UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ST SHIPPING & TRANSPORT PTE, LTD.,

Petitioner,

-against-

AGATHONISSOS SPECIAL MARITIME ENTERPRISE,

Respondent.

15 Civ. 4983 (AT)

MEMORANDUM AND ORDER

ANALISA TORRES, District Judge:

Petitioner, ST Shipping & Transport PTE, Ltd., seeks to vacate an arbitration award issued on March 27, 2015 against Petitioner by a panel of the Society of Maritime Arbitrators, Inc. Respondent, Agathonissos Special Martime Enterprise, opposes vacatur and moves for confirmation of the award. For the reasons stated below, Petitioner's motion to vacate is DENIED, and Respondent's motion to confirm is GRANTED.

BACKGROUND

I. The Underlying Events

The following facts are undisputed by the parties. Petitioner, ST Shipping & Transport PTE, Ltd. ("ST Shipping"), is a Singapore company with an office in Singapore. Petition ¶ 1, ECF No. 8. Respondent, Agathonissos Special Martime Enterprise ("ASME"), is a Greek company with an office in Greece. *Id.* ¶ 2. ST Shipping and ASME entered into a charter party dated February 27, 2014, under which ST Shipping chartered a vessel owned by ASME (the "Vessel") to transport crude oil from Uruguay to Chile. *Id.* ¶ 5; Tanker Voyage Charter Party (hereinafter "Charter Party"), Aff. of Claurisse Campanale-Orozco ("Orozco Aff."), Ex. 9, ECF No. 15. Under the terms of the charter party, ASME was to pay demurrage for any time used for loading and discharging cargo that exceeded the amount of laytime agreed to in the charter

party.[1] Charter Party, Part II ¶¶ 7-8. The charter party provided for a total of 72 hours of laytime and demurrage at a rate of $25,000 per day. Charter Party, Part I ¶¶ H, I.

On March 11, 2014, the Vessel arrived at a designated location near La Paloma, Uruguay and tendered a Notice of Readiness ("NOR"), indicating that it was ready for loading operations. *Id.* ¶¶ 6, 8. Captain Antonios Michail was the Vessel's operator (the "Operator"). *Id.* ¶ 25. A few hours later, while at the designated location, the Vessel collided with a supply boat and sustained a puncture of approximately 400 millimeters in length on one of its ballast tanks. *Id.* ¶ 9. The next day, the Vessel's surveyor determined that the Vessel was prohibited from loading cargo or departing Uruguayan waters until repairs were finished. *Id.* ¶ 10. After repairs were completed, the Vessel returned to the designated location on March 21, 2014 and tendered an NOR later that day. *Id.* ¶¶ 11; Cross-Petition ¶ 37, ECF No. 13. On March 26, 2014, after completing loading operations, the Vessel departed for Chile. Petition ¶ 12. On April 5, 2014, the Vessel arrived near Quintero, Chile to discharge its cargo and tendered an NOR that same day. *Id.* ¶ 13. The NOR was accepted on May 3, 2014, and the discharge was completed the next day. *Id.* ¶¶ 13-14.

II. The Arbitration

On May 6, 2014, ASME notified ST Shipping by letter that it intended to commence arbitration proceedings and claimed damages resulting from the collision on March 11, 2014 (the "March 11 Collision"), including for lost time, repair costs and surveyor fees. *Id.* ¶ 15. On May 29, 2014, ASME commenced the arbitration pursuant to Clause 24 of the charter party, and an

[1] "Laytime" refers to the period of time allowed to the charterer under the charter party for loading and unloading the vessel. *A/S Dampskibssetskabet Torm v. United States*, 64 F. Supp. 2d 298, 311 (S.D.N.Y. 1999) (explaining that the allowance of laytime "protects the shipowner from its vessel lying dormant, waiting for cargo to be loaded or unloaded"). Generally, if the charterer exceeds the agreed upon laytime, the charterer is liable to the shipowner for "demurrage"—that is, liquidated damages measured at an hourly or daily rate. *Id.*

arbitration panel was appointed to oversee the proceedings. *Id.* ¶¶ 17-19. In October 2014, ASME amended its notice of arbitration to seek a partial final award for demurrage at the loading and discharging ports in Uruguay and Chile. *Id.* ¶ 21. The demurrage claims covered three time periods: (1) from the March 11 NOR to the March 21 NOR ("Period 1"); (2) from the March 21 NOR to completion of loading on March 26 ("Period 2"); and (3) from the April 5 NOR until completion of discharge on May 4 ("Period 3"). *Id.* ¶ 24.

