In conclusion, this decision may be placed in a wider context. It is easy to think that insistence on proof of actual dissipation, both in the sense that the disposal of assets would be dissipation and that there seems to be a real risk of this happening, represent a "tightening up" on the part of the courts about granting freezing orders. There may be some truth in this, and it would be no bad thing if it were true. But the recent decision of the Privy Council in *Broad Idea International Ltd v Convoy Collateral Ltd*,[32] dispensing by a 4:3 majority with the need for a cause of action within the jurisdiction as an essential condition of obtaining a freezing order, could be seen as leaning in favour of extending this form of relief. However, a more nuanced interpretation of these developments is suggested. *Broad Idea* says these powers are needed. *Les Ambassadeurs* and the other developments discussed in this comment say the powers must be exercised very carefully and responsibly.

David Capper*

## WHO IS AN OPERATOR WITHIN LLMC?

### *The Stema Barge II*

As discussed previously,[1] in *The Stema Barge II*,[2] Teare J held that Stema Shipping (UK) ("Stema UK"), an associated company of the barge's owner, Splitt Chartering APS ("Splitt"), and the charterer, Stema Shipping A/S ("Stema A/S"), was entitled to limit liability as an "operator" under Art.1(2) of the Convention on Limitation of Liability for Maritime Claims 1976 ("LLMC"). However, the Court of Appeal[3] has now reversed Teare J's decision. This note will analyse the reasons which led to this reversal.

### Brief background facts

*Stema Barge II* ("the Barge"), a dumb barge, whilst anchored off the coast of Dover during a storm, dragged anchor and damaged an underwater cable owned by the appellant. In the ensuing limitation action, Teare J found that Stema UK was an operator

32. [2021] UKPC 24.

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1. See Mayank Suri, "Will LLMC apply to Remote Control Centre Operators? (*The Stema Barge II*)" [2022] LMCLQ 9. Doubts in respect of remote operators falling within the ambit of LLMC are real. See Work Programme—Proposal for a new output to develop a consistent legal framework for the regulation of Maritime Autonomous Surface Ships (MASS) across IMO instruments, LEG 109/13/2, Canada and the Republic of Korea, 10 January 2022 at [12]: "Therefore, it is essential to consider whether the remote operator is falling within the scope of 'manager and operator of the ship'."

2. *Splitt Chartering APS v Saga Shipholding Norway AS (The Stema Barge II)* [2020] EWHC 1294 (Admlty); [2021] 2 Lloyd's Rep 307; [2020] Bus LR 1517 (hereafter "*Stema Barge II* HC").

3. *Splitt Chartering APS v Saga Shipholding Norway AS (The Stema Barge II)* [2021] EWCA 1880; [2022] 1 Lloyd's Rep 170 (hereafter "*Stema Barge II* CA").

which could limit its liability within the terms of LLMC. This finding required Teare J to define the meaning of the term "operator" and then apply it to the facts of the case.[4] In doing so, he had to differentiate the actions of an operator from those of a manager.[5] Mindful of the fact that he was dealing with a case of a dumb barge, where no crew in the conventional sense were on board, Teare J noted that physical presence on board the vessel is not relevant to the operator's role, although control of the physical operation of the barge is.[6] He said that such a requirement of physical presence manifests itself from the words of LLMC, Art.2(1)(a) that define claims subject to the right of limitation for damage to property arising from "the operation of the ship".[7] Teare J held that the role of an operator is to be seen through a higher level of abstraction that has "a notion of management and control over the operation of the ship".[8] Applying this principle to the dumb barge, he held that an entity physically operating it would have to have some management and control of it.[9] Once this further qualification was applied to the actions of Stema UK, the judge concluded that the act of operating the machinery could be characterised as an operator's, although not a manager's, act.[10] He thus found that Stema UK was the operator of the Barge.[11]

## Grounds of appeal

Although there were four broad grounds of appeal to begin with, the appellant persisted with only the first two.[12] These were:

1. Teare J erred in construing "the operator" of a ship in LLMC 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",[13] whether or not that ruling was limited to unmanned ships.[14]
2. Teare J erred in his application of the law to the facts in ruling that, despite its functionally and temporally limited activities on the barge, Stema UK was its operator.[15]

4. There was no authority on this point, although *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460 provides some insight into the purpose of the Limitation Convention.

