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Shippers Look To High Court For 'Safe Berth' Resolution

By **Andrew Stakelum**
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Does a charterer that agrees to nominate a "safe berth" to load and discharge cargo guarantee the berth's safety for the vessel? If you are litigating this issue in the U.S. courts within the Second and Third Circuits, the answer is yes. But the answer is much different in the Fifth Circuit, where a charterer's nomination of a "safe berth" only requires the exercise of due diligence in selecting a safe berth.

This split among what many consider to be the most influential U.S. courts for maritime issues may soon be resolved. In April, the U.S. Supreme Court granted a charterer's request to review a Third Circuit opinion that held that a standard safe berth clause in a vessel charter results in the charterer guaranteeing or expressly warranting that its nominated berth is safe for the vessel to load and discharge.[1]

The degree to which a charterer is responsible for ensuring the safety of its nominated berth can have significant commercial implications — especially in the energy business and the tanker trade. This question has particular importance given the inclusion of safe berth clauses in nearly every vessel charter, and the parties' attempts to manage this risk through indemnities and insurance.

At stake in Frescatti Shipping is the charterer's liability for more than $140 million in cleanup costs under the Oil Pollution Act. The facts of this oil pollution dispute are relatively straightforward. Citgo Asphalt Refining Company chartered the Athos I to transport crude oil from Venezuela to its asphalt refinery in New Jersey. The voyage charter included the standard clause that "[t]he vessel shall load and discharge at any safe place or wharf … which shall be designated and procured by the charterer."

Unbeknownst to the terminal operator, the charterer and the vessel, an abandoned anchor was located approximately 900 ft away from the refinery's berth. As the Athos I was approaching the berth, she struck the submerged anchor and punctured its hull and cargo tank. This resulted in the vessel discharging more than 260,000 gallons of crude oil into the Delaware River.

The allision resulted in a significant pollution event, with the vessel owner paying more than $45 million as required by the Oil Pollution Act, and the Oil Spill Liability Trust Fund bearing additional cleanup costs of $88 million. Through various procedural steps, the case was postured with the vessel owner and the United States seeking recovery of their cleanup costs from Citgo Asphalt Refining.

The federal district court initially applied Fifth Circuit law, concluding that the clause "imposed on the charterer a duty of due diligence to select a safe berth." The court concluded that the charterer neither knew nor had reason to believe that the anchor was located adjacent to the berth, satisfying its exercise of due diligence in selecting a safe berth. This resulted in the charterer avoiding liability for the pollution costs.

But on appeal, the Third Circuit rejected the district court's application of the Fifth Circuit's due diligence standard, and adopted what it called the Second Circuit's "longstanding formulation" that a safe berth provision guarantees the safety of the berth "without regard to the amount of diligence taken by the charterer." On remand, the district court determined that the charterer breached its duty to guarantee the safety of its nominated berth.

The Second (and now Third) Circuit's interpretation of the safe berth to impose an express guarantee or warranty by charterer follows English shipping law, and its historical view that an owner would not agree to send its vessel to distant, unknown ports if the charterer did not guarantee the port's safety. As one court noted, a 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."[2]

This view contrasts with the Fifth Circuit's more practical consideration of the issue:

[T]he master on the scene, rather than a distant charterer, is in a better position to judge the safety of a particular berth. The master is an expert in navigation, knows the draft and trim of his vessel, and is on the spot. Conversely, the charterer, who is usually a merchant, may know nothing about navigation or the vessel and is ordinarily far from the scene. Moreover, the charterer customarily chooses ports and berths based on commercial as opposed to nautical grounds.[3]

It is now up to the U.S. Supreme Court to settle this dispute and divergent views of the courts. While certain charterers, owners and insurers may each prefer a particular outcome, the broader marine commercial interests will be keen to have this unsettled area of law resolved. Managing risk can become significantly more complicated when one's risks materially change depending on the court.

Assuming the Supreme Court addresses the issue and does not resolve the dispute on another basis, there will be a new status quo for safe berth clauses in at least the U.S.'s major port regions. Any change should prompt companies to assess whether their risks are still adequately managed through their contracts and insurance.

Vessel casualties, and large-scale pollution events, rarely occur in a vacuum. Incidents often involve many parties with different contracts, each attempting to manage their risks by passing through any potential liabilities to the next. A vessel owner may contract the use of its vessel to a time charterer, who may in turn subcharter the vessel to a voyage charterer, who then purchases a cargo of crude oil from a shipper, who in turn contracts with a terminal operator for the use of its terminal and the loading of the vessel.

This common commercial arrangement involves four different contracts, each of which may contain representations related to the safety of a particular port or berth. The Supreme Court's consideration of this issue provides a good opportunity for companies to review the language of their safe berth clauses, understand the extent of their berthing risks and assess whether these risks are appropriately managed.

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[1] In re Frescatti Shipping Co., 886 F.3d 291 (3d Cir. 2018).

[2] Park S.S. Co. v. Cities Serv. Oil Co.,188 F.2d 804 , 806 (2d Cir. 1951).

[3] Orduna SA v. Zen-Noh Grain Corp., 913 F.2d 1149, 1156 (5th Cir. 1990).