

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN PORTUGAL

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

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

If a seafarer intends to arrest a ship in Portugal, 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 vessel can be arrested under the International Convention Relating to the Arrest of Sea-Going Ships 1952) ('the 1952 Convention') based on one of the maritime claims identified in the 1952 Convention. Pursuant to the 1952 Convention, a ship sailing under the flag of a non-contracting state can be arrested for one of the maritime claims listed in the 1952 Convention. The governing law of the claim has no implications for the granting of an arrest order, if the arrestor can produce in court sufficient evidence of the existence of a maritime claim.
 - 1.2 Outside the scope of the application of the 1952 Convention (for example, an internal dispute where the arrestor is Portuguese and the vessel sails under the Portuguese flag), to obtain security for his wages claim an applicant arrestor can make use of the Civil Procedure Code. Aside from a jurisdiction issue that needs to be carefully assessed at the outset, the applicant arrestor must satisfy an additional test with regard to evidence.
 - 1.3 The applicant arrestor has to produce evidence of the existence of a well-grounded fear of losing security for his claim because the debtor is dissipating his assets in order to damage creditors. This test is not required if the application is based on the 1952 Convention and tends to be somewhat difficult to comply with under the Civil Procedure Code.

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

- 2.1 The time limit for starting a claim depends on the law that governs the contract. If Portuguese law applies, the time limit is one year from the date of termination of the employment contract. Otherwise, the claim will be considered time barred. This defence needs to be invoked by the employer.
- 2.2 The procedural time limits are that the arrest order is made without a hearing by, or opposition from, the other party. After the arrest order is granted, the seafarer must commence the main proceedings on the merits within ten days. If the time limit is not observed, paragraph (a) number 1 and number 2 of article 389 of the Civil Procedure Code establishes that the arrest of a vessel expires and terminates if the arrestor does not start the lawsuit on the merits within the time limit established by law. In this case the arrestor may be liable for damages caused by the immobilization of the vessel.
- 2.3 In cases where the arrest of the vessel is based upon on the grounds of the 1952 Arrest Convention, the seafarer can apply for an extension of time to start the lawsuit on the merits or the enforcement proceedings.

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

- 3.1 To obtain the arrest of a vessel under the 1952 Arrest Convention, the arrestor needs to allege the existence of a maritime claim and present summary evidence of such a claim. The summary evidence may be an employment contract or a letter of appointment of the ship describing the value of the wages that the seafarer is entitled to receive, as well as any written correspondence that proves the unpaid wages. If the arrestor has any original documents that prove his claim, for instance, a final decision against the shipowner or an admission of debt made by his employer before a notary, it would be helpful if the documents are legalized and apostilled. If the country where such documents were issued is not part of the Hague Convention, then the documents will need to be legalised at the Portuguese Consulate. Documents written in a foreign language must be translated into Portuguese, and the translation must be legalized (the legalization can be made by a lawyer).

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

- 4.1 The arrestor must pay the court tax. The value of the court tax depends mainly on the amount claimed by the seafarer. The arrestor will also have to pay lawyer's fees

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and expenses incurred on behalf of the arrestor in order to prepare the case (expenses with translations, communications, travel expenses, etc.). Usually the lawyer will request in advance the funds necessary for the arrest of the vessel, such as lawyer's fees and expenses, and court tax. The lawyer's fees will be calculated based upon the time spent on the matter, the difficulty or complexity of the case, and the financial situation of the seafarer. So, the fees will depend on the details of the case. Additionally, the seafarer will also have to pay for the travel expenses of the witness that will be heard in court to prove his claim.

- 4.2 When a vessel is arrested by court order, the judge will appoint a bailiff who will have to keep, guard, administer and maintain the arrested vessel. The bailiff is not liable for the payment of the crew aboard the vessel. Such responsibilities are minimal. The arresting crew has no financial obligations regarding the maintenance of the vessel and/or crew. The costs of guarding and maintaining the vessel, as approved by the judge, are paid from the proceeds of the sale of the vessel in a subsequent phase of the proceedings.

