

## RINGKASAN

Kapal bangunan baru dan kapal *second-hand* memiliki karakteristik yang berbeda satu sama lain. Ditinjau dari mekanisme perolehannya maka kapal bangunan baru diperoleh melalui proses pengadaan atau lelang sedangkan kapal *second-hand* diperoleh melalui jual beli. Ditinjau dari para pihak yang terlibat maka kapal bangunan baru melibatkan pihak-pihak, yaitu : *shipbuilder* dan pemilik proyek, bank dan/atau lembaga keuangan lainnya, asuransi, *naval architect* dan *engineer*, *classification society* dan direktorat jenderal perhubungan laut/syahbandar/pejabat pemeriksa keselamatan kapal, *owner surveyor*, sub-kontraktor dan supplier sedangkan para pihak yang terlibat dalam jual beli kapal, yaitu : penjual dan pembeli, bank, *shipbroker*, *marine surveyor*, dan asuransi. Jenis kontrak pada kapal bangunan baru adalah kontrak pembangunan sedangkan pada kapal *second-hand* adalah kontrak jual beli. Pada kontrak pembangunan kapal, isi dari kontrak akan diatur berdasarkan negoosiasi kedua belah pihak. Pada kapal *second-hand*, isi kontraknya telah ditentukan oleh pihak pembuat *sale form* berkaitan dengan kontrak jual beli kapal dengan kedua belah pihak yang berasal dari negara yang berbeda yang mana menggunakan Nippon SF 1999, SSF dan NSF 2012. Dengan demikian maka isu hukum yang dibahas dalam penelitian ini berupa hubungan hukum para pihak dalam mekanisme perolehan kapal dan tanggung gugat para pihak dalam kontrak jual beli kapal.

Tujuan penelitian ini adalah untuk menemukan dan menganalisis hubungan hukum para pihak dalam keseluruhan proses pembangunan kapal dan jual beli kapal *second-hand* dan tanggung gugat para pihak yang timbul dalam

kontrak jual beli kapal. Manfaat dari penelitian ini adalah untuk memberikan pemahaman secara menyeluruh dan pengembangan analisis terhadap hubungan hukum para pihak dalam mekanisme perolehan kapal dan tanggung gugat para pihak dalam kontrak jual beli kapal serta memberikan sumbangan pemikiran dan masukan bagi praktisi hukum dan pihak-pihak terkait yang terlibat dalam usaha perkapalan dan pelayaran serta masyarakat pada umumnya. Penelitian ini adalah penelitian yuridis normatif. Pendekatan yang digunakan dalam penelitian ini adalah pendekatan perundang-undangan, konseptual dan perbandingan hukum.

Dalam pembangunan kapal dan jual beli kapal *second-hand* ditemukan karakteristik para pihak yang terlibat dalam perolehan kapal tersebut. Bank berperan sebagai lembaga pembiayaan yang membantu para pihak dalam perolehan kapal. Pihak asuransi berperan sebagai penanggung risiko yang dapat terjadi pada saat kapal dalam pembangunan dan dalam pelayaran/operasionalnya. *Classification society* berperan sebagai pengawas, pemeriksa, pembuat aturan dalam standar teknik pembangunan, pemberi sertifikasi bagi kelaiklautan kapal dan material kapal, dan lain sebagainya. *Shipbroker* berperan sebagai perantara atau penghubung bagi para pihak, membantu dalam mencari kapal yang sesuai dengan spesifikasi pembeli, membantu mengatur dan menegosiasikan kontrak, dan sebagainya. *Marine surveyor* berperan sebagai tenaga ahli yang melakukan pemeriksaan terhadap dokumen, riwayat dan fisik kapal dalam pembelian kapal *second-hand*. *Naval architect* berperan sebagai desainer kapal yang mendesain kapal berdasarkan spesifikasi yang diberikan. *Engineer* berperan sebagai ahli teknik yang membantu menerjemahkan desain kapal dalam bentuk struktur

bangunan kapal. Sub-kontraktor berperan sebagai *partner* galangan dalam membantu pengerjaan sebagian konstruksi kapal. Supplier berperan sebagai pemasok material kapal dan harus mendapatkan sertifikasi dari *classification society*. Direkrorat jenderal perhubungan laut/syahbandar/pejabat pemeriksa keselamatan kapal adalah wakil dari negara dalam bidang perkapalan dan pelayaran yang membantu dalam pengawasan dan pemeriksaan standar keselamatan dan kelaiklautan kapal.

