

The Balance of Legal Liability in Marine Cargo Insurance Based on the Principle of Subrogation in Indonesia

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DOI: <http://doi.org/10.29240/negri.v5i2.13741>

Submitted: Jun 12, 2025; Reviewed: Dec 15, 2024; Accepted: Dec 29, 2025

Abstract: The right of subrogation grants insurers the authority to assume the legal position of the insured after the payment of an indemnity; however, in practice, issues of imbalance and injustice frequently arise, particularly in disputes involving third-party carriers or port operators. This article examines the implementation of subrogation in marine cargo insurance contracts in Indonesia by focusing on whether the distribution of legal responsibilities among the insured, the insurer, and the carrier has achieved a fair and proportionate balance. The study specifically analyzes this issue within the framework of the Indonesian Commercial Code (Kitab Undang-Undang Hukum Dagang) and relevant maritime regulations. Employing a normative juridical method, this research utilizes statutory and conceptual approaches to assess the alignment between the legal constructs governing maritime transport liability and the subrogation rights of insurers. The findings reveal that the practice of subrogation in maritime cargo transport continues to encounter significant obstacles, including the absence of explicit regulatory provisions, inconsistencies between contractual clauses and statutory norms, and inadequate legal mechanisms to enforce claims against carriers or port operators. These shortcomings undermine the principle of balanced legal responsibility, leading to disproportionate burdens on insurers despite the formal recognition of their subrogation rights.

Keywords: Insurance, Marine Cargo ,Subrogation.

A. Introduction

As an archipelagic country with vast maritime territory, sea transportation serves as a vital means of supporting trade activities and the distribution of goods.¹ For Indonesia, maritime transportation holds a strategic role in ensuring interregional connectivity and supporting the smooth flow of national trade and logistics. Given the high intensity of maritime transport activities, the risk of losses during the shipping process—caused by natural factors, accidents, or

¹ Asmiati Asmiati, Sulastriani Sulastriani, dan Andi Batary Citta, "Pengembangan Sumber Daya Manusia Dalam Mendukung Transformasi Transportasi Laut Dalam Era Revolusi Industri 4.0," *Innovative: Journal Of Social Science Research* 3, no. 4 (2023): 6185.

the negligence of the carrier—is inevitable. To anticipate and mitigate such risks, marine cargo insurance contracts serve as a vital instrument for providing both legal and financial protection to customers (consumers) against potential risks and losses that may arise during transportation.²

The development of marine cargo insurance practices in Indonesia is inseparable from the complexity of legal relationships between the insurer, the insured, and third parties. In the event of loss or damage to the insured goods or objects, the insurance company that has paid compensation to the insured is entitled to exercise its right of subrogation to claim reimbursement from the third party deemed responsible for the loss. This legal relationship arises from the principle of subrogation, which serves as a key mechanism in marine cargo transportation. It allows an insurance company (the insurer) that has paid a claim to the owner of the goods (the insured) to assume the legal position of the insured in seeking compensation from a third party responsible for the loss. This principle is regulated under Article 284 of the Indonesian Commercial Code (Kitab Undang-Undang Hukum Dagang/KUHD), which states: "The insurer who has paid compensation to the insured obtains the right to take legal action against a third party in respect of the loss. The insured is liable for any action that may prejudice the insurer's rights against the third party." The right of subrogation applies in indemnity insurance, such as motor vehicle or cargo insurance, where the insured object can be valued in monetary terms and the principle of indemnity is fully applicable.

The principle of subrogation is a logical consequence of the principle of indemnity or the principle of balance which aims to ensure that the insured does not receive compensation exceeding the actual loss suffered, thereby preventing the insured from obtaining more than what is rightfully due based on their rights and obligations.³ Theoretically, the subrogation provision is closely related to the principle of balance. In addition to preventing the insured from receiving more than what they are rightfully entitled to, the subrogation right also serves to prevent third parties from escaping their obligation to pay compensation.⁴

However, the exercise of subrogation rights does not always align with the principle of balance. When subrogation is pursued without sufficient evidence of fault on the part of the third party, there is a risk of legal protection imbalance, particularly if the third party refuses to provide compensation for the alleged wrongful act. This is exemplified in the case of the Jakarta High Court Decision No. 452/PDT/2021/PT.DKI between PT Pelayaran Tempuran Emas Tbk and La Ode Aliftha versus PT Asuransi FPG Indonesia, which overturned the ruling of the North Jakarta District Court Decision No. 415/Pdt.G.2019/PN.Jkt.Utr. In the first-instance decision, the panel of judges had considered the defendant's unlawful act as the cause of the loss. However, the decision was overturned on appeal due to an error in the application of law at the district court level. One of the key considerations was that the legal relationship between the plaintiff, PT Asuransi FPG Indonesia, and the insured, PT RAPP, was purely contractual in nature—specifically, an insurance agreement. Meanwhile, the defendants, PT Pelayaran Tempuran Emas Tbk and La Ode Aliftha, had no direct involvement in that contractual relationship and were

² Meriza Elpha Darnia et al., "Asuransi Dalam Perdagangan Internasional," *Innovative: Journal Of Social Science Research* 3, no. 5 (2023): 7499.

