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Invitation to the Japanese maritime law from key concepts (4) — the "ownership" of a ship and a "shipowner"

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[Executive Summary]

The concept of "ownership" of a ship is a concept in the Civil Code (property law) and is not solely applicable to a ship. However, in the case where a ship is owned, we can point out the following characteristics: (i) a person who is qualified to the ownership (who can own) may well be restricted in the context of the nationality of a ship; (ii) the ownership is subject to registration; and (iii) there exist special rules in co-ownership. Due to the characteristics in (i) and (ii), when a ship is sold by operation of a judicial process (compulsory auction and others) without consent of the seller, an effective transfer of nationality and registration is not always internationally guaranteed. In the circumstances a treaty to deal with such situation, the United Nations Convention on the International Effects of Judicial Sales of Ships, was adopted last year and its signing ceremony will be held this September.

The concept of a "shipowner" does not necessarily simply mean a person who owns a ship. In the Japanese academic views in commercial law, the term of a "shipowner" is construed to be restricted to a person who conducts "maritime business activity" with its owned ship (a person who is a "maritime business entity"). Its employer's liability among others is based on such construction. However, emphasis of the restricted concept of a shipowner based on the concepts of "maritime business activity" and "maritime business entity" seems divergent from the perception of practitioners engaged in shipping business and from the assumptions in Maritime Transportation Act and other public regulations. The author is concerned about whether we can correctly understand the current realites of shipping business by starting discussions solely with the concepts of "maritime business activity" and "maritime business entity" under the law of maritime commerce.

In addiiton, the former Commercial Code provided that a party to provide the transportation service in a contract of carriage by sea was a shipowner, not a carrier. A party to a charterparty is yet an owner, who is not necessarily a person who owns a ship in fact. In public laws and regulations related to maritime affairs the provisions applicable to a shipowner are alternatively applicable to a borrower of a ship, a manager of a co-owned ship (and in the case of Seafarers Act further to other employers of seafarers), which we may say means the term of a shipowner

is used in a broader sense than a person who owns a ship. But perhaps this is a matter of terminology. We can also understand that the statues use the term of a shipowner no more than within a meaning of a person who owns a ship (the provisions of the former Commercial Code had not adopted the concept of a carrier as they had been drafted mainly assuming a sitiation where such a person was a party to provide the transportation service). But it should be noted that the academics in commercial law goes beyond to adopt a restrictive construction of the concept of a "shipowner" as above explained, which contruction is linked with a systematic understanding of the law of maritime commerce and the concepts of maritime business activity and maritime business entity in such system.

In private law, the typical liability of a shipowner is its employer's liability based on the restrictive construction of a shipowner in the above academic views in commercial law. In addition, Oil Pollution Liability Act provides for strict liability and channeling of liability of a registered shipowner for tanker oil pollution damage, joint and strict liability of a shipowner and others for general ship oil pollution damage, and strict liability of a shipowner for damages arising from a shipwreck. They are not linked with the said restrictive construction. Considering that an accident in the operation of a ship could directly trigger an environmental disaster, it is submitted that these responsibilities would be as critical as the ordinary employer's liability.

In public law, a person defined as a shipowner in the relevant laws and regulations shall have the responsibilities to comply with the rules under such laws and regulations. However, the scope of responsible entities has been expanded through the introduction of the concept of a "company" in the ISM Code. The substance of regulations is also becoming increasingly stricter and more sophisticated. One example is that the 2009 Ship Recycling Convention is eventually confirmed to come into force in 2025. In those circurmstances, an occasionally emerging issue is that whether costs for meeting those regulations shall been borne solely by a shipowner at all times. Last year, the BIMCO adopted standard clauses for a time charter to cope with two regulations to reduce greenhouse gases (the application of EU-ETS to shpping industry and the EEXI regulations/CII rating system under MARPOL) respectively, both of which contained additional responsibilities of a time charterer. But the clause for the latter regulations is strongly criticized and the future outlook remains to be seen.

1. Introduction

We will discuss a "shipowner" and a notion preceding thereto, the "ownership" of a ship, in this essay.
Apparently, these two concepts are quite simple and clear. But the concept of a "shipowner" may have different meanings from a person who merely owns a ship. And such "shipowner" has responsibilities not found in an "owner" of a "thing"[1] in general under the Civil Code. And a notion preceding thereto, the "ownership" of a ship, has characteristics and issues not found in the "ownership" of a "thing" in general under the Civil Code.
We can only make quite a general review to cover a wide range of topics. But I believe it not meaningless to start with such a general review because a person who stands in the first position

[1] This is an English translation of an original Japanese word [*mono* or *butsu* 物], as adopted in the translation by the Ministry of Justice in Japan. This may also be translated into "property" or "object".

in the chain of legal relationships related to the use of a ship is a person who "owns" a ship in question (or a "shipowner" who is apparently an alteranative expression thereto). The order of discussions shall first be the "ownership" of a ship and then the main topic of a "shipowner".

2. Ownership of a ship

A ship is a type of a "thing" as referred to in the Civil Code under Japanese law and is the object to be owned (subject to ownership).

The concept of "ownership" of a ship is a concept in the Civil Code (property law) and is not uniquely applicable to a ship. To discuss the ownership in general goes beyond the author's ability and is not the purpose of this essay. Here we would like to discuss a couple of characteristics of "ownership" of a ship arising from its special nature that differ from "ownership" of a "thing" in general in the Civil Code.

In the first place, as explained in the previous essay in this series,[2] a ship has a nationality. A person who is qualified to the ownership (who can own) may well be restricted in the context of the nationality requirement of a ship. It is the case at least in Japanese law. An owner shall be a Japanese national (including a Japanese juridical person who satisfies certain requirements; the same shall apply hereinafter) (Article 1 of Ship Act). Reflecting such characteristics, in the case of a Japanese ship, the law recognizes for the purpose of maintaining her Japanese nationality the right of an equity holder to demand transfer equity of another equity holder if a shipowner is an equity company who has two or more equity holders and the right of a co-owner to demand transfer co-ownership share of another co-owner if there are two or more co-owners, *i.e.* if a ship is co-owned by them (Articles 691 and 700 of the Commercial Code). Put it another way, the ownership of a ship is subject to restriction associated with the nationality.

Secondly, a ship is a type of "movables" within the meaning of a "thing" as referred to in the Civil Code,[3] but as is also explained in the previous essay of this series, she has an aspect similar to immovables in the sense that the contents of the right is registered and publicly announced (As to property registration [*toki* 登記], Article 686 of the Commercial Code, Article 34 of Ship Act and Ship Registration Order; As to administrative registration [*toroku* 登録], Article 5 of Ship Act).[4] In the case of a Japanese ship, the requirement for the perfection of transfer of ownership is *not* physical delivery as in the case of a movable property (Article 178 of the Civil Code) *but*

[2] Akiyoshi Ikeyama, 'Understanding the Japanese maritime law from key concepts (3) – the "nationality" of a ship' (https://abesakata.com/archives/392?en (last accessed 22 August 2023)) 19. According to Article 1 of Ship Act, if the ownership of a ship is transferred from a Japanese national (including a Japanese juridical person who satisfies certain requirements; the same shall apply hereinafter) to a non-Japanese national, she will automatically cease to be a Japanese ship, and conversely, if the ownership is transferred from a non-Japanese national to a Japanese national, she will automatically become a Japanese ship.

[3] Under the Civil Code, a thing is either immovables defined as "land and its fixture" or movables defined as a "thing other than immovables" (Article 86).

