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Understanding the Japanese maritime law from key concepts (2) — the “sea” and a “ship”

【Executive Summary】

The “sea” and a “ship” are both important basic concepts defining the scope of application of maritime law. Their definitions sometimes result in substantial differences.

Nevertheless, there is no statutory definition of the “sea”. It would be difficult to have anything more than “the sea in the social common sense” as advocated in the academic views on commercial law. Classifications of (1) internal waters, (2) territorial sea, (3) exclusive economic zone, and (4) high seas in the law of the sea and those of (1) smooth waters, (2) coastal waters, (3) near sea areas, and (4) far sea areas under Ship Safety Act are more important than the definition. Internal waters and smooth waters are different. Under the Commercial Code prior to the 2018 Amendment, carriage in smooth waters was treated as equivalent to carriage by land, which caused diversion of views regarding definition of the “sea” - whether the “sea” thereunder should refer to the sea other than smooth waters or the “sea in the social common sense”. Such treatment has been abolished by the 2018 Amendment.

A “ship” also does not necessarily have a statutory definition. There are more discussions in the academics about the definition than those about the “sea”. It may be generally defined as a certain “structure” “used in navigation” or “having the purpose and capacity of navigation” “in water”. As is the case with the sea, it is eventually considered to be “a ship in the social common sense” (in other words it is eventually determined by the social common sense). Classifications of the ship under Ship Act and other public maritime laws or the Commercial Code are more important than the definition. The Commercial Code in essence defines it in the manner of carving out the ship “used in navigation at sea for the purpose of conducting a commercial transaction”. This definition requires her to be (1) “used in navigation at sea” and (2) “for the purpose of conducting a commercial transaction”. However, the requirement under (1) is amended to apply the Code mutatis mutandis *in some areas to ships that are used in navigation in areas other than the sea;*

and the requirement under (2) is abandoned by Ship Act (though there is objective views in some areas). Thus, attention must be paid to how to apply the Code.

The issue in which the most substantial difference is concluded from the definitions of the "sea" and a "ship" is the scope of application of Limitation Act. It is concluded through the definition of what is the "ship" that is used in navigation at "sea". Prior to the 2018 amendment of the Commercial Code, some judicial precedents held on the assumption that the "sea" does not include smooth waters, but this year a new judicial precedent approved the limitation of liability on the assumption that the sea is "the sea in the social common sense". It may prevail in the future. Conceptually there can arise a similar issue under Oil Pollution Liability Act too. But it hardly turns out a real dispute in practice, because if there is any doubt about the definition of relevant terms – definition of "ship/boat etc. for the carriage by sea" – then one would need to confirm it beforehand with the relevant administrative authorities under the regulatory scheme for compulsory insurance or issue of relevant certificates among others. However, we cannot say that there cannot arise any problems in theory too. In fact, there is a case where the definition has become a major international issue in a foreign country.

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1. Introduction

This is a second paper in the captioned series. We would like to discuss concepts under maritime law from more basic ones in so far as we can. This is because the definition of those concepts may draw the line for the scope of application of the relevant maritime laws or the systems thereunder and sometimes results in significant substantial differences.

At the outset of this series we wrote, "Maritime law generally refers to the law concerning human activities related to the sea". Many of such activities are carried out through use of ships. What are the "sea" and a "ship" in the legal sense? This paper intends to examine this. In Japanese, the word "*kaiyo*" (海洋－word closer to "ocean") is sometimes used instead of "*umi*" (海－word closer to "sea"), but the former does not necessarily represent the ocean such as the Pacific Ocean. The former is often used synonymously with the latter, and both as translations of the "sea" in English. This paper therefore treats "*kaiyo*" and "*umi*" as synonymous, representing them by the word "sea". As to "*senpaku*" (船舶－word most officially representing "ship") in Japanese, words like "*fune*" (船－word closer to "ship") or another "*fune*" (舟－word closer to "boat") or *"senshurui*" (船舟類－collective word that may be literally translated into "ship/boat etc.") are also used. In English, the words "ship" and "vessel" are often used almost synonymously[1]. Thus we would like to discuss "*senpaku*" ("ship"), the most official expression.

Terms defined in the paper No. (1) of this series will have the same meanings in this paper.

2. Definition and classifications of the "sea"

[1] Perhaps in a linguistic sense, in between "*fune* (船)" and another "*fune* (舟)", the former often refers to a more structural craft in a larger size than the latter. As to "ship" and "vessel" in English, the latter originally means a container. We may perhaps say the latter has a broader coverage. As explained later in (n 22), a ship is defined as a vessel of any type whatsoever in MARPOL and a vessel is defined as every description of water craft in COLREG.

(1) Definition

There is no definition of the sea in a basic international convention concerning the sea to which Japan is a state party, *i.e.* the United Nations Convention on the Law of the Sea ("**UNCLOS**"). Turning to Japanese statutes, we cannot find any definitions in "Act on Territorial Sea and Contiguous Zone" that defines the scope of Japanese jurisdiction in the sea (territorial jurisdiction) and "Basic Act on Ocean Policy" that defines the basics of Japanese ocean policy. In "Act on Prevention of Marine Pollution and Maritime Disaster" ("**Marine Pollution Prevention Act**"), the concept of "sea area" is used everywhere (the main sentence of Article 4, etc.) and it is provided to "include" the area of the port under Act on Port Regulations (Article 3, item 1). But there is no definition of "sea area" as such.

An academic says the sea in the context of international law is based on the common idea of the sea; its space needs to have free and natural connections each other with other parts of the sea on the global basis; it does not include the inland sea (such as the Caspian Sea) that does not have free and natural connections with other parts of the sea[2]. But it does not necessarily seem common to give such a definition. In particular as to the Caspian Sea, an example mentioned above, it has been explained that international legal position as to whether it is the "sea" or not has been undetermined since 5 coastal countries have not reached any final agreements[3]. Reportedly, however, 5 coastal countries concluded "Convention on the Legal Status of the Caspian Sea" and related instruments on 12 August 2018 and 4 countries other than Iran ratified them by 1 October 2019. The Russian government official explained that the Caspian Sea is now described as a new concept "inner continental waters" that is neither the sea nor a lake so that UNCLOS will not apply[4].

Turning to Japan, if we focus on the existence of "free and natural connections with other parts of the sea", Lake Hamana (Shizuoka Prefecture) and Naka-umi (Shimane Prefecture) have such connections in fact. The latter even carries the name of the "umi" (sea). However, probably no one would consider them as parts of the sea (although the former is subject of measures by the Ministry of the Environment of Japan for enclosed "sea areas"[5]). On the other hand, Omura Bay (Nagasaki Prefecture) is connected with the open sea only through Hario Seto Channel and Haiki Seto Channel, the narrowest parts of which are only approximately 200 meters and 10 meters wide respectively (In contrast, Imagire Guchi of Lake Hamana and Sakai Suido of Naka-umi are also only approximately 200 meters wide). Nevertheless, probably no one would doubt if Omura Bay is included in the sea. The former two lakes are said to be brackish lakes, and thus difference in salinity and ecosystem may be the reason for these distinctions.

Therefore, it is unexpectedly difficult to define the "sea" subject to legal regulations in the form of general proposition. We must perhaps say both international convention and domestic statutes have provisions about the sea based on the assumption of "the sea in the social common sense". While this "the sea in the social common sense" concept may be an unfamiliar expression in

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[2] Terumichi Kuwahara, *Introduction to International Law of the Sea* (Shinzansha 2002) 13; The above explanation includes his further quotations from other sources.

[3] Kazuhiro Nakatani, 'Enclosed Seas: The Persian Gulf, the Caspian Sea and the Arctic Sea' (2009) Ocean Newsletter 225 (Ocean Policy Research Institute) See https://www.spf.org/opri/newsletter/225_2.html (accessed 15 October 2021)

[4] See https://www.jetro.go.jp/biznews/2018/08/e004ae9fa51f5b1a.html and https://www.jetro.go.jp/biznews/2019/10/2056f65c407280e0.html (both accessed 15 October 2021)

[5] http://www.env.go.jp/water/heisa/heisa_net/index.html (accessed 15 October 2021)

textbooks of the law of the sea that is public law, an old Marine Pollution Prevention Act commentary explains that "the scope of the sea and the sea area is an area regarded as the sea within the common sense meaning"[6]. In addition, as discussed later in this paper, the concept of "the sea in the social common sense" is in fact the definition of the sea in the law of maritime commerce (particularly in Limitation Act) adopted by some prominent academics and the most recent judicial precedent. This concept has significant impact when discussing the scope of application of those laws.

(2) Classifications under international law

From legal point of view, what is more significant than definition is classifications of the sea by its areas. First, UNCLOS classifies the sea into the following four areas in principle[7]:

internal waters	water area inside baseline, which is the basic line to measure the width of territorial sea (Article 7 and 8)
territorial sea	sea area up to a certain distance (12 nautical miles or less) from the baseline (Article 3)
exclusive economic zone	sea area up to a certain distance (200 nautical miles) from the baseline outside of territorial sea (Article 57)
high seas	sea area that does not belong to above water areas of any countries (Article 86)

In Japan, "Act on Territorial sea and Contiguous Zone", "Act on Exclusive Economic Zone and Continental Shelf" and Cabinet Orders for Enforcement of these Acts specify the respective areas[8]. These are classifications based on differences in how the coastal state's sovereign power (territorial jurisdiction) is extended. For example, the right of innocent passage of a foreign ship is applied to territorial sea and is not a matter of course applied to internal waters[9]. On the other hand, the coastal state has full sovereign power in internal waters or territorial sea in principle (Article 2, para. 2 of UNCLOS), whereas sovereign rights in exclusive economic zone is limited for the purpose of exploring and exploiting, conserving and managing the natural resources (Article 56). Therefore, for example, as for crimes where there is no appropriate provision for punishment of those committed outside Japan, in other words where only those committed within Japan are punishable (Articles 1 to 4-2 of the Penal Code and relevant Articles of various special statutes),

[6] See MOT Research Group of Act on Prevention of Marine Pollution (ed), *Guide to Act on Prevention of Marine Pollution* (Seizando Shoten 1976) 42. But subsequent similar publication, Research Group of Act on Prevention of Marine Pollution and Maritime Disaster (ed)*, Guide to Act on Prevention of Marine Pollution and Maritime Disaster* (Seizando Shoten 1996) 25-26 does not make a similar explanation but only discusses the border between the sea and rivers *"can only be said it depends on the social common sense"*.