³ Abdulkadir Muhammad, *Hukum Asuransi Indonesia* (Bandung: PT Citra Aditya Bakti, 2015). hlm 130.

⁴ *ibid.*

merely third parties. Therefore, the insurance contract could not impose any binding legal obligations on the defendants.

Although several studies have examined the issue of subrogation rights, one such example is the research entitled *“The Principle of Contribution in Marine Cargo Insurance”* by Luthfiana Arumsari, which focuses on the allocation of responsibilities among insurers in cases of double insurance.⁵ Another research is *“Tinjauan Yuridis Terhadap Hak Subrogasi Dalam Pelaksanaan Perjanjian Pertanggungan Asuransi Pengangkutan (Studi Putusan Mahkamah Agung Nomor 555 K/Pdt/2018)”* by Sindi Safitri pada tahun 2021. Another research focuses on an in-depth analysis of subrogation rights from the perspective of Islamic law.⁶ The study did not comprehensively explain the application of subrogation rights. However, this aspect is addressed in another study entitled *“Pembatasan Hak Subrogasi Penanggung Terhadap Pihak Ketiga Dalam Konteks Asuransi Pengangkutan Laut”*,⁷ As observed in the study, the focus is on the protection of third parties from potential abuse of subrogation rights by insurance companies. However, the author considers that there has yet to be a systematic analysis of the principle of balance in the implementation of subrogation rights within marine cargo insurance contracts, ensuring fairness for all parties involved, including the insurer, the insured, and third parties. In that study, however, the application of subrogation rights was not examined comprehensively *“Pembatasan Hak Subrogasi Penanggung Terhadap Pihak Ketiga Dalam Konteks Asuransi Pengangkutan Laut”*, As highlighted in that study, the focus was placed on the protection of third parties from potential abuse of subrogation rights by insurance companies. However, the author observes that there is still a lack of systematic analysis regarding the principle of balance in the implementation of subrogation rights within marine cargo insurance contracts particularly in ensuring fairness for all parties involved, including the insurer, the insured, and third parties.

In insurance practice, as reflected in the aforementioned case decision, legal issues often arise when third parties who are not directly involved in the insurance contract are held liable by the insurance company. This situation raises concerns about how legal balance can be upheld in subrogation claims. There is a pressing need for national legal regulations to mediate such conflicts in order to ensure justice and legal certainty. The state bears responsibility in overseeing and directing subrogation practices so that they operate within the framework of justice and legal certainty by establishing appropriate policies and national legal regulations.

Accordingly, this study aims to examine how legal responsibility is balanced in the practice of subrogation in marine cargo insurance in Indonesia. The findings are expected to serve as a reference for implementing subrogation rights in a manner that does not contradict the principle of equal legal protection for all parties and remains grounded in its foundational doctrine the principle of balance. This principle ensures fairness and proportionality between the insurer, the insured, and third parties. Thus, the implementation of subrogation rights in insurance contracts particularly in the context of marine cargo insurance in Indonesia warrants further examination

⁵ Luthfiana Arumsari, “Penerapan Prinsip Kontribusi dan Prinsip Subrogasi dalam Asuransi Pengangkutan Laut (Studi Kasus PT. Asuransi Axa Indonesia dengan PT. Asuransi Buana Independent),” *“Dharmasinya” Jurnal Program Magister Hukum FHUI* 1, no. 1 (2020): 38.

⁶ Sindi Safitri, “Tinjauan Yuridis Terhadap Hak Subrogasi Dalam Pelaksanaan Perjanjian Pertanggungan Asuransi Pengangkutan (Studi Putusan Mahkamah Agung Nomor 555 k/Pdt/2018)” (Universitas YARSI, 2021).

⁷ Jaya Irianto Purba, “Pembatasan Hak Subrogasi Asuransi dan Tanggung Jawab Pengangkut dalam Pengangkutan Laut (Studi Putusan Nomor 5145k/Pdt/2022)” (Universitas Kristen Indonesia, 2024).

and should contribute to the development of subrogation practices that align with equitable legal protection for all stakeholders.

Research Method

The research method employed in this study is normative legal research, also known as doctrinal legal research.⁸ The study applies both a statutory approach and a conceptual approach, providing an analytical perspective to address issues concerning legal liability in subrogation practices. This type of legal research is primarily conducted through the examination of library materials or secondary data, including the Indonesian Commercial Code, insurance law, and maritime transport law. The analytical method is used to evaluate whether a particular regulation aligns with the fundamental principles or values it is intended to uphold.

