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Research

Higher Education

Opportunities for Foreign Educational Institutions in India

Strategic, Legal and Tax Issues

June 2022

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Educational Institutions in India**

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1. Introduction

India has one of the largest networks of higher educational institutions (hereafter “**Indian HEIs**”) in the world.¹ The higher education sector in India has been consistently growing as well - India’s Gross Enrollment Ratio in higher education had gone up to 27.1% in 2020-21 from 8.1% in 2001-02.² The number of universities and other institutions also witnessed a 30% jump from 2015-16 to 2019-20.³ Moreover, enrolments in Indian HEIs are expected to rise from 40 million students in 2020 to 53 million students by 2025, 70 million students by 2030 and 92 million students by 2035.⁴

This growth has been further fueled by technological advancements in the education sector – particularly the rise of online education in the Covid era. Not only this, but the Indian Government’s efforts towards expanding education in the past few years have also contributed. The regulatory landscape of higher education in India is constantly evolving to be more flexible, relaxed and self-governance driven, enabling opportunities in this space.

A key catalyst of policy change is India’s National Education Policy 2020 (“**NEP**”).⁵ It laid the foundations for internationalization of higher education and promotion of India as a global study destination. The NEP envisions opening doors for the entry of foreign universities in India. The University Grants Commission (“**UGC**”), which is India’s higher education regulator, has also formed a committee which is finalizing regulations that will enable foreign universities to set up campuses in India.⁶ Recently, India’s Minister for Education informed the Indian Parliament that two foreign higher educational institutions (“**FEIs**”) based out of Italy and France have shown interest in setting up campuses in India.⁷ On the other side, NEP also encourages high performing Indian universities to set up campuses in other countries.

The NEP lays impetus on strong collaborations between Indian HEIs and FEIs. There is focus on research, teaching, collaborations and faculty/student exchanges with high-quality foreign institutions. The NEP envisages execution of mutually beneficial MOUs between India and other countries for this purpose as well. There is also a proposal to increase research collaboration and student exchanges between Indian institutions and global institutions, which will result in the internationalisation of education in India.

It is also contemplated that credits acquired in foreign universities will be counted towards Indian degrees issued by Indian HEI. This is a new but critical proposal as it will make collaboration models a bigger success. There is also a push to have large multidisciplinary universities with a focus on research, liberal arts, skill-based, employment-oriented new-age learning. Institutions and faculties will have the autonomy to innovate on matters of curriculum, teaching and assessment within a broad framework of higher education qualifications that ensures consistency across institutions and programs, and across ODL (open and distance learning), online and traditional ‘in-class’ modes. The programs will also offer multiple entry and exit points for students, removing current widespread rigid course patterns. This will give greater flexibility to institutions with regard to program structuring.

In line with the vision of the NEP, in May 2022, the UGC has, for the first time recognised dual and joint degree programs between Indian HEIs and FEIs under the UGC (Promotion and Maintenance of Standards of Academic

1. See <https://www.ibef.org/industry/education-sector-india> (Last visited on May 19, 2022).

2. See 10th All India Survey on Higher Education (AISHE) for the year 2019-20, available at <https://aishe.gov.in/aishe/viewDocument.action?documentId=277> (Last visited on May 19, 2022).

3. Id.

4. See Slide 12 https://www.ibef.org/download/1650442073_education-and-training-ppt-feb-2022.pdf (Last visited on June 6, 2022).

5. See National Education Policy 2020, available at https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_o.pdf (Last visited on May 20, 2022).

6. See <https://www.moneycontrol.com/news/business/economy/ugc-forms-committee-finalising-rules-to-allow-foreign-universities-to-open-campuses-in-india-8518571.html> (Last visited on May 19, 2022).

7. See <https://indianexpress.com/article/india/two-foreign-institutes-want-campuses-in-india-govt-7830466/> (Last visited on May 19, 2022).

1. Introduction

Collaborations between India and Foreign Educational Institutions) Regulations, 2022 (**“Foreign Collaboration Regulations”**).⁸ This is a significant step towards fulfilling the internationalization project. The UGC had already issued guidelines on internalisation of higher education.⁹ A core objective of the guidelines was to promote linkage between Indian HEIs and FEIs. The guidelines also made references to credit recognition and transfer in twinning arrangements between Indian HEI and FEIs, which are now getting implemented under the Foreign Collaboration Regulations.

Moreover, in the Union Budget of India for 2022-23, which is the annual financial statement of the Government, the Finance Minister proposed that **“world-class foreign universities and institutions will be allowed in the GIFT City to offer courses in Financial Management, FinTech, Science, Technology, Engineering and Mathematics free from domestic regulations, except those by IFSCA to facilitate availability of high-end human resources for financial services and technology”**.¹⁰

The various progressive legislations, together with the opportunity that India offers, provide many options for FEIs to consider India. In this paper, we have analysed and discussed the regulatory landscape in India with respect to higher education. Our emphasis is on how this landscape provides opportunities to FEIs which are looking for potential collaboration and/or growth opportunities in India.

8. See UGC Foreign Collaboration Regulations, available at https://www.ugc.ac.in/pdfnews/4555806_UGC-Acad-Collab-Regulations.pdf. See also <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/5580/1.html> (Last visited on May 20, 2022).

9. A detailed analysis of the IHE Guidelines can be accessed on our hotline. See <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/4814/1.html> (Last visited on May 19, 2022).

10. See https://www.indiabudget.gov.in/doc/budget_speech.pdf (Last visited on May 19, 2022).

2. Regulators and Institutions

I. Key Higher Education Regulators

The regulatory structure in India's higher education ecosystem currently comprises of multiple governmental authorities. The NEP envisages that higher education will be regulated by a single, umbrella authority.¹¹ This was also echoed in the Union Budget of India for the year 2021-22.¹² The consolidation of regulators is expected to make regulation of higher education in India more streamlined and simplified. However, this may take some time.¹³ Under the present setup, the key regulators for higher education in India are as follows:

A. University Grants Commission (“UGC”)

The UGC was set up under the University Grants Commission Act, 1956 (“UGC Act”) to make provisions for the co-ordination and determination of standards in universities.¹⁴ UGC is the primary regulator for all degree programmes in India. As per the UGC Act, the right of conferring or granting degrees can be exercised only by a university or an institution deemed to be a university or an institution specially empowered to confer or grant degrees through a parliamentary legislation.¹⁵ The UGC Act empowers the UGC to make regulations in furtherance of its functions, including on minimum standards of instruction for grant of degrees, qualifications of faculty, etc.

The UGC has issued various regulations and guidelines on a wide variety of subjects, which govern specific aspects of higher education. For example, the UGC has specific regulations on online and ODL programmes¹⁶, collaborations between Indian HEIs and FEIs¹⁷, institutions deemed to be universities¹⁸, etc.

11. Paragraph 18 of the NEP states “Regulation of higher education has been too heavy-handed for decades; too much has been attempted to be regulated with too little effect. The mechanistic and disempowering nature of the regulatory system has been rife with very basic problems, such as heavy concentrations of power within a few bodies, conflicts of interest among these bodies, and a resulting lack of accountability. The regulatory system is in need of a complete overhaul in order to re-energize the higher education sector and enable it to thrive. To address the above-mentioned issues, the regulatory system of higher education will ensure that the distinct functions of regulation, accreditation, funding, and academic standard setting will be performed by distinct, independent, and empowered bodies. This is considered essential to create checks-and-balances in the system, minimize conflicts of interest, and eliminate concentrations of power. To ensure that the four institutional structures carrying out these four essential functions work independently yet at the same time and work in synergy towards common goals. These four structures will be set up as four independent verticals within one umbrella institution, the Higher Education Commission of India (HECI).”

12. See https://www.indiabudget.gov.in/doc/budget_speech.pdf (Last visited on May 19, 2022).

13. In 2018, the Draft Higher Education Commission of India (Repeal of University Grants Commission Act, 1956) Bill, 2018 was introduced in Parliament under which the UGC was sought to be abolished, and the HECI would be established in its place. However, the bill has since lapsed.

14. See University Grants Commission Act, 1956, available at https://www.ugc.ac.in/oldpdf/ugc_act.pdf (Last visited on May 19, 2022).

15. Section 22 of the UGC Act.

16. See UGC Online and ODL Regulations, available at <https://www.ugc.ac.in/pdfnews/221580.pdf>. See also <https://www.nishithdesai.com/Section-Category/33/Education-Sector-Hotline/12/42/EducationSectorHotline/5138/1.html> (Last visited on May 20, 2022).

17. See UGC Foreign Collaboration Regulations, available at https://www.ugc.ac.in/pdfnews/4555806_UGC-Acad-Collab-Regulations.pdf. See also <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/5580/1.html> (Last visited on May 20, 2022).

18. See UGC (Institutions Deemed To Be Universities) Regulations 2019, available at https://www.ugc.ac.in/pdfnews/1295001_DEB-Regulation-2019.pdf (Last visited on May 20, 2022).

2. Regulators and Institutions

B. All India Council for Technical Education (“AICTE”)

The AICTE was set up under the All India Council for Technical Education Act, 1987 (“**AICTE Act**”)¹⁹ with a view to ensure (i) proper planning and coordinated development of the technical education system throughout the country; (ii) qualitative improvement of such education in relation to planned quantitative growth; and (iii) the regulation and proper maintenance of norms and standards in the technical education system, and other related matters. The AICTE oversees technical education and the functioning of technical institutions within the country.

Under the AICTE Act, ‘Technical Institution’ refers to **“the institutions, other than universities, conducting the courses or programmes in the field of Technical Education”**.²⁰ ‘Technical Education’ is defined to include **“programmes of education, research and training in engineering technology, architecture, town planning, management, pharmacy and applied arts and crafts”**.²¹ The AICTE has been endowed with a wide array of powers under the AICTE Act such as regulation and proper maintenance of norms and standards in the technical education system, planning, formulation and accreditation of technical institutions, etc. Similar to the UGC, the AICTE has also issued regulations and guidelines with respect to technical education, including the procedure for grant of approval²², offering of online and ODL programmes²³, etc. Importantly, courses in technical programmes (except in architecture and pharmacy²⁴ and those offered by a university²⁵) cannot be offered without prior permission of the AICTE.

C. Statutory Professional Councils

Certain professional courses in India are regulated by statutory professional councils, in addition to the UGC. They are responsible *inter alia* for recognition of courses, promotion of professional institutions and providing grants for programmes. For e.g., the National Medical Commission (“**NMC**”) (which replaced the Medical Council of India vide the National Medical Commission Act, 2019²⁶ (“**NMC Act**”), is an umbrella regulatory body for regulating medical education and practices in India. NMC is, among other things, empowered to (i) frame policies for regulating medical institutions, medical researches and medical professionals; (ii) frame policies for maintaining high standards in medical education in India; (iii) frame guidelines for determination of fees and all other charges in respect of 50% of seats in private medical institutions and deemed to be universities; and (iv) ensure compliance by the State Medical Councils with the regulations and guidelines.²⁷

Similarly, the Bar Council of India (“**BCI**”),²⁸ Dental Council of India,²⁹ Indian Nursing Council,³⁰ etc., are some of the other notable councils governing the respective professions. These councils have been empowered to prescribe standards and formulate regulations in relation to their respective fields.

19. See All India Council for Technical Education Act, 1987, available at <https://www.aicte-india.org/downloads/aicteact.pdf> (Last visited on May 19, 2022).

20. Section 2(h) of the AICTE Act.

21. Section 2(g) of the AICTE Act.

22. See AICTE (Grant of Approvals for Technical Institutions) (1st Amendment) Regulations 2021, available at https://www.aicte-india.org/sites/default/files/Gazettee_of%20India%20-%20Regulations%202020.pdf (Last visited on May 20, 2022).

