

**Recommendations Concerning Aspects of  
the *Admiralty Rules* Relating to  
Undertakings and Bail Bonds**

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## **Table of Contents**

Introduction	3
Application for an Arrest Warrant and Accompanying Undertaking	3
Clarification of Existing Provisions	4
Releasing Arrested Property – Forms 18 and 19	5
Overlapping Undertakings	6
Alternatives to the Provision of Undertaking Upon Arrest	7
On-going Balance of Arrest Expenditure and Related Information	9
Pre-arrest Demands for Cash	10
Affidavit Supporting Application for Arrest Warrant	11
Wages, Collision: Security for Costs	12
Bail Bonds	13
Court’s Discretion and the International Convention on the Arrest of Ships	14

# **Recommendations Concerning Aspects of the *Admiralty Rules* Relating to Undertakings and Bail Bonds**

## Introduction

*The following recommendations accompany the results of research undertaken on behalf of Finkelstein J in response to various issues that were raised at the 11 November 1999 meeting (“the meeting”) between the Sydney Admiralty Committee Judges, various Admiralty Marshals of the Court, the profession and other parties interested in the Court’s Admiralty jurisdiction.<sup>540</sup> This research was presented at the November 2000 meeting of the Admiralty Committee in Sydney. The recommendations below relate to issues that were raised at the 1999 meeting and are presented in the order in which those issues were considered at that meeting.*

## **Application for an Arrest Warrant and Accompanying Undertaking**

**Recommendation 1 – Assuming that the Court wishes to *retain* the provisions in the Rules relating to the undertaking to pay to the Marshal, on demand, an amount equal to the amount of the fees and expenses of the Marshal in relation to the arrest, the Court should re-write provisions in the Rules relating to such an undertaking. In particular, the Court should consider:**

- i. Empowering the Marshal to accept, *instead of an undertaking*, a deposit of a sum as he/she considers reasonable to meet the fees and expenses of an arrest.<sup>541</sup> The Marshal would, in addition, need to be vested with the power to demand additional sums as

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<sup>540</sup> The results of the research (“the results”) are available from Finkelstein J. All of the particular Rules referred to in this discussion are contained in the results.

<sup>541</sup> This is the practice in Singapore (see O. 70, r. 23) and, interestingly, it was the practice which existed in the United Kingdom under the old *Supreme Court Rules* (see RSC O. 75, r. 23A). This was, however, abolished by the current *Civil Procedure Rules* which do not empower the Registrar to accept such a deposit in lieu of an undertaking (see CPR r. 781(1)).

required, post-arrest. This would have the advantage of removing the Court's concerns relating to solicitors' undertakings with regard to the arrest of a vessel.

- ii. Requiring, *in addition to the undertaking*, an up-front deposit of a sum to enable the Marshal to discharge his/her duties effectively upon the arrest of a vessel.<sup>542</sup>

### **Clarification of Existing Provisions**

**Recommendation 2 – If the undertaking provisions are to be *retained*, the Court should clarify the Rules so far as concerns the particular identity of the person/entity giving the undertaking. The Court should also consider implications arising as a result of the nature of the person/entity giving the undertaking. In particular, the Court should have regard to:**

- i. Amending the Rules so that a personal undertaking from the applicant's solicitor need *not* be given in order to secure the arrest of a vessel. The Rules should make it clear that the solicitor's law firm should give the undertaking. This would ameliorate problems which may arise when the solicitor giving the undertaking leaves the firm.
- ii. Whether or not undertakings from other entities (such as Australian corporations and P & I Clubs) might be sufficient and, if so, whether the Rules should be amended so as to enable such undertakings to be given. If the Rules are amended to enable such undertakings to be given, the Court should consider implications concerning (a) the additional financial information that would be required in order for the Marshal to be able to enforce the security against the entity; and (b) any difficulties, in terms of time and cost, which might result from the arrest given the nature of the undertaking party.

No jurisdiction the subject of research accepts undertakings from "other entities" in order to secure the arrest and detention of property by the Marshal. However, s 3(10) of the *Admiralty Jurisdiction Regulation Act 1983* (South Africa) should be noted. This

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<sup>542</sup> In Singapore, solicitors representing the arresting party are required to deposit a sum of between \$5,000 and \$10,000, depending upon the facts of the case (see the Supreme Court Practice Directions, paragraph 44(4)). The deposit is in addition to the usual undertaking.

deems property to be arrested by the giving of security or an undertaking to prevent an attempted arrest; the security or undertaking, for all intents and purposes, taking the place of an arrest. In practice, most claims are secured by way of a P & I Club Letter of Undertaking;<sup>543</sup> that security being given inter-partes to avoid the arrest.