[4] A small ship with gross tonnage of less than 20 tons is not subject to registration under the Commercial Code (Article 686, Paragraph 2 of the Code) but instead subject to registration under the Act on Registration, etc. of Small-Sized Ships ("**Small-Sized Ships Registration Act**") and required to be registered with the small-sized ship registry (this is a system in which property register [*toki*] and administrative register [*toroku*] are merged) in principle (Articles 2 and 3 of the Act). In addition, the requirement for perfection of transfer of ownership as will be discussed later is the said registration (Article 4 of the Act). The attachment order by the Court is also registered in the said registration (Article 27 of the Act, Article 98-2 of the Civil Execution Rules).

registration in the ship's register *plus* entry in a ship's nationality certificate (Article 687 of the Commercial Code; see also Articles 5 and 6-2 of Ship Act as to the issue and endorsement on a ship's nationality certificate). Reflecting such characteristics, the method of compulsory execution is also special. Basically, a special measure is adopted in view of the special nature as movables *i.e.* she can physically move freely in the sea (forfeiture of a ship's nationality certificate; see Article 112 *et seq.* – in particular Article 114 – of Civil Execution Act). In the case of a Japanese ship, an attachment order by the Court is also registered in the same manner as in the case of immovables (Articles 121 and 48 of the said Act).
Thirdly, the special provisions for the case where a ship is co-owned are stipulated in the Commercial Code (Article 692 *et seq*.) in addition to the basic stipulations (Article 249 *et seq*. of the Civil Code).[5] Some of these provisions, *e.g.* the right of a co-owner who objects to the commencement of a new voyage or a major repair not planned in advance among the co-owners to demand the purchase of its co-ownership share (Article 694), are construed as default rules. The provision for the appointment and registration of a ship's husband by her co-owners (Article 697) is construed to be a compulsory rule. A ship's husband herein has the power to represent the co-owners with respect to the certain matters concerning the use of a ship and has the obligation to prepare calculation about the use of the ship and seek the approval of the co-owners for each period of time. It is an entity different from a ship manager or ship management company in practice (who is entrusted to manage a ship by her owner) who is to be discussed later in this series.[6]
A caution must also be paid when a practitioner explains that a ship is co-owned. If listened carefully, the real situation may not be the (legal) co-ownership of a ship with characteristics as just explained but the "co-ownership" like status of the legal owner of a ship, which means the situation where respective persons have "shares" of a corporation who has the sole ownership of a ship.

A technical legal issue reflecting the first and second characteristics just explained is that, in the event that ownership of a ship is transferred without sale or any other contract between the parties (typically by the compulsory judicial procedure of attachment and auction) and it triggers the change of her nationality, it may well be the case that the party losing the ownership will not cooperate in any procedures to change her nationality and registration in both previous and new countries and thus those changes are not necessarily always guaranteed to take place smoothly as a matter of fact. For example, if (a) a Japanese court auctions (b) a foreign ship and (c) a

[5] Strictly speaking, these are provisions for "co-owners" of a ship. As discussed later in this essay, the concept of a "shipowner" which perhaps logically comes before the concept of "co-owners", is understood in academic views in commercial law to mean a person who does not merely own a ship but conducts maritime business activity with its owned ship. Under such proposition, the provisions for co-owners of a ship are perhaps to apply to the case where a ship is co-owned by a group of shipowners in that sense. It is also argued that provisions for a partnership [*kumiai* 組合] under the Civil Code shall also apply. We shall discuss thie pont later in this essay too.

[6] The original Japanese word of a ship's husband herein is [*senpaku kanrinin* 船舶管理人], which may also be translated as a "managing owner", or more literally a "ship manager". A "ship's husband" is a translation adopted in the translation of the Commercial Code by the Ministry of Justice. In so far as we discuss in English, it is clear that a ship's husband and a ship manager (ship management company) in practice are different. But if we discuss in original Japanese, it may well be confusing that these two both use the words of [*senpaku kanri* 船舶管理]. Confusion may also arise in English if the same translation words (ship manager) are used. A caution shall be paid to these possibilities.

purchaser (new owner) is a non-Japanese national (and therefore the ship remains a foreign ship before and after the auction), the original registry (the registry of the country for the former owner) may or may not recognize the loss of ownership through the Japanese court proceedings and the new registry (the registry of the country for the purchaser) may or may not recognize the acquisition of ownership through the Japanese court proceedings. If (a') a foreign court auctions (b') a Japanese ship and (c') a purchaser (new owner) is a Japanese national (and therefore the ship remains a Japanese ship before and after the auction), the Legal Affairs Bureau and Transportation Bureau of Japan, which are the original and new registries (the registries of the country for the former owner and for the purchaser) may or may not recognize the loss and acquisition of ownership through the foreign court proceedings.[7]

Against this background, the draft United Nations Convention on the International Effects of Judicial Sales of Ships was approved on 30 June 2022 by the General Assembly of the United Nations Commission on International Trade Law (the "**UNCITRAL**") and adopted as the Convention on 7 December 2022 by the UN General Assembly.[8] The signing ceremony is scheduled to be held in Beijing on 5 September 2023 to be known as the Beijing Convention.[9]

This Convention defines a "judicial sale" as any sale of a ship ordered, approved or confirmed by a court or other public authority by way of public auction among others in which the proceeds of sale are made available to the creditors (Article 2(a)). It then provides for the issue of a certificate (Article 5) by the authorities upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale (The clean title is defined in Article 2(a) and construed to mean an ownership without restriction in which the purchaser is free from an assertion of any security and lease interests that had occurred in the ship with the former owner); the validity of the judicial sale with the certificate in other State Parties (Article 6); and the obligation of the registry in the State Parties to delete the former registration and accept the new registration based on the certificate (Article 7).[10]

This Convention does not try to unify the substantive law such as (i) the effect of a judicial sale under the laws of each country and (ii) the qualifications for registration of a ship. As for (i), the issue is whether a purchaser (new owner) will acquire the clean title under the law of a country where a judicial sale is conducted. Under Japanese law, if an auction is held, maritime lien and mortgage will extinguish but possessary lien and registered lease among others will survive (Article 701 of the Commercial Code, Articles 121, 59, and 83, Paragraph 1 of the Civil Execution

[7] Tetsuro Nakamura, 'Recognition of Foreign Judicial Sales of Ships', (2010) 54 JMLA 35 at 36 explains some countries grant cancellation of registration and new registration by reason of Japanese court proceeding and others do not; and there was no precedent as of 2010 of the converse case where a Japanese national purchase a ship in a foreign court proceeding and tries to register her as a Japanese ship.

[8] As to the process of deliberations in the UNCITRAL, see Tomotaka Fujita, 'Draft Convention on the Recognition of the Judicial Sales of Ships: The Current Discussions in UNCITRAL', 'Ditto (No.2)' and 'Ditto (no subtitle) (No.3)', respectively (2020) 64 JMLA 109, (2021) 65 JMLA 65 and (2022) 66 JMLA 115. The title of the Convention was changed during the deliberation. The text of the Convention can be found at the press release by the UNCITRAL at https://uncitral.un.org/en/judicialsaleofships (accessed 20August 2023).

[9] See the UN press release at https://unis.unvienna.org/unis/en/pressrels/2022/unisl335.html and the UNCITRAL's information brochure at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/info_brochure_bjss_and_signing_ceremony_en.pdf (accessed 20 August 2023).

[10] Any claim or application to avoid or suspend the effect of a judicial sale conducted in a State Party shall be subject to an exclusive jurisdiction of the said State (Article 9) whilst the other State Pary may exceptionally deny its effect in the said other State if a court of the said other State determines that the effect would be manifestly contrary to the public policy of the said other State (Article 10).

Act). There are differences in this point according to the law of each country. This Convention does not include the effect to grant the clean title in the definition of a judicial sale but provides that the obligation to issue a certificate is restricted to the case where the clean title is as a matter of fact granted in a particular case (Article 5, Paragraph 1) and that the international validity and the obligations of registration authorities are restricted to the case where such certificate is issued and presented (Articles 6 and 7, Paragraph 1), thereby establishing the framework for its international validity only when a clean title is actually granted.[11] As for (ii), an owner of a Japanese ship is required to be a Japanese national under Japanese law (Article 1 of Ship Act) and a person who does not satisfy this requirement is naturally unqualified to be registered as an owner of a Japanese ship even if it is a purchaser of a ship. This also varies from country to country. The Convention provides that a ship and a person in whose name the ship is to be registered shall meet the requirements of the law of the State of registration (Article 7, Paragraph 1, Item (c)), but no further. Presentation of a certificate does not guarantee the new registration by virtue of this Convention regardless of this requirement.
Further details of the Convention, the prospect of its entry into force, and the pros and cons of Japan's accession to the Convention are outside the scope of this essay. However, it may be worth repeated that the need to consider international rules such as the Convention may have reflected the characteristics of the ownership of a ship.

3. Shipowner

A shipowner stands in the first position in the chain of legal relationships related to the use of a ship and is the most important entity in the law of maritime commerce and public laws related to maritime affairs. However, a shipowner does not necessarily mean a person who merely owns a ship. A restrictive construction is adopted in (1) as discussed below; and we may say in some cases, as in (2) and (3), a person other than a person who owns a ship is also called a shipowner.

