

USING E-SIGNATURE IN VIETNAM: MARKET PRACTICE AND LEGAL VALIDITY

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Wet signature and physical execution of contract has gradually become obsolete concepts in a technology-driven world. The outbreak of unprecedented coronavirus pandemic, during which direct physical contact is drastically reduced, asserts the aforementioned assumption. Despite a long-standing tradition of honouring the validity of wet signature and seal in any transaction, the recent uptake of e-signature, be it motivated by digital conversion macropolicy or forced by Covid-19 related social distancing, has now been prevalent in Vietnam.

Against this backdrop, legal questions on form and legality of e-signature in ordinary transactions emerge more often than ever. In this article, the authors will examine and address the following key legal questions in connection with the use of digital signature.

1. What are the essential forms of e-signature?
2. Would a contract be legally valid and binding if it is executed by way of using e-signature?
3. Would e-signatures be acceptable to the documents submitted to the State authorities?

What are the forms of e-signature?

The legal terminology of e-signature in Vietnam is akin to that set forth under the UNCITRAL Model Law¹. Accordingly, e-signature must embody the following intrinsic characteristics, (i) it is created by electronic means; (ii) it is affixed or logically associated with data message; (iii) it has the ability to identify the signatory of the data message; and (iv) it represents the signatory's approval of the information contained in the data message. As such, e-signature may vary in diversified forms, including but not limited to digital signature, scanned signature, image signature, email confirmation, electronic consent submitted an online platform, electronic devices or applications.

From the perspective of practical use, scanned signature, image signature, email confirmation and digital signature, in such particular order of commonness, are vividly employed for the

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¹ See *more*: 2005 Law on E-transactions, art. 21; 2001 UNCITRAL Model Law on Electronic Signatures, art. 2(a).

electronic execution of commercial contracts. Below is the simple demonstration of such frequently used forms of e-signature.

Common forms of e-signature ²	Method of creation	Common usage	Pros & cons
Scanned signature	The data file of the contract is printed in hard copy by any party to the contract and its signatory person will sign it in wet-ink. Then, the signed contract is converted into electronic format (via scanning process) and sent to the other parties for their counter-signing.	Scanned signature's common usage is in contracts/ agreements whereby physical execution is difficult to carry out due to impediments, for instance, cross-border transactions.	<p>Pros:</p> <ul style="list-style-type: none"> (1) Accelerating the process of document execution by avoiding the prolonged period caused by courier or physical meetings to sign the documents. (2) Cost-saving (i.e. save delivery and travelling expenses, reduce waste of resources such as paper, personnel, etc.). (3) Facilitating the filing and storage process thanks to digitized and compact instruments. (4) In essence, the scanned signature is a wet-ink signature signed by the signatory on each document, which makes it contain more personal imprint of the signatory. Thus, the scanned signature can restrict the abuse or forgery of signature and contribute to prove the signatory's consent to the document contents. <p>Cons:</p> <ul style="list-style-type: none"> (1) Being converted into an electronic format such as

² Apart from those being listed, electronic consent (i.e. hitting "Accept" or "Agree" button on virtual platform) is also widely used in virtually formulated transactions whereby the execution takes place substantially if not wholly on the platform developed by one party. However, this means of "execution" shall not be included into the coverage of this article.

			<p>image or pdf via scanning process and reverted without identity verification or encryption, the integrity of the entire document after signing is not guaranteed because a party may interfere and edits it.</p> <p>(2) Besides, reliability of scanned signature to prove that the document is duly printed and signed by the signatory is not completely guaranteed.</p> <p>(3) There is a possibility that the scanned signature is abused for other purposes (i.e. used as an image signature embedded in other documents)</p>
Image signature	<p>Unlike scanned signature, printing hard copies is not required during the creation of image signature. The signatory of each party only has to insert their signature into the signature box dedicated to them and revert the data file of the contract (with their inserted image signature) to the other parties for their counter-signing.</p>	<p>Image signature is often used in situations where the signatories are unable to represent in geographical location to sign the printed copy of a document by wet-ink signatures.</p>	<p>Pros:</p> <p>(1) Same with those in Item (1), (2) and (3) of the pros of the aforementioned scanned signature.</p> <p>(2) Being electronically saved and able to insert into the data file, the parties can execute the documents even in case the signatory is not present at a place where the contract can be printed and signed by wet-ink signatures.</p> <p>Cons:</p> <p>(1) Same with those in Item (1) of the cons of the aforementioned scanned signature.</p> <p>(2) Failure to prove the consent of signatory to the document</p>

