CARRIER' S LIABILITY FOR MARINE POLLUTION UNDER INDONESIAN MARITIME LAW

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CARRIER' S LIABILITY FOR MARINE POLLUTION UNDER INDONESIAN MARITIME LAW

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ABSTRAK

Kajian ini menganalisa tingginya risiko laut Indonesia dan keselamatan pelayaran di perairannya dari aspek liabiliti. Kedudukan laut Indonesia yang terbentang di antara benua dan lautan menyebabkan kecenderungan untuk berlaku kemalangan kapal. Pihak kerajaan Indonesia telah menjalankan semakan terhadap undang-undang dan meningkatkan kemudahan pengangkutan laut di dalam usahanya untuk mengurangkan jumlah kemalangan kapal laut. Data Kementerian Pengangkutan Indonesia menunjukkan tren kemalangan kapal laut yang semakin meningkat sejak tahun 2009 hingga 2014. Objektif kajian ini adalah mengkaji prinsip liabiliti undang-undang yang digunakan di Indonesia berdasarkan liabiliti kapal laut; menganalisa undang-undang yang terpakai berhubung dengan pencemaran laut oleh kapal-kapal pengangkut; mengkaji bentuk pencemaran laut yang dilakukan oleh kapal-kapal pengangkut; dan menganalisa mekanisma pampasan yang boleh dituntut oleh kapal-kapal pengangkut yang berusaha membanteras pencemaran laut berdasarkan Undang-undang Pelayaran Nombor 11 Tahun 2008. Kajian ini menumpukan kepada pencemaran laut dan mencadangkan undang-undang dan prinsip yang dapat digunakan untuk menuntut ganti rugi pencemaran laut daripada kapal yang menyebabkan pencemaran di perairan Indonesia. Kaedah kajian ini melibatkan kaedah analisis undang-undang iaitu terhadap peruntukan undang-undang yang relevan dengan liabiliti pihak-pihak di dalam kemalangan kapal. Temubual juga dijalankan dengan pakar-pakar di dalam bidang pencemaran laut seperti hakim-hakim, pegawai-pegawai Kementerian Pengangkutan dan Mahkamah Maritim termasuk syarikat-syarikat perkapalan. Dapatan kajian menunjukkan terdapat aplikasi prinsip *fault liability* di dalam Kitab Undang Undang Hukum Dagang, *negligence liability di* dalam Undang Undang Pelayaran Nombor 11 Tahun 2008, *strict liability* di dalam Undang-Undang Lingkungan Hidup 2007. Prinsip *strict liablity* boleh digunakan di dalam kes pencemaran laut walaupun dalam beberapa kes hakim masih mengaplikasi prinsip *fault liability*. Didapati bahawa walaupun *strict liablity* bukan regim yang baru akan tetapi mengalami kesukaran untuk diaplikasi di Mahkamah Indonesia. Dalam usaha mencari suatu penyelesaian, *mutual liability* boleh ditambah sebagai prinsip baru untuk membantu aplikasi prinsip *strict liability.* Dapatan juga menunjukkan kerangka perundangan Indonesia sebagai asas kepada implementasi prinsip *mutual liability* sememangnya relevan berdasarkan undang-undang yang sedia ada.

Kata Kunci: Kemalangan Kapal, Pencemaran Maritim, Undang-undang Maritim, *Mutual Liability*

ABSTRACT

This study analyses the high risk nature of Indonesian waters and the safety of ships crossing these waters in the aspect of liability. Since the country lies across continents and oceans, such vulnerable areas tend to cause ship accidents. The government has undertaken revision of relevant regulations and the upgrading of facilities of transportation in its effort to minimize shipping accidents. Data from the Ministry of Transportation of Indonesia showed the trend of ship accidents has increased between 2009 until 2014. The objectives of the study therefore are to examine the principle of liability in Indonesian law; to determine which law could be applied in relation to marine pollution; to examine the pattern of sea pollution that ships had caused; and analyze the mechanism of compensation for ships that has been involved in eradicating the pollution caused by such shipping accidents based on Shipping Law Number 11 of 2008. This study focuses on marine pollution caused by ships involved in accidents and incidences at Indonesian sea. The method of research is to make a legal analysis of the key provisions of relevant laws upon the liability of parties in shipping accidents. Interviews were conducted with the experts in the field of marine pollution such as judges, ministerial officers of Ministry of Transportation and Maritime Court including shipping companies. The findings indicated that there are various forms of carrier's liability in Indonesia namely the principle of fault liability regulated in Indonesian Commercial Code, liability based on negligence adopted by Shipping Law Number 11 of 2008 and the strict liability principle adopted in Indonesian Environmental Law 2007. Currently, the principle of strict liability could be applicable in the case of marine pollution although in some cases in court, the judges still apply the fault liability principle. The finding from the case laws and authority has also indicated that, strict liability is not a new law in Indonesia but still facing difficulties in its implementation and application. In the quest for suitable solution, the principle of mutual liability can be added as a new legal principle to assist the application of the principle of strict liability. It is also found that the legal framework as basis for the application of mutual liability principle in Indonesia is already relevant in existing laws.

Keywords: Shipping Accidents, Marine Pollution, Maritime Law, Mutual Liability

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LIST OF ABBREVIATIONS

AR	: All Risks
BKI	: *Biro Klasifikasi Indonesia*
B/L	: Bill of Lading
BW	: *Burgerlijk Wetboek*
CLC	: Civil Liability Convention
DWT	: Dead Weight Tons
FOC	: Flag of Convenience
FCL	: Full Container Load
HR	: *Hoge Raad*
IMO	: International Maritime Organization
INPRES	: *Instruksi Presiden*
IACS	: International Association of Classification Society
ICC	: Indonesian Commercial Code
IDR	: Indonesian Rupiah
INSA	: Indonesian National Ship Owner Association
ISM	: International Safety Management
KNKT	: *Komite Nasional Kecelakaan Transportasi*
KM	: *Kapal Mesin*
L/C	: Letter of Credit
ICD	: Inland Container Depot
SOLAS	: Safety of Life at Sea
MARPOL	: Marine Pollution
MV	: *Maatchapij Verordening*
NBW	: *Nieweu Burgerlijk Wetboek*
P&I	: Protect and Indenmity
PT	: *Perseroan Terbatas*
PP	: *Peraturan Pemerintah*
PERMENHUB	: *Peraturan Menteri Perhubungan*
SOMS	: Straits Of Malacca and Singapore
SR&CC	: Strike, Riots and Civil Commotion
TLO	: Total Loss Only

WvK	: Wetboek Van Kopendandel
WA	: With Average
WPA	: With Particular Average
FC&S	: Free of Capture and Seizure

LIST OF STATUTES

The Merchant Shipping Act 1854

The Balitic and International Maritime Council Unifrom 1992

Convention on The Unification of Certain Rules of the Bills of Lading (The Hague Rules 1924)

Convention on The International Carriage of Goods by Sea (The Hamburg Rules 1978)

UN Convention for the International Carriage of Goods wholly or partly by (The Rotterdam Rules 2009)

Amendments of the International Convention on Standards of Training, Certification and Watch keeping for Seafarers, 1978

International Convention for the Prevention of Pollution from Ships, 1973, as modified by Protocol of 1978 relating thereto (MARPOL 73/78)

International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC Convention 69).

International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention 74); SOLAS Protocol 78; SOLAS PROTOCOL 88; 1995

International Convention such as the United Nations Convention on Law of the Sea, 1982 (UNCLOS 82)

Intenational Labour Convention Number 185 Year 2008 on Seaferars Identification Document

International Convention of Goods wholly or Partly by Sea 2009

Indonesian Civil Code *(Burgerlijk Wetboek) Staatsblaad 1648*

Indonesian Commercial Code (*Wetboek van Koopenhandel) Staatsblaad 1847*

New Netherland's Code of Private Law *(Nieuwe Burgerlijk Wetboek)*

Shipping Law Act Number 17 Year 2008

Environmental Act Number 32 Year 2009

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Ryland Versus Fechter

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Supreme Court Number 3138 K/4 pdt/1999: Janizal versus PT Kentanik Super International

Supreme Court Number 3219 K /Sip/ 1982: PT Remaco Ltd versus Ny Liang Tia Lan

Supreme Court Number 2266.K/Pdt/1990: Ismail Hutajulu versus PT Lolypop Records

Supreme Court Number 366 K/Pdt/1994:MP Siagian vs Gunawan Chandra

Court Decision Number. 820/pdt/G/1988/PN. Jkt.Pst: WALHI versus Indonesian Government and PT Inti Indorayon Utama.

Court Decision Number 499/Pdt.G/2000/PN Jak.Sel: WALHI versus PT Freeport Indonesia Company

Court Decision Number 55 /Pdt. G/2000/PN. Jkt. Pst Any R Gultom versus PT Securindo Packatama Indonesia

Maritime Court Decision 1010/051/I/MP.10 KM Samudera Jaya

Maritime Court Decision 1011/051/III/MP.10 KM Dumai Express-10

Maritime Court Decision 1012/051/III/MP.10 MT Alexandri

Maritime Court Decision 1013/051/III/MP.10 TB Benua Asia

Maritime Court Decision 1051/051/IV/MP.10 KM Karya Rejeki

Maritime Court Decision 1015/051/MP.10 KLM Karya Rejeki

Maritime Court Decision 1023/051/MP. 10 KM Marina Nusantara

Maritime Court Decision 1029/051/XII/MP. 10 KM Wetar

Maritime Court Decision 1011/051/III/MP.10 KM Dumai Ekspress-10

Maritime Court Decision 1030/051/II/MP-11 KM Lambela

Maritime Court Decision 1031/051/II/MP-11 KM SHINPO-18 versus KM Bosowa VI

Maritime Court Decision 2010/06/III/MP-11 Tanker MT- AB-8

Maritime Court Decision 2011/09/VII/MP-11 KM Intan Samudra

CHAPTER ONE

INTRODUCTION

1.1 Background of The Study

Indonesia is the largest archipelagic country in the world[133] with the population of more than 250 million and abundant natural resources spread out over more than 17,000 islands. [134] Transportation services, mostly by sea, are needed to serve the mobility of both passengers and goods. This transportation service is expected to contribute towards development in Indonesia, especially from the viewpoint of transportation to stimulate and to support the economic growth of underdeveloped areas; to serve commercial economic and other sectors; to support the competitive power of commodities produced both domestically and abroad; and also, to be a medium by which to strengthen national harmony[135]. Sea transport is critical, based on its functions; sea carriage is an artery for the Indonesian economy, social, politics, culture, defense, and security. Moreover, considering that Indonesia lies between two continents and two oceans and has critical sea-lanes in the Indian and Pacific Oceans, sea carriage plays an important role in international relationships, in addition to

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[133] Robert Cribb and Michele Ford, Indonesia Beyond the Water's edge, Managing an Archipelagic State, ISEAS, Singapore,2009,1. See Anis Idham, *Pranata Jaminan Kebendaan Hipotik Kapal Laut*, Alumni, Bandung, at p 1 and Etty R. Agoes, *Konvensi Hukum Laut 1982 dan Masalah Pengaturan Hak Lintas Kapal Asing*, Abardin,Bandung, 2012,164.

[134] John G. Butcher and Re Elson, Sovereignty and The Sea, How Indonesia Became an Archipelagic State, NUS Press, Singapore, 2017, ix.

[135] Tjuk Sukardiman in Husseyn Umar, *Hukum Maritim dan Masalah-masalah Pelayaran di Indonesia*, Pustaka Sinar Harapan, Bandung, 2011, ii.

keeping the stability and the harmony of the Nation.

Geographically, Indonesia is spread over vast expanses of oceans, and this condition makes sea transport service be extremely necessary for reaching all the islands of Indonesia. Therefore, sea carriage functions not only to transport passengers and goods from one place to another, but also to keep all areas together as a nation.[136]For these reasons, sea carriage service is vital for open access to connect both developed areas and isolated ones. Because the role of transportation is important for Indonesia, the country has a great interest in keeping the sea as a medium of transportation. The Sea of Indonesia consists of many straits and areas that are strategic and vital for connections between the Indian Ocean and Pacific Ocean. It means that the Indonesian Sea plays a significant role not only for commercial vessels but also for the warships, including submarines.[137]

Indonesia should become more capable of retaining and receiving benefits from this position to increase the security and to keep the harmony of the nation. Unfortunately, the use of the sea by Indonesian ships has faced difficulties because these ships cannot compete with foreign vessels. This is because much inter-isle transportation uses foreign ships, and foreign vessels carry most of the exported and imported goods. Consequently, Indonesia pays a huge sum of money, amounting to about US$ 10 billion annually, to finance the transportation of non-oil and gas exports.[138] Even though, based on the *cabotage* principle in the Indonesian Shipping Law Act 2008, the

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[136] Imam Subekti*, Implementasi Perjanjian Pengangkutan Penumpang Angkutan Laut antar Pulau di Indonesia,* PHD Thesis, *200,* 2.
[137] Hasjim Djalal, *Negara Kepulauan Menuju Negara Maritim*, IKAPI JAYA,Jakarta, 2009, 103
[138] Hasjim Djalal, 105

principle stated that foreign shipping companies are only permitted to enter international ports. Indonesian shipping Law Act 2008 provides that coastal shipping, namely, domestic shipping, is to be performed by Indonesian flagged ships[139]. In fact, non-Indonesian vessels can come easily into any port they wish. In the implementation of Asia-China Free Trade Area, estimates suggest that the traffic of cargo via the sea will be so great that the time is right for Indonesian vessels to anticipate global competition. [140]In 2010, there were 20 million dead weight tons (DWT) of vessels needed to load 250 million tons of domestic cargo and 450 million tons of international cargo. In the same year, total sea cargo was recorded as of 552.6 million tons consisting of 149.9 million tons of international cargo and 412.7 million of domestic cargo. Ironically, national ships could only ship 22.48 million tons of the total potential of international cargo; in contrast, foreign vessels loaded 390.25 million tons or 94.55%. With respect to domestic cargo, national ships could only carry 89.9 million tons or 59.9% of the total, and foreign ships carried 59 million tons or about 40.0%.[141]

These figures clearly contradict the *cabotage* principle as mentioned in President Instruction *(INPRES*) 5/2005 and Law No. 17, 2008 concerning shipping. Based on this principle, domestic cargos should be carried by Indonesian flagged ships. However, the application of this *cabotage* principle, which says that Indonesian ships should be used to export from/and import to Indonesia and inter-isle transportation, cannot be applied easily. This is because foreign vessels, including ships of Flag of

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[139] M. Husseyn Umar,Hukum Maritim dan Masalah-masalah Pelayaran di Indonesia, Sinar Harapan, Jakarta,2011, 271.

[140] Vijay Sakhuja, Asian Maritime Power in the 21st Century, ISEAS, Singapore, 2011, 251.

[141] Kardady, *Tinjauan Transportasi Laut Internasional Indonesia*, paper hhtp://kardady.wordpress.com/ 2010/01/05/. Accessed Jan 15, 2012

Convenience (FOC), appoint Indonesian shipping companies as their agents and also its ports are in Indonesia. Additionally, the low performance and competitive power of Indonesian shipping threatens governance of sea transportation. This threat can be seen from the business indications shown by the low market target/access. While Indonesia was once known for its maritime transportation, unfortunately, Indonesia has been left behind by neighboring countries such as Malaysia and Singapore today. Until the mid-1980s, Indonesia, in fact, could still compete with them.[142] By 2010, foreign vessels carried 94.5% of foreign cargo while foreign vessels carried 40% of Indonesian domestic cargo that same year.[143] Whatever the case, the assumption nowadays is that the national shipping company is only acting as an agent for the foreign ships. This condition puts Indonesia in a powerless condition in reducing inefficient sources in sea transportation.

Factors concerning transportation include: insufficient marine transportation safety and high risk, high cost of marine safety and marine environmental pollution. As we know generally with respect to the world of law itself, environmental aspects applying to the legal science have arisen in the last quarter of a century. In the field of maritime law, the environment is something that can not be ignored because the marine environment is a tool in the management of marinetransportation. Hazelwood said[144] "...in the last quarter of a century, few areas of law can have increased in size and complexity as much as that relating to the environment and oil pollution in

[142] Alan Jeffrey Dompas, *75 Tahun Hasjim Djalal, Negara Kepulauan Menuju Negara Maritim*, IKAPI JAYA, Jakarta, 2009, 253.
[143] Alan Jeffrey Dompas, *253*
[144] Hazelwood, Steven J., *P & I Clubs Law and Practice*, LLP Professional Publishing, London, 2000, 218.

particular." Simon Bughen also said that "this manifests itself in the environmental damage caused by all this relentless expansion in human economic activity."[145] Thus, marine environmental pollution has the potential to disturb all shipping transportation activities.

In addition to low performance and competition factors, the natural condition of Indonesia worsens the potential for pollution problems. The geographic position of the Indonesian seas resting between two continents-Asia and Australia and two oceans – Indian and Pacific Ocean makes Indonesian seas a strategic path to sail, especially with the advent of globalization that brings changes in existing transportation systems and increases in traffic across those seas. Naturally, with the increase in the traffic of vessels sailing or harboring in Indonesia waters come the potential for increased collisions and pollution. The background in this thesis will be concluded in the Figure below.

[145] Simon Baughen., *International Trade and The Protect of Environment,* , Routledge-Cavendish, New York, 2007, 2.

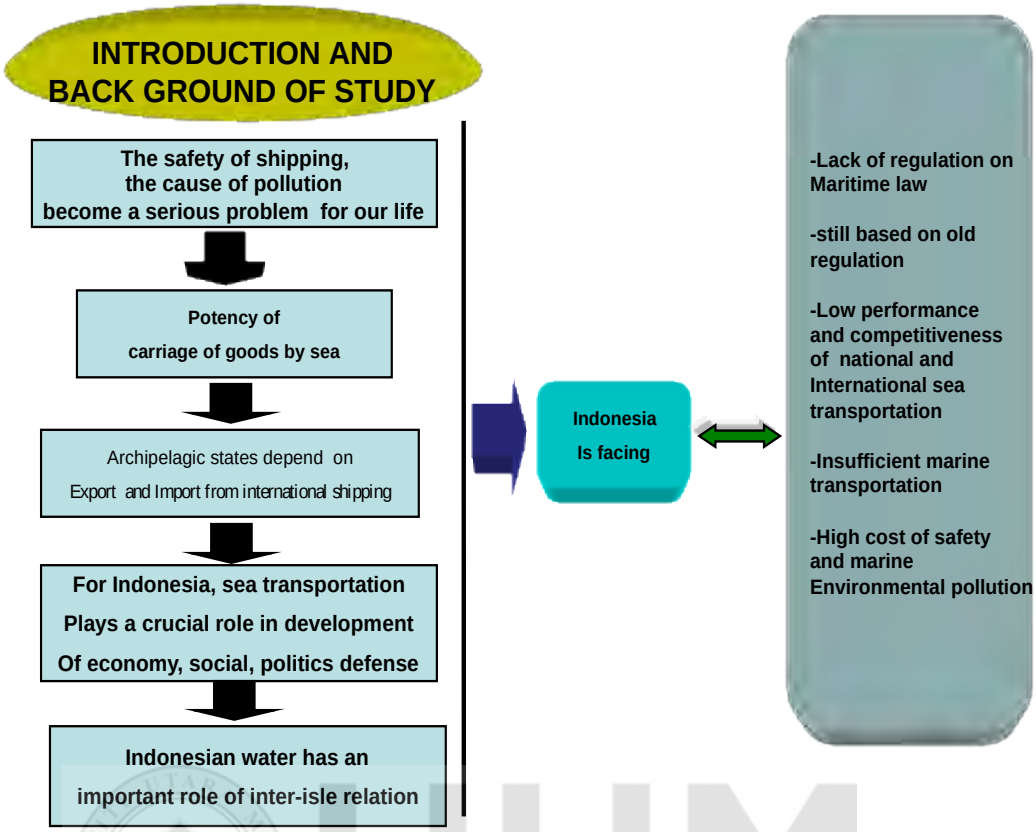

Figure 1.1 Flow chart of background of the study.

1.2 Problem Statement

The natural conditions of Indonesian seas can be hazardous to shipping activities. Indonesia is largely outside the tropical cyclone zone, so its coastal regions are generally not subject to the intense winds and storm surges that repeatedly cause enormous loss of life in neighboring countries. Otherwise, local storm at sea can be catastrophic for carriers. Indonesia is the large spread of island causing expanse of water and irregular monsoon cycle as main determiners of Indonesian climate.[146] Indonesian's location in zone of geological instability means that many of its seas are

[146] Departemen Perhubungan: Badan Penelitian dan Pengembangan , *Penelitian Kecelakaan Kapal di Indonesia dan Upaya Mengatasinya*. Journal of Pusat Penelitian dan Pengembangan Perhubungan Laut, Jakarta, 2010, 1.

vulnerable accident. The perils of shipwreck from storm or reef or simply of individual misadventure, room larger at the sea than do comparable dangers on land. In more complex ways it has to do with the sense of having an advance knowledge about the sea for instance an ability to read the sea, to identify an underwater hazard such as reef or to foresee a change wind or the approach of a storm. Collisions that occurs in the South China Sea, Java Sea, generally because of the heavy currents and wind.[147] Hence, some sea routes in Indonesian waters could cause dangerous natural conditions for ship safety.

Indonesia is an archipelagic state with about 52,000 kilometers of coast line and extends more than 5,000 kilometers from east to west and more than 3,000 kilometers from north to south crossing ocean and the equator; [148] many of sea lane run through narrow passages between islands, with consequent problems of congestion, thus, the region is a vulnerable area to shipping accidents. Table 1 below recapitulates data on shipping accidents in Indonesian waters.

Table 1.1

Number of Ship Accidents during the period from 2009- 2014

	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

[147] Departemen Perhubungan*, 5.*
[148] Robert Crib and Michele Ford,146

4.	2012	128	41	15	21	29	22
5.	2013	145	59	25	14	26	21
	Total	903	199	90	72	88	99

Source Director General of Sea Communication, Ministry of Transportation, December 2015, Report

According to the data above from Director of Sea Transportation of Indonesian Ministry of Transportation, 903 ship accidents occurred from 2009 to 2013, producing a large number of sinking ships followed by burning ships, wrecking ships and collision ships.[149] 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%.[150] Human factors consisted of the captains (masters) and seamen, pilots, and shipping companies. Besides human factors and bad weather, other factors causing collisions were too many passengers and unseaworthy ships. Many unseaworthy ships were secondhand ships bought from another country, which could not be sailed any longer in their home country.[151] 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 *Makassar* strait of West Sulawesi in 4-meter seas, a sinking partially caused by overweight cargo and the loading of 250 more passengers than the ship was rated for. From the investigation by Maritime Court found that The Master ignoring warnings

[149] Komite Nasional Kecelakaan transportasi, *Analisis Data Kecelakaan dan Investigasi Transportasi Laut Tahun 2009-2012*, paper.

[150] Komite Nasional Kecelakaan transportasi, *Analisis Data Kecelakaan dan Investigasi Transportasi Laut Tahun 2009-2012*, paper

[151] Departemen Perbuhungan, *Kajian Analisis Trend Kecelakaan Transportasi Laut Tahun 2003- 2008*, Laporan Penelitian, 22.

from Indonesian weather agency that the condition on the crossing were too dangerous.[152]

A 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 has 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[153] In addition to sea pollution, some cases create problems in 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 the sea environment as in the case of the MV *Nakhoda* and MV *Prestige*.[154] The Russian tanker the MV *Nakhodka* 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

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[152] *MV Teratai Prima , in Research.omicsgroup.org.>index.php, ascessed January 12 2012*

[153] Konstantinos Giziakis and Ernestini Bardi-Giziaki, Assessing the risk of pollution from ship accidents Disaster Prevention and Management *Volume: 11* Issue: 2 *2002. Accessed 12 January 2012*

[154] *Konstantinos Giziakis.*

spills off its coast such as *Showa Maru* (1975), *Nagasaki Spirit* (1992), *Maersk Navigator* (1993), *Evoikos* (1997), *King Fisher* (2000) and *Lucky Lady* (2004).[155]

According to the theory of liability Insurance as stated by Roscoe Pound, the dependent shall compensate general damage suffered by a human.[156] In its operation, sea transportation bears the risk associated with the loss of life and material goods. Loss could happen both to the carrier as the operator and to the users of sea transportation.

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 was 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 "fault liability".

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155 Sea Alarm Indonesia, *A Summary of Oiled wildlife response arrangements and resources worldwide,* paper,www.sea-alarm.org , accessed January 2012

156 Pound, Roscoe, *An Introduction to the Philosophy of Law*, New Heaven, Yale University, 1954,97.

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*".[157]

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 above opinions, the compensation system in marine pollution can be fault liability or strict liability.[158] In Indonesian Tort law, based upon article 1365 of the Civil Code where a 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

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[157] Nicholson, David, Environmental Dispute Resolution in Indonesia, Iseas, Singapore, 2009, 137

[158] *Nicholson, David,* 69.

of Environmental Management Act 2009 which adopted strict liability as applied by the 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.[159] Thus, the compensation system in marine pollution is still confusing whether based on strict liability or fault liability.

The Indonesian private maritime law is the part of Indonesian Commercial Code, which dates from 1848 and which was originally identical with the Dutch Commercial Code of 1838. The latest revision of the maritime law part of the Code was made in 1934 following the revision of its Dutch counterpart. The maritime law part of Indonesian Commercial Code has remained unaltered since.[160] Dutch case laws dates from before the enactment of the new codified law, and the writings of authoritative Dutch scholars are often used as references in the interpretation of the corresponding Indonesian Code provisions. Dutch law is a part of the civil law system, which is understandably different from the common law system, in those two systems do not always provide the same solution to the same questions.[161] For instance in Common Law System Bill of Lading is the only title to sea carriage contract[162] while in Dutch Law System Bill of Lading is not the only title to sea carriage contract but also receipt of mate[163]. So, in Dutch civil law system bill of Lading is not a must in sea Carriage

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159 Court Decision No.820/pdt/G/1988/PN. Jkt.Pst.

160 Sunaryati Hartono, *Hukum Ekonomi Pembangunan*,, Pustaka Sinar Harapan, Jakarta, 1984, . 4.

161 Mochtar Kusumaatmadja, , *Pemantapan Cita Hukum dan Asas-asas Hukum Nasional di Masa Kini dan Masa yang akan datang*, 1995, paper.

162 Article 1.b. Rotterdam Rules, Contract of carriage applies only the contract of carriage covered by a bill of lading or any similar document of title.

163 Article 502 Commercial Code of Indonesia: The sender may request the carrier to issue a bill of lading referring to the good surrendered for shipment, against withdrawal of the receipts, that he might have submitted earlier.

contract because it can be replaced by any other document even the document is not a title of law. This differs from common law system which have regulated that Bill of Lading or any document of title is a must in sea carriage contract and only can be replaced by another document of title. Another example, court decision in civil law system is not bound to another court decision in same cases.

The legal terminologies in the civil law system are not always easily or accurately translated into an English version of the Common law system and vice-versa. This fact is particularly important to emphasize because Indonesia is one of the few countries in this part of the world, which uses the Civil law system, whereas a substantial number of Indonesia's trading counterparts are Common law countries. For example, Unlawful act (*perbuatan melawan hukum*) in Old Dutch civil law system is not the same as tort in common law system.[164]

The objectives of safety of people, property and the environment, as well as the prevention of liabilities to other parties are matters of civil liability, and they require an extra budget allocation for civil law breaches for a company or a ship owner to fulfill these requirements. For this reason in the development of carriage of goods by sea business, the extra budget and the needs for civil law are not only matters of concern of a company but also all the stakeholders involved in the complex infrastructure. Sheppard said, "Because of the nature of the business in which we operate, accidents and losses will continue to happen in the most safety conscious

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[164] Sunaryati Hartono, 45

environments. But we all have a collective responsibility to work together.[165] The safety of shipping, people and property and sea environment become a serious problem in our life nowadays. Meanwhile the function of improved science technology is not guarantee for marine safety and pollution prevention. In this case the problem above becomes a collective problem of mankind. Safety of people, property and the environment collective responsibility is a continual process with the ultimate goal of providing long-term benefits to the sea environment.

Based on the above issues, these research questions appear as follows:

1. What is the nature of liability under Indonesian Maritime Law?
2. What is the applicable law related to sea carriers?
3. How can the ship owner recover in removing the pollution bound to the carrier?

The problem statement for this study is as follows:

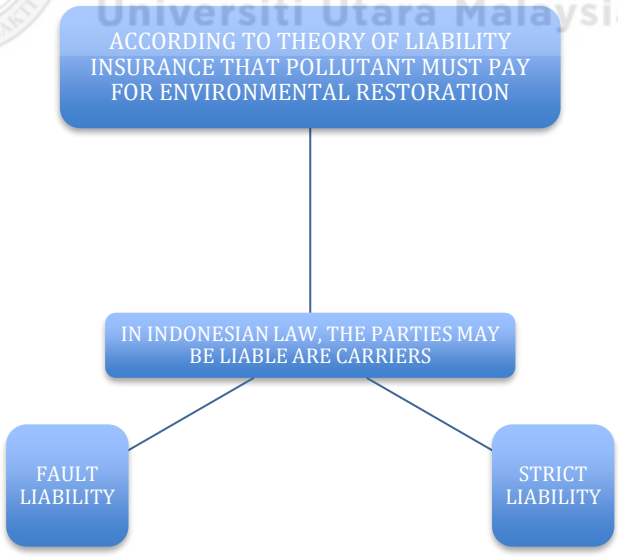

Figure 1.2 Flow chart of problem statement

[165] Aleka Mandaraka-Sheppard, *Modern Maritime Law*, Routledge-Cavendish, Canada,2009, 1025.

1.3 Objectives of The Research

The general aim of the study is to find the principles of carrier's liability with respect to recovery from sea pollution, to achieve better protection for the environment of the sea and carrier as a user or provider of transportation services by sea, which will help develop international law. Specifically, the objectives of the study are to:

1. To examine the regime of liability used by Indonesian sea carrier's liability;
2. To determine the applicable law that could be applied in relation to marine pollution and non-statutory regulation mechanisms in pollution of the sea by sea carriers;
3. To examine the pattern of sea pollution that ships caused; and analyze the compensation of carrier ships to remove the pollution in accordance with the applicable laws.

1.4 Significance of The Study

In its operations, sea carriage has some inherent risks, one of which is the risk of a pollution that can have dangerous effects on the marine environment. Local companies have been unable to handle the abatement and cleanup of maritime pollution because of the expensive costs.

The activities that arise from sea pollution damage, however, raise problems suggesting that a re-assessment may be needed, at least in some cases. Thus, the problems addressed in this research are important. For example, this study will focus primarily on the various laws related to the Indonesian legal system and then make a comparison with the common law system. Common law traditions will be analyzed, and relevant new components will be suggested for adoption and adaptation in

Indonesia. The common law tradition will be analyzed in the context of conflict of jurisprudence rationality, and components of these laws that could be adopted if they were consistent with respect to Indonesian law.

This study will also examine the role of government as well as legal entities and private institutions in the coaching regime of maritime transport in environmental management. This institutional aspect is an integral part of the recovery activities of the marine environment.

This research will not only examine feasibility for an extended legislative regime for the development of maritime law, but also will review the non-legal regulatory mechanisms to protect business continuity of the carriers. Therefore, the findings from this study are expected to have important implications for the public sectors, especially in developing maritime law in Indonesian government, as well as in helping service provider companies such a carrier in Indonesia so that there can be good competition.

Briefly, the significance of this study came from the fact that the Indonesian ship carriers generally face the problems of high cost of recovery involving marine environment pollution and the costs of marine pollution is a threat to the sustainability of the shipping industry in Indonesia. Those problems present difficulties to solve due to lack of clear and adequacy of laws and regulations for the protection of the ship carrier and its stakeholders. This research is expected to provide suggestions regarding carrier liability form and open the field for further research on shipping law.

1.5. Scope of The Study

The scope of study in this research is limited on the regulations under the Commercial Code of Indonesia (*Wetboek van Koophandel Staatsblaad 1*847 Number 23) and International Convention such as the United Nations Convention on Law of the Sea, 1982 (UNCLOS 82); International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention 74); SOLAS Protocol 78; SOLAS PROTOCOL 88; 1995 Amendments of the International Convention on Standards of Training, Certification and Watch keeping for Seafarers, 1978; International Convention for the Prevention of Pollution from Ships, 1973, as modified by Protocol of 1978 relating thereto (MARPOL 73/78); and the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC Convention 69).

1.6. Limitations of The Study

This study will focus on the liability of the carrier and how that liability can be structured to protect the best interests of a carrier. This study does not involve discussions regarding abatement or remove of sea pollution.

1.7. Methodology

The methodology used for this research is based on library reasearch. 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 consist 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.

The literature and research locations sources are university libraries, these include: Universiti Utara Malaysia Library, National University of Singapore Library, Singapore, Padjadjaran University Library Indonesia, Directorate General of Sea Communication of Ministry of Transportation, Maritime Council (locally known as Mahkamah Pelayaran), National Transportation Safety Committee (locally known as Komite Nasional Keselamatan Transportasi), PT. PELNI, PT PELINDO (persero) II.

Some information and data obtained from the results of some reviews, reports and technical-scientific nature do not explain directly the legal setting. Data and information obtained from this research is needed in the writing of this thesis because the causes and effects of the marine environment or pollution problems and operational ships should be analyzed from many perspectives.

Examining information and data from books or references, journals and other sources will help 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 conducted about the issues raised. Discussions and correspondence use an

interview guide prepared in the form of open (free-response) questions. The interviews focus on the object of research and 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, P&I Clubs) to seek official opinions as well as current practices of the marine pollution restoration. Finally, any comparative is used to discuss issues raised and to analyze the data and information obtained in this study. The historical approach particularly directed to analyzing and discussing the development of the principle responsibilities of carriers and marine environmental settings, which have been carried out by countries or international organizations in Southeast Asia. In addition, this approach is also used to discuss and analyze the development of international maritime law in general, and development principles.

The comparative approach used to seek for alternatives by comparing the existing regulations, both at the national and at regional regulations of ASEAN member countries and regional agreements in other areas. Then, realizing the complex problems which do not only contain legal aspects but also other aspects, there should be an interdisciplinary discussion to get a clearer idea in selecting and determining alternative legal arrangements and its institutional development.

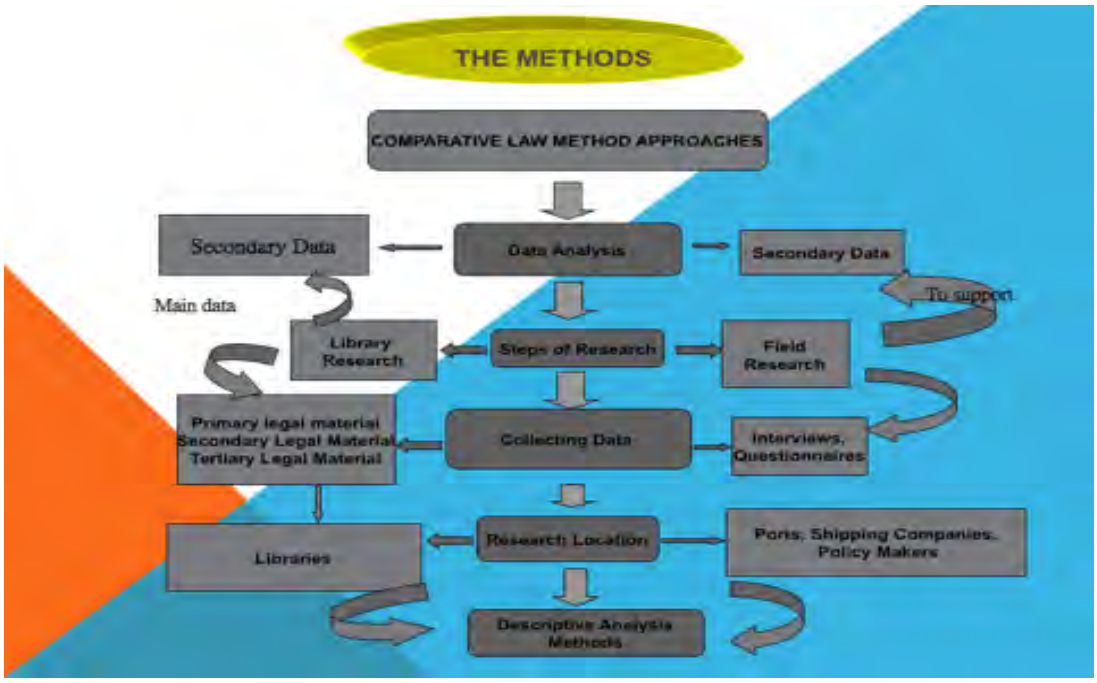

Figure 1.3 The Methods

CHAPTER TWO

LITERATURE REVIEW

2.1 Verbintenis As Source of Liability in Shipping Activity

Liability in shipping activity is an important issue hence, the consequence of liability is to whom the liability is given and how the application of the liability is executed. In Indonesian law, liability is involved with obligation as its source of law.

Based on Indonesian civil code (Old *Burgelijk Wetboek*) *Verbintenis* is a source of liability. [166] *Verbintenis* is a word deriving from the Dutch which comes from a verb "*verbinten*" meaning to tie. *Verbintenis* refers to the occurrence of "a tie" or 'agreement'.[167] Looking at its root, *verbintennis* has a French word root which later on translated as "Obligation" which defined as right from creditor for performance.[168]

Verbintennis is regulated in The Third Book of Indonesian civil code, but none of the articles is related to *verbintenis d*efinition. Definition of verbintenis is explained a mentioned above yet had a weakness in which it only emphasizes right of creditor which has passive character. Later the weakness of the definition is improved by several experts as follow [169]:

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[166] Article 1233 Indonesian Civil Code

[167] Simanjuntak, *Pokok-pokok Hukum Perdata Indonesi*a, Djambatan, Jakarta,2005, 317.

[168] Zimmermann, Reinhard, The Law of Obligation, Kluwer, C1998, 568 see Sunarjati Hartono, *Mencari Bentuk dan Sistem Hukum Perdata Nasional,* Alumni, Bandung,1996, 176.

[169] Friedmann, Wolfgang*, Legal Theory,* London. Stevens and Son, 1990, 92.

