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Switzerland - News from Switzerland (2012-2014): Major Reform of the Rules on Unfair Competition and of Domestic and International Family Law

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**NEWS FROM SWITZERLAND (2012-2014): MAJOR
REFORM OF THE RULES ON UNFAIR COMPETITION AND
OF DOMESTIC AND INTERNATIONAL FAMILY LAW**

Thomas Kadner Graziano* and Michel Reymond†

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I. INTRODUCTION

Switzerland is a federal state with a civil law tradition. Like in all civil law jurisdictions, the law is highly codified, and legislation is the authoritative backbone of the law. The major centerpieces of Swiss private law are the Civil Code and the Code of Obligations, in force since 1912.¹ Swiss private law belongs to the Germanic legal tradition, but French law has also had an impact on its development, in particular in the southwest of the country. In recent decades, Switzerland has reformed its law in many areas (such as consumer protection) in order to make it more EU-compatible. However, Switzerland is not a Member State of the European Union and its legal system is still largely independent.²

The present Chronicle covers recent legislative developments in Switzerland for the years 2012–2014. The first part will be devoted to the revision of the *Loi contre la concurrence déloyale* (LCD), which was related to the law of antitrust, but also had effects on the whole of Swiss contract law. The second part will focus on family law, and on two distinct revisions: the first concerning the issue of forced marriage, the second concerning the procedure of changing names for marrying spouses.³

1. Available in English at www.admin.ch/ch/e/rs/210/ (Civil Code) and www.admin.ch/ch/e/rs/c220.html (Code of Obligations) (last visit on the March 27, 2014).

2. For an introduction to Swiss law in English, see KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 167-79 (3rd ed., Oxford Univ. Press 1998); Pascal Pichonnaz, *Switzerland* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 702-708 (Jan M. Smits ed., Edward Elgar Publishing 2006); FRANÇOIS DESSEMONTET & TUĞRUL ANSAY, INTRODUCTION TO SWISS LAW (3rd ed., Kluwer Law Int'l 2004).

3. For further recent developments in Swiss law not covered here, see Pascal Pichonnaz, *Le point sur la partie générale du droit des obligations / Entwicklungen im Obligationenrecht, Allgemeiner Teil*, 109 REVUE SUISSE DE JURISPRUDENCE 189-194 (2013).

II. THE REVISION OF THE “*LOI CONTRE LA CONCURRENCE DÉLOYALE*”A. *Introduction*

The LCD, or *Loi contre la concurrence déloyale* (Law against unfair competition)⁴ is one of the two federal laws dealing with issues of unfair competition and antitrust law. The second law, the LCart, or *Loi sur les cartels* (Law on cartels),⁵ which deals with monopolies and illegal price agreements, will not be discussed in this article as it was not part of the reform.

In order to better understand the multiple aims of this legislative endeavor, the basic tenets of the LCD need to be explained. As mentioned above, this law deals with acts that, when committed by commercial businesses in the course of their dealings, are considered as “unfair competition”. The Article 2 of the LCD⁶ states that such acts can be recognized by three distinctive negative effects on the economic marketplace: first, they distort the relationship between competitors vying for the same market(s); second, they tend to mislead and weaken the position of buyers, a term which includes consumers; and third, they reduce the general sense of trust in the economy, and in the concept of fair dealing.⁷ Any act that falls under this definition, and thus under the ambit of article 2 of the LCD, can form the basis of a legal civil action, which can be brought before the Swiss courts by any private entity whose interests were affected by that act.⁸

4. Recueil Systématique (RS) 241. Translation by the authors.

5. RS 251. Translation by the authors.

6. Article 2 of the LCD states that “any commercial behavior or practice which is misleading or which is contrary to the principle of good faith, and which affects the relationship between competitors or between business entities and their clients” (translation by the authors).

7. Conseil Fédéral, Message concernant la modification de la loi fédérale contre la concurrence déloyale (Message related to the modification of the federal law on unfair competition), FF 2009 5539, p. 5544 (all translations of the titles of the Swiss legislative documents are done by the authors).

8. Article 9 LCD.

The Article 2 of the LCD is a “catch-all” provision that deals with any case falling into its definition.⁹ Nonetheless, the law provides in the following articles a non-exhaustive list of acts that constitute unfair competition. For example, demeaning competitors in the course of marketing communications,¹⁰ publishing misleading advertising about the merits of one’s products,¹¹ or ignoring a consumer’s stated wish not to be presented with advertisement¹² constitute such infringements of the LCD. As the original version of the current LCD dates from 1986, it has sometimes been deemed necessary to update this list in order to better include emerging unfair practices. For example, in 2006, the act of e-mail spamming has been included in the list of unfair acts, subject to an “opt-in” principle.¹³

The reform discussed in this contribution entered into force on April 1, 2012. It is a major update of the law regarding four sensitive areas of today’s business landscape: the validity of clauses contained in general terms and conditions (B), the description of goods and prices in electronic commerce (C), the practice of directory listing frauds (D), and, finally, the issue of pyramid (“Ponzi”) schemes (E). Alongside these substantive points, the new text of the law also provides a new procedural scope, as it now allows the Swiss Federal State to bring both penal and civil claims (F). Each of these points will be dealt separately in the following paragraphs.