[7] For an archipelagic state, there is another concept of archipelagic waters (Article 46 of UNCLOS *et seq*) but this is omitted in this paper.

[8] You can refer to baseline and internal waters of Japan at https://www1.kaiho.mlit.go.jp/JODC/ryokai/kakudai/itiran.html, and territorial sea and exclusive economic zone of Japan at https://www1.kaiho.mlit.go.jp/JODC/ryokai/ryokai_setsuzoku.html (both accessed 15 October 2021).

[9] However, the right of innocent passage will continue to exist when an area that was not considered internal waters before the establishment of straight baseline is incorporated into internal waters (Article 8, para. 2.).

if they are committed at sea, the provision of the Penal Code shall apply when they are committed within the Japanese internal waters or territorial sea in principle[10]. In civil matters, many articles for international jurisdiction in the Code of Civil Procedure ("**CCP**") (Article 3-2 *et seq*) use the phrase "*when --- is located in Japan*" in determining the basis of Japanese international jurisdiction. Act on General Rules for Application of Laws, being the general rules for governing law, adopts an expression of "*the law of the place where --- *" in many articles (*e.g.* "*the law of the place where the result of the wrongful act occurred*" or "*the law of the place where the wrongful act was committed*" in tort (Article 17)). It is perhaps clear that internal waters and territorial sea are covered by them but not necessarily clear whether exclusive economic zone is covered by them[11]. Provided, however, Act on Exclusive Economic Zone and Continental Shelf provides that artificial islands, installations and structures in exclusive economic zone of Japan are regarded as located in Japan and Japanese law shall apply to them (Article 3, para. 2) .

(3) Classifications under public law

Secondly, a more important classification in practice is that of navigational areas provided for in Ship Safety Act and the Ordinance for Enforcement of the said Act. They classify all water areas (including lakes and rivers in Japan) into the following four categories (Article 1, items 6 to 9 of the Ordinance for Enforcement of the said Act):

smooth waters	water areas such as lakes, rivers, and ports in Japan, the northern part of Tokyo Bay, most part of Osaka Bay, and some parts of Ise Bay and Seto Inland Sea[12]

[10] Hitoshi Otsuka *et al* (eds), *Great Commentaries on the Penal Code: Vol. 1* (3rd edn, Seirin Shoin 2015) 82 [Yuki Furuta and Sakiko Watanabe] for the definition of "anyone who commits a crime within the territory of Japan" under Article 1, para. 1 of the Penal Code. Note, however, that (1) crimes in a Japanese ship and a Japanese airplane are punishable (Article 1, para. 2 of the Penal Code); and (2) as mentioned next in this paper, artificial islands, installations and structures in exclusive economic zone of Japan are regarded as located in Japan and Japanese law shall apply to them (Article 3, para. 2 of Act on Exclusive Economic Zone and Continental Shelf); In addition, according to UNCLOS, (3) sea area outside territorial sea up to 24 nautical miles from the baseline is called "contiguous zone" (a part of exclusive economic zone), and a coastal state may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea (Article 33) and the competent authorities of the coastal State has the right to continue hot pursuit of a foreign ship outside the contiguous zone when they have good reason to believe that that ship has violated the laws and regulations of that State and if such pursuit is commenced when that ship is within the internal waters, the territorial sea or the contiguous zone of the pursuing State (Article 111, para. 1). Act on Territorial Sea and Contiguous Zone has provisions based on these rules (Articles 3 to 5).

[11] For instance, the governing law of ship's collision in high seas is a typical issue for debate but it is unclear whether ship's collision in exclusive economic zone shall be considered in line with the same in high seas or in territorial sea. This matter does not seem to be covered by Article 3, para. 2 of Act on Territorial Sea and Contiguous Zone either. On the other hand, contrary to the Penal Code, a Japanese ship or space in a Japanese ship is not treated as if it is the Japanese territory under the CCP. This is supported from the absence of express provisions anywhere in the CCP like those in the Penal Code, as well as inferred from the fact that Article 3-3 of the CCP dealing with the basis of international jurisdiction has a structure almost corresponding to Article 5 dealing with the basis of domestic geographical jurisdiction (Article 5, items 3 and 6) but nevertheless does not have any provision that would establish jurisdiction by virtue of ship's registered country.

[12] See https://jci.go.jp/areamap/heisuiengan.html (accessed 15 October 2021)

coastal waters	band of areas approximately 20 nautical miles from the coasts of Japan, part of Sakhalin, and the Korean Peninsula[13][14]
near sea zone	water area surrounded by lines along long. 175° E. (eastern end), long. 94° E (western end), lat. 11° S (southern end), and lat. 63° N (northern end) (water area around from the Malacca Strait to the Kamchatka Peninsula)[15]
far sea zone	All other water areas of the world

Note that areas of *internal* waters mentioned above and *smooth* waters here are not interrelated with each other. As you can see in the water area maps found in the website referred to in the footnotes, Sagami Bay, for example, is not in smooth waters, although it is yet inside the baseline and in internal waters[16].

These classifications are originally designed as standards to classify the ship by navigational area of that ship, for the purpose of application of safety standards for construction and facilities of ships under "Ship Safety Act" and/or standards for the boarding of the qualified personnel under "Ships' Officers and Small Ships Navigators Act[17]". For example, "Criteria for Seaman's Boarding" stipulated in Article 18 of Ships' Officers and Small Ships Navigators Act and Article 5 and Appended Table 1 of Cabinet Order for Enforcement of the said Act provide for in detail what types of qualified personnel shall be on board a ship in what arrangements, depending on her navigational area, her gross tonnage, power output of her propelling machinery, etc.

(4) Classifications under commercial law

[13] See https://jci.go.jp/areamap/pdf_etc/enkai_a2.pdf (accessed 15 October 2021)

[14] In addition, there is another classified area called "shore waters" ("*engan kuiki* 沿岸区域") in Japan (areas where shore small ships can navigate). This is different from "coastal waters" ("*enkai kuiki* 沿海区域"). This covers smooth waters, plus area within 5 nautical miles off the shores of Honshu, Hokkaido, Shikoku, Kyushu and their neighboring islands, whose shores directly touch coastal waters (Article 2, para. 3 of Ordinance for Safety of Small Ships). See https://wwwtb.mlit.go.jp/kinki/senpaku/engan.pdf (accessed 15 October 2021)

[15] See https://jci.go.jp/areamap/pdf_etc/kinkai_enyou.pdf (accessed 15 October 2021)

[16] Nevertheless, academic views of commercial law often describe a ship to be navigated only in *smooth* waters as an "*internal* waters ship" (*e.g.* Toda (n 29) 17; Toda and Nishijima (eds) (n 29) 158 [Nomura]; Shigeta (ed) (n 29) 40 [Kazuhiko Shizuta]; Kobayashi (n 29) 39 etc.). This description may be because 1910 Collision Convention and 1910 Salvage Convention as discussed later in 3. (3) of this paper refer to "vessels of inland navigation". But in any event, it seems a conventional but maybe a little misleading description.

[17] This Act is translated into the "Law for Ships' Officers and Boats' Operators", according to the expression in the blank form of certificate of competency in Ordinance for Enforcement of the said Act etc. (Forms Nos. 4 and 16). It would be regarded as the current official translation of the Government of Japan. But I do not adopt this for three reasons: (1) the original Japanese word for "small ship" or "boat" is "*kogata senpaku* 小型船舶" and the former translation is obviously closer to the original. The latter may be a possible simplified translation but in this paper it is used for another more casual word "*fune* 舟"; (2) the original Japanese word for "navigator" or "operator" is "*soju-sha* 操縦者", which means a person who physically steers or navigates. Thus, the former fits better. The latter may be possible but it is often used in a broader sense. The Japanese word usually used equivalently to "operation" is "*unko* 運航", not at all "*soju* 操縦"; and (3) a statute enacted by the Diet (legislative body of Japan) was once often translated into "Law" but is recently into "Act" more often in line with the word used in statutes enacted by the U.K. Parliament and the U.S. Congress. Japanese Law Translation website by the Ministry of Justice ("**MoJ**") also adopts this in principle. See http://www.japaneselawtranslation.go.jp/law/?re=02 last accessed 23 October 2021.

Prior to the 2018 amendment ("**2018 Amendment**") of the Commercial Code for Transport and Maritime Commerce as entered into force in 2019, then Commercial Code ("**former Commercial Code**") treated a carrier by smooth waters in the same way as a carrier by land (and thus provisions in Book 3 (Maritime Commerce) of the Commercial Code did not apply to it), which is called just a "carrier" and distinguished from a proper carrier by sea by way of using the concept of smooth waters[18]. However, such treatment was abolished by the said Amendment. Under the current Commercial Code, carriage by land and carriage by sea are distinguished by way of whether the relevant carriage is by land or by a ship as prescribed in the Commercial Code. As far as the carriage in question is made by such prescribed ship, it is regarded as carriage by sea in principle (Articles 569, 684 and 747 of the current Commercial Code; a ship prescribed in the Commercial Code and how to treat a ship other than that will be discussed later). The distinction between contracts of carriage through distinctions of water areas to be carried was abolished.

As a result, carriages by barge in Tokyo Bay for example, formerly treated equal to carriage by land, is now subject to the same rules as those for domestic carriage by sea (coastal transport) in Japan[19].

On the other hand, the current Commercial Code has newly introduced a distinction between a "ship used in navigation at sea for the purpose of conducting a commercial transaction (except tender boats or other boats steered solely or mainly with oars)" ("**seagoing ship**") as specified in Article 684 and a "ship used in navigation exclusively in lakes, rivers, ports and harbors and other areas other than the sea for the purpose of conducting a commercial transaction (exceptions in the parentheses are the same)" ("**non-seagoing ship**")[20] as specified in Article 747. This is a distinction between ships. Through this distinction of ships, we now have distinction between navigation at the "sea" and navigation in "lakes, rivers, ports and harbors and other areas other than the sea". Thus, the definition of the "sea" therein has yet become a new issue. This point will be discussed later in 4 (1), in which this distinction will be particularly problematic. However, in

[18] Article 569 of the former Commercial Code provided, "*The term Carrier means a person in the business of transporting goods or passengers on land, over lakes or rivers, or at ports or harbors.*" On this basis, Article 122 of Act for Enforcement of the Commercial Code and Ordinance of the Ministry of Communication No. 20 of 1899 issued thereunder stipulated, "*The scope of lakes, rivers, ports and harbors shall be decided by the area of smooth water passages*". The "smooth water passages" therein and "smooth waters" in Ship Safety Act are the same, as stipulated in Article 37 of the latter Act.

