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Draft guide to enactment of the UNCITRAL/UNIDROIT model law on warehouse receipts

1. This note contains in its annex the preliminary draft Guide to Enactment of the Model Law on Warehouse Receipts for consideration by the Working Group.
2. The draft Guide was prepared by the Working Group on a Model Law on Warehouse Receipts – Guide to Enactment, convened by UNIDROIT in consultation with the UNCITRAL secretariat (Rome, 13–15 November 2023). It is to be considered in conjunction with the revised draft Model Law (A/CN.9/WG.I/WP.133). The draft Guide does not deal extensively with provisions on electronic warehouse receipts pending the determinations of the Working Group on the desired approach.
3. The draft Guide to Enactment is composed of four main parts:
 - Part I – Purpose of this Guide
 - Part II – Introduction to the Model Law
 - Part III – Article-by-article Commentary
 - Part IV – Complementary Legislation
4. 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. Part IV offers guidance for drafting the complementary legislation that is required to implement the law at the domestic level.
5. The Secretariat is grateful to Working Group members and observers Ms. Elsa Ayala, Mr. Marek Dubovec, Mr. Adam Gross, Mr. Thomas Johnson, Ms. Dora Neo, Ms. Jacqueline Odundo, Ms. Teresa Rodriguez de las Heras Ballell, Mr. Hiroo Sono and Ms. Guo Yu for their contributions to this document.



Annex

UNCITRAL/UNIDROIT Model Law on Warehouse Receipts

Guide to enactment

Contents

	<i>Page</i>
I. PURPOSE OF THIS GUIDE	4
II. INTRODUCTION TO THE MODEL LAW	5
A. BACKGROUND AND DRAFTING HISTORY	5
B. PURPOSE OF THE MODEL LAW	6
C. SCOPE	6
D. STRUCTURE	7
E. ELECTRONIC WAREHOUSE RECEIPTS	8
F. FINANCING PRACTICES INVOLVING WAREHOUSE RECEIPTS	9
G. PRIVATE INTERNATIONAL LAW ISSUES	12
III. ARTICLE-BY-ARTICLE COMMENTARY	13
Chapter I – Scope and General Provisions	13
Article 1 – Scope of application	13
Article 2 – Definitions	14
Article 3 – Form of warehouse receipts	15
Article 4 – Party autonomy	15
Article 5 – Interpretation	16
Chapter II – Issuance and Contents of a Warehouse Receipt; Alteration and Replacement	16
Article 6 – Obligation to issue a warehouse receipt	16
Article 6 bis – Electronic warehouse receipt	16
Article 7 – Representations by the depositor	16
Article 8 – Incorporation of storage agreement in the warehouse receipt	17
Article 9 – Information to be included in a warehouse receipt	17
Article 10 – Additional information that may be included in a warehouse receipt	18
Article 11 – Goods in sealed packages and similar situations	18
Article 12 – Alteration of a warehouse receipt	19
Article 13 – Loss or destruction of a warehouse receipt	19
Article 14 – Change of medium of a warehouse receipt	20
Chapter III Transfers and Other Dealings in Negotiable Warehouse Receipts	20
Article 15 – Transfer of a negotiable warehouse receipt	20
Article 15 bis – General reliability standard for electronic warehouse receipts	21
Article 16 – Rights of a transferee generally	21

