

THE U.N. CONVENTION ON ELECTRONIC CONTRACTING: BACK FROM THE DEAD?

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In 2006, the United Nations General Assembly opened the Convention on the Use of Electronic Communications in International Contracting (ECC/the Convention) for signature. The ECC was created to provide a mainly procedural framework that would allow for the global recognition of international contracts formed using electronic means. The Convention was, perhaps, the final product of many years work in the area, which first gained attention in 1996 with the largely successful UNCITRAL Model Law on Electronic Commerce. The Convention was based in large part on Model Law and other influential national laws such as the American Uniform Electronic Transactions Act and the Canadian Uniform Electronic Commerce Act, which were also based on the Model Law, as well as principles of electronic contracting generally accepted in the West. Yet despite the substantially similar, if not virtually identical, language of the ECC and its predecessors in the field, and the fact that many of the drafters of the Model, Canadian, and American laws were also ECC drafters, the Convention has yet to gain wide acceptance.

However, it is possible that the convention has caught a second wind. While it is true that at the time of writing only eighteen countries have signed the convention, after four years of dormancy two of the required three ratifications were submitted in June and July 2010. Suddenly, and almost from nowhere, the Convention was on the brink of coming into force. Two years later, in August 2012, the third ratification was registered, officially bringing the Convention into force and bringing to light the “under-the-radar” influence the ECC has had with developing nations during that time. These developments could have important ramifications, especially in the areas of oil, technology, manufacturing and arbitration, to name a few, as current signatories include Russia, South Korea, China and Singapore.

Given the history of the ECC and recent developments involving the Convention, this article aims to briefly review the principal similarities and any major differences between the ECC and the current electronic commerce laws of Canada, the United States and the European Union. This review will serve as a basis for a brief argument for the wider adoption of the ECC in the West. The article will then go on to explore how the Convention is influencing the laws of the ASEAN member states

and how those states will benefit from adopting the convention as domestic law even if it never gains acceptance in the West.

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I. INTRODUCTION¹

On November 23, 2005, the “United Nations General Assembly adopted . . . [the] Convention on the Use of Electronic Communications in International Contracting” (the Convention/ECC).² The Convention was created to ensure the global recognition of international contracts formed using electronic means.³ It is the end product of over ten years of work in the electronic commerce area, which first gained widespread attention with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (Model Law)

1. This paper was originally written in August 2011 predicting the entry into force of the ECC as part of the author’s LL.M. Dissertation at Queen Mary University of London. It was updated, by the author, for this publication.

2. *General Assembly Adopts New Convention on Use of Electronic Communications in International Contracting*, U.N. (Nov. 23, 2005), <http://www.un.org/News/Press/docs/2005/ga10424.doc.htm>.

3. *Id.* See also *United Nations Convention on the Use of Electronic Communications in International Contracts* (New York, 2005), UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html (last visited Oct. 18, 2016).

upon which the ECC was based. Yet despite the Convention being hailed as “one of the most important recent developments in international e-commerce law”⁴ and in spite of the success of the Model Law,⁵ it has yet to gain widespread acceptance. To date, only eighteen nations have signed the ECC; none of them are a major “western” power.⁶

However, the Convention may have been successfully resuscitated. In June 2010, after almost five years of dormancy, Honduras submitted the first instrument of ratification.⁷ Three weeks later, in July 2010, Singapore submitted the second.⁸ Finally, in August 2012, with little warning within the legal field, the Dominican Republic submitted their accession⁹ – the third required instrument to bring the Convention into force.

Since the Convention’s entry into force on March 1, 2013, four additional countries—Russia, Congo, Montenegro, Sri Lanka—have ratified, accepted or acceded to the ECC.¹⁰ It appears that this once-dead Convention is not only alive, but beginning to thrive. In 2011, the Australian Parliament passed the Electronic Transactions Act 2011,¹¹ which was specifically drafted to comply with the ECC. The Australian government plans to “move to accede to the UN Convention” as soon as

4. Ter Kah Leng, *Towards Uniform Electronic Contracting Law*, 18 SING. ACAD. L.J. 234, 234–35 (2006).

5. Domestic laws based on the Model Law have been enacted in 42 countries, including the United Kingdom, Singapore, China, 48 states of the United States and all ten provinces and two territories of Canada. See *Status UNCITRAL Model Law on Electronic Commerce (1996)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (last visited Oct. 18, 2016).

6. *Status United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (last visited Oct. 18, 2016).

7. *Id.*

8. *Id.*

9. *Id.*

10. Russia (Jan. 2014), Congo (Jan. 2014), Montenegro (Sept. 2014) and Sri Lanka (July 2015). *Id.*

11. Bruce Arnold, *ETA II*, BARNOLD LAW (Feb. 9, 2011), <http://barnoldlaw.blogspot.com/2011/02/eta-ii.html>.

the “amendments have been enacted in all jurisdictions.”¹² Furthermore, accession to the ECC is currently under consideration by the United States.¹³

This proverbial second coming of the Convention could have important ramifications in areas such as oil, shipping, technology, manufacturing and the financial sector as current signatories include Russia, China, Iran, Saudi Arabia, South Korea, Panama and Singapore.¹⁴ Perhaps more important than these official developments, however, are those that are happening under the radar of many international practitioners. The ECC is having more of an impact than previously realized, as evidenced by developments in the Association of Southeast Asian Nations (ASEAN). ASEAN is actively encouraging all member nations to amend their national electronic commerce laws to incorporate the Convention and “achieve harmonisation [sic] . . . in” the region.¹⁵ This is an important development as only two of the ten ASEAN member nations are ECC signatories and the additional eight countries routinely attract facilities outsourced from developed countries.¹⁶

12. See Robert McClelland, *Updating the Electronic Transaction Act*, PARLINFO (May 10, 2011), <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=Updating%20the%20Electronic%20Transactions%20Act;rec=0;resCount=Default>.

13. In February 2016, after the Convention spent several years on the State Department’s list of conventions under consideration, President Obama formally submitted the Convention to the U.S. Senate for their advice and consent with a recommendation for ratification. See *Message to the Senate—The UN Convention on the Use of Electronic Communications in International Contracts*, THE WHITE HOUSE (Feb. 10, 2016), <https://www.whitehouse.gov/the-press-office/2016/02/10/message-senate-un-convention-use-electronic-communications-international>.

14. *Status United Nations Convention on the Use of Electronic Communications in International Contracts* (New York, 2005), *supra* note 6. Of these countries, Singapore is the only State to have ratified the Convention. *Id.*

15. Chris Connolly, *Using the Electronic Communications Convention to Harmonize National and International Electronic Commerce Laws: An ASEAN Case Study*, in THE UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS: AN IN-DEPTH GUIDE AND SOURCEBOOK 315, 315 (Amelia H. Boss & Wolfgang Kilian eds., 2008) [hereinafter SOURCEBOOK].

16. *Id.* ASEAN is composed of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

This article will review the history of the ECC and its relationship to current electronic commerce laws in the United States, Canada and Europe. The review will demonstrate the vast similarities between these laws and their compatibility with the ECC and, with Australia as an example, will present an argument for wider adoption of the Convention in the West. The article will then go on to explore how the Convention is influencing the laws of ASEAN member states and how ASEAN is achieving regional harmonization with the ECC as its model. In addition to ASEAN, this paper will also explore the state of electronic commerce law in China, an ECC signatory, and India, a non-signatory, and how those states—and developing nations generally—can benefit from adopting the ECC as domestic law even if it never gains wide acceptance among developed countries. The final section will give a brief overview of important current signatories and the major global industries that could be affected, under the international law of treaties, by the Convention's rise from the dead.

II. THE ECC AND THE WEST

It is, perhaps, common knowledge that countries with a highly developed information and communications technology infrastructure, such as the United States, Canada and those of Western Europe, have been leading the way in the growth of electronic commerce. This has little to do with legal developments in these countries; it is simply a practical matter: 308 of the 500 largest companies in the world are headquartered in the United States, Canada or Western Europe.¹⁷ With the increasing growth and availability of the Internet and advanced communications technology in countries around the world, it has become more cost efficient for large companies to conduct business via electronic means. Yet despite the growth of international electronic commerce¹⁸ and the need for a degree of legal certainty in international business dealings,

17. See *Global 500: Our Annual Ranking of the World's Largest Corporations*, CNNMONEY (2011), <http://money.cnn.com/magazines/fortune/global500/2011/index.html>.

18. See generally Rachel Martin, *The Growing Importance of International Ecommerce*, PITNEY BOWES, <http://www.pitneybowes.com/us/global-ecommerce/case-studies/the-growing-importance-of-international-ecommerce.html> (last visited Oct. 16, 2016).

none of these countries have adopted the Convention.¹⁹ This is an odd development, as the current domestic laws of the United States and Canada and parts of the European Union have the same origins as the ECC and were even consulted during the drafting of the Convention.²⁰

It appears that the drafters of the ECC took pains to avoid creating any major conflicts with existing domestic e-commerce laws based on the Model Law, possibly in hopes that doing so would inspire a smooth ratification process and bring about international harmonization as quickly as possible. As a result the Convention, much like its predecessors in the field, takes a “facilitative—rather than regulatory—approach . . . [deferring] to domestic law”²¹ on matters ranging from contract formation to party obligations. The minor differences in wording between the Model Law and the ECC, which do exist in some ECC provisions, were “not intended to produce a different practical result, but rather are aimed at facilitating the operation of the Convention in various legal systems.”²²

In one specific instance of differing language, the UNCITRAL Secretariat explains, “the definition of ‘electronic communication’ establishes a link between the purposes for which electronic communications may be used and the notion of ‘data messages’, which already appeared in the [Model Law].”²³ Furthermore, the ECC “is only concerned with international contracts so as not to interfere with domestic law”²⁴ and “does not apply . . . when it is not apparent . . . that [the parties] are located in two different States. In those cases, the Convention gives way to the application of domestic law.”²⁵ Other ECC

19. See *Status United Nations Convention on the Use of Electronic Communications in International Contracts* (New York, 2005), *supra* note 6.

20. *Status UNCITRAL Model Law on Electronic Commerce* (1996), *supra* note 5 (referring to the adoption of the Model Law in France, Ireland and Slovenia).

21. UNCITRAL, *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*, in UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, ¶ 12, U.N. Sales No. E.07.V.2 (2007) [hereinafter *UNCITRAL Explanatory Note*].

22. *Id.* ¶ 15.

23. *Id.* ¶ 92.

24. *Id.* ¶ 60.

25. *Id.* ¶ 67.

articles remind “the parties of the need to comply with possible . . . obligations that might exist under domestic law.”²⁶

The ECC is the result of many years of work, beginning as early as 1985,²⁷ dealing with the rapid development of electronic communications technology and the use of such technology to negotiate contracts in the international marketplace. Since then there have been a series of steps taken, and instruments created, to build a solid legal foundation for the formation of electronic contracts.²⁸ The most widely successful instrument to date has been the 1996 Model Law.²⁹

A. The United States and Canada

As early as 1998, the United States and Canada began enacting legislation that established a legal foundation for electronic commerce.³⁰ Most jurisdictions within the United States³¹ and Canada³² have adopted uniform laws that closely follow the Model Law. These laws provide that “[information] shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.”³³ They

26. *Id.* ¶ 122.

