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**Point n° 5 de l'ordre du jour: Mise à jour concernant certains projets du Programme de travail 2023-2025 ayant une priorité élevée**

**b) Loi type CNUDCI/UNIDROIT sur les récépissés d'entrepôt et Guide pour l'incorporation**

(préparé par le Secrétariat)

<i>Sommaire</i>	<i>Mise à jour concernant les progrès sur le projet conjoint de Loi type CNUDCI/UNIDROIT sur les récépissés d'entrepôt et soumission du projet de Guide pour l'incorporation de la Loi type pour approbation</i>
<i>Action demandée</i>	<i>Le Conseil de Direction est invité à prendre note des progrès réalisés sur le projet depuis sa dernière session en mai 2023</i>  <i>Par ailleurs, le Conseil de Direction est invité à approuver le projet de Guide pour l'incorporation de la Loi type sur les récépissés d'entrepôt (voir Annexe II)</i>
<i>Mandat</i>	<i>Programmes de travail 2020-2022 et 2023-2025</i>
<i>Degré de priorité</i>	<i>Élevé</i>
<i>Documents connexes</i>	<i><a href="#">UNIDROIT 2020 - C.D. (99) A.8</a>; <a href="#">UNIDROIT 2020 - C.D. (99) A.2</a>; <a href="#">UNIDROIT 2020 - A.G. (79) 10</a>; <a href="#">UNIDROIT 2021 C.D. (100) B.24</a>; <a href="#">UNIDROIT 2022 - C.D. (101) 8</a>; <a href="#">UNIDROIT 2022 C.D. (101) 21</a>; <a href="#">UNIDROIT 2022 A.G. (81) 9</a>; <a href="#">UNIDROIT 2023 - C.D. (102) 4</a>; <a href="#">UNIDROIT 2023 - C.D. (102) 25</a>; <a href="#">Study LXXXIIIA - W.G.1 - Doc. 3</a> (en anglais seulement)</i>

1. Le présent document a pour objet d'informer les membres du Conseil de Direction des progrès réalisés quant au projet de Loi type sur les récépissés d'entrepôt depuis la 102<sup>ème</sup> session du Conseil de Direction en mai 2023, de recevoir leurs commentaires sur les amendements inclus dans le texte adopté lors de ladite réunion, ainsi que d'inviter le Conseil à approuver le projet de Guide pour l'incorporation de la Loi type sur les récépissés d'entrepôt.

**I. HISTORIQUE DU PROJET**

2. À la suite d'une proposition du Secrétariat au Conseil de Direction lors de sa 99<sup>ème</sup> session en avril/mai 2020, le Conseil avait décidé à l'unanimité de recommander à l'Assemblée Générale

d'inclure l'élaboration, conjointement avec la CNUDCI, d'une Loi type sur les récépissés d'entrepôt comme nouveau projet ayant une priorité élevée dans le Programme de travail 2020-2022, sous réserve de l'approbation d'un mandat parallèle par la Commission de la CNUDCI ([C.D. \(99\) A.8](#), para. 21). La Commission de la CNUDCI a approuvé le projet lors de sa 53<sup>ème</sup> session en septembre 2020 ([UN Doc. A/75/17](#)). Lors de sa 79<sup>ème</sup> session en décembre 2020 ([A.G. \(79\) 10](#), paras 39 et suiv., conjointement au para. 47), l'Assemblée Générale d'UNIDROIT a ensuite approuvé la recommandation d'inclure le projet dans le Programme de travail avec une priorité élevée.

3. L'objectif du projet était d'élaborer une Loi type, accompagnée d'un Guide d'accompagnement à sa mise en œuvre, afin d'aider les États à concevoir une législation de pointe sur les récépissés d'entrepôt couvrant à la fois les récépissés d'entrepôt électroniques et papier. Les récépissés d'entrepôt sont des documents, sur papier ou sous forme électronique, émis par les entrepositaires, qui attestent de la propriété d'une marchandise et peuvent être échangés ou utilisés comme garantie pour l'obtention d'un crédit. Un cadre juridique favorable est largement considéré comme une condition préalable au bon fonctionnement d'un système de récépissés d'entrepôt qui peut favoriser les transactions et faciliter l'accès au financement, en particulier dans le secteur agricole et avec une importance particulière pour les petits entrepreneurs.

4. Le projet a été articulé sur deux phases. Tout d'abord, le calendrier provisoire pour la mise en œuvre du projet prévoyait que la préparation du premier projet pour la Loi type proposée se déroulerait sur quatre sessions d'un Groupe de travail d'UNIDROIT en présentiel (2020-2022), et serait suivie de l'adoption par le Conseil de Direction du projet complet à soumettre à la CNUDCI lors de sa 101<sup>ème</sup> session en mai 2022. Lors de la 100<sup>ème</sup> session du Conseil de Direction tenue en septembre 2021, la complexité théorique du projet qui avait émergé au cours des discussions du Groupe de travail sur la base d'importantes différences structurelles concernant les approches des juridictions à l'égard de divers aspects des récépissés d'entrepôt a amené le Conseil à autoriser la prolongation du projet pour une année civile, et à programmer l'adoption par le Conseil de Direction du projet complet prévu à sa 102<sup>ème</sup> session en mai 2023 ([C.D. \(100\) B.24](#), par. 101). Au cours de la deuxième phase, après approbation par le Conseil de Direction, le projet de Loi type sera soumis à des négociations intergouvernementales par l'intermédiaire d'un Groupe de travail de la CNUDCI.

5. En outre, parallèlement à la discussion du projet de Loi type à la CNUDCI, le Groupe de travail d'UNIDROIT élaborerait un Guide pour l'incorporation de la Loi type, comme autorisé par le Conseil lors de sa 101<sup>ème</sup> session en juin 2022 ([C.D. \(101\) 21](#), para. 223). Un tel Guide pour l'incorporation expliquerait non seulement les dispositions incluses dans le texte de la Loi type aux législateurs qui cherchent à la mettre en œuvre dans la législation nationale, mais fournirait aussi des orientations sur la préparation des règlements d'application et d'autres législations subsidiaires.

6. Par conséquent, à sa 101<sup>ème</sup> session, le Conseil de Direction a recommandé à l'Assemblée Générale de maintenir la formulation d'une Loi type sur les récépissés d'entrepôt dans le Programme de travail 2023-2025 en tant qu'activité hautement prioritaire jusqu'à son achèvement final: pour le texte de la Loi type en 2023, et pour le Guide pour l'incorporation en 2024 ([C.D. \(101\) 21](#), para. 224). L'Assemblée Générale a approuvé la recommandation (voir [A.G. \(81\) 9](#), para. 67).

## **II. ÉLABORATION DU PROJET DE LOI TYPE SUR LES RÉCÉPISÉS D'ENTREPÔT**

### ***Phase 1: préparation du projet de Loi type et du Guide pour l'incorporation par le Groupe de travail d'UNIDROIT***

7. Conformément à la méthodologie de travail établie par l'Institut, le projet de Loi type a été élaboré par un Groupe de travail dont les membres ont été sélectionnés en fonction de leur compétence en matière de législation sur les récépissés d'entrepôt, présidé par la Professeure Eugenia Dacornia, membre du Conseil de Direction. Les experts ont participé à titre personnel et

ont représenté différents systèmes juridiques et régions géographiques. En outre, plusieurs organisations intergouvernementales ayant une compétence interdisciplinaire dans le domaine des systèmes de récépissés d'entrepôt ont été invitées à participer au Groupe de travail en tant qu'observateurs, afin d'aider à la fois à l'élaboration et à la mise en œuvre de la Loi type une fois qu'elle aura été adoptée. Il s'agit, entre autres, de l'Organisation des Nations Unies pour l'alimentation et l'agriculture (FAO), de l'Organisation des États américains (OEA), de la Conférence des Nations Unies sur le commerce et le développement (CNUCED) et du Groupe de la Banque mondiale (GBM). En outre, plusieurs parties prenantes des secteurs public et privé ont été invitées à participer au Groupe de travail en tant qu'observateurs, afin de s'assurer que l'instrument répondait aux besoins des parties prenantes <sup>1</sup>.

8. Le Groupe de travail a élaboré le projet de Loi type au cours de six sessions tenues entre 2020 et 2023. Le Conseil de Direction a reçu du Secrétariat des mises à jour détaillées sur les quatre premières sessions du Groupe de travail à sa 101<sup>ème</sup> session en juin 2022 (voir [C.D. \(101\) 8](#)), et sur les cinquième et sixième sessions à la 102<sup>ème</sup> session en mai 2023 (voir [C.D. \(102\) 4](#)). Les rapports sommaires correspondants des réunions du Groupe de travail et les documents pertinents sont disponibles sur la [page dédiée au projet](#) sur le site Internet d'UNIDROIT.

9. À l'issue de la sixième session du Groupe de travail, le Secrétariat a présenté un projet final de Loi type sur les récépissés d'entrepôt au Conseil de Direction à sa 102<sup>ème</sup> session, qui s'est tenue du 10 au 12 mai 2023 (disponible à l'Annexe du document [C.D. \(102\) 4](#)). Le Conseil de Direction a adopté à l'unanimité le projet de Loi type tel qu'il a été présenté et a accepté qu'il soit soumis à la CNUDCI en vue de négociations avec les États et de son achèvement (voir [C.D. \(102\) 25](#), par. 80).

10. Suite à l'adoption du projet de Loi type par le Conseil de Direction d'UNIDROIT à sa 102<sup>ème</sup> session et sur la base des travaux du Groupe au cours des deux années précédentes, le Groupe de travail d'UNIDROIT, en étroite collaboration avec le Secrétariat, a préparé un projet complet du Guide pour l'incorporation de la Loi type. D'importants travaux préparatoires ont déjà été entrepris parallèlement à l'élaboration de la Loi type, au cours desquels des références à la nécessité d'inclure des parties spécifiques dans le Guide ont été fréquemment et dûment notées.

11. La première version complète du Guide a été distribuée au Groupe de travail d'UNIDROIT pour examen et a été discutée lors de plusieurs réunions intersessions à distance. Tout au long du processus, les Secrétariats d'UNIDROIT et de la CNUDCI ont collaboré étroitement afin de veiller à ce que le projet de Guide reflète toute modification apportée au texte de la Loi type pendant et après ses négociations au sein du Groupe de travail I de la CNUDCI. Par la suite, une session du Groupe de travail s'est tenue du 13 au 15 novembre 2023 pour discuter de l'ensemble du projet de Guide pour l'incorporation, au cours de laquelle les modifications finales ont été convenues et mises en œuvre dans le projet de texte. Le Rapport sommaire de la session du Groupe de travail figure dans le document [Study LXXXIIIA – W.G.1 – Doc. 3](#) (en anglais seulement).

12. À l'issue de la session, le projet de Guide a été envoyé au Secrétariat de la CNUDCI pour examen par le Groupe de travail I, comme prévu.

### ***Phase 2: négociation du projet de Loi type et du Guide pour l'incorporation par le Groupe de travail I de la CNUDCI***

13. À la suite de l'approbation du projet de Loi type par le Conseil de direction d'UNIDROIT, le projet de Loi type a été soumis à la CNUDCI pour négociation intergouvernementale, où il a été assigné au Groupe de travail I.

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<sup>1</sup> La liste complète des participants invités au Groupe de travail est disponible sur la page dédiée au projet à l'adresse suivante: <https://www.unidroit.org/fr/travaux-en-cours/loi-type-recepissés-dentrepot/>.

14. Deux sessions du Groupe de travail I ont été consacrées à l'examen du projet de Loi type. La première session s'est tenue du 25 au 29 septembre 2023 à Vienne, où les délégués et les observateurs du Groupe de travail I de la CNUDCI ont discuté du projet de Loi type. UNIDROIT était représenté au sein du Groupe de travail par le Secrétariat, qui a fourni des informations générales sur le processus et les considérations lors de la préparation du projet de Loi type par le Groupe de travail d'UNIDROIT. Les délégués et les observateurs ont exprimé leur appréciation pour le texte préparé par le Groupe de travail d'UNIDROIT et ont discuté du texte article par article.

15. À l'issue de la session, le Secrétariat de la CNUDCI a incorporé les résultats des discussions dans le texte de la Loi type, qui n'a abouti qu'à des modifications mineures, laissant inchangée la structure du projet de Loi type. Toutefois, comme l'avait demandé le Groupe de travail de la CNUDCI, le Secrétariat a préparé deux versions alternatives de la Loi type pour examen, mettant en œuvre l'approche fondée sur l'équivalence fonctionnelle et l'approche neutre quant au support, respectivement. La première approche avait été adoptée par les précédentes lois types de la CNUDCI, tandis que la seconde avait été choisie et mise en œuvre par le Groupe de travail d'UNIDROIT dans le projet de Loi type, car elle traitait les reçus électroniques et papier sur un pied d'égalité et était donc considérée comme plus prospective en ce qui concerne l'importance croissante du format électronique.

16. Le texte révisé de la Loi type a de nouveau été soumis au Groupe de travail I pour examen lors de sa réunion de février 2024 au siège de l'ONU à New York, où le Groupe a également examiné le projet de Guide pour l'incorporation. Le Secrétariat d'UNIDROIT était représenté à la session. Les délégués et les observateurs ont examiné le projet révisé de Loi type et le Guide pour l'incorporation, et ils ont approuvé les deux textes, sous réserve d'autres modifications convenues au cours de la réunion. Il est important de noter que le Groupe s'est mis d'accord sur le maintien de l'approche neutre quant au support.

17. À l'issue de sa 41<sup>ème</sup> session, le Groupe de travail I a convenu de recommander à la Commission de la CNUDCI d'adopter la Loi type accompagnée du Guide pour l'incorporation à sa 56<sup>ème</sup> session du 24 au 12 juillet 2024. Les derniers textes de la Loi type et du Guide, qui sont actuellement distribués par le Secrétariat de la CNUDCI aux experts et aux États membres pour commentaires finaux, figurent respectivement aux Annexes I et II du présent document. La Loi type est fournie en version révisée de afin de permettre aux membres du Conseil de Direction d'identifier facilement les changements apportés au texte qui avait été approuvé par le Conseil lors de sa dernière session en mai 2023.

### **III. APERÇU DU PROJET DE LOI TYPE SUR LES RÉCÉPISSÉS D'ENTREPÔT**

18. L'objectif de la Loi type et du Guide qui l'accompagne est d'aider les États à élaborer une législation de pointe sur les récépissés d'entrepôt qui permette l'émission et le transfert de récépissés électroniques et papier. La Loi type vise à guider les États qui ne disposent pas actuellement de lois habilitantes sur les récépissés d'entrepôt, ainsi que les États qui disposent déjà de telles lois mais qui cherchent à les moderniser, par exemple pour permettre l'utilisation des récépissés d'entrepôt électroniques.

#### ***Loi type sur les récépissés d'entrepôt***

19. La Loi type est conçue comme un instrument autonome destiné à être adopté par les États. Il s'agit d'un ensemble de dispositions couvrant tous les aspects essentiels nécessaires pour réglementer le volet de droit privé d'un système de récépissés d'entrepôt, y compris l'émission et le transfert des récépissés d'entrepôt et les droits et obligations des parties.

20. La Loi type est compatible avec les systèmes de droit civil et de *common law*. Tenant compte des différentes traditions juridiques en ce qui concerne le format des récépissés d'entrepôt, la Loi type autorise à la fois les systèmes de récépissés d'entrepôt simples et doubles. En outre, la Loi type est harmonisée avec les approches et la terminologie adoptées dans d'autres instruments internationaux pertinents, notamment la Convention des Nations Unies sur le contrat de transport international de marchandises effectué entièrement ou partiellement par mer, la Convention des Nations Unies sur les lettres de change internationales et les billets à ordre internationaux, ainsi que la Loi type de la CNUDCI sur les documents transférables électroniques.

21. Le champ d'application de la Loi type couvre à la fois les récépissés d'entrepôt sur papier et les récépissés d'entrepôt électroniques qui sont émis pour tout type de marchandises, sans se limiter aux produits agricoles. Il est important de noter que la Loi type envisage l'émission et le transfert de récépissés d'entrepôt électroniques, y compris en utilisant des plateformes électroniques, des systèmes de technologie de registre distribué et d'autres mécanismes technologiques innovants.

22. La Loi type est organisée en six chapitres:

- Chapitre I Champ d'application et dispositions générales
- Chapitre II Émission et contenu du récépissé d'entrepôt; modification et remplacement
- Chapitre III Transferts et autres opérations concernant des récépissés d'entrepôt négociables
- Chapitre IV Droits et obligations de l'entrepositaire
- [Chapitre V Certificats de gage]
- Chapitre VI Application de la présente loi

23. La structure et le contenu de la Loi type ont été présentés au Conseil de Direction lors de sa 102<sup>ème</sup> session en 2023 (voir [C.D. \(102\) 4](#), par. 19) et sont restés pour l'essentiel inchangés tout au long des négociations des États sur le texte à la CNUDCI.

### ***Révisions du projet de Loi type sur les récépissés d'entrepôt effectuées à la suite des négociations entre États à la CNUDCI***

24. La structure de la Loi type, y compris l'organisation en six chapitres énumérés ci-dessus, ainsi que l'ordre des questions abordées tout au long du texte de la Loi type, sont restés inchangés à la CNUDCI. En ce qui concerne le contenu de la Loi type, les paragraphes suivants visent à expliquer les principales modifications qui ont été apportées au projet d'articles au cours de la deuxième phase du projet à la CNUDCI. Toutes les modifications sont mises en évidence dans la version révisée du projet de Loi type, jointe à l'Annexe I du présent document, qui montre les modifications apportées à la CNUDCI au texte qui avait été approuvé par le Conseil de direction d'UNIDROIT en mai 2023. Le Secrétariat est d'avis que les modifications sont adéquates et ne s'écartent pas des éléments essentiels du projet approuvé par UNIDROIT.

#### *Approche des récépissés d'entrepôt électroniques*

25. En particulier, l'approche sous-jacente consistant à traiter les récépissés d'entrepôt électroniques sur un pied d'égalité avec les récépissés d'entrepôt papier, fondée sur l'approche neutre quant au support, a été maintenue. Cette approche des documents électroniques s'écarte de l'approche de l'équivalence fonctionnelle qui a traditionnellement été adoptée par les textes de la CNUDCI, y compris la Loi type de la CNUDCI sur les documents transférables électroniques, et qui a donc fait l'objet de discussions à la CNUDCI. En définitive, les délégations des États ont considéré l'approche neutre quant au support comme l'approche la plus tournée vers l'avenir, qui tenait également compte du fait que les reçus électroniques n'étaient plus considérés comme une forme

secondaire qui devrait reproduire les caractéristiques des reçus papier, d'être reconnu comme juridiquement équivalent.

26. En ce qui concerne le contenu des dispositions relatives aux récépissés d'entrepôt électroniques, la Loi type a été simplifiée afin de mettre pleinement en œuvre l'approche neutre quant au support. Cela a donné lieu à plusieurs ajouts dans le projet de texte:

- i) À l'article 2, la définition d'un "porteur" d'un récépissé d'entrepôt électronique a été élargie pour refléter la définition d'un porteur d'un récépissé papier, à savoir pour faire la distinction entre un récépissé délivré à l'ordre d'une personne désignée et un récépissé délivré au porteur ou endossé en blanc. Dans les deux cas, le porteur demeure la personne qui a le contrôle du reçu, et aucune modification substantielle n'a résulté de ces modifications. De plus, la Variante 2 a été ajoutée afin de proposer une autre définition du terme "porteur" qui simplifierait le traitement des reçus électroniques et papier en utilisant le terme "contrôle" pour les deux formulaires (voir Variante 2 pour le paragraphe 2, point a)). Les mêmes ajouts ont été apportés à la définition du "porteur" d'un certificat de gage à l'article 32, qui reflète la définition du porteur d'un récépissé d'entrepôt, y compris une Variante 2 correspondante pour le porteur d'un certificat de gage.
- ii) L'article 3 ("Contrôle d'un récépissé d'entrepôt électronique") a été supprimé en tant qu'article séparé et son contenu a été intégré dans les dispositions plus élaborées des articles 6 et 7 sur le "récépissé d'entrepôt électronique" et la "Norme générale de fiabilité pour les récépissés d'entrepôt électroniques". Les dispositions détaillées ont été reprises à partir de la Loi type de la CNUDCI sur les documents transférables électroniques: l'article 6 combine les articles 10 et 11 de la Loi type de la CNUDCI, et l'article 7 reprend littéralement l'article 12 de la Loi type de la CNUDCI.

#### *Chapitre I: champ d'application et dispositions générales*

27. L'auto-identification du récépissé en tant que "récépissé d'entrepôt" a été retirée de la définition d'un récépissé d'entrepôt à l'article 1, paragraphe 2, pour devenir un élément obligatoire à inclure dans le récépissé conformément à l'article 10 ("Informations à inclure dans un récépissé d'entrepôt"). En dehors de cela, les informations énumérées à l'article 10 sont restées en grande partie inchangées, à l'exception de l'ajout d'informations supplémentaires qui devaient être incluses dans le récépissé, notamment en vertu de l'alinéa h) "L'existence de droits ou de demandes de tiers sur les marchandises notifiées par le déposant à l'entrepositaire conformément à l'article 8, alinéa c)". Le paragraphe 2 de l'article 10 révisé a été modifié pour faire référence à la responsabilité "en vertu d'une autre loi" en cas de déclarations de renseignements incomplètes ou incorrectes, plutôt que d'établir directement la responsabilité de l'entrepositaire pour les pertes subies du fait d'une telle déclaration. Le paragraphe 2 correspondant de l'article 11 pour les informations supplémentaires qui peuvent être incluses dans un récépissé d'entrepôt a été révisé en conséquence.

28. En ce qui concerne l'article 3 ("Autonomie des parties"), alors que le projet de Loi type préparé par le Groupe de travail d'UNIDROIT offrait deux options aux États adoptant la Loi concernant l'admissibilité des dérogations ou des dérogations à la Loi par les parties, la version révisée adopte maintenant la première option, avec de simples changements éditoriaux, plutôt que d'offrir deux options.

#### *Chapitre II: émission et contenu du récépissé d'entrepôt; modification et remplacement*

29. L'article 5 maintient l'obligation de délivrer un récépissé d'entrepôt, tandis que l'ancien premier paragraphe 2, qui stipulait que l'absence d'émission d'un récépissé d'entrepôt n'affecte pas la validité du contrat d'entreposage, a été supprimé.

