



EN

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

Fourth session (hybrid)
Rome, 28 February - 2 March 2022

UNIDROIT 2022
Study LXXXIII – W.G.4 – Doc. 2
English only
February 2022

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 fourth session.
2. The issues considered in this document were identified by either members of the Working Group during and/or after the previous sessions, 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 structure for the Working Group's deliberations at its fourth session.
3. The document retains an updated version of the parts of the Issues Paper from the previous sessions 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 six sections:
 - i. Scope and general provisions
 - ii. Issuance of a warehouse receipt
 - iii. Transfer of warehouse receipts
 - iv. Electronic warehouse receipts
 - v. Security Rights in warehouse receipts
 - vi. Rights and obligations of the warehouse operator
4. The abovementioned sections i., ii. and iii. are to be considered in conjunction with the Preliminary Drafting Suggestion for the Model Law on Warehouse Receipts (Study LXXXIII - W.G.4 - Doc. 3), which contains revised drafting suggestions for the scope and general provisions (draft Chapter I); the issuance of a warehouse receipt (draft Chapter II); and issues that may need to be addressed concerning their transfer (draft Chapter IV).
5. The Secretariat is grateful to Mr Marek Dubovec, Kozolchuk National Law Center (NatLaw) as well as Working Group members Ms Teresa Rodriguez De Las Heras Ballell and Mr Andrea Tosato for their contributions to this document.

TABLE OF CONTENTS

I.	PRELIMINARY MATTERS	3
	A. Background of the project	3
	B. Format and title of the future instrument	4
	C. Target audience	4
	D. Methodology and timeline for the project	4
	E. Composition of the UNIDROIT Working Group	5
	F. Relationship of the Model Law with existing international instruments	6
II.	SCOPE AND STRUCTURE OF THE MODEL LAW	7
III.	CONTENT OF THE MODEL LAW	8
	A. Scope and general provisions	8
	B. Issuance of a warehouse receipt	8
	C. Transfer of warehouse receipts	9
	D. Electronic warehouse receipts	9
	E. Security rights in warehouse receipts	9
	F. Rights and obligations of the warehouse operator	9
	1. Standard of care	10
	2. Storage of goods: separation, blending and commingling of stored goods	11
	3. Obligation to redeliver	11
	4. Accessory obligations	13
	5. Option to terminate storage	14
	6. Warehouse liability	15
ANNEXE	Model Law on Warehouse Receipts Preliminary draft structure	19

I. PRELIMINARY MATTERS

A. Background of the project

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

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

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

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

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

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

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

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

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

⁵ *Ibid.*, para. 195.

⁶ *Ibid.*, para. 196.

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

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

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

B. Format and title of the future instrument

11. The Model Law shall consist of a set of black letter rules. In addition, once the project is completed, 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 is expected to be developed. The Working Group meetings have already identified many aspects that ought to be covered in such a guide to enable a seamless implementation of the future model law.

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

C. Target audience

13. The Model Law will be a standalone instrument for adoption by States seeking to reform their domestic legislation to introduce or modernise warehouse receipt systems. It is being designed to complement other international standards addressing related aspects, especially the use of warehouse receipts as collateral and their issuance/transfer electronically. As consistent with all UNCITRAL and UNIDROIT instruments, the Model Law should be capable of being adopted by both common law and civil law jurisdictions.

D. Methodology and timeline for the project

14. The project is a joint UNCITRAL/UNIDROIT initiative 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 of 2020-2022. Once completed by the UNIDROIT Working Group, the draft Model Law shall be submitted for intergovernmental negotiations through an UNCITRAL Working Group.

15. Under the guidance of the Chair of the UNIDROIT Working Group, Professor Eugenia Dacoronia, the Working Group 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.

16. The Working Group meets twice a year for three days. Meetings are held in English without translation. Remote participation is possible, although experts are expected to attend in person if circumstances permit.

17. The tentative calendar for the implementation of the project anticipated the preparation of the first draft for the proposed Model Law over four in-person sessions 2020-2022, followed by the adoption by the Governing Council of the complete draft to be sent to UNCITRAL at its 101st session in May 2022.

18. However, discussions of the Working Group thus far have revealed the existence of structural differences of approach between different legal families and traditions concerning various key aspects of the design of the system of warehouse receipts. Addressing these differences, in a time when in-person meetings are restricted, poses a challenge to the proposed calendar activities. In light of these observations, and following consultations with UNCITRAL, the Governing Council at its 100th session on 22-27 September 2021 approved the proposal to grant the Working Group an additional year to finalise a complete draft Model Law text. This extension of one year will accommodate well the envisaged schedule of working group time available in UNCITRAL for the second part of the project.

