

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.; UNITED STATES,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

**BRIEF OF MANFRED W. ARNOLD, AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

Chester Douglas Hooper
Counsel of Record
15 Candleberry Lane
Harvard, MA 01451
978-456-3171
chesterdhooper@outlook.com

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INTEREST OF *AMICUS CURIAE* AND INTRODUCTION*

Manfred W. Arnold, hereinafter referred to as Amicus, has spent 59 years in the shipping industry in Germany, Japan and the United States. Amicus has a professional interest in the outcome of this case, given his long-time service as a maritime arbitrator and his career in the shipping industry. He hopes that predictability and uniformity of commonly used charterparty terms can be achieved.

After attending numerous arbitration hearings as an observer, he joined the Society of Maritime Arbitrators, Inc. (SMA) as a member in 1971 and received his first appointment in 1973, serving as a panel chair.

In 1963, a small group of well-credentialed individuals who were active in the maritime business in New York and who had encountered arbitrations on occasions, had foreseen the need for an organization dedicated to the promotion of sound arbitration practice by experienced and highly qualified maritime and commercial professionals who would observe strict ethical standards. As a result, they formed the SMA, a professional, non-profit organization that, unlike some other arbitral fora, requires its members to issue only fully reasoned awards. It also demands that its members, even when party-appointed, must be impartial

* No counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amicus curiae* represented in this brief made any monetary contribution to its preparation or submission. The printer, Wilson Epes, printed the brief gratis. All parties have consented to the filing of this *amicus* brief.

and act without bias, partisanship or the appearance thereof. The SMA's mission statement reads as follows:

The Society of Maritime Arbitrators is a professional non-profit organization that has achieved international recognition as a leading forum for the arbitration of maritime and commercial disputes. The mission of the SMA is to promulgate arbitration and mediation and to establish commercially effective legal procedures for Alternative Dispute Resolution. The SMA trains and provides the maritime industry with experienced commercial professionals who resolve disputes in an impartial, timely and cost-efficient manner.

SMA website: <http://www.smany.org/> (last visited Sept. 12, 2019).

Its current membership consists of 75 commercial men and women; including numerous members with legal backgrounds who, however, no longer practice law. The Association requires the issuance of fully reasoned awards, including concurring opinions and or dissents. The publication of awards allows the industry to predict arbitration results and provides uniformity for the industry.

Shortly after joining the SMA and having done committee work, he was elected vice president and served a one-year term. His career as an arbitrator flourished; he eventually became a member of the Board of Governors and served as chair for various SMA committees. In the meantime, he had also become a non-lawyer member of The Maritime Law Association of the United States (MLA). He served for

multiple years as co-chair of the MLA/SMA Liaison Committee, and as a member of the MLA's Arbitration-Alternative Dispute Resolution Committee. In 1985, he decided to become a full-time arbitrator.

In 1988, he was elected president of the SMA and served five consecutive terms. During that time, he also became the SMA's permanent representative on the Steering Committee of the International Congress of Maritime Arbitrators (ICMA), a world-wide arbitration organization for which the Amicus served numerous years as chair; rotating in that position with London's permanent representative Mr. Bruce Harris, who at that time was president of the London Maritime Arbitrators Association (LMAA).

The Amicus has served on approximately 1,500 arbitration cases of which close to 1,000 cases resulted in awards; of those awards, 973 have been published by the SMA and can be accessed via Lexis/Nexis and Westlaw. He also participated in the issuance of a number of additional awards, which were rendered for cases conducted under the auspices of the International Chamber of Commerce (ICC) in Paris, the American Arbitration Association (AAA) in New York, the Hong Kong International Arbitration Center (HKIAC) in Hong Kong, and the Cairo Regional Center for International Commercial Arbitration (CRCICA) in Cairo.

He has testified in Federal Court as an expert witness on maritime cases and has also acted as a mediator in charterparty disputes.

