



## INSURANCE ARBITRATION

*Main Topics :*

**Efektifitas Klausul Arbitrase dalam  
Meningkatkan Kualitas Perjanjian Asuransi**

*Junaedy Ganie*

**Timbulnya Sengketa Asuransi**

*Frans Lamury*

**The Role of Arbitration in Outer Space  
Insurance Dispute : International and  
National Law Aspects**

*Danrivanto Budhijanto*

*Side Topics :*

**Peran Mekanisme Penyelesaian Sengketa  
dalam Kebijakan Perlindungan Konsumen**

*Erman Rajagukguk*



**WIN-WIN SOLUTION**



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# Indonesia Arbitration

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## Contents

From the Editor ..... ii

### Main Topics :

Efektifitas Klausul Arbitrase dalam Meningkatkan Kualitas Perjanjian Asuransi  
*Junaedy Ganie* ..... 1

Timbulnya Sengketa Asuransi  
*Frans Lamury* ..... 5

The Role of Arbitration in Outer Space Insurance Dispute : International and National Law Aspects  
*Danrivanto Budhijanto*..... 15

### Side Topics :

Peran Mekanisme Penyelesaian Sengketa dalam Kebijakan Perlindungan Konsumen  
*Erman Rajagukguk* ..... 32

**News & Events** ..... 36

# From the Editor

Like they say, the future is full of uncertainties. This is where insurance will be needed. And this is also why the main and important objective of insurance contract is to give protection and financial security to the insured. It explains the principle of *Uberrimae Fide* or utmost good faith as one of the seven principle of insurance. But then, as always happened with a contract, potential dispute is always in there.

BANI have chosen insurance arbitration as its Newsletter main topic in anticipation of the growing need of protection in the area of business, trade, industry as well as individual health etc as a consequences of increasing demands of insurance as economic growth and people awareness also increases.

The Board of The Editor have chosen three Bani Arbiters to join the main topics. First, DR. Juanedy Ganie specializing on insurance dispute or claim settlement to explain the effectiveness of a dispute clause in insurance contract. Still in the main topics we welcome Frans Lamury elaboration on why dispute occurred and different types of insurance dispute as well as how to avoid the occurrence of potential disputes. In completion of the main topics Dr. Danrivanto Budhijanto article concentrated on the specific role of arbitration in outer space insurance dispute from both the national and international law aspect. The articles underlines the enormous increase in private commercial activity related to space in recent decades that should be followed by dispute resolution mechanism that extend beyond the diplomatic and governmental channels, which a historically used by the primary actors in the space industry : state parties. Finally, as side topics, a closing article is presented by Prof. Erman Rajagukguk on the dispute resolution mechanism rule in consumer protection Policy.

June 2014



A seasoned professional and business leader with a solid proven track record combining rare expertise and professional qualifications in life insurance, general insurance, broking and reinsurance business and passion for capacity building, risk management, good corporate governance and acceleration toward sustainable Indonesian insurance business growth and make insurance as part of the life style of the Indonesian society. His past professional insurance broker and risk management career has given him the competitive advantage to understand many of his clients' various nature of businesses from property, retail, manufacturing, to infrastructure, mining, shipping, aviation, petrochemical, oil and gas, forestry and hence being able to provide effective risk solutions.

Junaedy has been an arbiter at BANI since 2007. He has been President Director of BNI Life Insurance since 2011 to ensure successful transformation of the company. His past work experiences had been with US joint venture or US affiliated companies including representing Lippo Group for 16 years as CEO of Aon Indonesia. Junaedy is also an entrepreneur in a number of privately-held small-scale businesses.

Junaedy Ganie is in possession of doctoral qualification in Business Law from University of Padjadjaran (cum laude). Earlier educations include study in Economics and post graduate study in Business Administration. His professional qualifications includes being a Chartered Life Underwriter (CLU), Chartered Financial Consultant (ChFC), Certified Insurance Practitioner (CIP) and a Senior Associate, both from Australian and New Zealand Institute of Insurance and Finance and is an Ahli Asuransi Kerugian (honoris causa) from Asosiasi Ahli Manajemen Asuransi Indonesia (AAMAI).

Junaedy is author of Hukum Asuransi Indonesia text book.

# EFEKTIFITAS KLAUSUL ARBITRASE DALAM MENINGKATKAN KUALITAS PERJANJIAN ASURANSI

Dr. Junaedy Ganie

## Abstract

*The insurance industry in Indonesia has implemented standard dispute clauses especially for insurance policies written based on the standard set by the insurance company associations such as for fire or property insurance and motor vehicle insurance. The standard clauses offer options whether to incorporate the clause that would require to bring any dispute to the court, arbitration forum or to provide the privilege to the insured to select whether to bring the case to the court or to arbitration forum at the time of dispute. In practice, there are a number of variations used widely in Indonesia and most of them are adoption from the dispute clauses used overseas. The choice of non standard clauses may depend on the origin of the policy wording used. However, in a number of instances, total adoption of the clause without careful adaption to the local practices may expose the parties to the agreement to difficulties in the event of dispute due to the differences in the court system, local practice resulting in denial of the agreement due to different local perception. To give an example, there is a wording widely used in Indonesia which restricts the parties in dispute to bring to arbitration forum dispute concerning amount of claim (quantum) only. In other word, disputes regarding cause of loss, differences in interpretation, execution of policy conditions, breach of policy condition or termination would have to be first settled in court, a situation that may cause the parties in dispute to have dispute resolution in 2 different forums, in court and in arbitration forum. Such situation will definitely take longer and cost more. In fact, even the standard clause that provides the privilege to the insured to select between submitting dispute case to the court and arbitration forum is not without flaw. The clause provides no provision for insurer to be the first party seeking resolution of any difference without the insured first select the resolution forum.*

*Effectiveness of a dispute clause is critical for an efficient dispute or claim settlement to further promote the fast growing insurance potential in Indonesia. The continuous enhancement rests with the insurers keeping in mind that insurance contract is a Contract of Adhesion. Under such type of contract, insurer is the sole party preparing the contract wording and issuing the insurance policy and due to the lack of knowledge on the part of the insureds, in most cases insurance contracts hardly go through negotiations of the wording.*

Setiap pihak yang beritikad baik akan menghendaki setiap persengketaan dapat diselesaikan dengan adil dan efisien sesuai ketentuan yang berlaku. Sejalan dengan pertumbuhan

pesat bisnis asuransi di Indonesia dan meningkatnya kesadaran berasuransi masyarakat Indonesia, baik pada *asuransi umum* maupun *asuransi kehidupan* (asuransi jiwa), adalah hal wajar jika persengketaan dalam perjanjian asuransi dapat meningkat pula. Penyelesaian klaim terjadi mulai dari klaim yang sederhana yang dapat diselesaikan dengan cepat sampai kepada tuntutan atas klaim yang bersifat rumit dan menimbulkan perbedaan penafsiran. Mengingat prosedur penyelesaian klaim yang cepat dan adil akan berpengaruh besar dalam peningkatan kepercayaan masyarakat terhadap perlindungan asuransi dan dalam mendorong agar perlindungan asuransi dapat menjadi gaya hidup masyarakat Indonesia, penulis hendak mengemukakan beberapa hal pokok yang perlu menjadi perhatian para pemangku kepentingan terkait dengan ketentuan penyelesaian persengketaan antara penanggung dan tertanggung, khususnya tentang pentingnya dua hal, yaitu penyusunan klausul arbitrase yang efektif dan pandangan terhadap pengaduan penyelesaian sengketa melalui badan peradilan.

***Ketelitian dalam penyusunan klausul arbitrase dalam perjanjian asuransi dan implikasi bagi para pihak***

Polis-polis asuransi di Indonesia mengenal beberapa jenis klausul arbitrase, diantaranya terdapat klausul yang telah menjadi klausul baku khususnya bagi polis-polis yang mengacu kepada ketentuan asosiasi perusahaan perasuransian di Indonesia dan klausul-klausul yang mengikuti format asli dari polis-polis yang berasal dari luar negeri. Disamping itu, terdapat pula beberapa format khusus yang dibuat atau sebagai

hasil modifikasi dari bentuk aslinya terutama untuk polis-polis yang ditempatkan melalui pialang asuransi.

Klausul baku umumnya merujuk kepada penyelesaian persengketaan melalui salah satu forum, yaitu arbitrase atau badan peradilan atau klausul lain yang memberikan hak kepada tertanggung untuk memilih apakah akan menyelesaikan melalui arbitrase atau membawa perkara ke Pengadilan Negeri. Salah satu kekurangan dari klausul ini adalah kemungkinan adanya hambatan bagi penanggung untuk mengajukan upaya penyelesaian sengketa terlebih dahulu setelah upaya perdamaian dan musyawarah tidak menghasilkan kesepakatan apabila tertanggung tidak atau belum menentukan pilihan apakah akan membawa perkara ke forum arbitrase atau Pengadilan Negeri walaupun secara nyata telah terdapat ketidaksepakatan diantara para pihak yang perlu diselesaikan. Ketentuan tersebut seolah-olah memposisikan penanggung untuk tidak melakukan permohonan penyelesaian sengketa terlebih dahulu.

Tulisan ini tidak dimaksudkan untuk memberikan pandangan kepada pelaku usaha perasuransian tentang pilihan mana yang paling tepat atau lebih menarik untuk industri asuransi Indonesia dewasa ini atau membahas dampak tingkat pemahaman tertanggung pada umumnya tentang peranan pihak yang akan memeriksa perkara yang timbul dan tentang pemahaman hakim atas perjanjian asuransi. Kebijakan yang diambil tentu terkait erat dengan pandangan dan pemahaman pelaku usaha perasuransian (baca *underwriter* masing-masing perusahaan).

Khusus untuk klausul yang berasal dari polis-polis yang diadopsi dari luar negeri, masih terdapat polis-polis yang mempergunakan klausul

penyelesaian sengketa yang dapat menyulitkan para pihak dalam menyelesaikan perselisihan. Contohnya adalah klausul yang mencantumkan bahwa perselisihan yang timbul mengenai *quantum* atau jumlah klaim akan diselesaikan melalui forum arbitrase. Klausul ini akan membuat penyelesaian perselisihan harus melalui dua tahapan, yaitu pertama para pihak terlebih dahulu harus membawa persengketaan yang timbul ke Pengadilan Negeri untuk memeriksa dan memutus perkara tentang hal-hal yang bukan mengenai jumlah klaim, misalnya jika timbul persengketaan tentang penyebab kerugian, perbedaan penafsiran, pelaksanaan ketentuan polis, ketentuan tentang pembatalan dan pelanggaran terhadap kondisi polis. Setelah itu, jika terdapat persengketaan tentang jumlah klaim, baru dibawa ke forum arbitrase. Ketentuan ini akan membuat penyelesaian persengketaan akan berlangsung lama dan mungkin menimbulkan biaya yang lebih besar pula. Peningkatan efisiensi dan efektivitas metode penyelesaian perkara perselisihan antara penanggung dan tertanggung merupakan salah satu langkah efektif untuk meningkatkan citra bisnis asuransi. Tertanggung besar kemungkinan tidak akan memahami implikasi dari pilihan yang ada. Oleh karena itu pemahaman dan pilihan yang dilakukan oleh penanggung yang akan berperan penting, apalagi mengingat perjanjian asuransi bersifat Perjanjian yang Dipersiapkan Sepihak (*Contract of Adhesion*). Sifat sebagai *Contract of Adhesion* tersebut mendudukan penanggung sebagai pihak yang mempersiapkan ketentuan polis dan menerbitkan polis dan tertanggung menjadi pihak yang memiliki hak untuk menerima atau menyetujui tetapi seberapa banyak tertanggung yang memahami ketentuan yang akan diberlakukan dan akan adanya hak tersebut. Akibatnya, isi perjanjian asuransi jarang melalui proses negosiasi.

Pada sebuah bentuk klausul impor lainnya, terdapat ketentuan yang mengatur bahwa jika para pihak tidak sepakat untuk menunjuk arbiter tunggal, maka masing-masing pihak akan memilih satu arbiter untuk memeriksa dan memutus perkara yang timbul dan jika kedua arbiter tidak bersepakat dalam pengambilan putusan, kedua arbiter tersebut akan menunjuk seseorang untuk menjadi wasit (*umpire*) dalam memutus suatu perkara. Hal ini berarti bahwa keberadaan *umpire* tidak diperlukan jika diantara kedua arbiter yang telah ditunjuk tidak terdapat perbedaan pendapat dalam pengambilan putusan atas perkara yang mereka periksa. Dalam pengalaman penulis, ketentuan dalam klausul ini dan implikasi yang ada belum tentu sepenuhnya dipahami oleh semua penerbit polis.

