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SHIP ARREST IN INDONESIA AND CROSS-BORDER MARITIME DISPUTE

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Abstract

Ship arrest is an in rem action on ships that exercised with purpose of obtaining security for maritime claims. The arrest is intended to prevent a ship from moving pending settlement of the claim and consequently will also prevent her owners from enjoying any profits. In present shipping industry, which became more borderless, dispute involving different nationals and jurisdictions might arise. In such case, existence of clear and certain rules are one of the keys to resolve them. In respect of that, ship arrest has been introduced in Indonesia through the Law number 17 Year 2008 “Shipping Law”. Since the enactment of Shipping Law, ship arrest is possible to carried out within the Indonesian jurisdiction. However, the practice of ship arrest in Indonesia is relatively new comparing to other countries such as Netherlands and Singapore, which have implemented it long before Indonesia. Another question is whether it is necessary for Indonesia to be a party in international treaties on arrest of ships. Learned from examples outside Indonesia, we may able to see issues concerning ship arrest in Indonesia; existence of the implementing rules, compatibility with the current civil procedural rules, readiness of the courts to implement it, etc. Responding to the development of shipping industry, Indonesia must assured to moving onward by showing its readiness in following international practice on shipping law.

Keywords: Ship arrest, Shipping Law, Indonesia, maritime law

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I. INTRODUCTION

Security for claim is one of crucial aspects in a dispute. It is important for the claimant to assure that his/her claim would not be ended in vain. The claimant needs to be certain that fair recovery would eventually be available once the claim has been successful. Ship arrest is an effective way to obtain security for claim and potentially prepare for a judicial sale of the ship, if that become necessary. It may also be a suitable remedy for creditors such as owners who need to repossess the vessel under the charter party, bunker suppliers that have not been paid, a bank that has terminated the loan facility and wishes to draw on its mortgage or crew members that have outstanding

wages¹.

Without ship arrest, a claimant who has a claim against a ship would have very small chances of recovery if the ship freely leaves the jurisdiction especially if the defendant ship-owners are domiciled in a foreign jurisdiction whilst the only asset in the claimant's jurisdiction would be the ship. Hence, a special legal regime of actions against the ship offers a practical solution to the problem². Ship arrest aims at preventing the ship from continuing its movement in order to apply the court decision concerning an action *in rem*. The arrested vessel will be under the power of the court and the owners of the ship will be prevented to stop the action or procedure unless after releasing and settling the claim.³

Ship arrest provides pre-judgment security for the claim as well as confirms the courts' *in rem* jurisdiction. If the *in rem* action is successful, the judgment may be enforced against the ship by way of judicial sale⁴. In England, action *in rem* is driven originally from *processus contra contumacem* or "a process of arrest of property to compel appearance of the defendant".⁵ The intention of such action is to counter any attempts from the defendant to deny appearance in a court where there is claim directed against him. In the context of ship arrest, action *in rem* is used as a securing tool for the claimant's right against the defendant. The essential difference between the action *in rem* and the action *in personam* is that the ship together with the owners are both become

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¹ Ingar Fuglevåg, "Ship Arrest Explained," *International Law Office*, last modified July 28, 2009, <http://www.internationallawoffice.com/Newsletters/Litigation/Norway/Vogt-Wiig/Ship-Arrest-Explained>.

² Michael Tsimplis, *Southampton on Shipping Law, Institute of Maritime Law*, (London: Informa), 349.

³ Omar Mohammed Faraj, "The Arrest of Ships: Comprehensive View on the English Law" (master's thesis, Faculty of Law, Lund University, 2012), 14.

⁴ UK Essays, "Action In Rem And Action In Personam Are Two Legal Entities Civil Law Essay," *Law Teacher*, last modified November 2013, <http://www.lawteacher.net/free-law-essays/civil-law/action-in-rem-and-action-in-personam-are-two-legal-entities-civil-law-essay.php>.

⁵ Verónica Ruiz Abou-Nigm, *The Arrest of Ship in Private International Law*, (New York: Oxford University Press, 2011), 29.

defendants.⁶

The 1952 International Convention for the Unification of Certain Rules relating to Arrest of Sea-Going Ships ("**1952 Ship Arrest Convention**") provides the following definition for arrest; "*Arrest*" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.⁷ Under the 1952 Ship Arrest Convention, the legal reasons for which ship arrest is possible is limited to a closed list of claims which set out in Article 1(1). Such limitation is also expressly stipulated in Article 2 which says that "*A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any governments or their departments, public authorities, or dock or harbor authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction*" (emphasis added), although it does not restrict the contracting states' right to extend the cause for which ships can be arrested under their respective local laws. Similar definition of arrest is also provided under the 1999 International Convention on Arrest of Ships ("**1999 Ship Arrest Convention**") which defines "arrest" as "...any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument"⁸.

