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INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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

Fifth session (hybrid)
Rome, 5-7 December 2022

UNIDROIT 2022
Study LXXXIII – W.G.5 – Doc. 4
English only
November 2022

**NOTE ON
INCLUSION OF RULES GOVERNING SECURITY RIGHTS
IN WAREHOUSE RECEIPTS IN THE MODEL LAW**

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I. INTRODUCTION

1. At its Fourth Session, the Working Group considered a Note on Security Rights in Warehouse Receipts.¹ The Note explained how the provisions of the UNCITRAL Model Law on Secured Transactions (MLST) on negotiable documents would apply to warehouse receipts and queried whether any of those provisions should be incorporated, as adapted to warehouse receipts, in the Model Law on Warehouse Receipts (MLWR).

2. A majority of the Working Group members were, in principle, against including provisions on security rights in warehouse receipts in the MLWR.² One member cautioned that they were unaware of any warehouse receipts law that attempted to “pre-empt” secured transactions legislation, and it would be both unnecessary and risky for the MLWR to attempt such an undertaking.³ Other Working Group members argued that it would not be sufficient to entirely ignore the issue or even simply cross-reference domestic legislation on secured transactions.⁴ They took the position that the MLWR should not assume that every State has a modern secured transactions law in place.⁵

3. This Note suggests that rather than simply deferring to domestic legislation on secured transactions, the MLWR should include minimum provisions, particularly with respect to third-party effectiveness of security rights in warehouse receipts, in order to build a link with and fill any gaps in the domestic secured transactions regime.⁶ In its deliberations, the Working Group may wish to take into account several considerations:

- Recently enacted legislation on warehouse receipts (e.g., Kenya) covers some aspects of security rights in warehouse receipts. While this is not uncommon in States with outdated secured transactions laws, warehouse receipts laws are often developed by a different group of stakeholders who may not appreciate the effect of secured transactions laws, and particularly the provisions on security rights in negotiable documents.
- Increasingly warehouse receipts are issued electronically and the MLST does not provide rules specific to the third-party effectiveness and priority of security rights in electronic warehouse receipts (EWR) analogous to those for paper receipts. As a result, a security right in an EWR may need to be made effective against third parties by registration in a “secured transactions registry.” A creditor acquiring some form of control over an EWR, in a secured transaction, that does not qualify as a protected holder, as defined in Article 2 of the MLWR, would not have protection in insolvency as well as against other competing claimants. A creditor in possession of a paper warehouse receipts would be protected.
- The provisions on security rights in warehouse receipts in many States are cumbersome and unduly increase the cost of credit.
- Finally, the Working Group has considered aspects of “dual receipt systems” where the warehouse operator issues a pledge instrument if the holder seeks to secure credit from a third party. The Working Group has not yet adopted a decision on whether the MLWR

¹ Note on Security Rights in Warehouse Receipts, prepared by the Working Group Member Prof. Andrea Tosato, <https://www.unidroit.org/wp-content/uploads/2022/03/Study-LXXXIII-W.G.4-Doc.-5-Discussion-Paper-and-Drafting-Options-on-Security-Rights-in-WRs.pdf>.

² See Summary Report of the Fourth Session (Feb-March 2022), p. 19, <https://www.unidroit.org/wp-content/uploads/2022/05/Study-LXXXIII-W.G.4-Doc.-6-Report.pdf>.

³ Id.

⁴ Id.

⁵ Id. Only nine (known) States have adopted legislation based on or influenced by the MLST. See Status: UNCITRAL Model Law on Secured Transactions (2016), https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions/status.

⁶ Id.

should be conceived for either the single or dual receipt receipt format, or accommodate both. The Secretariat’s review of law and practice in 40 jurisdictions found that about half of the countries adopted dual receipts or a combination of both, single and dual formats.⁷ All provisions of the latest draft MLWR would seem to accommodate both formats, but additional consideration should be given to the provisions on security rights, should those be included.⁸ It was agreed that the MLWR would be assessed, once a comprehensive draft is available, to identify all provisions that would not accommodate both formats.

