

WAREHOUSE RECEIPTS
DEVELOPING AN UNCITRAL INSTRUMENT ON WAREHOUSE RECEIPTS

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Annex I: WRS Initiatives By International and Regional Organizations at a Glance

I. BACKGROUND INFORMATION

The purpose of this report is to examine the desirability and utility of a United Nations Commission on International Trade Law (UNCITRAL) instrument on warehouse receipts. The analysis shows that there are significantly different approaches towards warehouse receipts legislation and regulation globally. The warehouse receipts-related documents published by regional and international organizations such as the World Bank Group (“WBG”), the European Bank for Reconstruction and Development (“EBRD”), the Food and Agriculture Organization of the United Nations (“FAO”), the Organization of American States (“OAS”), UNCITRAL, and the International Organization of Securities Commissions (“IOSCO”) also reveal a number of differences. The UNCITRAL instruments that, in one way or another, affect warehouse receipts (e.g., security rights in negotiable documents) do not provide adequate and holistic guidance to countries seeking to legislate in the area of warehouse receipts.

In March 2017, during the UNCITRAL Fourth International Colloquium on Secured Transactions, the panel on warehouse receipt financing concluded that UNCITRAL should develop an instrument on warehouse receipts in the form of a model law.¹ Specifically, the panel suggested

¹ UNCITRAL Fourth International Colloquium on Secured Transactions (15-17 March 2017, Vienna), available at https://uncitral.un.org/en/colloquia/security/papers_2017.

that this instrument should concentrate on “a modern general framework for the issuance and transfer of warehouse receipts, the duties and rights of issuers and holders of warehouse receipts, and the allocation of losses in case of a shortage of stored assets.”² In addition, the warehouse receipts instrument “could also address the use of warehouse receipts as collateral that are not negotiable documents and especially the third party effectiveness of security rights in electronic warehouse receipts.”³

In April 2018, the governments of the United States and Mexico submitted a proposal for an UNCITRAL model law on warehouse receipts (Proposal). The Proposal was inspired by the UNCITRAL Fourth International Colloquium on Secured Transactions and recommended that an UNCITRAL Working Group should be established to “harmonize and modernize the legal framework on warehouse receipts” for the purpose of creating a corresponding instrument, which would “allow many businesses to benefit from a predictable and modern [regime] that facilitates sales of warehouse receipts, as well as their use as collateral for loans, whether domestically or in cross-border transactions.” The proposal addresses the desirability and the feasibility of the legal regime.

The desirability component of the Proposal is underpinned by the assumption that an effective warehouse receipts system benefits all of the participants in the commodity market, whether in agriculture or other industries (e.g., mining), including producers, warehouse operators, traders, and creditors. This assumption is generally accepted among international organizations and

² UNCITRAL, *Possible Future Legislative Work on Security Interests and Related Topics* (April 20, 2017) at 11, available at <http://undocs.org/EN/A/CN.9/913>.

³ *Id.*

governments alike, providing economic justification for warehouse receipt initiatives. The Proposal also provides specific examples for the desirability of an UNCITRAL instrument, including: i) the fact that a majority of economies still lack norms governing warehouse receipts; ii) the need to harmonize existing standards on warehouse receipts promoted by international organizations like the WBG and the EBRD; and iii) the growing importance of warehouse receipts in supply-chain and value-chain financing.

The feasibility of the Proposal is premised on UNCITRAL's unique position to engage in this type of work that has already resulted in the adoption of international standards facilitating modernization and harmonization of laws. Of relevance to warehouse receipts, those laws and standards include: i) the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partially by Sea ("the Rotterdam Rules"); ii) the UNCITRAL Model Law on Electronic Transferable Records; and iii) the principles, recommendations, and model provisions contained in the UNCITRAL texts on secured transactions. Although these model laws and standards address some issues related to warehouse receipts, they do not provide a comprehensive and systematic framework for a modern warehouse receipts regime. A future model instrument would build on UNCITRAL's extensive experience in developing international standards, the warehouse receipts initiatives of other international organizations, and the practices of countries in instituting warehouse receipts systems.

II. ASSESSMENT OF DOMESTIC LEGISLATIVE AND REGULATORY FRAMEWORKS

This section covers the domestic legislative and regulatory framework on warehouse receipts and related matters in the following six jurisdictions: Bulgaria, France, Malawi, Mexico, Philippines,

and the United Arab Emirates. The goal of this section is to assess the different legislative/regulatory approaches to warehouse receipts systems (WRS) around the world and illustrate the need for modernization. The approaches vary, for instance, some jurisdictions have a general framework embedded in a code while others have stand-alone warehouse receipts laws. Some enacted legal rules on electronic warehouse receipts (EWRs) while in others contractual frameworks underpin the trading of EWRs. A few have also enacted specialized legislation applicable to particular sectors, such as warehouse receipts covering agricultural products and gas. Legal traditions have also shaped some of the approaches of legislative frameworks on warehouse receipts. For instance, many civil law jurisdictions—following the French model—have implemented a dual WRS, where the warehouse issues a warehouse receipt (also known as a certificate of title) and a pledge bond (also known as a warrant). The warehouse receipt represents ownership rights over the stored goods while the pledge bond is used to secure an obligation, such as a loan to a farmer who deposited crop into a warehouse. In addition, some civil law jurisdictions analogize warehouse receipts to negotiable instruments and securities, applying many rules governing these instruments and securities interchangeably. In contrast, many common law jurisdictions, especially those that follow the English law, do not have any legislation on warehouse receipts whatsoever.

Many of the jurisdictions analyzed in this section are covered by the World Bank’s Enabling the Business of Agriculture 2017 Report (hereinafter “EBA Report”). The EBA Report builds on the World Bank’s Doing Business methodology and quantifies regulatory approaches and legal barriers that affect the business of agriculture in 62 countries across 12 topic areas.⁴ The EBA

⁴ Enabling the Business of Agriculture, available at <http://eba.worldbank.org/> (last accessed Sept. 20, 2018).

Report provides quantitative indicators on regulations for seed, fertilizer, machinery, finance, markets, transport, water, and information and communications technology (ICT). Specifically, the finance indicator measures, among others, the “use of agriculture relevant assets as movable collateral and availability of credit information on low-amount loans, including from non-bank lenders.” The Warehouse Receipts Index of the EBA Report measures the following five characteristics of a WRS: i) the existence of a law regulating the operation of warehouse receipts; ii) whether the warehouse operator is required by law to provide a performance guarantee, such as a bond, an indemnity or guarantee fund, and/or insurance; iii) whether warehouse receipts are negotiable; iv) which types of receipts may be issued (paper-based, electronic, or both); and v) what information must be provided on a warehouse receipt in order for it to be legally valid (e.g., date of issuance, location of the storage facility, description of the goods, security right over the goods etc.).

A. BULGARIA

Bulgaria’s WRS was rated first in a 2009 comparison of the systems in Eastern Europe and Central Asia (“EECA”), prepared by the Food and Agricultural Organization of the United Nations (“FAO”). The 2009 FAO assessment classified Bulgaria as an “advanced” warehouse receipt WRS.⁵ Whether this remains the case after post-2009 legislative developments is arguable, particularly after 2015, when Bulgaria’s National Assembly repealed the warehouse receipts law applicable to the storage and marketing of grain on which the FAO assessment was based. Bulgaria

⁵ The use of warehouse receipts in agriculture in transition countries, p. 10 (FAO, 2009) (“For the last eight years, the system has established itself as a major factor in stability of the grain market, and there have been no defaults related to the activities of licensed public warehouses. The financial sector lends an annual 10 to 50 million euro against warehouse receipts, depending on market prices. Some local traders finance their grain trading operations completely on the basis of warehouse receipts and off-take contracts, without any fixed assets required by the banks.”), available at <http://www.fao.org/3/a-i3339e.pdf>.

nevertheless meets the minimal requirements of a functional WRS, including specific rules governing warehouse receipts, their transfers by negotiation, and performance guarantees.

Bulgaria's current WRS is adversely affected by a lack of supervision with respect to warehouses storing agricultural commodities (particularly grain) and a fragmented secured transactions framework. Additionally, an underdeveloped commodity market and an absence of an EWR exchange limit the potential of the WRS. The Law on Electronic Documents and Electronic Services (2001)⁶ is insufficient to provide an adequate basis for institutionalization of EWRs.

In 2013, Bulgaria enacted a law, which provides for warehousing and an associated regulatory framework with respect to crude oil and petroleum products. Moreover, Bulgaria's experience in eliminating its specific WRS for grain is illustrative of the challenges faced by other EECA countries, such as Ukraine.

a. Legislative Framework

Bulgaria's warehouse receipts laws are presently comprised of the: i) the Commercial Law (1991),⁷ which is similar in form to a commercial code typically enacted in a civil-law jurisdiction that contains provisions governing warehouse receipts transactions for all goods; and ii) the Law on the Storage of Crude Oil and Petroleum Products (2013),⁸ which governs warehouse receipts

⁶ Law on Electronic Documents and Electronic Services (2001), available at <https://www.lex.bg/laws/ldoc/2135180800>; see also Regulation (EU) No 910/2014, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0910>.

⁷ Commercial Law (1991), available in Bulgarian at <https://lex.bg/laws/ldoc/-14917630>; available in English at <https://www.ebrd.com/downloads/legal/securities/bulgaria2.pdf>.

⁸ Law on the Stockpiling of Crude Oil and Petroleum Products (2013), available in Bulgarian at <https://www.lex.bg/laws/ldoc/2135837969>.

transactions for oil as well as provides for the associated regulatory framework. Accordingly, Bulgaria's WRS contains general, and commodity-specific, legislation.

Although the Law on the Storage and Marketing of Grain (1999),⁹ which governed warehouse receipts transactions for grain, was repealed in 2015,¹⁰ some of its provisions are discussed below. It was drafted with technical assistance provided by the United States Agency for International Aid ("USAID"), during a period when international organizations were particularly active in developing warehouse receipts systems for grain across the former Soviet sphere. Bulgaria's specific WRS for grain was eliminated due, at least in part, to the inability or unwillingness of the government to fund its comprehensive regulatory framework.

The Law on the Stockpiling of Crude Oil and Petroleum Products was enacted for Bulgaria to comply with the requirements set forth in Council Directive 2009/119/EC,¹¹ which imposes an obligation on European Union Member States to maintain minimum stocks of crude oil and petroleum products.¹² Whereas the Law on the Storage and Marketing of Grain was intended to facilitate the fluid exchange of grain and grain products in an organized commodity market, the Law on the Stockpiling of Crude Oil and Petroleum Products is primarily intended to secure Bulgaria's crude oil supply, nearly 99% of which is imported.¹³ This partly explains the more

⁹ Law on the Storage and Marketing of Grain (1999), available in Bulgarian at <https://www.ciela.net/svobodna-zona-normativi/view/2134424582/zakon-za-sahranenie-i-targoviya-sas-zarno>.

¹⁰ Law on the Termination of the National Grain Service (2015), available in Bulgarian at http://www.mzh.government.bg/media/filer_public/2018/03/26/zakon_za_zakrivane_nsz.pdf.

¹¹ Council Directive 2009/119/EC (2009), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:265:0009:0023:EN:PDF>.

¹² New Crude Oil and Petroleum Products Reserves Act; Changes to Director Qualifications Requirements, available at <http://www.newbalkanslawoffice.com/publications/new-crude-oil-and-petroleum-products-reserves-act-changes-to-director-quali>.

¹³ "Bulgaria: National Energy Indicators and Policy Challenges," CENTER FOR STUDY OF DEMOCRACY, p. 6 (2014), available at www.csd.bg/fileSrc.php?id=22673.

restrictive regime of the Law on the Stockpiling of Crude Oil and Petroleum Products with respect to transferring warehouse receipts.

Finally, the Law of Obligation and Contracts (1950)¹⁴ and the Commercial Law provide a regime governing the creation, perfection and enforcement of possessory pledges over movable assets, including warehouse receipts. The Law on Registered (Special) Pledges (1997)¹⁵ provides for non-possessory pledges, some provisions of which also affect warehouse receipts.¹⁶ The framework does not align with the international best practice, such as the UNCITRAL Model Law on Secured Transactions (2016).

1. Types of Warehouse Receipts

The Bulgarian WRS contains two types of double paper warehouse receipts: i) for all goods generally, and ii) for oil and petroleum products in particular. Bulgarian law does not recognize non-negotiable warehouse receipts, a “single” warehouse receipt, or EWRs.

Article 577(1) of the Commercial Law provides that “[a]t the request of the bailor, the bailee shall issue a warehouse receipt for the [deposited] good.” Article 577(2) provides that “[t]he warehouse receipt...shall consist of a certificate of title and a pledge certificate,” and also enumerates the

¹⁴ Law of Obligations and Contracts (1950), *available in English at* <http://www.bulgaria-law-of-obligations.bg/law.html>.

¹⁵ Law on Special (Registered) Pledges (1997), *available in English at* <https://www.ebrd.com/downloads/legal/facts/bulgaria.pdf>.

¹⁶ *See* Georgi Tzvetkov and Lyoboslav Lyubenov, *International Secured Transactions: Bulgaria*, p. 1 (Oxford, 2010) (“Since 1997, the modern techniques of non-possessory pledges, implemented in article 9 of the Uniform Commercial Code (UCC) of the United States and the Model Law on Secured Transactions of the European Bank for Reconstruction and Development (the “EBRD Model Law”), have made their way into Bulgarian secured credit law”), *available at* <http://www.dgkv.com/uf/publications/unc19bul.pdf>.

elements that both parts must contain.¹⁷ A “double” paper warehouse receipt, thus consists of i) a goods note, which evidences the holder’s right to receive the goods stored in the warehouse; and ii) a pledge note, which evidences the holder’s security right.

The Law on the Stockpiling of Crude Oil and Petroleum Products provides for a special type of warehouse receipt for oil and petroleum products.¹⁸ The Law on the Stockpiling of Crude Oil and Petroleum Products recognizes the warehouse receipt as a type of “promissory security” that, in turn, falls under the broader category of a security. This is the case in many EECA countries, where warehouse receipts are also ordinarily classified as securities. Article 35(3) additionally provides that “[a] warehouse receipt, issued for a quantity, stored in a warehouse, which is not registered [i.e. licensed]... is invalid.” Article 35(4), moreover, provides that “[a] warehouse receipt shall be issued after its entry into the warehouse registry of the respective warehouse on the basis of a signed and written contract for deposit and shall consist of a goods note and a pledge note”. Article 35(5) further provides that the two parts of the warehouse receipt shall contain the elements enumerated in Article 577(2) of the Commercial Law as well as four additional elements.¹⁹ Finally, Article 35(10) provides that “[a] warehouse receipt shall be issued in a form approved by the

¹⁷ Both parts of the warehouse receipt must contain: 1. indication of the public warehouse and the sequence number under the warehouse register; 2. name and address of the depositor; 3. type and quantity of goods and whether they may be mixed with other goods; 4. time period for keeping the goods; 5. statement by the depositary that he shall deliver the goods as agreed; 6. acts to be undertaken by the depositary for preservation of the goods; 7. information whether the goods are insured, with whom, for what sum insured, against what risks and for what premium; 8. amount of remuneration due and unpaid expenses prior to the issue of the warrant; 9. amount of ullage, except where the goods have been accepted by numbers; 10. place and date of issue of the warrant; 11. signatures of the depositor and the depositary.

¹⁸ Under Article 35(2) Law on the Stockpiling of Crude Oil and Petroleum Products, a warehouse receipt is defined as a “security evidencing the stockpiling of [crude oil and petroleum products] under this Law.”

¹⁹ Those elements are as follows: i) the name “warehouse receipt for crude oil and petroleum products,” ii) the registration number of the warehouse and the date it was entered into the warehouse registry, iii) the number and date of the certificate of conformity regarding liquid fuels, and iv) the duration of storage.

President of the [State Reserve] and printed in accordance with the terms and procedures for printing securities.”

2. Transfer of Warehouse Receipts

Transfers of warehouse receipts are governed by the relevant provisions of the Commercial Law. However, there are some special rules governing transfers of warehouse receipts for oil. Articles 578-79 of the Commercial Law govern the procedure for transferring warehouse receipts, including to secure obligations. Article 578(2) provides that the general rules governing the transfer of a bill of exchange, and in particular Articles 466-70 and Article 475, apply to the transfer of a warehouse receipt.²⁰ Articles 468-69, in turn, provide that transfers of bills of exchange may be completed by endorsement (in cases where the draft is made out to a named individual), and delivery to the transferee. Article 578(1) additionally provides that warehouse receipts may be transferred by endorsing the back side of both the goods note and the pledge note. Pursuant to Article 578(3), an endorsement on the pledge note alone “shall constitute a right of pledge on the goods deposited in favor of the endorsee.” Article 582 provides that “[t]he goods deposited shall be returned to the depositor, or where a warehouse receipt has been issued, to the holder of the receipt who is established through the continuous sequence of endorsements, against presentation of the receipt.”

Article 35(9) of the Law on the Storage of Crude Oil and Petroleum Products provides that “[a] warehouse receipt, and its components, may not be endorsed.” However, this would not preclude

²⁰ The Bulgarian system for transferring bills of exchange appears to be based in part on the UN Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930), *available at* https://www.uncitral.org/pdf/english/texts/payments/billsnotes/X_12_e.pdf.

their transfer by other means, such as assignment. Article 35(9) additionally provides that “the quantities of crude oil and petroleum products covering emergency reserves cannot serve as a guarantee, except for a pledge to secure a bank loan for the purchase of crude oil and petroleum products.”²¹ Accordingly, only acquisition security rights may be created with respect to the commodity stored in such a warehouse. Emergency reserves transferred for collateral purposes, moreover, are subject to restrictions, which limit the utilization of warehouse receipts for oil as a commodity-financing instrument.

b. Regulatory Framework

The following summarizes the regulatory framework for warehouses relating to i) all goods; ii) crude oil and petroleum products; and iii) grain (under the Law on the Storage and Marketing of Grain repealed in 2015).

1. Generic Regulatory Framework

There is no comprehensive regulatory framework in place for public warehouses. Moreover, there is no general requirement that warehouses obtain a license to accept goods for storage or issue valid warehouse receipts. The Commercial Law imposes a duty on the bailee to enter the contract [for the deposit of goods] in a warehouse registry that it must maintain.²² The procedure for maintaining the warehouse registry and making valid entries therein is determined by the Ministry of Justice.²³ The Commercial Law provides a general requirement that warehouses insure the

²¹ See Law on the Stockpiling of Crude Oil and Petroleum Products (2013), Article 4, which provides that automobile gasoline and gas oils, kerosene type jet fuels, and diesel fuel constitute “emergency reserves.”

²² *Id.* at 574(2).

²³ *Id.* See also Regulation No. 3 on Warehouse Registers for a Public Warehouse, available at <http://www.justice.government.bg/Files/Naredba3.pdf>.

goods stored in their facilities against damage caused by fire, flood, and earthquake.²⁴ Thus, the Commercial Law contains a few general rules of a regulatory nature relevant to warehouses. The intention was for specific laws or regulations to provide for a detailed regulatory framework.

2. Former Regulatory Framework for Grain

Although a regulatory framework governing the storage of grain and issuance of corresponding warehouse receipts is no longer in place, it is nevertheless informative to highlight some of its features. This is because it is representative of many EECA countries, such as Ukraine, that attempted to institute comparable regulatory frameworks and faced similar challenges, particularly with respect to securing sufficient funding from the regulated participants to support the supervisory regime. The regulatory regime thus has a significant impact on the commercial law framework governing the issuance and transfers of warehouse receipts.

