

Tanker Oil Pollution Insurance: The Importance of Protection and Indemnity Application in Indonesia

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Abstract- Marine insurance is needed in tanker oil pollution as an application of the principle of strict liability. Protection and Indemnity (P and I) as an insurance specifically for tanker oil pollution claims has its own special features different from insurance in general. This insurance (legal liability insurance) that is mutual in nature (mutual benefit reciprocal) is based on the presence of shared interest from its members and their respective risks in overcoming the dangers that arise with the capital raised by the members in the spirit of mutual benefit for its members.

Keywords- Insurance, Oil Pollution, Tankers, Protection and Indemnity

I. INTRODUCTION

Claims for compensation based on the interests of the marine environment due to the concept of the blue economy proclaimed by the government must surely be the basis of the claims of losses made by polluters to retribute victims both humans (fishermen) and marine ecosystems, given that several international instruments have been ratified by the national legal system related to the provisions governing compensation for oil pollution by tankers.

Not long ago in Teluk Penyau Bay in Cilacap there was a claim for compensation for oil pollution. On Monday, May 25, 2015, there was a very large oil spill in the waters of Cilacap. The residents and fishermen on Monday, May 25, 2015 were busy with the activities collecting crude oil spills that polluted the tourist area of Teluk Penyau Beach in Cilacap Regency, Central Java. The spillage was from the leakage of the crude oil owned by Pertamina Refinery Unit IV Cilacap which was damaged on Wednesday night, May 20, 2015 [1].

The problem above shows that Indonesia still has problems with oil pollution by tankers, and insurance obligations as stipulated in the 1969 Civil Liability Convention/ CLC, as an embodiment of the principle of strict liability, have not been applied accordingly. This paper will discuss several matters related to Protection and Indemnity (P and I) insurance applied internationally and providing more guarantees on tanker oil pollution losses.

II. RESEARCH METHOD

This research was a normative legal research. The research data used in this study were secondary data. The aim of this study was to be oriented to reform (reform oriented research) [2]; a research that intensively evaluates the fulfillment of current provisions. The approach used in this research was conceptual approach. The specification of the qualitative analysis technique in this study was content analysis.

III. FINDINGS AND DISCUSSION

1. Absolute Liability Principle in Environmental Pollution

Liability principle in environmental resolution, particularly pollution, uses the principles of *strict liability* and *absolute liability*. *Strict liability* is a direct and immediate liability, and it is a conditional liability on limiting the amount of compensation payments determined in advance in marine pollution in a direct and immediate manner. *Absolute liability* is an unconditional absolute liability (full and complete in compensation payments). The stipulation of this principle in the state's laws and regulations is often caused by the evolution in the international world, particularly with the development of environmental law.

In 1978, the Indonesian government ratified the 1969 *Civil Liability Convention* [3] and the 1971 *Funds Convention* in its national law through Presidential Decree No. 18 of 1978 concerning Ratification of the 1969 CLC and Presidential Decree No. 19 of 1978 concerning Ratification of the *Convention for the Prevention of Pollution from ships 1973* along with the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from the Ship 1973*. With the ratification of the 1969 CLC, the principle of *strict liability* has begun to be recognized in the Indonesian legal system, particularly in the sphere of environmental law. This concept is understood as a type of activity that can be classified as *extra hazardous* or *ultra hazardous* or *abnormally dangerous* required to bear all losses incurred even though the person concerned has acted very carefully (*utmost care*) to prevent all hazards and losses and unintentional losses.

In *strict liability*, there is a defendant's obligation to assume liability for the losses which are not related to his mistakes. The defendant's obligation to assume the liability for this loss arises directly and immediately, once there is a fact that there has indeed been an event that causes the loss. [3] The principle of *strict liability* arises from the awareness of the community that, for every act carried out either by individuals or groups, the person or group will not be able to escape from liability for any losses caused by the act. This principle is always associated with compensation. [4]

In the concept of *ultra-hazardous, tort law* imposes *strict liability* on the activities that involve a high level of danger that cannot be prevented by those who have acted cautiously or who may be victims. [4] The principle of *strict liability* has encouraged those who carry out the activities classified as *extra hazardous* to create alternatives that can reduce danger degree. [4] *The Injurer* will take preventative measures at the optimal level because when taking precautions below the optimal level there will be a *total accident cost* to be borne.

