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**UNIDROIT Working Group on a Model Law on
Warehouse Receipts**

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ISSUES PAPER

1. UNIDROIT and the United Nations Commission on International Trade Law (UNCITRAL) have approved a joint project to develop a Model Law on Warehouse Receipts. In this project, the UNIDROIT Working Group on a Model Law on Warehouse Receipts will develop the text for a draft Model Law, which will subsequently be submitted to intergovernmental discussions through an UNCITRAL Working Group. This document provides a preliminary discussion of issues that the UNIDROIT Working Group may wish to consider at its first session.
2. The issues considered in this document were identified by the participants of a webinar that was co-organised by UNIDROIT and UNCITRAL on 26 March 2020, involving a broad selection of experts and organisations, to discuss the feasibility of formulating a Model Law on Warehouse Receipts. This document does not intend to provide an exhaustive list of issues or a full legal analysis of each issue. Rather, the purpose of the document is to provide a starting point for the Working Group's deliberations and a structure for discussions at its first session.
3. The document is divided into three sections: (i) preliminary matters; (ii) scope of the Model Law; and (iii) content of the Model Law. It provides a number of questions that the Working Group may wish to consider.
4. This document should be considered in conjunction with Study 83 – WG 1 – Doc. 4 (Background Paper), which describes existing international instruments and guidance documents concerning warehouse receipts legislation. That study also contains a comparative legal analysis of national warehouse receipts legislation reflecting the major legal traditions and geographical regions, to which the Model Law provisions would ultimately need to be adaptable. More broadly, a Model Law should be designed in a flexible manner in order to accommodate different legal and contextual conditions of diverse economies, and consider the special needs of smallholders and small and medium-sized enterprises.
5. The Secretariat is grateful to Working Group members Nicholas Budd, Teresa Rodriguez De Las Heras Ballell and Andrea Tosato as well as to the Kozolchyk National Law Center (NatLaw) for their contributions to this document.

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I. PRELIMINARY MATTERS

A. Background of the project

6. The first proposal for UNCITRAL to develop a Model Law on Warehouse Receipts was made at an UNCITRAL colloquium on secured transactions in 2017.¹ Following the discussion of this proposal at its 33rd session in 2018, Working Group VI (Security Interests) requested a mandate to develop a modern legal instrument for warehouse receipts. In view of this request, the UNCITRAL Commission, at its 51st session in 2018, invited the Secretariat of UNCITRAL to conduct exploratory and preparatory work on warehouse receipts.²

7. Thereafter, NatLaw carried out a feasibility study on possible future work on warehouse receipts,³ which the Secretariat summarised during the UNCITRAL Commission at its 52nd session, in July 2019.⁴ The Commission confirmed its decision to include the topic in its work programme but stated that further elements would need to be considered before initiating the work, namely how such work should be undertaken (whether by a Working Group or the Secretariat), the scope of the project, and the form of the resulting instrument.⁵ It requested the Secretariat of UNCITRAL to proceed with its preparatory work and to convene a colloquium with other organisations with relevant expertise, to consider the scope and nature of the work and possibly advance the preparation of initial draft materials.⁶

8. Following the 52nd UNCITRAL Commission session, its Secretariat invited the UNIDROIT Secretariat to consider joint work in the area of warehouse receipts, with particular focus on the possible drafting of a Model Law. On 26 March 2020, UNIDROIT and UNCITRAL co-organised a webinar to discuss the feasibility of formulating a Model Law on Warehouse Receipts with a broad audience of experts and organisations.⁷

9. Based on the conclusions and recommendations of the webinar, the UNIDROIT Secretariat proposed that the Governing Council, at its 99th session in April/May 2020, might recommend that the General Assembly include the drafting, jointly with UNCITRAL, of a Model Law on Warehouse Receipts as a new project with high priority status in the 2020-2022 Work Programme, subject to approval of a parallel mandate by UNCITRAL's Commission. The Council unanimously endorsed this proposal.⁸

10. A project proposal consistent with the one submitted to the Governing Council at its 99th session in April/May 2020 was submitted by the UNCITRAL Secretariat to the Commission at its 53rd session held virtually in September 2020 for approval.⁹ The proposal received very positive reactions from the delegations and was approved by the Commission without amendments.

¹ UNCITRAL Fourth International Colloquium on Secured Transactions (15-17 March 2017, Vienna), available at https://uncitral.un.org/en/colloquia/security/papers_2017. For details on the proposal see Dubovec and Elias, A Proposal for UNCITRAL to Develop a Model Law on Warehouse Receipts (28 June 2017).

² Report of the United Nations Commission on International Trade Law, Fifty-first session (25 June-13 July 2018), para. 253(a), available at <https://undocs.org/en/A/73/17%20>.

³ UNCITRAL, Warehouse receipts: Developing an UNCITRAL Instrument on Warehouse Receipts, 2019, available at https://uncitral.un.org/sites/uncitral.un.org/files/warehouse_receipts_report_final.pdf.

⁴ Report of the United Nations Commission on International Trade Law, Fifty-second session (8-19 July 2019), para. 194, available at <https://undocs.org/en/A/74/17>.

⁵ Ibid., para. 195.

⁶ Ibid., para. 196.

⁷ The Summary Report of the UNCITRAL/UNIDROIT Webinar on Warehouse Receipts (26 March 2020) is available at <https://www.unidroit.org/english/news/2020/200326-warehouse-receipts/report-e.pdf>.

⁸ Report of the UNIDROIT Governing Council, 99th Session (April/May 2020), Doc. C.D. (99) A.8, para. 21, available at <https://www.unidroit.org/english/governments/councildocuments/2020session/cd-99-a-08-e.pdf>.

⁹ UNCITRAL, Possible future work on warehouse receipts, Fifty-third session (6-17 July 2020), UN Doc. A/CN.9/1014, available at <https://undocs.org/en/A/CN.9/1014>.

B. Format and title of the future instrument

11. The Model Law shall consist of a set of black letter rules. In addition, once the project is successfully completed, consideration will be given to proposing complementary work on a guide to enactment/user guide, including commentaries on the model provisions as well as on secondary legislation that may be deemed necessary to implement the Model Law at the country level.

12. It is suggested that the formal title of the future instrument will be the 'UNCITRAL/UNIDROIT Model Law on Warehouse Receipts'.

C. Target audience

13. The Model Law will be a standalone instrument for adoption by States seeking to reform their domestic legislation to introduce or modernise warehouse receipt systems. As consistent with all UNCITRAL and UNIDROIT instruments, the Model Law should be capable of being adopted by both common law and civil law jurisdictions.

D. Methodology and timeline for the project

14. The project is a joint UNCITRAL/UNIDROIT project consisting of two phases. First, UNIDROIT will lead the joint preparatory work through a UNIDROIT Working Group that will develop a first comprehensive draft for a Model Law on Warehouse Receipts over the period 2020-2022. Once completed by the UNIDROIT Working Group, the draft Model Law shall be submitted for intergovernmental negotiations through an UNCITRAL Working Group.

15. Under the guidance of the Chair of the UNIDROIT Working Group, Professor Eugenia Dacoronia, the Working Group will undertake its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT's practice, the Working Group will not adopt any formal rules of procedure and seek to make decisions through consensus.

16. The Working Group will meet twice a year for two-three days. Meetings will be in Rome, unless external funding is provided to hold a meeting in a different location. Meetings will only be held in English without translation. Remote participation will be possible, although experts will be expected to attend in person if circumstances permit.

17. As the Model Law on Warehouse Receipts is a high priority project on the UNIDROIT Work Programme for the period 2020-2022, the Secretariat intends to complete the entire project during this Work Programme. The following would remain a tentative calendar, the effective execution of which may be affected by the evolution of the current volatile international context:

- (a) Preparation of the first draft for the Model Law over four in-person sessions 2020-2022
 - (i) First session: December 2020 (hybrid)
 - (ii) Second session: first half of 2021
 - (iii) Third session: early second half of 2021
 - (iv) Fourth session: late in 2021 or early in 2022
 - (v) It is envisaged that remote meetings may be conducted when deemed necessary, in between in-person sessions. Given the extraordinary circumstances, one or more of the in-person meetings may be replaced by remote webinars.
- (b) Consultations and finalisation: first half of 2022
- (c) Adoption by the Governing Council of the complete draft to be sent to UNCITRAL at its 101st session in May 2022

E. Composition of the UNIDROIT Working Group

18. As consistent with UNIDROIT's established working method, the Working Group is composed of experts selected for their expertise related to warehouse receipt systems. Experts participate in a personal capacity and represent different legal systems and geographical regions. The Working Group is composed of the following members:

- Eugenia Dacoronia, Professor of Civil Law, University of Athens (Chair) (Greece)
- Nicholas Budd, former partner and head of the Trade & Commodity Finance Groups, White & Case (France)
- Adam Gross, Director, Darhei Noam Limited (United Kingdom)
- Keith Mukami, Director, Head of Africa: Banking & Regulatory, CMS-RM Partners (South Africa)
- Dora Neo, Associate Professor and Director, Centre for Banking & Finance Law, National University of Singapore (Singapore)
- Jean-François Riffard, Professor of Civil Law, University Clermont Auvergne (France)
- Teresa Rodriguez De Las Heras Ballell, Associate Professor of Commercial Law, Universidad Carlos III de Madrid (Spain)
- Hiroo Sono, Professor of Law, University of Hokkaido (Japan)
- Andrea Tosato, Associate Professor of Commercial Law, University of Nottingham (United Kingdom); Lecturer in Law, University of Pennsylvania (USA)

19. UNIDROIT has also invited a number of intergovernmental organisations and public sector stakeholders with expertise in the field of warehouse receipt systems to participate as observers in the Working Group. Participation of these different organisations and stakeholders will ensure that different regional perspectives are taken into account in the development and adoption of the instrument. It is also anticipated that the cooperating organisations will assist in the regional promotion, dissemination and implementation of the Model Law once it has been adopted. The following organisations and public sector stakeholders have been invited to participate as observers in the Working Group:

- Food and Agriculture Organization of the United Nations (FAO)
- International Fund for Agricultural Development (IFAD)
- Organization of American States (OAS)
- Organisation for the Harmonisation of Business Law in Africa (OHADA)
- United Nations Conference on Trade and Development (UNCTAD)
- United States Department of State
- World Bank Group (WBG)

20. Finally, UNIDROIT has also invited a number of industry associations and other private sector stakeholders to participate as observers in the Working Group, to ensure that the Model Law will address the stakeholders' needs in facilitating the use of warehouse receipts. The private sector stakeholders will also assist in promoting the implementation and use of the Model Law. The following stakeholders have been invited to participate as observers:

- Association of General Warehouses, Mexico
- Bsystems Limited
- GrainChain Inc.

- Indonesia Commodity & Derivatives Exchange
- Information Services Corporation, Canada
- International Warehouse Logistics Association
- Kozolchyk National Law Center (NatLaw)
- Sberbank Hungary Ltd.
- Secured Finance Network
- VOCA Consult

F. Relationship of the Model Law with existing international instruments

21. The Model Law's scope will focus on the private law aspects of a warehouse receipt system, see in detail on the scope Section II "Scope of the Model Law", below. There are a few international conventions that, while not yet in force, address some relevant aspects, as well as two international model laws that are particularly relevant for certain aspects of the Model Law. It is suggested that the terminology and concepts used in the Model Law on Warehouse Receipts be harmonised with those of these existing instruments, and that uniformity and consistency with their provisions ought to be ensured.

22. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)¹⁰ establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door carriage that includes an international sea leg. Importantly, it is the only international convention that deals expressly with negotiable documents (including in electronic form).

23. The United Nations Convention on International Bills of Exchange and International Promissory Notes¹¹ deals extensively with the transfer and endorsement as well as with the protection of the holder of such documents. In view of the Model Law on Warehouse Receipts, it is useful to note that the Convention's rules were insofar generally acceptable to States.

24. Lastly, if the Working Group eventually decides to include provisions on the warehouse contract in the Model Law itself rather than in a guide to enactment – a question that will need careful consideration during the Working Group's discussions – then the United Nations Convention on Liability of Operators of Transport Terminals¹² should also be taken into consideration. While this Convention has not entered into force either, it gives an indication of what was acceptable to States in terms of international harmonisation with regard to liability.

25. An international model law that is particularly relevant for specific aspects of the Model Law is the UNCITRAL Model Law on Secured Transactions (2016).¹³ Notably, as part of any warehouse receipts reform, attention should be paid to the secured transaction framework. This is primarily to ensure that transfers of warehouse receipts for purposes of creating security rights are coordinated with the third-party effectiveness (perfection) and priority regime set forth in the relevant secured

¹⁰ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 2008, not yet entered into force), available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf>.

