

THE THREE R's OF BAREBOAT CHARTERING:

RIGHTS, RESPONSIBILITIES AND RISKS

Do you bareboat charter vessels for use by yourself or your company? Did you know that the penalties for any deficiencies found on the vessel or for improper operation of the vessel were your responsibility?

Do you bareboat charter your vessel to others to defray the cost of ownership? Did you know that you risk losing your vessel by forfeiture to the government for the illegal actions of your charterer?

This article is intended to highlight some of the possible implications and consequences of bareboat charters of recreational vessels. *Recreational vessel owners who attempt to bareboat charter their vessels may be surprised to learn that they have taken on greater risks than anticipated.* We will look at the background of this form of charter and how it evolved and clarify the relationships of the involved parties. This article focuses on the charter of vessels less than 100 gross tons, but many of the same principles pertain to the charter of larger vessels as well.

First some definitions of terms to be used will be helpful. A small passenger vessel is a vessel of less than 100 gross tons carrying more than six passengers and is required to be inspected by the Coast Guard. An uninspected passenger vessel is a vessel less than 100 gross tons carrying six or fewer passengers and is not required to be inspected. However, it is required to be under the command of an operator licensed by the Coast Guard and to comply with the rules in Title 46, Code of Federal Regulations, Subchapter C for uninspected commercial vessels. *For most purposes, any individual carried on either type of vessel, other than the owner or crew is considered a passenger, however, the law does make an exception for "a guest on board a vessel being operated only for pleasure who has not contributed consideration for carriage on board."* Note that there are two parts to this exception: "operated only for pleasure" and "has not contributed consideration." Vessels which meet both of these criteria are considered recreational vessels. Consideration need not be in the form of money. Consideration includes anticipated future financial gain, such as that anticipated when entertaining business clients or prospective clients.

When an owner attempts to bareboat charter his or her vessel, he or she must consider the following issues: (1) If there is not a valid

bareboat charter, does the vessel meet pertinent inspection and manning requirements, and is the vessel properly documented or numbered; and (2) If there is a valid bareboat charter, is the vessel nevertheless still carrying "passengers" (i.e., is the charterer carrying passengers). This again raises the inspection, manning and documentation concerns. As will be discussed below, *having a valid bareboat charter does not necessarily absolve an owner of risks and responsibilities.*

The bareboat charter has evolved as a highly complex contractual agreement between a vessel owner and a charterer who is willing to accept the benefits and consequences of ownership for a period of time. Historically, it was a device used with respect to large commercial vessels for multi-year periods. As the charterer accepts the benefits and liabilities of ownership, the owner must relinquish command, control, and possession of the vessel. It is NOT sufficient to establish this transfer solely on the terms of the contract.

The courts have long held that the establishment of a bareboat charter must be contingent on more than the mere weight of the paper to support it. The actual conduct of the involved parties must be consistent with the written agreement. The vestiges of ownership must have in fact passed from the owner to the charterer for the term of the charter. The burden of establishing the existence of the bareboat charter rests with the owner and this is indeed a heavy burden. *When the dealings and relationships between the involved parties are indicative of anything less than complete transfer of command, control, and possession, the courts are reluctant to find that the vessel was legally bareboat chartered.*

The owner, charterer and master/skipper all should be aware of their responsibilities and the risks involved in a bareboat charter.

OWNER: Under the terms of a valid bareboat charter, the owner (be it an individual, partnership, corporation, etc.) of the vessel retains exclusive title to the vessel for the duration of the bareboat charter. Of course, as with any lease or rental type agreement, the owner will receive some compensation or consideration for the use of the property.

The owner is charged with furnishing a generally seaworthy vessel, free of defects, to the charterer. To insure this and that the vessel is returned in original condition (normal wear and tear excepted), it is generally stipulated that a survey by the owner and charterer is completed prior to commencement of the charter. This "on

charter" survey establishes the condition of the vessel at the time the vessel is "handed over" to the charterer. It is also generally accepted that an "off charter" survey is conducted at the termination of the charter period to insure that the vessel is returned in original condition exclusive of normal wear and tear.