[19] See Matsui and Oono (eds) (n 29) 16. As a result, carriage by barge, once governed by the complete freedom of contract in the past (all the Commercial Code provisions in respect of carriage by land were default rules), is now subject to the obligation to exercise due diligence for seaworthiness to be compulsorily applicable in so far as it is a contact of carriage of individual cargo under the Commercial Code (Article 739, para. 2 and Article 756, para. 1).

[20] The word "navigation" translated herein is "*koko* 航行" in the original Japanese. How to translate this original Japanese into English may be an issue. Another option is to translate it into "voyage" as adopted in translation by the MoJ of relevant provisions in the Commercial Code. But I would suggest "navigation" is better than "voyage" since this word also appears in the academic definition of a ship and the former fits better than the latter at least in that context. Similarly, the word "commercial transaction" translated herein is "*shokoi* 商行為" in the original Japanese. Another option is "commercial act". It may be a more straightforward and direct translation but perhaps sounds slightly strange to say conduct an act or do an act. The MoJ's translation adopts "commercial transaction" and I follow them. See Japanese Law Translation website by the MoJ (n 17). Unfortunately, English translation of the Commercial Code found therein is still the former Commercial Code before the 2018 Amendment even as of 23 October 2021. Here I refer to their translation of Article 684 of the former Code, equivalent to the current Article 684.

so far as carriage of goods is concerned, since the provisions in the Commercial Code that are originally designed to apply to carriage by a seagoing ship also all apply *mutatis mutandis* (put simply, are extended to apply) to carriage by a non-seagoing ship and both types of carriage are treated as the same (Article 747 and Article 756, para 1), there is no difference as was found in the former Commercial Code.

3. Definition and classifications of a "ship"

(1) Definition

a. Conventions and statutes

There is no uniform definition in conventions and statutes regarding a "ship" either. Under UNCLOS, a ship is one of primary subjects to be regulated thereunder for example in the context of grant of her nationality (Article 91), status in high seas (Article 92) and right of innocent passage in territorial sea (Article 17) among others. But it does not give definition of a ship as such. We cannot find the definition in Ship Act that can be said to be a basic law concerning ships in Japanese law[21].

Unlike the sea, however, a ship is not a natural existence but a structure created by human beings. Perhaps for that reason we can find definitions in certain conventions and statutes.

As to the laws and regulations belonging to public law, Marine Pollution Prevention Act defines her as "*ship/boat etc. (*senshurui 船舟類*) used in navigation in the sea area (including the area of a port under Act on Port Regulations)*" (Article 3, item 1); and Act on Preventing Collision at Sea also defines her as "*ship/boat etc. used for water transportation (including seaplanes)*" (Article 3, para. 1). These seem to generally reflect the fact that there are definitions in the international conventions on which they are based[22]. But if you go through these definitions, we face with a strange word of "ship/boat etc." of which we find no definition[23].

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[21] As discussed later, there is an exceptional provision in Ships Act that a dredger without propelling machinery shall not be regarded as a ship (*i.e.* exempt from application of the Act) (Article 2 of Detailed Regulations for Enforcement of the said Act).

[22] As for the former, the International Convention for the Prevention of Pollution from Ships, 1973/1978 ("**MARPOL**") defines a ship as "*a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms*" (Article 2, para. 4). As for the latter, the Convention on the International Regulations for Preventing Collisions at Sea, 1972 ("**COLREG**") defines that "*The word 'vessel' includes every description of water craft, including non-displacement craft, WIG craft and seaplanes, used or capable of being used as a means of transportation on water"* (Article 3, item a). As you see, the latter is not the definition of a ship but a vessel.

[23] As to the meaning of "ship/boat etc. (*senshurui* 船舟類)", MOT Research Group of Act on Prevention of Marine Pollution (ed) (n 6) 43 explains that it is "*a structure which utilizes its buoyancy, is capable to load persons and goods, and is movable*"; whilst the later published Research Group of Act on Prevention of Marine Pollution and Maritime Disaster (ed) (n 6) 28 explains in a different nuance that it is just "*a structure which utilizes its buoyancy*". Moreover, if the readers look into English text of conventions corresponding to these words, MARPOL defines a ship as a vessel of any type whatsoever on the basis that the subject to be regulated is a ship, whereas COLREG defines a vessel as every description of water craft on the basis that the subject to be regulated is a vessel. The Japanese official translations of these conventions, however, do not distinguish these two and use the common term "ship/boat etc.," which may not sound unusual in English translation but sounds strange in Japanese. The original word surely is composed of "ship 船, boat 舟, etc.類" but a word

Turning to private law, the Commercial Code defines a ship as "*ship used in navigation at sea for the purpose of conducting a commercial transaction (except tender boats or other boats steered solely or mainly with oars*" (Article 684; this is referred to in Article 2, para. 1 of COGSA) as mentioned earlier. This stipulates the scope of application of the Code by carving out only a specified range of ships, but there is no definition of a "ship" as such again. Limitation Act also defines a ship as a "*ship used in navigation at sea except tender boat or other boat steered solely or mainly with oars and ship used for governmental purpose*" (Article 2, para. 1, item 1). This is an approach similar to the approach under the Commercial Code, *i.e.* to carve out a certain range of "ships" to prescribe its scope of application. In Oil Pollution Liability Act, a "tanker" is defined as "*ship/boat etc. for the carriage by sea of crude oil, etc. in bulk*" and a "general ship" as "*ship/boat etc. for the carriage by sea of passengers or cargoes and other goods other than crude oil, etc. in bulk (except that steered solely or mainly with oars)*" (Article 2, items 9 and 10). Again, we face with the word "ship/boat etc."[24]

Thus, in so far as we only review statutes, they contain no definition of a "ship" or they define it as "ship/boat etc." conceptually. The latter means nothing but a replacement of words.

We repeatedly find the exception provisions related to a boat steed with "oars". This is commonly abbreviated as a "**ship with oars (*rokai-sen* ろかい船)**". "*Ro* 艪/ろ" is a unique traditional oar set at astern used in the East Asia, "*kai* 櫂/かい" is oars set at sides. A "tender boat" ("*tanshu* 端舟") mentioned as an example is understood to be a "boat that does not use an engine or sail for propelling machinery (propulsion power)"[25]. In the context of the Commercial Code, such ship has been explained to be exempt from application of the provisions of Book III (Maritime Commerce) because it is severe or unnecessary and inappropriate for her owner to be subjected thereto since such ship is generally extremely small[26]. As will be discussed later, she is also often exempt from application of public maritime law.

b. Judicial precedents

Turning to judicial precedents, in an old Judgment of Matsuyama District Court on 25 August 1961, Hanrei Times 123-64 (The *"Ehime"*) the Court held, for the purpose of approving that towage of a dredger barge without propulsion on its own was towage of another "ship", a ship in the law of maritime commerce means no more than a ship in the social common sense that is used in

connecting these three is perhaps not in the vocabulary of ordinary Japanese language.

[24] Tokioka *et al* (n 29) 317 [Tanikawa] explains that "ship/boat etc." in Oil Pollution Liability Act is "*a concept that includes not only ships under Ship Act but also oil barges without its own propulsion power, plastic sausages for oil transportation… The shape does not matter.*" but does not give the definition of a ship as such, though it is understandable that it refers to oil transportation factor as it deals with a concept under Oil Pollution Liability Act. Limitation Act and Oil Pollution Liability Act are legislation also based on international conventions. In LLMC on which the former is based, the term "ship" is found in the definitions of a "shipowner" as the owner or others of a "seagoing ship" (Article 1, para. 2), but there is no definition of a ship as such. In 1992 CLC/FC on which the latter is based, a ship is defined as "*any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo*" (Article 1, para. 1 of CLC and Article 1, para. 2 of FC; As to proviso therein, see 4. (2) of this paper.), but there is no definition of a ship as such either, and instead we find another new concept "seaborne craft (*kaijo yo shutei* 海上用舟艇)".

[25] JMPCAA (n 28), *Quick Guide on Maritime Law - Act on Port Regulations*, Section 1-3; Murata (n 29) 48; Okada (n 29) 129

[26] *e.g.* Komachiya (n 29) 49-50; Ishii and Ohtori (n 29) 15; Tanaka (n 29) 154; Murata (n 29) 48; Kobayashi (n 29) 35

navigation at sea for the purpose of conducting a commercial transaction. In Judgment of Tokyo High Court on 23 August 1972, Hanrei Jiho 681-79 (The *"No. 2 Sanyo Maru"*), it was indicated in the context of demands for salvage rewards set forth in Article 800 of the former Commercial Code (current Article 792) that a "ship" set forth in the said Article is synonymous with a "ship" set forth in Article 684, and it broadly means a "structure used in navigation at sea for the purpose of conducting a commercial transaction" (except ships with oars), and whether a certain structure is a ship or not "*shall be determined by the social common sense having regard to her overall purpose of use, shape, and characteristics of the structure*" and it cannot be said that a structure is not a ship by reason of lack of her own propulsion power. It further held that a container barge without her own propulsion power adapted from a tanker was still a "ship", because she still retained a shape of ship after removal of her engine and other parts and was capable of floating in the water with a load and being navigated by way of towage, though she did not have her own propulsion power. The qualification by "used in navigation at sea for the purpose of conducting a commercial transaction" as well as exception of ships with oars in this judgment reflected the requirements under the Commercial Code.
A more recent Decision of Osaka High Court on 10 March 2010, Kaijiho 217-62 (the ***"Neptune Z"***) held, in relation to the application of Limitation Act to a crane ship without her own propulsion power, the main purpose of the ship in question was to render services at a specific location, but considering that she was able to be navigated by being towed, was equipped with facilities for persons to stay on board, and was actually carrying men who worked on board, she was a ship under Limitation Act for the reasons that she "*not only had a structure suitable for transporting persons, but was also a structure that moved in water with the purpose of transporting persons to their destination ... by being towed ... and thus she could be said to be used in navigation*" (whether she was "used in navigation at sea" was next issue).
These judgments are understood to reflect academic views discussed below. It is noteworthy that they explicitly referred to an idea of determining by the social common sense as in the case of the definition of the sea and/or putting weight on factors such as navigation or transportation in water[27].