23. See AICTE Open and ODL Guidelines, available at <https://www.aicte-india.org/sites/default/files/aicte-odl-online-guidelines-2021.pdf> (Last visited on May 20, 2022).

24. Clause 3.1(a) and 3.1(g) of the AICTE (Grant of Approvals for Technical Institutions Regulations), 2020 (“AICTE Approval Regulations”).

25. Clause 1.4 of the AICTE Approval Regulations.

26. See NMC Act, available at <https://egazette.nic.in/WriteReadData/2019/210357.pdf> (Last visited on May 19, 2022).

27. Section 10 of the NMC Act.

28. See <http://www.barcouncilofindia.org/> (Last visited on May 19, 2022).

29. In January 2020, the Union Ministry of Health and Family Welfare put in the public domain the draft National Dental Commission Bill 2020, a bill aimed at replacing the Dental Council of India and replacing it with National Dental Commission. See the press release here <https://main.mohfw.gov.in/sites/default/files/Public%20Notice%20for%20NDC.pdf> (last visited on May 19, 2022).

30. The Ministry of Health and Family Welfare has proposed to replace the Indian Nursing Council with a statutory authority through the National Nursing and Midwifery Commission Bill, 2020.

2. Regulators and Institutions

There have also been some instances where the jurisdiction of different regulators in specific programmes has been called into question. For e.g., the UGC had released guidelines in January 2013 regarding the introduction of the one-year LLM program.³¹ Subsequently, in January 2021, the BCI issued the BCI Legal Education (Post-Graduate, Doctoral, Executive, Vocational, Clinical and other Continuing Education), Rules, 2020³² under which the one-year LLM under the UGC guidelines was abolished, and all LLM programmes were required to be of two years' duration. Subsequently, a petition was filed in the Supreme Court by the Consortium of National Law Universities and two other petitioners, but the case is currently pending. The BCI had represented that the two-year LLM programme requirement will be implemented from the 2022-23 academic session.³³ Hence, such legal considerations would need to be evaluated prior to entering into arrangements with respect to such specific courses.

D. Other regulations

In addition to the above, Indian HEIs are also be governed by state-specific regulators and other authorities, on matters of fee fixation, land requirements, governance, etc.

II. Higher Educational Institutions

A. Universities

Universities are degree granting bodies in India. The UGC Act defines a university as that which is established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the UGC in accordance with regulations under the UGC Act. According to the information available on the website of the UGC, in India, there are 54 Central universities, 453 state universities, 126 deemed to be universities, and 410 private universities.³⁴

Universities are considered as a body corporate, depending on their treatment under the respective legislature, and are governed by their own ordinance and statutes. All universities are also required to adhere to the provisions and directions of the UGC including those with respect to maintenance of academic norms and standards of teaching. For e.g., the UGC has introduced standards and regulations that private universities³⁵ are required to maintain under the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003.³⁶

B. Institutions deemed to be universities

Under Section 3 of the UGC Act, the Central Government has the power to declare that any institution for higher education, other than a university, be deemed to be a university for the purposes of the UGC Act, based on the advice of the UGC. Indian HEIs which have been declared as such are subject to all provisions of the UGC Act, and also have the power to award degrees under Section 22 of the UGC Act, similar to universities.

31. Available at: https://www.ugc.ac.in/pdfnews/4968873_llm_one-year.pdf (last visited on June 6, 2022).

32. Available at https://www.livelaw.in/pdf_upload/pdf_upload-386894.pdf (Last visited on June 6, 2022).

33. Available at <https://www.hindustantimes.com/education/rules-scrapping-1-year-ll-m-course-will-not-be-implemented-this-year-bci-to-sc-101613102051221.html> (Last visited on June 6, 2022).

34. See <https://www.ugc.ac.in/oldpdf/consolidated%20list%20of%20all%20universities.pdf> (Last visited on May 19, 2022).

35. A Private University, under the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003, has been defined as "a university duly established through a State/Central Act by a sponsoring body viz. a Society registered under the Societies Registration Act, 1860 or any other corresponding law for the time being in force in a State or a Public Trust or a Company registered under Section 8 of the Companies Act".

36. See UGC (Establishment of And Maintenance of Standards in Private Universities) Regulations 2003, available at https://www.ugc.ac.in/oldpdf/regulations/establishment_maintenance.pdf (Last visited on May 19, 2022).

2. Regulators and Institutions

The provision for institutions deemed to be universities under the UGC Act was made in order to bring institutions under the purview of the UGC, which for various reasons did not qualify as universities and yet were carrying out work of high standard in a specialized academic field comparable to that of a university. Accordingly, grant of a deemed to be university status would enable them to further contribute to the cause of higher education, which would mutually enrich the institution and the university system.

Regulations for deemed universities are presently covered under the UGC (Institutions Deemed to be Universities) Regulation, 2019³⁷ (“**Deemed Universities Regulations**”). The Deemed Universities Regulations prescribe certain requirements to qualify for the grant of status as a deemed to be university such as: the institution *inter alia* should have been (i) in existence for at least 20 years; (ii) accredited with 3.26 CGPA for three consecutive cycles by National Assessment and Accreditation Council or in case of technical institutions, two-thirds of the eligible technical programmes should be accredited by the National Board of Accreditation; and (iii) at the time of application should be in top 50 in any specific category or in top 100 of overall ranking of National Institute Ranking Framework³⁸ (unless declared under the de-novo category, which are institutions devoted to innovations in teaching and research in unique and emerging areas of knowledge).³⁹ The status of deemed university granted to such institutions is, initially made for a period of 5 years.⁴⁰

A deemed university enjoy certain advantages when compared to an ordinary institution. It has much more freedom as compared to an ordinary institution in terms of academic, administrative, finance, research, evaluation and extension aspects, etc. However, despite being entitled to privileges similar to that of universities, deemed universities are unitary institutions similar to private universities. Thus, they cannot affiliate institutions/ colleges unlike ordinary universities. The colleges or institutes may form constituents of a deemed university only where they belong to the same trust or society managing the deemed university.

C. Institutions of Eminence

To provide impetus to top performing Indian HEIs to compete with global standards, the Government introduced a scheme of providing regulatory architecture for categorising certain Indian HEIs as ‘**Institutions of Eminence**’.⁴¹ IoE is an initiative by the Government to recognize certain Indian HEIs as world class teaching and research institutes. This is sought to enable Indian HEIs to make their mark amongst the top 100 world institutions rankings and also to get global recognition. In 2019, based on recommendations made by the UGC, the government recommended conferring IoE status on 10 public and 10 private institutions.⁴²

Government IoEs are governed by the UGC (Declaration of Government Educational Institutions as Institutions of Eminence) Guidelines, 2017 (“**IoE Guidelines**”)⁴³ while private IoEs are governed by the UGC (Institutions of Eminence Deemed to be Universities) Regulations, 2017 (“**IoE Regulations**”).⁴⁴

37. Available at https://www.ugc.ac.in/pdfnews/1295001_DEB-Regulation-2019.pdf (Last visited on May 19, 2022)

38. Regulation 4.01 of Deemed Universities Regulations.

39. Regulation 6.04.1 of Deemed Universities Regulations.

40. Regulation 5.05 of Deemed Universities Regulations.

41. See https://www.ugc.ac.in/pdfnews/4523868_Press-release-IoE-final.pdf (Last visited on May 19, 2022).

42. See <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1581182> (Last visited on May 19, 2022). The list of institutions is as follows: Public IoEs: IIT Bombay; IIT Delhi; IISc Bangalore; IIT Madras; IIT Kharagpur; Delhi University; University of Hyderabad, Hyderabad; Jadavpur University, Kolkata; Anna University, Chennai; BHU, Varanasi; and Private IoEs: BITS Pilani, Rajasthan; Manipal Academy of Higher Education; Jio Institute (Reliance Foundation, Maharashtra) Green Field (yet to be established); Amrita Vishwa Vidyapeetham, Bangalore; VIT Vellore, Tamil Nadu; Jamia Hamdard, New Delhi; Kalinga Instt. of Industrial Technology, Bhubaneswar; O.P JINDAL University, Haryana; Shiv Nadar University, Uttar Pradesh; Bharti (Satya Bharti Foundation), Delhi.

43. See IoE Guidelines, available at https://www.ugc.ac.in/pdfnews/2170800_Guidelines-for-Educational-Institutions-as-Institutions-of-Eminence-2017.pdf (Last visited on May 20, 2022).

44. See IoE Regulations, available at https://www.ugc.ac.in/pdfnews/5403862_Gazette-Institutions-of-Eminence-Deemed-to-be-Universities.pdf (Last visited on May 20, 2022). A detailed analysis of the IoE Regulations is available at <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/4845/1.html> (Last visited on May 20, 2022).

2. Regulators and Institutions

Some of the key provisions under the IoE Guidelines and IoE Regulations are:

- exemption from Government approval for academic collaboration with FEIs ranked in top 500 in global ranking;⁴⁵
- flexibility in admission of foreign students subject to maximum of 30% of the strength of domestic students;⁴⁶
- freedom to fix fees for both foreign⁴⁷ and domestic students;⁴⁸
- freedom to offer courses within a programme, as well as to offer degrees in newer areas after approval from its governing council;⁴⁹
- flexibility to determine course structure in terms of number of credit hours and years to take a degree⁵⁰ and in fixing curriculum and syllabus, with no UGC mandated curriculum structure;⁵¹
- freedom to hire foreign faculty on tenure or contract basis.⁵²

Through an amendment to the IoE Regulations in 2021⁵³, the IoE regime has been further liberalized, and IoEs have been given the power to (i) set up off-shore campuses and off-campus centres with certain approvals, (ii) offer online courses without any approval except compliance within minimum UGC standards and (iii) enter into arrangements for practical training of students of a skill-oriented vocational course if approved by the UGC or any other statutory body.

Given the high degree of autonomy and flexibility that IoEs enjoy, especially with respect to collaborations with FEIs and for online programmes, IoEs can easily be the first choice for FEIs looking to enter the Indian higher education space. A detailed analysis of the amended IoE Regulations is available here.⁵⁴

D. Institutions of National Importance

Certain institutes such as the Indian Institutes of Technology (“IIT”) and Indian Institutes of Management (“IIM”) have been categorised as ‘Institutions of National Importance’ (“INI”) by the Government of India. These institutions are established under separate legislations of the Parliament, and are governed by their own charter. Typically, the UGC’s regulations do not apply to them since these institutes are not categorised as a university or an institution deemed to be a university. Nevertheless, there have been some discussions regarding the jurisdiction of UGC over INIs,⁵⁵ and there are certain grey areas in this aspect.

Certain INIs have also been recognised as IoEs. As a result, they may be subject to provisions of UGC regulations applicable to IoEs. For e.g., while such IoEs do not require UGC approval for offering online courses, they would be subject to compliance with other requirements under the Online and ODL Regulations.

