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ONLINE DISPUTE RESOLUTION: A CANADA-UNITED STATES INITIATIVE

With the development of the internet and consistent improvement of technology comes new opportunities for increased international business transactions through the use of online technology. The widespread availability of the internet has increased the ability of businesses to engage in transactions across international boundaries, thereby increasing the potential exchange of goods. The U.S. and Canada have long promoted an increase in the cross-border exchange of goods as a way to improve living standards for citizens of both countries, as well as create wealth and strengthen the Canada-U.S. relationship.¹

The major obstacles to increasing transnational online business transactions include a lack of confidence in online transactions and the lack of predictable internet commercial laws for the resolution of online disputes.² Engaging in online transactions with international corporations may decrease the availability of legal options by potentially subjecting a business partner to an inconvenient legal forum with unfamiliar and unfavorable laws regulating the online transactions. This risk decreases the willingness of organizations to engage in online international business. Creating access to an online alternative dispute resolution process may decrease some of the perceived risk of online transacting, thereby encouraging cross-border business.³

Online dispute resolution (ODR) refers to a wide class of alternative dispute resolution processes that take advantage of the availability and increasing development of internet technology.⁴ Through ODR, parties may engage in a number of different alternative dispute resolution (ADR) methods, including negotiation, mediation, and arbitration, adapted for complete online

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¹ The commitment to encouraging trade and business across the Canada-U.S. border is emphasized by the enactment of NAFTA, which promotes free trade with the goals of increasing positive relations between the countries, as well as increasing wealth creation to the benefit of both countries. See North American Free Trade Agreement, art. 102, Dec. 17, 1992, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78.


use, which confers a number of advantages not available through traditional ADR.

This paper will discuss the advantages of creating an ODR system to resolve disputes in business to business (B2B) transactions and propose a model ODR system for use in Canada-U.S. transactions. This model will seek to facilitate business transactions and the exchange of goods by installing confidence in the online purchasing procedure, create wealth through the increased cross-border exchange of goods, and preserve a positive relationship between Canada and the U.S. Part I of this paper will present an overview of ODR, including a brief history and the advantages of participation in the process. Subsequently, part II will discuss a series of recommendations for the joint creation of an ODR system by the U.S. and Canada, through the use of a trustmark system, tailored to the interests of the two countries.

I. ONLINE DISPUTE RESOLUTION: AN OVERVIEW

The term online dispute resolution refers to the use of ADR techniques facilitated by internet technology. A number of ODR service providers are currently in existence, offering services ranging from negotiation, mediation, arbitration, and a combination thereof. Many of these providers have taken and expanded upon the traditional ADR models, providing additional advantages through the incorporation of online technology. While some ODR services closely resemble the conventional ADR processes by simply providing the service in a more convenient online forum, other ODR providers have greatly developed the dispute resolution process through the use of technology.

5 ODR is applicable to both B2B and business to customer (B2C) transactions and has most notably been used in the B2C context. However, for the purposes of simplification, this paper will focus on B2B transactions, as such transactions have the greatest influence over the international relationship of Canada and the U.S. and therefore demand a good deal of focus. Preserving a continuing business relationship through the peaceful and cooperative resolution of disputes is particularly important between such large and influential businesses. Further, many of the procedural unfairness that may be present in B2C ODR is not present in the B2B context because most businesses are sophisticated, repeat players with increased access to necessary resources, including legal consultation, which may be necessary for procedural fairness in online dispute resolution. While many of the suggestions in this paper may be applied to B2C transactions, the additional considerations for preserving fairness in this context is outside the scope of this paper. See Elizabeth G. Thornburg, Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process, 6 COMP. L. REV. & TECH. J. 89 (2002).

6 Katsh, Cyber Law, supra note 4, at 813.

7 Id. at 817.

8 Ethan M. Katsh & Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace 2-3 (Jossey-Bass 2001) [hereinafter Katsh].
A. History

The first modern ODR system was the Virtual Magistrate\(^9\), created in 1995 through grants from the National Center for Automated Information (NCAIR), a private foundation.\(^10\) The group further promoted the use of ODR by providing funding for a variety of other projects developing ODR technology, including the Online Ombuds Office,\(^11\) and by holding a conference on ODR in 1996.\(^12\)

