

## SEAFARER SUBJECT GUIDE

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### MARITIME LIEN FOR SEAFARERS' WAGES IN BRAZIL

This Guide deals with the rights of seafarers of any nationality to claim a maritime lien for unpaid or underpaid wages in respect of Brazilian flagged ships, and foreign ships which are in the ports of Brazil. These rights can be enforced in the Labour Court by the arrest and forced (judicial) sale of the ship.

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 Brazil.

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

- 1.1 Brazil has ratified the International Convention for the Unification of Certain Rules of Law Related to Maritime Liens and Mortgages 1926 ('the 1926 Convention'), which is in force in Brazil. According to the 1926 Convention, seafarers' wages are secured by a special maritime lien on the ship, on the freights related to all the voyages which originated such wages, and also on the ship's and freight's accessories acquired since the beginning of the voyage, which include indemnities in relation to material damages, freight losses, general average and assistance or help, as described in the 1926 Convention.
- 1.2 The rules concerning the special maritime lien, however, are applied only when the ship belongs to the jurisdiction of a contracting state (that is, a party which is a party to the 1926 Convention).
- 1.3 Seafarers must commence legal proceedings claiming the unpaid wages within one year from the due date. After that, the wages lose their special maritime lien, but the claim for wages will still be enforceable according to other rules of Brazilian law.
- 1.4 In other cases, seafarers will hold a lien on the ship based on article 470 and the articles of the Commercial Code (which came into force in 1850) in relation to claims for wages arising from the last voyage.
- 1.5 Seafarers' claims for wages that have a maritime lien are enforced in exactly the same manner as any other claim for wages for any employee against any employer (there is

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no special proceeding provided by law), except that the lien allows for a special arrest of the ship.

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

- 2.1 The Labour Courts have jurisdiction over seafarers' wage claims, since Brazilian law defines the relation between a seafarer and his employer as being a labour relation.
- 2.2 The jurisdiction of the Labour Courts is determined by the location where the employee renders or rendered his services to the employer, even if the employee was hired at another location, or in a foreign country. There are Labour Courts of first instance in almost every municipality of Brazil.
- 2.3 In addition, the Brazilian Labour Courts also have jurisdiction over claims related to services rendered at foreign branches of an employer headquartered in Brazil, as long as the employee is a Brazilian or a foreigner residing in Brazil and there is no international convention providing otherwise.
- 2.4 The Brazilian Courts have no jurisdiction to hear claims for wages resulting from services rendered abroad to employers that are not headquartered in Brazil, even when they have a branch in Brazil.

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

- 3.1 Brazilian courts can refuse to hear seafarers' claims for wages when the courts have no jurisdiction and the issue of jurisdiction is raised by the defendant. However, Brazilian scholars understand that the courts cannot refuse to try a case when it would amount to a denial of justice, if, for example, no other court has jurisdiction to hear the case.
- 3.2 The Brazilian courts cannot refuse to hear a case on the grounds of *forum non conveniens*.

### **4. Who can claim seafarers' wages?**

- 4.1 Seafarers' wages can be claimed by the seafarers themselves, or by their labour unions.

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

- 5.1 The concepts of jurisdiction *in rem* and jurisdiction *in personam* of the common law countries are unfamiliar to Brazilian law. The Brazilian courts have jurisdiction to hear

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claims related to national or foreign ships wherever they are located, as long as such claims fall within their rules of jurisdiction.

- 5.2 Decisions against ships that are not in Brazilian waters, however, may need the cooperation of foreign authorities to be effective with regard to the ship.

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

- 6.1 According to the 1926 Convention, the maritime lien for wages includes the 'claims arising out of the contract of engagement of the master, crew and other persons hired on board.'
- 6.2 In relation to labour contracts governed by Brazilian law, a maritime lien covers all the rights guaranteed by the Brazilian law, which encompasses not only the wages but also other credits arising out of the labour contract.

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

- 7.1 Brazilian law accepts the existence of non-written labour contracts, according to article 443 of the Consolidation of the Labour Law Act.
- 7.2 With regard to labour contracts subject to foreign law, the Brazilian courts accept the format provided for in the applicable foreign law as stated by article 13 of the Law for Introduction to the Norms of the Brazilian Law.

