



ONLINE COMMENTARY
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COMMENTARY ON

Art. 12 CO

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II. Written form

1. Form required by law

a. Scope

Art. 12

Where the law requires that a contract be done in writing, the requirement also applies to any amendment to the contract with the exception of supplementary collateral clauses that do not conflict with the original document.

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I. PURPOSE AND SCOPE OF ART. 12 CO

- 1 Art. 12 CO is in principle a **supplement to Art. 11 CO**. Unless special provisions apply¹, Art. 12 CO extends the formal requirements of contracts and any judicial acts as defined in Art. 11 CO² to their amendments («*Abänderungen*», «*modifications*»). Contrary to its wording, Art. 12 CO not only applies when the law requires the simple written form for a judicial act, but also in the case of public notarization³. However, Art. 12 CO does not apply if the parties have agreed on a specific form (see Art. 16 CO).⁴

II. AMENDING/MODIFYING AND SUPPLEMENTING A CONTRACT

- 2 Amending a contract or a specific provision therein, respectively, means either (i) **modifying** the contract or (ii) **supplementing** the contract by adding additional provisions without modifying its essential content.
 - The *modification* of a contract means that a contractual provision is either completely deleted or replaced by another (e.g. by changing a certain deadline, by allowing installments instead of lump sum payments or by modifying the pledge⁵, etc.). Art. 12 CO also applies when a contract is transferred in its entirety to a third party.⁶ However, Art. 12 CO does not apply if the parties further describe or define already existing contractual obligations.⁷ This can be done in any form.
 - By *supplementing* a contract pursuant to Art. 12 CO the parties add a provision to their existing (form-requiring) contract.⁸
- 3 **In practice**, contracts can be amended/modified either by (i) destroying the old and issuing new contract documents/certificates, (ii) issuing separate addenda to the existing contract or (iii) correcting the relevant provision(s) by hand. However, it is not advisable to use the latter method due to the difficulty of future proofing.⁹

III. «*SUPPLEMENTARY COLLATERAL CLAUSES*»

- 4 As an **exception** to the above rule, Art. 12 CO refers to «*ergänzende Nebenbestimmungen*» or «*stipulations complémentaires*», which translate into English as «*supplementary collateral clauses*» of a contract.

1. As in the case of apprenticeship contracts (see Art. 344a para. 1 CO, according to which an apprenticeship contract can be extended without any formal requirements); see BGE 103 II 127 consid. 2; for further examples see BK-Müller, Art. 12 OR N. 31.

2. See OK-Brütsch, Art. 11 CO.

3. BGE 95 II 419 consid. 2b with further references; BGE 123 III 97 consid. 2 (cancellation conditions for promissory notes under Art. 799 para. 2 CC); see also BK-Müller, Art. 12 OR N. 10 with many further references and examples; see also CR-Xoudis, Art. 12 OR N. 1.

4. BGE 40 II 614 consid. 1; decision of the Federal Supreme Court 4A_258/2014 of 8.7.2014 consid. 1.3; BK-Müller, Art. 12 OR N. 11 with references; BSK-Schwenzer, Art. 12 OR N. 2.

5. See BGE 95 IV 113 consid. 1.

6. However, for conflicting views in legal doctrine and inconsistencies in the case law of the Federal Supreme Court see BK-Müller, Art. 12 OR footnote to N. 21; for a further explanation see also ZK-Jäggi, Art. 12 OR N. 6 et seq.

7. E.g. if the contractual parties agree that the execution of the agreement, which they originally agreed to be «*in the second half of 2023*», will be «*on 31 November 2023*», see ZK-Jäggi, Art. 12 OR N. 16, see also BGE 95 II 310 consid. 3.

8. E.g. when one party undertakes to pay for the storage or additional transportation costs of an object; for further examples see BK-Schmidlin, Art. 12 OR N. 17 et seq.; ZK-Jäggi, Art. 12 OR N. 8.