Article 17 – Protected holder of a negotiable warehouse receipt	22
Article 18 – Rights of a protected holder of a negotiable warehouse receipt	23
Article 19 – Third-party effectiveness of a security right	24
Article 20 – Representations by a transferor of a negotiable warehouse receipt.	25
Article 21 – Limited representations by intermediaries	26
Article 22 – Transferor not a guarantor	26
Chapter IV – Rights and Obligations of the Warehouse Operator	26
Article 23 – Duty of care	26
Article 24 – Duty to keep goods separate.	26
Article 25 – Lien of the warehouse operator	27
Article 26 – Obligation of warehouse operator to deliver.	28
Article 27 – Partial delivery	28
Article 28 – Split warehouse receipt.	28
Article 29 – Excuses from delivery obligation	28
Article 30 – Termination of storage by the warehouse operator.	29
Chapter V – Pledge Bonds	30
Article 31 – Issuance and form of a pledge bond	30
Article 32 – Effect of a pledge bond.	32
Article 33 – Transfers and other dealings.	32
Article 34 – Rights and obligations of the warehouse operator	33
Chapter VI – Application of This Law	34
Article 35 – Entry into force	34
Article 36 – Repeal and amendment of other laws	34
IV. COMPLEMENTARY LEGISLATION	35
A. INTRODUCTION	35
B. LICENSING AND SUPERVISION.	36
C. INSURANCE.	38
D. CENTRAL REGISTRY OF WAREHOUSE RECEIPTS.	40

UNCITRAL/UNIDROIT Model Law on Warehouse Receipts

GUIDE TO ENACTMENT

I. PURPOSE OF THIS GUIDE

6. The purpose of this Guide to Enactment is to provide comprehensive guidance for implementing the Model Law on Warehouse Receipts (the “Model Law” or “MLWR”) at the domestic level.¹ 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 Transactions² (the “MLST”) and the UNCITRAL Model Law on Electronic Transferable Records³ (the “MLETR”).

7. 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.

8. 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.

9. 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.

10. 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.⁴

¹ UNIDROIT Document A.G. (81) 9.

² United Nations publication, Sales No. E.17.V.1.

³ United Nations publication, Sales No. E.17.V.5.

⁴ 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

11. Warehouse receipts are documents, in [paper][non-electronic] 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.

12. The introduction of the warehouse receipt, in most cases as part of a system for regulating and overseeing the warehouse operators that issue them, has facilitated trade and finance. Further, the use of warehouse receipts is promoting the integrity and resilience of markets and the financial system, and is protecting 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.

13. 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).

14. 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 traditional forms of collateral such as real estate and fixed assets. 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.

15. 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 MLWR. A WRS law typically comprises both private and regulatory law. The MLWR 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.

16. Recognizing the important potential of warehouse receipts to strengthen the agricultural, industrial and financial systems of developing economies, several global 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.⁵

[Drafting history to be completed.]

B. PURPOSE OF THE MODEL LAW

17. 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.

18. The primary objective of the MLWR 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 MLWR 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 by providing a secure form of collateral to obtain loans. 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.

19. In addition, the harmonization of warehouse receipt laws will aid the formation of regional and international markets.

20. This legal framework will be particularly useful to developing countries. By improving the ability of farmers in these countries to grow and store crops and other agricultural products, the MLWR 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

21. 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 warehouse receipt system (WRS) law, e.g., licensing, supervision and insurance requirements. The enactment of the MLWR should be accompanied by the issuance of a legislative instrument containing complementary rules further elaborated on in Part IV.

22. It is important to note that the scope of the MLWR extends beyond agricultural commodities to other types of goods which may be the subject of a warehouse receipt. 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

⁵ 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.

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.

23. An important aspect of the scope of the MLWR 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. In order for this to be effective, however, it is essential that EWRs are “functional equivalents” of their paper-based counterparts and vice versa. 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”. Moreover, article 14 allows for the change of medium of a warehouse receipt without affecting the rights and obligations of the parties.

24. The scope of the MLWR 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. In earlier drafts of the MLWR, there was also a chapter specifically dedicated to non-negotiable warehouse receipts; however, this was eventually deleted as the typical use of non-negotiable warehouse receipts in field warehousing arrangements was deemed to be outside the scope of the MLWR. Therefore, while the scope of the Model Law encompasses both negotiable and non-negotiable warehouse receipts, emphasis is placed on negotiable warehouse receipts.

25. 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 on the transferee. 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.