1. Hofman who defined *verbintenis* as legal agreement between limited legal subjects concerning an individual of few individuals (a debtor or debtors) who agree to bound a party to behave in a certain way to the other party who has the right to such act.[170].
2. Pitlo who defined *verbintenis* as a legal agreement which refers to things which characterized as wealth between two parties or baser on who has the right (creditor) and other party who has the responsibility (debtor) for performance.[171]

Thus, word *verbintenis* could be translated into English with "obligation" as Zimmerman said above, nevertheless in practice, many Indonesian Lawyers have any intrepertations to translate *verbintenis* into English word such as agreement. But the problem is agreement in another term means part of *verbitennis* as stated in the Article 1320 in *Old burgerlijk wetboek*. It can be concluded the use of agreement as a translation from *verbintennis* will cause distraction in law practice. Therefore, *verbitenis* is a legal agreement which is an agreement that causes legal effects and not a common agreement of no legal effect.

2.1.1 Legal Relation

A legal agreement is an agreement that regulated by law. [172] Besides legal agreement, there is also a relation which occurs in social interaction based on politeness, decency, and social norms. Breach of such agreement does not cause legal effect, so that agreement outside legal setting is not a *verbitenis*. Therefore, R Setiawan stated that,

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[170] Friedman, Wolfgang,93.
[171] Purwahid Patrik, *Hukum Perikatan (Perikatan yang lahir dari perjanjian dan dari undang-undang),* Mandar Maju, Bandung,1994, 2
[172] R. Setiawan, *34*

denial to such agreement, will not cause legal effect.[173] Thus, such agreement outside legal jurisdiction is not subject to legal suit in the law court.

A relation is considered as a legal agreement when the agreement can be measured with money which means the loss caused can be interpreted into money value.[174] But, in practice not all legal agreements have monetary value. *Verbintenis* has three types, they; to give something, to do something and not to do something. [175] For example, in shipping, not to enter through the port with full speed means the ship must decrease its speed when entering the port. Even though the act is not related with monetary value. Because the parameter that "can be measured by monetary value" is not the only limitation whether an act is a legal act or not. As stated by Scholten who highlighted that it is difficult for us to give distinctive criteria for Property. [176] Commonly, such right can be measured by monetary value. It can be transferred or given to the heir and each debtor can take it as bill payment. The special thing about this right is that each material wealth is a property right, even though it has value only to the owner of the thing and there has no monetary value at all.[177] Nevertheless, the criteria "can be worth monetary value" is not an irrelevant matter.

Even though in an agreement that has right and obligation, those right and obligation appear in different form and as described in the case, law cannot interfere in the practice so this kind of obligation is not legal obligation (*rechsplicht*).[178] Therefore,

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[173] *Rosa Agustina, 45.*
[174] R. Setiawan, 3
[175] Article 1234 Indonesian Civil Code
[176] Scholten, *Zakenrecht*, 10
[177] *J. Satrio*

[178] *Scholten,215*

Van Barkel gives a definition of *verbintennis* which is not too strict that is something that responsibility given to another party by or based on legal regulation that binds the economic life of someone.[179] It means that *verbintennis* is something that can be measured by money even though there is *verbintenis* which has no monetary value .

2.1.2 Right and Responsibility Deriving From *Verbintenis*

The right deriving from legal agreement is usually called a legal right while the obligation is called a legal obligation. Obligation is regulated in law concerning property. The distinction between the two categories is intended to differentiate economic interest *(geldelijk belang*) and moral interest (*zedelijkebelang*). [180] Based on the distinction, there is a negligence to fulfill a verity where the loss could be described in monetary value.

The amount of monetary value exactly appears in the side of plaintiff claim which is described in certain monetary value. Or the claim is described in different form of one performance from the debtor, like fulfillment or the return of the previous condition. For example, in a pollution of sea cases, the country where the pollution occurs is able to claim a huge amount of money and recovery of sea environment to its previous condition. It includes appearing obligation which appears due to cause effect of an agreement derives from unlawful act such as collision which is regulated in the article 534-544 in the Indonesian Commercial Code.

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[179] Barkel, S. Van., Leerboek van het Nederlandse Verbintenissenrecht, Zwolle, WEJ Tjeenk Willink, 1948, 10 as quoted in J. Satrio.

[180] Barkel,

Law itself through article 1304 BW gives possibility to the parties to determine a fine appointment to guarantee the execution of responsibility to fulfill an agreement. This means that parties can arrange obligation as fulfillment of the Third Book criteria by mentioning a fine in the obligation[181]. So, the person who claims to get its fulfillment of an obligation can request the money value setting compulsion to more guarantee the execution of court decision. The consequence is that the judge with his verdict create an obligation as mentioned in the Third Book, based on the claim of fulfillment of obligation that its consideration has no monetary value. Undoubtedly, in Indonesia, an obligation can be regarded as a source of law.

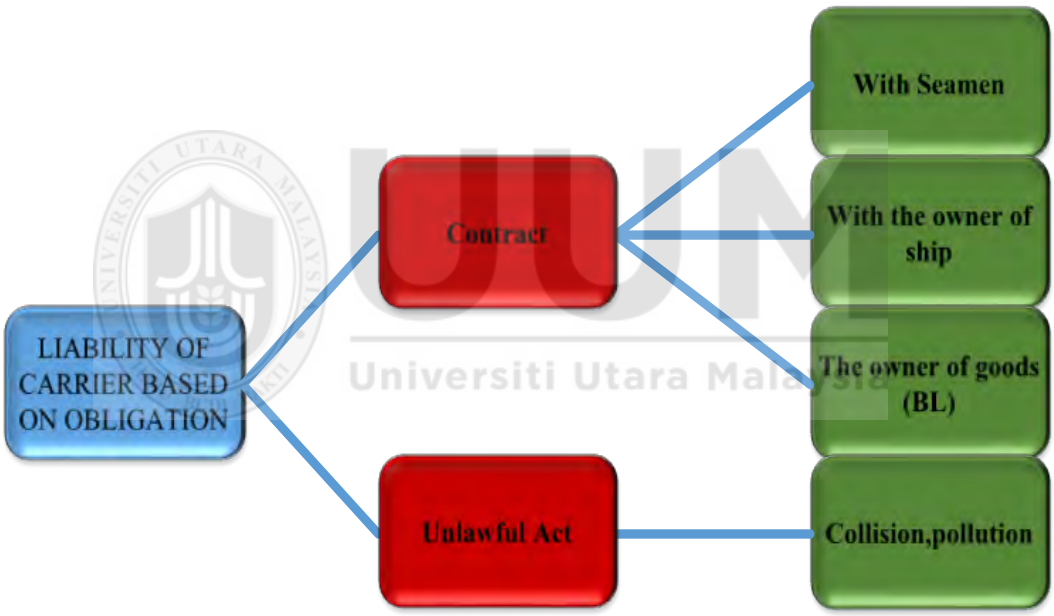

Figure 2.1 Source of Obligation for Carrier's Liability

2.1.3 Verbintenis Which Comes From Contract

Verbintenis is divided based on the source that appears in article 1233 to the contracts

[181] R. Setiawan.,

and unlawful acts which then be divided into more detail : rights and obligation among the owners of the Neighborhood Curtilage (article 625), obligation to maintain and educate children (article 104) and Obligation which appear due to human action.[182] The source of the last obligation is divided deeper into action regarding law like volunteering custody (article 1354), payment of non-*debtor* claim (article 1359) and unlawful actions law (article 1365 of Indonesian Civil Code.[183]

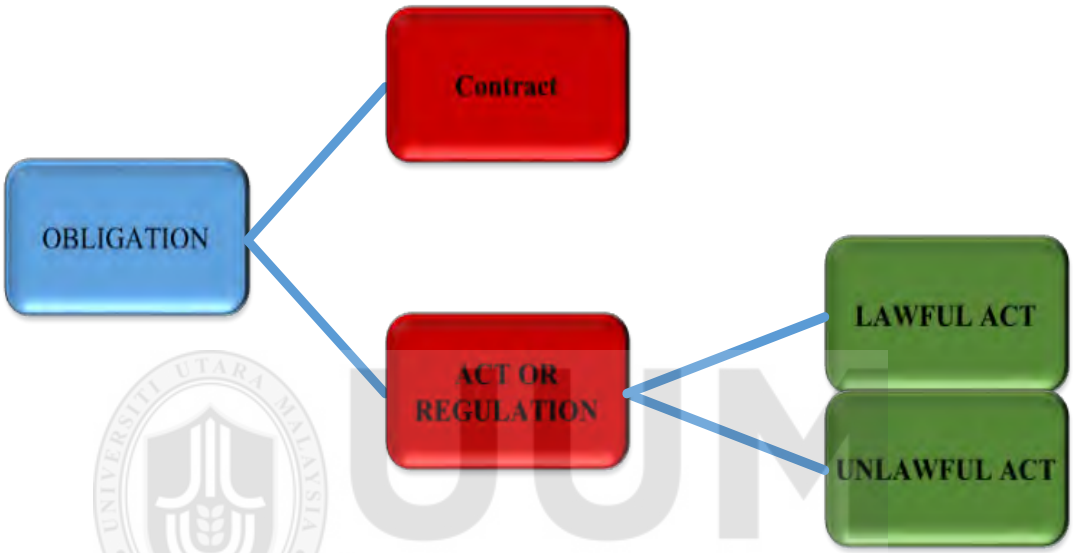

Figure 2.2 Source of *Verbintenis*

The term of *verbitenis* which bears from laws is used to follow the term of law makers in article 1233. Division of *verbintenis* given by the law makers, by comparing contract and act or regulation has attracted criticism. The existence of the division has appeared as if both of them have the same value whereas according to article 1319 and 1338, act is higher than contract. [184] Experts believe that parties in the agreement actually

[182] Mariam Darus Badrulzaman, *KUH Perdata Buku II Hukum Perikatan Dengan Penjelasan*, Alumni, Bandung, 2002, 13.
[183] R. Setiawan, 1996, 9-15.
[184] Huijbers, Filsafat Hukum dalam lintasan sejarah, Kanisius, Yogyakarta, 2005, 62.

are bound with their own promise.[185] This is a logical consequence of the application of natural law theory by Indonesian civil code which is eligible in Indonesia. This theory is propounded by Hugo Grotius in 17th centuries which says that human moral responsibility to apply what is promised (*Pacta Sunt Servanda*).[186] Grotius defined Natural Law a a dictate of right reason which points out that an act, according as it or it is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity, furthermore at page 36 stated " Among the chief axioms of natural law enumerated by Grotius are the following : to abstain from that which belongs to other person, to restore to another any goods of his which we may have; to abide by pacts and to fulfill promises made to other persons; to pay any damage done to another through fault; and to inflict punishment upon men who deserve it.

In the agreement, parties agree on the *verbintenis* form in the contract as a basis of all parties involved in the promise, not because of the laws. *Verbintenis* is the promise which is given to tie the parties, such as a treaty which binds a country who signed the treaty even though there is no laws which obliges such thing.[187] So article 1233 does not intend to compare agreement and laws in such way mentioned by law makers because the law makers have intention to state the differences of obligation source as a "*feitelijke voorwaarde* (agreement)" and as *"rechtsoorzaak*" (law or act)[188] The source of obligation as *rechtsoorzaak* (law or act) is always actions. Besides actions and contracts, *Verbintenis* can refer to other things that is legal action of one party or

[185] Pirlo, 96
[186] Bodenheimer*, Jurisprudence, The Philisophy and Methods of the Law*, Harvard University Press, Cambridge, Massachusetts, 1980, 35
[187] Asser, as quoted in Roscoe Pound. An Introduction to The Philosophy, 54
[188] Asse*r*

from court decision which cannot be grouped in one of the two sources mentioned above. The act are unlawful action (*onrechtmatigedaad)*, voluntary representative *(zaakwaarneming*) and allowance for bad debt *(onverschuldigde betaling*) that appear from debt mentioned by law except that people interpret the word as an action that against the law.

The definition of contract is defined in article 1313 of civil law as: "A contract is an act by which two or more persons binding themselves to one or more persons". The definition of agreement on article 1313 of Indonesian Civil Code has some weakness. Many experts criticize the definition among others is Vollmar in the book of Adiwimarta:[189] The formulation of the article agreement is not completely perfect and on the other side it becomes too wide. It only concerns one party agreement and what includes in "act" is action like taking care of thing.

Then Volmar stated in article 1313 of Indonesian Civil Code as too wide, because it also includes agreement with specific characteristics like marriage and any action which refers to law in family scope. The response to incomplete nature of the definition does not only come from Vollmar, it also comes from some experts who think similar but with different point of view, like Soekardono, Sri Sudewi Maschoen Sofwan, Soedikno and Satrio, which basically describing the incomplete nature of the definition.[190] Among the different point of views, the writer prefer Soedikno to the others who explains agreement as:

> *"legal relationship between two parties or more based on words of agreement to cause legal effect."* [191] *Thus, when the two parties agree to decide the right*

[189] Vollmar, *Pengantar Studi Hukum Perdata*, translated by Adiwimarta, Rajawali Press, Jakarta 1983, 127-128.
[190] Wienarsih Imam Subekti, 30
[191] Wienarsih Imam Subekti, 30

and obligation that tie them to be obeyed and fulfilled. The contract causes legal effect when the agreement is violated, it can come to legal consequence or sanction. It also explains that contract is an interaction process or legal relationship from legal action which faces one another that is offered by the party who claims and the party who accepts, the contract from both should reach a point that can determine the content of contract which will bind both of them.

Writer prefer to Soedikno because it explains that a contract is a process of interaction from two legal actions which opposes each other that is an offer from the party who claims and acceptance by the other party. Furthermore, Soedikno has explained clearly about the existence of legal action and as well the combination of two opposing legal actions which causes binding contract. That is one by side of the party that claims and the other party that accepts it. Between two parties, it is expected to determine the content of the contract which binds the two parties.

The basic principle of contract law is freedom of contract, it can say that the essential principle of civil law contract is the principle of freedom of contract. [192] According to this principle, a party or a person has a free choice to entering or not to entering an agreement, furthermore the party or person is free to whom he enters the agreement and the most important within this principle is a freedom to determine what are the contents or the conditions of the contract.

L.J. van Apperldoorn stated that freedom a contract is the principle of Dutch Civil Contract.[193] In European Continental legal thinking, the principle of freedom of contract

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[192] Peter Mahmud Mazrui, An *Introduction to Indonesian Law,* Malang, Setara Press, 2013, 237

[193] L.E.H. Rutten in Vollmar, 103

is a consequence of principles in agreement e.g. consensual and binding force of an agreement which is commonly called *pacta sunt servanda*. [194] Consensual principle deals with the formation of a contract; as well as *pacta sunt servanda* is an implication of the creation of a contract, by which both parties to the contract are bound.[195] Thus, the freedom of contract principle is related to the substance of a contract.

Van Apeldoorn referred to Hegel's dialectic thought when he tried to find a philosophical basis for the principle of freedom of contract. [196] It Stated that: Freedom of contract is a logical consequence of recognition of the ownership right. Hegel Insist that freedom of contract is a substantial basis for all rights and duties that should be a reference for law. Ownership right in Hegel's opinion is the basis for other rights. Ownership right holder should honor another holder of ownership right. Honoring ownership right by each other holder of the right is the basic idea of contract law.[197]

It can be concluded, that the main idea of freedom of contract is to preserve the existence of the parties. In fact, the principle of freedom of contract is limited. Indonesian civil code itself limited the principle with regulation and public interest. For sea carriage contract this principle is very important due to in case many of Indonesian carriage contracts applied International conventions which have not been ratified by Indonesian government e.g. Hague Rules 1924, Hague and Visby Rules 1968. Many Indonesian sea

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194 Sunaryati Hartono, Mencari *bentuk dan system Hukum perjanjian Nasional kita*, bandung, Alumni, 1983, 57.

195 Atiyah, *The Rise and Fall Of Freedom of Contract*, Oxford, Clarendon Press, 2008, at p. 11

196 Atiyah, *The Rise and Fall Of Freedom of Contract*, Oxford, Clarendon Press, 2008, at p. 11.

197 AT. Peperzak, Enkele hoofdlijnen van hegels rechsfilosofie. 1988, 188 in Peter Mahmud Marzuki, Ibid.

carriage contract apply those convention even for domestic carriage. Many Indonesian domestic shipping lines apply The Hague Rules as paramount clause in their bill of Lading. Hence the International conventions can be enforced through the principle of Freedom of Contract.

2.2. Liability Based on Contract

Sea Carriage contract concerns a contract law as regulated in book II of Indonesian Civil Code as a common regulation and Indonesian Civil Code as a specific regulation.[198]Sea Carriage Contract still refers to two of basic understandings of a contract based on Indonesian Civil Code. [199] Principles of the general private law embodied in the Civil Code are applicable when the Commercial Code is silent on certain issues or specifically refers to the provisions in the Civil Code.

Sea Carriage Contract, as a special agreement which refer to Indonesian Commercial Code, still has its basis the principles of contract in the civil code. The Commercial Code is considered as a specialty contract to the Civil Code. The regulation of the Third Book is valid for obligation which is regulated in Indonesian Commercial Code as well. Article 1 of Indonesian Commercial Code states that Indonesian Civil Code is applicable to commercial matter, in so far as it has not been specially deviated from in this Code. [200] Based on that article it can say that the commercial code is considered as special contract for the Civil Code.

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[198] Third Book of Indonesian Commercial Code.
[199] Article 1 of Indonesian Commercial Code.
[200] Article 1 of Indonesian Commercial Code.

On article 15 Indonesian Commercial Code it is determined that all limited companies mentioned in this chapter is in power of agreement by concerned parties (Obligation), by this book (the commercial code) and by civil Code. [201]Then in the article 396 Indonesian Commercial Code which regulates this sea working agreement is making the regulation come into effect beside other regulations from the second, third, fourth and fifth part from chapter 78 of the Third Book of Indonesian Civil Code while the regulation use coming into effect is not clearly being exceptional.[202] This aspect should be carefully watched considering there is also special certain agreement which is not recognized and valid for certain legal institutions in Indonesian Commercial Code, for instance the regulation of article 1617 of Indonesian Civil Code; some people interpret that freight agreement as regulated in Indonesian Commercial Code is not a contractual working so that regulation of Indonesian Civil Code is not eligible for freight agreement. Therefore, as in principle, general regulation about freight which is stated in Indonesian Civil Code is valid for Indonesian Commercial Code as long as it is not violated.[203] Indonesian Commercial Code does not mention definition of Sea Carriage Contract, it only follows the regulation of article 466 Indonesian Commercial Code which mentions some kinds of sea carriage contracts. The article 466 of does not only mention about definition of carriage but also mention about kinds of carriages. The article says:[204]"A carrier in the sense of this articles is he. Who commits himself, either by time charter or a voyage charter, either by a time-charter or a voyage

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[201] Tri Budiyono *Hukum Dagang, Betuk Usaha Tidak Berbadan Hukum*, , Penerbit Griya Media, 2010 Salatiga, 6

[202] Zainal Asikin, 2013, *Hukum Dagang*,, PT Raja Grafindo Persada, Jakarta, 202

[203] Zainal Asikin, 2013, *Hukum Dagang*,, PT Raja Grafindo Persada, Jakarta, 202.

[204] Article 466 Indonesian Commercial Code.

charter, either by any other agreement, to undertake the shipping of goods, in their entirely or in part, by sea."

Charter *Contract* or we can also all Tramp Shipping which is the opponent of fixed line direction shipping or liner that is a ship that connects two harbors or more in fixed schedule. [205]The charter agreement in Indonesia generally is stated in a document which is called charter party. In Indonesia, the use of charter document in Indonesia is not a must as stated in article 566 of Indonesian Commercial Code "each party can sue to force to make an official document of the agreement.

This official agreement is called as charter party. In practice, charter party is already standardized, so that all parties who are willing to close the charter agreement just choose the form of standardized charter to be used. [206] The selection of charter format is matched with kinds of commercial activity. There are few kinds of charter as stated by Indonesian Commercial Code, the agreement of charter has two kinds that are based on the course/ship trip or based on time frame called time charter party. While in practice, it is known as demise charter which is adopted from common law system.

2.2.1 Agreement of Charter Based on Ship Trip/Course (Voyage Charter)

The understanding of charter contract based on a ship trip is defined by article 453 point (2) Indonesian commercial code which saying that:

> *"Voyage-charter is the contract, by which the one party (the letter) commits himself to make the assigned ship or portion of that ship available to the other*

[205] Raoul Colinvaux, *Carver's Carriage By Sea*, Volume 1, Steven & Sons, London, 1982,. 1236

[206] John F Wilson, *Carriage of Goods by Sea*, Pearson, England, 2010, 49.

party (charterer), in order on one or mode fixed voyages, to transport persons or goods by sea for the latter, against a certain price for that transportation."

When we read article 453, we must relate the article to article 466 so that we can assure that charter agreement referring to the ship trip is always a shipping agreement either it ships people or goods. Concerning charter contract, shipping of people or goods has no specific arrangement mentioned in Indonesian Commercial Code since the arrangement of Indonesian Commercial Code element of charter is integrated with the arrangement of shipping contract and unlike charter contract, a particular specific time is arranged in Chapter V (five) paragraph 2 (two). Even though there is no specific contract concerning charter referring to ship trip, arrangement of charter can be found in Chapter V paragraph 1 of Indonesian Commercial Code. In article 459 point (4) there is a general regulation which will be valid for charter contract referring to both ship trip or time frame. In this article, says:[207]

"The charterer will be obliged to pay compensation to the letter for any loss resulting from the investigation and the delay cause thereby, unless the investigation proves that the ship is not a proper state of maintenance, is not fully equipped, or is not suitable for the use as stipulated the charter party."

From the article, we can conclude that the shipper is obliged to maintain the ship, complete the ship in sufficient facility to be workable as stated in charter contract. The typical characteristics of charter contract is that the ship is wholly or partially chartered (few decks charter). Therefore, the authority for the ship use is in one party who charters (*vervrachter)* as stated in regulation of article 518 of Indonesian Commercial Code:

"From the agreements which are mentioned in article 453, then the one who charters is not allowed to hold a charter referring to a ship trip with a third party, except when in the agreement/charter party the right is given to the third party"

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[207] Artcicle 459-point 4 Indonesian Commercial Code

It is obvious that the one who charters is not allowed to delegate the ship to third party [208] unless the agreement clearly mentioned that the charterer is allowed to re-charter to third party. It is different from charter referring to time frame which is stated in article 518 a of Indonesian Commercial Code. It states as follows:

> *Without reducing the responsibility of the one who give charter instruction, to fulfill the agreement which is made by the one who charters, then the one who gives charter instruction, has the right to hold, either delegate charter process referring to ship trip to a third party.*

In this regulation, it is obvious that the party who charters is allowed to re-charter the ship to a third party without informing the party who gives the instruction to charter that he will re-charter the ship. This authority does not need to be stated in the agreement. The shipper chooses to arrange an agreement of charter by considering the following things[209]:

1) The amount of goods to be sent turns out to be too big in number so that the capacity will be overloaded for the fixed schedule ships.
2) the shipping with fixed lines (liner service) possibly have no direct route from export harbor to import harbor.
3) The cost for freight (freight cost) will be much cheaper when we use the whole area in the ship than if we use certain area in a fixed line ship (liner service).

Charter agreement is a general contract, so that principles which are applied to the contract also are applied to voyage charter[210]. Whereas the most important principle which is valid here is a freedom to make a contract. This principle

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[208] Purba, Radiks, *Angkutan Muatan Laut*, Jilid 3,, Bhratara Karya Aksara, Jakarta , 1991, 41 see also Soekardono,, Hukum Dagang Indonesia, Bandung, Alumni, 2003. 67
[209] Bugden, Paul M, *Good In Transit and Freight*. London, Sweet&Maxwell., 2013, at p.61
[210] Article 517 z Indonesian Commercial Code

triggers standardized contract. A standardized contract, in Indonesian voyage charter contract, which is usually applied is *gencon* charter which refers to The Baltic and International Maritime Council Uniform General Chapter (as revised 1992, 1976, 1994).

2.2.2 Time Charter Parties

Different from voyage charter, time charter contract is applied for a certain period of time, which is commonly stated in the contract. Both time and ship operation are in the hand of the one who owns the ship *(*ship owner*)* and he will get money from the ship rent cost which has been agreed by both owner and the one who rents the ship, it is prepaid and at schedules of payment as agreed; while the responsibility concerning the plan to use the ship and ship fuel which is needed is in the hand of the one who charters[211]. Apart from all matters as previously mentioned, the thing that to differ voyage charter party from time charter party, in time charter party, the one who charters has the right to conduct supervision/observation much bigger than it does in voyage charter. Besides, the party who charters the ship is subject to an additional obligation to pay harbor tax and ticket to pass the canal, to provide fuel and other things needed during travel.[212] It can be concluded that charter agreement in time charter party is held by the party who charters following reasons as follows:[213]

1) The party who charters could supervise the ship without having to own the ship himself.
2) The one who charters does not need to provide capital to buy a ship to run the

[211] Article 518 Indonesian Commercial Code.
[212] Wiwien Winasih, 124
[213] Soekardono.. p. 69

charter business.

3) The one who charters does not need to do the maintenance of the ship and does not need to provide cost for the human resource who operates the ship.

4) The one who charters needs additional ship when one or some ships are being fixed or repaired or the owners of the ship is in need of more ships due to a lot of shipments at the same time.

Parties involved in voyage charter party and parties involved in time charter party are the same, consisting the one who owns the ship (ship owner) and party who charters the ship (charterer) but it is possible for the contract to be done by an agent which is given authority by all parties.[214]

Oftentimes, an agent mentions that the closing of charter agreement is held to a certain principal or even in the closing there is no certain principal name which is appointed at all. Therefore, in this case, the owner of the ship will consider the charter agreement is closed for certain agent. This can be seen in article 455 of Indonesian Commercial Code which says that:

> *He, who concludes a charter-party for another person, will nevertheless be committed on his own account unless in concluding the agreement he is acting within the limits of his power of attorney and mentions his principal.*

So here, it is possible for an agent to be considered as a party in an agreement. Even though charter agreement in principle is made between the party who owns a ship (ship owner) and the party who charters (charterer) agreement as well binds the following

[214] Article 455 Indonesian Commercial Code

parties:[215]

1) The owner of stocks (the stockholder) of a ship (in relation with *rederij*) or the owner of some part of a ship;
2) The ship buyer; The ship buyer wholly or new owner of a ship (new owner) will be bound by the charter agreement which is already made for the ship.[216]
3) Mortgage giver (mortgagor) or mortgage holder (mortgagee) in relation to this concern, Indonesian Commercial Code does not regulate it at all. In Indonesian Commercial Code, it is stated that the ship can be given to mortgage, this is stated in article 314 point (2) of Indonesian Commercial Code which says that "Ship recorded in the shipping register, ships under construction and shares in such ships and ships."

As occurs in common law system, it is made possible for the ships which are given into mortgage and then be used for charter service, the profit of the charter service is given to the holder of mortgage. This is possible because in the mortgage the right is in the hand of the one who charters the ship, so that if the ship is given to charter service it is too easy for the mortgage owner to observe the ship and such arrangement can be included in charter agreement considering there will be article 1338 of Indonesian Civil Code.

Even though the charter agreement commonly known as consensual agreement, in

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[215] Abdul Kadir Muhammad, *Hukum Pengangkutan Niaga,* Bandung, Citra Adiya Bhakti, 2008, , 282.
[216] Article 456 Commmercial Code of Indonesia, Rahmanata Andjar Pachta, Commercial Code of Indonesia, Wetboek van Koophandel (S.1847 No. 23), UI, Lembaga Penerbit Faklutas Ekonomi Unoversitas Indonesia.

practice, though, charter agreement is made in written form. Charter agreement referring to time charter party is usually written and there are some kind of standardized formats for agreement. Among others, there are Liner time, Bal time, and New York Produce Exchange while for the shipping of fuel like oil there is also certain standardized fuel like Exon, Shell, Mobil and Caltex as well as Pertamina.

2.2.3 Contract of Sea Carriage Of Goods

Article 466 does not mention that agreement beside charter is partial shipping because in the goods only mentioned that there is other agreement, but in article 520 it is mentioned that "the shipping of goods which is called as any other agreement is covered by other agreement outside from the charter agreement" so that we can draw a conclusion that other agreement that is meant by article 466 of Indonesian Commercial Code is agreement of sea carriage of goods as another form of agreement of such agreement is agreement of shipping in fixed route or scheduled (liner service). The difference between the two agreements of shipping is that in the partial shipping of goods it is common to use unfixed line/ ships (*wilde vaart*) in an understanding that the ship that is being used does not regularly connect two harbors or more, while shipping with fixed route/line always connects two or more harbors with schedules.[217] Unlike in the charter agreement, which emphasized more on the ship, either in the agreement of partial shipping of goods or a shipping with fixed route/line what is more important is the goods that is shipped so that in the two agreements it is given shipment documents in which in Indonesian commercial Code is called as consignment, while

[217] Wirjono Prodjodikoro , *216*

in countries which apply common law it is also called as bill of lading.

In article 506 of Indonesian Commercial Code it is stated that consignment is a letter with date and the shipper explaining that he has received certain goods to be shipped to a certain destination and there give the goods to certain person by stating the condition of goods delivery.[218] As also known, it is also consignment can be printed on one name, based on the appointment of the sender or the third party or by the appointed name.[219] Even though in practice it is seldom found that consignment is released for appointed name. Since the document of shipping is always related with the interest of the sender which is already obvious.

Then in article 510 of Indonesian Civil Code which says that the holder of consignment has the right to sue the delivery of the goods in the harbor of receiver except when consignment is obtained in a manner that is against the law. Consignment along with other documents which are required with L/C for the withdrawal of L/C.[220] Besides parties which are previously mentioned who are bound by the charter agreement, the holder of bill of lading will be bound to the charter agreement as well, when bill of lading refers to charter agreement in line with article 511 of Indonesian Commercial Code which stated as follows: "…but if and only this consignment refers to agreement to shipment or that charter party.

Eventhough in the charter, it is not required that bill of lading is not released, it is also

[218] Pasal 506 KUHD
[219] Pasal 506 ayat 2 KUHD
[220] Husseyn Umar, *25*

possible in charter agreement to release bill of lading. If bill of lading is issued then all parties will have to obey the special requirement of concerning that bill of lading. Whereas the one who releases bill of lading is the one who owns the ship (ship owner) and in Indonesian law book it is a ship businessman, who in this case is represented by a ship's captain; considering a ship's captain is a worker for the one who owns the ship (ship owner based on regulation of Common law) or ship businessman (based Indonesian Commercial Code.

As we know bill of lading according to Scheltema is included in bond which has substantive characteristic so that bill of lading is treated equally as we treat other kinds of bond. That is the highlight of article 517a Indonesian Commercial Code. [221] Thus, bill of lading may also be functioned as collateral for loan which is received by the holder of bill of lading, the bill of lading will be given to the bill of lading holder. Therefore, the party who charter will give the shipped goods to the holder of bill of lading therefore the one who charters the ship will give the shipped goods to the holder of bill of lading, the giver of bill of lading has no right for the handover of the shipped goods, except when he already fulfilled his payment to the creditor.

When bill of lading then act as collateral for loan then bill of lading will be given to creditor. Then the guarantor is the one who has right of the handover of shipped goods[222] because bill of lading is considered as movable goods so that when it is used

[221] Article 517 a Indonesian Commercial Code

[222] Article 1 Bill of Lading Act 1855, "every consignee of goods here in mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in hi all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

as collateral, the bill of lading should be given to creditor. In shipping practice, some kinds of consignments or bill of ladings which are released by various shipping companies or organization of shipping company, where inside consignment has some requirements of shipping agreement.

As documents which have important roles in international trade, consignment cannot be separated from the influence of international laws such as The Hague 1924 which then in year 1968 and 1978 experience amendment, it is also known as Hague/Visby Rules, also Hamburg Rules and Rotterdam Rules which was made after Hague and others previously mentioned.

International Shipping world up to the present still commonly uses The Hague Rules/The Hague Visby Rules, particularly in shipping to/from Indonesia even though Indonesia up to now has not ratified this convention. Thus, the principle of commercial code has never been used in Indonesian National shipping.

2.3 Liability Based on Unlawful Action.

2.3.1 Development of Unlawful Action

Unlawful action is a form of obligation which bears from laws as an effect of human actions against law regulated by Indonesian Civil Code. The arrangement of actions against law in general can be seen from two articles that are article 1365 of Indonesian Civil Law Code.[223] Article 1365 is an article regulating about actions that is against

[223] Article 1365 KUHP completely says: each action which is against law which brings disadvantage to others, oblige others due to his mistake of causing the loss, should cover the loss. Then article 1366 says that: everyone is responsible for not only the loss which is caused by his own action but also

law which has an important role in civil law field. In the first development, there has been an argument which occurs for few years to find out the meaning of actions against law.

Based on regulations which are formulated in article 1365 BW that are intended to explain action against law which provokes an engagement. the characteristics are:[224] The existence of an unlawful action, the actions causes losses to others, the existence of errors in legally executed action and the existence of causal relationship between action and loss.

2.3.1.1 Actions Against Law

Netherlands Supreme Court *(Hoge Raad)* had an old definition regarding Tort in civil law sytem in 1919, it stated that: *"Onrechtmatig is slecht een daad, die inbreuk maakt op eens anders subyektief recht, of die in strijd is met des daders eigen rechtsplicht* (against law is an action which violate subjective right of others or against legal obligation by the law makers) [225]

From the definition, it is clear that such action should refer to violation of subjective right of others or against the legal obligation of the law maker, which is arranged in laws, or in other words action against law is interpreted as action against law. Such interpretation occurs due to the legalism influence who thinks that there is no law but act. As consequence is that law experts cannot give interpretation outside from written

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for the loss caused by negligence and carelessness.

[224] Rosa Wulandari, 213

[225] R. Setiawan, *Pokok-pokok Hukum perikatan*, Putra abardin, Bandung, 1997, 76.

rules. It is Molengraff who begins to say that the narrow interpretation cannot be maintained or continued[226]. In one of the articles which is published in *rechtgeleerd magazijn* year 1887 by Molengraff it states that understanding of actions against law which is meant by article 1365 does not only cover actions which is against all things available and regulated by laws, it also covers all outside law which includes polite custom, and social actions but in some of his decisions, *Hoge Raad* stays with his narrow opinion. [227] As consequence of interpretation which is narrow, commerce and industry are given disadvantage.

Many occurrences showed that one cannot claim indemnity for other person's actions like in the case of *Singernaimachine Mij* (Arrest HR dated 6 Januari 1905) then the case of *zutphense Juffrouw* Arrest HR dated 10 Juni 1910 to *Hoge Raad* in year 1910 still follow legalism in other words against law means unlawful acts. In its development which is quite significant, it occurred in the year 1919 with a "Standard Arrest "verdict which is very popular. [228] This decision can be considered as revolutionary decision and brought significant changes to civil law in general. From this decision, we reach a conclusion that the existence if new criteria saying that an action which even though not against laws is considered against law if it is against decency and social norm.[229]

Based on articles in Indonesian Civil Law Code we can find out that one action which

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[226] Rutten, Asser, *Asser's Handleiding Tot De Beoefening Van Het Nederlands Handelsrecht, Verrbintenissenrecht, De Verbintenis Uit De Wet*, 6e druk. Zwolle, W.E.J. Tjeenk Willink, 1983, 57.
[227] *Rutten, Asser.*
[228] Gunawan Widjaja*, Aanvullend Recht dalam Hukum Perdata*, PT Raja Graffindo Perkasa, Jakarta, 2006, 87
[229] Gunawan Widjaya, 97

is against law is an engagement it is related to articles 1233, 1352 and 1354 snot to saying that each action which is against law is an engagement for not to do or not to do something because each action which is against law and one fact is a violation.[230] What is not suggested to do is a law order and if action cannot be allowed to do has affected other people and disadvantage others then he has obligation to give indemnity to the party experiencing loss. A warning not to do violation is instructed by laws in which the actions are not allowed to be done and in fact causing losses to other people then he has obligation to give indemnity to which experience loss.

In Netherlands' New Civil Law Code (*Nieuwe Burgerlijk Wetboek Dutch)* which is new in Book VI article 162 point (2) obviously stated that what is included in actions which are against law includes violation does not only covers violations to other people's right, it also includes doing or not doing something. This means that actions that is against law does not only discuss an engagement for not doing something but also discuss engagement of doing something that if it is done will be against other's people legal obligation. That is the formula of article 162-point 2 Book VI *Nieuwe Burgerlijk Wetboek Dutch.*[231]

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[230] Simanjuntak, Pokok-Pokok Hukum Perdata, , Jambatan, Jakarta 2005,. 349.
[231] Article 162-point (2) NBW:

> *(2) Als onrechtmatige daad worden aangemerkt een inbreuk op een ander recht en een doen of natalen in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatchappelijk verkeer betaamt, een en ander behourdens de aanwezigheid van een rechtvaardigingsgrond(*(2) As action violating law , a violation can be considered violation to other people's right and committing or not commiting an action which is against legal obligation or by with is decent in social interaction according to the law which is unwritten, among others, except

2.3.1.2 Law relating to Unlawful Action

Article 1365 BW in its history is accordance with the regulation of article 1401 BW Dutch which arranges the same regulation that is regarding "*onrechtmatige daad*". In the beginning, regulation or article 1401 BW Dutch is narrowly applied by the court in The Netherland. An action is considered as a law offense when there is a regulation which stipulates and/or forbids an individual to perform an action.[232] The narrow interpretation of law in law offense has numerous reactions and criticisms.

In the beginning of 1919, based on the initiative of Netherlands High Court with its verdict dated on 31st January 1919, the word "law" in law offense was interpreted extensively so that not only covering laws, government regulations or existing written regulations but also appropriateness and morality through the case of *Cohen versus Libenhaum.*[233] The court decision of Netherlands High Court dated on 31st January 1919 provided an extensive meaning of law offense so that it also covered the action done by Cohen.

In the court decision, the revealing the information which caused financial loss to the owner of the information was considered a violation towards somebody else's right and it was against appropriateness or morality *(geode zeden*) or even properness in the society without considering any individual interest (*indruist tegen de zorgvuldigjeid,*

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when there is a reason that can justify ,) as quoted in Gunawan Widjadja and Kartini Muljadi, *Hukum Perikatan, Hukum Perikatan yang timbul dari Undang -undang* Jakarta, Rajawali Press, 2003.96

[232] Rosa Wulandari, 70
[233] Gunawan Widjadja and Kartini Muljadi ,97

welke in het maatschappelijk verkeer betaamnt ten aanzien van eens anders person of goed). The action performed by Cohen, which was indecently performed and used, violated the right of Lindenbaum and it was considered against Article 1401 of Netherlands' Code of Civil Law.[234] Thus, the meaning of against the law in the event of against the law is no longer interpreted as written regulations either laws or other government regulations but if an action or a deed performed violates somebody else's right and is against morality and society interest as well.

