

## ADMINISTRATIVE DECISION NO. VII -- A

*(Claims of American Charterers of Foreign Ships and American Owners of Ships Chartered to Aliens [Tanker Cases], August 7, 1926, pp. 704-715.)*

---

PARKER, *Umpire*, rendered the decision of the Commission.

Numerous cases have been submitted to the Commission by American charterers of foreign ships and several by American owners of ships chartered to aliens. In each case of both of these classes it becomes necessary to ascertain what, if any, estate or interest the charterer had in the vessel at the time she was destroyed and the value of such estate or interest in order to determine the value of the American interest therein, whether such interest be that of owner or charterer.

This Commission's Administrative Decision No. VII<sup>1</sup> established the broad rule that the provisions of the Treaty of Berlin dealing with damage to property are (save in certain cases arising in German territory) limited to physical or material damage to tangible things and that under that Treaty Germany is not obligated to make compensation for losses sustained by American nationals of prospective profits as such growing out of the destruction of tangible things. As applied to the loss of shipping, it is clear, the tangible thing destroyed was the vessel, in which, through the existence of a charter<sup>2</sup> or charters or otherwise, several estates or interests may have inhered at the same time.

As was said in Administrative Decision No. VII:<sup>3</sup>

"When the whole ship destroyed was American-owned the aggregate amount of Germany's obligations for its loss is not affected by the existence of a charter or charters. But if any estate or interest in the ship was foreign-owned and the remainder American-owned, then Germany's obligations may be affected by the existence of a charter."

" \* \* \* Germany is obligated \* \* \* to pay the reasonable market value of the whole ship, including all estates or interests therein, provided they were on the requisite dates impressed with American nationality. In arriving at the market value of the whole ship, it is a *free ship* that is valued, and no account is taken of the independent market value of any charter that may exist thereon. Such charter may at a given time be an asset or a liability as determined by several factors, chief among which is the relation of the stipulated hire to the current market hire."

In each case in the group dealt with in the present decision Germany's obligation is under the Treaty limited to making compensation for the

<sup>1</sup> Decisions and Opinions, pages 308-345. (*Note by the Secretariat*, this volume, pp. 227-252 *supra*.)

<sup>2</sup> Administrative Decision No. VII was rendered May 25, 1925. At page 336 therein (*Note by the Secretariat*, this volume, p. 246 *supra*.) it was held that a charterparty might under certain conditions constitute "a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself. Such a right and interest is an encumbrance on the ship in the sense of constituting a limitation on the owner's right to possess, control, and use it and as affecting the price at which it could be disposed of in the market burdened with the charter. It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof". In support of this statement there was cited among others (note 21) the old case of *De Mattos v. Gibson* (1859), 4 De Gex & Jones' Reports 276. On November 17, 1925, the Judicial Committee of the British Privy Council in the case of *Lord Strathcona Steamship Company, Limited, and Dominion Coal Company, Limited*, I (1926) Appeal Cases 108, on appeal from the Supreme Court of Nova Scotia, approved, reaffirmed, and applied the principle laid down by Knight Bruce, L. J., in *De Mattos v. Gibson*. The decision was unanimous. The strong opinion which was read by Lord Shaw announced in no uncertain terms that equity will restrain the purchaser of a ship burdened with a charter of which he had notice from making use of the ship in violation of the charter to the prejudice of the charterer or its assigns. In the course of the opinion it was pointed out that the vessel "was not bought or paid for as a *free ship*, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and that the charterer has no means, legal or equitable, of preventing this in law". Elsewhere in the opinion it was said that, although the assignee of the charterer could not enforce specific performance of the charter obligation, such an action would fail "only on the broad ground that the Court of equity had no machinery by means of which to enforce the contract". Again it was said that such purchaser "appears to be plainly in the position of a constructive trustee with obligations which a Court of equity will not permit him to violate."

<sup>3</sup> Decisions and Opinions, pages 338 and 337. (*Note by the Secretariat*, this volume, p. 247 *supra*.)

American-owned estate or interest in the tangible property destroyed—the ship—and such compensation is measured by the reasonable market value of that ship as of the time and place of her destruction, less the value of the foreign estate or interest if any therein, plus damages by way of interest on the remainder in accordance with those rules laid down in Administrative Decision No. III.<sup>4</sup> The first step, therefore, in measuring the damages, if any, sustained by an American claimant resulting from the loss of a vessel in which his estate or interest was less than the whole is to ascertain the reasonable market value of that ship as a *free ship* at the time and place of her destruction.