Ketidakhahaman dapat melahirkan sikap yang menyulitkan proses penyelesaian sengketa dan merugikan para pihak terutama mengingat bahwa perjanjian asuransi merupakan Perjanjian Sepihak (*Unilateral Contract*). Berdasarkan sifat tersebut, pada perjanjian asuransi seolah-olah hanya penanggung yang membuat perikatan untuk melakukan prestasi walaupun polis bersifat kondisional, yaitu bahwa perjanjian asuransi akan menjadi batal apabila tertanggung melanggar kondisi-kondisi tertentu dari polis. Sesuai dengan sifat dari perjanjian asuransi tersebut, penanggung tidak dapat menolak klausul yang sudah melekat di polis yang diterbitkannya sendiri dengan alasan bahwa ketentuan demikian tidak lazim sehingga sekiranya diperjanjikan demikian maka dapat dikesampingkan. Sikap demikian tentu akan membingungkan tertanggung dan dapat menimbulkan

pertanyaan apakah akan diberlakukan sama kepada tertanggung sekiranya tertanggung yang merasa dirugikan atas ketentuan dalam polis asuransi yang dianggapnya tidak lazim dan merugikan setelah tuntutan klaim terjadi.

Terdapat berbagai bentuk klausul arbitrase yang dipergunakan oleh masing-masing penanggung untuk berbagai jenis polis selain dari polis-polis yang secara umum telah mempergunakan klausul baku. Praktik tersebut dipengaruhi oleh kebiasaan atau jenis klausul yang dipergunakan di negara asal tempat polis, reasuradur yang mendukung atau negara asal penanggung, masing-masing mungkin memiliki kelebihan dan kekurangan sendiri-sendiri setelah diberlakukan pada kondisi praktik bisnis asuransi dan tatanan hukum di Indonesia. Beberapa kejanggalan mungkin bersumber dari ketidaktepatan penanggung, misalnya penulis pernah menemukan klausul arbitrase yang merujuk kepada prosedur yang dimuat dalam *Arbitration Act 1952* yang tidak dikenal di Indonesia atau adanya klausul yang dapat menimbulkan kesulitan karena tidak memuat definisi atas suatu istilah yang dipergunakan yang belum lazim dikenal di Indonesia.

***Wewenang badan peradilan terhadap pengaduan perkara asuransi yang memuat klausul arbitrase***

Bagaimana kekuatan hukum sebuah klausul arbitrase? Apakah keberadaan klausul arbitrase dapat dikesampingkan bilamana timbul perselisihan?

Sesuai dengan konsep *autonomy, separability* atau *severability*, klausul arbitrase merupakan suatu perjanjian terpisah yang tidak akan secara otomatis berakhir apabila perjanjian induk

menjadi berakhir. Konsep tersebut termuat secara jelas pada Pasal 10 Undang-undang No. 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa yang menyatakan bahwa suatu perjanjian arbitrase tidak menjadi batal karena berakhirnya atau batalnya perjanjian pokok. Ketentuan Pasal 11 Undang-undang tersebut di atas secara tegas menyatakan bahwa perjanjian arbitrase meniadakan hak para pihak untuk mengajukan penyelesaian sengketa atau beda pendapat yang termuat dalam perjanjian ke Pengadilan Negeri, dan bahwa Pengadilan Negeri **wajib** (huruf tebal dari penulis) menolak dan tidak akan campur tangan di dalam suatu penyelesaian sengketa yang telah ditetapkan melalui arbitrase, kecuali hal-hal tertentu ditetapkan dalam undang-undang. Sesuai dengan asas *Pacta Sun Servanda*, keberadaan klausul tersebut atau modifikasi atas ketentuan yang dimuat di dalamnya hanya dapat dilakukan atas kesepakatan para pihak yang berkehendak melakukan ketentuan lain, misalnya dari semula bersepakat untuk membawa persengketaan ke forum arbitrase menjadi ke Pengadilan Negeri atau dari semula akan diperiksa oleh majelis arbitrase *ad hoc* lalu diubah untuk ke lembaga arbitrase tertentu.

Dengan demikian, jelaslah bahwa ketelitian dalam pembuatan klausul arbitrase dan sikap setiap pemangku kepentingan termasuk sikap badan peradilan merupakan faktor penting dalam efektifitas klausul arbitrase atau klausul penyelesaian sengketa dalam sebuah polis asuransi dalam upaya penyelesaian persengketaan termasuk tentang klaim asuransi yang timbul dalam praktik bisnis asuransi di Indonesia.

Jakarta, 21 April 2014.



Born in Flores (NTT) almost 72 years ago, 23 July 1942. Presently, holding several positions such as Chairman of Badan Mediasi dan Arbitrase Asuransi Indonesia (BMAI), Technical Advisor of Lippo General Insurance, listed as Arbitrator at BANI Arbitration Center and Member of Dewan Pakar of Asosiasi Ahli Manajemen Asuransi Indonesia (AAMAI).

Started his insurance career since more than 50 years ago. Joined several insurance companies (national and joint venture) and occupied several managerial position and retired as Vice President Director of PT Lippo General Insurance Tbk at the end of 2004.

Formal education : finished high school in the year 1961. Joined several local universities but none completed.

Gained insurance knowledge from Australian Insurance Institute, Melbourne and Chartered Insurance Institute, London and through courses and training of insurance from both local and overseas institutions.

Holding Senior Associate Membership of ANZIIF (Australia and New Zealand Institute of Insurance and Finance) and the certificate of Ahli Asuransi Indonesia (Kerugian) from Asosiasi Ahli Manajemen Asuransi Indonesia (AAMAI).

Since the year 2000 until now, often appointed as Member as well as Chairman of Ad-Hoc Arbitration Tribunals dealing with general insurance claims disputes.

# TIMBULNYA SENGKETA ASURANSI

Frans Lamury

## ABSTRACT

*There are several kinds of disputes in insurance business such as a) Non Payment of insurance premium by the Insured b) Repudiation of claim by the Insurer, c) Insurer is sanctioned by its regulator d) Reinstatement of life insurance policy, e) Surrender of life insurance policy, and f) Embezzlement of insurance premium by its agent.*

*The causals of disputes can be the A) Selling Process: The prospect does not fully apprehend the explanation by the seller. B) The Insurance Proposal - Forms : False and incorrect answers may cause the insurance policy to void or be voidable. C) Unintentional Buying : the prospects are not interested in buying insurance, and they are not paying attention to the explanation given by the seller and are disappointed when their claims are rejected. D) Compelling Buying : insurance is bought at the request of some interested party (financial institutions), leading to under insurance. E) Interpretation of Policy Terms and Conditions, for example, the exact time when the insurance begins and ends, the grace period to pay the premium, the accuracy of the description of the insurance objects, or misunderstanding of the terminology used in the policy. F) Calculation of Loss : the disagreements often arise in some areas insurance principles such as Indemnity, Contribution, Subrogation, Insurable Interest, and the Deductible/Own Risk. G) Perception Towards Loss Adjuster's Role : the outcome of the Loss Adjuster work is not accepted by the Insured. H) Service by Insurer's Claims Staff.*

*What Should Be Done By the Insurer : selling properly; spare enough time for explanation to the prospect; prepare the policy in simple and easy to understand language; provide prime quality service from the time of negotiating the deal until settlement of a loss. Always remember "The business of insurance is paying losses". For the Insured : answer all questions in the insurance proposal form correctly and honestly. Each and every question has its purpose. No question is redundant. Spare some time to read the insurance policy, if any point is unclear, please seek for clarification from the Insurer. Abide by all the policy conditions.*

**Key Words: Utmost Good faith, Proximate Cause, Indemnity, Contribution, Subrogation, Insurable Interest, Deductible/Own Risk.**

**Asuransi adalah Perjanjian**, seperti ternyata dari Undang-Undang yang disebut di bawah ini :

*KUHD pasal 246 : "Asuransi atau pertanggungan adalah **suatu perjanjian** dengan mana seorang penanggung mengikatkan diri kepada seorang tertanggung, dengan menerima suatu premi, untuk memberikan penggantian kepadanya karena suatu kerugian, kerusakan atau kehilangan keuntungan yang diharapkan, yang mungkin akan dideritanya karena suatu peristiwa yang tertentu".*

UU RI Nomor 2 tahun 1992 tentang Usaha Perasuransian : *"Asuransi atau pertanggungan adalah **perjanjian** antara dua pihak atau lebih, dengan mana pihak penanggung mengikatkan diri kepada tertanggung, dengan menerima premi asuransi, untuk memberikan penggantian kepada tertanggung karena kerugian, kerusakan atau kehilangan keuntungan yang diharapkan, atau tanggung jawab hukum kepada pihak ketiga yang mungkin akan diderita tertanggung, yang timbul dari suatu peristiwa yang tidak pasti, atau untuk memberikan suatu pembayaran yang didasarkan atas meninggal atau hidupnya seseorang yang dipertanggungkan".*

Suatu perjanjian senantiasa menciptakan hak dan kewajiban bagi para pihak yang mengikat diri di dalam perjanjian itu. Dan sebagai demikian, ia tidak luput dari perbedaan pendapat para pihak yang berjanji dan berakibat pada timbulnya sengketa di antara mereka.

Di dalam perjanjian asuransi Penanggung berkewajiban untuk memberikan ganti rugi kepada Tertanggung, apabila terjadi peristiwa yang diperjanjikan yang menimbulkan kerugian bagi Tertanggung.

Penanggung mempunyai hak untuk mendapat kontra prestasi berupa premi asuransi dari Tertanggung. Sebaliknya, Tertanggung mempunyai kewajiban membayar premi asuransi kepada Penanggung dan mempunyai hak untuk mendapatkan ganti rugi dari Penanggung, apabila terjadi peristiwa yang diperjanjikan yang menimbulkan kerugian baginya. Hak dan kewajiban dari Penanggung dan Tertanggung ini dinyatakan secara tertulis di dalam sebuah naskah yang dinamakan polis asuransi. Penanggung dan Tertanggung sama-sama mempunyai kewajiban untuk mematuhi sepenuhnya semua syarat dan ketentuan yang tercantum di dalam polis asuransi tersebut.

#### **TIMBULNYA SENGKETA ASURANSI**

Perselisihan pendapat antara para pihak di dalam suatu perjanjian selalu mungkin terjadi. Dan ini terjadi, akibat salah satu pihak tidak melaksanakan kewajibannya yang telah disepakati. Demikian juga di dalam perjanjian asuransi.

Penanggung tidak melakukan kewajibannya membayar ganti rugi kepada Tertanggung, dengan alasan Tertanggung tidak melaksanakan kewajibannya membayar premi asuransi atau Tertanggung tidak mematuhi ketentuan dan syarat polis asuransi, atau Penanggung memang tidak mempunyai uang untuk membayar klaim Tertanggung atau mungkin Penanggung telah bangkrut. Tertanggung tidak melakukan kewajibannya membayar premi karena ia lupa atau karena ia belum punya uang untuk membayar. Tertanggung tidak melakukan kewajibannya mematuhi syarat dan ketentuan polis karena mungkin ia tidak membacanya, atau jika ia membacanya, ia tidak memahami sepenuhnya syarat dan ketentuan polis tersebut. Jika selisih

pendapat antara Penanggung dan Tertanggung tidak dapat diselesaikan dengan cara musyawarah untuk mufakat, maka selisih pendapat itu akan bermuara pada sengketa yang harus diselesaikan melalui proses mediasi, arbitrase atau pengadilan negeri.

### **MACAM-MACAM SENGKETA ASURANSI**

Sengketa-sengketa asuransi yang sering terjadi adalah selisih pendapat mengenai :

#### **a) Pembayaran Premi Asuransi oleh Tertanggung**

Pada asuransi jiwa, premi selalu dibayar dimuka sebelum asuransi berlaku, oleh sebab itu tidak ada atau amat langka terjadi perselisihan karena premi asuransi yang belum dibayar. Lain halnya dengan asuransi umum. Di sini premi asuransi jarang dibayar di muka, tetapi dapat dibayar setelah asuransi berlaku, bahkan dapat dibayar secara angsuran. Akibatnya, Tertanggung bisa lupa atau kadangkala Tertanggung memang belum punya uang untuk membayar. Konsekuensi dari tidak dibayarnya premi asuransi pada waktunya ialah Tertanggung kehilangan hak untuk menuntut ganti rugi, sebab asuransi telah batal sejak premi tidak dibayar sesuai jadwal pembayaran yang telah disepakati.

