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Party Autonomy and Procedural Law:

A Few Comments from an Austrian Perspective

> "Einschränkungen der prozessualen Dispositionsfreiheit bedürfen aber stets einer auf konkrete Wertungen abstellenden Begründung für das jeweilige Einzelproblem, die sich durch den Hinweis auf allgemeine und pauschale Schutzbedürfnisse oder gar abstrakte soziale Gestaltungsziele nicht ersetzen lässt." (*Gerhard Wagner*, Prozessverträge – Privatautonomie im Verfahrensrecht [1998] 61)

I.

This paper is based on a short lecture I gave in April 2010 at an Uppsala conference on "Party Autonomy in Civil Procedure" organised by *Torbjörn Andersson*. *Torbjörn Andersson* and *Aleś Galič* were the two keynote speakers and both focused on a number of aspects relating to the balance of powers between the judge and the parties in their respective jurisdictions. When they invited me to join the conference, they might have expected that I would do the same with respect to Austrian law, probably because the well-known concept of a welfare-state oriented civil procedure developed by *Franz Klein,* which was the basis for the Austrian Zivilprozessordnung of 1898, seemed important. However, I did not fulfil their expectations for the following reasons: First, it is indeed true that *Klein's* legal thinking is important in this context, not only from an Austrian, but also from a European perspective. I have, however, commented on this a number of times[1] and I do not want to repeat myself again

[1] See especially *Oberhammer*, Richtermacht, Wahrheitspflicht und Parteienvertretung, in: *Kralik/Rechberger* (eds), Konfliktvermeidung und Konfliktregelung, Veröffentlichungen des Ludwig Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen XIII, (1993) 31 et seq; see also *Oberhammer*, Richterliche Gewalt, gegenseitige Unterstützung und

at this stage of my academic career. Second, having been educated in a legal system under *Klein's* spell, I developed a certain natural tendency not to believe every single word of his scripture. And third, the subject of the conference was, after all, "Party Autonomy", and that was not what *Klein* was actually aiming at; on the contrary, he did everything to reduce it. Furthermore, his procedural thinking was strongly influenced by the idea of a strong state, which was probably more appealing in the late 19th century than it is today. We have since learned from experience that the state is in reality not that strong in a system based on democracy and a market economy and that such a system necessarily has to rely on private initiative, such as, e.g., the exercise of party autonomy in civil procedure. *Klein*'s political approach was somewhat authoritarian (at least from today's perspective) and resulted in a massive strengthening of the judge's powers in civil litigation. However, the procedure created on this basis turned out to be a great practical success. It is almost generally accepted today that an active role of the judge in the fact-finding process is one of the most important tools for making civil procedure more efficient, irrespective of ideology. I absolutely agree with this view.[2] I am, however, not of the opinion that this necessarily results in a corresponding reduction of party autonomy in every case. On one hand, the "strong judge" can also be a flexible one, offering a range of dispute resolution techniques to the parties. On the other hand, the idea of an efficient civil procedure is not something that should be forced upon parties in any event – after all, litigation is about their property. It seems as if we tend to forget this from time to time.

anwaltliche Vertretung im österreichischen Zivilprozeßrecht, in: L'assistance dans la résolution des conflits, 4e partie: Europe médiéval et moderne, suite, Recueils de la Société Jean Bodin LXV (1998) 215 et seq; *Oberhammer*, Prozessbeschleunigung als rechtspolitisches Gestaltungsanliegen, in *Bundesministerium für Justiz* (ed), Franz Klein Symposion (2005) 55 et seq; *Oberhammer/Domej*, Powers of the Judge – Germany, Austria, Switzerland in *van Rhee* (ed), European Traditions in Civil Procedure (2005) 295–305; *Oberhammer/Domej*, Improving the Efficiency of Justice: Some Remarks from an Austrian Perspective, in *van Rhee/Uzelac* (eds), Civil Justice between Efficiency and Quality: From Ius Commune to CEPEJ (2008) 61–70; *Oberhammer/Domej*, Delay in Modern Austrian Civil Procedure and the Legislator's Response, in *van Rhee* (ed), Within a Reasonable Period of Time: The History of Due and Undue Delay in Civil Litigation (2010) 255 et seq.

[2] See *Oberhammer*, Die Aufgabenverteilung zwischen Gericht und Parteien – Überlegungen à propos „Een nieuwe balans" aus Sicht des deutschen Rechtskreises, in *Ingelse* (ed), Commentaren op fundamentele herbezinning (2004) 81 et seq.

