



# General Assembly

Distr.: General  
5 May 2020

Original: English

**United Nations Commission on  
International Trade Law**  
**Fifty-third session**  
New York, 6–17 July 2020

## Possible future work on warehouse receipts

### Note by the Secretariat

#### Contents

	<i>Page</i>
I. Introduction . . . . .	2
II. Preparatory work carried out by the Secretariat . . . . .	3
A. Existing legal instruments and guidance documents on warehouse receipts . . . . .	4
B. The desirability of an additional instrument . . . . .	5
C. Unidroit-UNCITRAL webinar on possible legislative guidance on warehouse receipts . . . . .	6
III. Proposed scope and working method . . . . .	7



## I. Introduction

1. 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>1</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>2</sup>

2. 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>3</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>4</sup> The Commission was further informed that a delegation would prepare and submit a study on warehouse receipts for that purpose.

3. 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>5</sup>

4. 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. In support of that proposal, the importance of warehouse receipts to agriculture and food security as well as their use in supply and value chains, was highlighted.<sup>6</sup> At that session, the Commission also heard that the Organization of American States (OAS) was in the process of updating its 2016 report on principles for electronic warehouse receipts for agricultural products in light of recent developments.<sup>7</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>8</sup>

5. At its fifty-second session, 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 (NatLaw)<sup>9</sup> on possible future work on warehouse receipts. The study had examined the legislative and regulatory frameworks governing warehouse receipts in several States, illustrating a wide range of different approaches to warehouse receipts. While divergence of approaches to, and legal treatment of, warehouse receipts was not in and of itself a problem, the study suggested that a certain level of harmonization could facilitate the use of warehouse receipts, in particular across sectors and in the cross-border context. The study also pointed out that several States, in particular those with a common law tradition, did

<sup>1</sup> *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 125.

<sup>2</sup> The deliberations and conclusions of the Colloquium are summarized in documents [A/CN.9/913](#) and [A/CN.9/924](#).

<sup>3</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 227.

<sup>4</sup> *Ibid.*, paras. 225 and 229.

<sup>5</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>6</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 249.

<sup>7</sup> *Ibid.*, para. 182.

<sup>8</sup> *Ibid.*, para. 253(a).

<sup>9</sup> NatLaw 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.

not yet have a legislative or regulatory framework on warehouse receipts, whereas in other States, the framework had only been developed partially, thus requiring a more comprehensive solution to facilitate the use of warehouse receipts. The study suggested that the Commission should consider developing a model law on warehouse receipts in consultation with international and regional organizations that have already undertaken work in that field.

6. 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>10</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, such as: how such work should be undertaken (whether by a working group or the Secretariat with the assistance of experts); the scope of such work (for example, whether to address all substantive legal aspects of warehouse receipts, whether to focus on their use for financing purposes or on their cross-border use and whether to cover their use more generally or in a specific sector); whether the work should focus on dematerialized forms of warehouse receipts and the legal nature of such warehouse receipts in the digital economy and their use; the form of such work (a convention, a model law or a guidance text). The Secretariat was requested to examine the relationship of the topic with existing UNCITRAL texts, mainly the Model Law on Secured Transactions and the Model Law on Electronic Transferable Records.<sup>11</sup>

7. There was general agreement that the work should be comprehensive, as suggested in the study, and not only limited to the use of warehouse receipts as collateral in secured transactions. While there was a preference for referring the work to the first available working group, the Commission reserved its position as to whether the project could be integrated into the longer-term work programme of any existing working groups. 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>12</sup>

## II. Preparatory work carried out by the Secretariat

8. Following that request by the Commission, the Secretariat invited Unidroit to participate in, and contribute to, the preparatory phase of the Commission's future work in the area of warehouse receipts. The choice to partner with Unidroit for this preparatory work followed naturally from the long-standing relationship between both organizations, and the complementary nature of their respective work programmes and areas of expertise, in particular general secured transactions law, negotiable instruments and micros, small and medium enterprises (MSMEs), as regards UNCITRAL, and private law and agriculture (but also assets-based secured transactions), as regards Unidroit.

