Tort Claim under the Ship Time Charter: The Perspective of Indonesian Law

Kartika Paramita

*International Business Law Program, Universitas Prasetiya Mulya, Indonesia,
E-mail: kartika.paramita@pmbs.ac.id*

Submitted: October 16, 2020; Reviewed: November 17, 2020; Accepted: January 18, 2021

Article Info	Abstract
Keywords: <i>Carriage of Goods by Sea, Tort, Shipping.</i> DOI: <i>10.25041/fiatjustisia.v15no3.2089</i>	<i>During a cargo carriage by sea under the time charter scheme, there can be a situation where the Ship-owner of the vessel does not have a contractual relationship with the cargo owner. This situation could happen when the charterer becomes the contractual carrier under the bill of lading instead of the Ship-owner. In that given scenario, if cargo damage occurs, the cargo owner can submit a tort claim against the Ship-owner. Indonesia never ratifies an international convention in the field of carriage of goods by sea. Suppose the given scenario happens without the incorporation of the Charter party or the provision of any international convention into the bill of lading, a tort claim will become a choice for the cargo owner to ask the Ship-owner's liability. It is the purpose of this article to analyze how Indonesian laws will examine a tort claim and how the Ship-owner will construe his defense in the field of carriage of goods by sea. The writing finds that Indonesia Commercial Code provides a legal basis for a cargo owner's tort claim against the Ship-owner. However, it needs further discussion to set the relationship status among the Ship-owner, the time-charterer/contractual carrier, and the cargo owner under Indonesian laws and regulations.</i>

A. Introduction

In case damage occurs during the carriage of goods by sea, a cargo owner can choose between filing a claim based on the articles of the carriage contract or according to the statutory provision of tort. Both claims are essentially different and bring different legal effects. The contractual claim is based on the terms consented and agreed upon by the contractual parties. The liability raised upon the contract's violation is rather strict and sticks to what the parties

have agreed. On the other hand, the provision of tort imposes a general duty to everyone not to injure willfully or negligently the property of others.¹ It employs a non-consensual liability, meaning that it is imposed by the applicable law regardless of the liable party's consent,² and evaluated through fault-based.³

In general, there are several situations where an action in tort is usually chosen by the injured party (the cargo owner) instead of filing a contractual claim against their carriers regardless of their contractual relationship.⁴: (1) when the wrongful act does not constitute a breach of contract;⁵ (2) when the wrongful act constitutes a crime although it is not a breach of contract;⁶ (3) when the wrongful act constitutes a breach of contract, but still filed under tort claim to evade the statutory and/or contractual limitations and exclusions; or (4) when a tort claim is purposed to mitigate the doctrine of contract privity. Furthermore, a third party other than the contracting carrier who plays a part in the cargo carriage can also become a party on the cargo owner's claim.

There are several available roles frequently carried out by a third party in a carriage of goods by sea: (1) the third party is acting as a subcontracting carrier and becomes the bailee of the goods; (2) the third party engaged in stevedoring activities as an independent contractor; (3) the third party is one of the Ship-owner's employees (i.e., the crew of the ship); or (4) the third party is the Ship-owner himself who does not act as a carrier but charters his vessel to a charterer who later acts as the carrier instead. This writing will particularly allude to the latter situation to limit the discussion.

For instance, there is a contract of carriage under a bill of lading under Indonesian law. The contractual carrier on such document is not the Ship-owner himself but the ship's time charterer.⁷ During a voyage, cargo damage

¹ Donoghue v Stevenson [1932] UKHL 100 (AC 562 May 26, 1932).

² Agustina, Rosa et al., *Hukum Perikatan - Law of Obligations*, Seri Unsur-Unsur Penyusun Bangunan Negara Hukum (Jakarta: Pustaka Larasan, 2012).

³ Roy Kreitner, "Fault at the Contract-Tort Interface," *Michigan Law Review* 107 (April 27, 2009): 1533, <https://doi.org/10.1017/CBO9780511780097.008>.

⁴ A tortious act that occurs on any given vessel had multiple contracts to identify a governing law. For example, the perplexity to decide when a collision happens, or when a given ship may be sailing on a certain state's territorial waters or the high seas when the tort occurs. For further discussion regarding the choice of law that may be applicable, see Martin P. George, "Choice of Law in Maritime Torts," *Journal of Private International Law* 3, no. 1 (April 1, 2007): 137–72, <https://doi.org/10.1080/17536235.2007.11424320>.

⁵ George D. Theodoridis, "Mechanisms of Protection from Non-Contractual Modes of Recovery in Sea Carriage: A Comparison between Common Law and Civil Law Systems," *Journal of Maritime Law and Commerce* 44 (2013): 219, <https://heinonline.org/HOL/Page?handle=hein.journals/jmlc44&id=225&div=&collection=>.

⁶ Tom Hadden, 'Contract, Tort and Crime: The Forms of Legal Thought,' *L.Q.R.* 87 (1971): 240–60.

⁷ Bill of lading and Charterparty are both contracts that regulate the rights and obligations of the Shipowner, the shipper, and the charterer. For further information regarding their 234

was occurred due to a nautical negligence committed by the Ship-owner's crew in navigating the vessel. The cargo owner then files a tort claim against the Ship-owner to recover his damage. The cargo owner demanded the Ship-owner vicariously liable as he is the employer of the crew members who acted negligently, resulted in damage to the cargo.

There is no direct contractual relationship between the Ship-owner as the actual carrier and the cargo owner in this scenario. Furthermore, Indonesia is not the party of the Hague Visby Rules or any other international convention on the carriage of goods by sea. Accordingly, the exemptions towards carrier's liability as usually stipulated under any international carriage of goods convention cannot be applied unless included in the articles of the bill of lading.⁸ The claims, thus, shall be submitted under the statutory provision of tort or *perbuatan melawan hukum* under article 1365 of the Indonesian Civil Code.

It is the aim of the study to provide answers to these following questions further. First, how Indonesian laws will examine the available scenario considering the absence of international convention commitments; and second, how a ship-owner (under the scheme of time charter) will construe his defense in a tort claim submitted by the cargo owner.

---

relationship, see Soumyadipta Chanda, "A Comparison of Rights and Liabilities under Charter Party and Bill of Lading," August 2, 2011, <https://dx.doi.org/10.2139/ssrn.1919597>.

⁸ For example, Article IV (2) of the Hague Rules constructs a list of carrier's liability exceptions – also known as the catalog of exception: Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; (b) Fire, unless caused by the actual fault or privity of the carrier; (c) Perils, dangers and accidents of the sea or other navigable waters; (d) Act of God; (e) Act of war; (f) Act of public enemies; (g) Arrest or restraint or princes, rulers or people, or seizure under legal process; (h) Quarantine restrictions; (i) Act or omission of the shipper or owner of the goods, his agent or representative; (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; (k) Riots and civil commotions; (l) Saving or attempting to save life or property at sea; (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; (n) Insufficiency of packing; (o) Insufficiency or inadequacy of marks; (p) Latent defects not discoverable by due diligence; (q) Any other cause arising without the actual fault or privity of the carrier, or without the real fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

B. Discussion

1. The Concept of Time Charter

A time charter is an agreement made between the Ship-owner and the charterer⁹ where the Ship-owner places his vessel at the disposal of the charterer under an agreed period.¹⁰ In a situation where a time charter is applicable, it is the charterer who controls the vessel's commercial function (bear the expenditure of the running of the vessel, such as the cost of fuel, loading and discharging cargo, and the port charges). The Ship-owner on the other hand will retain the seamanship or navigation function. The Ship-owner will appoint the master and the vessel's crew.¹¹ However, both of the master and the crews will comply with the charterer's instructions and orders.¹² Therefore, the charterer can become the contracting carrier under the bill of lading in such a situation, although it does not perform a carrier's role.

