



Questionnaire on Security Interests over Shipping Containers

CMI International Working Group on Security Interests over Shipping Containers

1 Background

1.1 Questionnaire to National Maritime Law Associations

This questionnaire is addressed to National Maritime Law Associations in order to gather information and experience in relation to legal issues around the financing of containers, in particular repossession and enforcement.

1.2 Containers can be financed by security being granted by the owner, financed by way of lease from a leasing company or by way of hire purchase, conditional sale or other arrangement involving retention of title. An express grant of security is for convenience referred to as a 'mortgage' even though in many jurisdictions that is not the concept known to the law.

1.3 The aim of the questionnaire is to establish whether or not a case can be supported for a Container Protocol to the Cape Town Convention on International Interests in Mobile Equipment.

1.4 Responses are requested by 15 February 2020 to:
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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.

A/ Firstly, it is important to remark that Colombia is a Member State to the Cape Town Convention on International Interests in Mobile Equipment, and its amending Protocol. Accordingly, such Convention was incorporated in the Colombian jurisdiction by Law 967/2005.

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Moreover, in 2013 was enacted Law 1676 (Colombian Movable assets Security Law) that allows that movable property of the guarantor, including containers, can be used as a Security of underlying obligations (either contractual or extracontractual). Please note, that this law has a broad scope of application, and does not provide an exhaustive list of the goods to be provided as Security. Even, it allows that the rights arising from contractual obligations, can be provided as a Security of legal obligations. Nevertheless, this Law does not apply to movable goods, such as aircrafts, aircraft equipment and some other goods subject to the Cape Town Convention on International Interests in Mobile Equipment, and its amending Protocol.

Accordingly, the guarantor should conclude a written "Movable asset Security Contract" with the creditor specifying the goods provided as Security, namely containers. To make such agreement enforceable to third parties it should be register before a public registry held for such purpose.

Moreover, Law 1676 expressly provides for its application (art. 3) to the right of retention arising from the cases where such right is incorporated. Therefore, is it possible under Colombian Law to use the right of retention, ownership rights upon containers and other movable goods and even rights arising from contractual agreements, as a Security of legal obligations.

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?

A/ Yes there is a unified public registry to register the Security obtained over a movable good, namely container. Such registry is held by a public nature entity called CONFECAMARAS.

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 recognize that interest (ie in circumstances where a party sought to enforce that registered interest in your jurisdiction)?

A/ The Colombian Movable assets Security Law contains a conflict-of-laws provision (art. 83) stating that the law where the asset provided as **Security is located** shall prevail for the purpose of creation, register and enforceability of such Security interest.

If, the asset provided as Security is used in different jurisdictions, the applicable law shall be the law where the **guarantor is located**.

According to the previous rules, if the security interest was created and registered in a foreign jurisdiction, but the guarantor is in Colombia, the registered interest may be enforceable in the Colombian jurisdiction subject to Colombian Law. Moreover, if the container provided as a Security is in Colombia, the creation, register and enforceability of the Security interest will be subject to Colombian law.

3.2 If 'yes', on what legal basis?

A/Please see the answer above.

3.3 If 'no', on what legal basis?

4 Recognition of chosen law for property matters

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

A/ Choice of law provisions are not contained in the Colombian Movable assets Security Law. Rather, the applicable law can be construed from the conflict-of-law provision described above. Please note, that currently there is no clear/unified position in Colombia concerning the validity of choice of law provisions contained in commercial contracts concluded in foreign jurisdictions that are enforceable in Colombia (art. 869 of the Colombian Commercial Code) if a dispute arising from such contracts is submitted to the ordinary Colombian Courts.

However, the Colombian Movable Assets Security Law, allows the incorporation of arbitration clauses and the performance of arbitration proceedings in matters concerning creation, interpretation, priority rights and enforcement of a Movable Asset Security (art. 78). Furthermore, the Colombian Arbitration Law (Law 1562/2012) expressly allows the application and enforceability of the choice of law provisions contained in a contract submitted to arbitration proceedings (art. 101). Therefore, if there is a choice of law provision jointly with an arbitration clause, the property aspects of a transfer of title or grant of mortgage may be enforceable in the Colombian jurisdiction.

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

(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?

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?

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?

A/ According to article 3 of the Colombian Movable assets Security Law, the right of retention is deemed as a moveable security interest. Moreover, the moveable asset as Security can be created because of a lease or as Security of any legal obligation (either contractual or extracontractual).

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

A/ Pursuant to article 2417 of the Colombian Civil Code, the right of retention may exist by way of statutory right of retention in the cases set out by the law or by way of a contractual agreement/arrangement. As explain before, according to article 3 of the Colombian Movable assets Security Law, any legal reference to the right of retention contained in the Colombian law

should be deemed as a Movable asset Security. Accordingly, the right of retention can be subject to a written "Movable asset Security Contract" between the creditor (lessor) and the guarantor.

