

“ARBITRATION SCHMARBITRATION”: EXAMINING THE BENEFITS AND FRUSTRATIONS OF DEFINING THE PROCESS

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As Deborah Hensler and Damira Khatam observe in their lead essay in this symposium, “Re-Inventing Arbitration,” “arbitration” looks very different, depending where and how it is used.¹ They aptly explain that commentators on arbitration tend to view the process from their various “silos,” and do not typically try to come up with a unified field theory of arbitration, nor examine where this might lead in terms of policy implications.² In an effort to remedy this disunity, Hensler and Khatam focus on three disparate types of arbitration: domestic, investor-state, and international commercial.³ Drawing on their analysis they try to mold an appropriate definition of arbitration and then use that definition to help us better design both arbitral and litigation processes.⁴ They urge that arbitration has been “re-invented” to handle more public disputes, making the arbitration process more formal and litigation-like, and that this re-invention of arbitration “risks undermining its value for private actors with private disputes, while at the same time undermining courts as institutions for public contest over public policy issues.”⁵

Professor Deborah Hensler initially presented these ideas in a talk, the inaugural Chris Beecroft Jr. Lecture on Conflict Resolution, given at UNLV in the spring of 2017.⁶ Chris Beecroft Jr. was the ADR Commissioner for Clark County, Nevada from 2001 to 2016, and he contributed immeasurably to the

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¹ Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381 (2018).

² *See id.* at 421–25.

³ *Id.* at 382–83.

⁴ *Id.*

⁵ *Id.* at 381.

⁶ *CLE: Re-Inventing Arbitration: Drawing Lessons from International Trade Treaty Controversies*, UNLV WILLIAM S. BOYD SCH. L., <https://www.law.unlv.edu/event/cle-re-inventing-arbitration-drawing-lessons-international-trade-treaty-controversies> [https://perma.cc/LN6Y-LW3C] (last visited Feb. 1, 2018).

conflict resolution community in Las Vegas, Nevada, and the nation. For example, he created an extremely innovative “short trial” program designed to provide disputants with a trial experience that could be quicker and cheaper than a traditional trial.⁷ Commissioner Beecroft was constantly thinking about how to provide disputants with a better and more just experience. Thus, it is most appropriate that Professor Hensler should use the inaugural lecture to urge us to better devise our arbitral and litigation systems of justice. After Professor Hensler gave her lecture, the Nevada Law Journal circulated a preliminary version of her article (co-authored with Damira Khatam) to the excellent commentators whose remarks are also contained in this symposium. I am delighted that so many accomplished arbitration scholars were willing and able to provide their own thoughts on related matters, thus turning the lecture into a rich issue of this law journal. I note, however, that constraints of timeliness precluded us from ensuring that all the authors had the chance to comment on the most recent versions of each other’s work.

Hensler and Khatam are certainly correct in their assessment that arbitration lacks a unifying theory. Indeed, if anything they have understated the variety of processes that are sometimes called “arbitration.” If they were to have also examined labor arbitration,⁸ lemon law arbitration, baseball arbitration, non-binding court connected arbitration, on-line arbitration of consumer disputes, uses of arbitration to resolve Olympics or other athletic drug-use controversies, state-to-state arbitration, and so on, it would be even more obvious that arbitration in one setting looks nothing like arbitration in another.⁹ As commentator David Noll observes, “the term [arbitration] actually refers to several distinct systems, each with its own basis of authority, procedures, and external constraints.”¹⁰

Indeed, in teaching arbitration, I have sometimes challenged my students to come up with a good definition of arbitration, or at least a good description of arbitration. They think this will be simple, and easily throw out words like “private,” “speedy,” “informal,” and “inexpensive.” I then typically respond with that ever-present law school mantra, “it depends.” As Hensler and Khatam have shown, processes called arbitration are not always private, speedy, informal, or inexpensive. And, perhaps more frustratingly from a definitional standpoint, it is not that arbitration is trying and failing to meet these goals, but often that in certain contexts it does not even aspire to these attributes. Along similar

⁷ *Obituary: Chris Beecroft Jr.*, LEGACY.COM, <http://obits.reviewjournal.com/obituaries/lvrj/obituary.aspx?pid=183490847> [<https://perma.cc/YE87-JDD8>] (last visited Feb. 1, 2018).

⁸ See CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 397–401 (2d ed. 2011) (discussing both grievance and interest arbitrations in the labor law setting).

