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## Liability of Freight Forwarding Companies for Losses on Delivery of Fishery Products Due to Container Shortage Effects

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### Keywords:

Accountability;  
Container; Sea;  
Transportation.

### Abstract

Nowadays various types of transportation are also used in the context of Indonesia's development, one of which is the sea transportation service business or better known as freight forwarding. However, there has been a decline in export products which cannot be separated from the impact of containers shortage. Previously, the impact of container shortages often occurred, but only for a short time. However, a long-term containers shortage only occurred when the COVID-19 pandemic emerged. With the effects of a shortage of containers, this was exacerbated by other problems such as limited space on logistics carriers which can affect the domestic logistics distribution supply chain. This research uses a normative legal research approach with the results indicating that the party responsible in cases of losses due to containers shortage is the freight forwarding company and the legal consequence of a transportation agreement that is affected by containers shortage is that as long as the carrier has agreed to the transportation agreement, the freight forwarding company must ensure that containers are available according to the transportation agreement. The reason for the shortage of containers can be used as a justification for the carrier's actions but not in the long term.

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### Introduction

One of necessary aspects to support development of a strong economy lies within the development of the transportation sector itself. The development in the economic sector also cannot be separated from Indonesia's goals for the implementation of the economy as mentioned in Article 33 paragraph 4 of the 1945 Constitution which stated that the economic process in a national scope held on economical democracy contains a principle of togetherness, efficiency justice, independence, sustainability and insightful environment while protecting its national economy unity.<sup>1</sup> Furthermore, safeguarding the unity of the national economic principle can be interpreted as using natural and human resources as little as possible with the objective of prosperity to all Indonesian people. Therefore, it is necessary to come up with a possible transportation system that can accommodate the purpose of Article 33 paragraph 4 of the 1945 Constitution of

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<sup>1</sup> The 1945 Constitution of Indonesia.

the Republic of Indonesia. However, in effort to develop the transportation sector, a problem arises in distribution and collection of goods for export and import activities. The solution to this problem is to create an efficient, fast and easy transportation system.

In the implementation of transportation sea, the type of transportation often used since earlier times is mainly boats or ships. Article 1 number 36 of Law No. 17 of 2008 defines a ship as a propelled water vehicle using the power of wind, mechanics, or energy to move below the water surface.<sup>2</sup> Furthermore, Article 31 of Law No. 17 of 2008 mentioned various type businesses related to sea transportation, one such is management transportation service or known as freight forwarding. Article 15 Minister of Transportation Regulation no. PM 59 of 2021 provides explanation that freight forwarding activity includes starting from receiving, marking, managing transportation, completing required documents, and distribution to completing required bills. In doing management on sea transportation, a freight forwarding company accepts various types of items, one of which is fisheries products.<sup>3</sup> Indonesia is a country that has an abundance of natural resources, one of which is fisheries product. With the abundant fishery products in Indonesia, it means that this fishery product is one of the biggest export commodities in Indonesia, with fisheries commodities for export in Indonesian consisting of various types of fishes and includes shrimp, cephalopods, tuna, mackerel, grouper, lobster, and several crab products.<sup>4</sup>

Related to export value in Indonesia, as seen from the statistics export fisheries product book published by Director General Product Maritime Affairs and Fisheries, in 2017 Indonesia reached USD 4,524 billion.<sup>5</sup> Furthermore, fisheries export product value since 2017 until 2021 experienced an increase of 6.32% each year.<sup>6</sup> The increasing mark in fishery export products is also balanced with the increasing mark in fishery import

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<sup>2</sup> Ibid.

<sup>3</sup> Minister of Transportation Regulation Number PM 59 of 2021 concerning Implementation of Service Businesses related to Water Transportation (The Republic of Indonesia State Gazette Year 2021 Number 778).

<sup>4</sup> Kementerian Perdagangan Republik Indonesia, *Warta Ekspor Edisi Juni 2014* (Ditjen PEN 2014) 05.

<sup>5</sup> Direktorat Jenderal Penguatan Daya Saing Produk Kelautan dan Perikanan, *Buku Statistik Ekspor Produk Perikanan Tahun 2017-2021* (Sekretariat Direktorat Jenderal Penguatan Daya Saing Produk Kelautan dan Perikanan 2022) xxiii.

<sup>6</sup> Ibid.

product which also reached USD 500 billion in 2021.<sup>7</sup> Nevertheless, the increasing number of fishery export products does not occur throughout the world; countries that are considered as the main exporters of fishery products experienced a decline compared to 2019, for example India experienced a decline of 15.15%, China decreased by 7.8%, Norway by 7.5%, Thailand by 2.2%, and Vietnam a decrease of 2.1%.<sup>8</sup> One of the reasons for this decline of fishery export products in these various countries is a result of container shortage during the COVID-19 pandemic.