## **Releasing Arrested Property – Forms 18 and 19**

**Recommendation 3 – Forms 18 and 19, which are invoked in essentially the same circumstances, should be harmonised. The current inconsistency concerning (i) an undertaking to pay the fees and expenses of the Marshal in complying with a release application (where release is sought from the Registrar); and (ii) an undertaking to pay the fees and expenses of the Marshal in connection with the custody of the ship/property while under arrest (where release is sought from the Court) is unsatisfactory. The Rules should be amended so that, before property under arrest is released, the party at whose instance the release is sought and obtained must, in accordance with the directions of the Registrar or of the Court (from whomever the release is sought) either:**

- i. pay (a) the costs, charges and expenses due in connection with the care and custody of the property while under arrest; and (b) the costs, charges and expenses associated with the release of the property, or of endeavours to release the property; or**
- ii. give a written undertaking to pay those costs, charges and expenses.**

*No jurisdiction studied makes the distinction that our Forms 18 and 19 do.<sup>544</sup> The undertaking filed upon release should cover all of the Marshal's expenses of arrest, custody and release and should supersede that given upon issue of arrest proceedings.*

<sup>543</sup> J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* (1999, Juta & Co Ltd, Kenwyn) p 99.

<sup>544</sup> See (i) New Zealand's Rule 779(8); (ii) the United Kingdom's ADM 12; (iii) Canada's Rule 489; and (iv) the United States' Supplemental Rule E(5)(c).

## Overlapping Undertakings

**Recommendation 4 – If the undertaking provisions are to be *retained*, the Marshal should *not* have the benefit of overlapping undertakings.**

The Marshal should not have the benefit of collecting fees and expenses from anyone of the parties, leaving those parties to sort out, amongst themselves, matters of contribution.

Where more than one party arrests property by the one arrest warrant, those parties should, and would, be jointly liable upon the required undertaking. The arresting parties will work out, amongst themselves, their individual contribution to the fees and expenses of the arrest.

Where there are successive arrests of the same property, only the undertaking provided by the “initial plaintiff” should be enforced.<sup>545</sup> This would avoid the receipt of proportionate payments from the various plaintiffs.

The Rules will need to be amended so as to provide a mechanism for the settlement of disputes which may arise amongst arresting parties as to their individual contribution pursuant to the undertaking.

It should be noted that, in Singapore, undertakings *may* be overlapped. Thus, if Law Firm A provides an undertaking when it seeks the arrest of property and Law Firm B later provides an undertaking when it seeks the release of the property from arrest, the Marshal is able to choose to claim his expenses incurred during the period of arrest from *either* Law Firm A or B. In the event that a party disputes the expenses of the Marshal, that party is able to apply to the Court for directions or a determination of the matter.<sup>546</sup> When an application for release is unsuccessful, the unsuccessful applicant need not provide the undertaking as the undertaking which would be required only upon release.

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<sup>545</sup> This is the practice in the United States (see Volume 7 of the Marshal’s Manual (United States), para 7.3-6(e), contained in Appendix T to the results.)

<sup>546</sup> See o. 70, r. 23(3) of the Singapore Rules.

## Alternatives to the Provision of Undertaking Upon Arrest

**Recommendation 5 – If the undertaking provisions are to be *not* to be retained the Court should consider other means which the Marshal could use in respect of meeting the fees and expenses of an arrest. The Court should consider each of the following options:**

- i. *Abolishing* the requirement to provide an undertaking and *replacing* it with (a) an indemnity to the Marshal indemnifying him/her/his or her officers and agents for any fees and expenses that may be incurred in the execution of the arrest warrant and against any liability arising out of or incidental to any act lawfully done in executing the arrest warrant; and (b) a requirement that the applicant provide security, up-front, to the satisfaction of the Marshal for any fees or expenses associated with the arrest.<sup>547</sup>

Consistent with practice prevailing in New Zealand, where an arrest is on-going, the Court should require the Marshal to demand a sizeable payment (by way of security) consistent with established port fees, likely fuel consumption and ships provedores costs. Naturally, the Marshal would need to be vested with the power to demand additional security to cover the fees and expenses of an arrest should this be required. This would enable the security fund to be “topped-up” when and if required. The Court should have regard to the possibility of this practice being abused by, for example, the captain of a vessel who may request excessive volumes of fuel and the like and the Marshal should be vested with powers to prevent such abuse.

- ii. *Abolishing* the requirement to provide an undertaking and *replacing* it with a requirement to pay to the Marshal, in advance, a cash sum sufficient to cover the fees and expenses of the arrest.<sup>548</sup> This is the model which exists in the United States, at federal level, pursuant to Title 28, U.S.C. § 1921. 28 U.S.C. § 1921 obliges the Marshal to collect, in advance,<sup>549</sup> sufficient fees to cover the cost of service of the process, U.S. Marshal’s insurance and sufficient keeper and maintenance (keeper and maintenance fees depend upon local labour situations and prevailing work conditions in a particular district). Following seizure of property, the Marshal has the power to demand additional deposits as are necessary until the litigation is concluded. If the party initiating the

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<sup>547</sup> See Rule 776 of the *High Court Rules* (New Zealand).

<sup>548</sup> The deposit required must take into account any special circumstances which exist which will require greater expenditure.

seizure fails to deposit the requested funds, the U.S. Marshal must seek relief from the district court including, but not limited to, the right to release the property from arrest or attachment with a reservation of the right to proceed against the plaintiff for any balance due.

