

PART TWO

I. CURRENT CHALLENGES FOR VIET NAM IN DEVELOPING THE LEGAL AND REGULATORY SYSTEM FOR E-COMMERCE

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Introduction

E-commerce has been developing independently in Viet Nam for some years in line with progress in information technology applications for the economic sector. Until the present, e-commerce has been considered as a special instrument to be used in transactions among trade persons in Viet Nam. It has not yet been developed further for transactions between traders and consumers. However, the initial success of this kind of business for wholesale trade has been encouraging and has created a greater interest among the people of Viet Nam in terms of its potential for broader and deeper economic development.

It has been acknowledged that in material terms Viet Nam is not yet completely ready for the general practice of online commerce. The current economic and technological challenges are mostly the same as in other developing countries.² However, stable economic development would certainly contribute to more rapid familiarity and acceptance of this form of commercial activity. Such a development would gain popularity with the Vietnamese people as a parallel to the popularity of Internet use in daily life.

Vietnamese lawmakers have quickly found it necessary to place e-commerce on a solid legal base in order to facilitate its implementation. At the beginning of 2000, Viet Nam was officially engaged in the APEC common action programme for the development of non-written commercial transactions. The need to strengthen Vietnamese legislation on e-commerce became more urgent.

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² The development of e-commerce presumes facilities exist, such as a developed information industry; a dynamic and diversified commodity economy, sufficient general use of information technology achievements in various economic fields, a trustworthy electronic and/or online payment system and a good encryption system for economic transactions. Most of these requirements are in the process of being formed in Viet Nam.

To this effect, the government established a special committee in 2000 in order to elaborate an ordinance on e-commerce. Under the direction of this committee, a draft ordinance has been prepared and revised several times. During the process of refining and finalizing the draft e-commerce ordinance, Vietnamese lawmakers were confronting the same problems as their colleagues in other countries. That is, they needed a definition of e-commerce transactions, qualification of electronic signatures, qualification of secured electronic signatures, accreditation of the electronic certification service provider and establish the responsibilities of the net service provider.

In addition, development of the e-commerce legal system in Viet Nam has had unique problems, such as the standardization of the written language to be used in domestic electronic commerce; definition of the object of e-commerce law, choice of a model of the electronic certification service provision and state management of e-commerce.

The government had recently decided to elaborate a law on electronic transactions of all kinds. The e-commerce ordinance project would be included in this new legislative endeavour, which is expected to be finished at the end of 2005 or in early 2006.

This paper contains the author's reflections on some of the most sensitive issues relating to creating the legal basis for e-commerce development in Viet Nam.

A. Definition of e-commerce

Many difficulties have been encountered when trying to formulate the definition of e-commerce. The following difficulties can be highlighted from the experience of Viet Nam. First, e-commerce is conceived as a special form of commercial activity that is carried out and concluded through the Internet. Therefore, in principle, it must be legally practiced in conformity with commercial law. The problem is that Vietnamese commercial law is now at an embryonic stage. The normal concept of a commercial act, in particular, is still a fragile element in the positive law of Viet Nam.

The current law on commerce tries to formalize a general definition of what is a commercial act on the one hand, while it draws up a limiting list of commercial acts on the other hand. By virtue of article 5 of the Commercial Law of 1997, a commercial act is an act contracted by a person denominated as a trader in the

professional exercise of his commercial activities.³ According to article 15 of the same law, however, an act cannot qualify as commercial if it is not mentioned in a list established by that article. It should be noted that in accordance with the legal enumeration of commercial acts, many activities that traditionally qualify as commercial in most judicial systems, are surprisingly excluded from commercial life by the authors of the said law. Examples include accommodation services, transportation services as well as some industrial activities.

Vietnamese lawmakers have proceeded to revise the law, based on awareness of the weak points in the current commercial law. For the definition of a commercial act, there has been a strong tendency to set the criteria based mostly on what has been established law in most European countries, especially under French law. The law on e-commerce would be drafted in line with this tendency. The problem may nevertheless become rather complicated owing to the fact that the revision of the law on commerce has been entrusted to the Ministry of Commerce, while the Commission of Sciences, Technology and Environment of the National Assembly has been preparing the legal framework for e-commerce activities.