Article 453 of Indonesia Commercial Code defines time charter as an agreement in which one party (the party who loans out the ship) binds himself to supply the use of a ship for the other party (the party who charters), to be used to sail on the sea, with the payment of a price that is calculated according to the length of time. The loaning party has to provide a ship to be used by the chartering party, and maintain the ship at a good condition throughout the agreement, with the necessary facilities suitable to the use stipulated in the charter party, and a capable crew.¹³ He is liable to pay damages that might be claimed by the chartering party due to the condition of the ship, except if he can prove that he has fulfilled his responsibilities in this matter. If the agreement concerning the ship calls for a ship that is propelled mechanically, the fuel for the engine is the responsibility of the chartering party.¹⁴

2. The Concept Of Tort According To Indonesian Law

In Indonesia, both contracts and tort are regulated under the Indonesia Civil Code (ICC.), derived from the Old Dutch civil code, *Burgerlijk Wetboek*. However, most carriage regulations are stipulated under the articles of Indonesia Commercial Code - *Wetboek van Koophandel* which are also derived from the Old Dutch Commercial Code.¹⁵ Since their promulgation,

⁹ William Tetley, *Marine Cargo Claims*, 3rd Edition (Montreal, QC, Canada: International Shipping Publications, 1988).

¹⁰ John F Wilson, *Carriage of Goods by Sea*, 7th ed., Longman (Pearson Longman, 2010).

¹¹ Evi Plomaritou, "A Review of Shipowner's and Charterer's Obligations in Various Types of Charter," *Journal of Shipping and Ocean Engineering* 2014 (January 1, 2014): 307–21.

¹² Martin Dockray, *Cases and Materials on the Carriage of Goods By Sea* (Routledge, 2013) p.292; Wilson, *Carriage of Goods by Sea*. p.87.

¹³ Article 460 of the Indonesia Commercial Code.

¹⁴ *Ibid*.

¹⁵ Indonesia Civil Code is a set of general civil rules, whereas Indonesia Commercial Code is a set of more specific commercial matters. Both codes were applicable according to the 236

some of the articles in both codes have been changed by more current legislation. However, it is not the case for tort and contract, whose basic concepts are still based on colonial law.

Different from most common law countries where the ship-owner liability in delivering the cargo is governed in details and developed on a case-by-case basis,¹⁶ Indonesia does not recognize the use of precedent.¹⁷ The Indonesian legal system gives judges the authority to base their judgments on the laws, although they are still free to interpret and argue on a case-per-case basis (*vrije gebondenheid*). Given that Indonesia never ratifies any international convention on the carriage of goods by sea nor has specific regulation related to contract or tort in the field of carriage of goods by sea, those laws are still legally binding until nowadays. Consequently, there are not many developments on the basic idea of carriage of goods in Indonesia than the old Dutch law. Today, scholars and courts interpret the rules according to the old Dutch jurisprudences as a parent law.¹⁸

Under Indonesian law, the tort is known as *Perbuatan Melawan Hukum* or Unlawful Action – in its literal meaning. It is regulated under Article 1365 – 1366 ICC, which stipulated:

Article 1365: *Every unlawful action that brings damage to other people obliges the person whose fault causes such loss, to compensate such loss.*

Article 1366: *Everybody is responsible for the damage caused by his action and for any damage caused by his negligence or carelessness.*¹⁹

"concordance principle" – *asas konkordansi*, which was influential in the colonial era. According to this principle, the Netherlands' codified laws would apply in its colony, including Indonesia, to uniform law. See Purwosutjipto, H.M.N., *Pengertian Pokok Hukum Dagang Indonesia I* (Jakarta: Djambatan, 2007); Tetty Lubis, "Towards a Reformed Carriage of Goods by Sea Law: Indonesia and Global Practice," *Mulawarman Law Review*, August 6, 2020, 61–79, <https://doi.org/10.30872/mulrev.v5i1.330>.

¹⁶ Francis Reynolds, 'Some Recent Development in Maritime Law in England,' *Maritime Law Association of Australia and New Zealand Journal* 7 (1990): 35–50.

¹⁷ Article 20 *Algemene Bepalingen van Wetgeving voor Indonesie*.

¹⁸ Indonesia does not have specific regulations in the carriage of goods by sea, although it has: Act No. 17 Year 2008 – Shipping law, Government Regulation No. 20 Year 2010 regarding transportation in waters, and Government Regulation No. 8 Year 2011 regarding multimodal transportation. However, those regulations are very general, covering the carriage of goods by sea and passengers. For specific stipulations on such matters, such as; liabilities of the sea carrier and the use of carriage documents, are regulated under the Indonesian Commercial Code.

¹⁹ Influenced by the doctrine of legalism, in the early 19th century, the concept of tort under Indonesian law was interpreted narrowly. Formerly, tort was an unlawful act that conflicted with legal rights and obligations under the laws. Unlawful act (*Perbuatan Melawan Hukum – Onrechtmatige daad*) was equated to the action of breaking the law (*Perbuatan Melawan Undang-Undang – Onwetmatige daad*). Under such interpretation, a tortious action only existed when the stipulation of law was breached. In the early 20th century, the interpretation of tort was turned into a broader one by the Dutch Supreme Court's decision on the case of *Lindenbaum vs. Cohen*. According to such decision, tort was later interpreted to cover not only actions that breach people's rights and obligations as stipulated on legal statutory but also actions that breach

The early discussion regarding the application of tort law in Indonesia argued that Article 1365 only covers the unlawful action that was done actively with an intent (*opzettelijk*),²⁰ whereas article 1366 only the unlawful action that happened because of negligence (*culpose onrechtmatige daad* or *quasi-delits*).²¹ However, currently, a broader interpretation of the article is upheld. It will cover not only an active unlawful action but also a passive unlawful action.²² In 1988, the Central Jakarta Court²³ interpreted that "action" as stated in article 1365 ICC covers also negligence (*kelalaian - nalatigheid*) and imprudence (*kekurang hati-hatian - onvoorzichtigheid*) that can be accounted for every loss as stated in such article.

a. The Elements of Tort

Tort law in Indonesia is somewhat abstract, covering written rules and social norms among the people. Therefore, it is difficult to determine the scope as well as its limitation. However, referring to article 1365 ICC, there are at least four elements that should be fulfilled to file a tort claim; (a) an unlawful act, (b) fault, (c) loss, and lastly, (d) causality between the action and the damage.

An act can be categorized as unlawful if it is either in contradiction: to others' subjective right, to the wrongdoer's legal responsibility (*rechtplicht*) as stipulated by the law, morality, or the custom and prudence principles living in the society.²⁴ Concerning somebody's subjective right, it is not easy to determine the scope and the definition of the right since it cannot always be proven in a written document. It can be an absolute property right, or personal rights (right to have privacy, reputation, and honor), or right based on the contractual relationship. The subject can be identified as an interest strongly related to such a person who directly acknowledges such authority by the law or has a strong evidential value. For instance, in 1984, Mataram District Court noted that avoiding a marriage proposal could be regarded as a violation of

---

other people's subjective right, the wrongdoer's responsibility, moral rules and norms that live among the people as well as their principle. See Moegni Djojodirdjo, *Perbuatan Melawan Hukum*, 2nd ed. (Pradnya Paramitha, 1982). Munir Fuady, *Perbuatan Melawan Hukum Pendekatan Kontemporer* (Citra Aditya Bakti, 2005).

