

No. 18-565

In The
Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY;
CITGO PETROLEUM CORPORATION;
CITGO EAST COAST OIL CORPORATION,

Petitioners,

v.

FRESCATI SHIPPING COMPANY, LTD.; TSAKOS
SHIPPING & TRADING, S.A.; and UNITED STATES,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

**BRIEF OF *AMICUS CURIAE*
SIR BERNARD EDER
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICUS CURIAE*¹

Sir Bernard Eder, herein the *Amicus Curiae* (the “Amicus”), obtained his degree in law at Cambridge University, England and thereafter practiced continuously as a barrister in the set of Chambers known as 4 Essex Court/Essex Court Chambers in London for some thirty-five years, specializing in commercial litigation and international arbitration covering a wide range of commercial disputes including shipping, international trade, insurance/reinsurance, banking, construction (including shipbuilding), commodities and energy law. He was appointed Queen’s Counsel in 1991, a Recorder of the Crown Court in 1996, and a Justice of the High Court of England and Wales in 2011. He retired from the bench on April 1, 2015. During his time as a High Court Judge, he sat mainly in the Commercial Court in London, where he presided over a number of high-profile trials including numerous charter party cases.

On May 7, 2015, he was appointed an International Judge of the Singapore International Commercial Court. That appointment was renewed in May 2018. He was also previously a Visiting Professor at University College London, where he taught shipping

¹ Pursuant to the Court’s Rule 37.6, no counsel for any party authored this brief in whole or in part and no person other than the *amicus* or his counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to the Court’s Rule 37.2(a), counsel for Petitioners have granted blanket consent to the filing of *amicus curiae* briefs, and counsel for Respondents have consented to the filing of this brief.

law for a number of years. He now practices as an international arbitrator. Many of the cases in which he has acted or continues to act as arbitrator are shipping cases. He was the Senior Editor of the leading shipping textbook, *Scrutton on Charterparties and Bills of Lading*, for the 22nd and 23rd Editions.

The Amicus understands the critical question in the present case to be whether the obligation on a charterer to nominate or to procure a “safe port,” “safe berth,” or “safe place or wharf” that the vessel can “. . . proceed thereto, lie at, and depart therefrom always safely afloat . . .” is, on the one hand, “strict” or, on the other hand, is qualified in the sense that the charterer will only incur liability in circumstances where such charterer has failed to exercise due diligence or acted negligently.

Given his involvement in many shipping cases over the last forty years as counsel, judge and arbitrator, the Amicus has a strong interest in the proper determination of that question. Moreover, the Amicus understands the proper determination of that question to be of considerable importance to the world-wide shipping community, of which members of his profession are an important part.

SUMMARY OF ARGUMENT

The relevant wording of the charter party in the present case is in a standard form. It is strongly preferable that the scope and effect of such wording should,

so far as possible, be treated similarly in all jurisdictions around the world. So far as English law is concerned, the correct approach is that the charterer's obligation is "strict." In the context of this case, that result would impel the Court to affirm the judgment of the Third Circuit Court of Appeals.

ARGUMENT

Under English law, the nature of a contractual obligation ultimately depends upon the proper construction of the words contained in the relevant charter party. The exercise of contractual interpretation has been considered in a number of recent cases in the Supreme Court of the United Kingdom, notably in *Arnold v. Britton* [2015] UKSC 36 in particular per Lord Neuberger at paragraphs 14-23. As stated there (see paragraph 15), the focus is on the ". . . meaning of the relevant words . . . in their documentary, factual and commercial context. . . ." In the view of the Amicus, the words in the present charter party (which appear in one form or another in most standard forms) are clear and unqualified, *i.e.*, they constitute a warranty of safety on the part of the charterer (in relevant respects) which is not qualified in any way.

It is, of course, always open to parties to agree to reduce the standard of the charterer's primary safe port undertaking to the exercise of due diligence – see, for example, Clause 4 of the Shelltime 4 standard form. But no such words appear in the present charter party;

and there is no basis for seeking to qualify or water down the express words used by the parties.