27. U.N. Secretary-General, *Legal Value of Computer Records*, U.N. Doc. A/CN.9/265 (Feb. 21, 1985).

28. *Recommendations to Governments and International Organizations Concerning the Legal Value of Computer Records (1985)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1985Recommendation.html (last visited Oct. 16, 2016); *UNCITRAL Model Law on Electronic Commerce (1996)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html (last visited Oct. 18, 2016); *UNCITRAL Model Law on Electronic Signatures (2001)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html (last visited Oct. 16, 2016).

29. *See* UNCITRAL, MODEL LAW ON ELECTRONIC COMMERCE, U.N. Sales No. E.99.V.4 (1996) [hereinafter MLEC].

30. *See infra* notes 31–32.

31. *See* Uniform Electronic Transactions Act, 7A U.L.A. 21 (2001) [hereinafter UETA].

32. *See* Uniform Electronic Commerce Act (1999) [hereinafter UECA], available at <http://www.ulcc.ca/en/1999-winnipeg-mb/359-civil-section-documents/1138-1999-electronic-commerce-act-annotated>.

33. MLEC, *supra* note 29, art. 5. *See also* UETA, *supra* note 32, at § 7(a) (“A record or signature may not be denied legal effect or enforceability solely because it is in

additionally provide that where a writing is required, the requirement is met by an electronic form.³⁴ From the provisions of the Model Law itself, it is plainly apparent that the drafters did not intend to create substantive law dealing with contract formation and validity issues; this is left up to the jurisdictions themselves. Rather, the Model Law provides a procedural framework that merely allows for the recognition of electronic information and documents as acceptable and enforceable. In the United States, the Uniform Electronic Transactions Act (UETA) “does not speak to the validity of a signature or an electronic record . . . but it does assert that [they] . . . are facially valid as a means of contract formation. Thus, UETA ensures procedural protection to e-contracts”³⁵ Given the near mirror image of the Canadian Uniform Electronic Commerce Act³⁶ (UECA) to UETA, the argument can easily be made that the same is true in Canada.

As the most successful piece of international electronic commerce legislation to date, the Model Law has “facilitated . . . the recognition of electronic contracting on the domestic front. The Model Laws could not remedy the issue of . . . international electronic contracting.”³⁷ Thus, though legal validity of electronic contracts was beginning to develop throughout the world, there existed no such certainty for the growing number of electronic contracts concluded between parties residing in

electronic form.”); Council Directive 2000/31 of June 8, 2000, Directive on Electronic Commerce, 2000 O.J. (L 178) § 3, art. 9 (EC) [hereinafter E-Commerce Directive] (“Member states shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.”).

34. MLEC, *supra* note 29, art. 6(1) (“Where the law requires information to be in writing, that requirement is met by a data message”); UETA, *supra* note 31, § 7(c) (“If a law requires a record to be in writing, an electronic record satisfies the law.”); UECA *supra* note 32, art. 7 (“A requirement . . . that information be in writing is satisfied by information in electronic form”).

35. Sarah E. Smith, *The United Nations Convention on the Use of Electronic Communication in International Contracts (Cuecic): Why It Should Be Adopted and How It Will Affect International E-Contracting*, 11 SMU SCI. & TECH. L. REV. 133, 147–48 (2007).

36. UECA, *supra* note 32, § 5 (“Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form.”).

37. Anjanette H. Raymond, *Electronic Commerce and the New UNCITRAL Draft Convention*, 23 COMPUTER & INTERNET LAW. 9, 9 (2006).

different states. As such, a convention was “necessary to remove the barriers that continued to exist.”³⁸ That convention, the ECC, is “the next necessary step in the evolution of the international law on [electronic commerce].”³⁹

The ECC itself is based on the Model Law, as well as UETA and UECA to a lesser degree. In fact, “[t]he provisions of the [ECC] . . . owe a heavy debt to the [Model Law]. It is not surprising, therefore, given their common sources, that the provisions of the Convention and those of . . . UETA . . . are substantially similar.”⁴⁰ It has “widely adopted” the “principles outlined in the [Model Law],”⁴¹ which is evident from the language of the Convention, and has the same goal as the Model Law, the American UETA and Canadian UECA. Article 8 of the ECC provides “[a] communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.”⁴² ECC Article 8 is virtually identical to UECA Sections 5 and 7 and has the same effect as UETA Section 7.⁴³

B. The European Union

The European Union, as a whole, is another major player in the international commercial world. Due to the unique structure of the EU and certain provisions within the ECC, it may take longer for the EU to begin adopting the Convention, either as a single entity or as individual member states. This is despite the fact that the European Directives relating to electronic commerce appear to be perfectly compatible with the terms of the ECC.

There are currently two Directives relating to electronic commerce operating within the EU, the E-commerce Directive of 2000⁴⁴ and the E-

38. *Id.*

39. Smith, *supra* note 35, at 133.

40. Amelia H. Boss, *The United States' Perspective on the Convention on the Use of Electronic Communications in International Contracts*, in SOURCEBOOK, *supra* note 15, at 265.

41. Smith, *supra* note 35, at 151.

42. UNCITRAL, UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, art. 8, para. 1, U.N. Sales No. E.07.V.2 (2007) [hereinafter ECC].

43. *See* UECA, *supra* note 32.

44. E-Commerce Directive, *supra* note 34.

signatures Directive of 1999.⁴⁵ Of the two Directives, the E-commerce Directive is more easily reconciled with the terms of the ECC. The main focus of the E-commerce Directive is not the regulation of international contracts, but rather the regulation of information society services.⁴⁶ As such, the relatively short Article 9 is the only provision of the Directive that deals with the formation or validity of electronic contracts. Article 9 provides that “Member States shall ensure that their legal system allows contracts to be concluded by electronic means.”⁴⁷ They must also “ensure that the legal requirements . . . neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity . . .”⁴⁸ solely because they were concluded by electronic means. The remaining portions of Article 9 allow EU members to create exemptions for certain categories of electronic contracts⁴⁹ and require member states to submit reports regarding the application of such exemptions.⁵⁰

While the E-commerce Directive of the EU merely enables the use of electronic communications in one short article, there are a few minor differences between the ECC and the European Community Electronic Signature Directive (E-signature Directive), mainly regarding the intention of the parties.⁵¹ Article 9(3) of the ECC requires that where an electronic signature is concerned, the method used must not only identify the party concerned but also “indicate that party’s intention in respect of the information contained in the electronic communication.”⁵² However, “the notion of ‘signature’ in the Convention does not necessarily and in all cases imply a party’s approval of the entire content of the communication to which the signature is attached.”⁵³ Instead, the

45. Council Directive 1999/93/EC of Dec. 13, 1999, Directive on a Community Framework for Electronic Signatures, 2000 O.J. (L 13) 12 (EC) [hereinafter E-Signature Directive].

46. See *E-Commerce Directive*, EUR. COMM’N (July 6, 2016), http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm.

47. E-Commerce Directive, *supra* note 33, art. 9(1).

48. *Id.*

49. *Id.* art. 9(2).

50. *Id.* art. 9(3).

51. See ECC, *supra* note 42, art. 9. See also E-Signature Directive, *supra* note 46, art. 2.

52. ECC, *supra* note 42, art. 9(3)(a).

53. *UNCITRAL Explanatory Note*, *supra* note 22, ¶ 160.

provisions of Article 9(3) “are only intended to remove obstacles to the use of electronic signatures and do not affect other requirements” regarding the electronic communication.⁵⁴ “Whether an electronic communication that fulfills the requirement of a signature has legal validity is to be settled” under the domestic law applicable under conflicts of law rules.⁵⁵ The E-signature directive is concerned only with authentication of electronic signatures and makes no reference to a party’s intention.⁵⁶ In the context of electronic signature, ‘intention’ “only marks the existence of a relation between an electronic signature and other electronic data. The existence of such a relationship is not expressly referred to, but is implicitly indicated, in the definition of an electronic signature . . . in Article 2” of the E-signatures Directive.⁵⁷ Because the Directive accepts all authentication methods for electronic signatures, regardless of whether the signatory approves of the content, and because the ECC does not require an approval of the content either, both the E-signature Directive and the Convention are compatible.⁵⁸

A further “indication of compatibility . . . is the lack of any conflict in the European Community as far as the application of [the Model Law] is concerned.”⁵⁹ This is exemplified by the fact that France, Ireland and Slovenia have all enacted electronic commerce laws based on the Model Law.⁶⁰ “If the law of those EU Member States [was not] in line with European Community law, the European Commission would have had the legal obligation to interfere and to enforce revisions.”⁶¹ This is especially true in the case of Slovenia, which enacted their Electronic Commerce and Electronic Signatures Act in 2000⁶² before joining the European Union in 2004. If the European Commission believed there was any conflict between the European Directives and the Model Law, they would have taken action then.⁶³ However, no such action appears to

54. *Id.* ¶ 156.

55. *Id.*

56. Wolfgang Killian, *The Electronic Communications Convention: A European Union Perspective*, in SOURCEBOOK, *supra* note 15, at 413.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5.

61. Killian, *supra* note 58, at 413.

62. App. F, in SOURCEBOOK, *supra* note 15, at 495.

63. *See* Killian, *supra* note 58, at 413.

have been taken against any of the three countries so far. Thus, it is reasonable to assume that the ECC is fully compatible with European Directives relating to electronic commerce.

C. The Australian Example

Given the facilitative approach of the ECC, the similarities to existing domestic laws, and UNCITRAL's widespread deference to domestic law in drafting the Convention, why has the Convention not been more widely accepted among leading developed countries? One American authority⁶⁴ even concludes "that the Convention is fully compatible with both the principles as well as the policies in the American domestic law of electronic commerce."⁶⁵ Perhaps because of the close resemblance between the ECC and existing domestic laws, the international community has not been convinced that the ECC is "not merely superfluous," but "a necessary step in establishing harmonization in international e-contracts."⁶⁶ However, one developed, westernized country seems to have been convinced—Australia. The developments in Australian electronic commerce laws are illustrative of the relative ease with which domestic laws based on the Model Law can be updated to allow accession to the Convention.

Australia enacted their version of the Model Law, the Electronic Transactions Act, in 1999 (ETA 1999).⁶⁷ The ETA 1999 is strikingly similar both in language and approach to the American UETA and Canadian UECA, as it, too, is based on the Model Law.⁶⁸ The ETA 1999 provides for the facial validity of contracts formed wholly or partly by

64. Henry D. Gabriel, *United Nations Convention on the Use of Electronic Communications in International Contracts and Compatibility with the American Domestic Law of Electronic Commerce*, 7 LOY. L. & TECH. ANN. 1, 1 n.1 (2006-07), ("[Henry Gabriel] served as a member of the United States Delegation to the [UNCITRAL] Working Group that drafted the Convention. He also was a member of the . . . Drafting Committee for the Uniform Electronic Transactions Act.").

65. *Id.*

66. Smith, *supra* note 35, at 162.

67. *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5. See also *Electronic Transactions Act 1999 (Cth)* (Austl.), <https://www.legislation.gov.au/Details/C2011C00445> (last visited Oct. 18, 2016).

