TRIAL PRACTICE
Journal

Going Through the Motions: The Federal Arbitration Act's Limits on the Right to a Jury Trial and Discovery in Federal Court

By Stuart Widman

To preserve the speed and efficiencies of arbitration, the Federal Arbitration Act expressly provides that most pre-arbitration and post-arbitration district court proceedings are handled by motion. Jury and non-jury trials are the exception, and discovery is often not permitted. To qualify for a jury trial, certain conditions must be met. Where trials are permitted, the party resisting arbitration has the upper hand in determining whether the process is motion practice.

Litigators reflexively think that federal court litigation carries with it the right to a jury trial and discovery. That is to be expected, as Fed. R. Civ. P. 38(a) states that the right to trial by jury under the Seventh Amendment to the Constitution "shall be preserved to the parties inviolate." Similarly, Rules 26-37 provide the guidelines for the extensive and often time-consuming discovery prevalent in most federal court litigation. Thus, it is not surprising that lawyers who have a case under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.* (1947)[1], assume that it will also have those attributes of typical federal court litigation. But that is not the case.

FAA Section 6 Prescribes A Motion Practice To Protect Arbitration's Efficiencies

In matters brought in the federal district courts under the FAA, jury trials and discovery are the exception, not the norm. That is because of the short but sweeping provisions of FAA Section 6:

> Any *application* to the court hereunder shall be made and heard in the manner provided by law for *the making and hearing of motions*, except as otherwise herein expressly provided.

9 U.S.C. § 6 (emphasis added). That motion procedure is restated in most of the FAA sections that discuss district court litigation. The word "application" reappears in FAA Section 3 (to stay an existing case pending arbitration), Section 4 (to compel arbitration where there is no prior suit), Section 5 (to appoint arbitrators), Section 9 (to confirm an award), Section 10 (to vacate an award), and Section 11 (to modify or correct an award). Except for Section 4, those sections state that the district court shall consider the matter "on application of one of the parties" or "upon the application of either party," or that a party "may apply to the court." Further, FAA Section 12 specifies the process and time deadline for giving "notice of a motion" to vacate, modify or correct an award under FAA Sections 10 and 11, and FAA Section 13 lists the "moving" papers that must be filed in support of an application under FAA Sections 9 and 11. Only FAA Sections 4 and 7 (enforcing arbitrators' subpoenas) say that a party "may petition" or "upon petition" can request district court action, rather than making an application or motion.

This article discusses the limited rights to a jury trial and discovery in litigation in the district courts under the FAA. It shows that FAA Section 4, alone among the FAA provisions, expressly permits a jury trial, although, under that section and the case law, certain conditions must be met to qualify for it. This article also shows how, depending on the fact question raised, discovery may be permitted under FAA Sections 3 and 4, but is permitted in only limited circumstances under Sections 10 and 11 regarding award vacatur and modification. Thus, litigators who have FAA matters in federal district court will more likely find themselves going through the motions. There are strategic decisions that can be made to affect that and increase (or decrease) the likelihood that there will be a jury trial and discovery, if that is a desired goal. Caution must also be taken to use the right nomenclature in pleadings filed under the FAA so the limited statutory rights are not lost

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Arbitration is recognized as a faster and less encumbered means to resolve a dispute. Unless the parties otherwise agree, motion practice is less frequent, discovery is more limited, and the technical rules of evidence do not apply at the hearing. But the efficiencies of arbitration would be lost, or at least compromised, if the process to get into or out of arbitration[2] was as involved and lengthy as traditional federal court litigation. Accordingly, the FAA was drafted with a goal of protecting—some would say complementing—the speed and efficiencies of arbitration. Truncating the district

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court process to be akin to "the making and hearing of motions" therefore respects the overall goals of arbitration and avoids layering onto it slower- moving and more involved litigation.

The preservation by FAA Section 6 of the overall goals of arbitration is well recognized. The United States Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983), criticized the district court's refusal to proceed with a hearing as "plainly erroneous in view of Congress's clear intent in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." The Supreme Court recognized the "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Id.* at 23.

