peculiar facts of *The CMA CGM Libra*, a useful example was provided by Lord Hamblen. His Lordship stated that if the causative negligence "consisted of errors made by the master or deck officers in the *execution or monitoring stage of passage planning* during the voyage then prima facie the carrier would be able to rely on the nautical fault exception" (para 142, emphasis added). While there is no doubt that Lord Hamblen has provided useful guidance for future cases (including a helpful summary of the key points from the judgment), there would have been room to go further and resolve some of the uncertainties arising from a plethora of cases on unseaworthiness. To take one example, his Lordship could have provided further clarification on the implications of the Court of Appeal's decision in *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 Lloyd's Rep 7 on the scope of the seaworthiness obligation. The failure to sufficiently explain the distinguishing features of *The Aquacharm* will lead to a lingering uncertainty about the circumstances in which the lower courts should treat the facts as falling on "the boundaries of seaworthiness" (see, especially, para 101 of Lord Hamblen's speech in *The CMA CGM Libra*).

Although the Rules have a worldwide application and constituted a fairly well-harmonised system of law governing carriers' rights and obligations in international carriage by sea, some continental European countries may have a slightly different approach to the problem. Following the entry into force of the International Safety Management Code ("ISM Code"), the owner is obliged to "ensure safety at sea and prevent damage to property, personnel and environment", by maintaining the ship in conformity with the provisions of relevant rules and regulations and with any additional requirements which may be established by the entity responsible for the operation of the ship (see paras 6.2 and 7 of the ISM Code). The ISM Code imposes what is effectively a *continuing* obligation on the owner to maintain the seaworthiness of the vessel. Whenever the violations of the ISM Code obligations have a direct consequence on the goods carried by the ship, the carrier is liable towards cargo interests under the bill of lading since the obligations under article III rule 1 of the Rules cannot be delegated. Thus, if the owner and the carrier are different entities, the carrier continues to be liable to consignees for any loss of or damage to cargo generated by unseaworthiness related to a violation of the ISM Code obligations. In this context, it could be said that the ISM Code regulations supplement those under article III rule 1 of the Rules and, more importantly, establish a continuing obligation of the carrier to exercise due diligence in making the ship seaworthy beyond the beginning of the voyage. The carrier's obligations in relation to seaworthiness of the ship are therefore aligned with the corresponding obligations to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried", which were already a continuing obligation under article III rule 2 of the Rules.

The above considerations on the impact of the ISM Code obligations on the Hague and Hague-Visby Rules would not have changed the conclusions of the Supreme Court in *The CMA CGM Libra*. However, it is submitted that they extend the horizon of the carrier's obligations as to seaworthiness beyond the beginning of the voyage. In other words, the temporal scope of the seaworthiness obligation as interpreted by the Privy Council in *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] 2 Lloyd's Rep 105 only provides a partial picture of the extent of the carrier's obligation. In addition, there may be implications for the long-running debate as to whether the obligation to exercise due diligence is reinstated at every port of call. It has been debated whether any form of a "continuing obligation" could survive in the light of the clear wording of article III rule 1. Given the supplementary effect of the obligations under the ISM Code, however, this debate could finally be regarded as irrelevant.

Dr Filip Saranovic, Senior Lecturer in Shipping Law, Centre for Commercial Law Studies, Queen Mary University of London.

Dr Alberto Batini, Partner and Founding Member, BTG Legal, London and Milan.

Limitation of liability: what is an operator?

Splitt Chartering APS and Others v Saga Shipholding Norway AS and Others (The "Stema Barge II") [2021] EWCA Civ 1880; [2022] 1 Lloyd's Rep 170

The meaning of "operator" in the right to limit liability within limitation conventions was considered in The Stema Barge II*, on appeal from the decision of Teare J ([2021] 2 Lloyd's Rep 307).*

The right to limit liability is contained in the Limitation Convention 1976, as amended by the 1996 Protocol. The UK gives the force of law to the Limitation Convention and Protocol in section 185 and schedule 7 of the Merchant Shipping Act 1995.

Article 1 of the Limitation Convention provides that:

> "1. Shipowners and salvors, hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.
>
> 2. The term 'shipowner' shall mean the owner, charterer, *manager or operator* of a seagoing ship."
>
> (Emphasis added.)