Furthermore, in December 2020, Indonesia's trade balance was only USD 2.10 billion, which shows that Indonesia's trade balance decreased by 51.42%. Meanwhile, in December 2021, Indonesia's trade balance experienced a surplus of USD 1.02 billion. The trade balance surplus in December 2021 only occurred because the export value was higher than imports. The export value recorded last month reached USD 22.37 billion, while imports amounted to USD 21.35 billion.

Container shortage or called as scarcity of containers is one of the main causes of the problem in transportation on water. The scarcity of containers over a long period began with the emergence of the COVID-19 pandemic. Every country in the globe published a quarantine legislation as a result of the pandemic, and these restrictions had an impact on the presence of storage containers in local ports since the operations at the port would be limited.<sup>9</sup> Furthermore, these problems were aggravated because at that time, there were no positioned empty containers ready to be used. This circumstance cannot be divorced from the fact that China holds 50% of the world's containers.<sup>10</sup> With the COVID-19 pandemic originating in China, which gave rise to a state lockdown policy by the local government, this resulted in a rapid decline in domestic commercial activity as well as the emergence

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<sup>7</sup> Ibid.

<sup>8</sup> Humas Direktorat Jenderal Penguatan Daya Saing Produk Kelautan dan Perikanan, (KKP, 2021) 'Ekspor Produk Perikanan Naik 6,6 Persen di 2021', <<https://kkp.go.id/djpdspkp/artikel/36738-ekspor-produk-perikanan-naik-6-6-persen-di-2021>> accessed 14 September 2022.

<sup>9</sup> Nektarios A. Michail and Kostis D. Melas, 'Shipping markets in turmoil: An analysis of the Covid-19 outbreak and its implications' (2020) 7 *Transportation Research Interdisciplinary Perspectives* 1, 2.

<sup>10</sup> Arda Toygar, Umut Yildirim and Gani Mustafa İnegöl, 'Investigation of empty container shortage based on SWARA-ARAS methods in the COVID-19 era' (2022) 14 *European Transport Research Review* 1, 2.

of a more intensive container shortage problem than the world had ever experienced.<sup>11</sup> Furthermore, it is estimated that there was a 20 to 50% decrease in cargo shipments from January 2020 to October 2020 for exports and cargo receipts as part of imports at Chinese ports.<sup>12</sup> Apart from that, the decline in fishery products from around the world has also had an impact on Indonesia, especially during the COVID-19 pandemic. GPEI Secretary General Toto Dirgantoro explained that ocean freight prices were skyrocketing amidst a shortage of containers, reaching 500% on almost all shipping routes, which inevitably brought problems related to the process of transporting fishery products.<sup>13</sup>

With the global pandemic conditions resulting in lockdowns for large countries, thus affecting the container circulation process in countries including Indonesia, it would be interesting to carry out research regarding the problems of the container circulation process with freight forwarding companies as parties providing logistics services in the national and international market, especially their liability in overcoming this.

### **Research Method**

In this paper, the type of legal research used is doctrinal legal research or also called as normative legal research. In this case, the focus of doctrinal legal research is to collect legal principles, legal doctrine, legal findings in a quo cases, levels of legal synchronization, and others.<sup>14</sup> Meanwhile, the legal approach in this research is called statutory regulation legal approach or known as the statute approach. Furthermore, this research also uses a conceptual approach as well. The statute approach is carried out by examining laws and other legislation in Indonesia which relate to the issues in the topic discussed.<sup>15</sup> On the other hand, the conceptual approach is by conducting a study of the legal doctrine that applies in Indonesia. Moreover, the research will also base under the circumstances that both parties will also incorporate Indonesia Law and INCOTERMS 2020 in their agreement.

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<sup>11</sup> Ibid.

<sup>12</sup> Lang Xu et al., 'The effect of COVID-19 pandemic on port performance: Evidence from China' (2021) 209 *Ocean and Coastal Management*, 06.

<sup>13</sup> Luthfil Hadi, "Resume: Container Shortage di Indonesia" (*indoshoppinggazette*, 2021) <<https://indoshoppinggazette.com/2021/resume-container-shortage-di-indonesia/>> accessed 10 November 2022.

<sup>14</sup> Abdulkadir Muhammad, *Hukum dan Penelitian Hukum* (Citra Aditya Bakti 2004) 52.

<sup>15</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media 2016) 47.

### **Legal Consequences of the Container Shortage Effect as an Obstacle in the Sea Transportation Process.**

The word “transportation” refers to Article 1 point 3 of Law Number 22 of 2009, namely the process of moving people or goods from their place of origin to their destination using vehicles. Based on the definition of “transportation” in statutory regulations, experts also provide a definition of “transportation”. Purwosutjipto stated that a carriage contract is an agreement between the sender and the carrier; in this case, the sender will bind himself to pay while the carrier will organize the transportation of goods or people from the place of origin to the destination.<sup>16</sup> Furthermore, Article 466 of the Commercial Code also explains that sea transport is a person or entity that, based on a time charter agreement, travel charter or other agreement, enters into an agreement to transport goods by sea.<sup>17</sup>

Regulations regarding sea transportation in general are currently regulated by Law Number 17 of 2008. The purpose of the regulations regarding water transportation is explained in Article 3 of Law Number 17 of 2008. Furthermore, the scope of regulation is not only limited to sea transportation, but also regulates other forms of transportation, including transportation on rivers, lakes and crossings. Article 31 of Law Number 17 of 2008 explains that, with the aim of maintaining the smooth running of transportation activities in Indonesian waters, businesses are carried out related to transportation carried out on water.<sup>18</sup> This research will only focus on one type of transportation management service business, known as a freight forwarding company, which handles all important activities related to shipping in the sea transportation process including the availability of containers.