The foundation of the draft law on e-commerce appears to be strongly influenced by the example of European commercial legislation, but the drafters seem more ready to adapt the French notion of commercial act to the Vietnamese legal situation in their conceptions about the revised law on commerce. It does not seem to indicate any attempt to simply adopt the French concepts, rather it is an adaptation. The law on e-commerce would not be expected to regulate all acts qualified as commercial in most systems and in accordance with international practices, while the new law on commerce only concerns a limited number of acts as strictly enumerated by law.

Another difficulty encountered in Viet Nam is that the authors of the law project on e-commerce still hesitate about how to define the scope of application for this law. Reports say that two options have been under consideration. The first option is to have the law on e-commerce regulate all commercial acts acknowledged in commercial law without distinguishing between acts that must be in writing (solemn act) and which may be concluded simply in conformity with the principle of consensus. The second option says that the law on e-commerce concerns all commercial acts, except for the acts that must be concluded in writing.

³ Thus, the possibility is excluded that a commercial act can be concluded by a non-professional trader.

In the event that the first solution would be adopted, Vietnamese lawmakers would have to cope with a rather delicate problem. As for the acts which must be concluded in writing, a set of conditions must be established for the equivalence between manuscript writing and electronic writing. In reality, this solution was adopted by number of countries.⁴ Vietnamese lawmakers could refer to the concerned systems for a solution to the problem that is most adaptable to Vietnamese legal practice. Nevertheless, the idea of assimilation of electronic signature to manuscript signature in case the latter is required *ad validitatem* (as condition of validity), even under certain conditions, seems not suit the Vietnamese way of thinking.

For the time being, there is a strong tendency towards the second solution. The adoption of this solution does not exonerate the lawmaker from establishing conditions for equivalence between manuscript writing and electronic writing. In the hypothetical situation, the problem would be raised only in the field of proof, since the manuscript signature would be required *ad probationem* (as a condition of proof) and not *ad validitatem* (as a condition of validity).

It is noted that before the introduction of e-commerce practice in Viet Nam, lawmakers acknowledged that when concluding a sales contract, electronic writing had the same probatory value as writing on paper, as a result of article 49 of the Law on Commerce of 1997. An e-mail thus could be judged as probatory as a traditional letter. Such a solution might lead the way to an astonishing deduction according to which, in the point of view of proof in commerce, the signature is not considered to be a necessary element of a written deed. This conception seems abnormal and not in conformity with traditional juridical thinking. It is probable that the Vietnamese drafters of law on e-commerce would not use this strange conception, considered as a technical mistake in the matter of legislation. Indeed, in all the projects concerning e-commerce, an electronic signature has always been defined as the key element of an electronic document.

B. Electronic signature

The regulation of electronic signature has developed around the basic idea according to which the electronic signature is the signature conceived in the normal sense and put in an electronic document with the aid of electronic means. The electronic signature is essentially different from the manuscript signature for the fact

⁴ The non-distinction between electronic writing and manuscript writing, upon certain conditions, was approved by most European countries as well as by the United States.

that the latter emanates from the writing gesture of the signer. In this sense, the electronic signature is not really something so original or strange to Vietnamese people.

Traditionally, there are arrangements to permit one person to conclude and execute a legal obligation through another appointed person. For decades, facsimile technology applications have been facilitating the acknowledgement of copied signatures as extrajudicial proof of manuscript signature even in important transactions. It is not so difficult to point out the particularities of an electronic signature. On the one hand, the author of an electronic signature does not really sign, although that is not the case for a facsimiled signature. On the other hand, the affixture of an electronic signature on an electronic document is a personal gesture of the signer, and that is not the case of mandator.

The problem, however, is that, like most systems inspired by French legal culture, the Vietnamese law does not conceive a definition of normal (manuscript) signature.⁵ It should also be noted that the current Vietnamese civil code does not contain systematic rules of proof of juridical act and that the development of regulations of proof has not been brought into question in the framework of the current revision of the civil code as assumed by the Ministry of Justice.

In summary, a formal definition of a manuscript signature is not included in Viet Nam to be part of written law. Meanwhile, the definition of electronic signature is being refined with care by the drafters of the law on e-commerce. In all drafts of the law on e-commerce, electronic signature is defined in the same manner as in other legal systems.

Since the notion of signature has not been conceived in written law, the definition of functions of signature has likewise been neglected. It is widely admitted in practice, however, that affixing one's signature into a document implies that the author of the document is also the person whose identity is described in the same document and affixing one's signature into a document implies the author adheres to the content of the document. Vietnamese law thus seems to tend towards the same conception of function of signature as in the law of most of countries.

