

Legal Analysis of the U.S. Supreme Court Position Upon a Safe Berth Warranty and Evaluation of the UK Legal Position

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ABSTRACT: This research is focused upon the evaluation of safe berth clause pursuant to US law, in conjunction with UK law, based on the recent US Supreme Court ruling over “ATHOS I”, which was fixed pursuant to an ASBATANKVOY charterparty to carry a cargo of heavy crude oil from Venezuela to Paulsboro, New Jersey. The dispute arose during the final stretch of the voyage, as the vessel entered the Delaware River, an uncharted abandoned ship anchor ruptured the vessel’s hull causing 264,000 gallons of oil to spill. The Oil Pollution Act 1990 required the Owners to fund the clean-up costs in the first instance (limited to US\$45 million) and the US Federal Government’s Oil Spill Liability Trust Fund reimbursed Owners for an additional US\$88 million in clean-up costs. Owners and the US Federal Government filed suit against voyage charterers for breach of the ASBATANKVOY charterparty safe berth clause. The case went through two trials, and before the Court of Appeals for the Third Circuit twice, before the Supreme Court was asked to determine ultimate liability. The question before the Court was whether the safe berth clause was a warranty of safety, which meant that liability for an unsafe berth would be imposed on voyage charterers irrespective of whether they exercised due diligence. The answer to that question was yes; the language of the safe berth clause in this case was unambiguous and unqualified. The obligation on the voyage charterers was to designate a berth that was free from harm or risk such that the vessel come and go from always safely afloat. The Court went on to comment that “charterers 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. In the absence of any such qualifying language however the Supreme Court has made it clear that a charterer is liable to the owner for any consequences arising out of the ship being ordered to an unsafe berth, an obligation unfettered by any issues of due diligence or the degree of knowledge on the part of the charterer.

1 INTRODUCTION

On 30th March, 2020, in a landmark decision which followed fifteen years of litigation, the US Supreme Court held that the safe port clause in the standard ASBATANKVOY form constitutes an express warranty of safety by the charterer as a matter of US law.

On 26th November, 2004, the ATHOS 1 was berthing on the Delaware River in New Jersey when an abandoned ship anchor punctured the ship’s hull. This caused approximately 264,000 gallons of crude oil to spill into the river, creating the third worst marine oil spill in US history. The charterers, CITGO Asphalt Refining Co, who were also the owners of the discharge terminal, had chosen the berth.

The question before the court was whether the safe port clause in the charterparty was a promise by the charterer that the port would be safe for the ship, or merely an undertaking to “exercise due diligence” or reasonable care to ensure that it would be safe.

The United States Supreme Court was asked to consider clause 9 of the widely used ASBATANKVOY form charterparty, which provides: “the 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 court held that the plain language of the clause established a warranty of safety, upholding the decision reached by the 3rd Circuit Court of Appeal. The clause imposed on the charterer a duty to select a safe berth and, given the unqualified language of the clause, that duty was absolute. There was no requirement for the clause to state the term “warranty”, as long as the clause included a statement of material fact regarding the condition of the berth selected by the charterer [12].

2 THE CASE OF ATHOS I

2.1 *The Facts*

The voyage charterer of the fully laden tanker ATHOS I was also the owner of the refining complex in Paulsboro, New Jersey, which the vessel was approaching when its (single skin) hull was torn open by an anchor that had been lost/abandoned by some unknown vessel. The anchor was lying on the bottom of a federally-maintained anchorage ground through which the ship had to transit on its way to the berth from the federally-maintained ship channel. The anchor, which had not been previously discovered or removed by the U.S. Army Corps of Engineers, had evidently laid on the bottom with its flukes down for at least three years, during which time many ships had passed over it without incident. But, at some time prior to the ATHOS I’s arrival, the anchor was somehow flipped over so that its flukes could be in position to rake the ATHOS I’s hull and tear open a number of its cargo tanks. ATHOS I’s cargo was Venezuelan heavy crude oil, which the charterer/wharfinger was importing to use in making asphalt. Because the anchorage was maintained by the federal government, the charterer/wharfinger had never expected that the anchorage would have obstructions within it so, although passage through the anchorage en route the berth commonly involved passage through the anchorage, the charterer/wharfinger never took steps on its own to conduct sonar surveys. An estimated 263,000 gallons of Venezuelan crude oil was released into the Delaware River when ATHOS I was punctured, giving rise to enormous (U.S. \$180 million+) cleanup and business interruption expenses [7].

