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LIMITATION OF LIABILITY FOR PARTIES OTHER THAN OWNERS, CHARTERERS OR MANAGERS: WHO IS AN "OPERATOR" FOR THE PURPOSES OF THE LIMITATION CONVENTION?

Splitt Chartering ApS & Others v Saga Shipholding Norway AS & Others [2021] EWCA CIV 1880

The English Court of Appeal have considered the meaning of the word "operator" under the Limitation Convention. Narrowing the meaning of the term, the Court held that an "operator" must be involved in the management or control of the vessel, and not simply provide crew.

The Court of Appeal has handed down its judgment in *Splitt Chartering ApS & Others v Saga Shipholding Norway AS & Others* [2021] EWCA CIV 1880 last week, overturning the May 2020 decision of Sir Nigel Teare in the Admiralty Court on the meaning of "operator" for the purposes of the Convention on Limitation of Liability for Maritime Claims 1976 ("the Limitation Convention" or "the Convention").

While it is well known that the registered owner of a ship and a charterer (including a slot charterer) can limit their liability under the Limitation Convention in accordance with the tonnage of the ship in question, the Convention also allows the "operator" of the ship to limit their liability in the same way by including "the owner, charterer, manager, or operator of a seagoing ship" within the definition of "shipowner" (see Article 1(2)). However, there is no recognised definition of "operator".

The case concerned damage to a submarine cable owned by Réseau de Transport d'Électricité ("RTE"), which runs under the English Channel between England and France. In late 2016, the anchor of the dumb barge STEMA BARGE II dragged during a storm. At the time, the barge had been anchored off Shakespeare Beach near Dover and was supplying rock armour for a project to rebuild damage to the railway infrastructure in the area. The rock armour was supplied by Stema Shipping A/S ("Stema A/S"), who had chartered the STEMA BARGE II from its registered owners, Splitt Chartering ApS ("Splitt"). It was recognised that those two entities, both part of the Mibau group of companies, could limit their liability under the Limitation Convention. Another company in the same group, Mibau Baustoffhandel, had initially sought to limit, but dropped its claim.

The proceedings centered around a fourth company in the group, Stema Shipping (UK) Limited ("Stema UK"), who were not the owners or charterers of the barge and did not have any formal role in respect of the barge's management or operation. However, Stema UK's personnel operated the machinery of the barge whilst it was off Dover and were involved in monitoring the weather and in the decision to leave the barge at anchor during the storm. Stema UK sought to limit under the Limitation Convention on the basis that they were an "operator" of the barge following her arrival off Dover.

The Admiralty Court's Judgment in 2020

The then Admiralty judge, Sir Nigel Teare, had held in the Admiralty Court in 2020¹ that Stema UK was entitled to limit its liability as an "operator" but that Stema UK was not a "manager" of the barge. He concluded that the ordinary meaning of "the operator of a ship" includes the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of business.

The judge noted that although Stema A/S was clearly the barge's "operator" prior to arrival at Dover and retained a role as "operator" while the barge was off Dover, from the time of the barge's arrival off Dover, Stema UK had a "real involvement" with the barge, its employees not only anchoring her but preparing her for lying safely at anchor and,

¹ *Splitt Chartering ApS & Others v Saga Shipholding Norway AS & Others* [2020] EWHC 1294 (Admty)

during discharge, operating the barge's machinery to ensure that she was safely ballasted. The judge observed that "[n]o personnel of Stema A/S were on board; only personnel of Stema UK" (para. 110).

The Judge then asked himself whether it could fairly be said that Stema UK was the operator of the barge off Dover (in which case it could limit its liability), or whether Stema UK merely assisted Stema A/S to operate the barge (in which case it could not limit its liability). He held that:

"Although Stema A/S was the operator of the barge in the sense of being its manager I would not describe Stema UK as merely assisting Stema A/S to operate [the barge] off Dover in circumstances where Stema A/S had no personnel present able to operate [the barge] off Dover. The necessary operation of [the barge] was in fact performed by Stema UK alone, sending its personnel on board to do what was necessary" (Paragraph 120).