The Commission has had procured and laid before it much data dealing with the relative demand and supply of ships; charts purporting to reflect the market prices of vessels with the fluctuations in those prices graphically expressed; and tabulated statements of actual sales of bottoms made during periods prior to, throughout, and subsequent to the World War, compiled from evidence filed in numerous cases before the Commission. From these it is possible to evolve a fairly accurate composite of tonnage values at any particular time during the war period. But at best this presents merely a composite picture, a general average, and while helpful as a general guide it cannot safely be used as a standard of measurement without making particular adjustments for the actual conditions which obtained in each particular case. Ships are in a sense living things, created to move and to carry, not to be consumed. Food and fuel may be measured on a unit of value per ton, but a ship's value must be measured according to her ability to perform—to carry safely in volume with dispatch and economy.

There are many factors which must be taken into account in arriving at the fair market value of any vessel at any particular time and place, and the weighted value of each factor varies, of course, from time to time as the conditions change. This is especially true with respect to the abnormal and kaleidoscopic conditions created by the World War, as a result of which the trade in which a vessel was engaged, or the particular seas to which her use was restricted, or her nationality (as affecting the extent of her exposure to regulation, requisition, or destruction), considered in connection with the laws of the nation to which she was subject, may, singly or together, have had an influence more or less controlling in determining her market value, although in normal times they would have been much less important. Normally the cost of a vessel, her age and physical condition, and the cost of replacement are important factors in arriving at her market value. Some of the shipping experts whose testimony has been presented to the Commission go so far as to declare that during the war period those factors were without influence in determining the value of a ship, which was measured *solely* by her availability for use. While the evidence before the Commission of actual sales made and of charters actually entered into, involving bottoms of varying ages and classes, does not justify those extreme statements,<sup>5</sup> nevertheless there were times

---

<sup>4</sup> Decisions and Opinions, pages 61-70. (*Note by the Secretariat*, this volume, pp. 64-71 *supra*.)

<sup>5</sup> For instance, in the agreement for compensating Dutch shipowners by the United States and Great Britain, it will be noted, age was a material factor in fixing ship values. Bottoms up to 10 years of age were valued at \$237.50, 10 to 30 years at \$190.00, and 30 years and over at \$167.25 per deadweight ton. And in February, 1918, under the new scale for rates and insurance fixed for vessels plying between United Kingdom and French ports the values for war-risk insurance on steamers 10 years old or less was fixed at £40 and over 30 years old at £30 per d. w. t. Elsewhere there have been many other recognitions of age as a factor in determining values during the war period.

during the war period when the demands for tonnage so far exceeded the available supply, and those demands were so imperative, that factors normally controlling were so far outweighed by the consideration of availability for use as to become comparatively insignificant. But even that condition was not constant, and conditions existing at the particular time must be looked to in determining the relative importance of the various elements obtaining in each case.

Speaking generally, the factors which must be taken into account during the war period in fixing the value of the whole ship including all estates therein are availability for use, cargo capacity, nationality of registry and of ownership, nationality of charterer, class, original and reproduction costs, speed, age, draft, and adaptability for particular trades.

The nationality of registry and of ownership and the charterer's nationality are important in determining generally the degree of exposure to requisition and to regulation both as to use and rates. For example, it will be recalled that Great Britain did not hesitate to assert and to exercise jurisdiction for the purpose of requisitioning ships of British registry operating even outside of British waters while under charter to Americans during American neutrality.<sup>6</sup> It will also be recalled that the far-reaching regulations applied by the Allied Powers, and later by the United States after it had entered the war, affected not only the tonnage of the nation issuing them but indirectly, to a great extent, neutral tonnage as well. Witness the British regulation of January 12, 1917, forbidding the chartering of any vessel of over 1,000 tons deadweight cargo capacity to or from an Allied port, except with the license of the Board of Trade; the later regulation of March, 1917, forbidding the purchase or sale in England of any foreign vessel; the regulation of chartering and of charter rates on vessels of both American and foreign registry by the United States Shipping Board; the arrangement devised by Great Britain, sometimes referred to as the "bunker pressure", made possible by the need of Norway, Sweden, and Denmark for British coal, whereby those Scandinavian countries provided for the chartering or requisitioning at reduced rates of certain tonnage of their nationals to the Allied Powers in consideration of the latter's arranging to deliver them coal and other supplies; the requisitioning by the Allied Powers and by the United States of Dutch tonnage; and the agreement entered into between the United States and Japan in March, 1918, whereby the latter nation undertook to furnish the former with 150,000 deadweight tons of steam shipping for warzone trade in exchange for steel to be used principally in shipbuilding. The influence exerted by the inter-Allied ship control over tonnage values, chartering, and charter rates, even as applied to neutral vessels while indirect, was substantial, but it varied from time to time; and this influence at any particular moment must be considered in determining the value of a vessel or the value of a charter thereof at that time.

