

**DEFERENCE TO A REFERENCE: INCORPORATING ARBITRATION
WHERE IT OUGHT NOT BE**

*Stuart M. Boyarsky**

I. INTRODUCTION

There shall your swords and lances arbitrate

— WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1.

The history of arbitration¹ in the United States is one of extremes.² Throughout the nineteenth and early twentieth centuries courts uniformly viewed arbitration with hostility if not outright contempt.³ In their view, arbitration agreements were a form of makeshift justice that impinged upon the courts' sacred duty of implementing law.⁴ Furthermore, there was suspicion among a number of courts that the existence of genuine mutual assent was absent from predispute arbitration agreements, and therefore these courts feared a dispute resolution clause

* Stuart Boyarsky is an attorney in the New York office of Kasowitz, Benson, Torres & Friedman LLP. The following views are solely those of the author.

¹ Arbitration is defined as “[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.” BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

² Arbitration in America predates the Declaration of Independence and was first introduced to the colonies by English merchants as a way to resolve differences outside a courtroom thereby avoiding costly and lengthy litigation, which was as prohibitive then as it is today. Margaret Mannix, *No Suits For You: Mad at a Firm? Arbitration Could Be Your Only Recourse*, U.S. NEWS & WORLD REP., June 7, 1999, at 58.

³ See, e.g., U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010-11 (S.D.N.Y. 1915) (“The courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators”); see also *infra* note 6 and accompanying text.

⁴ See *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406-07 (2d Cir. 1959) (discussing the historical judicial reluctance to enforce a contract that would remove the jurisdiction of the court); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265, 283-84 (1926) (explaining the historical attitude of courts was a major impetus for the creation of the Federal Arbitration Act).

could be a trap by which “the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy.”⁵ For these reasons, courts commonly refused to view arbitration agreements as binding and instead held that either party could revoke the agreement at any time.⁶

Arbitration began to gain acceptance in America during the early part of the twentieth century, as first demonstrated by the reforms implemented to New York’s arbitration law in 1920.⁷ These reforms enforced agreements that committed the contracting parties to arbi-

⁵ *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904). These considerations led Justice Joseph Story to explain that “when [courts] are asked to . . . compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.” *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320-21 (D. Mass. 1845) (No. 14065).

⁶ *See Ins. Co. v. Morse*, 87 U.S. (1 Wall.) 445, 450 (1874) (“There is no sound principle upon which such [arbitration] agreements can be specifically enforced.”); *Mitchell v. Dougherty*, 90 F. 639, 642 (3d Cir. 1898) (stating that courts will not enforce contracts that “oust the jurisdiction of the courts, and substitute for them an extra-legal tribunal of their own creation, with power to finally and conclusively decide [a dispute]”); *Jones v. Enoree Power Co.*, 75 S.E. 452, 454 (S.C. 1912) (“An agreement to submit to arbitration all questions of law and fact that may arise under a contract is contrary to the public policy and void, as an attempt to oust the courts of their jurisdiction and establish in their place a contract tribunal.”); *Parsons*, 48 S.E. at 697 (“The mere executory agreement to submit [to arbitration] is generally revocable . . .”). *But see Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983 (2d Cir. 1942) (stating the hostility of English courts toward arbitration was due to the “desire of the judges, at a time when their salaries came largely from fees, to avoid loss of income”); *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.) (explaining the doctrine of revocability is not based on the possible lack of mutual consent by the contracting parties, but on the petty jealousy of courts fearing the loss of jurisdiction); H.R. REP. NO. 68-96, at 1-2 (1924) (lamenting that “[s]ome centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction”).

⁷ 6 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 20:2 (2002); *see* H.H. Nordlinger, *Twenty Years of Statutory Development of Arbitration in New York*, 17 N.Y.U. L.Q. REV. 517, 517 (1940).

trate future disputes.⁸ Congress soon followed suit in 1925, when it passed the Federal Arbitration Act (FAA) which “revers[ed] centuries of judicial hostility to arbitration agreements”⁹ In passing the FAA, Congress placed arbitration agreements on equal footing with other contracts¹⁰ and thereby established a federal policy that favors arbitration¹¹ and requires courts to “rigorously enforce agree-

⁸ See BRUNER & O’CONNOR, *supra* note 7. The 1920 New York arbitration statute stated, “A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to . . . the code of civil procedure, shall be valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 1920 N.Y. Laws 804. “Although the New York statute was repealed and replaced in 1937 and again in 1963, the relevant sections are effectively the same.” Anthony S. Fiotto, *The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of an Old Statute*, 66 B.U. L. REV. 1041, 1057 n.121 (1986) (citations omitted).

⁹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974); see *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005). Interestingly, the FAA does not define the term arbitration. *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 688 (10th Cir. 2004). Courts have interpreted this lack of a strict definition as a sign of the drafter’s intent that arbitration be interpreted broadly so that various forms of alternative dispute resolution fall under the FAA’s expansive umbrella. See *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 749 (E.D. Va. 2001) (“[C]ourts have liberally construed [the] term [arbitration] to encompass various diverse dispute-settlement mechanisms.”).

¹⁰ *Scherk*, 417 U.S. at 511. The FAA accomplishes this by providing that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2006). These grounds include the common law contract defenses of fraud, duress, and unconscionability. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

¹¹ See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The FAA itself empowers judges to interpret arbitration agreements broadly and thus it is rare for a court not to enforce an agreement to arbitrate. See *id.* at 24-25. The United States Supreme Court has explained that “[t]he [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* (citations omitted).

ments to arbitrate”¹² Today, arbitration is viewed by litigants, courts,¹³ and scholars as “an efficient¹⁴ and cost-effective¹⁵ alternative

¹² Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985). However, despite the success of the FAA, at least one practitioner, pointing to a recent trend by California courts finding arbitration agreements unconscionable, warns that “‘judicial hostility’ to arbitration has reared its unwelcome head once again.” Michael G. McGuinness & Adam J. Karr, *California’s “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 61 (2005).