68. See *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5.

electronic means,⁶⁹ establishes that laws requiring a writing are satisfied by electronic documents,⁷⁰ and allows for the validity of electronic signatures, among other things.⁷¹ Essentially, it “implements three key aspects of the [Model Law]: the legal validity of electronic transactions, non-discriminatory treatment of different electronic methods, and party autonomy to agree to alternative terms and conditions.”⁷² From the language of the ETA 1999, it is apparent that much like UETA and UECA, the ETA 1999 provides more of a procedural, facilitative framework for the recognition of electronic contracts than it does a set of substantive laws for electronic contracting. Just as in the US (UETA) and Canada (UECA), this lack of substantive provisions means that the issues of offer and acceptance, validity, performance and other contract law problems are left up to the common law and statutes that exist outside of the ETA 1999.

In early 2011, realizing that the ECC is essentially the international enactment of the Model Law and that it provided no real conflict with the ETA 1999, the Australian government introduced a (subsequently ratified) bill to amend the ETA 1999⁷³ to comply with the language of the ECC and allow for accession to the Convention.⁷⁴ The Electronic

69. *Electronic Transactions Act 1999*, s 8(1) (“For the purposes of a law of the Commonwealth, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.”).

70. *Id.* s 9 (“If, under a law of the Commonwealth, a person is required to give information in writing, that requirement is . . . met . . . by means of an electronic communication . . .”).

71. *Id.* s 10 (“If, under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if: (a) in all cases—a method is used to identify the person and to indicate the person’s approval of the information communicated; and (b) in all cases—having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated. . . .”). *See also* Arnold, *supra* note 11 (“The Bill applies those default rules in determining the time of dispatch and receipt in relation to all electronic communications, including recognition of automated message systems, clarification of an invitation to treat, rules to determine the location of the parties, updating electronic signature provisions and default rules for time and place of dispatch and receipt. The amendments do not represent major changes to settled contract law.”).

72. Arnold, *supra* note 11.

73. Electronic Transactions Amendment Bill 2011 (Cth) (Austl.).

74. *Legislation Proposed for Introduction in the 2011 Autumn Sittings*, DEP’T OF THE PRIME MINISTER AND CABINET,

Transactions Amendment Act 2011 (ETA 2011) is a short piece of legislation consisting of just over 2,500 words including notes.⁷⁵ The process of creating and adopting these amendments was relatively short, beginning only in late 2008 when the Attorney-General of Australia announced the release of a consultation paper on the subject, seeking input from the public and Australian business interests.⁷⁶ Having received no objections, and with the support of state and territorial attorneys-general, the government introduced the amendments in May 2011.⁷⁷ The bill was adopted by the Australian Parliament and came into force on June 22, 2011.⁷⁸

The ETA 2011 made only relatively minor changes to the ETA 1999. Of the seventeen amendments, six were adding definitions (such as “addressee” and “originator”) or expanding upon previous definitions promulgated under the ETA 1999.⁷⁹ A further four amendments merely repealed notes referring the reader to the former section in the ETA 1999 setting out exemptions, due to the fact that the exemption section moved to a schedule.⁸⁰ An additional amendment sets out transitional provisions.⁸¹ Thus, over half of the amendments implemented by ETA 2011 are minor, while the remaining six amendments are longer in form; they do not affect any major change upon the status of electronic contracting under ETA 1999.

Australia’s example could play a very important role in achieving international harmonization of electronic commerce. Not only will their

https://web.archive.org/web/20110219182752/http://www.dpmc.gov.au/parliamentary/docs/proposed_legislation.pdf (last visited Oct. 18, 2016). See also *Electronic Transactions Amendment Act 2011* (Cth) (Austl).

75. See *Electronic Transactions Amendment Act 2011*.

76. *Australian E-commerce Review: UN Convention on Electronic Communications*, AUSTL. GOV’T (2008), http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_Australiane-commercereview-UNConventiononelectronicCommunications.

77. *Legislation Proposed for Introduction in the 2011 Autumn Sittings*, supra note 76; *Electronic Transactions Amendment Act 2011*.

78. *Legislation Proposed for Introduction in the 2011 Autumn Sittings*, supra note 76; *Electronic Transactions Amendment Act 2011*.

79. See *Electronic Transactions Amendment Act 2011* at sch 1.

80. See *id.*

81. See *id.*

adoption of the ETA 2011 and the coming accession to the Convention bring the ECC into force, but it also provides an example for other westernized countries to follow. Australia's actions effectively demonstrate to the United States, Canada and Europe that the ECC is an important step in the harmonization process and should be adopted.

D. Implementation in the US, Canada, and the EU

The provisions of the ECC, the governmental structures of the United States and Canada, along with the structure of the European Union create several possibilities for the implementation of the Convention. The provisions of the convention, which allow for numerous declarations to be made, create a fairly flexible document that would allow each country to tailor the ECC to their needs, while still providing general harmonization in the field. Furthermore, UNCITRAL recognized the unique relationship between the European Commission, EU member states, and international law, by including special provisions and options for regional economic units and their member states.⁸²

Australia, like the US and Canada, is organized as a federal state. This means that in the implementation of certain treaties, Australia has two options. They can either create a "dualist" regime, whereby there is one set of laws for federal and international issues and another for purely domestic issues. The second option is to try to achieve a single regime, by updating the laws not only of the federal government, but also of the various sub-national jurisdictions. Australia has opted for the latter approach, with intentions to accede to the Convention after all the states and territories in Australia have implemented their own version of the federal ETA 2011.⁸³

This, of course, means that both the US and Canada have the same options available to them. The developments in Australia are offered merely to prove that a developed, westernized economy, with e-commerce laws based heavily on the Model Law, can easily update their

82. See ECC, *supra* note 42, arts. 17–19, 21.

83. John D. Gregory, *The United Nations Electronic Communications Convention*, (Sept. 29–Oct. 2, 2015), <http://unctad.org/meetings/en/SessionalDocuments/The%20United%20Nations%20Electronic%20Communications%20Convention%20UNCITRAL.pdf>.

laws to comply with the ECC without affecting any major changes. The Australian example is not meant to advocate their approach over the creation of a dualist regime. It may be easier for Canada and the US to use their constitutional powers over international commerce,⁸⁴ to initially create a dualist regime and then work to bring their domestic laws into line over time. In addition, the fact that the ECC is designed specifically to cover international contracts works in favor of the latter approach. As international law is the purview of the federal governments, by default any federal law dealing with an international matter would, arguably, trump any state or provincial law to the contrary—at least to the extent the laws conflict. Such an approach is even embodied with the U.S. Constitution.⁸⁵

In fact, the US Congress has already done so to a certain extent by enacting the Electronic Signatures in Global and National Commerce Act (E-sign) in 2000.⁸⁶ E-sign is a federal law “that applies in those states that have not enacted the UETA.”⁸⁷ It was passed “to encourage states to adopt the UETA”⁸⁸ because of fear “that the necessity of state-by-state enactment of the UETA would take too much time”⁸⁹ The law was designed to “respond to the need for immediate action,” and recognized the supremacy of state law provided that E-sign “only applies to those states that have not enacted the UETA.”⁹⁰ Thus, it is not unprecedented,

84. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.) *reprinted in* R.S.C. 1985, app II, no 5 (“[it] is hereby declared that . . . the exclusive Legislative Authority of the Parliament of Canada extends to . . . The Regulation of Trade and Commerce,”); U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States . . .”).

85. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.”).

86. Electronic Signatures in Global and National Commerce Act (E-sign), 15 U.S.C. §§ 7001–7031 (2006).

87. Boss, *supra* note 40, at 263.

88. *Id.* at 265.

89. *Id.*

90. *Id.* Currently, E-sign is only applicable in the states of Washington, Illinois and New York. See *Electronic Transactions Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act> (last visited Oct. 18, 2016).

for the US at least, to create a dualist regime in the electronic commerce field with the aim of encouraging sub-national jurisdictions to change their domestic laws.

In addition to the substantial similarities and common heritage shared by the ECC, UETA and UECA, and the apparent compatibility between EU law and the ECC, there are flexibilities built into Convention in the form of declarations.⁹¹ Use of these declarations would allow the US, Canada and European countries (and/or the EU itself) to tailor their implementation of the ECC to best fit their needs. Article 21 of the Convention allows for contracting parties to enter declarations, at any time, under Article 17 (Participation by Regional Economic Integration Organizations (REIOs)), Article 19 (Declarations on the Scope of Application), and Article 20 (Communications Exchanged under Other International Conventions).⁹² These are in addition to a separate declaration available under Article 18 (Effect in Domestic Territorial Units), which is only allowed at the time of “signature, ratification, acceptance, approval or accession,”⁹³ and the extensive list of exclusions set out in Article 2.⁹⁴

91. See *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5. The UETA and UECA are both domestic enactments of the Model Law and were designed as an update to the Model Law which would reflect developments in technology and encourage harmonization. The compatibility between the ECC and the EU directives has been argued in previous sections of this article. For declarations see ECC, *supra* note 42, art. 21(1).

92. ECC, *supra* note 42, art. 21(1) (“Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time.”).

93. *Id.* art.18(1).

94. *Id.* art. 2 (“1. This Convention does not apply to electronic communications relating to any of the following: (a) Contracts concluded for personal, family or household purposes; (b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary. 2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.”).

Finally, it is important to note that Article 17 of the Convention provides a unique situation for REIOs, such as the EU. Article 17 would allow the EU to create a duality of regimes, similar to the dualist regimes that can be created in the US, Canada and Australia.⁹⁵ Subject to certain qualifications, the EU could sign the ECC as the European Union itself and not as individual member states, thus making the Convention EU Law.⁹⁶ Article 17(4) would then allow the EU to make an Article 21 declaration stating that EU directives will preempt the ECC, when both parties to an electronic contract are located within the jurisdiction of the EU.⁹⁷ This essentially allows for the EU to create a unique dual regime—one that applies regionally within the EU and another that applies internationally. This is not as easily accomplished in the EU as in the US or Canada; however, it is a perfectly feasible option.

Overall, there appears to be no good reason why the ECC has not gained more of a foothold among developed countries. The laws of the US and Canada are both based on the Model Law, as is the ECC. Additionally, as the current e-commerce laws in France, Ireland and Slovenia are also based on the Model Law⁹⁸ and have all been in existence for eleven years, it appears that there is no conflict between the ECC and EU directives on e-commerce.⁹⁹ Finally, given that the laws of these countries—and the EU directives—are all derived from, or are compatible with, the same source as the Australian ETA 1999, Australia has proven that developed states can easily update their laws to

95. *Id.* art.17. By utilizing this Declaration, the EU would create a de facto duality of regimes.

96. *Id.* See also E-Commerce Directive, *supra* note 34; E-Signatures Directive, *supra* note 46.

97. ECC, *supra* note 42, art. 17(4) (“This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in States members of any such organization, as set out by declaration made in accordance with article 21.”).

98. See *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5, for adoption of Model Law by France, Ireland and Slovenia.

99. *Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A12012M%2FTXT> (last visited Oct. 18, 2016) (“The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.”).

implement the ECC. Their example should be followed: developed countries should begin updating their laws to allow accession to the Convention. The US, Canada and the EU are all important players in global e-commerce; without their participation and support it is unlikely that the ECC, or any other convention, will ever be able to harmonize international electronic commerce law.

