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Understand the Japanese maritime law from key concepts (1)
— "*Gross Negligence*" and "*Reckless Act with Knowledge*"

【Executive Summary】

Gross negligence under Japanese law is a concept to define even further exceptional cases within the exceptional cases where exemption from or limitation to the principle of negligence liability are permitted. It is occasionally defined as situation closer to intentional act. However, it should be noted that gross negligence may in fact be found in cases where there is negligence at an elementary level and/or failure to implement basic procedures, or in cases where the background of the accident is found completely unknown.

Reckless act with knowledge ("*act or omission recklessly and with knowledge that damage/such loss would probably result*") is a concept under maritime law that refers to exceptional cases in which exemption from or limitation of liability is lost or broken within the cases where such exemption or limitation is permitted in principle. Under Japanese law, this concept is adopted only in the domestic legislations to implement international conventions. In Japan, a judgment suggesting reckless act with knowledge of the master was reported for first time last year. In overseas countries on the other hand, a couple of judgments that found reckless acts with knowledge not only of the master but also of the shipowners and other related parties have already been reported in tanker oil pollution and other cases. Historically it must have been designed to make it virtually impossible to break the limitation. If it is broken in real cases, it would not only be an important matter of interpretation of a convention for the country of such judgment, but it would also have a substantial impact on other state parties to such convention and/or on the global insurance/compensation system based on such convention. Under the circumstances the IMO is now considering measures for unified interpretation of relevant conventions.

These two concepts can be adopted in private agreements between private parties too. It would be desirable to carefully consider before doing so, correctly understanding the interpretations of these concepts when used under the laws and international conventions.

1. Introduction

In 2020, the impact of COVID-19 pandemic was wide-ranging all over the world and it occupied most of our topics everywhere. Unfortunately, the situation will remain unchanged for some time in 2021. We however would like to take up a topic other than those related to COVID-19.

One of the incidents that attracted attention in the Japanese shipping industry in 2020, other than those related to COVID-19, was the grounding of *M/T Wakashio* off the coast of Mauritius in July. This incident is an ongoing event and nobody knows what will happen about this case in the future. One of the issues in question in this case may be the limitation of liability of her owner. Some people referred to the question that whether her owner would be entitled to limit its liability, together with the unconfirmed media reports of inappropriate onboard situations leading to the accident. If you want to discuss this issue, the key concept is "*act or omission, committed with the intent to cause damage/such loss, or recklessly and with knowledge that damage/such loss would probably result*" (hereinafter abbreviated as "***intentional act* or *reckless act with knowledge***", and in the case of the latter part only, as "***reckless act with knowledge***"; In

Japan, the latter is sometimes simply abbreviated as "reckless act"; as you see, however, *knowledge* that damage/such loss would probably result is additionally required independently of *recklessness*. I therefore would like to adopt this abbreviation so that this additional requirement may not be overlooked in the analysis.). As will be explained later, we also saw some other noteworthy news in Japan in the context of reckless act with knowledge last year.
I now would like to discuss this international concept of reckless act with knowledge, to be compared with a domestic concept of gross negligence, which is an exceptional concept to deny exemption from or limitation of liability. For the convenience I would begin with discussions of gross negligence.

2. Gross negligence

(1) When/how gross negligence is at issue

Under Japanese law, the basic concept to trigger liability for damages is "*intent* or *negligence*" under tort law (Article 709 of the Civil Code) or "*grounds attributable to an obligor*" for contractual liability (Article 415, para. (1) of the Code). The scope of damages is in principle extended to all loss or damage with reasonable causal connection, *i.e.* (i) loss or damage that would normally occur and (ii) loss or damage that caused by special circumstances foreseeable to the parties concerned (Article 416 of the Code). We cannot say the so-called consequential loss or non-monetary loss falls outside the scope of damages. We also do not have a certain monetary limitation of liability for damages in principle. The concept of "*gross negligence*" serves to define the scope of further exceptions to (a) the exceptions to these basic rules to trigger liability or (b) special rules concerning these principles of the scope of damages, in other words define the scope in which we shall return to apply the principles. (a) Exemption from tort liability under Act on Liability for Negligent Fire (exemption for negligent fire other than gross negligence) and (b) the partial exemption of liabilities of directors and others under Companies Act (Articles 425, para. (1), 426 and 427) are examples.[1]
In the context of maritime law, the concept of "*gross negligence*" appears in the following articles related to maritime transport law, among others:
First is to define exception to the standardized carrier's liability for loss of or damage to the goods (calculation of damages based on the value of goods only; Article 576 of the Commercial Code); the *second* exception is exemption of carrier's liability for carriage of valuables without the shipper's proper declaration (Article 577 of the Commercial Code and Article 15 of the International Carriage of Goods by Sea Act (the **"COGSA**")). Strictly speaking, these rules are not of maritime law but of general transport law in both cases, but the former rule also applies to domestic sea carrier, and the latter applies to both domestic and international sea carrier. In that sense, these rules can also be said to be rules under maritime law; and *thirdly*, the Commercial Code prior to amendments in 2018 had a provision that referred to gross negligence of the crew and other servants, to which case liability regime under the Commercial Code – default rules in principle – is compulsorily applied (Article 739 before amendment). Turning to the contractual terms, the general contractual terms of the carrier of goods by land often set out a certain amount of limitation of liability before or after the amendment of the Commercial Code. If loss of or damage to the goods is caused by gross negligence, however, the validity of such terms may well be questioned.
In cases where gross negligence of a corporation was at issue, whose act or omission (in principle hereinafter referred to as "act" to include both) within such corporation shall be the basis of judgment? Under Japanese law the principle in this respect is that if a servant within a corporation performing the duty within the corporation – for example a truck driver for land transportation or the master or crew onboard for maritime transportation – was found grossly negligent, the corporation will be found grossly negligent. In judicial cases cited later, it was gross negligence of the servant that was questioned. [2] It is

[1] Judgment of Tokyo High Court on 28 February 2013, Hanrei Jiho 2181-3 (The "*NYK Argus*") is a case in which the application of Act on Liability for Negligent Fire was at issue in a maritime casualty.
[2] In respect of *negligence* and *grounds attributable to the obligor*, this approach is justified by employer's vicarious liability under tort law (Article 715 of the Civil Code in general and Article 690 of the Commercial Code for the master and crew employed by the shipowner) and through the interpretation of "*grounds attributable to an obligor*" under contract law (Article 415 of the Civil Code – more specifically "*grounds attributable to the obligor in light of the contract or other sources of obligation and the common sense in the transaction*" Article 415, para. 1 of the Civil Code). The same shall also

taken for granted that gross negligence of the servant concludes gross negligence of the corporate carrier.

(2) What is gross negligence?

Gross negligence has been defined in judicial precedents in the context of Act on Liability for Negligent Fire as "*a state of extreme negligence of attention, quite close to intent, in which unlawful and harmful consequences could have been foreseeable, had a small amount of attention been paid*" (Judgement of Supreme Court on 9 July 1957, Minshu 11-7-1203). Its reference to "*quite close to intent*" apparently indicates it may be extremely difficult to find gross negligence. If you review judicial precedents, however, you will know it is not: gross negligence may well be found in (i) cases where there is negligence at an elementary level and/or failure to implement basic procedures, or (ii) cases where the background of the accident is found completely unknown.