Ship arrest must not be confused with pre-judgment attachment or which in Indonesia is recognized as conservatory attachment or in Dutch term called '*conservatoir beslag*'. The two are very different in their purpose and function. As explained in the above, ship arrest is an *in rem* action, which intended to seek security for claim. Ship arrest compels the owners to settle the claim or provide security in substitute of release of the ship. Whilst pre-judgment attachment is a legal process by which a court of law issue an order at the request of the claimant, that

⁶ Faraj, "The Arrest of Ships: Comprehensive View on the English Law," 16.

⁷ *The 1952 International Convention for the Unification of Certain Rules relating to Arrest of Sea-Going Ships*, Art. 1 (2).

⁸ *The International Convention on Arrest of Ships, 1999*, Art. 1 (2).

certain property of the defendant to be attached as security for recovery for the plaintiff if his claim is successful. The main difference is also on the treatment of the object. While ship arrest prevents operation of the ship so that the owners cannot move her, pre-judgment attachment does not stop the owner to enjoy economical use of the attached property. If object of the attachment is a movable property, the owner may even still keep such property under his possession until the claim prevails and the court orders the hand over of the property to the plaintiff⁹. Another difference is in the grounds for their application. Ship arrest operates on the grounds of maritime claims which shall be granted if the claimant is able to prove his claim is valid while pre-judgment attachment may be granted by the court if there is proof of meritorious allegation that the defendant deceptively attempts to dispose of or conceal his property¹⁰.

II. CROSS-BORDER MARITIME DISPUTES AND SHIP ARREST

As business has become more borderless, opportunities for international commerce has increased which connect products and people throughout the world. Align with such development, shipping industry plays a pivotal role in serving cross-border transportation of goods. In the light of that, a ship sailing across the world's oceans is likely to get involved in disputes arising either by the way of her operation or trade. It is not unusual for ships to get involved in both 'wet' disputes that arise from accidents such as collisions, salvage, towage or pollution claims as well as 'dry' shipping disputes that may arise from contractual claims by cargo or passengers and insurance¹¹.

In international shipping, disputes involving different national and jurisdiction become more likely to occur which require an effective dispute resolution tool to cater the character of the industry¹². Issues

⁹ *The Indonesian Civil Procedures or Herziene Indonesisch Reglement, State Gazette 1941-44, Art. 197 (8).*

¹⁰ *The Indonesian Civil Procedures or Herziene Indonesisch Reglement, State Gazette 1941-44, Art. 227 (1).*

¹¹ Tsimplis, *Southampton on Shipping Law, Institute of Maritime Law*, 349.

¹² Vivian Ang, "Dispute Resolution in Cross-Border Shipping Cases – A Singapore Perspective," *Focus*, accessed September 9, 2016, <http://www.lawgazette.com.sg/2000-3/focus2.htm>.

concerning jurisdiction, enforcement of judgment and injunctive relief might be problematic when parties to the cross-border maritime disputes are seeking recovery for their claims as they are naturally located in different countries. Having considered that, ordinary *in personam* action against a named defendant might not be a quite effective approach for the purpose of securing instant recovery for maritime claims. Thus, an *in rem* action against the ships that place the ship itself as if she was defendant is deemed more effective as a device to put pressure on the owners to defend.¹³

An action *in rem* is an action instituted against a particular thing rather than a personal defendant. The advantage of an action *in rem* is that the plaintiff may obtain the arrest of the *res* concerned and, upon proof of his claim, obtain the court sale of the *res*. Action *in rem* can also reflect a recognition of the mobile nature of the property and the consequent fact that, while the property itself may be within the jurisdiction of the court, the owner of the property may never have been within its jurisdiction and might never be. Note that in maritime disputes, *in rem* actions may be brought only where the ship is within the territorial jurisdiction of the relevant court¹⁴. Another character of an *in rem* action is that the judgment not only affects and binds the immediate parties to it as well as all persons who may be interested in the *res*, but also has for its primary object the determination of the title to property or status of a person, property or thing to the world generally. Provided that the court had jurisdiction over the *res*, the *in rem* judgment will be conclusive against the entire world in respect of the questions of title or status (of the persons or that property) so determined even though the facts on which it necessarily proceeds are not established against the entire world¹⁵.

The *in rem* action can best be described as procedural tool by which a claimant can force the defendant ship-owner to appear before the

¹³ Tsimplis, *Southampton on Shipping Law, Institute of Maritime Law*, 351.

¹⁴ Graeme Bowtle and David Osborne, *The Law of Ship Mortgages*, (Oxford and New York: Informa Law from Routledge, 2014), 279.

