

Reply by the German Maritime Law Association
to the CMI IWG Questionnaire of 7 November 2019
“Security Interests over Shipping Containers”

1 Background

2 Registration of interests

2.1 *In your jurisdiction is it possible to register a property interest of any nature in containers, for example as:*

- (a) *an owner generally;*
- (b) *an owner under a retention of title arrangement;*
- (c) *a mortgagee under a mortgage; and/or*
- (d) *a lessor under a lease.*

No, as a matter of German law, there is no facility that allows the public registration of property interests of any kind, including security rights in containers.

2.2 *Is any register in your jurisdiction specific to the applicable party or is it specific to the type of asset, i.e. containers?*

In Germany, public registers relate to the type of assets, e.g. immovable property, ships or companies. There is no register in respect of containers.

3 Recognition of foreign registered interests

3.1 *If an interest in containers is registered as referred to in question 2 in a jurisdiction which is not your jurisdiction, would your jurisdiction recognise that interest (ie in circumstances where a party sought to enforce that registered interest in your jurisdiction)?*

3.2 *If 'yes', on what legal basis?*

3.3 *If 'no', on what legal basis?*

In principle, German jurisdiction is quite open when it comes to recognise circumstances and issues arising in a foreign state.

The legal basis for a recognition of an interest depends on the type of the registered interest. The first step, as a matter of German law being the *lex fori*, would be to ascertain whether the interest in fact relates to a property right in an object (as opposed to a mere right to withhold the object). Insofar, German international private law applies a generous test.

A property right in an object established under the regime of the law of a foreign state is not recognised in Germany if it violates the German public order. German law provides for a number of property rights in an object. That catalogue is conclusive, there are no other types of property rights. However, this concept is not part of the German public policy. As a result, even if the foreign property right in an object does not correspond to any property rights in German law, this would not exclude recognition.

In so far as a registered interest is qualified as a property right in an object, Article 43 (1) of the German Introductory Act to the Civil Code provides for the applicability of the German law on property rights in objects, if the object is located in Germany (*lex rei sitae*). In so far, German law accepts the property right in an object which arose under the regime of the law of a foreign state. The property right is, however, not recognised as such but in accordance with the character it has under the previous foreign legal regime.

There are decisions rendered by the German Federal Court of Justice (Bundesgerichtshof – BGH) concerning the recognition of property rights in objects on the basis of foreign jurisdictions, e.g. a lien on a truck under French law or the mortgage on a vehicle under Italian law (BGH judgment dated 11 March 1991 – II ZR 88/90). In respect of the issue of recognition of such rights, the court refers to the existence of property rights in German law which do not require possession of the goods. As a result, it is unlikely that a property right arising under a foreign law is not recognised.

There are no references neither in German law nor in reported decisions on the question how property rights in an object that arose under some foreign legal regime should be dealt with. However, the prevailing opinion seems to agree that the foreign property right is not transformed into the closest, most similar German property right, but that it is sufficient to adjust the effects of the foreign property right as far as that is necessary.

Insofar as a registered interest in an object cannot be qualified as a property right, it may be re-characterised as a contractual agreement between the parties concerned which would allow the respective party to withhold the object, i.e. to refuse to deliver it to the other party. It is unclear whether this would work in relation to registered property rights, the purpose of which is to have effects also in relation to third parties.

4 Recognition of chosen law for property matters

4.1 Do the laws of your jurisdiction recognise the law chosen by the parties to govern the property aspects of a transfer of title or grant of mortgage:

Under German law, the parties cannot choose the law applicable to a property right in an object. The purpose is to protect third parties, who normally are unaware of the relevant agreement. Third parties are further protected by the conclusive catalogue of property rights in German law, together with publicity requirements.

The materials available from the German legislative bodies concerning the Act through which the Articles 43 *et. seq.* were added to the German Introductory Act to the Civil Code show that it was intended to exclude to choose the applicable law by agreement. It is expressly stated in the materials that the right to choose the applicable law would not correspond to the conclusive character of the catalogue of property rights in German law and that third parties will not be able to identify the chosen law.

The Federal Court of Justice adds that the concept, that the applicable property law is determined by the location of the object is internationally recognised, to the effect that any German decision on that issue is more easily recognised in a foreign state (BGH judgment dated 25 September 1996 – VIII ZR 76/95).

- (a) *if the containers are physically located in your jurisdiction when the transfer or grant takes place; or*

Article 43 (1) of the German Introductory Act to the Civil Code provides that property rights in an object are subject to the law of the state where the object is located (*lex rei sitae*). If the object is located in Germany, it is German property law that would apply. The German regime does not allow to choose the relevant law.

