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

***Second session (hybrid)***  
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**ISSUES PAPER**

1. This document provides a discussion of issues that the UNIDROIT Working Group on a Model Law on Warehouse Receipt may wish to consider at its second session.
2. The issues considered in this document were identified by either members of the Working Group during and/or after the first session, the Chair of the Working Group, or the Secretariat. This document does not intend to provide an exhaustive list of issues nor 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 second session.
3. The document retains a revised version of the parts of the Issues Paper from the first session ([Study LXXXIII - W.G.1 - Doc. 3](#)) relating to preliminary matters associated to the Model Law on Warehouse Receipts (MLWR) and the scope. The third part of this document relates to the content of the Model Law, and is divided into eight sections:
  - i. Issue of a warehouse receipt
  - ii. Form and content of a warehouse receipt
  - iii. Loss of a warehouse receipt
  - iv. Transfer of warehouse receipts
  - v. How to address both paper and electronic warehouse receipts in Model Law provisions
  - vi. Transfer of electronic warehouse receipts
  - vii. Execution and priority of security rights
  - viii. Rights and obligations of the warehouse operator
4. The abovementioned sections i., ii., iii. and iv. are to be considered in conjunction with the Preliminary Drafting Suggestion for the Model Law on Warehouse Receipts (Study LXXXIII - W.G.2 - Doc. 3), which contains drafting suggestions for the issue of warehouse receipts (draft Chapter II) and examples of issues that may need to be addressed concerning their transfer (draft Chapter IV).
5. Noting that the discussion of several other issues at the first session of the Working Group was not concluded and might require further deliberation, the Working Group members are invited to raise any of these matters during the course of the second session, with reference to [Study LXXXIII - W.G.1 - Doc. 3](#).
6. The Secretariat is grateful to Mr Marek Dubovec, Kozolchuk National Law Center (NatLaw), as well as Working Group members Mr Nicholas Budd, Mr Jean-François Riffard and Ms Teresa Rodriguez De Las Heras Ballell for their contributions to this document.

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## I. PRELIMINARY MATTERS

### A. Background of the project

7. The first proposal for UNCITRAL to develop a Model Law on Warehouse Receipts was made at an UNCITRAL colloquium on secured transactions in 2017.<sup>1</sup> Following the discussion of this proposal at its 33<sup>rd</sup> 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 51<sup>st</sup> session in 2018, invited the Secretariat of UNCITRAL to conduct exploratory and preparatory work on warehouse receipts.<sup>2</sup>

8. Thereafter, NatLaw carried out a feasibility study on possible future work on warehouse receipts,<sup>3</sup> which the Secretariat summarised during the UNCITRAL Commission at its 52<sup>nd</sup> session, in July 2019.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

9. Following the 52<sup>nd</sup> 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.<sup>7</sup>

10. Based on the conclusions and recommendations of the webinar, the UNIDROIT Secretariat proposed that the Governing Council, at its 99<sup>th</sup> 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.<sup>8</sup>

11. A project proposal consistent with the one submitted to the Governing Council at its 99<sup>th</sup> session in April/May 2020 was submitted by the UNCITRAL Secretariat to the Commission at its

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<sup>1</sup> UNCITRAL Fourth International Colloquium on Secured Transactions (15-17 March 2017, Vienna), available at [https://uncitral.un.org/en/colloquia/security/papers\\_2017](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).

<sup>2</sup> 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>.

<sup>3</sup> 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](https://uncitral.un.org/sites/uncitral.un.org/files/warehouse_receipts_report_final.pdf).

<sup>4</sup> 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>.

<sup>5</sup> *Ibid.*, para. 195.

<sup>6</sup> *Ibid.*, para. 196.

<sup>7</sup> 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>.

<sup>8</sup> Report of the UNIDROIT Governing Council, 99<sup>th</sup> 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>.

53<sup>rd</sup> session held virtually in September 2020 for approval.<sup>9</sup> The proposal received very positive reactions from the delegations and was approved by the Commission without amendments.

## **B. Format and title of the future instrument**

12. 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.

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

## **C. Target audience**

14. 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**

15. The project is a joint UNCITRAL/UNIDROIT project consisting of two phases. First, UNIDROIT leads the joint preparatory work through a UNIDROIT Working Group that is developing 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.

16. Under the guidance of the Chair of the UNIDROIT Working Group, Professor Eugenia Dacoronia, the Working Group is undertaking its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT's practice, the Working Group has not adopted any formal rules of procedure and seeks to make decisions through consensus.

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

18. 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: March 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

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<sup>9</sup> 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>.

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 101<sup>st</sup> session in May 2022.

## **E. Composition of the UNIDROIT Working Group**

19. 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 ten members:

- Eugenia Dacoronia, Professor of Civil Law, University of Athens (Chair) (Greece)
- Paula María All, Professor of Private International Law, Universidad Nacional del Litoral (Argentina)
- 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)

20. 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)

21. 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)
- Secured Finance Network
- SMBC Bank International PLC
- VOCA Consult

## **F. Relationship of the Model Law with existing international instruments**

22. The Model Law's scope will focus on the private law aspects of a warehouse receipt system (see Section II "Scope and structure of the Model Law", for more details, 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.

23. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)<sup>10</sup> 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).

24. The United Nations Convention on International Bills of Exchange and International Promissory Notes<sup>11</sup> 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 have generally been deemed acceptable by States thus far.

25. 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 Terminals<sup>12</sup> should also be taken into consideration. While this

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<sup>10</sup> 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>.

<sup>11</sup> 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](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/x_12_e.pdf).

<sup>12</sup> 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](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ott_e.pdf).

Convention has not entered into force either, it provides an indication of what has been deemed acceptable to States in terms of international harmonisation with regard to liability.

26. An international model law that is particularly relevant for specific aspects of the Model Law is the UNCITRAL Model Law on Secured Transactions (MLST), 2016.<sup>13</sup> 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 transaction legislation. The UNCITRAL Model Law on Secured Transactions recognises types of assets called “negotiable documents”, which encompass warehouse receipts, for which it sets out some specific rules.

27. The other particularly relevant instrument is the UNCITRAL Model Law on Electronic Transferable Records (MLETR), 2017.<sup>14</sup> 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 (EWRs).

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<sup>13</sup> 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](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf).

<sup>14</sup> UNCITRAL Model Law on Electronic Transferable Records (2017), available at [https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records).

## II. SCOPE AND STRUCTURE OF THE MODEL LAW

28. 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.

29. 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.

