



Susanne Brüttsch

Kommentar zu Art. 11 OR

Zitiervorschlag: Susanne Brüttsch, Kommentar zu Art. 11 OR, in: Christoph Hurni (Hrsg.) Onlinekommentar.ch, <https://onlinekommentar.ch/or11>, 1. Aufl., N. XXX zu Art. 11 OR (besucht am XXX).

- I. The Principle: Freedom of Form
- II. Types of Formal Requirements
 - A. Simple Written Form
 - B. Qualified Written Form
 - C. Public Certification
- III. Extent of Formal Requirements
- IV. Legal effects
 - A. In General
 - B. In case of Failure to Comply with Form Requirements
- V. International Private Law

I. The Principle: Freedom of Form

- 1 In accordance with the general principle of freedom of contract, Art. 11 para. 1 CO establishes the freedom of form as the default rule. Contracts, therefore, only (but still) require a special form if such form is expressly required by (federal) law.¹ Contrary to its wording, the rule of Art. 11 CO not only applies to contracts but to any juridical act.²
- 2 Formal requirements have multiple purposes.³ Foremost, they have a cautionary effect deterring parties from entering into contracts hastily.⁴ Formal requirements also serve to create legal certainty and to provide clear evidence of the parties' agreement in writing. They increase transparency by embodying the legal act in a physical form, making a legal act perceptible and visible to third parties (e.g. also for registration authorities).⁵
- 3 If for the validity of a legal act a specific form is required, the parties have to comply with the formal requirement irrespective of whether its purpose (as described above) is

¹ Cf. BGE 132 III 549 consid. 2.1.1; cf. BUCHER, p. 160 et seq, for contractual reservations see Art. 16 CO.

² Cf. BGE 121 III 31 E. 2c; CR CO I-XOUDIS, mn. 6 to Art. 11 CO; cf. also various examples in GAUCH/SCHLUEP/SCHMID, mn. 572 and 572a.

³ Cf. BK OR I-MÜLLER, mn. 46 et seq to Art. 11 CO; cf. CR CO I-XOUDIS, mn. 4 et seq. to Art. 11 CO; cf. also TERCIER/PICHONNAZ, mn. 720 et seq.

⁴ Cf. BGE Pra 1997, No. 150 consid. 1b; BGE 118 II 32 consid. 3d); BGE 117 II 382 consid. 2b; BGE 112 II 330 consid. 3a.

⁵ Cf. BGE 82 II 48 consid. 1 on the written form requirement of an assignment, which serves to enable third parties "to determine who is entitled to the claim on the basis of a process that has been clearly made known"; cf. also BGE 122 III 361 consid. 4c); BGE 118 II 32 consid. 3d; BGE 140 III 200 consid. 4.2; cf. also BUCHER, p. 161 et seq.

otherwise guaranteed in the case at hand. Adherence to the formal requirements is to be assessed and examined separately and independently of the substantive validity of the legal act and its interpretation.⁶

- 4 Statutory formal requirements are to be interpreted narrowly based on the principle of *favor negotii*.⁷ However, this does not change the fact that formal requirements are mandatory law and as such not subject to the parties' disposition.⁸ Nevertheless, parties may agree on a stricter form than is provided for by law (cf. Art. 16 para. 1 CO).⁹

II. Types of Formal Requirements

A. Simple Written Form

- 5 Simple written form ("*einfache Schriftlichkeit*", "*forme écrite simple*") is the mildest of all formal requirements. It is required that the declarations of intent are made in writing on a physical object of any kind or at least that the declaration is recorded in a way that allows permanent, unchanged reproduction in the form of text.¹⁰
- 6 Further specific requirements are set out in an exhaustive manner in Art. 12-15 CO.¹¹ In particular, the contractual document (or object) has to be signed by each party, on whom it imposes obligations (cf. in case of an assignment agreement Art. 165 CO).