But what about the seemingly contradictory rights to a jury and discovery under the above-cited Federal Rules of Civil Procedure? The answer lies in Fed. R. Civ. P. 81(a)(3), which states:

> In proceedings under Title 9, U.S.C., relating to arbitration... these rules apply only to the extent that matters of procedure are not provided for in those statutes.[3]

Thus, for those FAA sections to which it applies, FAA Section 6 preempts the Federal Rules with respect to a jury trial and discovery. *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1257-1258 (7th Cir. 1992) (finding that the ostensible purpose of arbitration—litigation avoidance—would be frustrated if all due process rights attached to civil actions regarding arbitration); *Kruse v. Sands Brothers & Co., Ltd., et al.*, 226 F. Supp. 2d 484, 486 (S.D.N.Y. 2002) (policy behind Section 6 is "to expedite judicial treatment of matters pertaining to arbitration"). Also, Fed. R. Civ. P. 43(e) and 78 both provide that district courts may decide motions on the papers, particularly where it is necessary to "expedite its business." *Legion Insurance Company v. Insurance General Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987). Accordingly, the Federal Rules of Civil Procedure work in tandem with FAA Section 6 to accommodate the objectives of arbitration by providing for swift disposition of certain matters in the district court both before and after the actual arbitration hearing.

The Scope Of Trial And Discovery In Pre-Arbitration Proceedings Under FAA Sections 3-5

As mentioned above, FAA Sections 3-5 cover pre-arbitration matters in the district court: staying pending litigation while the parties arbitrate, compelling arbitration where there is no pre-existing litigation,[4] and appointing arbitrators. FAA Section 3 is only one sentence and provides that a court may, on application of one of the parties, stay pending litigation if the court is satisfied that the issues involved in the lawsuit are referable to arbitration under the parties' agreement. FAA Section 5, just slightly longer, is still straightforward, and provides that a court may designate and appoint an arbitrator or arbitrators, upon the application of either party to the controversy, if the parties' agreement does not provide any method for appointment or the method prescribed has failed for some reason. Thus, those two sections have no language which provides any reason not to look to FAA Section 6 for the process and mechanics of pursuing the requested relief. Indeed, as noted, FAA Section 6 covers "any application to the court hereunder," unless otherwise provided.

The general rule, therefore, is that a full evidentiary hearing is not permitted under FAA Sections 3 and 6.

Case law supports the use of FAA Section 6 in proceedings under FAA Section 3, and counsel should not expect a trial under Section 3. The Supreme Court in *Moses H. Cone* noted that a request for relief under FAA Section 3 "is to be treated procedurally as a motion." 460 U.S. at 23, n. 27. The Fifth Circuit in *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 340 (5th Cir. 1984), applied the principles of *Moses H. Cone* in holding that no evidentiary hearing was required under a FAA Section 3 proceeding in the district court. The issue in the district court was whether the arbitration clause was broad enough to cover the claims at issue. The Fifth Circuit noted that plaintiff had not alleged, nor did it appear, that disputed factual questions existed. In the absence of that, and also based upon Fed. R. Civ. P. 78, an evidentiary hearing was not required in order to honor the swift justice underlying the FAA. *Commerce Park*, 729 F.2d at 340.

Ten years after *Commerce Park*, the Eighth Circuit in *Daisy Manufacturing Co., Inc. v. NCR Corporation*, 29 F.3d 389, 395 (8th Cir. 1994), also followed *Moses H. Cone* and actually decided the issue that the district court did not adjudicate "in order to facilitate the prompt arbitration that Congress envisaged." Based solely on the papers, the court of appeals stayed the judicial proceeding and ordered arbitration, concluding that the arbitration clauses covered plaintiff's claims against defendant.[5] Had the court of appeals concluded that FAA Section 3 required a trial, the matter would have been remanded, but the Eighth Circuit acted "in accordance with the intent of the Arbitration Act for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Id.* at 396. The general rule, therefore, is that a full evidentiary hearing is not permitted under FAA Sections 3 and 6.

