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Report on German Case Law

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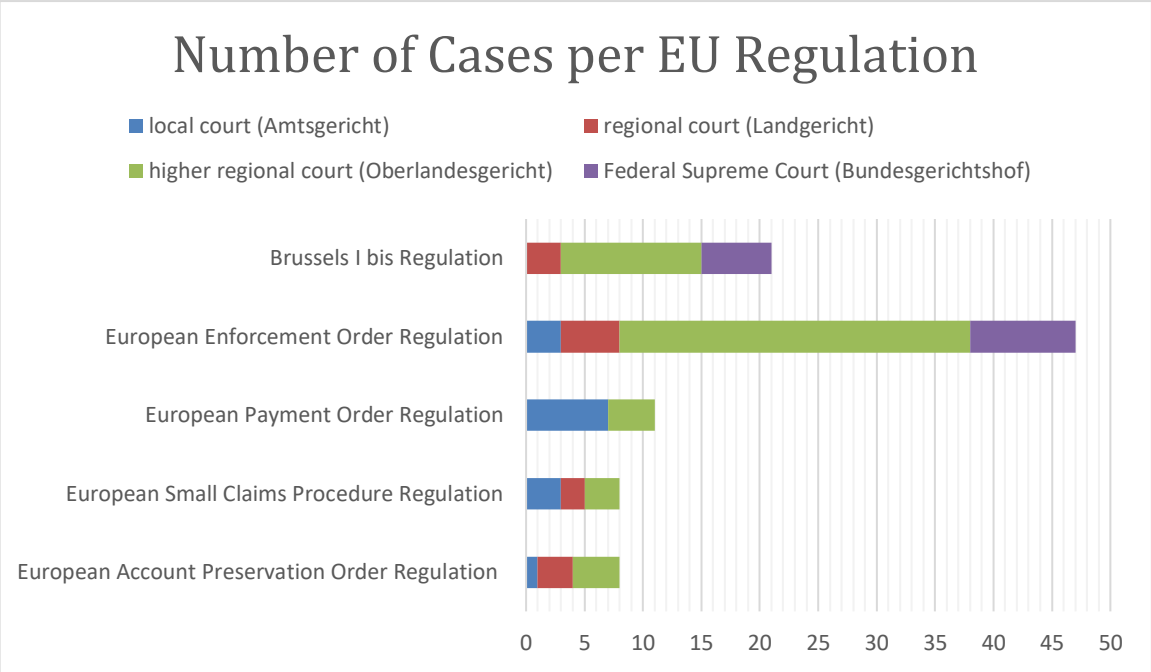
I. Pre-selection

The cases for this report were selected by conducting a search in common German legal databases (e.g. Beck-Online, Juris) for search-terms associated with the regulations covered by this report. It should be noted that the German courts do not publish each and every judgment. Nonetheless, the vast majority of cases dealing with issues of general legal interest are indeed made available.

In general, all the available cases dealing with the regulations were collected; a pre-selection did not take place (e.g. only certain courts, etc.). The number of cases per regulation divided into court hierarchy can be derived from the table below.



The cases were then screened. Cases not specifically dealing with the regulations (e.g. cases only mentioning the (existence of) a regulation in passing) were deleted from the sample. This course of action was particularly necessary for the Brussels I bis Regulation, which plays a role in numerous cases. Subsequently, the remaining cases were

analyzed and categorized according to the issues with which they deal. Issues of general interest and importance are reported on below.

II. Brussels I bis Regulation

1. Jurisdiction ratione materiae

In a recent case, a creditor had obtained a judgment of a German court against a pseudo-foreign company based in London. Once the creditor sought to enforce the German judgment in Germany, the debtor filed a request to refuse the enforcement. Surprisingly, it based its request on Art. 45 and 46 Brussels I bis Regulation, but was unsuccessful in the first and second instance.[1] Ultimately, the Federal Supreme Court accordingly and convincingly refused the request.[2] While the domicile of the defendant is indeed relevant for the Brussels I bis Regulation's rules on jurisdiction in Chapter II (cf. in particular Art. 4 and 6 Brussels I bis Regulation), it is of no importance under Chapter III on recognition and enforcement. On the contrary, the latter rules govern the recognition (Art. 36 Brussels I bis Regulation) and enforcement (Art. 39 Brussels I bis Regulation) of a "judgment given in a Member State (…) in the other Member State". Therefore, their scope presupposes a cross-border element with regard to the judgment and not with regard the defendant. In the case at hand, in which a German judgment was to be enforced in Germany, the Brussels I bis Regulation is inapplicable and the enforcement procedure is solely governed by national law.

2. Interplay with national rules on enforcement

The interplay of the Brussels I bis Regulation with national rules on enforcement appears to play a role frequently. Three cases are discussed here. In a case decided by the Federal Supreme Court (*Bundesgerichtshof*), an Italian creditor had obtained a preventive attachment order from an Italian court, which it sought to enforce in Germany. German civil procedural law, however, prescribes that a preventive attachment order can only be enforced within one month of its issuance (§ 929 (2) German Code of Civil Procedure[3]). The German court of first[4] and second[5] instance had refused to enforce the order due to the lapse of time. The question then arose whether the Italian judgment will have to be enforced in Germany as long as it is enforceable under Italian law (cf. Art. 39 Brussels I bis Regulation) or whether the Member State of enforcement can impose additional requirements, such as the time limit in the case hand, as the enforcement procedure itself is governed by national law (Art. 41 (1) Brussels I bis Regulation).[6] The case was eventually referred to the CJEU[7] by the Federal Supreme Court (*Bundesgerichtshof*)[8]. Ultimately, it held, in line with the CJEU's preliminary ruling, that such time limits for the enforcement of preventive attachment orders can indeed be upheld by the law of the Member State of enforcement.[9]

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[1] LG Osnabrück, 27.01.2020, 3 O 3090/19 (unpublished); OLG Oldenburg, 20.04.2020, 9 W 4/20 (unpublished).
[2] Bundesgerichtshof, 18.02.2021, IX ZB 28/20, BeckRS 2021, 4461.
[3] Zivilprozessordnung, ZPO.
[4] Amtsgericht München, 22.06.2015, OF-6698/19 (unpublished).
[5] Oberlandesgericht München, 16.11.2015, 34 Wx 314/15, BeckRS 2016, 1569.
[6] Even though, for temporal reasons, the case was decided under the Brussel I Regulation, the legal questions have not diminished in importance, because the same issues play a role under the Brussels Ia Regulation.
[7] Court of Justice of the European Union, 04.10.2018, C-379/17, *Società Immobiliare Al Bosco Srl.*
[8] Bundesgerichtshof, 11.05.2017, V ZB 175/15, BeckRS 2017, 114741.
[9] Bundesgerichtshof, 13.12.2018, V ZB 175/15, BeckRS 2018, 37000.

