

# THE “GANTS PRINCIPLES” FOR ONLINE DISPUTE RESOLUTION: REALIZING THE CHIEF JUSTICE’S VISION FOR COURTS IN THE CLOUD

HAROLD HONGJU KOH\*

**Abstract:** The late Chief Justice Ralph D. Gants was many things to many people: a beloved friend and family member, a visionary judge, an advocate for the vulnerable, and a forward-looking thinker. This Article recalls both personal and professional aspects of Ralph to illuminate an area of law where his judicial legacy will endure: online dispute resolution (ODR). Well before the onset of the COVID-19 pandemic, Chief Justice Gants recognized the significance of online, cloud-based courts and articulated key principles for developing these courts to improve the lives of those who appear before them. This Article assesses the sta-

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\* Sterling Professor of International Law and former Dean (2004–09), Yale Law School; U.S. Assistant Secretary for Democracy, Human Rights and Labor (1998–2001); Legal Adviser (2009–2013), Senior Adviser (2021–present), Office of the Legal Adviser, U.S. Department of State. This essay is a lightly edited version of remarks originally presented as the inaugural Chief Justice Ralph D. Gants Memorial Lecture at Harvard Law School on November 20, 2020 at Harvard’s Center on the Legal Profession Conference on “Online Courts: Perspectives from the Bench and Bar.” I am grateful to our close Harvard friend and classmate, Professor David B. Wilkins of Harvard Law School, for inviting me to deliver the inaugural Gants Lecture. I also thank the editors of the *Boston College Law Review*, Dean Vincent Rougeau, and Professor Steven Arrigg Koh for allowing me to include these reflections on Ralph’s professional vision in their published symposium in honor of Chief Justice Gants, along with personal memories of Ralph presented with our beloved friends Scott Gilbert and Larry Tu. See E. Scott Gilbert, Harold Hongju Koh & Lawrence P. Tu, *Remembering Ralph*, 62 B.C. L. REV. 2684 (2021). I am grateful to Gavin Alexander, Catherine Amirfar, Pedro Antonino, Sir Daniel Bethlehem, David Bigge, Clara Brillembourg, Sharla Draemel, Mary-Christy Fisher, George C. Freeman III, Alec Freund, Kimberley Gahan, Joel Goldstein, Josh Goldstein, Judge Elaine Gordon, Craig Isenberg, Meg Kinnear, Steven Arrigg Koh, William Hagan Wonlim Koh, Aaron Marcu, Judge Jeffrey Meyer, Sophie Nappert, Gerry Neuman, Shubha Sastry, Tim Schnabel, Garth Schofield, Nicole Thornton, Judge Larry Vilardo, Philippa Webb, David Wilkins, and several others who asked not to be named for written or oral interviews or helpful comments. I also thank India Johnson and the Board of the American Arbitration Association, on whose Board I was honored to serve, for educating me on the various forms of alternative dispute resolution. I am particularly grateful to one of Ralph’s Little League coaching proteges, Michael Loughlin of the Yale Law School class of 2021, for his truly outstanding research assistance. Finally, let me express my deepest appreciation to the members of the Chief Justice Gants Legacy Committee—Gavin Alexander, Justice Margot Botsford, Susan M. Finegan, Michael Ramirez Gants, Governor Deval Patrick, Jeff Robbins, and Professors Deborah Ramirez, Nicole Summers, and David Wilkins—for all they have done to honor Ralph’s legacy. For each and every one of us, making this enduring record of Ralph’s accomplishments has been a labor of love.

tus and trends governing the recent explosion of ODR in both international and domestic settings. It closes by presenting four “Gants Principles,” which Ralph championed and urged us toward, to govern how ODR systems can develop more equitably and efficiently.

## INTRODUCTION

Ralph Gants was my brother-in-the-law. He will always be one of the people in this world who I love and admire the most. Maybe somewhere there is someone as smart, kind, and admirable as Ralph, “[b]ut I don’t know if I’ve met them yet.” I expect I never will.<sup>1</sup>

As an intellect, Ralph was a giraffe: a visionary judge and lawyer whose feet were firmly planted on the ground, but whose head was always above the clouds. Ralph had an extraordinary capacity to think about the present and the future at the same time. Somehow, he always found the time to look up from today’s work to contemplate tomorrow’s problems: access to justice, racial and criminal justice, and the future of the judicial system itself. In each of those areas, this Symposium Issue illuminates the fruits of his work, the challenges he leaves us, and the many areas of law where Ralph’s foresight and multi-faceted vision lives on.

Part I of this Article describes the man I knew before he wore robes, and the judicial perspective he later brought to one of today’s fastest developing justice issues: the emerging challenges of online dispute resolution (ODR).<sup>2</sup> Ralph first engaged with that topic before online adjudication was fully upon us. In the spring of 2020, our gifted law school classmate, Professor David Wilkins, asked Ralph to comment on the future of online courts in a conversation with British author Richard Susskind, regarding his just-published book, *Online Courts and the Future of Justice* (Gants Susskind Commentary).<sup>3</sup> As courts in the cloud proliferate and evolve, the Chief Justice suggested four “Gants Principles” in his first, prescient encounter with this issue—requiring equity, ensuring accessibility, protecting the vulnerable, and preserving dignity

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<sup>1</sup> E. Scott Gilbert, Harold Hongju Koh & Lawrence P. Tu, *Remembering Ralph*, 62 B.C. L. REV. 2684, 2691 (2021) [hereinafter *Remembering Ralph*].

<sup>2</sup> See *infra* notes 9–22 and accompanying text.

<sup>3</sup> See generally RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (2019) (discussing central aspects of online courts); Harvard L. Sch. Ctr. on the Legal Pro., *Online Courts and the Future of Justice with Richard Susskind*, YOUTUBE (Apr. 24, 2020), <https://youtu.be/QOS4LRf-zes> [<https://perma.cc/M7BU-KKYU>] [hereinafter Gants Susskind Commentary] (discussing opportunities and challenges of courts in the cloud with commentary from Chief Justice Gants and Professor David B. Wilkins); see also Richard Susskind, *The Future of Courts*, THE PRACTICE, July/Aug. 2020, <https://thepractice.law.harvard.edu/article/the-future-of-courts/> [<https://perma.cc/XLG5-DEJ8>] (providing a brief account of Mr. Susskind’s position).

through participation—that offer crucial normative guidance as to how these online institutions should evolve more fairly in the years ahead.

This Article continues that conversation by addressing, as Ralph himself would do, both the “is” and the “ought” of ODR. Ralph always wanted to see the evidence: what is actually happening in the field. So, shortly after Ralph passed, at the start of 2021 (about nine months into the COVID-19 pandemic), I interviewed about two dozen “early adopters” of online adjudication in search of lessons about how ODR has been evolving in a variety of settings. In the second and third Parts of this Article, I present the lessons gleaned from ODR in the international sphere, and reflect on the lessons from domestic ODR.<sup>4</sup>

One of Ralph’s defining features was that he never accepted that the way “justice” happens to be delivered in our time is how real justice *should* be delivered in a better world. The closing Part of this Article sketches four normative “Gants Principles” to guide the future of ODR: (1) treating litigants equitably; (2) ensuring accessibility; (3) protecting the vulnerable; and (4) preserving dignity through participation.<sup>5</sup> These Gants Principles remind us of the moral thrust of Ralph’s judicial vision. Courts, he believed, cannot simply wait for problems to find them. Instead, judges and lawyers should proactively identify and address impediments to justice within the institutions we are creating.

Ralph’s vision of courts in the cloud reveals his gifts as both a judge and a reformer.<sup>6</sup> As a judge deciding cases, he respected and learned from precedent. As a judicial reformer, however, he would not let “the way things have always been” stand in the way of progress. As Chief Justice, he recognized that technological change poses both threats and opportunities. Given the rapid move to online adjudication, he saw that preserving the status quo for its own sake could become a tool of inequity. In contrast, he grasped that proactively considering how these changes might expand justice could afford an historic opportunity to reexamine outdated areas of the legal system that are ripe for improvement.

Maybe the real point is that in life, the personal and the professional are never as separate as we sometimes pretend. Ralph and I were friends for forty-five years, starting long before we became lawyers. We talked countless times, but usually about things other than law. This Article illuminates one corner of the law where our professional worlds overlapped. Ralph lived most of his career in the courts of Massachusetts; I have lived mine in the overlapping

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<sup>4</sup> See *infra* notes 24–63 and accompanying text.

<sup>5</sup> See *infra* notes 64–82 and accompanying text.

<sup>6</sup> In this article, the phrase “courts in the cloud” is used interchangeably with “online courts” to describe courts that have no physical location and operate virtually through the use of servers and internet access.

worlds of procedure: domestic, transnational, and international.<sup>7</sup> As time passed, it slowly dawned on me that my friend Ralph had become one of the finest judges of his generation. To paraphrase one of our greatest musicians speaking about his most famous partner: at the time, I was just rooming with this guy named Ralph, but now I look back and realize that all along, I was learning from Chief Justice Gants.<sup>8</sup> This Article honors how much he taught me.

