



International Distribution Institute

IDArb: Facilitating Arbitration for International Distribution Disputes

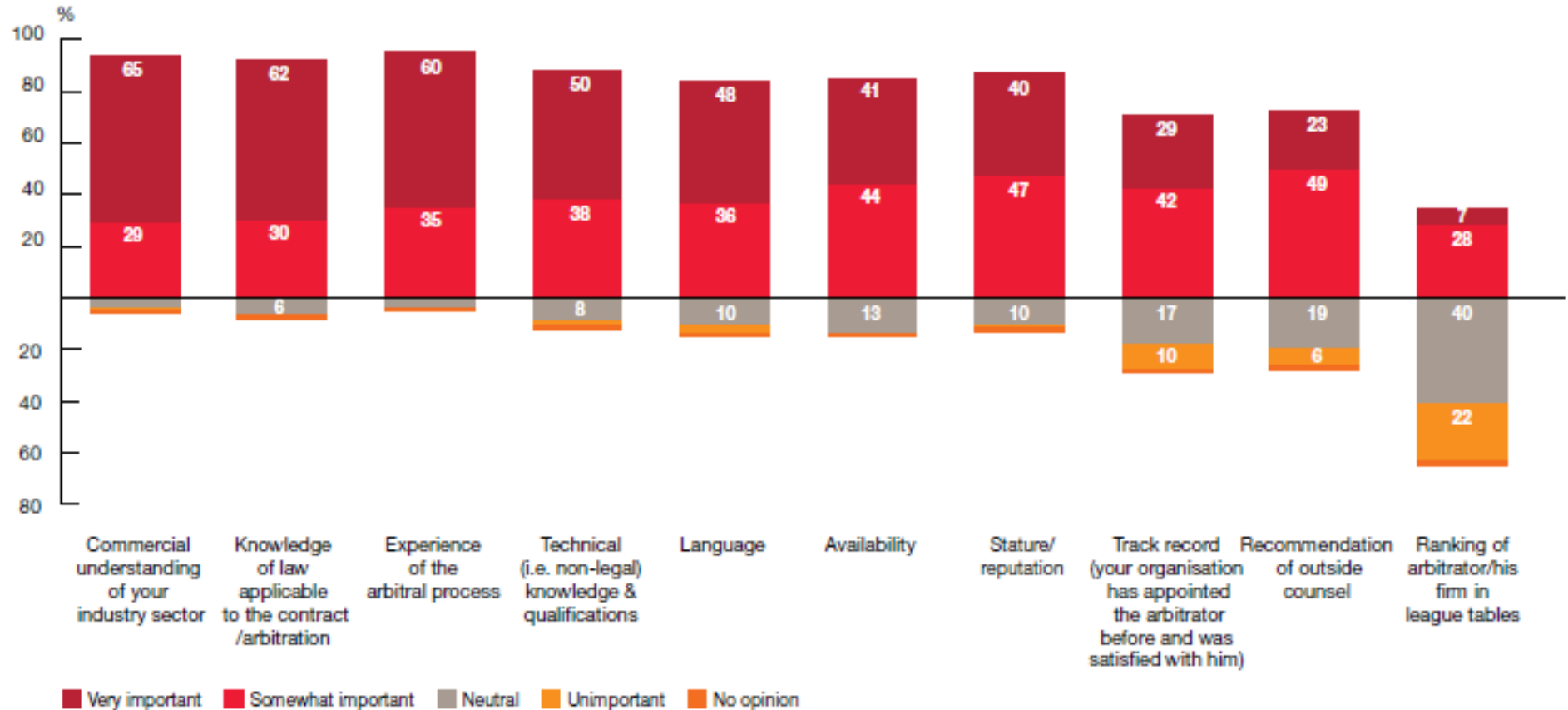
*The importance of choosing arbitrators who
“know the business”*

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Florence, 9 June 2018

How important are the following factors in influencing your organisation's choice for the nomination of a co-arbitrator?



What are the criteria when choosing an arbitrator?

- Survey: corporate choices in International Arbitration, PwC & Queen Mary, 2013
- Commercial understanding of your industry sector is the most important factor
- Distribution is not a relevant sector for arbitration yet

Arbitrators with experience in distribution for the IDArb Project

- In the IDArb Project the selection criteria for arbitrators focus more on the experience in distribution than on the specific experience as arbitrators (both aspects are relevant)
- Specific attention is devoted to in-house counsels of companies having distribution networks because of their specific knowledge of their respective business.

Arbitrators' experience

- Looking for arbitrators with an actual understanding of the commercial background of the agreement which forms the object of the dispute.
- Arbitrators who know the business as an additional guarantee of a fair and equitable judgment.
- The Selecting Committee has decided to accept also candidates without extensive experience as arbitrators considering the actual experience in distribution even more relevant.

Arbitrators experience

- The specific experience in distribution matters may warrant a special understanding of the underlying economic and managerial situation.
- The cases described by the prospective arbitrator may also describe the experience made in negotiating agreements or preventing litigation through negotiations, settlement agreements either directly or via the intervention of professional mediators.

Specificities of Distribution Contracts

- Long-term contracts
- Relationship based on common interest and trust
- Requires implication and efforts on both sides
- Relationship evolves in time
- Impact of external factors (financial or economic crises, currency fluctuations, geopolitical or regulatory issues)

Typology of Distribution Disputes

- Complex legal and factual issues
- Sale of competing products, unfair competition, violation of IP rights
- Issues concerning the execution of the contract, advertising and promotion, sales performance, quality of the products, ...termination of contract, termination indemnity, termination notice, ...

Arbitrators experience

- The application form allows to mention experience gained as in-house counsel assisting external counsel as well as direct experience as in-house counsel.
- Such an experience useful in case of a pro-active role of the arbitrator in view of the settlement (see recommendations).

Usages, practices and principles

- Arbitrators are commercially minded problem solvers who should give commercially reasonable meaning to the contract keeping in mind usages, practices and principles.
- Especially usages and practices tend to be dignified by the business community with a status equivalent to that of actual law.
- The practitioners could help to discover the law from their knowledge of the international business practices.

Usages, practices and principles

- “Quoi qu’il en soit, qu’elles le précisent ou non dans leur compromis, les parties attendent généralement de l’arbitre qu’il applique à la solution du litige, d’abord leurs stipulations contractuelles et, à côté de ou même à la place d’un droit étatique particulier, les usages du commerce, les conditions générales ou les principes généraux admis dans le milieu ou la branche considérés.” (Pierre Lalive, Sur la contribution de l’arbitrage au développement d’un droit du commerce international- Geneve 1977).

Importance of understanding the business

- Appreciation of notions such as « reasonable », « good faith », « loyal »
- Termination: when is a breach a « substantial breach »? Tolerated behaviour
- Termination indemnity: application of the agency status to the distributor
- French notion of « rupture brutale »: what is an adequate termination notice?
- Calculation of damages

Role of the business community

- International business law has been primarily developed by the transnational community of business people and has had a more or less continuous history for some nine centuries with the only exception of the positivist codification movement of the nineteenth century.
- Today the states have left the space open and the business community can use it.