Statutory regulations do not provide a concrete definition of containers. Therefore, experts have their own definitions. Sudjarmiko defines a container as a type of warehouse but can be easily moved or a removable warehouse which has the function

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<sup>16</sup> H.M.N. Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia* (Kencana 2007) 02.

<sup>17</sup> The Commercial Code of Indonesia.

<sup>18</sup> Law Number 17 of 2008 concerning Sea Voyage (The Republic of Indonesia State Gazette Year 2008 Number 64, Annotation 4849).

of transporting goods.<sup>19</sup> Meanwhile, Banu Santoso defines a container, which also refers to the International Convention for Safe Containers and the International Standards Organization, as a large crate made from a metal such as aluminum and has a door that is locked from the outside of the container.<sup>20</sup>

Based on the definition by experts, it can be concluded that a container is a crate made from aluminum and has the function of being a temporary storage place for goods to facilitate the transportation process. The price of the container itself depends on the size and type of container; for containers measuring around 20 feet the price range is IDR 27,000,000,000.00. Meanwhile, the price range for a 40 feet container is IDR 48,000,000,000.00. Furthermore, the advantages of using containers during the sea transportation process include:<sup>21</sup>

- a. Flexibility;
- b. Efficiency;
- c. Time optimization;
- d. High level of security; and
- e. Tax deduction.

This research will focus on reefer type containers which have a special technology, namely the presence of a refrigeration unit that relies on electricity so that this type of container can regulate the air temperature from -65<sup>0</sup>C to 40<sup>0</sup>C.

With the function of the container itself as a temporary storage place for goods to facilitate the transportation process, it can be said that containers are an important aspect in sea transportation. However, problems related to containers themselves often occur in sea transportation, for example, damage to containers, inappropriate types of containers, and in the last two years the world in the trade sector has been faced with the problem of a shortage of containers or what is known as container shortage.

Container shortage is an event in the form of a shortage of containers available that can be used to carry out the transportation process. Regarding the sea transportation process, usually after the ship carrying the imported container arrives at the destination

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<sup>19</sup> F.D.C. Sudjatmiko, *Pokok-Pokok Pelayaran Niaga* (Bhratara 1995) 173.

<sup>20</sup> Banu Santoso, *Port Terminal Operation* (AMNI 1998) 53.

<sup>21</sup> Juliana Aguilar-mäkelä, 'Global shipping containers shortage' (Tesis Satakunta University of Applied Science 2022) 16.

port with a full load, the container is taken by the importer and unloaded at the importer's location. Then they are returned to a predetermined location, which is a container depot or an empty container park. Before an empty container can be used to fulfil requests from exporters, it is usually surveyed at the container depot to ensure the quality of the container is suitable for exporters to present. If repair work is required, the container will be repaired in an export-oriented country and, after surveying and repairing, the empty container is sent to the exporter for further export. So ideally, if every imported container can be filled by an exporter and used for export, there will be no container shortage problem.

However, there are several causes that give rise to container shortages in the transportation process; this usually arises due to several factors, which include:<sup>22</sup>

- a. There was an error in container repositioning between the shipping company and the container rental company. Shipping companies position containers as a means of transportation, while container rental companies consider containers as their core assets. So, container rental companies focus on depreciation of empty containers and try to generate sustainable profits during the rental period. Furthermore, container rental companies tend to ignore the issue of repositioning empty containers because they can still make a profit even if the container becomes empty during the rental period.
- b. There is a build-up of containers at several ports. This build-up is usually caused by waiting for the transportation process which is caused by several factors.
- c. The low volume of purchases and sales of containers itself has caused a decline in container production. This is related to the maintained circulation of containers throughout the world due to a country's export and import activities. So, if there is a build-up of containers, this will cause this sector to be unable to meet all demand while the economy is rebuilding.

With the COVID-19 event which started in 2019, the weaknesses in the strategies implemented by several companies became a big problem; this was exacerbated by the

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<sup>22</sup> Juliana Aguilar-mäkelä (n 21) 28.

emergence of several policies issued by national and international governments which generally resulted in:

- a. Lockdown policy which resulted in the closure of several company sectors, including ports and cargo production centers prepared for export. This cessation of operations has resulted in a build-up of empty containers at regional ports that have high levels of exports;
- b. Workers were also forced to quarantine to avoid the spread of the virus, resulting in the cessation of shipping processes and the operation of trading facilities at ports;
- c. The container production process itself, the sector being unable to meet the increasing demand for the number of containers; and
- d. A policy has emerged stating that ships only have a docking limit of up to 15 days to prevent cases of COVID-19 transmission among ship crew. This gives rise to ship operations with minimum potential space usage.