¹¹ United Nations Convention on International Bills of Exchange and International Promissory Notes (adopted 1988, not yet entered into force), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/x_12_e.pdf.

¹² United Nations Convention on Liability of Operators of Transport Terminals (adopted 1991, not yet entered into force), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ott_e.pdf.

¹³ UNCITRAL Model Law on Secured Transactions (2016), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf.

transaction legislation. The UNCITRAL Model Law on Secured Transactions recognizes types of assets called “negotiable documents”, which encompass warehouse receipts, for which it sets out some specific rules.

26. The other particularly relevant instrument is the UNCITRAL Model Law on Electronic Transferable Records (2017).¹⁴ This Model Law aims to enable the legal use of electronic transferable records both domestically and across borders. It applies to electronic transferable records that are functionally equivalent to transferable documents or instruments, such as warehouse receipts. Such electronic transferable records are increasingly relevant for countries seeking to establish a market for electronic warehouse receipts.

Question for the Working Group:

- *Are there further international instruments, in addition to the above-mentioned conventions and UNCITRAL model laws, that need to be considered with regard to ensuring harmonised definitions and concepts as well as uniformity and consistency with their provisions?*

¹⁴ UNCITRAL Model Law on Electronic Transferable Records (2017), available at https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records.

II. SCOPE OF THE MODEL LAW

27. With regard to the scope of the Model Law, the experts who participated in the above-mentioned webinar on 26 March 2020, as well as the Secretariats of both UNCITRAL and UNIDROIT, agreed that a Model Law should focus on the private law aspects of the warehouse receipt system. Hence, the Secretariat's proposal to the UNIDROIT Governing Council in April/May 2020 suggested the joint drafting of a Model Law on the private law aspects of warehouse receipts. The proposed scope was unanimously supported by the Governing Council members, as it was by the UNCITRAL Commission.

28. Accordingly, the Model Law should cover the private law aspects of warehouse receipts, covering both electronic and paper, negotiable and non-negotiable receipts. It should seek to provide a comprehensive instrument that covers all the essential aspects necessary to regulate the private law side of a system of warehouse receipts, including:

- a set of definitions of the main concepts;
- the legal status and format of the receipt;
- the form and the content requirements of the receipt;
- the contractual rights and obligations of the parties;
- registration of receipts upon their issuance;
- the negotiability and the means of transfer of the receipts;
- the substitution and removal of goods from the warehouse, and the termination of storage; and
- aspects concerning creation and third-party effectiveness of a security right in warehouse receipts (and stored goods) as well as relevant priority and enforcement-related issues.

29. Although the exact details of the scope are subject to further discussion and refinement by the Working Group, the regulatory aspects should be touched upon only when strictly necessary. The institutional and regulatory framework of the operation of warehouses could be addressed – together with other aspects concerning the implementation of the Model Law – in a guide to enactment/users guide, which should be considered after completion of the Model Law. Lastly, with regard to assets covered by warehouse receipts, it should be noted that the Model Law will not be limited to agricultural commodities, as is the case in many domestic laws, but rather shall cover all storable goods.

Recommendation for the Working Group:

- *When reviewing the following sections the Working Group is invited to identify and consider additional aspects that should be included in the scope of the Model Law.*

III. CONTENT OF THE MODEL LAW

30. The following sections address selected aspects of the private law side of a warehouse receipt system. Reference will be made to relevant rules set out in international instruments that should be taken into consideration, with a view to ensuring harmonisation with the future Model Law. The sections also refer to national legislation on warehouse receipts. In this respect, it should be highlighted that any such references to national legislation merely serve to provide examples and inform the discussions, without evaluating or advocating for any particular domestic law solution or legislative approach to regulating the aspect in question. For a detailed review and analysis of national warehouse receipt legislation, see Study 83 – WG 1 – Doc. 4 (Background Paper).

A. Definitions

31. The key terms should be defined in the Model Law, such as warehouse receipt, negotiation, holder, warehouse operator, among others.

32. The following paragraphs present some relevant definitions contained in UNCITRAL model laws and the UNCITRAL Legislative Guide on Secured Transactions that may be relevant to the Model Law on Warehouse Receipts. As such, the UNCITRAL Model Law on Secured Transactions (MLST)¹⁵ contains the following definitions:

- “Grantor” means:
“(i) A person that creates a security right to secure either its own obligation or that of another person;
(...)”¹⁶
- “Possession” means “the actual possession of a tangible asset by a person or its representative, or by an independent person that acknowledges holding it for that person;”¹⁷
- “Priority” means “the right of a person in an encumbered asset in preference to the right of a competing claimant;”¹⁸
- “Security right” means:
“(i) A property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation;
(...).”¹⁹

33. The UNCITRAL Legislative Guide on Secured Transactions²⁰ sets out the definition of a negotiable document as follows:

¹⁵ UNCITRAL Model Law on Secured Transactions (2016), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf.

¹⁶ Id., Art. 2 (o).

¹⁷ Id., Art. 2 (z).

¹⁸ Id., Art. 2 (aa).

¹⁹ Id., Art. 2 (z) (kk).

²⁰ UNCITRAL Legislative Guide on Secured Transactions: Terminology and recommendations (2009), available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/terminology-and-recs.18-1-10.pdf>.

“Negotiable document” means “a document, such as a warehouse receipt or a bill of lading, that embodies a right to delivery of tangible assets and satisfies the requirements for negotiability under the law governing negotiable documents”.²¹

34. Likewise, the UNCITRAL Model Law on Electronic Transferable Records (MLETR)²² contains a couple of definitions in its Art. 2 that may be relevant:

- “Electronic record” means “information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not;”
- “Transferable document or instrument” means “a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.”²³

Recommendation for the Working Group:

- *When reviewing the following sections the Working Group is invited to identify which terms should be defined in the Model Law on Warehouse Receipts.*

B. Legal status and format of warehouse receipts

1. Legal status

35. Two important distinctions with respect to a warehouse receipt’s legal status are whether it is considered a document of title, and whether it is negotiable.

1.1 Document of title

36. Legislation might explicitly state that a warehouse receipt is a document of title and, as such, represents *prima facie* evidence of ownership of the underlying stored goods and the right to enforce the rights of the depositor under the storage agreement.

37. The core functions of warehouse receipts are generally to (i) evidence the existence, location and control of the goods described in the receipt, (ii) evidence the storage contract with the warehouse operator, and (iii) facilitate transfer of title to the goods and the underlying storage contract. These functions are subsumed under the rubric of “document of title” or in the vernacular “commodity paper”.

38. Warehouse receipts are generally regulated as documents of title. The legal character of warehouse receipts as “documents of title” is expressed in many laws. The common law and statutory treatment of “documents of title” is flexible and covers bills of lading, warehouse receipts and other forms of custodial documents customarily accepted in the trade as evidence of title to goods and a delivery obligation on the part of the custodian. For example, the term document of title may include a “warehouse receipt ... and any other document which in the ordinary course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and

²¹ Id., p. xii.

²² UNCITRAL Model Law on Electronic Transferable Records (2017), available at https://uncitral.un.org/en/texts/e-commerce/modellaw/electronic_transferable_records.

²³ Id., Art. 2.

dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by ... a bailee and purport to cover goods in the bailee's possession ...".²⁴ Transferability is implied by the right of "disposition".

39. The "title" is the property interest held by the depositor at the time of delivery to the warehouse. The depositor's interest in the goods is not affected in any way by reason of issuance of the warehouse receipt. If the property interest of the depositor is subject to paramount claims of secured creditors, unpaid vendors or subsequent purchasers, those paramount interests are not impaired as between the depositor and the unpaid vendor or buyer or the secured creditor merely because of the deposit of the goods in a warehouse. However, if a document of title is issued to and remains in the possession of the depositor and is thereafter transferred to another buyer or lender, in certain circumstances the transferee will receive full title unaffected by the interests of the paramount title claimant.

Question for the Working Group:

- *Should the Model Law define the features of the warehouse receipt qua transferable document of title?*

1.2 Negotiability

40. A document of title can also be a negotiable document, but it is important to note that this is not a descriptive factor.

41. "Negotiable" is a term applied to a diverse community of commercial documents and instruments that are designed to circulate freely in commerce due to certain immutable characteristics. Such characteristics include transferability;²⁵ a format, terms and conditions that are dictated by statute or commercial usage; simplicity lending certainty as regards interpretation and enforcement; and jurisprudence developed over a considerable period of time.

42. Jurisdictions may provide for negotiable and non-negotiable warehouse receipts. Commonly, non-negotiable receipts must be marked as non-negotiable to provide notice to involved parties that rights associated with the receipt cannot be transferred by negotiation.

43. As noted under Section II "Scope of the Model Law" above, the Model Law should cover both negotiable and non-negotiable receipts.

2. Format of warehouse receipts: single and double receipts

44. Legislation may provide for warehouse receipts that consist of a single document or of two documents, referred to as single and double warehouse receipts, respectively. The main distinction between single and double receipts lies in whether or not the certificate of deposit and the security (pledge) right over the stored goods are represented separately by two different documents.

45. A single receipt typically encompasses the right to take delivery of the underlying stored goods and the right to pledge them as collateral. The single receipt may be used by the depositor as collateral to obtain financing, in accordance with legal rules for pledge rights or security interests.

46. On the other hand, a double receipt conceptually separates the right to take delivery of the underlying goods from the right to pledge them as collateral. Accordingly, the double receipt often consists of a certificate of title and a certificate of pledge (also called certificate of deposit and warrant

²⁴ See UCC Art. 1 (Definitions).

²⁵ By delivery or endorsement, without notification to and acceptance or attornment by the issuer of the document.

in some countries). The certificate of title represents the promise to deliver goods deposited in the warehouse, and the pledge certificate grants a security right in the goods.

47. Many civil law countries have chosen to use double receipts. Conversely, most common law countries implement single receipt systems. However, there are exceptions where a civil law country has chosen to use single receipts and vice versa. Other countries maintain flexibility and allow for both single and double receipts. For example, legislation may prescribe that depending on the request of the depositor, a warehouse issues a single or a double receipt upon delivery of goods for storage. Alternatively, a more general piece of legislation allows for both single and double warehouse receipts, but special legislation requires using one or both types for a particular sector.

Question for the Working Group:

- *Should the Model Law accommodate both single and double receipts, or opt for one of these formats?*

C. Receipt details and form

1. Minimum documentary information

48. Several questions arise in relation to the documentary information of warehouse receipts, namely what information should be included in warehouse receipts, who is responsible for providing this information, who is liable for omissions and inaccuracies, and to what extent may parties limit or exclude such liability.

49. Warehouse receipts should contain certain minimum information. This minimum information serves a notice and identification function for all parties involved in the warehouse receipt system, from the warehouse operator to the depositor and from the lender to the eventual buyer of the stored goods. A depositor or a buyer will want to ensure his or her rights to a certain quantity and quality of product stored at a certain location. A lender will want to be certain of the quality and quantity of the pledged collateral stored in a warehouse. Explicit requirements for the minimum information to be contained in warehouse receipts serve to protect the interests of each involved party.

50. Because all warehouse receipt systems aim to satisfy similar notice functions with respect to providing information to involved parties, several core minimum requirements are common across jurisdictions. These frequent, minimum content requirements include the following:

- name and location of the warehouse where the goods are stored;
- unique receipt identification number;
- quantity and quality of stored goods;
- statement whether the goods will be delivered to the bearer or a named person (negotiability);
- whether the goods are insured;
- obligations and rights of the depositor and warehouse and/or reference to the applicable law;
- rate of storage and handling charges and whether there will be a warehouse lien over the goods;
- date of issue and expiry of the receipt;
- signature of the warehouse operator or agent.

51. Further minimum information often required includes the allowable weight or quality loss (e.g. moisture loss) and whether goods are commingled or identity-preserved. Another possible additional point for consideration as required minimum information is whether and how third-party stock is segregated from warehouse operator proprietary stock, which is often pertinent to banks in mitigating fraud risk.

52. Additionally, legislation may allow for optional terms to be included in the receipts, such as limitations of liability (subject to the statutory minimum standards), clauses relating to insurance of the goods, and generally any provision that does not impair the obligation of the warehouse to redeliver goods or exercise due care.

