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

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PRELIMINARY DRAFTING SUGGESTIONS FOR

CHAPTER IV - RIGHTS AND OBLIGATIONS OF THE WAREHOUSE OPERATOR

1. This document provides preliminary drafting suggestions for Chapter IV on Rights and obligations of the warehouse operator. Please note that the drafting suggestions are merely indicative to facilitate the Working Group's discussions. Firstly, the Working Group is invited to consider for each of the suggested provisions whether the Model Law should contain the provision, or whether the matter could be addressed in the future Guide to Enactment which can describe the essential features and options for legislating on the warehousing contract. Secondly, questions on the content of the draft provisions are suggested in the table for consideration by the Working Group.

2. The Secretariat is grateful in particular to Mr Marek Dubovec (International Law Institute) as well as Working Group Members Mr Nicholas Budd and Mr Hiroo Sono for their contributions to this document.

DRAFTING SUGGESTIONS

Chapter IV. Rights and obligations of the warehouse operator

Note by the Secretariat: The Working Group is invited to consider for each of the provisions proposed below whether the Model Law should contain the provision, or whether the matter could be addressed in the future Guide to Enactment.

Suggested text	Discussion
Article 1. Duty of care; Contractual limitations of warehouse operator's liability	The "exercise reasonable care" and "commercially reasonable manner" standards are reflective of the Anglo-American approach whereas many civil law countries adhere to the "level of diligence expected of a professional operator in the relevant sector."
1. The warehouse operator is liable for loss or damage to the goods caused by its failure to [exercise reasonable care] [act in a commercially reasonable manner] [act with diligence expected of a professional operator in the relevant sector] to preserve the goods[, unless the damage could not have been avoided].	The Working Group may wish to consider whether the clause 'unless the damage could not have been avoided' is necessary.
2. In the warehouse receipt or the storage agreement, the parties may limit the amount of liability beyond which the warehouse operator is not liable.	The Working Group may wish to discuss whether the parties' ability to limit or exclude the warehouse operators' liability should be limited. Such a limitation could be either qualitative or quantitative or both.
3. This section does not modify or repeal [insert reference to any statute that imposes a higher responsibility upon the warehouse operator or invalidates a contractual limitation that would be permissible under this article].	
Article 2. Termination of storage at warehouse operator's option	Warehouse receipts laws in both common law jurisdictions (see, e.g., U.S. UCC § 7-206) as well as civil law jurisdictions (see, e.g., Kyrgyz Civil Code, Art. 904) provide rules determining when the warehouse operator may lawfully terminate the storage.
1. The warehouse operator, by giving notice to the known holder, and any other person known to claim an interest in the goods, may demand payment of the storage fees and removal of the goods:	

<p>(a) at the end of the storage period fixed in the storage agreement or warehouse receipt; or</p> <p>(b) if a period is not fixed, within [a period of not less than 30 days] [a reasonable period] [a short period to be specified by the enacting State].</p>	
<p>2. If the goods are not removed before the date specified in the notice, the warehouse operator may sell them pursuant to Article 4(4) (of this chapter).</p>	
<p>3. If the warehouse operator [in good faith] [reasonably] believes that goods are about to deteriorate or decline in value to less than the amount of its lien within the time provided in paragraph 1 and Article 4(4) (of this chapter), the warehouse may specify in the notice given under paragraph 1 any reasonably shorter time for removal of the goods and, if the goods are not removed, may sell them at a public sale held not less than one week after a single advertisement.</p>	<p>The Working Group may wish to consider if a private sale should also be allowed to give the warehouse operator more flexibility in the case that the goods deteriorate quickly.</p>
<p>4. If, as a result of a quality or condition of the goods of which the warehouse operator did not have knowledge at the time of deposit, the goods are a hazard, the warehouse operator may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouse operator, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner.</p>	<p>The Working Group may wish to consider whether this paragraph and the former could be consolidated, and the procedural steps aligned in these scenarios requiring prompt removal of the goods.</p>
<p>5. The warehouse operator must deliver the goods to the person entitled to them upon due demand made at any time before sale or other disposition under this Article.</p>	
<p>6. The warehouse operator may satisfy its lien from the proceeds of any sale or disposition under this Article but shall hold the balance for payment on demand to any person to which the warehouse operator would have been obligated to deliver the goods.</p>	

Article 3. Duty to keep goods separate	Virtually all warehouse receipts laws provide for the duty of the warehouse operator to store goods separate from other goods, unless they are fungible goods, which may be commingled in a mass (see, e.g., Brazilian Civil Code, Art. 645).
1. The warehouse operator must keep the goods separate so as to permit at all times identification and delivery.	
2. Fungible goods may be commingled into a mass.	The Working Group may wish to consider if a definition of 'fungible' ought to be included. It may further wish to consider whether commingling should be permitted without either the consent of the depositor or a provision to that effect in the storage agreement.
3. Where fungible goods are commingled into a mass the persons entitled to the goods immediately before commingling have a right to the mass proportionally according to their share.	<p>The Working Group may wish to consider if this provision should address the situation where there is a shortage of goods, i.e. where the mass is insufficient to meet all the receipts the warehouse operator has issued against it.</p> <p>It may further wish to consider if this provision, in addition to this property law rule, should clarify that the warehouse operator will still be liable, as a matter of obligation, to deliver the same amount of fungible goods that were deposited.</p> <p>The Group may consider whether the relevant time to decide the proportion (the time of commingling) needs to be specified.</p>
Article 4. Lien of the warehouse operator	Civil law jurisdictions do not address the matter under consideration homogenously. In jurisdictions influenced by the Napoleonic codifications, warehouse operators generally benefit from a lien in the deposited goods to secure their unpaid fees. Nevertheless, there is great diversity in the manner in which these legal systems regulate the scope of this lien, its priority regime and enforcement process.
1. The warehouse operator has a lien in the goods covered by a warehouse receipt and in any proceeds for:	The Working Group may wish to consider whether the term 'lien' should be replaced with a more jurisdiction-neutral term such as security right or right of retention.
(a) charges for storage of goods; (b) expenses necessary for the preservation of the goods;	