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

- 5.1 The concept of wrongful arrest is established in the Civil Code and the Civil Procedure Code. If an arrest order is considered unfounded or expires by reasons imputed to the arrestor, he will be liable for damages caused with fault to the arrestee, provided the arrestor has not acted with due diligence. Pursuant to the Civil Procedure Code, the arrest order expires, *inter alia*, when the main proceeding on which it is fully dependent is not commenced within a certain given time or if it is stalled by negligence on the part of the applicant for more than 30 days, or the right he intends to protect through the arrest is already extinguished. The normal prudence required is a concept of law that must be ascertained with regard to the details of the case, for instance, where an arrestor acts without the normal prudence required if he uses false statements regarding the facts or uses fabricated evidence. The ultimate failure of the claim (that is, a final and non-appealable judgment refusing the claim) is not, *per se*, a sufficient basis for a wrongful arrest claim. The Civil Code, states that the arrestor has a duty to present counter security if it is demanded by the court. The Civil Procedure Code provides that the judge can request the arrestor to provide counter security and to grant the arrest order on the provision of the counter security. Counter security can be produced, *inter alia*, in cash or a bank guarantee. The judge will ultimately assess the sufficiency and quality of the security offered. This is not common practice and hence it is difficult to convey what amount will be asked as security by the judge. Courts have used the requirement to provide security if, and

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after, the arrest order has been disputed in court by the arrestee. And after arrestees have offered security, courts have determined the provision of security by the arrestors in order to maintain the arrest. The court does not appear to treat the crew claims differently from other claims in this respect.

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

- 6.1 Acceptance of jurisdiction depends on the particulars of the case. In general, the claimant needs to allege, in its points of claim, that the court has jurisdiction based upon the grounds of law as the defendant may invoke an exception saying that the Portuguese court has no competence to rule on the merits of the claim.
- 6.2 In any dispute which involves a conflict on the proper jurisdiction to rule on the substantive claim the judge will take into consideration the Portuguese conflict of law provisions as follows: first, the international conventions to which Portugal is a contracting party, which prevail over domestic rules on jurisdiction. If the vessel was arrested on the grounds of the 1952 Convention, the judge will accept jurisdiction over the substantive claim in the cases stipulated in the 1952 Arrest Convention, which determines several situations where courts have jurisdiction to decide on the merits, besides the arrest. The cases are stipulated in the 1952 Convention and state that the court where the arrest is granted shall have jurisdiction over the merits if the claim concerns the voyage of the ship during which the arrest was made.
- 6.3 Besides the 1952 Arrest Convention, the judge will also take into account the contents of the Brussels and Lugano Convention rules, when applicable, and the Regulation (EC) No. 44/2001, dated of 22 of December 2000, on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters.
- 6.4 According to Regulation (EC) No. 44/2001 when the employer has its domicile, a branch or an office, in a member state any dispute resulting from employment contracts and jurisdiction will be ruled by articles 18 to 20, without prejudice to article 4 and article 5(5) of this Regulation.
- 6.5 The validity requirements of a jurisdiction clause are contained in article 21 and in order to be considered valid the jurisdiction clause needs to comply with article 23 of this Regulation.
- 6.6 When the employer does not have a domicile, a branch or an office in an U E member state the judge must decide the jurisdiction on the basis on internal rules, namely, the Labour Procedure Code.

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

- 7.1 The Portuguese rules applicable to arrest do not include any specific rule that imposes an obligation to support and maintain the crew during arrest and subsequent proceedings. The law only mentions that during the arrest of the vessel, the judge appoints a bailiff with the duty to guard, keep, administer and maintain the vessel including its main and auxiliary engines; appliances; fittings; lifesaving equipment; accessories; and further equipment existing on board which is necessary for its operation.
- 7.2 The bailiff presents to the court a list of all the expenses incurred which need to be approved by the judge and will be paid with the proceeds of the sale. The maintenance of the crew is not usually considered to be a cost included in such expenses; but that depends on developments in court, and on the measures taken by the parties involved in the proceedings. However, at the discretion of the bailiff and in accordance with his powers to guard and maintain the arrested vessel, he may maintain crew onboard and request the court to ensure that the wages of the crew who remain on board are paid from the proceeds of the sale; but that needs to be approved by the judge as being a necessary expense for guarding and maintaining the vessel.

