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## What Is the Meaning of a “Safe Berth” Clause in a Charter Party?

### CASE AT A GLANCE

Ships are leased pursuant to contracts known as “charter parties.” Like most form contracts, charter parties contain a great deal of “boilerplate.” In this case, the Supreme Court must decide whether a “safe berth” clause guarantees a ship’s safety or merely imposes a duty of care on the lessee (“charterer”).

***CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.***  
**Docket No. 18-565**

**Argument Date: November 5, 2019**  
**From: The Third Circuit**

by Robert M. Jarvis  
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### INTRODUCTION

Parties that lease ships typically do so on preprinted forms known as “charter parties.” Like most commercial contracts, charter parties contain numerous boilerplate clauses. One such clause is a “safe berth” clause, which requires the lessee (called the “charterer”) to send the ship only to docks it can reach safely. Such a clause resembles, and often is combined with, a “safe port” clause, which requires the charterer to send the ship only to ports it can reach safely.

The U.S. Court of Appeals for the Second Circuit, based in New York, views such clauses as guarantees:

[T]he charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer’s acceptance of the risk of its choice.

*Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir.), cert. denied, 342 U.S. 862 (1951). See also *Venore Transportation Co. v. Oswego Shipping Corp.*, 498 F.2d 469 (2d Cir.), cert. denied, 419 U.S. 998 (1974); *Ore Carriers of Liberia, Inc. v. Navigen Co.*, 435 F.2d 549 (2d Cir. 1970); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169 (2d Cir. 1962), cert. denied, 372 U.S. 967 (1963).

In contrast, the U.S. Court of Appeals for the Fifth Circuit, located in New Orleans, considers these clauses to be merely promises that the charterer will do its best to send the ship to safe locations:

[N]o legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth. Moreover, avoiding strict liability does not increase risks because the safe berth clause itself gives the master the freedom not to take his vessel into an unsafe port.

*Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990). The same conclusion has been reached by trial courts in the Fourth and Ninth Circuits. See *In re Jubilant Voyager Corp., S.A. of Panama*, 1983 WL 589 (E.D. Va. 1983); *California ex rel. Department of Transportation v. S/T Norfolk*, 435 F. Supp. 1039 (N.D. Cal. 1977).

In the present case, the U.S. Court of Appeals for the Third Circuit, headquartered in Philadelphia, adopted the Second Circuit’s position:

We are persuaded that the Second Circuit’s longstanding formulation of the safe berth clause is the one we should follow....

To the extent the Fifth Circuit in *Orduna* deviated from this well-established standard, we are not persuaded by its reasoning and decline to follow the course it charted. Hence we conclude that the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer.

*In re Frescati Shipping Co., Ltd.*, 718 F.3d 184 (3d Cir. 2013) (citations and footnotes omitted). Thus, it now is up to the U.S. Supreme Court to decide whether the Third Circuit made the right choice.

### ISSUE

Is a “safe berth” clause in a charter party a guarantee, or merely a promise, that the charterer will send the owner’s ship to a safe dock?

### FACTS

On November 26, 2004, the 748-foot Cypriot oil tanker *Athos I* was nearing the end of a 1,900-mile journey from Puerto Miranda, Venezuela, to a CITGO refinery in Paulsboro, New Jersey, just

across from the Philadelphia International Airport. When it was within 900 feet of the dock, however, it struck an abandoned nine-ton iron anchor. The allision ripped two holes in the *Athos I*'s hull and caused 200,000 barrels of crude oil to be released into the Delaware River.

Following the accident, Randive, Inc., a New Jersey salvage company, managed to retrieve the anchor. Despite a formal investigation by the U.S. Coast Guard, the anchor's owner was never identified. Likewise, the Coast Guard was unable to say how long the anchor had been lying on the river's bottom. See <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/INV/docs/documents/AthosI.pdf> (at page 38).

At the time of the mishap, the *Athos I* was owned by Frescati Shipping Company, Ltd. (a Cypriot firm) and managed by Tsakos Shipping & Trading, S.A. (a Greek company). In 2001, Tsakos had "time-chartered" the *Athos I* into a "tanker pool" assembled by Star Tankers, Inc. of Connecticut. Thus, when CITGO needed a vessel to carry its oil, it "voyage-chartered" the *Athos I* from Star.

Frescati ended up paying \$143 million to decontaminate the river and settle the claims of various third parties (including a nearby nuclear power plant that was forced to temporarily shut down). Because the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2761, caps the liability of shipowners, the U.S. government (USG) reimbursed Frescati \$88 million. This money came from the Oil Spill Liability Trust Fund, which is financed by a tax on petroleum products.

To recover their respective costs, Frescati and the USG sued three CITGO entities (collectively, "CARCO"): CITGO Asphalt Refining Company, CITGO East Coast Oil Corporation, and CITGO Petroleum Corporation. These claims were consolidated with Frescati's lawsuit seeking exoneration under the Shipowner's Limitation of Liability Act of 1851, 46 U.S.C. §§ 30501–30512.

