IMPLEMENTATION OF PROTECTION AND INDEMNITY FOR INDONESIAN SHIP A COMPLIANCE TO COMMON LAW SYSTEM

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IMPLEMENTATION OF PROTECTION AND INDEMNITY FOR INDONESIAN SHIP A COMPLIANCE TO COMMON LAW SYSTEM

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Abstract: *As an archipelago, sea carriage has an important role in all aspects of national life especially as the bond that unites the whole of Indonesia. However, due to the geographical aspect, Indonesian carrier has a lot of risks in doing its business. In many archipelago states, carrier owners form associations that function to bear the losses suffered by their members. The association is named as Protection and Indemnity (P and I) club, but P and I has not been required in national shipping. The purpose of this study is to see what the benefits of the implementation of the P and I in the carriage contract in Indonesian Sea are and what the form of liability implemented to the carrier in Indonesian Sea Carriage is. The method used in this study is a juridical normative with the specifications of analytical description. The research was conducted by collecting primary, secondary and tertiary legal materials through library and field research, and then analyzed with qualitative methods. Based on the results of this study, it is revealed that: Firstly, the legal basis of the application of the Implementation of Protection and Indemnity For National Shipbuilding is already very relevant. Secondly, there are various forms of Carriage Legal Liability in Indonesia, namely full liability and based on fault liability, liability based on negligence Liability, and strict liability principle.*

Keywords: *Protection and Indemnity, Based on Fault Liability, Maritime Law.*

1. INTRODUCTION

The safety of shipping, the cause of pollution become a serious problem for our life nowadays. Mean while the function of improved[1] science technology have not guarantee for marine safety and pollution prevention. In the meantime for the Asean member countries such as Indonesia, Malaysia. Philippine, that are archipelagos, dependent on exports and import from International shipping. For Indonesia, Sea transportation plays a crucial role in development of economy, Social, Politics, Economy and Security. It has particularly a large share since it is almost entirely carried by sea. More over that Indonesia is a country located

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between two continents and two oceans sea transportation has an important role in the framework of inter-state relations.

In fact, Indonesia is facing lack of regulation in Maritime Laws, low of performance and Competitiveness, power of International and National Sea Transportation. In Business of Transportation puts Indonesia into inefficient in sea transportation. The worst is many cases. In marine pollution that disturb shipping transportation Activities.

The position of Indonesian sea lies between two continents and Two oceans influences of the traffic of vessel sailing in Indonesian water where collision is likely to happen. The natural conditions making the legal situation more difficult is the spread of islands, expanse of water and the effects of monsoon cycle as main determiners of Indonesian climate.[2] The wind so extremely influences the direction of sea flow that knowledge about the flow and wind is critical for the safety of shipping. Collisions happen in South China Sea, Java Sea, generally because of the heavy currents and wind.[3] Hence, some seas in Indonesian waters offer dangerous natural conditions for ship safety.

The Condition is worsened by the condition of the ship such as a secondhand ship bought from other country. The ship were not feasible to sail and the last factor is lack of monitoring resulting many collisions caused by overweight. Table 1 below recapitulates data on shipping accidents in Indonesian waters.

Table 1
Number of Ship Accidents during the period from 2009-2012

	Year	*Amount of Accidents*	*Ship Sinking*	*Ship Burning*	*Ship Collision*	*Ship wreck*	*Other Accidents*
1.	2009	159	63	27	20	23	26
2.	2010	137	54	22	15	17	29
3.	2011	124	41	26	16	19	22
4.	2012	128	41	15	21	29	22
	Total	548	199	90	72	88	99

Source: Ministry of Transportation, December 2012 Report.

According to the data above from the General Directorate of Sea Connection of Ministry of Transportation of Indonesia, 548 ship collisions happened from 2007 to 2010, bringing about a large number of sinking ships followed by burnt ships, stranded ships and moored ships.[4] Natural, technical and human factors were responsible for these collisions and the biggest percentage was because of natural conditions at 38%; human factors were second at 37%.[5] Human factors consisted of the captain and sailors, sea guides, and shipping companies. Beside human factors and bad weather, other factors causing collisions were too many passengers