30. Les “Déclarations du déposant” figurant à l’article 8 ont été élargies aux porteurs subséquents, pour inclure également le fait que l’opérateur déclare qu’il avait le pouvoir de demander la délivrance d’un récépissé d’entrepôt.

31. L’article 9 (“Incorporation de l’accord d’entreposage dans le récépissé d’entrepôt”) a été modifié, passant de la prescription qu’un récépissé d’entrepôt par la loi comprend les conditions de l’accord d’entreposage, à la possibilité facultative pour le récépissé d’indiquer qu’il comprend tout ou partie de ces termes.

32. L’ancien article 12 relatif à la modification d’un récépissé d’entrepôt a été supprimé sans substitution.

33. L’article 13 relatif à la “perte ou destruction d’un récépissé d’entrepôt” a été élaboré afin de soumettre le droit d’exiger de l’entrepositaire qu’il délivre un récépissé d’entrepôt de remplacement à la preuve de la perte ou de la destruction, ainsi que le remboursement des frais raisonnables de remplacement. Les autres modifications apportées au paragraphe 1 sont d’ordre rédactionnel. La référence au dépôt de garantie auprès de la Cour au paragraphe 3 a été supprimée. Le paragraphe 5 a été ajouté pour préciser, en particulier, qu’une personne qui, de bonne foi, acquiert le récépissé d’entrepôt que l’on croit perdu ou détruit conserve tout droit de réclamer à un porteur antérieur des dommages qui peuvent être accordés en vertu d’autres lois.

#### *Chapitre III: transferts et autres opérations concernant des récépissés d’entrepôt négociables*

34. Le Chapitre III, relatif aux transferts et autres opérations des récépissés, est resté pratiquement inchangé. Les sous-titres des sections du chapitre ont été supprimés, sans modifier les articles qui s’y trouvent. L’article 18 a ajouté l’option 2 qui propose une présentation différente de la disposition dans le but d’en améliorer la clarté, sans toutefois en modifier le contenu.

#### *Chapitre IV: droits et obligations de l’entrepositaire*

35. L’ancien projet d’article 23 (“Application du présent paragraphe”) a été supprimé sans substitution, car il n’a été considéré ni nécessaire ni utile.

36. L’article 23 (“Devoir de garde”) a été révisé afin d’indiquer explicitement que toute clause limitant le devoir de garde de l’exploitant en cas de fraude, de faute intentionnelle, de négligence grave ou de détournement des marchandises doit être nulle et non avenue. Une phrase a été ajoutée pour préciser que la nullité d’une telle clause n’affecte pas la validité du récépissé d’entrepôt en tant que tel.

37. L’article 28 (“Récépissé d’entrepôt fractionné”) est passé d’une option (volontaire) à une obligation pour l’entrepositaire de fractionner le récépissé d’entrepôt à la demande du porteur du récépissé si les conditions déterminées à l’article sont remplies. À ces conditions s’ajoutait la prise en charge des frais de fractionnement. Le paragraphe 2 a été ajouté pour exiger de l’entrepositaire d’annuler le récépissé d’entrepôt original.

38. En ce qui concerne l’article 30 (“Résiliation de l’entreposage par l’entrepositaire”), les dispositions visées aux paragraphes 1 et 2 ont été réordonnées afin de traiter séparément de l’avis par voie d’annonce publique figurant au paragraphe 2, en se référant à l’autre loi spécifiée par l’État d’adoption pour la procédure. Le paragraphe 3 a été ajouté pour tenir compte de la situation où l’entrepositaire détermine de bonne foi que, dans le délai prévu à l’alinéa a) du paragraphe 1), les marchandises sont sur le point de se détériorer ou de perdre de la valeur à un niveau inférieur au montant garanti par son privilège et permet à celui-ci de vendre les marchandises conformément à l’alinéa b) du paragraphe 1).

#### *Chapitre V: certificats de gage*

39. L'article 31 ("Champ d'application des dispositions relatives aux certificats de gage") a été révisé pour se limiter à préciser que le chapitre régit les effets du certificat de gage une fois qu'il a été transféré séparément du récépissé d'entrepôt. La description d'un certificat de gage dans l'ancien paragraphe 2 de l'article a été incorporée dans l'article 32 ("Émission et forme d'un certificat de gage") et le paragraphe 3, qui se référait à l'ancien article 3 sur le contrôle d'un récépissé d'entrepôt électronique (qui a été déplacé vers les dispositions plus détaillées sur les récépissés électroniques d'entreposage dans le texte révisé), a été supprimé.

40. L'article 32 a été révisé afin d'inclure des éléments de la définition d'un certificat de gage au paragraphe 1. En outre, comme indiqué précédemment, la définition du "porteur" d'un certificat de gage figurant au paragraphe 3 de l'article 32 a été révisée en fonction de la révision de la définition du "porteur" d'un récépissé d'entrepôt.

41. L'article 33 ("Effet d'un certificat de gage") a été révisé afin d'exiger, au paragraphe 2, que le porteur du certificat de gage le remette au porteur du récépissé en cas de paiement des montants garantis par le certificat de gage.

#### *Chapitre VI: application de la présente loi*

42. Aucune modification substantielle n'a été apportée aux dispositions de ce chapitre.

### **IV. APERÇU DU GUIDE POUR L'INCORPORATION DE LA LOI TYPE SUR LES RÉCÉPISSÉS D'ENTREPÔT**

43. Le Guide pour l'incorporation de la Loi type contient un commentaire article par article des dispositions de la Loi type, d'une part, et des conseils sur la législation complémentaire, d'autre part.

44. En conséquence, le Guide est composé de quatre parties principales:

Partie I	Objectif de ce Guide
Partie II	Introduction à la Loi type
Partie III	Commentaire article par article
Partie IV	Législation complémentaire

45. Après la partie I, qui définit les objectifs du Guide, la partie II présente la Loi type en expliquant le contexte et l'historique de la rédaction, ainsi que l'objectif, la portée et la structure de la Loi type. Elle donne également des précisions sur les récépissés d'entrepôt électroniques, les pratiques de financement impliquant des récépissés d'entrepôt et les questions de droit international privé liées à la Loi type.

46. La partie III fournit des commentaires détaillés sur les différentes dispositions de la Loi type. Elle explique l'historique et l'objectif de chaque disposition, la manière dont elles doivent être interprétées et appliquées, ainsi que la relation avec le cadre juridique plus général d'un État adoptant la Loi type qui pourrait être pertinent pour son application.

47. La partie IV propose des orientations sur l'élaboration de règles complémentaires pour mettre en œuvre efficacement les dispositions de la nouvelle loi sur les récépissés d'entrepôt au niveau national. En tant que telle, la présente partie va au-delà du champ d'application de la Loi type pour fournir des orientations sur la conception des aspects réglementaires d'un système de récépissé d'entrepôt, qui ne mettent pas directement en œuvre les dispositions de la Loi type. La décision d'inclure de telles orientations dans le Guide pour l'incorporation a été prise en raison de l'importance de ces aspects dans le fonctionnement du système de récépissés d'entrepôt, qui renforcera la valeur



des récépissés d'entrepôt. Par conséquent, la partie décrit les règles relatives à l'octroi de licences et à la surveillance des entrepôts et des entrepositaires; les règles relatives aux polices d'assurance obligatoires que l'État d'adoption peut exiger de l'entrepositaire pour l'infrastructure et les marchandises destinées à l'entreposage, à la responsabilité civile professionnelle ou à l'assurance responsabilité civile; et des règles supplémentaires pour l'établissement et la tenue d'un registre permettant de suivre les transactions de récépissés d'entrepôt et les récépissés d'entrepôt émis par les entrepôts dans une base de données centrale.

48. Le texte du Guide pour l'incorporation de la Loi type, tel que recommandé à la Commission de la CNUDCI, figure à l'Annexe II du présent document (en anglais). Il est à noter que le projet de Guide a été partagé par la CNUDCI avec les États membres pour commentaires et qu'il fera encore l'objet de révisions. À ce jour, la structure du Guide telle que préparée par le Groupe de travail d'UNIDROIT est restée inchangée.

## **V. ÉTAPES FUTURES**

49. La Loi type sur les récépissés d'entrepôt et le Guide pour l'incorporation sont recommandés à la Commission de la CNUDCI pour adoption à sa 56<sup>ème</sup> session du 24 au 12 juillet 2024.

50. À la suite de l'adoption de la Loi type et du Guide pour l'incorporation, les Secrétariats d'UNIDROIT et de la CNUDCI envisagent des activités conjointes de diffusion. Le Secrétariat de l'Institut a également commencé à prendre contact avec les experts et les organisations associés qui ont participé au Groupe de travail d'UNIDROIT sur la Loi type concernant les activités de promotion potentielles.

## **VI. ACTION DEMANDÉE**

51. *Le Conseil de Direction est invité à prendre note des progrès réalisés sur le projet conjoint de la Loi type CNUDCI/UNIDROIT sur les récépissés d'entrepôt et à exprimer son point de vue sur le texte final.*

52. *En outre, le Conseil est invité à approuver le projet de Guide pour l'incorporation de la Loi type sur les récépissés d'entrepôt (tel qu'il figure dans l'Annexe II).*



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## **ANNEXE I**

### **UNCITRAL/UNIDROIT Draft Model Law on Warehouse Receipts**

(anglais seulement)

*(état: 22 avril 2024)*

## DRAFT MODEL LAW ON WAREHOUSE RECEIPTS

### CHAPTER I

#### SCOPE AND GENERAL PROVISIONS

##### Article 1. Scope of application

1. This Law applies to warehouse receipts.
2. For the purposes of this Law, a warehouse receipt is an electronic record or paper document issued and signed by a warehouse operator ~~that identifies itself as a warehouse receipt and~~ by which the warehouse operator:
  - (a) Acknowledges holding goods ~~described in~~covered by it on behalf of the holder; and
  - (b) Promises to deliver the goods to the holder.

##### Article 2. Definitions

For the purposes of this Law:

1. “Depositor” means a person who deposits goods for storage with a warehouse operator.
2. “Electronic record” means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.

##### Variant 1

3. “Holder” of a warehouse receipt means:
  - (a) In the case of an electronic negotiable warehouse receipt that is issued to the order of a named person - ~~that~~ that person or the most recent endorsee, if in ~~who has~~ control of the receipt;
  - (b) In the case of an electronic negotiable warehouse receipt that is issued to bearer or endorsed in blank - the person in control of the receipt;
  - (c) In the case of a paper negotiable warehouse receipt that is issued to the order of a named person - that person, or the most recent endorsee, if in possession of the receipt;
  - (d) In the case of a paper negotiable warehouse receipt that is issued to bearer or endorsed in blank – the person in possession of the receipt; and
  - (e) In the case of a non-negotiable warehouse receipt – the person to whom delivery of the goods is to be made in accordance with the terms of the receipt.

##### Variant 2<sup>1</sup>

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<sup>1</sup> Note to the Commission: Variant 2 is offered to simplify the definition and reflect more clearly the preference expressed by the Working Group, at its forty-first session (New York, 5-9 February 2024) “to streamline and simplify the draft definition in particular by finding common terms for the different concepts used in paper and electronic contexts.” (A/CN.9/1165, para. 21).

3. “Holder” of a warehouse receipt means:
- (a) ~~In the case of a paper negotiable warehouse receipt that is issued to bearer or endorsed in blank, the person in possession~~control of the warehouse receipt:
- (i) pursuant to a method used in accordance with article 6, paragraph 3, if the warehouse receipt is electronic, or
- (ii) by possession, if the warehouse receipt is issued in paper form;
- (b) In the case of a warehouse receipt that is issued to the order of a named person – that person, or the most recent endorsee, if in control of the receipt;
- (c) In the case of a non-negotiable warehouse receipt – the person to whom delivery of the goods is to be made in accordance with the terms of the receipt.
4. “Negotiable warehouse receipt” means a warehouse receipt that is issued:
- (a) To the order of a named person; or
- (b) To bearer.
5. “Non-negotiable warehouse receipt” means a warehouse receipt that is issued in favour of a named person only.
6. “Protected holder” means a person that satisfies the requirements of article 17, paragraph 1.
7. “Storage agreement” means an agreement between a warehouse operator and a depositor that sets out the terms on which the warehouse operator agrees to store goods.
8. “Warehouse operator” means a person who is in the business of storing goods for other persons ~~for reward~~.

### ~~Article 3 — Control of an electronic warehouse receipt~~

~~A person controls an electronic warehouse receipt if a reliable method is used:~~

~~(a) — to establish exclusive control of that electronic warehouse receipt by the person; and to identify that person as the person in control.~~

### **Article 34. Party autonomy**

#### ~~ALTERNATIVE A:~~

~~The provisions of this Law~~Parties may not be derogated from or varied by agreement ~~any provision of this Law~~.

#### ~~ALTERNATIVE B:~~

~~1. — Parties may derogate from or vary by agreement the following provisions of this Law: [...].<sup>2</sup>~~

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<sup>2</sup>- ~~The enacting State may consider which provisions of the Model Law, if any, may derogate from or vary by agreement~~

~~2. — Such an agreement does not affect the rights of any person who is not a party to that agreement.~~

#### **Article 45. Interpretation**

In the interpretation of this Law, regard is to be had to its international origin and the need to promote uniformity in its application.

### **CHAPTER II**

## **ISSUANCE AND CONTENTS OF A WAREHOUSE RECEIPT; ALTERATION AND REPLACEMENT**

#### **Article 56. Obligation to issue a warehouse receipt**

1. A warehouse operator ~~shall~~ must issue a warehouse receipt in relation to goods, after ~~taking possession of the goods~~ receiving them for storage, if requested by the depositor, in accordance with the terms of the storage agreement.

~~2. — The lack of issuance of a warehouse receipt by the warehouse operator does not affect the validity of the storage agreement.~~

#### **Article 67. Electronic warehouse receipt**

~~1. — Where an electronic warehouse receipt is issued, a reliable method shall be used:~~

~~(a) — To identify the electronic warehouse receipt;~~

~~(b) — To render that electronic warehouse receipt capable of being subject to control from its issuance until it ceases to be valid; and~~

~~(c) — To retain the integrity of that electronic warehouse receipt.~~

~~2. — The criterion for assessing integrity shall be whether information contained in the electronic warehouse receipt, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display.~~

~~3. — An electronic warehouse receipt is subject to control if a reliable method is used:~~

~~(a) — To establish exclusive control of that electronic warehouse receipt by a person;~~

~~(b) — To identify that person as the person in control; and~~

~~(c) — To transfer control over the electronic warehouse receipt.~~

#### **Article 7. General reliability standard for electronic warehouse receipts**

~~For the purposes of article 6, the method referred to shall be:~~

~~(a) — As reliable as appropriate for the fulfilment of the function for which the method is being used, in light of all relevant circumstances, which may include:~~

- (i) Any operational rules relevant to the assessment of reliability;
  - (ii) The assurance of data integrity;
  - (iii) The ability to prevent unauthorized access to and use of the system;
  - (iv) The security of hardware and software;
  - (v) The regularity and extent of audit by an independent body;
  - (vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;
  - (vii) Any applicable industry standard; or
- (b) Proven in fact to have fulfilled the function by it together with further evidence.

### **Article 87. Representations by the depositor**

When requesting the issuance of a warehouse receipt, ~~The depositor represents to the warehouse operator~~ and to the subsequent holders, ~~at the time of deposit,~~ that:

- (a) It has the authority to deposit the goods;
- (b) It has the authority to request the issuance of a negotiable or non-negotiable warehouse receipt; and
- (c) To the best of knowledge of the depositor, the goods are free of any rights or claims of third parties except as agreed by notified to the warehouse operator.

### **Article 98. Incorporation of storage agreement in the warehouse receipt**

1. A warehouse receipt may state that it is taken by operation of this Law to include some or all terms of the storage agreement. In that case, a copy of the storage agreement or of its provisions shall be made available on request by the current holder to the potential transferees.

2. Notwithstanding paragraph 1, the warehouse operator may not invoke against any person who becomes a holder under articles 15 or 16 any term of the storage agreement that is are not inconsistent with the express terms of the warehouse receipt.

### **Article 109. Information to be included in a warehouse receipt**

1. A warehouse operator ~~shall~~must include the following information in a warehouse receipt:
  - (a) The words "warehouse receipt" whether it is negotiable or non-negotiable;
  - (b) If it is negotiable, the name of the person to whose order the receipt is issued or a statement that it is issued to bearer;
  - (c) ~~if it is negotiable, any limitations on the manner in which it may be transferred;~~
  - (d) If it is non-negotiable, the name of the person in whose favour it is issued;
  - (e) The name and address of the depositor;
  - (f) The name and address of the warehouse operator;
  - (g) A description of the goods and their quantity ~~the type and quantity of the goods;~~
  - (h) The existence of any rights or claims of third parties to the goods notified by the depositor to the warehouse operator pursuant to article 8, subparagraph (c);
  - (h) The fixed period of the storage, if any;

- (i) The place where the goods are stored;
- (j) A unique identification number for the receipt;
- (k) The date and place of issuance; and
- (l) The date of the storage agreement ~~and a statement that a copy of the storage agreement will be made available to potential transferees on demand.~~

2. A ~~missing~~, incomplete or incorrect statement of information required by paragraph 1 does not affect the validity of the warehouse receipt, ~~but~~ ~~the~~ warehouse operator is not relieved from any liability that it would have under other law to for any losses suffered by any person as a result of ~~the statement being any such~~ incomplete or incorrect ~~statement~~.

3. If a ~~negotiable~~ warehouse receipt does not include the information required by paragraph 1, subparagraph (b) or (c), it is presumed to be a negotiable warehouse receipt ~~name a person to whose order it is issued that~~, ~~it~~ is issued to bearer.

#### **Article 1~~19~~. Additional information that may be included in a warehouse receipt**

1. A warehouse operator may also include any other information in a warehouse receipt, such as:

- (a) The name of the insurer, if any, who has insured the goods, the details of the insurance policy covering the goods and the insured value;
- (b) The amount of the storage fees if they are a fixed amount or, if they are not a fixed amount, how the fees are calculated;
- (c) The quality of the goods; or
- (d) If the goods are fungible, whether the goods may be commingled.

2. An incorrect statement of information referred to in paragraph 1 does not affect the validity of the warehouse receipt, ~~but~~ ~~the~~ warehouse operator is not relieved from any liability that it would have under other law to liable for any losses suffered by any person as a result of ~~the any such incorrect~~ statement being incorrect.

3. If a warehouse receipt covers fungible goods but does not state the quality of the goods, the goods are presumed to be of average quality.

#### **Article 1~~21~~. Goods in sealed packages and similar situations**

1. If the warehouse operator has no practicable or commercially reasonable means of ~~inspecting~~ ~~assessing~~ the goods or otherwise verifying, the information provided by the depositor, the warehouse operator may describe the goods, including their type, quantity and quality:

- (a) In accordance with information provided to it by the depositor, by a statement to that effect in the warehouse receipt; ~~and~~
- (b) In the case of goods in a sealed package, by a statement to the effect that the package is said to contain the described goods, and that the warehouse operator otherwise has no knowledge of the contents or condition of the contents of the package.

2. A warehouse operator who describes goods in accordance with paragraph 1 ~~will~~ shall not be liable for any losses suffered by any person as a result of the description being incomplete or incorrect, unless the warehouse operator knew or had reasonable grounds to believe that the description was ~~incomplete~~ ~~false~~ or ~~misleading~~ ~~incorrect~~.

## **SECTION B. ALTERATION AND REPLACEMENT**

### **Article 12 — Alteration of a warehouse receipt**

~~— If a field in a negotiable warehouse receipt is left blank by the warehouse operator and is later filled in without the warehouse operator's authorization, the insertion will be effective as against the warehouse operator if a subsequent holder has no knowledge of the lack of authorization at the time that person becomes the holder.~~

### **Article 13. Loss or destruction of a warehouse receipt**

1. In the event of ~~the~~ loss or destruction of a warehouse receipt, the holder at the time of loss or destruction may require the warehouse operator to issue a replacement warehouse receipt subject to reasonable requirements that the warehouse operator may establish as regards by providing:

- (a) Proof of the loss or destruction of the warehouse receipt;
- ~~(a)(b) such~~ Proof of the holder's its entitlement to the warehouse receipt;
- ~~(c) An such~~ indemnity in relation to the issuance of the replacement warehouse receipt, and security in support of that indemnity; and
- (d) Reimbursement of cost reasonably incurred for the replacement of the warehouse receipt, when such possibility is not covered by the storage agreement.

~~as the warehouse operator may reasonably require.~~

2. In the case of an electronic warehouse receipt:

- (a) "Loss or destruction" in paragraph 1 occurs when any of the conditions for an electronic warehouse receipt set out in article 6 paragraph 1, or any of the conditions necessary for establishing the existence of control set out in article 6 paragraph 2, cease to be met; means loss of control; and
- (b) "Issue a replacement warehouse receipt" in paragraph 1 may include reinstatement of control of the electronic warehouse receipt over which control has been lost.

3. If a warehouse operator fails to issue a replacement warehouse receipt pursuant to paragraph 1, the holder at the time of loss or destruction may apply to the court for an order that the warehouse operator issue a replacement warehouse receipt, including by way of proceedings in the form of ~~[the expeditious proceedings to be specified by the enacting State specifies the appropriate expeditious proceedings]~~. ~~In the case of a lost negotiable warehouse receipt, the applicant must deposit with the Court adequate security to indemnify the warehouse operator against claims by a holder of the lost warehouse receipt.~~

4. A replacement warehouse receipt issued under this article ~~must~~ shall state that it is a replacement warehouse receipt and shall cancel and supersede the warehouse receipt believed to have been lost or destroyed.

5. Only the replacement warehouse receipt issued in accordance with paragraph 4 entitles the holder, or a person nominated by the holder, to claim delivery of the goods under article 26, but a person who, in good faith, acquires the warehouse receipt believed to have been lost or destroyed retains any right to claim damages from a previous holder that may be available under other laws.

### **Article 14. Change of medium of a warehouse receipt**



1. If the holder of a warehouse receipt so requests, a warehouse operator may change the medium of the warehouse receipt from paper to electronic or from electronic to paper.
2. At the time of the change of medium, the warehouse operator ~~must~~shall ensure that the warehouse receipt can no longer be used in its previous medium.
3. The change of medium does not affect the rights and obligations of the parties.