Hubungan hukum tercipta berdasarkan hubungan kontraktual yang diadakan oleh para pihak. Di dalam hubungan hukum tersebut terdapat prinsip-prinsip hukum dan hukum kebiasaan yang nampak, yaitu prinsip itikad baik adalah prinsip yang selalu muncul dalam kontrak di mana para pihak harus selalu bertindak dalam itikad baik mulai dari tahap pra-kontrak sampai dengan tahap pelaksanaan kontrak; prinsip kepatutan adalah prinsip di mana selain harus bertindak dalam itikad baik maka para pihak harus bertindak dengan patut terutama bagi profesi jasa yang mana dalam melaksanakan pekerjaannya harus tunduk pada kode etik; prinsip *privity of contract* merupakan prinsip yang memberikan perlindungan bagi para pihak yang mengadakan kontrak yang mana kontrak tersebut hanya berlaku bagi para pihak yang membuatnya sehingga pihak ketiga tidak dapat menuntut pihak kontraktan kecuali dinyatakan secara tegas atau diperjanjikan sebaliknya; prinsip kepercayaan (*fiduciary*) adalah prinsip yang mendasari hubungan antara prinsipal dan agen di mana dalam melaksanakan pekerjaannya maka agen berpegang pada kepercayaan yang diberikan oleh prinsipal kepadanya; hukum kebiasaan dipandang sebagai bagian dari perjanjian

di mana suatu perjanjian tidak hanya mengikat untuk apa yang secara tegas diatur, akan tetapi juga hal-hal yang menurut kebiasaan lazim diikuti;

Dalam kontrak jual beli kapal *second-hand* berupa *sale form* maka terdapat klausul-klausul pokok yang perlu diperhatikan, yaitu *purchase price and payment, inspection, time and place of delivery, dan default and compensation*. Klausul-klausul ini dibentuk oleh pembuat *sale form* berdasarkan pada aturan hukum jual beli yang berlaku di negara pembuat *sale form*, seperti Nippon SF 1999 yang menggunakan *Code Civil* Jepang, SSF yang menggunakan aturan hukum jual beli Singapura yang mana bersumber pula dari hukum Inggris, seperti SGA 1979, dan NSF 2012 yang menggunakan SGA 1979. Ketika salah satu pihak tidak melaksanakan kewajibannya maka itu adalah wanprestasi terhadap kontrak dan pihak yang dirugikan dapat mengajukan tuntutan atas kerugian yang dideritanya. Selain atas dasar tindakan wanprestasi maka pihak yang dirugikan juga dapat mengajukan tuntutan atas dasar perbuatan melanggar hukum. Hal ini terkait dengan profesi jasa yang terlibat dalam pembangunan kapal dan jual beli kapal *second-hand*, seperti *classification society* dan *shipbroker*.

Berkaitan dengan tanggung gugat dalam kontrak jual beli kapal *second-hand* maka terdapat prinsip-prinsip yang nampak, yaitu prinsip kebebasan berkontrak mengandung arti bahwa para pihak bebas untuk menentukan bentuk kontraknya, bebas menentukan dengan siapa ia akan melakukan kontrak, bebas menentukan isi kontrak sepanjang tidak bertentangan dengan Undang-undang, kesusilaan dan ketertiban umum dan bebas untuk menentukan objek perjanjian; prinsip proporsionalitas dalam kontrak diberlakukan dalam hal mengenai

pembagian kewajiban dan tanggung gugat para pihak yang berarti bahwa hak dan kewajiban harus dibagi secara proporsional sesuai dengan bagian masing-masing; prinsip *party autonomy* memberikan kebebasan bagi para pihak untuk menentukan pilihan hukum dan forumnya.