A report prepared and submitted by the Ministry of Justice of Japan for deliberations at the Sub-Committee for Commercial Code (Transport and Maritime Commerce) of Legislative Council, organized for the amendment of the Commercial Code as mentioned earlier, is a publicly available convenient material for our reference.[3] This picks up more than 10 reported judicial precedents related to gross negligence in the context of transport and maritime law at the time of its submission (October 2014). You will find therein Judgment of Tokyo High Court on 25 September 1979, Hanrei Jiho 944-106 (as approved by Judgment of Supreme Court on 25 March 1980, Shumin 129-339) as an example of the category (i). A car driver of valuable goods, being a servant of the contractual carrier, forgot to lock and check the fitting of the rear door of his car from which goods were loaded. Then the door half-opened during carriage and goods dropped off and were lost. The court found gross negligence of the carrier and rejected to apply exemption of carrier's liability for carriage of valuables without the shipper's proper declaration in the Commercial Code. Gross negligence was found by reason of the driver's elementary failure to follow the procedure for loading, that could be easily done with little care. But it is submitted that it is yet different from "quite close to intent". The judgement also did not refer to this formula. Anyway, this is a typical example of gross negligence at an elementary level and/or failure to implement basic procedures.[4] To be contrasted is Judgment of Tokyo District Court on 20 April 1989, Hanrei Jiho 1337-129, which may be an example of the category (ii). In this case valuable goods in carriage by land (in courier service) were lost for completely unknown reasons. The court found gross negligence because such loss for completely unknown reasons is in its opinion an indication of the total inadequacy of the storage and control system of the carrier. It is submitted that loss for unknown reasons is different from "quite close to intent". Loss for unknown reason may possibly indicate the suspicious conduct of servants during their jobs such as pilferage and thus they may want to treat the situation as "quite close to intent". But the phrase "quite close to intent" is an expression to describe the seriousness of negligence but not to describe the degree of proof.[5]

Naturally, there are cases finding or not finding gross negligence in similar cases. It is difficult to draw a clear line in actual cases. In addition, we also have a recent case in which the first instance court and the appellate court made different judgments in respect of gross negligence of a sea pilot. Analysis of this case from a theoretical perspective is a difficult task.[6] Having said that, although more than six years

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apply to g*ross negligence*.

[3] Reference Report No. 18 to Sub-Committee for Commercial Code (Transport and Maritime Commerce) of Legislative Council (http://www.moj.go.jp/content/001127920.pdf accessed 18 March 2021)

[4] See also Judgment of Tokyo High Court on 20 September 1983, Hanrei Jiho 1093-80; Judgment of Tokyo District Court on 28 March 1990, Hanri Times 733-221; Judgment of Kobe District Court on 31 January 2014, LLI/DB Hanrei Hisho (affirmed gross negligence); and Judgment of Kobe District Court on 19 July 1994, Kominshu 27-4-992 (denied gross negligence)

[5] See also Judgment of Supreme Court on 19 March 1976, Minshu 30-2-128 (affirmed gross negligence, after interpreting "*his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct*" in Article 25, para. 1 of the original Warsaw Convention on International Carriage by Air in 1929 to mean gross negligence under Japanese law); and Judgment of Osaka District Court on 11 November 1991, Hanrei Jiho 1461-156 (denied gross negligence)

[6] Judgment of Osaka High Court on 14 October 2016, Westlaw (The "*Hanjin Brisbane*") dealt with the exemption clause for cases other than gross negligence in the standard terms and conditions of pilotage services. It reversed the first instance judgment (Judgment of Kobe District Court on 3 September 2015) that had found gross negligence and denied gross negligence. The appellate court on one hand held gross negligence is found "*where degree of breach of negligence is so serious that can be regarded* as almost equivalent to intent *and therefore the pilot need not be protected even having due*

have passed since the preparation of the Report by the Ministry of Justice, it does not appear that there has been any sign of a significant change in the trends described in categories (i) and (ii) above.[7]

3. Reckless act with knowledge

(1) When/how reckless act with knowledge is at issue

The concept of intentional act or reckless act with knowledge is found only in domestic legislations of the maritime international conventions to which Japan is a state party.[8]
In the *First* place, the COGSA provides for (i) standardized carrier's liability for loss of or damage to the goods (Article 8) and (ii) package/weight limitation of liability of carrier (Article 9, para. (1)). However, these two rules do not apply if loss of or damage to the goods is caused by the carrier's intentional act or reckless act with knowledge (Article 10). This exception basically reflects relevant provisions of the Hague-Visby Rules (the "**HVR**"; Articles 4, 5(a), (b) and (e)).[9] *Secondly*, Act on Limitation of Liability of Shipowners, etc. (the "**Limitation Act**") provides for limitation of liability of a shipowner and its servants among others (whether the basis of liability be tort, contract or otherwise) arising from the operation of a ship among others pursuant to the international gross tonnage of such ship for each accident

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regard to the purpose of the relevant exemption clause, namely *(i) cases where the pilot committed a reckless act that could not be committed by any ordinary pilot, despite with knowledge that unlawful and harmful consequences would probably result and/or (ii) cases where unlawful and harmful consequences could have been easily foreseeable and avoidable, had a small amount of attention been paid, let alone the degree of attention ordinarily required, but nevertheless such unlawful and harmful consequences could not have been foreseen or avoided since such a small amount of attention was not paid*." This general formula sounds a mixture of *reckless act with knowledge* and what has been formerly said about *gross negligence*. It on the other hand went on to hold in its application to the case that the attitudes on the part of the master or shipowner (who are to receive the services from the pilot) that may have impeded the performance of the pilot – failure to properly implement Bridge Resource Management in this case – shall also be taken into account. I would say this latter ruling considered something like contributory negligence of the other party not at the quantum level, *i.e.* in terms of awarding damages, but at the liability level, *i.e.* in terms of decision of gross negligence. Surely, though, gross negligence in contract liability is an exception to the principle trigger of liability, "*grounds attributable to the obligor*" (See Article 415, para. 1 of the Civil Code), in which various factors may be taken into account (See (n 2)); and the Code also provides, "*If the obligee is negligent regarding the failure of performance of the obligation, the court shall determine the liability for damages and the amount thereof by taking such elements into consideration.*" (Article 418) and thus awarding no damages (not nominal) may be possible by virtue of application of contributory negligence. Perhaps due to this judgment, general terms and conditions of pilot services have been amended to read a mixture of *reckless act with knowledge* and *gross negligence*. See Article 21, para. 3 of http://www.tokyobay-pilot.jp/pdf/yakkan_e2019.pdf last accessed 18 March 2021)

[7] These trends in the judgments of gross negligence do not seem to be limited to the context of transport and maritime law. An influential academic view in civil law discusses gross negligence in the context of Act on Liability for Negligent Fire, "Precedents in lower courts apparently adopt the formula of "quite close to intent" but do not in reality consider gross negligence in comparison with intent in deciding actual cases. They rather tend to find gross negligence in so far as the duty of care shall be set at a higher level, especially when the duty of care in the course of business, shall be found and such duty was nevertheless not implemented." He further argues that it is the recent mainstream theoretical view in civil law studies that gross negligence is not something "quite close to intent" but serious breach of duty of care located in between intent and ordinary negligence, and such seriousness is judged under a matrix formulated *first* from the viewpoints that whether the level of awareness and prevention is to be questioned or the level of external behavior is to be questioned, and *secondly* that whether the level of deviation from the pattern of appropriate acts is substantial or the level of duty to act shall be set at a higher level. See Yoshio Shiomi, *Law of Tort Vol. 1* (2nd edn, Shinzansha Shuppan 2009) 259, 308-309.

[8] In the discussions for the amendment of the Commercial Code as mentioned earlier, it was submitted that reckless act with knowledge shall be adopted to make the scope of exceptions to exemption of the carrier's liability for carriage of valuables without the shipper's proper declaration narrower than gross negligence by reason of its unique theoretical basis, but this submission was not accepted. See Takashi Hakoi, 'Theoretical Analysis of the Carrier's Liability' (2018) Hoso Jiho 90-3-27, 29-30.

[9] As to the interpretation of the HVR, it seems that (i) standardized carrier's liability for loss of or damage to the goods thereunder (Article 4, para. 5(b)) is not necessarily excluded even if carrier's intentional act or reckless act with knowledge (sub-para. (e)) is found. See Hisashi Tanikawa, 'Amendment of the Bills of Lading Convention and the Assistance and Salvage Convention – Report of 12th Diplomatic Conference on Maritime Law' (1968) 13 JMLA Rep 3, 58, 71; Kenjiro Egashira, 'On the Total Amount of Damages for which the Carrier Shall Be Liable' (1992) 36 JMLA Rep 51, 57; Noboru Kobayashi, 'Incorporation of the Visby Rules into the International COGSA' in *Legal Essays in Commemoration of Koki (70th Birthday) of Tsuneo Otori Sensei – History and Development of Modern Corporate Law Legislation* (Shoji Homu 1993) 717, 728. But the COGSA provides for exception by intentional act or reckless act with knowledge in respect of both (i) and (ii).

