

SEAFARER SUBJECT GUIDE

ARREST OF SHIPS FOR SEAFARERS' UNPAID WAGES IN GERMANY

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

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

If a seafarer intends to arrest a ship in Germany, 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 arrest of vessels in Germany is subject to domestic legislation under §916 et seq of the Code of Civil Procedure ('the ZPO'). Arrest is possible if an entitlement to and grounds for arrest exist. As well as personal arrest, the arrest of vessels is also possible. The circumstances for arrest are, according to the ZPO, as follows.

- (1) 'Seizure is an available remedy wherever there is the concern that without a writ of pre-judgment seizure being issued, the enforcement of the judgment would be frustrated or be significantly more difficult.'
- (2) 'It is to be deemed sufficient grounds for a writ of seizure to be issued if the judgment would have to be enforced abroad and reciprocity has not been granted.'
- (3) Since 20 April 2013, the ZPO has been expanded: no grounds for arrest are necessary if only for securing the levy of an execution on a vessel. Any German seafarer can thus initiate an arrest of a ship, without furnishing *prima facie* evidence.

1.2 In addition, (international) jurisdiction exists under the 1952 Convention. Under this convention, (restricted) arrest for maritime claims, such as 'wages of masters, officers, or crew' is possible. The personal sphere of application applies to vessels flying the flag of a contracting state and thus also to the members of their crew.

1.3 Finally, (international) German jurisdiction may according to the ZPO, apply to foreign crew members under German law, which states, 'for complaints under property law brought against a person who has no place of residence in Germany, that court shall

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be competent in the jurisdiction of which assets belonging to that person are located, or in the jurisdiction of which the object being laid claim to under the action is located.' And further, '[i]n the absence of any stipulations to the contrary, local jurisdiction derived in this way simultaneously justifies international jurisdiction.'" The defendant has assets in the court district, for example, the crew member's ship, at the time at which proceedings are instituted, but no later than on conclusion of the oral hearing, should there be one.

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

- 2.1 A seafarer's entitlement to pay is subject to time-barring. The time-barring limits depend upon the law and the respective contractual situation. As a general rule, claims arising from an employment contract are time-barred in three years in accordance with the general provisions of the German Civil Code ('the BGB').
- 2.2 However, claims for pay may be forfeited earlier due to time limits. This may be laid down in the articles of agreement. However, provisions of collective pay agreements must be observed as well. Thus the time limit in §34 of the MTV-See must be observed, according to which claims for pay are forfeited if they are not asserted in writing within three months of the due date. The period does not start until receipt of the statement. The cut-off period begins following relief and return to Germany in the case of employees who are on board or abroad on the due date.
- 2.3 Arrest, according to the BGB, will interrupt time-barring of such claims: 'The limitation period is suspended by the service of an application for an attachment order, an interim injunction or an interim order, or, if the application is not served, the filing of the application if the order for attachment, the interim injunction or the interim order is served on the obligor within one month of its being pronounced or of its service on the obligee.'

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

- 3.1 The following are required for an application for an arrest.
- (1) The application should identify the claim, stating the amount of money or monetary value, and identify the grounds for arrest.
 - (2) The claim and the grounds for a writ of seizure to be issued are to be demonstrated to the satisfaction of the court.
 - (3) In order to present *prima facie* evidence, the seafarer may employ any means conducive to helping the judge reach a conclusion and enabling judicial notice

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to be taken of a fact requiring proof. This means submitted evidence such as witness statements, documentary evidence, expert witness reports, inspection and evidence gained from examination of the parties.

- (4) In proceedings for arrest in which obtaining an enforceable instrument for attachment is crucial, and if possible without an oral hearing, the following should also be submitted: personal or third-party statutory declarations which contain a detailed description of the circumstances, not just references to partisan submissions; written witness statements; official information; official statements; legal assurances; and authenticated photocopies. The seafarer should therefore be able to submit at least his pay agreement and most recent payslip.

- 3.2 The language of the court is German. All the submissions and the application for arrest must therefore be in German. If all the adjudicating judges understand the language, the court may waive a translation, without considering the other party. A translation shall be deemed to be true and complete where this is confirmed by a translator.

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

- 4.1 Arrest proceedings incur court costs and attorney costs. Court costs are determined by the German Judicial Costs Act ('the GKG') and attorney costs are determined by the Attorneys' Remuneration Act ('the RVG') if an attorney has been appointed. Appointment of an attorney not a condition of an application for arrest, but is nevertheless recommended.
- 4.2 The court has discretion in determining the amount in dispute. The upper limit is the value of the principal claim asserted (outstanding pay). The amount in dispute in arrest proceedings is lower than in principal proceedings. The fractional values are approximately one third or half of the value of the main item.
- 4.3 Court costs in arrest proceedings are not payable in advance, unlike summary debt collection proceedings. No advance burden of costs is therefore placed on the seafarer as the complainant in a case. An arrest decision can thus be served without prepayment, and may be considered and made verbally.
- 4.4 Should the seafarer have appointed an attorney, the attorney will decide whether he will act without payment of an advance. For example, if a fractional value of $\frac{1}{2}$ is assumed, the following costs and fees will be incurred by a pay demand for €10,000.

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Value of the matter in dispute:	Euros €	5,000.00	
Procedure fee rate (§13 RVG , no. 3100 VV (administrative proceedings))			€ 393.90
Hearing Fee* (§13 RVG, no. 3104 VV RVG)			€ 363.60
	<i>Subtotal</i>		€ 757.50
Lump-sum for postal and telecommunications services (no. 7002 VV RVG)			€ 20.00
	<i>Net Subtotal</i>		€ 777.50
19% VAT no. 7008 VV RVG			€ 147.73
	Amount Due		€ 925.23

*No hearing fee will be incurred if no oral hearing takes place.