### I. RALPH: FROM ROOMMATE TO ROBES

I first met Ralph Gants in 1975, as we were both graduating from college. We became close friends and classmates at Harvard Law School, where we graduated in 1980. As fledgling lawyers, we lived together as roommates in Washington, D.C. Ralph, Scott Gilbert, Larry Tu, and I formed a quartet of close friends who went on to live parallel lives in life and law.<sup>9</sup> And we stayed together. We attended each other’s weddings and family events; we talked often by phone; and our last Zoom call was the morning before Ralph passed away, just after he suffered what we all assumed was a mild heart attack. Incredibly, just a day later, he was gone, but never from our hearts.

As our careers progressed, we watched with pride as Ralph excelled in every legal endeavor he pursued: as a judicial law clerk, Special Assistant to the Director of the Federal Bureau of Investigation, Assistant U.S. Attorney in Massachusetts, partner at Palmer & Dodge, law teacher at Northeastern University School of Law and Harvard Law School, and perhaps the most brilliant judge of the Massachusetts trial and appellate courts. As his professional trajectory soared, his personal qualities never varied: he was always the same kind, thoughtful, witty, and self-deprecating friend, no matter how heavy his work’s challenges.

Ralph did not come from privilege. His parents Gustav and Helaine were warm and honest, and unfailingly generous and welcoming. They worked hard for everything they had and gave it to their beloved sons, Fred and Ralph. Consequently, Ralph instinctively saw things from the perspective of the little guy. From the beginning, he always rooted for the underdog, especially our

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<sup>7</sup> See generally HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS (2008) (providing an analytical framework for understanding transnational litigation conducted in U.S. judicial fora); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (defining the concept of transnational public law, as opposed to private law, litigation).

<sup>8</sup> Chuck Arnold, *All the Beatles’ Secrets Revealed in Hulu’s ‘McCartney 3, 2, 1’ Documentary*, N.Y. POST, <https://nypost.com/2021/07/16/a-mistake-led-to-sgt-pepper-new-paul-mccartney-doc-on-hulu/> [<https://perma.cc/6VEX-7Q5R>] (July 16, 2021, 9:46 AM) (“‘At the time, I was just working with this bloke called John,’ [Paul McCartney] says. ‘Now I look back, and I was working with *John Lennon*.’”) (emphasis in original).

<sup>9</sup> See *Remembering Ralph*, *supra* note 1, at 2685.

beloved Red Sox.<sup>10</sup> That passion was fueled by Deborah Ramirez, whom Ralph met, courted, and married as fellow Assistant U.S. Attorneys, before she went on to become a path-breaking and passionate professor at Northeastern. Around the family table, Ralph and Deb talked daily about the practical challenges of meaningful justice, transmitting to their talented children—Rachel and Michael—their determination to make the world a more just and equal place. So, when Governor Deval Patrick elevated Justice Gants to lead the Massachusetts Supreme Judicial Court, he was breaking the mold twice: not just by appointing the Commonwealth's first Jewish Chief Justice, but also by naming a Chief who would view litigants' problems from the perspective of the most marginalized among us.<sup>11</sup>

As he rose through the courts, Ralph's desire to build true justice became stronger and more urgent. His connection to those at the margins of justice deepened and grew more public. When Donald Trump targeted Muslims, Ralph visited mosques to explain why we were all part of one America.<sup>12</sup> When Massachusetts struggled with the treatment of persons of color, those with disabilities, and LGBTQI+ individuals, Ralph demanded equity and inclusion.<sup>13</sup> Not surprisingly, Ralph's abiding concern for the underdog also suffused his forward-looking vision of courts in the cloud.

Among his many gifts was Ralph's unusual foresightedness. He saw problems in full before they landed on his doorstep. And so, when asked in the early days of the pandemic to comment on Richard Susskind's celebration of the coming of online courts during the Gants Susskind Commentary, the Chief Justice responded with a remarkably prescient intervention that refocused the issue in two key respects.

First, unlike those who treated online courts as a project of the future, Ralph understood that the future was already here. Chief Justice Gants ex-

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<sup>10</sup> We were all thrilled when shortly after becoming Chief Justice of Massachusetts, Ralph threw out the first pitch at Fenway Park as the Chief Justice of Red Sox Nation. Indeed, on our last call, when I asked him how he was doing, Ralph answered wryly, "Rebuilding. Like the Red Sox." Fittingly, our last photo together was taken at wintry Wrigley Field, in front of the statue of Ernie Banks, that sunny, optimistic Ralph-like star of America's other great baseball underdog, the Chicago Cubs. See *Image Supplement*, 62 B.C. L. REV. final page (2021).

<sup>11</sup> Deval Patrick, *Ralph Gants: Judge and Mensch*, 62 B.C. L. REV. 2676, 2676–77 (2021).

<sup>12</sup> Chief Justice Ralph D. Gants, *Address at the Islamic Society of Boston Cultural Center* 1, 4–5 (Dec. 16, 2016) (transcript available from the Massachusetts Supreme Judicial Court), <https://www.mass.gov/doc/remarks-delivered-at-the-islamic-society-of-boston-cultural-center-december-16-2016/download> [<https://perma.cc/6UZP-HVA7>]; see also Jeffrey Robbins, *Remarks*, 62 B.C. L. REV. 2678, 2679–80 (2021).

<sup>13</sup> Gavin Alexander, *Depression to Dedication: How Chief Justice Gants Saved My Life and Catalyzed Ongoing Advocacy for Mental Health in the Legal Profession*, 62 B.C. L. REV. 2759 (2021); Sheriece M. Perry, "Diversity, Equity and Inclusion"—*Catchy Slogans and Buzzwords with Little Proof That They Matter to the Legal Profession in Massachusetts!*, 62 B.C. L. REV. 2747 (2021).

plained that he had “little doubt that over the course of time, the issue will not be *whether* we will have online courts, *but how* they will work, *how* extensive they will be in terms of the scope of matters they will address, and *when* they will become part of the norm in many, if not most, of our justice systems.”<sup>14</sup>

Second, Ralph saw immediately that the online revolution had two faces. Obviously, he understood, online courts could produce immediate and visible gains in efficiency—through saved costs, time, and travel—and in environmental savings from a reduced carbon footprint. But he also recognized that online courts would have more complicated implications for equity and access to justice. Ralph understood instinctively that access to justice would be readily available to sophisticated, repeat technology users with ample resources, but could end up widening the justice gap between the haves and the have-nots.<sup>15</sup>

Chief Justice Gants thus emphasized the need to ensure that close judicial attention to the values of dignity, equity, and fairness accompany the rush to online adjudication. As usual, Ralph saw ahead of his time and thought first about human needs. He cautioned that the transition to online courts must happen “in a manner that [is] respectful of the interests of all litigants, and not put any at an advantage or disadvantage because of issues of education, language access, or other concerns.”<sup>16</sup> Although he predicted that more and more matters would inevitably be handled online, he expressed hope that the transition could be managed in a way that would level, not widen, inequities.<sup>17</sup>

As the COVID-19 pandemic approached its peak in the spring of 2020, courts in the cloud became a sudden reality. As Chief Justice of the Commonwealth, Ralph saw immediately that necessity must become the mother of invention. In a rare “three Chiefs” May 2020 letter to the Massachusetts Bar, two months after the pandemic had shuttered the physical court buildings, Ralph, Chief Justice Mark Green of the Massachusetts Appeals Court, and Chief Justice Paula Carey of the Massachusetts Trial Court echoed the Gants Susskind Commentary, writing, “[l]ong before the pandemic, we recognized that the civil courts of the future would need to resolve an increasing number and range of matters without . . . the need to come to a courthouse.”<sup>18</sup> The justices noted that this shift had the potential to make litigation less time-consuming and cost-

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<sup>14</sup> Gants Susskind Commentary, *supra* note 3, at 31:55 (emphasis added).

<sup>15</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 125 (1974) (famously arguing that the “haves” possess a number of advantages that allow them to “come out ahead” in the traditional system).

<sup>16</sup> Gants Susskind Commentary, *supra* note 3, at 40:30.

<sup>17</sup> *Id.* at 42:30.

<sup>18</sup> Letter from Ralph D. Gants, C.J., Mass. Supreme Jud. Ct., Mark V. Green, C.J., Mass. Appeals Ct., & Paula M. Carey, C.J., Mass. Trial Ct., to the Massachusetts Bar (May 14, 2020), <https://www.mass.gov/doc/letter-from-judiciary-leaders-on-path-forward-during-the-pandemic-may-14-2020/download> [<https://perma.cc/V5PQ-QV4Y>].

ly as parties could avoid seeking leave from work or hiring childcare or elder-care.<sup>19</sup> The three Chiefs included a very prophetic closing sentence that sounded just like Ralph: “Therefore, even when this pandemic is behind us, we do not believe we will or should go back to doing things as we did [before] . . . as we not only keep the wheels of justice spinning but also work to create a better spinning wheel.”<sup>20</sup>

If we were talking to Chief Justice Gants today about courts in the cloud, what would he ask and what would he value? First, Ralph would want to know what is actually going on in all the courts. How are online courts functioning? “Let’s not just speculate,” he would say, “let’s hear from the front.”<sup>21</sup> Second, he would ask how well they are functioning. How closely does what is happening resemble what *should* be happening? Before and after he became a judge, Ralph always cared about both the “is” and the “ought”: here, the reality of a large-scale move to online dispute resolution at both the international and domestic levels; but also the normative goal that “civil disputes [should be] resolved equally, thoughtfully, but more efficiently.”

