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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 Commission.

2. The draft guide was prepared by the Working Group on a Model Law on Warehouse Receipts – Guide to Enactment, convened by International Institute for the Unification of Private Law (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.9/1182).

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

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Guide to enactment

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Guide to enactment

I. Purpose of this guide

1. The purpose of this Guide to Enactment is to provide comprehensive guidance for implementing the model law on warehouse receipts (the "Model Law") at the domestic level.[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 Transactions[2] (the "MLST") and the UNCITRAL Model Law on Electronic Transferable Records[3] (the "MLETR").

2. The Guide is primarily addressed to legislative and executive branches of Governments considering introducing or reforming their legal framework for a warehouse receipt system. Moreover, by providing explanations of the rationale and application of the provisions, it is also a helpful source for users, including warehouse operators, depositors, holders of warehouse receipts and lenders, as well as judges, arbitrators and other practitioners. Finally, the Guide can also be used as a tool by development institutions supporting countries in legal reforms.

3. Several provisions of the Model Law, as well as the optional chapter V (Pledge bonds), indicate that an enacting State is required to make a decision or choose among alternative options. Most of these options were included in the Model Law to take account of structural differences of approach between different legal families and traditions concerning the design of a warehouse receipt system. The Guide explains the background and implications of such decisions or choices in order to assist enacting States in that respect.

4. Recognizing that the trend of legal reform is towards introducing a framework for electronic warehouse receipts, this Guide provides detailed discussion towards implementing a framework that supports and promotes the issuance and transfer of electronic warehouse receipts, irrespective of the technology or model used.

5. The Guide was prepared by the UNIDROIT Working Group on a Model Law on Warehouse Receipts (the "UNIDROIT Working Group") in collaboration with the Secretariats of both UNIDROIT and UNCITRAL, based on the deliberations of the UNIDROIT Working Group and UNCITRAL Working Group I.[4]

II. Introduction to the model law

A. Background and drafting history

Background information

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

[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.

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

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

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

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

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

- Mandate, powers and governance of the regulatory authority;
- Licensing criteria and procedures for warehouse operators (sometimes also quality and weight certifiers and inspectors); and
- Offences, penalties and disciplinary procedures.

11. Recognizing the important potential of warehouse receipts to strengthen the agricultural, industrial and financial systems of developing economies, several international development institutions, such as the World Bank Group (WBG), the United Nations Food and Agriculture Organization (FAO) and the European Bank for

Reconstruction and Development (EBRD), have provided support for warehouse receipt systems, of which legal reform is often a key component.[5]

Consideration by the Commission of the exploratory work on the topic

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

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

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

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

16. At its fifty-second session, in 2019, the Commission took note with appreciation of a note by the secretariat (A/CN.9/992) providing an overview of a study presented to the secretariat by the Kozolchyk National Law Center[13] on possible future work on warehouse receipts. The Commission noted the practical relevance of the project, given the importance of warehouse receipts to agriculture and food security, and their use in supply and value chains.[14] The Commission confirmed its earlier decision to include the topic in its work programme but agreed that it still needed to consider several important elements before embarking on the development of an international legal instrument on warehouse receipts. The Commission agreed to request the

[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.

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

[7] The deliberations and conclusions of the Colloquium are summarized in documents A/CN.9/913 and A/CN.9/924.

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

[9] Ibid., paras. 225 and 229.

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

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

[12] Ibid., para. 253(a).

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

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

secretariat to proceed with its preparatory work and to convene a colloquium with other organizations having relevant expertise, with a view to considering the questions of scope and nature of the work discussed at that session and possibly advancing the preparation of initial draft materials.[15]

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

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

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

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

20. The Working Group on a Model Law on Warehouse Receipts convened by UNIDROIT in consultation with the UNCITRAL secretariat (hereafter the "Working Group") held six sessions between 2020 and 2023. The progress made in the first two sessions of the Working Group was summarized in a note (A/CN.9/1066) considered by the Commission at its fifty-fourth session. The Commission took note with appreciation of the progress made and agreed that the drafting of uniform provisions

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[15] Ibid., paras. 196 and 221(b).