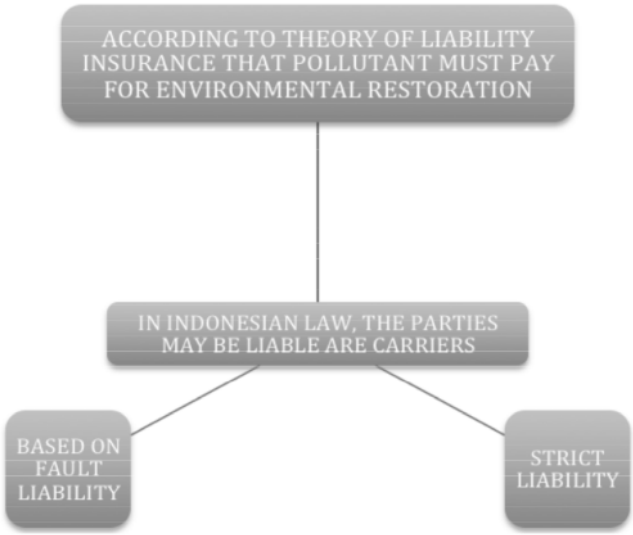
and unsea worthy ships. Many unseaworthy ships were secondhand ships bought from another country, which could not be sailed any longer in their home country.[6] The last factor is the lack of monitoring, which has resulted in many collisions caused by overweight or unreported hazardous cargos. For instance, the MV Teratai Prima sank on January 11, 2009, in the Majene strait in 4-meter seas, a sinking partially caused by overweight cargos and the loading of 55 more passengers than the ship was rated for.[7]

In Indonesian maritime law, a ship collision is unlawful ac (perbuatan melawan hukum). Flemming said Unlawful act is a recognition of moral responsibility turn into legal liability. Marine pollution as a part of torts will relate to the party for payment of compensation for any damaged caused and possible remedies.

According to theory of Liability Insurance, pollutant must pay costs to the state for environmental restoration. Therefore, responsibility for environmental pollution require high cost for carrier. In Indonesian law, Parties who may liable for the pollution is carrier. Based on Commercial Code, Carrier must prove whether the accident was his fault or non, so that such a liability based on absolute liability. The differs from the rules of Environmental Law In Indonesia which was adopted strict liability as applied by common law system.

The consequence of a collision is liability towards goods and passengers. The most severe effect upon the sea is pollution because oil waste and chemical substances flow from the vessel into the sea. For several decades, maritime organizations and particularly the International Maritime Organization (IMO) looked at measures to find effective ways to reduce collisions. Data collected have shown that 60 percent of collisions happened in port and the sea have caused environmental damages and that big vessels have seven times risk higher as the polluter than the tankers'[8] In addition to sea pollution, some cases create problems that the dead vessel has not been removed by the owner and, as a result, shipping lanes are disturbed. Collisions are not only fatal for the ships, cargoes, sailors, and passengers, but also in some conditions, they directly impact towards the sea environment as happened with the MV Nakhoda and MV Prestige.[9]

The Russian tanker the MV Nakhoda sank on January 2, 1997, polluting the coast of Japan with heavy oil; the MV Prestige sank on November 13, 2002, polluting thousands of miles of coastline and more than one thousand beaches in Spain, France, and Portugal. Damage associated with incidents such as these includes damage for the inoperable ships, recovery of the ships, the loss of cargos, and an enormous expense for the environmental recovery, and the compensation to industries disturbed by the pollution. In Indonesian sea, Indonesia has experienced a number of major oil spills off its coast such as Showa Maru (1975), Nagasaki Spirit (1992), Maersk Navigator (1993), Evoikos (1997), King Fisher (2000) and Lucky Lady (2004).[10]



According to the Theory of Liability Insurance as stated by Roscoe Pound, the dependent shall compensate common damages suffered by a human.[11] In its operation, sea transportation bears the risk associated with the loss of life and material goods. Loss can happen both to the carrier as the operator and to the users of sea transportation.

Thus, the compensation system in marine pollution caused by ship pollution is still confusing whether strict Liability or absolute Liability. Based on above issues, some research questions come up as follow :

A. What is the nature liability under Indonesian Maritime Law?
B. What are the benefits of the implementation of the P and I in the carriage contract in Indonesian Sea areas?