B. Validity of Clauses Contained in General Terms and Conditions

The new version of the LCD first deals with the validity of certain clauses that are inserted into general terms and conditions.

9. Article 2 LCD.

10. Article 3, §1.a LCD.

11. Article 3, §1.b LCD.

12. Article 3, §1.u LCD.

13. Article 3, §1.o LCD. According to the “opt in” principle, spam is illegal as long as the recipient has not expressly agreed to receive commercial offers from that professional.

Since general terms and conditions are often drafted in advance and included into a contract by the way of a general reference, it is often assumed that these clauses have not been negotiated by the parties. Because of the risk that commercial businesses might insert unfair clauses into their general conditions, and because this risk is even more acute in cases of consumer contracts, the LCD has, since its original 1986 version, contained a provision banning such unfair clauses. However, this rule has been regarded as largely ineffective in practice, a conclusion which prompted its rewriting in the reform discussed here. In order to better frame the pros and cons of this reform, both the old and the new provision will be discussed in the following paragraphs.

Under the old article 8 of the LCD, in order to be considered as unfair, a clause inserted into general terms and conditions had to meet two conditions. First, it had to be misleading; second, the rule it contained either had to notably diverge from the standards of the otherwise applicable law, or to impart rights and obligations to the parties in such a way that would notably diverge from the usual conduct of that type of contract. Only if these two conditions were met, would a clause be considered as unfair, and thus unenforceable. This proved to be too restrictive: in particular, the requirement of a “misleading” clause was almost never fulfilled in practice, as even the most egregiously unbalanced clause is usually written clearly and plainly. Thus, in practice, article 8 of the LCD fell short of its intended goal.¹⁴ As a consequence, until the reform of the LCD, Swiss law has been quite tolerant towards businesses which rely on general terms and conditions.¹⁵

14. Conseil Fédéral, *supra* note 7, at 5566. *See also* Nicolas Kuonen, *Le contrôle des conditions générales: l'envol manqué du phénix*, SJ 2014 II 1, 23; Sylvain Marchand, *Art. 8 LCD: un léger mieux sur le front des intempéries*, REAS 328, 328 (2011).

15. This does not mean that, prior to the reform of the LCD, Swiss law allowed *all* standard terms. While art. 8 LCD was largely ineffective, a judge-made rule, called the exception of the unusual clause or *clause insolite*, struck down terms which greatly diverged from usual contractual clauses and which were not specifically brought to the attention of the other contractual party. For

This long standing position—which endured from 1986 to 2012—also needs to be put into the perspective of European law, which opted for a far more efficient (and restrictive) regime. Under the Council Directive on unfair terms in consumer contracts,¹⁶ any terms that have not been individually negotiated and have been inserted in a consumer contract, and which cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer, are regarded as unenforceable.¹⁷ The Directive also includes a list of terms that are deemed unfair; for example, a clause completely excluding liability in cases of non-performance, or a clause allowing its drafters to alter the terms of the contract unilaterally and without a valid reason, fall into this definition.¹⁸ Furthermore, some European countries, such as France, have devoted significant resources to inform consumers of their rights when considering standard terms.¹⁹ All these foreign developments have been noted by the Swiss legislature, and have indeed been a basis for the reform of article 8 of the LCD—as they are directly mentioned in the motives of the Federal Council (*Conseil Fédéral*).²⁰

According to the new version of article 8 of the LCD, a contractual clause contained in standard terms is deemed unfair if, under the principle of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the

more details, see the Federal Court cases: ATF 119 III 334, §1a); ATF 109 II 457, §4; Kuonen, *Le contrôle des conditions générales*, *supra* note 14, at 23-26.

16. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. L 95/29.

17. Council Directive 93/13/EEC, *supra* note 16, at art. 1, §1.

18. See annex to the Directive 93/13/EEC, *supra* note 16, in particular letters (a), (b) and (j), (k).

19. See the official French website on unfair clauses, which offers a list of clauses deemed unfair, and includes related case law, at <http://www.clauses-abusives.fr/> (last visit on March 27, 2014).

20. Conseil Fédéral, *supra* note 7, at 5561. The *Conseil Fédéral*, which is composed of seven members, is the government of Switzerland. For its current members, see <http://www.admin.ch/br/org/index.html?lang=en> (last visit on March 27, 2014).

consumer. The new formulation eliminates the requirements of a “misleading” term that “notably diverges from the otherwise applicable law,” thus allowing for a stronger legal basis against unfair clauses.²¹

That being said, some elements of this new regime remain unclear.²² First, while the new formulation is inspired by the European Directive on unfair terms in consumer contracts²³, it has not yet been determined to what extent European law will have an impact on the practice under the LCD. Most notably, it is not sure that the list of unfair terms may be imported into Swiss law. Second, one can question the scope of the new article 8 of the LCD, as it is now exclusively applicable to consumer contracts, as opposed to the more general regime of the old article 8 of the LCD. Given that the LCD does not provide a definition of the consumer, the exact effect of the new regime thus remains unknown. Finally, the revised text relies on the principle of good faith, a reference which gives some grounds for uncertainty, when considering the rather unclear boundaries of this concept.

