

TU TECHNISCHE
UNIVERSITÄT
WIEN
Vienna University of Technology

VO 330.226
Wirtschaftsrecht

Hon-Prof Dr Walter Brugger

walter.brugger@profbrugger.at

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- **Private International Law**
- **Austrian Court System in Civil Litigation**
- **Mediation**
- **Arbitration**

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Private International Law – PIL
Internationales Privatrecht - IPR

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Important Sources of Law

- IPRG
- Rom I-VO
- Rom II-VO

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Private International Law – Which Substantive Law?

- Starting point
 - Law of state of forum (*lex fori*) -> its conflict rules
- Sources of private international law
 - National laws
 - Example Austria: Austrian Conflict of Laws Act (IPRG)
 - EU law supersedes national law (primacy!)
 - Rome I Regulation (contractual obligations; superseded Rome Convention and – to a large extent – Austrian IPRG)
 - Rome II Regulation (non-contractual obligations; superseded Austrian IPRG)
 - Rome III Regulation (Divorce)
- USA
 - Restatement Second of Conflict of Laws (relevant is the

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Rome I Regulation: Rules of Private Int'l Law

- The Rome I Regulation sets out the rules that the courts apply to determine which law applies to contractual obligations. Under this Regulation, a contract is normally governed by the law chosen by the parties.

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Rome I Regulation: Rules of Private Int'l Law

- However, your agreed choice of law can be displaced in the following situations:
 - where there are mandatory legal rules in the place where the dispute is being heard, or in a country connected to the dispute (one example here would be laws on employee rights); and
 - where some provisions of the law chosen by the parties are clearly incompatible with public policy in where the dispute is being heard (for example, where performance of an act would be illegal).

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Rome I Regulation: Rules of Private Int'l Law

- Where the parties to an agreement have not expressed a choice, the Rome I Regulation sets out specific rules to determine the governing law for certain types of contract.
- In general, this will be the law of the country where the party who is to carry out the contract is habitually resident.

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Rome I Regulation: Rules of Private Int'l Law

- List of choice of law rules for specific contracts (Art 4 (1))
 - Sale of goods: law of country **where seller is domiciled**
 - Provision of services: law of country where provider is domiciled
 - Rights in rem: law of country where property is located
 - Default rule: Characteristic performance (Art 4 (2)) that the other party is paying for
 - 2 escape rules: Principle of closer/closest connection (Art 4 (3) & (4))
 - Rome I directly designates substantive law: No renvoi (Art 20)
 - Refusal against application: if against *ordre public* (Art 21)
 - Scope of application
 - **Civil and commercial law matters**
 - Exclusions (Art 1 (2))
 - Status or legal capacity (but see Art 13; Austria: sec 12, 9 and 10 IPRG)
 - Agency (Austria: sec 49 IPRG)
- www.profbrugger.at and arbitration agreements (see Brussels I Regulation)

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Rome I Regulation allows choice of law

- Clauses are valid for
 - Choice of substantive law (for whole contract or only for parts)
 - Choice of procedural law **only** for arbitral proceedings
 - Negative choice possible (e.g. exclusion of CISG although the contract is a sale of goods; Note: CISG needs to be explicitly excluded!)
- Requirements for a valid choice of law clause in a contract
 - Expressly or clearly demonstrated by terms of contract
 - If the law of a specific state is chosen, while all facts of the dispute were realized in a different state, the mandatory provisions of law of the latter one cannot be overruled (Art 3 (3); similar provision re European law in Art 3 (4))
 - Exceptions for consumers (Art 6) and employees (Art 8)
- Form requirement
 - No mandatory form requirements
 - But written agreement is advisable

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Rome II Regulation: Non-Contractual Obligations

- Scope: **Tort** (including product liability and unfair competition), unjust enrichment, negotiorum gestio, culpa in contrahendo
- General rule for tort (Art 4 (1)): Substantive law of country **where damage occurs**
 - Exception I (Art 4 (2)): Both parties domicile in same country when damage occurs
 - Exception II (Art 4 (3)): Manifestly more closely connected with different country
 - Special rules for product liability, unfair competition etc
- Unjust enrichment (Art 10) and negotiorum gestio (Art 11)
 - Law governing existing relation between parties
 - Or exception I or II above
- Culpa in contrahendo (Art 12)
 - Law governing the contract

