



# COVID-19 (Austria): How to sign a contract when working remotely from home

## Introduction

The numerous precautionary measures being imposed by governments worldwide forces people to work from home to limit the further spread of the Covid-19 virus. Working remotely confronts us with new challenges and even simple tasks in everyday business like signing a contract can become a logistical nightmare. This note sets out a high-level guidance on remote execution options for B2B contracts under Austrian law.

## General rule: no formal signature requirements

Austrian law contracts can, in principle, be concluded orally or in writing (sec. 883 General Civil Code (*Allgemein Bürgerliches Gesetzbuch*)) without following any specific formal requirements (including by way of exchanging text messages/emails, telephone calls, video chats, etc.).

There are, however, exceptions to this principle. Depending on the subject matter of the contract, valid execution may require (i) a handwritten signature (e.g. in case of a surety (*Bürgschaft*) or a guarantee (*Garantie*)) or (ii) an even stricter form which may involve the presence of a notary (such as a notarial deed, e.g. in case of real estate mortgages or a transfer of shares in an Austrian limited liability company).

Where the law does not provide for a certain execution method, the contract parties may contractually agree on a specific method (e.g. for documentation purposes).

Note that where the law or a contractual agreement between the parties requires a handwritten signature, this requirement can generally be met either by (a) “wet ink” signature (including virtual signing by way of exchanging PDF signature pages via email) or (b) qualified electronic signature (details below). However, where the law requires a notarial deed virtual signing is currently not permissible under Austrian law.

## Virtual signings

Virtual signings can be organised in the form of (i) an exchange of email/PDFs or (ii) signing by electronic signature.

### Exchange of PDF signature pages via email

This method may be used if handwritten “wet ink” signatures are required or agreed. Documents are circulated by email, signatories print, sign and scan signature pages and return PDF copies of their signature pages by email. It is possible where a signatory has a printer but does not have scanning capability to scan documents using scanning apps on mobile devices or by way of taking a photo of the signature page with the mobile device camera.

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## Virtual signings by electronic signature

This method may be used if handwritten “wet ink” signatures are not required or agreed. Under Austrian law, contracts can, in principle, also be signed electronically. There are, however, restrictions and it must be assessed on a case-by-case basis if a specific contract can be signed electronically and what type of electronic signature is appropriate (simple or qualified electronic signature).

### Simple electronic signature

The simple electronic signature is, as the name already suggests, the simplest way of signing a contract electronically and can only be used if there are no formal requirements stipulated either by law or by agreement of the parties. A simple electronic signature can include pasting an electronic copy of a pre-existing e-signature into an electronic copy of a document. Also, the mouse or a touchscreen device such as a tablet or mobile phone can typically be used to produce a signature (if using a desktop or a laptop, Adobe Acrobat does, e.g. offer a “Fill & Sign” tool for signing; mobile phones and tablets generally offer a similar signing tool).

Use cases for simple electronic signatures:

- Loan agreements and security documents (excluding, however, real estate mortgages and special powers of attorney relating to security documents);
- Resolutions of the board of directors (*Geschäftsführer*) of an Austrian limited liability company or of the management board (*Vorstand*) of an Austrian stock corporation; meeting minutes of such boards (if, however, there are no specific requirements under the article of association and/or by the by-laws);
- General commercial contracts (depending on the dispute resolution clause).

Note that if such documents (e.g. a loan agreement or a commercial contract) include an arbitration clause or, although there is no foreign element (*kein Auslandsbezug*), include a choice of court clause, a qualified electronic signature should be used.

### Qualified electronic signature

A qualified electronic signature is an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures (“qualified certificate”). A qualified certificate can only be issued by a qualified trust service provider, e.g. DocuSign. When issuing a qualified certificate, the trust service provider must verify the identity of the signatory.

Use cases for qualified electronic signatures:

- Power of attorneys (this has to be assessed on a case-by-case basis; if the power of attorney has to be notarised and/or filed with the commercial register (*Firmenbuch*) or land register (*Grundbuch*), electronic signatures are generally not appropriate);
- NDAs (e.g., in an auction process);
- Shareholder resolutions of an Austrian limited liability company which do not need to be notarised and/or filed with the commercial register (*Firmenbuch*), e.g., resolutions approving certain measures or legal transactions of the board of directors; including circular resolutions (*Umlaufbeschlüsse*);
- Lease agreements within the (partial) application scope of the Austrian Tenancy Act (*österreichisches Mietrechtsgesetz*) providing for a limited lease term (otherwise the lease agreement is deemed to be concluded for an unlimited term).

There are, as mentioned above, documents which are typically not appropriate for electronic signatures (neither simple nor qualified electronic signature). This includes:

- Shareholder resolution of the general assembly of an Austrian limited liability company and stock corporation where the law requires the resolutions to be recorded in form of notarial minutes;
- Real estate mortgages;
- Agreements for the sale and purchase of shares in an Austrian limited liability company or real estate;
- Submissions to the commercial register (*Firmenbuch*) or to the land register (*Grundbuch*);
- Company formation documentation, establishment of a private foundation;
- Appointment/removal of managing directors or members of the supervisory board;
- Changes of the articles of association of an Austrian limited liability company or stock corporation;
- Corporate reorganisations (statutory mergers, demergers, conversion, etc.);
- Dissolution of a company or private foundation.

## **Notarial deeds and other documents requiring the presence of a notary**

To date, Austrian government has not (yet) announced any measures that will allow for a remote or electronic execution of documents requiring the involvement of a notary (including documents that require (i) a notarised signature, (ii) minutes recorded by a notary public or (iii) a notarial deed by law).

Due to the precautionary measures imposed by the Austrian government, most notary offices have reduced their services. As of now, notaries will, where possible, still take appointments but only if compliance with legal requirements can be ensured. This may include limiting the amount of people attending such appointment, e.g. by the use of power of attorneys. In any case, where the execution of a contract in front of a notary is foreseeable within the next weeks, early coordination is highly recommended.

## **Specifics for English law governed agreements**

Where DocuSign (or another qualified trust service provider) is not being used, and instead signatories are signing using a computer or other device, English law documents may be executed in the following ways: (a) using Adobe Acrobat – relevant when signing on a laptop or desktop; (b) on an iPad/iPhone using the Apple Mail app; (c) on a smartphone/iPad using the Outlook app; and (d) an iPhone/iPad using the Blackberry app. Other e-signature options include pasting an electronic copy of a pre-existing e-signature into an electronic copy of a document. Key points to consider include: (i) if the document is a deed, other execution formalities still apply, including the need for a witness; and (ii) some types of document cannot be executed by e-signature – for example, stock transfer forms and some documents that have to be registered. If you propose to sign English law agreements or deeds by e-signature using any of the methods set out above, please contact us to obtain step-by-step instructions for doing so.

In light of the above, we recommend examining on a case-by-case basis which execution method is appropriate. If you would like to discuss how Covid-19 may affect your signing procedures in general or if you need further assistance in assessing the right execution method for a specific contract, please do not hesitate to reach out to a member of our Global Transactions team.

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