The vessel was operated under the separate charter parties. Namely, the first was a time charter between the ship’s owner and a charterer which agreed to exercise “due diligence” to ensure that the vessel was

only sent to “safe places.” The time charterer then subchartered the vessel under a voyage charter to the operator of the Paulsboro refinery on the ASBATANKVOY form, which contained a “safe berth” or “safe berth” warranty that was not expressly limited to the exercise of due diligence. Based upon the privity of contracts, the vessel owner was not under a contractual relationship with the subcharter. The owner of the ship remained its operator and was therefore the responsible party for the consequences of the oil spill under the Oil Pollution Act of 1990 [10].

The origin of the anchor being unknown, the shipowner sued the charterer/wharfinger for breaches of both the contractual “warranty of safe berth” (Charterer “shall select . . .always safely afloat”) found in the ASBATANKVOY charter party and of the maritime law duty of care to properly maintain its berth and the approach(es) thereto. The United States was a party to the suit both for recovery of funds from the national Oil Spill Liability Trust Fund, which had made partial reimbursement payments to the innocent ATHOS I and her underwriters, and as the subject of a counterclaim for having failed to properly maintain the anchorage [8].

2.2 *Third Circuit Decision*

The case was originally tried for 41 days to the bench in the U.S. District Court for the Eastern District of Pennsylvania (Hon. John P. Fullam presiding), which found that the charterer/wharfinger was not liable for harm caused by the casualty on any theory. But the Third Circuit reversed in a precedential opinion (In re Petition of Frescati, 718 F.3d 200 (3rd Cir. 2013)). The Third Circuit held that the ship owner was a third-party beneficiary of the voyage charter warranty because that warranty was certainly intended for the benefit of the vessel. That contractual warranty had been breached as a matter of law irrespective of the amount of diligence exercised by the wharfinger/charterer under the circumstances because the approachway to the berth was in fact obstructed and the contractual warranty did not have a due diligence limitation. (“[The] safe berth warranty is an express assurance of safety.” The ship’s captain was not in a better position to ascertain the safety of the berth than the charterer because the charterer was itself on scene and “had selected its own berth.”) It further held that the contractual warranty obligations were not avoidable, as had been argued by the charterer/wharfinger, as a result of the ship’s captain having impliedly accepted the berth as safe when it had been nominated [7].

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In its opinion, the Third Circuit declined to follow the Fifth Circuit’s decision in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), which had adopted a due diligence limitation for the reasons suggested by notable admiralty law scholars Gilmore and Black, but instead followed the reasoning of a line of cases decided by the Second Circuit going as far back as 1935, citing *Venore Transportation Co. v.*

Oswego Shipping Corp., 498 F. 2d 469 (2nd Cir. 1974) as the most recent in the line.

The ATHOS I case was remanded to the district court for findings as to causation. The district court (Hon. Joel H. Slomsky in place of the by-then-retired Judge Fullam), found that the breach of the charter party warranty—as defined by the Third Circuit opinion—was a proximate cause of the casualty and its resultant costs, entering judgment against the charterer/wharfinger [13].