John D. Blackburn, Elliot I. Klayman and Martin H. Malin by referring to Article 520 of the *Restatement of the Law of Torts* in America states that, to determine whether an activity is an activity of *abnormally dangerous*, it can be subject to *strict liability*. There are several factors that can be used as the determinants as follows: a) The capacity involves a high degree of harm to the person, land or chattels of others; b) The harm which may result from it is likely to be great; c) The risk cannot be eliminated by the exercise of reasonable care; d) The activity is not a matter of a common usage; e) The activity is in the appropriate place where it is carried on; f) The value of activity to the community [5]. In *strict liability*, a person is responsible whenever a loss arises. This explains the situation as follows: a) The victims are released from a heavy burden to prove the causal relationship between the loss and the defendant's individual actions; b) The "*potential polluters*" will pay attention to both the level of care and level of activity. [5]

These two things are the advantages of *strict liability* from the concept of error. Because of its strict and hard nature, *strict liability* cannot be imposed on all activities. According to LB Curson [5], the principle of *strict liability* is based on the following reasons: a) It is essential to ensure the compliance with certain important regulations needed for social welfare; b) Proving the presence of *mens rea* will be very difficult for the violations related to social welfare; c) The high level of social danger posed by the conduct in question.

2. Principle of Strict Liability in accordance with Law No. 32 of 2009 on Environmental Protection and Management (UUPPLH)

The damages in *strict liability* is usually associated with a system of *ceilings* (the maximum limit of liability).

The responsible party is only charged to a certain extent. Indonesia adheres to the school of *ceiling* in strict liability because in the explanation of Article 35 paragraph (1) of Law Number 23 of 1997 concerning Environmental Management (UUPPLH) [12] and in the explanation of Article 88 of Law Number 32 of 2009 concerning Environmental Protection and Management (UUPPLH), [6] explain that the amount of compensation that can be charged to environmental pollutants or polluters can be determined to a certain extent. The definition of certain limits according to applicable laws and regulations, insurance obligations are determined for the businesses and /or activities concerned / availability of environmental funds.

3. Fulfillment of Strict Liability Principle in Oil Pollution Cases by Tanker in accordance with the Civil Liability Convention (CLC) with the Transfer of Insurance Obligations through Protection & Indemnity (P&I)

In the Commercial Code (KUHD) [14] Articles 592 to 685, they specifically regulate marine insurance. The matters that can be included in the scope of marine insurance according to Article 593 of the Commercial Code are; *casco* or keel of a ship, empty or with its cargo, armed or unarmed, sailing alone or together with other ships, all the equipment of a ship, its war equipment, all the living needs and generally everything unloaded by the ship until the ship can sail, all the goods contained in the cargo, all the wages of transportation to be obtained, and all the dangers of piracy. Article 594 of the Commercial Code states that the coverage can be held on; all or part of the items concerned, together or individually, in a peaceful situation or during a war, before or during the voyage of the ship, for travel only or on its return, or for commuting, or also just for particular matters, for all the dangers of the sea, and for good and bad news.

Special marine insurance for the ship is related to the shipping coverage which is actually a way in which the first party, the guarantor, is bound to the other party, the insured party. With the receipt of an amount of money called a premium, the guarantor is obliged to compensate for losses, damages or other costs concerned when the insured suffers the losses on the goods which are the subject of coverage of the insurer. The losses caused or caused by certain hazards are more clearly specified in an agreement between the two parties called policy. It can be said that such coverage is actually an agreement or contract between the parties. [7] The difference between the coverage agreement from other agreements is that this policy is an agreement signed by only one party, the insurer, while the other party, the insured party, does not sign the agreement letter, which is in this case the policy. [9]

Indonesia requires every tanker to have a 1969 CLC Certificate and Fund 1992.[10] CLC bunkers are required as a safeguard for coastal states in terms of receiving tankers that enter the territorial sovereignty and

anticipating and protecting against *force majeure* due to environmental pollution. [10] The CLC requires the instrument to be enforced through a *compulsory liability* that requires the owner of the ship carrying more than 2,000 tons of oil (both in *bulk* and in *cargo*) to cover insurance or other forms of insurance in accordance with the limit of liability for compensation payments (CLC 1969, Article VIII (1)). [11]

