

SEAFARER SUBJECT GUIDE

MARITIME LIEN FOR SEAFARERS' WAGES IN CHINA

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of Chinese flagged ships, and foreign ships which are in the ports of China. These rights can be enforced in the Maritime 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 China.

*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 maritime lien for seafarers' wages is a statutory right of seafarers defined in the Maritime Code of China ('the Maritime Code'). As against owners, demise charterers, and operators of the ship, the maritime lien attaches to the ship that incurred the seafarers' wages according to relevant labour laws, administrative regulations, and employment contracts.
- 1.2 Subject to the Maritime Code, a maritime lien shall be enforced by the Maritime Court arresting the ship. According to the provisions of the Special Maritime Procedure Law of China ('the Special Maritime Procedure Law'), the process may be divided into five key steps: declaratory judgment action; arrest of the ship; auction of the ship; registration of claims; and satisfaction of claims.

2. Which courts have jurisdiction over seafarers' claims for wages?

- 2.1 Under Chinese law, the Maritime Courts are the court of first instance with exclusive jurisdiction over the disputes in respect of seafarers' employment contracts. According to the Special Maritime Procedure Law, the Maritime Courts in the domicile of the plaintiff, the place of signature of the contract, the place of the port of embarkation or disembarkation of the seafarer, or the domicile of the defendant, have jurisdiction over a seafarer's wage claim.

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

- 3.1 A seafarer's employment contract dispute is distinctive from ordinary employment contract disputes. Under Chinese labour law, when a dispute happens during an ordinary employment contract, labour arbitration is a prerequisite. However, a seafarer can go directly to the Maritime Court. The Maritime Court shall not refuse to hear this kind of case, as clarified by a judicial interpretation of the Supreme People's Court.

4. Who can claim seafarers' wages?

- 4.1 According to the Civil Procedure Law of China ('the Civil Procedure Law'), in most cases, only the individual who is a party to the particular legal relationship in question is qualified to sue. So the seafarer is normally the most competent plaintiff.
- 4.2 However upon the death of a seafarer, successors in title of the deceased, such as his dependents, are entitled to claim in their own name. According to the Succession Law of China, the right to claim the wages shall be transferred to the successors.
- 4.3 Academic opinion differs as to whether a third party (such as crew agency) is entitled to claim for seafarers' wages after having paid the wages of the seafarers. In practice, however, there is no authoritative case clarifying this legal issue. Article 27 of Maritime Code provides that where the rights attaching to the maritime claims in article 22 of this Code are transferred, the maritime liens attached thereto shall be transferred accordingly.

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

- 5.1 Enforcement of a maritime lien for a seafarer's unpaid wages is often connected with the arrest of a ship. In theory, arrest is permissible of the ship attached to the maritime claim for the seafarer's unpaid wages, and also any other ships owned by the person who is liable for the maritime claim, who is or was the owner, demise charterer, time charterer or voyage charterer of the ship. This is in accordance with article 23 of the Special Maritime Procedure Law. In practice, however, it can be rarely found that the Maritime Courts arrest any other ship.

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

- 6.1 According to the Maritime Code, payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the master, crew members and other members of the complement shall be entitled to maritime liens in accordance with the

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relevant labour laws, administrative rules, and regulations or labour contracts. In practice, these items of wages are narrowly defined by the Maritime Courts.

6.2 Many items defined or deemed to be wages in other states are contained in the term 'other remuneration.' Legislation and practice in respect of this term is also broadly interpreted in China in favour of seafarers.

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

7.1 The actual employment relationship between a seafarer and their employer is supported by the courts. Nevertheless, if the seafarer is not able to demonstrate that he has accurately calculated the amount of unpaid wages, the court has a discretion to determine a reasonable amount, which will probably be lower than the market level. This means that the seafarer may not obtain a sufficient remedy. According to recent legislation on matters of seafarer service, a Chinese seafarer is entitled to have a written employment contract so as to protect himself from exploitation.

7.2 Chinese Maritime Courts cannot exercise their discretion in calculating wages where foreign seafarers or employers are involved.

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

8.1 In accordance with the Maritime Code, only the claims for wages made by the master, crew members and other members of the complement who are working on board the ship shall be entitled to maritime liens.

8.2 This does not mean that all the seafarer's services must have been rendered on board the ship. The maritime lien protects the rights and interests of seafarers facing the particular risks of shipping and working at sea. The point is not whether the seafarer's service has been rendered on board the ship or not, but whether his service is related to a particular ship.

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

9.1 The legal costs for enforcing the maritime liens, the expenses for preserving and selling the ship, the expenses for distribution of the proceeds of sale and other expenses incurred for the common interests of the claimants shall be deducted and paid first from the proceeds of the auction sale of the ship according to article 24 of the Maritime Code.

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- 9.2 A maritime lien shall have priority over a possessory lien and a ship mortgage according to article 25 of the Maritime Code.
- 9.3 Articles 22 and 23 of the Maritime Code provide that the following maritime claims are entitled to maritime liens: (1) payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations, and labour contracts; (2) claims in respect of loss of life or personal injury occurred in the operation of the ship; (3) payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges; (4) payment claims for salvage payment; and (5) compensation claims for loss of or damage to property resulting from tortuous act in the course of the operation of the ship.
- 9.4 Article 23 of the Maritime Code stipulates that the maritime claims set out above shall be satisfied in the order listed. Any subsequent maritime claims for salvage shall have priority over claims under sub-paragraph (1) through (3). If there are more than two maritime claims under sub-paragraphs (1),(2),(3) or (5) of paragraph 1 of article 22, they shall be satisfied at the same time regardless of their chronological order; if they cannot be paid in full, they shall be paid in proportion.
- 9.5 A claim for wages is inferior to the expenses incurred for the common interests of claimants and the payment of subsequent claims for salvage.
- 10. Can wages be claimed if the employer is not the shipowner or acts illegally?**
- 10.1 The Maritime Code does not expressly deal with the situation where the employer is not the shipowner, or the employer acts illegally.
- 11. Can the seafarer's maritime lien for wages be abandoned or waived by agreement?**
- 11.1 A maritime lien for a seafarer's unpaid wages is a statutory right, which cannot be abandoned or waived by mutual agreement in employment contract.
- 11.2 However, in accordance with paragraph (1) of article 118 of Special Maritime Procedure Law, a plan for distribution of the proceeds of auction of the ship or the limitation fund for maritime claim may be put forward through consultation at the creditors meeting, and an agreement for satisfaction may be signed. This means the seafarer, as a creditor, can sign the agreement for satisfaction and abandon the maritime lien by agreement in certain circumstances.

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

- 12.1 If the maritime liens have not been enforced within 60 days of a public notice made by the court on the transfer of the ownership of the ship, they will be forfeited or not recognized.
- 12.2 If the maritime claim has not been enforced within one year of the existence of the maritime lien, it shall be extinguished. The period of one year shall not be suspended or interrupted.
- 12.3 A maritime lien is extinguished in one of the following circumstances:
- (1) by satisfaction of the claims since it is widely accepted that purpose of the maritime lien is to secure particular claims and if the claims are satisfied, there will be no foundation and no need for the existence of the maritime lien;
 - (2) by judicial sale when the ship is auctioned by order of the court; or
 - (3) by the loss of ship since the maritime lien is attached to the particular ship which gave rise to the claims.