Rekomendasi dari penelitian ini adalah bahwa pemerintah harus mewujudkan lembaga pembiayaan, selain bank, bagi kapal sehingga baik industri perkapalan dan pelayaran dapat memperoleh pembiayaan dengan mudah. Profesi jasa seperti *shipbroker* harus dibuatkan peraturan lanjutan yang lebih rinci mengatur mengenai badan usaha, tugas, fungsi, kewenangan, sanksi dan lain sebagainya selain daripada yang diatur dalam UU Pelayaran dan PP No 20/2010 tentang Angkutan Di Perairan. Terkait dengan syahbandar dan PPKK sebagai wakil negara berkenaan dengan pengawasan, pemeriksaan, pengujian, dan pematuhan keselamatan dan kelaiklautan kapal maka harus menjalankan peran dan tugasnya sesuai dengan standar operasi kerja yang ditetapkan dan memperhatikan peraturan-peraturan yang berlaku baik nasional dan internasional serta bertindak tegas dan menerapkan sanksi dengan sungguh-sungguh bagi pemilik kapal/perusahaan pengoperasian kapal yang tidak memenuhi keselamatan dan kelaiklautan kapal termasuk penyediaan perlengkapan keamanan kapal mengingat masih rendahnya kesadaran masyarakat untuk mematuhi peraturan-peraturan yang berlaku di bidang keamanan, keselamatan dan kelaiklautan kapal. Prinsip-prinsip yang terkandung dalam hubungan hukum para pihak harus dimaknai dan dijalankan sepenuhnya terutama prinsip kepercayaan yang merupakan prinsip utama bagi profesi jasa. Dengan membandingkan aturan

hukum jual beli dalam BW dan SGA 1979, NBW, *Code Civil* dan *Code Commercial* Jepang terkait dengan klausul-klausul *sale form* maka ketika BW hendak diganti dengan UU hukum perdata yang baru seyogyanya mengatur dengan lebih spesifik dan detail mengenai hak dan kewajiban para pihak dalam jual beli yang mana pihak pembuat UU dapat melihat dan mengacu pada aturan hukum jual beli SGA 1979, NBW dan *Code Civil* dan *Code Commercial* Jepang. Pemberian ganti rugi sebagai akibat tindakan wanprestasi harus dilakukan dengan wajar dan sesuai dengan kerugian yang sebenarnya dialami. Dalam mengajukan tuntutan perbuatan melanggar hukum, pihak yang dirugikan harus terlebih dahulu dapat membuktikan tindakan yang dilakukan oleh profesi jasa tidak dilakukan dengan kehati-hatian, keahlian dan keterampilan yang layak serta harus dapat pula membuktikan adanya hubungan kausal antara ketergantungan pada profesi jasa dan kerugiannya. Pihak pembuat *sale form* dalam melakukan revisi maka klausul-klausulnya harus tetap berpedoman dan menerapkan prinsip kebebasan berkontrak dan memperhatikan keadilan, kebiasaan, kepatutan dalam penerapan klausul-klausulnya. Prinsip proporsionalitas harus diterapkan dalam setiap kontrak termasuk kontrak baku yang mana isi dari kontrak tersebut harus mencerminkan pembagian yang proporsional atas hak dan kewajiban para pihak terutama dalam *sale form* terkait pemeriksaan kapal dan pembebasan tanggung gugat salah satu pihak. Mengacu pada lembaga arbitrase yang dimiliki oleh Jepang, Singapura dan Inggris maka Indonesia juga dapat turut membentuk lembaga arbitrase khusus di bidang maritim mengingat Indonesia dikenal sebagai negara maritim.

## SUMMARY

Newbuilding ship and secondhand ship have different characteristics from each other from the aspect of acquisition mechanism. Reviewed from the acquisition mechanism, newbuilding ship is obtained by procurement or auction process, while secondhand ship is obtained by sale and purchased. Reviewed from the parties involved, newbuilding ship involves the parties, namely: shipbuilder and project owner, bank and/or other financial institution, insurance, naval architect and engineer, classification society and directorate general of sea transportation/harbormaster/official inspector of ship safety, owner surveyor, subcontractor, and supplier, while the parties involved in sale and purchase of ship are: seller and buyer, bank, shipbroker, marine surveyor, and insurance. The type of contract on newbuilding ship is a building contract, while on secondhand ship is a sale-purchase contract. In shipbuilding contract, the content of contract will be set based on negotiation between the two parties. On secondhand ship, the content of contract has been set by the maker of sale form related to the ship sale-purchase contract with the two parties originating from different country using Nippon SF 1999, SSF, and NSF 2012. Therefore, the legal issue to be discussed in this study is in form of relationship between the parties in ship acquisition mechanism and liability of the parties in ship sale-purchase contract.