The negative impact of the emergence of this government policy has caused huge losses for companies operating in the sea transportation sector. The emergence of the negative impact of the lockdown policy can be seen that countries with high global trade volumes will almost certainly have a high demand for empty containers, and if the request cannot be fulfilled, the cargo available to be promised will be stored in the warehouse, whereas empty containers that are not used and are stored at the port or warehouse will almost certainly cause losses in both costs and time for maritime companies.<sup>23</sup>

It should also be understood that seven out of ten large ports used to accommodate containers are in China. This is inseparable from the fact that more than 50% of global container shipping volume is handled at Chinese ports because this country is the largest in exporting terms, but also the largest in importing. The COVID-19 epidemic, which began in China, prompted the local government to implement a state lockdown policy, which resulted in a dramatic fall in domestic economic activity and the creation of a more intense container scarcity situation than the world has ever seen.<sup>24</sup> Furthermore, based on a study conducted by Lang Xu, it is predicted that cargo shipments decreased by 20 to 50% between January 2020 and October 2020 for exports and cargo revenues as part of imports into China.<sup>25</sup>

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<sup>23</sup> Arda Toygar, Umut Yildirim, and Gani Mustafa İnegöl (n 10).

<sup>24</sup> Ibid.

<sup>25</sup> Lang Xu et al., (n 12) 6.



In regard to COVID-19, China, the country where the pandemic originated, became the first country to export, while other countries were still facing the impact of COVID-19, such as North America and Europe, which were affected by restrictions on port operations, workforce reductions and minimal production levels. As a result, almost every container sent from Asia to the North American and European continents could not return on time. Even North America experienced a 40% imbalance in container inflow and outflow at the time, which meant that for every container that entered the North American continent, only 40 containers were re-exported. This demonstrates that leftover containers continued to build up at North American ports, producing container shortages in various nations.<sup>26</sup>

In Indonesia itself, the impact of the container shortage due to the COVID-19 pandemic is clearly visible from the decline in income in the export and import sector; in December 2020, Indonesia's trade balance only amounted to USD 2.10 billion, which shows that it experienced a decrease of 51.42%.<sup>27</sup> In dealing with the COVID-19 pandemic, Toto Dirgantoro, as General Secretary of GPEI, also explained that the increase in ocean freight prices reached 500% on some shipping routes.<sup>28</sup> With the container shortage effect itself, this had a various impacts, including on sea transportation agreements which, of course, involve containers.

Regarding the transportation agreement itself, unlike the concept of general agreements regulated in *Burgerlijk Wetboek*, it needs to be understood that according to Article 468 paragraph 1 of the Commercial Code, a transportation agreement requires the carrier to safeguard the goods being transported during the transportation process.<sup>29</sup> HMN Purwosutjipto explained that the parties involved in transportation agreement consist of two parties, namely the carrier and the consigner.<sup>30</sup> Moreover, usually both

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<sup>26</sup> Juliana Aguilar-mäkelä (n 21) 31.

<sup>27</sup> Cindy Mutia Annur, 'Neraca Perdagangan Indonesia Hanya Surplus US\$ 1,02 Miliar pada Akhir 2021, Ini Pemicunya' (databoks, 2022) <<https://databoks.katadata.co.id/datapublish/2022/01/17/neraca-perdagangan-indonesia-hanya-surplus-us-102-miliar-pada-akhir-2021-ini-pemicunya>> accessed 14 December 2022.

<sup>28</sup> Luthfil Hadi (n 13).

<sup>29</sup> The Commercial Code of Indonesia.

<sup>30</sup> H.M.N. Purwosutjipto (n 16) 16.

parties will incorporate INCOTERMS, which is an international trade term created by the International Chamber of Commerce (ICC).

Regarding the principles contained in the carriage agreement itself, Abdulkadir Muhammad explained that, under Indonesia transportation agreements, there are public principles that apply to the parties to the transportation agreement as well as third parties who have an interest in the agreement. Furthermore, there is also a private principle that applies only to the parties involved in the transportation agreement.<sup>31</sup>

If in a transportation agreement one of the parties has not fulfilled their obligations, for example in the case of not delivering on time or not making payment, which in this case could be due to a shortage of containers, it can be said that there is a breach of an agreement. The definition of default is regulated in Article 1234 BW which explains that the form of achievement is giving something, doing something, or not doing something. Based on the contents of this article, breach of an agreement is an act that is contrary to Article 1234 BW.<sup>32</sup> Furthermore, breach of an agreement has a form or forms consisting of:<sup>33</sup>

- a. Late in fulfilling an agreement;
- b. Not meeting an agreement;
- c. Fulfilling an agreement but not as promised; and
- d. Doing something that is not allowed to be done in the agreement.