c. Secondary sources

In order to further consider what is a "ship" (exactly speaking what characteristics are required to be a "ship") we need to seek secondary sources.
They are divided into various explanations in guidebooks on maritime public law[28] and academic

[27] Another special case is Judgement of Tokyo District Court on 6 September 2013, LLI/DB. In deciding that the lease of rigs (which can be floated for moving with a load) used for offshore drilling is the lease of a "ship" under Income Tax Act, it held various circumstances related to the lease of such subject shall be examined in the light of the social common sense. In connection with this, although it is not the law *per se*, Para. 2-4-4 of Practice Directions on the Application of Durable Life by National Tax Agency states, "*Salvage ships, construction ships, crane ships, and other service ships fall under the category of ships even if they do not navigate in water by themselves. But those that have been constructed (including adapted) mainly for the purpose of using them as buildings or fixed structures such as so-called oyster ships (*kakifune かき船*, traditional Japanese oyster restaurants on water) or hotel ships do not fall within the category of ships even if their shape and structure are similar to ships.*" See
https://www.nta.go.jp/law/tsutatsu/kobetsu/sonota/700525/02/02_04.htm (accessed 15 October 2021)
[28] References in preparation for this paper include: Masahiko Minami, *Guide to Ship Act* (Kaibundo 1959) 6-

views on commercial law[29]. Apparently they discuss definition of a ship more or less similarly, but variously in different lengths and nuances if looked in detail. Now we would like to try to make a rough summary of their discussions in the following paragraphs.

Caution: This is just an attempt to generally analyze various views. It goes without saying that a definition of a notion in a statute shall be interpreted against the background objectives of such statute. Strictly speaking, there may be different discussions if you discuss different statutes. In practice, we also need to seek views of the relevant administrative authorities if necessary, in addition to having regard to explicit wordings in provisions of each statute, because the risks of penal or administrative sanctions by reason of breach of relevant regulations may arise if your interpretation is different from theirs. We discuss the general definition of a "ship" only because what is a "ship" is a logically starting point whenever considering the ship variously qualified or classified by various words in various statutes.

7; Kiyoshi Mori, *Studies on Marine Accident Inquiry System* (Chuo University Press 1968) 245-248; Shoji Sumita, *Studies on Seafarers Act* (Seizando Shoten 1973) 60-65; Chiyuki Mizukami, *Ship's Nationality and Flag of Convenience* (Yushindo Kobunsha 1994) 2-13; Japan Marine Procedure Commission Agent Association ("**JMPCAA**"), *Guide on Ship Act and Relevant Laws and Regulations* (1997 Fiscal Year) Section 1.2.1 https://nippon.zaidan.info/seikabutsu/1997/01275/contents/006.htm (accessed 15 October 2021); JMPCAA, *Quick Guide on Maritime Law - Act on Port Regulations* (1997 Fiscal Year) Section 1.3 https://nippon.zaidan.info/seikabutsu/1997/01274/contents/004.htm (accessed 15 October 2021); Maritime Law Research Group of Kobe University Graduate School of Maritime Science (ed), *General Guide on Maritime Law* (Seizando Shoten 2010) 4 [Ship Act], 186 [Marine Accident Tribunal Act], 202 [Act on Preventing Collision at Sea], and 237 [Marine Pollution Prevention Act]; Mitsutaka Arima (ed), *Guide to Ship Safety Act* (5th edn, Seizando Shoten 2014) 15; Nagahiro Kawaguchi (ed), *Commentaries on Act on Preventing Collision at Sea* (Seizando Shoten 2020) 9-10; Website of Tohoku District Transport Bureau, Ministry of Land, Infrastructure, Transport and Tourism ("**MLIT**") (https://wwwtb.mlit.go.jp/tohoku/ka/ka-sub00.html (accessed 15 October 2021)

[29] References in preparation for this paper include: Sozo Komachiya, *General Commentaries on Law of Maritime Commerce Vol. 1* (Iwanami Shoten 1932) 46-47; Teruhisa Ishii and Tsuneo Ohtori, *Law of Maritime Commerce and Insurance* (Keiso Shobo 1976) 13; Yasushi Tokioka *et al*, *Commentaries on Act on Limitation of Liability of Shipowners and Act on Liability for Oil Pollution Damage (*Shojihomu Kenkyukai 1979) 26-27 [Yasushi Tokioka] and 316-318 [Hisashi Tanikawa]; Seiji Tanaka, *Detailed Commentaries of Law of Maritime Commerce* (Supp 3rd edn, Keiso Shobo 1985) 146-154; Takeo Inaba and Itsuro Terada, *Commentaries on Act on Limitation of Liability of Shipowners (*Hosokai 1989) 60-64; Harumi Murata, *Legal System of Maritime Commerce* (Seizando Shoten 1990) 38-42; Shuzo Toda, *Law of Maritime Commerce* (New 5th edn, Bunshindo 1990) 11-14; Shuzo Toda and Umeji Nishijima (eds), *Seirin Hogaku Sosho: Law of Insurance and Maritime Commerce* (Seirin Shoin 1993) 156-158 [Shuya Nomura]; Ujiharu Shizuta, 'Legal Analysis of Ships' in *Kurume University Law and Politics Library No. 1: Modern Law of Maritime Commerce* (Seibundo 1994) 107; Kaoru Imai *et al* (eds), *Modern Commercial Law IV: Law of Insurance and Maritime Commerce* (Revised ed, Sanseido 1994) 250 [Kazuhiko Kurita]; Haruo Shigeta (ed), *Lectures on Modern Enterprise Law 6: Law of Maritime Commerce* (Seirin Shoin 1994) 34 [Kasuhiko Shizuta]; Junnosuke Tamura and Yoshimichi Hiraide (eds), *Lectures on Modern Law: Law of insurance and Maritime Commerce* (Supp 2nd edn, Seirin Shoin 1996) 136 [Yoshimichi Hiraide]; Shuzo Toda and Masumi Nakamura (eds), *Commentaries on International Carriage of Goods by Sea Act* (Yuhikaku 1997) 32-35 [Kazuhiko Kurita]; Masumi Nakamura and Takashi Hakoi, *Droit Maritime* (2nd edn, Seibundo 2013) 40; Kenjiro Egashira, *Commercial Transaction Law* (8th edn, Kobundo 2018) 298-299; Nobukazu Matsui and Akihiro Oono (eds), *Q&A on 2018 Amendment of the Commercial Code* (2018 Shojihomu) 14-16, 57; Toyoki Okada, *Modern Law of Insurance and Maritime Commerce* (Chuo Keizaisha 2020) 128-130; Takashi Hakoi, *Basic Lecture on Modern Law of Maritime Commerce* (4th edn, Seibundo 2021) 17-22; Noboru Kobayashi, *New Law of Maritime Commerce* (Shinzansha Shuppan 2021) 31-38, 104-105

(a) Definition in general

A “ship” is generally defined as a certain “structure” “used in navigation” or “having the purpose and capacity of navigation” “in water” but it is often said that we can only say ultimately it is a “ship in the social common sense” (or it is determined by the social common sense)[30]. Some present a more theoretical definition that a ship is a structure with (i) floating capacity (or buoyancy), (ii) mobility, and (iii) loading capacity[31]. But we cannot say many academics have adopted this explicitly.

We now would like to discuss elements in the former definition.

(b) Navigation “in water”

This includes those navigating not only on the water surface but also underwater (submersibles) and those navigating in space slightly above water surface with support by water (hovercrafts). But it does not include those with structures intended mainly for aerial navigation (seaplanes and airships) in principle[32].

(c) “Navigation” in water

As the definition includes “navigation (*koko* 航行)”, it does not include what is fixed in one location and not for navigation (buoys, floating docks, water hotels). But it includes what anchored temporarily on the seabed (oil drilling ships).

It also generally includes what does not have her own propulsion power (barges and towed ships). It must be noted in this regard that Article 2 of Detailed Regulations for Enforcement of Ship Act stipulates “*a dredger without propelling machinery shall not be regarded as a ship*”. Reference to a dredger alone is exemplary and it is interpreted to apply to a service ship in other types[33]. It is apparently unclear from the text that whether this means that she is not a ship *per se* for reason that she does not have the usage and capability of “navigation” or that she is still a ship *per se* but is excluded therefrom for policy reasons. Assuming that no propulsion power is required to satisfy the definition, the latter would probably be a logical answer[34].

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[30] Sumita (n 28) 62-63 argues “ships in the social common sense” have broader and narrower senses. The former broader one is a “structure floating on the water” and includes floating docks and floating hotels, but the latter narrower one means a “structure that normally moves”, and Ship Act assumes the latter, and thus it does not include floating docks and floating hotels. But this distinction is perhaps not popular.

[31] Mizukami (n 28) 4; Ujiharu Shizuta (n 29) 108-109, 111; Maritime Law Research Group of Kobe University Graduate School of Maritime Science (ed) (n 28) 237 [Marine Pollution Prevention Act]; Tohoku District Transport Bureau, MLIT of Japan (n 28). According to Mizukami (n 28) this type of definition appears to have originally been advocated in international law or law of the sea.

[32] Exceptionally, the definition in Act on Preventing Collision at Sea includes seaplanes to be regulated thereunder, as discussed earlier in this paper.

[33] Minami (n 28) 7; Sumita (n 28) 63; Mizukami (n 28) 10. The *Neptune Z* points out the existence of a Circular by the Director of Seafarers Bureau of MLIT to this effect.

[34] Some discuss this point explicitly. Komachiya (n 29) 46 reads to say the former. Sumita (n 28) 62-63, on the other hand, robustly explains the latter interpretation. Ujiharu Shizuta (n 29) 111 also reads to say the latter. Turning to judicial precedent, the *Neptune Z* explicitly upheld the latter in deciding whether a crane ship without her own propulsion power falls under the category of a “ship”. According to the decision, in situations where such exemptive provision does not apply, for example, when one considers the concept of a ship under the Commercial Code, the fact that she is excluded under Ship Act does not preclude her from being considered as a “ship”.