- iii. *Adopting* the Canadian model whereby possession of and responsibility for property arrested does *not* vest in the Sheriff but continues in the person in possession of the property immediately before the arrest.<sup>550</sup> This provision is liable to be overridden by a Court order that the Sheriff “take possession of arrested property on condition that a party assume responsibility for any costs or fees incurred or payable in carrying out the order and give security satisfactory to the Court for the payment thereof.”<sup>551</sup>
- iv. Placing the arresting party before an *election* to fund the preservation of the property arrested or to have the arrest lapse. Where an arrest lapses, the owner would have an election to pay the costs and obtain delivery of his/her property or face the sale thereof if he/she does not pay.

The Association of Maritime Sheriff’s of South Africa has recently proposed this election mechanism.<sup>552</sup> In essence, the proposed model:

- affords the arresting party with an election to fund the costs of custody and preservation or face the release of the arrest;
- affords the ship-owner a subsequent election to pay the costs incurred by the Marshal in the knowledge that he/she is able to remove the ship from the Marshal’s custody when the Marshal’s costs are paid;
- empowers the Marshal to rid him/herself of the burden of taking custody of detained property and to take steps to recover moneys expended in an orderly, timely and controlled fashion;
- does not impact upon the rights of the litigants or of the ship-owner without first affording them an opportunity to protect that right;
- removes the unilateral burden upon the Marshal; and
- will result in interested parties taking greater consideration of the consequences of instructing the detention of property.

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<sup>549</sup> This sum for expenses must be paid 10 days in advance of the arrest unless local rules provide otherwise.

<sup>550</sup> Rule 483 of Part 13 of the *Federal Court Rules 1998*.

<sup>551</sup> Rule 483(2).

## On-going Balance of Arrest Expenditure and Related Information

*Recommendation 6 – The Rules should entrench an obligation on the Marshal to make available to an interested party information concerning (a) the acts taken by him/her, or proposed to be taken by him/her; (b) the costs incurred in respect of these actions, or costs anticipated to be incurred in the future; and (c) the condition of arrested property. This information should be contained in periodical reports prepared by or on behalf of the Marshal.*

This recommendation does not deny that practices may exist whereby Marshals provide interested parties with information such as the on-going balance of arrest expenditure, whether actual or anticipated. The recommendation does, however, seek to place Marshals under an obligation to provide such information. In doing so, it recognises the parties' interest in having timely and accurate information in respect of the on-going costs of the preservation of arrested property and, also, in the condition arrested property.

If this recommendation were implemented, the Court would need to consider when the Marshal would be required to prepare and make available the reports. The Association of Maritime Sheriffs of South Africa, in their proposed changes to rule 21 of their Admiralty Rules which suggests imposing a similar duty upon the Sheriff,<sup>553</sup> suggests that the reports should be prepared weekly. The Court might be of the opinion, however, that fortnightly or monthly reports would be sufficient given the additional administrative burden that the duty will place upon the Marshal. If implemented, this recommendation would assist solicitors in obtaining counter-security from clients in circumstances where a solicitor undertakes to pay the fees and expenses of the Marshal associated with the arrest of property.

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<sup>552</sup> See Appendices M and N to the results for a detailed discussion of the proposed changes to Rule 21 of the Admiralty Rules.

<sup>553</sup> See proposed rule 21(5).

## Pre-arrest Demands for Cash

**Recommendation 7 – If the undertaking upon arrest is *retained*, demands for cash at the time of filing an arrest warrant should *not* be allowed. The Act and Rules should be followed in all Registries of the Court. The required undertaking is sufficient, especially when coupled with the Marshal’s power to demand additional sums, as necessary, after the arrest.**

*It appears that the jurisdictions studied in which pre-arrest demands for cash are permitted are those that do not require an undertaking, or those in which the Rules specifically provide that such demands may be made. In Singapore, for example, upon the arrest of a vessel, the solicitors representing the arresting party are required to deposit, with the Sheriff, a sum of between S\$5,000 and S\$10,000, depending upon the facts of each case.<sup>554</sup> Such a deposit is in addition to the usual undertaking. In the United States, cash deposits must be paid to the Marshal in order to secure an arrest.*

## Affidavit Supporting Application for Arrest Warrant

**Recommendation 8 – The affidavit to support the application for an arrest warrant should contain more detail than that presently required.**

The present Form 13 requires only the barest of detail and amounts, in effect, to a simple assertion of what the relevant claim is in any one case. While the affidavit appears to conform with those in other jurisdictions,<sup>555</sup> it is suggested that it should be altered to require the provision of information concerning any “special circumstances” which might exist or pertain to the vessel or property to be arrested. Information to be included as “special circumstances” should include, for example, information as to:<sup>556</sup>

- the condition of the vessel;
- whether crew is aboard;
- whether that crew will need to be maintained aboard;

<sup>554</sup> Supreme Court Practice Directions, para 44(4).

<sup>555</sup> See, for example, the affidavits required in New Zealand, the United Kingdom and Singapore.