2. LITERATURE REVIEW

Many books and works have contributed ideas about the issues or problems that are the subjects of this study. These books and papers have stimulated the researcher's interest in the subject. Beberapa Segi Hukum Internasional Masalah Ganti Rugi Pencemaran Minyak Akibat Kecelakaan Kapal di Laut, Komar Kantaatmadja focuses on oil pollution caused by ships. The study in this book is based on a doctoral thesis from Faculty of Law, Padjadjaran University, Indonesia. This book serves a useful reference in analyzing problems of the liability of sea pollution as a subject of this research but only discussed about state liability and pollution based on oil spill.

Endang Saefullah wrote the book Tanggung Jawab Pengangkut dalam Hukum Pengangkutan Udara Internasional dan Nasional, This book was based on doctoral thesis presented to the Faculty of Law, Padjadjaran University, Indonesia. According to Saefullah, there were three principles or theories concerning liability:[12]

1. Fault liability, liability based on fault principle;
2. Rebuttable presumption of liability principle; and
3. No-fault liability, absolute or strict liability principle.

This is immensely valuable reference, especially when it discussed principles or theory concerning carrier liability but its only concerned about transportation by air which has different principle with carriage by sea principles.

In P and I Clubs: Law and Practice, Steven Hazelwood stated that if marine pollution were viewed as a form of a tort, that this then would relate to the determination of which party should bear the liability for the payment of compensation for the damage and for possible remedies. This is connected with the purpose of the law of torts regulating how much of the losses the other party should suffer and how much charges/costs should be incurred as a result of a tort.

Sea transportation is an extremely important, but high-risk service business. A potential ship collision is a big risk to be borne by the shipping companies or ship owners. If the underwriter does not accept indemnification, clauses are made to release the under writer from the obligation to pay the damage. Some risks that cannot be indemnified. As the demand for insurance increased, its need was responded to and largely satisfied by the emergence of P and I Clubs, which are now such a familiar and important part of the modern legal landscape. Hence P and I Club is not common in Indonesian Maritime Law.

Aleka Mandaraka Sheppard wrote in her book, Modern Maritime Law, about details of law and practice in recent maritime law. Significantly as a reference for this research, the book has taken into account current developments in the law and practice of maritime law.

The most important change is the book approach towards maritime law as a subject from a modern perspective, focusing the subject on the importance of risk management in maritime operation and the law. It is also extensive and the depth ranges from basic principles of the contract law and tort, including regulations pertaining to safety at sea, collisions at sea and its liabilities and protection of the environment. The subject of this current thesis is focused on problems with respect to liability for marine pollution.

Hasjim Jalal, in his book Negara Kepulauan Menuju Negara Maritim, found that Indonesia need cooperation and understanding from neighbors in regional and international communities in order to implement any international convention toward the development of Indonesia Maritime Law.[13]

The development of Maritime Law is a tool that can support national development. In this period of development, updating and creating new law in accordance with the needs and development of society towards the creation of modern society will be necessary. This has to do with the multi functions of the law, which means that in addition to functioning as an instrument of social control, law also serves as a means of social reformation in the community serving human life and the environment.

A broad scope of legal accountability that has been developed, especially in marine pollution accountability, is the accountability of private (private liability) against marine pollution damages. However, as was stated earlier, restoration of marine environmental pollution is high cost even it is could be more expensive than the ship itself. Liability theory says that the general losses or losses suffered by human beings must be guaranteed to insure.

Susan Hodges and Christopher Hill, in their book entitled Principles of Maritime Law, discussed the ever-rapid development of maritime law, which was impacted by the introduction of international conventions, the enactment of domestic British Statutory Law and the endless production of court cases on maritime disputes. Significantly for this thesis, the book also discussed collision and oil pollution, the recent developments with respect to the recovery for pure economic loss.[14] Based on the focus, there are comparatively few legal cases and statutes with Indonesian Maritime Law as a subject.

Rhidian Thomas, in his book Liability Regimes in Contemporary Maritime Law, presents the legal regimes of recent maritime law with its concepts of duties, liabilities, exceptions and rights of limitation. He also reminds the reader about the broad traditions with respect to the full range of strict, presumed fault and traditional fault based liabilities, together with accompanying manipulations to the burden of proof and question of causation and remoteness.[15]

This book is relevant to this current research, which seeks a suitable liability regime for liability of a sea carrier in Indonesian Maritime Law. This book discusses the principle that the polluter pays, a concept widely applicable to marine pollution, which connotes strict liability and embodies compensatory, deterrent and regulatory components of policy. It also comparatively distinguishes liability under civil and common law.