### CHAPTER III

#### TRANSFERS AND OTHER DEALINGS IN NEGOTIABLE WAREHOUSE RECEIPTS

##### ~~SECTION A. HOW A NEGOTIABLE WAREHOUSE RECEIPT MAY BE TRANSFERRED~~

###### Article 15. Transfer of a negotiable warehouse receipt

1. A paper negotiable warehouse receipt may be transferred:
  - (a) By endorsement and delivery, if it is issued or endorsed to the order of the person transferring it; or
  - (b) By delivery, if:
    - (i) It is issued to bearer; or
    - (ii) It is endorsed in blank or to bearer.
2. An electronic negotiable warehouse receipt may be transferred by change of control.

##### ~~SECTION B. EFFECT OF A TRANSFER OF A NEGOTIABLE WAREHOUSE RECEIPT~~

###### Article 16 – Rights of a transferee generally

1. A person to whom a negotiable warehouse receipt has been transferred acquires:
  - (a) The benefit of the obligation of the warehouse operator to hold and deliver the goods in accordance with the terms of the receipt; and
  - (b) Such rights to the receipt and the goods as the transferor was able to convey.
2. Paragraph 1 does not limit the rights of a protected holder of a negotiable warehouse receipt pursuant to article 18.

###### Article 17. Protected holder of a negotiable warehouse receipt

1. A person is a protected holder of a negotiable warehouse receipt if:
  - (a) The receipt has been transferred to the person pursuant to article 15;

- (b) The person acted in good faith and without knowledge of any right or claim to the receipt or the goods covered by it, or of any defence on the part of any person other than the warehouse operator; and
- (c) The transfer was in the ordinary course of business or financing.

[2. A person does not have knowledge of a right or claim to a warehouse receipt or the goods covered by it for the purposes of paragraph 1(b) merely because information relating to that claim has been registered in [~~the enacting State specifies the appropriate a~~-registry established pursuant to a secured transactions law ~~as specified by the enacting State~~].<sup>2</sup>

3. If a negotiable warehouse receipt is issued by a warehouse operator to the order of a named person other than the depositor, the issuance of the receipt to that person by the warehouse operator has the same effect, for the purposes of determining whether that person is a protected holder, as if the receipt had been transferred to that person pursuant to article 15.

### **Article 18. Rights of a protected holder of a negotiable warehouse receipt<sup>3</sup>**

#### Option 1

1. A protected holder of a negotiable warehouse receipt acquires ownership of the receipt and the goods covered by the receipt, and the benefit of the obligation of the warehouse operator to hold and deliver the goods in accordance with the terms of the receipt, free of any right, claim or defence of the warehouse operator or any other person, other than any right, claim or defence that arises under the terms of the receipt or under this Law.

#### Option 2

~~1. A protected holder of a negotiable warehouse receipt acquires ownership of the receipt and the goods covered by the receipt, and the benefit of the obligation of the warehouse operator to hold and deliver the goods in accordance with the terms of the receipt,~~ free of any claim or defence of the warehouse operator or any other person, other than any right, claim or defence that arises under the terms of the receipt or under this Law:

- ~~(a) Ownership of the receipt and the benefit of the obligation of the warehouse operator to hold and deliver the goods in accordance with the terms of the receipt; and~~
- ~~(b) Such rights to the goods as it would acquire by the transfer of physical possession of the goods under other law.~~

2. Paragraph 1 applies even if:

- (a) The transfer to the protected holder or any prior transfer constituted a breach of duty by the transferor;
- (b) A previous holder of the receipt lost control or possession of the receipt as a result of fraud, duress, theft, ~~conversion~~misappropriation, misrepresentation, mistake, accident or similar circumstances; or

<sup>2</sup> This provision appears within square brackets as not all enacting states may have a registry for the registration of notices with respect to security rights of the type envisaged in chapter IV of the UNCITRAL Model Law on Secured Transactions.

<sup>3</sup> The enacting state may wish to choose the option that better reflects the nature of the rights acquired by the protected holder of a documents of title in respect of the goods covered.

- (c) The goods or the receipt had been previously sold, transferred or encumbered to a third person.

3. The ~~ownership and benefit~~rights of a protected holder of a negotiable warehouse receipt under paragraph 1 are not subject to [~~the enacting State specifies any retention-of-title, security or equivalent right as specified by the enacting State~~] that any person may have in or in relation to the goods covered by the receipt.

4. The ~~rights of ownership and benefit of~~ a protected holder of a negotiable warehouse receipt under paragraph 1 are not subject to any right pursuant to a judgment against any ~~other~~ person ~~other than the protected holder~~. The warehouse operator is not obliged to deliver the goods to a person claiming pursuant to such a judgment, unless the warehouse receipt is surrendered to ~~the~~ warehouse operator.

## **~~SECTION C. SECURITY RIGHTS~~**

### **Article 19. Third party effectiveness of a security right**

A security right in a negotiable warehouse receipt may be made effective against third parties by:

- (a) [Registration in a registry established pursuant to [~~the enacting State specifies its a secured transactions law providing for such registry as specified by the enacting State~~];]<sup>4</sup>
- (b) In the case of an electronic negotiable warehouse receipt, the secured creditor taking control of the receipt; or
- (c) In the case of a paper negotiable warehouse receipt, the secured creditor taking possession of the receipt.

## **~~SECTION D. REPRESENTATIONS AND GUARANTEES BY A TRANSFEROR OF A NEGOTIABLE WAREHOUSE RECEIPT~~**

### **Article 20. Representations by a transferor of a negotiable warehouse receipt**

A transferor of a negotiable warehouse receipt represents to the transferee that:

- (a) The receipt is authentic; and
- (b) ~~The transferor does it does~~ not know of any fact that would impair the validity of the receipt, the value of the goods covered by the receipt, or the effectiveness of the transfer of ~~ownership of~~ the receipt and rights to the goods it covers, except as notified to agreed by the transferee.

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<sup>4</sup> This provision appears within square brackets as not all enacting states may have a registry for the registration of notices with respect to security rights of the type envisaged in chapter IV of the UNCITRAL Model Law on Secured Transactions

### Article 21. Limited representation by intermediaries

~~Notwithstanding Article 20, a~~An intermediary that is known to be entrusted with warehouse receipts on behalf of another person may exercise all rights arising out of the receipt but ~~or with collection of a negotiable instrument or other claim,~~ represents by the transfer of a negotiable warehouse receipt only that it is authorized to do so and does not make the representations referred to in article 20.

### Article 22. Transferor not ~~a guarantor~~responsible for the warehouse operators' performance

A person who transfers a negotiable warehouse receipt does not guarantee, by virtue of the transfer, the performance by the warehouse operator of any obligations evidenced by in relation to the receipt.

## CHAPTER IV

### RIGHTS AND OBLIGATIONS OF THE WAREHOUSE OPERATOR

#### ~~Article 23 — Application of this Chapter~~

~~The obligations imposed by this Chapter on a warehouse operator apply if a warehouse receipt has been issued, even if:~~

- ~~(a) — the receipt does not comply with the requirements of this Law; or~~
- ~~(b) — the warehouse operator is in violation of an applicable regulatory requirement.~~

#### Article 234. Duty of care

1. The warehouse operator ~~shall~~must store and preserve the goods in accordance with the level of care expected of a diligent and competent owner of goods of that type~~operator in that particular trade.~~
2. The warehouse receipt may contain limitations and conditions to the operator may vary its obligation under paragraph 1 by the terms of the warehouse operator under this article, but in any clause purporting to lower the duty of care in paragraph 1 or to exclude or limit~~receipt. However, the warehouse operator's may not exclude or limit liability for its fraud, wilful misconduct, gross negligence, or conversion-misappropriation of the goods should be null and void. The invalidity of such a clause shall not affect the validity of the warehouse receipt as such.~~

#### Article 245. Duty to keep goods separate

1. Subject to paragraph 2, the warehouse operator ~~must~~shall keep the goods covered by each receipt separate so as to permit identification of the goods at any time.
2. The warehouse operator may commingle fungible goods into a mass of goods of the same type and quality, to the extent permitted by if so stated in~~the warehouse receipt.~~

### Article 256. Lien of the warehouse operator

1. The warehouse operator has a lien on the goods in its possession and in any proceeds for:
  - (a) Charges for storage of the goods;
  - (b) Unexpected reasonable expenses necessary for the preservation of the goods;
  - (c) ~~expenses-Reasonable expenses~~ incurred in the sale of the goods in accordance with paragraph 4; and
  - (d) Similar charges or expenses owed by the holder in relation to other goods held by the warehouse operator, if so stated in the warehouse receipt.
2. Subject to paragraph 3, the warehouse operator's lien is effective against third parties.
3. As against a protected holder, the lien is limited to:
  - (a) Charges and expenses ~~specified on the face of expressly stated in~~ the warehouse receipt; or
  - (b) If no charges or expenses are so ~~stated~~specified, a reasonable charge for storage after the date of issuance of the receipt.
4. The warehouse operator may enforce its lien as permitted by [*relevant other law as specified by the enacting State*].

### Article 267. Obligation of warehouse operator to deliver

1. Except as provided in Article 2930, the warehouse operator ~~must~~shall deliver the goods to the holder, ~~of the warehouse receipt or a person nominated by the holder,~~ if the holder:
  - (a) Provides the warehouse operator with an instruction to deliver the goods ~~to it~~;
  - (b) Surrenders ~~possession or control of~~ the warehouse receipt to the warehouse operator; and;
  - (c) Pays any outstanding~~satisfies the~~ amounts owed to secured by the warehouse operator's lien under Article 26 in respect of any of the charges or expenses referred to in article 25, paragraph 1 or, in the case of a protected holder, those referred to in article 25, paragraph 3.
2. Upon delivery of the goods, the warehouse operator ~~shall~~must cancel the warehouse receipt.

### Article 278. Partial delivery

1. Except as provided in Article 2930, the warehouse operator ~~must~~shall deliver part of the goods to the holder, or a person nominated by the holder, ~~of the warehouse receipt~~ if the holder:
  - (a) Provides the warehouse operator with an instruction as to the to-delivery~~of that part of the goods to it~~;
  - (b) Surrenders ~~possession or control of~~ the warehouse receipt; and
  - (c) Pays ~~satisfies~~ a corresponding proportion of any outstanding~~the~~ amounts owed to secured by the warehouse operator's lien under Article 26 in respect of any of the charges or expenses referred to in article 25, paragraph 1 or, in the case of a protected holder, those referred to in article 25, paragraph 3.

2. Upon partial delivery of the goods, the warehouse operator ~~shall must~~ note the partial delivery on the warehouse receipt and return possession or control of the receipt to the holder.

### Article ~~289~~. Split warehouse receipt

1. If requested by the holder of a warehouse receipt, a warehouse operator ~~may shall~~ split the warehouse receipt into two or more warehouse receipts that cover in total the goods that were covered by the original warehouse receipt, upon surrender of ~~possession or control of~~ the original warehouse receipt and payment of any additional cost reasonably incurred by the warehouse operator as a consequence of the split and reissuance of the warehouse receipt where such possibility was not covered by the storage agreement.

2. Upon delivery of the split warehouse receipts, the warehouse operator shall cancel the original warehouse receipt.

### Article ~~2930~~. Excuses from delivery obligation

The warehouse operator is ~~excused from relieved of its obligation to from~~ delivering the goods if and to the extent it establishes any of the following:

- (a) Destruction or loss of the goods for which the warehouse operator is not liable;
- (b) That it has sold or otherwise disposed of the goods in enforcement of its lien pursuant to article ~~26(4)25, paragraph 4 or article 30;~~  
~~that it has sold or otherwise disposed of the goods pursuant to Article 31;~~
- (b) That it has received competing claims to the goods and the matter has yet to be resolved; or
- (c) That it is prevented from doing so by court order or otherwise by circumstances beyond its control.

### Article ~~301~~. Termination of storage by the warehouse operator

1. The warehouse operator, by ~~giving reasonable~~ notice to all persons known to the warehouse operator to claim an interest in the goods, ~~or if the warehouse operator does not know of any person claiming an interest in the goods by public advertisement,~~ may:

- (a) Demand payment of the amounts secured by the lien and removal of the goods ~~at by~~ the end of the storage period specified in the warehouse receipt or, if the storage period has expired, or no storage period is specified in the warehouse receipt, within a reasonable period [not less than ... days [the enacting State specifies a certain period]] after the warehouse operator gives notice, as on the date specified in the notice; ~~or and~~
- (b) Reserve the right, if the amounts are not paid and the goods not removed by the date or within the period specified in the notice, to sell the goods afterwards by public sale, according to [relevant law on public sale as specified by the enacting State], or private sale, in any commercially reasonable manner.

2. If the ~~warehouse operator amounts are not paid and the goods not removed before the date contemplated by paragraph 1,~~ the warehouse operator may sell the goods by public or private sale, in a commercially reasonable manner, by reasonable notice to all persons known to the warehouse operator to claim an interest in the goods or if the warehouse operator does not know

of any person claiming an interest in the goods, the notice required by paragraph 1 may be given by public advertisement pursuant to [relevant other law as specified by the enacting State].

3. If the warehouse operator in good faith determines that, within the time provided in subparagraph 1(a), the goods are about to deteriorate or decline in value to less than the amount secured by its lien, the warehouse operator may specify in the notice given under subsection 1(a) any reasonably shorter time for removal of the goods and, if the goods are not removed, may sell them in accordance with subparagraph 1(b).

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, in a commercially reasonable manner, on reasonable notice to all persons known to the warehouse operator to claim an interest in the goods. If the warehouse operator, after reasonable efforts, is unable to sell the goods, it may dispose of them~~ goods in any lawful manner.

## [CHAPTER V PLEDGE BONDS]<sup>5</sup>

### Article 312. ~~Scope of provisions on pledge bonds and general provisions~~

This chapter governs the effects of the pledge bond once transferred separately from the warehouse receipt.

~~1. This Law also applies to pledge bonds.~~

~~2. For the purposes of this Law, a pledge bond is an electronic record or paper document issued and signed by the warehouse operator that identifies itself as a pledge bond and satisfies the requirements of Article 33.~~

~~4. Article 3 applies in relation to pledge bonds in the same way as it applies to warehouse receipts.~~

### Article 323. Issuance and form of a pledge bond

1. The warehouse operator, shall issue a pledge bond as a paper document signed by the warehouse operator that is associated with, but detachable from, the warehouse receipt, or as an electronic record capable of being controlled separately from the electronic warehouse receipt, which once detached: at the time it issues a negotiable warehouse receipt, must attach to the receipt (if it

<sup>5</sup> *This Chapter is ~~suggested for offered to~~ enacting States that ~~wish seek to implement-introduce or modernize a system of-~~ "dual" system of warehouse receipts consisting of two documents capable of being transferred separately, a warehouse receipt and a pledge bond. This text has been presented separately in order to facilitate the use of the Model Law by States that do not want to adopt a dual warehouse receipts system. An enacting State that ~~does want to adopt~~ wishes to maintain or introduce a dual warehouse receipts system could also consider drafting the content of these provisions into enact this chapter in its current form or integrated with the contents of the main part body of the Model Law rather than retain them separately here, in order to facilitate understanding and use of the Model Law in that State. The chapter appears within square brackets, as States that wish to maintain or introduce a single warehouse receipt system would not incorporate chapter V in their legislation.*

~~is in paper form), or associate with the receipt (if it is in electronic form) a pledge bond that contains the same information as the warehouse receipt.~~

~~(a) Represents the holder's right to payment of the amount stated in the pledge bond; and~~

~~(b) Grants the holder of the pledge bond a possessory security right in the goods covered by the warehouse receipt.~~

~~2. The pledge bond and the warehouse receipt shall each be identified as pledge bond and warehouse receipt, respectively, and contain the same information.~~

#### Variant 1

3. "Holder" of a pledge bond means:

(a) In the case of an electronic pledge bond, ~~the person who has that is issued to the order of a named person – that person, or the most recent endorsee, if in~~ control of the pledge bond;

~~(b) In the case of an electronic pledge bond that is issued to bearer or endorsed in blank – the person in control of the pledge bond;~~

(c) In the case of a paper pledge bond that is issued to the order of a named person, that person, or the most recent endorsee, if in possession of the pledge bond; and

(d) In the case of a paper pledge bond that is issued to bearer or endorsed in blank, the person in possession of the pledge bond.

#### Variant 2<sup>6</sup>

3. "Holder" of a pledge bond means:

~~(a) In the case of a paper~~ pledge bond that is issued to bearer or endorsed in blank, the person in ~~possession-control~~ of the pledge bond:

~~(i) pursuant to a method used in accordance with article 6, paragraph 3, if the pledge bond is electronic, or~~

~~(ii) by possession, if the pledge bond is issued in paper form;~~

~~(b) In the case of a pledge bond that is issued to the order of a named person – that person, or the most recent endorsee, if in possession-control~~ of the pledge bond.

5. ~~Articles 95 to 14 with the exception of article 10, paragraph 1, subparagraph (a) apply in relation~~ to pledge bonds in the same way as they apply to warehouse receipts.

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<sup>6</sup> Note to the Commission: Variant 2 is offered to simplify the definition and reflect more clearly the preference expressed by the Working Group, at its forty-first session (New York, 5-9 February 2024) "to streamline and simplify" the definitions used in the draft model law, in particular "by finding common terms for the different concepts used in paper and electronic contexts." (A/CN.9/1165, para. 21).



### Article 334. Effect of a pledge bond

1. ~~A pledge bond grants the holder a possessory security right in the goods covered by the warehouse receipt.~~ The rights of the holder of the warehouse receipt to goods are subject to the rights of the holder of the pledge bond.

2. The holder of the warehouse receipt may pay the amount~~s~~ secured by the pledge bond to its holder whether or not the amount is yet due, in which case the holder of the pledge bond shall surrender the pledge bond to the holder of the warehouse receipt.

34. If there has been default in payment of the amount secured by a pledge bond, the holder of the pledge bond ~~can~~may enforce its security right over the goods pursuant to [*relevant other law as specified by the enacting State*].

### Article 345. Transfers and other dealings

1. A pledge bond may be transferred together with the warehouse receipt, or separately. When transferred separately from the warehouse receipt, the pledge bond only transfers the rights referred to in article 32, paragraph 1, subparagraphs (a) and (b).

2. The first holder of a pledge bond to transfer it separately from the warehouse receipt ~~shall ensure that~~must note the following information in the pledge bond:

- (a) The amount secured by the pledge bond and the due date for payment ~~of the amount secured by the pledge bond~~ are inserted in the pledge bond; and
- (b) Such information is transcribed into the warehouse receipt and a copy of the completed warehouse receipt is provided to the warehouse operator.

3. Articles 15 to 18 and 20 to 22 apply to pledge bonds in the same way as they apply to warehouse receipts.

### Article 356. Rights and obligations of the warehouse operator

1. If the pledge bond has been transferred separately from the warehouse receipt pursuant to article 34, paragraph 1, the warehouse operator shall only split the warehouse receipt in accordance with article 28 if requested by both the holder of the warehouse receipt and the holder of the pledge bond.

2. Prior to the due date for payment of the amount secured by the pledge bond, the warehouse operator may only deliver all or part of the goods upon presentation of both the warehouse receipt and the pledge bond.

3. After the due date for payment of the amount secured by the pledge bond, the warehouse operator ~~must~~shall deliver the goods ~~[upon presentation of the pledge bond whether or not the warehouse receipt is also surrendered, and/or as required by the holder of the pledge bond pursuant to its procedure for enforcing the pledge bond].~~ Subject to paragraphs 1 and 2, Articles 23 to 31 apply ~~to pledge bonds in the same way as they apply to warehouse receipts.~~

**CHAPTER VI**  
**APPLICATION OF THIS LAW**

**Article 367. Entry into force**

1. This Law enters into force on [*on the date or according to a mechanism to be specified by the enacting State*].
2. This Law applies to warehouse receipts [and pledge bonds] that are issued after this Law enters into force.

**Article 378. Repeal and amendment of other laws**

1. [*The laws as specified by the enacting State*] are repealed.
2. [*The laws as specified by the enacting State*] are amended as follows [*the text of the relevant amendments to be specified by the enacting State*].



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**ANNEXE II**

**UNCITRAL/UNIDROIT Draft Model Law on Warehouse Receipts  
Guide to Enactment**

(anglais seulement)

*(état: 16 avril 2024)*

# UNCITRAL/UNIDROIT Model Law on Warehouse Receipts

## Guide to enactment

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# UNCITRAL/UNIDROIT Model Law on Warehouse Receipts

## GUIDE TO ENACTMENT

### I. PURPOSE OF THIS GUIDE

1. The purpose of this Guide to Enactment is to provide comprehensive guidance for implementing the Model Law on Warehouse Receipts (the “Model Law”) at the domestic level.<sup>1</sup> Accordingly, the Guide is composed of four parts: Parts I and II introduce the purpose of the Guide and the Model Law, respectively. Part III provides comprehensive commentary on the individual provisions of the Model Law, including on their background, purpose and relationships with the more general legal framework of a State enacting the Model Law (the “enacting State”). Part IV offers guidance for drafting the complementary legislation that is required to implement the law at the domestic level. Throughout, the Guide explains the relation with broader domestic legislation as well as with the relevant international legal framework, in particular the UNCITRAL Model Law on Secured Transactions<sup>2</sup> (the “MLST”) and the UNCITRAL Model Law on Electronic Transferable Records<sup>3</sup> (the “MLETR”).
2. The Guide is primarily addressed to legislative and executive branches of Governments considering introducing or reforming their legal framework for a warehouse receipt system. Moreover, by providing explanations of the rationale and application of the provisions, it is also a helpful source for users, including warehouse operators, depositors, holders of warehouse receipts and lenders, as well as judges, arbitrators and other practitioners. Finally, the Guide can also be used as a tool by development institutions supporting countries in legal reforms.
3. Several provisions of the Model Law, as well as the optional chapter V (Pledge bonds), indicate that an enacting State is required to make a decision or choose among alternative options. Most of these options were included in the Model Law to take account of structural differences of approach between different legal families and traditions concerning the design of a warehouse receipt system. The Guide explains the background and implications of such decisions or choices in order to assist enacting States in that respect.
4. Recognizing that the trend of legal reform is towards introducing a framework for electronic warehouse receipts, this Guide provides detailed discussion towards implementing a framework that supports and promotes the issuance and transfer of electronic warehouse receipts, irrespective of the technology or model used.
5. The Guide was prepared by the UNIDROIT Working Group on a Model Law on Warehouse Receipts (the “UNIDROIT Working Group”) in collaboration with the Secretariats of both UNIDROIT and UNCITRAL, based on the deliberations of the UNIDROIT Working Group and UNCITRAL Working Group I.<sup>4</sup>

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<sup>1</sup> UNIDROIT Document A.G. (81) 9.