¹³ ABM Farms, Inc. v. Woods, 692 N.E.2d 574, 576 (Ohio 1998). A more cynical, although perhaps accurate, explanation for the courts’ preference for arbitration of disputes is that it results in the removal of cases from their ever-expanding dockets. See Sec. Indus. Ass’n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989) (stating that the FAA was “therapy for the ailment of the crowded docket”); Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967) (“The policy of the [FAA] is to promote arbitration to accord with the intention of the parties and to ease court congestion.”) (citation omitted); Ruth R. Rimmel Revocable Trust v. Regions Fin. Corp., 255 S.W.3d 453, 458 (Ark. 2007) (“Arbitration is looked upon with approval by courts as a less expensive and more expeditious means of settling litigation and relieving docket congestion.”) (citation omitted); Buchholz v. W. Chester Dental Group, No. CA2007-11-292, 2008 WL 4541954, at *2 (Ohio Ct. App. Oct. 13, 2008) (“Arbitration provides the parties with an ‘inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.’” (quoting Bd. of Educ. v. Findlay Educ. Ass’n, 551 N.E.2d 186, 189 (Ohio 1990))).

¹⁴ See National Arbitration Forum: The Benefits of Arbitration, <http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3> (last visited April 5, 2010). While federal litigation takes on average two years to progress from the initial filing to the actual trial, a typical arbitration lasts only four to six months. See *id.*; Lisa Rickart, *Arbitration Ain’t Broke, but Trial Lawyers Want to “Fix” It*, INST. FOR LEGAL REFORM, Apr. 2, 2008, http://www.instituteforlegalreform.org/component/ilr_president_corner/66/article/24.html. Similarly, unlike a court proceeding, parties to an arbitration do not have to wait for their turn on the court’s docket for their action to proceed. See Diane P. Wood, *Snapshots from the Seventh Circuit: Continuity and Change, 1966-2007*, 2008 WIS. L. REV. 1, 6 (“[T]o the extent that litigants wish to avoid these queues, they are opting out of the judicial system altogether and turning to arbitration and mediation.”); Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—And for the United States*, 32 TULSA L.J. 1, 15 (1996) (“The longer the queue, the greater the incentive of the parties to a dispute to substitute arbitration or other nonjudicial methods of dispute resolution for the courts”).

¹⁵ See IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 3 (1992) (“For a good many years the commercial and financial world has felt increasingly beleaguered by the costs of litigation.”); see also Christopher R. Drahozal & Keith N. Hylton, *The Economics of*

to traditional litigation.”¹⁶

Although it is a well-accepted axiom that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit[,]”¹⁷ there nevertheless are instances where parties have been compelled to arbitrate disputes despite never having entered an arbitration agreement.¹⁸ In fact, less than ten years after the passage of the FAA, the United States Supreme Court confronted the issue of whether a state legislature could impose arbitration by statute on parties who did not include an arbitration provision in their contract. The 1935 case, *Hardware Dealers’ Mutual Fire Insurance Co. of Wisconsin v. Glidden Co.*, involved the constitutionality of a Minnesota statute which made all disputes involving the amount of loss covered by a fire insurance policy written in the State of Minnesota subject to mandatory arbitration.¹⁹ The appellant argued the statute restricted his freedom to contract and the Fourteenth Amendment precluded the exercise of compulsory arbitration by the legislature.²⁰ Although the Supreme Court agreed the arbitration process in that circumstance was not entirely voluntary, it nevertheless upheld the statute, explaining “the pro-

Litigation and Arbitration: An Application to Franchise Contracts, 32 J. LEGAL STUD. 549, 560-61 (2003) (arguing that a lower dispute resolution cost is a significant determinant of the probability of arbitration).

¹⁶ Christopher L. Frost, *Welcome to the Jungle: Rethinking the Amount in Controversy in a Petition to Vacate an Arbitration Award Under the Federal Arbitration Act*, 32 PEPP. L. REV. 227, 230 (2005); see *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (extolling the virtues of mandatory arbitration).

¹⁷ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

¹⁸ See 9 U.S.C. § 2 (2006). Similarly, when there is evidence the parties had at one time intended to enter into an agreement to arbitrate, but for unknown reasons failed to sign the arbitration agreement, the provision may still be valid. See *Clar Prods., Ltd. v. Isram Motion Pictures Prod. Servs., Inc.*, 529 F. Supp. 381, 383 (S.D.N.Y. 1982) (“[I]t is settled law in this Circuit that ‘a party may be bound by an agreement to arbitrate even in the absence of a signature,’ as long as the arbitration provision itself is in writing” (quoting *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980) (citing *Fisser v. Int’l Bank*, 282 F.2d 231, 233 (2d Cir. 1960))). In such situations, courts turn to basic contract law to determine whether the unsigned agreement is enforceable. See, e.g., *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845-46 (2d Cir. 1987) (applying general contract principles in enforcing arbitration under both signed and unsigned agreements between the parties).

¹⁹ *Hardware Dealers’ Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 155-56 (1931).

²⁰ *Id.* at 156-57.

cedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.”²¹ The Court further explained that:

The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.²²

Similarly, in *Firelock Inc. v. District Court*, the court addressed a Colorado statute requiring arbitration for most civil actions involving damages of fifty thousand dollars or less.²³ The appellant argued the statute, which required the district courts to refrain from exercising general jurisdiction over pending arbitration, violated the separation of powers provision of the Colorado Constitution.²⁴ The court disagreed and explained that since the statute provided the arbitration panel’s decision must be filed with the district court, and the decision would be enforceable only if neither party demands a trial de novo within thirty days after the filing, the Act did not “vest judicial authority in another

²¹ *Id.* at 158.