(1) Shipowner in the Commercial Code and "maritime business entity"

First of all, it is important to note that the Japanese academics in commercial law have traditionally considered that the concept of a "shipowner" has a special meaning (a restricted meaning). For example, the most recent textbook of the law of maritime commerce published after the 2018 Amendment of the Commercial Code argues, "*A shipowner generally means a person who owns a ship* (owner of a ship, Shiffseigentümer, propriétaire de navire) *in a broader sense, but in a narrower sense, it means a person who actually conducts maritime business activity with its owned ship,* i.e. *a person who is generally called a shipowner* [senshu 船主] (shipowner, Reeder, armateur)*. In this sense, a shipowner is an outfitter who performs maritime business activity by its own outfitted ship and is distinguished from a person who merely owns a ship but does not*

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[11] The scope of a judicial sale subject to the Convention (whether it shall be limited to a sale granting the clean title; and if so, whether it shall be limited to a sale always granting it under the laws of a State Party or whether it may include a sale as a matter of fact granting it in a particular sale); and what is the validity of a judicial sale (an early stage draft could read to try to unify the law to the effect that it shall grant the clean title as a substantive effect of a judicial sale) were major issues during the deliberation process. They were finally settled as discussed above. Reportedly what had been advocated by Japan at an early stage was eventually adopted. See Fujita (n 8) (No. 1) at 114, 121-122, 129-130, 143-144, and (No. 2) at 67-68, 87-88.

use her for maritime business activity." [underlined by the citator][12] It distinguishes the term in a "broader sense" and a "narrower sense" and says a shipowner in the real sense, who is meaningful in terms of the Commercial Code, is the latter. We would say this is a firm idea in the Japanese academics in commercial law.

This idea may be based on the idea that the Commercial Code represents the law of business activity (the business law theory of commercial law) and the law of maritime commerce, which constitutes a part of the Code, shall be the law of "maritime business activity" (business activity conducted by a ship) at least in principle; and that a shipowner governed by the law of maritime commerce must therefore be a shipowner who is the entity conducting the "maritime business activity" ("maritime business entity") in theory.[13] Put it another way, the concept of a shipowner by academics in commercial law is inseparably linked with the concept of a "maritime business entity."

In fact, if you look at the table of contents of reputable textbooks of the law of maritime commerce in Japan, they often divide the categories of subjects of the law into the organizations for maritime activity and the maritime activity itself; further divide such organizations into the physical organizations and the human organizations; the human organizations are further conceptualized as a "maritime business entity"; and a "shipowner" is its first category (the corresponding physical organization is a "ship"). The table below is the divisions of categories shown in those textbooks (See the footnote for the full name of textbooks).[14] Some books avoid the word of "maritime business entity" and instead adopt the concepts of "business voyage entity" or "ship

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[12] Noboru Kobayashi, *New Law of Maritime Commerce* (Shinzansha Shuppan 2021) 61-62

[13] See Kobayashi (n 12) 5, 61. Noboru Kobayashi, 'Entity and Assistant of Ship Operation' in Seiichi Ochiai and Kenjiro Egashira (eds), *Encyclopedia of Maritime Law in Commemoration of Centennial Anniversary of Japan Maritime Law Association* (Shoji Homu 2003) 3 at 4 explains, "A maritime business entity, who is a ship operation entity, is a person who conducts maritime business activity by using a ship for operation". In other words, it means to say a maritime business entity is a "ship operation entity" or a "person who conducts maritime business activity by using a ship for operation."

[14] Textbooks appearing in the table are: Sozo Komachiya, *General Commentaries on Law of Maritime Commerce Vol. 1* (Iwanami Shoten 1932) 45-247; Teruhisa Ishii and Tsuneo Ohtori, *Law of Maritime Commerce and Insurance* (Keiso Shobo 1976) 12-56; Seiji Tanaka, *Detailed Commentaries of Law of Maritime Commerce* (Supp 3rd edn, Keiso Shobo 1985) 67-221; Seiji Tanaka and Taichi Haramo, *New Edition of Law of Maritime Commerce* (all rvsd edn, Chikura Shobo 1989) 31-133; Harumi Murata, *Legal System of Maritime Commerce* (Seizando Shoten 1990) 50-125; Shuzo Toda, *Law of Maritime Commerce* (New 5th edn, Bunshindo 1990) 11-87; Shuzo Toda and Umeji Nishijima (eds), *Seirin Hogaku Sosho: Law of Insurance and Maritime Commerce* (Seirin Shoin 1993) 149-181 [Shuzo Toda *et al*]; Kaoru Imai *et al* (eds), *Modern Commercial Law IV: Law of Insurance and Maritime Commerce* (Revised ed, Sanseido 1994) 248-290 [Kazuhiko Kurita]; Haruo Shigeta (ed), *Lectures on Modern Business Law 6: Law of Maritime Commerce* (Seirin Shoin 1994) 33-94 [Kasuhiko Shizuta]; Junnosuke Tamura and Yoshimichi Hiraide (eds), *Lectures on Modern Law: Law of Insurance and Maritime Commerce* (Supp 2nd edn, Seirin Shoin 1996) 135-169 [Yoshimichi Hiraide]; Yoshiro Yamano and Yasuhiko Yamada (eds), *30 Lectures on Modern Law of Insurance and Maritime Commerce* (6th edn, Chuo Keizaisha 2004) 176-194 [Takashi Aihara *et al*]; Masumi Nakamura and Takashi Hakoi, *Droit Maritime* (2nd edn, Seibundo 2013) 39-141; Toyoki Okada, *Modern Law of Insurance and Maritime Commerce* (Chuo Keizaisha 2020) 128-156; Takashi Hakoi, *Basic Lectures on Modern Law of Maritime Commerce* (4th edn, Seibundo 2021) 17-59, Kobayashi (n 12) 31-162. In response to this systematic arrangement of the maritime business organization (maritime business entity), some textbooks explain various topics such as carriage by sea and general average under the main category of "maritime business activity." As is with maritime business entity, there are variations there too. But the approach to describe the law with such systematic categorizations is the same.

navigation entity", or more directly "maritime carrier." In any event their common unchanged approach is that these highly abstracted concepts are assumed in the first place and then a shipowner is placed in the first place.[15]

Categories in textbooks of the law of maritime commerce (tables of contents)

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[15] There are also difference in terminologies among literatures in original Japanese language, like [*kaijo* 海上] and [*kaisho* 海商]. The former can be translated not only as "maritime" but also as "marine" or "seaborne". The author adopts "maritime" in this essay. As to the latter, he adopts the translation of "maritime commerce" as adopted in the translations of the relevant part of the Commercial Code by the Ministry of Justice of Japan. Similarly, the term [*kigyo* 企業] as translated into "business" above may also be translated as "enterprise" or "company"; and the [*shutai* 主体] as translated into "entity" above may also be translated as "person" or "main body". All of these words may well carry different nuances in the original Japanese and English translation. Some textbooks further adopt the term of "outfit" [*giso* 艤装] (This may also be translated as "equip", though we do not think an "equipper" is in a common usage.), "voyage" [*kokai* 航海] (This may also be translated as "voyage at sea" as the original Japanese word includes tha notion of the sea and we adopt this in other places of this essay; or further "navigation" or "navigation at sea") and/or "operation" [*unko* 運航]. These terms require further discussions. The term of "operation" will be discussed in another essay in this series.

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<tr><td>Kobayashi (2021)</td><td colspan="2">ship</td><td colspan="2">maritime business entity</td><td colspan="2">Seafarers and other operation assistant</td></tr>
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This systematic understanding and approach of the law of maritime commerce and restrictive construction of a shipowner might have been derived from ideas in continental law.[16] It may also be possible to find the grounds in statues in force in Japan. First, Article 684 of the Commercial Code stipulates that "*The term 'ship' as used in this Part* [Note: Part III Maritime Commerce] *means a ship that is used in a voyage at sea for the purpose of conducting a commercial act...*" [17] and only such a ship (a commercial ship) is qualified to a ship in the law of maritime commerce, thus it seems that the owner of such a ship may also need to have the "purpose of conducting a commercial act" in such a ship. Secondly, the Commercial Code also provides that a shipowner shall be liable for loss or damage caused to third parties by intent or negligence of the master or crew in performing his/her duties (Article 690) in principle, and that is understood to be a special provision to the employer's liability in general under Article 715 of the Civil Code, and this provision is understood to be based on the assumption that a shipowner therein is a person who has the substance of an employer of the master and crew and such substance may be construed to be

[16] This is indicated among others by the reference to German and French words in the narratives of Kobayashi (n 12) cited herein. On the other hand, he also refers to two English terms, an *owner of a ship* and a *shipowner* as if there are such significant differences in these two, but at least in so far as the author knows, the shipping practice today does not seem to strictly distinguish these two English words in those different senses.

