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Patricia Audrey Ruslijanto

Faculty of Law, Brawijaya University, Indonesia, g25audrey@gmail.com

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TRANSFORMING LANDSCAPES: HOW ODR RESHAPING THE PROSPECT OF DISPUTE SETTLEMENT IN A CONNECTED WORLD

Patricia Audrey Ruslijanto*

* Faculty of Law Brawijaya University,
Correspondence: g25audrey@gmail.com

Abstract

The existence of law and culture has bring significant forces to human life, since them both shaping and influencing the emergence of values and norms in communities and societies. The restless development of human history has forged law in dynamic relation with culture, resulted in changing laws, values and practices. Beyond politics, present life is also bringing fresh challenges for law and culture globally, such as: the increased use of technology in law and human life. One of the big leap issue is the changing in the culture of trade, which shifted to non-face-to face or e commerce, which offer easiness and practicality in conduct trade regardless the non-barrier border. Indeed, there is still a lack of effective legal regimes and processes capable to meet the needs of globalization. The increased possibilities to access information, to form online relationships, and to conclude online transactions have introduced a new dimension of legal conflicts, which is electronic disputes. Regarding this issue, the needs of effective dispute settlement, which is "fitting to the forum", is necessary, and online dispute resolution (ODR) is the answer. Therefore this paper aims to find how ODR reshaping the prospect of dispute settlement and what obstacle may be faced by the implementation of ODR. The method use in this paper is juridical normative with conceptual approach, statute approach and comparative approach. The result of this paper show that ODR able to reshape the prospect of dispute settlement, since it may offer fairness by providing transparent system of negotiation, trust in content offer by ODR system and security develop in ODR system in the process of dispute settlement. Meanwhile, there are also obstacles that may face by ODR, which are technology issue and local culture issue, which means the acceptance of ODR practice in society, especially when applied to developing country.

Keywords : *ODR, dispute settlement, cyberspace, legal certainty*

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I. INTRODUCTION

The issue of human civilization has always been an interesting issue to explore, since the restless development of human history grow emergingly. In the humanities issue, the role of culture has been an attribute also to the particular level of sophistication in education, art, sciences. Culture as it is define by E.B. Tylor “ *it is that complex whole which includes knowledge, belief, art, morals, law, custom and any*

other capabilities and habits acquired by man as a member of society”¹, alternatively also culture is defined as a domain that emphasizes the practices, discourses and material expression, which over time, express the continuities and discontinuities of social meaning of a life held in common².

Culture has offer much of human civilization building, that resulted in the change of society potential issue, in the shape of value, which focuses on holistic value³. What means by holistic value in this term is the issue of social engineering, as a process of cultural transformation which bring human being to the process of independence of transparency. Yet the process of social engineering needs to be supported with consistent instrument, and this instrument manifested in the existence of law.

“*Ubi Societas ibi Ius*” as it means where there is society, there is law, has show that law in its existence cannot separate from society, while peace and justice in society may reach while law structure has work effectively. Law as a part of social norm has the most strict function in its sanction, in which refer not only to the statute, but also the nature of culture⁴, since law has various function, yet one of its function is law as a tool of social control, in which it means law function as a society control so that society in their relation will adhere to law regulation, and shall help regulates society relation toward other in a respectful meaning.

The restless development of human history has forged law in dynamic relation with culture, resulted in changing laws, values and

¹ E. B. Tylor, *Primitive culture: researches into the development of mythology, philosophy, religion, art, and custom* (New York: Gordon Press, 1974)

² James, Paul; Magee, Liam; Scerri, Andy; Steger, Manfred (2015). *Urban Sustainability in Theory and Practice: Circles of Sustainability*. London: Routledge, 2015. p. 53

³ Balogun Mustapha, “What is the relationship between law and culture?” <https://www.quora.com/What-is-the-relationship-between-law-and-culture>

