

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN THE BAHAMAS

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

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

If a seafarer intends to arrest a ship in the Bahamas, 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 As a creditor, a seafarer can arrest a ship for unpaid wages. His nationality is irrelevant, and, as long as the vessel is within the Bahamian court's jurisdiction, the flag is also irrelevant. However because the party arresting the vessel must bear the costs of the arrest, maintenance, and security of the vessel until it is released or disposed of, an impecunious seafarer suing for unpaid wages is highly unlikely to be able to pay such significant costs on his own. It is possible, though uncommon in the Bahamas, for the crew to secure the funding from another organization or group for this purpose.
- 1.2 Therefore, it is the norm for the seafarer's claim to piggyback on the *in rem* action by a mortgagee bank or other institutional creditor against the ship. After the arrest and sale of the vessel, the seafarer's wages claim is paid after the Admiralty Marshal's costs and expenses, but otherwise first in order of priority and before the claims of the mortgagee and other creditors.

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

- 2.1 The Merchant Shipping Act ('the MSA') requires that claims for unpaid wages under the Act commence within one year after the cause of action arises. In practice it is suggested that the seafarer should seek to start the action as soon as possible. The court will not be tolerant of late claims.

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

3.1 The documents required in an action *in rem* are:

- (1) writ supported by an affidavit;
- (2) an application for service out of the jurisdiction (if applicable);
- (3) a *praecipe* requesting issue of the warrant together with an affidavit made by the applicant or his agent;
- (4) a note to the Consular office for the flag of that vessel stating that an action has begun to arrest the vessel; and
- (5) the applicant must also cause a search to be conducted in the relevant registries to make certain that there are no caveats to the action.

3.2 If the documents listed above are not written in English, the documents must be translated into English. The translation must be certified by the translator, that the translation is correct, and a certificate must verify the translator's full name, address and qualifications as a translator. The documents must be duly notarised by a notary public. An apostille is also needed under the Hague Convention Abolishing the Legalisation of Foreign Public Documents.

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

4.1 The costs of every arrest will vary depending on the circumstances of that arrest. However a very significant portion of the costs has to be funded in advance and on a day to day basis.

4.2 For example, the arresting crew would have to pay any estimate or invoice provided by the Admiralty Marshal in advance, not only to maintain the vessel and crew, but also other necessary services such as providing 24 hour security for the vessel and dockage fees. The arresting crew may have to pay for the towing and pilotage fees if the vessel has to be moved from place to place.

4.3 The service of the warrant of arrest is done by the Admiralty Marshal or his substitute. The arresting crew also assumes the financial responsibility for paying the Admiralty Marshal to execute the warrant. The warrant will not be executed until an undertaking is given in writing by the arresting crew or their attorney that the Admiralty Marshal be paid upon presentation of the invoice or estimate. The Admiralty Marshal must be satisfied with the undertaking that all his fees and expenses will be paid. This undertaking shall be lodged in the Admiralty Marshal's office. The Admiralty Marshal's payment cannot be postponed.

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- 4.4 In the Bahamian case of *Storebrand Bank ASA (formerly Finansbanken) v. The Owners and Parties Thompson, J* indicated that the Admiralty Marshal has to be confident that he will be paid upon demand as the arrest progresses:

'Tanja (an interested party) further contends that it is entitled to the charges and expenses of the Admiralty Marshal in arresting the MN Forrest Carrier and the legal costs involved in the arrest as a prior charge on the fund, and that these costs rank prior to the costs of the Admiralty Marshal in effecting the second arrest.

In respect of the amount claimed with respect to the Admiralty Marshal's expenses and legal fees for Tanja's attorney, it is argued that the Admiralty Marshal is bound to call upon the undertaking given by Tanja's attorney at the time of the arrest and that undertaking is personal to the attorney and not to Tanja. See section 281 of the Merchant Shipping Act which provides that it is not until a sum is awarded by a court in respect of costs or expenses that these items would have priority to all other claims. In this connection Tanja did not obtain judgment in its actions and no order in terms of section 281 of the Merchant Shipping Act was ever made.'

- 4.5 According to the MSA:

'...any sum awarded by a court as costs arising out of any proceedings in respect of the arrest of a ship or the subsequent sale thereof, including such charges or expenses incurred in effecting the arrest or sale shall have priority over all claims in payment out of the proceeds of the sale or of any moneys paid into court for the release of the ship from that arrest...'

- 4.6 The above case recognises that the Admiralty Marshal is first in the order of priorities and likewise those, such as Tanja, who provide services to the vessel while under arrest. However, Tanja did not obtain an order of the court indicating that it was entitled to be paid as a first priority. Certainly, the arresting crew or any other party arresting the vessel should be sure to obtain such an order.
- 4.7 The warrant for arrest is only valid for 12 months beginning with the date of its issuance, then the warrant expires (and the applicant would have to get the warrant reissued if required). Therefore, an estimate should be made even before the vessel is arrested of the likely length of time of the arrest before sale, and the substantial funds required to maintain the vessel during that time.

