

CMI International Working Group on Security Interests over Shipping Containers

Questionnaire to National Maritime Law Associations

1. **Background**
   1. 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.
   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.
   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.
   4. Responses are requested by 15 February 2020 to:

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1. **Registration of interests**
   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.

The containers can neither be a subject of general ownership registration nor a subject of ownership registration under a retention of title arrangement under PRC law, but according to the Measures for Chattel Mortgage Registration (2019 Revision) , The Guarantee Law of the People's Republic of China, The Property Law of the People's Republic of China, Interim Regulation on Enterprise Information Disclosure, containers can be the subject of a mortgage for the purpose of registration in the State Administration of Market Regulation.

It is also possible for a lessor under a container lease to register the legal title in the credit reference center of the People’s Bank of China. Interpretation of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Cases Involving Disputes over Financial Leasing Contracts has made it clear that such ~~a~~ registration can be effective against a bonafide third party.

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

Article 2 of The Measures for Chattel Mortgage Registration (2019 Revision) is applicable to “manufacturing facilities, raw materials, semi-manufactured goods and products” as contained in article 180 of the Property Law. Registration information includes: applicable party (mortgagor and mortgagee), overview of secured creditor’s rights, overview of the mortgaged containers (ownership, right to use, and amount of the mortgaged containers).

1. **Recognition of foreign registered interests**
   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)?

Yes.

* 1. If 'yes', on what legal basis?

Article 37 of Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships states that the parties concerned may choose the laws applicable to the right over the movables by agreement. If the parties do not choose, the laws of the place where the movables were located when the legal facts occurred shall apply. Thus, if the registration interests are recognized by the jurisdictions mentioned above, it may be recognized by Chinese courts.

There are cases in which Chinese courts have recognized the BIC Code (Bureau International des Containers et du Transport Intermodal) and the survey report issued by DNV as prima facie evidence in support of title of containers.

* 1. If 'no', on what legal basis?

1. **Recognition of chosen law for property matters**
   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:

(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?

Yes. It is irrelevant whether the containers are physically located in the Chinese jurisdiction. Article 37 of Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships provides, “The parties concerned may choose the laws applicable to the right over the movables by agreement. If the parties do not choose, the laws at the locality of the movables when the legal facts take place shall apply”

* 1. 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?

1. **Re-characterisation of leases**
   1. Are there circumstances in which your jurisdiction would re-characterise a lease or a retention of title arrangement as a security interest?

There is no express law that re-characterises a lease or a retention of title arrangement as a security interest.

* 1. If 'yes', briefly, how and when will it do this?
  2. 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? If so, please explain.
  3. If 'yes', is it necessary or possible for the lessor to protect its interest by any security registration or filing? (See question 2).

1. **Enforcement remedies**
   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. There is no regime of “self-help” in our jurisdiction. According to Article 245 of the Property Law, where a realty or chattel under possession is encroached on, the possessor has the right to require the return of the original object; where any act impairs the possession, the possessor has the right to request the termination of impairment or danger; and where any damage is caused by virtue of encroachment or interference, the possessor has the right to require compensation.

* 1. 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.

For owner or lessor, it is possible to apply a maritime injunction, which is an interim procedural measure, to Chinese Maritime Courts if the matter is subject to the jurisdiction of a Chinese maritime court. However, before a maritime court issues a maritime injunction, the applicant must meet the test of emergency etc., and provide security to the Court; For a mortgagee, it can apply to a court to enforce the mortgage directly without a full trial of the case if the case fulfills the legal requirements. In this procedure, a court usually makes an order within one month.

If a court refuses to grant the maritime injunction application or refuses to enforce the mortgage directly, then the applicant should commence litigation before the court. and The court will decide the merits first (i.e. the title to the containers, and whether these containers should be returned); then if the claimant gets a favorable judgement, it can apply to have it enforced.

* 1. 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:

1. located shore-side on property of a third party; or

If the containers are located outside the port limits, then the matter may be subject to a non-maritime court’s jurisdiction. It is possibly that a full trial may be needed, i.e. the claimant must demonstrate title to the containers and rights under a mortgage or lease agreement.

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

It is probable that the matter will be subject to a maritime court’s jurisdiction. The claimant may apply for a maritime injunction (for lessor) or to enforce the mortgage directly without a full trial (for mortgagee). If the court refuses, then a full trial will be needed, as stated in answer 6.2.

* 1. 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?

No, but the cargo owner will have the right to take the cargo back.

1. **Insolvency**
   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?

Yes.

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

Article 20 of the Enterprise Bankruptcy Law of the People's Republic of China provides that, “After the people's court accepts an application for bankruptcy, any civil action or arbitration involving the relevant debtor that is in the process of trial shall be suspended. The action or arbitration can be resumed after a bankruptcy administrator takes over the debtor's assets”.

Article 38 further provides, “After the People's Court accepts an application for bankruptcy, where the assets in the possession of the relevant debtor are not owned by the debtor, the owner of the assets may take the assets back through the bankruptcy administrator, unless it is separately prescribed by the present Law.

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

A port operator may assert a lien over containers, if their counter party (under a contract) has failed to pay the costs in a timely manner. Chinese courts generally consider that if the containers do not belong to the debtor, then the port operator cannot exercise a lien over them; however, it would take much time to settle the issue if a full trial takes place before a Chinese court.

Also, the right to demand rewards for rescuing the containers may result in a lien.

1. **Problems experienced in practice on enforcement**
   1. Please briefly outline any know problems which have arisen in relation to enforcing against or re-possessing containers in your jurisdiction, including:
2. problems of identification and tracking containers;

Notably, in a case decided by a Chinese court, where the plaintiff failed to demonstrate the location of the containers, the court finally dismissed its claim of for the return of the containers.

(b) establishment and recognition of property rights.

There is a system in place for the registration of title of to containers in China. and The Chinese Court would pay attention to the BIC numbers marked on the containers, and take the numbers as prima facie evidence for of title. The court will also request the parties to submit the sales contract, payment slip, invoice, survey report, and will take these as evidence as a whole to judge the title of the containers. If these documents originate outside China, then the court usually prefers that these documents be notarized, which sometimes can be troublesome.