¹⁵ Peter R. Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law*, (New York: Oxford University Press, 2001), 75.

competent court or risk losing its ship¹⁶. The modern *in rem* claim has become a piece of legal machinery directed against the ship alleged to have been the instrument of wrongdoing in cases where it is sought to enforce a maritime or statutory lien or in a possessory action against the ship whose possession is claimed. This does not mean that the ship itself is the wrongdoer but that it is the means by which the wrongdoer (her owner) has done wrong to some other party. It is also logically the means by which the wrongdoer is brought before the court as a defendant to what may thereafter turn into another maritime claim¹⁷.

On the basis of the above, it is quite self-explanatory that arrest of ships is a key mechanism to secure and enforce maritime claims and an issue of considerable importance to the international shipping and trading community. In cross-border maritime dispute, owners of ships and cargo have a vested interest in ensuring that legitimate trading is not interrupted by the unjustified or wrongful arrest of ships while the interests of claimants lie in being able to obtain security for their claims. In the objective of balancing these interests, the 1952 and 1999 Ship Arrest Conventions were installed to harmonizing different approaches adopted by various domestic legal systems¹⁸. The 1952 Ship Arrest Convention has been widely adopted, with over 70 ratifications and accessions. However, there are critics that the closed list of claims as the grounds for which an arrest can be made is too restrictive such as it does not allow arrest in respect of unpaid insurance premiums. The drafting of the 1952 Ship Arrest Convention has also been criticized insofar due to ambiguous wording in certain sections, which has invited completely different interpretations from civil law and common law courts. For example, some civil law courts have interpreted Article 3(4) as allowing a ship to be arrested for the debts of her time charterer. On the other hand, in common law jurisdictions, arrest for the debts of anyone other than the ship owners or demise charterer is only possible following the sale of a ship and in respect of maritime liens or other *in rem* claims which

¹⁶ Tsimplis, *Southampton on Shipping Law, Institute of Maritime Law*, 352.

¹⁷ Christopher Hill, *Maritime Law*, 6th edition, (Hong Kong: Informa Professional, 2003), 89.

¹⁸ United Nations Conference on Trade and Development, *Review of Maritime Transport 2011*, Chapter 5, (New York and Geneva, 2011), 110.

survive the sale of a ship¹⁹. The 1999 Ship Arrest Convention refines and updates the principles of the 1952 Ship Arrest Convention²⁰. It features some notable changes to the 1952 Ship Arrest Convention such as the list of claims that has been significantly expanded. Under the 1952 Ship Arrest Convention there are 17 categories of claim which can give rise to a right of arrest while under the 1999 Ship Arrest Convention there are 22 categories, with bottomry having been removed and 6 new heads of arrest having been added. Different from the 1952 Ship Arrest Convention, the 1999 version allows claimants multiple opportunities to secure their claims, for example, pursuant to article 5, a claimant may re-arrest a ship after it has been released, and has the option of arresting multiple ships, in order to top up the security for his claim²¹.

III. SHIP ARREST IN INDONESIA AND OTHER COUNTRIES

Ship arrest is relatively new in Indonesia, the Law number 17 of 2008 on Shipping (“**Shipping Law**”) is the first Indonesian legislation that formally introduces the practice of ship arrest. The Shipping Law stipulates that ships implicated in either criminal or civil cases are subject to arrest by the harbormaster by virtue of a court order²². It is also the first time in Indonesia, the court may grant an *in rem* security for claim without submission of claim is required. In conjunction to that, the Shipping Law provides a closed list of maritime claims in respect of which ship arrest can be done.²³

The introduction of ship arrest in Indonesia shall not less be praised as progressive development that illuminate the obsolete practice of civil procedures that has been for long only relying on the pre-judgment

¹⁹ Bob Deering and Jonathan Reese, “An Overview of the 1952 and 1999 Arrest Conventions,” *Ince & Co*, last modified September 30, 2011, <http://www.incelaw.com/en/knowledge-bank/publications/overview-of-the-1952-and-1999-arrest-conventions>.

²⁰ United Nations Conference on Trade and Development, *Review of Maritime Transport 2011*, 110.

²¹ See note 19 above.

²² *The Law of the Republic of Indonesia number 17 of 2008 on Shipping*, Art. 222(1) and (2).

²³ *The Law of the Republic of Indonesia number 17 of 2008 on Shipping*, Art. 223(1) and its elucidation.

conservatory attachment in securing the enforcement of court decision. However, despite it has brought fresh air to the settlement of maritime disputes in Indonesia, the lack of explanation on the substance and application of ship arrest in the Shipping Law has become a wedge to the implementation of ship arrest in Indonesia. In point of fact, the implementation of ship arrest is supposed to be regulated under a ministerial regulation as said under Article 223 (2) of the Shipping Law. Unfortunately, until the present, the implementing regulation has yet been made that consequently causes obscurity in the implementation of ship arrest in Indonesia.