While *Commerce Park* and *Daisy Manufacturing* addressed the right to a trial under FAA Section 3, *Kiepper v. SLI, Inc., et al.*, 2002 WL 1058092

(3d Cir. 2002), indicates that discovery may be permitted under that provision even though it is motion practice. While defendant's stay of litigation was pending, the district court issued an order requiring the parties to complete discovery. The court of appeals construed the discovery order as tantamount to a ruling permitting the litigation to proceed and thereby denying the stay request under FAA Section 3. The Third Circuit vacated the district court's discovery order, criticizing it as unnecessarily subjecting the parties "to the very complexities, inconveniences and expenses of litigation that they determined to avoid." However, in remanding the matter back to the district court for an examination of the arbitration clause, the court of appeals stated: "Of course, to the extent discovery is appropriate on the arbitrability issue, we leave that to the sound discretion of the able district judge." Thus, *Kiepper* signals a restriction on merits discovery, but possible discovery on the arbitrability issue (or a scope question) under FAA Section 3. Under *Kiepper*, whether discovery is proper under FAA Section 3 depends upon the nature of the arbitrability issue. *See also, In the Matter Between Andros Compania Maritima, S.A. and Marc Rich & Co.*, 579 F.2d 691, 702 n. 15 (2nd Cir. 1978) (recognizing discovery on existence question). Permitting discovery on an existence question is consistent with the cases under FAA Sections 4 and 10, as discussed below.

The appointment of an arbitrator or arbitrators under FAA Section 5, another pre-arbitration proceeding, fits well with motion practice. It is unlikely to generate substantial factual issues that a district court cannot resolve on motion papers. Clearly, it would not raise the existence and scope questions under FAA Sections 3 and 4. *See Acequip Ltd. v. American Engineering Corporation*, 315 F.3d 151 (2d Cir. 2003), holding that a Section 5 proceeding does not require the district court to also determine whether the agreement is valid under FAA Section 4. Indeed, the district court may even ignore an existence issue in a Section 5 proceeding, since there is a "less stringent standard" governing a decision to appoint an arbitrator as opposed to a decision to compel arbitration. *Id.* at 156. Thus, the appointment of an arbitrator does not also mean that the parties must participate in the arbitration after such appointment. *Id.* at 157. As for discovery, although Fed. R. Civ. P. 81(a)(3) would also apply to Section 5, it is doubtful that any discovery would be necessary, and apparently none was allowed in *Acequip*.

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In contrast to Sections 3 and 5, FAA Section 4 (to compel arbitration) is much longer and discusses in much greater detail the route to a hearing on the "petition" or "application." Unlike Sections 3 and 5, Section 4:

- specifically provides that a jury trial may be demanded;
- states that the "court shall hear and determine such issue" if there is no jury demand;
- states that the "court shall proceed summarily to the trial thereof";
- discusses notice and service of the application; and
- provides where the court shall hold the hearing.

For Section 4, therefore, the last phrase of FAA Section 6—"except as otherwise herein expressly provided"—applies, potentially creating a full trial, and likely a process much more involved than the "making and hearing of motions." Much depends, however, on whether the jury is timely requested, by whom, and whether there are factual issues before the court. For example, if no jury is timely demanded, Section 4 provides that "the court shall hear and determine such issue," permitting the court to still consider the petition like a motion under Section 6. Thus, in *Starr Electric Co., Inc. v. Basic Construction Co.*, 586 F.Supp. 964 (M.D.N.C. 1982), only a non-jury trial was permitted on an existence question even though the defendant made a jury demand. The court refused the jury for two reasons. First, the jury demand was untimely, since it was filed after the return day of the notice of application as required by FAA Section 4. Defendant argued that its jury demand was timely filed under Fed. R. Civ. P. 38 (10 days after service of the last pleading), but the court held that under Fed. R. Civ. P. 81(a)(3), FAA Section 4 trumped Rule 38 on Title 9 matters. *Starr Electric*, 586 F.Supp. at 967. Second, the court refused to exercise its discretion under Fed R. Civ. P. 39(b) because granting such a request further delays any determination of the arbitrability question, thereby defeating the purpose of prompt disposition of FAA Section 4 issues. *Id.*

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Also, the right party must make the jury demand. By its terms, Section 4 does not give both the plaintiff and defendant the right to a jury. Rather, Section 4 gives only the party "alleged to be in default"—i.e., the defendant who failed, neglected, or refused to arbitrate under a written agreement—the right to request the jury trial. However, in *Moses H. Cone*, the Supreme Court stated that Mercury Construction's Section 4 application "was properly treated procedurally as a motion" even though the hospital, which failed or refused to arbitrate, had requested a jury trial. *Moses H. Cone*, 460 U.S. at 22. Nonetheless, the Supreme Court does briefly contrast the right to a trial under Section 4 with the motion procedure under Section 6. 460 U.S. at 23, n. 27.

