

# CONTENTS

Introduction	xi
About the Editors	xiii
About the Authors	xv

## Chapter 1

### **A BRIEF PRIMER ON THE HISTORY OF ARBITRATION** **1**

*Daniel Centner, Megan Ford*

I. Introduction	1
II. Roots / History of Arbitration	1
III. Judicial Attitudes Toward Arbitration	3
IV. The Rise of Institutional Arbitration	6
V. Arbitration Pitfalls: Have the Stated Goals of Arbitration Proven Elusive?	8

## Chapter 2

### **ISSUES, IMPACTS, AND ETHICAL CONSIDERATIONS** **11**

*Amy E. Bentz, Gina Shearer Lockwood, J. Trey Felty*

I. Introduction	11
II. Enforcement of Contractual Arbitration Provisions	11
A. Compelling the Performance Bond Surety to Arbitrate	12
B. Compelling the Payment Bond Surety to Arbitrate	15
C. Enforcing Arbitration Clauses Against Other Potential Third Parties	16

- III. To Participate or Not to Participate:
  - Strategic Considerations for the Surety 17
  - A. Advantages of Arbitration 17
  - B. Disadvantages of Arbitration 18
  - C. The Effect of an Arbitration Award
    - on the Non-Participating Surety 18
  - D. The Effect of a Determination of the Amount
    - of the Principal’s Liability in Arbitration
      - on Future Litigation Involving the Surety 20
- IV. Ethical Considerations for the Surety in Arbitration 22
  - A. The Use of Tender Counsel 22
  - B. Reliance on the Joint Defense Privilege 25
- V. Conclusion 29

**Chapter 3**

**SCOPE AND ENFORCEABILITY OF ARBITRATION CLAUSES AND REQUIREMENTS 31**

*Aaron G. Weishaar, Christopher M. Indelicato, Jennifer Leuschner*

- I. Introduction 31
- II. History and Validity of Arbitration Agreements 32
- III. Incorporation by Reference Clauses Impacting the Surety 34
- IV. Current Developments in the Law 35
  - A. Federal Decisions 35
  - B. State Court Decisions 39
- V. Arbitration Clauses in Related Contracts and Agreements 43
- VI. Conclusion 43

**Chapter 4**

**ARBITRATION: PARTICIPATION OF THE SURETY AS A NAMED PARTY 45**

*Grace Winkler Cranley, Tina M. Kocke*

- I. Introduction 45
- II. When Is a Surety Required to Arbitrate? Mandatory
  - Requirement Versus Voluntary Decision 46
  - A. Contractual Requirements 46
  - B. Consensual 56

III. Evaluation of the Advantages and Disadvantages to Participating in an Arbitration	57
A. Cost Concerns	57
B. Potential Limitations on Discovery	58
C. Evidentiary Concerns	59
D. Impact on the Surety's Defenses	59
E. Concerns Over Finality of the Arbitration Decision	62
F. Concerns Over Settlement Incentives	62
IV. What Issues Should the Surety Arbitrate?	63
V. Rejection of the Surety as a Participant	64
VI. The Mechanics of Arbitration	67
A. Beginning the Process	67
B. Pre-Hearing Matters	69
C. The Arbitration Hearing	70
D. The Award and Enforcement Powers of the Arbitrator	71
VII. Conclusion	77

## Chapter 5

### **ENFORCEMENT OF THE ARBITRATION AWARD AND LIMITED RIGHTS OF APPEAL: ARBITRATION IS A FINAL ADJUDICATION** **79**

*Joseph H. Wolenski, DeWitte Thompson, Stephanie Geer*

I. Introduction	79
II. Substantive Considerations for Challenges to an Arbitration Award	81
A. Background	82
B. The FAA and Statutory Grounds to Vacate	83
III. Grounds for Modification/Correction of an Arbitration Award	97
IV. Procedural Considerations	97
A. Is the Award Final?	97
B. Was the Error Preserved?	99
C. Is There a Reasoned Decision?	99
D. Is There a Record?	100
E. What Are the Deadlines for a Vacatur Action?	100
F. Is There a Good-Faith Basis for the Vacatur Action?	100
V. Conclusion	101

**Chapter 6****RES JUDICATA AND COLLATERAL ESTOPPEL  
EFFECT UPON THE SURETY: 50 STATE SURVEY 103***Jonathan Bryan, Ryan Springer*

I. Introduction	103
II. Is an Arbitration Award Binding Upon a Surety?	104
A. Does the Surety's Incorporation by Reference of the Underlying Contract Containing an Arbitration Provision Bind the Surety to Arbitration or Any Award Rendered in Arbitration?	105
B. Notice of Arbitration or Absence Thereof	111
C. Are the Issues Decided in the Arbitration the Same as the Issues Against the Surety?	119
D. Other Issues	121
III. What Is the Effect of the Miller Act on Applying <i>Res Judicata</i> to the Surety?	122
IV. Conclusion	126

