

Risk in Transporting Goods by Sea Ship

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Abstract: The increase in the need for human life for transportation has an impact on developments in the field of technology, transportation facilities and infrastructure, science that studies transportation, and transportation law, in addition to the unavoidable emergence of various problems caused by transportation itself. The transportation of goods by sea by sailing ship is preceded by an agreement between the parties who wish to carry out the transportation of goods, which eventually gives rise to an agreement for the transportation of goods by sea based on the provisions of Article 1320 of the Civil Code concerning the legal terms of an agreement. The agreement is contained in the form of an agreement for the transportation of goods by sea which gives rise to different rights and obligations and responsibilities of each party. The purpose of this study is to determine the risk in the transportation of goods by sea by sailing ship, resulting in the transfer of responsibility from the carrier to the sender. Result obtained: The risk in the transportation of goods by sea by sailing ship arises because the carrier does not carry out the achievements assigned to him. Forced circumstances, negligence and Avarai are the causes of the Carrier being unable to carry out its performance. Risks due to compelling circumstances, the carrier is released from his responsibility. While the risk due to negligence and avarai is the responsibility of the carrier, this risk often results in the transfer of responsibility from the carrier to the sender. So Article 41 paragraph (3) of Law Number 17 of 2008 concerning Shipping requires the implementation of goods insurance. Insurance is a form of legal protection for the transported goods, aiming to replace the carrier in providing compensation to the owner of the goods or the shipper, for losses that occur in the operation of transporting goods by sea.

Keywords: Risk, Transportation, Goods, Ship

Preliminary

Background

The increase in the need for human life for transportation has an impact on developments in the field of technology, transportation facilities and infrastructure, science that studies transportation, and transportation law, in addition to the unavoidable emergence of various problems caused by transportation itself.

Transportation means the business of carrying, delivering or moving people or goods from one place to another. Meanwhile, the carrier is an entrepreneur who runs a transportation company, owns his own means of transportation or uses other people's transportation equipment with a rental agreement.

The means of transport in the waters are called ships which are run by a captain. According to Article 1 number 36 of Law No. 17 of 2008 concerning Shipping, a ship is a water vehicle with a certain shape and type, which is driven by wind power, mechanical power, other energy, pulled or delayed, including vehicles that have dynamic support, vehicles on below the water surface, as well as floating equipment and floating buildings that do not move¹.

The purpose and objective of carrying out the transportation of goods is to move goods from one place of origin to a place of destination where the movement is absolutely necessary to achieve and increase benefits and efficiency. The transportation of goods is carried out because the value of the goods will be higher at the destination than at the place of origin. Therefore, transportation is said to give value to the goods transported, because the value of the goods will be greater than the costs incurred.

The transportation of goods by sea by sailing ship is preceded by an agreement between the parties who wish to carry out the transportation of goods, which eventually gives rise to an agreement for the transportation of goods by sea based on the provisions of Article 1320 of the Civil Code concerning the legal terms of an agreement. The agreement is contained in the form of an agreement for the carriage of goods by sea which gives rise to different rights and obligations as well as responsibilities of each party.

The agreement for the carriage of goods by sea with sailing ships creates different rights and obligations as well as responsibilities of each party, where the Carrier in carrying out the transportation of goods, is responsible for maintaining the safety of the goods transported from the time of receipt, until they are handed over to the recipient in accordance with the amount and weight. stated in the cargo document. These responsibilities include, among others, destruction, loss, damage to the goods being transported; Delays in goods being transported, as well as losses to third parties (Article 41 paragraph (3) of Law No. 17 of 2008 concerning Shipping).

On the other hand, the Carrier is responsible for delays in the delivery of the goods it transports, based on the carrier's responsibility principle adopted in the law of transportation in Indonesia. Based on the background explanation above, the author is interested in studying and studying more deeply about the risks in the transportation of goods by ship.

Problem

The problems that will be discussed in this study are: What are the risks in transporting goods by sea by sailing ships, resulting in the transfer of responsibility from the carrier to the sender.