C. Rules for E-commerce

The second topic covered by the reform of the LCD—that is, electronic commerce—has for a long time been a sticking point for Swiss lawmakers. Efforts made to adapt Swiss law to this field can be traced as far back as thirteen years ago. Indeed, in 2001, the legislature envisioned a thorough revision of general Swiss contract law in order to adapt it to the emerging online landscape.²⁴

21. *Supra* note 7, at 5565-5568.

22. For comments on this new article, see Kuonen, *Le contrôle des conditions générales* and Marchand, *Art. 8 LCD*, *supra* note 14.

23. Article 8 LCD (current) is inspired by Art. 1, §1 of the 93/13/EEC Directive, *supra* note 16.

24. *Projet de loi fédérale sur le commerce électronique (révisions partielles du code des obligations et de la loi sur la concurrence déloyale)* (Draft of the federal law on electronic commerce (partial revision of the code of obligations and the law on unfair competition)), Janvier 2001; *Rapport explicatif sur le projet de loi fédérale sur le commerce électronique (révisions partielles du code*

This ambitious proposal, had it been accepted, would have clarified the relationship between the traditional rules of Swiss contract law and e-commerce, and it would also have strengthened the protection of e-consumers by offering them a right of withdrawal from the contract.²⁵ However, due to a lack of support, the project failed in 2005 when the Federal Council (*Conseil Fédéral*) signaled its abandonment.²⁶ The same fate befell a parliamentary motion made shortly thereafter, which also aimed at strengthening the consumer's rights in e-commerce.²⁷ Because of this legislative reluctance, Swiss law did not, until the reform of the LCD, contain any specific rule regarding electronic commerce.

As a matter of fact, the issue of electronic commerce was not even part of the initial project submitted by the *Conseil Fédéral*.²⁸ It is only during the Parliamentary debates that the idea of using the ongoing revision to fill this gap in Swiss law came up.²⁹ As such, the LCD now contains a new provision specifically aimed at businesses operating through the Internet. Under the revised law,³⁰ any e-commerce website offering goods or services now has to: (1) clearly indicate the identity of its operator, including its full name, address, and e-mail; (2) describe in detail the different steps leading to the conclusion of the contract; (3) detect input errors, and allow its users to correct them; and (4) send a confirmation e-

des obligations et de la loi sur la concurrence déloyale) (Explanatory report on the draft of the federal law on electronic commerce (partial revision of the code of obligations and the law on unfair competition)), Janvier 2001.

25. For more information on this project, see Michel Jaccard, *Le législateur Suisse à l'épreuve d'Internet : aperçu de l'avant-projet de loi fédérale sur le commerce électronique*, SJ 2003 II 209 (2003).

26. *La protection des consommateurs ne sera pas étendue*, Communiqué DJPF, 09.11.05.

27. Initiative parlementaire Simonetta Sommaruga, 15.12.05, Amélioration de la protection des consommateurs, contrats conclus à distance et garantie (Enhancing consumer protection, distance contracts and warranty), 05.458.

28. See Conseil Fédéral, *supra* note 7. The document does not mention e-commerce at all.

29. Conseil des Etats, Session d'automne 2010, 29.09.10, Loi contre la concurrence déloyale, modification, BO 2010, p. 930.

30. Article 3, §1.s LCD.

mail at the moment of the users' final assent. If a website does not respect these requirements, it is deemed to commit an act of unfair competition.

These four elements are embedded in European Union law, as they are required by the Directive on e-commerce.³¹ However, this incorporation is only partial, as the Swiss legislature chose not to adopt other more stringent requirements found in the European regime. For example, the aforementioned directive also requires website owners to provide any code of conduct they are required to respect, and to provide a printable version of their terms and conditions.³² Furthermore, under the Directive on consumer rights,³³ European consumers are also granted a right of withdrawal, which allows them to terminate the contract within a period of fourteen days without giving any reason for doing so.³⁴ As these elements are currently absent from Swiss law, Switzerland retains a more favorable regime for e-commerce businesses than its neighboring countries.³⁵

D. Scams Involving Directory Listings

The third element of the revision of the LCD concerns directory listing scams. They involve documents, sent by mail or by fax, offering business companies the opportunity of being

31. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), O.J. L 178/1. These obligations can be found at article 5, art 10.a, art. 10.c, and art. 11, §2.

32. *Id.* at art. 10 al. 2 and 10 al. 3.

33. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. L 304/64.

34. *Id.* at art. 9–16.