To answer Ralph’s “is” question, I start by providing an overview of how ODR is playing out after more than a year in operation during the global pandemic. To do so, I interviewed about two dozen “early adopters” of ODR: federal and state judges, arbitrators, mediators, trial lawyers, international lawyers, and arbitration counsel, both inside and outside the federal government.<sup>22</sup> This included interviewing friends and acquaintances who participate in international arbitrations and state-to-state cases before the International Court of Justice (ICJ), as well as those whose practices include transnational and civil litigation in the domestic domain.<sup>23</sup>

Most interview subjects agreed that I could report their names and quotations, so long as I did not attribute statements to individuals on the record. Although admittedly preliminary and impressionistic, these interviews suggest

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Unfortunately, recent reporting in the popular media has not attempted a systematic overview, but has instead focused narrowly on anecdotal accounts of comic snafus and glitches in Zoom proceedings. See, e.g., Sam Karlin, *How a High-Stakes Hearing Over Louisiana Coronavirus Rules Turned into a Zoom Meeting Fiasco*, THE ADVOCATE, [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_6825662a-252f-11eb-90a0-af7a2fd99df2.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_6825662a-252f-11eb-90a0-af7a2fd99df2.html) [https://perma.cc/CYG4-EUHS] (Nov. 12, 2020, 7:29 PM) (describing the frustrations of one Louisiana judge dealing with Zoom participants who refused to mute themselves during a hearing); Daniel Victor, *‘I’m Not a Cat,’ Says Lawyer Having Zoom Difficulties*, N.Y. TIMES, <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html> [https://perma.cc/NFD6-LAEM] (May 6, 2021) (describing how a Texas lawyer could not figure out how to turn off the “cat filter” on his Zoom screen during zoom civil forfeiture hearing).

<sup>22</sup> See *infra* notes 24–63 and accompanying text.

<sup>23</sup> See *supra* note \* (providing a partial listing of interview subjects).

that *the future is now*. ODR is no longer a dream of a distant future. Both the migration of traditional dispute resolution online and the development of entirely new modes of purely online dispute settlement are happening now, with increasing frequency and higher stakes.

## II. INTERNATIONAL ONLINE DISPUTE RESOLUTION

### A. International Online Adjudication

Let me start with online international adjudication at the ICJ in the Hague, where I have had the honor to appear on several occasions. At the time this Article went to press, the Court had held seven online hearings—mostly jurisdictional, straightforward set pieces full of legal argumentation.<sup>24</sup>

Even in ordinary times, the ICJ bench is passive, with little back and forth between the judges and the arguing counsel. So, not surprisingly, online international adjudication has been a near-complete success. A court where there is little or no questioning is plainly well-suited to video hearings. The real test will arise in future merits hearings with more evidence and witness examinations. Some speculate that online hearings may lower the barriers to entry for states considering bringing ICJ cases, due to reduced costs and reduced need for government officials to leave their capitals for several-week hearings. But the experienced observers I interviewed believe instead that continued online adjudication will advantage repeat players at the ICJ bar and developed-world counsel who wield the resources and adaptability to handle such proceedings efficiently.

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<sup>24</sup> The International Court of Justice has used video proceedings in the following cases : *Guyana v. Venezuela*; *Qatar v. United Arab Emirates*; *Islamic Republic of Iran v. United States of America (Alleged Violations of 1955 Treaty of Amity)*; *Somalia v. Kenya*; *Democratic Republic of Congo v. Uganda*; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/case/181> [<https://perma.cc/CWC2-WCVN>]; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Columbia)*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/case/155> [<https://perma.cc/5J2X-257L>]. See *Multimedia Galleries: Case-related Videos, Photos and Audio Files*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/multimedia-cases> [<https://perma.cc/9T4W-58T3>] [hereinafter *Multimedia Galleries*] (providing images). Of these hearings, five were jurisdictional and hence involved legal argumentation only. *Somalia v. Kenya* went to the merits, but in a one-sided proceeding where only Somalia appeared. *Congo v. Uganda* concerned compensation only, and so involved some examination of expert witnesses, which revealed the difficulty of one party objecting to questions posed to a witness, because the online platform used by the court only allowed one party to connect at a time. See generally Giulia Pinzauti & Philippa Webb, *Litigation Before the International Court of Justice During the Pandemic*, 34 LEIDEN J. INT’L L. 787 (2021), <https://doi.org/10.1017/S092215621000406> [<https://perma.cc/L5D4-36XY>].



### B. Online Interstate Arbitration, Mediation, and Conciliation

The Permanent Court of Arbitration (PCA) also sits in the Peace Palace at the Hague.<sup>25</sup> The PCA conducts state-to-state arbitration, mediation, and conciliation.<sup>26</sup> Initially, the PCA decided that holding video proceedings during the pandemic would be inappropriate, but once the ICJ announced that it would proceed with video, the PCA quickly reconsidered and found it appropriate after all.<sup>27</sup>

If and when the COVID-19 pandemic subsides, the PCA will likely return to in-person hearings for witness-intensive hearings, but will still use video for procedural meetings and lower-budget issues that they did not do by video before. In the interstate setting, with respect to both the PCA and the ICJ, video proceedings lose the “gravitas effect” of interstate dispute resolution, because the formality of in-person hearings amid the grandeur of the Peace Palace has significant symbolic effect on public perceptions of the dispute.<sup>28</sup> Consequently, once given the opportunity after the pandemic abates, globally-symbolic interstate proceedings will almost certainly move more decisively back to in-person proceedings.

### C. Online Investor-State Arbitration

What about online arbitration between investors and states? Recalling one recent World Bank arbitration before the International Centre for the Settle-

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<sup>25</sup> See *About Us*, PERMANENT CT. OF ARB., <https://pca-cpa.org/en/about/> [<https://perma.cc/KK9G-2NB9>].

<sup>26</sup> *Id.*

<sup>27</sup> *Update: In-Person Hearings at the Peace Palace*, PERMANENT CT. OF ARB. (June 3, 2021), <https://pca-cpa.org/en/news/update-in-person-hearings-at-the-peace-palace/> [<https://perma.cc/FR9P-U9Q3>] (“In addition, the PCA continues to support hearings and meetings held by videoconference and is committed to working with parties and tribunals to identify the most appropriate solution for each case.”); see, e.g., *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PERMANENT CT. OF ARB., <https://pca-cpa.org/en/cases/229/> [<https://perma.cc/K7ST-GX7X>].

<sup>28</sup> Another important factor cited is the “diplomatic-dimension” benefits of physical presence: e.g., the availability of backchannels, corridor conversations and the like. As one interviewee also pointed out, “there is a form of accountability in having the [responding] state’s [own high] official appear in person to be confronted, not phoning it in from their offices,” as occurred recently when Nobel Peace Prizewinner Aung San Suu Kyi of Myanmar appeared before the ICJ to defend a charge of genocide committed against the Rohingya. See *Multimedia Galleries*, *supra*, note 24; FP Editors, *Transcript: Myanmar’s Aung San Suu Kyi Takes the Stand*, FOREIGN POL’Y (Dec. 12, 2019), <https://foreignpolicy.com/2019/12/12/myanmars-aung-san-suu-kyi-takes-the-stand/> [<https://perma.cc/HNE6-JHAT>]. Two of the ICJ cases conducted online, *Somalia v. Kenya* and *DRC v. Uganda*, presented the additional wrinkle that only one of the two judges *ad hoc* appointed by the opposing parties was able to be physically present for the hearings and deliberations, an asymmetry that triggered an unsuccessful procedural challenge before the International Tribunal for the Law of the Sea. See Pinzauti & Webb, *supra* note 24, at 797 (discussing possible resolutions of this problem).

ment of Investment Disputes, one interviewee gently noted, “The pandemic has successfully forced a lot of older people to get up to speed electronically very quickly.” In these proceedings, technical preparation and testing have proven key. The technology has certainly been up to the challenge and is continually getting better—including video examination of witnesses, LiveNote Stream transcripts,<sup>29</sup> online tribunal questioning, and final arbitrator deliberations.

Online arbitration has also had a noticeable democratizing effect: reducing costs and allowing additional counsel and clients to access the arbitration room who might not otherwise have such access during in-person proceedings. Most interlocutors suggest that the benefits include more focused advocacy, pre-vetting of agreed-upon documents, and better preparation. The tiring nature of remote proceedings, however, limits proceedings to about five hours per day maximum, forcing more days of hearings and longer proceedings.

In international online arbitration, the imperfect overlap of time zones permits visibly shorter windows of useable time. Thus, a recent virtual hearing that spanned the United States, the United Kingdom, continental Europe, the Middle East, and Singapore could sit for only 4.5 hours each day, which not only extended the number of hearing days, but also made a 1:00 A.M. hearing time routine for the unfortunate chairperson.

Interviewees also reported that videoconferencing is harder to use in multilateral negotiations for drafting agreements and tends to shorten both pre-hearing preparation and post-hearing deliberations. The interviewees generally agreed that hybrid proceedings may be possible, but as of the time of writing this Article, few have been tried. In hybrid proceedings, countries participating remotely could face a disadvantage vis-à-vis those in the room. This is especially true for multilateral negotiations, where the real deal-making and settlement talks often happen live at the forum—for example, at the cafe during the breaks. Finally, all agreed that losing the social aspect of bringing counsel and arbitrators together in person, as well as the chance for counsel to “show off” for the client, constitute a great disadvantage of video hearings. Taken together, the consensus among early adopters was that these factors will collectively create pressure to revert to in-person hearings once they again become possible.

