WILLKIE

CLIENT ALERT

Written form or text form for long-term leases: Recommendations for action from a legal perspective.

March 11, 2025

AUTHORS

Cornelia Thaler | Henning Aufderhaar, LL.M. | Dr. Christian Werthmüller

German law was amended, effective as of January 2025, so that agreements in text form (for example, agreements produced as email, SMS or WhatsApp) have now become the legally accepted form for newly concluded or amended commercial leases with a term of more than one year — and not the written form (for example, agreements signed by hand in wet ink) as previously was the case (Section 578, paragraph 1, sentence 2, 550 BGB). Starting on January 1, 2026, text form will even apply as a statutory form requirement for all commercial leases (including those concluded before January 1, 2025).

This change in form has caused a great deal of uncertainty in German legal practice. According to Section 550 BGB, before January 1, 2025 all (material) agreements (*i.e.*, leases and amendments) had to be concluded in written form as stipulated under case law of the German Supreme Court ("BGH") (under the theory of apparent connection) and any amendments had to refer to the previous agreements in the original lease agreement and also had to be in written form. Otherwise, the lease agreement could be terminated at any time with statutory notice.

The reason for eliminating the written form was, therefore, to prevent long-term leases from being terminated at any time. This is a unique characteristic of German law unknown in other jurisdictions.

However, the German legislature decided not to abolish the written form, but to replace it with the text form requirement. It is likely that the entire case law of the BGH on the written form will now be transferred to the text form. This in turn would mean that every significant contractual provision in the tenancy agreement must refer to all other significant contractual provisions of the tenancy (*e.g.*, tenancy agreement as well as any amendments) and, if it does not do so, the entire tenancy agreement is deemed to have been concluded for an indefinite period and can be terminated at any time with statutory notice.

After this change in law, the question of evidence arises: How can evidence of the completeness of leases between landlords and tenants (*e.g.*, vis-à-vis a financing bank or a buyer) be established if emails, WhatsApp, text messages, etc. contain relevant agreements? How can it also be determined between the parties whether there is agreement on the content of the tenancy?

The second key question is: How can or must the principles of the BGH's case law be applied to the text form?

For example, would an obligation to use a shared filing location for tenancy agreements (*e.g.*, the mailbox) or in a data room folder be feasible? And what would be the consequence if agreements were nonetheless made outside of this storage location? Is the text form then violated or can the parties agree — also in accordance with the German AGB (General Terms and Conditions, “GTC”) — that they will not invoke their rights as long as the agreement has not been jointly placed in the filing system? And what would be the consequences if, for example, different versions of a document were uploaded by the parties?

In our opinion, it is therefore at least currently necessary, for the purposes of evidence and also to avoid breaches of form, to agree in the lease to comply with the principles of written form.

Relevant leases should therefore be demonstrably agreed to in writing, including the (qualified) electronic signature. We therefore recommend that the written form is specifically referred to as the agreed upon form in new tenancy agreements. This should also be possible as GTC because Section 309, no. 13 BGB only applies to notifications and declarations, but not to agreements.

The same also applies to existing tenancy agreements because otherwise the text form will also apply to these starting from January 1, 2026. Our strong recommendation here is to conclude corresponding amendments which clearly state that all parties agree on the written form as the governing and binding form for the respective agreement.

In addition, certain other provisions must be included in lease agreements to minimize any risks.

For example, the legal consequences of a breach of the written form must be explicitly regulated. If this is not done, the lease or amendment will be — in case of doubt — void (*see* Section 125, sentence 2 BGB), or deemed not to have been concluded (*see* Section 154, paragraph 2 BGB). Neither of these outcomes would be desirable.

In most cases, the most legally secure option at present would be also to apply the legal consequences of Section 550 BGB to a breach of the contractually agreed written form and to agree to this in the tenancy agreement or amendment.

The consequence of this approach is that everything remains as it was without the change of law — with all of the advantages and disadvantages associated. But as long as it is not clear whether the case law of the BGH on written form will be abandoned or adopted, and if it is to be adopted, how it will be adapted, the consequences are otherwise not calculable.

We also recommend including an obligation to provide a declaration of completeness in the lease. As in the past, it will remain a matter of debate whether it makes sense to add the written form cure clause in the contracts, which the BGH has found to be ineffective as GTC.

As the text form requirement will also apply to all existing tenancy agreements starting from January 1, 2026, it is also advisable to conclude corresponding amendments in order to protect long-term contracts from the risk of termination. The widespread "normal" or "double" written form clause should not be relied upon as it is highly controversial whether this can be effectively agreed as GTC.

Another consideration could be the limitation of the double written form clause to the contracting parties (and not legal successors), or that a telecommunicative (*e.g.*, per email) transmission is possible by means of an individual agreement, but will be confirmed by a subsequent agreement complying with the written form requirements: the latter allows more flexibility but also makes a dispute more likely.

A tightening of the text form for notifications and declarations by a contracting party, such as rent indexation letters, will generally not be able to be effectively agreed upon as GTC due to Section 309, no. 13 BGB.

Our recommendation is therefore is to seek legal advice/information, and decide as early as possible how you want to deal with the change in the law.

This client alert is not a substitute for legal advice. The Willkie Real Estate team will be happy to assist you at any time.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Cornelia Thaler

+49 69 79302 238
cthaler@willkie.com

Henning Aufderhaar, LL.M.

+49 69 7930 2149
haufderhaar@willkie.com

Dr. Christian Werthmüller

+49 69 7930 2370
cwerthmueller@willkie.com

WILLKIE

BRUSSELS CHICAGO DALLAS FRANKFURT HOUSTON LONDON LOS ANGELES MILAN
MUNICH NEW YORK PALO ALTO PARIS ROME SAN FRANCISCO WASHINGTON

Copyright © 2025 Willkie Farr & Gallagher LLP. All rights reserved.

This alert is provided for educational and informational purposes only and is not intended and should not be construed as legal advice, and it does not establish an attorney-client relationship in any form. This alert may be considered advertising under applicable state laws. Our website is: www.willkie.com.