3. METHODOLOGY

The methodology used for this research is library based on this study uses secondary data as the main data source, and the selected material is a matter of law. The information and data collected in this normative research and secondary data consists of primary law materials and secondary legal materials that are qualitative. These will be obtained by studying and analyzing various kinds of sources that relate either directly or indirectly to this research problem, such as Reports and research results, Indonesian legislation; International conventions; Global nature of international documents, such as conventions, declarations and guidelines; Books/references; and Journals, and other sources.

Examining information and data from books or references, journals and other sources will help to get the concepts, theories and strategies for marine environmental management and carrier liability. The data and information are considered to be important because they give a general description of the phenomena of the issues raised, which can serve as the conceptual basis for the analysis when confronted with the available factual data.

Besides library research, interviews and discussions or correspondence with relevant experts will be conducted about the issues raised. Discussions and correspondence will use an interview guide prepared in the form of open (free-response) questions. The interviews will focus on the object of research and will use discussions and interviews conducted by researcher with government (such as the Department of Transportation in Indonesia, the Department of Law and Human right, and the Maritime Court) and the private sector (such as carrier companies and insurance companies) to seek official opinions as well as current practices of the carrier liability.

4. RESULT AND DISCUSSION

A. Nature Liability of Ship Carrier in Indonesia

1. Liability of carriers based on article 468 to article 480 Indonesian Commercial Code. Following, there is a review of liability of carriers based on article 486 to article 480 of Indonesian Commercial Code. which explains responsibilities of carriers in shipping business. they are:

   (a) Article 468 Carriers have to take care of the goods they bring as they received the goods until the goods are received by the party appointed by the sender. Carriers have to substitute for the loss which is caused by not handing over the goods or by the damage of the goods partially or wholly, except if the carriers are able to prove that the damage or the not handing

over the goods happen because, as generally understood or as proper action done by the carriers is unavoidable due to the character or weakness of the goods itself, or by the error or carelessness of the sender, the carriers are responsible for the workers who are given the instruction to deliver the goods.

In article 1 above, it is determined that it is the liability of carrier to keep the goods safe during shipping which refers to due diligence. In article 2 it is determined that the carriers have to substitute for the loss or the damage or the missing of the goods partially or wholly, unless the damage the loss or the missing goods are caused by force majeure in regular term or in proper term which means unavoidable.[16] But the occurrence of force majeure must be proven by the carrier so that the carrier does not have to substitute for the loss if the missing goods or the damage of the goods is caused by force majeure. It also applies if the damage or the loss of the goods is caused by the fault done by the sender.

In article 3 it is determined that the carrier is responsible for the actions done by staff working for the carrier because the staff is hired by the carrier not by other person. The carrier is also responsible for the equipment used to transport the goods including the carrier who decides the equipment which are used during shipping process. Therefore, based on the statement in article 3, the carrier is responsible for the missing goods or the damage of the goods which are caused by the action done by the carrier's staff or by the equipment used in shipments which are not legible for shipment or the cabin inside the ships which are not proper or does nor fulfill the requirement for the goods load, except when the carrier can prove the occurrence of force majeure.[17]

(a) Article 470 This article limit the carrier to determine the conditions which deduct his responsibility from his actual responsibility when the conditions let him free from responsibility at all. This limitation is necessary due to the letter that is issued by the carrier is a unilateral agreement because only the carrier party which can arrange conditions which are stated on shipment letter. So, article 470 which is a paramount clause which protects the owner of the goods from one sided conditions which may be arranged arbitrarily by the carrier.

To support the statement in article 470, Article 517 b determines that the shipment letter which is issued by the carrier for the shipment from Indonesian ports so that the content of the letter cannot be against the statement as determined in article 470 which is an absolute statement.

(b) Article 471 This article also protects the goods owner from one sided conditions which (possibly) arranged arbitrarily by the carrier, because

in this article, it is stated that the carrier is always responsible when the carrier can prove that in the shipment or the staff hired by the carrier , it is found a mistake or carelessness in doing the tasks.

So, even though there is a limitation to refer to the carrier's responsibilities, the carrier must be responsible for the mistake or carelessness of the staff the carrier hired. Further, the mistake or the carelessness of the staff must be proven by the goods owner.

(c) Article 472 up to article 476 These articles mention the procedures of determining how to decide the compensation being the burden for the carrier. These articles will be discussed later in the section of claim.

