

DISPUTE RESOLUTION



Three viable solutions

```
graph TD; A[Three viable solutions] --- B[1 AMICABLE COLLECTION PROCEDURES and MEDIATION]; A --- C[2 ORDINARY LITIGATION and PRECAUTIONARY MEASURES]; A --- D[3 ARBITRATION PROCEEDINGS];
```

1

**AMICABLE
COLLECTION
PROCEDURES**
and
MEDIATION

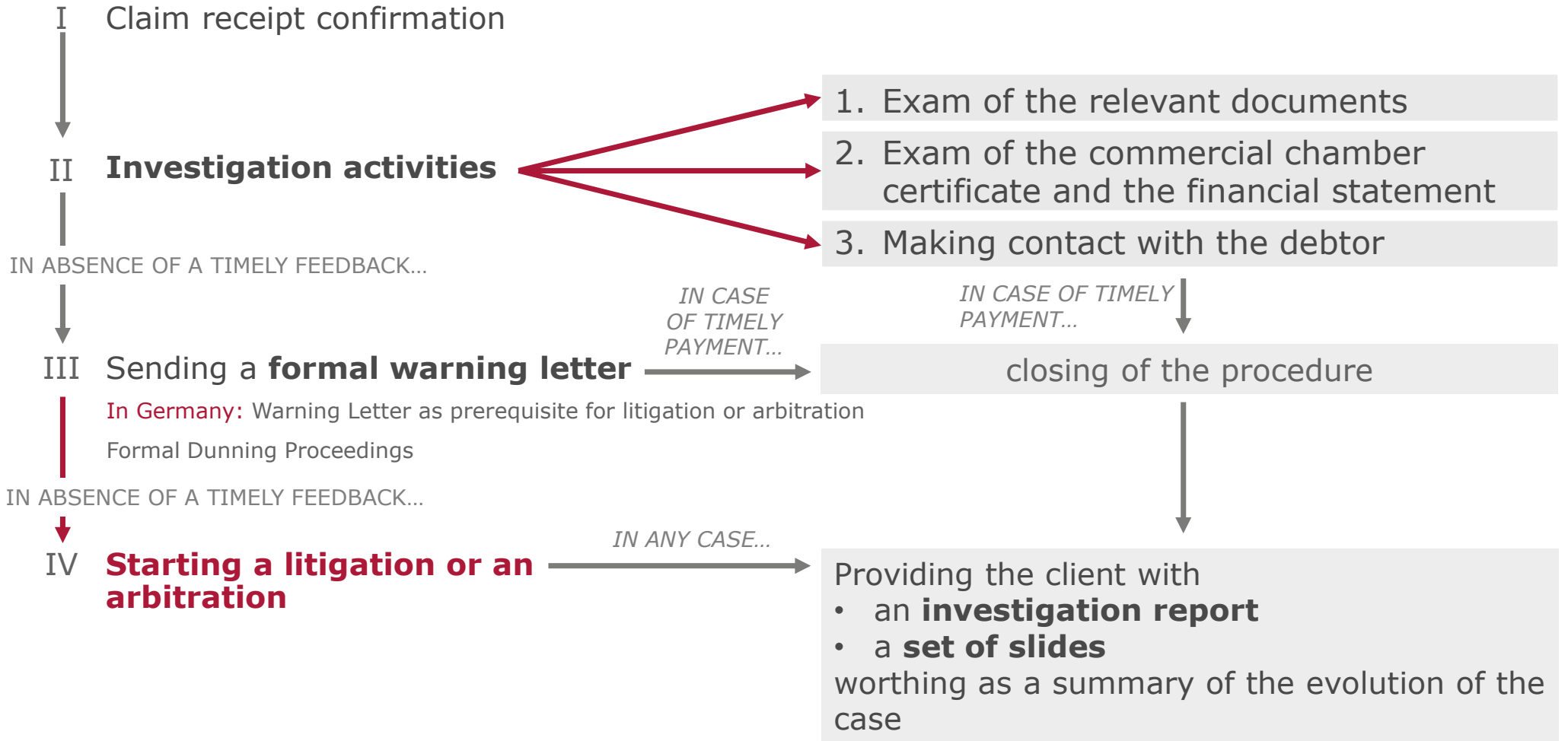
2

**ORDINARY
LITIGATION**
and
**PRECAUTIONARY
MEASURES**

3

**ARBITRATION
PROCEEDINGS**

1 AMICABLE COLLECTION PROCEDURES



IN GERMANY

1. Warning letter as prerequisite for litigation or arbitration

2. Formal dunning proceedings

- Issuance of Dunning Order upon application
- If debtor does not file an objection within two weeks:
Issuance of Enforcement Order
- Otherwise: initiation of state court litigation or arbitration

Advantages:

- Cheap and quick proceedings to obtain enforceable title
- Requirement for debtor to react within two weeks in case of objection

1 MEDIATION

- the mediator is a professional with the requirements of honour, competence and **impartiality** who, individually or collectively, conducts the mediation
- the mediator doesn't have the power to make **binding** decisions

jointly nominated
by the parties

appointed by the
mediation institute

AIMS AT

- helping the parties to find a **mutually satisfactory solution** to the dispute, leading them to reach a shared **agreement** and thus avoiding legal actions
- the mediation report containing such an agreement, once it has been approved by the president of the court, becomes enforceable
- has the advantage of a **celer timing** (no more than 3 months) and **very low and certain costs**
- negotiation process allows more flexible solutions and safeguarding of the parties' interests