Furthermore, in transportation, especially sea transportation, the scope of breach of an agreement is outlined in Article 40 paragraph 1 of Law Number 17 of 2008 which states that water transportation companies have a responsibility for the security and safety of passengers or goods being transported.<sup>34</sup> Furthermore, Article 41 paragraph 1 of Law Number 17 of 2008 states that transportation companies also have responsibility for the consequences that arise, including:<sup>35</sup>

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<sup>31</sup> Abdulkadir Muhammad *Hukum Pengangkutan Darat, Laut and Udara* (Citra Aditya Bakti 1995) 37.

<sup>32</sup> Elisabeth Butarbutar, *Hukum Harta Kekayaan Menurut Sistematika KUH Perdata dan Perkembangannya* (Rafika Aditama 2012) 127.

<sup>33</sup> Leonora Bakarbesy and Ghansam Anand, *Buku Ajar Hukum Perikatan* (Zifatama Jawara 2018) 42-43.

<sup>34</sup> Law Number 17 of 2008 concerning Sea Voyage (The Republic of Indonesia State Gazette Year 2008 Number 64, Annotation 4849).

<sup>35</sup> *Ibid.*

- a. Delays in passengers or goods being transported;
- b. Damaged, lost or destroyed transportation goods;
- c. Passenger injury or death; or
- d. Losses resulting to third parties.

Based on the definition and division of forms or types of breach of contract, if in the transportation agreement one of the parties commits a breach of the agreement, then accountability measures can be sought for the breach of contract. This accountability effort itself can take the form of responsibility and accountability from the party who commits the default. In terms of liability itself, if a court decision is made referring to Article 1266 and Article 1267 BW, then liability can be imposed including:

- a. Compensation;
- b. Fulfillment of an agreement;
- c. Fulfillment of an agreement with compensation;
- d. Cancellation of an agreement; or
- e. Cancellation of an agreement with compensation.

Meanwhile under INCOTERMS, the rights and obligations of both parties are determined on which INCOTERMS that they used. This is because there are 11 types of INCOTERMS wherein the seller and the buyer each have their own rights and obligations to the agreement. For instance, if both parties agreed to a CIF contract, then the seller's obligation is to provide the goods, other shipping documents, and even procure a contract of carriage with the carrier.<sup>36</sup> The risk of the goods being damaged then will be transferred to the buyer during the shipment of the goods; even where goods are appropriated or sold that have already been shipped before the contract was made, the risk passes retrospectively to the buyer at the time of shipment.<sup>37</sup>

When applied in the case of a shortage of containers in a sea transportation agreement which is likely to result in delays in delivery of goods, as long as the carrier has agreed to the transportation agreement, the carrier must make every effort to have containers available before the delivery date of the goods according to the transportation agreement. The reason for the shortage of containers cannot be used as a justification

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<sup>36</sup> International Chamber of Commerce, *ICC Rules for The Use of Domestic and International Trade Terms* 2020 (International Chamber of Commerce, 2019) 114.

<sup>37</sup> *Ibid.*

for the carrier's actions because container shortages are not included in *overmacht* or *force majeure* as regulated in statutory regulations. Regarding the relationship between *overmacht* and the condition of container shortages, we need to look first at the causes of the container shortage, which in this case is linked to the COVID-19 pandemic. It is also important to note that at the time this article was written, the Indonesian government through Presidential Decree Number 12 of 2020 concerning Determination Non-Natural Disasters determined the spread of COVID-19 is a national disaster.

Regarding the COVID-19 pandemic itself as the cause of the shortage of containers, of course it is necessary to first look at the situation and conditions of the pandemic. In the event that a shortage of containers occurs as a result of the start of a pandemic, this could be a reason for *overmacht* in the transportation process because it is an emergency. However, in the long term, the COVID-19 pandemic cannot continue to be used as an *overmacht* in the sea transportation process because both parties can adapt to the current pandemic problem situation and several policies also have emerged that have been accommodated by the government, especially those related to the standardization of work procedures which aim to reduce the level of COVID-19. This is further supported by the enactment of Presidential Decree Number 17 of 2023 concerning the Determination of the End of the Corona Virus Disease 2019 (COVID-19) Pandemic Status in Indonesia which stated that the pandemic itself has ended and, therefore, cannot be categorized as a national disaster.

## **The Party Responsible for Losses due to the Container Shortage Effect**

### **1. Consigner**

Consigner according to Article 1 number 17 of Law Number 7 of 2014 covers people or institution or business entity. Usually, the consigner is an exporter that typically consists of three types:

- a. Producer Exporter is an exporter whose position is also the producer of the goods;
- b. Agent Exporter is an exporter who only acts as an intermediary in sending goods;
- c. Merchant Exporters are exporters who play a role in finding potential buyers/importers for goods produced by small and medium suppliers.

