“recklessly and with knowledge” in Japanese Law

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Two Standards for Limitation Break

- recklessly and with knowledge that damage/loss would probably result
  - Japanese COGSA, Art.13-2 (HVR, Art.4(5)(e)) (international sea carriage)
    - Limitation break & exclusion of damage-computation rule (HVR4(5)(b))
  - Act on Limitation of Liability of Shipowner, Art.3(3) (LLMC’76/96, Art.4)
  - Montreal Convention, Art.22(5) & Warsaw/Hague, Art.25

- gross negligence
  - Commercial Code, Art.581 & 766 (land & domestic sea carriage)
    - Exclusion of damage-computation rule
    - Also applied to breaking limitation by contracts and excluding exemption of liability for undeclared precious goods (CC Art.578)
  - Warsaw 1929, Art.25 (Supreme Court, 1976/3/19)
Two types of “gross negligence”

- State of mind nearly equal to “intentional” or “willful”
- Significant lack of due care

Supreme Court, 1980/3/25 (on Art.581)

- Hatchback door of a minivan opened while driving and goods (jewelry inside a cardboard box) fell out. Driver didn’t check whether the door was locked, as he had never experienced similar accident
- Driver significantly lacked due care and was grossly negligent, exemption of liability for undeclared precious goods denied
- The amount of damage awarded was decreased by taking the account of shipper’s fault for not declaring the value
“Recklessly and with Knowledge”

- Literature
  - “recklessly” standard is different from “gross negligence” and should be interpreted as such

- Case law
  - None on J-COGSA or Japanese LLMC
  - Only one case on Warsaw/Hague: Nagoya District Court, 2003/12/26, affirmed by Nagoya Court of Appeals, 2008/2/28
Clash of China Airline, Flight 140 (1994/4/26)
- Operational error on landing procedure by co-pilot
- Killed 249 passengers (7 survived) & all 15 crews

1 survivor and families of 87 victims sued China Airline (and Airbus) for total of about 200M USD

China Airlines invoked limitation under Warsaw/Hague (250,000 francs ≈ 20,000 USD)
- Cf. So-called “Japanese Initiative” on 1992
- Cf. Montreal Convention entered into force on 2003/11/4

Limitation of liability was denied, ordered to pay 50M USD in total
■ Knowledge of the employee of the carrier necessary for limitation break
  • “should have known” is insufficient (from the drafting process)
  • Rejected plaintiff’s argument that break should be made easier since limitation under Warsaw is out of date

■ Knowledge inferred from objective circumstances
  • Knowledge that the control lever was heavy → knowledge that he was attempting to override auto-pilot → basics of aircraft operation + highlighted warnings in the operation manual + simulator training → knowledge that his attempt would put the aircraft in out-of-trim and cause crash → knowledge that damage would probably result

■ Effect on future maritime case law?