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Invitation to the Japanese maritime law from key concepts (5)
— "management" and "operation" of a ship

[Executive Summary]

In the terminology in shipping practice, the "operation" of a ship has two meanings: operation in commercial sense, in the sense that one employs a ship in a voyage in accordance with the purpose of its employment; and operation in nautical sense, in the sense that one keeps a ship in navigable state and actually cause it to be navigated. It is submitted that the latter is more or less equal to the "management" of a ship, though somewhat different in nuances, and that the practice is implicitly assuming distinction of these two meanings.

Under Japanese law, the concepts of "management" and "operation" ("manager" and "operator") of a ship are found in the following historical categories: (1) "ship manager" within the meaning of the Commercial Code in case of a co-owned ship; (2) "manager" and "operator" within the meanings of (a) Limitation Act and (b) Ship Oil Pollution Liability Act as imported concepts from relevant international conventions ((a) LLMC and (b) Bunker Convention); and (3) "operator" and "manager" of a ship found in the concepts of "ship operator" and "ship manager", regulated bodies by Marine Transportation Act and Coastal Shipping Business Act respectively.

The most important amongst these concepts are (2). But as for manager and operator within the meaning of Limitation Act/LLMC, comments by draftsmen at the time of enactment and amendment of the said Act only said these concepts under the Conventions were imported just in case; and turning to commercial law academics, a certain academic once explained manager within the meaning of Limitation Act as if they are equal to manager under (1) but more recent academic says they are ship management company; as for operator, academics made

explanations merely replacing it with the concept of maritime business entity. We do not find clear explanations about manager and operator within the meaning of Ship Oil Pollution Act/Bunker Convention.

In my opinion, manager in (2) means ship management company, i.e. *operator in nautical sense, who should be further understood to be the same as ship manager in Coastal Shipping Business Act. In contrast, as for operator in (2), I would suggest to distinctively consider operator in (a) within the meaning of Limitation Act/LLMC and operator in (b) withing the meaning of Ship Oil Pollution Liability Act/Bunker Convention. As for the latter (b), it is submitted that it means operator in nautical sense, and thus it also means the so-called ship management company. This is because Nairobi Convention, for which Japanese domestic law is amended together with for Bunker Convention, indicated operator therein is the "Company" under the ISM Code,* i.e. *ship management company and we do not think it necessary to depart from this; and because, if we are to consider it covers operator in commercial sense, we need to include time charterer, which would mean we have changed their tortious liability into strict one but no serious debate about this seemed made at the time of amendment. In contrast, as for the former (a), it is submitted that we shall include operator in commercial sense. This is because the entities qualified to limit liabilities therein include time charterer and others and we can find the law intends to cover all entities involved in operation both in commercial and nautical senses; and because in a certain precedent in Japan none of great many interested parties in and out of Japan did not object the treatment in that way. Certainly, another Japanese judicial precedent laid down a decision apparently assuming operation in nautical sense for the purpose of "operation" under Limitation Act; and an English case held a consignee who is involved in responsive actions against rough weather did not fall within the operator, dealing with a unique set of facts. But it is submitted that these precedents just clarified the meaning of operator in nautical sense but did not judge operator therein could not cover operator in commercial sense.*

We recently see, for example, remote operator is subject of regulation in the context of MASS Code amongst others. I believe it is increasingly important to clarify the meanings of "management"/ "manager" and "operation"/"operator" to avoid confusions.

1. Introduction

In this essay we will discuss "management" and "operation" of a ship, or "manager" and "operator" carrying out those activities in accordance with contract with shipowner or others.
These terms refer to the businesses carried out, and the entities carrying them, on a daily basis in the current shipping practice. They are also the concepts used in legally important contexts. For example, the manager and operator are entities qualified to limit liabilities together with *inter alia* the shipowner and charterer under Limitation Act and its origin LLMC; they are responsible entities together with *inter alia* the shipowner (but not charterer) under Ship Oil Pollution Act[1] and its origin Bunker Convention. Recently we also see deliberations about how to regulate remote operation center in the context of regulation for Maritime Autonomous Surface Ship (MASS). What the operation therein means may be an issue. [2] It must therefore be very important to analyze

[1] This is what was abbreviated as Oil Pollution Act, *i.e.* Act on Liability for Oil Pollution Damage from Ships and Others in previous essays in this series. Why abbreviation so changed will be explained later in 3. (2) b.
[2] By way of another example, in May this year the Comité Maritime International ("**CMI**") made public the

meanings of these concepts. However, the terminology in practice is not quite easy to understand. It further seems that judicial precedents and commercial law academics in Japan have not discussed their meanings very well and, as a consequence, their views may be discrepant from the understanding in practice. I do not think such situations may be left ignored.

In the following sections, I would like to first introduce a general understanding of concepts of management/manager and operation/operator in shipping practice (at 2.), then check out principal laws in which these concepts are stipulated (at 3.), then further consider and state my opinions about the meanings of these two concepts within the meanings of Limitation Act/LLMC and Ship Oil Pollution Liability Act/Bunker Convention (at 4.), before making concluding remarks (at 5.).

I will discuss on the basis that "manager" is "person who manages" a ship and "operator" is "person who operates" a ship, therefore discussion of "manager" is equal to discussion of "management" and discussion of "operator" is also equal discussion of "operation"; and *vice versa*. I believe the languages naturally so direct us.

2. Management and Operation of a Ship in Shipping Practice

(1) Management of a ship and two meanings of operation of a ship

In launching into discussion of "management" and "operation" of a ship, I must point out that the meaning of "operation" of a ship sounds beyond doubt but if you check out its component factors from practical perspective, it perhaps connotes two meanings or nuances, one of which overlaps with "management".

Imagine a shipping company "operates" its owned ship completely by its own employees without any contract with other companies, although this is in reality impossible in its perfect from and therefore it is an illustrative example. This "operation" contains two aspects: (1) they decide the route (including ports of call) in which the ship shall be employed (They depend on contract of carriage they entered or want to enter with their customer); instruct the Master, head of the ship who actually navigates the ship in such route; and cause the branch located in ports of call – we used to call "port branch" [*rinko-ten* 臨港店 in Japanese] as distinct from "sales branch" [*eigyo-ten* 営業店 in Japanese] though we do not often hear recently – to implement procedures for the ship to enter into or depart from such port and make arrangements of cargo works and/or embarkation/disembarkation of passengers – these are tasks to be carried out by business and/or administration sections; and that (2) they man the ship with the master and other crew members who will actually navigate the ship on board; maintain the ship in navigable state (relevant works include those before and during navigation); and cause such master and crew member on board to actually navigate the ship – these are tasks carried out by marine and/or technical sections, as well as by the section of the very ship (it is also one of sections in that it is equivalent to a factory in the manufacturing industry). And the latter (2) may be called "management" of a ship (in

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draft CMI Lex Maritima (https://comitemaritime.org/work/lex-maritima/ accessed 16 August 2024). One of the defined words to describe various principles therein is the "ship operator" in Rule 2(7), which is defined as the "*person or persons operating the ship, not being the shipowner*". Apart from suggestion that the basic operator shall be a shipowner, this itself is simply a literal or neutral definition at which apparently nobody can complain. In reality, however, the ship operator so defined is, together with the shipowner as separately defined in Rule 2(6), very comprehensively listed as a party to contract and/or have obligations (See Principles 5, 6, 10, etc.). Whether this approach is appropriate shall perhaps be subject to scrutiny.

particular, when it is contracted-out to the third party, as will be discussed later).
This explanation does not refer to supply of bunker oil, lubricating oil, various equipment and spare parts, fresh water, foods and others. Supply of those except bunker oil falls within the latter (2). As for bunker oil, as it occupies substantial portion of costs, the volume varies depends on navigational situations, and it would be arranged by time charterer if time charter is in place, perhaps it is generally disposed of in the category of the former (1).
Probably reflecting this distinction is only implicitly observed in practice, we cannot find any discussions suggesting this in the legal theories (at least in textbooks of maritime commerce in Japan). However, an academic shipping economist (ex. Japanese shipping company) explains almost the same contents in the following manner:

> "*The term 'operation' has two meanings in the Japanese shipping practice. Literatures related to the shipping have used the term [*unko 運航*]* [Author's note: this is the Japanese translation of operation] *or 'operation' without distinguishing those two meanings on the assumption that readers are aware there are such two meanings, and business people have judged which was indicated in the relevant passage by considering the context. However, this will cause confusions to people not related to the shipping. So let's sort out here:*
> *[Meaning No. 1] The following series of works: 1. establishment of voyage plans (determination of loading ports, discharging ports, and voyage schedules according to transportation demands); 2. appointment of a ship agent at each port of call (The agent implements actual procedures for the ship to enter into and departure from the port and makes actual arrangements for cargo handling works. Branches and/or local subsidiaries of an operator may be set up in important ports.); 3. arrangements of heavy oil for fuel; 4. shipping instructions to a ship; and 5. schedule management.*
> *[Meaning No. 2] Ship management works: Put simply, works "to keep a ship movable at any time" (specifically, to man the ship with crew members, maintain and repair the ship, procure ship supplies (parts and fittings stored and equipped on board), procure lubricants, and arrange insurance for the ship) and "to cause the ship to actually move". The meaning No. 2 have been increasingly often expressed as ship management in recent times.*
> *In this book* [Author's note: his book]*, I will refer to the meaning No. 1 as operation and the meaning No. 2 as ship management.*" [Underlined by the author; the same applies to underlined words and phrases in the following quoted sentences unless otherwise indicated.][3]

This is what I have also generally observed for many years from my experiences. I also presume, in fact, many people engaged in the shipping would agree too if presented in this way and probably would not feel strange.

（2） Examples

And what I just explained – that operation of a ship has two meanings and the latter thereof is more or less equal to management of a ship – is not a matter of mere feelings but is really ascertainable, for example, in the following official explanations by the MLIT, the Japanese authorities to regulate the shipping industry, and standard contract form in the industry, as well

[3] Hiroyuki Goda, *Historical Developments of FOC Ships Arrangements in the Shipping Industry in Postwar Japan (Seizansha 2013)* 16 (n 2)

as usage of words in relation to international conventions:

In the first place, we can find it in the explanation of current transaction structure of the shipping industry by the MLIT. Operation herein suggests meaning No. 1.

As already introduced in my essay in this series, the MLIT Maritime Report explains that, with respect to ocean shipping, its "*business structure mainly consists of an operator who charters a ship from a shipowner who owns and manages the ship.*" [4] In many cases, a shipowner here contracts out with a ship management company, specialist in shipowner's works such as manning the ship with crew members and maintaining the ship in navigable state, and has they act on shipowner's behalf. The diagram in the Report shows "ship management business" as one of the principal shipping-related industries to have contract with a shipowner. In coastal shipping, it is illustrated that a shipowner time-charters out a ship to an operator to receive charter hires, the operator enters into a freight contract with a merchant to receive freight charges; and on the other hand, the shipowner commissions ship management services to a ship management company. [5]

Put them in another way, we may be able to say in the practice, in a converse order of what I discussed at the outset:

⑴ the "management" of a ship is a series of works carried out for a ship in order to keep the ship in navigable state and to actually cause the ship to be navigated. It is the shipowner who is in a position to do them. But it is currently common that such works are contracted-out to ship management company;

⑵ the "operation" of a ship is a series of works to actually employ the ship in such state in a voyage for passenger/cargo transportation in accordance with a contract with passenger/cargo interests. (Exactly speaking, transportation is merely a typical purpose of employment of a ship as contemplated by conventional law of maritime commerce. Other purposes may also exist.) It is exactly the operator who is in a position to do them. – this obviously corresponds with the meaning No. 2 of operation advocated by the above academic.