Since 1995, ODR services have increased in popularity through a variety of experimental projects and conferences to discuss potential guidelines for the promotion of ODR efficacy.\(^13\) A number of B2C ODR providers have begun to emerge, including SquareTrade\(^14\) and the Better Business Bureau Dispute Resolution\(^15\), making ODR a prominent resolution tool for disputes arising between consumers and online merchants. One the most notable uses of ODR has been for the resolution of domain name disputes through the Uniform Dispute Resolution Policy (UDRP), created by the Internet Corporation for Assigned Names and Numbers (ICANN), which controls the management and supervision of the internet domain name system.\(^16\) This arbitration based system, established in 1999, has resolved a number of trademark

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\(^9\) The Virtual Magistrate program was an arbitration based ODR system. The program was considered a failure because only one case was arbitrated, suggesting the difficulties in persuading parties to engage in online arbitration without a prior agreement. *Id.* at 56. The Virtual Magistrate is now run by the Chicago-Kent College of Law and is still available for online dispute resolution. *See* The Virtual Magistrate Home Page, http://www.vmag.org (last visited Nov. 28, 2006).

\(^10\) Katsh, *supra* note 8, at 56.


\(^12\) Katsh, *supra* note 8, at 55.

\(^13\) In 1999, the Federal Trade Commission and paired with the Department of Commerce to sponsor a workshop exclusively focused on ODR and issued a summary report of suggestions for its evolution. For a summary of the conference and the summary report see http://www.ftc.gov/bcp/altdisresolution. *See also* Organization for Economic Co-operation and Development workshop reports on Dispute Resolution and Redress in the Global Marketplace, *available at* http://www.oecd.org/home (search ODR).

\(^14\) SquareTrade, established in 1999, has partnered with a number of large online merchants, including eBay, Yahoo, and Google, and boasts that it has resolved over two million disputes in five different countries, through its mediation and assisted negotiation services. *See* The SquareTrade Home Page, www.squaretrade.com.

\(^15\) The BBB dispute resolution service is run by a nonprofit organization for the resolution of customer disputes arising from online transactions made in Canada and the U.S. *See* The BBB Home Page, http://www.bbbbonline.org (last visited Nov. 28, 2006).

\(^16\) *See* The ICANN Uniform Dispute Resolution Policy, *available at* http://www.icann.org/udrp/udrp.htm.
disputes arising from the use of domain names and provided a framework for
the creation of future arbitration ODR systems.\textsuperscript{17}

ODR systems have continued to evolve with the development of technol-
ogy, incorporating new advancements of technology into the dispute resolu-
tion process. These developments, including the use of artificial intelligence\textsuperscript{18}, have increased the efficacy of ODR, fostering the popularity and use of such systems. Two integral components to the promotion of ODR has been the creation of trustmarks and electronic and digital signatures, discussed in the next sections.

\textbf{B. Trustmarks}

Trustmarks are roughly equivalent to a seal of approval, created by inde-
dependent organizations and displayed on the webpage of online businesses for the purposes of creating trust and confidence in the business, thereby encour-
aging online transactions.\textsuperscript{19} In order to display the trustmark, businesses must agree to commit to certain codes of conduct for the prevention and resolution of disputes, as created by the trustmark organization.\textsuperscript{20} Guidelines often re-
quire businesses to adhere to best marketing practices and provide easy ac-
cess to information including cancellation and refund policies, privacy prac-
tices, and complaint and dispute resolution procedures.\textsuperscript{21} Some trustmarks require businesses to participate in ODR for the resolution of any disputes through the use of specified private providers.\textsuperscript{22} It is then up to the trustmark organization to police and regulate the member businesses to ensure compliance with the guidelines.\textsuperscript{23} By ensuring potential business partners easy access to dispute resolution services and installing trust and confidence in a

\textsuperscript{17} See William Krause, \textit{Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution}, 19 J. MARSHALL J. COMPUTER & INFO. L. 457, 465-68 (2001); See gener-
ally Thornburg, supra note 5.


\textsuperscript{19} Berkman Center for Internet & Society at Harvard Law School, E-Commerce: An Intro-
duction, Session 5: Disputes, \textit{available at} http://cyber.law.harvard.edu/ecommerce/dis-
putes.html.

\textsuperscript{20} See supra note 2.

\textsuperscript{21} See supra note 2; Hart, supra note 3.