B. Qualified Written Form

- 7 Qualified written form ("*qualifizierte Schriftlichkeit*", "*forme écrite qualifiée*") necessitates to observe additional formal or contextual requirements such as the signature in manuscript of an entire text (e.g. in case of a testament, Art. 505 para. 1 CC) or the requirement to use specific forms provided by the authorities (e.g. when terminating residential or commercial leases, Art. 266l para. 2 and Art. 269d CO).¹²

⁶ Cf. decision of the Federal Supreme Court 4C.110/2003 of 8 July 2003 consid. 3.1.

⁷ Cf. BGE 89 II 185 consid. 3; BGE 119 II 135 consid. 2b; BGE 113 II 402 consid. 3c or BGE 112 II 23 consid. 4; cf. instead of many CR CO I-XOUDIS, mn. 14 to Art. 11 CO or TERCIER/PICHONNAZ, mn. 716.

⁸ Cf. decision of the Federal Supreme Court 4A_420/2007 of 19 December 2007 consid. 2.4.1, where a contract in case of doubt was considered as a personal guarantee.

⁹ BSK OR I-SCHWENZER/FOUNTOULAKIS, mn. 30 to Art. 11 CO; cf. also Art. 16 CO; the Cantons, however, are prohibited from introducing form requirements regarding legal acts, for which federal law does not provide for special form requirements (cf. BGE 99 II 159 consid. 2a).

¹⁰ Regarding the text-form requirement, cf. BK OR-MÜLLER, mn. 95 et seq to Art. 11 CO or CR CO I-XOUDIS, mn. 17a to Art. 11 CO.

¹¹ For more examples, key points and special circumstances cf. BK OR-MÜLLER, mn. 73-79 to Art. 11 CO; GAUCH/SCHLUEP/SCHMID, mn. 505 et seq. or CR CO I-XOUDIS, mn. 18 to Art. 11 CO; cf. also the commentary to Art. 13-15 CO, which discusses also the different means and new forms of communication.

¹² Cf. BGE 118 II 130 consid. 2b; cf. TERCIER/PICHONNAZ, mn. 737; see for a compilation of examples BK OR-MÜLLER, mn. 84-90 to Art. 11 CO; see for further literature GAUCH/SCHLUEP/SCHMID, mn. 523a.

C. Public Certification

- 8 Public certification or notarisation ("*öffentliche Beurkundung*", "*forme authentique*") is the strictest formal requirement. The parties' agreement (or the legal act) has to be recorded by a person officially entrusted with this task by the state (e.g. a judicial or administrative authority or a notary public) pursuant to the applicable procedures.¹³
- 9 This formal requirement usually applies whenever the legal act is the basis for a (mandatory) entry in public registers (e.g. for real estate transactions) or is particularly sensitive (e.g. for marital agreements or contracts of succession).¹⁴
- 10 It is not federal but cantonal law that regulates the manner in which public deeds are drawn up in their territory (Art. 55 para. 1 of the final title of the CC).¹⁵ In terms of minimum standards, the notary will write down the parties' agreement truthfully and in full, read out aloud the recorded text in their presence and ask for their consent that the text reflects their agreement.¹⁶ The notarization is completed with the sealing and signing of the deed with place and date.¹⁷

III. Extent of Formal Requirements

- 11 The extent to which formal requirements apply is governed by federal law.¹⁸
- 12 Whereas the law in some cases extends the formal requirements to a specific legal act as a whole (e.g. for the sale of immovable property, which is subject to public certification pursuant to Art. 216 para. 1 CO), formal requirements may also only affect certain parts/clauses typically included in a broader contractual framework (e.g. non-competition clauses within employment contracts, cf. Art. 340 para. 1 CO¹⁹ or in case of personal suretyships, cf. Art. 493 CO).
- 13 That being said, only the so called *objectively* or *subjectively essential parts* of an agreement (*essentialia negotii*) are subject to formal requirements.²⁰ As statutory law does not provide more guidance on this distinction it is mainly case law which determines the (objectively and subjectively) essential parts of an agreement with a view to its purpose and legal nature.²¹

¹³ BGE 99 II 159 consid. 2a; cf. BUCHER, p. 167 et seq.