2.3 Supreme Court Decision

The U.S. Supreme Court, recognizing the split between the circuits as to the interpretation of the contractual safe berth language, granted the writ of certiorari and the case was argued in 2019. In an opinion by Justice Sotomayor issued on March 30, 2020, joined by all but two dissenters (Alioto and Thomas, JJ), the Court used the traditional contract analysis principles said to have been adopted by the general maritime law to find that no ambiguity existed in the ASBATANKVOY language as to the agreement or intent of the parties. “Our analysis begins and ends with the language of the safe-berth clause.” The use in the charter of the words “shall . . . designate and procure” a “safe place or wharf” and “always safely afloat” created a strict contractual warranty obligation upon the Charterer as to the ship’s safety, not a mere duty to exercise due diligence. “Due diligence” is a tort concept that has no place in the analysis because no such language is anywhere found in the charter form at issue. The Court found that the decisions of the Second Circuit, which had been followed by the Third in this case, were in tune with the longstanding contract interpretation rules; the contrasting decision of the Fifth Circuit relied upon by the charterer was based less upon contract language analysis and more upon considerations of public policy. According to the majority, the dissent’s central pillar, the idea that the charter gave the charterer the right to select a berth rather than an obligation, was “atextual”. “The word shall usually connotes a requirement,” says the majority in a brief footnote [4].

The charterer had argued that unless a “due diligence” limitation was read into the charter, the charterer would be “strictly liable” for damage caused by the breach of contract. The Court showed little sympathy for this view because contract law does not consider notions of “fault.” If a contractual promise is breached, damages are awardable whether or not the breach was in any sense the fault of the promisor. The parties could easily have agreed to limit or condition the charterer’s safe berth promise if they had chosen to, according to the Court, citing examples of such limits elsewhere in the charter. The Court also pointed to other forms of charter party that explicitly incorporate the “due diligence” limitation in their safe-berth clauses [2].

The Court in similar fashion rejected the argument that the charter somehow imposed a duty upon the ship’s master to refuse to enter a berth chosen by the charterer, based upon the concept proposed by legal commentators that the master is usually in a better position than the charterer to learn whether or not a

berth is safe. The Court holds that no such duty exists merely because the master has the admitted right of refusal and the existence of such a right does not relieve the charterer of its warranty obligation.

3 LEGAL ISSUES ASSESSED IN ATHOS I

3.1 Significant Claim

Owners and their insurers handled the matter in accordance with protocols at the time, owners being the responsible party under OPA 90. Clean up costs totalled USD 133 million which owners’ insurers attempted to recover from the charterer, a US refining company.

After 16 years of litigation and doubtless excessive legal costs, the Supreme Court has given judgement that has significant implications for charterers who elect their charterparties to follow US legal jurisdiction.

The Court had to decide whether charterers had breached the safe berth provision in the charterparty. Charterers had argued throughout that their duty was of due diligence only and that no amount of due diligence could have identified an uncharted anchor in an approach channel, which was the proximate cause of the loss [8].

3.2 Absolute Contractual Warranty

In a majority decision the Supreme Court ruled that an unqualified safe berth clause is an absolute contractual warranty of safety which imposes strict liability for its breach. It was not an obligation to only exercise due diligence, which Charterers proved they had undertaken. Charterers were liable to owners for breach of the safe berth warranty [13].

Claims for breach of the safe berth / port provision have therefore become easier under US law with this judgement as it now forms the backstop that owners can rely on when arguing that a port was safe or unsafe, albeit they have to pass a very similar “Eastern City” style test to get a claim home i.e. “this vessel could proceed to discharge her cargo and depart from the port and that in the absence of some abnormal and unforeseen occurrence and given good navigation and seamanship this could be done without undue risk of physical damage to the vessel.” (The Oceanic First, SMA 1054)

3.3 Covid-19 implications

The shipping industry is adapting to the Covid-19 crisis impacting the globe. Interestingly, an advisory paragraph in the Supreme Court’s decision is informative for any owner and charterer facing concerning when entering port. The Court reminded the parties that vessel masters have an “implicit” right to refuse entry to a port should they find it unsafe and that refusal requires charterers to pay the associated costs. The refusal, though, has to be a “justifiable refusal.” This is a high bar, but one we may very well face in US ports with hotspot Covid-19 ratios let alone

in ports worldwide. While it is less likely an entire port will be deemed unsafe today, given the safety precautions being taken to keep people healthy and cargoes flowing, conditions continue to evolve. If a master refused to enter port due to coronavirus conditions, he or she would have to keep a careful evidentiary record of conditions on the ground as guided by shoreside operations [13].