[16] Ibid., *Seventy-fifth Session, Supplement No. 17* (A/75/17), para. 60.

on the topic required a neutral and functional approach that respected differences in legal doctrines and practice among various legal systems.[17]

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

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

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

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

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

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

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[17] Ibid., *Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 220.
[18] Ibid., *Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 197.
[19] Ibid., *Seventy-eighth Session, Supplement No. 17* (A/78/17), para. 177.
[20] Ibid.
[21] Ibid., paras. 22(b) and 177.

[Drafting history to be completed.]

B. Purpose of the model law

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

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

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

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

C. Scope

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

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

33. An important aspect of the scope of the Model Law is its applicability to both paper-based and electronic warehouse receipts. In recent years, many States have introduced electronic warehouse receipts (EWRs) as an alternative to their paper-based counterparts or are contemplating enactment of legislation providing for EWRs only. EWRs improve trading efficiency and facilitate access to credit by removing the need for the physical transfer of receipts and thus allowing for instantaneous, low-cost transactions. Moreover, commercial documents are nowadays seen as individual components of the broader digital trade ecosystem. Thus, a warehouse receipt may, for instance, incorporate information on the origin and quality of the commodity, such

as the place of mining or conditions of growing and harvesting, which may originate in other electronic documents, such as bills of lading or certificates of origin. In order for EWRs to be effective, however, it is essential that EWRs and their paper-based counterparts have the same legal status and treatment. Article 1, paragraph 2 is important in this regard as it clarifies that a warehouse receipt may be either an "electronic record" or a "paper document". Some jurisdictions have gone a step further and require several types of commercial documents, including warehouse receipts, to be issued electronically. This reflects a policy choice typically made after a careful assessment of the public and private sector's readiness to transact exclusively electronically. The Model Law acknowledges implicitly the implications of such a choice and introduces no such requirement. A State that wishes to implement such choice could easily do so by enacting the provisions dealing with electronic warehouse receipts and adapting some of the other provisions as appropriate.

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

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

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

D. Structure

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

38. Chapter I, entitled "Scope and general provisions", outlines the scope of application of the Model Law, placing particular emphasis on its applicability to both electronic and paper warehouse receipts, and provides definitions for key terms used throughout the Model Law. Furthermore, this chapter contains provisions regarding party autonomy as well as the interpretation of the Law in respect of its international origin and the need to promote uniformity in its application.

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

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

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

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

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

E. Electronic warehouse receipts

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

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

46. The Model Law is compatible with any model and system used for the issuance and transfer of EWRs, including registries and tokens. Approaches may vary within

each category: for instance, registries may be single, centralized or multiple; general or sector-specific; public or private, etc. All these structural and organizational aspects could be addressed in complementary rules.

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

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

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

F. Financing practices and products involving warehouse receipts

50. Warehouse Receipt Finance (WRF) refers to any financial product and practice that enables the lender to rely on the underlying goods covered by a warehouse receipt as a source of repayment of a loan. Financing products such as those listed below may focus on the warehouse receipt as sole security or on a package of assets that include warehouse receipts:

- Warehouse receipt discounting: a depositor stores goods in a warehouse and receives a loan against a percentage of the value of the stored goods;
- Supplier finance: a supplier takes a loan against goods stored in the buyer's warehouse;
- Inventory finance: a buyer – e.g., a trader that aggregates goods, an exporter that exports goods, or an industrialist that processes or manufactures – takes a loan against goods stored in its own warehouse;
- Warrantage: 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; and
- Commodity *murabaha*: in the Islamic world, warehouse receipts may be used to support Shariah-compliant, or interest-free banking products.

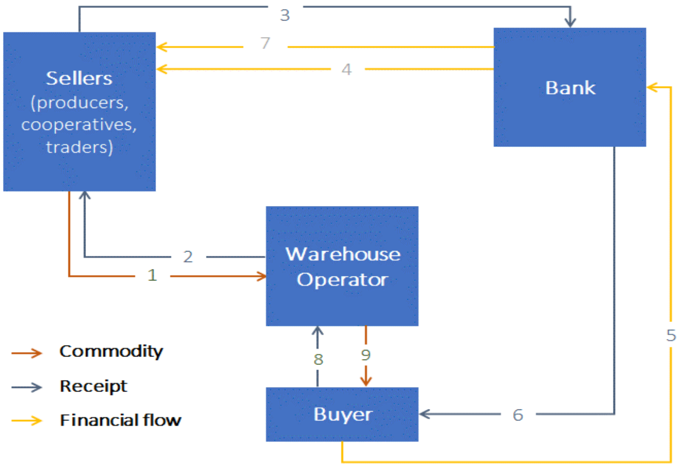
51. Prominent financial products and practices in which the warehouse receipt is just one of the assets include:

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

- All-assets lending, in which the lender lends against the entire pool of the borrower's assets, immovable as well as movable.