It is presumed that this business structure is, as for cargo transportation, perhaps a result of historical evolutions of business models in maritime trades. After asking readers to forgive the roughness as I am not an expert in the history of shipping economics, I would like to categorize:

⑴ Before early modern times, trade of goods, *i.e.* international sales and purchases of goods, and marine transportation of goods were not distinguished. Parties owned ships by themselves to carry out both trading and transportation of goods (The East Indian Company since the Age of Discovery would exactly fit in this image.);

⑵ In early modern times, shipping companies who were engaged in the business of marine transportation, as distinct from the trade, emerged;

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[4] See the MLIT, *Maritime Report 2024* (https://www.mlit.go.jp/maritime/maritime_fr1_000087.html accessed 16 August 2024) 32 (Table 4-3). This is the updated version of the MLIT, *Maritime Report 2022* that I cited at Akiyoshi Ikeyama, 'Invitation to the Japanese maritime law from key concepts (4) - the "ownership" of a ship and a "shipowner" ' 11-12 (n 24) (https://abesakata.com/archives/450?en accessed 16 August 2024).

[5] The MLIT (n 4) 24 (Table 3-2). The MLIT (n 4) 23 (table 3-2) also illustrates operators located in between owner and merchant are existing in multiple layers, such as in 1st, 2nd or 3rd layer. See also Tomotaka Fujita (sv), *Research and Study Report on Facts of Transport Transactions* (Shoji Homu Kenkyukai 2013) 60-61 [Fumiko Masuda]. This research was commissioned by the Ministry of Justice as preliminary studies for the 2018 Amendment of the Commercial Code.

⑶ Thereafter, among shipping companies, owners who owned ships that were manned, maintained and made navigable, and operators who leased-in such ship (not real lease contract or bareboat charter but lease only in economic sense. Time charter is considered as a contract for this purpose in many cases.) to operate ships within the meaning No. 1 as above in order for them to be employed for freight contract entered into with merchants, have differentiated; and

⑷ Further thereafter, specialist ship management companies have emerged, to whom owners contracted out their works after they invested their funds to own ships, *i.e.* daily works of manning, maintaining and making them navigable. [6]

The emergence of this ship management company seems to be in line with the generalization of the FOC ship as a scheme for a shipowner in ocean shipping to own a ship.[7] However, since it also exists in coastal shipping, FOC cannot be the *sole* reason. It is submitted that ship management is, in essence, is a developed form to contract out shipowner's works.

For avoidance of doubt, ship management company is engaged in the business of shipowner as agent of and/or at the accounts of shipowner. Even if ship management company acts not as agent, its economic balance vests with shipowner. The profit of ship management company is based on management fees[8]. In contrast, operator engaged in operation in commercial sense, *i.e.* time charterer, enters into freight contract with merchant, transports the cargo and receives freight charges. The difference between freight charges (per volume) and charter hires (per time) *plus* fuel costs, port charges and others to be borne by time charterer makes their profit. Thus, profit structures of these two are quite different.[9]

Textbooks of law of maritime commence in Japan do have classifications of "maritime business entity" or similar and their assistant.[10] But it seems to me that in most cases they just assume

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[6] In more details: (1) many operators themselves may have their owned ships. They are the owner/operator of those ships. From the operator's perspective, to lease a ship from the owner (to time charter) is a method for adjusting their fleet or the tonnage of their ships, which is equivalent to the production capacity of a factory in the manufacturing industry; (2) Conversely from the owner's perspective, to lease a ship to the operator is not the sole method for conducting their business. If they can enter into a freight contract directly with the merchant, then they operate their ship in the meaning No. 1 and become the owner/operator; and (3) even in cases where the operator once chartered a ship (and thus puts it in the list of ships to be operated in the Meaning No. 1, *i.e.* in their fleet), if they have got no freight contract to be performed by the ship during the charter period, the ship would be left idle. In such cases the operator would further lease out (T/C out) the ship to another operator as if they are in the position of owner.

We may also add another evolution stage: (5) as a further evolution in the relationship between operators and merchants, freight forwarders who had initially arranged transportation but without responsibility for transportation as such gradually began to undertake responsibility for transportation to become *contractual* carriers, whilst operators began to become the so-called *actual* carriers as distinct from the former.

[7] As for the emergence of ship management business, see Ikeyama (n 4) 12 (n 28).

[8] According to the Standard Coastal Ship Management Contract Form adopted by the Japan Shipping Exchange Inc. ("**JSE**") (See https://www.jseinc.org/document/naiko/naiko_kanri_2022_sample.pdf accessed 16 August 2024), manager concludes contract between the third party on behalf of shipowner (Article 3-3) and accordingly, the costs arising from such contract is borne by shipowner as a matter of course, and any extra costs incurred shall also be borne by shipowner (Article 7, Paragraph 2). Manager separately receives prescribed management fees from shipowner (Article 7, Paragraph 1).

[9] I once pointed out this in Akiyoshi Ikeyama (2014) Waseda Law Review 90-1-69 at 79 for Judgment of Tokyo District Court on 30 September 1997, 1654 Hanrei Jiho 142 (The "*Camfair*").

[10] See Ikeyama (n 4) at 6 *et seq.* "Maritime business entity" is an English translation of [*kaijo kigyo shutai* 海上企業主体] in Japanese. I discussed other candidate translation words at Ikeyama (n 4) at 8 (n 15).

manager of a ship is ship manager of a co-owned ship in the Commercial Code to be discussed later, and sometimes use the concept of operation of a ship without definition, having no sufficient regard to the business structure arising from evolutions into owner, operator, and ship management company. I would revisit this in 4. (1) a. and (2) a.

Second situation is the cases where term "operation" is used in the course of explaining individual works belonging to "management". They can be found in the MLIT Maritime Report and the MLIT Guidelines, as well as in the standard contract form by the Japan Shipping Exchange, Inc. Operation therein suggests Meaning No. 2 (or a part thereof).

The said MLIT Maritime Report indicates three components of ship management business in coastal shipping: (a) crew employment and manning management; (b) operation implementation management; and (c) ship maintenance management.[11] As we will discuss in 3. (3) b. below, registration or filing of ship management company has become compulsory. In the history leading to this, the MLIT published in July 2012 "Guidelines for Ship Management in Coastal Shipping Services", which explained the ship management services are, in a different order, the "*services including the following all three services to be performed collectively: (i) 'crew manning and employment management', which is the service of employing crew members and manning managed ships with them; (ii) 'ship maintenance management', which is the service to maintain the seaworthiness of managed ships; and (iii) 'ship operation implementation management', which is the service of management of implementation of operation of managed ships through crew members manned with such ships.*" [12]. The JSE has adopted the Standard Coastal Ship Management Contract Form.[13] If we review this, we can again find: (i) crew manning and employment management; (ii) ship maintenance management; and (iii) operation implementation management (plus (iv) sales management and (v) insurance arrangements). Review of the contents of (iii) reveals that first sentence of Article 3-2 thereof provides (iii) is to mean to "*conduct operation implementation management in accordance with ship management practices in order for the ship to be operated in accordance with relevant regulations by law and with all regulations and recommendations by classification society*". According to second and third sentences of the said Article, the manager is to "*give necessary instructions on the operation of the ship" and "negotiate with concerned government agencies, insurance companies, salvors and others and provide support, if necessary, in the event of emergency such as accident or marine disaster on behalf of*" the shipowner.

We can see "operation" in these contexts is conceptually a component factor of "management". And the standard contract of the JSE is of course a contract between shipowner and ship management company but not between shipowner and operator. It follows it would be natural to consider the term "operation" in these contexts as meaning No. 2 (or a part thereof).

Third situation is the usage of words in the so-called ISM Code of SOLAS. Operation herein is also meaning No. 2.

The official name of the International Safety Management Code (ISM Code) is the *International Management Code for the Safe Operation* – translated into [*unko* 運航] in Japanese – *of Ships and for Pollution Prevention*.[14] It is the IMO Resolution incorporated as an integral part of SOLAS

[11] See the MLIT (n 4) 24.

[12] The MLIT, 'Guidelines for Ship Management Services in Coastal Shipping' (July 2012) 3.1.1. (https://www.mlit.go.jp/common/001012473.pdf via https://www.mlit.go.jp/maritime/maritime_tk_13091906.html accessed 16 August 2024)

[13] See (n 8).

[14] Translated title here in the Japanese version of this essay adopting [*unko* 運航] for operation is taken from

(Chapter 9 of the Annex). It demands the "Company" as defined therein to establish documented safe management system of a ship and implement it to achieve safe operation of the ship and prevent marine pollution. Under Japanese law, it has force of law by Article 12-2 of Ordinance for Enforcement of Ship Safety Act.

Its title refers to the "*safe operation of ships*" as one of its objectives. The regulated body "Company" is defined as "*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 shipowner and who, on assuming such responsibility, has agreed to take over all the duties and responsibility imposed by the Code*."[15] In fact, however, what the Company is required to establish is "safety management system" and to document is "safety management manual". The Company is called "safety management company" in a circular by the MLIT[16] if they are not the shipowner. They are the ship management company in practice.[17] They say the entity who is responsible for operation of a ship is ship management company, who is to undertake safety management. It is then natural to think the "operation" herein shall indicate the meaning No. 2 by the above academic. On the other hand probably reflecting this, the MLIT circular said it is to "ensure safe operation – it was translated into not [*unko* 運航] but [*koko* 航行] in Japanese – of a ship"[18] and a literature supervised by the MLIT people even adopted a different translation for the title of *International Management Code for the Safe Operation* – again not [*unko* 運航] but [*koko* 航行] in Japanese – *of Ships and for Pollution Prevention*.[19] The latest translation by the MLIT is also changed into *International Management Code for the Safe Operation* – again not [*unko* 運航] but [*koko* 航行] in Japanese – *of Ships and for Pollution Prevention*, although the translation of "operation" in the definition of the Company remains [*unko* 運航].[20] This must mean that operation (and Japanese term of [*unko* 運航]) is considered to have meanings Nos. 1 and 2 and operation under the ISM Code is construed to have meaning No. 2, which is rather translated into [*koko* 航行] here.

For the avoidance of doubt, we shall not understand that *operation* in English has two meanings represented by two Japanese [*unko* 運航] and [*koko* 航行] and accordingly [*unko* 運航] in Japanese has a narrower meaning. If so, either of Japanese translation both by the MLIT would somehow become wrong. Conversely, *operation* in English in shipping context is most often translated into [*unko* 運航] and people must generally think these two are the same and interchangeable. As is in this case, however, operation is occasionally translated into a different term [*koko* 航行] – this

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the translation of Chapter 9 of Annex to SOLAS by the MLIT (Safety Policy Division, Maritime Bureau) (sv), *SOLAS Consolidated Edition 2020 in English and Japanese* (Kaibundo 2020) 723.

[15] As for the definition of the "Company" under the ISM Code, see also Akiyoshi Ikeyama, 'Understand the Japanese maritime law from key concepts (1) – "Gross Negligence" and "Reckless Act with Knowledge"' 8 (https://abesakata.com/archives/304?en accessed 16 August 2024)

[16] Circular No. Kaisa 756 by Director of Maritime Bureau, MLIT, 'Inspections of Safety Management Manual for domestic implementation of the International Safety Management Code' dated 26 December 1997 at the footnote in Part II (https://www.classnk.or.jp/hp/pdf/activities/statutory/ism/flag/japan/756-H261203.pdf accessed 16 August 2024)

[17] MLIT (Inspection and Measurement Division, Maritime Bureau), *Commentaries on the ISM Code and Inspection Practice – Understand the International Safety Management Code* (3rd edn, Seizando Shoten 2008) 64 *et seq* discusses what is the "Company" under the title of "ship management company".