Over forty years ago, the Second Circuit in *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365 (2nd Cir. 1965), observed that Section 4 contains the only express provisions that conflict with FAA Section 6. Nonetheless, *World Brilliance* held that issues of laches and waiver were not covered by FAA Section 4. Rather, the defense of waiver, not an issue relating to the making of the arbitration agreement, was properly left to the arbitrator. Similarly, the defense of laches, an issue traditionally decided by a judge sitting in equity without a jury, could be decided by the district court wholly on the papers. Thus, *World Brilliance* acknowledged the statutory breadth of FAA Section 4 and its potential for a jury trial, but carved out exceptions for issues that did not fall within the district court's initial consideration of existence or scope questions.

Twenty years ago, in *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987), the Seventh Circuit dissected an inconsistency in FAA Section 4 and further narrowed the district court's obligation to hold a jury trial. Rumbleseat refused to participate in the arbitration and made a demand for jury trial in response to the Post's lawsuit. 816 F.2d at 1193-94. In rejecting Rumbleseat's argument that the district judge should have ordered a jury trial on the scope question, the Seventh Circuit noted that FAA Section 4 provides both that:

- if a question is raised regarding the agreement to arbitrate, and the party alleged to be in default demands a jury trial, the district court "shall" conduct such a trial; but also that
- "upon being satisfied that the making of the agreement for arbitration...is not in issue, the court shall make an order directing the parties to" arbitrate.

Id. at 1196. In reconciling those provisions, the Seventh Circuit concluded that the party who refuses to arbitrate does not have a right to a jury trial, merely by demanding it, if there is no triable issue concerning the existence or scope of the agreement. The Seventh Circuit concluded, "if the arbitrability of the parties' dispute involves no questions or only legal questions, a jury trial would be pointless because its outcome could not affect the judge's decision on whether to order arbitration." *Id.* at 1196. Thus, the Seventh Circuit further limited the right to a jury trial to cases where there are genuine factual disputes. That approach also preserves the speed of arbitration.

FAA Section 4 does not expressly identify the evidentiary burden that a party seeking to avoid compelled arbitration must meet in order to obtain a jury trial.

Without engaging in the same statutory parsing as in *Saturday Evening Post*, the Third Circuit in *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, Ltd., 636 F.2d 51 (3rd Cir. 1980), elaborated the familiar Fed. R. Civ. P. 56 standard used to resolve summary judgment motions for determining whether a jury trial is required under FAA Section 4. Although the opinion does not say so, the inference is that Par-Knit, the party refusing arbitration, asked for a jury trial on the key existence issue. *Par-Knit* recognized that the party who was contesting the making of the agreement "has the right to have the issue presented to a jury," and that "if there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury." 636 F.2d at 54. But the *Par-Knit* court also recognized that the court could decide as a matter of law whether an agreement existed "when there is no genuine issue of fact concerning the formation of the agreement." *Id.* In vacating the district court's order staying the litigation pending arbitration, the Third Circuit concluded that Par-Knit was entitled to a jury trial because it adequately supported with affidavits its argument that an arbitration agreement did not exist. Under the circumstances presented in *Par-Knit*, "it is for a jury and not the court to make said determination." *Id.* at 55.

FAA Section 4 does not expressly identify the evidentiary burden that a party seeking to avoid compelled arbitration must meet in order to obtain a jury trial. *Tinder v. Pinkerton Security*, 305 F.3d 728, 735 (7th Cir. 2002). Nonetheless, following the *Par-Knit* guidelines, the weight of authority is that the party opposing arbitration must demonstrate that a genuine issue of material fact exists. *See Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997) (recognizing summary judgment standard where jury requested); *Doctor's Associates, Inc. v. Disthajo*, 107 F.3d 126, 129-30 (2nd Cir. 1997) (affirming district court's decision to proceed without a jury trial and rule on the arbitrability issues as a matter of law); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d