30. During the first Working Group session, revisions to the list of aspects to be covered by the Model Law were suggested. Accordingly, the following revised list of aspects is suggested for consideration by Working Group at its second session:

- 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, limited to the extent required by the instrument itself;
- registration of receipts upon their issuance;
- the negotiability and the means of transfer of the receipts;
- amendments to warehouse receipts, including dynamic updating of EWRs;
- 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.

31. The main focus of the Model Law will be on the financing function of warehouse receipts, whereas the contractual rights and obligations of the parties will only be covered to the extent required for the functioning of the Model Law. The contractual rights and obligations of the different parties engaging in the practice of a warehouse receipt system could be explained and illustrated in a guide to enactment/users guide or other accompanying document. Furthermore, it should be underlined that technology shall permeate the entire instrument.

32. The regulatory aspects should be touched upon only when strictly necessary. The institutional and regulatory framework of the operation of warehouses could be addressed in an accompanying document, which should be considered after completion of the Model Law.

33. Based on the discussion of aspects to be covered by the MLWR during the first Working Group session, a preliminary structure for the MLWR was prepared and included in Annexe I to this document for consideration by the Group.

### Recommendation for the Working Group:

- *The Working Group is invited to consider the revised list of aspects that should be included in the scope of the Model Law.*

- *The Working Group is invited to consider the preliminary draft structure for the MLWR, suggested in [Annexe I](#) to this document, and propose any additional contents that should be included as well as proposing any rearrangement of chapters as appropriate.*

### III. CONTENT OF THE MODEL LAW

#### A. Issue of a warehouse receipt

##### Recommendation for the Working Group:

- *The Working Group is invited to consider the following paragraphs in conjunction with Chapter II, Art. 1 of the suggested draft Model Law provisions included in Study LXXXIII - W.G.2 - Doc. 3, p. 2.*

34. Different approaches are adopted in national legislations with regard to the question of who is permitted to issue a warehouse receipt. For example, UCC 7-201 does not establish any restriction on who may issue a warehouse receipt. However, some jurisdictions adopt a more regulatory approach. For example, in Japan, a warehouse receipt can be issued only by warehouses that are licensed by the government (see, Warehousing Business Act, Art. 13(1)<sup>15</sup>). Limiting the issuance of negotiable receipts to licensed operators can increase confidence of stakeholders in the warehouse receipt system. However, one ought to consider that this requires an institutional framework including a licensing and oversight agency, which needs to be organised and funded, and a regulatory framework governing the admission and activities of licensees. The necessary resources for setting up such an institutional framework are not present in all countries. Instead of designating a government agency with the licensing and oversight of warehouses, some countries privatised the regulatory functions using collateral management companies to issue the receipts, so for example India.

##### Question for the Working Group:

- *Should the MLWR (i) adopt a permissive approach, (ii) adopt a regulatory approach, or (iii) leave it to each jurisdiction to determine who may issue a warehouse receipt?*

35. Jurisdictions also pursue a different approach with regard to the question of whether the issuance of a warehouse receipt is voluntary or mandatory. For example, in Germany, the warehouse keeper is permitted, but not obligated, to issue a warehouse receipt (see Comm. C. § 475c, para. 1<sup>16</sup>). The same approach is adopted by the UCC (see UCC § 7-201(a)<sup>17</sup>). Conversely, in France, the issuance of a receipt is mandatory (see Comm. C. Art. L522-24<sup>18</sup>). Alternatively, as not all depositors need a warehouse receipt, in particular when they do not contemplate to trade the receipt or pledge it, it could be provided that a warehouse “shall” issue a WR “if requested by the depositor”.

##### Question for the Working Group:

- *Should the issuance of a warehouse receipt be voluntary or mandatory?*
- *Should the issuance of a warehouse receipt be mandatory if requested by the depositor?*

36. Lastly, some national legislations refer to the warehouse, others to the warehouse operator or to the warehouse keeper, while all of these terms are defined very similarly. For example, the UCC states that any warehouse may issue a warehouse receipt, and defines a warehouse as “a person

<sup>15</sup> Available at [倉庫業法 | e-Gov法令検索 \(e-gov.go.jp\)](#).

<sup>16</sup> Available at [§ 475c HGB - Einzelnorm \(gesetz-im-internet.de\)](#).

<sup>17</sup> Available at <https://www.law.cornell.edu/ucc/7/7-201>.

<sup>18</sup> Available at [Article L522-24 - Code de commerce - Légifrance \(legifrance.gouv.fr\)](#).

engaged in the business of storing goods for hire” (UCC § 7-102(13)). Under the German Commercial Code, any warehouse keeper may issue warehouse receipts; while the term warehouse keeper is not defined, its definition is derived from the description of a storage contract and means any person who accepts goods for storage against payment on a professional basis. In Ontario, a warehouse operator is defined as “a person who receives goods for storage for reward” (Warehouse Receipts Act, Art. 1). All definitions require that the person accepts goods for storage as part of its business against compensation.

37. Accordingly, the MLWR could define the warehouse operator as “a person who accepts goods for storage for reward on a professional basis”.

Question for the Working Group:

- *The Working Group is invited to consider the definition of warehouse operator suggested above.*
- *What other definitions are necessary with regard to the suggested Art. 1, Issue of a warehouse receipt?*

**B. Form and content of a warehouse receipt**

Recommendation for the Working Group:

- *The Working Group is invited to consider the following paragraphs in conjunction with Chapter II, Art. 2 of the suggested draft Model Law provisions included in Study LXXXIII - W.G.2 - Doc. 3, pp. 2-9.*

38. The Working Group agreed that the MLWR should cover both paper and EWRs. Accordingly, the suggested Art. 2, para. 1 of Chapter II of the draft Model Law states that a warehouse receipt can be issued in paper form or electronically.

*1. Essential terms*

39. With regard to the content included in warehouse receipts, national laws commonly distinguish between essential and optional terms. With regard to essential terms, the Working Group agreed during its first meeting that at least the following information must be set out as minimum content requirement in the MLWR (cf. [Report of the First Session](#), para. 93):

- (1) the name and location of the warehouse;
- (2) the unique receipt identification number;
- (3) the quantity and the quality of the stored goods; and
- (4) the signature of the warehouse operator.

40. The Working Group agreed that, if those were not included in a document, that document would not qualify as a warehouse receipt. The Group agreed to further consider how to address the other content requirements.

