Chapter 12
Switzerland: Between Cosmopolitanism and Parochialism in Civil Litigation

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Abstract On 1 January 2011, the new Swiss Code of Civil Procedure entered into force, replacing the twenty-six cantonal codes of civil procedure. One of the main incentives for unifying civil procedure was the perception that divergent rules were inhibiting the efficient administration of justice. Despite Switzerland's close economic and cultural ties with other countries the focus was, however, almost exclusively on finding compromises between different cantonal models. Meanwhile, comparatively little attention was directed to international developments in the field of civil procedure. Nevertheless, international models have had an important impact on Swiss civil procedure. One of the most influential has been the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. It not only created uniform rules applicable in all contracting States regarding jurisdiction and enforcement in cases with an international element but also influenced legislation and case law in purely domestic cases. The Swiss legislature and Swiss case law often voluntarily follow European developments even in cases where they are contrary to Switzerland's original political intentions. The development of the European area of freedom, security and justice has, however, advanced far beyond the matters originally contained in the Brussels Convention and now in the Brussels I Regulation. Switzerland has not been partaking in this development. Even as regards jurisdiction and recognition and enforcement of foreign judgments, Switzerland risks losing contact with the impending reforms on the EU level. As opposed to the situation in several other areas of law, 'autonomous implementation' (*autonomer Nachvollzug*), i.e. the

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enactment of national provisions mirroring EU law, is not considered, in general, to be an option in the field of civil procedure.

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12.1 The Swiss Legislature's Attitude Towards Harmonisation of Civil Procedure

On 1 January 2011, the new Swiss Code of Civil Procedure (*Schweizerische Zivilprozessordnung/Code de procédure civile/Codice di diritto processuale civile svizzero*)[1] entered into force, replacing the twenty-six cantonal codes of civil procedure.[2] Thus, for the first time in history, there is now a unified law of civil procedure in Switzerland—after a series of failed attempts over the course of the twentieth century to achieve this.[3]

The report accompanying the government draft of the new code pointed out that divergent rules were creating artificial dividing lines cutting across regions with a common economy, language and culture. This, the report stated, was inhibiting the efficient administration of justice in these regions and creating adverse economic effects.[4] Thus, one of the main incentives for unifying civil procedure was the wish to remove such obstacles.

Switzerland has close economic and cultural ties with other countries, especially with neighbouring European States and with the European Union as a whole.

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[1] SR 272.

[2] Meanwhile, the Federal Act on Federal Civil Procedure (*Bundesgesetz über den Bundeszivilprozess*, SR 273) which applies in cases where the Bundesgericht (Federal Court), i.e. the Swiss supreme court, decides at first instance, was not abrogated. This Act's scope of application, however, has been narrowed down very much in recent reforms.

[3] See Domej 2006, 241 with further references.

[4] Botschaft 2006, 7228 et seq.

One might, therefore, expect that a legislature that saw harmonisation of civil procedure as an instrument to facilitate economic and cultural exchange would also think deeply about international harmonisation. But this was not much the case in the legislative process that led to the new Swiss code. Apparently, only the borders between the cantons, not those with other countries, were considered to be *artificial* dividing lines. In the eyes of the authors of the code, harmonisation of civil procedure meant harmonisation of the different cantonal models. Meanwhile, comparatively little attention was directed to international developments in the field of civil procedure.

Especially in the earlier stages of the drafting process, there was a certain reluctance to deal with international developments. At least, one might get such an impression from reading the explanatory report accompanying a preliminary draft[5] that was drawn up by a group of experts in 2003. In the introductory passages of that report, the relations between Switzerland and the EU were, indeed, mentioned as a relevant factor in the legislative process—but, rather curiously, only with regard to the mobility of the legal profession:

> Another argument [i.e. in favour of harmonisation of Swiss civil procedure] is the free movement of lawyers, be it in the Swiss single market, be it within the framework of the bilateral treaties with the EU. One might probably consider it as a factual discrimination if in Switzerland, as opposed to the situation in the other EU Member States, there is no single national law of civil procedure, but, besides the rules of procedure of the Federal Court, 26 cantonal laws of civil procedure—a situation that is downright prohibitive for the cross-border practice of law.[6]

Undoubtedly, the international mobility of lawyers is an important issue; but certainly it is not the only one worth considering in respect of Switzerland's positioning towards what might once become a real single European area of justice.

