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RESEARCH ARTICLE

LIABILITY OF A SEA CARRIER IN THE REGULATION OF SHIP COLLISION UNDER INDONESIAN MARITIME LAW

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ABSTRACT

The increasing use of ship for the carriage of goods, oil, passengers has been very useful for the growth of the industry and has benefit for all parties. Otherwise there are any aspects of the hazards associated with pollution maritime been neglected in the past. Whereas it needs an advance attention from the regulatory body and the general public as well. Marine environment plays a very important role in maintaining the balance in the global ecosystem as a whole. Damage the environment will result in long-term weakness. 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 method. Based on the results of this study, it is obvious that: there are various forms of Carriage Legal Liability in Indonesia there are based on fault liability, strict liability and presumption of liability.

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INTRODUCTION

Every year ship accidents never decrease even though the government has made improvement in the regulations on sea feasibility not only in national law but also in ratifying several international conventions. Until now the government has not been able to solve essential sea transportation involving port checking system, ship feasibility, up to shipping company's bad management. The number of ship accidents in Indonesia is apprehensive, especially during 2006-2011, by the existence of 691 cases. In 2006, there were 71 accident cases, in 2007: 79 accidents, in 2008: 125 accidents, in 2009: 119 accidents, in 2010: 159 accidents and in 2011: 138 accidents. At average there was an increase of 17% in the last 6 years. The kinds of accidents which occurred at average for the last 6 years (2006-2011) were sinking (37%), running aground (13%), collision (15%), fire (18%) and other kinds of accidents (17%). Whereas the causes of the ship accidents were 37% of human error, 23% of technical fault, 38% of nature condition and 2% of other causes.

Some components of ship accidents in Indonesia which cause high rate of sea accidents are related to the lack of qualified instructors, especially in private sea transportation training. There are very limited visual displays and ships for cadet to practice, so that there are so many cadets who are hampered to have their sea practice. Besides that, the implementation of International Ship & Port Facility Security Code (ISPS Code) has not entirely been integrated, not to mention the sufficiency and liability of navigational equipments are relatively low. The safety of shipping, the cause of pollution become a serious problem for our life nowadays. Meanwhile the function of improved 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, Seatransportation 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 between two continents and two oceans sea transportation has an important role in the framework of inter-state relations.

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In Indonesian maritime law, a ship collision is unlawful act (perbuatanmelawanhukum). 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.¹ 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*.²

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 cargoes, 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).³

Based on above issues, some research questions come up as follow :

- 1. What is the nature liability under Indonesian Maritime Law?
- 2. What is the applicable law related to sea collision?

MATERIALS AND METHODS

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.

CARRIER LIABILITY OF SHIP COLLISION

Ship is a means of sea transportation and where people rely their life on. Each safety of human life is threatened, either the sailor or anybody who sails. The data reveals the fact that the sea accident has taken a lot of victims and lots of loss in term of wealth, accident can just happen anytime at anyplace to anyone. ⁴For such anticipation, the ship crew and the ship passengers must know the techniques to rescue himself/herself when collision happens (personal survival technique), passengers and crew must also know about fire fighting, first aid and personal safety and social responsibility. ⁵For this purpose of safety, the ship crew needs training, particularly in safety so that the ship crew is skillful with safety procedures and techniques as required by IMO Convention and concerned government. While knowledge, understanding, proficiency and skill which are needed by ship crew in anticipating the risk of the accidents like the fire that burns some part of the ship or even when the whole ship is exploded; the ship collision that may happen, collision to other ship or crashing pier or other

¹ Konstantinos Giziakis and Ernestini Bardi-Giziaki, Assessing the risk of pollution from ship accidents Disaster Prevention and Management *Volume: 11 Issue: 2 2002*.

² *Ibid.*

³ Sea Alarm Indonesia, *A Summary of Oiled wildlife response arrangements and resources worldwide*, paper , www.sea-alarm.org

⁴ SPC, Regional Maritime Information Bulletin, 2009, p. 69

⁵ Jones, Teven M. Implication and effect of Maritime Security on the operation and management of merchants vessels in Indonesia beyond the water's edge, : managing an archipelagic State. Singapore ISEAS, p. 87

objects in the sea; sinking, shipwrecked, ship capsized either temporarily or permanently. ; leakage in the ship that makes the ship sink as well as hypothermia risk, sea pollution occurrence and the damage of the environment as describe at Table 2 below.