4 UK LEGAL POSITION OF SAFE PORTS- SIX STEPS ASSESSMENT

Pursuant to UK law, just as the charterer has a clear commercial interest in ensuring that the vessel is delivered in accordance with its description in the charter and at the time and place there stipulated, and that the vessel is delivered in a seaworthy condition, so the shipowner has a clear interest in ensuring that the vessel is looked after by the charterer. In particular, the owner is concerned to ensure that the vessel is only used between safe ports and that the termini chosen by the charterer do not expose the vessel to physical or political danger.

In order to evaluate the UK position upon the charterer's duty to nominate safe ports/safe births in comparison to the UK position, as depicted in "Athos I", six parameters will be initially assessed, namely: a) the effect of express warranties in time and voyage charters; b) can the warranty upon safe birth be implied? c) can the warranty be excluded? d) when must the port be safe? e) which parts of the port must be safe? f) the effect of accepting an invalid nomination [1].

4.1 *Express warranties in time and voyage charters*

Both time and voyage charters typically impose a duty on the charterer to nominate only safe ports and/or berths through an express clause in the charter.

The two examples below are taken from ASBATANKVOY voyage charters under UK legislation and are indicative of the safe birth nomination: "The vessel shall load at one or two safe berths each at one or two safe loading ports or places in the River Parana, not higher than and/or one or two safe berths at each of one or two safe loading ports or places in the River Uruguay not higher than in Charterer's option..."

"[The vessel shall with all convenient speed] proceed to 1/2 safe berth(s)/safe anchorage(s) Mississippi River not above but including Baton Rouge, which in case of named port(s) Owners acknowledge as safe and suitable for this vessel and there load always afloat in such (safe) berth, (safe) dock, (safe) wharf or (safe) anchorage as Charterers or their Agents or Shippers may direct..."

The first issue which arises is whether the fact that the charterparty itself names the port or ports which can be nominated by the charterer means that the owner has acknowledged any and all of those ports as safe, and thus whether he is precluded from claiming damages if the nominated port turns out to be unsafe.

For obvious reasons, this issue is more likely to arise in a voyage or a time-trip charter [5].

In this part three options should be distinguished, namely: (i) Express safe port warranty - where the charter expressly imposes a safe port warranty and consecutively the charterer is liable if the port "chosen" among the range proves to be unsafe. Thus, when the charter names only one loading and/or discharging port and contains a safe port warranty, the only named port must be safe! (Livanita, 2008). (ii) "which Owner acknowledges as safe" - here the charter contains a clause stating that the owner acknowledges the safety of the port or ports described in the charter, then the charterer is clearly not liable for wrongful nomination if the port nominated turns out to be unsafe. (iii) No express warranty - where the charter is silent, then the charterer is not liable for breach of the safe port warranty, given that the owner has agreed to the vessel going to the ports mentioned in the charterparty [11].

4.2 *Implied warranty upon birth/port safety?*

It follows from what has been said earlier - at any rate where the charter is a voyage charter, or a time trip charter, or even a time charter where the ports to be used are expressly named in the charter - that the charterer does not undertake that the nominated ports are safe in the absence of an express term imposing such a duty [3].

It is still, however, possible to argue that where the charter is a time charter which does not name the ports between which the vessel may be used and yet does not include an express safe port warranty, such a duty is implied in favour of the owner by the common law, such as *The Evaggelos Th* [1971] 2 Lloyd's Rep. 200 (QB), a case which does not appear to have been cited to the court in *The APJ Priti*. From an owner's point of view, it is always wise to provide for the duty expressly in the charterparty.

4.3 *Exclusion of warranty?*

There is no rule imposing the obligation upon the charterer. The charter can explicitly exclude liability for breach of the duty. This is usually done in charters favouring the charterer, more commonly through the device of a stipulation that the owners have acknowledged the safety of ports mentioned in the charter.