35. For a comparison between the Swiss and European regimes regarding electronic commerce, see Sylvain Marchand, *Commerce électronique: la manifestation de volonté au bout du doigt*, in DROIT DE LA CONSOMMATION ET DE LA DISTRIBUTION: LES NOUVEAUX DÉFIS 1-31 (Blaise Carron ed., Helbing Lichtenhahn 2013).

included in a “yellow pages”-style directory listing. These offers—which are more often than not directed towards young, start-up companies—are misleading as they seemingly only ask for a confirmation of the business’ contact information, but in reality provide for a long-term, expensive service which is contracted into once the offeree responds. Other forms of this scam involve the use of pre-printed payment forms, closely modeled after the ones used by the Swiss Federal Institute of Intellectual Property, sent to companies having recently registered for an IP to mislead them into paying for a nonexistent supplementary registration service; instead of forms, some scams use fraudulent representatives who claim that the contract that the victim accepted is completely free of charge.³⁶

Directory listing scams have been recognized as a considerable problem in Switzerland. In 2008, no less than 940 cases were reported by the official authorities.³⁷ Their prevalence at that time can be explained by the absence of any specific legal regulation, effectively forcing the companies that were victims of these practices to rely on the slow and expensive judicial court system in order to terminate one of these fraudulent contracts. In order to curb these practices, their inclusion in the list of acts deemed unfair competition in the sense of the LCD was one of the key points of the reform.

The new version of the law now requires that any advertisement that contains a firm offer should clearly mention its character as a binding offer, and detail the length, the cost, and the specifics of the directory service agreed to.³⁸ Furthermore, the act of sending a payment form, devoid of any prior contact with the

36. Conseil Fédéral, *supra* note 7, at 5545-5546. *See also* an informative brochure on this topic, published by the State Secretariat for Economic Affairs, <http://www.seco.admin.ch/dokumentation/publikation/00035/00038/02243/?lang=fr> (last visited: March 12, 2013).

37. Conseil Fédéral, *supra* note 7, at 5579.

38. Article 3, §1.p LCD.

addressee, is now also, in itself, considered an act of unfair competition under the LCD.³⁹

This development is to be welcomed, as it strengthens the position of Swiss business companies against a practice which undoubtedly has no redeeming qualities whatsoever. It is interesting to note, however, that this does not mirror any similar movement found in the European Union: as the *Conseil Fédéral* noted in its legislative project, EU law as a whole does not contain any specific rule against directory listing scams.⁴⁰

E. Pyramid Schemes

The last substantive point included in the revision concerns so-called pyramid or “Ponzi” schemes. While some definitional issues still exist regarding them, pyramid schemes can be generally described as fraudulent, hierarchical business schemes in which the participants are expected to pay an entry fee upon their inclusion in the scheme’s structure, and from which revenue is generated through the upward flow of these fees through the pyramidal structure, rather than through any legitimate business activity. Due to their high risk of collapsing when no more participants can be recruited, and due to the disastrous financial consequences suffered by the victims, these schemes are widely acknowledged as illegal — both in the United States⁴¹ and in the European Union.⁴²

39. Article 3, §1.q LCD. For more detail on these provisions, see *Conseil Fédéral*, Message concernant la modification de la loi fédérale contre la concurrence déloyale, FF 2009 5539, 5562-5563.

40. The *Conseil Fédéral* drew, however, inspiration from the national law of Liechtenstein, which, along with Belgium, is one of the few European countries with a specific position on this issue. See *Conseil Fédéral*, *supra* note 7, at 5560.

41. *In re Amway Corp.*, 93 F.T.C. 618 (1979).

42. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, O.J. L 149/22.

Swiss law is no different in this regard, as pyramid schemes have been banned since 1938.⁴³ Two points, however, have been addressed by the revision of the LCD. The first point is merely formal. Because the LCD itself did not exist back in 1938, the legal provision banning pyramid schemes was included in a secondary law attached to the Federal Law on lotteries. The law reform thus moved it from this text to the LCD.⁴⁴

The second point concerns the issue of defining what a pyramid scheme is. The regime in force before the revision of the LCD contained a restrictive definition of pyramid schemes, as it defined them as organizations which derive their revenue *only* through the recruitment of new members. The new rule broadens this definition, and only requires that the revenue be derived *principally* through these means. This allows the LCD to be effective against structures which engage in *some* business activity, such as the supply of goods and services, but in which the underlying pyramidal structure remains the principal source of revenue. This change also allows for better interaction with the rules currently in force in the European Union, which retain a similar, open-ended definition of illegal pyramid schemes.⁴⁵

F. Right of Action by the Federal State

Under the previous regime, the right to bring an action against a business entity that was in violation of the LCD was reserved to private entities whose interests were affected by the illegal act. In contrast, the Swiss Federal State could only bring an action against a business entity whose violation of the LCD was so severe that the country's international reputation would be at stake.⁴⁶

43. See Ordonnance relative à la loi fédérale sur les loteries et les paris professionnels (executive order related to the federal law on lotteries and professional betting), RS 935.511, état au 1er Août 2008, art. 43, num. 1.

44. Conseil Fédéral, *supra* note 7, at 5547.

45. *Id.* at 5564-5565.