- whether machinery is operable or will have to be operated;
- whether the vessel is moored or will have to be anchored;
- whether cargo is aboard and, if so, whether or not it is perishable, dangerous or hazardous in nature;
- the estimated value of the vessel and cargo;
- the registry of the vessel;
- whether the vessel will have to be moved; and
- any other information that would pertain to the protection, maintenance and upkeep of the vessel or the property while under seizure.

### **Wages, Collision: Security for Costs**

**Recommendation 9 – The Marshal should *not* require security for costs from the master or crew in such matters. Rather, an undertaking for the fees and expenses of an arrest should be given, as required, by the law firm representing the master and crew and the Marshal ought to be able to hold the solicitors of the arresting party to the undertaking.**

While it may seem unfair to relieve the master and crew of a vessel from an obligation to provide security from costs and yet to require an undertaking from their solicitors, the solicitors are able to claim counter-security from the master and crew. This recommendation ensures that the Marshal is not unfairly burdened with the financial obligations associated with preserving an arrested vessel.<sup>557</sup>

*It should be noted that, in New Zealand, the master and crew of a vessel, while not required to provide security for costs in relation to a claim for unpaid wages by the crew, are not relieved from the requirement to provide an indemnity in respect of the costs of an arrest. In the United Kingdom, wages claims are treated no differently to other claims under the Civil Procedure Rules and the rules generally applicable to undertakings and the like apply to such claims. Security for costs, if applied for by ship-owners, is only obtainable by an order of a Judge who has full discretion.<sup>558</sup> In the United States, master and crew wishing to arrest a vessel pursuant to a wage claim must make the same cash deposit as is required of other*

<sup>556</sup> These are borrowed from Volume 7 of the Marshal's Manual (United States), para 7.3-6(d), contained in Appendix T to the results of the background research to these recommendations.

<sup>557</sup> Note that this is the practice prevailing in Singapore.

*arresting parties.*<sup>559</sup> *In Canada, a seaman suing for wages or for the loss of clothing and effects in a collision is not required to give security for costs in Canada.*<sup>560</sup>

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<sup>558</sup> Mr Keith Houghton, Admiralty Marshal, correspondence to the author 18 July 2000.

<sup>559</sup> Mr Philip A Berns, Attorney in Charge, Torts Branch, US Department of Justice, San Francisco, correspondence to the author 7 July 2000.

<sup>560</sup> Rule 499.

## Bail Bonds

**Recommendation 10 – Given that the release of an arrested vessel is able to be secured by the party seeking release providing security for that release, the Court should consider:**

- i. requiring bail bonds signatories to provide detailed financial information upon filing the bail bond, and vesting the Registrar with a power to refuse to accept the security in appropriate circumstances; and/or**
- ii. formulating a list of acceptable bail bond signatories; and/or**
- iii. amending the required form of bail bonds to require sureties to bail bonds to make an affidavit stating that they are able to pay the sum for which the bond is given.**

If implemented, this recommendation would speed up the process of release of vessels and would vest the Registrar with a degree of control over the bail bond system at an earlier stage than current law provides. The Registrar will be able to determine the sufficiency of the proposed surety *before* the surety is accepted. The Rules would require amendment so as to remove the objection to bail provisions. The surety would bind any party served with a notice of bail. The current scheme whereby the Registrar cannot determine the sufficiency of the surety unless a party, having been served with a notice of bail, files a notice of objection against the sufficiency of the surety is unsatisfactory as it has the tendency to delay proceedings.

This recommendation follows the practice in the United States where release of an arrested vessel may be secured by the provision of a stipulation, bond, or other security. The security given must be approved by either the Court or the Marshal, whomever is releasing the vessel, and it is a requirement of such approval that the security be provided by an approved entity.<sup>561</sup>

The suggested amendment requiring sureties to bail bonds to make an affidavit stating that they are able to pay the sum for which the bond is given is borrowed from the Singapore Rules.<sup>562</sup> In Singapore, however, where a corporation is a surety to a bail bond given on behalf of a party, no such affidavit is required on behalf of the corporation unless the opposite party requires it. Where the affidavit is required, it must be made by a “director, manager, secretary or other

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<sup>561</sup> Mr Philip A Berns, Attorney in Charge, Torts Branch, US Department of Justice, San Francisco, correspondence to the author 7 July 2000.

<sup>562</sup> O. 70, r. 15.

similar officer of the corporation.”<sup>563</sup> If Australian law were to require the filing of an affidavit, it is suggested that the affidavit be required in all circumstances, regardless of the nature of the surety to the bond.

Alternatively, and perhaps more attractive given that more financial information would be required than in Singapore, Australia could adopt a form similar to the Canadian Form 486A. Form 486A is required where bail consists of the bond of (a) a surety company licensed to do business in Canada or to furnish security bonds in the part of Canada where the bond is executed; or (b) an individual. It is an affidavit which requires the person providing the surety to state that he/she/it has a net worth of more than the amount in which bail is to be given and to provide, in an appendix attached to the affidavit, a financial statement confirming the declared net worth.