26. 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 MLWR. 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

27. 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.

28. 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 MLWR. 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.

29. 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.

30. 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 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 made by the transferor to the transferee.

31. 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.

32. 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.

33. 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.⁶

E. ELECTRONIC WAREHOUSE RECEIPTS

34. The importance of EWRs in modern commercial practice is recognized by the MLWR and signalled by its drafting in a technology-neutral manner. In the first provision of the MLWR (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).

35. The MLWR is technology neutral. It applies to both electronic and paper-based warehouse receipts. Thus, the MLWR 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/regulatory framework to facilitate the transition to EWRs with enabling provisions. It does not preclude a State from implementing a system only for

⁶ This Chapter may be renumbered if the Working Group decides to adopt a chapter on electronic warehouse receipts.

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

36. 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.

37. In implementing the MLWR 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.

F. FINANCING PRACTICES INVOLVING WAREHOUSE RECEIPTS

38. 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, WRs may be used to support Shariah-compliant, or interest-free banking products, such as commodity *murabaha*.

39. 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.

40. 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]

41. Looking beyond finance in the primary market, loans secured with warehouse receipt may also be securitized and the resulting financial instruments traded into 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.

42. On commodity derivative exchanges, warehouse receipts are typically classified as an eligible type of collateral for use as margin against a derivative position. 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.

43. 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-specified 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 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)?

44. The MLWR, 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.

45. In the mitigation of both legal and custody risk, the MLWR 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.

46. The MLWR contains a range of provisions which provide lenders with confidence that the enforcement rights enshrined in law 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.

47. Mitigation of custody risk entails the bank 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 MLWR 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 MLWR.

48. Lenders may privately contract with a “collateral manager”, a business which specializes in taking custody, controlling and preserving the condition of warehouse receipt collateral. 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.

49. Lenders may also utilize a WRS, in which the regulatory aspects of WRS law – not included in the MLWR (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.

50. 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 recent developments in some countries, government agencies such as commodity marketing boards are also offering public warehousing.

51. 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

52. 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.

53. 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.

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

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

- 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.

56. The following briefly summarizes how these issues may be dealt with in domestic laws.

57. For warehouse receipts, the law chosen by the issuer may determine whether the issued record or document is a warehouse receipt. Accordingly, the issuer may select the law of a foreign country, if, for instance, its domestic law does not recognize warehouse receipts as negotiable documents of title. In any case, a transferee of a receipt would be able to determine “from its face” the applicable law. Absent a choice, the law of the location of the issuer could be the governing law for this aspect.

58. The approach to determine the applicable law for the preceding issue may be the same for enforcement of the issuer’s obligation to deliver the goods. The same law is expected to govern the rights and obligations between the issuer and a secured creditor. This is already the approach of article 96 of the MLST under which the law governing the rights and obligations of an issuer of a negotiable document and the grantor of a security right is also the law that determines the conditions under which the security right may be invoked against the issuer.

59. Generally, warehouse receipts recognized as negotiable documents of title are treated as movable assets, so that the law of the location at the time of the transfer determines the effectiveness of that transfer. Warehouse receipts may be used to create security interests in goods, or may themselves be the object of security interests. Article 85 of the MLST provides for the location of an asset as the connecting factor

for the law that governs the creation, third-party effectiveness and priority of a security right in a tangible asset.

60. Electronic warehouse receipts should be subject to the same private international law rules as non-electronic warehouse receipts, as the choice of medium should not have an impact on the applicable law. However, certain adjustments need to be made to transpose in the electronic environment legal notions conceived for the paper-based one. The traditional connecting factors for the proprietary effects of transfer of rights in tangible assets is tied to their physical location (tangible assets are defined in art. 2 of the MLST to include warehouse receipts). In an electronic environment, an adequate functionally equivalent connecting factor may need to be found depending on the business model or technology used by the parties (e.g., the law governing the exchange, or the registry that records transfers of warehouse receipts).