Discussion and Analysis

Subrogation Rights in Marine Cargo Insurance

Insurance (Perasuransi) is a legal term used in legislation and by insurance companies. The term "perasuransi" derives from the word "asuransi" (insurance), which refers to the coverage or protection of an object against potential dangers or losses. There are four essential elements that must be present in an insurance agreement, namely:⁹

1. An agreement that forms the basis of a binding obligation between two parties (the insured and the insurer), simultaneously creating a civil legal relationship;
2. A premium, in the form of a sum of money paid by the insured to the insurer;
3. Compensation from the insurer to the insured in the event of a claim or upon the expiration of the insurance contract;
4. The existence of an uncertain event (evenement/accident), which may or may not occur, associated with a potential risk.

An insurance contract is a reciprocal agreement between the insurance company as the insurer and the policyholder as the insured, in which the content of the agreement is to transfer the losses resulting from potential risks that may be suffered by the insured to the insurer. In return, the insured is obliged to pay a premium to the insurer based on the principle of indemnity or balance in order to achieve fairness between the insured and the insurer.¹⁰ One of the principles applied in insurance, to avoid the risk of loss caused by another party, is the principle of subrogation.

Normatively, the right of subrogation is regulated under Article 284 of the Indonesian Commercial Code (Kitab Undang-Undang Hukum Dagang – KUHD), which provides the legal basis for the insurer (insurance company) to assume the position of the insured after compensation has been paid. Through this principle, the insurer acquires the right to claim compensation from

⁸ Irawansyah Irawansyah, "Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel," *Yogyakarta: Mirra Buana Media* 8 (2020). hlm 42.

⁹ Irius Yikwa, "Asuransi Hukum Pelaksanaan Perjanjian Asuransi," *Lex Privatum* 3, no. 1 (2015): 136, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/7033>.

¹⁰ Rinitami Njatrijani, Putri Ayu Sutrisno, dan Cantika Assyifani Primastito, "Peran Otoritas Jasa Keuangan (OJK) sebagai Badan Pengawas Terhadap Fenomena Gagal Bayar Polis Asuransi Di Indonesia," *Jurnal Pembangunan Hukum Indonesia* 6, no. 2 (2024): 151.

a third party deemed responsible for the loss covered under the insurance policy. This principle may only be exercised if the following elements are fulfilled:¹¹

1. If the insured, in addition to having a right against the insurer, still has a right against a third party.
2. Such right arises due to the occurrence of a loss.

In practice, liability in the implementation of the right of subrogation is generally based on the principle of unlawful acts as regulated in Article 1365 of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata – KUHPer), which requires the existence of fault on the part of the third party as the basis for liability for the loss incurred. The term "perbuatan melawan hukum" in English is referred to as "tort." ¹² The term "tort" itself essentially means "wrong." However, particularly in the field of law, the term has evolved to refer to a civil wrong in which a person commits a specific act that causes harm to another person by violating rights and obligations established by law, which do not arise from a contract or trust, and for which compensation for the resulting loss may be claimed.

In the context of transportation, when the carrier acts as a third party causing loss or damage to goods or passengers that have been insured, legal liability for such loss is generally determined by the existence of fault on the part of the carrier.¹³ Menurut Nasution Dalam hukum pengangkutan, dikenal tiga prinsip utama yang digunakan untuk menentukan tanggung jawab pihak pengangkut, yaitu:¹⁴

1. The principle of liability based on fault (*liability based on fault principle*);
2. The principle of liability based on a rebuttable presumption (*rebuttable presumption of liability principle*); dan
3. The principle of strict liability (*strict liability atau absolute liability principle*).

Under this principle, the carrier may be held liable for the death or injury of passengers, the destruction, loss, or damage of transported goods, as well as delays in delivery, if it is proven that the loss occurred due to the carrier's fault. However, one of the main obstacles in the implementation of the right of subrogation is the difficulty in proving fault on the part of the third party. This barrier affects the effective execution of subrogation rights, as the success of subrogation depends on the insurer's ability to claim compensation from the third party deemed responsible for the insured's loss.¹⁵

One of the cases concerning the right of subrogation in marine transportation occurred in a dispute between PT Asuransi FPG Indonesia and the carrier (PT Pelayaran Tempuran Emas) as well as the ship captain (La Ode Aliftha). Based on this case, the court at the first level previously

¹¹ Angger Sigit Pramukti dan Andre Budiman Panjaitan, "Pokok-Pokok Hukum Asuransi," *Yogyakarta: Pustaka Yustisia*, 2016.

