# INTRODUCTION

It is now commonplace for a surety to learn that its principal is arbitrating a dispute or is faced with a demand that the surety agree to arbitrate disputes involving its principal, obligee and/or claimants. In light of this growing trend, sureties and surety counsel are increasingly tasked with assessing the risk the surety may face by participating in, or refusing to participate in, an arbitration wherein its principal is a party.

*Arbitration and the Surety* provides a meaningful tool to the surety practitioner to determine whether the surety should or must participate in an arbitration proceeding and what happens if the surety chooses not to do so. It examines whether the surety must participate as a named party and whether an arbitration award against its principal has a preclusive effect on the surety. This publication thoroughly examines these issues and provides case law from all 50 states that will aid the surety practitioner in addressing these issues.

Yet further, this publication considers the cost-effectiveness of arbitration as opposed to litigation, measures the surety can take to control its costs, effective uses of arbitration to resolve disputes and proactive steps the surety can take to minimize the risk of an adverse decision.

*Arbitration and the Surety* started as a program that was presented at the mid-winter 2018 meeting of the Fidelity and Surety Committee (FSLC), which is part of the American Bar Association's Tort Trial and Insurance Practice Section. Members of the FSLC expressed interest in seeing the presentation memorialized in a book, which has led to this publication. Though many excellent papers have been written concerning the surety and arbitration, this is the first book concerning the surety and arbitration published by the ABA. Papers

previously written include, but certainly are not limited to those listed in the footnote, below.[1]

The editors of this publication want to thank the ABA and the Tort Trial and Insurance supporting this book, and we wish to thank all of the authors, as well as their staff, who helped prepare this comprehensive analysis of the issues and considerations a surety practitioner will want to address in representing the surety faced with the decision to arbitrate and controlling the risk and costs associated with that decision.

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1. "Forced Arbitration Over the GAI: Where Do They Come Up with This Stuff." Nancy C. Manno and Christina A. Craddock. Eighteenth Annual Southern Surety and Fidelity Claims Conference. April 12 and 13, 2007. James D. Ferrucci & R. Scott Cochrane, *Ch. 13, Effect of an Arbitration Provision in the Principal's Contract with the Obligee,* in THE LAW OF PERFORMANCE BONDS 677, 678 (Lawrence R. Moelmann, Matthew M. Horowitz and Kevin L. Lybeck, eds., Am. Bar Ass'n, 2d ed. 2009). Thomas H. Hayman, Patrick T. Uiterwyk and John A. McDevitt, Incorporation by Reference: A Surety's duty to Arbitrate, 11 EASTERN BOND CLAIMS REV. 1 (May 2008). Gregory R. Veal, *Arbitration and the Surety: When You Should, How Far You Should, and What If You Don't?* (unpublished paper submitted at the Sixth Annual Southern Surety and Fidelity Claims Conference). Graves Stiff, III, Brian A. Dodd and Carl C. Coe, Jr., *Arbitration and the Contract Surety – An Update* (unpublished paper submitted at the Fourteenth Annual Southern Surety and Fidelity Claims Conference on April 10, 2003). Robert J. Dietz and Ian H. Frank, *Early Dispute Resolution for Performance Bond Claims*, Under Construction, Spring 2017 (Vol. 18 No. 3), American Bar Association Forum on Construction Law. Philip Bruner, *Settle Now, Argue Later: Expedited Construction Adjudication Is Coming to North America*, THE DISPUTE RESOLVER (Am. Bar Ass'n Nov. 16, 2016).