46. Article 10, §2.c LCD (former version).

The old system thus mostly relied on an effort of self-regulation on the part of the private sector, as the task of exposing and pursuing unfair business practices was left to entities such as competitors, business consortiums and consumer groups.⁴⁷ This meant, however, that the LCD was effectively used only when private interests so required, and only when these interests were strong enough to justify the cost of litigation. In practice, this system was unsatisfactory, because important public interests were not sufficiently represented and enforced. When addressing this issue during the reform, the *Conseil Fédéral* expressly acknowledged that the goal of the LCD, which is to protect the market at large, was not reached.⁴⁸

Consequently, the recast contains a provision which broadens the scope of action of the Swiss Federal State. The right of action in cases where national reputation is at stake is retained, and a new cause of action is created, allowing it to bring action in cases where collective interests are affected by acts of unfair competition.⁴⁹ The term “collective interests” is to be interpreted broadly, and can include the interests of a certain age range, of a certain type of professionals, or even of the market at large.⁵⁰ Also included in the reform is a specific choice-of-law clause that guarantees the application of the LCD to all judicial proceedings brought by the Federal State under these provisions, even in cases where the unfair act has been committed abroad. All in all, the new LCD both broadens and strengthens the role of the Swiss public authorities in maintaining a healthy marketplace.⁵¹

47. Article 10, §2 LCD (former version).

48. *Conseil Fédéral*, *supra* note 7, at 5548-5549.

49. Article 10, §2 LCD.

50. *Conseil Fédéral*, *supra* note 7, at 5568-5570.

51. This does not, however, change the nature of the LCD as a tool of private law. Even with this extended outreach to public authorities, any claim made by them will be a civil one, rather than criminal or public one. Under art. 23.c LCD, the Swiss Federal State can join both a civil claim under the LCD and a claim in criminal law against the same unfair activity.

Finally, the reform also reviews some minor points related to procedure, such as the right for the Federal State to warn the public of ongoing unfair acts,⁵² and its cooperation with foreign states in matters of antitrust.⁵³

III. FAMILY LAW

Both reforms discussed in the following chapter deal with aspects of the institution of marriage. They extend, *mutatis mutandis*, to the institution of registered partnership (*partenariat enregistré*) for same-sex couples.⁵⁴

A. New Measures against Forced Marriages

The first development in family law worth mentioning concerns the topic of forced marriages. On June 15, 2012, the two chambers of Parliament adopted several changes of the law with the aim of hardening Switzerland's position on this practice.⁵⁵ The reform, which entered into force on July 1, 2013, was the result of a longstanding effort by the Swiss legislature to curb such marriages, whether they are concluded domestically or abroad. After a short summary of the events leading to this reform (1), the new legal provisions will be presented (2, 3).

1. Legislative History

The phenomenon of forced marriages — understood as the marriage of a person against his or her own will by the way of coercion or duress⁵⁶ — is a considerable problem in Switzerland.

52. Article 10, §4 LCD.

53. Article 21 and 22 LCD.

54. See Loi sur le Partenariat du 18 juin 2004, RS 211.231.

55. For a transcript of the parliamentary debates, see the following link: http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20110018 (last visited: February 21, 2014).

56. See also art. 23 al. 3 of the International Covenant on Civil and Political Rights, and point 1.3.2.2 of the 2005 Resolution on forced marriages and child marriages of the Council of Europe for similar definitions. The definition of a forced marriage has been a sticking point during the legislative process of the

According to a study conducted in 2010 by the University of Neuchâtel, around 1300 to 1900 individuals per year are either forced into, or forced to remain in marriage; around 90% of these cases are directed against women, and around 30% against children of less than 18 years of age.⁵⁷ Tragic examples of this unfortunate reality have been numerous and well-publicized by the press. To cite just two notorious cases: in 2001, a young Turkish woman who fled to Switzerland to avoid being married against her will was murdered by agents of her family; in 2006, a Pakistani man murdered his wife when she filed for divorce in order to escape their forced union.⁵⁸ Needless to say, the public outcry against this practice has been strong.

Aware of this sentiment, and considering that current Swiss law was too lenient on this matter, Parliament filed several motions in favor of a stricter regime.⁵⁹ In 2008, the *Conseil Fédéral* published a report laying the groundwork for reform. The project envisaged a thorough modification of Swiss law, which would affect civil law but also related fields such as private international

reform, as the initial proposal concerned both forced marriages and arranged marriages, *i.e.*, marriages that are organized and helmed by another member of the family or a third party. It was finally considered that these marriages would not be targeted by the reform, as they did not *per se* lead to coercion or duress towards one of the spouses. See Conseil Fédéral, Répression des mariages forcés et des mariages arrangés ; Rapport du Conseil fédéral en exécution du postulat 05.3477 du 9.9.2005 de la Commission des institutions politiques du Conseil national (Repression of forced and arranged marriages ; Report of the *Conseil Fédéral* according to postulate 05.3477, formulated on the 9.9.2005 by the Commission of political institutions of the *Conseil National*), 9-10 and 17-18; Conseil Fédéral, Message relatif à une loi fédérale concernant les mesures de lutte contre les mariages forcés du 23 février 2011 (Message related to a federal law on measures against forced marriages of the 23th of February 2011), FF 2011 2045, 2075.

57. Anna Neubauer & Janine Dahinden, “*Mariages forcés*” en Suisse: causes, formes et ampleur 32-45 (Office fédéral des migrations 2010).

