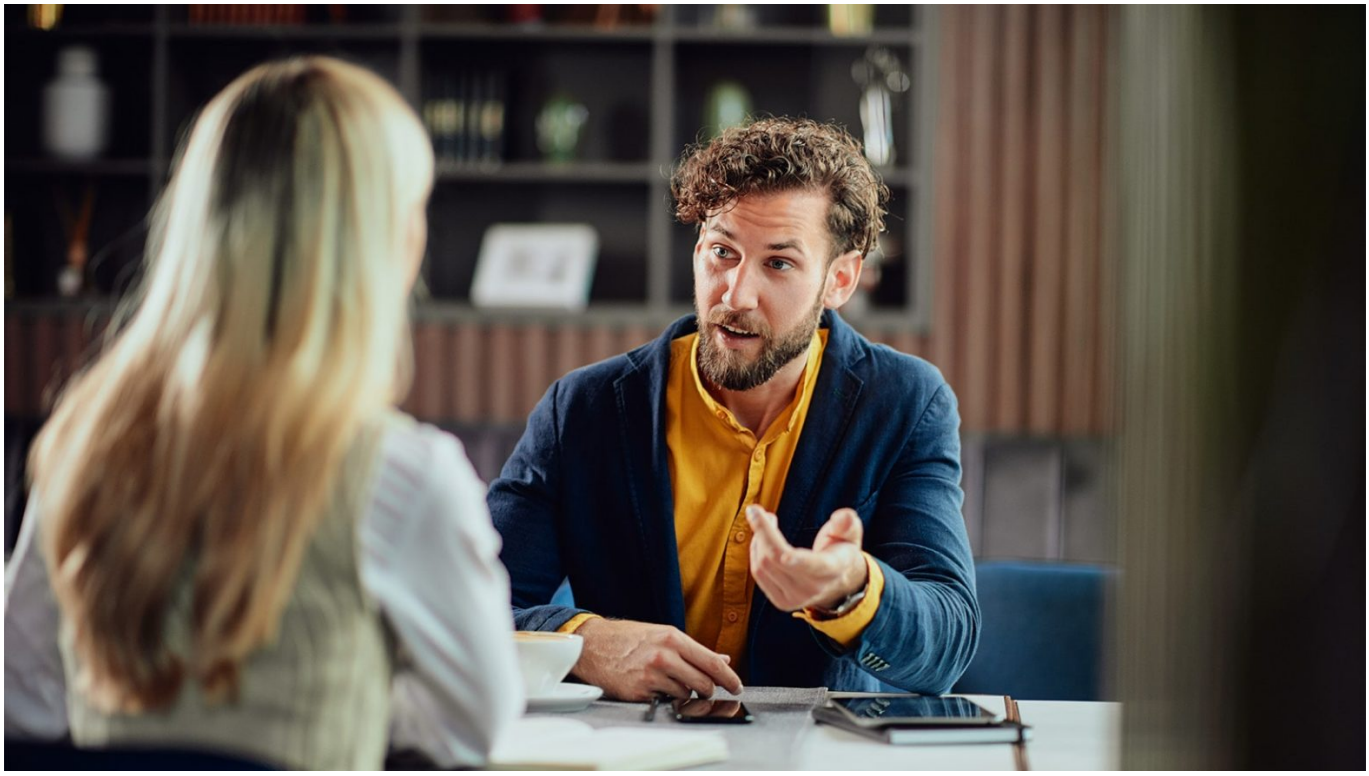
Litigation vs arbitration: what's the difference?



It's common knowledge that for commercial disputes which cannot be resolved amicably, the courts are there to assist. Often, an underlying contract will have a 'jurisdiction' clause which specifies that a particular country's courts will be nominated to resolve any and all disputes. The process of resolving disputes through the courts is referred to as 'litigation'.

But is litigation always available as an option, or must you follow a different process? And at what point do you have a choice?

The short answer is that litigation is not always available, as of right. One of the most common reasons for this is where the underlying contract contains an arbitration clause, stipulating that any/all disputes which arise and cannot be resolved amicably must be referred to arbitration.

The contract negotiation stage is therefore the best (and sometimes the only) opportunity to agree a mechanism for how future disputes are to be resolved.

Arbitration is one of the most widely used alternatives to litigation. It is a common misconception that arbitration is the same as mediation; it is not. Arbitration is an adversarial process which results in a binding 'award' – the equivalent of a court judgment (whereas mediation is a negotiation assisted by a nominated 3rd party). Arbitration shares some of the characteristics of litigation, but if you are considering specifying it as a dispute resolution mechanism in your contract, it is important to have a basic awareness of how it differs to litigation, so that an informed choice can be made.

The below offers some key comparisons, which illustrate how the processes differ.

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