## **Court’s Discretion and the International Convention on the Arrest of Ships**

**Recommendation 11 – The Court should consider (i) exactly how the Convention will impact upon bail bonds; and (ii) the need to adapt the Rules in order to accommodate the Convention, should it be adopted.**

It is suggested that, were the Convention adopted, the Court would have a discretion to interfere in the wording and terms of any security provided in order to secure the release of an arrested vessel. Accordingly, the Rules relating to (i) release from arrest; and (ii) bail bonds would need to be re-written in order to accommodate such a discretion and to remove matters concerning the amount and form of security required from the sole province of the Registrar. The Rules would need to provide for the possibility of an agreement between the parties as to the sufficiency and form of the security and, in the event of no such agreement, for the Court to be able to determine the nature and amount thereof, not exceeding the value of the arrested ship.<sup>564</sup>

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<sup>563</sup> O. 70, r. 15(3).

<sup>564</sup> See Art 4(2) of the Convention.

The relevant Rules in the jurisdictions studied all included some form of intervention by the Court with regard to the nature and form of security provided to secure the release of an arrested vessel.

In New Zealand, while such matters are generally the province of the Registrar, the Court may interfere, either directly or indirectly, in the wording and terms of security provided (a) upon the application of any party;<sup>565</sup> (b) where the Registrar exercises his/her discretion to apply to the Court for orders to assist in the performance or exercise of any function, duty, right or power conferred or imposed upon him/her under the Rules;<sup>566</sup> or (c) upon the application of any party who is affected by a decision of the Registrar under the Rules.<sup>567</sup>

In the United Kingdom, the Court interferes with the nature and form of security provided (a) where there is a dispute as to the amount of security to be provided and a party applies to the Court for it to determine that dispute; and (b) where the defendant/payee applies to the Court for a reduction of an amount already paid upon the ground that the security provided was an excessive amount. This may occur, for example, where security was put up in order to secure the prompt release of arrested property.

In South Africa, s 5 of the *Admiralty Jurisdiction Regulation Act 1983* vests the Court with fairly wide powers so far as concerns maritime claims. Of interest are (a) the power to order that any arrest made/to be made or that anything done/to be done in terms of the Act or any order of the court “be subject to such conditions as the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused; or otherwise”;<sup>568</sup> and (b) the power to order that, in addition to property already arrested, further property be arrested “in order to provide additional security for any claim, and that any security be increased, reduced or discharged, subject to such conditions as the court thinks just.”<sup>569</sup>

In Canada, any question as to the form of bail or the sufficiency of a surety “may be determined by a designated officer or referred by that officer to the court.”<sup>570</sup>

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<sup>565</sup> Rule 781(1).

<sup>566</sup> Rule 795(1).

<sup>567</sup> Rule 795(2).

<sup>568</sup> s 5(2)(c).

<sup>569</sup> s 5 (2)(d).

<sup>570</sup> Rule 486(4).

In the United States, where a special bond is provided in order to secure the release of arrested property, the parties may stipulate the nature and amount of that security. In the event of the inability or refusal of the parties to so stipulate, the Court has the power to stipulate the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the claim fairly stated with accrued interest and costs.<sup>571</sup> Where a general bond or stipulation is provided, that surety must be sufficient and must be approved by the Court. The Court may therefore indirectly interfere with the sufficiency of the surety.<sup>572</sup>

In Singapore, bail bonds are not required by the Sheriff. They are given inter-partes; vis-à-vis the arresting and releasing party. The Court has a discretion to change or vary the wording of the bond.

## **Summary of Recommendations Concerning Aspects of the *Admiralty Rules* Relating to Undertakings and Bail Bonds**

This summary refers to the recommendations set out in the paper prepared by Justice Finkelstein and Emma Murphy on “Recommendations Concerning Aspects of the *Admiralty Rules* Relating to Undertakings and Bail Bonds”.

The recommendations have been listed into four categories:

- amendments if undertaking upon arrest are to be retained;
- amendments if undertakings upon arrest are not to be retained;
- other amendments concerning undertakings; and
- other amendments.

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<sup>571</sup> Supplemental Rule E(5)(a).

<sup>572</sup> Rule E(5)(b).

Where appropriate, the summary includes information on the current rules and on any relevant comments provided by District Registrars and Marshals. The summary also raises for consideration a number of other amendments concerning the fees and expenses of the Marshal.

## **Amendments if undertakings upon arrest are to be retained**

### **The current situation**

Rule 41 of the Admiralty Rules (“the Rules”) provides:

An application for an arrest warrant constitutes an undertaking to the court:

- (a) if the application is made by the applicant personally — by the applicant; or
  - (b) if the application is made by a solicitor on behalf of the applicant — by the solicitor;
- to pay to the Marshal, on demand, an amount equal to the amount of the fees and expenses of the Marshal in relation to the arrest.

Paragraph 78(b) of the Rules provides, inter alia, that where a person is liable to pay fees and expenses of a Marshal under these Rules, the Marshal may make 1 or more demands for interim payments on account of those fees or expenses.

In practice, as soon as an arrest warrant is issued the Marshal will usually ask/demand that an amount of money be deposited with the Court on account of the fees and expenses likely to be incurred in relation to the arrest.