[17] Article 684, Paragraph 1 of the Commercial Code before the 2018 Amendment also provides the same in a more archaic expression. It has not been substantially amended.

satisfied in the case where it conducts the maritime business activity with the ship. Thirdly, in the case of co-ownership of a ship, the academics in commercial law construe that the co-ownership of a ship within the meaning of the Commercial Code indicates a case where the shipowners in the above-mentioned sense co-own a ship, and therefore the provisions for a partnership contract (a contract in which each party makes a contribution to conduct a certain joint business) under the Civil Code (Article 667 *et seq.* of the said Code) shall be applied to the co-ownership of a ship as supplementary provisions. As a reason for this, they say it is obvious from the drafting style of relevant provisions of the Commercial Code dealing with "matters relating to the use of a ship" and a "new voyage at sea" among others, as well as from the historical backgrounds that co-owned ships have developed to be used for maritime business. The drafting style of legislation so argued may also be relied on as a ground.[18]

However, the first point is a restriction to a ship but not to a shipowner. In addition, as explained in another essay in this series[19], Article 35, Paragraph 1 of Ship Act provides, "*The provisions of Part III of the Commercial Code shall apply* mutatis mutandis *to a ship used in navigation at sea but not for the purpose of conducting a commercial act* (proviso omitted)". The Japanese law as a whole, therefore, such restriction on a ship has become inapplicable for the purpose of provisions of the Commercial Code. As to the second point, the provision of the Commercial Code separately says, "*a lessee of a ship has the same rights and obligations as a shipowner* vis-à-vis *a third party with regard to the matters belonging to the use of a ship*" (Article 703, Paragraph 1 of the Commercial Code), which means the employer's liability is undertaken by a lessee if the lease of a ship is in place, Put it another way, it may be construed that a shipowner is expected to undertake the employer's liability only when a ship is not leased out from it, *i.e.* when it is considered that a shipowner does employ the master and crew by itself.[20] If so, we may possibly conclude that the concept of a shipowner within the meaning of the Commercial Code yet only exactly refers to a person who owns a ship. With regard to the third point, the co-owners of a ship will certainly often jointly use her or jointly engage her in a new voyage at sea and thus it is natural that the provisions for those cases are found in the Commercial Code. That said, however, it does not necessarily follow that the concept of a shipowner itself shall be construed in a restrictive manner. With respect to the application of provisions for a partnership contract under the Civil Code, Article 696 of the Commercial Code rather stipulates, "even when there exists a partnership contract among the co-owners of a ship" in the context of the freedom of transfer of a co-ownership share. This may conversely read that the co-ownership of a ship without any

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[18] See *e.g.* Imai *et al.* (n 14) 267 to 268 [Kurita]. With respect to the application of provisions of the Civil Code to the co-ownership of a ship, see also *e.g.* Nakamura and Hakoi (n 14) 74 and Kobayashi (n 12) 71-72.

[19] Akiyoshi Ikeyama, 'Understanding the Japanese maritime law from key concepts (2) – the "sea" and a "ship" ', (https://abesakata.com/archives/356?en (accessed 22 August 2023)) 16

[20] Discussion here does not consider the case where a ship management company is appointed by a shipowner and the former effectively mans the master and crew on board. Even if we consider such cases, if we further assume that the former is no more than acting on behalf of the shipowner as employer or just dispatching them to the ship where a shipowner is an employer who directs them, there will be no inconsistency. If we instead further assume that a ship management company becomes an employer who directs the master and crew on its own behalf, it would be possible to conclude the entity who shall undertake the employer's liability for the acts of master and crew may be a ship management company but not a shipowner, and if we rule the shipowner shall nevertheless be liable including in such cases under the Commercial Code, such rule may constitute a kind of special provision. However, even accepting the possibility of this argument, it does not seem to lead to a proposition that a shipowner within the meaning of the Commercial Code shall be restricted to an entity who is actually engaged in maritime business activity (maritime business entity).

partnership contract could do exist.[21] However, it has not been explained in that way traditionally but explained that the very concept of a shipowner itself shall be construed to have a restricted meaning as described above (Perhaps the provision like Article 703, Paragraph 1 of the Commercial Code should rather conversely be read as reflecting such restricted construction).
Also in judicial precedents, there are a couple of cases having held that a shipowner within the meaning of Article 690 of the Commercial Code is subject to the more or less similar restrictive meaning and that a shipowner falling outside is not liable for a collision with another ship.[22]
However, emphasis of such restrictive concept of a shipowner by the academics and judicial precedents in Japanese law, as well as emphasis of the logically preceding concepts of "maritime business activity" and "maritime business entity", seems divergent from the actual perceptions of the realities of shipping business among practitioners. The author once wrote in a case review, "*The concept of maritime business entity is a concept unknown to shipping people in modern times*." [23] As the author believes in fact, even those who work for shipping companies to be engaged in shipping business (whether they work onshore or onboard) and those who transact with shipping companies as shippers or other counterparts have rarely heard of these concepts, unless they are from the law faculty of universities and did study the law of maritime commerce or they have worked in the legal departments after joining their companies and have studied textbooks of the law of maritime commerce. The common-sense entities for practitioners would just be an owner and an operator (plus a ship manager who is a subcontractor of the former) but not others. The MLIT Maritime Bureau Annual Report says, the ocean shipping's "*business structure mainly consists of an operator who charters a ship from an owner who owns and manages the ship.*"[24] And the owner explained therein is now in most cases contracts out with a

[21] Some academics pointed out that the relevant provision in the Commercial Code before the 2018 Amendment (the former Article 698) was to be regarded as a mistake in legislation (*e.g.* Imai *et al*. (n 14) 267-268 [Kurita]). But the said provision was not revised in the 2018 Amendment (the current Article 696).
[22] Judgment of Supreme Court of Judicature on 17 December 1926, 5 Minshu 854 (The *"Koei Maru"*), denied liability of the appellee in the event that the ship had been transferred to him as a trust for the purpose of securing the payment of money lent by him to a third party and it was the said borrower who actually used her for navigation at sea as a shipowner, on the ground that a shipowner within the meaning of then Article 544, the predecessor of Article 690 of the Commercial Code, referred to "*a person who owns a ship and uses the ship by voyage at sea for the purpose of business.*"; Judgment of Yokohama District Court on 20 April 1965, 179 Hanrei Times 159 (The *"Take Maru"*), denied liability of the defendant in the event that he had already assigned the ownership of a ship but had not satisfied the conditions for perfection of such assignment, on the ground that a shipowner within the meaning of Article 690 of the Commercial Code was "*a person who uses his owned ship for voyage at sea*"; and Judgment of Osaka District Court on 12 August 1983, 519 Hanrei Times 189 (The *"Shinko Maru"*) was a case in which liabilities of both a shipowner and a time charterer are pursued, but held that Article 690 of the Commercial Code "provides for the liability of a maritime transport entity and therefore a shipowner referred to in the said Article is not merely a person who has ownership of a ship, but a person who uses its owned ship for a voyage at sea for the purpose of conducting maritime transportation business." It further held that a time charter is a mixed contract between lease of a ship and supply of labor service contract" and in case of a lease of a ship, "*the lessee* [Note: this includes a time charter in the judgment's logic] *shall occupy the position of a maritime transport business entity and thus assume the rights and obligations arising from the use of a ship*" according to Article 704, Paragraph 1 (current Article 703) of the Commercial Code and concluded that the time charter is liable but the shipowner is not liable.
[23] Akiyoshi Ikeyama (2014) 90-1 Waseda Law Review 69 for Judgment of Tokyo District Court on 30 September 1997, 1654 Hanrei Jiho 142 (The *"Camfair"*) at 83 (n 20)
[24] The MLIT (Ministry of Land, Infrastructure, Transport and Tourism), *Maritime Bureau Annual Report 2022*

specialist ship manager to cause the latter to implement on the former's behalf the so-called owner's matters such as manning crew and maintaining the ship in navigable conditions. The said MLIT Maritime Bureau Annual Report also illustrates the coastal shipping with the basic distinction between an owner and an operator. In contrast with the ocean shipping, a ship manager is in addition expressly illustrated therein.[25] Maritime Transportation Act, administrative regulatory statute for the shipping business, divides maritime transport business into two broad categories: (i) ship operation business and (ii) ship leasing business (including time chartering).[26] Similarly, Coastal Shipping Business Act divides coastal shipping business into three broad categories: (i) coastal transport business, (ii) ship leasing business used for coastal transport (including time chartering), and (iii) ship management business used for coastal transport.[27] Nobody is talking about who is or is not a maritime business entity among those parties. These would be a much more straightforward understanding of the realities.