222, 231 n. 36 (3rd Cir. 1997); *Dillard v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992); *Smarttext Corporation v. Interland, Inc., et al.*, 296 F.Supp. 2d 1257 (D. Kan. 2003) (applying Section 4 to motion to stop existing litigation and compel arbitration, court orders jury trial on existence issue where plaintiff raised genuine issues of fact); *Topf v. Warnaco, Inc.*, 942 F.Supp. 762 (D. Conn. 1996) (applying summary judgment standard, court denies plaintiff jury trial because plaintiff fails to show triable fact issue). Thus, FAA Section 4 provides two alternatives to the motion practice under FAA Section 6: jury trial and non-jury trial, depending on whether (i) a jury demand is properly made and (ii) a genuine fact question can be established by the papers. Where genuine fact issues are raised by the papers but no jury that has been demanded, under the Section 4 language discussed in *Saturday Evening Post* above, the court "shall proceed summarily to the trial thereof." *Bensadoun v. Jobe-Riat, et al.*, 316 F.3d 171 (2nd Cir. 2003) (remand for possible trial on existence question which trial court erroneously made on a "sparse record"); *McAllister Brothers, Inc. v. A&S Transportation Co., et al.*, 621 F.2d 519 (2nd Cir. 1980) (non-jury trial on existence question); *A/S Custodia v. Lessin International Inc.*, 503 F.2d 318 (2nd Cir. 1974) ("full trial" on existence question although no indication that jury demanded); *Interocean Shipping Company v. National Shipping & Trading Corporation, et al.*, 462 F.2d 673 (2nd Cir. 1972) ("full trial" on existence question). *See also, Institut Pasteur v. Chiron Corp.*, 315 F.Supp. 2d 33, 40 (D.D.C. 2004) (applying Rule 56 standard. "court must proceed summarily to the trial" on existence question); *Brown v. Dorsey & Whitney, LLP*, 267 F.Supp. 2d 61, 78 n. 12 (D.D.C. 2003) ("proceeding summarily means that the court initially determines whether material issues of fact are disputed and, if such factual disputes exist, then conducts an expedited evidentiary hearing to resolve the dispute," although court concluded no need for a trial on existence issue); *In The Matter of Arbitration Between Hidrocarburos*, 453 F.Supp. 160, 173 (S.D.N.Y. 1978) (since contract is maritime and within admiralty jurisdiction, the trial is non-jury); *Tubos de Acero de Mexico v. Dynamic Shipping, Inc.*, 249 F.Supp. 583, 592 (S.D.N.Y. 1966) ("early trial to be held before this court").

Although there is a clear statutory difference, there does not seem to be a substantive reason for the disparate treatment between FAA Section 3, which does not expressly permit a jury trial, and FAA Section 4, which does. The primary factual and legal issues involved in both proceedings—existence and scope questions—are the same.

Although there is a clear statutory difference, there does not seem to be a substantive reason for the disparate treatment between FAA Section 3, which does not expressly permit a jury trial, and FAA Section 4, which does. The primary factual and legal issues involved in both proceedings—existence and scope questions—are the same. Nonetheless, only Section 3 is limited to the motion practice of FAA Section 6. There are some strategic considerations arising from that, and winning the race to the courthouse might play an important role. For example, a party that is resisting arbitration and does not want to risk a full trial in the district court could first file a lawsuit in order to be confronted only with a Section 3 proceeding. On the other hand, a party that wants arbitration and believes it is best to have either a jury or non-jury trial might want to initiate a Section 4 proceeding before the other side filed litigation in order to avoid Section 6's motion practice. But, as shown above, it is not the plaintiff's prerogative to ask for a jury under a Section 4 proceeding. Thus, in the end, the party resisting arbitration has the greater control in determining whether the procedure is by trial or motion.

What about discovery in Section 4 proceedings? Existence and scope questions can raise significant disputes about offer and acceptance, actual or apparent authority, principal and agent, consideration, intent, and other fundamental contract issues. First, as noted above, under Fed. R. Civ. P. 8l(a)(3), federal discovery rules should apply to FAA Section 4 proceedings in the district court because Section 4 says nothing about discovery. Also, discovery should be permitted where there are important factual issues to be developed. In *Doctor's Associates, Inc. v. Disthajo, et al.*, 107 F.3d at 129-30, the trial court permitted discovery on the defenses of fraudulent inducement and waiver where the prior remand asked the district court to revisit and determine additional factual issues. More recently, a plaintiff was "entitled" to take discovery on an existence question in response to a motion to compel arbitration, although the matter was perhaps more properly a Section 3 proceeding because plaintiff had earlier filed a lawsuit. *Cunningham v. Van Ru Credit Corp.*, 2006 WL 2056576 (E.D. Mich. 2006). Also, in *Toppings, et al. v. Meritech Mortgage Services, Inc., et al.*, 209 F.R.D. 375, 376 (S.D.W.Va. 2001), the court allowed "substantial discovery" on plaintiffs unconscionability and mutuality challenges to the arbitration agreement. Similarly, the district court in *In The Matter of Hidrocarburos,*