As already pointed out, however, international harmonisation was not a top priority for the group of experts. The explanatory report stated:

> The future Swiss Code of Civil Procedure should continue the Swiss legal tradition, that is, the accepted foundations and principles that are expressed in the cantonal codes of civil procedure. Innovations that were developed in foreign legal systems can only be taken into consideration if they are suitable for implementation in the Swiss legal system and if such implementation would bring about a real improvement.[7]

Later, the report goes on to list some foreign developments that the group of experts viewed with scepticism or at least with reserve, especially class actions and 'so-called mediation.'[8] As regards mediation, however, the legislature was somewhat more open-minded than the group of experts, perhaps because mediation was considered as a possible instrument for reducing the burden on courts and

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[5] Expertenkommission 2003a.

[6] Expertenkommission 2003b, 5 et seq. All translations are my own.

[7] Expertenkommission 2003b, 10.

[8] Expertenkommission 2003b, 15.

thus for making the system of civil procedure more efficient; and history teaches that increasing the efficiency of civil procedure is a goal of any legislature in the field of civil procedure.[9] A 'foreign innovation' the group of experts considered suitable for implementation in Switzerland was the enforceable authentic instrument.[10] I will come back to that later on.[11]

What the group of experts failed to see (or at least to write down) was that not only spectacular 'innovations' come from abroad, but that one might also learn from one's neighbours and their experiences in more down-to-earth issues of civil procedure. It is hardly surprising that among the most controversial topics in the legislative process were the position of the judge, the role of the parties in giving evidence and the admissibility of late allegations. All of these have been much discussed internationally in recent years, but the group of experts failed to take notice of this international debate—or if it did take notice of it, it did not share its thoughts about the international developments in these fields with the public.

Considering the rather conservative attitudes that predominated in the group of experts, it is certainly not surprising that the 'Anglo-American class action' (as it was called in the report) was not deemed to be compatible with the Swiss system of civil procedure.[12] And perhaps the attempt to introduce controversial 'innovations' from abroad would really have endangered a project that was considered risky enough as it was. One reason why such a strong emphasis was placed on the 'cantonal traditions' was that there were apprehensions in the legislative process that the attempt to unify civil procedure would fail, as so many had before, and that such a failure might especially be caused by the reluctance of the cantons to give up their venerated procedural traditions.[13] Therefore, the sceptical attitude towards foreign 'innovations' displayed by the group of experts in the explanatory report might be a political message designed to obviate such potential opposition. Legal history shows that statements of this sort do not always tell the whole truth about all the factors really influencing the content of legislative proposals. Nevertheless, one can safely say that systematic and intense analysis of foreign models obviously did not take place in the preparation of the draft by the group of experts.

The preliminary draft drawn up by the group of experts served as the basis for a public consultation. Subsequently, a government draft[14] was drawn up on the basis of the preliminary draft, taking into account some of the results of the consultation.[15] In the consultation, some—though not many—criticised the lack of comparative

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[9] See, in this context, Oberhammer 2004a, 217 et seq.

[10] Expertenkommission 2003b, 15.

[11] See 12.3.2 below.

[12] For a more balanced discussion of instruments of collective redress, see, e.g. Romy 1997; Gordon-Vrba 2007.

[13] See Domej 2006, 241 et seq.

[14] *Schweizerische Zivilprozessordnung*—Entwurf 2006.

[15] The results are compiled in Bundesamt für Justiz 2004.

research in the preparation of the preliminary draft.[16] Perhaps it was a reaction to such criticism that the report accompanying the government draft refers to international developments somewhat more extensively.[17] But in this phase of the legislative process it was too late for real in-depth research. It is no wonder, therefore, that the passages on international trends in civil procedure and on how such trends are reflected in the government draft are on a rather superficial level. In my view, they mainly serve aesthetic and rhetorical purposes.