²⁰ Indonesian criminal law also recognizes the similar term of *Perbuatan Melawan Hukum* although it contains different interpretation. The term in criminal code is interpreted restrictively to the violation of formal applicable written law (*formele wederrechtelijkheid*). The law's applicability is essential to be proven since there is a legality principle that is strongly upheld. Shidarta Shidarta, "Perbuatan Melawan Hukum Lingkungan Penafsiran Ekstensi Dan Doktrin Injuria Sine Damno," *Jurnal Yudisial* 3, no. 1 (January 20, 2017): 60–77, <https://doi.org/10.29123/jy.v3i1.5>.

²¹ L. C. Hofmann, *Het Nederlands verbintenissenrecht, de algemene leer der verbintenissen* (Wolters-Noordhoff, 1968). p.266.

²² J. Satrio, *Hukum perikatan: perikatan yang lahir dari Undang Undang : bagian pertama* (Citra Aditya Bakti, 2001). p.140.

²³ Central Jakarta District Court Decision, No. 251/Pdt/G.IX 1988/PN.JKT.PST. (July 21, 1988).

²⁴ Fuady, *Perbuatan Melawan Hukum Pendekatan Kontemporer*.

somebody's subjective right because it violates the other's reputation and honor.²⁵

Regarding the violation of legal responsibility, the assessment is based on the wrongdoer's duty rather than the injured party's position. An unlawful act can occur when the wrongdoer disregards his responsibilities or performs an action that is prohibited. In line with that, an unlawful act can rise from the violation of morality, living norms, or the people's custom. However, to file the tort claim, the respective norm must be proven applicable and accepted by society.²⁶ An unlawful act can be construed by ignoring others' interests, doing an action that harms others, and/or can bring damage to others (*onbetamelijk*) according to reasonable person assessment²⁷

Article 1365 ICC does not differentiate an intentional action and negligence to fulfill the element of fault (*schuld*). Therefore, an act is already considered a fault if ²⁸: (1) an intention, or (2) negligence (*negligence, culpa*), where there is no legal justification, such as self-defense and mental distress²⁹

Loss (*schade*) is one of the elements that should be fulfilled to prove tort. Consequently, the absence of this element will make the claim void.³⁰ However, even if article 1365 ICC requires the wrongdoer to pay compensation, there is no statutory provision specifically regulates the requirement of such compensation. Since then, it is the judge who usually determines the amount of the compensation by considering the following aspects³¹: (a) the severity of the offense and the reinstatement of good name and honor; (b) the parties' position, status, and financial conditions; and (c) related circumstances.³² The compensation given over a tort claim is purposed to bring back the situation before the injury happened - *restitutio in integrum*.³³

---

²⁵ Mataram District Court Decision, No. 073/PN.MTR/PDT/1983 (March 1, 1984).

²⁶ Satrio, *Hukum perikatan*. p.176.

²⁷ R. Setiawan, *Pokok-pokok hukum perikatan* (Binacipta, 1986). p.82-83.

²⁸ Fuady, *Perbuatan Melawan Hukum Pendekatan Kontemporer*. p.12.

²⁹ Unlike criminal law, the existence of intent in a tort claim is a relatively less critical to determine liability. It is because tort takes a broader approach to determine the responsibility where it not only focuses on the tortfeasor but also on the victims and the society in general. See Peter Cane, 'Mens Rea in Tort Law,' *Oxford Journal of Legal Studies* 20, no. 4 (1 January 2000): 533–56, <https://doi.org/10.1093/ojls/20.4.533>.

³⁰ Central Jakarta District Court Decision, No. 477/82 G (30 April 1983).; Supreme Court Decision, No. 1080/K/Sip/1973 (October 20, 1976).; Supreme Court Decision, No. 1159 K/Sip/1978 (3 June 1980).

³¹ According to the Decision of the Indonesian Supreme Court, the judge can also set the compensation higher than the compensation asked by the injured party if it is regarded more suitable. See Chidir Ali, *Yurisprudensi Indonesia Tentang Perbuatan Melanggar Hukum (Onrechtmatige Daad)* (Bandung: Binacipta, 1978). Supreme Court Decision, No. 60/K/Sip/1968 (May 23, 1970).

³² Article 1372 of the Indonesian Civil Code.

³³ Agustina, Rosa et al., *Hukum Perikatan - Law of Obligations*, Seri Unsur-Unsur Penyusun Bagunan Negara Hukum (Jakarta: Pustaka Larasan, 2012).

Accordingly, the compensation will also cover the immaterial loss that has been calculated materially.³⁴

The mere fact that someone's action has affected another causally is not sufficient to imply liability. There are other elements involved, such as the definition of the harm and the tortfeasor's prior knowledge of the likely consequences.³⁵ Therefore, to prove the liability, article 1365 ICC requires a causal link between the tortfeasor's fault and the victim's loss. There are two theories – used mostly in countries as the underlying concept to determine the causation – formulated by Professors H.L.A. Hart and Tony Honore³⁶: (1) *Conditio Sine Qua Non*-theory or the 'but-for' test, also known as actual causation theory; and (2) the Legal Cause theory – Proximate Cause or *Adequate Veroorzaking* – also known as adequate causation theory.

Generally, an act is considered has fulfilled *conditio sine qua non* if, without this act, the damage would not have occurred.³⁷ To establish whether an act is considered a *conditio sine qua non*, the judge usually asks the following question: would the same result have occurred if the tortfeasor had not acted the way he did (but for test)?³⁸ If the same result would have occurred even without the tortfeasor's act, then the causal link is not established, and there is no liability. Although this "but-for" theory is undeniably simpler and straightforward, it has several well-known weaknesses, particularly in the case of overdetermination and pre-emption, where the concept denies causal status to actions that appear instinctively causal, mostly where there were multiple actors. The theory tends to lead to "all or nothing recovery".³⁹ For example, there is a situation where each of the two fires is necessary to destruct a building, but neither fire is independently sufficient for the building's destruction. In this case, according to the actual

---

³⁴ Different from tort, Article 1246 ICC does have a particular explanation regarding the compensation for a contractual violation which says, "*The compensation for costs, damages, and interests that the creditor is entitled to demand, in general consists of the loss he suffers and the expected profit he supposed to enjoy, without prejudice to the exceptions and alterations mentioned hereafter.*" Compensation in breach of contract claim is purposed to compensate for the loss and expected profit rather than brings back the situation before the violation. Accordingly, settlement in a contractual claim does not essentially acknowledge the immaterial loss suffered by the injured party but rather indemnifying the broken commitment.

³⁵ Desmond Clarke, "Causation and Liability in Tort Law," *Jurisprudence* 5 (December 1, 2014), <https://doi.org/10.5235/20403313.5.2.217>.

³⁶ H. L. A. Hart and Tony Honore, *Causation in The Law, Causation in the Law* (Oxford University Press, 1985).

³⁷ Benedict Winiger, Helmut Koziol, and Bernhard A. Koch, *Digest of European Tort Law*, ed. Reinhard Zimmermann, vol. 1, Essential Cases on Natural Causation (Germany: Springer-Verlag, 2007).

³⁸ Faro Sobczak, 'Proportionality in Tort Law A Comparison between Dutch and English Laws with Regard to the Problem of Multiple Causation in Asbestos-Related Cases,' *European Review of Private Law* 19 (2010): 1155–79.

³⁹ *Ibid.*

causation theory, neither fire has destroyed the building.⁴⁰ Therefore, in many cases, the actual causation is necessary but not a sufficient basis for imposing liability. The courts usually will use the legal cause theory to determine the scope of the damage.