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

1. Borrower deposits goods at warehouse
2. Warehouse operator issues warehouse receipt
3. Warehouse receipt is encumbered as collateral
4. Bank disburses loan against warehouse receipt
5. Buyer pays sales proceeds to bank
6. Bank transfers warehouse receipt to buyer
7. Bank remits surplus to seller after satisfying the owed obligation
8. Buyer presents WR to warehouse operator
9. Warehouse operator releases goods to the buyer



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

54. On commodity derivative exchanges, warehouse receipts are typically classified as an eligible type of collateral. EWRs may also be used to settle transactions on futures and other derivative exchanges. Should the seller's position on a physically deliverable commodity derivative instrument be held open through to the delivery period, a warehouse receipt may be submitted by the seller to the exchange, typically one issued by the operator of one of its designated delivery warehouses, which will then be transferred from seller to buyer to fulfil the settlement process.

55. For commodity spot exchanges, the warehouse receipt not only fulfils delivery functions in settlement of exchange-traded contracts, as above, but also is required as the prerequisite for a seller to trade through the exchange, providing pre-trade assurance that the goods offered for sale are already in the warehouse, quality- and quantity-verified and guaranteed. In light of the above, some of the world's largest and most sophisticated WRS are operated by or in association with commodity exchanges.

56. 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 recognize warehouse receipts as documents of title and permit the efficient creation, perfection and enforcement of security rights?

- Custody risk: do the warehousing arrangements secure the presence and value of the stored assets?

- 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)?

57. The Model Law, which aims to strengthen and harmonize warehouse receipt laws around internationally agreed best practice, enhances the mitigation of both legal and custody risk, and thus can contribute to increased worldwide adoption of WRF and, more broadly, the growing use of warehouse receipts in financing transactions to drive higher volumes of commodity trade and finance at lower risk and cost.

58. In the mitigation of both legal and custody risk, the Model Law is expected to be an enabler of cross-border trade and finance. Lenders may leverage an increasingly harmonized legal framework across jurisdictions to build cross-border WRF portfolios. Moreover, cross-border harmonization may accelerate the emergence of new commodity markets and associated clearing and settlement mechanisms, by enabling the rights of buyers and sellers in different jurisdictions to benefit from 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. The formation of regional commodity markets may bring disproportionate benefit for small-scale economies that may otherwise struggle to build sufficient scale from the national market alone.

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

60. Mitigation of custody risk entails the lender evaluating the capacity of the warehouse operator to maintain the goods, or otherwise provide compensation for loss or damage that may take place while the goods are in storage. The Model Law incorporates a range of provisions that specify the obligations of the warehouse operator that issues the warehouse receipt, including a duty to verify the quality and quantity of goods described in the receipt and to take good care of them.

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

62. Lenders may also utilize a WRS, in which the regulatory aspects of WRS law – not included in the Model Law (see above Part II, C) – 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.

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

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

64. 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.

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

G. Private international law issues

66. 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.

67. Warehouse receipt laws do not typically include conflict of laws rules. Transfers of warehouse receipts have traditionally been done domestically 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.

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

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

- The law applicable to the validity of the warehouse receipt;
- The law applicable to the enforcement of a right of the holder as against the warehouse operator;

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

III. Article-by-article commentary

Chapter I – Scope and general provisions

Article 1 – Scope of application

70. Under article 1, the Model Law applies to warehouse receipts, either in the form of an electronic record or paper document. This reflects the intention to design a medium-neutral instrument. Whatever form is chosen, only one single warehouse receipt can be issued in respect of the same goods. The Model Law does not allow parties to issue concomitantly an electronic and a paper-based warehouse receipt covering the same goods, which could result in conflicting claims and losses for the holders of these receipts.

71. The Model Law does not specifically define an EWR, which is simply a "warehouse receipt" issued as an electronic record. Thus, the Model Law includes in article 2 the definition of "electronic record" based on the definition contained in article 2 of the MLETR. The notion of EWR is then based on the concept of "electronic record."