In 2011, following a 41-day nonjury trial, Senior District Judge John P. Fullam of the U.S. District Court for the Eastern District of Pennsylvania ruled that CARCO had no liability, either in contract or in tort, to Frescati and the USG. See *In re Frescati Shipping Co., Ltd.*, 2011 WL 1436878 (E.D. Pa. 2011). In the meantime, the *Athos I* had been sold to scrap dealers (for \$9.4 million) and dismantled by shipbreakers in Bangladesh.

On appeal, the Third Circuit, in an opinion by Circuit Judge Thomas L. Ambro, partially affirmed and partially reversed. See *In re Frescati Shipping Co., Ltd.*, 718 F.3d 184 (3d Cir. 2013). Unlike Judge Fullam, Judge Ambro concluded that Frescati was a third-party beneficiary of the safe berth clause contained in the Star-CARCO voyage charter party. As such, he remanded for a determination of whether CARCO had violated the clause. He also directed Judge Fullam to consider whether CARCO had met its tort law "duty of care." Although CARCO appealed Judge Ambro's decision to the Supreme Court, it declined to hear the case. See *CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 571 U.S. 1197 (2014).

By now, Judge Fullam had retired, so the case was reassigned to District Judge Joel H. Slomsky, who held an additional 31

days of hearings before finding that CARCO had 1) breached the safe berth clause and 2) failed to search for obstructions in the approach to its dock, thereby failing to fulfill its tort law duty of care. See *In re Petition of Frescati Shipping Company, Ltd.*, 2016 WL 4035994 (E.D. Pa. 2016). As a result, he awarded Frescati 100 percent of its requested damages (\$71.5 million).

Judge Slomsky also awarded damages to the USG, but reduced its claim by 50 percent due to the USG's failure to discover the nearly seven-foot-long anchor. Judge Slomsky considered this fair given that the anchor had been resting in the Mantua Creek Anchorage, a government-controlled waterway better known as Federal Anchorage Number Nine, for likely decades. Accordingly, Judge Slomsky granted the USG \$48.6 million.

On appeal, the Third Circuit, in an opinion by Chief Judge D. Brooks Smith, once again affirmed in part and reversed in part. See *In re Frescati Shipping Co., Ltd.*, 886 F.3d 291 (3d Cir. 2018). Although agreeing with most of Judge Slomsky's decision, Chief Judge Smith held that CARCO had not violated any tort duty. This conclusion, however, had no effect on Frescati's judgment: "Both theories of liability independently support the District Court's judgment against CARCO. As a result, our decision to affirm the judgment based on CARCO's contractual liability [i.e., the safe berth clause] means that we are not required to delve into the District Court's tort analysis."

Turning to the USG's claim, Chief Judge Smith held that Judge Slomsky had erred by reducing it: "When, as here, the plaintiff seeks relief on a contract, the defendant may not resort to equitable recoupment as a means to assert a non-contractual claim, whether sounding in an equitable-balancing analysis, in tort, or otherwise." Thus, Chief Judge Smith remanded the case to Judge Slomsky "for the purpose of recalculating [the USG's] damages and prejudgment interest."

Upon receiving Chief Judge Smith's decision, CARCO filed a new petition for *certiorari* with the Supreme Court. This time, the Court granted it. See *CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 139 S. Ct. 1599 (2019). On August 5, 2019, the Court granted CARCO's motion to dispense with printing the joint appendix. See *CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 2019 WL 3538073 (U.S. 2019).

## CASE ANALYSIS

Charter parties are agreements under which one party (the owner) leases its ship to another party (the charterer). The term *charter party* comes from the Latin phrase "*charta partitia*," meaning "divided document." Early charter parties were cut in half after signing, to allow each party to retain a copy.

There are three basic types of charter parties: time, voyage, and demise. In a time charter party, the owner agrees to lease the vessel for a set period (typically one year). In a voyage charter party, the owner agrees to lease the vessel for a specific voyage. Demise charter parties are used almost exclusively in the financing of new vessels. Such charter parties tend to run 20 to 30 years, which is the normal working life of most vessels. (At the time of her scrapping in 2008, the *Athos I* was 25 years old.)

In both time and voyage charters, the crew is provided by the owner. In demise charters, the crew is provided by the charterer. As a result, demise charters also are known as “bareboat” charters.

Most charter parties give the charterer the right to sub-charter (i.e., sublease) the vessel to third parties. Such third parties are known as sub-charterers. When a charter party “string” has a sub-charterer, it is common to refer to the actual owner as the “head owner” and the charterer as the “disponent owner” to reflect its dual role.

Charter parties typically are arranged by independent brokers, although large companies often have their own in-house brokers. In rare instances, parties take the time to negotiate charter parties from the “ground up.” Such charter parties are known as “homegrown” charter parties. More commonly, parties use preprinted forms that require only a few key terms (such as the name of the ship, the dates of deployment, and the “hire,” or rental, price) to be filled in. If the parties wish to change any of the preprinted clauses, or add any special provisions, they do so by attaching amendments called “rider” clauses.

