“The master to sign bills of lading as presented by the charterer”: a comparative analysis

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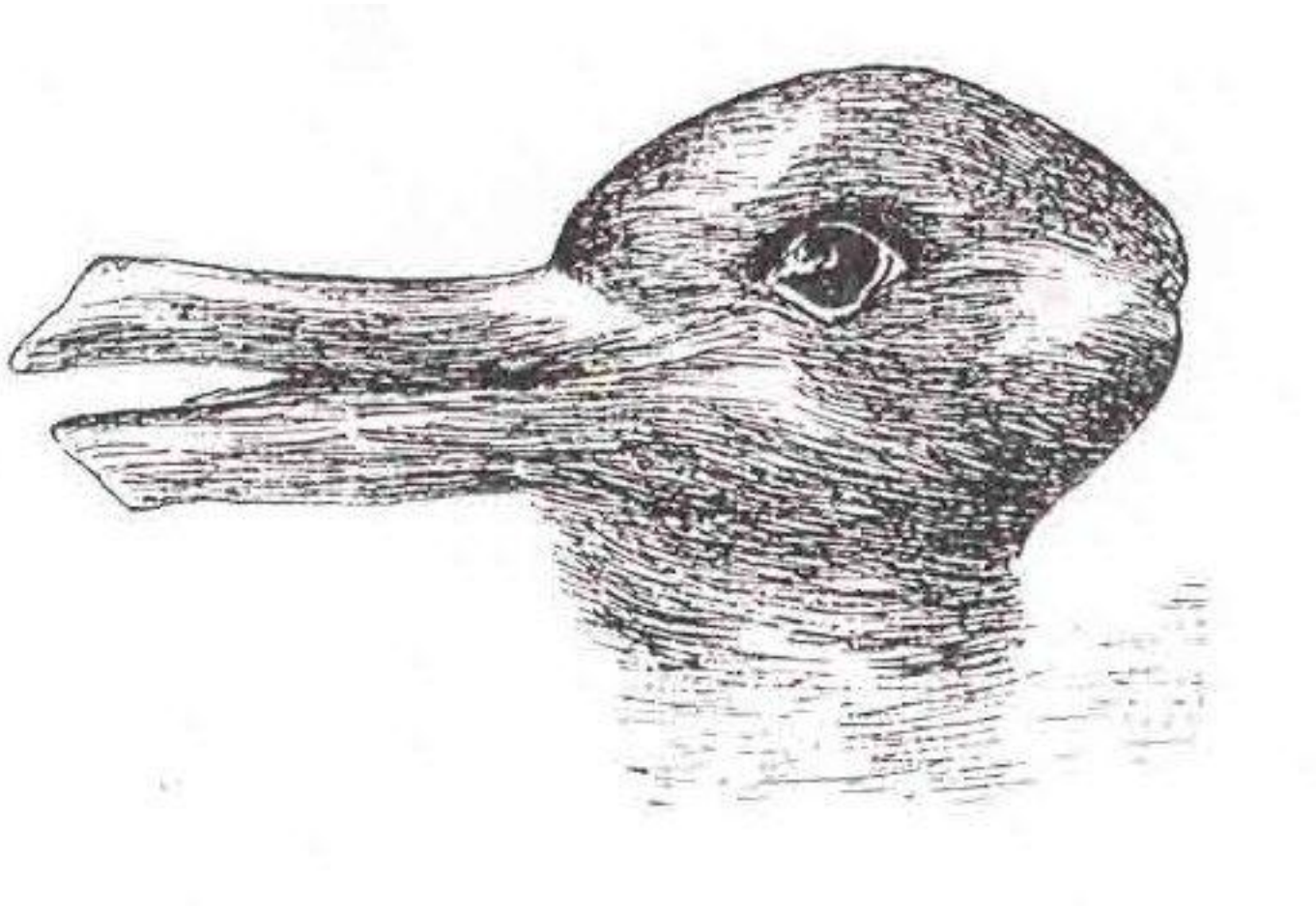
The typical clause

- New York Produce Exchange cl.8:
  - "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."
  - Often supplemented by a rider giving charterer authority to sign itself or to appoint an agent to do so

The typical clause

- Shelltime 4, cl. 13(a):
  - "The master (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment of the vessel, agency and other arrangements, and shall sign bills of lading as Charterers or their agents may direct…without prejudice to this charter."

What do you see?



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A curious disagreement

- English law sees the owner agreeing to enter into a binding contract on the terms of any bill of lading presented by the charterer
  - Result: owner's bill
- American law sees (or at least some American courts see) the owner agreeing that its master will act as the charterer's agent when signing bills of lading
  - Result: charterer's bill
- Other American courts see the same as the English

The English view

- A preliminary proposition: in *The Starsin* [2003] 1 Lloyd's Rep 571, the House of Lords held that an identification of the carrier on the front of a bill of lading is the dominant consideration in determining whether it is an owner's bill or a charterer's bill.
- What about generic bills of lading, or bills of lading simply signed by or on behalf of the master without identifying for whom?

