

Port Closure Due to the Covid-19 Pandemic in the Law of Carriage of Goods By Sea and Unidroit Principles of International Commercial Contracts

Syifa Salsabila Misridaputri^{1*}, Isis Ikhwansyah², Purnama Trisnamansyah³

¹²³Law Faculty, Universitas Padjadjaran. Indonesia

*Corresponding Author: syifa18009@mail.unpad.ac.id

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Abstract: Port closure as an effort to slow the spread of the Covid-19 virus has had various impacts, such as port congestion which has led to delays and drastically increased transportation costs. This study examines the impacts caused by port closures and legal remedies that can be taken based on international sea transport law. Losses due to port closures cannot be borne by the carrier based on the conventions of sea shipping law as long as the carrier can prove that the fault was not his own. The closure of the port can be categorized as a hardship, in which there are fundamental changes that affect the agreement, namely the increase in shipping costs and delays. efforts that can be made based on the UPICC are renegotiation, and if it fails, the parties can seek a dispute settlement through the courts. In implementing the agreement, the parties must prioritize the principle of good faith and prove that the losses incurred and losses did not originate from themselves.

Abstrak: Penutupan pelabuhan sebagai upaya dalam memperlambat penyebaran virus Covid-19 memiliki berbagai dampak seperti kemacetan pelabuhan yang berujung pada keterlambatan serta biaya pengangkutan yang meningkat drastis. Penelitian ini bertujuan untuk mengkaji berbagai dampak yang ditimbulkan akibat penutupan pelabuhan serta upaya hukum yang dapat dilakukan berdasarkan hukum pengangkutan laut internasional. Kerugian akibat penutupan pelabuhan tidak dapat dibebankan kepada pengangkut berdasarkan konvensi-konvensi hukum pengangkutan selama pengangkut dapat membuktikan bahwa kesalahan bukan berasal dari dirinya. Penutupan pelabuhan tersebut dapat dikategorikan sebagai *hardship*, di mana terdapat perubahan fundamental yang memengaruhi perjanjian, yaitu kenaikan biaya pengiriman serta keterlambatan. upaya yang dapat dilakukan berdasarkan UPICC adalah renegosiasi, dan apabila gagal, para pihak dapat menempuh upaya penyelesaian melalui pengadilan. Dalam pelaksanaan perjanjian, para pihak harus mengedepankan prinsip itikad baik dan membuktikan kerugian yang timbul serta kerugian tersebut bukan berasal dari dirinya.

INTRODUCTION

Shipping is one of the most essential parts of human existence. In today's increasingly globalized economy, shipping plays a fundamental and crucial role as the primary engine of cross-border trade. In addition to increasing the value of goods by moving them to more valuable locations and fostering competition and production by expanding the spatial boundaries of commodity and labor markets, shipping also increases the demand for goods and services and provides employment for a large number of people. Therefore, freight transport infrastructure is a significant contributor to the wealth and productive capability of a nation. The mode of shipping is subdivided into the following categories:

1. Land freight;
2. Water freight and
3. Air freight.

Sri Redjeki Hartono indicated that the commodities were transported because their worth at the destination would be greater than at the origin (Nugroho & Haq, 2019, p. 19). The value given is in the form of time utility and place utility. Place value means that through shipping, there is a movement from a place that is deemed less useful in the place of origin, but then the value of the goods increases after the shipping is carried out, while the time value means that shipping makes the goods arrive on time according to needs (Nugroho & Haq, 2019).

The community commonly uses water transportation, which is further subdivided into three subtypes: river and lake freight, crossing freight, and sea freight. In general, sea freight or sea shipping refers to the coordinated shipment of commodities or persons (Nalentina & Perkov, 2017). One of the sea's various services is as a conduit for ships and other water vehicles that connects all of the world's land. Therefore, sea

shipping is regarded as universal since it facilitates the flow of material resources, people, and others around the globe. Each industry in the shipping sector has unique features that determine its place and relevance in the sphere of traffic and the economy. Given that more than 80% of worldwide trade is measured by volume and up to 70% of its value is conveyed by ships and processed through seaports, maritime transport is essential for trade and development (Millefiori, et al., 2021). The characteristics of sea shipping are as follows (Nalentina & Perkov, 2017):

1. The sea as a large waterway that connects the whole world;
2. The sea as a natural waterway that does not require special investment for infrastructure;
3. Ships as the only means of transportation that can transport thousands of tons of goods at once.