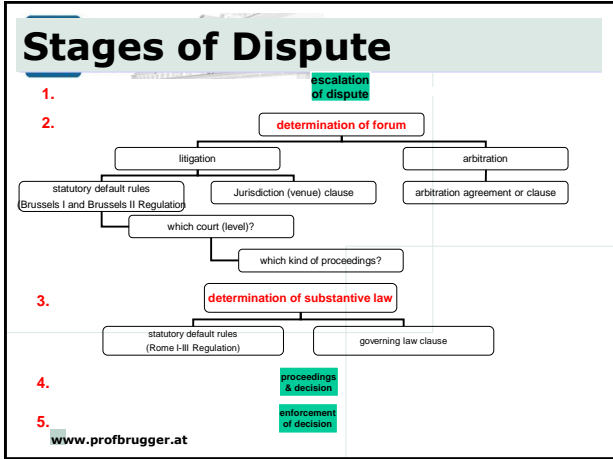
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International Dispute Resolution – The Dispute

- Viennese Hotel orders 200 fridges from U.S. producer
- Dispute arises as fridges are not functioning
- Jurisdiction clause (venue clause): Order form reads: „... Vienna, Inner City“
- Governing Law: No choice of law clause (or: "This contract shall be governed by Swiss law")

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Austrian Court System in Civil Litigation

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Important Sources of Law

- Code of Civil Procedure (Zivilprozessordnung, ZPO)
- Court Jurisdiction Act (Jurisdiktionsnorm, JN)
- Law on Enforcement (Exekutionsordnung, EO)

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Vorbereitung

- **Unterlagen für RA (welche?)**
- **Besprechung mit RA (?)**
- **Ziel? Klage:**
 - Parteienbezeichnung (FN, Adr)
 - Kurzer Sachverhalt
 - Forderung (detailliert aufgeschlüsselt, jede Position begründet)
 - Beweismittel zu jeder Behauptung?!

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Civil Litigation

- State regulated enforcement of civil claims
- Proceedings before national courts
 - District Court
 - Provincial Court (Land Court)
 - Higher Regional Court (Court of Appeals)
 - Supreme Court

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The Court System in Civil Proceedings

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    graph TD
      BG1[BG (District Court)  
single judge  
value up to EUR 15,000  
(appeal restricted if value below EUR 2,700)]
      LG1[LG (Land Court)  
panels of 3 judges]
      LG2[LG (Land Court)  
single judge  
value between EUR 15,000 and EUR 100,000]
      LG3[LG (Land Court)  
panels of 3 judges  
value above EUR 100,000  
(if requested by one of the parties)  
+ labour law litigation]
      OLG[OLG (Court of Appeals)  
panels of 3 judges]
      OGH[OGH (Supreme Court)  
panels of 5 judges  
value above EUR 5,000]

