

FROM THE BENCH:
**A BRIEF LOOK AT HOW THE COURTS INTERPRET CRITERIA FOR
BAREBOAT CHARTERS**

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Bareboat charter parties have a long and generally unremarkable history in maritime commerce. They have received more scrutiny in recent years as a result of the Passenger Vessel Safety Act of 1993. Whether and how a vessel is chartered is a key element in the application of numerous sections of the Act. Many owners mistakenly refer to their vessel as a "charter boat" or their operations as "charter operations." The Act sought to remedy the abuses of bareboat charter parties in connection with the carriage of passengers on recreational vessels not subject to inspection. The U.S. Coast Guard's Navigation and Vessel Inspection Circular No. 7-94 ("NVIC") of 1994 attempted to explain the application of the Act and more specifically define the terms of a bareboat charter. This paper will discuss those terms and how the courts have interpreted them in determining whether a bareboat charter exists.

For the purposes of the Passenger Vessel Safety Act of 1993, "a charter is an agreement where the charterer has the use of the vessel and may take on legal obligations, to the vessel owner, the crew, passengers carried, and others."¹ The NVIC provides that the charter operation must be controlled by a written charter agreement, and no consideration may be received for the carriage of individuals on board, or the vessel will be considered as carrying "passengers for hire." A different set of rules and regulations apply to vessels carrying "passengers for hire."

Two types of charters are referenced in the Act. In the first type, the owner provides or specifies the crew. In the second, the charterer selects and pays the crew and retains the authority to dismiss the crew for cause. For the second type of charter, the NVIC provides that the vessel owner may offer "suggestions to, and furnish the crew, and the charter may still be considered as one with no crew specified or provided by the owner."² Either way, the vessel owner may require a minimum level of proficiency for whatever crew is retained in order to ensure that the vessel is manned and operated by a competent crew, and the owner will still not be considered as specifying or providing the crew.³

The NVIC identifies the criteria which are indicative, but not conclusive, of a valid bareboat charter arrangement. Not all elements need to be present for the arrangement to be considered a valid bareboat charter. A valid bareboat charter may still exist where one or more of the listed criteria are not met. The NVIC recognizes that in any particular situation, each charter agreement must be evaluated on its own merits. As a general matter, valid bareboat charters meeting the following criteria "may be" considered to be charters with no crew provided or specified by the owner:⁴

1. The charterer must have the option of selecting the crew. Although a master or crew may be furnished by the owner, full possession and control must be vested in the charterer. This does not preclude the charterer from taking advice from the master and crew regarding hazardous conditions such as, inclement weather, navigational obstructions, etc.
2. The master and crew are paid by the charterer.
3. All food, fuel, and stores are provided by the charterer.
4. All port charges and pilotage fees, if any, are paid by the charterer.

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¹ NVIC at 6.

² NVIC at 6-7.

³ *Id.* at 7.

⁴ NVIC at 7.

5. Insurance is obtained by the charterer, at least to the extent of covering liability not included in the owner's insurance. A greater indication of full control in the charterer is shown if all insurance is carried by the charterer (of course, the owner retains every right to protect his or her interest in the vessel).
6. The charterer may discharge, for cause, the master or any crew member without referral to the owner.
7. The vessel is to be surveyed upon its delivery and return.

As a general matter, “[a]ny provision that tends to show retention of possession or control of the vessel...during the charter of the vessel contradicts the claim that a valid bareboat charter exists.”⁵

In *Guzman v. Pichirilo*,⁶ a case often cited as the standard for relinquishment of control of a vessel by an owner, the Supreme Court stated that in order to create a bareboat or demise charter, the owner must “completely and exclusively relinquish possession, command, and navigation thereof to the demise.”⁷ The Court further stated that such a charter is, therefore, “tantamount to, though just short of, an outright transfer of ownership.”⁸ Likewise, in *Avin Intl. Bunkers Supply, S.A. v. Wellrun Management*,⁹ the court held that “[t]he vital distinction between a bareboat charter (also termed a demise), and other charter parties, is the exclusive control of the vessel by the charterer. To create a bareboat charter or a demise of the vessel, the owner must completely and exclusively relinquish possession, command, and navigation to the demisee. It is ‘tantamount to, though just short of, an outright transfer of ownership.’”¹⁰ And in *Certain Underwriters at Lloyd's Syndicate 1206 v. Eldia Diazolmo*,¹¹ the court agreed that demise charters are “tantamount to, though just short of, an outright transfer of ownership,” and further agreed that “anything short of such a complete transfer is a time or voyage charter party or not a charter party at all.”¹²

However, not all courts agree that *Guzman* is controlling. In *Bishop v. United States*,¹³ the court stated that the *Guzman* finding that “courts should be reluctant to find a demise charter when the dealings between the parties are consistent with any lesser relationship” was only *dictum*.¹⁴ The court in *Gowanus Indust. Park v. Arthur H. Sulzer Assoc.*¹⁵ held the same.