Conversely, a judgment is only enforceable in the Member State of enforcement as long as enforceability in the Member State or origin continues to exist (Art. 39 Brussels I bis Regulation). For that reason, a Rumanian judgment which was no longer enforceable under Rumanian law due to the passing of time, could accordingly not be enforced in Germany.[10]

In a case before the Federal Supreme Court (*Bundesgerichtshof*), the German claimant had obtained a title against a Polish defendant, who had in the meantime filed an appeal. The court of first instance had declared its judgment provisionally enforceable under the condition that the claimant post security in the amount of 110% of the claim. The claimant requested the court of origin to provide a certificate for the provisionally enforceable judgment pursuant to Art. 53 in conjunction with Annex I Brussels I bis Regulation without having posted the security. However, under Nr. 4.4 of the Form in Annex I it is stated: "The judgment is enforceable in the Member State of origin *without any further conditions having to be met*" (italics added). As the enforcement was conditional on the posting of security, the court refused to provide the creditor with the Form.[11] The claimant continued to pursue its request at the Federal Supreme Court, which referred various preliminary questions to the CJEU.[12] Unfortunately, these remained unanswered[13] as the claimant in the meantime had withdrawn its request for the reason that the appeal court had ruled in favour of the defendant. These interesting questions in this case, which are only partially intertwined with particularities of national law, appear to be worthy of further exploration on the European level.

Finally, a case decided by the Federal Supreme Court is based on a somewhat peculiar facts, but it nonetheless contains interesting considerations on the interplay between the Regulation and national law. The claimant had obtained a judgment in Greece with a provisional measure for the attachment of a bank account. The defendant had filed a request at the Regional Court (*Landgericht*) Düsseldorf and was successful in preventing the enforcement of the Greek judgment in Germany.[14] Also the claimant was informed of the Regional Court's judgment, combined with information on the possibility of appeal pursuant to Art. 49 (2) Brussels I bis Regulation. Regrettably, the Regional Court had mistakenly indicated that the appeal was to be filed either at the Regional Court itself or at the Higher Regional Court (*Oberlandesgericht*). The reason for the confusion might lie in the fact that the German provision implementing Art. 49 (2) Brussels I bis Regulation, i.e. § 1115 (5) German Code of Civil Procedure, refers to a remedy under national law (*sofortige Beschwerde*) for which those courts are indeed generally competent (cf. §§ 567 et seq., particularly § 569 (1) German Code of Civil Procedure). In reality, however, only the Higher Regional Court is competent, as that court has been communicated to the Commission by Germany pursuant to Art. 75 (b) in conjunction with Art. 49 (2) Brussels I bis Regulation. The claimant, on the basis of the information provided by the court, proceeded to file an appeal at the – incompetent – Regional Court, which indeed refused the request for reasons of lack of jurisdiction. By the time the claimant had filed its appeal at the competent Higher Regional Court, it was rejected on grounds of inadmissibility due to the lapse of time.[15] Ultimately, the Federal Supreme Court gave the claimant a helping hand and overturned the Higher Regional Court's decision.[16] It bases its decision largely on

[10] Oberlandesgericht Düsseldorf, 19.02.2019, 3 Wx 174/18, BeckRS 2019, 6069.
[11] Kammergericht, 07.10.2016, 23 U 30/16, BeckRS 2016, 129705.
[12] Bundesgerichtshof, 25.01.2018, IX ZB 89/16, BeckRS 2018, 1121.
[13] Bundesgerichtshof, 27.09.2018, IX ZB 89/16, BeckRS 2018, 32144.
[14] Landgericht Düsseldorf, 23.04.2019, 22 O 32/19 (unpublished).
[15] Oberlandesgericht Düsseldorf, 08.10.2019, 3 W 157/19, BeckRS 2019, 33589.
[16] Bundesgerichtshof 15.07.2021, IX ZB 73/19, BeckRS 2021, 27907.

the convincing argument that the Higher Regional Court's competence pursuant to Art. 49 (2) Brussels I bis Regulation and the communication to the Commission, being a proper European remedy, trumps the domestic implementation rules on that court's competence.

3. Interplay with other regulations

A case decided by the Higher Regional Court (*Oberlandesgericht*) Brandenburg shows that a thorough familiarity with and understanding of the European framework of cross-border enforcement sometimes lacks in practice. A Polish court had issued a European Payment Order, which the claimant sought to enforce in Germany. The defendant argued before the German enforcement court that the European Payment Order violated the ordre public of the forum and was substantively inaccurate and, therefore, requested the court to refuse its recognition pursuant to Art. 45 Brussels I bis Regulation. After being unsuccessful in the first instance,[17] the Higher Regional Court confirmed the initial decision[18]. It correctly argued that the conditions under which a European Payment Order is granted are governed exclusively by the corresponding regulation, which provides for a stand-alone regime. Whether the requirements for the issuance of a European Payment Order are met, is only assessed by the court in the Member State of origin. Moreover, the rules on review in exception cases (Art. 20 EPOR) exhaustively regulate the remedial system for European Payment Orders. As *leges speciales*, these rules prevent the defendant from invoking the *lex generalis* of Art. 45 Brussels I bis Regulation.

4. Refusal of recognition

An interesting case decided by the Higher Regional Court (*Oberlandesgericht*) Koblenz raises a question pertaining to Art. 45 (1)(c) Brussels I bis Regulation, which allows the court upon application to refuse the recognition of a judgment when it is irreconcilable with a judgment given between the same parties in the Member State addressed.[19] A former spouse and mother of four children (creditor) had obtained a judgment from a Swiss court establishing a maintenance obligation of the other former spouse/father (debtor). After the debtor had not fulfilled (parts of) the maintenance obligation, the creditor had turned to the public maintenance fund, which had made advance payments. The creditor had then attempted to enforce the Swiss judgment, resulting in a judgment by the Federal Supreme Court in 2011[20] refusing the enforcement in Germany due to the fact that the former spouse/mother was no longer the creditor. Rather, the public maintenance fund, after having made the advance payments, was entitled to claim from the debtor on the basis of subrogation. Subsequently, the public maintenance fund attempted to enforce the exact same Swiss judgment in Germany. In those proceedings, the debtor argued that the recognition of the Swiss judgment was irreconcilable with the 2011 judgment of the Federal Supreme Court. The Higher Regional Court, however, convincingly relied on the wording of Art. 45 (1)(d) Brussels I bis Regulation, which requires a judgment "between the same parties", whereas in the case at hand, the 2011 judgment concerned a dispute between the spouses. The fact that the Federal Supreme Court had refused to enforce the claim because the spouse/mother was no longer entitled to pursue the claim due to subrogation, does not prevent the public maintenance fund from pursuing the claim at a later point in time.