In addition, there are also matters that regulate sea shipping which is called the law of sea shipping. Based on the opinion expressed by HMN Purwosutjipto, the law of sea shipping is all the rules and norms that regulate traffic related to the transportation of sea crossings (Sembiring, 2022). The law of carriage of goods by sea is listed in various conventions, laws and other regulations. R. Sukardono then argued that the law of carriage of goods by sea does not have a sea object in public, but is based on private relations born of a shipping agreement (Sembiring, 2022). The civil relationship in question is as stipulated in civil law or private law, namely relating to the relationship between the carrier and the user of sea transportation services subject to the law of the agreement (Sembiring, 2022).

Constantly, the carrier and the shipper are the primary parties to a contract for the carriage of goods. The agreement essentially outlines the rights and responsibilities of the

carrier as well as those of the shipper (Muhammad, 2013). The shipping agreement is consensual (reciprocal) in which the carrier binds himself to organize the transportation of goods to and from the place of destination, as well as to make payments for transportation costs as agreed by the parties (Sugistiyoko, 2016). Generally, the shipping agreement between the carrier and the shipper is not written but is facilitated by a shipping document that serves as evidence of the shipping between the carrier and the shipper (Wulandari & Imanullah, 2018). This document is then called the bill of lading. The three general characteristics of a bill of lading include (Aikens, Lord, & Bools, 2016):

1. Constitutes a receipt for goods sent or received by the carrier;
2. Is a document of ownership rights for the said goods; and
3. Contains or proves a contract of carriage by sea relating to goods.

The port is an essential part of maritime shipping. The relevance of ports in global supply chains has expanded as a result of the globalization of sophisticated industrial production processes. Port activities are no longer restricted to cargo handling; international logistics services offering has become an integral aspect of port operations (Munim & Schramm, 2018). The position of seaports as hubs of trade in the global context contributes to the growth of the transportation system by stimulating the expansion of the cargo network. International freight pays significant attention to competitive aspects such as port infrastructure, the quality and scope of services offered, and the port's ability to manage huge volumes of cargo in a timely, cost-effective manner (K, 2019). The main types of losses experienced in sea freight include cargo damage, non-delivery of cargo, errors in cargo delivery, and including delays in delivery of cargo (Baughen, 2009).

In early 2020, the World Health Organization (WHO) announced a case of the Covid-19 virus in the world (World Health Organization, n.d.). Covid-19 as a viral pandemic has become a concern with a very big global effect. The virus that was initially found in Wuhan, People's Republic of China, has rapidly spread around the globe. The pandemic has not only become a huge danger to the health and medical sector, but it has also produced problems in a variety of areas that the global economy cannot ignore. Various laws have been enacted addressing the Covid-19 pandemic in an effort to limit the virus's spread. Countries experienced a decline in their Gross Domestic Product (GDP), which disrupted trade activities, as well as the policies of each country, including lockdowns, stay-at-home orders, community quarantines, temporary business closures, travel restrictions, and the reduction or prohibition of trading activities.

The limitations imposed under Covid-19 have affected several industries, particularly the maritime industry. The restrictions enforced in several nations as a result of the Covid-19 outbreak are inconsistent with the expansion of electronic commerce. In comparison to the period preceding the pandemic, there was a large increase in the delivery of products, resulting in an overload and delivery delays. Lockdown implementation, which restricts transit and forces employees to adjust to new conditions, also contributes to delivery delays. These scenarios can result in damages for the parties, including significant and immaterial losses for the receiver. These limits gradually lead to alterations in social behavior and worldwide movement patterns, which in turn disrupt social and economic activity.

