

## SEAFARER SUBJECT GUIDE

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### MARITIME LIEN FOR SEAFARERS' WAGES IN SOUTH KOREA

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of South Korean flagged ships, and foreign ships which are in the ports of South Korea. These rights can be enforced in court, where they are secured and preferred by maritime liens 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 South Korea.

\*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 Although South Korea has not ratified nor acceded to the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages of 1926 ('the 1926 Convention') and the International Convention on Maritime Liens and Mortgages of 1993 ('the 1993 Convention'), certain provisions of the 1926 Convention and 1993 Convention are incorporated into its domestic law, the Korean Commercial Code (the 'KCC'). The KCC provides that 'A claim arising out of the contract of employment of the crew and other persons hired on board' shall be secured by a maritime lien. Seafarers' wages thus fall within the ambit of this clause, and wages are accordingly secured by a maritime lien.
- 1.2 The KCC provides that a wide range of objects may be subject to a maritime lien, including 'the vessel, her appurtenances, the freight for the voyage during which the claim giving rise to the lien arises, and any claim incidental to such vessel and freight.'
- 1.3 A maritime lien can be enforced by arresting the vessel for judicial sale through relevant court procedures. The law which regulates these proceedings is the 'Civil Execution Act' under which the compulsory auction (forced sale of vessel) of a vessel may take place. The creditors holding a maritime lien can enforce the lien without the necessity of obtaining a court's judgment or arbitration award on the merits of claims secured by the lien.
- 1.4 In order to determine the law governing a maritime lien, the court considers the Private International Act ('the PIA'). The PIA provides that the maritime lien 'shall be

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governed by the law of the country of registry of the ship.' Therefore, when the issue of whether seafarers' wages can be secured by maritime liens arises in Korean courts, the law of the country where the ship was registered must be investigated in the first place. If such country is Korea, then the KCC applies and, as a consequence, the court will recognize a maritime lien for seafarers' wages.

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

- 2.1 South Korea is not a country that adopts a federal system of government. The country does not have a court that is officially titled as an admiralty court and is granted specialized jurisdiction over admiralty and maritime actions. Instead, there are three levels of courts: the district court, the high court and the Supreme Court. The district court is granted general jurisdiction over all legal matters including maritime contracts, torts, injuries and offences, and is the principal court of first instance. Therefore, the district court is, in principle, the court of first instance to exercise jurisdiction over a seafarer's wage claim.
- 2.2 The district court, which has territorial jurisdiction over the port where the ship called, has jurisdiction over the arrest and compulsory auction of the ship for enforcement of the maritime lien by virtue of the Civil Execution Act.
- 2.3 Under the PIA, a wage claim is treated specially. Unlike some other claims, wage claims are treated with special solicitude by the PIA as to the jurisdiction under which the claimants, that is, the employees, can bring a lawsuit. The PIA stipulates that the employee to whom wages are due can litigate in a state 'where he habitually provides his service or even where he habitually provided his service for the last time,' and it further provides that in case the employee does not, or did not, habitually provide his service within one country, he may file a lawsuit against an employer 'even in a country where the business office of the employer, who hired the employee, is or was located.' It is noteworthy that the Supreme Court has ruled that the state where the ship is registered falls within 'a state where [employee] provides his service.' Furthermore, a non-exclusive jurisdiction agreement between a seafarer and his employer is effective on certain conditions as set out in the PIA as follows: 'The parties to an employment contract may, in writing, make an agreement on international jurisdiction, provided that such agreement shall be effective only in any of the following subparagraphs: in case a dispute has already occurred; or in case of the filing of a lawsuit with other courts in addition to the competent court under this article, paragraph 3 is permitted to the employee.'

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

- 3.1 The answer is no unless the court lacks personal jurisdiction or there is an agreement between the seafarer and his employer to refer the disputes arising out of the employment contract to arbitration. There is no particular provision in Korean law which gives a court the discretion to decide whether to hear a seafarer's wage claim.

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

- 4.1 A seafarer himself and his heir can claim seafarers' wages in a court. An assignee and a subrogee of the seafarer's claim for wages can also claim the wages of the seafarer, for example, an assignor or subrogor under Korean law. However, if the governing law of the contract of employment is that of a foreign state, whether the assignment of or subrogation to a claim for seafarers' wages is allowed, and whether such assignee or subrogee can claim seafarers' wages, is determined by the governing law of the foreign state pursuant to the PIA.
- 4.2 The assignment of, or subrogation to, a claim for seafarers' wages secured by a maritime lien entails the simultaneous assignment of, or subrogation to, such a maritime lien under Korean law.

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

- 5.1 Ships, whether registered or not, to which the KCC applies are subject to the jurisdiction of Korean courts. It does not matter whether they are sunken ships, if it is possible to salvage them, or whether they are foreign ships.

