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INTER-AMERICAN JURIDICAL REPORT.

ELECTRONIC WAREHOUSE RECEIPTS FOR AGRICULTURAL PRODUCTS

The topic of electronic warehouse receipts for agricultural products was included on the agenda of the Inter-American Juridical Committee at its 81st Regular Session in Rio de Janeiro in August 2012. For the Committee's 82nd regular session in March 2013, the rapporteur for this topic, Dr. David P. Stewart, presented a preliminary discussion in the document entitled "Electronic warehouse receipts for agricultural products" (CJI/doc.427/13). At its 83rd regular session in August 2013, the Committee considered a first draft of a document titled "Proposed Principles for Electronic Warehouse Receipts" (CJI/doc.437/13). For the Committee's 84th regular session in March 2014, the rapporteur presented a report together with preliminary draft Principles "Electronic Warehouse Receipts" (CJI/doc.452/14). For the 86th regular session in March 2015, the 87th regular session in August, 2015, and the 88th regular session in April, 2016, the rapporteur presented reports on the work related to this topic that has been undertaken by other organizations (CJI/doc.475/15, CJI/doc.483/15 and CJI/doc.497/16, respectively).

Background: Throughout the Americas, producers in the agricultural sector, especially those at the small and medium-sized end of the scale, too often lack ready access to credit. In many countries in the region, these producers often have no choice but to sell their produce immediately upon harvest. As a result, they lose the potential benefits that would come from greater flexibility in marketing. Warehouse receipt systems "enable producers to delay the sale of their products until after harvest when prices are generally more favourable."[1] Such systems also enable producers to access credit by borrowing against the products in storage. An effective and efficient warehouse receipts system can therefore contribute directly to economic growth and development where it is needed the most.

But an effective warehouse receipt system requires *both* a reliable network of physical infrastructure (modern warehouses) and a legal regime for warehouse receipts that inspires confidence among lenders.

As explained in some detail in the earlier documents noted above, warehouse receipts are not widely used today in Latin America as a source of financing. One reason appears to be the lack of a modern and harmonized approach to the relevant law. This situation inspired the rapporteur to investigate the topic, particularly with a view towards the development of draft legislation that might encourage a shift towards *electronic* warehouse receipts which are also *negotiable* (i.e., available for use as security for credit), given the benefits that would be associated with such arrangements.

Accordingly, research was undertaken by the Department of International Law under the direction of the rapporteur that confirmed the highly technical and complex nature of this subject. As explained in previous reports, consultations were initiated with various organizations that are also engaged in related work, including the United Nations Commission on International Trade Law (UNCITRAL) Working Group IV on Electronic Commerce concerning its ongoing work

[1] Food and Agriculture Organization of the United Nations, European Bank for Reconstruction and Development, 2014. Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends. P. viii.

towards a draft Model Law on Electronic Transferable Records; Food and Agriculture Organization of the United Nations and the European Bank for Reconstruction and Development (2014), *Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends*; World Bank Group (2016), *A Guide to Warehouse Receipt Financing Reform: Legislative Reform;* International Institute for the Unification of Private Law (UNIDROIT), FAO and International Fund for Agricultural Development (IFAD) (2015), *Legal Guide on Contract Farming* (as to its possible relevance) and the National Law Centre for Inter-American Free Trade (NATLAW), which has been working towards a draft model law for warehouse receipts that would cover both paper-based and electronic format.

These consultations suggest not only that there is growing awareness of the importance of the subject worldwide but also that there does not yet appear to be a sufficient understanding of the issues or consensus on an agreed approach that would support development of model substantive legislation that is "medium neutral"(*i.e.,* applicable to both paper-based and electronic format). Accordingly, the following set of draft principles is offered in the hope they may serve: (1) as an initial step to underscore for OAS Member States the importance of warehouse legislation reform, and (2) as a means of promoting developments in this area without precluding future work on model legislation for electronic warehouse receipts, if and when appropriate circumstances should materialize.

While these principles may have application to a wider range of goods, the focus of this effort has been on warehouse receipts for *agricultural* products, in order to promote access to credit among those producers, both large and small, in that financially underserved sector.