72. The Model Law does not apply to all electronic records or paper documents simply labelled "warehouse receipt". Rather it provides for two essential requirements for a document to be considered a warehouse receipt for purposes of the Model Law. This approach consolidates the definition of warehouse receipt with the essential elements of a warehouse receipt into one comprehensive provision. A paper document or electronic record that does not meet the requirements of article 1, paragraph 2, may nonetheless have some legal effect under other law of the State, for instance as evidence of the information it contains, but would not be subject to the Model Law. Article 9 lists information that must be included in a warehouse receipt. However, the omission of such information would not disqualify the paper document or electronic record from being considered a warehouse receipt for purposes of the Model Law (see paras. 97–98 below on the legal effect of omitting such information).

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

74. 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, instructs the warehouse operator to deliver the goods, and pays any outstanding storage fee (see art. 26, para. 1).

Article 2 – Definitions

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

Depositor

76. Depositor is defined in article 2, paragraph 1 as "a person who deposits goods for storage with a warehouse operator" and is a party to the storage agreement. The person depositing goods is not always the same as the holder; the Model Law makes this important distinction clear by providing separate definitions. The identity of the depositor must be included in a warehouse receipt (see art. 10, para. 1, subpara. (d)). The depositor may be a logistical company or an agent of a financial institution that takes the warehouse receipt as collateral.

Electronic record

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

Holder

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

Negotiable warehouse receipt

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

Non-negotiable warehouse receipt

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

Protected holder

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

Storage agreement

82. Paragraph 7 provides a definition of storage agreement, which is entered into between a warehouse operator and a depositor. Under paragraph 7, the storage agreement "sets out the terms on which the warehouse operator agrees to store goods." The fact that the storage agreement sets out the terms by which the goods are held will be of primary interest to the holder of a warehouse receipt. The terms of the

storage agreement may be contained in the warehouse receipt (see art. 9 on incorporation of storage agreement in the warehouse receipt). It should be noted, however, that although the Model Law assumes the existence of an underlying storage agreement, the Model Law does not deal with the storage agreement and obligations of the parties thereunder.

Warehouse operator

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

Article 3 – Party autonomy

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

Article 4 – Interpretation

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

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

Chapter II – Issuance and contents of a warehouse receipt; alteration and replacement

Article 5 – Obligation to issue a warehouse receipt

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

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

Article 6 – Electronic warehouse receipt

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

Article 7 – General reliability standard for electronic warehouse receipts

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

Article 8 – Representations by the depositor

91. Article 8 provides for representations of the depositor at the time of deposit, which are contained in subparagraphs (a), (b) and (c). Those representations are made directly to the warehouse operator, but article 8 expressly extends their benefit to all subsequent holders. Nothing in this article requires the warehouse operator to verify any representations made by the depositor under this article.

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

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

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

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

Article 9 – Incorporation of storage agreement in the warehouse receipt

96. Article 9, paragraph 1 allows the warehouse operator, by an appropriate statement in the warehouse receipt, to incorporate by reference all or some terms of the storage agreement. However, to protect subsequent holders and enhance confidence in the negotiation of warehouse receipts, paragraph 2 prevents the warehouse operator from relying on terms of the storage agreement that are inconsistent with the express terms of the warehouse receipt. In other words, a transferee takes the warehouse receipt subject to the terms of the storage agreement,

so long as they do not conflict with an express term of the warehouse receipt. A warehouse operator is required to provide a copy of the storage agreement to potential transferees on demand of the holder.

Article 10 – Information to be included in a warehouse receipt

97. Article 10 lists the information that must be included in a warehouse receipt, clarifies the effect of any incomplete or incorrect statement of information, and provides a rule addressing situations where a negotiable warehouse receipt does not list the name of the person to whose order it is issued. In the interest of legal certainty, paragraph 2 states that a failure to include any of the information listed in article 10 will not disqualify the paper document or electronic record from being considered a warehouse receipt for purposes of the Model Law. However, missing, incomplete or incorrect information may render the issuer liable under other law.

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

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

100. To increase predictability, paragraph 3 addresses situations where a warehouse receipt does not include the information required by paragraph 1, subparagraph (b) or (c), in which case it is presumed to be a negotiable warehouse receipt that is issued to bearer.

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

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

102. 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.

103. 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.