In light of the aforementioned occurrences, parties who participate in sea shipping agreements for each transportation activity must analyze and comprehend the pandemic's diverse effects. Unstable

situations during a pandemic have the potential to result in losses for one or more contracting parties. The parties must comprehend the different repercussions and ramifications of port closures owing to the Covid-19 epidemic, as well as the countermeasures that might be done. Recognizing that the activity of conveying products by water encompasses international transportation operations, the parties must also be familiar with the norms of law of carriage of goods by sea. The scope of international maritime shipping include internationally recognized treaties, principles, and customary practices. The Hague Rules 1924, which were later updated by the Hague-Visby Rules 1968, the Hamburg Rules 1978, and the Rotterdam Rules, are the agreements most often used in international marine freight contracts. In addition, there are also rules that can be used as a reference for contract implementation, namely the UNIDROIT Principles of International Commercial Contracts.

On the foundation of the description of the research context, the problem can be identified as follows:

1. What is the effect of closing ports due to the Covid-19 pandemic?
2. What are the legal remedies taken by the parties regarding the closure of ports due to the Covid-19 pandemic based on law of carriage of goods by sea?

RESEARCH METHODS

The method employed is normative qualitative as well as the method of normative juridical approach, in which research is based on legal sources whose results are utilized to construct a widely recognized system of understanding that implies the normative content of diverse legal regimes. The following data sources were used for this study:

1. Primary legal materials, namely legal materials related to statutory regulations;
2. Secondary legal materials, namely legal materials that explain primary legal materials, such as research results, articles, reference books, and other information media such as the internet;
3. Tertiary legal materials, namely legal materials provide instructions and explanations of secondary legal materials, such as legal dictionaries and general dictionaries.

RESULTS AND DISCUSSION

The effect of closing ports due to the Covid-19 pandemic

Shipping companies or carriers play a crucial role in the sea freight segment of the freight sector. In terms of the cost of shipping and the number of commodities, sea shipping is the most efficient technique. The objective of shipping activity is to satisfy market demands. Given that 90% of goods are carried between nations via sea freight services, sea freight is seen as a crucial method for maintaining global trade flows and assuring supply chain stability (Gui, Wang, & Yu, 2022). As ports accelerate high-quality development, maintaining port operations is critical to today's global economy and trade (Gui, Wang, & Yu, 2022).

Covid-19 has had a considerable effect on the implementation of international trade and the movement of commodities. The closure of the port might then result in delays, namely the failure to meet a planned deadline for the completion of activities. Given that Covid-19 is a circumstance that few people have encountered, the prevalence of lockdown, restriction, and quarantine rules has generated issues in nearly every area of society. The unexpected emergence of the Covid-19 pandemic has impacted all aspects of the maritime supply chain at about the same time, resulting in

unprecedented disruptions in worldwide ports and the shipping industry (Gui, Wang, & Yu, 2022).

The closure of the port has resulted in the queue for available berths increasing, and the time for picking up containers at the terminal is getting longer. This is then called port congestion, a condition relevant to delays, queues, extra voyages, and the dwell time of ships and cargo in port (Gui, Wang, & Yu, 2022). Port congestion occurs when maritime participants utilize port resources concurrently with other parties. Over the past two years, the overall transit time of commodities, including port logistics, has increased, negatively affecting the functioning of the supply chain (Beškovnik, Zanne, & Golnar, 2022). The volume of goods to be shipped increased, thus burdening the liquidity of the goods owners (Beškovnik, Zanne, & Golnar, 2022).