(Article 3, paras. (1) and (2)). However, each of the shipowner or its servants cannot limit its liability for the loss if such loss is caused by its own intentional act or reckless act with knowledge (para. (3)). This can be a potential topic of debate in the *Wakashio* casualty. This exception reflects the relevant provision of the International Convention for Limitation of Liability for Maritime Claims ("**LLMC**") (Article 4).[10] And *thirdly*, according to Act on Liability for Oil Pollution Damage (the "**Oil Pollution Liability Act**"), which is a further special law concerning the protection of victims of oil pollution from tankers among others, provides for the special limitation of liability different from the same in the Limitation Act (Article 5, main text and Article 6), together with channeling of liability to and strict liability of a tanker owner (Article 3, paras. (1) and (4)). However, each of servants or other entities other than the tanker owner can be found liable – as an exception to channeling of liability – if oil pollution damage is caused by its intentional act or reckless act with knowledge (Article 3, para. (4) proviso to main text); and the tanker owner cannot limit its liability if oil pollution damage is caused by its own intentional act or reckless act with knowledge (Article 5 proviso). This also complies with the relevant provisions of Civil Liability Convention for Oil Pollution Liability ("**CLC**") (Article 3, paras. 1 to 4).[11]

All of them aim to provide for considerably increased limitations of liability for damages than its respective predecessors, and in exchange of such increase, they are designed to make it practically impossible (unbreakable) to break the limitation of liability.[12] Nevertheless, they are not merely intended to protect the owners, carriers and other industry parties concerned and/or the shipping business in general, but also intended to ensure to enable them to make insurance arrangements up to such increased limitations at reasonable costs, thereby contributing to the protection of victims or claimants generally. In addition, with respect to the convention in the *second* category (LLMC) (in so far as it is applied to oil pollution damage from an ordinary ship as provided in Bunker Convention reflected in Oil Pollution Liability Act of Japan) and the convention in the *third* category (CLC), (i)(a) joint and several strict liability of the shipowner and certain other parties or (b) strict liability of the shipowner and chanelling of liability thereto, as well as (ii) compulsory insurance requirements up to the limitation amounts and (iii) victims' rights to present direct claims against such compulsory insurers are also adopted to enhance the protection.[13]

One supplementary point to note: As observed from our explanation in the convention in the *first* category (the HVR), standardization of damages is excluded if there is a gross negligence of the carrier (including its servants or agents as mentioned earlier) under the Commercial Code, whereas it is excluded only if there is a reckless act with knowledge of the carrier (excluding its servants or agents to be discussed later) under the COGSA. There is a gap between domestic sea carriage subject to the former and international sea carriage subject to the latter. This can be said to reflect the difference in the basic philosophies of the law in domestic sea carriage and international sea carriage – the former is subject to the Commercial Code

[10] In addition to the 1976 LLMC initially signed, 1996 LLMC increased limitation amounts, which have further been increased in 2015 in accordance with the simplified revision procedure in 2012. Japan is a state party of the latter. Mauritius, the country where the *Wakashio* casualty occurred, is a party to the 1976 LLMC. It creates a problem.

[11] In addition to the 1969 CLC initially signed, there are 1984 Protocol (not entered into force) and 1992 CLC (it is an amendment protocol but normally so called) which raised the limitation amounts, among others. The limitation amounts in 1992 CLC was further increased in 2003 through the simplified revision procedure in 2000. The compensation regime for tanker oil pollution needs to be considered together with compensation by the International Oil Pollution Compensation Fund (the "**IOPC Fund**") under Oil Pollution Fund Convention ("**FC**") and its amendment protocol (including the 2003 Amendment Protocol for the Additional Fund) among others.

[12] The Hague Rules (predecessor of HVR) did not specify when the limitation of liability was breakable and thus there was debates whether limitation was breakable in case of gross negligence under the former COGSA based on the Hague Rules. Under the Shipowners' Limitation of Liability Convention 1957 (predecessor of 1976 LLMC) at Article 1 proviso, para. 1 and 1969 CLC (predecessor of 1992 CLC) at Article 5, para. 2 the condition to break limitation was defined in the different terms – where there was "*actual fault or privity*" ("*his own negligence*" under the then domestic legislations of Japan). Judgment of Tokyo District Court on 19 February 1991, Hanrei Jiho 1392-89 found "*actual fault or privity*" of the owner under the former Limitation Act pursuant to 1957 Convention and thus denied its limitation of liability – the settlement agreement concluded between collided fishery boats interests relying upon the applicability of limitation of liability was held null and void.

[13] As to liability for oil pollution from ordinary ships, see Oil Pollution Liability Act, Articles 39 to 43. As to wreck removal liability, strict liability and compulsory insurance requirements is provided for under the said Act (Article 49 to 51) in accordance with Nairobi Convention, which Japan joined together with Bunker Convention at the same time, but limitation of liability for wreck removal liability is not provided for under the Act, since Japan declared reservation when it joined 1976 LLMC (See Article 3, paras. (4) and (5), Article 2, para. (1) items 1 and 2 of Limitation Act).

which are default rules in principle and have no statutory package/weight limitation of liability, whereas the latter is subject to the COGSA based on the HVR which are in principle one-sided compulsory rules, but have statutory package/weight limitation of liability.

(2) What is reckless act with knowledge? – whose act

In considering the application of intentional act or reckless act with knowledge, it should be noted that the relevant words indicate the perpetrator's "own" intentional act or reckless act with knowledge. In other words, if a carrier, shipowner or tanker owner in question is a corporation (which would normally be the case), then unlike gross negligence cases, intentional act or reckless act with knowledge of its servants or agents is not sufficient; the corporation's own intentional act or reckless act with knowledge needs to be established. This is an unusual approach under Japanese law, but it is evident from the text and structure of the provisions. Under the COGSA, the provisions for carrier's duty to care for goods and seaworthiness and those for fire-exemption (Article 3 proviso, paras. (1), (2), and (5)) obviously distinguish between the carrier and its servants or agents, and the provision related to intentional act or reckless act with knowledge is limited to "his" act, *i.e.* carrier's own act only; The Limitation Act designates the shipowner and other persons concerned ("*a Shipowner, etc., Salvor, or Servant, etc.*") other than the petitioner as a beneficiaries (Article 2, para. (1), item (viii)) on the premise that each of them can separately enjoy the limitation of its respective liability, and then it provides that "*a Shipowner, etc., Salvor, or Servant, etc.*" cannot limit their liability if the claim is due to damage caused by intentional act or reckless act with knowledge of "the person in question" (Article 3, para. (3)); and the same applies to exceptions to channeling of liability and loss of limitation of tanker owners under the Oil Pollution Liability Act (Article 3, para. (4) main text proviso, Article 5 proviso).
Furthermore, when the concept of intentional act or reckless act with knowledge was historically first adopted in Warsaw Convention 1929 as amended by Hague Protocol 1955 on air transport (the "**Warsaw-Hague**") (Article 25), it had provided that a carrier cannot limit its liability if there was intentional act or reckless act with knowledge of not only such carrier but also its servants or agents (in the course of performing their duties); however, when this concept was thereafter imported into the Carriage of Passengers by Sea Convention 1961, only such acts of the carrier was adopted as a trigger to break limitation (Article 7)[14], and then the same approach was adopted in the HVR in 1968 too.[15] This history make it clearer.
Having confirmed this point, the first basic issue when we consider the meaning of intentional act or reckless act with knowledge is, where the perpetrator is a corporation, whose intentional act or reckless act with knowledge within the corporate organization shall be treated as the standard to decide act of the corporation itself; or alternatively, whether we can adjudge the corporate intentional act or reckless act with knowledge from overall facts without the need to set the standard to decide whose act is the issue. In this regard, Japanese academic views have impliedly adopted the former approach and been explaining in various somewhat different nuances:

- "*representative organ of a corporation and one(s) who have equivalent authority*"[16];
- "*representative and executive organs of a corporation or their equivalents*"[17];
- "*representative and executive organs of a corporation and, if their authority is assigned to subordinates, the chief officer of that department*"[18];