### **Suggested recommendations**

#### ***Recommendation 1(i) – power to require deposit instead of undertaking***

Under this recommendation, rule 41 would be amended to empower the Marshal to:

- accept, *instead of an undertaking*, a deposit of a sum as the Marshal considers reasonable to meet the fees and expenses of an arrest prior to the arrest; and
- demand additional sums as required after an arrest.

[Note: At present the Marshal's power under rule 78 to demand payment by a party relies on that party being liable to pay fees and expenses pursuant to the undertaking imposed by rule 41. If there is no undertaking then consideration may have to be given as to whether the Rules should expressly provide that a party is liable for the fees and expenses in relation to the arrest.]

### ***Recommendation 1(ii) – power to require deposit in addition to undertaking***

Under this recommendation, rules 41 and 78 would be amended to empower the Marshal to require, *in addition to the undertaking*, an up-front deposit of a sum to enable the Marshal to discharge his/her duties effectively upon the arrest of a ship.

[Note: This amendment reflects the practice of the Marshal under the current Rules.]

### **Recommendation 7 – no power to require deposit prior to arrest**

Under this recommendation, rule 78 would be amended so that the Marshal would

- not have the power to demand cash in advance at the time an arrest warrant is filed;
- have the power to demand payment of additional sums as required after an arrest.

[Note: This recommendation, unlike recommendations 1(i) and 1(ii), reduces the options available to secure the Marshal's fees and expenses. A mixture of undertakings and up-front deposits provides more flexibility and greater likelihood of the fees and expenses being satisfactorily secured. There are many advantages in allowing the Marshal to obtain up-front deposits where possible.]

### **Recommendation 2 – who should give the undertaking**

Under this recommendation, rule 41 would be amended to:

- replace the personal undertaking of the plaintiff's solicitor with an undertaking by the law firm acting for the plaintiff (rec 2(i));
- in addition, allow the undertaking to be given by other entities (such as Australian corporations and P & I Clubs) (rec 2(ii)).

[Note: There are concerns as to whether an undertaking from a firm will deliver any real benefit. There may be cases where the partners who make up the firm are not prepared to give the undertaking. The main issue is whether the person or entity giving the undertaking has the means to honour it – in this regard consideration should be given to requiring the responsible partner of the law firm acting for the arresting party to provide the undertaking. Consideration might also be given to allowing a registrar to accept a domestic bank guarantee for the purposes of securing the fees and expenses of an arrest.]

### **Amendments if undertakings upon arrest are not to be retained**

If the requirement for an undertaking upon arrest is not to be retained then the paper suggests that consideration be given to amending the Rules to give effect to one or more of the following options.

#### ***Recommendation 5(i)***

Require the arresting party to:

- indemnify the Marshal, the Marshal's officers and any agents retained by the Marshal for any fees and expenses that may be incurred in the execution of the arrest warrant and against any liability arising out of or incidental to any act lawfully done in executing the arrest warrant; and
- provide security, up-front, to the satisfaction of the Marshal for any fees or expenses associated with the arrest; and
- provide additional security as demanded by the Marshal to cover any additional fees and expenses associated with the arrest.

#### ***Recommendation 5(ii)***

Require the arresting party to:

- pay the Marshal, in advance, a cash sum sufficient to cover the fees and expenses of the arrest; and
- pay the Marshal such additional amounts as demanded by the Marshal to cover any additional fees and expenses associated with the arrest – if the amount is not paid the Marshal may seek orders from the court to release the ship with reservation of the right to proceed against the plaintiff for any balance due.

***Recommendation 5(iii)***

Amend the Rules to provide that, unless the court orders otherwise, possession of and responsibility for the arrested ship remains vested in the person in possession of the ship immediately prior to the arrest. The Court may order that the Marshal take possession of the ship on condition that a party be responsibility for any costs or fees incurred, and that that party give security for those costs and fees.

***Recommendation 5(iv)***

Amend the Rules to provide that the arresting party may elect to;

- fund the preservation of the property arrested; or
- have the arrest lapse – in which case the owner must elect whether to pay the costs and obtain delivery of the ship or allow the ship to be sold.

[Note: These options could be adopted while retaining the undertaking. See the earlier note about the desirability of having a wide a range of mechanisms for securing the fees and expenses of an arrest.]

## Other amendments concerning undertakings

### **Recommendation 3 – undertakings and release of ship**

At present, a ship or property may be released by the Registrar or the Court:

- Subrule 51(1) provides, inter alia, that where a ship or other property is under arrest in a proceeding, the Registrar may, on application in accordance with Form 18, order the release from arrest of the ship or property if satisfied that:
  - (a) an amount equal to:
    - (i) the amount claimed; or
    - (ii) the value of the ship or property;whichever is the less, has been paid into court; or
  - (b) a bail bond for an amount equal to:
    - (i) the amount claimed; or
    - (ii) the value of the ship or property;whichever is the less, has been filed.

Form 18 includes an undertaking by the applicant to pay the fees and expenses of the Marshal in complying with the application.