      BG1 -- "(Berufung = appeal)" --> LG1
      LG1 -- "(Berufung = appeal)" --> OLG
      LG2 -- "(Berufung = appeal)" --> OLG
      LG3 -- "(Berufung = appeal)" --> OLG
      OLG -- "(Revision = appeal for error)" --> OGH
  
```

OGH (Supreme Court)
panels of 5 judges
value above EUR 5,000

OLG (Court of Appeals)
panels of 3 judges

LG (Land Court)
panels of 3 judges
value above EUR 100,000
(if requested by one of the parties)
+ labour law litigation

LG (Land Court)
single judge
value between EUR 15,000 and EUR 100,000

LG (Land Court)
panels of 3 judges

BG (District Court)
single judge
value up to EUR 15,000
(appeal restricted if value below EUR 2,700)

BG = Bezirksgericht
LG = Landesgericht
OLG = Oberlandesgericht
OGH = Oberster Gerichtshof

Berufung:
incorrect ascertainment of fact,
incorrect legal evaluation,
serious procedural error

Revision:
incorrect legal evaluation,
serious procedural error

taken from: Hausmaninger,
The Austrian Legal System, 3rd ed. (Vienna: 18
Menz, 2003)

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Principles of Litigation

- Publicness
- Orality
- Immediacy
- Fair Trial and Right to be heard – no rejection of evidence due to anticipative consideration of evidence
- Equality between plaintiff and defendant
- Principle of investigation?

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Parties to civil procedures

- Plaintiff and Defendant
- Capacity to sue and be sued (natural persons, legal entities, OG, KG)
- Entitlement to take legal action
- Representation by lawyer mandatory: Court of Appeal, Provincial Court (District Court if value of claim > EUR 5000)
- Third party intervenor

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Procedure before Court of First Instance

- Writ of Complaint
- Formal Examination of complaint by Court
- Delivery of complaint to defendant
- Order to file a Defence (Answer)
- Summoning
- Preparatory hearing and maybe additional hearings (procedure of taking evidence)
- End of hearing before Court of First Instance, Judgement (written)

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Sitzordnung im Zivilprozess

(Publikum)

Kläger und RA

Zeuge

Richter

(SV)

(Rp)

Beklagter u RA

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Zivilprozess - Beweismittel

- **Vorlage von Urkunden (Privatgutachten?)**
- **SV-GA**
- **Einvernahme von**
 - Zeugen
 - Parteien (GeFü)
 - (Auskunftspersonen zur Bescheinigung)
- **Ortsaugenschein (LA)**

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Zivilprozess - 1. Instanz

- Distinguish: witness/party (Parteienvernehmung - Zeugenvernehmung)
- Distinguish: ordinary proceedings/summary proceedings for preliminary injunction (ordentliches Verfahren - Provisorialverfahren für EV)

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Costs of Litigation

- All costs caused by appropriate or necessary legal proceedings
 - Lawyer's fees, court fees, expert fees ...
- Reimbursement of costs for prevailing party
- Separate decision or together with judgement
- Legal Aid: costs necessary for litigation, litigation must not be wilful or hopeless (only for natural persons)

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JUSTIZ REPUBLIK ÖSTERREICH
LANDESGERICHT FÜR ZIVILRECHTSSACHEN GRAZ
MARBURGER KAI 49

41 Cg 23011 y. 43
(Bitte in allen Eingaben anführen)

Judgement

IM NAMEN DER REPUBLIK

Das Landesgericht für Zivilrechtssachen Graz, Marburgerkai 49, Abteilung 41, erkennt durch die Richterin Mag. Birgit Schiller in der Rechtssache der klagenden Partei **_____ Gesellschaft mbH, _____** vertreten durch die Dorda Brugger Jorda Rechtsanwälte GmbH in Wien, gegen die beklagte Partei **_____ GmbH, _____**, 8200 Brodbergg., vertreten durch Dr. Christian Riesenmann M.B.L. Rechtsanwälte GmbH in Graz, wegen **€ 39.607,14 samt Anhang**, nach mit beiden Teilen durchgeführter öffentlicher, mündlicher Streitverhandlung zu Recht:

1. Die Klagsforderung besteht mit € 39.607,14 zu Recht.
2. Die einredeweise geltend gemachte Gegenforderung ist nicht aufrechenbar.
3. Die beklagte Partei ist schuldig, der klagenden Partei € 39.607,14 samt 12 % Zinsen aus € 23.755,73 seit 17.3.2011, aus € 4.708,81 seit 23.3.2011 und aus € 11.142,60 seit 8.4.2011 zu zahlen und die mit € 11.571,38 (darin € 1.680,23 an USJ und € 1.490,- an Barauslagen) bestimmten Verfahrenskosten binnen 14 Tagen bei sonstiger Exekution zu ersetzen.

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Remedies: Appeal