The legal cause is dealing with the remoteness of the injury and the question of whether the tortfeasor's conduct closely enough to the damage to make it fair to hold him liable. In most cases, applying the theory will make the courts consider either the intervening actions, a foreseeable plaintiff, the scope of the risk of the tortfeasor's actions, and/or the policy concerns to determine the feasibility of liability.⁴¹

3. Filing Lawsuit Against A Shipowner Under Indonesian Tort Law

To determine whether it is possible or not for a cargo interest to file a tort claim towards a ship-owner, it shall be assessed, first, whether or not the Ship-owner is vicariously liable towards his crew's fault; second, whether the claim can be considered as a tort and not a contractual claim, and lastly whether or not the elements of a tort claim are fulfilled.

a. Vicarious Liability – *Aanprakelijkheid*

Article 1367 ICC contains a responsibility theory,⁴² they are also known as a vicarious liability - where a person is responsible for the damage caused by his act or omission and the damages caused by the act or omission of persons under his responsibility or caused by the properties under his supervision. According to this article, employers and those who appoint other persons to represent their affairs are responsible for any damage caused by their employees or their assistants in doing the job for which those persons are employed.⁴³ However, this article does not mention that such a person can

---

⁴⁰ Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (New York: Oxford University Press, 2010); Steve Hedley, "Rethinking Actual Causation in Tort Law," *Harvard Law Review* 130 (June 10, 2017): 2163–82, https://harvardlawreview.org/wp-content/uploads/2017/06/2163-2182_Online.pdf.

⁴¹ Sandra F. Sperino, 'Statutory Proximate Cause,' *Notre Dame Law Review* 88 (2013): 1999–1247. The most recent development of the theory is the NESS (Necessary Element of a Sufficient Set) test articulated by Professor Richard Wright to determine whether an element of a set of actual antecedent conditions is sufficient for the occurrence of a result. This theory is induced by J.L. Mackie's sufficiency theory – that causation is not only about the counterfactual dependence and the production of a given result. See Richard W. Wright, 'Causation in Tort Law,' *California Law Review* 73 (1985): 1735–75; J.L. Mackie, 'Causes and Conditions,' *American Philosophical Quarterly* 2 (1965): 245.

⁴² *Aanprakelijkheid* theory (Dutch) – *Tanggung-gugat* theory (Bahasa).

⁴³ There are six other parties who, according to article 1367, 1368 and 1369, are vicariously liable toward other people's deeds, namely: (1) parents and guardian toward their minor; (2) schoolteachers toward their students; (3) carpenters' advisors toward their employees; (4) the owners of animals toward their animal; (5) the user of animals; and (6) the owner of a building towards his building.

escape from such liability, although the responsibility might end if he cannot prevent the act or omission for which they have to be responsible.⁴⁴

Article 321 of the Indonesian Commercial Code further specifies that the Ship-owner will be responsible for the legal actions carried out by those in permanent or temporary services of the ship within the limit of his authorization. The Ship-owner will also be accountable for the damage suffered by the third parties due to unlawful acts performed by those who work permanently or temporarily to the ship, or those who work in providing services for the ship or the cargo, or those who are carrying out their duties.

Referring to those articles, under the provisions of Indonesian law, the Ship-owner has the responsibility to bear and become responsible for his crew's actions. When a navigational fault has been made by the ship's crew and damaged the goods, the Ship-owner is vicariously liable, regardless of whether he is the carrier or not under the bill of lading.⁴⁵

b. Tort and Contract Relationship under Indonesian Law

Referring to article 1233 of the Indonesian Civil Code, an agreement (*perikatan*) can be established either by consent or by the law (*onstaan of uit overeenkomst, of uit de wet*). A violation of an agreement made by consent will be brought under a breach of contract claim (*wanprestasi*), whereas a breach of an agreement established according to the law will come under a tort claim. There are at least three differences between a tort and a contractual claim.

A breach of a contractual claim and a tort claim is different from their legal source. A violation of contract claim that arises from an agreement which is made according to article 1320 Indonesian Civil Code shall fulfill the following requirements: (a) there must be an agreement between two parties

⁴⁴ Article 1367 Indonesian Civil Code.

⁴⁵ There are three parties involved in transportations in waters: the Shipowner or the ship operator company, the master of the ship, and the vessel's crews. Those parties are all related and work based on certain agreement. The law, however, put additional rights and obligation for some of them. For example, Indonesia Commercial Code also confirms the position of the master of the ship as the employee of the Shipowner. Article 341e of the Code stipulates "The shipowner shall be entitled to revoke at any time the master's authority over his ship". Further, article 363 of the Code also stipulates, "In respect of the Shipowner, the master shall be obligated at all times to act in accordance with the stipulations of his appointment and instructions given to him based on such appointment, provided that such provisions and instructions are not contradictory to the obligations imposed on him as a leader based on laws and regulations. He must keep the Shipowner informed at all times about all matters concerning the ship and the cargo thereof and must ask for his instruction before commencing important financial actions." See: Herman Susetyo, "Tanggung Jawab Nahkoda Pada Kecelakaan Kapal Dalam Pengangkutan Penumpang Dan Barang Melalui Laut Di Indonesia," *Masalah-Masalah Hukum* 39, no. 1 (January 5, 2010): 8–16, <https://doi.org/10.14710/mmh.39.1.2010.8-16>; Hari Utomo, "Siapa yang Bertanggung Jawab menurut Hukum dalam Kecelakaan Kapal (Legally Responsible Parties in Ship Accident)," *Jurnal Legislasi Indonesia* 14, no. 1 (May 3, 2018): 57–75, <https://e-jurnal.peraturan.go.id/index.php/jli/article/view/75>.

and (b) one of the agreement's principles shall stipulate that a promise must be kept.⁴⁶ Therefore, breach of contract happens where: a debtor does not fulfill an obligation as promised, does not fulfill his duty on time, or does not properly perform his obligation.⁴⁷ Whereas in this regard, a tort claim arises from someone's unlawful action.

Plaintiff shall file both claims differently. Under a claim of breach of contract, it is crucial to file an ultimatum to the other party before filing the claim to ask for compensation.⁴⁸ However, this is not the case in a tort claim. Whenever an unlawful action happens, the injured party can directly file a compensation claim. The compensation available for both claims is also stipulated differently. There is a starting period to count the compensation in a breach of contract claim, which is calculated after the breach of contract happened.⁴⁹ The law also stipulates the type and amount of compensation for the breach of contract claim, which consists of; (a) loss suffered by the creditor, (b) possible future profit if the agreement is fulfilled, and (c) compensation for the interests. On the other hand, article 1365 Indonesia Civil Code does not stipulate the amount and the type of compensation for a tort claim. Consequently, the injured party can claim for immaterial or material compensation⁵⁰, which can consist of the actual loss or all cost to restore the original condition (*herstel in de oorspronkelijk toestand, hestel in de vorige toestand*). In this regard, the judge will usually consider: the social, economic situation of both parties, and⁵¹ the appropriateness and propriety aspects⁵² to determine the possible amount of compensation obtained.

Even though both claims are quite different, it is not easy to differentiate both since an action that breaches an agreement can also become an action

---

⁴⁶ Article 1320 Indonesian Civil Code stipulates four elements that have to be fulfilled to make a valid contract in Indonesia: (1) consent of the parties; (2) capacity of the respective parties to conclude a contract; (3) a particular subject matter; and (4) a legal cause. The first two elements are known as subjective requirements, and the last two elements are known as the objective requirements. The failure to fulfill one of the subjective conditions does not invalidate the contract (*nietig*). Still, it only raises the possibility for the other party to claim that the contract is void (*vernietigbaar*). However, the failure to fulfill one of the objective requirements will result in the contract being null and void by law. See: Samuel Hutabarat, "Harmonisasi Hukum Kontrak Dan Dampaknya Pada Hukum Kontrak Indonesia," *Veritas et Justitia* 2, no. 1 (June 21, 2016): 112–34, <https://doi.org/10.25123/vej.2068>.