19. Accordingly, the revised calendar for the completion of the project provides the following:

- (a) Preparation of the first draft for the Model Law over six in-person Working Group sessions 2020-2023
 - (i) First session: December 2020 (hybrid)
 - (ii) Second session: March 2021 (hybrid)
 - (iii) Third session: September 2021 (hybrid)
 - (iv) Fourth session: February/March 2022 (hybrid)
 - (v) Fifth session: second half of 2022
 - (vi) Sixth session: early 2023
 - (vii) Remote meetings may be conducted when deemed necessary, in between in-person sessions.
- (b) Consultations and finalisation: first half of 2023
- (c) Adoption by the Governing Council of the complete draft to be sent to UNCITRAL at its 102nd session in May/June 2023.

E. Composition of the UNIDROIT Working Group

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

- Eugenia Dacornia, 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)
- Yu Guo, Associate Professor, Director of the Maritime Law Research Centre, Beijing University
- 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)
- Bruce Whittaker, Senior Fellow, University of Melbourne

21. 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)

22. 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

23. 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 these instruments, and that uniformity and consistency with their provisions ought to be ensured.

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

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

25. The United Nations Convention on International Bills of Exchange and International Promissory Notes¹¹ deals extensively with the transfer and endorsement as well as with the protection of the holder of negotiable instruments. 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.

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

27. An international model law that is particularly relevant for specific aspects of the Model Law is the UNCITRAL Model Law on Secured Transactions (MLST), 2016.¹³ Notably, as part of any warehouse receipts reform, attention should be paid to the secured transactions framework. This is primarily to ensure that transfers of warehouse receipts 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.

28. The other particularly relevant instrument is the UNCITRAL Model Law on Electronic Transferable Records (MLETR), 2017.¹⁴ This Model Law aims to enable the legal use of electronic transferable records both domestically and across borders. It applies to electronic transferable records that are functionally equivalent to transferable documents or instruments, such as warehouse receipts. Such electronic transferable records are increasingly relevant for countries seeking to establish a market for electronic warehouse receipts (EWRs).

II. SCOPE AND STRUCTURE OF THE MODEL LAW

29. With regard to the scope of the Model Law, throughout the project the Working Group, 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. The proposed scope was unanimously supported by the Governing Council members, as it was by the UNCITRAL Commission.

30. 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.

31. During its second session, the Working Group agreed on the following list of aspects to be covered by the Model Law:

- a set of definitions of the main concepts;

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

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

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

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

- 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.

32. 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 a warehouse receipt system could be explained and illustrated in a guide to enactment/users guide or other accompanying document. Furthermore, technology shall permeate the entire instrument.

33. 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 guide to enactment.

34. During its second session, the Working Group agreed on the preliminary structure for the MLWR included in the Annexe to this document.

III. CONTENT OF THE MODEL LAW

A. Scope and general provisions

35. Based on the Working Group's discussion of the drafting suggestions that were presented at its third session for Chapter I "Scope and general provisions", the draft provisions for that Chapter have been revised for consideration by the Working Group at this fourth session.

Recommendation for the Working Group:

- *The Working Group is invited to consider the drafting suggestions for Chapter I together with the items for discussion included in Study LXXXIII - W.G.4 - Doc. 3.*

B. Issuance of a warehouse receipt

36. Based on the Working Group's discussion of the drafting suggestions that were presented at its third session for Chapter II "Issue of a warehouse receipt", the draft provisions for that Chapter have been revised for consideration by the Working Group at this fourth session.

Recommendation for the Working Group:

- *The Working Group is invited to consider the revised drafting suggestions for Chapter II together with the items for discussion included in Study LXXXIII - W.G.4 - Doc. 3.*

C. Transfer of warehouse receipts

37. During the previous session of the Working Group, draft provisions for Chapter IV on the transfer of warehouse receipts were presented as examples of issues that may need to be addressed in the Model Law, while it was highlighted that the Working Group would need to find a “legal functional equivalent” to express those concepts in a manner broadly acceptable among legal systems. Based on the Working Group’s deliberations, those draft provisions were revised as included in Study LXXXIII – W.G.4 – Doc. 3 for consideration by the Working Group at this fourth session.

Recommendation for the Working Group:

- *The Working Group is invited to consider the revised drafting suggestions for Chapter IV together with the items for discussion included in Study LXXXIII - W.G.4 - Doc. 3.*

D. Electronic warehouse receipts

38. Following the decision taken by the Working Group at its third session that the level of detail on electronic warehouse receipts to include in the MLWR should be evaluated during the intersessional work, a Discussion Paper on the topic was prepared and discussed at a Special Workshop on Electronic Warehouse Receipts held on 26 January 2022. Based on the outcome of that workshop, the Discussion Paper on Electronic Warehouse Receipts and Drafting Options included in Study LXXXIII - W.G.4 - Doc. 4 was prepared for the Working Group to consider at its fourth session.