- Remove errors or mistakes that happened in proceedings
- Different remedies against judgements and other decisions
- Only if party has been put at a disadvantage
- Innovations (new pleas or statements) prohibited
- Deterioration prohibited (reformatio in peius)
- Time frame (2 or 4 weeks ...)

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- Berufung: gegen Urteile 1. Instanz
- Revision: gegen Urteile 2. Instanz
- Rekurs (nicht "Beschwerde"):
gegen Beschlüsse der 1. Instanz
- Revisionsrekurs: gegen
Entscheidungen der 2. Instanz über
einen Rekurs

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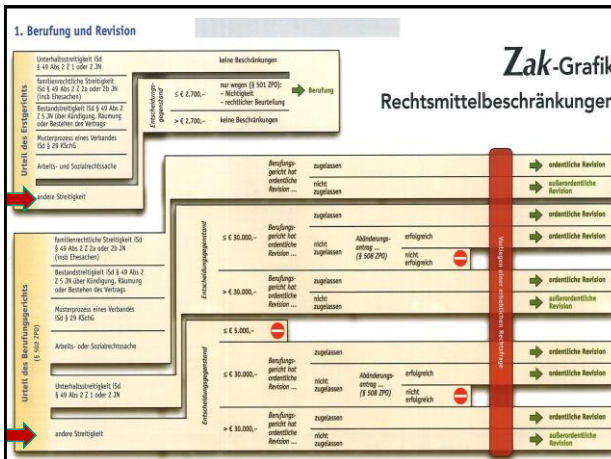
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Rechtsmittelverfahren im Zivilprozess

- **Berufung** → BerBea → mV? → Urteil/Beschluss des BerG
- **Revision(srekurs)** → RevBea → Urteil/Beschluss des OGH

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Legal Force (legally binding)

- Remedies are not possible any more
- Principle of uniqueness: no litigation regarding same claim at a later time ("res iudicata" objection)
- Parties are bound to decision of court
- Enforcement possible

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Excursus: USA

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Court system

- Federal and state courts
- Own court system in each state
- Federal court jurisdiction limited (federal statutes, bankruptcy, disputes between parties located in different states with a value of claim > \$75.000)

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Court system

- 94 federal District Courts dealt with 290.000 filed civil cases in 2010
- State courts dealt with 19.4 million filed civil cases in 2008

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Sources of Law

- Federal Rules of Civil Procedure
- Federal Rules of Evidence
- Federal Rules of Bankruptcy Procedure
- Federal Rules of Appellate Procedure
- State Rules of Civil Procedure (e.g. Iowa Rules of Civil Procedure,..)
- State Rules of Appellate Procedure (e.g. Florida Rules of Appellate Procedure,..)
- State Rules of Evidence (e.g. Texas Rules of Evidence,..)

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Proceedings before court

- Complaint filed by plaintiff, answer by defendant
- Service of summons, writs or other legal papers by attorneys possible under federal and some state laws.
- Pre-trial conferences
- Meeting of judge and lawyers to decide which matters are in dispute and should be presented to the jury, to review evidence and witnesses to be presented, to set a timetable for the case, and sometimes to discuss settlement of the case.
- Pre-trial discovery
- Document requests, interrogatories (written questions asked by one party that the opposing party must answer in writing and under oath), deposition (examination under oath by the attorneys)
- Possible to request any matter that is relevant to the claim or defense!

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Costs

- All litigants bear their own attorneys' fees
- Court can award attorneys' fees if authorized by a statute or by a provision in the contract between the parties, or if the lawsuit is frivolous

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Appeals

- State court → State appellate court → state supreme court
- Federal: District court → circuit court of appeals → US Supreme Court
- US Supreme Court hears less than 150 of the 7.000 cases that are filed each year

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Excursus: England and Wales

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Court System

- **County Courts** (minor claims)
- 216 County Courts in England and Wales, dealing with 1.6 million cases in 2010
- Small claims track: claims < £5.000 (usually no representation by a solicitor, early trials)
- Fast track: claims > £5.000 but under £25.000, with issues not complex enough to merit more than a one day trial
- **High Court:** (claims > £25.000)
- Multi track: cases complex enough to merit preliminary hearings

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Court System

- 3 Divisions of High Court

| Queen's Bench | Chancery | Family |
|--|--|---|
| <ul style="list-style-type: none"> • Contractual disputes, tort, commercial, tort, disputes • Specialist Courts: Commercial Court, Technology and Construction Court, Administrative Court | <ul style="list-style-type: none"> • Tax, insolvency, bankruptcy, equity and trusts, wills • Specialist courts: Patents Court, Companies Court • Appeals from the country courts on bankruptcy and land | <ul style="list-style-type: none"> • Matrimonial proceedings, proceedings relating to children |