Although the criteria for a bareboat or demise charter are relatively easily understood in the abstract, the difficulty lies in their application to the varying circumstances of the contracts between vessel owners and charterers. The question of whether a charter is a bareboat charter “is a factual one, which depends upon all the circumstances of the case, including not only the terms of the contract, but also the conduct of the parties under the arrangement.”¹⁶ Still, other courts frame the standard as “the validity of an alleged bareboat charter is a *question of law*, but that conclusion is based on subsidiary findings of fact.”¹⁷

In determining whether a charter is a bareboat, individual provisions must not be read in isolation, divorced from context. The charter is interpreted “according to the intent of the parties as manifested by the whole instrument rather than by the literal meaning of any particular clause taken by itself.”¹⁸ “While the transfer of responsibility to the charterer for any costs and expenses can be a telltale sign of a bareboat charter, ‘the question whether the possession and control is transferred to the charterer must be determined by the intention of the parties as expressed by the wording of the contract as a whole.’”¹⁹ Still, other courts look for more specific language and have declined to find that the agreement between the parties was a bareboat charter because the agreement was referred to as a “Boat Rental Agreement,” the parties were referred to

⁵ NVIC at 9.

⁶ *Guzman v. Pichirilo*, 369 U.S. 698 (1962).

⁷ *Id.* at 699-700.

⁸ *Id.* at 700.

⁹ *Avin Intl. Bunkers Supply, S.A. v. Wellrun Management*, 607 F. Supp. 738 (S.D.N.Y. 1985).

¹⁰ *Id.* at 741, quoting *Guzman*, 369 U.S. at 700.

¹¹ *Certain Underwriters at Lloyd's Syndicate 1206 v. Diaz-Olmo*, 2013 U.S. Dist. LEXIS 108182 (D.P.R. July 29, 2013).

¹² *Id.* at *10.

¹³ *Bishop v. United States*, 334 F. Supp. 415 (S.D. Tex. 1971).

¹⁴ *Id.* at 419.

¹⁵ *Gowanus Indust. Park v. Arthur H. Sulzer Assoc.*, 2013 U.S. Dist. LEXIS 47063 (E.D.N.Y. Mar. 7, 2013).

¹⁶ *Avin Intl. Bunkers Supply, S.A.*, 607 F. Supp. at 741.

¹⁷ *Colletti v. Tiger Tugz LLC*, 2011 U.S. Dist. LEXIS 145606, at *8-9 (W.D. La. Dec. 16, 2011) (emphasis added).

¹⁸ *JJ Water Works, Inc. v. San Juan Towing and Marine Services, Inc.*, 59 F. Supp. 3d 380, 391 (D.P.R. 2014), citing *The Rice Co. (Suisse) v. Precious Flowers Ltd.*, 523 F.3d 528, 534 (5th Cir. 2008).

¹⁹ *Stolthaven Houston, Inc. v. RACHEL B*, 2008 AMC 2067, 2073, 2008 U.S. Dist. LEXIS 55723, at *14, (S.D.N.Y. July 18, 2008) (citation omitted).

as “renters” and not as “charterers” or “demises,” and the agreement did not mention “charter”.²⁰

While the terms of a written charter would be of primary importance to determining whether the criteria for a bareboat charter exist, some courts have held, contrary to the NVIC, that a bareboat charter need not be in writing.²¹

Examples of How the Courts have Ruled on the Criteria for Bareboat Charters

Operator/Operations Restrictions Generally Permitted

Morris v. Paradise of Port Richey, Inc., 2009 U.S. Dist. LEXIS 2392, at *12 (M.D. Fla. Jan. 13, 2009):

Retention of the right “at any time, on reasonable notice, to inspect the vessel” and “the vessel’s logs” does not alone alter the character of an agreement as a bareboat charter.

Stolthaven Houston, Inc. v. RACHEL B, 2008 AMC 2067, 2008 U.S. Dist. LEXIS 55723, at *15 (S.D.N.Y. July 18, 2008):

The retention of a right to inspect the vessel and its logs, approve insurance obtained by charterer, approve insured repairs to the vessel, and be notified of the vessel’s hire does not invalidate a bareboat charter.