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

Article 12 – Goods in sealed packages and similar situations

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

106. 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)).

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

Article 13 – Loss or destruction of a warehouse receipt

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

109. Paragraph 1 recognizes the well-established commercial practice of warehouse operators making delivery when they are satisfied that the purported holder is the person entitled under a missing or destroyed warehouse receipt. Paragraph 1 lists the items that the purported holder must present to the warehouse operator in order to obtain a substitute warehouse receipt. They consist of adequate proof of the loss or destruction of the warehouse receipt, proof of the holder's entitlement to the warehouse receipt and indemnity in relation to the issuance of the replacement warehouse receipt (and security in support of that indemnity). Acting without a court order, the warehouse operator remains liable on the original negotiable warehouse receipt. To protect itself, the warehouse operator has the right to insist that the purported holder provide indemnity. Moreover, the warehouse operator is entitled to reimbursement of cost reasonably incurred for the replacement of the warehouse receipt, when such possibility is not covered by the storage agreement.

110. Paragraph 2 provides for specific rules with respect to loss of EWRs. 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 enforce 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.

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

112. Paragraph 4 governs the form of a replacement warehouse receipt to alert prospective transferees to the fact that an original might have been lost or destroyed. 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.

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

Article 14 – Change of medium of a warehouse receipt

114. Article 14 entitles the receipt holder to request a change of medium of a warehouse receipt from paper to electronic or from electronic to paper (see para. 1) and sets forth the minimum requirements for giving the reissued warehouse receipt effect and validity (see para. 2). The change from electronic to paper might be needed in less developed markets where some players might not have access to the technology that was used to issue the receipt to the original holder. At the time of the change of medium, the warehouse operator has the duty to ensure that the warehouse receipt can no longer be used in its previous medium (see para. 2). In case the previous warehouse receipt was in electronic form, corresponding technological actions to "delete" the EWR (or even render it inaccessible), or to flag or tag it as unusable or replaced, should be carried out by the warehouse operator. Paragraph 3 clarifies that the change of medium has no legal effect on the rights and obligations of the parties.

Chapter III –Transfers and other dealings in negotiable warehouse receipts

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

Article 15 – Transfer of a negotiable warehouse receipt

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

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

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

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

Article 16 – Rights of a transferee generally

120. 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.

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

122. Applying article 16, paragraph 1, subparagraph (b), the transferee's rights over the receipt and the goods depend on what rights the transferor was able to convey. If the transferor's rights over the receipt and the goods are curtailed in some way, for example if the transferor is not their true owner and has no authority to transfer the receipt and the goods, or if the transferor has granted a security right in the receipt and the goods to a third party, this will correspondingly affect the rights that the transferee will obtain upon the transfer of the receipt. In the former situation, the transferee will generally not obtain any property rights over the receipt and the goods. In the latter situation, the transferee's rights over the receipt and the goods will be subject to the prior security right. This effect is a consequence of the principle that a person cannot transfer 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.

123. 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

124. 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.

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

126. Article 17, paragraph 2 focuses on the question of what amounts to knowledge of a right or claim to the warehouse receipt or the goods covered by it, which is one of the components of article 17, paragraph 1, subparagraph (b). This paragraph appears within square brackets as not all enacting States may have a registry for the registration of notices with respect to security rights of the type envisaged in chapter IV of the MLST. In those States that have established such a registry, article 17, paragraph 2 would clarify that a person should not be taken to have knowledge of a claim just because information relating to that claim has been registered in a secured transactions registry specified by 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.

127. 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 as 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

128. Article 18 sets out the rights of a protected holder in a negotiable warehouse receipt. The Model Law advocates clarity with regard to the rights of the holder, in particular the protected holder. In legal systems where the protected holder becomes the owner of the goods covered by the warehouse receipt, an express legislative

recognition of the holder's ownership may further enhance legal certainty and confidence in warehouse receipts negotiation. Acknowledging, however, that there are systems which do not necessarily recognize such ownership rights, the Model Law offers two options.

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

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

131. 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 not is not an exhaustive list. It does not mean that a claim or defence that is not mentioned in article 18, paragraph 2 will necessarily affect a protected holder's rights. The protection given by article 18, paragraph 1 is broad enough to cover all claims and defences except those arising under the terms of the receipt or the Model Law.

132. 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 dispute 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.