An issue that may have room for debate is whether it only requires to be used for "navigation", but it also requires to be used for "carriage of persons or goods" as an essential element of the definition. It appears most academic views do not strictly discuss the difference between the two and require the latter too by way of treating these two as virtually synonymous[35]. If we require the latter, dredgers, crane ships and other service ships may not be logically included in the "ships". However, in fact it seems to be generally understood to include them. Some academic views explain the reasoning that those also have the purpose for carriage of dredges or cranes or other equipment on board for works[36]. In the *Neptune Z*, the Court held the main purpose of the crane ship in question was to render service but specifically referred to the purpose of transporting the workers and used the latter point as if it was the basis for the conclusion to include her in the "ship". In our opinion, however, it seems too technical to explain a crane ship has the purpose of carrying the crane itself to justify she is a ship. It would be more natural to say that the crane is a part of her characteristic structure to fulfill her purpose of use, rather than something to be carried by her. As to the *Neptune Z*, it is not clear how the Court would have thought if the crane ship in question had not moved with workers on board, but workers had chased her by another ship to embark her at the working place and then had immediately disembarked after completion of work. Is it not possible to simply say used in "navigation" is sufficient for the definition[37]?

(d) A certain "structure"

In connection with this element, it is occasionally discussed whether it is necessary to have a concave shape with buoyancy. There used to be the prominent affirmative view in the past, but now the negative view seems more prevailing[38]. The affirmative view raises a "water ski, etc." as a typical example of what is not a ship due to lack of concave shape[39], whilst the negative view also denies a "water bike, etc." to be at least a seagoing ship by reason of its structure[40]. But water skies and water bikes are also structures. The only reason for not treating them as "ships"

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[35] Komachiya (n 29) 46; Murata (n 29) 38-39; Toda (n 29) 11; Imai *et al* (eds) (n 29) 250 [Kurita]; Shigeta (ed) (n 29) 34 [Kazuhiko Shizuta]; Tamura and Hiraide (eds) (n 29) 136 [Hiraide]

[36] Komachiya (n 29) 46; Toda and Nishijima (eds) (n 29) 157 [Nomura]

[37] Tanaka (n 29) 149 explicitly discusses, *"it is recognized under the common sense in transactions that the ability to load goods or persons is required as incidental to the concept of navigation"* and thereby links "navigation" and "load" (perhaps "carriage" in other words) by something called the "*common sense in transactions*". He then introduces Dr Masaharu Kato and Dr Ren Takei as academics with opposite views in pre-WWII era. The author could refer only to the former, who discussed, "*As long as she serves a certain purpose in navigation, it does not matter what is the purpose of her usage*"; "*Some define the ship as an instrument to carry persons or goods on water* (citations of German academic view are omitted)*, but since the usage of ships is so broad, it is too narrow to define that carriage is the only purpose for which ships are to be used, although in many cases ships should also be said to be used for carriage of persons or goods*" (Masaharu Kato, *Studies on Maritime Law, Vol 2* (Reprint with Amendments, Yuhikaku 1923) 5). This is a century-aged academic view but seems suggestive even in the present.

[38] Former prominent affirmative view includes Tanaka (n 29) 149. Recent negative view includes Ujiharu Shizuta (n 29) 113; Nakamura and Hakoi (n 29) 44; Kobayashi (n 29) 32.

[39] Minami (n 28) 6; JMPCAA (n 28), *Guide on Ship Act and Relevant Laws and Regulations*, Section 1.2.1

[40] Nakamura and Hakoi (n 29) 43; Hakoi (n 29) 19. As for reasons, this view argues that a seagoing ship needs to have a "certain structure to be prepared for the perils of the sea", but a "water bike, etc." lacks such structure and thus it is a structure for navigation in water but not a seagoing ship. They do not state clearly whether they admit a "water bike, etc." (and a "water ski, etc." raised by affirmative views) can be the ship as such (*i.e.* non-seagoing ship within the ships).

appears nothing but the social common sense in the end. Also, if you look at a crane ship without her own propulsion power to be towed, her shape on the bottom may be described as a cuboid (rectangular solid). But it would not be reasonable to deny her to be a ship only by reason of lack of concave shape. Is it too much to say that reference to concave shape perhaps just reflected then academic's understanding of the social common sense?

(e) Other issues

Because a ship being built is not generally used in navigation at that moment, she is understood to be not a ship yet (Article 850 of the Commercial Code reflects this and applies the provisions on ship creditors to ships being built not directly but *mutatis mutandis*). But it is said after launch she can be regarded as a ship even before completion. It is interpreted that a sunken or wrecked ship that cannot be salved is no longer a ship for the same reason[41].

Whether unmanned ships among maritime autonomous surface ships currently being researched and developed by many interests may fall within the category of ships is occasionally pointed out as an emerging issue in recent times[42]. No one, however, would really agree they are not ships and it is appropriate to place them outside legal regulations. So this argument only seems to say in substance that many laws and regulations related to ships (including not only public ones but also private ones such as the Commercial Code which presupposes that the navigation of a ship is carried out by the master and crew as a matter of course) are based on the premise that the ship is manned and therefore this will give rise to problems unless suitably adjusted.

(2) Classifications under public law

Just as in the case of the "sea", what is more significant than definition in practice is rather its classification. Under public maritime law, it can be said in very rough terms as mentioned in the below table that (1) a ship less than a certain gross tonnage is subject to special regulations under the heading of a "small ship"; and (2) a ship with oars is also often treated separately regardless of her gross tonnage (in addition to (3) a fishing ship and (4) a moored ship that may also be treated separately among others). Of course, different statues have specific classifications in line with their respective regulation objectives and one needs to check them in detail case by case[43].

Ship Act	- A ship automatically becomes a Japanese ship whenever her owner meets the prescribed requirements thereunder such as being a Japanese citizen (Article 1) and the Act mainly regulates a Japanese ship; - (1) a ship less than 20 gross tons and (2) a ship with oars shall be exempt

[41] Judgment of Supreme Court on 1 September 1960, Minshu 14-11-1991 (The *"Eian Maru"*) held that ownership registration as a requirement for perfection of ownership transfer regarding a ship (Article 687 of then Commercial Code) shall not apply to a sunken ship that cannot be salved; "delivery" under Article 178 of the Civil Code for movables shall apply to the perfection of ownership transfer regarding such a ship. "Delivery" is to be checked through finding of facts regarding the transfer of physical control over her hull.

[42] *e.g.* Kengo Minami, 'Realization of Maritime Autonomous Surface Ships and its Impacts on Legal Schemes – Current Legal Issues Arising from Unmanned and Automated Ships –' (2019) Kaijiho 244-2 at 5-6

[43] Under UNCLOS, distinctions among "warships" (Article 95), "ships owned or operated by a State and used only on government non-commercial service" (Article 96) and other general "ships" are important but not discussed here.

	from the obligation of measurement applications, ship registrations and having certificate of a ship's nationality under the Act (Article 20); Instead - (1) is required to be registered under "Act on Registration of Small Ships" in so far as she is a Japanese ship or a ship used in navigation only between ports or in lakes, rivers, or ports in Japan, except she falls within the prescribed exception such as a fishing ship, moored ship, and ship with oars (Articles 2 and 3); - A dredger without propelling machinery shall not be regarded as a ship (Article 2 of Detailed Regulation for Enforcement of the Act)
Ship Safety Act	- The Act regulates a Japanese ship in principle; - There are detailed regulations subdivided according to navigational area and gross tonnage, propulsion power, length, and type; - (1) a ship less than 20 gross tons is subject to separate inspection system as a small ship (Articles 6-5 and 25-2 *et seq*); (2) a ship with oars is not completely exempt from the application, but a boat "only" steered with oars with carriage capacity of 6 or less persons is exempt from the prescribed standards together with other prescribed very small ships (Article 2, para. 2 of the Act and Article 2 of the Ordinance for Enforcement of the Act)
Seafarers Act	- The Act regulates a Japanese ship in principle through definition of a "seafarer" as a subject of discipline (a non-Japanese ship is subject to limited application); - A ship less than 5 gross tons, a ship used in navigation only in lakes, rivers or ports, and a fishing ship with less than 30 gross tons that meets prescribed requirements among others are excluded from regulation by not including them in ships (Article 1, para. 2 of the Act and Article 1 of Ordinance for Enforcement of the Act)
Ships' Officers and Small Ships Navigators Act	- The Act mainly regulates a Japanese ship in principle (a non-Japanese ship is subject to limited application); - (1) a ship less than 20 gross tons (and a ship 20 or more gross tons in certain cases) is subject to separate regulations as a small ship (Article 2, para. 4) and (2) a boat "only" steered with oars, moored ship, and towed barge among others are excluded from definition (Article 2, para. 1 of the Act and Article 2 of Ordinance for Enforcement of the Act)

(3) Classifications under commercial law

Under the Commercial Code, a "ship" is defined as a "*ship used in navigation for the purpose of conducting a commercial transaction (except tender boats or other boats steered solely or mainly*

with oars)" (Article 684). It remained unchanged in substance in the 2018 Amendment. The Commercial Code carved out a "ship" (1) for the purpose of conducting a commercial transaction and (2) used in navigation at sea to be subjected thereto[44] and excluded (3) a ship with oars. This is called a "seagoing ship" and a ship that satisfies (1) but does not satisfy (2) (other than (3)) is referred to as a "non-seagoing ship" as discussed earlier. The purpose to exclude (3) is explained in 3. (1) a. of this paper.

The requirement under (1) derives from that one of the purposes of the Commercial Code is to regulate the "commercial transaction" (Article 1) and Book 3 thereof is intended to cover "Maritime Commerce" (put it another way, the law of maritime commerce does constitute a part of the Commercial Code – ships satisfying or not satisfying this requirement are respectively called hereinafter "**commercial ships**" or "**non-commercial ships**"). On the other hand, the requirement under (2) perhaps derives from that Book 3 thereof is intended to cover "Maritime Commerce".

But these requirements under (1) and (2) are both substantially amended (to expand scope of applications) and thus we shall note that it has become difficult to correctly understand the scope of application of the Commercial Code in relation to these requirements.

