

DRAFT OF VIETNAM E-TRANSACTION LAW 2022

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The fast-moving digital shift in Vietnam and the pressures stemming from the COVID-19 pandemic and Industrial Revolution 4.0 have urged, and continue to urge the country to introduce reform for its applicable e-transaction regulations. The current E-Transaction Law issued in 2005 (hereinafter “Law 2005”) was outdated to the point that it was unable to govern any transactions on the Internet. Pertinent questions, like the types of e-signatures that are accepted, call for clearer answers in the present climate. In response, Vietnam Ministry of Information and Communication (“MIC”) prepared a new draft revising almost every part of Law 2005 in May 2022 and proceeded to seek public comments thereon. Afterwards, in late June 2022, MIC introduced another draft (hereinafter “Draft Law”), which substantially removes new concepts firstly introduced in the previous draft. The Draft Law is scheduled to be submitted to the Vietnam National Assembly for legislative opinions in October 2022, and it will hopefully be finalized and issued next April.

In principle, the drafting committee of MIC is quite ambitious and open-minded in terms of providing a legal backbone for e-transactions in various socio-economic sectors.¹ The changes reflected in the Draft Law, in comparison with Law 2005, are substantially focused on the following issues:

- Scope of application and general principles;
- Legality of e-certificates;
- Introduction of reliability levels (“độ tin cậy” in Vietnamese) of e-signatures and recognition of foreign e-signatures;
- Recognition of contracts executed on automated systems;
- Responsibilities of administrators of information systems for e-transactions.

1. Scope of application and general principles

In the draft letter submitted by MIC to the Government in relation to the Draft Law, MIC stated that as part of its direction, it intends to expand the scope of applicability of e-transactions to all activities of society. Accordingly, Article 1 states that the Draft Law covers e-transactions in “*activities of the various governmental authorities; civil, business and commercial activities and other fields as regulated by laws*”. This is significantly broader than the scope stipulated in Law 2005, which excludes the issuance of land use right certificates, real estate ownership certificates, inheritance documents, marriage certificates, decisions on divorce, birth/death certificates and other important documents. It is worth noting, at this juncture, that the Draft Law has a tendency to only discuss the technical issues of e-transactions, thus leaving room for other laws to guide the contents of a transaction (e.g., leaving room for other laws to define “transaction”).

Besides, the Draft Law presents a new principle regarding the implementation of e-transactions. Such principle states that the implementation of e-transactions will be optimized to save the time, fees and efforts of organizations and individuals. The implementation of e-transactions will not increase the fees and time currently taken under the implementation of transactions. Although it is uncertain how the foregoing principles will be applied in practice, we hope that this will help reduce the burden of paperwork for several applicable recipients, including foreign private sectors.

2. E-certificates

¹ Confirmed by MIC Drafting Committee at the seminar organized by MIC and Vietnam Chamber of Commerce and Industry on 14 July 2022 (July seminar).

With the intention of covering all of the abovementioned social activities, the Draft Law also sets forth the legality of e-certificates.

Pursuant to Article 4.8 of the Draft Law, e-certificates are “*data messages issued by an authority or organization in which the information is used as the results of administrative procedures, licenses, degrees, certificates, diplomas, valuable papers, approvals or other confirmation documents in electronic forms*”.