\textsuperscript{22} See SquareTrade’s Seal Member Agreement, requiring Seal members to respond to any filed customer disputes within two days of notification, at the SquareTrade Home Page, www.SquareTrade.com (click hyperlink “Seal Member Agreement”).

\textsuperscript{23} See id.
particular online business through established dispute prevention procedures, a trustmark encourages the use of internet transactions.\textsuperscript{24}

The concept of trustmarks may also be directly applied to the ODR process to encourage ODR providers to adhere to a set of guidelines to ensure fairness throughout, and install confidence in, the resolution process. The creation of a trustmark system specifically for ODR providers may increase the willingness of businesses and consumers to engage in online dispute resolution.

C. Electronic and Digital Signatures

An electronic signature, as defined by the UNCITRAL Model Law on Electronic Signatures, is “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message.”\textsuperscript{25} Electronic signatures are distinct from digital signatures. An electronic signature may be any electronically created symbol intended to be a signature which ensures a specific signor. A digital signature, on the other hand, not only ensures a specific signor, but also ensures that the signature is for a specific, untampered document.\textsuperscript{26}

A digital signature is a form of an electronic signature that uses specific private/public key infrastructure (PKI) technology involving an encryption process. Through this technology, a certificate authority (CA), which may or may not be licensed by a governmental authority, issues both a private and a public key to a single individual. The individual may then encrypt a message using the private key, which are decryptable by the recipient using the public key.\textsuperscript{27}

Digital signature technology also uses a hash function to protect the integrity of the message and ensure that the message has not been tampered or changed. The hash function is an algorithm that creates a unique message digest, which is included in the message. When the message is decrypted, a recipient will be able to tell if the message has been modified by simply looking at the message digest.\textsuperscript{28}

\textsuperscript{24} Katsh, \textit{supra} note 8, at 66-67.
\textsuperscript{25} \textit{UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES}, art. 1.
\textsuperscript{28} Lewis, \textit{supra} note 26, at 70-73.
Electronic, and specifically digital, signatures may be used to authenticate a writing, by associating the signor with the document, ensure the integrity of the document, and express the signor’s approval of the legal affect of the writing. This technology is invaluable to ODR as it provides for a method of creating legally enforceable contracts entirely online without the inconvenience of a face-to-face meeting or transmission of multiple documents. Further, digital signature technology creates a safeguard, not available in the “paper world,” against the tampering of agreements or messages.

Recognizing the importance of electronic and digital signature technologies, most countries have developed legislation promoting the use of electronic signatures, in addition to a number of international uniform laws. Many interests groups have also promulgated standards for creating enforceable electronic signatures, including the licensing of CAs and specific technological procedures. A large problem encountered by electronic signature technology is the lack of international, and even domestic, uniformity in legislative standards required to give legal affect to electronic signatures.

D. Advantages of ODR

Through the use of the traditional ADR procedures, ODR is able to provide the usual advantages of such legal alternatives, as well as additional advantages through the use of technology. Some of the advantages that are traditionally accredited to ADR include decreased cost and fast resolution through the avoidance of formal court procedures. This further decreases the strain on the legal system and saves judicial resources, creating an overall benefit to society.

Additionally, ADR encourages parties to craft their own agreement, allowing for the development of creative alternatives and eliminating the zero-sum element of the adversarial system. The self-creation of an agreement also increases the willingness of the parties to adhere to the settlement and

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29 Id. at 66-69.
30 Thomas, supra note 27, at 1008.
31 Id.
33 See Krause, supra, note 17, at 469-71.
34 See id.
35 Hart, supra note 3, at 4.
decreases the need for future litigation.\textsuperscript{37} Further, cooperative interaction between the parties aids in the preservation of the party relationship, allowing for future business transactions.\textsuperscript{38}

ADR facilitates party interaction and the exchange of information, allowing an opportunity to effectively solve a dispute before spending exorbitant amounts of time and money through the formal adjudicative system. ODR is similarly advantageous, however, through the incorporation of technology into the dispute resolution process, ODR is able to provide additional advantages not available through traditional ADR means.\textsuperscript{39}

In addition to the decreased cost and time of ADR through avoidance of litigation, ODR further saves time and money by eliminating the need for face-to-face meetings. Because all interaction may be done online, parties do not have to agree on a meeting place, eradicating travel expenses and time.\textsuperscript{40} Additionally, some ODR procedures may be done asynchronically, eliminating the need for finding a mutually agreed time for resolution and allowing for greater convenience.\textsuperscript{41} This further increases the speed at which resolution may be met, as parties do not have to wait for a mutually convenient time to begin discussions.\textsuperscript{42}