¹² Munir Fuady, "Perbuatan Melawan Hukum (Pendekatan Kontemporer)," 2005. hlm 2

¹³ Zahputra Taufik Hamzah, "Kewajiban Dan Tanggung Jawab Hukum Pihak Pengangkut Pada Pengangkutan Udara Niaga Di Indonesia," *Lex Privatum* 9, no. 9 (2021). hlm 85

¹⁴ Khoirotul Bariyah, "Kapita Selekta Hukum Perdata Dagang," n.d.hlm 58

¹⁵ Rinitami Njatrijani, "Klaim marine hull and machinery dalam praktek pertanggungan," *Diponegoro private law review* 3, no. 1 (2018).

stated that PT Pelayaran Tempuran Emas, Tbk and La Ode Aliftha had committed an unlawful act (tort). The elements of an Unlawful Act (onrechtmatige daad) were fulfilled:

1. There must be an act

Based on the legal facts acknowledged by both the Plaintiff and Defendant I and Defendant II regarding the incident of the collision, it is established that the event occurred on August 30, 2017.

2. The act must be unlawful

The Panel of Judges opined that the actions of Defendant I and Defendant II constitute acts that violate the rights of others guaranteed by law, or acts that contradict the legal obligations of the perpetrator, and acts that conflict with the proper conduct in society to consider the interests of others.

3. There must be fault on the part of the perpetrator

The actions of Defendant I and Defendant II can be categorized as elements of fault by Defendant I as the owner (employer) of the vessel MV. Umbul Mas and Defendant II as the captain (employee) of the vessel MV. Umbul Mas in the form of negligence (culpa). In addition to violating the rights of others guaranteed by law or conflicting with the legal obligations of the perpetrator and proper conduct in society, it also fulfills the essential element of negligence (culpa).

4. There must be damage or loss

The incident on August 30, 2017, in which the vessel MV. UMBUL MAS owned by Defendant I and captained by Defendant II collided with the jetty/private dock and the insured object belonging to the Plaintiff's insured, caused partial damage/destruction to the insured object. The collision incident resulted in damage to the insured object owned by the Plaintiff's insured.

5. There must be a causal relationship between the unlawful act and the damage

The factual causal relationship (causation in fact) is a matter of "fact" or what actually occurred, namely the incident on August 30, 2017, where the vessel MV. UMBUL MAS owned by Defendant I and captained by Defendant II collided with the jetty/private dock and the insured object owned by the Plaintiff's insured. The collision caused partial damage/destruction to the insured object.

Based on the considerations in the decision at the first instance, the panel of judges had taken into account the description regarding the unlawful act committed by the Defendants which caused losses. Nevertheless, this decision was annulled at the appellate level due to an error in the application of the law at the first instance. One of the main grounds for consideration was that the legal relationship between the Plaintiff, namely PT Asuransi FPG Indonesia, and the insured party, PT RAPP, was merely a contractual relationship in the form of an insurance agreement. Meanwhile, the Defendants, namely PT Pelayaran Tempuran Emas Tbk and La Ode Aliftha, did not have direct involvement in the legal relationship and were only positioned as third parties. Therefore, the insurance agreement could not bind the Defendants.

As stated in the insurance contract, the main duty of the insurer is to bear the risk, and if an event causes a loss to the insured, the insurer must provide compensation.¹⁶ Therefore, in principle, the insurer has a legitimate legal interest to recover the loss through the right of subrogation against the third party deemed responsible for the occurrence of the loss.¹⁷ There are two main elements in the principle of subrogation. First, the transfer of rights and responsibilities from the insured to the insurer to claim compensation from a third party for the damage to the insured object. This right of the insurance company refers to compensation that must be paid by the third party due to their actions that caused loss to the insured.¹⁸

However, in this case, the insurer's interest cannot automatically be protected solely on the basis of claim payment, without sufficient evidence that the third party (the Defendant) has indeed committed an unlawful act. Accordingly, this decision reflects how the legal system seeks to balance the insurer's interest as a party who has fulfilled its contractual obligations, with the protection of third parties' rights from claims that are not supported by adequate evidence. In practice, this shows that the right of subrogation must be exercised with caution and based on strong legal evidence, in order to remain within the framework of justice and legal certainty.

The Principle of Balance in Insurance Subrogation Agreements

The principle of balance is a fundamental principle in contract law that emphasizes the importance of balancing the interests between the parties in a contractual relationship.¹⁹ This principle affirms that an agreement is legally binding only if it is made and executed based on a balance between the rights and obligations of each party. An agreement that is disproportionate or unbalanced, in which one party bears an unfair burden, may be deemed contrary to the principle of good faith, the sense of justice, and propriety, and therefore loses its binding legal force. To assess the application of the principle of balance, there are three dimensions that can serve as parameters, namely:²⁰

- a) the actions of the parties before and during the agreement
- b) the content of the contractual clauses themselves,
- c) and how the agreement is implemented.