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

- 6.1 Crewmen or any other persons hired on board can claim their wages in Korean Courts. In the KCC, there is no definition of 'crewmen or any other person hired on board'. Crewmen include masters. 'Crewmen' does not include those who, although having entered into a contract of employment, do not work on board the ship. 'Any other persons hired on board' include watchmen, ship managers, sales clerks working at cafeteria on a passenger ship, and such other person engaged in any similar capacity on board any ship. However, crewmen do not include engineers who repair a ship at a port, stevedores, pilots etc.
- 6.2 According to the Seafarers Act of Korea, employees are entitled to: wages; retirement allowance; unemployment allowance; repatriation allowance; overtime work allowance; paid leave pay; and accident compensation. Wages secured by the maritime lien include virtually everything due to a seafarer pursuant to the

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employment contract, the Seafarers Act, and other relevant statutes. That being the case, wages would also include claims for damages for wrongful dismissal. The Supreme Court has held that where there was an agreement that the master of a fishing boat shall receive a special bonus contingent on a fishing catch, such a special bonus came under a category of claim for wages in respect of his employment contract. In the Busan District Court it was held that a claim for a dividend is also to be considered to be wages where the employment contract includes a provision for such claim.

- 6.3 Wages are secured by an expanded maritime lien on the total freight due for all voyages. A claim for wages thus gives rise to a lien on the total amount of freight due for all voyages during the subsistence of the same contract of employment; whereas other claims give rise to maritime liens on the freight only for the particular voyage during which the claims arise.

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

- 7.1 A written contract is not one of the requirements of contract formation under Korean law. It will be difficult, but not necessarily impossible, to prove the existence of a contract of employment on the vessel by circumstantial, testimonial or indirect evidence.

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

- 8.1 The answer to this question is to be found in the relevant provisions of the KCC, which have enacted aspects of the 1926 Convention. The 1926 Convention refers to: 'Claims arising out of the contract of engagement of the master, crew, and other persons hired on board'.
- 8.2 There is common consensus that the maritime lien provisions of the KCC apply only to those seafarers and other persons 'hired on board' even though the Korean words used in the relevant provisions of the KCC do not have such a clear qualification in this regard.

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

- 9.1 There are four paragraphs in article 777 of the KCC, and each paragraph stipulates claims secured by maritime liens. As to the ranking of claims, the order of priority is 'as the order set in the subparagraphs of Article 777, paragraph 1.' A claim for wages

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is in the second of the four paragraphs, and therefore its priority would be second in the four claims listed in that provision. Article 777 provides:

'(Claim with Lien on Ship): A person who has the following claims shall have maritime liens on a vessel, its appurtenances, the freight for the voyage during which the claim giving rise to the lien arises, and any claim incidental to such vessel and freight;

- (1) Costs of litigation incurred in the common interest of the creditors, all the taxes imposed on the vessel concerning a voyage, pilotage dues, towing fees, maintenance charges and inspection charges of the vessel and its appurtenances after final entry into port;
- (2) Claims arising out of the contract of employment of the crew and other persons hired on board;
- (3) Remuneration for salvage, and the contribution of the vessel in general average; and
- (4) Indemnities for collision or other accident of navigation, as also for damage caused to navigation facilities, works forming part of harbours, and navigable ways; indemnities for loss of life of or personal injury to passenger or crew.'

9.2 With respect to the priority of wages earned over the last three months and accident compensation, the Labour Standards Act provides for the privilege of such wage and compensation claims taking priority over all other claims whether secured or not. In this regard, the privileged wage claim takes precedence over claims secured by other maritime liens.

9.3 A maritime lien, including a claim for wages, takes priority over a pledge right and a mortgage right. Thus, the lienholder is protected from possibly excessive claims secured by a pledge or a mortgage.

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

10.1 In cases where the employer is not the shipowner the maritime lien is not dependent on who hired the seafarer, be it the owner or the charterer. Also, seafarers are granted a maritime lien where they are employed by ship management company or ship operator.

10.2 There would appear to be no direct precedent of Korean courts dealing with the payment of wages when the shipowner acts illegally.

10.3 Even where the employer had stolen the vessel, or taken it by force, or obtained it by fraud from the original owner, the wages of seafarers are secured by a maritime lien, provided that the seafarers contributed to the maintenance of the vessel without

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complicity on their part and that the seafarers actually provided labour for the navigation.

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

11.1 It is prohibited to waive a maritime lien before the claim for wages exists because the maritime lien is a kind of statutory real right granted by way of security. Even if any agreement to waive the maritime lien was made before the claim giving rise to the lien arises, such agreement is rendered null and void.

11.2 However, the waiving of a maritime lien after it arises can be valid as a kind of agreement of immunity from execution.

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

12.1 No provision in the KCC provides for the forfeit of a maritime lien. Seafarers who leave the ship before the end of their contract also have a lien the ship. In addition, the maritime lien on a vessel is not affected by any change of ownership or of registration or of flag.

12.2 However, it is only the vessel and its appurtenances that remain the object of maritime lien pursuant to the aforementioned provision, and a lien on the freight for a voyage and any claim incidental to such freight shall be excluded unless the claimant has garnished such a claim for freight before such a claim is transferred to the third party

12.3 A maritime lien ceases to exist at the expiration of a period of one year from the date when claim giving rise to the lien arose unless, prior to the expiry of that period, the vessel has been arrested for enforcement of the lien. A maritime lien for wages is also extinguished when the claim secured by the lien has been extinguished, or the vessel has been destroyed by force majeure. However, when a ship is destroyed by force majeure, maritime lien can attach to its substitute, for example, insurance money.

12.4 In the case of compulsory auction, all other maritime liens attaching to a vessel are extinguished at the time when the price of the successful bid is paid fully in the compulsory auction proceedings initiated by a lienholder.