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[17] LG Frankfurt (Oder), 28.10.2020, 14 O 162/20 (unpublished).
[18] Oberlandesgericht Brandenburg, 02.06.2021, 7 W 99/20.
[19] Oberlandesgericht Koblenz, 24.03.2017, 13 UF 438/16, BeckRS 2017, 109906.
[20] Bundesgerichtshof, 02.03.2011, XII ZB 156/09, NJW-RR 2011, 650.

5. Forms

A case decided by Higher Regional Court (*Oberlandesgericht*) München demonstrates the importance of a prudent completion of the forms in the Annexes to Brussels I bis Regulation should not be underestimated and can prevent unpleasant surprises for the claimant. In the case at hand, a claimant had obtained a provisional measure at an Italian court prohibiting the defendant to distribute certain products in, inter alia, Germany, which it sought to enforce. The Higher Regional Court, however, refused to enforce the Italian provisional measure because the form provided by the Italian court did not satisfy the requirements of the Brussels I bis Regulation.[21] Firstly, it had left Nr. 4.6.2.1 of the Form in Annex I entirely blank, so that the German court could not satisfy itself of the precise contents of the omission obligation, even though Art. 42 (2)(b) explicitly requires a "description of the measure". More importantly, however, the Italian court had not confirmed that it had jurisdiction as to the substance of the matter, as Art. 42 (2)(b)(i) Brussels I bis Regulation requires (cf. also Nr. 4.6.2.2.1 of the Form in Annex I). This is particularly problematic, because by doing so it remained unclear whether the judgment was at all covered by the Brussels I bis Regulation. As can be derived from Art. 2 (a) 2nd para. Brussels I bis Regulation, only provisional measures ordered by the court which by virtue of the Regulation has jurisdiction as to the substance of the matter, are considered "judgments" within the meaning of the Regulation to begin with.

III. European Enforcement Order Regulation (EEOR)

1. Jurisdiction ratione materiae

Three cases deal with the EEOR's scope, all of which concern the judicial officer's refusal to provide the creditor with an EEO. Two of the cases arrive at rather predictable conclusions, but are nonetheless worth mentioning in this report. In a case decided by the Higher Regional Court Berlin (*Kammergericht*) , it was held that claims stemming from the separation of assets after a divorce are not covered by the EEOR.[22] The decision is unsurprising insofar as the EEOR explicitly excludes property rights arising out of matrimonial relationships (Art. 2 (2)(b) EEOR). The wording of the relevant provision in the EEOR is identical to Art. 1 (2) Brussels Convention, for which the CJEU had already distinguished between maintenance claims (which are covered) and matrimonial property law.[23] The German court also relies on this interpretation. Moreover, a case decided by the Higher Regional Court (*Oberlandesgericht*) München concerns a judgment to refrain from doing a certain act. Also here the EEO certification was rightly so refused, as omissions do not constitute a "claim for payment of a specific sum of money" within the meaning of Art. 4 (2) EEOR.[24]

Finally, the Higher Regional Court (*Oberlandesgericht*) München had to decide a case concerning the application of Art. 6 (1)(d) EEOR, which contains additional rules for the certification of a judgement as an EEO in consumer cases. A German claimant had obtained a judgment for an uncontested claim against a foreign defendant, because the latter had used the claimant's second credit card in violation of the agreement between the parties that the defendant shall only use the credit card for payments of up to EUR 1.000 a month. The judicial officer and the court of first instance had refused to provide an EEO for the judgment, as the defendant was a consumer and the conditions of Art. 6 (1)(d) EEOR were not met. On first sight, it is indeed true that the foreign defendant was a

[21] Oberlandesgericht München, 09.11.2020, 7 W 1210/20, BeckRS 2020, 29974.
[22] Kammergericht, 16.04.2010, 3 WF 49/10, NJW-RR 2010, 1377-1378.
[23] Court of Justice of the European Union, 27.02.1997, C-220/95, *Van den Boogaard v Laumen*.
[24] Oberlandesgericht München, 30.04.2007, 6 W 687/07, NJW-RR 2007, 1582-1583.

consumer and the judgment was not given by the court of the Member State in which the consumer is habitually resident. Art. 6 (1)(d) EEOR does not expressly require that the other party contracted in a professional capacity. The Higher Regional Court, however, held that the arrangement between the parties constitutes a C2C-contract. In such a situation, in which both parties have contracted in a consumer capacity, the additional rules in Art. 6 (1)(d) EEOR are not applicable, as the CJEU had previously held in its *Vapenik/Thurner*-judgment.[25]

2. Service requirements

In view of the fact that the EEO certification is only justified when the defendant's procedural rights have been observed (cf. recital 10), the EEOR provides detailed rules on service, which aim to safeguard that the defendant has indeed been made aware of the proceedings against him. Simultaneously, practical difficulties can easily arise when it comes service in cross-border cases. Against that background, many German cases deal with issues pertaining to service of documents to the debtor. It appears that in practice, the lack of service of documents or mistakes in that regard are quite frequent.

An interesting matter on the interplay between European and national law was brought up in a case decided by the Local Court (*Amtsgericht*) Augsburg.[26] An Austrian court had issued an EEO for its judgment, which the creditor sought to enforce in Germany. Pursuant to Art. 20 (1) EEOR, the enforcement procedure is, in principle, governed by the law of the Member State of enforcement, while Art. 20 (2) EEOR provides for a non-discrimination clause which requires Member States to enforce foreign EEO-certified judgements under the same conditions as national judgments. The Local Court held that the EEO was insufficient to commence the enforcement procedure in Germany, because the creditor had failed to demonstrate that the Austrian judgment had been served to the debtor, which is a requirement under the domestic rules on enforcement (cf. § 750 German Code of Civil Procedure). Indeed, the EEOR in Chapter III on minimum standards particularly requires the document instituting the proceedings to be served, but it does not require the judgment to be served.[27]

For German practice it is also noteworthy that some modes of service provided for by national law do not fulfil the criteria laid down by the EEOR. The Higher Regional Court Berlin (*Kammergericht*) had to deal with a case in which the defendant could not be traced.[28] In such a situation, German service rules allow for a so-called service in public (*öffentliche Zustellung*, §§ 185 et seq. German Code of Civil Procedure), which essentially entails the posting of an announcement on the court's notice board. Such a service in public brings about the legal fiction that the document was served (§ 188 German Code of Civil Procedure). However, the Higher Regional Court rightly held that this mode of service does not satisfy the criteria of Art. 14 EEOR.