⁴⁷ Other than *wanprestasi*, the objectives and purpose of a contract could not be reached if there is compulsion, mistake, fraud, or force majeure. See Agri Chairunisa Isradjuningias, "Force Majeure (Overmacht) Dalam Hukum Kontrak (Perjanjian) Indonesia," *Veritas et Justitia* 1, no. 1 (June 30, 2015), <https://doi.org/10.25123/vej.1420>. M. Yahya Harahap, *Hukum acara perdata: tentang gugatan, persidangan, penyitaan, pembuktian, dan putusan pengadilan* (Sinar Grafika, 2005).p.454.

⁴⁸ under a process called *ingebrekestelling* or *in mora stelling* (*interpellatio*).

⁴⁹ Article 1237 Indonesia Civil Code.

⁵⁰ Harahap, *Hukum acara perdata*. p.455.

⁵¹ Supreme Court Decision, No. 196 K/Sip/1974 (October 7, 1976).

⁵² Supreme Court Decision, No. 1226 K/Sip/1977 (May 22, 1978).

that breaches the law. For example, the Indonesian Supreme Court's decision in 2000⁵³ noted that an act of terminating a contract unilaterally could be regarded as a tort since it was in contradiction with the parties' legal responsibility and morality principle. Therefore, according to such a case, regardless of the parties' contractual relationship, a tort claim can still be submitted. However, theoretically speaking, it is unjustifiable to combine a breach of contract and a tort claim since they have different nature and sources. It is unsuitable for claiming under breach of contract if the event was objectively a tort or the other way around; if the event was a breach of contract, it is incorrect to file a claim under tort. Referring to the decision of Indonesian Supreme Court No. 1875 K/Pdt/1984 dated 24 April 1986, a tort and contractual claim cannot be filed together since they are based on different provisions. By doing so, it will make a claim vague (*obscuur libel*). Another decision strengthened this argument in 2001⁵⁴ which noted that combining a tort with a breach of contract claim is a violation of procedural law since they should be decided separately.

However, sometimes cases are settled differently in Indonesia, depending on the judges' interpretation of the cases' facts. On the Indonesian Supreme Court decision dated 29 January 1987,⁵⁵ a tort claim was brought before the court, but it was based on an action of breach of contract. On its reasoning, the court decided that the claim was not vague- *obscuur libel* because the court could differentiate both matters separately and understand the parties' reason.⁵⁶ The Supreme Court also noted a comparable decision in 2007⁵⁷, in which the court, in its reasoning, decided: "*That actually this lawsuit is a mixture of a contract violation claim and tort but they are firmly explained as two separate matters. Accordingly, this claim constitutes an objective cumulative claim that can be justified.*"

The cargo owner in the scenario does not have a contractual relationship with the Ship-owner but the charterer. The Ship-owner also does not have contract responsibility to the cargo owner since he only binds himself to the charterer through the Charter party. When the Ship-owner fails to fulfill his obligation to take care of the cargo, he is not in breach of contract with the cargo owner.⁵⁸ Therefore, due to such absence, it is possible if the cargo owner, in this regard, wants to file a tort claim towards the Ship-owner.

---

⁵³ Supreme Court Decision, No. 1284 K/Pdt/1998 (December 18, 2000).

⁵⁴ Supreme Court Decision, No. 879 K/Pdt/1997 (January 29, 2001).

⁵⁵ Supreme Court Decision, No. 2686 K/Pdt/1985 (January 29, 1987).

⁵⁶ Harahap, *Hukum acara perdata*. p.456.

⁵⁷ Supreme Court Decision, No. 886 K/Pdt/2007 (October 24, 2007).

⁵⁸ In Indonesia, a contractual cargo claim is usually settled in the destination port. The cargo interest will show the Bill of Lading document so that the carrier can release the document of Notice of Claim. See: Sedy Anantyo, "Pengangkutan Melalui Laut," *Diponegoro Law Review* 1, no. 4 (2012): 1–7.

c. The Elements of Tort and the Ship-owner's Liability

According to Indonesian law, there are three kinds of tort: tort with an intention, tort caused by negligence, and tort without fault (strict liability). In accordance with the given scenario, this writing will limit the discussion to the tort caused by negligence.

Res ipsa loquitur doctrine is applicable to the tort of negligence. According to this doctrine, in some instances, the injured party of a tort (caused by negligence) does not have to prove the element of the wrongdoer's negligence. It is sufficient to show the fact and conclude that the wrongdoer highly likely does conduct the fault.

Under Indonesian law, this doctrine is stipulated under article 1922 ICC, related with the use of presumption as a piece of evidence; "*Presumptions*" which are not based on the law (*presumptions of fact*), shall be submitted to the consideration and prudence of the judge, which however cannot observe other presumptions, other than the important, significant and accurate ones. Such "*presumptions*" may only be considered in cases wherein the law permits witnesses' testimony, and if there is any objection submitted against omission or a deed, based on the existence of bad faith or fraud. "Presumption" is a conclusion drawn by the judge upon an event that has been occurred.⁵⁹ Therefore, the claimant does not have to prove the element of negligence from the wrongdoer in determining whether or not there is an action in tort. The judge on such case can conclude a "presumption" of facts if they are significant and accurate that negligence has occurred.

However, this doctrine is not accessible to all tort of negligence, only to⁶⁰: (a) tort actions which usually does not happen without the negligence from the wrongdoer; or (b) tort actions which are not caused by the injured party or third party; or (c) when the property that causes damage is under the exclusive control of the wrongdoer; or (d) when the cause of such negligence shall be under the wrongdoer's scope of obligation towards the injured party; and (e) when the injured party has no contributory negligence.

Practically speaking, when a cargo owner suffers damage because of the negligence of the contractual carrier, he can file a tort claim regardless of their contractual relationship as long as he does not combine it with a breach of contract claim and all elements of tort under the article are fulfilled. In this regard, the contractual relationship between the cargo owner and the contracting carrier will not prevent the cargo owner from getting compensation under a tort claim. It will also be the same if the wrongdoer himself is not the carrier but the Ship-owner. No contract between them will make it easier for the cargo owner to file a claim under tort. The cargo owner should make sure that all elements of tort have been fulfilled (an unlawful act,

---

⁵⁹ Retnowulan Sutantio, *Hukum acara perdata dalam teori dan praktek* (Mandar Maju, 1995). p.77.

⁶⁰ Fuady, *Perbuatan Melawan Hukum Pendekatan Kontemporer*. p.71.

fault, loss, and causality), as well as proving that the Ship-owner has a duty of care against the cargo.

An unlawful act occurs when somebody's subjective right or legal responsibility is breached. In this case, the cargo owner must prove that the Ship-owner has breached his subjective right or the Ship-owner's legal responsibility.

Article 466 Indonesian Commercial Code defines a carrier as someone *who commits himself, either by a time-charter or a voyage-charter, either by any other agreement, to undertake the shipping of goods, in their entirety or part, by sea*. Further in article 320, the Code defines Ship-owner as *"someone who uses a vessel for seafaring, either he is running the vessel by himself or has the vessel run by a captain who is in his service."*

In article 474, the Code stipulates, *"If the carrier is the Ship-owner, then the responsibility for the damages suffered by the goods transported by ship, to the limit of 50,- for each cubic meter net content of the ship, in so far as it involves a ship that is propelled mechanically, plus what is used to determine its contents minus gross content of the space that is used for the propelling engine."* Continued in article 475, *"If the carrier is not the Ship-owner, the responsibility for paying damages according to article 468 concerning transportation by sea, which is limited to the amount lost through damages, based on the stipulations of the previous article, can be demanded from the Ship-owner. If there is a dispute, the carrier must point out the limits of his responsibility."*

More recent regulation, article 40 (1) and (2) of Law No. 17 Year 2008 about Shipping stipulates that the water transportation companies are the ones that have responsibility for the cargo, *"(1) Water transportation companies are responsible on the safety and security of passengers and/or goods being transported. (2) Water transportation companies are responsible for the ship's cargo in accordance with the type and amount stated in cargo documents and/or agreed upon agreements or contract"*.⁶¹ The law, however, does not further elaborate on the definition of water transportation companies.⁶²

Based on the provisions above, it is worth mentioning that Indonesia Commercial Code does not merely focus on the contracting carrier whose name is mentioned in the carriage documents, but rather on the actual tasks

⁶¹ Article 41 of the Shipping Law further stipulates, *"The responsibility referred to in Article 40 may be caused as a consequence of the operations of ships, in the form of: a. death or injury of passengers being transported; b. loss of or damages to goods being transported; c. delay of transportation of passengers and/or goods; d. third party losses"*. A similar article is found in article 180 of Government Regulation No. 20 Year 2010 regarding Water Transportation. However, there is no further elaboration regarding the definition of water transportation companies.