			<p>content is a potential risk, especially in case where a dispute may arise since the signatory of a party may likely disclaim his/her consent to the document.</p> <p>(3) Same with that in Item (3) of the cons of the aforementioned scanned signature.</p>
Email confirmation	<p>Contract will be made in the form of an electronic mail (either incorporated into and presented directly in an email or via file attachment) by one party and sent to the other parties seeking their confirmation to be bound by the terms of the contract. Such email confirmation, if sent by the offeree to the offeror, shall be considered as the offeree “has executed” the contract, thereby establishing a binding contractual agreement between the offeror and the offeree.</p>	<p>Image confirmation is often used for internal communications in a corporation, or also often used in case of acceptance of proposal prior to the execution of an official contract. The common feature of situation which this form is applied is capacity to authenticate the offeree by email address.</p>	<p>Pros:</p> <p>(1) Same with those in Item (1), (2) and (3) of the pros of the aforementioned scanned signature.</p> <p>(2) The approval of the parties shall be (partly) insured by the identity authentication and verification measure.</p> <p>(3) Quite secured against fraud and tampering of signed documents since most email confirmation will be sent within specific context and no party is allowed to tamper with the email which has been sent by one party and received by the others.</p> <p>Cons:</p> <p>(1) The parties still have to manually check to ensure the integrity of data</p>
Digital signature	<p>Digital signature is a unique subset of e-signature as it involves</p>	<p>Besides being used in the contract/agreement between the</p>	<p>Pros:</p> <p>(1) Same with those in Item (1), (2) and (3) of the pros of the</p>

	<p>encryption. Accordingly, the digital signatures of the parties shall be created by using a cryptographic platform/device provided by a digital signature authentication service provider, and then, it is embedded in electronic documents that need to be signed. The parties receiving such document is able to determine the compatibility of the digital signature and the integrity of the contents of data as from the time of making the abovementioned digital-signing³.</p>	<p>parties, digital signature is used mostly in the administrative situations where a digital signature is required for the submission of tax declarations, enterprise registration, customs procedures, social insurance declarations, e-invoice and so forth.</p>	<p>aforementioned scanned signature.</p> <p>(2) The approval of the parties shall be insured by the identity authentication and verification measure.</p> <p>(3) The encryption helps to protect the integrity of the data and prevent interference without the awareness and consent of the parties. The parties on either side of a digital signature can also detect whether its associated electronically signed document was altered or changed in any way that would invalidate it.</p> <p>(4) Facilitating the filing and storage process thanks to digitized and compact instruments, especially in data accessibility by using a authentication number.</p> <p>(5) Highly secured against fraud and tampering of signed documents.</p> <p>Cons:</p> <p>(1) Requires both/all parties involved purchase the certificates from the digital signature authentication service provider, who granted a <i>digital certificate</i> issued by the National Service Provider.</p>
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³ See more: Decree No. 130/2018/ND-CP providing detailed regulations for implementation of the Law on E-transactions regarding digital signatures and digital signature authentication service, art. 3.6

			(2) Storage risk depending on the digital signature authentication service provider.
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Would a contract be legally valid and binding if it is executed by way of using e-signature?

From a global perspective, it was not until 1996 that e-signature was formally recognized in a legislative document, which is the Utah Digital Signature Law attempting on governing e-signatures, certificates and certification authorities⁴. Since then, e-signature quickly became a legal hotspot encouraging other jurisdictions to formulate rules for the same (e.g. USA, Germany, Italy, Spain, Argentina, European Union, etc.) with a view to grant the legal status of contracts or agreement signed by the e-signature as equal as those being signed by conventional handwriting. However, multiple jurisdictions come along with multiple approaches, making it difficult to set the common standards for e-signatures. Thus, the UNCITRAL adopted the Model Law on Electronic Signatures on 5 July 2001 as the recommended model for other states to accommodate their legislation in line with a harmonized international approach⁵.

In Vietnam, on the basis of the UNCITRAL Model Laws⁶, e-signature was initially recognized and given legal effect since 2005 by the promulgation of the 2005 Law on E-transactions and then Decree 52/2013/ND-CP dated 16 May 2013 on e-commerce; and Decree 130/2018/ND-CP dated 27 September 2018 guiding the provisions of the 2005 Law on E-transactions on digital signatures and digital signature authentication service and other relevant legislation.