58. Conseil Fédéral, Répression des mariages forcés et des mariages arrangés ; Rapport du Conseil fédéral en exécution du postulat 05.3477 du 9.9.2005 de la Commission des institutions politiques du Conseil national, 6-7.

59. *Id.* at 7-9. See also, for example, the transcript one of these motions: http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20053477 (last visited: February 21, 2014).

law, criminal law and immigration law. This law “package” was accepted by the two chambers of Parliament without major changes. In the following paragraphs, only the topics that fall under the ambit of the present chronicle, civil law and private international law will be covered.

2. *Changes in Civil Law*

In regard to civil law, the reform mostly addressed the grounds for the annulment of a marriage.⁶⁰ Under Swiss law, a marriage can only be annulled if there is either an absolute ground⁶¹ or a relative ground for annulment.⁶² Both sets of grounds are exhaustive, meaning that any marriage falling outside the scope of these two provisions cannot be annulled at all.

The absolute grounds⁶³ cover situations in which there is a strong public interest in the annulment of the marriage; for example, if one of the spouses was already married at the time of the wedding celebration, or if he or she lacked capacity of judgment at that moment, or if the marriage is prohibited because of kinship, article 105 of the Civil Code will apply. Marriage annulment procedures resting under an absolute ground may be initiated at any time by any interested party. In particular, the

60. While the rules concerning the preparatory procedure preceding the marriage have also been amended by the reform, the modification made thereof was mostly of a formal, rather than substantial, nature. Indeed, even before the advent of this reform, the civil register office was bound to refuse the celebration of any marriage which was affected by coercion or duress. Since 2011, it also had the duty of reminding the spouses that consent is the cornerstone of marriage. These rules, however, were not directly set out in the civil code: the first being deduced from the general rules of marriage formation (art. 35 par. 2 CC) and the second being contained in art. 65 par. 1bis of the *ordonnance sur l'état civil (executive order on civil status)* (RS 211.112.2), which is a supplement to the Civil Code focused on the functioning of the civil register office. The reform thus allowed for the inclusion of these rules into the code itself (art. 99 al. 1 n. 3 CC). *See* Message relatif à une loi fédérale concernant les mesures de lutte contre les mariages forcés du 23 février 2011, FF 2011 2045, 2053.

61. Article 105 CC.

62. Article 107 CC.

63. Article 105 CC.

Swiss civil authority of the current domicile of the spouses may bring such an action by its own accord (*ex officio*).

The relative grounds⁶⁴ cover situations where the interest of only one of the spouses is affected. These include cases where one of the spouses was deceived or induced into an error by the other spouse, or if he or she temporarily lacked capacity of judgment during the wedding celebration. Only the afflicted spouse may bring an action for annulment under relative grounds, and it is subject to two time limits. It will be time barred if not made within six months starting from the moment of the discovery of the grounds, and within five years starting from the wedding celebration. Once either of the delays expires, the only recourse left is an action for divorce.

Before the reform, the fact that a marriage was concluded without the consent of one of spouses was, in itself, not considered as a ground for annulment. Only in cases of qualified coercion—i.e., if the spouse proves the marriage was concluded under a clear threat against his or her physical integrity, life, or the well-being of his or her relatives—would a relative ground for annulment be given.⁶⁵ This was deemed to be insufficient by the legislator, because the standard of qualified coercion was difficult to prove for the victim, and because the relative nature of this ground made it subject to the two time limits discussed above. In practice, it was extremely difficult for the victim of an arranged marriage to achieve an annulment.⁶⁶

In response to this situation, the reform introduced three major changes. First, it eliminated the problematic concept of qualified coercion.⁶⁷ Second, it added a new absolute ground for annulment concerning situations in which a spouse has not married out of his

64. Article 107 CC.

65. Article 107, n° 4 CC.

66. Conseil Fédéral, Message relatif à une loi fédérale concernant les mesures de lutte contre les mariages forcés du 23 février 2011, FF 2011 2045, 2053-2054.

67. Article 107, n° 4a CC was removed.

or her own free will.⁶⁸ Third, it introduced another absolute ground, addressing cases where one of the spouses is a minor.⁶⁹ These changes not only allow victims of forced marriage to bring an annulment action regardless of any time limit, they also strengthen the position of the Swiss civil authorities, which will now be able to annul, *ex officio*, any forced marriage or any marriage in which one of the spouses is a minor.⁷⁰

3. Changes in Private International Law

Other changes were made in the field of Private International Law. The reform addressed a) the law applicable to marriages celebrated in Switzerland, and b) the procedure of marriage annulment.