(d) Article 477 In this article, it is determined that the carrier is responsible for the loss which is experienced by the owner of the goods when the carrier delay the hand over process so that the receiver get the goods late, except when the carrier can prove that the delayed handover is caused by an incident that is regarded proper or incident which is unavoidable or cannot be prevented (Force majeure).[18]

Incidents which slow down the hand over of the goods which belongs to the receiver which can be considered as force majeure among other things are as follows:

(e) Article 478 and article 479 In both articles, it is determined that the shipment right for the claim from the goods owner may occur when: (1) the carrier experienced loss due to the letters needed for shipment of the goods are not given as it should be (article478) (2) the carrier experiences loss because the carrier is not given with information as it should be and he is not given with proper information concerning the true condition, shape and characters of the goods by the sender of the goods (article 479).

The letters which are meant are letters which should be provided by the sender of the goods. For example a carbon copy letter to notify the export of the goods which are not given by the sender of the goods so that the ship should delay its embarkation point so that the cost for being idle (idling cost) is added up. [19]For such loss which is charged by the carrier, the amount is as much as additional idling cost, the carrier gets the compensation from the sender of the goods.

Goods which endangers other goods or which endange[12] the vessel, including illegal goods, may be destroyed or discarded by the carrier without requesting compensation to the owner of the goods when the sender of the goods gives incorrect or incomplete information about the goods characters or even when the sender of the goods does not give

information at all.[20] The goods which endangers the ship and other cargo consist of explosives like dynamites, bullets, matches and other flammable goods like film, matches, explosive powder and paraffin.

Referring to article 479, the owner of the goods must inform to the carrier completely and precisely about the condition, shape and character of the goods. When the sender does not inform completely and precisely to the carrier,, then when the carrier experiences loss which is caused by the goods, the sender of the goods must substitute for the loss which happens to the carrier.[21] The necessity of informing the carrier about the condition, shape and character of the goods completely and precisely to the carrier is that the carrier may arrange the placing of the goods inside the hold of the ship as to prevent the goods from damage.

Referring to this article 479 , the carrier has the right to get compensation when the carrier experience loss, like when the ship is damaged or when the carrier or the owner of the goods must replace the damage of other goods that belongs to other owner of the goods. So, when the carrier does not experience any loss, the carrier has no right to file any claim from the owner of the goods. Like for example, what happens to Goods A and Goods B mentioned above, when the owner of other goods (Goods B) does not request compensation from the carrier, then the carrier does not experience any loss so that the carrier cannot claim any compensation from the owner of goods A.

1. Responsibility in Laws number 17 Year 2008 Concerning Shipment Article 33 Chapter VI regarding things related to port part eight which concerns about responsibilities in clause one, it is mentioned as follows: Everyone or every corporation who carries out any activity in public port is responsible for the compensation for the damage in or to the building and/or any facility in the port which is caused by the activity done by the shipping process." Then, in clause (2) which says: "the owner and/or the operator of the ship is responsible for the substitute of any damage to the building and/or to any facility in the public harbor which is caused by the ship."

   In clause (3) it is mentioned that to guarantee the responsibility practice for the compensation as mentioned in clause (2), the owner of the ship/ the operator of the ship must give guarantee. Clause (4) " statement as referred to in clause (1), clause (2), and clause (3) is government regulation.

   In article 34 Chapter VI about regarding things related to port part eight , responsibilities in clause (1) it is explained that the management of the port is responsible for the loss of the port user or for other third party due

to the mistake in the port operation. in clause (2) " the user of port service or other third party as mentioned in clause (1) have the right to file compensation claim for the loss.

In article 86 Chapter IX about Sea Transportation part ten concerning responsibilities of the carrier in clause (1) it is mentioned that "transportation company/service in waters is responsible for the effect which is made by the ship operation, the effect is in a form of : death or injuries experienced by the passengers transported, the missing, disappearance and the damage of the goods which is shipped, the lateness of passenger transportation and or the lateness of the goods transported and the third party loss.