Teare J, at first instance, decided that the "operator of a ship" on its ordinary meaning "embraces not only the manager of the ship but also the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of the ship's business" (para 99).

Background

The action arose following severe weather weakening the railway line on Shakespeare Beach, necessitating repairs. National Rail hired contractors to make these repairs, and these contractors then contracted Stema Shipping (UK) Ltd (Stema UK) to provide rock armour. Stema UK purchased rock armour from Stema Shipping A/S (Stema A/S) who was the charterer/operator of the *Stema Barge II* on which the rock armour was transported, and Stema UK was the receiver of the cargo. The registered owner of the *Stema Barge II* was Splitt Chartering APS (Splitt).

After arriving with the third load of rock armour, the *Stema Barge II* was anchored when Storm Angus was forecast to cause storm-force winds. The decision was made to let the barge ride out the storm, and on 20 November 2016 the barge began to drag her anchor and thus damaged the undersea cable owned by RTE Réseau de Transport d'Électricité SA (RTE).

RTE claimed for damages, and it was accepted that Splitt and Stema A/S were able to limit their liability. Stema UK sought a declaration of non-liability, which was stayed. RTE disputed that Stema UK was able to limit its liability. Teare J held that Stema UK was an operator and thus entitled to limit.

RTE appealed the decision on four grounds of appeal. The case was heard before Phillips LJ, Sir David Richards, and Sir Launcelot Henderson. Phillips LJ delivered the leading judgment, with which the others agreed. The appeal was allowed and Stema UK's claim for a declaration that it is entitled to limit its liability was rejected.

The law

In the judgment of the Court of Appeal on 15 December 2021, Phillips LJ decided, and the other judges agreed, that Stema UK was not entitled to limit its liability as Stema UK was not an "operator of a ship".

Phillips LJ took a different view of the meaning of "operator" than Teare J did at first instance. Phillips LJ did, however, start from the same point in his reasoning by recognising that operation is at a higher level of abstraction, and involves management or control of the vessels, as compared to the mere operation of machinery. This meaning is the same for manned and unmanned vessels. However, Teare J's reasoning then became contradictory and cyclical, and resulted in a decision that was inconsistent with the meaning of "operator".

The object or purpose of the Limitation Convention is isolated to the common ground found in encouragement of international trade by sea carriage; the introduction of higher limits of liability; and allowing salvors to limit as owners do (referring to Longmore J at para 11 in *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep 460). The travaux préparatoires show that the majority of contracting parties rejected a proposal to widen the classification of persons entitled to limit.

Phillips LJ agreed with the reasoning in *ASP Ship Management Pty Ltd v Administrative Appeals Tribunal* [2006] FCAFC 23. The crucial aspect of operation is that it is more than "working with the ship" and that there is "a real, substantial and direct role in the management of control" (paras 94 and 97).

Court of Appeal decision

Phillips LJ held that, at most, Stema UK assisted Stema A/S in its operation of the vessel, but that Stema UK was not also an operator. It did not have a formal role in the management or operation of the vessel. Stema UK's personnel operating the machinery of the barge, monitoring the weather, and involvement in the decision to let the barge ride out the storm, did not equate to management or operation.

On the first ground of appeal, that Teare J was wrong in construing "operator" as including "any entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of the ship's business", the Court of Appeal agreed with the appellant. Phillips LJ agreed with counsel's submission that the reasoning was cyclical and abandoned the requirement that operation be at a higher level of abstraction. Therefore, the reasoning at first instance was inconsistent and contradictory, and the ground was made out.

On the second ground of appeal, that Teare J was wrong in his application of the law in holding Stema UK was an operator, the Court of Appeal agreed. As Stema UK was at most assisting Stema A/S, the second ground was made out.

The third and fourth grounds were lesser arguments, but Phillips LJ did consider them for completeness. On the third ground, Phillips J left open the possibility of finding more than one operator. On the facts, however, Stema UK was not capable of being a second operator.

On the fourth ground, that Teare J had erred that in concluding that Stema UK was party to the decision to ride out the storm in practical terms, the Court of Appeal agreed. As it was only an advisory role and the steering committee as a whole was advisory, Stema UK was not party to the decision. The decision was made by Stema A/S as operator.

On the respondent's notice, as to whether Stema UK was the manager, Phillips LJ concluded that as the respondent had not challenged

Teare J's finding that operator includes manager, Stema A/S was the manager or operator, and Stema UK had at most assisted Stema A/S in its operation.

