

SEAFARER SUBJECT GUIDE

MARITIME LIEN FOR SEAFARERS' WAGES IN GERMANY

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of German flagged ships, and foreign ships which are in the ports of Germany. These rights can be enforced in an employment tribunal, where they may be secured and preferred by maritime liens.

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 Germany.

*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 The seafarer's legal entitlement to wages/salary/remuneration (pay) is based upon a contract, the German Maritime Employment Act ('the SeeArbG'), the general principles of employment law and any applicable collective pay agreements.

1.2 Should the seafarer have arrears of pay, he is deemed to be a 'holder of a maritime lien'. According to the German Commercial Code ('the HGB'), holders of a maritime lien are:

'individual creditors listed in the German Commercial Code and analogously in the German Inland waterway vessels act (BinSchG) who hold a particular statutory right of lien to the ship's assets which does not require entry in the shipping register, is not extinguished by acquisition in good faith, may be pursued against third party owners and which takes precedence over all other encumbrances. The rights of holders of a maritime lien have a specific order of precedence.'

1.3 Maritime liens, not only those of seafarers, exist outside the shipping register. In the case of seagoing vessels, they always take precedence over other liens, and sometimes in the case of inland waterway vessels. According to the HGB:

'Creditors holding the following receivables have the rights of holders of a maritime lien: claims for pay from the captain and other members of the ship's crew.'

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- 1.4 Where the shipowner failed to pay the remuneration, but also other components of pay, (for example, social security deductions, the social security and unemployment insurance funds) the stipulations for maritime liens must also be applied.
- 1.5 Claims for pay also apply if articles of agreement are concluded with crewing agencies instead of with the shipowner directly, and the crew members work on various ships. However, the claim to be secured by a maritime lien must be one directly associated with the vessel from which it arose.
- 1.6 The seafarer must assert the maritime lien by levying execution. In the case of vessels entered in the shipping register, an enforceable instrument is required, either by the registration of a ship mortgage or by a foreclosure sale. In practice, it may prove necessary for the seafarer to levy execution by means of a foreclosure sale. In the case of unregistered vessels, §808 et seq ZPO, applicable to movable property, must be used. The same applies to foreign vessels.

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

- 2.1 Claims for pay must be asserted before an employment tribunal. The stipulations of collective pay agreements must also be observed. For example, the exclusive geographical jurisdiction of the Hamburg Employment Tribunal, which has a dedicated chamber for maritime transport, is stipulated. Exclusive geographical jurisdiction applies to both parties bound by the collective pay agreement, that is, where both the employed seafarer and the shipowner are members of an entity recognised in the collective pay agreement.

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

- 3.1 As stated above, employment tribunals have substantive jurisdiction. The SeeArbG covers, 'the working and living conditions of seafarers on board merchant ships sailing under a German flag.' A court can thus only dismiss a claim by a seafarer not covered by this jurisdiction.

4. Who can claim seafarers' wages?

- 4.1 Every seafarer is entitled to assert a claim for pay in person, in his own name, before an employment tribunal, irrespective of the amount of the claim. No attorney is required. However, it is recommended that advice be obtained from a specialist attorney, who should be appointed to represent the seafarer's interests.

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

- 5.1 The list of maritime liens in the HGB refers to receivables arising from maritime use of the ship. The list applies to merchant vessels only.
- 5.2 In addition, inland waterway vessels are subject to the provisions for holders of maritime liens if claims arising from contracts of employment for the crew are involved.

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

- 6.1 The maritime lien for pay applies to all the remuneration granted under the articles of agreement, including supplements, allowances, bonuses and special payments (shares in cargo, profit and revenue). Pay is the remuneration due to the crew member, as agreed in writing. According to the SeeArbG, 'The crew member is entitled to the payment of the agreed pay for the term of the employment contract.'
- 6.2 Pay is assessed in calendar months. A thirty day calendar month is used to calculate pay for single days. Pay is due at the end of each calendar month or on termination of the employment contract. According to the SeeArbG:

'Should variable components of pay not yet have been established at the end of the calendar month, they will be due at the end of the calendar month during which their amount is specified or could reasonably be established. Should shares in cargo, profit or revenue not have been established at the end of the calendar month, the crew member may demand a payment on account in the approximate amount of the proportion of pay earned.'
- 6.3 Under the SeeArbG, the right to receive pay covers, 'the duration of the necessary journey to the agreed point of commencement of service, before the beginning of the employment contract. The entitlement also applies to time by which the arrival of the ship is delayed.'
- 6.4 The rights of a holder of a maritime lien arising from claims originating in contracts of employment of the ship's crew allow salary and wage claims from the past, but not for a period exceeding six months, calculated from the sequestration of the ship in the course of levy of execution.