Aim

The purpose of this study is to determine the risk in the transportation of goods by sea by sailing ship, resulting in the transfer of responsibility from the carrier to the sender.

Literature Review

Risk

The term risk used in everyday life is always associated with the possibility of something detrimental that is unexpected or unwanted. Risk is the level of spread of values in a distribution of values in a distribution around the average value, meaning the greater the level of the spread, the greater the value. the risk.

The meaning of risk in everyday words is different from the meaning of risk in engagement law. In the law of engagement, the term risk has a special meaning, risk is a teaching about who should bear the compensation if the debtor does not meet the performance in a force majeure situation. Regarding risk, Sri Rejeki Hartono stated that: risk is an uncertainty in the future regarding losses. Subekti defines risk as the obligation to bear the loss caused by an event beyond the fault of one of the parties.

Risk is a problem that often occurs in the transportation of goods by sea. Risk is uncertainty that can cause losses. Uncertainty is divided into economic conditions, provisions caused by nature, human behavior. Besides that, there are also speculative risks and pure risks.

Risk in transportation is often referred to as a marine accident. The regulation of sea accidents or own risk in Article 245 of Law No. 17 of 2008 concerning shipping. A ship accident in this article is an incident experienced by a ship that can threaten the safety of the ship and/or human life, in the form of a ship sinking, a ship on fire, a ship colliding, a ship aground.

Abdul Kadir Muhamad does not use the term risk but uses the term marine accident, which the accident can be caused by:

1. Damage to the ship's engine,
2. Ship collision,
3. The ship ran aground on the rock,
4. The sinking of the ship due to bad weather, and
5. Burning ship due to explosion²

Sution Usman in his book does not use the term risk but uses the term marine loss which means losses due to ship collisions, shipwrecks, ship aground, finding goods at sea and averij.

Risk is also interpreted by Subekti as an obligation to bear losses if something happens outside the fault of one of the parties that befalls the object referred to in the agreement. Then H.M.N. Purwosutjipto, defines risk as an obligation to bear losses caused by a cause or event beyond one's own fault.

Based on the opinion above, it can be concluded that risk is a human act or occurrence of natural phenomena that causes losses. And this risk consists of, ship collision, shipwreck, ship aground, bad weather.

Freight

Transportation comes from the word angkut which means lifting and carrying, loading or sending. Transportation means the business of carrying, delivering or moving people or goods from one place to another. So, in the sense of transportation, it is concluded that a process of activity or movement from one place to another.

R. Soekardono, SH, is of the opinion that transportation basically consists of the movement of places both regarding objects and about people, because the movement is absolutely necessary to achieve and increase benefits and efficiency.

Adulkadir Muhammad said that transportation is the process of loading goods or passengers into the means of transportation, carrying goods or passengers from the place of loading to the destination and unloading the goods or passengers from the means of transportation to a specified place.

The definition of transport in general is also given by H.M.N. namely: "Transportation is a reciprocal

agreement between the carrier and the sender, where the carrier binds himself to carry out the transportation of goods and/or people from one place to a certain destination safely, while the sender binds himself to pay the transportation fee".

Based on the definition of transportation above, it can be seen that the operation of transportation is based on a form of reciprocal agreement. In the sense that the parties to this agreement are the Carrier and the Shipper/Passenger, each of which has its own obligations and rights. The carrier's obligation is to provide transportation services for goods/people from one place to a certain destination safely, so that the carrier has the right to receive payment of transportation fees from the sender/passenger. Meanwhile, the sender/passenger is obliged to pay the transportation fee to the transportation, so that the sender/passenger has the right to obtain transportation services safely and safely until they arrive at their destination.

Goods

The object of the agreement for the carriage of goods by sea is goods. Goods in Article 1 number 28 PP 20 of 2010 concerning Water Transportation are, All types of commodities including livestock that are unloaded and loaded from and to ships.

