A COMPARATIVE STUDY OF SHIP SEAWORTHINESS BETWEEN AUSTRALIA AND INDONESIA*

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Abstract

Since this era is ever changing and the International Business Transaction is developing in a very rapid manner, there are a lot of commercial transactions between parties through delivery of a cargo by using a vessel to transport his cargo because it can amount lot of items. However a problem starts to rise whenever the standard of a vessel to be used in a contract between parties is questionable when the vessel that has been used is sinking, broken during the stages of voyage or failing to deliver the cargo properly. In this journal the writer wants to uphold and describe the legal definition of due diligence in maritime law especially concerning the standard of vessel to

Abstrak

Seiring dengan jaman yang terus berubah dan perkembangan transaksi bisnis internasinal yang amat cepat, terdapat banyak transaksi komersil antara berbagai pihak melalui pengiriman kargo dalam jumlah besar menggunakan jasa pekapalan. Meski demikian, permasalahan mulai muncul saat standar kapal yang digunakan dalam kontrak meragukan; beberapa kapal telah tenggelam, rusak dalam tahap pengiriman, atau tidak berhasil mengirimkan kargo secara sepatutnya. Dalam jurnal ini penulis ingin menegakkan dan mendeskripsikan definisi hukum dari 'legal due diligence' dalam hukum maritim, terutama berkaitan dengan standar kapal yang memenuhi krite-

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be considered as a vessel that can be fit to enter a contract for delivering the cargo in general also by comparing the standard of seaworthiness in Australia and Indonesia supported by the cases that has been happened in each countries.

ria layak untuk dipergunakan dalam kontrak pengiriman kargo secara umum, serta dengan membandingkan standar kelaiklautan di Australia dan Indonesia sebagaimana didukung oleh studi kasus dalam kedua negara tersebut.

***Keywords**: seaworthiness, international business transaction, due diligence.*

A. Introduction

Over the past thousand years, there has been an exponential growth in the number, scope, and influence of international marine in international trade law. This growth has greatly expanded the capacity of ship owner and a charterer to control the committed acts that detrimentally affect the interests of each individual. The law of contract regulates the performance of obligations which the parties have chosen to be imposed on themselves in the course of their commercial relations. As a result, it has become necessary to decide who is responsible and liable to provide compensation, when an individual breaches the international marine law.

Australia, as one of the biggest state that has a significant recent development in marine business has a lot of issues concerning the seaworthiness of a vessel and the implementation of exercising due diligence to prove whether a vessel is seaworthy or not. On the other hand Indonesia is the largest archipelagic state and having the largest seawater area in the world. Hence it would be very interesting to analyze both of these neighboring states.

Before the enactment of Hague/Visby Rules concerning the obligations of ship owners and charterers was very hard to be determined because there was no fixed standard concerning the obligation of each party; for example the duty of charterers to deliver the ship and the limitation of responsibility for the shipowners if there is a latent defect which was undiscoverable by due diligence. As time

goes, the Hague/Visby rules has been enacted. This followed with an apparent dilemma arising from the obligation to provide only due diligence to make the ship seaworthy. Reflecting to this concern the Author wants to identify the problems concerning the obligation of shipowners to provide a seaworthy ship from the Australian and Indonesian point of view. Since it is obvious, that there is no fixed standard for a vessel to be regarded as a seaworthy ship or not; yet the ship must be in a condition to encounter whatever perils of the sea a ship. ("Steel v. State Line SS Co.," 1877) {Beller, 1994 #5}

The Author also sees the problem In Indonesia concerning the rules and source of law that regulate maritime matters especially for the standard of a vessel to be considered as a seaworthy ship. This is for the reason that in Indonesia, the regulation that handles such matters is just enacted within the Law No. 17 Year 2008.

Reflecting to this concern the Author decides to write a paper that contains the standard of ship to be considered as seaworthy based on the comparison of Australian Maritime Law and Indonesian Maritime Law. In the next section writer will divide these article into three section, they are the definition concerning Due Diligence and Seaworthiness in Australia and Indonesia and an analysis supported by some cases that was happened in both countries.

B. Legal Definition of Due Diligence

Due diligence to make a vessel seaworthy in respect of a loss is one of the most controversial concepts in The Hague or Hague/Visby Rules. Before the advent of the Rules, the obligation of the carrier to make the vessel seaworthy was absolute; it was not sufficient to exercise due diligence.("Steel v. State Line SS Co.," 1877; "The Torenia ", 1983)

Art. 3(1) of The Hague and Hague/Visby Rules reads:

> "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
> "a) Make the ship seaworthy;
> "b) Properly man, equip and supply the ship;
> "c) Make the holds, refrigerating and cool chambers,

> and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

The due diligence provision of art. 3(1) as stated in the Hague/Visby rules is of public order, in virtue of art. 3(8) and cannot be contracted out of. ("Bundesgerichtshof," 1984) Due Diligence under art. 3(1) is similar, but not identical, to the exculpatory exception at art. 4(2) (p) "Latent defects not discoverable by due diligence.