61. The law governing the rights of a protected holder should govern any conflict against a buyer of goods or a person with a security right in the goods. MLWR provides a substantive rule resolving such conflicts in article 18, paragraph 3.

III. ARTICLE-BY-ARTICLE COMMENTARY

Chapter I – Scope and General Provisions

Article 1 – Scope of application

62. Under article 1, the MLWR applies to warehouse receipts, either in the form of an electronic record or paper document. This reflects the intention to design a medium-neutral⁷ instrument.

63. There is no separate definition of an EWR for the purposes of the MLWR. An EWR is simply a “warehouse receipt” issued as an electronic record. Thus, the MLWR 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.”

64. The MLWR 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 MLWR. 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 should 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 MLWR (see commentary to article 9 on the legal effect of omitting such information).

65. 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

⁷ Reference to a medium-neutral approach is made without prejudice to the determination of the Working Group on whether a medium-neutral or a functional equivalence approach should be taken.

the holder to preserve the quantity and quality of the goods in its custody (see art. 23 on duty of care).

66. 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 (see art. 26, para. 1, subpara. (b)).

67. 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 stock on behalf of a financier, issues a non-negotiable warehouse receipt as a record of the stock, and then releases the stock 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 MLWR (e.g. on transfers) would not be applicable.

Article 2 – Definitions

68. The MLWR provides for definitions of key terms in article 2 that supplement the general definition of warehouse receipt in article 1.

Depositor

69. The first subparagraph of article 2 provides a definition of depositor, which is "a person who deposits goods for storage with a warehouse operator." The person depositing goods is not always the same as the holder; the MLWR 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

70. The definition of electronic records (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

71. The definition of holder contains separate subparagraphs outlining what constitutes "holder" for purposes of electronic negotiable warehouse receipts, paper negotiable warehouse receipts to the order of a named person, paper negotiable warehouse receipts issued to a bearer, and non-negotiable warehouse receipts. Holder is one of the key concepts in the MLWR, 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 receipts, such as being an endorsee of the receipt.

Negotiable warehouse receipt

72. 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, or delivery and 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

73. The MLWR 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.” Unlike the law of negotiable instruments generally, the MLWR does not create the presumption of negotiability. 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.

Protected holder

74. 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

75. 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 are contained in the warehouse receipt (see art. 8 on incorporation of storage agreement in the warehouse receipt).

Warehouse operator

76. Paragraph 8 defines 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 – Form of warehouse receipts

77. Article 3 contains a statement on the possibility to issue warehouse receipts in [paper][non-electronic] or electronic form on an equal footing, thus implementing a medium-neutral approach. The use of the disjunctive “or” implies a prohibition of issuing warehouse receipts in mixed medium (i.e., partly on paper and partly in electronic form).

Article 4 – Party autonomy

Option 1

78. Article 4 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 MLWR 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.

Option 2

79. Article 4 is based on the MLST (see art. 3). Paragraph 1 of Option B is intended to reflect the principle that, except for the provisions listed in paragraph 1, parties are free as between themselves to vary by agreement the effect of the provisions of the MLWR. The mandatory provisions relate to matters that affect the rights of third parties or reflect a fundamental policy of such importance that their application should be mandatory.

80. Paragraph 2 reiterates the general principle that an agreement between two parties cannot affect the rights of a third party.

Article 5 – Interpretation

81. Article 5 is intended to provide guidance in the interpretation of the MLWR and to limit the extent to which the MLWR, once incorporated in national law, would be interpreted only by reference to concepts of national law.

82. The purpose of the reference to the international origin of the MLWR is to draw the attention of any person that might be called upon to interpret and apply a national law implementing the MLWR 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 6 – Obligation to issue a warehouse receipt**

83. Article 6 outlines the obligation of the warehouse operator to issue a warehouse receipt. A warehouse receipt is typically issued in accordance with the underlying storage agreement. However, the MLWR does not make issuance of a warehouse receipt mandatory in all cases. Rather, paragraph 1 conditions the obligation of the warehouse operator to issue a warehouse receipt on the depositor requesting one. In other words, the MLWR 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.