As to the requirement under (1), Ship Act stipulates that the provisions of Book 3 (Maritime Commerce) of the Commercial Code are extended to apply *mutatis mutandis* to "*a ship used in navigation at sea but* not *for the purpose of conducting a commercial transaction*" (except a "ship owned by the governmental or other authorities" ("**governmental purpose ship**")[45]) (Article 35, para. 1[46]). The requirement under (1) therefore would not be required for the application of Book 3 of the Commercial Code in the end. This is sometimes described as the impasse of commercial transaction doctrine in commercial law. More strictly speaking, however, there exist views to doubt to which extent this requirement is abolished by the application of Book 3 of the Code (to doubt if it shall be construed to be really abolished altogether in accordance with the text). Especially, whether provisions related to carriage of goods by sea in Book 3 of the Code shall apply to carriage by a non-commercial ship is in debate. (a) Some academics say carriage covered by the Code can be nothing but carriage being a commercial transaction and thus the Code cannot apply *mutatis mutandis* (put simply, be extended to apply) to carriage by a non-commercial ship (despite Article 35 of Ship Act)[47]; (b) Others say it reasonable to apply the Code *mutatis mutandis* (be extended

[44] Whilst the definition is a ship "*used in navigation at sea*" "*for the purpose of conducting a commercial transaction*", we discuss the latter first as (1) and then the former as (2). This is because in original Japanese language the latter comes first. English version readers are requested not to be confused.

[45] The text of the provision reads to exclude a "*ship owned by the governmental or other authorities*" (Article 1, para. 1 and Article 35, para. 1 of Ship Act). But it is commonly understood that "owned" therein shall in fact be interpreted not by ownership but by purpose of the ship (Recent academic views to this effect are found in Nakamura and Hakoi (n 29) 42 and Kobayashi (n 29) 35 among others) and for this reason it is called "governmental purpose ship". Limitation Act as discussed later in the paper straightforwardly excludes "ship used for governmental purpose".

[46] This Article is sometimes described as "Supplementary Article 35" as it is located in the final place of Ship Act under the heading of "Supplementary Provisions". But this heading therein has a different nuance from ordinary usage because the heading called Supplementary Provisions is usually used in a statute to identify the place collecting articles providing for the date of entry into force or transitional arrangements, etc. and its para. 2 also calls itself just "Article 35 … of Ship Act" when it refers itself in the replacement wording. See (n 52). Therefore, this paper does not call it "Supplementary" Article.

[47] Murata (n 29) 45; Hakoi (n 29) 22. The former says it is obvious because the said Article does not provide for *mutatis mutandis* application of the COGSA to non-commercial ships; the latter says a carrying ship in

to apply) to a fishing ship or other "profit-making ship" (by virtue of the said Article) even if they are non-commercial ships but the Code cannot be applicable to a "non-profit-making ship" (despite the said Article)[48]; On the other hand, (c) some academics argue in respect of the COGSA (Article 2, para. 1) incorporating the definition of a ship under the Commercial Code that, by virtue of Article 35 of Ship Act, the COGSA shall apply even to non-profit-making seagoing ships[49]. This view logically assumes that the Commercial Code also applies to such ships or non-commercial ships. The view (c) is a natural view from the text whilst we would say (a) and (b) are ideas trying to put priority at different levels to the doctrine that the Commercial Code is the law to be applied to commercial transactions over the wording in Article 35 of Ship Act[50]. In contrast, as discussed later, Limitation Act also defines without the requirement under (1) from the outset and clearly applies to ships both satisfying (1) and not satisfying (1).

As to the requirement under (2), (a) the provisions of the Code related to carriage of goods (originally by a seagoing ship in the definition of a ship) shall expressly apply *mutatis mutandis* (put simply be extended to apply) to carriage of goods by a non-seagoing ship as mentioned above (Articles 747 and 756, para. 1); and (b) the relevant provisions of the Code related to ship's collision and salvage (similarly, originally related to a seagoing ship) shall also expressly apply *mutatis mutandis* (be extended to apply) to ship's collision between a seagoing ship and a non-seagoing ship and to salvage of a non-seagoing ship (including salvage of cargo on board a

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carriage of goods by sea is naturally limited to a commercial ship. Toda and Nishijima (eds) (n 29) 159 [Nomura] also appears to adopt this view.

[48] Shigeta (ed) (n 29) 38 [Kazuhiko Shizuta]; Tamura and Hiraide (eds) (n 29) 131 [Hiraide]

[49] Kaichi Yamato, *International Carriage of Goods by Sea Act* (Kaibundo 1958) 27; Toda and Nakamura (eds) (n 29) 34 [Kurita]. The latter does not explicitly so argue but it simply says whether a ship is a commercial ship or not does not matter by virtue of Article 35 of Ship Act. This reads the author implicitly assumes this view. Hisashi Tanikawa, *Structure and Irregularities of Maritime Civil Law – Basic Theory of Maritime Civil Law Studies* in Osaka City University Law Library No. 12 (Yuhikaku 1958) discusses theoretical analysis of the law of maritime commerce and advocates that Book of Maritime Commerce in the Commercial Code includes provisions for maritime commercial law in the substantial sense (maritime enterprises law) plus those for what shall rather be called maritime civil law. As to Article 35 of Ship Act, he discusses whether it just provides what shall be provided in theory or provides extension of scope of application for the convenience of policy. But he does not seem to argue the said Article does not apply to carriage of goods (at 156-157).

[50] The Commercial Code, being special rules to more general law of the Civil Code, has a tradition from 19th century to adopt a notion of "commercial transaction" to define its general scope of application. Very roughly speaking, a transaction can be a commercial transaction when (a) its substance falls within the categories listed therein (Article 501), (b) when it is conducted as a business and its substance falls within other categories listed therein (Article 502), or (c) when it is conducted as a business by a merchant whatever its substance may be (Article 503). Book 2 of the Commercial Code (Commercial Transaction), following Book 1 (General Provisions) and followed by Book 3 (Maritime Commerce), constitutes nothing but to provisions for commercial transactions. The very requirement (1) in relation to the definition of a ship reflects this notion of "commercial transaction". Views (a)(b) are trying to put priority at different levels to this doctrine over the wording in Article 35 of Ship Act. In view (b), we encounter distinction between "profit-making" and "non-profit-making" ships (further different from commercial and non-commercial ships). Readers may well feel strange to hear the argument on the basis that a fishing ship is not a commercial but profit-making ship. No one would understand this unless he/she knows the idea of commercial transaction. Carriage falls type (ii) (Article 502 item 4) but fishery is type (iii). Accordingly, fishery may be a business and thus profit-making transaction but may not be a "commercial transaction" if not carried out by an entity who is not a merchant. It may be inevitable under the structure of the Commercial Code – or commercial law doctrine – but may sound dogmatic discussions to non-lawyers.

non-seagoing ship hereinafter) (Articles 791 and 807). The former reflects change of the definition of carriage by sea in the 2018 Amendment as discussed earlier; and the latter is expressly provided in the 2018 Amendment because commercial law academics had argued the necessity to such extended application on the grounds *inter alia* that 1910 Collision Convention provides it applies to collision between seagoing vessels and vessels of inland navigation thereunder (Article 1) and 1910 Salvage Convention also provides it applies to salvage between seagoing vessels and vessels of inland navigation thereunder (Article 1)[51]. Provisions in (b) shall further apply *mutatis mutandis* to a ship not satisfying requirements (1) and (2), or a non-commercial non-seagoing ship, *i.e.* a "*ship used in navigation exclusively in lakes, rivers, ports and harbors and other areas other than the sea but* not *for the purpose of conducting a commercial transaction*" (except for governmental purpose ship) (Article 35, para. 2 of Ship Act). As a result, the requirement under (2) is also displaced in these areas.

This follows a complicated application of the provisions of the Commercial Code summarized in the following table:

Ship / Area	commercial seagoing ship	non-commercial seagoing ship	commercial non-seagoing ship	non-commercial non-seagoing ship
Book 3 of Commercial Code in general (in principle)	Applicable (Definition of a ship)	Applicable *Mutatis mutandis* (Art. 35, para. 1 of Ship Act)	**Not Applicable**	**Not Applicable**
Carriage of goods[52]	Applicable (Definition of a ship)	**Views Divided**	Applicable *Mutatis mutandis* (Arts. 747 and 756, para. 1)	**Not Applicable**
Salvage	Applicable (Definition of a ship)	Applicable *Mutatis mutandis* (Art. 35, para. 1 of Ship Act)	Applicable *Mutatis mutandis* (Art. 807)	Applicable *Mutatis Mutandis* (Art. 35, para. 2 of Ship Act, Art. 807)

[51] Matsui and Oono (eds) (n 29) 138, 155; Hakoi (n 29) 202-203, 218; Kobayashi (n 29) 321-323, 346

[52] We would like to explain here how carriage of passengers is treated as we do not explain it in the main text. As is the case of carriage of goods, the former Commercial Code distinguished carriage of passengers by sea or not based on whether it was carriage in smooth waters or not (See Article 569 of the former Code at (n 18)). Then Articles 590 to 592 in Book 2 (Commercial Transactions) applied to carriage of passengers not by sea and Articles 777 to 787 in Book 3 (Maritime Commerce) applied to carriage of passengers by sea. The 2018 Amendment defines carriage by sea as carriage of goods and passengers by a seagoing or non-seagoing ship (Article 569, item 2) and therefore carriage by water has become all regarded as carriage by sea regardless of area. Instead, above provisions for carriage of passengers by sea is repealed and Articles 589 to 593 in Book 2 related to carriage in general shall now apply whether by sea or not by sea. In the end, carriages by a seagoing ship and by a non-seagoing ship are both subject to the same rules, as is the case of carriage of goods. (It is not through *mutatis mutandis* application of provisions originally for a seagoing ship to a non-seagoing ship in Book 3 but direct application of the same rules in Book 2.) But it is still a precondition that the carrying ship is a commercial ship, whether seagoing or non-seagoing. As Article 35, para. 1 provides for application of Book 3, it probably cannot apply to carriage of passengers covered by Book 2 either.

