

## SEAFARER SUBJECT GUIDE

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### MARITIME LIEN FOR SEAFARERS' WAGES IN MALTA

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of Maltese flagged ships, and foreign ships which are in the ports of Malta. These rights can be enforced in the civil courts, where they are secured and preferred by special privileges 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 Malta.

\*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 Malta does not have the concept of a 'maritime lien' and is not a signatory to an international convention governing maritime liens.
- 1.2 According to the Malta Merchant Shipping Act 1973 ('the MMSA') a seafarer is a crew member on a merchant vessel: he is any person employed or engaged in such a capacity on board a ship, excluding the master and the apprentice, unless otherwise stipulated. Seamen on fishing vessels are not included under the MMSA.
- 1.3 Seafaring is considered a unique type of employment. The law that deals with regular employment conditions, the Conditions of Employment Regulation Act, specifically excludes seafaring from its scope. Under Maltese law the rights of a seafarer are to be found mainly in Part IV of the MMSA.
- 1.4 Maltese law does not include a definition of wages per se. The MMSA has followed the United Kingdom Merchant Shipping Act in stating by way of definition that wages include 'emoluments'. An emolument is any allowance, bonus or other financial benefit that accrues to the advantage of a member of the crew of a ship as contractual recompense for services that have either been rendered, or in the normal circumstances would be rendered for the benefit of the ship. Wages, therefore, includes paid leave, bonuses and other allowances granted by the owner including union contributions paid by the ship owner on behalf of the crew and the social welfare benefits, which the shipowner agreed to pay.

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- 1.5 Due to economic differences that exist from one country to another the best that the international community could do to regulate wages was to prescribe a minimum wage to stop this type of discrimination from being abusive. The regulation of the minimum monthly wage is set out in paragraph 10 of the International Labour Organization's 'Recommendations on Seafarers Wages, Hours of Work and the Manning of Ships, 1996'. Maltese law abides by this prescribed wage as set from time to time in the MMSA. The minimum wage as per the recommendation is recalculated periodically taking into account several factors such as the consumer prices of the major shipping countries and the seafarer supplier countries together with an extensive analysis of exchange rates so that inflation does not affect the seafarer's wages.
- 1.6 Although, as stated earlier, Maltese law does not recognize the concept of a 'maritime lien,' a number of 'special privileges on ships' are recognized under the MMSA. The difference between an ordinary maritime claim (as recognized under article 742B of the Code of Organisation and Civil Procedure ('the COCP') and a special privilege is essentially twofold. First, special privileges survive the voluntary sale of a ship for a period of one year from when such sale is recorded in the ship's register. Second, special privileges would rank in priority to ordinary maritime claims.
- 1.7 The possibility of a seafarer enforcing his right to wages is mentioned in the MMSA. This section deals with special privileges. These privileges are defined with regard to an exhaustive list of debts. The MMSA states in part that: 'the debts hereunder specified are secured by a special privilege upon the vessel, as well as any proceeds from any indemnity arising from collision and other mishaps as well as any insurance proceeds.'
- 1.8 The MMSA gives priority to both mortgages and special privileges over all other debts of the shipowner. However, it is only in section 50 of the MMSA in the ranking of creditors, that the importance of wages over mortgages is observed. The special privilege with regard to wages was somewhat restricted before the 2000 amendments. Section 50[h] which dealt with wages stated that there is a special privilege over 'wages of the master and the crew employed for a period of three months prior to last voyage for the last voyage and for the period after her last entry into port.'
- 1.9 This section of the MMSA now reads: 'Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf.'

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- 1.10 There is now no peremptory period and the privilege has been extended to repatriation and social insurance contributions.
- 1.11 Section 54A of the MMSA establishes the ranking order and states that debts shall rank in the order listed and the possessory liens shall not be paid in preference to [h], which deals with wages and some other privileges even though possession is still enjoyed by the creditor. From this point of view, a registered mortgage does not rank before wages.

