



OCTOBER 6, 2026

Getting Ahead of an Arbitration: First Steps When a Dispute Surfaces

When a commercial dispute first surfaces—whether through a formal demand letter, a notice of default, or an escalating disagreement over performance—the steps taken before any arbitration is commenced can be just as consequential as those taken after. An organized team can prevent document loss, keep their business teams on message, and be ready to hit the ground running if and when a dispute arises. This article addresses what in-house and outside counsel should do in the period between the emergence of a dispute and the filing of a notice of arbitration, laying the groundwork for an effective defense or, where appropriate, a well-positioned claim.

IDENTIFYING AND FRAMING THE ISSUES

The first priority is to identify, with precision, what the dispute is actually about. Pull the contract and read it carefully against the facts as you understand them. Determine which provisions are in play—whether the disagreement concerns performance obligations, payment terms, representations, termination rights, or something else—and assess the strength of each side's position

on the text. This exercise is not academic; it will drive every decision that follows, from what documents to collect, to how aggressively to respond, to whether settlement makes sense.

Do not limit the analysis to the provisions the other side has raised. Consider the full scope of the contract, including indemnification, limitation of liability, notice requirements, conditions precedent, and any dispute resolution prerequisites such as mandatory negotiation or mediation. A thorough review at this stage often reveals arguments the other side has not yet considered—and equally important, potential vulnerabilities in your own position that are better identified now than at the hearing.

DOCUMENT COLLECTION AND PRESERVATION

Once the issues are framed, use that understanding to guide document collection and retention. Locate all relevant agreements, amendments, side letters, and related correspondence. Gather internal communications—emails, messages, memoranda, and

meeting notes—that bear on the disputed issues, as well as any documents reflecting the parties’ course of dealing or performance history. Where electronic records are involved, coordinate with information technology early to ensure that relevant data is preserved and not overwritten through routine retention policies.

Even where no formal document-preservation obligation has yet been triggered, implementing a litigation hold at this stage is prudent practice. Arbitral tribunals take document integrity seriously, and a respondent’s failure to preserve relevant materials can result in adverse inferences or, at a minimum, damage credibility before the tribunal. Credibility is your strongest asset in an arbitration where the same person deciding discovery disputes and spoliation allegations is evaluating the witnesses on the merits.

MANAGING COMMUNICATIONS

The issue analysis should also guide how the organization communicates—both internally and externally—about the dispute. Every written communication from the point a dispute emerges is a potential exhibit. Counsel should remind the business team that emails, text messages, and even informal notes may be discoverable and should be drafted accordingly.

Two points deserve particular emphasis. First, be careful about admissions. Acknowledging fault, conceding a deadline was missed, or volunteering that a deliverable fell short may be useful in diffusing the situation, but they can be difficult to walk back once proceedings begin. Along those same lines, broad or open-ended statements can be taken out of context and used as a leverage point later on. While attorneys think in terms of how a statement might look years later in a brief, most business people, engineers or project managers do not. Counsel should review and, where appropriate, clear any substantive external correspondence before it is sent.

Second, counsel the client to avoid inflammatory or emotionally charged language internally and externally. While a sharp response may feel satisfying in the moment, intemperate communications can undermine credibility before an arbitrator and suggest that a party

was not behaving reasonably—a consideration that may bear on costs, damages, or the tribunal’s overall assessment of the case.

ASSEMBLING THE DISPUTE TEAM

As soon as a dispute takes shape, designate an internal point person to serve as the central contact for questions, document requests, and updates as the matter develops. This individual should have sufficient authority and institutional knowledge to make day-to-day decisions without requiring escalation on every issue, and can also serve as the coordinator for document management and timeline tracking.

If the matter is likely to result in arbitration, engage outside counsel early. This does not require embedding external lawyers on the team from day one, but an early outside perspective can be invaluable. For instance, if the business is taking a position that the contract cannot support, an independent legal assessment at this stage can provide the basis for recalibrating the organization’s approach before positions harden, and it ensures that outside counsel is up to speed if proceedings are eventually commenced.

Finally, begin tracking the costs incurred in responding to the dispute from the outset. Many arbitration rules and governing laws permit a prevailing party to recover its reasonable legal costs, and a contemporaneous record of time and expenses will be far more persuasive than a reconstruction assembled months or years later. Even where cost recovery is uncertain, maintaining a clear cost picture helps the organization make informed decisions about settlement and resource allocation as the dispute evolves.

For more information or assistance, please contact [Graham R. Cronogue](#), [Ashley F. Calcagno](#), or another member of Blank Rome’s [International Arbitration group](#).

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