84. Notably, the reference in paragraph 1 to “after taking possession of the goods” 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.

85. Paragraph 2 separates the obligation of the warehouse operator to issue a warehouse receipt from the validity of the storage agreement. In other words, the fact that a warehouse receipt has not been issued cannot be used as grounds to invalidate the terms and conditions of the storage agreement.

Article 6 bis – Electronic warehouse receipt

86. Article 6 bis sets forth the requirements for issuing an electronic warehouse receipt under a medium neutral approach. It is based on article 10 MLETR and is complemented by article 15, paragraph 3, on the notion of “control”.

Article 7 – Representations by the depositor

87. Article 7 provides for representations of the depositor at the time of deposit, which are contained in subparagraphs (a) and (b).

88. Subparagraph (a) provides that the depositor represents to the warehouse operator 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).

89. Similarly, subparagraph (b) provides that the depositor represents that the goods are free of any rights or claims of third parties 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.

90. Subparagraph (b) is to be read in conjunction with article 9, 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.

91. 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 8 – Incorporation of storage agreement in the warehouse receipt

92. Article 8, paragraph 1 provides that a warehouse receipt is taken by operation of law to include all terms of the storage agreement. Paragraph 2 determines that the express terms of the warehouse receipt prevail over any inconsistent term of the storage agreement. 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 (see article 9, paragraph 1, subparagraph (l)).

Article 9 – Information to be included in a warehouse receipt

93. Article 9 lists the information that shall 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 9 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 MLWR. For this reason, paragraph 2 states that an omission or erroneous declaration will not invalidate the document, but may render the issuer liable.

94. Paragraph 1, in subparagraphs (a) through (l), lists the information that shall be included in a warehouse receipt, beginning with the denomination as “warehouse receipt” in subparagraph (a). The MLWR 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 identification number, an indication of the date of issuance and date of the storage agreement. Notably, subparagraph (l) provides that the warehouse operator must also make a statement on the warehouse receipt that a copy of the storage agreement will be made available to potential transferees on demand (see art. 8 on the relationship between warehouse receipt and storage agreement).

95. 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 MLWR. The Model Law encourages the inclusion of this information to promote good practices. Under paragraph 2, the effect of an 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 MLWR thus places the obligation on the warehouse operator, as issuer, to issue a warehouse receipt that contains correct and complete information.

96. 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 10 – Additional information that may be included in a warehouse receipt

97. Article 10 lists additional information that may be included in a warehouse receipt, clarifies the effect of any incorrect statement of information (similarly to art. 9, para. 2), and addresses situations where a warehouse receipt covers fungible goods but does not state the quality of the goods.

98. 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.

99. 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.

100. 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.

101. Paragraph 4 aims to clarify that an electronic warehouse receipt may contain, because of its nature, additional information that cannot be written – or easily written – in a paper warehouse receipt. This could be, for instance, information generated by oracles and incorporated in the receipt at regular times, such as the temperature of a container storing goods covered by the receipt, or algorithms for contract automation. The paragraph is based on article 6 of the MLETR.

Article 11 – Goods in sealed packages and similar situations

102. Article 11 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.

103. 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)).

104. 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 12 – Alteration of a warehouse receipt

105. Article 12 discourages the risky practice of issuing negotiable warehouse receipts with “blanks.” As between the warehouse operator (the issuer) and a subsequent holder, the risks should fall on the former, which is the approach of article 12. In such cases, any unauthorized insertion will be effective against the warehouse operator, so long as the subsequent holder has no knowledge of the lack of authorization at the time that person becomes the holder. The provision applies equally to paper and electronic negotiable warehouse receipts.