The definition of goods according to Article 1 (c) of The Hague Rules, namely goods are all types of goods and merchandise except live animals and cargo which according to the carrier agreement is determined to be transported on the deck and indeed loaded on the deck.

Meanwhile, according to Article 1 of The Hamburg Rules, goods include live animals and goods in containers/pallets. Regarding animals, the transportation is also done by ship but the carrier provides room and drinking water for the animals. Regarding its safety until it is unloaded at the port of destination, the carrier is declared not to be the burden of the carrier but the shipper.

The goods in Abdulkadir Muhammad's book are goods that are legal and protected by law, which are contained in a carrier to be transported to the specified destination. While Article 1332 of the Civil Code confirms that only goods that can be traded can be the subject of an agreement. Goods and objects have a relationship, which in article 499 of the Civil Code called objects are goods and rights controlled by property rights, which are then divided again into movable objects and immovable objects.

The definition of goods above confirms the classification of goods that are the object of cargo, including:

1. Goods in terms of necessity, namely: clothing goods, food goods, household goods, educational goods, development goods, and traded animals.
2. Physical goods, namely: Dangerous goods, non-dangerous goods, liquid goods, valuables, bulk goods, special goods.
3. Goods of natural nature, namely: solid goods, liquid goods, gas goods, hollow goods

Goods in terms of care and maintenance, namely: Dangerous goods, cold or frozen goods, goods whose length or weight exceeds a certain size

The goods transported need to be examined carefully, carefully, based on the nature of the goods in order to facilitate the carrier in carrying out the transportation and proving if there is a loss in the operation of the transportation.

Based on the description above, it can be concluded that the object of transportation by sea by sailing ship can be in the form of goods that have economic value because they can be traded and consist of commodities or natural products such as copra, candlenut, tamarind, cashew, walnuts, etc., as well as livestock. such as goats, cows, pigs etc.

Boat

Today the ship is still the only means of transportation used for transportation by sea. The definition of the ship itself can be found in article 309 of the KUHD, namely ships are all boats, with any name, while article 310 of the KUHD says that ships are all ships used for shipping at sea or those intended for it, and Law No. Shipping, ship is a water vehicle with a certain shape and type, which is driven by wind power, mechanical power, other energy, pulled or delayed, including vehicles with dynamic support capacity, vehicles under the water surface, as well as floating equipment and floating buildings that do not move. - move.³

Ships in article 309 of the KUHD are all boats (arks), with any name, and of any kind (nature). This understanding is interpreted broadly so that anything that can sail can be said to be a ship.

Sailing ship is a ship that is driven by using a sail that utilizes wind power as a propulsion. The construction of this ship is generally made of wood and has been used for a long time as the backbone of both civil and military shipping until the invention of the steam engine and iron/steel ships in the 19th century along

with the hectic Industrial Revolution pioneered by England through the invention of the steam engine by James Watt.

The ship is operated by a captain. The captain in Law No. 17 of 2008 concerning Shipping Article 1 number 41 is one of the crew members who is the highest leader on the ship and has certain authorities and responsibilities in accordance with the provisions of the legislation.

The captain in his book Abdulkadir Muhammad is mentioned as a leader in a ship whose job is to carry the ship from the point of departure to the destination safely and safely, in this case the captain acts on behalf of the carrier.

Research Methods

This research was conducted in Alor Regency, Pantar Barat District at Bara Nusa Harbor starting from September – November 2021. This research is classified as a normative juridical research using literature review.

Research aspects include: transportation facilities, responsibility of the carrier, transportation agreements and risks in transportation. Types and sources of data include primary data and secondary data. Data collection techniques using Literature Studies.

Discussion

The agreement for the carriage of goods by sea as a type of insurance agreement includes a reciprocal agreement which means that the first party is obliged to take legal action for the second party. In the case of insurance, the insurer binds himself to compensate for the loss or pay a certain amount of money to the insured party, and the insured party binds himself to pay a premium to the carrier.