Some of the key difficulties raised in international hearings arise from remote simultaneous interpretation. Everyone agrees that Zoom is currently the best platform for conducting simultaneous interpretation, although many multi-

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<sup>29</sup> LiveNote Stream is a secure remote deposition broadcasting software used to give a contemporaneous reproduction of oral arguments and testimony. *LiveNote Stream*, THOMSON REUTERS LEGAL, <https://legal.thomsonreuters.com/en/products/livenote-stream> [https://perma.cc/Y8D6-GMT2].

lateral intergovernmental institutions, including many United Nations bodies, use Interprety, a program that allows simultaneous interpretation to all six United Nations official languages. Zoom's technology permits a choice of language channels, whereby the listeners can, depending on their language preference, switch from English to French to Russian with a single click. For security reasons, the United Nations initially prohibited the use of Zoom; but this restriction may become outmoded as that platform's security systems improve.

Technical difficulties sometimes arise, ironically, from large law firms where big-name partners expect to delegate technical matters to the "help"—information technology experts, younger associates, or paralegals—rather than learning it themselves. Additionally, court reporters have much more difficulty keeping up with the proceedings than they would in person, interrupting the flow of proceedings more frequently to get clarifications or to ask for counsel or witnesses to repeat themselves.

Barristers and counsel tend, in online settings, to lose their perceived "value added" in cross-examining witnesses. As one interviewee put it, "A skilled cross-examiner has many tools at their disposal—facial expressions, body posture, tone—to coax testimony out of a reluctant or difficult witness. You lose some of those tools in an online hearing." Other interviewees agreed that this might be true, but also speculated that this might make for better proceedings from the tribunal's point of view. All agreed that online hearings work best with cooperative parties. When parties actively try to disrupt and discredit the proceedings, establishing order on Zoom can be extremely challenging, as uncooperative parties can totally disrupt an online hearing.

These early trends raise three questions. First, the expensive online format plainly favors parties who can pay for quality hearing space and equipment, and for experienced counsel to think and plan through those details. Won't these advantages overtly favor the repeat-player bar? Almost certainly, the answer is yes.

Second, can an arbitral tribunal order a virtual hearing over the objection of a party? Probably yes, as a matter of inherent powers, but due process principles can be invoked to argue in opposition. An early precedent on this issue is a July 2020 Austrian Supreme Court judgment ruling that a virtual hearing against the will of one party was not a *per se* violation of Article 6 of the European Convention on Human Rights, which guarantees a "fair and public hearing."<sup>30</sup> Interestingly, the court specified some remarkable requirements, includ-

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<sup>30</sup> *Oberster Gerichtshof*[OGH] [Supreme Court] July 23, 2020, 18 ONc 3/20s (Austria), [https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20200723\\_OGH0002\\_018ONC00003\\_20S0000\\_000/JJT\\_20200723\\_OGH0002\\_018ONC00003\\_20S0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf) [<https://perma.cc/TW4E-VEZE>]; see also Maxi Scherer, Franz Schwarz, Helmut Ortner & J. Ole Jensen, *In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns*, KLUWER ARB. BLOG (Oct. 24, 2020), <http://arbitration>

ing, for example, that a periodic 360-degree video scan of the room be done throughout the hearing to make sure that no text messages were being sent to warn or prep the witness.<sup>31</sup> Particularly in Europe, the public has voiced concerns over the effects of COVID-19 on the “right to a fair trial” and other due process rights implicated by the pandemic and the transition to online courts.<sup>32</sup>

A third, qualitative question asks how much courts and litigants will learn and adapt from their pandemic experience. Will video-only hearings allow for the development of trust needed for pre-hearing case preparation, cooperation within and between counsel teams, coordination between counsel and their clients and witnesses, evidence gathering, expectation management, and political-level oversight and engagement? As one of my interviewees thoughtfully put it, “While justice can still be seen to be done virtually, it is not quite the same . . . . This is manageable in the short term, [but] there is a real risk of systemic degradation if this becomes the longer-term norm.” One interviewee asked even more pointedly: “Will remote justice make justice feel more remote?”

#### *D. International Commercial Arbitration: ADR and ODR*

Turning to international commercial arbitration, one interviewee explained that in “international commercial arbitration . . . online tools have been used for many years [before the pandemic and are] extremely useful in that context, where ‘justice’ may be less of a concern than ‘dispute resolution.’”<sup>33</sup>

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blog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/[https://perma.cc/YWX9-Y96Y] (describing the Austrian Supreme Court’s decision).

<sup>31</sup> *Oberster Gerichtshof* [OGH] [Supreme Court] July 23, 2020, 18 ONc 3/20s, ¶ 11.1.4. (Austria).

<sup>32</sup> AMAL CLOONEY & PHILIPPA WEBB, *THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW* 47 & nn.351, 354 (2020) (noting the apprehensions articulated during the pandemic in various countries that are States Parties to the European Convention on Human Rights about the human rights implications of remote trials). The United Nations Human Rights Committee (Committee) is the expert body that construes the International Covenant on Civil and Political Rights, to which 173 states (including the United States) are parties. In drafting its General Comment 35, the Committee rejected the suggestion that the live presentation of the defendant to a court during arraignment should be done remotely to reduce logistical problems. As one interviewee wrote, the Committee reasoned, “The judge needs to see the suspect in the judge’s own courtroom, not in the total custody of the jailers, both to lessen the opportunity for intimidation of the defendant, and to let the judge perceive indication of whether the detainee has been tortured or otherwise mistreated.” U.N. Hum. Rts. Comm., General Comment No. 35 on Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/CG/35 (Dec. 16, 2014), <https://undocs.org/CCPR/C/GC/35> [https://perma.cc/LW4H-PYMS].

<sup>33</sup> See generally Gabrielle Kaufmann-Kohler, *Online Dispute Resolution and Its Significance for International Commercial Arbitration*, in *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER* 437 (Gerald Aksen ed., 2005), <https://lk-k.com/wp-content/uploads/Online-Dispute-Resolution-and-Its-Significance-for-International-Commercial-Arbitration.pdf> [https://perma.cc/SS98-8SCV] (providing an early discussion of online dispute resolution); GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* (2004); Jasna Arsic, *International*

But these online tools come in two distinct modalities: (1) judicial or alternative dispute resolution (ADR) proceedings conducted online that were traditionally conducted in person; and (2) the development and use of entirely new ODR platforms, usually without video interaction, that operate outside of the context of traditional courts, arbitration, or mediation. The latter introduces many novel issues of due process, equitable participation, and the appropriate use of artificial intelligence.<sup>34</sup> Use of online tools in commercial arbitration has been prevalent in both the migration online of traditional business-to-business (B2B) disputes—which have formed the established domain of this field, at times for very large sums of money—and in more novel forms of non-face-to-face ODR. These are now used primarily for consumer-focused efforts to create quick and efficient peer-to-peer dispute resolution for high-volume, low-monetary-value disputes.

Emerging trends in the world of B2B international commercial arbitration and alternative dispute resolution (ADR) largely mirror the online migration trends in investor-state arbitration. In high-profile international commercial arbitration, the COVID-19 pandemic initially postponed disputes over very large dollar amounts. But as the lockdown proceeded, the urgency of dispute resolution gained primacy, and holding virtual video hearings, even for billion-dollar controversies, soon became commonplace. “Travel and other restrictions due [to] the COVID-19 pandemic have meant that virtual hearings have become the ‘new normal’ for international commercial arbitration . . . .”<sup>35</sup>

As one interviewee put it,

[O]f course, everything is taking place on Zoom. The economics are impossible to argue with. Don’t fly to Singapore. Spare that expense for the parties. These are uncertain times for safety. The very reason arbitration has survived during the pandemic is because of the migration online to the three leading virtual platforms: Zoom, Webex, and Teams.

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*Commercial Arbitration on the Internet—Has the Future Come Too Early?*, 14 J. INT’L ARB. 209 (1997).

<sup>34</sup> See U.N. Comm’n on Int’l Trade L., Note by the Secretariat on Legal Issues Related to the Digital Economy—Proposal for Legislative Work on Electronic Transactions and the Use of Artificial Intelligence and Automation, U.N. Doc. A/CN.9/1065 (May 5, 2021), <https://undocs.org/en/A/CN.9/1065> [<https://perma.cc/8K9C-VZXS>] (setting forth UNCITRAL’s proposal to develop rules to govern the use of artificial intelligence in automated contracting, which could impact ODR).

<sup>35</sup> See Luke Nottage, *Will the COVID-19 Pandemic Be a Long-Term Game Changer for International Arbitration?*, KLUWER ARB. BLOG (Jul. 16, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/07/16/will-the-covid-19-pandemic-be-a-long-term-game-changer-for-international-arbitration/> [<https://perma.cc/MM3Y-UWRS>].