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

7.1 No crew member may work on board a ship without valid written articles of agreement. The Seafarers' Act valid until 31 July 2013 did not include a requirement for the written form. The written form is crucial, but the electronic form is precluded.

7.2 Seafarers have greater legal security following the enactment of the SeeArbG. The Seafarers' Act covered the details of contracts in the certificate of hire, whilst SeeArbG now stipulates written articles of agreement. The articles of agreement must be concluded before commencement of employment. Retrospective conclusion of the contract is precluded.

7.3 The articles of agreement must be sent to the seafarer before the conclusion of the contract, including conclusion of collective pay agreements applicable to the employment contract. According to the SeeArbG,

'The crew member should be given sufficient opportunity to examine the content of the contract and possibly obtain advice from a third party, due to the particular danger of over-hasty conclusion of contracts and the more extensive rights and responsibilities compared to employment on land.'

7.4 The seafarer is not defenceless, even if the shipowner does not observe the requirement for the written form. The provisions of the SeeArbG must then be applied to the employment contract, at least analogously.

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

8.1 If the service is not performed on a ship, the rights to bring maritime claims for liens will not be available to the crew member. The SeeArbG is designed for the specific conditions of maritime employment on merchant vessels, which do not exist in other fields of work.

8.2 Employment law covering work on shore is applicable to employees of shipping companies working in shore establishments. The specific provisions of §21 to §25 of the BinSchG and general national law applicable to on-shore employment apply to employment on inland waterway vessels. Public sector employment law must be applied to ship's crews on government vessels which are not merchant ships.

8.3 The right to bring maritime claims for liens also depend on whether an individual is deemed a seafarer or crew member. Other individuals working on board during the voyage who are not in a paid relationship with the owning entity, for example, pilots,

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artists and scientists, are not deemed to be crew members. Individuals working on board in port (stevedores, dockers, shipyard workers and shore employees of the shipowner) are also not members of the crew.

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

- 9.1 The ranking of maritime claims is determined by the numbering by which the claims are listed. The pay claims of the captain and other members of the ship's crew are ranked first. Seafarers' claims follow claims arising from public shipping and freightage charges, particularly bridge, lock, canal and harbour dues, in second place.
- 9.2 The rights of a holder of a maritime lien arising from claims originating in contracts of employment of the ship's crew allow salary and wage claims from the past, but not for a period exceeding six months, calculated from the sequestration of the ship in the course of levy of execution.

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

- 10.1 According to the HGB, 'a shipowner is the owner of a ship which it operates for gain.' Regardless if the owner is an individual or a legal entity, they hold responsibility for wages. Under the SeeArbGm, if 'a party other than the owner is the employer or trainer of the crew member, the rights and obligations of the owner are incumbent on said party under this act (the SeeArbG) and the other statutory provisions implementing the ILO Maritime Labour Convention.'
- 10.2 The owner must ensure, by concluding a contract with the other party, that the said other party will fulfil the rights and obligations of the owner under the SeeArbG and the other statutory provisions implementing the ILO Maritime Labour Convention, in respect of the crew member. The owner is liable for payment obligations of the other party arising from the employment contract as a guarantor waiving the objection of a preliminary injunction. The extent of liability is restricted to fulfilment of obligations under this act and statutory instruments issued on the basis thereof. Liability for the obligation to pay is restricted to the usual remuneration.
- 10.3 In addition, there are also operators. Under the HGB, the operator is 'the party' 'operating a ship which it does not own for gain. It is regarded as an owner in relationships with third parties,' that is, also with seafarers, who may assert a claim for pay against the operator. The owner may not obstruct any party deriving a maritime lien from the use of the ship from asserting the claim, unless its use was unlawful and the creditor has not acted in good faith. §477(3) of the HGB is a new

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introduction. It standardises an obligation of the owner to disclose an operating relationship, if it faces a claim by a third party considering the owner to be the shipowner and claiming against it in this respect. This provision is intended to enable the aggrieved party to determine the identity of the debtor, particularly in the case of tortious liability.

