

SEAFARER SUBJECT GUIDE

MARITIME LIEN FOR SEAFARERS' WAGES IN PORTUGAL

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of Portuguese flagged ships, and foreign ships which are in the ports of Portugal. These rights can be enforced in the Maritime Court, where they are secured and preferred by priority liens and enforced by the arrest and forced (judicial) sale of the ships.

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

If a seafarer intends to claim his wages, he is strongly advised to consult a lawyer qualified to practise in Portugal.

*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. What is the maritime lien for seafarers' wages? How is it enforced?

- 1.1 Portuguese law states that a priority lien regardless of its registration is a right granted to certain creditors to be paid with preference over the remaining creditors, considering the nature of their claims.
- 1.2 The general lien on movable assets includes the value of all the movable assets owned by the debtor at the time of the seizure or at the time of an equivalent procedure.
- 1.3 Special liens include only the value of certain movable assets. A vessel is a movable asset. The Commercial Code and the Decree 201/98 10 July set out the rules of conflicts of law applicable to priority of payments and claims. In principle, the maritime lien is governed by the law of the flag under which the ship sails or, in case of dual registration, where ownership of the vessel is registered. For vessels sailing under the Portuguese flag, the wages of the master and of the crew have a maritime lien over the vessel and the payment of claims is made by the order set out in the Commercial Code.
- 1.4 Labour contracts governed by Portuguese law are subject to the Labour Code, which provides that the employee's claims resulting from a labour contract, from its breach or termination, have a general lien over movable assets that ranks before claims mentioned in article 747 of the Civil Code that include, inter alia, state claims for taxes or claims of a person that suffered injury under tort law.

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1.5 In order to protect his claim the seafarer must notify the 'armador' or the shipowner, claiming payment of his wages within a certain time limit; and, if payment is not made, he must request the arrest of the vessel in court in order to obtain security for his claim; and afterwards start a proceeding on the merits of the claim in the competent court to obtain a final court decision; and then start an enforcement proceeding when in possession of a favourable judgment.

2. Which courts have jurisdiction over seafarers' wage claims?

2.1 The Labour Court has jurisdiction over a lawsuit on the merits for a wages claim arising from an employment contract.

2.2 The Code of Labour Proceedings empowers the Labour Court with jurisdiction. Under the Code of Labour Proceedings, a claim can be started in Portugal according to the rules of territorial jurisdiction or if all the facts or part of the facts that are the object of the claim took place in Portuguese territory. The Code of Labour Proceedings states that the jurisdiction clauses that remove the court's international jurisdiction granted by the Portuguese Law, cannot be invoked in a Portuguese court, unless provided otherwise in an international convention or in European Union regulations.

2.3 The Maritime Court of Lisbon has jurisdiction over the arrest of a vessel that is located within Portuguese continental ports. The arrest proceeding in respect of a vessel in Madeira or in the Azores Islands must be started in the competent Civil Court. The proceedings to collect the wages due for salvage and assistance to a vessel must be filed in the competent Civil Court where the facts occurred, or in the court of the place of residence of the owner of the salvaged objects, or in the court of the place where the vessel belongs, or in the court of the vessel's current location.

3. Can the courts refuse to hear seafarers' claims for wages?

3.1 The court decides this question according to statutory law. If the court does not have jurisdiction to decide the merits of a claim for wages, the court will issue a decision ruling that the court is incompetent and will formally acquit the defendant, although not on the merits.

3.2 There can be several procedural or substantive issues that prevent the court from knowing the merits of the claim and thus from issuing a formal ruling or from recognizing the claim.

3.3 Dilatory exceptions prevent the court from knowing the merits of the claim and result in the formal acquittal of the defendant or in the remittance of the proceeding to another competent court. This happens when the court rejects jurisdiction.

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3.4 The peremptory exceptions involve the acquittal of the claim (facts that prevent, change, or extinguish the legal effect of the facts alleged by the seafarer). All this depends on the case in question and for that reason it is recommended that the seafarer should always seek legal counsel before starting any actions.

4. Who can claim seafarers' wages?

4.1 The seafarer (and, in the case of his death, the seafarer's legal or voluntary heirs) can collect the wages that were not paid or that remain outstanding.

4.2 A third-party duly subrogated to the seafarer's claim can claim such credit before a court; for example, a third party that paid the wages to the seafarer may request the arrest of the vessel in order to obtain security for such a claim.

5. Which ships are subject to the jurisdiction of the courts?

5.1 According to law, a vessel is a movable asset and a floating device designed to navigate by water. As a general rule, all merchant vessels, cruise vessels, fishing vessels, pleasure vessels can be subject to the jurisdiction of the Portuguese courts, provided all the requirements are met for the Portuguese courts to be considered competent to rule on the matter.