²² *Id.* (internal citations omitted). The principle that a state may apply any form of remedy as long as it is not unreasonable or arbitrary has consistently been applied by courts in upholding statutes that compel arbitration. *See, e.g.*, *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958) (“A State may, of course, distribute the functions of its judicial machinery as it sees fit.”); *Country-Wide Ins. Co. v. Harnett*, 426 F. Supp. 1030, 1032 (S.D.N.Y. 1977) (holding a “state may choose to provide any rational method of dispute settlement that comports with the basic procedural safeguards required by due process”) (citation omitted); *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 893 (2d Cir. 1991).

²³ *Firelock Inc. v. Dist. Court*, 776 P.2d 1090, 1092-93 (Colo. 1989).

²⁴ *Id.* at 1093. Article III of the Colorado Constitution provides that “[t]he powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.” COLO. CONST. art. III.

branch of government in violation of article III of the Colorado Constitution”²⁵ Thus the court upheld the statute.²⁶

However, even though a court cannot compel a party to arbitrate if the party did not enter into an arbitration agreement²⁷ or absent a statute requiring arbitration, a commonly occurring situation exists when a separate arbitration agreement the litigant was not a party to compels the party to arbitrate its claims.²⁸ Researchers describe this situation using the concept of incorporation by reference²⁹ as *archival drafting*,³⁰ and courts have universally accepted this rationale without much discussion or debate over the fairness to the nonsignatory party³¹

²⁵ *Firelock Inc.*, 776 P.2d at 1094-95.

²⁶ *Id.* at 1100. Statutorily mandated arbitration seems to be a growing trend in the United States. *See, e.g.*, E.D. PA. R. 53.2(3) (providing for compulsory, nonbinding arbitration for most civil cases with potential awards less than one hundred and fifty thousand dollars); E.D.N.Y. & S.D.N.Y. R. 83.10(d) (providing for compulsory arbitration for most civil cases where the amount in dispute does not exceed one hundred and fifty thousand dollars).

²⁷ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”).

²⁸ However, the pendulum of compulsory arbitration on nonsignatories apparently swings both ways with the United States Supreme Court recently ruling that a nonsignatory to an arbitration agreement could invoke section 3 of the FAA, thereby staying an action in favor of arbitration, and is likewise entitled to an interlocutory appeal of an order denying such a motion. *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1903 (2009).

²⁹ Incorporation by reference has been defined as: “A method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one.” BLACK’S LAW DICTIONARY 834 (9th ed. 2009).

³⁰ K.C. Jain, *Referential Legislation: Need for Fresh Look*, (2000) 2 SCC (Jour), available at <http://www.ebc-india.com/lawyer/articles/2000v2a2.htm> (last visited April 5, 2010) (citing F.A.R. BENNION, BENNION ON STATUTORY INTERPRETATION: A CODE 759 (5th ed. 2008)). Indeed, Bennion explains the modern day concept of incorporation by reference is “in accordance with the maxim *verba relata hoc maxime operantur per referentiam ut in eis inesse videntur* (words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them).” BENNION, *supra* note 30, at 758 (citation omitted).

³¹ It should be noted that some states, such as New York, briefly held that unequivocal language must be present before arbitration is mandated, and therefore a party would not be compelled to arbitrate solely due to the incorporation by reference of an agreement containing an arbitration clause. *See, e.g.*, *Lehman v. Ostrovsky*, 264

who is bound to arbitration.³² Indeed, legal scholars specializing in commercial arbitration explain that:

To form a binding agreement to arbitrate, no express reference to arbitration need be made in a given contract if, instead, the contract incorporates by reference arbitration rules or other documents reciting an obligation to arbitrate. The end product of an incorporation by reference is to demonstrate an unambiguous intent to arbitrate, rather than litigate, disputes arising out of the aggregated contract.³³

But how does one demonstrate *unambiguous intent to arbitrate* when the agreement itself does not mention arbitration and the signatory

N.Y. 130, 132 (N.Y. 1934) (“No one is under a duty to resort to arbitration unless by clear language he has so agreed.”).

³² See, e.g., R.J. O’Brien & Assoc., Inc. v. Pipkin, 64 F.3d 257, 260 (7th Cir. 1995) (“A contract . . . need not contain an explicit arbitration clause if it validly incorporates by reference an arbitration clause in another document.” (citations omitted)); Thomson-CSF, S.A. v. Am. Arbitration Ass’n, 64 F.3d 773, 776, 780 (2d Cir. 1995) (holding a nonsignatory party can be held to an arbitration agreement, but only if the enforcement is consistent with applicable contract law); U.S. Fidelity & Guar. Co. v. W. Point Constr. Co., 837 F.2d 1507, 1507 (11th Cir. 1988) (compelling a surety to arbitrate where the performance bond incorporated by reference a subcontract that contained an arbitration provision); J.S. & H. Constr. Co. v. Richmond County Hosp. Auth., 473 F.2d 212, 213, 217 (5th Cir. 1973) (holding a subcontract incorporated by reference the general conditions of the prime contract including the requirement that all parties submit their disputes to arbitration); Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co., 351 F.2d 503, 505-06 (2d Cir. 1965) (holding a separate agreement with a nonsignatory expressly “assum[ing] all the obligations and privileges of [the signatory party] under the subcharter” constitutes grounds for enforcement of an arbitration clause by a nonsignatory). Although not discussed in this Article, other theories by which a nonsignatory party can be compelled to arbitrate include: assumption, agency, veil piercing/alter ego, and estoppel. *Thomson-CSF*, 64 F.3d at 776.