Comment

Teare J did give consideration to the importance of control, as did the Court of Appeal. However, Teare J interpreted it to a lower threshold that allowed for him to reach his decision in the case. The Court of Appeal took a view that the law requires real, substantial, and direct control, as compared to sufficient control. This is an interpretation of operator that is more consistent with the positions of the owner, charterer, or manager. It could be argued that Teare J, in focusing solely on the relationship between management and operation, inadvertently lowered his expectation of the necessary control, instead of asking what level of control makes an entity the equivalent of an owner.

Phillips LJ noted that Teare J made an unnecessary distinction between manned and unmanned vessels, a distinction that would have been undesirable for the consistency of law. This distinction led Teare J to place too much emphasis on the aspect of physical operation of the barge in deciding that Stema UK was an operator. For the courts to make such a decision would be extraordinary, as it would make a distinction as to the significance of physical operation on unmanned and manned ships that could make third parties on unmanned ships entitled to limit liability when they do not have real, substantial, and direct control. Although the employees would be exercising some management or control, it would not be to the extent necessary to be considered a shipowner. A test based on sufficiency, which is then further reduced by unnecessary emphasis on physicality when a ship is unmanned, would conflict with the established understanding of the shipowner and his servants.

This reasoning can be further considered in relation to remote-controlled and autonomous ships, of which some are likely to be unmanned. Although Teare J's decision would not have been problematic for individual employees of a remote-controller or company providing an autonomous system, it may have allowed those companies to be considered as operators and entitled to limit their liability. If a decision is to be made regarding the inclusion of these companies within limitation, that should be decided by the state parties. Phillips LJ's decision could indicate that as remote-controlled and autonomous systems are developed, the company involved would need to have a level of real, substantial, and direct control of the ship that would equate it with being an owner, charterer, manager or operator. Phillips LJ emphasised that the simple provision of crew is not the same as operation; therefore, the mere provision of a remote crew or an autonomous system would not equate the provider to an operator.

This is an interesting case regarding the issues it raised in relation to unmanned ships, and the potential for the reasoning at first instance and the Court of Appeal to be applied to remote-controlled and autonomous ships. However, it is equally interesting in its contemplation of a term that had received little judicial attention. It is an example of how, when interpreting terms, even though reasoning may have the correct starting point, the reasoning can become flawed, and the wrong conclusion reached. Phillips LJ was conscious that he was disagreeing with an esteemed Admiralty judge but was comforted that a similar circumstance arose in *The CMA Djakarta*. Therefore, this case is a clear reminder that all judges are capable of erring despite their considerable experience and expertise.

Dr Hannah Stones, Lecturer in Law, Bournemouth University

Recap contract making

BP Oil International Ltd v Glencore Energy UK Ltd [2022] EWHC 499 (Comm)

The claimant BPOI purchased a cargo of crude oil from the defendant Glencore, and alleged that it was contaminated with organic chlorides. By the contract of sale, formed in April 2019 on now disputed terms, Glencore had sold 100,000 mt +/- 10 per cent of Russian Export Blend Crude Oil to BPOI, to be loaded between 13 and 18 April 2019, delivered CIF Rotterdam, and at a price of "Dated Brent + 0.53 USD" per barrel. The contract of sale incorporated by reference BPOI's General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products 2015 Edition (the "GT&Cs"). BPOI subsequently resold the cargo to BPESE, an affiliate company.

The cargo was loaded on 16 April 2019 at Ust-Luga and discharged on 22 April 2019 at Wilhelmshaven. Before loading, the parties' appointed load port inspectors had inspected the cargo. The three certificates made no mention of organic chlorides and were delivered to BPOI on about 17 April and 8 May 2019. On about 20 June 2019 BPOI made arrangements to buy back the cargo from BPESE and to have it shipped to Castellon to be diluted, blended and processed. BPOI now contended that sample testing showed that the cargo was contaminated by organic chlorides. The issue arose as to the terms on which the contract had been made. Negotiations were by email, starting with a recap from Glencore on 1 April 2019 and concluding with documentary instructions from BPOI on 9 April 2019. BPOI contended that a binding contract had been concluded following offer and acceptance in the first two exchanges on 2 April, whereas Glencore's position was that it had made counteroffers on subsequent