⁴ Cicero in *De Legibus*: that an understanding of law should not derived from the formal source of legal rules, such as statute, enacted by the popular assemblies or the edicts or magistrates. These rules are but one aspect of universal justice, which is to be found in the nature of man. Natural reason which is fixed and develop in human mind and common to all men, whatever their cultural background, commands what ought to be done and forbids what should not be done”, Eka Sjarief, “Ubi societas ubi ius,” https://www.academia.edu/2479524/Ubi_Societas_Ibi_Ius

practices. Beyond politics, present life is also bringing fresh challenges for law and culture globally, such as the increased use of technology in law and human life. Globalisation⁵ in the era of modern has transform also social structure and bring human being comes from various region of nation into single borderless nation, though it interconnected from one to another, from the economy aspect, social aspect and political aspect⁶, through the role of science and technology. The support of human intelligence has provide much innovative way for human to develop various way to fulfill their needs. One of this essential need is trade, since trade has been consider as an essential keys to provide human basic needs. From time to time, trade has evolved from the direct existence exchange of goods and services, without the use of money call barter⁷. Later, modern traders negotiate through a medium of exchange, such as money, follow with the invention of non physical money which greatly simplified and promoted trade⁸. By the existing of trade, has show interdependence between regions since they may have comparative advantage in the production of tradable commodity, including production of natural resources⁹

Time by time, the demand of society and fast paced development has bring change to the face of trade conduct, from face to face into

⁵ Globalisation as it is defined by Anthony McGrew as growing global interconnectedness and has a number of distinctive attributes. Firstly, it implies that social, political and economic activities are becoming stretches across national frontiers such that events, decisions and activities in one part of the world come to have immediate significance for individuals in distant part of the globe.Fourthly, growing interconnectedness generates a host of transnational problems, which cannot be resolved by the action of individual governments but only through multilateral and international cooperation. Anthony McGrew, *The Transformation of Democracy*, (UK: Tata McGraw Hill 1997), hlm 4

⁶ A.F.Elly Erawaty, "Globalisasi Ekonomi dan Perdagangan Bebas: Suatu Pengantar", dalam Ida Susanti & Bayu Seto, *Aspek Hukum dari Perdagangan Bebas*, (Bandung: Citra Aditya Bakti. 2003), hlm 3

⁷ Samuelson, P (1939). "The Gains from International Trade". *The Canadian Journal of Economics and Political Science*. 5 (2): 195–205. doi:10.2307/137133

⁸ Dollar, D; Kraay, A (2004). "Trade, Growth, and Poverty" (PDF). *The Economic Journal*. 114 (493): F22–F49.

⁹ Munim, Ziaul Haque; Schramm, Hans-Joachim (2018). "The impacts of port infrastructure and logistics performance on economic growth: the mediating role of seaborne trade". *Journal of Shipping and Trade*. 3 (1): 1–19. doi:10.1186/s41072-018-0027-0

faceless trading model, which known as electronic commerce,¹⁰ and by the conduct of electronic commerce, it serves buyer with space for a various available products in quality and quantity as they desired, yet for seller the assistance of electronic commerce will provide meaningful action in gather customer around the world with a model of borderless trade¹¹.

Naturally, the practice of electronic commerce is just the same with the conventional trade apart from the use interconnected network/internet services as the main service to operates the process. Agreement between party and necessity to fulfill one's obligation to another is needed and vice versa. Yet, it possible to happen when sometimes a breach of contract happen between parties and lead to the happening of dispute¹². Issue of dispute in electronic commerce area lead to different model as it compares to conventional trade, and may lead to the model of dematerialisation, desocialisation and dejudicialisation, since it meet with the nature of faceless trading¹³. Therefore the needs of dispute settlement in electronic commerce have two main goals, which are settle dispute between parties and to build parties confidence to interact in electronic commerce issue¹⁴. Regarding this issue, the needs of effective dispute settlement, which is "fitting to the forum", is necessary. One that has regard to meet the criteria is the existence of online dispute resolution.

Online dispute resolution which is a branch of dispute resolution uses technology to facilitate the resolution of disputes between parties. Online dispute resolution primarily involves negotiation, mediation or arbitration or combination of all three, while compares to conventional

¹⁰ Tom Allen & Robin Widdison. "Can Computer Make a Contract ?". 1996. Harvard Journal of Law & Technology Winter., hlm. 1

¹¹ E. Gultom. 2002. Konsumen dalam Transaksi Perdagangan melalui Transaksi ECommerce, dalam M.K. Kantaatmaja, Cyberlaw: Suatu Pengantar. ELIPS. Bandung. hlm 54

¹² Iman Sjahputra.2010. Perlindungan Konsumen dalam Transaksi Elektronik. Alumni. Bandung. hlm 93

¹³ G Kauffman-Kohler and T Schultz, "Online dispute resolution: Challenges for Contemporary Justice", Kluwer Publishing, 2004, hlm 85.

