Charterparty 'chain reaction': The recent U.S. Supreme Court decision in the 'Athos I' case

The U.S. Supreme Court on March 30th issued its decision in Citgo Asphalt Refining Co. ('Carco'), et al. v. Frescati Shipping Co., Ltd. et al. (the 'Athos I' case), affirming the Third Circuit Court of Appeals holding that CARCO as sub-charterer was responsible, via the 'safe berth' clause in its sub-charter, to the vessel owner to indemnify for all of the costs of a major pollution cleanup. The case is a cautionary tale of the wording of clauses which may apply to a party that is in the 'chain' of charter parties but was not an actual signatory to the contract containing the clause in question.

Published 02 April 2020

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The case also illustrates the high costs of pollution cases in the United States and the commensurate lengthy litigation that can ensue. Our US lawyer and pollution expert, Frank Gonynor, discusses the specifics of the 'Athos I' decision and, since most charter parties incorporate English law, we asked Adrian Moylan, an English Solicitor, to comment as well.

Setting the stage

In the appeal to the Supreme Court the narrow issue for determination was whether the safe berth provision in an ASBATANKVOY charter party, was an absolute warranty or guarantee of safety or merely required the charterer to use due diligence in selecting the berth or port. The Third Circuit held in the Frescati Shipping*'s* favour, that the clause was a warranty while the Fifth Circuit in a different case had ruled a similar clause imposed only a duty of due diligence. This set up conflicting law among Federal Circuit Courts of Appeal which formed the basis for CARCO's appeal to the Supreme Court.

It has been almost sixteen years from the spill in 2004 to the decision in the U.S. Supreme Court, entailing a procedural voyage of saga-like character – including a 41 day long original trial and issuance of a written opinion, the retirement of the original district court judge, a subsequent hearing of 31 days with a new district court judge who issued a 193 page decision and two separate appeals and written opinions by the U.S. Court of Appeals for the Third Circuit. To set forth the legal twists and turns of that judicial journey would allow for an interesting tale for maritime lawyers. appellate specialists, and legal scholars, but is far beyond the scope of this article. Instead – we look to the Supreme Court's reasoning and what it means for Owners, Charterers.

The spill and the litigation

The tank vessel 'Athos I', owned by Frescati, was on time charter to Star Tankers, which had in turn voyage chartered it to CARCO, which directed the vessel to deliver a cargo of crude oil to the CITGO asphalt refinery at Paulsboro, New Jersey, on the shore of the Delaware River. Unbeknownst to any of the parties, and anyone else for that matter, lurking on the bottom of the Delaware River, about 900 feet from the berth, was an abandoned ship's anchor. The ship during its arrival on November 26th, 2004 struck that submerged anchor, which punctured the hull and allowed approximately 265,000 gallons of oil to spill into the river impacting over 280 miles of shoreline. The pollution response cost a total of USD 133 million, paid for in part by the ship's insurer and by the U.S. government; both of those parties were seeking to recover from CARCO.

One key prior underpinning of the Supreme Court decision was the ruling of the Third Circuit Court of Appeals that the vessel owner was to be the third party beneficiary of the wording of the 'safe berth' clause, as contained in the voyage charter between Star Tankers and CARCO. This critical finding of the vessel owner as a 'third party beneficiary' of that clause laid the foundation for the rest of the analysis. The reader, if ever faced with such a possibility of implying such a status in a charter party dispute would do well to be aware of that particular analysis [which can be found at *In Re Frescati Shipping Co.*, 718 F.3d 184, 200 (Third Cir. 2013) and Gard's earlier article discussing implication of that ruling]. US pollution law provides subrogation rights to the US Oil Spill Liability Trust Fund for costs of clean-up and

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compensation paid in excess of the vessel's limitation amount. So, because Frescati was deemed a third-party beneficiary of the safe berth clause in the voyage charter party, so was the Government.

The ASBATANKVOY clause provided:

"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 always safely afloat."