At the same time, interviewees generally acknowledge and mourn the “loss of human chemistry that comes from not putting everyone in the same room.” Interviewees agree that assessing evidence and credibility of witnesses is harder online, and eventually these aspects of proceedings will likely return to in-person after the pandemic. They equally see, however, no reason why all aspects of procedural case-management cannot continue online. Not surprisingly, new virtual services are being developed to support the online hearing industry, such as “concierge service hosting,” and live transcription services like Opus 2, which has gained a strong foothold in the United Kingdom.<sup>36</sup>

So, whether online or offline, complex, high-value commercial disputes will likely remain the province of traditional ADR mechanisms. Hybrid proceedings online will likely evolve over time, with virtual video arbitration hearings to resolve initial procedural matters and in-person proceedings to present the witnesses. To accommodate this likely evolution, the leading arbitration centers—the International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association—all now offer online mediation and arbitration support services.<sup>37</sup>

Yet these large-scale, virtual international commercial arbitrations have come to coexist online with ODR: a very different, less personal, increasingly widespread form of virtual commercial arbitration. ODR now embraces “online mediation, online arbitration, and even arbitration utilising the same blockchain technology as cryptocurrencies: blockchain arbitration.”<sup>38</sup> As ODR has become more widespread, the United Nations Conference on International Trade Law (UNCITRAL) has developed an instructive set of notes on how ODR should be handled to meet core values, including “efficiency” and “fairness.”<sup>39</sup> Unlike large-dollar-amount B2B cases, ODR seeks mostly to address

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<sup>36</sup> E.g., *About*, LAUNCHPRESS, <https://www.launchpress.com/about/> [<https://perma.cc/29DN-9R5S>]; *About Opus 2*, OPUS2, <https://www.opus2.com/en-us/about-us> [<https://perma.cc/46L9-62A2>] (providing “virtual workspaces” that enable litigation teams to collaborate in “real time” through an “integrated,” “secure,” internet-based platform).

<sup>37</sup> See, e.g., *ICC DRS App*, INT’L CHAMBER OF COM., <https://2go.iccwbo.org/icc-drs-app> [<https://perma.cc/7FCL-2JFP>] (describing its dispute resolution services (DRS) app); *LCIA Online Filing*, LONDON CT. INT’L ARB., <https://onlinefiling.lcia.org/> [<https://perma.cc/9PG3-ENC9>]; *Dispute Resolution Made Easy*, AM. ARB. ASS’N, <https://www.adr.org/Support> [<https://perma.cc/7PN5-LGR7>]; see also Ljiljana Biukovic, *International Commercial Arbitration in Cyberspace: Recent Developments*, 22 NW. J. INT’L L. & BUS. 319, 320–21 (2002) (describing “virtual dispute resolution centers” and asking whether “arbitration agreements . . . and arbitration awards rendered online meet the formal requirements of the [New York] Convention on Recognition and Enforcement of Foreign Arbitral Awards . . . and enjoy the benefits of worldwide enforcement”).

<sup>38</sup> Deric Yeoh, *Is Online Dispute Resolution the Future of Alternative Dispute Resolution?*, KLUWER ARB. BLOG (Mar. 29, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/> [<https://perma.cc/KCL2-DNKZ>].

<sup>39</sup> See U.N. COMM’N ON INT’L TRADE L., UNCITRAL TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION 2 (2017), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/>

parties who will not have a continuing relationship, because they have engaged in one-off transactions and do not expect to have a repeat relationship.<sup>40</sup> Accordingly, these dispute resolution mechanisms are generally binary—“pay or don’t pay.” They are transactional, non-relational, relatively impersonal, and focused on resolution of peer-to-peer disputes.

In the early days of the World Wide Web, ODR proceedings ranging from mediation to arbitration started on email, and soon migrated to dedicated company platforms, like eBay’s ODR platform.<sup>41</sup> Under ODR, an online mediation usually begins with an email sent to the parties informing them of basic organizational information. Meetings are conducted in virtual chat rooms and breakout rooms. In these virtual rooms, the mediator can communicate by text separately or simultaneously with parties, or parties can communicate with their teams or each other. Asynchronous online mediation has become particularly popular. It facilitates increased speed, flexibility, convenience, and cost savings by providing time to formulate answers and avoiding the need to reconcile differing schedules.<sup>42</sup> At the same time, there are undeniable costs associated with online mediation, resulting from the loss of human interaction.<sup>43</sup>

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v1700382\_english\_technical\_notes\_on\_odr.pdf [https://perma.cc/EW3L-XT8M] (articulating other essential values of ODR including “transparency, due process and accountability”).

<sup>40</sup> In the small-dollar B2B context, in 2019 the Asia-Pacific Economic Cooperation launched a pilot program designed to facilitate the resolution of disputes through online means. *See generally* ASIA-PAC. ECON. COOP., APEC COLLABORATIVE FRAMEWORK FOR ONLINE DISPUTE RESOLUTION OF CROSS-BORDER BUSINESS-TO-BUSINESS DISPUTES—ENDORSED 1 (2019) [http://mddb.apec.org/Documents/2019/EC/EC2/19\\_ec2\\_022.pdf](http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_022.pdf) [https://perma.cc/L75F-NFQR] (describing how the pilot particularly focused on low-value disputes involving “micro-, small-, and medium-sized enterprises” in the participating countries, by maintaining a list of ODR providers that agreed to abide by the procedural rules set forth in its ODR Framework). APEC is in the process of implementing this ODR Framework, which it hopes will result in ODR providers offering options that are friendlier to small businesses. *Id.*

<sup>41</sup> The electronic auction company eBay helped pioneer this kind of large-scale ODR by developing a quick and easy ODR system that is inexpensive, fast, and trusted by its users. eBay uses its own ODR platform whereby proceedings are resolved in days, and rarely last more than a week. *Dispute Resolution Overview*, EBAY, <https://pages.ebay.com/services/buyandsell/disputeres.html> [https://perma.cc/5U4T-D7FS]. *See generally* Louis F. Del Duca, Colin Rule & Kathryn Rimpfel, *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ARB. & MEDIATION 204 (2014) (discussing the evolution, mechanics, and performance of eBay’s ODR system).

<sup>42</sup> Yeoh, *supra* note 38.

<sup>43</sup> *Id.*

[T]he downside to online mediation is that it dilutes some of the key features of mediation, which is the human relational aspect of mediation. Online mediation may not effectively capture the various needs, interests, motivations and emotions of the parties involved. The use of emails to convey messages instead of face to face dialogue may also embolden parties to make inflammatory comments which may not occur if they were in the same room with a mediator . . . . The effectiveness of communication at the mediation is also highly dependent on the parties’ literary skills in expressing themselves over email. The largely

When online mediation fails, parties can turn to online ADR-style commercial arbitration. Through online commercial arbitration, all aspects of the proceedings are conducted online, including video conferencing, uploading evidentiary documents, questions and answers, and brief written decisions. A simpler alternative is streamlined online arbitrations, which are widely used for internet domain name disputes and can be legally binding or non-binding in nature.<sup>44</sup>

Since 2017, the newest form of ODR has been blockchain arbitration to resolve disputes arising from “smart contracts” for the trading of cryptocurrencies such as Bitcoin. The rise of cryptocurrencies inevitably led to disputes that required quick, “onchain” resolution.<sup>45</sup> Blockchain is essentially a digital ledger of cryptocurrency transactions—spread across a network of millions of computers simultaneously to minimize risk of corruption—that can be programmed to record financial transactions and exchanges. Blockchain technology has given rise to “smart contracts,” written entirely in code, that automatically execute or enforce obligations. Through “smart contracts,” once payment is received in a sales contract, ownership automatically transfers to the buyer. Some applications hosted on blockchain offer a dispute resolution mechanism whereby a party automatically refers a dispute to the app, uploads documents,

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asynchronous nature of online mediation may also be detrimental to the mediation process, as it breaks the momentum that a long and uninterrupted mediation session can bring.

*Id.*

<sup>44</sup> The Internet Corporation for Assigned Names and Numbers’ (ICANN) governs internet domain name disputes under its Uniform Domain Name Dispute Resolution Policy (UDRP). The World Intellectual Property Organization (WIPO), as one of the UDRP dispute resolution service providers, administers the UDRP Administrative Procedure and appoints panelists to render nonbinding, but effective, decisions. *UDRP Procedures for Generic Top Level Domains (gTLDs)*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/amc/en/domains/gtld/udrp/index.html> [<https://perma.cc/2WD9-GH9W>]. Parties may sue if they are unsatisfied with the domain name decision, but this is seldom done, as fighting over a domain name rarely justifies the cost of expensive and time-consuming cross-border litigation. See *Uniform Domain-Name Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/help/dndr/udrp-en> [<https://perma.cc/VDK4-NBSU>]. Legally binding online arbitrations over domain names can also happen through the Hong Kong International Arbitration Centre (HKIAC) and Hong Kong Internet Registration Corporation (HKIRC). HKIRC’s Hong Kong Domain Name Dispute Resolution Policy (HKDRP), Article 4, states that the parties are required to submit to a mandatory arbitration proceeding governed by the Hong Kong Arbitration Ordinance. This process leads to a non-appealable arbitration award rendered in Hong Kong and enforced under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. *Domain Name Dispute Resolution Policies*, HONG KONG INTERNET REGISTRATION CORP., [https://www.hkirc.hk/en/our-support/domain\\_dispute\\_policies\\_and\\_procedures/domain\\_name\\_dispute\\_resolution\\_policies/](https://www.hkirc.hk/en/our-support/domain_dispute_policies_and_procedures/domain_name_dispute_resolution_policies/) [<https://perma.cc/2EVQ-PXBD>].