While it is true that vessels of neutrals and vessels of some belligerents were less subject to these restrictions than those of other belligerents, nevertheless it is a mistake to assume, as several of the shipping experts have assumed in their testimony before this Commission, that neutral bottoms were throughout the period of the war free from all restrictions and hence that American charters on such vessels must be valued accordingly. We are not here concerned with

---

<sup>6</sup> *Earn Line Steamship Co. v. Sutherland Steamship Co., Ltd.* (British S. S. *Claveresk*), 254 Federal 126 (1918), affirmed 264 Federal 276 (1920); *Isle of Mull*, 257 Federal 798 (1916), reversed 278 Federal 131 (1921), certiorari denied, 257 U. S. 662 (1922); and *The Frankmere*, 262 Federal 819 (1920), affirmed 278 Federal 139 (1921), certiorari denied, 257 U. S. 662 (1922).

any question of the *right* of a particular government to enforce restrictions and regulations without compensation, but only with the fact of their existence and enforcement and the effect which they *actually had* on the market value of the vessels at the time of destruction.

After the amount of the reasonable market value of a free ship has been established, the next practical step is to determine the relative interest in such amount of the owner and the charterer respectively to the end that the American and foreign interests may be segregated. If the ship was American-owned the burden will ordinarily be on Germany to establish the extent of the foreign interest and the amount of the encumbrance imposed by the charter held by the foreigner. But if the ship was foreign-owned the burden will ordinarily be on the claimant to establish the extent of the American interest and the amount of the encumbrance imposed by the charter held by the American national.

In discharging these burdens resort cannot be had to determining the cash market value of a charter as such established through transfer and assignment as distinguished from subchartering, for charters have never to any considerable extent been sold and purchased for a present out-of-pocket cash consideration. In normal times there was no occasion for such a practice, as ordinarily the free tonnage supply was adequate to meet all demands. During the World War, at times when demands for tonnage were greater than the supply, the risk of the termination of the charter through the destruction of the ship was too great to justify the hazarding of a considerable out-of-pocket payment in the purchase of a charter. There is but one case before this Commission (and no similar cases have been cited in the testimony of the shipping experts) where a charter was assigned and transferred for a cash consideration, the assignee stepping into the shoes of the charterer and assuming his obligations. Rather than take the risk of such an investment the shipper preferred through subchartering to obligate himself to pay a higher rate when and as the ship was used without making any out-of-pocket investment or obligating himself to make any payment in the event of her loss. Ordinarily the charterer's investment is the hire stipulated for in the charter which he pays if, when, and as earned, coupled with his obligation to make such payment to the owner (or if a subcharterer to the time-chartered owner) from time to time even though it may be substantially more than the current charter hire. While insurers were, under the law of averages, justified in taking the risk of insuring a charterer against loss of the vessel, each risk was, in accordance with established insurance practice, distributed and participated in by a number of insurers instead of being carried by one only.

But the absence of any established cash market value for charters as such does not imply that the charterer had not a substantial pecuniary interest in the ship constituting an encumbrance on her and susceptible of being measured by standards other than the market value, and such other standards must be found for determining the value of the respective estates or interests of the owner and the charterer in a vessel at any particular time. As a basis for the application of such standards all of the terms of the charter must be fully developed and carefully considered in connection with the several factors hereinbefore enumerated which affect the value of a ship otherwise free. As pointed out in Administrative Decision No. VII (page 338)<sup>a</sup> the chief factor which will ordinarily obtain in determining whether a charter is at a given time an asset or a liability to the charterer "is the relation of the stipulated hire to the current market hire." After a most painstaking examination by the

<sup>a</sup> *Note by the Secretariat*, this volume, p. 247 *supra*.