¹⁴ E Katsh 'Online dispute resolution: some implications for the emergence of law in cyberspace', Lex Electronica Vol 10, No 3, 2006, available at <http://www.lexelectronica.org/articles/v10-3/katsh.htm>

alternative dispute resolution, it combines the synergy with information and communication technology¹⁵. Dealing with this issue, international law established regulations in regulate the practice and role of dispute settlement body, especially those who take part in the form of alternative dispute resolution as an option for dispute settlement legal enforcement, apart from the practice of litigation body like court that blamed in provide lack of efficiency of cost and practicality of time, as alternative dispute settlement has provide. Regulations that has provided are 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards or New York Convention, UNCITRAL Model Law on International Commercial Arbitration 1985 that has been amended in 2006 to provide recognition upon electronic data transaction upon the use of international commercial arbitration¹⁶. Stressing also the focus that happen in Indonesia as a part of international society member, not also missed its role to participate in efforts to regulate the practice of electronic commerce dispute settlement, since the development of technology also removes barrier to the practice of trade itself. In regulating alternative dispute settlement, Law number 30 year 1999 on Arbitration and Alternative Dispute Resolution have been established to regulates the standard to conduct dispute settlement between parties. Follow in 2008, Law number 11 year 2008 on Information and Electronic Transaction established to regulates and removes barrier in conduct electronic contract, yet with its all part of role including provide option method for parties to settle dispute between them¹⁷

Indeed, there is still a lack of effective legal regimes and processes capable to meet the needs of globalization. Therefore this paper aims to find how online dispute resolution reshaping the prospect of dispute settlement and what obstacle may be faced by the implementation of online dispute resolution.

¹⁵ J. A. García Álvaro, "Online Dispute Resolution Uncharted Territory" (2003) 7 *The Vindobona Journal of International Commercial Law and Arbitration* P. 180

¹⁶ Abdul Halim Barkatarullah. 2010. *Sengketa Transaksi E-Commerce Internasional*. Nusa Media. Bandung. hlm 28

¹⁷ Frans Hendra Winata, 2011, *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia & Internasional*, Sinar Grafika, Jakarta, hlm 45

II. ONLINE DISPUTE RESOLUTION AND ITS EFFORT RESHAPING THE PROSPECT OF DISPUTE SETTLEMENT

A proper law is regulation that live in social society system, as it means law regulation ought to settle issue of dispute settlement which happen in society. There are two models that often use by society for dispute settlement, litigation method and non litigation method. What means by litigation method is a model of structured settlement by the assistance of court to settle issue between disputing parties from a legal case. While the second model is non litigation, which means that dispute is settle by parties without bringing a lawsuit to the court. The model of non litigation also often recognised as alternative dispute resolution, which includes techniques and act of disagreeing party to settle disputes with the help of third party¹⁸

In its existence, alternative dispute resolution may consider as an effective way to settle dispute with fewer cost than court and preference for confidentiality, and also offer various method to settle problem by offering various type which are negotiation, mediation, collaborative law and arbitration¹⁹.

However, the existence of globalization and its development has bring such a vast development in many aspect in human life, yet it also transform the nature of human to communicate one to another in conduct trade, as it is assisted information technology in trade known as electronic commerce. The existence of electronic commerce has known as a new type of legal action, as such it convert the practice of face to face trading to facelesstrading, yet this time of legal action still requires legal consequence, so that it will fulfill balance of rights and obligations toward parties and legal certainty to conduct such action²⁰

Online dispute resolution is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. Online dispute resolution has essential role in support the development of electronic commerce, yet guarantee its legal certainty toward parties.