- (b) *if the containers are physically located in another jurisdiction (not being the jurisdiction of the chosen law) when the transfer or grant takes place?*

Recognition of a choice of law agreed by the parties is not *per se* excluded. The relevant law applicable is again determined by Article 43 (1) of the German Introductory Act to the Civil Code, which refers to the law of the state where the object is located. If the law of that state allows a choice of law, it would be considered also by a German court.

The German literature on international private law understands the relevant provisions in the Introductory Act to the Civil Code to allow the reference to a choice of law by the parties, if the respective international private law principles refer to the international private law of a foreign state and if that law allows a consideration of a choice of law agreement. Article 43 (1) of the German Introductory Act to the Civil Code refers to the laws of a particular state including its international private law. In particular, the legislator's decision not to allow a choice of law in the interest of third parties does not fall under the German public policy.

- 4.2 *If the answer to question 4.1(a) and/or (b) is 'no', how would the law of your jurisdiction determine which law does apply?*

Article 43 (1) of the German Introductory Act to the Civil Code provides that the law of the state in so which the goods are located is relevant. Article 45 is concerned with an exception which relates to means of transport including ships (Article 44 relates to real estate). Containers facilitate the transport of goods, but are not means of transport such as trucks, vessels, etc. for the purpose of Article 45. As a result, that regulation is not applicable. A further exception is found in Article 46. If in the circumstances there is a substantially closer connection to the law of a state other than the law determined by Article 43, the law of that other state shall apply. However, this general clause does not allow the consideration of a choice of law agreement which, as a matter of German law, is not recognised.

5 Re-characterisation of leases

- 5.1 *Are there circumstances in which your jurisdiction would re-characterise a lease or a retention of title arrangement as a security interest?*

We understand the re-characterisation to occur if the parties intended that one of them remained the owner of the respective object whilst the other was entitled to use it for his own purposes. Due to the re-characterisation, the owner's right in the object is downgraded to a mere security interest, to the effect that the other party is considered to be the beneficial owner. This may have effects, in particular, in case of an insolvency of the other party.

(a) Leasing

As a matter of German law, a re-characterisation of the leasing contract normally would not occur (as to one exception, see 5.2 (a) below).

German law does not provide specific regulations relating to leasing contracts. Rather, it would depend on the circumstances how the respective contract is qualified. The contract's characterisation in respect of a company's financial statement as well as in tax law may deviate from that in civil law.

Recognised forms of leasing contracts are contracts which can be described as "operational leasing" and "financial leasing". Under an operational leasing concept, the lessor seeks to amortize the purchase price of the object by letting it to one or (normally) more lessors (in a row). This type of agreement is easily qualified as a regular leasing contract subject to the respective provisions of Sections 535 *et seq* of the German Civil Code. In a financial leasing concept, the purchase price plus costs etc. is paid by the lessee, who owes regular payments under the contract. Such scheme is characterised by the German Federal Court of Justice as well as the prevailing opinion in the legal textbooks as a particular, atypical form of a leasing contract. These types of agreements normally are carefully drafted with a view to the orders issued by the tax authorities to ensure that the leased object is not attributed to the lessee as its beneficial owner.

In both operational and financial leasing, if insolvency proceedings are opened in relation to the lessee, the lessor, as a matter of German insolvency law, is entitled to claim separation of the object from the insolvency estate (and its redelivery). The receiver is not entitled to sell the object, nor may he claim for a reimbursement of costs. However, the court in charge of the insolvency proceedings may order that the lessor cannot retrieve the object, if the lessee requires it to continue its business. In this case, the lessor may claim for a compensation.

(b) Retention of Title

As a matter of German law, a retention of title agreement in particular between a seller and a buyer normally is not understood in a way that the seller only has a mere security interest in the object (whilst the buyer is the beneficial owner). There is agreement that the retention of title, in case of an insolvency of the buyer, entitles the seller to claim separation of the object from the insolvency estate. However, in certain cases particular extended forms of retention of title agreements may be re-characterised as providing a security interest (see 5.2 (b) below).