45. Clause 6.1 (j) of the IoE Guidelines; Regulation 11.4 of the IoE Regulations.

46. Clause 6.1 (a) of the IoE Guidelines; Regulation 11.1.1 of the IoE Regulations.

47. Clause 6.1(b) of the IoE Guidelines; Regulation 11.1.2 of the IoE Regulations.

48. Clause 6.1 (c) of the IoE Guidelines; Regulation 11.1.2 of the IoE Regulations.

49. Clause 6.1 (d) of the IoE Guidelines; Regulation 11.2 of the IoE Regulations.

50. Clause 6.1 (e) of the IoE Guidelines; Regulation 11.2.2 of the IoE Regulations.

51. Clause 6.1 (f) of the IoE Guidelines; Regulation 11.2.3 of the IoE Regulations.

52. Clause 6.1 (m) of the IoE Guidelines; Regulation 11.3 of the IoE Regulations.

53. See IoE Amendment Regulations, available at [https://www.ugc.ac.in/pdfnews/1789815_IoE-Regulation\(Deemed\)-Jan2021.pdf](https://www.ugc.ac.in/pdfnews/1789815_IoE-Regulation(Deemed)-Jan2021.pdf) (Last visited on May 20, 2022).

54. See <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/4844/1.html> (Last visited on May 20, 2022).

55. For e.g., see <https://www.indiatoday.in/india/story/ugc-on-iit-controversy-letter-misconstrued-as-encroachment-205633-2014-08-25> (Last visited on July 6, 2022).

2.Regulators and Institutions

These institutes typically have a great amount of freedom and flexibility both academically and administratively, including the offering of courses. Accordingly, in addition to IoEs, INIs can also be top choices for FEIs to collaborate with, for venturing into the Indian higher education space.

E. Autonomous Colleges

Autonomous colleges refer to colleges which are affiliated to a university but have been granted administrative and academic autonomy. The “autonomous” status is granted by the UGC as per the UGC (Conferment of Autonomous Status upon Colleges and Measures for Maintenance of Standards in Autonomous Colleges) Regulations, 2018 (“**Autonomous Colleges Regulations**”).⁵⁶ As per the status list of approved autonomous colleges under the UGC Scheme, India has 871 autonomous colleges.⁵⁷

Some of the key criteria for identification of institutions for grant of autonomy include:

- Financial strength of the institution⁵⁸
- Academic reputation and previous performance in university examinations⁵⁹
- Research achievements of the faculty⁶⁰ and their motivation in promotion of innovative reforms⁶¹
- Quality and merit in the selection of students and teachers⁶²
- Adequacy of infrastructure⁶³
- Quality of institutional management including responsiveness of administrative structure⁶⁴

Autonomous colleges have the freedom to design their course, curriculum, fix fees of the courses at their own level, have flexible teaching methods and modules, and have administrative autonomy, unlike affiliated colleges. Further, an autonomous college is free to start diploma (undergraduate and postgraduate) or certificate courses without approval of the university and can issue diplomas and certificates under the seal of the college. The autonomy granted to them is institutional and they can run undergraduate and post-graduate courses that were being run at the time of conferment of autonomous status. Further, all courses introduced by the colleges after the conferment of autonomous status automatically come under the purview of their autonomy. Additionally, an autonomous college can also start a new degree or postgraduate/Ph.D. course or certificate with the approval of the academic council of the college and concerned statutory council, provided that such courses fulfil the minimum standards as prescribed by the university/UGC.

56. See UGC (Conferment of Autonomous Status upon Colleges and Measures for Maintenance of Standards in Autonomous Colleges) Regulations, 2018, available at https://www.ugc.ac.in/pdfnews/2838506_182734.pdf? (Last visited on May 19, 2022).

57. The figure provided by the UGC is updated till 22.02.2022. See https://www.ugc.ac.in/pdfnews/0062368_Latest-832-Auto-Colleges16-06 2021.pdf? (Last visited on May 20, 2022).

58. Regulation 8.6 of the Autonomous Colleges Regulations.

59. Regulation 8.1 of the Autonomous Colleges Regulations.

60. Regulation 8.2 of the Autonomous Colleges Regulations.

61. Regulation 8.8 of the Autonomous Colleges Regulations.

62. Regulation 8.3 of the Autonomous Colleges Regulations.

63. Regulation 8.4 of the Autonomous Colleges Regulations.

64. Regulation 8.5 of the Autonomous Colleges Regulations.

3. Regulatory and Policy Developments in Higher Education

In this chapter, we discuss the important regulatory and policy developments in India's higher education segment, with a view to explain the opportunities these developments open for FEIs looking at India.

I. Foreign Collaboration Regulations⁶⁵

The Foreign Collaboration Regulations allows FEIs to collaborate with Indian HEIs. The Foreign Collaboration Regulations supersede the earlier UGC (Promotion and Maintenance of Standards of Academic Collaborations between India and Foreign Educational Institutions) Regulations 2016⁶⁶ and permit collaboration between Indian HEIs and FEIs in three forms:

- Twinning programme ⁶⁷ - means a collaborative arrangement under which students enrolled with an Indian HEI may undertake their programme of study partly in India, and partly in the FEI, while complying with relevant UGC regulations.
- Joint degree programme ⁶⁸ - means a collaborative arrangement under which the curriculum is designed jointly by the collaborating Indian HEI and FEI. Upon completion of the programme, the degree is awarded by the Indian HEI and FEI with a single certificate.
- Dual degree programme ⁶⁹ - means a collaborative arrangement which is jointly designed and offered by the Indian HEI and FEI in the same disciplines/subject areas and in the same level. However, the degrees for such programme are conferred by the Indian HEI and FEI, separately and simultaneously, upon completion of degree requirements of both the institutions.

We have summarised these arrangements envisaged under the Foreign Collaboration Regulations in the table below:

	Twinning Programme (Reg. 3.1)	Joint Degree Programme (Reg. 3.2)	Dual Degree Programme (Reg. 3.3)
Degree	Degree may be awarded only by the Indian HEI. ⁷⁰	Degree awarded by both institutions in a single certificate. ⁷¹	Separate degrees conferred simultaneously from the Indian HEI and FEI upon completion of their degree requirements. ⁷²

65. See UGC Foreign Collaboration Regulations, available at https://www.ugc.ac.in/pdfnews/4555806_UGC-Acad-Collab-Regulations.pdf (Last visited on May 19, 2022).

66. The UGC (Promotion and Maintenance of Standards of Academic Collaborations between India and Foreign Educational Institutions) Regulations, 2016, available at [https://www.ugc.ac.in/pdfnews/5003871_Foreign-Collaboration-Regulations-2016\(1\).pdf](https://www.ugc.ac.in/pdfnews/5003871_Foreign-Collaboration-Regulations-2016(1).pdf) (Last visited on May 19, 2022).

67. Regulation 3.1.1 of the Foreign Collaboration Regulations.

68. Regulation 3.2.1 of the Foreign Collaboration Regulations.

69. Regulation 3.3.1 of the Foreign Collaboration Regulations.

70. Degree to conform to the provisions of section 22(3) of the UGC Act, 1956 and should also be in conformity with the norms, standards and requirement for award of such degree, as laid down by the statutory authority concerned.

71. Degree programme to conform to nomenclature and duration of the degrees as per section 22(3) of UGC Act, 1956 and also to minimum eligibility and other norms and standards to offer such degree programme.

72. Degree by HEI to conform to nomenclature and duration of the degrees as per section 22(3) of UGC Act, 1956 and also to minimum eligibility and other norms and standards to offer such degree programme.

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Credits	<p>Credits earned from the FEI should not exceed 30% of the total programme.</p> <p>Credits earned by the student at the FEI should count towards their credit requirements at Indian HEI.</p> <p>Indian HEI to ensure that credits earned at FEI should not be from an overlapping course content.</p>	<p>Student must earn at least 30% of the total credits from each of the Indian HEI and FEI.</p> <p>Credits earned for the course in the Indian HEI and FEI should count towards the degrees jointly awarded by both the Indian HEI and FEI.</p> <p>Credits earned at both institutions must not be from overlapping course contents.</p>	<p>At least 30% of the credits should be earned from the Indian HEI.</p> <p>Credit earned for the courses in an institution should count towards degrees to be awarded by both institutions.</p> <p>Same as joint degree programme.</p>
Mode of earning Credits	Credits to be earned by the Indian students from the FEI and credits earned by the foreign students from Indian HEI should be obtained through conventional mode. ⁷³	Same as twinning programme	Same as twinning programme
Evaluation process	N/A	Only one evaluation process for the student in each of the courses by the institutions in which they have registered.	Same as joint degree programme.
Doctoral programme	N/A	Student should spend a minimum of one semester in each of the collaborating institution during the programme. Student should have a supervisor at each institution but must submit only one thesis.	Same as joint degree programme.
Tuition fees	<p>Tuition fee for the entire duration of the programme has to be made public at the time of admission.</p> <p>Tuition fee should be reasonable so as to make quality higher education accessible and affordable to all sections of society.</p>	Same as twinning programme	Same as twinning programme
Transcript	Transcript should be issued by the institutions for their respective courses with a remark noting that the student has taken courses at the partner FEI.	Same as twinning programme	Same as twinning programme
Exit pathway	An exit pathway to be made available to students who are unable to complete the programme having clear specification for future acceptance of credit earned by student.	Same as twinning programme	Same as twinning programme

The key conditions for collaboration under these regulations include the following:

- The FEI must figure in the top 1000 of Times Higher Education or QS World University ranking at the time of application.⁷⁴

73. Regulation 2.6 defines "Conventional mode" to mean "a mode of providing learning opportunities through face-to-face interaction between the teacher and learner in regular class room environment but does not exclude supplementary instructions if any for the learner through use of online".

74. Regulation 5.2 of the Foreign Collaboration Regulations.

3.Regulatory and Policy Developments in Higher Education

- Indian HEI should be accredited with grade not less than A or its equivalent by any AAA authorized by the UGC;⁷⁵
- a written memorandum of understanding (“MoU”) should be entered into between the FEI and Indian HEI;⁷⁶
- No prior approval of UGC is required. However, Indian HEIs need to seek approval from their appropriate authority such as Board of Governors or Executive Council.⁷⁷ For professional programmes, Indian HEIs would also need approval from relevant statutory councils and bodies;
- Franchise agreements are not permitted.⁷⁸

Importantly, collaborations are not permitted in online or ODL mode of learning.⁷⁹ Nevertheless, as compared to the existing regulations, the Foreign Collaboration Regulations have liberalized collaboration arrangements between Indian HEIs and FEIs to a great extent. For instance, the requirement for approval of UGC has been removed for UGC related courses, and the eligibility criteria for the partnering institutions has also been relaxed. Joint degree programmes and dual degree programmes have been expressly permitted for the first time in India.

Overall, the Foreign Collaboration Regulations are very progressive and have made collaboration arrangements much more attractive for both Indian HEIs and FEIs. A detailed analysis of the Foreign Collaboration Regulations is available here.⁸⁰

II. Collaboration with IoEs

As mentioned above, the IoE regime provides certain premier Indian HEIs with significant autonomy and flexibility, especially with respect to their collaboration with FEIs ranked amongst top 500 in global rankings. Since IoEs are a special category of institutions, the applicability of the Foreign Collaboration Regulations to these institutions would need to be evaluated as well. As per the Foreign Collaboration Regulations, the eligibility requirement for the partnering FEI is that it must figure in the top 1000 of Times Higher Education or QS World University ranking at the time of application. Hence, there is an anomaly wherein IoEs, being a special category of institutions are restricted more than other institutions which are eligible under the Foreign Collaboration Regulations, and the IoE Regulations should be amended to remove this anomaly.

Moreover, at the time that the IoE Regulations were issued, joint degree and dual degree programmes were not permitted. While the IoE Regulations do not specify the kind of academic collaborations that IoEs may enter into, it is difficult to argue that IoEs are also permitted to now enter into joint and dual degree programmes under the IoE Regulations. The UGC should provide clarifications on this aspect as well.