II. TREATMENT OF NEGOTIABLE DOCUMENTS UNDER THE UNCITRAL MODEL LAW ON SECURED TRANSACTIONS

4. In determining whether to include rules on security rights in the MLWR, it is useful to briefly summarize the treatment of negotiable documents under the MLST from the Note on Security Rights in Warehouse Receipts. The MLST provides for several rules specific to security rights in negotiable documents, including with respect to creation (Art. 16), perfection (Art. 26), and priority (Art. 49).⁹ The general rules governing, for instance, registration of notices and enforcement of security rights in tangible assets in the MLST apply to negotiable documents. Together, these rules provide a framework for security rights in negotiable documents, including warehouse receipts.

5. In States with secured transactions laws that conform to the MLST, there may not be a need to include rules governing security rights in the law on warehouse receipts. Any provisions concerning security rights in EWRs may be inserted in the secured transactions law through a consequential amendment. Many States have not enacted modern secured transactions laws along the lines of the MLST.¹⁰ Kazakhstan and Ukraine, for example, have enacted Civil Codes and standalone legislation with rules governing pledges of warehouse receipts.¹¹ This is also the case of Kyrgyzstan and many States in Eastern Europe and Central Asia. Thus, it can be expected that some States will need to include rules on security rights in their warehouse receipts law.

III. COMPARATIVE OVERVIEW

6. Warehouse receipts laws in Brazil, Kenya, Kyrgyzstan, and Pakistan, for instance, all provide for specific rules governing security rights in warehouse receipts. In all four States, these rules refer to “pledges” of warehouse receipts. Notably, this is also the case in Kenya even though it abolished that security mechanism in its enactment of the 2017 secured transactions law fully consistent with the MLST. This is an illustration of a commercial law reform process where two distinct groups of stakeholders support the adoption of secured transactions and warehouse receipts laws without any form of coordination. The scope and contents of these rules vary from jurisdiction to jurisdiction, in both civil-law and common-law systems.

⁷ See Summary Report on National Laws on Single and Dual Warehouse Receipts, available in Annex II of the Report of the Third session (1-3 September 2021), <https://www.unidroit.org/english/documents/2021/study83/wg03/s-83-wg03-02-e.pdf>.

⁸ See Preliminary Drafting Suggestions for the Model Law on Warehouse Receipts (Feb-March, 2022), <https://www.unidroit.org/wp-content/uploads/2022/03/Study-LXXXIII-W.G.4-Doc.-3-Preliminary-Draft-Model-Law.pdf>.

⁹ See Tosato, Security Rights Note, supra n. 1.

¹⁰ See Status of MLST supra n. 5

¹¹ See Kazakh Law on Grain (2001, last amended in 2021), https://online.zakon.kz/Document/?doc_id=1021432&pos=866;-26#pos=866;-26; and the Ukrainian Law on Grain and Grain Market (2002, last amended in 2021), <https://zakon.rada.gov.ua/laws/show/37-15#Text>.

7. The Brazilian Civil Code (2002) contains a set of rules governing pledges of “credit titles,”¹² which would apply to pledges of warehouse receipts.¹³ Its warehouse receipts legislation covering agricultural commodities also includes rules specific to pledges of warehouse receipts. Such legislation provides for a pledge instrument (warrant), which must contain the essential information of the pledge agreement. Kyrgyzstan’s warehouse receipts legislation contains several rules specific to pledges of warehouse receipts, including the issuance of a warrant, the rights and duties of holders of warrants (i.e., pledgees),¹⁴ transfer of warrants,¹⁵ perfection of rights under warrants,¹⁶ and enforcement of rights under warrants.¹⁷

8. Pakistan and Kenya have issued acts and regulations with specific rules on the pledge of warehouse receipts for agricultural commodities that supplement, or in the case of Kenya overlap with, more general rules governing security rights in negotiable documents found in their secured transactions laws.¹⁸ Pakistani regulations (issued in 2019) provide rules on the pledge of EWRs through a platform operated by a collateral management company.¹⁹ Kenyan regulations (issued in 2021) require pledgees of all types of warehouse receipts to register their interest in a public warehouse receipts registry.²⁰ The Kenyan framework thus recognizes two forms of third-party effectiveness in two distinct registries without providing a corresponding priority rule.