Dampak jelek bagi Penanggung ialah bahwa ia mempunyai piutang premi yang tidak tertagih, untuk masa pertanggunganan yang telah diberikannya kepada Tertanggung selama tenggang waktu pembayaran premi.

#### **b) Penolakan Klaim oleh Penanggung**

Inilah jenis sengketa yang paling banyak terjadi. Tertanggung amat kecewa, sebab harapannya untuk mendapat ganti rugi tidak dipenuhi, terlebih pada saat ia

sangat memerlukan. Penyebabnya amat beragam, mulai dari saat penawaran asuransi oleh petugas atau agen asuransi hingga saat penuntutan ganti rugi oleh Tertanggung dan pelayanan petugas asuransi yang tidak memuaskan. Dua penyebab utama yang sering terjadi adalah : 1) Tertanggung tidak membayar premi atau 2) Tertanggung tidak melakukan kewajibannya sesuai syarat dan ketentuan polis.

#### **c) Penanggung Dikenakan Sanksi PKU (Pembatasan Kegiatan Usaha)**

Kegiatan badan usaha perasuransian diatur dan diawasi oleh Komisioner Otoritas Jasa Keuangan Bidang Institusi Keuangan Non Bank (OJK-IKNB). Berbagai sanksi dapat dikenakan kepada suatu badan usaha perasuransian, jika ada peraturan yang dilanggar. Sanksi dimulai dari yang ringan yaitu berupa teguran : teguran pertama, teguran kedua, teguran ketiga sampai kepada teguran terakhir yaitu Pembatasan Kegiatan Usaha (PKU). Pembatasan Kegiatan Usaha berarti perusahaan yang diberi sanksi tidak boleh berjualan untuk mendapatkan nasabah baru, tidak boleh menerbitkan polis baru atau perpanjangan polis bagi nasabah lama. Kegiatannya hanyalah melayani penuntutan ganti rugi dari Tertanggung.

Masa PKU dibatasi selama-lamanya satu tahun. Jika sebelum berakhirnya masa PKU, kesalahan yang mengakibatkan pelanggaran peraturan telah diperbaiki, maka PKU akan dicabut dan perusahaan asuransi dapat berusaha lagi seperti biasa.

Dalam status demikian ini, biasanya perusahaan asuransi tidak mempunyai cukup dana untuk membayar klaim Tertanggung.

**d) Pencabutan Izin Usaha Penanggung**

Selama masa PKU, perusahaan asuransi diharapkan dapat memperbaiki kinerjanya untuk menjadi sehat kembali, supaya sanksi PKU nya dapat dicabut dan dia dapat berusaha kembali seperti sediakala. Jika tidak, maka izin usahanya akan dicabut dan ini berarti ia berhenti berusaha sebagai perusahaan asuransi. Nasib Tertanggung tergantung dari berapa besar dana yang dimiliki pada saat pailit di jatuhkan.

**e) Pemulihan Polis Asuransi Jiwa (Reinstatement)**

Polis yang menjadi batal dengan sendirinya sebagai akibat dari pembayaran premi yang tidak teratur dapat dipulihkan kembali, tetapi proses pemulihannya dirasakan tidak adil bagi Tertanggung. Penanggung tidak bersedia menghidupkan kembali polis Tertanggung, atau jika bersedia menghidupkan, maka persyaratan-persyaratannya yang ditetapkan Penanggung dirasakan memberatkan oleh Tertanggung.

**f) Penebusan Polis Asuransi Jiwa (Surrender)**

Polis asuransi jiwa dapat ditebus apabila telah melampaui batas waktu tertentu saat nilai tunai polis sudah tercapai. Nilai tunai senantiasa lebih rendah dari pada jumlah premi yang telah dibayar Tertanggung. Tertanggung kurang memahami alasan penurunan nilai premi yang sudah pernah dibayarkannya itu.

**g) Penggelapan Premi Asuransi oleh Agen**

Agen, menurut Undang-Undang Perasuransian, adalah bagian dari Penanggung. Ia adalah perpanjangan tangan Penanggung. Membayar premi asuransi kepada Agen adalah sama

dengan membayar premi asuransi kepada Penanggung. Penanggung tidak boleh menyangkal pembayaran dengan cara ini dan apabila terjadi kerugian Penanggung tidak boleh menolak tuntutan ganti rugi dari Tertanggung dengan alasan premi asuransi belum diterima dari Agen.

**PENYEBAB TIMBULNYA SENGKETA ASURANSI**

Seluruh proses kegiatan perusahaan asuransi, mulai dari penjualan produk asuransi yang menyangkut perilaku penjual, persepsi calon nasabah yang kemudian menjadi Tertanggung, pemahaman Tertanggung tentang syarat dan ketentuan polis asuransi, sampai dengan perilaku petugas pelayanan klaim, dapat menjadi sumber penyebab timbulnya selisih pendapat antara Penanggung dan Tertanggung yang berakibat pada sengketa.

**A. Proses Penjualan Asuransi****1. Penjual Kurang Profesional**

Baik petugas penjualan yang adalah pegawai Penanggung, maupun para agen yang mewakili Penanggung, tidak mempunyai pemahaman yang cukup tentang syarat dan ketentuan produk asuransi yang dijualnya. Mereka juga tidak mempunyai pengetahuan yang memadai tentang dasar-dasar dan prinsip-prinsip asuransi. Semuanya ini menjadi penyebab penjelasan yang salah kepada calon nasabah yang berakibat pada pemahaman yang keliru dari calon nasabah yang kemudian menjadi Tertanggung. Pemahaman keliru Tertanggung ini kemudian menjadi penyebab timbulnya silang pendapat pada saat klaim terjadi. Harapan tidak sesuai dengan kenyataan.

## **2. Penjual Kekurangan Waktu Untuk Menjelaskan**

Para penjual mempunyai beban target premi asuransi yang ditetapkan oleh Penanggung yang harus dicapai dan hal ini akan bisa tercapai jika mereka dapat menjumpai calon nasabah sebanyak-banyaknya. Mengapa harus meluangkan waktu bagi satu orang calon nasabah pada hal dengan waktu yang sama mereka dapat bertemu dengan tiga atau empat orang calon nasabah yang lain? Penjelasan mengenai manfaat dan syarat serta ketentuan produk dilakukan seadanya dan cenderung mengenai hal-hal yang baik saja. Akibatnya, Tertanggung mempunyai pemahaman yang keliru mengenai apa yang dibelinya dan timbul kekecewaan tatkala ada klaim di kemudian hari.

## **3. SPPA Tidak Dijawab Dengan Benar dan Lengkap**

Surat Permintaan Pertanggungan Asuransi (SPPA) adalah sarana bagi Penanggung untuk mengetahui dengan baik sifat, keadaan obyek yang akan dipertanggungkan, baik mengenai diri manusia ataupun harta benda atau kepentingan lainnya. Penjual sering menganggap remeh tentang pentingnya fungsi SPPA ini. Padahal atas informasi yang diberikan calon Tertanggung di dalam SPPA inilah, Penanggung telah membuat penilaian atas risiko yang dihadapi dan menetapkan besaran premi serta syarat-syarat dan ketentuan perjanjian asuransi. Jika informai yang diberikan di dalam SPPA berbeda dengan fakta yang ada dan fakta tersebut memberikan risiko yang lebih tinggi kepada Penanggung,

maka Penanggung dapat menolak tuntutan ganti rugi dari Tertanggung. Amat sering terjadi, Penanggung menolak membayar klaim dengan alasan SPPA tidak dijawab dengan lengkap dan benar. SPPA sering diisi oleh penjual atau agen dan calon Tertanggung hanya menandatangani saja. Tertanggung senantiasa berada pada posisi yang lemah, ketika ada jawaban yang tidak sesuai dengan fakta, sebab SPPA yang tidak lengkap dan tidak benar diisi itu ditanda tangani olehnya. Tertanggung dianggap tidak mengungkapkan fakta yang material.

## **4. Pembeli Tidak Punya Cukup Waktu Untuk Mendengarkan**

Asuransi di negeri kita dijual, bukan dibeli. Artinya seseorang tidak berpikir tentang membeli asuransi, apabila asuransi tidak ditawarkan kepadanya, bahkan tidak jarang ia dipaksa untuk membeli, karena ada pihak lain yang berkepentingan, misalnya bank atau perusahaan pembiayaan. Calon Tertanggung mempunyai kesibukan mengurus pekerjaannya sendiri, ia tidak ingin membuang waktu, lagi pula bahan percakapan yang dibawakan penjual asuransi kurang menarik baginya. Akibatnya ia hanya mendengarkan apa yang suka didengarnya yaitu janji pembayaran ganti rugi dan mengabaikan hal-hal pokok yang menjadi kewajibannya. Lebih parah lagi, Tertanggung tidak membaca polis asuransi pada saat ia menerimanya. Mungkin membaca seadanya dan walaupun tidak paham mendiarkannya saja, Tertanggung tidak meminta penjelasan lebih lanjut dari Penanggung.

## B. Alasan membeli asuransi

### 1. Dipaksa Membeli Asuransi

Seseorang terpaksa berasuransi karena diwajibkan oleh pihak lain yang mempunyai kepentingan, misalnya bank atau lembaga keuangan/pembiayaan. Akibatnya, sering terjadi Nilai Pertanggungan ditetapkan hanya sebesar nilai pinjaman dari bank yang berakibat pada terjadinya "asuransi di bawah harga" (underinsurance) yang tidak disadari oleh Tertanggung. Pembayaran klaim menjadi tidak penuh, sebab prinsip tanggung renteng (contribution) berlaku.

### 2. Terpaksa Membeli Asuransi

Membeli tidak dengan niat yang sungguh-sungguh, karena sekedar ingin membantu teman yang berprofesi sebagai penjual, atau mengindahkan rujukan kawan atau ingin menghindari dari penjual yang ngeyel. Mendengarkan penjelasan sambil lalu dan membeli seadanya dan mengalami kekecewaan di saat hendak menuntut ganti rugi kepada Penanggung.

## C. Penafsiran dan Pemahaman isi polis asuransi

### 1. Saat Mulai dan Berakhirnya Polis

Pukul berapa polis mulai berlaku dan pukul berapa polis berakhir? Waktu di tempat mana yang berlaku? Di tempat polis diterbitkan atau di tempat obyek pertanggungan berada? Untuk menghindari kesalahpahaman biasanya, di dalam polis, setelah tanggal mulai dan tanggal berakhir pertanggungan, ditambahkan kata-kata : "*kedua hari tersebut pada pukul 12 siang di tempat polis diterbitkan*".

### 2. Pembayaran Premi Asuransi

Pertanggungan asuransi baru mulai berlaku setelah premi asuransi dibayar oleh Tertanggung. Oleh karena itu, ketika terjadi musibah padahal premi belum dibayar oleh Tertanggung, maka klaim ditolak. Seringkali Penanggung memberikan tenggang waktu pembayaran (grace period) selama 14 atau 30 hari sejak tanggal mulai berlaku yang disebut di dalam polis. Pertanggungan telah berlaku selama masa tenggang, tetapi jika premi tidak dibayar setelah masa tenggang terliwati, maka klaim tidak dibayar karena polis telah berakhir dengan sendirinya. Pertanggungan tertunda bila premi belum dibayar setelah masa tenggang. Pembayaran melalui transfer bank baru diakui bila dana telah sungguh-sungguh masuk ke dalam rekening Penanggung. Pembayaran dengan cek baru diakui setelah ceknya diuangkan.

### 3. Penggunaan Obyek Pertanggungan (Occupation)

Bangunan yang dijamin asuransi digunakan untuk apa? Rumah Tinggal? Toko? Pabrik Tekstil? Bengkel Perbaikan Mobil? Etc..? Mobil dipakai untuk apa? Pribadi? Disewakan untuk mengangkut penumpang? Disewakan untuk mengangkut barang? Etc..? Apa pekerjaan seseorang yang dirinya diasuransikan terhadap risiko kecelakaan? Pekerjaan terkait administrasi? Pekerja penjualan? Tukang batu, kayu besi..? Sopir? Jenis penggunaan obyek pertanggungan dan jenis pekerjaan menentukan tinggi rendahnya risiko yang dihadapi Penanggung dan atasnya premi serta syarat dan ketentuan polis asuransi ditetapkan

oleh Penanggung. Penggunaan obyek pertanggungan dan jenis pekerjaan disebutkan di dalam polis; bila penggunaan obyek pertanggungan dan jenis pekerjaan dalam kenyataan tidak sesuai dengan apa yang disebut di dalam polis, klaim tidak dibayar

#### 4. Uraian Obyek Pertanggungan

Uraian mengenai apa yang menjadi obyek pertanggungan seringkali tidak spesifik, terlampau umum. Jika yang disebut sebagai obyek pertanggungan adalah "Isi rumah" misalnya, apakah sepeda, komputer, lap top, handphone termasuk di dalamnya? Jika yang disebut hanya "Stok", maka semua jenis stok mulai dari stok bahan baku, stok bahan pembantu, barang dalam proses, stok barang jadi termasuk semuanya.