For these reasons, port congestion due to the lockdown also has an impact on global supply chains. One of the countries that has experienced the impact of restrictions due to the outbreak is China, which is the world's largest exporter (Akram, n.d.). The lockdown that was implemented in China's commercial capital, Shanghai, which is also home to the world's largest port, has led to disastrous supply chain disruptions that impacted almost every country around the world. China is also the country where the Covid-19 virus was discovered for the first time (World Health Organization, n.d.). In January 2022, Ningbo Port, China's third-busiest port after Shenzhen and Shanghai, paused operations at a number of warehouses and reduced the capacity of ongoing freight services when it was confirmed that some local citizens had also infected the Covid-19 virus. This is not the first port where Covid-19 has caused a lockdown. In August 2021, just a few months after the Yantian port in Shenzhen partially closed in early June, the Meishan Terminal in Ningbo Port was also shuttered for two weeks. China witnessed

the worst outbreak of the virus since the beginning of the pandemic, namely in March 2022, when a lockdown was enforced on Shenzhen, a city with a population of 17.5 million, causing companies to close (FreightSight, n.d.). Additionally, there has been a rise in instances in Shanghai. Given that Shenzhen is the fourth biggest port in the world and Shanghai is the largest, more ships were delayed when the pandemic struck Yantian's terminal in Shenzhen, comparable to the Ever Given incident on the Suez Canal. The shutdown created considerable delays at the Shanghai port, which is located in the eastern portion of the city.

Not only in China, port closures have also occurred in various countries, for example the United States. Due to the widespread closure of many important markets in countries affected by the Covid-19 pandemic, port volumes in the United States decreased by 7.3% in the first five months of 2020 (Holmstad, n.d.). Then, in Italy, which was the first country in Europe to experience the widespread spread of Covid-19 and the second-most-affected country after China, the maritime sector was affected by a lockdown, which weakened trade connections and made Italy one of the countries impacted by Covid-19's effect on transportation (Team, n.d.). Latin America was also affected by the outbreak, where ships were emptied to reduce capacity as a result of a substantial decrease in cargo volume recorded by the WPSP-IAPH Port Economic Impact Barometer on 22 May 2020. Furthermore, the high volume of ship calls from accumulated cargo put pressure on port operations and cargo flow planning, which is based on a report dated July 6, 2020. Border crossings and port restrictions imposed by neighboring countries also give landlocked countries in Latin America, such as Bolivia and Paraguay. As a maritime nation, Indonesia has not been immune to the effects of the virus, as shipping

companies encountered delays owing to port closures, resulting in delays and a less number of ships than before the pandemic. When the port is congested, shipping delays are highly likely to occur. This results in a rise in shipping rates or shipping expenses, as well as additional expenditures that did not previously exist, such as for transportation that would normally travel directly to the destination port but should now dock at another port owing to a lockdown policy at the target port.

The delay can also affect various other agreements that have been made by the parties. For example, agreements carried out by consignees who act as retailers with their customers. The impacts in the commercial and operational aspects of all parties in the supply chain include (Bhonsle, n.d.):

1. Increased Total Cost of Ownership, delays cause an increase in the overall cost of ownership due to higher costs incurred due to delays;
2. Delayed sales and manufacturing, if a container contains raw materials destined for a manufacturing plant, production may be delayed if there is a delay in delivery, as well as for containers carrying finished goods, sales to importers or final consumers will be delayed;
3. Money is tied up in inventory and lower cash flow, i.e. the more containers are delayed, the longer it takes to clear the cargo, and more money is tied up in inventory and the cash flow is slower;
4. Increased risk of damage, theft, spoilage, and obsolescence, i.e. the longer the cargo is in transit, the more vulnerable the goods are to the risk of damage or theft. In the case of time-sensitive cargo, such as perishable goods, delays can reduce the value of the cargo and hence its selling price;
5. Lower asset turnover, where the longer it takes in the process of shipping containers and containers, the less time

it can be reversed, indicating less optimal use of assets.

The legal remedies taken by the parties regarding the closure of ports due to the Covid-19 pandemic based on law of carriage of goods by sea and UNIDROIT Principles of International Commercial Contracts

Delays in the shipping of goods related to delivery time. Delivery time is a specified period of time during which a carrier must perform transportation and related tasks, namely moving shipments from one specified location (delivery) to another specified location (delivery, or destination) (Sosedová, Otáhalová, Dávid, & Galieriková, 2021). Referring to several law of carriage of goods by sea conventions, the burden of proving late delivery lies with the carrier. This is stated in several conventions such as The Brussels Protocol of 1968 amending the Brussels Convention of 1924 (Hague-Visby Rules), the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules). Especially in the Rotterdam Rules, the burden of proof is on the carrier, there are also alternatives for the claimant to provide evidence.