Up to the present, there has not been any positive definition from the laws regarding the action against the law but it is given to the jurisprudences and existing laws. According to the aforementioned court decision in 1919, doing or not doing is an action against the law when it:[235]

a. violates somebody else's right, Asser's Rutten further said violating somebody else's right is violating subjective right of somebody else. According to Meiyers, the characteristic of subjective right is a special authority which is given by law to someone to be used for his interest.

b. is against legal obligation of the maker. Legal obligation is an obligation on the ground of law either written or unwritten. Based on above definition, what it is meant by legal obligation is an obligation based on laws. Legal obligation is interpreted in narrow sense because what Netherland's High Court defined as the action against the law was taken from laws draft in 1933 in which the

[234] Kartini Mulyadi, *97*
[235] Gunawan Widjadja and Kartini Muljadi, 98

interpretation of against the legal obligation of the maker is regarded as against the obligation based on laws.

c. is against morality when society acknowledges it as legal norms. Against existing properness in the society either to an individual or somebody's good. Every human understands that he is part of society's life and, in consequence, all the things he has done should consider other people's interests. He should consider his own interest and other people's interests and also follow what society regards as something decent and appropriate.

Matters which can be regarded against the properness[236] : Deed which can really harm other people without any decent interest and Deed which can cause danger to other people that according to normal people should be paid attention to. Pertaining to violating someone else's legal right, it is mentioned in *Nieuwe Burgerlijk Wetboek* (New Civil Code of Netherlands) in Book VI article 162 article (2) explicitly explains what is included in legal offense is the violation of somebody else's right and doing or not doing something which is against the obligation towards the law or properness in society based on unwritten law. That is the definition of Article 162-point (2) Book VI NBW of the Netherlands.

From the above meaning, if it is related to the action against the law in the extensive point of view in which the action against the law is not merely related to the consent not to deliver something or the consent to do something[237]; so that the meaning of

[236] Mariam Darus Badrulzaman, *KUH Perdata Buku III Hukum Perikatan dengan Penjelasan*, Bandung, Alumni, 2006, 146.
[237] Article 1234 Civil Law Code

violating someone else's legal right in terms of being against appropriateness and morality or properness in the society, can exist in the forms of[238] :

a. Not doing something which is supposed to be done and by not doing it has harm someone else's interest or legal right and at the same time is against appropriateness and morality *(geode zeden*) or certain properness in the society;

b. Not giving something, which is supposed to be given and by not giving certain thing has harmed someone else's legal right according to appropriateness or morality *(geode zeden*) or to properness in the society;

c. Doing something and by doing it has violated someone else's certain legal right and is against with appropriateness or morality (*geode zeden*) or with certain properness in the society.

2.4 Loss in The Unlawful Action

Every contract, either the one coming from agreement or laws, brings the obligation to substitute in the forms of cost, loss and payment of interest. The substitute of cost, loss and payment of interest is a form of performance which is a quantity which can be measured by money.[239] It means that it is in accordance with the principles of the contract which bring us to a performance which can be measured by money. This is a logical explanation since law of contract is in law of property and its payoff is in the form of warranty of debtor's property as asserted in Article 1131 of Indonesian Civil

[238] Mariam Darus Badrulzaman.,65
[239] Gunawan Widjadja and Kartini Muljadi, at 102

Code.

By determining the obligation or achievement to be fulfilled so the party requesting for the fulfillment of obligation or achievement can assess whether the obligation or achievement resulted from the contract has been fulfilled or not. If the decided achievement is not fully fulfilled, this brings the right to the requesting party to have compensation of cost, loss and interest.[240]

In the contract coming from an agreement, it is relatively easy to decide and measure an achievement which has been determined. A contract born from laws i.e. an action against the law, an individual may request certainty from another individual to abide existing regulations. In civil law, this regulation generally is stated in government regulations and jurisprudences. Whereas in common law, law has flexible meaning which cover equity, common law and judicial decisions.[241] Thus, the standard is the fulfillment of achievement or obligation in the case of an action against the law which must be decided before hand i.e. everything which has been decided by law cannot be broken and cause loss to another party.

2.4.1 Compensation of Loss, Cost and Interest

The action against the law in extensive meaning is not only a contract not to perform or do something but also a contract to perform or do something. From failing to fulfill an achievement, the laws have decided that as the substitution or addition there can be

[240] *Zimmerman, 108.*
[241] Rosa Wulandari, *87*

a new contract regulating cost, loss and interest. This new contract as the obligation to compensate cost, loss and interest is regulated by Article 1243 of Indonesian civil Law and will take the understanding of the compensation of loss, cost and interest can be requested by a creditor to a debtor who fails to fulfill and has been warned and ordered to implement his obligation.

Article 1247 of Indonesian Civil Code limits the form of compensation of cost, loss and interest only to cost, loss and interest which is hoped or estimated when a contract is made. There are two things which need to be paid attention to:[242]

a. Concerning the meaning when the contract is made in the context of the contract is born from laws.
b. Concerning the expected definition in the context of the contract is born from laws.

The duty of laws is to guarantee the life of society by always providing order in their life and providing strict and certain rules. Nevertheless, there is a possibility that a certain form of sentence given by the state through the laws which is applicable to public is not enough to accommodate certain individual's interest who is harmed as the result of an action done or an event/ a prohibited event occurred. For that purpose Article 1365 up to 1380 of Indonesian civil Code regulates the compensation of private loss.[243] In this case, it can be concluded that laws have predicted a form of

[242] Kartini Mulyadi dan Gunawan, 98
[243] Muhammad Syaifudin, *Hukum Kontrak, Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik, dan Praktik Hukum (Seri Pengayaan Hukum Perikatan),* , PT Mandar Maju, Bandung 2012,369.

compensation should be made by those who perform action against the law. In this context, once a contract is concluded, it is the time when laws apply such rules along with possibility of criminal sentence and compensation.

In a contract where the main contract is not possible to be implemented anymore; so the obligation to compensate cost, loss and interest become the only obligation that must be carried out. In this context, to determine the cost of loss or any interest is not a simple thing[244] and there should be an action or legal action done.

To be prosecuted based on an action against the law, Article 1365 Civil Code of Netherlands requires a mistake. The mistake must be objectively and subjectively measured. Objectively we must prove that in that condition a normal person might estimate the possibility of impact and this impact will prevent a good person to do or not to do. Whereas subjectively, we must examine carefully whether the doer with his skill can estimate the impact of his action. The person who performs an action against the law must be made sure what he has done because someone who does not know what he has done is not subject to pay compensation. Sometimes in a certain situation an action can be regarded no action such as an emergency action.

2.4.2 Tort as The Basis of Liability In Common Law System And Its Similarity In Indonesian Law

Compensating an amount of money through sentence because of committing an offense is the beginning of the history of liability. It is also the beginning of liability which is the

[244] Gunawan Widjaja, 120

compensation of a certain thing, or in fact is the same thing or a certain amount[245]. It is promised in such wisdom so that it will endanger public safety if this promise is not carried out. In Greek law, in *personam* action is the beginning of history of rights *in personam* of *obligation theory* (relationship between parties which called as rights in *personam)* is the first compensation of a certain good or certain amount of money which is the right of this kind of promise. [246]In juridical terminology, the main opinion of the early liability is the obligation to resolver. On the one hand is the obligation to improve by compensating the loss and on the other hand is the obligation to perform formally. The liability as if comes from deliberate action – either in the form of active action or aggression or in the form of agreement. So that is why the natural cause of liability is offense or contract.

Concerning the principles which underlie liability, both systems (Continental Europe and Common law) move on similar lines which are caused by ethical and social influences of Western civilization.[247]*Obligatio*n in Greek definition is the relationship between parties which law experts say as *right in personam.*[248] So the agreement made by parties will bring about right in *personam* as stated above that will bind certain parties. *Rights in personam* and theories about *obligation* are those which explain compensation of loss of a good or a certain amount of money from a promise.[249] Besides, a liability can appear from an offense.

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[245] Zimmerman, 1031

[246] Zimmerman, 1032

[247] H. Friedmann, *Teori dan Filsafat Hukum, Hukum dan Masalah-masalah Kontemporer (Susunan III),* Rajawali Pres, Jakarta, 1990, 174

[248] Friedman, 174.

[249] Cartwright, John, Contract Law. *An Introduction to English Law of Contract for Civil Lawyer,* Oxford and Portland, Oregon,2010, 10

The responsibility which appear from a contract/agreement either according to the law of Continental Europe or common *law* is absolute *liability,* in the sense that the party who does not implement an agreement cannot be charged to compensate the loss when the non performance is caused by a cause beyond debtor's authority. [250] In Continental Europe law, it is known as "*overmacht*" and in common law, it is known as "*frustration".*[251]For the action against the law in *common law,* it is categorized as *absolute liability*, knowing that it breaches the rules of laws which burdens the obligation but later is not fulfilled. S*trict liability*[252] may also happen in the action against the law in the case of Rylands *v. Fletcher.* Concerning this *strict liability,* Redmond explains as follows[253]:*The term 'strict liability' is, however, preferred to "absolute liability" since, generally, certain defenses are available.* Occasionally, statutes may create "absolute" duties whereby liability will attach irrespective of how the breach of duty was brought about, and these defenses may not be available here.

The action against the law in Continental Europe must be proven by showing that there is a debtor's mistake and the mistake must have causal effect relationship to the loss. The word "Tort" originated from French-Normandy which simply means wrong. In British law, this word is used to show a mistake which can be prosecuted in court by a party who is harmed. This mistake can be directly shown by a party who suffers from loss. So, that is why tort is a mistake in the field of civil law to differentiate it with the mistake in the field of criminal law. At first in British law, there is no difference between crimes and

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[250] Cartwright, John, 12.
[251] Redmond, at p. 232
[252] Kadar et.al., 346 said that:*"Strict liability is a liability which would arise irrespective of whether a person was at fault or not.*"
[253] Redmond, 98

civil wrongs. [254] Generally, it is said that the court will give attention when the action disturbs society security in the form of violence. In common law, in order to have an action against the law, it requires general requirements for liability as follows:[255]

1) Intention is not the necessity in terms that the accused does not need to prove that he intends to have the cause of his action, even though in the proof what he has done is a real evidence.[256] The impact of an action can be intended to happen when a person acts according to his thought and later is carried out. A person can be suspected to let something happen as the result of his actions but fails to anticipate possible consequences and this plainly negligence rather than intention and will create liability. Even though several actions against the law clearly cannot be committed unknowingly (such as fraud). It is a general requirement for liability that other wrong lawful actions will be unlawful actions if done on purpose[257]
2) Motive and Malice[258]

   Generally, law does not have any relationship with the reasons is done. We need to decide whether an action is included into unlawful action or not. A good reason will not discharge a wrongdoing; hence it is a bad reason not to make lawful action to be unlawful action.[259]

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[254] Owen David G, *Philosophical Foundations of Tort Law*, Oxford University Press, New York, 2001,103.

[255] Michael A. Jones, *Textbook on Torts*, Oxford University Press, New York 2002, 187.

[256] Michael A Jones, 190.

[257] William Geldart, *Introduction to English Law*, Oxford University Press, London, 1991, 135

[258] Michael A Jones. 188.

[259] Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, Oxford, Clarendon Press, 2008 109*op. cit., at* p. 187

3) Negligence

Negligence causes loss to another party, not to be just tort but as a liability requirement for tort.[260] *Negligence* is defined as follows[261]:

> "*omitting to do something which a reasonable would do, or the doing of something which a reasonable man would not do; more shortly, one may say that it is a failure to use proper care in one's conduct*."

Actually, Indonesian tort law does not possess the same concept with tort in common law system but in the development of maritime law, especially in the Environmental Act concerning pollution, it adopts the same concept of tort as mentioned above.

2.5. Conclusion

The carrier's liability may be based on the breach of contract or the commission of an unlawful act or tort, it may be also arisen by the operation of law, such as in the case of salvage, general average, pollution, and other obligation imposed by certain national or international convention.

The transport law, as a part of maritime law is largely influenced by the common law system and practices. International maritime conventions play also a significant and important role in constituting the law and practice. The Indonesian legal system with its open system law can easily adapt itself in order to the need of Indonesian shipping legal practice, and this is even more so science the provisions in the Indonesian Commercial Law are rarely used.

Based on article 1339 of the Civil Code which provides that an agreement is not only

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[260] Simon Deakin, Angus Johnston and Basil Markesinis ibid.

[261] Vivienne Harpwood, *Modern Tort Law*, Routledge&Cavendish, London 2000,65

bound by the provision which is expressly stated in the agreement but it also bound by justice and established common usages and practices. The concepts of freedom of contract and autonomy of party in the Indonesian legal system provide for the accommodation of practical needs and development.

CHAPTER THREE

CARRIER LIABILIY IN INDONESIAN LAW

3.1 Liability from Sea Carriage Contract In Practice

As discussed in earlier chapter, transportation contract in Indonesian law refers to the regulations of the Indonesian Commercial Code and International Conventions such as The Hague Rules in 1928 and The Hague Visby Rules of the year of 1968. As a document which is very important in international trade, the conventions are also very influential in international trade. One of the latest conventions is UN Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea which was signed in Rotterdam in 2009 and herein after is referred to as Rotterdam Rules.[262]

In the previous chapter, it was also discussed sea transportation in Indonesia according to Indonesian Commercial Code is divided into two: i.e. charter and agreement based on bill of lading. Generally, transportation documents do not only consist of charter agreement or bill of lading, but in international transportation there are also other documents; they are Letter of Credit and other necessary documents such as insurance and Protection and Indemnity Club and even though in national transportation those documents are not obliged to fulfill. [263]

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[262] John F Wilson, *Carriage of Goods by Sea*, Great Britain, Henry Ling Ltd., 2010, 230.
[263] Andi Susilo, Ekspor *Impor Manajemen Tata Laksana & Transportasi Internasional*, 2008, 57.2

3.1.1 Carriage Contract Based on Indonesian Commercial Code And ague/Visby Rules

In general, document or agreement of sea carriage is assumed as a document which contains rights and obligations of involved parties and other parties such as goods receivers, freight forwarders, loading companies, insurance companies, banking as well as carrier or owners of vessels. Usually a carriage document is related to transportation agreement as the basis of another transportation document. Carriage document can be regarded as a guideline or evidence of a certain carriage of goods or passenger agreement. Article 506 of Indonesian Commercial Code explains that what it is meant by Bill of Lading is a dated letter in which the carrier explains that it has received certain goods to be transported to a certain destination and delivers the goods to a certain person by mentioning the requirements concerning the delivery of the goods[264]. As mentioned above, Bill of Lading is one of the sea carriage documents which is usually used in international trade.

In the maritime practice, there are several forms of Bill of Lading standards issued by various shipping lines or the organization of shipping lines in which there are some clauses as the requirements of the carriage[265]. Besides, there are also short forms of Bill of Ladings which refer to general conditions of carriage which can be found in the head office of a shipping line for public information.

As a document which plays a very significant role in international trade, Bill of Lading

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[264] Husseyn Umar, *Hukum Maritim dan Masalah-masalah Pelayaran di Indonesia*, Penerbit Sinar Harapan, Jakarta,2001, 202

[265] Lasse,124

is not free from the influence of international law. The international convention which generally becomes the basis of clauses in Bill of Lading concerning the aspects of carrier's responsibilities in Brussel Convention 1924 (Convention for the Unification of Certain Rules of the Bills of Lading).

This convention is commonly known as the Hague Rules which later after 1968 and 1978 was revised is also known as Hague/Visby Rules.[266] Besides that convention, in 1978 there was UNCITRAL which made Hamburg Rules (Convention on The International Carriage of Goods by Sea 1978) and finally in 2009 UNCITRAL made a new convention to accommodate the carriage by using different means of transportation at the same time (multimode) and also to adjust with electronic data collection which is named UN Convention for the International Carriage of Goods, wholly or partly by Sea (Rotterdam Rules)[267] . Unlike The Hague, Visby which was made by influential countries in shipping and Hamburg Rules and Rotterdam Rules made by UNCITRAL, even though they have the same objective that is to create uniformity in carriage either wholly or partly using the sea. Rotterdam Rules is the latest international convention.

On 24th January 2008, UNCITRAL agreed the text of new international carriage convention mainly which is related to sea carriage. The word "partly" reflects to the fact that there are several acknowledged means of transportation even though, the important part is still sea.[268] This convention is applicable for international carriage

[266] Heru Prijanto, 33
[267] Indira Carr, International *Trade Law*, Routledge-Cavendish, London, 2011, 305.
[268] Rhidian Thomas, *The Modern Law of Marine Insurance*,Informa ,London, 2009,5

using multi means of transportation by sea as the basis.

Countries which have ratified the international convention generally included the regulations in the "Rules" into their laws such as Carriage of Goods by Sea Acts from different countries.[269] Those conventions are only valid in high seas where laws of any country are not applicable whereas in territorial waters the laws of a country are valid to regulate. For example, to protect the goods in Indonesian piers, the regulations in Indonesian Commercial Code are applicable. In Indonesia, article 517c of Indonesian Commercial Code provides opportunity to The Hague Rules to be valid in Indonesia for the goods imported to Indonesian territory.

In practice up to now, the convention that is mostly applied in Indonesian shipping is The Hague Rules 1924. Although this convention has not been ratified by Indonesian Government. PELNI (Indonesian Shipping Company) said that is very common for the company to use this convention since this convention is very easy to apply [270]. In Bill of Lading, it is stated in the General Provision of which laws is applicable. Besides, there are several kinds of Bill of Ladings according to their functions. The following are some classifications of Bill of Lading which become the document in carriage[271].

[269] Husseyn Umar, *Hukum dan Masalah-Masalah Pelayaran di Indonesia*, Buku Kedua, Penerbit Sinar Harapan, Jakarta, 2001,207.
[270] Interview with Hendri Frenda, Chief of Legal Officer at PT Pelabuhan Indonesia (persero) II,
[271] Suyono, 266.

3.1.1.1 Liability Based on Bill of Lading

According to its name, Shipped Bill of Lading is a document which shows that the goods are already loaded on a ship. This category of bill of lading will not be signed but it is returned to the carrier before the goods are loaded on a ship which will carry them to a destination. Received for Shipment Bill of Lading Based on its name, this Bill of Lading is used by a freight forwarder when it receives goods from a carrier in a warehouse or a place under supervision or inland container depot (ICD). Through Bill of Lading Through Bill of Lading is used for transshipment load of which carrier is responsible for the second carrier through its representative. In this case, the goods are unloaded first from the first carrier to be loaded to the second carrier until its destination. This one is called as Combined Transport Bill of Lading.

It is goods traveling document which covers goods carriage by using more than one means of transportation. This document mentions several freight operators that will take the goods at docking and take them to the destination. This bill of lading is a document which can be sold. Combined transport bill of lading is usually done for container shipment with the status of FCL (Full Container Load). Unlike ocean bill of lading, the carrier is fully responsible for the damage or lost that might happen without considering in which means of transportation that this will occur.

In this carriage, bill of lading can be:[272]

1) Clean Bill of lading; When a carrier agrees with the details and condition of the goods loaded by the carrier inside the container; so, the bill of lading issued

[272] Radiks Purba, 47.

is regarded as “Clean”.

2) Unclean / Claused Bill of Lading; When a carrier is not sure with the condition of goods inside the container, then there will be some notes in bill of lading which is named unclean or claused bill of lading.

Like the load in break bulk, carrier will try his best that the carrier or the captain signs letter of indemnity. Bill of lading is used by a forwarder by collecting several classified goods from many carriers and sending them as one unity. Ship owners issue Bill of Lading for the next forwarder and for each carrier to issue house bill of lading from its company.

The following are the parts which are usually included in bill of lading (as a case study the following is a bill of lading issued by PT. Jakarta Llyod).

The parts of bill of lading of PT Jakarta Lloyd are[273] :

3.1.1.2 Carrier (Sender)

The sender usually is the party who at first prepares a bill of lading and provides necessary details of the goods. [274] This is when Hague, Hague Visby Rules, Hamburg Rules or Rotterdam Rules are applicable, the sender must obtain the explanation of the existing regulations if the goods are shipped. On the other hand, the sender is obliged to provide clear explanation about the goods and if the explanation is incorrect, the sender may have prosecution from the carrier.

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[273] Bill of Lading issued by PT Jakarta Llyod in Suyono, 267.
[274] Suyono, 267.

3.1.1.3 Consignee (Receiver)

The details about the consignee are not of the interest of a ship, but in the matter between goods seller (usually is shipper) and prospective buyer. Depending on trade transaction of the goods, in the column for consignee in the bill of lading can be written "bearer" or "holder" or it can be mentioned "name of consignee", "to order" or the column is left empty.[275] All of them show the transfer of ownership of bill of lading and the monitoring of goods acceptance.

3.1.1.4 Vessel

The name of vessel carrying the goods must be written. This is necessary in a bill of lading to provide information that the goods have been physically transported from the seller to buyer. Given example is a bill of lading from PT. Djakarta Lloyd which has fixed to sail to Australia. Goods are at first shipped to Singapore by a ship of Djakarta Lloyd as the feeder and from Singapore by a large container vessel which is an alliance of Djakarta Llyod with other shipping companies.[276]

So, that is why there are 2 blank columns i.e. the above one is for a ship sailing from Indonesia to Singapore and the second column is intended for Ocean Vessel from Singapore to Australia.

Place of Receipt is the place of bill of lading accepted by shipping company. In the example, the acceptance of bill of lading is in the head office of Djakarta Lloyd in

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[275] PELNI

[276] PELNI

Jakarta. It is important to know the origin of the goods which will be shipped. Origin of the goods is important to be known by buyers. This is in accordance with the regulations of Hague, or Hague-Visby Rules.

3.1.1.4.1 Port of Discharge (ocean vessel)

In bill of lading is usually only one port. In the case that port of discharge has been determined in the bill of lading, the owner of the vessel must sail its vessel to that destination except it is obstructed by a condition endangering the vessel.[277] To sail to another destination will be said that the vessel has deviated from its course as explained in earlier chapter. Port of discharge should also be paid attention so that there will not be Hamburg Rules applied in the port of loading which should have Hague Rules in effect. In this example is Port of discharge (Ocean Vessel) is Melbourne.

3.1.1.4.2 Carrier's Description of Goods

According to Hague, Hague-Visby or Hamburg Rules, carrier has the right to demand bill of lading from the vessel which clarifies the details of goods loaded. By looking to bill of lading, buyers can have the knowledge of the goods inside the vessel. Further detail is deemed necessary in the world of trade. The details of the load is needed because the load often times cause troubles and the carrier only knows the condition from outside. This then creates the terminology: apparent good order and condition.[278] In this bill of lading, the details of goods are divided into Marks & number, Number of containers or other Packages, pieces or units, description of goods, Container

[277] Suyono, 45

[278] Suyono, 45

numbers, Gross and weight, and measurement.

3.1.1.4.3 Condition of Carriage

The condition of carriage when goods are carried by a vessel can be seen at the back page of bill of lading. The conditions are written in very small letters and they are hardly to be read as if the conditions are not important matter. Whereas in fact all conditions of an agreement can be found on this page and they are of the same importance with the front page. So, when it is demanded, shipping company must be able to explain clearly to the carrier.

For the company in Indonesia, all refer to Hague or Hague Visby Rules, it is rare to find the application of Hamburg Rule or even Rotterdam Rule.[279] Sometimes there is also a variation of both conventions. This is interesting since those conventions have not been ratified by the government of Indonesia. But, in Article 517 c of Indonesian Commercial Code enables carrier in Indonesia to apply the convention. As earlier mentioned, Indonesia does not ratify any of the conventions on carriage of good at sea. However, Hague or Visby rules could be made applicable to domestic and international trade thorough the implementation of choice of law. The Indonesian national shipping line PT Djakarta Lloyd for instance includes The Hague Rules as paramount clause in its bill of lading.

Some important content of bill of lading from Indonesia/ Australia/ Straits Service is:

[279] Interview with Directorate General of Sea Communication, Bobby R. Mamahit, 12 October 2014.

3.1.1.4.4 Hague Rules Governing Law and Jurisdiction

To provide information that this bill of lading is based on Hague Rules made in Brussel on 25th August 1924 and Protocol Hague Rules on 28th February 1968 which becomes the foundation of responsibility of carrier.[280] Goods loaded on a vessel based on this bill of loading is protected by Hague-Visby Rules and the law of Indonesia. There is no prosecution towards the carrier except it is done in the court in Indonesia or except the carrier decides to do it in another country. So, this article explains that the existing law is only Hague –Visby Rules and the law of Republic of Indonesia.

3.1.1.4.5 Carrier's Liability

This article explains more about the responsibility of a carrier towards the load. The carrier is not a common carrier and has the right to reject each good which is loaded with deep consideration.[281] Carrier is not responsible for the goods which are provided in delivery place or available in the place of goods delivery if it deals with living animals (including sickness or death).

In the case of damage or loss of load on the deck, or in the case of fire but not carrier's fault, act of God, act of public enemies,[282] this article discusses more the responsibility of a carrier towards carrier's load.

Carrier is not responsible for the goods which the carrier does not receive as mentioned in the bill of lading or the fault of the sender as long as it can be proven that

[280] Bill of Lading issued by PT Jakarta Llyod,
[281] Bill of Lading issued by PT Jakarta Llyod
[282] Bill of Lading issued by PT Jakarta Llyod

the loss and delay is out of what has been regulated in Hague Rules or the goods (made by sub-contractor) are out of the regulation of carrier.[283] The responsibility of a carrier is not as important as what is mentioned in Hague Rules, more over when the carrier can prove that the loss or damage is caused by other reasons. The damage can be caused by another vessel of not having seaworthiness or damage caused by forced sail.

3.1.1.4.6 General Average, New Jason Clause

If "general average" happens, it will be resolved in Melbourne, Australia or in another port or another place or place appointed by a carrier according to York-Antwerp Rules 1974.[284] General average statement application will be implemented and declared by an adjuster who is appointed by a carrier. For additional cost or fare will be collected to goods receiver based on responsibility. So, this article discusses the solution relationship between carrier and trader who has goods.

3.1.2 Liability based on Letter of Indemnity

As described in earlier chapter, if goods sender receives Foul Bill of Lading by making Letter of Indemnity; so the forwarder will receive Clean Bill of Lading from the carrier. When carrier is willing to receive letter of Indemnity, it means that the carrier is willing to lie.[285] Using Letter of Indemnity to obtain Clean Bill of Lading is a dishonest deed because it can cause problem and/or loss for goods receiver at the port of destination. This can bring about a problem between goods receiver and carrier if goods receiver

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[283] Bill of Lading issued by PT Jakarta Llyod
[284] Bill of Lading issued by PT Jakarta Llyod
[285] Radiks Purba, 62

demands compensation of the goods which are not suitable to what is stated in Bill of Lading.

When there is a claim from goods receiver, the carrier does not have to pay attention it because Letter of Indemnity. It releases the carrier from the loss which is claimed by goods receiver and the loss will be compensated by goods forwarder.[286] In the case that goods receiver is the buyer and finds out that the sender (seller) obtains Clean Bill of Lading based on Letter of Indemnity. Hence the buyer is not pleased with what the buyer has done unless the goods receiver does not mind with the damage or less quantity of goods. When the goods are enlisted in the Clean Bill of Lading then there is no problem. But in fact, the sender can gain the benefit from the dishonest deed.

3.1.3 Marine Insurance

In sea carriage besides bill of lading issued by vessel agent or its representative, marine insurance policy is also an important document and even stipulated in international carriage. In the operation, sea carriage is subject to risks which can cause loss of property and human's life. The loss can be experienced by the operator and can also be experienced by sea transportation users. To prevent any loss, then it should be covered by insurance in which the insurance will cover the loss according to insurance coverage.

In sea carriage, this guarantee is really necessary, especially to those vessels which sail on international routes. One of the important documents in international trade is marine

[286] Radiks Purba, 62

Insurance Policy.[287] Thus, without marine insurance policy, there cannot be any international voyage.

Sea insurance is generally similar to other insurances i.e. the loss is guaranteed for the risk which becomes the object of insurance. In sea insurance, the coverage for a risk is not precise because in a voyage there can be some danger at the same time so that there is a need of sea insurance which can cover all risks.[288] Insurance is a method of a party who requires protection from all kinds of danger by contributing to a joint fund organized by an insurance company to pay compensation of any loss which might happen. Insurance is also defined as a relation which happens because of a contract and when a party (insurance company) for the purpose of getting premium promises to compensate loss to another party (insurance service buyer) which may happen for certain field.[289] In sea carriage, insurance has the purpose to guarantee the sustainability of vessel operation and to guarantee the interest of vessels, ship crew, passengers and goods which can be found on a vessel.

The Laws of number 17/2008 on Shipping demands companies to insure its responsibility as stated in Article 41 and 54 that insurance company is obliged to insure its responsibility for death or injury of its passengers, the damage or loss of goods carried, the delay of transportation and the loss of the third party. Article 203 explains that vessel owner is obliged to insure its responsibility for removing ship's hull and/or

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[287] Susan Hodges, *The Quest For Seaworthiness, A Study of US and English Law of Marine Insuranc*e, London, 2010, 199.
[288] Susan Hodges, 200.
[289] Heru Prijanto, *Hukum Pencemaran Minyak di Laut*, Bayu Media Publishing, Malang, 2011, 7

cargo which endanger the safety and security of the journey. Article 231 requires the owner or operator to insure his responsibility for the pollution coming from his ship. Then Article 327 explains the sanction when insurance is not taken will be 6 (six) months of imprisonment and fine as maximum as Rp100.000.000, - (one hundred million rupiah).

The insurance policy which is widely used is Llyod insurance policy from United Kingdom where underwriters are united in an association called Institute of Marine Underwriters, Standard Clause issued by Institute of Marine Underwriters in London consisting[290]:

a. Institute of Cargo Clause for goods insurance

b. Institute of Time Clause for vessel insurance

There are also insurance policies from other countries for example United States which uses American Institute of Marine Underwriters and American Hull Insurance Syndicate or the Netherlands which uses *Amsterdamche Beurpollis* and *Rotterdamcshe Beurrsgoederenpolis*. [291] For the insurance of hull in Indonesia, the association in Indonesia has provided a policy called Indonesian Marine Hull Pool Companies Combined Policy.

3.1.4 Liability form Insurance

Insurance can be made by the owner of a vessel or carrier and the owner of goods: It

[290] Heru Priyanto, 8

[291] Suyono, Shipping, *Pengangkutan Intermodal Ekspor Impor Melalui Laut*, , Penerbit PPM, Jakarta 2001,87

depending on the conditions in the charter party, charterer is subject to risk and responsibility to those of owner of a vessel, especially this might happen in time charter.[292] Charterer is not subject to any responsibility in the event of ship collision, pollution or damage made by the vessel to a third party, but the charterer can be subject to responsibility concerning the cargo.

Furthermore, Insurance can be made by the owner of goods. Same goods loaded onto the vessel may be owned by charterer or owner of a vessel, but usually owned by a third party. Whoever the owner of the goods is, it is better that he insures himself towards loss or damage of the goods, and also his contribution when the vessel is subject to general average or salvage.

Insurance deal in Institute Cargo Clauses can be in the form of Free of Particular Average. It means that an underwriter is free from the payment of part of loss which happens unintentionally. [293] The underwriter only compensates of "total loss" and general average; in addition, the underwriter does not have the obligation to compensate particular average loss.[294] The loss is determined when a vessel runs aground on the coast. The word "particular" is defined as "unintentionally" and the word "average" is from French: "*avarie"* which means part of loss.
This condition is generally used for trade merchandise insurance.[295]

[292] Niehaus Harrington, Risk Management& Insurance, Pearson, Boston ,2011,87.
[293] Peter Koh Soon Kwang, 28
[294] Wiwoho Soedjono, *Hukum Pertanggungan Laut*, , Pt Rineka CIpta, Jakarta, 1993, 50
[295] Redja, George E and Mc Namara, Michael, Principles of Risk Managemen and Insurance, Boston Kluwer, 2010 ,183.

3.1.4.1 With Average (W.A.) or With Particular Average (W.P.A)

It means that an underwriter is responsible for providing compensation to part of loss and damage happening during sea carriage, either total loss, general average, or particular average which happens unintentionally, except the loss which is exempted by laws or requirements mentioned in the insurance policy[296]

The loss which happens as follows[297] Perils of the sea, which are caused by: Nature: winds, waves, sunken rocks, ce bergs, lightning, fire, collision, washing overboard. Caused by Dead of human that covering, action of crew, act of jettison, barratry, deviation of course. It could be caused by action of third party such as pirates, rovers, pilferage, Assailing thieves

3.1.4.2 With Average Subject to Franchise

When insurance is issued with the deducted value which means that the insured party will not be given any compensation for small loss up to certain amount.[298] The amount is called “deductibles” or excesses or franchise. Franchise is a minimum loss or should be lost in order to be covered by insurance and it is explained in percentage.

3.1.4.3 All Risks (AR)

Underwriter has the obligation to provide compensation of the loss or physical damage of goods caused by external factors without looking at the percentage. The risk coverage is the continuation of insurance deal With Average and it does not cover risks

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[296] Redja, 183.
[297] Suyono, 206.
[298] Wiwoho. 64

because of war, strike, civil commotion, seizure and risks which are not included in FC & S (free of Capture and Seizure). SR & CC (Strike, Riots and Civil Commotion and Warranty except the riots specifically are agreed[299]. This kind of insurance is commonly used for valuable goods and exclusive goods which have high premium.

3.1.4.4 Total Loss Only (TLO)

It means that an underwriter only provides compensation when all goods insured are damaged or all missing, either in the understanding of "actual loss" i.e. cargo/vessel is physically lost or all its value is lost because of damage or "constructive total loss" which means that cargo/vessel is in one place (for example running aground on the coast) but cannot be used anymore and the cost of savior is much higher than the value of the cargo.[300]

Goods in the cargo divided into any categories [301]:

1. Deck Cargo and Living animal. Living animal, whether carried under on or under deck, are vulnerable and susceptible to the stresses and strains of any form of transportation. Not to mention a turbulent sea voyage. The general rule that they must be specific, and not just as goods the insurer cannot later complain that he was unaware of the nature of the subject matter insures or the extent of the risk which he has agreed to underwrite.
2. Containers and packing materials Indonesian Civil Commercial Code has

[299] Suyono, 78
[300] Arnould, Law of Marine Insurance and average, London Routldge, 1981, 1186
[301] Arnould,1187

failed to indicate whether containers and packing materials are covered by a policy on goods. The general rule appears to be that, if the container is virtually part and parcel of the goods, it is probably covered.

3.2 Sea Carriers in Indonesian Law

3.2.1 The Practices of Organization of Sea Carrier

Even though all kinds of risks can be insured in sea insurance, there are possibilities that the loss cannot be covered by sea insurance or general average (such as costs and loss) in the event that there are measures taken intentionally to save the vessel and its cargo.[302]Since there are risks that are not guaranteed by insurance company; the owner of the vessel and/or sea carrier will have loss when there is disaster/damage to the goods which are not insured. [303] Concerning what has been described before, there should be another form of protection to a vessel and its cargo.

At this time, there is a legislation framework to prevent or decrease sea pollution and lessen the degradation of sea environment quality. This framework basically was developed after 1970s. Until 1970, sea freedom means that pollution was not regulated by law and any vessel can do whatever it wants which means that a vessel could clean its tank and threw its hazardous waste to the sea. Everything was done in the name of business efficiency and financial success. Besides, tort that is based pollution damage restoration has been difficult to be proven.

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[302] Arnould,1187

[303] Muchtarudin Siregar, Beberapa *Masalah Ekonomi dan Manajemen Transportasi*, Lembaga Penerbit UI, Jakarta,2012.

In sea cargo transportation, sea carrier (owner of vessel) faces risks from two sides as follows: 1). The risk as a ship, and 2). Risk as a carrier. Protection is related to liability in operating a ship; i.e. that is to protect a ship from the risk encountered that is a risk without having any compensation from underwriters. Whereas indemnity is related to liability in operating a ship as a carrier that is to guarantee a risk encountered by a carrier because of having no compensation from the underwriters. [304]Thus P&I can be explained as liability towards the third party and the costs but not the risks covered by the hull and machinery insurance such as war risk, loss of profit detention, strike and others.

Since there are risks which are not guaranteed by underwriter; so ship owners established a club among ship owners which functions to bear loss among the members as long as the loss does not have any compensation or where the underwriter insure less compensation. The club is called Protection and Indemnity Club or called P&I Club for short.

This club provides warranty to its members in two aspects: protection and indemnity. That is why it is called Protection & Indemnity Club. P&I club at first was a club founded by ship owners and an organization intended to help its members. The establishment of this club is primarily because of the above interest so that ship owners do not suffer a higher loss. For mutual benefit and with the intention of helping one another; ship owners established a club which guarantees its members from the risks

[304] Director of Sea Communication, Final *Report Kajian Analisis Trend Kecelakaan Transportasi* Laut Tahun 2006-2011

which are not guaranteed by the insurance.[305] Each member has the obligation to pay annual fee and this fee is used to pay the loss suffered by a member.

Each owner of a vessel especially international vessels can be the member by paying annual fee. The amount of fee is determined based on the tonnage of the ship owned by a member. Every member can withdraw himself from membership or become a member again in every year. The fee collected may be used to cover the loss of a member and to finance the running of the club. For each member (vessel), the club issues a certificate which functions as a membership and an insurance policy for a year. After one year, the club will issue another new certificate to those who have paid the fee for one year.

The income of a vessel as a member is stated by a certificate issued by the club. The certificate is similar to that of an insurance policy. Fee payment made every year is just like a kind of premium. Shipping company can withdraw oneself or join the membership again every year so that the implementation is precisely like closing deal of insurance policy. The responsibility of carrier is guaranteed by P&I Club.