9. Building on the study by NatLaw, on which the Secretariat reported to the Commission at its fifty-second session (see para. 5 above), the preliminary assessment of the two secretariats is that, despite an already existing body of work on the subject of warehouse receipts by international organizations, international institutions supporting legislative reform in developing and middle-income countries could benefit from a neutral legislative standard (in the form of a model law or legislative

<sup>10</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 195.

<sup>11</sup> United Nations publication, Sales No. E.17.V.5.

<sup>12</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 196 and 221(b).

guidance) reflecting current best practices and taking also into account recent technological developments.

## A. Existing legal instruments and guidance documents on warehouse receipts

10. The practical relevance of warehouse receipts has driven several international organizations to work in this area. The current stock of international documents includes general analysis of combined legal and economic content, principles and legal guides.

11. While their contents vary, existing materials have generally addressed the concept of warehouse receipts and how warehouse receipt financing works. Highlighting the importance and benefits of a warehouse receipt system, some of the materials have focused on infrastructure requirements, practical implications for financial institutions as well as recent trends in the use of electronic warehouse receipts.

12. Existing international texts include guidance documents on legislative matters and legal reform concerning warehouse receipts developed by the Food and Agriculture Organization of the United Nations (FAO) and the European Bank for Reconstruction and Development (EBRD) in 2015 (*Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends*)<sup>13</sup> and by the World Bank Group in 2016 (*Guide to Warehouse Receipt Financing Reform*).<sup>14</sup> Also in 2016, but with a regional scope, the OAS adopted the *Principles for Electronic Warehouse Receipts for Agricultural Products*.<sup>15</sup> There are other instruments, regional and global, that do not specifically address warehouse receipts but are nevertheless relevant for national warehouse receipt legislation, namely -and by way of relevant examples- the *Uniform Act Organizing Securities*<sup>16</sup> approved by Organisation for the Harmonization of Business Law in Africa (OHADA) in 2010, or the consultation report *Commodity Storage and Delivery Infrastructures, Good or Sound Practices*, of 2018 of the International Organization of Securities Commissions (IOSCO).<sup>17</sup>

13. In addition to the Model Law on Secured Transactions, UNCITRAL has adopted several instruments that are highly relevant for the design of selected aspects of a system of warehouse receipts, including the Model Law on Electronic Commerce (MLEC),<sup>18</sup> the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules, 2009),<sup>19</sup> and the Model Law on Electronic Transferable Records (MLETR).<sup>20</sup>

14. The wide scope of those instruments and the high quality of the advice they provide offer valuable guidance for legislators and users in their specific areas. There is, however, no international legislative standard addressing all elements that have been identified as necessary to establish a modern and efficient system of warehouse receipts. UNCITRAL is well placed to develop an international standard (possibly in the form of a model law) that is acceptable for legislators and potential users in different regions and belonging to different legal traditions.

<sup>13</sup> Available at [www.fao.org/3/a-i4318e.pdf](http://www.fao.org/3/a-i4318e.pdf).

<sup>14</sup> Available at <http://documents.worldbank.org/curated/en/885791474533448759/pdf/108450-WP-PUBLIC.pdf>.

<sup>15</sup> Available at [www.oas.org/en/sla/iajc/docs/CJI-doc\\_505-16\\_rev2.pdf](http://www.oas.org/en/sla/iajc/docs/CJI-doc_505-16_rev2.pdf).

<sup>16</sup> Available at [www.ohada.org/index.php/en/component/content/article?id=494:uniform-act-organizing-securities](http://www.ohada.org/index.php/en/component/content/article?id=494:uniform-act-organizing-securities).

<sup>17</sup> Available at [www.iosco.org/library/pubdocs/pdf/IOSCOPD604.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD604.pdf).

<sup>18</sup> United Nations publication, Sales No. E.99.V.4.