The author frankly feels concerned as a practitioner about whether such realities of the current shipping business can be understood appropriately and whether we can always get an appropriate conclusion in the actual handling of cases through analysis solely starting with the concepts of "maritime business activity" and "maritime business entity" based on the system of law of maritime commerce since 19th century (when an owner and an operator was not quite differentiated and a ship manager had not emerged[28]). This problem would perhaps become evident if we did *not* discuss the contractual liability (typically the liability under a contract of carriage by sea) through a natural methodology to ascertain contractual liability from reasonable constructions of documents or agreements in other forms indicating the parties to and the substance of a contract and/or the tort liability (typically collision or other accident liability) through a natural methodology to ascertain the duty of care under tort law from the services or

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(https://www.mlit.go.jp/maritime/maritime_fr1_000050.html (accessed 20 August 2023)) 27 and 28 (Table 3-5)

[25] The MLIT (n 24) 36 (Table 4-3)

[26] See Article 2, Paragraphs 1, 2 and 7 of the Act. The types of maritime transportation business in this Act include shipping broking business and shipping agency business, which are obviously not in the notion of "transportation". It should be understood that this coverage has perhaps derived from the nature of the Act as a regulatory statute.

[27] See Article 2, Paragraph 2 of the Act. In the case of coastal shipping, there is a definition of ship management business as it is also regulated with registration requirements.

[28] As to the emergence of ship management business, Hiroyuki Goda, *Historical Development of FOC Ship System in Postwar Japan Shipping* (Seizansha 2013) 138 and 184 points out that Japanese shipping companies started to manage their FOC ships by setting up a separate ship management company rather than by their internal marine or technical divisions. Kunihiko Ishihara, *Knowledge of Ship Management Operations* (Seizando 1991) 9-10 says, from the 1970s onwards, the small and medium-sized shipowners started to outsource the management of their FOC ships, or conversely, some companies started to not only manage their own ships but also actively accepting ship management of other companies. Willingale (ed), *Ship Management* (3rd edn, LLP 1998) 39-40 explains that the origin of the modern ship management business is found in the 1950s, but it began to expand in the 1960s with the expansion of FOC ships and it matured by the 1980s. According to these statements, the emergence of ship management business is presumed to be triggered by the emergence of FOC shipowners who had no choice but to outsource the substantial matters for ship owning business. But it must not have been the sole reason, since the ship management business, which is the outsourcing business of a shipowner, is widespread and is recognized by the law (Article 2, Paragraph 3 of the Coastal Shipping Business Act) even in the owners of coastal ships in Japan who are not related to FOC ships. In any event, it did not exist at the time of the enactment of the Commercial Code, nor does the text of the present Commercial Code expressly envisages its existence.

duties which the parties concerned have undertaken under a contract or as a matter of fact (The author thinks that they are the very natural approaches) *but* did them through taking a dogmatic approach to first conceptually assume the liable party shall be a "maritime business entity" and to ask who was it, which was once a mainstream approach.[29] We also would say so because we strangely hear neither the concept of a land business entity in theory nor discussions about who is a land business entity when a business activity takes place in a contractual chain of multiple entities (If I dare say, each entity is just engaged in business activity of its own within each chain of contracts but no more).

That said, however, the Japanese legal approach invariably assumes that any area of law does have its system and certain core concepts therein (in so far as we assume the law of maritime commerce as a part of the commercial law, it does have its system and certain core concepts therein). The systematic understanding and approach discussed above based on this assumption and restrictive construction of the concept of a shipowner are firm in the academics in commercial law in Japan. The 2018 Amendment of Commercial Code did not change them at least explicitly. On the other hand, in far as the solution of a particular case is concerned, the recent academics and judicial precedents do not tend to deal with the issue solely from the dogmatic approach as above explained.[30] It is also expected that if we criticize current systematic understanding of the law, we will in turn be requested to newly show a proper system but the author has neither intention nor ability to show it.[31] Accordingly, when we are to solve actual cases, we must perhaps be content with a manner that, whilst fully understanding the existence of such systematic understanding and approach of the law, we shall not stick to the dogmatic approach that may arise therefrom too much (in other words, we shall not discuss whether a shipowner or any other party is qualified to a "maritime business entity" too abstractly or generally) but shall try to reach

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[29] Judgment of Osaka District Court in 1983 discussed in (n 22) related to time charterer's liability for tort in the event of a collision of ships illustrates a typical example of such an approach. In academics, according to the expression of Kobayashi (n 13) 10, "*an issue that whether or not to grant a time charterer the status of a maritime business entity, i.e. whether or not to acknowledge it could be a contractually or tortiously liable entity for the operation of a ship, has caused controversies in both judicial precedents and academics in our country, and that has been vigorously debated as one of the important issues in the law of maritime commerce in our country.*" The author finds uncomfortable with the very setting of the issue. However, his previous literature, Noboru Kobayashi, 'Time Charter – comparative studies of English/American law and German law – (Nos. 1 to 5 (final))', Hogaku Kyokai Zasshi 105-5-1 to 105-11-70 (1988) (later included in Noboru Kobayashi, *Time Charter*, (Shinzansha 2019) is an epoque-making paper which advocated to deny to solve the issues only through such dogmatic approach.

[30] For example, see Nakamura and Hakoi (n 14) 85-90 and Kobayashi (n 13) 10-14. As to the judicial precedents, Judgment of Supreme Court on 29 April 1992, 1421 Hanrei Jiho 122 dealing with the time charterer's liability for tort in the event of a collision of ships did not adopt an approach as adopted in Judgment of Osaka District Court in 1983 in (n 22). Judgment of Supreme Court on 27 March 1998, Minshu 52-5-527 for the liability under a bill of lading did not adopt such an approach either.

[31] Among the textbooks of Japanese commercial law academics, what is remarkable in this respect is Kenjiro Egashira, *Commercial Transaction Law* (8th edn, Kobundo 2018). Since its first edition (Vol. 1 1990, Vol. 2 1992), this has been a textbook only on "commercial transaction law" and discussed the "transport business" in general, including non-maritime transport (287-372), and any specific explanation of a shipowner does not appear (perhaps because the responsible entity is a "carrier" (287)) and an explanation of a "ship" is only mentioned in the note (Note (1) 298-299). Since it covers "commercial transaction law" it is to basically cover contract law and contractual liability, and tort liability is not covered as a subject in the legal system. He deals with time charter and time charterer's tort liability only in additional notes in the course of a chapter for voyage charter, "contract of carriage of goods in the form of charter of a ship" (347 and 349-350).

an appropriate solution reflecting factual matrix of the case, just with proper instruction of relevant laws and contracts.

(2) Shipowner as a party to a contract

There are also cases where the concept of a shipowner appears to refer to the position of a party on the side of providing a ship to a contract relating to the said ship, whether or not it is a person who literally owns the ship.

In the first place, although it has already ceased to be the good law, under the former Commercial Code prior to the 2018 Amendment, a contract of carriage by sea to which the former Commercial Code applied (as to carriage of goods, limited to domestic carriage since 1957 COGSA) was a contract with a "shipowner" but not with a "carrier". The word of a "carrier" did not appear in the Chapter of Maritime Commerce in the Commercial Code, but instead the word of a "shipowner" was used as a name of the party to a contract (Articles 738 and 739 for carriage of goods and Articles 779 and 782 for carriage of passengers). In so far as we consider a contract of carriage as nothing but a contract in which one party promises to provide the transportation service to the other, even in the carriage by sea the first party is not necessarily a shipowner (as the service provider is not necessarily a shipowner). Supposing that the former Commercial Code always called the service provider a shipowner whether or not it owned a ship, however, we might then be able to say it was one of the special usages of the concept of a "shipowner".

