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Possible future work on warehouse receipts

Note by the Secretariat

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I. Introduction

1. At its forty-ninth session, in 2016, the Commission decided to place the topic of warehouse receipt financing on its future work programme and agreed that it should be considered further after a colloquium or an expert group meeting.¹ Accordingly, the Secretariat organized the Fourth International Colloquium on Secured Transactions (the “Colloquium”, Vienna, 15–17 March 2017) to obtain the views and advice of experts with regard to possible future work on security interests and related topics, which included the topic of warehouse receipts.²

2. At its fiftieth session, in 2017, the Commission took note of the deliberations and conclusions of the Colloquium and decided that priority should be given to the preparation of a practice guide on secured transactions.³ With respect to the topic of warehouse receipts, the Commission decided to retain the topic on the future work agenda for further consideration.⁴ The Commission was further informed that a delegation would prepare and submit a study on warehouse receipts for that purpose.

3. During the thirty-third session of Working Group VI (Security Interests) (New York, 30 April–4 May 2018), it was proposed that work should be undertaken to prepare a substantive text on warehouse receipts and after discussion, the Working Group agreed to recommend to the Commission that it be mandated to undertake work on the topic.⁵

4. At its fifty-first session, in 2018, the Commission took note of the proposal by Working Group VI on possible future work on warehouse receipts, which would aim at developing a modern and predictable legal regime. In support of that proposal, the importance of warehouse receipts to agriculture and food security as well as their use in supply and value chains, was highlighted.⁶ At that session, the Commission also heard that the Organization of American States (OAS) was in the process of updating its 2016 report on principles for electronic warehouse receipts for agricultural products in light of recent developments.⁷ After consideration, the Commission concluded that more preparatory work on the topic of warehouse receipts was needed before it could decide on future steps and thus decided to request the Secretariat to conduct exploratory and preparatory work on warehouse receipts so as to refer that work to a working group.⁸

5. Accordingly, this note provides an overview of the study presented to the Secretariat by the Kozolchyk National Law Center (NatLaw)⁹ on possible future work on warehouse receipts (the “Study”). The objective of this note is to provide information to the Commission to make an informed decision on whether and, if so, how to undertake work on warehouse receipts, including whether to refer that work to a Working Group.

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

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

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

⁴ *Ibid.*, paras. 225 and 229.

⁵ [A/CN.9/938](#), paras. 92 and 93. The proposal is set out in the annex to the report of the Working Group.

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

⁷ *Ibid.*, para. 182.

⁸ *Ibid.*, para. 253(a).

⁹ NatLaw is a non-profit research and educational institution affiliated with the James E. Rogers College of Law at the University of Arizona in Tucson, Arizona.

II. Overview of the Study

6. The Study examines the desirability and utility of an instrument on warehouse receipts by assessing: (i) existing domestic legislative and regulatory frameworks on warehouse receipts; (ii) a wide range of initiatives by international and regional organizations; (iii) possible interaction with the UNCITRAL Model Law on Electronic Transferable Records (MLETR); and (iv) the use of warehouse receipts in the cross-border context. The Study concludes by setting forth the possible scope of such work and the form it might take.

A. Divergence in and lack of domestic frameworks – need for harmonization

7. The Study examines the legislative and regulatory frameworks governing warehouse receipts in a number of States, illustrating a wide range of different approaches to warehouse receipts. Some have addressed the use of warehouse receipts in their general legal framework (for example, in the civil code), while some have developed stand-alone legislation. Some have enacted specific legislation on electronic warehouse receipts. Some have enacted legislation for a specific sector or commodity. Some have developed separate regulations for warehouses and for warehouse receipts. The treatment of warehouse receipts in civil law jurisdictions also differ: in some, they consist of a receipt that represent ownership rights and a pledge bond for security purposes, while in others they are treated as analogous to negotiable instruments or securities. While divergence of approaches to, and of legal treatment of, warehouse receipts is not in and of itself a problem, a certain level of harmonization could facilitate their use, particularly across sectors and in the cross-border context.