5. *Stema Barge II* HC, [72] of Teare J's judgment. Again, at [74], Teare J reflected on the difficulty that arises in distinguishing a manager from an operator when the question is in respect of a conventional merchant ship. This was acknowledged at *Stema Barge II* CA, [28].

6. *Stema Barge II* HC, [110]; acknowledged *Stema Barge II* CA, [29].

7. *Stema Barge II* HC, [84]: "However, since Art 2 refers to the physical operation of the ship, reference to that article would tend to narrow the meaning of 'the operator of the ship' to those who physically operate it and so exclude those acting as manager".

8. *Stema Barge II* HC, [79]; acknowledged *Stema Barge II* CA, [30].

9. *Stema Barge II* HC, [81]; acknowledged *Stema Barge II* CA, [31].

10. *Stema Barge II* HC, [81]. See also *ibid*, [72] for Teare J's distinction between "management" and "operation".

11. *Stema Barge II* HC, [121].

12. *Stema Barge II* CA, [47]. See *ibid*, [68] and [71] for reasons for withdrawal of these grounds.

13. *Stema Barge II* HC, [99].

14. *Stema Barge II* CA, [47].

15. *Ibid*, [48].

## Court of Appeal's judgment on ground 1

The Court observed that the logic of Teare J's definition of "operate" appeared to be circular, and that "operate her" ought to be read as referring specifically to the operation of the ship's machinery.[16] The Court further stated that Teare J's judgment was confusing, inasmuch as it did not clearly distinguish between unmanned and conventional vessels,[17] although Teare J's judgment did seem to apply the general rationale behind LLMC, that of encouraging international trade by sea carriage, to both unmanned and conventional vessels.[18] The Court's main criticism was that Teare J's judgment would appear to bestow, wrongly, the benefit of limitation on those parties who simply provide crew to operate the machinery of those vessels, even if they have no other role in the broader operation of the vessel.[19] Such a conclusion would expand the protection to service providers that LLMC sought to exclude, as revealed by an interpretation of the travaux préparatoires.[20] Adopting Teare J's principal construction, that the operator is to be understood at a higher level of abstraction than mere physical operation, one that involves management and control, the Court stated that it could not therefore agree with Teare J's conclusion that full-time presence of crew is crucial.[21] Management and control is likely to be exercised not by those on board the vessel but rather by those who direct those on board.[22] The Court suggested that a group of companies,[23] as in the present case, may bring all its associates within the "the umbrella of the protection by ensuring that crew are seconded to the owner or operator and/or ensuring that the owner or operator is responsible for the actions of the associate".[24] Additionally, the Court said that "ensuring such protection would seem to be an important business consideration for those engaged in international trade by sea and one which they might be expected to arrange with care".[25]

## Court of Appeal's judgment on ground 2

Teare J, first, considered it important that Stema UK provided the personnel that operated the barge when no one was present from Stema A/S, the Danish charterer and operator of the vessel.[26] Second, Teare J inferred that Stema UK had responsibility for determining what action should have been taken when the storm was forecast.[27] The Court rejected both these findings, and stated that it did not support a finding of management and control in Stema UK in any sense because Stema A/S were instructing, supervising and responsible

16. *Ibid*, [52].
17. *Ibid*, [53].
18. *Ibid*.
19. *Ibid*, [55].
20. *Ibid*.
21. Although it is hard to infer such an observation from the reading of Teare J's judgment as a whole. See *supra* fnn 8–11.
22. *Stema Barge II* CA, [56].
23. A reference to the Mibau group of companies: see *ibid*, [8].
24. *Ibid*, [61].
25. *Ibid.*
26. *Ibid*, [63].
27. *Ibid*.