The responsibility of carrier (vessel) which is not guaranteed by insurance but can be burdened on P&I Club as described above is[306]:

1) Loss of life, injury or illness, either crew or third party
2) Damage of goods carried when the vessel is responsible for it
3) The responsibility of damage to the dock, port, jetty, other moving and fixed

[305] Sugiyanto, *Hukum Asuransi Maritim Protection&Indemnity (P&I) Insurance*, Jakarta Salemba Humanika, 2010,78

[306] Director of Sea Communication. Penerapan P&I Club Bagi Kapal Indonesia. Research Report.

objects

4) The responsibility to move ship's hull when there is total loss and local government orders it

5) The responsibility of oil pollution

6) The responsibility of having collision with another ship and it is not guaranteed by hull & machinery

7) The loss of freight especially chartered freight

The above loss and its loss calculation is guaranteed by The Club, but it depends on the rules issued annually by The Club which is known as P&I Rules.The insurance provided by P&I Club to its members is to protect them against the loss during vessel operation.

The protections provided by The Club are[307] :

1) The loss because of collision. Usually the compensation borne by insurer is ¾ of the loss (RDC ¾) whereas the remaining loss is compensated by P&I Club.

2) The compensation for human life and accident.

3) The cost for ship crew who are sick

4) The fee for doctor or medical cost for ship crew and passengers who are sick or have accident as long as based on the rules becomes the burden of the owner of the vessel (carrier).

5) The cost to remove sunk vessel.

6) The compensation of the loss or damage caused by the ship to the pier, wharf and other objects at the port.

[307] Steven Heazelwood, *P&I In Practice*, 131.

7) Compensation for loss or damage of the goods which are transported as the consequence of navigation error (improver navigation).

8) Compensation to other vessel in which the vessel experience damage which is caused by themselves (not because of ship collision)

9) In general, maritime loss, the goods condition is in a condition which cannot be withdrawn by the owner of the goods.

As for guarantee (indemnity) of P&I Club:[308]:

1) Compensation for the goods damage which are caused by wrong delivery of cargo.

2) Punishment (fine) as the consequence of violation (mistake/error) as custom of labor in ports.

In general, maritime loss, the vessel cannot get contribution from the goods shipped due to the condition of the vessels which are not in proper condition to sail. Besides, there is a risk category which is insured by P&I Club that is the category which is related to public service interest when there is shipping accident, that are[309] Responsibility of the damage which is caused by the ship to the pier, to the anchor, to other dock facilities, and to the navigation signs; Responsibility to remove the ship's hull which disturbs transportation line when not removed; Responsibility for oil spill; Responsibility to the ship crews.

[308] Director of Sea Communication. *Penerapan P&I Club Bagi Kapal Indonesia*. Research Report.
[309] Director of Sea Communication. *Penerapan P&I Club Bagi Kapal Indonesia*. Research Report.

From the previous explanation, it is obvious that P&I Club acts as guarantor to the members and replace the loss which happen to the members by these following principles:[310]

1) Give protection (protection) to the vessel as a ship

2) Give guarantee (indemnity) to the vessel as a carrier of cargo.

Even though P&I aims at protecting its members and indemnity which is given by the club to the members based on the amount which is stated in the maritime agreement. Let us take a look at an example, the agreement it is stated that the indemnity for the goods damage which is substituted by P&I is IDR 40,000. - per square meter, then the club will substitute as stated in the agreement. [311]When the loss exceeds compared to the amount stated then P&I Club will not substitute an amount which are not covering what is stated in the agreement.

Another example is when the vessel hit a pier in the port, when we refer to the local regulation, the vessel should compensate the damage. But when it refers to P&I Club compensation regulation then the club will substitute the loss.[312]: But when it is determined referring to an agreement between ship owner and the authority of the port, then generally there is no compensation given by P&I Club. The Ship owners as members of the club surely may feel dissatisfied and they may file protest to P&I Club. To prevent negative things to occur, so P&I Club always recommend its members to firstly consult to P&I Club or to its representative before approving the amount of

[310] Steven Heazelwood, P&I In Practice, 131.
[311] Sugiyanto, 133.
[312] Director of Sea Communication. *Penerapan P&I Club Bagi Kapal Indonesia*. Research Report.

compensation for the loss to the third party.[313] When P&I has agreed with the amount of compensation for the loss, then the owner of the ship will be convinced to resolve the problem due to the compensation guarantee from P&I Club. Every year, club releases books which explains about club responsibilities to its members (the ship owners) with compensation of the loss which will be covered by the club.

In each period, the biggest amount of claim which is taken care of by P & I club is cargo claim and all claims related to personal accident, and among many claims, the most expensive claim is the removing of ship wreck. In "International hull insurance" clause, the insurance will cover up to 75% (seventy five percent) of the responsibilities for the ship collision and P & I will cover the rest, 25 % (twenty five percent) from the collision responsibilities.[314] P & I Club will also cover 25 percent from club is the biggest of the ship damage or a quarter of hull damage. In practice, this could often mean that the club is the one who handle the biggest risk. Even when the member chooses, the club is able to offer the 100 percent coverage for the risk closing. It is interesting to note that the main intention of the establishment of club when it was first established in 1865 is to protect the ship owner from obligation for personal injury and death under Merchant Shipping Act of 1854 and also for other ship risks which are not covered by regular sea insurance policy.[315]

3.2.2 P&I Club Indonesia

At this moment, Indonesia has owned its own P&I Club under the name Perkumpulan

[313] Steven Heazelwood, P&I In Practice, 131.
[314] Steven Heazelwood, *P&I In Practice*, 131.
[315] Steven Heazelwood, *P&I In Practice*, 131

Proteksi Maritim Indonesia (Promindo)/ Indonesian Maritime Protection. The funding is collected from its members annually. When the shipping company needs the funding then the funding will be given. At present, Indonesia handles around 8.500 ships operated in Indonesian waters and 600 ships always pay regularly P&I funding to P&I provider overseas like in London, Japan, Korea and China. [316]Apart from accident funding, *Promindo* also provides funding for supply need of a ship funding for it members.

Even though Indonesian P&I Club was just established in 2010, while other International P&I Clubs particularly the one in England and in United States have been operated since early nineteenth century, Indonesian P&I is essentially needed by Indonesian Ship Businessmen. Before P& I was established, compensation for Indonesian Ship pollution was always paid through P&I outside Indonesia so that Indonesian devise flows outside Indonesia and the amount reaches hundreds of millions dollar each year.[317]This situation burdens Indonesian ship businessmen in category of regular civilian shipping so that by the establishment of Indonesian P&I, the shipping businessmen can be more active in the involvement in P&I Club. Even though the involvement in P&I Club is not national vessels, is not compulsory for concerning maritime law only oblige the carriers to insure its responsibilities as stated in article 41 clause 3 and in article 58 Shipping Act.

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[316] *Indonesia punya P&I Club untuk amankan operasi kapal*, from Kontan.id in www.industry.kontan.co.id. 28 Oktober 2011.accessed 20 Januari 2012

[317] *Mampukah P&I Club berikan jasa yang menarik*, from tribunnews.com in www.tribunnews.com accessed 20 Januari 2012

This is in line with the explanation given by INSA (Indonesian National Shipowners' Club) which points out that among Indonesian vessels amounting 10.405, only 1.200 vessels are insured and included in International P&I Club.[318] This is because of the minimum of seaworthiness of Indonesian Ship in International board's view. Furthermore, Indonesian ships must be increased in their quality of safety of shipping and seaworthiness based on International standard.

3.3 Liabilities of Carriers in Indonesian Law.

3.3.1 Liability of carriers based on article 468 to article 480 Indonesian Commercial Code

Following, there is a review of responsibilities of carriers based on article 486 to article 480 of Indonesian Commercial Code explaining about responsibilities of carriers in shipping business. they are:

3.3.1.1 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 got the instruction to deliver the goods.

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[318] Interview with Director of Sea Communiaction of Ministry of Transporation.

In article 1 above, it is determined that it is the carriers' responsibility 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 and the loss or the missing goods are caused by *force majeure* in regular term or in proper term which means unavoidable. [319] But the presence 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 mistake 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 employed by the carrier not by another 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 which are caused by the equipment used in shipments which are not legible for shipment or the cabin inside the ships which are not proper or does not fulfill the requirement for the goods load, except when the carrier can prove the occurrence of *force majeure.*

According to Article 468 ICC it can conclude that the carrier is obliged to pay compensation for the damage or non-delivery of the goods carried, except if he can

[319] Radiks Purba, *Angkutan Muatan Laut*, Penebit Bhratara Karya Aksara, Jakarta, 1981, 145

prove that the damage or non deliveru was caused by a circumstance that could not reasonably have been avoided by the carrier or his servant, by the inherent vice or hidden defect of the goods or by the fault of the shipper.

3.3.1.2 Article 469 of Indonesian Commercial Code

In this article, it is determined that the carrier is not responsible for the valuable goods like gold, silvers, diamonds, and in Indonesia valuable goods include human hair, crocodile skin, and so on, except when it concerns character and price which are already previously notified by the owner or by the sender of the goods. This is so important that the carrier is able to determine the proper place, which is safe, to put the goods in the ship as well as to determine the cost of the freight which is used in ad valorem rates.[320]

The cost of the freight of the valuable goods which are notified to the carrier which is higher than the cost of freight of regular goods and the valuable goods which are not previously notified. Besides in the point of view of claim, the sender must notify the price or the value of the goods which are valuable to the carrier. When the sender does not notify the price of valuable goods to the carrier and when the valuable goods are missing, the carrier is only responsible for the substitute for regular goods shipment price/value. But if it is notified, the substitute will be valued based on the real price of the missing goods (sound value).[321]

[320] Article 469 Indonesian Commercial Code
[321] Article 470 Indonesian Commercial Code.

Under 469 ICC a carrier is presumed to be responsible for the delivery of the goods, regardless of what portion of the journey of tha cargo that spends on board. Thus, the carries are liable for the goods when such circumstance occurs.

3.3.1.3 Article 470

This article limits 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 as stated on the 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.

According to article 470 ICC, the carrier is limit his liability for loss or damage arising out neglicence, fault or failure in the carrying out of his (or his servant) duties or obligation, due to the lack of sea or cargo worthiness of the vessel. Furthermore, the article stipulates that the carrier has been well notified of the nature and value of such goods before the acceptance or shipment of the goods.

3.3.1.4 Article 471

This article also protects the goods owner from one sided conditions which (possibly) arranged 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 employed by the carrier is found a mistake or carelessness in doing the tasks. So, even though there is a limitation to refer to the carrier's liabilities, the carrier must be responsible for the mistake or carelessness of the staff the carrier hired. Instead the mistake or the carelessness of the staff must be proven by the goods owner.

Article 477 ICC allows the carrier to make specific contractual limitation on his liability. However, he will not release from his liability. If his or his servant's fault or negligence is proven, unless it is explicity agreed that in any case he is not liable.

3.3.1.5 Article 472 Up to Article 476

These articles mention the procedures of determining how to decide the compensation which becomes the burden for the carrier. These articles will be discussed later in the section of claim.

3.3.1.6 Article 477

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

Incidents which slow down the handover of the goods which belongs to the receiver

which can be considered as force majeure among others, are as follows:[322]

1) Broken engines bring about shipping should be delayed enabling the repair of the broken part to be proceeded. parts of the ships which are broken can be fixed while the ship sails are not included in the force majeure.
2) The Vessel commits violation of route which should be taken to avoid the sea storm.
3) The vessel assists people to be saved from danger in the sea, for example save a drowning passenger or boat people.
4) The vessel has to enter a port which is not a stopover port to let passengers or ship crew disembark due to the need of getting medical assistance to save their lives.
5) The vessel which is blocked by the pirate's ship but manage to escape through hardship and battle and through difficult and painstaking cruise.

Those incidents experienced by the ship that are described above must be proven by the ship's captain so that the ship owner can be free from law suit filed by the goods owner.

3.3.1.7 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 does not receive any information as it should be and he is not given proper information concerning the true condition, shape and

[322] Maritime Court, *Kumpulan Putusan Mahkamah Pelayaran 2011,* paper

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. [323]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 endangers 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.[324] 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 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

[323] Purwahid Patrik, 123
[324] Purwahid Patrik, 123

for the loss which happens to the carrier. [325] 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 any 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. For instance, 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. Regarding article 480 the last purpose of the shipment of the goods is to hand over the goods, shipped by the carrier to the receiver in the destined port (unloading dock) . [326]In article 480, it is regulated about how to hand over (redeliver) the goods by the carrier to the receiver of the goods in the destined port in a close by area with the destined port, that is, where the ship can securely float when the unloading of the goods be taken place. When the receiver of the goods receives the goods beside the ship, then receiver will receive the goods in the pier or by using some boats. When the receiver get the goods in the warehouse then the carrier must handle the transport of the goods by some boats

[325] Lasse, 64.

[326] Lasse,79.

to the warehouse. Usually, the carrier hands over the goods in a nearby location to the destined port. When the water in the port is to shallow, when it is agreed, the handover of the goods can take place in a nearby port.

3.3.2 Liability in Act number 17 Year 2008 on Shipping

Article 33 Chapter VI regarding things related to port part eight concerning the responsibilities in clause one, it is mentioned as follows: “Everyone or every corporation that 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 a guarantee. Clause (4) “statement as referred to clause (1), clause (2), and clause (3) is government regulation.

In article 34 Chapter VI regarding things which are 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 liabilities of the

carrier in clause (1) it is mentioned that "transportation company /service in waters liable 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.*

3.3.3 Liability 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.[327] 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 ton 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 P&I 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. The carelessness in fulfilling this insurance provision which is obligatory is considered a

[327] Frank J Vandall, Srtict Liability, Legal and Economic Analysis, New York, Quorum Books,1989, 115

crime for the owner and the one responsible for the ship and the ship is subject to arrest. P&I club will act as guarantor based on CLC 1969 and CLC 1992 and give evidence which is sufficient to 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. [328]. 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 national rules which is 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.[329]

3.3.4 Liability of Carrier to The Ship

Ship is a means of sea transportation and where people rely their lives on. Each safety of human life is threatened, either the sailor or anybody who sails. The data reveal 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.

For such anticipation, the ship crew and the ship passengers must know the techniques to rescue himself/herself when accident happens (personal survival technique), passengers and crews must also know about firefighting, first aid and personal safety and social responsibility.

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[328] Frank J Vandall .115
[329] Frank J Vandall .115.

For this purpose of safety, the ship crews need training, particularly in safety so that the ship crews will be skillful with safety procedures and techniques as required by IMO Convention and concerned government. A lot of accident victims in the sea were caused by lack of basic knowledge of safety, security, and protection to the environment, in line with the data from IMO that reveals the fact that there were a big number of victims of accidents in the sea transportation which were caused by Human Factor.

While knowledge, understanding, professionalism which are needed by ship crews in anticipating the risk of the accidents such as the fire that burns some part of the ship or even when the whole ship is exploded; The ship collision that might happen, collision other ship or crashing pier or other 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.

Government Regulation Number 1 in the Year of 1998 concerning the investigation of ship accidents, it splits the investigations of ship accidents into 5 categories, they are as follow: ship sinking, ship Burn/Fire, ship Collision, ship Accident which causes threat to human life and causes loss and ship wreck

The investigation of ship accidents comprises preliminary investigation by the chief of port and continuous investigation by Maritime Court. While in Indonesian Laws on Shipping Number 17 Year 2008 about shipping article 245 stating that: Ship Accident is an incident happen to a ship which threats the safety of the ship and/or threats human

life. The accidents covering: ship sinking; ship burn/ fire; ship collision; and ship wrecked.

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

a. Ship Accident investigation is done by National Transportation Safety Commission. The Commission is to seek the fact to avoid the accidents to be possibly occurred in similar causes.
b. Investigation as stated in clause (1) is done to each ship.
c. 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 Number 17 year of 2008, regarding shipping stating 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 government. And further to guarantee the safety in the sea, it needs a standard (regulation) which is applied nationally and internationally, among others:

1) Laws number 17 year of 2008 regarding shipping in which the procedures/the regulations to apply are explained in Government regulation and ministry decree.

2) Law Number 3 year of 1988 substituting Law Number 5 year 1964 regarding telecommunication, which is completed by PP (Government Regulation) No. 22 year 1974 regarding telecommunication for public.

3) Government regulation Number 7 year of 2000 regarding seamanship's 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 noncommercial cruise and also except specific boats/ships.

3.3.5 International Standard

In International standard, there are three world organizations which arrange the safety of the ships 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 per 5 (five) years. International conventions which arranges the ship safety comprises:

SOLAS 1974 (Safety Of Life At Sea) is one of the international conventions requirements which consists of ship requirements in the purpose of keeping the safety of people to prevent or to minimize accidents in the sea which covers ship, crew and

its cargo. To be able to guarantee the safety of shipping, 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:

1. Ship construction which is related with structure, subdivision and stability, mechanical installation and electrical installation in the ship.
2. Ship Constructions which are connected with fire either concerning fire protection, tools to locate fire and fire extinguisher. ‘’’
3. Setting and use of safety and rescue tools
4. Radio Communication tools.
5. 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 73/78 and its protocols 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, based on Marpol, are related to the conventions are:

1. Certificate of pollution prevention which is caused by oil.
2. Certificates of pollution prevention which is caused by sewage
3. 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 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. Collreg 1972 (Collision Regulation) Transportation ships are made without certain standard of safety. Besides, there are a big number of fleets in Indonesia which are used and are purchased from other countries. The maintenance of the ships is also below standard, the used ships which are inappropriate used to operate, or the ships are actually not feasible to be in operation. The use of ships, in the origin countries, are actual not used as transportation means anymore.

Tonnage Measurement 1966 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 are not reported

by STCW 1978 Amendment 95 and 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 0f 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:

1. Ship Requirements
2. Human Resources Requirements
3. Operational Requirements
4. External factor Influence to the ship operations

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. Time after time, sea accidents happen in Indonesia and the number never go down. Even, sea accident is caused by repeated same problem, that is, bad weather, overloaded cargo, or the ships which is not feasible to operate. Hence, Maritime Court stated that the bad weather have never been accepted by the court as an accident reason, in case of bad weather can predict with forecasting weather. In that cases head of port

(*syahbandar*) will not permit ships to sail.[330] In case of MV Teratai Prima the Master refused the warning of head of port (syahbandar) and weather agency that condition on the crossing were too dangerous to sail. From the survival passanger said it does not appear a general was raised to warn the passanger before the sinking. Furthermore, The National Transpotation Safety Committee said The Teratai Prima was inspected on December 9th, 2009, and found to be in a good condition.[331] It Stated that the sinking was caused by the weather and not a mechanical problem. For instance, it can be assumed that the sinking vessel caused by very bad weather and disobedience of the warning from port state control.

The reason of bad weather and nature condition, are actually not proper to be proposed as the main cause of shipping accident, because Metrology, Climatology and Geophysics office (BMKG) always notify condition of weather and its forecast.
This case makes the role of the chief of port very important. The head of port must strictly select which ships should be allowed to operate and which ships should 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, we also know there are many causes of sea accidents, such as: [332]

1. Bad Weather;
2. Fire including as the result of having dangerous cargo;
3. Ship stability including as the result of cargo shifted from its position;

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[330] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013
[331] CBC News, More Than 250 feared dead after cyclone sinks Indonesian ferry, January 12th, 2009
[332] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013

4. There is no reserved floating power as the result of excessive cargo;
5. Grounding and stranding;
6. Collisions;
7. Poor design and structure;
8. Human Negligence;
9. Blow Out (Offshore Oil Platform).

In respect of the above, the term seaworthiness relates to degree of fitness of the ship a to structure, equipment, and manning.[333] The sea worthiness has several purposes, firstly for marine purposes a ship is seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the sea of the adventure insured. Secondly, for the purpose of sea carriage contract that is the term may have an even wider application and will include cargo worthiness.

Seaworthiness means when a ship is on the fit condition and it fits for any normal perils of the sea, including the fitness of the vessel itself as well as any equipment on it and the skills and health of its crew.[334] A seaworthiness is a basic need for a shil to sail and so does not include piracy, severe storms or other such hazards that may occasionally be encountered. The seaworthiness standard is one of reasonable fitness and does not require a ship owner to have a perfect ship. The law does not require a ship to "weather any conceivable storm or withstand every peril the sea" [335] so the

[333] Convention on the International Regulation for Preventing Collision at Sea 1972 (CLOREG '72) this convention has been ratified by Indonesian Government through the KEPRES Number 50 Year 1979.
[334] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013
[335]COLREG'72

vessel must simply be fit for its particular purpose and offer reasonable safety on the open sea.

Furthermore, COLREG'72 stated in Rule 5, it requires that every vessel shall at the times maintain a proper look out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and condition so as to make a full appraisal of the situation and of the risk of collision. Within COLREG'72 Indonesian Government through Director General of Sea Communication regulated a guideline for Safety ship for sailing to be used by any head of port (*syahbandar*) in Indonesia. The guidelines regulates the procedure and liability for ships since preparing for sea up to preparing for arrival in port.[336] In port, they liable to accept cargo and passengers; Locating and discharging procedures; including those related to dangerous goods; preventing the accidental spillage of liquid cargoes and ship's bunker; use of reception facilities for oil, noxious liquids and garbage, and response to pollution incidents. At the sea, a ship must control the discharge into the sea of oily water from machinery spaces bilges, cargo residues from oil tankers, noxious liquid substances and garbage. This guideline is a manual standard containing minimal standard for ship since the ship in port, preparing for sea, at the sea until the ship is preparing for arrival in port. Since it is only a minimal standard the real guidelines is up to the ship and her company.

[336] Guidelines for seaworthiness for ship.

3.4 Cases in Shipping

As described in earlier chapter, until now ship accidents are something that we must be concerned of. 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 2009-2013, by the existence of 903 cases. In 2009, there were 159 accident cases, in 2010: 137 accidents, in 2011: 124 accidents, in 2012: 128 accidents, and in 2013: 145 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 5 years (2009-2013) were sinking (37%), running aground (13%), collision (15%), fire (18%) and other kinds of accidents (17%). See Table 1) Whereas According to Directorate General of Sea Communication the causes of the ship accidents were 37% of human error, 23% of technical fault, 38% of nature condition and 2% of other causes as described in the following table.

Table 2.1

The Factors of Accidents

	Year	Human	Natural condition	Technically
1.	2009	52	43	31
2.	2010	43	84	24
3.	2011	31.	99	48
4.	2012	24	78	66

5.	2013	37	75	25

Source Ministry of Transportation, 2014 Data was processed

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.[337] 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, 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 equipment are relatively low. Guiding and tug boats in several ports are not sufficient either in number or technical condition. Coast guard patrol ships or GAMAT/KPLP ships owned now are still not enough in quantity and quality.

3.4.1 Supporting factors on Safety of Shipping

3.4.1.1 Marine Inspector

The frequency of ship accidents occurred in our country, especially during 2009 - 2013, gave a big question concerning the performance of the Marine Inspector. Has the marine inspector performed his obligation? For example, sound system which does not properly work to warn emergency situation on the ship (emergency alarm system), in case MV Teratai Permai davit which does not open when touching sea surface, and sprinkler which cannot spray water when there is fire[338]. Even though alarm, davit and sprinkler do not function but in fact those are stated feasible in the certificate.

[337] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013
[338] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013

Marine Inspector begins to work once a ship is built in the dock. The inspector checks whether the construction of ship flank, electricity and ship machinery, and other things have met the requirements as stated in Safety of Life at Sea (SOLAS). In practice, every country can delegate the work done by Marine Inspector to another party and it is based on the country's classification. But, in Indonesia, this duty has not been given fully to BKI (*Biro Klasifikasi Indonesia or Indonesian Bureau of classification*) /[339] PT. Only countries of flag of convenience (FoC) which delegate ship safety inspection aspects to foreign classification because they do not have it.

In Indonesia, Ministry of Transportation as the one who holds the authority of applying SOLAS – in IMO, it is said as the Administration – has given the authority of checking ship flank, electricity and ship machinery to Indonesian Bureau of Classification or BKI. Whereas other aspects, such as; radio installation, feasibility of safety equipment on board of the ship, etc are still carried out directly by the Ministry of Transportation through its Marine Inspector. That condition is commonly said by domestic ship owners as multiple classification. At first, the classification done by BKI and then is further classified by the Ministry of Transportation. In other countries, the authorized party usually conducts the classification will do all work related to ship safety aspects because the government has handed over the authority to the authorized party.

3.4.2 The Performance of Marine Inspector of Ministry of Transportation

Having known the testimonies from the survivors from various accidents in Indonesia and the findings from the authorities who investigated the causes of the accidents, it is

[339] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013

revealed that most of the victims died from falling because the safety equipment available onboard the ships were not sufficient or did not function as they should be. In the fire case of KM Levina, it was revealed that the sprinkler to extinguish the fire did not work. Whereas in KM Teratai Prima accident, as revealed by the survivors, there was no announcement whatsoever from the crew that there was an emergency situation. Ironically, referring to the certificate for safety equipment, those ships had completed certificates. Even in the case of KM Teratai Prima, the ship just underwent docking.

The question is whether the certificates issued by the Ministry of Transportation was after the overall inspection by the Marine Inspector? It is not to blame, but it seems that the safety equipment was not checked in detail.

It might be possible that the Marine Inspector of the Ministry of Transportation made some notes to the feasibility of ship safety equipment in the certificate that he issued so that the owner of the ship should make some improvement when the certificate must be renewed. If in emergency situation, those equipment do not function well, then they should be blamed. If the Marine Inspector does not perform his work accordingly, they should also be questioned for their responsibility.

The cause of ship accident as the result of storm or ebb tide relatively easier to cope with the presence of communication system and report from BMKG (Indonesian Weather Bureau) which is much faster and more accurate.

On the other side, IMO statistics shows that 80 percent of all sea accidents are caused

by human error as the result of bad management system of ship owner's company. So, there has been special emphasizing that ship company must be responsible for ship safety besides captain, officers and crew of the ship

3.4.3 International Safety Management Code (ISM Code)

ISM Code is an international standard for safety management in ship operation and precaution / control of environment pollution. Based on the awareness to the importance human factor and the need to improve ship operation management of ship accident precaution, human, cargo and properties and to avoid sea pollution to happen; so IMO issued a regulation concerning ship safety management and the protection of sea environment known as International Safety Management Code which is consolidated into SOLAS Convention. Basically, ISM Code regulates that there must be a safety management either shipping company or ship including the human resource handling it.

For shipping company, an officer with the level of manager known as DPA (Designated Person Ashore) must be appointed. He is responsible and conducts monitoring on safety from on behalf of the shipping company. The manager is responsible and has the direct access to the Managing Director / Ship Owner of the shipping company.

For vessel, in every vessel there must be a system and procedure to cope and prevent any disturbance towards safety and in the implementation an officer must be assigned to be responsible in monitoring the safety of ship and pollution prevention from the ship.

In practice, the condition in the field of all over Indonesia shows that the regulation dealing with the report in safety management system is often manipulated. In fact, to maintain the safety of ship and environment, ISM Code system is implemented with Designated Person Ashore (DPA) to monitor the ship and company's management periodically. ISM Code is not applicable for vessels with the measurement< 500 GT. The aim of ISM Code is to provide international standard in ship management and operation which is safe and prevent itself from making any pollution.

For vessels that meet the requirements will be awarded Safety Management Certificate (SMC) whereas freight management which fulfill the regulation will be awarded with Document of Compliance (DOC) by Indonesian Classification Bureau.

3.4.4 The Decision of Maritime Court

Maritime Court is a judicial court which is under the Ministry of Transportation which had the duty to try cases or offences towards the safety of sea voyage which are filed by the Directorate General of Sea Transportation.[340]

Judicial ground for Maritime Court dated from Dutch West Indies in 1934 based on *Ordonantie op de Raad voor de Scheepaart* published in State Gazette 1938-2 (later was corrected and added) and for the first time a judicial body of court of maritime was established and has the duty to legally settle the ship accident[341]. After Indonesia gained its independence, judicial body of court of maritime became Maritime Court of

[340] Djoko Triyanto, Bekerja Di Kapal, PT Mandar Maju, Bandung, 2005, 168
[341] Interview with the Head of Maritime Court on 10-10-2011

which organization is under the Department of Transportation as explained in Laws of Maritime.

The following table explains several cases which already obtained the decision from Maritime Court;

Table 3.1

List of Cases of Maritime Court

Decision Number	Case	Decision
1010/051/I/MP.10	The burning of KM Samudera Jaya	The burning of the ship was because of electric short circuit. The captain was punished
1011/051/III/MP.10	The sinking of KM Dumai Express-10	The sinking of the ship was because of captain's incapability to navigate in bad weather
1012/051/III/MP.10	Grounding of MT Alexandri in Buton Strait	The ship ran aground because the captain was not accurate in preparing the procedure and navigational equipment
1013/051/III/MP.10	The collision of TB Benua Asia I ship which was towing TK Mudah I on its side with Kapal Pedalaman in the waters	The collision was because of captain's inaccuracy in managing ship movement
1051/051/IV/MP.10	The sinking of KM Karya Rejeki in Karimunjawa waters	The accident was caused by ship leakage on left and right front part and the captain did not pay attention to wind course
1015/051/MP.10	Grounding of KLM Karya Rejeki	The ship ran aground because the captain did not pay attention to environment condition and procedure which was started by Port Authority
1023/051/MP. 10	The collision of KM Marina Nusantara with Tk Bungur which was towed	The collision happened because the captain of KM Marina Nusantara was inaccurate in deciding when his ship sailed into the other ship
1029/051/XII/MP. 10	The burning of KM Wetar	Lack of fire extinguishers and unskilled crew
1011/051/III/MP.10	The sinking of KM Dumai Ekspress-10	Ship leakage which made the ship sink Unskilled crew

Decision Number	Case	Decision
1030/051/II/MP-11	The sinking of KM Lambela	
1031/051/II/MP-11	Collision of KM SHINPO-18 With KM BOSOWA VI	Ship leakage of KM Shinpo -18
2010/06/III/MP -11	The shinking of Tanker MT-AB-8	Bad weather
2011/09/VII/MP-11	The Shinking of KM Intan Samudra	Unskilled crew

Source Decisions of Maritime Court (data was processed)

From the aforementioned decisions of Maritime Court, it is proven that ship crew did not uphold sea transportation law and violated Indonesian Code of Commerce book II on Sea Transportation Article 342 point 1 which explains that in coping bad weather, a ship captain *Nakhoda* does not anticipate in early time according to the good skills of crew. So that based on the cases above, it can be concluded that the accidents happened because of internal factors:

> *The master was inaccurate in sailing his vessel and based on above cases, the master was not skilled in managing the course of his ship (going in and out of a port). In the view of the implementation of STCW-95 which commenced on 1st February 2002, in fact, the master and his crew did not entirely implement SCTW-78 Amanded in 1995 and the Decree of Minister of Transportation numbered 70 regulating the crew of commercial vessel. One of the indicators of the accidents above was because of the carelessness of the captain and his crew. The other indicator was mostly captain and his crew have not obtained required certificates (certificate of competence and certificate of profession).*[342]

In view of Port Authority, knowing its strategic institution in the prevention of ship accident, the institution has the right whether a ship is feasible to sail or not. After a ship is technically and juridically examined, the ship then can set sail. Even though a

[342] Mahkamah Pelayaran, Kumpulan Putusan Mahkamah Pelayaran Tahun 2010

master on board of a ship understands the condition of his ship and the master has the right not to set sail when he knows that his ship is not feasible.[343] Regarding the last decision whether a ship can set sail, the Port Authority has the last say. But, in fact, the Port Authority will issue the permit to sail even though safety equipment, are not adequate or even there is passenger over-capacity especially in peak season.[344] This may happen because port authority officer in the field gets external pressure or there is a possibility that the officer is not professional.

Ship condition. A ship must be equipped with various equipment covering not only their quality but also their quantity. In reality, there is an understanding about the distance of the route the ship sails. It means that if the distance is short, so the equipment are limited. Different quality and quantity of the existing equipment may become the factor of the accident.

Besides internal factor, there are also external factors: Nature factor in Indonesia. Indonesia has so many ridges of corals and this has become the factor of ship accidents, as an example is KLM Karya Rejeki shipwreck. Coral reefs below sea level can cause high risk of accident. So, ships must avoid getting stuck in coral reefs when the ship makes its sea course line on the map.

The physical peculiarity of the Indonesian sea are possibilities of accidents due to the

[343] Official Rules for the crew of PT PELNI ships Article 6 point 6: The captain or the head of vessel as the skilled seaman, when he wishes to set sail must make sure that his ship has met the requirements of sea feasibility and is entitled to refuse to set sail when his ship does not have seaworthiness.

[344] Wiwien Imam Subekti, *Implementasi Perjanjian Pengangkutan Penumpang Angkutan Laut Antar Pulau di Indonesia,* Disertation at Doctoral Program in FHUI, 300

heavy traffic. According to Hamzah, the climate in the Indonesian sea is typically equatorial with uniform high temperature, high humidity and copious rainfall and two main seasons: the Northeast Monsoon (occurs from late November to March) and Southwest Monsoon (occurs from May to September). Strong thunderstorms called Sumatera's may produce gusts of 40-50 knots or higher during the Southwest Monsoon.[345] There are dangerous banks composed of sand at the One Fathom Bank Traffic Separation Scheme and Fair Channel Bank[346].

Port Condition. The port is relatively sensitive for ongoing and ingoing ships such as in the collision case between TB Benua Asia I ship which was towing TK Mudah I ship on its side and *Pedalaman ship*, either in the view of the current, depth and narrow passage.

Navigation. The procedure of navigation beyond the government standards this could be seen from the accident involving Dumai Ekspress and Aleksandria ships. It could happen as the result of poor monitoring and implementation of ISM Code.

There has been the lack of sea navigational equipment such as beacons, buoys and etc which are really necessary for sea passage and port (in view of quality and quantity). So, according to those points above and results of research, it is clear that the cause of accidents mostly are caused by human error especially ship crew who are not disciplined and the implementation of laws or regulation of safety.

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[345] Hamzah, The Straits of Malacca, International Co-Operation in Trade, Funding & Navigational Safety, , UM Publication, Petaling Jaya 1997, 10

[346] Mary. Legal Regime Of The Straits of Malacca and Singapore, , Lexis Nexis Malaysia ,2014, 10

The other factor which is also important is weather which determines sea safety. Based on a source in KNKT or National Commission on Transportation Accidents, bad weather should have been avoided because bad weather makes a ship automatically not set sail and because of that there is a need to improve the information about weather as well as port andship's hull and all those described become the responsibility of the government.

CHAPTER FOUR

MARINE POLLUTION IN INDONESIAN SEA

4. 1 Overview of Types of Marine Pollution

4.1.1 Definition

Pollution is defined as follow : Pollution is defined in the Dictionary of environment and Development as : the addition to the natural environment of substances that, through either their composition or the amount released cannot be rendered harmless by normal biological processes.[347] Whereas, UNCLOS stated thet :" Pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely result in such deleterious effect of harm of living resources and marina life, hazard to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairments of quality for use of sea water and reduction of amenities."

This definition is the same as definition of Pollution in Indonesian Management Environmental act 32 Year 2009 defines that pollution is any direct or indirect alteration of the physical, thermal, chemical, or biological properties of any part of

[347] UNCLOS

the environment by discharging, emitting, or depositing environmentally hazardous substances, pollutants or wastes so to affect any beneficial use adversely, or welfare, or to animals, birds, or to plants or to cause a contravention of any condition, limitation, or restriction to which under this Act is subject.[348]

Pollution as defined in the Dictionary of Environmental Science and Technology, the introduction into environment of substances or affects that are potentially harmful or interfere with species or habitats.

Pollution of Marine environment is defined in Article 1(1)(4) Law of the Sea Conventions (LOSC) as the introduction by men of substances or energy into marine environment which results or is likely to result in one or all of the following four deleterious effects: i harm of living resources, ii hazard to human health, iii hindrance to marine activities (including fishing and impairment of quality for use of sea water and reduction of amenities.

Under this definition, pollution is assumed as the introduction of pollutant in the marine environment. This provision calls for three brief comments.[349] First, this is an open definition which may include all resources- the existing and new sources-of marine pollution. Second, the definition covers substances or energy which is likely to result in deleterious effects. It would follow that potentially harmful effects on the marine environment encompasses marine living organisms. Hence the protection of

[348] Article 1 Environmental Protection and Management act 32 Year 2009

[349] Patricia Birnoe, Alan Boyle, Catherine Redgwell, Marine Pollution, Oxford Press, United Kingdom,2010, 381

the marine environment also involves the protection of marine species can also become the object of regulation. Third, as shown in the reference to living organisms. Hence the protection of the marine environmental also involve the protection of marine species.[350] In other provisions the term is used, however, in the sense of the result of the introduction of pollutants. Combined with chemical characteristics of the water influence the absorptive capacity and carrying capacity of the marine environment. These capacities are predicted to decrease in line with the increase of marine pollution in the straits from land – based sources, dumping and from vessel.

The marine pollution in the straits is polluted by a number of sources as mentioned above. Major oil spill accidents have been reported in the Straits of Malacca and Singapore.[351] In January 1975 MV Showa Maru spilled 54,000 barrels of crude oil in the Straits of Malacca; on October September 1992 MV Nagasaki Spirit Collided with MV Ocean Blessing and spilled 100,000 barrels of crude oil and 21 May 1999 the SS Sun Vista spilled 14,000 barrels of fuel oil and sank in the same straits , On April 2008 the 533 ton MV Indah Lestari was in its way to East Kalimantan in Indonesia with some 60 tons of the poisonous industrial chemical phenol and 18 tons of diesel.

Marine environment plays a very important role in maintaining a balance in the overall global eco-system. Tampering with this environment without due thought, would surely result in long term drawbacks. Hence much stress is laid these days on

[350] Yoshifumi Tanaka,2012, The International Law of The Sea, Cambridge University Press, United Kingdom. 2010. 256

[351] John G Butcher, Indonesia Beyond the water's Edge, Managing Archipelagic State, Indonesia, ISEAS, Singapore, 2010 105

preventing maritime pollution.

The LOSC identifies six sources of Marine Pollution[352] :

i. Pollution from land-based sources.

ii. Pollution from seabed activities subject to national jurisdiction

iii. Pollution from activities in the Area

iv. Pollution from dumping

v. Pollution from vessels

vi. Pollution from or through the atmosphere

Based on the principle, these sources of marine pollution can be divided into four principal categories i. land- based marine pollution ii. vessel-source marine pollution, iii. dumping, iv. Pollution from seabed activities.[353] The same as Mohamad Naqib stated that the are four main sources of marine pollution, namely operation of ships, dumping, sea bed activities, and land based activities. [354] Furthermore, Mohammad Said wrote that Oil pollution in the oceans is due to major tanker accidents. Hence In this thesis, only vessel source marine pollution will be discussed.

