

WilhelmGilliéron

AVOCATS



Auteur: Christophe Wilhelm | Le : 30 March 2021

To have a contract signed at a time when the signatories are all telecommuting? Yes, it's possible!

"It will be difficult to get this contract signed in the next few days, as the person in charge is not in the office. The signatories are not all here and Mr. X, the only one who can sign this contract, will be back next week." Such comments are no longer relevant.

These long-standing difficulties have been exacerbated by the current pandemic, which has made the need for paperless contracting ever more relevant.

We have previously discussed the modalities of the electronic signature ([see our paper of May 27, 2019](#)) introduced in Swiss law since the entry into force on January 1, 2017 of the law on electronic signatures, as well as recent reliefs concerning the modalities of this electronic signature during the COVID-19 pandemic ([see our paper of April 6, 2020](#)).

However, it has to be said that this electronic signature is very cumbersome to use and does not meet the current needs of legal subjects and the ever increasing digitalization of the business world.

Some platforms, the most widespread of which is DocuSign, offer to conclude contracts through them, making their services available to the parties almost free of charge. The parties can sign their contracts online, distribute them to each other and ensure that the documents have been duly signed.

Is this method of proceeding valid under Swiss contract law and is such a signature binding on the parties who have proceeded in this way?

In order to answer this question, it must first be pointed out that Swiss contract law establishes the principle of **freedom of contract** (11 CO), i.e., it admits the validity of contracts concluded orally or by means of a deed, provided that each party expresses its will in a way that is recognizable and understandable for the recipient.

In Swiss law, many contracts, and not the least, are not subject to any particular form and can therefore be validly concluded orally, by conclusive acts or by means of the aforementioned platforms. These include contracts for the sale of movable property, employment contracts, leases and agency agreements. The same applies to shareholder agreements or share purchase and sale agreements and to almost all commercial contracts that are signed in the course of a company's daily business.

There is no doubt that entering into a contract through digital platforms such as DocuSign meets the above-mentioned criteria of recognition and understandability for the recipient. Consequently, the conclusion of contracts via a DocuSign-like platform, which are not subject to compliance with a particular form under Swiss law, meets the requirements of formal validity under Swiss law.

However, this is not the case if Swiss law requires a particular form for the validity of the deed or contract.

For example, the sale of real estate is subject to the **authentic form** (216 CO), i.e., the execution of the deed before a notary, as are many deeds related to the life of a corporation, essentially when the articles of association of the corporation are amended.

Other contracts are subject to the **simple written form**, such as the deed of assignment of claim (165 CO), the promise to give (243 CO), the deed of guarantee if the guarantor is not a natural person (493 CO) or the life annuity contract (517 CO), or to the **qualified written form** (which presupposes, for example, the use of an official form (266I CO) or that the text is entirely handwritten by its author - 347a CO).

Finally, it should be noted that Article 11 para. 2 CO, which provides that “in the absence of a provision to the contrary on the scope of the prescribed form, the contract is only valid if this form has been observed”, can, however, reveal a trap for the parties. This provision means that if the parties have agreed to a particular form, such as in writing, any subsequent amendment or pre-contractual agreement must follow that form. A signature by DocuSign would therefore not be valid, unless the parties agree that a signature by DocuSign or a similar tool will be considered to meet the requirements of written form in their case.

In view of the above, we recommend that a specific clause governing the use of these platforms be included in the contract for its conclusion and possible future modifications. This clause will avoid any doubt about the formal validity of the contract in question.

We therefore suggest inserting the following standard clause:

“In the event that the Parties use an electronic signature system such as DocuSign or a comparable platform or site through signatories that they warrant are duly authorized, they confirm that they use such a system with full knowledge of the facts, in particular of its proposed terms of use and level of security, and undertake to consider such a signature as equivalent to the written form and not to call into question the validity and binding nature of this contract as a result of such signature. “

This type of clause will avoid many future misunderstandings. Of course, it must be carefully adapted to each individual case.

Source :

<https://www.wg-avocats.ch/en/news/contract-law/to-have-a-contract-signed-at-a-time-when-the-signatories-are-all-telecommuting-yes-its-possible/>