According to Abdulkadir Muhammad, transportation has a very vital value in people's lives, it is based on various factors, namely:

1. Support development in various sectors
2. Close the distance between the village and the city
3. The development of science and technology⁷

The transportation of goods by sea cannot be separated from the dangers of risk, therefore, the Carrier limits the liability for damage or loss of the goods being transported. Article 41(2) of Law 17 of 2008 provides limits on the responsibility of the carrier not to compensate for the loss, if it can prove that the damage/non-delivery of the goods is beyond the fault of the carrier. The master has taken action to save the goods and the ship from an unavoidable event resulting in defects or damage to the goods being transported.

The captain in Article 1 number 41 of Law No. 17 of 2008 concerning Shipping is one of the crew members who is the highest leader on the ship and has certain authorities and responsibilities in accordance with the provisions of the legislation. While Article 342 of the Commercial Code states that the captain is required to act with such skill and accuracy and wisdom as necessary to carry out his duties, he is responsible for all losses issued by him in his position to other people due to intentional or obvious mistakes.

Risks in carrying out transportation require the captain to take the following actions:

1. Entering the nearest port area and anchoring, if he hears that the flag under which he is sailing is no longer free (Article 367 of the Commercial Code).
2. If the destination port is under siege, the captain can enter the nearest port area and dock (Article 368 of the Commercial Code).
3. If the ship is dragged, detained, or confiscated, the captain may reclaim the ship and its cargo by notifying the entrepreneur and the ship charter (if the ship is chartered) in advance (Article 369 of the Commercial Code).

In principle, transportation activities by sailing ship are a legal relationship of a civil nature, but considering that sea transportation has become a necessity for the wider community, government intervention is needed in shipping activities by sailing ships, namely determining policies or regulations related to transportation activities by sailing ships so that the interests of consumers using air transportation services are protected.

The carriage agreement essentially has to be subject to the articles of the general part of the *Burgerlijk Wetboek* (KUH Perdata) contract law, however, by law, various special regulations have been stipulated which aim to limit the freedom in the public interest in terms of making a carriage agreement, namely putting various special obligations to the carrier that cannot be excluded in the agreement⁷.

Subekti provides the following definition: "Risk is the obligation to bear losses caused by an event beyond the fault of one of the parties." So the risk stems from the occurrence of an event beyond the fault of one

of the parties to the agreement, in contract law it is called a state of coercion. Whereas in the Civil Code in the general part of book III there is one article that actually states about risk, namely Article 1237 which reads as follows: "In the case of an agreement to provide a certain item, the item since the engagement was born is the responsibility of the debtor".

The word dependent in this article is the same as "risk". However, in this Article, the risk referred to is only in unilateral agreements, such as grant agreements and borrow-use agreements. Another article in the Civil Code that regulates risks for reciprocal agreements is contained in a special section on buying and selling, exchanging and so on.

The article that regulates the risk of buying and selling is Article 1460 of the Civil Code which reads as follows: "If the object being sold is in the form of an item that has been determined, then this item from the time of purchase is the responsibility of the buyer even though the delivery has not been made and the seller has the right to demand the price."

In legal theory, there is a teaching called *resicoleer* (teaching about risk). *Resicoleer* is a teaching which states that a person is obliged to bear the loss, if something happens outside the fault of one of the parties that befalls the object that is the object of the agreement. *Resicoleer* teachings arise when there are compelling circumstances, this teaching can be applied to unilateral agreements and reciprocal agreements.

A one-sided agreement is an agreement in which one of the parties actively performs achievements while the other party is passive. In a unilateral agreement, the risk is borne by the debtor or debtor (Article 1237 of the Civil Code), while a reciprocal agreement is an agreement in which both parties are required to comply with a mutually agreed agreement, and the risk lies with the creditor.

