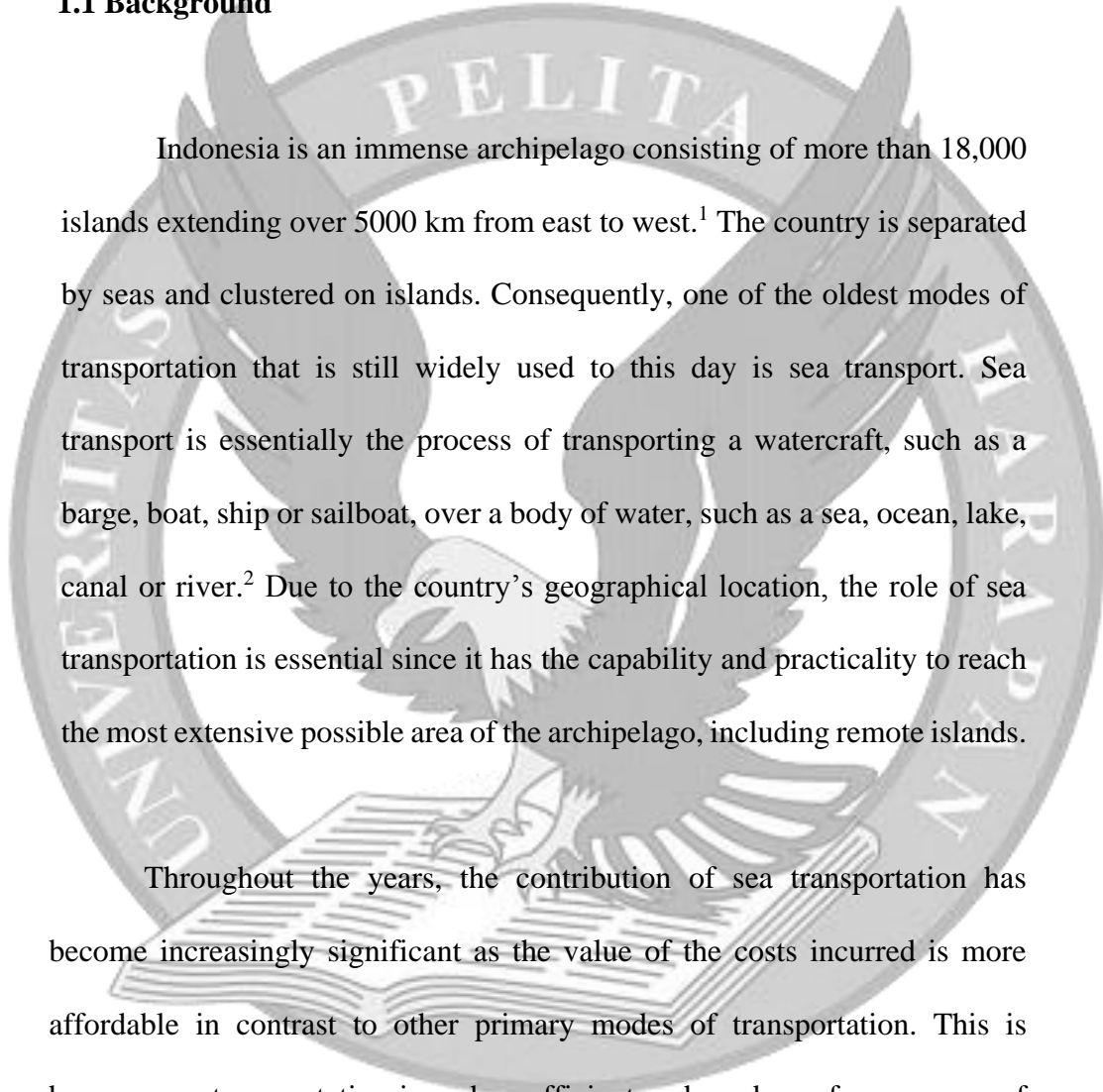


# Chapter I

## INTRODUCTION

### 1.1 Background



Indonesia is an immense archipelago consisting of more than 18,000 islands extending over 5000 km from east to west.<sup>1</sup> The country is separated by seas and clustered on islands. Consequently, one of the oldest modes of transportation that is still widely used to this day is sea transport. Sea transport is essentially the process of transporting a watercraft, such as a barge, boat, ship or sailboat, over a body of water, such as a sea, ocean, lake, canal or river.<sup>2</sup> Due to the country's geographical location, the role of sea transportation is essential since it has the capability and practicality to reach the most extensive possible area of the archipelago, including remote islands.