53. In case a warehouse receipt lacks the required information, legislation may establish that the warehouse operator is liable for damages caused to a person by its omission.²⁶ In several other jurisdictions, the consequence may not be liability of the warehouse operator but invalidity of the warehouse receipt. This may not be the most appropriate solution and indeed, the Rotterdam Rules provide otherwise for transport documents and electronic transport records, preserving document validity and establishing presumptions to fill certain missing information. Art. 39, paragraph 1 of the Rotterdam Rules states that

“[t]he absence or inaccuracy of one or more of the contract particulars [in the transport document or electronic transport record] does not of itself affect the legal character or validity of the transport document or of the electronic transport record”.

Paragraph 2 establishes presumptions for missing information on the date and order and conditions of the goods in the document or record.²⁷

Questions for the Working Group:

- Should the Model Law prescribe minimum information to be contained in the receipt?
- If the Model Law should prescribe minimum information:
 - Should the Model Law provide for the consequences of the failure to include the required minimum information?
 - Should the Model Law include presumptions to fill missing information in receipts (e.g. on the date, condition of goods)?
 - Should the Model Law explicitly allow for optional terms to be included in warehouse receipts?
- Should the Model Law contain rules establishing who is responsible to provide the information to be included in warehouse receipts, and who is responsible for the accuracy of this information?
- Should the Model Law determine the effects that flow vis-à-vis third parties if the warehouse receipt contains either omissions or inaccurate information, as well as the enforceability of any term that seeks to exclude or limit the liability of warehouses?
- Should the Model Law prescribe the methodology for amending information in receipts (including defining the situations in which amendment is permissible, and the rights and obligations of parties in the event of an amendment)?

²⁶ See for example UCC §§ 7-202, 7-203.

²⁷ Text of the Rotterdam Rules available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf>.

2. Form: paper and electronic receipts

54. Traditionally, warehouse receipts have been issued and traded in paper form. To address the risk of forgery or fraud of such paper receipts, legislation may, for example, require the use of serial numbering, that paper receipts be issued on specially distributed paper, as tear-outs from books of special paper or with specific security features, or that they may only be printed by specifically approved printers.

55. Over recent decades, the trend in several countries around the world has been towards introducing electronic warehouse receipts (EWRs). EWRs are electronically issued data records that contain the information required for warehouse receipts. If legislation provides that they are legally equivalent to paper receipts, they can be used in the same way, for example as collateral for loans.

56. There are several advantages and challenges to introducing EWRs. Their introduction can facilitate the negotiation and transfer, allowing for a fast transfer of ownership as they do not need to be physically handed over, which also reduces transfer costs. EWRs have enhanced marketability, particularly where the warehouse receipt system is linked to an exchange. A system for EWRs strengthens system transparency as lenders and other users can monitor the receipts, and thus reduces documentary fraud. Among the challenges to introducing electronic receipts are the requirements of necessary facilities and infrastructure. Furthermore, amendments to existing legislation might be necessary to incorporate electronic receipts, for example to recognize that a document's required signature can be satisfied with an electronic one.

57. One of the first countries to introduce EWRs in legislation was the United States. The revised United States Warehouse Act (USWA) allows the voluntary use of EWRs and provides regulatory authority to establish rules for the providers operating an electronic receipt system, including the requirements for their approval.²⁸ At the state level, in 2003 the Uniform Commercial Code (UCC) was revised to recognize electronic documents of title.²⁹ Today, revised Art. 7 of the UCC - Warehouse Receipts, Bills of Lading and Other Documents of Title – provides a framework for both electronic and paper documents of title and leaves the choice between paper and electronic receipts. The introduction of electronic documents of title at the state level necessitated amendments to several provisions of the UCC.

58. At an international level, the UNCITRAL Model Law on Electronic Transferable Records (MLETR) aims to enable the legal use of electronic transferable records both domestically and across borders.³⁰ The MLETR applies to electronic transferable records that are functionally equivalent to transferable documents or instruments. Transferable documents or instruments are paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring possession of the document or instrument. Warehouse receipts are typical examples of such transferable documents or instruments.

59. The MLETR builds on the principles of non-discrimination against the use of electronic means, functional equivalence and technology neutrality.

60. According to the MLETR, an electronic transferable record is functionally equivalent to a transferable document or instrument if that record contains the information required to be contained in a transferable document or instrument, and a reliable method is used to: (i) identify that electronic record as the electronic transferable record; (ii) render that electronic record capable of being subject

²⁸ 7 U.S.C. §250 (e)(2) and (7).

²⁹ See Uniform Law Commission, UCC Article 7, Documents of Title, 2003, p. 1.

³⁰ See UNCITRAL Model Law on Electronic Transferable Records, available at https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records.

to control from its creation until it ceases to have any effect or validity; and (ii) retain the integrity of that electronic record (Art. 10).

61. Control is a fundamental notion of the MLETR since it represents the functional equivalent of possession of a transferable document or instrument. In particular, the possession requirement is met with respect to an electronic transferable record if a reliable method is used to: (i) establish exclusive control of that electronic transferable record by a person; and (ii) identify that person as the person in control (Art. 11).

62. As noted under Section II “Scope of the Model Law” above, the Model Law should cover both electronic and paper warehouse receipts.

Questions for the Working Group:

- *Should the Model Law adopt and explicitly formulate or state the general principles of non-discrimination against the use of electronic means, functional equivalence and technology neutrality of the MLETR for EWRs?*
- *Should the Model Law adopt the provisions of the MLETR on functional equivalence for EWRs?*
- *Should the Model Law adopt the provisions of the MLETR on control for EWRs?*

D. Transfer and negotiation

1. Transfer

63. If the warehouse receipt is to be a document that will circulate freely in commerce (sellers to buyers and borrowers to lenders), then ease and reliability of transfer among commercial actors are necessary. Ease and reliability of transfer have been achieved for negotiable instruments and similar cash equivalents under the established international rules governing the form and transfer of negotiable instruments.³¹ Although there are some similarities between commodity paper and debt instruments in form and substance, title documents covering goods present, *inter alia*, issues regarding transfer between counterparties and custodians and passage of title to goods. These are issues that cannot be settled contractually while maintaining ease and reliability of transfer and need to be dealt with either by legislation or by accepted commercial practice (law merchant) and recognized by judicial precedent.³² Thus, one important objective of the Model Law is to identify the issues proven to facilitate free transferability of the warehouse receipt and to ensure that transferees are protected against risks that would discourage commercial activity.

1.1 Distinction between depositors and holders

64. The provisions in the Model Law dealing with the obligations of the warehouse operator to, *inter alia*, exercise due care in the storage and handling of the goods (on the standard of care, see Section F.1, below), will apply to all persons holding the warehouse receipt, whether they are the initial depositor or subsequent purchaser or secured creditor. The difference is that the depositor should not have protection against third party claims (for example, claims by unpaid vendors or creditors holding non-possessory security interests), simply because the goods have been placed in

³¹ One example is the 1930 Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes. Similar rules, while not at the international level, are contained in the English 1882 Bills of Exchange Act and the UCC.

³² In the absence of warehouse receipts legislation, parties may create contractual solutions utilizing trusted custodians and collateral management companies and the laws of bailment and possessory pledge. However, the rights created by these arrangements are not freely alienable nor are they designed to give comfort to third parties seeking to purchase or finance the goods.

a warehouse and are covered by a warehouse receipt. Until the receipt is transferred³³ by sale or grant of security to a good faith purchaser or lender, the receipt in the hands of the depositor offers no protection against third party claimants and creditors. These protections are limited to good faith transferees of the receipt.

1.2 Method of transfer - Negotiable receipts

65. The practice for negotiable documents and instruments is that if they are made out in bearer form³⁴ or endorsed in blank, they can be transferred by simple delivery, but otherwise require endorsement to accompany delivery. Endorsement entails certain implied warranties of genuineness and authority of the endorser.³⁵ Simplicity of transfer is enhanced because the rights of the purchaser of a negotiable warehouse receipt are perfected without notification of the warehouse operator of the transfer. However, in practice this legal protection will either be disregarded by the diligent buyer or lender (who will ordinarily notify the warehouse of the transfer and confirm the existence of the goods before paying or lending), but may also encourage counterparties to avoid taking reasonable steps to confirm and therefore be exposed to fraud.³⁶ In either case, eliminating the legal need to notify the warehouse does not provide any commercial advantage in today's world of instant electronic communication.

Question for the Working Group:

- *Should the Model Law require purchasers of paper negotiable receipts to notify the warehouse operator and receive confirmation to have priority rights against other purchasers who notified the operator beforehand?*

1.3 Method of transfer - Non-negotiable receipts

66. Unlike negotiable receipts, which have a long tradition of the form of endorsement and physical delivery, countries that have enacted document of title legislation provide little guidance on the forms of transfer of non-negotiable receipts. Some form of written transfer or assignment agreement conforming to the contractual norms of the country(ies) involved, together with notification to and some form of confirmation (attornment) by the issuer, are minimum requirements to perfect the transfer. The consequences of failure to observe the minimum (albeit usually undescribed) requirements are, at worst, failure of the transfer and, at best, the potential of a claim from a good faith purchaser.

Questions for the Working Group:

- *Should the Model Law include a simple form for (i) assignment of the non-negotiable warehouse receipt, (ii) notification to the warehouse operator of the assignment, and (iii) acceptance by the warehouse operator of the assignment?*

67. Another common, although not universal, practice in the transfer of non-negotiable receipts is the necessity to deliver the physical document to the transferee.³⁷ Considering that the non-negotiable receipt is not transferable by endorsement, may be issued in multiple duplicate original forms, and is easily replaced if lost or stolen or defaced, there seems to be no need to attach any legal significance to the mere possession of the document. The warehouse operator will normally

³³ "Transferred" in the case of English law or "negotiated" in the case of the UCC.

³⁴ A rare occurrence in the commercial world.

³⁵ Which are reduced in the case of banks acting as collecting agents.

³⁶ Fraud could take several forms: the receipt may have been altered or be counterfeit, the goods may have been sold or pledged, or the receipt may represent goods that have not been received or have been released.

³⁷ E.g., UCC § 1-201 (14) and (15); § 7-504(a); § 7-507; § 7-601 (a).

require a delivery order signed by the warehouse receipt holder to deliver the goods and, with the delivery order in hand, is under no obligation to require surrender of a non-negotiable receipt.

Question for the Working Group:

- *Should the Model Law exclude any requirement for the tender or delivery of possession of an original non-negotiable receipt as a condition to the transfer of the receipt or to obtain delivery of the goods?*

2. Negotiation

2.1 Title conflict aspects of documents of title and the nemo dat exemption

68. Documents of title represent and convey title to the underlying goods and to the delivery obligations of the carrier or warehouse operator by simple transfer of the document. Conflicting title claims could undermine the reliability of such documents, since merchants are not in the position to know all prior links in the chain of title when buying or lending against the documents, and when goods are held in remote locations and may have undergone a series of transactions. Without some protection, merchants and banks would be exposed to vendor liens, reservation of title clauses, trust receipts, chattel mortgages and charges, faithless brokers and borrowers and agents selling documents and goods without authorisation, rights of stoppage in transit, and the possibility of having title to the goods set aside by prior title claimants during expensive court proceedings lasting years.

69. In light of the above, English law provides sales and pledges of goods covered by warehouse receipts and other documents of title with an exemption from the strict rule of the sale of goods, *nemo dat quod non habet* (you cannot give what you do not have). For example, the English Factors Act (and the Sale of Goods Act and Carriage of Goods by Sea Acts 1971 and 1992) protects good faith purchasers of title documents from claims of the owners of the goods (i) held by middlemen for purposes of sale³⁸ or (ii) who allow the goods to remain in the possession of sellers after the sale price had been paid,³⁹ or (iii) who delivers them to buyers while the purchase price remains unpaid.⁴⁰ In the United States, this *nemo dat* exemption is expanded to cover all good faith purchasers and secured creditors acquiring negotiable warehouse receipts in the ordinary course of business, with various limitations discussed below.

70. However, the concepts of title documents and negotiable documents may not be known or practiced in other jurisdictions. In view of the loaded expression of “document of title”, its use might not be suitable for a uniform law instrument.

Question for the Working Group:

- *Should the Model Law embrace (with a clear definition) the term “negotiable document” that may or may not have a history or may present conflicting interpretations under domestic laws?*

³⁸ In this case the claim would be made by the owner/principal after the faithless agent/middleman sold the goods without consent of the owner and fails to remit the sales proceeds (agency).

³⁹ In this case the claim would be made by the buyer who left the seller in possession with apparent authority to deal in the goods and attempts to enforce his title claim against the good faith purchaser (estoppel).