Finally, in a case before the Higher Regional Court (*Oberlandesgericht*) Stuttgart,[29] the document instituting the proceedings in Germany had been served to the Dutch defendant. The court of first instance (Regional Court (*Landgericht*) Rottweil) had then ordered the parties to appear in court. This court order had only been served to the defendant via regular mail and the defendant did not appear at the hearing. The court ruled in favour of the claimant.

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[25] Court of Justice of the European Union, 05.12.2013, C-508/12, *Vapenik*.
[26] Amtsgericht Augsburg, 27.01.2012, 1 M 10281/12, openJur 2012, 120564.
[27] Art. 18 (1) (a) EEOR merely stipulates that a non-compliance can be cured by service of the judgment.
[28] Kammergericht, 27.06.2011, 12 W 30/11, BeckRS 2011, 19801.
[29] Oberlandesgericht Stuttgart, 23.10.2007, 5 W 29/2007, 5 W 29/07, openJur 2012, 60088.

Subsequently, however, the judicial officer had refused to create an EEO for the judgment, as a service via regular mail without the service person attesting the delivery (Art. 14 (3) EEOR) is only permitted where the debtor has his address in the Member State of origin. In the case at hand, however, the defendant resided in the Netherlands. The non-compliance with Art. 14 EEOR was not cured pursuant to Art. 18 EEOR. Hence, the Higher Regional Court held that the judicial officer had rightly refused the EEO certification. This is problematic insofar as under German civil procedural law, the court itself serves the relevant documents. Against that background, service deficits cannot be influenced by the creditor, even though they eventually are to his detriment.

3. Lack of ordre public

One of the main traits of the EEOR and the most important difference in comparison with the enforcement regime of the Brussels I bis Regulation is the lack of ordre public-clause. The debtor cannot argue that the enforcement of the EEO-certified judgment would amount to an ordre public-violation in the Member States of enforcement (cf. Art. 5 and 21 EEOR, recital 18). Surprisingly, however, a debtor argued that the enforcement of a judgment of a Polish court with EEO certification had to be refused by the German court for the reason that certain procedural rights were not upheld by the Polish court, which in the opinion of the debtor constituted a violation of German ordre public. The debtor was unsuccessful with this line of argumentation, both at the court of first instance[30] as well as at the court of second instance[31]. Also the Federal Supreme Court (*Bundesgerichtshof*) held that the grounds for refusal of enforcement are governed exhaustively by Art. 21 EEOR.[32] Therefore, an ordre public-objection cannot be raised in the Member State of enforcement.

4. Enforceability

Two court decisions deal with the enforceability in Germany of an EEO issued by a foreign court, both of which ultimately refused to enforce the judgment. In a case before the Federal Supreme Court (*Bundesgerichtshof*), a creditor had obtained a judgment from a Dutch court against a German debtor. The Dutch judgment mentioned the debtor's trade name with the addition of the legal form "GmbH" (limited liability company). When seeking enforcement in Germany, the creditor found that the debtor, while indeed trading under the name mentioned in the judgment and EEO, was in fact not a GmbH but a single person merchant (Einzelkaufmann, cf. §§ 1 et seq. German Commercial Code[33]). Against that background, the Federal Supreme Court,[34] like the courts in the first[35] and second[36] instance, held that enforcement against the person in its capacity as merchant was not possible, because the merchant is distinct from the (inexistent) legal entity.

In another case, a creditor had obtained a judgment with an EEO-certification from an Italian court and sought to enforce that EEO in Germany. The EEO, without any further specification, contained the reference that interest was payable starting from the moment in time prescribed by law ("*come per legge*"). The Regional Court (*Landgericht*) München II (partially) refused to enforce the judgment, as German law, which governs the enforcement procedure

[30] Amtsgericht Berlin-Köpenick, 17.01.2012, 32 M 8052/11, BeckRS 2014, 10431.
[31] Landgericht Berlin, 29.04.2013, 51 T 111/12, BeckRS 2014, 10427.
[32] Bundesgerichtshof, 24.04.2014, VII ZB 28/13, ZfBR 2014, 555-557.
[33] Handelsgesetzbuch, HGB.
[34] Bundesgerichtshof, 26.11.2009, VII ZB 42/08, EuZW 2010, 159-160.
[35] Amtsgericht Bayreuth, 12.03.2008, 2 M 20380/08.
[36] Landgericht Bayreuth, 17.04.2008, 42 T 57/08.

(cf. Art. 20 (1) EEOR), requires that the title can unambiguously be determined. At least for the interest claim, the title was insufficiently determined.[37]

5. Translations

The enforcement procedure in the Member State of enforcement can only commence, if the creditor has provided the enforcement authorities with a copy of the judgment and a copy of the EEO (Art. 20 (2)(a), (b) EEOR). Additionally, the EEO may have to be transliterated or translated "where necessary" (Art. 20 (2)(c) EEOR). In a case decided by the Local Court (*Amtsgericht*) Fürstenfeldbruck,[38] the debtor had argued that such a translation was not provided by the creditor and that, therefore, the enforcement procedure could not commence. The Local Court, however, in line with the legislative materials to the German implementing provision (§ 1083 German Code of Civil Procedure), held that a translation is not required when the EEO does not contain any other entries than mere ticked boxes, as was the case here. Indeed, the point of the forms in the annexes of the EEOR is precisely to establish a standardized EEO certificate (cf. recital 17), which is easily understandable also without a translation. Against that background, the court's decision on the necessity of translations pursuant to Art. 20 (2)(c) EEOR contributes to that aim.

6. Cost decisions

While costs are generally covered by the EEOR and cost decisions are, as a matter of principle, considered judgments capable of EEO certification (cf. Art. 4 (1) and 7 EEOR), a number of cases concern the refusal of the judicial officer and German courts to provide an EEO for cost decisions.[39] Practical difficulties often arise out of the fact that under German civil procedural law, the proceedings leading up to a cost decision by the court can be characterized as a proper, independent procedure, which is separated from the court's substantive decision (cf. §§ 103 et seq. German Code of Civil Procedure). Only in the cost proceedings, costs are in fact substantiated and put in concrete terms. Even where the documents instituting the proceeding have indeed been served to the debtor, the creditor's request for a cost decision, which starts the cost proceedings, is often not served to the debtor in accordance with Art. 13-15 EEOR or lacks the necessary information pursuant to Art. 16 and 17 EEOR. In the absence of such a proper service and correct information, the cost decision cannot be certified as an EEO (cf. also Art. 18 (2) EEOR, which does not provide for cure of the failure to provide the necessary information). Moreover, the costs decision is not governed by Art. 7 EEOR, because it is not included in the judgment on the substance of the matter, which the wording of Art. 7 EEOR explicitly requires. Consequently, cost decisions are not capable of obtaining an EEO-certification in such situations.

