

Limitation of liability: Who is an 'Operator' and who is a 'Manager' - *Stema Barge II* [2020] EHC 1294

This article, written by Ian Teare and Matthew Dow of Law Firm, Wikborg Rein, discusses the judgment handed down in the Admiralty Court on the case of the *Stema Barge II*, and looks in detail at the scope and meaning on the Limitation Convention 1976. In determining the meaning of 'Operator', it was necessary for the Court to also examine the meaning of 'Manager'. This is the first time that the English Court has been called upon to consider this issue which it did in some detail.

The Background

In December 2015, severe weather caused damage to the railway line which ran along the English coast between Dover and Folkestone. Subsequently, the appointed repairers contracted with Stema Shipping (UK) Limited (Stema UK) for the provision of rock to be used in the repairs. Stema UK purchased the rock from its associated company, Stema A/S. The rock was shipped from Norway in the barge, *Stema Barge II*, which was anchored in an agreed location before it dragged anchor in gale force winds in November 2016, allegedly damaging a subsea electricity cable owned by Réseau de Transport D'Electricite (RTE).

This was a limitation action arising from the above events. RTE accepted that the Registered Owner of the barge, Splitt Chartering APS (Splitt), and the Charterer, Stema A/S, were entitled to limit their liability but denied that the third defendant company, Stema UK, was entitled to limit.

The Roles of Stema A/S and Stema UK

There was a written agreement between Splitt and Stema A/S for the carriage of the rock on *Stema Barge II* from Norway to the UK for this project. Although the contract was not in the form of what might be regarded as a conventional charterparty, it was not challenged that Stema A/S was the Charterer. However, there was also evidence from an employee of Stema A/S that he was "an Operator" with "daily responsibility for the operation of barges owned by Splitt". This individual also followed procedures in a "Barge Operator Manual" which included the fixing of tugs, insurance, surveys at the load and discharge ports and weather routing.

Although Stema UK were the party who contracted with the main railway repairer ashore for the provision of the rock, they also had some involvement with the barge. They provided a Method Statement to the rail repairer which included matters such as the anchorage and transshipment location. They also provided a Safety Statement and other documents, including a Man

When the barge arrived off the English coast in November 2016, Stema UK placed on board a barge master and a crew member who were operating under a shore based superintendent who was also from Stema UK. Between them, these personnel were responsible for dropping the barge's anchor and following a check list which included checking the illumination of navigation lights, the preparedness of the emergency towing wire, ballasting arrangements, the operation of the generators and monitoring the barge's position.

On the night of the casualty, although the decision to leave the barge at anchor to ride out the storm was ultimately made by the Owners, Splitt, it was based on the conclusion of a meeting on-site which included two people from Stema A/S and two from Stema UK.

On the facts, therefore, it can readily be seen that both Stema A/S and Stema UK had some role in the physical activities on and in relation to the barge. Stema UK argued that the number of activities for which they were responsible was sufficient to amount to management and control and thus they could properly be described as the Operator. In contrast, RTE argued that (i) in fact, Stema A/S was both the Charterer and the Operator, and (ii) Stema UK was, in reality, simply the purchaser of rocks who had to do certain things on the barge to take delivery and these tasks were not sufficient to make them the Operator.

Interpreting Article 1(2) – the meaning of "Operator" and "Manager"

The parties took the Judge to a wide range of sources from which it was said that guidance could be taken in undertaking this exercise in interpretation. These sources included the *travaux preparatoire* of the 1976 Limitation Convention, the Australian Federal Court decision in *ASP Ship Management Pty Ltd v The Administrative Appeals Tribunal*, the wordings of BIMCO's Shipman contract, various practitioners' textbooks and industry dictionaries.

It was accepted by both sides in this case that there might be some overlap between the meanings of Operator and Manager.

The Judge concluded that the ordinary meaning of 'Manager' in the Limitation Convention is:

"...the person entrusted by the Owner with sufficient of the tasks involved in ensuring that a vessel is safely operated, properly manned, properly maintained and profitably employed to justify describing that person as the Manager of the ship. I put it that way because if a person is entrusted with just one limited task it may be inappropriate to describe that person as the Manager of the ship. A person who is entrusted with just one limited task of management may be described as assisting in the management of the ship rather than being the Manager of the ship."

In relation to the meaning of 'Operator' in the Limitation Convention, the Judge first noted that the meaning of "Operator" would include the Manager and, in many cases involving

conventional merchant vessels, there may be little scope for the definition to go further than that. However, this case did not involve conventional tonnage but a dumb barge and so the Judge went further. He concluded:

"Those who cause an unmanned ship to be physically operated have some management and control of the ship. If, with the permission of the Owner, they send their employees on board the ship with instructions to operate the ship's machinery in the ordinary course of the ship's business, 3/4

they can, I think, be said to be the Operator within the ordinary meaning of that phrase, though they may not be the Manager of it."

The Judge also made the perhaps obvious observation that the fact that Article 1(2) expressly includes both the words "Operator" and "Manager" of itself suggests the possibility that there might be parties who would qualify as an Operator but not as a Manager.

In arriving at the above quoted definition, the Judge also noted that the ordinary meaning of the word "Operator" should be understood in the light of the object and purpose of the Limitation Convention. In this respect, he noted that if a dumb barge is used in an operation such as this it would have to be anchored on arrival and, ordinarily, the Owner would have to arrange for the steps to be taken to do that. It would not encourage international trade by sea, he said, if an Owner could limit its liability for losses which arose through the negligent performance of that task but that a third party engaged for the same tasks could not.

Applying the Judge's principles to the Facts

It was clear that Stema UK could not be considered to have been the Operator at any stage prior to the barge's arrival off the English Coast. It was also clear that Stema A/S retained some operational role after the barge was anchored. However, the Judge recorded that once the barge arrived on site, Stema UK had *"a real involvement"* with the barge, including anchoring and ballasting. The only personnel who went on board while she was at anchor were employees of Stema UK. Of equal, or perhaps even greater, significance was that while the ultimate decision to leave the barge at anchor on the night of the casualty was taken by the Owner, Splitt, it was a decision based on the advice from Stema UK personnel on site.

Taking all of the evidence as a whole and in the round, the Judge found that the nature of Stema UK's operation of the barge during the relevant period was such as to make it appropriate to describe them as the Operator and thus entitled to limit their liability.

In reaching the above conclusion, the Judge rejected RTE's argument that the use of the word "the" ahead of "Operator" in the Convention suggested that there could be only one Operator. He did also note, however, that the facts would have to demonstrate that, as in this case, the division of operational tasks was sufficient to make it appropriate to describe both parties as Operators.

Observations

Whilst, on the face of it, this case may be of greater potential interest to parties in the offshore sector than the conventional blue water fleets, as RTE discovered in this case, in the world of marine casualties one can never choose who or what you may, quite literally, come into contact with so it ought to be of general interest.

While the judgment provides a comprehensive and, one might say, common sense analysis of the Limitation Convention, it raises the obvious question: how many tasks (and perhaps of what nature) does it take to be an Operator? In this case, that appears to have been a relatively easy decision but it could be more challenging in cases with different fact patterns. 4/4

In the context of fact pattern in this case, it is worth noting the extent of detail to which the contemporaneous documents and witness statements were scrutinised by the Judge in arriving at his conclusion. There was no single piece of evidence which alone pointed definitively towards the conclusion which is why the Judge was at pains to say that he was *"taking all of the evidence as a whole and in the round"*. This approach is worth keeping in mind at the evidence gathering stage of any future casualty which has the potential to follow a similar path to this case.

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