

GOVERNANCE: AN OVERVIEW OF E-SIGNATURES AND ELECTRONIC LEGAL TRANSACTIONS (GERMANY)

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Legal Briefings - By **Dr Sven Wortberg**

In light of the restrictions on contact necessitated by the Covid-19 pandemic, the possibility of conducting legal transactions electronically has become a central issue. Corresponding questions which investors should consider when doing transactions in the German market are inter alia whether declarations can be submitted by electronic means with binding effect, whether notarisations can be carried out online and whether shareholder resolutions can be passed without holding a physical meeting.

E-SIGNATURES

Generally, there is no prescribed form or requirement for submitting binding declarations under German law. A simple e-mail or the click of a button is in principle sufficient to enter into a sale and purchase agreement.

But there is no rule without an exception: For certain declarations the German Civil Code (Bürgerliches Gesetzbuch, BGB) stipulates a written form requirement (statutory written form) (see under 1.) and in certain cases a notarisation is even required (see under 2.). Irrespective of this, the parties to a contract may also agree to use a written form of contract (voluntary written form) (see under 3). The voluntary written form is often used in practice as it may serve as evidence in a future dispute among the parties regarding what was contractually agreed.

The options to submit a declaration electronically vary as follows depending on the relevant requirement:

1. Statutory written form

If applicable, this requires observation of the written form (e.g. guarantees (Bürgschaften) or termination of an employment contract) or, if the non-compliance with the written form requirement has certain legal consequences (e.g. the right to terminate a commercial lease prior to the end of the fixed term), a handwritten signature is required on the original document: In the case of contracts, both contracting parties need to sign on the same document. A scanned signature transmitted by fax or PDF is not sufficient.

However, the legal written form can be substituted by observing the electronic form - this already applied before the Covid-19 pandemic - pursuant to § 126a BGB. In this case a qualified electronic signature (qeS) is required.

The use and the recognition of the qeS is regulated in the [eIDAS Regulation](#).

A qeS can only be issued and used via a so called "[trusted service provider](#)". The qeS can either be created using software and then downloaded to a chip card (in which case the user needs a chip card reader or mobile phone and a PIN) or a remote signature ("sign-me")¹ can be used for issuing the qeS. This requires the user to first register via the homepage of a trusted service provider and then identify himself using an eID identity card (an online identity card with a built-in chip issued in 2017 at the earliest). Afterwards the user can download the signature from the provider's homepage.

The qeS is assumed to be authentic, i.e. the qeS is considered genuine as long as no facts are presented that give rise to serious doubts about its authenticity, for example that the data has been hacked.

If the statutory written form is not complied with, the declaration or the relevant legal transaction is in general considered null and void, § 125 BGB. An exception is stipulated for long-term commercial rental contracts: these are deemed to have been concluded for an indefinite period of time and can be terminated with a statutory period of notice of six to nine months regardless of the contractual term. The rationale behind this is to give the acquirer of a property who assumed the corresponding leases by operation of law a right to terminate in case not all provisions of the leases had been stipulated in the written documentation available to the acquirer.

Assessment:

qeS are in general not suitable for facilitating the compliance with a statutory written form requirement. Firstly, the time and effort required to set up a qeS in advance is relatively high. Additionally, the evidential value of a handwritten signature is higher pursuant to applicable German law. Finally, German law only requires the statutory written form in a relatively few cases. With respect to long-term commercial leases, verdicts of the German Federal Supreme Court (Bundesgerichtshof, BGH) require the so called “uniformity of the document” in order to comply with the written form requirement which means that – simply speaking – the lease contract must be stored in once piece. It is very questionable whether the BGH would consider a document stored on servers to be fulfilling such criteria. So far, there has been no ruling of the BGH on this issue. However, in the light of the economic risks, it is not advisable to conclude commercial leases with a qeS.

In conclusion, it seems advisable not to replace a handwritten signature with a qeS but instead to provide a document with a handwritten signature if the law requires the statutory written form. This is true in particular due to the fact that even during the Covid-19 pandemic documents can be delivered relatively easily via postal services.

2. Notarisation obligation

Certain legal transactions are subject to notarization requirements, which means it is required that declarations are issued personally and in writing before a notary public. This applies in particular to the completion of property purchase agreements, the sale and purchase of shares in a GmbH or the completion of GmbH partnership agreements.

The notarisation usually takes place in the presence of a notary and in the personal presence of the parties (or their representatives). The notary prepares a record of the notarisation, which is read out, approved and then signed by the parties in person in the presence of the notary. An Online notarisation for example via a video conference is not (yet) permissible under German law.