Table 2. The Analysis of Sea Transportation Accident Characteristic

	ACCIDENT TYPE	Object
WHAT	Accident Type and Safety Indicator a. Accident Type : Drown, Burn/fire, Collision, Sink b. Accident Level	Engine Ship, Sail Boat, Motor, Tug Boat, barge, Tanker
WHY	Possible Cause of Accident a. Human Factor Carelessness in operating the ship Inability of the crew in mastering various skills in problem handling which may occur in operational of the ship. Realizing that the carrier load too much goods b. Technical Factor Inaccuracy in designing the ship inability of the crew to master various possible problem handling when there is accident during operating the ship Realizing that the ship is overloaded Ignorance of ship maintenance that causes damage to the ship parts or to the ship it causes accidents, burn/fire. Natural Factor Bad weather; storm, high tide, overrated current, fog that causes	Captain of the ship, Ship Crew, Port Control Officers, Passengers Ship Owner, Marine Inspector, Ship Staff, Dock Officials, Ship Equipment Supplier, Ship flow, Port Pond, Information from Meteorological, Climate and Geophysics Office.

Under Government Regulation Number 17 Year 2008 on shipping concerning the ship accidents , it splits ship accidents into 4 (four) categories into:

- ship sinking;
- ship burn/ fire;
- ship collision; and
- shipwrecked

Next is article 256 about Investigation of Accidents of ship. It states that:

- Ship Accident investigation is done by National Transportation Safety Commission. The Commission is to seek the fact to avoid the accidents to occur with similar cause.
- Investigation as stated in clause (1) is done to each ship.
- Investigation which is done by National Transportation Safety Commission as stated in clause (1) not to determine the mistake or carelessness for the accident cause.

Based on Law number 21 Year 1992 which had already been revised by law Number 17 year of 2008, regarding shipping and it states that ship feasibility is that : condition of the ship which is fulfill the requirement of safety, prevention of sea pollution, crew completion, cargo capacity, health and welfare of ship crew and passengers and legal status of the ship to sail in certain waters.

The effort to rescue in the sea is an activity which is used to control the occurrence of accident in the sea , which is aimed to minimize the impact to human, to the ship and to its cargo as much as it can. To minimize accidents in the sea, it needs an effort to rescue with standard procedures in line with

regulations which are arranged by IMO, ILO, ITU and which are arranged by government. And further to guarantee the safety in the sea, it needs a standard (regulation) which is applied nationally and internationally.

They are⁶ :

National Indonesian Standard Covering:

- Laws number 17 year 2008 regarding shipping in which the procedures/the regulations to apply are explained in Government regulation and ministry decree.
- Law Number 3 year 1988 substituting Law Number 5 year 1964 regarding telecommunication, which is completed by PP (Government Regulation) No. 22 year 1974 regarding telecommunication for public.
- Government regulation Number 7 year 2000 regarding seamanship which among others arranging competence , qualification of competence and skills for the ship crew and ship captain in all ships except engine sail boat, sail boat, engine boat with capacity/size less than GT 35, personal cruise ship which is used for personal cruise and not for the purpose of non commercial cruise and also except specific boats/ships.

International Standard

In International standard, there are three world organizations which arranges the safety of the ship which are IMO (International Maritime Organization), ILO (International Labor Organization) and ITU (International Telecommunication Union), Indonesia is one of the members of the three organizations and Indonesia has ratified their conventions. As the consequence of the membership, Indonesia must apply the regulations well and proven concretely in a certification through independent evaluation once in 5 years. International conventions which arranges the ship safety comprises:

⁶ Kajian Analisa Trend Kecelakaan laut, Report. Komisi Nasional Kecelakaan Transportasi, Ministry of Indonesian Transportation, 2008, p, 87-116.

- SOLAS 1974 (Safety Of Life At Sea) and its amendments
- Marpol 73/78 and its protocols
- Load Line Convention 1966
- Collreg 1972 (Collision Regulation)
- Tonnage Measurement of 1966
- STCW 1978 Amendment of 1995
- ILO No. 147 year 1976 regarding Minimum standard of Labor for commercial shipping crews.
- ILO Convention No. 185 Year of 2008 regarding SID (Seafarers Identification Document) which has already been ratified based on law Number 1 Year of 2009. Besides the conventions which are mentioned above, there is one regulation which cannot be separated from shipping safety which arranges Communication Radio which has a very close connection to GMDSS that is Radio Regulation (RR), Telegraph and Telephone Regulation under International Convention of International Telecommunication Union (ITU).

From all convention standards mentioned above, we can draw a conclusion that to reach the safety of people in the sea, there are 4 (four) main requirement groups as follows:

- Ship Requirements
- Human Resources Requirements
- Operational Requirements
- External factor Influence to the ship operations

Ship Requirements

To prevent ship accidents in the sea, the ships must fulfill all the requirements of the ship safety based on the regulations of International Conventions as mentioned above, those are:

SOLAS 1974 (Safety of Life At Sea)

That is one of the international conventions requirements which consists of ship requirements in the purpose of keeping the safety of people to prevent or minimize accidents in the sea which covers ship, crew and its cargo.