In general, the regulatory framework of Vietnam fully recognizes the legitimacy of e-signature provided that it satisfies the requirement specified in art. 24 of the 2005 Law on E-Transactions. Accordingly, an e-signature used to sign data message shall be deemed valid subject to its satisfaction of the following criteria:

- **First criterion** – Regardless of its form, a signature bears the legal functions of identifying the signatory and representing the signatory's approval or consent of the contents in

⁴ R. Jason Richards, "The Utah Digital Signature Act As "Model" Legislation: A Critical Analysis" (1999) 17 J. Marshall J. Computer & Info. L. 873

⁵ This Model is built on the fundamental principles of art. 7 of the UNCITRAL Model Law on Electronic Commerce (1996) with respect to the fulfilment of the signature function in an electronic environment, as a discrete framework to specify the legal issues of electronic signature.

⁶ UNCITRAL Model Law on Electronic Commerce (1996) and UNCITRAL Model Law on Electronic Signatures (2001)

which the signature is created. Likewise, the methods of creating e-signatures must also fulfill these functions.

- **Second criterion** – The method of creating the e-signature (as in the first criterion) is sufficiently **reliable** and **appropriate** to the purpose for which the data message was created and sent. There is no quantum as clearly set out by laws to determine the *reliability* nor *appropriateness*. As the e-signature laws in Vietnam substantially follows the approach of the UNCITRAL Model Law, it would be reasonable to revisit the relevant factors in the spirit of the UNCITRAL Model Law⁷ that may be used to address whether an e-signature is reliable and appropriate. These include legal, technical and commercial factors as follows: (a) the sophistication of the equipment used by each of the parties; (b) the nature of their trade activity; (c) the frequency at which commercial transactions take place between the parties; (d) the kind and size of the transaction; (e) the function of signature requirements in a given statutory and regulatory environment; (f) the capability of communication systems; (g) compliance with authentication procedures set forth by intermediaries; (h) the range of authentication procedures made available by any intermediary; (i) compliance with trade customs and practice; (j) the existence of insurance coverage mechanisms against unauthorized messages; (k) the importance and the value of the information contained in the data message; (l) the availability of alternative methods of identification and the cost of implementation; (m) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (n) any other relevant factor (e.g. a third party providing the digital signature authentication service)⁸.

Besides, in case the law requires a document [data message] to be affixed with the seal of an organization, the legislators require stricter criteria to ensure the legitimacy of documents to which an electronic signature is embedded, namely authentication⁹. Nonetheless, only the digital signature, at least to the explicit extent provided by the prevailing laws (i.e. Decree 130/2018/ND-CP), can be authenticated.

All in all, regulatory framework of Vietnam is concrete and unequivocal about the validity of contracts made in electronic form and signed by digital signatures, while the legal validity of the contracts using scanned signature or image signature remains debatable. However, owing

⁷ UNCITRAL Model Law on Electronic Commerce (1996)

⁸ See Guide to Enactment of the of UNCITRAL Model Law on Electronic Commerce (1996), para 57-58.

⁹ Technically, art 24.2 of the 2005 Law on E-Transaction stipulates two conditions of the e-signature in this case which are: (i) to satisfy the conditions stipulated in art. 22.1 of the 2005 Law on E-Transactions; and (ii) the e-signature must be authenticated. However, due to the provision of art. 22.2 of the 2005 Law on E-Transactions, an authenticated e-signatures shall be considered to satisfy all of the conditions specified in art. 22.1.

to tendency to respect the agreement between the parties and minimize the invalidation due to the improper form of the agreement, we opine that the scanned signature and image signature are lawfully valid if they are capable of proving the authority and approval of the signatories to the documents. Though concerns related to the invalidity of these signatures may only be theoretical, the harder work is how to establish sufficient security check to prevent frauds by using such form of e-signatures (i.e. the signature was forged, placed on the document by an unauthorized person or that signature was removed from one document and placed on another).

For that reason, the 2005 Law on E-Transactions provides the obligations and liability of the concerned parties, including the signatory of e-signature and party accepting e-signature, as a deterrent against fraud. In terms of the signatory, their obligations focus on the management of e-signature to avoid it being misused or wrongfully used, and to notify other relevant party(ies) upon the discovery that e-signature is no longer under control; and in case of using authenticated e-signature, to ensure the accuracy and integrity of information in the e-certificate. These obligations are to prevent e-signature from illegal usage of any third party(ies) and reduce the damage may be caused by such illegal act. With respect to the party accepting e-signature¹⁰, the obligations focus on verifying the reliability of e-signature and relevant e-certificate, if any, before the acceptance of such e-signature¹¹.

