From the Bench:

A Brief Look at How the Courts Interpret Criteria for Bareboat Charters

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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.” Navigation and Vessel Inspection Circular No. 7-94 (“NVIC”) at 6. 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."

Two types of charters are referenced in the Act. The first is a charter where the owner provides or specifies the crew; and the second is where the charterer selects and pays the crew and retains the authority to dismiss the crew for cause. In the second situation, the charter may be considered to be one with no crew specified or provided by the owner, although the NVIC also 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.” 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 still not be considered as specifying or providing the crew.

The NVIC identifies the criteria which are indicative, but not conclusive, of a valid bareboat charter arrangement. Not all elements need to be present 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.

1. The charterer must have the option of selecting the crew.
    - A master or crew may be furnished by the owner where full possession and control is 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.

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 (although 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.

"Any 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." NVIC at 7.

In *Guzman v. Pichirilo*, 369 U.S. 698, 699-700 (1962), a case often cited by the U.S. Coast Guard as the standard for relinquishment of control of a vessel by an owner, the 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." The Court further stated that such a charter is, therefore, "tantamount to, though just short of, an outright transfer of ownership." *Id*. See also *Avin Intl. Bunkers Supply, S.A. v. Wellrun Management,* 607 F. Supp. 738, 741, 1985 AMC 2513 (S.D. NY 1985)("The 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 demise. It is "tantamount to, though just short of, an outright transfer of ownership."); *Certain Underwriters at Lloyd's Syndicate 1206 v. Eldia Diazolmo*, 2013 U.S. Dist. LEXIS 108182 (D. PR. 2013)(Demise charters are "tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all.").

Not all courts agree that *Guzman* is controlling; see *Bishop v. United States*, 334 F. Supp. 415 (S.D. TX 1971)(*Guzman* opinion that courts should be reluctant to find a demise charter when the dealings between the parties are consistent with any lesser relationship is *dictum*); *Gowanus Indust. Park v. Arthur H. Sulzer Assoc*., 2013 U.S. Dist. LEXIS 47063 (E.D. NY 2013)(same).

Although the criteria for a bareboat or demise charter are relatively easily understood in the abstract, the difficulty lies in its application to the varying circumstances of contract 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." *Avin Intl. Bunkers Supply, S.A.,* 607 F. Supp. at 741. But see *Colletti v. Tiger Tugz LLC*, 2011 U.S. Dist. LEXIS 145606 (W.D. LA 2011)("The validity of an alleged bareboat charter is a *question of law,* but that conclusion is based on subsidiary findings of fact")(emphasis added).

Contrary to the NVIC, courts have held that a bareboat charter need *not* be in writing, *Colleti*, 2011 U.S. Lexis 145606 *17; *In Re Natures Way Marine, LLC*, 984 F. Supp.2d 1231, 1241 (S.D. AL 2013).

The intent of the parties (as to whether a charter is a bareboat) "is manifested by the whole instrument rather than by the literal meaning of any particular clause taken by itself." *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). The courts warn that 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." *The Rice Co.,* 523 F.3d at 391. See also *Stolthaven Houston, Inc. v. Rachel B*, 2008 U.S. Dist. LEXIS 55723 *14, 2008 AMC 2067, 2073 (S.D.NY 2008)("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"). But see *Certain Underwriters At Lloyd's Syndicate 1206, supra* at *11-12*,* where the court 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 as "renters" and not as "charterers" or "demises," and the agreement and did not mention "charter."

Examples of How the Court has Ruled on the Criteria for Bareboat Charters

Operator/Operations Restrictions Generally Permitted

David Morris v. Paradise of Port Richey, Inc., 2009 U.S. Dist. LEXIS 2392 (M.D. FL 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 U.S. Dist. LEXIS 55723, 2008 AMC 2067 (S.D.N.Y. 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 (D. MA 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."

Limon v. Berryco Barge Lines, LLC, 2011 U.S. Dist. LEXIS 22293 (S.D. TX 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., 2006 AMC 542 (D. OR. 2005):

> Bareboat charter of barge was valid despite restrictions including owner's right 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

Federal Barge Lines, Inc. v. SCNO Barge Lines, Inc., 711 F.2d 110 (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.

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

Walker v. Braus, 995 F.2d 77, 1993 AMC 2455 (5th Cir. 1993):

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

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

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

Fuel

Gabarick v. Laurin Maritime (America) Inc., 900 F. Supp. 2d 669 (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 1976 AMC 61 (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 U.S. Dist. LEXIS 55723, 2008 AMC 2067 (S.D.N.Y. 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."

Avin Intl. Bunkers Supply, S.A. v. Wellrun Management, 607 F. Supp. 738 (S.D. NY 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 (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 (1962):

> The fact that the captain is employed by the owner is not fatal to the creation of a [demise] charter because a vessel can be demised complete with captain as long as the captain is subject to the order of the charterer during the period of the demise charter.

Grillea v. United States, 229 F.2d 687 (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 U.S. Dist. LEXIS 55723, 2008 AMC 2067 (S.D. NY 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, 1998 AMC 405 (E.D. VA 1997):

> The court found that yacht owner retained control over captain where the captain reported to the owner daily, bore no expenses, was paid by the day and was only paid 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 (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 (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., 2006 AMC 542 (D. OR 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 U.S. Dist. LEXIS 66842, 2012 AMC 1744 (E.D. LA 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.

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