The Law on the Storage and Marketing of Grain empowered the Ministry of Agriculture and Food (“MinAgro”) to provide for a “state policy regarding the production, marketing, storage and processing of grain.”²⁵ Accordingly, MinAgro issued corresponding rules and regulations, particularly with respect to organizing the National Grain Service (“NGS”), which was a sub-agency within MinAgro charged with implementing the WRS for grain, including administering a central electronic registry of warehouse receipts issued by grain warehouses,²⁶ as well as supervising warehouses to ensure compliance with the applicable standards.²⁷

²⁴ *Id.* at 575(4).

²⁵ Law on the Storage and Marketing of Grain, Article 3.

²⁶ *Id.* at 21(a).

²⁷ *Id.* at 4.

The Law on the Storage and Marketing of Grain effectively provided for a mandatory licensing requirement for public grain warehouses: only licensed warehouses could issue valid warehouse receipts for grain,²⁸ and unlicensed warehouses that accepted grain for storage were subject to monetary sanctions.²⁹ Although MinAgro acted as the primary licensing authority, the NGS accepted and screened applications and sent a corresponding recommendation on whether or not to approve the application to MinAgro. The NGS also issued certificates of registration to warehouses that confirmed their compliance with the applicable rules and regulations regarding the structure and maintenance of their storage facilities.³⁰ The NGS recorded licensed warehouses and registered storage facilities in a publicly accessible central electronic registry.³¹ Accordingly, the WRS for grain contained a dual licensing regime with respect to warehouses: i) a licensing requirement for entities engaged in the public storage of grain (i.e. operators), and ii) a registration requirement for the grain storage facilities. In addition to infrastructural requirements, license applicants also had to meet managerial requirements,³² provide a bank guarantee in favor of MinAgro,³³ and take out insurance, covering the grain stored in their facilities, against fire, flood, and earthquake damage.³⁴ Moreover, licensed warehouses were required to join the Guarantee Fund, which indemnified depositors and holders of warehouse receipts in cases where participating warehouses failed to meet their obligations.³⁵

²⁸ *Id.* at 16(3).

²⁹ *Id.* at 33(1).

³⁰ *Id.*

³¹ *Id.* at 11i and 13(1).

³² *Id.* at 11a.

³³ *Id.* at 9(4).

³⁴ *Id.* at 10(4).

³⁵ *Id.* at 9a(1).

The NGS also supervised public grain warehouses, which primarily involved on-site inspections of storage facilities.³⁶ Where violations were discovered, the NGS was authorized to impose sanctions on warehouses, including recommending to MinAgro that their license be revoked, and removing their storage facilities from the central registry.³⁷

The repealed Law on the Storage and Marketing of Grain thus provided a comprehensive, and also quite complex, framework for regulating and supervising Bulgaria's WRS, complete with: i) regulatory and supervisory bodies; ii) mandatory licensing and registration requirements; iii) warehouse and warehouse receipts registries; iv) performance guarantees; and v) an operational guarantee/indemnity fund.

The elaborate regulatory framework that was provided for under the Law on the Storage and Marketing of Grain did not function in a sufficiently cost-effective manner to financially sustain the NGS over the long term. This seemed to be the case despite the fact that Article 4a of the Law enumerated several possible sources of funding other than the state budget, which included: i) licensing and registration fees; ii) certification fees (confirming the quality of the grain); iii) monetary penalties imposed for violations; and iv) the collection of taxes.

There were several references in the Law to the trading of grain covered by warehouse receipts on the commodity exchanges,³⁸ and even the financial markets (in the case of warrants).³⁹ However, no such organized trading was ever established, primarily due to an underdeveloped commodity

³⁶ *Supra* note 25, Article 29(5).

³⁷ *Id.* at 32(2).

³⁸ *See id.* at 19(1), 23(3), and 33(1).

³⁹ *Id.* at 19(2).

and financial market, including a general lack of associated trading infrastructure.⁴⁰ The use of warehouse receipts for grain in Bulgaria was therefore limited to securing loans from banks, rather than facilitating trades on organized exchanges.⁴¹ One of the reasons that the NGS was unable to sustain itself from funds derived from market participants was an insufficient volume of transactions on the grain market.

Notably, Ukraine faced a similar problem with respect to its WRS for grain. Rather than repealing its corresponding warehouse receipts law, it eliminated its licensing and supervisory body and never implemented its guarantee/indemnity fund. Presently, Ukraine is considering a proposal to transfer licensing and supervisory functions to commodity exchanges regulated by a securities exchange commission.

3. Regulatory Framework for Oil

The regulatory framework for storing oil and issuing corresponding warehouse receipts generally aligns with that which was formerly in place with respect to grain until 2015. Accordingly, the WRS for oil contains a regulatory and supervisory body vested with the authority to issue rules and regulations, register (license) and supervise warehouses, and impose sanctions where violations are uncovered.

The Law on the Stockpiling of Crude Oil and Petroleum Products provides that the “State Agency ‘State Reserve and Wartime Stocks’ [“the State Reserve”] ... shall be a central body of the

⁴⁰ Krasimir Davchev and Alexander Davchev, “Terms and conditions for launching a futures commodity exchange trading in Bulgaria,” UNIVERSITY OF AGRIBUSINESS AND RURAL DEVELOPMENT, p. 101 (2015), available at <http://regions.uard.bg/index.php/regions/regions/paper/viewFile/21/12>.

⁴¹ *Id.*

executive branch and shall perform the functions of... managing stockpiles.”⁴² Accordingly, the State Reserve issues rules and regulations, such as “on Inspections, Conducted by the [State Reserve]...” (“Regulation 1”).⁴³ The State Reserve also “supervises the creation, storage, renewal, use and restoration of the stockpiles,”⁴⁴ which includes registering and inspecting warehouses.⁴⁵

Rather than “licensing,” the Law on the Stockpiling of Crude Oil and Petroleum Products provides a regime for “registering” warehouses, which is substantively the same as licensing.⁴⁶ Only warehouses registered with the State Reserve may store crude oil and petroleum products.⁴⁷ The State Reserve is authorized to conduct on-site inspections of the warehouses and storage facilities.⁴⁸ Where violations are uncovered, the State Reserve may terminate a warehouse registration,⁴⁹ as well as impose a range of other administrative penalties, including monetary fines.⁵⁰ Bulgaria’s WRS for oil thus consolidates regulatory, supervisory, and licensing functions into a single government entity, the State Reserve.

c. Enforcement

⁴² Law on the Stockpiling of Crude Oil and Petroleum Products, Article 6(1). The stated aim of the Law on the Stockpiling of Crude Oil and Petroleum Products is to “ensure the supply of liquid fuels in cases of a lack of supply or significant interruption in supply of crude oil and petroleum products in the country, in other Member States of the European Union, and/or pursuant to an effective decision of the International Energy Agency regarding the release of stockpiles.”

⁴³ Regulation No. 1 on Inspections, Conducted by the State Agency “State Reserve and Wartime Stocks” Pursuant to the Law on the Stockpiling of Crude Oil and Petroleum Products (2014), *available at* http://www.statereserve.bg/bg/assets/resourcedocuments/1549/NAREDBA_1_28_07_2014_%20ZA_%20PROVER_KI_%20po_%20ZZNN.pdf.

⁴⁴ *Supra* note 42, Article 6(2).

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 38(1).

⁴⁷ *Id.* at (2).

⁴⁸ *Id.* at 56(1).

⁴⁹ *Id.* at 39(1).

⁵⁰ *Id.* at 60-74.

Although Bulgaria’s secured transactions framework is comprehensive, it does not provide for a “functional approach” to security over movable assets.⁵¹ A security right in a commodity covered by a warehouse receipt may be perfected by registration or possession. The universally preferred method of perfecting a security right in a commodity covered by a warehouse receipt is possession, which is achieved upon delivery of possession and certification of the date contained in the written possessory pledge agreement.⁵² The latter is not an element found in international best practice. The order of priority with respect to commercial (possessory) pledges in relation to special (registered) pledges is based on the time of perfection.⁵³ Priority is therefore established according to the earlier of: i) the date of certification of the possessory pledge agreement, and ii) the date of registration of the special (registered) pledge.⁵⁴ Many jurisdictions contain a special non-temporal priority rule with respect to security rights in negotiable instruments and documents, where possession (even subsequent to registration) is the superior method of perfection.⁵⁵ However, neither the Law on Special (Registered) Pledges, nor any other law, provides for a comparable priority rule applicable to warehouse receipts.

Extra-judicial enforcement of the security right in a warehouse receipt is available, where the following requirements are met: i) the pledge agreement is executed in writing with a certified date, ii) the pledge agreement expressly provides for the sale of the encumbered asset without court

⁵¹ “Report on the Observance of Standards and Codes: Insolvency and Creditor/Debtor Regimes, Bulgaria,” p. 41 (WBG, 2016), available at <http://documents.worldbank.org/curated/en/627841500888030145/pdf/117718-BG-ICR-ROSC-Final-2016-EN-for-disclosure.pdf>.

⁵² Commercial Law, Article 311.

⁵³ *Supra* note 16, p. 38.

⁵⁴ *Id.*

⁵⁵ 2016 UNCITRAL Model Law on Secured Transactions, art. 46(1).

intervention upon default by the debtor, and iii) the asset has a market price.⁵⁶ Extra-judicial enforcement of special (registered) pledges of warehouse receipts is also recognized.

Finally, Article 583 of the Commercial Law provides that a “bailee shall be entitled to a lien over the goods deposited for the payment of its fees.” A warehouse may then enforce its lien by selling the deposited goods.

B. MALAWI

Malawi performed poorly on the warehouse receipts index of the 2017 World Bank “Enabling the Business of Agriculture” report, scoring zero points.⁵⁷ However, that evaluation was conducted prior to the 2018 reform, and thus does not reflect the current state of warehouse receipt legislation in Malawi. The reform was supported by the World Bank Group, which provided technical advice on the drafting of the text, similar to the process that led to the enactment of the Personal Property Security Act (PPSA) in 2013.

a. Legislative Framework

Malawi’s warehouse receipt system (WRS) is governed by the Warehouse Receipts Act of 2018 (WRA). The WRA is supplemented by other applicable laws, including the PPSA and the common law and equitable principles relating to bailments, agency, fraud and misrepresentation, and sales of goods.⁵⁸ Under the WRA, a warehouse receipt may be issued by a warehouse operator covering a broad range of commodities, agricultural or otherwise.

⁵⁶ *Id.* at 43.

⁵⁷ WORLD BANK, ENABLING THE BUSINESS OF AGRICULTURE 2017: MALAWI, 35-36 (2017).

⁵⁸ IFC, A GUIDE TO THE WAREHOUSE RECEIPTS ACT 2018 IN MALAWI: STRUCTURING FACILITIES USING THE WAREHOUSE RECEIPTS 2018, 3 (2018) (hereinafter “IFC GUIDE”).

1. Types of Warehouse Receipts

The WRA was based on the U.S. Uniform Commercial Code (UCC) Article 7. It provides for both negotiable and non-negotiable WRs. A WR is negotiable “if, by its terms, the goods are to be delivered to bearer or to the order of a named person.”⁵⁹ The holder of a negotiable WR acquires the following rights: i) title to the document; ii) title to the goods; iii) all rights under the law of agency or estoppel; and iv) other than claims arising from the WRA or the terms of the document, including an obligation of the issuer to deliver the goods free of any claims or defenses.⁶⁰ WRs may be issued in paper form or electronically. They may be converted from one form to the other at the request of the holder.⁶¹

2. Transfer of Warehouse Receipts

Generally, if, by its original terms, a paper WR runs to the order of a named person, it may be negotiated (transferred) by endorsement and delivery.⁶² If, by its original terms, the paper WR runs to bearer, it can be transferred by delivery alone. These rules mirror those found in UCC Article 7.⁶³ On the other hand, where the original terms of an EWR run to the order of a named person or to bearer, the EWR can be transferred by control.⁶⁴ The WRA provides for “due negotiation” of WRs, which refers to the transfer of the WR to a holder that purchases it in good faith and for value, without notice of any defense or claim, provided the negotiation was in the regular course of business and the document was not received or, with respect to EWRs, control taken in

⁵⁹ Section 9, WRA.

⁶⁰ Section 28, WRA.

⁶¹ Section 6 & 8(3), WRA; IFC GUIDE, *supra* note 58, at 3, 5.

⁶² Section 25, WRA.

⁶³ See UCC § 7-501.

⁶⁴ Section 26, WRA.

settlement or payment of a monetary obligation. Transferees to whom a WR has been delivered but not duly negotiated acquire only the title and rights that the transferor had actual authority to convey.⁶⁵

In addition to transfer of possession or control to the secured creditor, a security right may be perfected by registration of a notice in the collateral registry created under the PPSA. Where the goods are in the possession of the issuer of the WR, the security right perfected in the WR will also be perfected in the goods. The PPSA provides a modern and effective framework for the perfection of security rights in WRs and the determination of priority between competing claims. It also governs the rights and remedies of secured creditors.⁶⁶ The WRA supplements the PPSA in that it contains rules on the priority rights of purchasers of negotiable WRs, granting purchasers priority over perfected security rights in negotiable WRs where the purchaser: i) gave value; ii) acquired the negotiable WR without actual knowledge that the transaction breached the security agreement; and iii) took possession or control of the negotiable WR.⁶⁷

Following its UCC 7 model, the WRA does not provide for a central warehouse receipt registry for the registration of the issuance and transfer of WRs. However, the WRA provides for the use of an electronic system/database by issuers of EWRs to evidence their transfer. The function of such a system is to reliably establish that a person who has control of the EWR is the person to

⁶⁵ Section 30, WRA.

⁶⁶ Section 36, WRA.

⁶⁷ Section 40(1), WRA.

whom the EWR was issued or transferred.⁶⁸ However, it fails to stipulate the parameters for such systems, leaving the development of technologies that satisfy this function to the private sector.⁶⁹

b. Regulatory Framework

Malawi's WRS lacks a main regulator, and the WRA does not specify one. As a result, it is not clear which government agency is responsible for implementing the WRA. The Malawi WRS is dominated by the activities of two (private) commodity exchanges - the Agricultural Commodity Exchange for Africa (ACE) and the AHL Commodity Exchange (AHCX). Both exchanges operate subject to their own internal rules that their participants must adhere to. Accordingly, commodity trading in Malawi is governed by soft-law regulation, some of which is now superseded by the WRA.⁷⁰ ACE commenced operations in 2011, followed by AHCX in 2014.⁷¹

The Reserve Bank of Malawi (RBM) plans to bring a Commodity Exchange Directive (Directive) into operation in April 2019.⁷² The Directive will forbid price manipulation, imposing penalties for such activities, and prohibit commodity exchanges from trading (directly or indirectly) on their own markets, except in exceptional circumstances with the permission of the RBM.⁷³ It will also contain rules that grant the RBM power to license and regulate the commodity exchanges,⁷⁴ as well as prescribing financial requirements for commodity exchanges to remain solvent.⁷⁵

⁶⁸ Section 7, WRA.

⁶⁹ IFC GUIDE, *supra* note 58, at 25.

⁷⁰ This information is based largely on an interview with Kristian Schach Møller, the CEO of ACE that Dr. Marek Dubovec, the Senior Research Attorney at NLCIFT, conducted in Lilongwe, Malawi, June 20, 2014. [hereinafter "Møller interview"]

⁷¹ Bob Baulch et al, *Commodity Exchanges and Warehouse Receipts in Malawi: Current Status and their Implications for the Development of Structured Markets*, IFPRI Working Paper No. 25, 9 (Oct. 2018).

⁷² *Id.* at 8.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

1. Licensing/Certification Regime for Warehouses

The WRA does not contain any rules on licensing of warehouses.⁷⁶ The internal rules and operations of the ACE and AHCX provide for such licensing requirements that warehouses must meet to become eligible to store commodities covered by exchange-traded WRs.⁷⁷ While the AHCX operates its own warehouses, the ACE licenses private sector warehouses. Informal warehouses called “rural storage places” are also associated with the exchanges. Smallholders typically deposit their crops into these storage places from which they are delivered to aggregators. The conditions of getting a license from ACE are set out in the ACE Warehouse Receipt System Rules and Regulations (hereinafter “ACE Rules and Regulations”). According to Rule XV, ACE reserves the right to inspect the storage facility to ensure that the warehouse satisfies the requirements of the ACE Rules and Regulations. However, it is unclear to what extent ACE actually conducts inspections of the warehouses. ACE maintains an electronic WR registry that contains relevant information regarding issued WRs.⁷⁸ Among other, the registry keeps track of deposits, withdrawals, and transfers of ownership.⁷⁹

2. Government-Supported Mechanisms for Protecting the Financial Interests of Holders of Warehouse Receipts/Insurance

Malawi lacks a mechanism to protect the financial interests of WR holders. The WRA fails to provide for indemnity/guarantee funds, bonds, or insurance by warehouse operators. This is in addition to the lack of provisions on licensing and the absence of a regulator.

⁷⁶ IFC GUIDE, *supra* note 58, at 4.

⁷⁷ *Id.*

⁷⁸ *Id.* at 18.

⁷⁹ *Id.*

c. Enforcement

With respect to security rights, the WRA defers to the PPSA in certain respects, including on priorities and rights and remedies of the parties. The PPSA provides for the perfection of a security right by one of three methods: i) registration; ii) possession; and iii) control. However, in the PPSA, the use of control is restricted to deposit accounts and investment securities. The WRA expands the application of control by allowing the perfection of a security right in EWRs.⁸⁰ Likewise, security rights in negotiable paper WRs may be perfected by registration of a notice in the collateral registry or possession of the WR. The priority rules for security rights in goods covered by nonnegotiable WRs follow the general priority rules of the PPSA that were based on UCC Article 7 and 9.⁸¹ In keeping with international best standards, a perfected security right in a negotiable WR or EWR has priority over security rights perfected by other methods.

Secured creditors can enforce a security right extra-judicially where the debtor (grantor) does not object to the removal of the collateral, which is not a concern for situations where the secured creditor is in possession of the warehouse receipt. This conforms with modern standards that recommend the availability of extrajudicial repossession. Although prior notice is not required for repossession of the collateral, the PPSA requires the registration of an enforcement form identifying the debtor, the secured party, and the collateral. However, it is unclear whether the requirement to register an enforcement form applies to security rights perfected by possession or control instead of registration. Other remedies provided by the PPSA include the right to dispose

⁸⁰ Section 39, WRA.

⁸¹ See section 20, PPSA.

of the collateral and the retention of the collateral in satisfaction of the secured obligation (but, only where the secured party has priority over the other competing claimants).

