

The 'Professionalization' of International Arbitrators: What Role for the Professional Arbitral Associations?

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The unique way arbitrators organize and regulate themselves has been increasingly an interest of mine. Being within the world of arbitration it is easy to forget how unique the arbitration 'market' and the arbitrators' 'function' is. Undoubtedly one of the most curious aspects of international arbitration is how distinctive the process of 'professionalisation' of arbitrators has been.

I - The concept of 'professionalisation'

The process of 'professionalisation' – i.e. the way by which certain occupations have over time developed institutionally autonomous or semi-autonomous systems of regulating members of a profession – has long been a staple of sociological enquiries.

Classical studies, such as Wilensky's influential 'The Professionalization of Everyone?' (1964, *American Journal of Sociology*), have attempted to demonstrate how many professions tend to organize, monopolize, and self-regulate through predictable steps. These studies often explained how the members of a certain number of high prestige professional occupations, most often those that required advanced and specialized education, were able to organize and extract legal protection and the right to determine who was able to join their ranks.

While specific jurisdictions and specific professions have developed their unique stories, what is clear is that often a grand bargain between the state and a profession emerges. In return for the 'guarantee' by the profession of developing a framework of self-regulation that ensures that the members defend public interest goals, the state often offers protection from 'unfettered' competition.

II - The special case of 'professionalisation' of international arbitrators

The readers of this blog are well-aware that arbitrators' organization, regulation, and function is not comparable to that of other professions. Their process of 'professionalization' – assuming that such a process has occurred at all – has been unique in the sense that the 'state' does not offer protection to arbitrators from would-be competitors.

The particularities of the arbitration market and of the arbitral function have led to the fact that arbitrators generally do not act or perceive themselves as full-time service providers. Most often being an 'arbitrator' is still an occupation that is combined with another legal activity, such as being a lawyer, a university professor, or less often other professions such as engineers or accountants.

Differently from most other professions, no specific education or training is legally mandated. Also, differently from other professions, arbitrators are not subject to the disciplining powers of specific arbitral professional associations.

The specificities of the 'arbitrator' as a 'profession' means that the regulatory framework in which they operate is not comparable to that of any other profession. International arbitrators operate under a system of almost 'radical' self-regulation. With states most often establishing only an outline of the duties and obligations of the arbitrator, it has been most often the arbitral community to detail and expand ideas for regulation. Such self-regulatory rules, despite their undeniable influence, however, have rarely been more than 'soft law'. Further, the enforcement of such rules does not involve the kind of sanctions found in other professions such as the threat of being expelled from the profession.

III - The role of professional arbitral organizations: how different are they?

Another stark difference between the arbitral landscape and that of other professional services is the characteristics of the professional associations. For most of the so called 'learned professions' it is often possible to identify the existence of a national, regional or local professional association that organizes the professionals working in that particular jurisdiction. Participation in these professional associations is often mandatory and a requirement to legally operate in that market. Further, these associations often have an exclusionary nature, having strict requirements for entrance: often requiring members to have a particular education and undertake training and/or examinations. Finally, in many of these professional associations it is possible to identify a dual nature in terms of their goals: i) at times they function as regulators of the profession; ii) at other times they operate as 'defenders' of the interests of the professionals they represent.

The situation is considerably different regarding arbitral associations. Most often arbitral associations are open to entrants, having as members not only arbitrators but also legal practitioners and others interested in arbitration. Entrance often does not demand more than paying an entrance fee and rarely demands commitment to a specific code of ethics. Perhaps most strikingly, arbitral associations do not seem to be directly interested in playing the role of 'regulators' of international arbitrators. While some of these institutions have played an important role in developing ethical rules, they have rarely stepped in to actually play the role of 'enforcers' of arbitrators' professional obligations.

Instead, arbitral associations are mostly concentrating on advancing arbitration as a dispute resolution system. They further most often function as centres where those involved with arbitration get to know each other, exchange experiences and further their professional endeavours. While some arbitral institutions offer training, this is by no means a function that seems to be central to most arbitral associations' goals.

IV - The future of arbitral professions associations: how are they perceived and what are they to 'do'?

The arbitral profession has changed considerably in the last few years. Accompanying the growing number of cases, there has been an increase on the number of people acting as arbitrators. At the same time, some arbitrators appear to approach this role in a more full-time capacity. The increasing number of arbitration boutiques is a strong signal of how some are looking to this function more and more as a full-time endeavour. Further, the environment has been noted to be increasingly competitive especially at the institution level but also at the arbitrators' level.

Altogether, there seems to be plenty of indications that arbitration and arbitrators are changing. How much these changes are welcomed by the arbitral community and how they expect their associations to change in reaction to them, if at all, is, however, still very much an open question.

Against this background, I would like to invite the readers of this blog to participate in the following survey I am conducting. Your responses will remain anonymous.

<https://oxford.onlinesurveys.ac.uk/professional-associations-in-ica-wc>

Your views and opinions on this topic will be welcomed.