Wills v. One Off, Inc., 2010 U.S. Dist. LEXIS 34922, at *5, 13, 16 (D. Mass. Apr. 8, 2010):

The charter party of a yacht made available for charter contained the following provision: “Charterer, however, shall not allow anyone to operate the Yacht unless properly trained and experienced in coastwise piloting and deep sea navigation of vessels similar in type and size to the Yacht.” The charter party also restricted use of the vessel to that of a pleasure vessel and prohibited the vessel from engaging in trade. The court found a valid bareboat charter based on the owner’s transfer of possession and control. “[N]othing in the parties’ actions suggests anything other than compliance with the full transfer of control intended by the Charter Agreement.”

²⁰ *Certain Underwriters At Lloyd’s Syndicate 1206 v. Diaz-Olmo*, 2013 U.S. Dist. LEXIS 108182, at *11-12 (D.P.R. July 29, 2013).

²¹ *Colletti v. Tiger Tugz LLC*, 2011 U.S. LEXIS 145606, at *17 (W.D. La. Dec. 16, 2011); *In re Natures Way Marine, LLC*, 984 F. Supp. 2d 1231, 1241 (S.D. Ala. 2013).

Limon v. Berryco Barge Lines, LLC, 2011 U.S. Dist. LEXIS 22293, at *22 (S.D. Tex. Mar. 7, 2011):

Restrictions as to limits on weight and use of vessel in rough waters did not defeat a finding of bareboat status because such restrictions were not inconsistent with possession and control being in the hands of the charterer, not the owner.

Tidewater Barge Lines, Inc. v. Port of Lewiston, 2006 AMC 542, 2005 U.S. Dist. LEXIS 41947 (D. Or. Oct. 21, 2005):

Bareboat charter of barge was valid despite restrictions including permitting owner to inspect the barge, prohibiting charterer from making any alterations, changes or additions to vessel without owner’s prior consent, and prohibition on carrying certain types of cargo.

Gabarick v. Laurin Maritime (America) Inc., 900 F. Supp. 2d 669 (E.D. La. 2012):

Safety directives to use a certain life vest, the ability to approve major repairs, participation in a hurricane preparedness plan, and the ability to request removal of problematic crew members from its property are facially reasonable in nature and neither violative of the charter nor materially determinative of ultimate vessel control.

Insurance

Brophy v. Lavigne, 801 F.2d 521 (1st Cir. 1986):

Fact that owner purchased and maintained the hull insurance on the vessel during the term of the charter did not otherwise invalidate [oral] demise charter agreement.

Federal Barge Lines, Inc. v. SCNO Barge Lines, Inc., 711 F.2d 110, 111-12 (8th Cir. 1983):

Demise charter contained provision that owner “would provide certain stipulated insurance coverage ‘as a matter of convenience’ and that its agreement to do so ‘will in no way alter the intent of the agreement as to possession and control of the vessel.’” The court found this provision did not establish ambiguity in the demise charter agreement, in light of clear (written) intent that the charterer was to retain possession and control of the vessel.

Baker v. Hasbrouck, 1992 AMC 1303, 1991 U.S. Dist. LEXIS 16286 (D. Or. Nov. 1, 1991):

Owner’s payment of hull insurance (and of major repairs and maintenance) demonstrates that the owner

was protecting its ownership interest in the vessel and not that it retained command, control and navigation of the vessel sufficient to invalidate the bareboat charter.

Madeja v. Olympic Packer, LLC, 155 F. Supp. 2d 1183 (D. Haw. 2001):

Owner's payment of insurance did not invalidate bareboat charter where charterer failed to pay for insurance; paying for insurance only protected owner's investment in case of loss or damage to the vessel. Paying for insurance did not transfer control of the vessel back to owner in whole or in part. The agreement was a bareboat charter despite owner's payment of the vessel's insurance.

But see:

Lovette v. Happy Hooker II, 2006 U.S. Dist. LEXIS 1451 (M.D. Fla. Jan. 11, 2006):

Failure of a charterer to obtain insurance on the vessel is indicative of no bareboat charter (other factors also considered).

Comar Marine Corp. v. Raider Marine Logistics, LLC, 792 F.3d 564, 570 (5th Cir. 2015), citing *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993):

As charterer's personnel operate and man the vessel during a bareboat or demise charter, charterer has liability for any and all casualties resulting from such operation and therefore provides insurance for such liabilities.

