

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN BRAZIL

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

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

If a seafarer intends to arrest a ship in Brazil, 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 The Brazilian Commercial Code provides that a ship can be arrested, in any port of Brazil, for a claimant that holds a maritime lien, regardless of who the debtor is, when it is carrying no cargo or when it is loaded with less than 1/4 of its tonnage, among other limitations. It can, however, be arrested if carrying more than that if the claim is related to the preparation of the ship for its next voyage and there are no other assets of the debtor to secure the claim.
- 1.2 Pursuant to the Brazilian Commercial Code, a foreign flagged vessel should not be arrested in Brazil unless it is due to: (1) a maritime lien originating in Brazil; or (2) even if originating abroad, a maritime lien that is grounded in a title that may be considered enforceable in Brazil. It has long been a controversial matter whether this article is still in full force, and there is an argument that it is unconstitutional since the Federal Constitution superseded the Brazilian Commercial Code.
- 1.3 It is not clear either if arrest is available for a seafarer who does not hold a Commercial Code lien but does hold a lien provided for in the the International Convention for the Unification of Certain Rules of Law Related to Maritime Liens and Mortgages 1926 ('the 1926 Convention') for example, claims for wages for voyages other than the last one. The Commercial Code makes reference, when dealing with the arrest, to maritime liens and also to the articles of the Commercial Code itself that created them, but it is possible to envisage that courts may apply the arrest in favour of claimants that hold maritime liens provided in other Acts, including the 1926 Convention. In fact, although the Commercial Code dates from 1850, there are very

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few cases where the parties used this mechanism, and the court system as a whole is unfamiliar with these provisions.

- 1.4 Even if a seafarer does not hold a lien, he can also claim the arrest provided for in the general provisions for urgent interim measures of the Civil Procedure Code, which require him to evidence that his claim against the shipowner has serious grounds (*fumus boni iuris*) and that debtor is insolvent or that there is otherwise a risk of non payment in case the arrest is not granted (*periculum in mora*).

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

- 2.1 In order to keep the maritime lien provided for in the 1926 Convention, the seafarer must file a suit before a court of law within one year from due date of the wages.
- 2.2 Also, the claim must be filed before the expiry of any limitation period provided for by the law that governs the seafarer's employment agreement. If this is Brazilian law, the seafarer must file suit within two years after termination of his employment agreement, and he can claim only wages due in the five year period before filing suit.

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

- 3.1 The following documents are required to obtain an arrest of a ship:
 - (1) a power of attorney in writing, signed by the seafarer and granting powers to a Brazilian-qualified counsel to represent him before a court of law;
 - (2) copies of the seafarer's identification card or passport;
 - (3) the employment contract (if in writing);
 - (4) the seafarer's social security number (*Cadastro de Pessoa Física*, if the seafarer has one);
 - (5) any termination letter or agreement;
 - (6) the labour identification/booklet (if applicable);
 - (7) documents that evidence that the seafarer's claim is sound and that there is a serious risk of not being paid if the arrest is not granted.
- 3.2 Foreign documents that are signed must have the signature(s) notarised in the country where they were signed and have the notary's signature recognized by the Brazilian Consulate. All documents in foreign language must be translated into Portuguese by a translator sworn before the Brazilian government.
- 3.3 In an urgent matter, the court may waive the requirement to present all documents for a given period of time and hear the request for arrest before they are presented.

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

4.1 There are normally no specific court expenses connected with the arrest (which, under Brazilian civil procedure law, is an interim measure that can be granted to protect a main claim/suit), but the court expenses for the main claim/suit are equivalent to 2% of the claim. They are paid by the losing party after first instance decision.

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

5.1 The Brazilian Civil Procedure Code states that the court may impose, at its discretion, a counter security. Further, in a claim filed by a foreign plaintiff, who does not own real estate in Brazil, the court may request security for court costs and legal fees incurred by the defendant lawyer, corresponding to 10% to 20% of the total claimed amount.

5.2 However, the court is unlikely to order counter security or security for costs from seafarers and other employees.

5.3 The arrest does not change the liability for those obligations, but payment of maintenance of the arrested ship, its crew and other costs will be paid with the proceeds of sale before the wages are paid. Despite several courts decisions ordering commercial claimants to pay the maintenance costs of the ship during the lawsuit and before the sale (which are recoverable), it is unlikely that the courts will order the same in the case of an arrest sought by the crew (employees) for unpaid wages.

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

6.1 The court will only arrest a ship if it has jurisdiction over the substantive claim. In theory it is possible for a court to arrest a ship when it has no jurisdiction and leave the claim to be tried by the foreign court that does have jurisdiction, in a case where refusal to arrest would amount to a denial of justice.

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

7.1 The crew will be maintained during any arrest.

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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 crew are not required to remain on board during any arrest proceedings but can be repatriated at any time.
- 8.2 According to Convention 166 of the International Labour Organization, the employer is responsible for the repatriation of seafarers and therefore shall pay for such expenses.

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

- 9.1 If the agreement with the seafarer is governed by Brazilian law, the wages will accrue until such agreement is formally terminated.
- 9.2 If the agreement is governed by a foreign law, the answer to this question will be found in the material law that governs the agreement.

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 the legal proceedings depends on how long it takes to obtain a judgment. This may take more than five years.

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

- 11.1 The seafarer, as any other party to a proceeding before a Labour court, is free to negotiate any kind of arrangement with his lawyer, but a contingency fee is the most usual. Such payment is not recoverable, but court fees and some other costs are.

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

- 12.1 There are no provisions dealing with arrest of sister ships under Brazilian Law.
- 12.2 However, a seafarer can claim unpaid wages against any asset (including ships) of the debtor, and also against ships of other companies from the same economic group.
- 12.3 Pursuant to the Brazilian Code of Civil procedure, an arrest may be ordered by the court as injunctive relief, even before the defendant is served process. However, there must be strong evidence of the satisfaction of the legal requirements for the arrest, as well as reasonable arguments supporting the fact that the grant of the arrest is a matter of the utmost urgency.