This article is not a thorough academic analysis on the subject of party autonomy, but simply presents a number of thoughts I shared with the Uppsala audience in order to stimulate discussion on the subject. In this respect, it turned out to be rather successful. Initially, I did not want to publish it at all, but as *Torbjörn's* pressure to do so kept growing, I finally gave in.

II.

As "party autonomy" is a rather abstract concept, I would like to start with a case from Austrian court practice. It is not a spectacular or even a very important case, but it can serve as a starting point for what I want to discuss. In a recent decision[3], the Austrian supreme court had to deal with the following issue: The parties to a litigation had agreed to replace the claimant by a third party; the third party had agreed as well. I will return to the facts of the case later. At this stage, I only want to point out that, although all the relevant parties had agreed upon this change of claimant, the court was of the opinion that this change of parties raised serious and complicated legal issues. In the end, and after lengthy deliberations, the court came to the decision that this change of claimant was not admissible under Austrian procedural law. I actually agree with the Supreme Court that this case was not "an easy one" under Austrian law. From a distance, however, one might ask why this is so. The litigation was about the payment of unpaid rent and the eviction of a tenant, in other words, an ordinary case under the law of obligations with no specific public interest involved. The claimant could have waived his claim while the defendant could have agreed to pay and leave the flat. So why is it a legal problem when they decide to have the case tried with a third party? The answer seems to be simple. In civil procedure, courts do not simply do what the parties tell them to do under Austrian law. The same is true to some extent for all of the legal systems I know. Let me take a closer look at this aspect of civil procedure. I will first address the traditional notions of party autonomy under the laws of German-speaking countries. Then I will return to the case I have mentioned before and explain why I referred to it.

[3] Oberster Gerichtshof, decision of 15 December 2008, 4 Ob 79/08h, published in Wohnrechtliche Blätter 2010, 85 et seq.

III.

In German-speaking countries, the issue of party autonomy is discussed under three different traditional notions: the "Dispositionsgrundsatz", the "Verhandlungsgrundsatz" and the "Parteibetrieb".

With respect to the "Dispositionsgrundsatz" ("nemo iudex sine actore"), textbooks usually mention the opening of the proceedings as well as amendments of the initial complaint and the disposition over the subject matter, for example, by settlement, withdrawal of the action or cognovit.[4] This principle is basically considered to be a consequence of party autonomy under substantive law: The party who is in the position to waive his or her claim under substantive law should also be the one who may withdraw or settle the complaint under procedural law. This principle is, however, not as trivial as it may seem. Legal history and comparative law reveal different notions of party autonomy. Consider, on the one hand, the former socialist systems where entering into a settlement required court approval based on a test as to whether the settlement was fair and in line with the principles of the socialist society.[5] Even today, Swiss courts have the duty to examine settlements in divorce proceedings as to whether "the spouses reached agreement of their own free will and after careful reflection and that the agreement is clear, complete and not manifestly inappropriate".[6] Consider, on the other hand, the class action system where people become claimants without actually realizing it. There have been voices in the German-speaking countries that this is against public policy because it is in conflict with the "Dispositionsmaxime". [7]

The principle "da mihi facta, dabo tibi ius" is expressed in the "Verhandlungsmaxime" (or "Beibringungsgrundsatz"), the adversarial principle. This relates to the role of the judge and the parties in the fact-

[4] See e.g. *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 16th ed (2004) 479 et seq (Germany); *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 203 et seq (Austria); *Staehelin/Staehelin/Grolimund*, Zivilprozessrecht (2008) 111 et seq (Switzerland).

[5] See e.g. *Oberhammer*, Richterbild im Zivilprozeß: Zwischenbilanz eines Jahrzehnts der Reformen in Mitteleuropa, in *Oberhammer* (ed), Richterbild und Rechtsreform in Mitteleuropa (2001) 131 et seq = Justiz im Umbruch: Richtermacht in den neuen Demokratien Mitteleuropas, in *Storme/Hess* (Hg), Discretionary Power of the Judge: Limits and Control (2003), 273 et seq.

[6] See e.g. *Büchler/Vetterli*, Ehe – Partnerschaft – Kinder (2007) 105.