<u>Recommendation</u>:

Adoption of the attached draft principles.

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Principles for Electronic Warehouse Receipts for Agricultural Products

PREAMBLE:

Warehouse receipt financing is a form of asset-based lending that offers agricultural producers access to credit. A modernized system of warehouse receipts, whether paper-based or electronic, that reduces uncertainty and increases lender confidence, can significantly improve access to credit and thereby contribute towards the development of the agricultural sector; this requires a reliable legal framework.

The Organization of American States (OAS) adopted the Model Inter-American Law on Secured Transactions (2002) and accompanying Model Registry Regulations (2009), which have served as a basis for the modernization of secured transactions regimes in several OAS Member States and which envisage the use of electronic documents and signatures.

The United Nations Commission on International Trade Law (UNCITRAL) adopted Model Laws on Electronic Commerce (1996) and Electronic Signatures (2001) and an Electronic Communications Convention (2005) to serve as a basis for legislative reforms and to encourage the transition towards electronic commerce. UNCITRAL is continuing its work in this area with the preparation of a draft Model Law on Electronic Transferable Records.

Other international organizations have also recognized the need for legislative reforms to encourage the use of warehouse receipts as a vehicle for increasing agricultural lending, for example, Food and Agriculture Organization of the United Nations and European Bank for Reconstruction and Development, <u>Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends</u> (2014) and World Bank Group, <u>A Guide to Warehouse Receipt Financing Reform: Legislative Reform</u> (2016).

In order to bring attention to the importance of this work for the agricultural sector of the Americas, particularly small producers without access to traditional forms of credit, and in furtherance of these legislative advancements, the following principles have been formulated.

COMMENTARY:

Warehouse receipt financing is a form of asset-based lending that allows businesses to obtain loans by using warehouse receipts as collateral. A receipt is typically issued by the warehouse operator to the depositor (producer) upon delivery of produce. Because the receipt provides proof of ownership of a specific quantity and quality of products stored in a specific location, on the basis of these receipts, the depositor (producer) can raise money from lenders willing to accept the receipts as collateral.

A strong warehouse receipt system is critical for the modernization of the agricultural sector and will particularly benefit small scale producers who would otherwise lack or have only little conventional access to credit. Improving performance of the agricultural sector is essential in many countries as a way to alleviate poverty and stimulate economic growth.

A modern electronically-based system of warehouse receipts can have significant advantages over traditional paper-based systems; depending on design and implementation, this can reduce uncertainty and increase efficiency and thereby encourage lender confidence. However, to be effective it also requires a reliable legal structure regulating the system of warehouse receipts and guaranteeing the enforceability of the receipts in case of default of the depositor. Besides mandating the transferability of warehouse receipts, the system must also prescribe the form and manner of registration of warehouses and issue of warehouse receipts, including the legal recognition of electronic records and transfers.

In principle, different legislative options are available to legally enable the use of electronic warehouse receipts. One possibility is to maintain the existing legislative regime applicable to paper-based warehouse receipts and to adopt legislation based on the functional equivalence principle such as the forthcoming UNCITRAL Model Law on Electronic Transferable Records. Another option would be to adopt legislation dealing specifically with warehouse receipts existing only in electronic form (and therefore separate and different from paper-based warehouse receipts). A third possibility could be to prepare medium-neutral legislation on warehouse receipts that repeals pre-existing legislation dealing with paper-based warehouse receipts.

1. PURPOSES

The purposes of these principles are as follows:

(a) To promote a strong and reliable system of warehouse receipt financing and thereby encourage secured lending for and modernization of the agricultural sector;

(b) To improve access to credit, particularly for small scale agricultural producers without access to conventional forms of collateral, as a way to stimulate economic growth and alleviate poverty;

(c) To facilitate and encourage a transition from paper-based to electronic warehouse receipts;

(d) In support of efforts to further harmonization and codification at regional and international levels in the field of secured lending, to outline basic principles for electronic warehouse receipts that are consistent with the OAS Model Inter-American Law on Secured Transactions and other related international instruments and that can serve as the basis for further development or future model law.

COMMENTARY:

Some countries in the Hemisphere have not yet enacted the necessary legal provisions to recognize electronically transferable records. These principles are intended to accommodate both paper-based and electronically-based warehouse receipts and to serve as a bridge to facilitate this transition.

