their partner (UK) institutions as reliable and trustworthy providers of high quality education and training.

This standard of conduct underpins the others that follow and encompasses all aspects of agents' activities.

2. Agents shall promote themselves and their partner (UK) institutions in a professional and ethical manner and shall ensure that their business activities reflect best practice.

This standard of conduct refers both to ethical behaviour (doing the right thing) and to standards of professionalism (doing it well). Best practice means that an agent's business activities should not be of a kind that might bring discredit on their (UK) client(s) or UK education generally.

3. Agents shall be honest in communicating information about themselves, their partner (UK) institutions and potential students in published, oral or any other form. They shall not knowingly or by a failure of professional standards provide or disseminate false, incomplete or misleading information.

This standard of conduct is closely related to clause 5 and refers to any information released by an agent on behalf of its client institutions about facilities, entry requirements, admissions processes, course content, fees or any other matter. All claims made by an agent about itself, client institutions or students shall be capable of being substantiated.

This standard of conduct also applies equally to information provided about potential students in applications to client institutions and visa authorities.

In particular, information provided to potential students shall be sufficient to enable them to make an informed judgement. The inclusion of the word 'incomplete' in this standard is especially important: agents shall not in published or orally delivered information omit any fact which may reasonably be of material relevance to an international student, where an omission might be construed as being misleading.

The accidental production or dissemination of incorrect or incomplete information is likely to be viewed in itself evidence of a failure to adhere to professional standards, except where there is compelling evidence to suggest otherwise.

In summary, this standard requires agents to provide full, honest and accurate information about client institutions and the courses and facilities they offer.

4. Agents shall promote themselves and their partner (UK) institutions fairly and without recourse to unfavourable or negative comparisons with other institutions, or otherwise employ unfair or unprofessional practice to damage the interests of other institutions.

This standard of conduct refers to any attempt by agents to gain advantage for their clients by using information about other institutions negatively. Using verifiable data to show the standing of a client institution in relation to others is acceptable, but this practice shall not be executed in such a manner as to discredit other institutions. This means agents should promote products by focusing on the strengths and achievements of their client institutions rather than by making unfavourable comments about competitors.

5. Agents shall act at all times in the best interests of students or prospective students as well as (UK) partner institutions. They shall offer advice and counselling and provide information to students, and where appropriate their parents, in a manner consistent with this principle.

This standard of conduct is fundamental to good practice in education marketing and student recruitment. It refers not only to truthfulness and accuracy, but also to appropriateness. An example of inappropriate advice would be encouragement of a student to enter a course of study for which they were inadequately prepared in terms of language proficiency or academic attainment. The standard also includes advice or information given to sponsors of students and other such bodies or persons as well as directly to students. Again, the omission of salient information in an effort to secure the placement of a student is likely to be judged as a breach of this standard.

6. Agents shall conduct themselves with due regard to the regulatory conditions in the market(s) in which they operate. They shall comply with all applicable national laws, regulations and official policies.

7. Agents shall conduct themselves with due regard to the need for transparency and openness in all their dealings with client institutions.

Appendix 3

The London Statement – Joint statement of seven principles by Education officials from UK, Australia, Ireland and New Zealand

The London Statement's seven principles are:

- Agents and consultants practice responsible business ethics.
- Agents and consultants provide current, accurate and honest information in an ethical manner.
- Agents and consultants develop transparent business relationships with students and providers through the use of written agreements.
- Agents and consultants protect the interests of minors.
- Agents and consultants provide current and up-to-date information that enables international students to make informed choices when selecting which agent or consultant to employ.
- Agents and consultants act professionally.
- Agents and consultants work with destination countries and providers to raise ethical standards and best practice.