Insurance for oil tankers has a special form for calculating the risk or uncertainty of transporting oil by oil tankers at sea. This insurance is intended for the risks to marine pollution carried out by tankers carrying oil cargo at sea. Oil pollution risk insurance carried by tankers is known as *Protection & Indemnity* (P&I) Insurance. The Law on the *Merchant Shipping Act 1854* governing legal liability and limitation of liability, specifically the provisions of liability which regulates the maximum liability for the mistakes and negligence of a person resulting in losses to other parties is limited to no more than 15 *poundsterling* per ton. Before the issuance of the *Merchant Shipping Act 1854*, the restrictions on shipowner's liability and cargo insurance were always included in the policy for insurance and in shipping documents for shipping. In line with the limitation of the legal obligations of ship owners, the idea of closing liability insurance was emerged based on the liability of shipowners on the maximum liability which also constitutes the maximum liability limit of P&I Insurance. Thus, a person does not need to be bothered due to mistakes or negligence resulting from his actions causing another party's loss, and must pay compensation. [11]

In the beginning of the operation of P&I Insurance, the liability of P&I Insurance is two-type liability insurance, each of which is two types of liability insurance which is separated and independent: a) The class of *Protection Defense* Insurance, which is an insurance that guarantees risk of liability for non-commercial liability arising from the operation of the ship, and; b) The class of *Indemnity* Insurance, which means *reimbursement* or the insurance that guarantees payment of compensation for the payment of claims made by the insured (ship businessman) for the lawsuits originating from contractual agreements with their customers. In its development, both types of insurance are incorporated into an insurance recently recognized as P&I Insurance.

P&I Club was originally born in London in 1855. At that time, P&I Club was not in the form of insurance but still in the form of social ties that had important similarities similar to the cooperatives of ship owners/businesses. The social tie is known as *The Ship Owners Mutual Society*, which was a social union to defend the common interests of ship owners/businesses in an effort to deal with claims for compensation for lost/damaged merchandises transported by ships from service users/cargo owners. P&I Insurance, which has been in the form of the first P&I Mutual Insurance is still known today as

The Britain Steam Ship Insurance Association Limited. [12]

The birth of the P&I Club was mainly because it was triggered by the birth of the Commercial Law in the UK known as the *Merchant Shipping. Act 1854*. This law regulates the limitation of the maximum amount of *limitation liability of the owner / operator* of the ship against claims for compensation from the owner of the cargo in which the responsibility of the carrier in settling the cargo claim is limited to no more than 15 *poundsterling* per ton. On the other hand, at that time, the volume of ships and the value of the cargo carried by vessels continue to increase in value or price. The average value far exceeds the selling price of the shipping vessel so that the ship owner is in a very critical position in facing demands for liability that exceeds the sale price of the ship. Logically, when there is a fatal accident that results in the loss of all the cargo, without insurance the responsibility for payment of compensation to the owner of the goods may not be paid. In fact, the ship owner may face bankruptcy risk and still leaves a debt obligation to pay the cargo claim despite receiving a replacement claim on his ship from *Hull & Machinery* Insurance. [13]

P&I or commonly called PANDI is an abbreviation for *Protection & Indemnity*, that is a type of compensation insurance as liability for claims from other parties (known as liability). This type of insurance is classified as liability insurance (legal liability- liability insurance). This type of insurance guarantees all types of liability of the owner or operator of the ship as a consequence of the liability of the owner or operator of the ship as a consequence of his responsibility for the agreement concerning the field of marine services with: a) The captain and / or the crew (in a sea work agreement), and; b) The charterers who are bound in a charter agreement or space with their customers (*charter parties*) based on time (*time charter parties*), based on *voyage* (*voyage charter parties*, or agreements for the transportation of goods by sea in which in providing sea transportation services transportation documents are issued (B / L). [13]

This type of liability insurance does not at all guarantee and provide compensation for the loss or damage suffered by the insured for loss due to loss or damage to the insured property. However, this type of insurance actually guarantees payment of damages suffered by other parties.