¹⁴ Cf. BSK OR I-SCHWENZER/FOUNTOULAKIS, mn 7 to Art. 11 CO; cf. a compilation of examples in BK OR-MÜLLER, mn. 129 et seq. to Art. 11 CO.

¹⁵ Cf. instead of many CR CO I-XOUDIS, mn. 20 et seq. to Art. 11 CO.

¹⁶ Cf. GAUCH/SCHLUEP/SCHMID, mn. 526 with references.

¹⁷ Cf. KUKO OR-WIEGAND/HURNI, mn. 5 to Art. 11 CO; note that cantonal law can also provide for the possibility of producing deeds in an (equivalent) electronic form, cf. Art. 55a of the final title of the CC as well as the regulations within the EÖBV.

¹⁸ For public certification, cf. BGE 125 III 131 consid. 4a; BGE 113 II 402 consid. 2a; whereas the procedure of public certification falls under the jurisdiction of the cantons (cf. Art. 55 of the final title of the CC, see also para II.C. above).

¹⁹ For case law in that regard cf. BGE 145 III 365 consid. 3.2.

²⁰ BGE 90 II 34 consid. 2; BGE 135 III 295 consid. 3.2; BGE 125 III 131 consid. 4b; BGE 113 II 402 consid. 2a; cf. CR CO I-XOUDIS, mn. 24 et seq to Art. 11 CO; cf. a compilation for formal requirements of various legal acts in BK OR-MÜLLER, mn. 162-165 to Art. 11 CO.

²¹ Cf. para I above.

- 14 Formal requirements also apply to amendments of the main contract (cf. Art. 12 CO) and may even extend to ancillary agreements, if such agreements are linked to the main contract.²²

IV. Legal effects

A. In General

- 15 Compliance with the formal requirements of simple or qualified written form does not lead to an increased probative value. No conclusions as to the accuracy of the document's content or to the authenticity of the signatures can be drawn on the basis of this circumstance alone.²³

- 16 However, pursuant to Art. 9 CC, public deeds constitute full proof of the facts evidenced by them, unless their content is shown to be incorrect.²⁴ In addition, public deeds may, under certain conditions, be enforced like judicial decisions pursuant to Art. 347 CPC and the DEBA.²⁵

B. In case of Failure to Comply with Form Requirements

- 17 Legal acts or contracts which fail to meet applicable formal requirements²⁶ are considered invalid (Art. 11 para. 2 CO).²⁷

- 18 According to the case law of the Federal Supreme Court invalidity means nullity. Such nullity has to be taken into account *ex officio* and may be invoked at any time (without becoming time-barred) and also by third parties which are not directly involved in the invalid legal relationship.²⁸ On the other hand, this strict view is challenged in legal doctrine, which advocates a case-by-case assessment.²⁹ Still, the Federal Supreme Court saw no need to revisit its case law in a recent decision and did not address legal doctrine's critique.³⁰

²² Cf. BGE 113 II 402 consid. 2a; BGE 125 III 131 consid. 4b.

²³ Cf. ZK OR-JÄGGI, mn. 54 to Art. 13 CO; cf. also BGE 101 II 211 consid. 4b using the example of a testament.

²⁴ Cf. BGE 127 III 248 consid. 3c.

²⁵ Cf. instead of many TERCIER/PICHONNAZ, mn. 762.

²⁶ Cf. for different types of violations Bucher, p. 168 (e.g. if an essential element has not been publicly certified or not to the necessary extent).

²⁷ Unless there is a contrary provision, like in Art. 40d CO, where the default of formal requirements only has the effect that the deadline for revoking a contract is not yet triggered (Art. 40e CO); cf. for more examples BK OR-MÜLLER, mn. 254 et seq. to Art. 11 CO; cf. for property purchase contracts GAUCH/SCHLUEP/SCHMID, mn. 563 et seq. with many references to special literature.