III. THE ECC AND DEVELOPING COUNTRIES

The importance of the US, Canada and the EU in global commerce, and their apparent lack of interest in the ECC, should not deter developing countries from adopting the Convention. In fact, developing countries around the world could benefit greatly by acceding to the Convention regardless of its status among developed countries. As the economic woes of the last decade continue and companies world-wide are forced to implement austerity measures, businesses will become more and more dependent upon electronic communications as a means of reducing expenses. Additional means of reducing expenses will mean the continued, if not increased, movement of facilities from high-priced developed countries, to the low-cost countries of the developing world.

However, companies conducting business in developing countries via electronic communications will need a degree of legal certainty regarding the validity of electronic contracts. By adopting the ECC, “the potential for businesses [in developing] countries to engage in international e-commerce transactions will increase, because parties outside the country will have greater confidence that their contract, although concluded by electronic means, will receive the same recognition as a paper contract.”¹⁰⁰ The greater degree of legal certainty would allow “developing-country companies [to] effectively compete for . . . opportunities that can lead to increased development”¹⁰¹

The status of electronic commerce laws in developing countries since the United Nation’s adoption of the ECC in late 2005 can be roughly divided into three categories; the active Convention signatory (including

100. William J. Luddy, Jr. & Peter W. Schroth, *The New UNCITRAL E-Commerce Convention in the Mosaic of Developing Global Legal Infrastructure*, ACAD. LEGAL STUD. BUS. (May 26, 2006), <http://alsb.roundtablelive.org/Resources/Documents/NP%202006%20Luddy-Schroth.pdf>.

101. *Id.*

countries in which the ECC is officially in force), the inactive Convention signatory, and the non-signatory. The active signatory is a country that has signed the ECC and, at the very least, taken affirmative steps to bring their domestic laws into line with the Convention. The inactive signatory is a nation that has signed the ECC but has yet to take any steps to implement changes in their domestic law. The non-signatory is, of course, a country that has not signed the ECC.

Given recent developments in electronic commerce legislations in Asia, and the current or growing importance of certain Asian nations in international commerce and trade, this section will focus on Singapore and the Association of Southeast Asian Nations, China and India.¹⁰² Due to the amount of outsourced manufacturing facilities, among other things, flowing into Asia, international law practitioners would do well to keep the region's e-commerce developments on their radar.

A. The Active Signatory: Singapore and Regional Harmonization in the Association of Southeast Asian Nations

It appears that Singapore and the Association of Southeast Asian Nations (ASEAN), of which Singapore is a member, have recognized the potential benefits that adoption of the ECC could confer upon its ten member states. While Singapore has fully ratified the ECC¹⁰³ (and, as such, the ECC is officially in force in Singapore), ASEAN as a whole is essentially a hybrid of all three categories. The Philippines, another ASEAN member, has signed the ECC but has not yet amended their domestic laws to reflect the ECC.¹⁰⁴ The other eight ASEAN member states are all non-signatories to the Convention, each with varying degrees of electronic commerce legislation.¹⁰⁵ Given ASEAN's goal of

102. It is important to note that though some current electronic commerce laws in developing countries discussed below were adopted before 2005, draft versions of the Convention, as well as Working Group notes and reports were available before the ECC was adopted.

103. *Status United Nations Convention on the Use of Electronic Communications in International Contracts* (New York, 2005), *supra* note 6.

104. *Id.* See also Electronic Commerce Act, Rep. Act. No. 8792, § 1 *et seq.*, 96:48 O.G. 7675 (June 14, 2000) (Phil.). The Philippines Electronic Commerce Act, which predates the ECC, appears to be the only law addressing electronic transactions.

105. *Id.* See also *Galexia Consulting to Assist ASEAN Harmonise Electronic Commerce*, GALEXIA CONSULTING (Mar. 8, 2004),

harmonizing into an EU like single market for goods and services within Southeast Asia,¹⁰⁶ this discord between the electronic commerce laws of member states is problematic.

In 2004, to address the lack of harmonization between member states, ASEAN began the Electronic Commerce Project.¹⁰⁷ The project designed to “implement a harmonized legal infrastructure for electronic commerce in ASEAN,”¹⁰⁸ with the goal of integrating “into one market for goods, services, and investment by establishing a harmonized legal, regulatory and institutional environment for e-commerce.”¹⁰⁹ The project would also allow some of the lesser-developed members to “leapfrog the years of confusing court decisions and conflicting legislation that befell those developed countries in which the technology had far exceeded the law’s ability to respond.”¹¹⁰ It is important to note that the project follows the EU approach of “legislatively [facilitating] borderless electronic transactions across a group of nations,”¹¹¹ a further testament to the importance of developed countries in the e-commerce world. More importantly, however, is the fact that ASEAN decided to use the ECC as the tool to achieve this harmonization.¹¹²

ASEAN’s decision to harmonize the electronic commerce laws of its member states dates back to 2000 with the e-ASEAN Framework Agreement.¹¹³ “Confident that the e-ASEAN initiative . . . would enhance ASEAN’s competitiveness in the global market . . . [.]”¹¹⁴ member states agreed to work toward the implementation of a legal structure that would

www.galexia.com/public/assets/galexia_aadcp_ecommerce_overview_v2_website_2004_0319.pdf.

106. See generally Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, <http://asean.org/asean/asean-charter/>.

107. *Galexia Consulting to Assist ASEAN Harmonise Electronic Commerce*, *supra* note 105.

108. *Id.*

109. *Id.*

110. Luddy & Schroth, *supra* note 100.

111. *Galexia Consulting to Assist ASEAN Harmonise Electronic Commerce*, *supra* note 105.

112. Connolly, *supra* note 15, at 315.

113. See *E-ASEAN Framework Agreement*, ASEAN (Nov. 25, 2000), http://asean.org/?static_post=e-asean-framework-agreement.

114. *Id.* pmbl.

“facilitate the growth of electronic commerce in ASEAN.”¹¹⁵ Not only did they wish to harmonize e-commerce laws between member states, they wanted to “ensure that their legal infrastructure would be compatible with international developments. The project guidelines for electronic contracting legislation are therefore based on the . . .” ECC.¹¹⁶

This is an extremely important development for two reasons. First, the developments in ASEAN appear to be happening off the radar of most international commercial law practitioners, especially those outside of the region. Second, and most importantly, of the ten ASEAN member nations, only Singapore and the Philippines have actually signed the Convention.¹¹⁷ These two taken together mean that an additional eight nations will likely soon have laws that reflect the ECC, enabling them to unexpectedly accede to the Convention at any time, proving that the ECC is actually more influential than previously realized.

Singapore, arguably the most developed, westernized and important of the ASEAN member states, appears to be leading the push for the development of e-commerce law within ASEAN. To date, Singapore is the only ASEAN country that has amended their electronic commerce laws to reflect the provisions of the Convention, doing so just before acceding to the Convention, with the implementation of the Electronic Transactions Act 2010 (the 2010 Act).¹¹⁸ The 2010 Act amended the Electronic Transactions Act 1998, which was based on the Model Law like the current laws of the US, Canada, and certain EU member states.¹¹⁹

Of the ten ASEAN member nations, nine have some form of currently enacted e-commerce legislation.¹²⁰ According to UNCITRAL only five of those countries have enacted domestic laws based on the Model Law.¹²¹ Thailand, Vietnam and the two ECC signatories in ASEAN, Singapore and the Philippines, are all listed as having enacted the Model

115. *Id.* art. 3(b).

116. Connolly, *supra* note 15, at 319.

117. *Status United Nations Convention on the Use of Electronic Communications in International Contracts* (New York, 2005), *supra* note 6.

118. Electronic Transactions Act 2010 (Act 16 of 2010) (Sing.). Officially cited as the Electronic Transactions Act 2010 or the ETA 2010, referred to here as the 2010 Act to avoid any confusion with the Australian ETA 2011.

119. *Id.*

120. Boss, *supra* note 40, at 265. *See also* Luddy & Schroth, *supra* note 100.

121. *See Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5.

Law.¹²² However, the e-commerce laws of Indonesia, Malaysia and Myanmar all share substantial similarities with those countries and the Model Law.¹²³

More importantly, however, is the fact that the current electronic commerce laws of Brunei, Indonesia, Malaysia, Myanmar, the Philippines, Thailand and Vietnam, all share at least three of the six key provisions of the ECC, as identified by one commentator.¹²⁴ The six provisions of the Convention so identified are those relating to party autonomy (Article 3), the time of communications and place of communications (both Article 10), invitations to make offers (Article 11), use of automated messaging systems (Article 12) and errors (Article 14).¹²⁵ The current law in Malaysia, enacted in 2006, contains all six of these provisions.¹²⁶ In addition, electronic commerce legislation recently enacted in Laos and Cambodia also contain the six provisions.¹²⁷ The current laws of Myanmar and the Philippines embody five of the six principles.¹²⁸

The existing similarities between the current laws of ASEAN members and the ECC means that the eight member nations with currently enacted electronic commerce legislation could most likely update those laws to reflect the provisions of the Convention with relative ease. Despite the differences between the current laws within ASEAN and the ECC, it is important to note that the eight enacted e-commerce laws, as well as the two draft laws, recognize, enable and give legal validity to the use of electronic communications, electronic forms,

122. *Id.*

123. *See* Connolly, *supra* note 15, at 326, 328.

124. Boss, *supra* note 40, at 265.

125. Connolly, *supra* note 15, at 326, 328.

126. *Id.* The Electronic Commerce Act 2006 in Malaysia reflects the six key provisions of the ECC in Arts. 3, 20 and 21, 23, 17, 17(2)(b), and 18 (respectively).

127. *Id.* Both pieces of draft legislation were under consideration and/or pending in 2008, at the time of publication of the aforementioned book. The Lao legislation was passed in 2012 (*see Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5), and Cambodia was slated to enact their legislation by the end of 2015. *See* Sok Chan, *E-commerce Law to Debut by End of Year*, KHMER TIMES, (Oct. 6, 2015), <http://www.khmertimeskh.com/news/16571/e-commerce-law-to-debut-by-end-of-year>. However, recent research by the author is unable to reveal the exact text of the Lao legislation or a definitive date of enactment (as well as the text) of the Cambodia legislation.

128. Connolly, *supra* note 15, at 326, 328.

electronic signatures and electronic records.¹²⁹ These four categories are arguably the fundamental underlying principles of the Model Law and the minimum requirements of the ECC.

Through the efforts of the ASEAN Electronic Commerce Project and with the example of Singapore, it appears that the remaining ASEAN member states are slowly progressing toward domestic adoptions of the ECC. Following the examples of Singapore and Australia, those states with current laws based on the Model Law should find that given the similarities between their laws and the ECC, they are well situated to allow adoption of the ECC. Both Cambodia and Laos, having no current legislation in place, might find themselves even more ideally situated than their other ASEAN counterparts. The lack of enacted legislation would allow both countries to adopt the ECC wholesale, utilizing the Convention's flexibilities as needed, creating a unified domestic and international e-commerce regime with relative ease.

Overall it appears that all ASEAN member states are on the path to implementing legislation consistent with the provisions of the ECC. The question remains as to whether the additional eight ASEAN member states will formally recognize this relationship between their laws and the ECC by signing or acceding to the Convention. Regardless, the developments in ASEAN prove that the ECC is beginning to have an impact upon the developing world, even if at a much slower pace than hoped for. There are, of course, many other developing nations throughout the world that could benefit greatly from the adoption of the ECC, most of which have not progressed as quickly as ASEAN. However, ASEAN could serve as an example for other nations to follow, especially ASEAN neighbors India¹³⁰ and China,¹³¹ two of the fastest growing economies in the world.