<sup>2</sup> United Nations publication, Sales No. E.17.V.1.

<sup>3</sup> United Nations publication, Sales No. E.17.V.5.

<sup>4</sup> The reports of the UNIDROIT Working Group are available on the UNIDROIT website. The reports of the UNCITRAL Working Group are available on the UNCITRAL website.

## II. INTRODUCTION TO THE MODEL LAW

### A. BACKGROUND AND DRAFTING HISTORY

#### Background information

6. Warehouse receipts are documents, in paper or electronic form, issued by warehouse operators that evidence property rights in a stored commodity or goods and that may be traded or used as collateral to obtain credit.

7. Enabling warehouse receipt legislation, in most cases as part of a system for regulating and overseeing the warehouse operators that issue them, has facilitated trade and finance. Furthermore, the use of warehouse receipts promotes the integrity and resilience of markets and the financial system and protects the interests of the parties to a trade or financing transaction. It does so through five main functions:

- Delivery of goods: the warehouse receipt grants its holder a right to delivery of the stored commodity (subject to payment of the operator's fees);
- Preservation: The warehouse operator owes a duty to the holder to store and maintain/preserve the stored goods according to standards and conditions specified in the receipt, as well as the statutory general duty of care;
- Valuation: The specification on the warehouse receipt of the type, weight and/or quality of the stored goods enables their valuation by financiers or trading counterparties, in most cases without needing to perform prior physical inspection, and thus drives efficiencies, including over large distances;
- Encumbrance: The warehouse receipt is a document of title that can be encumbered so as to secure an obligation of the holder to repay a loan or other extension of credit; and
- Trade: The warehouse receipt can be transferred to a trading counterparty, "sight unseen", to fulfil delivery obligations, without requiring the physical movement or recertification of the goods, whether in a bilateral "over the counter" setting or through a commodity exchange.

8. Underpinning all five functions is a guarantee provided by the warehouse operator, as required by law, of the presence, condition and availability of the goods, backed by sufficient financial resources to provide compensation in the event of damage to the goods (e.g., through theft, fire, flood and other "perils") or a breach of obligations by the operator (e.g., as a result of fraud, negligence or unexplained losses). Financial resources that stand behind the warehouse operator's guarantee typically include insurance, performance bond and balance sheet (the latter subject to minimum net worth requirements).

9. Specifically, in developmental settings, warehouse receipts have become increasingly salient as an instrument of financial inclusivity. Prevailing lending practices in the developing world usually place emphasis on physical collateral such as real estate, motor vehicles and equipment. In practice, smaller-scale actors, including smallholder farmers, tend to lack traditional collateral and thus face barriers to accessing finance. However, smaller-scale actors do often have access to movable assets – in particular, agricultural inputs and outputs – that may be stored in a warehouse with the warehouse receipts used as collateral for a loan.

10. The approach to warehouse receipt legal reform often involves the enactment of a warehouse receipt system (WRS) law. This has a wider scope than the Model Law. A WRS law typically comprises both private and regulatory law. The Model Law focuses on the private law aspects only, i.e., those that define the rights and obligations of the parties to the warehouse receipt in a transactional context. Regulatory law, by contrast, would also cover – inter alia – the following aspects:

- Mandate, powers and governance of the regulatory authority;



- Licensing criteria and procedures for warehouse operators (sometimes also quality and weight certifiers and inspectors); and
- Offenses, penalties and disciplinary procedures.

11. Recognizing the important potential of warehouse receipts to strengthen the agricultural, industrial and financial systems of developing economies, several international development institutions, such as the World Bank Group (WBG), the United Nations Food and Agriculture Organization (FAO) and the European Bank for Reconstruction and Development (EBRD), have provided support for warehouse receipt systems, of which legal reform is often a key component.<sup>5</sup>

#### **Consideration by the Commission of the exploratory work on the topic**

12. At its forty-ninth session, in 2016, the Commission decided to place the topic of warehouse receipt financing on its future work programme and agreed that it should be considered further after a colloquium or an expert group meeting.<sup>6</sup> Accordingly, the Secretariat organized the Fourth International Colloquium on Secured Transactions (the “Colloquium”, Vienna, 15–17 March 2017) to obtain the views and advice of experts with regard to possible future work on security interests and related topics, which included the topic of warehouse receipts.<sup>7</sup>

13. At its fiftieth session, in 2017, the Commission took note of the deliberations and conclusions of the Colloquium and decided that priority should be given to the preparation of a practice guide on secured transactions.<sup>8</sup> With respect to the topic of warehouse receipts, the Commission decided to retain the topic on the future work agenda for further consideration.<sup>9</sup> The Commission was further informed that a delegation would prepare and submit a study on warehouse receipts for that purpose.

14. During the thirty-third session of Working Group VI (Security Interests) (New York, 30 April–4 May 2018), it was proposed that work should be undertaken to prepare a substantive text on warehouse receipts and after discussion, the Working Group agreed to recommend to the Commission that it be mandated to undertake work on the topic.<sup>10</sup>

15. At its fifty-first session, in 2018, the Commission took note of the proposal by Working Group VI on possible future work on warehouse receipts, which would aim at developing a modern and predictable legal regime.<sup>11</sup> After consideration, the Commission concluded that more preparatory work on the topic of warehouse receipts was needed before it could decide on future steps and thus decided to request the secretariat to conduct exploratory and preparatory work on warehouse receipts so as to refer that work to a working group.<sup>12</sup>

16. At its fifty-second session, in 2019, the Commission took note with appreciation of a note by the secretariat (A/CN.9/992) providing an overview of a study presented to the secretariat by the Kozolchyk National Law Center<sup>13</sup> on possible future work on

<sup>5</sup> Several of these organizations have published guidance documents on legal reform, such as *Designing warehouse receipt legislation: Regulatory options and recent trends* (2015) by the FAO and EBRD, as well as *A Guide to Warehouse Receipt Financing Reform: Legislative Reform* (2016) by the WBG.

<sup>6</sup> *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 125.

<sup>7</sup> The deliberations and conclusions of the Colloquium are summarized in documents A/CN.9/913 and A/CN.9/924.

<sup>8</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 227.

<sup>9</sup> *Ibid.*, paras. 225 and 229.

<sup>10</sup> A/CN.9/938, paras. 92 and 93. The proposal is set out in the annex to the report of the Working Group.

<sup>11</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 249.

<sup>12</sup> *Ibid.*, para. 253(a).

<sup>13</sup> The Kozolchyk National Law Center is a non-profit research and educational institution affiliated with the James E. Rogers College of Law at the University of Arizona in Tucson, Arizona, USA.

warehouse receipts. The Commission noted the practical relevance of the project, given the importance of warehouse receipts to agriculture and food security, and their use in supply and value chains.<sup>14</sup> The Commission confirmed its earlier decision to include the topic in its work programme but agreed that it still needed to consider several important elements before embarking on the development of an international legal instrument on warehouse receipts. The Commission agreed to request the secretariat to proceed with its preparatory work and to convene a colloquium with other organizations having relevant expertise, with a view to considering the questions of scope and nature of the work discussed at that session and possibly advancing the preparation of initial draft materials.<sup>15</sup>

17. At the fifty-third session, the Commission had before it a note in which the secretariat presented the progress made since the fifty-second session of the Commission (A/CN.9/1014). The Commission was informed that its secretariat had invited UNIDROIT to participate in and contribute to the preparatory phase of the Commission's work on warehouse receipts. The Commission was also informed that, in line with the mandate received from the Commission at its fifty-second session (see para. 16 above), UNIDROIT and the UNCITRAL secretariat had jointly organized and held a workshop with a broad audience of experts and organizations on 26 March 2020 (due to the measures put in place by States and the United Nations in response to the COVID-19 pandemic, the workshop eventually took place in the form of a webinar by videoconference).

18. The Commission concurred with the assessment made by the secretariat and requested the secretariat to proceed with the necessary preparatory work towards the development of a model law on the private law aspects of warehouse receipts, covering both electronic and paper, negotiable and non-negotiable receipts. The Commission agreed to authorize such work to start on a broad basis aiming at the preparation of a comprehensive instrument covering all the essential aspects necessary to regulate the private law side of a system of warehouse receipts.<sup>16</sup>

19. As regards the methodology, and bearing in mind the overall work programme of the Commission and the expected progress of the projects then being dealt with by the various working groups, the Commission agreed to carry out the project jointly with UNIDROIT, and noted with appreciation the information that the Governing Council of UNIDROIT had already authorized its secretariat to participate in such a joint project. The Commission also agreed with the proposal by the secretariat that UNIDROIT could convene a study group or working group set up by UNIDROIT under the auspices of its Governing Council and to which the UNCITRAL secretariat would be invited in order to start the work. Once the UNIDROIT study group or working group had completed its work, the preliminary draft model law would be submitted for intergovernmental negotiations through an UNCITRAL working group with a view to its ultimate adoption by UNCITRAL. The Commission further agreed that the final text to be adopted by UNCITRAL would bear the names of both organizations, in recognition of their close cooperation and the contribution by UNIDROIT during the preparatory phase of the project. In conclusion, the Commission requested its secretariat to proceed with the preparatory work in cooperation with UNIDROIT towards the development of a model law on the private law aspects of warehouse receipts, as proposed in paragraphs 24–26 of the note by the secretariat (A/CN.9/1014) and present the results of that work to the Commission for consideration at its next session.

#### **Consideration by the Commission of the preparatory work carried out by UNIDROIT and the secretariat**

20. The Working Group on a Model Law on Warehouse Receipts convened by UNIDROIT in consultation with the UNCITRAL secretariat (hereafter the "Working

<sup>14</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 195.

<sup>15</sup> *Ibid.*, paras. 196 and 221(b).

<sup>16</sup> *Ibid.*, *Seventy-fifth Session, Supplement No. 17 (A/75/17)*, para. 60.

Group”) held six sessions between 2020 and 2023. The progress made in the first two sessions of the Working Group was summarized in a note (A/CN.9/1066) considered by the Commission at its fifty-fourth session. The Commission took note with appreciation of the progress made and agreed that the drafting of uniform provisions on the topic required a neutral and functional approach that respected differences in legal doctrines and practice among various legal systems.<sup>17</sup>

21. The progress made in the third and fourth sessions of the Working Group was summarized in a note (A/CN.9/1102) considered by the Commission at its fifty-fifth session. The Commission took note with appreciation of the progress made by the Working Group and the estimated time for completion of the first phase of the project. The Commission noted the technical difficulty of formulating rules acceptable to different legal systems and the complex issues raised by negotiable instruments and stressed the importance for the working group of adopting technological neutrality and functional equivalence as basic principles for its drafting effort.<sup>18</sup>

22. At its fifty-sixth session, the Commission considered the note by the secretariat summarizing the work done by the Working Group at its fifth and sixth sessions and containing the draft model law as revised by the Drafting Committee following the sixth session of the Working Group and the subsequent written consultation of the Working Group (A/CN.9/1152). In addition, the Commission was informed that the UNIDROIT Governing Council, at its 102nd session (Rome, 10–12 May 2023), had agreed that the draft was ready for submission to UNCITRAL for State negotiations and completion.<sup>19</sup>

23. The Commission commended the Working Group for the work accomplished since its establishment in 2020 and the UNIDROIT Governing Council for the approval of the draft model law on warehouse receipts. The Commission commended its secretariat and UNIDROIT for the work already accomplished, noting that it was the result of a good and effective coordination and cooperation between UNCITRAL and UNIDROIT, which should continue throughout the preparation of a draft guide to enactment of the model law on warehouse receipts. While the Commission agreed that the current draft model law accommodated different legal traditions and dealt with the most essential issues for establishing an efficient and predictable regime for warehouse receipts operation and financing, it was observed that the draft model law did not contain rules on important issues such as loss sharing and warehouse operators’ liability, which the UNCITRAL working group may wish to include in its discussions.<sup>20</sup>

24. After deliberation, the Commission agreed to refer the draft model law on warehouse receipts to Working Group I. In doing so, the Commission noted the advanced stage of the draft model law on warehouse receipts and its belief that consideration of the text by the Working Group would require only a short amount of time, possibly two sessions.<sup>21</sup>

25. At its fortieth session, the Working Group completed a first reading of the draft model law on warehouse receipts, discussing scope of application of the model law and general provisions, issuance and contents of a warehouse receipt, transfer and other dealings in negotiable warehouse receipts, rights and obligations of the warehouse operator, and pledge bonds, and holding a general discussion on warehouse receipts in electronic form (A/CN.9/1158).

26. At its forty-first session, the Working Group completed a second reading of the model law on the basis of a revised text (A/CN.9/WG.I/WP.133) and reviewed the draft guide to enactment of the model law (A/CN.9/WG.I/WP.134). The Working Group agreed to recommend to the Commission the adoption of the Model Law on Warehouse Receipts and its Guide to Enactment at its fifty-seventh session and

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<sup>17</sup> Ibid., *Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 220.

<sup>18</sup> Ibid., *Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 197.

<sup>19</sup> Ibid., *Seventy-eighth Session, Supplement No. 17* (A/78/17), para. 177.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid., paras. 22(b) and 177.

requested the secretariat to make substantive and editorial amendments to both texts reflecting its deliberations.

[Drafting history to be completed.]

## **B. PURPOSE OF THE MODEL LAW**

27. The purpose of the Model Law is to assist States in developing a modern warehouse receipts law supporting the issuance and transfer of electronic and paper-based receipts alike. The Model Law is intended to be useful to States that currently do not have enabling warehouse receipts laws, as well as to States that already have such laws but wish to modernize them – for instance to support the use of electronic warehouse receipts.

28. The primary objective of the Model Law is to facilitate commercial transactions that involve stored goods. While goods stored in warehouses may be transferred conveniently through the use of warehouse receipts, they may also be used as collateral. Thus, another objective of the Model Law is to promote short-term financing in the agricultural sector. By assisting States to develop well-designed warehouse receipts laws, the Model Law will facilitate access to credit and reduce the cost of financing for farmers. The standardization of rules relating to the issuance and transfer of warehouse receipts will improve confidence in warehouse receipt systems, which will in turn attract private sector investments to the agricultural sector.

29. In addition, the harmonization of warehouse receipt laws will aid the formation of regional and international markets. This legal framework will be particularly useful to developing countries.

30. Moreover, by improving the ability of farmers countries to grow and store crops and other agricultural products, the Model Law has the potential to increase global food production and assist in overcoming the food security challenge. In this regard, the Model Law has the potential to contribute to achieving the United Nations Sustainable Development Goal 2 which aims to “End hunger, achieve food security and improved nutrition and promote sustainable agriculture”.

## **C. SCOPE**

31. The Model Law contains provisions relating to the private law aspects of warehouse receipt systems, i.e., the issuance and transfer of warehouse receipts and the rights and obligations of the parties in a transactional context. It does not contain regulatory provisions such as those generally included in a WRS law, e.g., licensing, supervision and insurance requirements. The enactment of the Model Law should be accompanied by the issuance of a legislative instrument containing complementary rules further elaborated on in Part IV.

32. It is important to note that the scope of the Model Law extends beyond agricultural commodities to other types of goods which may be the subject of a warehouse receipt, such as mineral commodities, gas and oil. Article 1, paragraph 1 of the Model Law explains that it applies to “warehouse receipts”, with no restriction on the type of goods that may be covered by such receipts. Furthermore, article 1, paragraph 2 provides a general definition of a warehouse receipt which does not include any requirement that would limit its application to any particular sector. Thus, the Model law can provide guidance to the enactment of both generic or commodity-specific legislation on warehouse receipts.

33. An important aspect of the scope of the Model Law is its applicability to both paper-based and electronic warehouse receipts. In recent years, many States have introduced electronic warehouse receipts (EWRs) as an alternative to their paper-based counterparts or are contemplating enactment of legislation providing for electronic warehouse receipts only. EWRs improve trading efficiency and facilitate access to credit by removing the need for the physical transfer of receipts and thus

allowing for instantaneous, low-cost transactions. Moreover, commercial documents are nowadays seen as individual components of the broader digital trade ecosystem. Thus, a warehouse receipt may, for instance, incorporate information on the origin and quality of the commodity, such as place of mining or conditions of growing and harvesting, which may originate in other electronic documents, such as bills of lading or certificates of origin. In order for this to be effective, however, it is essential that EWRs and their paper-based counterparts have the same legal status and treatment. Article 1, paragraph 2 is important in this regard as it clarifies that a warehouse receipt may be either an “electronic record” or a “paper document”. Some jurisdictions have gone a step further and require several types of commercial documents, including warehouse receipts, to be issued electronically. This reflects a policy choice typically made after a careful assessment of the public and private sector’s readiness to transact exclusively electronically. The Model Law acknowledges implicitly the implications of such a choice and introduces no such requirement. A State that wishes to implement such a choice could easily do so by enacting the provisions dealing with electronic warehouse receipts and adapting some of the other as appropriate. Moreover, article 14 allows for the change of medium of a warehouse receipt without affecting the rights and obligations of the parties.

34. The scope of the Model Law also extends to both negotiable and non-negotiable warehouse receipts. The definitions of both are provided in article 2, subparagraphs 4 and 5 respectively. Chapter III of the Model Law sets out the rules relating to the [creation] and third-party effectiveness of security rights in negotiable warehouse receipts. While the Model Law encompasses both negotiable and non-negotiable warehouse receipts, emphasis is placed on negotiable warehouse receipts, since non-negotiable warehouse receipts are more likely to be issued by collateral managers in the context of field warehousing arrangements that may not need to be subject to the regulatory requirements applicable to the operators of public warehouses

35. The scope of the Model Law also extends to both the transfer and security functions of negotiable warehouse receipts. Articles 15 through 18 deal with the transfer of paper and electronic warehouse receipts as well as the effects of such transfers. These provisions, particularly those relating to transferees with protected holder status, are important in enhancing trading efficiency as they promote confidence in the warehouse receipt system. Article 19 provides for the perfection of security rights in warehouse receipts, which will facilitate access to credit. However, enacting States wishing to form a conducive legal framework for secured transactions, including for security rights in warehouse receipts, are encouraged to implement the MLST.

36. Finally, the inclusion of the optional chapter V on “Pledge bonds” enables the Model Law to apply to both single and dual warehouse receipt systems. For States that wish to maintain or introduce a dual warehouse receipt system, chapter V should either be adopted in its current form or integrated with the contents of the main body of the Model Law. This type of system is more common in civil law countries, particularly those in South America, and involves the issuance of two separate documents relating to the property and security rights in the goods. On the other hand, States that wish to maintain or introduce a single warehouse receipt system would not incorporate chapter V in its legislation.

## **D. STRUCTURE**

37. The Model Law is organized into six chapters: Scope and general provisions; Issuance and contents of a warehouse receipt; alteration and replacement; Transfers and other dealings in negotiable warehouse receipts; Rights and obligations of the warehouse operator; Pledge bonds; and Application of this Law.

38. Chapter I, entitled “Scope and general provisions”, outlines the scope of application of the Model Law, placing particular emphasis on its applicability to both electronic and paper warehouse receipts, and provides definitions for key terms used

throughout the Model Law. Furthermore, this chapter contains provisions regarding party autonomy as well as the interpretation of the Law in respect of its international origin and the need to promote uniformity in its application.

39. Chapter II relates to the “Issuance and contents of a warehouse receipt; alteration and replacement”. It deals with the issuance and contents of warehouse receipts, imposing an obligation on the warehouse operator to issue a warehouse receipt upon request by the depositor, and enumerating the required information to be included in the warehouse receipt, as well as additional information which the warehouse operator may wish to include. It also deals with the alteration of warehouse receipts after the date of issuance, the replacement of warehouse receipts in the event of loss or destruction and the change of medium of a warehouse receipt from paper to electronic or vice versa.

40. Chapter III deals with “Transfers and other dealings in negotiable warehouse receipts”. It outlines the requirements for the transfer of both paper and electronic negotiable warehouse receipts. It then explains the rights and benefits of transferees, including the additional rights of transferees with “protected holder” status, as well as the third-party effectiveness of security rights in negotiable warehouse receipts. Finally, it contains provisions regarding representations and guarantees in the context of transfers.

41. Chapter IV sets out the “Rights and obligations of the warehouse operator” including the duty of care, the duty to keep goods separate and the obligation to fully or partially deliver goods upon instruction by the holder, as well as excuses from this delivery obligation. This chapter also contains provisions relating to the warehouse operator’s lien on stored goods, the possibility of splitting a warehouse receipt, and the termination of storage by the warehouse operator. The rights and obligations of the warehouse operator set out in this chapter are limited to the extent required for the functioning of the Model Law.

42. Chapter V on “Pledge bonds” is an optional chapter intended only to be adopted by enacting States that seek to reform or implement a dual warehouse receipt system. In a dual receipt system, the warehouse operator issues a warehouse receipt and a pledge bond. The pledge bond grants its holder a security right in the goods covered by the warehouse receipt, and the rights of the warehouse receipt holder are subject to the rights of the pledge bond holder. In a single receipt system, only one warehouse receipt is issued for the deposited goods. Chapter V deals with several matters pertaining to pledge bonds, including their issuance and form, their effect and transfer, and the rights and obligations of the warehouse operator.

43. Chapter VI on “Application of this Law” contains provisions relating to the entry into force of this Law as well as the repeal and amendment of other laws in the enacting State.

## **E. ELECTRONIC WAREHOUSE RECEIPTS**

44. The importance of EWRs in modern commercial practice is recognized by the Model Law and signalled by its drafting in a medium-neutral and technology-neutral manner. In the first provision of the Model Law (art. 1), delimiting its scope of application, warehouse receipts are defined for the purposes of the Law as “an electronic record or a paper document” when certain conditions are met (art. 1, para. 2).

45. The Model Law is medium-neutral. It applies to both electronic and paper-based warehouse receipts. Thus, the Model Law acknowledges the increasing relevance of EWRs in many jurisdictions where their use is already widespread in commercial transactions. Moreover, it provides guidance to legislators and regulators aiming at adapting the legal and regulatory framework to facilitate the transition to EWRs with enabling provisions. It does not preclude a State from implementing a system only for

electronic warehouse receipts, which would however necessitate some changes in the law, especially to eliminate the provisions that exclusively apply to paper receipts.