5.2 For an arrest order, it will be sufficient to have the ship calling at a Portuguese court. For an action on the merits, further consideration of the statutory law will be required on a case by case basis.

6. What is included in the maritime lien for seafarers' wages?

6.1 The law only mentions wages. What is or is not included in wages depends on the terms of the employment contract, the law that governs such an employment contract, and the applicable collective labour agreement.

7. Can seafarers' wages be claimed if there is no written contract of employment?

7.1 The answer to this question depends on the law that governs the employment contract and whether that law demands that the contract be written or not.

7.2 Portuguese law states that the contracts, which are subject to a special regime, need to be written; for example, contracts entered into with foreign workers.

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- 7.3 Decree 384/99 dated of 23 September (legal regime applicable to the crew vessels) states that the contracts of employment for work on board a vessel are subject to a special regime.
- 7.4 The contract of employment for work on fishing vessels or on a commercial vessel (vessels registered in Conventional Registry), is a contract that is subject to written form.
- 7.5 For the vessels registered in the International Shipping Registry of Madeira, the seafarers must have a written labour contract.
- 7.6 It thus appears that employment contracts that are subject to Portuguese law need to be concluded in written form.
- 7.7 The seafarer may try to claim his outstanding wages through other permitted means of proof, for example, by testimonial proof. However, it will be difficult to prove outstanding wages when the law demands written form. Alternative proof has been accepted in a judgment where the seafarer had no written employment agreement but was registered in the crew list and had performed service onboard the ship.

8. Must seafarers' services have been rendered on board the ship?

- 8.1 The answer depends on the contents of the contract of employment, the law that governs such contract, and the circumstances of the case. But, as a general rule, the seafarer renders service on board a ship.
- 8.2 The seafarer needs to be employed by the employer and if the terms of the employment agreement state that the seafarer is to provide services ashore he will be considered to be employed and therefore entitled to wages.

9. What is the ranking of seafarers' claims for wages in the event that sale proceeds are distributed?

- 9.1 According to the rules of conflict of laws, in cases where the vessel sails under a foreign flag, the Portuguese judge will apply the priority list contained in the law of the jurisdiction of the state under whose flag the vessel sails, or in case of dual registration, where the ownership of the vessel is registered, provided the claimant alleges such foreign law and presents evidence of such foreign law (the burden of proof lies with the claimant).
- 9.2 Portugal has ceased to be a party to the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 (the 1926

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Convention'). As from 13 May 2012, this convention is no longer applicable in Portugal. Before 13 May 2012, if the vessel sailed under a contracting state of the convention flag the judge had a duty to apply the priority list in the 1926 Convention.

9.3 For vessels sailing under the Portuguese flag, the judge will apply the priority list contained in the Commercial Code in the following order:

- (1) court costs made in the common interest of the creditors;
- (2) salvage rewards;
- (3) claims secured by mortgages or pledges over ships;
- (4) pilots and towing expenses for entry into port;
- (5) tonnage, anchorage, public health, light and other harbour dues;
- (6) expenses made with the keeping of the vessel and storage of her appurtenances;
- (7) master and crew wages;
- (8) repair costs of the vessel, her appurtenances and equipment;
- (9) reimbursement of the price of the cargo that the master was forced to sold;
- (10) insurance premiums;
- (11) the outstanding price of the last purchase of the vessel;
- (12) repair costs of the vessel, her appurtenances and equipment, in the three years previous to the voyage at issue and counted from the date of termination of the repairs;
- (13) costs related to shipbuilding contracts;
- (14) the insurances premiums over the ship, if entirely covered, or over the covered part or her appurtenances not mentioned in paragraph (x); and
- (15) indemnities due to the shippers for shortage or damage of goods.

9.4 Claims mentioned in (1) to (10), excluding the claims mentioned in (3), are those incurred in the last voyage and because of it.

10. Can wages be claimed if the employer is not the shipowner or acts illegally?

10.1 In many cases the seafarer is hired by a third party (ship manager or a manning agent) on behalf of the shipowner or the armador so the recruitment and employment of the seafarer made by such party binds its principal - the shipowner - and not the agent.

10.2 Under the condition that the seafarer has been hired to work on board the ship (the employment contract mentions the ship specifically) and the seafarer has effectively worked on board the ship and has wages in debt, he is in principle entitled to arrest

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the ship to obtain a guarantee, even if he was hired by a third party who acted illegally against the orders of its principal.