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 presence of the crew on board is not a procedural requirement for the arrest of a ship under the 1952 Convention or under Portuguese internal procedural rules applicable to the arrest.
- 8.2 After the arrest is granted, the crew can be repatriated. However, in practical terms a vessel that has at least a minimum crew on board will be better guarded and maintained. There is no specific rule that obliges the court to pay the necessary expenses for the crews' repatriation. In principle, such expenses are paid by the vessels interests (it is usually the ship's agent and the ship's management who pays such expenses on behalf of the ship owner or armador, provided he receives funds).

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

- 9.1 Arrest is only a way of obtaining security to guarantee a claim, so the arrestor makes a calculation of the amount of the claim and requests the arrest of the vessel in order to guarantee the maritime claim with a specific amount which may include interest,

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covering the time it is expected to take to obtain a final decision on the merits, as well as expenses. If the judge is convinced by the evidence, he will grant the arrest to guarantee the amount claimed.

- 9.2 Whether wages continue to accrue during the arrest depends mainly on the terms of the contract made and the law applicable to the contract. The seafarer's wages are calculated on the basis of the terms of the contract and on the applicable law. Thus, if the seafarer is considered still to be in employment during the proceedings, his wages continue to accrue. But no wages continue to accrue if the contract is considered terminated before or at the time proceedings commence.

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 time needed to sell a ship and distribute the sale proceeds depends on the specific circumstances of the case, but it is a long process and may take years. The factors to consider are as follows.
- 10.2 As a rule, the arrestor needs first to obtain a final judgment without appeal in the competent jurisdiction in order to start enforcement proceedings with regard to the decision, or to start the enforcement proceedings if he already has an enforceable title because the arrest order is only aimed at obtaining security to guarantee his credit.
- 10.3 As a rule, the arrestor needs to start enforcement proceedings in court with regard to its enforceable title and request the judicial sale of the vessel in those proceedings. The judicial sale of any vessel cannot, as a general principle, be performed in the arrest procedure, but only in the enforcement procedure where a creditor is enforcing an enforceable title. Considering, however, that the process of obtaining a judgment may take considerable time, the judge of the Lisbon Admiralty court has long authorized the anticipated sale of arrested vessels within the arrest procedures. The test for the issuance of a sale order is accomplished when the arrested ship's value is depreciating due to poor, or lack of, maintenance or due to any other reason. In one case lawyers obtained the anticipated sale of a vessel in a period of one to five months from the date of the application requesting the anticipated sale, but the money remained deposited at the order of the court for much longer period. The subsequent phase of the procedure, the enforcement proceedings, where the proceeds of the sale were distributed between the creditors was concluded in a period of five years counted from the date of application requesting the enforcement proceedings.

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10.4 Enforcement proceedings have different phases, which may be extended or reduced, depending on developments in the case. The creditor starts the enforcement proceedings based upon his enforceable title (for example, a final judgment or other enforceable title) where the arrest order over the vessel is converted in a seizure order. At a certain phase of the proceedings, the court has a duty to serve all the creditors who have any right of guarantee *in rem* over the vessel with notice to claim their rights in the enforcement proceedings (like mortgages). These third party creditors may also present their claim in the seafarer's enforcement proceedings within the time limit to claim their rights and if they do not yet possess any final judgment they may request that the ranking of all credits and the distribution of the proceeds of the judicial sale stays or waits for their final judgment on the merits. So, the average time depends on several factors, but mainly on the number of creditors who claimed their rights of guarantee *in rem*.

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

11.1 Usually the creditor who intends to arrest a vessel has to pay the lawyer's fees and the initial court tax in advance. The final decision on the merits of the lawsuit always includes a condemnation on court costs. The winning party of the lawsuit on the merits is entitled to recover from the losing party an insignificant part of the lawyer's fees plus the tax of justice already paid; the costs effectively supported duly documented; the fees paid to the enforcement agent; and the expenses incurred by the enforcement agent. But if the lawsuit on the merits ran in another jurisdiction the creditor may be allowed by that jurisdiction to recover all amounts already spent.