The principles pave the way for future development of legal instruments in this subject matter, such as a model law, when the sufficient degree of ripeness has been achieved to enable harmonization on specific issues that currently remain at variance in different legal systems (see discussion below on single vs. dual paper-based documents).

2. SCOPE

The principles apply to electronic warehouse receipts that are used for agricultural products in general, without differentiation by industry.

COMMENTARY:

The principles are broadly applicable to electronic warehouse receipts used for different kinds of agricultural products, without differentiation by industry. However, this does not foreclose the possibility of developing "commodity-specific" receipts if the need so arises in the future (e.g., electronic warehouse receipts for cotton). The term "agricultural products" is left undefined to enable interpretation as needed.

3. CONSISTENCY WITH RELATED AREAS OF LAW

(a) The principles are intended to operate in conjunction with a modern secured transactions regime, one that is consistent with international standards as embodied in the OAS Model Inter-American Law on Secured Transactions and other international instruments in the field of secured transactions, such as the recently adopted UNCITRAL Model Law on Secured Transactions (2016) and UNCITRAL Legislative Guide on Secured Transactions (2007) among others.

(b) The principles are intended to support and supplement, and to be consistent with, the overarching domestic legal framework that governs secured lending and related areas of insolvency and/or bankruptcy.

(c) The principles are intended to be consistent with domestic laws governing electronic commerce and signatures.

COMMENTARY:

The principles are intended to be consistent with and to further harmonization efforts at the regional and international levels in the field of secured lending and electronic commerce.

A warehouse receipt may be encumbered (*i.e.*, "charged") by a security interest and thus used as collateral to obtain financing. Therefore, the law that governs these receipts must be consistent with the overarching legal framework that governs security interests. If the legal regime does not permit or recognize the creation of such interests, then it will be difficult if not impossible to adopt a modernized system of electronic warehouse receipt financing.

Similarly, because a warehouse receipt may be subject to a security interest, it is important that the rights and priorities associated with that interest are clear, especially *vis-à-vis* third parties who may have competing claims in the receipt itself or against the goods represented by the receipt. This is especially true in the event of the insolvency and/or bankruptcy of either the depositor or the warehouse operator. Accordingly, the principles must also be consistent with the legal regime that governs insolvency and/or bankruptcy and that establishes the rights and priorities of creditor claims.

4. DEFINITIONS

For the purposes of the principles, the following definitions apply:

*"**Authority**" means the entity that has been authorized to license a warehouse, to conduct regular inspections and to renew or revoke the license. It may be a government body or a private entity.*

*"**Depositee**" (or "bailee") means a person (warehouse operator) to whom goods are delivered for deposit and who issues the warehouse receipt.*

*"**Depositor**" (or "bailor") means a person who delivers goods to a depositee for deposit, and to whom the warehouse receipt is initially issued.*

*"**Deposit**" (or "bailment") means the transfer of possession of moveable goods (without transfer of title, ownership or property rights) from the depositor to the depositee for custody and control, storage and safekeeping.*

*"**Electronic warehouse receipt"** or **("EWR")** means a warehouse receipt that is issued [or released] in and exists in electronic form.*

*"**Electronic warehouse receipt provider**" (or "**EWR provider**") means an entity that issues or releases electronic warehouse receipts, which may be the warehouse operator itself or a third party service provider operating on behalf of the warehouse.*

*"**Licensed warehouse**" means a warehouse that has been licensed by the authority as defined above.*

*"**Warehouse operator**" means a person who operates a "licensed warehouse" for the storage of goods.*

*"**Warehouse receipt**" means the paper-based documentation that is issued to the person in control (depositor or bailor) upon the delivery of goods.*

COMMENTARY:

Insofar as possible, terms used in the principles are intended to be consistent with the same or similar terms as defined in related instruments. The term "warehouse receipt" is defined broadly to encompass both the "single document" and "dual document" systems as used in common law and civil law jurisdictions as described below [see Commentary under Point 5 – Legal Characteristics]. An electronic warehouse receipt (EWR) is considered to be an "electronic transferable record" as that term is defined in the UNCITRAL Draft Model Law on Electronic Transferable Records[2] although that definition is yet to be finalized.[3]