(i) Legal validity of e-certificates

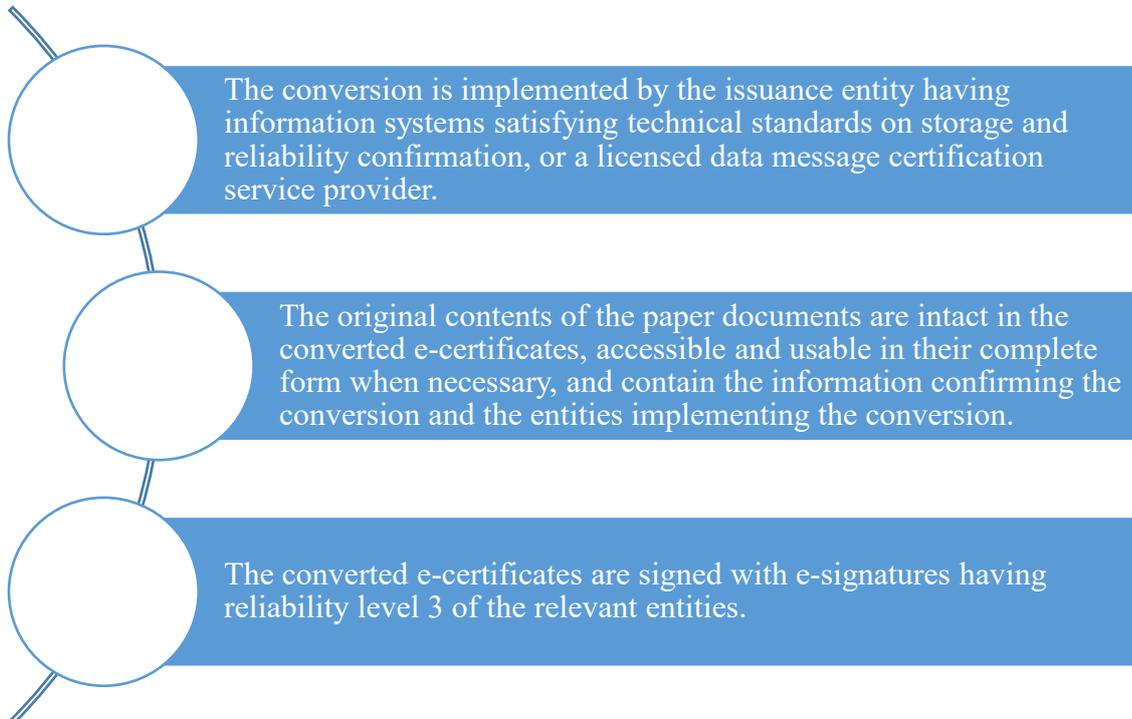
In accordance with Article 23 of the Draft Law, e-certificates are legally valid if they are signed with e-signatures having reliability level 3 (See section 3 below) and able to display accessible and usable contents in their complete form when necessary. E-certificates will not simply be denied for their lack of legal validity, effect or implementation abilities because they are issued in a foreign nation.

There are two types of e-certificates: transferable and non-transferable. In cases where the applicable laws allow the e-certificates to be transferable, the transfer must be certified by a licensed data message certification organization. Moreover, if e-certificates are transferable, upon the completion of the conversion from paper documents to e-certificates under the Draft Law, such paper documents will cease to be valid, and vice versa.

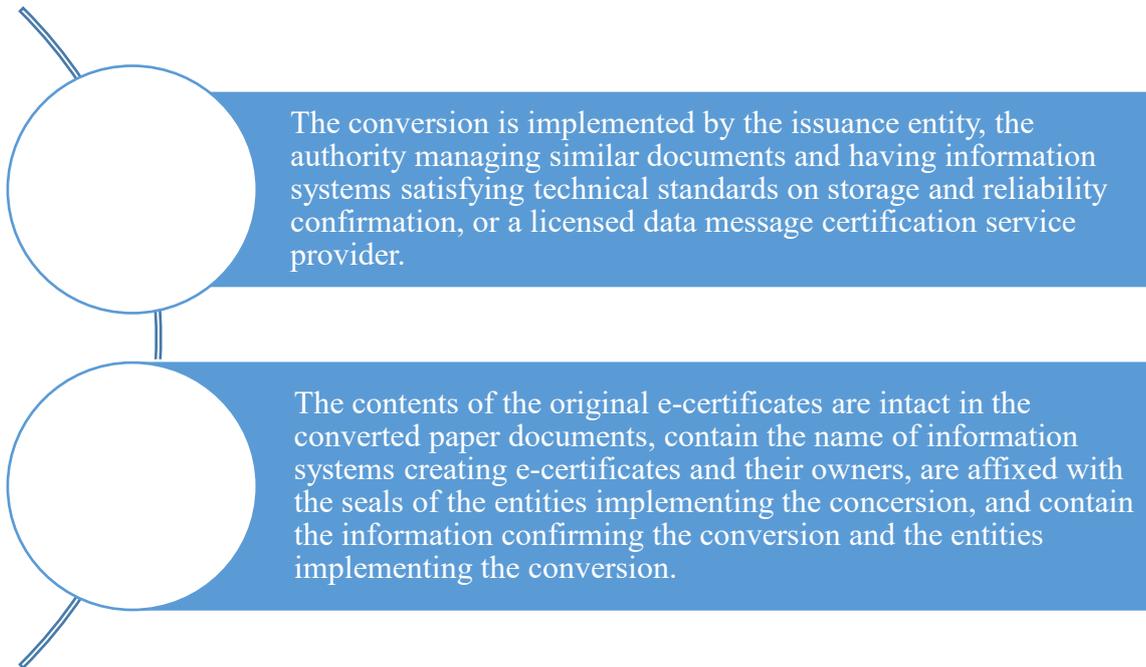
(ii) Conversion between paper documents and e-certificates

The Draft Law newly introduces the possibility to convert documentation from paper documents to e-certificates.

