



## Contracts during the Covid-19-Pandemic

# The Conclusion of Contracts while Working from Home

The SARS-CoV-2-Virus (coronavirus) means that many companies are currently allowing their employees to work from home. This gives rise to the question of whether and how this way of working has an effect on the conclusion of contracts.

We have set out below a brief overview of the general principles of concluding contracts in Germany, showing the implications of the current situation.

### Basic principle of freedom of contract

In Germany, the principle of freedom of contract prevails, which means that contracts in particular can be concluded without formality. A contract comes into existence by two corresponding declarations of intent followed by offer and acceptance (see §§ 145 et seq. German Civil Code (hereinafter referred to as BGB)). The respective declaration of intent can be made both in writing and orally, only silence is not considered a declaration of intent.

### Formal requirements as an exception

It is only in a few exceptional cases that the law itself prescribes a certain form for the submission of a declaration of intent or the conclusion of a contract. If this legal form is not complied with, the intended legal transaction is invalid according to § 125 (1) BGB.

These formal requirements are intended to protect the person making the declaration from reaching a hasty decision and being “forced” into a contract. They are therefore mostly found in contracts which are essential in everyday life - from a consumer’s point of view.

Under German law, the following four types of declarations of intent exist:

- Written form, § 126 BGB
- Text form, § 126 b BGB
- Notarial recording, § 128 BGB
- Official certification, § 129 BGB

## The Conclusion of Contracts while Working from Home

One of the above-mentioned formal requirements must be complied with, in particular, when concluding a consumer loan, a contract for the purchase of real estate, when giving a guarantee or making a gift, and when drawing up a will or an inheritance agreement. If contracts are concluded in these areas, the respective formal requirements prescribed by law must be observed.

For “normal” day-to-day business transactions within a company, however, the statutory formal requirements are usually not relevant.

### **Unilateral declarations of intent which require acknowledgement of receipt**

This is different in the case of so-called unilateral declarations of intent which require acknowledgement of receipt, such as the termination of an employment relationship (§ 623 BGB) or a tenancy for residential accommodation (§§ 766, 564a BGB). In these cases the declaration must always be in writing.

If the contractual partner does not terminate the contract himself, but acts through a lawyer, for example, the lawyer requires an original power of attorney for this purpose, since the recipient of the termination can otherwise reject the termination and the termination would then be invalid, § 174 BGB.

### **Written form as preferred contract form - what should be observed?**

Often, however, a certain form is agreed in the contracts themselves, for example for making changes to the contract or terminating it. Therefore, before a contract is amended or terminated, it must first be examined whether such a formal requirement has been agreed. Even if such agreements on form are often invalid or can be very easily waived, the agreed form should be adhered to if there is no possibility of having the validity legally checked beforehand. The conclusion of a contract outside of everyday life should always be made in writing for the sole purpose of facilitating evidence.

### **Handwritten signature**

Written form means that the text has been signed by hand. However, this does not mean - at least not as long as this is not explicitly required, e.g. in the case of a will - that the entire contract must be drawn up by hand. The declaring party can therefore sign the contract himself or be represented (with a few exceptions, such as in the case of a will).

Within the scope of representation (cf. §§ 164 ff. BGB), the signing party must act with power of representation which can be granted to him by law or legal transaction. Thus in the case of a GmbH the managing director is basically authorised to represent it by law (see § 35 GmbH Act). However, due to the current situation of the coronavirus pandemic and the resulting increase in people working from home, the managing director may be prevented from signing the contract in his own hand, so that a company can also grant other employees power of representation in legal transactions; this can be done in particular by granting powers of attorney, whereby the power of attorney can in principle be granted without



## The Conclusion of Contracts while Working from Home

form, i.e. explicitly or by implication (exceptionally, however, the granting of power of attorney requires an explicit declaration in accordance with § 48 Commercial Code).

### Electronic Form

Declarations by e-mail or fax, on the other hand, do not normally conform to the written form requirement. In certain cases, however, the written form can be replaced by the electronic form. For this purpose, however, the electronic document must be provided with a so-called “qualified electronic signature” (§ 126 a BGB) and the recipient of the declaration must agree to the electronic form. This form is not up until now very widespread in Germany, however.

### Signature on the same document

If the written form must be observed, the two signatures must be on the same document. However, this does not mean that the respective signatures of the contracting parties must be on one and the same “piece of paper”. It is recognised and sufficient that a contract text with the same wording is signed and sent to the other party, for example by fax or scanned by e-mail.

### Conclusion

For the conclusion of a contract for which no special formal requirements exist, the exchange of e-mails, fax messages, etc. is sufficient. Under German law, a purchase contract can be concluded orally even with very high volumes. It is critical that the content of the contract can be proven.

Working from home should basically not affect the conclusion of contracts. As long as the above is observed, contracts can still be entered into without problems even in times of coronavirus. Particular care should be taken so that concluded contracts can also be documented and therefore proven after the event without problems.

### Further Information

If you should have any further questions on the above or other legal issues surrounding the coronavirus, our experts at TW are always available to provide advice and assistance.