C. FRANCE

The French legal system has significantly influenced many civil law systems globally.⁸² The first law on warehouses and warrants in France was adopted in 1848 as a response to the critical industrial and commercial crisis the country was facing at that time. Manufacturers and retailers had excess goods on their hands and could not sell them. To remedy this situation, the government passed the 1848 Decree allowing dealers and manufacturers to store raw materials, goods, and manufactured items in public warehouses certified by the state (“licensed warehouses”).⁸³ The creation of the system of licensed warehouses was inspired by the English warrant system.⁸⁴ At that time, the French Minister of Finance explained the purpose of the licensed warehouse as: “the best way to remedy the [industrial and commercial crisis] is to encourage consumption by the circulation [of goods and money] ...; for now, idle collateral must be unlocked.”⁸⁵

However, the licensed warehouse and warrants system introduced under the Decree were not successful.⁸⁶ Even though a few certified warehouses located in major cities flourished, most certified warehouses went out of business.⁸⁷ This situation was attributed to some flaws in the Decree.⁸⁸ Specifically, two main criticisms of the Decree were raised.⁸⁹ First, only one document,

⁸² Philine Wehling & Bill Garthwaite, *Designing Warehouse Receipt Legislation, Regulatory Options & Recent Trends* 77 (Food & Agriculture Organization of the United Nations, 2015).

⁸³ 48 Duv. & Boc. 111 (1848) (<https://gallica.bnf.fr/ark:/12148/bpt6k54924258>).

⁸⁴ P. Nicole, *Magasins Généraux, Docks et Warrants* X, (Lambert, 2d ed., 1860).

⁸⁵ *Id.*

⁸⁶ Bruno J.-M. Dubron, *Etude Juridique et Economique sur les Magasins Généraux, les Récépissés et les Warrants* 18 (Faculté de Droit de Paris, 1898).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ P. Nicole, *Ibid.* at X-XI.

serving for either the sale or the pledge of the stored goods, was issued to the depositor.⁹⁰ Usually, the goods were pledged for less than their full value; thus, if the depositor wanted to sell the unencumbered goods, the depositor could not do so because the warrant was in the hands of the secured creditor.⁹¹ Second, any endorsements of the warrant had to be registered in the warehouse's internal registry.⁹² This limited the circulation of the warrant, preventing it from becoming a true negotiable document.⁹³ Furthermore, the sale of the stored goods upon default by the debtor had to be authorized by a judge.⁹⁴

The French government eventually introduced a law aimed at improving the warehouse receipt system. In 1858, the Law on Transactions Related to Goods Stored in General Warehouses (“General Warehouse Law”)⁹⁵ was enacted, with the goal of establishing, among others, a warehouse receipt system comprised of two documents: a warehouse receipt and a warrant.

Later, the Ordinance n° 45-1744 of 1945 abrogated and replaced the previous provisions related to warehouse receipts and commercial warrants. This ordinance shaped the current commercial warehouse receipt law in France, maintaining the dual-document warehouse receipt system. In 2000, the Ordinance n° 2000-912 codified the provisions of the ordinance in the *Code de Commerce*. More recently, France enacted Law n° 2011-525 in order to comply with the EU Directive 2006/123/CE of December 21, 2006, related to services in the internal market. Prior to 2011, by virtue of Article L. 522-2 of the *Code de Commerce*, the process for granting a license to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at XI.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 58 Duv. & Boc. 201-13 (1858) (<https://gallica.bnf.fr/ark:/12148/bpt6k5493907c/f6.image>).

a warehouse operator required the Prefect to consult professional and inter-professional bodies.⁹⁶ This consultation was in conflict with the EU Directive on services in internal market, which prohibits competing actors from intervening in administrative authorization procedures.⁹⁷

a. Legislative Framework

The French WRS is mainly governed by the *Code de Commerce*.⁹⁸ Specifically, warehouses are governed by sections 1-3 of Chapter II, Title II, Book V of the *Code de Commerce*;⁹⁹ and warehouse receipts and commercial warrants are governed by section 4 of Chapter II, Title II, Book V.¹⁰⁰

1. Types of Warehouse Receipts

Under current French law, warehouse receipts are issued as “to the order” documents.¹⁰¹ A warehouse receipt must state: i) the name, occupation, and address of the depositor; ii) the nature and description of the goods deposited, including their value; and (3) the indication that the stored goods are covered by the general warehouse’s insurance policy.¹⁰² Furthermore, each warehouse receipt “must have attached to it a negotiable instrument, known as a warrant, containing the same wording as the receipt.”¹⁰³ However, the depositor is not obligated to use the warrant, unless it pledges the stored goods.

⁹⁶ C. com. art. L. 522-2, version in force between September 21, 2000, and May 19, 2011.

⁹⁷ Projet de loi prec. at 9.

⁹⁸ C. com. arts. L. 522-1 et seq (Fr.).

⁹⁹ *Id.* at arts. L. 522-1 et seq.

¹⁰⁰ *Id.* at arts. L. 522-24 et seq.

¹⁰¹ Michel Cabrillac, *Répertoire de Droit Commercial : Magasins Généraux* § 58 (Daloz, May 2016)

¹⁰² C. com. arts. L. 522-24 and R. 522-20

¹⁰³ *Id.* at art. L. 522-25

2. Transfer of Warehouse Receipts

The holder of the warehouse receipt and warrant may transfer them by endorsement, either together or separately.¹⁰⁴ If the holder transfers the warehouse receipt and the warrant together, the transaction is considered a complete sale of the goods stored.¹⁰⁵ However, if the stored goods were pledged before the owner transfers the warehouse receipt, it can only transfer the warehouse receipt – the warrant held by the creditor – and the buyer will take ownership of the stored goods subject to the warrant.¹⁰⁶ To be valid, the endorsement of the warehouse receipt and the warrant must be dated.¹⁰⁷ In addition, the endorsement of the warrant separate from the receipt must indicate the total amount of the secured obligation, the due date for the repayment, and the name, profession, and domicile of the creditor.¹⁰⁸ Also, the transferee of a warehouse receipt or warrant must request the registration of the transfer of the warehouse receipt in the registry maintained by the warehouse.¹⁰⁹ This registration requirement is mandatory for the first transferee of the warrant separate from the warehouse receipt. If the first transferee of the warrant fails to register the endorsement, the endorsement is not enforceable against third parties.¹¹⁰ However, this registration requirement does not apply to future endorsements of the warrant. Nevertheless, in practice, a subsequent transferee requests a registration.¹¹¹

b. Regulatory Framework

¹⁰⁴ *Id.* at art. L. 522-26.

¹⁰⁵ *Id.* art. L. 522-28.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at art. L. 522-29.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at art. L. 522-27.

¹¹⁰ Michel Cabrillac, *Warrant* at § 43.

¹¹¹ *Id.* at art. L. 532-36, making an express reference to the decree of March 12, 1859, which allowed this practice.

General warehouses are regulated under Chapter II, Title II, Book V of the *Code de Commerce*.¹¹² As mentioned, only licensed warehouses can issue warehouse receipts. Warehouse operators must obtain their license from a Prefect¹¹³ which is the French state's representative at the Department¹¹⁴ level.¹¹⁵ The *Code de Commerce* does not provide minimum requirements regarding the operation of a warehouse.¹¹⁶ These rules must be prepared by the warehouse operator and then approved by the Prefect.¹¹⁷ In addition, national standard rules of operation apply to all general warehouses.¹¹⁸ For example, they include provisions on the classification of the goods that may be stored, the obligation of a warehouse to be insured against fire, the conditions under which the warehouses may deliver stored goods to the holder of a receipt, the issuance of warehouse receipts and warrants, and so on.

Furthermore, warehouses must file a financial guarantee with the Prefect.¹¹⁹ The amount of the guarantee is proportionate to the warehouse's storage area, subject to a minimum threshold.¹²⁰

¹¹² C. com. arts. L. 522-1 et seq. (Fr.).

¹¹³ The Prefect's role is defined in Article 72 of the French Constitution: "In the territorial collectivities of the Republic, the representative of the State [i.e., the prefect], representing each member of the Government, is responsible for the national interests, the administrative control, and the respect of the laws." Their main missions include: representing the state to local governments; security; safety; responsibility for official documents; ensuring respect for legality.

¹¹⁴ The department is one of the three levels of government below the national level. It is the intermediary administrative division of France between the administrative region and the city. There are 96 departments in metropolitan France. Each department is administered by an elected body, and the prefect represents the government in the department.

¹¹⁵ C. com. art. L. 522-1.

¹¹⁶ *Id.* at art. L. 522-17.

¹¹⁷ *Id.* at arts. L. 522-1 and R. 522-2.

¹¹⁸ *Id.* at art. L. 522-13.

¹¹⁹ C. com. art. L. 522-12.

¹²⁰ *Id.* at art. R. 522-10.

The operations of general warehouses are supervised by the Prefect, in accordance with regulations¹²¹ enacted by the *Conseil d'Etat*.¹²² These regulations provide that the Prefect has unrestricted access to warehouses.¹²³ It should be noted that the Prefect's duty of supervision of warehouses has been delegated to the Economic and Financial General Control Body of the Ministry of Economy and Finance.¹²⁴ Additionally, warehouse operators must file an annual report with the Economic and Financial General Control Body of the Ministry of Economics and Finance.

c. Enforcement

On default, the holder of a warrant can pursue a sale of the collateral at a public auction. First, the holder must deliver through a bailiff (*huissier*) or notary a deed of protest¹²⁵ to the debtor.¹²⁶ It must then wait for eight days before taking any further action.¹²⁷ The creditor loses its recourse against the endorsers if the sale is not carried out within one month of the date of the protest.¹²⁸ The sale must be by a public auction in accordance with Article L. 322-4. of the *Code de Commerce* that must be properly advertised.¹²⁹ In cities where the commercial court maintains a list of brokers, the creditors will typically choose a broker from the list.¹³⁰

The holder of a warrant has priority over other creditors. However, taxes and customs duties, as well as storage and other similar fees, have priority.¹³¹

¹²¹ *Id.* at arts. R. 522-17 through R. 522-19.

¹²² The *Conseil d'Etat* is the highest administrative court in France. In addition to its judicial power, it has regulatory power when a law requests the *Conseil d'Etat* to provide guidance for the application of this law.

¹²³ *Id.* at art. R. 522-17.

¹²⁴ *Id.* at art. R. 522-19.

¹²⁵ *Id.* at arts. L. 511-52 et seq.

¹²⁶ *Id.* at art. L. 522-31.

¹²⁷ *Id.*

¹²⁸ *Id.* at art. L. 522-33.

¹²⁹ Michel Cabrillac, *Warrant* at § 83.

¹³⁰ *Id.* at § 82.

¹³¹ *Id.* at arts. L. 522-28 and L. 522-32

D. MEXICO

Mexico scored 4.5 out of 5 points on the warehouse receipts index of the 2017 World Bank “Enabling the Business of Agriculture” report.¹³² Mexico missed a perfect score because the warehouse receipts legal framework currently does not provide for EWRs.¹³³ It should be noted that since 2015, Mexico has been engaged in a reform of its legal framework with the goal of transitioning from a paper-based warehouse receipt to an electronic system.¹³⁴ In parallel with this transition, Mexico also intends to shift from a “double” warehouse receipts system (i.e., warehouse receipt and pledge bond) to a single warehouse receipts system.¹³⁵

In 2014, Mexico successfully reformed some aspects of its warehouse receipts legal framework.¹³⁶ Among the changes introduced was the creation of a centralized electronic registry (*Registro Único de Garantías Mobiliarias*) (RUCAM) in which warehouses must register the issuance and cancelation of warehouse receipts and pledge bonds. Warehouses must also register in RUCAM information about their premises (e.g., location, warehousing capacity, and classes of goods they can receive for storage) as well as similar information about their field warehouses.

¹³² <http://eba.worldbank.org/>

¹³³ Id.

¹³⁴ Adalberto Elias, *Recent Electronic Warehouse Receipts Developments in Mexico*, Arizona Journal of International & Comparative Law, Vol. 33, No. 1 (2016).

¹³⁵ Id.

¹³⁶ DECRETO por el que se reforman, adicionan y derogan diversas disposiciones en materia financiera y se expide la Ley para Regular las Agrupaciones Financieras [Decree by which provisions in financial matters are reformed, added or abrogated and by which the Law Governing Financial Groups is enacted](Jan 10, 2014), available at http://www.diputados.gob.mx/LeyesBiblio/ref/lgtoc/LGTOC_ref21_10ene14.pdf.

In 2017, Mexico received USD\$120 million from the International Bank for Reconstruction and Development for the “Grain Storage and Information for Agricultural Competitiveness Project.”¹³⁷ The main goal of the project was to increase “the competitiveness of small and medium private agricultural production units in the center and south of the country, where poverty is widespread and indigenous populations abound, by providing access to transparent pricing information of agricultural commodities, increasing access to financial mechanisms in the sector, while strengthening the warehouse system, and supporting investments in human capital to reduce post-harvest losses.”¹³⁸

a. Legislative Framework

The provisions governing warehouses receipts and pledge bonds are scattered throughout different bodies of law. The main laws affecting the Mexican WRS system are the following: i) the General Law on Credit Instruments and Operations (*Ley General de Títulos y Operaciones de Crédito*) (“CI Law”);¹³⁹ ii) the General Law on Auxiliary Organizations and Credit Activities (*Ley General de Organizaciones y Actividades Auxiliares del Crédito*) (“Auxiliary Organizations Law”)¹⁴⁰; and iii) the Commerce Code (*Código de Comercio*).¹⁴¹

¹³⁷ International Bank for Reconstruction And Development, *Project Appraisal Document on a Proposed Loan in the Amount Of US\$120 Million to the United Mexican States for the Grain Storage and Information for Agricultural Competitiveness Project* (March 3, 2017), available at <http://documents.worldbank.org/curated/en/263681490714537272/pdf/Mexico-PAD-main-03072017.pdf>. See also Disbursement Letter for Loan 8729-MX, available at <http://documents.worldbank.org/curated/en/375101513357039205/Official-Documents-Disbursement-Letter-for-Loan-8729-MX-Closing-Package>.

¹³⁸ International Bank for Reconstruction And Development, *supra* note 137 at 12.

¹³⁹ Ley General de Títulos y Operaciones de Crédito [General Law on Credit Instruments and Operations], arts. 229 – 251, available at http://www.diputados.gob.mx/LeyesBiblio/pdf/145_220618.pdf.

¹⁴⁰ Ley General de Organizaciones y Actividades Auxiliares Del Crédito [General Law of Auxiliary Credit Organizations and Activities], available at http://www.diputados.gob.mx/LeyesBiblio/pdf/139_090318.pdf.

¹⁴¹ Código de Comercio [Commerce Code], available at http://www.diputados.gob.mx/LeyesBiblio/pdf/3_280318.pdf

1. Types of Warehouse Receipts

Mexico's WRS utilizes two documents: a warehouse receipt (*certificado de depósito*) and a pledge bond (*bono de prenda*). The WRS is generic, applicable to any goods. However, specific provisions have been enacted to apply to warehouse receipts (and pledge bonds) covering agricultural products.¹⁴²

Warehouse receipts and pledge bonds are considered "credit instruments" (*títulos de crédito*) and, as such, are mainly governed by the CI Law.¹⁴³ The term "credit instrument" covers not only documents of title (*títulos representativos de mercancías*) (e.g., warehouse receipts and bills of lading), but also negotiable instruments (e.g., bills of exchange). As such, many rules applicable to negotiable instruments also apply to documents of title.¹⁴⁴ According to Article 19 of the CI Law, documents of title confer upon their holder the exclusive right to dispose of the goods described in the document.¹⁴⁵

A warehouse receipt represents ownership rights over the goods deposited in the warehouse.¹⁴⁶ The pledge bond, on the other hand, may be used to create a security right over the goods described in the warehouse receipt.¹⁴⁷ No bearer warehouse receipts or pledge bonds are allowed. Both the warehouse receipt and the pledge bond must include the following information: i) name, signature and location of the warehouse in which the goods are deposited; ii) date of issuance and sequential number, which must be identical for both the warehouse receipt and pledge bond; iii) a statement

¹⁴² Id., art. 11 Bis 1.

¹⁴³ LGTOC, *supra* note 139, arts. 229 – 251.

¹⁴⁴ Id. art. 251.

¹⁴⁵ Id., art. 19.

¹⁴⁶ Id., art. 229.

¹⁴⁷ Id.

as to whether the goods must be segregated or may be commingled; iv) a detailed description of the goods, including nature, quantity and quality; v) the time of the deposit; vi) name of the depositor; vii) a statement as to whether the deposited goods are subject to taxes; viii) a statement as to whether the goods are insured and, if so, the amount of the insurance; and ix) the storage fees owed to the warehouse, if any.¹⁴⁸

Warehouse receipts and pledge bonds can only be issued by a licensed warehouse (*Almacén General de Depósito*); warehouse receipts issued by any other person or legal entity “would not have the effect of a credit instrument.”¹⁴⁹ This means that the principles common to credit instruments would not apply to such documents.

i. Agricultural Sector

Although warehouse receipts and pledge bonds can be issued for any type of commodity, whenever these instruments cover agricultural products they must satisfy additional requirements. For instance, warehouse receipts covering agricultural products must include the following additional information: i) the statement as to whether they are basic or strategic agricultural products as defined by the Sustainable Rural Development Law;¹⁵⁰ ii) the place of production; iii) the year and agricultural production cycle as well the quality pursuant to the applicable regulations; iv) a statement as to whether the price of agricultural products is hedged and, if so, any details; v) a

¹⁴⁸ LGTOC, *supra* note 139, arts. 231.

¹⁴⁹ LGTOC, *supra* note 139, arts. 229. This is the rule unless the goods are generically categorized in the warehouse receipt, in which case, a warehouse can issue several pledge bonds, which do not need to be adhered to the warehouse receipt.

¹⁵⁰ Ley de Desarrollo Rural Sustentable [Sustainable Rural Development Law], art. 3(XXIII), available at http://www.diputados.gob.mx/LeyesBiblio/pdf/235_200618.pdf. Defines basic and strategic products as those “that are part of the diet of the majority of the population or differentiated by region, and those agricultural products which production process is related with significant segments of the rural population or national strategic objectives.”

metric unit (e.g., kilograms, liters or meters) applicable to the product and a declaration of its value by the depositor; and vi) the insurance term.¹⁵¹

2. Transfer of Warehouse Receipts

Warehouse receipts can be issued in negotiable or non-negotiable form.¹⁵² When negotiable they can be transferred by endorsement and delivery.¹⁵³ A security right (pledge) over the goods represented by a warehouse receipt can be created either by the endorsement and delivery of a warehouse receipt or by the issuance of the pledge bond.¹⁵⁴

The warehouse receipt and the pledge bond can be transferred together or separately. When transferred separately for the first time, the issuing warehouse must be involved in the transfer.¹⁵⁵

It is at this moment when the following information must be added to the pledge bond: i) the name of the transferee of the pledge bond; ii) the amount of the loan the pledge bond secures; iii) interest rate; iv) duration of the loan, which cannot extend beyond the expiration of the term of the deposit; v) the signature of the transferee of the pledge bond; and vi) a statement by the warehouse or financial institution that the warehouse receipt has been marked as being subject to a pledge bond.¹⁵⁶ Both the warehouse and the holder of the warehouse receipt are responsible for damages caused by any omissions or inaccuracies in the information on the pledge bond.¹⁵⁷

¹⁵¹ Auxiliary Organizations Law, *supra* note 140, art. 11 Bis 1.

¹⁵² LGTOC, *supra* note 139, arts. 241.

¹⁵³ *Id.*, arts. 25-27.

¹⁵⁴ *Id.*, art. 334(VI).

¹⁵⁵ *Id.*, art. 236.

¹⁵⁶ *Id.*, art. 232.

¹⁵⁷ *Id.*, art. 236.