The words used in the present charter party appear in one form or another in most standard forms and have a long history. There is a long line of authority offered by the Amicus, going back over 150 years, which establishes or is consistent with the conclusion that such words impose a strict obligation not dependent on any negligence or failure to exercise due diligence by the charterer. *See*, for example, *Ogden v. Graham* [1861] 1 B&S 773; *Lensen Steamship Co. v. Anglo-Soviet Steamship Co.* [1935] 52 Ll. L. Rep 141; *Reardon Smith Line v. Australian Wheat Board* [1956] AC 266 (PC); *Leeds Shipping Co. v. Société Française Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127 (CA). According to the Amicus, the classic modern definition of a "safe port," which has been followed and applied in many subsequent cases, is found in the Judgment of Slessor LJ in *The Eastern City*, at page 131:

If it were said that a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law. . . .

It is noteworthy that there is nothing in *The Eastern City* or in the subsequent cases to indicate otherwise than that the effect of the typical wording which

appears in the present charter party is that the charterer warrants the safety of the port/berth/place (as the case may be) and that the charterer's liability for breach of such warranty does not depend on any negligence or failure to exercise due diligence. *See*, for example, *Pearl Line Carriers Inc. v. Japan Line Ltd. (The Chemical Venture)* [1993] 1 Lloyd's Rep 508 where the court stated at page 510, right hand column:

The definition of a safe port should present no problem. It has been an established part of our maritime law since at least *The Eastern City* [1958] 2 Lloyd's Rep. 127, and the only question is whether, on all the relevant facts, the approach to Mina Al Ahmadi was unsafe for Chemical Venture, within that definition.

The foregoing is consistent with views expressed in the four major textbooks dealing with this topic, as suggested by the Amicus:

Scrutton on Charterparties and Bills of Lading, 23rd Edition (2015) Art. 85:

Where a charter, whether for voyage or time, expressly provides that a ship shall go to a safe port or berth to be nominated or ordered by the charterer, the charterer is obliged so to nominate or order, and, in so doing, warrants that the port or berth is safe.

(Paragraph 9-011). That sentence first appears in virtually identical form at page 110, Article 35 of the 17th edition (1964).

Carver on Charterparties (2017) Art. 4-006:

Strict Liability: A safe port undertaking in principle imports strict liability. The right to control the employment of the vessel is considered to demand a warranty of safety of any nominated port and not just an undertaking to exercise reasonable care. *Ogden v. Graham* [1861] 1 B&S 773.

Time Charters, 7th Edition (2014) Chapter 10 – in particular:

Paragraph 10.3 – referring favorably to *The Eastern City*.

Paragraph 10.52 – “. . . The charterers’ primary obligation is ‘absolute’ rather than being one to exercise due diligence (absent express limiting language, for example the due diligence wording in the Shelltime 4 form: see paragraphs 10.54 et seq.). The question is whether the port is (prospectively) safe, not whether, if it is unsafe, the charterers have been careless or worse. . . . So, in particular, the charterers will be in breach even if ignorant, despite taking care, of the unsafety. . . .”

Paragraph 10.53 – referring to various other authorities.

Paragraph 10.54 – referring to certain charter forms including the Shelltime 4 which “. . . expressly reduce the charterers’ safe port obligation to one of due diligence only. . . .”

Notably, in *Time Charters* the U.S. editors at paragraphs 10A.9-10 disagree with the decision of the

Fifth Circuit in *Orduna S.A. v. Zen-Hoh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990).

Voyage Charters, 4th Edition (2014) Chapter 5, in particular:

Paragraph 5.31 – “. . . An express warranty of safety may be given in relation to either the port or berth, or both. . . . The result is simply that by virtue of the parties’ express agreement the risk of unsafety of the named port or berth falls on the charterer, although it would, in the absence of agreement, fall upon the owner. . . .”