- Subrule 52(1) provides, inter alia, that a party to a proceeding may apply to the Court in accordance with Form 19 for the release of a ship or other property that is under arrest in the proceeding. Under subrule 52(3), the Court may order the release of the ship or property on such terms as are just.

Form 19 includes an undertaking by the applicant to pay the fees and expenses of the Marshal in connection with the custody of the ship or property while under arrest.

Neither rule 51 nor rule 52 refer to the undertaking required by forms 18 and 19 respectively. Rule 53 provides that the Marshal may refuse to release a ship or other property from arrest in accordance with an order under this Part unless arrangements satisfactory to the Marshal have been made for the payment of the fees and expenses of the Marshal in connection with the custody of the ship or property while it was under arrest.

The paper recommends that rules 51 and 52 be amended to provide that, before property under arrest is released by the Court or a registrar, the party seeking the release must, in accordance with the directions of the Court or registrar (from whomever the release is sought), pay or give a written undertaking to pay:

- the outstanding costs, charges and expenses due in connection with the care and custody of the property while under arrest; and
- the costs, charges and expenses associated with the release of the property, or of endeavours to release the property.

It is also recommended that an undertaking under the proposed amendments would supersede the undertaking given by the applicant upon the arrest of the ship or property.

[Note: The paper (at page 6) suggests that the payment and undertaking should also include the costs of the arrest. However, this is not reflected in the current wording of the recommendation.]

Subsequent to this amendment, forms 18 and 19 should be amended to omit the undertaking or to replace it with an undertaking in the terms of the proposed rule.

[Note: The recommendation also proposes harmonising forms 18 and 19. However, apart from the different undertakings, the differences between the forms reflect the different requirements under rules 51 and 52.]

## **Recommendation 4 – overlapping undertakings**

At present, the fees and expenses of the Marshal may be the subject of more than one undertaking. For example, this may arise where there are successive arrests by different plaintiffs of the same ship or property, or where a defendant or other party gives an undertaking for the release of the ship or property.

Under the recommendation, the Rules would be amended to:

- provide that the Marshal can not seek an undertaking upon arrest from more than one party – in most cases this would mean only the plaintiff who first arrests the ship must give an undertaking (but would allow multiple plaintiffs to give a joint undertaking); and
- provide a mechanism for the settlement of disputes which may arise amongst arresting parties as to their individual contribution pursuant to any joint undertaking.

If recommendation 3 is adopted then, where an undertaking is given on the release of a ship or property, the Marshal could not enforce the undertaking given upon arrest.

[Note: There is a concern that if only the undertaking provided by the “initial plaintiff” can be enforced then there is no, or less, disincentive to other parties seeking to arrest the ship as many times as they wish.]

### **Other amendments proposed in the paper**

#### ***Recommendation 6 – Information to be provided by the Marshal***

***Under this recommendation, the Rules would be amended to require the Marshal to make available to an interested party information concerning:***

- (a) the acts taken, or proposed to be taken, by the Marshal;***
- (b) the costs incurred, or expected to be incurred, in respect of these acts; and***
- (c) the condition of arrested property.***

***This information should be contained in periodical reports prepared by or on behalf of the Marshal.***

[Note: There are a number of concerns about the Marshal being required to provide a report on the condition of the arrested property. As the Marshal does not have the expertise to prepare such a report, the question arises as to who should bear the cost of obtaining a report from a suitably qualified person (ie should it be the party requesting the report, the plaintiff (as a cost of the arrest) or the Marshal). This costs issue is particularly important if the Marshal is required to prepare a periodical report irrespective of whether any interested party wants it. There may also be an issue as to whether the Marshal might be liable to those who rely on a report which proves to be incomplete or otherwise misleading. In many cases the short duration of the arrest may make a condition report unnecessary.]

### ***Recommendation 8 – Affidavits in support for arrest warrant***

Subrule 39(2) provides that an application for an arrest warrant must be supported by an affidavit in accordance with Form 13.

Under this recommendation, Form 13 would be amended to require the provision of information concerning any “special circumstances” relating to the ship or property to be arrested. This information should include, for example, the following:

- the condition of the ship;
- whether crew is aboard;
- whether that crew will need to be maintained aboard;

- whether machinery is operable or will have to be operated;
- whether the ship is moored or will have to be anchored;
- whether cargo is aboard and, if so, whether or not it is perishable, dangerous or hazardous in nature;
- the estimated value of the ship and cargo;
- the registry of the ship;
- whether the ship will have to be moved; and
- any other information that would pertain to the protection, maintenance and upkeep of the ship or the property while under seizure.

[Note: Consideration should also be given as to whether the affidavit should include evidence, or set out the basis for belief, that the ship identified for arrest is the ship described in the application. Where a surrogate ship is to be arrested, the affidavit should include evidence identifying the vessel and its ownership so that the risk of arresting the wrong ship is minimised.

The Rules should accommodate the situation where the information, or parts of it, is not within the knowledge of the party seeking the arrest.

Consideration might be given to amending rule 40 to allow a registrar to refuse to issue a warrant if the information in support is deficient or otherwise unsatisfactory.]