5. LEGAL CHARACTERISTICS

Recalling that a warehouse receipt -

- *usually is a contractual agreement for the storage of a specific quantity of goods with specific characteristics in a specific warehouse for a specified period;*
- *is an agreement for deposit (or bailment) between the initial depositor of the goods and the warehouse operator;*
- *should include the elements of a contract (parties, price, performance) and describe the respective rights and obligations of each party while respecting the principle of freedom of contract;*
- *should state on its face whether it is negotiable or non-negotiable; and,*
- *should state clearly whether or not it is subject to the claims of any prior creditors with a security interest in the goods represented by the warehouse receipt;*

…an electronic warehouse receipt (EWR) shares these same legal characteristics.

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[2] *Draft Model Law on Electronic Transferable Records, Note by the Secretariat*. A/CN.9/WG.IV/WP.137. 23 February 2016, para.29.

[3] *Ibid*., para. 19. See discussion below regarding "release".

An electronic warehouse receipt (EWR) and a paper-based warehouse receipt are functionally equivalent and should be equally admissible in a court of law and provide full evidence of the rights and obligations that it embodies.

COMMENTARY:

Background:

Upon delivery of agricultural products (such as grain) to a warehouse, the warehouse operator issues a warehouse receipt. The traditional - and still predominant - practice in most countries of the Hemisphere is to issue the receipt in paper form. That receipt, defined herein as the "paper-based documentation" - and it is assumed for the moment that it is a *negotiable* receipt – not only serves as proof of receipt of the goods, it also has the following two functions: 1) proof of ownership and 2) negotiable paper capable of being given as collateral.

Most common law countries operate under the "single document" system, wherein the "paper-based documentation" that is issued by the warehouse operator consists of only one document, referred to as the "warehouse receipt." That single document can encompass both functions; 1) it is a statement of ownership rights in the stored commodities, recognized in law as or *de facto* equivalent to a document of title. Whether or not the warehouse receipt is 2) negotiable, is typically indicated directly on the document.

Most civil law countries operate under the "dual document" system, wherein these two functions - ownership and negotiability - have been separated into two different documents (or two parts, attached as one document). One of these is referred to as the "certificate of deposit" (*certificado de depósito)* (alternatively, "certificate of property" *[certificado de propiedad]* or "title of ownership" *[titulo de propiedad]*); the other is referred to as the pledge bond (*bono de prenda*). If the certificate of deposit is issued on its own without the pledge bond, the certificate grants full rights (in civil law these are referred to as "dominion rights") over the goods and the holder thereof may, by presenting only the certificate, obtain release of the goods from the warehouse. When 1) the certificate of deposit is issued together with 2) the pledge bond, the certificate of deposit in itself establishes title, but only an imperfect right to the release of the stored goods. In that case, both documents must be presented together to obtain the goods. The pledge bond can be separated from the certificate of deposit and both documents can be negotiated separately. The pledge bond can be used as collateral for credit from financial institutions; the pledge bond is held by the lender until the sale of the goods whereupon the proceeds of sale are used to repay the loan.

Under this system, where two documents may be issued and where both documents may be negotiated independently, there is potential for fraud and misuse. It has been suggested that this may be one of the reasons why, in civil law countries using the dual document system, warehouse receipts are underutilized as a major source of financing.

By contrast, under an electronic warehouse receipt (EWR) system, upon delivery of the products to a warehouse, the warehouse operator as issuer submits a request to the EWR provider (if the operator and EWR provider are not one and the same entity) for the release of the EWR to the credit of the depositor's EWR account. When the depositor obtains a loan from the lender using the EWR as collateral, that transaction would be appropriately recorded in the relevant registry that is maintained, presumably, by the EWR provider. An integrated and properly supervised system of electronic warehouse receipts can promise more security against fraud and mismanagement than the current paper-based system. Moreover, distinctions between the single or dual document systems (should) become irrelevant.