Even with a valid bareboat charter of the vessel, the owner faces certain risks. *If the charterer improperly uses the vessel, such as outside the documented use of the vessel (for example, a pleasure yacht being used for commercial purposes), the vessel may be subjected to seizure and forfeiture.* Other violations may also call for seizure and forfeiture, for example, smuggling. *The owner may remain responsible for violations irrespective of the charter status.* An example may prove helpful:

A documented yacht (recreational vessel) is bareboat chartered to a group of individuals. The documentation of a vessel serves to establish its nationality and provides evidence of its qualification to engage in a given trade. There are five categories of U.S. federal documentation: **registry** (allows vessel to engage in foreign trade); **coastwise** (restricts trade between any two points embraced within the coastwise laws of the U.S. to vessels built, manned, owned and controlled by U.S. citizens); **Great Lakes**; **fishery**; and **recreational**. Day sails - with limited exceptions - from a U.S. port are coastwise trade. The group hires a non-U.S. citizen as master or captain and they take along a few paying passengers on a coastwise voyage to help defray expenses. All of this may be without the knowledge of the owner. If the vessel is a yacht documented only for recreation it may not carry passengers. The vessel may be seized and forfeited for violation of the document and engaging in a protected (coastwise) trade. The owner may be held liable for civil penalties for allowing the vessel to be under the control of a non-U.S. citizen and for carrying passengers without the necessary safety certificates and licensed personnel.

If it is subsequently determined that no bareboat charter of the vessel existed, additional responsibilities fall on the owner. If the vessel is damaged or lost, the possibility exists that insurance coverage may be voided (depending on the terms of the insurance policy). If persons are injured, the owner may be sought as the responsible party, which becomes particularly important if merchant seamen are the injured parties. There will still be the civil penalties noted above

with which to contend. In general, if it is found that a bareboat charter did not exist, the owner will be considered to have carried passengers on board the vessel. Any payment for the cruise/voyage would be sufficient to establish consideration for carriage on board.

CHARTERER: Under a valid bareboat charter, the charterer stands in the shoes of the owner of the vessel. The charterer has complete command, control, and possession of the vessel as if it were his or her own. There is usually a clause dealing with return of the vessel in the same condition as it was in at the start of the charter (off-charter survey). *Also, as the "owner" for the term of the charter, the charterer must assume responsibility for the vessel operations within the maritime laws and regulations.* Herein lies the risk to the charterer under this form of agreement.

The charterer, under a valid bareboat charter arrangement, assumes ownership for the purposes of several of the liabilities attendant to vessel operations. Under the laws dealing with merchant seamen protection, the owner (in this case the bareboat charterer) owes employees a safe place to work and proper equipment with which to work. The charterer becomes the warrantor of seaworthiness for his or her employees and passengers or guests. Proceedings resulting from negligent operation of the vessel may be directed toward the charterer. Violations resulting from the carriage of passengers on a vessel which does not meet the regulations for passenger service, may be directed to the charterer as well as the owner.

Coast Guard investigations have revealed numerous instances where vessels that were purported to be under a bareboat charter were actually engaged in the carriage of passengers. More often than not, purported charterers did not understand the bareboat charter agreement or the potential liabilities and risks they were assuming. The Coast Guard has found vessels operating with large numbers of persons with inadequate lifesaving, fire protection, navigation, and other safety equipment. There have even been cases of total vessel losses due to structural inadequacy of the vessel and/or operator error while under a purported bareboat charter. The maritime safety laws and regulations have evolved over a considerable period of time and they are generally written and amended as a result of casualties and loss of life. The use of bareboat charters to circumvent these important safety laws is of great concern, especially where unsuspecting charterers do not fully understand the consequences of the charter.