[7] E.g. *Ebbing*, Class Action, Zeitschrift für vergleichende Rechtswissenschaft 103 (2004) 46.

finding process. While German[8] and Swiss[9] textbooks state that the adversarial principle applies in these countries, some Austrian authors are of the opinion that the proceedings in Austria are somewhat more inquisitorial.[10] Note, however, that this discussion is symbolic to a certain extent. For example, Austrian academic lawyers stress that all means of evidence can be taken by the judge ex officio under Austrian law. In reality, however, this almost never takes place because the parties refer to the relevant evidence themselves anyway. After all, they want to win the case. In contrast, under German law, witness evidence must not be taken ex officio. From a distance and from a comparative perspective, all of this seems pretty irrelevant. And indeed, for example, from a traditional common law perspective, both German and Austrian proceedings are simply inquisitorial.[11] Such minor differences, however, are considered to be very important in the political discussions in many jurisdictions. All in all, the role of the parties and the judge in the fact-finding process is perhaps most important from a "Germanic" perspective when it comes to party autonomy. Contributions with titles like "Richtermacht und Parteifreiheit"[12] have their focus almost entirely on that aspect. – And indeed, this is an aspect worth discussing. As already mentioned above,[13] I have done so quite frequently in the past.

The third traditional notion of party autonomy in the German-speaking jurisdictions is "Parteibetrieb" vs. "Amtsbetrieb":[14] Who exercises control over the formal conduct of the proceedings, i.e. who has the initiative with respect to hearings, deadlines, service of summons etc? Normally, textbooks do not deal with this in great detail and it seems to be a technical issue even for proceduralists. In practice, however, there are significant differences which you cannot learn from textbooks. For example, in most of the jurisdictions, there are time periods fixed by law and time periods

8 See e.g. *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 16th ed (2004) 481 et seq

9 See e.g. *Staehelin/Staehelin/Grolimund*, Zivilprozessrecht (2008) 116 et seq.

10 See for a typical example *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 204 et seq.

11 Cf *Kötz*, Zur Funktionsteilung zwischen Anwalt und Richter im deutschen und englischen Zivilprozess, Festschrift für Imre Zajtay (1982) 277.

12 Sc *Habscheid*, Richtermacht und Parteifreiheit, ZZP 81 (1968) 175 et seq.

13 See supra I.

14 See *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 16th ed (2004) 496 (Germany); *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 207 (Austria); *Guldener*, Schweizerisches Zivilprozessrecht, 3rd ed (1979) 179 et seq (Switzerland).

where the judge has discretion. Both the Swiss and the Austrian codes allow an extension of the time limit for the answer to the complaint. The Austrian Code simply says that the judge "can" do so (Section 128 of the Austrian Code of Civil Procedure), while under the Swiss Code there must be "sufficient reasons" to do so *(*Art. 144 of the Swiss Code of Civil Procedure). The reality, however, is very different between Switzerland and Austria. If it is not a simple case, the courts of Zurich will normally grant an extension at least once if the defendant sends a polite apology to the court with an explanation as to why he or she could not comply with the initial time limit. In contrast, Austrian courts almost never do so. In addition, in Swiss practice, an extension will most likely be granted when the opponent agrees to it. The Austrian Code, however, expressly states that the parties cannot agree upon such an extension. One might wonder about the reasons for this difference and, especially, why the parties' consent on that aspect is irrelevant under Austrian law – and so do I. *Franz Klein*, the creator of the Austrian Code of Civil Procedure, was very fond of the limitation of party control. In his writings, he stated that an extension of time limits or the postponement of hearings based simply on party consent is absolutely disastrous because it delays proceedings.[15] Of course, proceedings do take longer in such situations. It is, however, hard to see why this is disastrous. There is a creditor and a debtor, and both express that they are not in a hurry and agree to such measures. So why was *Franz Klein* so proud of the fact that he forced these people into faster proceedings they did not want to have? It could not have been the national budget, as this kind of procedural delay does not make the proceedings more expensive for the state. I believe that this rather technical aspect of procedure shows a fundamental approach to procedure, and, more generally, to the relation between the individual and the state. As already mentioned above, it is obvious from *Klein's* publications that he strongly believed in the state and therefore in the judiciary while at the same time despising the parties to a certain extent. That was already evident in his thesis on fraudulent parties[16] and is also obvious in his more political writings.[17] This resulted in a very state- and court-oriented

[15] He characterised this as a "wüstes Vertagungsunwesen"; see, e.g., *Klein*, Vorlesungen über die Praxis des Zivilprozesses (1900) 7.

[16] *Klein*, Die schuldhafte Parteihandlung (1885).