In regard to the law applicable to marriages celebrated in Switzerland, the system in force at the time of the reform allowed, under certain circumstances, for the application of foreign marriage laws. While the conditions of admissibility of a marriage celebrated in Switzerland were, in principle, to be found in domestic law,⁷¹ it also allowed the application of a foreign law if the two spouses were foreign nationals and if Swiss law did not permit their union.⁷² This exception was however still subject to the general exception of public policy. The goal was to favor the conclusion of marriage (*favor matrimonii*). It allowed for the celebration of marriages that would otherwise not have been accepted under the Swiss Civil Code, namely, marriages involving minors.⁷³

68. Article 105, n° 5 CC.

69. Article 105, n° 6 CC.

70. Conseil Fédéral, Message contre les mariages forcés, *supra* note 66, at 2073-2076.

71. Article 44, §1 of the Federal Act on Private International Law (LDIP), RS 291.

72. Article 44, §2 of the Federal Act on Private International Law (LDIP), RS 291.

73. Other cases which were envisaged as relevant for the purposes of art. 44 par. 2 were marriages concluded with a nephew or a niece, marriages with the

Because of the (high) risk that a marriage involving a minor would be concluded against his or her own will, the legislature considered that these cases would no longer be compatible with Swiss public policy. As a result, the exception contained in article 44 §2 of the LDIP was abolished. Under the new rules, all marriages celebrated in Switzerland must conform to Swiss law.⁷⁴

Finally, the reform addressed the issue of marriage annulment, which was previously not specifically covered by the Private International Law Act. Indeed, prior to the reform, one had to look under the rules of divorce in order to find both the rules on international jurisdiction and on the applicable law to an action for annulment. The legislature introduced a new provision in the Private International Law Act.⁷⁵ At the same time, the rules themselves were reformed: while the rules on divorce open a forum at the Swiss domicile of each spouse, the new rule on annulment adds a new forum, located at the place of the wedding celebration, in order to give more options to a victim of a forced marriage; and while foreign law may be applicable to a divorce concluded in Switzerland under certain conditions, actions for annulment are governed by Swiss law exclusively.⁷⁶

child of one's spouse, and marriage between adopted brothers and sisters. However, due to a modification of the civil code, the first two cases are not anymore an obstacle for marriage in Switzerland, *see* Conseil Fédéral, Message contre les mariages forcés, *supra* note 66, at 2077.

74. This stricter stance about marriages involving minors brought about by the reform also signaled the disappearance of another rule, formerly contained in art. 45a LDIP, which allowed a minor to reach majority when successfully married under foreign law. *See* Conseil Fédéral, Message contre les mariages forcés, *supra* note 66, at 2068-2069.

75. The legislature introduced a new article 45a in the Private International Law Act.

76. Conseil Fédéral, Message contre les mariages forcés, *supra* note 66, at 2077-2078.

B. Revision of the Rules Governing the Name(s) of Marrying Couples

The second development in family law concerns the name of married couples. The new regime applies to all marriages and partnerships concluded after January 1, 2013. It is designed to comply with the principle of gender equality and to offer spouses a large degree of independence in the choice of their post-marital surname.⁷⁷ The reform responded to severe criticism of the previous system by supranational entities. We will thus first provide a short description of the circumstances leading to this reform (1). Then, the new rules will be presented (2).

1. Legislative History

Since the entry into force of the Civil Code of 1907, under Swiss law, the wife of a marrying couple automatically took the surname of her husband.⁷⁸ There were two exceptions: first, the wife could choose to retain her last name as a component, which would then be followed by the couple's common surname;⁷⁹ second, the couple could instead choose to use the surname of the wife as their shared surname. This last option, however, required both parties to take part in a name-changing procedure, and required that they had a legitimate interest in doing so.⁸⁰ Children would also automatically be given the surname of the father,

77. The reform also touched on the issue of *droit de cité* (citizenship), which determines the canton of origin of a given person. Given that this topic is rather peculiar to Switzerland, it will not be covered in this article.

78. Article 160 al. 1 CC (previous version, dated 01.01.12, hereafter "aCC"). For a summary of the legislative history of the reform, *see also* Commission des affaires juridiques du Conseil national, Initiative parlementaire, Nom et droit de cite des époux, Egalité, Rapport de la Commission des affaires juridiques du 22 Août 2008 (Parliamentary motion, Name and citizenship of spouses, Equality, Report of the Commission of legal affairs of the 22nd of August 2008), FF 2009 II 365, 368-370 [hereinafter "Nom et droit de cite des époux"].

79. Article 160, §2 aCC.

80. Article 30, §2 aCC.

except if they were born out of marriage, in which case they would take the mother's surname.⁸¹

While obviously inappropriate with respect to gender equality, this rule was for a long time maintained in legislation because of its strong link with the traditional depiction of marriage, which promoted family unity through a shared name. In 1984, during an otherwise thorough revision of matrimonial law aimed at promoting gender equality, the *Conseil Fédéral* decided to keep the rules on family names as they were, explaining that it would be too difficult to alter such well-accepted rules. While the *Conseil Fédéral* was well-aware of its clear bias in favor of the husband, it added that reaching complete gender equality on this topic was impossible as no other option was viable: choosing the name of the wife would only reverse the inequity, and introducing a new, alternative system of shared, hyphenated names would be too complicated to maintain in situations of multiple, successive marriages.⁸²

This position, however, was hardly defensible under international law. The situation ultimately led to the landmark judgment *Burgharz* of the European Court of Human Rights.⁸³

The case concerned a Swiss couple who had married in Germany. Under German law, they chose the common surname "Burgharz", which was the maiden name of the wife. The husband chose to keep his own surname as a middle component, as "Schnyder Burgharz". However, the Swiss registry office recorded the husband's surname, "Schnyder", as their joint surname. The couple then motioned to have their choice approved by the Swiss

81. Article 270, §1 and 2 aCC.

82. Message concernant la révision du code civil suisse (effets généraux du mariage, régimes matrimoniaux et successions) du 11 juillet 1979 (Message related to the revision of the Swiss Civil Code (general effects of marriage, matrimonial regimes and inheritances) of the 11th July 1979), FF 1979 II 1179, 1227-1229. The Parliament, however, used this revision to introduce the exception contained in article 160, §2 of the aCC. *See* Nom et droit de cité des époux, *Egalité*, *supra* note 78, at 369.