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

- 2.1 By virtue of the Vice Admiralty Court (Transfer of Jurisdiction) Ordinance of 1892, jurisdiction over Admiralty matters in Malta was transferred to the Maltese Commercial Court. The Commercial Court thus inherited the admiralty jurisdiction of the English Admiralty Court as at 1892, which was still based on the 1840 and 1861 Vice Admiralty Court Acts.
- 2.2 Following the transfer of jurisdiction from the British model to the independent Maltese system in 1892, amendments to the English Admiralty law were not incorporated into Maltese admiralty law. In Maltese admiralty law, and the notion of jurisdiction *in rem*, remained intrinsically linked to the 1840 and 1861 Vice Admiralty Court Acts. This situation persisted even after Malta obtained independence from the United Kingdom in 1964.
- 2.3 Even with the enactment of the MMSA in 1973, the status quo as regards the *in rem* jurisdiction exercised by the Commercial Court was maintained by virtue of that Act which provided:
- 'The Commercial Court shall continue to exercise, as part of its ordinary jurisdiction and in accordance with the mode of procedure in force in that court, the jurisdiction hitherto exercised by it by virtue of the Vice-Admiralty Court [Transfer of Jurisdiction] Ordinance.'
- 2.4 In 1995, the Commercial Court was abolished and its jurisdiction devolved to the First Hall of the Civil Court.
- 2.5 It was only in 2006, with the deletion of article 370[1] and the addition of article 742B to the COCP, that Maltese courts were able to break free from the restrictions posed by the 1840 Admiralty Court Act and the 1861 Admiralty Court Act in relation to their *in rem* jurisdiction. The new article 742B lays down no less than 25 claims in respect of which the courts of Malta can now exercise jurisdiction *in rem* over ships or

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vessels. These claims include those claims which, in terms of the MMSA, give rise to special privileges over vessels. There is therefore no doubt that the Maltese courts have jurisdiction *in rem* over claims secured by a special privilege.

- 2.6 The MMSA imposes no limitations on the jurisdiction *in rem* of the civil courts with regard to the nationality or residence of the claimant, the nationality of the ship, or the law under which the claim arose. Thus, the civil courts of Malta are deemed to be vested with jurisdiction when an action *in rem* is brought by any person of whatever nationality or residence, against any ship, wherever it may be registered, in respect of a maritime lien over such ship, regardless of where such maritime lien arose, so long as the conditions for the action to subsist are present. The presence of the defendant ship or vessel within the territorial jurisdiction of the Maltese courts has consistently been held to be a *sine qua non* condition for the availability of the action *in rem*.
- 2.7 As regards the possibility of enforcing a claim secured by a special privilege by means of an action *in personam* in Malta, it is submitted that in light of the origins of the admiralty jurisdiction of the Maltese Courts, and in the absence of any statutory provision to the contrary, the civil courts of Malta will be competent to exercise jurisdiction *in personam* over claims secured by a special privilege.
- 2.8 It is, however, almost invariably the case, both in Malta and in England, that a claimant will choose to enforce his claim by means of an action *in rem*, rather than by means of an action *in personam*.
- 2.9 Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) has had an impact on the ability of Maltese courts to exercise their jurisdiction *in rem* in cases where the owner of a vessel is domiciled in another European Union ('EU') member state.
- 2.10 Where the owner of a vessel is domiciled in a state which is not an EU member state, the provisions of the Brussels I Regulation do not apply, and consequently the jurisdiction *in rem* of the Maltese court is to be determined in accordance with the rules laid down in article 742B of the COCP. Where, however, the owner of a vessel is domiciled in a member state, the jurisdictional rules laid down in the Brussels I Regulation come into play, and the provisions of article 742B of the COCP no longer apply. According to article 2 of the Regulation, the owner of a vessel may only be sued in the member state of his domicile.
- 2.11 If Malta were a party to International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships 1952 ('the 1952 Convention'), it would be

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arguable that by virtue of the provisions of article 71 of the Brussels I Regulation, such Regulation would not apply to jurisdiction over vessels. This was the route taken by the English courts. However, since Malta is not currently a party to the 1952 Convention, it would appear that the jurisdiction rules contained in the Regulation apply also to the jurisdiction *in rem* of the Maltese courts over ships.

- 2.12 Nevertheless, it is submitted that article 31 of the Brussels I Regulation, which makes provision for the taking of provisions or protective measures by the courts of a member state other than that seized with jurisdiction as to the substance of a claim, would allow the issue of a precautionary warrant of arrest in Malta, even where the court of another member state (the member state of the shipowner's domicile) is seized of the merits.

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

- 3.1 The Maltese courts may refuse to hear a seafarer's claim if the courts do not have jurisdiction in terms of the COCP, or if there are already ongoing proceedings on the same merits in another jurisdiction. If the claimant has instituted legal proceedings after the term allowed by the COCP, the Maltese courts may refuse to continue hearing such claim due to a time bar.