Indonesia itself is not a contracting state to any of international ship arrest conventions though it has signed the final act of 1999 Ship Arrest Convention. Interestingly, the list of maritime claims provided under the Shipping Law is somehow similar to the list of claims set out under Article 1 (1) of the 1999 Ship Arrest Convention as can be seen in below table²⁴:

1952 Ship Arrest Convention Article 1 (1)	1999 Ship Arrest Convention Article 1 (1)	The Shipping Law Elucidation of Article 223 (1)
1. Damage caused by any ship either in collision or otherwise;	1. Loss or damage caused by the operation of the ship;	1. Loss or damage caused by the operation of the ship;
2. Loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;	2. Loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;	2. Loss of life or serious injuries occurring, whether on land or on water or sea caused by the operation of the ship;

²⁴ *The 1952 International Convention for the Unification of Certain Rules relating to Arrest of Sea-Going Ships*, Art. 1 (1), *The International Convention on Arrest of Ships*, 1999, Art. 1 (1), *The Law of the Republic of Indonesia number 17 of 2008 on Shipping*, Elucidation of Art. 223(1).

3. Salvage;	3. Salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;	Damages to the environment, ship, or cargo due to salvage operations activities or agreement on salvage;
4. Agreement relating to the use or hire of any ship whether by charter party or otherwise;	4. Damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (4);	4. Damages or threat of damage to the environment, coastline or other interests caused by ships, including costs required to take preventive steps on damages to recover the environment, his ship, or her cargo, as well as to recover the environment due to inflicted damages;
5. Agreement relating to the carriage of goods in any ship whether by charter party or otherwise;	5. Costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;	5. Costs or expenses relating to the lifting, removal, repair of ships including costs of saving ships and her crews;
6. Loss of or damage to goods including baggage carried in any ship;	6. Any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;	6. Costs for the use or operations or chartering ships set forth in a charter party or other;
7. General average;	7. Any agreement relating to the carriage of goods or passengers onboard the ship, whether contained in a charter party or otherwise;	7. Costs for transporting goods or passengers on board set forth in a charter party or other;

8. Bottomry;	8. Loss of or damage to or in connection with goods (including luggage) carried on board the ship;	8. Loss or damage of goods including boxes or suitcases carried on board the ship;
9. Towage;	9. General average;	9. Loss or damage to ship and goods due to accident at sea (general average);
10. Pilotage;	10. Towage;	10. Towage costs;
11. Goods or materials wherever supplied to a ship for her operation or maintenance;	11. Pilotage;	11. Pilotage costs;
12. Construction, repair or equipment of any ship or dock charges and dues;	12. Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, reservation or maintenance;	12. Costs of goods, ancillaries, ship's requirements, fuel oil or bunker, ship's equipment including containers provided to serve and for ship's requirements for the operations, handling, saving or maintenance of the ship;
13. Wages of Masters, Officers, or crew;	13. Construction, reconstruction, repair, converting or equipping of the ship;	13. Costs for the construction, re-construction or re-conditioning, repair, change or equip ship's requirements;
14. Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;	14. Port, canal, dock, harbour and other waterway dues and charges;	14. Costs of port, canal, dock, harbor, shipping lane, and/or other retributions;
15. Disputes as to the title to or ownership of any ship;	15. Wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;	15. Wages and other indebted payment to the master, officers and crews and others employed on board the ship including costs for repatriation, social insurance for their interest;

16. Disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;	16. Disbursements incurred on behalf of the ship or its owners;	16. Disbursements spent for the interest of the ship in the name of the owners;
17. The mortgage or hypothecation of any ship.	17. Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;	17. Insurance premiums (including "mutual insurance call") for ship that must be paid by the ship owner or the charterer of bare boat (demise charterer);
	18. Any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;	18. Commission, expenses, intermediary or brokerages or agency which must be paid in respect of the ship in the name of the bare boat owner (demise charterer);
	19. Any dispute as to ownership or possession of the ship;	19. Costs for dispute in connection with status of ship ownership;
	20. Any dispute between co-owners of the ship as to the employment or earnings of the ship;	20. Costs for dispute arising between co-owner of the ship related with the operations and earnings or yield of hawser;
	21. A mortgage or a 'hypothèque' or a charge of the same nature on the ship;	21. Costs of mortgage or hypothèque or other encumbrances having the same nature on ship
	22. Any dispute arising out of a contract for the sale of the ship.	22. Costs for dispute arising out of an agreement for the sale of ship.