12.2 The Lugano Convention as a Driving Force for Harmonisation of Civil Procedure

I have drawn a picture that makes important actors of the Swiss legislative process appear somewhat narrow-minded or even nationalist. Nevertheless, international models have had a very important impact on Swiss civil procedure in recent years. One of the most influential has been the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Convention did not only create uniform rules applicable in all contracting States regarding jurisdiction and enforcement in cases with an international element. Probably in most contracting States it also influenced legislation and case law in purely domestic cases (as well as in international cases outside the scope of application of the Convention). It certainly did so in Switzerland, and experiences from abroad show that the Lugano Convention (as well as the Brussels Convention and later the Brussels I Regulation) has been one of the most important driving forces of procedural harmonisation in Europe (besides Article 6 para 1 of the European Convention on Human Rights, which is also of considerable importance as a source of common procedural standards).[18]

Especially, many of the provisions of the Swiss Act on jurisdiction in domestic cases (*Gerichtsstandsgesetz*) that entered into force in 2001[19] were modelled after those of the Lugano Convention.[20] These provisions are now included (with some

[16] See, especially, the statement by the University of Zurich, Bundesamt für Justiz 2004, 76; Oberhammer 2004b, 1038 et seq.

[17] Botschaft 2006, 7248 et seq.

[18] In particular, the case law of the European Court of Human Rights is also taken into account by the Swiss Federal Court when interpreting the domestic rules on the right to a fair trial, especially Art. 29 of the Swiss Federal Constitution, see BGE 133 I 100, 103. On Art. 6 para 1 of the European Convention on Human Rights as a driving force of procedural harmonisation, see also the contribution by Andrews (Chap. 2) in the present Vol.

[19] Amtliche Sammlung 2000, 2355.

[20] Botschaft 1998, 2834 et seq.

modifications) in the Swiss Code of Civil Procedure.[21] The case law of the Swiss Federal Court (*Bundesgericht*) has also been strongly influenced by the Lugano Convention and by the case law of the European Court of Justice relating to the Brussels Convention and the Brussels I Regulation. Often, such case law is followed not only when applying the Lugano Convention but also when interpreting functionally equivalent provisions of national law.[22]

One example of this is the case law on *lis pendens* in domestic cases: contrary to its earlier case law, here the Federal Court followed the case law of the European Court of Justice according to which an action for negative declaration bars a subsequent action for performance.[23] Another example where the case law of the ECJ influenced the Swiss Federal Court is the interpretation of the provisions of Swiss national law on jurisdiction in cases involving multiple defendants.[24] The Federal Court is clearly of the opinion that there is an interest, at least in the field of jurisdiction and *lis pendens*, to create as much harmony as possible between domestic cases, Lugano cases and international cases not within the Convention's scope of application (except, of course, in cases where the Swiss legislature deliberately chose a solution different to the one chosen by the authors of the Lugano Convention).[25]

This development continues. Several provisions of the new Swiss Code of Civil Procedure on jurisdiction and on *lis pendens* were modelled after provisions of the Lugano Convention or influenced by them. It is, for instance, worth noting that the new Swiss Code of Civil Procedure contains a rule conferring jurisdiction on the court at the place of performance in cases concerning contractual matters (Article 31 *Zivilprozessordnung*). Only a few years ago, such a provision would have been considered as contrary to established principles of Swiss civil procedure

[21] The *Gerichtsstandsgesetz* was abrogated by the *Zivilprozessordnung*, see Annex 1 to the *Zivilprozessordnung,* point I. The rules on jurisdiction in domestic cases are now contained in Arts. 9 et seq *Zivilprozessordnung,* while jurisdiction in international cases outside the scope of application of bi- or multilateral treaties is still subject to the provisions of the *Bundesgesetz über das Internationale Privatrecht* (Act on Private International Law) SR 291.

[22] See Domej 2008b, marginal No. 39; Walther 2002, 128 et seq; Walter 2007, 268 et seq.

[23] BGE 128 III 284, 287 et seq. See, however, also BGE 123 III 414, 430; 131 III 319, 325 et seq where the *Bundesgericht* decided that in such cases, the prerequisites of national law for a *Feststellungsinteresse* (legal interest to seek a declaratory judgment) have to be fulfilled, and that the mere interest to secure a favourable forum does not suffice in this regard. According to a recent judgment of the *Bundesgericht,* this also applies to cases within the scope of application of the Lugano Convention (BGE 136 III 523).