⁴⁰ In this case the claim would be made by the seller who had delivered the goods to the buyer on credit terms with apparent authority to deal in the goods and attempts to enforce his reservation of title against the good faith purchaser (estoppel).

2.2 Importance of negotiability as compared to transferability

71. The warehouse receipt should be issued by a custodian for hire and contain the minimum standard terms. In addition, in order to be negotiable, it must be issued to a named person or order, or in blank or endorsed in blank. The receipt may be transferred by assignment, negotiation or due negotiation, where this is recognised, conferring qualitatively different rights and protections on transferees. Due negotiation, a concept drawing on the negotiable instrument concept of holder in due course, confers the highest form of protection from pre-existing defences and claims.

72. The concept of due negotiation means, at the very least, that a buyer or lender who is aware that the description of the goods is erroneous or that the agent was not authorized by his principal or his bank to sell the goods, is not entitled to claim protection as a good faith purchaser for value. This is a fairly universal standard.

73. However, some laws go beyond that. Under UCC Art. 7, only commercial purchasers (banks and traders acting in the ordinary course of their business) can claim the benefit to the *nemo dat* exemption to take title over prior equities. Furthermore, the term “due negotiation” has been interpreted to apply to sellers as well, meaning that a purchase by a commercial counterparty of a warehouse receipt from a non-commercial actor at an unusually low price are not duly negotiated. In brief, the requirements for “due negotiation” of a warehouse receipt may be the following:⁴¹

- The receipt must be in negotiable form;
- The receipt must have been negotiated to the holder, i.e., properly endorsed and delivered;
- The receipt must have been purchased in good faith, i.e., honesty in fact and in observance of reasonable commercial standards of fair dealing;
- Without notice of any other defence or claim to the transfer of the goods or the receipt;
- For value as part of a commercial transaction;
- In the regular course of business or financing (for the seller); and
- Not in settlement of a debt.

74. In brief, the *nemo dat* exemptions that may follow from “due negotiation” are a superior claim to title to the document and the goods as against:

- Other persons to whom the goods may already have been delivered;
- Other persons who may have previously bought the goods or the document;
- Other persons from whom the receipt was acquired by fraud, theft or other improper means or sold through breach of duty;
- The warehouse operator apart from defences noted on the face of the receipt or applicable laws;
- Owners who have placed the goods in the possession of faithless buyers, sellers or commercial intermediaries giving rise to claims of agency and estoppel.⁴²

75. The policy of these exemptions is to protect purchasers of receipts that have entered commerce, and thus a title to stolen goods is not lost if the thief deposits the goods in a warehouse and obtains and negotiates a warehouse receipt. However, if the goods are deposited in a warehouse

⁴¹ UCC § 7-501.

⁴² See UCC § 7-502 and UCC § 7-503 (a)(3). This is a restatement of the English Factors Acts and Sale of Goods Acts.

by a person authorised or with apparent authority from the owner to handle or deal with them,⁴³ acquiescence is established and the paramount owner's claim is lost as against the nemo dat exemption. A variant on the theme of protection of goods that have entered commerce to the detriment of the warehouse receipt holder is to be found in UCC Section 7-205. This protects purchasers of fungible goods from a warehouse operator/merchant who has sold the goods covered by a negotiable warehouse receipt to a buyer in the ordinary course of business.

76. Civil law systems would seem to achieve very similar – if not identical – results through specific principles and concepts applicable to negotiable instruments (e.g. principles of literality or abstraction), without the need to resort to a general doctrine of negotiability. The Working Group might want to consider to what extent the latter, anchored in common law conceptual doctrine, is easily transposable to other systems.

77. In light of the previous consideration, it might seem appropriate for the Working Group to consider finding a solution based on a functional equivalent that could more easily be used by any type of legal system. The 1930 Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes could serve as an example in this regard.

Question for the Working Group:

- *Should the Model Law adopt a solution based on functional equivalence? What other examples for such a solution exist that could be useful for the Working Group to consider for its further discussions?*

E. Registration

78. Registration systems play various roles in relation to the issuance, transfer, and other transactions with warehouse receipts. Registration systems operated largely for regulatory purposes, such as a registry of licensed or certified warehouses maintained by the licensing authority, are outside the scope of the Model Law and the following discussion. In some jurisdictions, internal records/registries maintained by warehouse operators play a role in completing the negotiation of a warehouse receipt and in transferring non-negotiable warehouse receipts where notifications or acknowledgements are required.

79. Other registration systems aim to enable the issuance and transfer of EWRs in commercial transactions (bailment of goods, sales, and secured transactions). These registration systems enable the issuance and transfer of warehouse receipts by electronic entries, replacing the traditional transfer mechanisms of delivering possession and endorsements. The design of these registries may vary from centralised to decentralised, and from single registry to sectoral registration systems.

80. Technology has enabled the issuing and transferring of EWRs, whether in a centralised platform-like model or privately. As trading platforms are contract-based, the fundamental question to tackle is whether and, if so, to what extent these contractual rules can fill, change, or somehow affect the transfer regime that warehouse receipts are subject to as documents of title in regard to the transfer of the property (*in rem*) rights (to the stored goods) reified in warehouse receipts. These platform-based models can also operate as exchange markets for options and futures contracts to delivery of commodities stored in warehouses.

81. The dynamics of the issuance and transfer of EWRs in or related to electronic registries and platforms raise a number of legal issues. The concepts of possession, delivery, and endorsement

⁴³ UCC § 7-503 (a)(1)(a). This is a restatement of the English Factors Acts.

must be reconsidered in the context of electronic transactions and digital assets. The design options to emulate the mechanics of warehouse receipts in a digital environment vary. Centralised registries, distributed systems, or decentralised systems can represent reliable methods of establishing control and enabling transfers of EWRs. An EWR system can also be designed to emulate “paper dynamics” with a digital-asset-based model. Digital assets then act as a functional equivalent to paper-based documents.

82. Several other aspects related to the use of technology in warehouse receipt systems may need to be considered, such as the accessibility of information in registries, confidentiality issues, or the possibility of dynamic updating, without human intervention, of certain information recorded on the EWR and/or registered in the registry with smart contracts and Internet of Things (IoT) devices.

1. Systems for the issuance and transfer of electronic warehouse receipts

83. Registration systems play various roles in warehouse receipt systems, which may be broadly divided into “regulatory” and “private law.” “Regulatory” refers to the institutional framework of a warehouse receipt system; for example, legislation may require registration of warehouse operators as a condition of authorizing their activities. As previously noted, these kinds of registration systems are however outside the scope of the current project as far as administrative and regulatory aspects are concerned. Regulatory aspects, whether or not they involve registration systems, may not be suitable for harmonisation given the variety of approaches taken domestically. The legal effect and validity of warehouse receipts issued by unregistered, or otherwise unlicensed, warehouse operators, the legal nature of the warehouse receipt, and the duties of the warehouse operator resulting from administrative law are scope issues that this section of the Issues Paper does not cover. In general, failure to register or obtain a license should not affect the duties of the warehouse operator in respect of the holder of a warehouse receipt.

84. Commercial laws impose duties on warehouse operators to maintain internal records/registries of all issued warehouse receipts, which perform a function similar to the company records of shareholders. Entries in these registries are generally not constitutive of rights to the stored goods, which are embodied in warehouse receipts. However, in some countries, negotiation of a warehouse receipt is completed upon notification of the issuer and its entry of the transfer in internal records. These registries may also play a role in transferring non-negotiable warehouse receipts that typically require a notification of the warehouse operator and relevant acknowledgment for their transfer. The registry then serves as a repository of the acknowledgments. Data to be included in these internal records may differ among jurisdictions (typically, capturing the mandatory information to be included in the warehouse receipts as prescribed by the law).

85. The function of these internal records is largely regulatory to facilitate supervision of warehouse operators and ensure compliance with the applicable regulatory framework. While the registry of licensed or certified warehouses maintained for regulatory purposes is typically centralised, these registration systems maintained by warehouse operators typically do not transmit the information to a central, publicly accessible database of issued warehouse receipts. The registry keeps track of deposits, withdrawals, and transfers of ownership. At times, the registry may also record security rights. One of its functions is to provide notice that a warehouse receipt has been properly issued and has not been forged (this is primarily the case where a paper receipt has been issued). The actual functions will also depend on the law, and the types of receipts it authorizes to be issued. For instance, if the law allows the issuance of paper warehouse receipts, it may also need to include a function for converting a paper warehouse receipt into an EWR.

Questions for the Working Group:

- *Should the Model Law preserve some role for these types of registries?*

- *Should the Model Law address at all aspects of operating registries that perform largely regulatory functions?*

2. Electronic registration systems for warehouse receipts

86. Another type of a registration system is one maintained to support commercial transactions, including bailments of goods, sales, and use of EWRs as collateral for loans. These registration systems do not complement the role of “paper” warehouse receipts, but rather enable the issuance and transfer of EWRs. They protect the rights of holders more efficiently in terms of precluding destruction, theft or other occurrences that may negatively affect those rights. Registration systems, as well as actual EWRs, provide a reliable method to ensure integrity of the information that is normally included in a paper warehouse receipt, including an indication of the time of issuance and transfer that enhances transparency.

87. Various technologies have enabled the electronic issuance and transfer of warehouse receipts, either directly between the parties, or more commonly by entries in the records of issuers. These registries differ from the internal ones of warehouse operators. Designs may vary: some are based on a centralised model maintained by a governmental or regulatory agency that warehouse operators may access to issue EWRs. The governmental or regulatory agency may also authorise technological platform providers, such as a commodity exchange, that warehouse operators may choose to use to issue EWRs. Finally, each warehouse operator may also maintain its own registration system. Depending on the legal and regulatory framework, a State may also provide registration systems of limited application, such as for agricultural goods or petroleum products.

Questions for the Working Group:

- *Should the Model Law prescribe a particular model for a State to establish and operate a registry for EWRs?*
- *What functions should the registry perform (e.g., issue and transfer may be effectuated only by entries in the registry)?*

3. Trading platforms

88. Trading platforms are contract-based systems. Warehouse operators and subsequent holders (parties) must be registered users of the platform to issue, transfer, and withdraw EWRs. Users join the platform by accepting their terms and conditions (membership agreement and platform internal policies). Platform regulations govern issuance, transfer, and other transactions with EWRs that are typically issued only by warehouses previously authorised by these platforms. In some cases, the platform owner itself owns warehouses.

89. Where general legislation enables the electronic issuance of warehouse receipts, these regulations define the specific requirements to establish exclusive control of a warehouse receipt and the reliable methods of transferring control within the platform. The platform operates an internal registry (ledger) enabling the issuance and transfer of EWRs by entries in that registry. The fundamental question posed by these platforms for the issuance and the transfer of warehouse receipts entirely based on agreements is to what extent these contractual rules can change, or somehow affect, the transfer regime that warehouse receipts are subject to as documents of title in regard to the transfer of the property (*in rem*) rights to the stored goods. Naturally, if the mechanisms deployed by these platforms meet the requirements for transfer of rights in warehouse receipts as provided in the applicable legislation, such transfers would have legal effects. The question arises when the deployed mechanisms do not entirely fit within the statutory framework or the mechanisms attempt to meet some general standards that may not clearly apply to warehouse receipts.

90. Platform-based models can also operate exchange-like trading systems for options and futures on commodities stored in warehouses. These trading platforms can be centralised and authorised by statutes like exchanges or alternative trading systems, in conformity with securities/derivatives laws or other capital-market-related regulations. The exchange typically licenses and supervises warehouses that are authorized to store commodities ready for delivery should the parties to the commodity contracts decide to take delivery of commodities, rather than settle their obligations by offsets, which is far more common.