9. The following table provides an overview of the warehouse receipts law of Brazil, Kenya, Kyrgyzstan, and Pakistan, particularly (1) the general law governing security rights in negotiable documents, (2) the specific law governing security rights in warehouse receipts, and (3) the types of warehouse receipts (e.g., paper/electronic and single/double).

	Security rights in negotiable documents	Security rights in WRs	Types of WRs
Brazil (Civil law)	- Civil Code governs pledges of “credit titles,” including registration in the Registry of Documents and Titles	- Law on Warehouse Receipts for Agricultural Products states that WRs may be subject to a pledge and provides for a pledge instrument (warrant) that must contain information about the pledge agreement	- Paper and electronic - Double receipts
Kenya (Common law)	- MPSR governs security rights in negotiable documents, including registration in the secured transactions registry	- Warehouse Receipts System Act Regulations provide for obligations of pledgees, one of which is registering its interest in a public warehouse receipts registry	- Paper and electronic - Single receipts

¹² See Brazilian Civil Code (2002), Arts. 1,451-1,460.

¹³ Art. 1,452 of the Brazilian Civil Code subjects pledges of credit titles to registration in the Registry of Titles and Documents.

¹⁴ See Kyrgyz Law on Warehouses and Warehouse Receipts (2019), Art. 8,

¹⁵ Id. at 13.

¹⁶ Id. at 8.

¹⁷ Id. at 17.

¹⁸ Notably, secured transactions legislation in Pakistan provides for control of “electronic documents of title” similarly to the U.S. Uniform Commercial Code, see § 7-106 of the Uniform Commercial Code (Control of Electronic Document of Title), <https://www.law.cornell.edu/ucc/7/7-106>.

¹⁹ See Art. 19 of the Pakistani Collateral Management Company Regulations (2019).

²⁰ See Art. 29 of the Kenyan Warehouse Receipts System Regulations (2021).

Kyrgyzstan (Civil law)	- Law on Pledge defers to legislation on securities with respect to pledges of negotiable documents	- Civil Code and Law on Warehouses and Warehouse Receipts provide detailed rules governing pledges of warehouse receipts	- Paper and electronic - Double and single receipts
Pakistan (Common law)	- Financial Institutions Act governs security rights in documents of title	- The Collateral Management Companies Regulations provide rules governing pledges of electronic warehouse receipts	- Paper and electronic - Single receipts

IV. DUAL RECEIPTS SYSTEMS

10. Legislation may provide for warehouse receipts that consist of a single document or of two documents, referred to as single and dual warehouse receipts. Single receipts are composed of one document, whereas dual receipts are made up of two, separable documents: (1) a certificate of deposit, and a (2) pledge instrument, which embodies the creditor's security right. Several civil-law jurisdictions (e.g., Brazil) provide for dual receipts. Conversely, most common law jurisdictions (e.g., Kenya and Pakistan) implement single receipt systems. Other countries maintain flexibility and allow for both single and dual receipts (e.g., Ukraine).²¹

11. During the first Working Group Session, several Working Group members advanced arguments in support of a single receipt approach, citing (1) an inefficiency of the dual receipts system, (2) the fact that in practice creditors take possession of both the pledge instrument and the certificate of deposit, (3) the potential drafting issues that may arise if a separate set of rules governing the issuance and transfer of the pledge instrument is included, etc.²² Other Working Group members were in favor of dual receipts. They observed that many jurisdictions, particularly in Latin America, continue to use the dual system and a disregard of those systems may undermine the MLWR's usefulness to those States.²³ It was highlighted that the MLWR should not be ignoring the legal traditions of a considerable number of States that follow the dual format approach.

12. However, many jurisdictions in Latin America have implemented the OAS Inter-American Model Law on Secured Transactions that does not contemplate dual receipts. Since these dual receipts systems include provisions on security rights in their warehouse receipts legislation, the Working Group may consider providing options in the Guide to Enactment on how its existing approach to warehouse receipts, including their use as collateral, could be replaced in those State to coordinate with their secured transactions laws.