Further, since the IoE Regulations are special laws, it is also unclear if IoEs must comply with other requirements under the Foreign Collaboration Regulations. This is because IoEs enjoy significant autonomy for offering online courses, and there is no cap on the number of online programmes that they can offer. There is also no express restriction when it comes to academic collaborations with FEIs. Hence, it would need to be evaluated if IoEs can collaborate with FEIs for online programmes as well, since they may not be subject to the restriction on such collaborations under the Foreign Collaboration Regulations.

75. Regulation 5.1 of the Foreign Collaboration Regulations.

76. Regulation 4.5 of the Foreign Collaboration Regulations.

77. Regulation 4.1 of the Foreign Collaboration Regulations.

78. Regulation 7.3 of the Foreign Collaboration Regulations.

79. Regulation 7.2 of the Foreign Collaboration Regulations.

80. See <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/5580/1.html> (last visited on May 19, 2022).

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Moreover, IoEs also enjoy flexibility in admission of foreign students, subject to maximum of 30% of the strength of admitted domestic students, in addition to the freedom to fix fees for foreign students without restrictions. Additionally, IoEs are also permitted to recruit foreign faculty on both tenure and contract basis. Accordingly, it can be assessed if FEIs and Indian HEIs can enter into more significant research collaboration and faculty / student exchange programmes.

IoEs can also set up new “Off-shore Campuses” with the prior approval of the Ministry of Education. They would, however, need a no-objection certificate from the Ministry of External Affairs and the Ministry of Home Affairs. The norms and standards of the Off-shore Campus in relation to courses, admission criteria, curriculum, examinations and evaluation must be the same as those of the main campus.

Allowing IoEs, India’s top-notch institutes, to set up campus in foreign jurisdictions is likely to help in developing more cross-border collaborations with foreign universities and research collaborations as well.

III. Internationalization of Higher Education Guidelines ⁸¹

UGC released the Internationalisation of Higher Education Guidelines 2021 (“**IHE Guidelines**”) in July 2021. These guidelines aim to boost collaborative arrangements between FEIs and Indian HEIs. ⁸² The key objectives underlined in the Guidelines are:

- To make India an attractive study destination for foreign students;
- To foster international competencies in Indian faculty and students;
- To develop a global mindset of learners and shape them as global citizens;
- To promote active linkage between Indian HEIs and FEIs;
- To improve global ranking of Indian HEIs in internationalization indicators;
- Enabling credit transfers between Indian HEI and FEIs through twinning programmes;
- Aligning the curriculum, faculty and infrastructure of Indian HEIs with global standards.

It would be interesting to see how these principles are adopted in practice, and especially if unique kinds of programmes can be developed in collaboration between FEIs and Indian HEIs.

IV. AICTE Regulations ⁸³

As per the AICTE (Grant of Approvals for Technical Institutions Regulations), 2020 (“**AICTE Approval Regulations**”), prior approval of AICTE is required for collaboration and twinning programmes between Indian HEIs and FEIs in the field of technical education, research and training. Additionally, the Approval Process Handbook (“**APH**”) released by the AICTE every year, among other things, provides comprehensive information with respect to the requirements of AICTE and the approval process. The APH from 2022-23 ⁸⁴ contains a section

81. Available at https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/int_he.pdf (Last visited on May 19, 2022).

82. A detailed analysis of the IHE Guidelines can be accessed on our hotline. See <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/4814/1.html> (Last visited on May 19, 2022).

83. See AICTE Approval Regulations, available at https://www.aicte-india.org/sites/default/files/Gazettee_of%20India%20-%20Regulations%202020.pdf (Last visited on May 19, 2022).

84. See <https://www.aicte-india.org/sites/default/files/approval/2022-23/Approval%20Process%20Handbook2022-23.pdf> (Last visited on May 19, 2022).

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on “**collaboration and twinning programme between Indian and Foreign university/ institution in the field of technical education, research and training**”, which *inter alia* states that:

- the Indian institution / department of Indian University has to be AICTE approved;
- the Indian institution / department of Indian University should have a valid NBA accreditation for one year beyond April 10 of the next calendar year in the programme/ courses for which approval is sought;
- FEI must be accredited by the authorized agency in the parent country or be amongst top 500 rank in the QS/ THE ranking.
- the degree / diploma must have the same nomenclature as in the parent country of the FEI;
- the Indian institution is required to obtain a no objection certificate from its affiliating university / board. For the purpose of collaboration/ twinning arrangement FEI and the Indian institution must enter in to a bipartite agreement/ MoU, and the Indian institution is also required to enter into a bipartite agreement/ MoU with the concerned affiliating University/ board.
- For course(s) where University/ Board approval is not mandatory, the FEI and Indian institution are required to enter in to a bipartite agreement/ MoU;
- the students admitted under the twinning programme should spend at least one semester for two years programme and two semesters for four years programme in the FEI in its parent country; and

In addition to these key terms, other conditions for approval and compliance may also apply, which may be specified by the AICTE in the APH from time to time. Given the flexibility that the UGC has provided for under the Foreign Collaboration Regulations, the AICTE should also follow suit, and remove the approval requirement for entering into collaboration agreements in technical education courses. Moreover, the eligibility criteria for the FEI should also be relaxed in line with the Foreign Collaboration Regulations.

V. ABC Regulations

The UGC (Establishment and Operation of Academic Bank of Credits in Higher Education) Regulations, 2021⁸⁵ (“**ABC Regulations**”) *inter alia* provide for the establishment of an Academic Bank of Credits (“**ABC**”) for facilitating the recognition and transfer of credits earned by students, amongst various Indian HEIs. The aim of the Regulations is to enable students to “**choose their own learning path to attain a Degree or Diploma or Post Graduate diploma or academic qualification, working on the principle of multiple entry-multiple exit (“MEE”) as well as any-time, any-where, and any-level learning**”.

To supplement these Regulations, the UGC has also released guidelines on the implementation of MEE in Academic Programmes offered in Indian HEIs⁸⁶ (“**MEE Guidelines**”). The ABC⁸⁷ is a national-level online facility established by the UGC with the approval of the Central Government to promote flexibility of curriculum framework and interdisciplinary or multidisciplinary academic mobility of students across Indian HEIs. The ABC has been established on the lines of the National Academic Depository (“**NAD**”) which stores a student’s

85. Regulations notified on July 28, 2021, and are available at: https://www.ugc.ac.in/pdfnews/9327451_Academic-Bank-of-Credits-in-Higher-Education.pdf (Last visited on May 19, 2022).

86. Available at <https://www.ugc.ac.in/e-book/GL%20Multiple%20Entry%20Exit/mobile/index.html> (Last visited on May 19, 2022).

87. Defined under the ABC Regulations as “an academic service mechanism as a digital or virtual or online entity established by the Commission with the approval of the Central Government, to facilitate students to become its academic account holders, thereby paving the way for seamless student mobility between or within degree-granting Higher Educational Institutions through a formal system of credit recognition, credit accumulation, credit transfers and credit redemption to promote distributed and flexible teaching-learning”

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academic documents. It functions similar to a commercial bank with students as account-holders, and provides services such as credit ⁸⁸ accumulation ⁸⁹, credit transfer ⁹⁰, and credit redemption ⁹¹ through the opening, closure and validation of academic bank accounts⁹² (“ABA”).

Students who pursue education as freelancers can also accumulate credits which can be deposited to student accounts. Upon collection of credits equivalent for a degree, diploma or certificate, these credits will be debited / deleted from the bank account. This will help a student to avail MEE options in Indian HEIs, based on preference, convenience or necessity, and opt for a tailor-made degree.

The ABC acts as the body empowered by the Central Government / UGC to provide authenticated records of credits earned by students from registered Indian HEIs. Nevertheless, the ABC Regulations clarify that the ABC will not encroach upon the statutory powers of Indian HEIs to award degrees and other academic qualifications.

The primary objectives of the ABC and MEE system are *inter alia* to:

- promote student centricity with learner-friendly approaches in higher education and promote a more interdisciplinary approach;
- enable students to select the best courses to suit their aptitude and quest for knowledge;
- permit students to choose a pace and associated logistics and costs for their studies;
- allow students to tailor their degrees or make specific specialisations;
- enable MEE for students to complete their degrees as per their time preferences, providing mobility across various disciplines and Indian HEIs for degree, diploma or certificate programme or course work for the Ph.D. programme;
- Enable the conducting of the teaching-learning activities in a distributed and blended manner through integration across campuses or universities or autonomous colleges with increased mobility.

The Regulations apply to universities, institutions deemed-to-be-universities and autonomous colleges. ⁹³ In order for an Indian HEI to be part of the ABC scheme, the ABC registers such Indian HEIs as per the Regulations and ensures that ABAs are opened and credits are verified and transferred. Only such Indian HEIs which fulfil the

88. Defined under Regulation 2(h) of the ABC Regulations as “the standard methodology of calculating one hour of theory or one hour of tutorial or two hours of laboratory work, per week for a duration of a semester (13-15 weeks) resulting in the award of one credit; which is awarded by a higher educational institution on which these regulations apply; and, Credits’ for internship shall be one credit per one week of internship, subject to a maximum of six credits”

89. Defined under Regulation 2(i) of the ABC Regulations as “the facility created by Academic Bank of Credits in the Academic Bank Account opened by students in order to transfer and consolidate the credits earned by them by undergoing Courses”.

90. Defined under Regulation 2(l) of the ABC Regulations as “the process of commuting the accrued credits in the Academic Bank Account of the students maintained in ABC for the purpose of fulfilling the credits requirements for the award of Degrees or Diplomas or Certificates or Course work for Ph.D. programme etc., by the registered degree-awarding Higher Educational Institutions”.

91. Defined under Regulation 2(k) of the ABC Regulations as “the process of commuting the accrued credits in the Academic Bank Account of the students maintained in ABC for the purpose of fulfilling the credits requirements for the award of Degrees or Diplomas or Certificates or Course work for Ph.D. programme etc., by the registered degree-awarding Higher Educational Institutions”.

92. Defined under Regulation 2(b) of the ABC Regulations as “an individual account with the Academic Bank of Credits opened and operated by a student, to which all academic credits earned by the Student from course(s) of study are deposited, recognised, maintained, accumulated, transferred, validated or redeemed for the purposes of the award of degree/diploma/certificates etc. by an awarding institution”.

93. Defined under Regulation 2(d) of the ABC Regulations as “any institution, whether known as such or by any other name, accorded with autonomous status by the Commission upon the recommendations of the affiliating university and the State Government concerned, by virtue of which it provides for a course or programme of study with academic and innovative flexibility for obtaining any qualification from a university; and which, in accordance with the Statutes and Ordinances of such university, is recognised as competent to provide for such course or programme of study and present students undergoing such course or programme of study for the examination leading to the award of such qualification”.

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eligibility criteria can be registered with the ABC under the ABC Regulations.⁹⁴ Additionally, the Indian HEIs will be first required to obtain approval from their respective statutory authorities to apply for registration.

The ABC Regulations and MEE Guidelines are revolutionary in the context of how higher education in India has conventionally operated. It introduces learning flexibility, and a system of earning and redeeming credits which, albeit prevalent in several other countries, evaded India. The ABC scheme is expected to provide a boost to online and other futuristic modes of learning since credits earned in these courses must be recognised by Indian HEIs. This is a significant step and will provide both legitimacy and recognition to educational platforms which provide quality MOOC courses. It is also in line with the UGC (Open and Distance Learning Programmes and Online Programme) Regulations 2020,⁹⁵ (“**UGC Online and ODL Regulations**”) where Indian HEIs can offer online degrees / diplomas entirely through approved platforms. Moreover, there is an emphasis on integration of general education with skill and vocational education, which would involve the recognition of prior learning and practical experience in industries.