2 ORDINARY LITIGATION

INJUNCTION DECREE

the legal procedure consists in requesting the court to issue an **injunction order**, which, once it has been obtained, has to be served to the debtor

if the injunction has **immediate executory force**

the court can order the debtor to pay immediately and the creditor can start the execution proceeding in order to recover its credit

otherwise the debtor has **40 days to challenge the injunction**

if the injunction isn't timely challenged, the latter becomes executory and the creditor can start the execution proceeding

BANKRUPTCY PETITION

the legal procedure consists in requesting the court to **declare bankrupt the debtor**

to this end the debtor has to

- be **insolvent**, which means that it is no longer able to pay its debts
- be a **business entrepreneur**
- have assets over the last three fiscal years higher than **eur 300,000.00**
- have gross revenues over the last three fiscal years higher than **eur 200,000.00**
- have total debts higher than **eur 500,000.00** and not lower than **eur 30,000.00** for what regards the acting creditor

IN GERMANY

Injunction decree

- Possibility to challenge the injunction
- Court will decide by judgment
- In case of appeal judgment of second instance
- Utmost difficult to obtain preliminary injunction for performance
- More used to preserve status (no disposal of specific asset, no implementation of disputed shareholders' resolution, refraining from disputed allegations)

Bankruptcy Petition

- German law acknowledges insolvency of companies and private persons
- Payment quotes of around 2%-3%
- Generally not attractive

2 ORDINARY CIVIL PROCEEDINGS

- I** The actor files a **writ of summons** and serves it to the defendant
This act must contain the setting of the hearing in such a way that from the day of the service to the day of the hearing there is a minimum of:
 - 120 days if the service is done in Italy
 - 150 days if the service is done abroad
- II** the defendant has to file an **appearance** not later than 70 days before the first hearing
- III** the president of the court appoints the judge who's competent to decide on the case
- IV** **first hearing: the parties must appear in court in person**
- V** before the hearing: **3 pleadings**
 - 1°: at least 40 days before the first hearing
 - 2°: at least 20 days before the first hearing
 - 3°: at least 10 days before the first hearing
- VI** hearing to rule on preliminary requests and take admitted **evidences**
- VII** referral of the case back to the court for judgement
- VIII** **closing statements** and **replies**
- IX** publication of the **decision**

IN GERMANY

- writ of summons
- upon service defendant has
 - 2 weeks for notification of defense
 - at least 2 further weeks for substantiation of defense (may be extended)
- competent judge/chamber determined by organization plan of court
- number of submissions and date in discretion of competent judge/chamber
- publication of decision
- parties are not obliged to appear personally in court in case of comprehensive power of attorney for lawyer
- time period between writ of summons and decision depending on court and judge/chamber

2 PRECAUTIONARY MEASURES

INSTRUMENTAL → in relation to the final decision on the merits →

1. informal
2. eventually inaudita altera parte
3. can't be res judicata and will be absorbed in the final decision

TEMPORARY

MUST BE BASED ON

PERICULUM IN MORA: risk that the length of the trial may prejudice the applicant

FUMUS BONI IURIS: likelihood that the right claimed by the applicant is grounded

AIMS AT

Preserving the legal and factual situation existing at the time of application

→ such as →

- *cautionary seizure ex art. 671 c.p.c.*
- *deliberations' suspension ex art. 2378 c.c.*

Anticipating and provisionally ensuring the effects of the final decision

→ such as →

- *emergency measures ex art. 700 c.p.c.*

ANTE CAUSAM

before the trial starts

PENDING LITIGATION

as a sub-trial of the main one

3 ARBITRATION PROCEEDINGS

ALTERNATIVE DISPUTE RESOLUTION → *OUT-OF-COURT PROCEEDINGS*

PRIVATE NATURE:

- consensually chosen by the parties
- before a private arbitrator / arbitration panel

RITUAL ARBITRATION

OR

IRRITUAL ARBITRATION

the award has the force of a decision and becomes **enforceable**

the award has **negotiating nature and effects**, thus it can't be enforceable but it may be used to apply for an injunction or as documentary evidence

ACCORDING TO LAW

OR

IN EQUITY

arbitrators must apply only the rules of the **governing law**

arbitrators may deviate from the strictness of the rule of law and refer to **broader usages or principles of justice**, having regard to the concrete case

3 INTERNATIONAL ARBITRATION

QUALIFYING CRITERIA:

Subj involves parties having their residence or seat in different states

1. involves international economic interests

Obj 2. cross-border nature of one or more obligations under the contract

3. devolution of the dispute resolution to an international institution

INSTITUTIONAL ARBITRATION

OR

AD HOC ARBITRATION

The parties choose as rules applicable to the arbitral proceeding the ones adopted by a particular arbitral institution.

The parties don't select a particular institution but they agree a clause which governs the procedure and the rules applicable thereto, which are, therefore, specifically outlined in relation to the concrete case.

ENFORCEMENT

The New York convention has simplified the regime for the recognition and enforcement of foreign arbitral awards and harmonised the relevant national laws, establishing:

- minimum formal requirements
- list of mandatory cases for refusal
- the possibility for the contracting states to adopt a more favourable system of enforcement

- arbitration is private and confidential
- arbitration provides only for one instance
- arbitration proceedings can be conducted in any language
- arbitrators' fees may be substantial
- full cost reimbursement of all attorneys' fees
- state court proceedings are public proceedings
- state court proceedings provide generally for three instances
- state court proceedings are generally conducted in the language of the country where the court is located
- state court fees are more moderate
- cost reimbursement of attorneys' fees is limited

THANK YOU

ADVANT Altana | Beiten | Nctm