<p>(c) expenses reasonably incurred in the sale of the goods in accordance with this Law; and</p> <p>(d) similar charges or expenses owed by the holder in relation to other goods held by the warehouse operator if provided so in the warehouse receipt.</p>	
<p>2. In the case of a negotiable receipt the lien is limited to:</p>	
<p>(a) charges specified in the receipt; or</p> <p>(b) if no charges are so specified, to a reasonable charge for storage subsequent to the date of a receipt.</p>	
<p>3. The warehouse operator’s lien is effective against any third parties, other than persons protected under Article 15 (of latest draft MLWR¹).</p>	
<p>4. The warehouse operator may enforce its lien by public or private sale of the goods at any time or place and on any terms that are [commercially reasonable] [customary in the industry], after notifying all persons known to claim an interest in the goods.</p>	<p>Consistently with the explanation of “commercially reasonable”, an alternative is provided.</p> <p>The Working Group may wish to consider whether the enforcement of the warehouse operator’s lien should be dealt with in a separate article and include more detailed guidance.</p>
<p>5. The warehouse operator may satisfy its lien from the proceeds of any sale pursuant to this Article but shall hold any surplus for the benefit of a holder.</p>	
<p>Article 5. Obligation of warehouse operator to deliver; obligation to cancel the document or indicate partial delivery</p>	<p>Warehouse receipts laws in virtually all jurisdictions provide rules governing the duty of the warehouse operator to deliver the goods upon presentation of the warehouse receipt and payment of storage fees (see, e.g., Pakistani Collateral Management Companies Regulations, Art. 16).</p>
<p>1. Except as provided in Article 6 (of this chapter), the warehouse operator must deliver the goods to a holder if that person:</p>	
<p>(a) satisfies the warehouse operator’s lien; and</p>	<p>The Working Group may wish to consider whether the surrender of the receipt for cancellation or indication or partial delivery should be a requirement for the delivery obligation.</p>

¹ Article 15. Rights of a protected holder subject to certain claims.

(b) surrenders possession or control of any outstanding warehouse receipt covering the goods for cancellation or indication of partial delivery.	
2. The warehouse operator must cancel the warehouse receipt or indicate in the receipt the partial delivery of the goods.	The Working Group may wish to consider whether this should be limited to negotiable warehouse receipts.
Article 6. Excuses from delivery obligation	In some circumstances, the duty of the warehouse operator to deliver the goods may be excused. Such circumstance are typically explicitly laid out in warehouse receipts legislation (see, e.g., Kyrgyz Law on Warehouses and Warehouse Receipts, Art. 15)
The warehouse operator need not deliver the goods if and to the extent it establishes any of the following:	
<ul style="list-style-type: none"> (a) delivery of the goods to a person whose warehouse receipt was effective against the person claiming the goods; (b) destruction or loss of the goods for which the warehouse operator is not liable; (c) previous sale or other disposition of the goods in lawful enforcement of a lien pursuant to Article 4(4) (of this chapter) or on a warehouse operator's lawful termination of storage pursuant to Article 2(3),(4) (of this chapter); (d) any other lawful excuse. 	
Article 7. Rights pursuant to a judgment against goods covered by negotiable receipts	This Article provides that a warehouse operator may not release goods pursuant to a judgement until the corresponding warehouse receipt has been surrendered to it or to the court (see, e.g., Kenyan Warehouse Receipts System Act, Art. 36).
1. In the case of a negotiable warehouse receipt:	
<ul style="list-style-type: none"> (a) a right pursuant to a judgment does not extend to goods stored by the warehouse operator, unless possession or control of the receipt is surrendered to the warehouse operator; and (b) the warehouse operator shall not deliver the goods to a person claiming pursuant to a judgment until possession or control of the 	Would it need to be clarified that this is not any judgment but a judgment on negotiable warehouse receipt? A true owner of the goods that were stolen and deposited should be able to enforce a judgment ordering return of the goods without a surrender of a warehouse receipt.

warehouse receipt is first surrendered to the warehouse operator or to the court.	
2. A protected holder takes free of the right pursuant to a judgment.	
Article 8. Irregularities in issue of receipt or conduct of warehouse operator	
The obligations imposed by this Law on a warehouse operator apply even if: (a) the receipt does not comply with the requirements of this Law; (b) the warehouse operator violated laws regulating the conduct of its business.	