³³ THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION 8-1 to 8-2 (3d ed. 2009). Acceptance of the doctrine of incorporation by reference has not been limited to American courts. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 189 (2d ed. 2001) (“Under most developed national arbitration regimes, arbitration provisions may, subject to varying conditions, validly be incorporated into an agreement by reference from other agreements or sources.” (citations omitted)).

may be unaware the contract which the agreement is referencing contains an arbitration clause? Was not the possibility of a party being compelled to arbitrate despite the lack of mutual assent to do so the exact scenario courts feared prior to the passage of the FAA?³⁴ Furthermore, the FAA itself provides that a court should order arbitration only if it is “satisfied that the making of the agreement for arbitration . . . is not in issue.”³⁵

Discussion concerning the hardships facing an unsuspecting party that finds itself bound to arbitrate has not been limited to the isolated lectures of a handful of academics or the occasional disapproving dicta of an otherwise unconcerned judiciary, but has reached the United States Congress as demonstrated by the introduction of the Arbitration Fairness Act of 2007.³⁶ The purpose of the Act is to amend the FAA, thereby making predispute agreements to arbitrate employment, consumer, franchise, or civil rights disputes unenforceable. The legislation states in pertinent part:

³⁴ See *supra* note 6. Clearly, the requirement for mutual assent to an arbitration agreement is as essential today as it was prior to the implementation of the FAA. *Dinallo v. Empire, Ltd.*, No. BER-C-194-05, 2005 WL 2759225, at *4 (N.J. Super. Ct. Ch. Div. Oct. 21, 2005) (noting that it is well accepted that “courts will not enforce arbitration agreements absent a finding of mutual assent to arbitrate” (citations omitted)).

³⁵ 9 U.S.C. § 4 (2006).

³⁶ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007). The Arbitration Fairness Act of 2007 was introduced on July 12, 2007 to both the House (H.R. 3010) and the Senate (S. 1782). While the bill was sent to both the House Judiciary Committee and the Senate Subcommittee on the Constitution, neither committee issued a report and the bill never came to the floor for a vote. See S. 1782: Arbitration Fairness Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1782> (last visited April 5, 2010). To view the history of the 2007 Act, see *id.* The bill was recently reintroduced as the Arbitration Fairness Act of 2009 in the House (H.R. 1020) and in the Senate (S. 931) and is currently before the Senate Committee on the Judiciary and the House Subcommittee on Commercial and Administrative Law. To view the current status of the House bill, see H.R. 1020: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1020> (last visited April 5, 2010), and for the Senate bill, see S. 931: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=s111-931> (last visited April 5, 2010).

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.³⁷

Introducing the Act in 2007, Senator Russ Feingold (D-WI), explained that while arbitration can be an efficient way to handle some disputes, “[p]eople from all walks of life—employees, investors, homeowners, those enrolled in HMOs, credit card holders, and other consumers—often find themselves strong-armed into mandatory arbitration agreements.”³⁸ If these problems exist in consumer agreements stating that all disputes are subject to arbitration, the inequities of mandatory arbitration in situations involving incorporation by reference become glaringly apparent.

Nevertheless, courts have continuously enforced arbitration agreements where the contract at issue did not contain an arbitration

³⁷ H.R. 1020.

³⁸ Press Release, U.S. Senator Russ Feingold, Wisconsin, Sen. Feingold, Rep. Johnson Introduce Measure to Preserve Consumer Justice (July 12, 2007), <http://feingold.senate.gov/~feingold/releases/07/07/20070712.html>.

clause but merely referred to another contract that did contain such a clause.³⁹ In fact, after the United States Court of Appeals for the Second Circuit reversed a decision in which Judge Charles S. Haight Jr. ruled that an arbitration clause in an earlier contract was not incorporated by reference into a contract created a decade later and entered into by nonsignatories to the first contract,⁴⁰ Judge Haight humorously lamented that if “a judgment of mine could be reversed [it] surely furnishes dramatic evidence that [incorporation by reference] is a complex and vexing subject.”⁴¹ This Article attempts to tackle this “complex and vexing subject” by discussing the effect the FAA’s policy favoring arbitration has on encouraging courts, via incorporation by reference, to find agreements to arbitrate where none may legitimately exist.

This Article discusses the role that incorporation by reference plays in creating a binding obligation to arbitrate and its evolution from requiring a straightforward reference, to requiring a chain of references, to requiring the implication of a reference, to finally requiring what appears to be no reference at all. The Article concludes that suspicion of predispute arbitration agreements lacking genuine mutual assent is well grounded as demonstrated by the increased success of parties preventing claimants from entering the courtroom and relegating them to arbi-

³⁹ See, e.g., *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003) (“Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.”); *Cianbro Corp. v. Empresa Nacional De Ingenieria Y Tecnologia, S.A.*, 697 F. Supp. 15, 16, 20 (D. Me. 1988) (finding the surety bound by an arbitration clause in the subcontract, which the surety did not sign, because the subcontract was incorporated by reference into the performance and payment bonds); *Exch. Mut. Ins. Co. v. Haskell Co.*, 742 F.2d 274, 276 (6th Cir. 1984) (“[T]he performance bond incorporates by reference the obligation to arbitrate.”).

⁴⁰ *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 48-49 (2d Cir. 1993) (reversing a ruling by Judge Haight of the Southern District of New York and holding it would not be “unduly stretching” the arbitration clause to extend it to the nonsignatory reinsurers); see *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 802 F. Supp. 1069, 1080 (S.D.N.Y. 1992), *rev’d*, 991 F.2d 42 (2d Cir. 1993).