Ketidak-jelasan penguraian obyek pertanggungan biasanya menjadi kesalahan Penanggung, sebab ia yang membuat polis asuransi tersebut.

#### 5. Istilah-istilah Yang Digunakan di Dalam Polis

Banyak istilah yang digunakan di dalam polis tidak mempunyai pengertian yang sama dengan pengertian yang berlaku umum di dalam masyarakat. Istilah-istilah ini biasanya didefinisikan pengertiannya di dalam polis misalnya : Kerusakan, Huru-hara, Terorisme, Sabotage, Pemogokan dll. Dalam asuransi Jiwa misalnya Penyakit, Kecelakaan, Masa Tunggu, Penyakit yang sudah ada dll. Jika terjadi sesuatu peristiwa, maka pengertian yang didefinisikan di dalam polis itulah yang berlaku dan bukan pengertian umum.

#### D. Penghitungan Jumlah Ganti Rugi oleh Penanggung

Bila terjadi sesuatu peristiwa yang dijamin oleh polis yang menimbulkan kerugian bagi Tertanggung, maka Penanggung akan memastikan terlebih dahulu apakah peristiwa itu dijamin oleh polis dan semua ketentuan polis telah dipenuhi. Setelah itu Penanggung menghitung besarnya jumlah ganti rugi yang akan dibayarkan kepada Tertanggung berdasarkan beberapa azas yang diuraikan di dalam polis, misalnya :

##### a. Indeminitas (Indemnity)

Azas ini mengatakan bahwa Tertanggung akan dibayarkan ganti rugi setinggi-tingginya sebesar kerugian yang dideritanya, dengan syarat Nilai Pertanggungan dari Obyek Pertanggungan harus sama dengan Nilai Sesungguhnya dari Obyek Pertanggungan tersebut. Jika Nilai Pertanggungan lebih rendah dari pada Nilai Sesungguhnya, maka Tertanggung akan mendapat ganti rugi secara prorata yaitu sebesar Nilai Pertanggungan dibagi Nilai Sesungguhnya dikalikan Besarnya Kerugian Sesungguhnya. Mengapa demikian? Karena asuransi adalah memindahkan risiko kepada perusahaan asuransi dan pemindahan risiko itu, bisa seluruhnya atau sebagian saja. Dalam hal mengasuransikan dengan nilai dibawah nilai sesungguhnya dari obyek tersebut, berarti pemindahan risiko tersebut hanya sebagian saja dan bagian yang lainnya masih ada pada yang empunya. Oleh sebab itu, ketika terjadi musibah, kerugian yang timbul harus dipikul oleh Penanggung dan Tertanggung secara prorata.

### **b. Kontribusi (Contribution)**

Jika sebuah Obyek Pertanggungan yang sama diasuransikan pada beberapa perusahaan asuransi, maka jumlah ganti kerugian yang dibayarkan kepada Tertanggung adalah sama dengan perhitungan Indemnity pada huruf a. di atas dan jumlah tersebut dibagi secara prorata kepada semua perusahaan asuransi yang menanggung, sebanding Nilai Pertanggungan mereka masing-masing. Tertanggung tidak boleh mendapat ganti rugi lebih besar daripada kerugian yang dialaminya.

### **c. Subrogasi (Subrogation)**

Hak untuk menuntut ganti kerugian dari seseorang yang oleh karena kesalahan/kelalaiannya telah mengakibatkan kerugian pada orang yang menuntut, harus berpindah dari Tertanggung kepada Penanggung setelah Penanggung membayar ganti rugi kepada Tertanggungnya sesuai syarat dan ketentuan polis. Hak subrogasi Tertanggung harus berpindah kepada Penanggung, sebab jika tidak demikian, maka Tertanggung akan mendapat ganti rugi lebih besar daripada kerugian yang sesungguhnya ia derita.

### **d. Kepentingan Berasuransi (Insurable Interest)**

Tidak hanya karena namanya tercantum sebagai Tertanggung yang disebutkan di dalam polis asuransi, maka seseorang dapat menuntut ganti rugi kepada Penanggung, tetapi ada syarat-syarat lain yang harus dipenuhi olehnya. Setelah terjadi suatu peristiwa yang diperjanjikan yang menimbulkan kerugian bagi Tertanggung, Tertanggung harus membuktikan bahwa ia mempunyai

kepentingan atas harta benda yang dipertanggungkan itu. Tertanggung harus membuktikan bahwa ia adalah Pemilik sah dari harta benda yang diasuransikan. Pembuktian tentang kepemilikan tidak diminta Penanggung pada saat asuransi dimulai tetapi pada saat penuntutan ganti rugi dilakukan oleh Tertanggung. Penanggung meyakini bahwa setiap orang yang akan mengasuransikan sesuatu harta benda, mempunyai iktikad yang baik yaitu ia tidak mengasuransikan harta benda orang lain, melainkan harta benda kepunyaannya sendiri.

### **e. Risiko Sendiri (Deductible)**

Adakalanya Tertanggung harus memikul sendiri sebagian dari jumlah kerugiannya, oleh karenanya jumlah tersebut selalu dikurangi dari ganti kerugian yang dibayarkan oleh Penanggung. Ketentuan ini jelas tercantum di dalam polis. Risiko sendiri yang harus dipikul oleh Tertanggung dimaksudkan untuk beberapa tujuan yaitu : 1) agar Tertanggung berhati-hati dan ikut menjaga keselamatan harta benda yang diasuransikan – jangan mumpung ada asuransi; 2) untuk mengurangi risiko Penanggung; 3) untuk menurunkan besaran premi asuransi yang dibebankan kepada Tertanggung; 4) untuk menghindari pengurusan klaim-klaim yang kecil-kecil - biaya pengurusan lebih tinggi dari pada ganti rugi yang dituntut.

### **E. Pandangan Terhadap Loss Adjuster**

Fungsi Loss Adjuster ialah memberikan jasa profesional kepada Penanggung manakala ada peristiwa yang mengakibatkan kerugian pada Tertanggung, dengan melakukan investigasi mengenai penyebab timbulnya kerugian. Loss Adjuster juga

harus menghitung besarnya kerugian yang dialami Tertanggung dan besarnya kerugian yang harus dibayar Penanggung kepada Tertanggung sesuai perjanjian polis asuransi. Loss Adjuster adalah suatu badan usaha yang bersifat profesional yang independen dan imparisial. Ia tidak membela siapa-siapa dan ia pun tidak dapat dipengaruhi oleh siapapun.

**a. Memihak dan tidak independen**

Loss Adjuster, oleh Tertanggung dianggap memihak kepada Penanggung dan tidak independen karena ia ditunjuk dan dibayar jasanya oleh Penanggung, padahal Loss Adjuster adalah sebuah badan usaha independen yang profesional yang menyediakan jasanya untuk digunakan siapa saja. Untuk menghindari pandangan ini, Tertanggung dan Penanggung bersepakat sejak awal asuransi dimulai, menetapkan Loss Adjuster yang akan digunakan manakala timbul klaim.

**b. Kurang Profesional**

Loss Adjuster dianggap Tertanggung kurang memahami seluk-beluk teknis usaha yang dijalankan oleh Tertanggung. oleh karenanya mereka tidak dapat menilai dan menghitung dengan benar kerugian yang dialami Tertanggung. Loss Adjuster, memang bukan orang yang tahu segalanya, namun karena sifat usahanya yang berhubungan dengan banyak disiplin ilmu, mereka senantiasa bekerja sama dengan pihak-pihak yang ahli dalam bidang tertentu, bila mereka membutuhkannya. Tidak ada seorangpun ahli dalam segala hal, oleh sebab kerja sama dengan pihak lain yang menguasai permasalahan harus dilakukan.

**F. Cara Penanganan Petugas Klaim**

**a. Petugas Klaim Tidak Menjelaskan Dengan Baik**

Petugas klaim kurang mampu menerangkan dengan baik alasan penolakan klaim. Ketika klaim ditolak, sulit bagi Tertanggung untuk mencerna penjelasan Penanggung, apalagi bila penjelasan diberikan oleh petugas yang belum berpengalaman. Tertanggung segera merasa kecewa, sebab apa yang diharapkan berbeda dengan kenyataan yang ia hadapi.

**b. Petugas klaim sulit dihubungi**

Ketika klaim diajukan, Tertanggung ingin segera dilayani. Keterlambatan sedikit saja dapat menjadi perkara besar. Perkara bisa menjadi lebih besar ketika klaimnya ditolak.

**KESIMPULAN DAN SARAN**

Asuransi adalah sebuah bisnis yang dilakukan melalui perjanjian tertulis. Asuransi juga mempunyai banyak aspek teknis yang spesifik yang perlu dimengerti dengan baik oleh para pihak yang terlibat di dalam perjanjian itu, yaitu Penanggung, Tertanggung, Pemegang Polis dan Ahli Waris. Oleh sebab itu, perlu kecermatan dan kearifan dalam menyusun naskah perjanjian tersebut. Berbeda dengan perjanjian pada umumnya di mana naskah perjanjian dibuat dan disepakati bersama oleh para pihak yang akan mengikat janji, naskah perjanjian asuransi dibuat oleh Penanggung sendiri tanpa keterlibatan pihak Tertanggung, Pemegang Polis atau Ahli Waris. Penanggung, oleh karenanya, adalah pihak yang paling mengerti tentang isi perjanjian tersebut. Meskipun demikian, Tertanggung, Pemegang Polis dan Ahli Waris wajib memahaminya juga, sebab mereka adalah pihak dari perjanjian asuransi itu.

Perjanjian asuransi memang rentan terhadap kesalah-pahaman yang dapat berakibat pada timbulnya sengketa. Oleh sebab itu, para pihak yang terlibat, harus memperhatikan hal-hal berikut :

**Penanggung :**

- ❖ Lakukanlah penjualan dengan benar, dengan membekali para penjual pengetahuan yang memadai agar mereka mampu menjelaskan dengan benar syarat dan ketentuan dari produk asuransi yang dijualnya.
- ❖ Buatlah naskah asuransi dalam bahasa sederhana yang mudah dipahami kaum awam asuransi, agar terhindar dari selisih paham yang tak perlu. Ukuran font huruf yang memadai, agar mudah dibaca.
- ❖ Berikanlah pelayanan sebaik-baiknya kepada para nasabah dan tepatilah janji yang menjadi hak mereka.  
*(Your business is paying losses, that is what you are here for).*

**Nasabah :**

- ❖ Jawablah semua pertanyaan di dalam formulir SPPA dengan benar, jangan ada yang dibiarkan kosong. Isilah sendiri formulir SPPA; jika tidak memungkinkan, boleh diisi orang lain, tetapi jawaban harus datang dari anda dan bacalah dan pastikan kebenaran jawaban-jawaban tersebut sebelum SPPA anda tandatangani.
- ❖ Bacalah dengan seksama naskah perjanjian asuransi (polis) segera setelah polis diterima. Bila ada isinya yang tidak jelas, klarifikasikan dengan Penanggung. Bila ada yang tidak sesuai dengan keinginan anda, mintalah Penanggung mengubahnya.
- ❖ Patuhilah semua ketentuan dan syarat perjanjian asuransi (polis) agar tidak ada alasan bagi Penanggung menolak tuntutan ganti rugi anda.

Semoga.