129. *Id.* at 328.

130. India is the world's twelfth largest economy, and the third largest in Asia behind Japan and China. See *U.S. Relations with India*, U.S. DEP'T OF STATE (Oct. 9, 2015), <http://www.state.gov/r/pa/ei/bgn/3454.htm>.

131. China is the world's second largest economy, having just overtaken Japan. See *China overtakes Japan as world's second-biggest economy*, BBC NEWS (Feb. 14, 2011), <http://www.bbc.co.uk/news/business-12427321>.

B. China: The Inactive Signatory

As the largest of the four BRIC nation economies,¹³² China is an important player in global commerce today, and poised to be a powerhouse in the e-commerce field within the near future. Like ASEAN member nations, China routinely attracts outsourced facilities and services from the West. As a result of its increased development and capabilities, due in large part to Western foreign investment,¹³³ China exports vast quantities of goods and services to the United States, Canada and the European Union.¹³⁴

Despite the myths and misconceptions about law in China, the Chinese legal system is a burgeoning civil law system. Legal certainty for both domestic and foreign businesses has increased significantly, especially in the last ten years, beginning with the 2006 adoption of legal codes covering property, corporate and individual taxation, anti-monopoly and labor contracts.¹³⁵ Given the sheer amount of international commerce taking place between China and the West and China's rising

132. Brazil, Russia, India, and China.

133. China received over \$61 billion in total Foreign Direct Investment in 2013. *U.S. Relations with China*, U.S. DEP'T OF STATE (Jan. 21, 2015), <http://www.state.gov/r/pa/ei/bgn/18902.htm#econ>. China received €20.7 billion in Foreign Direct Investment from the EU in 2014. *Countries and Regions: China*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> (last updated Sept. 8, 2016)). China also received C\$12.410 from Canada in 2015. *Canadian Outward Foreign Direct Investment to Asia*, ASIA PAC. FOUND. CAN., <http://www.asiapacific.ca/statistics/investment/outward-foreign-direct-investment/canadian-outward-foreign-direct-investment> (last visited Sept. 16, 2016).

134. Trade between China and the United States has increased from \$33 billion in 1992 to \$562 million in 2013, thereby making China the third largest export market for American goods. *U.S. Relations with China*, *supra* note 133. In 2015, the European Union imported €350.4 billion in goods from China. In 2014, the EU imported €302.1 billion and €280.1 in 2013. *Countries and Regions: China*, *supra* note 133. In 2015, Chinese merchandise imports to Canada amounted to C\$65.6 billion, or 12.26 percent of Canada's total merchandise imports. *Canada's Merchandise Trade with China*, ASIA PAC. FOUND. CAN., <http://www.asiapacific.ca/statistics/trade/bilateral-trade-asia-product/canadas-merchandise-trade-china> (last visited Sept. 19, 2016).

135. Steven Dickinson, *Debunking Myths About China's Legal System*, BLOOMBERG (Nov. 29, 2007, 12:53 PM), <http://www.bloomberg.com/news/articles/2007-11-29/debunking-myths-about-chinas-legal-system> *businessweek-business-news-stock-market-and-financial-advice*.

importance in the global economy, the legal status of electronic commerce in China is a very important matter.

China is a signatory to the ECC,¹³⁶ but as yet has been inactive in regard to implementing changes required to comply with the Convention. China's current electronic commerce law, the Electronic Signature Law of the People's Republic of China (ESL),¹³⁷ was adopted in 2004 before other business related legal codes came into place. The ESL is based on the Model Law¹³⁸ and was "expected to completely remove the legal obstacles to the development of electronic commerce and to build a harmonious legal environment for both electronic commerce and electronic government."¹³⁹ The ESL is not fully reflective of the ECC, even though the drafters of the ESL were most likely aware of the existence of the then nearly completed draft version of the Convention. However, like many other domestic Model Law enactments, the ESL is similar enough to the ECC that it would only require minor amendments to the ESL to bring it into compliance with the Convention,¹⁴⁰ as demonstrated by both Singapore and Australia.

As a domestic enactment of the 1996 Model Law, the ESL appears to be mostly compatible with the ECC. The ESL currently provides for the legal recognition and validity of electronic communications and electronic contracts,¹⁴¹ and adopts the functional equivalence¹⁴² and media neutrality¹⁴³ principles of the Model Law and ECC. The functional equivalence principle is also reflected in the 1999 Chinese Contract Law,

136. *Status United Nations Convention on the Use of Electronic Communications in International Contracts* (New York, 2005, *supra* note 6).

137. Electronic Signature Law of the People's Republic of China (promulgated by The Standing Comm. of the Tenth Nat'l People's Cong., Aug. 28, 2004, effective Apr. 1, 2005), translation available at http://www.china.org.cn/business/2010-01/21/content_19281152.htm [hereinafter Electronic Signature Law].

138. See *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5.

139. Gao Fuping, *Implementation of the Electronic Communications Convention: A Chinese Perspective*, in SOURCEBOOK, *supra* note 15, at 388.

140. *Id.*

141. Electronic Signature Law, *supra* note 137, art. 3.

142. *Id.* at arts. 6–8.

143. Fuping, *supra* note 139, at 390.

which includes electronic communications within its definition of a writing.¹⁴⁴

Many similarities between the ESL and the ECC are readily apparent, such as the Chinese law's comparable provisions regarding the requirement that a party produce a writing.¹⁴⁵ Much like other domestic enactments of the Model Law and the ECC itself, the ESL also specifically excludes the application of this provision to certain transactions such as real estate and loan documents.¹⁴⁶ China permits the use of automated systems in the first of two articles regarding electronic signatures.¹⁴⁷ Article 9 of the ESL creates an attribution rule that applies to the transmission of information through electronic means, including automated systems.¹⁴⁸ Under Article 9, "a sender cannot deny being the sender of a piece of information if the information is sent either by an authorized person or by the sender's automatic information system, or if the information can be verified by a method approved by the sender."¹⁴⁹ Furthermore, "[if] a party's intention can be inferred from the conduct of the sender, the aforesaid attribution rule states that the conduct functions as a signature as provided in the ECC."¹⁵⁰ This article of the ESL, like provisions of the ECC, allows parties to opt out of certain provisions of the ESL through contract.¹⁵¹ The second, and most important, article on electronic signatures provides that "[a] reliable electronic signature shall have equal legal force with handwritten signature or the seal."¹⁵² In a final, important similarity between the ECC and the Chinese Law, ESL Article 5 allows electronic communications to be "deemed to satisfying

144. Contract Law of the People's Republic of China (promulgated by the Second Session of the Ninth Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 11 ("A writing means a memorandum of contract, letter or electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail), etc. which is capable of expressing its contents in a tangible form."), *translation available at* <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf>.

145. Electronic Signature Law, *supra* note 137, art. 5.

146. Fuping, *supra* note 139, at 392.

147. Electronic Signature Law, *supra* note 137, arts. 1, 2.

148. *Id.* art. 9.

149. Fuping, *supra* note 139, at 395. *See also* Electronic Signature Law, *supra* note 137, art. 9.

150. Fuping, *supra* note 139, at 395.

151. Electronic Signature Law, *supra* note 137, at 395 n.41.

152. *Id.* art. 14.

the requirements for the form of the original copies” subject to certain conditions.¹⁵³

The principles and provisions of the ESL in China appear to be perfectly in line with the Convention. The “Model Law actually contributes a great deal in the implementation of the ECC,” and the “Model Law has created a harmonious atmosphere for the implementation of the ECC.”¹⁵⁴ The fact that the ESL is a domestic enactment of the Model Law, and that Chinese contract law also explicitly recognizes electronic contracts¹⁵⁵, will certainly facilitate the amendment of the ESL to reflect the ECC.

However, despite the basic similarities between the Convention and the ESL, there may be some obstacles to the adoption of the ECC in China, namely one influential Chinese law professor’s unique view of the ECC’s role in both the international and domestic realms.¹⁵⁶ The argument is made that “an international electronic contract can only be enforced in a country that enforces domestic electronic contracts and has procedures for their enforcement.”¹⁵⁷

It is certainly the case that it would be much easier to enforce an international electronic contract in a country that recognizes the validity of electronic contracts at a domestic level. However, this does not mean an international contract could not be enforced in a country that has no domestic law validating electronic contracts. In fact, this is a relatively normal situation in countries that are organized as federal states, such as the US, Canada and Australia, whereby the federal government has the power to sign a treaty but not the power to force the provisions of said treaty upon its states and provinces, creating a dual regime. This would be the case if the UETA was never enacted in the US, meaning there was no domestic law on electronic contracts.¹⁵⁸ Given that situation, if the United States government then went and signed and ratified the ECC, due to separation of powers in the US, the ECC would apply only to international contracts. However, at the same time there would be no

153. *Id.* art. 5.

154. Fuping, *supra* note 139, at 405.

155. *Id.*

156. *See id.*

157. *Id.* at 387.

158. This is actually the case in the three jurisdictions, including New York, of the United States that have not enacted the UETA.

domestic law recognizing the validity of electronic contracts concluded wholly within the United States. Such a situation could arise in any country where the structure of government creates a separation of powers between the national and sub-national governments. In addition, countries such as Laos and Cambodia, which for many years had no domestic electronic commerce legislation, have used the ECC to create a single regime applying to both domestic and international contracts.¹⁵⁹ This further proves that countries need not have electronic commerce legislation in place to adopt the ECC.

The argument continues that before the Convention can be fully implemented in China, “the general principles established by the ECC need to be converted into evidentiary rules and adopted into the national legal system.”¹⁶⁰ However, this argument appears to conflict with one of the underlying aims of the Convention, as rules of evidence are generally accepted to be substantive rules of law, not procedural. Rules of substantive law are “composed of the law which is applied by the system of procedural law. Substantive law consists of . . . the rules of evidence.”¹⁶¹

The ECC provides a mainly procedural framework that merely recognizes the validity of, and allows for the use of, electronic communications in forming international contracts. In fact, the UNCITRAL Secretariat and numerous legal scholars have noted that the Convention goes out of its way to avoid any conflict with substantive domestic laws.¹⁶² One of the Convention drafters notes that the ECC does

159. “Cambodia and the Lao People’s Democratic Republic have been assisted by UNCTAD in preparation of their [e-commerce] legislation.” Note by the UNCATAD Secretariat, U.N. Conference on Trade and Development, *Cyberlaws and Regulations for Enhancing E-Commerce: Case Studies and Lessons Learned*, ¶ 44, U.N. Doc. TD/B/C.II/EM.5/2, (Jan. 14, 2015). See also, Connolly, *supra* note 15; “E-commerce is becoming a major player in the region’s economic playground, but Cambodia has a long way to go before it is ready to compete with the big boys[.]” Jennifer Meszaros, *Trading Places*, SOUTHEAST ASIA GLOBE (Aug. 28, 2014), <http://sea-globe.com/trading-places-2-e-commerce-southeast-asia-globe/>.