[24] See BGE 129 III 80, 84 et seq; 134 III 27, 31 et seq; 134 III 80, 84.

[25] See, e.g. BGE 129 III 80, 87.

(at least in cases involving a Swiss defendant). Under the Lugano Convention 1988, Switzerland originally even made a reservation according to which foreign judgments could not be recognised and enforced in Switzerland if the jurisdiction of the court had been based only on Article 5 No. 1 of the Convention (see Article Ia, Protocol 1 of the Lugano Convention 1988).[26] The reservation ceased to have effect on 31 December 1999.[27] But the forum at the place of performance was still considered as problematic, and the *Gerichtsstandsgesetz* did not provide for such a forum (though the original draft of the Act did).[28] In the negotiations on the reform of the Brussels and Lugano Conventions, Switzerland originally even pleaded for the total abolition of Article 5 No. 1.[29] But in the end, the forum at the place of performance has now also made its way into the rules on jurisdiction in domestic cases.[30] This and other examples demonstrate that the Swiss legislature and Swiss case law sometimes voluntarily follow European developments even in cases where they are contrary to Switzerland's original political intentions.

Thus, on the whole, there is a rather strong tendency in Switzerland to try to harmonise rules contained in conventions to which Switzerland is a party and national law that applies outside such conventions' scope of application. There can be two main reasons for this 'internal harmonisation,' as one might call it, i.e. harmonisation between different sets of rules that are all in force in Switzerland but apply to different types of cases. There can be the impression that the rules contained in the convention work well—and that they are acceptable as models because Switzerland has partaken of their negotiation (or has at least taken a sovereign decision to become a contracting State of the convention). But even if the rules in themselves or in the way that they are applied under the convention are not considered to be fully satisfactory, there can still be an inducement to harmonise national law with them as it may be considered as inefficient if divergent rules apply within the convention's scope of application and outside it.

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[26] See, in this context, Botschaft 1990, 267.

[27] According to the prevailing opinion, the reservation ceased to have effect also with regard to judgments given before 2000; see BGE 126 III 540; Knoepfler 1996, 537 et seq; Kren Kostkiewicz 1999, 243 et seq; Domej 2008a, marginal No. 3 et seq; contra: Markus 1999, 63 et seq.

[28] See Botschaft 1998, 2858 et seq.

[29] See Botschaft 2009, 1788.

[30] Note, however, that Art. 31 *Zivilprozessordnung* differs from Art. 5 No. 1 Lugano Convention in that it confers jurisdiction on the court for the place of performance of the characteristic obligation irrespective of the type of contract. This solution had also been proposed (unsuccessfully) by the Swiss delegation in the negotiations on the reform of the Brussels and Lugano Conventions, see Botschaft 2009, 1789.

12.3 The Wish to Avoid 'Self-Discrimination' as an Argument in Favour of Harmonising Civil Procedure

12.3.1 Introduction

Besides the reasons mentioned above,[31] a popular argument for adapting Swiss law to certain foreign models has been the wish to avoid 'self-discrimination,'[32] meaning, especially, that Swiss creditors should also be able to profit from instruments of debt enforcement that are at the disposal of foreign creditors (or of creditors importing judgments or authentic instruments from other contracting States of the Lugano Convention into Switzerland). This was also the reason given for several amendments in the field of enforcement law which were introduced by the legislation implementing the 2007 revised Lugano Convention in Switzerland[33] and—directly or indirectly—influenced by the Lugano Convention.

12.3.2 Enforceable Authentic Instruments

One of the most widely discussed innovations in the new Swiss Code of Civil Procedure is the enforceable authentic instrument. Under the Lugano Convention (Article 50 of the 1988 and Article 57 of the 2007 Lugano Convention), authentic instruments, if they are enforceable in the State of origin, can be declared enforceable in all other contracting States as well—regardless of whether the law of the State of enforcement also provides for such enforceable authentic instruments. Therefore, for example, enforceable notarial deeds from Germany or Austria have to be declared enforceable in Switzerland. They have to be treated like judgments. In the procedure for the enforcement of money claims, an authentic instrument that is enforceable in its State of origin is a title for a so-called *definitive Rechtsöffnung*.[34] This means that a debtor can prevent execution only if he or she can produce documentary evidence that the claim has been paid or deferred, or that the limitation period has expired (and also, according to the prevailing opinion, that the claim does not exist at all).