91. The International Organization of Securities Commissions (IOSCO) encourages warehouses to adopt its set of Good or Sound Practices (the Practices), which it has published to assist them and their relevant oversight bodies to identify and address issues that could affect commodity derivatives' pricing and in turn affect market integrity and efficiency.⁴⁴ In relation to warehouses, the Practices encompass (i) oversight, (ii) transparency, (iii) fees and incentives, (iv) conflicts of interest, and (v) operations.⁴⁵ IOSCO expects the implementation of the Practices will lead to a more transparent and robust commodity storage and delivery environment that will benefit all commodity market participants.⁴⁶ The Practices include establishment of clear jurisdiction over warehouses by a market authority, such as an exchange or statutory regulator, to set minimum standards for participation and approval, as well as a clear process for dispute resolution between and among market participants and the warehouse, including restitution.⁴⁷

92. The Practices build on IOSCO's Principles for the Regulation and Supervision of Commodity Derivatives Markets developed in response to trends in the commodity derivatives market related to the scale, speed, and cross-border nature of these markets.⁴⁸ These Principles comprise five categories:

- Contract Design Principles
- Principles for Surveillance of Commodity Derivatives Markets
- Principles to Address Disorderly Commodity Derivatives Markets
- Principles for Enforcement and Information Sharing
- Principles for Enhancing Price Discovery on Commodity Derivatives Markets

93. Misconduct by entities involved in the storage and delivery of commodities, including warehouses, can impact derivative markets, but while financial regulators have the enforcement and investigative authority to address such misconduct, most financial regulators do not have direct oversight over warehouses.⁴⁹ However, they do generally have some authority over exchanges and how they oversee warehouses, although such authority varies according to jurisdiction.⁵⁰ This includes requiring exchanges to ensure that warehouses support the goal that derivatives contracts be priced effectively, settled efficiently and that the market remains orderly.⁵¹

⁴⁴ Commodity Storage and Delivery Infrastructures: Good or Sound Practices – Final Report (IOSCO, Feb. 2019), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD622.pdf> (last accessed 11 Sep. 2020).

⁴⁵ *Id.*, at 17–20.

⁴⁶ *Id.*, at 1.

⁴⁷ *Id.*, at 17.

⁴⁸ Principles for the Regulation and Supervision of Commodity Derivatives Markets – Final Report, at 63 (IOSCO, Sep. 2011), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf> (last accessed 11 Sep. 2020).

⁴⁹ The Impact of Storage and Delivery Infrastructure on Commodity Derivatives Market Pricing – Final Report, at 7, 25, (IOSCO, May 2016), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD530.pdf> (last accessed 11 Sep. 2020).

⁵⁰ *Id.*, at 7.

⁵¹ *Id.*, at 8.

94. Most commodity derivative exchanges and clearing houses act as regulators for warehouses that facilitate settlement of physically-delivered commodity derivatives contracts.⁵² Requirements imposed by exchanges may include the obligation to store a commodity of a quality specified in a derivatives contract appropriately and to deliver the specified quantity by the stipulated deadline.⁵³

Question for the Working Group:

- *Are any rules needed in the Model Law to enable transactions with EWRs on platforms?*

4. Electronic transfers: the mechanics

95. The mechanical aspects of issuing and transferring EWRs through an electronic registry (platform) raise a number of questions. Unlike paper warehouse receipts, the holder does not possess a document that it delivers to a transferee. Rather, entries in registries or control of an electronic/digital representation of the warehouse receipt are functional equivalents of the traditional transfer mechanisms of delivering possession and endorsements.

96. Registration (i.e. entries in the registry) replaces endorsement, possession of the document, its delivery, or the issuance of one or two documents (warehouse receipt and warrant/pledge bond provided for under some, mainly civil-law, jurisdictions as referenced in Section B.2 above) as traditionally employed in paper-based warehouse receipts to transfer rights over or perfect security interests in the stored goods. The issuance, the prescribed information, and all the subsequent transfers and transactions are contained in the chain of entries recorded in the registry.

97. Registries and platforms can be designed and operated as centralised systems or adopt a distributed or decentralised model. In a centralised system, the entries in the central registry serve as reliable methods to indicate control and enable transfers. The central operator of the registry acts as a trusted third-party ensuring the reliability of the registered information. In a distributed ledger technology (DLT) based model, entries are distributed in all or selected nodes. However, a DLT system is expected to be permissioned where a single or a small number of nodes confirm transactions with EWRs. Therefore, additional rules on the selection of these authorised nodes and the governance of the DLT system are necessary for the proper operation of decentralised systems.

98. As an alternative to registry and platform models, EWRs can emulate paper warehouse receipt dynamics with a digital-asset-based model. In this model, the digital asset is designed to operate as a functional equivalent to a paper document. Thus, it contains all the prescribed information, and the keeping and transfer of exclusive control over the digital asset replicates possession of a document and its transfer in a paper-based context. To that end, reliable technological methods must be implemented to guarantee the identification of the person holding exclusive control, the uniqueness of the digital asset, and the transfer of control.

99. As in the book-entry negotiable securities regimes, both the issuance and the transfer of the EWR are on a “nominative basis” as an entry in the registry always identifies the holder.

Questions for the Working Group:

- *Should registration be the exclusive mechanism for the issuance and transfer, or should transfers without involving an authority, such as by delivery of a digital asset be recognized as well?*
- *How should the registry be designed to enable transfers of EWRs (e.g., an account-based system where a transferor’s account is debited and the transferee’s credited)?*

⁵² Id.

⁵³ Id.

- *Should an entry in the registry constitute control over the EWR? How should security transfers be effectuated (e.g., by crediting the EWR into a special collateral account or blocking its disposal in the account of the transferor)?*
- *Should the Model Law contemplate and provide for rules for alternative models for EWRs (registry-based – either centralized or DLT-based – or digital-asset models)?*

5. Availability of information

100. Access to the registry and availability of the information to the public are relevant aspects in the design of the registry and the legal framework. Design decisions on the publicly available information and its accessibility to searchers are linked to commercial confidentiality considerations. The registry is expected to capture the same information that the law would prescribe to be included in a warehouse receipt. However, making that information accessible to the public at large may raise some objections as to the commercial sensitivity of that information. Information in a paper warehouse receipt would naturally be available only to the interested parties.

Questions for the Working Group:

- *Should the registry restrict access only to interested parties?*
- *If so, how should it enforce any access restrictions?*

6. Capturing information in an electronic warehouse receipt

101. Various technologies applied to the issuance and the transfer of EWRs invite discussions on the feasibility and the legal treatment of “dynamic” warehouse receipts, where some information in the document may be automatically changed while it is controlled by a person. Regulations for warehouse receipts that cover agricultural products require certain characteristics of the product to be recorded on the EWR. These properties may vary over time while the commodity is in a warehouse but could be periodically measured and recorded in a dynamic field of an EWR. The updated EWR would more accurately reflect the current condition and value of the underlying goods. Where the measurement of such properties is automated by the IoT, the EWR may be automatically updated using a smart contract without human intervention. In this scenario, the holder would not have the power to prevent these kinds of changes. The EWR issuer/provider would seem to qualify as the “person in control” in which case the holder would not have an absolute power to prevent changes to the record. In that respect, this control element replicates the feature of possession. This assumes that this particular change caused by a smart contract triggered by the IoT is attributable to the issuer rather than some system in which the EWR was issued.

102. The possibilities of dynamic updating of certain information recorded on the EWR can be enabled in the registry model. The registry operator may implement updating mechanisms based on smart contract and IoT devices, where such technology is available. Then, entries would be modified on an automatic basis with no human intervention.

Question for the Working Group:

- *How should the Model Law ensure that EWRs may enable information to be captured and updated in a dynamic fashion?*

F. Execution and priority of security rights and liens

103. This section explores rights in goods deposited under a warehousing contract that may arise by way of a statute (e.g., a warehouseman lien for unpaid charges), or consensually, such as security rights in warehouse receipts. The Working Group may wish to consider whether other priority

questions should be included in the discussion, particularly with respect to “preferential claims”, such as for owed taxes.

1. The warehouse lien

104. In warehousing contracts, parties do not perform their obligations synchronously. Typically, these agreements require depositors to pay only part of their fees at the time when goods are delivered in storage, while the balance is due either at regular intervals or at the time of redelivery. Conversely, warehouse operators are obliged to perform their services in whole or in part, prior to the time when depositors are required to discharge their payment obligations. Thus, warehouse operators almost invariably become unsecured creditors of their depositors and bear the associated default risk.

105. In some common law jurisdictions, lawmakers and courts have buttressed the position of warehouse operators by awarding them a lien. Generally, this lien is for any unpaid storage fees, it attaches to the goods held in storage by the warehouse operator and entitles the warehouse operator to retain possession of these goods until payment. However, across jurisdictions, there is significant variance regarding the character of this warehouse lien, its specific or general nature and whether it may secure a balance of account. Moreover, the rules governing priorities and its enforcement process are also subject to markedly different legal frameworks.

106. The Model Law could adopt one of two alternative approaches. It could choose not to award a lien to warehouse operators, leaving them to grapple with the counterparty default risk through contractual stipulations and consensual security rights. Alternatively, the Model Law could introduce a warehouse lien, the exact contours of which would need to be defined in considerable detail.

Comparative analysis

107. Civil law jurisdictions do not address the matter under consideration homogeneously. In jurisdictions influenced by the Napoleonic codifications, warehouse operators generally benefit from a lien in the deposited goods to secure their unpaid fees. Nevertheless, there is great diversity in the manner in which these legal systems regulate the scope of this lien, its priority regime and enforcement process.

108. In English common law, custodians that perform bailments for reward are not afforded the comfort of a common law lien. Such protection is only bestowed upon bailees that add value to the goods in their possession.

109. The UCC establishes an elaborate warehouse lien and supports it with a detailed enforcement regime.⁵⁴

Question for the Working Group:

- *Should the Model Law provide for a warehouse lien?*

2. Consensual security rights

110. The past two decades have witnessed the progressive emergence of a consensus regarding the key tenets that should be at the heart of a modern secured transactions law. The UNCITRAL Model Law on Secured Transactions (MLST) and its supporting Practice Guide represent the most recent and authoritative embodiment of this consensus.

⁵⁴ Cf. UCC § 7-209, 7-210.

111. With the aim of providing a structural blueprint and a substantive reference point for the Model Law, the discussion below reviews the legal framework articulated by the MLST for the taking of security in negotiable documents.

112. At the outset, two preliminary observations should be noted. First, the MLST provides rules for the taking of security in negotiable documents, understood as a broad category that includes all incarnations of this asset class. Care is required to determine whether this regime might benefit from adjustments specifically tailored for warehouse receipts. Second, the MLST intends negotiable documents exclusively as tangible assets in paper form that can be reduced into possession; there is no mention of electronic documents. Because of this stance, it is necessary to establish the extent to which the regime of MLST is viable for EWRs that are intangible in nature.

2.1 *Creation*

113. The MLST conceptualizes security rights as property rights in movable assets that are effective *erga omnes*. Nevertheless, this legislative instrument distinguishes between the moment when a security right becomes enforceable between grantor and secured creditor and that in which it becomes effective against third parties. In this schema, a security right is treated as having been created when grantor and secured creditor satisfy all requirements established for it to become enforceable *inter partes*.

General principles

114. Under the MLST, a security right may encumber any type of movable asset and secure one or more obligations of any type.

115. A security right is created by agreement between the grantor and the secured creditor, provided that the grantor has rights in the asset to be encumbered or the power to encumber it. For non-possessory security rights, such an agreement must be in writing – including electronic records – and signed, yet no terms of art or linguistic formulations are required. Security agreements must contain the information to identify the grantor and the secured creditor, as well as a generic or specific description of the encumbered asset and the secured obligation. Differently, for possessory security rights, the agreement can be oral provided that the secured creditor is in possession of the collateral.

116. A validly created security right extends into the identifiable proceeds of the encumbered assets. If the encumbered asset is commingled in a mass, the security right extends into that mass.
Asset-specific rules applicable to negotiable documents

117. For creation, the MLST contains an asset-specific provision that is cardinal to the effective use of negotiable documents as collateral. MLST Art. 16 states that:

“A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the document is in possession of the asset at the time the security right in the document is created.”

118. This provision receives the long-established principle that a negotiable document reifies rights in the assets it covers. It establishes that the creation of a security right in a negotiable document concurrently and automatically creates a security right in the goods covered by the encumbered document. Accordingly, a security right in goods deposited in a warehouse can be created simply by creating a security right in the relevant warehouse receipt.

119. Notably, MLST Art. 16 contains a material limitation to this principle. A security right in a negotiable document extends to the assets covered by that document, only if the issuer of the document is in possession of the assets when the security right is created.

Questions for the Working Group:

- *To what extent should the Model Law incorporate the general regime for the creation of security rights established by the MLST?*
- *Should the Model Law expressly establish that a security right in a negotiable warehouse receipt extends to the tangible asset covered by the receipt, provided that the issuer is in possession of the asset, directly or indirectly, at the time the security right in the receipt is created?*

2.2 *Perfection*

120. The MLST generally requires a distinct and ulterior act apart from creation in order for a security right to become effective against third parties. When this act is carried out the security right is said to have been “perfected”. Typically, the normative aim of perfection is to institute some form of public notice of the actual or potential existence of a security right in an asset and, thus, eliminate secret liens.