46. The Model Law is compatible with the use of any model, including models based on registries, and models operating as token-based systems. Various sub-models can be found within each category, be they single, centralized or multiple registries, general or sector-specific registries, public or private registries, etc. All these structural and organizational aspects should be addressed in complementary rules, if so decided.

47. In implementing the Model Law provisions and developing complementary rules, where necessary, legislators and regulators should be mindful of the risk of legal obsolescence in the face of rapid technological progress and seek to formulate solutions based on technology neutrality that are appreciated by the industry as market-sensitive as well as innovation-enabling.

48. The provisions of the Model Law that enable the use of EWR – namely, articles 6 and 7 – are inspired by the corresponding provisions of the UNCITRAL Model Law on Electronic Transferable Records (MLETR). This is done to ensure that similar reliability standards would apply to different electronic documents exchanged in the same digital trade ecosystem: for instance, to an electronic bill of lading and to an electronic warehouse receipt relating to the same goods. Maintaining similar reliability standards is of great importance to ensure system interoperability and, ultimately, the smooth flow of trade-related data.

49. The Model Law is a comprehensive legal text that offers a modern set of statutory provisions for warehouse receipts regardless of their support. Alternative approaches are however possible. For instance, jurisdictions that have already adopted the MLETR and apply it to warehouse receipts may opt for continuing to rely on the MLETR by enacting only the provisions of the Model Law relating to the generic use of warehouse receipts, or to the use of paper-based warehouse receipts, and not enacting those provisions that apply only to EWR such as articles 6 and 7 Model Law.

## **F. FINANCING PRACTICES INVOLVING WAREHOUSE RECEIPTS**

50. Warehouse Receipt Finance (WRF) refers to any financial product and solution which involves an encumbrance over the warehouse receipt that enables the lender to secure the repayment of a loan or other obligation against the underlying goods. Financing products may focus on the warehouse receipt as sole security or on a package of assets that include warehouse receipts:

- Practice has developed the following financing arrangements when the warehouse receipt is used as the sole security: When a depositor stores goods in a warehouse and receives a loan against a percentage of the value of the stored goods, the product may be known as “warehouse receipt discounting”;
- When it is a supplier that has taken WRF against goods stored in the buyer's warehouse, the product may be known as supplier finance;
- When it is a buyer – e.g., a trader that aggregates goods, an exporter that exports goods, or an industrialist that processes or manufactures – that takes WRF against goods stored in its own warehouse, the product may be known as inventory finance;
- In parts of Africa, informal versions of WRF, usually offered by microfinance institutions against community food stocks held in community-based storage under dual lock custody, the product is known as warrantage; and
- In the Islamic world, warehouse receipts may be used to support Shariah-compliant, or interest-free banking products, such as commodity *murabaha*.

51. Prominent financial products and solutions in which the warehouse receipt is just one of the assets encumbered include:

- Trade finance, in which the encumbrance of the WR may be paired with the assignment of the borrower's receivables, linked to a payment guarantee instrument (e.g., letter of credit), among other potential risk mitigation mechanisms, to support a cross-border transaction;
- Asset-based lending, in which the warehouse receipt is one of several movable assets that are encumbered, typically alongside inventory, receivables, and a bank account; and
- All-assets lending, in which the lender lends against the entire pool of the borrower's assets, immovable as well as movable.

52. Notwithstanding all the possible variations, “classic WRF” – generally, in the form of the warehouse receipt discounting product may be depicted as involving the following flow:

[Insert table]

53. Looking beyond finance in the primary market, loans secured with warehouse receipt may also be securitized and the resulting financial instruments traded in the capital markets. A more common transaction in the secondary market is a financing mechanism that relies on a central bank facility or other special, typically government-owned, financial institutions that provides financing to the agricultural sector. One of the functions through which they support agricultural activities is the extension of credit against loans secured with warehouse receipts to provide low-cost financing to the financial institutions that generated the loan. Under some regulations, loans secured with warehouse receipts may benefit from a favourable prudential treatment.

54. Should the seller's position on a physically deliverable commodity derivative instrument be held open through to the delivery period, a warehouse receipt may be submitted by the seller to the exchange, typically one issued by the operator of one of its designated delivery warehouses, which will then be transferred from seller to buyer to fulfil the settlement process.

55. For commodity spot exchanges, the warehouse receipt not only fulfils delivery functions in settlement of exchange-traded contracts, as above, but also is required as the prerequisite for a seller to trade through the exchange, providing pre-trade assurance that the goods offered for sale are already in the warehouse, quality- and quantity-verified and guaranteed. In light of the above, some of the world's largest and most sophisticated WRS are operated by or in association with commodity exchanges. When the warehouse receipt is used in a commercial transaction, whether against credit or in a trading position, the prospective purchaser or lender will consider a range of risks:

- Legal risk: does the legal framework permit the efficient creation, perfection and enforcement of security rights?
- Custody risk: do the warehousing arrangements secure the presence and value of the collateral?
- Credit risk: will the counterparty have willingness and capacity to fulfil their obligations?
- Market risk: will there be a buyer willing to purchase the goods?
- Price risk: will the value of the goods be sufficient to fulfil obligations (if this is required)?

56. The Model Law, which aims to strengthen and harmonize warehouse receipt laws around internationally agreed best practice, enhances the mitigation of both legal and custody risk, and thus can contribute to increased worldwide adoption of WRF



and, more broadly, the growing use of the warehouse receipt as collateral to drive higher volumes of commodity trade and finance at lower risk.

57. In the mitigation of both legal and custody risk, the Model Law is expected to be an enabler of cross-border trade and finance:

- Lenders may leverage an increasingly harmonized legal framework across jurisdictions to build cross-border WRF portfolios;
- Cross-border harmonization may also drive the formation of regional commodity markets and exchanges for electronic warehouse receipts. This may bring disproportionate benefit for small-scale economies which may otherwise struggle to build sufficient scale from the national market alone to meet the scale and structure requirements of such markets; and
- Finally, harmonization may also accelerate the emergence of new cross-border commodity exchange markets, and associated clearing and settlement mechanisms, by enabling the rights of buyers and sellers in different jurisdictions to enjoy a common and consistent legal foundation so that the legal framework, including the commodity exchange rulebook, can be applied without discrimination or differentiation according to counterparty domicile or the location of the stored goods.

58. The Model Law contains a range of provisions which provide lenders with confidence that the enforcement rights in goods can be realized in practice, allowing them recourse in the event of non-performance by the borrower or the warehouse operator. These provisions include giving the warehouse receipt the status of “document of title”, standardizing the content of the warehouse receipt, setting out the rights and obligations of the parties to a warehouse receipt, and specifying the modalities for issuance and transfer of the warehouse receipt.

59. Mitigation of custody risk entails the lender evaluating the capacity of the warehouse operator to maintain the goods, or otherwise provide compensation for loss or damage that may take place while the goods are in storage. The Model Law incorporates a range of provisions that specify the obligations of the warehouse operator that issues the warehouse receipt, including a duty to verify the quality and quantity of goods described in the receipt and to take good care of them. In practice, lenders typically utilize one or both of two approaches to reinforce the custody risk-mitigation provisions enshrined in the Model Law.

60. Lenders may privately contract with a “collateral manager”, a business which specializes in taking custody, controlling and preserving the condition of goods. This may take place through a tripartite agreement involving the lender, borrower and collateral manager, known as a collateral management agreement (CMA). In general, the CMA involves a field warehousing arrangement in which the collateral manager takes control over the borrower’s own warehouse. The warehouse receipts issued under this arrangement tend to be non-negotiable.

61. Lenders may also utilize a WRS, in which the regulatory aspects of WRS law – not included in the Model Law (see Part II, A.) – typically define eligibility criteria for warehouse operators, including operational capability and capital adequacy. In practice, even under WRS, and especially when the WRS is nascent, lenders often wish to enter into private agreement with the warehouse operator and work only with warehouse operators that meet the lender’s eligibility criteria. The warehouse receipts issued under this arrangement tend to be negotiable.

62. In smaller economies, public warehousing has usually been established only in sites with particularly high throughflow such as ports and the largest commercial centres. Often such warehousing may be integrated into the operations of logistics, shipping and forwarding businesses in which case it is not offered as a stand-alone service. In practice, it has been difficult to establish public warehousing outside these locations, in particular in rural areas close to farmers, who tend to be the weakest actor in the value chain, with the highest unmet financing need. Commodity exchanges may in practice be best positioned to open up public warehouses. However,

in commodity exchange delivery warehouses, WRF may be available only to those parties also willing to trade through the exchange. This may be a limiting factor. In some countries, government agencies such as commodity marketing boards are also offering public warehousing.

63. Generally, though, efforts in smaller-scale economies to promote WRF outside the ports and commercial centres may be structured around private and field warehousing arrangements. Common examples include larger buyers offering storage services to their suppliers and farmer organizations (FOs) offering storage services to their farmer members. The warehouse owner offers these services as it helps to secure more supply than their own working capital and credit lines would allow. The depositor stores the goods and self-finances via WRF. When the buyer/FO has more cashflow later in the season, the goods are bought from the depositor. Experience shows that a lender may in some circumstances trust the buyer or FO as the warehouse operator to issue the WRs that the lender then finances. However, sometimes the lender may require an independent warehouse or collateral manager to control the goods and issue the warehouse receipts. The latter is always the case if the warehouse owner wishes to borrow using the same arrangement.

## **G. PRIVATE INTERNATIONAL LAW ISSUES**

64. The Model Law does not include an article that would determine the law applicable to various aspects of transactions with warehouse receipts, such as the proprietary effect of transfers. At its Fifth Session, the UNIDROIT Working Group considered a Note on Conflict of Laws Issues that examined various aspects of law applicable to warehouse receipts, their issuance, rights and obligations of the issuer, transfers and security rights. The Working Group decided for a brief explanation of the relevant issues, without formulating any recommendations, to be included in the Guide to Enactment. This Section provides a summary of the relevant issues.

65. Warehouse receipt laws do not typically include conflict of laws rules. Transfers of warehouse receipts have traditionally been domestic and completed by delivery of a paper document. Thus, the general connecting factor of *lex rei sitae* is sufficient for such transactions. However, the digitalization of records and establishment of platforms for EWRs opens greater access to cross-border trading. Moreover, digitalization raises novel questions that the general approaches determining the applicable law according to *lex rei sitae* may not be able to answer satisfactorily.

66. The mutual rights and obligations of a warehouse operator and the depositor are provided for in the terms and conditions of their storage agreement. These terms and conditions typically establish the governing law for disputes arising out of the storage agreement as well as which courts have jurisdiction to adjudicate disputes.

67. Enacting States wishing to promote cross-border trading in warehouse receipts, are advised to consider the various issues of private international law that may arise in connection with the circulation of warehouse receipts in different jurisdiction with a view to ascertaining whether their existing laws offer adequate rules for determining the relevant applicable law. Common issues would include the following::

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

68. It is advisable for the enacting State to ...

### III. ARTICLE-BY-ARTICLE COMMENTARY

#### Chapter I – Scope and General Provisions

##### Article 1 – Scope of application

69. Under article 1, the Model Law applies to warehouse receipts, either in the form of an electronic record or paper document. This reflects the intention to design a medium-neutral instrument. Whatever form is chosen, only one single document can be issued in respect of the same goods. The Model Law does not allow parties to issue concomitantly an electronic and a paper-based warehouse receipt covering the same goods, as duplicity of documents of title would undermine legal certainty.

70. There is no separate definition of an EWR for the purposes of the Model Law. An EWR is simply a “warehouse receipt” issued as an electronic record. Thus, the Model Law includes in article 2 the definition of “electronic record” pursuant to the MLETR: “information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.” The notion of EWR is then based on the concept of “electronic record.”

71. The Model Law does not apply to all electronic records or paper documents simply labelled “warehouse receipt”. Rather it provides for two essential elements that must be present for a document to be considered a warehouse receipt for purposes of the Model Law. This approach consolidates the definition of warehouse receipt with the essential elements of a warehouse receipt into one comprehensive provision. A paper document or electronic record that does not meet the requirements of article 1, paragraph 2, may nonetheless have some legal effect, for instance as evidence of the information it contains, but would not be subject to this law. In contrast, article 9 lists information that must be included in a warehouse receipt. However, the omission of such information would not disqualify the paper document or electronic record from being considered a warehouse receipt for purposes of the Model Law (see commentary to article 9 on the legal effect of omitting such information).

72. Under article 1, paragraph 2, the first essential element is that the warehouse receipt is issued and signed by a warehouse operator that acknowledges holding goods on behalf of the holder (see article 2, para. 3 for definition of holder). This means that a warehouse operator must issue the warehouse receipt, identify itself as the party holding the goods on behalf of the holder, and authenticate the document by adding its signature. The signed acknowledgement reflects the warehouse operator’s duty to the holder to preserve the quantity and quality of the goods in its custody (see art. 23 on duty of care).

73. Second, the warehouse receipt must include a promise by the warehouse operator to deliver the goods to the holder. That is, in addition to safeguarding the goods, the warehouse operator must deliver them to the holder. The warehouse operator’s delivery obligation is triggered when the holder surrenders possession or control of the warehouse receipt and instructs the warehouse operator to deliver the goods (see art. 26, para. 1).

74. Because the warehouse operator’s delivery obligation consists of an undertaking to make the goods available under certain conditions, it might appear to apply to field warehousing where a collateral manager controls goods on behalf of a financier, issues a non-negotiable warehouse receipt as a record of the goods, and then releases the goods to the borrower on the instruction of the financier. However, in those situations, the collateral manager would issue a non-negotiable receipt to which several provisions of the Model Law (e.g. on transfers) would not be applicable.

##### Article 2 – Definitions

75. The Model Law provides for definitions of key terms in article 2 that supplement the general definition of warehouse receipt in article 1.

#### *Depositor*

76. The first subparagraph of article 2 provides a definition of depositor, which is “a person who deposits goods for storage with a warehouse operator” and is a party to the storage agreement. The person depositing goods is not always the same as the holder; the Model Law makes this important distinction clear by providing separate definitions. The identity of the depositor must be included in a warehouse receipt (see art. 9, para. 1, subpara. (d)). The depositor may be a logistical company or an agent of a financial institution that takes the warehouse receipt as collateral.

#### *Electronic record*

77. The definition of electronic record (see art. 2, para. 2) draws from the MLETR. The purpose is to provide a foundational underpinning for EWRs (see art. 1, para. 2).

#### *Holder*

78. The definition of holder contains separate subparagraphs outlining who qualifies as “holder” for purposes of negotiable warehouse receipts issued to a bearer, negotiable warehouse receipts to the order of a named person, and non-negotiable warehouse receipts. Holder is one of the key concepts in the Model Law, identifying the person who is entitled to delivery and could satisfy the additional conditions to become a protected holder (see art. 17). For a person to become a holder, that person must have some association to the receipt, such as being an endorsee.

#### *Negotiable warehouse receipt*

79. The fourth paragraph defines a negotiable warehouse receipt as one issued to either the order of a named person or to bearer. A warehouse receipt that satisfies either of these conditions may be transferred by delivery, or delivery and endorsement, in the case of a paper warehouse receipt (see art. 15, para. 1) and by transfer of control, in the case of an EWR (see art. 15, para. 2). Only a negotiable warehouse receipt may confer the status of a protected holder under article 17.

#### *Non-negotiable warehouse receipt*

80. The Model Law distinguishes a negotiable warehouse receipt from a non-negotiable warehouse receipt in that the former may be transferred by delivery/endorsement or change of control, whereas the latter may be transferred by assignment. This distinction is reflected in the definition of non-negotiable warehouse receipt, which is “issued in favor of a named person only.” It follows from the definition of a negotiable warehouse receipt that where a warehouse receipt is issued in favour of a named person whether or not qualified by the word “only”, but without the words “to the order” or equivalent, the warehouse receipt is non-negotiable. The warehouse receipt is non-negotiable also when it contains language prohibiting its transfer or uses equivalent formulation.

#### *Protected holder*

81. The definition of protected holder refers to article 17, paragraph 1, which outlines the various requirements that must be met for a person to be considered a protected holder. A transferee and a secured creditor may satisfy those requirements and acquire the corresponding rights, including the highest protection against competing claims.

#### *Storage agreement*

82. Paragraph 7 provides a definition of storage agreement, which is entered into between a warehouse operator and a depositor. Under paragraph 7, the storage

agreement “sets out the terms on which the warehouse operator agrees to store goods.” The fact that the storage agreement sets out the terms by which the goods are held will be of primary interest to the holder of a warehouse receipt. The terms of the storage agreement may be contained in the warehouse receipt (see art. 9 on incorporation of storage agreement in the warehouse receipt). It should be noted, however, that although the MWR assumes the existence of an underlying storage agreement, to which it makes reference as necessary for the circulation of the warehouse receipt, the Model Law does not deal with the storage agreement and obligations of the parties thereunder. Accordingly, the Model Law only applies if a warehouse receipt has in fact been issued.

#### *Warehouse operator*

83. Paragraph 8 defines the warehouse operator as “a person who is in the business of storing goods for other persons.” A warehouse operator under this definition may be a person whose sole business is to provide storage for third-parties or a person for which such storage may be one among other services.

### **Article 3 – Party autonomy**

84. Article 3 provides that “[p]arties may not derogate from or vary by agreement any provision of this Law.” This option thus makes all the provisions of the Model Law mandatory. That does not mean that the parties would not be able to deal with other issues in a storage agreement or the warehouse receipt.

### **Article 4 – Interpretation**

85. Article 4 is intended to provide guidance in the interpretation of the Model Law and to limit the extent to which the Model Law, once incorporated in national law, would be interpreted only by reference to concepts of national law.

86. The purpose of the reference to the international origin of the Model Law is to draw the attention of any person that might be called upon to interpret and apply a national law implementing the Model Law to the fact that its provisions, while part of a national law, should be interpreted and applied in a manner that will promote uniformity among all enacting States.

## **Chapter II – Issuance and Contents of a Warehouse Receipt; Alteration and Replacement**

### **Article 5 – Obligation to issue a warehouse receipt**

87. Article 5 outlines the obligation of the warehouse operator to issue a warehouse receipt if requested by the depositor. A warehouse receipt is typically issued in accordance with the underlying storage agreement. However, the Model Law does not make issuance of a warehouse receipt mandatory in all cases. Rather, it the Model Law gives the depositor the choice as to whether a warehouse receipt shall be issued or not. Nevertheless, regulations may impose a separate obligation on licensed warehouse operators to issue a warehouse receipt (whether or not the depositor requests one) and penalties for violations.

88. Notably, the reference in paragraph 1 to “after receiving them for storage” covers not just situations where the warehouse operator has taken direct physical possession of the goods itself, but covers also situations where the goods are being held on behalf of the warehouse operator, as may be the situation in the case of goods in transit.

### **Article 6– Electronic warehouse receipt**

89. Article 6 sets forth the requirements for issuing an electronic warehouse receipt under a medium-neutral approach. It is based on articles 10 and 11 MLETR. The requirements are: (a) identification of the electronic warehouse receipt (as opposed to any other electronic record); (b) control of the electronic warehouse receipt during its entire lifecycle; (c) retention of integrity of the warehouse receipt; and (d) the use of reliable methods.

#### **Article 7 – . General reliability standard for electronic warehouse receipts**

90. Article 7 provides for the general reliability standard for electronic warehouse receipts, based on article 12 of the MLETR. Under article 7, the method referred to in article 6 must be as reliable as appropriate for the fulfilment of the function for which the method is being used, in light of all relevant circumstances. Article 7 sets out a non-exhaustive list of seven elements that are relevant to determine the reliability of the method used in managing electronic warehouse receipts. Regulators wishing to provide guidance on the reliability of electronic warehouse receipts management systems may do so on the basis of this article and mindful of the desirability of preserving the application of the principle of technology neutrality. Article 7 does not prevent the enacting jurisdiction from adopting such mechanisms to assess the reliability of methods and systems before their use (ex-ante approach) or from associating legal consequences to that assessment (e.g., legal presumptions). Moreover, the parties may agree on the reliability of the methods used in the electronic warehouse receipts management system. Such agreement may be contained in rulebooks that may be incorporated by reference in the storage agreement. Moreover, article 7 does not prevent enacting jurisdictions from taking into account any agreement between the parties.

#### **Article 8 – Representations by the depositor**

91. Article 8 provides for representations of the depositor at the time of deposit, which are contained in subparagraphs (a), (b) and (c). Those representations are made immediately to the warehouse operator, but article 8 expressly extends their benefit to all subsequent holders.

92. Subparagraph (a) provides that the depositor represents to the warehouse operator and to subsequent holders that it has authority to deposit the goods and request the issuance of a warehouse receipt. Authority to deposit covers not only situations where the depositor is the owner of the goods, but would also include situations where, for example, the depositor is acting on behalf of the owner (as its agent).

93. Subparagraph (b) provides that the depositor represents that it has authority to request the issuance of a warehouse receipt.

94. Lastly, subparagraph (c) provides that the depositor represents that the goods are free of any rights or claims of third parties to the best of its knowledge and except as notified to the warehouse operator. Subparagraph (b) thus imposes liability on the depositor in cases of misrepresentations (by the depositor) about the existence of rights in the goods covered by the warehouse receipts held by some third party, such as a secured creditor, judgment creditor or tax authority. It effectively requires the depositor to disclose the existence of such claims to the warehouse operator.

95. Subparagraph (c) is to be read in conjunction with article 10, paragraph 1, subparagraph (g) and paragraph 2, which requires warehouse operators to include in the warehouse receipt information about the existence of any rights of third parties to the goods notified by the depositor to the warehouse operator. A warehouse operator would not be held liable for an incorrect statement caused by a misrepresentation of the depositor.

96. Nothing in this article requires the warehouse operator to verify any representations made by the depositor under this article, the obligation of the warehouse operator being to deliver to the holder of the warehouse receipt, according to article 26.

#### **Article 9 – Incorporation of storage agreement in the warehouse receipt**

97. Article 9, paragraph 1 allows the warehouse operator, by an appropriate statement in the warehouse receipt, to incorporate by reference all or some terms of the storage agreement. However, to protect subsequent bearers and enhance confidence in the negotiation of warehouse receipts, paragraph 2 prevents the warehouse operator from relying in on terms of the storage agreement that are inconsistent with the express terms of the warehouse receipt. In other words, a transferee takes the warehouse receipt subject to the terms of the storage agreement, so long as they do not conflict with an express term of the warehouse receipt. Notably, a warehouse operator is required to disclose a copy of the storage agreement to potential transferees on demand of the holder.