2. Responsibility in International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC Convention 69). This convention arranges the system which possibly enable the victims to get compensation from the owner of the ship (cargo ship) which directly is responsible for the pollution (Strict Liability) Convention on Civil Liability (CLC) comprises two versions. CLC requires that the compensation must be paid to the victims of pollution by the ship owner as oil transporter. One of the main points from CLC rules is the requirement regarding insurance which is obligatory where the owner of the ship must have insurance to guarantee that they have enough funding to cover the claim based on the convention.[22] CLC year 1992 stated that the owner of the ship which is used or made to transport oil in a big amount or to transport more than 2000 tons of oil as cargo must keep the insurance in an amount that is sufficient to cover its responsibility limit based on the convention. This requirement can be fulfilled by joining PandI club membership. As a proof of this insurance availability, the ship must have and bring certificates that are issued by the country where the ship is registered as the proof that the insurance is available and in force. The carelessness in fulfilling this insurance provision which is obligatory is considered a crime for the owner and the one responsible for the ship and the ship is subject to arrest. PandI club will act as guarantor based on CLC 1969 and CLC 1992 and give evidence which is sufficient *t* prove that insurance is available to cover what is requested (called blue card), which enables the certificate to be issued by related department in government.[23] Club recommends clauses to its members to join as members in replacement the club gives guarantee stating that the member owns relevant certificate of CLC (and other certificates which is required by United States Law), the owner does not have responsibilities further to make or to keep each additional guarantee for each additional rules which are specific and when there is

loss due to the unavailability of guarantee possessed by the ship owner and in such case the insurance will be guaranteed by the one who rents the ship.[24]

A carrier is liable for damages caused by collision with another vessel if that collision is caused due to fault. Article 536 of the Commercial Code states that

> "If the collision is resulting from a fault of the ships colliding or of another, the carrier that was in fault shall be responsible for the entire damage".

Liability for the provision of compensation for the losses inflicted on the ships, goods and people contained in the vessel or other things hit by a ship is also addressed. Article 534 of the Commercial Code states that

> "In the case of a collision in which a seagoing ship is involved, the responsibility for the damage, inflicted on the ship and on the property or person, on board will be subject to the provisions of this title."

The rule, which in part says that

> "all the collisions were due to his fault", means that the carrier must prove whether the accident was his fault or not. So, for the article above, liability system in The Commercial Code is based on the principle of liability named "based on fault liability".

This is different from the rules of environmental pollution as expressed in both the Environmental Law and the International Convention on the Marine Environment pollution which use the principle of indemnity as adopted from strict liability. Article 87 of the Environmental Management Act 32 of 2009 obliges a business which

> "infringes the law in the form of environmental pollution and or damage which give rise to adverse impacts on other people or the environment ... to pay compensation and/or to carry out certain actions" .[25]

This article interpreted, the necessity to prove the fault of the defendant previously is no longer necessary, and even the obligation to pay compensation to the state beach as sea pollution victim arises immediately. There is even the possibility that ship owners will bear full responsibility, a concept commonly known as strict liability as mentioned in article 88 of the Environment Management Act 32 of 2009. Strict Liability will be applied in some case of maritime law if there are some marine pollution caused by ships. This is also regulated by International Convention on Civil Liability for Oil Pollution Damage, 1969 as amended by 1992 (CLC Convention) that the owner of the ship will be directly liable to any pollution which caused by his ship.

Thus, from the opinions above, the compensation system in marine pollution can be based on fault liability or strict liability.[26] In Indonesian Tort law, was based

upon article 1365 of the Civil Code where Commercial Code carrier must prove whether the accident was his fault or non, so that such a liability be based on fault. This differs from the rules of Environmental Management Act 2009 which is adopted strict liability as applied by common law system. Otherwise, in many court decisions *i.e.* Court Decision No. 820/pdt/G/1988/PN.Jkt.Pst. in this sea environment pollution case, based on fault liability, still be used as a basis for the decision.[27] Thus, the compensation system in marine pollution is still confusing with whether strict liability or based on fault liability.

B. Benefits of the Implementation of the P and I in Indonesian Sea

In carrying out its operation, sea transportation experiences risks which affecial things and material loss either in a form material things or loss of life. The loss can be experienced by the carrier and it can also be experienced by any sea transportation users. Matters regarding the damage of the vessel and sea pollution due to ship collision and accidents is the biggest risks and it should be put into priority and others should come after. To prevent the loss, the protection is provided through insurance. Insurance will cover the loss which is in line with the liability. Despite, in practice, not all the loss can be covered by sea insurance in general.