## Upcoming Events



The RAIF is a regional arbitral organisation found in 2007 by the Singapore Institute of Arbitrators, the Malaysian Institutes of Arbitrators, the Institute of Arbitrators and Mediators Australia, the Hong Kong Institute of Arbitrators, the BANI Arbitration Centre and the Arbitration Association of Brunei Darussalam. The RAIF was established to allow its members to collaborate on certain common objectives, including serving the educational and social needs of the members of the arbitral institutes, facilitating the exchange and dissemination of information on arbitration and promoting understanding and co-operation between their respective institutes

More details information on <http://www.siarb.org.sg>



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## The Role of Arbitration in Outer Space Insurance Dispute : International and National Law Aspects

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### ABSTRAK

Kegiatan pemanfaatan ruang angkasa oleh umat manusia telah berpusat kepada komersialisasi dan industrialisasi, yang tidak saja memanfaatkan teknologi termaju namun juga dengan biaya yang sangat mahal dan memunculkan risiko yang tinggi serta bervariasi. Risiko secara teknikal dan finansial perlu diantisipasi dengan mekanisme asuransi. Karakter yang khusus dan unik dalam pemanfaatan ruang angkasa menjadikan perlunya mekanisme asuransi yang memadai. Perbedaan dan pertentangan kepentingan yang memunculkan sengketa terhadap komersialisasi ruang angkasa perlu diantisipasi dengan forum penyelesaian sengketa. Arbitrase sebagai mekanisme dan forum penyelesaian sengketa komersial dapat mengambil peran yang penting. Tulisan ini mengilustrasikan dan menganalisis karakter asuransi dalam komersialisasi dan industrialisasi kegiatan di ruang angkasa (termasuk pengertian dari asuransi ruang angkasa, permasalahan hukum dalam kegiatan asuransi ruang angkasa, kontrak kegiatan ruang angkasa, kontrak asuransi kegiatan ruang angkasa, industri asuransi ruang angkasa); implikasi asuransi terhadap industri ruang angkasa; penyelesaian sengketa pada kegiatan ruang angkasa, peran arbitrase dalam penyelesaian sengketa asuransi ruang angkasa; serta kebijakan dan legislasi kegiatan ruang angkasa di Indonesia.

### A. Introduction

Insurance is generally reputed to be a monotonous-subject. Space Law or Outer Space Law, on the other hand, has sometimes been regarded only as an academic with speculative exercise. After having listened to the space law experts' and lawyers' contributions one should quickly get rid of their doubts,

if he had any: insurance is by no means a monotonous-subject nor is Space Law a speculative academic exercise. They are a simply fascinating, extraordinary and highly demanding arena where hundreds of million of dollars are spent in complex projects which might spectacularly, yet painfully, vanish into the air leaving technical speculations on the ground open as to what happened and sometimes, harsh legal disputes on whose fault it was.

While many of the mistakes have been rectified resulting in the insurance market returning to profitability, satellite operators were disdainful over some of the changes and noted that some space insurance policies had become no longer good value for money. For example, with the ending of multi-year post launch in-orbit insurance at each annual renewal insurers were able to impose exclusions every year according to what faults showed themselves to the insured and related satellites. Brokers note that while insurers initially sought to exclude everything that was problematic, since then there are signs that they have taken a more balanced view to the application of "equipment based" exclusions. The first space insurance loss event for 2013, in a Zenit 3-SL sea launch rocket failure, Intelsat 27 was lost on 1 February. The satellite's insured value including the main policy and top-up policies totaled \$406 million.

This paper will illustrate and discuss the insurance characteristic in commercialization and industrialization of outer space activities (include definition of outer space insurance, legal issues arising from insured outer space activities, outer space contracts or agreements, outer

space insurance contracts or agreements, outer space industry and insurance spin-offs); the insurances implication in outer space industry; the settlement of disputes in outer space activities; the role of arbitration in outer space insurance dispute; and Indonesian legal and policy in outer space activities.

## **B. The Insurance Characteristic in Commercialization and Industrialization of Outer Space Activities**

### **1. Definition of Outer Space Insurance**

The definition of "Space Insurance" or "Outer Space Insurance", that understand as a typically a space insurance coverage is meant to indemnify the owner of a telecommunication satellite during all the sequential phases of its launching, transportation and placement in (most of the times) geostationary orbit at about 36,000 Km from the earth and during its "operational life" against the risk of loss or physical damage to it.

We can, therefore, ideally limit to three main time frames when the satellite is exposed to some sort of "homogeneous risks":

- a. the "pre-launch" phase (transportation from the manufacturer's premises to the launch site and preparation to launch);
- b. the "launch phase" (from ignition of the launch vehicle transporting the satellite to the completion of in-orbit tests in geostationary orbit); and
- c. the "in-orbit phase" (from beginning of commercial operations to the "natural end of life", i.e. the time when the station keeping fuel on

board the satellite is exhausted and it is placed in the so-called "graveyard orbit").

All above mentioned phases are intimately connected and the relevant insurance contracts must carefully match one another, because the insurers might not be the same and, after the satellite is launched, it is often uncomfortable to go out on the spot and investigate the "fortuitous event" which has caused the damage at a given moment in time.

Apart from the main "property coverage" on the satellite itself, there are other policies that are currently offered by the space insurance market: for example the "third party legal liability" policy, which covers the liability for damage to third parties. Another one indemnifies the insured for "loss of revenue and extra expenses", in case of interrupted communications leading both to cancellation of contracts with the various broadcasters who use the satellite's channels and to extraordinary expenses to reactivate the service.

## **2. Legal Issues Arising from Insured Outer Space Activities**

### **a. Outer Space Contracts or Agreements**

Outer Space contracts include satellites and transponders (channels) purchase agreements, launch services agreements and space insurance policies. Ambiguity in contract wording is the greatest contributor to space contract litigation. Ambiguity is certainly the reason why so many warranty

disclaimers used in contracts between space manufacturers and service providers, on the one side and their customers, on the other, have also been challenged in courts. The satellite manufacturer and the launch service provider have long been seeking to limit or disclaim their liability towards their customer, the satellite owner, on the assumption that space is a high-risk area of endeavor. Liability limitation provisions are therefore used in these contracts so that the customer undertakes to assume damage to his own property and to waive any claim against any other participant. Furthermore, he has to ensure that his own sub-contractors adhere to the same provisions. However, this interparty waiver of liability approach is sometimes implemented with excessively restrictive language, sometimes with an overly inclusive one.

### **b. Outer Space Insurance Contracts or Agreements**

Some recurring problem areas in both launch and in-orbit coverage which have given rise to space related insurance disputes. The "insuring agreements" are the core of a space policy. There the parties "meet their minds" and it is there that, in case of dispute, the existence of mutual assent is to be ascertained. Unfortunately not always is this mutual assent clearly expressed in the policy wording. Sometimes the language used is conditional in nature, like in the following example: "underwriters will indemnify the assured if the

power output on the transponder (i.e. channel) fails to meet a level to be later agreed." On the other hand, in the sentence "Underwriters will indemnify the assured if the power output on the transponders falls below a usable level" the true intent of the parties does not appear 'as univocal. A typical provision in a space policy is the "due diligence" clause. Typically the Insured warrants to "use due diligence and do and concern in doing all things reasonably practicable to avoid or diminish any loss under the policy". But what is "reasonable" in space activities? For the Leasat 3 satellite, marooned in low orbit, a total loss was paid by all insurers but one, who was brought to court by the insured. A jury in California determined that it would have been reasonable to attempt an unprecedented salvage mission via a Space Shuttle to repair the stranded satellite, with a cost approaching one-quarter of the total cost of the satellite itself, and rejected the claim.

### c. Outer Space Industry and Insurance Spin-Offs

Orbital arc availability is no longer just a hypothetical problem. There might soon be cases where a satellite is drifted on purpose into the operational orbital slot of another, causing unprecedented interference problems for the broadcasting of the latter with very little remedies to the injured party. This scenario would call for a different definition of "total loss" (currently limited to physical

damage to the satellite), a new interpretation of the "due diligence clause" (should it include the commencement of legal action to defend the insured's right in front of the international telecommunication authorities?), and perhaps, new commercial demands to satisfy the need to actually buy orbital slots from commercial firms.

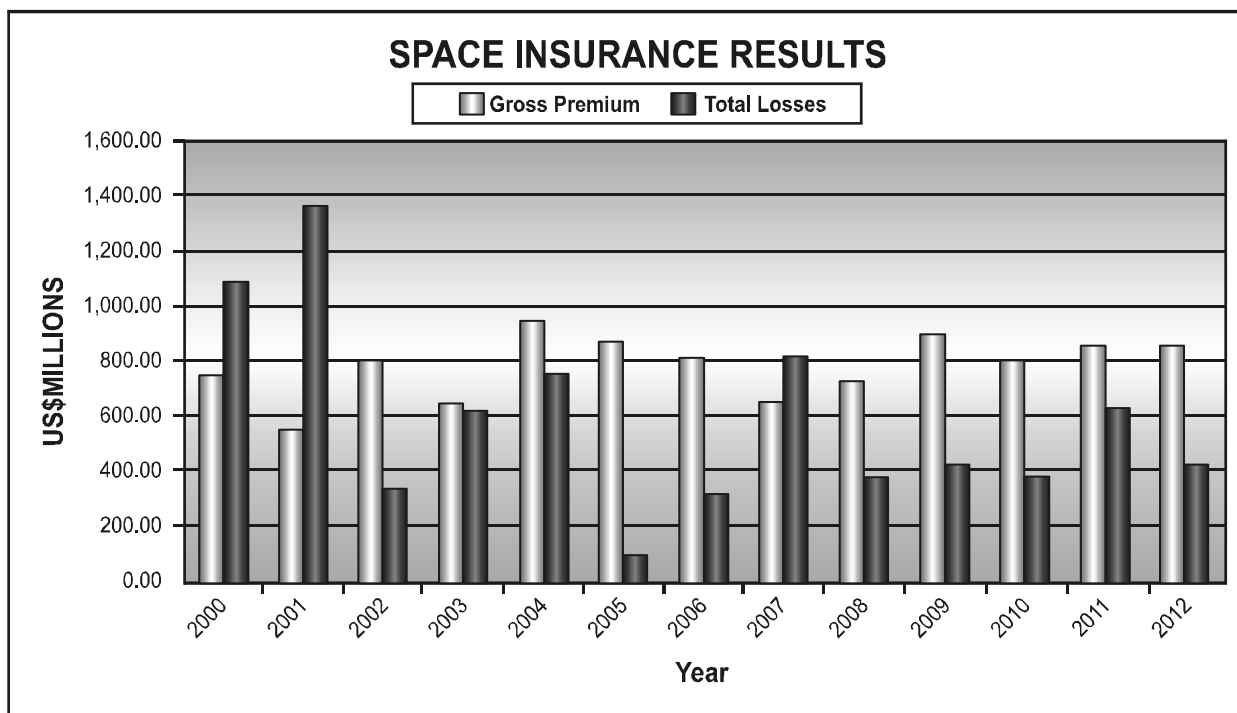
On the other hand, all these future private issues might be confronted with political and regulatory uncertainties. There is a growing influence of export governmental control and foreign policy over decisions involving private East-West Joint Ventures for commercial space launches. Eastern companies will most likely provide hardware and launch capabilities and western partners will contribute investment and marketing experience. But these undertakings will surely face new risks, which they will hardly be able to control such as space products import and export regulations, programmed delays, protectionist measures, dumping practices.

### C. The Insurances Implication in Outer Space Industry

On a calendar accounting basis, in 2012 the space insurance market as a whole returned a very healthy profit continuing the profitable trend of recent years. Nevertheless, insurers are concerned that with incoming capacity attracted to this profitable class, premium rates will fall further, making it more likely that unprofitable years will be ahead. "Insurance rates are largely driven by supply and demand. The over-supply of capacity

currently available has increased competition and driven rates to some of the lowest levels ever seen” said David Wade, Space Underwriter at the London-based Atrium Space Insurance Consortium (ASIC). Underwriters are even more concerned about the lack of differentiation between reliable launch vehicles and spacecraft and their less reliable brethren. “Despite losses, rates have continued to be put under pressure and, significantly, the differentiation between different risks has been eroded to a point where it is minimal,” warns Wade.

\$425.4 million (preliminary estimate) are gross launch and in orbit premium revenues of circa \$859 million. This premium total increased compared to the previous year despite lower premium rates and was due to an increase in the number of high value satellites as part of fleet replenishment programs. However, now that fleet replenishment launches are passed their peak, the number of insured launches is likely to fall and underwriters are fearful that premium income will also fall in coming years, to the point where the premium cannot cover losses. David Wade of the



Source: Flightglobal SpaceTrak database with insurers' premium estimates

With respect to the actual losses, while the late 1990s and early 2000s were dominated by in orbit failures, the losses incurred in 2012 were more dominated by launch vehicle and upper stage launch vehicle failures rather than in-orbit spacecraft unreliability.

