

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN CHINA

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

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

If a seafarer intends to arrest a ship in China, 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 is entitled to a maritime lien for unpaid wages according to the Maritime Code, regardless of his nationality and regardless of the flag of the ship. This claim can be enforced by application for arrest of a ship in question, according to the Special Maritime Procedure Law. For example, the Guangzhou Maritime Court and the Shanghai Maritime Court have each dealt with this kind of case in favour of foreign seafarers.

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

2.1 In accordance with the Special Maritime Procedure Law, the period for arresting a ship for security for a maritime claim shall be 30 days; a seafarer must therefore start a claim for unpaid wages within 30 days after a maritime court approves the application for the arrest of the ship.

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

3.1 To obtain the arrest of a ship, the claimant must lodge a written application for the arrest of the ship; the reasons for the application; information on the ship in question; and amounts for a guarantee (if any), together with the evidence. Documents originating from foreign countries or regions must be notarized pursuant to Some Provisions of the Supreme People's Court on Evidence in Civil Procedures.

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

4.1 The arrest of a ship for a seafarer's unpaid wages always links with enforcement of a maritime lien. According to the Maritime Code, the costs of the arrest includes the court costs for enforcing the maritime liens, the expenses of preserving and selling the ship, the expenses of the distribution of the proceeds of the sale and other expenses incurred for the common interests of the claimants. Costs should be paid in advance, but if no funds are available, the court normally does not require the seafarer to pay them but instead will speed up the auction of the ship to force some person to appear and provide security to cover these costs.

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

5.1 The question of ordering counter security is in the discretion of the court. The court may, in approving an arrest application, order the claimant to provide counter security according to the Special Maritime Procedure Law. The method and quantity of counter security is determined by the Maritime Court, and shall not exceed the value of the preserved property.

5.2 In practice, the court is often requires counter security from the claimant. Generally speaking, the court does not treat a seafarer's claim differently to other claims.

5.3 After a seafarer has filed an arrest application, if no person provides security in time, the court may initiate the ship auction. In accordance with the Maritime Code, the court expenses of enforcing the maritime liens, the expenses of preserving and selling the ship, the expenses of the distribution of the proceeds of sale and other expenses incurred for the common interests of the claimants, shall be deducted and paid first from the proceeds of the auction sale of the ship.

5.4 In practice, the court may allow a seafarer to postpone paying court expenses and deduct them from amounts of the auction sale. An attorney's fees are nevertheless for the account of the seafarer.

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

6.1 The Special Maritime Procedure Law provides that the court in which an arrest has been effected will accept jurisdiction over the substantive claim if the maritime dispute has not gone to litigation or to arbitration after the arrest, unless the parties have signed a litigation jurisdiction agreement or an arbitration agreement.

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6.2 In practice, maritime courts in Guangzhou, Qingdao, Tianjin, Beihai and elsewhere have accepted foreign seafarers' maritime claims for unpaid wages against foreign flagged ships and foreign parties.

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

7.1 During the arrest, necessary expenses such as maintenance of the ship and the crew in question shall be deducted and paid first from the proceeds of the auction sale of the ship or from a security fund provided in advance.

7.2 There are no explicit clauses concerning who will disburse or fund the maintenance of seafarers in this period. A Maritime Court has discretion in this respect.

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 It is unnecessary for the crew to stay on board the vessel during the course of the legal proceedings. On the contrary, they are often allowed to disembark to rest, or they can be repatriated at the expense of the defendant or they can apply for execution from the proceeds of the auction of the ship.

8.2 The Regulation of the People's Republic of China on Seamen ('the Regulation on Seamen') stipulates that the employer of the crew shall bear the costs of repatriation.

8.3 There are no explicit laws on the repatriation of a foreign crew. In practice, the court approves that the costs of repatriating seafarers may be paid on applying for prior execution from the proceeds of the auction sale of the ship, which means that the costs of repatriation can be paid in advance before distributing the sale proceeds in settlement of the seafarer's claim.

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

9.1 Whether the seafarer's wages will continue to accrue or not during the arrest depends on the employment period and the contractual terms. If it is found that the employment period has not lapsed, or that the construction of the contract is to be understood to allow for seafarers' wages during the arrest, the court will decide in favour of the accrual of wages. Otherwise, for a Chinese seafarer, legislation on labour contract law and maritime labour resources do not have explicit clauses to support this kind of claim.

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9.2 For a foreign seafarer, the above mentioned legislation will not apply, and the terms in the employment contract is the only possible resort for the foreign seafarer.

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 Once the court accepts jurisdiction over the claim, it will take approximately twelve months for the court to give judgment, sell the vessel and then distribute the sale proceeds in settlement of the seafarer's claim for unpaid wages.

10.2 Due to the procedures for the auction of the ship and distribution of the sale proceeds, the seafarer has to wait for the final settlement until all relevant disputes can be resolved. It will take a shorter time if the case is really simple or some person is willing to resolve the issue quickly.

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

11.1 There are two general ways to pay an attorney's fees: fixing a lump sum of fee for the whole case service and an advance payment before initiating the legal service by agreement; or fixing a fundamental fee and a conditional fee which depends on the degree to which the court is in favour of the claimant.

11.2 Except for the necessary legal costs such as notarial fees, translation costs, the whole or partial court expenses, the attorney's fee is for the account of the claimant under Chinese law. For a case between an alien seafarer and an alien defendant, foreign substantive law or an expressed agreement between parties may be applied. In practice, the court generally does not support the defendant bearing the attorney's fee for a seafarer, if it cannot find sufficient and sound grounds.

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

12.1 Chinese law does not explicitly use terms such as 'a sister ship' or 'an associated ship'. The Special Maritime Procedure Law provides:

'Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose, owner of the ship in respect of which the maritime claim arose; or demise charterer, time charterer or voyage charterer of that ship. This provision does not apply to claims in respect of ownership or possession of a ship.'

In practice, however, cases where 'any other ship or ships' are arrested by Chinese courts are extremely rare.

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- 12.2 For a seafarer it is more beneficial to rely on the services of local lawyers rather than to bring the claim himself. This is more effective in ensuring procedural justice, which is also deemed to be the cornerstone of substantial justice.
- 12.3 According to the Regulation on Legal Aid of the People's Republic of China, when requesting the payment of wages, a Chinese citizen who needs a lawyer or a legal counsel and who fails to appoint a lawyers due to financial difficulties, may apply to legal aid institutions for legal aid.
- 12.4 A seafarer may apply for the postponement of court expenses, such as the expense of the application for the arrest. The court has discretion in determining whether a seafarer is entitled to postpone payment or not. The best timing for this application is the time when one files a claim.
- 12.5 A seafarer is entitled to claim for interest (calculated on basis of the amount of unpaid wages), until the time specified in a judgment. Nevertheless, a seafarer will be deemed to have given up this right if he does not expressly claim it in the court. If a person fails to fulfil his obligations to pay money within the time limit specified in a judgment or other legal documents, he shall pay a double interest for the debt based on the time he was in default, according to the Civil Procedure Law of the People's Republic of China.
- 12.6 With regard to claims for other remuneration, crew repatriation and social insurance costs, a maritime court will apply the same rule as it does in the case of interest on unpaid wages.
- 12.7 If a seafarer omits to make some claims to which he is entitled, or undercharges the amounts he is owed by mistake or for some other such reasons, he may adjust his claims within the time limits. Otherwise, the court will deem the seafarer to have given up his claims.