[18] See (n 16) Preamble

[19] (n 17) 295

[20] The MLIT (Safety Policy Division, Maritime Bureau) (sv), *SOLAS CODES IN ANNEXES 2024 in English and Japanese* (Kaibundo 2024) 337

is in fact conversely translated into *navigation* in English quite often – to carry a certain nuance in operation and its Japanese equivalent [*unko* 運航]. In essence, we must conclude both *operation* in English and [*unko* 運航] in Japanese occasionally carry a nuance closer to *navigation* in English and [*koko* 航行] in Japanese; and the translator here implicitly thought *operation* adopted in the title of the Code might rather be replaceable by *navigation* and thus chose the Japanese word [*koko* 航行] usually equivalent to navigation.

（3） Reservations

If we once again review the above-mentioned meanings Nos. 1 and 2 of operation and try to simplify them against the background these examples, we may perhaps say:

- The concept of "operation" has two meanings of:
  - ⑴ commercial sense, in the sense that one employs a ship in a voyage for the purpose of its employment, and
  - ⑵ nautical sense, in the sense that one keeps a ship in navigable state and actually causes it to be navigated;
- The latter is more or less equal to ship "management"; and
- The shipping practice (and the MLIT) is implicitly assuming them.

I would like to refer to them respectively as (1) "operation in commercial sense" and (2) "operation in nautical sense" in the following discussions.[21]

But if I stop here with just simplified replacement of explanations, they will probably be subject to criticisms based on misunderstanding. Supplementary considerations are required. I would like to explain them, the order of which is unimportant.

In the first place, The latter operation is also activity nothing but in commercial nature. If, as is in the example introduced at the beginning, a shipping company who owns a ship carries out all works within their company, the latter sense will form a part of overall "operation" conducted by such company together with the former; and if it is contracted out by shipowner to ship management company, that will be an activity carried out in accordance with a surely commercial transaction called ship management contract. And the latter may be easier to understand if we describe it technical rather than nautical. But "technical" *[gijutsuteki* 技術的 in Japanese] is often used for an English translation of technical [*komu* 工務 in Japanese] section as opposed to marine section and thus not technical but nautical is adopted to avoid possible confusion. At any rate these adjectives are just for convenient and comparative purpose and what is important is

[21] If we adopt these categorizations, I believe we can more easily understand the implications of operation commissioning contract (variously translated but the Japanese is [*unko itaku keiyaku* 運航委託契約]) observed in Japanese coastal shipping (See https://www.jseinc.org/document/itaku/itaku_sample.pdf accessed 16 August 2024 for a standard contract form adopted by the JSE) and the meaning of "operation" therein. The structure of this contract is: the operation in commercial sense is commissioned (contracted out) by a shipowner to a contractor instead of conducting it by themselves (Article 2, Paragraph 1), the contractor enters into a freight contract with a merchant in their own name (Article 3), but always at the account of the shipowner as commissioner (Article 2, Paragraph 1 and Article 6). The contractor just receives commission fees (Article 7). This structure is partly common with that of time charter in the sense that the operation in commercial sense is conducted by the counter part of the shipowner. But the revenue structure is fundamentally different. It is also fundamentally different from a ship management contract in which the operation in the nautical sense is commissioned (contracted out) by a shipowner. The meaning of an operation commissioning contract is similarly explained by (n 17) 78-79 too.

substances I have variously explained.

Secondly, another expression of the latter, ship management, may well be defined by different words too. An MLIT literature says it shall be the "*provision of a seaworthy ship who can safely carry passengers and cargo*".[22] And as will be discussed in 3. (3) b, the Japanese Coastal Shipping Business Act, drafted and applied by the MLIT as competent authorities, also gives another definition. Which is the most appropriate may be an issue but I do not think all of them are really different and I do not think it is a substantial question. They are in the end no more than how to best define what is conducted or to be conducted by ship management company.

Thirdly, you observe the latter contains both (i) to "keep a ship in navigable state" and (ii) "to actually cause a ship to be navigated", following explanation by the above-mentioned academic quoted in (1) that covered both (ii) "to keep a ship movable at any time" and (ii) "to cause the ship to actually move". But when we do use the term "operation" to indicate operation in nautical sense, perhaps we in reality want to only indicate, or at least to put emphasis on the latter, *i.e.* (ii) to actually cause a ship to be navigated (Thus we may occasionally want to translate it differently into [*koko* 航行] in Japanese); but when we use the term "management", perhaps we rather want to put emphasis on the former, *i.e.* (i) to keep a ship in navigable state (and for that purpose man the ship with crew members and carry out maintenance works). It is certainly a ship *management* company who undertakes responsibility of *operation* and acts on behalf of shipowner if a ship caused an accident during *operation* under the ISM Code, but we seldom directly say, "*management* company *operates* a ship" somehow. It is submitted, however, that they are no more than linguistic difference in nuances derived from impression of each word. It shall not mean *operation in nautical sense* and *management* are really different. Even if there exists some difference in meanings, I would suggest they nevertheless almost overlap each other. I will revisit this overlap later.

Fourth is related to the third. The latter may also be used to describe the case where master and crew on board "actually navigate the ship", in other words in the nuances of [*sosa* 操作], [*soju* 操縦], or [*sosen* 操船] in Japanese, which falls outside the category of management.

The operation used in the context of deliberations about rules applicable to Maritime Autonomous Surfaces Ship ("**MASS**") is this example. At present, the IMO is working to prepare the MASS Code, which will be non-mandatory rules for the time being. There are concepts such as remote operator and remote operation center therein.[23] This logically contains the concept of operation of a ship. In Japanese language, however, they go on to sometimes translate the term of "operation" here not into [*unko* 運航] but [*sosa* 操作], [*soju* 操縦], or [*sosen* 操船] (thus the above terms into [*enkaku sosensha* 遠隔操船者] and [*enkaku sosensho* 遠隔操船所]).[24] This is like a difference between [*unko* 運行] and [*unten* 運転] of a bus. I dare say this sits next to management

[22] (n 17) 64

[23] As to the version currently open to public, see DRAFT INTERNATIONAL CODE OF SAFETY FOR MARITIME AUTONOMOUS SURFACE SHIPS (MASS CODE) in MSC 108/4 – Report of the Correspondence Group (submitted by Marshall Islands). This is included in papers for the IMO Maritime Safety Committee 108th session held in May 2024. This is available to anyone who has the IMO Web Accounts obtainable by accessing https://docs.imo.org (accessed 16 August 2024). As for the 108th session, see the MLIT's Press Release (https://www.mlit.go.jp/report/press/kaiji06_hh_000319.html accessed 16 August 2024) See PART 1, paras. 4.38 and 4.39 for respective definitions.

[24] Gen Goto, *Status of Deliberations about MAAS in the IMO*, 141 (2024) The Captain 2 at 5 introduces *remote operation center* in original English without translation but when he explains its substance, he refers to [*sosa* 操作] of the whole or partial functions of a MASS, [remote *soju* 遠隔操縦] of a MAAS or [*sosen* 操船] of a MASS.

but we must say this has already go beyond the scope of management – which is to be carried out by a company – in its linguistic meaning. For your information, these Japanese terms may conversely be translated into “steering” or “manoeuvring” in English, which are surely a certain aspect of nuances carried by the concept of “operation” in nautical sense.
I would summarize what I am suggesting in the third and fourth in the following table:

<table>
<tr><th colspan="3">Operation of a ship</th></tr>
<tr><th colspan="2">Operation of a ship in nautical sense (*)</th><th rowspan="2">Operation of a ship
in commercial sense</th></tr>
<tr><td rowspan="2">[Master and crew]
To actually navigate (maneouver) a ship</td><td colspan="2">Management of a ship (**)</td></tr>
<tr><td>To keep a ship in navigable state (**)</td><td>To actually cause a ship to be navigated (*)</td><td>To employ a ship in a voyage for the purpose of its employment</td></tr>
</table>

(*) and (**) indicates which factor is focused on.

And **fifthly**, if we talk about manager and operator, of course we shall not mean shipowner and/or the lessee of a ship does not carry out management or operation of a ship. As is clear from my illustrative example at the outset, if they neither enter into ship management contract with ship management company nor time charter out their ship, they would of course carry out management and operation by themselves. The situation where the concepts of manager and operator would make real sense is when they did not carry out them by themselves. In other words, if we have a general list of “shipowner, lessee of a ship, and manager and operator of a ship”, it shall mean “shipowner, lessee of a ship, and in case they neither manage nor operate a ship by themselves, manager and operator of a ship”.
In my opinion if the substance each actually has in mind is different when we discuss the concepts of management and operation, it would be one of factors to cause confusion. I believe it is crucial to explicitly recognize what we discussed here before looking into them from legal perspective.

3. Management and Operation of a Ship under Japanese Law – Where They Appear

Under Japanese Law, principal situations in which we may find the concepts of “management” and “operation” (“manager” and “operator”) of a ship are classified into the following historical categories:

(1) Commercial Code

The first is the ship manager that has been existing in the Commercial Code from the past. Although the concept of “management” of a ship does not exist in the Commercial Code, there exists the concept of ship “manager” of a co-owned ship (Article 697 *et seq*). Perhaps this has the oldest history.
However, this manager is nothing but a representative of part owners of a co-owned ship in connection with its employment required to be appointed by such part owners. Duties of this ship manager include (1) to represent them in a contract in order to employ the ship except as otherwise prescribed (Article 698), as well as (2)(i) to keep books concerning its duties and record all information concerning the employment of ship therein and (ii) to settle the accounts concerning the employment of ship for each certain period to request approvals from all part

owners of the ship (Article 699). This is different from ship management company as discussed earlier. We must not be confused between these two when we discuss management of a ship.[25] In the Commercial Code there exists no "operation" concept, except in the Article that have been partially transplanted from Limitation Act by the 2018 Amendment (Article 842, item 1). This Article will be discussed in (2) c. below.

（2） Limitation Act and Ship Oil Pollution Liability Act

Second is "management" and "operation" of a ship, which have been introduced with express stipulation that they are equivalent to those found in international conventions to which Japan is a Contracting State (more precisely, introduced in the form of "manager" and "operator" who are to perform their tasks), or which have been introduced as imported concepts therefrom. They are found in a. and b. below. What will be explained in c. and d. are not expressly stated as imported concepts but yet derived from international conventions and therefore explained together.

a. Article 98 of Limitation Act (Article 1, Paragraph 2 of LLMC)

In this context, the concepts of "management" and "operation" ("manager" and "operator") of a ship perhaps first appeared when Japan ratified the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships of 1957 ("**1957 Convention**") together with 1969 CLC and 1971 FC in 1975 to enact Limitation Act, in order to introduce monetary limitation of shipowners' liability (Act No. 94 of 1975, effective on 1 September 1976).
The 1957 Convention is a convention for limitation of liability of primarily "owners" of sea-going ships (Article 1, Paragraph 1), but Article 6, Paragraph 2 stipulated, "… *the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment in the same way as they apply to an owner himself*" and included the "manager" and "operator" of a ship in the entities qualified to limit liabilities. When enacting Limitation Act to coordinate with the ratification of this Convention, Japan introduced in the opening part thereof the defined concepts of the "Shipowner" (= the owner, lessee, or charterer of a ship; and the unlimited liability members[26] of a corporation who is the owner, lessee, or

[25] A ship manager for a co-owned ship ([*senpaku kanrinin* 船舶管理人]) may also be translated as a "managing owner" in English. We would not be confused with a "ship manager"/"ship management company" [*senpaku kanrinin* [船舶管理人]/[*senpanku kanri kaisha* 船舶管理会社]) in practice as long as we use this different translation in English. However, "managing owner" gives an impression that they shall be one of part owners, which is not necessarily the case. The third party may be appointed under Japanese law (Article 697 Paragraph 2). This is misleading. In any event, the same term of [*senpaku kanri* 船舶管理] is in fact used for both in the original Japanese and thus the confusion could take place. Also, the former may occasionally be translated as a "ship's husband", in which case we may also distinguish them by different translations. (Translation by the Ministry of Justice of Japan adopts this. See Ikeyama (n 4) 4 (n 6).) However, if a ship's husband is considered equivalent to a ship management company today, the confusion would eventually take place. See also Shigeta (n 33) *infra* at 36-37 (n 3).