106. Alteration of an electronic warehouse receipt is based on the notion of integrity. If certain non-mandatory information is not included in the initial entry of an EWR, it can be subsequently inserted. This gap-filling action is carried out by annotating a successive entry with the relevant information. The annotation will be effective as to subsequent holders, and consequently, to ulterior entries, provided that it is authorized by the warehouse operator or, if not authorized the subsequent holder has no knowledge of the lack of authorization. An authorizing mechanism may be easier to implement with regard to electronic warehouse receipts than with regard to [paper] [non-electronic] ones; non-authorized changes can be either technically impossible, by designing the system not to make changes unless authorized, or by automatically notifying the subsequent holder about lack of authorization, such as by push notifications or other notices.

Article 13 – Loss or destruction of a warehouse receipt

107. 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. Article 13 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.

108. Paragraph 1 recognizes the legality of 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 receipts, proof of the holder’s entitlement to the warehouse receipt and such 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 an indemnity bond or other indemnity.

109. Paragraph 2 provides additional clarity with respect to loss and replacement of EWRs based on the concept of control. 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.

110. Paragraph 3 provides rules of a procedural nature governing application to the courts for an order that the warehouse operator issue a replacement warehouse receipt. Paragraph 3 invites States to provide for “expeditious proceedings” with respect to such applications. Similar to paragraph 1, paragraph 3 requires applicants to deposit an indemnity bond or other adequate security for indemnity with the court.

111. Paragraph 4 governs the form of a replacement warehouse receipt to prevent instances of 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.

112. Paragraph 5 provides that only the replacement warehouse receipt issued in accordance with paragraph 4 entitles 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

113. Article 14 entitles the receipt holder to request a change of medium of a warehouse receipt from [paper][non-electronic] to electronic or from electronic to [paper][non-electronic] (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][non-electronic] 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.

Chapter III – Transfers and Other Dealings in Negotiable Warehouse Receipts

114. Chapter III 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

115. Article 15 sets out how a negotiable warehouse receipt may be transferred. It covers both [paper][non-electronic] 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.

116. Article 15, paragraph 1 deals with the transfer of [paper][non-electronic] 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.)

117. Article 15, paragraph 1, subparagraphs (a) and (b) address the first transfer of a [paper][non-electronic] negotiable warehouse receipt after its issuance, as well as subsequent transfers. Article 15, paragraph 1, subparagraph (a) deals with a situation where a [paper][non-electronic] negotiable warehouse receipt is issued or endorsed to the order of a named person. This 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][non-electronic] 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 signature.

118. Article 15, paragraph 2 covers the transfer of electronic negotiable warehouse receipts. The rules governing these transfers are the same as those governing [paper][non-electronic] negotiable warehouse receipts, except that the requirement of delivery is replaced by the requirement of transfer of control. Article 15, paragraph 2, subparagraph (a) provides that an electronic negotiable warehouse receipt that is issued or endorsed to the order of a named person is transferred by endorsement and transfer of control. Article 15, paragraph 2, subparagraph (b) provides that an electronic negotiable warehouse receipt issued to bearer, or endorsed in blank or endorsed to bearer is transferred by the transfer of control.

119. Article 15, paragraph 3 sets out the pre-conditions for control of an electronic warehouse receipt. The requirements are that 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. These requirements are cumulative and all three must be satisfied. Requirements (a) and (b) are identical to the requirements set out in article 11, paragraph 1, subparagraphs (a) and (b) of the MLETR which establishes control as the electronic equivalent of possession of a transferable document or instrument.

Article 15 bis – General reliability standard for electronic warehouse receipts

120. Article 15 bis provides for the general reliability standard for electronic warehouse receipts, based on article 12 of the MLETR. Under article 15 bis, the method referred to in article 15, paragraph 3 shall 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 15 bis 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. Article 15 bis 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. Article 15 bis does not prevent enacting jurisdictions from taking into account any agreement between the parties.