83. *Burgharz v. Switzerland*, no. 16213/90, ECHR 1994.

authorities. Their request was denied at first, as they could not point out any inconvenience arising from the “Schnyder” name. On appeal, the Federal Court (*Tribunal Fédéral*) accepted “Burgharz” as their joint surname, using a general clause permitting a name change when justified under the circumstances. The husband’s request to retain the double name “Schnyder Burgharz”, however, was denied on the ground that only the wife was permitted to retain her previous name as a middle particle; as the system was deliberately lopsided to safeguard familial unity, the husband could not benefit from an exception which was available for wives only.⁸⁴ This part of the judgment led to the appeal before the ECHR.

Reasoning in two steps, the European Court concluded that Swiss law was breaching the Convention. The Court held that a person’s name falls under the ambit of the protection of family and personality rights granted by article 8 of the Convention. It also held that the name-changing regime for marrying couples in Switzerland was discriminatory and that the arguments of family unity and tradition fell short before the need for an equal treatment of both sexes. At the very least, Swiss law could have allowed for husbands to take on a double-barreled name without seriously compromising these values.⁸⁵

Following the ECHR judgment, the Swiss legislature added, in an executive regulation, the possibility for a husband to keep his previous name as a component when both spouses decide to undergo the procedure to designate the wife’s name as the shared surname. The Parliament, not satisfied with this “tacked-on” solution, introduced the system that is now in force in Switzerland.

84. Tribunal Fédéral, 08.06.89, Burgharz Schnyder und Schnyder gegen Kanton Basel-Stadt, ATF 115 II 193.

85. *Burgharz v. Switzerland*, no. 16213/90, § 22- 30, ECHR 1994.

2. Changes Introduced by the Reform

Under the new system, each spouse keeps his or her previous name after the marriage.⁸⁶ In other words, marriage has now no bearing upon one's surname. However, a couple may decide to share a common surname, which can be the birth name of either of the spouses. This requires no specific procedure, as just a declaration to the civil registrar will suffice.⁸⁷

Some complications arise with respect to the surname of children.⁸⁸ If the parents are married and share the same surname, then the child will have this name as well.⁸⁹ If the parents decide to keep their previous names, then, at the moment of their marriage, they will need to decide in advance on which one of their birth names they will pass on to their children.⁹⁰ Should they change their mind in the meantime, they can still opt for the surname of the other spouse, within one year starting from the birth of their first child.⁹¹ Lastly, if, at the moment of the marriage, they do not manage to decide on which name to pass on, they then can request the civil registrar to choose in their stead. One interesting feature of this new system is that it can lead to discrepancies when one or both of the spouses have kept a surname acquired through a previous marriage, as only a birth surname, and not an acquired one, can be passed on to their children.⁹²

Children born out of marriage acquire the birth name of the mother; they can nonetheless acquire the surname of their father,

86. Article 160, §1 CC.

87. Article 160, §2 CC.

88. The issue of which of the spouse's names would pass on to the children was indeed one of the sticking points of the reform, and the cause of the failure of the 1998 effort. *See* Nom et droit de cité des époux, *supra* note 78, at 370.

89. Article 160, §3 and 270, §3 CC.

90. Article 270, §1 CC.

91. Article 270, §2 CC.

92. *See* example 2 of the explanatory note for families established by the department of justice and explaining the new system, at <https://www.bfm.admin.ch/content/dam/data/gesellschaft/gesetzgebung/namensrecht/anwendungsbeispiele-f.pdf> (last visited on March 12, 2014).

even without a marriage, if the child protection authority assigns parental care to both parents.⁹³

IV. CONCLUSION

This brief survey of the changes made in Swiss law in the last two years allows us to make two observations.

First, while Swiss law is undeniably affected by foreign law, and most notably by the law of the European Union, one cannot say that Switzerland has been moving towards full harmonization with its EU neighbors. The reform of the LCD shows that the Swiss legislature still prefers to adopt the rules of foreign law that it deems necessary, while discarding others. Furthermore, the reform on forced marriages shows that Switzerland is not reluctant to rely exclusively on its *lex fori* to tackle issues of controversial nature.

Second, a look at the legislative history of all of the reforms described in this Chronicle shows that the Swiss legislature heavily relies on a comparative law methodology when making its own choices and shaping its own rules. Consequently, the existing differences with the EU law are the result of an informed, calculated choice, leading to a selective and soft harmonization of the law while preserving some specific features and characteristics of Swiss law.

93. Article 270a, §1-3 CC.