

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN NIGERIA

This Guide deals with the rights of seafarers of any nationality to arrest a ship for unpaid or underpaid wages in a port in Nigeria.

This document is not intended to be legal advice, nor does it constitute legal advice.

If a seafarer intends to arrest a ship in Nigeria, he is strongly advised to consult a lawyer qualified to practise in that country.

*A full text version of this Subject Guide including footnotes will become available for subscription in due course. In the meantime if there is a specific inquiry on any Subject Guide, please contact SRI.

1. Can a seafarer arrest a ship for unpaid wages regardless of his nationality and regardless of the flag of the ship?

1.1 A seafarer can arrest a ship for unpaid wages in Nigeria irrespective of his nationality and regardless of the flag of the ship as long as the ship can be found within the territorial waters of Nigeria as there is no provision in Nigerian laws barring such a seafarer solely on those grounds.

2. What is the time limit within which a seafarer must start a claim for unpaid wages?

2.1 A provision of the Merchant Shipping Act ('the MSA') seems to suggest that the maritime liens provided in the MSA, including 'wages and other sums due to the masters, officers and other members of the ship's complement in respect of their employment on the ship' would be 'extinguished' after a year from the time a claim in respect of such lien arises, except when the ship had been arrested and had been subjected to a forced sale before the expiration of the one year period. An interpretation of this section of the MSA (in the absence of any known judicial consideration/interpretation of it) is that, except if the seafarer's claim is secured by an arrest of the ship (as in an *in personam* action or claim brought in respect of it), it will lapse after one year.

2.2 It is important to note that the Admiralty Jurisdiction Act ('the AJA') has an omnibus provision in respect of a limitation period for proceedings that may be brought on maritime claims and/or maritime liens 'or other charge', which is to the effect that the right to bring an action in respect of such claim would be lost after three years following the time when the cause of action arose. The provision will not be

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applicable where there is a limitation period in any law or contract applicable to the claim and usually such limitation period will apply.

3. What documents are required to obtain an arrest of a ship?

- 3.1 The documents necessary for filing an action in court for the arrest of a vessel (an *in rem* action) are stipulated in the AJA and include a writ of summons, a statement of claim and copies all the documents the claimant intends to rely upon at trial. Written statements on oath of witnesses to be called by the claimant must be filed within seven days of filing the writ of summons.
- 3.2 It is a procedural requirement in a Nigerian court that all the documents to be relied upon in court must be translated into the English language. They may also be notarised to authenticate them, though this is not mandatory.

4. What are the costs of the arrest, including court expenses and other expenses?

- 4.1 The main expense for the plaintiff in an arrest is the filing (court) fees which are calculated on a graduated scale in relation to the value of the claim of the arresting party. Currently, the highest filing fee of the court is N50,000.00 (about US\$ 312.50) for a claim of N1 million naira (about US\$ 6,250.00) and above, which may rise to about N100,000.00 (about US\$ 625.00), when the cost of complementary court processes such as affidavits, exhibits and service of processes are added.
- 4.2 Additionally, an arresting party is obliged to make an initial deposit of at least N100,000.00 (about US\$ 625.00) and not more than N500,000.00 (about US\$ 3,125.00) to the Admiralty Marshal towards his expenses in respect of the arrest.

5. Does the arresting party have to lodge counter security against wrongful arrest?

- 5.1 The Admiralty Jurisdiction Procedure Rules 2011 ('the AJPR') provides that a plaintiff at whose instance a ship is arrested may be ordered by the court on the application of an interested party to give 'security for cost' at the commencement or at any other time in the course of the proceedings. An application for security for cost may be made against the plaintiff where either the security demanded by the plaintiff is above N5 Million (about US\$ 31,250.00) or its foreign currency equivalent or where the court is satisfied that the plaintiffs do not have assets in Nigeria.

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6. Once a vessel has been arrested, will the court accept jurisdiction over the substantive claim?

6.1 The court is bound to accept jurisdiction over the substantive claim of an arrest as it would not possess any jurisdiction to grant an arrest of a ship in respect of any matter over which it cannot exercise jurisdiction in respect of the substantive claim. A notable departure in this regard would be matters for which there exists an arbitral clause in the agreements/contracts founding the claim. In such a situation, the court may stay the action on the condition that the ship remains under arrest or that sufficient security is furnished for its release. Such matter may then be referred to arbitration as required under the contract.

