Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Justices' Citgo Ruling Offers Shippers Contractual Clarity

By **Christopher Nolan and Robert Denig** (April 2, 2020, 4:52 PM EDT)

Christopher Nolan

Robert Denig

Negotiating a contract — a charter party, in maritime parlance — is a balance of leverage, and sometimes a leap of faith. Certain issues are more important to companies than others.

For those important issues, the language of clauses will be negotiated over email drafts for hours, days or weeks, depending on insurance concerns and other considerations. The remaining clauses are often standard, with form language added, subtracted or amended over time based on industry practice, personal preference or the whims of previous counsel from a bygone era.

The U.S. Supreme Court, in its March 30 opinion in Citgo Asphalt Refining Co. v. Frescati Shipping Co. Ltd., provided a roadmap for interpreting one of the most prevalent and important of these charter party clauses: the safe berth/safe port clause. The court ruled that the form clause commonly used in the industry must be construed as an express warranty of safety, and imposes on the charterer an absolute duty to select a safe berth.

Notably, Holland & Knight, on behalf of amici curiae BIMCO (formerly the Baltic and International Maritime Council), the International Association of Independent Tanker Owners and the International Association of Dry Cargo Shipowners — maritime industry associations whose members represent most of the world's ocean-going vessel owners — filed a brief supporting the absolute warranty of safety, the position now finally affirmed by the Supreme Court's decision.

Industry Significance

The dispute arose from a 2004 oil spill in the Delaware River involving the M/T Athos I. After a 1,900-mile voyage from Venezuela, the Athos I struck a submerged 9-ton abandoned anchor only 900 feet from its intended berth, which punctured the hull of vessel and caused 264,000 gallons of heavy crude oil to spill into the river.

The shipowning interest of the Athos I was designated the responsible party for the spill, pursuant to the Oil Pollution Act of 1990, and initially bore the costs of the environmental cleanup, which topped $100 million. Following the environmental response, the shipowner and federal government sought to recoup monies expended for cleanup costs from the vessel's voyage charterer.

The safe berth clause at issue was dissected by district court judges and the U.S. Court of Appeals for the Third Circuit over the course of a handful of trials and appeals of notable length and cost. The most important legal issue concerned the interpretation of the standard industry Asbatankvoy safe berth clause, slightly revised in the charter as follows:

> Safe Berthing — Shifting. 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, any lighterage being at the expense, risk and peril of the Charterer.

Significantly, the Supreme Court decision turned on the plain-meaning interpretation of two words in the popular clause: "safe" and "always."

Interpreting Safe Berth Clauses

In a 7-2 opinion authored by Justice Sonia Sotomayor, the Supreme Court considered the key terms in the agreement consistent with the intent of the parties as is required in any contract dispute. Because the safe berth clause was clear and unambiguous, the majority concluded that the analysis began and ended with a plain-meaning reading of key terms in the clause itself.

After 15 years of court submissions and appeals, how could the language of the clause be so clear to the majority? Below are three considerations that every owner and charterer (and their insurers) should be mindful of when reviewing their charters to determine how they are impacted.

Consult your dictionary.

The safe berth clause required the charterer to designate a "safe place" for the vessel to traverse so long as it could continue to the selected port "always safely afloat." The use of the word "safe" must have connoted the designation of a safe berth "free from harm or risk" per the simple definition in a Webster's dictionary.

Additionally, a vessel's travel "always" in a manner that is "safely afloat" must mean in every instance; all of the time. These simple concepts, when read together, must "bind the charterer to a warranty of safety."

Look for limiting clause language.

A safe berth clause friendlier to charterer interests would not have absolute warranty-type language. The majority opinion surveyed key clauses in the charter party, and found several where the parties affirmatively included language requiring the exercising of due diligence.

This inclusion of the concept of tort-based fault in a contractual setting with other clauses reaffirmed the warranty nature of the safe berth clause, because it did not include this liability-limiting qualified language.

Assess other industry forms.

Although not dispositive, it did not aid the charterer's position that other industry forms not chosen by the parties provided a roadmap for properly limiting an absolute warranty of safely.

In a footnote, the court quoted the Intertankvoy form safe berth clause which includes "safe port" and "always afloat" language, but qualified with a charterer being required to exercise only due diligence in selecting the berth.

The Big Picture When Fixing Your Next Charter Party

In sum, the contract interpretation, guided by decades of U.S. Court of Appeals for the Second Circuit and Society of Maritime Arbitrators arbitral award holdings that the safe berth clause expressed an absolute warranty of safety, resulted in the Supreme Court ruling in favor of the shipowner.

The court's decision carries an impact broader than just the interpretation of the Asbatankvoy safe berth clause. While the dissenting opinion noted the majority ruling "provides a clear background rule for the maritime industry to contract against," the majority ruling added important context for charterers, in confirming that "[c]harterers remain free to contract around unqualified language that would other[wise] establish a warranty of safety, by expressly limiting the extent of their obligations or liability."

For every pending dispute involving an incident arising out of the interpretation of the safe berth

clause, the Supreme Court has provided clear guideposts for companies and their counsel. When drafting and negotiating future agreements, traders, brokers and their lawyers should reflect on the few simple steps that will provide more certainty concerning the obligations being undertaken.

Carefully including the terms "warranty" or "due diligence" around the use of "safe berth" and "always afloat" language will be useful, initial steps to help avoid a similar two-decade legal saga. Further contractual nuance will be addressed with the particularities of the shipping company's business in mind.

Christopher R. Nolan is a partner and F. Robert Denig is an associate at Holland & Knight LLP.

Disclosure: Holland & Knight filed a supporting brief on behalf of amici curiae BIMCO, the International Association of Independent Tanker Owners and the International Association of Dry Cargo Shipowners in the case that is the subject of this article.