[26] Unlimited liability members of a corporation are not referred to in 1957 Convention and 1976 LLMC, but their rights are separately recognized under Limitation Act of Japan, because the petition for limitation of liability by a shipowner will be rejected if they are in bankruptcy, but unlimited liability members of such shipowner is yet to be allowed to file a separate petition for limitation of liability as a matter of course since they do have separate unlimited liabilities.

charterer of a ship (Article 2, Paragraph 1, item 2)) and the "Master" (= the master, crew members, or the shipowner's other employees, including the pilot) (Article 2, Paragraph 1, item 3)). At the same time, the Act instead contained a stipulation in a place close to the end thereof, "*This Act applies to the manager of a ship and the operator of a ship as provided for in Article 6, Paragraph 2 of the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships and to the unlimited liability members of a corporation who is such manager or operator, in the same manner as it applies to the Shipowner; and this Act applies to the servants of the manager of a ship and the operator of a ship as provided for in the said Paragraph in the same manner as it applies to the Master*" (Article 98).

Then 1976 LLMC was adopted as successor to 1957 Convention. The Shipowner therein as an entity qualified to limit liabilities was redefined in a more straightforward manner of "*the owner, charterer, manage and operator of a seagoing ship*" (Article 1, Paragraph 2). Limitation Act was then amended (Act No. 54 of 1982, effective on 20 May 1984[27]) in conjunction with Japan's accession to LLMC. In this amendment entities qualified to limit liabilities were changed from the "Shipowner"/the "Master" to the "Shipowner"/the "Salvor"/the "Servants", but there was no change in the definition of the "Shipowner". The above-mentioned Article 98 was also just amended with minimal logical modifications to change the Convention to be cited therein[28]. In a word, Limitation Act of Japan not only undefines the "manager" and "operator" but rather actively adds them to entities to limit liabilities through adding "*the manager of a ship and the operator of a ship as provided for in ⋯ the ⋯ Convention*", *i.e.* 1957 Convention or 1976 LLMC as the case may be.

About the meaning of this, the commentary written by draftsmen at the time of enactment of Limitation Act (*i.e.* at the time of ratification of 1957 Convention) just explained,

> "*⋯ there is no concept of operator of a ship in Japan; manager of a ship (Articles 699 and 700 of the Commercial Code) is an agent of part owners of a ship and thus will not be liable under the Commercial Code. Therefore, under Japanese law, there is no reason to apply this Act to manager and operator of a ship, and thus they were not included in the defined Shipowner in Article 2, item 2 ⋯. However, because in other Contracting States manager and operator of a ship under Article 6, Paragraph 2 of the Convention ⋯ may be found liable ⋯, this Act was drafted to be applied to these persons in the same manner as the Shipowner and applied to the servants of these persons in the same manner as the Master.*"[29]

Another commentary written by draftsmen at the time of amendment of Limitation Act (at the

[27] The accession date of LLMC by Japan was 4 June 1982 and effective date of the Convention was 1 December 1986. There was a time lag. For the reason of this, see Takeo Inaba and Itsuro Terada, *Commentaries on Act on Limitation of Liability of Shipowners* (Hosokai 1989) 40-43.

[28] The provision after the amendment is "*This Act applies to the manager of a ship and the operator of a ship as provided for in Article 1, Paragraph 2 of the Convention on Limitation of Liability for Maritime Claims and to the unlimited liability members of a corporation who is such manager or operator, in the same manner as it applies to the Shipowner; and this Act applies to the servants and other persons of the manager of a ship or the operator of a ship for whose act such manager or operator is responsible as provided for in the said Paragraph, in the same manner as it applies to the Servant.*" (Article 98, Paragraph 1) The underlined part remains unchanged.

[29] Yasushi Tokioka *et al*, *Commentaries on Act on Limitation of Liability of Shipowners and Act on Liability for Oil Pollution Damage* (Shoji Homu Kenkyukai 1979) 286-287 [Yasushi Tokioka]

time of accession to LLMC) generally followed this approach and just explained,

> "*Meanings of these concepts* [The author's note: manager and operator] *are not necessarily commonly understood in Japan. However, the manager under the Japanese Commercial Code is an agent of part owners of a ship (Article 700 of the Commercial Code) and will not become the responsible entity in principle. Therefore, they do not have to be listed as entities qualified to limit liabilities. As to the operator, because the Commercial Code does not have the entity equivalent thereto, it was considered unnecessary to expressly list the operator as such entity. However, since the substance of these concepts in the Convention is unclear, the provision of Article 98, Paragraph 1 was … included just in case*."[30]

To put them briefly, it was said that, based on the assumption that the concept of manager did not exist in Japanese law (except manager of co-owned ship who did not become the responsible entity) and the concept of operator did not exist either, those concepts in the Conventions were simply added as imported concepts as they were just in case, because they somehow existed in the provisions of Conventions.

The question that would then arise is how these concepts had been discussed in the deliberation process leading to the adoption of Conventions. But the terms of manager and operator had already existed in the first draft resulting in 1957 Convention prepared by the British Maritime Law Association in 1954.[31] It is beyond my capacity to really research why and in what intention BMLA inserted them in their first draft. (A report by Professor Komachiya to be referred to later records an informal explanation he received from an BLMA member in the CMI Conference in 1956.[32]) An academic in Japan explains that conference leading to the adoption of 1957 Convention did not reach to figure out these concepts; as to LLMC, what was discussed was rather whether or not to expand entities qualified to limit liabilities and certain drafts were deliberated but the wording finally became the same as those in 1957 Convention; and it follows how to understand these concepts are completely left to judicial decisions of Contracting States.[33]

The only substantive explanation in the said two commentaries of draftsmen, if any, would be found elsewhere in the former (related to 1957 Convention). It said,

> "*As for the operator, there is no equivalent in the Commercial Code, nor legislations of foreign countries that has ratified this Convention use the term of operator. In Japan, depending on the substance of tasks of the maritime business person, it is understood that they would fall*

[30] Inaba and Terada (n 27) 66

[31] Sozo Komachiya, 'Report on CMI Madrid International Conference – Focusing on the Draft Convention of Limitation of Shipowners' Liability-' (1956) 4 JMLA 101 at 103. As to the Japanese translation of first draft prepared by the British Maritime Law Association, see Article 8, Paragraph 2, item b of the draft cited at 104 *et seq* (n 5).

[32] Komachiya (n 31) at 117 (n 1) explains an episode that he was told informally by the British representative at the CMI Madrid Conference that manager and operator were synonymous, but the term of manager was included because the Dutch representative wanted to include the term of manager to enable a special term in Dutch language to be covered; but he himself was not persuaded by this explanation.

[33] Haruo Shigeta, 'Limitation of Liability of Shipowners' in Seiichi Ochiai and Kenjiro Egashira (eds), *Encyclopedia of Maritime Law in Commemoration of Centennial Anniversary of Japan Maritime Law Association* 29 (Shoji Homu 2003) at 36-37 (n 3)

within one of the Shipowners defined in this Article [The author's note: Article 2, item 2]." [34]

In the latter commentary (related to LLMC Convention), this explanation disappeared from the text[35] but instead it introduced at the footnote the similar opinion of Professor Komachiya at the time of adoption of 1957 Convention as will be discussed in 4. (2) a. below.[36] We may say this construction assumes (and only assumes) the operator is a kind of "maritime business entity".

b. Article 39 of Ship Oil Pollution Liability Act
(Article 1, Paragraph 3 of Bunker Convention)

When Japan enacted Limitation Act, the Act on Liability for Oil Pollution Damage was also enacted as special rules of the former and as domestic law of 1969 CLC and 1971 FC (Act No. 95 of 1975, effective on 1 September 1976). The latter Act was subsequently amended in 2004 to introduce a compulsory insurance system for oil pollution damage by bunker from general ships as Japan's unique legislation and renamed the Act on Liability for Ship Oil Pollution Damage. It was further amended in 2019 when Japan acceded to 2001 Bunker Convention and 2007 Nairobi Convention and renamed to the Act on Liability for Ship Oil Pollution Damage and Others[37] (Act No. 18 of 2019, effective on 1 October 2020), which has been good law up to the present. (In this series, we have abbreviated it as "Oil Pollution Liability Act", however, we will now refer to it as "**Ship Oil Pollution Liability Act**" to reflect this history.) After this re-amendment, it stipulates, "when a general ship oil pollution damage has occurred, … the Shipowners (including the manager and operator of a ship provided for in the Article 1, Paragraph 3 of the Bunker Convention. …) are joint and severally liable for compensation of damage." (main sentence of Article 39, Paragraph 1). Although the "Shipowners" in this Article as such are limited to the owner and lessee of a ship (Article 1, item 12), the scope of responsible entities is expanded by bracketed phrase. This corresponds to the fact that Bunker Convention defines the "shipowner" as "the owner, including the registered owner, bareboat charterer, manager and operator of the ship" (Article 1, Paragraph 3) and provides for strict and joint liability of those persons (Article 3, Paragraphs 1 and 2). Again, the "manager" and "operator" therein are not only undefined but also additionally specified as responsible entities in the style that "the manager and operator of a ship as provided for in … the Convention" *i.e.* Bunker Convention[38].
There is no clear provision about "the manager and operator of a ship" in Bunker Convention themselves, and as far as I know very few Japanese law literatures seem to discuss the meanings

[34] Tokioka *et al* (n 29) 31 [Yasushi Tokioka]
[35] Inaba and Terada (n 27) 494-495
[36] Inaba and Terada (n 27) 81 (n 18)
[37] English translation by Japanese Law Translation website operated by the Ministry of Justice of Japan ("**MOJ**") (https://www.japaneselawtranslation.go.jp accessed 16 August 2024) remains "Liability for Ship Oil Pollution Damage", without reflecting addition of "and Others" ([*to* 等] in Japanese). Also the word "Liability" is in any event not a literal translation of the original Japanese [*songai baisho hosho* 損害賠償保障], which would rather mean to say "secure compensation". It is inconsistent with another statute having the same Japanese words but translated into "Act on Securing Compensation for Automobile Accidents". But this essay adopts the translation by the MOJ as it is, since this is no more than the choice of translation words.
[38] After the first amendment and prior to the second amendment, the responsible entities from bunker pollution were limited to the "Shipowners of a general ship", *i.e.* the owner and lessee of a ship. (Article 39-2 and Article 2, item 5-2 of the pre-amended Ship Oil Pollution Liability Act)

thereof.[39]
However, the definition provision of operator does exist in Nairobi Convention, to which Japan acceded simultaneously at the time of the said second amendment of Ship Oil Pollution Liability Act. Namely, Article 1, item 9 thereof defines,

> "*'Operator of the ship' means 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 duties and responsibilities established under the International Safety Management Code, as amended.*"

This is equivalent to the definition of the "Company" under the ISM Code in SOLAS we discussed in 2. (2). Some non-Japanese articles do argue that there is no reason to construe the word in Bunker Convention differently from this definition in Nairobi Convention and thus time charter shall not be included herein,[40] although in Bunker Convention the operator is one of the responsible entities along with the shipowner and another, whilst in Nairobi Convention it is the registered owner who is responsible for the wreck removal referred to therein, with the operator being only responsible for reporting together with the master (Article 1, Paragraph 8, Article 5, Paragraph 1 and Article 10, Paragraph 1 of Nairobi Convention and Article 47, Paragraph 1 and Article 61, Paragraph 1 of Ship Oil Pollution Liability Act and Article 31 of Ordinance for Enforcement of Ship Oil Pollution Liability Act).

c. Article 3, Paragraph 1, item 1 of Limitation Act and
Article 842, item 1 of the Commercial Code
(Article 2, Paragraph 1, item a of LLMC)

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[39] Japanese literatures explaining Bunker Convention include Toshiaki Iguchi, 'On the "Convention on the Compensation of Pollution Damage by Bunker Oil in 2001"' (2003) 176 Kaijiho 2 and Hiroshi Kobayashi, 'Entry into Force of Bunker Convention and Review of Compensation System for Oil Pollution Damage by General Ships' (2009) 202 Kaijiho 26. Iguchi introduced discussions about responsible entities in the course of deliberations for Bunker Convention that channeling of liability as found in tanker oil pollution was rejected and instead manager and operator were included in responsible entities; He also recognized there might be criticism that who they were would be unclear; as for manager, he introduced the definition of the Company under the ISM Code but said this terminology was not necessarily well accepted in practice yet; and as for operator, he introduced the definition related to U.S. Oil Pollution Act by way of example but made no conclusive remark. The definitions of manager and operator under the Convention seem to remain unclear in the end. Kobayashi did not give any specific explanations. Also the MLIT Press Release at the time of amendment of Ship Oil Pollution Act, 'Cabinet decision on the 'Bill Partially to Amend the Act on Liability for Oil Pollution Damage' – Measures to protect victims of oil pollution and other damages caused by marine accidents' (https://www.mlit.go.jp/report/press/kaiji06_hh_000183.html accessed 16 August 2024) did not say time charterer would become responsible for bunker pollution by this amendment.