- Converting paper documents to e-certificates: The conversion is satisfactory to the Draft Law if it meets the following conditions:



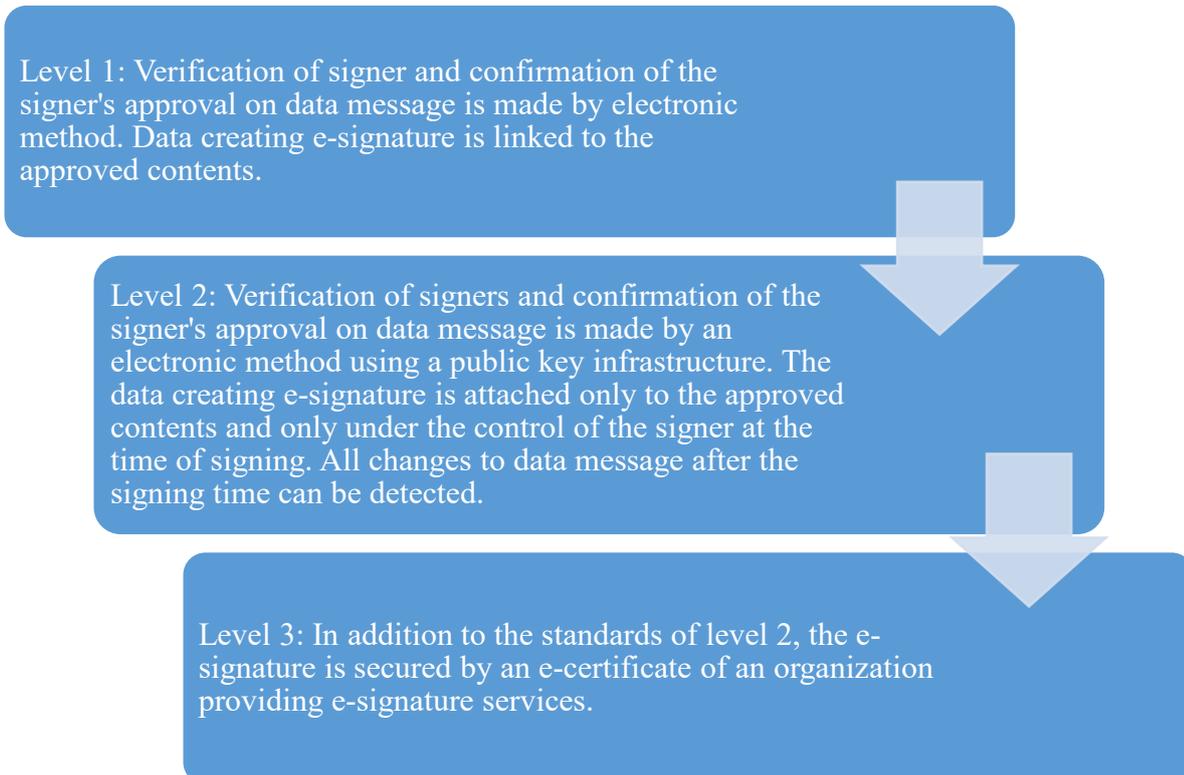
- Converting e-certificates to paper documents: The conversion satisfies the Draft Law if it meets the following conditions:



3. Reliability of e-signatures and recognition of foreign e-signatures

The application of reliability levels of e-signatures is an interesting new concept of this Draft Law (in the previous draft version in May, the reliability levels are applicable to all “e-transaction entities” which was removed in this Draft Law). Indeed, this is MIC’s proposed solution to the inadequacy of Law 2005 in procuring the legal validity of e-signatures.

Article 32 of the Draft Law proposes three reliability levels for e-signatures, with the respective verification standards being reflected in ascending order:



The legal validity of e-signatures is dependent on its reliability levels. Under Article 33 of the Draft Law, e-signatures have the validity to verify the transactions and the parties are free to agree on the reliability levels of the e-signatures, unless the law otherwise stipulates. If the law stipulates that a document holding a signature or a document be certified by an organization, the e-signature with reliability level 3 is satisfactory. However, this is a very general principle and in practice, the application of the freedom to agree on the reliability levels of the e-signatures of civil parties may be hindered by the requirements of the authorities, , e.g. tax or customary authorities, to provide documents in specific forms.