7. Interplay with the Brussels I Regulation

When the Brussels I Regulation was still in force, the creditor could elect between the enforcement regime of that Regulation and the enforcement regime of EEOR. In other words, the debtor could either follow the exequatur

[37] Landgericht München II, 19.01.2010, 6 T 6032/09, BeckRS 2011, 12370.
[38] Amtsgericht Fürstenfeldbruck, 14.10.2009, 2 M 10010/09, openJur 2012, 103948. Confirmed by Landgericht München II, 19.01.2010, 6 T 6032/09, BeckRS 2011, 12370.
[39] E.g. Bundesgerichtshof, 21.07.2011, I ZB 71/09, openJur 2012, 136; Oberlandesgericht Stuttgart, 03.06.2008, 8 W 223/08, openJur 2012, 60328; Oberlandesgericht Düsseldorf, 17.03.2010, I-24 W 17/10, openJur 2011, 75870; Landgericht Nürnberg-Fürth, 14.01.2009, 1 HKO 7762/06, BeckRS 2012, 1199.

procedure of Art. 38 et seq. Brussels I Regulation in the Member State of enforcement or opt for an EEO certification pursuant to Art. 6 et seq. EEOR in the Member State of origin. German courts repeatedly held that, once the creditor had opted for one of the procedures, the other regime was barred, because the creditor lacked a legally protected interest (Rechtsschutzbedürfnis) which under German civil procedural law has to be given in order to instigate court proceedings.[40] One of the main arguments for these decisions is that in the absence of this bar, the risk existed that two enforceable titles could potentially circulate. Therefore, this line of case law forced creditors to make a prudent choice between the enforcement regimes, because they were essentially bound by their initial selection.

IV. European Payment Order Regulation (EPOR)

1. Scope

When it comes to determining the scope of the EPOR, there have been two cases where the Local Court (*Amtsgericht*) Berlin-Wedding, which has exclusive competence for all EPOR-related proceedings in Germany (cf. § 1087 German Code of Civil Procedure), had to deal with the interpretation of the term "non-contractual obligation" pursuant to Art. 2 (2) (d) EPOR. In one case,[41] the creditor had applied for the issuance of an EPO for several claims based on unjust enrichment deriving from a copyright agreement. The judicial officer (*Rechtspfleger*) of the court, who is functionally competent for issuing the EPO (§ 20 (1) no. 7 German Judicial Officer Act[42]), dismissed the application on the grounds that the claims were non-contractual, thus not falling into the scope of the EPOR (Art. 2 (2) (d) EPOR). Subsequently, the creditor filed a reminder pursuant to German national law (§ 11 (2) German Judicial Officer Act in conjunction with Art. 26 EPOR) to the Local Court (*Amtsgericht*) Berlin-Wedding arguing that the judicial officer wrongfully denied the application. The court held that the application was indeed wrongfully dismissed and, consequently, instructed the judicial officer to issue the EPO. According to the court, the term "non-contractual obligation" cannot be interpreted pursuant to national law. Instead, it needs to be interpreted autonomously. The court relied on the negative definition in Art. 7 No. 1 a) Brussels I bis Regulation. Therefore, a claim based on unjust enrichment is contractual, when it is connected to an underlying contractual obligation. Since the asserted claims based on unjust enrichment derived from payments that the creditor had made in order to fulfill his (supposed) contractual distribution obligation, the court held that the claims based on unjust enrichment were contractual. In another case, which is very similar to the aforementioned case as it also dealt with the classification of a claim based on unjust enrichment deriving from payments that the creditor made in order to fulfill his (supposed) contractual distribution obligation, the court confirmed its interpretation of the term "non-contractual obligation" and, therefore, also arrived at the conclusion that the EPOR was applicable.[43]

2. Review in exceptional cases

In yet another case at the Local Court (*Amtsgericht*) Berlin-Wedding[44], the defendant objected to a declaration of enforceability ordered by the court on the grounds that the EPO had not been served pursuant to Art. 13-15 EPOR

[40] Bundesgerichtshof, 04.02.2010, IX ZB 57/09, openJur 2011, 1444; 14.06.2012, IX ZB 245/10, BeckRS 2012, 13821; Oberlandesgericht Stuttgart, 20.04.2009, 5 W 68/08, EuZW 2010, 37-40.
[41] Amtsgericht Berlin-Wedding, 10.02.2017, 70b C 6/17, BeckRS 2017, 108421.
[42] Rechtspflegergesetz, RPflG.
[43] Amtsgericht Berlin-Wedding, 13.04.2017, 70b C 5/17, BeckRS 2017, 108418.
[44] Amtsgericht Berlin-Wedding, 07.01.2013, 70b C 4/11, BeckRS 2013, 6344.

prior to the issuance of the declaration. Since a remedy for this scenario is not explicitly provided for in the EPOR, the court submitted a request for a preliminary ruling to the CJEU. The CJEU in *eco cosmetics*[45] held that the aforementioned scenario does not fall under the scope of the EPOR. Rather, and pursuant to Art. 26 EPOR, the national legislator needs to provide for domestic procedural remedies enabling the defendant to apply for a suspension of the EPO. As a reaction to the CJEU's decision, the German legislator adopted a national provision (§ 1092a German Code of Civil Procedure) in 2017, that provides the defendant with the necessary remedy.[46]

V. European Small Claims Procedure Regulation (ESCPR)

1. Commencement of the procedure

There are two cases in which German courts had to decide on the requirements of the procedure set out in Art. 4 (4) ESCPR. In a case decided by the Local Court (*Amtsgericht*) Geldern,[47] the claimant had lodged a standard claim Form A to the court in order to commence the procedure pursuant to Art. 4 (1) ESCPR against the defendant, who allegedly had to refund a down payment for a car. The court held that the information provided by the claimant in the standard claim Form A was inadequate and, thus, requested the claimant to complete the claim form. After the claimant handed in a (partially) completed claim form, the court still held the information provided to be inadequate and the claim, lacking sufficient information for its substantiation, was considered to be clearly unfounded. The court, therefore, dismissed the claim pursuant to Art. 4 (4) ESCPR without serving the claim form to the defendant. According to the court, citing recital 13, the concept of "clearly unfounded" is determined by national law. In German procedural law a claim is clearly unfounded if the information provided by the claimant, even assuming it is all true, cannot substantiate the claim (*Schlüssigkeitsprüfung*). The Local Court also held that according to the Regulation's aim, the claim cannot be served to the defendant because it would generate unnecessary costs for the defendant who would most likely invest in his legal defense despite the court dismissing the claim. Since the dismissal of the claim is not disadvantageous for the defendant, his right to be heard is not infringed by the lack of service. The dismissing judgment, on the other hand, is served to the defendant pursuant to Art. 19 ESCPR in conjunction with § 1102 German Code of Civil Procedure.

