# DISPUTE SETTLEMENT OF MARINE CARGO INSURANCE THROUGH ARBITRATION IN INDONESIA

**A joint paper of:**

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## I. INTRODUCTION

For a long time, legal experts have argued that it is important to formulate and implement special regulations and laws related to all legal actions that occur at or through the sea, especially regarding sea transportation. The main reason is because the sea are always moving, unpredictable and cannot be controlled by humans. Changes of sea boundary points that result in cross-country rights, waves sweeping, pirates, trade transactions by marine cargos, up to the damage of goods due to sea water are some of the considerations for drafting maritime regulations, one of which is marine cargo insurance.

In Indonesia, the activity of transporting goods by marine cargo is regulated in the Indonesian Commercial Code (KUHD / ICC), Indonesian Law No. 17 of 2008 concerning Shipping, and Indonesian Government Regulation No. 20 of 2010 concerning Transportation in Waters as amended by Indonesian Government Regulation no. 22 of 2011 concerning Amendments to Indonesian Government Regulation Number 20 of 2010 concerning Transportation in Waters. Article 468 of ICC essentially stipulates that the carrier or the owner of the marine cargo is responsible and shall tries his best to make sure the goods he transports remain intact from the time he receives the goods from the sender until the time he delivers the goods to the recipient. The carrier is also charged with compensation for damage to the goods transported, unless it can be proven that this is due to:

a. An unavoidable event;
b. The goods have been damaged;
c. Sender's error.

Dr. R. Wirjono Prodjodikoro, S.H., in his book entitled "*Law of the Sea for Indonesia*" said that there are two responsibilities of the carrier or ship owner, namely:

a. To the legal action committed by the workers on the ship;
b. Losses caused by unlawful acts committed by employees in their work environment.

Considering the risks that must be borne by entrepreneurs and/or owners of marine cargo, the insurance system appears as a transfer form of burdens and responsibilities in order to relieve ship owners.

## II. MARINE CARGO INSURANCE IN INDONESIA

Regulations on insurance in general in Indonesia are regulated in the Commercial Code (KUHD / ICC) and such definition is in Article 246. KUHD / ICC in essence regulates that insurance or coverage is an agreement between the insurer and the insured. The insurer gets a premium from the insured and the insured has the right to receive compensation, loss or transfer of risk from the insurer. This compensation is caused by conditions due to loss, damage or failure in obtaining the benefits as expected by the insured due to something that is uncertain or unpredictable.

In particular, marine cargo insurance means the insured's coverage which is charged to the insurer for matters contained in the sea transportation, including:

a. the sea transport itself (empty or loaded, armed or not, sailing alone or together with other ships);
b. Marine transportation equipment;
c. War equipment in sea transportation;
d. Foodstuffs, and in general all costs incurred by the shipping company;
e. cargo goods in sea transportation;
f. The expected profit from the implementation of sea transportation;
g. Transportation costs to be obtained;
h. And others.

The existence of insurance is an important factor for entrepreneurs or owners of marine cargo. This is because sea transportation insurance ultimately bears the responsibility of the insured (in this case the entrepreneur or marine cargo owner) according to the amount of loss he suffers. This is in accordance with the principles of the insurance agreement as follows:

a. The principle of indemnity, which means that the payment of claims in the form of compensation must be in accordance with the losses suffered;
b. The principle of interest, which means that there must be an interest between the insured and the object of insurance;
c. The principle of good faith, which means that the parties will carry out their respective rights and obligations as agreed in the insurance policy;
d. The principle of subrogation, which means that there is a transfer of the right to sue a third party as the cause of the loss, in this case the right to sue the loss party becomes directed to the insurance company;
e. *Proxima Causa*, which means that insurance as the insurer only accepts claims or the insured (employer and/or owner of sea transportation) is only entitled to receive compensation if it is proven that the loss occurred from the risks guaranteed in the insurance agreement.

In Indonesia, in general, insurance claims for risks can be made by the insured to the insurer if the following conditions occur:

a. Fire or explosion in sea freight;
b. stranded sea transportation and/or landed at the emergency port;
c. Collision with other objects/vessels;

d. Unloading of goods at the emergency port;
e. Disposal of goods into the sea;
f. The sweep of the waves;
g. Damage to sea transportation and/or cargo due to sea water;
h. Losses incurred during loading and unloading of sea transportation;
i. There are a number of costs incurred by the insured to save sea transportation and/or its cargo.

In marine transportation insurance policies, in general the insurer and the insured agree on the following matters:

a. Identity and legal standing of the parties
b. The validity period of the agreement
c. Definition (transport, ship, jettison, abandonment, etc.)
d. Guaranteed risk (loss, damage and liability for goods and interests borne);
e. Exceptions to the risks borne (because the ship is unfit or imperfect, war conditions, riots, due to the fault of the ship owner/insured,
f. General loss
g. Obligation of ship owner / carrier / insured to disclose facts
h. Premium payment and currency used
i. The rights and obligations of the parties during the transit period, at the end of the carriage agreement or when there is a change in the route of travel
j. Insurance claim
k. Total loss
l. Payment of compensation and loss of right to claim compensation
m. Abandonment / abandonment
n. Settlement of Disputes / Disputes through Arbitration

As regulated in Article 255 of the KUHD / ICC, the agreement between the insurer and the insured containing the clauses as described above must be agreed in writing. The coverage in the form of insurance is recorded in a document called a marine cargo insurance policy.