P&I insurance is a type of *legal liability insurance* that is *mutually* beneficial. What is meant by *mutual* here is an effort for the mutual benefit of its members. This is based on the presence of a common interest of its members and on the presence of a common interest and the risks of each in overcoming the dangers that arise with the capital collected by its members in the spirit of mutual benefit for its members.

In the P & I insurance, the party with the risk guaranteed by an insurance company is not named as the insured person as insurance in general, but he is called as a *member*. Liability insurance guarantees all types of *legal liability* that becomes a member's obligation as a consequence or cause arising from the operation of a ship by the owner/ charterer/ manager of the ship against all liability of the second party. Members are bound in an agreement (*contractual liability*) and legal liability or claim for payment of compensation to third party (*third party liability*), which is caused by the mistakes or negligence of themselves or other people they employ. [13]

4. *For Certain Ports / Countries, Protection & Indemnity is Mandatory*

Although P&I Insurance has been operating for more than a century, it turns out that in Indonesia only a few national shipping business operators have benefited by closing P&I insurance. Almost all shipping businessmen who serve domestic trade do not pay attention to the coverage of P&I, except the ocean ships that serve international trade and container shipping vessels that regularly trade to neighboring countries, such as Singapore, Malaysia and Thailand. They certainly do not forget to close their legal responsibilities with P&I insurance. When the ship is unable to show a *Certificate of Entry*, that is a certificate of the coverage proof of legal liability with the P&I Club, vessels are not allowed to dock at any ports in these neighboring countries.

This is understandable why these countries require the coverage of liability for P&I Insurance because if it is not guaranteed using P&I Insurance and only guaranteed using *Marine Hull & Machinery* Insurance and pollution occurs or until there is an obligation to get rid of shipwrecks and its cargo, these risks are generally not guaranteed in *Hull & Machinery* Insurance. In other hand, the costs of overcoming pollution at sea and removal of shipwrecks are very expensive. The costs of removing shipwrecks and handling pollution at sea can even exceed the price of the ship.

Therefore, without P&I Insurance, shipping company is the first required to handle it. Even though the law states that shipowners cannot implement it, the government will carry out the removal or elevation of the wreck. However, the costs and fees will still be borne by the ship owner. When this risk occurs, it is certain that the ship owner or the government will face extraordinary financial difficulties if the ship owner does not insure with P&I Insurance. Moreover, when the sinking ship is the sole property of the ship's entrepreneur. It is conceivable that the ship owner will not be able to finance it. [13]

5. *Obligatory coverage of Protection & Indemnity based on the provisions of the Law of the Republic of Indonesia*

In Indonesian Shipping Law Number 17 of 2008, [26] Article 41 Paragraph (3), Article 54, Article 203 Paragraph (5) and Article 231 Paragraph (2), they regulate that some types of accountability from shipping employers are required to be guaranteed with *liability* insurance. This is a must and the regulation is binding. All shipping businesspersons should realize the importance of the risks of financial responsibility arising from ship operations. This responsibility is so broad and large that it is deemed necessary and mandatory to be guaranteed with this type of *liability insurance*, in addition to the loss/ damage insurance of the ship and the ship's equipment itself which is guaranteed by *Hull & Machinery* Insurance. However, in practice, not all shipping companies, especially the shipping companies with the domestic business patterns only found it necessary although there are criminal sanctions that can be accepted if they do not heed the provisions of the law. In the Shipping Law, the insurance is required as stated in Article 54 that, "Multimodal transport service providers are obliged to insure their liabilities" and Article 231 Paragraphs (1) and (2) say that, "Ship owner or operator is responsible for pollution originating from his ship." And "To fulfill the liabilities referred to in paragraph (1) ship owner or operator must insure his liabilities". The criminal sanctions are mentioned in Article 327 which states that, "Anyone who does not insure his/ her responsibilities as stated in Article 231 Paragraph (2) is liable to a maximum imprisonment of 6 (six) months and a maximum fine of IDR 100,000,000.00 (one hundred million rupiah)".