160. Fuping, *supra* note 139, at 387-88.

161. See *Summary Court Judges Benchbook: Criminal Section*, S.C. JUDICIAL DEP’T, <http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/CriminalA.htm> (last visited Oct. 18, 2016).

162. Gabriel, *supra* note 64, at 19.

not “set out any substantive rules that would govern”¹⁶³ offer and acceptance or contract formation, because it is not “concerned with the underlying substantive law of contract validity.”¹⁶⁴ The ECC “is meant to facilitate . . . the use of electronic communications”¹⁶⁵ and “is designed to promote and provide for electronic commerce but specifically is not intended to create substantive rules of law.”¹⁶⁶ The goal of the ECC is to create a legal procedure for recognizing the use of electronic communications, which points to domestic law for substantive matters. Therefore, the ECC need not be converted into evidentiary rules before it can be successfully implemented into a country’s national legal system. While a country is free to implement the principles of the Convention in any way it sees fit, there are many other ways in which China could integrate the ECC into national law.

Regardless of the method of integration, by signing the Convention, China has recognized the need for international harmonization of electronic commerce laws as well as the need to update their own laws to reflect the provisions of the ECC. In addition, China has indicated to the e-commerce community that they are aware of the importance of global commerce to China’s economy and the current and future roles the country will play in the field. As a rapidly emerging economy with all eyes on it, the benefits of ratifying the Convention are many. The current state of Chinese e-commerce law should allow China to adopt the ECC in a relatively smooth manner, as demonstrated by Australia and Singapore, and further bolster the confidence of the e-commerce and legal worlds in China.

C. India and the Non-Signatory’s relationship to the ECC

Despite the fact that India has the lowest per capita GDP of the BRIC economies¹⁶⁷, and unlike fellow BRIC member states is not a major crude oil producing country, India is still an important player in the future of

163. *Id.*

164. *Id.* at 13.

165. *Id.* at 25.

166. *Id.* at 34.

167. Mark Esposito et al., *What is the State of the BRICS Economies?*, WORLD ECON. FORUM (Apr. 19, 2016), <https://www.weforum.org/agenda/2016/04/what-is-the-state-of-the-brics-economies>.

global commerce. India is currently the world's seventh largest economy by GDP,¹⁶⁸ one of the largest in Asia,¹⁶⁹ and has the ninth highest Gross Domestic Product in the world.¹⁷⁰ Like China, India routinely attracts Foreign Direct Investment¹⁷¹ from the West in the form of both investment and outsourced manufacturing and service facilities. As a result, India conducts a large amount of trade with the United States, Canada and the European Union.¹⁷²

Though ranked lower on the world economies list than Russia, Brazil or China,¹⁷³ in several ways India is more important when it comes to global commerce. In 2009, India was the world's fifteenth largest importer of goods, the second largest among BRIC nations.¹⁷⁴ By 2011, imports had increased by at least 54%,¹⁷⁵ making India the eight largest importer of goods, still ahead of Russia and Brazil.¹⁷⁶ In addition, in terms of Purchase Power Parity, India has the fourth largest economy

168. *Gross Domestic Product 2015*, WORLD BANK (Dec. 16, 2016), <http://databank.worldbank.org/data/download/GDP.pdf>.

169. *Id.* With the seventh largest economy in the world, India is either the third largest economy in Asia by GDP.

170. *See Gross Domestic Product 2010*, WORLD BANK (Jul. 1, 2011), <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

171. For instance, outward Foreign Direct Investment from the EU into India amounted to €3.2 billion in 2009. *See Directorate General for Trade, Countries and Regions: India*, EUR. COMM'N, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/india/> (last updated Sept. 5, 2016).

172. Bilateral trade between the US and India was nearly \$50 billion in 2008. *See U.S. Relations with India*, U.S. DEP'T OF STATE (Oct. 9 2015), <http://www.state.gov/r/pa/ei/bgn/3454.htm>. In 2009, the EU imported €32.8 billion in goods and services from India. *See Countries and Regions: India*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/> (last updated Sept. 5, 2015).

173. *See China Overtakes Japan as World's Second-Biggest Economy*, BBC NEWS (Feb. 14, 2011) <http://www.bbc.co.uk/news/business-12427321>.

174. *Trade to Expand by 9.5% in 2010 After a Dismal 2009*, WORLD TRADE ORGANIZATION (Mar. 26, 2010), http://www.wto.org/english/news_e/pres10_e/pr598_e.htm.

175. *Exports Record an Impressive 57% Growth in May*, THE HINDU (June 10, 2011), <http://www.thehindu.com/business/Economy/article2093933.ece>.

176. *See generally The World Factbook*, CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2087rank.html>; and *Economy – major importing countries (2012 rankings)*, GEOHIVE, http://www.geohive.com/charts/ec_exim2.aspx (last visited Oct. 19, 2016).

with \$4.06 trillion in 2010.¹⁷⁷ Briefly stated, India should not be overlooked in comparison to other BRIC nations merely because it has the smallest economy based on value.

Unlike fellow BRIC member states Russia (in which the ECC is fully in force) and China, India has yet to sign the ECC. This means that though India does have current domestic electronic commerce legislation,¹⁷⁸ they have not signaled to the global commercial community that they are ready to update their laws to reflect the revised principles and provisions of international electronic commerce.

Only five of the eighteen signatories to the ECC have yet to ratify the Convention (two countries in which the ECC was in force, were not original signatories to the Convention).¹⁷⁹ However, their signature alone demonstrates that those countries are willing to at least consider amending their domestic legislation to reflect the newly emerging and updated principles contained in the ECC. This perception is important for these countries, as they are mainly emerging economies where there are some generally perceived misgivings about the status of business and electronic commerce law; however misguided. The same is true for India; merely by signing the Convention India could increase confidence in its legal system and the use of electronic communications.

Even though India has not yet adopted the Convention, India is still in a better position with regard to electronic commerce laws than are many other non-signatories; India's Information Technology Act of 2000 (IT

177. See *World Economic Outlook Database: Report for Selected Countries and Subjects*, INT'L MONETARY FUND, http://www.imf.org/external/pubs/ft/weo/2011/01/weodata/weorept.aspx?sy=2009&ey=2016&scsm=1&ssd=1&sort=country&ds=.&br=1&pr1.x=22&pr1.y=11&c=534&s=NGDP_P_RPCH%2CNGDPD%2CNGDPDPC%2CPPPGDP%2CPPPPC%2CPCPI%2CPCPIPC&grp=0&a= (last visited Aug. 1, 2011).

178. The Information Technology Act, No. 21, Acts of Parliament, 2000 (India) [hereinafter Indian IT Act].

179. Dominican Republic and Congo. See *Status United Nations Convention of the Use of Electronic Communications in International Contracts*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (last visited Oct. 18, 2016).

Act) is a domestic enactment of the 1996 Model Law¹⁸⁰. However, unlike other countries with domestic Model Law enactments, India has taken a slightly different approach with the domestic enactment of some provisions of the Model Law. Much like any other Model Law based legislation, the aim of the IT Act is to “provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication.”¹⁸¹ The major departure between the IT Act and the Model Law is India’s “prescriptive approach, where technology is specifically prescribed in a statute.”¹⁸² While taking a prescriptive approach is usually the result of a desire to allow “legislatures and regulatory agencies to play a direct role in setting standards[,]”¹⁸³ it essentially destroys both the Model Law’s and the Convention’s underlying principle of technological neutrality. While the IT Act does recognize functional equivalence, a further departure appears with regard to party autonomy.

Importantly, “some of the features of party autonomy are only marginally present. In relation to the formation of contracts in the electronic medium, the governing rules are”¹⁸⁴ ambiguous and result in uncertainty. This lack of technological neutrality is found mainly within the electronic signature provisions of the IT Act.¹⁸⁵ Concerns were raised in India that “the electronic signatures market encompasses a variety of technologies and procedures that perform the two essential functions of an electronic signature: identification . . . and authentication”¹⁸⁶

In addition, Chapter 2 of the IT Act “provides legal recognition only to digital signatures[,]”¹⁸⁷ essentially a coded signature that can only be

180. *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5.

181. Indian IT Act, *supra* note 178, at pmbl.

182. Jayantha Fernando, *A Developing Country Perspective: The Impact of Electronic Communications Convention on Legislation in the South Asian Region*, in SOURCEBOOK, *supra* note 15, at 374.

183. *Id.*

184. *Id.* at 375.

185. *See* Indian IT Act, *supra* note 178, at ch. 3.

186. Fernando, *supra* note 182, at 375 (citing BUSINESS SOFTWARE ALLIANCE, COMMENTS OF THE BUSINESS SOFTWARE ALLIANCE (BSA) ON THE INFORMATION TECHNOLOGY BILL, 1999 (Feb. 2000)).

187. *Id.*

decrypted by a recipient possessing the key to do so.¹⁸⁸ While it is important that the IT Act does provide recognition of electronic signatures, the specification of a particular technology or category of technology to be used ties electronic commerce in India to the specified technology. The problem with such an approach is that it does not allow for the legitimate use of new technologies, some of which may be just as reliable and significantly cheaper. In addition, it burdens future sitting of Parliament by more or less requiring an amendment for every new technology of which the legislators and experts approve—a monumental and time consuming task.

Given these problems with the IT Act as adopted in 2000, an expert committee was appointed to review the act and suggest revisions.¹⁸⁹ In August 2005, the committee did put forth recommendations that would serve to eliminate the perceived problems in India's IT Act.¹⁹⁰ The committee suggested that the legislature amend the IT Act to provide for technological neutrality, an extremely important component of any electronic commerce legislation given the rapid development of technology in the last five years alone.¹⁹¹ The committee also suggested reforms in the area relating to electronic signatures as a means of further implementing a neutral approach to the use of technology and to provide means for legal recognition of electronic signatures that complies with the Model Law.¹⁹² Subsequently, a bill to amend the IT Act was created based on the expert committee's report and submitted to the Indian legislature in December 2006 and was finally ratified in 2009.¹⁹³

Interestingly, the proposed amendments draw solely on the Model Law for inspiration. It appears that neither the "Indian IT Amendment

188. See generally *What is Public-key Cryptography*, GLOBALSIGN, <https://www.globalsign.com/en/ssl-information-center/what-is-public-key-cryptography/> (last visited Oct. 19, 2016).

189. *Report of the Expert Committee, Proposed Amendments to the Information Technology Act 2000*, DEP'T OF INFO. TECH. (Aug. 2005), <http://www.mit.gov.in/content/report-expert-committee-amendments-it-act-2000-3>.

190. *Id.*

191. *Id.*

192. *Id.*

193. Fernando, *supra* note 182, at 378. See also Karnika Seth, *IT Act 2000 vs 2008 – Implementation, Challenges, and the Role of Adjudicating Officers*, NAT'L SEMINAR ON ENFORCEMENT OF CYBERLAW (May 8, 2010), http://catindia.gov.in/writereaddata/ev_rvnrbv111912012.pdf.

Bill nor the [expert committee] . . . considered any of the provisions of the Convention,”¹⁹⁴ which is made apparent by the fact that “none of the unique features contained in the Convention are found in the Amending Bill.”¹⁹⁵ This is despite the fact that when the expert committee published their report in August 2005, the UNCITRAL Working Group had nearly completed the final draft of the ECC;¹⁹⁶ the Convention was adopted only four months later. However, it is possible that the drafters of the report were unaware that the ECC was in the final drafting stages and would soon be submitted to the General Assembly.