In essence, an insurance agreement is a form of consent or contract that creates a legal relationship between two parties, namely the insurer (insurance company) and the insured (policyholder).²¹ In this agreement, reciprocal rights and obligations are attached, referred to as

¹⁶ Halim Al Hafizh, Komang Febrinayanti Dantes, dan I Nengah Suastika, "Tinjauan Yuridis Akibat Hukum Dalam Perbuatan Wanprestasi Klaim Asuransi Perusahaan Asuransi Jiwa Bersama Bumi Putera 1912 (Putusan Pengadilan Negeri Yogyakarta Nomor 182/PDT. G/2020/PN YYK)," *Jurnal Komunitas Yustisia* 6, no. 1 (2023): 381.

¹⁷ Ananda Dara Prameswari, Man S Sastrawidjaja, dan R Kartikasari, "Praktik Subrogasi Oleh Perusahaan Asuransi Di Kota Bandung Menurut Kajian Hukum Asuransi," *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 1, no. 2 (2018): 275.

¹⁸ Aldi Rinaldi, Muhammad Fauzan Januri, dan Jaenudin Jaenudin, "Studi Komparatif Terhadap Prinsip-Prinsip Asuransi Syariah Menurut Hukum Islam Dan Undang-Undang No. 40 Tahun 2014 Tentang Perasuransi," *Mabkamah: Jurnal Kajian Hukum Islam* 7, no. 2 (2022): 217.

¹⁹ Nasaruddin Nasaruddin dan Yulias Erwin, "Implementasi Asas Keseimbangan Dalam Perjanjian Baku Untuk Mewujudkan Keadilan bagi Para Pihak," *Journal Law and Government* 1, no. 1 (2023): 33.

²⁰ Safira Meisya Salsa Bina, "Asas Keseimbangan Dalam Hukum Perjanjian," *Journal Sains Student Research* 1, no. 2 (2023): 872.

²¹ Mohammad Hifni, "Aspek Hukum Perjanjian Asuransi Dalam Perspektif Hukum Perdata Di Indonesia," *Jurnal Al-Ahkam: Jurnal Hukum Pidana Islam* 6, no. 1 (2024): 25–32.

"prestations," which must be fulfilled by each party.²² The insured has the right to receive compensation for losses, damages, incurred costs, loss of profit, or legal liability to third parties resulting from an uncertain event. On the other hand, the insured is obligated to complete the administrative process for the policy application, provide necessary information and data when a claim occurs, and report the incident causing the loss as soon as possible along with relevant supporting documents.²³ In the realm of insurance agreements, the principle of balance plays a central role, particularly in loss insurance, where the principle of indemnity serves as the main foundation. This principle emphasizes that the insured must not receive compensation exceeding the actual value of the loss suffered. Through the mechanism of subrogation, the aim is not only to prevent the insured from receiving double compensation, but also to ensure that the third party responsible continues to bear the legal consequences of their actions.²⁴ Thus, subrogation not only reinforces the principle of indemnity but also becomes an important means of upholding justice and responsibility within the loss insurance system.

Although the principle of balance and the principle of subrogation are designed to create justice in the legal relationship of insurance agreements, the realization of these principles in practice often faces complex challenges. This can be seen in legal liability when losses are caused by a third party whose claim falls under unlawful acts as regulated in Article 1365 of the Indonesian Civil Code (KUHPerdata). However, in cases involving subrogation rights, such as in the ruling No. 415/Pdt.G/2019/PN.Jkt.Utr, which was overturned by Decision No. 452/PDT/2021/PT.DKI, the panel of judges, based on their considerations, stated that the defendants, namely PT Pelayaran Tempuran Emas Tbk and La Ode Aliftha, had no direct involvement in the legal relationship and only occupied the position of a third party.

This, of course, is not in accordance with the fundamental principle of subrogation agreements, which, although only involving the insurer and the insured, grants the insurer the right to claim compensation from a third party responsible for causing the loss in the context of an insurance contract.²⁵ After the insurer has paid the claim to the insured, provided that the third party is proven to have committed an unlawful act causing loss to the insured. Thus, subrogation becomes the practical embodiment of the principle of balance and ensures that the culpable third party is not freed from legal responsibility, while the insured does not receive double compensation exceeding the actual loss. However, the judges' consideration in this case is deemed less appropriate in giving consideration related to the right of subrogation. More specific regulations are needed regarding the subrogation mechanism, which would strengthen the role of the courts and supervision of insurance practices to ensure that subrogation is carried out fairly.

Although the principle of balance is not explicitly regulated in Indonesian legislation, its existence can be traced through the provisions of Article 1320 of the Civil Code, which governs

²² Rosdalina Bukido, "Urgensi Perjanjian Dalam Hubungan Keperdataan," *Jurnal Ilmiah Al-Syir'ah* 7, no. 2 (2016).