In its opinion, the Supreme Court, citing older U.S. and U.K. cases, made clear that any safe berth clause worded this way means that a charterer is giving a warranty of safety as a guarantee to the vessel owner. This is true even though the clause makes no use of the term 'warranty' at all, saying that it is "well settled as a matter of maritime contracts" that any statements of fact in the agreement about a material matter are to be deemed warranties, even if not so identified or named.

The Court found important to note that the charterer could have insisted on other prevalent charter party forms, which have safe berth clauses that impart a lesser duty upon the charterer, such as the INTERTANKVOY form, which only provides that charterer will exercise due diligence to ascertain if a berth is a 'safe' one, but does not give an absolute warranty.

One potential hurdle, however, for the Supreme Court was a prior decision by the Fifth Circuit Court of Appeals in New Orleans, Orduna S.A. v. Zen-Noh Grain Corp, 913 F.2d 1149 (1990), that held that a similarly worded clause to the sub-charter only imposed a duty of due diligence. The Supreme Court simply said that that case did not turn on the wording of the clause, but rather was decided on "tort law and policy considerations", in an apparent exercise of either focused reading of a case opinion or simply averting of the Justices' ' eyes from the inconvenient. Either way, the hurdle was bypassed, and after that, the analysis was rather straight forward and somewhat underwhelming in tone.

This decision by the U.S. Supreme Court was not a unanimous one – two of the nine Justices felt that the 'safe berth' clause only burdened the charterer with the limited obligation to exercise due diligence in seeing that a nominated berth would be safe for a vessel to call upon, and was not a guarantee. However, the arguments they made to this effect were clearly unpersuasive to the majority of the Court.

The end result was affirmation of a huge judgment against the sub-charterer, and thus from an American law perspective:

• 'Safe berth' clauses are shown by the courts to be, once again, a critical choice, and must not be approached in a casual manner by the parties but agreed to only after their gravity is considered and negotiated by the parties.

• Parties in the 'chain' of charter parties must be aware of what provisions are made for 'safe berth' in any charter party subsequently made in that chain, and should take steps to ensure/prevent the unexpected application of concepts of liability that are at odds with the charter party to which a party has actually signed.

An English law perspective

The English Supreme Court has recently reviewed the law on unsafe ports in the *Ocean Victory* , and the test between USA and UK is now closely aligned in its approach. The risk allocation between an owner and a charterer of an unexpected incident or danger occurring to the vessel within the port is well understood. Had the Athos I been dealt with by the English system, the presence of an undetected anchor which causes damage to the vessel during its approach to the berth would also have led to liability being imposed upon the charterer under the terms of an unamended ASBATANKVOY safe berth clause.

Where a tanker charterer wishes to ensure his liability is more limited or restricted, then he selects a charter such as BPVoy5 which provides:

"Before instructing Owners to direct the Vessel to any port, Charterers shall exercise due diligence to ascertain that the Vessel can always lie safely afloat at such ports. However, Charterers do not, in any part of this Charter or otherwise howsoever, warrant the safety of any port and shall be under no liability in respect thereof except for loss or damage caused by Charterers' failure to exercise due diligence as aforesaid."

Such a clause merely requires him to exercise due diligence to verify the port is safe before its nomination. If the vessel suffers damage which was not capable of being ascertained by a proper due diligence exercise, then the charterer is excused from liability.

This concept can occasionally become confused with prospective safety as the test is applied in terms of timing when the nomination of the port or instructions to proceed on the approach voyage are given, both in charters containing an absolute safety warranty, as well as charters requiring only due diligence. The difference is that in due diligence charters a dangerous characteristic of the port not discoverable by due diligence may excuse the charterers, whereas in an absolute warranty charter, the promise applies both at the time of nomination and in the future when the vessel must be able safely to enter, stay at and depart from the port. Unexpected or unforeseen events do not excuse the charterer who has given an absolute warranty; and in times of climate change or even pandemics, there is no requirement that such an event may have occurred in the historical past. The test is whether the danger encountered when the vessel calls is viewed as a characteristic of the port.