[14] This is a further precursor to the so-called Athens Convention 1974. See Hirohiko Otsuka, 'On the Convention of the Transport of Passenger by Sea, 1961' (1962) 9 JMLA Rep 91, 104
[15] Tanikawa (n 9) 71; Seiichi Ochiai, 'Amendment of International COGSA' (1992) 1008 Jurist 100, 104; Hisashi Tanikawa, 'Limitation of Liability of Carrier of Goods by Sea' (1993) 37 JMLA Rep 63, 83
[16] Ochiai (n 15) 105; Tanikawa (n 14) 84； Kandai Ukegawa, 'Conditions to Break the Limitation of Liability of the Carrier in Germany – Analysis of Case Law Related to Article 25 of Warsaw Convention as Amended by Hague Protocol' (1998) Waseda Law Rev 73-3-175, 195
[17] Shuzo Toda and Masumi Nakamura (eds), *Commentaries on International Carriage of Goods by Sea Act* (Seirin Shoin 1997) 292 per Akira Sano. Takashi Kurushima, 'Condition to Break the Limitation of Liability of Shipowners' in *Legal Essays in Commemoration of Beiju (88th Birthday) of Seiji Tanaka Sensei – Important Issues in Modern Commercial Law* (Keizai Horei Kenkyukai 1984) 569, 571 adopts the same formula without addition of "*or their equivalents*".
[18] Takeo Inaba and Itsuro Terada, *Commentaries on Act on Limitation of Liability of Shipowers* (Hosokai 1989) 117; Egashira (n 9) 58

- "*representative and executive organs of a corporation and one(s) who have been assigned with their particular duties from them, such as general management of business or operation and management of ships*"[19]; and
- "*in addition to acts of representative directors of a corporation, they also include acts of one(s) who have substantial decision-making authority over juristic or factual acts in question and whose acts can be legally treated as those of a corporation*"[20] (This explanation sounds tautological though, apart from the reference to representative directors who are also primary executive organs under Japanese Companies Act.)
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Under these circumstances, Decision of Hiroshima High Court on 21 February 2020 (final appeal and petition for acceptance of final appeal both dismissed by Decision of Supreme Court on 15 September 2020) (The "***Erna Oldendorff***") made an important ruling last year, sounding somewhat similar to the third explanation among above in the following words:

- "*representative and executive organs of a corporation and the person who has been assigned with their powers and regarded as the chief officer within the company in respect of the operation of the ship*" (referred to as "***executive organs etc.***" in the Decision).

It is presumed that all these explanations intend to reflect the doctrine under Japanese company law that the "business" of a corporation is to be executed by its representative directors (*i.e.* by person(s) who may perform juristic acts on behalf of the company) and other executive directors, and its other peoples are servants to assist them (Article 363, para. 1); but, as strictly limited application of this doctrine is perhaps felt unmatched with the reality, they seem to intend to make adjustment to more or less extend the scope as they think fit. It is thus made clear it does not include the master or other crew,[21] who are no more than the servants of a corporation at the scene. It is, however, yet unclear that act of the persons at which level in what capacity in the onshore office shall be included in considering the act of a corporation, particularly where such corporation is a big enterprise whose onshore organizations for the owning, operation or management of the ship are large and complicated – as the operation of a ship is divided into various aspects, such as commercial, marine or technical, the chief officer for the operation of a ship within the meaning of all those aspects may be found only at the representative director level; alternatively, we may say general manager or manager level at each aspect of the operation shall be regarded as the chief officer in so far as the operation of such aspect is concerned.[22] The *Erna Oldendorff* has presented the general formula in the above terms but how to draw a specific line within the officers in the onshore organization was not an issue before the court. As I discuss later, the court first held reckless act with knowledge of the master may possibly be found, and then moved on to deny reckless act with knowledge of *executive organs etc.* of the corporation after considering relevant facts, but no further. Although this ruling is on the premise that an act of the master is not an act of a corporation (the master is merely a "servant" of a corporation), we may have to consider the ruling in the above formula to generally define the scope of

[19] Haruo Shigeta, 'Limitation of Liability of Shipownes' in Seiichi Ochiai and Kenjiro Egashira (eds), *Encyclopedia of Maritime Law in Commemoration of Centennial Anniversary of Japan Maritime Law Association* (Shoji Homu 2003) 29, 70; Masumi Nakamura and Takashi Hakoi, *Droit Maritime* (2nd edn, Seibundo 2013) 108

[20] Yoichi Kikuchi, *Amended International COGSA* (Shoji Homu 1992) 96

[21] Tanikawa (n 9) 71; and Kikuchi (n 20) 96

[22] Kikuchi (n 20) 97 (n 8 therein) explains that under English law it is limited to board of directors or other organs of a corporation, whereas under the US law it widely covers to include onshore managing officers who have the authority related to operation and management of the ship. He does not make clear whether his own view is the same of either view or different from both. Tanikawa (n 14) 85 (n 14 therein) refers to Kikuchi to explain the debates in this issue and says, "As the intention of this provision is to make the limitation more unbreakable, stricter interpretation shall be followed."; Shigeta (n 19) 73 (n 29 therein) says others' views are perhaps the same as his own and then explains English law traditionally adopted a strict approach through the *alter ego* doctrine – notion traditionally used by English case law to describe the person whose act is regarded as the very act of a corporation itself – but recently appeared to change to flexible approach; and if so, it will become closer to the US law which has adopted a pragmatic approach from the past. See also Haruo Shigeta, 'Attribution of "Intention/Recklessness with Knowledge" in Case of a Corporate Owner – Meridian Global v. Securities Commission (HL) (*sic*) in 1995 and Change of English Case Law Related to Alter Ego Doctrine' in *Creation and Development of Modern Corporate Law – in Commemoration of Kanreki (60th Birthday) of Professor Takayasu Okushima Vol. 2* (Seibundo 1999) 605, 621

officers whose act is act of a corporation as *obiter dicta*. It ruled the general formula but it did not apply to the actual case before it.[23]

It is submitted that, at least when we try to find *reckless* act with *knowledge* of a corporation, let alone we try to deny it, both academic views as cited above and the *Erna Oldendorff* must stand on the implied premise that it is necessary in principle to identify certain officer(s) in an individual case whose act shall be reviewed as the corporation's act, because reckless act with knowledge is more than finding of *recklessness*, which is an objective assessment of what is or is not done by corporate organizations, but includes finding of a subjective fact of *knowledge* that damage/such loss would probably result[24]. I believe they otherwise would not have presented the general formula in various ways.

Important in identifying whose act shall be an act of a corporation is I think the so-called ISM Code (International Safety Management Code). The ISM Code is an international regulation in Chapter XI of 1974 SOLAS Convention. It requires the "Company", *i.e.* "the owner of the ship or any other organization or person such as the manager, or the bareboat charterer the owner of the ship" "who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all the duties and responsibility imposed by the Code", to establish and apply on board and ashore a documented Safety Management System; to cause such system verified by the flag state or its equivalent to have the Document of Compliance issued to the Company; and to maintain Safety Management Certificate on board the ship. This intends to ensure safety in an approach quite different from the various standards of safety for the ship and the cargo. Paragraph 4 the ISM Code stipulates that every Company should appoint Designated Person(s) ashore having direct access to the highest level of management in order to ensure the safe operation of each ship and to provide a link between the Company and those on board, whose responsibility and authority should include monitoring the safety and pollution-prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required. I believe whether or not/how (i) the "Designated Person(s)" under the ISM Code (who can be singular or plural) and (ii) "*the person who has been assigned with their powers and regarded as the chief officer within the company in respect of the operation of the ship*" as ruled in the *Erna Oldendorff* (The word "chief" indicates singularity and thus translated in singular but may be plural, since the *representative and executive organs of a corporation* may well be plural under the Companies Act of Japan. There is no difference in singular/plural forms in Japanese language anyway.) will have to be examined more in the future. Put it another way, it is perhaps not meaningful to further discuss pros and cons of abstract definitions presented in various nuances by various academics as cited above, such as whether to include "*executive organs*" or which shall be chosen between the formulations of "*equivalent authority*" or "*the chief officer if their authority is assigned*" etc. in those definitions. A definition apparently sounding narrow may be applied to cover wider individuals in its application to actual cases. (For example, knowledge by one of managers of the onshore organization may be recognized as knowledge by a corporation for reason that he/she was responsible in such a position). In considering whose act shall be an issue, it would be more desirable to discuss with more reflection of the development on the side of public law regulations like the ISM Code.[25]

In the *Erna Oldendorff*, the claimants alleged serious defects in construction and operation of SMS of the owner under the ISM Code. But they did not allege exactly whose act shall be treated as act of a corporation as far as I can understand from the Decision. The Decision also found the SMS manual had some defects. But the court ruled they did not directly cause the casualty as one of the reasons for denying reckless act with knowledge on the part of the corporation's *executive organs etc.* It did not refer to the

[23] The same approach was also adopted in another case in which reckless act with knowledge of a corporation was at issue: Judgment of Nagoya High Court on 17 August 2000, Kaijiho 166-76 (approved by Decision of Supreme Court on 13 February 2001, Kaijiho 166-73). This did not even make clear about whose act or omission shall be the standard for an act or omission of a corporation.