41. A review of national laws shows that there are similarities with regard to essential and optional information included in a warehouse receipt, while the consequences attached to missing information vary. Illustrative examples of provisions concerning the content requirements can be found in [Annexe II](#) to this document. 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.<sup>19</sup> In several other jurisdictions, the consequence may not be liability of the warehouse operator but invalidity of the warehouse receipt.

42. At international level, lessons might be taken from the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, which sets out form and content requirements for bills of exchange in its Annex I, Chapter I [Issue and Form of a Bill of Exchange], Art. 1. Similarly, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) require certain minimum information for transport documents and electronic transport records, see Arts. 36, 38, 39. The respective provisions of both Conventions are reproduced in Annexe III to this document.

43. Based on the discussions of the Working Group at its first meeting and the review of existing national requirements concerning the content of warehouse receipts, as well as the content requirements for similar documents as set out in international instruments, the suggested Art. 2, para. 2 on essential terms to be included in a warehouse receipt is being proposed for consideration by the Working Group as set out in Study LXXXIII - W.G.2 - Doc. 3, pp. 3-6. The signature by the warehouse operator is included in the suggested Art. 2, para. 4.

Questions for the Working Group:

- *The Working Group is invited to consider the content requirements suggested in Chapter II, Art. 2, paras. 2 and 4 set out in Study LXXXIII - W.G.2 - Doc. 3, pp. 3-7, which includes specific questions for the Group on single requirements.*
- *Would it be beneficial that the MLWR aim for harmonisation with the content required for a bill of lading, in order to achieve, as far as appropriate, a harmonised design of documents commonly used in transportation? See Rotterdam Rules, Arts. 36, 38, 39.*

2. *Optional terms*

44. National laws vary with regard to providing for possible optional terms included on a receipt, see also the examples set out in Annexe II to this document.

45. An advantage of enumerating optional terms in the law could be to promote good practices. On the other hand, bearing in mind that receipts are one sheet of paper, pre-printed with blanks, and each storage relationship may be unique, there is not a lot of flexibility on what can be placed on a receipt. It might therefore be better to confine the information to the minimum and deal with optional items in the storage agreement, which can be identified on the receipt (date and contract number).

46. With regard to the person who may decide upon the inclusion of optional terms in a receipt, laws vary providing either that their inclusion is at the choice of the parties or at the choice of the warehouse operator. Since the warehouse receipt is a document that embodies the obligation of the warehouse operator, it seems appropriate to allow the warehouse operator to decide what optional terms to include in the warehouse receipt pursuant to the Law.

Questions to the Working Group:

- *The Working Group is invited to consider the provision on optional terms suggested in Chapter II, Art. 2, para. 3 set out in Study LXXXIII - W.G.2 - Doc. 3, pp. 6-7.*
- *Should the MLWR explicitly enumerate possible optional terms?*
- *Should the inclusion of optional terms be at the choice of the parties or at the choice of the warehouse operator?*

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<sup>19</sup> See for example UCC §§ 7-202, 7-203.

### 3. *Consequences of missing or inaccurate information*

47. The Working Group agreed during its first meeting that the MLWR should state the consequences of missing and inaccurate information in a receipt, but the Group did not reach a decision on what those the consequences should be, except for four requirements flagged above (cf. [Report of the First Session](#), para. 93).

48. When considering the consequences of missing or inaccurate information on the receipt, the allocation of risk among the parties (depositor, holder or issuer) should be taken into account. If the receipt is invalidated the risk falls on the holder. If the problem results in a damage claim against the issuer but the integrity of the receipt is protected, the loss falls on the issuer.

49. For example, the Rotterdam Rules state in Art. 37 that “[t]he absence or inaccuracy of one or more of the contract particulars referred to in its Art. 36, paras. 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record”. Pursuant to the UCC, if one of the essential terms is missing in a warehouse receipt, the warehouse is liable for damages caused to a person injured by its omission (see UCC § 7-202(b)).

50. Furthermore, the type of consequences might depend on the type of missing or inaccurate information. For example, if a required signature is missing, the warehouse receipt, as any other document requiring signature, might automatically be considered formally void under national contract law (see for example in Germany, Comm. C. § 475c, para. 3 in conjunction with Civil Code § 125, 1<sup>st</sup> sentence).

#### Questions to the Working Group:

- *The Working Group is invited to consider the provision on consequences of missing or inaccurate information suggested in Chapter II, Art. 2, paras. 5 and 6 set out in Study LXXXIII - W.G.2 - Doc. 3, p. 7.*
- *What consequences should the MLWR attach to missing essential information in the receipt?*
- *Should the MLWR distinguish between the types of missing essential information with regard to the consequences?*

### 4. *Electronic warehouse receipts*

51. The suggested Article 3 in Chapter II of the draft Model Law draws from the MLETR, Art. 10. It provides a functional equivalence rule for the use of warehouse receipts by setting forth the requirements to be met by an electronic record.

#### Question to the Working Group:

- *The Working Group is invited to consider the provision on electronic warehouse receipts suggested in Chapter II, Art. 3, set out in Study LXXXIII - W.G.2 - Doc. 3, pp. 8-9.*

## **C. Loss of a warehouse receipt**

52. National warehouse receipt laws often provide for the case that a warehouse receipt is lost. Absent proof of destruction of the original the holder would have to indemnify the operator against claims from a good faith holder of the receipt in order to obtain a duplicate. The “guarantee” could be twice the value of the goods covered by the document.

Question for the Working Group:

- *The Working Group is invited to consider the provision on consequences of missing or inaccurate information suggested in Chapter II, Art. 4 set out in Study LXXXIII - W.G.2 - Doc. 3, p. 9.*
- *If the MLWR requires a court action for lost negotiable warehouse receipts, should it describe more precisely the appropriate procedure and the rights of the innocent holder of the lost warehouse receipt?*

**D. Transfer of warehouse receipts**Recommendation for the Working Group:

- *The Working Group is invited to consider the following paragraphs in conjunction with draft Chapter IV of the suggested draft Model Law provisions included in Study LXXXIII - W.G.2 - Doc. 3, pp. 10-20. Please note that the provisions for Chapter IV were selected as examples of issues that may need to be addressed in the Model Law; however, the Working Group will still need to find a "legal functional equivalent" to express those concepts in a manner more broadly acceptable among legal systems.*

1. *Transfer of a negotiable warehouse receipt*

53. As noted under Section II "Scope and structure of the Model Law" above, the Model Law should cover both negotiable and non-negotiable receipts. However, with regard to the terminology, the Working Group has not decided whether the MLWR should refer to "negotiable" warehouse receipts, or instead to "transferable" warehouse receipts. It was also queried during the first Working Group session whether it would be possible and desirable to replace the term "negotiability" with that of "transferability".