Shared Legal Characteristics:

The legal characteristics comprising Principle 5 and listed above are fundamental to any warehouse receipt, whether paper-based or electronic. The electronic warehouse receipt should not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

As a comprehensive study undertaken by the FAO has pointed out, it is important first to define the national policy objectives behind a legislative initiative to introduce a system of electronic warehouse receipts.[4] Particularly noteworthy, after an explanation of the "single" and "double" receipt systems, is the finding that "(i)t is crucial that the receipt format be consistent with the general legal framework to ensure smooth implementation within the commercial order and rapid uptake by warehouses and lenders."[5] Thereafter follows the observation that "an important challenge to ensure the integrity of electronic receipts is creating a unique electronic equivalent."[6]

Transferability:

To promote warehouse receipt financing and encourage commercial lending in the agricultural sector, warehouse receipts should be transferable with the effect that the transferee acquires rights equivalent to those transferred by negotiation of a paper warehouse receipt.

Treatment of Prior Claims:

These principles set out targeted standards that may not necessarily be current practice under every legal system. Ideally, it should be readily evident to the person in control of a warehouse receipt whether or not the goods it represents are subject to prior claims. One approach might be the position that issuance of a warehouse receipt cuts off any prior claims. The alternative is to consider that prior claims survive issuance. The latter would be more consistent with secured transactions rules under which a perfected security interest in the crop is not extinguished upon deposit of that crop into a warehouse.[7] In any case, clear rules as to the treatment of prior claims are essential.

To satisfy itself that the deposited goods are not subject to any prior claims, the warehouse operator may require the depositor to complete a statement of ownership and encumbrances. Thereafter, the warehouse receipt and the goods it represents should be eligible to be encumbered only by those claims that may arise subsequent to issuance, such as the warehouse operator's lien, or rights under certain legislation.

6. RIGHTS AND OBLIGATIONS OF THE PARTIES

Recalling that -

a) the warehouse operator -

- *is required to issue an appropriate warehouse receipt, and, where necessary, arrange for the release of an EWR and shall keep appropriate records of the relevant transactions;*
- *is required to exercise a general duty of care;*
- *is required to release the goods upon the satisfaction of the conditions stated in the warehouse receipt or the EWR that has been issued; and,*
- *has the right to be paid for its costs (storage, cleaning, etc.) as outlined in the terms of the warehouse receipt and is entitled to a possessory lien against the goods in order to secure payment for these costs.*

b) the depositor -

- *is responsible for its obligations in the underlying contract of deposit (or bailment);*
- *has the right to receive the goods or their fungible equivalent in exchange for the warehouse receipt; and,*

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[4] Food and Agriculture Organization of the United Nations and European Bank for Reconstruction and Development, 2014, *Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends.* See also, World Bank Group, 2016, *A Guide to Warehouse Receipt Financing Reform: Legislative Reform.*

[5] *Ibid.*, p. 35.

[6] *Ibid.*, p. 40.

[7] For example, United States Uniform Commercial Code (UCC), Article 7-503.See also UNCITRAL Model Law on Secured Transactions, Article 49.

- *is entitled to a "pro-rata" interest in commingled, undifferentiated stored commodities as may be applicable.*

c) [Where applicable] the person in control of a warehouse receipt [or holder-in-due-course], is entitled to the same rights as the depositor.

...accordingly, the EWR Provider -

- *shall comply with the obligations and rights set out in its operating agreement.*

COMMENTARY:

The warehouse operator and the depositor are subject to their respective rights and duties of their contract, *i.e.*, the warehouse receipt. The EWR provider is not a party to that contract, but rather, is governed by the terms of its operating agreement. It is expected to release EWRs appropriately when requested and to keep appropriate records of the transactions during the "lifecycle" of the EWR. The warehouse operator may also serve simultaneously as EWR provider or the two functions may be performed by different entities.

7. ISSUANCE [AND/OR RELEASE]

Recalling that a warehouse receipt should be issued only by a licensed warehouse operator, an Electronic Warehouse Receipt (EWR) should be issued [released] only by a licensed EWR provider.