The lack of face-to-face contact through the ODR process may further facilitate the likelihood of a resolution because parties are more able to focus on the actual dispute instead of the opposing party. There is often less emotion in online interaction allowing the parties to concentrate on the problem instead of their negative attitudes toward the other party.\textsuperscript{43} Further, models that feature asynchronous responses allow parties time to think rationally before responding, as opposed to the immediate, emotionally-fulfilled reactions that occur in traditional face-to-face ADR processes.\textsuperscript{44}

Increases in technology and the creation of new online mediums may allow for greater interaction between parties, answering the critics of ODR that cite face-to-face interaction as the reason for the success of ADR.\textsuperscript{45} Skilled third parties, such as mediators or arbitrators, may chose an appropriate medium (i.e. instant messaging, message board posting, video conferencing), or a combination of mediums, depending upon the needs of the parties and the

\textsuperscript{37} See Katsh, \textit{supra} note 8, at 113; Hang, \textit{supra} note 35, at 856.

\textsuperscript{38} See Hang, \textit{supra} note 35, at 856.

\textsuperscript{39} See generally Hang, \textit{supra} note 35, at 837.

\textsuperscript{40} Hang, \textit{supra} note 35, at 854-55.


\textsuperscript{42} See James C. Melamed, \textit{Mediating on the Internet Today and Tomorrow}, 1 PEPP. DISP. RESOL. 11, 11-14 (2000); Krause, \textit{supra} note 17, at 460.

\textsuperscript{43} See Yuan, \textit{supra} note 2, at 9.

\textsuperscript{44} See Melamed, \textit{supra} note 42, at 13; Tadic-Colic, \textit{supra} note 411, at 259-62.

\textsuperscript{45} Hang, \textit{supra} note 35, at 857-58.
effectiveness of increased or decreased interaction. In this sense, ODR actually provides more options to cater to the interests of individual disputants, increasing the likelihood of resolution.

Finally, ODR has the potential to resolve problems inherent in the application of "real world" law to the internet. Due to the nature of the internet as a global system, existing legal rules are often ill-equipped to effectively deal with disputes arising from online transactions. Jurisdiction and choice of law rules create barriers to the fulfillment of the internet's potential as a free flowing medium of commerce and information. Parties may be discouraged from online interaction because of the unpredictability of applicable legal rules and potential subjection to liability in any variety of global forums. ODR holds the potential to solve these issues through the concept of the Law Merchant, which would allow for the creation of a governing internet custom. The creation of this internet custom could establish a self-regulated, predictable system of guiding rules, applicable to all international online transactions.

II. SUGGESTIONS FOR CREATION OF CANADA-U.S. ODR SYSTEM

The creation of an ODR system for the resolution of B2B disputes between Canada and U.S. businesses would be highly advantageous for the promotion of online transactions, increased bilateral trade, and the fostering of a more cooperative relationship between the countries. The resources expended through the public creation of an ODR system would likely be recovered through the savings of judicial resources, by providing alternative solutions to formal adjudication, and the increase in the wealth of the economy created by improving relationships and confidence in engaging in bilateral trade, allowing businesses to prosper through international online transactions.

Because of the unique relationship between the U.S. and Canada, there is great potential for cooperative interaction to create an ODR system for use in B2B disputes, to the benefit of both countries. The following is a series of

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46 Tadic-Colic, supra note 41, at 262-63
47 See id.
49 See Geist, supra note 48.
50 The Law of the Merchant was a concept that arose from the medieval trade fairs. See Hang, supra note 35, at 839.
52 To create legal guidance through a set of customarily established rules requires transparency in the ODR system, which may decrease the willingness of parties to participate in ODR.
proposals for the creation and encouragement of such a system. However, because ODR is a newer field, more experience and experimentation are necessary to set better standards. Therefore, it is suggested that Canada and U.S. create a commission, not only to adapt to the inevitable evolution of ODR, but also to adopt customary standards of businesses into the regulation and practice of dispute resolution. The creation of a commission, which regularly publishes reports, may give greater legitimacy to ODR system through transparency. Further, if the commission were to take suggestions and encourage input and feedback from businesses in an effort to incorporate local business custom\textsuperscript{53}, organizations may be more likely to use the system.\textsuperscript{54}