⁵ The definition of signature was formalized in French written law since the adoption of law of 13/03/2000: CCF. Art. 1316 to 1316-4. In reality, the legal meaning of a signature acknowledged in Vietnamese law is the same as its general meaning. The signature is indeed the name of a person written with his or her own hand to signify that the writing that precedes accords with his or her wishes or intentions: *Merriam-Webster's Dictionary of Law*, 1996.

That explains why in the project of law on e-commerce, the definition of functions of electronic signature has been profoundly inspired by European law. The electronic signature has become indeed an element assuming two functions – identification of the signer and validation of the document. However, owing to the fact that the electronic signature is not the signer’s handwriting, the law must impose certain requirements for e-commerce to meet in order to ensure that the electronic signature is put into the document only by the appropriate personal gesture of the person whose identity is mentioned in the said document. To this effect, Vietnamese lawmakers foresee that it is possible to adapt the institution of secured electronic signature in the Vietnamese legal context, in addition to certification of electronic signatures.

Vietnamese lawmakers appear to be unwilling to follow the French homologue as for the question of certification. The latter imposes certification as one of the conditions for the acknowledgment of the validity of electronic signature. In general, e-commerce is a special form of commercial activity introduced into Viet Nam. It is not an endogenous product of Vietnamese economic development. The Vietnamese law thus has not had its own rules of conduct to be applied in this matter before Vietnamese lawyers started acquiring knowledge about foreign legislation on e-commerce and, more generally, on e-transactions. That explains why in the course of improving the Vietnamese law on e-commerce, the lawmakers did not encounter any conflict between Vietnamese law and foreign laws, as far as the solution of various technical problems are concerned. Most of the time, the lawmakers approve a solution already acknowledged in a foreign system, eventually with certain reserves.

It is sufficient for the lawmakers to refer to other systems for improving the legal regime concerning electronic signatures. However, the real problem is how to avoid having the regulation of electronic signatures becoming better elaborated than regulations on normal (manuscript) signatures, as part of civil law. The revision of the Vietnamese civil code does not include the insertion of rules relating to proof; the manuscript signature thus does not have any chance to appear as a formal legal object of Vietnamese written law.

C. Consumer protection

E-commerce has been practiced in Viet Nam between tradesmen and has not yet been acknowledged as a form of transaction between a tradesman and a consumer. However, it is certain that the development of e-commerce is destined for more general involvement of consumers. Wherever a consumer and a business

person are partners in a transaction, the protection of the consumer is put into question. It seems, however, that Vietnamese lawmakers have not found it necessary to prepare special measures to the effect of consumer protection in the field of e-commerce. With regard to Vietnamese legislation, the protection of consumer participating in e-commerce transactions is ensured normally by the general regulation on consumption. On this point, the position of Vietnamese law is very similar to French law.

D. State management of e-commerce

Viet Nam is a socialist country, which means that governance would be ensured by the socialist political system characterized by the all-sided leadership of the communist party. One of the most remarkable characteristics of a socialist regime is the close state management of economic development.⁶ E-commerce as a kind of economic activity must be mentioned among the objects of the State policy of economic management.

In addition, it has been said that the socialist regime permanently encounters critics and threats emanating from partisans of opposite ideologies. The socialist leaders find it necessary to proceed with control and supervision of the media in order to impede the diffusion of reactionary or hostile ideas or the communication of reactionary schemes against the socialist government, and more generally to prevent all ideological attacks on the socialist material and/or spiritual interests. The Internet serves as an excellent means of communication and information in modern times, but it must be considered as a main target for this kind of control. State control of the Internet has also been justified in Viet Nam by the protection of the social order and the necessity for the preservation and the development of traditional spiritual values against some so-called pernicious culture. E-commerce as a kind of commercial activity practiced through the Internet must be controlled as a result of the state's general policy to control and supervise Internet use.

The subjects that come under state control and supervision concerning e-commerce are: (a) use of the Internet for the practice of e-commerce; (b) web administration; (c) providing net service; and (d) providing electronic certification service.

⁶ Since the end of the 1970s, there has been a strong tendency originating from China, to renovate the socialist economic system. The renovated system is characterized by the application of market rules in economic activities. However, it is said that a modern socialist economic system is an open economy oriented to socialist outcomes. This orientation presupposes the active intervention of the State in the economic planning and development.