54. The Working Group did not reach a decision during its first session on whether the MLWR should use the terms "negotiable"/"non-negotiable" warehouse receipt (see [Report of the First Session](#), para. 41).

55. The term "negotiable document" is used in the MLST (for example Arts. 14, 16, 26, 46) and in the Rotterdam Rules (Chapter 11) to refer to a transferable document embodying a right to delivery of tangible assets. The UNCITRAL Legislative Guide on Secured Transactions defines a negotiable document as "a document, such as a warehouse receipt or a bill of lading, which embodies a right to delivery of tangible assets and satisfies the requirements for negotiability under the law governing negotiable documents".<sup>20</sup> The MLWR does not have to use the same term but doing so would align the terminology across these instruments. Introducing a new term (carrying the same meaning) could create confusion or uncertainty for States considering the adoption of both the MLST and the MLWR.

56. The mercantile custom and usage adopted by warehouse operators and traders in the international metals and soft commodities markets and virtually all modern warehouse receipts law reform initiatives during the past 30 years have followed the bill of lading terminology – that is, "negotiable" and "non-negotiable" warehouse receipt. For example, under the UCC, "[a] document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person"<sup>21</sup>. Under the Warehouse Receipts Act of Ontario defines a "negotiable receipt" as "a receipt

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

<sup>21</sup> UCC § 7-104.

in which it is stated that the goods therein specified will be delivered to bearer or to the order of a named person”, and a “non-negotiable receipt” as “a receipt in which it is stated that the goods therein specified will be delivered to the holder thereof”.<sup>22</sup> In Mexico, warehouse receipts are classified as documents of title that may be issued to the order of a named party, in which case they are “negotiable” and may be transferred by endorsement and delivery.<sup>23</sup>

Questions for the Working Group:

- *Should the MLWR use the terms “negotiable” and “non-negotiable” warehouse receipt?*
- *If so, should the Model Law include a definition of the terms “negotiable” and “non-negotiable” warehouse receipt?*

57. A related terminology question is whether the MLWR should use the term “transfer”, “negotiation”, or another term. The UN Convention on International Bills of Exchange and International Promissory Notes (Chapter III), the MLST (for example, in Arts. 1, 14, 26) and the Rotterdam Rules (Chapter 11) use the term “transfer”, which is in function and substance identical to the concepts of “negotiation” and “negotiate” used in particular in common law jurisdictions. Conversely, in many countries with a civil law tradition the special terminology of “negotiate” is unfamiliar whereas “transfer” would be more easily translated. It would thus be a more jurisdiction-neutral term.

58. The draft Chapter IV, Art. 1 suggested in Study LXXXIII - W.G.2 - Doc. 3, pp. 10-11 uses the term “transfer”. The suggested text does not distinguish between warehouse receipt transfers for purposes of sale and transfers for purposes of security, which corresponds to the approach adopted by the UN Convention on International Bills of Exchange and International Promissory Notes.

Question for the Working Group:

- *Should the MLWR adopt the term “transfer”, “negotiation”, or any other term?*
- *The Working Group is invited to consider the options for the transfer of a negotiable tangible warehouse receipt suggested in draft Chapter IV, Art. 1, para. 1, and those suggested for transferring a negotiable EWR in para. 2.*

2. *Rights of a transferee who is not a protected holder*

59. The suggested Art. 2 of draft Chapter IV addresses the rights of a transferee who is not a protected holder. If the conditions for protected holder status are not established, for example if the receipt is not in negotiable form, or if the formalities for transfer have not been established (e.g., no endorsement), or the transaction is outside the course of business or lack of value paid or lack of good faith, then the transferor can only convey the ownership of the goods and claims against the warehouse operator that he or she has the legal right to convey.

Questions for the Working Group:

- *Should the legend “non-negotiable” on a receipt render it non-negotiable regardless of the form of the receipt?*
- *Should the issuer be bound to accept the transfer of a non-negotiable receipt regardless of the terms of the storage agreement?*

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<sup>22</sup> Warehouse Receipts Act, Art. 1, available at <https://www.ontario.ca/laws/statute/90w03>.

<sup>23</sup> Ley General de Títulos y Operaciones de Crédito, Arts. 25-27.

- *Should the Model Law recognise a third variety of warehouse receipt, namely non-transferable receipts (referred to in the trade as goods received notes)?*

### 3. *Transfer of a negotiable warehouse receipt to a protected holder*

60. The aim of this provision is to expedite trade and financing by commercial parties to apparently normal trade transactions by reducing the need to verify the bona fides of the practically unknowable chain of transactions once the goods have entered in the established flow of commerce. This is an essential advantage of warehouse receipts, which should be provided by the MLWR.

61. The term “protected holder” suggested in Chapter IV, Art. 3 adopts the terminology employed in the MLST (Art. 46 II: “[protected holder] [other type of holder to be specified by the enacting State]” and in the UN Convention on International Bills and Notes), which is framed in a flexible manner letting the implementing State chose the term used for the corresponding concept in the domestic civil law.

62. The concept of “protected holder” or other terminology appropriate for the enacting State is meant to correspond to the national concepts referred to, for example, as “holder in due course” in the UCC and “*acquéreur/cessionnaire de bonne foi*” in France. The concept of “good faith purchaser for value” is found not only in the law of negotiable instruments but also in common law rules applying the *nemo dat* exemption to holders of warehouse receipts.

63. However, it should be noted that the negotiability doctrine adopted in the US might not be suitable for a uniform law instrument; if it were nevertheless adopted in the MLWR, the latter would need to set out a clear definition of this concept. Civil law theories of negotiable instruments automatically protect all holders in the endorsement chain (except for the initial holder/drawer) and would be confused by this notion. The 1988 UN Bills and Notes Convention uses this concept because it was an attempt to build a bridge between common and civil law on the matter (see Arts 29 - 32).