Commission it has been found impossible to lay down any fixed rule or mathematical formula for measuring in every case the extent and value of the charter encumbrance, if any such is found to exist. But under conditions usually obtaining in the cases before this Commission this measure can be fairly taken by ascertaining the excess, if any of the current charter hire at the time of loss over the hire stipulated for in the charter and extending such excess hire over that period (never exceeding the charter term) during which, under the law of averages, the ship under the conditions then existing would probably have survived and also probably have escaped requisition under circumstances working a frustration of the charter. The amount so arrived at (subject to the application of such other of the limiting factors hereinafter mentioned as may obtain in that particular case), reduced to its present value as of the date of the ship's loss, will ordinarily represent the charter encumbrance and the value of the estate which the charterer had in the vessel.

In order to insure accuracy and uniformity in the Commission's application of this rule, there has been assembled in the office of the Umpire a considerable body of pertinent data collected from the records of cases before this Commission and from all available official sources, including—

(1) Many affidavits of shipping and of chartering experts with lists which were submitted by them of actual sales made and charters entered into during the war period;

(2) Compilations procured from different sources aggregating approximately 700 time charters actually entered into in the United States during the war period and fairly distributed throughout that period, involving ships of United States, British, Canadian, Norwegian, Swedish, Danish, Dutch, Italian, French, Japanese, and other registry, tabulated in chronological order with respect to the date on which the charter was fixed, giving the name of the ship, flag, tonnage, charter rate, trade, delivery, and range;

(3) Similar compilations of approximately 1,500 trip, voyage, and net charters;

(4) A complete statement of all charters on foreign and American ships which were approved by the United States Shipping Board from October 3, 1917, to May 26, 1919, setting forth chronologically in tabulated form the name of each vessel, her type, flag, tonnage, date of fixture, date of approval, name of charterer, voyage, cargo, and rate;

(5) A similar statement, covering the same period, of charters disapproved, cancelled, or modified by the United States Shipping Board with its reasons for such action, frequent among which was the failure to file with the Board a guarantee to maintain and not exceed the Board's rates;

(6) Charts showing graphically the fluctuations in the average rate paid for steam vessels of all sizes under time charters covering every portion of the war period and a considerable time both prior and subsequent thereto;

(7) A statement, compiled from official sources, of all war-risk insurance rates promulgated by the Bureau of War Risk Insurance, United States Treasury Department, (now United States Veterans Bureau) beginning with September 17, 1914, and ending with November 27, 1918;

(8) A statement, month by month, compiled from official sources, covering all war-risk insurance written by the said Bureau of War Risk Insurance beginning with September, 1914, and ending with December, 1920, setting forth the amount of the insurance written, the amount of the losses paid, and the percentage of losses paid to the insurance written;

(9) Similar data on British rates, insurance, and losses, compiled from official sources;

(10) A statement, by nationalities and by months, throughout the war, of gross tonnage of merchant shipping (excluding that of Germany and her allies) lost through enemy action, with a similar statement of new merchant vessels constructed and brought into service; and

(11) Contemporary reports, contained in shipping journals and similar publications, and other data throwing light on shipping conditions as they existed at different times throughout the war period.

These data, with other pertinent evidence presented by or through either the American or the German Agent, will be examined, in connection with the facts of each particular case, in measuring whatever interest the charterer may have had in the ship at the time of her destruction.

For purposes of comparison it will be borne in mind that the charter rate per deadweight ton is influenced by the size of the ship, the rule being that (all other conditions being equal) the rate per deadweight ton decreases as the size of the ship increases. This is because the construction cost per ton of capacity is of course higher in small than in large vessels and also because the operating cost borne by the owner is less per ton in large than in small vessels.

For purposes of comparison it will also be borne in mind that ordinarily the rate per deadweight ton is less in long-term than in short-term charters. This is because the shipowner, who usually has a substantial investment in his ship, is ordinarily content to take a less rate for a long term than for a short term if by so doing he is reasonably assured of a steady income which will yield him a fair return on his investment and furnish steady employment for his ship and crew without taking the risks of fluctuations in charter hire and freight rates.