133. 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

134. Article 19 is inspired by article 18 of the MLST, which sets out the primary methods for achieving third-party effectiveness. The function of article 19 is to encourage States to recognize the methods that a general secured transactions law should make available to achieve third-party effectiveness of a security right in a warehouse receipt. The Model Law does not assume that every State has enacted a modern secured transactions law. 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.

135. 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.[22]

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

137. It is important that enacting States with a modern secured transactions regime ensure functional equivalence between paper and electronic receipts used as collateral. This can be achieved by (i) recognizing "control" as a separate method of third-party effectiveness, or (ii) recognizing that "control" is the functional equivalent of possession. If the latter approach is chosen, the legal effect of taking possession under the secured transactions law would apply equally to security rights in electronic

[22] 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.

warehouse receipts subject to control of the secured creditor.[23] If the former approach is chosen, enacting States should ensure they have in place a priority rule, comparable to that for paper warehouse receipts as specified in article 49 of the MLST. That rule would provide that a secured creditor in control of an electronic warehouse receipt would have priority over another security right made effective against third parties by registration, subject to satisfying the conditions set out in article 49 of the MLST. The Model Law in article 18, paragraph 3 already provides a 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.

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

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

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

Article 21 – Limited representations by intermediaries

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

Article 22 – Transferor not responsible for the warehouse operators' performance

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

[23] See UNCITRAL Model Law on Electronic Transferable Records, Explanatory Note, para. 114.

Chapter IV – Rights and obligations of the warehouse operator

142. 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

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

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

Article 24 – Duty to keep goods separate

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

146. 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 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 restitution claims of each depositor if a commingled mass results in a shortfall of available goods. The Model Law leaves these issues to other law of the enacting State.

147. 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.

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

Article 25 – Lien of the warehouse operator

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

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

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

152. 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).

153. 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, which would also apply to the warehouse operator's rights set out in article 30, or by referring to enforcement procedures under the applicable secured transactions laws and, where appropriate, extending those enforcement procedures to the types of non-consensual liens covered by this article.

Article 26 – Obligation of warehouse operator to deliver

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

155. 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.

156. 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 "cancelled" 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

157. 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.

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

159. 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

160. 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, subject to satisfying the conditions set out in paragraph 1, including the payment of a fee. Splitting warehouse receipts should respect the minimum quantity to be deposited.

161. The warehouse operator may split the warehouse receipt only if three conditions are met: it must be requested by the holder of the warehouse receipt, the original warehouse receipt must have been surrendered; and any additional cost reasonably incurred by the warehouse operator as a consequence of the split and reissuance of the warehouse receipt must have been paid, except to the extent that the question of costs is separately covered by the storage agreement.

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

Article 29 – Excuses from delivery obligation

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

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

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

171. Lastly, paragraph 4 provides for terminating the storage of hazardous goods. The warehouse operator has discretion to dispose of hazardous goods in any lawful

manner as such goods might require urgent disposal, and a delay could increase the risk posed by the goods. However, the warehouse operator may only rely on this paragraph if it was not aware, when the goods were deposited with it, that the goods were hazardous.

Chapter V – Pledge bonds

Introduction

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

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

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

Article 31 – Scope of provisions on pledge bonds

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

Article 32 – Issuance and form of a pledge bond

176. Article 32, paragraph 1, which mirrors the structure of article 1, paragraph 2, states the distinct function of a pledge bond under a dual system as a document that

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

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

Signature and information requirements

178. Paragraph 2 requires both the warehouse receipt and the pledge bond to be "identified" as such, which is usually done by their containing clear language to that effect. It should be noted that, whereas in a single system the designation of the document as "warehouse receipt" is mandatory information (see art. 10, para. 1 and accompanying commentary at paras. 97–98, 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

179. 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

180. Paragraph 4 provides that articles 5 to 14 (with the exception of article 10, paragraph 1, subparagraph (a)) apply to pledge bonds in the same way as they apply to warehouse receipts. Among them, articles 9 to 11 relate to the content of the warehouse receipt, and consequently the pledge bond. As a result of applying articles 10, paragraph 2 and 11, paragraph 2 to pledge bonds, any incomplete or incorrect statement of mandatory information (as listed in art. 10, para. 1) or incorrect additional information (as allowed by art. 11, para. 1) on the pledge bond does not affect the validity of the pledge bond. However, the warehouse operator is liable for

any losses suffered by any person, most typically the holder of the pledge bond, as a result of such incomplete or incorrect statement. The rules on the scope and measurement of loss are left to the discretion of each enacting State.