Throughout the years, the contribution of sea transportation has become increasingly significant as the value of the costs incurred is more affordable in contrast to other primary modes of transportation. This is because sea transportation is carbon-efficient and produces fewer grams of exhaust gas emissions for each ton of cargo transported than any other shipment method.<sup>3</sup> Additionally, in an ever-growing globalized economy,

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<sup>1</sup> Gillespie, R. and Clague, D., 2009. *Encyclopedia Of Islands*. 1st ed. Berkeley [Calif.]: University of California Press, Page 454

<sup>2</sup> Truu, S. "Water Transport". *Eprints.Ttk.Ee*, 2010

<sup>3</sup> "Top Five Advantages Of Ocean Freight Shipping". *Crowley News And Media*, 2018

there is a considerable need for shipping greater cargo volumes in the shortest possible period. As a result, this has led to the construction of mega-vessels, with the ability to carry huge quantities of goods and raw materials into thousands of shipping containers at once.<sup>4</sup> Furthermore, the importance of sea transportation is reflected in the increasing need for its services as it does not only carry the mobility of people, but it also carries commodities and merchandised goods in vast quantities from and to all corners of the country. Thus, the role of sea transportation in Indonesia has become beneficial and strategic in terms of accelerating the economy, foreign trade, import and export of merchandise and raw materials of all kinds.<sup>5</sup>

Just like any service provision when we offer service of carrying out goods by sea, there is a Contract of Carriage whereby it must be signed and agreed upon between the carrier and shipper. The carrier has the responsibility of undertaking transport persons or property from place to place, by any means of conveyance, and with or without compensation.<sup>6</sup> Whereas the shipper is the owner of goods who entrusts them on board a vessel for delivery abroad, by charter-party or otherwise.<sup>7</sup> The Contract of Carriage creates a responsibility for the carrier to safeguard the goods that are to be transported from the moment of acceptance up to the time the goods are submitted as

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<sup>4</sup> "Advantages Of Maritime Transport". *Blueocean Magazine*, 2020

<sup>5</sup> *Ibid*

<sup>6</sup> "What Is CARRIER? Definition Of CARRIER (Black's Law Dictionary)". *The Law Dictionary*, 2020

<sup>7</sup> "What Is SHIPPER? Definition Of SHIPPER (Black's Law Dictionary)". *The Law Dictionary*, 2020

stipulated in Article 468 of the Indonesian Commercial Code (*“Kitab Undang-Undang Hukum Dagang/KUHD”*).<sup>8</sup>

Under the Contract of Carriage, the Terms and Conditions (*“T&C”*) section establishes the rules and guidelines concerning the transportation of goods by sea. One of the clauses written in the T&C is regarding insurance. This clause regarding insurance is essential since the transportation of goods by sea is prone to dangers and risks such as excess cargo of goods or people as well as natural disasters. Hence, accidents at sea often occur. Thus, in order to prevent and minimize these risks from occurring is by transferring these risks to the insurance company.

The concept of insurance is governed under Article 246 of KUHD in Indonesia which stipulates that insurance is an agreement, in which the Insuring party commits to the Insured party by obtaining premium, to pay compensation for a loss due to a loss, damage or unobtained profit, which may be suffered due to an uncertain event.<sup>9</sup> In the context of maritime transportation, there is a specific type of insurance called marine insurance which pays for the loss of or damage to a ship and the goods it is carrying.<sup>10</sup> The concept of marine insurance is essential as shipping companies need to insure themselves against claims that result from harm to their ship, vessel,

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<sup>8</sup> Article 468 of the Indonesian Commercial Code

<sup>9</sup> Article 246 of the Indonesian Commercial Code

<sup>10</sup> "MARINE INSURANCE | Meaning In The Cambridge English Dictionary". *Dictionary.Cambridge.Org*, 2020

cargo and crew members. This also applies to any damage caused by their vessels to marine infrastructures such as bridges, harbour facilities or other fixed and floating objects. Without marine insurance, shipping and chartering companies can suffer from large losses due to maritime, physical and human perils. The costs of defending or pursuing claims and disputes can be enormous and run into millions.<sup>11</sup>