#### Questions for the Working Group:

- *In view of the considerations set out above, should the MLWR adopt the terminology “[protected holder] [other type of holder to be specified by the enacting State]”?*
- *The Working Group is invited to consider the criteria for the transfer of a negotiable warehouse receipt to a protected holder suggested in draft Chapter IV, Art. 3.*
- *The Working Group is invited to consider the provision on the rights of a [protected holder] [other type of holder to be specified by the enacting State] suggested in draft Chapter IV, Art. 4.*

### 4. *Rights of a holder defeated in certain cases*

64. The provision of draft Chapter IV, Art. 5, Rights of a holder defeated in certain cases, suggested in Study LXXXIII - W.G.2 - Doc. 3, pp. 16-17 aims to establish that the ownership by a protected holder of a warehouse receipt prevails over almost any interest in the goods that existed prior to the procurement of the receipt if the prior claimant is factually or legally responsible for the goods entering into the stream of commerce.

65. This provision, together with the provisions dealing with the warehouse operator’s duty of care for the goods, give rise to the most factual disputes involving the law. The fundamental premise is that a thief of the goods cannot by storing them in his own name acquire the power to transfer them to a good faith purchaser, nor can a mortgagor defeat a crop lien by wrongfully storing the goods and selling the warehouse receipt.

66. It should be noted that (apart from receipts covering inventory) the underlying policy and approach of this suggested provision does not follow the same approach adopted in Art. 49(2) of the MLST. For non-inventory collateral the first-in-time rule protects the interest of secured parties that have perfected their rights in the goods prior to the issuance of the warehouse receipt or binding commitment to lend, whichever first occurs. In reality most warehouse receipt financings will concern goods that are in storage pending resale, i.e., inventory.

Questions to the Working Group:

- *The Working Group is invited to consider the suggested draft Chapter IV, Art. 5.*
- *Should the MLWR incorporate a minor policy written into the MLST that would constitute a major departure from warehouse receipts practice?*
- *Are spare parts and energy supplies inventory?*
- *Are stocks held on consignment inventory?*

5. *Transfer of a warehouse receipt by assignment*

67. The suggested Art. 6 of draft Chapter IV, on the transfer of a warehouse receipt by assignment is consistent with current practice, but it is more precise and serves to notify the holders that they ignore the valid storage agreement terms at their peril: The provision restates in more precise terms the mechanic for the transfer of contractual rights under non-negotiable warehouse receipts and negotiable receipts that are transferred without the necessary formalities. In general, this section provides that the storage agreement and terms written on the receipt govern the conditions for transfer and the notice and acknowledgment that may be required by the warehouse operator to engage his or her responsibility and to perfect the assignment of contractual rights.

68. The UN Convention on International Bills of Exchange and International Promissory Notes treats transfers of bills and notes without the necessary endorsement as “incomplete” to achieve “protected holder” status (see Arts. 12, 29).

Question for the Working Group:

- *Should parameters for an effective “transfer” be included in the Model Law or should they be left to local practice regarding assignment of contractual rights and sale of goods?*

6. *Warranties on transfer of a warehouse receipt*

69. The rationale of Art. 7 is that delivery of goods by use of a warehouse receipt should not limit or displace the ordinary obligations of a seller regarding the sale of goods that arise under other law, such as warranties of merchantability and fitness for intended purpose. Parties are free to limit such obligations by contract.

70. Paragraph 2 of the suggested provision takes account of the modern view that banks handling receipts as collection agents or as a secured party should not be subject to the commercial standards of fair dealing imposed on merchants engaged in sale and purchase transactions. “Good faith” would require a bank to disclose known defects in the goods or genuineness of the receipt or its authority to transfer the receipt. Similar protections are offered to holders of instruments taken for collection under the UN Convention on International Bills of Exchange and International Promissory Notes (Art. 21).

71. Note by the Secretariat: It is noted, for consideration by the Working Group, that “warranty” is not a concept known as such in civil law jurisdictions.

Question for the Working Group:

- *Are the warranties provided for in draft Art. 7, para. 1 appropriate? Should any additional warranties be included?*
- *Should the provision of Art. 7, para. 2 be included in the MLWR?*

7. *Endorser not a guarantor*

72. Draft Art. 8 aims to exclude any continuing obligation on the part of the endorser for the performance by the warehouse receipt issuer. Endorsement of the receipt is directed to perfecting the transferee's rights rather than assuming other obligations, as is the case, for example, for endorsement of a negotiable instrument.

Question for the Working Group:

- *The Working Group is invited to consider draft Art. 8.*

8. *Subsequent sale of a warehouse receipt in possession of the seller*

73. The rationale of this provision on the subsequent sale of a warehouse receipt in possession of the seller laid down in Art. 9 is that a buyer who has allowed the seller to remain in possession of the goods following purchase assumes the risk that a subsequent purchaser will be misled by the seller in possession and purchase the goods in good faith. In these circumstances the original receipt holder is estopped from claiming paramount title as against the good faith purchaser or from claiming that the sale was unauthorised. The provision only applies to goods covered by negotiable receipts that have been transferred to a protected holder.

74. For purposes of the MLWR this provision seems useful for purposes of clarity. This is a conflict that can and does arise frequently.

Question for the Working Group:

- *Should such a rule be explicitly stated in the MLWR?*

9. *Transfer defeats retention-of-title right of a seller*

75. The rationale of the provision set out in draft Art. 10 is that a seller, who has by giving up possession of the goods or warehouse receipt, allowed a negotiable receipt to be outstanding, should not be permitted to defeat one who buys the receipts in good faith.

76. The priority stated in this Article is consistent with the other provisions suggested for the draft Chapter, however, because in many countries unpaid sellers with reservation of title clauses and the like are commonplace and courts are accustomed to enabling sellers to reclaim goods delivered to buyers, it may be useful to reinforce the concept protecting holders of negotiable receipts. If a State has enacted a secured transactions law along the lines of the MLST, this provision may be omitted as that law already deals with this type of a conflict.

Question for the Working Group:

- *The Working Group is invited to consider the provision of Art. 10. Should such a provision be included in the MLWR?*

## **E. How to address both paper and electronic warehouse receipts in Model Law provisions**

77. As noted under Section II “Scope and structure of the Model Law” above, the Model Law should cover both electronic and paper warehouse receipts. There are different legislative options in delimiting the scope.

78. One option would be that the Model Law is aimed to modernise and update the existing rules on paper-based warehouse receipts that States can adopt in combination with other legislation helping them to achieve functional equivalence. The other option would be to design the Model Law as a medium-neutral legislation aimed to assist States in modernising and replacing the existing paper-based legislation by introducing medium-neutral rules to promote the use of EWRs. A third option would be for the Model Law to limit its scope to EWRs and, by being enacted by a State, to promote a transition to EWRs – however, the Working Group agreed that the Model Law should provide for both paper and electronic warehouse receipts.

