

ASSOCIAZIONE ITALIANA DI DIRITTO MARITTIMO



Questionnaire on Security Interests over Shipping Containers

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

Whoever has sold machinery (it is doubtful if “containers” can be considered a machinery) has a lien for the unpaid purchase price conditional upon the registration of documents evidencing the sale and the claim in a register kept by the Court having jurisdiction over the place where the machinery is located; when the machinery was acquired by a third person, it should be in the same place where the registration was made.

The lien lasts for a period of three years.

Banks authorized to grant loans secured by machinery are also entitled to a lien provided the document delivered evidences the purpose of financing, the amount and the maturity date of the claim, and is registered. The practical application of such a provision is quite difficult with respect to containers in view of the fact that they are carried worldwide.

Credits for sums due to the depositary (such as a terminal containers operator) and to any person who carried out maintenance/repair works on containers are secured by a lien over such goods, provided that same remain in the depositary’s possession.

By a law decree of 2016, enacted with the intent to help the banks and the entrepreneurs as well as to narrow the gap with the “floating charge” foreseen by common law, it has been created the “non possessory pledge”; however said law is not yet in force as the registry on which these peculiar pledges should be registered has not been established yet.

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

Not yet established

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)?*

Liens over containers registered in foreign registers are not recognized under Italian law.

However, it is possible to recognize foreign property interests through the enforcement of foreign judgments, provided that during the recognition or enforcement proceeding the container is still on the Italian territory and that an application for arrest of the container has been filed with the Court and obtained.

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) *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?*

(a) Yes, at certain conditions (not relevant in international context)

(b) May be not, save for the “Non possessory pledge”.

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?*

The parties can agree in writing the applicable law.

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

There are no circumstances in which our jurisdiction would re-characterise a lease or a retention of title arrangement as a security interest.

6 Enforcement remedies

- 6.1 *Do the laws of your judicial [process] permit an owner, a mortgagee or a lessor to exercise "self-help" remedies to enforced 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).*

Any enforcement against the debtor and, therefore, his goods is subject exclusively to the rules put by the code of civil procedure.

The mortgagee could have a preferential title to exercise one's right of "lien" on the container.

It depends however on the contractual terms and conditions governing the mortgage and/or the leasing contract i.e. if therein is provided a lien or a similar right.

- 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 judicial process for the enforcement is ruled by the law. The repossession of the container located within the Italian jurisdiction could be realized after the process of execution is completed i.e. when a judgement (or similar measure) is rendered at the end of a judicial action brought before the Italian Court.

In addition, and should the specific requirements provided by law exist (to be ascertained case by case), the person entitled to act for repossession might ask an injunction to be issued if the container is located within the Italian jurisdiction; or, whereas the requirements provided by law exist, by a seizure of the container itself.

- 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 short-side on property of third party, or*
- (b) *located on a ship in a port owned and/or chartered by a third party?*

Legal steps provided by the law are basically the execution against a third party ruled by Italian civil procedure code. Any execution must be grounded either on a Court decision (or on any similar measure), or a definitive order of injunction, or a seizure. We must presume that the “debtor” is not a foreign person but a person based in Italy.

(a) By execution against a third party according to rules establishing criteria to determine the competent Court,

(b) The same as above but all the deeds must be served to the Master as well.

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

Yes. They could be liable in respect of cargo interests where these give the evidence of suffered damages and that these ones are proximately caused by enforcement / repossession action.

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?*

Yes.

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

Under Italian Insolvency Law with the opening of the bankruptcy proceeding the possibility for the individual creditor to execute the debtor's assets is barred by law. Special rules apply for credits of Banks arising out of loans secured by a first ranking mortgage over land or buildings; these Banks keep the right to start or continue enforcement actions.

The Trustee may not acquire or liquidate an asset if the liquidation activity appears manifestly not convenient. In this case the creditors can initiate enforcement or preventive actions on that asset.

The third party owner of the asset included in the bankruptcy estate must file an application for the repossession of the asset prior to the hearing when the status of liabilities of the debtor will be considered.

8 *Liens*

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

The Italian civil code and the Italian navigation code provide the creditor (e.g. the carrier) with a statutory lien and related right of retention which is comparable to a non-consensual lien. Such right can be enforced by the creditor on containers provided that the creditor holds/is in possession of them and the relevant credits arise from the contract of carriage.

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.*

None