The issue in Athos I which should cause surprise to many English practitioners is that a Head Owner can agree to trade his vessel upon one set of terms, yet become the windfall beneficiary of more favourable terms by which his own charterer was able to sub charter the vessel. A lien over sub freights may be a usual term which can impact a sub Charterer; however a term by which a Head Owner obtains a windfall benefit from contract promises made in sub-contracts and sub charters entered into by different parties and indeed subsequent in months or years to the date of the

head charter itself is an altogether more challenging concept to comprehend.

English law charter parties do recognize the privity of contract concept, which limit the enforcement of rights and obligations to the parties themselves and to the specific provisions contained in the charter itself. Mortgagees and lenders may, as part of any security loan documents, take assignments of the benefits of charters, enforceable by notice should the borrower default. Whilst the Contracts (Rights of Third Parties) Act 1999 applies to such charters and does make provision for the enforcement of contractual terms by third parties, the intended beneficiaries need be identified either expressly or by implication as a class of persons within the terms of the charter itself. Whilst the Act does allow third parties to enforce terms of contracts that benefit them, for example shipbrokers claiming commission, they must also subject themselves to its obligations, including, for example, the requirement they proceed with any claim under the arbitration clause. It is extremely common to exclude the Act from shipping contracts, and the decision in Athos I may lead to the more frequent express exclusion of the Act in most charter parties. It can be noted here that the Act, while it does apply to charter party contracts, it does not apply to bills of lading.

Concluding observations

The amicus brief filed by shipping industry organizations, BIMCO, INTERTANKO and INTERCARGO argued in favour of certainty and international uniformity in application of standard form charter party clauses and thus supported the shipowner's position in the Supreme Court. Shipping is global so it is positive for the same form charter party clauses to have the same meaning in different jurisdictions.

The Supreme Court decision also conforms with the English law view that charterers are free to contractually limit exposure by choosing more charterer friendly provisions. In the real world, it is the high-volume traders, like oil companies and major commodity traders, that can negotiate for due diligence standards. Freedom to contract is in many cases a function of leverage.

In times of freight volatility, charter chains can become long and complex with pairs of contractual counterparties selecting not only differing safe port/berth provisions but also law and jurisdiction clauses. Even if not long, such chains typically include one of more time charterers and an ultimate voyage charter. The 'Athos I' was time chartered to Star Tankers naming English law and arbitration with a due diligence standard for the safe port and berth clause. The Star Tankers voyage charter to CARCO was subject to US law and jurisdiction. So, Owners (and their subrogees including the US Government) not only benefited from the safe berth warranty but also from the law and jurisdiction clause.

It remains to be seen whether the third-party beneficiary analysis will jump the pond. The English practice in litigation under charter party "chains", where the head owner has suffered a loss allegedly due to an unsafe port or berth is that the owner initiates litigation against its charterer who in turn initiates litigation against its own contractual counter-party and so on down the line. Only the parties to the specific charter contract have title to sue so this cascade of litigation is the norm. Where the charter terms specify English law and arbitration and the terms are back-to-back the parties may agree to "streamline" an arbitration by all appointing the same arbitrators and combining the proceedings, but this is done merely for convenience and cost-saving. In the enforcement of a safe port/berth warranty there is no

recognised right in English law to proceed directly from the top of the chain to the bottom as was done in the US litigation, even when the terms are identical.

So, the decision by the U.S. Supreme Court in the 'Athos I' did achieve some uniformity of outcome for the interpretation of a type of 'safe berth' clause.

Citgo President and CEO Carlos Jordá said in a statement that the majority's ruling is a "disappointing result to a very long story. While we obviously have different views regarding the merits of our case, we respect the court's interpretation and can finally close this chapter on the Athos case," he said (Courthouse News, 30 March 2020).

However, upon further examination, as discussed above, there still exist significant unresolved legal issues and procedural differences in such situations, leaving the door open to future cases to further deal with the remaining complexities. One thing is certain – the charterer's contractual undertaking to name a safe port and berth, whatever its precise language, is an allocation of risk which can have monumental financial consequences. As was pointed out in the shipping industry organizations' amicus brief, such risks are insurable.