⁹ See *id.* at 383–84 (observing that “there are immense variations among arbitration processes,” and going on to discuss uses of arbitration in a variety of disparate settings). Of course, I am not suggesting that the authors should have taken on such a gargantuan endeavor!

¹⁰ David L. Noll, *Response: Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 478 (2018).

lines, one cannot accurately say whether arbitrators write reasoned decisions, whether arbitral decisions are published, whether arbitrators apply evidentiary rules, or whether arbitration decisions are final. Thus, when commentators (such as myself!) try to come up with a definition of “arbitration,” they typically provide a very impoverished definition, such as “a process in which a third party who is not acting as a judge renders a decision in a dispute,”¹¹ or “a binding adjudication of a dispute by private decision-makers outside a public court system.”¹²

Hensler and Khatam are to be lavishly commended for bravely entering this fray. Their effort at unifying the field of arbitration is very helpful to those of us who have pondered whether, why, and when arbitration is a valuable dispute resolution technique. As the many responses to their lead essay demonstrate, their article truly has inspired good thought on the questions of how arbitration should be defined and when it should be used. For example, Benjamin Edwards points out that by allowing domestic securities brokers to require investors to resolve claims against their brokers in arbitration, rather than litigation, we have permitted these disputes to be buried in a lawless shadow.¹³ Along related lines, Teresa Verges urges that securities arbitration, while fairer than some other forms of forced arbitration, still is not fair enough and ought to be fixed through legislation, if possible.¹⁴ Looking more generally at all of domestic arbitration, Imre Szalai urges courts to view arbitration through a “lens of procedure,” and therefore treat arbitration as procedural and reduce the preemptive scope of the Federal Arbitration Act.¹⁵ This approach would give states more authority to regulate arbitration as they see fit. In his article, Guillermo Garcia Sanchez points out that investor-state arbitration is an odd amalgam of public and private, noting that while the process is open and public in some ways, arbitrators generally issue purely monetary awards, rather than

¹¹ MENKEL-MEADOW ET AL., *supra* note 8, at 383.

¹² Hensler & Khatam, *supra* note 1, at (387) (citing Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 97–98 (2000)); *see also* Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 L. & CONTEMP. PROBS. 698, 699 (1952) (“The four essential aspects of arbitration are (1) it is resorted to only by agreement of the parties; (2) it is a method not of compromising disputes but of deciding them; (3) the person making the decision has no formal connection with our system of courts; but (4) before the award is known it is agreed to be ‘final and binding.’”). Yet, some “arbitration” is mandated by court rules, state or small print contract; some arbitrators do make compromise determinations; some arbitrators could be persons who also serve as judges; and some arbitral awards are non-binding.

¹³ Benjamin P. Edwards, *Arbitration’s Dark Shadow*, 18 NEV. L.J. 427, 430 (2018).

¹⁴ Teresa J. Verges, *Evolution of the Arbitration Forum as a Response to Mandatory Arbitration*, 18 NEV. L.J. 437, 438–39 (2018).

¹⁵ Imre S. Szalai, *Reconciling Fault Lines in Arbitration and Redefining Arbitration Through the Broader Lens of Procedure*, 18 NEV. L.J. 511, 512 (2018).

injunctions or orders for specific performance.¹⁶ This practice, according to Garcia Sanchez, allows both the state and investors to benefit. “Even if both sides complain in public about the existence of unaccountable arbitrators, the investors get paid, and the governments keep their policies intact.”¹⁷

My own take can be boiled down to “arbitration schmarbitration,” reflecting my uncertainty as to whether it is possible, or even desirable, to come up with a single useful definition of what are truly a series of disparate processes. As Professor Michael Moffitt deftly discusses in his related article, “Schmediation and the Dimensions of Definition,”¹⁸ definition is in the end often an odd endeavor, in that one wonders whether the enterprise is descriptive, prescriptive, or something else.¹⁹ Are we defining to try to describe existing reality or to change it to conform with an aspirational definition?