¹⁸ Lynch, J. "ADR and Beyond: A Systems Approach to Conflict Management", *Negotiation Journal*, Volume 17, Number 3, July 2001, hlm 213

¹⁹ Lynch, J. *Ibid*, hlm 215

²⁰ Ricardo Simanjuntak. *Asas-Asas Utama Hukum Transaksi dalam Transaksi Dagang Internasional: Sebuah Tinjauan Hukum*. *Jurnal Hukum Bisnis*, Agustus 2009

In its practice, online dispute resolution offer communication and time efficiency demand by parties, with its flexibility and assistency facility offer by online dispute resolution²¹

It primarily involves negotiation, mediation or arbitration, or a combination of all three²². These type of methods aims to bridging confidence toward parties in communicate and settle dispute that may happen one to another. In this respect it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, online dispute resolution in its form can classify into two types, that are (1) negotiation, divide into two type that are automated negotiation, where negotiation process designed to determine economic settlements for claims in which liability is not challenged. This type of automated negotiation divide into double blind bidding, for single monetary issues between two parties and visual blind bidding, for negotiations with any number of parties and issues. Second type of negotiation is assisted negotiation, that has a similar role as the mediator in a mediation. The role of the technology may provide a certain process and/or to provide the parties with specific (evaluative) advice²³; (2) arbitration, is a type of dispute settlement where a neutral third party (arbitrator) delivers a decision which is final, and binding on both parties. In an arbitration procedure parties usually can choose the arbitrator and the basis on which the arbitrator makes the decision, and once the procedure is initiated parties cannot abandon it²⁴.

The basic need of “fitting to the forum” model of dispute settlement, in the conduct of trade has made online dispute resolution not merely a tool to help electronic commerce, but instead a natural evolution of the trend towards using alternative approaches to litigation across a wide

²¹ Goodman, Joseph W. 2003. The Pros and Cons of Online Dispute Resolution: An Assesment of Cyber Mediation Websites. *Duke Law & Technology Rev* 0004

²² UNCTAD, (2003), *E-Commerce and Development Report 2003*, p.177

²³ Consumer International, (2000), *Disputes in Cyberspace: Online Dispute Resolution for Consumers in Cross-Border Disputes - An International Survey*

²⁴ Gabrielle Kaufmann-Kohler dan Thomas Schultz, 2004. *Online Dispute Resolution: Challenges for Contemporary Justice*. The Nederlands: Kluwer Law International.hlm 775-776

range of commercial disputes²⁵. Moreover, The methods use in online dispute resolution offer much more effectivity and efficiency rather than conventional dispute settlement. The use of technic in online dispute resolution has allow parties, not to meet others since the arbitrator may use the facility provided by provider by email, video conference and web conference. There are advantages for both buyer and seller in electronic commerce transaction, while they settle electronic ommerce transaction through online dispute resolution, which are :

a.Time and Cost Saving

The way how electronic commerce transform the way to conduct trade into borderless area, has provide efficiency for business user. The way online dispute resolution work will fit for the forum, since online dispute resolution provide freedom of forum and flexibility for parties. Online dispute resolution has such practical way, to make parties need to face one another, so that it will provide cost saving for both parties

b.Convinience of the Procedure

Online dispute resolution provide communication system which is asynchronous. What means by asynchronous which is a technology of communication and information that support online dispute resolution system by related program for user, so that user may allow user to exchange information without feeling intimidated

c.Selection of The Third Parties

Online dispute resolution may provide time for parties to have control on the process of dispute settlement. Yet parties, may allow to choose the third parties that concern to be proper candidate to solve the dispute

In the realm of online process and system, online dispute resolution need more than technology support, but also basic principles of fairness, trust and security to conduct the working system. Which explained as below:

a.Fairness in online dispute resolution

²⁵ Noam Ebner, E-Mediation, in Online dispute resolution: Theory and practice, a treatise on technology and dispute resolution 203-206 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

The role of fairness and justice in online dispute resolution is an complex issue, since parties may wonder the balance of fairness being distributed to settle the problem, yet through the condition faced by online dispute resolution that face dynamic marketplace may bring benefit, since there are development of legal norms and measures of fairness in dispute system design²⁶.