In general, marine insurance opens up the liability of third parties as ship or cargo owners may encounter the risks from third parties causing loss or damages. In this case, the principle of subrogation under marine insurance plays a major role with regard to accidents caused by third parties. Subrogation is essentially a right held by insurance companies to get the money it has paid to a customer back from the person who caused the accident or damage.<sup>12</sup> The main purpose of subrogation is to prevent damages to the insured that exceeds the value or amount specified in the insurance agreement and to prevent third parties from being freed from their obligations. In Indonesia, subrogation under insurance is governed under Article 284 of KUHD which stipulates that subrogation is the where the insuring party having paid compensation for losses in respect of insured goods shall obtain all rights possessed by the insured party towards third parties in respect of such losses, the insured party concerned shall be responsible for all actions

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<sup>11</sup> "Trade, Transport And Commodities - The Value Of Marine Insurance". *MECO Marine Insurance*, 2019

<sup>12</sup> "SUBROGATION | Meaning In The Cambridge English Dictionary". *Dictionary.Cambridge.Org*, 2020

which may potentially damage the rights of the Insuring party towards such third parties.<sup>13</sup>

The principle of subrogation is vital as there have been many incidents at sea associated with the act of negligence. This is because the causative factors mostly resulted from human factors that included lack of carelessness in carrying out the crew, the ability to master a variety of problems that may arise in the operation of ships as well as boats and ships aware of the excessive burden.<sup>14</sup> A prime example of this would be ship collision caused by a third party caused by negligence. The act of negligence in particular is governed under the concept torts (*Onrechtmatige Daad*). Torts is essentially a legal wrong committed upon the person or property independent of contract.<sup>15</sup> In Indonesia, the concept is regulated under Article 1365 of the Indonesian Civil Code ("*Kitab Undang-Undang Hukum Perdata/KUHPerdata*") in Book III concerning obligations, which stipulates that every unlawful act that causes damage onto another person obliges the wrongdoer to compensate for such damages.<sup>16</sup>

A person who is deemed to have committed an act against the law may be subjected to sanctions by compensating the victim as a result of his/her mistake, through a lawsuit filed against a judicial institution or a dispute

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<sup>13</sup> Article 284 of the Indonesian Commercial Code

<sup>14</sup> Faturachman, D and Mustafa, S., 2012. *Sea Transportation Analysis in Indonesia*, Page 619

<sup>15</sup> "What Is TORT? Definition of TORT (Black's Law Dictionary)". *The Law Dictionary*, 2020

<sup>16</sup> Article 1365 of the Indonesian Civil Code

settlement institution outside the court.<sup>17</sup> Nevertheless, it must be proven and accounted for the truth of acts against the law through proving the five elements based on Article 1365, namely:<sup>18</sup>

1. There is an Act
2. Such Act is Against the Law
3. There is Fault
4. There is Injury
5. There Exists a Causal Link Between the Tortious Act and the Damages

Under Indonesian Civil Law, torts is an obligation arising from the law as a result of human actions and it is not based on a contractual legal relation since it is interpreted as an act of harm rather than violation of contracts.<sup>19</sup> This is because the nature of the obligation is not agreed between the parties but rather is imposed by operation of law.<sup>20</sup> Under the concept of torts, the individual who experiences the loss and damage is able to claim compensation in accordance with the regulated statutory provisions of acts against the law aimed to protect and provide compensation to the injured party according to Article 1365 of *KUHPerdata*.<sup>21</sup> Thus, if a damage or loss arises

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<sup>17</sup> Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum*, 1967, Page 16

<sup>18</sup> Article 1365 of the Indonesian Civil Code

<sup>19</sup> Ibrahim, Andzar. "Tort Under Indonesian Law/Perbuatan Melawan Hukum Berdasarkan Hukum Indonesia", *Andzar Ibrahim*, 2019

<sup>20</sup> *Ibid*

<sup>21</sup> Article 1365 of the Indonesian Civil Code

as a result of another person's actions, an individual who experiences the loss and damage can claim compensation following Article 1365 of *KUHPerdata*.

With regard to the principle of subrogation under torts, an Insurer can obtain subrogation if the insured subject suffers a loss or damage that is guaranteed in the policy and is caused by negligence of a third party. The third party that causes the loss or damage is obliged to be responsible for all losses or damages that occur. After the Insurer pays compensation for the loss/damage suffered by the Insured, the Insurer obtains subrogation rights from the insured to sue the third party which results in loss or damage to the interests of the insured.<sup>22</sup> In addition, the Insured must choose only one source of compensation, either from a third party or from the Insurer, it cannot be from both parties because the insured will get reimbursement beyond what they should receive.<sup>23</sup> For example, if the insured has already received compensation from a third party, then the insured should not receive compensation from the insurer unless the amount of reimbursement from a third party is not entirely due to the loss suffered.