A. Overview

Similar to the model created by ICANN for domain name disputes, the availability of several private ODR providers would give businesses a choice of which provider to use and would encourage future ODR development through competition and profit incentive.\textsuperscript{55} Further, encouraging private ODR providers to establish, develop, and market their system individually would more effectively shift the cost burden away from the public and increase the feasibility of implementation of the program. However, there may be a necessity for some form of public subsidization to encourage parties to invest in private ODR systems, possibly by conferring nonprofit status. While competition may create possible barriers to ensuring the fairness and legitimacy of the process, there is worry of providers becoming too complainant-oriented.\textsuperscript{56} The creation of a trustmark and public regulations, as discussed below, may decrease the likelihood of such problems.\textsuperscript{57}

In the past, ODR providers have mainly applied the tradition ADR models of negotiation, mediation, and arbitration. Additionally, many of the models have created a hybrid or multi-tiered system, using a combination of the models to increase effectiveness.\textsuperscript{58} Taking advantage of the various options available for dispute resolution will increase the efficacy, as well as the cost effectiveness of the ODR process. Because this proposal allows for individ-

\begin{itemize}
\item\textsuperscript{53} Because of the similarities in culture and custom of business transactions in the U.S. and Canada, the incorporation of a local business culture into the standards of ODR are more feasible than potentially on a global level.
\item\textsuperscript{54} The ABA Task Force on Electronic Commerce and Alternative Dispute Resolution similarly suggested the creation of a commission to create guidelines for ODR based on similar reasons. See supra note 2.
\item\textsuperscript{55} See Thornburg, supra note 5, at 94-98.
\item\textsuperscript{56} See id. at 114.
\item\textsuperscript{57} See Hang, supra note 35, at 863; See also id. at 121-22.
\item\textsuperscript{58} For example, SquareTrade first allows parties to engage in negotiation. If a resolution is not reached by negotiation, then the parties may request a third party neutral mediator. See SquareTrade Home Page, www.squaretrade.com (last visited Nov. 28, 2006).
\end{itemize}
ual private ODR service providers to create their own system and evolve such a system through a process of market experimentation, no specific decisions need be made by the commission as to which system to employ. However, it may be helpful for the commission to provide information as to past ODR experiments to aid private investors in creating fair and effective systems initially and avoid repetition of past mistakes.\footnote{See Thornburg, supra note 5, for a survey of procedural and substantive fairness issues arising from the ICANN DRP, including issues regarding discovery, appeals processes, and time allotted to the responding party to gather information.}

Further, the constant development of new technology allows for new and innovative ways to aid in dispute resolution. For example, the use of artificial intelligence may be able to assist in negotiations by generating a best alternative to a negotiated agreement (BATNA) to encourage parties to settle.\footnote{See Lodder, supra note 18, at 325-331.} Another example of the application of newly developing technology to the field of dispute resolution is SmartSettle, a currently active ODR provider in the B2C context that uses algorithms to suggest potential solutions to the dispute. The use of such technology assures a completely neutral suggestion and prevents reactive devaluation, which often acts as a barrier to resolution.\footnote{Reactive devaluation occurs when one party rejects an otherwise fair solution because of biases against the party that suggests the solution. See id.} Finally, some ODR providers have used “blind bidding” as a tool to settlement in monetary disputes. In this procedure, each party will make a private bid that can not be viewed by the other party. The parties agree before participation that if the bids are within a certain proximity they will equally split the difference. The bidding process may continue until a bid is accepted or the parties decide to pursue an alternative dispute process. In the latter case, neither party knows any of the bids made by the other party, ensuring an equal playing field and eliminating the risk from participation.\footnote{See Melamed, supra note 42, at 19; See e.g. SmartSettle Home Page, www.smartsettle.com (last visited Nov. 28, 2006).}

These are merely examples of how technology may and has aided in the field of dispute resolution in ways not previously imagined. The flexible nature of ODR allows for easy adoption of new technology and every effort should be taken to incorporate such advances in the ODR process to increase effectiveness. Consideration should be given to the public subsidization of technological experiments and studies to promote the use of new technology to generate more effective ODR options.

