Alert

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COZEN O'CONNOR

U.S. Supreme Court Rules Safe Berth Clause is a Warranty

On March 30, 2020, in *Citgo Asphalt Refining Co. v. Fescati Shipping Co., Ltd.*, the U.S. Supreme Court held that, based on its specific wording, a charter party's safe-berth clause constituted an express warranty of safety, rendering the charterer's liability, in effect, absolute, irrespective of whether or not the charterer exercised due diligence in selecting the berth.

In order to appreciate this decision and the Supreme Court's reasoning, it is necessary to review both the factual background and some of its procedural history. Petitioner, Citgo Asphalt Refining Co. (CARCO) was the owner of an asphalt refinery on the Delaware River in Paulsboro, N.J., and wanted to transport a large parcel of crude oil from Venezuela to this facility. In order to effectuate this carriage, CARCO negotiated a charter party with a company called Star Tankers for use of the Motor Tanker "Athos I" (the vessel). Frescati Shipping Co. Ltd. (Frescati) was the owner of the vessel and had its own charter party with Star Tankers. This dispute focuses primarily on the wording of the safe-berth clause in the charter party agreement between CARCO and Star Tankers.

Unbeknownst to all parties, a ship anchor had been abandoned in the river bottom approximately 900 feet away from CARCO's terminal. While approaching the terminal, the vessel struck the anchor, puncturing its hull and spilling 264,000 gallons of crude oil into the Delaware River. The party responsible for abandoning the anchor was never identified, neither was it determined how long the anchor had been in the water.

Under the Oil Pollution Act of 1990, 33 U.S.C. Sec. 2702(a) (OPA), the vessel owner, Frescati, as a "responsible party," was obligated to pay for the cleanup. Although under OPA, Frescati had a maximum exposure of $45 million for cleanup costs, it spent substantially more. Ultimately, the Oil Spill Liability Trust Fund, organized and run by the U.S. Coast Guard, reimbursed Frescati an additional $88 million in cleanup costs.

Both Frescati and the United States sued CARCO to recover their respective share of the total cleanup costs on the theory that CARCO had breached the "safe-berth" clause in the charter party between CARCO and Star Tankers, which provided that "[t]he vessel shall load and discharge at any safe place or wharf, … which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer."

After extensive discovery, the parties conducted a 41-day trial in the Eastern District of Pennsylvania. Interestingly, despite intensive efforts on both sides to blame the other for failing to locate the anchor or otherwise properly maneuver the vessel in and around the terminal, the trial judge refused to attribute any fault to any party and found that the only party that bore responsibility for the anchor was the unknown master or ship that abandoned the anchor in the first place. In addition, the District Court ruled that Frescati was a third-party beneficiary of the specific wording of the safe-berth clause in the CARCO/Star Tanker charter party. This latter decision gave both Frescati and the United States standing to pursue CARCO for their respective cleanup costs.

The District Court's decision was appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed the District Court's findings. The Supreme Court granted CARCO's petition for *certiorari* in order to resolve a circuit split on the interpretation of safe-berth clauses. In particular, the Fifth Circuit, in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990) found that a similarly worded safe berth clause only imposed a duty of due diligence upon the charterer in selecting a safe berth, whereas the Second Circuit (*see,* e.g., *Paragon Oil Co. v. Republic Tankers*, S.A.,310 F.2d 169 (2nd Cir. 1962)) and Third Circuit found that this language imposed a warranty of safety. As a result, the Supreme Court's reasoning was limited exclusively to the contractual obligations of the parties based on the wording of this safe-berth clause.

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In examining the plain meaning of the safe-berth clause, the Supreme Court, per Justice Sotomayor, was persuaded by the use of the words "shall … designat[e] and procur[e]" a "safe place or wharf," "provided [that] the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." From the Supreme Court's perspective, this language clearly expressed an absolute duty on the part of CARCO to designate a safe berth, i.e. one that is "free from harm or risk." This determination is consistent with the remainder of the clause that provided that the vessel was allowed to come and go "always" safely afloat. In the Supreme Court's view, this language bound CARCO to an absolute warranty of safety.

The Supreme Court went on to reason that the fact that this clause did not use the word warranty did not pose a bar to imposing a warranty-like duty upon charterers. The Supreme Court found that "[w]hat matters, then is that the safe-berth clause contains a statement of material fact regarding the condition of the berth selected by the charterer. …" and this guarantee of safety was never subject to any limitation or qualification in the clause or elsewhere in the charter. The Supreme Court noted that the outcome might have been different if the charter party had instead imposed a duty of "due diligence" in selecting a safe berth.

By adopting this analysis, the Supreme Court rejected CARCO's argument that the safe-berth clause already contained an implicit limitation because it did not contain language relating to "strict liability" or "liability without regard to fault." The Court reasoned that, under basic contract law principles, contractual liability is more often than not strict liability (which the Court noted is essentially a tort concept), but noted parties are free to contract for tort-based concepts of limitation.

The decision concluded with the statement that "(c)harterers remain free to contract around unqualified language that would otherwise establish a warranty of safety by expressly limiting the extent of their obligations or liability." This suggests that parties who regularly negotiate charter party contracts should not necessarily infer limitations where they are not otherwise expressly stated.

It is rare for the Supreme Court to interpret the language in a charter party so owners, charterers, and shippers are well advised to review their standard charter party forms and consider whether the safe-berth clause, and possibly other clauses, should be revised to reflect a more balanced allocation of risk in the wake of OPA, and possibly other unexpected events, including, for example, the current COVID-19 pandemic.