In practice, the implementation of subrogation rights concerning torts has resulted in many legal disputes. For instance, issues related to how the subrogation letter format can be declared valid so that legally the insured is

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<sup>22</sup> Budi, Afrianto. "Prinsip Subrogasi". *Akademiasuransi.Org*, 2015

<sup>23</sup> "Prinsip Asuransi – Subrogasi – Pusatasuransi.Com". *Pusatasuransi.Com*, 2020

deemed to have subrogated his/her rights to the insurer. In addition, insurance companies that have subrogation rights from the insured often get disputes in demanding compensation caused by third parties.

This type of legal dispute is usually caused by a third party neglecting its responsibilities to carry out subrogation rights claims by refusing to pay compensation for various reasons, resulting in losses to the insurer who has paid claims to the insured. Hence, this creates the right for the insurer to sue the third party who caused the loss, in order to fulfill the compensation. Additionally, legal disputes that occur regarding demands for subrogation rights are carried out by the parties to the court so that the parties can receive the rights as fair as possible.

One landmark case that explains the dispute over subrogation rights in torts is the decision in the Jambi District Court Decision No. 10/PDT.G/2013/PN.Jbi that occurred in 2011. The parties in the decisions were the Plaintiff, PT. Asuransi Indrapura, an insurance company based in South Jakarta and the Defendant, PT. Fajar Marindo Raya National Shipping as a sea transportation company located in Jambi as well as ship TK Soekawati 18 as the third party.

The chronology of the case began when PT. Asuransi Indrapura, the Guarantor of PT. Surya Karya Cipta Makmur was insured with the object of responsibility of a barge named TK. Cipta Makmur I. On 1st February 2011



around 03.00 p.m., after loading 5,112.664 MT worth of copper slag into the barge. The barge headed to Batam towed by a towing ship named TB Putra BES 005 owned by PT. Fajar Marindo Raya National Shipping. Four days later, TK Cipta Makmur I's barge carrying the copper towed by ship TB Putra BES 005 unexpectedly upturned and accidentally crashed onto ship TK Soekawati 18.

Consequently, the entire cargo goods carrying 5,112.664 MT worth of copper slag fell into the sea. Based on the inspection results by the surveyor, it is explained that the cause of the accident was due to the act of negligence caused by one of the ship crew members of TB Putra BES 005, who was in charge of towing TK. Cipta Makmur I to be tethered close to TK. Soekawati 18's ship. The negligence resulting from the accident caused significant losses to the shipowner of Cipta Makmur I, in this case, PT. Surya Karya Cipta Makmur suffered from the following: 5,112.664 MT worth of copper slags that fell into the sea, expenses for salvors as well as compensation for third parties, including ship TK Soekawati 18.

As a result of this accident due to negligence that caused the capsized and fall of the Ship TK. Cipta Makmur I and caused losses to the owner, PT. Surya Makmur as the insured, which subsequently the said losses have been transferred to the Plaintiff as the Insurer. Therefore, the Defendant is rightly

responsible for the accident and is obliged to compensate the Plaintiff as the Insured as the party that is now finding itself placed unfairly at a disadvantage.

From this case, the Author believes that this matter is a major concern since the role of sea transportation in Indonesia is vital in terms of supporting the country's economic development and socio-cultural activities. Furthermore, there have been many comparable cases pertinent to the concept of torts and subrogation in Indonesia. However, the primary legal concern would be how subrogation rights can be used as a basis for claiming the accountability of third parties as well as how these cases are being interpreted and implemented by the judges in court. Nonetheless, comparable cases reoccur every now and then due to the unpredictability of the Indonesian court's rulings as the judges' do not adequately consider the evidence or have different interpretations with addressing their outcome of the judgement. Thus, the Author feels that this issue needs to be addressed more clearly, considering that there are relevant laws in Indonesia that accommodate their decision.