[24] An English law book explains that it might be argued that it should be possible to establish a reckless corporate culture even if recklessness cannot positively be attributed to one identified person; but recent authority seems clear, however, that specific requirement of knowledge at least requires the identification of an individual or group of individuals to whom it can be attributed. See Sir Guenter Treitel and F.M.B. Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) 744-74.

[25] Shigeta (n 19) 74 expects that negligence of Designated Person(s) under the ISM Code will be more scrutinized in accidents in the future and the limitation of liability will be more challenged to be broken (in other words reckless act with knowledge of the corporate owner will be more questioned). See also Patrick Griggs *et al*, *Limitation of Liability for Maritime Claims* (4th edn, LLP 2005) 34 in respect of English view.

Designated Person(s).

(3) What is reckless act with knowledge? – general

The second issue is what is intentional act or reckless act with knowledge generally?
It is stated in English translation of the Japanese statute that "*damage that the person in question caused intentionally, or --- damage arising from a reckless act that the person in question took with the knowledge that damage could result.*" However, this is no doubt a double translated version of the unique expression in the original text of the convention "*the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result*". It is therefore necessary to interpret the Japanese law wording in accordance with the wording of the original conventions.[26]
The former part, which is simply translated as "*intentionally*" (*intentional* act), corresponds with the original sentence of "*with the intent to cause such loss*", and thus shall be understood to require the positive intention to cause loss. As to latter part, the "*recklessly and with knowledge that such loss would probably result*", it shall literally mean (i) act or omission committed *with knowledge* that such loss would probably result – whether it shall also cover cases where a perpetrator should have knowledge will be discussed later; and (ii) *reckless* is nothing but reckless. We shall understand them as they are and shall avoid interpreting them by borrowing other existing legal concepts.[27] As to the reckless act with knowledge, however, two commentaries authored or co-authored by different officials of the Ministry of Justice at different times, one on the Amended Limitation Act to reflect 1976 LLMC and another on the Amended COGSA reflecting the ratification of the HVR, opine that a considerable portion of traditional *gross negligence* cases may fall with this category to break the limitation, or that the difference between gross negligence and reckless act with knowledge would be slim.[28] It is humbly submitted, however, that it may not be appropriate to so conclude, because *knowledge* is separately required in addition to *recklessness*[29], and the concept of gross negligence is in realty rather quite broad as discussed above.[30] Even if we must compare them, we shall perhaps stop at the level of metaphorical comparison, such as, *with intent to cause damage* refers to explicit intention and *reckless act with knowledge* refers to implicit intention, rather than being just grossly negligent[31]. I reiterate the better abbreviation should not be just

[26] Strictly speaking, the HVR, LLMC and CLC have slightly different texts respectively, and the text here is taken from the Limitaiton Act and LLMC, but the basic expressions are identical. As to Japanese language in Japanese statutes, the basic expressions are also substantially identical, though they are not literal translation of original texts. Unfortunately, such substantially identical Japanese expressions in Japanese statues are further translated differently in English in the website providing the English translations of Japanese statues at http://www.japaneselawtranslation.go.jp/law/?re=02 (See Limitation Act and Oil Pollution Liability Act therein; No translation is available for the COGSA). In addition, the original words "would probably" are somehow translated as just "could" (in the Limitation Act) or "may" (in the Oil Pollution Liability Act). I do not think they are meaningful but think they simply mean translators do not understand the international significance of formula of reckless act with knowledge. I am afraid they may well cause other countries to misunderstand that Japan intentionally adopts interpretation in different nuances from the original text. Improvement is requested.
[27] Kobayashi (n 9) 734-735; Ochiai (n 15) 105; Tanikawa (n 15) 84; Ukegawa (n 16) 194; Shigeta (n 19) 68; Nakamura and Hakoi (n 19) 106
[28] Itsuro Terada, 'Accesssion to the London Convention on Limitation of Liability for Maritime Claims and Amendment of the Law on Limitation of Liability of the Shipowners' (1982) 26 JMLA Rep 3, 22; Kikuchi (n 20) 96
[29] It should be noted, however, that Kurushima (n 17) 575 argues *recklessness* is to make clear the significance of *knowledge* and thus we need not understand they have two distinct significances. Teruo Sakamoto and Susumu Miyoshi, *New International Aviation Law* (Yushindo Kobunsha 1999) 231 also explains, in the interpretation of Article 25 of the Warsaw-Hague as explained later, whether these two shall be read as separate conditions or read combinedly to understand *knowledge* is a psychological element of *recklessness* is an issue and the prevailing view is the latter. I honestly cannot understand their substantial meaning in full but I do not think we can deny the text requires *knowledge* in any event.
[30] When 1976 LLMC was adopted, one of the candidate wordings made it clear to include gross negligence in parenthesis but it was deleted in the final text. See Hisashi Tanikawa, 'Amendment to Act on Limitation of Liability of Shipowners' (1982) 771 Jurist 90, 94. Report of the unified interpretation on the test for breaking the owner's right to limit liability under the IMO conventions recently submitted to the IMO Legal Committee in 2020, discussed below, reportedly reaffirmed the legislative process of the convention in which gross negligence had been rejected but reckless act with knowledge had been adopted. See Hideyuki Nakamura, 'Trends of Deliberation of the IMO 107th Legal Committee' Japan Maritime Daily, 5 February 2021, 10.
[31] Tanikawa (n 9) 71; Toda and Nakamura (eds) (n 17) 293 per Akira Sano. Shuzo Toda and Umeji Nishijima (eds), *Seirin Law Library, Insurance Law and Maritime Commerce Law* (Seirin Shoin 1993) 172-174 per Yasuhiko Yamada submits

reckless act but *reckless act with knowledge* to cause everyone to understand the significance of *knowledge*.[32]

(4) What is reckless act with knowledge? – specific issues of interpretation

A controversial issue in interpreting reckless act with knowledge is how to interpret "*with knowledge* that such loss would probably result". Is it necessary that the person in question shall *have actual* knowledge (*subjective test*) or does it cover the case where he/she *should have knowledge* under the objective evaluation of the circumstances surrounding him/her (*objective test*)?
Influential academic views in Japanese maritime law in this regard agree to the latter.[33] The latter view, however, does not only appear to be deviating from the text of the conventions[34], but also differs from a judicial precedent in Japan related to the relevant provision in the Warsaw-Hague (Article 25), which adopted the same wording except whose act is to be reviewed (the "***China Airlines***").[35]
Another influential academic says he would follow actual knowledge (*subjective test*) in principle but if the facts were so bad, the case in which the knowledge should have had (*objective test*) would perhaps be included.[36] In contrast, the interpretation under English case law is said to require actual knowledge (*subjective test*) but it is explained the more obvious the risk, the more appropriate it would be to infer recklessness and knowledge.[37] As to the former, one may want to ask which is his conclusion if taken in face value. But his background recognition of the issue may possibly be close to the latter – the literal reading of the text of the conversions may certainly require the actual knowledge but the knowledge (let alone another concept of intent) is a subjective fact and thus may not be demonstrated unless there is confession of the perpetrator; and the more vicious nature of objective facts (degree of recklessness) may well surely infer such subjective fact. In this sense he may want to say actual process of judgment would become closer to *objective test*, depending upon the facts.