[17] See *Oberhammer*, Prozessbeschleunigung als rechtspolitisches Gestaltungsanliegen, in *Bundesministerium für Justiz* (ed), Franz Klein Symposion (2005) 55 et seq.

concept of procedure. Most of this was of course visionary at his time but some of it was simply authoritarian, and this is true for the example I just gave.

IV.

Let me go back to the case I referred to above.[18] The question whether parties are free to agree to any change of the parties in the course of litigation obviously relates to the subject of party autonomy. So one might expect that the answer to this question has something to do with the three principles outlined above in a very sketchy fashion.[19] It seems obvious to me that it does not lie in the adversarial concept of procedure. Every informed Austrian lawyer would deny that it has something to do with the principle that the court runs the formal course of the proceedings, as it is not a mere "formality" who is a party to a litigation. It could, however, be the case that the solution to this problem can be found in the "Dispositionsgrundsatz". After all, this principle is based on the assumption that the parties who have free disposition over the rights and claims involved under substantive law should also be the "domini litis", the masters of the conflict under procedural law. In its decision, the Austrian Supreme Court, however, did not address this principle at all, either directly or indirectly and, more generally, also did not refer to any other general concept of party autonomy. The reasoning of the decision is telling. The initial plaintiff, who was the landlord, sued the tenant for payment of the unpaid rent and for eviction. Subsequently, the landlord's claim for payment of the rent was seized by a bank, the third party in this case. All the parties agreed that the bank, as the garnishee of the claim, should replace the landlord as the claimant in the pending proceedings against the tenant. In its decision, the Austrian Supreme court first pointed out that one should have a rather liberal approach in such situations. It did so in a broad obiter dictum stating that legal doctrine was too conservative with respect to a change of parties based on the parties' consent. The court may be correct in that respect. Secondly, however, the court stated that this change of claimant could not take place in the case at hand for the following reason: As a consequence of the enforcement proceedings, the bank was only entitled to sue the tenant for payment. The right to

[18] Cf. supra II.
[19] Cf. supra III.

evict the tenant could, however, not be subject to separate garnishment or assignment without a transfer of ownership of the house. – This is of course true under Austrian private law. Under the "Dispositionsgrundsatz", one might, however, have expected a different result with respect to procedure. If the bank had sued the tenant for eviction from the outset, nobody would have been of the opinion that the claim was inadmissible because the bank was not a party to the procedure. On the contrary, it derives from the principle of party disposition that the bank would simply be a party to that litigation because they commenced it with their action in their own name ("formeller Parteibegriff"[20]). The fact that the bank has no standing to evict the tenant would then simply result in a dismissal of the action on lack of merits. If the Austrian Supreme Court had applied the same approach to the exchange of claimant situation, the result would have been obvious: "Let them have their way, and maybe tell them that there are concerns about the standing of the bank, but if all the parties involved agree, respect that and maybe grant the outstanding rent claim and dismiss the eviction claim later on." This is obviously not what the Austrian Supreme Court did and the fact that the case was about a fundamental issue of party autonomy went unnoticed. The reason for that is clear. It is correct that the traditional notion of the "Dispositionsmaxime" does not cover situations like the one in this case, and there is also no other principle that could be applied here instead. As a matter of fact, there are numerous situations under procedural law where "party autonomy" might be an argument, but this is not the way it is done in the German-speaking countries, and especially not in Austria.

Therefore, one cannot blame the Austrian Supreme Court for not understanding that the case was also about a fundamental issue of party autonomy in civil procedure – seeing things from that perspective is simply not part of traditional legal thinking under Austrian procedural law. For an Austrian judge, it is crystal-clear that procedural law, at least as a starting point, is mandatory law. Party dispositions are therefore only accepted where the law has express provisions or there is a basis for an analogy. This approach is very common in Austria, but it also exists in Germany and Switzerland. There are some wonderful examples of this kind of thinking in Austrian legal scholarship. For example, there is a traditional discussion on the "nature" of forum selection and arbitration agreements. Under the prevailing opinion, these agreements must not

[20] Cf. *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 124 et seq.

be considered contracts. Leading scholars even went so far as to say that they are not even agreements, but only the statutory consequence of two timely coexisting acts of procedural law performed by the parties.[21] This approach is unfortunately not only theoretical, but also of some practical relevance, for example, when it comes to the interpretation of such clauses.[22]

V.