Furthermore, strict regulations are placed in most countries and it is not easy for any ship or company to get away after causing any damage to the marine environment. Marine pollution has various forms such as accidental spillage of oil (which is unfortunate but still understandable as accidents happen in all spheres of industry) due to ship collisions, grounding etc.

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[352] Article 1(1)(4) Law of the Sea Conventions (LOSC)
[353] Article 1(1)(4) Law of the Sea Conventions (LOSC)
[354] Muhammad Naqib Ishan Jan, *Principles of Public International Law*, IIUM, Malaysia,2009, 329.

The incidents of deliberate pollution are more worrisome as they pertain to the mindset of the seafarers and companies. For example, in the earlier days, all the waste oil, sewage etc., were dumped into the oceans. All this is strictly prohibited nowadays, and regulations prevent any disposal of these materials especially those such as plastics into the oceans. The losses resulting from marine pollution can end up in an endless chain of claims were injured parties will seek compensation. In practice, hundreds or thousands of claims may be generated from a particular incident. You can easily think of the impact that an oil pollution incident may have on vessels' hulls or on the equipment of fishing boats (e.g. fishing nets), or on maricultural facilities at the place of the slick. Perhaps, you have not considered the problem of including, or not, in the scope of losses giving rise to compensation more distant, yet related, situations, such as the reduction of entrance tickets to local car parks or aquariums in the area concerned or even the losses incurred by spa-resorts which have not suffered physical damage but have seen their bookings dramatically reduced. What is important to understand is that the circle of interests affected by the incident may grow out of control and some criteria are needed in order to provide solutions.

In the case of the sinking of the Solar 1 in August 2006 in Guimaras straits, in the Philippines, where about 1072 tons of oil were spilled according to the International Oil Pollution Compensation Funds (IOPCF), as at October 2013, 32,466 claims were received, and payment was made with respect to 26,870 claims. The vast majority of claims were received by the IOPCF, which will be discussed in Module 6, from the fishery industry; additionally, claims were submitted on the grounds of damage to maricultural, property damage, tourism-related infrastructure, etc.

Fundamentally, the solutions to the problem differ from one country to another, despite some degree of uniformity at the international level. Economic loss will be distinguished from cleanup and containment expenses and from the so-called ecological loss. These are important concepts that will be discussed below, and which are useful to remember. As already mentioned, it should be clear from the outset that the specific circumstances of the loss, which depend on the region and on the industry, should always be borne in mind when dealing with this matter.

Consequential economic losses are based on property damage or physical loss (of property). They can result from the contamination of fishing vessels, fishing gear, maricultural facilities or tourism-related infrastructure, which prevents the use of relevant assets, and results in loss of income. Loss of income continues to exist during cleaning or replacement operations. On the one hand, proof of the property damage or physical injury is needed. On the other hand, the loss of ensuing income will have to be proved as well. At a practical level, these are demanding tasks for the claimants concerned. Pure economic losses exist in the absence of property damage or physical loss (of property). Pure economic losses arise, for example, if a fishing fleet cannot depart from an affected port due to a fishery restriction (we assume that the vessel has not suffered any damage) or if access for tourists is rendered very difficult or impossible due to cleaning operations, which impacts on local hotels and bars. Confidence in a particular tourist destination or in seafood products from a particular area may be lost. Pure economic losses may take the form of lost profits, lost earnings,

business interruption damages, expenses incurred in efforts to limit the damage,[355] etc. Company accounts or other financial statements will evidence this type of loss. Depending on applicable statutes in a particular State, pure economic losses often go uncompensated. As mentioned above, economic losses should be distinguished from injuries to natural resources, commonly known as ecological damage (e.g. land, wildlife, air, etc.). Many discussions have been held on the utility of compensating pure ecological damage. Some of these discussions which advocate in favour of the compensation of publicly owned marine resources impaired by marine pollution incidents stress the fact that the public has the right to use certain marine resources, such as beaches, fish stocks, etc., and that the rights of the public are held "in trust" by the authorities for the public at present and in the future[356]

Depending on the legal system concerned ecological damage may notably give rise to the compensation of reinstatement measures or go uncompensated. It is clear that the impact of marine pollution accidents can be detrimental on coastal areas presenting an ecological interest and/or an interest for recreational activities, negatively impacting the quality of life of coastal populations. Even though the interest of the case presented below is local, the clarity of the facts will help your understanding of pure ecological damage. The case was adjudicated in 2006 by the Supreme Court of the Federated States of Micronesia in the North Pacific Ocean and it points to the numerous facets of ecological damage. The case is entitled 'People of Rull ex rel Ruepong v. MV

[355] Mulhern, 1997.

[356] Edwards & Carlson, 27

Kyowa Violet' (2006) FMSC53; [357]

4.1.2 Nature Of Casualties Involving Ships

Vessel-source pollution has two kinds: operational and accidental.[358] Operational vessel source pollution is produce by the normal operation of ships. Vessel with oil burning diesel engines discharge some oil with their bilge water, and the fumes discharged through their funnels into the atmosphere will eventually return to the sea. In the early days of tankers operation, it was common practice that oil with their bilge water and the fumes discharged through their funnels into the atmosphere will eventually return to the sea.

Ships have always used the sea on which they navigate to dispose of their operational waste. Formerly, sea consisted of garbage and sanitary waste, but today ships also discharge oily residues, such as bilge water, sludge and oil waste. In addition, chemical and oil tankers wash out dirty tanks at sea and also discharge their ballast water. In the early days of tankers operation, it was common practice that oil tankers washed their oil tanks by means of jets spraying seawater and disposed of the oily residue at sea. As a consequence, a considerable amount of oil was discharged into the sea, causing oil pollution. Currently this problem has been virtually eliminated by load on top and crude oil washing methods. [359] According to the "load on top" methods, tanks are to be cleaned by high pressure hot water cleaning machines, and resulting oily mixtures into a special slop tank. As oil is lighter than water, oil gradually floats to the surface.

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[357] http://www.paclii.org/ accessed last visit 8th January 2017.
[358] P. Birnie, A Boyle and C. Redgwell, International Law and the Environment, 3rd edition, Oxford University Press, 2009, 399
[359] www.imo.org./SharePoint?mainframe.asp?topic_id=306. Accessed 20 Maret 2016

Later, only the water at the bottom, is pumped into the sea, leaving only crude oil in the thank. Under the crude oil washing method, the tank is cleaned by using crude oil , i.e. the cargo itself. By spraying the oil onto the sediments clinging to the tank walls, the oil can turn back into usable oil that can be pumped off with the rest of cargo. This method became mandatory for new crude oil tankers of 20,000 tons above by Annex I of MARPOL 73/78 (regulation 13(6)).

MARPOL is Adopted by the IMO in 1973 and modified by the Protocol of 1978, MARPOL is the main instrument on marine pollution prevention and control. It represents the reaction of the international community to a number of serious maritime casualties involving oil, including the Torrey Canyon and the Amoco Cadiz. It is much more, however, than the combination of two texts (1973 and 1978 version – the instrument has also been modified by a Protocol dating 1997 which introduced Annex VI on air pollution by vessels), as it has been amended many times through the years by MEPC instruments (resolutions), and some of its recent amendments are expected to enter into force in the coming years. More specifically, the Convention aims at the prevention of pollution from ships and the protection of the marine environment from discharges or effluents of harmful substances to the sea, from the standpoint of both operational and accidental discharges. MARPOL sets out criteria for discharges at sea, which differ from one category of pollutant or sea area to another; it also requires from the ship master appropriate reporting of any pollution casualty referred to as 'discharge above the permitted level'. In addition to the above, MARPOL provides for cooperation between States parties with regard to the sanctioning of violations.

MARPOL 73/78 includes six annexes. All annexes have entered into force, following

their ratification by the requisite number of States which had to represent a gross tonnage of more than 50%. The Annexes are the following, namely: Annex I on Regulations for the Prevention of Pollution by Oil (in force since October 1983). Annex II on Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk (in force since October 1983). Annex III on Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form (in force since July 1992). Annex IV on Regulations for the Prevention of Pollution by Sewage from Ships (in force since September 2003). Annex V on Regulations for the Prevention of Pollution by Garbage from Ships (in force since December 1988). Annex VI on Regulations for the Prevention of Air Pollution from Ships (in force since May 2005). The annexes of MARPOL have been ratified by almost the entirety of the world's shipping tonnage.

Moreover, the number and the size of ships sailing on the ocean has increased considerably in this century not only in Indonesian but also in almost entirely sea of the world. The cumulative effect of this is a large scale operational pollution. This type of pollution has become a wide spreading problem. It not only affects coastal areas along the main shipping routes, but also vast areas of the oceans where there is little traffic of ships. Vessel-source pollution may damage fishing stock and various forms of marine life, and it also affects the shipping industries. It is, thus essential that state take action to reduce and control vessel source pollution of the sea in order to preserve the marine environment.

Besides vessel, the factors which contribute to the occurrence of marine of marine

pollution could be natural conditions, density of traffic and activities, and Legal institutional aspects of pollution control in the sea.

4.1.3. Natural Conditions

Indonesian sea has been identified by Sailing Direction issued by US Defense Mapping Agency as the most difficult passage in the world due to shifting of bottom sand, tidal rangers and tidal currents.

The sea is a funnel shaper waterway with extremely contrary physical features. The width of the sea varies from 3 miles at the narrowest passage near Singapore Island to 300 miles at the widest near the northwestern entrance between We Island and the Kra Isthmus. At different places, The Sea is quite shallow. The sea is 100 meters deep close to the Continental Slope of the Andaman Sea, full of rocks, dangerous reefs and cross currents.[360] Therefore, as mentioned previously the wind in Indonesian Sea is very unpredictable. It is obvious, since the natural conditions are a significant problem in navigation, especially for deep draft vessels such as Very Large Crude Carriers (VLCCs). These physical conditions have contributed to ship groundings, vessel collisions, and other navigational causalities such as the grounding of Showa Maru in 1975, the collision of Nagasaki Spirit and Maersk Navigator in 1992, the grounding of Cathay Shipping 2011, KM Cahaya Line 2012 and KM Harapan III 2013.

4.1.4. Density of Traffic and Activities

Until now, almost the entire country cannot be separated from the various rules of

[360] Mochtar Kusumaatmadja, (1998) Control of Marine Pollution In The Straits of Malacca and Singapore: Modalities For International Co-operation. Article from Singapore Journal of International & Comparative Law Journal 2, 453.

international conventions, where the United Nations to facilitate the establishment of international organizations related to transportation safety. In Indonesia, the motto is seen countries not members realized well.

This is associated with a variety of problem frequent shipping accidents, including the security of shipping, so getting in Indonesia which is considered unable to ensure the safety and security of sea transport activity, including how to carry out enforcement at sea it can say here is no clear who actually has authority of law enforcement at sea on all the problems of safety and security of shipping.

It is also supported by the circumstance that the waters of Indonesia is quite dense waters traversed by ships that ship collisions often occur, Among large enough collision case are:

As the island nation called Archipelagic State, UNCLOS 1982 has required Indonesia to provide sea shipping channel for commercial ships passing through Indonesian waters of the North towards the South and vice versa. The shipping channel known as the Indonesian archipelagic sea lanes (ALKI) designated as the flow of innocent passage for ships - International ships that crossed the ocean waters of Indonesia.

Vessel source solution presents certain peculiarities in that vessels, normally under the jurisdiction of the flag State, are moveable things which can be found in areas under the jurisdiction of third states which have a particular interest in protecting those areas. In addition, coastal states complain that past experience has shown that flag state legislation is not always adequate to protect their coast offshore living resources.

While knowledge, understanding, professionalism which are needed by ship crews in anticipating the risk of the accidents such as the fire that burns some part of the ship or even when the whole ship is exploded; The ship collision that might happen , collision with other ship or crashing pier or other objects in the sea. ; sinking, ship wrecked, 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.

The operations of ship that causes pollution, needs a treatment to avoid worse pollution. The regulation that applied to the treatment is MARPOL 73/78. It contains a set of regulations regarding sewage and garbage into the sea. Ship equipment to prevent the collision and any other accidents.

Maritime safety and marine environment protection are not totally independent concepts, they are deeply connected. You can easily appreciate that an unsafe ship, for example, either from the point of view of its equipment or maintenance, represents a potential danger for the marine environment. The full picture on marine pollution management and prevention cannot be grasped without understanding the role of another instrument, which operates in parallel with MARPOL, i.e. the International Convention for the Safety of Life at Sea, 1974. This is the most important international instrument on maritime safety, which also impacts by its very nature on the protection of the marine environment. It sets out the minimum safety standards on the construction, equipment and operation of vessels. Registration countries (also known as flag States) have the responsibility of ensuring that their vessels are compliant with these requirements. To this end, a number of certificates are laid down by the

Convention that are examined by port inspectors during port State control. The ISM Code and the ISPS Code are based on the Convention.

The very first version of SOLAS was adopted in 1914 following the Titanic disaster; numerous versions followed. The current version dates from 1974 but has, however, been subject to a number of amendments. For this reason, the Convention is commonly referred to as 'SOLAS 1974, as amended'.

The ISM Code is directly connected with marine environment pollution prevention and management. It has been adopted in recognition of the importance of safety culture and the role of the human element – it is well established that about 80% of maritime accidents are attributed to the human factor. This very important Code sets out an international standard for the safe management of ships, which includes marine pollution. A new Chapter to SOLAS was adopted on 24 May 1994 entitled "Management for the Safe Operation of Ships". The new Chapter (Chapter IX) is technically speaking an amendment to SOLAS and refers to the ISM Code, and thus making it mandatory (the Code is not included in SOLAS, but this is a technical matter, the essence is that the ISM Code is adopted through the said amendment and it has been mandatory - with variations in relation to ship category- since 1998). It should be noted that the ISM Code has been amended a number of times.

In practice, the Code requires that the entity who has assumed responsibility for operating the ship, (this technically includes the company, the shipowner, the manager, the bareboat charterer or any other person), establishes a Safety Management System (SMS). The SMS should be the tool for ensuring compliance with applicable rules and

standards, including IMO guidelines and other instruments.

More specifically, the SMS should ensure the following elements (referred to as 'functional requirements' in the terminology of the Code): a safety and environmental protection policy; necessary procedures with a view to ensuring safety and environmental protection; defined levels of authority and lines of communication for personnel aboard and ashore; accident reporting procedures; emergency response procedures for internal audits and management review. The entity who has assumed responsibility for operating the vessel must implement the objectives in question through appropriate plans, procedures and policies which should be properly documented (e.g. plans and instructions for major shipboard operations; adoption of corrective measures, where needed). Compliant companies are issued a Document of Compliance (DOC) subject to periodic checks of the flag State. Compliant ships are issued a Safety Management Certificate (SMC).

To ensure the safe operation of each ship and to provide a link between the Company and those on board, every Company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution-prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required. Some of the directions set out by the ISM Code represent important principles of environmental management which the companies are encouraged or are obliged to adhere to (e.g. by incorporating them in their planning and/or management systems).

In this context, one can take note, for example, of the following: -continuous improvement, including at the level of environmental performance; -appropriate education, training and motivation of employees; environmental emergency preparedness; self-evaluation, including audits and reviews, etc.

Table 4.1

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 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	Engine Ship, Sail Boat, Motor, Tug Boat, barge, Tanker Captain of the ship, Ship Crews, Port Control Officers, Passengers Ship Owner, Marine Inspector,
WHY	Technical Factor • Inaccuracy in designing the ship • Inability of crews 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 causes accidents, burn/fire. c. Natural Factor d. Bad weather; storm, high tide, overrated current, fog that causes limited sighting range.	Ship Staff, Dock Officials, Ship Equipment Supplier, Ship flow, Port Pond, Information from Metereological, Climate and Geophysics Office.

Source Departmen Perhubungan

As a long –term member of the IMO, Indonesia has ratified carious international maritime conventions on marine safety and marine protection. Indeed, with so much to gain from better safety at sea, Indonesia has ratified various international maritime conventions and IMO convention as well more than any other nation in South east

Asia. Indonesia's ratification of IMO conventions gives it rights and responsibilities as a flag state, it has the responsibility to ensure that ships comply with international regulation on technical management and labour. At the moment, there are 2,131 designated port in Indonesia consisting 0f 975 regular ports and 1,156 special ports. There are four main port are Balawan in Medan, Tanjung Priok in Jakarta, tanjung Perak in Surabaya dan Makasar.[361] This is not an easy effort to establishment of controlling port in Indonesia in order to obey the International and National regulation

4.2. Major Casualties from Shipping Activity

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 many 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.

Strict regulations are in place in most countries even though they are not easy to apply for any ship or company. This regulation are very needed to get away after causing damage to the marine environment. Marine pollution has various forms such as accidental oil spills due to ship accidents such as collision, grounding, shrinking.

[361] Interview with Capt Bobby R. Mahamit, at Ministry of Transportation 13 th December 2013

Marine Casualties as define in Government Regulation Number 1 in the Year of 1998 concerning the investigation of ship accidents, it splits the investigations of ship accidents into 5 categories, they are as follow: Ship sinking, Ship Burn/Fire, Ship Collision Ship Accident which causes threat to human life and causes loss. ship wreck. 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.

4.2.1 Collision

According to the findings of the Maritime Council there are some data that show some proofs the negligence of the master since he did not record the following things[362]:

1. The position of the vessel collision
2. The exact time when the collision happened because the time from the clock on the bridge and in the engine room as well as the accuracy of the course recorder, recording engine telegraph and the other must be synchronized at all times available appointment time of the crew who saw the collision happened

[362] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013

should also be noted.

3. Location of the ship or heading when collision occurs. It is important to be marked in the course recorder telegraph with ink when the violation occurred.
4. Angle of collision.
5. The estimated speed of the respective vessels when the violation occurred and the position of the location of the bow and engine rotation.

Based on data above the role and liabilities of the master as the person who liable for the ship collision is very big. As a leader, the master must be sure that all the crew members are viewing the collision occurred before and after the offense.

Articles 534 up to 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. [363] The professionalism of the crew aspect is examined by the Maritime Council which has an authority to determine whether the master and/or crew of the ship have committed fault when the accident/collision occurs.

[363] Interview with Mr Munanto as Judge at Maritime Court, Ministry of Transportation 13 December 2013

Under Indonesian Law, collisions and/or any accident at sea which has big impact will be investigated by the National Transportation Safety Committee (locally known as Komite Nasional Keselamatan Transportasi or "KNKT") as the authorized state authority to conduct investigations over any accident at sea. However, such investigation would not determine who is liable or negligent over such accidents. Based on the result of accident investigation, KNKT issues recommendations to the government to prevent the recurrence of similar accidents. 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.

For a comparative, A collision incident is governed by the Maritime Conventions Act 1911 in Singapore[364], which provides that generally, parties are liable for their proportionate degrees of fault in the event of a collision and where it is impossible to attribute fault to either vessel, blameworthiness is to be apportioned equally. The same legislation is also applicable in Malaysia by virtue of Section 5 of the Civil Law Act 1956 of Malaysia.[365]

Under the relevant articles in the Indonesian Commercial Code, the liability of parties in a collision is similarly dependent on the proportion of fault that causes the collision. In Indonesia, the most crucial issue to be proven is the element of fault, which is

[364] GARD, 19.
[365] GARD, 19

regularly taken to be reasonably related to the professionalism of the crew, especially the master.

4.1.2 Pollution

As mention in the previous chapter, Definition of pollution is to enter directly or indirectly into the marine environment, including estuaries a substance or energy that can cause damage to marine resources hazardous to human health, shutting down fisheries business, and degrades the sea to such an extent that it can no longer be used.[366] It also can be said the:

> *"Pollution of the marine environment" means the introduction by man, Directly or indirectly, of substances or energy into the marine environment, including estuaries, the which results or is Likely result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, Including fishing and other legitimate uses of the sea, impairments of quality for use of sea water and reduction of amenities.*[367]

Pollution from ships, particularly oil is wasted or spilled into the sea because of routine or accidental. Due to the installation of oil drilling platforms at sea, including in terms of ships, the oil spill from the regular activities and accidents become part of marine pollution that is assumed in the above definition.

Based on the previous chapter, there are 3 (three) factors cause marine pollution the caused by ship, they are:

1. Collision, explosion, ship Wrecking
2. Oil spill, disposal from oil, residual oil, garbage or other waste ship and from the

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[366] Lasse, *Keselamatan Pelayaran di Lingkungan Teritorial Pelabuhan dan Pemanduan Kapal,* Jakarta, STMT Trisaksi, 128.
[367] Lasee

ship, such as sewer pumping (bilges) of the vessel or ship ballast water discharge from the tank the tank.

3. Garbage and sewage, discharge not on purpose, as the ship transfer of oil, cargo, trash or other debris from the ship.

Naturally, in every ship's activity either intentionally or accidentally be spilled by oil and any other foreign objects into the sea, which by the terms of environmental law will be categorized as pollution of the marine environment.

Each ship have to give fixed instructions regarding retrieval and removal the procedures it does not apply for the oil tanker, but also all types of ships. This procedure should also mention the name of the liable party. In addition, the ship also should have a plan of oil spill cleanup operations when needed.

Ship owners together with the master should note that the guidelines on safe ship operation in dealing with the oil had to be at the boat to avoid the possibility of oil pollution by ships.

The risk of doing any pollution may have occurred due to unattended oil spill Although many actions have been found to reduce oil pollution by the Indonesian government in this case the port authority has taken action to prevent the pollution of oil by ship [368]:

1. Exercise of oil spill pollution by all crews

[368] Interview with Suyono. Cat. Judge of Maritime Court, 13 October 2015.

2. Disposal with caution from ship ballast water that has been contaminated.
3. Checking regularly on used bunker and cargo operations with a limited -time period by which time the examination is recorded in the appropriate logbook.
4. guarding remains to check how much oil and haulage when dismantling and loading of oil and bunker and rules should be established in writing.
5. Establish procedures for transferring oil remains above chemicals on the ship for the voyage

Although various procedures have been done, it's still prevalent pollution or pollution carried by ship mistake, yet a small mistake can cause pollution in the maritime field. At the time of the pollution carried by ships errors, although only a small error occurred, the ship's captain must understand the instruction contained in SOPEP (shipboard Oil Pollution Emergency Plan). SOPEP made under the provisions of MARPOL 73/78. In accordance with the regulations of MARPOL 73/78, every tanker of 150 GT to the top and ships with 400 GT to the top have had to do.

Steps to prevent further spread of contamination can be cleaned up to the oil spill by cleaning agents or dispersants oil spill from the deck of the ship and move to a safe place or existing oil sludge.[369] The master must take into account the residual oil remaining on board, the rest are in the pipeline or still exist on land or barge oil. This calculation is required in order to determine a large number of oil spills that ships are not subject to fines of environmental pollution is too great.

[369] David Ray, *Indonesian Port Sector Reform and the 2008 Shipping Law*, Singapore, ISEAS, 2008, 96

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 harbormaster 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. It has also been stipulated in Government Regulation No. 7. Year 2000 on Maritime and Ministerial Decision Number 70 of the manning of ships.

ISM CODE regulates the International Management Code for the Safe Operation of Ships and for Pollution Prevention as Adopted by the Assembly, as be Amended by the Organization. Based on ISM Code, as mention in the previous chapter ISM Code is an international safety arrangements to operate ships safely and for the prevention of pollution. At this point the company should be responsible for the operation of the vessel. The interest of ISM Code is to ensure the health at sea, prevent injury or loss of human life, and to avoid damage to the environment, particularly the marine environment and property.

For instance, the objective of the safety management of the company are:[370]

a. Setting up safety procedures in the operation of the ship and the safety of the work environment.

b. Creating a protection against all known risks.

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[370] ISM CODE

c. Continuously improving safety management skills of personnel between land and ships.

Including emergency preparedness related premises safety and environmental protection. Every company should develop, implement and maintain ISM CODE which includes the following functional requirements:[371]

a. Safety and environmental protection policies.

b. Instructions and procedures to ensure safe operation of ships and protection of the environment in obeying international regulations and state legislation (the flag of the ship in question).

c. Determining the level of authority and lines of communication between and land and ship.

d. Procedures for reporting accidents and deviation from the provisions of this code.

e. The procedure to prepare for and respond in an emergency.

f. Procedures for internal audits and management review.

In doing the safety and protection of environment in the company should arrange policy of safety and environmental protection are clear. Further it is implemented and maintained at all levels of the organization, both on board and ashore. So Quality management based on ISM code is the management of a process to maximize customer satisfaction at the Lowest overall cost to the company especially in Marine Pollution. The following formula with respect to improving the quality of management, explains

[371] ISM Code

it as the totality of activities to achieve quality.[372] Quality of care can be improved through the trilogy prices they are the quality of planning, monitoring and quality improvement. Since Quality management is the totality of ways for Achieving quality, so quality management includes all three processes of the quality trilogy they are quality planning, quality control, quality improvement. Furthermore, Quality management in the shipping industry always under control of management. Company control of the situation, overseeing the provision of transportation services that execution is in the hands of the skipper. Operationally the quality level determined skipper. But the totality of the personnel determined by planners.

Based on Article 302, 325 to 328 on Shipping Law stated that Individual / Person Disposing of waste executed as maximum imprisonment of two years and a maximum fine of Rp 300 million. Dispose of waste resulting in damage to living convicted of environment will be executed as maximum 10 years in prison and a maximum fine of Rp 400 million.

The master who does not do prevention pollution from ships shall be punished by a maximum imprisonment of 3 years and a maximum fine of Rp. 400 million. Boat Operator Not insure its liability for the pollution sourced from his ship was sentenced to a maximum of 6 months and a maximum fine of Rp 100 million. At the international level, prevention and control of pollution regulated by the conventions of the International Maritime Organization (IMO) through the Marine Environment Protection Committee (MEPC) is known as the MARPOL Convention '73 / 78 special

[372] Harrington Niehaus, Risk Managemen & Insurance, UK, Pearso, 2012 at 224.

pollution from ships. As for pollution from ships and non-vessel arranged in 46 chapters convention UNCLOS'82 namely Articles 192 up to 237. Both the Convention has been ratified respectively by Presidential Decision of No. 46 of 1986 on Ratification of UNCLOS '82.

The master must implement company policies relating to the safety and environmental protection to motivate the crew to carry out such a policy, issued appropriate instructions, clear, simple, examine and review ISM CODE, and reporting irregularities to the management on land. Therefore, the company is required to define and document the responsibility of the master.

In meeting the standard of human resources and personal, the company must ensure that the skipper is eligible to become leader of the ship, understand ISM CODE companies will get full support so that the task of the skipper can run properly. Any personnel or sailor must have the following:[373]

a. certificates;

b. Healthy accordance with national and international requirements;

c. Sufficient knowledge on the rules and codes of guidance relating to the company's ISM CODE.

d. Effective communication in carrying out the task.

In addition, ISM CODE signaled anyway to perform specific measurement that sale of equipment or system reliability can be maintained. All documents and data relating

[373] ISM Code

to ISM CODE should be controlled. A valid document must be stored at any location that is of no relevance. Company documents are reviewed and approved by the competent authority. Documents that have expired should be released. Doco uments used to describe and implement ISM CODE can be used as the Safety Management Manual (SMM). Documents must be stored in a safe place, ship operated by the company should have a Document of Compliance (DOC) is of no relevance to the ship. DOC published.

Seeing the increasing of shipping activity that cause pollution to Indonesian Oceans, Indonesia need a shipping fleet that friendly to the environment, namely green shipping fleet. To become a shipping fleet that friendly to the environment need a some criteria that can be viewed from existing regulation and technology can be applied. To make a green shipping fleet for new Indonesia, need the things to do and the regulation as described in the table bellow

Table 5.1

The Criteria for green shipping and the regulation

Criteria	Regulation
Reduce Gas Emission	MARPOL 73/78 Annex VI
Ship waste Disposal	MARPOL 73/78 Annex VI
Bilge Water Treatmen	MARPOL Annex I

Source Ministry of Transportation, 2009

Shipping activity can impact the environment of sea, these problems come from routine discharge of oily bilge and ballast water from marine shipping. The regulation that applied is MARPOL 73/78 Annex VI.

Bad consequences of oil pollution to the marine environment in Indonesia can be seen by the various components as follows: As a result of recent Oil Pollution, Inhibiting Fisheries and eradicate fish populations; Sea animals Damaging nerves and body heating system on and off; Sea birds Abolish food supply chain; Marine Park Destroyed animals and plants endangered; Coral Reef Inhibits growth and reduce marine populations; Plants in Turkish Damaging plant roots and destroy coastal vegetation; Recreation Reducing natural beauty and tourist services revenue: Bodies Ports port activities and the safety of ships disrupted; Ecosystem Damaging system marine plant and animal life; Industrial installations contaminants damaging the cooling system and fire hazards.

Make Safeguarding against all risks have been identified Continuously improving management skills, safety shipping, including face emergencies related to safety and environmental protection.

4.1.3 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.

4.1.4 Wrecking and sinking Ship

Wrecking ship is the worst major casualty in marine pollution, this accident causes many oil spill and other thing from ship. Wrecking ship usually caused by any other accidents such as collision or wrecking ship is an impact of the any accident. The location of Indonesian sea faces the problem of sudden equatorial storms. The exact location of such storms is difficult to predict, and shipping can easily be caught unawares. It was reported that half the ferries operating on busy route across Indonesian waters. The Ship are often significantly overloaded, making the death toll in disasters greater than it would be if loading limits were adhered to.

The results is a tragic catalogue of major maritime disasters. In modern time, the major one are as follows (in order of number lives lost).[374]

2006: the KLM Senopati nusantara sank off Mandalika Island with loss of 461 lives

2009: the MV Teratai Prima, capsized of Sulawesi, causing about 256 deaths

2005: The Digul, sank in Merauke, Papua, about 200 people died.

2007: The Acita III capsized of Baubau, Sulawesi with at least 66 peoples confirmed death

In addition to these major disasters, there have been dozens of incidents in which boats carrying small crews have been lost at sea. Until recently, Indonesia's response to such disasters was slow and piecemeal.

Before these accident, there are some big accidents in the past that Reports about the

[374] Erwin Rosmali, *Maritime Safety in Indonesian Water*, Singapore, ISEAS, 2009, at p 146

condition of the ship captain who will leave. It is very dangerous if without direct reference to the condition of the vessel; evidenced by the number of shipwreck (1,551 accident victims sea with 2,684 victims between 1990-1999) . In addition, the transport destination is also not materializing because of the convenience and security desired service users transport did not materialize.

Evidence of a passenger ship which sank due to excess passengers are as follows:[375]

1) Ship Tampomas II, sank in Masalembo dated 27 January 1980. According to the investigation of the many drawbacks Court Sailing aid equipment (not sufficient) that according to the Convention of Safety of Life at Sea 1974 (SOLAS) has been ratified. In the SOLAS stated that aid equipment should reach 125% of the number of passengers (passengers plus crew) 154 persons and nobody was safe in this accident.
2) The motor vessel grouse 02 and I Cloves motor boats in the Gulf of Bone. In addition, due to the wind, also caused the sinking of the overload passenger From the port explained that nobody port officials who know the exact number of passengers. The deadweight of the ship 60 tons with a capacitance of 100 passengers. It is estimated that at that time carrying approximately 200 passengers died in this accident without first aid from the carrier.
3) The sinking of Citra Indah on February 21,2003 in east Pamelika, pleaded guilty to the vessel exceeding the maximum permitted by the port.
4) The sinking of the motor screen Artha Rimba in the South China Sea caused

[375] Wienarsih Imam Subekti, Implementyasi Perjanjian Pengangkitan Penumpang Angkutan Laut Antar Pulau, Gitama Jaya, Jakarta, 2004, 140

the ship unseaworthy also exceeds capacity. The vessel weighing 147 tons and 280 PK engine with 25 passenger, whereas in the SIB written without passengers (passengers "nil"). So, the passengers were illegal 157 persons without registration.

5) The sinking of the Stars Motor Perkasa in waters Masalembo date March 10, 2007. The vessel weighing 643 tons. A permit issued by the passenger load of 16 people, it turns out according to the printing and electronic reached 81 people. It is clear there are violations committed by the master. Moreover, also said that the crew picked their own fees on passengers for Rp. 75.000, -. In this respect, port officer can also be blamed because not aware of any excess load.

The high cost of maintaining a safety regime at sea has been a serious obstacle to providing sound support for marine safety in Indonesia. With regard to the wreck removal, the Directorate General of Sea Communications 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. When a vessel is declared a wreck, various authorities will take over the conduct of the wreck removal, if necessary. When an incident happens within its jurisdictional waters, the authorities are authorized by the regulations to investigate the incident to prevent a recurrence of the same incident.[376] As comparative In Malaysia, the Director of Marine, who is the principal receiver of wrecks, is empowered under the Merchant Shipping Ordinance 1952 (MSO) to exercise general direction and supervision over all matters relating to wreck and salvage.[377] Under the MSO, where a ship wreck is likely to become a hazard to navigation or a public nuisance or cause harmful consequences to the marine environment, the owner is obliged to locate, mark and remove the wreck promptly and take steps to prevent pollution from occurring.

Any non-performance on the owner's part will result in fines. The Director of Marine may also demand financial security from the owner or master to ensure due performance of all actions which the owner or master has agreed to undertake with respect to the wreck removal. In addition, Malaysia has ratified the Nairobi Convention on the Removal of Wrecks 2007 and has enacted mirror provisions in its MSO which require a vessel entering or leaving a Malaysian port to have a contract of

[376] Gard, Marine Casualties in the Straits of Malacca and Singapore-which regime from www.gard.no./web/updates/content/2078357/marine -casualties-in-straits-of -malacca.
[377] Gard.

insurance or other financial security for wreck removal equal to the vessel's limitation of liability calculated under the 1996 Protocol. Any contravention will result in fines being imposed on the owner. Singapore and Indonesia have not ratified the Nairobi Convention and do not have similar provisions.

In Singapore,[378] the Maritime and Port Authority of Singapore (MPA) has the general supervision of wreck removal and may appoint a wreck receiver. Anyone other than the owner of a shipwrecked vessel finding or taking possession of a wreck, must deliver it to the wreck receiver as soon as possible. If the finder fails to deliver the wreck, without reasonable cause, he will not be able to make a claim for salvage and may also be exposed to liability towards the owner or another who is entitled to the wreck under Section 153 of the Merchant shipping.

In such a situation, the government institutions will also get involved to carry out an investigation related to the public law aspects. If the casualty is considered as national-scaled, KNKT as mentioned in the above paragraph will be the institution conducting the investigation. However, if the casualty is considered as small-scaled, the investigation will only be carried out by the local Port Authority.

During the investigation, the local Port Authority will gather information from both parties, especially from the master and crew employed by them. The statement and testimony of such masters and ship crews will be recorded in the minutes of the investigation.

[378] GARD, Ibid.

A physical survey on both colliding ships will also be carried out during the process of investigation. The port authority will ensure the rights of both parties to send a surveyor to measure the damage that occurred and determine the degree of fault on both sides of the parties. For this purpose, the port authority will usually halt any attempt to repair the colliding ship until both parties complete their surveys.

Indonesia does not have any regulation that obliges any defendant to disclose evidences or documents in court proceedings. Pursuant to Article 1865 of the Civil Code, a party who wishes to assert a right has to prove such rights on their own behalf.

4.3 Conclusion

In spite of the fact that international conventions seem to have carefully considered the conceptual differences in the world legal system. The world maritime history of the past and the influence of the growing process of trade and economic globalization may also explain this continuing development. The Indonesian national shipping line PT Djakarta Lloyd, PELNI, for instance, includes The Hague Rules as a paramount clause in its bill of lading.

Even though ship is an important component of international trade, the use of ships due to marine pollution. Commercial fleet on the marine environment due to accidents and special purpose, legal and illegal pollution during routine opartions in the ocean or dock. Beside National and International Regulation, Indonesia ship must comply with International standard since Indonesia is a member of IMO.

CHAPTER FIVE

MUTUAL LIABLITY IN INDONESIAN MARITIME LAW

5.1 Liability Of Sea Pollution Caused By Marine Casualties

5.1.1 The Liability Of Carriers In The Shipping Safety

The existence of Human Resources in transportation is important in controlling the machines of vehicles including custodian's worthiness of the ship. A ship technically is only a machine that uses mechanical power, electric power, hydraulic power. This means that the human being served behind the wheel of a vehicle or "man behind the steering wheel 'the entire command run machining resources. In other words, humans are the main resources in the transportation. Therefore recruitment, appointment, training of master and crew requires regulation and proper execution. This is because the reason that the safety of the ship and the cargo / passenger since the point of departure or loading to the point of interest is the primary responsibility of the master and crew.

In safety of shipping and manning of the ship as well as a part of the ship worthiness requirements as required are as follow[379]s:

[379] Husyen umar, 67

1) Article 343 Indonesian Commercial Code: The master is required to conscientiously observe the conventional rules and existing regulations in view of ensuring the seaworthiness and safety of the ships, the safety of the passengers and the safe transportation of the cargo. He shall not undertake the voyage, unless the ship is capable to conclude it, being properly equipped and sufficiently manned.
2) In the Act No. 17 of 2008 on Shipping Section 117 subsection (1) the safety and security of the water transport is the condition of the fulfillment of requirements: a ship seaworthiness; b navigation; paragraph 2 sea worthiness referred to the first paragraph that must be filled in every vessel in accordance with local voyage including a. safety of the ship; b. prevention of pollution from ships c. manning of ships d. line loading and unloading of ships e. welfare of crews and passengers health f. the legal status of the vessel g. security management vessel paragraph 3 meeting every ship airworthiness requirements referred to in paragraph (1) shall be evidenced by a certificate and letter of the ship.

The law stated that the master who represents the crew is not allowed to run the ship is unseaworthy, does not include the equipment and crew to taste; unprotected official papers. A seaworthiness ships must be proven by a certificate, letter of the ship, includes eight requirements, including the manning of the ship.

Manning of ships stipulated in shipping act. The third section states inter alia in Article 135 that any ship manned by a crew that meets the qualifications and competence in accordance with national and international provisions. With that provision can be

interpreted that each crew should have the qualifications and competence.