- 10.4 Charterers, managing owners and contract shipping companies are thus also regarded as shipowners, as well as the owner itself. Proceedings may also be instituted against them.
- 10.5 Contract crewing arrangements and the rules applicable to agency staff must also be observed. Personnel loaned to shipowners or equivalent parties are also seafarers or crew members. The seafarer is a crew member of the ship on which he is working temporarily. Crewing companies must also be mentioned in this connection. They do not provide permanent staff, but are employed under employment agency contracts. The German Temporary Employment Act must also be applied to such employment. However, this does not apply to a ship of the owner sailing under a foreign flag or to a foreign crewing company (agency) providing a crew for the ship on behalf of the German owner.
- 10.6 The owner or equivalent entity responsible for the invalidity of articles of agreement due to unconsonability or on other grounds is liable to the crew member (seafarer) for compensation for 'fault in conclusion of a contract' (*culpa in contrahendo*). The circumstances which would have existed in the absence of conclusion of the contract must be restored.
- 10.7 The owner or equivalent must also pay compensation for positive breach of contract if, for example, it culpably omits to pay social security contributions.

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

- 11.1 A maritime lien is statutory and need not be contractually agreed. It plays a protective role for the seafarer. The provisions on the contractual right of lien must be applied as soon as the statutory right of lien has been created.
- 11.2 Although contractual waiver of assertion of a statutory right of lien is possible, a seafarer should not entertain it. In this case it should be examined whether such a waiver would be unconsonable, constitute bad faith or, in particular, have a considerable negative effect on the seafarer's rights.

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

- 12.1 In the case of seagoing and inland waterway vessels, the seafarer's maritime lien lapses/becomes time-barred after one year.
- 12.2 However, the seafarer must first assert his claims arising from the articles of agreement before an employment tribunal. It must be noted that claims arising from the employment contract/demands for pay are subject to general time-barring after three years, starting at the end of the year in which the claim arose.
- 12.3 In the case of claims arising from an employment contract covered by a collective pay agreement, it must be noted that claims under §34 of the MTV-See are subject to time-barring if they are not asserted in writing within a cut-off period of three months after the due date.
- 12.4 If BinSchG is applied, the seafarer's right to salary and wage claims as the holder of a maritime lien will lapse in six months, calculated from the sequestration of the ship in the course of levy of execution.
- 12.5 Due to the brevity of the time-barring periods, the seafarer may have to assert his claims in interim proceedings, namely arrest, in order to protect his rights, because employment tribunals will not usually return a judgement within the short time-barring periods and because a party may also appeal.
- 12.6 The maritime lien is a statutory entitlement which comes into effect automatically and therefore need not be the subject of a separate contractual agreement. The maritime lien can only be extinguished if the underlying claims are (voluntarily) satisfied by the owner or if the seafarer is satisfied by the levy of execution from which the yield has been paid to him.
- 12.7 Should the yield from a levy of execution resulting from a maritime lien be insufficient, insolvency of the owner may result. The seafarer should note the following.
- (1) Insolvency law is covered by the Insolvency Order (InsO).
 - (2) The seafarer can first register his claim with the receiver and participate in the distribution process, provided that insolvency assets are available.
 - (3) In addition, the seafarer has a right to separate satisfaction from the ship on which he has worked if the owner is insolvent under §49 of the Insolvency Order. This right may overlap the maritime lien if the seafarer has already

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- taken the initiative and instituted a levy of execution before the commencement of insolvency proceedings.
- (4) Finally, German law provides special protection for employees if their employer becomes insolvent. The German Social Security Code grants the seafarer an entitlement to insolvency benefit. The German Department of Employment will pay outstanding claims for remuneration (pay) to the employees in question (seafarers) in the form of an insolvency benefit, under certain conditions. An entitlement to an insolvency benefit will apply in the event of insolvency during the previous three months (insolvency benefit period) of employment. Details will be found on the departmental website.