

Electronic Signature Cases – German Law

Introduction

Under German civil law, there are relatively few rules requiring a signature in order for a certain legal consequence to take effect, e.g. for an agreement to be valid and enforceable. In business practice, however, signatures are viewed as an established method of reliably confirming, controlling and proving business transactions. While in many business transactions a signature may not be required by law, a signature certainly has evidentiary value and is viewed as a prudent practice.

In many situations where a document or contract traditionally would be signed by hand (a “wet” signature), such a signature can be replaced by an electronic signature. More specifically, an electronic signature can be applied in the absence of specific laws that either require the written form or specifically exclude an electronic signature. Further, unlike a scanned handwritten signature that can readily be copied, an electronic signing platform, such as DocuSign eSignature, creates a digital audit trail that helps provide further evidence of the signature and transaction.

In essence, the following applies under German law:

- **Transactions**, in the absence of different requirements, generally can be finalized even orally. However, for evidentiary reasons, especially in a commercial context, it is recommended to finalize a contract in writing. This completion of a contract can be done in any medium, including in electronic form (Section 126b of the German Civil Code, “**BGB**”), as long as German law:
 - does not require the written form (which if it did, would require a qualified electronic signature to satisfy this requirement, Section 126a BGB), and
 - does not prohibit an electronic signature in specific cases.
- **Electronic text** generally has the same evidentiary status as text written on paper, so long as:
 - the person from whom it originates can be properly identified; and
 - the document is created and stored in a manner that ensures its substantive integrity (e.g., tamper evident protections).

An electronic document that does not meet the foregoing conditions still may have some evidentiary value, if other evidence is available to substantiate the substance of the document.

Electronic signature can take one of two primary forms, a standard electronic signature and a digital signature where a digital certificate linked to the signer's identity is embedded within the electronic signature. In most cases, industry practice is that a standard electronic signature is adequate. In heavily regulated industries, engagements with government entities and where there is a desire by the signatories to have heightened identity attached to an electronic signature, a digital signature could be used. Should a signer specifically desire to have a digital signature with a rebuttable presumption of reliability as to the identity of the signer, the signer could utilize a specific type of digital signature, which complies with the Electronic Identification, Authentication and Trust Services (eIDAS) qualified electronic signature (QES) requirements (Section 371a para. 1 ZPO).

Practical consequences. The fact that most contracts can be validly concluded with an electronic signature reaffirms the usefulness of an electronic signing platform, such as DocuSign eSignature. In practice, many business contractual relationships and ecommerce transactions are already executed based on a standard electronic signatures. While a qualified electronic signature (QES) has a higher evidential value, it is rare for German law to require either an eIDAS-compliant advanced (AES) digital signature (presumption of identity does not shift to the signer) or a qualified (QES) digital signature (presumption of identity shifts to the signer), in business transactions.

Support for electronic signatures in Germany

The position is simple: German law generally recognizes electronic signatures as a means of expressing a declaration of intent. For this purpose, a signature generally does not have to be technically sophisticated. Something as informal as a name typed at the end of an e-mail can serve as a signature, as can a scanned signature. However, often a heightened level of evidentiary support is desired, which leads to the use of an electronic signature.

In order to prove that a contract has been agreed to by the parties, the parties usually will draft and sign a written instrument. As a result, in cases where no other formalities are required, an electronic signature provided through a software platform, such as DocuSign eSignature, provides further assistance in proving that the parties have expressed their agreement as to the obligations set out in the contract and as to the manner in which they are to be performed.

Electronic transaction and signature court cases – a few examples from Germany

Federal Fiscal Court, ruling of 13 May 2015 – III R 26/14

E-mail without qualified electronic signature suitable as a replacement for paper-based, written objections.

The Federal Fiscal Court ruled that an objection could be filed by simple e-mail, i.e. without a qualified electronic signature, if the fiscal authority had opened access for the transmission of electronic documents.

In the underlying dispute, the family fund had reversed a child benefit assessment that had been made in favour of the plaintiff, and in the notice had stated the family fund's e-mail address. The plaintiff filed an objection to this decision by simple e-mail, which the family fund considered as invalid for lack of a qualified electronic signature. The Federal Fiscal Court held, however, that objecting by simple e-mail was sufficient in this case.

Higher Regional Court Saarbruecken, decision of 27 July 2005 – 1 U 515/04

A fax with only a signature can already constitute a declaration of acceptance if all essential elements of the agreement such as price, object of purchase and parties are fixed.

According to the Higher Regional Court, the plaintiff and the defendant concluded a binding contract for work by a fax which contained the last page of the offer of the plaintiff for a certain construction project, which was provided with the defendant's company stamp and the initials of its managing director and was sent to the plaintiff.

The court stated that for identification purposes, an individual character which sufficiently identifies the identity of the signatory, which is unique, has corresponding characteristic features and presents itself as a representation of a name is required and also sufficient (see also Federal Court of Justice, decision of 22 October 1993 – V ZR 112/92).

Local Court Bonn, decision of 25 October 2001 - 3 C 193/01

Proof of an agreement to pay brokerage fees cannot be provided by the submission of e-mail printouts from which the commitment is to be derived.