b.Trust in online dispute resolution

The issue of trust not only become the issue of online dispute resolution, but also all type of dispute settlement either by litigation and non litigation method. Trust in online dispute resolution provided by creating and facilitating only specific parties related to the issue, without doubt to settle the dispute between them²⁷.

c.Security in online dispute resolution

The issue of security in online dispute resolution might related with the terms of confidentiality, and it may also related with the sense of wellbeing and comfort in conducting online dispute resolution. To this extend may develop into four types of security, which are : (1) information security, meaning that mediator binds to duty to keep a process confidential and protecting from being uncovered by parties or judges; (2) data security, meaning that online dispute resolution using software and hardware to prevent external people from hacking the system, and obtaining non public information; (3) personal security, meaning that online dispute resolution may reduced the risk of physical harm compares to conventional alternative dispute resolution²⁸;

The practice of online dispute resolution, as explained above has shown us that the existence of online dispute resolution is not merely a dream about “fitting to the forum” model, but as a solution to the answer of electronic commerce dispute settlement.

²⁶ Nancy A. Welsh, Perceptions of Fairness, in *The negotiator's fieldbook*, 165-74 (Andrea K. Schneider et al. eds., 2006).

²⁷ Mohammed S. Abdu; Wahab, Ethan Katsh & Daniel Rainey eds, *Online dispute resolution: Theory and Practice, A Treatise on Technology and practice, A treatise on technology and dispute resolution*, 2012, hlm 357-358

²⁸ Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 OHIO ST. J. DISP. RES. 349 (2009).

III.FACING THE OBSTACLES OF ONLINE DISPUTE RESOLUTION

The existence of online dispute resolution has encouraged and assisted the globalisation of alternative dispute resolution, yet online dispute resolution system also pose number of challenges to the process of globalisation. The issue of accessibility, literacy and culture become important issues. What means by this issues are the problem that often face by states where the practice of online dispute resolution has not been one's choice to settle electronic commerce problem.

The issue of digital divide in which a condition that refer to the gap between demographics and regions to access modern information and communication technology may happen in area where the use of technology in electronic commerce is limited, and also the literacy of human resources to understand and operates the practical procedures of online dispute resolution becomes one of the main issue that bring difficulties to encouraged the system to come into effective effect.

Since the online dispute resolution system operates largely in cyberspace, the issue of cultures differences also important to notice. Rainey and Jadallah, for example, write of culture being in the code, which means that that technology is shaped by the culture of its designers, which is the codes of computer software programs are the cultural values, attitudes, assumptions and biases of the designers that are often overlooked code. In the event of online dispute resolution process, parties may face by linear multistep online process which only moves forward in an interest-based sequence, such as identification of individual interests, setting of agenda, generation of options by parties (not mediator), bargaining and outcome; neither the mediator nor the participants are able to revisit, change or skip any parts of the sequence. This process reflects the principles of party autonomy, linear logic, interest-based problem-solving and low intervention/process-orientation. Apply as follow, online mediators possess considerably less process power than off-line mediators whose intervention techniques are adaptable to the cultural needs of the parties and include transformative, interest-based, settlement-oriented, wise counsel and expert advisory styles . On the other hand, there are condition which is the reluctance of states to transfer legal competence to online dispute

resolution agencies and obstacles relating the technology and human resources issue that operates online dispute resolution system, and also trust that gain by society to prefer the use of online dispute resolution system, since there is lack of legal regulation that specifically regulates on online dispute resolution.

However, this doubt loses its significance because of the possibilities technological progress offer by online dispute resolution, as it is according to David Allen Larson, today online dispute resolution is not limited to specific software or e-mail communication anymore. New communication technologies make it possible to simulate real life situations . One of those new communication forms is teleimmersion which enables users in different geographic locations to interact in a simulated environment. It conveys the feeling of looking, talking, and meeting with each other face-to-face in the same room . Moreover, online dispute resolution can be supported through avatars which produce a three dimensional graphical representation of the user as it is already done in several computer games or other virtual places . Thus, real dispute negotiation sessions between the parties and the intermediary can take place in a virtual space integrating body language and gestures into the dialogue. Consequently new technologies can help to make online dispute resolution more widely applicable in the future²⁹.