B. The Dual-Purpose Trustmark System

Creation of a publicly created and regulated trustmark system for both private ODR providers and individual businesses may solve many of the is-
sues of enforcement of agreements, in addition to ensuring the legitimacy of ODR, decrease the cost in creating a publicly run ODR service, as well as to increase confidence in engaging in online business transactions with participating companies. Further, establishing and maintaining a public trustmark can increase awareness and publicity of the available ODR options, increasing the use of such alternatives. The proposed trustmark consists of two components: one for regulation of private ODR providers and one for use by businesses.

The use of the trustmark system can ensure legitimacy of the procedures employed by private ODR providers and help to build the public confidence necessary for ODR to become a popular tool for dispute resolution.\(^6^3\) Some of the guidelines that should be developed to regulate these services should include assurances of security and privacy of information, clearly posted procedures for choosing neutral parties to facilitate the resolution, and a system for identifying potential conflicts of interests between the neutral and the party. Further, the guidelines may necessitate the provider keep and post detailed reports regarding the cases resolved. Publicly available record keeping assures the public and potential parties that proper procedures are followed and may also provide a resource for evaluation of future cases.\(^6^4\) Finally, the generation of such a record may prevent providers, through public scrutiny, from becoming too complainant oriented, in an effort to draw business and beat competing ODR providers.\(^6^5\) The guidelines should further address and provide measures to prevent such complainant-oriented decisions.

Making trustmarks available to businesses, similar to SquareTrade’s Seal Program\(^6^6\), encourages businesses to use the ODR system, as well as increases the confidence of potential business partners in engaging in transactions with the trustmark holder.\(^6^7\) Guidelines regulating business trustmark holders may include clear listings of refund, return and complaint policies, which may avoid potential disputes, specific security and privacy protections for dealings in online business, and a requirement to utilize an ODR provider at the request of a complaining business partner.\(^6^8\) Without a prior agreement

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\(^6^3\) Katsh, *supra* note 8, at 66-67.

\(^6^4\) Providing a public resource may be particularly important for consistency in the development of the Law of the Merchant, as well as preventing wealthy parties from creating all legal rules and standards that would most benefit themselves. *See* Krause, *supra* note 17. However, the public posting of resolved cases implicates privacy issues and may decrease the willingness of party participation. This cost must be weighed against the potential benefits of transparency.

\(^6^5\) This tendency of providers to become too complainant oriented to draw business is one of the criticisms of the ICANN UDRP. *See* Thornburg, *supra* note 5, at 121-22.

\(^6^6\) *See* SquareTrade’s Seal Program at the Square Trade Home Page, www.squaretrade.com (last visited Nov. 28, 2006).

\(^6^7\) Katsh, *supra* note 8, at 66-67.

\(^6^8\) *Supra* note 2.
to engage in ADR proceedings, it has been shown that there is a decreased chance that businesses will use alternative dispute resolution, as opposed to regular litigation.\textsuperscript{69} Therefore, in order to promote the regular use of ODR, a commitment of businesses to use ODR prior to the arising of disputes becomes necessary. Further, the guidelines should also require that businesses comply with agreements created through ODR.

The goal of the trustmark program is to ensure legitimacy and consistency and to build the requisite trust in the ODR process.\textsuperscript{70} To ensure compliance with the trustmark guidelines, a system of regulation and enforcement must be established. Some suggestions for such a system may include providing a forum for feedback of participating parties and regular audits of businesses and ODR providers.\textsuperscript{71} Noncompliance with trustmark guidelines should command certain penalties, such as revocation of trustmark and/or litigation for breach of contract, fraud, and deceptive practices.\textsuperscript{72}

\section*{C. Enforcement of ODR Agreements}

One of the major criticisms of ODR is the lack of enforcement mechanisms for non-arbitration agreements created online. If parties choose not to follow mutually created agreements, future litigation becomes necessary, invalidating all benefits to the online process.\textsuperscript{73} However, because of the bilateral nature of the proposed ODR system and the alternative dispute resolution mechanisms already in place, available technology to ensure the contractual enforceability of the agreement, and inherent mechanisms in the system to encourage adherence, this is not a major barrier to the creation of an ODR system for use of business disputes in Canada and U.S.