for the barge at all times.[28] It thus seemed to distinguish the management and control element found in the role of operator from that of the physical operation of the machinery of the vessel.[29] It found that Stema UK was physically operating the vessel, "for, on behalf of, and supervised by Splitt and Stema A/S".[30] It qualified the actions of Stema UK as, 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".[31] The Court further qualified the actions of two Stema UK officials who were extensively involved in the decision-making process as "discussing and agreeing" actions.[32]

## Comment

### *A difference in approach*

It seems that there is a fundamental difference in the approach taken by Teare J, one that attempts to uphold the practices of maritime trade and bring it within the purview of the convention.[33] This approach seems to be underlined in Teare J's analysis of "typical functions" of a manager.[34] It is evident from his analysis of the similarity of the terms "manager" and "operator", where he identifies that a lacuna exists in respect of the identity of an operator in maritime trade, by analysing precedents, academic texts, and regulatory and contractual schemes.[35] It also explains why he came to the conclusion that LLMC, Art.2 is limiting in nature to the actual roles played by various entities whom Art.1 seeks to cover.[36] His conclusion, that Art.2 does not help in determining who is entitled to limit pursuant to Art.1, can be seen as providing clarity in respect of LLMC's coverage of the different entities whose actions result in the operation of a ship.[37]

### *Real involvement v identity in law*

It follows that Teare J relied more on the organisational affiliation of the personnel whose actions resulted in the physical operation of the barge than their evidence as to the name of the organisation which was responsible for the decision making.[38] He thus was

28. *Ibid*, [64].
29. *Ibid*.
30. *Ibid*.
31. *Ibid*, [65].
32. *Ibid*, [66]. Seemingly, the Court intended to distinguish these actions from the actions of Stema A/S, in which it saw a finality in the decision-making process.
33. Indeed, one may infer this from the Court of Appeal's own admission that it is "disagreeing with the views of an Admiralty Judge of great experience and expertise in this field": see *ibid*, [77].
34. *Stema Barge II* HC, [61], where Teare J refers to *Sea Glory Maritime Co v Al Sagr National Insurance Co (The M/V Nancy)* [2013] EWHC 2116 (Comm); [2014] 1 Lloyd's Rep 14; *Kairos Shipping Ltd v Enka & Co LLC (The Atlantik Confidence)* [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525; *MT Cape Bonny Tankschiffahrts GmbH & Co KG v Ping An Property and Casualty Insurance Co of China Ltd, Beijing Branch (The Cape Bonny)* [2017] EWHC 3036 (Comm); [2018] 1 Lloyd's Rep 356; and *Suez Fortune Investments Ltd v Talbot Underwriting Ltd (The Brillante Virtuoso)* [2019] EWHC 2599 (Comm); [2019] 2 Lloyd's Rep 485; [2020] Lloyd's Rep IR 1.
35. *Stema Barge II* HC, [54–101].
36. *Ibid*, [84].
37. *Ibid*.
38. *Ibid*, [120].

disinclined to see Stema UK's personnel's actions as being merely of "assistance".[39] His approach is also reflected in his findings in respect of the actions of the barge's steering committee, since he applies a test of geographical proximity to determine whose word was more important to the operation of the barge during the stormy situation.[40] Teare J seems to treat the physical operation of the machinery as exemplifying management and control of the vessel in this specific case, not as a requirement that, in order to be called an operator, every operator must physically operate the machinery of a ship. It might have been of much more assistance had the Court of Appeal explained or distinguished the qualities that Teare J attributes to an operator: for example, "business of doing"[41] and "real involvement".[42] On the other hand, the Court of Appeal states that shipping entities must have clearly defined roles.[43] This is also reflected in the Court's treatment of the issue of the steering committee, where it places more weight on who is responsible for the committee's final decision,[44] consequently colouring the Court's disinclination to agree with Teare J's "practical" approach.[45] This may be a possible explanation of why the Court chose to ignore that Stema UK was not a purely commercial entity since it was operating and chartering the other barge involved in the operation,[46] and that it was in fact Stema UK that was responsible for the leg of operations during which the damage occurred.[47]