In sea transportation, this liability is urgently required particularly by the vessels which apply international transportation. One of the documents which is important in international trade is marine Insurance Policy.[28]

Marine Insurance policy in general is the loss that is covered by any insurance in general, that is the loss that is covered for the risk that is charged as an object of liability. In Marine insurance policy the closing for one risk is inappropriate since in the shipping there can be several dangers at the same time so that insurance policy that can cover the whole risk that might occur is needed.

Therefore when there is risk which is not covered by underwriter, then the ship owner establish an association among them which functioned to cover the loss among the members, to the extent that the loss is not covered or the underwriter does not cover the loss completely. The association namely P and I Club which has the duty to cover the risk which can not be insured to the general sea insurance.

Internationally P and I Club has been running since early nineteenth century, but In Indonesia very little number of shipping companies join the club membership.[29] Almost all shipping businessmen which serve domestic shipping do not pay attention to the closing of PandI Club, except ships that serve international trade. As stated in the previous explanation that the ship which cannot show Certificate of Entry, a certificate that can be a proof that there has been a liability of law coverage with P and I Club, The ships cannot anchor in any international port in any country.

When there is pollution or even an obligation to remove ship wreck of a ship which exceeds the cargo limit, the risk is not guaranteed in sea loss insurance for example Hull And Machinery Insurance.[30] The cost is very high, it is even more expensive than the price of the ship itself. That is why a lot of shipwrecks which are not yet lifted in Indonesian seas. Based on the data which is obtained by Transportation Ministry concerning ship accidents, it is considered a common thing, even each year, the ship accidents, as stated in the previous explanation, never go down in number, it even is increasing each year.

As the consequence of ship accidents, it causes loss which is amounted into big number for the national shipping businessmen. The loss includes the lifting of shipwreck which causes other ships hampered and cannot sail freely and even worse the oil spill which pollutes the sea can come from the ship accident.

From few cases which are decided by shipping court, if we see the detail, we can see that most of the burden to cover the loss is given to the ship businessmen since it is considered as a mistake of the ship, ship captain and the crew.

Therefore, without P and I Club ship businessmen and shipping company who should handle it. Even though it is mentioned in the regulation that when the owner of the ship cannot carry out the handling of the case, the government will lift or removal of the shipwreck. But, the cost and the the fee will be still given to the owner of the ship.[31] When this thing occurs, it is clear that the businessman will experience financial shortage so that the shipping company of Indonesia will have problems to be competitive in sea transportation sector.

In the field of sea transportation, it is can that the ships owned by Indonesia does not have a reliable ability to compete with developing countries like seperti Singapura (shipping) and Philiphine (ship crew).[32] While actually Indonesian ship crews are potential source of Indonesian development then its empowerment should be explored.

The roles of ship crew and Indonesian shipping companies in Maritime Country, Indonesia, is a potential source for the development of Indonesia. The role of ship and ship crew of Indonesia in the field of local and international shipping should be developed as the role of foreign flag ships in inter islands and international shipping keep increasing.

By the enforcement of obligatory participation in P and I Club for Indonesian ships, it is expected that the shipping companies are able to actively participate in international shipping competitiveness. In regard to this point of view, the birth of Cabotage principle is also a strong supporting factor in the empowerment of Indonesian Shipping.

The beginning of cabotage principles implementation is Presidential decree. Its direction is to make ships which crosses Indonesian seas and stopover in domestic port or local which has Indonesian Flag.[33] One of the reasons for the implementation of cabotage principles , before this principle is applied in Indonesia, most domestic sea transportation were still be served by ships which have foreign flags so that sea transportation in Indonesia was getting worse. This cabotage principle is emphasized in Law Number 17 Year 2008 about shipping.

The implementation of this principle will determine a state revenue, opening job opportunities, accelerating economic development, avoiding the flow of fund to foreign countries and improving national security.[34] But, as long as Indonesia he field of shipping, the participation of ships which has foreign flag in shipping industry which has not been able to be independent in shipping field. The participation of ships which are owned by foreign countries should be given room for sustainable economic development.

Looking at the unpreparedness of domestic businessmen in this field, cabotage principle, which should have been implemented since May 8, 2011, should finally give exception to the ship which has foreign flag which transport oil and gas for national interest. This regulation is stated in the Regulation of Minister of Transportation (Permenhub) No. PM 48 Year 2011 regarding Procedures and requirements of Permit Letter for The Use of Foreign Ships for Other activities which are not included in Activities which are related to Passenger or goods transportations within domestic transportation.[35] This regulation contains specific regulations of exceptions of cabotage principles for ship that supports the leading activities of transporting offshore oil and gas.