With respect to recognition of foreign e-signatures, pursuant to Article 35 of the Draft Law, Vietnam will recognize the legal validity of e-signatures and the e-certificates of signatures of a foreign nation if all of the following conditions are satisfied:

- (i) The e-signatures or the e-certificates of signatures have the same safety levels as required under Vietnam laws, international treaties which Vietnam is a member or the recognized international standards;
- (ii) The certificate of e-signature was formed on the ground of adequate verified identity information of a foreign individual or organization;
- (iii) The organizations issuing the e-certificates legally established and operated in the country where the organizations providing e-signatures are established and accredited to satisfy technical standards on e-signatures that are equivalent to the technical standards applicable in Vietnam;
- (iv) Connected with the technical system of the national e-certification organization in order to check the validity of e-signature; and
- (v) The e-signatures and e-certificates of signatures are used by individuals or organizations that are not present in Vietnam.

4. Recognition of contracts executed with automated systems

Although the Draft Law removed most of the changes made in the previous draft version of May 2022, the recognition of contracts executed under an automated system is still vaguely reflected. Article 38.2 of the Draft Law states that: *“The contracts executed by the interaction between an automated information system and a human or among automated information systems with each other are not denied for its legal validity only because there is no check or intervention of a human in each specific activity implemented by automated information systems or in executed contracts”*.

To recall, in the draft version dated May 2022, e-contracts are clearly set forth in four types among which types 3 and 4 are “smart contracts” and “e-contracts entered into between persons and electronic means”, respectively. While there are critical comments that the earlier draft controversially conflicts with Civil Code on accepting contracts with a system, such draft gave a clearer view on how such contract can be executed. The text of the Draft Law is much less obvious. The legislators neither accept nor deny officially the existence of contracts executed under an automated system, which makes it difficult to determine liabilities upon a contractual breach.

5. Information systems and digital platforms

Information systems

Under Article 54 of the Draft Law, administrators of information systems for e-transactions are subject to several obligations, including:

- (i) Announcement of the safety levels of the systems and the reliability levels of e-transaction accounts: at the July seminar, MIC clarified that the announcement obligations, when applicable to offshore administrators, do not include the requirement to satisfy the safety levels and reliability levels under Vietnamese laws, i.e., purely requirement to announce them.
- (ii) Annual report: the Draft Law requires administrators of communications, Internet services, data centers and cloud computing services to annually review and report to MIC any incidents, indications of incidents, and risks associated with using their infrastructure and platforms.

- (iii) Personnel: the Draft Law requires administrators of applicable information systems to assign a contact person to communicate and coordinate with the State authorities upon request.

Digital platform

Although the digital platforms operated by both local and overseas platform holders have targeted and been accessed by Internet users in Vietnam since long ago, the legal framework for their operation and management has yet to be established. The absence of regulations on platforms has been a source of inconvenience for both the users and platform holders, especially the overseas platform holders, in their operation of the platforms and for State authorities in their management of them. This is especially true given that neither of the State authorities has full legal authority to manage them. However, in line with the growing trend toward tightening the management of cyber security in Vietnam, recently, the MIC has introduced the concept of a digital platform in the Draft Law. A digital platform is referred to in the Draft Law as an information system. In addition to the above-mentioned obligations of information systems, subject to the number of users or number of visits by users in Vietnam, digital platforms will have following additional obligations:

- (i) digital platforms having at least 1 million users in Vietnam or at least 10 million visits by users in Vietnam in 6 consecutive months must (x) publicize and disseminate the mechanism for exchanging, answering and providing information to users; (y) publicize and disseminate the mechanism for reporting and dealing with problems that arise; (z) publicize and disseminate the mechanism for reporting content that violates Vietnamese laws applicable to platforms, which has its own priority mechanism to receive and respond to feedback from sources that are assessed as reliable;
- (ii) digital platforms having at least 10 million users in Vietnam or at least 100 million visits by users in Vietnam in 6 consecutive months must, in addition to the above-mentioned obligations (x) to (z), fulfil the following obligations:
- + publicize the algorithm used to recommend and display content, and display ads to users, and allow users to choose not to use recommendations, display content, or display advertisements based on data analysis about users;
 - + allow users to uninstall any applications that are pre-installed on the digital platform, without affecting the basic technical features that help the digital platform operate normally;
 - + assign full-time specialized staff to monitor the platform's compliance and to communicate with the State authorities;
 - + publicize and disseminate the code of conduct applicable to stakeholders participating in the digital platform.

It is expected that the foregoing obligations will significantly burden platform holders

Conclusion

Although the Draft Law dated July 2022 has removed many of the reforms proposed in the previous draft (e.g., disclaimer clause for administrators of information systems), MIC's aims to provide a fair and improved environment for all e-transaction subjects should be realized. Aiming to enact the draft E-Transaction Law in May 2023, MIC is actively screening comments from relevant subjects on their drafts. Accordingly, several changes might be made before the date of enactment.

End

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