Article 33 – Effect of a pledge bond

Grant of security right

181. 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

182. The holder of the warehouse receipt is not necessarily the debtor of the credit secured by the pledge bond, but it has an interest in terminating the security right in the goods covered by the pledge bond so that it can obtain the goods from the warehouse operator. Indeed, the holder of the warehouse receipt may wish to be able to trade in the goods free and unencumbered or also claim their delivery from the warehouse operator. Both results are only possible after the security rights of the holder of the pledge bond are extinguished, and the documents are reunited. For that purpose, paragraph 2 recognizes the right of the holder of the warehouse receipt to pay the amounts secured by the pledge bond to its holder (of which the holder of the warehouse receipt has knowledge through the statement required by article 34, 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

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

Article 34 – Transfers and other dealings

184. Until the warehouse receipt and the pledge bond are separately transferred, the decision to detach them from one another, to keep and transfer them together or to transfer only one of them, rests entirely with the holder of the warehouse receipt. The holder may choose any of those options according to its business judgment and financing needs. Once separated, each document will transfer the rights it represents: the warehouse receipt will transfer rights to the goods, and the pledge bond will transfer a security right. Paragraph 1 stresses the import of each document by clarifying that the holder of a pledge bond acquired a security right but will neither directly nor by implication acquire ownership of the goods.

Separate transfer of warehouse receipts and pledge bonds

185. Paragraph 2 is an important provision to place any holders of the warehouse receipt and the pledge bond as well as the warehouse operator on notice of the separate circulation of the two documents as well as the amount of the debt secured by the

pledge bond and the due date for payment. Transcribing such information into the warehouse receipt and providing a copy of the completed warehouse receipt to the warehouse operator is an important requirement to enable the holder of the warehouse receipt to exercise its right to obtain the pledge bond in accordance with article 33, paragraph 2 and claim delivery of the goods pursuant to article 35, 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. 35, 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

186. 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 3 determines the application of articles 15 to 18 and 20 to 22 to pledge bonds. Conversely, paragraph 3 does not provide for the application of article 19 on third-party effectiveness of security rights to pledge bonds, since third-party effectiveness, in the case of a pledge bond, derives automatically from article 32, paragraph 1 and does not require the possession or control of the warehouse receipt. As the pledge bond is analogous to a negotiable instrument, the security right it represents becomes effective against third parties by the holder acquiring the pledge bond by endorsement and possession, or by endorsement and transfer of exclusive control if in electronic form.

Article 35 – Rights and obligations of the warehouse operator

Application of article 28 on split warehouse receipts

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

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

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

When the amount secured by the pledge bond is already due

189. However, once the debt secured by the pledge bond has matured and the secured creditor has not been satisfied by the due date, the presentation of the warehouse receipt is no longer needed, and the unsatisfied creditor holding the pledge bond is entitled to enforce its security rights by way of taking possession of the encumbered goods (see commentary on article 33, paragraph 3 at para. 183 above). In such a case, paragraph 3 provides for delivery of the goods upon presentation of the pledge bond whether or not the warehouse receipt is also surrendered. The provision assumes that if the debtor was in default, the creditor should be able to foreclose on the security (the underlying goods) without any need to produce the warehouse receipt. The detached warehouse receipt no longer has value unless accompanied by a pledge bond.

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

Chapter VI – Application of this law

Article 36 – Entry into force

191. Article 36, paragraph 1 requires the enacting State to determine the date when the new law will enter into force. If the enacting States so wishes, entry into force may be conditional to the establishment of a registration system (see art. 107 MLST). 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.

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

Article 37 – Repeal and amendment of other laws

193. 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.

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

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

IV. Complementary legislation

A. Introduction

196. 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. However, in order for these provisions to be

applied effectively, they may need to be complemented by legislation creating an institutional framework for regulating warehouses or creating a WRS. The primary purpose of this Part is to provide guidance on the development of complementary rules to implement the provisions of the new warehouse receipts law effectively.

197. As such, this Part goes beyond the scope of the Model Law to provide guidance on designing regulatory aspects of WRS, which do not directly implement the provisions of the Model Law. The decision to include such guidance in the Guide to Enactment was made because of the importance of these aspects in operationalizing the WRS, 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.[24]

198. 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.