<sup>19</sup> United Nations document A/RES/63/122, annex (with corrections in C.N.563.2012 and C.N.105.2013).

<sup>20</sup> United Nations publication, Sales No. E.17.V.5.

## B. The desirability of an additional instrument

15. The NatLaw study (see above, para. 5) and the preliminary research conducted by the secretariats of UNCITRAL and Unidroit confirm the potential usefulness of a new instrument to complement and update the international policy and guidance materials currently available. This is also confirmed by the experience of international organizations working on access to finance, particularly in the agricultural sector.

16. The treatment of warehouse receipts varies greatly among legal systems. Some jurisdictions have a general framework embedded in a code while others have stand-alone warehouse receipts laws. Some enacted legal rules on electronic warehouse receipts (EWRs) while others rely entirely on general contract or electronic commerce laws to govern the trading of EWRs. A few have also enacted special legislation applicable to particular sectors, such as warehouse receipts covering agricultural products, oil or gas. Legal traditions have also influenced the legislative frameworks on warehouse receipts. For instance, many civil law jurisdictions have implemented a dual system of warehouse receipts, where the warehouse issues a warehouse receipt (also known in some jurisdictions as a “certificate of deposit”) and a pledge bond (also known in some jurisdictions as a “warrant”). The warehouse receipt represents ownership rights over the stored goods while the pledge bond is used to secure an obligation, such as a loan to a farmer who deposited crop into a warehouse. In addition, some civil law jurisdictions apply by analogy to warehouse receipts many rules governing negotiable instruments and securities. In contrast, many common law jurisdictions do not have any legislation on warehouse receipts whatsoever, while some common law jurisdictions treat them alongside other negotiable documents.

17. Several countries are currently seeking to modernize their national warehouse receipts systems to attract private sector investment in the agricultural sector, enhance access to credit and lower its cost, and to facilitate transactions with agricultural commodities. These reforms should not only benefit larger agribusiness companies, but also small farmers and MSMEs in the agricultural and other sectors. However, many countries lack a modern warehouse receipt legislation that takes into account the new developments in the sector over the recent times. All too often, existing warehouse receipt legislation fails to adapt to the challenges and opportunities presented by new technology. In particular, obstacles arise with the failure to enable electronic warehouse receipts (be it through electronic registries or the blockchain), as well as platforms and systems for electronic exchanges of warehouse receipts. Electronic warehouse receipts increase transparency in the transactions involving warehouse receipts and mitigate traditional risks such as document fraud. Moreover, blockchain technology has the potential to mitigate or even eliminate some risks associated with the transfer of the receipts, *inter alia* through the accessibility for all parties involved of real-time data concerning the transfer of receipts and underlying commodities. Moreover, many domestic laws not only fail to contemplate or enable EWR but have remained logically linked to a business model of commodities warehousing that no longer corresponds to market reality, circumstances that have prevented warehouse receipts financing from reaching its full potential.

18. From a cross-border perspective, parties engaging in cross-border trade on the underlying commodities or wishing to use warehouse receipts as a financial collateral, are therefore often confronted with different legal provisions applying to warehouse receipts. This reduces legal certainty and increases transaction costs, thus discouraging parties from engaging in operations involving warehouse receipts. A harmonized legal framework would facilitate the understanding and use of receipts in a cross-border context.

19. Despite the differences in legislative treatment outlined above, in the assessment of both the Unidroit and UNCITRAL secretariats, legal harmonization in this area is not only desirable from an economical point of view, but also legally feasible. Indeed, in most systems warehouse receipts share the same economic and transactional function and an international harmonization effort is likely to benefit from the

common understanding of certain essential concepts and solutions such as “control” and “controlling party”, “protected holder” or “innocent acquirer”, unauthorized dispositions of assets by intermediaries, loss-sharing in case of shortfall and similar notions recognized in existing international texts on electronic transferable records,<sup>21</sup> transport documents<sup>22</sup>, negotiable instruments<sup>23</sup> and intermediated securities.<sup>24</sup>