To be able to guarantee the ship safely, the ship must fulfill all the regulations mentioned above, particularly the International Convention regarding SOLAS 1974 in Chapter I to V, which covers matters as follow:

- Ship construction which is related with structure, subdivision and stability, mechanical installation and electrical installation in the ship.
- Ship Constructions which is related to fire either concerning fire protection, tools to locate fire and fire extinguisher.
- Set and use of safety and rescue tools
- Radio Communication tools.
- Navigation Tools

In the application of the aspects mentioned above, it requires proof of the implementations in a form of certificate which is valid ;that is certificates of ship safety which covers all the requirements in chapter II-1, II-2, III, IV & V. It also applied for other chapters in SOLAS those are ISM Code, ISPS Code

and IMDG Code which started to be effective 1st January 2010.

MARPOL (Marine Pollution) 1973/1978

In Marpol, it is regulated about prevention and solution for sea pollution either in a form of oil, dangerous goods, toxic goods, waste, sewage, and air pollution containing in that annex Marpol. in this case, ship for passengers is closely related to oil spill, waste, and dirt in relation to keeping the sea area clean.

Certificates which are related to the conventions are

- Certificate of pollution prevention which is caused by oil.
- Certificates of pollution prevention which is caused by sewage
- Certificates of pollution prevention which is caused by garbage

In relation to ship accidents, Marpol plays an important role particularly concerning waste which is thrown in a form of dirty oil, waste and sewage. to find out whether the ship has fulfilled international conventions regarding 73/78 it is proven by the availability of certification.

LOAD LINE CONVENTION (LLC 1966)

Ship is a means of sea transportation and it has some requirements to make the ship feasible to operate in the sea. The requirements, among others, is Load Line Certificate which fulfill requirements of Load Line Convention (LLC 1966). Generally, all ship fleet have got Load Line Certificate either ship to load cargo or passenger ships. Procedures to get Load Line Certificates is that the ship must go through checking and testing which is arranged in Law Number 17 Year 2008 regarding shipping. The ship which is already checked and tested, when it fulfills safety requirement, can be given Certificate of Load Line which is issued/endorsed by Biro Klasifikasi Indonesia (BKI)/ Indonesian Classification Bureau which is nationally valid. The Certificate is also internationally accepted/valid in line with SOLAS 1974.

Time after time, sea accident happen in Indonesia and the number never go down. Even, sea accident is caused by repeated same problem, that is, bad weather, overloaded cargos, or ships which are not feasible to operate. At least, there are 2 (two) important causes of sea accidents in Indonesian sea. First is fleet condition. Transportation ships are made without certain standard of safety. Besides, there are a big number of fleets in Indonesia which are used ships which are purchased from other countries. The maintenance of the ships is also below standard, the used ships which are used to operate generally have quite old age. so that the ships are actually not feasible to be in operation. The used ships, in the origin countries, are actually not used as transportation means anymore. The second reason is the fleet operation, either the ship aspect or the cargo aspect. The problem arises due to the lack of control of safety standard of shipping so that the problem of overloaded cargo or goods which are not reported.

The reason of bad weather and nature condition, are actually not proper to be proposed as the main cause of shipping accident, because Meteorology, Climatology and Geophysics office (BMKG) always notifies condition of weather and its forecast. This case makes the role of the chief of port very important. The chief of port must strictly select which ships which are allowed to operate and which ships which must wait for the weather to be conducive, while the ships which have to be postponed by the chief of port to operate are special ships like High Speed Craft (HSC).

Besides that, we also know there are many causes of sea accidents, such as:

- Bad Weather
- Fire including as the result of having dangerous cargo
- Ship stability including as the result of cargo shifted from its position
- There is no reserved floating power as the result of excessive cargo
- Grounding and stranding
- Collision
- Imperfect design and structure
- Human Negligence
- Blow Out (Offshore Oil Platform)

Nature Liability of Ship Carrier in Indonesia

In the event of a collision, grounding or other major casualty, there are any key provisions that will impact upon the liability and response of interested parties. In particular, the relevant law / conventions in force in relation to:

The provisions related to the major casualty in the collision and salvage/general average, limitation of liability are predominantly regulated in the Indonesian Commercial Code ("ICC") (Kitab Undang-Undang Hukum Dagang). The ICC is a legislative instrument from the Dutch colonial era which was enacted in 1847. Since its enactment, Indonesia has not revised or amended the large portion of the provisions of the ICC, causing several provisions to fall short of current trends in the shipping industry

Collision

Articles 534-544 of the ICC are the key provisions relating to ship collision. In brief, the provisions regulate that the liability of parties in a ship collision depends on how far of fault that causes the collision. If both ships are at fault causing the collision then the proportion of the liability should be borne by both parties. In practice, the most crucial issue that must be proven in case of liability is the element of fault. From the shipping practice's point of view, the element of fault in the collision is reasonably closely related to the professionalism aspect of the ship's crew. The crew's professionalism aspect is examined by the Maritime Council (locally known as Mahkamah Pelayaran) which has an authority to determine whether the master and/or crew of the ship have committed fault when the accident/collision occurs. In addition, Indonesia has ratified the Convention on the International Regulation for Preventing Collisions at Sea 1972. This Convention is the

main reference for the Maritime Court to determine whether there is a fault in the navigational aspect from the colliding ships.