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

- 4.1 The seafarer himself and in his absence from Malta, his mandatory who may be the Maltese lawyer representing him before the Maltese courts, may claim wages.
- 4.2 Wages can also be claimed by any party who has been surrogated to the rights of the original claimant.

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

- 5.1 A ship may be arrested irrespectively of who the debtor might be. The only exceptions relate to ships of war, and ships wholly chartered in the service of the government of Malta or employed in any postal service either by the government of Malta or by any other government.
- 5.2 The COCP requires that a warrant of arrest may be issued only on a ship exceeding 10 meters in length, and that the claim in respect of which the ship is arrested be no less than EUR7,000. All matters relating to jurisdiction and ranking of creditors are subject to Maltese law as the *lex fori*.

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

- 6.1 The importance of wages is emphasized by the security provided by law. Seafarers' wages and other sums due constitute a special privilege over the ship, proceeds from any indemnity derived from collisions and other mishaps and insurance proceeds in respect of their employment.
- 6.2 The MMSA, which deals with wages, provides that there is a special privilege over:  
'Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf.'
- 6.3 No definition of wages is provided. The law only states that wages include emoluments. An emolument is any allowance, bonus or other financial security that accrues to the advantage of the crew member as compensation for services rendered for the benefit of the ship. Wages would therefore include paid leave, bonuses and other allowances including union contributions and social welfare benefits paid by the shipowner. Redundancy or severance pay is not included.
- 6.4 Maltese law does not impose the amount of wages to be paid to a particular seafarer. This is left entirely to the employer's discretion. However, the employer must ensure that all able seamen are paid at least the minimum basic wage established by the Minimum Wage Regulations. Only the Registrar General may authorize a lesser amount through collective agreements. There is no reference regarding wages of masters, officers and other seafarers.

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

- 7.1 Every seafarer aboard a Maltese vessel must have an agreement with the master of the vessel. The MMSA provides that:  
'the master of every Maltese ship, other than ships employed solely in navigation on the coasts of Malta, shall enter into an agreement in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port ... If a master of a ship carries any seaman to sea without entering into an agreement with him in accordance with this Act, he shall for each offence be liable to a fine ('multa') not exceeding fifty units.'

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7.2 However, the fact that there is no written contract of employment between the crewmember and the master does not hinder the crewmember from filing a claim for unpaid wages against his employer.

7.3 The MMSA specifically provides that a seaman is not bound to produce a contract of employment in his legal proceedings for unpaid wages:

'In any legal or other proceedings a seaman may bring forward evidence to prove the contents of any agreement with the crew or otherwise to support his case without producing, or giving notice to produce, the agreement or any copy thereof.'

7.4 Therefore, a seafarer can file an action *in rem* or *in personam* for unpaid wages, even though there is no employment contract. The employment contract is just proof of the contractual relationship between a seafarer and his employer. Such contract is not a legal requisite for a seafarer to file his claim for unpaid wages. In the absence of such a contract it will be up to the seafarer as claimant to present evidence to corroborate his claim before the court.

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

8.1 The MMSA provides:

'Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf.'

8.2 In order for the seafarer's claim for wages to qualify as a privileged debt under this section of the MMSA, the wages being claimed must relate to service rendered on that particular vessel.

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

9.1 The system of ranking of claims under Maltese law is set out in various articles of the MMSA, and reads as follows:

- (1) special privileges securing judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;
- (2) special privileges arising in respect of fees and other charges due to the registrar of Maltese ships in terms of the Merchant Shipping Act;

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- (3) special privileges arising in respect of the following debts, where such debts have been created prior to the debt of the creditor enjoying a possessory lien or privilege in terms of article 54 of the Merchant Shipping Act:
- i. tonnage dues;
  - ii. wages and expenses for assistance, recovery of salvage, and for pilotage;
  - iii. wages of watchmen, and expenses of watching the ship from the time of her entry into port up to the time of sale;
  - iv. rent of warehouses in which the ship's tackle and apparel are stored;
  - v. expenses incurred for the preservation of the ship and of her tackle including supplies and provisions to her crew incurred after her last entry into port;
  - vi. wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
  - vii. damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;
  - viii. moneys due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage;

provided that such debts have been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;