Star leased the *Athos I* to CARCO on a preprinted charter party known as “ASBATANKVOY.” Promulgated in 1977 by the Association of Ship Brokers and Agents (U.S.A.) Inc. (ASBA) ([www.asba.org](http://www.asba.org)), a leading trade group, ASBATANKVOY now is the main form used to voyage charter oil tankers. Its popularity has been attributed to the balanced nature of its terms.

In pertinent part, the ASBATANKVOY safe berth clause (paragraph 9) reads as follows:

The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat. . . .

At page 7 of its brief urging the Supreme Court to hear CARCO’s appeal, ASBA pointedly declined to say whether it intended its handiwork to be read as a guarantee or merely a promise:

*Amici* express no view on the proper interpretation of the safe-berth clause here. When the party that actually causes a loss—in this case, the party that abandoned the anchor that later damaged the *Athos I*—cannot be identified, some innocent party must bear the risk. Because the charterer typically nominates the berth, it would be entirely rational to construe a safe berth clause to impose an absolute warranty, thus allocating the loss to the charterer when both parties are innocent. It would also be entirely rational to construe a safe-berth clause to impose only a due-diligence obligation. That would have the effect of imposing the loss on the owner if the charterer exercised reasonable care to discover any conditions that might render the berth unsafe for the vessel.

However the safe-berth clause is construed, it is important for both parties to have a clear understanding

of the risks they bear when they enter into a transaction. Whether this Court affirms or reverses the judgment below, therefore, it should grant the petition and rule on the merits. Only if the result is clear in advance will the parties obtain the benefit of the risk allocation for which they bargained when they concluded the charterparty.

As noted above, the Second Circuit believes that a safe berth clause is a guarantee, while the Fifth Circuit considers it a mere promise. Over the years, academic commentators have lined up behind the Second Circuit, with one notable exception. In their oft-cited hornbook *The Law of Admiralty* (2d ed. 1975), Yale Law School Professors Grant Gilmore and Charles L. Black Jr. argued that others had “gone too far” in characterizing a safe berth clause as a guarantee.

In addition to *Orduna* and Professors Gilmore and Black’s treatise, CARCO relies heavily on *Atkins v. Fibre Disintegrating Co.*, 2 F. Cas 78 (E.D.N.Y. 1868) (No. 601), *aff’d*, 85 U.S. (18 Wall.) 272 (1873). In *Orduna*, the Fifth Circuit concluded that by adopting the district court’s opinion on the merits, the Supreme Court in *Atkins* signaled that safe port clauses (and, by extension, safe berth clauses) are promises and not warranties. However, even a cursory reading of the trial court’s decision in *Atkins* makes it clear that it stands only for the proposition that such clauses are waived in the absence of a timely protest:

If, then, the port named [i.e., Port Morant in Jamaica] was deemed an unsafe port. . . and so not within the privilege given by the charter, it was the duty of the master, as the sole representative of the owners, to have made known his objections at the time. Not having done so, he must be deemed to have waived the right to object, and, the condition having been waived, no action can now be maintained for the breach of it.

*Atkins*, 2 F. Cas. at 79.

## SIGNIFICANCE

As ASBA notes, it matters little how the Supreme Court rules in this case (except, of course, to the parties, who have a lot of money riding on the outcome). If the Court follows the Second Circuit, then charterers will be strictly liable when they send ships to specific docks. Conversely, if it sides with the Fifth Circuit, then charterers will be only presumptively liable for their choices. In either event, the risk will be priced into the insurance premiums that owners and charterers pay, and any added costs will be passed on to their customers.

What *is* interesting about this case is that it is the fourth admiralty appeal the Court has heard in the past two years. Last term, of course, the Court decided three admiralty cases: *The Dutra Group v. Batterton*, 139 S. Ct. 2275 (2019) (punitive damages are unavailable in unseaworthiness cases) (previewed at 46:6 at 26–29); *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881 (2019) (maritime law, rather than state law, regulates wages on the Outer Continental Shelf) (previewed at 46:7 at 11–13); and *Air and Liquid Systems Corp. v. DeVries*, 139 S.

Ct. 986 (2019) (seamen can sue manufacturers of marine parts that turn out to be dangerous) (previewed at 46:1 at 37–40).

At one time, the Court’s docket was filled with admiralty disputes, but since the 1970s, it has shown little interest in the field. That the Court suddenly has become reengaged is particularly surprising when one considers that its docket, which used to average 150 cases per year, now routinely fails to reach 75 cases per year.

There is no ready explanation for the Court’s rediscovery of admiralty, and the recent surge may just be a fluke. On the other hand, this trend—if it is a trend—bears watching and may indicate that it is becoming increasingly difficult for the Court to muster enough votes to take on more controversial matters.

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