8. The Study also points out that a number of States do not yet have a legislative or regulatory framework on warehouse receipts, particularly those with a common law tradition. In certain States, the framework has only been developed partially, thus requiring a more comprehensive solution to facilitate the use of warehouse receipts. Thus, an internationally recognized legal standard, which States could use as a basis for developing a legislative framework on warehouse receipts would be useful.

9. In summary, the Study highlights the divergence with regard to approaches taken in domestic frameworks governing warehouse receipts. This divergence is also derived from the different level of warehouse receipt utilization in those States. Considering the divergence, and the lack, of a legal framework for warehouse receipts in many States, the Study suggests that the preparation of an instrument by the Commission could assist in the modernization as well as the harmonization of legal rules governing warehouse receipts.

B. Initiatives by international and regional organizations – need for coordination

10. International and regional organizations have undertaken work to address and facilitate the use of warehouse receipts, which include the Food and Agriculture Organization of the United Nations (FAO), the World Bank Group (including the International Finance Corporation (IFC)), the European Bank for Reconstruction and Development (EBRD) and OAS. Such work has often resulted in guidance material, including principles, best practices and legal standards applicable to different aspects of warehouse receipts. The Study provides an overview of the existing material and contains a comparison chart in the annex.

11. While the contents of the material vary, they have generally addressed the concept of warehouse receipts and how warehouse receipt financing works. Highlighting the importance and benefits of a warehouse receipt system, some of the materials have focused on infrastructure requirements, practical implications for

financial institutions as well as recent trends in the use of electronic warehouse receipts.

12. The Commission may wish to note that, in their work, these organizations have all pointed to the legal issues that may arise in financing transactions involving warehouse receipts. They mention core elements that need to be addressed in a legislative framework for warehouse receipts, which include, for example, key definitions, the issuance of warehouse receipts including their form (electronic and paper-based), the negotiation and transfer of warehouse receipts, the rights and obligations of the parties involved, and the regulatory requirements to be met by warehouses and their operators (including licensing regimes and supervisory authorities).

13. While the work by these organizations provides useful guidance, the Study suggests that there are certain gaps that need to be filled. The guidance provided is sometimes based on the experience of certain jurisdictions or in a certain sector. There is lack of guidance on the role of regulators in the warehouse receipt framework. Finally, the guidance does not adequately address the use of warehouse receipts as collateral in secured transactions, including the right of the creditors over the commodities covered by warehouse receipts. Consequently, a number of diverse approaches are being recommended, which could lead to confusion and further fragmentation.

14. The Study further examines how work on warehouse receipts could interact with existing UNCITRAL texts. With respect to the use of electronic warehouse receipts, the Study suggests that the MLETR would provide the legal framework for dematerialization of existing paper-based warehouse receipt systems, as it provides that, if certain requirements are fulfilled, the issuance and transfer of a transferable document or instrument in electronic form will have the same legal effect as a similar transaction done in paper form (MLETR, art. 10). In the same vein, the UNCITRAL Model Law on Secured Transactions (MLST) could provide the legal framework for using warehouse receipts and commodities covered as encumbered assets. Certain aspects relating to the publicity of a security right in warehouse receipts (particularly in their electronic form) and the right of a secured creditor (particularly in enforcing its security right) may need to be carefully assessed in light of the rules provided in the MLST.

15. In summary, it may be necessary to take a more comprehensive approach to address all of the relevant legal issues that may arise from the use of warehouse receipts and this should be taking into consideration texts prepared by UNCITRAL as well as the work that has already been undertaken by a number of other international and regional organizations.

C. Use of warehouse receipts in a cross-border context

16. The Study also examines the use of warehouse receipts in cross-border trade, particularly in the context of supply chain financing. Several international and regional organizations, including the IFC, Asia Development Bank (ADB) and EBRD, have developed warehouse receipt financing products for exporters in the supply chain. The Asia-Pacific Economic Cooperation (APEC) also published a guidebook in 2015 on trade and supply chain finance, which highlight the importance of warehouse receipts in trade as well as the associated problems and risks, particularly due to the fact that domestic rules governing warehouse receipts differ significantly.

17. The Commission may wish to consider whether work on warehouse receipts should focus on providing a legal framework for facilitating the use of warehouse receipts in the domestic context or should also address legal issues that may arise in their cross-border use.