Paragraph 5.32 – “There are variants of the express warranty in common use. Sometimes the charterer warrants merely the exercise of due diligence to nominate a safe port or berth. . . .” citing paragraph 5.47 referring to the special wording in the Shellvoy form.

The views expressed above are also consistent with a learned article offered by the Amicus which deals with this topic. *Unsafe Berths and Implied Terms Reborn* (2010) Lloyd’s Maritime and Commercial Law Quarterly 489, 495.

The brief of *amici curiae* The American Fuels & Petrochemical Manufacturers Association and International Liquid Terminals Association (the “Petro Terminals Amici”) in support of Petitioners argues to the contrary at page 14:

Under English law, CARCO would not be liable for unknown and unknowable dangers

lurking in the Federal Anchorage based upon a charterparty's safe berth provision.

The Amicus does not consider that statement to be correct as a matter of English law (as evidenced by the above-referenced authorities), wherein the obligation on a charterer to nominate a "safe" port/berth/place does not depend on whether the dangers are "known" or "knowable." Rather, under English law the warranty imports strict liability.

To the Amicus, the view expressed by the Petro Terminals Amici appears to be based on a misreading of the case cited, *Gard Marine and Energy Limited v. China National Chartering Company Limited and another (The Ocean Victory)* [2017] UKSC 35. It is true that, as appears from the classic modern statement of the law expressed by Slessor LJ in *The Eastern City* quoted above, damage caused by an "abnormal occurrence" will not generally mean that a port/berth/place is unsafe. For example, there will be no breach of the safe port warranty if a ship is damaged by a meteor falling out of the sky. That is because such an event would properly be characterized as an "abnormal occurrence" which is not a characteristic of the port. To that extent, it is right to say that the safe port/berth/place warranty is not "absolute;" *i.e.*, it does not mean that the charterer guarantees that a ship will not suffer damage.

However, an underwater obstacle (such as an anchor) which is not properly marked or in respect of which no proper warning is given (whether known,

unknown or unknowable) is a feature or characteristic of the port and not an “abnormal occurrence.” It is perhaps worth emphasizing that the reference to “abnormal occurrence” in the statement of Slessor LJ in *The Eastern City*, is not a reference to the event or incident in question but a reference to that which is the cause of the event or incident in question. Thus, under English law the fact that no previous similar incident has occurred will not of itself mean that the port/berth/place was safe.

It has been observed that some confusion arises on account of the position under English law that the obligation to nominate a safe port/berth/place is primarily concerned with “prospective safety.” However, as stated in *Carver* paragraph 4-006, references to “prospective safety” should not mislead. As there stated, the charterer’s promise is *not* confined to one of “reasonable foresight” rather: “The charterer’s promise is of actual safety, not that which might reasonably be anticipated.” This serves to emphasize that, contrary to the submissions at pages 14-16 of the brief of the Petro Terminal Amici, the charterer’s warranty of safety imports a strict liability.

Finally, the majority of charter parties are governed by English or U.S. law, and most standard charter party forms provide for this. Usually, disputes are decided in arbitration in London or New York. However, unlike most other jurisdictions, including the U.S.A., Section 69 of the English Arbitration Act 1996 provides a limited right of appeal on a question of law arising out of an arbitration award, subject to leave of

court. The result is that where that Act applies and English law governs, arbitrators are generally bound by English law. The Amicus has observed that many of the shipping cases coming before the English courts are by way of appeal under Section 69, such that the determination of any such question of law on an appeal will then, in effect, be binding in subsequent arbitrations. By contrast, there is no separate corpus of arbitration “precedent.” That is, arbitration awards are not themselves binding. Indeed, under English law arbitration awards are generally confidential to the parties in the particular case and are generally not published.

CONCLUSION

The Amicus submits that English law and precedent support the proposition that the charterer’s safe port/berth/place obligation should be deemed strict, and not dependent upon a showing of negligence.

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 13, 2019