As Indonesia 'borrows' the list of maritime claims from the 1999 Ship Arrest Convention, it can be considered that although Indonesia is not a contracting state to said convention, it silently adopts limited content of the convention into its national law. The similarity of maritime claims under the Shipping Law to those in the 1999 Ship Arrest Con-

vention also raises a question whether ship arrest can be exercised for securing maritime liens in Indonesia, noting that Indonesia has ratified the International Convention on Maritime Liens and Mortgages, 1993. In relation to that, the elucidation of Article 223 (1) (u) of the Shipping Law provides that ship arrest may be exercised on the basis of maritime claim concerning the costs of mortgage or hypothèque or other encumbrances having the same nature on ship which substantially similar to Article 1 (1) (u) of the 1999 Ship Arrest Convention. However, there is no specific provision under the Shipping Law nor other related regulations that expressly makes ship arrest exercisable to secure maritime liens in Indonesia²⁵. Meanwhile, in comparison, Article 3 (1) (e) of the 1999 Ship Arrest Convention clearly stipulates that ship arrest can be exercised on the basis of claim that secured by a maritime lien²⁶.

While better clarity is necessary for the practice of ship arrest in Indonesia, practical implementation of ship arrest can be learned from the Netherlands. The Netherlands is considered a convenient jurisdiction for ship arrest. In principle, ship arrest within Dutch jurisdiction can be exercised for any claim against the ship-owner, regardless of whether the claim has a maritime character or is connected with the ship to be arrested. However, some restrictions are applied by several conventions to which the Netherlands is a signatory including the 1952 Ship Arrest Convention.²⁷ Ship arrest proceeding in the Netherlands is *ex parte* which starts with the submission of an arrest petition to the court in whose jurisdiction the ship is located or is expected to arrive shortly.²⁸ The petition should contain the full style of the claimant and debtor, the grounds for the arrest and the amount of claim.²⁹ It is the practice in the Netherlands, when a claimant files a petition to request for an uplift of

²⁵ *The Law of the Republic of Indonesia number 17 of 2008 on Shipping*, Elucidation of Art. 223(1) (u), *The International Convention on Arrest of Ships, 1999*, Art. 1 (1) (u).

²⁶ *The International Convention on Arrest of Ships, 1999*, Art. 3 (1) (e).

²⁷ "Ship Arrest in the Netherlands," *The MaritimeAdvocate.com*, accessed September 15, 2016, http://www.maritimeadvocate.com/ship_arrest/ship_arrest_in_the_netherlands.htm.

²⁸ Peter van der Velden, "Ship Arrest in the Netherlands," *Ship Arrests in Practice by Shiparrested.com Members*, 214, <http://shiparrested.com/wp-content/uploads/2016/04/NetherlandsSAP.pdf>.

²⁹ See note 27 above.

around 30% on the principal claim amount to cover costs and interest. The Dutch courts determine amount for the security that will be granted depends on the principal claim amount.³⁰

The submission of petition is very practical as it does not require written documents and leave for arrest can be obtained just within few hours. The court assumes and trusts that the lawyer submitting the petition has seen and examined the supporting documents. However, in case the ship-owner applies for release in summary proceedings, the claimant must be able to show its claim documentation. Practicality also applies to the documentation as originals are not needed, nor a power of attorney, and claim documents can be provided by any means of communication³¹. Another practicality is on the time flexibility as the petition can be submitted at any time even after office hours or during the weekend. The bailiff carries out the enforcement of ship arrest by serving the court order to the master and notifying the port authority. Upon such notification, the port authority will not allow the ship to order for pilot without which she will not be able to leave the port.³²

Simultaneously with the granting of arrest, the Dutch court sets time limit within which the claimant must file its claim in main proceedings before the proper court or arbitrators, either in the Netherlands or abroad, failing which the arrest will expire and the ship considered released from arrest. Ship arrest must be lifted immediately once the ship-owner has settled the claim or offered sufficient alternative security. Guarantees issued by first class Dutch bank or letter of undertaking by reputable P&I clubs are acceptable to Dutch courts. The ship-owner may request for an injunction ordering release from arrest in summary proceedings that can take place at very short notice. In such proceedings, the court decides whether the claim has sufficient merit to justify maintaining the arrest which will be rendered in a few days later or even sooner. In practice, it is hard to convince the court that the claim is clearly without merit.³³ The Dutch law does not provide for the ob-

³⁰ Elisabeth Birch, "Ship Arrest in the Netherlands," *Standard Bulletin*, September 2013, 9, <http://www.standard-club.com/media/1557577/ship-arrests-in-the-netherlands.pdf>.

³¹ See note 27 above.