However, it was probably not the case. It would have been more correct to understand that the Commercial Code had merely drafted its provisions by only assuming the cases where the party to provide the service under a contract of carriage was literally a shipowner, *i.e.* a person who does own a ship (or a lessee of a ship as the case may be, which case is omitted here). The reason is this: According to Article 759 of the former Commercial Code (deleted by the 2018 Amendment), "*In the case where a contract of carriage is entered into for the whole or part of a ship* [Note: in the case of a voyage charter] *and if a charterer further enters into another contract of carriage with a third party, only a shipowner is liable to the said third party to perform the obligations under the latter contract which fall within the scope of the duty of master.*" This article assumed that there could exist a sub-contract of carriage between a charterer and a third party in addition to a contract between a shipowner in the literal sense and a charterer but provided that the original shipowner, who was in the status like a subcontractor for the said third party, is solely and directly liable to the said third party. It is an unusual provision under the principle of contract law. Whether this provision be good or bad, we can find the idea here that a sub-contract of carriage may certainly be concluded by a voyage charterer who is not a literal shipowner but it is logically precedent that a contract of carriage (a voyage charter) between a literal shipowner and a voyage charterer always existed and such sub-contract is an exceptional one. It does not seem to imply that the concept of a "shipowner" itself, in general, refers not only to a person who owns a ship but also broadly to any other party providing the transportation service under a contract of carriage.[32]

[32] Also, COGSA before the 2018 Amendment excluded the application of Article 759 of the Commercial Code to international carriage of goods by sea and, in the case where the said Article could have been applicable, it provided any person entitled to claim damages had the maritime preferential right over a ship and others (Article 19, Paragraph 1, Article 20, Paragraph 1 of COGSA). This meant that a ship was directly liable as if in *rem*. Since a ship is the property of a person who owns her, its background concept was essentially similar is

Secondly, the concept of a shipowner is also sometimes used in the sense of a party who provides a ship in a charterparty. This is a matter of terminology in practice. In this context, the expression of just an "owner" is sometimes used. We would say this is a shorthand form of the word "shipowner".[33]

It is generally considered that there are three types of charterparties: bareboat charter, voyage charter and time charter.[34] The names of the parties thereto for each type are as follows:

Type	Legal nature	Relevant provisions	Names of parties under the law	Names of parties in practice
Bareboat charter[35]	Contract for lease	Articles 701 to 703	Shipowner	Owner/Shipowner
			Lessee	Charterer
Voyage charter[36]	Contract of carriage	Articles 570 and 748 to 756 Article 15 of COGSA	Carrier	Owner/Shipowner
			Charterer	Charterer
Time charter[37]	Contract for the use of ship	Articles 704 to 708	Shipowner	Owner/Shipowner
			Charterer	Charterer

what was found in Article 759 of the Commercial Code. In any event, this provision was also consistent with the understanding that the concept of a "shipowner" within the meaning of the Commercial Code meant a person who literally owned a ship and it in essence drafted the relevant provisions having assumed the situation where such a shipowner entered into a contract of carriage and further contract linked therewith was merely a sub-contract of carriage between the charterer and a third party.

These provisions of the former Commercial Code and COGSA contained a different problem. They assumed only a charterer as a person who can be a party to provide the transportation service in a sub-contract of carriage (see also Article 2, Paragraph 2 of COGSA before the 2018 Amendment) but did not assume the contract style of a contractual carrier (i.e., an NVOCC or freight forwarder who buys the transportation service from an actual carrier on a Master BL/SWB basis as a shipper therein and sells the transportation service to the merchant on a House BL/SWB basis as a carrier therein), which plays an extremely important role in the present ocean shipping. This point will be taken up again when we discuss a "carrier" in an essay in this series.

[33] As already explained, some textbooks of the law of maritme ommercie explain, based on a construction that there is a shipowner in broader and narrower senses, "a person who actually conducts maritime business activity with its owned ship" in a narrower sense is a "person who is generally referred to as an owner [*senshu* 船主]" (Kobayashi (n 12) 61). Considering that the word "owner" is a practical term in the shipping business, this understanding may be correct in some respects. However, it does not seem that the practice is clearly conscious of and distinctively uses the two (broader and narrower) meanings mentioned above.

[34] The Japanese law does not recognize the term "charterparty" as a generic superior concept common to each of these types,. Therefore, the strict definition of "charterparty" *per se* is not well discussed in Japan. This point will be discussed again in another essay in this series.

[35] The term of a bareboat charter *per se* does not appear in the Commercial Code, but perhaps it is not doubted that a bareboat charter in practice is a contract for lease in its legal nature and thus corresponds with a contract for the lease of a ship within the meaning of the Commercial Code.

[36] The term of a voyage charter *per se* did not appear in the Commercial Code before the 2018 Amendment, and the contract in question was expressed only as "a contract of carriage for the whole or part of a ship" (Article 737 of the Commercial Code and Article 16 of COGSA before the 2018 Amendment). The amended Commercial Code has come to explicitly refer to it as a "voyage charter" (Article 748).

[37] The concept of a time charter was not recognized in the Commercial Code before the 2018 Amendment, and its legal nature was considered as one of the typical issues in the law of maritime commerce. See *e.g.* Nakamura and Hakoi (n 14) 82-86 and Kobayashi (n 12) 91-93.

As is clear from the table above, a voyage charter is legally a contract between not a shipowner but a carrier and a charterer under Japanese law,[38] although the author believes that there are few practitioners who know this and there are few cases where the party is described as a carrier in contractual documents in practice.

In any of these charters, it is normal that mulitiple contracts are concluded in chain. In those cases, the correct statutory names of parties to contracts subsequent to the first contract to which a person who owns a ship is a party may respectively be: a charterer and a sub-charterer, a sub-charterer and a sub-sub-charterer, etc. In practice, however, such strict terminology is rarely used. On the contrary, it is perhaps common practice to say any charter at any stage of chain is between a shipowner (owner) and a charterer. The word "shipowner (owner)" is then used to refer to a party who provides a ship, whether or not it does own the ship. In English, a person who is a party to provide a ship but does not own the ship may specifically be referred to as a *disponent* owner. To *dispone* means to transfer legal powers to a third party, but there is no Japanese word literally corresponding to this. Instead, if we need to clearly translate a person with such status, we translate it as a chartered owner. They are nothing but practical terms but we may say this is a kind of special usage of a concept of shipowner (owner) deviating from its literal meaning.

(3) Shipowner subject to public laws and regulations

The term of a shipowner also appears to refer to the entities subject to public laws and regulations related to maritime affairs.

In the following laws and regulations, whilst it is supposed that a person subject to the regulations is in principle a shipowner within the meaning that a person who owns a ship, they are also drafted to alternatively apply to a ship manager and a ship borrower [*senpaku kariirenin* 船舶借入人][39] and to other certain person in replacement of a shipowner when such a person exists; and the relevant ministerial ordinances commonly used the word of a shipowner as a subject to those ordinances. As is discussed in (1) and (2) above, we may understand that the term of a "shipowner" is used here in a broader sense to include those who do not own a ship as a matter of usage of this term by way of replacement reading technique as mentioned above, but we may also say that the text of these laws and regulations use the term of a "shipowner" to mean nothing

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[38] As discussed earlier, the Chapter of Maritime Commerce in the Commercial Code before the 2018 Amendment used the term of a "shipowner" instead of a "carrier". Therefore, at that stage, the party to a voyage charter was a shipowner under the Commercial Code too; but after the enactment of COGSA in 1957, COGSA applied to a contract of international carriage of goods by sea (Article 1) and the party to the contract was changed to a carrier (Article 2, Paragraph 2 and others) and thus we could say a party to a contract of international carriage of goods by sea has become a carrier since then, whether it be a voyage charter or otherwise. Put it another way, a shipowner was replaced by a carrier for the statutory name of contractual party since 1957 COGSA for international carriage of goods by sea, and since the 2018 Amendment of the Commercial Code for other carriage by sea.

[39] In these laws and regulations, the term of a "ship borrower" is used instead of a "lessee of a ship" or a "bareboat charterer." This is perhaps intended to include not only the lease of a ship with price but also the lease of a ship without price. The original Japanese words for lease [*chin-taishaku* 賃貸借] or lessor/lessee [*chintainin/chnjakuni* 賃貸人/賃借人] carry the meaning that they are with price. Similar arrangements with no price, *i.e.* free rent, is callsed *shiyo-taishaku* [使用貸借] although apparently corresponding logical words thereto for its parties, *shiyo-kashinin/shiyo-karinin* [使用貸人/使用借人] are not in fact used but they are just called *kashinushi/karinusi* [貸主/借主]. The word of borrower [*kariirenin*/借入人] of a ship is found almost only here invented to contain both in this context.

but a person who owns a ship.