Hague-Visby Rules states related to "quarantine restrictions" or "quarantine restrictions". Article 4(2)(h) of the Hague-Visby Rules provides that delays in unloading caused by queues of ships and quarantine measures fall within these two defenses, as long as they have caused physical damage or loss of cargo, in the case of perishable goods. Subject to the Hague-Visby Rules, the carrier shall not be liable for any pure economic loss arising from port-related delays. Then, in Article 5 (1) of the Hamburg Rules it is stated that the carrier is responsible for losses resulting from loss or damage to the goods, as well as delays in

delivery, if the event that causes the loss, damage or delay occurs when the goods are in his responsibility, unless the carrier prove that he, his employees or agents took all actions reasonably necessary to avoid the incident and its consequences. The Hamburg Rules do not include any provisions addressing quarantine limitations. In the meanwhile, the Rotterdam Rules specify that the carrier is liable for damage, loss, and delivery delays if the claimant can demonstrate that the loss, damage, or delay, or the actions or conditions that caused or contributed to it, happened during the carrier's responsibility period. Article 17 (3) (d) of the Rotterdam Rules stipulates that the carrier may be released from all or a portion of its responsibilities if it is proven that one or more of the following circumstances caused or contributed to the loss, delay, or damage: quarantine restrictions and interference or obstructions imposed by the government or public authorities.

Based on the above conventions, it can be shown that the three conventions tend to absolve the carrier of responsibility if the delay was caused by quarantine policies and government or public authority policies. This also applies to municipal authorities closing ports to prevent the spread of the Covid-19 pandemic. The carrier can be released from the obligation to provide compensation to the aggrieved party as long as the carrier can prove that the mistake was not the players' own.

The next thing that can be seen is the classification of the various consequences caused by the closure of ports due to the Covid-19 pandemic. First, namely the closure of ports due to the pandemic is included in force majeure or not. Some of the elements of force majeure include (Nursaputri, 2021):

1. A situation that cannot be predicted in advance or cannot be expected to occur by the parties;

2. The element of incompetence cannot be borne by the risk to the party concerned;
3. The element of incompetence is not caused by the fault of the party concerned;
4. There is an obstacle that makes it impossible to perform.

The closure of the port due to the lockdown due to the sudden emergence of the Covid-19 case was an unexpected or unpredictable event. The closure of the port due to Covid-19 is also a condition beyond the control of the parties, therefore the carrier cannot be held responsible for this. There are also obstacles in fulfilling obligations that are not caused by intent, negligence, or bad faith, but due by the closure of the port due to the pressure spread of the Covid-19 virus. However, the closing of the port due to the Covid-19 pandemic did not directly cause the cancellation of the agreement. According to Refly Harun quoted by Setyo Aji Harjanto, matters related to the Covid-19 pandemic cannot be used to cancel an agreement (Junaidi, Surahmi, & Romli, 2022). The reason for force majeure used by the company in terminating the agreement cannot be justified (Junaidi, Surahmi, & Romli, 2022). Therefore, it can be inappropriate if the closure of ports due to the Covid-19 pandemic which has caused various consequences is categorized as a force majeure in international sea shipping.

Furthermore, referring to Article 6.2.2. UNIDROIT Principles of International Commercial Contracts, there is a regulation related to hardship which is defined as an event that has fundamentally changed the balance of an agreement, which then causes the value of the implementation of the agreement to increase or decrease drastically, these conditions cannot be predicted in advance, are beyond the power of the parties the aggrieved party, and the risk of this situation cannot be estimated by the aggrieved party. In international

contracts, in this case relating to international shipping that is cross-border between countries, the clause that is more attached and relevant is hardship, or difficult circumstances, as stated in the UPICC. As for the elements in a state of hardship based on Article 6.2.2. UPICC include:

1. There is an event that fundamentally changes the balance, which can be in the form of an increase in the cost of implementation or a decrease in the value of the implementation of the contract received by one of the parties;
2. The incident occurred or was only discovered by the aggrieved party after an agreement was reached;
3. These events could not rationally be predicted when the agreement was concluded;
4. The event is beyond the control of the aggrieved party;
5. The aggrieved party does not suspect the risk of the event occurring.