79. Drafting technology-related aspects separately may assume that most States have a modern warehouse receipts regime for paper receipts already in force. Besides, States may find unclear how to infer from an EWR regime medium-neutral rules to paper-based warehouse receipts if they are not familiar with general principles of technology-neutrality and functional equivalence or they are not recognised or enshrined in the legal system. That may lead to two scenarios. States may postpone the enactment of rules for warehouse receipts under the Model Law until they feel technologically prepared to the transition to EWRs. Alternatively, States willing to accelerate the digital transition can find in the Model Law the enabler. Nonetheless, even in such cases, as the existing paper-based modern regimes are expected to vary greatly, so any considerations of fitting the technology-related provisions in the Model Law into the domestic framework would be challenging. For those States that believe their regimes are efficient but wish to recognise EWRs they may implement the MLETR and rely on a digital transition of legislation based on the general application of principles of technology neutrality and functional equivalence. Furthermore, drafting the technology rules separately may signal that they are an appendix to the core rules that govern paper receipts. The objective of the Model Law to aspire to establish a unitary legal framework applicable to warehouse receipts regardless of the medium, but also technology-agnostic in the legal solutions devised by the law and adaptable to different economies and markets, invites to draft medium-neutral rules embracing both paper-based and electronic warehouse receipts.

80. In facilitating the transition to EWRs but keeping a medium-neutral approach, it should be taken into account the costs and complexities that the issuance and the negotiation of warehouse receipts on paper. Currently, the operating cost of warehouses to issue a paper certificate of deposit is high, plus the transaction costs associated with their transfer, such as transferring the credit certificate to a financial institution, as there is a significant security risk. The incidence of fraud should also be considered since there is no source of information to provide traceability between creditors and actual debtors in a transaction involving stored merchandise. There is also no approved mechanism that allows clarity of the moment in which a financial institution takes a certificate of deposit or a pledge bond derived from a pledge credit and therefore the impact that exists on that stored merchandise. These costs and complexities are not prevented if, with the aim of preserving both paper and electronic models, the paper-based warehouse receipts are digitised or the electronic receipts are printed for handling and management.

81. The need for the Model Law to adopt a technology-neutral approach can be achieved in different ways. The substantive rules can be formulated in a technology-neutral manner, so there would be no need for a declaration of functional equivalence. An explicit formulation of the general

principles of functional equivalence can be included in the Model Law and, if so, it may simply refer to or borrow the requirements and standards on functional equivalence for transferable records of the MLETR or, alternatively, carve out the principles for the purposes of the MLWR.

82. The functional equivalence rule is the minimum harmonisation threshold in the development of rules for warehouse receipts. The Model Law may consider going further in achieving the function of harmonisation and providing for more specific rules on transferring and negotiating EWRs to enhance legal certainty in the development of law-compliant technological solutions. Technology-agnostic rules aimed to facilitate the devising of law-compliant solutions in the market with legal certainty would prevent the risk of stifling technological progress and business innovation.

Questions for the Working Group:

- *Which policy option does the Working Group consider preferable: (i) that the MLWR is aimed to modernise and update the existing rules on paper-based warehouse receipts that States can adopt in combination with other legislation helping them to achieve functional equivalence; or (ii) that the MLWR is designed as a medium-neutral legislation aimed to assist States to modernise and replace the existing paper-based legislation and introduce medium-neutral rules to promote the use of EWRs?*
- *Are more concrete provisions on control than those contained in the MLETR needed?*
- *The Working Group is invited to consider the suggested draft Model Law provisions included in Study LXXXIII - W.G.2 - Doc. 3 and assess whether provisions need to be added to ensure functional equivalence.*

## **F. Transfer of electronic warehouse receipts**

83. 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.

84. 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, jurisdictions) 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.

85. 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.

86. 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.

87. 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.

88. Because the Model Law is expected to incorporate the concept of control (in one form or another), it could provide a definition that includes a list of factors and/or standards that when considered together constitute control, formulated in a technology-neutral manner, presuming control. An accompanying guide to the Model Law could also provide specific examples of control, such as a rule to the effect that crediting an EWR into an account of a transferee who may be a secured creditor and/or blocking its disposal amounts to control, sufficient to transfer it. UCC § 7-106 in the US, for example, governs the control of electronic documents of title, which is achieved if “the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.” This is the general test, however, paragraph (b) provides a safe harbour that meets the general test of paragraph (a). A general test is provided for under Art. 11 of the MLETR. Whatever form the concept of control takes in the Model Law, it should be broad enough to encompass a wide range of mechanisms for establishing control over EWRs. While that enables States to decide which of those mechanisms is the most appropriate, these options should not be presented in a manner that a State selects multiple, which could increase legal uncertainty and lead to priority conflicts. The Working Group may also give consideration to the harmonisation aspect of this project and the cross-border use of EWRs, which would favour a smaller number of options.

89. In addition to control, special consideration should also be given to negotiation of EWRs. For instance, UCC § 7-501(b) governs negotiable electronic documents of title, including by providing rules concerning electronic documents of title issued to a bearer and a named party, as well as their transfer through an endorsement. These rules also apply to EWRs. The Model Law may also provide specific rules governing negotiation of EWRs to supplement the general rules, but does not necessarily need to replicate all the processes for transferring paper receipts (e.g., endorsement may not be necessary to transfer an EWR).

90. Under a technology-neutral approach, it seems unnecessary that the Model Law specifies the design or the registry or the alternative technological models, provided that minimum requirements (or more elaborated standards), similar to Art. 12 MLETR, are formulated.

Questions for the Working Group:

- *Should the MLWR simply provide that an EWR is transferred when the requirements of the system in which it is held have been satisfied, or should the MLWR provide more details on how to satisfy those requirements, such as receiving a credit to an account or making an entry in an electronic registry? Or, should these mechanical details be addressed in an accompanying guide instead of the Model Law itself?*

## **G. Execution and priority of security rights**

91. This section was part of section III., F. “Execution and priority of security rights and liens” of the Issues Paper presented to the Working Group at its first session, see [Study LXXXIII - W.G.1 - Doc. 3](#). At its first meeting, the Working Group had time only to consider the first part of that section concerning liens, and only introductory addressed the second part on consensual security rights. Therefore, the paragraphs below are proposed again for consideration of the working Group at its second session. They explore rights in goods deposited under a warehousing contract that may arise 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.

92. 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.

93. 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.

94. 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.

### 1. *Creation*

95. The MLST conceptualises 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*

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

97. 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.