³² Velden, "Ship Arrest in the Netherlands," 214.

³³ *Ibid.*

ligation to provide counter-security prior to or during the arrest. However, the court does have the discretionary power to demand security for eventual damages caused by the arrest if the arrest transpires to be wrongful, although, in practice, it rarely happens that the claimant is required to put up security³⁴.

Another example of ship arrest practice that is worth to look at is in Singapore. It is an interesting fact that ship arrest is frequently carried out in Singapore despite it is not a contracting state to any of international ship arrest conventions. Nevertheless, Singapore is a signatory state to the Convention on Limitation of Liability for Maritime Claims, 1976, which has been given effect and incorporated into Singapore's Merchant Shipping Act³⁵. Record shows that Singapore is an important ship arrest venue by dint of geographical and economic factors. From a commercial perspective, Singapore has become an extremely important shipping center with connections to more than 600 ports in over 120 countries. Besides that, the status of Singapore as the world's busiest bunkering stop may assure that trends in Singapore arrest laws will remain of interest to the world's ship-owners and operators. With a steady flow of ship arrests and resulting litigation, Singapore has been gaining popularity as an arrest forum for maritime claimants over the past fifteen years or so³⁶.

The Singapore laws provide a closed list of claims for which the court may exercise its admiralty jurisdiction to arrest a vessel. Ship arrest can be exercised in Singapore irrespectively of her flag and debtor. The arrest can also be exercised against sister ships but not ships in associated ownership³⁷. Ship arrest in Singapore usually be held within 12 months as of the commencement of the admiralty *in rem* action, as long as the vessel is within the port limits of Singapore. In Singapore, the sheriff carries out ship arrest, as enforcement officer of the court,

³⁴ See note 27 above.

³⁵ Dato Jude P. Benny, "Ship Arrest in Singapore," *Ship Arrest in Practice by Shiparrested.comMembers*, 282, <http://shiparrested.com/wp-content/uploads/2016/04/SingaporeSAP.pdf>.

³⁶ Kendall Tan and Janice Pui, "Key Developments in Singapore Ship Arrest Laws: A Practitioner's Perspective," *Turkish Commercial Law Review*, Vol. 1, No. 3, (October 2015), 254, http://the-tclr.org/wp-content/uploads/2015/11/TCLR_3-web-081.pdf.

³⁷ Benny, "Ship Arrest in Singapore," 282.

but since 1994, solicitors have also been authorized to perform ship arrest. Once a ship is arrested, the maritime port authority of Singapore, the immigration and checkpoints authority and the police coast guard will be notified.³⁸ In order to obtain a warrant of arrest, the claimant is required to file a writ that briefly describes the claim and to prepare an affidavit in support of the application for a warrant of arrest. The affidavit needs to be signed before a commissioner of oaths, if executed in Singapore, or a notary public, if executed overseas. Copies of all relevant documents must be exhibited in the supporting affidavit, including those that may be detrimental to the claim. A power of attorney is not required for the arrest. All court documents for the arrest are filed electronically to the court's system. The court hearing for the issuance of the warrant of arrest can be swiftly arranged within a few hours once the supporting documents are ready. Once the warrant of arrest is issued, a ship can be arrested within a matter of a few hours, depending on the location of the ship.³⁹ The ship can be released from arrest if the ship-owner provides security for the claim which normally in the form a first class guarantee from a Singapore bank, a bail bond, payment into court, or a letter of undertaking from a reputable and internationally recognized P&I club or H&M underwriter.⁴⁰ The ship-owner may also apply to the court to set aside the arrest of the ship if the warrant of arrest is defective.⁴¹

The Singapore court generally assumes jurisdiction over the substantive claim following an arrest. Once service of the writ is effected, the Singapore proceedings are deemed to have commenced and the procedural timelines for the substantive claim will start to run. The ship arrest in Singapore is also possible to obtain security for ongoing or anticipated foreign arbitration proceedings.⁴² If the ship arrest has been taking place for quite some time but no security for the claim is offered, the application for sale of the ship *pendente lite* or pending the litigation can be done within a short time considering the ship is a wasting asset

³⁸ "Sheriff's Services," *Supreme Court Singapore*, accessed September 15, 2016, <http://www.supremecourt.gov.sg/services/court-services/sheriff's-services>.

³⁹ Benny, "Ship Arrest in Singapore," 283.

⁴⁰ *Ibid.*, 284.

⁴¹ See note 38 above.