Hensler and Khatam are undoubtedly correct that some arbitration—commercial arbitration—was traditionally private, informal, speedy, cheap, and equitable. Calling this the “folkloric” version of arbitration, Professor Ed Brunet recognizes that “folklore arbitration is both a mythical perception and a reality.”²⁰ He explains that “[t]he historical roots of folklore arbitration lie in the use of arbitration to resolve intraindustry disputes in the late nineteenth and early twentieth centuries.”²¹ Like Hensler and Khatam, Brunet points out that arbitration today “can often be a very different process than folklore arbitration”²²—far more formal and judicialized, in part because commercial arbitration is now used to resolve a far broader range of disputes.²³

It is also unquestionably true that both international commercial arbitration²⁴ and investor-state arbitration²⁵ do not and indeed have never shared the

¹⁶ Guillermo J. Garcia Sanchez, *The Blurring of the Public/Private Distinction or the Collapse of a Category? The Story of Investment Arbitration*, 18 NEV. L.J. 489, 491–93 (2018).

¹⁷ *Id.* at 508.

¹⁸ Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005). In Section I of his article, Moffitt describes what he calls “the ‘schmediation phenomenon,’ calling particular attention to ways in which scholars and practitioners have addressed the enormous variety of practices currently labeled ‘mediation.’” *Id.* at 72. His use of the pseudo-Yiddish term draws in turn on the work of Robert Nozick who, in a footnote, used the term “schmoctoring” to describe “an activity just like doctoring except that its goal is to earn money for the practitioner.” *Id.* at 73 (quoting ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 235 (1974)).

¹⁹ Moffitt was commenting on what one might call “ye olde” debate about the appropriate nature of mediation, and whether “evaluative mediation” deserves to be called “mediation,” or instead is truly an oxymoron. *Id.* at 82–85 (discussing Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996)).

²⁰ Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 42 (1999).

²¹ *Id.* at 43.

²² *Id.* at 45.

²³ *Id.* at 45–46; see also Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 1 (2010).

²⁴ See generally 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009).

folkloric ethos. Disputants adopt arbitration in those contexts for different reasons altogether—not to obtain a speedy, inexpensive determination from an expert in the field, but rather to create a dispute resolution process that will give businesses reasonable confidence that future disputes can be resolved in a neutral forum, and yield an enforceable determination.²⁶ Hensler and Khatam are also correct that both international commercial arbitration and investor-state arbitration look a lot like litigation in the United States.²⁷

But what are we to make of these empirical observations? It is true that it is confusing to use a single term—“arbitration”—to describe such disparate processes. A person who is highly familiar with one form of arbitration would be shocked and confused to learn that the process they know and understand so well in one setting plays out completely differently in another context. Whereas some forms of arbitration are cheap, speedy, and informal,²⁸ others are expensive, slow, and quite formal.²⁹ Sometimes arbitrators write long decisions that are published,³⁰ and some arbitral proceedings are open to the public.³¹ However, lots of things in life are confusing, and we certainly cannot expect to alleviate all such issues.

Hensler and Khatam do express a far more serious concern that goes way beyond mere confusion. They assert that by losing track of the appropriate essence of both arbitration and litigation, we have lost the best features of both processes.³² Arbitration, they suggest, is most appropriately used to resolve private disputes quickly, cheaply, and efficiently.³³ By contrast, litigation, they urge, is meant for public disputes and justifiably can be more formal, as well as slower and more expensive.³⁴ In focusing on process integrity—using each process to best fulfill its essence—Hensler and Khatam follow a distinguished path. Most notably, jurist Lon Fuller endeavored to set out the essential

²⁵ See generally GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007).

²⁶ For a short discussion of the goals of international commercial arbitration, see MENKEL-MEADOW ET AL., *supra* note 8, at 391–92. Regarding the goals of investor-state arbitration, see Hiro N. Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L.J. 541, 548–50 (2018) and Garcia Sanchez, *supra* note 16, at 497–501).

²⁷ Hensler & Khatam, *supra* note 1, at 408; see also Aragaki, *supra* note 26, at 445–48, 566, 572) (discussing broad disparities in categories of arbitration, and questioning whether a clear line can or should be drawn between arbitration and litigation).

²⁸ Brunet, *supra* note 20 at 42.

²⁹ See, e.g., James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, AM. LAW., Jan.–Feb. 1985, at 107.

³⁰ MENKEL-MEADOW ET AL., *supra* note 8, at 385.

³¹ See, e.g., Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 5 n.* (2009) (thanking arbitral panel and disputants for public access to arbitration of cyclist Floyd Landis doping issues).

³² Hensler & Khatam, *supra* note 1, at 381.

³³ *Id.* at 402.