The English view stated

- Brandon J. in *The Berkshire* [1974] 1 Lloyd's Rep. 185 at 188 re cl. 13 of Shelltime 4:
  - "The effect of such a clause in a charter-party is well settled. In the first place, the clause entitles the charterers to present to the master for signature by him on behalf of the shipowners bills of lading which contain or evidence contracts between the shippers of goods and the shipowners, provided always that such bills of lading do not contain extraordinary terms or terms manifestly inconsistent with the charter-party; and the master is obliged, on presentation to him of such bills of lading, to sign them on the shipowners' behalf. In the second place, the charterers may, instead of presenting such bills of lading to the master for signature by him on behalf of the shipowners, sign them themselves on the same behalf. In either case, whether the master signs on the directions of the charterers, or the charterers short-circuit the matter and sign themselves, the signature binds the shipowners as principals to the contract contained in or evidenced by the bills of lading."

An example of the English view

- *The Rewia* [1991] 2 Lloyd's Rep. 325
  - Shipowner was Liberian corporation
  - Cargo of nutmeg and mace carried under a bill of lading in the time charterer's standard form
  - Bill of lading signed "For the Master" by the time charterer's agent in Grenada, the place of loading
    - NYPE cl. 8, but with rider clause: "the Master will authorize Charterers or their Agents to sign Bills of Lading on his behalf"
  - Court of Appeal held: owner's bill

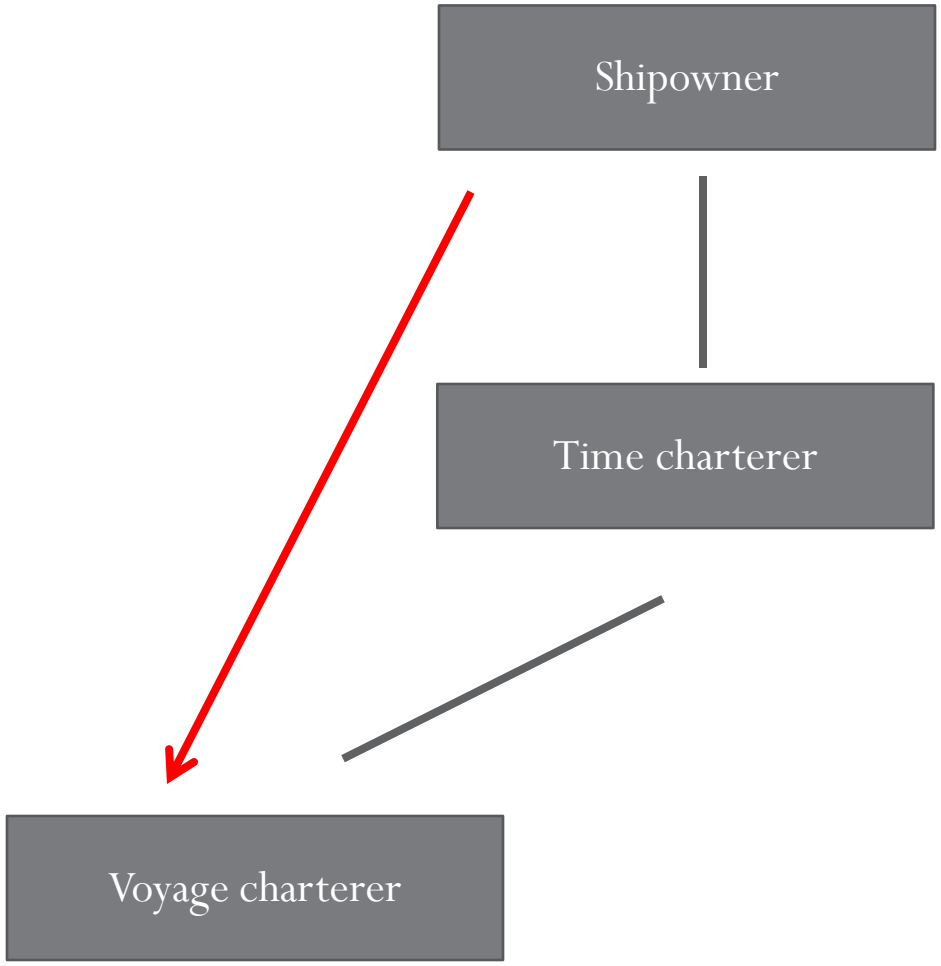
The Rewia

- Leggatt L.J. (at 333): "[A] bill of lading signed for the master cannot be a charterers' bill unless the contract was made with the charterers alone, and the person signing has authority to sign, and does sign, on behalf of the charterers and not the owners. Accordingly, the bills of lading in this case were owners' bills."