As mentioned, the warehouse receipt and the pledge bond confer different rights. The holder of both instruments together is considered the unrestricted owner (*pleno dominio*) of the stored goods.¹⁵⁸ Such a holder can withdraw the deposited goods at any time by presenting both instruments to the warehouse, subject to the payment of taxes and storage fees.¹⁵⁹ On the other hand, if transferred separately, the ownership rights of the holder of the warehouse receipt alone are limited by the rights of the holder of the pledge bond.¹⁶⁰ This means that the warehouse receipt holder can only obtain possession of the goods stored in the warehouse by paying any taxes and storage fees owed, as well as by paying to the warehouse a sum equal to the loan secured by the pledge bond.¹⁶¹ It should be noted that it is a common banking practice for both instruments to be transferred together.¹⁶²

b. Regulatory Framework

The main warehouse regulators are the Ministry of Finance (*Secretaría de Hacienda y Crédito Público*), the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) (CNBV), the Ministry of Economy (*Secretaría de Economía*) and the Ministry of Agriculture (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca*). The regulatory authority of each one of the listed entities derives mainly from the Auxiliary Organizations Law.¹⁶³ The Auxiliary Organizations Law classifies warehouses into four tiers: i) those that provide services to the agricultural and fisheries sectors only; ii) those that store all types of goods; iii) bonded warehouses that also satisfy i) and ii); and iv) those warehouses that satisfy i) – iii) and

¹⁵⁸ *Id.*, art. 239.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, art. 240

¹⁶¹ *Id.*

¹⁶² RAÚL CERVANTES AHUMADA, *Títulos y Operaciones de Crédito* at 162, Editorial Porrúa (2007).

¹⁶³ Auxiliary Organizations Law, *supra* note 140, arts. 5, 22 Bis 2, and 22 Bis 7.

also provide financing. The regulatory requirements vary depending on the tier in which the warehouse operates. Warehouses are responsible for any losses or damage to the stored goods inasmuch as there is a discrepancy with the description of the goods in the outstanding warehouse receipt.¹⁶⁴

1. Field Warehouses

A field warehouse is a storage facility, typically located on the property of a business that received a loan from a bank. Field warehouses are mainly regulated by the CNBV.¹⁶⁵ The CNBV issues regulations as well as guidelines on the management and preservation of the goods stored in field warehouses.¹⁶⁶ Warehouses must establish a contingency reserve for purposes of covering potential claims arising from losses in field warehouses.¹⁶⁷

2. Warehouse Receipts Registry

In 2014, Mexico reformed its WRS legal framework to provide for a centralized warehouse receipts (and pledge bonds) registry known as RUCAM administered by the Ministry of Economy.¹⁶⁸ RUCAM's objective is to provide increased legal certainty to lenders when securing obligations with pledge bonds.¹⁶⁹ Warehouses must register issuances, modifications, and

¹⁶⁴ Auxiliary Organizations Law, *supra* note 140, art. 11 Bis.

¹⁶⁵ *Id.*, art. 17.

¹⁶⁶ *Id.*

¹⁶⁷ Auxiliary Organizations Law, *supra* note 140, art. 16-A.

¹⁶⁸ Auxiliary Organizations Law, *supra* note 140, art. 22 Bis 6.

¹⁶⁹ Iniciativa de Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Organizaciones y Actividades Auxiliares del Crédito y de la Ley General de Títulos y Operaciones de Crédito (May 2013), *available at*

http://www.shcp.gob.mx/ApartadosHaciendaParaTodos/reformafinanciera/doctos/07_alnacenens_sofomes_08052013.pdf

cancelations of warehouse receipts and pledge bonds.¹⁷⁰ RUCAM is free of charge and can be searched by the general public. It should be noted that the warehouses' omissions or mistakes in a RUCAM registration have no effect on the validity of outstanding paper warehouse receipts and pledge bonds.¹⁷¹

Aside from warehouse receipts and pledge bonds, warehouses are also required to register in RUCAM information on their premises, including field warehouses.¹⁷² Other information that could be registered in RUCAM includes judicial or administrative decisions affecting goods stored in warehouses.

3. Regulation of Warehouses Dealing with Agricultural and Fisheries Products

When storing agricultural and fisheries products, warehouses must comply with an additional regulatory requirement, which is registration in a registry (*Sistema Integral de Información de Almacenamiento de Productos Agropecuarios*) (“AG Registry”) administered by the Ministry of Agriculture.¹⁷³ The Registry is publicly accessible electronically, and free of charge.¹⁷⁴ The information warehouses must furnish to the AG Registry include: i) report of deposits and withdrawals of agricultural products; ii) report of warehouse receipts and pledge bonds issued, canceled, and transferred; and iii) phytosanitary or zoosanitary reports.¹⁷⁵

c. Enforcement

¹⁷⁰ Auxiliary Organizations Law, *supra* note 140, art. 22 Bis 6. d.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*, 22 Bis 2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

The rules for enforcing a security right created through a pledge bond are different from those applicable to the traditional pledge in that the former provide for an extrajudicial procedure.¹⁷⁶ The legal device through which the enforcement process is initiated is known as *protesto*, a device imported from the negotiable instruments section of the CI Law.¹⁷⁷ Upon default, the secured creditor must present the pledge bond to the warehouse that issued the corresponding warehouse receipt and formalize the *protesto* against the holder of the warehouse receipt with the assistance of a notary public.¹⁷⁸ The *protesto* is formalized after the warehouse operator makes a notation in the pledge bond stating that the pledge bond was presented at the warehouse at the time when the debt became due and that it was not fully paid.¹⁷⁹ The holder of the pledge bond must then proceed to give notice of the default to all previous endorsers of the pledge bond.¹⁸⁰ The holder of the pledge bond must afterwards request (within a period of eight days following the formalization of the *protesto*) that the warehouse sell the goods through a public auction.¹⁸¹

The sale proceeds of the deposited goods must be distributed by the warehouse as follows: i) any taxes; ii) storage fees; iii) the obligation secured by the pledge bond.¹⁸² Any surplus is then remitted to the holder of the corresponding warehouse receipt.¹⁸³

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¹⁷⁶ LGTOC, *supra* note 139, arts. 242-250.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*, art. 142.

¹⁷⁹ *Id.*, art. 242.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*, art. 243.

¹⁸² *Id.*, art. 244.

¹⁸³ *Id.*

The current paper-based WRS in the Philippines is rated highly under the World Bank’s “Enabling the Business of Agriculture” warehouse receipts index, scoring 4.5 out of a possible 5 points.¹⁸⁴ However, more detailed assessments have evaluated its WRS less favorably. The EBRD/FAO Guide, for instance, identified a number of issues negatively impacting the WRS, including an outdated and overly complex legal framework, as well as an absence of out-of-court enforcement procedures and central warehouse receipts registry.¹⁸⁵ A more recent assessment echoed these problems.¹⁸⁶ Such deficiencies have prompted recent efforts to reform its WRS as well as the corresponding secured transactions framework in accordance with international best practices.

a. Legislative Framework

The legislative framework for the Philippine WRS is fragmented, comprising several statutes and regulations, as well as separate systems for commodities generally and grains and sugar in particular. The main laws governing the Philippine WRS are i) the Warehouse Receipts Act (1912), which applies generally to all “goods”¹⁸⁷; ii) the Bonded Warehouse Act (1937), which applies to most “commodities”¹⁸⁸; and iii) the National Food Authority Act (1981), which is

¹⁸⁴ Philippines assessment, Enabling the Business of Agriculture indexes, WORLD BANK http://eba.worldbank.org/data/exploreconomies/philippines/2017#eba_fina.

¹⁸⁵ EBRD/FAO Guide, p. 114.

¹⁸⁶ Warehouse Receipts as a System for Improving the Efficiency of Rice and Corn Marketing in the Philippines, PHILIPPINE INSTITUTE FOR DEVELOPMENT STUDIES (Dec 2016), *available at* <https://dirp3.pids.gov.ph/websitecms/CDN/PUBLICATIONS/pidsdps1645.pdf>.

¹⁸⁷ The Warehouse Receipts Act (1912), § 58 (“ ‘Goods’ means chattels or merchandise in storage or which has been or is about to be stored”), *available at* <http://www.chanrobles.com/acts/actsno2137.html>.

¹⁸⁸ The Bonded Warehouse Act (1937) (“ ‘commodity’ shall mean any farm, agricultural or horticultural product; animal and animal husbandry or livestock, dairy or poultry product; water, marine or fish product; mineral, chemical, drug or medicinal product; forestry product; and any raw, processed, manufactured or finished product or by-product, good, article, or merchandise, either of domestic or of foreign production or origin, which may be traded or dealt in openly and legally”), *available at* <http://www.chanrobles.com/acts/actsno3893.html>. The Bonded Warehouse Act, which originally applied to warehouses engaging in the storage of rice, was amended in 1948 to cover all commodities, *see* Republic Act 247, *available at* <http://www.chanrobles.com/republicacts/republicactno247.html#.W-HAGaeZMWo>.

limited to food products/commodities, but mainly applies to grains.¹⁸⁹ Thus, the Philippine WRS includes general as well as sector/commodity-specific WR legislation. The Warehouse Receipt Act governs the form and transfer of warehouse receipts, whereas the Bonded Warehouse Act and National Food Authority Act provide separate regimes for regulating and supervising warehouses. In addition to the above, the Personal Property Security Act (2018) contains rules governing the creation, perfection and enforcement of a security right, applicable to WRs.

1. Types of Warehouse Receipts

The Warehouse Receipt Act governs the form of WRs, which must satisfy several requirements.¹⁹⁰ Where a warehouse issues a non-conforming WR (e.g., a WR omitted one or more of the enumerated elements), it may be liable to any person for loss or damage caused by such non-conformance.¹⁹¹ The Warehouse Receipt Act recognizes negotiable WRs, which are “receipt[s] in which it is stated that the goods received will be delivered to the bearer or to the order of any person named in such receipt.”¹⁹² Non-negotiable warehouse receipts¹⁹³ must be clearly marked “non-negotiable” or “not negotiable.”¹⁹⁴ The Warehouse Receipt Act neither recognizes “double”

¹⁸⁹ the National Food Authority Act (1981), available at https://lawphil.net/statutes/presdecs/pd1981/pd_1770_1981.html. The National Food Authority Act, which was issued by presidential decree, effectively replaced the National Grains Industry Development Act (1972).

¹⁹⁰ The Warehouse Receipt Act (1912), § 2 (a WR “must embody within its written or printed terms: (a) The location of the warehouse where the goods are stored, (b) The date of the issue of the receipt, (c) The consecutive number of the receipt, (d) A statement whether the goods received will be delivered to the bearer, to a specified person or to a specified person or his order, (e) The rate of storage charges, (f) A description of the goods or of the packages containing them, (g) The signature of the warehouseman which may be made by his authorized agent, (h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and (i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.”)

¹⁹¹ *Id.*

¹⁹² *Id.* at 5.

¹⁹³ *See id.* at 4 (a non-negotiable warehouse receipt is “[a] receipt in which it is stated that the goods received will be delivered to the depositor or to any other specified person”).

¹⁹⁴ *Id.* at 5.

WRs nor EWRs. The Philippine WRS thus provides for a “single,” paper WR, which may be either negotiable or non-negotiable. However, some special characteristics exist with respect to the form of WRs issued for grain and sugar, which are discussed below.

2. Transfer of Warehouse Receipts

The Warehouse Receipt Act governs transfers of WRs. Article 37 provides that “[a] negotiable receipt may be negotiated by delivery... [w]here, by the terms of the receipt, the warehouseman undertakes to deliver the goods to a bearer.” Where the WR is issued to a named holder, Article 37 also requires an endorsement. Article 41, moreover, recognizes the principle of due negotiation, which means that “[a] person to whom a negotiable receipt has been duly negotiated acquires thereby... i) [s]uch title to the goods as the transferor had to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered had to convey to a purchaser in good faith for value;” and ii) “[t]he direct obligation of the warehouseman to hold the goods according to the terms of the receipt as fully as if such warehouseman had contracted directly with him.” Article 42 governs situations where a WR has been transferred but not negotiated, in which case the transferee “acquires the title to the goods subject to the terms of any agreement with the transferor.” Finally, Article 48 protects good-faith purchasers of WRs.¹⁹⁵

¹⁹⁵ Article 42 provides that “[w]here a person having sold, mortgaged, or pledged goods which are in warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by the person under any sale or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation.”

Sections 50-55 of the Warehouse Receipt Act criminalize various actions and failures related to the unlawful transfer/delivery of goods covered by warehouse receipts including: i) issuing a WR without receiving the underlying goods; ii) issuing a WR containing false statements; iii) issuing a duplicate not marked as such; iv) delivering goods without a WR; and v) accepting goods for which the depositor holds no legal title.

The Philippine WRS presently lacks a central warehouse receipts registry for the issuance and transfer of WRs. It also lacks an EWR system. However, a bill currently being deliberated in congress would provide for an EWR system where the issuance and transfer of EWRs would be recorded in a central warehouse receipts registry.

b. Regulatory Framework

Section 3 of the Bonded Warehouse Act empowers the Department of Trade and Industry (“DTI”) to regulate and supervise warehouses storing and issuing WRs covering all commodities other than food products. Warehouses must apply for a license from DTI annually, which includes the requirement to post a bond for “not less than thirty-three and one third percent of the market value of the maximum quantity or [commodity] to be received.”¹⁹⁶ In addition to posting of a bond, licensed warehouses are also required to insure commodities stored in their facilities against fire.¹⁹⁷ Finally, licensed warehouse must “keep a complete record of the [commodities] received, of the receipts issued therefor, and of all receipts returned to and cancelled,” and submit corresponding

¹⁹⁶ The Bonded Warehouse Act (1937), § 4.

¹⁹⁷ *Id.* at 6.

reports to the DTI.¹⁹⁸ The DTI may “suspend or revoke a license for any violation or failure to comply with any provision of this Act or of the rules and regulations made by virtue thereof.”¹⁹⁹

The National Food Authority Act authorizes the National Food Authority (“NFA”), which is a sub-agency within the Department of Agriculture (“DOA”), to register, license and supervise warehouses engaging in the storage of food products/commodities.²⁰⁰ To these ends, in 2006, the NFA issued the Revised Rules and Regulations on the National Food Authority on Grain Business (“NFA Regulations”), which provide a detailed framework for regulating and supervising warehouses engaging in the storage of grains, particularly rice and corn. Under Article 1 of the NFA Regulations, grain warehouses are required to obtain a license from the NFA in order to engage in grain-storage services.²⁰¹ Where a grain warehouse wishes to issue negotiable WRs, it must obtain a “franchise,” which is “a privilege granted to an owner/operator of NFA licensed bonded warehouse...”²⁰² Franchised grain warehouses must adhere to higher standards with respect to financial solvency and storage capacity.²⁰³ Finally, the NFA is tasked with providing both negotiable as well as non-negotiable warehouse receipts to the relevant grain warehouses.²⁰⁴

¹⁹⁸ *Id.* at 9.

¹⁹⁹ *Id.* at 11.

²⁰⁰ National Food Authority Act (1981), § 7(b).

²⁰¹ NFA Regulation VI, §§ 1-3, available at <http://www.nfa.gov.ph/images/files/archive/rules-regulations.pdf>. The requirements for obtaining a license under the NFA Regulations include paying a guarantee/bond “to secure the faithful compliance of the applicant’s obligations and responsibilities,” and also taking out fire insurance from an NFA-accredited insurer.

²⁰² *Id.* at VII, § 1.

²⁰³ *Id.* at 2-3.

²⁰⁴ *Id.* at 1.

Although the Bonded Warehouse Act and NFA Regulations require payment of a guarantee/bond as one of the requirements for obtaining a warehousing license, some banks do not consider such requirements to be adequate for purposes of accepting commodities covered by a WR as collateral for a loan.²⁰⁵ The Quedan Financing Programme (“QFP”), which was introduced in 1978, attempted to remedy this problem by providing an alternative guarantee mechanism for protecting secured creditors against insolvent warehouses. The QFP provides grain warehouses with the option of becoming accredited (on a voluntary basis) by the Quedan and Rural Credit Guarantee Corporation (“Quedancor”), which compensates secured creditors for up to 80% of the unrecovered value, in the event that the warehouse fails.²⁰⁶ In addition to the general regulatory framework for all warehouses, a separate regime exists for warehouses issuing warehouse receipts for grains and sugar.

c. Enforcement

The Personal Property Security Act (2018) provides a regime for creating, perfecting and enforcing security rights in the WRs and the goods they cover. According to the Department of Finance (“DOF”), one of the aims of the Act is to “develop a professional, regulated warehousing industry, which issues receipts that can be used as collateral by lenders and can be traded by investors and industry players.”²⁰⁷ Unlike the repealed Chattel Mortgage Act (1906), the Personal Property Security Act allows secured creditors to enforce their rights without a court order “if the security

²⁰⁵ EBRD/FAO Guide, p. 31.

²⁰⁶ *Id.* In order to become accredited, warehouses must submit i) a copy of the certificate of franchise, ii) a warehouse receipt, iii) a stock inspection report, iv) an affidavit of stock ownership and evidence that the stock is insured, and also v) pay a guarantee/bond to the NFA amounting to one-third of the value of the commodities stored in its facilities. Accredited warehouses must also allow Quedancor officials to inspect their facilities.

²⁰⁷ Law on secured transactions a boost to Philippines’ competitiveness, PHILSTAR GOLOBAL, available at <https://www.philstar.com/business/2018/02/04/1784260/law-secured-transactions-boost-philippines-competitiveness#EeAdfH6VfXKQ1JeM.99>.

agreement so provides.”²⁰⁸ This rule also applies to negotiable documents such as paper WRS.²⁰⁹ Accordingly, the legal framework for warehouse receipts now provides for out-of-court enforcement mechanisms in the event of debtor default, which was not accounted for in the EBRD/FAO Guide’s assessment of the Philippine WRS.²¹⁰

F. UNITED ARAB EMIRATES

The United Arab Emirates (“UAE”) has a paper and an electronic warehouse receipts system (“e-WRS”). The paper WRS lacks many of the support structures provided for under the e-WRS, which is overseen by a securities exchange commission, regulated by a private market authority with a mandate to organize a commodity market within its jurisdiction, and supervised by a commodity exchange and central clearing counterparty (“CCP”). The e-WRS utilizes a modern EWR platform, which facilitates the issuance, transfer and registration of EWRs, including for collateral purposes. Notably, the e-WRS is primarily utilized for transactions involving metals and plastics, rather than agricultural products like grains. Participation in the e-WRS is conditioned on entering into various standard-form contracts with the market authority, which stipulate the terms for accessing the EWR platform and other relevant trade infrastructure, such as the commodity exchange. Although some aspects of the UAE’s e-WRS are provided for in legislation, its main elements are contained in operating agreements and exchange rules. A similar framework exists in South Africa.

²⁰⁸ The Personal Property Security Act, § 47, available at <http://www.officialgazette.gov.ph/downloads/2018/08aug/20180817-RA-11057-RRD.pdf>.

²⁰⁹ *Id.* at 48(b) (“Upon default, the secured creditor may without judicial process... [in] a negotiable document perfected by possession, proceed as to the negotiable document or goods covered by the negotiable document.”).

²¹⁰ EBRD/FAO Guide, p. 114.