supra, 453 F.Supp. at 173, permitted "in case of need" some "appropriate discovery" on the issue of whether an individual defendant was bound to arbitrate because his corporations were his alter egos and their veils should be pierced. Such limited, or even expedited, discovery is justified by the overriding goal of the FAA—to protect and preserve the efficiencies of arbitration. Excessively lengthy and time-consuming discovery would be contrary to the Section 4 command to "proceed summarily to the trial thereof" whether it is a jury or non-jury proceeding.

The Scope Of Trial And Discovery In Post-Arbitration Proceedings Under FAA Sections 9-11

As noted above, FAA Sections 9 (confirmation of award), 10 (vacatur of award), and 11 (modification or correction of award) are all initiated by an "application" of a party to the arbitration.[6] On their face, therefore, each would be subject to the motion procedure specified in FAA Section 6. Indeed, a Section 9 proceeding is intended to be particularly swift. Provided that the application to confirm is made within one year of the issuance of the award, the "court must grant" the application unless the opposing party has timely filed an application to vacate, modify or correct the award.

Existence and scope questions can raise significant disputes about offer and acceptance, actual or apparent authority, principal and agent, consideration, intent, and other fundamental contract issues.

If your client wins the arbitration, this truncated procedure is probably good news. You want to turn the award into a judgment as quickly as possible, and the surest way to do that is by eliminating or restricting your opponent's collateral attacks. And the procedural limits help you do that. With that clear directive on the merits of an application, most of FAA Section 9 addresses venue and service of the application, repeating verbatim part of FAA Section 12 dealing with service. Given the limited scope of the proceeding under Section 9, trial and discovery are not necessary, and the matter can and should be handled as in "the making and hearing of motions."

The cases are mixed as to whether a trial or evidentiary hearing is permitted under FAA Sections 10 and 11, although the current trend is to apply FAA Section 6 to them. In *Health Services Management*, 975 F.2d at 1258, the Section 10 Application to Vacate was "correctly treat[ed]...as a motion." The Seventh Circuit noted that, in such motion practice, "it behooves the mov-

ing party ... [to] provide the Court with all matters that it desires the Court to consider in support ...." *Id.* at n.3. In *O.R. Securities, Inc., v. Professional Planning Associates Inc.*, 857 F.2d 742, 746, n.3 (11th Cir. 1988), the Court of Appeals, citing Fed. R. Civ. P. 43(e) and 78, approved the district court's summary proceeding of a Section 10 motion to vacate. Also relying on Fed. R. Civ. P. 43(e) and 78, the Fifth Circuit in *Legion Insurance*, 822 F.2d at 543, agreed that there is no automatic right to a full hearing on either Section 10 or 11 applications. Nonetheless, in *dicta*, the *Legion Insurance* court noted that some vacatur motions, such as claims based on arbitrator partiality or misbehavior, "may require evidentiary hearings outside the scope of the pleadings and arbitration record," *Id.* at 542-43. But the *Legion Insurance* appeal only raised issues—arbitrators exceeding authority, award exceeding damages requested, adequacy of evidence, and miscalculation of damages—that could be decided by the district court solely on the record submitted by the parties. A restricted inquiry into factual issues effectuates the policy of expeditious arbitration under *Moses H. Cone. Id.* at 543. *See also, Austin South I, Ltd v Barton-Marlow Co., et al.*, 799 F.Supp. 1135, 1144 (M.D. Fla. 1992) (citing *O.R. Securities* and *Legion Insurance*, evidentiary hearing was not warranted on Section 10 claim where plaintiff presented no facts suggesting that the record needed amplification); *Papenfuss, et al. v. Abe W. Mathews Engineering Co.*, 397 F.Supp. 165 (W.D. Wis. 1975) (denying jury trial on a Section 11 proceeding where plaintiff did not make a reasonable showing of fraud in the arbitration proceeding).