[40] Nicholas Gaskell and Craig Forrest, 'Marine pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003' The University of Queensland Law Journal (2008)2-2-103 at 138; and
Konstantinos Bachxevanis 'The Bunker Pollution Convention 2001' (Reed Smith LLP September 2009) 6 (https://www.reedsmith.com/en/perspectives/2009/09/the-bunker-pollution-convention-2001 accessed 16 August 2024)

The concept of "operation" of a ship also appears in the context of claim subject to limitation in Limitation Act, as well as in LLMC on which the said Act is based.

In the former 1957 Convention the scope of claim subject to limitation was qualified by whether person in question was "*being carried in the ship*" or property in question was "*on board the ship*" as the case may be, or damage thereto was "*caused by the act, neglect or default of any person … on board*" or in certain cases "*not on board*" "*for whose act, neglect or default the owner is responsible*" (Article 1, Paragraph 1 (a) and (b)). Limitation Act before the amendment also provided it to be "claim for damage arising from the voyage as follows". (Article 3, Paragraph1) The concept of operation did not appear at that stage. In LLMC, however, personal and property damage claim "*occurring on board or in direct connection with the operation of the ship*" is listed in the central concept of claim subject to limitation (Article 2, Paragraph 1, item a). Limitation Act based on this Convention has a provision to the same effect too (Article 3, Paragraph 1, item 1). Thus whether the claim occurred, if not on board, in direct connection with the "operation" of the ship has become the question.

In this context, we find Article 842, item 1 of the Commercial Code as amended in 2018 grants the highest priority maritime preferential rights (almost corresponding with maritime lien) on ships to a claim for compensation of damages arising from loss of life or personal injury occurring in direct connection with the "operation" of a ship. It means the concept of "operation" now exists in the Commercial Code now. However, this is also conceptually derived from Limitation Act/LLMC for the following reasons: The maritime preferential rights on ships had formerly been granted to all claims subject to limitation by virtue of Article 95 of Limitation Act,[41] and thus such rights had been granted to the above claim as part thereof too, but its priority had been low. For the purpose of protecting person's life, the said claim was carved out from claim subject to limitation in general to be implanted into the Commercial Code with the highest priority at the time of amendment.[42]

There is one lower (appellate) court judgment that attempted to clarify the meaning of this "operation" in the last year of 20th century[43]. In that case, the holder of a bill of lading issued by the master argued that their claim for damages arising from delivery of cargo without production of bill of lading fell within the claim subject to limitation under Limitation Act, *i.e.* "*a claim for damages resulting from … loss of or damage to property … occurring on board or in direct connection with the operation of a ship*" (Article 3, Paragraph 1, item 1), and that the maritime preferential rights on the ship shall be accordingly granted to the said claim by virtue of Article 95, Paragraph 1 of Limitation Act. The holder thus arrested the ship with no document for title of obligation, or enforceable judgment. In response, the shipowner lodged an objection that such claim does not fall within the claim subject to limitation. As for the meaning of the "operation" of a ship, the Court held,

> "*The concept of operation of a ship shall be understood to refer not only to the period during a voyage, but also to the entire operation* [The author's note: *sosa* 操作 in Japanese] *and management of a ship according to its mechanical usage for the purpose of a voyage, and thus it can be understood to include the operation and management of a ship for loading and*

[41] The provision to grant maritime preferential rights on ships to all claims subject to limitation has been existing since the enactment of Limitation Act, but it did not come directly from 1957 Convention and/or LLMC. See Tokioka et al (n 29) 279-280 [Yasushi Tokioka] and Inaba and Terada (n 27) 484-486.

[42] Nobukazu Matsui and Akihiro Ohno (eds), *Q&As on 2018 Amendment of the Commercial Code* (Shoji Homu 2018)

[43] Decision of Tokyo High Court on 25 February 2000, Hanrei Jiho 1743-134 (The "*Rokko*")

discharging cargo. However, the 'loss' of the cargo in this case as argued by the appellant [The author's note: the holder of bill of lading] *was caused by the act of delivery of cargo, not by the operation and management of the ship for discharging cargo. Therefore, it should be concluded that we cannot regard the said loss as the loss of property occurring 'in direct connection with the operation of the ship'.*"

and thus allowed the objection. However, this construction of concept of operation of a ship was laid down all of a sudden notwithstanding neither party had so argued. It did not explain any basis for this reasoning. I personally imagine it might have been inspired by the definition of the "operation" ([*unko* 運行 in Japanese; different *kanji* character in the same pronunciation]) of an automobile in the context of liability of personal injury or fatal claims in an automobile accident within the meaning of the Act on Securing Compensation for Automobile Accidents, which provides, "*The term 'operation' as used in this Act means the use of an automobile according to the usage of the devices thereof* … " (Article 2, Paragraph 2 of the said Act). Of course I have no idea about the truth.

d. Article 2, item 11 of Ship Oil Pollution Act
(Article 1, Paragraph 3 of 1992 CLC; Article 1, Paragraph 4 of Bunker Convention; and Article 1, Paragraph 8 of Nairobi Convention)

For the purpose of completeness, I shall finally explain the registered "operator" of a ship owned by a foreign state, which is found in the definition of the "Shipowner" in Ship Oil Pollution Act.
Article 2, item 11 of the Act provides the definition of the Shipowner to be the registered owner in principle and, in absence of registration, the owner of the ship. But the proviso thereof stipulates that it shall be "*with respect to the ship owned by a foreign state, the company or other organization registered as the operator of the said ship in such state in case there exists a company or other organization so registered*." This is derived from Article 1, Paragraph 3 of 1969 CLC (now 1992 CLC). The similar provision is also found in Article 1, Paragraph 4 of Bunker Convention and Article 1, Paragraph 8 of Nairobi Convention.
The Commentaries on 1969 CLC explains about this meaning,

"*This proviso is prepared mainly having regard to the Soviet Union and other socialist countries. It provides, if they adopt a system in which ownership of a ship belongs to a state but operation of the ship for commercial activities is commissioned to a company, cooperative or other organization and such organization is to be so registered and announced in public, then the state as owner of the ship is not regarded as the Shipowner but the law applies to the registered operator as the Shipowner. It is intended to avoid state immunity or other difficult issues that would arise if a state who owns a ship was made to be responsible entity.*" [44]

This clearly explains the intention of the law. Who is the operator shall depend on who is so registered by the state who owns the said ship. At any rate it is not a matter of Japanese law. That said, the expression of "operation of the ship for commercial activities" should not have been in line with the distinction between operation in commercial and nautical senses as discussed in 2. I believe both may be covered. As discussed there, operation in nautical sense is also nothing

[44] Tokioka et al (n 29) 319 [Hisashi Tanikawa]

but commercial activities.

（3） Maritime Public Law
- Marine Transportation Act and Coastal Shipping Business Act

The third is “management” and “operation” of a ship under maritime pubic law provisions.
This includes terminology under the ISM Code incorporated into Japanese law by operation of Article 12-2 of Ordinance for Enforcement of Ship Safety Act as already referred to in 2. (2). But what we need to discuss in particular here is the management and operation of a ship in the legislation for administrative purpose to regulate the shipping industry, *i.e.* Marine Transportation Act and Coastal Shipping Business Act. We have had the concept of “operation” for a long time there. It was a relatively recent event that the concept of “management” emerged there. I shall explain “operation” first.

a. Operation of a ship

Marine Transportation Act has divided marine transportation business into two broad categories from its enactment in 1949: (i) ship operation business and (ii) ship lease business (Article 2, Paragraphs 1, 2, and 7) [45]. The concept of “operation” of a ship appears in (i) here. However, since the definition thereof is “*business of transportation of persons or goods by ships at sea*” (exclusion of harbor transportation business omitted)(Article 2, Paragraph 2), the definition of “ship operation” can be paraphrased to “transportation … by ships”. In addition, ship operation business is divided into liner service business and non-liner service business, and the former is a “ship operation business carried out by causing a ship to be employed in a certain route with public announcement that transportation will be performed according to a certain schedule” (Article 2, Paragraph 3). The emphasis is also placed on “transportation” with decided route and schedule.
The second category (ii) ship lease business is defined as “*business of leasing ships (including time charter; the same applies hereinafter) or business of ship operation commissioning*” (Article 2, item 7). We find the concept of “operation” in the latter too but with no definition at all. According to the commentary written by draftsmen when Marine Transportation Act was enacted in 1949, “*Ship lease is usually referred to as bareboat charter and is pursuant to the provisions in the Law of Maritime Commerce (Article 737* et seq*). In this Act it also includes period charter, usually known as time charter, which is not provided in the Law of Maritime Commerce but arising from and widely prevailing in transactions in practice; Together with period charter, operation commissioning is also a contract that developed in* de facto *commercial customs of marine transportation. Depending on the substance of contract, it may be operation of a ship within the meaning of ship operation business in some cases. However, the operation commissioning referred hereto is positioned in between ship lease and ship operation. Difference from ship lease is that transactions are carried out at the account of the commissioner and the contractor just receives the fees for ship operation from the commissioner, nevertheless the operation is carried out in the*

[45] The definition of marine transportation business in this Act also includes shipping brokerage business and shipping agency business that are conceptually not “transportation”. This inclusion should be understood to come from the business regulating nature of the Act.

name of and under the responsibility of the contractor in the same manner as ship lease." [46]
We may find the meaning of operation a little more if we look into various regulations under Marine Transportation Act more closely. In case of general passenger liner service business which is a type within ship operation business, the concept of "operation" of a ship appears separately in that the operator is required to prepare a ship "operation" plan to be included in application papers for the permission thereof (for the business in designated routes) or to be filed separately (for the business in other routes) as the case may be (Article 3, item 3 and Article 6). The ship operation plan here means a plan concerning (1) day/time schedule of operation … , (2) maximum number or quantity of passengers, baggage, parcels, automobiles … and cargoes … per passenger ship to be employed, (3) if the operation is made only in the specific season of a year, such season for operation, and (4) planned date of the commencement of operation (Article 2, Paragraph 1, item 4 of Ordinance for Enforcement of Marine Transportation Act). In addition, the operator is required to appoint an "operation" manager, *i.e.* a person who shall manage the operation of a ship, rather than manage the ship herself (Article 10-3, Paragraph 4 of the Act).
These regulatory frameworks are more or less common in Coastal Shipping Business Act (except that there exist express regulations for the management to be discussed next).[47]
It follows that, in the public law regulations under Marine Transportation Act and Coastal Shipping Business Act, "operation" of a ship is in the end "transportation" by the ship, in other words, employment of the ship for the purpose of performing transportation contract with passenger or merchant, and the plan thereof, *i.e.* the operation plan, also indicates the plan concerning schedule, time, and season of operation in such meaning. I believe this suggest operation in commercial sense.

