

CHANDLER MHM

Newsletter

OVERVIEW OF E-SIGNATURES IN THAILAND

In Thailand, the legal validity of Electronic Signatures (e-signatures) has been officially recognized since the enactment of the Electronic Transactions Act, B.E. 2544 (2001) ("ETA"). However, the COVID-19 pandemic has highlighted the benefits of digitalization, including e-signatures, as social distancing and working from home becomes a new normal. E-signatures have many advantages over wet ink signatures, in terms of speed, cost, convenience, and, in some cases, even in terms of security as well. In this article, we will revisit the topic of e-signatures from a legal perspective.

What is an e-signature?

According to the ETA, "electronic signature" means letters, characters, numbers, sound or any other symbols created in an electronic form and affixed to electronic data for specifying the relation between an individual and such electronic data, for the purposes of identifying the signatory relating to such electronic data. Furthermore, it is also proof that such person has accepted the information contained in such electronic data. As you can see from this definition, any kind of symbol, a simple click, or even voice or sound can be an e-signature as well, if it shows the intent of the signatory and makes the signatory identifiable. In practice, e-signatures are usually equipped with a higher level of security, e.g. e-signature with OTP (one-time password) or biometrics signature (handwritten electronic signature that captures biometric information during signing, e.g. speed and acceleration of the writing, the pressure applied on the surface of a tablet, etc.) which makes the usage of e-signatures to be more secure and reliable.

What type of transaction can be made by e-signature?

From a legal perspective, there are certain types of transactions that can be made by e-signatures and those that cannot. In order to identify which transaction can be made by an e-signature, we have to consider whether any laws and/or regulations require a written document, signature, or any specific form for that transaction.

- **Transactions that can be executed with an e-signature**

We can usually divide transactions that can be executed by e-signatures into two types. Firstly, transactions where a written document or signature is not required by law in the first place, e.g. employment contracts. For this type of transaction, we do not have to worry whether the transaction should be executed in an electronic or other form. However, even if a document or signature is not required by law, parties usually have reasonable grounds (e.g. operational reasons) to document a consent, require a signature, etc.

Secondly, transactions that are void or unenforceable unless there is a written document signed by the parties to the transaction or only the liable party (depending on the nature of the transaction), but where registration is not required. Examples would include a lease of real estate for a period of not exceeding three years and hire purchase. The ETA provides that information shall not be denied legal effect and enforceability solely on the ground that it is in the form of electronic data. The ETA also states that in a case where the law requires any transaction to be made in writing or evidenced by writing, if the information is generated in the form of accessible electronic data which is reusable without any change in its meaning, it shall be deemed that such information is already made in writing or evidenced by writing.

Nevertheless, it is still possible that the validity of these contracts and signatures which are made in an electronic form could be challenged. In a case where the law requires a person to sign a signature and it is made by an e-signature, according to the ETA, it shall be deemed that the data message in question bears a signature if these two conditions are met:

- (1) a method is used whereby the signatory is identifiable and it is possible to prove that the signatory has approved that the information contained in the electronic data belongs to him; and
- (2) such method is reliable and appropriate for the purpose for which the electronic data was generated or sent, considering surrounding circumstances or an agreement between the parties.

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In determining a “reliable” method under (2), the following should be taken into account:

- (i) the security and strictness of the methods and equipment;
- (ii) the nature, kind and size of the transaction, the number of occasions on which or the frequency at which transactions take place, trade customs or practice and the importance and the value of the transactions made; and
- (iii) the strictness of the communication systems.

Therefore, when you decide which type of e-signature is the right type for a transaction, if it is a high-stakes transaction where a document and signature are both required by law for enforcement, to err on the side of caution, it might be preferable to use an e-signature with a high level of security, authenticity, or integrity so that the validity of such transaction can be proved without difficulties and to avoid any uncertainty arising from the use of e-signatures.

- **Transactions that cannot be executed with e-signature**

To date, the law explicitly disapproves of the legal validity of e-signatures and electronic documents for transactions relating to family and succession matters (Royal Decree Prescribing Civil and Commercial Transactions which are Exempted from the Application of the Law on Electronic Transactions, B.E. 2549 (2006)).

In addition, transactions which require registration with certain government authorities generally cannot be made by e-signature. For example, the Civil and Commercial Code requires the sale or mortgage of immovable property (e.g. land) to be registered with the Land Office. This type of transaction cannot be completed by using an e-signature as the authority has not adopted internal regulations to allow registration by using electronic documents and e-signatures.

What are the obligations of the signatory and party relying on the e-signature?

The ETA also imposes some obligations on the signatory and party relying on the signature. In a case where the signature creation data is used to create an electronic signature that has legal effect, the signatory shall, for example, exercise reasonable care to avoid unauthorized use of his signature creation data; notify any person that may reasonably be expected to act on the basis of the electronic signature when the signatory knows or should have known that the signature creation data has been lost, damaged, compromised, unduly disclosed or known in a manner inconsistent with its purpose, etc.

A party relying on the e-signature shall also take reasonable steps to verify the reliability of the e-signature. In a case where an e-signature is supported by a certificate, the party relying on this shall take reasonable steps to verify the validity, suspension or revocation of the certificate and observe any limitation with respect to the certificate.

Final Thought

E-signatures have many advantages over wet ink signatures, even in terms of security in certain cases, as an e-signature can offer additional security measures to protect the authenticity and integrity of the signature. However, from a legal perspective, it is important to consider which type of transaction is compatible with e-signatures and which type of e-signature is suitable for that transaction, to prevent the issue of validity of that transaction from arising.

If you would like to discuss the issues raised in this article further or related issues, please contact the authors listed in the right-hand column.