6. *Rules Book and the Risks Covered by Protection & Indemnity Insurance*

To find out the risks covered by P&I Insurance, each P&I Club has its own rules. However, in essence, the guaranteed risk is the same, namely accountability. *The rules book* of P&I is the terms and conditions similar to the provisions of insurance policy written behind a general insurance policy. The terms and conditions are written and printed each year in a book containing the articles governing the provisions regarding the types of liability risks guaranteed by P&I Insurance. The risks excluded from closing P&I Insurance and the maximum value of payment of compensation claims (*reimbursement*) from P&I Insurance, are specifically the risk of marine pollution caused by the vessels owned or operated by *members*. *The rules book* of the P&I is not in the form of a standard form as commonly used in standard policy of *Marine Hull & Machinery* and *Marine Cargo* Insurances with all the terms of the insurance cover are printed in micro letters noted on the opposite page of the policy. *The rules book* regulates the guarantee for all liabilities of ship owner / operator including the liability risks without limitation of total *sum insured* as generally always stipulated in loss insurance, for example in *Hull & Machinery* Insurance, *Marine Cargo* Insurance, motor vehicle insurance and others. P&I insurance does not limit

the amount of coverage, except the risk of pollution occurring at sea. [14]

7. *Liability Insurance (Liability) and Payment of Compensation (Indemnity)*

The types of liability insurance in a general sense is the insurance covering the liability risk of the insurance members (the insured). The risk covered bears the obligation of the member to pay compensation (*indemnity*) to other parties in which he is bound in an agreement caused by a broken promise or failure to fulfill the agreement. A breach of contract results in the loss of another party in which he is bound by an agreement with them (*contractual liability*) or the emergence of a claim to pay compensation by another party that has no prior legal relationship between them (*third party liability*). Both types of responsibility can be classified as a liability with the risks causing *reimbursement* to third party that can be insured with liability insurance.

P&I Insurance does not care or have no interest in loss, loss or damage to the ship in an accident that befell the ship. P&I Insurance only specializes in the coverage of all risks of liability as a consequence of ship operation faced by ship owner/ operator in which during his business various legal claims (claims) arise. These claims can be in the form of lawsuits from the second party due to breach of contract in an agreement between ship owner/ operator and those parties. [14] In addition to breach of contract, other claims can be in the form of a liability against third party due to the errors / negligence during the ship operation, both by the ship operator / owner and the people employed. The losses suffered by third party are not limited to the amount or coverage value, but rather the provisions of applicable law.

Risk coverage of P & I Insurance does not recognize the limit on the number/ value of the insured as well as other insurances (in general) in which general insurance is always a set amount / value of insurance (*sum insured*) as the maximum limit of claim payment from the insurer in the event of claim . The highest / maximum limit of risk coverage in P&I Insurance is not the value/ amount of coverage but the matters of the liability based on the applicable law so that it becomes an obligation for the member based on the *statutory* and / or on agreement. In other words, this is a breach of contract or loss suffered by a third party. Binding legal provisions can originate from court decisions, international conventions or orders from legitimate local authorities. This provision is binding (*mandatory*). [14]

Unlike general insurance in which the insurance and life insurance companies usually issue policies as proof of an insurance agreement that contains details of excluded risks, P&I Insurance does not issue these policies. Instead, the P&I Club will issue a document called a *Certificate of Entry* which is proof of coverage as in the case with a general loss insurance policy. General provisions

regarding the types of risks covered in P&I Insurance and excluded risks are included in the *P&I Club Rules Book*. *The Rules Book* is published annually and can be accessed freely through the *websites* of each P&I Club. The *Certificate of Entry* only confirms the summary of risks covered by P&I Insurance, which are the risks specifically covered and excluded.

IV. CONCLUSION

P&I Insurance is different from other insurances. P&I aims to defend the mutual interests of its *members*. In addition, P & I *Club* is the body establishing association and mutually beneficial for its members. When covering insurance, P&I *Club* will raise funds together from the contributions from its *members*. This fundraising aims to mutually benefit members and its funders in dealing with all risks. Members will entrust liability to the P&I Club and for the mutual benefit of members in facing the risk of liability for claims from second parties due to injury to promises or demands from third parties. This fee is known as a premium in general loss insurance. It is not referred to as a premium because it is mutually beneficial. P&I insurance is, in principle, a type of marine insurance that specifically bears all the risks of contingent liability as a consequence of such a wide and complex operation of the ship, such as: a) the effect of an injury in agreement with the crew, passengers and / or cargo owner; b) due to demands from third parties.

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