²⁸ Cf. for example BGE 137 III 243 consid. 4.4.6; BGE 112 II 330 consid. 2b; BGE 106 II 146 consid. 3; partially left open in BGE 112 II 330 consid. 2a, b.

²⁹ Cf. GAUCH/SCHLUEP/SCHMID, mn. 558 et seq. with many references in footnote 165, cf. also BK OR-MÜLLER, mn. 184 and 207 et seq. to Art. 11 CO or CR CO I-XOUDIS, mn. 42 to Art. 11 CO and TERCIER/PICHONNAZ, mn. 756 et seq., which, amongst many others, plead for a "nullity *sui generis*" (no absolute *ex-officio* nullity with possibilities to remedy the invalidity, e.g. through fulfilment of the contract); same view already BUCHER, p. 169 et seq.

³⁰ Question left open in BGE 140 III 583 consid. 3.2.2.

- 19 If only certain parts of a contract fail to meet formal requirements, partial nullity may be assumed in analogous application of Art. 20 para. 2 CO (except if the parties would not have entered into the agreement at all without the invalid part).³¹
- 20 If a contract is (irreversibly) invalid due to non-compliance with the formal requirements, no party can request performance or claim compensation (except for special cases such as *culpa in contrahendo*)³² and the parties have to return to one another what has already been exchanged or paid pursuant to the provisions of unjust enrichment (Art. 62 et seq. CO) or property law (*rei vindicatio*, Art. 641 para. 1 CC).³³ This principle applies even if the contract itself was completely valid (except from the formal requirement). In that case, a party can neither demand fulfilment of the contract nor claim any compensation.³⁴ However, in some cases the Federal Supreme Court affirms a claim for reliance damages or *culpa in contrahendo* ("Vertrauenshaftung").
- 21 However, should both parties have fulfilled their obligations under the contract despite it being invalid (and in full knowledge thereof³⁵) or should one party deliberately have caused³⁶ the formal invalidity of the contract, the subsequent assertion of the contract's invalidity may be qualified as an abuse of rights (cf. Art. 2 para. 2 CC). Whether this is the case, needs to be assessed in light of all circumstances of the specific case, in particular the conduct of the parties at the time of and after the conclusion of the contract.³⁷
- 22 Finally, if a formally invalid legal act meets all the requirements of another type of contract, it may, in some cases,³⁸ be reinterpreted as such (through "*conversion*", Art. 18 CO).³⁹

V. International Private Law

- 23 Pursuant to the general rule of Art. 124 PILA,⁴⁰ contracts are valid if they meet the requirements set out in the law applicable to them or in the law of the place where they

³¹ Cf. BGE 60 II 98, p. 99 et seq.; decision of the Federal Supreme Court 4C.175/2003 of 28 October 2003, consid. 5; cf. also BGE 120 II 341 consid. 5 where the non-use of the required form for the termination of a tenancy contract only led to partial nullity and not nullity of the whole tenancy; cf. for a differentiating view GAUCH/SCHLUEP/SCHMID, mn. 581 et seq. or CR CO I-XOUDIS, mn. 35 to Art. 11 CO.

³² Cf. BGE 106 II 36 consid. 5 or decision of the Federal Supreme Court 4C.175/2003 of 28 October 2003 consid. 3.2, e.g. if a party has wilfully or fraudulently violated certain cooperation or disclosure duties before entering into a contract; cf., however, the critical view in legal doctrine in BK OR-MÜLLER, mn 229 to Art. 11 CO; cf. for more examples GÖKSU, Präjudizienbuch, mn. 25 to Art. 11 CO.

³³ Cf. BGE 90 II 34 consid. 5.

³⁴ Cf. decision of the Federal Supreme Court 5C.96/2006 consid. 3.2 in fine.