5.2 *If 'yes', briefly, how and when will it do this?*

(a) Leasing

Sale and lease back transactions – where the seller at the end of the contract period re-obtains the object or where, in the circumstances, it is sufficiently sure that the seller will draw an option in his favour to purchase the object – are considered by a minority in the legal textbooks as a credit transaction combined with a security interest. If this is correct, the lessor would only have a security interest in the object. As a result, the lessor, as a matter of German insolvency law, would only be entitled to separate satisfaction as per Section 51 of the German Insolvency Statute. The receiver would have the right to sell the object, whilst the lessor may claim the proceeds (less a share of the costs). Again, the insolvency court may interfere and order that the receiver may not sell the object, if it is necessary to continue the lessee's business. If such an order is issued, the lessor may claim a compensation from the receiver.

(b) Retention of Title

In a basic retention of title agreement, title in the object would automatically pass once the purchase price has been fully settled. There may be, however, other arrangements to the effect that the transfer of property in the object depends on other conditions, in particular on the settlement of other claims of the seller against the buyer arising from other transactions. If such an extended retention of title agreement has been validly made and if in fact the purchase price has been fully settled, only the claims arising from other transactions prevent the property in the object to pass to the buyer. Here, it is recognised that the seller's right in the object is reduced to a mere security interest. As a result, the seller, if the buyer is insolvent, may only claim separate satisfaction as per section 51 of the German Insolvency Statute.

- 5.3 *If 'yes', could re-characterisation take place in certain circumstances under the laws of your jurisdiction even where the law chosen by the parties to govern the lease would not re-characterise? If so, please explain.*

See the comments to questions (3) and (4) above.

- 5.4 *If 'yes', is it necessary or possible for the lessor to protect its interest by any security registration or filing? (See question 2).*

No, German law does not provide for a registration of security interests.

6 **Enforcement remedies**

- 6.1 *Do the laws of your judicial permit an owner, a mortgagee or a lessor to exercise 'self-help' remedies to enforce and repossess in respect of containers located in your jurisdiction? (Assuming this is permitted by the chosen governing law and the terms of the documents).*

No, under German law, the concept of "self-help" is only applicable in rare circumstances. In principle, where an owner, a mortgagee or a lessor may claim redelivery of an object, he would need to turn to the courts to enforce his rights and commence (preliminary) proceedings. Personal self-help is only allowed if help cannot be obtained from the authorities in good time and if there is a risk that enforcement of the claim would be prevented or considerably more difficult (Section 229 of the German Civil Code).

Further, German law allows a party in possession of an object to take self-help measures. In particular, Section 859 (3) of the German Civil Code allows the possessor, if an object in his possession is taken away by unlawful interference, the use of force to remove it from the interferer who is caught in the act or who is pursued.

As a result, an owner, a mortgagee or a lessor normally is not entitled to self-help and retrieve the object by force. Rather, it is the party in possession of the goods who may prevent such steps by force. This also applies to containers.

- 6.2 *Please outline briefly the judicial process (ie not involving 'self-help') which would be necessary in order to enforce and repossess in respect of containers located in your jurisdiction.*

The owner, the mortgagee or a lessor of containers who is entitled to claim the return of containers located in Germany would need to bring legal proceedings to that effect against the contractual partner. These may be proceedings on the merits

or preliminary proceedings. A judgement which finds that the contractual partner must redeliver the containers would need to be enforced in accordance with the principles of the German Code of Civil Procedure. The owner etc. may instruct the local bailiff to retrieve the containers from the contractual partner (if they are in his possession).

6.3 *In particular, in your jurisdiction what legal steps would need to be taken in order to allow a mortgagee or lessor to take steps to repossess containers:*

(a) *located shore-side on property of a third party; or*

The owner, the mortgagee or a lessor of containers who has obtained a judgement or court order, respectively, against his contractual partner that he is to redeliver the containers may find that they are in fact in the possession of a third party, e.g. located on its premises. The third party may allow, in particular in view of the judgement or order against the contractual partner, that the owner etc. may remove the container. However, the third party may in the circumstances not be willing to do so, in particular because of unsettled issues with the contractual partner or other third parties. In this case, the owner etc. may bring proceedings against the third party in possession of the containers. For practical purposes, the third party may be included in the proceedings against the contractual partner. Alternatively, the owner etc. may be entitled, by way of enforcing the judgement or order against the contractual partner, to attach his claims for a redelivery of the containers against the third party and to instruct the third party to return the container to him (i.e. the owner etc.). Once the owner etc. is entitled to claim the delivery of the containers from the third party, he may instruct the local bailiff to retrieve the containers.

(b) *located on a ship in port owned and/or chartered by a third party?*

If the respective containers are not located on some shoreside premises, but on a vessel in a German port, the same principles as outlined above (a) apply. The owner, mortgagee or lessor would need to obtain a judgement or court order, respectively, against the contractual partner. The third party in whose possession the containers are would be the vessel owner. As a result, the owner etc., if necessary, needs to take the steps described above against the vessel owner.