Although the UAE's paper WRS lacks the support structures of its electronic counterpart, it meets the minimal requirements of a functional WRS, including specific norms pertaining to warehouse receipts, their transfer by negotiation and mandatory licensing and insurance for warehouses. The applicable secured transactions framework contains several deficiencies, particularly the absence of general out-of-court enforcement mechanisms, even in relation to possessory pledges. Moreover, despite the fact that the e-WRS incorporates many of the most modern warehouse receipts practices, the absence of a corresponding EWR law limits its application to those participating in the system. As a result, it may not provide for the same kinds of rights contained within the paper system, which is governed by a WR legislation of general application, exposing the participants to a number of risks especially with respect to claims arising under the framework outside of this closed system. Nevertheless, UAE's e-WRS has proven effective at supporting a commodity market, where trades are settled by delivery as well as in cash. It has also proven to be an effective financing platform, facilitating the use of EWRs as collateral.

a. Legislative Framework

The UAE contains laws applicable to paper warehouse receipts as well as specific laws applicable to EWRs. The Commercial Transactions Law (1993)²¹¹ provides for generally applicable rules governing paper WRs, including their issuance and transfer, as well as the rights and duties of holders and warehouses. The Commercial Transactions Law also contains rules governing possessory pledges, including in paper WRs, which may also be found in the Civil Code (1985).²¹² Finally, the Law on Pledging Movable Properties as Security for Debts (2016) ("the Law on

²¹¹ Commercial Transactions Law (1993), available in English at <https://www.wipo.int/edocs/lexdocs/laws/en/ae/ae007en.pdf>.

²¹² Civil Code (1985), available in English at [https://lexemiratidotnet.files.wordpress.com/2011/07/uae-civil-code-english-translation .pdf](https://lexemiratidotnet.files.wordpress.com/2011/07/uae-civil-code-english-translation.pdf).

Pledge”)²¹³ provides for a non-possessory pledge, the establishment of a modern collateral registry and out-of-court enforcement mechanisms. However, the secured transactions framework is highly fragmented with multiple laws applying to different security devices that could be taken over the same asset, including warehouse receipts.

There is no law of general application that governs the UAE’s e-WRS. Rather, the e-WRS is contained within the operating framework of the Dubai Multi Commodities Centre (“DMCC”), which is a private trade and finance entity formed by the Dubai Government in 2002 with a mandate to set up an infrastructure capable of supporting a commodities marketplace within its “free zone.” The federal constitution, the federal laws concerning free zones and the powers reserved by the individual emirates under the federal structure, allow each emirate to establish free zones for certain activities.²¹⁴ Free zones are permitted to enact their own laws and regulations in specific areas,²¹⁵ which is also the case in the DMCC free zone.²¹⁶ The DMCC free zone is described as “the world’s leading commodity focused ecosystem.”²¹⁷ The DMCC, moreover, “is the Government of Dubai Authority dedicated to establishing Dubai as the global gateway for commodity trade.”²¹⁸

²¹³ Law on Pledging Moveable Properties as Security for Debts (2016), *available in Arabic at* <https://www.mof.gov.ae/Ar/lawsAndPolitics/govLaws/Documents/لدين20%ضمنانا20%المنقولة20%الأموال20%رهن.pdf>.

²¹⁴ “Doing Business in the UAE,” LATHAM & WATKINS LLP, p. 2 (Second Edition) *available at* <https://www.lw.com/thoughtLeadership/doing-business-in-the-uae>.

²¹⁵ *Id.*

²¹⁶ Dubai Multi Commodities Centre Authority Free Zone Rules and Regulations (Third Edition, 2012), *available in English at* https://www.dmcc.ae/application/files/4915/0832/8310/FreeZoneRulesandRegulations2012-Fullversion_5.pdf.

²¹⁷ “Tradeflow Brochure: Enabling efficient transparent trade,” DMCC, p. 2, *available at* https://www.dmcc.ae/application/files/5615/2385/5725/Tradeflow_Brochure_Update_2018_single_pages_for_web_1.pdf.

²¹⁸ *Id.*

To those ends, the DMCC instituted an EWR platform called “Tradeflow.”²¹⁹ In order to gain access to Tradeflow, participants must enter into a standard-form Corporate Access Agreement with DMCC,²²⁰ and participating warehouses must additionally enter into a Warehouse Operating Agreement²²¹ with the DMCC. Together, the Corporate Access Agreement and Warehouse Operating Agreement provide for a regulatory as well as supervisory regime in relation to warehouses issuing EWRs through the DMCC platform. Transfers of EWRs are governed, in part, by the By-Laws of the Dubai Gold and Commodities Exchange (“DGCX”),²²² which is a subsidiary of the DMCC.

Another source of rules applicable to the UAE’s e-WRS include the Clearing Rules of the Dubai Commodities Clearing Corporation (“DCCC”),²²³ which is a subsidiary of the DGCX. The Clearing Rules provide for norms governing the settlement of EWR transactions as well as guarantee mechanisms. Finally, Appendix 2 of the Corporate Access Agreement, titled “Rules for Taking Security Over DMCC Tradeflow Warrants” (“Security Rules”), provides for a separate regime governing security rights in EWRs issued via Tradeflow. The activities of the DMCC, DGCX and DCCC are overseen by the Securities and Commodities Authority, which licenses commodity exchanges and their participants, including clearing houses and brokers.

²¹⁹ *Id.*

²²⁰ DMCC Tradeflow Corporate Access Agreement, *available in English at* <http://6164.stage.omobono.com/application/files/1314/8061/2881/DMCCTradeflow-CorporateAccessAgreement-NewLogo.pdf>.

²²¹ DMCC Tradeflow Warehouse Operating Agreement, *available in English at* https://www.dmcc.ae/application/files/7215/0174/4190/DMCCTradeflowWarehouseAgreement-newlogo_1.pdf.

²²² DGCX Exchange By-Laws (2018) *available at* <https://www.dgcx.ae/exchange-by-laws>.

²²³ DCCC Clearing Rules, *available at* <http://www.dccc.co.ae/clearing-rules>.

Although the UAE does not have an EWR law of general application, the Law on Electronic Commerce and Transactions (2006)²²⁴ provides the legal basis for transactions with WRs on Tradeflow. However, the Law falls short of making EWRs the functional equivalents of their paper counterparts. The legal basis for transactions involving EWRs is therefore largely contractual in nature.

1. Types of Warehouse Receipts

UAE's WRS provides for a double paper WR and at least three types of EWRs. Article 183(1) of the Commercial Transactions Law provides for a double (paper) warehouse receipt covering all goods, which is composed of i) a storage receipt, which evidences the right to the deposited goods; and ii) a pledge receipt (warrant), which evidences a security right. Article 183(1) further provides that a warehouse receipt must contain the following information: i) the depositor's name, ii) occupation and domicile, iii) the type, nature and quantity of the goods deposited, iv) the name and location of the warehouse, v) the name of the insurer of the goods (if any), and vi) such other particulars as are required to identify the goods and indicate their value.

UAE's e-WRS system provides for at least three types of EWRs: i) a Dubai Commodity Receipt ("DCR"), which is a "receipt representing a commodity... stored in a warehouse owned or operated by a DCR Issuing Member"; ii) a Dubai Gold Receipt ("DGR"), which is a "receipt representing gold or silver stored at a vault owned or operated by a DGR Issuing Member; and iii)

²²⁴ Law on Electronic Commerce and Transactions (2006), *available in English at* https://www.wipo.int/wipolex/en/text.jsp?file_id=316895. The Law on Electronic Commerce and Transactions is based on the UNCITRAL Model Law on Electronic Commerce, *see* "Text and Status," *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html.

a Warrant, which is a “paper certificate or electronic document representing and evidencing ownership of goods stored in a facility owned and operated by a DMCC Tradeflow Member.”²²⁵

2. Transfers of Warehouse Receipts

There are separate regimes for transfers of paper WRs. Article 185(1) of the Commercial Transactions Law provides that a (paper) WR may be issued to a named holder or a bearer. In cases where the WR is issued to a bearer, Article 185(2) provides that the holder may transfer it (together or separately) by endorsement.²²⁶ Article 187(1) provides that the holder of both the storage and the pledge receipt is entitled to take delivery of the goods deposited. Finally, Article 187(3) provides that the holder of a storage receipt without the pledge receipt “has the right to recover the goods deposited provided that he satisfies the obligation secured by the pledge receipt.”

Transfers of EWRs are completed via EWR platforms, or “Systems,” that correspond to the type of EWR issued through those platforms.²²⁷ The DMCC owns each of the individual EWR platforms, which are generally referred to as “Tradeflow.”²²⁸ Tradeflow not only facilitates the

²²⁵ Exchange By-Laws, *supra* note 222, pp. 5 and 12.

²²⁶ Article 186 of the Commercial Transactions Law provides for rules with respect to the endorsement of a warehouse receipt: i) an endorsement of the warehouse receipt must be dated; ii) where the warehouse receipt is transferred separately, the endorsement must contain the sum of the debt secured by the pledge receipt, the maturity date, the creditor’s name, occupation, domicile and the signature of the endorser; and iii) the endorsement and pledge receipt must be registered in the books of the warehouse.

²²⁷ Exchange By-Laws, *supra* note 222, pp. 6 and 12 (The DCR System is the “electronic system owned by DMCC for the issue, transfer and pledging of commodity receipts other than [DGRs],” whereas the Warrant System is the “electronic system owned by DMCC for the issue, transfer and pledging of Warrants in relation to commodities stored inside the [UAE]”).

²²⁸ Tradeflow Brochure, *supra* note 217, p. 3 (The DMCC defines Tradeflow as “a dedicated flexible and customised online platform for registering possession and ownership of commodities stored in UAE based storage facilities”).

transfer of rights to commodities utilizing EWRs, but also records the same transfers into its central registry, including the registration of ownership, its transfers and pledges.²²⁹

The DCR and DGR may be transferred by way of an electronic endorsement and/or delivery. The DGCX by-laws provide that a seller completes a transfer of a DCR or a DGR within Tradeflow through the issuance of a Delivery Notice, which is defined as “[a]n advice... issued to the [DCCC] by a Seller intending to deliver a commodity in satisfaction of an [exchange contract].”²³⁰ Accordingly, the DCR and DGR are used as settlement/delivery instruments for exchange contracts, and in particular futures. Upon sending a Delivery Notice through Tradeflow, the seller must appoint either the DMCC or the DCCC to act as its agent to complete the delivery.²³¹

The Warrant may be transferred by way of electronic endorsement, which effects a transfer of ownership to the underlying commodity. Article 4.1(a) of the Corporate Access Agreement provides that a seller completes a transfer of a Warrant within Tradeflow by the issuance of a Transfer Notification, which is a “request to transfer the legal title to a Warrant and the Goods represented by the Warrant via DMCC Tradeflow to a Transferee.” Article 4.1(c) provides that “[a] Transferee acquires by virtue of a Transfer Notification: i) such title to the Goods as the Transferor had the power to convey to a purchaser in good faith for value; and ii) the benefit of

²²⁹ *Id.* (Tradeflow is further described as “the centralized internet based online commodities title receipt system developed by DMCC”).

²³⁰ Exchange By-Laws, p. 6.

²³¹ The delivery instructions must include one or more of the following: i) instruct a participating warehouse (issuer) to cancel the DCR/DGR covering the commodity located at the warehouse; ii) instruct a participating warehouse to issue two or more DCRs/DGRs covering such commodity in place of the cancelled DCR/DGR; and/or iii) instruct DMCC to endorse by way of transfer to a Buyer or Buyers determined by the [DCCC], the DCR/DGR or DCRs/DGRs covering such commodity. The specific terms of the delivery are contained in the relevant provisions of each exchange contract and generally provide for settlement by immediate delivery, delivery at a future date, or payment in cash.

the obligation of the Storage Operator to hold the Goods for him according to the terms of the Warrant as if the Storage Operator had contracted directly with him.”

The Security Rules provide for a separate regime governing security rights in an EWR, which may be completed by way of pledge and Security Notification, which is “a notification sent by the Legal Owner of a Warrant to DMCCA via DMCC Tradeflow... instructing DMCCA to hold that Warrant as security of the Tradeflow creditor identified in that notification.”²³² Thus, transfers for trading purposes are achieved by way of a Delivery Notice or a Transfer Notification, whereas transfers for collateral purposes are achieved by way of a Security Notification.

b. Regulatory Framework

The UAE’s regulatory framework is composed of i) a general framework applicable to all warehouses, and ii) a specific framework applicable to warehouses participating in the electronic system owned and operated by the DMCC.

1. General Framework

The UAE’s WRS does not provide for regulatory, supervisory or licensing bodies with a general power. The Commercial Transactions Law provides for both mandatory licensing as well as insurance, which apply to all warehouses issuing negotiable (paper) WRs, no matter the location of the warehouse or commodity stored therein. The individual governments of each emirate have instituted their own separate regime, particularly as they relate to the licensing of warehouses. Local governments (e.g., the Economic Department of the Dubai Government) issue licenses to

²³² Corporate Access Agreement, *supra* note 220, p. 4.

warehouses.²³³ Although each emirate provides for their own specific licensing requirements, Article 178(2) of the Commercial Transactions Law requires public warehouses to obtain a license in order to issue negotiable (paper) WRs.²³⁴ The Commercial Transactions Law also contains a general insurance requirement for public warehouses.²³⁵

2. Specific Framework

The Dubai Government vested regulatory, supervisory and licensing powers over the commodity market generally, and the e-WRS in particular, in the hands of the DMCC. The DMCC has delegated some of these powers to its subsidiary DGCX. Finally, the DCCC, which is a subsidiary of DGCX, is a “Central Counter Party [“CCP”], providing clearing and settlement for exchange-traded derivatives contracts executed on [DGCX],” as well as performing risk-management, collateral-management and guarantee functions.²³⁶ The activities of each of the above entities is regulated to some degree by the UAE’s securities exchange commission, which licenses commodity exchanges and its participants, including brokers and clearing houses. Notably, the SCA and DMCC signed a memorandum of understanding that provides for collaboration and technical assistance in the development of applicable rules and regulations with respect to various market products, which may also include exchange-traded EWRs.²³⁷

²³³ “Commercial Permits Guide,” DUBAI GOVERNMENT, *available at* <http://www.dubaied.ae/PublicationsDocument/Commercial-Permits-English.pdf#search=warehouse>.

²³⁴ Article 178(3) of the Commercial Transactions Law defines public warehouses as warehouses that receive goods for deposit and issue a corresponding goods receipt and pledge receipt (i.e. a double warehouse receipt) covering those goods. Article 195 further provides that violations of the licensing requirement may be criminally prosecuted.

²³⁵ Article 178(4) of the Commercial Transactions Law provides that “[a]ny person exploiting a public warehouse shall cover it with an insurance against the risks of fire, perishing and theft.”

²³⁶ “About DCCC,” *available at* <http://www.dccc.co.ae/about-dccc>.

²³⁷ “SCA signs MOU with DMCC” (The MoU “provides for the identification of the scope of collaboration and technical assistance in the applicable rules and regulations in the field of securities, commodities, futures, options, and other market products”), *available at* <https://www.sca.gov.ae/english/news/pages/articles/2015/2015-1-18.aspx>.

In order for a warehouse operator to access Tradeflow, it must become a DMCC Member, which is achieved by entering into the Corporate Access Agreement with the DMCC. The Warehouse Agreement provides that “[t]he DMCC may, at any time, require the Storage Operator to make the Storage Facility available for an inspection and shall provide the Storage Operator with reasonable notice of the date and time of the inspection.”²³⁸ In addition to the DMCC, the DCCC provides collateral management services for creditors.²³⁹ The main guarantee mechanism contained in the e-WRS is a “Clearing Guarantee,” which exchange participants must provide.²⁴⁰

c. Enforcement

There are separate secured transactions frameworks for the paper WRS and the e-WRS. A security right in a double WR can be perfected by possession or registration. Article 165(1) of the Commercial Transactions Law provides that a security right is perfected when the WR is delivered to the creditor. However, the Commercial Transactions Law does not provide for extra-judicial enforcement with respect to possessory pledges.²⁴¹ Under the Law on Pledge, a security right in a WR may be perfected by registering a pledge of the WR in the collateral registry. The Law on Pledge provides for extra-judicial enforcement of the pledged asset so long as it is explicitly provided for in the pledge agreement.²⁴²

²³⁸ *Id.*

²³⁹ “Approved Banks for Non Cash Collateral,” available at <http://www.dccc.co.ae/approved-banks-for-non-cash-collateral>, see also <http://www.dccc.co.ae/margin-information> (The DCCC has also established a risk management framework, which “is underpinned by a system of initial margin, daily marking-to-market procedures and additional margins”).

²⁴⁰ Exchange By-Laws, *supra* note 222 (A Clearing Guarantee is a “guarantee by a Guarantor Clearing Member in the form prescribed by the [DGCX] from time to time pursuant to which that Guarantor Clearing Member guarantees to each Member (other than the Guaranteed Member) Contracts entered into by that Guaranteed Member and agrees to accept for registration in its name with the [DCCC] all contracts entered into by that Guaranteed Member”).

²⁴¹ Article 172 of the Commercial Transactions Law provides that where a “pledgor fails to pay on the date of maturity the debt secured by the pledge, the pledgee may, after the lapse of seven days from the date of service of notice on the debtor to pay, submit a petition to the Court to the effect of authorizing him to sell the mortgaged asset.”

²⁴² “New Mortgage Law in UAE – briefing on key issues,” CLIFFORD CHANCE LLP, p. 7 (2017).

Although the Law on Pledge applies to all types of movable assets, including EWRs, it does not apply in free zones such as the DMCC. Accordingly, a security right registered within Tradeflow would not be enforceable under the Law on Pledge.²⁴³ However, Rule 3 of the Security Rules, which applies in the DMCC, provides for an out-of-court enforcement mechanism by way of a Close Out Security Instruction that may be sent through Tradeflow to the DMCC. Rule 3 provides that upon receipt of a Close Out Security Instruction, the DMCC may sell the Warrants and apply the proceeds to satisfy the claims of the pledgee.

The Commercial Transactions Law provides for a warehouseman lien.²⁴⁴ Like the pledge, it may not be enforced without a court order. The same is also true with respect to the DMCC-operated e-WRS. In order to enforce the “Storage Operator’s lien,” an operator must send a notification via Tradeflow “to the relevant Legal Owner and simultaneously (if applicable) to any Tradeflow secured creditor” with a demand stating the following: i) the Storage Operator’s claim; ii) a demand for payment of the claim to be settled within 14 days; and iii) a statement that unless the claim is paid within the time specified the Storage Operator will seek a court order authorizing the sale of the goods by auction.²⁴⁵

III. INITIATIVES ON WAREHOUSE RECEIPTS BY INTERNATIONAL AND REGIONAL ORGANIZATIONS

²⁴³ “Pledge through DMCC Tradeflow Platform,” AL TAMIM & CO, available at <https://www.tamimi.com/law-update-articles/pledge-through-dmcc-tradeflow-platform/>.

²⁴⁴ Commercial Transactions Law, *supra* note 211, Article 194(1).

²⁴⁵ Corporate Access Agreement, *supra* note 220, Article 5.7 (“Enforcement of a Storage Operator’s Lien”).