Qualification and competition are two terminologies that are interrelated, but can be distinguished from one another. Qualifications, expertise improvement of crew is tiered in line of master, officers and subordinates within two (2) main groups engine deck department and department Competence is knowledge combined with skills, attitude and expertise per individual personnel to perform tasks on board.

5.1.2 The Authority of The Master

Article of 45 Shipping act stated that the master was one of the crew who became supreme leader in ship and have the authority and responsibility in accordance with certain provisions of laws and regulations. Thus, the master is the highest authority on board and has the authority in various fields as the flag bearer.

Because the ships are required to fly the flag of the State as a sign of vessel nationality, then the provisions of the laws and regulations that apply on board is the law of the State flag (flag state) even boats can be referred to as the region moves from the relevant flag.

Law Sailing further states that the Article 137 paragraph (1) that "The master for motor vessel GT size 35 (thirty-five Gross Tonnage) or more have the authority of law enforcement as well as responsible for the safety, security, and order the ship, gob and cargoes. Enforcement of the law referred to in this article this is the law of the flag State.

The ship's master is not only liable to navigating the ship safely he also has a function

as law enforcement, measures to apply this provision is addressed to the crew and passengers who misbehave are not worthy of the master or committed crime on board. The law for the crew and passengers have been arranged in Indonesian civil code.

The master may be on case of willful disobedience, or improper conduct of the shipmate towards him, a crew member or any other of the passengers and of the disturbance, besides or instead of imposing a fine as meant in the foregoing article. have the shipmate locked up for one or three days.

Furthermore, Shipping Law Section 138 is the provision of Article 138 paragraph 2 and paragraph 3 which provides the right to refuse sailing the ship for the master which is the ship in unseaworthy. Furthermore, in paragraph 2, before the ship set sail, the master shall ensure that it meets the requirements seaworthiness ship and report the matter to the harbormaster and paragraph 3 of the master is entitled to refuse to sail the ship to know if the vessel does not meet the requirements referred to in paragraph 2. The master should refuse dispatch ship unseaworthy or ship condition is categorized substandard and unsafe ship. Ship substandard conditions and unsafe ship is terminology applicable in accordance with the International Safety Management (ISM) code to declare the provisions of seaworthiness ship is not responding as it should, a condition where controlling through Port State Control.

Although recruited and appointed by the company, against whom even the two sides signed an agreement sea, the skipper lawmakers are allowed to reject sailing for the rejection was done with the full liability for the safety. Rejection of master is as a consequence on the basis of Article 343 KUHD have mentioned earlier that the master

is obliged to obey carefully any common rules and provisions in force to ensure the security fibers sailing ship, passengers, and cargo. Master is not necessarily afraid and does not hesitate to use this right.

Aspects of safety and the safety (security) are set in the SOLAS convention in Chapter IX of the International Safety Management (ISM) code which is applied in the form of Safety Management System (SMS) with the purpose of the safe operation of ships and maritime environmental protection. The objective of ISM code can only be realized if the sailors assigned to the ships or on land have a certificate issued by SCTW code. On the contrary in case of violations of SCTW code in the form of: The ship's crews did not have a certificate in accordance with the provisions requires seafarer competency standards. Supplies of health and safety of workers (Personal protective Equipment) are inadequate. Failed to serve proficient personnel who operate the equipment safety of navigation, radio communication or the plant equipment and marine environment pollution prevention. So, the goal of the application of ISM code will not become a reality. The essence of the ISM code application is safety management system whereas SCTW application code is manning cash management system are both implemented and are the responsibility of the vessel operator company. ISM code establishes safety requirements of ship operations and marine pollution prevention; and SCTW code set standards for qualification and competence through training administration system and certification and marine guard duty. Applications ISM code and code SCTW marine inspector monitored through Port State Control inspections.

5.1.3 The Liability of Master for Navigation Safety

Navigation safety means there is no disruption in shipping. Navigational safety issues will be more focused on the safety of the ship, especially for the safety of life on board the ship sailing in the sea. The safety of navigation is the safety of the ship that is determined by skill and capability of crew.

When the safety of navigation ignored, will obviously cause any accidents at sea. It will be an obstacle to sea transportation. Law No. 1 of 1970 on the Safety Working defines the accident as follows: "*An unexpected event that result in injury to people or damage to objects and working environment*". So, the safety of navigation plays a very important role for the transportation determines. Without the comply with the provisions of the safety of navigation, a ship cannot be used to transport goods or passengers smoothly. Therefore, the rules regarding the safety of navigation seen as a principle of law that will assure the safe and smooth transport.

The main factors that will cause major accident in general namely unsafe conditions and unsafe acts.[380]

1. Unsafe conditions (unsafe condition) in relation to the safety of navigation is: mechanical or physical condition that can lead to accidents and is a major cause of accidents. Things were included in these conditions is as follows:[381]

a. Equipment damaged or is not feasible:

b. Lack of ventilation and lighting;

[380] Herman Khaero, *Transformasi Politik Kelautan Indonesia*, Jakarta, Cidesendo, 2012,112.
[381] Herman Khaero, 113.

c. The environment that is overcrowded, damp, noisy;

d. Fire / explosion;

e. Less facilities the signal;

f. Toxic air condition, gas, dust, and fumes;

In addition, there are other factors which may affect the occurrence of accidents, the department, work schedules, and climate.

2. The action is not safe from human (unsafe act) is the tendency of behavior and attitudes that cause accidents, they are as follows.[382]

a. Working without authority;

b. Working without the correct procedure;

c. Failed to give a warning;

d. Working with the wrong speed;

e. Causes the protective devices do not work;

f. Using defective tools;

g. Not wearing safety equipment;

h. Using the broken tools

i. Violating work safety regulations;

j. Drunk, sleepy, distractedly, disturbance, abuse of drugs, shocked, and disagreements between crew.

Indonesian Regulations on the safety of navigation is not stipulated in the regulations, but scattered in various legislation, whether national, international as well as those set

[382] Herman,123.

out in National Standard. State of the vessel meets the requirements of the ship safety, the prevention of marine pollution from ships, load, health, and welfare of the crew and passengers as well as the legal status of the ship to sail in certain waters." (Article 1.10).

Based on Government Regulation No. 7 of 2000 on Vocational Qualifications and expertise both crew except motor yachts, sailboats and motor boats measuring less than GT. 25, a Yacht that is not used for commercial and special ships. Rescue operations at sea is used for handles of accidents at sea can be with a size of less than GT. 25, a yacht that is not used for commercial and special ships.

Effort saving lives at sea is an activity that used to overcome accidents at sea which can reduce the consequences arising as less as possible on humans, ships and cargo. To minimize the occurrence of accidents at sea, it takes an effort lifesaving with how to comply with national regulations and international / conventions International made by IMO has ratified Indonesia, namely the Safety of Life at Sea (SOLAS-74), Standards of Training Certification and Watchkeeping for Seafarer (STCW-95). COLLREG, ISM-CODE and the Athens Convention.

5.1.4 The Liability of Master to Comply with International Standards

SOLAS 1974 has been ratified by the Indonesian government in 1980, but unfortunately the government did not immediately make the branch of this law for all ship. [383] For instance shipping with a size of less than GT. 25, a yacht that is not fit

[383] Interview with SEACOM, Ministry of Transportation, !3rd November 2012

the principles or principles of law or principle of ratification. SOLAS-74 is an international convention that regulates vessel requirements in order to maintain the safety of life at sea in order to avoid or minimize the occurrence of accidents at sea covering the ship, ship crew and its cargo.

It is set in Chapter I up to Chapter V as follows[384]:

a. Construction vessels associated with the structure, subdivision and stability, machinery and electricity on board Construction vessels associated with good fire regarding fire protection, fire pathfinder and fire extinguishers
b. The setting and the use of the safety of life.
c. Supplies of radio communication devices;
d. Navigation tools;

In the implementation of this convention needs to be proven with the safety of passenger ships certificate to requirements set out in Chapter II-1, II-2, III, V.

The other Convention Amendments is the International Convention on Standards of Training Certification and Watchkeeping For Seafarers (STCW-95). STCW -95 known as a refinement CTCW-1978, in which some of the provisions of the convention has been refined and regulated in Decree of the Minister Communications on Education, State Examination and Certificate of Maritime. Participants of STCW desire to improve the safety of life and property at sea and protection of the marine environment

[384] SOLAS Convention 1974

by arranging joint international standards on training, certification and guard duty for seafarers.

Based on Article 1, it states that the parties have to comply all laws, decrees and regulations that benefit all ensuring the safety of life and property at sea, the sailors put quality and duties. (Article I) [385] The crew of the ship, in accordance with the authority and position, are required to have a certificate; that have the correct certificate (certificate is a legal document, however named, issued by or under the authority of government concerned, or recognized by the government that authorizes the holder to work as stated in the document or as authorized by national regulations). Certificates for masters, officers or crews should be given to candidates who have fulfilled the requirements of the government concerned, in accordance with the provisions relating to this convention. The certificate shall be endorsed by the government concerned, in accordance with the relevant provisions of this Convention and the certificate shall be endorsed by the Government.

The vessels, which are exempted in accordance with article III, while in the port of a party, may be examined by the government who has obtained authorization from the concerned party to prove that everyone on board has been in possession of a certificate or dispensation in accordance with the requirements of the convention. Such certificates must be certified, unless there are compelling reasons that the certificate is checked has been obtained illegally, or the certificate holder is not the legitimate

[385] Article I SCTW-95

holder. [386]Testing in accordance with section A STCW, the ability of seafarers to maintain preparedness standards as required by the Convention. If there is a specific reason to believe that those standards are not met any of the things mentioned in this regulation.

Government give responsibility to companies in terms of assignment of sailors on ships in accordance with the provisions of the convention. Each seafarer assigned to each ship must have a valid certificate in accordance with the regulations. [387] Examination perpetrated by inspectors who have been given authority of must be limited (Article X). They have to Verify all sailormen who serve on the ship must have a certificate of age, article X and Verify that the numbers assigned certificates in accordance with the requirements of labor safety that apply to the relevant government as well.

The shortcomings that might be considered as well as that could harm people when master and all crew do not have proper certificates, legal or documentary evidence that confirmation request has been submitted to the governments concerned as regulations of the tenth paragraph 5 and Non-compliance with labor safety requirements imposed by the government concerned. Hence they are not performed guard duty setting navigation or machines according to the requirements set by local authorities. Furthermore, they are not having someone operated the equipment eligible for the safe navigation, absence of security recommendations or no prevention of marine pollution.

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[386] Robert Mangindaan, *Menata Keamanan Maritim NKRI,* Lembaga Laut Indonesia, at Jakarta,2014, 191

[387] Robert Mangandiaan., 191

The task of the first watch at the time of the next launch cruise and officers do not get enough rest so it is not able to do their job properly. Failure to complete each regulation mentioned above is not determined by the implementing agency oversight. Nature has been in danger to people, property and the environment is the only reason, under article X, for a party to detain a ship.

Based on Load Line conventions (LLC 1966), ships are a means of sea transport have several requirements that can be said to be seaworthy. Terms of the vessel of which is Load Line Certificate that meets the rules of the Load Line Convention of 1966. In order to obtain the certificate vessels must go through examination and assessment that have been set in Undang Act No. 21 of 1992 on the cruise. The certificate issued by the Indonesian Bureau of Classification and applied nationally and internationally, in accordance with Solas 1974 as amendment 2001.

The International Labour Organization (ILO) 147 is regulated to ensure the safety of shipping, as supporting the smooth traffic of ships, their crew treated a skilled and capable. Thus, the ship will sail to be manned by a crew that is sufficient and competent to carry out the duties and responsibilities on board (according to the title). While considering the magnitude of the vessel, the arrangement of the ship, and cruise the area, considering the task as a crew that has special features, among others, leaving the family in a rather long period of time. When there is damage to the ship, the crew must handle themselves indefinitely / working hours and work on the all-weather protection arrangements so that the necessary work is national and international. As we Known that ILO Convention 147 which is born by the International Labour Organization in Specific recommended some form of labor interests of safety, health and welfare of

workers on board.[388] At the time of operating the ship, who is responsible is the master, not the owner (the company). Therefore, employers should be in full names and data master to the administration (government) of a State whose flag the ship is entitled to be flown in.

5.2 The Carrier's Liability In The Development Of Indonesian Maritime Law

The responsibility of someone or a certain party to do something well to the other party is the responsibility of the person or the concerned party. If the obligation is not carried out perfectly and causes loss to the other party; so, it is compulsory for the party who suffer from the loss to be given compensation.

Liability as described above is the responsibility which has been discussed in the earlier chapter and it is the liability which appears as the result of a contract which emerges bond for both parties. If someone concludes a contract so the consent binds the parties who conclude it as laws.

Besides that, liability, there is a responsibility which appears because of laws and when the laws is breached, it turns out to be a unlawful deed as discussed in the earlier chapters. In this case, the liability does not appear because of the provision in the contract which regulates a certain obligation but because of the provision in the laws which regulates certain obligation. In the Sea Transportation Laws, unlawful action is regulated in Chapter 6 of Book II of Indonesian Commercial Code.

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[388] Simon Bughen, International Trade and the protest of the Environment, , Routledge- Cavendish, Canada, 2012, .89

The liability in an unlawful action is based on fault. The fault must be proven by the parties who claim for compensation to the one who does the unlawful action. In order, someone can be obliged to compensate the loss because of unlawful action, the doer should at first presume that his action will cause such loss, only that the amount of loss should not be presumed.[389] So, that is why the loss in this case is different with the loss because of a contract which can be estimated when the contract is concluded whereas in a unlawful action the loss surely cannot be predicted.

In Chapter 6 of Book II of Indonesian Commercial Code, it is regulated about collision as one of the unlawful deeds. Book II of Indonesian Commercial Code regulates legal action in sea carriage which include an unintended event (Article 535 of Indonesian Commercial Code), because of a mistake done by one of the parties (Article 536 of Indonesian Commercial Code) and because of mistakes from both parties (Article 537 of Indonesian Commercial Code).

Unlike the countries which have the influence of common law in which the liability of a carrier is based on negligence whereas in Indonesian law the unlawful action only occurs in ship collision as explained above.

5.2.1 The Concept of Liability in Sea Transportation Law

Either based on the law applicable in Common Law System and Civil Law System, transportation company is a company which is responsible for loss suffered by the

[389] Suryodiningrat, Perikatan Bersumber UU, Tarsito, Bandung, 1980, 45

passengers and/or cargo senders, and also third party including coastal country concerning sea pollution caused by its ship.

Carrier is not only responsible for what happened but also for company's action, employees and agent or its representative or someone who is acting for and on behalf of a company. This is line with the provision in Article 321 point (2) that explains a ship owner is liable for his legal action and unlawful action carried out by skipper and his crew. Article 320 of Indonesian Commercial Code explains that a ship is always under the control of a ship owner (*reder). "Reder*" terminology is a special term of Indonesian Commercial Code because in Maritime Laws there is only "carrier" as the terminology. In The Hague Visby Rules there is only "carrier/owner" as the terminology. Based on this teaching and for the accountability, ship owner is regarded as someone.[390] So that measures taken by someone who works permanently or temporarily on a ship will bind a ship owner in line with the provision in Article 321 (point 2) which explains that a ship owner is liable for any legal action or non-legal action committed by his skipper and crew. Article 321 divides the responsibility into:

a. Point 1 which regulates the liability of ship owner towards the legal action committed by people who work permanently or temporarily on board a ship will bind the owner with a third party; as also stated in Article 517 c point 3 which states that whomever deals with a skipper may prosecute not only the charterer but also the ship owner.

[390] Nicholas Mateesco Matte, Ed. Annals of Air and Space Law. The Carswell Company Limited, Toronto,1979, 168,

b. Point 2 states that a ship owner is responsible for non-legal action committed by anyone who works permanently or temporarily on a ship and thereby binds the ship owner and any third party.
c. The element of non-legal action occurs in ship collision (having known that a ship is under an owner) so that the liability of the collision is taken care of by the ship owner. So that is why in the case of ship collision, the authorities will look for the fault of the ship. This occurred in the Decision of the Judge of Maritime Court numbered 1013/051/III/MP.10 concerning the collision case of Tb Benua Asia ship which happened because the skipper was not very prudent in the effort to save the vessel. The vessel was overload and it was not tied to the towing ship and set sail; so that this violated the provisions in Articles 342 and 343 of Indonesian Commercial Code.

In comparison with the case of Air Transport Law, this is also asserted by Julius Young Jewelry M.F.G. Co. especially in Inc vs Delta Airlines. It is assumed that A Master/and His Servants are considered to be one person for the purpose of liability.

Based on that concept, a company is liable for any legal action performed by a skipper such as sea-work agreement, the issuance of bill of lading and non-legal actions such as lost, theft, ship accident and collision.

5.2.1.1 Full Liability

Primary carrier's liability as described in earlier chapters is the liability to provide seaworthy vessel (Article 467 and 470 KUHD); the liability of a carrier is to protect the load from the time the goods are received until they are delivered (Article 468 point

1). In this provision, it is stated the liability of a carrier to manage the safety of goods and the carrier must show his proper effort (due diligence) ; Article 470 point 1 of Indonesian Commercial Code explains: (a) to manage maintenance, equipment or adequate crew; (b) to provide his best a carrier to be used as a transport based on the agreement; (c) mistreatment or less surveillance of loaded goods; when a vessel is late, the carrier is held responsible.[391]A carrier is not allowed to make any promise to revoke all his liabilities. When there is a promise to lift the responsibilities, such promise is void. From this provision, it is assumed that Article 470 is the paramount clause which protect the owner of goods from one-sided condition decided by a carrier.

A carrier can be free from any liability when it is the fault of sender/receiver because besides the carrier, the sender or carrier has also liability which can be seen from the following articles:

a. The obligation to inform the characteristics and price of the goods (Articles 469, 470 points 2 and 479 of Indonesian Commercial Code)

b. The obligation to give necessary letter (Article 478 of Indonesian Commercial Code)

c. The obligation to inform the characteristics of the good (Article 479 point (2))

Besides the fault of the sender as described above, the carrier can free himself from the liability when force major occurs and in the case of defect of the good (Article 468 point 2). Even though a carrier makes a promise to limit his liability based on Article 470a of Indonesian Commercial Code, the carrier is still obliged to prove that the

[391] Astle, 88

carrier performs his obligation according to Article 470 point (1) of Indonesian Commercial Code.

This liability is regarded as full liability or absolute liability. In a country which is under the influence of common law, the term "strict liability" is oftentimes used. The reason as explained by Astle[392]: a carrier can avoid himself for not to be liable in Act of God, public enemy, defect of goods is indeed the fault of the sender. Thus, the opinion of Schimitthoff and Sarre might free the carrier from the lost caused by act of God, the Queen's enemies; inherent vice in the thing carried, fault or fraud of the Shipper. [393]

When the obligation of the carrier is not kept, in this case, the carrier must be fully responsible, meaning that the carrier must pay the compensation according to the lost suffered by the opposing party. The liability of a carrier based on The Hague and Visby Rules is similar: i.e. liability based upon negligence which is according to Article III point 2 and Article IV point 2 q. [394] When the carrier does not implement his responsibility accordingly, the damage or loss will be under the responsibility of the carrier.

This is made clear by Article IV-point 2 q: A carrier is not liable when the fault happens without the actual fault or neglect of the agents or servants of the carrier.

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[392] Astle,109

[393] Pound,97

[394] Pound, 97.

Besides above provisions, there should be special attention to Article III point (1) which must be read together with Article IV point (1) The Hague Rules/ The Hague Visby Rules. In Article III point (1) it is explained that before and during the voyage, a carrier has the duty, according to Article IV point (1), to declare that the carrier is not responsible for the damage because of having no seaworthiness, except it is caused by lack of proper handling of the carrier so that the vessel is not sea-feasible.

The discussion of this liability is closely related to the duty to provide evidence. The provision about providing the evidence can be seen in Article IV point 1 which is explained as follows: whenever there is loss or damage caused by a vessel which is not feasible, so the burden to provide evidence that there have been proper stages of activities to make sure a vessel is feasible must be given by the carrier or other parties who require exemption of liability base on this article.

From this provision, it is clear that the burden of providing evidence of ship seaworthiness must be given by the carrier. At first, it is the obligation of the sender/receiver to prove that there is damage/loss that he suffers from. After that it is the obligation of the carrier to prove that the vessel is feasible before or at the time the vessel begins to voyage.

Besides Article IV point 1 The Hague and Visby Rules, there is also Article IV point 2q which is also an important provision and regulates as follows: the necessity to prove lies on the party who uses this exception to show that there is no fault or it is under carrier's knowledge, and there is no fault or carelessness of the agents or people who are involved in the loss or damage. Basically, this provision explains that to avoid the

responsibility of load damage, a carrier must show that the damage happens, and the carrier and his assistants do not make any carelessness.

THR Convention 1924 contains basic provisions that include separation of liability, the place and time limit liability carrier, and the fourth most important clause of immunity clause carrier. Article II manuscript Hague Rules 1924 states " .. under every contract of carriage of goods by sea the carrier, in relation to the loading handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities , and liabilities , and entitled to the rights and immunities hereinafter set forth .

The provisions in article II provides for a division of responsibility for the execution of each phase or a chain of events that are likely to involve many stakeholders such as loading, stowage, carriage, custody, maintenance (tender) and demolition (discharge).

The carrier is responsible for the extent of the transport as mentioned in article I E states that: Carriage of Goods covers the period from the time when the goods are loaded on the time they are discharged from the ship. Transportation of goods (carriage of goods) lasts from the time the goods load to ship until the time the goods are unloaded from the ship.

The Limit liability as THR 1924 is loaded at the port since the loader (meaning since good loading on the tackle) until unloaded it means the goods are released from the tackle at the port of loading. This provision in the shipping world known traditionally limitations of liability "ex tackle to tackle" or "ex tackles responsibility". At the second

goods across the ship's rail (ship's rail) at the port of loading, that's when the carrier began to be responsible and when the goods across the rail at the port of discharge, the end was the responsibility of the carrier in question.

The carrier which acts as an organizer of sea transport has a major obligation namely: a. make ship seaworthy. b. manning, manning, equipping, and providing supplies the ship and make the hold of ships, cargo space is cold, and all parts of the vessel under conditions sufficient to transport cargo safely. This provision is contained in Article III, paragraph 2 which states that:

"The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; Properly man, equip and supply the ship; Make the holds, refrigerating and cool chambers Reviews their fit and safe for reception, carriage and preservation.

This clause known as Due Diligence clause confirms carrier obligation to provide conveyance as a whole, the following ships ship equipment and supplies (eyeworthy), the following ships skilled crew to run the ship (seaworthy) and ship the next room to place safely (cargo worthy). With the provision of seaworthiness requirement ship as a whole, the risk of loss or damage that may occur on the goods being transported beyond the borders of minimal responsibility.

However, in case of negligence from carrier in the sense of not meeting the minimum limit of its obligations, for example, does not provide cargo space is seaworthy (cargo worthiness of the ship) and or manned boats to suit the demands for skills (crew

worthiness of the ship) then the shipper is responsible to replace losses incurred as a result of seaworthiness it.

The carrier issuing of bill of lading as the primary evidence stating that the carrier undertakes to transport the goods received from the sender (shipper in such circumstances seemed from the outside or just by size visions, THR 24, Article III paragraph 4 states "Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods are there in Described in accordance with par. 3 a, b, c. referred par.3 c declare the apparent order and condition of goods.

Understanding of this clause is the responsibility of the carrier is limited to the state of the goods upon receipt as can be seen from the outside. If there is a case where the owner of the goods received the goods in sound condition) as when it is accepted for shipment but when the packaging is opened it turns out it is damaged or lost, the carrier may refuse to provide compensation demanded by the owner of the goods.

The rejection of the claims for compensation can also occur when the goods are delivered to the consignee in the packaging is intact but the content is less than the amount should be. Proof of this incident based on the weight of the packaging is not reduced, it can be concluded that the shortage did not occur during the cruise, but occur prior to shipment. If there is an empty space that is equal in size to the shortage of goods, to be seen if occurred before or during the voyage.

THR 24 states that ship or carrier is not responsible for loss or damage as a result of the action, unawareness or negligence of the captain, crew, pilot or other party those who work on ships that run ship navigation and ship management.

This provision is stated at the origin IV paragraph 2 as follows:
"Neither the carrier nor the ship shall be responsible for loss or damage or the resulting Arising from a Act, neglect, or default of the master, mariner, pilot, or the Servants of the carrier in the navigation and management of the ship.

The abovementioned provision was impressed alleviate the responsibility of the ship and the carrier operating the ship. Explained that the implementation of the ship in the form of the division of tasks organizations ship, steer the ship underwent shipping service and leadership at the ship left entirely in the hands of the skipper.

The carrier itself either as the owner or operator of a vessel and not to interfere with the management and leader of the ship. The whole range of vessel personnel receive appropriate tasks according to skill or expertise and are fully under the command of captain the master and the entire organization on board ship duty according to expertise as evidenced by certificate individuals and are encouraged to be responsible to his superiors that the master.

THR 24 stating that the ship is not required to sail through these ordinary, or which has been broadcast to be navigable. Even if the irregularities ship cruise line in order to save live objects in the form of the vessel with its cargo, it is tidal considered a violation of the contract of carriage. The provisions contained in Article IV paragraph

4 as follows:

> *"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not have deemed to be an infringement or of the breach of this convention or of the contract of carriage, and the carrier shall nor be liable for any los or damage the resulting there from.*

In a voyage at sea, the master always follows the path traversed by ships. But the habit does not have to be followed in the event there is a compelling reason to safety of navigation or avoid the risk of threat at sea. When capturing broadcast broadcasting maritime bad weather conditions that could endanger the ship, the captain can avoid the location or path as it is broadcast. For example, entering a harbor.

The deviation is not considered as defects or adverse action. All forms of losses incurred as a result of irregularities extend the sailing time may be rejected by the carrier to provide compensation.

5.2.1.2 Hague Visby Rules 1968

The establishment of THV 1928 due THR is considered outdated in 1924 compared with the dynamics of marine transportation. In addition, HR 1924 was considered too defend the interests of the carrier, servants or agents, such as, among others, set on Negligence clause that the carrier is not liable in the event of loss or damage as a result of an error in navigation and ship management. By that clause, the shipper or owner of the goods placed in a weak position and unfair. So that the main objective is to eliminate the uncertainty of change and injustice under the responsibility of the carrier. Indonesian government often receive damages caused animals between islands because a live animal is not regulated in THR, 1924, so the death or loss of quality cattle outside the responsibility of the carrier.

The Limit of The Hague Visby Rules responsibility in 1968, that the 1924 THR limit liability from the carrier when loaded on the boat until then unloaded from the ship. According to HR 1924 is not responsible for the carrier before it is loaded onto ships at the port of loading and after unloaded from ships at the port of discharge, when the goods are already in the possession of the carrier.

In the modern haulage system is often the carrier took over the power over the goods before and after the implementation of the transportation system. When in port loading and demolition are not infrequent event of loss or damage to the goods. To eliminate that uncertainty, Hamburg Rules determine the limit of liability from the carrier when the goods are at the mercy of the carrier at the port of loading, during the voyage and at the port of discharge. On the one hand THR 1924 set the due diligence clause, which is the main carrier obligation to provide ships, crew and cargo space seaworthy (seaworthy, eyeworthy, and cargo worthy).

However, there are a number of provisions that frees the carrier from responsibility as "nautical fault" that is a mistake in navigation and ship management by personal boat is lifted or under the command of the carrier. As a result of this article shipper should bear the burden of risk while transporting loose hands of responsibility for the errors of navigation and ship management basically given the ineffectiveness of communication between the owner of the ship with the crew at that time. Hamburg Rules balance alignments an unfair condition to provide that a person who made a mistake liable for any loss including errors by servants or agents carrier. Moreover, based on the legal concept of economy, losses must be borne by the parties in a position to prevent damage to it.

The liability of the carrier in The Hague Visby organized on the principle that the carrier liable for any damage/loss since the goods are in their authority, during the voyage and before being delivered to the recipient at the port of discharge. The carrier may be exempt from liability only if the carrier includes servants or agents have attempted to avoid the events leading to the loss.

Transitional risks and responsibilities under KUHD mentioned in paragraph a of Article 468 which declares that from time to time acceptable to the recipient, the carrier is responsible for maintaining or protecting goods transported as cargo ship. Furthermore, paragraph b states if there is a loss the owner/shipper for any damage or shortage of goods, then the carrier is obliged to provide compensation; unless the carrier can prove that the cause of the loss in question is a catastrophe or events that are not capable of inevitability or the fault of the shipper.

Paragraph (c) states that the fault of everyone who works for the carrier consists of a crew and or helper is the responsibility of the carrier, including any equipment used in the sea. If the responsibility of the carrier according to the provisions of the Commercial code compared with THR conditions and THV then KUHD more flexible THR. Since loaded to unloaded Hamburg Rules. Since being in control at the loading port during a cruise up unloaded and give recipient KUHD RI.

The obligation to maintain the safety of the goods from the receipt to be submitted to the recipient. KVR 1968 and HR 1978 demarcate concretely with a starting point to the end of liability, while the Commercial code does not explicitly mention the start and end points carrier's liability, so the responsibility of carrier based KUHD wider

fields and can be shorter. This is because the responsibility of the carrier in KUHD is heavier because there is no disclaimer as in KVR and HR 1978. Based on this fact a shame if a clause in the Commercial code is never used as a basis manifest/bill of lading in the domestic haulage. Due to the transport of livestock and animal life as well as more protection against senders. Responsibility of carrier or transport providers in the waters according to Article 40 and 41 of Law Number 17 of 2008 that the shape of the responsibility for losses arising as a result of:

1. The death or injury of passengers transported
2. Destroyed, lost or damaged goods transported
3. Delay in transportation of passengers or goods transported
4. Loss third party

However, if the carrier can proof that such damages were not caused by his fault, then the carrier in question can be exempted from all or part of its responsibilities.

Against his liability more of Shipping Law Article 41, paragraph 3 explicitly says "mandatory for ship operators to insure their responsibilities" this is because the carrier sense is wrong however cannot disclaim liability insurance. Insurance is simply the transfer of risk. The insurance company as an insurer to pay compensation according to the insurance policy that the insured is entitled to claim in this case the sender of the goods / passenger. Carrier that does not mean escape from his responsibility and the insurance company was not acting as the power of the insured.

Shipping Company are not only regulated in Indonesian Commercial Code but also in Articles 40 up to 43 of Laws no. 17/2008 concerning Shipping. According to Article 40 of Shipping Laws (carrier in seawater is responsible for the safety and security of

its passengers and/or its cargo. Besides, the company is also liable for its load based on its category and amount which is stated in the document and/or carriage document which has been agreed upon.

Further provisions concerning the legal responsibility of a carrier are regulated by government regulations; so based on Article 353 of shipping Act, Government Regulations numbered 20/2010 is applicable. Based on Article 181 of the Government Regulation, a carrier enterprise which engages in sea carriage is responsible for the impact caused by the operation of the vessel such as death or injury of the passengers; destruction, loss or damage of the load; the delay for the passengers and/or goods carried; and the loss for the third party. In the explanation, what it is meant by "Liability" is the responsibility for the death and injury of the passengers caused by the accident during the carriage and it happens on the vessel and/or the accident during embarking or disembarking a vessel according to the existing laws and government regulations.

The liability of a carrier towards passengers in the sea (according to the government regulation) is to insure them. The limit of responsibility for destruction, loss or damage of the load; the delay for the passengers and/or goods carried; and the loss for the third party who suffers from the loss as the result of ship operation is decided based on the existing laws and government regulations. When a sea carrier can prove that the loss suffered by the passengers, goods sender or the third party is not the fault of the carrier or forwarder; so the carrier is free from part of the whole liability. The provision of the limit of the liability proves that the concept of legal liability used in Shipping Acts is presumption of liability which is known as the concept of reversed proof.

In private law, this liability can be found in Article 1365 of Indonesian Private Code. The article is known as non-legal action which is applicable to anyone as the general provision and as the specific provision of this article is ship collision.

Basically, the responsibility based on fault liability is valid for every carrier. Fault liability must comply with the elements of fault, and loss. The loss itself must have relationship with the fault. When the harmed party wishes to receive compensation for his loss, that particular party must prove the fault. If there is a fault, the carrier has the obligation to pay the compensation to the harmed party. If there is no fault or loss, the carrier will not pay such loss. If this happens, the passenger and, goods sender or even the third party must provide evidence against one another.

Based on Fault based liability must fulfill 3 elements:[395] 1) There is fault; 2) There is loss; and 3) The loss has the relationship with the fault. When there is a fault, but it does not create any loss, the enterprise will not be responsible. Thus, when there is loss but the loss has no relationship with the fault, so the carrier is not liable for it.

Indonesia is not a signatory party to any of international conventions related to marine cargo claims such as The Hague Rules, Hague-Visby Rules or Hamburg Rules. The provisions related to the marine cargo claims are still regulated in the ICC. The main provision of the marine cargo claims is stipulated in article 468 paragraph 2 of the ICC. Based on this provision, the carrier shall indemnify the damages if it does not

[395] Martono dan Eka Budi Tjahjono, Transportasi di Perairan Berdasarkan Undang-Undang Nomor 17 Tahun 2008, Rajawali Press, Jakarta,2011, 170

deliver the entire or parts of the damaged goods, except if it is able to prove that the failure of the delivery of the goods, either entire goods or parts thereof, was caused by a condition that could not be prevented or evaded as the result of the nature of the goods or the condition of the goods or that the goods were already defective when received or were damaged as the result of a fault of the shipper.

Under this provision it may be inferred that the damaged parties are usually the consignees of the goods which have the title to sue against the carrier although it is also possible for the consignee's agent to sue against the carrier. This is also stipulated in the Article 510 of the ICC which provides that the consignee has a right for the delivery of the goods in the destination specified in the bill of lading.

In case the carrier is not the owner of the ship, article 455 of the ICC provides that the carrier can still be held liable upon cargo damage unless the carrier specifically mentions in the carriage contract that the carrier merely acts on behalf of the owner whose name is specified in the carriage contract as well. Therefore, if a carriage contract contains a demise clause, it will only be enforceable if the clause specifically mentions the name of the shipowner on whose behalf the carrier is acting.

If it is stipulated that the "quality/quantity is unknown" or there are similar clauses in the bill of lading., under article 513 of the ICC, then the carrier will not be bound by such statement, unless the carrier should have known the conditions and types of the cargo or the cargo has been quantified in front of the carrier.

The ICC provides that the one-year time bar applies to: (i) a claim in relation to the

sum which is payable by a consignee in a carriage of goods contract; and (ii) a claim against a carrier in a carriage of goods contract.

Based on the court practice in Indonesia, any claims against the charterer lodged by the consignee may be based on non-contractual claims or under tort. This is because the consignee may find the basis of the claim is not yet stipulated in the bill of lading and may be found in statutory provisions. Any claims based on statutory provisions in Indonesia shall be made under non-contractual claims or tort.

In case the carriage contract contains a dispute resolution clause, it is possible under Indonesian law to incorporate this clause into the bill of lading. Under the freedom of contract principle that is adopted by Indonesian law, the parties to a contract shall be entitled to agree upon any provision that they desire including incorporating charter party terms under the bill of lading.

Based on Article 47 of Shipping Law and Article 188 of Government Regulation No. 20 year 2010 concerning Waters Transportation as amended, a carrier is obliged to submit a notification to the harbor master before the ships carrying the dangerous goods and/or the special goods arrive to the port. Failing such obligation, the relevant party will receive a fine of IDR 100,000,000 or six months imprisonment.

Under Indonesian law, a party seeking to obtain security for a maritime claim against a ship may proceed to initiate ship arrest to stop the ship from operating at the time the vessel concerned makes a call into any Indonesian port. The legal provisions regarding the arrest of a ship are stipulated in Article 222 and 223 of the Shipping Law. These legal provisions allow the arrest to be imposed on any ship involved in a

civil claim as well as a criminal case. These provisions also enable a party to request the court to arrest a ship without filing a claim/lawsuit. The arrest of a ship can be done after the relevant court issues an order.

The provisions of Article 222 and 223 of Shipping Law are somewhat ineffective due to the lack of implementing regulations. In Indonesia, the general provisions in the Act are required to be further stipulated in more detail under regulations which are made by government bodies known as implementing regulations. Article 223 of Shipping Law itself explicitly mentions that an implementing regulation in the form of a Minister Regulation is required to stipulate further procedure of arrest. However, until now the government (especially the MOT) has not issued the regulation. Because of this, some courts are still reluctant to issue orders for arrest of ship.

In addition to the above, Indonesian law also does not recognize arrest on a sister ship. Arrest of a ship can only be affected strictly on the relevant ship. The only way a claim, including a maritime claim, can be exercised under Indonesian law is through court proceedings in which the claimant submits an application to impose conservatory attachment upon the defendant's assets. The purpose of imposing conservatory attachment is to put the assets of the defendant as a security to settle the amount of claim that the claimant has asserted or to prevent the title of the disputed assets to be assigned to other third parties. In relation to maritime claims, what form of security is acceptable; for example, bank guarantee, P&I letter of undertaking.

In relation to maritime claims, the form of security which is acceptable in Indonesia is dependent on the agreement of the parties. There is no statutory provision stipulating

that only a certain form of security is acceptable. However, based on shipping practice, normally the parties agree to accept a letter of undertaking from P&I Club.

5.2.2 Unlimited Liability

When the harmed party is able to prove that there is fault from the carrier and the loss is because of the fault, so the carrier must pay for the compensation suffered by several harmed parties. The carrier has the obligation to pay in unlimited amount and the loss must be paid fully.[396] The concept of fault liability is fair when both parties have the same position i.e. when the position of the carrier and the sender and passengers or any party who is harmed are balanced so that both sides can prove the fault.

In the development, legal liability which is based on fault cannot be applied in transportation especially in air carriage considering that the positions of the parties are already not balanced because the carrier at this time has used high technology whereas the passengers and/or goods sender, in general, are not in control of high technology.[397] In the development of air transportation, fault based liability is not applicable because the position between passengers and/or goods sender is not balanced.

The carrier as the operator is in control of high technology, meanwhile passengers in general are not in control of the transportation technology. When passengers or goods sender and service user must prove the fault of the carrier, surely it will not be successful. So that is why there is a Presumption of Liability Concept.