I remember a discussion when I was still a young assistant at the department of civil procedure in Vienna. In this discussion, I dared to suggest something like a "laissez-faire approach" with respect to an issue of procedural law. I do not remember the exact issue, but I do remember the reaction of one of the professors very vividly. She told me: "What you are proposing is simply a 'Konventionalprozess'". I did not know the term "Konventionalprozess" then and the Professor did not explain it to me either. Obviously, she did not find it worth explaining why a "Konventionalprozess" is something so negative, but the tone of her voice and the expression on her face clearly showed me that it this must be the case for anybody who is not completely out of their mind. So I did not dare to ask about the "Konventionalprozess" concept then because I was afraid that the professor would get the impression that I had no idea what procedural law was all about. After having passed all the necessary steps of academic qualification, I might be in the position to ask my stupid questions now. It has been correctly stated that the danger of such a "Konventionalprozess" was used much too often in the past as an argument in order to restrict party autonomy in civil procedure.[23] A typical example for such an approach is given in the Austrian Supreme Court's decision of 7 October 2003:[24] In this judgment, the Supreme Court held that "Beweisverträge", i.e. agreements on evidence (such as the value of certain means of evidence or the evaluation of evidence) are inadmissible

[21] See e.g. *Matscher*, Die Zuständigkeitsvereinbarung im österreichischen und internationalen Zivilprozessrecht (1967) 23, 53.
[22] See *Oberhammer*, Internationale Gerichtsstandsvereinbarungen: Konkurrierende oder ausschließliche Zuständigkeit?, Juristische Blätter 1997, 434 et seq.
[23] *Wagner*, Prozessverträge (1998) 85.
[24] Oberster Gerichtshof, decision of 7 October 2003, 4 Ob 188/03 f, published in: Österreichische Richterzeitung 2004/10; Recht der Wirtschaft 2004, 223; Evidenzblatt 2004/40.

and therefore void under Austrian law because such agreements "violate the prohibition of the 'Konventionalprozess'" and would be contrary to the "mandatory character of procedural rules which are part of public law". The Supreme Court does not give any reason for this and does not explain the term "Konventionalprozess" either. Unfortunately, I have not had the time for serious research on the term "Konventionalprozess" on a historical basis. I will do so in the future. It still seems to be popular in Vienna today. When I googled it, my first hit was the outline of the main lecture on civil procedure at Vienna University (held by another professor than the one mentioned before).[25] Slide 8 of this presentation had the heading "Nature of Civil Procedure"; then it went like this: "1st: Public law; 2nd: Mandatory law; no 'Konventionalprozess'; opportunity for agreements in exceptional cases only".

All of this is in stark contrast to the fact that in all matters involving pecuniary claims, the parties can simply do away with this mandatory complex of laws by agreeing upon an arbitration clause.[26] If they do so, all these very important mandatory rules suddenly do not apply any longer, save for some very important principles such as public policy and due process. In arbitration, everything is up to the parties' disposition except for some issues of specific importance. In litigation, it seems as if the opposite is true.[27] It almost goes without saying that this is not the normal approach to mandatory law. Just think of labour law, which provides for numerous mandatory rules in most jurisdictions in order to protect employees. Of course, you cannot get rid of all these mandatory rules of labour law by simply agreeing that labour law does not apply as a whole, because, for example, the person who works for you agreed not to do so as an "employee", but as something different, e.g. a "slave". – This is, however, the case with the relation between arbitration and litigation. Almost every rule governing court proceedings is mandatory, but you can also have a final, binding and enforceable judgment without all of these mandatory rules by simply avoiding the whole court system. All this leads to the question which I want to discuss in the last part of this paper: What

[25] See http://zvr.univie.ac.at/fileadmin/user_upload/inst_zvr/Konecny/Hauptvorlesung/VO-ZIVILPROZESS_Teil1.pdf (visited on 8 November 2010).

[26] See for Austria section 582 para 1 of the Code of Civil Procedure; para 2 leg cit provides for some exceptions such as family law etc. For a comparative analysis see e.g. *Born*, International Commercial Arbitration (2009) 766 et seq.

[27] See also *Wagner*, Prozessverträge (1998) 62 et seq.

are the reasons for that approach? Why is procedural law mandatory law in the jurisdictions I know, at least in principle?

