

CMI Working Group on Security Interests over Shipping Containers

Questionnaire to National Maritime Law Associations

[VENEZUELA SUBMISSION]

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.**

Answer: In Venezuela there is no registry for owners, lessors or any other person who has a legal interest 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?

Answer: There is no such register. Containers enter to the country either as (i) an “element of transport” (for imports & exports), in which case it is declared by the carrier through the cargo manifest via the electronic customs system (SIDUNEA for its acronym in Spanish), and subject to a 90 day allowance for staying within the territory; or (ii) as an ordinary item of importation, subject to the payment of duties and customs clearance.

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?

Answer: Yes. In principle, when there are elements of a foreign law it is necessary to verify the existence of a ratified treaty between Venezuela and the State where that interest is registered, in accordance with article 1 of the Venezuelan Private International Law. If there is no such treaty, the provisions of articles 27 and 28 of same legal instrument must

be observed. Article 27 states that the constitution, content and extension of real estate rights over property are governed by the law of the place of the matter. Additionally, article 28 prescribes that the displacement of movable goods does not influence the rights that would have been validly constituted under the rule of the previous Law. However, such rights can only be opposed to third parties, after the requirements established by the law of the new situation have been fulfilled. For this registered interest to have full effects in Venezuela, it is necessary that the relevant title is apostilled pursuant to the 1961 Apostille Convention.

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:

(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?

Answer: Yes. Article 29 of the Private International Law states that conventional obligations are governed by the law agreed by the parties. Our domestic law does not prescribe restrictions on the subject matter, thus foreign law chosen by the parties to the specific container business is fully applicable and enforceable.

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?

Answer: In the absence of a valid indication of the applicable law, article 30 of the Private International Law states that conventional obligations are governed by the law with which they are most directly linked. Additionally, article 31 states that the rules, customs, and principles of international commercial law, as well as commercial practices and practices of general acceptance, shall apply where appropriate.

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?

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

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? 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).

Answer: It is unlikely that the courts in Venezuela would re-characterise a lease or a retention of title arrangement as a security interest. At least there is no precedent. Please note that contractual matters in Venezuela are governed by the principle of contractual freedom between the parties, and to that extent the contract has a 'force of law' as stated in article 1,159 of the Civil Code. Additionally, article 12 of the Civil Procedure Code states that in the interpretation of contracts or acts that present obscurity, ambiguity or deficiency, the judges will abide by the purpose and intention of the parties, taking into account the requirements of the law, the truth and good faith. Pursuant to these provisions, decisions of the Supreme Court of Justice have stated that judges are not authorized to modify the effects of the contract, either ex officio or at the request of any of the parties, since the judge is not allowed to worry, for the greater or lesser severity of the freely accepted clauses, and for the more or less damaging consequences that may be followed for any of the parties, as long as the contract was executed free of defects and in accordance to the law.

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 law and the terms of the documents).

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.

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?

Answer: In cases where the governing law and terms of the documents allow 'self-help' remedies, its exercise must be recognised by a local court, specially if third party rights are involved. The case would be relatively straight forward if the matter has been previously arbitrated, and a final award obtained in a foreign jurisdiction ordering an owner, a mortgagee or a lessor to enforce that award in Venezuela, it can be enforced through a first instance court without further formalities. In order to enforce any contractual terms to repossess containers, an application must be filed with the competent court, providing evidence in support of the claim requesting, if possible, by way of a precautionary measure for the embargo of the boxes. If third parties are involved, i.e. a warehouse or container yard, it is likely that it will intervene as an interested third party. This will complicate the matters for the claimant who in the worst-case scenario must take care of the storage costs. In any event, the repossession of the containers through the judicial action is a lengthy process. Note that article 93 (13) of the Maritime Commerce Law states that the supply of containers is a maritime credit, therefore, it would give rise to a right for arresting the vessel.

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?

Answer: If the container is loaded within the port area with cargo subject to payment of duties and customs clearance, the Treasury has a privilege over the cargo, therefore enforcement or repossession will find obstacles. On the other hand, even if duties have been paid and cargo is ready to leave the port or terminal, any repossession would be prevented by the rights of the consignees. In this case, the claimant would have to take care of the storage costs or seeking a precautionary measure from a Court to empty the containers with the subsequent costs.

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.

Answer: In the event of the counterparty entering into insolvency, all ongoing judicial proceedings that may affect its patrimony will be consolidated in the bankruptcy proceedings, in which case all creditors (including those with rights to enforce or repossess) participate in the liquidation of assets, in accordance to the nature of their rights and subject to the procedure in article 914 et seq., of the Commerce Code.

8 Liens

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

Answer: Article 102 of the General Law on Ports does recognize a right of retention of the cargo in favor of the port operator (in charge of the warehouse or container yard), to guarantee the price for the rendered services. According to article 104 of same Law, the port operator may petition to the competent judge the auction of the retained cargo, in order to satisfy its credit. Nevertheless, said provision states that such right does not extend to the containers owned by third parties and clearly identified as belonging to them, unless that the port operator has a credit against the owners of the boxes, arising out of repairs and improvements made to such. On the other hand, pursuant to article 10 of the Customs Law, the National Treasury has a preferred privilege on the goods under customs powers (among them the containers as element of transport), to cover the payment of taxes, duties, interests, fines, etc. The provision expressly prohibits any preventive or executive judicial measure upon merchandise that has not paid the corresponding fiscal credit.

9 Problems experienced in practice on enforcement

9.1 Please briefly outline any know[n] 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.

Answer: The lack of reliable electronic systems within commercial ports and customs, make it compulsory for the party enforcing against or re-possessing containers, to carry out its own investigation in order to ascertain the location of the boxes. Tracking is mainly done manually by checking cargo manifests, bills of lading and lists of empty boxes, and so difficult to obtain data from one accessible source. Containers are not only stored at yards within public ports, but also in yards located outside port areas requiring a previous search for the boxes location. On the other hand, although establishment and recognition of property rights are not necessarily of great concern, it is important to point out that in addition to the liens upon the boxes as explained in the above section 8 that may interact, containers (both full or empty) used as element of transport with more than 90 days in the national territory, will be subject to an onerous customs fine pursuant to article 161 of the Organic Customs Law. This fine has to be settled prior to shipping the container out of the country.