Article 16 – Rights of a transferee generally

121. For brevity, the heading of article 16 is "rights of a transferee generally". 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 MLWR, 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. This is in contrast to the rights of a protected holder, which are covered under article 18.

123. Applying article 16, paragraph 1, subparagraph (b), the transferee's rights over the receipt and the goods depends 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][non-electronic] receipts, and a transfer by endorsement and transfer of control, or by transfer of control alone 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 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 claims and defences, 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. It is possible that a person who has no actual knowledge could nevertheless be acting in bad faith. 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.

A transfer that is not in the ordinary course of business could raise questions about whether the transferee was acting in good faith, as this should have caused the transferee to suspect that there was something irregular about the transfer.

127. Article 17, paragraph 2 focuses on the question of what amounts to knowledge of a claim to the warehouse receipt or the goods covered by it, which is one of the components of article 17, paragraph 1, subparagraph (b). It clarifies 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 the highest possible clarity with regard to the rights of the holder, in particular the protected holder. In legal systems where property rights can be acquired by the protected holder, it is advisable for the law to say so. Acknowledging that there are systems which do not necessarily recognize such property rights, two options are presented in the Model Law.

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 claim or defence of the warehouse operator or any other person, other than claims and defences that arise under the terms of the warehouse receipt or under the MLWR 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 property rights to the goods as it would acquire by the transfer of physical possession of the goods. 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 is against commercial practice and 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 MLWR. A warehouse operator who loses the right to raise a claim or defence against a protected holder retains any rights of compensation or indemnity that the warehouse operator may have against the depositor, for example if the warehouse receipt is invalid.

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 MLWR 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.⁸

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][non-electronic] 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 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][non-electronic] 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.⁹ 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. The MLWR 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 MLWR 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 MLWR 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 ownership of 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.

⁸ 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.

⁹ See UNCITRAL Model Law on Electronic Transferable Records, Explanatory Note, para. 114.

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. [The intermediary can only transfer the receipt as an agent. This would incorporate the principles of agency, for example, the intermediary would be able to transfer the receipt only if it had authority to do so.] [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 a guarantor

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 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 MLWR 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 operator in the particular trade.

145. Paragraph 2 indicates that the provision in paragraph 1 is a default rule. 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 allowing limitation on the extent of liability if such a duty is breached. Paragraph 2 offers the greatest possibility for the operator to vary its obligation under paragraph 1. This can be done by the terms of both the storage agreement and of the warehouse receipt. But the freedom of the operator is limited in the sense that it may not exclude or limit its liability for fraud, wilful misconduct, gross negligence or misappropriation of the goods.

Article 24 – Duty to keep goods separate

146. Article 24 stipulates the obligation of the warehouse operator to store the goods 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 nature 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 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), but charges or expenses covered by article 25, paragraph 1, subparagraph (d) are incurred under another storage agreement and therefore must be 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.

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 upon instruction 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, possession or control of 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.

Article 29 – Excuses from delivery obligation

163. 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.

164. 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.

165. 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

166. 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, for example, when the validity of the warehouse receipt comes to an end at the expiry of the period stated on the warehouse receipt and the holder claims the goods, but the operator refuses to deliver. This situation shall be dealt with in accordance with article 26.

167. 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 the storage period has expired, or 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. It was noted during the preparation of the Model Law that there is a structural imbalance. 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 injury to or loss of the goods.

168. Paragraph 1 requires notice to be given before the operator takes action. During the preparation of the Model Law, the question of who should be notified was raised for discussion. 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. Therefore, 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.

169. 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.

170. Paragraph 3 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.

Chapter V – Pledge Bonds

Introduction

171. 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 interest 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.

172. 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 MLWR 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.

173. 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 – Issuance and form of a pledge bond

174. 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. 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.

Definition of a pledge bond

175. 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. 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.