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Sources of Law

- Civil Procedure Rules 1998 (CPR)
- Pre-action Protocols
- Practice directions

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Pre-action period

- "letter before claim" to defendant, exchange of documents
- Alternative dispute resolution or settlement (unreasonable refusals may entail cost penalties later on)

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Proceedings before Court

- Issuing a claim using provided claim forms
- Defendant's response: within 14 days of receipt
- No requirement of legal representation
- Costs: "loser pays"-system (discretion of court to order differently or to reward only parts, and to take into account parties' conduct before and during the proceedings)

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Appeals

- Appeals go to Court of Appeal Civil Division
- Permission by court of first instance or Court of Appeal itself needed
- 3rd Instance: Supreme Court, the final court of appeal, hears appeals on arguable points of law of the greatest public importance.
- Until 2009 the Appellate Committee of the House of Lords functioned as the highest court. The 12 justices of the new Supreme Court are no longer part of the House of Lords.

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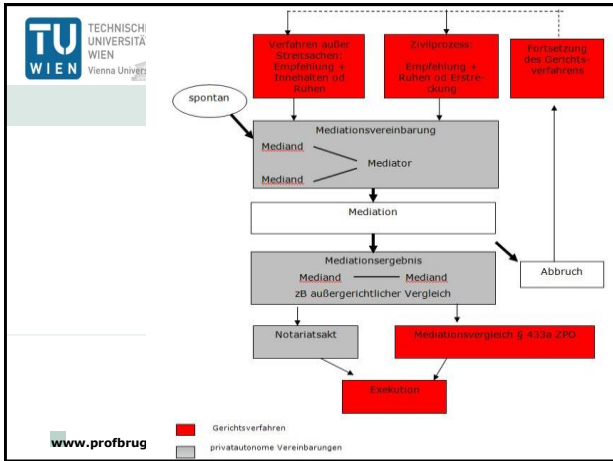
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Mediation

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Arbitration

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Arbitration

- Voluntary alternative to national courts
- Experts as arbitrators
- Privacy, no public hearings
- Arbitration agreement between parties needed
- Parties can select arbitrators and procedure themselves (ad hoc or referring to institution like ICC)
- Increasingly important!

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Arbitration clauses

Example:

"All disputes arising out of or in connection with the present contract, including any question regarding its existence, validity or termination, shall be submitted to the International court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or three arbitrators appointed in accordance with the said Rules.

The place of arbitration shall be Vienna, Austria.

The language of the arbitration shall be English."

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National Court

Arbitral Tribunal (only if agreed upon)

- | | |
|--|--|
| <ul style="list-style-type: none"> ▪ Public hearing ▪ Learned judges (national law) ▪ Summons of witnesses (subpoena) ▪ High costs if high value ▪ appeal to instance ▪ Total: 1-3 years ▪ Enforcement abroad only if Convention (EU: Lugano/ Brussels Convention; LGVÜ / EuVVO = Brüssel I VO; several international conventions) | <ul style="list-style-type: none"> ▪ Not public ▪ Specialists as arbitrators (?) ▪ No subpoena ▪ Cheaper (but expensive if small claims) ▪ No second instance ▪ Total: approx 1 year ▪ Enforcement according New York Convention (more than 140 countries) |
|--|--|

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TU WIEN **Lower Costs?**


| Amount in Dispute | VIAC | | Austrian Ordinary Court Fees (3 instances) |
|-------------------|---|---|---|
| | 1 Arbitrator | 3 Arbitrators | |
| EUR 50,000 | EUR 6,000 (administrative arbitrator fees) | EUR 10,500 - 12,000 (administrative arbitrator fees) | EUR 5,156 |
| EUR 100,000 | <i>EUR 9,000</i> | EUR 18,000 - 21,000 | EUR 12,317 |
| EUR 500,000 | <i>EUR 24,000</i> | EUR 48,750 - 57,000 | EUR 40,009 |
| EUR 1 mn | <i>EUR 37,500</i> | EUR 77,250 - 90,500 | EUR 67,009 |
| EUR 2 mn | <i>EUR 51,500</i> | EUR 106,250 - 124,500 | EUR 121,009 |
| EUR 10 mn | <i>EUR 95,000</i> | EUR 206,750 - 244,000 | EUR 553,009 |
| EUR 50 mn | <i>EUR 149,000</i> | EUR 335,750 - 398,000 | EUR 2,713,009 |
| EUR 100 mn | <i>EUR 204,000</i> | EUR 465,750 - 553,000 | EUR 5,413,009 |

Cheapest option shown in *italics*, most expensive option marked **bold**. (Figures do not include attorney's fees.)
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Almost Worldwide Enforcement of Awards

- Statute of NYC: Enforcement in more than 160 countries of the world



Warning: Map not updated!
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