Anticipating that ST Shipping would dispute demurrage during Period 1 on the basis that it resulted from the Operator's negligence during the March 11 Collision, ASME moved for a partial final award for Periods 2 and 3 only, arguing that delays during those periods were unrelated to the March 11 Collision. *In re ASME and ST Shipping Arbitration*, SMA No. 4248, 2015 WL 1520029, at *3 (S.M.A.A.S. Mar. 27, 2015). ST Shipping countered that the delays in Periods 2 and 3 were in fact attributable to the March 11 Collision, and that "incomplete discovery and evidence on the record" on those factual issues precluded the partial final award sought by ASME. Orozco Decl., Ex. 6 at 13, 17. Specifically, ST Shipping noted that ASME had "failed to produce the majority of the requested documents to date," including the "rough deck and engine log books of the Vessel, the Vessel's voyage data recorder and any risk assessments and check lists" relating to the Vessel's operations with the supply boat. *Id.* at 9. Although a deposition of the Operator had been conducted, ST Shipping argued that the deposition did not afford it an adequate opportunity to question the Operator because: (1) it was conducted via videoconference; and (2) certain documents relevant to the deposition had not been produced as of the date of the deposition. *Id.* at 9-10; *but see* Orozco Decl. Ex. 7 at 20 (noting that ST Shipping cross examined the Operator for "nearly three hours" and asked "nothing of [the deponent] relating to the post-repair period"). Nonetheless, both parties'

briefing included citations to the factual record adduced to date, *see* Orozco Decl. Ex. 7 at 18-19 (describing materials produced by ASME), including, *inter alia*, the NOR's and other notices tendered by the Vessel, the deposition testimony of the Operator, correspondence between the parties, the "official" deck and engine log books, and a declaration from the Operator, submitted as an exhibit to ASME's reply brief, addressing the alleged delays during Period 3 (the "Reply Declaration"). *See* Orozco Decl., Exs. 5-8.

On March 27, 2015, the three-member arbitration panel issued its decision, with two members of the panel finding in favor of ASME and one member dissenting. *In re ASME*, 2015 WL 1520029. In determining whether ASME was entitled to demurrage for Periods 2 and 3, the majority stated that the "issue" was whether demurrage for those periods could be awarded without first holding a hearing to determine whether "the alleged unseaworthiness or fault of [the Vessel or ASME] caused and/or contributed" to the March 11 Collision and resulting delays. *In re ASME*, 2015 WL 1520029, at *4. Articulating the relevant standard, the majority stated that ASME "has the initial burden of proving its prima facie claim for demurrage by establishing through notices of readiness, port logs, vessel logs and laytime calculations that time consumed in loading and discharging the cargo exceeded the agreed laytime." *Id.* ST Shipping would be liable to pay demurrage "except 1) where a specific provision of a charter party exonerates [ST Shipping] from liability; 2) where the delay is the fault of [ASME] or those for whom it is responsible; and 3) where the delay is caused by *vis major*." *Id.* The majority concluded that ASME had met its burden to make out a *prima facie* case that it was owed demurrage for Periods 2 and 3. *Id.* at *5. As for ST Shipping, the majority found that "[o]ther than repeatedly contending that the collision . . . on March 11 proximately caused all delays arising during Periods 1 through 3," ST Shipping had not "submitted any statements, declarations or

documentation whatsoever" to "explain and/or rebut" ASME's submissions, including the Operator's declaration. *Id.* The majority reasoned that the case was "essentially a burdens of proof dispute" and that "[ASME] has carried its burden with respect to its claims for demurrage during Periods 2 and 3, whereas [ST Shipping has not]." *Id.* Accordingly, without a holding a hearing on the March 11 Collision, the majority awarded ASME damages and interest in the amount of $708,283.54. *Id.*

The dissent disagreed with the majority's assessment of the record evidence, finding that ST Shipping had shown that the delays during Periods 2 and 3 were "directly related to and substantially affected" by the March 11 Collision, or at the very least, that ST Shipping had raised genuine issues of material fact precluding a final award. *Id.* at *6. According to the dissent, a full hearing would have allowed the panel to "better, more accurately and more fairly apply the burdens spoken of," and the failure to hold a hearing "incorrectly and unnecessarily deprives [ST Shipping] of this important right in this factually[,] legally and contractually complex case." *Id.*

DISCUSSION

I. Review of Arbitration Awards

A court reviewing an arbitration award under the Federal Arbitration Act "can confirm and/or vacate the award, either in whole or in part." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006). However, such review is not *de novo*, but instead "'severely limited,' so as not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71-72 (2d Cir. 2012) (citations and internal quotation marks omitted) (quoting *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009)). As such,

"in order to obtain vacatur of the decision of an arbitral panel under the FAA, a party must clear a high hurdle." *Id.* (internal quotation marks omitted); *see also Carina Intern. Shipping Corp. v. Adam Maritime Corp.*, 961 F. Supp. 559, 563 (S.D.N.Y. 1997) ("A party seeking to overturn an arbitral award is under a heavy burden to prove that the standards for such relief have been met, especially since it is the Second Circuit's policy to read very narrowly the courts' authority to vacate arbitration awards pursuant to Section 10[a] of the FAA." (alteration in original)); *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F. Supp. 2d 506, 515 (S.D.N.Y. 2000) ("The party seeking to vacate the award bears the burden of proof.").