Many lawyers seem to think that this is a consequence of civil procedure being public law. And, of course, in public law, there is usually much more mandatory law than in private law. However, the concepts of "public" and "private" law are rather vague. Most theories I know look at the relation between the parties involved and their interests. In civil procedure, we have two kinds of relations: the relation between the court and the parties, which is of course an expression of the state's sovereignty, and the relation between the parties, which under all concepts I know would have to be considered private. – The mere involvement of the court does not necessarily make this relation fall under public law. If this were the case, marriage or the sale of land would also have to be considered public law because you cannot get married or become the owner of real estate without public institutions such as the land registry or the registrar of marriages being involved. In addition, the fact that public law is normally mandatory does not indicate that civil procedural law has to be mandatory as well. Naturally, in a court system under the rule of law, court activity needs to be governed by sufficiently specific rules in order to protect parties from judges acting arbitrarily. Therefore, civil procedure cannot simply be a suggestion to the judge saying "you can do it like this, but you can also do it any other way if you prefer" (although, of course, judges will always necessarily have some degree of procedural discretion). This insight, however, is no explanation for the relatively detailed body of mandatory law governing civil procedure, for example, in Germany and Austria. The rule of law only requires that the state, i.e., the court, is prohibited from acting arbitrarily. However, a procedural rule ordering the judge to act on the basis of the parties' consent is perfectly in line with the rule of law. Individual freedom is not at all contrary to the "Rechtsstaatsprinzip"; although this is absolutely trivial, many proceduralists seem to forget that every now and then. Therefore, stating that civil procedure is part of public law is no argument at all for limiting party autonomy by mandatory rules.[28]

Moreover, even the degree to which court activity needs to be governed by strict legal rules is not fixed. Comparative law shows that there are significant differences in this respect. For example, the text of the

[28] See *Goldschmidt*, Der Prozess als Rechtslage (1925) 149; *Wagner*, Prozessverträge (1998) 13 et seq.

Austrian Code of Civil Procedure is more than twice as long as the new Swiss Code of Civil Procedure, and the German Code is even longer. – And indeed, Swiss judges have more procedural discretion than their Austrian colleagues. I do not want to discuss which approach is "better" here, but it is obvious even from that very simplistic comparison that there is no "natural degree" of regulation in civil procedure. Last year, I heard a lecture by a German colleague criticizing the new German code on non-adversarial and family proceedings. His main argument was that the number of sections on certain issues is much too small and that is contrary to "Rechtsstaatlichkeit". He did not even argue why these issues require more regulation. When I asked him why he believes that more sections are a sign of more "Rechtstaatlichkeit", he admitted that it is not as simple as this, but added that normally more statutory text indicates that there is more "Rechtsstaatlichkeit".

In many cases, mandatory law is used to protect the interests of parties such as children, consumers, employees and tenants etc. As is generally known, such rules exist in civil procedure as well. In the law of obligations, such rules are normally the exception to the general principle of party autonomy, whereas in civil procedure party autonomy already is the exception. Therefore, the specific rules for the protection of weak parties normally only eliminate a few of the small numbers of cases where party autonomy actually exists in civil procedure, such as forum selection or arbitration clauses. There is no "B2B" litigation in the German speaking countries where party autonomy would be the rule.

There may be practical reasons for mandatory procedural law. After all, procedure is the judge's tool and it might be practical that this tool does not change from one litigation to another. This is indeed true, but it does not seem to be a very strong general argument for limiting party autonomy – "it is more comfortable for the state" does not seem to be a very convincing argument against individual freedom, and it is definitely not a good argument for practically not allowing party dispositions in a field of law at all. This is even more true in proceedings involving large amounts in controversy. In these cases, the court fees, at least in Austria and Germany, do not only fully cover the costs of the court, but also heavily cross-finance small claim proceedings. I do not want to sound like a cynical neo-liberal here, but the argument that "it is more comfortable for the state" might be hard to understand for well-informed businesses who pay dearly for their litigation anyway.

VI.

As I have pointed out above, this paper does not even attempt to give a thorough analysis of the subject. It simply tried to "think outside the box" with respect to party autonomy in a number of respects and I can only voice a few guesses, questions and concerns. Much more thinking and discussion would be required to formulate something like a modern comprehensive concept of party autonomy in civil procedure in German-speaking jurisdictions. The traditional notions of "Dispositionsgrundsatz vs. Offizialmaxime", "Verhandlungsgrundsatz vs. Untersuchungsgrundsatz" and "Parteibetrieb vs. Amtsbetrieb" only reflect certain aspects of the relation between the parties and the court. At the same time, we do not sufficiently discuss civil procedure as a subject of regulation on a general level: What are the objectives and tools? How much regulation is required? What should be left to the judge's discretion and/or to party disposition etc.?