## 2. Freight Forwarding

Freight forwarding or referred to as transportation management services according to Article 1 point 6 of Minister of Transportation Regulation Number PM 59 of 2021 is a business activity that contains all activities that are essential for the successful delivery of goods via various types of transportation.<sup>38</sup> Regarding the scope of freight forwarding itself, it is regulated by Article 2 of Minister of Transportation Regulation Number PM 59 of 2021. It can be said that the freight forwarding role in the sea transportation process is the proxy of the goods sender who acts in the interests of the goods sender and has rights and obligations. The rights of freight forwarding include:

- a. Receive provision payments from sender;
- b. Having retention rights due to the nature of the expedition agreement.

Meanwhile, the obligations of freight forwarding are to:

- a. Look for suitable transportation/vehicles that suit the condition of the sender's goods;
- b. Prepare letters and transport documents required for goods to be sent; and
- c. Prepare goods so they are ready to transport.

In terms of container searches, there are two types of freight forwarding companies. Large freight forwarding companies such as Maersk Group have various branch companies in the transportation sector. One of them is PT Damco Warehousing Indonesia which operates in the field of freight forwarding, apart from that they have a subsidiary operating in the field of reefer containers, namely Maersk Container Industry. So, when it comes to the availability of containers, this company does not need other companies regarding the availability of containers. However, other freight forwarding companies are not members of one giant group, such as PT Transporindo Lima Perkasa which operates in the freight forwarding sector but has no subsidiaries operating in the field. Container rental requires an outside party to

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<sup>38</sup> Minister of Transportation Regulation Number PM 59 of 2021 concerning Implementation of Service Businesses related to Water Transportation (The Republic of Indonesia State Gazette Year 2021 Number 778).

provide the containers that will be used in the transportation process.

### **3. Container Rental Company**

Indonesian laws and regulations do not specifically provide a definition of container rental companies. However, statutory regulations classify these business activities as sea transportation rental business activities. One of these companies operates in the field of service equipment, namely containers. This company, as the name suggests, is engaged in renting containers to companies that need them.

### **4. Shipping Company**

First of all, it needs to be understood that it is not uncommon for freight forwarding companies to have parts of other companies in the same group that operate in the shipping sector, so they do not need other companies in the same field. However, it is also common for freight forwarding companies to need the assistance of shipping companies to carry out their duties. Regarding the rights and obligations of shipping companies in carrying out sea transportation, Article 38 of Law Number 17 of 2008 provides an explanation that sea transportation companies have an obligation to transport passengers or goods in accordance with the passenger agreement which is strengthened with the existence of passenger tickets and cargo documents.<sup>39</sup> Furthermore, regarding the obligations of the carrier, this is explained further in Article 48 of Law Number 17 of 2008 which includes:<sup>40</sup>

- a. Responsibility related to security and safety of passengers and goods transported.
- b. Responsibility for the ship's cargo in accordance with the statement agreement or cargo document which was agreed.

### **5. Consignee**

Article 510 paragraph 1 of the Commercial Code provides an explanation that the holder or recipient of the goods who is entitled is the holder of the valid bill of lading has the right to request delivery of goods according to that bill of lading. Concerning the rights and obligations of the sender of goods, the recipient of the

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<sup>39</sup> Law Number 17 of 2008 concerning Sea Voyage (The Republic of Indonesia State Gazette Year 2008 Number 64, Annotation 4849).

<sup>40</sup> Ibid.

goods has the right to receive the goods as long as he is the legal bill of lading holder. Meanwhile, regarding the obligations of the recipient of the goods, Article 491 of the Commercial Code provides an explanation that, if the cargo has been delivered, the recipient is obliged to pay transportation costs.

Regarding the liability during the sea transportation, if both parties used INCOTERMS in their sale of contract; the liability of the goods falls upon which INCOTERMS both parties used in their agreement. For instance, if both parties agreed to the CIF contract, then the consigner will bear the liability of the goods until the risk has been transferred to the consignee during the shipment.<sup>41</sup> Meanwhile, regarding the principles and types of responsibility Indonesia used in the sea transportation, statutory regulations do not provide a definite classification regarding the types and forms. Abdulkadir Muhammad provides a classification of responsibility for sea transportation into three types consisting of:<sup>42</sup>

a. Responsibility Due to Error (Fault Liability)

Regulated by Article 1365 BW which explains that carriers who are at fault in carrying out transportation can be responsible for paying for losses incurred.<sup>43</sup> Meanwhile, the party who experiences the loss must be able to prove the carrier's fault.

b. Liability Due to Presumption (Presumption Liability)

This means that the carrier will always be responsible for all activities that arise as a result of the transportation carried out by him. However, if the carrier succeeds in proving that he is not at fault, the carrier will be free from responsibility for the compensation.

c. Absolute Responsibility (Absolute Liability)

The carrier is obliged to be responsible for losses resulting from the transportation process carried out without the obligation to prove that there was a carrier error. So that the carrier will not be free from responsibility for any losses that arise.

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<sup>41</sup> International Chamber of Commerce (n 36) 115.

<sup>42</sup> Abdulkadir Muhammad (n 31) 37-41.