D. Conclusions of the Study

18. The Study suggests that the Commission should consider developing a model law on warehouse receipts in consultation with international and regional organizations that have already undertaken work in this field.

19. The study further suggests that a model law could address the following issues:

- Definitions of key concepts, including warehouse receipts;
- Form and content requirements of warehouse receipts;
- Negotiability of warehouse receipts;
- Rights and obligations of parties involved, including warehouse operators and buyers of stored goods;
- Means of transferring warehouse receipts;
- Substitution and removal of goods from the warehouse as well as termination of storage;
- In line with the MLST, the creation and third-party effectiveness of a security right in warehouse receipts (and stored goods) as well as relevant priority and enforcement-related issues; and
- Transitional issues.

20. The Study further suggests that regulatory aspects related to warehouses as well as their operators could also be addressed, which would aim to guarantee a level of performance of warehouses.

21. In summary, the Study notes that a model law could assist States that are currently developing a legislative framework on the use of warehouse receipts and that a model law could be prepared based on existing guidance material. It further notes that a model law would provide flexibility to enacting States in developing a modern warehouse receipt system, which allows the use of warehouse receipts particularly for financing purposes and which will suit their overall legal system.

III. Remarks for consideration by the Commission

22. The desirability and feasibility of possible work on warehouse receipts had been previously presented to the Commission at its fifty-first session in 2018 (see annex of document [A/CN.9/938](#)). It was noted that the absence of a model legal framework for warehouse receipts presented challenges, including for their use in cross-border supply chain transactions. Therefore, it was suggested that it would be desirable for the Commission to provide a harmonized legal framework to facilitate their use. It was also mentioned that the Commission, having prepared a number of related texts (the Rotterdam Rules, MLETR and MLST), was well-positioned to take the lead and formulate a legal text in coordination with other international organizations. In conclusion, it was emphasized that an UNCITRAL instrument on warehouse receipts would allow many businesses to benefit from a predictable and modern framework that facilitated sale of warehouse receipts as well as their use as collateral for lending, whether domestically or in cross-border transactions and that the Commission was uniquely positioned to engage in that work.

23. The Study generally supports the idea that it would be desirable and feasible for the Commission to undertake work in the area of warehouse receipts. It is based on the assumption that an effective warehouse receipt system would benefit all participants especially in the commodity market, including producers/manufacturers, warehouse operators, traders and creditors. This is the same assumption justifying a number of warehouse receipt initiatives by international organizations. In that context, the lack of a legislative framework on warehouse receipts in a number of jurisdictions, the divergence of legislative and regulatory approaches on their use, and

the growing importance of warehouse receipts in supply-chain and value-chain financing are all cited by the Study to support the conclusion that it would be desirable for the Commission to begin work on the topic. The work undertaken by international organizations illustrates that it is indeed feasible to prepare a legal standard on the topic and further exemplifies that it would be desirable for the Commission to coordinate such works.

24. In light of the above, the Commission may wish to discuss the following:

- Whether it wishes to undertake work on the development of an international legal instrument on warehouse receipts;
- If so, how such work should be undertaken (for example, referring it to a Working Group or to the Secretariat), resources permitting;
- The scope of such work (for example, whether to address all substantive legal aspects of warehouse receipts, whether to focus on their use for financing purposes or on their cross-border use and whether to cover their use more generally or in a specific sector);
- Whether the work should focus on dematerialized forms of warehouse receipts and the legal nature of such warehouse receipts in the digital economy and their use;
- The form of such work (a convention, a model law or a guidance text); and
- The need to closely coordinate with other international organizations that have already undertaken work on the topic.

25. If the information provided above is not sufficient for the Commission to make a decision on whether to refer the work to a Working Group or if there is no available Working Group to undertake work, the Commission may wish to instead request the Secretariat to compile information on the use of warehouse receipts as well as the underlying legislative framework from additional States. It may also consider requesting the Secretariat to organize a colloquium or an expert group meeting on the various legal issues surrounding the use of warehouse receipts in conjunction with relevant and interested international organizations (for example, with FAO on agricultural and crop financing), the results of which would facilitate its consideration at a future session.