²³ Selvi Harvia Santri, "Pelaksanaan prinsip subrogasi pada asuransi kendaraan bermotor menurut kitab undang-undang hukum dagang," *UIR Law Review* 2, no. 2 (2018): 354.

²⁴ Moody Rizqy Syailendra dan Vivienne Olivia Siswanto, "Tindakan Pemalsuan Dokumen Terhadap Asuransi Kesehatan," *Jurnal Kewarganegaraan* 7, no. 2 (2023): 2134–44.

²⁵ Budiarmanto Setyo Hutomo, Dea Safira Setiono, dan Gaby Mallinda Nena Chaniago, "Sekurititasi Aset Beragun Recovery Subrogasi Pada Produk Kontra Bank Garansi Pada Perusahaan Asuransi," *UNES Law Review* 6, no. 3 (2024): 8756–65.

the validity requirements of agreements, including the consent of the parties and their implementation which must be carried out in good faith and comply with propriety, customs, and laws. Agreements made without regard to this principle may be considered contrary to justice and fairness, thus potentially lacking legally binding force. In the context of insurance agreements, the principle of balance is concretely reflected in the principle of indemnity, which requires the insurer to provide compensation equal to the amount of loss suffered by the insured, no more. The purpose of this principle is to restore the insured's financial condition to its original state before the loss-causing event occurred, as well as to prevent the potential misuse of insurance as a means for profit. Within this framework, subrogation plays an important role as an instrument that upholds the principle of indemnity by granting the insurer the right to claim compensation from the third party responsible for the loss, after paying the claim to the insured. Thus, subrogation becomes a practical embodiment of the principle of balance and ensures that the liable third party is not freed from legal responsibility, while the insured does not receive double compensation exceeding the actual loss.

Judicial power according to the constitutional system of Indonesia is an independent authority exercised by the Supreme Court and the judicial bodies under it, as well as by the Constitutional Court, to administer justice in order to uphold law and justice.²⁶ Law enforcement and justice are among the functions of a nation's sovereignty.²⁷ Judges' considerations in interpreting a law when handling a case are very important and have a significant impact on the progression of future cases.²⁸ Therefore, in interpreting a law, a judge must assess it from a broader perspective regarding the legal provisions. In the case, the panel of judges held the view that the insurance contract made between the insurer and the insured did not produce legally binding consequences for the defendants. This viewpoint certainly raises fundamental issues in the context of exercising the right of subrogation, as subrogation functions as a legal mechanism that normatively allows the insurer to step into the insured's position to pursue claims against the third party causing the loss. This judicial consideration reveals an ambiguity in the interpretation of the third party's status in subrogation practice, reflecting a clear need for legal certainty. Legal certainty is one of the pillars of life in a democratic state.²⁹

This principle demands that the law should not be applied arbitrarily, but rather provide clear guidelines regarding rights, obligations, and procedures that can be followed in every legal relationship. It is necessary to reconstruct regulations in a more firm and comprehensive manner concerning the implementation of subrogation within the national legal system, so as to avoid a normative vacuum that could cause legal uncertainty and imbalance in the protection of the parties involved. Therefore, the responsibility of the state as the lawmaker does not end with the drafting of legislation but also includes providing interpretative mechanisms through authorized institutions. The presence of the state is necessary to formulate legal norms that not only protect

²⁶ Andi Suherman, "Implementasi independensi hakim dalam pelaksanaan kekuasaan kehakiman," *SIGN Jurnal Hukum* 1, no. 1 (2019): 42–51.

²⁷ Borman. *Op.cit*

²⁸ Dian Ratu Ayu Uswatun Khasanah dan Anggita Doramia Lumbanraja, "Perkembangan Interpretasi Hukum Oleh Hakim Di Indonesia Dalam Dominasi Tradisi Civil Law System," *Jurnal Ius Constituendum* 7, no. 2 (2022): 232–45.

²⁹ Ias Muhlashin, "Negara Hukum, Demokrasi Dan Penegakan Hukum Di Indonesia," *Jurnal AlQadan: Peradilan Dan Hukum Keluarga Islam* 8, no. 1 (2021): 87–100.

one party in insurance cases but also strengthen the legal position of all parties in a balanced manner. The state's involvement in regulating subrogation demonstrates the exercise of internal sovereignty as the state's full authority to establish national laws that reflect the values of justice in accordance with the interests of the nation.