Set against these losses which total

underwriting consortium, ASIC warns of “a withdrawal of capacity; less competition and a substantial increase in insurance rates across the board when the inevitable losses occur.” Some insurers note that compared to some related insurance classes such as aviation analysis of market stability is difficult due

**SPACE INSURANCE CLAIMS AND EXPECTED CLAIMS FOR 2012**

Spacecraft	Date of Occurrence	Expected Loss/Claim	Cause
INTELSAT 19	01/06/2012	84	Due to design/manufacturing issue, South solar array had trouble being deployed after launch and a power shortfall of circa 50% (25% for the whole spacecraft) still exists. Also incurred fuel loss during recovery.
EXPRESS-MD 2	06/08/2012	38.4	Proton M Breeze M Upper stage premature shutdown caused satellite to be stranded in useless orbit.
TELKOM 3	06/08/2012	185	Proton M Breeze M Upper stage premature shutdown caused satellite to be stranded in useless orbit.
ORBCOMM OG2-01	08/10/2012	10	Falcon 9 launch vehicle first stage engine failure and restrictions on fuel use in favor of main Dragon CRS payload resulted in stranding and re-entry.
YAMAL 402	08/12/2012	108	Proton M launch undershoot following Breeze M upper stage fault. Recovered but 4 years of 15 year lifespan lost.
<b>EXPECED</b>		425.4	

Source: Flightglobal SpaceTrak On-line Database

to the time lag between setting rates and the policies actually starting. "We don't know at the end of an underwriting year if our business is still sustainable or not because we have a lag factor. Meaning that satellites we insure today, will only be launched in maybe two or more years from now." Said Jan Schmidt, Space Underwriter at Swiss Re.

As already mentioned, underwriters do attempt to differentiate their rates between the lesser and high-risk placements. For example, a satellite flying on an Ariane 5 with its continuous run of 53 successful flights will usually get a lower insurance premium than the equivalent satellite flying on a less reliable rocket. But the Ariane 5 also causes fear. For while the Ariane 5

rocket's reliability is admired, the flying of two high value insured spacecraft on the same launch concerns many in the market. "As sums insured continue to increase and due to the accumulation of exposure on dual launches in particular, the insurance market will probably find itself with insufficient premium to pay a single large loss." Said David Wade of ASIC.

While the Ariane, Proton and Soyuz launch vehicles have been the mainstay of commercial flights and are a known quantity, a new and diverse range of launch vehicles is now joining them. The low cost SpaceX Falcon 9 launch vehicle has become the main challenger to Arianespace's Ariane 5 for commercial satellite flights especially now that

lightweight “all electric” communications satellites are coming on stream. However, such has been the Falcon 9’ s marketing success that its schedule is now becoming clogged. Meantime, China’s CGWIC (China Great Wall Industry Corp) and Japan’s Mitsubishi are now offering “turnkey” contracts that offer a full service to both construct a communications or Earth observation satellite and launch it on one of one of their Long March 3B or H2A launch vehicles respectively. They are beginning to win orders in this way.

Sea Launch is fully back in business and is now becoming the ‘reserve launcher’ of choice for operators as they book with Arianespace or SpaceX. While different (and cheaper) launch options are attractive to operators, satellite operators also want to use new communications payload, electric thruster and power generation technologies to help their operations and market competitiveness. They accuse insurers of not letting them get cutting edge technology. From their experience with “new technology” losses in the late 1990s and early 2000s, underwriters remain resistant to insuring new untried technology.

While underwriters, satellite manufacturers and launch providers have all learned lessons from the past, there are fears that the insurance cycle may undo some of this good work. For as insurance firms and capacity becomes attracted into this “profitable” class, rates will be forced downwards and sometimes to a level which will not cover the losses. The same effect can be seen on policy conditions as well, with launch plus multiple years back on the scene.

While whereas previously lead underwriters agreed the premium rate

and terms of the policy, criticized as effectively being “price fixing”, under vertical marketing now each underwriter has to bid his own premium rate to the broker. The broking firm acts on the insured’s behalf in assembling the necessary insurance capacity. Detractors of this new method note it is like a blind auction describing it derisively as “underwriting by e-Bay” rather than a true expert negotiation. They further point out that while these lower rates may be good for the insured in the short term, in the longer run such methods can actually accelerate destabilization of the market – especially if inexperienced space underwriting capacity is taking part. The end result will be that rates may have to rise again which may not be in the longer-term interest of satellite operators. As a broker, Yamin Mustafa, Managing Director of Marsh gives his own advice to insurers at a time of overcapacity warning that going back to the high rates and restrictions of the recent past would be a mistake: “We believe that the Insurers who will be most successful in the long term are those that offer a high quality service to customers.” Mustafa said. “By this we mean giving fair consideration to all of a customer’s risks, providing financially secure underwriting capacity, providing competitive pricing, not placing onerous technical demands on customers and being responsive in loss scenarios” he added.

Some underwriters are confident enough not to follow the herd as they try to give clients what they want, even if this means taking an apparently riskier approach. About five years ago, Swiss Re, a major Switzerland-based underwriting firm which has a space insurance capacity of \$75 million, broke ranks and

began offering launch plus three and launch plus five year policies again; the theory being that the highest risk of failure lies in the launch and first year rather than the “safer” later years. Since then other underwriters have followed the Swiss Re lead in again offering longer post launch cover. “Some clients love it.” said Jan Schmidt, Space Underwriter at Swiss Re, noting that so far the strategy had paid off. “We’ve had a few losses under these multi-year policies already, but overall it seems that satellite reliability has got better as there have been hardly any in-orbit losses post IOT (In-Orbit Testing)” said Schmidt, before adding “mature technology should probably take the credit”. Nevertheless, Schmidt knows his multi-year policies do have a “Sword of Damocles” hanging over them: they can be caught out by unexpected generic faults with new technology. In-orbit insurance policies with annual renewals do not have the same exposure to major losses as they can exclude known faults that could worsen. Jan Schmidt notes the bad past experience the market had twelve years ago with such multi-year policies but added: “If you are charging an adequate risk premium (for the extra years) then you can do it.”

It is not just rates that shape the market, personalities can have an effect as well. Mustafa noted the egos and pride involved in space insurance and warns that this can add complication and cost to the placement of space insurance risks. “Space Insurance is unusual in that a very high proportion of Insurers regard themselves as “leading underwriters.””notes Marsh’s Yamin Mustafa. However, Mustafa does agree that there is a difference in the quality of space

underwriters that became especially apparent after the introduction of vertical marketing. “Insurance losses do not fall equally across all Insurers.” noted Mustafa. “Whilst Individual Insurers do not disclose their results, our studies indicate a noticeable variation in profitability from insurer to insurer.” Mustafa added.

While underwriters and brokers have their own thoughts about the space insurance market, probably the one that counts most is their clients’ view. Major satellite operators have, as the insured, benefited recently from falling premium rates. Ruy Pinto, Chief Technology Officer of the mobile satellite services firm Inmarsat which insures its fleet of satellites on the international market, concurred with the view that this trend has been partly due to improvements in in-orbit reliability which was, in turn, probably the result of a more evolutionary approach to satellite technology. Pinto however warned that operators also wanted new spacecraft technologies as they stretch forever more capability but said that this risk could be managed. “Inmarsat ensures that thorough and extensive development, qualification and flight acceptance test programs are in place to ensure the flight worthiness of new technologies.” Said Pinto. With respect to what insurers can do, Ruy Pinto also noted his approval for the re-emergence of launch plus multi-year insurance policies. “More creative deals work well for operators,” he said.

While Inmarsat has never made an insurance claim for loss on its satellites, Pinto did express concern that improvements in satellite reliability had not been matched recently by certain

launch vehicles. For Pinto knows that however good his firm's past record, Inmarsat might yet one day be caught out by an unexpected launch failure. Pinto declined to confirm that Inmarsat's exemplary insurance claims record had resulted in lower insurance premium rates when compared to other operators. Instead he suggested that Inmarsat had been treated well by the insurance market due to its policy of disclosing its technology and in its dealings with its manufacturers and their quality control processes. Inmarsat famously locates its own overseeing engineering teams inside the manufacturers it uses "We are very transparent with them (the insurers) and we think this pays off" said Pinto before adding: "Seasoned operators like us are viewed (by the market) as being lower risk and, therefore, that allows better value for money agreements for both sides."

It is not just falling rates and fears over space systems' unreliability that cause underwriters to lose sleep, some "natural threats" such as space debris and solar and meteor storms also threaten to produce insurance losses. The subject of space debris had mixed messages for space insurers. For those commercial satellites likely to be insured from Low Earth orbit (LEO) operations it is noted that the risk of a debris strike is increasing – mainly because of the increasing use of polar and sun-synchronous orbits. Analysis of the risk of a debris strike is that it is currently circa 3% over the lifetime of a spacecraft. Efforts to reduce this by debris mitigating efforts such as re-entering old spacecraft and rocket stage unused propellant evacuation will have a

long-term effect, as will the natural self-cleansing nature of these orbits given the atmospheric drag present.

Nevertheless, while the lack of atmospheric drag there means that Geosynchronous Earth Orbit (GEO) cannot "clean themselves" of debris, most insured spacecraft that reside in this orbit are actually much "safer" from space debris. This is because there is a much lower density of space debris along with much lower relative velocities between such debris and any GEO spacecraft resulting in a much lower chance of a loss or failure due to a debris strike. Analysis has shown that the risk of such an occurrence is 1000 times less than for those satellites in LEO. GEO spacecraft are not out of the woods however. Apart from possible strikes by meteor showers, Cosmic rays and high-energy charged particles from the sun remain a risk to GEO spacecraft. And their brethren in lower orbits are at risk too, despite mostly flying beneath the protection of the Van Allen belts. For they still face hazards of higher concentrations of charged particles at the "South Atlantic anomaly" and cosmic rays leaking through at the poles (for those flying over them). However, the risk of spacecraft electrostatic discharges and logic "bit flips" has been somewhat mitigated by special electromagnetic hardening and the use of Faraday cages in spacecraft design. Thus while a very rare "Carrington class" solar event (the intense solar/geomagnetic storm of 1859) could cause damage to a significant number of satellites, in fact space weather events present relatively much more risk to the Earth's ground based power lines and oil pipe lines than they do to space hardware.

Of course, it is not just radiation and debris hazards that might affect spacecraft. The risk of military attack is increasing, especially now that commercial satellites often carry military hosted payloads or themselves provide communications services and imagery for military use. While hostile anti-satellite strikes by ground launched missiles and lasers or even hi-jacking attacks by computer hackers remain dangers, war/terrorism risks are usually excluded in most space insurance policies. Then again, given that space insurers already have launch vehicle upper stage failures, potentially unreliable new satellite and launch vehicle designs, and falling premium rates to contend with, perhaps space insurance remains risky enough, even without military hazards to fret about. That said, even when things are going well for space insurers, like the members of those other naturally pessimistic professions, farmers and shop keepers, they will always find something to moan about.

#### **D. The Settlement of Disputes in Outer Space Activities**

Differences of opinions and disputes regarding space activities have occurred from the very beginning of such activities. For a long time during which only the exploration and much less the practical use of outer space took place, such differences and disputes were more of an academic and abstract nature. Natural scientists, legal scholars, politicians, and diplomats disagreed at the national or international level on what could or should be done, what was permitted or forbidden, and which technical, political, and legal steps should be made in the

future. All this had little practical impact. Every state, institution, enterprise, and person proceeded, as they felt appropriate.

This situation has changed in recent years. With the growing practical use of outer space and the growing number of states, state institutions, international organizations, and private enterprises indirectly or directly involved or at least interested in space activities situations occurred and occur where the various views and uses are practically incompatible. If, as an example, only a limited number of locations are available on the Geostationary Orbit for certain satellites for technical reasons, the diverging views of the states as to the right of access to this Orbit cannot any longer stand beside each other and be implemented, if it is foreseeable that they interfere with each other or even exclude each other. In such a case a solution has to be found in order to assure that an orderly and effective exploration and use of outer space can continue in the future for the benefit of all concerned and for the benefit of the international community.

Space activities and space law in this context, are of course not in a historically unique or unknown situation. Often in the history of international relations states have found themselves in a situation where new fields of international cooperation and international competition were in need of a legal framework and, in case no agreement could be reached between disputing partners, in need of machinery for the settlement of disputes. It is a well-known weakness of public international law that, contrary to national law, rights and duties of a party cannot automatically be enforced against another party by access

to and decision by courts. Again, to find a similar situation in space law is not a surprising problem.

International law has developed a number of methods for the settlement of disputes at the international level most of which are already mentioned in Art. 33 of the Charter of the United Nations and in Resolution 2625 (XXV) of the UN General Assembly on "Principles of International Law Concerning Friendly Relations and Cooperations Amongst States in Accordance with the Charter". Not all of these methods can be dealt with here. In any case, decisive and the real tests are those that assure that a decision is achieved, even if one of the parties does not agree. These methods are international adjudication and international arbitration. These two methods are also possible options, if disputes occur regarding space activities.