\section*{D. Enforcement by Treaty}

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention, is an existing mechanism to enforce arbitral awards between member countries. Under this Convention, each contracting state must recognize international arbitration agreements meeting certain requirements.\textsuperscript{74}

\begin{thebibliography}{9}
\bibitem{70} Katsh, \textit{supra} note 8, at 66-67.
\bibitem{71} Thornburg, \textit{supra} note 5, at 131-132.
\bibitem{72} See \textit{supra} note 2.
\bibitem{73} See Krause, \textit{supra} note 17, at 475-76; \textit{supra} note 2.
\end{thebibliography}
The New York Convention was adopted by the United States in 1970 and Canada in 1986. As members to the Convention, both Canada and the U.S. are required to recognize and enforce international arbitral agreements made in the other country, and presumably including arbitral agreements made through an ODR arbitration process.

For agreements that are not included under the New York Convention, including nonarbitral contractual agreements made by parties through negotiations or mediation, a bilateral agreement or treaty to give judicial recognition or enforcement of such agreements may be created. Because the proposed system only involves the U.S. and Canada, which already have a long-standing tradition of cooperation, as opposed to a global system involving multiple countries, bilateral agreements and treaties may be more easily created that would facilitate enforcement of online agreements.

For example, both countries may agree to enforce online agreements created through sponsored ODR providers, similar to agreements to enforce arbitration awards. Another suggestion for technical enforcement of online agreements is to empower the mediator to render arbitral awards. Because arbitration awards are already enforceable through existing agreements, the need to litigate for breach of the agreement is eliminated.

E. Electronic Signatures

Legislative recognition of electronic signatures allows for the creation of a binding contract between parties, created entirely online, and without the inconvenience of a face-to-face meeting or repetitive transmissions of paper documents. Both Canada and the U.S. have adopted legislation recognizing and promoting the use of electronic signatures because of the advantages these signatures lend to online commercial transactions. While not completely parallel, the legislation of both countries may allow for recognition of contractual agreements created entirely online through the ODR process.

There are three types of basic legislative standards controlling the validity of electronic signatures. These standards are: (1) technology neutral, (2)
semi-specific, and (3) digital signatures. Under the technology neutral standard, legal effect is given to any electronic signature, however the evidentiary weight of the signature is determined by a court depending on the security of the technology used. The semi-specific standard specifies certain security attributes of the signature but does not require a particular technology. The third category specifically requires the use of PKI and often the government will determine certain licensing standards for CAs.

F. Canada Electronic Signature Legislation

In Canada, federal law regarding the use of electronic signatures is governed by the Personal Information Protection and Electronic Documents Act (PIPEDA). This act, recently amended on October 4, 2006, provides a series of regulations that most closely resemble a technology specific process using PKI digital signatures, certified by a CA verified by the President of the Treasury Board and listed on the website of the Treasury Board Secretariat. The PIPEDA allows the Governor in Council to make regulations prescribing specific technologies and processes required to for an electronic signature to be considered secured and therefore given the legal presumption of validity. These requirements may include PKI digital signature specific requirements including the application of a hash function to create a message digest, application of a private key for encryption process and application of a public key to decrypt the message digest, in addition to a digital signature certificate, authorized by a CA.

In addition to the PIPEDA, which governs federal law of electronic signatures, many of the Canadian providences have adopted varying versions of the Uniform Electronic Commerce Act (UECA), which follows the specifications set out in the UNCITRAL Model Law on Electronic Commerce. Both Acts are completely technology neutral, allowing for the recognition of a valid electronic signature without PKI technology specifications. Neither Act requires CAs (or certification service provider, as referred to in the

80 Lewis, supra note 26, at 75.
81 PIPEDA, Supra note 78.
82 Id. at s.4(1)-(2).
83 Id. at s.56; s.48(1).
84 Id. at s.48(1).
85 See Unif. Electronic Transactions Act, §§ 5; UNCITRAL Model Law on Electronic Commerce; See also Internet Law and Policy Forum, supra note 79.
86 See id.
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Model Law) to be licensed, recognizing the authority as long as the CA follows certain conduct rules. The lack of specific technology and CA requirements allows for greater flexibility in recognizing electronic signatures created in foreign or international jurisdictions.

PIPEDA does not explicitly allow for the recognition of electronic signatures validly created in other jurisdictions. However, the Model Law does have such a provision, giving the same legal affect to electronic signatures created in foreign jurisdictions, as those created in the domestic jurisdiction, assuming a “substantially equivalent level of reliability.”