<sup>45</sup> Currently, several models of blockchain arbitration have been developed, such as Kleros and CodeLegit. These models have drafted a set of Blockchain Arbitration Rules that envision, among other things, an Appointing Authority to appoint an arbitrator who may be a lawyer or blockchain technician and email communications. Such Blockchain Arbitration Rules even offer the possibility of an oral hearing over video conference should the arbitrator call for it.



timestamps the transaction, and provides reasons for paying or not paying. This process leads to a quick decision by a panel of five arbitrators, often anonymous, who direct the party whether to pay in a matter of hours. As one interviewee noted: “the ecosystem of blockchain generally accepts such decisions as commonsensical and fair and leading to mostly right results.”

This fascinating experiment in ODR raises three fundamental issues.<sup>46</sup> The first is the question of trust.<sup>47</sup> The creator of eBay’s ODR system observed that it worked primarily because eBay users thought of themselves as a community. Therefore, a major element in ODR’s effectiveness may be a trust factor through which ODR is understood as necessary to sustain an online community. As Sophie Nappert has thoughtfully noted,

the role played in traditional centralized justice by *procedural fairness as an enabler of trust via user satisfaction* is being replaced, in the world of online interaction, by *confidence that the technology will produce a result that meets user expectations*.<sup>48</sup>

The obvious question is whether the arbitration system can handle a shift from “participant trust,” rooted in a belief that the face-to-face arbitral system promotes traditional procedural fairness, toward a new construct of “virtual trust,” based on numerous quick outcomes delivered by impersonal and decentralized technology.

The second issue is the question of due process. As one interviewee noted, we need to “rethink what really constitutes due process in places where disputes take less time and involve no face-to-face human interaction.” Such instances tend to prioritize efficient dispute resolution over justice. That same interviewee explained:

Due process requirements are not really compatible with [the] speed and efficiency we associate with ODR, which is not document-heavy or witness-heavy. In ODR, theoretical discussions about law or due process generally play little role in the resolution of the matters, where the decision-maker uses common sense to decide who is on the hook.

For that reason, although online arbitration has been widely used in disputes between consumers and large-volume businesses, it is far less popular

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<sup>46</sup> See generally U.N. COMM’N ON INT’L TRADE LAW, *supra* note 39 (seeking to address the central issues implicated by ODR); ASIA-PAC. ECON. COOP., *supra* note 40 (same).

<sup>47</sup> See Sophie Nappert, *Twenty-First Century Arbitration: The Question of Trust*, in FESTSCHRIFT IN HONOR OF PROFESSOR GEORGE BERMAN (Julie Bedard & Patrick W. Pearsall eds., forthcoming 2021) (manuscript at 2–3) (on file with author).

<sup>48</sup> *Id.* at 7.

with consumers. Consumers view mandatory arbitration agreements as denying them access to justice through the courts, and in particular, through class action suits offering opportunities for greater aggregation and compensation.<sup>49</sup> These factors raise questions about whether the rush to dispute resolution diminishes “due process in the eye of the receiver”: the person receiving justice accorded by the dispute resolution mechanism.<sup>50</sup>

The third issue, and perhaps the most important, is how online arbitration challenges conventional notions of what arbitration entails. During the pandemic, traditional arbitration proceedings have increasingly incorporated modern technology, blurring the distinction between online arbitration and traditional arbitration. ODR has largely obliterated the line between the domestic and the international because it frequently takes place across geographic borders and without parties even mentioning geography as a relevant fact.

Still, as ODR proliferates, we will surely see further multilateral efforts to establish rules to govern this form of dispute resolution in a cross-border context. Proponents of such efforts should, however, heed the lessons learned from UNCITRAL’s prior work. The UNCITRAL effort resulted in a much less ambitious instrument than was originally contemplated. This was largely due to the differing cultural approaches to issues taken by the United States on the one hand, and European countries on the other.

For example, in the European Union, unlike in the United States, there is considerable reluctance to defer to party autonomy in contracting—particularly in the consumer setting where resorting to certain types of ODR may replace traditional means of adjudicating disputes. We may find that ODR outcomes are ultimately more widely accepted in the United States than abroad, notwithstanding the fact that ODR operates asynchronously across time zones and virtual space, thereby rendering traditional concepts of territory essentially irrelevant for determining jurisdiction.

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<sup>49</sup> See generally KATHERINE V. W. STONE & ALEXANDER J. S. COLVIN, ECON. POL’Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS (2015), <https://www.epi.org/publication/the-arbitration-epidemic/> [<https://perma.cc/D4BS-PP4R>]; Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, CTR. FOR AM. PROGRESS (Aug. 2, 2016), <https://www.americanprogress.org/issues/economy/reports/2016/08/02/142095/the-case-against-mandatory-consumer-arbitration-clauses/> [<https://perma.cc/BLE9-SBPQ>]; see also Senator Elizabeth Warren (@SenWarren), TWITTER (July 1, 2019, 8:11 PM), <https://twitter.com/senwarren/status/1145847506267508743> [<https://perma.cc/BQ3A-TJ7H>] (“Forced arbitration clauses are a fancy way for companies to force customers to waive their right to go to court when they’re cheated.”).

<sup>50</sup> See Harold Hongju Koh, *Charles Reich: Due Process in the Eye of the Receiver*, 36 *TOURO L. REV.* 771, 789 (2020) (arguing in favor of “a person-centered constitutional jurisprudence committed to due process in the eye of the receiver”).

### III. DOMESTIC ONLINE DISPUTE RESOLUTION

What about domestic ODR? What have been some early reactions to three variants: online domestic mediation,<sup>51</sup> civil adjudication,<sup>52</sup> and criminal adjudication?

#### *A. Mediation*

Over the course of my interviews, I talked to several domestic mediators. The most evocative of their responses was: “I now understand why online dating works. You can actually assess people’s personalities online.” These mediators viewed online mediation as an unmitigated improvement on traditional mediation. They pointed out that the logistics of setting up mediations were simpler and that clients vastly preferred the lower cost. Decision-makers were more likely to appear online than in person. Clients seemed more relaxed, calmer, and happier, because they were not confined to a conference room for extended periods of time. The interviewees also found that online mediation made overall communication before and after the formal mediation easier. Lawyers were less able to shield or block contact with their clients, thus enabling direct resolution of the dispute between the disputing parties. With equal screen presence, clients felt more empowered to participate.

One interesting intangible pointed out by one mediator was that all participants behaved better simply because they could see how others saw them. But the downside, she noted, was that there was no “schmooze factor”—in other words, no casual hallway meetings or moments of breaking bread to help create personal connections before the mediation began.

As a result, the mediators told me that online mediations tended to resolve faster. There was an increased settlement rate, even though there was also a lower “settlement *event*” effect, because online, it was also easier to walk out. Online, one mediator noted, no one could use the classic threat: “If we don’t resolve this in the next hour, I’m going to the airport and I’m not coming back.” Forcing a settlement becomes much harder when one participant’s biggest threat is to say, “I am frustrated by the lack of progress here. I’m in my house, so I’m planning to turn off my Zoom screen now.”

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<sup>51</sup> Domestic online mediation is happening around the world. Recently, for example, “the Singapore State Courts’ Community Justice and Tribunals System launched its ‘e-Mediation’ to help those with neighbourly disputes save time and money as they no longer need to go to the courts to file their documents.” Yeoh, *supra* note 38.

<sup>52</sup> As one interviewee noted, “There has also long been videoconferencing in administrative adjudicatory hearings in immigration law, and no doubt in other fields. [But f]or detained noncitizens facing deportation, the government supplies both ends of the technology, and not always well, so the vulnerable noncitizens suffer the disadvantages.”

These factors meant that lawyers had less control of clients and the mediator had less “persuasive power.” But as one domestic mediator explained, online mediation is here to stay: “the early verdict is that we’re not going back: the question is no longer ‘When do we travel?’ but ‘Why should we travel?’”

### B. Civil Adjudication

In early 2019, more than a year before the pandemic hit, Chief Justice Gants formally asked the Massachusetts Access to Justice Commission to investigate how state courts could conduct civil and criminal litigation online, with particular emphasis on the goals of respecting litigants’ needs and ensuring that nobody was taken advantage of through the process.<sup>53</sup> In the Gants Susskind Commentary, the Chief focused on three broad categories of civil cases: (1) “small-dollar disputes,” where there are rarely attorneys on both sides; (2) family disputes; and (3) housing disputes.<sup>54</sup> He noted that although the small-dollar disputes could be resolved through ADR, family and housing disputes would need to remain within the court system.