Due diligence to make the vessel seaworthy may be defined as a genuine, competent and reasonable effort of the carrier[1] to fulfill the obligations set out in subparagraphs (a), (b) and (c) art. 3(1) of The Hague Hague/Visby Rules.[2] It is the diligence of the "reasonably prudent" carrier, as at the time of the relevant acts or omissions, and not in hindsight. ("The Subro Valour," 1995) The English Court of Appeal has held that the test of due diligence is whether the carrier, its servants, agents and independent contractors have exercised "all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage." ("The Kapitan Sakharov," 2000) The French version of the Hague Rules (which is the official version) uses the words

[1] The "carrier" who owes the duty of due diligence has been held, in the United States, to include the non vessel-owning common carrier (NVOCC) who issues the bill of lading, without there being any requirement for the vessel operating carrier to ratify the bill. See All Pacific Trading v. Hanjin Lines 1991 AMC 2860 at p. 2861 (C.D. Cal. 1991), aff'd 7 F.3d 1427, 1994 AMC 365 (9 Cir. 1993), cert. denied 510 U.S. 1194, 1994 AMC 2997 (1994).

[2] Grain Growers Export Co. v. Canada Steamship Lines Ltd. (1918) 43 O.L.R. 330 at pp. 344-345 (Ont. S.C. App. Div.), upheld (1919) 59 S.C.R. 643 (Supr. C. of Can.), defined due diligence as "not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so [i.e. seaworthy], as far as diligence can secure it." See also C. Itoh & Co. (America) Inc. v. M/V Hans Leonhardt 719 F. Supp. 479 at p. 504, 1990 AMC 733 at p. 743 (E.D. La. 1989): "…such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." See also Tuxpan Lim. Procs. 765 F. Supp. 1150 at p. 1179, 1991 AMC 2432 at p. 2445 (S.D. N.Y. 1991): whatever a reasonably competent vessel owner would do under the circumstances.

"diligence reasonable". This illustrates that the diligence required is not absolute, but only reasonable.

C. Legal Definition of Seaworthy Vessel

According to the Australian law, Seaworthiness may be defined as[3]

(a) In a fit state as to the condition of hull and equipment, boilers and machinery, the stowage of ballast or cargo, the number and qualifications of crew including officers, and in every other respect, to:
   (i) encounter the ordinary perils of the voyage then entered upon; and
   (ii) not pose a threat to the environment; and

(b) It is not overloaded. If:
   (i) It is proposed to take a Safety Convention of Ship to sea on a voyage from a port in Australia; and
   (ii) There is in force in respect of the ship the certificate or certificates that may be required to be produced under subsection 206W(2) in respect of the voyage

The state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage. Seaworthiness has four aspects to be fulfilled they are:

"1) the ship, crew and equipment must be sound and capable of withstanding the ordinary perils of the voyage;[4]

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[3] Australian Navigation Act 1912 Sec 207; A similar definition of seaworthiness is to be found at art. 2063 cc (Québec 1994): "At the beginning of the voyage and even before, the carrier is bound to exercise diligence to make the ship seaworthy, properly man, equip and supply it, and make fit and safe all parts of the ship where property is to be loaded and kept during the voyage." See also Canada Steamship Lines Ltd. v. Desgagné [1967] 2 Ex C.R. 234 at p. 244, which discusses art. 1675 of the former Québec Civil Code (the Civil Code of Lower Canada of 1866) and the duties of the carrier under it.

[4] F.C. Bradley & Sons. V. Federal Steam Navigation Co. (1926) 24 Ll. L. Rep. 446 at p. 454 (C.A. per Scrutton L.J.): "The ship must have that degree of fitness which an ordinary owner would require his vessel to have at the

2) The ship must be fit to carry the contract cargo.[5]
3) Fit to meet and undergo the perils of the sea ("Kopitoff v. Wilson," 1876)
4) Degree of fitness which an ordinary careful and prudent owner to face all probable circumstances. ("McFadden v. Blue Star Line," 1905)

Regarding the definition of seaworthiness, those aforementioned theory concerning seaworthiness sometimes can't be used similarly in every situation because it different in each cases and depends on from the opinion of the judge in that proceedings.

In Indonesia, after the enactment of law no 17 of 2008, the government expected that it can help to support and decide the standard of seaworthy ship. The government hopes that it can help to analyze the factors that can affect the seaworthiness of a ship. Hence, it could give a contribution to decide whether Indonesian or foreign vessel is seaworthy and fulfill the standard that has been regulated by Indonesian government.

In the case of *The Teratai Permai,*[6] The vessel was sinking during the voyage. Now what happen in this case the vessel which was regularly sail once a week serves the rout from Samarinda to Pare-Pare. One day the vessel departed from the port of Pare-Pare on Saturday around 17.00 pm and got sunk when they entered the Marene gulf. According to Indonesian national police investigation from the crew which was survived, the accident was occurred to ship due to the tornado that caused waves as high as 2 meters.

