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

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**NOTE ON
CONFLICT OF LAWS ISSUES**

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I. BACKGROUND

1. The Working Group may wish to consider whether some provisions concerning “conflict of laws” (“private international law”) should be included in the Model Law on Warehouse Receipts (MLWR). The Issues Paper for the First Session of the Working Group provided brief commentary on conflict-of-law rules for security rights in warehouse receipts and analyzed the UNCITRAL the Model Law on Secured Transactions (MLST) with respect to some aspects of the law applicable to security rights in electronic warehouse receipts (EWRs).¹ Based on the discussions at the Second Session of the Working Group, the Issues Paper for the Third Session suggested that provisions on conflict of laws may not be needed in the MLWR text, and instead some guidance provided on the implementation of the MLST that covers these issues comprehensively. It suggested that the Guide to Enactment, rather than the MLWR, “may identify some connecting factors for the priority conflicts arising in connection with security rights in EWRs.”² Following the discussion of security rights in warehouse receipts during the Fourth Working Group Session, it was agreed to prepare drafting suggestions on conflict-of-laws provisions for the MLWR with a more elaborated commentary for consideration by the Working Group at its Fifth Session. Accordingly, this Note provides a more fulsome explanation of the relevant issues to aid deliberations of the Working Group at its Fifth Session.

2. Warehouse receipt laws do not typically include rules on conflict of laws. Warehouse receipt laws in Brazil, Kenya, Kyrgyzstan, and Pakistan, for example, do not provide conflict of law rules. Because transfers of warehouse receipts have been traditionally domestic for which the general connecting factor of *lex rei sitae*, applicable generally to tangible assets, was considered to be sufficient. However, the digitalization of records and establishment of platforms for EWRs opens greater access to cross-border trading, and therefore the assumption of purely domestic transactions may not reflect the needs of a new warehouse receipt law. An increase in the volume of cross-border transactions with warehouse receipts is expected to be driven by the need to create tools addressing food insecurity to facilitate movement of commodities. Moreover, digitalization raises novel questions that the general approaches determining the applicable law according to *lex rei sitae* do not satisfactorily answer.

3. The mutual rights and obligations of a warehouse operator and the depositor are provided for in the terms and conditions of warehouse receipts. These terms and conditions typically stipulate the governing law for disputes arising out of the storage agreement as well as which courts have jurisdiction to adjudicate disputes. But these matters are generally subject to party autonomy.

4. This Note suggests to the Working Group to consider the proposal to include the following provisions addressing conflict of law issues:

- (a) *The law applicable to the validity and legal effect of the receipt, including whether the receipt is negotiable and represents goods covered thereunder, is the law specified by the warehouse operator in the receipt.*
- (b) *In the absence of a specification of the applicable law in the receipt, the law of the warehouse operator’s location governs the validity and legal effect of the receipt, including whether the receipt is negotiable and represents goods covered thereunder.*

¹ See para. 154 of the First Issues Paper, available at <https://www.unidroit.org/english/documents/2021/study83/wg02/s-83-wg02-02-e.pdf>,

² See Third Issues Paper at <https://www.unidroit.org/wp-content/uploads/2022/03/Study-LXXXIII-W.G.4-Doc.-2-Issues-Paper.pdf>.

- (c) *The law applicable to the enforcement of the right of a holder, including a secured creditor, against the warehouse operator is the law determined in accordance with paragraphs (1-2).*
- (d) *The law applicable to the legal effect of a transfer of an electronic negotiable warehouse receipt, including whether the transferee qualifies as a protected holder is the law determined in accordance with paragraphs (1-2).*
- (e) *The law applicable to the legal effect of a transfer of paper negotiable warehouse receipt is the law of the State in which the receipt is located at the time of the transfer.*

II. EXISTING GUIDANCE

5. International instruments, especially the UNCITRAL Model Law on Electronic Transferable Records (MLETR) and MLST provide some guidance for the legal effect of transactions with electronic transferable records and security rights in negotiable documents, respectively.

6. Some emerging standards, such as the UNIDROIT's project to develop private law principles for digital assets, attempt to provide conflict of laws solutions for the transfers of digital assets that may be defined broadly to cover electronic warehouse receipts. However, these UNIDROIT principles are designed primarily to reflect the features of quintessential digital assets (e.g., cryptocurrencies) that have features distinct from warehouse receipts (e.g., the identity and location of an issuer of a cryptocurrency may not be known while the issuer of a warehouse receipt is always identifiable), and therefore some of the aspects of the UNIDROIT Digital Assets project may not be the appropriate model for warehouse receipts.

7. The future work programme of the Hague Conference in the area of digital assets may also explore some of these issues in the broader context.