This study aimed to find and analyze the legal relationship between the parties in the whole process of shipbuilding and the sale and purchase of secondhand ship as well as the liability of the parties occurring in the ship sale-purchase contract. The benefit of this contract was to give a comprehensive

understanding and development of analysis toward legal relationship between the parties in ship acquisition mechanism and the liability of the parties in ship sale-purchase contract as well as to contribute to thinking and feedback for legal practitioners and related parties involved in shipbuilding and shipping business and society in general. This study was a juridical normative research. The approach used in this study was the statute, conceptual, and law comparison.

In shipbuilding and sale and purchase of secondhand ship, we can find the characteristics of the parties involved in ship acquisition. Bank plays a role as the funding institution that assists the parties in ship acquisition. Insurance plays a role as the insurer of risks that may occur during the building of the ship and in its voyage/operational. Classification society plays a role as the supervisor, examiner, maker of rules in building engineering standard, certifier of sea-worthiness of ship and ship material, and so on. Shipbroker plays a role as intermediary or communicator for the parties, assisting in finding appropriate ship according to buyer's specification, assisting in setting and negotiating contract, and so on. Marine surveyor plays a role as an expert who examines documents, history, and physics of ship in purchase of secondhand ship and owner surveyor plays a role as a surveyor who act on behalf of project owner to supervise and examine in ship building project. Naval architect plays a role as ship designer who designs ship based on given specification. Engineer plays a role as technical expert who assist in translating ship design in form of shipbuilding structure. Sub-contractor plays a role as a partner of shipyard in assisting the processing of a part of ship construction. Supplier plays a role in supplying ship materials and has to obtain



certification from classification society. Directorate general of sea transportation/harbormaster/official inspector of ship safety is the representative of the state in field of ship and shipping who assists in supervising and inspection of safety standard and sea worthiness of ship.

Legal relationship is created based on contractual relationship held by the parties. In the legal relationship, there are principles of law and customary law, namely : the principle of good faith is a principle that always occurs in contract where the parties have to always act in good faith since the stage of pre-contract until the stage of contract implementation; the principle of equity is a principle where in addition to always act in good faith, the parties have to act appropriately especially for service professions where in implementing their job have to subject to code of ethics; the principle of privity of contract is a principle that provides protection for the parties who hold the contract, in which the contract only applies for the parties making it so that third party cannot sue the parties in the contract unless it is expressly stated or agreed otherwise; the principle of fiduciary is a principle underlying the relationship between the principal and the agent where in performing his duty, the agent holds the trust given by the principal to him; customaary law is considered as a part of agreement where an agreement does not only bind for the matters expressly set, but also for the matters that according to custom are common to be followed;

In secondhand ship sale-purchase contract in form of sale form, there are main clauses to be observed, namely purchase price and payment, inspection, time and place of delivery, and default and compensation. The clauses are formed by

the maker of sale form based on legal rules of sale and purchase applicable in the country of the maker of sale form, such as Nippon SF 1999 that uses the Civil Code of Japan, SSF that uses the legal rules of sale and purchase of Singapore that also originates from the law of England, such as SGA 1979, and NSF 2012 that uses SGA 1979. When one of the parties does not perform his obligation, then it constitutes a breach of contract and the harmed party can file a suit against the loss suffered by him. Besides based on default, the harmed party can also file a suit based on tort. It relates to service profession involved in shipbuilding and sale and purchase of secondhand ship, such as classification society and shipbroker

In connection with the liability in secondhand ship sale-purchase contract, there are visible principles, namely : the principle of freedom of contract means that the parties are free to determine the type of contract, free to determine with whom they will have contract, free to determine the content of contract as long as it does not contradict the law, morality, and public order, and free to determine the object of agreement; the principle of proportionality in contract is applied in case of distribution of obligations and accountability of the parties that means that the obligations and accountability have to be distributed proportionally pursuant to each part; the principle or party autonomy gives freedom to the parties to determine the choice of law and its forum.