## III. ARBITRATION AS SETTLEMENT OF MARINE CARGO INSURANCE DISPUTE IN INDONESIA

In the implementation of the agreement in the marine cargo insurance agreement, it is common of having disputes between the insurer (insurance company) and the insured (entrepreneur and/or owner of sea transportation). Disputes on marine cargo insurance occur due to several conditions, including the following:

a. Non-payment of insurance claims by the insurer (in this case the insurance company) even though all claim requirements have been met by the insured and have been acknowledged by the insurer;
b. Refusal of payment of insurance claims by the insurer;
c. The value of the claim offered and/or paid by the insurer is lower than the value claimed by the insured;
d. Policy recovery / reinstatement ; and/or
e. Policy redemption / surrender.

To resolve disputes that arise in the implementation of agreements related to marine cargo insurance between the insurer and the insured, the dispute settlement clause in the marine cargo insurance coverage agreement must be considered. In Indonesia, if the dispute resolution related to the implementation of marine cargo insurance coverage is brought to an arbitration forum, then there must be an arbitration clause on such marine cargo insurance as a dispute resolution, which is as follows:

> *"It is hereby stated and agreed that the Insured and the Insurer will settle the dispute through Arbitration in accordance with the Arbitration Rules and Procedures or through other Insurance Dispute Resolution Alternative Institutions registered with the Financial Services Authority of Republic of Indonesia."*

Arbitration is a way of resolving a civil dispute outside the court based on an arbitration agreement made in writing by the disputing parties. In Indonesia, dispute resolution related to insurance used to be done through the Indonesian Insurance Mediation and Arbitration Agency / BMAI. However, as of January 1, 2021, dispute resolution related to insurance is carried out through the Financial Services Sector Alternative Dispute Resolution Institution of Republic of Indonesia (LAPS SJK) which replaces the role of BMAI as stipulated in POJK Number 61/POJK.07/2020.

One of the important factors that must be considered by the insured as the applicant in the settlement of maritime cargo insurance disputes through an arbitration institution is the willingness of the parties to resolve this dispute by negotiating to get a win-win solution in a fast period of time. The main key to the successful negotiations is the existence of a agreed point between the wishes of the insured / applicant and the insurer / respondent. In the practice of arbitration, sometimes the Arbitrator Council requests that the company director or the policy makers of the insured / applicant and insurer / respondent can meet directly to negotiate in order to get a win-win solution. To reach the agreed point, it is recommended that the insured / applicant inform the lowest point of the negotiation point, and the insurer / respondent informs the maximum point that he can bear. With the movement in the level of demand and ability of the parties, it is hoped that a dispute settlement agreement will be reached which will eventually be embedded in the arbitration award which is final and binding.

However, if the negotiation effort unable to reach an agreement, then the next stage that must be a concern for the insured / applicant is about the evidences. Evidence in arbitration is not only be done through written evidence (documents, correspondence, etc.) but also by examining witnesses and expert examinations. At the evidentiary stage, the insured / applicant is charged with the obligation to prove that the condition he suffers is included in the agreement on the conditions that must be covered by

insurance. With the proven condition of coverage, the insured/applicant has the right to file an insurance claim to the insurer/respondent. The next issue is to prove that the insurance claim submitted by the insured / applicant is in accordance with the amount of loss suffered by the insured / applicant so that the insurer / respondent is obliged to pay the sum insured to the insured / applicant.

Therefore, the parties to the sea transport insurance agreement prefer to resolve the dispute through arbitration. Apart from being given the freedom to determine the number of the arbitral tribunal, the appointment of members of the arbitral tribunal, and even the schedule of the trial. For example, if the negotiation effort can be reached in a short time, then the result of the negotiation will be an arbitration award that must be implemented by the parties. Even if negotiations fail and the case is continued, the period of examination of the case in arbitration can also be completed in a shorter period of time than conventional courts.

## IV. CLOSING

It is important for entrepreneurs or owners of sea transportation to prioritize the function of marine cargo insurance. The reason is because with the existence of marine cargo insurance, the burden of responsibility of the entrepreneur or marine cargo owner can be transferred to the insurance company. However, the liability must be in accordance with the amount of the loss suffered by the entrepreneur or the owner of the marine cargo transportation. The principle of implementing marine cargo insurance must be based on four principles, namely the principle of indemnity, the principle of interest, the principle of good faith, and the principle of subrogation. While the condition of insurance coverage for marine cargo transportation in general is against fire or explosion conditions of sea transportation, collision with other objects or sea transportation, damage due to sea water, unloading of goods at emergency ports, and others.

In general, maritime transport insurance disputes in Indonesia are related to the payment of insurance claims, in this case it can be in the form of non-payment of insurance claims by the insurer, underpayment of insurance claims by the insurer, and/or rejection of the insured's claim application by the insurer. To resolve the dispute through an arbitration institution, the insurer and the insured must include an arbitration clause in the sea transport insurance agreement. Dispute resolution through arbitration provides convenience for the parties because all procedural laws and the arbitration panel can be agreed upon by the parties, and the period of dispute examination is much faster than conventional courts.