In a more recent case at the Regional Court (*Landgericht*) Nürnberg-Fürth,[48] the court had to decide on the formalities of the claimant's rectification pursuant to Art. 4 (4) ESCPR. The court held that the claimant's rectification could only be considered, if it was written on a new standard claim Form A. Rectifications or complementary notes laid out in a separate document, on the other hand, do not meet the formal requirements pursuant to Art. 4 (4) ESCPR. The court derives this interpretation by considering the wording of Art. 4 (4) ESCPR, its systematic comparison to Art. 5 (3) ESCPR and also the Regulation's aim to simplify and speed up litigation. According to the court, Art. 4 (4) ESCPR distinguishes between five alternatives that can be imposed on the claimant. Whereas the first two alternatives relate to the standard claim Form A itself, the third and fourth alternative require the submission of additional documents. Therefore, the claimant needs to hand in a new claim Form A in order to comply with the first two alternatives. When comparing the structure of Art. 4 (4) ESCPR with Art. 5 (3) ESCPR, the latter clearly mentions the alternative of using "any other appropriate way not using the answer form"

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[45] Court of Justice of the European Union, 04.09.2014, C-119/13, *eco cosmetics GmbH & Co. KG/ Virginie Laetitia Barbara Dupuy*.
[46] *Thode*, in: Vorwerk/Wolf (eds.), Beck'scher Online-Kommentar ZPO, 41. Ed., Munich 01.07.2021, § 1092a, para. 1.
[47] Amtsgericht Geldern, 09.02.2011, 4 C 4/11, openJur 2011, 77304.
[48] Landgericht Nürnberg-Fürth, 08.10.2019, 5 S 5696/19, BeckRS 2019, 55390.

beside the alternative of using the answer form, whereas Art. 4 (4) ESCPR does not name this alternative. Moreover, recital 11 and 12 differentiate between the usage of the standard form itself and the usage of additional documents. Therefore, the Regulation distinguishes between situations where the standard form needs to be used and situations where other appropriate documents suffice. Finally, the compulsory usage of the standard form serves the Regulation's aim to simplify and speed up litigation by comprising all information given by the claimant into one standardized claim form.

2. Competent court

§ 1104a German Code of Civil Procedure allows each state (*Land*) to concentrate the competence for proceedings pursuant to the ESCPR at one court. The state of Northrhine-Westfalia has made use of this possibility and has concentrated the competence at the Local Court (*Amtsgericht*) Essen. However, a recent decision of the Higher Regional Court (*Oberlandesgericht*) Hamm[49] shows that the competent court is not necessarily familiar with its own exclusive competence for claims under the ESCPR. In its decision, the Higher Regional Court had to affirm the exclusive jurisdiction of the Local Court, after the latter had denied its competence and referred the claim to another court.

VI. European Account Preservation Order Regulation (EAPOR)

1. Competent court

When it comes to determining the competent court for the issuance of an EAPO, German courts recently had to address two main issues: determining the competent court where the EAPO is based on an EPO and determining the competent court where the EAPO is based on a national payment order.

In general, the German legislator has provided for an implementation rule stating that the court of the main proceedings is competent for the issuance of an EAPO (§ 946 (1) German Code of Civil Procedure). Moreover, where the creditor obtained an enforceable official record pursuant to Art. 4 No. 10 EAPOR, the court of the district where the official record was drawn up is competent (§ 946 (2) German Code of Civil Procedure). Against that background, the remaining question is how to determine competence when the EAPO has to be established on a certificate of enforceability resulting from a default action without any previous main proceedings. Also, German courts had to decide whether a further differentiation is needed between a default action brought forward pursuant to the EPOR and a default action brought forward pursuant to national procedural law.

a) Procedure pursuant to the EPOR

The first issue arose when the Regional Court (*Landgericht*) Bielefeld denied its competence for the issuance of an EAPO to the creditor who had received a certificate of enforceability of an EPO of the Local Court (*Amtsgericht*) Berlin-Wedding (the exclusively competent for the issuance of EPOs and certificates of enforceability (§ 1087 German Code of Civil Procedure)).[50] The Regional Court deemed the certificate of enforceability to be an official record pursuant to Art. 4 No. 10 EAPOR and, therefore, referred the application to the Local Court (*Amtsgericht*) Berlin-Wedding as the court of the district where the official record was drawn up (§ 946 (2) German Code of Civil Procedure). The Local Court (*Amtsgericht*) Berlin-Wedding, on the other hand, denied its competence by pointing

[49] Oberlandesgericht Hamm, 03.05.2019, 32 SA 17/19, BeckRS 2019, 24044.
[50] Landgericht Bielefeld, 23.03.2017, 2 O 75/17.

out that the certificate of enforceability is a "judgment" pursuant to Art. 4 No. 8 EAPOR, rather than an "authentic instrument". This can be derived from the different wording in Art. 4 No. 10 EAPOR.[51] Hence, the Local Court (*Amtsgericht*) Berlin-Wedding held that the competent court is the court of the main proceedings (§ 946 (1) German Code of Civil Procedure). Since the proceedings pursuant to the EPOR are to be separated from the main proceedings (the latter can be initiated by the debtor lodging a statement of opposition (Art. 17 EPOR, § 1090 (1) German Code of Civil Procedure)), the exclusive competence of the Local Court (*Amtsgericht*) Berlin-Wedding pursuant to § 1087 German Code of Civil Procedure had already ended with the issuance of the certificate of enforceability of the EPO. The competent court for the main proceedings following the proceedings pursuant to the EPOR needs to be determined by the general German provisions on local and substantive competence (§§ 12 et seq. German Code of Civil Procedure). Thus, the competent court for the main proceedings pursuant to § 946 (1) German Code of Civil Procedure similarly needs to be determined by the general provisions on competence, regardless of the debtor actually lodging a statement of opposition. Since both the Regional Court (*Landgericht*) Bielefeld as well as the Local Court (*Amtsgericht*) Berlin-Wedding denied their competence, the Higher Regional Court (*Oberlandesgericht*) Hamm had to identify the competent court and confirmed the interpretation of Art. 4 EAPOR advocated by the Local Court (*Amtsgericht*) Berlin-Wedding.[52] By classifying the certificate of enforceability of the EPO as a judgment (Art. 4 No. 8 EAPOR), competence for the issuance of an EAPO lies with the court of the main proceedings pursuant to § 946 (1) ZPO, which would be determined by assuming the (hypothetical) case of the debtor lodging a statement of opposition (Art. 17 EPOR, § 1090 (1) German Code of Civil Procedure).