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[31] See 12.2.

[32] See, e.g. Botschaft 1998, 2835; Botschaft 2006, 7268; Botschaft 2009, 1821.

[33] *Bundesbeschluss über die Genehmigung und die Umsetzung des Übereinkommens über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen* (Federal Enactment on the Approval and Implementation of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), Amtliche Sammlung 2010, 5601.

[34] BGE 137 III 87; Staehelin 2005, 207; Visinoni-Meyer 2005, 429 et seq; Naegeli 2008, marginal No. 49 with further references.

Traditionally, Swiss law did not provide for such enforceable authentic instruments. Under Swiss law, an authentic instrument used to be only a title for so-called *provisorische Rechtsöffnung* (Article 82 *Schuldbetreibungs- und Konkursgesetz*).[35] It did not give the creditor any more rights than any ordinary document containing an acceptance of the claim (for example, a written contract naming the sum owed by the debtor).[36] The *provisorische Rechtsöffnung* is a special summary procedure that is embedded in the procedure for the enforcement of money claims. To put it simply, it enables creditors possessed of certain types of documentary evidence to obtain an enforceable title in a summary procedure if the debtor cannot show that very probably the claim is not good. If the application for a *provisorische Rechtsöffnung* is granted, the debtor may, within twenty days, bring an action for negative declaration called *Aberkennungsklage* (Article 83 para 2 *Schuldbetreibungs- und Konkursgesetz*). While such an action is pending, only provisional enforcement is possible (Article 83 para 1 *Schuldbetreibungs- und Konkursgesetz*). In the case of a *definitive Rechtsöffnung* (Article 80 *Schuldbetreibungs- und Konkursgesetz*), meanwhile, the creditor can proceed to definite enforcement in any case, and the debtor is only able to bring an action for negative declaration that does not automatically carry with it a stay of execution (Article 85a *Schuldbetreibungs- und Konkursgesetz*). Therefore, a creditor who had a Swiss authentic instrument used to be in a weaker position than a creditor with a foreign authentic instrument enforceable in the State of origin. This was one of the main reasons given for including the new provisions on enforceable authentic instruments in the Swiss Code of Civil Procedure.[37]

The Swiss Code of Civil Procedure now contains provisions on enforceable authentic instruments (Articles 345 et seq *Zivilprozessordnung*). Enforceable authentic instruments concerning money claims are now titles for *definitive Rechtsöffnung* (see Article 347 *Zivilprozessordnung* and the amended Article 80, para 2, No. 1 *bis Schuldbetreibungs- und Konkursgesetz*). These rules aim to put a creditor with a Swiss authentic instrument in the same position as one with an authentic instrument from another Lugano State where the instrument is directly enforceable. Besides that, they were also meant to have another effect: as long as authentic instruments were not directly enforceable in Switzerland, Swiss notaries were not able to draw up authentic instruments that are enforceable abroad under the Lugano Convention. The new rules on authentic instruments contained in the *Zivilprozessordnung* and in the *Schuldbetreibungs- und Konkursgesetz* were supposed to change this.[38] The notaries of some cantons are export-oriented and frequently notarise documents for foreign parties—which can be attractive for these parties because the Swiss fees are generally cheaper than those of German notaries. Being able to draw up enforceable authentic instruments might create another competitive advantage for Swiss notaries. It is open to doubt, however,

[35] Act on Debt Enforcement and Insolvency, SR 281.1.

[36] Oberhammer 2005, 248 et seq; Naegeli 2008, marginal No. 32 with further references.

[37] Even the group of experts saw a 'real need' for this, see Expertenkommission 2003b, 15.

[38] See, e.g. Kofmel Ehrenzeller 2010, marginal No. 1.

whether the new rules really comply with the prerequisite contained in Article 57 Lugano Convention 2007 (Article 50 Lugano Convention 1988) that the document must be 'enforceable' in the State of origin, as Article 349 para 1 *Zivilprozessordnung* and Article 82 para 2 *Schuldbetreibungs- und Konkursgesetz* give the debtor the possibility to raise substantive objections against the obligation to perform in the enforcement procedure itself if he or she has ready proof for the grounds of objection.[39]

12.3.3 Provisional Measures

Another example of an innovation that was at least partly motivated by the idea that self-discrimination should be avoided are the new rules on protective measures securing the enforcement of already existing titles that were introduced by the legislation implementing the 2007 Lugano Convention.