Signature and information requirements

176. 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 a condition for its validity and enforceability (see art. 9, para. 1 and accompanying commentary at paras. 93–94, 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

177. 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

178. Paragraph 5 provides that articles 3 and 6 to 14 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 9, paragraph 2 and 10, paragraph 2 to pledge bonds, any incomplete or incorrect statement of mandatory information (as listed in art. 9, para. 1) or incorrect additional information (as allowed by art. 10, 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 32 – Effect of a pledge bond

Grant of security right

179. 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

180. 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 interests 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

181. 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 33 – Transfers and other dealings

182. 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 secured credit. 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

183. 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 (and the custodian of the electronic warehouse receipt and pledge bond, as the case may be) is an important requirement to enable the holder of the warehouse receipt to exercise its right to redeem the debt 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

184. 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 31, 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 is perfected and 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 34 – Rights and obligations of the warehouse operator*Application of article 28 on split warehouse receipts*

185. 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 34, 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

186. 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 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

187. 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 32, paragraph 3 at para. 180 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] [or] [as required by the holder of the pledge bond pursuant to its procedure for enforcing the pledge bond]. The first alternative in square brackets 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. The second alternative refers to other procedures for enforcing pledge bonds in the enacting State pursuant to which the holder of the pledge bond may require delivery of the goods. Enacting States should choose the alternative that is consistent with their enforcement law.

188. 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 VI¹⁰ – Application of This Law

Article 35 – Entry into force

189. Article 35, 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.

190. Paragraph 2 of article 35 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 36 – Repeal and amendment of other laws

191. 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.

192. 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 provisions of its new law.

193. Like the other articles of the Model Law, article 36 takes effect only in the moment when the new law enacting the MLWR enters into force pursuant to article

¹⁰ This Chapter may be renumbered if the Working Group decides to adopt a chapter on electronic warehouse receipts.

35. Until that date, the provisions listed for repeal or amendment in this article remain in effect.

IV. COMPLEMENTARY LEGISLATION

A. INTRODUCTION

194. 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 and/or creating a warehouse receipt system (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.

195. As such, this Part goes beyond the scope of the MLWR 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.¹¹

196. 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.

197. 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).

198. 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 previously insured merchandise.

199. 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.

¹¹ See Part II, Section B, above.

B. LICENSING AND SUPERVISION

200. 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 participation in a WRS only after issuance of a respective license. Whether separate licences are provided for the warehouse itself and the operator of a warehouse or whether the enacting State provides only for a single licence for the operation of a warehouse may be left to the discretion of the respective rulemaker.

201. 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.

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

Scope and definitions

203. 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

204. 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.

205. 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

206. 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.

207. 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).

208. 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.

209. 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).

Licensing Period

210. 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

211. 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

212. 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.

213. 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

214. The legislation may also provide administrative procedures on the process 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

215. 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.

216. 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

217. 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 other receipt holders while the goods are stored in the warehouse. The insurance should guarantee the receipt holder's rights in case of warehouse default or failure to deliver the stored goods. Insurance thereby provides security and strengthens the trust of receipt holders to receive their goods.

218. The MLWR 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)).

219. 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.

220. 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

221. 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.

222. 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

223. 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.

224. 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”.

225. “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

226. 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 framework 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 rules, which must be reviewed at least once a year.

227. Accordingly, the warehouse’s policies and procedures on basic safety, prevention and protection must 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.

228. 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

229. 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 and/or stocks 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

230. 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

231. There are no registry-specific provisions in the MLWR. 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.

232. 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

233. The central registry functions may include registration of issued and transferred receipts, transfers of warehouse receipts, etc. The enacting State may also provide for rules regarding recognized evidence of the information contained in the register, for example confirming valid registration, for example, a certificate of registration or message or number confirming registration.

234. 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, transfer, and endorsements of receipts; settlement and 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

235. 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

236. 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

237. 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

238. In addition to the registration of 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.