Several organizations have promulgated principles, policies and standards applicable to every aspect of warehouse receipts systems (“WRS”), including i) the World Bank Group (“WBG”), ii) the European Bank for Reconstruction and Development (“EBRD”), iii) the Food and Agriculture Organization of the United Nations (“FAO”), and iv) the Organization of American States (“OAS”). The United Nations Commission on International Trade Law (“UNCITRAL”) and the International Organization of Securities Commissions (“IOSCO”) have promulgated standards and principles applicable to some specific aspects of a WRS such as security rights and electronic transferable records.

For instance, WBG published a toolkit titled “A Guide to Warehouse Receipt Financing Reform: Legislative Reform” (“WBG Guide”).²⁴⁶ The IFC of the World Bank Group published a guide titled “Warehouse Finance and Warehouse Receipt Systems: a Guide for Financial Institutions in Emerging Economies” (“IFC Guide”).²⁴⁷ The EBRD and FAO jointly published a guide titled “Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends” (“FAO/EBRD Guide”).²⁴⁸ OAS recommended the adoption of “Principles for Electronic Warehouse Receipts for Agricultural Products” (“OAS Principles”).²⁴⁹ IOSCO published a series of reports (“IOSCO Reports”) on the regulation of commodity markets and relevant storage infrastructure that informs some WRS-related aspects.²⁵⁰ UNCITRAL published a “Model Law on

²⁴⁶ WBG, A Guide to Warehouse Receipt Financing Reform: Legislative Reform (2016), p. iii, available at <http://documents.worldbank.org/curated/en/885791474533448759/pdf/108450-WP-PUBLIC.pdf> (last accessed Sept 17, 2019).

²⁴⁷ IFC, Warehouse Financing and Warehouse Receipts Systems: A Guide for Financial Institutions in Emerging Economies (2013), available at <https://www.mongolbank.mn/conference/books/01.pdf>.

²⁴⁸ EBRD/FAO, Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends (2014), available at <http://www.fao.org/3/a-i4318e.pdf>.

²⁴⁹ OAS, Principles for Electronic Warehouse Receipts for Agricultural Product (2016), available at http://www.oas.org/en/sla/iajc/docs/CJI-doc_505-16_rev2.pdf.

²⁵⁰ See, for example: IOSCO, Commodity Storage and Delivery Infrastructures: Good or Sound Practices , Consultation Report (June 2018), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD604.pdf>.

Electronic Transferable Records” (“Model ETR Law”), which could provide the legal basis for the issuance and transfer of electronic documents of title.²⁵¹

All of these publications provide for WRS principles, policies and standards, including i) the scope of the WRS; ii) the benefits of instituting an EWR system; iii) transfers of WRs; iv) regulation of the WRS and supervision of warehouses; v) licensing regime for warehouses; and vi) protection of the rights of creditors with a security right in a commodity covered by a WR. The following subsections discuss those principles, policies and standards. For a table comparing the publications discussed below see Annex I.

A. SCOPE

Most warehouse receipts laws apply generally to any type of asset that may be stored in a warehouse. Some warehouse receipts laws apply only to a specific sector of the economy (e.g., agricultural products) or a specific type of commodity (e.g., grain).

B. ELECTRONIC WRS

A WRS may be paper-based, electronic, or both. Virtually all of the publications recognize the advantage of instituting an electronic system. An electronic system, for instance, provides for a speedier and more secure method of transferring WRs. However, an electronic system often requires establishing a new legal, regulatory and trading infrastructure, which may prove difficult/costly for emerging economies.

IOSCO, Principles for the Regulation and Supervision of Commodity Derivatives Markets (Sept 2011), *available at* <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf>, IOSCO, The Impact of Storage and Delivery Infrastructure on Commodity Derivatives Market Pricing (May 2016), *available at* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD530.pdf>.

²⁵¹ Model Law on Electronic Transferable Records (UNICATRAL, 2017), *available at* http://www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf.

The IFC Guide identified a trend towards establishing an electronic WRS beginning in the 1990s, either within the framework of commodity exchanges, such as the London Metal Exchange or the Ethiopian Commodity Exchange (“ECE”), or within the framework of public systems applicable to all warehouses.²⁵² The OAS Principles provide for an electronic WRS for agricultural products, based on the experience of the United States, in which warehouses issue and transfer EWRs via platforms set up by government-licensed EWR providers. The OAS Principles define EWR providers as “an entity that issues or releases [EWRs], which may be the warehouse operator itself or a third-party service provider operating on behalf of the warehouse.”²⁵³ Under the OAS Principles, an EWR provider would administer a platform for the issuance, transfer and registration of EWRs, including for collateral purposes. The OAS Principles provide a detailed regime for regulating EWR providers.

It is therefore generally recognized that an electronic system provides for a more efficient and secure WRS. However, in instituting such a system, the entity charged with implementing the EWR platform should be clearly defined, and may be: i) a government entity, such as a financial regulator/securities exchange commission; ii) a commodity exchange; or iii) private government-licensed EWR providers.

C. TRANSFER OF WRS

Transfers of WRs are uniformly governed by the principle of negotiability. Transfers may be concluded for purposes of selling the underlying commodity or for purposes of securing the

²⁵² IFC Guide, p. 29.

²⁵³ OAS Principles, p. 5.

repayment of a loan. A WR law should clearly define WRs as negotiable documents of title, allowing for the transfer of property rights, including security rights in the underlying commodity via delivery of the WR. The taking free rules commonly included in WR legislation establish that transferees take negotiable WRs free of any competing claims in the underlying commodity, so long as certain requirements are met. On the other hand, WRs not intended to be traded or pledged may be issued as non-negotiable, thereby limiting their circulation. However, they may still be transferred to third parties by assignment.

There are different regimes for transfers of paper WRs. Transfers of paper WRs require an endorsement (if the WR is made out to a named holder) and physical delivery of the WR to the transferee. Delivery of possession would also have the effect of making the security right effective against third parties. The WBG Guide contemplates the delivery of the “single” WR while the EBRD/FAO Guide, taking into account the civil-law approaches, contemplates the “double” WR system – the receipt itself and a pledge bond/warrant. Despite the issuance of two documents, creditors regularly take possession of both, so the practical effect of making security rights effective against third parties in both systems is the same.

The WRS should provide a method for the “delivery” of EWRs which achieves a functionally same effect as transferring possession, equipping the transferee of an EWR with the equivalent set of rights granted to the transferee of a paper equivalent. The concept of control emerged as the functional equivalent to effectuate transfers of EWRs. The WBG Guide, for example, states that “[d]elivery of a negotiable electronic document is through voluntary transfer of control. The control concept as applied to negotiable [EWRs] is the substitute for both possession and

endorsement as applied to negotiable tangible documents of title.”²⁵⁴ The same concept of control is referenced in the OAS Principles, which provide that “the person in control of [an EWR]... is entitled to the same rights as the depositor”.²⁵⁵

In the context of EWR systems, most jurisdictions have established central registries to record the issuance and transfers of EWRs. It is important to distinguish between WR registries that i) merely record the issuance of WRs, and those that ii) act as platforms giving legal effect to the issuance and transfers.²⁵⁶ In the case of the former, registration may be a condition of validity designed to protect transferees against fraudulent issuance of WRs. In the case of the latter, the registry would not only perform these functions, but also give effect to transferring rights embedded in EWRs.

Transfers of EWRs may require the assistance of a third party. The OAS Principles envision a WRS in which EWR platforms are administered by licensed EWR providers. The IFC Guide, on the other hand, contemplates EWRs being integrated into an existing platform set up by a commodity exchange. In other cases, the EWR platform could be administered by a government entity, such as a financial regulator or a ministry of agriculture.

D. REGULATION OF WRS AND SUPERVISION OF WAREHOUSES

All of the organizations involved in promulgating WRS principles, policies and standards provide that an entity should be authorized to regulate the WRS through the issuance of rules and

²⁵⁴ WBG Guide, p. 82.

²⁵⁵ OAS Principles, p. 8.

²⁵⁶ IFC Guide, p. 31 (“Registries may either be paper-based or electronic; in the latter case, they are an integral part of an e-WR system. Indeed, the move to an electronic system facilitates the establishment of a registry, as the central server provides the data that a registrar will need—i.e., the link between an identified physical inventory and its corresponding WR—and an audit trail of past transactions”).

procedures. Such rules and procedures would generally provide a regime for the implementation of the WRS, such as instituting and administering a WR registry or EWR platform, as well as for supervising warehouses storing goods and issuing corresponding warehouse receipts. The power to issue rules and procedures governing specific aspects related to the operations of the WRS is ordinarily vested with a statutorily-authorized government entity. Historically, countries have empowered either i) financial regulators; or ii) ministries/departments of agriculture to fulfill this function. Governments have vested regulatory powers on financial regulators whenever warehouses have been perceived as auxiliary financial institutions and, as such, as an echelon of the overall financial system. More recently, the regulatory function is being placed with securities exchange commissions, which could facilitate the use of warehouse receipts as a trading instrument as well as a settlement instrument for futures.

One of the most important functions a WRS regulator fulfills is instituting a regime for supervising warehouses and warehouse operators. While the regulatory function generally concerns issuing rules and procedures with respect to the operations of the WRS, the supervisory function generally concerns policing warehouses and warehouse operators in order to ensure that they adhere to regulations as well as applicable standards for storing commodities and issuing corresponding warehouse receipts. In jurisdictions where a ministry/department of agriculture is empowered to regulate the WRS, the supervisory function is often placed in the hands of a department within the ministry/department of agriculture. However, the supervisory function does not necessarily have to be fulfilled by a government entity, and virtually all of the organizations involved in promulgating WRS principles, policies and standards contemplate that the supervisory function could also be delegated to a non-government entity, such as a trade association or a commodity

exchange. In the absence of an adequate supervisory regime for warehouses, the supervisory function may be fulfilled by private collateral management/inspection companies or banks. The WBG and IFC Guides pay considerable attention to the role of collateral management/inspection companies in the system of supervising warehouses.²⁵⁷

Among the functions a supervisory body typically fulfills are: i) instituting and/or implementing a licensing regime; ii) conducting on-site inspections; and iii) imposing sanctions for violations, such as license revocation/suspension and monetary fines. The supervisory body's most important function is implementing a licensing regime for warehouses, which provides the legal basis for the associated supervisory regime.

E. LICENSING REGIME FOR WAREHOUSES

Depending on the jurisdiction, the permission to engage in warehousing activities may be given in the form of a "license," "certificate of registration," "certification," and/or "accreditation." Some jurisdictions use more than one of these terms, giving each a different meaning. For example, warehouse receipts laws may provide that only "licensed" warehouses may engage in the storage of commodities, but only "licensed" and "accredited" warehouses may issue negotiable warehouse receipts.

The main purpose of licensing is to supervise the activities of warehouses and thereby assure depositors, buyers and creditors that they deal with an entity that satisfies the minimal requirements without incurring the cost of investigating whether that is in fact the case. A well-functioning

²⁵⁷ See WBG Guide, p. 35 ("It is critical to assess the appreciation of the market of the trustworthiness of local storage or collateral management companies, as they will be destined to play a key role in inspiring trust in the WRS").

licensing regime should minimize various risks, especially those associated with fraud and improper storage. Other purposes of licensing include providing for uniform and predictable warehousing practices and procedures, and also funding the supervisory regime for warehouses through fees.²⁵⁸

The WBG Guide highlights that a warehouse receipts law should not contain a general licensing requirement for warehouses storing goods and issuing warehouse receipts covering those goods. “There should be no limitations on the types of movable assets to which the law applies... although the implementation of the licensing regime may be limited to certain kinds of commodities (e.g., all agricultural commodities or grains and pulses).”²⁵⁹ However, the EBRD/FAO Guide also considers systems in which the warehouse receipts laws require all warehouses and/or warehouse operators to obtain a license prior to storing goods and issuing warehouse receipts. Accordingly, such laws ordinarily provide for a general prohibition against engaging in warehousing activity without obtaining a license and in some cases impose administrative and even criminal penalties.

Warehouse receipts legislation typically designates an authority to license warehouses, which can be either i) a government entity, such as a ministry/department of agriculture, the financial authorities or a securities exchange commission; or ii) a non-government entity, such as a trade association or commodity exchange. It is not uncommon for the licensing functions to be divided among several entities, whether or not governmental.

²⁵⁸ IFC Guide, pp. 36-37 (“At the outset, a regulatory agency may be funded primarily through grants, but it should be fully self-sufficient over time... This self-financing should be realized mainly through levies on licensed warehouses, though additional income may be generated through laboratory and other services. There may be a fixed charge for all warehouses and a variable component related to throughput or licensed capacity”).

²⁵⁹ WBG Guide, p. 58.

The warehouse receipts legislation may also establish general licensing requirements, which are typically supplemented with more detailed requirements through regulations. The EBRD/FAO Guide groups such requirements as: i) infrastructural, which pertains to standards concerning the facilities and equipment used to store and take proper care of a particular commodity; ii) managerial, which deals with the competence and ability of an entity to manage a warehouse; iii) personnel, which concerns the training and qualifications of warehouse staff, particularly those engaged in grading commodities; and iv) operational rules and fees, which relate to procedures governing the storage and delivery/release of a commodity.

In addition to the above, licensing regimes ordinarily provide for mechanisms to ensure that warehouses fulfill their obligations to depositors, buyers and creditors. Among such guarantee mechanisms are requirements that warehouses and warehouse operators take out insurance and/or post a bond to cover risks associated with damage or loss of the stored commodity as well as negligence and fraud. Some systems also provide for a guarantee fund to indemnify holders of warehouse receipts in cases where participating warehouses fail to meet their obligations to such holders. The guarantee/indemnity fund may be a separate entity from the licensing authority and may impose additional requirements for warehouses to participate. Additionally, the fund may carry out supplementary supervision functions of its participants.

F. PROTECTION OF THE RIGHTS OF SECURED CREDITORS

The WBG Guide emphasizes the need for warehousing legislation reform to address certain aspects of security rights in a commodity covered by a warehouse receipt. In particular, the WBG Guide foresees situations in which a creditor perfects a security right, by registration, in a

commodity that is subsequently deposited into a warehouse. In such cases, the corresponding warehouse receipt may be delivered to another second creditor, resulting in a priority conflict between the registered security right of the first creditor and the possessory security right of the second creditor. According to the WBG Guide, “[t]he modern approach is to provide in the warehouse legislation that the second creditor has priority if it takes without knowledge that the goods are encumbered and the first creditor acquiesced to the warehousing of the goods.”²⁶⁰ In some jurisdictions, it is sufficient for the second creditor to take without knowledge, irrespective of the any consent of the first creditor to the storage of goods. Knowledge standards may also vary from the existence of a security right to the knowledge of a violation of the security right. In some jurisdictions (e.g., those which do not recognize warehouse receipts as negotiable documents of title), the priority may be determined simply based on the first-in-time, first-in-right principle. Many jurisdictions lack any priority rule to resolve this conflict.

Some warehouse receipts legislation also provides for remedies upon default of a debtor that should be coordinated with the rules of secured transactions laws. In many, especially civil-law jurisdictions, warehouse receipts financing has been popular because the relevant laws that generally prohibit extra-judicial enforcement provided for exceptions, including for possessory pledges. Modern secured transactions laws typically allow secured creditors, including those with a security right in a warehouse receipt, to realize the collateral without a court order upon default by the debtor. Accordingly, where modern secured transactions laws have been enacted, warehouse receipts legislation should provide that enforcement of the rights of creditors with a security right in a warehouse receipt is governed by such laws. In the absence of applicable modern

²⁶⁰ Id.

secured transactions law, WR legislation may provide for specific enforcement mechanisms, which present some peculiar features not commonly associated with other types of secured transactions, such as the collateral (warehouse receipt) already being in possession of the secured creditor and the often perishable nature of the underlying commodity.

G. GAPS IN THE EXISTING PRINCIPLES, POLICIES AND STANDARDS

The documents considered above provide for a fairly complete framework for instituting a modern WRS, particularly if considered together. However, there are a number of issues that remain insufficiently addressed. First, a recommendation may be reflective of a system that operates efficiently under certain conditions. For instance, although the OAS Principles provide for a general framework with respect to designing such a system for agricultural commodities, it is based on the practice in the United States where government-licensed providers operate EWR platforms on a competitive basis. This system may not be workable in many jurisdictions and therefore other models, such as ones where a government entity or a commodity exchange administers an EWR platform, should also be considered. Moreover, there are many issues with respect to transferring electronic warehouse receipts that are left largely unaddressed, particularly regarding the legal mechanisms for transferring rights, which are quite different from those related to the transfer of paper warehouse receipts.

Second, there is a lack of guidance with respect to the role of regulators in the regulatory, licensing, and supervisory functions they ought to perform. One advantage of empowering securities exchange commissions and commodity exchanges with regulatory and supervisory functions is that this could facilitate the creation of an organized market for warehouse receipts and thereby lead to utilizing such receipts as settlement/trading instruments. An organized market would allow

creditors to more quickly liquidate the underlying commodity upon default of the debtor. Finally, an organized market would have a positive impact on fair and transparent commodity price formation.

Third, the WRS principles, policies and standards focus largely on a system for small and medium-sized farmers. However, there is insufficient discussion of the feasibility and practice of utilizing warehouse receipts in other sectors of the economy, such as the extractive sector (e.g., minerals and oil/gas), raw materials, inventory of general nature, etc.

Finally, the WRS principles, policies and standards do not sufficiently canvass the role of field warehousing as a means for creditors to exert control over the commodities covered by a warehouse receipt. Such practices are not uncommon in developing economies, but their cost structure makes them suitable only for larger transactions.

H. COMPARING & CONTRASTING WRS PRINCIPLES, POLICIES AND STANDARDS

Some of the WRS principles, policies, and standards reflect significant differences with regard to specific aspects. For instance, whereas the WBG Guide only provides for rules governing a “single” warehouse receipt, the EBRD/FAO Guide also considers rules of a “double” warehouse receipt system. This is an important issue that has hampered any progress with respect to developing a model law on WR at the OAS. This is an issue that a future UNCITRAL instrument should explore.

Another example relates to licensing whereby the WBG Guide provides that a warehouse receipts law should not contain a mandatory licensing requirement for warehouses, whereas the

EBRD/FAO Guide contemplates systems in which a mandatory licensing requirement applies to all warehouses. Furthermore, whereas the EBRD/FAO Guide places emphasis on the role governmental institutions play in supervising warehouses, the WBG and IFC Guides also consider the possible role of private-sector entities such as collateral management/inspection companies in carrying out this function. These differences may be attributed to the jurisdictions on which the respective guides focused. The WBG and IFC guides, for instance, are reflective of the American approach to the WRS, whereas the EBRD/FAO Guide takes into account some aspects of the civil law tradition. Despite these differences, however, the WBG, IFC and EBRD/FAO guides all provide for a flexible framework that takes into account variations with respect to a given jurisdiction's legal tradition as well as economic circumstances. While regulatory and licensing aspects may be outside the scope of a future UNCITRAL instrument, a section in a guide to enactment should be dedicated to these issues.

I. OTHER INITIATIVES

The International Organization of Securities Commissions (hereinafter "IOSCO") is recognized as the global standard setter for the securities sector.²⁶¹ IOSCO works closely with the G20 and the Financial Stability Board (FSB) to advance the global regulatory reform agenda for the securities industry.²⁶²

²⁶¹ International Organization of Securities Commissions, *About IOSCO*, available at https://www.iosco.org/about/?subsection=about_iosco (last accessed Sept 20, 2018).