Pursuant to the Local Court Bonn, mere e-mail printouts lack evidential value. It is common knowledge that e-mail files can be manipulated. Even if the relevant e-mails were to have been sent by the defendant (which the defendant denied), it is possible that individual words or individual sentences of these e-mails have been altered by third parties.

Federal Court of Justice, decision of 8 May 2019 – XII ZB 8/19

A signed original statement setting out the grounds of appeal, scanned and attached to an e-mail as a PDF file, shall not be lodged in writing with the court until a printout of the PDF file containing the complete pleading has been lodged.

An e-mail with a scanned pleading does not fulfil the requirements for an electronic document under Section 130a ZPO.

Documents in legal cases can only be submitted electronically to the address specified on the website of the Higher Regional Court within the required time limit by using qualified electronic signatures (QES) or other secure means of transmission (Section 130a para. 2 to 4 ZPO). The claimant did not meet these requirements by only sending an e-mail with a scanned statement of appeal as attachment within the time line.

Higher Regional Court Braunschweig, decision of 8 April 2019 – 11 U 146/18

If a notice of appeal is sent via the special electronic attorney mailbox without a qualified electronic signature, the simple signature indicated under the document must correspond to the sender of the document according to Section 130a para. 3 ZPO

In this case, a notice of appeal was submitted via the special electronic attorney mailbox of one attorney of the law firm representing the appealing party. This attorney also was indicated as sender in the notice of appeal. However, the document was signed by a different lawyer. In addition, the document had been provided with an advanced electronic signature of a lawyer.

The Braunschweig Higher Regional Court dismissed the appeal as inadmissible, since in its view there was no effective filing of an appeal. If a notice of appeal is sent via the special electronic lawyers' mailbox without a qualified electronic signature (QES), the simple signature given under the letter must, according to Section 130a para. 3 ZPO, correspond to the sender of the document. Using an advanced electronic signature did not satisfy the requirements of Section 130a para. 3 ZPO.

Comparison: Informal electronic signature versus a signing platform

Although an informal electronic signature/consent is in principle capable of constituting a signature, it does carry risks.

It may be necessary to produce evidence, perhaps long after the event, of the processes that were followed for any given signed document and what the contents of the document were. This evidence might be needed in court, or perhaps in other situations such as due diligence or inspection by auditors.

Informal electronic signatures often create uncertainty:

- It may be unclear whether a name inserted in the document was intended to be a signature at all.
- An informal electronic signature or a scanned manuscript signature can easily be copied.
- It may be difficult to establish the connection between the consent and the content of the document (who agreed to what)
- An easily amended electronic document signed with an informal electronic signature may be thought to be less robust than a paper-based traditional wet-ink signature.
- It may be unclear whether a required formality was complied with.

Using a genuine electronic signature through a software platform, such as DocuSign eSignature (as opposed to a scanned copy of a handwritten signature) renders remote contracting more secure in that the validity of contracts will be more difficult to challenge. DocuSign eSignature provides a structured auditable environment and step by step process for electronically signing documents.

Document integrity. An informal electronic signature leaves open the possibility of dispute about what the signed document consists of, and whether it might have been altered subsequently. Secure storage (e.g. tamper proofing) of the signed document and associated signatures reduce this risk.

Identity of signatory. What if the signatory subsequently denies that they signed the document? Can we prove that it was them? Many businesses wish to have the flexibility to choose a level of identity assurance that reflects the nature of the document and the value and importance of the transaction.

Overall, in the business to business context it is normally open to a business to choose the kind of electronic signature that it considers suitable for the transaction. Sophisticated cryptographic digital signatures offer the highest assurance levels of document integrity and identity of signatory. However, experience suggests that for most transactions businesses have taken a pragmatic view that such heightened technological level of assurance of a digital signature is not required and that a standard electronic signature is adequate.

Formalities Requirements

Separately from evidentiary requirements, German law may impose other formalities.

If the law requires the document to be signed by hand (on a paper), only a qualified electronic signature (QES) can replace this hand signing requirement (Sec. 126a BGB).

In some cases, the law excludes the possibility to replace a written form (i.e. signing on a paper) with an electronic signature, e.g. Section 781 sentence 2 BGB (“acknowledgement of debt”, *Schuldanerkenntnis*) or Section 780 sentence 2 BGB (“promise of debt”, *abstraktes Schuldversprechen*).

A smaller group of agreements and declarations cannot be given by mere written form but require notarization(e.g. transfer of real estate or shares of a German limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*), or physical presence.

However, the increasing need for remote working has sparked a greater need to adapt such formalities to modern-day needs of society, where interactions are increasingly virtual. This is particularly so with regard to the conclusion of contracts between people not physically in the same place. Therefore, these procedures may be more generalized in the near future and lead to the development of remote notarised electronic signature techniques.

Visit the [DocuSign eSignature Legality Guide](#) to learn more about electronic signature-related laws from around the world.

Disclaimer

The information in this White Paper is for general information purposes only and is not intended to serve as legal advice. It is limited to the laws of Germany. Laws governing electronic signature may change quickly, so DocuSign cannot guarantee that all the information in this White Paper is current or correct. Should you have specific legal questions about any of the information in this White Paper, you should consult a suitably qualified legal practitioner.

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