The same cannot be said for the proposed bill to amend the IT Act, which was not submitted until sixteen months after the expert committee’s report.¹⁹⁷ Though it is highly likely that the proposed amendments were based solely on the report published by the expert committee, there is no clear reason for ignoring the Convention in drafting the proposed amendments. The Indian Parliament and/or members of the expert committee must have been aware of the ECC, given that the Convention had been adopted by the General Assembly over one year before the IT Act amendment bill was submitted to the Indian Parliament.¹⁹⁸

While the changes suggested by the expert committee would certainly improve the IT Act, they would still not bring it into full compliance with the ECC, as some of the unique key provisions and definitions of the Convention are missing in the proposed amendments.¹⁹⁹ This discrepancy and the fact that the proposed amendments, if enacted, would still leave India behind current developments could explain the Indian Parliament’s reluctance to approve the proposed changes. The drafters of the amendment bill would have been wise to follow their neighbor Sri

194. Fernando, *supra* note 182, at 378.

195. *Id.* at 379.

196. The Committee’s report was published on August 29, 2005 and the ECC was adopted on November 23, 2005. Press Release, Press Info. Bureau Gov’t of India, Expert Comm. on Amendments to IT Act 2000 Submits its Report (Aug. 29, 2005), <http://meity.gov.in/content/report-expert-committee-amendments-it-act-2000-3> [hereinafter Press Release].

197. Press Release, *supra* note 196. *See also infra* note 198.

198. The ECC was adopted by the General Assembly on November 23, 2005. Press Release, *supra* note 196. The IT Act amendment bill was submitted to the Indian Parliament on December 6, 2006.

199. Fernando, *supra* note 182, at 355–73.

Lanka's example and use the Convention as a model for drafting the amendments proposed by the expert committee.²⁰⁰

Nevertheless, it is important to point out that while the proposed changes do not meet ECC standards, they are more in line with developments in the e-commerce world than the current version of the IT Act. In fact, it could be argued that the proposed amendments appear to align the IT Act with the Model Law on Electronic Signatures of 2001,²⁰¹ which, while not the Convention, is slightly more current than the 1996 Model Law on Electronic Commerce.

Regardless of whether the proposed amendments align the IT Act with the Model Laws or the Convention, adopting the proposed amendments would provide the IT Act with technology neutrality one of the key principles of the ECC. However, India should seriously consider amending the IT Act to reflect the provisions of the Convention, instead of the now outdated Model Laws. In fact, it has been argued that aligning the IT Act with the Model Law on Electronic Signatures (even as an interim measure) may make it more difficult to later update the IT Act to reflect the principles of the ECC.²⁰²

As one of the most rapidly developing economies in the world, India is an important player in the future of global commerce. With the amount of FDI and outsourcing coming in, India, much like China and ASEAN, has much to gain from adopting the ECC and much to lose should it chose to remain behind the times. Furthermore, as a current non-signatory, India could play an important role in the wider adoption of the Convention throughout developing countries, by setting an example for other similarly situated countries to follow.

IV. THE FUTURE OF ELECTRONIC COMMERCE

Electronic commerce is without a doubt the way of the future. The Internet and the continued development of information and communications technology have changed virtually every aspect of life in the developed world. In the last twenty years, the Internet has gone from a mainly governmental or business tool for communicating via

200. *Id.*

201. *Id.* at 383.

202. *Id.*

email, to an integral part of the daily lives of the majority of people throughout the first world. Now, the Internet is not only a business tool, but a source of information, and a way of communicating “face-to-face” across time zones and cultures. Anyone with a computer and an Internet connection can purchase just about anything they desire, maintain global networks and stay in contact with friends and family, regardless of time or location. On a daily basis, Internet users watch live television, stream movies, download music, access their home television and cable box, and collaborate on documents and presentations simultaneously. In addition, scholars and students no longer need travel to libraries for every piece of information; they save time and money by going online.

This does not even include the rapid development of mobile phone technology in the five years since the ECC was adopted. Smart-phone and tablet owners use their devices to obtain turn-by-turn audio directions, find the nearest restaurant, conduct a video call from the back of a cab, respond to email, and make an award winning short film.²⁰³ In fact, the last two paragraphs were written on a Blackberry.

iPhones, iPads, Blackberrys, Androids, touch screen tablet computers and similar technology have become ingrained in the daily lives of people and businesses across the globe. It is undeniable that their use will only increase as the technology becomes more efficient and cost effective. As the infrastructure for this technology spreads, and more people and businesses in the developing world have the access available in developed countries,²⁰⁴ the importance of electronic commerce as a means of conducting business will only continue to grow.

The ECC is poised to play a critical role in the continuing development of electronic commerce. As access to the Internet and other

203. See generally Rachel Mansur, *Splitscreen: A Love Story Shot Entirely On The Nokia N8 Mobile Phone*, BUS. INSIDER (June 29, 2011, 1:00 PM) <http://www.businessinsider.com/splitscreen-a-love-story-shot-entirely-on-the-nokia-n8-mobile-phone-2011-6?IR=T>.

204. 49.6% of the world’s internet users are located in Asia. From 2000-2016 the number of internet users increased by 7,416% in Africa, 3,937% in the Middle East, 2,029% in Latin America and the Caribbean, and 1,468% in Asia. By comparison, the highest percentage of growth in the developed world was 485% in Europe, fully half of the growth experienced in Asia in the same period. Importantly, in all of the regions with the highest growth, internet users still account for less than one third of regional populations. *World Internet Usage and Population Statistics*, INTERNET WORLD STATS, <http://internetworldstats.com/stats.htm> (last visited Oct. 18, 2016).

communications technology increases in Africa, Asia, the Middle East and Latin America, so too will the use of electronic communications in negotiating and concluding contracts around the globe. Of course, the spread of both the technology and its business applications throughout the developing world will require the implementation of legal structures to validate those contracts and communications. ASEAN has proven that the ECC is the perfect tool for implementing domestic electronic commerce legislation. By using the Convention to create their own laws, as the ASEAN member states and others have done,²⁰⁵ countries without sufficient domestic legislation can ensure a degree of legal validity for electronic contracts on both the domestic and international levels. In addition, countries without electronic commerce legislation could adopt the ECC word-for-word, changing Article 1 to apply to domestic as well as international contracts, and instantly create an internationally accepted framework for legal recognition of e-contracts in their country. Regardless of the way in which it is implemented, creating domestic legislation based on the ECC will only enhance a developing country's ability to engage in global commerce by creating certainty for both domestic and international businesses. With that certainty behind them, "developing-country companies [will be able to] effectively compete for . . . business opportunities that can lead to increased trade and development."²⁰⁶

It is clear that adoption of the ECC could greatly benefit developing countries. However, the benefits to developed countries are not as clear. Given the relationship between the Convention and the Model Law, lawmakers and legal scholars in those countries that have already adopted the Model Law may not see any reason why they should amend their legislation to reflect the ECC. This could be attributed to the "if it's not broke, don't fix it" mentality that seems to permeate the cultures of many leading developed countries. The United States, Canada, and Europe, both at the European Community and individual member state

205. When drafting their domestic legislation, Sri Lanka, an ECC signatory, took note of the ECC principles and provisions. *See generally* Fernando, *supra* note 182, at 355–73.

206. Peter W. Schroth & William J. Luddy, Jr., *On the Particular Value to Africa and the Developing World of the UN Convention on the Use of Electronic Communications in International Contracts*, 7 *PROC. INT'L ACAD. AFR. BUS. & DEV.* 136 (2006) (obtained directly from the author).

levels, have already implemented laws or directives, which at the very least require member jurisdictions to adopt laws providing for electronic commerce. UETA and UECA in the US and Canada, respectively, have largely succeeded in harmonizing the laws of the various sub-national jurisdictions of those two countries. The US went even further by enacting E-sign at the federal level, giving recognition to the use of electronic signatures, as a matter of national law, and encouraging states to adopt UETA by providing that the law will apply only in those states without it.²⁰⁷ Electronic commerce has also been recognized and validated in Europe. The European Community's two directives relating to electronic contracts and signatures require that member states implement their own domestic laws that will do the same. France and Ireland have done so by enacting domestic laws based on the Model Law in 2000; as has Slovenia, in 2000, four years before joining the European Union.²⁰⁸ The other 24 member states are required by EU law to recognize the use of electronic communications in contracting, even if they have no specific domestic law so providing.

UNCITRAL and legal scholars consistently state that the Convention and the Model Law essentially achieve the same goals and have the same purposes, even if the wording is not exactly the same.²⁰⁹ Given this similarity, many may wonder why the US, Canada and Europe should adopt the ECC when they already have laws in place to legitimize the use of electronic communications in forming contracts. There are two main arguments for the adoption of the ECC, one more academic than the other, but both with practical and legal affects.

The first is the need for the continued harmonization of laws in the international field. While the Model Law has significantly advanced the legal protection of electronic contracts and created a basic level of harmonization across the globe, it has not had the impact the Convention could have. In fact, it can never have the same impact as the Convention. The Model Law, as all such laws, was meant only to serve as a guide, a

207. See generally 15 U.S.C. §§ 7001–7002 (2000).

208. Slovenia joined the European Union in 2004. *Slovenia and the Euro*, EUR. COMM'N, http://ec.europa.eu/economy_finance/euro/countries/slovenia_en.htm (last updated Oct. 3, 2013). See also *Status UNCITRAL Model Law on Electronic Commerce (1996)*, *supra* note 5.

209. See generally, UNCITRAL Explanatory Note, *supra* note 22. See also Connolly, *supra* note 15, at 78.

set of “best practices” for countries to follow when creating their own domestic legislation. It has had great success and was a necessary step in the development of electronic commerce law; however, the Model Law is and always will be a model. Thus, in drafting domestic legislation, states are free to derogate from the model as much as they wish. They can pick and choose which provisions to include, substitute words that may change the intended meaning, or disregard the model all together. Such is the case with the Model Law; it has been adopted in over forty jurisdictions worldwide, which means there are over forty versions of the Model Law in existence today. Though these versions may all be substantially similar and share many provisions, it is unlikely that any two versions are exactly the same. This exposes an inherent flaw in the use of model laws in harmonization; “similar” does not mean “same.” In fact, it can be more difficult to work with multiple laws that are substantially similar, with few or minor distinctions between them, than it can be to work with vastly different laws. One is less likely to confuse completely different approaches than they are provisions of laws that are nearly, but not quite identical. Simply put, the smallest variation can make the biggest difference.

Harmonization is generally one of the main goals behind the drafting of U.N. Conventions or multi-lateral treaties, be they on matters of public or private law. As the world grows smaller through the advancement of technology and the phenomena of globalization continues to spread, the need for harmonized laws becomes apparent. Whether they are supplied by foreign vendors, have subsidiaries in different countries or have a random few customers abroad, businesses of all shapes and sizes are increasingly engaged in international commerce. Many companies utilize forms of electronic communication at some stage of negotiating contracts. Gone are the days when negotiating an important contract with a foreign supplier required a long trip abroad, even for those people who prefer to meet in person to conclude the contract. Offers and acceptances are often made through e-mail, as are discussions regarding terms that will later be included in the final contract. By ignoring these realities and maintaining the status quo the US, Canada and Europe will foster an environment of discord within the international commercial community. Keeping track of the minor variations in Model Law based legislations, in hopes of avoiding a serious mistake, will only increase the cost of doing business as companies begin to rely more and more on electronic

communications. For this reason alone, developed countries should adopt the ECC.