[396] Martono. 290.
[397] Martono, 210

Presumption of liability concept initially was applied in air transport in Warsaw Convention in 1929. Based on that concept, a carrier is presumed to be guilty so that the carrier in the name of law must pay the compensation suffered by passengers, sender and other users. The principle of presumption of liability means that the responsibility can be avoided when a carrier proves that the party is absent of Fault. As a comparative, In the case of De Marine vs KLM Royal Dutch Airlines; what is meant by accident is an accident is an event, a physical circumstance which unexpectedly taken place in according to the usual course of things. If the event on board an airplane is an ordinary, expected and usual occurrence, that it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or un expected, an unusual or unexpected happening. The event or occurrence is not an accident if it results solely from the state of health of the passenger and is unconnected with the flight. [398]. According to the presumption of liability concept, transportation company is presumed guilty so that the company in the name law must pay the compensation suffered by the passengers and/or goods sender. They do not have the necessity to prove the fault of the transportation company and they only need to inform that there is loss which happened during the accident, [399] so that passengers or sender and other users do not have the necessity to provide evidence of the fault of the company but only to notify the loss which occurs during the accident. In turn, transportation company has the right to enjoy Limited Liability of the compensation determined in the Convention which means that how high the loss

[398] Saefullah Wiradipraja, beberapa Pokok tentang Tanggung Jawab Pengangkutan Udara, Pusat Penerbitan Universitas, LPM Unisba, Bandung, 1995, 2.

[399] Saefullah wiradipraja, Tanggung Jawab Pengangkut Dalam Pengangkutan Udara Internasional dan Nasional. Yogyakarta; Liberty, 1989, 57.

suffered by the passengers and or goods sender, transportation company is not liable to pay all loss suffered by the passengers and or goods sender.

5.2.2.1 Strict Liability

The concept of legal liability without fault or strict liability is the concept that a businessman cannot free himself from the obligation to pay for the loss/damage. Based on law doctrine, the concept of liability is absolutely called as strict liability originated from Europe during Industrial Revolution in the nineteenth century. At that time, in the society there was stratified society: i.e. upper stratification which usually has the access to all needs such as economy, social, culture or politics; and, lower stratification which usually does not have equal opportunities as enjoyed by the upper stratification. Upper stratification is generally controlled by the industrialists, meanwhile in contrast the lower stratification generally consists of poor labor whose life is less fortunate than that of the industrialist.

The industrial revolution which took place in Europe beside giving advantage to the industrialist also giving negative impact to social life. Lower society always became the victim of human exploitation, environmental pollution, poverty, misery, unfair treatment and other social suffering. Lower society as the victim of industrial revolution demanded law protected lower society. Law must guarantee the protection of all people. Law also has to guarantee economic, social or political life of all people. At that time a new doctrine was born which demanded the responsibility of businessmen.

In the development, businessmen must be liable to prove the negative impact caused by industrial revolution without the necessity to prove the fault of businessmen. There is an unfairness when society is burdened to prove the fault of businessmen who enjoy the result of industrial revolution, so that is why businessmen must be liable of the impact of industrial revolution without proving their fault.

As mentioned in earlier chapters, Kadar pointed as follows: "strict liability is a liability which would arise irrespective of whether a person was at fault or not. [400] From that definition, it can be assumed that strict liability is a responsibility which appears without showing whether someone is guilty or not. It is also what was said by Michael A. Jones that Strict liability is a general term used to describe forms of liability that do not depend upon proof of liability.[401] This definition explains that this liability does not require to be proven beforehand about the fault of the accused.

Based on this principle, a carrier must be responsible for any loss/damage which appears in the carriage which it provides without the necessity to prove whether there is a fault from the carrier or not. A carrier is impossible to be free from the liability with any reason which appears together with the loss/damage. This principle can be defined in the following sentence:[402]

> *"A carrier is liable for every loss/damage which appears because of any cause in the operation of the carriage."*

[400] Kadar et all, Business Law, Heinemann Professional Publishing, Singapore, 1987, 341.
[401] Michael A. Jones, Textbook on Tort, Oxford University Press, London 2002. 390
[402] Abdul Kadir Muhamad, Hukum Pengangkut Niaga, , Citra Adiya Bhakti, Bandung, 2008, 56

In Indonesian law, strict liability for the first time was regulated in the Environment Laws especially in Articles 87 and 88[403].

1) Every law violation in the form of polluting and/or destroying environment which causes loss/damage to other people or environment makes the one who is responsible for the business and/or activity pay the compensation and/or do certain action.
2) Besides the burden to do certain action as stated in Point (1), a judge may decide a fine for each day of the delay of the action settlement.

Article 35 regulates the strict liability as follows:

1) The person who is responsible for the business and/or the activity of which business and activity causes substantial and important impact towards the environment and who also use hazardous and toxic substance is strictly responsible for the loss/damage caused by having the obligation to pay compensation directly and at the time of the environmental pollution or destruction.
2) The party who is responsible for the business and/or activity can be free from the obligation to pay the compensation as stated by Point (1) if the concerned can prove that the pollution and/or environment damage is caused by one of the followings:

a) Natural disaster or war
b) Force major; or
c) Third party action which causes pollution and/or damage to the environment.

[403] Article 34 and 35 Environment Act.

(1)In the case that there is loss caused by a third party as stated in Point (2) in part c, the third party is liable to pay for the compensation.

The interpretation of Strict Liability in Environment Laws *(Undang-Undang Lingkungan Hidup*) Numbered 32 of 2009 on The Protection and the Management of Environment is that in strict liability, the element of fault does not need to be proven by the plaintiff as the basis of compensation payment.[404] This provision is *lex specialist* in the lawsuit of non-legal action in general. The amount of compensation which can be imposed towards the environmental pollution or damage based on this article can be applied up to certain limit and according to the existing laws and government regulations, there is a necessity to insure business fund and/or activity or the environment fund is already available.

The provision in the Environment Laws is specific non-legal action regulation even though in the practice at the court, it is always controvertible with Article 1365 of Indonesian Civil Code. In the case of *Wahana Lingkungan Hidup Indonesia (WALHI or Indonesian Environment Organization) and PT Inti Indorama Utama (PT IIU)* in 1998. This lawsuit polarized Article 1365 of Indonesian Civil Code with the Strict Liability Principle of the Environment Laws. The panel of the judges in the verdict rejected lawsuit of WALHI by implementing the principle of reversed fault proof to the plaintiff as regulated in Article 1365 of Indonesian Civil Code, so based on the Decision of the Panel of Judges, there was no sufficient proof that PT. IIU had the

[404] Explanation of Article (1) of Environment Laws

fault.[405] The principle of compensation applied by the judges in the lawsuit is indeed the principle found in Article 1365 of Indonesian Civil Code that is the compensation which can be granted when the victim can prove that there is the element of fault in the subject.

With the specific rule of compensation principle in environment cases, in fact the implementation of Article 1365 of Indonesian Civil Code which adheres the principle of "liability based on fault: in which the burden of proof is with the victim is no longer relevant. It is because Environment Laws fully exempts plaintiff/victim from the obligation to prove that there is an element of fault.[406]

Like the presumption of innocence, strict liability is an alternative to overcome the weakness of fault-based liability principle. By using this principle, then there is no obligation of scientific proof which is impossible to succeed when it is charged with usual liability.

The concept of strict liability is understood as an absolute obligation which is related to damage caused.[407] So, that is why one of its main characteristics is the absence of fault requires a fault. In some cases of environment pollution which causes loss/damage to sea environment especially dangerous actions in which the provision of liability without fault can be applied. The other important factor which is related to

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[405] Rosa Agustina, Perbuatan Melawan Hukum, , Penerbit UI, Jakarta 2003, 220

[406] M. Daud Silalahi, Hukum Lingkungan Dalam Sistem Penegakan Hukum Lingkungan Indonesia, Alumni Bandung, 2001,40

[407] Hendrik Salmon, Eksistensi dan Fungsi Prinsip Strict Liability dalam Penegakan Hukum Lingkungan, Jurnal Fakultas Hukum, Universitas Pattimura Ambon downloaded from www.fhukum-unpatti.org accessed 17th January 2013

strict liability doctrine is the burden of proof.[408] One of the criteria determining the division of the burden of proof should be given to the party having substantial capacity to provide proof of one matter. In relation to the damage or environment pollution, it is obvious that the polluter has the more capability to give proof. In Indonesian legal reference, strict liability concept has various interpretations. Some legal experts interpret as risk liability, direct and immediate liability, strict liability, and no-fault liability. No fault liability is usually known in insurance practice[409]. Whereas strict liability later is used in Environment Laws.

From the provision in Environment Laws, it is known that liability should be tied to a business and activity giving substantial and important impact towards environment, business and activity which uses dangerous and toxic substance, and also business and activity producing dangerous and toxic waste.[410] This means that not all forms of business and activity abide strict liability principle.

As described above in strict liability, the burden of proof has shifted from the plaintiff to the defendant. The plaintiff does not have to prove that there is an element of fault as the basis of claim for compensation. On the other hand, the defendant is burdened by an obligation to prove that he is blamed but he is not the cause or who causes the loss/damage to other people or environment or what it is called as "reversed burden or proof".[411]

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[408] Hendrik Salmon
[409] Reuben Netto, No Fault Liability, What The Publics Needs to Know, , Marsden Law Book Sdn Bhd, . Kuala Lumpur, 2007 17
[410]Dikdik Mohamad Sidik, Hukum Laut Internasional dan Pengaturannya di Indonesia, Bandung, Refika aditama, 2011,238
[411] Hendrik Salmon,

The principle of strict liability is not found in marine carriage law as regulated in the Indonesian Code of Commerce. This cannot be regulated by the reason that the carrier in transportation business does not have to be burdened by hard risk.[412] But it does not mean that damaged party cannot use this principle in the carriage activity. Knowing that strict liability originates from right; so if it is related to legal action, strict liability does not usually originate from a contract.

In the early development, the damaged party can claim based on tort for the violation of obligation stipulated by laws. If based on laws it is stated that absolute obligation does not need to show the proof of negligence or wrongful intent.[413] In the case between Groves versus Lord Wimborne (1898), the plaintiff was damaged because of the violation made by the defendant to make fence around dangerous equipment.[414] The court decided that the defendant should be responsible because the laws regulates the compelling provision: i.e. absolute duty.[415] But when the laws does not burden the absolute duty so the negligence must be proven.[416] Based on the above provisions , if the plaintiff is successful in filing his claim, he must prove the following circumstances:[417]

1. The laws have been violated and the violation is the direct loss/damage
2. The plaintiff is a person or group who are protected by laws
3. The claimed loss/damage is what is meant by the laws to be protected

[412] Abdul kadir Muhamad,
[413] Hepple and Matthews' Tort Cases and Materials, London, Oxford, 2009 101
[414] Hepple and Matthews' Tort Cases and Materials, London, Oxford, 2009, 101.
[415] Hepple and Matthews' Tort Cases and Materials, London, Oxford, 2009, 101.
[416] Hepple and Matthews' Tort Cases and Materials, London, Oxford, 2009, 101.
[417] Andi Hamzah, Penegakkan Hukum Lingkungan, Jakarta, Sinar Grafika, 2005, 90

So, in this case, strict liability will be imposed to the carrier who violates Environment Laws as stated above and Marine Laws in the case of sea pollution. Besides those aforementioned national laws, there is also the International Convention viz. International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC Convention 69).

In Indonesian law, strict liability for carrier was just applied in the Environment Laws in which the explanation provides the understanding as follows:

> *"What it is meant by Strict Liability is the element of fault should not be proven by a plaintiff as the basis of loss/damage payment. The provision is lex specialis in the lawsuit of action violating the law in general. This article can be applied in certain extend concerning the amount of compensation burdened to the polluter or environment damager."*

Up to the present, there has not been any implementing regulation of Article 35 but in the case of compensation because of oil spill in the sea, strict liability relating to whether or not there is a fault either the oil spiller, third party or oil owner; so the carrier must compensate the loss/damage up to the highest limit set up at the beginning by Tovalop system, Crystal system or CLS/Funds Convention andis limited in category and description of compensation that can be claimed. Strict liability compensation system is simpler in the evidence ansolution processbut limited in providing loss/damage compensation and category of loss/damage which can be claimed.

Strict liability now is considered necessary in environment pollution, but it does not cover ship collision except the ship collision causes pollution. Ship collision only causes ship grounding and the shipwreck lies on ship lane. There has not been any case

which applied strict liability. But in fact, the shipwreck really disturbs ship lane for other ships and may be a potential cause for accident and another ship collision as which happened to the sinking of KLM Karya Rejeki ship in the waters of Karimun Jawa and the verdict was reached at Marine Court numbered 1015/051/IV/MP.10. The existence of shipwreck causes another ship to have leakage and made the master unable to change course and as the result the ship sank.[418] The existence of the shipwreck made the sea passage became obstructed because it caused collision with the shipwreck. This of course threatened the safety of voyage.

The existence of strict liability in the case was necessary because there should be fast handling of lifting the shipwreck. If the prevailing liability still refer to liability based on fault which is still applied to non-legal action in Indonesia especially in carriage and this does not provide sufficient protection either to the doer or victim. With the strict liability, there can be loss spreading and better risk with the help of P&I Club which is related to a certain high amount to be burdened upon.

As regulated in CLC concerning a system which makes possible the victim of pollution to receive compensation from the owner of the ship (carrier) who is directly liable to the polluter. Based on this liability, P&I Club needs to persuade its members about legal damage and compensation paid by its members in the occurrence of pollution. It should be noted that according to general philosophy of the Club that a member is insured only to his liability in his capacity as the owner or the ship lessee and not as

[418] The Decision of Maritime Court numbered 1015/051/IV/MP.10

the owner of cargo. When the laws or other government regulations put the effort to uphold the liability to the oil owners, importers or exporters eksportir, the Club is not liable to it even though its members are the owners of cargo and at the same time as the owner of ship such as oil businessmen who have his own tankers.

CLC Convention is applied to provide a direct measure which makes it possible for the victims of oil pollution such as the countries having coastline to claim directly to ship businessmen without the compulsory to prove his fault. In this case P&I Club is the only defense to share the risk so that ship businessmen can be free from bankruptcy even the pollution is caused by good intention of its members.[419]

In addition, to carry the responsibility according to convention, the Club can be demanded to provide compensation from owner's liability according to national law. In the framework of maritime law development as said by Mochtar Kusumaatmadaja: "…law is needed for the process of change including fast process of change which is usually expected by developing society and if the change is going to be done accordingly".[420] The development of legal liability especially the change of liability based on fault concept becomes strict liability in the cases of pollution and ship collision is deemed necessary.

In Indonesian Law strict liability principle is not a new law or new term, but it still hard to apply until now. Before it stated in Management of Environmental Act, this

[419] The Decision of Maritime Court numbered 1015/051/IV/MP.10.
[420] Mochtar Kusumaatmadaja, 1976, 13.

principle is known in International Convention on Civil Liability for oil Damage (CLC) 1969. The application of strict liability in Indonesia is not an easy since there are some obstacles which must be solved, they are:

1. Based on this principle, liability for pollution damage compensation directly go to polluter and this is the opposite principle to liability based on fault, this principle never been popular in court decision, many cases in the court the strict liability rarely apply to solve the case of water pollution and any other pollution, the judges mostly still apply liability based on fault as a principle in Pollution case.
2. The application of the principle of strict liability requires that proof is on the polluter of the environment (pollution). It is assumed that the polluter has a high ability to give evidence in the scientific technical to explain any causal relationship between actions and consequences.
3. There is a possibility that the polluter will deceive or cover up certain facts that would undermine the allegations

But although there are some difficulties in the implementation of the application of the principle of strict liability in the case of marine pollution in Indonesia this is because

1. Indonesia is a State Party to the Convention on the Law of the Sea 1982 has an obligation to comply with all the provisions of the convention, including the protection of the environment.
2. Even though the application of liability based on fault would harm the State of victims and the injured party, because not all victims were State human resources and technology capable of being used to search for evidence of the fault of the polluter.

3. Application of Liability based on fault is more suitable retained in case of other than pollution of marine environment such as in breach of the contract of carriage sea.
4. The application of strict liability is considered to be a good protection for victims and polluter, because it can be held division of losses spreading loss better with the help of institutions guarantor such as insurance and the club.

From the foregoing it will turn out that the system of "strict liability" has specificity compared with the system of liability based on fault, the rules of evidence will be simpler and relatively shorter on strict liability, a matter that not infrequently a factor complicating the general compensation general, However broad the scope of the compensation which it is possible to be limited. Because another aspect of "strict liability" is the existence of a ceiling limit on the amount of compensation. It can be concluded because of the nature of "strict liability" is special since it excluding the common elements of compensation in the form of the element of fault the polluter, then it must be seen as a package deal with the disadvantages of "limitation of liability ". It makes an absolute compensation system that are limited in number and no liability in the case of an exceptions to this principle of strict liability.

In Limitation of liability is determined that the owner of the ship responsible for the losses incurred due to oil spill with limits of liability highest up to 2,000 euros for each ton of the weight of the ship provided that the total amount will not exceed 210 million euros for each ton of the weight of the ship with provided that the total amount will not exceed 210 million euros. While the weight of the ship here is intended notion

net weight (net) of the vessel plus the amount deducted from the gross weight (gross) by the engine room.

In the event that the ship is difficult to determine its weight under the general rules of measurement weight of the ship, then the weight of the ship will be 40 percent of weight in tons or 2,240 lbs of oil carrying capacity of the ship. Eventually need to be mentioned here that the possibility which the ship owners will have full liability, that can be known in tort marine pollution with absolute liability, namely in terms of " accident occurred as a result of the actual fault or privity of the owner:

> *Thus it is clear that the general principles to be followed in compensation of marine pollution are: Strict liability " with the possible use of the general principles of compensation (absolute liability) as an exception*

5.2.2.1 Limitation of liability

The provisions regarding limitation of liability under Indonesian law are governed under the ICC. As mentioned previously, the ICC itself was enacted during the Dutch colonial era in Indonesia and thus, some provisions are not updated since its provisions, especially those that relate to shipping matters (including those related to the carrier's limitation of liability), have never been amended. With respect to the carrier's limitation of liability, the ICC recognizes two types of limitations of liabilities:

i. Package Limitation of Liability as stipulated under Article 470 (2) of the ICC which allows the carrier to affix a certain number of limitation of liability as long as it is less than 600 Dutch Guilders.
ii. Tonnage Limitation of Liability as stipulated under Article 474 of the ICC which restricts the liability of the carrier to maximum 50 Dutch Guilders per

cubic meter of net tonnage of the ship, added, in the case of a mechanically propelled ship by what to determine the tonnage, has been deducted from the gross tonnage of the space which is occupied by the means of propulsion.

Particularly for collision cases, Article 541 of the ICC stipulates that a ship may limit its liability to 50 Dutch Guilders for each cubic meter of the net tonnage of the vessel. In case the vessel is a self-propelled one, the net tonnage shall be calculated by excluding the space within the ship that is used for the engine.

As the provisions on the limitation of liability in the ICC were enacted in the Dutch colonial era, the liability limit uses "Dutch Guilder' currency – the currency that was used during such era. Since Indonesian independence, the Dutch Guilder currency in the ICC has been read as Indonesian Rupiah and it is very low and unrealistic to be applied at the present time.

Our recent research on this matter shows that there are no precedents which particularly address the limitation of liability action in Indonesia which are relevant to the current situation, and therefore we can assume that the disputing parties in the cases that carry liability or collision have never applied the statutory provisions in the court proceedings and they seemed to settle the dispute.

In Indonesia, the obligation to deposit the limitation fund is only applicable to limitation of liability of oil spill incidents under Article V paragraph 3 of CLC. Indonesia is the ratifying party of the International Convention on Civil Liability for Oil Pollution Damage since 6 July 2000 by virtue of Presidential Decree

No 42 of 1999 dated 28 May 1999.

There is no special provision in Indonesia that regulates the form of security that needs to be deposited when establishing a limitation fund. Therefore, the general instrument of security such as cash deposit and P&I LOU is acceptable. In Indonesia, the obligation to deposit the limitation fund is only applicable to limitation of liability of oil spill incidents under Article V paragraph 3 of CLC. Indonesia is the ratifying party of the International Convention on Civil Liability for Oil Pollution Damage since 6 July 2000 by virtue of Presidential Decision No 42 of 1999 dated 28 May 1999.

However, under Indonesian Law, the limitation of liability is governed by the Indonesian Commercial Code (ICC) which recognizes two types of limitations: Firstly, package limitation of liability and secondly, tonnage limitation of liability.

If there is a collision, a ship may limit its liability to 50 Indonesian rupiah for each cubic meter of the net tonnage of the vessel, unless the collision occurred intentionally or was due to gross negligence or a major error. Neither the Indonesian Civil Code nor Indonesia's Shipping Law provide a definition of gross negligence or major error. However, it most likely relates to a material error or mistake committed by the ship's master in circumstances where he should have been fully aware that such an act or omission would compromise the safety of the ship, its passengers, crew and/or cargo. Limitation The limitation of liability regime which currently applies in Singapore is the Limitation of Liability for Maritime Claims 1976 (the 1976 Convention). In Malaysia, however, the Limitation of Liability for Maritime Claims 1976 as amended by the Protocol of 1996 (the 1996 was the Convention Relating to the Limitation of

Liability of Owners of Seagoing Ships in 1957 (the 1957 Convention) until very recently. This changed in earlier this year when the Merchant Shipping (Amendment and Extension) Act 2011 came into force in Malaysia making the 1996 Protocol the new regime for the limitation of liability in Malaysia from 1st March, 2014.

Malaysia, is also a party to numerous international conventions – the International Convention for the Prevention of Pollution from Ships 1973/1978; the International Convention on Civil Liability for Oil Pollution Damage 1992; and the International Convention for Compensation for Bunker Oil Pollution Damage 2001 – and has laws in place prohibiting the discharge of oil or harmful substances, such as oil, hazardous substances, pollutants or waste from any vessel into its territorial waters and economic zone. A person in contravention of the laws is liable to be fined or imprisoned or both. The Malaysian authorities are entitled to detain the offending vessel until they receive adequate security. As mentioned above, all vessels sailing into Malaysia waters or its economic zone, must have in place a certificate of insurance or other financial security equivalent to the owners' total liability under the applicable conventions.

Owners of vessels sailing into Singapore waters are liable for pollutants that are discharged from their vessels. Pollutants in Singapore cover more than oil and include garbage, waste matter and plastics as well. Under the Prevention of Pollution of the Sea Act, the master, owner and agent of a vessel shall be liable for a criminal offence where such pollutants are discharged from the vessel, unless the discharge incident falls within one of the exceptions, for example if it was necessary for the purpose of securing the safety of a ship or saving life at sea. Further, the owners of a vessel are liable to pay for the cost of the measures taken by the MPA to remove the pollutants

and for the costs of preventing or reducing any damage caused by the discharge.

Slightly different regulations that apply to discharges of oil or bunker fuel from vessels that are constructed or adapted for carrying oil in bulk as cargo. Civil liability is imposed on the owners of such vessels by the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act. Under this Act, the owners of such vessels are strictly liable for the damage caused by the discharge and the cost of the measures taken to prevent or reduce such discharge. Liability also extends to any damage that such preventive measures may cause. The owner can however escape liability under certain limited circumstances, for example suppose he can prove that it was caused by the act or omission of a person with the intent to cause damage who is not an employee or agent of the owner. An owner who is found liable under this Act may limit his liability according to the Act, and this limitation is calculated based on the Vessel's tonnage. Limitation is however not allowed in cases where the discharge resulted from an act or omission of the owner done either with the intention to cause the damage or cost described in the Act, or recklessly and in the knowledge, that any such damage or cost would probably result.

For discharge of bunker fuel (or its residues) from other types of vessels, civil liability is determined by the Merchant Shipping (Civil Liability and Compensation for Bunker Oil Pollution) Act 2008. This Act contains similar provisions to the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act, however under this Act strict liability for the discharge is imposed not only on the registered owner of the vessel but also the bareboat charterer, manager and operator. An owner who is found liable under this Act may also limit his liability, however in these cases limitation is calculated in

accordance with the provisions of the 1976 Convention.

5.3 Protection and Indemnity As A Form Of Mutual Liability In Indonesia

As mentioned in previous chapter, in carrying out its operation, sea transportation experiences risks which cause loss. The loss is suffered by the carrier also by any sea transportation users. Damage of the vessel and sea pollution due to ship collision and accidents is the biggest risks and it should be given priority and others should come after. To prevent the loss, the protection is provided through insurance. Insurance will cover the loss which is consistent with the liability. Despite this assurance in practice, not all of the loss could be covered by sea insurance in general.

In sea transportation, this liability is pertinent particularly by the vessel which uses international transportation. One of the important documents of international trade is marine Insurance Policy.[421] In general any peril happened in the sea will be covered by Marine Insurance. The loss that is covered for the risk 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 happening at the same time so that insurance policy that can cover the whole risk that might occur is needed.

Therefore, when there is a 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 where the loss is not covered or the underwriter does not cover the loss completely. The association namely P&I Club has the duty to cover the

[421] Suyono., 199.

risk which are insured by the general sea insurance. In effect the P&I Club provides an extension of protection for ship owners who are members of the club.

5.3.1 The Application Of P&I Club in Connection to *Cabotage* Principle

Internationally, P&I Club has been running since early nineteenth century, but Indonesia has a less number of shipping companies joining the club membership.[422] Almost all shipping businessmen which serve domestic shipping do not pay attention to the closing of P&I Club, except ships that serve international trades. As stated in the previous explanation, any ship which cannot show its Certificate of Entry – a proof that there has been a liability of law coverage with P&I Club, is prohibited to 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 Insurance Hull & Machinery. [423] The cost is very high even more expensive than the price of the ship itself. That is why a lot of shipwrecks which are not yet removed 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, ship accidents, as stated in the previous explanation had never decreased in number instead are increasing each year.

As the consequence of ship accidents, it causes loss which is amounted into big number

[422] Departemen Perhubungan.
[423] Sugiyanto, 96

for the national shipping businessmen. The loss includes the removal of ship wrecks which cause other ships to hamper and cannot sail freely and even worse the oil spill which pollutes the sea usually resulted from ship accidents.

From few cases decided by shipping court, it appears that most of the burden to cover the loss is given to the ship businessmen since it is considered as a mistake on the part of the ship, ship master and the crew. Therefore, without P&I Club, ship businessmen and shipping company are left to bear the burden of any losses. 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 remove of the shipwreck. On the other hand, the cost and the fee will still be charged to the owner of the ship.[424] When this occurs, it is clear that businessmen will suffer from financial shortage so that many shipping companies of Indonesia will not be able to have that competitive edge in sea transportation sector of the country.

In the field of sea transportation, it can be seen that the ships owned by Indonesia do not have a reliable ability to compete with developing countries such as Singapore (shipping) and the Philippines (ship crew).[425] It is undeniable that Indonesian ship crews are potential sources of Indonesian development so that its empowerment should be explored.

The role of ship crew and Indonesian shipping companies in Maritime Country

[424] Sugiyanto. 97
[425] Hasjim Djalal. 45

Indonesia, is a potential source for the development of Indonesia. The role of ship and ship crews of Indonesia in the field of domestic 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&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 *cabotag*e principles implementation is implemented through the Indonesian Presidential Decision. Its direction is to make ships cross Indonesian seas and stopover in domestic ports which has Indonesian Flag.[426] 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 of Shipping act.

The author believed that implementation will strengthen state revenue, opening job opportunities, accelerating economic development, avoiding the flow of fund to foreign countries and improving national security.[427] Yet, as long as Indonesia do not

[426] Hasijm Djalal,45

[427] Indonesia Maritime Magazine,

increase its rate of the competitiveness edge, the participation of ships which have foreign flag in shipping industry have 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.

Noticing 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 involved in passenger or goods transportations within domestic transportation.[428] This policy contains specific regulations of exceptions of *cabotage principles* for the ship that supports the leading activities of transporting off-shore oil and gas.

Cabotage principle gives a legal power to those carrying 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 either to sail or to trade in and around the waters of the country. [429]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.

[428] Indonesia Maritime Magazine
[429] Hasjim Djalal.,

At this moment, particularly when facing free trade era, among shipping businessmen there is a circulated discussion which is improper, that the application of the *Cabotage principle* is against liberalization of the 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 such as law, economy, social, cultural and security aspects. Besides, *cabotage principle* also elevates Indonesian people's economy by giving opportunities as many 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. *Cabotage principle* is functioned to protect Indonesian sovereignty as a 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 Indonesia increases as much as 60.8 percent from 6041 fleet unit in 2005 to 9715 fleet unit in August 2010. [430] This condition shows that the demand of the ship fleet is getting higher.

[430] Interview with SEACOM Ministry of Transportation in 13rd November 2012

Amidst the increasing demand to the national fleet, Indonesian shipping businessmen have to concentrate on the funding of ship unit provision, and on 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&I Club.

The obligation to join P&I there 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. At this time, the grade determination given to ships operated in Indonesia is carried out by foreign classification bureau like American Bureau of Shipping, Germanischer Llyod, Nippon Kaiji Kyokai, or Llyod [431]. 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&I Club is very crucial in relation to the application of

[431] *Laksanakan asas cabotage Cermin Strategi Maritim,* dalam Indonesia Maritime Magazine, Edisi 13, Oktober 2011

cabotage principle. By the existence of P&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 worrying about its safety by paying the fee as a premium. P&I Club is not the only way to protect sea environment but by joining P&I Club, the ship is automatically equipped with sea worthy documents so that it can improve the standard of safety of Indonesia ships in general then Indonesian ships can be competitive and ready to compete with international ships.

5.3.2 The Implementation of P&I Club in Indonesia's Transportation

5.3.2.1 The Benefit Of Implementation Of P&I Club To A Port

P&I Club can cover ship operational cost compared to Hull Insurance which only covers ship physically instead of the whole operation of a ship. This made possible considering that P&I Club is able to cover the whole operation of a ship including unloading activity as well as ship crews who involved in their activities.

This can help the port handle the risk of accident which may occur in the working area of the port due to the improvement of secure to port operators. The positive implications are: the existence of *force majeure* like bad weathers, tornados, tectonic earthquakes in the sea due to the insurance claim which is generally in need of concrete proof and evidence as well as it has to follow all the procedures so that the cost which can be anticipated to cover the repair will be minimized.

By joining P&I Cle the technical difficulties previously explained can be anticipated particularly to the port ships which cause some damage when operated experiencing damage or when the ship is relocated in a different port area. All ships have to prepare

a letter or certificate which may not be endorsed or transferred.

5.3.2.2 The Benefit Of Application Of P&I Club To The Safety Of Shipping

Based on above explanation, the application of P&I club will give positive impacts to shipping safety from any possible aspect which may appear, applied by P&I or it can give plus points to the ship itself.

The condition of the ship will be well maintained, and it can also give benefit to the ship crew and ship ‘s hull which experiences damage due to accidents like ship crashes, and sinking ships. Those troubles will be covered by the club so that the ship’s hull can be cleared from the shipping channel. The shipping channel is also cleared from impact of sinking ships.

Gradually, the traffic of entrance and exit from and to the port will be unhampered and it can improve the safety of shipping. This is a logical consequence considering that the Club will not accept the liability when the ship has not fulfilled the requirements of sea worthy documents availability as well as the availability of liability to related parties which experience loss due to ship accidents with secure and good condition of the ship, it will safeguard sea environment in Indonesia.

5.3.3 Legal Aspects Related To The Application Of P&I For National Ships

Some aspects of regulations which are related to the application of P&I Club for national ships in Indonesian law are as follows:

5.3.3.1 Regulations Concerning Associations

Besides the association which is regulated in Indonesia Civil Code as explained in

previous chapter, in its development in Indonesia, there are few regulations which arrange matters related to the association. Associations have purposes which are different from one to another and they are arranged in different regulations. The regulations are as follows[432] :

1) Association of people or group of people which is regulated in article 1653 Indonesian Civil Code and Staatsblad 1870 Number 64 as mentioned above.
2) Association of ship businessmen which is called *rederij* as regulated in article 353 of Indonesian Commercial Code.
3) Association of people or group of people which is called political party as regulated in regulations number 31 year 2002 about political party.
4) Association of people or group of people which is called cooperative as regulated in regulation number 25 regarding Cooperative.
5) Association of people or group of people which is called social organization as regulated in Regulation number 8 year 1985 regarding social organization.

When referring to grouping which was mentioned above then the following questions aroused: Which association can P&I Club be classified? Is it in the category of association of ship businessmen which is called *rederij ois* in a category of association called cooperative or an association which gives liability among one another according to BW?

[432] Interview with Agus Riyanto, Kasubdit Badan Hukum Direktorat Jendral Administrasi Hukum Umum Kementrian Hukum dan HAM, Jakarta, 25 April 2013.

In connection of understanding of the nature of P&I Club as association an explanation will be given regarding *rederij* and cooperative and association which gives liability among members. Before answering above questions, let us see what is stated by Chidir Ali. He pointed out that there are four kinds of associations which are referred in article 1653 Indonesia Civil Code which is [433]:

1). Association established by public power;

2). Association acknowledged by public power;

3). Association which is allowed; and

4). Association established for certain purpose or goal;

Association established or held by public power for example Provinces, cities, banks which are established by a state. So, association which is established or held by public power covers Civil Law Bodies. Therefore, associations which are recognized and acknowledged by public power covers Civil Law Bodies. Association permitted is a political party and association established for a certain aim such as Private Limited. So, the association approved because it is permitted and established for a certain goal will also include Private Law Bodies.

Compared with *rederij* as stated in Indonesian Commercial Code, based on Article 323 is joint ownership of a vessel by several shipping businessmen which is used for marine voyage on a joint financing and its form is different from association regulated in Book One of Indonesian Commercial Code.

[433] Chidir Ali, 56.

From the definition of *rederij* above as regulated in Article 323 of Indonesian Commercial Code, *rederij* has several characteristics or absolute requirements to be classified as *rederij*, they are [434]:

1) Joint ownership of a ship;
2) Ship operation in the sea based on joint financing;
3) Not in the form of Maatschaap (enterprise), Firma (firm), CV (limited partnership enterprise) or PT (private limited company);
4) Only for a vessel;

Even though *rederij* is indeed an association of carriers its objective is only for the operation of only a ship on joint costs and if there are some ships, so there must be some *rederij*. So that is why the emphasizing is the ship and if a ship is destroyed, so *rederij* is dissolved in the name of law.

Rederij is not a legal body with the following reasons:[435]

1) Based on Vollmar, *rederij* institution is not a legal body with the reason that Article 332 of Indonesian Commercial Code explains that the judge's decision on *rederij* or book keeper can be applicable to the joint wealth of *rederij* partners;
2) Dorhout Mess also asserted that *rederij* is not a legal body because Article 326 of Indonesian Commercial Code regulates that the *rederij* partners respectively is liable.

[434] Article 323 Indonesian Commercial Code
[435] Djohari Santosa, *Pokok-pokok Hukum Perkapalan*, Yogyakarta, UII Press, 2004, 40

The development was not like in the Netherlands which was famous with "*rederij Van kooi*" Amsterdaam. In Indonesia, since long time ago until today, "*rederij*" has not been recognized and did not exist. In the Netherlands, *"rederij*" institution was left for a long time because it was not interesting anymore for some reasons[436], among others *rederij* must fulfill some requirements of possessing one vessel and the vessel is owned by some shipping businessmen or the ship belongs together. It brings consequences with many ships which require many "*rederijs*". This is not suitable anymore with the latest development of marine transportation which requires a shipping company to have more vessels.

Referring to category of association described above, P&I Club is also not included in an association established by general authority because P&I Club is not a Public Legal Body. P&I Club is also not under the category of an association controlled by people in general such as a church. It is because P&I Club is an association of ship businessmen which consist of 20 people from shipping companies and it was founded by and for the interest and benefit of the members.[437]

Based on the interview with an official from the Ministry of Law and Human Rights, at this moment P&I Club has not been approved as a legal body.[438] In practice, the application from P&I Club to be a legal body has been filled to the Ministry but then got rejected because the Ministry seemed to think that P&I Club was not included in

[436] Djohari Santosa, *Pokok-pokok Hukum Perkapalan*, Yogyakarta, UII Press, 2004, 41
[437] Steven J. Hazelwood, P&I Clubs Law and Practice, Third Edition, 2000, 12
[438] Interview with Agus Riyanto, Kasubdit Badan Hukum Direktorat Jendral Administrasi Hukum Umum Kementrian Hukum dan HAM, Jakarta, 25 April 2013.

an association which was described in the State Gazette 1870 Numbered 64 on Association.

Based on the writer, P&I Club is an association established for a certain aim and objective. This is similar to the objective to establish a cooperative. Only that according to Cooperative Laws, the members of cooperative are individuals, whereas P&I Club has members of carriers which are in the form of companies already acknowledged by the country where P&I Club is founded. Those companies must fulfil the requirements set up by respective country[439]. So the subject of cooperative is different from that of P&I Club.

The similarity between P&I Club and Cooperative is the mutual principle (mutual benefits) among the members even though the mutual principle in P&I is to share risk and loss/damage which happens on the vessel to other members of the Club. P&I Club only guarantees all risks threatening ship businessmen in ship operation and all kinds of lawsuits (legal liability) which appear to those parties in a carriage agreement (contractual liability) or any lawsuit coming from the third party (third party liability) because of mistake or negligence of ship businessmen and also other people that they employ.

On the other hand, referring to cooperative definition, fundamentally it is an economic movement so that its objective is economy as well. It is different from P&I Club as the

[439] Interview with Agus Riyanto, Kasubdit Badan Hukum Direktorat Jendral Administrasi Hukum Umum Kementrian Hukum dan HAM, Jakarta, 25 April 2013., page 13

association of which aim is non-economy because P&I Club shares the loss or even damage among the members. Even though in the development, this aim has changed a lot because at the beginning P&I Club has the intention to assist the members to cover the liability of ship owner which is only guaranteed by the insurance up to ¾ of the ship. P&I Club can guarantee the remaining ¼ loss/damage of ship because of ship collision. [440]

Thus, the author is of one opinion that, P&I Club is under the category of association in accordance with the characteristics of association which mutual help and it is established for certain aims and objectives of P&I Club.