The misinterpretation of § 946 (2) German Code of Civil Procedure and Art. 4 No. 10 EAPOR by the Regional Court (*Landgericht*) Bielefeld might stem from the novelty of the Regulation and the lack of case law and literature on the aforementioned provision at the time of its decision. This was also pointed out by the Higher Regional Court (*Oberlandesgericht*) Hamm that identified the EPO to (still) be a relatively uncommon title in German legal practice.

b) National procedure for default actions

In a later case at the Regional Court (*Landgericht*) Freiburg,[53] the court had to decide on its competence for the issuance of an EAPO based on a certificate of enforceability stemming from a national default action. As decided for the certificate of enforceability derived from an EPO (see above), the Regional Court held that the certificate of enforceability that derives from a national default action, is also a "judgment" pursuant to Art. 4 No. 10 EAPOR. Therefore, the court of the main proceedings is again competent for the issuance of an EAPO (§ 946 (1) German Code of Civil Procedure). In contrast to the aforementioned decision, the Regional Court did not determine the court of the main proceedings in a national default action by assuming the hypothetical case of the debtor lodging a statement of opposition, which could potentially have led to the initiation of the main proceedings. Instead, the court identified a parallel between the EAPOR's rules on international jurisdiction provided for in Art. 6 (1)(3) and the German provisions on local and substantive competence in § 946 (1) German Code of Civil Procedure, as both refer to the court of the main proceedings. Furthermore, the German legislator uses the same wording in § 946 (1) German Code of Civil Procedure as in the German national provisions on interim relief (§§ 919, 937, 943 German Code of Civil Procedure). Hence, the legal practice of determining the court that is competent to grant interim relief

[51] Amtsgericht Berlin-Wedding, 03.04.2017, 6a C 1001/17, openJur 2021, 1111.
[52] Oberlandesgericht Hamm, 10.04.2017, 32 SA 28/17, BeckRS 2017, 110970.
[53] Landgericht Freiburg, 20.08.2018, 5 O 269/18, BeckRS 2018, 21743.

in the course of a national default action should also apply to determining the court competent for the issuance of an EAPO. Therefore, one needs to distinguish between a situation where the main proceedings are already pending, and thus lead to the competence of the seized court, and a situation where the main action has not yet been initiated. According to the Regional Court (*Landgericht*) Freiburg, the court issuing the payment order in the course of a national default action is the court of the main proceedings and, thus competent to grant interim relief, as long as the actual main proceedings have not been initiated. However, the Regional Court also points out that this approach of determining the court of the main proceedings is disputed in the German literature[54]. Nonetheless, following the decision of the Regional Court (*Landgericht*) Freiburg, the court issuing the payment order is also the court of the main proceedings pursuant to § 946 (1) German Code of Civil Procedure and, thus, competent for issuing the EAPO – as long as a statement of opposition has not resulted in the initiation of the main proceedings.

2. Jurisdiction ratione materiae

When it comes to the matter of jurisdiction, the Higher Regional Court (*Oberlandesgericht*) Hamm had to decide, whether a German attachment order qualified as a "judgment" pursuant to Art. 6 (3) EAPOR.[55] In the case brought forward by a Russian creditor who had obtained an interim attachment order for a partial amount of 100.000 EUR from the Regional Court (*Landgericht*) Münster[56] against a debtor residing in Austria, the creditor applied for the issuance of an EAPO for the whole amount of several billion Rubel at the Regional Court (*Landgericht*) Münster. Although the creditor argued that the previous attachment order qualified as a judgment pursuant to Art. 6 (3) EAPOR and that, therefore, jurisdiction of the Regional Court existed, the latter denied its jurisdiction and dismissed the application. Consequently, the creditor filed a complaint subject to a time limit (*Wiedereinsetzung in den vorigen Stand*) to the Higher Regional Court (*Oberlandesgericht*) Hamm, claiming that the Regional Court had jurisdiction pursuant to Art. 6 (3) EAPOR. The Higher Regional Court (*Oberlandesgericht*) Hamm held that the attachment order does not qualify as a "judgment" pursuant to Art. 6 (3) EAPOR and dismissed the creditor's complaint.[57] The Higher Regional Court argued that the concept of a "judgment" within the meaning of Art. 4 No. 8 EAPOR indeed needs to be interpreted in a broad manner and, therefore, certain interim relief decisions may qualify as judgments. However, in order to qualify as a "judgment" pursuant to the Regulation, the decision needs to contain a certificate of enforceability. An attachment order, on the other hand, would only serve to secure the future fulfilment of the claim without already deciding on the merits of case. By citing Art. 5, 6 (1)(3), 7 (2) EAPOR, the court argued that the Regulation's systematic structure shows a clear distinction between the situation where the creditor has not yet obtained a certificate of enforceability, and the situation where he already has. Therefore, not every interim order may qualify as a "judgment". Moreover, the court held that the CJEU's interpretation in *Maersk*[58], which qualifies a decision ordering the establishment of a liability limitation fund as a "judgment" pursuant to Art. 25 Brussels Convention , cannot be transferred to the present case as Art. 6 (3) EAPOR contains more specific requirements.

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[54] According to the opposing view, the court referred to in the application being competent in the hypothetical case of the debtor lodging a statement of opposition resulting in the initiation of the main proceedings, is competent for granting interim relief, cf. *Vollkommer*, in: Zöller (ed.), Zivilprozessordnung, 33. Ed., Cologne 2020, § 919 para. 4.

[55] Oberlandesgericht Hamm, 13.11.2019, 8 W 30/19, BeckRS 2019, 38961.

[56] Landgericht Münster, 02.09.2019, 024 O 54/19.

[57] Oberlandesgericht Hamm, 13.11.2019, 8 W 30/19, BeckRS 2019, 38961.

