

Latham & Watkins Corporate Department – Germany

23 March 2020 | Number 2649

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## How to Implement Contracts in Germany During the COVID-19 Crisis

### *Electronic contract processing enables parties to avoid physical contact.*

In Germany and around the world, work processes are changing drastically. Health policy considerations have already prompted many large companies in Germany to increasingly switch to work remotely. For companies that continue their business activities, the rapid change from office to home-based working creates challenges for processes that were previously taken for granted, including contract implementation.

In principle, there is no formal requirement for the conclusion of legal transactions in Germany. Therefore, unless otherwise provided by law, a contract can also be concluded orally. However, the legislator has prescribed a certain form for a large number of legal transactions due to their special significance or in order to protect against haste. Furthermore, the parties to a legal transaction often agree on a certain form.

### What formal requirements have been stipulated by the legislator?

#### Text form

The text form according to Sec. 126b German Civil Code (Bürgerliches Gesetzbuch, BGB), is the simplest statutory form of laying down textual declarations. It is merely required that the declaration is made legibly in characters. Such declaration can therefore also be made by email and does not require a signature.

#### Written form

Written form pursuant to Sec. 126 BGB requires that a document be drawn up that contains the essential parts of the declaration and is personally signed by the declarant. If such document is a contract, it must always include the signature of all parties. If several documents with the same wording are drawn up, it is sufficient under Sec. 126 para. 2 sentence 2 BGB that each party signs the document intended for the other party. Therefore, it is sufficient for a contract if each party signs the text of the contract personally on the respective different documents. The signature must spatially complete the respective document. A scanned and then electronically inserted signature, however, does not satisfy the written form requirement.

## **Notarial recording**

A notarial recording in accordance with Sec. 128 BGB is made directly before a notary, whereby a simultaneous presence of the contracting parties is generally not required. It suffices if first the offer and then the acceptance is notarized.

## **Official certification**

The official certification according to Sec. 129 BGB is an official certificate of authenticity of the signature and the name sign. The declaration must be recorded in writing and the personal signature must be executed before a notary and certified by such notary.

## **What form can be agreed in legal transactions?**

Even in cases in which the legislator has not prescribed a particular form, the parties are nevertheless free to agree on a form to be observed. In many cases, the text form described above according to Sec. 126b BGB is agreed since it is particularly easy to comply with and declarations can be made accordingly in a speedy manner.

If a certain form has been agreed upon in a legal transaction, then in case of doubt, if the parties have not made any further provisions in this regard, the respective corresponding legal provision shall apply. Thus, if written form has been agreed, the written form in the sense of Sec. 126 BGB applies in case of doubt. However, the law provides for a simplification of form in the case of a legal agreement on a certain form compared to the legally required form, unless the parties have agreed otherwise. The requirement of written form shall also be met if executed by means of telecommunications (e.g., email or fax) and in case of a contract by exchanging letters. If the parties have agreed on electronic form and have not stipulated otherwise, any electronic signature other than the qualified electronic signature provided for under Sec. 126a BGB is also sufficient. It is then sufficient, for example, to attach a scanned signature.

## **What can companies do now to comply with any formal requirements?**

### **Replacement of written form by electronic form**

The statutory written form can be replaced by an electronic form in the sense of Sec. 126a para.1 BGB. The advantage of such replacement is that a handwritten signature is not required, rather a so-called qualified electronic signature is sufficient. Such qualified electronic signature must be based on the certificate of a qualified trusted service provider and must have been created by a secure signature creation device. The following companies offer the possibility of signing with a qualified electronic signature: <https://webgate.ec.europa.eu/tl-browser/#/tl/DE>.

However, the electronic form is excluded, for example, for the termination of an employment contract by notice or by termination agreement, for declarations in connection with a suretyship, or generally when acknowledging a debt (Schuldanerkenntnis). Even if no specific form is required by law, declarations by companies should be recorded in such a way that any necessary proof of the exact contents can be provided in the future.

### **Issuance of a power of attorney**

Another practical way of “facilitating” the conclusion of a contract is to grant a third party power of attorney to carry out a legal transaction requiring a specific form. The advantage of this procedure is that the declaration of the power of attorney does not, in principle, require the form that is intended for the legal transaction to which the power of attorney relates. For example, in the case of any notarial recording, the notary’s employees can be authorized to sign; thus, personal appearance at the recording process is not

required. In some cases, however, the formal requirement that applies to the legal transaction may also apply to the power of attorney (e.g., in the case of suretyship or loan contracts). Likewise, there is always the possibility of subsequent (form-free) approval of a legal transaction requiring a certain form that was concluded by a representative without power of representation.

## **What are the formal requirements in individual cases?**

### **Transfer of shares**

The transfer of shares in a German limited liability company (Gesellschaft mit beschränkter Haftung, GmbH) requires notarization; this applies both to the assignment and the obligatory transaction under the law of obligations.

The German Stock Corporation Act, unlike the German Limited Liability Companies Act, does not stipulate a formal requirement for notarization. Shares can generally be transferred without formalities.

Also the transfer of shares in a general partnership (offene Handelsgesellschaft, oHG) or a limited partnership (Kommanditgesellschaft, KG) requires notarization only in exceptional cases and can be carried out without formalities.

### **Commercial register**

Applications to the commercial register must be submitted electronically in an officially certified form. The same form is also required for granting a power of attorney for the application.

### **Financing contracts**

In principle, loan contracts can be concluded without observing any specific form requirements. However, this does not apply to consumer loan contracts; such contracts require the written form, which can be replaced by the electronic form.

Finance lease contracts can be concluded between entrepreneurs without observing any specific form requirement, but must be in writing when concluded with a consumer, which can also be replaced by electronic form.

### **Real estate law**

Purchase contracts for real estate require notarization.

### **Related legal transactions**

A special formal requirement may also arise in individual cases for types of legal transactions for which the legislator has not actually stipulated a specific form requirement. This is the case if they are legally connected with another legal transaction. Thus, for example, the formal requirement of notarization in the case of a contract for the purchase of real estate also applies to the legal transaction that has a legal connection with such contract.

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