b. Management of a ship

In contrast, we used to have no regulation defining and regulating "management" of a ship. But now there exists such regulation in Coastal Shipping Business Act.
Since the 2000s, the Japanese government have recognized to enhance ship management as one of their tasks in their coastal shipping policy and various measures have been taken.[48] After twists and turns, as part of the 2021 amendment (effective in 2022) of Coastal Shipping Business Act by the "Act to Partially Amend Marine Transportation Act and Others to Strengthen the Infrastructure of Maritime Industry" (commonly known as Maritime Industry Strengthening Act), the new business category of (iii) business of management of ships employed in coastal transportation was recognized, in addition to (i) business of coastal transportation and (ii)

[46] Yuji Sawa and Ichiro Kawage, *Commentaries on Marine Transportation Act* (Goshima (or Goto) Shoten 1949) 109-110. As to the meaning of an operation commissioning contract of a ship, see also (n 21).
[47] In the classifications of business categories under Coastal Shipping Business Act, corresponding categories are straightforwardly expressed as (i) business of coastal transportation and (ii) business of lease of ships (including time charter) engaged in coastal transportation. "Coastal transportation" in the former is defined as "transportation of goods by sea by ships with port of loading and port of discharge both in Japan" (exception omitted). The concept of operation is not used (Article 2, Paragraphs 1 and 2 of the Act).
[48] The trigger for this was the "Next Generation Coastal Shipping Vision" announced in 2002 by the MLIT's "Next Generation Coastal Shipping Discussion Forum" established in 2001. This had proposed to enhance of the business form of ship management company. For detailed process leading to the amendment of Coastal Shipping Business Act effective in 2022, see Japan Ship Managers' Society, *Coastal Ship Manager Manual ver. 2022* (2023) 1-1 to 1-20.

business of lease of ships (including time charter) employed in coastal transportation, that had existed from the past corresponding with two categories in ocean-going transportation business. Registration or filing of a ship management company is now required (Article 2, paragraph 2, item 3 and Article 3 of the said Act). I have already discussed in 2. (2) that "Guidelines for Ship Management in Coastal Shipping Services" published by the MLIT about 10 years before amendment, in July 2012, had included a certain explanation of ship management services. But the final Act (Coastal Shipping Business Act) defines the management of a ship in a slightly simpler manner, as the "*services to man the ship with crew members, check and maintain its conditions, and implement its voyages upon demand by other persons, regardless of commissioning or any other names given thereto*" (exclusion of harbor transportation business omitted) [49]. There is no term such as operation implementation management as found in the Guidelines. Duplicate use of the term "operation" is carefully avoided. Nevertheless, I believe this definition generally corresponds with the understanding of management of a ship in the practice as discussed in 2. (1) above.

Yet Marine Transportation Act does not have the concept of management of a ship, and therefore ship management in ocean-going transportation is not subject to permission or filing requirements or other governmental control, except regulations related to the ISM Code.

4. Management and Operation of a Ship under Japanese Law – Limitation Act and Ship Oil Pollution Liability Act

Amongst the constructions of concepts of "management" and "operation" in the three historic categories discussed in 3. above, what are particularly important in the context of private law (or from juridical perspective) would be those under Limitation Act and Ship Oil Pollution Liability Act expressly identified as imported concepts, as explained in (2) a. and b. This is because, as for (1), the identification thereof is unlikely to be problematic since the person who is expressly appointed by part owners will become the manager anyway; and as for (3), they are in reality categorizations of persons subject to public law regulations by the authorities and thus if we find any doubt in practice, we shall stand on the safe side through consultations with the authorities. In contrast, as for (2) a. and b., whilst the relevant provisions themselves expressly say they are imported concepts, the commentaries on Limitation Act as cited above did not give us any firm guidance, and the sole judicial precedent on "operation" within the meaning of definition of claim subject to limitation just abruptly provided its rulings. After all, the meaning thereof under Japanese law is yet unclear. We therefore would like to discuss in turn the meanings of "management"/"manager" and "operation"/"operator" of a ship under Limitation Act and those under Ship Oil Pollution Liability Act.

(1) Management/manager of a ship

a. Commercial law academics' views

[49] The MLIT Press Release, '"Bill to Partially Amend Marine Transportation Act and Others to Strengthen the Infrastructure of Maritime Industry" decided by the Cabinet' (5 February 2021) and seminar materials by the MLIT Maritime Bureau for business people, 'Amendment of Coastal Shipping Business Act' (11 January 2022) (https://www.mlit.go.jp/report/press/kaiji01_hh_000512.html for the former, and https://www.mlit.go.jp/maritime/content/001449060.pdf via https://www.mlit.go.jp/maritime/maritime_tk3_000074.html for the latter; all accessed 16 August 2024)

We first deal with the "management"/"manager" of a ship.
Professor Sozo Komachiya, who participated in the capacity of legal advisor to the delegation of Japanese Government in the 10th Diplomatic Conference of Maritime Law (in Brussels), which adopted 1957 Convention, stated in the next year of the Conference, 1958,

> "*Although the Convention indicates the manager of a ship together with the charterer and operator, the manager of a ship is a person commissioned to employ the ship by its part owners but not a person who runs voyage business at its own account (see Article 700 of the Commercial Code).*" [50]

Also about 20 years later, when 1957 Convention was ratified by Japan and Limitation Act was enacted in 1976, he explained that Limitation Act did not include manager within the definition of "Shipowner" (Article 2, item 2 of Limitation Act at the time of enactment) as principal provision regarding entities qualified to limit liabilities (Article 98 instead included manager under the Convention just in case), because the "*the manager of a ship is an agent of part owners of a ship (Article 700 of the Commercial Code) and thus the responsible entities shall be such part owners but not the manager*" [51]. These statements are based on the assumption that manager under the 1957 Convention is synonymous with ship's manager in case of co-ownership of a ship as discussed in 3. (1). Certainly, Coastal Shipping Business Act had not yet been amended at that time and the sole provision under Japanese law relating to manager of a ship was found in the Commercial Code provision in the context of co-owned ship. But I do not believe this assumption is internationally common. I believe we have no ground to say manager under 1957 Convention assumes only the co-ownership situation of a ship.
To be contrasted is a later academic opinion dealing with manager and operator who said,

> "*It is difficult to define them in an easy-to-understand manner. … Conceptual structure thereof is completely left to judicial decisions of Contracting States.*" He went on to deal with the manager, "*If we exploit this concept with a few comments by English academics, a ship manager has long been known in English law as a 'ship's husband', who is an agent appointed under a management contract to perform technical management and operation-related duties on behalf of the company (shipowner) in relation to a ship owned by them. He can be understood as a manager under the law. He is not a part owner or co-owner of a ship. He is distinguished from managing owner (managing agent in more modern terminology) who is also one of the part owners of a ship but actual administrator of a ship.* … [The author's note: after introducing the definition of the Company in the ISM Code] *It will bring to us a clue to have the real image of a ship manager in the recent ship business structure.*" [52]

This opinion reads to suggest in the construction of Japanese law, not through the understanding

[50] Sozo Komachiya, 'Studies on International Convention relating to the Limitation of Liability of Owners of Sea-going Ships' at 98 in *Studies on Maritime Conventions*, Vol. 7 of *Studies on the Law of Maritime Commerce* 81 (1984). It first appeared at (1958) Hogaku Shinpo 65-6-16 and 65-7-1. Article 700 of the Commercial Code mentioned here is Article 698 after 2018 Amendment.
[51] Sozo Komachiya, 'On Act on Limitation of Liability of Shipowners' (1976) Minshoho Zasshi 74-2-185 at 191 and 193
[52] Shigeta (n 33) at 36-37 (n 3)

of Japanese *practice* but through the route to "exploit with a few comments by English *academics*", that we should depart from Komachiya's theory effectively equating manager of a co-owned ship with manager of a ship under Limitation Act. The latter part of his opinion also suggests in essence the Company under the ISM Code, or a ship management company in practical terms, should rather be construed as "manager" under Limitation Act too.

Finally, departing from manager within the meaning of Limitation Act to turn to manager of a ship generally, it seems to me that most textbooks of the law of maritime commerce in Japan still deals even in the present with ship manager of a co-owned ship only but not ship management company or ship management conducted by them in practice.

b. The author's opinion

I agree to the straightforward construction that manager here shall refer to ship management company in practice, or the "Company" under the ISM Code, as advocated by the latter academic and it does not mean ship manager of a co-owned ship under the Commercial Code. The short reason for this is the practice of ship management and ship management company do firmly exist. Certainly, the contracting out practice for ship management was perhaps not generally prevailing when 1957 Convention was adopted, but it had already become firm when Bunker Convention was adopted in 2001 – This is later than 1993 when the ISM Code was resolved by the IMO. In any event, I believe we have no reason to say what popularly exists as ship manager in the world (and is recognized under Japanese public maritime law) is not a manager under Japanese law of maritime commerce.
If we are to attempt to define the management of a ship, however, since Japan fortunately has Coastal Shipping Business Act recognizing and defining the ship management company, it would perhaps be more consistent under Japanese law as a whole to define the management as the "*services to man the ship with crew members, check and maintain its conditions, and implement its voyages as commissioned by the shipowner or others*" and define the manager accordingly in line with the said Act. In contrast with this approach, we may adopt the definition of "Company" under the ISM Code as it is to first define the manager as "*a person who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all the duties and responsibility imposed by the ISM Code*" and then go on to consider the management as services provided by such person. However, the latter approach entails conceptual problems in that it includes the term "operation" and thereby we must first assume and decide the concept of operation; and the substance of management cannot be clarified unless the responsibility under the international convention of ISM Code is clarified as the responsibility thereof logically comes first.
Somewhat troublesome may be the fact that Bunker Convention already defines the Company under the ISM, ship management company in practice, as "operator" rather than "manager" as explained in 3. (2) b. above, perhaps having regard to the fact that it contains the concept of "operation". It is submitted, however, that this does not mean ship management company is not manager (but operator) of a ship, but shall rather mean that manager is also operator in nautical sense. In other words, it would mean management of a ship is almost the same as operation of a ship. This must be consistent with the understanding in practice introduced in 2. (1) that operation in Meaning No. 2 is management.

（2） Operation/operator of a ship

a. Commercial law academics' views

The meaning of "operation"/"operator" of a ship is more troublesome.
Professor Sozo Komachiya's 1958 thesis, as introduced earlier, also argued,

> "*the so-called armateur, or operator of a ship shall be construed to mean any person who acts as voyage business entity other than owner and charterer … in view of the use of these terms together with affréteur or charterer and armateur gérant or manager of a ship. Lessee of a ship and other parties equivalent hereto would be the best example.*" [Underline is emphasis in the original text.] [53]

In 1970s, another academic stated in his studies on Merchant Shipping Act 1958 of England which incorporated 1957 Convention into domestic law,

> "*Having regard to the interpretation of the mother Convention and the purpose of limitation of shipowner's liability system, it can be construed to refer to anybody who acts as voyage business entity. At any rate, we have no option but to expect judgment by the court in the future.*" "*Therefore, in addition to demise-charterer, we may say the partner in shipping speculation, whom I introduced as an example of possessor of a ship, and the contractor who is engaged in operation of a ship commissioned by the commissioner shipowner pursuant to operation commissioning contract are qualified to this.*"[54]

At the time of ratification of 1957 Convention by Japan further another academic also said,

> The operator "*must surely mean a certain person who has become maritime business entity other than those in the list, and regardless of whoever falls within this concept, it would not be meaningless to have a provision for this*." [55]

According to these, the concept of "maritime business" referred to in 2. (2), or its apparent equivalence "voyage business" shall first come and an operator shall be the entity to do such business other than owner or charterer as a matter of construction of Japanese law. They are

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[53] Komachiya (n 50) at 98. The reason why both French and English words are cited therein was probably because both French and English texts were authentic in 1957 Convention.