### C. Unidroit-UNCITRAL webinar on possible legislative guidance on warehouse receipts

20. In line with the mandate received from the Commission at its 52<sup>nd</sup> session (see above, para. 7), and in order to discuss the proposal to conduct legislative work on warehouse receipts, Unidroit and UNCITRAL jointly organized and held a workshop with a broad audience of experts and organizations, on 26 March 2020<sup>25</sup> (due to the measures put in place by States and the United Nations in response to the Coronavirus disease 2019 (COVID-19) pandemic, the workshop eventually took place as a webinar by videoconference). The purpose of the webinar was to discuss global experiences with modernizing warehouse receipts systems, to identify emerging trends and to identify the main legal issues necessary to the development of a Model Law on Warehouse Receipts. The discussion took place with selected experts from various geographic regions with experience in legal reforms of warehouse receipt systems or related regimes, such as those governing secured transactions and electronic commerce, including members of academia, relevant stakeholders, institutional actors, and organizations active in the field.

21. The main conclusions and recommendations of the webinar, as agreed by both convening institutions, can be summarized as follows:

(a) There is a need for international legislative guidance on warehouse receipts (possibly in the form of a model law), as many countries need to modernize their national legal frameworks for warehouse receipts and incorporate the challenges and opportunities brought by new technologies;

(b) Such guidance should lead to increased harmonization, which is found to be desirable in the sector;

(c) The need has been identified by international organizations working on the ground in developing and middle-income jurisdictions. Moreover, both the need and the importance of this work is consistent with previous work undertaken by global (FAO, the International Finance Corporation (IFC), the World Bank) or regional (OAS) intergovernmental organizations;

(d) Participants agreed that the drafting of a global legislative standard on warehouse receipts should be feasible, as generally the core regulation of the topic is conceptually similar across jurisdictions, including those with divergent legal cultures;

(e) The global nature of UNCITRAL and Unidroit, as well as their expertise, would make them especially suitable for the task;

(f) With regard to the scope of such guidance, and on the assumption that it could take the form of a model law, the participants agreed on the following:

<sup>21</sup> For instance, in the MLETR (see above, note 20), and the functional equivalence criteria set out in the MLEC (see above, note 18).

<sup>22</sup> For instance, in the Rotterdam Rules (see above, note 19).

<sup>23</sup> For instance, in the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988), adopted by General Assembly resolution 43/165 on 9 December 1988 (A/RES/43/165).

<sup>24</sup> For instance, in the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 9 October 2009) ([www.unidroit.org/instruments/capital-markets/geneva-convention](http://www.unidroit.org/instruments/capital-markets/geneva-convention)).

<sup>25</sup> The programme is available at [www.unidroit.org/english/news/2020/200326-warehouse-receipts/programme-e.pdf](http://www.unidroit.org/english/news/2020/200326-warehouse-receipts/programme-e.pdf).

- (i) The text law should be as comprehensive as possible, covering both negotiable and non-negotiable instruments. Most participants agreed that also both electronic and paper-based warehouse receipts ought to be included. It was found crucial that a model law be designed in a flexible manner in order to accommodate for different legal and contextual framework conditions of diverse jurisdictions, and in any case consider the special needs of smallholders and SMEs. Further details ought to be considered when/if the project is approved;
- (ii) It was agreed that a model law should focus on the private law aspects of the warehouse receipts system, and the negotiability of the warehouse receipt is a paramount part of the project;
- (iii) Electronic platforms, distributed ledgers technology (DLT) systems and other technological mechanisms already in use in the more developed systems ought to be part of a model law;
- (iv) There was agreement on the importance of bearing in mind the institutional and regulatory framework of the operation of warehouses. However, those and other regulatory matters (such as financial services and prudential supervision) should not be the focus of the work and should be best addressed in a guide to enactment or a users' guide, to be drafted as a by-product at a later stage;
- (g) Participants underlined the importance that a model law is drafted in a manner suitable for integration into the broader existing legal framework of any country. Hence the existence of an enabling legal framework is key;
- (h) Lastly, the project would need to be consistent with the UNCITRAL Model Law on Secured Transactions as well as with other relevant existing instruments of both institutions.