The scheme is also bound to attract further investment into the higher education sector both from outside India and from domestic sources as it is expected to help increase the enrolment ratio in higher education in India. It is also aimed at raising the demand for new kinds of service providers which facilitate the transaction of credits for Indian HEIs, as well as provide counselling services to students.

Even otherwise, the ABC Regulations open up a wide range of opportunities since certification courses organised by FEIs or through industry partnerships could also be considered for earning credits. As an increasing number of flexible courses are available, more students are likely to enrol in such courses. This would create further scope for different types of content, tailored to novel combinations which would further lead to more scope for partnerships between Indian HEIs, FEIs as well as industry bodies. Indian HEIs can even tie up with corporate entities for training purposes, and potentially utilise such courses for offering credits. Hence, all such futuristic and flexible models can be considered and developed accordingly.

VI. UGC Online and ODL Regulations

In September 2020, the UGC notified the UGC Online and ODL Regulations, which superseded the earlier University Grants Commission (Open and Distance Learning) Regulations, 2017,⁹⁶ and the University Grants Commission (Online Courses or Programmes) Regulations, 2018.⁹⁷ The UGC Online and ODL Regulations are largely applicable to undergraduate and post graduate degree programmes and post graduate diploma programmes⁹⁸ offered by universities and institutions deemed to be universities.⁹⁹ They permit such programmes to be offered completely in online and ODL modes.

94. Indian HEIs must fulfil one of the following criteria to be eligible for registering under the ABC scheme:

- accredited by either National Assessment and Accreditation Council with minimum ‘A’ Grade or by National Board of Accreditation for at least three programme(s) with a minimum score of 675 individually;
- ranked in top 100 by the National Institutional Ranking Framework (NIRF) or a similar Assessment and Accreditation body to be established by the Indian Government from time to time;
- appearing in top 1000 world ranking of Quacquarelli Symonds (QS)/ Times Higher Education (THE);
- recognised as an Institution of Eminence; or
- recognised as an Institution of National Importance.

95. Available at <https://www.ugc.ac.in/pdfnews/221580.pdf> (Last visited on May 20, 2022).

96. Available at <https://www.ugc.ac.in/oldpdf/regulations/distance%20education%20regulations.pdf> (Last visited on May 20, 2022).

97. Regulation 2(q) of the UGC Online and ODL Regulations defines ‘Online Course or Programme’ to mean the Course or Programme of studies which are delivered through online mode leading to award of a Certificate or Diploma or Degree by an approved Higher Educational Institution and recognised under these Regulations.

98. Regulation 1(2) of the UGC Online and ODL Regulations.

99. Regulation 1(3) of the UGC Online and ODL Regulations.

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Programmes in engineering, law, medical, dental, pharmacy, research-based programmes such as M. Phil and Ph. D and any programme which is not permitted to be offered in ODL ¹⁰⁰ or online mode by any regulatory body, have been categorized as “prohibited programmes” under these regulations. Therefore, they are not permitted to be offered in online and ODL modes, except if the concerned statutory body permits such courses and the UGC subsequently notifies that these courses may be permitted in these modes. ¹⁰¹

In order to offer programmes in online and ODL mode, the Indian HEI must fulfil certain eligibility conditions under the UGC Online and ODL Regulations and must seek approval from the UGC. ¹⁰² Certain high-ranking / high-scoring Indian HEIs are also eligible to offer a maximum of three under graduate programmes and ten post graduate programmes without prior approval of the UGC, provided that they obtain the approval of their statutory bodies. ¹⁰³

The maximum duration for a programme in online mode is twice the amount of time for the same programme in conventional mode. ¹⁰⁴ There is a narrative that these regulations are also targeted at learners who are part of the working or the executive class, and need the flexibility to complete online programmes at their own pace. The extended duration of online programmes helps in catering to the specific needs of all kinds of learners.

Importantly, these regulations require that at least 60% of the self-learning material or e-Learning Material has to be developed by the in-house faculty of the Indian HEIs and the rest can be sourced from available resources (such as other Indian HEI, Open Educational Resources, and SWAYAM) duly approved by the statutory authorities of the Indian HEIs. ¹⁰⁵ This essentially means that 40% of the e-learning material used for courses in the online mode can be obtained from FEIs, so long as they are duly approved by the statutory authorities of the Indian HEIs. Further, online programmes can be delivered through any learning platform duly approved by the statutory bodies of the Indian HEI, and the UGC. It is unclear if Indian HEIs are also permitted to use foreign platforms, however, based on the information available on the UGC website, a number of Indian HEIs which are entitled to offer online programmes under these regulations are using foreign platforms. ¹⁰⁶

100. Regulation 2(v) of the ODL and Online Regulations defines “Open and Distance Learning Mode” to mean “a mode of providing flexible learning opportunities by overcoming separation of teacher and learner using a variety of media, including print, electronic, online and occasional interactive face-to-face meetings with the learners or Learner Support Services to deliver teaching-learning experiences, including practical or work experiences.”

101. Regulation 2(z) of the UGC Online and ODL Regulations define “prohibited programmes” as such programmes which shall not be permitted to be offered in Open and Distance Learning Mode and Online Mode in Higher Education, as detailed under:
 (a) The programmes in the disciplines (including their allied domains) of Engineering, Medical, Physiotherapy, Occupational Therapy and other Para-Medical disciplines, Pharmacy, Nursing, Dental, Architecture, Law, Agriculture, Horticulture, Hotel Management, Catering Technology, Culinary Sciences, Aircraft Maintenance, Visual Arts and Sports;
 (b) The research based programmes such as M.Phil and Ph.D;
 (c) Such other Programmes not permitted to be offered through Open and Distance Learning mode and/or Online mode by any concerned statutory or regulatory body or council:
 Provided that, if the concerned statutory or regulatory body or council permits any of the prohibited programmes, as mentioned above, under its domain, in Open and Distance Learning mode and/or Online mode, the same may be considered by the Commission, and the decision so taken shall be notified by an Order.

102. In summary, Regulation 3(B)(b) of the UGC Online and ODL Regulations provide that any HEI may apply for offering programmes through the Online mode, which fulfils the following conditions, namely:- (i) shall be in existence for at least three years; and (ii) shall be accredited by the National Assessment and Accreditation Council (“NAAC”) with minimum score of 3.01 on a 4-point scale; or shall be in the top-100 in University category in the National Institutional Ranking Framework (“NIRF”) for at least once in last two preceding cycles (at the time of application). HEIs having NAAC valid score equal or more than 3.26 or having rank in Top-100 in University category of NIRF at least twice in three preceding cycles are permitted to enroll International Learners also.

103. Regulation 3(B)(a) provides that HEIs having NAAC score 3.26 and above or having rank in Top-100 in University category of NIRF, at least twice in three preceding cycles (at the time of application) shall be permitted to start full-fledged Online programmes without prior approval of the UGC, provided it satisfies all the conditions mentioned in the Online and ODL Regulations.

104. Regulation 13(A)(2)(iii) of the UGC Online and ODL Regulations.

105. Regulation 13(B)(2) of the UGC Online and ODL Regulations.

106. See https://deb.ugc.ac.in/pdf/Additionalist_of_Entitled_HEI_19052022.pdf (Last visited on June 6, 2022).

3.Regulatory and Policy Developments in Higher Education

The UGC has also proposed certain amendments to the UGC Online and ODL Regulations.¹⁰⁷ As per the proposed amendments, there will be no requirement for the learning platform to be approved by the UGC, and any learning platform which complies with UGC guidelines can be used for offering online programmes. Moreover, the limit on the number of online programmes that an Indian HEI can offer is sought to be removed, and there will not be a requirement for Indian HEIs to offer only such courses which they have been offering in conventional mode.

The Online and ODL Regulations would need to be read with the ABC Regulations and the MEE Guidelines. By virtue of these regulations operating simultaneously in addition to the possibility of pursuing two programmes simultaneously (discussed below), there can be immense benefits to students, Indian HEIs as well as FEIs. These regulations will increase higher education enrolments by increasing flexibility for learners of all ages and backgrounds. This will also lead to an increased demand for combinations of courses and specialisations from students, thereby further increasing the scope for FEIs to participate in the Indian higher education sector.

VII. Guidelines for Pursuing Two Academic Programmes Simultaneously

The UGC also released Guidelines for Pursuing Two Academic Programmes Simultaneously in April 2022¹⁰⁸ which permit students to pursue two full-fledged academic programmes at the same time, except in case of Ph.D. programmes.

Importantly, ODL / online programmes can be pursued only with such Indian HEIs which are recognised for offering such programmes. In addition to the UGC, the respective statutory/professional councils will also govern the degree or diploma programmes under these guidelines.

Students can now pursue:

- two full time academic programmes in physical mode provided that the class timings of the two programmes do not overlap
- two academic programmes, with one being in physical mode and another in ODL or online mode,
- up to two ODL / online programmes simultaneously.

The objective is to do away with hard separations between arts and sciences, between curricular and extracurricular activities, between vocational and academic streams, etc. in order to eliminate harmful hierarchies among, and silos between different areas of learning.¹⁰⁹ Further, these guidelines also seek to enable individuals to study one or more specialized areas of interest at a deep level and pursue a range of disciplines including sciences, social sciences, arts, humanities, languages, as well as professional, technical, and vocational subjects.

It would be interesting to see if degrees offered by FEIs in physical mode, which are granted equivalence in India, could also be considered within the ambit of these guidelines. For instance, if a student enrolls for a full-time degree programme in physical mode at an FEI and simultaneously enrolls for an online degree programme at a recognised Indian HEI, will both degrees be recognised? These questions would need to be evaluated based on the specific nature of degree programmes, and the conditions of their recognition, if any.

107. Available at: https://www.ugc.ac.in/pdfnews/3265630_Proposed-Amendments.pdf (Last visited on June 3, 2022).

108. Available at: https://www.ugc.ac.in/pdfnews/5729348_Guidelines-for-pursuing-two-academic-programmes-simultaneously.pdf (Last visited on June 3, 2022).

109. Page 1 of the UGC Guidelines for Pursuing Two Academic Programmes Simultaneously.

3.Regulatory and Policy Developments in Higher Education

All in all, these guidelines, combined with the UGC Online and ODL Regulations, the ABC Regulations and MEE Guidelines can provide more autonomy to students, who can easily pick courses in parallel. This would be easier especially since online programmes can have a maximum duration of double that of the conventional programme. Hence, students can enrol for one conventional programme and one online programme, and pace out the online programme as per their convenience. They can even exit either or both of the courses after collecting credits, and redeem credits for pursuing yet another specialisation.