*Interpretation of LLMC, Art.1(4)*

The Court's finding that Stema UK's role was "for, on behalf of and supervised" by Splitt (the barge's owner) and Stema A/S (its charterer),[48] to the latter of which the Court refers as "the undoubted operator throughout", sits uncomfortably with its conclusion that Stema A/S was not responsible for Stema UK. Agency may be defined as "the relationship which exists where one person (the principal) authorises another (the agent) to act on its *behalf* and the agent agrees to do so".[49] It prompts the question why LLMC, Art.1(4) would not cover Stema UK? Do these attributes, "for, on behalf of and supervised", not signify a relationship of responsibility as required by Art.1(4)? The Court of Appeal merely stated that Stema A/S is both the operator and the manager, and Stema UK was assisting.[50] It would have been helpful had the Court expanded on how Stema UK could have been a "second or alternative operator" in this case, instead of merely stating that it "assisted" the operator.[51] There is precedent that an assistant's actions have led to an employer's being

39. *Ibid*.
40. *Ibid*.
41. *Ibid*, [72].
42. *Ibid*, [110].
43. *Supra*, fn.24.
44. *Stema Barge II* CA, [72(ii)].
45. *Ibid*, [72(i)].
46. *Ibid*, [8 (iii)] ("Stema UK charters a barge from Splitt to tranship ...").
47. *Ibid*. ("Stema UK charters a barge from Splitt to tranship from the ocean-going barge and then lands the material on a beach.")
48. *Supra*, fn.28.
49. Beatson, Burrows et al (eds), *Anson's Law of Contract*, 31st edn (Oxford, 2020), 680.
50. *Stema Barge II* CA, [75].
51. *Supra*, fn.31.

liable to another;[52] and the Supreme Court of Canada, at least, accepts the doctrine of vicarious immunity.[53] Additionally, shipowners have been held liable for their crew unless it is found that the crew were on a "frolic of their own".[54] Other Conventions direct that liability is channelled to the shipowner for acts of persons "employed or engaged in any capacity on board the ship or to perform any service for the ship".[55]

*Interpretation of the travaux préparatoires*

The Court of Appeal's reliance on the travaux préparatoires to LLMC is surprising. If one is to go through the entire section of the travaux préparatoires to which the Court of Appeal has referred, it is hard to come to the conclusion that has been laid out in the appeal judgment.[56] An analysis of that section brings to light that the conference delegates were discussing ways of extending the protection to parties for which the shipowner, as defined in the Convention, would be vicariously liable.[57] In that context, the entity most discussed was "pilot".[58] The discussions result in an understanding between the conference delegates, that the words as adopted and which finally resulted in the present Art.1(4) were appropriate to cover those intended. The discussions bring to light that a restrictive wording, which the USA sought to incorporate, was declined by the other delegates.[59] It also did not sit well with the scheme of the appeal judgment that the Court chose entirely to ignore, instead of distinguish, Teare J's interpretation of the travaux préparatoires.[60]

It seems that the Court of Appeal was quick to lose sight of the predicament Teare J was in, that of first defining the "operator" and thereafter applying that definition to the facts of the case, which involved a dumb barge.[61] It is difficult to find in the appeal judgment an argument so strong that it could usurp Teare J's recognition of the object and purpose of the Limitation Convention, that of encouragement of international trade by sea carriage,[62] and more importantly, usher an industrywide scramble for clearer contractual

52. *Newman v Bourne and Hollingsworth* (1915) 31 Tax LR 209.

53. *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 (Can SC).

54. *The Druid* (1842) 1 W Rob 391.

55. International Convention on Civil Liability for Oil Pollution Damage 1992. See Merchant Shipping Act 1995, s.156(2)(b).

56. *Stema Barge II* CA [55], [58] and [59]. The Court comes to the conclusion that the travaux préparatoires prove an express exclusion of analogous service providers from the coverage of Art.1(4).