Cabotage principle give a legal power to the one who carry out shipping business in the home country fully to the coastal states which means that the coastal countries have the right to forbid foreign ships to sail and to trade in and around the waters of the country.[36] The application of the principle is supported by the international maritime law in relation to the sovereignty and the jurisdiction of the country for its seas. Therefore, foreign ships cannot be around or cannot enter the sea area of the country without permission and distinct reason or purpose.

At this time, particularly in time of facing free trade era, among shipping businessman there is a circulated discussion which is improper, that considering that the application of the Cabotage principle is against liberalization principle of trade. While the principle is globally applied as part of maritime law which is internationally acknowledged even it has been long applied in developed countries like United States which is widely known as the pioneer of liberalization of trade.

The urgency of cabotage principle application to Indonesian shipping is based on the consideration that domestic sea transportation has a strategic and significant role in national development, starting from law, economy, social, cultural and security aspects. Besides, cabotage principle also elevates Indonesian people's Economic by giving as much opportunity as possible to carry out business to both local and national businessmen. It is believed that this rule is able to improve the domestic ship production since the whole ships which sail in domestic sea areas have to belong to Indonesian ships. Besides, cabotage principle is functioned to protect Indonesian sovereignty as maritime country.

If we see the data from transportation ministry, it shows that the increase of the number of ship fleet of national trade which belong to Indonesian increases as much as 60,8 percent from 6041 fleet unit in 2005 to 9715 fleet unit in August 2010.[37] This condition shows that the demand of the ship fleet is getting higher.

Amidst the increasing demand to the national fleet, Indonesian shipping businessmen have to concentrate to the funding of ship unit provision, and to the risk which may occur in the sea and this should be shared to the companies as guarantor and among ship businessmen in a form of P and I Club.

Beside that, the obligation to join P and I will give trust to the Indonesian Ship Grade Arranger Body improved. At this moment, the obstacle to determine grade of Indonesian ship is hampered by BKI (Indonesian Ship Grade Arranger) has not become part of IACS (International Association of Classification Societies). This condition causes the trust from foreign parties particularly the guarantor becomes very little. All this time, the grade determination given to ships operated in Indonesia is carried out by foreign classification bureau like American Bureau of Shipping, Germanischer Lyyod, Nippon Kaiji Kyokai, or Llyod.[38] To become a member of IACS, BKI has to improve its quality to become a body that is considered by institutions which guarantee the ships that sails in Indonesian seas. The existence of Protection and Indemnity Club is crucially needed to guarantee the risk over environmental pollution caused by accidents or spilled load. Most of the club members are not willing to give guarantee when the recommendation of IACS is not provided because it is considered incompetent.

Thus, the existence of P and I Club is very crucial in relation to the application of cabotage principle. By the existence of P and I Club, the safety of the sail will be guaranteed so that the need of service will be fulfilled well. The owner of the ships will be able to operate the ships without having to worry about its safety by paying the fee as a premium. By joining P and I Club, the ship is automatically equipped with sea worthy documents so that it can improve the standard of safety of Indonesia ships so that it can improve the standard of Indonesian ships in general then Indonesian ships can be competitive and ready to compete with international ships.

5. CONCLUSION

Firstly, the legal basis of the application of the Implementation of Protection and Indemnity For National Shipbuilding is already very relevant. Thus, it is possible that the obligation for Indonesian ships can take advantages of the Implication of Protection and Indemnity Sea Carriage Contract in Indonesia. This is to cover risks that cannot be covered by Marine Insurance in general. Therefore, this Protection and Indemnity Club is very different from the marine insurance where the money paid is due and may be withdrawn if there is no claim. Club also meant to be non-profit making and for its members to help each other.

Secondly, there are various forms of Carriage Legal Liability in Indonesia, namely full liability and based on fault liability as regulated in KUHD (Commercial code), liabi based on negligence Liability as regulated in the Convention of The Hague Rules, the Hamburg Rules and the Rotterdam Rules, and strict liability principle that can only be implemented to the carrier in case of sea environment pollution in accordance with UUPPLH although in some cases in court, judges still apply the principle of liability based on fault.

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