The importance of this thesis is how this issue had been discussed in previous case analysis yet there are still procedural issues concerning the interpretation and implementation of the judge's decision concerning the validity of subrogation claims in tort cases which recurs annually. Thus, the goal of this thesis is that Author wants to give a fresh perspective with the

intent that judges in court can analyze future cases similar to these in a different manner considering that the relevant concepts and regulations are explained under the Indonesian Civil Law. For this reason, the Author hopes that this issue will open up a door for further interpretation.

Consequently, the Author has conducted legal research methods based on the formulation of the issue, namely how the panel of judges in court analyze and determine the validity of subrogation rights in maritime tort cases. Furthermore, the Author will also thoroughly examine the legal considerations of the court rulings that led the panel of judges in Jambi District Court to reject PT. Asuransi Indrapura's tort claim against PT. Fajar Marindo Raya National Shipping. Thus, seeing the background described above, the Author will raise and examine this issue under the title: **Juridical Analysis on Tort Claim by Holder of Subrogation Rights Against a Ship Owner Due to Ship Collision Based on Decision No. 10/PDT.G/2013/PN.Jbi, in conjunction with Decision of the Supreme Court Decision No. 2366K/PDT/2014.**

## **1.2 Formulation of Issues**

To clarify the issues that will be discussed, it is important for the Author to formulate two research questions:

1. How do the panel of judges in Indonesian court analyze and determine the validity of subrogation rights in maritime tort cases?
2. How is the case concerning PT. Asuransi Indrapura as the holder of subrogation rights to PT. Fajar Marindo Raya National Shipping deliberated by the Panel of Judges in Jambi District Court in conjunction with the Supreme Court?

### **1.3 Research Purpose**

The purpose of the Author in conducting this thesis is to answer the questions formulated in the previous subsection, in order to:

1. To examine the pattern of similar cases and analyze whether the interpretation and judgement from the panel of judges concerning the validity of subrogation rights in maritime tort cases conforms with *KUHPerdata* as well as *KUHD*.
2. To analyze judges' the considerations in deciding cases at the Jambi District Court in conjunction with the decision of the Supreme Court by comparing the provisions, legal basis and legislation in the field of insurance and sea transportation, so that the results can be analyzed whether the judge's decision is in accordance with existing laws as well as regulations.

### **1.4 Research Benefit**

The benefits of this research are divided into two aspects, namely, the theoretical benefit and practical benefits:

1) Theoretical Benefit

1. This research is expected to support the development and advancement of science in the field of Civil Law, particularly in the scope of Insurance Law and Shipping Law, namely the implementation of subrogation rights in marine insurance disputes.

2. To expand the knowledge regarding torts and subrogation rights under the Indonesian Civil Law.

2) Practical Benefit

1. This research can be used as a guideline, thought contribution, and source of information for the government, relevant institutions as well as the general public.

2. This research can be used as a source of information for the parties who have an interest in taking strategic steps in implementing the law relating to the implementation of subrogation in marine insurance arising from torts.

3. The results of this research are expected to be useful in providing answers to third parties to the problems being studied, in this case the problem of torts in marine insurance as well as providing input and

consideration in solving problems of shipping disputes regarding subrogation in torts.

### **1.5 Framework of Writing**

To ease the reader of this paper, the Author will describe the chapters briefly in order to provide clarity of the discussion:

#### **Chapter 1: INTRODUCTION**

The first chapter will discuss the introduction, which will include the background of the issue as well as the chronology of the case. Furthermore, there are formulations of issues preceded by the benefits of the search as well as the structure of the thesis.

#### **Chapter 2: LITERATURE REVIEW**

This chapter will further define the terms that will be discussed throughout the thesis. This section will cover terms such as definition, history as well as concept and elements of torts in Indonesia. Furthermore, the types of obligations under the Indonesian Civil Law, concept and regulation of insurance agreements following the concept of subrogation will also be thoroughly explained.

### **Chapter 3: RESEARCH METHODOLOGY**

This chapter will explain the Author's approach in regards to the procedures and sources in conducting data collection and research.

### **Chapter 4: RESEARCH & ANALYSIS**

This chapter will thoroughly discuss and analyze the results of the research that has been conducted by the Author. In this chapter, the questions that have been raised in the formulation of issues will be answered.

### **Chapter 5: CONCLUSION**

In concluding this research, the Author will divide this chapter into two parts, namely the conclusion and the recommendation. This chapter contains the final remarks on the information that has been obtained by the Author and the analysis; as well as the recommendation from the Author concerning the issues that have been discussed in the research thesis.