[54] Haruo Shigeta, 'Limitation of Shipowner's Liability System in England (Part II)' (1971) Hogaku Shinpo 78-1,2,3-225 at 233 and 237-238 (n 5). According to this academic, a bareboat charterer "*may possibly be construed*" to be included in a charterer, *"but, if we have regard to the history of Merchant Shipping Act and the fact that mere charterer and demise-charterer have been clearly distinguished in qualification for limiting liabilities, it is rather reasonable to construe that such pro hac vice owner shall be included in the operator to be discussed next.*" (at 232). *The "partner in shipping speculation*" referred to in the passage is elsewhere described as *the "partner in shipping speculation who does not own a ship but carries out operational activities* [Author's note: *gyomu katsudo* 業務活動 in Japanese]" (at 233). As to the latter, he refers to an English case nearly 150 years ago in 1878 that I am unable to access by way of example (at 237 (n 4)). It is beyond my imagination who could fall within this in the current shipping practice.

[55] Kenjiro Egashira, 'Act on Limitation of Liability of Shipowners – Issues in Substantive law –', 606 Jurist 70 (1976) at 72

explanations deducted from the theory that the Commercial Code is business law, but it seems to only replace the concept of operator by another concept of entity of "maritime business" or "voyage business" (which may certainly be a starting concept under commercial law theory but is in fact ambiguous and difficult for business people to understand).
Professor Komachiya himself, in his thesis at the time of enactment of Limitation Act 20 years later, pointed out operator in the authentic languages English and French was ambiguous and in legislations of other Contracting States there were not always a term corresponding with operator, in order to explain the reason why the definition of "Shipowners" in the opening part of Limitation Act (Article 2, item 2) as entities qualified to limit liabilities did not include operator, and then remarked,

> How to construe the operator is "*believed to be left to academic views and judicial decisions as they construe it as falling within one of entities in the list of definitions of the 'Shipowners', depending on the nature of tasks of the so-called operator*".[56]

Logically he seemed to say that operator should fall within either of owner, lessee or charterer depending on the services performed (and in reality, there existed no such independent entity of operator). This may possibly sound different in nuance from his previous view depending on how you read it. According to this view Limitation Act may contain self-inconsistency in that it does not include operator within the list of the Shipowner but has nevertheless the separately importing provision of Article 98. Professor Komachiya might have been critical to such solution.
And, an academic whose monograph I cite next to Professor Komachiya's first thesis eventually remarked in 2003, about 30 years later than his previous one in 1971,

> "*It is difficult to define them* [The author's note: manager and operator] *in an easy-to-understand manner. … Conceptual structures thereof are completely left to judicial decisions of Contracting States."* And he went on to conclude [after discussing difficulties in the concept of manager] that the operator is *"relatively clear. It normally means a person who operates a ship*." [57]

It is humbly submitted, however, that this is no more than a tautology. The question must have been what "operate" exactly meant.

Departing from operator within the meaning of Limitation Act to turn to operator of a ship generally, what it means is equally unclear.
For example, the edited book that included the monograph by the academic last mentioned above included another monograph by another academic, 'Entity and Assistant of Ship Operation'. At the

[56] Komachiya (n 51) at 191 and 192 (n 4) and (n 5). He pointed out, *inter alia*, that French equivalent of operator is *armateur* therein, but *exploitant du navire* in some other conventions; since charterer, manager, operator of the ship are *affréteur, armateur, armateur-gérant,* operator must refer to "outfitting shipowner" (this assumes that *armateur* in French means outfitting shipowner); as for English language, 1958 Merchant Shipping Act reflecting 1957 Convention referred to *any person interested in or in possession of this ship, and in particular any manager or operator of the ship* in addition to the charterer; and as for German language, we cannot find which word indicates operator in the official German translation of the Convention and in the amended German domestic law.
[57] Shigeta (n 33) at 36-37 (n 3)

outset he said, "*A maritime business entity, who is a ship operation entity, is a person who conducts maritime business activity by engaging a ship for operation*" and went on to divide "ship operation entity" into four categories of owner, part-owners, lessee and time charterer of a ship. But he explained, as for time charterer, "*there has been great controversies both in judicial decisions and academics in Japan whether or not the status of maritime business entity shall be given to it ⋯ and much has been debated as one of important issues in the law of maritime commerce*."[58] Time charterer's liability for collision was a typical issue. According to this view, as maritime business entity is equal to ship operation entity, if we further replace it with ship operator, it would logically read that owner, part-owners and lessee of a ship has been recognized as "operator" but whether or not time charterer is "operator" has been seriously debated. But the preceding proposition of what is "operation" remains unclear.[59]

A certain recent textbook also contains a chapter of "Entity and Assistant of Ship Operation". The author of this book says at the outset, "*Ship operation entity is a person who conduct maritime activities (operation = voyage of a ship) by themselves*" and discusses the above four categories. As for time charterer, he further discusses "ship operation entity (responsible entity) nature of time charterer", having in mind its collision liability.[60] Here it is somehow assumed that "operation" of a ship is "voyage". But only saying so seems just a replacement of word. What voyage means – this could also carry multiple meanings – would then be unclear.

At any rate, the question raised in these views would be whether time charterer is ship operation entity (in other words, operator). But if we return to terminology in practice and by the MLIT, time charterer is exactly operator, which may well logically mean time charterer is responsible for collision. But it is at least not a general understanding. They would be surprised if they are told time charter is operator, which means they are responsible. Even these academics are not dealing with time charterer's responsibility in such a simple and deductive manner.

Another academic argues he would call "a person who employs a ship for the purpose of voyage at sea in its own name" to "ship operator" and further divide it into "own ship operator" and "other's ship operator". The former is owner and part owners of a ship; and the latter is lessee of a ship. This view, however, says time charterer is not "other's ship operator" (and thus not even "ship operator") on the ground that time charter shall be construed to be neither lease of a ship with provision of labor by seafarers nor lease of the business (enterprise) but a kind of contract of affreightment.[61] In his view, "operation" may be understood as "to employ a ship for the purpose of voyage at sea in its own name". It may be more illustrative than former views.[62] But

[58] 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* 3 (Shoji Homu 2003) at 4 and 10 – This is the first monograph in this Encyclopedia.

[59] What has been once seriously debated about time charterer was, in reality, not whether it was "operator" but whether it was "maritime business entity" generally. In a textbook written by the same academic after 2018 Amendment of the Commercial Code, he took the same approach to list above four parties including time charterer as possible maritime business entities to consider them respectively, but the words of "ship operation entity" disappeared. See Noboru Kobayashi, *New Law of Maritime Commerce* (supp edn, Shinzansha Shuppan 2022) 61 and 85 *et seq.* The edited book in (n 58) included monographies by many subscribers in various themes in maritime law listed systematically. Therefore the title of 'Entity and Assistant of Ship Operation' might have been decided and assigned by editors rather than by Professor Kobayashi himself.

[60] Takashi Hakoi, *Basic Lectures on Modern Law of Maritime Commerce* (4th edn, Seibundo 2021) 39 and 49

[61] Harumi Murata, Legal System of Maritime Commerce (Seizando Shoten 1990) 79-94

[62] Before making this argument, this academic (Professor Murata) presents quite a unique and complicated argument: the law of maritime commerce shall be the law to govern "*business maritime activities*" (They

in so far as he says time charter is not operator of a ship, it will be inconsistent with the practice called them operator.
As you perhaps observe, both anomalies must have arisen because they did not distinguish operation in commercial and nautical senses. It follows that, let alone time charterer's responsibility for collision (It is not a topic of this essay[63]), some commercial law academics in Japan seem to adopt the concepts of "ship operation entity" or "own/others' ship operator" as a starting point for analysis but the substance thereof seem to remain unclear, or at the very least, they perhaps would not give us any guidance when we consider the meanings of "operator" within the meaning of Limitation Act/LLMC and Ship Oil Pollution Act/Bunker Convention.

b. The author's opinion – in case of Ship Oil Pollution Act/Bunker Convention

My opinion is in the first place about "operator" within the meaning of Ship Oil Pollution Act and/or Bunker Convention. I believe it shall be operator in nautical sense, *i.e.* ship management company in practice, and it shall be construed to be the same as ship manager within the meaning of Coastal Shipping Business Act.
The first reason for this is because this is a construction to keep consistency with the sole definition of an operator existing in the conventions concerned (the definition in Nairobi Convention) as mentioned in 3. (2) b. I also introduced some non-Japanese articles clearly so argued in 3. (2) b. The definition of manager in Nairobi Convention is the same as the definition of the Company under the ISM Code as discussed in 2. (2) and in a word it refers to ship management company in practice. In particular Japanese law has incorporated the substances of both Bunker Convention and Nairobi Convention in single Act called Ship Oil Pollution Liability Act, and Article 31 of Ordinance for Enforcement of the said Act refers to operator in Nairobi

mean maritime activities by business and are different from activities of maritime business contemplated in the prevailing theory); and (1) the business maritime activities are conceptually divided into (i) business maritime activities *per se* (business activities conducted at the site of the sea) and (ii) supplementary business maritime activities (others); (2) examples of business maritime activities are (a) operation activities of a ship *per se* (act to cause the ship itself to proceed its voyage), (b) maritime carriage activities, … (g) maritime fishery activities, … etc. (they are respectively composed of the above (i) and (ii)); and (3) such example business maritime activities are divided into the categories of (x) voyage activities and (y) non-voyage maritime activities and the above (a), (b) and many others fall within (x) but for example above (g) is to get fishery products and different in nature from (a) and (b) and thus falls within (y). (Murata (n 61) 7-19) The (a) as presented here reads to use "operation" implicitly within the meaning of operation in nautical sense and it is perhaps the basis of the concept of "ship operator" as discussed above. But he does not say that operation in commercial sense is also called "operation" in practice. He does not present the concept of "management" of a ship either.

[63] As is well known, in Japan, time charterer's responsibility for collision has been a controversial issue as one of the typical issues regarding time charterer for a long time, and the responsibility of time charterer was admitted in the Judgment of Supreme Court on 28 April 1992, 164 Saibanshu Minji 339 in respect of a particular set of facts in that case. In the 2018 Amendment of Commercial Code, it was clarified through the article structures that Article 703, Paragraph 1 and Article 690 (which shall be applied to lessee of a ship with respect to employer's liability for the act by master and other crew members) are not applied *mutatis mutandis* to time charterer (See Article 707 for time charterer denied *mutatis mutandis* application of Article 703, Paragraph 1 with respect to such employer's liability), and that time charterer accordingly does not undertake the employer's liability as a matter of principle, in conjunction with the very recognition of time charterer. However, this amended law is said not to deny the room for judgment similar to the above-mentioned Supreme Court Judgment (Matsui and Ohno (n 42) 83) and controversies remains.

Convention in the context of wreck removal responsibility. I do not think it reasonable to consider the meaning of "operator" in different manners in sections corresponding with Bunker Convention and those corresponding with Nairobi Convention.