199. 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 WRS, administration of warehouse licences, licensing periods, inspections, and suspension or revocation of licences. 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 licences).

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

201. 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 its accessibility.

B. Licensing and supervision

202. 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 licence. The enacting State may decide whether to provide separate licences for the warehouse itself and the operator of a warehouse or only a single licence for the operation of the warehouse.

203. An adequate licensing and inspection system for warehouses will enhance confidence in warehouse receipts. The following are some of the provisions that may be considered.

Scope and definitions

204. 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

[24] See Part II.B, above.

vaults and tanks respectively for precious metal and oils, or alternative storage facilities like silo bags, and whether it may be public or private or both.

Administration

205. 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.

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

Licensing requirements

207. 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 licence will be issued by the licensing authority.

208. 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).

209. 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.

210. Warehouse operator requirements: The licensing authority may require the warehouse operator to meet certain conditions (for example, legal registration, management capacity, financial resources, and standard operating procedures). It may also require the warehouse operator to issue warehouse receipts even where the depositor does not request one (see art. 5).

Licensing Period

211. The legislation may provide for a licence validity period that is annual or multi-year depending on the existing licensing practices.

Inspections

212. The legislation may provide for inspections of warehouses as a condition of granting the licence to ensure transparency and maintenance of standards in the storage industry. Inspections may be carried out not only during the licence 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

213. The legislation may provide the parameters and the procedure of the inspections e.g., inspection of the goods in storage, storage records, 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. Obstruction of inspectors may constitute an offence.

214. The legislation may provide for the appointment of inspectors to undertake inspections for the issuance of licences and to monitor the maintenance of quality standards during the validity of the licences 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 licence

215. The legislation may also provide administrative procedures for suspension and revocation of licences, including giving notification of the intention to suspend or revoke the licence to the warehouse operator. The administrative procedure may provide for a hearing of the warehouse operator before the suspension or revocation of the licence. 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 offences

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

217. The conditions under which a licence 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

218. The enacting State may require the warehouse operator to procure mandatory insurance policies for the infrastructure and goods in storage, professional indemnity or third-party liability insurance. The overall aim of requiring warehouse operators to insure the deposited goods is to protect the rights of depositors, creditors, and holders while the goods are stored in the warehouse. The insurance should safeguard the holder’s rights in case of warehouse insolvency or failure to deliver the stored goods. Insurance thereby provides security and strengthens the trust of holders to receive their goods.

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

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

221. 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

222. 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.

223. 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

224. 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, agricultural products may need to be covered against fire and standard perils. A common categorization 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, separate coverage may be needed for civil unrest, political violence and terrorism.

225. 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 mould, breakage, marring or scratching, criminal acts, and acts of war. It is necessary that the minimum events set out in the legislation are not excluded from the coverage of "all risks".

226. "All risks" policies provide more robust 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 operators when negotiating the insurance contract.

Risk-reduction measures

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

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

- the physical security of the facilities where the goods are 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 centre – 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.

229. The cost 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

230. 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 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 types of assets covered by the relevant insurance policy. This includes all goods owned by the insured or third parties in custody, for which they are legally responsible, and that are located at the declared locations.

Separately insured merchandise

231. The legislation would not preclude depositors from taking out their own insurance to cover some or all risks during the period the goods are in storage or storing the goods without insurance. In these cases, the storage fees would likely be lower. 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

232. There are no registry-specific provisions in the Model Law. However, an enacting State may develop additional rules for the establishment and maintenance of a registry to keep track of warehouse receipt transactions and warehouse receipts issued by warehouses at a central database.

233. When drafting additional rules for registries, the enacting State may wish to achieve a balance between legal certainty and impeding or forestalling 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

234. The central registry functions may include registration of issued and transferred receipts. The enacting State may also provide for rules regarding the evidentiary effect of the information contained in the registry.

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

receipts; delivery of goods; cancellation and surrender of receipts; loss or destruction of warehouse receipts; and replacement of warehouse receipts.

The institution designated to undertake registration

236. 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 a private entity under the supervision of a public authority.

The duty to register warehouse receipt transactions

237. 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

238. 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 record of all transfers for an appropriate time span after the respective warehouse receipt no longer covers goods;
- 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

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