Since the pandemic hit, many courts have reopened with online hearings. My interviews with civil litigators and judges demonstrated that in cases with sophisticated repeat users, online hearings were feasible—especially with oral argument, but less so with cross-examination—and could continue indefinitely. The primary reason was cost. As one interviewee noted, “No one will ever again pay a lawyer to wake up in the morning in New Orleans, fly to Houston, do a three-hour hearing, and then fly back and bill 15 hours for that day.” There are other advantages as well: online adjudication facilitates participation, observation, and evaluation not just for counsel, but also for clients and the public.<sup>55</sup>

Perhaps most fascinating, the increasing availability of online mediation, arbitration, and adjudication continues to erode the claimed traditional distinc-

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<sup>53</sup> See generally MASS. ACCESS TO JUST. COMM’N, REPORT OF THE ONLINE DISPUTE RESOLUTION COMMITTEE, JULY 2021, <https://massa2j.org/wp-content/uploads/2021/08/FINAL-Report-of-the-Online-Dispute-Resolution-Committee-MA-A2J-Commission-July-2021-7.28.21.pdf> [<https://perma.cc/ZE7A-JTGV>] (outlining methods to guarantee that “access to justice” values are centrally incorporated within an ODR system). The Massachusetts Access to Justice Commission’s Director and Chair, Mary K. Ryan—a longtime leader on to access-to-justice issues within the American Bar Association and Massachusetts—led the committee. The committee brought together many different perspectives. The report was clearly inspired by the Gants Principles outlined in Part IV *infra*, and particularly by Chief Justice Gants’ concern about ensuring that ODR programs be implemented with the needs of unrepresented litigants in mind and according to access-to-justice principles.

<sup>54</sup> Gants Susskind Commentary, *supra* note 3, at 33:25.

<sup>55</sup> One interviewee described an online hearing in a student loan class action where more than one hundred plaintiffs logged in. As the hearing progressed, the plaintiffs began exchanging information about the case in the chat: so much so, that the judge’s law clerk who was monitoring the proceeding sent a note to the judge who decided to enter the entire chat into the record as evidence.

tion between the domestic and the international. The great Lord Denning, Master of the Rolls in the United Kingdom, once famously said, “As a moth is drawn to the light, so is a litigant drawn to the United States.”<sup>56</sup> But as online hearings proliferate, many U.S. domestic arbitrators may easily work internationally on online platforms. Such work raises the question: will European litigants bring their matters to U.S. forums, as opposed to local venues, as U.S. fora become increasingly available online?

In many civil cases, the concerns about having juries of adequate size are growing because very few jury summonses have been answered during the time of COVID-19. Some courtrooms have been forced to reduce to six-person civil juries in all cases. For example, the Lackawanna, Pennsylvania court system recently announced that it had “allow[ed] judges to remove” peremptory challenges, because of “the decline in citizen response to jury summonses during the pandemic.”<sup>57</sup> As one judge explained, “Absolutely no one wants jurors deciding cases from home, with their kids running around, repair people coming to the door, the TV on, while they are multitasking, with all the other distractions of being at home.” Another judge cogently summarized, “We should remember that our in-person system works in part because everyone is uncomfortable and wants to get out of there as fast as possible.”

### C. Criminal Adjudication

The main hesitation about online domestic litigation arose when interviewees began discussing criminal jury trials. As one judge explained, “Taking pleas, any issue that involves individual dignity, significant losses of liberty, all make me very nervous to do online.”

In the 2020 Gants Susskind Commentary, Chief Justice Gants thoughtfully addressed criminal jury trials, paying particular attention to the human aspects of a trial.<sup>58</sup> Having spent twelve years as a trial judge, the Chief explained that “something remarkable happens” when twelve people—grouped off the streets—sit together as juries. He expressed his concern that this experience of civic bonding simply would not occur online. He noted his special apprehension concerning online criminal cases, explaining that, “[I]n a courtroom [the defendant] is very much a human being, as are the witnesses, as are

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<sup>56</sup> Smith Kline & French Lab. Ltd. & Others v. Bloch, [1983] 1 WLR 730 at 733 (Eng. C.A.).

<sup>57</sup> Max Mitchell, *As Jury Attendance Declines, Lackawanna Judges Can Nix Peremptory Challenges. Will Others Follow?*, LAW.COM (Nov. 19, 2020), <https://www.law.com/thelegalintelligencer/2020/11/19/as-jury-attendance-declines-lackawanna-judges-can-nix-peremptory-challenges-will-others-follow/> [<https://perma.cc/XDE7-N8WF>].

<sup>58</sup> Gants Susskind Commentary, *supra* note 3, at 1:08:20.

the victims,” something that can be diluted if the jury sees the defendant as just another face on a video screen.<sup>59</sup>

As one commentator has noted, the COVID-19 pandemic has been extraordinarily damaging to the right to a criminal jury trial.<sup>60</sup> He argues that the main two ways that courts have tried to adapt criminal jury trials are at best, unfair to all participants in the criminal justice system, and at worst, likely violations of the Sixth Amendment rights of the accused.

Characteristically thinking of the underdog, Ralph anticipated this trend, fearing that “seeing individuals on a screen may diminish the humanity of what goes on in the course of a court of law.”<sup>61</sup> He explained that, despite the ongoing pandemic, he hoped to make in-person jury trials available—especially for incarcerated defendants awaiting trial—even if it meant encouraging defendants to accept six-person juries, spacing jurors out in the courtroom, or using two courtrooms per case: one for the hearing and the other for jurors to deliberate.<sup>62</sup> So long as the pandemic rages, there seems to be no other viable alternatives. Jury trials that are in-person and compliant with social distancing policies remain the imperfect, but only feasible way, to accommodate both health and justice concerns under pandemic conditions.<sup>63</sup>

#### IV. FOUR “GANTS PRINCIPLES” FOR ONLINE DISPUTE RESOLUTION

Given that the online future has already arrived, how can we focus on Chief Justice Gants’s priorities? Ralph’s own early thinking presciently suggested four “Gants Principles” to guide the development of ODR: (1) treating litigants equitably; (2) ensuring accessibility; (3) protecting the vulnerable; and (4) preserving dignity through participation.

##### *A. Principle One: Treat Litigants Equitably*

Ralph believed a justice system should produce the correct result based on the facts and law, but that too often, the resources of the justice system are

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<sup>59</sup> *Id.* at 1:08:55.

<sup>60</sup> See Brandon Marc Draper, *And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right*, 62 B.C. L. REV. E. SUPP. I-1 (2021), <https://lawdigitalcommons.bc.edu/bclr/vol62/iss9/1> [<https://perma.cc/4ZX2-FWYA>].

<sup>61</sup> Gants Susskind Commentary, *supra* note 3, at 1:09:05.

<sup>62</sup> The Western District of New York, for example, has resorted to the “two courtroom” approach to resume live criminal trials.

<sup>63</sup> *Accord* Draper, *supra* note 60, at I.-10 (rejecting the video conference option and arguing that criminal jury trials should proceed “in-person and compliant with social distancing standards”) *But see Justice COVID-19 Response*, JUSTICE.ORG.UK, <https://justice.org.uk/our-work/justice-covid-19-response/> (last visited Nov. 11, 2021) (describing how the charity JUSTICE in the United Kingdom has been experimenting with virtual mock jury trials and receiving generally positive feedback).

skewed in ways that create unfairness to the vulnerable. To provide true justice, Ralph believed, any procedural system must be structured to ensure that the vulnerable are not disadvantaged simply because of their vulnerability. To Ralph, if the vulnerable are treated unfairly and inequitably, the system does not deliver justice.

Significantly, Ralph's call was for more equitable, not more equal, treatment. Formally equal treatment would, for example, allow for digital hearings that are scheduled fairly. Such treatment, however, would not account for the inequitable internet access issues that some parties face. He reasoned that giving each party equal opportunity to attend the hearing and ignoring the reality of the uneven playing field with respect to access would lead to an inequitable result. In contrast, equitable treatment, in some instances, would require *unequal* treatment: affirmative action to give "advantages" or support to certain parties to bring them up to a level playing field with the more advantaged party.

Ralph's insistence on equitable treatment made him skeptical of Susskind's suggestion that cases should be triaged or tiered between simple and complex cases, so that "everyday legal issues" could be handled online and in-person dispute resolution could be reserved for more complex matters.<sup>64</sup> Chief Justice Gants did not deny the important role technology could play in the "triaging of cases" to reduce the time litigants have to spend in court.<sup>65</sup> He suggested that online courts should carefully consider "user experience," and cited, as an example, the way that Massachusetts courts ensured that domestic violence victims could conduct hearings over the phone during the COVID-19 pandemic to ensure that their complaints were heard.<sup>66</sup>

But the Chief balked at the notion that cases could be broken into simple and complex matters, with the concerns of the poor being deemed "simple," and the concerns of the rich being called "complex." He recognized that such bifurcation could lead to a two-tiered system of procedural justice: online adjudication for the poor and in-person adjudication for the wealthy. Many so-called "everyday" legal disputes, he argued, are in fact extremely complex and challenging. His own lengthy judicial experience had taught him that it could be much easier to decide a high-dollar amount civil suit than a question of

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<sup>64</sup> Gants Susskind Commentary, *supra* note 3, at 1:24:25.

<sup>65</sup> *Id.* at 59:50.