General Principles

121. The MLST establishes two primary methods to perfect a security right. First, a secured creditor can file a notice in a specifically designated security rights registry, the function of which is to enable to give notice of their rights to third party searchers, including other secured creditors or claimants as well as prospective buyers. Second, a secured creditor can perfect a security right by taking possession of the encumbered asset. Notably, in such cases, but subject to some narrow exceptions that also apply to warehouse receipts (see below para. 169), perfection is lost in the event of relinquishment of possession.

122. Accordingly, under the MLST, a security right in a warehouse receipt may be made effective against third parties either by registration in the general security rights registry or by transfer of possession of the receipt to the secured creditor during the period that the assets are covered by the receipt.

Asset-specific rules applicable to negotiable documents

123. The MLST contains an asset-specific provision that addresses perfection of security rights in negotiable documents. Its focus is on the relationship between the third-party effectiveness of a security right in a negotiable document and the third-party effectiveness of a security right in the tangible assets covered by the document. MLST Art. 26 states:

“1. If a security right in a negotiable document is effective against third parties, the security right that extends to the tangible asset covered by the document ... is also effective against third parties.

2. During the period when a negotiable document covers a tangible asset, a security right in the asset may also be made effective against third parties by the secured creditor’s possession of the document.

3. A security right in a negotiable document that was effective against third parties by the secured creditor’s possession of the document remains effective against third parties for [a short period of time to be specified by the enacting State] after the document or the asset covered by the document has been returned to the grantor or other person for the purpose of dealing with the asset.”

124. This provision contains three rules. First, consistently with MLST creation rules under which a security right in a negotiable document extends into the assets covered by the document, MLST

Art. 26.1 establishes that perfection of a security right in a tangible document automatically perfects the extending security right in the assets covered by the document.

125. Second, leveraging the link between negotiable document and covered goods, MLST Art. 26.2 establishes that, if a secured creditor has a security right in goods covered by a negotiable document, it may be perfected by registering a notice or taking possession of the goods, but also by taking possession of the negotiable document, for as long as the assets are covered by the document.

126. Third, the MLST acknowledges that a secured creditor may often wish to relinquish possession of a negotiable document to enable the grantor to deal with the assets in the course of the grantor's business (i.e. take redelivery of the deposited goods from the warehouse and sell them). In principle, this loss of possession would result in the lapse of third-party effectiveness, unless the secured creditor had also achieved third-party effectiveness through registration. MLST Art. 26.3 grants secured creditors a temporary period of automatic third-party effectiveness following relinquishment of possession of the document. Consequently, the security right remains effective against third parties' rights that arise during the temporary period even if the security right is not otherwise made effective against third parties before the expiry of the statutorily-determined period.

Questions for the Working Group:

- *Should the Model Law establish a special perfection regime for warehouse receipts?*
- *If so:*
 - Should the Model Law replicate the relevant provisions of the MLST? If so, would any adaptations be necessary?

2.3 Priority

127. The MLST contains an elaborate set of provisions that resolve conflicts between rights of competing claimants in a grantor's assets by establishing an order of priority. These rules determine whether and to what extent a secured creditor may obtain the economic benefit of its right in an encumbered asset in preference to any other competing claimant that derives its rights in that asset.

General principles

128. The key tenet that lies at the heart of the MLST priority framework is succinctly described by the phrase "first to register or, otherwise, to perfect". Competing security rights are ranked based on the time of registration or when they became effective against third parties (e.g., upon taking possession). If an encumbered asset is sold or otherwise transferred while the security right in that asset is effective against third parties, the buyer or other transferee acquires its rights subject to such security right.

129. The MLST complements this general priority tenet with several asset-specific rules which differ from it in that they are not temporal in nature. Notably, the claims of acquisition secured creditors and buyers in the ordinary course of business are governed by a priority regime that departs from the "first to register or, otherwise, to perfect" axiom. Similarly, the priority regime for competing claims to warehouse receipts focuses on facilitating their negotiability and circulation rather than temporal considerations.

Asset-specific rules applicable to negotiable documents

130. The MLST establishes a special priority regime to govern conflicts between rights of competing claimants in a grantor's negotiable document and the assets that it covers. MLST Art. 49.1 states:

“... a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right made effective against third parties by any other method.”

131. This rule governs priority among competing security rights in the same negotiable document. It grants priority to secured creditors that perfect their security right by taking possession of the negotiable document over those who do so by registration. Temporal considerations aside, the normative aim of this priority rule is to encourage reliance on negotiable documents as a medium of commerce.

132. MLST Art. 49.2 establishes an exception to the rule in MLST Art. 49.1:

“Paragraph 1 does not apply to a security right in a tangible asset other than inventory if the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of:

- (a) The time that the asset became covered by the negotiable document; and
- (b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time to be specified by the enacting State] from the date of the agreement.”

133. This rule limits the reach of the non-temporal priority rule in MLST Art. 49.1 for assets other than inventory. It addresses a conflict between a secured creditor that has perfected a security right in certain assets and a competing claimant who later takes possession of a subsequently issued negotiable document which covers those same assets. To resolve such a conflict, MLST Art. 49.2 departs from the rule in MLST Art. 49.1 and returns to the general priority regime of the MLST based on temporal order. The rationale is to prevent negotiable documents and their priority regime from being used as tools that allow grantors to upset the expectations of secured creditors. Nevertheless, it should be noted that the rule in MLST Art. 49.2 does not apply to inventory (defined as tangible assets held by the grantor for sale or lease in the ordinary course of the grantor’s business), as the MLST takes the view that protecting the negotiability of documents covering this type of collateral is paramount.

134. MLST Art. 49.3 completes the special priority regime for negotiable documents. It addresses conflicts between a transferee of a negotiable document that obtains possession and secured creditors that hold a security right in that same negotiable document and the tangible assets covered by it that was not perfected through possession. In such cases priority is awarded to transferees who take possession of the document, provided that they have satisfied the negotiation requirements established by the applicable law.

Questions for the Working Group:

- *Should the Model Law replicate the priority regime of the MLST?*
- *Should the policies and principles of this regime be made applicable to EWRs (see further discussion in Section E., above)?*

2.4 *Enforcement*

135. The MLST provides an elaborate enforcement regime for security rights. On one hand, this body of rules enables secured creditors to exercise control over the encumbered assets and obtain satisfaction for their secured obligation. On the other, it puts protections in place for the grantor to

safeguard their residual proprietary interest in the collateral. The challenge is to balance the diverging prerogatives of secured creditors and grantors.

General principles

136. The secured creditor can exercise post-default rights either through judicial proceedings or through out-of-court measures. The MLST provides for a set of extra-judicial remedies, but also empowers the parties to provide for additional remedies in their security agreement. Regarding extra-judicial enforcement, repossession of the collateral is conditional upon the security agreement expressly contemplating this option and the secured creditor notifying both the grantor and whomever might be in possession of the collateral. Notably, opposition to such notice of the person in possession of the collateral halts the extra-judicial process. When the secured creditor is already in possession of the warehouse receipt and the goods are in possession of a warehouse operator who has no grounds to object, this structure facilitates extra-judicial enforcement. Similarly, if the secured creditor seeks to either dispose of or acquire the collateral extra-judicially, they must notify the grantor and any other competing claimants. Regarding judicial enforcement, the MLST defers to the procedural rules of the relevant jurisdiction but requires that distribution of the proceeds comply with its priority regime.

137. The MLST provides secured creditors with two enforcement options in the event of debtor default. They may repossess and dispose of the encumbered assets (e.g., by sale) and distribute the proceeds pursuant to the applicable priority rules. Alternatively, they may propose to acquire the encumbered asset in total or partial discharge of their unsatisfied secured obligation.

Asset-specific rules applicable to negotiable documents

138. The MLST does not provide asset specific rules for the enforcement of security rights in negotiable documents. Accordingly, the regime generally applicable for all assets also covers warehouse receipts.

Questions for the Working Group:

- *Should the Model Law incorporate an enforcement regime for security rights in warehouse receipts which replicates the extra-judicial options provided by the MLST?*
- *The MLST invites States to institute or designate expedited judicial proceedings. Should the Model Law provide for such expedited remedies?*

2.5 *Conflict of laws*

139. The MLST includes a detailed, mandatory regime of conflict-of-laws provisions addressing all facets of secured transactions, including creation, perfection, priority, and enforcement, as well as the mutual rights and obligations of the grantor and the secured creditor.

General principles

140. The mutual rights and obligations of the grantor and secured creditor arising from their security agreement are governed by the law chosen by the parties and, in the absence of a choice of law, the law governing the security agreement. Creation, perfection and priority of security rights in tangible assets are governed by the law of the State in which the asset is located (*lex rei sitae*). For all matters concerning enforcement, the applicable law is that of the State in which the encumbered asset is located at the time enforcement proceedings commence.

Asset-specific rules applicable to negotiable documents

141. The MLST articulates a conflict-of-laws regime for negotiable documents that differs slightly from that generally applicable to tangible assets.

142. First, while creation and perfection of security rights in these assets are governed by the rule generally applicable to tangible assets, MLST Art. 85.2 provides a special rule for priority:

“The law applicable to the priority of a security right in a tangible asset covered by a negotiable document made effective against third parties by possession of the document as against the right of a competing claimant is the law of the State in which the document is located.”

143. Thus, if a tangible asset located in one State is covered by a document in possession of a secured creditor in a different State, the priority of the security right in the asset covered by that encumbered document as against the rights of competing claimants will be governed by the law of the State in which the document is located, and not by the law of the State in which the asset covered by that document is located.

144. Second, MLST Art. 96 sets out the conflict-of-laws rule that governs the rights and obligations between issuers of negotiable documents and secured creditors:

“The law governing the rights and obligations between ... an issuer of a negotiable document and the grantor of a security right in that ... asset also is the law applicable to:

- (a) The rights and obligations between the secured creditor and the ... issuer;
- (b) The conditions under which the security right may be invoked against the ... issuer; and
- (c) Whether the obligations of the ... issuer have been discharged.”

145. This provision establishes that the conflict-of-laws rules that normally govern perfection and enforcement do not apply vis-à-vis the issuer of a document. Rather, the law applicable to these issues is the law that governs the legal relationship between the grantor and the issuer of the document.

146. The ratio of MLST Art. 96 is that commercial actors who issue negotiable documents governed by a determinate law, should not be subjected to a different law for their rights and obligation due to a transaction to which they are not privy resulting from a transfer of a warehouse receipt.

Question for the Working Group:

- *Should the Model Law incorporate conflict-of-laws rules governing security rights in warehouse receipts?*

2.6 *The Model Law on Secured Transactions and electronic warehouse receipts*

147. The regime articulated by the MLST for taking security in negotiable documents appears to be conceptually compatible with EWRs. Nevertheless, there are two problematic issues that need consideration.

a) Warehouse receipt possession and EWR control

148. Multiple MLST cardinal rules for creation, perfection, priority and enforcement of security rights are conditional upon taking possession. This requirement is ontologically incompatible with EWRs, as the MLST limits possession exclusively to tangible assets. Thus, if the Model Law were to incorporate the regime of MLST for the taking of security in negotiable documents, the viability of

EWRs as collateral would require the adoption of a concept that is functionally equivalent to possession but is compatible with intangible assets.

149. As previously mentioned, the MLETR addresses the possession requirement for electronic transferable records in its Art. 10 and 11. According to Art. 10, an electronic transferable record is functionally equivalent to a transferable document or instrument if that record contains the information required to be contained in a transferable document or instrument, and a reliable method is used to: (i) identify that electronic record as the electronic transferable record; (ii) render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and (iii) retain the integrity of that electronic record.

150. That article is coupled with Art. 11 pursuant to which the possession requirement is met with respect to an electronic transferable record if a reliable method is used to: (i) establish exclusive control of that electronic transferable record by a person; and (ii) identify that person as the person in control. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.

151. A conceptually similar approach was adopted by the Rotterdam Rules. According to Art. 1(22), "the 'transfer' of a negotiable electronic transport record means the transfer of exclusive control over the record". Art. 8 on the use and effect of electronic transport records determines that, subject to the requirements set out in the Rules:

"(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document."

On the procedures for use of negotiable electronic transport records, Art. 9(1) prescribes that

"The use of a negotiable electronic transport record shall be subject to procedures that provide for:

- (a) The method for the issuance and the transfer of that record to an intended holder;
- (b) An assurance that the negotiable electronic transport record retains its integrity;
- (c) The manner in which the holder is able to demonstrate that it is the holder; and
- (d) The manner of providing confirmation that delivery to the holder has been effected, or that [...] the electronic transport record has ceased to have any effect or validity."

