

## SEAFARER SUBJECT GUIDE

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### SHIP ARREST FOR SEAFARERS' WAGES IN THE UNITED STATES OF AMERICA

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

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

If a seafarer intends to arrest a ship in the USA, 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.

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- 1. Can a seafarer arrest a ship for unpaid wages regardless of his nationality and regardless of the flag of the ship?**
  - 1.1 Most wage litigation in the USA involves foreign seafarers suing or bringing claims against foreign flagged vessels for both unpaid wages and for penalties. The Wage Statute provides for a penalty of two days' pay for every day of delay when wages are withheld 'without sufficient cause'. Both the unpaid wages and the penalties are entitled to maritime lien status.
  - 1.2 The Wage Statute has been interpreted to mean that the case may not be transferred under the doctrine of *forum non conveniens* to a court outside of the USA. However, if the seafarers' contract of employment calls for arbitration, the USA courts will enforce the arbitration agreements.
  - 1.3 The awards for delay or penalty wages can be substantial. In *Griffen v. Oceanic Contractors, Inc.*, a wage underpayment of USD \$412.50 became an award of more than USD \$300,000. The penalty wage statute is applicable to foreign vessels when in ports or harbours of the USA.
- 2. What is the time limit within which a seafarer must start a claim for unpaid wages?**
  - 2.1 The United States Congress did not enact a statute of limitation setting the time for when a suit or a claim for unpaid wages must be made. To fill this void, courts use the principle known as laches. A maritime claim is extinguished if the party who is asserting the claim unreasonably delays commencing the action to the prejudice of the other party. The courts look to analogous state statutes of limitation for guidelines

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as to whether a claim is timely and the court considers the equities of each particular situation.

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

- 3.1 A seafarer's claim for unpaid wages must be presented to the appropriate court in a document of pleading known as a 'Petition' or a 'Complaint' as prepared by an attorney. It must be verified under oath by either the seafarer or his attorney. The court will review this pleading and will then enter an order instructing the Clerk of the Court to issue a warrant of arrest. The warrant of arrest is then served on the ship by the United States Marshal. A guard is placed on board the ship and the ship cannot leave the port until the court issues another order releasing the ship. In most cases, the shipowner will place either cash or a bond into the Registry of the Court so the ship may be released while the litigation continues in the court for the unpaid wages. The cash or bond in the Registry of the Court guarantees payment of any judgment in favour of the seafarer.
- 3.2 The seafarer will need his contract of employment and wage records evidencing the underpayment of his wages. If not in the English language, these documents must be translated into English. The contract of employment and the wage records will be used to prove the amount of the wage underpayment at the time of the trial.

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

- 4.1 The normal deposit required by the United States Marshal and Clerk of Court for the arrest of the ship is a minimum of USD \$10,000. In addition to this USD \$10,000, the plaintiff seafarer will have to advance the costs of maintaining the ship while it is under arrest, including food for the crew, fuel, oil and similar items. These items are considered *custodia legis* and are recovered as part of an award of costs for seizing the vessel. Normally, the attorney representing the seafarer will advance these funds, as very rarely will an unpaid seafarer have sufficient financial resources. The USD \$10,000 must be funded in advance and the other costs, normally on a weekly basis. The attorney representing the seafarer will have to be paid, either on an hourly basis or on a contingency basis, meaning a percentage of the amount recovered. An award of attorney's fees is authorized under USA law when a seafarer is forced to sue for what is patently due to him, whether it be wages or maintenance and cure.
- 4.2 The attorney for the crew or seaman assumes the obligation of posting the court costs and USD \$10,000 United States Marshall fee upon the filing of the lawsuit. The crew, as the arresting party, is responsible for maintaining the vessel during the

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period of seizure, including providing food for the crew and bunkers for the vessel, all of which can be recovered as *custodia legis* out of any settlement or the sale proceeds. The attorney for the crew, or the crew, must have these sums/amounts and these sums/amounts must be paid either in advance or as the sums/amounts are incurred. The attorney for the crew, or the crew, will be repaid for these expended sums/amounts out of any settlement or sale of the vessel.

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

5.1 The vessel owner has the right to move that counter-security be posted for wrongful arrest. This is accomplished by the vessel owner filing a counter-claim against the arresting party and demanding security.

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

6.1 The court will accept jurisdiction over the substantive claim since arrest of the vessel effects *in rem* jurisdiction enforcing the seafarers' maritime lien for the unpaid wages. Other claims may be joined with the claim for unpaid wages, such as a claim for personal injury and the court will normally accept jurisdiction over these additional claims.

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

7.1 The arresting party, meaning the crew seeking the unpaid wages, through their attorney representing those seeking the unpaid wages for the crew, will fund the maintenance/support of the crew and vessel during the arrest/seizure of the vessel. In virtually all cases such as these, the attorney who undertakes the representation of the crew seeking the unpaid wages advances the costs of filing suit, the United States Marshall's fee, and the maintenance and support of the vessel during the time of the vessel's arrest.

### **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 If the seafarers arresting the vessel are currently on the vessel at the time of the arrest of the vessel, they would remain on the vessel during the course of the proceedings, or until they were repatriated to their home country. Repatriation would only take place if the litigation was lengthy. If the seafarers on the arrested vessel

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were repatriated, United States Coast Guard manning requirements would require that other seafarers replace the repatriated seafarers for safety reason.

- 8.2 The crew can be repatriated before the vessel is sold as long as minimum manning requirements are maintained on board the vessel. The court will not pay for the crew's repatriation but the costs can be advanced and recovered as *custodia legis*, with the court's permission.

### 9. Do the seafarers' wages continue to accrue during the arrest of the vessel?

- 9.1 Payment to the seafarers continues to accrue during the arrest of the vessel - but as costs of *custodia legis* - and not as wages. The seafarers continue to be paid because they are maintaining the vessel during the period of arrest.

### 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 If the vessel goes to a United States Marshall's sale, it is normally a minimum of three to four months from the arrest of the vessel until appraisal, advertisement and actual sale of the vessel. After that, each party makes a claim with the court for the amount of their maritime lien. Wages have the highest priority and they are paid with the costs of *custodia legis* being paid first. This, of course, assumes the sale of the vessel brings in enough at the United States Marshall's sale to cover the *custodia legis* and all the wages that are due.

- 10.2 Normally, prior to an attorney agreeing to accept the representation of a crew and arrest of the vessel on behalf of a crew, the attorney causes the vessel to be appraised by a shipbroker to make sure the potential sale of the vessel would bring in sufficient funds to cover the *custodia legis* and unpaid wages. *Custodia legis* and unpaid wages are paid with preference and priority over any mortgage(s) on the vessel.

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

- 11.1 A seafarer may pay his lawyer on an hourly basis or on a contingency basis. In the USA, virtually all unpaid wage litigation is conducted on a contingency because seafarers do not have funds to pay a lawyer in advance nor do seafarers have funds to pay the costs as they are incurred. Only court-approved *custodia legis* costs are recoverable from the proceeds of the sale and those are paid with preference and priority over the wages.

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

- 12.1 Actions may be brought in either state or federal court utilizing a *quasi in rem* attachment vis-à-vis the vessel on which the seafarers worked or on property owned by the same registered owner.
- 12.2 In terms of claims against a sister ship, the maritime lien for unpaid wages only attaches to the vessel upon which the seamen served and earned the wages. However, if the party who owned the vessel is also the owner of another ship, that property may be attached by a *quasi in rem* proceeding by attaching the vessel. The vessel owner would then have to post a bond to guarantee payment of any judgment. However, if the ship is sold, the mortgage holder would be paid prior to the seafarers' wage claim.