4. Possible arrangements for FEIs in Indian higher education sector

The Indian higher education sector can be divided broadly into structured and unstructured:

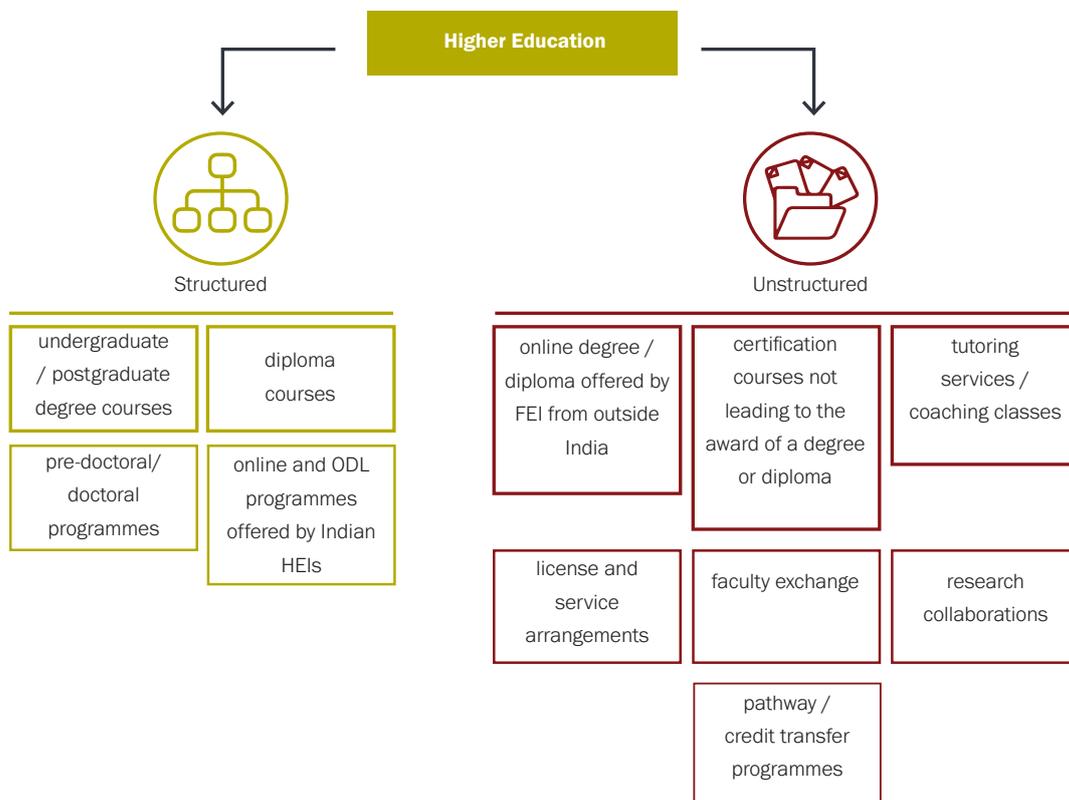


Fig. 1 Academic structures in the Indian Higher Education System

I. Online Degree / Diploma / Certificate Programme Offered by FEI Directly from Overseas

Indian laws currently do not govern online programs offered by FEIs directly from outside India. Hence, there is a great amount of flexibility that FEIs enjoy while offering such programmes. However, from the perspective of learners, FEIs would need to consider the recognition of such degrees / diplomas / certificates in India. Currently, foreign degrees completed in a pure online mode are not granted equivalence in India (as compared to degrees / diplomas granted by Indian HEIs) by the Association of Indian Universities.

Accordingly, such programmes may not be recognised by certain authorities such as public sector employers, professional bodies, etc.

4. Possible arrangements for FEIs in Indian higher education sector

II. Twinning Programmes

The Foreign Collaboration Regulations permit “Twinning Programmes”, which, as discussed above, means a collaborative arrangement under which students enrolled with an Indian HEI may undertake their programme of study partly in India, and partly in the FEI, while complying with relevant UGC regulations. In such a programme, the degree is awarded by the Indian HEI only, but credits earned by the students at an FEI are counted towards this degree. However, the credits earned by the student from the FEI are not permitted to exceed 30% of the total credits for the programme. Importantly, the credits can only be earned through courses in the conventional / physical mode.

Notably, the degree must be in conformity with the UGC Act and with the norms, standards and requirement for award of such degree, as laid down by the statutory authority concerned. Both the Indian HEI and FEI are required to make provisions for exit pathways for students who are unable to complete the twinning programme with clear specification with respect to future acceptance of credits earned by the students. Thus, these regulations have been issued considering that students can avail the benefits of the MEE Guidelines and the ABC Regulations, as well. Further, since the Foreign Collaboration Regulations emphasise on compliance with UGC regulations generally, it appears that these collaboration arrangements (including joint degree programmes and dual degree programmes) can be used by students to accumulate and redeem credits, as provided under the ABC Regulations.

Further, both the Indian HEI and FEI are required to issue a transcript for their respective courses, indicating the modules which the student has undertaken at such institution. It should be ensured that the credits earned by the students from the FEI are not from course contents/curriculum which overlap with that of the Indian HEI. The regulations require transparency in respect of the applicable fees, and the fees for the entire duration of the programme (including for courses undertaken at the FEI) are required to be disclosed at the time of admission. There is also a requirement for the fee structure to be “reasonable” such that higher education is accessible and affordable to all sections of the society.

Twinning programmes, therefore, can be considered where the FEI is envisaged to have a limited role, and students can spend part of their study programme at the FEI, subject to a cap of 30% of total credits to be earned.

III. Joint Degree Programmes

In a “Joint Degree programme”, the curriculum is designed jointly by the collaborating Indian HEI and FEI. Upon completion of the programme, the degree is awarded by the Indian HEI and FEI with a single certificate. Hence, more involvement of the FEI is envisaged in such programmes, as opposed to twinning programmes. This is evident from the fact that at least 30% of the total credits must be earned from each of the Indian HEI and the FEI. Accordingly, up to 70% of the credits can potentially be earned at the FEI.

The degree should conform to the UGC Act and the minimum eligibility and other norms and standards to offer such degree programme. Moreover, the programmes at both the Indian HEI and FEI should be in conventional mode, and collaboration for online programmes is not permitted.

The credits earned by a student for the course(s) in an institution count towards the degrees jointly awarded by both the institutions. Both institutions are required to ensure that the credits earned by the students are not from overlapping course contents/curriculum. Moreover, it should be ensured that students submit to only one examination and evaluation process for each of the courses by the institutions in which they have registered for that course.

4. Possible arrangements for FEIs in Indian higher education sector

For doctoral degree programmes specifically, students must have a supervisor at each institution, and they should spend a minimum of one semester in each of the collaborating institutions during the study programme. However, the two institutions can jointly devise a framework, under which the student will submit a single thesis.

Similar to twinning programmes, there is a requirement for transparency and reasonability of fees charged from students. Further, each institution is required to issue a transcript for their respective courses, with a remark indicating that the student has taken certain modules at the partner institution. In joint degree programmes as well, the collaborating institutions must make provisions for exit pathways for students who are unable to complete the joint degree programme with clear specification with respect to future acceptance of credits earned by the students.

Interestingly, for joint degree programmes, the participating institutions have the flexibility to determine all other issues pertaining to offer such programmes, so long as they conform to the respective rules, regulations and laws of their respective institution and country. Hence, agreements for such collaboration arrangements can be flexible, but it would need to be ensured that sector-specific regulations in addition to cross-border considerations for foreign exchange and tax are adequately accounted for.

IV. Dual Degree Programmes

As per the Foreign Collaboration Regulations, dual degree programmes are programmes jointly designed and offered by the Indian HEI and FEI in the same disciplines/subject areas and in the same level. However, the degrees for such programme are conferred by the Indian HEI and FEI, separately and simultaneously, upon completion of degree requirements of both the institutions. This is important to note, and is not to be construed as two degree programmes in separate disciplines/subject areas and/or levels being pursued simultaneously. Credits earned at each institution are recognised for the purpose of granting the degree at the other institution. Hence, dual degree programmes involve two institutions, and two degrees but in the same discipline / subject area.

At least 30% of the total credits must be earned from the Indian HEI. Accordingly, up to 70% of the credits can potentially be earned at the FEI. Prospective students must meet the admission requirements of both the Indian HEI and FEI and are required to apply to and be admitted separately to both the institutions. Requirements regarding conventional mode of offering programmes, evaluation process, provisions for doctoral programmes, disclosures on fees, and exit pathways are the same as those under joint degree programmes.

Institutions participating in dual degree programmes also have the flexibility to determine other aspects of the programmes to be offered through an agreement, so long as they conform to the respective rules, regulations and laws of their respective institution and country. Hence, agreements for dual degree programmes are flexible, but it would need to be ensured that sector-specific regulations in addition to cross-border considerations for foreign exchange and tax are adequately accounted for, similar to joint degree programmes.

As is evident, FEIs now have multiple alternatives through which they can enter into formal arrangements with Indian HEIs. Degrees obtained through such arrangements are treated at par with degrees granted solely by Indian HEIs. Hence, there is an added incentive for FEIs to explore these arrangements. Importantly, these arrangements under the Foreign Collaboration Regulations are only with respect to programmes which are not for technical education or professional courses, for which sector-specific regulations would need to be evaluated.

V. License and Service Arrangements

A. License Arrangement

FEIs are not allowed to have a campus in India as yet. Hence, some FEIs prefer to enter into license arrangements with Indian HEIs. Under such an arrangement, the FEIs usually license their brand name, curriculum, know-how etc., to the Indian HEI. Such a license can be granted directly by the FEI to the Indian HEI from outside India under an agreement. If the FEI is interested in having an Indian presence, it can even set up an Indian centre (through a private limited company or a limited liability partnership), which offers a license to an Indian HEI. The Indian HEI then offers the programmes to students in India.

We have seen several models of license arrangements, with each having its own nuances:

i. UGC Online and ODL Regulations

As discussed earlier, the UGC Online and ODL Regulations apply to online and ODL programmes offered by Indian HEIs. The regulations require Indian HEIs to ensure that at least 60% of “e-Learning Material” is developed by the in-house faculty of the Indian HEI and remaining per cent of the material can be sourced from available e-resources such as Open Educational Resources (OER), SWAYAM or other source, duly approved by the statutory authorities of the Indian HEI.¹¹⁰ Hence, for its online programmes, an Indian HEI can source e-Learning Material from external sources, including FEIs, provided they are approved by the Indian HEI’s statutory authorities.

Interestingly, as per the UGC Online and ODL Regulations, an Indian HEI “Online Mode” means **a mode of providing flexible learning opportunities by overcoming separation of teacher and learner using internet, e-Learning Materials and full-fledged programme delivery through the internet using technology assisted mechanism and resources.**¹¹¹ E-Learning Material has been defined to mean **“content in the form of structured course material, as a part of one or more courses in the Online Programme, in digital format delivered through Learning Management System, which is inter alia self-explanatory, self-contained, self-directed at the learner, and amenable to self-evaluation, and enables the learner to acquire the prescribed level of learning in a course of study, but does not include text-books or guide-books; as defined in these regulations.”**¹¹²

Thus, e-Learning Materials are only **one** of the modes of programme delivery. For e.g., live streaming of lectures may not qualify as e-Learning Material. Similarly, text books and other course content which is not self-contained and amendable to self-evaluation, may not be covered under “e-Learning Material”. FEIs can enter into licensing arrangements for e-Learning Material as well as other learning material such as lecture notes prepared by faculty. This can be a highly beneficial arrangement, given that FEIs may have high-quality learning material which can be of significant value to Indian HEIs and students. However, any such arrangements should be strictly reviewed from a legal, regulatory and tax perspective for several checks and balances to be built in for such arrangements.

The UGC has also proposed certain amendments to the UGC Online and ODL Regulations.¹¹³

As per the proposed amendments, the limit on the number of online programmes that an Indian HEI can offer is sought to be removed, and there will not be a requirement for Indian HEIs to offer only such courses

¹¹⁰. Regulation 13(C) of the UGC Online and ODL Regulations.

¹¹¹. Regulation 2(u) of UGC Online and ODL Regulations.

¹¹². Regulation 2(j) of UGC Online and ODL Regulations.

¹¹³. Available at: https://www.ugc.ac.in/pdfnews/3265630_Proposed-Amendments.pdf (Last visited on June 3, 2022).