### **Recommendation 9 – Security for costs in claims for wages or collision**

Rule 76 currently provides, inter alia, that the master, or a member of the crew, of a ship who is a plaintiff in a proceeding:

- (a) of the kind mentioned in paragraph 4(3)(t) of the Act (ie a claim for wages or for an amount due under a contract of employment or by operation of law); or
  - (b) for loss of goods in a collision between 2 or more ships;
- shall not be required to give security for costs.

The paper recommends that the Rules be amended to provide that the Marshal:

- can not require security for costs [given rule 76(a), presumably this refers to the fees and expenses in relation to the arrest] from the master and crew in wage and collision claims;

- may require the law firm acting for the master and crew to give an undertaking for the costs of the arrest [which the Marshal can already do under rule 41, but may need a specific rule if undertakings upon arrest are to be omitted – see recommendation 5 above].

[Note: The amendment may need to deal with the situation where the master and crew are not legally represented. In this situation, if no undertaking can be required from the master and crew then the Marshal must bear the costs of the arrest or require an up-front deposit (if given the power to do so)].

## **Recommendation 10 – Bail bonds**

Part VII of the Rules deals with bail. Under rule 54, bail on behalf of a party must be given by filing a bail bond in accordance with Form 20 which, unless the court or a registrar otherwise orders, has been signed by two sureties. Before a bail bond can be filed, notice must be given to each party to the proceeding, who may then object to the sufficiency of the proposed surety. If there is an objection, the registrar must determine the sufficiency of the proposed surety. If there is no objection, or the registrar determines the surety is sufficient, the bail bond may be filed.

Under the recommendation, consideration should be given to the following amendments:

- an amendment to require each surety to provide detailed information on the surety's financial situation at the time the bail bond is lodged;
- an amendment to allow the registrar to refuse a proposed surety in appropriate circumstances (such as the amount being insufficient, or the financial situation of one or both of the sureties being insufficient) – if this amendment is adopted then consideration should be given to repealing the objection process;

[Note: Given recommendation 11 below, consideration might also be given to an amendment to allow the Court refuse or amend a proposed surety. Alternatively, the power could just lie with the Court which can then delegate its exercise to a registrar.]

- an amendment requiring bail bonds to be given by an 'approved entity' [which raises the issue of what or who should be an 'approved entity'];

- an amendment providing that each surety must file an affidavit stating that the surety is able to pay the sum for which the bond is given.

[Note: Bail bonds are rarely used in the Court. Consideration should be given to amending the Rules to provide for the use of domestic bank guarantees.]

### **Recommendation 11 – Court’s discretion on terms of release**

Under this recommendation, if the Convention on the Arrest of Ships 1999 is adopted then the Rules should be amended to allow the Court to vary the amount and form of security.

At present, a party who disagrees with a decision of the registrar under rule 51 or rule 56 may seek a review of the decision by the Court. This review process seems to be based on section 35A of the Federal Court of Australia Act. In addition, under rule 59 the Court may reduce the amount of bail in respect of which a bail bond has been filed.

Consideration should be given to the Admiralty Rules being amended to provide for a review of decisions by a registrar, irrespective of whether the Convention is adopted.

### **Additional amendments**

#### **Liability for the fees and expense in connection with the care and custody of an arrested ship**

Rule 53 provides that the Marshal may refuse to release a ship or other property from arrest in accordance with an order under this Part unless arrangements satisfactory to the Marshal have been made for the payment of the fees and expenses of the Marshal in connection with the custody of the ship or property while it was under arrest.

However, there is no express requirement for the arresting party (or any other party except one who successfully applies for the release of the ship or property) to be liable, whether under the Rules or pursuant to an undertaking required by the Rules, for the fees and expenses of the Marshal in keeping the ship or property in custody. (cf rule 41 which provides that an application for an arrest warrant constitutes an undertaking to pay the fees and expenses of the Marshal in relation to the arrest).

## “Fees and expenses”

In a recent case before Justice Tamberlin, an issue arose as to whether the “fees and expenses of the Marshal” incurred after an arrest include the Marshal’s salary. As the issue was settled, Justice Tamberlin did not have to determine it.

The issue apparently arose in light of the following:

- item 6 of the Schedule to the *Federal Court of Australia Regulations 1978* provides that the fee for executing the process of the Court (which includes a writ and an arrest warrant) includes the salary payable to the Marshal;
- apart from poundage, the Regulations make no provision for fees payable after an arrest;
- subsection 3(5) of the Admiralty Act provides that a reference in this Act to the costs and expenses of the Marshal includes a reference to the amounts payable to a person acting in accordance with the Rules as a Marshal of a court;
- apart from section 3, there is no reference in the Act to the costs and expenses of the Marshal;
- there is no reference in the Admiralty Rules to the costs and expenses of the Marshal – instead, the expression “fees and expenses of the Marshal” is used;
- the Admiralty Rules do not define “fees and expenses of the Marshal”.

To avoid argument, consideration should be given to amending the Rules by replacing each reference to “fees and expenses of the Marshal” with “costs and expenses of the Marshal”.