However, there is a far more practical and important reason to implement the ECC, which also demonstrates the need for harmonization. This reason is rooted in Article 18 of the Vienna Convention on the Law of Treaties (Vienna Convention) which is now, arguably, a customary principle of international law. Article 18 reads, in part, “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty. . . .”²¹⁰ In other words, once a country has signed a treaty, they are bound by international law to not take steps that conflict with it. Since the Vienna Convention was based upon general principles of customary international law, and given the number of signatories, it is highly likely that the Vienna Convention now forms part of the principles of customary international law and is applicable to all nations.²¹¹ Thus, under customary international law and the Vienna Convention, the signatories to the ECC are obligated to not adopt measures conflicting with the Convention.

The main argument for the adoption of the Convention is that this rule affects current signatories Iran, Saudi Arabia, Panama, Singapore, the Republic of Korea, and China, in addition to countries in which the Convention is in force, such as Russia.²¹² Most people will recognize the significance that these countries have in relation to important global

210. Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

211. “One archetypical example of a treaty describing customary international law is the Vienna Convention on the Law of Treaties” Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1798 (2011). See generally *Vienna Convention on the Law of Treaties*, U.S. DEP’T. OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Oct. 18, 2016) (“The United States considers many of the provisions of the [Treaties] Convention. . . to constitute customary international law on the law of treaties.”).

212. *Id.* See also Vienna Convention on the Law of Treaties art. 18(a), *supra* note 210; *Status United Nations Convention of the Use of Electronic Communications in International Contracts*, U.N. COMMISSION ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (last visited Oct. 18, 2016).

industries. Furthermore, by specifically extending application of the ECC to other conventions already in force, Article 20 implicates additional signatories and fields.²¹³ In addition, by operation of Article 1 of the Convention only one party need be located in a contracting state for the ECC to apply.²¹⁴ Thus, a party located in a non-contracting state could be subjected to the ECC if the conflict of law rules point to the law of a state party to the Convention. While at the time of writing Singapore is the only country listed that will be a party when the Convention enters into force, the principles of treaty law mentioned above mean that industries in the other ECC signatories could be impacted.

The energy sector is the largest and probably most important industry linked to current ECC signatories, with four signatories being in the top ten largest producers of oil, coal and natural gas in 2014.²¹⁵ Russia is second for oil, second for gas and sixth for coal.²¹⁶ China is first for coal, fourth for oil, and fourth for gas.²¹⁷ Iran is third for gas and seventh for oil, while Saudi Arabia is the second largest producer of oil and the seventh largest for gas.²¹⁸ In addition, Russia holds 38% of the world's proven natural gas reserves, while the entire Middle East holds 35%.²¹⁹ Russia also holds 18% of the world's coal reserves, while China holds 13%, second and third (respectively) to the United States.²²⁰ Combined, these four ECC signatories produced over 38% of the world's main energy resources – coal, oil and natural gas – in 2014.²²¹

213. ECC art. 20 specifically extends application of the ECC to the New York Convention, the CISG and numerous other conventions. ECC, *supra* note 42, art. 20.

214. ECC, *supra* note 42, art. 1.

215. *Infra* notes 218–222.

216. Oil: 10,777,000 barrels per day. Gas: 604 billion cubic meters. Coal: 170.9 million tonnes oil equivalent. BP STATISTICAL REVIEW OF WORLD ENERGY, BP 8, 22, 32 (June 2015), <https://www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2015/bp-statistical-review-of-world-energy-2015-full-report.pdf>.

217. China 2013: Oil: 4,216,000 barrels daily Gas: 124.9 billion cubic meters. Coal: 1.8 billion tonnes oil equivalent. *Id.* at 8, 22.

218. Iran: 3,525,000 barrels of oil per day and 164 billion cubic meters of gas. Saudi Arabia: 11,393,000 barrels of oil per day, 100 billion cubic meters of gas. *Id.*

219. See *Natural Gas Reserves*, UNCTAD, <https://archive.is/o/RjGb/r0.unctad.org/infocomm/anglais/gas/market.htm> (last updated July 10, 2014).

220. See BP STATISTICAL REVIEW OF WORLD ENERGY, *supra* note 216, at 30.

221. *Id.*

Another large and important industry tied to Convention signatories is information technology. This is a fitting coincidence as the rapid progress in information technology from these countries over the last twenty years has led to the formulation of both the Model Law and the ECC. Asian countries are the dominant force in the exportation of information technology, with China, Singapore and South Korea all in the top five in 2009.²²²

In addition to these two major industries, with a large representation among ECC signatories, there is a mix of other diverse and significant sectors, which are represented among Convention signatories to a lesser degree. Of these, the financial sector is arguably the most important. ECC Article 2 excludes many portions of the financial sector.²²³ However, “it should be noted that not all financial transactions are excluded under the [ECC].”²²⁴ Of the top fourteen financial centers in the world, as determined in a centrality study by The Wharton School in 2002, Singapore and Panama were ranked as fourth and fourteenth, respectively.²²⁵

Defense and shipping are also linked to the ECC by Russia and Panama, respectively. In 2007-2008 Russia became the second largest arms exporter behind the United States, supplying weapons to eighty countries.²²⁶ Shipping is highly relevant to the commercial world, and most of the industries listed above. The majority of the world’s goods in international transit are moved by container vessels on the high seas.²²⁷ Shipping is represented among ECC signatories by Panama, which has

222. “Asia’s share of global ICT exports at record high,” *Asia’s Share of Global ICT Exports at Record High*, THIRD WORLD NETWORK (Feb. 22, 2011), <http://www.twn.my/title2/wto.info/2011/twninfo110205.htm>.

223. ECC, *supra* note 42, art. 2. Boss, *supra* note 40, at 76–77.

224. Boss, *supra* note 40, at 77.

225. SANG RIM CHOI ET AL., BANKS AND THE WORLD’S MAJOR BANKING CENTERS, 2000, WHARTON FIN. INSTS. CTR. 24 (July 2002), <http://fic.wharton.upenn.edu/fic/papers/02/0236.pdf>.

226. RIA Novosti, *Russian Arms Exports Exceed \$8 bln in 2008*, SPUTNIK INT’L (Dec. 16, 2008), <https://sputniknews.com/russia/20081216/118889555.html> (stating “Russian arms exports in 2008 have been worth over \$8 billion. . .”).

227. See *International Maritime Organization: IMO Profile*, UN-BUS. ACTION HUB, <https://business.un.org/en/entities/13> (last visited Sept. 21, 2016) (stating “over 90% of the world’s trade is carried by sea . . .”).

the largest registry of merchant vessels in the world, accounting for 23% of deadweight tonnage shipped and 8,065 ships.²²⁸

Finally, ECC Article 20 extends the scope of the ECC to cover the New York Convention, which deals with foreign arbitration awards.²²⁹ This could become particularly relevant in the case of Singapore. Over the last several years, Singapore has become a leading regional center for commercial arbitration in Asia. Worldwide, Singapore is now the fifth most preferred seat of arbitration,²³⁰ and the Singapore International Arbitration Centre (SIAC) is the fourth most preferred arbitration institution.²³¹

Though this review of major industries that stand to be impacted by the ECC entering into force has been brief, it is plain to see that simply through the principles of international treaty law alone, the ECC could have a much wider impact than previously realized. All of these industries are extremely important parts of global commerce with which both the developed and developing world must deal every day. In addition, the possible impact on arbitration and shipping could have significant results, as nearly all commercial contracts include arbitration clauses and nearly all goods are transported on the high seas. As Singapore continues to grow and become more important to arbitration, a significant number of arbitration agreements and awards in Asia and around the world could be affected. Furthermore, with Panama accounting for such a large percentage of the world's shipping and merchant fleet, many more transactions could be touched by the ECC through the shipping arrangements. Thus, given the need for harmonization and the potential for impact upon major industries, the developed world should adopt the ECC to avoid heaping unexpected consequences upon their own commercial sectors.

228. REVIEW OF MARITIME TRANSPORT 2009, U.N. CONFERENCE ON TRADE AND DEVELOPMENT 54-55 (2009), www.unctad.org/en/docs/rmt2009_en.pdf.

229. ECC, *supra* note 42, art. 20. See also *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Sept. 22, 2016).

230. WHITE & CASE LLP, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 19 (2010), <http://www.arbitration.qmul.ac.uk/docs/123290.pdf>.

231. *Id.* at 23.

V. CONCLUSION

There are a great many benefits to adopting the ECC, for both developed and developing countries. For developed countries such as the United States, Canada and EU member states, one benefit is the added legitimacy their support will give to a convention that is based largely upon their own laws. This will further the harmonization of e-commerce law across the globe, and allow for the creation of a single, worldwide framework for the recognition of electronic contracts, which will only serve to protect the interests of their own commercial sectors as well as some governmental operations. For developing countries both with and without domestic e-commerce legislation, adopting the ECC, either to create a new framework where none existed or to amend an existing law, is an opportunity to bolster confidence in their e-commerce system. Doing so will allow for businesses within their borders to compete more effectively in the international commercial market and potentially bring more trade and development opportunities and foreign direct investment money into their domestic market. The consequences of the increased ability to compete could eventually lead to raising the standard of living in developing countries.

Though the Convention on the Use of Electronic Communications in International Contracts appears to have died on arrival, the fact is the Convention has been much more influential than previously realized. The ECC has been utilized to influence the development and implementation of electronic commerce law in developing countries, in regional economic organizations, and even in developed countries. However, all of these developments have taken place behind the scenes and under the radar of many in the international commerce field. Only eighteen countries have signed the convention; however, at least nine other nations, have chosen to adopt the provisions of the ECC without signing the Convention itself.²³² This means that there are nine additional countries that could decide at any time to accede to the Convention,

232. See *Status United Nations Convention on the Use of Electronic Communications in International Contracts* (New York, 2005), *supra* note 6. See also Connolly, *supra* note 15; *Galexia Consulting To Assist ASEAN Harmonise Electronic Commerce*, *supra* note 105.

bringing it into force and surprising many in both the legal and corporate commercial fields.

The most important development regarding the ECC is Australia's decision to amend their e-commerce legislation with the express purpose of later acceding to the Convention. In fact, the amendments have already been implemented at the federal level, and are currently being adopted across Australia's sub-national jurisdictions.²³³ It is highly likely that this process will be completed within the next year, allowing Australia to accede to the Convention by the end of 2012, if not earlier. Given the principles of treaty law, if Australia accedes and the ECC comes into force, it could have significant ramifications for major global industries relied upon by the developed world. It is clear the ECC has become a much more important document than realized. It should be adopted for the reasons outlined above, the most important of which is the fact that Australia is about to perform the miraculous and even unprecedented act of bringing the Convention back from the dead.

233. See Arnold, *supra* note 11; McClelland, *supra* note 12. See also *Electronic Transactions Act 2011*, AUSTLII, http://www.austlii.edu.au/au/legis/wa/consol_act/eta2011256/ (last visited Sept. 22, 2016).