- (4) possessory liens or privileges arising in favour of a ship repairer, shipbuilder and other creditor in possession in terms of article 54 of the Merchant Shipping Act;
- (5) special privileges arising in respect of the debts listed in paragraph (3) above, where such debts have been created after the debts of the creditor enjoying a possessory lien or privilege in terms of article 54 of the Merchant Shipping Act.
- (6) Special privileges arising in respect of ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and in respect of any disbursement during such period not enjoying a special privilege in paragraphs [a] to [i] of article 50 of the Merchant Shipping Act, though in any case for a sum in the aggregate not in excess of four thousand units;
- (7) mortgages registered under the Merchant Shipping Act, or foreign mortgages recognised under such Act; mortgages shall be entitled in priority, one over the other, according to the date and the time at which each mortgage is recorded in the register;

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(8) special privileges arising in respect of:

- i. moneys lent to the master for necessary expenses of the vessel during her last voyage, and the reimbursement of the price of goods sold by him for the same purpose;
- ii. moneys due to creditors for provisions, victuals, outfit and apparel, previously to the departure of the ship on her last voyage: provided that the relevant debt has been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;
- iii. damages and interest due to freighters for non-delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master or the crew;
- iv. damages and interest due to another vessel or her cargo in cases of collision of vessels;
- v. the debt specified in article 2009[d] of the Civil Code for the balance of the price from the sale of a ship;

(9) other hypothecary and privileged claims.

Article 51 of the MMSA makes provision for the order of ranking of special privileges. It provides where debts similar to those listed in article 50, giving rise to special privileges, are contracted on one single occasion of arrival in, or return to, a port, the order of ranking shall be the order in which such debts are listed. Where, however, such debts have been contracted on different occasions of arrival in, or return to, a port, those debts contracted on the occasion of a later arrival or return shall take priority over those contracted on an earlier arrival or return.

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

- 10.1 In terms of the MMSA, the seafarer can claim wages, and such a claim qualifies as a special debt, for service rendered on a ship irrespective of whether the employer is the owner of the ship or not. If the seafarer has provided a service on board a ship, he is entitled to institute *in rem* proceedings against the ship for unpaid wages.
- 10.2 On the other hand, a seafarer cannot claim wages if he refuses or neglects to work, during period of imprisonment or during period of illness caused by his own fault.

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

11.1 In the case of wages, the MMSA provides that:

'A seaman shall not by any agreement forfeit his rights on the ship, or be deprived of any remedy for the recovery of his wages, to which in the absence of the agreement he would be entitled, and shall not by any agreement abandon his rights to wages in case of the loss of the ship, or abandon any right that he may have or obtain in the nature of salvage; and every stipulation in any agreement inconsistent with any provision of this Act shall be void.'

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

12.1 The MMSA as quoted above governs the forfeiture of maritime liens.

12.2 The special privilege travels with the property into whosoever's possession such property may pass. Such a description must not however be taken to mean that a special privilege once created is indestructible.

12.3 There exist various ways in which a special privilege may be extinguished or rendered ineffectual. The most relevant to the Maltese situation are:

- (1) statutory time limitations;
- (2) judicial time limits;
- (3) payment and acceptance;
- (4) security by way of guarantee of judgment;
- (5) voluntary acceptance of security in lieu of payment;
- (6) agreement;
- (7) surrender to trustee in bankruptcy or liquidator;
- (8) sale by the court; and
- (9) destruction of the res.

12.4 The MMSA provides that 'privilege shall be extinguished upon payment of the price and relative charges ...'

12.5 The MMSA refers to the extinguishment of a possessory lien by the voluntary release of the ship by the creditor.

12.6 The MMSA refers to extinguishment of privilege either by payment or by adequate security is deposited in the Civil Court First Hall.

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- 12.7 A statutory time limitation in relation to special privileges is imposed by the provisions of the MMSA:

'Without prejudice to any other cause which may at law extinguish an obligation the special privileges in article 50 are not extinguished by the sale of the vessel, except in case of a sale made pursuant to an order or with the approval of a competent court made according to the forms prescribed by law, or where, subsequent to a voluntary sale a period of one year has elapsed from the date of the registration, recording or annotation of that voluntary sale in the registry to which the ship belongs or where no such registration, recording or annotation are entered in that registry from the date of closure of the register of the ship in such registry subsequent to such voluntary sale, unless within such period of one year an action for the recovery of the claim secured by such privilege has been brought before a competent court.'

- 12.8 Although a special privilege travels with the vessel into the hands of a new purchaser following a voluntary sale, it remains effective for a period of only one year following the recording of such sale, after which time, if no action for its enforcement has been brought, it is extinguished.