³⁴ *Id.* at 422.

moralties of certain processes including not only litigation, arbitration, and mediation, but also legislation, contract, and managerial discretion.³⁵

While I share most of Hensler and Khatam's empirical observations, I am quite unsure about some of their normative recommendations. Like them, I want to ensure that all our dispute resolution processes support justice for private disputants and for the public. Indeed, I believe this so strongly that I have made a conscious effort to end most of my articles with the word "justice."³⁶ I also agree with many and perhaps most of their policy positions with respect to particular types of arbitration. Most notably, I have long been a critic of the forced or mandatory form of domestic commercial arbitration, in part because I believe we should not permit private companies to take important issues of public policy out of the public eye.³⁷ However, I am less confident than they are that we can easily distinguish between public and private implications. As commentators Hiro Aragaki, Guillermo Garcia Sanchez, and David Noll all observe, the line between public and private has been confounding us for many years.³⁸ Investment arbitration is a great exemplar of this confusion, because

³⁵ See, e.g., THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L FULLER (Kenneth I. Winston ed., Hart Publ'g, rev. ed. 2001) (1981); Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 23–24 (1963); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 370–71, 394–95, 398 (1978) (arguing that adjudication is well suited to claims of right and accusations of guilt, but not to resolve "polycentric" disputes in which the disposition of one item has implications for the disposition of others); see also Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 14–22 (2000) (discussing expositions of the essentials of various dispute resolution processes); Mentschikoff, *supra* note 12, at 710 (asserting that "[t]here appears to be much more of good than of evil in the arbitration process," in that arbitrators often have flexibility and expertise that may be missing in litigation, but recognizing too that arbitration may sometimes disserve the public interest, particularly in the creation of precedent).

³⁶ See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1675 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*]; Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1499 (2004) [hereinafter Sternlight, *Enforcing Employment Discrimination Laws*]; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 712 (1996).

³⁷ See, e.g., Sternlight, *Creeping Mandatory Arbitration*, *supra* note 36, at 1671–75 (urging that the problem with forced consumer and employment arbitration is not simply that the arbitrations are private, but also that this form of dispute resolution is imposed by private parties, rather than legislatively).

³⁸ Aragaki, *supra* note 26, at 544–46 (questioning whether or why it is problematic to use private forums to adjudicate public claims); Garcia Sanchez, *supra* note 16, at 507 (arguing that the public/private distinction has reached a point of "hopeless contradiction," and urging that in the investment arbitration context, states are permitted to violate the rights of investor companies with significant impunity, in that arbitrators typically impose, at most, monetary penalties which may in the end not even be enforceable); Noll, *supra* note 10, at 479 (suggesting that the identification of particular disputes as either "public" or "private" reflects "political judgments about where the public interest lies, and costs and benefits of channeling disputes to competing dispute-resolution systems").

state interests and state laws are always in play in this process that some might say is private in nature.

I am also less confident than Hensler and Khatam that a labeling or definitional enterprise is the best way to ensure that arbitral and litigation processes are just. Can we easily push all forms of adjudication into either a private, inexpensive informal box called “arbitration” or a public, formal expensive box called “litigation”? As Thomas Main points out, it is extremely difficult to figure out what arbitration is, much less what it is good for.³⁹ What if we decide that some hybrid processes are appropriate for certain kinds of disputes? And what if we call some of these hybrids either “arbitration” or “litigation”? Hiro Aragaki points out that the so-called Permanent Court of Arbitration, which handles disputes between states, conducts a process called “arbitration” that is quite public and also court-like.⁴⁰ Run out of the Peace Palace in The Hague, Netherlands, this entity was established in 1899 by treaty, to resolve various issues between states, and claims to have “developed into a modern, multi-faceted arbitral institution perfectly situated to meet the evolving dispute resolution needs of the international community.”⁴¹

For me, the core and difficult enterprise is to find fair and just dispute resolution processes for a broad array of contexts. What process is fair and just? I believe the answer will ultimately be that tried and true “it depends.” As I have written previously, we are trying to serve many private and also public interests as we set up our dispute resolution systems with respect to a broad array of domestic issues.⁴² A process that best serves private disputants’ interests in speed, efficiency, and (sometimes) privacy will not always best serve the interest of the public in transparency, deterrence, and lawmaking.⁴³ And a process

³⁹ Thomas O. Main, *Arbitration, What is it Good for?*, 18 NEV. L.J. 457, 465 (2018) (asserting that if arbitration is good for something, the something is circumstances in which parties have knowingly and voluntarily traded their right to go to court for an opportunity to resolve their dispute privately, through arbitration).

⁴⁰ Aragaki, *supra* note 26, at 546–48.