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that the former is narrower than the intent in the ordinary sense as it requires positive intent to cause damage; and the latter is equivalent to the intent in the ordinary sense as it accepts occurrence of damage. Ukegawa (n 16) 193 submits the former is a more malicious subjective concept.

[32] In the context of law of carriage by air, it is explained that the concept of *intentional act* or *reckless act with knowledge* was to fully import the formula of common law notion of *wilful misconduct* when adopted in the 1955 Hague Protocol, since its precursor in the 1929 original Warsaw Convention, "*his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct* (*son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol)*" (See (n 5)) could not achieve international unification of the law. See Sakamoto and Miyoshi (n 29) 229-231; Katsutoshi Fujita (ed), *New Lectures on Aviation Law* (Shinzansha Shuppan 2007) 180 per Katsutoshi Fujita; Katsutoshi Fujita *et al* (eds), *Commentary on the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)* (Yuhikaku 2020) 318 per Yuji Ito. In the context of maritime law, however, *wilful misconduc*t now means a separate notion to trigger exemption of the insurer's liability for direct claim from the victims in tanker oil pollution among others. See (n 47). This makes us recognize another difficult issue of difference between *intentional act* or *reckless act with knowledge* and *wilful misconduct*. But I must leave it beyond the scope of this paper.

[33] Tanikawa (n 15) 84; Toda and Nakamura (eds) (n 17) 293 per Akira Sano; Nakamura and Hakoi (n 19) 107-108. In contrast, in the context of carriage by air (Article 25 of the Warsaw-Hague and Article 22 para. 5 of Montreal Convention (passenger delay and baggage)), Sakamoto and Miyoshi (n 29) 231 and Fujita *et al* (eds) (n 32) 319 per Yuji Ito explain the conclusion already reached in the Conference for adopting the Hague Protocol was *subjective test.*

[34] Shigeta (n 19) 69 points out that this differs from the majority view in other countries. Another paper by the same author discussing this issue in more detail (Haruo Shigeta, 'Legal Structures of Intention/Recklessness with Knowledge' in *Legal Essays in Commemorations of Koki (70th Birthday) of Yoshimichi Hiraide Sensei and Toshikazu Takakubo Sensei – Issues in Modern Corporate and Finance Law Vol.1* (Shinzansha Shuppan 2001) 313, 328) says *subjective test* is adopted in England, Australia, Italy, Switzerland and the US among others; *objective test* is adopted in France, Germany, Republic of Korea and Greece among others; and Katsutoshi Fujita, 'Status and Issues in the Compensation Scheme of International Aircraft Accidents – Inspired by Compensation Issues of China Airlines Accident in Nagoya Airport' in *Theories in Modern Corporate Law – Legal Essays in Commemoration of Koki (70th Birthday) of Kikushi Sugawara Sensei* (Shinzansha Shuppan 1998) 519, 545 and Fujita (ed) (n 32) 180-181 per Katsutoshi Fujita summarize there are two trends in the world in the interpretation of the Warsaw-Hague: one represented by English case law to support *subjective test* to set standards on the knowledge of the perpetrator and the other represented by French case law to adopt *objective test* to set on the prudent person. I do not have the capability to check them.

[35] Judgment of Nagoya District Court on 26 December 2003, Hanrei Jiho 1854-63

[36] Ochiai (n 15) 105

[37] Griggs *et al* (n 25) 38. Nakamura and Hakoi (n 19) 108 submits that these two tests will not perhaps result in drastic difference normally, as knowledge of an individual must be inferred in any event.

I now would like to discuss two Japanese precedents which dealt with reckless act with knowledge.
One is the *China Airlines*. It was a case in which reckless act with knowledge of a co-pilot (first officer) of a passenger aircraft was found in his navigation in the approach for landing at Nagoya Airport (As mentioned elsewhere, reckless act with knowledge of the carrier's servants or agents also triggered to break limitation of liability of the air carrier). The court adopted *subjective test* after detailed analysis of legislative history of relevant wording of the convention. And then it moved on to deny limitation of liability of the air carrier as it found act with *actual* knowledge of co-pilot as a matter of finding of facts. The loss to be assumed in this casualty should be the loss of lives of passengers and crew including himself arising from crash of the aircraft. The finding of the court is therefore quire unusual and severe to the deceased in that the co-pilot committed reckless act in question with knowledge that he too would probably be killed by it and was in fact killed. The navigation in question by the co-pilot as found by the judgment was "continuously pushing down the control wheel against autopilot despite wheel's strong resistive force" in approach for landing at Nagoya Airport. Background findings were that strong resistive force of the control wheel usually meant the aircraft was out of trim (the trim of the aircraft, which was of vital importance for safety, was lost); The co-pilot no doubt knew this; At the material time Go Around (abort landing) mode of the autopilot had been inadvertently engaged; and the co-pilot must have known it even more dangerous to push down the steering wheel against autopilot in that mode as it would cause further out of trim. It thus held "*Act of the co-pilot to continue to push down the steering wheel against autopilot despite the wheel's strong resistive force shall be ruled to be an act committed with knowledge that damage would probably result.*" Then why did he do it? The court went on to hold, "*He intentionally continued to strongly push down the steering wheel to continue approach, in order to avoid the go-around costly in money and time and recover his failure. We must say he only put priority to resume the aircraft into approach route and failed to play his most fundamental role to keep the aircraft in trim at that time. In other words, the co-pilot ignored his most fundamental and important role to carry lives and properties of passengers* (the author's note: What he did was in fact directly related to his own life, though!). *He continued his act --- against autopilot with knowledge that it may result in crash and such act must be nothing but reckless.*" I am unable to evaluate this finding of facts but surely it is an extremely unusual set of facts.[38]
Two is the *Erna Oldendorff* which is also important in that it gives us *another* example set of facts on this issue. In this case, the girder of a bridge in Seto Inland Sea (Oshima Ohashi Bridge) was damaged because the ship tried to pass under the bridge despite her air draft was insufficient to safely pass it. Enormous loss was suffered as she destroyed the water pipe along the girder connected between two islands, Honshu and Suo Oshima. When the second mate prepared the voyage plan, he failed to realize a warning about Oshima Ohashi Bridge in the ECDIS (electric chart) and did not utilize the function for checking air draft in the ECDIS. The master, who took over his predecessor at a port while en route to destination was told the plan had been confirmed by his predecessor (in fact not in detail) and thus approved it without checking it in detail by himself. And the most problematic was when the master recognized the bridge's lights just before approaching the bridge, he realized the danger of contact of the ship with the bridge girder. (The height of ship's cranes was approximately 34 to 35 meters; the stern mast which was the highest in the ship was as high as about 42 meters including its antenna; but the height from the sea surface to the lower part of the bridge at that time was approximately 33 meters only; and the navigable air draft was set from 24 to 30 meters.) He then ordered the officer to survey the bridge's height, but the result did not become available to him immediately. He considered to slow her down pending the completion of survey of height, but being concerned about the pressure flow, eventually decided to proceed as she was and caused her to collide with the bridge. The Decision particularly focused on the very fact that the master did not take an evasive action despite that he had recognized the risk of contacts, and remarked

[38] The direct immediate reason for the crash is said to be thrust maximization by the captain who took over the navigation from the co-pilot at the last minute to abort landing, which caused the sharp nose-up of the aircraft and thereby loss of her speed. However, reckless act with knowledge picked up in this case was continuous pushing of steering wheel by the co-pilot that made the danger of crash unavoidable. On the other hand, the Japan Transport Safety Board also published its report on this casualty. It identified 12 chained and combined factors for the cause in which we can find references to inappropriate navigations by the pilots (pp. 95-96). In contrast with the judgment, however, there is no indication that the co-pilot navigated recklessly but with actual knowledge that crash may probably result (https://www.mlit.go.jp/jtsb/eng-air_report/B1816.pdf accessed 18 March 2021).

that it would be "*possible to adjudge*" the master's act was reckless with knowledge. Whether to understand this remark just suggested the "plausibility" of such finding or whether to read it adjudged his reckless act with knowledge although as *obiter dicta* – as this was an appeal case against the decision to commence limitation procedure by the petition of the owner, reckless act with knowledge of the owner, not of the master, was a material issue there. – would be controversial. In either case, however, this is perhaps the first example in maritime case in Japan in which reckless act with knowledge could be found. It is also noteworthy that its finding was based on finding of the master's "subjective" knowledge, although it indicated no views about *subjective test* and *objective test*.