11.2 From the proceeds of the sale of the vessel are paid all the courts costs of the enforcement proceedings, the court costs of the lawsuit on the merits of the enforcement creditor, and also the fees and expenses incurred by the enforcement agent and other third parties hired by this agent to carry out the necessary steps of the procedure (for instance, the expenses incurred by bailiff who maintained and guarded the vessel, and all the necessary expenses, charges and fees of the sale of the vessel). In addition, the distribution of the sale proceeds first pays the court costs made in the common interest of the creditors (above court costs and all costs fees).

11.3 Employees can resort to forms of representation in court other than a lawyer. The Code of Labour Procedure states that all employees are entitled under Portuguese law to protect their interests by using one of the following alternative measures. Instead of appointing a lawyer to represent their interests, they are entitled to attend the Labour Court and request the Public Prosecutor to represent them in their lawsuit on the merits claiming their rights, but this facility is mainly for the purpose of claiming

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rights of a social character (for example, rights emerging from a labour accident). If the employee appoints a lawyer, then the role of the Public Prosecutor immediately ceases.

- 11.4 Law 34/2004, dated of 29/7, rules that legal state aid granted to all Portuguese citizens is granted also to:
- (1) nationals of any member state of the European Union;
 - (2) any foreigner or stateless person with a valid residence permit in a member state of the European Union that is in economic need;
 - (3) foreigners without a valid residence permit in a member state of the European Union that have the right to legal protection, provided that such protection is also given to Portuguese citizens by the Laws of their respective countries under the reciprocity principle.
- 11.5 Under the terms of this law, an employee may request legal state aid in regard to:
- (1) an exemption from the payment of the tax of justice and further charges with regard to proceedings on the merits;
 - (2) the appointment of lawyer and the payment of his fees;
 - (3) the payment of the tax of justice or lawyer fees by instalments; and
 - (4) the appointment of an enforcement agent.
- 11.6 This is a special administrative procedure subject to a written request and to written evidence evidencing financial difficulties and is subject to specific rules.
- 11.7 In addition, there is also a special Decree 71/2005, dated 17 March, that rules this system of legal state aid is for all citizens with residence in another state of the EU that have a pendent lawsuit in Portugal.

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

- 12.1 Portuguese substantive law sets out that all the debtor's assets and thus all the ships owned by the debtor can be arrested as security for any debt. Therefore, under this principle a seafarer can make a claim against all ships that belong to the same owner. On the grounds of the 1952 Arrest Convention a creditor is also entitled to arrest sister ships. In terms of an associated ship arrest, until a judgment in 2009, it was as a general principle not possible to arrest an associated ship. In fact the doctrine on piercing the corporate veil sustained this scenario in only very specific situations and subject to strong evidence. The Lisbon Admiralty Court has, however, in the 2009 judgment accepted the arrest of two vessels under the doctrines of associated ship

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arrest and of 'piercing of the corporate veil.' The claimant attached evidence in support of these doctrines. The arrest orders issued in the first instance were withdrawn pursuant to an out of court settlement agreement and hence were not tested on appeal. They did, however, pave the way to allow further arrests based on these doctrines.

- 12.2 For arrests under domestic rules is necessary to allege and prove a credit and to sustain that there is a grounded fear of losing the patrimonial guarantee.
- 12.3 For a claim arising from a labour contract subject only to Portuguese law, there are specific rules that protect the employees. The Labour Code provides that an employee has a lien on all movable assets for unpaid wages. This right needs to be exercised before the asset is sold. In the reinforcement of employees' guarantees, article 334 states that for credits in debt for more than three months the employer and companies in a group of companies in relation with the employer are jointly and severally liable under the Commercial Companies Code. But these rules are only applicable to companies with a head office in Portugal and this lawsuit is only allowable under certain difficult requirements and subject to the production of evidence.
- 12.4 The fastest procedure is the arrest of a vessel with the aim of obtaining security. Nevertheless, the seafarer may always start enforcement proceedings against all the assets owned by the debtor, provided that the court is competent and he has an enforceable title to start such enforcement proceedings. The types of enforcement titles allowed under Portuguese law are final judgments without appeal for specific amounts; and confession of debt made before a notary. The agreement made between the employer and employee before a judge of a Portuguese labour court under which the employer was condemned to pay a specific amount to employee is also considered to be an enforceable title.