9. See BK-Müller, Art. 12 OR N. 23 with further references.

- 5 Such «*collateral clauses*», which merely specify or supplement a contract or which only affect non-essential clauses of a contract, do **not have to comply** with any specific formal requirements, unless the provision(s) is/are in conflict with the original document. However, if a «*collateral clause*» contradicts the main contract, but does not itself have to meet any specific formal requirements (i.e. if it does not contain subjectively or objectively essential points of a contract¹⁰), it can, according to the Federal Supreme Court and most of legal doctrine, be concluded without any formal requirements.¹¹

IV. ART. 12 CO VS. 115 CO

- 6 Art. 115 CO has similarities with Art. 12 CO. According to Art. 115 CO, no particular form is required for the **extinction of a claim by agreement** even when the obligation itself could not be assumed without satisfying certain formal requirements required by law or elected by the parties. This means that, under certain conditions, a party may extinguish a debt without complying with any particular form.
- 7 In order to prevent contractual parties from circumventing Art. 12 CO, legal doctrine and case law have developed certain **theories to distinguish** between the two provisions. In the case of unilateral contracts (where only one party waives a claim), Art. 115 CO is supposed to override Art. 12 CO. However, Art. 115 CO does not apply in the case of a (synallagmatic) contract, unless all obligations are completely cancelled and the contract is revoked in its entirety.¹² Therefore, the conclusion of an (out-of-court) settlement does not fall within the scope of Art. 12 CO (as it does not qualify as a «*modification*», see above section II), and can thus be concluded without any formal requirements.¹³
- 8 If an obligation is merely **reduced or weakened** for one party, as it is the case when only one party's obligation is cancelled or modified, Art. 12 CO remains applicable (as this is most likely to have a negative effect on the other party's obligation(s)).¹⁴
- 9 In practice, it should be noted that, especially in the case of **public notarization**, the revoked act (e.g. a real estate transaction) might still appear in the land register (on which third parties may rely on in good faith).¹⁵

V. LEGAL EFFECTS IF THE PARTIES FAIL TO COMPLY WITH ART. 12 CO

- 10 If the contractual parties amend their main contract without following the formal requirements, the amendment is considered **invalid**. The «*old*» contract remains in force.¹⁶

10. For a definition of these terms, see OK-Brütsch, Art. 11 CO.

11. BGE 123 III 97 consid. 2 (for the example of the modification of the cancellation conditions of a contract); BSK-Schwenzer, Art. 12 OR N. 5; for a contrary view, see CR-Xoudis, Art. 12 CO, N. 3.

12. See BGE 95 II 523 consid. 4 with reference to BGE 75 II 146; where the parties decided not to transfer a property and no payment had to be made; the contract could be terminated without any disadvantage to either party and therefore without fulfilling any formal requirements; see also decision of the Federal Supreme Court 4A_49/2008 dated 9.4.2008 consid. 2.1; BSK-Schwenzer, Art. 12 OR N. 6; ZK-Jäggi, Art. 12 OR N. 19 et seq.

13. BGE 95 II 419 consid. 2b/c; of course, this does not apply if the parties agree on something that requires a special form (e.g. if one party undertakes to transfer a property); see CR-Xoudis, Art. 12 CO N. 7.

14. See decisions of the Federal Supreme Court 5A_251/2010 dated 19.11.2010, consid. 6.1.2 or 4A_49/2008 dated 9.4.2008, consid. 2.1 et seq.; Göksu, Präjudizienbuch, N. 3; BK-Müller, Art. 12 OR N. 33 et seq. with numerous references to other, differing and contradictory views.

15. See BK-Müller, Art. 12 OR N. 18; ZK-Jäggi, Art. 12 OR N. 9; see also OK-Brütsch, Art. 11 CO N. 9.

16. See BK-Müller, Art. 12 OR N. 25; ZK-Jäggi, Art. 12 OR N. 14.

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