The Marene route that has been used by *The Teratai* was a

commencement of the voyage having regard to all the probable circumstances of it.", cited with approval in The Fjord Wind [2000] 2 Lloyd's Rep. 191 at p. 197 (C.A. per Clarke L.J.); The Lendoudis Evangelos [2001] 2 Lloyd's Rep. 304 at p. 306 (per Cresswell, J.), and The Eurasian Dream [2002] 1 Lloyd's Rep. 719 at p. 736 (per Cresswell, J.) (enumerating the following aspects of seaworthiness: physical condition of the vessel and equipment; competence/efficiency of the master and crew; adequacy of stores and documentation; and cargoworthiness).

[5] The Aquacharm [1982] 1 Lloyd's Rep. 7 at p. 11, cited with approval in The Good Friend [1984] 2 Lloyd's Rep. 586 at p. 593. See also The Kriti Rex [1996] 2 Lloyd's Rep. 171 at p. 184.

[6] An incident occurred in Pare-Pare, North Sulawesi in 2009.

dangerous route for a vessel because there are a lot of accidents that have been occurred in that gulf. From year 2007 until 2008 there have been three vessels that sunk in that gulf.

D. Analysis

Relating to those aforementioned cases that has happened in Indonesia it clearly shows a clear and a significant difference between the seaworthiness aspects that has been render and applicable in Australia and Indonesia. For example in Australia in the case of *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad (The Bunga Seroja)*[7] the Australian High Court has summarized seaworthiness in Hague/Visby rules as follows:

> "Article III, r. 1 therefore effectively imposes an obligation on the carrier to carry the goods in a ship which is adequate in terms of her structure, manning, equipment and facilities having regard to the voyage and the nature of the cargo."

Moreover, seaworthiness means many things -- a tight hull and hatches, a proper system of pumps, valves and boilers, equipped with up-to-date charts, notices to mariners and navigating equipment and the crew must be properly trained and instructed in the ship's operation and idiosyncrasies and engines, generators and refrigeration equipment in good order. The ship must be bunkered and supplied for the voyage or diligent preparations must have been made in advance to obtain bunkers and supplies conveniently along the route.

Conclusively an Australian vessel must be presumed seaworthy if it fulfill all of the administrative requirements, technical aspects

[7] (1998) 158 A.L.R. 1 at p. 25, [1999] 1 Lloyd's Rep. 512 at p. 527, 1999 AMC 427 at p. 459 (High C. of Aust. per McHugh J.). N.B. The Bunga Seroja must be read with caution, however, because the decision is flawed in concluding that a peril of the sea may exculpate the carrier even if it is expected. The judgment also ignores the delicate balance between due diligence, peril of the seas and care of the cargo under the Hague and Hague/Visby Rules. Finally, the High Court passed over the argument that once a peril has been determined to exist before and at the commencement of the voyage, the carrier is only duly diligent in preparing for that peril if it takes various measures, including, inter alia, avoiding the peril by a change of course, staying in port until the expected storm abates, etc. (This latter argument may not have been properly pleaded, however.)

which proven that the vessel can safely afloat at any stages of voyage ("Quebec Marine Ins. Co. v. Commercial Bank of Canada," 1870) and have a degree of the fitness that can ordinarily careful having regard to the possible all circumstances.

Compare to Indonesia the definition of Seaworthiness is a very important aspect in order to the fulfillment of the service reliable and secure for a ship during his sailing in national and international level. Now what happen in Indonesia, the process to determine the standard of seaworthiness of the vessel does not running optimally, there still lot of problems and difficulty to analyze whether a ship already fulfill the standard of seaworthiness or not. Because, according to the Indonesian law, seaworthiness could be defined as a condition of ship which fulfills ship safety required water pollution prevention from ship, legal status of ship, management for safety and pollution prevention from ship, ship secure management for carry on certain waterway.[8]

[8] Art. 1 Para. 33 Law No. 17 of 2008 on Navigation of Sea.

E. Conclusion

The aforementioned analysis clearly shows that the regulation concerning seaworthiness in Australia is very developed because the regulation is not only to regulate the administrative procedure for a vessel to be considered as a seaworthy ship. But, they also regulate the technical aspects concerning the "*uji kepastian*" or due diligence to ensure that the vessel is appropriate enough. Regarding the aforementioned definition concerning seaworthiness the Author concludes that the term seaworthy creates a strict liability for the ship owners to provide that his ship is proper enough to enter in to the contract. For example when one day during the ship owners still or bound by a contract with a charterer this will create harms if during the contract or the sailing of voyage the vessel get a damage but this damage was a latent defect caused by the construction of the vessel which is undiscoverable even if the master already exercise due diligence in accordance with art. 3(1) of The Hague or Hague/Visby Rules It is the diligence of the "reasonably prudent" carrier, as at the time of

the relevant acts or omissions, and not in hindsight ("The Subro Valour," 1995) and master has held and conduct a proper test to the vessel. Conclusively regarding the standard of seaworthy ship in Indonesia is not strict as the Australia standard because the Indonesian one merely only focusing on the administrative requirement but not consider the technical and the real checking of the vessel to be considered as seaworthy ship.

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B. Statute

Australian Navigation Act 1912.

Former Québec Civil Code (the Civil Code of Lower Canada of 1866)