²⁶² *Id.*

In June 2018, IOSCO published a report on “good and sound practices” for commodity storage and delivery infrastructure (hereinafter “IOSCO Report”).²⁶³ The IOSCO Report is based on previous IOSCO reports that generally aimed to develop recommendations “on regulation and supervision of commodity derivatives markets to strengthen transparency and address market abuse.”²⁶⁴ In the context of warehouse receipts and commodity markets, the IOSCO Report seeks to provide guidance on relevant storage infrastructure²⁶⁵ (e.g., warehouses, silos, tanks, etc.) and their relevant oversight bodies²⁶⁶ (e.g., market authority, trading venue, central counterparty, etc.) to assist in identifying and addressing issues “that could affect commodity derivatives’ pricing and in turn affect market integrity and efficiency.”²⁶⁷

The IOSCO Report recommendations are mainly designed to address disparities in practices related to the storage of physical commodities and storage infrastructure operations.²⁶⁸ These practices were categorized into five broad areas for potential reform: i) oversight; ii) transparency; iii) conflicts of interest; iv) fees and incentives; and v) operations.²⁶⁹ The recommendations in each one of these areas can be divided into three categories: i) preventive practices that seek to establish

²⁶³ IOSCO, *Commodity Storage and Delivery Infrastructures: Good or Sound Practices*, Consultation Report, CR05/2018 (June 2018), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD604.pdf> (last accessed Sept. 20, 2019) [Hereinafter “IOSCO Report”]

²⁶⁴ IOSCO, *Principles for the Regulation and Supervision of Commodity Derivatives Markets*, FR07/11 at 5 (Sept 2011), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf> (last accessed Sept. 20, 2018). See also IOSCO, *The Impact of Storage and Delivery Infrastructure on Commodity Derivatives Market Pricing*, FR03/2016 (May 2016), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD530.pdf> (last accessed Sept. 20, 2018).

²⁶⁵ Relevant Storage Infrastructure is defined as “any physical infrastructure used to store or transfer commodities as part of the physical delivery process related to a commodity derivative contract, whether the commodities are held for a short or long-term period. Depending on the nature of the commodity this may include warehouses, grain elevators, sheds, silos, tanks, pipelines, marine vessels, open storage areas, vaults or other forms as appropriate to a deliverable commodity.” See IOSCO Report, *supra* note 261, at 4.

²⁶⁶ Relevant Oversight Bodies are defined as “a market authority, such as a trading venue, a central counterparty (CCP), a self-regulatory organization or a statutory regulator that oversees an RSI. This oversight can be through direct governance, at arm’s length or indirectly.” See IOSCO Report, *supra* note 261, at 4.

²⁶⁷ *Id.*, at 1.

²⁶⁸ *Id.*, at 2-3.

²⁶⁹ *Id.*

good governance and dispute resolution procedures; ii) monitoring practices that seek to address issues as they arise in order to mitigate deleterious effects; and iii) punitive practices which address, through resolution, behaviors after the fact.²⁷⁰

The following are examples of recommendations found in the IOSCO Report: in the area of Oversight, “[warehouses and silos] linked to trading venues...should adhere to the Good or Sound Practices [in the IOSCO Report].”²⁷¹ “[Relevant oversight bodies] may promulgate certain rules to prevent behaviors by [warehouses and silos] that could negatively impact the price discovery process.”²⁷² In addition, “legislative bodies could consider granting express direct oversight of [warehouses and silos] to financial regulators.”²⁷³ In the area of Transparency, “trading venues and [central counterparties] could be expected to implement a periodic audit procedure for [warehouses and silos].”²⁷⁴ Equally, “trading venues should have policies and procedures in place to address any [warehouse or silo] audit deficiencies.”²⁷⁵ With respect to Fees and Incentives, “[relevant oversight bodies] could require that [warehouses and silos] establish a fee structure that incentivizes on-time delivery.”²⁷⁶ In addition, “[relevant oversight bodies] could institute a penalty structure on [warehouses and silos] for failure to deliver or delay of delivery.”²⁷⁷ In the area of Operations, “financial regulators may require that there is an appropriate management and record-keeping system in place for [warehouses and silos] to properly record, audit and reconcile, on a periodic basis, the throughput of commodities.”²⁷⁸

²⁷⁰ *Id.*

²⁷¹ *Id.*, at 17.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*, at 18.

²⁷⁵ *Id.*

²⁷⁶ *Id.*, at 19.

²⁷⁷ *Id.*

²⁷⁸ *Id.*, at 19-20.

a. IOSCO Principles in Action

The EBRD is supporting a legal reform project undertaken by the National Securities and Stock Market Commission (NSSMC), Ukraine's securities regulator, aimed at supplementing the current WRS model, administered by the Ministry of Agrarian Policy and Food (MinAgro) with an electronic one regulated by the NSSMC.²⁷⁹ The proposal draws an inspiration from the IOSCO Report.²⁸⁰ This approach represents a shift from previous warehouse receipts reform projects, because the focus is on establishing a market for EWRs that would allow their trading and use as collateral similarly to conventional securities, administered by a securities regulator. The IOSCO-inspired WRS would result in the migration of Ukraine's WRS away from the regulatory infrastructure established by MinAgro for the agrarian sector, into that instituted by NSSMC for the financial sector. The NSSMC would regulate commodity exchanges that trade EWRs for many different types of commodities, not just for grain.²⁸¹ In this proposed environment, the commodity exchanges would oversee warehouses by requiring adherence to the applicable standards.²⁸² One of the most attractive features of NSSMC's proposal is that it delegates oversight functions to private entities, such as commodity exchanges, which may be viewed positively in those jurisdictions where governmental entities do not have the capacity to exercise such functions, or where the private sector generally lacks confidence and trust in governmental entities.

²⁷⁹ See *NSSMC will develop a market for warehouse receipts*, STOCKWORLD, available in Ukrainian at <https://www.stockworld.com.ua/ru/news/nktsbfr-budiet-razvivat-rynok-skladskikh-svidietiel-stv> (last accessed August 7, 2018).

²⁸⁰ See, e.g., *The Impact of Storage and Delivery Infrastructure on Commodity Derivatives Market Pricing* (OICU-IOSCO, 2016).

²⁸¹ *Supra* note 279

²⁸² *Supra* note 235.

IV. APPLICATION OF UNCITRAL MODEL LAW ON ELECTRONIC TRANSFERABLE RECORDS

A. OVERVIEW OF THE MODEL ETR LAW

The 2017 UNCITRAL Model Law on Electronic Transferable Records (“Model ETR Law”)²⁸³ aims to “enable the legal use of electronic transferable records [“ETRs”] both domestically and across borders.”²⁸⁴ The Model ETR Law “applies to [ETRs] that are functionally equivalent to transferable documents or instruments [“TDIs”].”²⁸⁵ ETRs are increasingly relevant for developing countries seeking to establish a market for EWRs to facilitate farmers’ access to credit.²⁸⁶ They are a primary feature of a paperless trade environment.²⁸⁷

The Model ETR Law is divided into three chapters: i) general provisions; ii) provisions on functional equivalence; and iii) use of ETRs. Chapter II provides for the “functional equivalency” of TDIs and ETRs, especially with respect to their issuance and transfer. Article 11(1) provides that “[w]here the law requires or permits the possession of a [TDI],” such as a warehouse receipt, “that requirement is met with respect to an [ETR] if a reliable method is used: (a) to establish exclusive control of that electronic transferable record by a person; and (b) to identify that person as the person in control.” Article 11(2) further provides that “[w]here the law requires or permits

²⁸³ UNCITRAL Model Law on Electronic Transferable Records (2017), *available at* http://www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf

²⁸⁴ “Summary of UNCITRAL Model Law on Electronic Transferable Records,” *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2017model.html

²⁸⁵ *Id.* TDIs are defined as “paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring possession of the document or instrument. Transferable documents or instruments typically include bills of lading, bills of exchange, promissory notes and warehouse receipts.”

²⁸⁶ *Id.*

²⁸⁷ *Id.*

transfer of possession of a [TDI], that requirement is met with respect to an [ETR] through the transfer of control over the electronic transferable record.”

Chapter III deals with the use of ETRs, including the endorsement, and replacement of a transferable document or instrument with an ETR and *vice versa*. For instance, Article 15 provides that “[w]here the law requires or permits the endorsement in any form of a [TDI], that requirement is met with respect to an [ETR] if the information required for the endorsement is included in the [ETR].” Accordingly, when certain requirements are met, the Model ETR Law provides that the issuance and transfer of a TDI in electronic form will have the same legal effect as a similar transaction done in paper form. The Model ETR Law may thus provide a legal framework for dematerialization of a well-designed legal framework for paper WRs. The section below examines how Mexico’s efforts to institutionalize an EWR system could be aided by this model.

B. MEXICO EWR AMENDMENTS

The Mexican warehouse receipts legal framework is mainly comprised of two laws: i) the CI Law; and ii) the Auxiliary Organizations Law. In 2016, Mexico began the amendment process for implementing an EWR system.

b. Implementation of an EWR

The proposed amendments were designed in a way that leaves the door open for the potential digitalization of other credit instruments (*títulos de crédito* — an umbrella term covering all negotiable documents and instruments governed by the CI Law) if the Mexican government decides to do so in the future. This was achieved by incorporating the concept of control from the

U.S. Uniform Electronic Transactions Act (“UETA”)²⁸⁸ and the Model ETR Law into the general section of the CI Law.²⁸⁹

In the drafting process, the Mexican Ministry of the Economy (“Ministry”) expressed reservations with the use of the term “control” even though it agreed with its legal and practical effect. This was because the Ministry was concerned that the introduction of a new and revolutionary concept such as control would encounter unnecessary political opposition. Thus, while avoiding the use of the term “control,” the elements of control were embedded in the amendment, and these elements were adapted to the terminology already present in the CI Law. As such, the amendment equated a person in control of an electronic credit instrument under the Model ETR Law to a “holder” (*tenedor*) of the electronic credit instrument.

Proposed Article 17 Bis of the CI Law provides for the following: “A person becomes a holder of an electronic credit instrument only when the information system...provides indubitably that such a person is the person to whom the credit instrument has been issued or transferred. An information system should be understood as a system for generating, sending, receiving, storing or otherwise processing data messages.” Article 17 Bis was drafted with the consideration that the Mexican government intended to rely on the existing infrastructure (RUCAM) as the information system for the issuance and transfer of EWRs. Furthermore, proposed Article 17 Bis 1 of the CI Law

²⁸⁸Uniform Electronic Transactions Act, *at* http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf (last accessed April 25, 2017) [Hereinafter “UETA”].

²⁸⁹ Since the Model ETR Law was still work in progress at the time the Legislative Proposal was developed, the control concept was mainly based on UETA.

provides: "... a person becomes the holder of an electronic credit instrument when the instrument is issued and/or transferred per the following rules:

- a) The credit instrument is unique, identifiable and, except as provided in (d), unalterable.
- b) The credit instrument identifies the holder as:
 - i. The person to whom the electronic credit instrument has been issued;
 - ii. The person to whom the electronic credit instrument has been transferred.
- c) The credit instrument was transferred to and is maintained by the person claiming to be its holder.
- d) Any revision of the credit instrument is readily identifiable as authorized or unauthorized.

As shown by Mexico, the implementation of an EWR system using the concepts enshrined in the Model ETR Law is feasible as long as a country has a functional warehouse receipts law. However, the needs of most emerging economies go much beyond the introduction of EWRs as counterparts to paper receipts.

V. NEED FOR MODERNIZATION

The following section summarizes the warehouse receipts systems of five countries, divided into two categories: i) countries without warehouse receipts legislation and regulatory framework –

Cameroon, Nigeria, and Poland; and ii) countries with a partially developed warehouse receipts system – Belarus and Russia.

This section illustrates that jurisdictions with WRS at various levels of development either lack some essential elements or are deficient in other respects. An UNCITRAL instrument for warehouse receipts could greatly facilitate modernization of those aspects and fill any gaps. While jurisdictions may attempt to undertake these efforts on their own, constructing a functional and comprehensive system would be aided by a model framework that does provide for all of those elements.

A. COUNTRIES WITHOUT WAREHOUSE RECEIPTS LEGISLATION AND REGULATORY FRAMEWORK

a. Cameroon

Cameroon’s legal framework is characterized by its “bijural system,” where English common law controls in the two Anglophone regions of the Northwest and Southwest, and French civil law controls in the eight francophone regions.²⁹⁰ There is no law of general application governing warehouse receipts.²⁹¹ In addition, there is no regulatory framework for warehouses and their operators (or collateral managers).²⁹² Warehousing relationships are governed by the principles of general law, mainly contract and deposit.²⁹³ The creation and perfection of security rights is

²⁹⁰ *Cameroon Legal System*, HG, available at <https://www.hg.org/legal-articles/cameroon-legal-system-7155>.

²⁹¹ *Enabling the Business of Agriculture: Moveable Collateral – Warehouse Receipts (WBG Index) – Cameroon*, WBG available at http://eba.worldbank.org/data/exploreconomies/cameroon/2017#eba_fina.

²⁹² *Cameroon - Warehouse Receipt System: Making Progress in Market, Finance and Post-harvest Risk Management*, IFAD, available at http://p4arm.org/app/uploads/2018/05/Cameroon_WRS_policy-brief_EN.pdf.

²⁹³ *Id.*

governed by the OHADA Uniform Act (2010),²⁹⁴ which provides for extra-judicial enforcement mechanisms.²⁹⁵

Warehouse financing in Cameroon is based on two separate models: i) the third-party holding system, where a collateral manager operates a warehouse on the premises of the borrower; and ii) the community inventory system, where commodities are stored in warehouses under the control of producer organizations.²⁹⁶ However, neither financing scheme utilizes warehouse receipts, and studies found that these arrangements are “fraught with risks of fraud and defaults.”²⁹⁷ As a result, the International Fund for Agricultural Development (“IFAD”) recently recommended that Cameroon enact a comprehensive law for a WRS, including the licensing of warehouses and collateral managers, and that any such law should recognize warehouse receipts as negotiable documents of title.²⁹⁸

b. Nigeria

Although the agricultural and mining sectors serve as backbones of the economy, Nigeria still lacks a WRS of general application, including legal and regulatory norms.²⁹⁹ The Nigerian government has attempted to institute a warehouse receipts system in 2013 through the

²⁹⁴ OHADA Uniform Act (2010), available at

http://www.ohada.org/attachments/article/482/AUDCG_EN_Reviewed_Unofficial_Translation.pdf.

²⁹⁵ *Enhancing Structured Lending into Francophone African Countries: OHADA Adopts a Major Reform of its Uniform Act Organizing Security Law*, MAYER BROWN (2011) (“[T]he amended OHADA Uniform Act now allows self- appropriation of the secured asset... which allows the secured lender to take possession of the asset and sell it even without a court order”), available at <https://www.mayerbrown.com/files/Publication/a1e8d808-ecb2-4a7c-9bf3-16b21edc5e0e/Presentation/PublicationAttachment/f449f57d-5cd9-491e-8c63-179a59f48f85/10768.PDF>.

²⁹⁶ *Cameroon - Warehouse Receipt System*, *supra* note 292.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See WBG Index, available at http://eba.worldbank.org/en/data/exploreconomies/nigeria/2017#eba_fina. Nigeria received 0 out of a possible 5 points for its warehouse receipts system. To the question of whether “there a law regulating the operation of warehouse receipts in your country,” the WBG Index answered “no.”

development of a bill.³⁰⁰ The bill provided for the establishment of the Nigerian Independent Warehouse Regulatory Agency, which would regulate and supervise the proposed warehouse receipts system.³⁰¹ It also provided for a licensing regime for warehouses, including performance guarantees such as insurance and posting of bonds.³⁰² The bill also recognized negotiable (paper) warehouse receipts, which could be transferred for trading or collateral purposes, including on a commodity exchange – the Nigerian Commodity Exchange (“NCX”).³⁰³

The NCX launched a pilot program in 2014 aimed at establishing an EWR system for agricultural products.³⁰⁴ However, the NCX has not been able to attract the necessary volume to maintain its operations.³⁰⁵ This may be attributed to the lack of a modern warehouse receipts legal framework.

The Secured Transactions in Movable Assets Act (2017) (STMAA)³⁰⁶ provides a modern framework for creating and perfecting security rights in movable assets, including documents of title. The STMAA permits extra-judicial enforcement in the event of default by the grantor. However, its provisions are predicated on the existence of a modern WRS, which would give creditors the confidence to accept WRs as collateral.

³⁰⁰ The Warehouse Receipts and Other Related Matters Bill, *available at* <http://nass.gov.ng/document/download/8203>.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *The Privatisation of the Commodities Exchange and Prospects for the Diversification of the Nigerian Economy, DETAIL, available at* <https://www.detailsolicitors.com/media/archive1/newsletters/TheFutureofNigeriasEconomyStartswiththePrivatizationofitsCommoditiesExchangeClean.pdf>.

³⁰⁵ *Id.*

³⁰⁶ The Secured Transactions in Movable Assets Act (2017), *available at* <https://www.cbn.gov.ng/Out/2017/CCD/STMA%20ACT,%202017.pdf>

c. Poland

Although a warehouse receipts law was passed in 2000 with technical support provided by the United States Agency for International Development (USAID), the law was never fully implemented due to lack of funding, particularly that needed to establish the guarantee/indemnity fund.³⁰⁷ The fate of Poland’s WRS for grain is illustrative of a general trend in of Eastern European countries failing to implement (e.g., Ukraine) or completely dismantling (e.g., Bulgaria) similar systems. However, unlike Ukraine and Bulgaria, which maintain the basic elements of a WRS, Poland’s legal framework no longer recognizes negotiable warehouse receipts, much less provides for an associated regulatory framework. While Article 853(2) of the Civil Code³⁰⁸ provides that a warehouse operator must issue a “storage receipt” to the bailor upon deposit of the goods, the storage receipt is not recognized as a negotiable document of title that may be transferred by endorsement for trading or collateral purposes. The relevant sections of the Civil Code contain norms with respect to the rights and obligations of warehouses, but do not impose mandatory licensing or insurance.³⁰⁹

B. COUNTRIES WITH A PARTIALLY DEVELOPED WAREHOUSE RECEIPTS LEGISLATION AND REGULATORY FRAMEWORK

³⁰⁷ *United Nations Conference on Trade and Development – Expert Meeting on Financing Commodity-Based Trade and Development*, UNCTAD (2004), (“[T]he law was passed in 2000. However, the potential funding for the indemnity fund was never allocated because of disagreements with the Polish National Bank. Following the passing of the Polish warehouse receipt law in late 2000 nothing happened in terms of its implementation.”), available at https://unctad.org/en/Docs/ditcmisc200419a1_en.pdf. See also *Warehouse Finance and Warehouse Receipt Systems: A Guide for financial institutions in emerging economies*, IFC (2013) (“Partial or failed implementation of [warehouse receipts] initiatives in the region has been attributed to a lack of initial consensus among government institutions, donors, and the private sector about key priorities and program components. In some countries, including Poland and Slovakia, government intervention was maintained at a high level, resulting in farmers not being interested in storage using WRs.”), available at <https://www.mongolbank.mn/conference/books/01.pdf>.

³⁰⁸ Civil Code, available at <https://supertrans2014.files.wordpress.com/2014/06/the-civil-code.pdf>.