On the other hand, evidentiary hearings were warranted and approved in *In The Matter of Arbitration Between Sanko SS Co., Ltd. and Cook Industries Inc.*, 495 F.2d 1260 (2nd Cir. 1973), where the motion to vacate raised issues of arbitrator bias and inadequacy of disclosures, and *Campbell v. American Fabrics Co.*, 168 F.2d 959 (2nd Cir. 1948), allowing a non-jury trial on the issue of the adequacy of the arbitrator's valuation. Thus, with respect to trials, FAA Sections 10 and 11 may also be treated like FAA Section 4—courts will hold evidentiary hearings if a genuine issue of fact has been raised and the record is insufficient to enable the court to decide the matter. Notably, that is a judicial gloss unique to FAA Sections 10 and 11 that has not also been applied to other sections of the FAA, such as Section 3, that are also expressly subject to FAA Section 6. Clearly, there is not totally consistent treatment of matters raised under FAA sections that are, by statute, subject to FAA Section 6.

Discovery under FAA Sections 10 and 11 may be permitted, again depending on whether facts outside the record are necessary to prove the grounds asserted in the motion to vacate or modify. Indeed, Fed. R. Civ. P. 81(a)(3) should apply here, too. If it is permitted, however, courts generally draw the line at deposing the arbitrators. For example, in *In The Matter of Andros Compania Maritima S.A. and Mark Rich & Co.*, 579 F.2d 691 (2nd Cir. 1978), the court of appeals affirmed the district court's denial of the depositions of all three arbitrators and held that the district court had fairly decided the vacatur motion from the papers presented. Although recognizing that the discovery rules of the Federal Rules of Civil Procedure are generally applicable to Title 9 proceedings, 579 F.2d at 702, the court held that questioning of arbitrators should be limited to situations "where clear evidence of impropriety has been presented," but not where the discovery is about the merits of the dispute that had been arbitrated. *Id. Andres* was cited approvingly in *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 430 (9th Cir. 1996), also finding that "depositions of arbitrators are repeatedly condemned by the courts" because the federal discovery rules do not apply to "post hoc" questioning of arbitrators. *See also, Legion Insurance*, 822 F.2d at 543, criticizing "time-consuming, costly discovery" where neither arbitrator partiality nor prejudicial misbehavior were in issue; *Fukaya Trading Company S. A. v. Eastern Marine Corp.*, 322 F.Supp. 278 (E.D. La. 1971) (no depositions of arbitrators where no objective evidence of mistake or prejudice). On the other hand, there is a better chance to depose the panel where the vacatur issue is arbitrator misconduct, since it is unlikely that the supporting facts would be apparent from the record. *Campbell v. American Fabrics Co.*, 168 F.2d at 961 (deposition of arbitrator on written questions).

With respect to trials, FAA Sections 10 and 11 may also be treated like FAA Section 4—courts will hold evidentiary hearings if a genuine issue of fact has been raised.

Thus, on the issue of discovery, the federal courts have treated FAA Sections 10 and 11 like FAA Sections 3 and 4. Discovery may be permitted, depending on the issue raised and the extent to which the party seeking discovery has established in the papers a justifiable basis for it. Even discovery of the arbitrators may be permitted in limited circumstances. Clearly though, the Federal Rules of discovery, although technically applicable to proceedings under FAA Sections 10 and 11, do not have the same significant role that they do in regular court litigation.

Using The Proper Form May Make A Substantive Difference

In matters subject to FAA Section 6, counsel must be alert to avoid land mines of improper form. In *Kruse*, 226 F.Supp. 2d at 486-487, addressing both

Sections 9 and 10 petitions, the court summarily confirmed the award because respondent's application to vacate was improperly entitled "Counter-Petition to Vacate." Applying FAA Section 6 strictly as requiring a party to proceed by motion, not a complaint, the court held that respondent's cross-petition to vacate was "not the legal equivalent of a Motion to Vacate." Moreover, the court would not consider a further vacatur request because it would be untimely.