Section 10 of the FAA provides specific grounds upon which an arbitration award may be vacated by a district court. 9 U.S.C. § 10. Section 10(a)(3), relevant here, provides that vacatur is permitted where, *inter alia*, "the arbitrators were guilty of misconduct in refusing to . . . hear evidence pertinent and material to the controversy." *Id.* In determining whether to vacate an arbitration award under Section 10(a)(3), the district court is not to "superintend arbitration proceedings," but must instead determine whether "the misconduct . . . amount[ed] to a denial of fundamental fairness of the arbitration proceeding." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (citations omitted). Although arbitrators "must give each of the parties to the dispute an adequate opportunity to present its evidence and argument," they are not required to hear all evidence offered by a party or "follow all the niceties observed by the federal courts." *Id.* at 120; *see also Areca, Inc. v. Oppenheimer & Co., Inc.*, 960 F. Supp. 52, 55 (S.D.N.Y. 1997) ("It is well settled that arbitrators are afforded broad discretion to determine whether to hear evidence."). "Only the most egregious error which adversely affects the rights of a party constitutes misconduct and [e]rroneous exclusion of evidence does not in itself provide a basis for vacating the award absent substantial harm to the moving party." *In re Arbitration Between*

Interdigital Communications Corp. v. Samsung Electronics Co., 528 F. Supp. 2d 340, 354 (S.D.N.Y. 2007) (alteration in original) (internal quotation marks omitted) (quoting *In re Consolidated Arbitrations Between A.S. Seateam v. Texaco Panama, Inc.*, No. 97 Civ. 214, 1997 WL 256949, at *7 (S.D.N.Y. May 16, 1997)).

Courts have found a denial of fundamental fairness under Section 10(a)(3) where the arbitrator "to the prejudice of one of the parties, reject[ed] consideration of relevant evidence essential to the adjudication of a fundamental issue in dispute, and the party would otherwise be deprived of sufficient opportunity to present proof of a claim or defense." *Fairchild Corp. v. Alcoa, Inc.*, 510 F. Supp. 2d 280, 287 (S.D.N.Y. 2007). However, there is no brightline rule requiring arbitrators to conduct oral hearings. *In re Arbitration between Griffin Indus., Inc. & Petrojam, Ltd.*, 58 F. Supp. 2d 212, 219 (S.D.N.Y. 1999); *see also Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 209 (S.D.N.Y. 2002) (citation omitted); *NYKCool A.B. v. Pacific Fruit, Inc.*, 507 F. App'x 83, 88-89 (2d Cir. 2013) (summary order). Rather, "[a]s long as an arbitrator's choice to render a decision based solely on documentary evidence is reasonable, and does not render the proceeding 'fundamentally unfair,' the arbitrator is acting within the liberal sphere of permissible discretion." *Griffin*, 58 F. Supp. 2d at 220. "The key issue is whether the arbitral panel 'allow[ed] each party an adequate opportunity to present its evidence and argument.'" *Companion Prop. & Cas Ins. Co. v. Allied Provident Ins., Inc.*, No. 13 Civ. 7865, 2014 WL 4804466, at *10 (S.D.N.Y. Sept. 26, 2014) (alteration in original) (quoting *Yonir Techs., Inc.*, 244 F. Supp. 2d at 209).

II. Application

ST Shipping urges the Court to vacate the March 27, 2015 arbitration award pursuant to 9 U.S.C. § 10(a)(3), arguing that the arbitration panel, in refusing to hear "evidence pertinent and

material to the controversy," engaged in misconduct amounting to a denial of fundamental fairness. ECF No. 6 at 6. Specifically, ST Shipping points to the panel's failure to: (1) afford an opportunity to respond to the Reply Declaration or cross-examine the declarant; and (2) provide for "reasonable discovery" and hold a "full and fair hearing on the claims before it." *Id.*