8. MLETR does not include any conflict of laws provisions for electronic transferable records (transferable records include negotiable instruments and negotiable documents, such as warehouse receipts). MLETR Article 19 provides for non-discrimination of electronic transferable records issued in a foreign State ensuring that they are not denied legal effect, validity or enforceability. MLETR Article 19 paragraph (2) adds that "Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument". Accordingly, the otherwise applicable conflict of laws rules in the enacting State will continue to govern. MLETR took this approach so as not to displace existing private international law or create an undesirable dual regime.³ There should not be any difficulty with respect to transferable documents and instruments issued in paper for which *lex rei sitae* would govern the effect of transfers and the law chosen by the issuer of the document/instrument would govern other aspects, including the enforceability of a right embedded therein. However, a court in a forum State may have difficulties determining the applicable law and may need to resort to creating a fiction establishing a "location" of an electronic equivalent or apply the rules for intangible assets. None of these approaches may produce a predictable result.

9. MLST provides rules that determine the applicable law for various aspects of security rights in negotiable documents that would include warehouse receipts. It treats negotiable documents as tangible assets. Accordingly, under Article 85(1) the law applicable to the creation and effectiveness against third parties is the law of the State in which the asset is located. Unlike generally for tangible assets, Article 85(2) provides that the priority of a security right made effective against third parties by possession is the law of the State in which the document is located. It does not contain an analogous set of rules for electronic equivalents of negotiable documents. Consequently, the rules

³ Explanatory Note to the MLETR, paragraphs 187-188, at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf.

applicable generally to security rights in intangible assets should be applicable as electronic warehouse receipt are intangibles. Generally applicable conflict of law rules are expected to assimilate paper negotiable warehouse receipts to tangible assets and apply the law of the location of the receipt, rather than the underlying goods covered thereunder. The result is thus equivalent to that of the MLETR.

10. A special rule for security rights in electronic negotiable documents was not necessary in the MLST as it did not provide for a method of third-party effectiveness for security rights in EWRs other than registration. The result is that a different law may be applicable to an aspect of a security right in a negotiable document depending on the form it has been issued in (e.g., law of the location of the paper document and law of the location of the grantor for an electronic document).

11. The Digital Assets and Private Law Project includes a principle providing a set of approaches, in a waterfall format, that determine the law applicable to proprietary issues of commercial transactions with digital assets. The Principles apply to digital assets in the form of “linked assets” where the digital record purports to convey an interest in a real-world (e.g., a commodity) or other digital asset. Electronic negotiable warehouse receipts would fall under “linked assets”. Under the Principles, the applicable law would be the law of the State expressly specified in the digital/linked asset. The law specified in the digital asset would then apply to proprietary issues, including transfers and security rights effectuated by control. It has not been decided whether the same law would apply to determine whether the digital asset establishes an effective link so that a transfer of the digital asset would also transfer the linked asset. The Principle provides a set of default rules if no specification of the applicable law has been made.

III. ISSUES PERTAINING TO WAREHOUSE RECEIPTS

12. Warehouse receipts raise several questions of the applicable law, including in the following situations relevant to the MLWR:

- (a) the law applicable to the validity of the warehouse receipt;
- (b) the law applicable to the enforcement of a right of the holder as against the warehouse operator;
- (c) the law applicable to transfers of warehouse receipts, including whether a person satisfied the requirements to qualify as a protected holder; and
- (d) a conflict between the rights of a protected holder of the receipt and a right of a person with an interest in the goods.

13. These situations should be examined for paper and electronic receipts separately. While the law applicable in situation 1 and 2 should be the same regardless of the form of the warehouse receipt, whether paper or electronic, it would differ in situations 3 and 4 because for paper receipts it is the location of the receipt that determines the applicable law and EWRs do not have a physical location.

14. MLWR may include only conflict of laws rules for negotiable receipts that are treated as documents of title and thus objects of proprietary rights. It may not need to deal with contractual (mutual) rights and obligations of parties to transfers of warehouse receipts.

Question to the Working Group:

- *Does the Working Group agree that the identified situations are relevant and whether others should be considered?*

Issue 1: Whether the writing represents goods, and thus qualifies as a negotiable warehouse receipt

15. Generally, for negotiable documents and negotiable instruments the law chosen by the issuer determines whether the issued record/document is a warehouse receipt. Accordingly, the issuer may select the law of a foreign country, if, for instance, its domestic law does not recognize warehouse receipts as negotiable documents of title. It may also make a choice of a law that does not recognize warehouse receipts as documents of title. In any case, a transferee of a receipt would be able, “from its face”, to determine the applicable law. Absent a choice, the law of the location of the issuer, which would likely be synonymous with the location where the writing was issued is likely to be the governing law for this aspect. Alternatively, the law applicable to the characterization of the writing as a warehouse receipt could be the law of the issuer’s location, as a mandatory rule. An issuer in a State enacting the MLWR will have less of an incentive to choose some foreign law, so the connecting factor of the issuer’s location would ensure that a modern and predictable regime is applicable to negotiable warehouse receipts. However, this approach where the location of the issuer determine the law applicable to the characterization of the receipt would depart from the domestic laws under which the issuer may choose the applicable law for the writing that embodies a right to an asset.