Moreover, if the creditor (lessor) has the tenure of the Movable Asset Security or a right of retention upon such asset, both, the tenure and the right of retention can be re-characterized in a Security without tenure, insofar the Security is duly registered and enforceable against third parties. In such re-characterization the priority rights allocated on the creditor will remain unmodified. Likewise, a Security without tenure can be re-characterized in a Security with tenure where the tenure of the asset is given to the creditor and the register is cancelled.

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 recharacterise?

A/ As explain before, there is no chosen of law provisions contained in the Colombian Movable assets Security Law. Rather, from the conflict-of-laws provision therein stated, the applicable law would be either (i) the law of the jurisdiction where the asset provided as **Security is located**, or (ii) the law where the **guarantor is located** if the asset is used in different jurisdictions. Such applicable law may be circumvented and hence the chosen law applicable if there is an arbitration clause.

Accordingly, and providing there is no arbitration clause jointly with choice of law clause, if the Security or the guarantor are in Colombia, the Security can be subject to Colombian law, and re-characterization may take place in the way explain in questions 5.1 and 5.2.

If so, please explain.

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).

A/ Yes. Please see answer to question 5.2.

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).

A/ Yes. The Colombian Moveable asset Security Law allows a contractual 'self-help' remedy for the creditor (lessor, mortgagee, etc.) to enforce and repossess moveable assets given as Security, including containers (art. 60).

Accordingly, where the creditor and the guarantor so agree or the creditor has the tenure upon the asset, the creditor is entitled to self-pay the debt by repossessing the asset. In doing so, an expert appraiser should be appointed to fixing the price of the asset. If the price exceeds the amount of the debt, the creditor should pay the exceeding amount either to other registered creditors in order of priority or even the debtor or the owner of the asset (if the owner is not the

debtor) by way of a judicial deposit. If the creditor is not in tenancy of the asset, and the guarantor/debtor refrain himself to give him such tenancy, the creditor may file an application before the judicial authority requesting the issuance of an order of delivery against the guarantor/debtor.

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.

A/ Without prejudice the non-judicial remedy described before, the creditor is entitled to initiate "proceedings for the awarding or realization of the Moveable asset Security". This proceeding can be summarized as follows:

- ✓ Before filing the claim, the creditor should fill in and submitted to the authority holding the registry of the Security a document called "register form to enforcement."
- ✓ The creditor should submit the formal judicial claim (lawsuit) before the judicial authority.
- ✓ If the lawsuit meets all the formal requirements stated by the Colombian Procedural Law, the Court will grant a ten (10) business days to the defendant (debtor/guarantor) to submit his statement of defense. The defendant may only rely on the defense grounds set out in paragraph 2 of article 61 of the Colombian Moveable asset Security Law.
- ✓ If the defendant does not rely on the named grounds, or fail to succeed on them, the creditor may request the awarding of the asset and be legally appointed as the new owner of the asset.
- ✓ Should the value of the asset has suffered loss over 60%, either party may request to the Court the judicial sale of the asset.

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

A/ Firstly, please keep in mind the applicable law according to the conflict-of-laws provision (art. 83) contained in the Colombian Moveable asset Security Law, and particularly the ground regarding the jurisdiction where the asset is located.

Accordingly, if the container is located in the shore-side of Colombian territory or the ship is in port or Colombian jurisdictional waters, Colombian law would be the applicable law and repossession may take place pursuant to the measures described in questions 6.1 and 6.2.

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?

A/ Pursuant to paragraphs 2 and 4 of article 18 of the Colombian Moveable asset Security Law the guarantor (i.e. lessee), bears the risk of loss or damage to the Moveable asset given as security (i.e. container) unless insurance has been taken in favor of the creditor. Accordingly, enforcement and repossession may fall within the meaning of 'loss'.

However, it is important to make a distinction between the container itself and the goods carried as cargo inside such container. Accordingly, the guarantor has no contractual legal duties nor liabilities for the cargo carried in such containers, unless the guarantor and the carrier are the same person. Hence, if the carrier has given a container as a Security and as consequence of an enforcement or repossession, both the container itself and the carried goods therein contained are lost, the carrier may face liability against cargo consignees/cargo interests.

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?

A/ It depends on whether the moveable asset given as security is essential for the economic activity of the guarantor/debtor. According to article 50 of the Colombian Moveable asset Security Law, if the Moveable asset is essential to the economic activity of the debtor subject to an insolvency proceeding and such asset was reported to the Insolvency Court, the admission and continuation of legal proceedings to enforce the Security is prohibited.

On the other hand, if the Moveable asset is not essential to the economic activity of the guarantor/debtor, the admission and continuation of legal proceedings to enforce the Security is allowed.

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

A/ Please see answer to question 7.1.

8 Liens

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

A/ Article 1033 of the Colombian Commercial Code set out a statutory lien / right of retention allocated on the carrier. Accordingly, the carrier is entitled to retain the carried goods for debts owed by the cargo interest arising from the contract for the carriage of goods.

9 Problems experienced in practice on enforcement

9.1 Please briefly outline any know 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.

A/ No cases reported so far on this regard in Colombian jurisdiction.