⁴¹ *Introduction to the PCA*, PERMANENT CT. ARB., <https://pca-cpa.org/en/about/introduction/> [<https://perma.cc/MTM2-RMTH>] (last visited Feb. 1, 2018).

⁴² *See, e.g.*, Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289, 296 (2003) [hereinafter Sternlight, *ADR is Here*] (urging that as societies choose and design the best dispute resolution systems for particular kinds of disputes, they should consider a broad range of individual and societal interests); Sternlight, *Creeping Mandatory Arbitration*, *supra* note 36, at 1663 (discussing impacts of mandatory binding arbitration on individuals and on larger society, and concluding that public litigation is not necessarily the best means of resolving all disputes); Sternlight, *Enforcing Employment Discrimination Laws*, *supra* note 36, at 1487–88 (urging that both formal and informal, public and private systems of dispute resolution can serve important roles in resolving employment discrimination disputes); Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad*, 56 DE PAUL L. REV. 569, 573–76 (2007) (urging that ADR can sometimes be supportive of justice in ways that publication litigation cannot).

⁴³ FED. R. CIV. P. 1 urges that the rules be “construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding.” but

that best serves the private or public interest in accuracy and fairness may not also serve interests in speedy low-cost resolution. In addition, we must remember the importance of protecting additional justice interests including procedural justice and increasing societal harmony as well as reconciliation.⁴⁴ Designing dispute resolution processes is difficult and requires the balancing of many factors, which sometimes are in tension if not direct conflict with one another. We also must wrestle with the question of when we should allow private disputants to pick the form of dispute resolution that best meets their needs, and when we should, instead, allow governments to make those choices, in order to protect the public interest.⁴⁵

In the end, I care far more about whether our various dispute resolution processes protect individual and societal interests in justice than I care about the naming of particular processes. For that reason, I am content to say “arbitration schmarbitration,” even as I share the concerns of Hensler, Khatam, and other authors in this symposium, who all seek to improve various forms of dispute resolution. While I can certainly see that our very divergent uses of the term “arbitration” create substantial dangers of confusion, I am also doubtful that we can successfully police the labeling of dispute resolution processes throughout the world. In the mediation context, we have seen a tremendous amount of energy spent in articles, conferences, classrooms, and elsewhere, trying to define true mediation,⁴⁶ and yet I am dubious that this enterprise has ultimately improved our justice system. I also share the concern, expressed by commentators Aragaki, Garcia Sanchez, Noll, as well as many others in a variety of contexts, that drawing a clear line between public and private is never easy, and quite possibly hopeless.⁴⁷ In short, whether or not a domestic, interna-

does not focus on the fact that seeking speedy “justice” on the cheap may not always work out well.

⁴⁴ See Sternlight, *ADR is Here*, *supra* note 42, at 300 (discussing individual and societal interests in justice).

⁴⁵ See, e.g., Sternlight, *Enforcing Employment Discrimination Laws*, *supra* note 36, at 1495 (suggesting that “public agenc[ies] will be better situated than the individual disputants to decide whether or not a particular dispute has public as well as private implications,” and if so, how it ought to be resolved); see also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2694–95 (1995) (urging that while it may be impossible to decide *ex ante* which disputes should be assigned to which dispute resolution processes, clearly certain issues are so important that they must be publicly decided).

⁴⁶ See, e.g., Kovach & Love, *supra* note 19, at 32; Moffitt, *supra* note 18, at 71–72; see also Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30–50 (2003) (developing a new way of analyzing various styles of mediation); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23–24 (1996) (setting out the now famous/infamous distinction between “evaluative” and “facilitative” mediation).

⁴⁷ See Garcia Sanchez, *supra* note 16, at 507–08 (citing Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982)); see also Aragaki, *supra* note 26, at 563.

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tional commercial or investor-state dispute resolution process is labeled “arbitration,” I do believe we must try to ensure that these disparate processes all protect the justice interests of private persons and of the public at large.⁴⁸ Hensler and Khatam have done an exceptional job of setting out some important concerns along these lines and sparking a fascinating conversation regarding the proper realm of arbitration and litigation. I am grateful to both and to all the authors in this symposium issue for advancing our discussion of how various forms of dispute resolution can best serve justice.

⁴⁸ Moffitt, *supra* note 18, at 102. As Professor Moffitt expressed in the mediation context, I fear that focusing on definitions may hinder, rather than enhance, our efforts to ensure that dispute resolution processes provide justice.

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