Legal Liability of the Parties in Maritime Carriage Disputes

Maritime transportation is the sector most vulnerable to subrogation disputes because the majority of international trade activities are conducted by sea, thereby increasing the potential for cargo loss or damage during the carriage process. The legal regime governing the carrier's liability in the Indonesian legal system is built upon a combination of the provisions in the Commercial Code (KUHD) and Law Number 17 of 2008 on Shipping, which introduces a more modern legal paradigm and provides stronger protection for cargo owners. From a normative perspective, the construction of carrier liability that adopts the principle of *presumption of liability* plays a central role in determining the extent to which the insurer's right of subrogation or right of recourse may be effectively exercised after the payment of claims to the insured.³⁰ Accordingly, the effectiveness of subrogation is contingent upon the extent to which the legal framework is capable of ensuring a clear and enforceable attribution of liability to the carrier in cases of cargo damage or loss during transportation.

The regulation of carrier liability in Indonesian maritime carriage law is explicitly reflected in Articles 40 and 41 of Law Number 17 of 2008 on Shipping, which establish that shipping companies are responsible for the safety and security of goods while they are under their custody. These provisions adopt the doctrine of *presumption of liability*, a principle that automatically deems the carrier liable for any damage to or loss of cargo unless the carrier can prove one of the exonerating circumstances, such as force majeure, fault of the cargo owner, or inherent defect of the goods (*vice propre*).³¹ This principle reinforces a legal orientation that places the burden of proof on the carrier as the party that, in practice, possesses and controls the goods throughout the transportation process. In line with this, Article 468 of the Indonesian Commercial Code (KUHD) establishes that the carrier's liability extends from the moment the goods are received for carriage until their delivery to the entitled party, while Article 477 of the KUHD provides grounds for exemption from liability only when it is proven that the loss resulted from force majeure, inherent defects of the goods, or the fault of the consignor. Moreover, liability is not imposed solely on the party directly handling the carriage, but also on companies under its responsibility, including stevedoring companies, when violations occur. Normatively, the consistency between the KUHD provisions and the Shipping Law demonstrates that Indonesia's positive law provides a strong foundation for assessing the carrier's fault and, at the same time, determining the success of the insurer's exercise of the right of subrogation.

³⁰ Dekie GG Kasenda (2016). Tanggung Jawab Pengangkut Terhadap Keselamatan dan Keamanan Barang Dalam Kapal. *Jurnal Ilmu Hukum Tambun Bungai*, 1(1), 34-42.

³¹ Ridwan Labatjo (2019). Analisis Yuridis Tentang Kedudukan Prinsip Tanggung Jawab Mutlak (Absolut Of Liability) Dalam Penyelenggaraan Pengangkutan Barang Dengan Kapal Laut Di Indonesia. *Jurnal Yustisiabel*, 3(1), 1-15.

Marine cargo insurance essentially functions as a legal protection instrument against losses to goods during the transit process.³² After the insurer pays the claim to the insured, a transfer of legal standing occurs, which is normatively regulated through the mechanism of subrogation. Through this mechanism, the insured is deemed to have obtained compensation for their loss, while the insurer assumes the insured's legal position to pursue liability against the carrier or port operator (carrier/PBM). Accordingly, the carrier/PBM becomes the party that can be held legally accountable for the damage to or loss of the goods. However, the central issue examined in this article is whether such a tripartite relationship reflects a balanced allocation of responsibilities among the parties, as required by civil law principles. In practice, the subrogation mechanism often places insurance companies in a weaker position, particularly when confronted with carriers or PBMs who invoke exoneration clauses, port operational standards, or other liability-exempting grounds to deny or reduce their obligation to provide compensation. This imbalance indicates the potential for disharmony between the normative construction of subrogation and its implementation in enforcing the liability of carriers/PBMs.

In the context of subrogation disputes, Article 1365 of the Indonesian Civil Code (KUHPerdata) plays a significant role when the actions of the carrier or PBM are no longer merely classified as a breach of contractual obligations, but instead extend beyond such limits to constitute an act of unlawful conduct (*onrechtmatige daad*). Normatively, four elements must be fulfilled to establish the existence of an unlawful act.³³ First, there must be an act that constitutes a violation of law, which includes the infringement of another party's subjective rights, the breach of a legal duty imposed on the carrier, or conduct that is contrary to morality or the standard of reasonable care. Second, the element of fault (*schuld*), which in the context of cargo carriage may be reflected in negligence in providing adequate protection for the cargo; for example, inadequate securing of goods that results in broken lashing ropes may be regarded as a form of *culpa*. Third, the element of loss (*schade*), which may consist of actual loss as well as loss of profit, as provided under Article 1246 of the Civil Code. Fourth, there must be a causal relationship (*causal verband*) between the negligence and the damage or loss of the goods, such that it can be legally established that the loss is the direct consequence of the carrier's or PBM's act or omission. When all four elements are fulfilled, the basis of liability is no longer derived solely from the contract but instead rests on the regime of unlawful acts, which provides a broader avenue for the insurer to seek recovery through the mechanism of subrogation.