COMMENTARY:

In traditional paper-based systems, the "issuance" of the warehouse receipt is usually in the hands of the warehouse operator, who is also the depositee (or bailee) and dutiful caretaker of the stored goods. The terms "issuance" and "issuer" as used in many paper-based systems have potential connotations under substantive law. Under electronic registry systems, the term "release" had been suggested in order to differentiate the function of the physical or technical step of putting the electronic transferable record (in this case the electronic warehouse receipt) into circulation.[8] The modalities for release depend on the type of system (token or registry). In a registry system, the "issuer" (*i.e.*, warehouse operator) submits a request for the release of the electronic warehouse receipt to the registry operator (EWR provider).[9] However, it has been suggested that in this context the use of the term "release" may be confusing because it has traditionally denoted the physical action of the release of goods from the warehouse and that therefore, another term may be preferable. It has also been suggested that "issue" is indeed the correct term to use. Rather than focus on the terms or a single step such as issuance or release, what counts is the ability to manage the whole life-cycle from issuance to archival storage. Whether the system is paper-based or electronic, confidence among lenders in the integrity of the system in its entirety is essential, including the critical components of credible issuance and/or release.

Also integral to establishing such confidence is the need to circumscribe the relationship between paper based and electronic receipts for the same underlying goods. Conditions under which an EWR may be released to replace an already issued paper-based receipt must be clearly specified.

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[8] UNCITRAL, Legal issues relating to the use of electronic transferable records: Note by the Secretariat. A/CN.9/WG.IV/WP.118. August 17, 2012, paras. 8 and 9. Footnote 36 states that: "The term "release" of an electronic transferable record is used to refer to the technical step of putting that electronic record into circulation, while the terms "issuance" and "issuer" are used in their well-established meaning under applicable substantive law..." However, this discussion has since been abandoned and Working Group IV has decided to consider the whole life-cycle rather than specific steps.

[9] *Ibid.*, para. 29.

8. REQUIREMENTS FOR WAREHOUSE OPERATORS AND EWR PROVIDERS

Recalling that -

- *warehouse operators should be accredited and licensed by an appropriate, independent governmental authority or private entity;*
- *warehouse operators are generally required to carry insurance or other forms of coverage to indemnify the depositor and/or any third parties in the event of loss or destruction of the goods stored.*

...an EWR provider should be accredited and licensed by an appropriate, independent governmental authority or private entity and should be appropriately insured.

COMMENTARY:

Lenders must be assured that the stored goods exist in order to serve as collateral and will continue to be preserved during the entire period until release. The two means to achieve such confidence are accreditation (of warehouse operators and EWR providers) and indemnification.

<u>Accreditation</u>

Warehouses should be accredited and licensed by an appropriate, independent governmental authority or duly authorized private entity. The accreditation and license should be for a stated period of time, renewable under certain conditions. The appropriate governmental authority or private entity should have continuing responsibilities of supervision, inspection and regulation, with rights of access to monitor the warehouse operation.

<u>Indemnification</u>

Lenders need certainty that should the goods in custody be destroyed or damaged, the lender will nevertheless be made whole. Lender confidence can be strengthened through the use of mechanisms such as insurance, indemnity funds and performance bonds. A key factor is legislative requirements that warehouse operators maintain insurance coverage.

Comparable oversight and regulation is required for the EWR provider. Whether or not the EWR provider is distinct from the warehouse operator, the EWR provider may be subject to a range of obligations that go beyond those of the warehouse operator. These may include requirements concerning record duration, data confidentiality, centralized database or registry maintenance, and restrictions on changes, corrections and re-issuances. Provisions should be considered to require licensing for the operation of the electronic registry and for monitoring and oversight. Insurance coverage can be important for damage due to errors and omissions, fraud and dishonesty (although coverage for intentional acts varies with each jurisdiction).

9. PRIORITIES

These principles respect the rights and priorities of lenders and creditors as established by the existing domestic legal framework governing secured transactions, bankruptcy and insolvency.

COMMENTARY:

As noted above, the principles are intended to operate in conjunction with a modern secured transactions regime. If the legal regime does not permit or recognize the creation of security interests in warehouse receipts, then it will be difficult if not impossible to adopt a modernized system of electronic warehouse receipt financing.

The purpose of Principle 9 is to confirm that the principles are not intended to change existing rights of creditors but rather, to work in tandem with the existing legal framework.