(Ship's collision)

Ship A / Ship B	commercial seagoing ship	non-commercial seagoing ship	commercial non-seagoing ship	non-commercial non-seagoing ship
commercial seagoing ship	Applicable (Definition of a ship)	Applicable *Mutatis mutandis* (Art. 35, para. 1 of Ship Act)	Applicable *Mutatis mutandis* (Art. 791)	Applicable *Mutatis mutandis* (Art. 35, para. 2 of Ship Act and Art. 791)
non-commercial seagoing ship	-	Applicable *Mutatis mutandis* (Art. 35, para. 1 of Ship Act)	Applicable *Mutatis mutandis* (Art. 35, para. 1 of Ship Act and Art. 791)	Applicable *Mutatis mutandis* (Art. 35, paras. 1, 2 of Ship Act and Art. 791)
commercial non-seagoing ship	-	-	**Not Applicable**	**Not Applicable**
non-commercial non-seagoing ship	-	-	-	**Not Applicable**

How to apply the Commercial Code to ship's collision is even more complicated because two ships are involved. As indicated in the above table, if we classify ships into 4 categories by the above requirements (1) and (2), we have to consider 10 patterns (as calculated by (4x4-4)÷2+4 or 4x4-3x2x1 or 4+3x2x1). In summary, it applies to collision between seagoing ships and between seagoing and non-seagoing ships, whether they are commercial or non-commercial ships, which further means it does not apply to collision between non-seagoing ships (3 patterns out of 10).
We would repeat that the Commercial Code is mainly intended to apply only to a commercial seagoing ship but it does not stop there; On one hand Article 35 of Ship Act extends the application of the Commercial Code to non-commercial seagoing ship (but its scope is unclear); on the other hand, the Code itself extends its scope of application to a commercial non-seagoing ship to a certain extent, thus making scope of applicability complicated. Attention must be paid.

4. Cases Where the definitions of the "sea" or a "ship" are critical

Discussions of the definitions of the "sea" and a "ship" until here are not simply academic ones to understand the object of legal regulations. They would occasionally cause substantial differences in real cases.
One example is found in ship's collision. It is to be noted that the Commercial Code has a special provision (Article 789) about negative prescription (time bar) for ship's collisions different from the principle under the Civil Code (Article 724).
Secondly and more importantly, they would become a matter of dispute in the context of applicability of unique system in maritime law - limitation of liability in a marine or pollution casualty. What has become an issue thus far in Japan in published cases is those related to Limitation Act. But if we also have a look at cases overseas, it cannot be completely denied that they would potentially become an issue even in Oil Pollution Liability Act. Now we would like to further discuss this second case.

(1) The "sea"

Limitation of liability under Limitation Act applies to a "ship" as defined in the Act, namely a "*ship used in navigation at sea except tender boat or other boat steered solely or mainly with oars and ship used for governmental purpose*" (Article 2, para. 1, item 1). In other words, Limitation Act applies, except for governmental purpose ships and ships with oars, not only to a commercial seagoing ship that are subject to the Commercial Code but also to a non-commercial seagoing ship to which the Commercial Code applies *mutatis mutandis* by operation of Article 35, para. 1 of Ship Act. On the other hand, Limitation Act does not apply to a non-seagoing ship whether she is a commercial or non-commercial ship.

Therefore, when considering the scope of application of the Act, what is "navigation at sea" or more exactly what is the "sea" within the meaning of a seagoing ship must be decided[53]. If we consider the "sea" used therein to be (1) an area other than smooth waters in accordance with the definition of carriage by sea under the former Commercial Code, not only a ship navigating the areas obviously not the sea such as lakes and rivers, but also a ship navigating the areas that are truly "the sea in the social common sense" such as most of the Tokyo Bay, Osaka Bay, and Seto Inland Sea, cannot limit the liability. Conversely, if we consider the "sea" to be (2) "the sea in the social common sense", the conclusion would be reversed (How to consider ports and harbors will be referred to later).

Prior to the 2018 Amendment, in the Decision of Tokyo High Court on 10 December 1992, Hanrei Jichi 108-10 and the Decision of Tokyo High Court on 17 October 1995, Hanrei Times 907-269 (the "*No. 8 Fujinomiya Maru*") the Court held that the "sea" in the concept of "ship used in navigation at sea" under Limitation Act does not include smooth waters and, therefore, the ship that navigate only in smooth waters is not a "ship used in navigation at sea" in Limitation Act and is not entitled to limit liability[54]. Subsequently in the *Neptune Z* in 2010, while the decision was still based on the premise that the "sea" in the Act does not include smooth waters in the same way as preceding precedents, it is held that a ship whose navigational area under Ship Safety Act was intended to be limited to smooth waters does not become a "ship used in navigation at sea" even if there was a fact that she has navigated outside such waters just by chance, but she can become such a ship and be entitled to limit liability if it can be said that she was in reality intended to navigate outside smooth waters[55].

In response to them, the prominent academics opposed that the "sea" shall rather be considered as "the sea in the social common sense"[56]. Under such circumstances, a recent Decision of

[53] Although there is no definition of a ship in LLMC, the same issue arises because the owner of a ship, who is an entity entitled to limit liability, is defined as the owner and others of a "seagoing ship" (Article 1, para. 2). This is the same in its predecessor, the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships (the "**1957 Convention**") (Article 1, para. 1).

[54] This view was simply described as prevailing view in Tokioka *et al* (n 29) 26 [Tokioka] (1979), commentaries by draftsmen at the time of initial enactment of Limitation Act when Japan ratified the 1957 Convention. The Court might have adopted it as prevailing view. However, Inaba and Terada (n 29) 61-62 (1989), commentaries by draftsmen at the time of the revision of Limitation Act when Japan acceded to LLMC, has already adopted a neutral explanation that there are prevailing view and objecting view.

[55] The actual location where the accident occurred was in smooth waters in Osaka Bay (and further in the port area of Kobe). But the trading warranty of the ship's insurance extended to outside smooth waters and she had in fact been navigating there immediately before.

[56] Formerly Ishii and Ohtori (n 29) 14-15; recently Nakamura and Hakoi (n 29) 45-46

Fukuoka High Court on 4 February 2021, Kaijiho 252-59 (the "***Houn Maru***") decided that the "sea" under Limitation Act means "the sea in the social common sense" and hence a ship navigating in waters considered as the sea in the social common sense is entitled to limit liability under Limitation Act[57]. This is a decision diverted from previous ones. The Court pointed out that the statutory grounds for treating carriage by ship navigating in smooth waters as the same as carriage by land and excluding the former from application of the law of maritime commerce were lost under the 2018 Amendment, and held,

> *"Ship Safety Act, aiming to maintain the seaworthiness of ships and preserve safety of human life, divides the navigational areas of ships into four areas, namely, smooth waters, ..., and imposes administrative regulations on ships according to their characteristics ... The purpose of this legislation is not necessarily equal to that of the law of maritime commerce, guiding principle of which is to govern legal relationships in private law. There is little necessity to align the definition of a seagoing ship under the law of maritime commerce by adopting the definition of smooth waters under Ship Safety Act. It is thus reasonable to construe the law of maritime commerce and Limitation of Liability Act shall apply to a ship navigating the areas that are regarded as the sea in the social common sense, as being a seagoing ship thereunder."*

This is considered to have accepted the criticisms by prominent academics mentioned above. This decision was made after entry into force of the 2018 Amendment but the relevant accident had occurred before entry[58]. The Court also stated in this point that the fact that this accident occurred prior entry into force of the 2018 Amendment shall not affect the above interpretation because there was no substantial reason to make the abovementioned alignment and because Supplementary Provisions of the 2018 Amendment provides that the amended law shall also apply to matters that occurred prior to entry into force thereof. As the 2018 Amendment certainly abandoned the idea to classify navigational areas into the "sea" or others in commercial law in accordance with smooth waters under Ship Safety Act, this would be a logical consequence. This Decision may prevail in the future[59].

Strictly speaking, however, not all the problems will be solved even if it prevails. The remaining issue is where to draw the line of "the sea in the social common sense". Apparently, this may be a matter of individual fact-finding, but it should be noted that the current Commercial Code still adopts an expression that "lakes, rivers, ports and harbors and other areas other than the sea" in a distinction between a seagoing ship and a non-seagoing ship, so it appears that "ports and harbors" (although it is narrower than the former "smooth waters") are yet treated as if not the "sea" under the Commercial Code. However, we must also say ports and harbors must also be nothing but the "sea in the social common sense"[60].

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[57] This decision has become final and conclusive without a special appeal to the Supreme Court. The decision also contains a new judgment regarding reckless act with knowledge discussed in paper No. (1) in this series. It is noteworthy that the Court adopted an approach different from the approach in the *Erna Oldendorff* in 2020 discussed therein. However, we need to postpone to discuss it till a later date.

[58] The 2018 Amendment entered into force on 1 April 2019. The accident took place on 4 September 2018, the previous year.

[59] Matsui and Oono (eds) (n 29) 57 explains, however, that the 2018 Amendment does not intend to solve the conflict situation about how to interpret the "sea" – between areas other than smooth waters in "traditional prevailing view" *versus* the sea in the social common sense in "recent prominent view".

[60] The answer may be different depending on which area you have in mind as ports and harbors. For instance,

A similar issue in respect of the concept of the "sea" can logically arise in Oil Pollution Liability Act too. The subjects of application of Oil Pollution Liability Act are "tanker", namely "ship/boat etc. for the carriage by sea of crude oil, etc. in bulk" and a "general ship", namely "ship/boat etc. for the carriage by sea of passengers or cargoes and other goods other than crude oil, etc. in bulk" (except ships with oars and governmental purpose ships) and thus "carriage by sea" or the concept of "sea" is the precondition for application (Article 2, items 9, 10, Article 62). However, unlike Limitation Act in general, these ships are subject to regulations such as compulsory insurance and issue of related certificates. The subject ships are virtually determined at the stage of determining whether they are subject to such regulations. Whether a ship is the subject of the Act or not does not become an issue only after a casualty occurs. (Her owner needs to take measures to comply with such regulations if applicable, as confirmed in advance.) So, it would be unlikely that this issue is brought before the Court. In practical point of view, the MLIT has issued a QA related to issue of certificates in line with the entry into force of the revised Oil Pollution Liability Act when Japan acceded to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the "**Bunker Convention**") and the Nairobi International Convention on the Removal of Wrecks 2007 (the "**Nairobi Convention**"). It says, "*Q4: Does it also apply to a ship navigated only in smooth waters? – It applies to a ship navigated at sea regardless of navigational area*"; and "*Q5: Does it also apply to a ship navigated only lakes, marshes, or rivers? – It does not apply (only applies to a ship navigated at sea)*[61]." An owner needs to confirm with the relevant administrative authorities in advance whenever he has a slightest doubt. Of course, the relevant administrative authorities' opinion is not ultimately binding on Courts. We cannot completely rule out the possibility that their interpretation will be challenged later after the accident occurred and the Court will adopt a different interpretation. See also the example in Greece discussed below with respect to the definition of a "ship".