Other cases have held, however, that the form of the submissions is not controlling. In *O.R. Securities*, 857 F.2d at 745-746, the court stated that the proper procedure to seek vacatur of an arbitration award under FAA Section 10 is to file a motion to vacate pursuant to FAA Section 6, as amplified by Fed. R. Civ. P. 7(b). The court also noted that "'the manner in which an action to vacate an arbitration award is made is obviously important, for the nature of the proceeding affects the burdens of the various parties as well as the rule of decision to be applied by the district court." Nonetheless, the court held that the district court did not err in considering the merits of O.R. Securities' request even though it was called a "Complaint and Application to Vacate Arbitration Award," because "an erroneous nomenclature does not prevent the court from recognizing the true nature of a motion." *Id.* at 746. In the end, therefore, the *O.R. Securities* court pulled back from the strict application of FAA Section 6. Similarly showing such flexibility, the district court in *Brown v. Dorsey & Whitney LLP*, 267 F.Supp. at 66-67, in addressing a "Motion to Dismiss and Compel Arbitration," noted that a Section 4 petition can be made through the use of a motion to dismiss because "strict nomenclature regarding how a motion is titled is not required," and that hypertechnical pleading requirements would not serve the FAA's objectives of litigation avoidance, citing *Thompson v. Nienaber*, 239 F.Supp. 2d 478, 483 (D.N.J. 2002).

Thus, counsel proceeding under those FAA sections that are subject to Section 6 should identify their applications as "motion." For a Section 4 proceeding, it is less clear because Section 6 does not apply and Section 4 uses both "petition" and "application" numerous times. Indeed, since more extensive litigation, possibly including a jury trial and discovery, might ensue under a Section 4 proceeding, calling the initial pleading a "complaint" would not seem inappropriate.

Conclusion

For pre-arbitration and post-arbitration litigation under FAA Sections 3, 5, 9, 10 and 11, the procedure in the federal district court is motion practice under FAA Section 6. In certain circumstances, however, courts have permitted trials on post-arbitration matters raised under Sections 10 and 11, provided that genuine fact issues on matters beyond the record are shown. That is a judicially-created, not statutory, possibility. Since Sections 3, 10 and 11 are subject to the Federal discovery rules pursuant to Fed. R. Civ. P. 81(a)(3), selected and limited discovery may be permitted, provided that it does not jeopardize the goal of expedited proceedings or intrude upon the arbitrators' deliberations.

However, FAA Section 4, because of its express provisions, is not similarly subject to FAA Section 6. Jury or non-jury trials may occur if there is a proper jury request and/or the court is satisfied that there are genuine issues of material fact, akin to the summary judgment standard under Fed. R. Civ. P. 56. Similarly, discovery is also more likely under Section 4 proceedings, although the court may reign in expanded discovery so the parties can proceed summarily to the trial of the existence or scope issues that may be raised.

Overall, FAA proceedings in the federal district courts are not intended to become full blown litigation. Achieving that goal is important in order to protect and preserve the primary benefit of arbitration—swifter justice.

Endnotes

[1] Technical amendments to FAA Section 10—the "comma bill"—were made in 2002.

[2] FAA Sections 3, 4, and 5 govern the steps to get into arbitration via district court approval; FAA Sections 9, 10, 11, 12, and 13 govern the steps getting out of arbitration via district court review.

[3] *See also*, Fed. R. Civ. P. 1: "These rules govern the procedure in the United States district courts in all suits of a civil nature..., with the exceptions stated in Rule 81.

[4] Thus, FAA Sections 3 and 4 provide two parallel devices for enforcing an arbitration agreement: a stay of litigation that raises a dispute referable to arbitration, and a pre-emptive request to engage in arbitration. 9 U.S.C. §§ 3, 4. *Moses H. Cone*, 460 U.S. at 22.

[5] There are two predominant arbitrability questions facing a district court under FAA Sections 3 and 4: (i) the existence question: whether there is an arbitration agreement between the parties, and (ii) the scope question: whether the arbitration agreement includes or covers the type of dispute between the parties. *Daisy Manufacturing*, 29 F.3d at 392. *Commerce Park* and *Daisy Manufacturing* raised scope questions. Cases *infra* also discuss existence questions.

[6] Arbitration awards are not judgments. If necessary, the winner must have a court confirm the award and turn it into a judgment. Conversely, the loser must ask the court to vacate the award and prevent the entry of judgment.