5.3.3.2 The Regulation in Indonesian Commercial Code

Article 246 of Indonesian Commercial Code explains as follows:

> *"A guarantor binds himself to compensate loss/damage of the guaranteed as the result of loss, damage, financial loss and unachieved the expected profit which is suffered by the guaranteed because of an unknown and unpredictable occurrence, and as repayment from the guaranteed given by the guarantor, the guaranteed pay premium to the guarantor when closing a deal."*

Under Article 250 of Indonesian Commercial Code, it is explained that encumbrances can be covered when the guaranteed has the interest in the property of the guaranteed. It means that encumbrance can only be closed based on the interest which can be guaranteed. Article 596 of Indonesian Commercial Code explains that the fundamental matter of a marine encumbrance especially among others are *casco* or ship hull; under the circumstances that the ship is empty or with cargo; all equipment, all life

[440] Shipping & Trade Law, Volume 11, Juni 2011 Number 5

necessities in order for a ship to sail; all goods in the cargo; all carriage fare which will be received; and all danger of slavery.

5.3.3.3 The Regulation Found In Act Number 17/2008 On Shipping

A carrier as the operator in providing marine transportation service must be liable for the loss/damage of passengers and suffered by passengers and goods owners caused by carelessness/mistake of the carrier in operating his ship. Next, to guarantee the risk of financial payment, the laws stipulate the ship owners/businessmen to insure his liability risk. Laws numbered 17/2008 regulates the carrier's (ship owner/businessman) obligation. The regulation can be found in Article 40 and 41 of Marine Transportation Law.

Besides, in Article 54 of Maritime Transportation Law (*Undang Undang Pelayaran)*, it is stated: "Multimode transportation facilitator is subject to insure its liability" and also in Article 231, it explains that a carrier is subject to insure its liability to sea pollution.

As described previously, the laws and regulations determine that ship owner/operator must be responsible for the safety of passengers and cargo when accident occurs and causes injury or loss/damage to the passengers and damage to the cargo, If ship owner/operator has guaranteed the risk that might appear by insurance, so P&I Club will guarantee up to the maximum liability according to the regulation in national law and applicable conventions

From several laws and regulations described above, it is clear that the obligation of

one ship to participate in Protection & Indemnity Club is inevitable. The obligation to apply Protection & Indemnity Club is an undisputed matter and consistent with the existing laws. Even the form of the Club itself is not something new in Indonesian law but it is possible based on the laws and regulations as stated above.

Especially when it is related to the spirit of Mutual Liabliy which gives priority to mutual help rather than just merely business aspect. This is really suitable with the soul of Indonesian society who priorities brotherhood than individual's interest. This is described in Article 33 of 1945 Constitution which says: "…mutualism and brotherhood and Article II Transferring Regulation of 1945 Constitution which implicitly rules that the temporary condition of the system of Dutch laws and regulations which is inspired by individualism and decided that Article 33 of 1945 Constitution which is based on mutualism in a permanent position.[441] It is further explained that Article 33 of 1945 Constitution is a moral message in the constitution of Republic of Indonesia in the scope of economy. This provision is not only giving the direction about the structure of economy and the state's authority regulating economic activity, but also reflecting goals: a belief held firmly and is struggled consistently by leaders of the government.[442] The constitutional message is very clear that the direction is towards a certain economic system which is not capitalist (based on individual belief), but the economic system based on brotherhood and familial relationship.[443] So that is why mutual liability principle which upholds brotherhood,

[441] Elli Ruslina, Pasal 33 Undang-Undang 1945 *Sebagai Dasar Perekonomian Indonesia Telah Terjadi Penyimpangan Terhadap Mandat Konstitusi,* Doctoral Dissertation at Doctoral Program in Faculty of Law of University of Indonesia, Jakarta, 2010, 2

[442] Bagir Manan, *Pertumbuhan dan Perkembangan Konstitusi Suatu Negara*, Mandar Maju, Bandung 1995, 45.

[443] Herman Soewardi, *Koperasi (suatu Kumpulan Makalah)*, Ikopin, Bandung, 1989, 413 page 1-2 in

according to the writer, is not against economic law system in Indonesia.

This is the same with the opinion of Mochtar Kusumaatmadja that in building our national law, we need to prior general principles accepted by all nations without leaving upon our original law principles or traditional law which are still valid and relevant in modern life.[444] So, that is why the application of Mutual Liability will not go against Indonesian law principle even though P&I Club itself derived from United Kingdom which was famous with its capitalistic economy.

Furthermore, Mutual liability based on the data above has a simply meaning, that is the liability contain a mutualism and brotherhood aspect. In Maritime activity any institution could be work together for preventing collision and marine pollution as well. In carrying out this task, the directorate must call on the cooperation of many other sections of government, both within and outside the Directorate General of Marine Transport.

This collaboration is mutualism networking that has been delivering some promising results, with Indonesia making significant progress on enchacing marine safety in several areas.

1. Navigations

The Directorate of Navigations is working on the planning, procurement, operations,

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Elli Ruslina, 3

[444] Mochtar Kusumaatmadja, *Pemantapan Cita Hukum dan asas-asas Hukum Nasional di masa kini dan dimasa yang akan datang*, dalam Majalah Hukum NAsional, Nomor I 1995, Edisi Khusus, Badan Pembinaan Hukum Nasional Departemen Kehakiman, 96-97

maintenance and supervision of navigational aids and marine telecommunications based on international regulations. The provision of these facilities is especially important in the archipelagic sea lanes that Indonesia is obliged to recognize under the 1982 United Nasions Conventions on the law of the sea (UNCLOS); Indonesia ratified the convention in 1985 under Law No. 17/1985. In archipelagic sea lanes, the relevant archipelagic state is obliged to provide access to foreign-flagged ships, including suitable navigational aids stationed outside those ships, and designed and operated to increase the safety and efficiency of ship navigation and/or ship traffic. Marine telecommunications include the broadcasting, sending and receiving of locations, pictures, sound and any other information through fibreoptic, or marine safety systems.

2. Climate/weather

The Meteorology and Geophysics Agency (Badan Meteorologi dan Geofisika, or BMKG) is a non-departmental government body with the role of managing government responsibilities in meteorology, climatology, air quality and geophysics. BMKG collects, analyses and distributes data on weather conditions and air quality. In the field of marine safety, one of its most important tasks is to provide wave information.

3. Nautical publications

To support marine safety, the government issues nautical publications such as sea charts, guides for pilots, a list of Indonesian lighthouses and lights at sea, a nautical almanac, tide table and notice to mariners. These are distributed by the Indonesian navy through the Hydrography Institute.

4. Search and rescue

With is new status as a non-departmental government body, Basarnas is in charge of handling the response to transport accidents and natural disaters. Hampered by a lack

of infrastructure, information and communication tools, and resources, Basarnas must still rely on the cooperation of the army, the police and other bodies. Indonesia's complex geography means that bringing the country's search and rescue service up to international standards will still take some time.

5. **Sounding and dredging**

Many of the marine routes leading into Indonesian ports run through bays, estuaries and rivers that are susceptible to sedimentation. To maintain these routes, depth measurement and dredging are performed regularly.

6. **Piloting and towing**

In order to maintain the safety of navigations in harbors, it is compulsory for vessels to use piloting and towing services, carried out in accordance with the applicable regulations. Pilots must hold a government-accredited qualification.

7. **Marine safety and security**

A key element in the maintenance of marine security is the availability of marine inspectors. The Directorate General of Marine Transport currently employs 242 tye A marine inspectors (authorized to inspect ships of 500 gross tonnes and over), 360 type B marine inspectors (authorized to inspect ships of under 500 gross tons) and 53 radio inspectors, spread across the whole of Indonesia. They are required to attend regular refresher courses and meetings so that they can remain up to date with new developments in the field.

A second key element is the harbormaster, the government official with the highest level of authority to monitor and enforce compliance with regulations on marine safety and security and the protection of the marine environment in a specific port. Indonesia has 287 harbourmasters across the archipelago.

The duties of harbormaster are to monitor ship seaworthiness; safety, security and order in the port; shipping traffic and the marine channel; loading and unloading activity; underwater activity and salvage; ship towing activity; piloting; loading and unloading of dangerous goods and dangerous or poisonous waste; fuel filling and fuel bunkers; embarkation and disembarkation; dredging and reclamation; and port facility development. The harbormaster is also responsible for executing search and rescue assistance; minimizing lead pollution and extinguishing fires in the port; and monitoring the implementation of marine environment protection measures.

To perform these task and function, the harbormaster has the authority to coordinate all governance activity in the port; inspect and file letters, document and ship news; publish ship activity agreements; conduct ship inspections; publish marine agreements; conduct ship accident inspections; detain ship on behalf of the ruling court; and conduct seafarer reviews and approvals.

A third element in the reform of marine safety administration has been establishment of a special body to investigate shipping accidents, the Maritime Court *(Mahkamah Pelayaran).* Under the International Convention for the Safety of Life at Sea (SOLAS), adopted in 1974, Indonesia is obliged to investigate accidents that take place it in seas, but until the establishment of this court it hard no formal, standing means of conducting such investigations. The legal mandate of the Maritime Courts is to identify the causes of shipping accident and to apply administrative sanctions on ship masters and officers if they are found to be at fault. Its investigations are to be presided over by a council of at least five judges with the appropriate nautical and legal qualifications.

The sanctions that can be applied by the Maritime Court on those found quality of causing and accident through error or carelessness range from issuing a warning to revocation of a marine certificate for a maximum of two years. Structurally the Maritime Courts is an executive body of the Ministry of Transport, not a general judicial body, despite its judicial duties. This is because its main purpose is to promote good conduct. Decisions of the Maritime Court are final and proceedings are open to the public.

5.3.3.4 The Distinction between P&I Club and Other Marine Insurance

Type of Guaranteed Before P&I Club, there was The Ship Owners' Mutual Protection Society which, for the first time provided protection to its members towards the liability of the loss of goods or life unguaranteed by common insurance. Only that this association did not refer to the protection of the remaining ¼ ship liability and the object of the Club was merely to protect its members from the limitation of liability made by marine insurance and ship damage which was not guaranteed by "Hull Insurance".[445]

P&I Club had extended its protection better than other the previous clubs. As explained above, at first the protection was only given to life casualties and injury or damage either the damage of permanent or movable objects. [446] Whereas the protection to the quarter of ship hull as the impact of ship collision is done for certain cargo. It is interesting that the cargo claimed at that time was not a heavy burden for a ship owner

[445] Robert Merkin, 2011 Marine Insurance, London, Sweet & Maxwell, 528
[446] Steven J Hazelwood, 99

even though bill of lading was not included with a broad exceptional clause: providing immunity from liability towards cargo loss or damage; which later was introduced, probably with the reason that the marine insurance at that time generally did not use their rights of transposition of creditor and pursued the claim of cargo loss or damage to ship owner.[447] But, the marine insurance later carried out their rights of transposition of creditor; then resulted to the introduction of the acquaintance of liability clause in bill of lading as regulated in The Hague Rules 1924.

With the development of overseas trading and the existence of steam ship, the demand from ship owners for protection and compensation coverage grew and in line with the growth, P&I Club was widened both in its scope and number. That was the change in law which began around mid-19th century by imposing legal action for the obligation of ship owners. As a result, this has made a rapid growth of the P&I Club. [448] The condition was a remarkable development in the expansion of legal liability in the history of P&I Club.

As a new obligation and liability created for ship owners in marine activity, the Club was created to provide more protection and compensation to ship operation. Basically P&I Club was established to anticipate the end of business with usual insurance.

In reality other clubs already widened its protection in this 21st century such as protection for life casualty and personal injury or the damage of permanent and

[447] Robert Merkin, 76
[448] Robert Merkin, 87

movable objects.[449] Then the protection is given for a quarter of damage of another ship involved in collision, and certain damage occurred to other ships in collision and also certain claim cargo. It is interesting that cargo claim at that time was not considered as a burden for ship [owners even though the bill of lading did not include any exceptional clauses which was broad and did not provide any immunity from responsibility towards cargo loss or damage which was later introduced with the reason that marine insurance at that time did not make use of the right of transposition of creditors and was only going after loss/damage claim for cargo or the damage to ship owners. The marine insurance only applied their right which then causing the introduction of acquaintance clause from bill of lading as the foundation of The Hague Rules.[450]

As the new obligation and liability created by vessel businessmen and owners, there was also a demand from the Club to protect and guarantee their loss/damage from the additional cost of ship operational costs which appear from the increasing obligation. Temporary general conclusion is that marine damage insurance covers the vessel and its cargo, whereas P&I Club protects ship businessmen and owners with the protection of their obligation.

P&I Club provides protection to the ship owner's liability. P&I Club derived from mutual group which was established by British ship owners in the 19th century. This establishment was the reaction towards the change in the laws which widened the

[449] Gard
[450]Gard

responsibility of ship owners to third parties and the failure of insurance companies and marine underwriters to respond the needs of ship owners.[451] The difference between P&I Club with marine loss insurance in general is that P&I Club covers the loss/damage more extensively which is not covered by any marine insurance and only concentrates on cargo damage according to the contract of carriage. Another difference is that even though P&I Club covers the more extensive protection from marine loss insurance, in fact the fee paid is lesser because the Club only covers the risk which is not guaranteed by underwriter.

5.3.3.5 The Role of Members In The Club

The other distinction is that P&I Club is guided and managed by the members owning vessels which guarantee members' interests and make sure it is run in non-profit. This makes P&I Club more interesting in finance.

P&I Club at first was an organization established by the owners of vessels and intended to have mutual assistance among members. The establishment (of the Club) is due to above interest is in fact excluded by insurance companies because of high risk that might be reached by the ship owners. Based on the collective interest and the intention to mutually help, so that the ship owners founded such an organization which guarantees its members towards risks unguaranteed by the insurance. Each member is subject to annual fee payment and the fee is used to cover loss/damage suffered by the members.

[451] Hazelwood.,

5.3.3.6 P&I Has The Nature Of "Nonprofit Making"

The distinction with common insurance is that P&I Club has characteristic of an association and it is nonprofit. The other distinction is that if in the duration of (1) one year and there is no claim, the member should receive the reimbursement of his premium which has been paid and is deducted by management and Club. The basic calculation for the reimbursement is 3 (three) years.[452]

So, if a member who has already joined for more than 3 (three) years and does not propose any claim to the Club, basically the member can propose reimbursement of the premium that he has already paid. But, because of its nature to help one another so the claim should be seen in wider scope. So, even though one company does not file a claim if other members have filled a claim in such a big amount and the total amount of all collected premium by the Club is only adequate to pay and cover management cost; this means that the concerned member will not receive anything. [453] That is why the owners of ships do not realize that P&I Club is actually an organization where they become the members.

As explained previously, in general the interest which can be insured in the insurance market is the interest of Hull & Machinery, ship rent, disbursement and insurance premium, and some of liability in the collision between two ships. Another liability as explained above, such as liability based on carriage agreement (to ship owner and passengers), legal liability towards third party, liability towards the crew, and liability

[452] Departemen Perhubungan, Implementasi P&I Bagi Kapal Nasional, Research Report.
[453] Departemen Perhubungan, Implementasi P&I Bagi Kapal Nasional, Research Report

in the case of ship collision which is not insured by Hull & Machinery Insurance, the aforementioned can be guaranteed by P&I Club.[454]

P&I Club at first was an organization founded by the owners of ships and was an organization intended to mutually help among its members. The establishment of the Club is because the interests as described before in fact are excluded by insurance companies due to the high risk that ship businessmen might experience. In view of mutual interest and the intention to mutually help, ship owners formed an association to guarantee its members towards the risks which are not guaranteed by insurance. Based on mutual benefits and objective to provide assistance one to another; so the ship owners established an association protecting its members against the risks which are not guaranteed by the insurance. Every member should pay annual fee that will be used to compensate the loss endured by the members.

5.3.2.4 Income Regarded as Fee For The Club

Every ship owner, especially ships which sail internationally can be a member by paying the fee annually. The amount of fee is decided according to the tonnage number of the ship owned by the members. Every member can withdraw his membership from the club or become a member again every year. The accumulated fee is used to cover the loss of the members and to finance the management of the club[455]. For every member (ship), the club issues a certificate which functions as indication of his membership and as a policy issued for a year. After a year, another new certificate is

[454] Departemen Perhubungan, Implementasi P&I Bagi Kapal Nasional, Research Report
[455] Departemen Perhubungan, Implementasi P&I Bagi Kapal Nasional, Research Report.

issued again to those who have paid the fee for another year.

A shipping company joining the club as a member is stated in the certificate issued by the club. The certificate is similar to that of an insurance policy. The payment of annual fee is just like a premium which has to be paid. A shipping company can withdraw or join again as a member every year so that the implementation is similar to that of an usual insurance.

P&I has the objective to protect its members and the warranty given by the club to its members is based on the amount which is stated in the carriage agreement.[456] For example if in the agreement, it is stated that the warranty of damaged goods covered by P&I is Rp 40,000. - (forty thousand Indonesian rupiah) for a meter square, so the Club will compensate as it is stated in the agreement. When the loss is more than what it is stated in the agreement, so P&I Club will not compensate more than what it is stated.

Another example is when a ship crashes a pier at port and based on the local regulation the ship must pay for the loss. If the compensation is according to the compensation covered by P&I Club, so the club will cover the loss. But, if it is determined based on the agreement between the owner of the ship and the port authority, generally there is no compensation from P&I Club. Of course, the owner of the ship as the member is not satisfied and protests to P&I Club.

[456] Departemen Perhubungan, Implementasi P&I Bagi Kapal Nasional, Research Report.

To avoid negative things, P&I Club always recommends its members to consult with P&I Club or its representative before making any agreement concerning the amount of compensation to the third party. If P&I club has agreed the amount of compensation, without any doubt the ship owner will settle the problem as the result of having the assured compensation from P&I Club. Every year, the club issues a book consisting the responsibility of the club towards the obligation of its members (ship owner) with the compensation which will be covered by the club.[457]

In brief, the differences between P&I Club and P&I Club and Other Marine Insurance will be drawn in the table below:

Table 5.2

The difference between P&I Club and Marine Insurance.

Subject	P&I Club	Marine Insurance
Protection	Cover ¼ of Hull not covered by Insurance, Cover the risk of Sea Pollution, Ship wrecking	Cover ¾ of Hull, Cover only the risk of goods and Passenger
Ship Owner	As a member	As an Insurer
Profit	Non-Profit Making	Profit Making
Fee	As a member fee	As a Premium

Before P&I Club there are any of international compensation regime for marine pollution. Compensation to victims of pollution damage caused by spills of persistent oil from tankers. The previous regimes are 1969 Civil Liability Convention, 1971 Fund Convention (ceased to be in force in 2002-1971 Fund and dissolved in 2014. This is the first convention that stated strict liability and oil pollution become civil liability in

[457] Robert Merkin, Marine Insurance in Martime Law. Second Edition, London, Sweet & Maxwell, 2011, 88

this convention ship-owner required to have compulsory third party insurance and certificate.

In accordance with the habits of modern trade system for each risk may be transferred to third parties, namely the guarantor. This arises because of the great risk both in the transport. In addition, the cost of cleaning (cleaning-up cost) pollution due to oil spillage is very expensive, especially if incorporated into ecological compensation because it was when the insurer cannot be longer guarantee institution, established institutions indemnity compensation. After the entry into force of the CLC Convention governing compensation liability (liability) by the shipowner to the damage being caused because of spilled oil pollution from ships. This Convention organizing principle duty of the ship-owner to establish that is obliged by insurance system. Insurance funds are limited because the ship owner is limited obligations in a certain amount and also by the amount of tonnage ships.

Because the compensation of CLC is insufficient, established of The Fund Convention, namely: The International Oil Pollution Compensation Fund (Fund conferences were) and Indonesia has become one of the members since 1978.

5.4 The Development Of Indonesian Maritime Law

Maritime Law terminology is a new general terminology which has been used since a few years ago.[458] All this time the terminology used was sea law (*zeerecht*) and shipping

[458] Huseyn Umar, Buku Kedua, . 25

law (*scheepvaartrecht*).[459] The knowledge of those terminologies all this time has no influence from Dutch law. Generally maritime means anything which is related to sea. In Anglo Saxon law system, often times it is called Admiralty Law.[460] Maritime Law in fact involves numerous law problems related to sea. In Black's Law Dictionary, Maritime Law is defined as follows [461]:

> *That system of law which particularly relates to commerce and navigation, to business transacted at sea or relating to navigation, to ships and shipping, to seamen, to the transportation of persons and property by sea, and to marine affair generally. The Law relating to harbors, ships, and seamen. An important branch of the commercial law of maritime nations; divided into a variety of departments, such of those about harbor, property of ships, duties and rights of masters and seamen, carriage contracts, average, salvage, etc.*

From above description, it is clear that maritime law covers a wide scope not just sea but all aspects concerning sea, trade and carrier, harbor, captain, ship crew and harbor workers, dock either from private or public law. Because ships used as carrier have the function to move one object from one place to another place; so that it does not limit a country with another country. This makes it clear that maritime law will also connect to the aspects of international law either public or international private. Transactions of international trade such as import and export, are always related to sea carriage. This then brings about international conventions covering shipping and maritime aspects.

Regionally, the purpose of maritime law, firstly is to provide law framework for sea carriage provider especially providers to and from overseas. Secondly, maritime law (based on the regulations) implements basic objectives concerning the interest of a country as port state and coastal state. Thirdly, maritime law can cover the regulations

[459] Soekardono. p35
[460] Huseyn Umar., p. 1
[461] Henry Black, Black's Law Dicitionary

which involves the implementation of certain objectives in economy to be pursued.[462] In line with the first objective of maritime law that is to be the legal framework for sea carriage provider, there should be law regulations which regulate the relationship among many parties related to sea carriage.[463]

In Indonesian law, Civil Code Book II has regulated the rules of sea carriage agreement that is concerning the administration of goods and human carriage, liability of freight management, ship crash, sea loss (*avarij*) In the development, there are some matters which cannot be separated from the administration of sea carriage and it has not been regulated in Indonesian Civil Code but it is regulated in international convention, such as regulation on ship safety, qualification requirements for master and crew and sailing safety which are regulated by ratified conventions by Indonesian government. There are other conventions which have not been ratified by the government.

As described the objective of maritime law is to implement basic objectives of a country as port state and coastal state. The objective is to uphold the regulation that a ship stopping over a port or sailing along coastline should meet the requirement of ship safety so that any accident or sea pollution caused by a ship can be prevented.[464] Thus the existence of government regulations on ship safety, sailing, ship crew, ship crash anticipation and sea pollution are important.

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[462] Guideliness for Maritime Legislation, ESCAP (Economic and Social Commision for Asia and The Pacific, Bangkok
[463] Huseyn Umar,
[464] Huseyn Umar,

Another objective of maritime law is[465] the sending of seamen to work on foreign vessels so that we need regulations relating to the matter such as the qualification requirement for seamen, standard requirements for work agreement. Also other things concerning foreign investment which allow foreign vessels are registered in the ship registration of country (open registry system). This requires government to make such regulations. International Convention does not really regulate this matter, and usually it is regulated by concerned party in blind agreement. In International Maritime Codeit is also concepts as follows:[466]

5.4.1 Jurisdiction of State Flag (Flag State Jurisdiction)

It has been acknowledged that international law, like previously mentioned saying that the country in which its flag is becoming an identity of the ship has jurisdiction right for the ship. And the ship has the country nationality status. This principle is stated in article 5 of Convention of International Waters year 1958 and article 92 of United Nation Convention concerning Sea Law 1982[467] and Based on article 314 Indonesian Commercial Code legal effect of ship registration , [468]is for the status and position of ship which beforehand was moving goods (article 510 BW) changes to fixed good, concerning procedures of transfer of title, transferring of ownership of ship right or in the making of procedures should be attended by registration staff and the recording of change of ship ownership and binding process as collateral must be done with mortgage for the ship.

[465] Guidelines for Maritime Legislation.
[466] Hussyen Umar.
[467] Johari Santosa,
[468] Djohari Santosa,

In the point of view of International Law, in some countries, it is known that the registration to get nationality, is commonly known as public registration which causes:[469] the ship becoming under jurisdiction of Flag State, in this case its administrative handling, that is concerning safety, sea feasibility, ship crew and Civil Code for any crime committed on board. Besides, flag State is internationally responsible for the ship which transports its flag; thus the ship gets the benefit of protection from the country with ship flag that is given to its citizens. [470] Therefore, registration is considered as a proof of ownership of the ship (evidence of title), even though in several countries this evidence is not required.[471]. All things sign the existence of effective supervision from the flag state for the ship.

Generally, we recognize dual and single system of registrations. Single ship registration only occurs in one state and each has one registration book either for ship registration or for the registration of rights on board. In Indonesia we have single system of registration that is one book for ship registration and for the rights registration of the ship, for example the mortgage exists in the main reg book. To get the ship nationality it is arranged by certain regulation and it is recorded in written in a separates list. Only the ship which is registered, can get the sign of nationality.

The reason of the owner of the ship to register the ship is to get a letter of flag state statement as previously mentioned. Regarding the benefits and privileges which is gotten the letter of nationality as mentioned previously. Depending on the benefits and

[469] Anis Idham, 170
[470] Anis Idham, 170.
[471] Anis Idham, 170.

privileges which are gotten from certain country. For example, registration gives the right for the ship to join certain trade, so that it gets certain aids and facilities for the ship owner, it also can get tolerance fro tax system from the country where the ship got its nationality status. One of the concepts which is important in international law is regarding jurisdiction. In Civil Law Code, international law of jurisdiction related to court problem, in which country judicial court which is considered to have a right to handle one problem and then which law code will be applied to handle the problem. [472]

5.4.2 Coastal State Jurisdiction

Coastal State Jurisdiction covers the power of a country to supervise the activities of foreign ships in its waters including the area of its sea territory and its borderlines [473] International Water Convention of United nations 1982 regulates this widely as stated in article 25, 33 and 220.

Port State Jurisdiction has sovereignty for the area because its power covers its activity as well as supervising the activity of foreign ships in its ports or in other spots like in off Shore terminals in its territory.[474] Such power covers its right to check certificates of ships, for the inspection even it covers the arrest of the ship.

Jurisdiction of a sovereignty of its country area covers its country power to regulate its sea freight inside the country and outside the country also regulate the operation of sea

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[472] Husseyn Umar
[473] Dikdik Mohammad Sodik, Hukum Laut Internasional, dan Pengaturannya di Indonesia, Bandung, Refika Aditama, 2011, 77
[474] Erif Djohan Tunggal, Pokok-Pokok Hukum Laut, Jakarta, Harvarindo, 2010, 21

freight from and to the country. The provision of sea freight that connects ports in the country is based on cabotage principle, it is a full jurisdiction of concerned country including things regarding business permit.[475]

In nature, every country has the same jurisdiction, specifically concerning transportation to and from other country because often time it concerns other country's jurisdiction and it can cause problem. The problem can involve some concerned countries which have sea freight activity in the area, particularly when a country considers its national ships get discriminative treatment by other country, either it concerns the ship loads which are shipped or its port tariff. Law Number 3 years of 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 of 2000 regarding seaman ships 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 noncommercial cruise and also except specific boats/ships.

5.4.3 Maritime Court in Indonesia

Indonesian maritime claims conducted through: i) national courts (including any specialized maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution.

[475] Husseyn Umar.

Indonesia does not have a specific court dealing with shipping disputes. As such, shipping disputes are litigated in the district courts (the courts of first instance). Before the commencement of the proceedings, it is mandatory to have a 40-day mediation hearing.

The proceeding is started with the exchange of a claim letter and a reply letter between the parties. After the exchange of claim letters and reply letters, the proceedings will continue to an evidentiary phase where the parties have a right to produce evidence or witnesses to prove their claims and arguments. Finally, after the evidentiary phase, each of the parties will provide conclusion documents that summarize the entire proceedings to the court. After that, the court will give its decision.

With regard to the special court, the Maritime Council Court (*Mahkamah Pelayaran*) in Indonesia does not litigate shipping disputes, but merely examines an indication/allegation of error and/or negligence in the application of the seamanship professional standard by a master and/or officers of the ship in case of an accident. The decision of the Maritime Court may contain either release and discharge or imposition of administrative sanctions on the master and/or officers concerned. The decision rendered by the Maritime Court can also be accepted as evidence if the parties decided to continue the dispute to the ordinary court.

hipping disputes are commercial matters which can be referred to arbitration under Indonesian law. Procedure for arbitration and other alternative dispute resolutions such as mediation and expert determination are governed under Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("Law No. 30 of

1999"). There is no specific arbitration procedure for shipping disputes in Indonesia.

Law No. 30 of 1999 did not adopt UNCITRAL Model Law on International Commercial Arbitration. However, it has covered various stages in arbitration, such as constitution of arbitration, power of the court to assist the arbitration proceedings and enforcement of arbitration awards.

One of the arbitration institutions in Indonesia is the Indonesian National Arbitration Board or the *Badan Arbitrase Nasional Indonesia ("BANI"*) which has its own Rules of Arbitral Procedures. It has a number of arbitrators who have expertise in shipping law matters. BANI's head office is located in Jakarta and it has branch offices in some Indonesian cities such as, Batam, Bandung, Denpasar, Medan, Surabaya, Palembang and Pontianak. In relation to the litigating in Indonesia both through court or arbitration, a potential party should bear in mind of several matters: the litigation costs are to be borne by each party. It is not possible to request for the recovery of the litigation costs; any interest on the claims is payable in theory. In practice, the judges are reluctant to adjudge that the interest should be added in the claim calculation unless there is a strong reason that interest should be added; the length of the proceeding usually takes from five months to one and a half years for the judges to render a decision at the district court level (court of the first instance); there are two appeal processes that may be pursued in the proceeding consecutively, the first is appeal to the Court of Appeal or High Court *(Pengadilan Tinggi*) and then cassation (*kasasi*) to the Supreme Court (*Mahkamah Agung*); andevidence to be produced in court must be in the form of original documents. If the documents are in a foreign language, the documents must be translated by a sworn translator of Indonesia.

Foreign courts' judgments are not recognized and enforceable in Indonesia. Thus, if a foreign court judgment is to be enforced in Indonesia, the dispute must be re-litigated before an Indonesian court. Indonesia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Under Indonesian Law, foreign arbitration awards are recognized and can be enforced in Indonesia upon the issuance of enforcement (exequatur) by the Chairman of Central Jakarta District Court, to the extent that the arbitration award fulfills the following requirements:

i. it is issued in the country with which Indonesia is bound by a treaty concerning recognition and enforcement of foreign arbitration awards;
ii. it is pertaining to a dispute in commercial matters under Indonesian law; and
iii. it does not violate Indonesian public policy.

Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

The Indonesian Government has passed a regulation in connection with the acknowledgment of international classification societies. This regulation was issued in the form of the Regulation of Ministry of Transportation No. 7 of 2013 regarding the Obligation for Indonesian Flag Vessels to Maintain Class with the Classification Society. This regulation also sets out a provision which acknowledges some classification societies, all of them are members of IACS which operate in Indonesia. The most important provision related to such acknowledgment is that all of the acknowledged classification societies must firstly obtain an approval from Seacomms before commencing operation in Indonesia. There are some requirements that must be satisfied to obtain such approval. One of the most important provisions

is the obligation for those acknowledged classification societies to establish a branch office in Indonesia.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

Sunken cargo spilled into the sea or in the form of oil or other hazardous materials can pollute the marine environment around the crash site. The accident resulted in a loss to shippers or operators of ships or the coastal State or State of the islands affected by the damage to the marine environment.

The loss can be in the form of (1) property, i.e. loss or damage of ship cargo, the cost to remove, clean up, restore from the oil, replace or repair damage to fishing equipment, terminal and port facilities or other property; (2) industry such as loss of livelihood and benefit for shippers, crews, fishermen, recreational areas and the industrial chain of tourism; (3) aquaculture such as shrimp farming, fish, shellfish and seaweed.

Oil pollution coming from ships not only briefly unsettled at the time of the accident but also contamination can also occur from routine activities i.e. engine room effluent discharges containing oil, mixed ballast water discharges from tanks, waste water sanitation systems, sewage galley. Waste and garbage from food and drinks.

Safety and safe operation of the ship is determined by various factors. First,

seaworthiness condition of ships, cargo and crew space, the second is the expertise shipper to boat, avoid risks and his ability to lead the whole crews. Third, is the external factors or natural factors, namely wind, currents, waves or storm, fog, rain, tides, darkness, visual impairment, navigational aids, and so forth. Fourth, external factors beyond the control captain of violence (molest), piracy, war, act of god, and sea perils.

In order to protect and preserve the marine environment from pollution especially wide variety of oil pollution coming from ships, the national and international laws have been enacted that (1) Act Shipping Articles 65-68 and 119-121 (2) MARPOL convention '73 / 78 (3) of the UN Convention on the Law of the Sea (UNCLOS) 1982 Article 192-237 of the pollution comes from ships and non-ships. In addition, there is the International Safety Management Code (ISM) has been established and placed as chapter IX of SOLAS Convention, as the Republic of Indonesia has ratified the SOLAS Convention, the ISM Code itself into positive law in Indonesia.

The recovery of destruction and pollu88888tion of the marine environment into the top part of the process control and destruction of the marine environment. This recovery function is to restore the function and capacity of the marine environment. Recovery of function is intended to make the marine environment capable of supporting human life and other living creatures. While the recovery of capacity is intended to make the polluted marine environment back serves to absorb, energy and components that go into it.

The discussion in the previous chapter emphasized that the implication of new principle of the marine environment is an attempt to prevent against marine pollution. It is a realistic and relevant to the demands of growth and life of shipping industry in Indonesia.

Theory of environmental management in the perspective of maritime law can be formulated within some characteristics. They are as follow: 1. To collect of rules and legal principles controlling the behavior of the marine environment 2. To control carrier not to destruction, 3. To ensure the preservation of the marine environment; 4. To promote the protection of the marine environment through marine environmental management efforts.

Marine environmental management theory as described in the previous chapter is as a tool of application of the principle of liability of the carrier for the pollution of the marine environment as a preventative measure against sea pollution due to the shipping industry.

In the shipping industry, the carrier is the party most responsible for all activities of the operation of the ship to the safety of cargo ships, passenger ships and even to prevent environmental destruction. Carrier in Indonesia law can be anyone who is a ship owner, a ship operator and an owner of the shipping company. The carrier which is based on Article 451 KUHD can delegate his authority as the leader of the ship to the captain, so that the captain who should be responsible for the safety of the ship. In order to help the captain, the carrier can also delegate some authority to pilot so that the vessel is declared unseaworthy. The presence of the pilot in KUHD is as helpers to

captain and Pilot responsible to the captain. Therefore, the pilot act as advisors to the Pilot even in certain circumstances such as unsafe ships can make a firm decision without compromise. However, the existence of pilot does not exceed the liability of the captain and carrier in an accident aboard the ship.

There are various forms of principles of Carriage Legal Liability in Indonesia, namely full liability and based on fault liability, based on negligence liability, strict liability. Full liability and based on fault Liability Principle regulated by KUHD (Commercial code). Otherwise, based on negligence liability principle regulated by the Convention of The Hague Rules, the Hamburg Rules and the Rotterdam Rules. Strict liability principle can only be implemented to the carrier in case of marine environment pollution in accordance with UUPPLH (Environment Management Act Year 2007). This is a new principle in Indonesian liability although in some cases in court, judges still apply the principle of liability based on fault.

Strict liability that is based on fault liability have very different legal concepts. UUPLH which is new in Indonesia considers that this principle should be applied and considered beneficial because the proving process will be simpler and shorter. However, wide the possible compensation to be limited, because other aspect of strict liability is the limitation of liability. And because of the nature of strict liability specific element that is the fault of the carrier, it is also affixed to the restriction that loss Limitation of Liability. This makes strict liability is always accompanied by a system of absolute damages are limited in number. However, there is a possibility that vessel owners will have full responsibility, that can be known in legal damages marine pollution with absolute liability, namely in terms of "accident occurred as the result of

the actual fault or Privity of the owner.” However, there is a possibility that vessel owners will have full responsibility, that can be known in legal damages marine pollution with absolute liability, namely in terms of "accident occurred as the result of the actual fault or Privity of the owner.

This would bring the issue to the carrier in Indonesia because it will lead to disruption or destruction of cruise business. This is because the cost of restoration of the marine environment is very expensive especially when putting into it is also ecological compensation. Due to this issue, the compensation must be bound by the carrier with another form of liability, Mutual Liability.

The objectives of safety people, property and the environmental, prevention of liabilities to third parties is not only of the company concern from the top of hierarchy of the workplace, but also of all players involved in the complex infrastructures.

The legal basis of the application of the Mutual Liability in Indonesia 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, TOVALOP, Liner conference, Protection and Indemnity Club which have been established in Indonesia. They are very different from the marine insurance where the money paid is due and may be withdrawn if there is no claim. They also meant to be non-profit making and for its members to help each other.

Besides help each other, quality shipping is a matter of mutual liability. In this liability

not only shipper, and carrier who involved the quality shipping but also the government such as port, and any carriers and other stake holders.

The most actual and logical demands is the application of some aspects of the underlying fundamental legal principles of environmental responsibility is carried out consistently and continuously. If the application of the legal aspects of the liability enforced by the carrier consistently, it is expected to prevent marine pollution due to the shipping industry. Quality shipping a worthwhile objective with long term rewards and it is a must for all those who wish to stay for business.

In this recovery, employers and activities that cause pollution of the sea and the destruction of the marine environment is responsible for implementing a series of measures for the recovery of the marine environment in accordance with the level of polluted and the damage to the marine environment. In this activity, the government is obliged to guide and monitor the implementation of the recovery. Besides responsibility for a series of efforts costs are charged to the vessel, transport and activities that cause pollution or destruction.

This will make company more competitive, resulting in greater profitable, it may have the effect of lower insurance premiums, it will enhance freight returns, and it will open other opportunities for investment.

6.2 Recommendations

To avoid risks, vessel accidents, and pollution of the marine shipping companies to apply one set of management systems that need to be created harmonization safety on

land and on ships. So that shipper or shipping companies need to:

1. Create policies that run ashore and ship personnel, supervise the implementation of safety and environmental protection policy
2. Describe and document the responsibility captain, describe and create standards captain authority to make decisions for the safe operation and pollution prevention.
3. Recruit master, officers, and other ship crews carefully, qualified and certified and healthy as required under the STCW Convention and Shipping Law.
4. Develop procedures and educational and training programs (training) the basics of safety, skills captain for new personal enrichment and refresher courses for personnel or long.
5. Develop training programs and procedures of preparation and coping with the dangers.
6. Plan and implement maintenance construction, machinery and ship equipment in accordance with national legislation and international.

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