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

- 5.1 The applicant is not required to provide counter security for damages in case of wrongful arrest.
- 5.2 However wrongful arrest proceedings may occur in the Bahamas. If the applicant's claim is found to be based on malice or gross negligence, the applicant may be sued for wrongful arrest. In an action for wrongful arrest, the defendant bears the burden of proving malice or gross negligence. The Privy Council in *The Strathnaver* stated that the plaintiffs having arrested the ship in commencement of proceedings *in rem* in admiralty and having failed to prove their cases, the court had to consider whether damages should be awarded against them in respect of the arrest and detention. It was held that proof of actual damage is not necessary to sustain an action in an Admiralty Court for wrongful arrest if the seizure of the vessel was the result of *mala fides* or *crassa negligentia* implying malice.
- 5.3 It is conceivable, although unlikely, that a defendant shipowner may apply for the arresting crew to lodge, not counter security against wrongful arrest, but security for the costs of the arrest. The principle here is that a foreign plaintiff or claimant may be required in the court's discretion to put up a sum to cover the costs of the defendant, in the event that the plaintiff or claimant loses the case. It is unlikely to occur, as usually the shipowner either does not appear in or does not resist the action. In any event, there is no Bahamian case where the court has ever exercised its discretion to require the seafarer claimants to pay security for costs.
- 5.4 It should also be noted that, generally speaking, a foreign plaintiff is frequently required to post security for costs of the defendants. But, the shipowner frequently does not appear in, or does not resist the action. Therefore, in the event that a seafarer was to bring an action, such an application for security for costs would probably not be made.

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

- 6.1 Once the Admiralty Marshal arrests a ship, it is done on behalf of the court. A warrant of arrest for a vessel may be obtained in the Supreme Court. This type of action is in effect an action against the *res*.

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- 6.2 A writ commencing an admiralty action *in rem* is directed not to any defendant by name but to the owners and other persons interested in the *res*. The Admiralty Marshal will serve the warrant of arrest on the property against which the action is brought.
- 6.3 Service of the writ upon the ship is notice to persons interested in the ship. The warrant of arrest secures jurisdiction and ensures that the ship with which the claim is concerned will be available for satisfaction of the judgment. The Admiralty Marshall's actions are that of the court and anyone who interferes in the arrest process may be found in contempt of court.
- 6.4 However, it should be noted that the Supreme Court does not have jurisdiction to hear or determine a claim for unpaid wages where the applicant(s) have commenced the same action for unpaid wages in another jurisdiction.
- 7. Will the crew and vessel be maintained/supported during the arrest?**
- 7.1 The crew and vessel will be maintained while it is under arrest by the Admiralty Marshal on behalf of the court. The expenses incurred while the vessel is under arrest will form part of the Admiralty Marshal's expenses.
- 7.2 Having been put in funds by the party arresting the vessel, the Admiralty Marshal will pay the maintenance, support, unpaid wages and expenses of repatriation. The expenses incurred by the Admiralty Marshal will form part of the Admiralty Marshal's expenses, and are reimbursed to the arresting party as a first priority on the basis of the Admiralty Marshal's first priority.
- 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 The court usually provides for the payment and repatriation of the crew at the beginning of the proceedings. Therefore, the crewmembers are not held on the vessel during the extent of the legal proceedings. They give a power of attorney to their lawyer to collect the balance of sums owed to them, if any.
- 8.2 There is no reason why the crew cannot be repatriated before the ship is sold. That is the norm. The court pays for the crew's repatriation with the advances paid to the Admiralty Marshal by the arresting party. The repatriation expenses incurred by the Admiralty Marshal will be reimbursed out of the proceeds of the sale of the vessel.

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8.3 In *Global Terminal & Container Services Inc. v. The Owner and All Other Persons Interested in the M/V 'East Trader'* in an action for the arrest of the vessel M/V Trader for breach of a contract for services, a warrant of arrest was issued. While the court ordered the vessel to be sold, the crew was left on the vessel and needed to be discharged. The court ordered that the Alconia Shipping Management Co. Ltd. make payments for the master, officers and crew of the M.V. East Trader ('the vessel') on account of repatriation expenses and that those payments be subrogated to the rights of the master, officers and crew against the vessel.

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

9.1 The seafarer is entitled to sue for unpaid wages from the date the wages become due until repatriation. Even after the vessel is arrested, the seafarer continues to provide service to the vessel.

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 The length of time depends on how soon a buyer is found, and therefore will vary. A judgment can usually be obtained in a timely manner.

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

11.1 The seafarer, as any other client, is directly responsible to pay his lawyer's fees.

11.2 However costs are recoverable from the proceeds of sale by order of the court to reimburse the seafarer. As in all common law jurisdictions, the reimbursement may be somewhat less than billed by the attorney.

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

12.1 The Bahamas is a signatory to the International Convention Relating to the Arrest of Sea-Going Ships ('the 1952 Convention'). Article 3 of the 1952 Convention states:

'Subject to the provisions of para. (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1 (o), (p) or (q).'

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- 12.2 Thus, a seafarer can arrest a sister vessel or an associated ship, as defined in that article. The latter maritime claims enumerated in article 1 (o), (p) or (q) are not relevant.
- 12.3 Typically, the seafarer intervenes in an action commenced by another creditor. Under order 67 rule 17 of the Rules of the Supreme Court, the claimant may apply to the court for leave to intervene in the action. This order reads as follows:
- 'Where a property against which an action in rem is brought is under arrest or money representing the proceeds of sale of that property is in court, a person who has an interest in that property or money but who is not a defendant to the action may with the leave of the court, intervene in the action.'
- 12.4 Therefore, the seafarer does not have to be the claimant who funds the action. Rather, the seafarer can appear in the action as an intervener, that is, a party that has an interest in the action, for unpaid wages.