Two contracts not one

- A consequence of the English view is that if there is a sub-charter (e.g., a voyage sub-charter), the sub-charterer is party to two contracts of carriage, not one

Two contracts not one



Two contracts not one

- Rix LJ *Tradigrain S.A. v. King Diamond Shipping S.A. (The Spiros C)* [2000] 2 Lloyd's Rep. 319 at 329:
  - "As for the contractual structure, the owner is a party to two contracts, the time charter and the bill of lading…The other party to that bill of lading, Tradigrain [the sub-charterer], by contracting that its freight is to be governed by the sub-charter, also indicates that it is prepared to have its responsibilities governed by the terms of another contract and by performance under it."

The (or at least an) American view stated

- "Two hats"
- *Yeramex International v. S.S. Tendo*, 595 F.2d 943, 944, 946 (4th Cir. 1979):
  - "[T]he terms of the vessels' time charters grant the masters dual authority to act separately as agents for the owner and as agents for the charterer in matters involving the separate responsibilities for ship, as assumed by the owner, and for cargo, as assumed by the charterer."
  - "The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers."

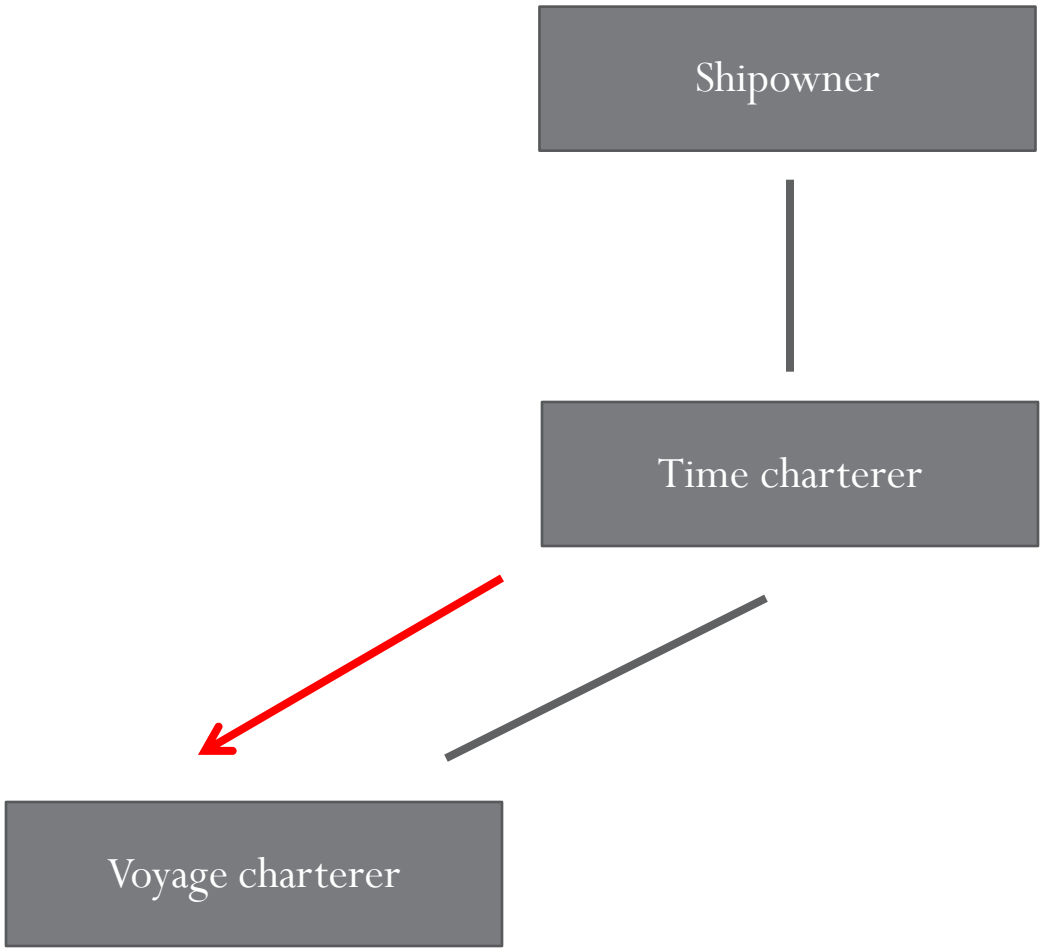
An example of the American view

- *Vanol USA, Inc. v. M/T Coronado*, 663 F.Supp. 79 (S.D.N.Y. 1987)
- Tanker on long time charter under Shelltime 3
- Carriage of a cargo of vacuum gas oil from Spain to New Jersey pursuant to voyage sub-charter
- Master signed bill of lading presented by time charterer
- Held: charterers' bill of lading

