

SEAFARER SUBJECT GUIDE

MARITIME LIEN FOR SEAFARERS' WAGES IN HONG KONG

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of Hong Kong flagged ships, and foreign ships which are in the ports of Hong Kong. These rights can be enforced in the Court of First Instance with admiralty jurisdiction, 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 Hong Kong.

*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 Pursuant to Hong Kong law, the general position is that a claim by a seafarer for his wages is secured by a maritime lien, giving the seafarer the right to arrest the ship upon which he works. The ship will stand as security for the seafarer's claim for wages.
- 1.2 A maritime lien for seafarers' wages is a claim on the '*res*' in respect of service that a seafarer has rendered to his ship. In these circumstances, the '*res*' (meaning the 'property') includes the vessel (including its appurtenances and equipment), the cargo, the freight, or eventually the proceeds of sale.
- 1.3 The fact that a claim for seafarers' wages is a maritime lien provides the seafarer with the ship as security for his wages.
- 1.4 In Hong Kong, the lien for the wages of the master and seaman attaches to the ship and freight and every part of it, provided that the wages:
 - (1) have been 'earned on board the ship'; and
 - (2) are earned under an 'ordinary mariners' contract.'
- 1.5 'Ordinary contracts' are contracts 'made by word and writing only and not by deed' and are for services rendered to the ship at sea. On the other hand, 'special contracts' are contracts which are personal agreements between the shipowner and the seafarer. However the distinction between an ordinary and special contract has

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not survived into the modern law. Following the legislative amendment to section 10 of Admiralty Court Act 1861, the distinction between the ordinary and special contracts has been extinguished and the Hong Kong court has jurisdiction regardless of the nature of the contract. Nowadays wages earned under a so-called special contract in most cases enjoy the status of a maritime claim in Hong Kong giving rise to a maritime lien (although other claims such as for pension contributions may not give rise to a lien over the ship).

- 1.6 Maritime liens are enforced by the commencement of proceedings, followed by the arrest, and if necessary, by the sale of the *res* (the ship). If the ship is in Hong Kong, the Court of First Instance with admiralty jurisdiction will first seize the ship and forcibly dispossess those who claim to own her.
- 1.7 Following the arrest the seafarers must bring their claim for wages before the court and the court will proceed to hear the matter in the ordinary way. Once judgment is entered and any relevant period ordered by the court has passed, the seafarers may apply for the proceeds of the sale to be distributed.
- 1.8 In order to preserve the value in the vessel, the ship may be sold on application by the arresting party, pending the outcome of the proceedings (that is '*pendent lite*'). Such an order is made as a matter of course in Hong Kong unless it is resisted for whatever reason by the shipowner. If the vessel is sold by the court the interest of the arresting party is transferred to the proceeds of the sale. At the conclusion of the proceedings the various claimants will be satisfied according to the rules of priority.

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

- 2.1 Pursuant to s 12A (2) (n), (7) (a) of the High Court Ordinance (Cap 4) (the 'HCO'), the High Court has admiralty jurisdiction in the Court of First Instance to hear and determine any claim by a master or member of a crew of a ship for wages.
- 2.2 In Hong Kong any person may begin proceedings in the Hong Kong courts pursuant to Order 5 of the Rules of the High Court (the 'RHC').
- 2.3 Pursuant to the admiralty jurisdiction of the Court of First Instance, the High Court has jurisdiction over any claim by a master or member of a crew of a ship for wages. This provides seafarers of every nationality with a forum for such employment disputes.

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

- 3.1 A Hong Kong court may refuse to hear a seafarer's claim for wages based on Hong Kong being the incorrect jurisdiction to hear the claim (the 'forum'). The Hong Kong court will exercise its discretion first to consider whether the interests of the parties and of justice are best served in Hong Kong or abroad. If the seafarer's claim does not satisfy this test, then the court will refuse to hear the seafarer's claim. This however, is generally only considered by the court if the owner of the ship, or an intervener, makes an application to contest the jurisdiction of the High Court. It is very rare that there would be any such decision by the court of its own motion. Further, pursuant to the International Convention on the Arrest of Sea-Going Vessels 1952, to which Hong Kong SAR is a party, the Hong Kong court will have prima facie jurisdiction over a dispute giving rise to a right to arrest under the 1952 Convention.
- 3.2 Factors which the court will consider in deciding whether Hong Kong is the correct forum include the law governing the transaction and what is the most appropriate and natural forum. If a foreign court is found to be a more appropriate forum, then the court may stay the Hong Kong action.

4. Who can claim seafarers' wages?

- 4.1 Both the master and the seamen can claim seafarers' wages in Hong Kong. Notwithstanding the fact that a pilot will earn wages while working on board a vessel not owned by the Hong Kong Marine Department, a pilot will not be able to claim a seafarer's lien over that third party vessel.

