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Safe-Berth Clauses as an Absolute Warranty: What You Need to Know

The U.S. Supreme Court recently found in a 7-2 decision that the safe-berth clause at issue in the long-litigated ATHOS I oil spill constituted an absolute warranty in which the charterer promised the owner that the discharge port would be safe. The opinion affirmed the decision of the Third Circuit Court of Appeals and resolved the long-standing circuit court split between the Second Circuit, which has also read such clauses to impose a warranty, and the Fifth Circuit, which has interpreted these types of clauses as only imposing upon charterers a duty of due diligence to select to a safe berth.

What You Need to Know

Safe-berth or safe-port clauses have long been included in maritime contracts between ship-owners and charterers for the hire of a ship. At their heart, these clauses speak to the charterer's contractual duty to select safe berths as they direct the movement of the ship for various purposes. In laymen's terms, when the charterer contracts to direct the movement of a ship it does not own, the charterer assumes certain risks and provides some level of assurance to the ship-owner that it will only take its ship to safe ports.

The question stems from the scope of this duty: Does a safe-berth clause provide an absolute warranty that the berth nominated by the charterer will be completely safe, or does it instead only impose upon the charterer a duty of due diligence to select a safe berth?

The Supreme Court recently addressed this question and squarely answered, as a matter of contract interpretation, that the safe-berth clause is a warranty.

The Supreme Court, however, limited its analysis to a strict interpretation of a specific contract. Perhaps the most important takeaway is that its recent decision is only meant to define the legal framework against which future charter parties will be negotiated. There is nothing in the Court's holding that would prevent charterers from negotiating more lenient safe-berth terms in future contracts. Going forward, owners, time charterers, and voyage charterers will all be free to contract to limit this duty depending on their respective appetites for risk, their bargaining power, and where the market sets the cost of a pure promise of safety.

Background

The case arises out of a charter party between CITGO Asphalt Refining Company (CARCO), who sub-chartered the oil tanker M/T ATHOS I from the tanker operator, Star Tankers, which had in turn chartered the tanker from the owner, Frescati Shipping Company (Frescati). In 2004, the tanker was en route to its discharge berth in New Jersey when it allided with a nine-ton anchor abandoned on the bed of the

Delaware River. The anchor punctured the tanker's hull, causing 264,000 gallons of heavy crude oil to spill into the river.

Under the Oil Pollution Act, Frescati and the United States covered the costs of the cleanup. They then both sued CARCO to recover the costs, alleging that CARCO had breached the safe-berth clause found in its charter party.

The charter party was based on the standard industry ASBATANKVOY form, which included a provision wherein the charterer, in this case CARCO, was responsible for designating a safe berth at which the tanker would discharge its cargo. This provision, commonly known as a "safe-berth clause," read 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."

The lawsuit eventually made its way to the Supreme Court, which granted certiorari to answer the question of whether the safe-berth clause is a warranty of safety, imposing liability for an unsafe berth regardless of CARCO's diligence in selecting the berth. It held that it is.

The Supreme Court's Analysis

The Supreme Court analyzed the issue as a straight-forward contract interpretation. Relying on well-established rules of contract interpretation, the Supreme Court explained that statements of fact contained in a charter party that relate to some material matter are called warranties. It did not matter that the safe-berth clause at issue did not expressly invoke the term "warranty." What mattered instead was that the clause contained a statement of fact regarding the safe condition of the berth nominated by the charterer, which, to the Court, was of course material. The clause required CARCO to designate a "safe" berth: That meant a berth "free from harm or risk."

There may well be legitimate reasons to not impose a strict, absolute warranty on charterers. For instance, and as advocated by Gilmore and Black's leading treatise on admiralty, vessel owners and their masters are often in a better position than charterers to assess the risks present in any given berth or port. Yet the Supreme Court, while neither dismissing, nor endorsing any policy considerations, simply did not find it necessary to take them into account in this specific case of a breach of contract. "Our analysis starts and ends with the language of the safe-berth clause," the Supreme Court explained. "We . . . take the safe-berth clause at face value. It requires the charterer to select a safe berth, and that requirement here amounts to a warranty of safety."

Yet it is important to note that the decision was limited to the strict interpretation of a specific contact. The Supreme Court was quick to remind that its decision only serves "to provide a legal backdrop against which future charter parties will be negotiated." Going forward, charterers are free to contract

around an absolute warranty of a safe berth by including express language that limits their duty to select a safe berth "so far as the foregoing conditions can be attained by the exercise of due diligence."

Conclusion

With guidance from the Supreme Court, other courts will now interpret unqualified safe-berth clauses to impose an absolute duty on charterers to select a berth "free from harm or risk." This will not change much at all for the numerous cases that are brought within the Second Circuit's jurisdiction or the many claims that are resolved by the Society of Maritime Arbitrators. But this case specifically rejects the Fifth Circuit's approach to safe-berth cases. All parties should carefully review their charter parties currently in effect and examine the safe-berth clauses to see if they provide any qualifications or limitations, or if they instead follow the unqualified ASBATANKVOY form. If the latter, charterers are now on notice and should know that they carry all of the risk in selecting berths. Going forward, owners, time charterers, and voyage charterers will all still enjoy their freedom to contract and can choose to negotiate the limit of this duty as they see fit.

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