⁶² Article 1 (29) of Government Regulation regarding Water Transportation defines Sea Transport National Company as a sea transport company registered according to Indonesian law which doing sea transportation activity in Indonesian waters and/or from and to ports overseas.

they performed. Generally, the carrier is obliged to pay cargo damages and responsible for all his crews' actions. However, in case the document of the contract of carriage does not mention the Ship-owner as the carrier, the liability to pay cargo damages can be demanded from both the Ship-owner and the contractual carrier.

Moreover, article 518c of the Indonesian Commercial Code also stipulates, *"Within the limits determined by the charter party, the master of the ship has to obey the orders of the chartering party in all matters related to the acceptance, transportation and handing over of the freight. In this case, he is entitled to act on behalf of the chartering party except if the chartering party has appointed another person for this matter. Whosoever has taken actions against the master of the ship in accordance with that, except for the chartering party, can also take action to the Ship-owner."* Accordingly, it fulfills the first element of the tort claim.⁶³

The cargo owner must also prove that there is a nautical fault resulting from the shipmaster's negligence, the loss that he suffered, and the link between the loss and the fault. An action can be regarded as a tort caused by negligence if⁶⁴: (a) there is an action of neglecting; (b) there is a duty of care that is violated⁶⁵; (c) causing a loss for other people; and lastly (d) there is a causation between the action with the loss. In this regard, fault in navigation has been interpreted broadly, covering many actions, such as⁶⁶: faulty maneuvering, berthing, and anchoring; error in interpreting and assessing meteorological information; error in speed adjustments; as well as non-compliance to international or local maritime regulations. Accordingly, if the nautical fault made by the Ship-owner's crew is proven using either *Conditio Sine Qua Non*-theory or Legal Cause – Proximate Cause theory that it harms the cargo, the judge can use his presumption to consider it as a tort of negligence. When all the elements are fulfilled, the cargo owner can submit the tort claim.

---

⁶³ This situation is different compared to the regime applied in the Hague Visby Rules. Indonesia Commercial Code does not recognize the nautical fault exemption but opens the possibility for the Shipowner and the Carrier to collectively bear cargo damages. For further reading on nautical fault, exemption see: Yonggang Liang and Zhongsheng Li, "Abolishing the Exemption of Liability for Fault in Ship Management in the Nautical Fault Exemption System," *China Oceans Law Review* 2006, no. 1 (2006): 537, <https://colr.xmu.edu.cn/2014/0210/c4475a78187/page.htm>. Marel Katsivela, "Overview of Ocean Carrier Liability Exceptions Under the Rotterdam Rules and the Hague-Hague/Visby Rules," *Revue Générale de Droit* 40, no. 2 (2010): 413–66, <https://doi.org/10.7202/1026957ar>.

⁶⁴ Fuady, *Perbuatan Melawan Hukum Pendekatan Kontemporer*. p.71.

⁶⁵ Duty of care here is defined as an obligation to take care of the injured party (of tort) at the same level as a reasonable man will do in the same condition.

⁶⁶ Yin Yang, "The Abolition of The Nautical Fault Exemption: To Be or Not To Be" (Master Thesis, Lund University, 2011), <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1969992&fileId=1975378>.

4. The Shipowner's Defense Under Indonesian Law

a. Defenses on the Merits of the Case

Regarding the merits of the case, the Ship-owner can make several defenses under the Indonesian Commercial Code provisions. First, the master and the vessel crews' action is under the responsibility of the contractual carrier.

According to article 468 of the Indonesian Commercial Code, *"The transportation contract will oblige the carrier to take good care of preservation of the goods being transported, from the moment of receipt thereof until the delivery. The carrier must pay for damages caused by his inability to deliver all the goods or part of the goods because of damage, except if he can prove that not all the goods were submitted for delivery or the damage 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 deliverer. He is responsible for the actions of the people that he employs, and for all the things that are used in transportation."*

As also stipulated in article 518c, the master of the ship has an obligation to obey the chartering party's orders in all matters related to the acceptance, transportation, and handing over of the freight within the limitation determined in the Charter party.

Furthermore, mentioned under article 518d Indonesian Commercial Code, *"The chartering party is entitled to accept goods to be transported from a third party at freight costs and conditions that are deemed appropriate. If the Bills of lading issued are signed by or on behalf of the vessel's master, the bills' holder can charge the Ship-owner altogether with the chartering party. If because of this the Ship-owner gets more responsibility than what had given to him by the charter party, he can claim damages from the chartering party."* By signing the bill of lading himself, the carrier has agreed to bear all the consequences that follow. Such article will also lead to the second argument that the Ship-owner will only be responsible for what has been stipulated under the Charter party.

Article 460 of the Indonesian Commercial Code regulates the contractual relationship between the Ship-owner and his time charterer. According to such article, the Ship-owner is liable to pay damages that might be claimed by the chartering party due to the condition of the ship. The Ship-owner is exempted from the liability only if he can prove that he has fulfilled his responsibilities in this matter. In this regard, the liability of the Ship-owner to the charterer is limited only to the condition of the ship or only to the agreed articles of Charter party. Article 1315, 1340 and 1316 ICC contain the principle of contract privity – a third party does not necessarily become a party of an agreement once mentioned by other parties. Article 1315 stipulates, *"In general, an*

individual may only commit to or agree to something for and on behalf of himself." Article 1340 further emphasizes, "An agreement can only apply to the parties who make it. An agreement cannot bring any damage to any third parties; the third parties cannot get any advantage from that place, except for the matter governed in article 1317".⁶⁷ Article 1316 further strengthens the protection given to any third party in an agreement, "Nevertheless, it is allowed to guarantee or secure a third party, by promising that this person will perform something, without prejudice to a claim for compensation against the person who has guaranteed such third person or who has promised, to make the third party confirming something, if this party refuses to fulfill the agreement."

Hence, according to Indonesian laws, contracting parties can assign or delegate their contractual rights and obligations to a third party. However, the contracting parties still under responsibility if the third party does not fulfill the contract obligations. The carriage contract has been made between the carrier/the charterer and the cargo owner in the available scenario. Therefore, the only parties who are entitled to become the claimant or the respondent on a claim which arises from a contract are the contracting parties themselves. If the cargo owner makes a tort claim, the Ship-owner can argue that he only has a responsibility towards the charterer under the Charter party. It would be difficult for the cargo owner to refer to the Charter party to claim legal responsibility directly or draw an unlawful act of the Ship-owner since he is not the document's party.

b. Other Defenses

Other than the discussion regarding the merits of the case, when a tort claim against a ship-owner is submitted under Indonesian law, several other defense arguments can be used by the Ship-owner.