⁴¹ Charles S. Haight, Jr., Senior U.S. Dist. Judge for the S. Dist. of N.Y., *Arbitration and the Courts: Some Recent American Cases*, Speech Before the Fourteenth International Congress of Maritime Arbitrators (Oct. 25, 2001), available at <http://www.smany.org/congress/haight.html> (last visited April 5, 2010).

tration through the use of incorporation by reference. Thus, the lessons here are twofold: (1) parties must be vigilant in climbing the ladder of agreements in order to ascertain whether an agreement somewhere up the chain included an arbitration provision; and (2) in the event the existence of a contract containing an arbitration clause is later discovered, a party will be left in the inequitable position where it is presumed to have been on constructive notice that such an agreement to arbitrate existed at the time the parties executed their agreement.

II. INCORPORATION BY REFERENCE OF AN ARBITRATION CLAUSE

A. *Basic Incorporation*

Basic contract law states there are four prerequisites to forming a valid contract: (1) offer, (2) acceptance, (3) consideration, and (4) reliance.⁴² Not listed is perhaps the most basic and quite possibly the most important ingredient for a valid contract—the requirement of mutual assent.⁴³ However, this prerequisite does not call for the parties to actually assent to the terms of the contract. Rather, it requires that the parties perform an action, whether it be signing a document or saying something that would allow a reasonable person to infer they agreed to the terms of the contract.⁴⁴ The purpose of this requirement is “to satisfy ‘the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances—to rely on an individual’s behavior that apparently manifests their assent to a transfer of entitlements.’”⁴⁵ Therefore, the requirement of mutual assent does not actually require individualized consent at all, but merely requires the appearance of shared understanding and agreement.

⁴² See CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* xi-xiii (6th ed. 2007).

⁴³ *Id.* (“[A] bargain resulting in mutual assent is the traditional and probably most important way in which a contract can be formed . . .”).

⁴⁴ Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 *HOFSTRA L. REV.* 83, 113-14 (1996).

⁴⁵ *Id.* at 114 (quoting Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269, 301 (1986)).

But to what extent can a party to a contract be held liable for something he may not have explicitly agreed to?⁴⁶ The *Restatement (Second) of Contracts* explains that an individual “does not assent to a term if the other party has reason to believe that the [nondrafting] party would not have accepted the agreement if he had known that the agreement contained the particular term.”⁴⁷ Nevertheless, through the principle of incorporation by reference, a party that did not assent to an agreement to arbitrate future disputes can be bound to arbitration.⁴⁸

Disputes caused by incorporation by reference arise most often in the context of construction agreements.⁴⁹ This is due to two factors: First, the construction industry—perhaps more than any other field—

⁴⁶ While some have argued it is in a party’s best interest to be compelled to arbitrate, there are numerous disadvantages to arbitration which should not be overlooked, including: (1) high costs in both filing fees and arbitrators’ hourly rates; (2) possible bias of arbitrators, due to the fact that arbitration providers are organized to serve businesses, not consumers; (3) limited discovery; (4) prohibition of class actions; (5) the fact that arbitration clauses often require hearings to be held in a location inconvenient to the claimant; (6) the one-way requirement by which many arbitration clauses require only the consumer, employee, or franchisee to arbitrate its claims, while allowing the corporate party to bring its claims in court; (7) lack of a public record of the proceedings; (8) limited judicial review, allowing a decision to be overturned only when there is “fraud or manifest disregard of the law”; and (9) unavailability of numerous remedies in arbitration, such as injunctive relief. Public Citizen, Congress Watch, Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees, and Small Businesses, <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7332> (last visited April 5, 2010).

⁴⁷ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (2009).

⁴⁸ The argument that the reason for placing the incorporation by reference language in a document was solely for the limited purpose of incorporating only the overall subject matter of the referenced document, such as the scope of work the document required, but not the entirety of the document, such as an arbitration clause, has been routinely rejected. *See, e.g.,* Travelers Cas. & Sur. Co. of Am., Inc. v. Long Bay Mgmt. Co., 792 N.E.2d 1013, 1016-17 (Mass. App. Ct. 2003) (vacating the Superior Court’s order construing the language in a performance bond that incorporated by reference an underlying construction contract as only incorporating language regarding the work to be performed, not to incorporate the arbitration clause itself, and instead holding the party had the right to compel arbitration).

⁴⁹ Charles Davant IV, *Tripping on the Threshold: Federal Courts’ Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 533 (2001) (citing J. Michael Franks & John W. Heacock, *Arbitration and the Contract Surety: Inclusion and Preclusion*, 32 TORT & INS. L.J. 997, 980 (1997)).

uses arbitration to settle disputes.⁵⁰ Second, “large construction projects require multiple layers of contractual relationships among owners, developers, contractors, subcontractors, sub-subcontractors, lessors, sureties, and others.”⁵¹ While these parties often do not intentionally form contractual relationships with one another, a “complex web of incorporations by reference” frequently links them.⁵² Since more often than not these numerous contracts are ambiguous when read together, it is common for construction disputes to result in litigation over which parties consented to arbitration and which did not.⁵³ These situations typically involve

a developer and a general contractor [who] sign a construction agreement containing an arbitration clause. The general contractor then enters into contractual relationships with other parties, such as subcontractors and sureties. In most cases, the subcontract or performance bond does not contain an arbitration clause but does contain a provision incorporating by reference the underlying construction agreement. Oftentimes, the performance bond or subcontract contains language that suggests litigation is the agreed-upon method for resolving disputes—a feature that automatically puts the secondary agreement at odds with the primary. The question presented by these cases is whether incorporation by reference binds a surety (or guarantor) or subcontractor to submit to arbitration or whether the reference to the underlying contract merely serves to define the scope, quality, character, and manner of the nonsignatory’s performance.⁵⁴

In these situations, the surety or subcontractor immediately finds itself fighting an uphill—and usually losing—battle due to the strong policy of resolving *any doubts* concerning whether agreements require

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 534.