Present case dispute that used arbitration was when Eutelsat has been arguing with Deutsche Telekom over certain satellite assets at 28.5 degrees (which is the location used to beam hundreds of TV channels into the UK and Ireland). The dispute has been settled. The argument has been the subject of arbitration proceedings before the International Chamber of Commerce in Paris, and the result could impact a separate dispute also being arbitrated between Eutelsat and SES over the same frequencies. Eutelsat is accusing SES of breaking an agreement signed in 1999, which outlined how both satellite operators would continue to work together to coordinate satellite frequencies at the 28.2/28.5 degrees East positions.

Deutsche Telekom, in its annual report published February 28th said simply that

"following intensive negotiations, the parties signed a settlement agreement on February 7th to terminate the proceedings." The Report makes clear that Eutelsat wanted clarification on a right to use a certain orbital position, and the agreement between Deutsche Telekom and Media Broadcast GmbH that acquired the rights "a number of years ago". The Deutsche Telekom (DT) statement says that DT is no longer involved in the satellite business. The ongoing dispute between Eutelsat and SES will determine who controls the frequencies currently used by Eutelsat's 28A/Eurobird satellite. That argument is being heard at a Paris arbitration tribunal. SES has said that on October 4th it intends transmitting on the disputed frequencies currently occupied by Eutelsat.

#### **E. The Role of Arbitration in Outer Space Insurance Dispute**

Although the technology utilized in commercial space ventures has advanced at an almost unimaginable pace in recent years, disputes involving insurance coverage, property damage, cross-waivers of liability, subrogation, salvage, product liability and choice of law have been resolved so far by courts using traditional legal principles that are often hundreds of years old. The arbitration procedure for any disputes related to commercial space ventures. The arbitrators should be experts in the field and the procedure would probably be more expeditious and less expensive than traditional litigation.

The *Martin Marietta v. Intelsat* case where the latter claimed that, as a result of Martin Marietta's negligence and gross negligence, the Intelsat VI satellite did

not reach its intended orbit. The losses claimed totaled 400 million U.S. dollars. The focus of the claim turns around the existence of a valid express waiver of liability and the possibility to impute a cross waiver provision based on the Commercial Space Launch Act, as amended in 1988, thereby barring Intelsat claim. This claim was decided by relying upon the holding in a case where the plaintiff was injured when he parachuted into power lines and therefore sued the operator, despite having signed a waiver of liability just prior to departing on his parachute adventure. It is difficult to hide, however, that there is very little similarity between the relative bargaining position of Intelsat and of the parachuter.

A different solution was found to resolve another well-known space insurance claim. In July 1990, ten days before the original launch date, the hook of a launch pad crane fell onto Insat 1 D's C-Band antenna and the spacecraft had to be removed and repaired. At that time, the risk of loss was still with Ford Aerospace, the spacecraft manufacturer. Insures paid the loss and were subrogated in Ford Aerospace's rights. Various London Underwriters against McDonnell Douglas, which had the responsibility of the pre-launch and launch operations, then filed a claim. The Federal Judge determined that he was bound to apply state law in existence at the time the land where the accident occurred was ceded to the government, and that happened to be the Florida State law of the 1950's. Then McDonnell Douglas, through arbitration in London, sought to recover, from the Indian Space Department, their customer, what they had to pay to the above underwriters, based on the indemnity

provisions in their contract. To complete the circle, the Indian Space Department itself commenced arbitration proceedings in New Delhi against Ford Aerospace on the grounds that Ford Aerospace had agreed, in the spacecraft purchase agreement, that it would not seek indemnity from any party in the event of a loss. Eventually, and with no surprise, a global settlement was reached. But this example clearly illustrates how carefully the commencement of legal actions should be considered by wise undertakers of space endeavors.

The Permanent Court of Arbitration in The Hague (the "**PCA**"), an intergovernmental organization offering dispute resolution services to states, state entities, intergovernmental organizations and private parties, has sought to address some of the complexity around dispute resolution associated with satellite transactions and other space-related activities. At the end of 2011, the PCA launched the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (the "**Space Arbitration Rules**"), the first formal dispute resolution mechanism dedicated to space-related disputes which accommodated private parties.

The Space Arbitration Rules, compiled by a special advisory group of space law experts, are based on the 2010 Arbitration Rules of the United Nations Commission on International Trade Law (**UNCITRAL**), with certain modifications to reflect the specific challenges associated with disputes having an outer space component. They are very broad in scope, being intended to be used in disputes involving states, international organizations and private entities where

there is some connection with outer space activities. This includes disputes around the interpretation and application of multilateral treaties relating to the use of or access to outer space.

However, it is the application of the rules to contractual disputes that is of particular interest. The enormous increase in private commercial activity related to space in recent decades, particularly in the telecommunications arena, has created a need for dispute resolution mechanisms that extend beyond the diplomatic and governmental channels historically used by the primary actors in the space industry: state parties. Finding a mechanism to accommodate disputes involving the variety of non-state actors that are engaging with space has become of increasing concern.

International arbitration has always offered significant advantages to parties in international disputes, such as the possibility for the parties to select a neutral forum and tribunal, procedural flexibility and the international enforcement of awards. The Space Arbitration Rules seek to address some of the particular challenges presented by space-related disputes through the following features :

- a. **Recommended list of specialists for appointment as arbitrators or experts:** The PCA maintains a list of industry specialists with space-related expertise who may be selected by the parties or tribunal as experts or arbitrators, although use of the list is optional.
- b. **Designated appointing authority:** The Secretary General of the PCA will act as appointing authority under the rules, avoiding the potential for delay if the parties are unable to agree on

the constitution of the tribunal. The International Bureau of the PCA will provide secretariat services to administer arbitral proceedings.

- c. **Possibility to provide for larger, five member tribunals:** Arbitrations are normally determined by a sole arbitrator or a three-member tribunal. The possibility for parties to provide for disputes to be heard by larger tribunals of five arbitrators recognizes the technically complex and politically sensitive nature of the disputes which might arise in this field, in particular as such disputes are likely to involve state interests and very high value claims.
- d. **Enhanced confidentiality:** The rules include a broad power for the tribunal to implement specific confidentiality mechanisms to protect the commercially sensitive proprietary information related to the technology in the sector. This includes the power to appoint a confidentiality adviser as a technical expert to report to the tribunal about the basis of information claimed by a party to be confidential without disclosing the actual information to either the other party or the tribunal.
- e. **Additional scientific/technical assistance :** Provision for the tribunal to request that the parties provide a non-technical document summarizing and explaining the background to any scientific or technical information which the tribunal needs to understand the dispute. The parties and the tribunal may also appoint experts where necessary.

- f. **Discretion for tribunal to continue where one arbitrator fails to participate:** The rules grant the tribunal a discretion to continue the arbitration in the event that one of the arbitrators (in a three or five person tribunal) fails to participate in the arbitration. Under other arbitration rules, it is typical for the arbitration to be stayed while a substitute arbitrator is selected, a process that can lead to significant delay and cost.

The rules also contain a model arbitration clause that can be inserted into contracts or other agreements. With many significant developments in the satellite technology field on the horizon, it will be interesting to see whether the Space Arbitration Rules will become a feature of satellite-related transactions in the years to come.

These new rules recognize the importance of having an effective dispute resolution mechanism to protect rights and minimize risk in the satellite community. Arbitration could be particularly well suited to resolve disputes relating to satellite activities for the following reasons :

- a. **Neutrality:** Satellite disputes almost always involve international parties and arbitration allows a venue to be selected that is outside the "home" courts of any party.
- b. **Enforceability:** Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), arbitral awards are enforceable in 146 States, subject only to a very limited list of exceptions.
- c. **Confidentiality:** As mentioned above, the arbitral process is confidential to

the parties, which can be of significant importance where disputes involve technical, scientific or commercially sensitive issues.

- d. **Party autonomy:** Arbitration provides users with a great deal of choice to tailor the arbitration process to meet their needs. These choices include, for example, determining the rules to apply, the arbitration venue, the number of arbitrators and how they are to be appointed. Where it is important that a tribunal have specific knowledge or qualifications to resolve a dispute, the parties can build this into their arbitration agreement.

Arbitration is a flexible process and not a one-size-fits-all solution. The tailored approach of the new PCA rules is a positive step in the development of an effective dispute resolution mechanism for the industry.

## F. Indonesian Legal and Policy in Outer Space Activities

Indonesia has a long history and journey in space activities. Soeharto as President of Indonesia, on 29th September of 1969, officially launched an Earth Station at Jatiluhur-Cibinong Indonesia that collaboration of Indonesian Government and International Telephone and Telegraph Corporation (ITT)-USA. The use of satellite to engage international telecommunications via INTELSAT Satellite. Indonesia is a third country after Canada and USA that have independent satellite launched on 8th July of 1976 called PALAPA A1 Satellite, from Kennedy Space Centre Cape Canaveral-Florida, USA with Delta 2914 rocket launcher.

In recent years, competition in the Asia-

Pacific satellite business has been intense. Companies in this business compete primarily on coverage power, product offerings and price. The Indonesian satellite industry is loosely regulated, and in practice operates in accordance with an "open-sky" policy. This means that Indonesian satellite operators must compete with foreign satellite operators.

The telecommunications industry in Indonesia will be driven by several important trends in the future, which present major opportunities for modern telecommunications service providers. These trends include the continued growth in the telecommunications sector, that the telecommunications industry will continue to grow, as continued development and modernization of Indonesia's economy are expected to increase demand for telecommunications services. With relatively low fixed line telephony and cellular penetration, Indonesia's telecommunications industry offers positive growth potential. The other trend is the migration of voice and data traffic from fixed to wireless networks, that wireless services will become increasingly popular as a result of wider coverage areas and improving wireless network quality, declining handset costs and the proliferation of prepaid services. At current growth rates, the wireless penetration will surpass fixed line telephony penetration in Indonesia in the near future.

Indonesia has ratified Space Treaty 1967 by Law No. 16 Year 2002 and three international conventions that Convention on International Liability for Damage Caused by Space Objects of 1972 by Presidential Decree No. 20 Year 1996; Convention on Registration of Objects Launched into Outer Space 1975 by

Presidential Decree No. 5 Year 1997; and Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 by Presidential Decree No. 4 Year 1999.

Outer space activities especially in telecommunications and broadcasting had a specific legislation on Law No. 36 Year 1999 regarding Telecommunications and Law No. 32 Year 2002. The Indonesian Space Law enacted on 6<sup>th</sup> August 2013 as Law No. 21 Year 2013. The Indonesian Space Law 2013 as a new legal regime of Indonesian space or outer space regulated among others outer space activities; outer space operators; outer space station; security and safety; search and rescue of space objects; registration; international cooperation; responsibility-liability and compensations; insurances; mortgage and facilities; environmental protection; financing; community participations; and sanctions.

Specific regulations in Indonesian Space Law 2013 related with the outer space insurance are as follows :

#### CHAPTER X RESPONSIBILITY-LIABILITY AND COMPENSATIONS

##### Article 76

- (1) The Republic of Indonesia's Government have international responsibility on any Space Activities that operating in Republic of Indonesia territorial sovereignty and/or jurisdiction.
- (2) Space Operator has compensation liability in any damage related with the result of space activities.
- (3) Responsibility as stipulated in particle (1) accordance with a prevailing legislations and regulations.

CHAPTER XI  
INSURANCE, MORTGAGE, AND FACILITIES

Article 84

- (1) Any Space Operator must insure their Damaging liability to third parties as a result of their Space Activities.
- (2) Insurance obligation as stipulated in particle (1) are not constituted for Government Institution.
- (3) Insurance clause as stipulated in particle (1) and Damage compensation as a result of space activities accident perform by Government Institution should regulated by Government Regulation.

The Indonesian Space Law 2013 had completing the legal basis for outer space activities in Indonesia. The Indonesian Space Law 2013 completing the existing legislations of outer space activities in Indonesia, that previously enacted Telecommunications Law 1999 and Broadcasting Law 2002.

**G. Conclusion**

Although the technology utilized in commercial space ventures has advanced at an almost unimaginable pace in recent years, disputes involving insurance coverage, property damage, cross-waivers of liability, subrogation, salvage, product liability and choice of law have been resolved so far by courts using traditional legal principles that are often hundreds of years old. The arbitration procedure for any disputes related to commercial space ventures. The arbitrators should be experts in the field and the procedure would probably be more expeditious and less expensive than traditional litigation.

The enormous increase in private commercial activity related to space in recent decades, particularly in the

telecommunications arena, has created a need for dispute resolution mechanisms that extend beyond the diplomatic and governmental channels historically used by the primary actors in the space industry: state parties. Finding a mechanism to accommodate disputes involving the variety of non-state actors that are engaging with space has become of increasing concern. International arbitration has always offered significant advantages to parties in international disputes, such as the possibility for the parties to select a neutral forum and tribunal, procedural flexibility and the international enforcement of awards.