4.4 *Under which circumstances a port should be safe?*

The issue here is whether the port must be safe at the time of nomination, at the time of the arrival of the vessel at the nominated port or at both and in between. Until *The Evia* [1982] 2 Lloyd's Rep. 307 (HL), the rule was that the charterer was under an obligation to ensure that the port nominated was actually safe at all those times, with the exception of situations where the port was unsafe only through temporary or abnormal circumstances.

Since the decision in *The Evia*, however, it is now clear that the port only has to be prospectively safe,

namely at the time of nomination, the charterer is under a primary duty to nominate a port which is likely to be safe by the time of arrival.

If, during the voyage, the nominated port ceases to be prospectively safe, or if it ceases to be actually safe at the time of arrival, the charterer is under a secondary obligation to re-nominate a safe port. If the vessel is trapped in a port which was prospectively safe at the time of nomination and actually safe at the time of arrival, the charterer is under no secondary duty to re-nominate a port [6].

4.5 Which parts of the port must be safe?

The port must be such as to allow the vessel to reach, use and leave the port, with the exercise of competent navigation and seamanship.

In a recent and important decision, Teare J held: “[A] port will not be safe if the vessel will be exposed to a danger which cannot be avoided by good navigation and seamanship. Counsel’s emphasis upon “reasonable” safety and whether a port “is to be criticised” for not having a particular system suggests that the warranty of safety is not broken so long as reasonable precautions have been taken by the port. In my judgment counsel’s submission is mistaken. A port is not saved from being unsafe where, although the vessel will be exposed to a danger which cannot be avoided by good navigation and seamanship, the port has taken precautions designed to protect vessels against that danger but which in fact do not protect the vessel from that danger. If, despite the taking of such precautions, the vessel remains exposed to a danger which cannot be avoided by good navigation and seamanship then the port is unsafe.

The charterers’ warranty is of safety, not of reasonable safety. The enquiry in an unsafe port case is not into the conduct of the port authority, for example, whether it has acted reasonably or otherwise. Rather, the enquiry in an unsafe port case is into the prospective exposure of the vessel, when arriving using and leaving the port, to a danger which cannot be avoided by good navigation and seamanship. Of course, aids to navigation, the availability of weather forecasts, pilots and tugs, the quality of the holding ground for anchoring, the sufficiency of the sea-room for manoeuvring and the soundness of the berths and of the fendering arrangements are, as with all aspects of the port set-up, relevant when deciding whether the vessel will be exposed to a danger which cannot be avoided by good navigation and seamanship. But if, having taken into the account the set-up in the port, the vessel will be exposed to such danger then the port will be unsafe.” (The Ocean Victory [2014]). This case was overruled in CoA, but finally confirmed in Supreme Court, which endorsed the decision in the “CMA Djakarta”

4.6 The effect of accepting an invalid nomination

This issue is distinguished in three separate instances [8]: a) The master is not entitled to take leave of his senses and accept a manifestly invalid nomination. If accepting an order was obviously absurd in the circumstances, then the cause of the loss is not the

charterers’ nomination, but the owner’s conduct. b) If the Master stays with the order and makes for the port, this does not mean that he waives- he has a reasonable time in which to make his mind up (Jute, 1971). c) If the master gives a Notice of Readiness to load, or gives some other indication that he is accepting the nomination of the port as contractual, the owner cannot then be heard to say that the loss was caused by an invalid nomination (The Kanchenjunga, 1990).

5 REMARKS

It can be safely stated that the position under US law has therefore hardened against charterers; but there are important takeaways [9]:

1. Firstly, the parties are still free to contract using language that reinstates the due diligence obligation albeit that language must be unambiguous and clear.
2. Secondly whilst the risk under US law is enhanced, the position realistically only mirrors English law, the most common jurisdiction in shipping, where there has been a warranty of safety for many years.
3. And finally the judgement effectively balances the position between the two jurisdictions; it’s up to an individual Assured to determine which legal system and jurisdiction to use.