4. Possible arrangements for FEIs in Indian higher education sector

which they have been offering in conventional mode. Moreover, there will be no requirement for the learning platform to be approved by the UGC, and any learning platform which complies with UGC guidelines can be used for offering online programmes. The proposed amendments also specifically recognise that Indian HEIs can avail the services of one or more technology service providers for the purposes of technology maintenance, learning platform, ICT support (including production and animation), technology support for proctored examination, cloud support, advertisement and marketing and placement of learners.

All these relaxations would provide much needed flexibility to Indian HEIs, and lead to even greater scope for enrolling learners. Accordingly, FEIs are also set to benefit from this as the flexibility will lead to greater opportunities for partnering with Indian HEIs for a mutually beneficial relationship.

Regardless of the nature of arrangement, however, care should be taken to ensure that the arrangement is not in the nature of franchising,¹¹⁴ as this is expressly prohibited under the UGC Online and ODL Regulations. Regulation 2(l) of the UGC Online and ODL Regulations defines “Franchising” to mean and include the **practice of allowing, formally or informally, any person or institution or organisation, other than the Higher Educational Institution recognised under these regulations for offering programmes under Open and Distance Learning mode and Online mode, to offer such programmes of study or any related activity on behalf of or in the name of the recognised Higher Educational Institution, and the terms franchise’ and ‘franchisee’ shall be construed accordingly’.**

The primary responsibility of offering courses under these regulations should be that of the Indian HEI itself. Accordingly, the Indian HEI should not enter into franchising agreements, either as the franchisor or the franchisee.

ii. Online / offline certification programmes offered by Indian HEIs and private entities

- Offline certification programmes offered by Indian HEIs are largely unregulated.
- While the UGC Online and ODL Regulations regulate certification programmes offered by Indian HEIs, the provisions in the regulations are ambiguous. This is because Regulation 24 of the UGC Online and ODL Regulations state that **“A Higher Educational Institution recognised for offering programmes at Under Graduate Degree or Post Graduate Degree or Post Graduate diploma levels in Open and Distance Learning mode and/or Online mode may offer Certificate or Diploma programmes in Open and Distance Learning mode and/or Online mode in the domains other than prohibited programmes as per clause (z) of regulation 2 subject to the condition that before the actual start of such programmes, all the Certificate or Diploma programmes are duly approved by the statutory authorities of the Higher Educational Institutions and the regulatory authority/council, as applicable, and the delivery mechanism conforms to the quality standards of the Open and Distance Learning education and/or Online education. The Higher Educational Institution shall be solely responsible for any legal issues arising out of non-compliance of such requirements: Provided that, if the concerned regulatory authority/council permits any of the prohibited programmes, as mentioned above, under its domain, in Open and Distance Learning mode and/or Online mode, the same may be offered by the Higher Educational Institutions after the approval of its statutory authorities and Regulatory Authorities or Councils, as applicable and after conforming to the quality standards of Open and Distance Learning and Online mode of education”.**

114. The UGC had, in January 2022, issued a notice reiterating that franchising arrangements are not permitted under the UGC Online and ODL Regulations. Our detailed analysis of this notice and permitted structures is available at <https://www.nishithdesai.com/SectionCategory/33/Education-Sector-Hotline/12/42/EducationSectorHotline/5190/1.html> (Last visited on June 6, 2022).

4. Possible arrangements for FEIs in Indian higher education sector

Hence, subject to these requirements, FEIs may also consider licensing arrangements with respect to online certification programmes, where there is no express limitation regarding the amount of learning material that can be outsourced by an Indian HEI.

- Further, certification programmes are also offered by private entities (such as EdTech platforms, industry bodies, etc.). There are no education sector specific regulations for certification programmes offered by private entities in India. FEIs may also consider sector or subject specific collaborations with such private entities.

iii. Summer schools / Upskilling courses

Indian HEIs also offer courses outside their academic calendar, or outside their fixed curriculum. These may be in the form of summer schools, extra-curricular courses for skill / knowledge development or other formats. Such courses are generally outside the purview of the structured curriculum leading to a degree or diploma. Courses offered by reputed institutions are often in high demand for learners who are looking to upskill. There is a demand not only amongst graduates but even amongst executives for such upskilling courses.

These courses offer great opportunities for FEIs to license their content for consumption of learners by partnering with institutions which can emphasise on their expertise for providing course content.

iv. Partnership with industry / corporate

An increasing number of corporate entities are looking to train and upskill their employees through various means, including through conventional and online training programmes. This is again an unregulated space which FEIs can explore. Partnerships with private parties and industries could be on an ongoing basis, with a mix of live lectures and recorded content and / or reading material. Such programmes often have evaluations at the end of each module or the programme, and lead to a certification.

The arrangements discussed above are a win-win for all parties as (i) the FEIs benefit from the license fee and goodwill generated because of its name being recognized in the Indian market; (ii) the Indian HEI benefits from the license of curriculum and brand name of the FEI, which enable them to attract students to their institution; and (iii) the students get access to the curriculum and teaching methods of FEI in India itself, thus saving on costs.

It is important to note that the structures discussed above have several nuances and it is important to seek advice from a legal, regulatory and tax perspective. Otherwise, the programme may fall under the purview of regulated collaborations (as discussed above) or of franchising (which is prohibited in higher education in India).

B. Services Arrangement

In addition to granting a license of the brand, curriculum etc., FEIs may also enter into services arrangement with Indian HEIs. Under such an arrangement, the FEI may provide services such as advising on standards for evaluation of students, qualification and recruitment of teachers, training teachers, advertising, inputs on infrastructure facilities etc. At times, FEIs also send their faculty and staff to the Indian HEI for teacher / student training programmes. The FEIs benefit from such an arrangement as they are able to exercise control over the curriculum, standard of education offered etc. Further, the FEI also earns from the service fee (in addition to license fee). The Indian HEI as well as students, on the other hand, benefits from the expertise and experience of the FEIs.

VI. Credit Transfer / Pathway Programmes

In such programmes, an FEI typically enters into agreements with Indian HEIs or other institutions. As per the agreement, students may pursue a certification course (not leading to a degree or diploma in India) with the Indian partner institution. Based on the student's satisfactorily completing the course in India and fulfilling other eligibility criteria of the FEI, the student may be provided admission into a programme of the FEI itself, leading to a degree, diploma or certificate being granted by the FEI. A variation of this model is where the FEI may license its IP (brand, curriculum) or provide some services to Indian HEI as well.

Another model for tie-ups between FEIs and Indian entities (typically private entities) is the credit transfer model. In this model, students enrol with an Indian service provider which provides teaching as part of the programme (using its own staff or the FEI's staff). Generally, credits are granted by Indian service provider to students in India. A degree, diploma or certification is not awarded at this stage. The course studied in India is recognized by the FEI by giving credit equivalence to students (as per its own charter documents, and applicable laws). The student then transitions to the FEI and completes the course and obtains a degree/diploma. This helps students save costs, allows the FEI to have a brand name in India and the Indian service provider benefits from this model as well. In such a model as well, a variation can be considered where the FEI may license its IP (brand, curriculum) or provide some services to the Indian entity as well.

It is important that parties enter into robust documentation to give effect to all the models discussed above. The agreements can cover various aspects such as quality standards, scope of consultancy to be provided by the FEI to the Indian HEI or entity, ownership of intellectual property, exclusivity, termination eventuality, dispute resolution, etc. Since there are multiple regulations, and regulators governing higher education in India, it is equally important to understand the law of the land to ensure the arrangements do not expose either of the parties to regulatory or legal risks in India. Equally important are the tax considerations, specially from a FEI perspective, which have been discussed in Chapter 5 below.

5. Other applicable laws

In this section, we have discussed some of the key laws which would need to be considered for offering higher education programmes in India.

I. E-commerce Rules

The E-Commerce Rules, 2020¹¹⁵ (“E-Commerce Rules”) under the Consumer Protection Act, 2019¹¹⁶ (“CPA”) are applicable to all e-commerce entities. Rule 3(1)(b) of the E-Commerce Rules defines “e-commerce entity” to mean any person who owns, operates or manages digital or electronic facility or platform for electronic commerce but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity. E-commerce entities are further categorized as inventory e-commerce entities and marketplace e-commerce entities.

An e-commerce entity which is not established in India, but systematically offers goods or services to consumers in India is also governed by the E-Commerce Rules. There is no threshold provided in the E-Commerce Rules for determination of the term “systematically”. However, the term “systematic activity” has been defined under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 as “any structured or organised activity that involves an element of planning, method, continuity or persistence”. While this is in the context of publishers of news and online curated content, this may provide guidance for the interpretation of the term “systematically” under the E-Commerce Rules, as well.

If a FEI is providing courses from outside India, through a platform to students in India, one will need to evaluate whether the CPA and the E-Commerce Rules will apply to an FEI or not. This will have to be decided after examining all the details of the respective arrangement between the parties and students.

The CPA and E-Commerce Rules do not apply if services are provided without any consideration. For e.g., courses which are offered free of cost will not come under the purview of these laws. Nevertheless, it is important to make sure that any communication / advertisement to students is accurate in nature, regarding the cost and other aspects of the program. Otherwise, such communications may amount to “misleading advertisements” under the CPA and E-Commerce Rules, and may lead to consequences under such laws as a result, regardless of the program being free of cost.

If the E-Commerce Rules are applicable to an FEI / service provider, they will be subject to certain compliance requirements such as disclosure of address, contact details of customer care and grievance officer, etc. on their website, and establishment of a grievance redressal mechanism, among other requirements.

The E-Commerce Rules define two specific types of entities as well, namely, inventory e-commerce entities and marketplace e-commerce entities. An inventory e-commerce entity is **“an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers and shall include single brand retailers and multi-channel single brand retailers.”** A marketplace e-commerce entity is an **“e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers.”**

If an FEI will be offering its own program to students in India, it may also be categorized as an “inventory e-commerce entity” under the E-Commerce Rules. An inventory e-commerce entity has further compliance

115. Available at <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf> (English version from p. 7) (Last visited on May 20, 2022).

116. Available at <https://consumeraffairs.nic.in/sites/default/files/CP%20Act%202019.pdf> (Last visited on May 20, 2022).

5. Other applicable laws

requirements¹¹⁷ in addition to those enumerated above such as vouching for/guaranteeing the authenticity of goods/services and bearing appropriate liability, disclosing information on available payment methods and security thereof, and other items. Marketplace models are typically EdTech platforms which are facilitators of university courses to students via their platform. They also have specific compliance requirements in addition to those of e-commerce entities such as disclosing information regarding sellers, payments methods, requiring sellers to provide accurate information to consumers, etc.¹¹⁸

II. Data Protection

The Information Technology Act, 2000 (“IT Act”) read with the **Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“Data Protection Rules”)** places obligations on body corporates that collect, store, process and transfer sensitive personal data or information (“SPDI”) of individuals. SPDI of an individual contains the following items of personal data: passwords; financial information such as Bank account or credit card or debit card or other payment instrument details; physical, physiological and mental health condition; sexual orientation; medical records and history; and biometric information.