Court Costs (Depending on whether an oral hearing is scheduled or not) € 181.50

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

5.1 The court may make ordering an arrest dependent on payment of security, even if *prima facie* evidence for the claim and the grounds of arrest has been presented. This provision has remained unchanged, although the new legislative provision now acknowledges the arrest of a ship as express grounds for arrest. However, future consideration will be determined by literature and case law. Nevertheless, the legislature has stated the following in its justification:

'The provision is based on a suggestion by the expert group. Unlike general procedural rules, it provides for obtaining the arrest of ships no longer being dependent on presentation of *prima facie* grounds for arrest.'

5.2 Claims by crew members for arrears of pay (maritime liens) are thus treated differently (preferentially) to claims not based on maritime liens. Should the court nevertheless demand provision of security, it has discretion in the amount thereof. The amount of security is determined at the court's discretion. The security may be provided in the form of cash, a guarantee or lien. It is usually assessed so that it covers all eventual losses, but not necessarily the amount of the claim to be secured.

5.3 Creditors, that is, including seafarers, bear a fundamental obligation to pay compensation if the arrest of the ship subsequently proves unlawful. As stated above, with the new version of the ZPO, the legislature has given seafarers an easier opportunity to secure claims for pay by arrest, even without providing security, insofar

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as the legislator's grounds reflect this. The danger of a liability to pay compensation is reduced, because the seafarer can judge whether pay is in arrears.

- 5.4 The seafarer is not under an obligation to provide further security, particularly for the costs of operating the ship, and particularly for board for the (rest of the) crew. Within the scope of weighing up interests, this would not entail any contradiction of the new statutory provisions of §917(2)(2) of the ZPO, as the seafarer is not in a financial position to make such payments. Should costs be incurred, they must be paid from the yield of the liquidation (sequestration) of the ship.

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

- 6.1 Arrest is only a temporary measure. An appeal may be filed against the arrest decision. If an appeal is lodged, the legality of arrest is decided by a final judgement. The court may amend or cancel the arrest as a whole or in part, which may include making the confirmation, amendment or cancellation dependent on payment of a security.
- 6.2 If the main action is not pending, the court responsible for the seizure is to order, upon corresponding application being made and without holding a hearing for oral argument, that the party having obtained the writ of seizure (for example, the seafarer) is to bring proceedings in the courts within a period to be determined. Should this order not be complied with and a corresponding application be made, the seizure is to be set aside in a final judgment.
- 6.3 Both the court with jurisdiction in the main case and also the district court with jurisdiction at the location of the object of arrest will be responsible for ordering arrest.
- 6.4 If the main case is not yet pending, the seafarer may, at his discretion, contact any court of first instance which may have jurisdiction for the proceedings in the main case under general rules or on the basis of an effective agreement on the court of jurisdiction. The ZPO also governs international jurisdiction. Jurisdiction for non-residents, for merchants under general rules, or by agreement apply to foreign debtors (seafarers) who are not resident in Germany. This also applies to the scope of application of the European Court Enforcement Order ('the EuGVVO').

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

7.1 The crew and vessel will not be entitled to state support during arrest. Seamen's Missions or other institutions will usually try to assist.

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 presence of the crew on board the vessel is not necessary for assertion of the seafarers' claims for pay. It is important that the claim has arisen in connection with the vessel's activity.

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

9.1 Only the claims for pay which have just arisen may be asserted with the application for an arrest order. Thus the arrest order (decision) will only include the claims existing at this time. Should further claims for pay arise after issue of the arrest order, new, separate, temporary measures must be put in place for them in the form of an arrest. They will thus not accrue with the arrest which has just been obtained.

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 application for arrest of a seagoing vessel will be notified within a few hours if no oral hearing takes place and within a few days if there is an oral hearing. However, selling a vessel usually takes much longer, often many months.

10.2 The crew's outstanding claims for wages can only be met by the sale (auction) of the ship and the proceeds thereof (if any). The court or other state authorities or associations are not obliged to make advance payment, for example, to advance or pay the costs of the journey home.

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

11.1 The seafarer can pay his attorney in cash or by credit transfer if he is in funds. Should he not be able to pay an attorney, the possibility exists of applying for legal aid within the European Union. There are no other ways of financing legal representation. However, there are attorneys who work *pro bono*. In this respect, seafarers should contact the local bar association or the local attorneys' association. Recommendations can also be made by trade unions, which may themselves take action.

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12. Are there any other procedures for enforcing a seafarer's wage claim?

- 12.1 A seafarer is not likely to achieve success in a claim for unpaid wages against a sister ship or associated ship. The entire assets of a shipowner comprise the subject of an arrest. Should the shipowner own more than one ship, another vessel to which it has title may also be arrested for a claim made against it. However, if the creditor has arrested the ship which is the object of a maritime lien, the arrest of a sister ship could raise the question of over-hedging, which could entail refusal of the application for arrest due to lack of risk to the claim. However, hardly any real sister ships still exist, since single-ship companies dominate national fleets. See also the stipulations of article 2 of the 1952 Convention. The same applies to 'associated ships.'
- 12.2 There are no procedures to be highlighted for enforcing seafarers' claims for pay beyond the possibilities of arrest mentioned above.