Traditionally, Swiss law was rather reluctant in granting such measures. Especially, the *Arrest*, that is, the attachment of assets to secure a money claim, used to be available only if the debtor was domiciled abroad or in certain cases where there was typically a really manifest danger that the claim would not be satisfied (if the debtor had no fixed domicile at all or if he or she was planning to escape or to dissipate his or her property, or if the creditor had unsuccessfully tried to enforce the claim before; see Article 271 *Schuldbetreibungs- und Konkursgesetz* in its wording before the reform). Meanwhile, the mere fact that the creditor had an enforceable title was not grounds for granting protective measures against a debtor domiciled in Switzerland.

Under Article 39 of the 1988 and Article 47 of the 2007 Lugano Convention, on the other hand, a creditor whose application for a declaration of enforceability has been granted at first instance is entitled to apply for protective measures. Such measures must be granted without any further prerequisites, especially regardless of whether there is a risk that the claim will otherwise not be satisfied.[40] And, of course, in Switzerland, the restrictions that the debtor must be a foreigner or that there must be one of the other specified grounds for granting an *Arrest* were not applicable in this context.[41]

Thus, if the debtor was domiciled in Switzerland, a creditor with an enforceable title from another contracting State used to be in a stronger position than a creditor with a Swiss title. This has now changed. Under the amended Article 272

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[39] Oberhammer 2011b, marginal No. 24.

[40] Staehelin 2008, marginal No. 5.

[41] Note also, in this context, that opinions differed widely in Swiss case law and literature as to which measures under domestic law were best suited as provisional measures under Art. 39 para 2 Lugano Convention 1988 with regard to money judgments (see, e.g. Staehelin 2008, marginal Nos. 16 et seq with further references). This controversy is now obsolete, as the federal legislature has meanwhile decided in favour of the *Arrest* (see Botschaft 2009, 1821).

Schuldbetreibungs- und Konkursgesetz, the *Arrest* is available to any creditor with an enforceable title regardless of whether the title falls within the scope of the Lugano Convention. With regard to non-money judgments, Article 340 *Zivilprozessordnung* authorises the enforcement court to order protective measures. Again, the idea that self-discrimination should be prevented was one of the key arguments in favour of the introduction of these new rules into Swiss civil procedure.[42]

12.4 The European Area of Justice and Switzerland

All in all, the Lugano Convention has strongly influenced the recent development of Swiss civil procedure—even in purely domestic cases. This is not a phenomenon limited to Switzerland. Conventions can be a very powerful tool to achieve international harmony or at least approximation of national laws of civil procedure. Even where such conventions have a limited scope of application and only apply in cross-border cases (or even only in the relations between the contracting States), there is still a chance that in the long run national law outside the scope of application is also harmonised. Especially, the Lugano and Brussels regimes have probably contributed more to the knowledge in European States about each other's procedural systems and even to the approximation of national laws of civil procedure than any other instrument or project has done so far.

The development of the European area of freedom, security and justice has advanced far beyond the matters originally contained in the Brussels Convention and now in the Brussels I Regulation. Switzerland has not been partaking in this further development. Even as regards jurisdiction and recognition and enforcement of foreign judgments, Switzerland risks losing contact with the impending reforms on the EU level. After years of negotiations, the new Lugano Convention has re-established the parallelism between the Lugano and the Brussels I regimes. The reform envisaged for the Brussels I Regulation,[43] however, may soon once more disrupt that parallelism. Furthermore, the other European instruments in the field of civil procedure (besides the Brussels I Regulation) have not been extended to the EU-Switzerland relations at all, and there appears to be little hope that this will substantially change in the foreseeable future. If one regards these EU instruments as cornerstones of a European civil procedure, then 'Europe' is not a geographical or a cultural area but the European Union, and it is doubtful if at all and in what way countries like Switzerland will be able or even willing to become a part of the emerging 'single judicial area.'[44]

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[42] See Botschaft 2009, 1821.