- 10.3 What concerns the lawsuit on the merits will depend on the contract and the law that governs it, so it is important to seek legal advice in respect of all the contract details.
- 10.4 Rome I (Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008) prevails over the internal Portuguese rules on conflicts of laws. According to Rome I, the labour contract should in principle be ruled by the law chosen by the parties. In cases where the parties did not choose a law applicable to the employment contract, the following alternative criteria will be applied:
- (1) the labour contract should be governed by the law of the country in which or, failing that, from which the employee habitually carried out his work in performance of the contract; or
 - (2) if this is not possible to apply, the contract shall then be governed by the law of the country where the place of the business via which the employee was engaged is situated, under article 8 (3) of Rome I.
- 10.5 However, article 8(4) of Rome I states that 'where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 and 3 the law of that other country shall apply.' It is to be stressed that article 9(2) of Rome I determines that nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. This will be important regarding the applicability of Portuguese if the matter is decided in Portugal and if the contract is governed by a foreign law.

11. Can the seafarer's maritime lien for wages be abandoned or waived by agreement?

- 11.1 This depends mainly on the law governing the maritime lien, which will be either the law of the contract or the law of the flag.
- 11.2 If the parties agree to apply Portuguese law to the employment contract and if the vessel sails under Portuguese flag, Portuguese law is applicable.
- 11.3 Under Portuguese law, no type of lien may be created by agreement. Only maritime liens stipulated in statutory law are allowed. The Commercial Code states that the creditor's lien over a vessel is considered extinguished when the obligation that such maritime lien serves as a guarantee is extinguished. Payment of a claim thus extinguishes the maritime lien securing the claim.

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11.4 Under civil law, remission or waiver by agreement is a cause of extinction of claims under which the creditor's waives his right through an agreement made with the other counterparty debtor (contract). Article 578 grants a maritime lien to different types of obligations that are ruled by different laws. So, the waiver of the creditor's right by agreement entered with the debtor needs to be carefully assessed in terms of the law governing the type of right that the creditor intends to waive or renounce through an agreement with the debtor. The validity of a creditor waiver depends on:

- (1) what type of right the creditor is waiving or renouncing by agreement (if the law allows the renounce to such right or not); and
- (2) how the agreement is drafted and under what terms or circumstances it is made in order to be considered legal or null and void before the appropriate rules that govern such obligation and its causes of extinction. There are certain rights (such as employment accidents compensation), to which the law grants special protection and does not allow waiver. Thus each right needs to be carefully assessed.

12. When is the seafarer's maritime lien for wages forfeited or not recognised or extinguished?

- 12.1 The answer depends mainly on the law that rules the lien and the obligation the lien arises from.
- 12.2 In cases where Portuguese law is applied, the claim for wages will not be recognized by a judge if the seafarer's claim for outstanding wages is time barred under the applicable rules. There are general rules for the counting of time bars and caducity time limits for a credit claim which are foreseen in the Civil Code.
- 12.3 The Labor Code (which is applicable to employment relationships in general without taking in account the specific regime applicable to seafarers), states that the employee's claim that arises out of an employment contract due to its breach or termination has a time bar of one year counting from the day following the day in which the employment contract was terminated.
- 12.4 The Labour Code provides that the claim corresponding to a compensation for breach leave rights, compensation for abusive sanctions or for payment for overtime work that are more than five years overdue can only be proven through documents. This one year time limit is also applied to employment contracts of seafarers working on board vessels registered in the Conventional Registry. This one year time limit to claim unpaid wages is counted as from the date on which the employment contract ceased or terminated. Whilst the employment contract is in force this time bar is

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stayed. This means that the seafarer must start the legal proceedings within the period of one year counting from the date of the termination of the employment contract (for any reason whatsoever be it caducity, revocation, denouncement or termination) to claim unpaid wages. The time bar will only be interrupted by judicial citation or notification. This time bar must be invoked by the employer in court. The judge cannot hear and render a decision regarding this defence *ex-officio*. Contracts that purport to change the rules governing time bars are considered null and void under the Civil Code so the collective agreements cannot breach these rule. The time bar for claiming overdue interests for lack of payment of outstanding wages is five years. The time limit to enforce a judicial sentence that condemns an employer to pay wages is 20 years.

12.5 The Commercial Code states that a creditor's liens over a vessel are extinguished under one of the following situations:

- (1) under the same conditions under which the obligation, from which the lien arises, is extinguished (for example, payment of a obligation extinguishes the maritime lien);
- (2) through the judicial sale of the vessel by way of which the lien is transferred to the sales proceeds of the vessel; or
- (3) through the volunteer sale with the notification to the creditors with the lien, if there are any, after three months have elapsed without having enforced their lien or contested the price of the sale under the provisions of the special proceedings foreseen in articles 998 to 1007 of the Civil Code on the extinction of mortgages and liens.