<sup>43</sup> The Civil Code of Indonesia.

Moreover, Article 40 of Law Number 17 of 2008 states that company has responsibility on security and safety goods transported according to the carriage agreement or document payload.<sup>44</sup> Article 41 of Law Number 17 of 2008 also explains the loss consequence of boat operations if the carrier succeeds in proving that the losses are not caused by the carries, then the carrier is partially/completely released from the responsibility.<sup>45</sup>

Meanwhile, regarding the justification for the carrier to obtain freedom for not fulfilling his obligation under the contract because of an *overmacht*, Subekti states that *overmacht* can categorized as events that cause performance to fail due to other causes which cannot be anticipated or prevented by the debtor.<sup>46</sup> Arrangements about *overmacht* are established in Articles 1244 BW, 1245 BW, 144 BW, and 1445 BW. The cause of *overmacht* consists of:<sup>47</sup>

- a. Unexpected natural events and cannot be avoided by anyone because it has a natural nature without any element of intention;
- b. An emergency is a compelling situation resulting from conditions that cannot be predicted in advance;
- c. Arising from the loss or destruction of the object of the agreement; or
- d. Caused by government policy which can occur if there is a change in government policy which results in the agreement not being implemented because the object of the agreement is prohibited from being traded.

*Overmacht* itself can also be permanent or temporary; if an *overmacht* is permanent then the validity of the agreement will stop.<sup>48</sup> Meanwhile, if the *overmacht* is temporary then the validity of the agreement will be postponed and if the situation returns to normal/disappears then the agreement will start working again.<sup>49</sup>

Regarding the relationship between *overmacht* and container shortage conditions, we need to first look at the causes of the container shortage, which in this case will be linked to the COVID-19 pandemic. It should also be noted that the government through

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<sup>44</sup> Law Number 17 of 2008 concerning Sea Voyage (The Republic of Indonesia State Gazette Year 2008 Number 64, Annotation 4849).

<sup>45</sup> Ibid.

<sup>46</sup> R. Subekti, *Hukum Perjanjian* (Intermasa 2005) 55.

<sup>47</sup> Leonora Bakarbesy and Ghansam Anand (n 33) 55.

<sup>48</sup> Leonora Bakarbesy and Ghansam Anand (n 33) 59.

<sup>49</sup> Ibid.



Presidential Decree Number 12 of 2020 stated that COVID-19 was declared a national disaster. Regarding the shortage of containers caused by the COVID-19 pandemic, it is necessary to first look at the situation and conditions of the COVID-19 pandemic. In the event that a shortage of containers occurs as a result of the start of a pandemic, this could be a reason for *overmacht* in the transportation process because it is an emergency.

However, in the long term, the COVID-19 pandemic cannot continue to be used as an *overmacht* in the sea transportation process because several policies have emerged that have been accommodated by the government, especially those related to the standardization of work procedures which aim to reduce the level of COVID-19. If referring to container rental contracts, the container rental company is obliged to provide notification to the freight forwarding company regarding a shortage of containers due to the COVID-19 pandemic; the freight forwarding company must also provide preventive and repressive steps regarding the goods delivery contract with the exporter itself.

When talking about how long an *overmacht* can be implemented, especially in relation to product delivery during the COVID-19 pandemic, we need to pay attention to the contract clauses in the transportation agreement. If both parties incorporate INCOTERMS under their contract, usually they already contain several obligations that the parties have to fulfill before the risk of the goods are passed to another party. In Indonesia, this type of agreements usually contains two types of *overmacht* clauses.<sup>50</sup> The first is that the non-exclusive clause is a condition which is considered to be a force majeure which is not special, so that the debtor can claim force majeure as long as there are conditions that are agreed upon for the force majeure to come into effect, while the exclusive clause is a force majeure which is only limited to certain conditions.<sup>51</sup> For example, it is stated that it explicitly declares a disease or pandemic as a *force majeure* event.

This is reinforced by the government's decision which, although it has designated COVID-19 as a non-natural disaster, the earlier years of the pandemic can be categorized as *overmacht* through Presidential Decree Number 12 of 2020. With the government's

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<sup>50</sup> KlikLegal.com, 'Apakah Covid-19 Otomatis Menjadi Dasar Penerapan Force Majeure?' (KlikLegal.com, 2020) < <https://kliklegal.com/apakah-covid-19-otomatis-menjadi-dasar-penerapan-force-majeure/> > accessed 10 November 2022.

<sup>51</sup> Ibid.

policy to lift the lockdown situation and revoke Presidential Decree Number 12 in 2020 through Presidential Decree Number 17 of 2023 concerning Determining the End of the Status of the COVID-19 Pandemic in Indonesia, this indicates that, the beginning of COVID-19 Pandemic can be categorized as a temporary *overmacht*, which, if the prohibition is issued after the agreement has been made, this situation constitutes *force majeure* and the losses suffered by the consigner are not the responsibility of the consignee unless otherwise specified in the agreement.<sup>52</sup> While, if there is an agreement made when the epidemic is spreading with several regulations regarding trading during the pandemic era already being established, the outbreak and lockdown cannot be used as a reason for *force majeure*.<sup>53</sup> On the other hand, regarding the contract between the consigner and freight forwarding companies, Article 41 paragraph 1 of Law Number 17 of 2008 states that water transportation companies are responsible for:<sup>54,55</sup>

- a. Delays in passengers or goods being transported;
- b. Damaged, lost or destroyed transportation goods;
- c. Passenger injury or death; or
- d. Losses resulting to third parties.