152. A similar approach to regulating the possession requirement for electronic documents based on the notion of control is found in UCC §§ 7-106, 7-501. UCC § 7-106 defines the notion of Control of Electronic Document of Title:

"(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a), and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:

- (1) a single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;
- (2) the authoritative copy identifies the person asserting control as:
 - (A) the person to which the document was issued; or
 - (B) if the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;
- (3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- (4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.”

153. This section is coupled with UCC § 7-501 pursuant to which transfer of control of an electronic document of title has equivalent legal effects to the endorsement of a paper document of title.

b) Location of EWRs

154. Several rules in the MLST conflict-of-laws framework rely on the location of the asset to determine the applicable law. Even the asset-specific provisions for negotiable documents explicitly refer to the “State in which the document is located”. Nevertheless, this connecting factor is not suitable to EWRs that are intangible and will likely be digital, stored on a network and possibly tokenized on a DLT system. Instead, a variety of possible connecting factor require careful consideration, including the law of the grantor, the law of the issuer of the negotiable document, or the law of the location of the underlying goods.

Question for the Working Group:

- *Should the Model Law include a conflict-of-law rule specific for security rights in [and outright transfers of] EWRs?*

G. Rights and obligations of the warehouse operator

155. The core contractual obligations of the warehouse operator are to (i) take delivery of the depositor’s goods, (ii) store them for safekeeping, and (iii) redeliver the deposited goods either to the depositor or another person entitled to delivery. Operators typically assume other obligations, the mechanics of which are prescribed in the warehouse receipts, such as the right of the depositor to access the warehouse.

Recommendation for the Working Group:

- *When reviewing the following sections, the Working Group is invited to preliminarily consider whether the Model Law should contain provisions on the warehouse contract or rather focus on the receipts. As a possible alternative, rather than in the text of the Model Law, the warehouse contract could be addressed in a guide to enactment.*

However, it is not recommended that the Group decides on this question before its work overall has reached a more advanced stage.

1. Standard of care

156. Warehouses offer a custody service in return for a fee. A fundamental normative issue is whether or not they should be subject to a standard of care when performing their contractual obligations. Moreover, if a standard of care is adopted, it would then be necessary to determine its substantive content and whether it should be enshrined in either a default or mandatory rule.

157. Influenced by Roman law and the Napoleonic codifications, civil law jurisdictions have almost ubiquitously imposed a duty of care on persons performing service contracts, including non-gratuitous deposit contracts. Similarly, common law jurisdictions have long established that commercial operators offering services both to consumers and businesses should be subject to a duty of care. Historically, both in civil and common law jurisdictions, the policy aim of these rules has been to curtail sharp contract practices and untoward behaviour that prevailed when service markets were solely governed by the *caveat emptor* standard.

158. The Model Law could adopt one of several alternative approaches. It could remain silent on this issue, deferring to general contract law principles governing bailments and service contracts in the relevant jurisdiction. Alternatively, the Model Law could establish a specific standard of care that would apply either as a default or mandatory rule to the performance of all or some of the obligations owed by the warehouse operator.

Comparative overview

159. In civil law jurisdictions, warehouse operators are typically required to perform their service obligations with the level of diligence expected of a professional operator in the relevant sector. The precise content of this standard is a matter for the courts on a case by case basis and can differ markedly across jurisdictions. Notably, in some systems this duty of care is mandatory while in others it can be altered by the parties.

160. In some common law systems such as the US UCC, a warehouse operator must perform its obligations with regard to the goods as “a reasonably careful person” would exercise under similar circumstances. US courts have held that this standard demands the level of care that an ordinarily prudent person engaged in that business is in the habit of exercising toward property entrusted for safekeeping, the degree of care that ordinarily prudent warehouses are accustomed to exercise with respect to similar goods under like circumstances, or the standard as a prudent person would exercise over that person’s own property. Moreover, US courts have articulated this standard of care into specific obligations regarding incidental acts or omissions in connection with the storage, the quality and condition of the place where the goods are stored. This standard of care is mandatory, though parties are at liberty to agree a higher standard of care.⁵⁵

Questions for the Working Group:

- *Should there be a rule establishing a specific standard of care applicable to warehouse operators?*
- *If so, should this rule be default or mandatory?*

⁵⁵ Cf. UCC § 7-204.

2. Storage of goods: separation, blending and commingling of stored goods

161. The obligation to store the goods delivered by the depositor is at the core of the warehousing contract. In principle, the warehouse is at liberty to store deposited goods as best suits its operation, albeit within the constraints of any applicable standard of care. Alternatively, the parties may contractually stipulate that the deposited goods need to be stored in a particular manner and possibly kept separate from all other deposited goods in storage.

162. The difficulty in leaving the issue under consideration exclusively to party autonomy is that the manner in which goods are stored can have ramifications that go beyond individual contractual agreements and personal claims, also giving rise to property law conundrums. Specifically, if deposited goods are blended, difficulties may arise in subsequently separating the goods. Even more problematically, if deposited goods are commingled into a mass, in such a way that they are no longer distinguishable, an even broader range of questions require consideration. *Inter alia*, it is necessary to establish the respective proprietary rights of each depositor into the commingled mass (e.g., ownership in common or other proprietary arrangement). Moreover, it is necessary to determine both the proprietary rights, contractual claims and possibly restitutionary claims of each depositor, if a commingled mass results in a shortfall of available goods either due to unforeseen loss or because of an over issuance of documents of title on the part of the warehouse.

163. The Model Law could adopt one of several alternative approaches. First, it could remain silent on this issue, leaving it to parties to address claims *in personam* in their agreement and tacitly deferring to personal property law for all claims *in rem* stemming from both lawful and wrongful commingling of goods. Alternatively, the Model Law could establish a regime that imposes either default or mandatory obligations on the warehouse operator regarding the manner in which goods must be stored – addressing both commingling and blending – coupled with special rules that address proprietary claims associated with commingled masses of goods.

164. For example, where a jurisdiction has decided to regulate the matter, warehouse receipts legislation may distinguish between fungible and non-fungible goods. For non-fungible goods, legislation may require warehouses to keep deposited goods separated to permit both identification and redelivery at all times. By contrast, for fungible goods, it may expressly allow warehouses to consolidate deposited goods into a commingled mass, unless otherwise agreed. It may also address explicitly some of the proprietary issues that arise when fungible goods are commingled, for example whether they are owned in common by the persons entitled thereto.

Questions for the Working Group:

- *Should there be rules that require the warehouse operator to keep deposited goods separated?*
 - *If so: Should this rule be default or mandatory?*
- *Should there be rules that address proprietary, contractual and restitutionary claims if goods are either blended or commingled into a mass?*

3. Obligation to redeliver

165. The obligation to redeliver the deposited goods is a cardinal element of warehousing contracts. Two sets of issues deserve special attention: a) the terms pursuant to which the redelivery obligation is performed; and b) whether there are defences that absolve the warehouse operator from performance of this obligation vis-à-vis a person who is entitled to take delivery of the goods under the warehousing contract or the associated warehouse receipt.

a) Performance

166. A warehouse operator has a duty to redeliver the deposited goods. Performance of this obligation is governed by the applicable law and the terms of the warehouse receipt.

167. In both common law and civil law jurisdictions, rules are often found that address specific facets of the redelivery obligation. For example, a common default rule is that the warehouse operator must redeliver the identical property stored, yet for fungible goods it may redeliver substitute goods, as long as they are of the same kind and quantity as the goods originally stored. Similarly, default rules often tackle the modalities of redelivery, including the time and place of performance.

168. The Model Law could adopt one of several alternative approaches. It could remain silent on this issue leaving it entirely to party autonomy and defer to the courts regarding any gaps and omissions in the parties' contractual agreement. Alternatively, the Model Law could establish a kernel of default rules addressing some of the most common issues encountered in performance of redelivery.

Comparative overview

169. In most civil law jurisdictions, the redelivery obligation of warehouses is governed by detailed mandatory rules that are often buttressed by administrative sanctions.

170. UCC Art. 7 does not address the substance of the redelivery obligations. Nevertheless, certain states have developed a wealth of case law establishing default rules that supplement the parties' warehousing agreements.

Questions for the Working Group:

- *Should there be rules articulating the substance of the redelivery obligation of warehouse operators?*
- *If so, should they be default or mandatory?*

b) Defences to redelivery

171. A warehouse operator is always justified in refusing to deliver deposited goods to a person that is not entitled to delivery. Conversely, a warehouse operator is liable if it fails to redeliver the deposited goods on demand to a person who is entitled to their possession under the warehousing contract or on presentation of a warehouse receipt.

172. A warehouse operator is also absolved for any such breach if it falls outside of the idiosyncratic liability regime for injury or loss of the deposited goods that applies to warehousing agreements (see F.6, below). However, in addition to these general exemptions, laws governing warehouse contracts often expressly articulate narrower exceptions that specifically address certain failures to perform the redelivery obligation.

173. The aforementioned exceptions can typically be divided into three categories. First, a warehouse operator's failure to redeliver the deposited goods is excused if it has already delivered the goods to a person whose receipt was rightful as against the claimant. Second, a warehouse is excused from its redelivery obligations if it disposed of the deposited goods in lawful enforcement of its lien or on the lawful termination of storage. Third, a warehouse is excused from redelivery if it refuses to perform because of a personal defence against the claimant. Notably, these exceptions all have their roots in general principles of property law, contract law and the law of restitution.

174. The Model Law could adopt one of several alternative approaches. It could remain silent on this issue and rely on the application to the relevant principles of property law, contract law and the law of restitution. Alternatively, it could explicitly establish specific exceptions to increase legal certainty and simplicity.

175. Laws typically establish a list of “excuses” that exempt a warehouse from liability for failure or delay in redelivery. Those clauses may be phrased as follows:

“A bailee shall deliver the goods to a person entitled under a warehouse receipt ... unless and to the extent that the bailee establishes any of the following:

- (1) delivery of the goods to a person whose entitlement to the goods was rightful as against the claimant;
- (2) damage to or delay, loss, or destruction of the goods for which the bailee is not liable;
- (3) previous sale or other disposition of the goods in lawful enforcement of a lien or on a warehouse’s lawful termination of storage;
- (4) release, satisfaction, or any other personal defence against the claimant; or
- (5) any other lawful excuse.”⁵⁶

Questions for the Working Group:

- *Should there be a rule establishing specific excuses to the warehouse operator’s redelivery obligation?*
- *If yes, should they be default or mandatory?*

4. Accessory obligations

176. The obligations of the warehouse operator to take delivery, store, allow inspection of and redeliver goods are cardinal. Nevertheless, alongside these obligations, it is possible to configure ulterior duties that may have a material impact on facilitating optimal performance of warehousing contracts and, in turn, the commercial use of warehouse receipts. For example, obligations requiring the warehouse to maintain its facilities in line with certain structural standards, implement security measures, employ personnel with certain qualifications or procure insurance cover for risks relevant to the storage of the goods in question.

177. These obligations are not necessarily closely related to a single warehousing contract, rather to the carrying out of the storage for hire activity of a warehouse in a holistic sense. Accordingly, it is a matter for consideration whether such obligations are most effectively implemented as contractual obligations, administrative law duties, or a combination of the two.

178. The Model Law could adopt one of several alternative approaches. First, it could remain silent on this issue, leaving it to market forces to determine whether warehouses commit to undertakings of this nature. Alternatively, the Model Law could nudge warehouses towards assuming these undertakings through default contractual obligations. Otherwise, the Model Law could suggest linking such obligations to the administrative law framework governing the warehousing activity. The remedial and enforcement pathways would, in particular, differ profoundly depending on whether these obligations were articulated as contractual or administrative.

⁵⁶ Cf. UCC § 7-403.

Comparative overview

179. The French Commercial Code specifically articulates a set of warehouse obligations concerning the state of the storage facilities, staff qualifications, security measures and others. This Code, in particular, also requires warehouses to take out insurance against fire damage.

180. Under English law, courts have held that the bailee's standard of care extends to the appointment, training and supervision of its staff, as well as monitoring the condition of stored goods, notifying the depositor of adverse events, and installing security measures. By contrast, English courts have held that warehouses are not required to insure the deposited goods, unless the parties agree otherwise, or such obligation arises due to trade customs or special circumstances.

181. UCC Art. 7 does not expressly impose obligations on the warehouse regarding its operational standards or insurance cover. Nevertheless, US state courts have articulated the standard of care imposed on bailees by the UCC into a multiplicity of specific obligations including duties regarding the condition of the warehouse, staff qualifications, preventive measures against fire, water damage, meteorological events and other hazards for staff. Notably, these same courts have held that warehouses are not required to insure deposited goods.