#### **Article 10 – Information to be included in a warehouse receipt**

98. Article 10 lists the information that must be included in a warehouse receipt, clarifies the effect of any incomplete or incorrect statement of information, and provides a rule addressing situations where a negotiable warehouse receipt does not list the name of the person to whose order it is issued. In the interest of legal certainty, inclusion of the information listed in article 10 is not mandatory so that its absence would not disqualify the paper document or electronic record from being considered a warehouse receipt for purposes of the Model Law. For this reason, paragraph 2 states that a declaration containing missing, incomplete or incorrect information will not invalidate the warehouse receipt, but may render the issuer liable.

99. Paragraph 1, in subparagraphs (a) through (l), lists the information that must be included in a warehouse receipt, beginning with the denomination as “warehouse receipt” in subparagraph (a). The Model Law provides for several rules specific to transfers and other dealings with negotiable warehouse receipts (see ch. III). Moreover, the application of subparagraphs (b) and (c) of article 9 depends on whether the warehouse receipt is negotiable or non-negotiable. A negotiable warehouse receipt, for instance, must include the name of the person to whose order the receipt is issued or a statement that it is issued to bearer (see subpara. (b)). Subparagraphs (d) through (i) require an indication of the name and address of the depositor and the warehouse operator, a description of the goods and their quantity, an indication of the existence of any rights of third parties to the goods notified by the depositor to the warehouse operator pursuant to article 7, subparagraph (b), the fixed period of storage (if any), and the place where the goods are stored. This information reflects the terms and conditions of the storage agreement. Subparagraphs (j) through (l) require the warehouse receipt to contain a unique identifier, an indication of the date of issuance and date of the storage agreement.

100. A warehouse receipt that is issued need not contain any of the information listed in paragraph 1 in order to qualify as a warehouse receipt so long as it satisfies the “essential elements” of a warehouse receipt in article 1 of the Model Law. The Model Law encourages the inclusion of this information to promote good practices. Under paragraph 2, the effect of a missing, incorrect or incomplete statement of information does not invalidate the warehouse receipt, which could negatively impact the rights of subsequent holders, but rather exposes the warehouse operator to liability for any losses proximately caused by such incorrect or incomplete statement. The degree of liability would be determined by some other law. The Model Law thus places the obligation on the warehouse operator, as issuer, to issue a warehouse receipt that contains correct and complete information.

101. To increase predictability, paragraph 3 addresses situations where a warehouse receipt does not include the information required by paragraph 1, subparagraph (b) or

(c), in which case it is presumed to be a negotiable warehouse receipt that is issued to bearer.

#### **Article 11 – Additional information that may be included in a warehouse receipt**

102. Article 11 lists additional information that may be included in a warehouse receipt, clarifies the effect of any incorrect statement of information (similarly to art. 10, para. 2), and addresses situations where a warehouse receipt covers fungible goods but does not state the quality of the goods.

103. Paragraph 1 provides that a warehouse operator may include any other information in a warehouse receipt, including (but not limited to) the name of the insurer, if any, who has insured the goods, the details of the insurance policy covering the goods and the insured value (see subpara. (a)); the amount of the storage fees if they are a fixed amount or, if they are not a fixed amount, how the fees are calculated (see subpara. (b)); the quality of the goods (see subpara. (c)); and, if the goods are fungible, whether the goods may be commingled (see subpara. (d)). If applicable, inclusion of such additional information is encouraged, but its omission does not expose the warehouse operator to any liability, as in the case of omission of the information under article 9.

104. Under paragraph 2, the effect of an incorrect statement of the information does not invalidate the warehouse receipt, but rather renders the warehouse operator liable for any losses caused by such incorrect statement (similarly to art. 9, para. 2). Notably, under article 10, the warehouse operator is not obliged to include any additional information. It can only be held liable in cases where additional information is provided and it states such information incorrectly.

105. To increase predictability, paragraph 3 provides that if a warehouse receipt covers fungible goods but does not state their quality, the goods are presumed to be of average quality.

#### **Article 12 – Goods in sealed packages and similar situations**

106. Article 12 provides rules governing situations where the warehouse operator may not have a practicable or commercially reasonable means to describe the type, quantity and quality of the goods itself because they are sealed in packages or some other similar condition exists.

107. In such cases, the warehouse operator may describe the goods in accordance with information provided to it by the depositor (see para. 1, subpara. (a)) or, in the case of goods in a sealed package, by a statement to the effect that the package is said to contain the described goods, and that the warehouse operator otherwise has no knowledge of the contents or condition of the contents of the package (see para. 1, subpara. (b)).

108. Paragraph 2 releases the warehouse operator from liability for any losses suffered by any person caused by misdescription of the goods, if the operator describes the goods in accordance with paragraph 1. However, liability for misdescription can be established if the warehouse operator is found to have known or have had reasonable grounds to believe that the description was incomplete or incorrect.

#### **Article 13 – Loss or destruction of a warehouse receipt**

109. Article 13 governs loss or destruction of a warehouse receipt by providing the holder with the right to request a replacement receipt, and if unsuccessful, apply to the court for an order that the warehouse operator issue a replacement warehouse receipt.

110. Paragraph 1 recognizes the well-established commercial practice of warehouse operators making delivery when they are satisfied that the purported holder is the person entitled under a missing or destroyed warehouse receipt. Paragraph 1 lists the items that the purported holder must present to the warehouse operator in order to



obtain a substitute warehouse receipt. They consist of adequate proof of the loss or destruction of the warehouse receipt, proof of the holder's entitlement to the warehouse receipt and indemnity in relation to the issuance of the replacement warehouse receipt (and security in support of that indemnity). Acting without a court order, the warehouse operator remains liable on the original negotiable warehouse receipt, and, to avoid liability, paragraph 1 provides the warehouse operator with the right to insist that the purported holder provide indemnity. Moreover, the warehouse operator is entitled to reimbursement of cost reasonably incurred for the replacement of the warehouse receipt, when such possibility is not covered by the storage agreement.

111. Paragraph 2 also provides for specific rules with respect to loss of EWRs based on the concept of control, as well as the form of a replacement warehouse receipt. While paper-based warehouse receipts are highly dependent upon the medium and, consequently, the destruction or loss of the medium does inevitably entail the destruction or loss of the warehouse receipt itself, in EWRs the ability to retain and exercise control is equally or even more important than the medium by which the relevant information about the EWR is recorded. This difference has interesting practical implications. Although they do not imply a substantial deviation from the general framework, provisions specific to EWRs assist in the interpretation and the application of substantive rules. Hence, article 13, paragraph 2 clarifies the meaning of loss or destruction of an EWR and provides guidance on how to interpret and apply the obligation of the warehouse operator to issue a replacement warehouse receipt upon request of the holder (at the time of the loss or destruction). In a registry-based model, even if the "deletion" of the entry related to the EWR is theoretically possible, the effects of loss or destruction will be more frequently associated with loss of control, irretrievability or inaccessibility of the information, lack of interoperability, or system failures. Likewise, while the issuance of a replacement for a lost or destroyed paper warehouse receipt entails the production of an entirely new receipt in the chosen medium (paper or electronic as per art. 14), in the case of EWRs, it includes all actions directed at reinstating the control that has been lost.

112. Paragraph 3 provides rules of a procedural nature governing application to the courts – or depending on the system, a regulatory body – for an order that the warehouse operator issue a replacement warehouse receipt if it declines to do so under paragraph 1. Paragraph 3 invites States to provide for "expeditious proceedings" with respect to such applications. The procedure to be followed will in most cases be provided in the enacting State's rules on court or administrative proceedings.

113. Paragraph 4 governs the form of a replacement warehouse receipt to prevent fraud. It provides that a replacement warehouse receipt must state that it is a replacement warehouse receipt. The replacement warehouse receipt shall cancel and supersede the warehouse receipt believed to have been lost or destroyed.

114. Paragraph 5 provides that only the replacement warehouse receipt issued in accordance with paragraph 4 entitles the holder, or a person nominated by the holder, to claim delivery of the goods under article 26, but a person who, in good faith, acquires the warehouse receipt believed to have been lost or destroyed retains any right to claim damages from a previous holder that may be available under other laws.

#### **Article 14 – Change of medium of a warehouse receipt**

115. Article 14 entitles the receipt holder to request a change of medium of a warehouse receipt from paper to electronic or from electronic to paper (see para. 1) and sets forth the minimum requirements for giving the reissued document effect and validity (see para. 2). The change from electronic to paper might be needed in less developed markets where some players might not have access to the technology that was used to issue the receipt to the original holder. At the time of the change of medium, the warehouse operator has the duty to ensure that the warehouse receipt can no longer be used in its previous medium (see para. 2). In case the previous warehouse receipt was in electronic form, corresponding technological actions to "delete" the EWR (or even render it inaccessible), or to flag or tag it as unusable or replaced,

should be carried out by the warehouse operator. Paragraph 3 clarifies that the change of medium has no legal effect on the rights and obligations of the parties. In other words, despite the change of medium, the warehouse receipt is a single document.

### **Chapter III – Transfers and Other Dealings in Negotiable Warehouse Receipts**

116. Chapter III deals with transfer of negotiable warehouse receipts, rights of the transferee in general and of the protected holder, and related matters such as representations of the transferor. It does not apply to assignment of rights under non-negotiable warehouse receipts, which is governed by other law.

#### **Article 15 – Transfer of a negotiable warehouse receipt**

117. Article 15 sets out how a negotiable warehouse receipt may be transferred. It covers both paper and electronic warehouse receipts. The method of transferring negotiable warehouse receipts varies according to the manner in which the receipt is issued or endorsed. Article 15 envisages negotiable warehouse receipts that are issued or endorsed to the order of a named person or to bearer, or endorsed in blank.

118. Article 15, paragraph 1 deals with the transfer of paper negotiable warehouse receipts. An endorsement is a signature on a document that facilitates its transfer. Article 15 mentions endorsements to the order of a named person, to bearer, or in blank (where no words are inserted other than the transferor's signature.)

119. Article 15, paragraph 1, subparagraphs (a) and (b) address the first transfer of a paper negotiable warehouse receipt after its issuance, as well as subsequent transfers. Article 15, paragraph 1, subparagraph (a) deals with a situation where a paper negotiable warehouse receipt is issued or endorsed to the order of a named person. The paper negotiable warehouse receipt is transferred by endorsement and delivery by the named person to the intended transferee. A negotiable warehouse receipt that is endorsed to a named person only (i.e., without the words "to the order" or equivalent) becomes a non-negotiable warehouse receipt. Article 15, paragraph 1, subparagraph (b) deals with transfer of paper negotiable warehouse receipts that are issued to bearer, or endorsed in blank or endorsed to bearer. In such cases, the warehouse receipt is transferred by delivery and there is no need for any endorsement.

120. Article 15, paragraph 2 covers the transfer of electronic negotiable warehouse receipts. The rules governing these transfers are the same as those governing paper negotiable warehouse receipts, except that the requirement of delivery is replaced by the requirement of transfer of control.

#### **Article 16 – Rights of a transferee generally**

121. The rights provided under article 16 are twofold. Under article 16, paragraph 1, subparagraph (a), a person to whom a negotiable warehouse receipt has been transferred obtains the benefit of the obligation of the warehouse operator to hold and deliver the goods in accordance with the terms of the receipt, and under subparagraph (b), obtains such rights to the receipt and the goods that the transferor was able to convey.

122. Under article 16, paragraph 1, subparagraph (a), the warehouse operator's obligations to hold and deliver the goods depends on the terms of the warehouse receipt. Under article 8 of the Model Law, the terms of the warehouse receipt includes all the terms of the storage agreement. The transferee will have recourse against the warehouse operator if the warehouse operator breaches the terms of the warehouse receipt. It follows from this that if the warehouse operator has a lawful reason under the warehouse receipt for not delivering the goods, this would entitle the warehouse operator to withhold delivery from a transferee who is not a protected holder.

123. Applying article 16, paragraph 1, subparagraph (b), the transferee's rights over the receipt and the goods depend on what rights the transferor was able to convey. If

the transferor's rights over the receipt and the goods are curtailed in some way, for example if the transferor is not their true owner and has no authority to transfer the receipt and the goods, or if the transferor has granted a security right in the receipt and the goods to a third party, this will correspondingly affect the rights that the transferee will obtain upon the transfer of the receipt. In the former situation, the transferee will generally not obtain any property rights over the receipt and the goods. In the latter situation, the transferee's rights over the receipt and the goods will be subject to the prior security right. This shows the operation of the principle that a person cannot give a better right than that person has (*nemo dat quod non habet*). If the transferor of a warehouse receipt has ownership rights over the receipt and the goods, these rights will be passed on to the transferee who will become the owner.

124. The rights of a protected holder are set out in article 18, which gives greater rights to a protected holder than article 16 gives to a transferee who is not a protected holder. Article 16, paragraph 2 states that article 16, paragraph 1 does not limit the rights of protected holders under article 18.

### **Article 17 – Protected holder of a negotiable warehouse receipt**

125. Article 17 explains who a protected holder of a negotiable warehouse receipt is. It should be read together with article 18, which provides for the rights of a protected holder.

126. Article 17, paragraph 1 sets out the three characteristics of a protected holder. First, under article 17, paragraph 1, subparagraph (a), the receipt must have been transferred to that person pursuant to article 15. As discussed earlier, such transfer would encompass a transfer by endorsement and delivery, or by delivery alone, for paper receipts, and a transfer by control for electronic receipts. The second requirement, set out in article 17, paragraph 1, subparagraph (b), is that the person must have acted in good faith and without knowledge of any right or claim to the receipt or the goods covered by it, or of any defence on the part of any person other than the warehouse operator. This second requirement is important because the rights of the protected holder set out in article 18 give the protected holder immunity against such rights and claims, and this would be unfair if the protected holder already knew about them at the time of the transfer. The requirement of good faith means that the protected holder must act honestly. A protected holder would not be acting in good faith if the circumstances are such that a reasonable person in the position of the protected holder would have enquired further about the circumstances of the transaction, for example if goods are sold for substantially below their market price. The requirement of having no knowledge refers to actual knowledge rather than constructive knowledge. Under article 17, paragraph 1, subparagraph (c), the third requirement is that the transfer must have occurred in the ordinary course of business or financing. This provision is general enough to cover the ordinary course of the transferor's business as well as the ordinary course of the transferee's business.

127. Article 17, paragraph 2 focuses on the question of what amounts to knowledge of a right or claim to the warehouse receipt or the goods covered by it, which is one of the components of article 17, paragraph 1, subparagraph (b). This paragraph appears within square brackets as not all enacting States may have a registry for the registration of notices with respect to security rights of the type envisaged in chapter IV of the UNCITRAL Model Law on Secured Transactions. In those countries where such a registry exists, Article 17, paragraph 2 would clarify that a person should not be taken to have knowledge of a claim just because information relating to that claim has been registered in a specified secured transactions registry in the enacting State. This means that registration of a claim does not give constructive knowledge of the claim to someone with no actual knowledge of it.

128. Article 17, paragraph 3 addresses the situation where a warehouse receipt is issued to the order of someone who is not the depositor and makes it possible for this person to qualify to be a protected holder. Although the first requirement for a protected holder is not satisfied at face value because the receipt has not been "transferred" to that person, this is cured by article 17, paragraph 3, which provides

that the issuance of the warehouse receipt by the warehouse operator to a person who is not a depositor has the same effect as if the receipt had been transferred to that person pursuant to article 15. This provision is important to provide comfort to secured creditors who may require their customers to arrange for the issuance of such warehouse receipts to the order of the secured creditor.

#### **Article 18 – Rights of a protected holder of a negotiable warehouse receipt**

129. Article 18 sets out the rights of a protected holder in a negotiable warehouse receipt. The Model Law advocates clarity with regard to the rights of the holder, in particular the protected holder. In legal systems where the protected holder becomes the owner of the goods covered by the warehouse receipt, an express legislative recognition of the holder's ownership may further enhance legal certainty and confidence in warehouse receipts negotiation. Acknowledging, however, that there are systems which do not necessarily recognize such ownership rights, the Model Law offers two options.

130. *Option 1:* In article 18, paragraph 1, a protected holder of a negotiable warehouse receipt acquires ownership of the receipt and the goods covered by the receipt. This is superior to the rights acquired by a non-protected holder, who will not acquire ownership of the goods if the transferor's ability to transfer the goods was limited in some way, for example if the transferor was not the owner of the goods and did not have the authority to transfer them. The protected holder also acquires the benefit of the obligation of the warehouse operator to hold and deliver the goods in accordance with the terms of the receipt, free of any right, claim or defence of the warehouse operator or any other person, other than rights, claims and defences that arise under the terms of the warehouse receipt or under the Model Law even if the transferor would have been subject to such claims or defences.

131. *Option 2:* In article 18, paragraph 1, a protected holder of a negotiable warehouse receipt acquires the following rights free of any claim or defence of the warehouse operator or any other person, other than any claim or defence that arises under the terms of the receipt or under this Law: Under subparagraph (a), the protected holder acquires ownership of the receipt and the benefit of the obligation of the warehouse operator to hold and deliver the goods in accordance with the terms of the receipt. Under subparagraph (b), the protected holder acquires such rights, including property rights, to the goods as it would acquire by the transfer of physical possession of the goods under other law. Subparagraphs (a) and (b) make a distinction between the protected holder's rights over the receipt as contrasted with the protected holder's rights over the goods. In some jurisdictions, transferring ownership of the goods with the warehouse receipt would expose the owner to the loss of the goods when the depositor did not have title to the goods. Option 2 of article 18, paragraph 1 addresses this concern by achieving the effect that while the protected holder obtains ownership over the receipt upon transfer of the receipt, the protected holder may not necessarily acquire ownership of the goods, as this would depend on the effect of the transfer of physical possession of the goods.

132. Article 18, paragraph 2 emphasizes the high degree of protection accorded to the protected holder. It sets out specific circumstances which might ordinarily affect a transferee's rights, and states that these do not affect the protected holder's property rights in the goods, nor its immunity from claims and defences. The situations mentioned in article 18, paragraph 2 are (a) where the transfer to the protected holder or any prior transfer constituted a breach of duty by the transferor; (b) where a previous holder of the receipt lost control or possession of the receipt as a result of fraud, duress, theft, conversion, misrepresentation, mistake, accident or similar circumstances; or (c) where the goods or the receipt had been previously sold, transferred or encumbered to a third person. Article 18, paragraph 2 makes clear that the specific events set out in that article will not negatively affect the rights of the protected holder under article 18, paragraph 1. This list is not an exhaustive list. It does not mean that a claim or defence that is not mentioned in article 18, paragraph 2 will necessarily affect a protected holder's rights. The protection given by article 18,

paragraph 1 is broad enough to cover all claims and defences except those arising under the terms of the receipt or the Model Law.

133. Article 18, paragraph 3 addresses the situation where the goods covered by a negotiable warehouse receipt are subject to some encumbrance. A common example of this type of arrangement is for a seller of goods to retain title in the goods until they have been paid for. Another example might be where the goods have been subject to a security right before they are deposited in the warehouse. Such arrangements could result in a tussle between the seller with the right of retention of title or the person with the security right in the goods and the protected holder. Article 18, paragraph 3 states that the rights of a protected holder are not subject to any retention of title right, security or other equivalent right in or in relation to the goods covered by the receipt. Enacting States should insert appropriate terminology to cover the relevant domestic concept of security.

134. Article 18, paragraph 4 addresses the situation where a judgment has been made against a person and the question arises whether this judgment can be enforced against a warehouse receipt that is held by a protected holder. This article makes clear that the rights of a protected holder of a negotiable warehouse under article 18, paragraph 1 are not subject to any right pursuant to a judgment against any person other than the protected holder. This means that the protected holder's rights in the warehouse receipt will only be subject to a judgment made against the protected holder. In this situation, the warehouse operator will only be obliged to deliver the goods to the judgment creditor if the warehouse receipt is surrendered to it.

#### **Article 19 – Third-party effectiveness of a security right**

135. Article 19 is inspired by article 18 of the MLST, which sets out the primary methods for achieving third-party effectiveness. The function of article 19 is to encourage States to recognize the methods that a general secured transactions law should make available to achieve third-party effectiveness of a security right in a warehouse receipt. The Model Law does not assume that every State has a modern secured transactions law in place. It is not a function of warehouse receipts laws to provide a comprehensive set of rules for security rights in warehouse receipts. Rather, that law should build on, and ensure proper coordination with, an existing secured transactions law.

136. Enacting States are encouraged to implement the MLST, which provides for several rules specific to security rights in negotiable documents, including with respect to creation (art. 16), third-party effectiveness (art. 26), priority (art. 49), and rights against the issuer of a negotiable document (art. 70). The general rules governing registration of notices concerning security rights and enforcement of security rights in tangible assets in the MLST apply to negotiable documents. Together, these rules provide a comprehensive framework for security rights in negotiable documents, including warehouse receipts. For more detailed guidance on the provisions that should be included in a secured transactions law to facilitate the use of warehouse receipts as collateral, the enacting State may refer to Notes prepared for meetings of the UNIDROIT Working Group on a Model Law on Warehouse Receipts.<sup>22</sup>

137. Article 19 recognizes that three methods should be made available to parties to transactions where a warehouse receipt is used as collateral. These three methods are: (i) registration in a registry established pursuant to an applicable secured transactions law; (ii) taking control of an electronic warehouse receipt; and (iii) taking possession of a paper warehouse receipt. The registration method is bracketed, and a State should include it if it has established a registration system pursuant to its secured transactions law. Articles 18 and 26 of the MLST recognize registration and taking possession as the methods applicable to security rights in warehouse receipts. Article 19 encourages

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<sup>22</sup> See UNIDROIT Working Group on a Model Law on Warehouse Receipts, Study LXXXIII – W.G.4 – Doc. 5, Note on Security Rights in Warehouse Receipts, and Study LXXXIII – W.G.5 – Doc. 4, Note on Inclusion of Rules Governing Security Rights in Warehouse Receipts in the Model Law.

States to recognize control as a method of third-party effectiveness specific to electronic warehouse receipts.