1) Error in Persona

Under Indonesian law, if a claimant erred in determining the respondent, the lawsuit will formally defect and be called error in persona. It brings quite a serious consequence since the lawsuit can be rejected (*niet-ontvankelijke verklaard*). There are three kinds of error in persona; (1) Disqualification in Person; (2) Misdirected Respondent; and (3) *Plurium Litis Consortium* – the lack number of parties. Disqualification in Person refers to when the plaintiff

---

⁶⁷ Article 1317 ICC contains a stipulation that an individual who has concluded such an agreement may not revoke it if the third party has declared his intent to rely on it. Indonesia Civil Code in nature give more leniency towards contract that provides benefits and rights to the third party rather than contract that brings obligations. Maulidiazeta Wiriardi, "Prinsip-Prinsip Hukum Perjanjian Dalam Kesepakatan Para Pihak Yang Bersengketa Atas Permohonan Intervensi Pihak Ketiga Dalam Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa," *Yuridika* 26, no. 1 (March 26, 2011): 71–80, <https://doi.org/10.20473/ydk.v26i1.263>.

either lacks the right to file a claim or is incapable of submitting a claim.⁶⁸ Supreme Court once decided that a lawsuit from someone who is not eligible to file a suit shall not be accepted.⁶⁹ This eligibility requirement can be fulfilled by proving a legal relationship between the plaintiff and the problem's object.⁷⁰ Misdirected respondent (*gemis aanhoeda nigheid*) refers to a situation when the respondent is either incapable or has no legal standing before the court (*persona standi in judicio*) or has no legal relationship with the plaintiff. Unlike the first qualification that focuses on the plaintiff's quality, the latter focuses more on the respondent's quality. *Plurium Litis Consortium* refers to a situation when there is a lack of party to be included in the lawsuit. Although it can be on both sides – either plaintiff or respondent - most of the Supreme Court decisions employ this maxim when there is a lack of respondent number. For example, in a Supreme Court Decision dated 13 May 1975, the Court decided to declare that the claim submitted by a creditor was inadmissible since it should be submitted against two debtors instead of one.⁷¹ The Supreme Court then requires all parties who became signatories of an agreement should be included as respondents on the claim to avoid the condition of *plurium litis consortium*.

Under the argument of error in persona, the Ship-owner can argue a lack of direct legal relationship between himself and the cargo owner. The cargo owner has mistakenly chosen a respondent (*gemis aanhoeda nigheid*) as the Ship-owner is not the carrier under the bill of lading; therefore, he is not the one who shall be responsible according to the Indonesian Commercial Code.

2) *Vrijwaring*

Vrijwaring is the inclusion of a third party other than the disputing parties.⁷² It is regulated under Indonesian law under article 70-76 Reglement of de Rechtsvordering (Rv). *Vrijwaring* can be submitted by the respondent verbally or in writing to invite a third party to protect the respondent himself before the tribunal. This kind of submission is called an incidental lawsuit and will be decided through an interlocutory judgment. If a respondent submits a *vrijwaring*, there will be two different lawsuits before the tribunal: the principal lawsuit and the incidental lawsuit. On such an incidental lawsuit, the

⁶⁸ Article 1330 of the Indonesian Civil Code.

⁶⁹ Supreme Court Decision, No. 442 K/Sip/1973 (October 8, 1973).

⁷⁰ Supreme Court Decision, No. 639 K/Sip/1975 (May 28, 1977).

⁷¹ Supreme Court Decision, No. 151 K/Sip/1975 (May 13, 1975).

⁷² Rv differentiates three kinds of intervention in a civil claim: *Voeging*, *Tussenkomst*, and *Vrijwaring*. *Voeging* is an intervention made by a third party based on his own initiative to defend one of the parties. *Tussenkomst* is an intervention made by a third party to defend his own interest. *Vrijwaring* is an inclusion of a third party made by one of the disputing parties. See: Puri Galih Kris Endarto, "Tinjauan Yuridis Gugatan Intervensi Tussenkomst Sebagai Upaya Hukum Alternatif Dalam Gugatan Hukum Acara Perdata Biasa," *Pandecta Research Law Journal* 5, no. 2 (2010), <https://doi.org/10.15294/pandecta.v5i2.2302>.

respondent's status is changed into a "plaintiff guarantor" – *pengugat penjamin*, and the third party will become a "respondent guarantor" – *tergugat penjamin*. A *vrijwaring* claim will be settled like other civil cases, the respondent guarantor will be allowed to defend himself, and the claimant on the principal lawsuit will also be invited to share his opinion.

For this article scenario, if the cargo owner files a direct tort claim against the Ship-owner, the Ship-owner can file a *vrijwaring* to defend himself. He can invite the other party, such as the charterer, to protect himself from the principal lawsuit.

C. Conclusion

Filing a tort claim against Ship-owner under Indonesian law is acceptable, although it is uncommon. Practically speaking, the relationship between the Ship-owner and the cargo interest is generally established by adding the articles of the Charter party into the bill of lading. Therefore, although the Ship owner is not the carrier mentioned in the contract of carrier, a contractual relationship can arise between him and the cargo interest, leading to a contractual claim when cargo damage occurs (which will then be settled by referring to the articles of the contract).

However, suppose the possible scenario has happened and there is no international convention applicable under the bill of lading articles. In that case, the provisions of the Indonesian Civil and Commercial Code will apply. The articles of the Indonesian Commercial Code provide a possibility for a cargo owner to demand the carrier and the Ship-owner to pay cargo damages under a tort claim. However, the Ship-owner can also construct his defenses under the articles on his Charter party due to contract privity doctrine. In the end, it is worth noting that this topic needs further discussion, particularly on how Indonesian laws cover the relationship and liability among the Ship-owner, the time-charterer or contractual carrier, and the cargo owner.

References

- Agustina, Rosa, Hans, Niewenhuis, Jaap, Hijma, and Suharnako. *Hukum Perikatan - Law of Obligations*. Seri Unsur-Unsur Penyusun Bangunan Negara Hukum. Jakarta: Pustaka Larasan, 2012.
- Ali, Chidir. *Yurisprudensi Indonesia Tentang Perbuatan Melanggar Hukum (Onrechtmatige Daad)*. Bandung: Binacipta, 1978.
- Anantyo, Sendy. "Pengangkutan Melalui Laut." *Diponegoro Law Review* 1, no. 4 (2012): 1–7.
- Cane, Peter. "Mens Rea in Tort Law." *Oxford Journal of Legal Studies* 20, no. 4 (January 1, 2000): 533–56. <https://doi.org/10.1093/ojls/20.4.533>.
- Central Jakarta District Court Decision, No. 477/82 G (April 30, 1983).
- Central Jakarta District Court Decision, No. 251/Pdt/G.IX 1988/PN.JKT.PST. (July 21, 1988).