There are some other issues in detailed interpretation of this formula too.
First, degree of likelihood within the meaning of "damage would probably result". As the original text says "would probably", it is understood that the likelihood must reach probability, mere possibility being insufficient.[39] *Secondly*, does the term "damage" mean specific damage that in fact resulted (and thus knowledge of probability of such specific damage is required) or the same type of damage as actual one (knowledge of such type)? The latter view is prevailing.[40] In England, one argues that there is a gap between the "*damage*" as used in the HVR and the "*such loss*" as used in LLMC and the scope of those two are different.[41] It is unclear, however, that to what extent different views in these issues will cause differences in the judgment of actual cases. I humbly reiterate it would be a bigger problem to overlook reviewing the requirement of *knowledge*, distinct from *recklessness*, by taking a view like distance between reckless act with knowledge and gross negligence are not so far.
Finally, a somewhat different issue is the burden of proof of reckless act with knowledge. As the text of the relevant conventions say "if it is proved", I believe it clear that it is ultimately on the part of the claimant seeking to break the limitation. Academic views basically agree to this.[42] It should be noted, however, that when filing a petition for the limitation procedure, the petitioner (usually the owner) needs to present a *prima facie* case that the estimated total amount of claims subject to limitation exceeds the applicable limitation amount of liability (Article 18 of Limitation Act) and thus absence of reckless act with knowledge must be *prima facie* presented by the owner.[43] The *Erna Oldendorff* also referred to the need for *prima facie* evidence at the time of the petition and then held that the final burden of proof lies with the claimant in view of the wording of the convention.

(5) Judicial precedents in other countries and international trends

Until here, I limited my explanations to Japanese law in principle. However, as reckless act with knowledge is a concept in national legislation reflecting international conventions, we must also pay attention to international trends. There are judicial precedents abroad which admitted reckless act with knowledge. I would like to make a brief explanation as far as I can do.
Judicial precedents not to be missed are the judgment of the Cour de Cassation in France on 25 September 2012 concerning Erika oil pollution incident off French coast in December 1999 (the "***Erika***") and the judgment of Spanish Supreme Court on 14 January 2016 concerning Prestige oil pollution casualty in November 2002 (the "***Prestige***").[44] Both are related to the interpretation of 1992 CLC.
The *Erika* dealt with liabilities of an oil company (TOTAL) who was the parent company of the charterer of the ship and of the classification society of the ship (RINA). It first said they both fell within the category of entities who are in principle exempted from liability as a result of channeling of liability to

[39] Ochiai (n 15) 105; Toda and Nakamura (eds) (n 17) 293 per Akira Sano; Inaba and Terada (n 18) 116; Shigeta (n 19) 69; Nakamura and Hakoi (n 19) 107
[40] Inaba and Terada (n 18) 116; Shigeta (n 19) 69; Nakamura and Hakoi (n 19) 106
[41] Griggs *et al* (n 25) 35
[42] Tanikawa (n 9) 71; Tanikawa (n 15) 85; Ukegawa (n 16) 195; Kurushima (n 17) 577-579 (reasonings without reference to the text of LLMC); Inaba and Terada (n 18) 117-118; Shigeta (n 19) 70; Nakamura and Hakoi (n 19) 109; Kikuchi (n 20) 96; Junnosuke Tamura and Yoshimichi Hiraide (eds), *Lectures on Modern Law – Insurance Law and Maritime Commerce Law* (2nd edn supp, Seirin Shoin, 1992) 174 *per* Yoshimichi Hiraide
[43] Inaba and Terada (n 18) 118
[44] Hiroshi Kobayashi, *Liability and Compensation Regimes for Oil Pollution from Ships: Interface with Marine Pollution Prevention Act* (Seibundo, 2017) 70-78 shows the outlines of both casualties in Japanese. He wrote he described them relying on the report of IOPC Fund, Incidents involving the IOPC Funds 2013, 6-11. Due to the timing of publication, there is no reference to the latter Spanish Supreme Court judgment of the *Prestige* in this book.

the owner as stipulated in Article 3, para. 4 of 1992 CLC (equivalent to Article 3, para. 4 of the Oil Pollution Liability Act). But it in the end concluded to find respective reckless act with knowledge by both these parties and found them liable as exceptions to channeling of liability. According to the Report of IPOC Fund in English as I could refer to (I cannot refer to the English or Japanese translation of the judgment in full), the former was found guilty of imprudence when carrying out its vetting operations prior to the chartering of the Erika; and the latter was also found guilty of its imprudence in renewing the Erika's classification certificate on the basis of an inspection that fell below the standards of the profession. It is therefore presumed that such imprudence was considered to have reached at a level of *recklessness*. However, it is unknown to me what interpretation and findings were made in respect of another requirement *knowledge*; or whether those two requirements were combinedly considered; and what interpretation and findings were made in respect of whose act within the corporation – they are both corporations – should be treated as an act of the corporation.[45]

The *Prestige* found reckless act with knowledge of the owner and denied limitation of its liability. According to the English translation of this judgment available in the website of the IOPC Fund, the crack on the starboard side of the ship that caused the casualty arose from her structural defects. The ship's documentations had been in order with relevant certification from the classification society; but she (aged 26 years old) had already been disclassified by some shippers including BP; her access to certain countries and ports was limited, crucial in relation to the management and planning of her activity; and she showed significant operational defects. Then the court said it logical to infer, with the exclusion of other alternatives as more reasonable, that *the owner* knew what her real state was; it is very hard to reasonably maintain that the owner was not aware of the structural situation of the ship or her state of repair. In addition, it referred to a testimony of an employee of the ship management company that the owner knew the state of the ship and her immediately preceding voyage was intended to be the last one. Nevertheless, one more voyage (in which the casualty took place) was decided to be taken despite foreseeable encounter with adverse weather en route, which the court held showed "utmost lack of caution and care". In a word the court find *recklessness* and *knowledge* of the owner from these facts among others. Whose knowledge within the organization of the owners is apparently not explicitly held.[46] Under the CLC, a claimant is entitled to make a direct claim to the owner's insurer (Article 7, para. 8, first sentence) but instead the insurer can separately invoke limitation of liability even if the owner committed reckless act with knowledge and was thus unable to limit its liability (Article 7, para. 8, second sentence 2). Therefore, even if the owner was unable to limit its liability, its insurer should not be required to compensate damages beyond such limitation up to the upper limit of the P&I insurance contract.[47] However, on the basis that the owner is unable to limit its liability, the judgment further ordered the owner's insurer (London Steamship P&I) to compensate damages up to the upper limit under the insurance contract (USD 1 billion). The reason mentioned among others was that the insurance policy stipulated to cover owner's liability up to the upper limit therein and that the Spanish domestic law allows direct claims against the insurer, with also pointing that the owner's insurer did not actually appear and defend the case.[48]

Both are the highest court judgments of foreign countries and one must strictly refrain from lightly criticizing them. But it is not difficult to imagine how they were met with great surprise by the parties concerned, since reckless act with knowledge had originally been formulated as a virtually unbreakable formula as mentioned elsewhere but these judgments did break limitations in such serious casualties. If limitation is in fact broken (and in addition if the liability of insurer is also not exempted or its limitation is also broken), that would not only be an issue for the owner and the insurer in question in that particular case as the resulting amount of compensation can be quite huge. Since insurances of liability of owners

[45] See IOPC/OCT12/3/5/1, paras. 2.6-2.9; IOPC/APR13/3/3, paras. See 4.10.2-4.11; IOPC Fund, Incidents involving the IOPC Funds 2013 pp 9-10. As this judgment apparently ruled civil liabilities of relevant parties as a part of criminal judgment against them, the summary of the specific reasoning that may be related to reckless act with knowledge is found in the criminal liability section of these reports. An introduction in Japanese language is found at 210 Gard News 18 (May/July 2013; www. gard.no/Content/20735567/GN210-web.pdf accessed 18 March 2021).