98. 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*

99. 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.”

100. 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.

101. 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.

102. At the first Working Group session, the Working Group agreed that the MLST would be taken into consideration for the provisions on the creation of security rights in the MLWR.

Question for the Working Group:

- *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? (This question was introduced at the first session of the Working Group, but could not be considered in detail, in view of the little time left. Therefore, it is proposed for consideration again at the second session.)*

2. *Perfection*

103. 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*

104. 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, perfection is lost in the event of relinquishment of possession.

105. 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*

106. 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."

107. 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.

108. 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.

109. 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? Would any adaptations be necessary?*

3. *Priority*

110. 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*

111. 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.

112. 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*

113. 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."

114. 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.

115. 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."

116. 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.

117. 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?*

#### 4. *Enforcement*

118. 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*

119. 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.

120. 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*

121. 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?*

#### 5. *Conflict of laws*

122. The MLST includes a detailed, primarily 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*

123. 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*

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

125. 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.”

126. 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 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.

127. 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.”

128. 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.

129. The rationale 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?*

6. *The Model Law on Secured Transactions and electronic warehouse receipts*

130. 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*

131. 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.

132. 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 (ii) retain the integrity of that electronic record.

133. Said Art.10 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.

134. 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."

135. 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."

136. 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."

137. 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*

138. 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" for the purpose of determining the priority of a security right. This connecting factor is difficult to apply to security rights in EWRs that are intangible, whether stored on a network or tokenised 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?*

## **H. Rights and obligations of the warehouse operator**

139. 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. Notably, rather than in the Model Law text, the warehouse contract could be addressed in a guide to enactment which can describe the essential features and options for legislating on the warehousing contract.*

- *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*

140. 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.

141. 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.

142. 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*

143. 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.

144. 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.<sup>24</sup>

#### *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?*

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<sup>24</sup> Cf. UCC § 7-204.

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

145. 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.

146. 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.

147. 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.

148. 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*

149. 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

150. 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.

151. 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.

152. 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*

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

154. 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

155. 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.

156. 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 H.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.

157. 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.

158. 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.

159. 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.”<sup>25</sup>

*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*

160. 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.

161. 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.

162. 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.

*Comparative overview*

163. 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.

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<sup>25</sup> Cf. UCC § 7-403.

164. 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.

165. 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, preventative 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*

166. 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.

167. 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.

168. 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.

169. Some laws address this issue in detail. As a general principle, these texts recognise 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.

170. 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.<sup>26</sup>

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*

171. 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

172. 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.

173. 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*

174. 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.<sup>27</sup>

175. 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 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:*

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<sup>26</sup> Cf. UCC § 7-206.

<sup>27</sup> Cf. UCC § 7-204.

- 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*

176. 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.

177. 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*

178. 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.

179. 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.

180. 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

181. 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.

182. 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.

183. 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*

184. 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.

185. 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.

186. 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.”

187. Notably, the UCC acknowledges that other laws might void any contract term limiting or excluding warehouse liability.<sup>28</sup>

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<sup>28</sup> Cf. UCC § 7-204.

**ANNEXE I****MODEL LAW ON WAREHOUSE RECEIPTS - PRELIMINARY DRAFT STRUCTURE**

Below, a suggested draft structure for the Model Law is set out for consideration. It takes into account the aspects to be covered by the MLWR's scope proposed in Section II of this document above. The text included under the Chapter titles in form of bullet points is not being proposed as the headings of provisions, but merely as a prompt for the contents.

Recommendation for the Working Group:

- *The Working Group is invited to consider the preliminary draft structure for the MLWR and propose any additional contents that should be included as well as proposing any rearrangement of chapters as appropriate.*

<b>Heading</b>	<b>Contents</b>
<b>Chapter I. Scope of application and general provisions</b>	<ul style="list-style-type: none"> <li>• Scope of application</li> <li>• Definitions and rules of interpretation</li> <li>• Party autonomy</li> <li>• General standards of conduct</li> <li>• International origin and general principles</li> </ul>
<b>Chapter II. Issue of a warehouse receipt</b>	<ul style="list-style-type: none"> <li>• Persons who may issue a warehouse receipt</li> <li>• Form and content of a warehouse receipt</li> <li>• Loss of a warehouse receipt</li> <li>• Duplicate warehouse receipts</li> <li>• Issuance or re-issuance in electronic form</li> </ul> <p>This chapter would include the registration of warehouse receipts as far as a warehouse receipt need to be entered in the register in order to be considered issued (see also comment on Chapter III, below).</p>
<b>Chapter III. The warehouse receipts registry system</b>	<ul style="list-style-type: none"> <li>• Establishment of the registry system</li> </ul> <p>While registration of warehouse receipts is dealt with in Chapter II to the extent necessary for the warehouse receipt to be validly issued, Chapter III contains the provisions that set up the registry system, and explain how it works. This division of the material would not be dissimilar to the way in which registration is dealt with in the MLST (Chapter III, Art. 18, vs Chapter IV).</p> <p><u>Question for the Working Group:</u></p> <ul style="list-style-type: none"> <li>• <i>Should the registry provisions be merged with the EWR sections?</i></li> </ul>
<b>Chapter IV. Transfer of a warehouse receipt; Protected holder and other transferees; Warranties; Miscellaneous provisions regarding transfers</b>	<ul style="list-style-type: none"> <li>• Transfer of a negotiable warehouse receipt</li> <li>• Transfer of a negotiable warehouse receipt to a [protected holder] [other type of holder to be specified by the enacting State]</li> </ul>

Heading	Contents
	<ul style="list-style-type: none"> <li>• Rights of a [protected holder] [other type of holder to be specified by the enacting State]</li> <li>• Rights of a holder defeated in certain cases</li> <li>• Transfer of a warehouse receipt by assignment</li> <li>• Rights of a transferee who is not a [protected holder] [other type of holder to be specified by the enacting State]</li> <li>• Warranties on transfer of a warehouse receipt</li> <li>• Endorser not a guarantor</li> <li>• Subsequent sale of a warehouse receipt in possession of the seller</li> </ul>
<b>Chapter V. Dealings with warehouse receipts by way of security</b>	<ul style="list-style-type: none"> <li>• Apart from including secured creditors as “purchasers” in the definition section, this subject should be dealt with by the secured transactions law of the enacting State. Section IV, bullet points 3 and 4, gives priority to protected holders against existing “non-possessory security rights”, however this need not be recognised by the secured transactions law of the enacting State. If there is a conflict it should be addressed in the Model Law, however this may not require a separate chapter.</li> </ul>
<b>Chapter V. Rights and obligations of warehouse operators</b>	TBD
<b>Chapter VI. Conflict of laws</b>	<ul style="list-style-type: none"> <li>• These provisions may not be needed, and instead some guidance provided on the implementation of the MLST that covers these issues comprehensively. A guide may identify some connecting factors for the priority conflicts arising in connection with security rights in EWRs.</li> </ul>
<b>Chapter VII. Implementation of the law</b>	<ul style="list-style-type: none"> <li>• Amendment and repeal of other laws</li> <li>• Transitional rules</li> <li>• Act does not apply to existing warehouse receipts</li> <li>• Entry into force of this Law</li> </ul>