Fuel

Gabarick v. Laurin Maritime (America) Inc., 900 F. Supp. 2d 669, 673 (E.D. La. 2012):

The court held that the payment of fuel and lube oil by the vessel owner failed to invalidate a bareboat charter, stating that "[t]here is no legal authority to support claims that such payments equate to operational control of a vessel, certainly not at the level contemplated to nullify the instant charter arrangements."

O'Donnell v. Latham, 525 F.2d 650, 653 (5th Cir. 1976):

The fact that the vessel owner provided the fuel for a fishing charter (at no cost to charterer) was "without countervailing significance" and thus did not invalidate the demise, or bareboat, charter.

But see:

Stolthaven Houston, Inc. v. RACHEL B, 2008 AMC 2067, 2073, 2008 U.S. Dist. LEXIS 55723, at *15 (S.D.N.Y. July 18, 2008):

"In keeping with that broad transfer of control, the charterer also assumes full responsibility for the navigation, operation, supply, *fuel* and repair of the vessel and for all costs associated therewith"

(emphasis added).

Avin Intl. Bunkers Supply, S.A. v. Wellrun Management, 607 F. Supp. 738 (S.D.N.Y. 1985):

In a dispute over nonpayment of bunkers by a charterer, the court found that where the owner did not demand full payment of charter hire and indirectly advanced sums for supplies, there was an issue of fact as to whether a true demise charter existed.

Employment/Control of Captain

United States v. Shea, 152 U.S. 178, 189 (1894):

The fact that a captain is employed by the owner is not fatal to a demise charter where the captain is subject to orders of the charterer during the period of demise. "No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control."

Guzman v. Pichirilo, 369 U.S. 698, 701 (1962):

"[T]he fact that the captain is employed by the owner is not fatal to the creation of a [demise] charter, for a vessel can be demised complete with captain if he is subject to the orders of the [charterer] during the period of the demise."

Grillea v. United States, 229 F.2d 687, 689-90 (2d Cir. 1955):

Charter provision allowing owner to remove the master or chief engineer "if it shall have reason to be dissatisfied with his conduct, or if it considers his employment to be prejudicial to the interests of the United States," did not impact finding that charter was a demise.

Stolthaven Houston, Inc. v. RACHEL B, 2008 AMC 2067, 2008 U.S. Dist. LEXIS 55723 (S.D.N.Y. July 18, 2008):

Retaining the ability to ensure that a competent manager is appointed does not constitute retention of significant control or management.

Also:

Yacht Sales, Intl. v. City of Virginia Beach, 977 F. Supp. 408 (E.D. Va. 1997):

The court found that the yacht owner retained control over the captain where the captain reported to the owner

daily, bore no expenses, was paid by the day and was paid only to take the boat from point to point daily.

Stephenson v. Star-Kist Caribe, Inc., 598 F.2d 676 (1st Cir. 1979):

Charter of fishing vessel found not to be a demise charter where owner retained substantial control, hired captains and crew, had sole power to fire crew, and had ultimate financial responsibility for crew's wages.

Geographic/Trade Limits

Schnell v. United States, 166 F.2d 479, 480 (2d Cir. 1948):

Charter party restriction that charterer would be "subject to all regulations of general application in the trade issued by the United States with respect to cargoes, priority of cargoes, contracts of affreightment, rates of freight and other charges, and as to all matters connected with the operations of vessels in the trade" did not change the charter's characterization as a demise charter.

Grillea v. United States, 229 F.2d 687, 689-90 (2d Cir. 1955):

Charter provision limiting ship's operation to "Trade Route 1" was irrelevant to consideration of whether charter was a demise (found to be demise charter).

Tidewater Barge Lines, Inc. v. Port of Lewiston, 2006 AMC 542, 2005 U.S. Dist. LEXIS 41947 (D. Or. Oct. 21, 2005):

Bareboat charter was valid despite owner's restrictions, including limiting operation of vessel to certain geographical areas, and prohibition on carrying certain types of cargo.

Surveys

Community Bank of LaFourche v. M/V Mary Ann Vizier, 2012 AMC 1744, 2012 U.S. Dist. LEXIS 66842 (E.D. La. May 11, 2012):

A lack of contractual provisions for vessel surveys, and restrictions on liens or other customary provisions of a bareboat charter does not necessarily deprive a charter party of bareboat status.

Conclusion

In many areas of the United States, the U.S. Coast Guard continues to implement an aggressive program to eliminate illegal charters. While the NVIC criteria for a bareboat charter have remained the same, the interpretation of the criteria appears to be continually evolving.