6.4 *If a mortgagee or lessor took enforcement or repossession action in respect of a loaded container in your jurisdiction would the mortgagee or lessee have legal duties or liabilities to cargo consignees and, if so, of what nature?*

If the respective container which is to be returned to the owner, the mortgagee or the lessor is loaded with goods, further difficulties would arise. The owner of the goods – often, but not necessarily the consignee – may require the container owner etc. not to interfere with the goods. This would include, in principle, any removal of the goods from the container. However, if the container owner etc. is entitled to retrieve the container, he is normally also entitled to remove any goods from the container. The owner of the goods is bound to tolerate such measures. Please note that there are no reported decisions on this issue. The container owner is under the obligation, vis-à-vis the owner of the goods, to ensure that the goods are protected from loss and damage.

7 *Insolvency*

7.1 *Under the insolvency laws of your jurisdiction can there be any stay or restriction on the right to enforce or repossess if the applicable counterparty enters into insolvency proceedings?*

7.2 *If the answer is 'yes', please outline briefly.*

In principle, as a matter of German law, any proceedings are stayed if insolvency proceedings are opened in relation to either party. The proceedings remain pending until they are continued in accordance with the relevant insolvency regulations. If the plaintiff is entitled to claim separation of the container from the insolvency estate (see 5.1 (a) above) or if the plaintiff is entitled to separate satisfaction of his claim (see 5.2 (b) above), the proceedings may be continued by both the plaintiff and the insolvency receiver.

8 Liens

8.1 *Please briefly outline the types of non-consensual liens affecting containers which can arise under the law of your jurisdiction.*

As a matter of German law, containers may be subject to a number of statutory liens. In relation to FCL containers, the carrier may have a lien in the container in respect of his claims under the contract of carriage, i.e. for freight and reimbursement of costs. In cases where the containers are owned by the time charterer of the vessel, the (disponent) owner under the time charter has a lien on the containers for all claims arising from the time charter. If the vessel and its cargo in the course of the voyage were subject to salvage operations, the salvor may obtain a lien on all salvaged assets including the containers on board as a security for his claims for a salvage remuneration. Further, if a general average situation occurred in the course of the voyage which resulted in a claim by the vessel owner against the cargo for general average contributions, these claims would be secured by a statutory lien on the cargo including any containers. And finally, if the container has been repaired, the contractor carrying out the works obtains a lien on the container as a security for his claims under the repair contract.

9 Problems experienced in practice on enforcement

9.1 *Please briefly outline any known problems which have arisen in relation to enforcing against or re-possessing containers in your jurisdiction, including:*

- (a) *problems of identification and tracking containers;*
- (b) *establishment and recognition of property rights.*

There do not seem to be any reported decisions on these issues in Germany. There were, however, a number of disputes in relation to the breakdown of the Hanjin Group in 2016/2017 in relation to containers located on terminals in German ports. From the perspective of the owner, the mortgagee or the lessor of the container, it may indeed be difficult in the circumstances to identify and track the respective container in which he has an interest. In many cases, however, these issues were solved with the assistance of the involved carriers. In relation to the owners etc. property rights in containers, the principal problem was to retrieve the containers from the operators of the terminal where the containers were located. Here, the terminals' foremost interest was to ensure that all amounts owed them in relation to the handling etc. of the containers were paid by the container owner etc.. In some instances, the claims raised by the terminals appeared to be inflated.

Finally, it would seem that in practice the focus is not so much on the issue whether the party claiming redelivery of the containers in fact is the container owner, mortgagee or lessor and entitled to claim but rather on the cost issues. However, the reason for this may be that it would seem that no courts were involved in these matters. Had this been the case, it would have been necessary to clarify the

respective plaintiff's position in relation to the container. None of the property rights in containers as provided by German law require a public registration. As a result, courts are used to deal with unregistered property rights and to focus on the contractual agreements. However, it would seem that a public registration of property interests in containers would assist any container owner etc. who needs to enforce his rights. This is particularly relevant in an international context. On the other hand, the container leasing companies we spoke to did not see an imminent need to introduce a public registration of rights in containers. The reason for this may be that they are used to rely on the German concepts which do not depend on registration. Ultimately, the contemplated Protocol to the Cape Town Convention concerning rights in containers may be useful, but it would not seem that it is urgently required from a German perspective.