As to the former, ST Shipping does not show that it ever attempted to submit evidence regarding the Reply Declaration, much less that any such evidence was refused by the panel. Nor does ST Shipping show that it requested an opportunity to cross-examine the declarant; that it objected to the panel's consideration of the declaration; or that the panel restricted what the parties were permitted to submit in connection with the partial final award. More than four months elapsed between the filing of the Reply Declaration and the issuance of the arbitration award, *see* Orozco Decl., Exs. 1, 8, and the Court cannot conclude on the present factual record that ST Shipping's lack of a response to the Reply Declaration was due to the panel's refusal to hear such evidence rather than ST Shipping's inaction. *See Yonir Tech.*, 244 F. Supp. 2d at 210 ("Plaintiffs have only themselves to blame if they did not include relevant material in their written submissions, against some possibility that oral hearings would be held."). Indeed, in its opinion, the majority signaled its willingness to entertain such evidence, but noted that ST Shipping had not submitted any. *See In re ASME*, 2015 WL 1520029, at *5 ("[ST Shipping] has not submitted any statements, declarations or documentation whatsoever . . . that explain and/or rebut . . . the [Reply Declaration], regarding the delays at La Paloma and Quintera."). As such, ST Shipping has not carried its burden to show that the panel engaged in misconduct as to the Reply Declaration amounting to a denial of fundamental fairness.

ST Shipping's remaining objections amount to the contention that the panel engaged in misconduct when it rendered a decision in ASME's favor before allowing further discovery and

holding a hearing, ostensibly on the question of ASME's responsibility for the March 11 Collision and its effect on the demurrage claims for Periods 2 and 3. As a threshold matter, an arbitration panel has no obligation to hold an oral hearing and may decide matters, as discussed *supra*, on the basis of written submissions. *See, e.g.*, *Griffin Indus.*, 58 F. Supp. 2d at 219. ST Shipping cannot, therefore, prevail simply by pointing to the absence of an oral hearing. Instead, ST Shipping must show that the panel failed to allow ST Shipping "an adequate opportunity to present its evidence and argument" when it issued the May 27, 2015 award on the basis of the written submissions and factual record before it, without holding a hearing or allowing further discovery. *Tempo Shain*, 120 F.3d at 20. This ST Shipping does not do. When the arbitration panel issued its March 27, 2015 award, it had the benefit of the parties' written submissions and the substantial factual record adduced to date. This record included, *inter alia*, NOR's and other notices tendered by the Vessel, the Operator's deposition testimony and declaration, correspondence between the parties, and the "official" deck and engine log books. *See supra* at 3-4. Although further discovery and an evidentiary hearing may well have helped ST Shipping refine its theory of the case, the arbitration panel was within its authority to issue a partial final award on the basis that ST Shipping had not, in the panel's judgment, produced any evidence whatsoever to support its contention that the delays during Periods 2 and 3 were attributable to the March 11 Collision, despite the substantial discovery conducted to date.[2] Indeed, that the dissent concluded based on the same factual record that ST Shipping had shown that the delays were "directly related to and substantially affected" by the March 11 Collision supports the conclusion that the panel had sufficient evidence on which to make such a determination. *In re*

[2] Although ST Shipping may quarrel with the majority's assessment of the evidence and its burdens of proof analysis, such quarrel does not pertain to the panel's willingness to hear "evidence pertinent and material to the controversy," but rather its interpretation and application of the law, which ST Shipping has not challenged in this action.

ASME, 2015 WL 1520029, at *6.

Moreover, beyond asserting that a hearing and further discovery was necessary for ST Shipping to defend against the demurrage claims, ST Shipping does not identify with any particularity, in its briefing before this Court, what evidence further discovery and a hearing would have adduced, such that ST Shipping was prejudiced by the panel's decision to issue an award before allowing further development of the record. *See Interdigal Comm'ncs*, 528 F. Supp. 2d at 354 ("[E]xclusion of evidence does not in itself provide a basis for vacating the award absent substantial harm to the moving party."); *NYKCool A.B.*, 507 F. App'x at 88-89 ("Pacific Fruit identifies no reason on appeal why an evidentiary hearing would have helped the arbitration panel resolve the issue of joint and several liability in Charterers' favor.").

In sum, given the "high hurdle" that a party must clear to obtain vacatur of an arbitration award, *Scandinavian Reinsurance Co.*, 668 F.3d at 72, and the "broad discretion" given to arbitrators "to determine whether to hear evidence," *Areca, Inc.*, 960 F. Supp. at 55, the Court cannot conclude that the panel's decision to issue the March 27, 2015 award without permitting further discovery and a hearing amounted to a denial of fundamental fairness. Accordingly, Petitioner's motion to vacate is DENIED. Moreover, because the Court has not identified any other ground for vacating, modifying or correcting the March 27, 2015 arbitration award, Respondent's motion to confirm the award is GRANTED. *See* 9 U.S.C. § 9. Respondent's application for attorneys' fees and costs is DENIED.

CONCLUSION

For the reasons stated above, Petitioner's motion to vacate is DENIED, and Respondent's motion to confirm is GRANTED. The Clerk of Court is directed to terminate the motion at ECF No. 24 and to close the case.

SO ORDERED.

Dated: June 6, 2016
New York, New York

ANALISA TORRES
United States District Judge