Likewise, for purposes of comparison, the restrictions, territorial and otherwise, contained in the charter are important as affecting its value. During the war a chartered vessel free to engage in European trade commanded a greater hire than a similar ship restricted to use outside of the war zone.<sup>7</sup>

The risk of the termination of a charter through the destruction of the ship by an act of war had a distinct influence in determining the relative interest of the shipowner and the charterer. The value of the charterer's interest largely depended on the probable life of the vessel. This was not true to so great an extent with respect to the owner, who, as a rule, was protected against loss by war-risk insurance, the heavy premiums on which were frequently paid by the charterer, especially with respect to charters entered into during the war. By the law of averages the risk of loss of a chartered vessel as it then appeared at any given time can be approximated by the application of the war-risk insurance rates which were then in effect and applicable to the particular trade in which the ship was at that time engaged, taking into account the safe margin allowed by the insurers.

The risk of frustration of the charter through requisition can be fairly approximated in the light of the extent to which the requisitioning power was exercised at the particular time.

The probability of the termination of the war and its being followed by a violent decline in charter hire and freight rates was a risk affecting the value of the charters in some of the cases before the Commission. One of the leading American charter experts, testifying before this Commission, has stated that

<sup>7</sup> Many examples can be cited in support of this statement. It will suffice to refer, among others, to the United States Shipping Board rates of \$10.75 per deadweight ton per month on Danish steamers and 43s. 6d. on similar Norwegian steamers trading *in* the war zone and its rates in effect at the same time of \$8.50 on the same Danish steamers and 35s. on the same Norwegian steamers trading *outside* the war zone.

“every one recognized that the minute the war ended there might come such a drop in freights and values as to practically make tonnage of no value temporarily.” While this is probably an extreme statement, it will nevertheless be recalled that in fact the average time-charter hire per deadweight ton per month did drop from approximately 58s. at the time of the signing of the Armistice to approximately 29s. toward the end of the first half of 1919, when there was a recovery, and that by the end of 1919 the rate was approximately 47s., after which time-charter rates steadily declined to approximately 17s. at the end of 1920 and to approximately 7s. at the end of 1921. During the war period the prevailing opinion, broadly speaking, seems to have been that charter rates would following the termination of the war decline to approximately their average during the 15 years preceding the war. That opinion was apparently abundantly justified by the decline in tonnage values and in time-charter rates which followed the termination of the Boer War.

The World War found numerous long-term charters in existence. Wherever the owner had bound himself to operate the ship and to bear the expense of all insurance including war-risk insurance, the gradually mounting operating costs increasingly absorbed the charter hire until in a number of instances the hire did not suffice to pay them. But after the declaration of war very few time charters were entered into for a longer period than one year and usually they were for shorter terms save such as provided for delivery after the termination of the war. Even in the early days of the war, because of the unsettled conditions in shipping and the impossibility of forecasting the future, the charterers preferred to pay higher rates for one or two round trips or for a few months rather than to commit themselves under even a 12-month fixture. In many cases the charterers obligated themselves to carry war-risk insurance for the account of the owners in amounts substantially in excess not only of the actual original cost of the ships but in some instances the higher cost of their reproduction under the conditions then existing. The premiums on such insurance as a general rule could be paid by the charterer only voyage by voyage. Consequently the extent of his liabilities under the charter could never be accurately defined until the last payment had been made. As the cost of war-risk insurance increased, in some instances far beyond what could reasonably have been foreseen by the charterer at the date of the fixture, the obligation to carry insurance for the account of the owner became more and more burdensome. The terms of each charter, under conditions obtaining at the material time, with respect to the extent of the charterer's obligation to carry war-risk insurance for the owner's account, will be carefully examined by the Commission in determining the value of the charter and in comparing it with others.

The foregoing is not intended as an all-inclusive enumeration and analysis of the numerous factors which affected the value of vessels and of charters or as furnishing an exact formula for computing the relative interests of the owner and the charterer of a ship during the war. Its purpose is to enumerate the most important factors which will be taken into account in determining such values and such interests, in order to assist in the preparation and presentation of all cases of the classes here dealt with. The data which have been assembled by the Agencies and the Commission will be helpful in ascertaining average values and rates at a given time but they furnish only a general guide which at best requires adjustments in the light of the facts and conditions which may be found to have existed in each particular case. All of the pertinent facts in each claim asserting an alleged American interest less than the whole in a ship which has been damaged or destroyed will be fully developed in the light of this opinion, that the Commission may measure the extent and value of the



American interest, if any is found to exist, under the principles established in Administrative Decision No. VII.

Done at Washington August 7, 1926.

Edwin B. PARKER  
*Umpire*

---