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## PERAN MEKANISME PENYELESAIAN SENGKETA DALAM KEBIJAKAN PERLINDUNGAN KONSUMEN<sup>\*)</sup>

*Erman Rajagukguk*

### ABSTRACT

*This article emphasizes the importance of an alternative dispute resolution to protect the Indonesian consumer right. The alternative dispute resolution can be in the form of negotiation, mediation, conciliation, and arbitration. Under the article 29 of the Law No. 21 of 2011 concerning the Financial Service Authority, the Financial Service Authority may form the dispute resolution agency in financial service for Province and Regency.*

Sengketa yang mungkin terjadi antara konsumen disektor jasa keuangan dapat dilakukan di pengadilan melalui gugatan perdata dan penyelesaian sengketa di luar pengadilan seperti negosiasi, mediasi, konsiliasi, dan arbitrase. Hanya saja negosiasi dapat mengalami kegagalan, begitu juga mediasi yang didampingi oleh seorang mediator, atau konsiliasi yang diperantarai konsiliator.

Penyelesaian sengketa melalui arbitrase, bila Dewan Arbitrase gagal untuk mencapai keputusan menurut Undang-Undang No. 8 Tahun 1999 tentang Perlindungan Konsumen (Pasal 45 ayat (4)), sengketa kemudian diselesaikan melalui pengadilan. Namun penyelesaian sengketa melalui arbitrase biasanya tidak mungkin gagal karena putusan arbitrase bila tidak tercapai dengan jalan musyawarah, maka putusan diambil melalui voting. Oleh karena itu anggota-

\* Disampaikan dalam Seminar Nasional “Mekanisme Penyelesaian Sengketa di Sektor Jasa Keuangan”, diselenggarakan oleh Otoritas Jasa Keuangan, 7 November 2013.

anggota Dewan Arbitrase harus berjumlah ganjil.

### **Penyelesaian sengketa melalui arbitrase lebih efisien daripada melalui pengadilan**

Negosiasi antara para pihak yang bersengketa mungkin saja gagal. Begitu juga penyelesaian sengketa melalui mediasi yang didampingi oleh mediator (penengah) dan penyelesaian sengketa konsiliasi yang didampingi oleh konsiliator. Keberhasilan negosiasi, mediasi, konsiliasi amat banyak tergantung kepada para pihak yang bersengketa, yaitu, apakah para pihak benar-benar bermaksud menyelesaikan sengketa diantara mereka. Berlainan dengan penyelesaian sengketa melalui arbitrase, penyelesaian sengketa dengan cara ini amat tergantung kepada arbitrator atau dewan arbitrator yang telah disepakati oleh para pihak. Bila tidak tercapai musyawarah, maka Dewan Arbitrase bisa mengambil keputusan melalui pemungutan suara (voting). Dewan Arbitrase dapat dibentuk oleh para pihak setelah terjadinya suatu sengketa (Arbitrase Ad Hoc). Para pihak dapat pula menunjuk institusional arbitrase yaitu Badan Arbitrase yang sudah berdiri, seperti BANI dan BASYARNAS. Putusan arbitrase adalah *final* artinya putusan akhir yang tidak bisa banding dan kasasi ke pengadilan dan *binding* artinya mengikat seperti putusan hakim yang berkekuatan hukum tetap.

Kalangan *businessman* lebih menyukai arbitrase karena :

1. Anggota Dewan Arbitrase dipilih sendiri oleh para pihak.
2. Sidang arbitrase tidak terbuka kepada publik.
3. Putusan arbitrase bersifat rahasia hanya untuk kedua belah pihak.
4. Putusan arbitrase dapat dicapai dalam waktu yang relatif singkat, karena tidak bisa naik banding atau kasasi ke pengadilan.
5. Biaya arbitrase relatif lebih murah dari pengadilan, karena pemeriksaan satu tingkat.

Penyelesaian sengketa di sektor jasa keuangan, berdasarkan Undang-Undang Perlindungan Konsumen dapat diselesaikan melalui alternatif penyelesaian sengketa atau pengadilan (Pasal 45 Undang-Undang No. 8 Tahun 1999 tentang Perlindungan Konsumen).

Penyelesaian sengketa di luar pengadilan, bagi :

1. Perbankan dapat diselesaikan melalui Badan Arbitrase Nasional Indonesia (BANI) atau Badan Arbitrase Syariah Nasional (BASYARNAS).
2. Pasar Modal melalui Badan Arbitrase Pasar Modal Indonesia (BAPMI).
3. Asuransi dapat diselesaikan melalui Badan Mediasi Asuransi Indonesia (BMAI).

### **Peranan Otoritas Jasa Keuangan (OJK) dalam penyelesaian sengketa di luar pengadilan**

Berdasarkan Pasal 29 Undang-Undang No. 21 Tahun 2011 tentang Otoritas Jasa Keuangan, OJK dapat membentuk Badan Penyelesaian Sengketa disektor jasa keuangan pada Daerah Tingkat I (Provinsi) dan Daerah Tingkat II (Kabupaten). Pasal 29 tersebut menyatakan, OJK melakukan pelayanan pengaduan Konsumen yang meliputi :

- a. menyiapkan perangkat yang memadai untuk pelayanan pengaduan Konsumen yang dirugikan oleh pelaku di Lembaga Jasa Keuangan;

- b. membuat mekanisme pengaduan Konsumen yang dirugikan oleh pelaku di Lembaga Jasa Keuangan; dan
- c. memfasilitasi penyelesaian pengaduan Konsumen yang dirugikan oleh pelaku di Lembaga Jasa Keuangan sesuai dengan peraturan perundang-undangan di sektor jasa keuangan.

Badan Penyelesaian Sengketa Komsumen pada Daerah Tingkat II sebagaimana diamanatkan oleh Pasal 49 Undang-Undang No. 8 Tahun 1999 tentang Perlindungan Konsumen belum terbentuk di seluruh Daerah Tingkat II. Hal ini antara lain karena kelangkaan sumber daya manusia. OJK dapat mengadakan pelatihan-pelatihan untuk calon-calon mediator, konsiliator, dan arbiter untuk penyelesaian sengketa di sektor jasa keuangan (perbankan dan non perbankan).

**Gugatan perdata (ganti rugi) tidak menghapuskan tindak pidana**

Gugatan perdata tidak menghapuskan tindak pidana. Putusan pidana dijatuhkan oleh hakim Pengadilan Negeri.

Pasal 52 ayat (1) Undang-Undang No. 21 Tahun 2011 tentang Otoritas Jasa Keuangan, menyatakan setiap orang perseorangan yang melanggar ketentuan Pasal 33 ayat (1), ayat (2), dan/atau ayat (3), dipidana dengan pidana penjara paling lama 6 (enam) tahun dan pidana denda paling banyak Rp. 15.000.000.000,00 (lima belas miliar rupiah). Ayat (2) pasal menyebutkan, apabila pelanggaran terhadap ketentuan Pasal 33 ayat (2) dan/atau ayat (3) dilakukan oleh korporasi, dipidana dengan pidana denda paling banyak Rp. 45.000.000.000,00 (empat puluh lima miliar rupiah) dan/atau sebesar jumlah kerugian yang ditimbulkan akibat pelanggaran tersebut.

Pasal 33 Undang-Undang ini menyatakan :

- (1) Setiap orang perseorangan yang menjabat atau pernah menjabat sebagai anggota Dewan Komisioner, pejabat atau pegawai OJK dilarang menggunakan atau mengungkapkan informasi apa pun yang bersifat rahasia kepada pihak lain, kecuali dalam rangka pelaksanaan fungsi, tugas, dan wewenangnya berdasarkan keputusan OJK atau diwajibkan oleh Undang-Undang.
- (2) Setiap Orang yang bertindak untuk dan atas nama OJK, yang dipekerjakan di OJK, atau sebagai staf ahli di OJK, dilarang menggunakan atau mengungkapkan informasi apa pun yang bersifat rahasia kepada pihak lain, kecuali dalam rangka pelaksanaan fungsi, tugas, dan wewenangnya berdasarkan keputusan OJK atau diwajibkan oleh Undang-Undang.
- (3) Setiap Orang yang mengetahui informasi yang bersifat rahasia, baik karena kedudukannya, profesinya, sebagai pihak yang diawasi, maupun hubungan apa pun dengan OJK, dilarang menggunakan atau mengungkapkan informasi tersebut kepada pihak lain, kecuali dalam rangka pelaksanaan fungsi, tugas, dan wewenangnya berdasarkan keputusan OJK atau diwajibkan oleh Undang-Undang.
- (4) Pelanggaran terhadap ketentuan ayat (1), ayat (2), dan ayat (3) dapat dikenai sanksi administratif dan/atau sanksi lainnya sesuai dengan ketentuan peraturan perundang-undangan.
- (5) Ketentuan lebih lanjut mengenai kerahasiaan, penggunaan, dan pengungkapan informasi sebagaimana dimaksud pada ayat (1), ayat (2), dan

ayat (3), diatur dengan Peraturan Dewan Komisioner.

Kemudian Pasal 53 ayat (1) menyatakan, setiap orang yang dengan sengaja mengabaikan, tidak memenuhi, atau menghambat pelaksanaan kewenangan OJK sebagaimana dimaksud dalam Pasal 9 huruf c, huruf d, huruf e, huruf f, huruf g, dan/atau Pasal 30 ayat (1) huruf a, dipidana dengan pidana penjara paling singkat 2 (dua) tahun dan pidana denda paling sedikit Rp. 5.000.000.000,00 (lima miliar rupiah) atau pidana penjara paling lama 6 (enam) tahun dan pidana denda paling banyak Rp. 15.000.000.000,00 (lima belas miliar rupiah). Ayat (2) pasal ini menyebutkan, apabila pelanggaran sebagaimana dimaksud pada ayat (1) dilakukan oleh korporasi, dipidana dengan pidana denda paling sedikit Rp. 15.000.000.000,00 (lima belas miliar rupiah) atau paling banyak Rp. 45.000.000.000,00 (empat puluh lima miliar rupiah).

Selanjutnya, Pasal 54 ayat (1) menyatakan, setiap Orang yang dengan sengaja

mengabaikan dan/atau tidak melaksanakan perintah tertulis sebagaimana dimaksud dalam Pasal 9 huruf d atau tugas untuk menggunakan pengelola statuter sebagaimana dimaksud dalam Pasal 9 huruf f, dipidana dengan pidana penjara paling singkat 2 (dua) tahun dan pidana denda paling sedikit Rp. 5.000.000.000,00 (lima miliar rupiah) atau pidana penjara paling lama 6 (enam) tahun dan pidana denda paling banyak Rp. 15.000.000.000,00 (lima belas miliar rupiah). Ayat (2) pasal ini menyebutkan, apabila pelanggaran sebagaimana dimaksud pada ayat (1) dilakukan oleh korporasi, korporasi dipidana dengan pidana denda paling sedikit Rp. 15.000.000.000,00 (lima belas miliar rupiah) atau paling banyak Rp. 45.000.000.000,00 (empat puluh lima miliar rupiah).

Atas putusan Pengadilan Negeri, Terpidana bisa naik banding, kasasi, dan kemudian mengajukan Peninjauan Kembali (PK) bila ia menemukan bukti baru atau hakim salah menerapkan hukum.

# News & Events

## Past Events

### 1. APRAG 10th Anniversary Conference-Arbitration in the world economy



Date : 26th- 28th March 2014  
 Venue : Sofitel Melbourne on Collins

The accomplishments of Asia Pacific Regional Arbitration Group (APRAG) in its first ten years will be highlighted by each of the previous four presidents along with the current President, and more importantly, the conference will also seek to project forward for APRAG itself and the entire Asia-Pacific international arbitration community.



With around forty prominent speakers and the support of members of the judiciary, the conference will examine areas of potential growth for arbitration in the region, and will also provide an excellent networking opportunity for delegates.



## 2. Workshop : “SETTLEMENT OF INTELLECTUAL PROPERTY DISPUTES THROUGH MEDIATION“

**March 11 and 12, 2014  
Ruang Rapat Lt.8  
Gedung Ditjen HKI  
Jl. H.R Rasuna Said Kav. 8-9  
Jakarta Selatan**

*Organized by :*  
Directorate General of Intellectual  
Property Rights (DGPIR)  
Indonesia

*And*  
World Intellectual Property  
Organization (WIPO) Arbitration  
and Mediation Center



## **BANI REGIONAL CENTERS AND REPRESENTATIVE OFFICES**

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