Nevertheless, it would be necessary to draw a line between the fulfilment of the above obligations and the validity of e-signature. In other words, we take the view that any failure to comply with such obligations, either from the signatory's end or its counterparty, shall not adversely affect the validity the e-signature. For instance, signatory is required to take actions to prevent illegal usage of e-signature and to warn other party if misuse takes place, but failure to perform the same does not invalidate the e-signature (provided that such e-signature has been created in the proper manner). In fact, failure of the concerned parties to fulfill their statutory obligations may only lead to certain legal liabilities¹². Accordingly, either signatory or the party accepting e-signature shall be responsible before the law for any consequence resulting from its failure to uphold their obligations as set forth in art. 25 and art 26 of the 2005 Law on E-Transactions. The consequences in this case might be monetary compensation, specific performance of contract or cancellation/null of contracts, etc. and shall be determined on the basis of reference and application of other applicable laws.

Would e-signatures be acceptable to the documents submitted to the State authorities?

¹⁰ The notion of "party accepting an e-signature" is intended to cover any party that might implement the contents of the received data message, whether or not only having a contractual relationship with the signatory, *see more*: 2005 Law on E-transactions, art. 25.1

¹¹ *See more*: 2005 Law on E-transactions, art. 26

¹² *See more*: 2005 Law on E-transactions, art. 25.3 and art. 26.3

For the time being, digital signature is the only type of e-signature listed above which are officially recognized in the legislations as proper documents to submit to the State authorities for the administrative procedures. Even so, the applicable industries and procedures is not widely and limited in the following sectors:

- **Tax declaration and payment:** Enterprises with digital signature is entitled to register an account on the website of the General Department of Taxation¹³ to register, declare and pay tax electronically on the General Department of Taxation's web portal under art 7 of Circular 19/2021/TT-BTC dated March 18, 2021 on providing guidelines for e-transactions in taxation.
- **E-invoice:** E-invoice is made in the form of electronic data by the sellers or service provider to record information on goods, services in accordance with prevailing regulations of Vietnam. Similar to paper invoice, e-invoice must reflect the actual transaction by recording content such as information of invoice, seller and buyer, goods and services; and signatures of the seller, the buyer,... but, subject to the electronic form of e-invoices, the parties do not need to sign directly by wet-signature on the invoices, instead the authenticated digital signature to sign e-invoice¹⁴. The Government have made a roadmap for compulsory of using e-signature from 1 July 2022 on the basis of enactment Decree 123/2020/ND-CP dated 19 October 2020 on prescribing invoices and records.
- **Enterprise registration:** Enterprises is able to use their digital signature to register an account on the National Business Registration Portal and carry out enterprise registration procedures such as register and notice on change of registered enterprise information, establish branch/representative office/business location, etc. In which, the application dossier can be signed by digital signature on electronic documents or directly by wet-signature on paper documents and scan the document; then authenticated by a digital signature on the National Business Registration Portal for consideration and approval of competent authorities¹⁵.
- **Customs procedures:** electronic declaration for customs procedures has been officially recognized and applied since 2013 under Decision No. 2341/QD-BTC dated 18 September 2013 on promulgating roadmap of carrying out use of public digital signatures in e-customs procedures and mandatory since 2016. This customs

¹³ <https://thuedientu.gdt.gov.vn>

¹⁴ See more: Decree 119/2018/ND-CP dated 12 December 2018 on prescribing electronic invoices for sale of goods and provision of services, art. 6

¹⁵ See more: Decree No. 01/2021/ND-CP dated 4 January 2021 on enterprise registration, art. 43-44

procedures proceed from registration of receipt to customs clearance of goods on the system by means of a digital signature registered with the customs authority.

- **Declaration of social insurance:** Enterprises can register an account to submit electronic social insurance applications, in which, the electronic social insurance documents must have digital signatures of persons who have responsible for signing the electronic social insurance documents in accordance with art 9.1 of Decree 166/2016/ND-CP dated 24 December 2016 regulations on electronic transactions in social, health and unemployment insurance. Signing by digital signatures in electronic transactions of social insurance is collectively referred to as electronic signing¹⁶.

¹⁶ See *more*: Decision No. 838/QĐ-BHXH dated 29 May 2017 on issuance of process for electronic transactions in the sector of social insurance, health insurance, unemployment insurance, art. 43

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