V. CONSIDERATIONS

13. The Working Group is invited to consider whether the text of the MLWR should include some provisions on security rights in warehouse receipts. Such provisions would not replicate the general rules on security rights that are expected to be found in secured transactions legislation already or after a reform consistent with the MLST. To facilitate the implementation of MLST, ensure its coherence with warehouse receipts legislation, fill in the gaps in the existing international standards concerning EWRs, and to provide guidance to States with dual receipts systems, the MLWR could

²¹ Notably, standalone warehouse receipts legislation in Kyrgyzstan provides for pledges only of double receipts issued in paper form. Electronic warehouse receipts may not be pledged.

²² See Summary Report of First session (remote) Rome (2-4 December 2020), <https://www.unidroit.org/english/documents/2021/study83/wq01/s-83-wq01-05-e.pdf>.

²³ Id.

include the following provisions on third-party effectiveness and priority. A separate Note, prepared for the Fifth Working Group Session, outlines some conflict of laws issues that would complement the third-party effectiveness and priority aspects of security rights.

Corresponding to Article 26 of the MLST, the MLWR may include the following provision:

1. *A security right in a negotiable warehouse receipt may be made effective against third parties by*
 - a. *[registration in a registry established pursuant to a secured transactions law,]*
 - b. *the secured creditor's control of the receipt issued electronically, or*
 - c. *the secured creditor's possession of the receipt issued in paper.*

14. Registration would be bracketed for the enacting State to either omit it, if that State does not have a registry of this nature, or, for those States that have established such registries, to identify the relevant law pursuant to which the registry was established. The inclusion of this provision in domestic warehouse receipts legislation would ensure proper coordination with the secured transactions law and avoid crafting rules on third-party effectiveness of security rights inconsistent with the generally applicable secured transactions legislation. States may need to substitute the terms "security right" and "effective against third parties" with terms that align more closely with its generally applicable secured transactions legislation, such as "pledge" and "perfection".

15. This provision would ensure that all methods of third-party effectiveness are recognized to then craft a comprehensive priority rule. What amounts to possession would be left up to the generally applicable property law, similarly to possession of paper receipts for the purpose of an outright transfer under the MLWR. Article 2A on control, included in the MLWR, would equally apply to security rights. This means that the article on security rights in the MLWR could simply cross-refer to that article, as follows:

2. *A security right in an electronic negotiable warehouse receipt may be made effective against third parties by control in accordance with Article 2A.*

Corresponding to Article 49 of the MLST, the MLWR may then include the following provision:

3. *A security right in a negotiable warehouse receipt made effective against third parties by possession or control of the receipt has priority over a competing security right [whether in the receipt or goods covered by the receipt] made effective against third parties by any other method.*

16. This provision would amplify the corresponding rule of the MLST with respect to EWRs. All these provisions assume that a security right in a negotiable warehouse receipt would extend to the goods covered thereunder as a consequence that such warehouse receipts represent/embody rights to those goods. The text in square brackets would provide a protection to secured creditors equivalent to those conferred on protected holders under Article 14(3) of the MLWR.

17. The MLWR already defines whether a protected holder has priority or is otherwise affected by a right, including a security right in goods prior to their deposit in a warehouse (see Articles 14 and 15).

18. MLST Article 49(3) allows transferees to take free of security rights in the negotiable document and the tangible asset covered thereby. This is equivalent to Article 14(3) of the MLWR. Article 15 of the MLWR applies generally whether a holder is protected or a secured creditor. It would seem to provide a limited exception from the taking free rule governing the rights of the protected holder. However, the same approach might not apply as against a secured creditor as Article 15

cross-references Article 14(3) that is, by its terms, applicable to a protected holder only. UCC 7-503, which inspired these provisions, is crafted differently to apply in all situations.

Question to the Working Group:

- *Consider consistency of Articles 14(3) and 15 of the MLWR with the MLST approach.*

19. In dual receipt systems, the references to “receipt” in paragraphs (1) and (3) would simply be replaced with a “pledge instrument” or whatever other term already used in their legislation.

20. The Guide to Enactment could include recommendations and explanations from the Note on Security Rights in Warehouse Receipts that would enhance the collateral value of warehouse receipts. It could encourage States, reforming their warehouse receipts legislation, to consider, where feasible, consequential amendments to secured transactions legislation to incorporate other provisions concerning security rights, especially on creation and enforcement.