16. Several cases have considered the effect of choice-of-law provisions on the qualification of a document as a warehouse receipt representing rights to goods. In *Mercuria v Citi*,⁴ the English High Court considered a repurchase agreement of warehouse receipts subject to English Law covering metal stored in China. When fraud was discovered, Citi was holding warehouse receipts. Under English law, warehouse receipts, other than warrants traded at the London Metal Exchange, are not documents of title. As a result, delivery of a “negotiable warehouse receipt” does not transfer property rights to the goods.

17. In *Natixis v. Marex and Access World*, the High Court considered repurchase agreements of warehouse receipts covering nickel stored in Korea and Malaysia, but subject to Singaporean law.⁵ The warehouses in Korea and Malaysia were subsidiaries of Access World. The dispute arose when Marex delivered Natixis sixteen warehouse receipts, as part of the repurchase agreement, that were later discovered to be forged. The Court applied Singaporean law (which the parties agreed was equivalent to English law),⁶ and on this basis, concluded that delivery and endorsement of the warehouse receipts alone did not transfer property rights to the nickel.

Question for the Working Group:

- *What should be the connecting factor for the law that determines the validity of a negotiable warehouse receipt?*

Issue 2: Enforcement of the holder’s rights against the issuer

18. The approach to determine the law for Issue 1 should be the same for enforcement of the issuer’s obligation to deliver the goods. The law chosen by the issuer, or the law of the location of the issuer in the absence of a choice, would govern the rights and obligations between the (protected) holder and the issuer. The same law is expected to govern the rights and obligations between the issuer and a secured creditor as well as a holder of a non-negotiable receipt. This is already the approach of Article 96 of the MLST under which the law governing the rights and obligations of an

⁴ [2015] EWHC 1481 (Comm).

⁵ See *Natixis v. Marex and Access World* [2019] EWHC 2549 (Comm) <https://www.twentysessex.com/wp-content/uploads/2019/11/Approved-Judgment-Natixis-SA-.pdf>.

⁶ The terms and conditions of the warehouse receipts in question included a choice of law provision in favor of “the rules and regulations set out by the London Metal Exchange (the “LME”), applicable local law and regulations of the jurisdiction where the metal is stored, and the standard terms of the Warehouse available at www.accessworld.com.”

issuer of a negotiable document and the grantor of a security right is also the law that determines the conditions under which the security right may be invoked against the issuer.

Question for the Working Group:

- *Does the Working Group agree with the approach for enforcement of the holder's rights against the issuer? If so, this aspect could be addressed through a single provision in the text of the MLWR providing an answer to Issues 1 and 2.*

Issue 3: Proprietary aspects of transfers

19. Generally, warehouse receipts recognized as negotiable documents of title are treated as movable assets, so that the law of the location at the time of the transfer determines the effectiveness of that transfer. The prospective transferee should be easily able to determine the applicable law. Article 85 of the MLST provides for the location of an asset as the connecting factor for the law that governs the creation, third-party effectiveness, and priority of a security right in a tangible asset. It also includes a special rule for the priority of a security right made effective against third parties by possession of the negotiable document in Article 85(2).

20. MLST defers to the law of the location of the transferor/grantor for the third-party effectiveness of a security right achieved by registration, but this is a matter of general secured transactions law in those States that have established a registration system. Nonetheless, the law of the location of the warehouse receipt would govern the priority between a security right perfected by registration and a competing security right perfected by possession. This aspect need not be covered in the MLWR as it is more appropriate for a general secured transactions law.

21. Electronic warehouse receipts do not have a location. Location of the transferor may establish a connecting factor as the transferee should be able to determine the relevant location at the time of transfer. However, this may be the case for inter-personal transactions, but not necessarily so for exchange-based dealings. An alternative would be the law chosen by the issuer, which also UNCITRAL recognized for some special types of intangible assets, such as equity securities not held with an intermediary under Article 100(1) of the MLST.

Questions for the Working Group:

- *Should the MLWR include a rule for paper negotiable warehouse receipts that determines the law applicable to proprietary aspects of transfers according to the location of the receipt at the time of the transfer? This approach would apply to both outright and security transfers of a receipt and align with the MLST approach.*
- *Should the MLWR include a rule for electronic negotiable warehouse receipts that determines the law applicable to proprietary aspects of transfers according to*
 - *the location of the transferor; or*
 - *the law chosen by the issuer?*

Issue 4: Priorities

22. The law governing the rights of a protected holder should govern any conflict against a buyer of goods or a person with a security right in the goods. MLWR provides a substantive rule resolving such conflicts in Article 14(3). This approach would be consistent with Article 85(2) of the MLST.

Question for the Working Group:

- *Should the Working Group decide to include a rule on Issue 3, the same rule in the MLWR could specify that the proprietary aspects include the priority as against competing claimants with a right in the goods. Is this an acceptable approach?*