In their publication *Maritime Arbitration in New York*, at 1 (7th ed March 2016) the SMA stated:

the awards offer significant insight as to how maritime arbitrators view various issues and certain practices and customs of the trade. The published awards, therefore, serve not only as a guide for the resolution of disputes between disputants, but also as a means for the maritime community to avoid potential disputes in future fixtures and other contracts.

<http://www.smany.org/arbitration-new-york.html>.

The awards issued also represent a body of precedents which, although not binding, has established guidance for the users of the system, leading eventually to a concept similar to *stare decisis*. The Amicus has adopted this tenet and applied it during his career, taking due notice of accepted customs and usage as well best trade practices. The arbitration awards evidence the customs and practices of the shipping industry.

The Amicus states that, based upon his personal experience and his participation in international arbitral proceedings and arbitration conferences, the world of arbitrators as well as ship owners and charterers embrace uniformity of contract as it benefits international commerce by clearly allocating risk and financial responsibility. It is notable that London and New York, the two leading arbitration centers, share the common view that the clause now before the bar represents a non-delegable warranty. This position applies to tankers, bulk-carriers, container ships alike.

The SMA has published about 67 awards dealing with the safe port/safe berth clause without containing a due diligence qualifier. Resp. Br. Add. 1a. These

cases were heard by 20 different arbitrators; the Amicus participated in 15 of those awards. (Most arbitration panels consist of three arbitrators.) In every one of those decisions, the arbitrators treated the wording of safe berth clauses identical or substantially similar to the case at bar as an absolute warranty. Not one decision implied a due diligence standard such as Petitioner contends here. Indeed, the contention that Petitioner raises here that the safe berth clause has an implied “due diligence” qualifier was very rarely even raised by charterers in these cases.

It should be mentioned that over the years, a number of oil companies have created their own pro-forma contracts, following the example set by Standard Oil/Exxon with the most often used ASBATANKVOY, which was derived from the earlier Exxonvoy tanker form and which was published by the Association of Ship Brokers & Agents in 1977. Mobil and Shell eventually amended their forms.

Mobil deleted the safe port/safe berth clause and Shell modified their clause to provide that they do not warrant “... the safety of any port ... and shall not be liable for loss or damage arising from any unsafety if they can prove that due diligence was exercised in giving the order.”

ExxonMobil, EXXONMOBILVOY2005, cl. 16(b); Shell, Shellvoy 6 Part II, cl. 4 (Mar. 2005).

Voyage charterers, such as CARCO, have historically warranted the safety of the port and berth to which they have directed the ship they have chartered. They continue today to make the same warranties with language similar to or identical to the language

in the charterparty now before the bar. Parties to charterparties may so agree because they enjoy freedom of contract and may agree to whatever terms the shipping industry requires. If the parties wished to lower the charterer's duty from a warranty to a mere promise to exercise due diligence to choose a safe port and berth, they could do so. Such an agreement was not made in the case now before the bar. The voyage charterer, CARCO, clearly agreed that CARCO would warrant the safety of the port and berth. The port and berth were not in fact safe. The Third Circuit correctly held CARCO to the warranty that CARCO breached.

SUMMARY OF ARGUMENT

The customs and practices of the shipping industry have long treated and continue to treat the safe port, safe berth language in the charterparty now before the bar and in similar charterparties as warranties that the ports and berths are safe; the language is not treated as a mere agreement to exercise due diligence to try to choose a safe port.

Most charterparty disputes are resolved by arbitrators who are experienced commercial men and women in the shipping industry. Their arbitration awards provide us with excellent evidence of these customs and practices. Amicus has participated as an arbitrator in about 1,500 arbitration panels, about 1,000 of which resulted in written arbitration awards. He has participated in about 15 arbitrations that have involved safe port or berth language similar or identical to the language now before the bar constituted a warranty. Most of those arbitrations assumed without expressly discussing that the language constituted a warranty. The parties to many of those arbitrations did not even question the warranty nature of the language. The disputes often involve the issue of whether the nature of port or berth on one hand or improper navigation or unseaworthiness on the other hand caused the damage.