³⁵ Cf. BGE 112 II 330 consid. 2b; BGE 138 III 401 consid. 2.3.1.; cf. also decision of the Federal Supreme Court 4C.175/2003 of 28 October 2003 consid. 3.2.

³⁶ Cf. BGE 88 II 24 consid. 5 including references; cf. also BGE 90 II 21 consid. 2c.

³⁷ Cf. BGE 138 III 123 consid. 2.4.2; BGE 116 II 700 consid. 3b; BGE 138 III 401 consid. 2.3.1; BGE 140 III 583 consid. 3.2.4; BGE 140 III 200 consid. 4.2, for tenancy law cases cf. the summary of the principles in the decision of the Federal Supreme Court 4A_129/2011 of 28 April 2011 consid. 2.3; cf. BK OR-MÜLLER, mn. 198 et seq. to Art. 11 CO, GÖKSU, Präjudizienbuch, mn. 18 to 11 CO and GAUCH/SCHLUEP/SCHMID, mn. 552 et seq.; see for other examples CHK-KUT, mn. 20 to Art. 11 CO or for a more in-debt analysis CR CO I-XOUDIS, mn. 36 et seq. to Art. 11 CO; cf. also TERCIER/PICHONNAZ, mn. 755, which point to practical difficulties.

³⁸ Cf. BGE 93 II 439 consid. 5 (reinterpretation of a family- into a common foundation) or BGE 76 II 8 consid. 5 (conversion of a marriage- into a testamentary contract); cf. for more examples and some exceptions BK OR-MÜLLER, mn. 240 et seq. to Art. 11 CO.

³⁹ Cf. BGE 135 III 441 consid. 3.3; BGE 124 III 12 consid. 2b/bb; BGE 126 III 182 consid. 3b; cf. for further information BK OR-MÜLLER, mn. 236 et seq. to Art. 11 CO; cf. for further references GAUCH/SCHLUEP/SCHMID, mn. 584b.

⁴⁰ Federal Act on International Private Law (SR 291).

were concluded. However, special rules may apply for specific types of contracts. For instance, contracts regarding property are principally governed by the *lex rei sitae* (cf. Art. 119, para. 3, sentence 1 PILA).⁴¹

Literature:

BUCHER EUGEN, Schweizerisches Obligationenrecht, Allgemeiner Teil, 1988.

GAUCH PETER/SCHLUEP WALTER R./SCHMID JÖRG, OR AT, Schweizerisches Obligationenrecht Allgemeiner Teil, vol. I, 11. Edition, 2020.

GAUCH PETER/STÖCKLI HUBERT: Präjudizienbuch OR, die Rechtsprechung des Bundesgerichts (1875-2020), 10. Edition, 2021 (cit. [AUTHOR], Präjudizienbuch)

HONSELL HEINRICH (ed.), Kurzkomentar Obligationenrecht, 2014 (cit. KUKO OR-[AUTHOR]).

FURRER ANDREAS/SCHNYDER ANTON K. (eds.), Handkommentar zum Schweizer Privatrecht, Obligationenrecht, Allgemeine Bestimmungen, 3. Edition, 2016 (cit. CHK-[AUTHOR]).

MÜLLER CHRISTOPH, in: Obligationenrecht, Allgemeine Bestimmungen, Art. 1-18 CO (...), 2018 (cit.: BK-MÜLLER).

TERCIER PIERRE/PICHONNAZ PASCAL, Le droit des obligations, 6. Edition, 2019.

THEVENOZ LUC/WERRO FRANZ (eds.), Commentaire romand, Code des obligations I, 3. Edition, 2021 (cit. CR CO I-[AUTHOR]).

WIDMER LÜCHINGER CORINNE/OSER DAVID (eds.), Basler Kommentar, Obligationenrecht I, 7. Edition, 2020 (cit. BSK OR I-[AUTHOR]).

⁴¹ Cf. instead of many and for more examples and exceptions CR CO I-XOUDIS, mn. 54 to Art. 11 CO.