**Chapter 7****ARBITRATION AS A SHORTCUT TO RESOLUTION:  
COSTS AND CONSIDERATIONS AND RELATIVE  
MERITS OF ARBITRATION 131***Bradford R. Carver, Wayne D. Lambert, Michael R. Morano,  
Katherine L. Freeman*

I. Introduction	131
A. Nature of Arbitration: One Form of Alternative Dispute Resolution	131
B. Studies Are Inconclusive About Cost Savings of Arbitration	132
C. Sureties Are Often Not Involved With Drafting Contract Arbitration Clauses	133
D. Industry Changes Impacting the Surety: Surety-Specific Rules and EDR Bonds	135
II. Relative Advantages and Disadvantages of Arbitration	137

A.	Potential Advantages of Arbitration	137
B.	Potential Disadvantages of Arbitration	140
III.	Costs	143
A.	Fees in Arbitration Cases That Are the Same or Similar to Fees Incurred in Litigating Cases in Federal or State Courts	143
B.	Fees in Arbitration Cases That Are Not Found in Litigation	143
IV.	Arbitration Clause Drafting That Can Help Save Costs	143
V.	Shortcuts to Resolution	145
VI.	Conclusion	147

## Chapter 8

### **EFFECTIVE USE OF ARBITRATION** **149**

*Theodore M. Baum, Ashley L. Belleau, Bryan R. Rendzio,  
Patricia H. Thompson*

I.	Introduction	149
II.	Flexibility: The Key to Effective Arbitrations	149
A.	Flexibility Is Key to Achieving the Fundamental Goals of Arbitration	149
B.	The Drafting of the Pre-Dispute Arbitration Agreement Is the First and Best Opportunity to Exercise Control and Flexible Decision-Making	151
C.	Expedited Construction Adjudication of Performance Bond Disputes as an Example of a Detailed Arbitration Agreement Drafted for a Specific Type of Dispute	154
D.	Once a Dispute Arises, All Stakeholders in the Arbitration Process Have Key Roles to Play in Designing and Managing the Arbitration to Avoid the Delay and Expense of Litigation and Reinforce the Desired Benefits of Arbitration	157
E.	Mastering the Arbitral Rules and Statutes	160
III.	Arbitration Counsel	170
IV.	The Arbitrator	172
A.	The Ability to Choose	173

- B. Qualities to Look for in an Arbitrator 178
- C. Conducting Due Diligence 179
- V. Alternative Billing 181
- VI. How to Manage an Arbitration to Effect Savings and Expedite the Proceedings 184
  - A. Time Is Money 185
  - B. Controlling Expense and Delay 186
  - C. Decisions to Save Time and Money Need Not Sacrifice a Fair, Well-Reasoned Decision 190
- VII. The Arbitration Award 191
  - A. Monetary and Nonmonetary Relief 191
  - B. Costs and Fee Shifting Provisions 191
  - C. Types of Awards 192
  - D. Will Aspects of the Award Impact Companion Litigation? 194
- VIII. Post-Hearing 196
  - A. Challenge to Award and Appellate Remedies 196
  - B. Enforcement Considerations (FAA and State Acts) 198

**Appendix A**

**EXPEDITED DISPUTE RESOLUTION BOND,  
TRAVELERS CASUALTY AND SURETY  
COMPANY OF AMERICA 201**

**Chapter 9**

**PROACTIVE STEPS: WHAT STEPS CAN THE  
SURETY TAKE TO MINIMIZE THE RISK  
OF ADVERSE DECISIONS? 209**

*Thomas H. Duke, Neil Haldrup, Mark Oertel, Kathryn M. Truman*

- I. Introduction
- II. Defining the “Risk” of Arbitration for Sureties—  
What’s the Downside Anyway? 209
  - A. Damned If You Do: Getting Stuck With a  
Bad Decision 210

B. Damned If You Don't: Getting Stuck With a Bad Decision	211
III. Identifying Opportunities for Sureties to Minimize Their Risk—Where Do We Look?	212
A. Go to the Source: Underwriting, Underwriters and Bond Agents	213
B. Head 'em Off at the Pass: Handle Claims Pre-emptively	214
C. The Enemy of My Enemy: Work With Principals and Indemnitors	218
D. Love the One You're With: Take Full Advantage of the Process	222
IV. Pursuing New Opportunities to Reduce the Risks of Arbitration—What Might Be Changed?	226
A. Addressing Sureties' Objections: Swallowing the Meat, Spitting Out the Bones	228
B. Petitioning for Redress: Pursuing Legislative Change	228
C. Reform the Reformers: Tighten the Rules for Arbitrators and Arbitrations	231
D. Grassroots Movement: Revise Standard Arbitration Clauses in Industry Documents	234
V. Conclusion	235
Table of Cases	237