(2) A "ship"

Since the subject of limitation of liability under Limitation Act is a "ship" defined therein as discussed, whether a certain structure is a "ship" (apart from that she satisfies "navigation at sea" or the "sea" or not) is also decisive in determining whether she is entitled to limitation. The *Neptune Z*, involving a crane ship without self-propulsion power, was also the judicial precedent in this respect. This was already discussed in 3. (1) b. and will not be repeated.

Again, a similar issue can logically arise in Oil Pollution Liability Act. If you look back at definitions described above, both "tanker" and "general ship" will eventually be "*ship/boat etc. for the carriage by sea*" (except ships with oars and governmental purpose ships) and its definition will be an issue. (Its definition is not directly linked with a definition of a "ship" in other public maritime laws and the Commercial Code discussed previously but it turns out a definition of a "ship" again

please compare the "sea" in front of Yamashita Park in Port of Yokohama and legal port and harbor area of Kashima (See https://www.mlit.go.jp/kisha/kisha07/11/110308/01.pdf accessed 15 October 2021). The latter area outside the breakwater is nothing but the Pacific Ocean.

[61] See Website of MLIT "Amended Oil Pollution Liability Act – Q&A (Frequently Asked Questions)" (https://www.mlit.go.jp/maritime/content/001426709.pdf) accessible via "Steps to be taken to meet with Amendment of "Act on Oil Pollution Liability"" (https://www.mlit.go.jp/maritime/maritime_tk6_000035.html) (both accessed 15 October 2021). No reference is made herein to a ship navigating only in "ports and harbors".

under the original CLC/FC as discussed below). However, for the same reason as explained in relation to the "sea", it is virtually determined at the stage of determining whether they are subject to regulations and it is unlikely that the issue is brought before the Court. The aforementioned QA related to issue of certificates by the MLIT includes explanations that ships not subject to the Act are those without "gross tonnage under Ship Act" and "international gross tonnage under the Act on Measurements of Tonnage of Ship" (*e.g.* domestic barges without propulsion power), and the examples include, "following ships without propulsion power: service ships (anchor handling ships, dredgers, crane ships and crane barges), barges, floating platforms (FSO, FPSO), floating docks and moored ships"[62].

Now, with regard to the interpretation of this term "ship" (or ultimately "*ship/boat etc. for the carriage by sea*" under Oil Pollution Liability Act of Japan), as is the case of interpretation of the "sea", the relevant administrative authorities" views are not ultimately binding on Courts. Therefore, the possibility that their interpretation will be challenged later after the accident occurred and the Court will adopt a different interpretation cannot be ruled out. Contrary to the "sea", there is an overseas case where the administrative interpretation was challenged after the accident occurred and the Court did give a different interpretation, which resulted in a major international issue. We now would like to introduce the case. It is related to a tanker oil pollution under Oil Pollution Liability Act if occurred in Japan to be compensated by the IOPC Fund under FC, to which Japan contributed too and in which Japan had substantial interests.

This is what is called Slops case, disputed in Greece[63]. The subject was what is called Slops, originally an oil tanker who was later adapted, screws removed, engines sealed, anchored to the seabed and used as an oil waste receiving facility. It caused oil spill. Its owner and the IOPC Fund got sued on the ground that the Slops shall fall within what CLC/FC states as a "ship", and the Greek Supreme Court affirmed liabilities for compensation in 2006. This differed from what the Greek governmental authorities and the IOPC Fund had understood. Although the ship registration in Greece was maintained after the adaptation to this Slops, it was considered not to be a "ship" as provided in CLC/FC, and no compulsory insurance was concluded and no certificate was issued. The Greek government authorities did not appear to consider it problematic. It was also the view of the IOPC Fund managing FC. However, after the accident, the people involved in this accident sued the registered owner and IOPC Fund before the Court in Greece alleging that this Slops was a "ship", and it went all the way to the Grand Bench of the Supreme Court, who affirmed the claims[64]. Since this was the binding judicial decision of a Member State, the IOPC Fund had to pay accordingly. In response to this, there seems to have been considerable debates in the IOPC Fund as to whether a reimbursement action should be brought against the Greek government for their breach of the Convention – the Greek government did not regulate the Slops as a subject of the Convention – but this idea was not pursued in the end.

The background of this issue seems to be the definition of a "ship" under CLC/FC, "*any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo*" followed by the proviso "*provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during*

[62] MLIT (n 61). There are also detailed regulatory classifications depending on gross tonnage of ships or tonnage of transported crude oil in case of tankers.

[63] The explanation that follows relies on the IOPC Fund, *Annual Report 2006*, 94-100; *Annual Report 2008*, 90-95; Tomotaka Fujita, 'The Implementation of Uniform Private Law: The Case of IOPC Fund', (2014) Hokkaido Law Rev 63-2-105,123-126.

[64] See the IOPC Fund (n 63) (2006) 99 and Fujita (n 63) 124-125 for the Greek Supreme Court judgment

any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard" (Article 1, para. 1 of CLC and Article 1, para. 2 of FC). Consequently, there seems to have room for an interpretation that the Conventions appear to contain two categories of definitions, namely "*vessel (ship) constructed or adapted for the carriage of oil in bulk as cargo*" and "*ship capable of carrying oil and other cargoes*" and only the latter would need to be in the voyage during or immediately after the carriage. As the definition style in Oil Pollution Liability Act of Japan is different, it does not necessarily seem possible to interpret it in the same manner[65]. But since Japan also contributes to the IOPC Fund, this case was not irrelevant. This case is introduced as one of the cases in which, if the interpretation of the uniform private law convention becomes divided among member states, the problem is not only we could not unify the law in practical terms, but also the maintenance of the convention scheme itself would be at risk[66].
The IOPC Fund subsequently discussed the concept of the definition of a ship subject thereto again, and published detailed guideline about the definition[67] (although the interpretation of the Conventions is left to the Courts of Member States and, therefore, they have no binding force). They gave up making the definition as such but took a style to raise examples where it is obviously subject to CLC/FC and obviously not subject to CLC/FC. It is indicated that, if ambiguous, one must consider whether it is used in maritime transport chain. In fact, this is not an attempt to define a "ship" as such at an abstract level but an attempt to define a "*vessel ... constructed or adapted for the carriage of oil ... as cargo*" under CLC/FC, corresponding to a "ship/boat etc. for the carriage by sea" under Oil Pollution Liability Act. An attempt to define it having regard to underlined qualifying words.

(3) Conclusion

We have discussed at length how to consider the basic concepts of the "sea" or a "ship". It is not merely a discussion of abstract words but it defines the scope of application of unique systems in maritime law, namely Limitation Act and Oil Pollution Liability Act to bring about a substantial difference in practice. In that sense, it has the same function as reckless act with knowledge considered in paper No. (1) of this series.
On one hand, the limitation of liability under these systems permits liable persons to be *de facto* exempt from their liability for an amount in excess of their limitation (conversely, the victim is not given remedy to that extent) and therefore it is sometimes severely criticized for being biased toward protecting shipowners or shipping industries[68]. On the other hand, these systems are linked to the systems of compulsory insurance and/or international compensation fund at least for oil pollution damage – in case of tanker oil pollution damage, up to the amount under CLC/FC

[65] The Proviso in CLC/FC does not appear in the definition of tanker Oil Pollution Liability Act, but appears in the definition of tanker oil pollution damage for the purpose of limiting its scope (Article 2, Item 14 (a)).
[66] Fujita (n 63) 130-132
[67] The IOPC Fund, *Guidance for Member States Consideration of the definition of "ship" 2016 Edition*
[68] In litigations challenging limitation of liability, claimants have often presented arguments that Limitation Act would be unconstitutional in Japan. Some claimants in the *Erna Oldendorff* in 2020 (later reported at Hanrei Jiho 2490-35) also so argued. Hideaki Ozawa, 'Legal Responsibilities of the Grounding Accident off Mauritius' (2021) Horitsu Jiho 93-6-98 at 103 points out, "*It is certainly very unusual from a straight sense of justice to discard the damage suffered by those who had no fault at all. We shall say that at least companies advocating CSR in the present are required to make a decision fully aware of their social responsibility in exercising their rights under the Shipowner's Limitation of Liability Act.*"

(Articles 13 *et seq* and 22 *et seq* of Oil Pollution Liability Act); in case of general oil pollution damage other than the above, up to the amount under LLMC (Articles 41 *et seq* of Oil Pollution Liability Act) – and for other cases, in other words for cases where only Limitation Act is applicable, one is required to constitute an actual fund at least under Limitation Act of Japan (Article 19 *et seq*) in order to actually limit his liability, and thereby the systems are designed to ensure payment up to the amount of such fund (on the assumption that the claim is verified in accordance with the general principles under the law of damages). To these extents, these systems are also designed to contribute to the protection of victims.

In that sense, we do not believe these concepts that would define the scope of the availability of these systems shall simply be interpreted as narrowly as possible (and reckless act with knowledge discussed in paper No. (1) of this series shall be interpreted as broadly as possible to the contrary) and thereby the limitation of liability shall be made available as difficultly as much as possible. We think efforts shall continue to be made to interpret them in an appropriate manner having due regard to all relevant circumstances[69].

[Opinions herein are personal opinions of the author in the present and not opinions of corporations or organizations he belongs to. This paper shall not be construed to give legal advices to any specific cases.]

[69] The circumstances would include that these systems are global schemes developed and operated through international conventions over many years and therefore it would be difficult for only Japan to adopt an extreme interpretation. It would also be inappropriate for only Japan to be disengaged from the international schemes under the relevant conventions. Indeed, Japanese Government and industries seem to have taken important roles in the international schemes under the relevant conventions, including maintenance of the schemes (through contributions to the fund and mutual insurance) as well as revisions for increases in legal limitation amounts.