[46] See https://iopcfunds.org/wp-content/uploads/2018/10/Prestige_Judgment_January_2016_e.pdf, at para. 67 in pp. 131-133 (accessed 18 March 2021). IOPC/APR16/3/2, paras. 5.13.4-5.13.5 for the summary.

[47] In addition, the insurer is exempted from liability if there was *wilful misconduct* of the owner under the CLC (Article 7, para. 8, third sentence). They are in substance the same as those of the Oil Pollution Liability Act (Article 15, para. 1 main text, para. 3, and the proviso in para. 1). The difference between *intentional act* or *reckless act with knowledge* and *wilful misconduct* may well be another issue. See (n 32).

[48] See (n 4646) paras. 68-69, pp. 133-138. IOPC/APR16/3/2, paras. 5.13.6-5.13.7 for the summary.

and the P&I insurers are connected through pooling and reinsurance arrangements in the International P&I Group consisting of all major P&I insurers worldwide in respect of liabilities more than a certain amount, a huge liability will also affect the business operations of all major P&I insurers (mutual insurance among owners) and shipowners worldwide. Moreover, in tanker oil pollution cases such as these, it would have significant impacts on the scope of compensation by the IOPC Fund under the FC which have an integral relationship with the CLC and whose contributors are not shipowners but oil companies. [49] It is beyond the scope of this paper but it is worth mentioned that the International P&I Group made clear its critical position against the *Prestige* in that the insurer was ordered to make direct payment up to the policy limit, not up to the limitation amount liability, in breach of the CLC in their opinion. Reportedly it was heavily discussed at the IOPC Fund meeting immediately after the judgment.[50] Under these circumstances, the IMO Legal Committee has recently begun to consider the preparation of documents on unified interpretation of the relevant conventions. Prior to the 106th Session in March 2019, it was proposed by some States as well as the International P&I Group and the International Chamber of Shipping to produce some new output about the unified interpretation of the test for breaking the owner's right limit liability under the IMO conventions.[51] During that Session, some countries presented negative views that interpretation of conventions was within the competence of the courts of States Parties but this proposal was finally approved. [52] The proposal paper did not refer to any specific cases but only said the virtually unbreakable limitation of liability was introduced as *quid pro quo* for acceptance of strict liability together with channelling of liability and compulsory insurance in case of oil pollution convention; inconsistent interpretation is highly undesirable as it would result in confusion and uncertainty about payable amounts; and a number of past cases also suggest it would lead to protracted and unnecessary legal recourse to the detriment of claimants and conflicts with the objectives of ensuring prompt payments.[53] The real impetus for this move was said to be the *Prestige*.[54] It followed that a report of detailed review of *Travaux Préparatoires* for 1976 LLMC, which adopted the notion of the perpetrator's "own" intentional act or reckless act with knowledge, and clarification of its original legislative purpose was submitted by some countries and the above two organizations.[55] At the 107th Session in November-December 2020, it was agreed to establish a correspondence group within the Legal Committee to organize the ideas about when the limitation of liability does not apply, and to consider the form of the document for output.[56] Further deliberations are expected at the 108th Session scheduled to be held in July 2021.[57]

Apart from these oil pollution cases, we received a big news from England in 2016 that the English court found intentional act of the owner and thus granted to break its limitation of liability. It was the first ever case in England that ruled to break limitation under the LLMC. [58] But it was a case in which the owner

[49] Tomotaka Fujita, 'The Implementation of Uniform Private Law: The Case of IOPC Fund', (2014) Hokkaido Law Rev 65-2-390 discusses, through a number of examples other than test for breaking limitation of liability, that the maintenance of convention schemes may be undermined if the CLC/FC are not interpreted in a unified manner.

[50] See IOPC/APR16/9/1, paras. 3.3.24-3.2.42； Comments in Japanese is found in Hideyuki Nakamura, 'The *Prestige* Casualty – The Impact of the Spanish Supreme Court Judgment' Japan Maritime Daily, 2 June 2016, 4.

[51] LEG106/13

[52] LEG106/16, paras. 12-13

[53] LEG106/13, paras. 4, 8, 16-17, among others

[54] Hideyuki Nakamura, 'Recent Trends in the IMO Legal Committee' Japan Maritime Daily, 27 June 2019, 4

[55] LEG107/9 and LEG107-INF.5. But they are somehow not publicly available in the IMO website. LEG/9/2 (Comments by the Secretariat thereon) is made available.

[56] Press Release of Maritime Bureau, Ministry of Land, Infrastructure, Transport and Toursim of Japan, 'Launch of Preparatory Works for Unified Interpretation of the Shipowner's Limitation of Liability Conventions – Summary of the Results of the IMO 107th Legal Committee (LEG 107)' 4 December, 2020; and Nakamura (n 30). Form of the document mentioned herein is probably related to the issue of what is an appropriate document (whether to be adopted at the IMO General Assembly, at IMO Legal Committee or at the Conference of the Parties) for production of output in the context of public international law (Vienna Convention on the Law of Treaties). This point had been pointed out in a document submitted by the IMO Secretariat prior to the 107th Session (LEG 107/9/2).

[57] LEG108/1, para. 8

[58] See Kairos Shipping v. Enka (The "*Atlantik Confidence*"), [2016] EWHC 2412 (Admlty). Comments in Japanese is found at Yosuke Tanaka (2018) Law and Politics 69-2-II-381 (note). There is another reported case in France. In the *Heidberg*, grain bulker (not oil tanker), reckless acts with knowledge of the owner as well as the master were argued in respect of her contact with a jetty in March 1991. The lower court admitted it but after various procedural history, Cour de Cassation eventually denied it and granted the limitation of liability in September 2015. (https://www.hfw.com/Limitation-of-liability-HEIDBERG-the-end-of-a-24-year-story-October-2015 accessed 18 March 2021).

instructed the master/chief engineer to set fire on board and cause the ship to sink in order to fraudulently get insurance money. The primary issue was how to find such an unusual facts. The owner who allegedly committed an intentional act was a corporation and the judge apparently did not discuss the formula to decide whose act shall be an act of a corporation. But it was perhaps unnecessary to do so by the nature of the case, as Mr. A was the sole shareholder and director of the corporation; in other words, the owner was in substance a private enterprise of Mr. A. The judge found the intent of Mr. A (and thus the intent of the corporation) from circumstantial evidence and granted to break limitation of liability.[59]

4. Conclusion

Extensive discussions about gross negligence and (intentional act or) reckless act with knowledge until here may possibly cause you to have impressions that straightforward reading of the texts or their definitions *and* their applications to actual cases may tend to sound inconsistent. It is daringly submitted that, the reason for this, if any, may possibly be that if a casualty did take place, if the claimants (victims) did suffer loss (sometimes enormous loss), and if negligence was apparently recognized on the part of the owner, or master or crew or its other servants or agents, then the limitation of liability for compensation may well be felt discomfortable to give remedies to the victims; and applications of the relevant provisions in dealing with a specific case may be tacitly dragged on by such discomfort.

If ever so, in order to seek interpretations in line with their languages and legislative purposes, it is necessary to make repeated efforts to seek understanding of the legislative purposes and *raison d'être* of these concepts, whilst taking into accounts the balance with the protection of victims in the case concerned.

In case of *reckless act with knowledge* in particular, one must make efforts – they have already been made in various situations as I understand – to ask wider communities to understand that it is not merely a legislation to protect the owners, carriers and other industry parties concerned and/or the shipping business in general, but it is intended to make it possible to arrange insurance at reasonable costs by making it practically impossible (unbreakable) to break limitation at the same time; it would contribute to the protection of victims as a whole; and above all, it is based on the systems under international conventions and thus it is not an issue that could be adopted or abandoned by a single country only. It would also be necessary to raise awareness of the community that the limitation amounts have been increased as much as possible in successive conventions and Japan has been taking the lead in joining such increased versions.

These two concepts can be adopted as keywords providing for exceptions in private agreements (like basic agreements for services) between private parties too. But it would be desirable to carefully consider before doing so, correctly understanding the interpretations of these concepts as used under the laws and international conventions as explained here, because they are concepts originally used there.

[Opinions herein are personal opinions of the author and not opinions of corporations or organizations he belongs to.]

[59] Teare J. just concludes there was deliberation (intention) by Mr. A, *alter ego* of the company, at the end of his judgment.