The Minister of Transportation Regulation Number 49 of 2017 further explains that the obligations of freight forwarding companies with other parties can also be regulated in the agreement between the two parties.<sup>56</sup> Furthermore, it is also explained that, in order to minimize liability and with the aim of guaranteeing parties who experience losses, transportation management service companies have an obligation to provide insurance for goods.<sup>57</sup>

In practice, if the consigner makes a contract with a freight forwarding company, the freight forwarding company's obligation is to be responsible for losses that occur

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<sup>52</sup> Ibid.

<sup>53</sup> Rio Christiawan, 'Hukumnya Jika Ekspor-Impor Dilarang karen COVID-19' (HukumOnline.com, 2021) < <https://www.hukumonline.com/klinik/a/hukumnya-jika-ekspor-impor-dilarang-karena-covid-19-lt601a8c8e64955/>> accessed 10 November 2022.

<sup>54</sup> Ibid.

<sup>55</sup> Law Number 17 of 2008 concerning Sea Voyage (The Republic of Indonesia State Gazette Year 2008 Number 64, Annotation 4849).

<sup>56</sup> Minister of Transportation Regulation Number PM 49 of 2017 concerning Organizing and Operating Transportation Management Services (The Republic of Indonesia State Gazette Year 2017 Number 913).

<sup>57</sup> Ibid.

during the process of sending and transporting goods, while the recipient of the goods has the right to receive the goods according to the B/L. So, if there is a shortage of containers that arises after the signing of the agreement between the freight forwarding company and the consigner regarding the delivery of fishery products, the freight forwarding company is responsible for preventing damage to the agreed fishery products until a suitable container is found to carry out the process of transporting the product.

Furthermore if the freight forwarding company also acts as the carrier, Article 472 paragraph 1 of the Commercial Code provides a statement regarding losses that must be borne by the carrier as a result of the goods being transported not being able to be delivered to the recipient, then a calculation must be made based on the price of the goods and the type and condition of the same at the place of delivery, also taking into consideration when the goods must be delivered.<sup>58</sup> However, if the freight forwarding company does not want to replace losses, this can be done through lawsuits to the injured party in the agreement, related about solution dispute, then the parties can make choices regarding the settlement efforts that can be agreed upon through a court route or outside dispute resolution channels

When discussing the liability of freight forwarding companies due to losses from shipping fishery products from a shortage of containers, it also falls upon the container rental company to provide notification to the freight forwarding company regarding the shortage of containers, so that the freight forwarding company can also provide preventive measures regarding contracts delivery of goods with the consigner. Meanwhile, regarding contracts that have been signed, freight forwarding companies need to make maximum efforts to maintain the condition of the fishery products so that they are not damaged while being placed in the storage warehouse. And if the product is at its destination but damaged, the recipient and/or sender of the goods (depends on the type of contract) can submit a claim for compensation to the freight forwarding company or can file a lawsuit based on breach of contract or a lawsuit based on consumer protection due to losses suffered during transportation.

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<sup>58</sup> The Commercial Code of Indonesia.

## **Conclusion**

The government labelled COVID-19 a national disaster by Presidential Decree 12 of 2020. Regarding the COVID-19 pandemic and its effects on container shortages, in the event that a shortage of containers occurs as a result of the start of a pandemic, this could be a reason for *overmacht* in the transportation process because it is an emergency. However, in the long run, the COVID-19 pandemic cannot be used as an *overmacht* in sea transportation because the government has adopted several policies, especially those that standardize work procedures to reduce COVID-19. The container rental company must notify the freight forwarding company of a container shortage due to the COVID-19 pandemic, and the freight forwarding company must take preventive and repressive measures regarding the exporter's goods delivery contract.

The legal consequence of a transportation agreement that is affected by a shortage of containers is that as long as the consigner already had an agreement with the freight forwarding companies (which sometimes also act as the carrier) during the beginning of the pandemic, it can be said that the freight forwarding companies have to fulfil their obligation and keep the goods safe. However, in its development to combat the pandemic, the freight forwarding company must be able to adapt to the situation and ensure that containers are available according to the transportation agreement. The reason for the shortage of containers cannot be used as a justification for the carrier's actions because the shortage of containers is not included in *overmacht*. Furthermore, the consigner has the right to request cancellation of the agreement along with compensation for losses suffered by the carrier in accordance with Articles 1266 and 1267 BW provided that the freight forwarding company cannot prove that they are not at fault for the losses suffered.

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