³⁰⁹ *Id.* at articles 853-859.

a. Belarus

There is limited potential for the development of an effective WRS in Belarus because the agricultural and mineral sectors are highly dependent on the government.³¹⁰ Nonetheless, its legal framework recognizes warehouse receipts as negotiable documents of title, which may be sold or used as collateral. Specific norms related to warehouse receipts can be found in the Civil Code.³¹¹ For instance, Article 802 provides for three types of warehouse documents, two of which (the “single” and the “double” warehouse receipts) are recognized as securities that may be transferred by endorsement and delivery of possession. Similar three-part warehouse receipts frameworks are found in other Eastern European jurisdictions, including Russia and Ukraine. Although the Civil Code includes rules pertaining to the rights and duties of holders of each type of warehouse document, as well as the rights and duties of warehouses, it does not require mandatory licensing or insurance with respect to warehouses. The Civil Code and the Law on Pledge provide for the creation and perfection of security rights over virtually any movable asset, including warehouse receipts, as well as extra-judicial enforcement where it is explicitly provided for in the corresponding pledge agreement.³¹²

Recently, the Administration of the President and the Council of Ministers drafted regulations relating to the issuance and circulation of warehouse receipts, including the operations of the warehouse receipts registry, but those regulations are yet to take effect.³¹³ Belarus therefore lacks

³¹⁰ The use of warehouse receipts in agriculture in transition countries (“FAO Assessment”) p. 45 (FAO, 2009), available at <http://www.fao.org/3/a-i3339e.pdf>.

³¹¹ Civil Code, available at <https://www.wipo.int/edocs/lexdocs/laws/ru/by/by027ru.pdf>.

³¹³ See Report on the Work of the Department of Securities of the Ministry of Finance in 2014, available at <http://www.minfin.gov.by/upload/depcen/otchet/dcb2014.pdf>.

detailed rules with respect to the transfer and registration of warehouse receipts, as well as the associated regulatory framework.

b. Russia

A 2009 assessment of its WRS conducted by the FAO placed Russia in a group of countries within Eastern Europe and Central Asia (“EECA”) with a “partially developed” system.³¹⁴ The FAO Assessment characterized countries with a partially developed warehouse receipts system as having corresponding legislation that mostly aligns with international best practice, but where implementation of the core elements, such as a licensing and supervisory regime for warehouses or performance guarantees, had not yet been fully completed.³¹⁵ The FAO’s assessment of Russia’s WRS appears to be unchanged after almost a decade, as confirmed by the World Bank’s Warehouse Receipts Index, under which Russia scored 3.5 out of the maximum 5 points.³¹⁶

Specific norms pertaining to the WRS can be found in the Civil Code.³¹⁷ Article 912 provides for three types of (paper) warehouse documents: i) the nonnegotiable warehouse slip; ii) the negotiable “single” warehouse receipt; and iii) the negotiable “double” warehouse receipt. Accordingly, similar to Belarus and Ukraine, Russia’s warehouse receipt system provides for two warehouse receipts that are negotiable documents of title.³¹⁸ The Civil Code and the Law on Pledge govern the creation and perfection of a security right over various movable assets including warehouse receipts, and permit enforcement of pledges without recourse to the courts.³¹⁹

³¹⁴ FAO Assessment, *supra* note 310, p. 10.

³¹⁵ *Id.*

³¹⁶ WBG Index – Russia, available at http://eba.worldbank.org/en/data/exploreconomies/russian-federation/2017#eba_fina.

³¹⁷ Civil Code, available at http://www.consultant.ru/document/cons_doc_LAW_9027/#dst0.

³¹⁸ Like Ukraine and Belarus, the single and double warehouse receipts are explicitly recognized as securities.

³¹⁹ *Id.* at Article 349.

Although Russia’s framework recognizes negotiable warehouse receipts, it does not provide licensing or insurance requirements with respect to warehouses, either through legislation or corresponding regulations. The Russian government is considering the adoption of a standalone warehouse receipts statute – the Bill on Double and Single Warehouse Receipts.³²⁰ The Bill would impose a licensing (certification) requirement for warehouses issuing negotiable double and single warehouse receipts, and create a warehouse receipts registry.³²¹ However, since 2012 no steps have been taken to enact the Bill.³²² In addition to the Bill on Double and Single Warehouse Receipts, a bill on warehouse receipts was recently introduced in parliament, which would apply exclusively to grains.³²³

VI. USE OF WRS IN CROSS BORDER CONTEXT

A. EGRAIN

eGrain is a U.S. platform licensed by United States Department of Agriculture for the issuance and transfer of grain EWRs.³²⁴ The following is an example of a common international transaction at eGrain’s platform that involves the use of an EWR as collateral: a Saudi Arabian grain trader has an account and controls a grain EWR at eGrain.³²⁵ The Saudi Arabian firm transfers the grain EWR to a European bank (lender) that also has an account at eGrain. After the European Bank obtains control of the EWR, it wires the loan to the Saudi Arabian grain trader. In this transaction,

³²⁰ Bill No. 134369-6 on Double and Single Warehouse Receipts, *available at* <http://sozd.parliament.gov.ru/bill/134369-6>.

³²¹ *Id.*

³²² *Id.*

³²³ Marianna Bazarova, *Warehouse Receipts: Problems and Perspectives*, *available at* <http://www.del-p.ru/docs/sklad.html>.

³²⁴ eGrain, *available at* <https://www.egrain.com/>

³²⁵ Telephone interview with John D. Hill, Vice President, eGrain (May 19, 2016).

non-U.S. parties rely on a U.S.-based EWR platform for purposes of using U.S.-grown and warehoused grain as collateral for a loan. The EWR used as collateral was issued by a U.S. warehouse.

B. SUPPLY CHAIN FINANCING

Warehouse receipt financing allows exporters and importers of agricultural commodities or other assets to access credit using warehouse receipts as collateral. Warehouse receipts are key components of supply chain financing especially when the chain involves “dry” commodities, goods, or metals. In recent years, international organizations have paid considerable attention to the use of warehouse receipts in supply chain financing. The IFC, ADB, and EBRD, for instance, have worked on developing warehouse receipts financing products that not only provide working capital to small farmers and agricultural producers in supply chains, but also short-term financing to exporters in emerging markets that sell to large international companies.³²⁶

In 2015, the Asia-Pacific Economic Cooperation forum (“APEC”) published a comprehensive guide titled “A Guidebook on Trade Supply Chain Finance” (“the APEC Guide”),³²⁷ which summarizes the role of warehouse receipts in import/export trade based on the experience of several Asian countries. The APEC Guide highlights the importance of warehouse receipts in supply chain finance, but also the associated problems and risks that arise in the cross-border

³²⁶ *Trade Finance and SMEs*, WTO (2016), available at https://www.wto.org/english/res_e/booksp_e/tradefinsme_e.pdf.

³²⁷ *A Guidebook on Trade and Supply Chain Finance*, APEC (2015) (“APEC Guide”), available at <https://www.apec.org/-/media/APEC/Publications/2015/11/Guidebook-on-Trade-and-Supply-Chain-Finance/APEC-book-web.pdf>.

context, where rules pertaining to warehouse receipts may vary drastically depending on the jurisdiction.³²⁸

The APEC Guide identified import and export financing products in which warehouse receipts play a role. In the former, an importer obtains a loan from a bank to purchase goods from a foreign seller, which will subsequently be stored in a pre-approved warehouse. The importer pledges the warehouse receipt covering those goods to the bank as collateral for the loan.³²⁹ Ordinarily, import financing is facilitated by a warehouse (collateral) manager that supervises the import process at the port, which could include verifying the weight and quality of the imported goods and issuing a survey report as well as quality and weight certificates.³³⁰ Generally, the warehouse (collateral) manager undertakes all of these actions prior to accepting the goods for storage in one of its facilities and issuing a warehouse receipt to replace the bill of lading issued by the carrier.³³¹ The bank, importer, and the collateral manager would typically enter into a collateral management agreement (“CMA”), stipulating the terms of storage and issuance/delivery of the warehouse receipts to be used as collateral.³³²

Under collateral management agreements, companies that specialize in managing collateral operate either their own or a third party’s storage facility.³³³ CMAs are prevalent in countries with

³²⁸ One of the most famous cases involving fraud in Asia took place at Qingdao port in China, where multiple fraudulent warehouse receipts for the same stock of metals stored in the warehousing facility were used as security interest to obtain financing from multiple creditors. The total exposures of banks and large global trading companies totaled as much as US\$900 million and involved 100,000 tons of aluminum, 200,000 tons of alumina, and 20,000 tons of copper. See *Regulatory Issues Affecting Trade and Supply Chain Finance*, APEC, p. 25 (2015), available at https://apecmsmemarketplace.com/sites/default/files/doc/15_smewg40_0071.pdf.

³²⁹ APEC Guide, *supra* note 327, p. 26.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ Marek Dubovec & Adalberto Elias, *A Proposal for UNCITRAL to Develop a Model Law on Warehouse Receipts*, *Uniform Law Review*, Volume 22, Issue 4, 1 December 2017, at 720.

insufficient warehousing infrastructure and with an inadequate or inexistent warehouse receipt legal framework.³³⁴ CMAs usually involve non-negotiable warehouse receipts and their fee structure is prohibitive for most SMEs.³³⁵

The APEC Guide also outlines the procedures involved in export financing, including the sale of goods to international buyers.³³⁶ The supply chain begins with the goods stored in the warehouse and continues from the warehouse to the ship and on to the final buyer. In such cases, the exporter typically enters into a forward sales agreement with an international buyer.³³⁷ The goods are transported by sea and stored in a pre-approved warehouse at the destination.³³⁸ As part of the agreement, a collateral manager is appointed by the bank.³³⁹ Once the goods arrive at the port of discharge, the warehouse (collateral) manager verifies and inspects the goods before issuing a warehouse receipt to the order of the bank.³⁴⁰

a. Types of Warehouses in Supply Chain Financing

The APEC Guide identified two types of warehouses that facilitate supply chain financing: i) bonded warehouses; and ii) non-bonded warehouses. The former are warehouses clustered within a “bonded area” or “bonded zone” at ports along the coast awaiting clearance by customs, both with respect to imported and exported goods.³⁴¹ The bonded area is supervised by the customs authorities, which ensures that the goods are not released until the payment of import duties.³⁴²

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 27.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* at 10.

³⁴² *Id.*

While goods remain within the bonded area, they are considered to be in an offshore territory.³⁴³ According to the APEC Guide, “[t]he jurisdiction and type of law that will apply if the goods are in a bonded area is critical in the case of the enforcement of the security.” In cases where a borrower has defaulted and the collateral is stored in a bonded warehouse, the creditor is required to present the pledge document, the storage agreement, and the corresponding warehouse receipt in order to sell the goods via a registered import/export company.³⁴⁴ The import/export company may either sell the goods domestically (after clearing customs) or re-export them, which is the preferred option given that bonded zones are ordinarily located on the coast or at a seaport.

Import financing typically involves a complex procedure by which the goods arrive at a seaport and are then transported to a non-bonded warehouse located outside the bonded zone.³⁴⁵ In such cases, the bank finances the importer and takes the bill of lading as security, which is then replaced by warehouse receipts.³⁴⁶ Once the cargo arrives at the destination, the bank employs a warehouse (collateral) manager to accept delivery of the cargo from the carrier and clear the cargo through customs.³⁴⁷ After the cargo is cleared, the collateral manager transports it to a non-bonded warehouse and issues a warehouse receipt to the importer’s bank.³⁴⁸ The CMA typically provides that the collateral manager will not release the goods until instructed by the bank.³⁴⁹

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 11.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

VII. SCOPE OF WORK AND TYPE OF A MODEL INSTRUMENT

UNCITRAL should consider developing a model law on warehouse receipts accompanied by a guide to enactment. This instrument should be prepared in consultation with other regional and international organizations that have undertaken work in the field of warehouse receipts, especially the FAO, the EBRD, the OAS, the World Bank, UNIDROIT, and IOSCO. At a minimum, the model law should cover the following issues: (a) clear definitions of key concepts and terms, including the warehouse receipt; (b) information required in a warehouse receipt; (c) the form in which a warehouse receipt may be issued; (d) negotiable and non-negotiable warehouse receipts; (e) fundamental duties of warehouse operators; (f) responsibility for loss or damage to stored goods; (g) irregularities, misdescription of goods, and over-issue of warehouse receipts; (h) transfers of warehouse receipts by negotiation, assignment, control or otherwise; (i) rights of transferees of warehouse receipts providing priority and taking free rules consistent with the approaches of the UNCITRAL Model Law on Secured Transactions; (j) rights of buyers of goods covered by warehouse receipts; (k) substitution and removal of goods from the warehouse; (l) termination of storage; (m) third-party effectiveness of security rights in electronic warehouse receipts; (n) third-party effectiveness of security rights in non-negotiable warehouse receipts; (o) (judicial and extrajudicial) enforcement of a security right in a warehouse receipt building on the UNCITRAL Model Law on Secured Transactions; (p) warehouseman's lien and its enforcement; and (q) transitional matters. Of particular importance will be the development of rules facilitating transfers of EWRs for trading and collateral purposes, building on the Model ETR Law and the Rotterdam Rules.

Additional aspects related to warehouses and warehouse receipts should also be considered either in the model law or in the guide to enactment, including: (a) licensing of warehouses; (b) regulation of warehouses; (c) insurance and bonding of warehouses; (d) maintenance of adequate reserves; (e) maintenance of accounting records; and (f) trading of warehouse receipts on exchanges. A guide to enactment may also contain model provisions typically inserted in regulations. It would be especially important to outline some of the approaches to guaranteeing the performance of warehouses, since many jurisdictions fail to establish such mechanisms, which undermines the confidence of users.

A model law should be flexible enough to support the development of a modern warehousing infrastructure for organized (exchange) trading of EWRs, including their use as collateral. This would be reflective of the recent trend of assimilating EWRs to securities. It should also provide strong incentives to transition away from a paper system.

Work in the area of warehouse receipts does not appear to be suitable for an international convention since a vast majority of transactions are local. Moreover, development of a guide would not aid those countries in the process of reforming their warehouse receipts frameworks as such guides have already been developed by other institutions in the recent past.

ANNEX I:

WRS INITIATIVES BY INTERNATIONAL AND REGIONAL ORGANIZATIONS AT A GLANCE

WRS INITIATIVES BY INTERNATIONAL AND REGIONAL ORGANIZATIONS AT A GLANCE

	Scope	e-WRS	Transfers	Licensing	Performance guarantees	Registry	Rights of secured creditors	Type of Warehouse Receipts Covered
WBG ³⁵⁰	Not limit the types of movable assets the law applies to (the licensing regime may be limited to certain commodities) (p. 58)	Instituted if deemed appropriate and practical (p. 57)	Depend on whether the WR is negotiable or non-negotiable (p. 87)	Licensing and registration should be voluntary and failure to obtain a warehouse operator's license or to register a warehouse document should not affect the WRs validity or enforceability as against the warehouse operator or any transferor (p. 18)	Require adequate insurance coverage for the warehouse (p. 18)	To give notice to prospective lenders and to confirm validity and subsequent transfers to purchasers (p. 58)	Not subject to registration and rights should extend to bankruptcy proceedings (p. 54)	Single
IFC ³⁵¹	Establish the types of commodities and warehouses (p. 34)	More secure and efficient systems possible than in the past (p. vii)	Based on the principle of negotiability, which is a prerequisite to efficient transfer of title (p. 3)	Warehouses may or may not be licensed under a government scheme, or may be accredited in some other way—e.g., by an industry association or a commodity exchange (p. 6)	Need to establish a form of guarantee or indemnity fund to protect depositors and financiers in the event of warehouse failure, nonperformance, or fraud (p. 23)	To minimize the risk of forgery (p. 30)	Protected by acts recognized in the law providing for creation, perfection and priority of a security right (p. 25)	Single and double (p. xii)

³⁵⁰ WBG, *A Guide to Warehouse Receipt Financing Reform: Legislative Reform* (2016), available at <http://documents.worldbank.org/curated/en/885791474533448759/pdf/108450-WP-PUBLIC.pdf> (last accessed Sept 17, 2019)

³⁵¹ IFC, *Warehouse Financing and Warehouse Receipts Systems: A Guide for Financial Institutions in Emerging Economies* (2013), available at <https://www.mongolbank.mn/conference/books/01.pdf>.

EBRD/FAO ³⁵²	Determine the set of goods or commodities that warehouse receipts can be issued for (p. 4) Provides guidance for general as well as sector/commodity-specific WR laws	Functional equivalents to paper WRs, which facilitate commerce and reduce transfer costs (p. 4)	Governed by principle of negotiability (p. 35)	May be required for warehouses to operate and issue receipts. Legislation assigns a competent institution to license and inspect warehouses, and determines this institution's mandate (p. 4)	Include mandatory insurance, performance bonds, letters of credit, and/or an indemnity fund (p. 4)	Legislation may establish a government registration system for warehouse receipts and determine the responsibilities of the registration office (p. 5)	Have the right to seize and liquidate the underlying stored goods and recover the debt (p. 5)	Single and double (p. 366)
OAS ³⁵³	Encompass electronic warehouse receipts used for agricultural products (p. 4)	Encouraged as an alternative to paper WRs (p. 2)	Transferee acquires rights equivalent to those transferred by negotiation of paper WRs (p. 7)	Carried out by an appropriate, independent governmental authority or private entity (p. 9)	Require warehouses to carry insurance or other forms of coverage to indemnify the depositor and/or any third parties (p. 9)	Recording of transactions involving EWRs as collateral (p. 6)	Rights provided for under a modern secured transactions regime applicable to WRs (p. 9)	Single and double (p. 6)
IOSCO ³⁵⁴	Could be determined by an exchange's rules used to describe the regulatory framework for the operation of trading venues and of central counterparties (2018, p. 4)	Encompasses "electronic entitlements" such as a warrant or electronic warehouse receipt (2016, p. iv)	May be facilitated using an exchange's electronic trading platform (2011, p. 9)	Could be carried out by market authority, an exchange, central counterparty, or a self-regulatory organization (2018, p. 4)	N/A	N/A	N/A	N/A

³⁵² EBRD/FAO, *Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends* (2014), available at <http://www.fao.org/3/a-i4318e.pdf>.

³⁵³ OAS, *Principles for Electronic Warehouse Receipts for Agricultural Product* (2016), available at http://www.oas.org/en/sla/iajc/docs/CJI-doc_505-16_rev2.pdf.

³⁵⁴ See, for example: IOSCO, *Commodity Storage and Delivery Infrastructures: Good or Sound Practices, Consultation Report* (June 2018), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD604.pdf>; IOSCO, *Principles for the Regulation and Supervision of Commodity Derivatives Markets* (Sept 2011), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf>; IOSCO, *The Impact of Storage and Delivery Infrastructure on Commodity Derivatives Market Pricing* (May 2016), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD530.pdf>.

UNCITRAL ³⁵⁵	Applies to “electronic transferable records,” which generally include warehouse receipts, but not securities and financial instruments (§ 1)	Electronic warehouse receipts may be classified as electronic transferable records, which are functionally equivalent to paper warehouse receipts (§§ 2 and 10)	May be done in electronic form, including the endorsement and the delivery of possession, which is facilitated by the “control” concept (§§ 10-11)	N/A	N/A	N/A	N/A	N/A
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³⁵⁵ UNCITRAL Model Law on Electronic Transferable Records (2017), available at http://www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf.