DePaul University
College Of Law

Winds of Change:

Solutions to Causes of Dissatisfaction with Arbitration

Whither Arbitration?

What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill-Affects

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Thank you

DePaul University College of Law Center for Dispute Resolution

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For the insight and commitment of resources to develop and present this timely and much needed program.

Background

L. Tyrone Holt, Esquire, B.A., 1971 (summa cum laude), Morehouse College; J.D. 1974, Stanford University; M. Theology, 1997 Peace Theological Seminary and College of Philosophy. Ty is the Principal of THE HOLT GROUP LLC, Attorneys & Counselors at Law and WESTERN NEUTRAL SERVICES LLC, in Denver, Colorado. He has over thirty-four years of experience as a construction transactions and civil trial attorney; and more than twenty-five years of experience as a construction mediator and arbitrator. In addition to construction arbitration, Mr. Holt has also arbitrated labor, fair employment, intellectual property and commercial contract disputes. Mr. Holt arbitrated his first case as an advocate in 1976.

Ty has been a frequent speaker on American Bar Association, American Arbitration Association, Design Build Institute of America, Practice Law Institute and other national programs. Mr. Holt is a Member of the Governing Committee of the American Bar Association Forum on the Construction Industry; a member of the Board of Visitors of the Stanford Law School; a Fellow and Member of the Board of Directors of the College of Construction Arbitrators; a Life Fellow of the American Bar Foundation; a member of the American Arbitration Association's Construction Arbitration Master Panel, and a nationally recognized construction mediator.

He is admitted to practice law in the State of Colorado, and before the United States District Court for the District of Colorado, the United States District Court for the Western District of Texas, the United States District Court for the Northern District of Georgia, the United States Court of Appeals for the Ninth and Tenth Circuits, and the United States Supreme Court. He was a law clerk to the Honorable Preston Devine of the California Court of Appeals in 1974.

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INTRODUCTION - *The arrival of Arbigation*

The comments and opinions expressed by the author apply to commercial arbitration and are generally not applicable to consumer and other forms of arbitration.

Since the end of World War II, in the United States, commercial arbitration has become prevalent as a means to take many commercial disputes out of the state and federal civil court systems. Over the last decade, commercial arbitration has come under attack by many of those who claim to seek its benefits, but abhor its supposed risks and limitations.

Parties and their counsel desire a fast, flexible and binding means of commercial dispute resolution, yet they cannot seem to release their grip on litigation devices that give them such comfort and security---expansive discovery, formal rules of evidence, and the shining promise of appellate review. Conflicted, they seek a marriage of convenience between arbitration and litigation, the result of which is "arbigation": a process in which parties seek to use civil litigation tools to navigate the arbitral arena. These efforts compromise arbitration's goals of effective, fair and efficient relief.

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"Better – Cheaper – Faster"

The comments and opinions expressed by the author apply to commercial arbitration and are generally not applicable to consumer and other forms of arbitration.

A common criticism is that arbitration is no longer better, cheaper and faster than commercial litigation. From the perspective of the construction industry neutral and advocate, I do not participate in the process because it promises to always be cheaper – I do so because it offers the opportunity for faster, fairer, more predictable and precise results in construction industry disputes.

I also believe that if properly managed from the beginning of the process to the end, by experienced counsel, competent arbitrators and parties of good will, commercial arbitration has the potential for consistently producing more cost effective dispute resolution than court accessed commercial litigation.

Further, commercial arbitration can also consistently provide better results, faster decisions and consistently cost effective dispute resolution compared to "arbigation".

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"Arbigation"

A marriage of convenience between arbitration and litigation, the result of which is "arbigation": a process in which parties and their counsel use civil litigation tools to navigate the arbitral arena.

I believe that this effort compromises arbitration's goals of effective, fair and efficient relief.

It is unclear when the term "arbigation" arose or who coined it. It has at least been in circulation since 2003. See Jeffrey W. Stempel, Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication, 3 Nev. L.J. 305, 314 (2003) (using term "arbigation"). That article did not define "arbigation" in the exact manner in which I use the term here.

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The Anecdotal Perceptions of Arbitration May Become Reality

While there is limited empirical evidence regarding the relative costs of commercial arbitration compared to civil litigation, the available information suggests that on a comparable case by case basis, commercial arbitration is still not as expensive as litigation. However, unless we take action to address the trend towards "arbigation", commercial arbitration may continue to increase in costs, without any corresponding benefits.

The very perception of arbitral inefficiency and excess costs is cause for major concern, and should be addressed by participants in the process -- parties, counsel and arbitrators.

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Neither litigation nor arbitration are perfect. All dispute resolution procedures have experienced significant increases in costs and expense sand this trend does not appear to be changing.

If counsel and the parties perceive that arbitration is more flawed, more expensive and at least as time-consuming as litigation on a comparable case by case basis, they are more apt to accept such assertions as truth and refrain from arbitrating appropriate commercial claims.

Additionally, although the support for these criticisms is largely anecdotal, if left unaddressed, the unsupported anecdotal perceptions will fuel the negative legal, business, political and public opinions about all forms of arbitration.

Unfounded complaints may also give rise to ill-considered reform initiatives. Thus, it is extremely important to address misperceptions and sort them out from legitimate concerns about the arbitral process. Legitimate inquiries such as this Symposium will serve as a platform for the improvement of arbitration for the common good. As result, commercial arbitration can be improved and legitimate criticisms addressed.

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Arbitration is an Invitation, Not a Command Performance

As a general rule, commercial arbitration clauses are entered into by the parties at the time of the creation of the basic documentation containing all of the other commercial terms of the Parties contract.

At that time, no disputes or ill will typically exist. The parties to the arbitration agreement and their counsel have great latitude to determine whether to agree to arbitrate or litigate any future disputes. Where arbitration is chosen as the dispute resolution procedure, the parties need to determine all aspects of the procedural aspects of the arbitration process. This may be accomplished by a short dispute resolution clause, including a reference to one of the several nationally recognized sets of arbitration rules (AAA, JAMS, CPR, etc.) or by the creation of custom tailored "ADR" clauses.

The creation of a mutually acceptable and workable arbitration clause is an both a right and an obligation of the parties.

Any perceived or actual problems with the arbitration process can be addressed by the parties, counsel and the arbitrator.

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Stages of Arbitration Process:

Stage 1 "Education/Evaluation": Consider and understand the differences between litigation and arbitration, and make a determination of the appropriate dispute resolution procedure to be included in your agreement.

Stage 2 "Drafting": Create the arbitration provision(s) for your needs or adopt an existing standard agree, AIA, JAMS, AAA, CPR, etc.

Stage 3 "Dispute": Commencement of proceeding, arbitrator selection, venue, forum issues.

Stage 4 "Pre-Hearing": Preliminary hearing, discovery and other pre-hearing activities.

Stage 5 "Hearing": What will it look like – be creative, use your experience.

Stage 6 "Post hearing": Interim Award, Attorneys Fee Hearing and Final Award.

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Stage 1 - The Development of the Arbitration Clause

One of the many values of arbitration is the opportunity for the parties to create a custom and uniquely appropriate dispute resolution procedure that addresses all of the needs, concerns and many of the desires of the parties.

Arbitration costs, speed and efficiency can be ignored or enhanced as a part of this process.

This opportunity does not exist with litigation as a dispute resolution procedure.

The first opportunity to keep unwilling participants from poisoning the arbitral process with litigation antics and to address all legitimate concerns of the willing participants.

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Stage 1 - The Development of the Arbitration Clause – an opportunity

Before an arbitration clause is ever inserted into a contract, counsel and the parties to the agreement should be aware of the decision to use arbitration as the dispute resolution procedure.

They should jointly consider why arbitration is being chosen and what the comparable characteristics of arbitration vs. litigation are for the particular commercial transaction – KNOW WHY YOU ARE SELECTING ARBITRATION.

Before an arbitration clause is ever inserted into a contract, counsel need to know with certainty that their client is aware that an agreement to arbitrate is an almost irrevocable commitment and that the arbitrator's decision is going to be enforced absent very rare circumstances.

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Stage 1 - The Development of the Arbitration Clause – an opportunity

If a party knows and accepts this before agreeing to an arbitration clause, there is a higher probability of avoiding challenges to arbitrability and the arbitration award, with their attendant undesirable cost and time implications.

If speed, efficiency, costs savings, privacy, confidentiality and technical knowledge of the person who will decide any disputes are important, this is the time to make sure that the process addresses them appropriately.

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Stage 1. Client Education and Awareness - Concepts

The Client and counsel should consider and understand the differences between litigation and arbitration, and make a determination of the appropriate dispute resolution procedure to be included in the agreement.

In the absence of a conscious selection of arbitration, litigation applies by default.

Litigation is generally more formal and provides an array of due process protections, and pre-established rules and procedures that apply to every dispute in the same manner.

There is no control or choice of the decision maker, except as between a judge or a jury, in most non-equity cases.

As a general rule, litigation can be inefficient, slow and more expensive than arbitration. However, litigation generally involves less up front costs to initiate the process.

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Stages of Arbitration Process Selection and Structuring

Stage 1. Client Education and Awareness (Continued)

Arbitration must be affirmatively selected by the Parties.

Arbitration is typically more informal, flexible, quicker, confidential, highly accessible, specialized and provides confidential results with quicker finality.

The "upfront" costs and expenses to initiate arbitration are generally greater than litigation, but the on-going process costs and expenses tend to be smaller. The on-going costs and expenses are more scalable, i.e., adjustable based upon the size of the dispute and on-going evaluation of the dispute.

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Stages of Arbitration Process Selection and Structuring

Stage 2. To Draft or Not to Draft – the Questions

Where litigation is the dispute resolution procedure, there is nothing to draft.

Where arbitration is the dispute resolution procedure, the lawyer must decide whether to develop a unique customized clause or clauses, or use a simple standard clause that relies upon one of the standard sets of rules for the details.

Only reasonably knowledgeable and experienced counsel should undertake to draft detailed, customized arbitration clauses. The risk of doing so for the unschooled and inexperienced can significantly increase costs, expenses and uncertain results, with increased potential for appellate issues, when the award is issued.

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Stage 2 - To Draft or Not to Draft – the risks and consequences

Attorneys who draft agreements may not be the same ones who represent the clients in the disputes. They may have little or no arbitration experience.

Their knowledge of dispute resolution may be limited to litigation, and they may assume that an arbitration will proceed just as a case would in the trial court.

The parties they represent may have the same limited perspective along with false expectations.

This creates a scenario of a series of disappointments and unexpected consequences, ending with deep disenchantment with the arbitration process.

The inevitable byproducts of these kind of up front mistakes are: increased costs and expense, wasted time, undesirable complications and deep disenchantment with the arbitration process. Finally, yet another anecdote about how bad arbitration is as a dispute resolution procedure.

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Stage 2 - To Draft or Not to Draft – the risks and consequences

If you choose to draft a customized arbitration provision or to materially modify a standard form arbitration agreement, include terms for the following issues:

1.Define the number of arbitrators, the dispute(s) to be arbitrated and commit arbitrability of all issues to the jurisdiction of the arbitrator(s).

2.Decide which law and rules will govern as well as what (if any) procedural rules to apply.

3.Decide availability of attorney fees and costs, use of a standard or reasoned award, contracting for arbitrated appeal.

4.Consider whether the parties wish to impose any limitation on the available types of remedies, damages or other type of relief that will be available.

5.Should cost, expense, efficiency and schedule be factors in the decision making process of the arbitrator(s)?

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Examples of arbitration agreement "drafting"

What is the likely impact on cost, schedule and quality of the arbitration process?

Example 1:

10.4 Demand for arbitration shall be filed in writing with the other party to this Agreement and with the AAA. A demand for arbitration shall be made within a reasonable lime after the claim, Dispute or other matter in question has arisen. In·no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, Dispute or other matter in question would be barred by the applicable statutes of repose or limitations.

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Example 2:

10.6 Notwithstanding the AAA rules applicable 10 this Agreement, the arbitrator or panel of arbitrators shall establish reasonable procedures and requirements for the production of relevant documents and the exchange of information concerning persons with knowledge of relevant facts and witnesses to be called. The parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration and the parties may use all methods of discovery available under the Colorado Rules of Civil Procedure and shall be governed thereby. Prior to the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less then ten (10) days prior to this date set for the expert witness's deposition. Any disputes arising from such discovery shall be decided by the arbitrator (or panel) and such decision shall be final as in all other matters.

Is this provision helpful? Does it minimize costs and provide clarity for anyone?

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Example 3:

10.8 Notwithstanding the AAA rules applicable to this Agreement, the Colorado Rules of Evidence shall be applied by the arbitrator (or panel) but liberally construed to allow for
the admission of evidence that is helpful in resolving the controversy. Rulings on the admission of evidence made by the arbitrator (or panel) at the hearing shall be final and not subject to any appeal. At the time of the award, the arbitrator (or panel) shall prepare and provide to the parties findings of fact and conclusions of law supporting the award.

Is this provision helpful? Does it minimize costs and provide clarity for anyone?

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Example 4:

10.9 The award rendered by the arbitrator or arbitrators shall be final and non-appealable and judgment may be entered upon it in accordance with Applicable Law in any court having jurisdiction thereof.

10.10 This agreement to arbitrate shall be specifically enforceable under all applicable prevailing arbitration law. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable Colorado law in any court having jurisdiction thereof. Notice of the demand for arbitration and all arbitration processes and procedures shall be governed by the AAA Rules, provided however, that in no event shall an arbitration be commenced after the date on which the applicable Colorado statute of limitations and/or statute of repose for such claims has expired. If the arbitrator(s) find that the applicable Colorado statute of limitations or repose has expired or run, the arbitration shall be dismissed, with prejudice, and such issue(s) shall be considered as early as reasonably possible in the arbitration process.

Are these provisions helpful? Do they minimize costs and provide clarity for anyone?

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Example 5: [Same arbitration as Examples 1-4]

10.3.3 The Parties shall select a panel of three arbitrators. Within ten (10) Business Days following the date a demand for arbitration was filed pursuant to this Section 10.3, the Parties shall each select one arbitrator. Within ten (10) Business Days following their selection, the two arbitrators shall select a mutually agreeable third arbitrator.

Is provision helpful? Does it minimize costs and provide clarity for anyone?

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Example 6: [Same arbitration as Examples 1-5]

10.3.4 Notwithstanding anything to the contrary in the Arbitration Rules, the panel of arbitrators shall establish reasonable procedures and requirements for the production of relevant documents and the exchange of information concerning persons with knowledge of relevant facts and witnesses to be called. The Parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration and the Parties may use all methods of discovery available under the Federal Rules of Civil Procedure and shall be governed thereby. Prior to the deposition of any expert witness, the Party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less then ten (10) days prior to the date set for the expert witness deposition. Any disputes arising from such discovery shall be decided by the panel of arbitrators and such decision shall be final with respect to the Arbitration.

Is provision helpful? Does it minimize costs and provide clarity for anyone?

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Stage 3 – A Dispute Arises – the arbitration clause is used

Frequently, the attorney who will handle the dispute in arbitration, is not the one who drafted the arbitration clause. Choose competent counsel with arbitration experience.

Many trial lawyers or "litigation attorneys" have little or no arbitration experience. Their knowledge of dispute resolution may be limited to litigation, and they may assume that an arbitration will proceed just as a case would in the trial court.

They may not be aware of the ways that schedule, scope of discovery, and other matters can be addressed in arbitration procedures to minimize costs and expenses, without sacrificing quality of process or result.

As a part of the description of the characteristics of the arbitrator, should the arbitrator be advised that the Claimant wishes to have a fair, just and reasonable proceeding, with appropriate attention paid to conserving costs, and avoiding unnecessary or wasteful expenses?

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Stage 3 – A Dispute Arises – the arbitration clause is used

How to save fees, costs, expenses:

Before the arbitrator is selected, the client and the lawyer need to talk, if the economics of the arbitration process are important considerations for the client, including how many arbitrators will be use, i.e., 1 or 3.

Consider whether they should jointly amend any of the arbitration terms, to improve efficiency and control costs, e.g., use one arbitrator vs. a panel of three.

Bring the dispute to proper venue (avoid risk of being sued for breach of arbitration provision).

Both counsel should provide a clear concise Statement of Claim and Damages and Counterclaims (be as complete as possible to avoid unnecessary amendment).

Confer to avoid wasteful and unnecessary procedural disputes.

Mutual agreements to amend the arbitration process are enforceable.

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Stage 3 – A Dispute Arises – During the Preliminary hearing

The arbitrator, counsel and the parties should:

Accurately gauge the real or likely discovery needs of the parties and consider the best approach to the type of hearing preparation that is likely to be needed with a view towards avoiding protracted and costly pre-trial activities.

Accurately assess the anticipated length of the case based on evidentiary expectations to avoid scheduling difficulties, continuations and expensive postponements.

Arbitrator should set tone and encourage communication throughout dispute.

Arbitrator should be alert to using his/her experience and training to aggressively seek to control costs and expenses without sacrificing neutrality, fairness, equity or justice.

Everyone must be creative or open to innovation!

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Stage 4 – Pre-Hearing

The arbitrator, counsel and the parties should:

Accurately gauge the real or likely discovery needs of the parties.

Consider the best approach to the type of hearing preparation that is likely to be needed with a view towards avoiding protracted and costly pre-trial activities.

Accurately assess the anticipated length of the case based on evidentiary expectations to avoid scheduling difficulties, continuations and expensive postponements.

Arbitrator should set tone and encourage communication throughout dispute.

In order to best address the economics of the process, everyone must be creative or open to innovation!

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Example 7:

5)Scope of Discovery.

a. Interrogatories. Each party shall be permitted to propound a set of interrogatories totaling no more than 25, including subparts.

b. Requests for Production of Documents. Each party shall be permitted to propound one request for production of documents, not to exceed 25, including subparts.

c. Additional discovery may only be granted by demonstration of good cause and, such an extension shall be solely at the discretion of the Arbitrator.

d. Depositions. Each party shall be permitted five fact witnesses depositions and one deposition of an expert witness.

   i. Length of Depositions. Depositions shall not exceed five hours (excluding breaks) unless agreed to by the parties. Depositions of any expert witness shall only occur after the determination of any dispositive motion filed by the parties. In such case, the parties will mutually agree on such timing. If the parties cannot do so, the Arbitrator shall determine the time of any such depositions. Depositions of out-of-state witnesses may be taken telephonically or in the state in which the witness resides, unless the parties agree otherwise.

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Example 7:

5) Scope of Discovery (Continued)

ii. The parties shall be entitled to use one expert witness on the issue of damages.

iii. The limitations with regard to depositions may be altered or amended by the mutual consent of the parties or by the Arbitrator upon good cause being shown. In no event will the amount of depositions permitted by either party exceed eight.

What message does this "Scope of Discovery" clause convey to the Arbitrator and the lawyers about the parties' views about the "economics" of the arbitration proceeding?

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Stage 5 – Hearing

The arbitrator, counsel and the parties should:

Hold a final pre-hearing conference call to address, in a realistic and practical manner, all anticipated hearing issues.

Jointly amend arbitration terms, as needed, to improve hearing process.

Resist litigation impulses (*i.e. evidentiary objections).*

Stipulate as necessary, bifurcate if sensible, have experts confer to minimize their disagreements, submit direct testimony in writing (to the extent possible), group witnesses topically to shorten hearing, use joint exhibits in lieu of witness testimony and engage in conference calls instead of hearings when issues arise.

In order to best address the economics of the process, everyone must be creative or open to innovation!

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Stage 6 – "Post Hearing": Interim Award, Attorneys' Fee Hearing and Final Award:

The arbitrator, counsel and the parties should consider:

Don't seek an attorneys' fee hearing or call fee experts unnecessarily.

Bring any errors, mistakes, miscalculations or requests for clarifications to the attention of the Arbitrator in a timely manner.

Before contesting confirmation or filing an appeal, consider whether a court has jurisdiction and gauge likelihood of success. Be aware of possible sanctions.

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Stage "7" – Post Final Award

Counsel and the parties should:

Before contesting confirmation or filing an appeal, consider whether a court has jurisdiction and gauge likelihood of success.

Carefully consider the limited grounds for opposing confirmation. Look carefully at the applicable law in the proper jurisdiction.

Consider imposition of additional attorneys' fees and cost awards.

Be aware of possible sanctions.

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Conclusion

The "holy grail" of making commercial arbitration consistently "better", "cheaper" and faster" can be achieved.

Unnecessary litigation and hardball antics can be avoided when parties and counsel are willing participants in the commercial arbitration process and apply good practice techniques from the beginning of the process.

We would all be best served by the avoidance of undesirable arbigation tactics and processes. Litigators would do well to stop leaning on old familiar ways when they arbitrate cases. Embracing arbitration's creativity and efficiency will encourage change, but experienced arbitrators and counsel must commit to help lead the way. Inasmuch as attorneys cannot castigate arbitration for the drafting defects and nasty litigation practices attorneys cause, arbitrators cannot be complicit by allowing deleterious litigation practices to erode arbitration's interests. Ensuring an effective arbitration process is the responsibility of all.

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Conclusion

Ensuring an effective arbitration process is the responsibility of all.