57. Comité Maritime International, *The Travaux Préparatoires of the Limitation Convention 1976, and of the Protocol of 1996*, 50–54. Accessed at: https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoirse-of-the-LLMC-Convention-1976-and-of-the-Protocol-of-1996.pdf. At p.50, [2], where the IMCO Legal Committee at its Twenty Fifth Session, notes that the words of the 1957 Convention "Master, members of the crew and other servants" should be replaced by "any person for whose act, neglect or default the shipowner or salvor is responsible".

58. At p.50 of the travaux préparatoires: see [13] and the ensuing discussion.

59. At p.53 of the travaux préparatoires, Mr Bursley of the USA proposed deletion of the word "responsible" and to substitute the phrase "legally liable at law in the absence of contract".

60. Teare J seemingly attempted to distinguish the role of Stema UK from "any persons rendering service in direct connection with the navigation or management of the ship", as was discussed in the travaux préparatoires. See *Stema Barge II* HC, [114].

61. *Ibid*, [120].

62. See *The CMA Djakarta*, *supra*, fn.4, for establishing this as a common ground and being accepted by the Court of Appeal.

relationships.[63] An additional query that may be posed of the Court's opinion is, should Protection and Indemnity organisations also cover the operator, regardless of how small, and often unknown beforehand, its role in the entire operation will be.[64] The Court of Appeal decision has left some unanswered questions: how should companies be seen as operating and not merely assisting; and if this can be achieved in practical terms, given the dynamic nature of shipping operations, as evidenced in the stormy situation in which *Stema Barge II* found itself.

Mayank Suri*

## FOREIGN CLAIMS AND FOREIGN LAWS

### *FS Cairo (Nile Plaza) v Brownlie*

If a tort is committed against me while I am abroad,[1] is my suffering consequential economic loss in England sufficient to establish the jurisdiction of the English courts over the defendant? In *FS Cairo (Nile Plaza) LLC v Lady Brownlie*[2] ("*Brownlie (No 2)*"), the Supreme Court held: yes. The second issue before the Supreme Court was under what conditions I can then rely on English law in pleading my claim, even if a foreign law applies to that claim. The answer: where neither party pleads that foreign law applies to the claim or when the foreign law that applies is materially similar to English law.

The *Brownlie* litigation has been the object of much commentary already,[3] so that the facts can be briefly summarised for our purposes. In 2009, Lady Brownlie booked a stay for herself and her husband, Sir Ian Brownlie, at the Four Seasons Hotel Cairo at Nile Plaza in Egypt. Before departing for Egypt, Lady Brownlie called the hotel to book a tour advertised on a brochure she had picked up during a previous stay at the same hotel. Tragically, the tour ended in an accident which took the life of Sir Ian Brownlie and his daughter, Rebecca, and left Lady Brownlie and Rebecca's two children seriously injured.

63. It is reasonable to assert that the board of Stema UK would be discussing with the larger Mibau group as to whose balance sheet would reflect the €55 million possible payout to the appellant.

64. One may gauge the interest of such organisations from a review of these resources: The Standard Club www.standard-club.com/fileadmin/uploads/standardclub/Documents/Import/news/2020-news/3334433-tmi-issue3-pi-special-edition-finalv3-003.pdf; The China P&I Club www.chinapandi.com/index.php/en/loss-prevention-en/5187-article-5187 ("Whilst the relax(ation) in restrictions is of common good for Members and the Association, it also conforms to the purposes of the system of limitation of liability"); The Shipowners' Club www.shipownersclub.com/limitation-of-liability-who-is-an-operator-and-who-is-a-manager-stema-barge-ii-2020-ehwc-1294/

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1. As at the time of writing, the rules described in this note apply irrespective of whether the defendant is domiciled in a Member State to the Lugano Convention or abroad elsewhere.

2. [2021] UKSC 45; [2021] 3 WLR 1011 ("*Brownlie (No 2)*").

3. In this quarterly, see A Dickinson, "Faulty Powers: One-Star Service in the English Courts" [2018] LMCLQ 189 and A Briggs, "Holiday Torts and Damage within the Jurisdiction" [2018] LMCLQ 196.