⁵⁴ *Id.* at 533-34 (internal citations omitted).

arbitration in favor of arbitration.⁵⁵ In fact, even in situations where the defendant discovers the incorporation by reference of an arbitration clause in the agreement after litigation has already begun, the court must grant the defendant's motion to compel arbitration.⁵⁶ However, if the issue of incorporation by reference only involved situations where the current contract referenced an earlier one containing an agreement to arbitrate, it would perhaps be understandable to blame the party desiring litigation for not carefully reading the contract that his agreement referred to.⁵⁷ The problem arises when there are multiple incorporations spanning numerous contracts, with only the original agreement containing a provision requiring arbitration. This situation, commonly referred to as a *chain of incorporation*,⁵⁸ demonstrates the uncertainties created when courts permit provisions not explicitly set forth in a contract to later be read into the agreement. The difficulty this creates is

⁵⁵ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

⁵⁶ See, e.g., *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 244 (E.D.N.Y. 1973) (holding the defendant did not waive the right to arbitration where the motion to compel arbitration was filed before the answer). However, there does come a point where a delay in moving for arbitration constitutes a waiver, even if the moving party discovers the existence of the incorporated arbitration provision after the litigation has begun. See, e.g., *Skordilis v. Celebrity Cruises, Inc.*, No. 08-22934-CIV, 2009 WL 129383, at *3 (S.D. Fla. Jan. 16, 2009) (holding the defendant waived the right to invoke an arbitration clause that was incorporated by reference into the agreement where the parties had already litigated the case for fifteen months).

⁵⁷ See, e.g., *Dapuzzo v. Globalvest Mgmt. Co.*, 263 F. Supp. 2d 714, 733 (S.D.N.Y. 2003) (asserting that a party "cannot escape the legal consequences of [its] obligation to fully review the entire contractual document . . . before committing to its contents" (citation omitted)); *Williams v. Eddie Acardi Motor Co.*, No. 3:07-cv-782-J-32JRK, 2008 WL 686222, at *4 (M.D. Fla. Mar. 10, 2008) ("[A] party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions." (quoting *Patricoff v. Home Team Pest Def., LLC*, Nos. 605CV1769ORL31KRS, 605CV1770ORL31KRS, 2006 WL 890094, at *2 (M.D. Fla. Apr. 3, 2006))). *But cf.* *Weiner v. Mercury Artists Corp.*, 130 N.Y.S.2d 570, 571 (N.Y. App. Div. 1954) (finding no incorporation by reference when a one-page contract referred to a 207-page booklet with an arbitration provision buried on page sixty-six).

⁵⁸ See *Commercial Union Ins. Co. v. Gilbane Bldg. Co.*, 992 F.2d 386, 388 (1st Cir. 1993) (finding that the chain of incorporation extending through a prime contract, subcontract, and performance bond was sufficient to require parties to arbitrate, relying on the "strong federal policy favoring arbitration agreements" (citations omitted)).

apparent: “The chain of incorporation by reference can go on indefinitely,”⁵⁹ creating uncertainty as to what obligations are actually set forth in the contract.

B. Chain of Incorporation

As with most instances of incorporation by reference, cases involving a chain of incorporation have predominantly involved situations concerning construction disputes.⁶⁰ In the construction context, these cases often involve a court “compelling a subcontractor’s performance bond surety to arbitrate a claim by the prime contractor due to an arbitration provision in the prime contract, which provision was held to be incorporated by reference into the subcontract and the performance bond even though there was no provision for arbitration in either”⁶¹

The United States Court of Appeals for the Sixth Circuit introduced the theory of chain of incorporation a quarter century ago in *Exchange Mutual Insurance Co. v. Haskell Co.*,⁶² a case which is perhaps a largely unnoticed bellwether representing the judiciary’s zealous desire to find binding arbitration provisions whenever possible. *Haskell* involved a performance bond that did not contain an arbitration clause but incorporated by reference the subcontract that incorporated the prime contract by reference.⁶³ In holding the incorporation language set forth in the performance bond and subcontract was broad enough to include the prime (or general) contract’s arbitration agreement, the court explained:

Here, the performance bond specifically referred to and incorporated the subcontract. The subcontract provides

⁵⁹ ROBERT C. FABER, *LANDIS ON MECHANICS OF PATENT CLAIM DRAFTING* § 10:8.1, at 10-49 (5th ed. 2008).

⁶⁰ See, e.g., *Drywall Sys. Plus, Inc. v. Steel Sys., Inc.*, No. 08-1019, 2008 WL 3307296, at *2 (W.D. Tenn. Aug. 7, 2008) (“[A] chain of incorporation running through a prime contract, a subcontract, and a performance bond rendered disputes that arose under the performance bond subject to the arbitration provision contained in the prime contract.” (citations omitted)).

⁶¹ John H. Gregory & Michael Jay Rune, II, *Liability of the Performance Bond Surety (Under Contract of Suretyship)*, in *THE LAW OF PERFORMANCE BONDS* 128 (1999).

⁶² *Exch. Mut. Ins. Co. v. Haskell Co.*, 742 F.2d 274 (6th Cir. 1984).