Recommendation for the Working Group:

- *The Working Group is invited to consider the Discussion Paper on Electronic Warehouse Receipts and Drafting Options included in Study LXXXIII - W.G.4 - Doc. 4.*

E. Security rights in warehouse receipts

39. In addition, during the intersessional period a Discussion Paper on security rights in warehouse receipts together with preliminary drafting options, included in Study LXXXIII - W.G.4 - Doc. 5, was prepared for the Working Group to consider at its fourth session.

Recommendation for the Working Group:

- *The Working Group is invited to consider the Discussion Paper on security rights in warehouse receipts together with preliminary drafting options included in Study LXXXIII - W.G.4 - Doc. 5.*

F. Rights and obligations of the warehouse operator

40. This section was already part of the Issues Papers presented to the Working Group at its previous sessions. However, it was decided to consider this section at a later stage, and thus the following paragraphs are included here for consideration by the Working Group.

41. 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 include provisions addressing obligations of the warehouse.*

1. Standard of care

42. 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.

43. 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.

44. 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

45. 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.

46. 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.¹⁵

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?*

¹⁵ Cf. UCC § 7-204.

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

47. The obligation to store the goods delivered by the depositor is at the core of bailment arrangements. 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.

48. 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 warehouse receipts on the part of the warehouse.

49. 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.

50. 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

51. The obligation to redeliver the deposited goods is a cardinal element of warehousing arrangements. 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 delivery of the goods.

(a) Performance

52. A warehouse operator has a duty to redeliver the deposited goods. 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.

53. 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

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

55. 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

56. 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.

57. 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 bailments often expressly articulate narrower exceptions that specifically address certain failures to perform the redelivery obligation.

58. 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 has 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.

59. 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.

60. 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.”¹⁶

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

61. 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 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.

62. These obligations are not necessarily closely related to a single warehousing arrangement, 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 statutory or contractual obligations, administrative law duties, or a combination of the preceding.

63. 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 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 statutory, contractual or administrative.

Comparative overview

64. 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.

65. 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

¹⁶ Cf. UCC § 7-403.

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.

66. 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 statutory, contractual obligations or administrative duties?
 - If articulated as statutory obligations, should they be default or mandatory?

5. Option to terminate storage

67. 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.

68. 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 arrangements where 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.

69. 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.

70. 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 the holder – pay outstanding charges and recover deposited goods at any moment in time, subject to a certain notice period.

71. 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.¹⁷

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

72. 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

73. 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.

74. 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

75. 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.¹⁸

76. 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:*

¹⁷ Cf. UCC § 7-206.

¹⁸ 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

77. 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.

78. 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. 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

79. 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.

80. English law has long established a special burden of proof regime for warehousing. 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.

81. 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

82. 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.

83. 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 substantially increase the cost of storage.

84. 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. 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

85. 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.

86. English law has historically favoured the practice of limiting or exempting bailees, including warehouse operators, as regards their liability for loss or damage 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.

87. 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.”

88. Notably, the UCC acknowledges that other laws might void any contract term limiting or excluding warehouse liability.¹⁹

¹⁹ Cf. UCC § 7-204.

ANNEXE**MODEL LAW ON WAREHOUSE RECEIPTS****Preliminary draft structure**

The suggested draft structure for the Model Law 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.

Heading	Contents
Chapter I. Scope of application and general provisions	<ul style="list-style-type: none"> • Scope of application • Definitions and rules of interpretation • Party autonomy • General standards of conduct • International origin and general principles
Chapter II. Issue of a warehouse receipt	<ul style="list-style-type: none"> • Persons who may issue a warehouse receipt • Form and content of a warehouse receipt • Loss of a warehouse receipt • Duplicate warehouse receipts • Issuance or re-issuance in electronic form <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>
Chapter III. The warehouse receipts registry system	<ul style="list-style-type: none"> • Establishment of the registry system <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>
Chapter IV. Transfer of a warehouse receipt; Protected holder and other transferees; Warranties; Miscellaneous provisions regarding transfers	<ul style="list-style-type: none"> • Transfer of a negotiable warehouse receipt • Transfer of a negotiable warehouse receipt to a [protected holder] [other type of holder to be specified by the enacting State] • Rights of a [protected holder] [other type of holder to be specified by the enacting State] • Rights of a holder defeated in certain cases • Transfer of a warehouse receipt by assignment

Heading	Contents
	<ul style="list-style-type: none"> • Rights of a transferee who is not a [protected holder] [other type of holder to be specified by the enacting State] • Warranties on transfer of a warehouse receipt • Endorser not a guarantor • Subsequent sale of a warehouse receipt in possession of the seller
Chapter V. Dealings with warehouse receipts by way of security	<ul style="list-style-type: none"> • 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.
Chapter V. Rights and obligations of warehouse operators	TBD
Chapter VI. Conflict of laws	<ul style="list-style-type: none"> • 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.
Chapter VII. Implementation of the law	<ul style="list-style-type: none"> • Amendment and repeal of other laws • Transitional rules • Act does not apply to existing warehouse receipts • Entry into force of this Law