G. U.S. Electronic Signature Legislation

In the U.S., Congress has enacted the Electronic Signatures in Global and National Commerce Act to govern electronic signatures. The purpose of this act is to promote the acceptance and use of electronic signatures on an international basis, in recognition of the advantages of electronic signatures to international electronic commerce. This Act requires the Secretary of Commerce to eliminate or reduce the impediments to commerce in electronic signatures, following the principles stated. These principles include adoption of relevant principles from the Model Law adopted by UNCITRAL, allow parties to self-determine appropriate and enforceable electronic signature technologies, and to take a nondiscriminatory approach to electronic signatures created in foreign jurisdictions.

In addition to this federal legislation, all states have adopted some form of electronic signature legislation, almost all of which is based on the Uniform Electronic Transactions Act (UETA), promulgated by the Uniform Law Commissioners. The UETA is also technology neutral, providing that legal recognition and enforceability of an electronic signature or legal writing can not be denied because it is in an electronic form. The Act gives judicial discretion for allotting the evidentiary weight to the electronic signature, based on a showing of the efficacy of the security procedure used, the context, surrounding circumstances, and any party agreements.

Because of the flexibility of the U.S. electronic signature legislation, international ODR agreements created using electronic signatures may be eas-

87 See Id.
88 UNCITRAL Model Law on Electronic Commerce, art. 12.
93 State Stat. Surveys E-Commerce, Uniform Electronic Transactions Act (2006);
94 Uniform Electronic Transactions Act (UETA), § 7.
95 Id., at § 9.
ily enforced in a U.S. jurisdiction adopting the UETA, or similar technology neutral standards. However, issues may arise for ODR participants attempting to enforce such agreements in a federal Canadian jurisdiction if the strict PKI requirements under PIPEDA are not fulfilled. A number of solutions may be adopted to deal with this issue. Under a bilateral treaty or amendment to the PIPEDA, Canada could agree to recognize international electronic signatures, or more specifically electronic signatures created for ODR agreements, that are similarly reliable. Additionally, legislation could require ODR agreements with electronic signatures to adhere to the stricter PKI digital signature standards of the PIPEDA. Further, ODR providers could agree amongst themselves to only use PKI digital signature standards to ensure the enforceability of their agreements. Finally, Canada and the U.S. could create a joint licensing program for CAs, which will be able to certify ODR agreements. A certificate from one of the licensed CAs could act as a presumption to the agreements validity and enforceability.

Notably, the creation of valid contracts using enforceable electronic signatures will ease the enforcement of ODR agreements, however because pursuing judicial recognition of a contract requires the expenditure of additional judicial resources, electronic signatures may not be particularly useful to ODR participants seeking judicial enforcement of an agreement.96 Electronic and digital signature requirements, however, may aid in creating standards for recognizing agreements and fulfilling the writing requirements in bilateral treaties, as discussed above. Judicial enforcement of ODR agreements may be made contingent on digital signature standards, which ensure the validity of the agreement to be enforced. In addition, digital signatures may still be used to ensure the integrity and security of the agreement.

H. Other Enforcement Mechanisms

The proposed ODR model additionally features other mechanisms that may prevent necessary future litigation for the enforcement of online agreements. The use of a trustmark system encourages parties to adhere to agreements created through ODR as failure to adhere to such agreements may result in penalties, including revocation of the use of the trustmark and subjection to litigation.97 Further, as with traditional ADR procedures, because the agreement is self-created between the parties, there is a greater likelihood that the parties will comply with its conditions.98 Finally, because the proposed model deals within the B2B context, there is greater likelihood that the

96 See Krause, supra note 17, at 475-76.
97 See supra note 2.
98 Katsh, supra note 8, at 66-67.
parties will want to preserve a continuing business relationship and therefore will be encouraged to follow the agreement.

III. CONCLUSION

Online dispute resolution is a new and developing field that holds great potential for encouraging online transactions. While ODR is currently used primarily for disputes arising out of online transactions, there is great possibility of application of the system to disputes arising from offline interactions. Because of the possible benefits, experimentation of ODR models should be promoted through public entities. In particular, Canada and the U.S. have much to gain from the use of ODR to resolve cross-border disputes in the business to business context and because of the pre-existing cooperative relationship between the countries many of the barriers to creation of an international ODR system are eliminated. Online dispute resolution holds great possibilities to provide advantages to the Canada-U.S. relationship and therefore its development should be pursued.

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