ARGUMENT**I. The Custom and Practice of the Shipping Industry has Treated and Continues to Treat the Safe Berth and Port Language now before the Bar as a Warranty by a Voyage Charterer that the Port and Berth are Safe.**

The best evidence of this custom may be found in the SMA published arbitration awards. Of the 67 arbitration awards that involve the safe berth, safe port issue, two awards will be discussed here. Amicus was a member of the panel of the first award to be discussed, *Tramp Shipping Co.*, SMA 1602, 1981 WL 640664 (Oct. 30, 1981). That award was decided before the Fifth Circuit opinion of *Orduna S.A., et al. v. Zen-Noh Grain Corporation, et al.*, 913 F.2d 1149 (5th Cir. 1990), which interpreted the usual safe berth, safe port clause not as a warranty, but only as an agreement to exercise due diligence to choose a safe port and berth. In the *Tramp Shipping* matter, a vessel grounded while entering and leaving the Port of Churchill in Canada in September 1974 shortly before the port closed for the winter. The vessel had difficulty navigating in slush ice and a severe blinding snow storm after the pilot boat could not reach the vessel.

There was a chain of charterparties for the vessel. One of the charterparties in the chain had no safe berth, safe port clause. The other charterparties contained the usual safe port, safe berth clause.

The charterer argued that the safe port, safe berth clause did not give rise to a warranty. The Panel responded unanimously as follows:

The Panel does not accept this line of reasoning and feels bound to recognize and follow

the long line of decisions dealing with the safe port warranty and the obligations which arise out of it. If the obligation is impracticable or burdensome, a Charterer need only provide otherwise in his charter party.

Id. at *13.

The second award that should be discussed is *T. Klaveness Shipping A/S*, SMA 3686, 2001 WL 36175174 (April 18, 2001), which was issued after the Fifth Circuit decision of *Orduna S.A. supra*. The *Orduna* decision was brought to the arbitrators' attention, but its reasoning was rejected by the arbitrators. The arbitrators instead followed the custom and practice of the shipping industry. The charterer argued: "Owner's claim should be denied on the basis of the ORDUNA... which held that a voyage charterer does not warrant the safety of the berth it selects but 'instead the safe berth warranty imposes upon the charterer a duty of due diligence to select a safe berth.'" *T Klaveness, supra* at *8. The majority of the Panel ignored that argument and held:

Having carefully examined the evidence, testimony and counsels' arguments the majority finds for Owner in that the ADM mooring was an unsafe berth at the time and under the prevailing circumstances in March of 1994; we also find that Owner had not waived the safe port/berth warranty simply by agreeing to New Orleans as the discharge port.

T Klaveness, supra at *9.

The arbitrators rejected the *Orduna* reasoning with the following comment:

We reject as inapplicable Charterer's contention that it should be excused from liability on the basis of the "due diligence only" requirement, championed in the minority opinion in *Orduna S.A. v. Zen-Noh Grain Corp.* (*supra*). Even if we were to consider this argument, we still would have concluded that Duferco failed to show that it properly exercised its due diligence duty when it selected ADM as the substitute berth.

T Klaveness, supra at *10.

The dissenting arbitrator in *T Klaveness* did not disagree with the majority's holding that the safe port, safe berth clause was a warranty. He thought that since the port had been named by the charterer, the owner should have known of the difficulty presented by strong currents in the Mississippi River in the spring and should not have accepted the discharge plans. *Id.* at Appendix A.

II. The Reasoned and Published Arbitration Awards of the Shipping Industry Provide Guidance and Predictability to the Industry.

The reasoned arbitration awards are relied on when fixing charterparties and when operating ships. They provide uniform guidance to the industry and prevent disputes. The industry should be able to rely on them without fearing that agreements they intend to make will not be upheld.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit in the case now before the bar should be affirmed in all respects.

Respectfully submitted,

Chester Douglas Hooper
Counsel of Record
15 Candleberry Lane
Harvard, MA 01451
978-456-3171
chesterdhooper@outlook.com

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