### III. Proposed scope and working method

22. If the Commission concurs with the assessment set out above, the Commission may wish to request 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 may further wish 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, and, including, *inter alia*, (i) a set of definitions of the main concepts, (ii) form and content requirements for the receipts, (iii) the rights and obligations of the parties concerned, (iv) the negotiability and the means of transfer of the documents, (v) the substitution and removal of goods from the warehouse, and the termination of storage, and (vi) aspects concerning creation and third-party effectiveness of a security right in warehouse receipts (and stored goods) as well as relevant priority and enforcement-related issues. The Commission may further wish to endorse the expert's recommendation that a text on warehouse receipts should contemplate the issuance and negotiation of electronic warehouse receipts (EWRs), including through electronic platforms, distributed ledgers technology (DLT) systems and other technological mechanisms, taking also into account possible future work by UNCITRAL on legal aspects of the digital economy, including issues related to DLT and electronic trading platforms (see A/CN.9/1012 and addenda).

23. As regards the methodology, and taking into account the overall work programme of the Commission and the expected progress of the projects currently being dealt with by the various working groups, the Secretariat proposes that the projects be carried out as a joint project between UNCITRAL and Unidroit, in which Unidroit would take the lead at this initial stage through 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 accordance with the working methods of Unidroit, such a study group or working group would be composed of international

legal experts representing different legal systems, international organizations and other relevant stakeholders invited to participate as observers.

24. Once the Unidroit study group or working group would have 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. It should be noted that this is not the first time that UNCITRAL would undertake to convene a working group to deliberate on the basis of a text developed by Unidroit. In fact, the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (OTT Convention),<sup>26</sup> which was adopted by a diplomatic conference in Vienna on 17 April 1991 was based upon a draft prepared by an UNCITRAL working group and an earlier preliminary draft Convention elaborated by Unidroit.

25. The difference between the OTT Convention and the proposed new instrument on warehouse receipts would be that, if the Commission agrees, the final text would bear the names of both organizations, in recognition of the close cooperation between UNCITRAL and Unidroit and the considerable contribution, including financial, that Unidroit would have made by taking the lead during the preparatory phase of the project. An additional advantage of this cooperation and joint branding of the final product would be to signal to member States and the international community not only the high level of coordination and fine-tuning between the work programmes of both organizations, but also their awareness of the interest of other organizations, notably FAO, IFC and OAS for this area, which relates directly to two important documents recently produced by UNCITRAL and Unidroit, namely, the UNCITRAL Model law on secured Transactions and the *Unidroit/FAO/IFAD Legal Guide on Contract Farming*.<sup>27</sup> An instrument bearing the names of both organizations would thus benefit from established cooperation networks and distributions channels of both organizations.

26. The proposed cooperation and division of responsibilities would allow the preparatory work to start at Unidroit in the second half of 2020 without requiring UNCITRAL to divert Secretariat resources from any of the other ongoing legislative or exploratory work approved by the Commission beyond the preparation for and attendance to Unidroit study group sessions. The secretariats of UNCITRAL and Unidroit estimate that the joint preparatory work could be completed by the Unidroit study group or working group within a period of two years, with a view to the transmittal to a UNCITRAL Working Group by the second half of 2022. The Secretariat expects that, at that time, it will be possible to assign the text on warehouse receipts to a working group, taking into account the timeframe of expected completion of projects currently handled by the six UNCITRAL working groups (see A/CN.9/1016).

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<sup>26</sup> *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2–19 April 1991* (A/CONF.152/14). United Nations, New York, 1993 (United Nations publication Sales No. E.93.X1.3).

<sup>27</sup> Available at [www.unidroit.org/instruments/contract-farming/legal-guide](http://www.unidroit.org/instruments/contract-farming/legal-guide).