[43] European Commission 2010.

[44] See also Domej 2010, 409 et seq.

In some other areas of law, Switzerland has enacted national provisions mirroring European law. This is especially the case in those areas of law that are considered to be of primary importance for cross-border trade. This phenomenon is referred to as 'autonomous implementation' of EU law (*autonomer Nachvollzug*).[45] In the field of civil procedure, however, such autonomous implementation is not, in general, considered to be an option. There might even be a tendency towards a restrictive handling of international cooperation in matters where Switzerland does not partake of an internationalised regime. The concepts of 'sovereignty' and 'territoriality' in law enforcement are, it seems, increasingly cherished by Swiss courts and also in parts of Swiss doctrine in certain areas of civil procedure where there is no international cooperation on the basis of conventions.

One example is the field of international insolvency law and of civil proceedings connected with insolvency proceedings. In recent years, the case law of the Federal Court has gradually brought about more and more restrictions as regards the rights of foreign liquidators to act in Switzerland. Switzerland does not recognise the universal effect of main insolvency proceedings opened abroad in the sense that assets in Switzerland would be directly available for the foreign insolvency proceedings. Instead, if a decision opening insolvency proceedings abroad is recognised in Switzerland, territorial insolvency proceedings have to take place in Switzerland, and only their net profit (after privileged Swiss creditors have been fully paid) is handed over to the liquidator in the main insolvency proceedings (see Articles 166 et seq *Bundesgesetz über das Internationale Privatrecht*). This procedure even has to take place if there are no privileged Swiss creditors, and especially in the (not infrequent) cases where there is only a Swiss bank account and no other connecting factor in Switzerland at all. It might even be considered as a criminal offence if the liquidator simply contacts a Swiss bank and demands that the balance of a Swiss bank account be paid to him or her.[46]

Moreover, the Federal Court is not very enthusiastic at the moment about cross-border cooperation in cases where an insolvent party domiciled in Switzerland is in any way involved—even if the foreign proceedings are ordinary civil proceedings. This attitude even gave rise to a dispute (meanwhile discontinued) between Belgium and Switzerland before the International Court of Justice[47]: the Federal Court decided that Swiss proceedings on a *Kollokationsklage* (i.e. an action concerning a creditor's right to participate in the distribution of the proceeds)

[45] In this context, see, e.g. Bieri 2007, 708 et seq; Piaget 2006, 727 et seq.

[46] See, in this context, BGE 134 III 366 = Praxis 97 (2008) Nr. 144; 135 III 40; 135 III 666; Oberhammer 2009, 431 et seq; Oberhammer 2011a, 327 et seq; Jaques 2006, 19 et seq; Lorandi 2008, 560 et seq; Neuroni Naef and Naef 2008, 1396 et seq; Gehri and Kostkiewicz 2009, 204 et seq.

[47] International Court of Justice Case of *Belgium v Switzerland*, Jurisdiction and Enforcement of Judgments in Civil Matters, General List No. 145. Belgium discontinued the proceedings in March 2011; see http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=besu&case=145 (last consulted 22 August 2011).

cannot on any account be staid on the basis that proceedings on the creditor's claim are pending abroad. The Court took the position that the Swiss courts are exclusively competent to decide about the right to participate in insolvency proceedings and that results of foreign proceedings cannot be taken into account in such matters, apparently not even as regards the existence of the claim under substantive law.[48]

12.5 Conclusion

International harmonisation of civil procedure does not seem to be a goal of primary importance in the eyes of the Swiss legislature today. There might be a certain tendency to consider civil procedure as a field where an emotional need for preserving 'local legal culture' and national sovereignty might be satisfied without incurring great economic risks. Against this background, the most promising way of harmonising civil procedure (or certain aspects of it) seems to be by way of international conventions. Such conventions often turn out to be important for the development of civil procedure even outside their proper area of application. Meanwhile, there seems to be some reluctance to take foreign national law or non-binding sets of principles or rules as models for Swiss legislation in this field. Therefore, the chances for informal international harmonisation of civil procedure (at least as a conscious process) appear to be limited at the moment from a Swiss point of view.

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[48] BGE 135 III 127; see also BGE 135 III 386.

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