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

- 8.1 Article 2, paragraph II, of Law 9537/97 (LESTA – Law on the Safety of the Water Traffic), defines as a 'waterway employee' (*aquaviário*) a person that has a certification from the Maritime Authorities to operate vessels professionally. Paragraph V of the same article defines vessel as 'any construction, including floating rigs and, when towed, the fixed rigs, subject to registration before the Maritime Authorities and capable of moving into water, by itself or not, carrying people or cargo.' 'Crew member' is defined as the 'waterway employee' who acts on board for the operation of a vessel. Consequently, Decree 2596/98, which regulated the LESTA, defined 'seafarers' as the crew members who operate vessels classified for long course, port support and inland navigation on board channels, lagoons, bays, coves, inlets and sheltered sea areas.
- 8.2 It therefore appears that for the service to be considered as a service rendered by a seafarer, the service has to be performed on board a ship.

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8.3 The lien provided for in the Commercial Code only applies to seafarers under article 470(5). However, with regard to the maritime lien provided for in the 1926 Convention, article 2(2) does not make any difference between waterway employees, employees, crew members or seafarers, assuring that there is a lien for 'the credits resulting from the engagement contracts of the master, the crew or other people engaged on board.'

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

9.1 Brazilian law grants a preference to employees' claims, including claims for wages, on all assets of solvent employers in relation to credits, even mortgages and other preferential ones, except for expenses related to the judicial sale of the employer's assets or its maintenance until such sale. This preference benefits seafarers' claims for wages whether or not they have a lien on the asset that was sold.

9.2 As to employers whose insolvency was declared by a court of law, the Insolvency Act provides that credits of employees up to the equivalent to 150 minimum wages per employee rank first in the order of payment of the debts of the insolvent estate. The balance (in case of claims for more than 150 minimum wages) will be paid only after payment of all claims for personal injuries of employees, tax credits, mortgages, pledges and other liens (this last group refers to assets subject to the mortgage, pledge or other lien), and credits with general preferences (*privilégio geral*).

9.3 It seems therefore that the 1926 Convention will be inapplicable as regards the seafarer's maritime lien in the case of insolvencies commenced after the coming into force of the Insolvency Act; however as yet there are no Court decisions in that regard.

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

10.1 The seafarer may claim his wages against the employer (and enforce the claim against all of the employer's assets), even if he is not the shipowner or acts illegally. Further, the 1926 Convention provides that its:

'provisions apply to vessels under the management of a person who operates them without owning them or to the principal charterer, except in cases where the owner has been dispossessed by an illegal act or where the claimant is not a bona fide claimant.'

10.2 The rules of the 1926 Convention, however, apply only when the ship to which the claim relates belongs to a contracting state. For other cases, there is no provision in

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Brazilian legislation with the same rule (although this may be the reasoning behind the lien provided for in the Commercial Code) and it is not settled in Brazilian law if the seafarer holding a lien provided for in the Commercial Code may enforce his claims for wages against the ship or other assets of the shipowner when the shipowner is not the employer (for example, when he was contracted by the charterer). The general rule, under Brazilian law, is that an employee can only make claims against his employer (that is, the one that has hired him and with whom he has a labour agreement). However, the courts tend to mitigate this rule in cases where the employees render services to the benefit of a third party.

10.3 There are, for instance, court decisions holding that a charterer is liable for the wages of the shipowner's employees in respect of voyage or time charters on the ground that their services benefited the charterer. Those decisions do not, however, take into consideration the lien provided for in the Commercial Code.

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

11.1 According to court precedents, an employee can only waive a legal right or benefit in a settlement before the Labour Courts, after the commencement of the proceedings by the seafarer. A waiver by agreement in any other case is unenforceable. Although there are no specific court precedents on the abandonment or waiver of a maritime lien, this reasoning should also be applicable to the abandonment or waiver of a maritime lien.

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

12.1 The seafarer's maritime lien for wages is forfeited if the seafarer does not commence legal proceedings claiming the unpaid wages within one year from their due date.

12.2 The seafarer's maritime lien for wages is extinguished if the seafarer does not commence legal proceedings claiming the unpaid wages within one year from their due date, or when the ship is sold by a court.