Normatively, the subrogation mechanism in marine cargo insurance derives its legal foundation from Article 284 of the Indonesian Commercial Code (KUHD), which requires the fulfilment of two cumulative conditions for the insurer's right of subrogation to apply: the existence of the insured's right to claim against a third party, and the arising of that right as a consequence of loss caused by the third party's conduct. Once both conditions are met and the insurer has paid the indemnity, the right to claim is automatically transferred to the insurer, thereby placing the insurer in the legal position of the insured when pursuing liability from the carrier or PBM. This regulatory framework contains a clear normative objective, namely preventing double

³² Marnia Rani, Pery Rehendra Sucipta, (2019). Perlindungan Asuransi Terhadap Kapal Pompong Sebagai Alat Pengangkutan Niaga Di Kota Tanjungpinang. *UIR Law Review*, 3(1), 38-51.

³³ Raafid Febriansyah, et.al, (2024). Perbuatan Melawan Hukum (PMH) Sebagai Perikatan Yang Lahir Karena Undang-Undang: Implikasi Terhadap Penentuan Ganti Rugi. *Media Hukum Indonesia (MHI)*, 2(4), 597-604.

recovery by the insured and ensuring that the party at fault ultimately bears the burden of liability. In determining the amount of loss, the principle of *restitutio in integrum* serves as the governing standard, requiring that compensation restore the situation as closely as possible to the condition prior to the occurrence of the loss. Accordingly, the subrogation norm functions not only as a mechanism of recourse but also as an instrument for maintaining a balanced allocation of responsibility among the insured, the insurer, and the third party that caused the loss.

The central issue in marine cargo subrogation lies in the question of whether the existing legal mechanisms are capable of ensuring a balanced allocation of responsibility among the insured, the insurer, and the carrier or PBM. Normatively, the insured receives compensation for the loss through the payment of the claim, while the insurer bears the initial financial burden and must pursue recourse in order to assume the legal position of the insured. Conversely, carriers and PBMs are placed in a position where they are legally required to prove the existence of grounds that exempt them from liability. Although the substantive framework both in the KUHD and the Shipping Law theoretically provides protection for insurers as holders of the subrogation right, practical realities indicate the presence of imbalance. Carriers or PBMs frequently rely on contractual clauses, weaknesses in technical documentation, or specific operational circumstances to avoid or reduce their liability. This discrepancy between the legal norms and their implementation underscores the need for stronger harmonization between the contractual regime governing carriage and the subrogation norms under the KUHD, so that the burden of responsibility does not become concentrated on insurance companies, and the objective of subrogation to uphold the accountability of the party at fault can be achieved effectively while providing clear legal certainty for all parties involved.³⁴

The concept of liability under the regime of unlawful acts (*onrechtmatige daad*) requires the wrongdoer to provide full compensation for the loss incurred, whether through monetary damages, restoration of the situation as closely as possible to its condition prior to the loss, or through joint and several liability when more than one party contributes to the occurrence of the damage. Normatively, this construction broadens the scope of liability and enables the insurer, as the holder of the subrogation right, to pursue claims against the carrier and PBM proportionally according to their respective degrees of fault. Thus, the unlawful act mechanism not only reinforces the legal obligations of carriers and PBMs but also provides a stronger juridical basis for insurers in exercising their right of recourse, thereby promoting a balanced allocation of responsibility in marine cargo subrogation disputes.

Conclusion

This study demonstrates that the balance of legal responsibilities in marine cargo insurance subrogation in Indonesia has not been fully achieved, despite the existence of a normative framework provided by the KUHD, the Civil Code (KUHPerdata), and the Shipping Law. Theoretically, the legal system positions the insured as the party entitled to recovery, the insurer as the holder of the subrogation right, and the carrier and PBM as parties obliged to prove the grounds for exemption from liability. However, in practice, the subrogation mechanism continues

³⁴ Rizky Fauzi R Zees, Djumikasih, Yeni Eta Widjanti, (2025). Execution of Second-Rank Mortgage Rights Due to breach of contract at PT Bank Sulutgo. *NEGRI: Academic Journal of Law and Governance*, 5(1), 27-43.

to face significant obstacles, including the use of contractual clauses by carriers or PBMs, weaknesses in technical documentation, and gaps between the contractual regime governing carriage and the subrogation provisions under the KUHD. This disharmony places insurers at a structurally weaker position when seeking to enforce liability, thereby undermining the purpose of subrogation to prevent double recovery and ensure that the responsible party bears the consequences of their wrongdoing. Accordingly, an imbalance in legal protection remains evident in subrogation practice, indicating the need for regulatory refinement and normative harmonization so that the subrogation mechanism may operate effectively and remain aligned with the principle of balanced responsibility among parties in maritime carriage

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