Article 1460 of the Civil Code places the risk on the buyer who is the creditor of the goods he buys, because he has the right to demand its delivery. A buyer who has just agreed to Article 1460 of the Civil Code, he is already burdened with the risk of the goods, whereas according to the Civil Code system in all kinds of buying and selling property rights only move if the goods are handed over. To reduce this peculiarity, Article 1460 of the Civil Code needs to be interpreted narrowly, namely aimed at the words of certain goods, in that article is an item that is chosen and appointed by the buyer and can no longer be replaced with other goods, and is only used if a compelling situation occurs. which is absolute in the sense that the purchased goods are destroyed before being sent.

The provisions of Article 1460 of the Civil Code have been revoked by SEMA No. 3 of 1963. This provision cannot be applied explicitly, but in its application it must pay attention to, depending on the location and location of the goods; Depends on the person who made the mistake of destroying the item.

In the sale and purchase agreement, the risk of the destruction of the goods is the responsibility of the buyer. The agreement for the carriage of goods by sea with sailing ships, the legal relationship between the sender of the goods and the recipient of the goods is a sale and purchase agreement so that the risk in the carriage agreement can be with the recipient.

Regulation on ship accidents or own risk in Article 245 of Law No. 17 of 2008 concerning shipping. A ship accident in this article is an incident experienced by a ship that can threaten the safety of the ship and/or human life in the form of a sinking ship, a burning ship, a ship colliding, a ship aground.

A ship accident is a legal event of transportation in the form of an event or disaster that is not desired by the parties, which occurs before, during, or after the operation of transportation due to human actions or damage to transportation equipment so as to cause material, physical, mental loss, or loss of livelihood. good for passengers, not passengers, the owner of the goods or the carrier.

Based on the above concept, the elements of an accident or risk are:

1. Event or disaster

A transportation accident or accident is an event that is not known to the user of the transportation service or the shipper or the carrier himself. However, for people who are experts in transportation equipment, perhaps the disaster can be expected to occur if the transportation equipment is not operational standard. Transport equipment that meets operational standards is proven by a certificate of eligibility.

2. Not desired by the parties

The occurrence of a disaster in transportation is not desired by the users of transportation services because the disaster results in losses. An accident in the transportation of goods is not desired but the cause of the disaster is ignored Because the parties involved in the transportation organization are accustomed to deviating from the provisions contained in the legislation.

3. Occurs before, during, or after the operation of transportation

Disasters in the operation of transportation can occur before, during and after transportation, in this case

the carrier remains responsible because the accident or disaster occurred when the carriage agreement had not ended.

4. Due to human actions or damage to the means of transportation

In sea transportation, this can happen because of the negligence of the carrier in operating the ship so that the ship is damaged in its operation.

5. Causing material, physical, mental loss, or loss of livelihood.

6. For the owner of the goods, or the carrier¹⁰.

Risk in transportation is a problem that often occurs in the transportation of goods by sea. Risk is uncertainty that can cause loss. The uncertainty is divided into economic conditions, conditions caused by nature, human behavior. In addition, there are also speculative risks and pure risks.

Abdul Kadir Muhamad¹¹ does not use the term Risk but uses the term marine accident, which accident can be caused by; Damage to the ship's engine, ship collision, shipwreck on the rock, sinking of the ship due to bad weather, and burning of the ship due to explosion. In line with the above opinion, Sution Usman in his book does not use the term Risk but uses the term Loss of the sea which means losses due to ship collisions, shipwrecks, ship aground, discovery of goods at sea and averij.

Based on the opinion above, the author draws the conclusion that risk is a human act or occurrence of a natural phenomenon that causes losses. And this risk consists of, ship collision, shipwreck, ship aground, bad weather.

Risk is an obstacle in carrying out the transportation of goods by sea. The risk is caused by human negligence. In addition, the limitations of port facilities and loading and unloading facilities are also an obstacle in carrying out the transportation of goods by sea by sailing ships.

Risks caused by negligence include, among others, the crew of the ship neglecting to check the hatch cover so that some of the hold is not closed and causing damage to goods, the crew of the ship neglecting to properly prepare the cargo space. While the risks due to errors include, among others, errors that cause the hatch cover to leak, errors in storing and leveling cargo, Errors in stacking goods so that the air vents are closed and resulting in no air exchange so that the goods are damaged, Carelessness in operating the ship, inability of the crew. in mastering various problems that may arise in ship operations, consciously loading ships excessively.