The issue of trust and confidentiality also plays important role in dispute resolution, and in the world of cyberspace this issue related to data security, online dispute resolution must be able to be accessed by unauthorised parties, yet this issue can be handle by the work of data secure system³⁰.

The appliance of technology aspect shall complete the practice of social aspect and legal aspect in conduct online dispute resolution, through the use of Hyper Text Transfer Protocol and Secure Socket Layer as website security and apply encryption system by the role of digital signature. Hyper Text Transfer Protocol and Secure Socket Layer may use with digital signature through the encryption system and combination of public key hold by client and server and private key

²⁹ National Dispute Resolution Advisory Council (NADRAC) Online ADR Background Paper (2001), available at <www.nadrac.gov.au>

³⁰ Van de Heuvel, 2000, hlm 14

exclusively use by client

While related to the importance of legal aspect enforcement itself, cannot apart from from compensation mechanism as a complement to enhance the work of legal aparature and build legal regulation. Since the model of compensation different from one to another, it may refer to the work of regional organization, for example in South East Asia, by ASEAN with the foundation of The ASEAN Coordinating Committee on Consumer Protection (ACCCP), The Southeast Asian Consumer Protection Agencies Network (SEA-CPAN) dan The Southeast Asian Consumer Council (SEA-CC). The work of Committee of Consumer Dispute Settlement. In further action, existence of supportive instrument such as security standardization of electronic commerce practice. As this type of method use by Republic of Singapore with the work of Case Trust as authorized agent to issue trust mark, to provide legal protection toward electronic commerce consumer and as a mediator in a electronic commerce dispute

In CaseTrust certification, compliance Internet Code of Practice compliance used as the underlying judgment granting certification to businesses, with a high payoff of consumer confidence. Certification filing process is conduct by collecting supporting documents and payment of administrative expenses, including the completeness of the organizational structure and business activities of the applicant, and resulted in the four groups of applicants certified in four types which include: browsing, purchasing, sales and security. With the compliance standards specified, seller has the capacity as trusted retailer , within this trusted status in the practice of electronic commerce transaction, it aims to fulfill policy formation both in the nature of legal and institutional arrangements to introduce how the transaction security certification.

Meanwhile, from the aspect of legal regulation, the needs of guidelines introduction of harmonised online dispute resolution framework for electronic commerce and also the platform of European Union online dispute resolution that may use to inspire other country to adopt such regulation into their national legislation, for such example like the establishment of UNCITRAL Model Law on Electronic Commerce, UNCITRAL Model Law on Electronic Signature dan European Union Directive on Electronic Commerce serta E-ASEAN

Reference Framework for Electronic Commerce Legal Infrastructure. By referring to above explanation, we can see that certainty of online dispute resolution may happen by the concretization of alternative dispute resolution in electronic commerce dispute resolution purpose.

In the end, one could agree that online dispute resolution in a way of the future may serve not as an alternative of online dispute resolution, but also as the major legal practice applied to internet case

IV. CONCLUSION

The existence of online dispute resolution has open a new vista for the possibility to solve the electronic commerce dispute, and offer adjustment of current law to the globalised era since it meets the needs of highly mobile and borderless transaction, by providing accesible and affordable legal services.

Online dispute resolution provides legal certainty by assuring that electronic commerce disputes can resolved efficiently without border, since online dispute resolution provide time and coset saving, practicality by fulfilling fair, trust and security principle. Yet the existence of online dispute resolution must be supported by the enforcement power of a court system and specific legal regulation to avoid fraud and to strengthen the trustworthiness of settlements

On the other hand, there are also obstacles that may face by online dispute resolution which are the reluctance of states to transfer legal competence to online dispute resolution agencies and obstacles relating the technology and human resources issue that operates online dispute resolution system, and also trust that gain by society to prefer the use of online dispute resolution system, since there is lack of legal regulation that specifically regulates on online dispute resolution. Yet, this condition may handle by the introduction of harmonised online dispute resolution framework for electronic commerce and also the platform of European Union online dispute resolution that may use to inspire other country to adopt such regulation into their national legislation.

In order to support the system, states should perceive the international law market as an incentive to constantly improve its legal services since

it has realise that online dispute resolution is evolving and changing the face of alternative dispute resolution and improve the functioning of dispute resolution market.

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