This study recommends that the government has to realize funding institutions, other than bank, for ship so that both shipbuilding and shipping business can obtain funding easily. Service profession such as shipbroker has to be made advanced legal rules with more details which regulating about business

entity, duties, functions, authority, sanctions and so on other than the ones contained in Shipping Act and Government Regulation No. 20/2010 regarding Water Transportation. Related to the directorate general of sea transportation/harbormaster/official inspector of ship safety as a representative of the state relating to supervision, inspection, testing and compliance with safety and sea worthiness of ship then had to perform their role and duty in accordance with the operating standards of work are set and take notice to the rules that apply both national and international and also acted coherent and imposing sanctions in earnest for the ship owners/companies of operating the ship which do not meet the safety and sea worthiness of ship including the provision of security equipment of ship given the low awareness of public to obey the rules applicable in the fields of security, safety and sea worthiness of ship. The principles contained in legal relationship of the parties have to be fully interpreted and implemented especially the principle of fiduciary that constitutes the main principle for service profession. By comparing the legal rules of sale and purchase in BW and SGA 1979, NBW, Civil Code and Commercial Code of Japan related to the clauses of sale form, if BW aims to be changed with new civil code, it should govern more specifically and in details regarding the rights and obligations of the parties in sale and purchase where the lawmaker can see and refer to the rules of sale and purchase SGA 1979, NBW, and Civil Code and Commercial Code of Japan. Giving compensation as a result of default action has to be done fairly and pursuant to the actual loss suffered. In filing a suit on tort, the harmed party has to be able to prove the action performed by service profession done with carelessness, without

decent expertise and skill, and has to be able to prove the existence of causal relationship between dependence on service profession and its loss. The maker of sale form in revising the clauses has to be guided by and implement the principle of freedom of contract, and has to notice the fairness, custom, and equity in implementing the clauses. The principle of proportionality has to be implemented in each contract including standard contract where the content of contract has to reflect proportional distribution of rights and obligations of the parties especially in sale form related to ship examination and release of liability of one of the parties. Referring to arbitration institution owned by Japan, Singapore, and England, then Indonesia can also be able to participate in forming special arbitration institution in field of maritime considering that Indonesia is known as a maritime country.

**ABSTRACT**

**CHARACTERISTICS SHIP SALE AND PURCHASE CONTRACTS**

*This research aims to analyze and find out the characteristics of ship sell and purchase contract through the involved parties in mechanism of shipbuilding and sell and purchase of second-hand ship and also contract clause in sale form based on the sell and purchase legal regulation. This research is expected to give overall view and analysis development upon legal relationship of the parties in ship acquisition including legal principles appeared in the legal relationship and liability of the parties in ship sell and purchase contract based on the clause in sale form and the legal principles shown in. The legal issues from this research are: (a) legal relationship of the parties in ship acquisition mechanism; and (b) the liability of the parties in ship sell and purchase contract.*

*Analysis of the legal relationship of the parties in the ship acquisition mechanism is based on the contractual relationship of the parties, the role and authority of each party in the ship acquisition including the relevant rule of law. In the analysis of the liability of the parties in the ship sell and purchase contract then it will be based on the discussion of the principal clauses of sale form. The type of this research is normative juridical with approach to statute, conceptual and legal comparison. The result of this research is a contractual relationship reflects the characteristics of each of the parties involved so that without a contract with the service provider or service profession the main contracts can not be run properly. Under the rules of sell and purchase by BW, SGA 1979, NBW and the Japanese Code Civil relating to clause of sale form it appears the differences regarding the arrangements for the inspection of goods and the transfer of risk. The compensation for breach of contract action should be proportionate to the harm caused. Demands for the actions of tort by the service profession can be performed during provable that there is lack of prudence, skill, knowledge and appropriate skills and the existence of a causal relationship between the losses suffered by the act of service profession.*

**Keywords: ships, buying and selling, sale form**