⁶³ *Id.* at 276.

that the same obligations and responsibilities apply in the subcontract as apply in the general contract. And, finally, the general contract provides that there is a duty to arbitrate. Thus, the performance bond incorporates by reference the subcontract, the subcontract incorporates by reference the general contract and hence the duty to arbitrate.⁶⁴

Relying on *Haskell*, courts have continued playing an arbitration shell game, dancing from one contract to the next in situations involving multiple incorporations, with the goal of finding an arbitration provision hidden somewhere along the chain of contracting parties.⁶⁵

C. *Implicitly Incorporated by Reference*

While explicit incorporation by reference is well established, there are instances where both courts and scholars have recognized that the incorporation of a separate agreement into a contract may be inferred from the context in which the parties created the contract at issue.⁶⁶ In these situations, instruments “executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction” are read together as one contract.⁶⁷ There have

⁶⁴ *Id.*

⁶⁵ *See, e.g.*, *Commercial Union Ins. Co. v. Gilbane Bldg. Co.*, 992 F.2d 386, 387-88 (1st Cir. 1993) (holding that where a subcontractor’s performance bond incorporated the subcontract by reference, and the subcontract incorporated by reference a prime contract containing an arbitration clause, the subcontractor’s surety could compel the general contractor to arbitrate disputes under the subcontractor’s bond by virtue of the chain of incorporation); *Drywall Sys. Plus*, 2008 WL 3307296, at *3 (holding a subcontract between general contractor and subcontractor incorporated by reference the prime contract containing an arbitration clause, thereby requiring the parties to arbitrate).

⁶⁶ *See Grandis Family P’ship, Ltd. v. Hess Corp.*, 588 F. Supp. 2d 1319, 1325 (S.D. Fla. 2008) (discussing certain cases where “the analysis focuses on what the parties would clearly understand, given their mutual understanding and knowledge of the terms in question” (citation omitted)).

⁶⁷ RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* 240 (4th ed. 1999); *see also United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 808 (8th Cir. 2001) (noting that two instruments executed by the same parties at the same time in the course of the same transaction will be construed together); *Hilltop Cmty. Sports Ctr., Inc. v. Hoffman*, 755 A.2d 1058, 1062 (Me. 2000) (same). *But cf.* *Franklin Fed. Sav.*

also been circumstances where courts have held the contracting parties need not be the same, nor must the contracts refer to one another, as long as the agreements each form part of a single transaction.⁶⁸ However, more alarming are the situations where courts require parties to arbitrate based upon a clause in a separate agreement, even though the agreement at issue contained a provision, such as a forum selection clause, clearly indicating the signatories' desire to be able to pursue their claims in court.⁶⁹

In *Personal Security & Safety Systems Inc. v. Motorola Inc.*, the United States Court of Appeals for the Fifth Circuit faced a claim arising out of a stock purchase agreement (SPA) which not only lacked an arbitration clause but in fact contained a forum selection clause which explicitly stated "[a]ny suit or proceeding brought hereunder shall be subject to the exclusive jurisdiction of the courts located in Texas."⁷⁰ Notwithstanding that clause, the defendant/appellant argued that an arbitration clause found in a product development agreement (PDA), which the parties executed with the SPA along with a third agreement, covered all disputes arising out of the transaction, regardless of the particular agreement the claim pertained to.⁷¹ The plaintiff countered that the arbitration provision did not apply because it governed only claims that arose out of the PDA, while the plaintiff's claims arose under the SPA, an entirely separate agreement.⁷² The court found the argument unavailing, holding "where the parties include a broad arbitration provision in an agreement that is 'essential' to the overall transaction, we will presume that they intended the clause to reach all aspects of the transac-

Bank v. United States, 431 F.3d 1360, 1366 (Fed. Cir. 2005) (explaining that although several instruments relating to the same transaction that were executed at the same time should be read together to demonstrate the parties' intent, it does not insinuate that instruments constitute one agreement in which every provision in each agreement becomes part of one another).

⁶⁸ See LORD, *supra* note 67, at 252-53; see also *Paramount Technical Prods., Inc. v. GSE Lining Tech., Inc.*, 112 F.3d 942, 945 (8th Cir. 1997) (holding that contracts "executed at the same time, by nearly identical parties, and as part of the same transaction," should be read together) (citation omitted).

⁶⁹ See, e.g., *Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 394-95 (5th Cir. 2002).

⁷⁰ *Id.* at 395.

⁷¹ *Id.* at 391.

⁷² *Id.* at 393.

tion—including those aspects governed by other contemporaneously executed agreements that are part of the same transaction.”⁷³ Then, in what can only be described as putting-the-cart-before-the-horse reasoning, the court brushed aside the agreement’s forum selection language, stating “[g]iven our conclusion that the arbitration provision in the [PDA] applies to all claims related to the overall transaction, we must therefore interpret the forum selection provision in the [SPA] in a manner that is consistent with the arbitration provision.”⁷⁴ The court concluded that a proper interpretation of the clause required the parties to litigate in Texas any dispute that was not subject to arbitration, such as an action to either challenge the validity of the clause or to enforce the award.⁷⁵

This concept of applying arbitration clauses from one agreement to disputes arising from entirely separate agreements has gained broad acceptance, further confusing parties as to which forum is proper for their dispute to be heard and ensnaring unwitting litigants who are unaware that courts may view them as having agreed to submit their disputes to arbitration.⁷⁶

D. Mere Reference

As mentioned earlier, incorporation by reference of an arbitration agreement is permitted when: (1) the underlying contract clearly references a separate document, (2) the identity of the separate document is ascertainable, and (3) the incorporation of the arbitration clause can be foreseen and will not result in hardship.⁷⁷ Not surprisingly, there have been numerous instances where courts found parties bound to arbitration even though their intent to be bound was not clear, the identity of the separate documents was uncertain to at least one of the parties, and

⁷³ *Id.* at 394-95.