If the closure of the port occurs after the agreement is closed and is not negligence, then the closure of the port is more relevant to be categorized as a hardship situation. The events described above occurred when cargo entered the queue, which was then suddenly closed due to a lockdown, hence, it can be categorized as a hardship.

Substantial cost increases can also be categorized as a fundamental change that is an element of hardship, where due to rising prices and a lack of supply due to port closures, consignees of goods who are also business actors or sellers face challenges when trying to resell their purchases. In addition, because the lockdown implemented by various public authorities is not uniform throughout the country, shipping is then transited to ports in other cities or countries that are still open. Delivery delays result from this, along with additional fees that did not exist before. There will be a very large loss due to the sudden increase in the cost of implementing

the agreement if the fulfillment of the agreement is in accordance with the first agreement, unlike when the performance is fulfilled under normal circumstances. However, there is one very important requirement, which must also be met: the hardship requires that at the time of closing the contract, the high increase in the price of shipping should not be foreseeable. Hardship requires that the events that lead to the change in balance are not unexpected. If the closure of the port can be seen and predicted beforehand, then the delay in shipping cannot then be made a thorny.

In accordance with Article 6.2.3 of the UPICC, the aggrieved party must promptly request a renegotiation of the agreement if it can be demonstrated that the aforementioned incidence constitutes a hardship. Agreement renegotiation can be a chance for the parties to realign their interests of the parties to the present reality (Nursaputri, 2021). If during the renegotiation the parties fail to reach a consensus within a reasonable period of time, then based on Article 6.2.3 UPICC, the parties can submit a request to the court to then prove the existence of hardship. If there is hardship, then Article 6.2.3 UPICC states that the court can decide to terminate the contract or change the contract in order to restore the balance.

The Hamburg Rules and Rotterdam Rules themselves state that disputes that arise can be resolved through arbitration, as stated in Article 22 of the Hamburg Rules and Chapter 15 of the Rotterdam Rules.

CONCLUSION

The port closures enacted in many nations to prevent the spread of the Covid-19 virus have had a number of important effects, including shipping delays and the incidence of port congestion or port congestion. Generally, port closures result in an increase in shipping costs or the incurrence of new expenditures. This will

also have a negative impact on the global supply chain and all parties involved, including the consignees of the goods. The occurrence of delay influenced the fulfillment of the consignee's other obligations. Consignees of goods, including those who operate as business actors, such as higher costs of ownership, sales delays, money tied down in inventory and weaker cash flow, greater risk of damage, theft, spoilage, obsolescence, and decreased asset turnover. There are a number of exclusions to the carrier's liability for a variety of losses incurred by the consignee of the goods, as outlined in the preceding law of carriage of goods by sea treaties. This also applies to damages experienced by consignees as a result of port restrictions caused by the Covid-19 pandemic, so long as the carrier can demonstrate that the error did not originate from them. Nonetheless, this does not directly terminate the contract. The consequences generated by the closure of ports as a result of the Covid-19 epidemic can be classified as a hardship since they result in shipping delays and a significant increase in expenses, both of which are elements of hardship according to the UPICC.

As mentioned in the UPICC, efforts that can be done by the parties in the case of a problematic occurrence include renegotiation. This also applies to port closures resulting from the Covid-19 pandemic, which might be classified as a hardship. In the event that the parties are unable to achieve an agreement during renegotiation, they may resort to both litigation and non-litigation court proceedings. Taking a look at the Hamburg Rules and Rotterdam Rules, these two agreements mandate arbitration for the settlement of disputes. As for the parties to be able to demonstrate, during the process of renegotiation and resolution of disputes through the courts, that the conditions that led to the loss were not the result of their mistakes or negligence.

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