Questions for the Working Group:

- *Should there be rules that expressly impose accessory obligations on warehouse operators?*
- *If so:*
 - *Should these requirements be articulated as contractual obligations or administrative duties?*
 - *If articulated as contractual obligations, should they be default or mandatory?*

5. Option to terminate storage

182. Storage of goods may be performed over an extended period of time. In principle, the duration of storage is either fixed (typically seasonal) or for an indefinite term; in practice, open-ended duration tends to be the norm in most trades.

183. For warehouse operators, it is generally unproblematic to organise their operation in such a way as to satisfy requests to redeliver deposited goods at short notice. In fact, it is extremely common to find warehousing contracts stipulating that depositors – or their order – can recover the goods on reasonable demand or subject to a 24 hours' notice period. By contrast, it is generally arduous to take redelivery of goods at short notice for depositors, as they tend not to have the necessary facilities and must rely instead on third parties. Thus, unexpected requests to take redelivery of deposited goods are likely to be extremely onerous for depositors, possibly resulting in distressed sales of the deposited goods at sub-market prices or even injury or loss to the goods.

184. This structural imbalance raises the issue whether the law should limit the extent to which warehouse operators can require depositors to take redelivery of deposited goods at short notice. The Model Law could remain silent on this issue, leaving this matter to party autonomy. Alternatively, the Model Law could set out default rules to establish a negotiating starting position, coupled with mandatory rules that address especially problematic scenarios.

185. Some laws address this issue in detail. As a general principle, these texts recognize that, in an open-ended agreement, warehouses can demand that the depositor – or their order – pay outstanding charges and recover deposited goods at any moment in time, subject to a certain notice period.

186. By way of exception, laws such as the UCC also provide that the notice period – which is 30 days according to the UCC – may be reasonably shortened if a warehouse believes in good faith that deposited goods are about to deteriorate or decline in value below the amount of outstanding charges subject to a lien held by the warehouse in the deposited goods. The 30 days' notice can also be shortened or entirely disregarded if, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, the warehouse may sell the goods at public or private sale without advertisement or posting on reasonable notification to all persons known to claim an interest in the goods.⁵⁷

Questions for the Working Group:

- *Should there be a rule limiting the right of a warehouse to terminate storage?*
- *If so, should this rule be mandatory or default?*

6. Warehouse liability

187. The liability regime for warehouses can be broken down into three key elements: (i) basis of liability, (ii) burden of proof, and (iii) limitation and exclusions.

a) Basis of liability

188. Since classical Roman Law, special liability regimes have been established for arrangements whereby one person is voluntarily in possession of goods which belong to another and is subject to an obligation to return them in due course. Moreover, liability regimes have, over the course of centuries, been differentiated according to whether such arrangements were gratuitous or for reward, with further distinctions having been drawn based on the activities carried out by the person in custody of the goods – naval carrier, innkeeper, restaurant, grain elevator, deposit vault.

189. The Model Law could adopt one of several alternative approaches. It could remain silent on this topic, deferring to the basis of liability generally adopted by the relevant jurisdiction for these kinds of transactions. However, it should be noted that the basis of liability for warehouse operators is one of the key aspects of the body of rules governing warehousing contracts, and has far-reaching implications on the commercial use of warehouse receipts as documents of title. Alternatively, the Model Law could either establish a regime of strict liability for warehouses or one that only holds them accountable when they fail to comply with the standard of care demanded of them in performing their obligations. In principle, both of these bases of liability are viable, yet they substantively alter the risk profiles assumed by warehouse operators and depositors respectively.

Comparative overview

190. Both under English law and the UCC, it has long been held that warehouse operators are not liable for losses or injury to deposited goods if they occurred without negligence. Accordingly, warehouse operators are not subject to a strict liability regime, rather one that is based on fault and anchored to the applicable standard of care. Notably, parties may agree upon a stricter liability regime for warehouse operators.⁵⁸

191. By contrast in most civil law jurisdictions – such as France, Italy and Germany – warehouse operators are subject to a strict liability regime for loss or damage to goods, which is mandatory and is expressly crafted as stricter than what is generally applicable for breach of contract. Typically, the only admissible exceptions to such liability are when the deposited goods were damaged or perished

⁵⁷ Cf. UCC § 7-206.

⁵⁸ Cf. UCC § 7-204.

due to an action or omission of the depositor, or unmitigable intrinsic flaws, or as a consequence of a fortuitous and unforeseen event.

Questions for the Working Group:

- *Should there be a rule establishing a special basis of liability for warehouse operators?*
- *If so:*
 - Should this special basis of liability cover all the obligations of a warehouse operator or only loss and damage to the goods? What about delay?
 - Should this basis of liability be mandatory or default?

b) Burden of proof

192. Warehouse liability for breach of its obligations presents burden of proof issues at two interconnected levels. First, burden of proof needs to be allocated regarding which party must evidence the substance of the obligations owed by the warehouse operator. Second, burden of proof needs to be allocated regarding which party must adduce evidence that such obligations have been breached.

193. The Model Law could adopt one of several alternative approaches. It could remain silent on this topic, deferring to the private law and procedural law regimes of the jurisdiction in question. Alternatively, it could establish special burden of proof rules. Regarding the first level, it is almost inevitable that burden of proof should be on the depositor who alleges a breach of contract. For the second level, however, the Model Law may consider switching the burden of proof wholly or partly from the depositor to the warehouse operator, depending on the normative objectives pursued.

Comparative overview

194. In most civil law jurisdictions, the burden of proof is almost entirely placed on warehouse operators, as soon as depositors have shown that the loss or damage to the deposited goods occurred while they were in storage. Because these legal systems generally subject warehouse operators to strict liability, this burden of proof regime compounds their position as *de facto* insurers of the deposited goods. This burden of proof regime is mandatory.

195. English law has long established a special burden of proof regime for warehousing agreements. In the first place, burden of proof lies with the depositor to show that the warehouse operator was voluntarily in possession of the deposited goods and that during this time they were either damaged or destroyed. Typically, depositors discharge this burden of proof by adducing evidence documenting that the goods were either not redelivered at all or that they were redelivered in worse condition than that they were in at the time of deposit. If such matters are proven, the burden of proof shifts to the warehouse operator. It is for the warehouse to show that it took care of the deposited goods in line with the required standard of care or that any failure to exercise such care did not cause or contribute to the loss or damage in dispute. This burden of proof regime is mandatory.

196. The UCC does not establish a uniform rule regarding the burden of proof regime for warehouse liability. The commentary to § 7-403(1)(b) expressly states that the allocation of the burden of proof is governed by the procedural law of the various states. This legislative stance has resulted in a fragmented legal framework. A narrow majority of states have adopted a burden of proof regime substantively analogous to that established by English law. However, a sizeable minority of states places the burden of proof almost entirely on depositors. They are required to adduce evidence proving the existence of the breached obligation, the loss or damage to the goods, and also that the warehouse was negligent in its operations. This fragmented burden of proof regime has attracted sharp criticism from both courts and commentators.

Questions for the Working Group:

- *Should there be a rule establishing a special burden of proof regime for the liability of warehouse operators?*
- *If so:*
 - Should the warehouse operator be subject to a greater burden of proof than that typically placed on defendants in a breach of contract claim?
 - Should this rule be mandatory or default?

c) Limitations and exclusions

197. Stipulations that exclude and limit liability for breach of contract are generally permitted by contract law, both in civil and common law jurisdictions. This is a corollary of the underlying freedom of contract principle. Nevertheless, limitation and exclusion terms are typically subject to close judicial scrutiny (e.g., narrow construction, *contra proferentem* interpretation) and are often regulated by statutes that aim to prevent certain market participants from exploiting their bargaining power, especially vis-à-vis consumers.

198. The limitation and exclusion of warehouse liability is a complex topic that requires careful consideration of multifarious factors. From a perspective *de iure condendo*, the challenge is to develop a limitation and exclusions regime that strikes the balance between the competing interests at play. At one end of the spectrum, if warehouse operators are allowed to completely exclude their liability, there is a risk that prospective depositors will shy away from using storage services; moreover, warehouse receipts will become unpalatable to market participants due to the absence of recourse against warehouse operators. At the other end of the spectrum, if warehouse operators are entirely prevented from limiting their liability for damage or loss, they might be unable to manage their risk *ex ante* and thus either not accept deposits or make the cost of storage extremely expensive.

199. The Model Law could remain silent on this topic, deferring to the private law of the jurisdiction in question and its general regimes on limitation and exclusion of liability. However, it should be noted that whether and the extent to which a warehouse operator may limit its liability for loss or damage to the goods are an essential element of the legal framework governing warehousing contracts. Alternatively, the Model Law could seek to develop a mandatory regime that strikes a balance between the need of warehouse operators to keep their maximum liability under control and the need of depositors and warehouse receipt holders to have recourse against warehouses if the deposited goods are lost or damaged.

Comparative overview

200. In France and other jurisdictions that have been influenced by the Napoleonic codifications, liability of warehouse operators is often limited by law. Administrative authorities establish ad hoc computational rules on the basis of which the maximum liability of warehouse operators is established, depending on the nature and value of the stored goods. It should be borne in mind that these rules exist in legal frameworks in which warehouse operators are subject to strict liability.

201. English Law has historically favoured the practice of limiting or exempting bailees, including warehouse operators, as regards their liability for loss or damages of the stored goods. Nevertheless, courts have expressly voided attempts to exempt liability for fraud as well as conversion for own benefit. Moreover, it should be noted that limitation and exclusion terms are generally subject to a substantive test of “reasonableness” pursuant to the Unfair Contract Terms Act 1977.

202. The UCC provides that warehouses may contractually exclude or limit their liability – both directly and indirectly – for loss or damage to the goods. The only mandatory bar concerns attempt to limit liability for conversion:

“(b) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse's liability for conversion to its own use”

“(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the bailment may be included in the warehouse receipt or storage agreement.”

203. Notably, the UCC acknowledges that other laws might void any contract term limiting or excluding warehouse liability.⁵⁹

⁵⁹ Cf. UCC § 7-204.

ANNEXE**ADDITIONAL RESOURCES**UNCITRAL Instruments

UNCITRAL, UNCITRAL Legislative Guide on Secured Transactions (2007)
https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf

UNCITRAL, UNCITRAL Guide on the Implementation of a Security Rights Registry (2013)
<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/security-rights-registry-guide-e.pdf>

UNCITRAL, UNCITRAL Model Law on Secured Transactions (2016)
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf

UNCITRAL, UNCITRAL Model Law on Secured Transactions: Guide to Enactment (2017)
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlst_guide_to_enactment_e.pdf

UNCITRAL, UNCITRAL Practice Guide to the Model Law on Secured Transactions (2019)
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10910_e.pdf

Other Instruments

OAS, Principles for Electronic Warehouse Receipts for Agricultural Products (2016)
http://www.oas.org/en/sla/iajc/docs/CJI-doc_505-16_rev2.pdf

OAS, Model Inter-American Law on Secured Transactions (2002)
https://www.oas.org/dil/Model_Law_on_Secured_Transactions.pdf

Global SCF Forum, Standard Definitions for Techniques of Supply Chain Finance (2016)
<https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-Standard-Definitions-for-Techniques-of-Supply-Chain-Finance-Global-SCF-Forum-2016.pdf>

Guides and Publications

FAO, The Use of Warehouse Receipt Finance in Agriculture in Transition Countries (2013)
<http://www.fao.org/3/a-i3339e.pdf>

FAO/EBRD, Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends (2015)
<http://www.fao.org/3/a-i4318e.pdf>

IFC, Warehouse Finance and Warehouse Receipt Systems - A Guide for Financial Institutions in Emerging Economies (2013)
https://collaboration.worldbank.org/content/usergenerated/asi/cloud/attachments/sites/collaboration-for-development/en/groups/agrifin/products/jcr:content/content/primary/blog/warehouse_financean-TQr3/Warehouse%20Finance%20and%20Warehouse%20Receipt%20Systems.pdf

IOSCO, Commodity Storage and Delivery Infrastructures: Good or Sound Practices, Consultation Report (2018)

<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD604.pdf>

IOSCO, Principles for the Regulation and Supervision of Commodity Derivatives Markets (2011)

<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf>

IOSCO, The Impact of Storage and Delivery Infrastructure on Commodity Derivatives Market Pricing (2016)

<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD530.pdf>

WBG, A Guide to Warehouse Receipt Financing Reform: Legislative Reform (2016)

<http://documents1.worldbank.org/curated/en/885791474533448759/pdf/108450-WP-PUBLIC.pdf>