However, in order to avoid or reduce personal contact and thereby the risk of infection, the notarisation can be conducted by a representative of the parties where such representative does not have a power of attorney. In this case, the notary usually reads out the document to one of his employees who acts as a representative without power of attorney for both contracting parties. The parties can then subsequently approve the contract. Notarisation of the subsequent approval, i.e the rereading of the notarised deed, is not necessary. This method of conducting a notarisation does not fully serve the purpose of making the parties aware of the magnitude of their declarations by reading them out loud to them, and furthermore, the notary does not have the opportunity to explain certain provisions of the deed during the notarization. This can, however, at least be taken care of during a prior telephone call between the notary and the parties.

If the parties approve the contract, then it becomes legally binding with retroactive effect. However, there is a risk that this retroactive effect does not apply to deadlines relating to tax implications.

Assessment:

In times of restricted contact, notarisations should only be carried out with a reduced number of people. This can be achieved by one authorised representative from each party being present during a notarisation. This facilitates compliance with social distancing rules. If legal advisors are to participate in the notarisation process, they can be patched in by way of a telephone conference.

An online notarization with none of the parties being physically present may in future become reality in relation to the incorporation of companies.

Outlook

On July 31, 2019, the [Digitalization Directive](#) of the European Union came into force. This Directive is to be transposed into national law by July 31, 2021 (with an extension option of one year). The Directive relates exclusively to digitalisation processes in corporate law, in particular to the online incorporation of corporations.

Within the context of the transposition of the Directives into national law, the design and procedure of an online notarisation during the formation of a company is currently being discussed in Germany. An online notarisation process could in the future be conducted via video conference using an identity card with an eID function and a qeS. However, the exact procedure has not been conclusively regulated. Therefore, the online notarisation process in the context of company formation remains theoretical for the time being.

3. Voluntary written form

In cases where the parties have voluntarily agreed on a written form requirement, a handwritten signature is dispensable, § 127 para. 2 sentence 1 BGB. In principle, mechanically produced signatures (such as a stamp or print) or a scanned signature are sufficient. An electronic signature is not required.

RELIEF REGARDING THE ADOPTION OF RESOLUTIONS BY COMPANIES

On 27 March 2020, the German legislator passed the [COVID Civil Act²](#) in order to facilitate the passing of resolutions by circular procedure and thus to keep companies capable of acting during the Covid-19 pandemic. The law applies to all shareholder meetings and resolutions that take place or are passed in 2020. Depending on the further course of the pandemic, the Federal Ministry of Justice and Consumer Protection may extend the time period until 31 December 2021.

1. German Limited Liability Company (Gesellschaft mit beschränkter Haftung, GmbH)

In principle, shareholder resolutions of a GmbH are to be conducted in shareholder meetings (i.e. with the physical presence of the shareholders), § 48 para 1 of the German Limited Liability Companies Act (GmbHG). Contrary to the previous § 48 para 2 GmbHG, which only allowed a resolution to be passed by way of a written procedure if all shareholders agreed to a resolution proposal or agreed to vote in writing, according to § 2 COVID-ZivilG resolutions can now be passed in text form (§ 126 b BGB, i.e. by e-mail; fax or otherwise by means of electronic communication) or by written vote even without the consent of all shareholders.

Some articles of association already address the written resolution procedure and stipulate that resolutions can be passed in text form, by telephone or video conference, if all shareholders agree. Since § 2 COVID-ZivilG only amends § 48 para GmbHG, it is questionable whether the requirement for unanimity is also no longer applicable where the articles of association impose certain requirements on the passing of resolutions.

Recommendation:

If the articles of association already provide for other forms of resolution than written (e.g. video conference), such procedure should only be applied if all shareholders agree to it in order to avoid the risk of an invalid resolution. In all other cases the vote can be made in text or written form according to § 2 COVID-ZivilG.

2. Stock Corporation (Aktiengesellschaft, AG)

For annual general meetings to be held in 2020, the management board of the company may - in deviation from Section 118 of the German Stock Corporation Act (Aktiengesetz, AktG) - decide on the participation of shareholders in the annual general meeting by means of electronic communication even without authorisation by the articles of association or rules of procedure. However, the virtual general meeting may only be held if:

1. a video and audio transmission of the entire meeting is conducted
2. the exercise of shareholders' voting rights via electronic communication (postal vote, (unless otherwise offered, electronic postal vote is to be provided for) or electronic participation) as well as the granting of proxies is possible,
3. the shareholders are given the opportunity to ask questions by way of electronic communication, and
4. shareholders who have exercised their voting rights in accordance with item 2 above are given the opportunity to object to a resolution of the annual general meeting even if they did not attend the annual general meeting (contrary to Section 245 AktG).

¹This is currently only offered by D-Trust GmbH and Deutsche Post AG .

²Law on measures in company, cooperative, association, foundation and residential property law to combat the effects of the COVID 19 pandemic.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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