6 CONCLUSION

The final decision in the ATHOS I saga has recently been issued by the U.S. Supreme Court, upholding the decision of the U. S. Court of Appeals for the Third Circuit to the effect that a plain reading of the language found in the ASBATANKVOY charter form creates a warranty of safety rather than merely a duty of due diligence.

This decision brings US law into line with the long established position under English law, namely that clause 9 of ASBATANKVOY is an absolute warranty of safety of the load and/or discharge port or ports nominated by the charterer.

As similar safe port/berth clauses appear in other industry standard charterparty forms, such as the NYPE form, Members should be aware that the decision is not limited to the tanker trade, and may be of wider application. That said, it is of particular relevance to contracts based on the ASBATANKVOY form, which is subject to US law as a matter of default.

Whilst the ruling will be welcome news for owners, the decision provides certainty for both owners and charterers when using the standard industry form. Importantly, the court made clear that the decision did no more than provide a legal backdrop against which future charterparties may be negotiated, reinforcing that parties remain free to contract as they wish.

Claims for breach of the safe berth / port provision have therefore become easier under US law with this judgement as it now forms the backstop that owners can rely on when arguing that a port was safe or

unsafe, albeit they have to pass a very similar “Eastern City” style test to get a claim home.

Freedom of contract is the basis of the Court’s decision. In its concluding paragraph, the Court states that “our decision today ‘does no more than to provide a legal backdrop against which future [charter parties] will be negotiated.’ Charterers 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.”

REFERENCES

1. Baatz, Y.: *Maritime Law*. Informa Law from Routledge (2020).
2. Burtchaell, R.A.I.: Paved with Good Intentions: The Supreme Court’s Plain Meaning Approach in *CITGO Asphalt Refining Co. v. Frescati Shipping Co.* *Tulane Maritime Law Journal*. 45, 443 (2020).
3. Han, N.-H., Kim, E.-J.: A Study on the Implied Terms of Safe Berth under Voyage Charterparty. *Journal of Korea Port Economic Association*. 26, 3, 92–113 (2010).
4. Hartman, P.G.: Safe Port/Berth Clauses: Warranty or Due Diligence. *Tulane Maritime Law Journal*. 21, 53 (1996).
5. Hawkins, D.: Breach of Contract Warranty Safe-berth Clause. *Wisconsin Law Journal*. (2020).
6. Hurley, J.N., Walker, C.M.: Charter Parties: Safe Harbor Warranty and Cargo Liabilities. *Journal of Transportation Law, Logistics, and Policy*. 80, 4, 255–268 (2013).
7. Jarvis, R.: What is the Meaning of a “Safe Berth” Clause in a Charter Party? Preview of United States Supreme Court Cases. 47, 13–16 (2019).
8. Maass, D.R.: The Safe-Berth Warranty and Its Critics. *Tulane Maritime Law Journal*. 39, 317 (2014).
9. Paré Jr, A.M.: The Safe Port/Safe Berth Warranty and Comparative Fault. *Journal of Maritime Law and Commerce*. 45, 141 (2014).
10. Rubin, S.: Safe Port and Berth Provisions in Time Charter Agreements: Apportioning Liability to Deter Accidents and Minimize Costs. *University of Miami Law Review*. 36, 3, 465 (1982).
11. Smith Jr, J.: Time and Voyage Charters: Safe Port/Safe Berth. *Tulane Law Review*. 49, 860 (1974).
12. Weintrit, A., Neumann, T.: Miscellaneous problems in maritime navigation, transport & shipping introduction. *Transport Systems and Processes: Marine Navigation and Safety of Sea Transportation*. 1 (2011). <https://doi.org/10.1201/b11347-4>.
13. Zhang, Y.: Case Note on *Citgo Asphalt Refining Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081 (2020). *Oil and Gas, Natural Resources, and Energy Journal*. 7, 1, 43 (2021).