7. Will the crew and vessel be maintained/supported during the arrest?

7.1 There is no specific provision under Nigerian legislation for the maintenance/support of crew during arrest in a situation where the crew has arrested a ship. It is ordinarily to be expected that the owner of the ship would maintain it and the crew during the period of arrest. In broad terms however, the Admiralty Marshal is tasked with ensuring the well-being of the ship while in his custody and he may become an agent of necessity for the crew to provide them with food and supplies where the owner abandons his responsibilities. Such expenses may be realised as part of the Admiralty Marshal's expenses from the proceeds of the sale of the ship.

8. Is the presence of the crew on board the vessel necessary during the course of the legal proceedings or can the crew be repatriated before the ship is sold?

8.1 The arresting crew of a ship do not have to be present in court in the course of the legal proceedings, except if and/or when they desire to give evidence in support of their application before the court.

8.2 Generally, the presence of litigants in court is not obligatory, though advisable, in civil cases such as in claims for wages/arrest of ships and other admiralty jurisdiction matters; however, the presence of the accused person is mandatory for criminal cases.

8.3 There is no provision of law or court procedure in Nigeria that prevents the crew from being repatriated before a ship is sold (by the order of court). The crew may be repatriated at anytime during an arrest of their ship with proper immigration arrangements and other administrative procedures having been put in place.

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8.4 The cost of the crew's repatriation is not usually borne by the court (or the Admiralty Marshal on its behalf) but may be charged against the proceeds of sale of the ship and is recoverable as part of the crew's wages after the costs of the Admiralty Marshall for the sale of the ship have been deducted, as was ordered by the court in the *Rhodian Trader*.

9. Do the seafarer's wages continue to accrue during the arrest?

9.1 While this issue is not dealt with by legislation in Nigeria, it has been held in the case of the *Rhodian Trader* that seafarer's wages will continue to accrue from the time of filing the writ/claim until the time judgment is given. The judge in this case followed the reasoning of the court in the English case of the *Fairpoint No.2* which concluded that since the institution of wages claim did not terminate the contract of service (between the seafarer and the owner of the ship), wages continued to accrue after proceedings were commenced.

10. How long on average does it take for the court to sell the vessel and then distribute the sale proceeds in settlement of the crew's claim?

10.1 The sale of a ship under arrest would more often than not occur at the conclusion of proceedings in a claim; however, there are provisions in the AJPR stipulating the circumstances for the sale of the ship during the course of court proceedings.

10.2 The court would not usually on its own, order the sale of a ship unless such an order is requested by the arrestor or other interested party where the ship has been arrested for at least six months without any security been posted by its owners for its release. However, the court may make an order for the sale of the arrested ship at any stage of the proceeding if the ship is 'deteriorating in value.'

10.3 The procedure for the sale of the ship is usually not a long one, consisting of:

- (1) the appointment of a valuer by the Admiralty Marshal;
- (2) advertorials in the national newspapers calling for the submission of sealed auction bids in respect of the ship(s) to be sold within 21 days of the adverts;
- (3) the opening of the bids would be fixed for a date after the expiration of bid submission and the sale made to the highest bidder; and
- (4) the Admiralty Marshall filing a return of sale and paying the sale proceeds into court within 21 days of the sale.

10.4 Notwithstanding whether an order of sale is made before or after the conclusion of court proceedings and judgment given, distribution of proceeds of sale would have to

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wait until judgment of the claim for wages and/or other claims that may be brought against the ship by any other interested party.

- 10.5 It must be stated that generally litigation in Nigeria can be quite tedious and long drawn and predictions about how long it takes to obtain a court judgement could be unreliable. The length of time taken would however be remarkably less where the claim of seafarers is unchallenged by the owners of the ship or other interested parties. On the whole, it may take as little as a year and as long as five years (or more) to reach the conclusion of a case at the Federal High Court.

11. How are the lawyer's fees for arresting the ship paid?

- 11.1 The lawyer's payment depends exclusively on the agreement between the seafarer and his lawyer and it could be agreed in a variety of ways, including payments from the award made by the court and recovered from the proceeds of ship's sale; payment made on behalf of the seafarer to the lawyer by his friends/family members or by the consular authorities of the seafarer's country. Contingency fee arrangements are not ethically encouraged.
- 11.2 In Nigeria, the legal costs of a claimant's lawyer are not by obligation recoverable by the claimant, just nominal cost for filing and attendance of proceedings by the lawyer may be awarded at the discretion of the court.

12. Are there any other procedures to enforce a seafarer's wage claim?

- 12.1 The AJA and AJPR contain procedures by which the Federal High Court will enforce a seafarer's wage claim.