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

- 5.1 A 'ship' is defined in the HCO as:
'any description of vessel used in navigation'.
- 5.2 The HCO, applies 'to all ships or aircraft...whether registered or not and wherever the residence or domicile of their owners may be.'
- 5.3 However, a maritime lien for seafarers' wages does not arise when the ship or the *res* belongs to the Hong Kong SAR Government or is owned by a foreign state.

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

6.1 'Wages' includes:

- (1) subsistence money;
- (2) travel allowance;
- (3) compensation for wrongful dismissal;
- (4) money allowance instead of food;
- (5) a bonus to a master to stand by a ship and bring her home; and
- (6) disbursements and liabilities by a master, by virtue of his general employment, and for which he can pledge the owner's credit which may be enforced in the same way as his lien for wages.

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

- 7.1 Wages can be claimed if there is no written contract of employment because 'ordinary contracts' means 'hiring on the usual terms made by word and writing only and not by deed.'
- 7.2 For seafarers employed on a Hong Kong ship, pursuant to section 80 of the Merchant Shipping (Seafarers) Ordinance, signed crew agreements shall be in writing.
- 7.3 However, if the governing law for the ordinary contract is from a non-Hong Kong jurisdiction, then the Hong Kong court might hear evidence from legal experts from that jurisdiction to decide whether wages can be claimed if there is no written contract.

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

- 8.1 The traditional view was that the wages must literally be earned whilst the seafarer is on board the ship.
- 8.2 However, case law, in particular the *Arosa Star*, a Bermudan Supreme court case held that, notwithstanding that the wages should be earned on board the ship, this extended to claims for wages earned during periods of contractual vacation and sick leave permitted under the relevant labour law, or the contract of employment. The case also decided that wages earned when the seafarers were away from the ship were also within the jurisdiction of the court.
- 8.3 The phrase 'earned on board the ship' is omitted from the United Kingdom statutory jurisdiction of the court, although this is not reflected in the Hong Kong statute.

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Nevertheless, the practice in Hong Kong is to follow the common law and the phrase 'earned on board the ship' is therefore also understood to include vacation and sick leave and is not limited only to wages earned by the seafarers during their actual time on board a ship.

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

9.1 All questions of priority of liens or claims are determined in Hong Kong under Hong Kong law. This is despite the rights of the claimants being determined by the law of the contract of employment, or the law of the country of the flag of the ship.

9.2 The costs incurred by the Director of Marine in dealing with the ship overrides all maritime liens.

9.3 Maritime liens are next in order and can be separated into the master's lien and the seaman's lien (which rank *pari passu* or on an equal priority). Despite being on an equal priority, the master's lien and the seaman's lien are each postponed by different claims, which are set out below.

9.4 The master's lien is postponed by:

- (1) a bottomry bond given after the wages are earned;
- (2) subsequent salvage;
- (3) damage and when the master is partowner and ordered the repairs or gave instructions;
- (4) the claim of a person who has supplied goods and materials to the vessel following the arrest, and to a solicitor's lien for costs.

9.5 The seaman's lien is postponed by:

- (1) a damage lien;
- (2) salvage rendered after the wages are earned;
- (3) a shipwright's lien from the time he had possession;
- (4) the claim of a dock or harbour authority in respect of dock and harbour dues;
- (5) damage to dock or harbour works; and/or
- (6) conservancy charges for the removal of wrecks and other obstructions.

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

10.1 The fact that the master and crew were engaged by some person other than the shipowner, even if that person had no right to engage them, does not affect the right

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to the maritime lien, so long as the seafarer has earned the wages on the ship pursuant to an ordinary or special contract as described above. This is because the lien for the wages of the master and the seaman attaches to the ship.

10.2 Provided that the master and crew are employed under a contract and have earned their wages on board the ship, then wages can be claimed as a lien against the ship, whether or not the shipowner acted illegally.

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

11.1 Pursuant to section 93 of the Merchant Shipping (Seafarers) Ordinance, the seafarer's lien for the recovery of his wages is not capable of being renounced by any agreement:

'...a seafarer's lien, his remedies for the recovery of his wages...shall not be capable of being renounced by any agreement.'

11.2 However, other maritime liens are capable of being abandoned by agreement.

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

12.1 Claims for maritime liens can be forfeited if they become statute-barred.

12.2 According to case law, there can be no lien on a *res*, which is not a ship, or her apparel or cargo.

12.3 If a lien has attached to a *res* and this *res* is subsequently sold by the owner, there is no lien against the proceeds of the sale since the lien travels with the *res*.

12.4 A maritime lien only attaches to the particular *res* in respect of which the claim arises and not to any other property of the owner.

12.5 A maritime lien is extinguished by giving bail or a guarantee to prevent the arrest or secure the release of the *res* in an action to enforce the lien, by arrest and the sale of the ship in an action *in rem* by a court of competent jurisdiction (whether Hong Kong or foreign), by assignment without the sanction of the court, or by failure to bring the claim arising from it within the statutory time limit.