⁷⁴ *Id.* at 395.

⁷⁵ *Id.* at 396.

⁷⁶ *See, e.g.,* Sullivan v. Mounger, 2002-IA-01463-SCT (432) (Miss. 2004) (finding the arbitration clause in one agreement applied to all documents at issue because “separate agreements executed contemporaneously by the *same parties*, for the same purposes, and as part of the same transaction, are to be construed together” (citation omitted)); Boulds v. Chase Auto Fin. Corp., 266 S.W.3d 847, 851 (Mo. Ct. App. 2008) (same); Vemco, Inc. v. Flakt, Inc., No. 94-1016, 94-1506, 1996 WL 506495, at *2 (6th Cir. Sept. 5, 1996) (same).

⁷⁷ *See supra* note 39.

the enforcement of the hereto unknown arbitration clause would indeed cause both surprise and hardship to the party that brought the action.

A case on point is *Kaye v. Macari Building & Design, Inc.*, in which the parties signed an architecture contract that incorporated by reference the project's plans and specifications.⁷⁸ While neither party disagreed they incorporated the project's plans and specifications into the contract, the parties differed on whether the American Institute of Architects (AIA) Document No. A-201, which contained an arbitration agreement, was properly incorporated into the contract.⁷⁹ The trial court denied the plaintiffs' motion to compel arbitration, finding that AIA Document No. A-201 was not properly incorporated into the contract.⁸⁰ However, Florida's Fourth District Court of Appeal disagreed, using a chain of incorporation to show that the parties did intend to be bound to arbitration.

The district court began its opinion by quoting language from a section referred to as General Notes, contained in the plans and specifications, which stated "The American Institute of Architects Documents No. A-201, April 1997 Edition is hereby made a part of these specifications and this contract."⁸¹ The notes specifically stated the contract documents consisted of the "plans, specifications, AIA contract, addenda and change orders."⁸² Thus, the issue became whether this was enough to incorporate the arbitration provision buried in AIA Document No. A-201 into the underlying contract, or whether this sentence represents "a mere reference" and therefore is not enough to alert the contracting parties they will be subject to the arbitration clause. The court explained,

The doctrine [of incorporation by reference] requires that there must be some expression in the incorporating document . . . of an intention to be bound by the collateral document. A mere reference to another document is not sufficient to incorporate that other document into a con-

⁷⁸ *Kaye v. Macari Bldg. & Design, Inc.*, 967 So. 2d 1112, 1113 (Fla. Dist. Ct. App. 2007).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

tract, particularly where the incorporating document makes no specific reference that it is 'subject to' the collateral document.⁸³

Following this reasoning, it would appear the statement that AIA Document No. A-201, along with other documents, was made a part of the contract would not be enough to demonstrate intent to be bound by that document given there was no specific reference making the parties subject to the provisions of AIA Document No. A-201, specifically the arbitration clause. Surprisingly, this was not the case. The court found the parties' intent to be bound by the arbitration clause was clear, explaining the words "'part of these specifications and this contract' unambiguously indicate[d] the parties' intention to be bound by the AIA Document as well as by the plans and specifications and the contract" which included intent to be bound by the arbitration clause.⁸⁴

The *Kaye* court is hardly alone in finding that a reference with intent to be bound to a separate document containing an arbitration clause is sufficient to constitute an explicit expression of intent to be bound by the collateral document.⁸⁵ As discussed previously, the FAA's policy favoring arbitration requires any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration, and this policy has led courts to find agreements to arbitrate in situations where only a mere reference exists.

III. CONCLUSION

While arbitration has increasingly become the prevalent form of alternative dispute resolution due to its many advantages over traditional litigation, the drawbacks of the process cause many practitioners and commentators to prefer a court's judgment over that of an arbitra-

⁸³ *Id.* (citation omitted).

⁸⁴ *Id.* at 1114.

⁸⁵ *See, e.g.,* *World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc.*, 517 F.3d 1240, 1245 (11th Cir. 2008) ("It is clear . . . that an arbitration clause can be incorporated even if the relevant incorporation language does not specifically refer to it."); *J.S. & H. Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212, 213, 215 (5th Cir. 1973) (concluding that a subcontractor was bound to arbitrate a dispute based on the arbitration clause in a section entitled General Conditions, even though the incorporation provision in the subcontract did not mention the arbitration clause).

tion panel.⁸⁶ These deficiencies become even more glaring in situations involving incorporation by reference, where a party may not realize that a contract prohibits the party from pursuing its grievances through the court system. The Obama administration has recently taken note of these deficiencies and hardships. In 2009 the United States Department of the Treasury issued a white paper discussing financial regulatory reform entitled *A New Foundation: Rebuilding Financial Supervision and Regulation* which proposes:

The SEC should study the use of mandatory arbitration clauses in investor contracts. Broker-dealers generally require their customers to contract at account opening to arbitrate all disputes. Although arbitration may be a reasonable option for many consumers to accept after a dispute arises, mandating a particular venue and up-front method of adjudicating disputes—and eliminating access to courts—may unjustifiably undermine investor interests. We recommend legislation that would give the SEC clear authority to prohibit mandatory arbitration clauses in broker-dealer and investment advisory accounts with retail customers.⁸⁷

The troubles the Department of the Treasury refers to above are also found in cases involving incorporation by reference and appear to be the exact predicament opponents of the FAA predicted prior to its passage. Nevertheless, courts continue to enforce arbitration agreements where the contract at issue does not contain an arbitration clause, but instead referred to a contract that does.

⁸⁶ Even the Supreme Court has begrudgingly noted that arbitration's "informal procedures" do not provide all of the rights and protections found in civil trials. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648-49 (1985).

⁸⁷ DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.