One contract not two

- *Vanol* (at 81):
  - "The … bill of lading signed by the Master as agent for [the time charterer] is not a contract of carriage between [the shipowner] and [the sub-charterer] but rather a receipt for the goods because the cargo was shipped pursuant to the terms and conditions of the voyage charterparty between [the sub-charterer] and [the time charterer] making it the governing contract of carriage. Here, because [the sub-charterer] was both voyage charterer and consignee, the bills of lading were in the possession of the charterer and, consequently, were merely receipts, and the rights and liabilities of the parties were governed by the terms of the charterparty."

One contract not two



Another American view

- *Pacific Employers Insurance Co. v. MV Gloria*, 767 F.2d 229 (5th Cir. 1985)
  - NYPE cl. 8
  - Charterer given authority to sign on behalf of the master or to appoint agent to do so
  - Charterer's agent signed "on behalf of the Master"
  - Held: bill of lading bound the owner
  - Fifth Circuit distinguished *Yeramex* on the ground that the *Yeramex* charterparty required the time charterer to indemnify the owner against the consequences of master signing bills of lading on charterer's instructions, and *Gloria* charterparty did not
    - Isn't that upside down?
    - Doesn't the presence of the indemnity suggest that the owners will be made liable to cargo if the charterer's agent signs?
    - Doesn't the absence of the indemnity lend at least some support to the view that the charterer is binding only itself?

Charterer's authority is important

- *Gloria* (at 237):
  - "Generally, when a bill of lading is signed by the charterer or its agent 'for the master' with the authority of the shipowner, this binds the shipowner and places the shipowner within the provisions of COGSA…When, however, a bill of lading is signed by the charterer or its agent 'for the master' but without the authority of the shipowner, the shipowner is not personally bound and does not by virtue of the charterer's signature become a COGSA carrier."
- *Asoma Corp. v. SK Shipping Co. Ltd*, 467 F.3d 817, 827 (2d Cir. 2006):
  - "Generally, when chartered owners…have been authorized by remote owners in the chain of charter to issue bills of lading "for and on behalf of the master", the bills of lading are deemed also to specify the rights and responsibilities of these remote owners."
- How can the shipper/bill of lading holder discern the charterer's authority from the outside?

Charterer's authority is important

- *QT Trading, LP v MV Saga Morus*, 641 F.2d 105 (5th Cir. 2011)
  - NYPE cl. 8
  - Master authorized sub-charterer and its agent to sign on his behalf, specifically instructing them to include mate's receipts and P&I Club preshipment survey comments
  - Sub-charterer's agent signed without including survey comments, and did not sign "for the Master"
  - Held: no-one up the chain of charter was bound

MV Saga Morus

- Attic to Saga to Daewoo, bills issued to QT's seller, indorsed to QT
- Attic not bound; it hadn't authorized Daewoo to sign on its behalf
- Saga not bound, bill not signed "for the Master"
- If it had been, Saga would have been bound under the *Gloria* view but wouldn't because Daewoo had exceeded its authority by not clausing the bills
- Ostensible authority?

Apparent or ostensible authority?

- Impression given by the principal that the supposed agent has authority to bind
- Impression given by the shipowner that the charterer has authority to bind
- Is chartering a vessel to someone else to find cargoes enough in itself to give the impression to cargo-owners that the charterer has authority to bind the shipowner?
- Recall also the American doctrine of ratification: whoever issued the bill of lading and with whatever actual authority (or lack of it) the ship *in rem* ratifies the bill of lading by sailing with the cargo aboard

"As presented"

- *In re MT Elsewin*, SMA Arbitration No. 4137 (June 21, 2011)
  - Owner to time charterer on Shelltime 4
  - Time charterer to voyage sub-charterer on ExxonMobilvoy 2005
  - Cargo loaded in Nigeria
  - Sub-charterer presented backdated bill of lading to master for signature
  - Master refused to sign; eventually did days later after getting letter of indemnity
  - Demurrage claim by time charterer against sub-charterer
  - Should it include the time lost as a result of the master's refusal to sign?
  - Held (by majority): Yes. Master should have signed the bill of lading "as presented." Sub-charterer would have had to indemnify time charterer for any consequences of requiring master to do so.

Conclusion

- A duck is a very different thing from a rabbit
- Considerable differences flow from the two different ways of seeing the effect of the same typical clause
  - Is there privity with the shipowner?
  - Who owes contractual obligations to whom?
  - Who is bound by, e.g., arbitration clauses?