⁴² Benny, "Ship Arrest in Singapore," 283-284.

and continues to incur costs. After the order for sale of the ship has been granted, the ship will usually be put up for public auction. Private sale of the ship may be possible if that will result in a better return for the ship than a public auction. The sale by private treaty will have to be sanctioned by the court⁴³. The proceeds of the sale are then used to satisfy the claims of the plaintiff and other relevant parties, after the expenses of the sheriff and other dues have been deducted. Any party who has obtained judgment against the ship may apply to the court to determine the order of priority of the claims against the proceeds of sale of the ship. Upon being served with an order of court, the sheriff will then distribute the proceeds of sale accordingly⁴⁴.

IV. ISSUES OF SHIP ARREST IN INDONESIA

Because of the absence of the implementing regulation, procedural matters can perhaps be considered as the primary issues of ship arrest in Indonesia. Procedural issues encompass sub-issues such as procedures of obtaining an arrest order and the release of ship, against whom the action can be directed, timing of the process, evidentiary, form of acceptable security, judicial sale of the ship, legal remedies, etc.

In regard to the process of effecting the arrest, a clear procedure must be set including the form of application, whether the process is *ex parte* or *inter partes*, any supporting documents that may be required, evidentiary, and other related technical aspects. The procedure for release is also very important as an element of balance. The form of acceptable security must be determined and also the procedure to set aside the arrest in the case of wrongful arrest.

Other important issue to highlight here is jurisdiction. Pursuant to the Indonesian Civil Procedures (“**HIR**”) and the Civil Procedures for the region outside Java and Madura (“**RBg**”), Indonesian courts basically assume jurisdiction on the basis of *actor sequitur forum rei* principle or the court in whose jurisdiction the defendant is domiciled or having his habitual residence⁴⁵. Such principle is naturally correlated with *in*

⁴³ *Ibid.*, 284.

⁴⁴ See note 38 above.

⁴⁵ *The Indonesian Civil Procedures or Herziene Indonesisch Reglement, State Gazette*

personam claim that directed to a person, which applies as the general practice for the submission of claim in Indonesia. There is no provision under HIR and RBg that explains whether *in rem* action can be initiated against the *res*, or in the case of maritime claim directed to the ship as defendant. Article 118 (3) of HIR opens the chance for *in rem* action to be done in Indonesia but no explanation given whether such action can be directed to the *res* instead of the person-owner. Article 142 (5) of RBg provides better opportunity for *in rem* action owing to the analogy approach where the *res* is treated as if a person-defendant. In respect of the foregoing, clearer rules regarding the exercise of *in rem* action are necessary to be set. Alternatively, effecting ship arrest as *quasi in rem* action where the action affect a named defendant's interest in the ship, may be more suitable with the current existing civil procedural rules in Indonesia. Similar to the case with *in rem* actions, a court may hear a *quasi in rem* action if the named property or a vessel is within the court's jurisdiction, even if the court does not have the power to exercise *in personam* jurisdiction over the defendant owner.⁴⁶

Another relevant issue in respect of jurisdiction is the possibility of parallel litigation in Indonesia. The jurisdiction in which the ship arrest is exercised and where the claim in respect of the merit is proceeded might be different due the difference of the competent court where each action should be initiated. In such circumstance, the relevant question is whether the practice of parallel litigation can be accommodated under Indonesian law. Particularly in cross-border maritime dispute, the need of effecting ship arrest is naturally more urgent than to pursue the merit of the claim. While the ship arrest normally must be conducted in the jurisdiction of the location of the vessel or the next port of call, *in personam* action against the ship-owner or other relevant party may need be brought in different jurisdiction either in Indonesia or overseas, or even an arbitration. Therefore, the future implementing regulation on ship arrest must be ready to deal with the issue of parallel litigation that might happen in cross-border maritime dispute. In relation to this issue,

1941-44, Art. 118 (1) and (2), *The Civil Procedures for Region outside Java and Madura or Reglement tot Regeling van het Rechtwezen in de Gewesten Buiten Java en Madura*, State Gazette 1927-227, Art. 142 (1) and (2).

⁴⁶ "Quasi in rem: an overview," *Cornell University Law School*, accessed September 16, 2016, https://www.law.cornell.edu/wex/quasi_in_rem.

the 1999 Ship Arrest Convention specifically address that the court in which ship arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have determined to submit the dispute to court of another state which accepts jurisdiction or to arbitration⁴⁷. Such provision could be ideal to resolve this issue subject to compatibility with the existing civil procedural rules in Indonesia, otherwise law adjustment must be made to suit the application.

Issue of applicable law is also worth to note as conflict between *lex fori* and *lex causae* might arises in relation to ship arrest. Assuming there is no difference in jurisdiction, anticipation must be made if the rules of procedure where the ship arrest is affected and the applicable law of the subject matter are different. Such difference is likely to occur in a cross-border maritime dispute, especially in the event the parties had designated a certain choice of law under the agreement or any form of contractual documents (i.e. bill of lading and charter party).