As a result, the term "operator" was given a wide meaning. While it was recognised that there can be more than one "operator" for the purposes of the Convention, the Admiralty Court's judgment meant that a party with no formal role involved in providing limited services to a ship for a limited time in a particular location might also be able to rely on the limitation protection of the Convention as an "operator".

RTE's Appeal to the Court of Appeal

RTE's first ground of appeal was that the Admiralty judge was wrong in construing "the operator" of a ship in the Limitation Convention to include the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of business in this way.

Delivering the lead judgment, Lord Justice Phillips first noted Longmore LJ's summary at paragraph 10 of *The CMA Djakarta* (CMA CGM SA v Classica Shipping Co Ltd [2004] EWCA Civ 114) that, when construing an international convention such as the Limitation Convention, the duty of a court is to "[...] ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the convention. The Court may then, in order to confirm that ordinary meaning, have recourse to what may be called the travaux préparatoires and the circumstances of the conclusion of the convention".

In the absence of previous authorities on the meaning of "operator" for the purposes of the Limitation Convention, the Court of Appeal considered the official records of the negotiations for the Convention (that is, the "travaux préparatoires"), which revealed that a proposal that limitation protection should extend to include "all persons rendering services in direct connection with the navigation, management or the loading, stowing or discharging of the ship", had been rejected by majority vote of the contracting parties.

The other authority relied on by the Court of Appeal was the judgment of the Australian Federal Court ASP Ship Management Pty Limited v Administrative Appeals Tribunal [2006] FCAFC 23, which concerned the meaning of the words "operated by" in a maritime context for the purposes of Australian legislation concerning statutory compensation for injuries. Lord Justice Phillips adopted the Federal Court's view in that case that the mere provision of the crew for a vessel does not mean the vessel is operated by the provider.

Lord Justice Phillips then went on to find (at paragraph 58) that:

"[...] the term "operator" must entail more than the mere operation of the machinery of the vessel (or providing personnel to operate that machinery) [...]. The term must relate to "operation" at a higher level of abstraction, involving management or control of the vessel, or else [...] categories of service providers would be included notwithstanding their express exclusion by the contracting parties as revealed in the travaux préparatoires."

Applying this to the facts of the present case, the Judge held that Stema UK's actions were for, on behalf of and supervised by Splitt and Stema A/S. To the extent that any of them amounted to operating the barge, he considered that those actions were plainly by way of assistance to Stema A/S in its role as operator, not by way of becoming a second or alternative operator or manager.

Analysis

As a result of the Court of Appeal's judgment, the meaning of "operator" has been restricted to those who also have a degree of management or control over the vessel in question. While there can be more than one "operator", the judgment notes that an alleged second operator may in fact be providing assistance to the undoubted operator, and that the Court should not readily find that there is more than one operator.

The judgment confirms that not all those involved in providing services to ships will be able to limit their liability under the Convention. While there can be more than one owner, charterer, manager or operator for the purposes of the Convention, this latter category is not to be construed widely as a "catch all". Instead, the entities entitled to rely on the protection of the Limitation Convention remain a select group.

HFW Partners Alex Kemp and Stanislas Lequette and Senior Associates Jenny Salmon and Mona Dejean acted for the successful Appellants, Réseau de Transport d'Électricité, with Chirag Karia QC as Counsel.

HFW are regularly instructed in limitation actions and maritime disputes where a party is seeking to limit its liability under the Limitation Convention. Alex and Jenny were also involved in *The Atlantik Confidence* (Kairos Shipping Ltd v Enka & Co LLC [2016] EWHC 2412 (Admlty)), the first and only recorded case in which a party has "broken" an owner's right to limit by demonstrating that the vessel in question had been sunk deliberately by the owner. For further details, read more in our HFW briefing on that case: <http://www.hfw.com/downloads/HFW-Atlantik-Confidence-October-2016.pdf>.

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