Name of Act	Provisions related to the scope of a shipowner
Seafarers Act	The provisions concerning a shipowner in the provisions of this Act ⋯ and the provisions of any orders under this Act ⋯ shall apply to a ship's husband if a ship is co-owned, to a ship borrower if a ship is leased with or without price, and to an employer other than a shipowner, a ship's husband and a ship borrower if such a person instead employs a seafarer. (Article 5, Paragraph 1) [Exceptions thereto to be discussed later]
Ship Safety Act	The provisions concerning a shipowner in this Act and any orders under this Act shall apply to a ship's husband if a ship is co-owned and a ship's husband is appointed and to a ship borrower if a ship is leased with or without price ... (Article 26)
Ships' Officers and Small Ships Navigators Act	The provisions concerning a shipowner in this Act shall apply to a ship's husband if a ship is co-owned and to a ship borrower if a ship is leased with or without price. (Article 3)
Maritime Pollution Prevention Act	The qualification that "(meaning a ship's husband if a ship is co-owned and a ship borrower if a ship is leased with or without price; the same shall apply hereinafter)" is inserted immediately after the word "shipowner". (Parentheses in Article 5, Paragraph 1),

It should be noted that in Seafarers Act "an employer other than a shipowner, a ship's husband and a ship borrower" is found within the scope to a shipowner in principle. A literature explains the reason for this, "*Seafarers Act includes provisions governing labour relations. For this reason, a shipowner does not mean an owner of a ship but means a person who employs seafarers in order to receive labor on board a ship.* [underlined by a citator] ⋯ *In addition, if a person other than a shipowner, a ship's husband and a ship borrower runs a shop, a hair salon, a laundry shop, etc., and employs a salesperson, a hairdresser, a laundry husband, etc., the provisions related to a shipowner in Seafarers Act shall apply to the employer.*"[40] Further exceptionally with respect to maritime labour certificates or inspection by the flag state in Chapter 11-2, Seafarers Act does apply to "*an employer other than a shipowner, a ship's husband and a ship borrower if such person instead employs a seafare*r" (Article 5, Paragraph 2).[41] The former of these two had existed before entry into force of the MLC in Japan but in the present it is submitted to also correspond with the MLC, which stipulates an expanded defition that a shipowner means "*the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner*." (Article 2, Paragraph 1 (j)), and on this basis provides for the shipowner's name as a mandatory entry in a seafarer's employment agreement (Regulation 2. 1, Standard A2. 1, Paragraph 4 (b)) and for the shipowner's liability (Regulation 4.2). It is also submitted that a "company" as defined in the ISM

[40] Kobe University Graduate School of Maritime Science, Martime Law Research Group (ed), *General Guide on Maritime Law* (Seizando Shoten, 2nd rev edn 2020) 75-76
[41] Kobe University (n 40) 76

Code in SOLAS, *i.e.,* "*the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who on assuming such responsibility has agreed to take over all the duties and responsibilities imposed by the International Safey Management Code*" (Chapter IX Regulation 1, Paragraph 2; usually a ship management company) would also be expected to be a shipowner within the meaning of the MLC as a party to an employment agreement.

4. Shipowner's obligations and responsibilities

A ship is a type of a "thing" under the Civil Code. It is qute difficult to comprehensively and generally discuss the obligations and responsibilities of an owner of a "thing", as the Civil Code, being a general code of private law, does not have straightforward chapter for the obligations and responsibilities of an owner. As a matter of legal system, it is drafted in a way to cover the substance and scope of the rights arising from the ownership and neighboring relations to describe an extension of the ownership (or the rights held by an owner). Of course, there may be responsibilities arising from the ownership itself, such as land structure liability as a kind of tort liability.[42] The duty of care in handling of a certain thing and consequent tort liability for the damage caused by the existence or handling of the said thing may also be fouind in the context of general tort liability. In addition, we also find the obligations and responsibilities under various public laws (typically, tax laws, various environmental laws, etc.). These obligations and responsibilities are applicable to a ship too.[43]
However, it goes beyond the ability of the author to comprehensively discuss all of them. This section introduces some of the duties and responsibilities typical of a shipowner (as discussed in 3., it may be construed in a restrictive manner or may include other persons but it is a person who owns a ship in principle), dividing them in private and public laws for the convenience of discussions.[44]

(1) Private law

The employer's liability of a shipowner as referred to in 3. (1) above is typical of the liability of a shipowner under private law. Article 690 of the Commercial Code has the very title of "Liability of Shipowner". This is a special provision of Article 715, Paragraph 1 of the Civil Code for the employer's liability in general. Comparing the two, the characteristics of a shipowner are: (i) a shipowner is assumed to be an "employer" of the master and crew as a matter of course (provided,

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[42] If a defect in the installation or preservation of a structure on land causes damage to another person, the possessor is primarily liable for damages; provided, however, if the possessor has exercised the necessary care to prevent the damage, the owner is liable. This shall not preclude the reimbursement claim aginst the other liable persons. (Article 717 of the Civil Code).
[43] For example, we may say property tax is an obligation arising from the very ownership of a relevant thing (although it is procedurally applied to its registered owner). Waste Management and Public Cleansing Act imposes an obligation on an emitter of industrial wastes to dispose of them by itself or to consign disposal to a certain qualified contractor in accordance with the certain regulations. Supposing that the emitters are in many cases the owners of disposed wastes (because it should not be possible to dispose of other people's property in principle), we may say they are virtually close to the obligation of the owner.
[44] When we discuss the liability of a shipowner, we may also have to discuss the liability of a beneficial shipowner of an FOC ship. We will discuss this on another occasion.

however, that if a ship is leased, "*a lessee of a ship has the same rights and obligations as a shipowner* vis-à-vis *a third party with regard to the matters belonging to the use of a ship*" (Article 703, Paragraph 1 of the Commercial Code) and thus shall undertake the employer's liability.[45] As discussed in 3.(1), this may be a basis for a restrictive construction of the concept of a shipowner by the academics in commercial law.); and (ii) a shipowner as an employer is not exempted from the liability even in the case of full exercise of due care for the appointment and supervision of the master and crew as employees.

Textbooks of the law of maritime commerce mainly deals with this employer's liability in the context of the responsibility of a shipowner. But what we shall discuss in the liability is not at all limited to that. Oil Pollution Liability Act has further special provisions of responsibilities. They are not restricted to the liablity of a shipowner who is a maritime business entity as referred to by the adademics in commercial law. But considering that an accident in the operation of a ship could directly trigger an environmental disaster, it is submitted that these responsibilities would be as critical as the ordinary employer's liability, which is based on the negligence of the master and crew. In the first place, in the event of tanker oil pollution damage as referred to in the Act (Article 2, item 14), a shipowner of the relevant tanker (called a tanker owner, who is in principle a registered shipowner (Article 2, item 11), not a shipowner in academic views in commercial law) shall be strictly liable save in exceptional cases, and the channelling of liability is adopted in a manner that any other persons including a lessee of a ship shall not be liable in principle (Article 3, Paragraphs 1 and 4). This law is designed in conjunction with limitation of liability with greater amount than normal and with more restricted exceptions (Articles 5 and 6), compulsory insurance (Article 13) and a direct claim against an insurer (Article 15). Secondly, in the event of general ship oil pollution as referred to in the Act (Article 2, Item 16), a shipowner and others (including a lessee, a manager and an operator of a ship in addition to a shipowner (Article 2, Item 12 and parentheses of the main sentence of Article 39, Paragraph 1)) of the relevant general ship shall be jointly and severally liable save in exceptional cases (Article 39), and the system is designed in conjunction with compulsory insurance (Article 42) and a direct claim against an insurer (Article 43). Thirdly, in the event of loss arising from a shipwreck as referred to in the Act (Article 2, item 17), a shipowner of the said ship is strictly liable save in exceptional cases (Article 47). This law is designed in conjunction with compulsory insurance (Article 49) and a direct claim against an insurer (Article 51). This is a domestic statute corresponding to the CLC/FC, the Bunker Convention, and the Nairobi Convention respectively.[46]

In contrast, the liability of a shipowner as a party to a contract, as referred to in 3. (2) above, is, of course, a liability in accordance with the relevant contract.

Depending on the types of claims pertaining to such liability, the liability of a shipowner may be subject to the limitation of liability under the Limitation Act together with other parties concerned.

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[45] In contrast, since the same paragraph and article do not apply *mutatis mutandis* to a time charterer (Article 707), a time charterer is in principle not liable for the employer's liability under the same paragraph and article. We shall discuss what circumstances may possibly trigger tort liability of a time charter on another occasion.

[46] The third loss arising from a shipwreck stipulated in the said Act is the liability for compensation of the monetary loss arising from the identification, indication, removal, or other measures for a ship in the event the ship becomes a shipwreck. The Act is not the basis to identify who shall be responsible to take those measures for the said shipwreck. The basis is found in public law provisions depending on the circumstances, such as Maritime Pollution Prevention Act (Articles 38 and 39) and Port Regulation Act (Articles 24 and 25). The responsible entity may include a person other than a shipowner, but the primary entity would often be a shipowner.

We discussed the reckless act with knowledge, which will deprive of the right to limit, in the first essay of this series.[47] We would like to consider the limitation of liability generally on another occasion.