MASTER/CAPTAIN/SKIPPER (HIRED):

As previously noted, the master's responsibility is to the charterer under a valid bareboat charter, as the charterer, not the owner, is the employer. Although the charterer is responsible for finding and hiring a master, the owner has an interest in the competency of the master. To this end, an owner may provide the charterer with a list of masters from which to choose, however, the charterer cannot be restricted to this list. This can make for a very difficult position for the hired skipper, in that he or she may be in a position of having to please both parties. Failure to satisfy the demands of the owner may result in removal from future approval or selection, while failure to accommodate the charterer can result in immediate dismissal. That difficulty notwithstanding, it is clear that the master's allegiance must be to the charterer. It is for this reason that *the Coast Guard will not accept as a valid bareboat charter, those charters where the owner acts as the vessel master.* An owner cannot relinquish command of the vessel while acting as the master.

There are some risks associated with acting as the hired captain in addition to the traditional hazards. The Coast Guard has acted under the Suspension and Revocation Proceedings against licensed masters. In cases where the claim of a bareboat charter was defeated, masters have had their licenses suspended for operating a passenger carrying vessel without the required equipment or inspection certificate. The law also provides for civil penalties against the owner, charterer, managing operator, agent, master, or individual in charge of those vessels which are operated without the required safety equipment or inspection certificates.

Summary

The Coast Guard has recently witnessed an increase in owners of previously bareboat chartered vessels, applying for Coast Guard inspection and certification. This may possibly be attributed to an increased awareness of potential liabilities by vessel owners or after consideration and discussion with Coast Guard inspection personnel, the perceived costs of operating inspected vessels was less than originally anticipated. Certainly that cost is less than the potentially catastrophic costs of litigation and liability resulting from a casualty where it is subsequently determined that no bareboat charter existed. Also, the cruise business is showing dramatic increases. There are more passenger dollars available and still more predicted for the

future. Increased Coast Guard investigation and enforcement in this area may also be persuading owners of borderline or questionable charter operations to submit their vessels for certification. Vessel owners and operators who have successfully completed the certification process are very vocal and do not hesitate to report questionable operations. After all, they are in competition for the same clientele.

While the bareboat charter of recreational type vessels will continue, both parties to the purported charter must fully understand the three R's of chartering: Rights, Responsibilities and Risks. More often than not, charterers really do not understand the liabilities undertaken and the safety considerations which they are responsible for. Owners do not always fully appreciate the exposure they have to penalties and forfeiture for both legitimate and illegitimate charters. And most important, *the Coast Guard is concerned that the fundamental intent of the vessel inspection and manning laws (ie. the safety of passengers) could be compromised when unsuspecting individuals enter into alleged bareboat charter arrangements.*

WHEN CONSIDERING A BAREBOAT CHARTER, REMEMBER:

1. **THE OWNER MUST RELINQUISH COMMAND, CONTROL AND POSSESSION OF THE VESSEL TO THE CHARTERER.**
2. **THE CHARTERER IS RESPONSIBLE FOR THE OPERATION AND SAFETY OF THE VESSEL, ITS CREW, PASSENGERS, AND ALL OTHER PERSONS ABOARD DURING THE TERM OF THE CHARTER.**
3. **THE CHARTERER IS RESPONSIBLE FOR ENSURING THAT THE VESSEL COMPLIES WITH ALL REGULATIONS WHICH ARE APPLICABLE TO THE SERVICE OF THE VESSEL.**
4. **THE VESSEL OWNER MAY STILL BE AT RISK TO PENALTY ACTION STEMMING FROM THE CHARTERERS MISUSE OF THE VESSEL.**
5. **A BAREBOAT CHARTERED VESSEL IS STILL AT RISK OF FORFEITURE IF IN VIOLATION OF CERTAIN U.S. LAWS.**
6. **THE MASTER MAY ALSO BE HELD ACCOUNTABLE FOR THE SAFE OPERATION OF THE VESSEL AS WELL AS INSURING COMPLIANCE WITH ALL APPLICABLE SAFETY EQUIPMENT REQUIREMENTS AND APPLICABLE INSPECTION CERTIFICATES.**