There might also be a question whether Indonesia should become a member of the 1952 and/or 1999 Ship Arrest Conventions. To answer such question, a lesson and example can be learned from Singapore which also not a member to any of said ship arrest conventions. The example shows that become a member of international ship arrest convention is not an absolute condition to develop a world class legal system that friendly to ship arrest. If Indonesia can prove that its domestic law is more than sufficient to support the international shipping industry with excel and fair practice of ship arrest then a question of becoming contracting state to international ship arrest convention may no longer so important. Nevertheless, the 1952 and 1999 Ship Arrest Conventions provide substantial guidelines that may help their contracting states in setting up local ship arrest laws according to international standard. However, each country including Indonesiamay have its own policy and reason in regard to the adoption of international ship arrest convention. And most importantly, it is not the membership status of international ship arrest convention that matters but the quality and ability of a state in implementing fair and just ship arrest that counts.

⁴⁷ *The International Convention on Arrest of Ships, 1999*, Art. 7 (1).

V. CONCLUSION

Looking at enormous potential of Indonesia as the world's largest archipelagic state, it is fair-minded that a goal is set of transforming Indonesia to become a global maritime axis. In support of such idea, the president of Indonesia has also introduced new maritime doctrine that comprises five key elements such as embedding maritime cultures, developing marine infrastructure through an inter-island maritime highway, boosting Indonesia's maritime-resource development, placing maritime and border issues at the heart of diplomacy, as well as strengthening maritime security. The idea of making Indonesia to become the fulcrum of global maritime also fits the trend of 21st century that will unequivocally be a maritime century where most global commerce moves by sea and most of the world's population lives within 200 miles of the coast⁴⁸.

It must not be forgotten, that developing Indonesia to become a world's maritime center also need the support of excellent legal instruments in maritime sector which vital to ensure legal certainty and the rule of law in all maritime activities conducted in Indonesia. In that respect, being a global maritime axis, Indonesia must be prepared to accommodate the heaps of cross-border shipping activities including the risk of maritime disputes that may occur within its jurisdiction. Hence, establishing legal instrument that can be relied on by international shipping communities to solve cross-border maritime dispute is a homework which completion must not be delayed. Consistent with that, Indonesia must be ready to keep up with the international shipping law practice to show seriousness in aiming its goal to become a global maritime axis.

One of the key international practices in shipping law is the implementation of ship arrest to provide security for claim in a maritime dispute. The intention of Indonesia to implement such practice has been shown through the adoption of the basic principle of ship arrest under the Shipping Law. However, the work is still far from end as the implementation of ship arrest remains unclear in Indonesia due to lack of the implementing regulation. At this point, Indonesia must not fail to

⁴⁸ Pandu Utama Manggala, "Rethinking Indonesia's global maritime axis," *The Jakarta Post*, last modified March 22, 2015, <http://www.thejakartapost.com/news/2015/03/22/rethinking-indonesia-s-global-maritime-axis.html>.

develop international standard legal instrument to show its earnest commitment and determination in manifesting the idea of making Indonesia as an axis of world maritime.

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ARCHIPELAGIC STATE RESPONSIBILITY ON ARMED ROBBERY AT SEA

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Abstract

Recent hijackings to Indonesian ships on the southern waters of the Philippines have raised alarming concerns not only from the involving states but also other countries in the region. Such crimes at sea frequently occur in the area of the coastal states in this case archipelagic states such as Indonesia and the Philippines. This privilege as archipelagic states automatically extends their sovereignty and jurisdiction to enforce their national legislations. As a corollary, responsibility to ensure the security and capacity to protect and supervise territory should be carefully examined when looking at the current situations. This paper examines the responsibility of archipelagic states in the event of sea armed robbery within their jurisdiction.

Keywords: State Responsibility, Armed Robbery, Indonesia, Philippines

I. INTRODUCTION

“To neglect the ocean is to neglect two thirds of our planet.

To Destroy the Ocean is to kill our planet, a dead planet serves no nation”²

On March 26, 2016, two Indonesian-flagged boats, tug boat *Brahma 12* and barge *Anand 12*, had been seized during their voyage from Sungai Puting, South Kalimantan, to Batangas Province, South of the Philippines. They were believed to had been attacked in Tawi – Tawi, part of the Philippines water. The hijackers immediately released the tugboat and detained *Anand 12* together with its 10 crew in an unknown location. The hijackers, who confirmed to have an affiliation with Abu

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² Quotation by Thor Heyerdahl, see : The UN Conference on the Law of the Sea, *Summary Records of Plenary Meetings : 1st Plenary meeting*, 3 December 1973, par. 5.