(2) Public law

As mentioned in 3. (3) above, in public laws and regulations related to maritime affairs the term of a shipowner is used in a broarder sense to include a person other than a person who owns a ship. Naturally, a shipowner as defined therein shall have the responsibilities to comply with the rules under such relevant regulations.
As introduced in the previous essay of this series,[48] the safety of life at sea, prevention of maritime pollution, qualifications and working conditions of seafarers, etc. are now subject to extremely detailed regulations that have been gradually strengthened and standardized to a considerable extent in the form of many multilateral conventions centering on the SOLAS, MARPOL, STCW, MLC and their related resolutions and guidelines. The laws and regulations introduced in 3. (3) above can be said to be domestic legislations thereof. The physical object of regulations is a ship, and the person responsible for complying with regulations is basically a shipowner in the first place, because a ship is the property of a shipowner and it is in principle a shipowner who mans the master and crew on board.
These responsibilities of a shipowner are becoming increasingly stricter and expanded, and involving a change in responsible entity as the time comes to the present.
A recent example is that the 2009 Ship Recycling Convention (the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009) is eventually confirmed to come into force on 26 June 2025.[49] This Convention requires a ship of 500 gross tons or more, including an existing ship, to prepare and maintain an inventory (a list specifying the locations and amounts of hazardous materials used on a ship), and her flag state to examine it and issue a necessary certificate.[50] It also requires the recycling of a ship at a facility approved under the Convention in accordance with the necessary procedures under the Convention. This

[47] Akiyoshi Ikeyama, 'Understanding the Japanese maritime law from key concepts (1) – "Gross Negligence" and "Reckless Act with Knowledge" ' (https://abesakata.com/archives/304?en (accessed 22 August 2023)) 4 *et seq.*

[48] Ikeyama (n 2) 6

[49] See *e.g.* the MLIT Press Releases, 'Adoption of the "Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009" (tentative name)' and 'The "Ship Recycling Convention" is confirmed to come into force (Entry Date: 26 June 2025)' (https://www.mlit.go.jp/report/press/kaiji05_hh_000003.html and https://www.mlit.go.jp/report/press/kaiji05_hh_000260.html (accessed 20 August 2023)) and Michio Aoki, 'Maritime Law Practice in Reiwa Era (25): Ship Recycling Convention eventually enters into force after more than 10 years since adoption – Risks to be prepared by shipping industry interests', Japan Maritime Daily, 28 July 2023 at 5.

[50] There are a number of articles and introductions for this Convention. In addition to the information described in the previous note, see Shinichiro Otsubo *et al.*, *Explanations and Practices of the Ship Recycling Convention* (2017, Kaibundo). Reportedly Japan played a leading role in the deliberations of the draft Convention in the IMO and then enacted a domestic law of the Convention prior to its entry into force (the Act Concerning the Proper Implementation of Recycling of Ships (Act No. 61 of 2018)) and has urged Bangladesh (the world's largest recycler of ships) and other countries to ratify the Convention at an early date to achieve requirements for entry into force of the Convention (see *e.g.* MLIT press releases at (n 49)).

Convention means that a ship will be subject to regulations related to environmental protection and industrial safety and health not only since the time of her birth (at the time of construction) through the time of her activities (at the time of navigation) but also until the time of her end of life (at the time of withdrawal) and a shipowner must continue to take measures to prepare for such regulations.

As to a responsible entity, since the entry into force of the ISM Code in SOLAS, a "company' as defined therein as "*the owner of the ship or any other organization or person … who has assumed the responsibility for operation of the ship from the owner of the ship and who on assuming such responsibility has agreed to take over all the duties and responsibilities imposed by the International Safey Management Code*" has become a responsible party as dictinct from a shipowner. The responsible entity has thus been expanded.[51]

Furthermore, as various regulations become increasingly stricter and more sophisticated, an occassionally emerging issue is that whether a shipowner should solely bear the costs for complying with these regulations at all times, particularly when a ship is time chartered. If a ship was required to be equipped with a new facility or otherwise refurbished with substantial costs in order to comply with newly effective stricter regulations in the middle of a time charter, in so far as we assume it is the continuing duty of a shipowner to provide a ship who satisfies the regulations, such costs may have to be borne by a shipowner in principle as those new regulations were primarily addressed to a ship and a ship was the property of a shipowner; but it may become a difficult issue depending on the construction of the contract in question. Most recently, with regard to the application of the EU Emission Trading System (EU-ETS) to the shipping industry[52] in order to reduce greenhouse gases, since the fuels generating greenhouse gases are purchased at the expense of a time charterer and consumed for the purpose of operations required by a time charterer, there is an argument that the allowances for such emissions should also be purchased by a time charterer and transferred to a shipowner; and with regard to the EEXI regulation and CII rating scheme under the MARPOL,[53] actual clearance of the regulations by a ship depends to a certain extent not only on the objective specifications of a ship but also on how a ship is operated (required speed of the ship, ratio of ballast voyages, etc.). Therefore, a shipowner may want to ask cooperation of a time charterer if a ship is in a time charter. On the other hand, such cooperation is problematic from a time charterer's perspective as it would become the intervention to the matters that a time charterer could and should determine on the basis of its own commercial needs. In 2022, BIMCO, a global shipping organization, adopted the standard clauses for these: ETS – Emission Trading Scheme Allowances Clause for Time Charter Parties 2022 and CII Operations Clause for Time Charter Parties 2022.[54] In these clauses, the obligations to comply with the relevant regulations may be considered as transferred from a

[51] As stated earlier, the MLC expanded the definition of a shipowner therein in the context of employment of seafarers (in a manner similar to that of the company in the ISM Code) and provides the said expanded shpowner is responsible as an employer.

[52] See *e.g.* 'Shipping EU-ETS to Begin Next Year' Japan Maritime Daily, 26 June 2023 at 2.

[53] See *e.g.* the MLIT Press Release, 'Energy Efficiency Existing Ship Index Regulations (EEXI Regulations) + Carbon Intensity Indicator Rating System (CII Ratings)' (https://www.mlit.go.jp/common/001406844.pdf (accessed 20 August 2023)) and ClassNK, 'Outline and Response of EEXI Regulations and CII Rating System' (2022) 102 KANRIN (Bulletin of the Japan Society of Naval Architects and Ocean Engineers (JASNAOE)) 13.

[54] See https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/etsa_clause and https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/cii-operations-clause-2022 (both accessed 20 August 2023).

shipowner to a time charterer to a considerable extent through contractual arrangements.[55] However, strong criticism is reported particularly as to the latter. The future outlook remains to be seen.[56]

5. Conclusion

As discussed in 3., whilst we may say the term of a "shipowner" is used in a sense not restricted to a person who owns a ship, we believe we may also understand the term of a shipowner is adopted with the literal meaning of a person who owns a ship in the statutes (and the provisions concerning carriage by sea in the former Commercial Code had just been drafted primarily on the assumption that a shipowner in such literal sense was the very party who provides the transportation service). But a caution must be paid that (i) the academics in commercial law in Japan go beyond to construe the concept of a "shipowner" under the Commercial Code in a restrictive manner, and such construction is linked with (ii) a systematic understanding of the law of maritime commerce and (iii) the concepts of maritime business activity and maritime business entity as derived from that system. These issues are logically different from each other. The construction issue of (i) as such is probably a matter of how to use a word; The issue in (ii) is a theoretical issue related to the legal system. Concerns from the practitioners' point of view may be that a restrictive construction in (i) is linked with (iii).
As discussed in 4., a shipowner has the obligations and responsibilities beyond those of an owner of a mere "thing." In private law, there are important special rules in Oil Pollution Compensation Act in addition to the employer's liability for the acts and omissions of the master and crew as mainly discussed in textbooks of the law of maritime commerce; and in public law, we see many regulations about the obligations and responsibilities of a shipowner. They are becoming increasingly stricter and expanded, and involving a change in responsible entity as the time comes to the present.. This trend will continue in the future too.
At the end of the lengthy discussions, the author woud be more than happy if those who read though this essay until here find the attributes of maritime law in the fact that we have so many issues to be discussed even in the apparently simple and clear concepts of the "ownership" of a ship and a "shipowner".

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

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[55] See *e.g.* Gard, 'Parsing the BIMCO Emission Trading Scheme Allowances Clause' (2022) and 'Under the lens – BIMCO's CII clause for time charterparties' (2022) (https://www.gard.no/web/articles?documentId=33798632 and https://www.gard.no/web/articles?documentId=34531156 (both accessed 20 August 2023)) and Michio Aoki, 'Maritime Law Practice in Reiwa Era (22): Introduction of EU-ETS scheme to international shipping and special clauses in the time charter' Japan Maritime Daily, 31 January 2023 at 9 and 'Ditto (21): Issues under the time charter relating to the forthcoming operation of CII' Japan Maritime Daily, 30 November 2022 at 5.

[56] It was reported at the end of 2022 that more than 20 leading shipping companies jointly sent an open letter of the opposition. See '23 shipowners and charterers oppose CII clause: an open letter sent to BIMCO' Japan Maritme Daily, 27 December 2022 at 3 and other media reports.