138. It is important that enacting States with a modern secured transactions regime ensure functional equivalence between paper and electronic receipts used as collateral. This can be achieved by (i) recognizing “control” as a separate method of third-party effectiveness, or (ii) recognizing that “control” is the functional equivalent of possession. If the latter approach is chosen, the legal effect of taking possession under the secured transactions law would apply equally to security rights in electronic warehouse receipts subject to control of the secured creditor.<sup>23</sup> If the former approach is chosen, enacting States should ensure they have in place a priority rule, comparable to that for paper warehouse receipts as specified in article 49 of the MLST. That rule would provide that a secured creditor in control of an electronic warehouse receipt would have priority over another security right made effective against third parties by registration, subject to satisfying the conditions set out in article 49 of the MLST. The Model Law in article 18, paragraph 3 already provides a “taking free” rule that enables a protected holder of a warehouse receipt to cut off a security right or other interest in the receipt or goods covered thereunder.

139. The Model Law also includes an optional chapter V on pledge bonds to reflect the legislation in some jurisdictions where two documents may be issued: (i) a certificate of deposit and (ii) a pledge instrument, which embodies the creditor’s security right over the underlying goods. For the commentary on the articles of the Model Law that explain their incorporation in a warehouse receipt law, see Chapter V below.

#### **Article 20 – Representations by a transferor of a negotiable warehouse receipt**

140. Article 20 sets out two main representations made by the transferor of a negotiable warehouse receipt to the transferee. The first representation is that the receipt is authentic, that is, it is genuine, not a forgery. The second representation is that the transferor does not know of any fact that would impair the validity of the receipt, the value of the goods covered by the receipt, or the effectiveness of the transfer of rights to the receipt and the goods it covers, except as notified to the transferee. These representations are for the transferee’s protection. The transferee’s position will be prejudiced if any of the representations are not true. In such a case, the transferee can bring a personal action against the transferor for breach of the representation. The transferor will be liable for breach of article 20, subparagraph (a) if the receipt is not authentic, even if the transferor did not actually know about this. In contrast, under article 20, subparagraph (b), the transferor will not be liable if the transferor did not know about the impairment of the validity of the receipt, the value of the goods or the effectiveness of the transfer.

#### **Article 21 – Limited representations by intermediaries**

141. Article 21 deals with the situation where the transferor of a negotiable warehouse receipt is an intermediary who holds the receipt on behalf of another, or who is entrusted with the collection of a negotiable instrument or other claim, for example a collecting bank. The function of this article is to limit the application of article 20 so that the collecting bank would not be liable for breach of the representations referred to in article 20. The intermediary, such as a collecting bank, may exercise all rights arising out of the receipt. This would include obtaining delivery of the goods. By transferring the receipt, the intermediary does not make the representations set out in article 20, but represents only that it is authorized to make the transfer.

#### **Article 22 – Transferor not responsible for the warehouse operators’ performance**

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<sup>23</sup> See UNCITRAL Model Law on Electronic Transferable Records, Explanatory Note, para. 114.

142. Article 22 makes clear that a person who transfers a negotiable warehouse receipt does not guarantee, by virtue of the transfer, the performance by the warehouse operator of any obligations in relation to the receipt. This means, for instance, that the transferee cannot seek recourse under the warehouse receipt against the transferor of the receipt if the warehouse operator fails to deliver the goods or if the warehouse operator has not stored the goods with care in accordance with the requirements of the Model Law or the storage contract.

## **Chapter IV – Rights and Obligations of the Warehouse Operator**

143. Chapter IV is aimed at enhancing confidence in warehouse receipts, rather than comprehensively regulating the rights and obligations of the parties to the storage agreement. Accordingly, the chapter does not contain a comprehensive list of all rights and obligations of the warehouse operator. Instead, it lists the key rights and obligations that are likely to affect the confidence in the warehouse receipts.

### **Article 23 – Duty of care**

144. Article 23 establishes the general obligation of the warehouse operator to store and preserve the goods received. The standard of care required by article 23 is not absolute, but is the level expected of a diligent and competent owner of goods of the same type of the goods covered by the warehouse receipt.

145. Different jurisdictions have different tolerances for contracting out of the general standards of care under a storage agreement, with some not allowing it forthright, others allowing it subject to an essential core of mandatory obligations under the duty of care, and others still not allowing it but permitting limitation on the extent of liability if such a duty is breached. Paragraph 2 sets limits for the operator's ability to vary its obligation under paragraph 1. Generally, paragraph 2 treats the duty of care provided in paragraph 1 as a mandatory minimum standard that the warehouse operator is not allowed to exclude or lower. Neither may the operator exclude or limit its liability for fraud, wilful misconduct, gross negligence or misappropriation of the goods. The invalidity of a clause limiting liability does not, however, affect the validity of the warehouse receipt.

### **Article 24 – Duty to keep goods separate**

146. Article 24 stipulates the obligation of the warehouse operator to store the goods covered by each receipt separately. The obligation to store the goods is at the core of the storage agreement. In principle, the warehouse operator is at liberty to store deposited goods as best suits its operation, provided this falls 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. This article establishes a mandatory rule that the goods should be kept separately.

147. Article 24 is based on the understanding that not keeping the goods separately may affect the interests of third parties. In the preparation of the Model Law, it was pointed out that the difficulty in leaving the issue of whether to store the goods separately 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 disputes. Specifically, if deposited goods are blended or commingled into a mass, in such a way that they are no longer distinguishable, an even broader range of issues requires consideration. Inter alia, it is necessary to establish the respective property rights of each depositor in the commingled mass. Moreover, it is necessary to determine the proprietary rights, contractual claims and possibly restitutionary claims of each depositor if a commingled mass results in a shortfall of available goods.

148. Article 24 imposes mandatory obligations on the warehouse operator regarding the manner in which goods must be stored, but does not specify the consequence of

breaching this obligation. The consequence shall therefore be determined in accordance with other law of the enacting State.

149. Paragraph 2 creates an exception to paragraph 1 in the case of fungible goods. Paragraph 2 of this article allows goods of the same quality to be commingled, if this is stated in the warehouse receipt.

#### **Article 25 – Lien of the warehouse operator**

150. Article 25 stipulates that the warehouse operator has a lien on the goods in its possession and in any proceeds. The inclusion of the phrase “any proceeds” is intended to confirm that the lien would not be extinguished upon the goods being no longer in the warehouse operator’s possession. For example, the goods might be destroyed but insured, such that the warehouse operator is now “in possession” of the insurance pay-out. The warehouse operator’s lien extends to the insurance pay-out.

151. Article 25, paragraph 1 lists four kinds of charges or expenses against which a warehouse operator has a lien. According to article 10, paragraph 1, subparagraph (b) of the Model Law, the amount of the storage fees and their calculation method are optional information that may be included in the warehouse receipt. The charges covered by this paragraph are therefore not necessarily stated in the warehouse receipt. This does not affect the establishment of a lien against charges and expenses listed in article 25, paragraph 1, subparagraphs (a), (b) and (c), and a lien can also be established against charges and expenses listed in article 25, paragraph 1, subparagraph (d), which are incurred under another storage agreement, as stated in the warehouse receipt. This provision is intended to make the holder aware of the existence of these unusual charges.

152. The lien is effective against third parties. Third parties include any holder of the warehouse receipt.

153. The protected holder is a special type of third party. To enforce a lien against a protected holder, the charges and expenses must be specified on the face of the warehouse receipt or constitute a reasonable charge for storage after the date of issuance of the receipt. This “reasonable charge” only refers to charges provided for in article 25, paragraph 1, subparagraph (a).

154. Paragraph 4 requires the enacting State to specify the law according to which the warehouse operator may enforce its lien. The Model Law itself does not contain provisions on methods and requirements of enforcement. The enacting State may do so either by incorporating enforcement provisions into the law enacting the Model Law, in addition to the warehouse operator’s rights set out in article 30, or by referring to enforcement procedures under the applicable secured transactions laws and, where appropriate, extending those enforcement procedures to the types of non-consensual liens covered by this article.

#### **Article 26 – Obligation of warehouse operator to deliver**

155. The obligation to deliver the deposited goods is a key element of any storage agreement. Article 26 makes it a mandatory obligation for the warehouse operator to deliver the goods to the holder or to another person nominated by the holder. The excuses that absolve the warehouse operator from performance of this obligation vis-à-vis a person who is entitled to delivery of the goods are listed in article 29.

156. The person entitled to delivery of the goods is the holder of the warehouse receipt who meets the three requirements laid out in article 26.

157. The warehouse operator shall cancel the warehouse receipt upon delivery of the goods. If the warehouse receipt is not cancelled, the operator is liable to the holder of the warehouse receipt, even if the holder has obtained the warehouse receipt after delivery of the goods. No special provision is made on how to cancel the warehouse receipt. In business practice, the usual method is to destroy the document or write the



word “canceled” on it, in the case of a paper-based warehouse receipt, or to make it inoperable, in the case of an electronic warehouse receipt.

#### **Article 27 – Partial delivery**

158. Article 27 establishes a mandatory obligation for the warehouse operator to deliver part of the goods, if so instructed by the holder of the warehouse receipt. Regulations may set the minimum quantity to be deposited with the warehouse operator or may give flexibility to the warehouse operator in setting its own limits. If the amount of deposited goods falls below the minimum quantity, partial delivery may be refused.

159. Paragraph 1 lists three conditions for partial delivery. These conditions are the same as those stipulated in article 26, paragraph 1.

160. Paragraph 2 sets out the obligation of the warehouse operator to note the partial delivery on the warehouse receipt and return possession or control of the receipt to the holder.

#### **Article 28 – Split warehouse receipt**

161. Article 28 imposes an obligation on the warehouse operator to split the warehouse receipt into two or more receipts that cover in total the stored goods covered by the original warehouse receipt. This is a mandatory obligation; the operator may not refuse a request by the holder to split the warehouse receipt. Splitting warehouse receipts should respect the minimum quantity to be deposited.

162. The warehouse operator may split the warehouse receipt only if three conditions are met: it must be requested by the holder of the warehouse receipt, the original warehouse receipt must have been surrendered, and additional cost reasonably incurred by the warehouse operator as a consequence of the split and reissuance of the warehouse receipt has been paid, unless such cost has been covered by the storage agreement.

163. Paragraph 2 requires the warehouse operator to cancel the original warehouse receipt. This obligation is similar the one set out in article 26, paragraph 2.

#### **Article 29 – Excuses from delivery obligation**

164. It is generally accepted that in some circumstances, the duty of the warehouse operator to deliver the goods may be excused. Article 29 sets out the excuses of the warehouse operator from delivering the goods.

165. Article 29 lists four circumstances under which the warehouse operator is excused from liability for failure or delay in delivery. Subparagraph (a) provides for the destruction or loss of the goods for which the warehouse operator is not liable. One example is where the warehouse operator fails to perform its obligation due to an impediment beyond its control, and the warehouse operator could not have reasonably been expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome it, or its consequences. Nevertheless, in many circumstances, the warehouse operator may be liable for loss or destruction of the goods subject to exceptions that enacting States may determine in regulations. Subparagraph (a) should be read in conjunction with article 23, which deals with the duty of care of the warehouse operator. Subparagraph (b) should be read together with article 25 and article 30. As a natural consequence of enforcing the lien pursuant to article 25, paragraph 4, the warehouse operator is relieved of the obligation to deliver the goods. If the operator has sold or otherwise disposed of the goods pursuant to article 30, the storage agreement has been terminated and hence the warehouse operator is no longer under any obligation to deliver. The provision of article 29 merely clarifies and emphasizes that the warehouse operator is not liable in these circumstances. One example of the warehouse operator “[having] received competing claims to the goods” in subparagraph (c) is when there are multiple holders claiming the goods and it is unclear whether any of the claimants are protected

holders. It should be noted that the situation of over-issuance, where the aggregate quantity of goods covered by the warehouse receipts issued by the operator exceeds the total quantity available in the warehouse, is not covered by subparagraph (c). For this situation, the operator should be liable rather than being excused from its delivery obligation. Subparagraph (d) refers to a court order or other circumstances beyond the control of the operator, for example if the goods have been confiscated.

166. The burden of proof is on the warehouse operator who needs to establish the circumstances excusing itself pursuant to article 29.

### **Article 30 – Termination of storage by the warehouse operator**

167. Article 30 stipulates that the warehouse operator has the right to terminate the storage after giving notice. This may happen in case of a storage agreement for an indefinite period which the warehouse operator chooses to terminate. This right may also be triggered by other situations, including non-removal of goods upon expiry of the storage period. There is no provision in article 30 addressing the usual case where the holder of a warehouse receipt claims the goods but the operator refuses to deliver. This situation shall be dealt with in accordance with article 26.

168. Storage of goods may be performed over an extended period of time. In principle, the duration of storage is either fixed or for an indefinite term. According to paragraph 1, the time that an operator can terminate the storage is at the end of the storage period specified in the warehouse receipt. If no storage period is specified in the warehouse receipt, the warehouse operator can terminate the storage within a reasonable time. This reasonable time shall be not less than certain days after the time specified in the notice, and the exact days shall be specified by the enacting State. For warehouse operators, it is generally unproblematic to organize their operation in such a way as to satisfy requests to deliver deposited goods at short notice. By contrast, it is generally arduous for depositors to take delivery of goods at short notice, as they tend not to have the necessary facilities and must rely instead on third parties. Thus, unexpected requests to take delivery of deposited goods are likely to be extremely onerous for depositors, possibly resulting in the sale of the deposited goods at sub-market prices or even damage to or loss of the goods.

169. Paragraph 1 requires notice to be given before the operator takes action. Paragraph 1 requires notice to be given to all persons known to the warehouse operator to claim an interest in the goods. This raised the question of whether a warehouse operator necessarily knows who might have an interest in the goods. If not, then an issue arises regarding to whom the warehouse operator should give notice if it wishes to terminate the storage. It was noted that in some legal systems the warehouse operator would, upon making the decision to terminate the storage agreement and sell off the goods, give notice of the intended sale only in a public medium, such as a newspaper. The requirement of paragraph 1 goes further than these legal systems, because it requires giving notice to specific persons and not generally to the public. It was however noted that, in an electronic system, the warehouse operator would at least know the identity of the last registered holder of the warehouse receipt, which in practice would likely be the primary claimant of the goods. Hence the giving of notice specifically to claimants was less problematic. As a compromise, paragraph 2 of article 30 allows for notice to be given “by public advertisement” if the warehouse operator does not know of any person claiming an interest in the goods. The public advertisement shall be conducted in accordance with the relevant law specified by the enacting State.

170. Paragraph 1, subparagraph (b) outlines the consequences if a demand made by the warehouse operator in accordance with paragraph 1, subparagraph (a) is not met. If the amount is not paid and the goods are not removed before the date contemplated by paragraph 1, subparagraph (a), the warehouse operator may sell the goods. The sale can be public or private, but must be conducted in a commercially reasonable manner.

171. Paragraph 3 allows a warehouse operator, who in good faith determines that, within the time provided in subparagraph 1(a), the goods are about to deteriorate or decline in value to less than the amount secured by its lien, to specify in the notice given under subsection 1(a) any reasonably shorter time for removal of the goods and, if the goods are not removed, may sell them in accordance with subparagraph 1(b).

172. Lastly, paragraph 4 provides for terminating the storage of hazardous goods. The warehouse operator has discretion to dispose of hazardous goods in any lawful manner as such goods might require urgent disposal, and a delay could increase the risk posed by the goods. However, the warehouse operator may only rely on this paragraph if it was not aware, when the goods were deposited with it, that the goods were hazardous.

## **Chapter V – Pledge Bonds**

### *Introduction*

173. There are generally two systems of warehouse receipts under domestic laws. Many countries adopt the so-called “single” system, which provides for the issuance of warehouse receipts as one single document that can be used both for trading in the goods covered by the receipt and for obtaining financing secured by them. Several other countries, in particular those where the law does not allow a secured creditor to become the owner of the collateral in case of default by the debtor, separate the two functions through the so-called “dual” system, in which the warehouse receipt consists of two documents: a certificate of deposit that can be used to transfer rights in the goods (certificado de depósito, récépissé d’entreposage) and a pledge bond that grants the holder a security right in the goods for the amount stated in the bond (bono de prenda, warrant). The model law recognizes the existence of these two systems and offers Chapter V on “Pledge bonds” as an optional chapter for enacting States that wish to implement a dual warehouse receipt system, as well as to States that already have such a system but wish to modernize it – for instance to support the use of electronic warehouse receipts.

174. Chapter V deals with several matters pertaining to pledge bonds, including their issuance and form, their effect and transfer, and the rights and obligations of the warehouse operator. These provisions are presented separately from the rest of the Model Law in order to facilitate use of the Model Law by States that do not wish to adopt a dual warehouse receipt system; however, States that do wish to implement such a system may consider integrating the content of this chapter with chapters I through IV of the Model Law.

175. The Model Law gives enacting States the choice between providing for a single warehouse receipt or a dual warehouse receipt system. In the interest of clarity and legal certainty, the Model Law does not contemplate a hybrid system allowing for the issuance of both single and dual warehouse receipts at the choice of the warehouse operator or the depositor.

### **Article 31 – Scope of provisions on pledge bonds**

176. Article 31 sets out the scope of the provisions contained in the optional chapter V. Under the dual system, warehouse receipt and pledge bond are typically issued as one document capable of being separated into two at the choice of the holder, be it the original or a subsequent holder. The holder may, for instance, wish to retain the warehouse receipt – and thereby also the ability to trade in the goods by transferring the warehouse receipts – and at the same time borrow money using those goods as collateral, in which case the holder would detach the pledge bond from the warehouse receipt and transfer it to the lender. By allowing separate circulation of goods and secured credit, the dual system may promote efficient and innovative trade financing. The holder may also prefer to retain both documents together and later transfer them to the same new holder. In a dual system, both warehouse receipt and pledge bond are typically transferable – together or separately – under the same conditions and by the

same means as negotiable instruments. The provisions of the chapter will only have special application once the pledge bond is transferred separately from the warehouse receipt.

### **Article 32 – Issuance and form of a pledge bond**

177. Article 32, paragraph 1, which mirrors the structure of article 1, paragraph 2, states the distinct function of a pledge bond under a dual system as a document that represents the holder's right to payment of a certain amount and grants to its holder a possessory security right in the goods covered by the warehouse receipt. Paragraph 1 reproduces the signature requirement contained in article 1, paragraph 2. Paragraph 1 also stresses the relationship between the pledge bond and the warehouse receipt by requiring that the pledge bond be "associated" with, but "detachable from", the warehouse receipt. The provisions on pledge bonds apply once the bond has been detached from the receipt.

178. In practice, a paper pledge bond is typically "associated" with, while "detachable from", a warehouse receipt if both are issued in one paper (negotiable) instrument with a perforated line in between so that they can be separated. Electronic pledge bonds are "associated" with the electronic warehouse receipt by logically associating information or otherwise linking it together. In case of electronic warehouse receipts, the "detachability" is achieved if a method is used that makes the pledge bond capable of being controlled separately from the electronic warehouse receipt. Information relating to the electronic pledge bond does not have to be contained in a separate electronic record. It may be contained in the same composite electronic record. The peculiar features of the electronic warehouse receipt may overcome concerns related to the use of the dual system as it may be possible to trace at the same time the holder of the receipt and the holder of the bond despite their having been detached.

#### *Signature and information requirements*

179. Paragraph 2 requires both the warehouse receipt and the pledge bond to be "identified" as such, which is usually done by their containing clear language to that effect. It should be noted that, whereas in a single system the designation of the document as "warehouse receipt" is mandatory information (see art. 10, para. 1 and accompanying commentary at paras. 98–99, above), in the case of a dual system such clear designation is indispensable for purposes of transparency and legal certainty, as it serves to place the holder of the warehouse receipt on notice about the separate circulation of the pledge bond and vice-versa. Apart from that, however, the two documents must contain the same information, as they cover the same goods delivered for storage by the depositor.

#### *Definition of "holder" of a pledge bond*

180. Paragraph 3 defines the concept of "holder" of a pledge bond along the lines of the definition of holder in article 2, paragraph 3. Existing methods for issuance and transfer of warehouse receipts in paper and electronic form in a single system are also used in a dual system, as long the warehouse receipt and the pledge bond are capable of being independently controlled once transferred separately. In an electronic environment, this can be achieved, for instance, through the issuance of warehouse receipt and pledge bond as distinct digital tokens or through separate entries in electronic registries for each. In some systems, both documents are initially issued as paper documents and subsequently immobilized with a central custodian which afterwards keeps a registry of transfers and other transactions, including related information (such as the amount of the debt secured by the pledge bond).

#### *Application of the rules on control and on the issuance and content of warehouse receipts to pledge bonds*

181. Paragraph 4 provides that articles 5 to 14 (with the exception of article 10, paragraph 1, subparagraph (a)) apply to pledge bonds in the same way as they apply to warehouse receipts. Among them, articles 9 to 11 relate to the content of the warehouse receipt, and consequently the pledge bond. As a result of applying articles 10, paragraph 2 and 11, paragraph 2 to pledge bonds, any incomplete or incorrect statement of mandatory information (as listed in art. 10, para. 1) or incorrect additional information (as allowed by art. 11, para. 1) on the pledge bond does not affect the validity of the pledge bond. However, the warehouse operator is liable for any losses suffered by any person, most typically the holder of the pledge bond, as a result of such incomplete or incorrect statement. The rules on the scope and measurement of loss are left to the discretion of each enacting State.

### **Article 33 – Effect of a pledge bond**

#### *Grant of security right*

182. A necessary consequence of the function of the pledge bond as an instrument that embodies a security right in the goods covered by the warehouse receipt is that the rights of the holder of the warehouse receipt are subject to the rights of the holder of the pledge bonds. In other words, a person who acquires rights in the goods by becoming the holder of the warehouse receipt acquires goods encumbered by the security rights held by the creditor under the pledge bond. This means that security rights created by pledge bonds are effective against holders, including subsequent holders, of the warehouse receipt. This principle is reflected in paragraph 1.