Pollution

In 2009, the Environmental Law has been enacted to replace the previous law. Indonesia has also ratified international conventions related to marine environment. By means of Presidential Decision No. 18 of 1978, Indonesia has ratified the International Convention on Civil Liability for Oil Pollution Damage, Brussels, November 1969 ("CLC") to preserve the marine environment from sea pollution. Further, the Protocol of 1992 to amend the above convention has also been ratified through Presidential Decision No. 52 of 1999. In addition, through Presidential Decision No. 46 of 1986, Indonesia has ratified the Marine Pollution Conventions of 1973 and 1978.

Environmental preservation is also governed under Law No. 17 of 2008 on shipping ("Shipping Law"). The Shipping Law specifies pollution prevention resulting from ship operations and port activities, including waste disposal in waters. It regulates that every crew must prevent and mitigate the occurrence of the environmental pollution originating from the ship, which also includes obligation of the master of the vessel to immediately report to the nearest harbor master and/or other government authorities on the occurrence of any pollution of waters resulting from his ship operation. Criminal sanction in the form of imprisonment and fine may be imposed on the violation of such obligation. This obligation shall also extend to other parties, such as any parties responsible for offshore activities.

There is a likelihood that a marine casualty incident may result in pollution of the territorial waters of the three states so they are working hard to try to avoid this. Indonesia has ratified several conventions on pollution, such as the 1992 Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1973 International Convention for the Prevention of Pollution from Ships and the related 1978 Protocol. Indonesian shipping law further regulates the disposal of waste in water resulting from ship operations and port activities and imposes criminal sanctions if breached. Vessel crews are prohibited from disposing of any waste, trash or dangerous and poisonous chemical substances in Indonesian waters. They must prevent and mitigate the occurrence of a pollution incident, in addition to immediately reporting an occurrence of a pollution resulting from ship operations.

Salvage / General Average

According to article 568 of the ICC, the ship owner is the party who is responsible for the costs of ship's salvage. However in practice, the salvage costs are included in the calculation of claim or settlement between the relevant parties. General average is defined in article 699 of the ICC. The definition of general average consists of only 22 conditions that may be applicable for the general average to be applicable. Several conditions in this provision are no longer relevant in today's trend.

Wreck removal

With regard to the wreck removal, the Directorate General of Sea Communications (“Seacomms”) of the Ministry of Transportation (“MOT”), is a state authority that is authorized to issue an order of wreck removal. As required under Government Regulation Number 5 of 2010 regarding navigation, the owner of the shipwreck is obliged to remove such shipwreck and/or its cargo to a designated location as specified by the Minister of Transportation. Such wreck removal operation must be conducted within 180 calendar days as of the sinking of ship. If the owner fails to do so, the Seacomms will conduct the wreck removal operation at the cost of the owner. The relevant authority for wreck removal in Indonesia is the Directorate General of Sea Communications of the Ministry of Transportation. Under Indonesia’s Shipping Law, the Directorate General can direct for the owner to remove the wreck and/or its cargo to a designated place where it interferes with maritime safety and security. The wreck removal operations must be conducted within 180 calendar days after the vessel is sunk. Failing this, the owner may be the subject of criminal sanctions and the Directorate General will conduct the operations and claim the costs against owners accordingly.

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*”.⁷ 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.⁸ 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.⁹ Thus, the compensation system in marine pollution is still confusing with whether strict liability or based on fault liability.

Conclusion

As a ship is a means of sea transportation and where people rely their life on. Each safety of human life is threatened, either the sailor or anybody who sails, carriers must prove their ability to prevent a ship collision under Indonesian and International Standards to make his ship become seaworthy. There are various forms of Carriage Legal Liability in Indonesia in regard to ship collision namely based on fault liability as regulated in KUHD (Commercial code); liability based on negligence Liability as regulated in the Convention of The Hague Rules, the Hamburg Rules and the Rotterdam Rules, and as adopted by Shipping Act 17 Year 2008 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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⁷ Nicholson, David, Environmental Dispute Resolution in Indonesia, Singapore, Iseas, 2009, p.137

⁸ *Ibid.*, p 69.

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