Since FEIs are foreign entities, the compliance requirements under the Data Protection Rules should not apply, as it was clarified in a 2011 circular that the compliance requirements under the Data Protection Rules are only applicable to Indian entities.¹¹⁹ While the compliance requirements under the Data Protection Rules may not be applicable to FEIs, the below provisions may apply to a foreign entity in the event the nexus requirements under the IT Act are met.¹²⁰

- Section 72A of the IT Act may apply to offenders who, while providing services under the terms of a lawful contract, have secured access to the personal information of any person and with the intent to cause or knowing that they are likely to cause wrongful loss or wrongful gain, disclose such personal information without authorization.¹²¹
- If the data collector or processor is negligent in implementing and maintaining the reasonable security practices and procedures as described under the Data Protection Rules in relation to any SPDI, which may cause wrongful loss to any person, then the collector / processor may be liable to pay damages by way of compensation to the affected person under Section 43A of the IT Act,¹²² and/or a penalty not exceeding INR 25,000 (approx. USD 340). Such reasonable security practices and procedures include those which may be (i) agreed to by the data subject; or (ii) prescribed by law; or in the absence of (i) or (ii), such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit¹²³ and the entity is also required to maintain comprehensive documented security policies.¹²⁴

117. Rule 7 of the E-Commerce Rules.

118. Rule 5 of the E-Commerce Rules.

119. This was clarified via a Press Note released by the Ministry of Communications & Information Technology on August 24, 2011, available at: <http://pib.nic.in/newsite/erecontent.aspx?relid=74990> (last accessed June 3, 2022).

120. The IT Act will apply for offence or contraventions committed outside India “(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality. 31 (2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.”

121. This section prescribes a penalty of imprisonment up to three years and / or a fine up to INR 500,000 (approx. USD 6,800).

122. Section 43A of the IT Act.

123. Rule 8 of the Data Protection Rules provides that the IS/ISO/IEC 27001 standard on “Information Technology – Security Techniques – Information Security Management System – Requirements” is an example of such practices.

124. Rule 8 of the Data Protection Rules.

5. Other applicable laws

India is planning to overhaul its data protection law through the Data Protection Bill, 2021 (“**DPB**”). The latest publicly available draft of the proposed law contains provisions similar to EU’s General Data Protection Regulation (EU GDPR) and aims toward protection of wider categories of data, regulation of cross-border data flows, data localization, and enhanced obligations on data controllers. It also contains certain provisions with respect to non-personal data. Hence, the changes under the DPB will be crucial to determine data protection related obligations for FEIs as well as other service providers.¹²⁵

III. ASCI Code

The Advertising Standards Council of India (“**ASCI**”), a self-regulating body of the advertising industry in India, has also framed certain rules and guidelines for advertising of content (“**ASCI Code**”). The ASCI Code applies to advertisements read, heard, or viewed in India even if they originate or are published abroad, as long as they are directed to consumers in India or are exposed to a significant number of consumers in India.

While the courts of India have recognized and relied on the ASCI Code in cases dealing with content in advertisements, the enforceability of the ASCI Code vis-à-vis a FEI is unclear at this point in time. The ASCI Code does, however, may be viewed as a benchmark for local advertising by FEIs and other service providers. In case of television advertisements, since the TV channels are legally bound by the code, they may contractually require FEIs to comply with the ASCI Code.

The ASCI Code has specific guidelines issued for advertising of educational institutions and programs. Some key guidelines include:

- The advertisement shall not state or lead the public to believe that the institution/course or program is accredited, authorized, or recognized unless the same can be proved.
- An advertisement offering a degree, diploma, or certificate which is required to be recognized by law or approved shall have the name of the authority specified for that particular field.
- In cases where the advertised institution or program is not recognized or approved by any mandatory authority but is affiliated with another institution that is approved or authorized, then the name and location of the affiliated institution shall also be provided in the advertisement. The name of such affiliated institution shall not be less than 50% of the font size as that of the other institution. Additionally, in the event of a radio advertisement, the name of the affiliated institution shall also be stated.
- Advertisements shall not state or lead the public to believe that enrollment in the institution or program will provide the student a temporary or permanent job, a promotion, or the like. Further, such advertisements shall carry a disclaimer that “past record is no guarantee of future job prospects”. The disclaimer shall be of the same font size as that of the claim being made.

¹²⁵. Our analysis of the DPB is available at: <https://www.nishithdesai.com/SectionCategory/33/Research-and-Articles/12/60/ResearchatNDA/4988/1.html>.

IV. Tax¹²⁶

Important considerations from an Indian tax perspective¹²⁷

A. License of trademark, curriculum, software, know-how, etc.

In case of a licensing arrangement (as explained earlier), the consideration payable to FEIs by Indian HEIs under the license agreement may be taxable as royalty at 10% on a gross basis. Such taxes shall be withheld by the Indian HEI at the time of paying the consideration, followed by depositing the same with the Indian Government within the prescribed due date. It may be noted that payments which are normally not considered 'royalty' may be treated as 'royalty' for the purposes of the Indian income tax law, which defines the term in very wide terms. For example, the definition includes consideration paid for limited license of off-the-shelf computer software, even if the licensee is not given any right to commercially exploit the underlying IP. However, it may be possible to avail relief from such taxation under an applicable tax treaty.

B. Providing services

The consideration paid to FEIs by Indian HEIs for services rendered by the FEIs may be taxable as fees for technical services ("FTS") at 10% on a gross basis. Such taxes shall be withheld by the Indian HEI at the time of paying the consideration, followed by depositing the same with the Indian Government within the prescribed due date. However, under several Indian tax treaties (including the treaty with the US), consideration for services qualifies as FTS only where the services enable the service recipient to apply the underlying technology independently. Therefore, if payment for services do not constitute FTS, they would not be taxable in India unless the entity has a PE in India. Further, under treaties with some countries (for e.g., US and Singapore), consideration paid for teaching in or by an educational institution is also excluded from the purview of FTS.

C. 'Business connection' in India

If an FEI is considered to have a 'business connection' in India, its net income, to the extent attributable to such 'business connection' may be taxable in India at 40%.¹²⁸ Through the Finance Act 2018, and as part of India's commitment to the Base Erosion and Profit Shifting ("BEPS") initiative on digital economy, the ambit of 'business connection' was expanded to include non-resident companies that have significant economic presence ("SEP") in India. Amongst other things, a non-resident company can form an SEP in India if it carries out certain transactions in respect of digital services including provision of download of data/software in India or carries out systematic and continuous solicitation of its business activities in India or engaging in interaction with users in India, through digital or any other means. Non-resident ed-tech companies providing digital services in India may run the risk of constituting a 'business connection' in India by virtue of the concept of SEP. The applicability of SEP in India became effective from April 1, 2022.

¹²⁶. All income tax rates mentioned in this paper are exclusive of surcharge and cess; in case of non-resident companies, surcharge of 5%/ 2% is applicable on the income-tax if their total taxable income is in excess of INR 100 million (about USD 1.67 million) / in excess of INR 10 million (about USD 0.17 million) but less than INR 100 million (about USD 1.67 million) respectively; Health and Education and cess of 4% is applicable on the total of the income-tax and surcharge. .

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¹²⁸. Exclusive of applicable surcharge and cess.

5. Other applicable laws

Permanent Establishment (“PE”), which is a tax-treaty equivalent test of Business Connection, is much narrower and does not include SEP in its ambit. Hence, even if non-resident companies constitute a SEP in India, the narrower test of PE under the applicable tax treaty may be availed to determine taxable nexus with India.

Further, even if an FEI enjoys tax-exempt status under its domestic laws on account of being a charitable institution, generally it may not be able to claim any tax exemption/charitable status under Indian domestic tax laws except if it obtains an approval or registration from the prescribed authorities in India and fulfils prescribed conditions. Therefore, it may be key to avail relief under tax treaties. FEIs may find it difficult to claim tax treaty relief if they are set up as a fiscally transparent entity (like a partnership, trust, or LLCs, etc.). However, tax-exempt entities (for example, 501(c)(3) exempt entities in the US) should normally be entitled to relief if they are taxable in the absence of such exemption/upon not satisfying the conditions applicable to such exemption.

Some other important consideration from a tax perspective include:

- applicability of goods and services tax (“GST”) liability at the rate of 18%¹²⁹ on consideration paid by Indian entities for services rendered by FEIs;¹³⁰
- personal taxation of faculty or other employee visiting India. This typically involves determining their period of stay in India, the entity responsible for paying their remuneration etc. to ascertain their taxability in India;
- risk of collaboration arrangements between the FEI and Indian HEIs constituting an ‘association of persons’ (“AOP”). An AOP is a separate taxable entity and is considered to be resident in India even if a part of its control and management is situated in India. For e.g., in case of collaborations between an FEI and an Indian educational institution where the FEI provides course content, faculty training, etc. and the Indian HEI is responsible with respect to infrastructure and other on-ground activities, there is a risk that both entities may jointly be treated as an AOP (depending on the nature of relationship between the entities). As the Indian HEI is resident in India, such an AOP would also be treated as a resident of India. AOP classification could give significant exposure for FEI as AOPs resident in India are taxable on their worldwide income in India.

Further, the Government of India introduced the Equalization Levy (“Levy”) in the year 2016 to achieve the following two objectives:

- equalizing the playing field between resident service providers who pay income taxes in India and non-resident service providers who do not pay taxes in India;
- taxing the untaxed income of non-resident service providers who do not have a physical presence in India.

However, the Levy does not apply to non-resident companies that constitute a PE in India under the relevant tax treaty.

When introduced in 2016, the Levy was a 6% tax **“on consideration received or receivable for any on consideration received or receivable for any specified services” which currently includes “online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement”**. A FEI providing online advertisement services to an education services company in India, could be caught within the Levy.

Further, through the Finance Act, 2020, the scope of the Levy was expanded to cover non-resident e-commerce operators making supplies in India or having a nexus with India by imposing a 2% levy on the amount of

¹²⁹. Subject to exemptions available depending upon the satisfaction of conditions laid.

¹³⁰. Notification 8/2017 - Integrated Tax (Rate), available at <https://cbec-gst.gov.in/pdf/integrated-tax-rate/Notification8-IGST.pdf> (last visited on January 11, 2018). – Privacy error on this link

5. Other applicable laws

consideration received or receivable by an 'e-commerce operator' from 'e-commerce supply or services' made to an Indian resident or a non-resident in certain cases such as sale of advertisement / data involving Indian residents. 'E-commerce operator' has been defined as, **'a non-resident who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both'**, whereas, 'e-commerce supply or services' has been defined as, **'(i) online sale of goods owned by the e-commerce operator; or (ii) online provision of services provided by the e-commerce operator; or (iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator'**. Furthermore, 'online sale of goods' and 'online provision of services' is defined to include one or more of the following online activities, namely: (a) acceptance of offer for sale; or (b) placing of purchase order; or (c) acceptance of the purchase order; or (d) payment of consideration; or (e) supply of goods or provision of services. Thus, it is evident that the definitions are broad enough to cover even transactions of which only a part is conducted online. Considering the extremely wide definitions of 'e-commerce operators' and 'e-commerce supply or services' online services to be provided by FEIs are likely to be covered by the EL provisions.

6. Conclusion

In this paper, we discussed a variety of structures and arrangements that FEIs can consider for entering the Indian higher education sector. While we have discussed numerous regulatory aspects for such arrangements, it is important to crystallise these arrangements in India through carefully drafted agreements which account for the regulatory nuances. For e.g., apart from the laws mentioned above, exchange control regulations, tax laws, state-specific laws and a plethora of other regulations would also need to be evaluated to arrive at a structure which works best for all parties involved in the arrangement.

There are also numerous commercial considerations which would need to be evaluated. Ownership and rights in intellectual property, for e.g., is a crucial aspect of such arrangements. Similarly, provisions for termination and transitioning out of such arrangements should be well-documented.

The recent Indian regulations have not only opened up new avenues for FEIs in India, but made existing avenues also much more attractive. More such developments are in the pipeline, including regulations on permitting foreign universities to be established in India. The regulatory space has also become much easier to explore and navigate. Given the market size in India, the opportunity in India is huge. This will hopefully interest FEIs considering India.

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