Transportation by sailing ship is a form of people's shipping which is still traditional because transportation by sailing ship as a means of transportation between inland areas, the loading and unloading of goods is still traditional, namely by using human power.

Limitations of loading and unloading power or lack of support for human resources in carrying out unloading are obstacles or risks faced by the carrier in handing over the goods. Delay in delivery of goods as a result of limited port facilities and human resources on loading and unloading personnel causes losses for both the carrier and the recipient of the goods.

The carrier loses out as a result of the delays mentioned above because the limited port facilities have resulted in the ship having an extended waiting time at the port and a delay in departure time. In order to achieve the expected results and the transportation function can be achieved, in transportation it is necessary to have several adequate elements in the form of,

1. The means of transportation itself (operating facilities) Every goods or people to be transported of course requires adequate means of transportation, in terms of capacity, size and equipment. The equipment provided must be in accordance with the goods being transported.
2. Facilities that will be passed by means of transportation (right of way). If the facilities traversed by the transportation are not available or are not perfect, then the transportation process itself may not run smoothly.
3. Places for preparation of transportation (terminal facilities) These places for preparation of transportation are needed because a transportation activity cannot run effectively if there is no terminal used as a place of preparation before and after the transportation process begins.

Freight trade plays a very important role in the world of trade. Not only as a means of transportation that must carry traded goods to consumers but also as a means of determining the price of these goods. Therefore, to expedite their business, producers will look for continuous transportation and low transportation costs.

Marine hazards classified as risks consist of two groups, namely:

1. Marine hazards originating from nature, such as storms, big waves, windstorms, thickfog, rocks, icebergs, shipwreck remnants and so on.
2. Marine hazards originating from humans, both from crew members and from thirdparties, such as crew rebellions, pirate piracy, detention and confiscation by state authorities.

The agreement for the carriage of goods is a reciprocal agreement so that the loss caused by Overmacht will result in the loss of performance, the owner of the goods cannot claim compensation as referred to in Article 1246 of the Civil Code, and cannot request the cancellation of the agreement as referred to in Article 1266 of the Civil Code. Thus, Law No. 17 of 2008 concerning shipping in Article 41 paragraph (3), requires the owner of the goods or the carrier to insure the object of transportation, so that if a risk occurs, the loss is paid by the insurance company.

Conclusions and Suggestions

Conclusion

The risk in the transportation of goods by sea by sailing ship arises because the carrier does not carry out the achievements assigned to him. Forced circumstances, negligence and Avarai are the causes of the Carrier not being able to carry out its performance. Risks due to compelling circumstances, the carrier is released from his responsibility. While the risk due to negligence and avarai is the responsibility of the carrier, this risk often results in the transfer of responsibility from the carrier to the sender. So Article 41 paragraph (3) of Law Number 17 of 2008 concerning Shipping requires the implementation of goods insurance. Insurance is a form of legal protection for the transported goods, aiming to replace the carrier in providing compensation to the owner of the goods or the shipper, for losses that occur in the operation of transporting goods by sea.

Suggestion

1. The government must provide more careful supervision in carrying out the transportation of goods by sea by sailing ships, especially in the case of the application of standard clauses in the contract of carriage.
2. The government must pay attention to port facilities in remote areas where port facilities and the lack of human resources in loading and unloading goods are obstacles to the effectiveness of loading and unloading activities which often result in losses and transfer of responsibilities from the parties involved in the agreement.
3. The Regional Government of East Nusa Tenggara Province must pay more attention to the people's sailing ships that are still traditional in nature. Because Law No. 17 of 2008 concerning Shipping does not accommodate transportation by sailing ships, especially in the implementation of insurance for cargo goods. So the local government is recommended to issue a Regional Regulation of the Province of East Nusa Tenggara which regulates people's shipping.

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