[58] Court of Justice of the European Union, 14.10.2004, C-39/02, *Maersk Olie & Gas/Firma M. de Haan en W. de Boer*, paragraph 43 et seq.

To meet the Regulation's aim (cf. recital 13) of synchronizing both jurisdiction in the main proceedings and jurisdiction for the issuance of an EAPO, the "judgment" referred to in Art. 6 (3) EAPOR needs to contain the obligation of the debtor to perform. In deciding so, the court's interpretation of "judgement" pursuant to Art. 6 (3) EAPOR is in line with the German literature's interpretation.[59]

3. Conditions for issuing an EAPO

Since the entry into force of the EAPOR, German courts had to decide in two cases whether the creditor had demonstrated sufficient evidence to satisfy the court pursuant to Art. 7 (1) EAPOR.[60] The German courts uniformly held that in order to substantiate a risk of the debtor impeding future enforcement measures, the creditor has to bring forth concrete indications that enforcement of the existing or future judgment may be impeded or made substantially more difficult without an EAPO. Consequently, the creditor has to show an unusual depletion, concealment, destruction or disposal of the debtor's account balances, while the demonstration of abstract risks does not suffice.

Against this background, the Regional Court (*Landgericht*) Arnsberg held that neither the mere existence of a foreign bank account, nor the debtor's transfer of account balances from one Member State to another, nor the risk of the debtor being warned by the court's attachment and transfer order (*Pfändungs- und Überweisungsbeschluss*) suffice pursuant to Art. 7 (1) EAPOR.[61] After the creditor had appealed the Regional Court's decision by filing a complaint, the Higher Regional Court (*Oberlandesgericht*) Hamm confirmed the Regional Court decision.[62]

In a case decided by the Regional Court (*Landgericht*) Bremen[63], the court held – citing recital 14 – that in cases where the creditor applies for an EAPO prior to obtaining a judgment, the mere non-payment of the claim cannot be considered sufficient evidence of the risk that the debtor will impede future enforcement measures.

VII. Recurring issues

In view of the analysis of the application of the regulations covered by this report above, two recurring topics can be identified. One of the more prominent issues appears to be difficulties with regard to service, translations, and the incorrect completion of the Forms contained in the Annexes to the various regulations. Even though service issues particularly appear to play a role under the EEOR, they are accordingly of importance under the other regulations. For example, many cases in which a violation of ordre public is invoked under the Brussels I bis Regulation are of a similar nature. From a practical stance, defendants in these instances often argue that they were not informed of the proceedings or not a fluent in a language of and, therefore, invoke a violation of procedural rights. While practical difficulties relating to service in cross-border cases most likely cannot be entirely avoided, it

[59] E.g. *Hilbig-Lugani*, in: Rauscher/Krüger (eds.), Münchener Kommentar zur Zivilprozessordnung, 5. Ed., Munich 2017, Art. 6 EuKoPfVO, para. 11; *Harbeck*, in: Kindl/Meller-Hannich (eds.), Gesamtes Recht der Zwangsvollstreckung, 4. Ed., Baden-Baden 2021, Art. 6 EuKoPfVO, para. 9.
[60] Landgericht Arnsberg, 29.10.2018, 4 O 329/18, BeckRS 2018, 41506 and appeal judgment Oberlandesgericht Hamm, 14.01.2019, I-8 W 51/18, BeckRS 2019, 769; Landgericht Bremen, 07.01.2020, 3 O 2166/19, BeckRS 2020, 4950.
[61] Landgericht Arnsberg, 29.10.2018, 4 O 329/18, BeckRS 2018, 41506.
[62] Oberlandesgericht Hamm, 14.01.2019, I-8 W 51/18, BeckRS 2019, 769.
[63] Landgericht Bremen, 07.01.2020, 3 O 2166/19, BeckRS 2020, 4950.

appears that some of the issues discussed above, e.g. incomplete forms, were indeed avoidable. The importance of diligence cannot be underestimated in this regard.

In addition, the interplay of the European framework in cross-border enforcement matters with domestic procedural law appears to be an issue which is not limited to certain instruments only. Rather, it plays a role across the regulations covered by this report. In general, it can be observed that the European instruments on various occasions refer to the national laws of the Member States, which generally cover the enforcement proceedings. In view of the reliance on national laws by the European legislator, issues of demarcation are likely to occur and, indeed do occur in practice with a certain regularity. While also the national legislators have contributed to the promotion of a seamless application of European and national law by means of implementation rules, which have been discussed as part of the EFFORTS-project elsewhere, an important contribution in this regard also has been and will have to be made by national courts and the CJEU alike.

VIII. Summary and overall assessment

Overall, it appears that German courts possess a good understanding of the regulations covered by this report and reach satisfactory solutions in the vast majority of cases. Many cases appear to be decided on the basis of a rather straight-forward, but nevertheless highly coherent and consistent interpretation and application of the pertinent norms, where applicable, also in the light of CJEU case law.

Notwithstanding the above, it can be observed that the regulations– with the exception of the Brussels I bis Regulation – appear to play only a minor role in practice. An important indication are the relatively low numbers of cases, particularly in comparison with domestic procedures of a similar nature. For example, in 2019, 4.805.438 requests were filed under the German national payment procedure, while in that period the number EPO-requests amounted to 3.577.[64] When it comes to the ESCR in comparison with domestic claims not exceeding 5.000 EUR, which largely fall within the competence of the Local Courts (*Amtsgerichte*), the numbers are accordingly greatly disproportionate. In 2020, of the 856.000 cases at the Local Courts, merely 2.380 were proceedings pursuant to the ESCR.[65] The relatively low numbers of cases hamper learning effects and do not enable legal operators to develop a certain level of expertise by experience. Simultaneously, when it comes to the interplay between European instruments and national procedural law, it can be expected that at least some of the initial difficulties have in the meantime been settled in case law, ultimately resulting in legal certainty to the benefit of legal practice in general and litigants in particular.

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[64] *Statistisches Bundesamt*, Rechtspflege Zivilgerichte 2019, p. 13 (https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/zivilgerichte-2100210197004.html, last consulted 23.12.2021). See also *Magnus*, Herausforderungen bei der Anwendung der Europäischen Mahnverordnung, in: Pfeiffer/Lobach, Effektive grenzüberschreitende Vollstreckung in der Europäischen Union, Baden-Baden 2022, p. 49 (50).

[65] See *Hau*, Stand und Fortentwicklung der Europäischen Verordnung über geringfügige Forderung, in: Pfeiffer/Lobach, Effektive grenzüberschreitende Vollstreckung in der Europäischen Union, Baden-Baden 2022, p. 77 (83 et seq.)