The general idea behind control and supervision of content is that the exploitation of means of electronic communication and more particularly use of the Internet must not be harmful to the national security, the defense of the socialist ideology, the public order and good customs and habits.⁷ Consequently, the concept of illegal electronic transactions would be wider in Vietnamese law than in other systems. The notion of prohibited web has been conceived with reference to the political, cultural, moral criteria that are very special when compared to occidental law.

There are two categories of control measures. The first category is preventive measures. A measure qualifies as preventive once it is prepared for the purpose of precluding acts considered to be harmful to the protected interests. To this effect, the Vietnamese lawmakers plan to formalize a number of rules. The most noteworthy are the following: (a) provision of net service is subject to prior authorization of the government; (b) the same prior authorization is required for the creation of a web site, whether it is accessible by the public for free or not; (c) it is prohibited for the web administrator to put reactionary or pernicious information on a web site or to create direct or indirect linkage with the web sites containing information of this kind; (d) Internet users are obliged to not use or access prohibited web sites and not to help in the propagation of unfavourable information kept by a web site.⁸

The second category is suppressive measures, which are applied in cases of violation of rules concerning the State management of e-commerce. The measures may take the form of administrative sanctions or penal sanctions. It is thus expected that the administrative law and the penal law would have to be completed with corresponding rules.

E. Control of electronic certification service

The electronic certification service is used to the guarantee identification of the signer of an electronic document as well as the integrity of the document. State

⁷ It is prohibited to deal with anti-communist art works.

⁸ Since March 2004, users at Internet stores are obliged to show their identity card to the store manager, in accordance with a decision promulgated by the Ministry of Public Security. The net service provider must cooperate with the public authorities in prevention and detection of acts harmful to the national security and the public order. More particularly, the net service provider must create a firewall to block the penetration of dangerous information. In addition, the net service provider is obliged to cooperate with the competent authority to reveal use of the Internet for actions considered to be dangerous to the national security and the public order. The Internet store must also save information on the user's identity and web sites visited by users for at least 30 days in the interests of public control.

management of the electronic certification service can take the form of one of three different models.

Under the first model, all electronic certification service providers are subject to the public authorities' accreditation. A few countries have adopted this model. Under the second model, only providers planning to be engaged in the electronic certification service relating to important transactions or transactions concluded in such specific fields as public purchases, stocks and capital are subject to accreditation by public authorities. This is the most popular model.

Under the third model, development of electronic certification services are provided in a free market and depend only on the demand of society as well as the general rules of the market. The United States has this model and lawmakers give no attention to the regulation of certification. It is said that in accordance with the need of the society, the certification service would be reasonably offered and as a service it is also subject to the rules of competition like any other kind of business.

It seems that Vietnamese lawmakers do not prefer the third model, which is said to be antagonistic to the Vietnamese social and economic management system. Instead, the preference is for a combination of the first and the second models. Accreditation is thus held to be one of the conditions for becoming an electronic certification service provider. All electronic certification service providers must be accredited and the providers who intend to provide the service for partners engaged in important or specific transactions are subject to special accreditation. In any case, it is certain that accreditation would be obligatory for the provision of electronic certification services. Any non-accredited service would be considered illegal and subject to administrative or penal sanctions.

In addition, the electronic certification service provision would be placed under the permanent control assumed by a competent State organ. The objective of the control consists of two elements: efficiency of service and safety of service. To be efficient, the certification service must ensure the authenticity of the electronic signature; to be safe, it must ensure the integrity of the document validated by the certified signature. These qualities of the certification service cannot be attained if a service provider was not sufficiently equipped. The electronic certification provider must ensure that it does not grant certification to an illegal document.

F. Conclusion

The leaders in Viet Nam desire that e-commerce would develop rapidly, but with conditions. That is, measures should be in place to ensure that all-sided state control of Internet use, the general control of access and exploitation of media. In practical terms, it might not be so easy to satisfy this desire. Active state control and supervision of commerce, and more particularly of e-commerce, would not be very helpful for speeding up transactions. More precisely, the administrative control and supervision measures would take more time for an electronic transaction in Viet Nam when compared to another country. The national security could be ensured, but economic development in Viet Nam risks a slowdown.