**ANNEXE II****EXAMPLES OF NATIONAL LEGISLATION ON FORM AND CONTENT  
REQUIREMENTS FOR WAREHOUSE RECEIPTS****1. France**

[Comm. C. Art. L522-24, para. 1](#):

“These receipts shall state the name, profession and domicile of the depositor as well as the nature of the goods deposited and the particulars capable of establishing their identity and determining their value.”<sup>29</sup>

**2. Germany**

[Comm. C. § 475c \[Warehouse receipt\], paras. 1-3](#):

“(1) ... a warehouse receipt ... should contain the following particulars:

1. Place and date of issue of the warehouse receipt;
2. Name and address of the depositor;
3. Name and address of the warehouse keeper;
4. Place and day of storage;
5. The usual designation of the type of goods and the type of packaging, in the case of dangerous goods their designated designation according to the Dangerous Goods Regulation, otherwise their generally recognized designation;
6. Number of packages and their marks and serial numbers;
7. Gross weight or the otherwise specified quantity of the goods;
8. In the case of collective storage, a note about this.

(2) Further particulars that the warehouse keeper considers appropriate can be entered in the warehouse receipt.

(3) The warehouse receipt must be signed by the warehouse operator. A reproduction of the handwritten signature by printing or stamping is sufficient.”<sup>30</sup>

**3. United States of America**

Uniform Commercial Code (UCC) [§ 7-202](#) [Form of Warehouse Receipt; Essential Terms; Optional Terms]

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<sup>29</sup> Unofficial translation from the original French.

<sup>30</sup> Unofficial translation from the original German.

“(a) A warehouse receipt need not be in any particular form.

(b) Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to a person injured by its omission:

(1) the location of the warehouse facility where the goods are stored;

(2) the date of issue of the receipt;

(3) the unique identification code of the receipt;

(4) a statement whether the goods received will be delivered to the bearer, to a named person, or to a named person or its order;

(5) the rate of storage and handling charges, but if goods are stored under a field warehousing arrangement, a statement of that fact is sufficient on a nonnegotiable receipt;

(6) a description of the goods or the packages containing them;

(7) the signature of the warehouse or its agent;

(8) if the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, the fact of that ownership; and

(9) a statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest, but if the precise amount of advances made or of liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouse or to its agent that issued the receipt, a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient.

(c) A warehouse may insert in its receipt any terms that are not contrary to [the Uniform Commercial Code] and do not impair its obligation of delivery under Section 7-403 or its duty of care under Section 7-204. Any contrary provisions are ineffective.”

**ANNEXE III****EXAMPLES OF INTERNATIONAL TREATIES ON FORM AND CONTENT REQUIREMENTS FOR DOCUMENTS SIMILAR TO WAREHOUSE RECEIPTS****1. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), 2009<sup>31</sup>****Article 36 [Contract particulars]:**

“1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of the carrier;
- (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
- (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

- (a) The name and address of the consignee, if named by the shipper;
- (b) The name of a ship, if specified in the contract of carriage;
- (c) The place of receipt and, if known to the carrier, the place of delivery; and
- (d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.”

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<sup>31</sup> Text of the Convention available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf>.

**Article 38 [Signature]**

- “1. A transport document shall be signed by the carrier or a person acting on its behalf.
2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.”

**Article 39 [Deficiencies in the contract particulars]**

- “1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:
  - (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or
  - (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.
3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.”

**2. Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, 1930<sup>32</sup>**

Annex I, Chapter I. [Issue and Form of a Bill of Exchange],

**Article 1:**

“A bill of exchange contains:

1. The term “bill of exchange” inserted in the body of the instrument and expressed in the language employed in drawing up the instrument;
2. An unconditional order to pay a determinate sum of money;
3. The name of the person who is to pay (drawee);
4. A statement of the time of payment;
5. A statement of the place where payment is to be made
6. The name of the person to whom or to whose order payment is to be made;
7. A statement of the date and of the place where the bill is issued;
8. The signature of the person who issues the bill (drawer).”

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<sup>32</sup> Text of the Convention available at [143.pdf \(un.org\)](#).

**Article 2:**

“An instrument in which any of the requirements mentioned in the preceding article is wanting is invalid as a bill of exchange, except in the cases specified in the following paragraphs:

A bill of exchange in which the time of payment is not specified is deemed to be payable at sight.

In default of special mention, the place specified beside the name of the drawee is deemed to be the place of payment, and at the same time the place of the domicile of the drawee.

A bill of exchange which does not mention the place of its issue is deemed to have been drawn in the place mentioned beside the name of the drawer.”

**Article 7:**

“If a bill of exchange bears signatures of persons incapable of binding themselves by a bill of exchange, or forged signatures, or signatures of fictitious persons, or signatures which for any other reason cannot bind the persons who signed the bill of exchange or on whose behalf it was signed, the obligations of the other persons who signed it are none the less valid.”

**3. United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988<sup>33</sup>****Article 2, para. 3:**

“This Convention does not deal with the question of sanctions that may be imposed under national law in cases where an incorrect or false statement has been made on an instrument in respect of a place referred to in paragraph 1 or 2 of this article. However, any such sanctions shall not affect the validity of the instrument or the application of this Convention.”

**Article 3, para 1:**

“A bill of exchange is a written instrument which:

- (a) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the drawer.”

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<sup>33</sup> Text of the Convention available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/x\\_12\\_e.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/x_12_e.pdf).

**ANNEXE IV****ADDITIONAL RESOURCES**UNCITRAL Instruments

UNCITRAL, UNCITRAL Legislative Guide on Secured Transactions (2007)  
[https://www.uncitral.org/pdf/english/texts/security-lq/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](https://www.uncitral.org/pdf/english/texts/security-lq/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](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](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](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](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](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](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>