<sup>66</sup> *Id.* at 1:01:00. Ralph repeatedly talked about the importance of the "user experience" as a touchstone for our justice system. In his last days, Ralph was in conversation with IDEO, a global design firm that invented the concept of "human-centered design" based on a deep understanding of the "user experience," *About IDEO*, IDEO, <https://www.ideo.com/about> [<https://perma.cc/Q399-VT4Z>], about how to redesign aspects of the Massachusetts court system. Ralph's goal was to harvest IDEO's experience to improve the user experience in housing court through technology and other means.

child custody or eviction. Judges, he argued, should not “underestimate the challenges involved in the so-called lower-tier cases; they have their own complexities and certainly their own importance to the parties who are involved.”<sup>67</sup>

Treating litigants equitably also requires courts to preserve opportunities for equitable advocacy. Ralph was acutely aware that asymmetries of knowledge and skills created inequities, especially with repeat players like creditors. In the Gants Susskind Commentary, using disputes between debtors and debt collectors as an example, the Chief Justice highlighted the informational advantages of repeat players and expressed his concerns about the ability of debtors to understand their rights and adequately represent their interests. In this context, equitable advocacy would involve courts taking affirmative action to ensure that debtors understand all material information before commencing a debt collection hearing. If the debtors do not fully understand, the first Gants Principle—treat litigants equitably—would require the courts to provide online learning modules, accessible in terms of language and technology, to provide debtors with such necessary knowledge. For that reason, considerations of equity and accessibility are inextricably linked.

### *B. Principle Two: Ensure Accessibility*

Ralph believed that courts must adapt to the needs of the people. He said, insistently: “[courts must] take the user” where they are.<sup>68</sup> To do so, Ralph focused in his Gants Susskind Commentary on two determinants of accessibility: language and technology.<sup>69</sup>

Promoting language access would require developing written translations of all court forms, along with sample motions, orders, and other court documents for non-English speakers. Chief Justice Gants feared that asynchronous, written forms of adjudication might disadvantage those less able to read and/or write English effectively. He was a fierce opponent of eliminating oral argument in favor of written advocacy, which he noted favored those who could write English fluently or pay others to do so.<sup>70</sup> In up to twenty-five percent of his cases, he noted, oral argument changed some aspect of his reasoning.<sup>71</sup> So,

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<sup>67</sup> *Id.* at 1:25:00 to 1:27:00 (discussing this important clarification).

<sup>68</sup> *Id.* at 1:01:45 (“Listening to these individuals and adapting to their needs is absolutely essential . . . . I think you take the user as you find it; in many ways, simple is better . . .”).

<sup>69</sup> *Id.* at 35:00 to 37:00.

<sup>70</sup> *Id.* at 35:10.

<sup>71</sup> *Id.* at 36:50. I am advised that ICJ judges and advocates have also expressed this reason for why that Court should continue oral argument despite the availability in every case of massive written pleadings.



fairness and opportunity for equitable advocacy could be lost by preventing individuals from providing oral testimony and arguments.

Ralph had the same egalitarian instinct regarding access to technology. He recognized that “virtually everybody, at least in this country, has access to a smartphone, but not nearly as many have access to computers.”<sup>72</sup> With this in mind, Ralph preferred a smartphone-based system that would be more “respectful of the interests of all litigants,” and would not create advantages and disadvantages based on “access, or other concerns.”<sup>73</sup> Once again, Ralph insisted, courts must meet the users where they are—if the “users” of the justice system are more comfortable with phone calls than online virtual meetings, the courts should attempt to accommodate this approach.<sup>74</sup>

To further promote equitable access to online hearings, Ralph’s notion of affirmative action could prompt courts and governments to invest in publicly provided “digital hearing rooms” in marginalized communities, with the necessary hardware, quiet settings, and stable internet connections. After all, physical courtroom proceedings seek to provide all litigants a publicly provided physical venue that puts everyone on the same footing, whereby everyone can be heard and present their case. Court participants with unstable surroundings or limited cellphone data plans will suffer from virtual hearings, so the burden should fall on the courts, not the litigants, to take affirmative steps to eliminate this inequity.

### *C. Principle Three: Protect the Vulnerable*

If these core principles of equity and accessibility are observed, Chief Justice Gants would say that we could provide an online legal system that provides justice for the most vulnerable members of the community. Satisfying this principle requires contending with the various advantages and disadvantages that digital proceedings may create for different populations—both counsel and court users—and addressing these potential inequities thoughtfully with an eye toward protecting those with less privilege and access.

Nowhere is this concern more evident than in the Massachusetts Access to Justice Commission’s July 2021 ODR Report (Report), which was expressly

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<sup>72</sup> *Id.* at 40:00.

<sup>73</sup> *Id.* at 40:30. Once again, Ralph proved to be right about meeting users where they are. For example, my wife, Mary-Christy Fisher, senior counsel at the Connecticut Veterans Legal Center and a close friend of Ralph’s, has found that almost none of her clients, all of them former veterans, have access to Zoom. Further, many of them have smartphones with data plans that allow them a very limited number of minutes to communicate or participate in hearings or consultations with their counsel.

<sup>74</sup> *Id.*

inspired by the late Chief’s vision.<sup>75</sup> After reviewing the experiences of four other jurisdictions that have tackled the problem of online adjudication,<sup>76</sup> the Report effectively applied the Gants Principles, demanding that self-represented litigants “must be the focus of ODR.”<sup>77</sup> The Report expressly discussed the need to provide “equitable access to justice for all racial and socio-economic groups,” including vulnerable litigants, to ensure accessibility through low fees and costs, to make ODR “as widely available to users as possible,” to minimize technology imbalances, and to ensure that ODR be “language-friendly” with “[l]egal information, assistance, and advice . . . readily available to ODR users.”<sup>78</sup>

#### *D. Principle Four: Preserve Dignity Through Participation*

Fourth and finally, Ralph was determined that we must preserve the values of dignity and humanity in an online court system. Ralph memorably said, “[J]ustice is not only the result that emerges, [but also] the feeling that somebody has been heard.”<sup>79</sup> Although he suggested that this can be accomplished online, he emphasized that judges “resolving matters virtually need to be respectful . . . to make sure that the litigants understand that they have been heard, or read, or that there is some appreciation of the arguments that [the judges] have been given.”<sup>80</sup>

In short, Chief Justice Gants was less concerned about what constitutes due process as seen by insiders or the State, than about “due process in the eye of the receiver”: how the justice meted out feels to the outsider who finds herself on the receiving end of a dispute resolution process. In closing his Gants Susskind Commentary, Chief Justice Gants emphasized that the strongest argument for developing a new online court came from understanding the users of the justice system itself. We can develop a better justice system, online and offline, he suggested, “[I]f we truly listen to their experience, and understand what they are going through, and recognize that what is happening now is simply not good enough . . .”<sup>81</sup> It is telling that the Massachusetts Access to Justice Commission’s ODR Report, which Ralph charged in his last days, ended up concluding, in the same spirit, that “ODR can be a meaningful contribu-

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<sup>75</sup> See MASS. ACCESS TO JUST. COMM’N, *supra* note 53, at 1 (noting that “access to justice principles” must be central to any future ODR system in Massachusetts).

<sup>76</sup> The committee reviewed recent experience in Connecticut, Michigan, Utah, and British Columbia. See *id.* at 8–13.

<sup>77</sup> *Id.* at 15. To ensure that the vulnerable are protected, the Report directs that “[t]he design process must involve SRLs (self-represented litigants) and their advocates, as well as other relevant stakeholders, from the earliest stages through all stages of implementation.” *Id.*

<sup>78</sup> *Id.* at 2–3.

<sup>79</sup> Gants Susskind Commentary, *supra* note 3, at 1:17:10.

<sup>80</sup> *Id.* at 1:17:50.

<sup>81</sup> *Id.* at 1:31:25.

tion to a more fair and equitable court system. However, if the design or implementation of such a system, due to a failure to incorporate such measures, is likely to exacerbate, or even simply perpetuate, existing disparities between white parties and represented parties, on the one hand, and parties of color and [self-represented litigants], on the other hand, ODR should not be adopted.”<sup>82</sup>

### CONCLUSION

At Ralph’s investiture as a trial judge at the Massachusetts Superior Court, he recalled what his judge, the late Eugene Nickerson of the Eastern District of New York, had told him as a law clerk: “We can’t make this whole unfair world fair, but we can and must do everything we can to make this courtroom a place where fairness, justice, and civility rule.” Even in the cloud, Ralph would insist that online courts can and must still be places where this remains true.

Ralph’s overriding request would be that courts in the cloud preserve core human values: efficiency and cost savings, of course, but also treating litigants equitably, ensuring access to justice, protecting the vulnerable, and preserving dignity through participation. He believed in these values wherever adjudication might occur, whether in the real or the virtual world.

Always an optimist, Ralph even dared to dream of online or hybrid courts that could someday deliver even better justice than under the conventional system of in-person courts. Properly managed, he argued, “the capacity to be able to require individuals to come to court less often” will “reduc[e] the costs of litigation so that more people can afford to have lawyers,” and “make an enormous difference for those individuals who are struggling to come to court because of problems in terms of their job, [or] their responsibilities at home.”<sup>83</sup> Ever the dreamer, Ralph imagined a world where the right blend of in-person and online courts could deliver more and better justice to more people.

As roommates and young lawyers, Ralph and I used to talk late into the night about the problems of the world. One night, before we went to sleep, we made each other a promise: if, when we grew up, we ever reached positions of influence, we would do everything in our power to make the world a fairer, more just place.

As a judge, lawyer, and friend, Ralph kept his promise. But as courts in the cloud develop, the question Chief Justice Gants leaves us is: will we keep ours?

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<sup>82</sup> MASS. ACCESS TO JUST. COMM’N, *supra* note 53, at 2.

<sup>83</sup> Gants Susskind Commentary, *supra* note 3, at 42:30.