#### *Termination of the security right by the holder of the warehouse receipt*

183. The holder of the warehouse receipt is not necessarily the debtor of the credit secured by the pledge bond, but it has an interest in terminating the security right in the goods covered by the pledge bond so that it can obtain the goods from the warehouse operator. Indeed, the holder of the warehouse receipt may wish to be able to trade in the goods free and unencumbered or also claim their delivery from the warehouse operator. Both results are only possible after the security rights of the holder of the pledge bond are extinguished, and the documents are reunited. For that purpose, paragraph 2 recognizes the right of the holder of the warehouse receipt to pay the amounts secured by the pledge bond to its holder (of which the holder of the warehouse receipt has knowledge through the statement required by article 33, paragraph 2, subparagraph (b)) even if the amount is not yet due and request the surrender of the pledge bond by the paid creditor. Depending on the design of the warehousing receipt system and whether or not it is completely dematerialized, some domestic laws expressly provide the holder of the warehouse receipt with the right to deposit the amount due either with the warehouse operator or the custodian of the pledge bond who hold it in escrow to the benefit of the holder of the pledge bond, and thereby obtain the delivery of the goods.

#### *Enforcement of the security right*

184. Paragraph 3 provides for the right of the holder of the pledge bond to enforce its security rights in the warehouse receipt and the goods it covers if the debt secured by the pledge bond is not paid, by resorting to the remedies available under the laws of the enacting State that provide for the enforcement of security rights over moveable property.

### **Article 34 – Transfers and other dealings**

185. Until the warehouse receipt and the pledge bond are separately transferred, the decision to detach them from one another, to keep and transfer them together or to transfer only one of them, rests entirely with the holder of the warehouse receipt. The holder may choose any of those options according to its business judgment and financing needs. Once separated, each document will transfer the rights it represents: the warehouse receipt will transfer rights to the goods, and the pledge bond will transfer a security right. Paragraph 1 stresses the import of each document by

clarifying that the holder of a pledge bond acquired a security right but will neither directly nor by implication acquire ownership of the goods.

*Separate transfer of warehouse receipts and pledge bonds*

186. Paragraph 2 is an important provision to place any holders of the warehouse receipt and the pledge bond as well as the warehouse operator on notice of the separate circulation of the two documents as well as the amount of the debt secured by the pledge bond and the due date for payment. Transcribing such information into the warehouse receipt and providing a copy of the completed warehouse receipt to the warehouse operator is an important requirement to enable the holder of the warehouse receipt to exercise its right to obtain the pledge bond in accordance with article 32, paragraph 2 and claim delivery of the goods pursuant to article 34, paragraph 2. The due date is furthermore important for the warehouse operator to know as it will affect the conditions for delivery of the goods (art. 34, paras. 2 and 3). The amount need not be expressed as a fixed sum of money and may include interest rates and other financial charges.

*Application of the rules on transfer of warehouse receipts to pledge bonds*

187. Most provisions concerning transfers and other dealings in warehouse receipts under a single system would also apply to transfers and dealings in pledge bonds under a dual system. Accordingly, paragraph 4 determines the application of articles 15 to 18 and 20 to 22 to pledge bonds. Conversely, paragraph 3 does not provide for the application of article 19 on third-party effectiveness of security rights to pledge bonds, since third-party effectiveness, in the case of a pledge bond, derives automatically from article 32, paragraph 1 and does not require the possession or control of the warehouse receipt. As the pledge bond is analogous to a negotiable instrument, the security right it represents becomes effective against third parties by the holder acquiring the pledge bond by endorsement and possession, or by endorsement and transfer of exclusive control if in electronic form.

**Article 35 – Rights and obligations of the warehouse operator**

*Application of article 28 on split warehouse receipts*

188. The holder of a warehouse receipt has the right, under article 28, to request the warehouse operator to split the warehouse receipt into two or more warehouse receipts that cover in total the goods that were covered by the original warehouse receipt. In order to avoid a detriment to the rights of the secured creditor holding the pledge bond, article 35, paragraph 1, clarifies that, where a pledge bond has been transferred separately from the warehouse receipt, the warehouse operator shall only split the warehouse receipt when so instructed by the holder of both the warehouse receipt and the pledge bond. Where a warehouse receipt is split without the presentation of a pledge bond, this would have no effect on the security right of a pledge bond holder both in the warehouse receipt and the goods covered by it nor on the delivery obligations of the warehouse operator pursuant to this article.

*When the amount secured by the pledge bond is not yet due*

189. In order to avoid a detriment to the rights of the secured creditor holding the pledge bond and also ensure that the rights of the holder of the warehouse receipt in the goods are not deprived without its consent, paragraph 2 permits the delivery of all or part of the goods by the warehouse operator only upon presentation of both the warehouse receipt and the pledge bond.

*When the amount secured by the pledge bond is already due*

190. However, once the debt secured by the pledge bond has matured and the secured creditor has not been satisfied by the due date, the presentation of the warehouse receipt is no longer needed, and the unsatisfied creditor holding the pledge bond is entitled to enforce its security rights by way of taking possession of the encumbered

goods (see commentary on article 33, paragraph 3 at para. 184 above). In such a case, paragraph 3 provides for delivery of the goods upon presentation of the pledge bond whether or not the warehouse receipt is also surrendered. The provision assumes that if the debtor was in default, the creditor should be able to foreclose on the security (the underlying goods) without any need to produce the warehouse receipt. The detached warehouse receipt no longer has value unless accompanied by a pledge bond.

191. Except for these special situations, most provisions concerning rights and obligations of the warehouse operator under a single system, as set forth in articles 23 to 30, would also apply to transfers and dealings in pledge bonds under a dual system.

## **Chapter VI – Application of This Law**

### **Article 36 – Entry into force**

192. Article 36, paragraph 1 requires the enacting State to determine the date when the new law will enter into force. In determining the date for the entry into force of the new law, careful consideration should be given to its implications for all relevant stakeholders. A certain period of time will be necessary to, inter alia, allow stakeholders to familiarize themselves with the new law and its implementing secondary legislation and to prepare for compliance with the new rules.

193. Paragraph 2 of article 36 provides that the new law applies only to those warehouse receipts (and, in case of a dual receipt system, pledge bonds) that are issued after its entry into force. Enacting States that are reforming a dual receipt system are required to incorporate the bracketed reference to pledge bonds in paragraph 2, whereas States not implementing the dual system would have to delete the reference in its entirety.

### **Article 37 – Repeal and amendment of other laws**

194. The Model Law provides a comprehensive private law framework to govern the issuance and transfer of warehouse receipts. Accordingly, paragraph 1 requires the enacting State to specify the laws to be repealed upon entry into force of the new law. The way in which the repeal is effectuated will depend on the form of the prior law and the legal system of the enacting State. If the prior law is set out in a separate statute or combination of statutes, it can be repealed in its entirety. If the prior law is contained in statutes that also address other topics, the enacting State must specify the provisions to be repealed and those to be retained or amended. If all or part of the prior law is based on judicial opinions (as may be the case, for example, in common law systems), the effect of the new warehouse receipts law typically will be to override the rules derived from the prior case law without the need for the enacting State to take any explicit repealing measures.

195. Warehouse receipt law interacts with many other laws, including laws on secured transactions, commercial contracts, civil procedure and enforcement as well as the administrative law framework on warehouses more broadly. These other laws may contain provisions that refer to or are premised on the enacting State's prior law governing warehouse receipts. Accordingly, paragraph 2 provides for the enacting State to amend these provisions to the extent needed to align them with the new law.

196. Like the other articles of the Model Law, article 37 takes effect only in the moment when the new law enters into force pursuant to article 36. Until that date, the provisions listed for repeal or amendment in this article remain in effect.

## **IV. COMPLEMENTARY LEGISLATION**

### **A. INTRODUCTION**

197. The Model Law on Warehouse Receipts covers the private law aspects of warehouse receipts, including the issuance and transfer of warehouse receipts and the rights and obligations of the parties. These factors are important in enabling commercial transactions involving stored goods and in facilitating access to finance through the use of warehouse receipts as collateral. However, in order for these provisions to be applied effectively, they may need to be complemented by legislation creating an institutional framework for regulating warehouses or creating a WRS. The primary purpose of this Part is to provide guidance on the development of complementary rules to implement the provisions of the new warehouse receipts law effectively.

198. As such, this Part goes beyond the scope of the Model Law to provide guidance on designing regulatory aspects of WRS, which do not directly implement the provisions of the Model Law. The decision to include such guidance in the Guide to Enactment was made because of the importance of these aspects in operationalizing the warehouse receipts system, which will reinforce the value of warehouse receipts. The suggested provisions in this Part are therefore important in achieving the main objectives of the Model Law as outlined earlier in this Guide.<sup>24</sup>

199. The remainder of this Part is divided into four sections on licensing and supervision of warehouses, insurance, central registry of warehouse receipts, and electronic warehouse receipts. Within each section, there are suggested provisions for inclusion in the secondary legislation.

200. Section B on “Licensing and supervision” elaborates on the importance of these regulatory processes in giving confidence to all parties involved. It then outlines specific provisions that can be included in the relevant legislation in relation to the scope of the warehouse receipts system, administration of warehouse licenses, licensing periods, inspections, and suspension or revocation of licenses. Finally, it suggests several provisions for inclusion in secondary legislation relating to licensing requirements, inspection requirements, inspectors, and penalties and offences (including the suspension or revocation of licenses).

201. Section C on “Insurance” contains suggestions for provisions which relate to the warehouse operator’s obligation to take out an insurance policy which covers the stored goods. The suggested provisions pertain to the minimum coverage value and the events covered by such policies, the risk-reduction measures to be implemented by warehouse operators, the scope of insurance coverage, the information to be included in the warehouse receipt (in relation to insurance), and separately insured merchandise.

202. Section D on “Central registry of warehouse receipts” outlines several provisions relating to the registration of warehouse receipt transactions. The matters covered in this section include the types of transactions that can be registered; the establishment of a central registry; the duty/power to register transfers of warehouse receipts; functions, duties, and features of the central registry; and accessibility of the central registry to the parties.

### **B. LICENSING AND SUPERVISION**

203. The enacting State may wish to consider developing rules providing for the standards or requirements that warehouses and operators need to meet. Such legislation will specify, for example, the duty of care of the warehouse operator according to article 23. Enacting States may thus allow operating a warehouse or

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<sup>24</sup> See Part II, Section B, above.



participation in a WRS only after issuance of a respective license. The enacting State may decide whether to provide separate licences for the warehouse itself and the operator of a warehouse or only a single licence for the operation of the warehouse.

204. Requiring an operator to be licensed to operate a warehouse ensures confidence to all parties. An adequate licensing and inspection system for warehouses will enhance confidence in warehouse receipts.

205. The following are some of the provisions that may be considered.

#### *Scope and definitions*

206. The enacting State may include in its legislation a definition of a warehouse, e.g., the type of structure (for example bag warehouse or silo), whether it includes vaults and tanks respectively for precious metal and oils, or alternative storage types like silo bags, and whether it may be public or private or both.

#### *Administration*

207. The enacting State should designate the competent authority for licensing and supervision of warehouses and define its mandate and functions. The designated authority can be an already-existing regulatory body (e.g., the Ministry of Agriculture or the Securities Exchange Commission) or, where no such body exists, one formed pursuant to the new legislation (e.g., a Warehouse Receipts Council). An independent licensing and supervising authority provides confidence in the integrity of the warehouses.

208. The WRS legislation may also provide for the powers and functions of the designated licensing authority. These functions may include, among others, the issuance, suspension or revocation of licenses and the establishment of a grading and weighing system for commodities.

#### *Licensing requirements*

209. The complementary rules should determine standard conditions for warehouses to be licensed, which may include the provisions stated in the following paragraphs. Upon meeting the licensing requirements, a license will be issued by the licensing authority. However, if there are non-conformities or non-compliance, the applicant may be given time to correct the non-conformance.

210. Infrastructure requirements: The licensing authority may require the warehouse structure to meet certain conditions (for example, impervious to moisture and rodents; secured access; and appropriate equipment), or it may refer to relevant standards for the physical infrastructure if they are defined by another agency (e.g., Bureau of Standards, commodity sectoral regulator).

211. Qualified personnel: The legislation may require the employment of qualified personnel such as warehouse managers, certified graders, and weighers with integrity to ensure that the employed staff has the expertise to meet quality parameters, e.g., through accurate weighing and quality grading, as this affects the value of the stored goods.

212. Warehouse operator requirements: The licensing authority may require the warehouse operator to meet certain conditions (for example, legal registration, management capacity, financial resources, and standard operating procedures). It may also require the warehouse operator to issue warehouse receipts.

#### *Licensing Period*

213. The legislation may provide for a license validity period that is annual or multi-year depending on the existing licensing practices ensuring quality warehousing and parties' confidence in the system.

#### *Inspections*

214. The legislation may provide for inspections of warehouses as a condition of granting the license to ensure transparency and maintenance of standards in the storage industry. Inspections may be carried out not only during the license application process but also to monitor compliance with the duties of operating a warehouse. These inspections can be scheduled as well as unannounced. The scheduled inspections can be undertaken regularly, while the frequency of unannounced inspections may be left to the discretion of the competent authority.

*Inspection requirements and inspectors*

215. The legislation may provide the parameters and the procedure of the inspections e.g., inspection of the goods in storage, storage records, books of accounts, equipment, and the certificates showing calibration and maintenance schedules in addition to the licensing requirements. The legislation should impose a duty on the warehouse operator to grant the inspectors access to the warehouse and to relevant information as well as a general duty to cooperate. Respectively, obstruction of inspectors may constitute an offense.

216. The legislation may provide for the appointment of inspectors to undertake inspections for the issuance of licenses and to monitor the maintenance of quality standards during the validity of the licenses for compliance purposes. The inspectors can be employees of the licensing authority as well as employees of private entities, as long as the latter are under the oversight of the licensing authority. The roles and functions of the inspectors should be clearly outlined to ensure that the rights of the warehouse operator are protected and are not subjected to abuse. The appointed inspectors may be required to identify themselves in addition to presenting authorization letters during inspections.

*Suspension and revocation of a license*

217. The legislation may also provide administrative procedures for suspension and revocation of licenses, including giving notification of the intention to suspend or revoke the license to the warehouse operator. The administrative procedure may provide for a hearing of the warehouse operator before the suspension or revocation of the license. This enables the licensing authority to consider the prevailing circumstances that led to the infringement in order to take appropriate measures. These measures may encompass the imposition of fines, remedial actions with a warning, or other enforcement actions to protect the persons who have a legitimate interest in the goods stored in the warehouse.

*Penalties and offenses*

218. The legislation may provide for the imposition of sanctions for infringements of the license requirements. These sanctions may encompass suspension or revocation of a license. The nature as well as the intensity of the sanction should be proportionate to the severity of the infringement.

219. The conditions under which a license may be revoked or suspended may include, amongst others: failure to maintain the standards of the warehouse infrastructure; failure to preserve the quality of the goods in storage, and more broadly failure to fulfil the duty of care; failure to account for the deposited goods for which a warehouse receipt has been issued; criminal offences such as fraud and theft; and falsification of records.

## **C. INSURANCE**

220. The enacting State may require the warehouse operator to have mandatory insurance policies for the infrastructure and goods intended for storage, professional indemnity or third-party liability insurance. The overall aim of requiring warehouse operators to insure the deposited goods is to protect the rights of depositors, creditors, and holders while the goods are stored in the warehouse. The insurance should

safeguard the holder's rights in case of warehouse default or failure to deliver the stored goods. Insurance thereby provides security and strengthens the trust of holders to receive their goods.

221. The Model Law does not require a warehouse operator to take out any insurance for the fulfilment of its obligations in relation to the goods stored in its warehouse. It merely states that the warehouse operator may include in the warehouse receipt the name of the insurer, if any, who has insured the goods (see art. 10, para. 1, subpara. (a)).

222. However, the law governing warehouses often requires warehouse operators to take out insurance as a condition of issuing and maintaining a license. The legislation regarding warehouse receipt systems should establish the minimum coverage (value) and a list of events that must be covered by the insurance policy.

223. The regulatory authority should consider the maturity of the particular market; it should not go beyond what is necessary to achieve its purpose to balance prudential and market development objectives. In the agricultural sector, in particular, there has been an increase in insurance premium rates in recent years due to the frequency of losses, natural events, and the need for greater monitoring, among other factors. The regulatory authority should ensure that, in principle, the following aspects are addressed.

#### *Minimum coverage value*

224. The minimum coverage value is typically not specified in the legislation. Rather, its determination is delegated to the competent authority. The legislator may set a minimum limit that the insurance must cover and empower the authority to deviate upwards from this value. This approach provides flexibility to the competent authority to adjust the required amount over time. The legislation should then provide a minimum value that must be covered by the relevant insurance policy, which is usually equal to the maximum value of the goods stored in the warehouse at any given time.

225. It is essential to include in the complementary rules the warehouse operator's obligation to provide proof of the insurance to the depositor and the financier.

#### *Minimum events covered by insurance*

226. The legislation should also provide a list of events which must be covered by insurance policies taken out by warehouse operators. It is essential to cover liability in the case of an event outside the operator's sphere of influence. For example, legislation for agricultural products may require goods to be covered against fire and standard perils. A common categorisation of insurable risks would usually include fire and standard perils; burglary/theft; fidelity cover (i.e. against employee fraud); professional indemnity (i.e. against negligence). In some countries, according to context, separate coverage may be needed for civil unrest, political violence and terrorism.

227. The insurance policy must cover those events outlined in the relevant legislation, as well as any others agreed upon by the parties to an insurance contract. Alternatively, the insurance policy may provide coverage against "all risks" except for those specifically excluded. Such exclusions may relate to loss or damage from insects or vermin, extremes of temperature, wear and tear, rotting or molding, breakage, marring or scratching, criminal acts, and acts of war. If this wording is used, it is necessary that the minimum events set out in the legislation are not excluded from the coverage of "all risks".

228. "All risks" policies provide better coverage in case of unforeseen events, which would reduce the risk of loss for depositors and any holders of warehouse receipts. It may, however, result in increased insurance premiums for warehouse operators due to the potential of unforeseen claims, which in turn would increase the cost of storage for the depositor. These factors should be taken into account by the parties when negotiating the insurance contract.

*Risk-reduction measures*

229. It is common for insurance companies to establish conditions for warehouse operators to obtain the corresponding policies, including having security measures that reduce risk. As conditions may change, it is important to ensure regular review and update. Accordingly, it is recommended to include a corresponding provision in the legislation, which could require warehouse operators to develop policies and procedures on basic safety, prevention and protection, which must be reviewed at least once a year.

230. Accordingly, the warehouse's policies and procedures on basic safety, prevention and protection should consider at least the following:

- the physical security of the facilities where the merchandise is stored;
- the local alarm system regarding intrusion, fire, or attack on the warehouses or premises where the goods are located and, as the case may be, the sending of the corresponding signals to the alarm center – this system must also have an electrical backup;
- the establishment and implementation of procedures to detect fraud or theft of goods, considering the control of access to warehouses or premises;
- the supply of sufficient lighting in the periphery and manoeuvring areas of the warehouses or premises; and
- the security and protection of movable and immovable property, computer systems and personnel.

231. The price of warehouse insurance depends on the selected coverage (facilities, contents or optional coverage), the size of the warehouse, its location (industrial park, urban area or rural area), the age of the building, the most recent renovations and the security measures in place (such as doors, sensors, alarms, etc.).

*Scope of insurance coverage*

232. The basic coverage of insurance for warehouses includes coverage for the warehouse itself and its contents (i.e., goods). Considering the warehouse's contents, it is common for the description of the insured goods to include merchandise, raw materials, products in process, finished products, machinery, furniture, tools, accessories, and other equipment necessary for the operation of the insured's business. Accordingly, the legislation should include a provision that requires the description of the specific goods covered by the relevant insurance policy. This includes all inventories owned by the insured and/or third parties under their care, custody or control, for which they are legally responsible and which are located at the declared locations.

*Separately insured merchandise*

233. The legislation may determine the permissibility of warehouse operators providing an option for the depositor to take out its own insurance to cover some or all risks during the period the goods are in storage, or to store the goods without insurance. Such options would likely be offered in return for financial consideration (for example, through lower storage fees). Should such options be provided, the legislation may determine the extent of the warehouse operator's liability under its duty of care should insurable risks materialize.

**D. CENTRAL REGISTRY OF WAREHOUSE RECEIPTS**

234. There are no registry-specific provisions in the Model Law. However, an enacting State may develop additional rules for the establishment and maintenance of

a registry to keep track of warehouse receipt transactions and warehouse receipts issued by warehouses at a central database.

235. The enacting State should ensure that legislation is not overly prescriptive, since this may impede or forestall technological innovation. In order to develop an appropriate legal framework, the following aspects may be taken into consideration.

*Functions of the central registry and warehouse receipt transactions subject to registration*

236. The central registry functions may include registration of issued and transferred receipts, etc. The enacting State may also provide for rules regarding recognized evidence of the information contained in the register.

237. The answer to the question of which warehouse receipt transactions should be registered depends on the type of warehouse receipts issued or used in the enacting State, the medium of those receipts (paper or electronic receipts) and the existing legal framework. The transactions that can be registered are issuance and transfer of receipts; delivery of goods; cancellation and surrender of receipts; loss or destruction of warehouse receipts; and replacement of warehouse receipts.

*The institution designated to undertake registration*

238. The legislation should provide for where the registry is to be situated and which entities are to undertake the functions of the registrar. This could either be a public institution or private entities under supervision of a public authority.

*The duty to register warehouse receipt transactions*

239. The legal framework may impose the duty on the warehouse operators to register the relevant transactions in view of the fact that they are the ones who issue the receipts and have the necessary systems and personnel to do so, making the process easier and more efficient. However, certain transactions, such as transfers may need to be registered by the parties to those transactions.

*Duties and features of the central registry*

240. The legislation may provide for the duties and features of the central registry that would ensure its efficiency and integrity in managing warehouse receipt transactions. Such duties should include:

- Maintenance of an audit trail of the relevant warehouse receipt transactions to ensure a comprehensive representation of all transfers for an appropriate time span after expiry of the respective warehouse receipt;
- Security and risk management parameters to ensure the integrity of the receipts and transactions, including the performance of pre-checks before recording a transfer;
- Generation of reports on transactions with warehouse receipts;
- Capacity to handle warehouse receipts issued either electronically or in paper or both; and
- Ability to provide authorized parties with access to its records.

*Accessibility of the central registry*

241. In addition to parties to warehouse receipt transactions, the central registry could be accessed by authorized parties such as potential buyers and financial institutions to conduct due diligence on the status of the warehouse receipts. The legal framework may set out who these parties are and the access rights they hold in a way that ensures the confidentiality and security of warehouse receipts and facilitates faster, more efficient and transparent trade and access to credit.