- Chanda, Soumyadipta. "A Comparison of Rights and Liabilities under Charter Party and Bill of Lading," August 2, 2011. <https://dx.doi.org/10.2139/ssrn.1919597>.
- Clarke, Desmond. "Causation and Liability in Tort Law." *Jurisprudence* 5 (December 1, 2014). <https://doi.org/10.5235/20403313.5.2.217>.
- Djojodirdjo, Moegni. *Perbuatan Melawan Hukum*. 2nd ed. Pradnya Paramitha, 1982.
- Dockray, Martin. *Cases and Materials on the Carriage of Goods By Sea*. Routledge, 2013.
- Donoghue v Stevenson [1932] UKHL 100 (AC 562 May 26, 1932).
- Endarto, Puri Galih Kris. "Tinjauan Yuridis Gugatan Intervensi Tussenkomst Sebagai Upaya Hukum Alternatif Dalam Gugatan Hukum Acara Perdata Biasa." *Pandecta Research Law Journal* 5, no. 2 (2010). <https://doi.org/10.15294/pandecta.v5i2.2302>.
- Fuady, Munir. *Perbuatan Melawan Hukum Pendekatan Kontemporer*. Citra Aditya Bakti, 2005.
- George, Martin P. "Choice of Law in Maritime Torts." *Journal of Private International Law* 3, no. 1 (April 1, 2007): 137–72. <https://doi.org/10.1080/17536235.2007.11424320>.
- Hadden, Tom. "Contract, Tort and Crime: The Forms of Legal Thought." *L.Q.R.* 87 (1971): 240–60.
- Harahap, M. Yahya. *Hukum acara perdata: tentang gugatan, persidangan, penyitaan, pembuktian, dan putusan pengadilan*. Sinar Grafika, 2005.
- Hart, H. L. A., and Tony Honoré. *Causation in The Law*. Causation in the Law. Oxford University Press, 1985.
- Hedley, Steve. "Rethinking Actual Causation in Tort Law." *Harvard Law Review* 130 (June 10, 2017): 2163–82. https://harvardlawreview.org/wp-content/uploads/2017/06/2163-2182_Online.pdf.
- Hofmann, L. C. *Het Nederlands verbintenissenrecht, de algemene leer der verbintenissen*. Wolters-Noordhoff, 1968.
- Hutabarat, Samuel. "Harmonisasi Hukum Kontrak Dan Dampaknya Pada Hukum Kontrak Indonesia." *Veritas et Justitia* 2, no. 1 (June 21, 2016): 112–34. <https://doi.org/10.25123/vej.2068>.
- Isradjuningtias, Agri Chairunisa. "Force Majeure (Overmacht) Dalam Hukum Kontrak (Perjanjian) Indonesia." *Veritas et Justitia* 1, no. 1 (June 30, 2015). <https://doi.org/10.25123/vej.1420>.
- Katsivela, Marel. "Overview of Ocean Carrier Liability Exceptions Under the Rotterdam Rules and the Hague-Hague/Visby Rules." *Revue Générale de Droit* 40, no. 2 (2010): 413–66. <https://doi.org/10.7202/1026957ar>.
- Kreitner, Roy. "Fault at the Contract-Tort Interface." *Michigan Law Review* 107 (April 27, 2009): 1533. <https://doi.org/10.1017/CBO9780511780097.008>.

- Liang, Yonggang, and Zhongsheng Li. "Abolishing the Exemption of Liability for Fault in Ship Management in the Nautical Fault Exemption System." *China Oceans Law Review* 2006, no. 1 (2006): 537. <https://colr.xmu.edu.cn/2014/0210/c4475a78187/page.htm>.
- Lubis, Tetty. "Towards a Reformed Carriage of Goods by Sea Law: Indonesia and Global Practice." *Mulawarman Law Review*, August 6, 2020, 61–79. <https://doi.org/10.30872/mulrev.v5i1.330>.
- Mackie, J.L. "Causes and Conditions." *American Philosophical Quarterly* 2 (1965): 245.
- Mataram District Court Decision, No. 073/PN.MTR/PDT/1983 (March 1, 1984).
- Moore, Michael S. *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics*. New York: Oxford University Press, 2010.
- Plomaritou, Evi. "A Review of Shipowner's and Charterer's Obligations in Various Types of Charter." *Journal of Shipping and Ocean Engineering* 2014 (January 1, 2014): 307–21.
- Purwosutjipto, H.M.N. *Pengertian Pokok Hukum Dagang Indonesia I*. Jakarta: Djambatan, 2007.
- Reynolds, Francis. "Some Recent Development in Maritime Law in England." *Maritime Law Association of Australia and New Zealand Journal* 7 (1990): 35–50.
- Satrio, J. *Hukum perikatan: perikatan yang lahir dari Undang Undang : bagian pertama*. Citra Aditya Bakti, 2001.
- Setiawan, R. *Pokok-pokok hukum perikatan*. Binacipta, 1986.
- Shidarta, Shidarta. "Perbuatan Melawan Hukum Lingkungan Penafsiran Ekstensi Dan Doktrin Injuria Sine Damno." *Jurnal Yudisial* 3, no. 1 (January 20, 2017): 60–77. <https://doi.org/10.29123/jy.v3i1.5>.
- Sobczak, Faro. "Proportionality in Tort Law A Comparison between Dutch and English Laws with Regard to the Problem of Multiple Causation in Asbestos-Related Cases." *European Review of Private Law* 19 (2010): 1155–79.
- Sperino, Sandra F. "Statutory Proximate Cause." *Notre Dame Law Review* 88 (2013): 1999–1247.
- Supreme Court Decision, No. 60/K/Sip/1968 (May 23, 1970).
- Supreme Court Decision, No. 442 K/Sip/1973 (October 8, 1973).
- Supreme Court Decision, No. 151 K/Sip/1975 (May 13, 1975).
- Supreme Court Decision, No. 196 K/Sip/1974 (October 7, 1976).
- Supreme Court Decision, No. 1080/K/Sip/1973 (October 20, 1976).
- Supreme Court Decision, No. 639 K/Sip/1975 (May 28, 1977).
- Supreme Court Decision, No. 1226 K/Sip/1977 (May 22, 1978).
- Supreme Court Decision, No. 1159 K/Sip/1978 (June 3, 1980).
- Supreme Court Decision, No. 2686 K/Pdt/1985 (January 29, 1987).
- Supreme Court Decision, No. 1284 K/Pdt/1998 (December 18, 2000).
- Supreme Court Decision, No. 879 K/Pdt/1997 (January 29, 2001).

- Supreme Court Decision, No. 886 K/Pdt/2007 (October 24, 2007).
- Susetyo, Herman. "Tanggung Jawab Nahkoda Pada Kecelakaan Kapal Dalam Pengangkutan Penumpang Dan Barang Melalui Laut Di Indonesia." *Masalah-Masalah Hukum* 39, no. 1 (January 5, 2010): 8–16. <https://doi.org/10.14710/mmh.39.1.2010.8-16>.
- Sutantio, Retnowulan. *Hukum acara perdata dalam teori dan praktek*. Mandar Maju, 1995.
- Tetley, William. *Marine Cargo Claims*. 3rd Edition. Montreal, QC, Canada: International Shipping Publications, 1988.
- Theocharidis, George D. "Mechanisms of Protection from Non-Contractual Modes of Recovery in Sea Carriage: A Comparison between Common Law and Civil Law Systems." *Journal of Maritime Law and Commerce* 44 (2013): 219. <https://heinonline.org/HOL/Page?handle=hein.journals/jmlc44&id=225&div=&collection=>.
- Utomo, Hari. "Siapa yang Bertanggung Jawab menurut Hukum dalam Kecelakaan Kapal (Legally Responsible Parties in Ship Accident)." *Jurnal Legislasi Indonesia* 14, no. 1 (May 3, 2018): 57–75. <https://ejurnal.peraturan.go.id/index.php/jli/article/view/75>.
- Wilson, John F. *Carriage of Goods by Sea*. 7th ed. Longman. Pearson Longman, 2010.
- Winiger, Benedict, Helmut Koziol, and Bernhard A. Koch. *Digest of European Tort Law*. Edited by Reinhard Zimmermann. Vol. 1. Essential Cases on Natural Causation. Germany: Springer-Verlag, 2007.
- Wiriardi, Maulidiazeta. "Prinsip-Prinsip Hukum Perjanjian Dalam Kesepakatan Para Pihak Yang Bersengketa Atas Permohonan Intervensi Pihak Ketiga Dalam Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa." *Yuridika* 26, no. 1 (March 26, 2011): 71–80. <https://doi.org/10.20473/ydk.v26i1.263>.
- Wright, Richard W. "Causation in Tort Law." *California Law Review* 73 (1985): 1735–75.
- Yang, Yin. "The Abolition of The Nautical Fault Exemption: To Be or Not To Be." Master Thesis, Lund University, 2011. <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1969992&fileId=1975378>.