Secondly, if we do not construe in that way and find it indicate operator in commercial sense, operator in that sense is, in essence, time charterer, and it will further mean that Ship Oil Pollution Liability Act has made liabilities of time charterer for marine casualties (tort liability by nature) strict in the case of oil pollution from bunker. That would go too far from controversies concerning another tort case of ships' collision and its impact will be enormous both theoretically and practically. However, it is submitted that it is unnecessary to adopt such a drastic construction right now (By the way protection of victims is rather achieved by imposing obligations for insurance arrangements on shipowners and by granting victims direct claim rights against insurers). At the very least, I suppose there is no indication that this point was seriously considered and concluded when Ship Oil Pollution Liability Act was amended.[64]

It follows that operator under Ship Oil Pollution Act is the same as manager thereunder. This point may again seem problematic as the said Act lists both "manager" and "operator" as responsible entities distinctively. We must say, however, that we do have to so consider as a matter of fact in so far as we rely on the definition under Nairobi Convention. We also do not have to think it anomalous in conclusion, since the concept of operation has two meanings and operation in nautical sense is the almost same as management as discussed in 2. above. On the other hand, as is discussed in 2. (3), operation in nautical sense and management have difference in nuance, albeit almost the same. I do not think we are required to choose which shall be indicated here. Therefore, to list both of these two would still make sense. An English case as will be discussed later, albeit concerning LLMC, also emphasized that they overlap with another concept or entity.[65]

c. The author's opinion – in case of Limitation Act/LLMC

In contrast, as for "operator" within the meaning of Limitation Act and/or LLMC, it shall be construed that such operator not only refers to operator in nautical sense but also includes operator in commercial sense – it is different from "operator" under Ship Oil Pollution Act and/or Bunker Convention.

This is **firstly** because, under Ship Oil Pollution Act and/or Bunker Convention, operator (and manager) is listed as extended entities to undertake strict liability, only together with owner and lessee of a ship who would carry out operation in nautical sense by themselves if not commissioned to manager, but not together with charterer; but under Limitation Act and/or LLMC, operator (and manager) is listed as entities qualified to limit liabilities, together with not only owner and lessee of a ship but also with charterer (naturally including time charterer who operates a ship in commercial sense). The list of entities qualified to limit liabilities further includes servants and salvors. We can find the policy that all parties involved in operation both in nautical and commercial senses shall be covered in entities to be qualified to limit liabilities. Put it another way, in so far as charterer is covered in entities qualified to limit liabilities, we find the intention to allow operator in commercial sense to be the entity qualified to limit liabilities too. It follows that

[64] See (n 39)

[65] See (n 69) *infra* at para. 59 *per* Phillips LJ. See also (n 32) about the fact that Professor Komachiya was informally told that manager and operator were the same at the time of adoption of CMI draft later resulting to 1957 Convention by the representative of British Maritime Law Association who had prepared the first draft.

we may also include those who are involved in operation in commercial sense other than time charterer, if any in any manner.

Secondly, there is a recent Japanese precedent that adopted such approach.[66] In that case, beneficiary debtors under a certain limitation proceeding who was treated qualified to limit liabilities other than the applicant time charterer included:

(1) the company who "*provided the ship with the services of* inter alia *manning crew members, maintaining and managing hull and various equipment, purchasing and managing costs of supplies necessary for operation of the ship and assisting operation in accordance with a ship management contract*" with the shipowner, in the name of "*manager of the ship*"; and

(2) the company who "*were commissioned with administration of liner services and operation management of container ships*" by time charterer and "*undertook* inter alia *planning of route and fleet assignment, adjustment of schedules and preparations of container stowage plans*", in the name of "*operator of the ship*";

in addition to the shipowner, slot charters and the master as ordinarily conceivable beneficiary debtors. As for (1), their status is consistent with the interpretation of manager discussed earlier; As for (2), they may be called sub-contractor of time charterer's tasks when time charterer operates the ship in commercial sense.

What is important in this case would perhaps be none of great many interested parties in and out of Japan challenged this treatment by the Court. This case was related to the total loss casualty of a container ship in international trade who had carried thousands of TEU containers and interested parties in and out of Japan exceeded far one thousand. The preceding Decision by the same Court had already assumed that the above (1) and (2) shall be included in entities qualified to limit liabilities. [67] But nobody seemed to challenge this point in the course of the proceeding. On the other hand, the 2024 Decision denied their liabilities at any rate, before considering qualification to limit their liabilities. Therefore, we are perhaps unable to say it is a real judicial precedent that made a substantial ruling about an "issue" that whether these (1) and (2) are "manager" and "operator" under Limitation Act. Yet I believe this has some precedential value in that an application so lodged by the applicant (time charterer) was neither denied by the Court nor challenged by any of great many interested parties in and out of Japan.

Certainly, when 1957 Convention and LLMC were adopted and when Limitation Act was enacted and amended in Japan, there seemed no clear consensus about what it meant. In other words, we cannot say the intention of legislators was clear. But I believe we shall not continue indefinitely to be satisfied to say it is ambiguous or unknown, or somebody in maritime business entities.

d. Japanese and English judicial precedents

That said, it is certain that we also find a couple of judicial precedents that might have held "operation"/"operator" under Limitation Act/LLMC assumed operation in nautical sense.

In the first place, the expression in a Japanese judicial precedent on the definition of "operation" as discussed in 3. (2) c., "*the entire operation* [The author's note: [*sosa* 操作] in Japanese] *and management of a ship according to its mechanical usage for the purpose of a voyage*" seems to assume operation in nautical sense.

[66] Decision of Tokyo District Court on 22 January 2024, unreported (The "*MOL Comfort*"; Assessment Decision).
[67] Decision of Tokyo District Court on 16 July 2017, unreported (The "*MOL Comfort*"; Decision to Commence the Limitation Proceeding)

Secondly, a recent English case concerning operator under LLMC also seems to assume operation in nautical sense. Whilst this essay is to discuss the positions of Japanese law, the impact of English law in maritime law is overwhelming from a practical point of view. And the U.K. promptly ratified these conventions and enacted domestic laws.[68] In these senses, the construction of conventions in English law should be referred to when considering the position of Japanese law too. So, I would like to try to explain it as far as I can.

Even in England there has long been no judicial precedent in which the meaning of operator was a real issue. In the 2020s, however, they faced with a case in which the meaning of operator for the purpose of application of LLMC became a real issue – the Court of Appeal judgment in the *"Stema Barge II"* [69]. The fact of this case was somewhat unusual in that it is related to an unmanned barge at anchor awaiting transshipment of cargo for discharge after arrival at destination of transportation by towage. It was disputed whether a person who was originally the mere buyer/consignee of barge-loaded cargo could be construed to have been the "operator" of the said barge within the meaning of LLMC during anchoring, for the reason that such buyer/consignee was quite substantially involved in measures taken in response to the expected rough weather during anchoring (they were involved in decision on how to anchor in consultation with charterer, who was also their group company; they dispatched berth master and other personnel on the barge to adjust its ballast, operated generator, checked lights and made other preparations to cope with the rough weather)[70]. The Court of Appeal held,

> "*… the term 'operator' must entail more than the mere operation of the machinery of the vessel (or providing personnel to operate that machinery)…. The term must relate to 'operation' at a higher level of abstraction, involving management or control of the vessel* …." [71]

And they went on to reject consignee was operator or was able to limit liabilities under LLMC.

However, I believe these precedents only attempted to clarify the meaning and/or scope of operation in nautical sense. It is because the definition of "operation" of a ship presented by the first precedent in Japan is clearly no more than an attempt to define operation in nautical sense. The second case in England also put focus on holding that involvement in responsive actions

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[68] 1957 Convention was incorporated domestically by Merchant Shipping (Liability of Shipowners and Others) Act 1958 by amending the previous MSA. Article 3, Paragraph 1 of this Act, however, provided that entities qualified to limit liability included "*any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship*". It expanded entities to include underlined persons, compared with the Convention. Then LLMC was incorporated into domestic law by MSA 1995, by attaching the Convention texts and providing that it shall have the force of law in the U.K. (Article 185 and Part I of Schedule 7) to make the entities the same as those of the Convention.

[69] Splitt Chartering APS & Ors v Saga Shipholding Norway AS & Ors [2021] EWCA Civ 1880

[70] Supplementary facts are: Cargo (rock armour) was carried by a barge towed from Norway to England. After arrival at the destination in England, the barge was at anchor with unmanned conditions to await transshipment of cargo onto a smaller barge for eventual discharge to land. When it awaited it dragged its anchor due to rough weather, which cut the submarine cable. With respect to the liability for this accident, an English corporation Stema UK, who was in the same group company as charterer and was buyer/consignee of cargo, commenced limitation of liability proceedings as alleged (temporary) operator of the said barge, together with Splitt Chartering APS (owner of the barge) and Stema A/S (charterer). No doubt it would have been impossible to limit liability had they been the mere consignee, but Stema UK was in fact substantially involved in determination to anchor the barge and how to anchor as explained above.

[71] (n 69) at para. 58 *per* Phillips LJ

against rough weather in respect of unmanned barge during anchoring, in particular the act of sending personnel on board, did not yet reach the level of operation. In the course of criticizing the judgment at first instance which had held almost similarly in respect of the meaning of operation but nevertheless reached a converse conclusion[72], the Court held, "*it is difficult to see that a person who does no more than provide crew to operate the machinery of a vessel is any more 'the operator' than the crew that person provides.*" [73] This is a comparison from a different perspective with the crew, who actually operate a ship and must therefore be operator conceptually but who shall nevertheless fall within the category of not operator but servant under LLMC. In any event what his Lordship has in mind is obviously operation in nautical sense. I suppose that neither of them judged whether operator in commercial sense (other than time charterer) could be an entity qualified to limit liabilities.

5. Conclusion

In this essay, I had to go quite further with my personal opinions compared with my previous essays in this series.

Of course, what I said here is nothing more than a unique opinion of my own. Nevertheless, I do not believe I am presenting a very eccentric opinion. I think I just made a clear presentation of what the practice side has implicitly considered. Let me summarize again:

⑴ There exist two meanings of operation, in commercial and nautical senses; operation in nautical sense is increasingly called management; and "The literatures related to shipping have used the term … without distinguishing those two meanings on the assumption that readers are aware there are such two meanings, and business people have judged which was indicated in the relevant passage by considering the context", as have already been explained by an academic shipping economist. We can ascertain a couple of examples for this distinction;

⑵ It is natural to find manager within the meanings of Ship Oil Pollution Act/Bunker Convention as well as Limitation Act/LLMC shall be ship management company, since practice of ship management company does firmly exist (and a certain academic has already so found);

⑶ As for operator

(i) we may find operator within the meaning of Ship Oil Pollution Act/Bunker Convention shall be operator in nautical sense from the facts that (a) it shall be construed in the same way as the definition in Nairobi Convention, another convention incorporated into Japanese law by Ship Oil Pollution Act at the same time as Bunker Convention (and some non-Japanese articles so argued clearly); and (b) it was not explicitly argued that time charterer have been made strictly liable by ratification of Bunker Convention;

(ii) we may find operator within the meaning of Limitation Act/LLMC shall include operator in commercial sense from the facts that (a) Limitation Act/LLMC refers to it with (time) charterer who is operator in commercial sense and (b) none of great many parities in and out of Japan in the Tokyo District Court precedent challenged the treatment to

[72] See Splitt Chartering APS & Ors v Saga Shipholding Norway AS & Ors [2020] EWHC 1294 (Admlty) at paras. 79 and 99 *per* Teare J

[73] (n 69) para. 55 *per* Phillips LJ

this effect; and

⑷ Precedents in Japan and England introduced in 4. (2) d. just dealt with alleged operator in nautical sense in unique sets of facts.

At any rate, particularly with regard to the meaning of operation, it may well be a real issue again. One example is found in the concept of operation in the context of remote operation center and others in the deliberations to formulate the MASS Code by the IMO as discussed in 2. (3). Currently this point is disposed of in Japan by implicitly translating operation not into [*unko* 運航] but, *inter alia*, [*sosa* 操作], [*soju* 操縦], or [*sosen* 操船]. But I do not think this style is really desirable. I would suggest conscious consideration is required. In this sense, I believe there are increasing needs to reconsider the meanings of management and operation.

[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.]