

Electronic warehouse receipts for agricultural products

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ELECTRONIC WAREHOUSE RECEIPTS FOR AGRICULTURAL PRODUCTS

(presented by Dr. David P. Stewart)

The subject of a proposed model law on electronic warehouse receipts relating to the transportation of agricultural products was first raised in the Inter-American Juridical Committee at its 81st 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 for "Electronic Warehouse Receipts" (CJI/doc.452/14).

Over the course of the past year, the rapporteur has been assisted, very ably, in the ongoing work on this topic by research efforts undertaken by the Department of International Law. The results of this research are summarized in this report and form the basis for the recommendation below.

Background: The background to this topic was set out in some detail in the earlier documents noted above. In brief, throughout Latin America, warehouse receipts are underutilized as a financial instrument in gaining access to credit. A warehouse receipt is a document of title that represents the (agricultural) goods that a producer deposits in a warehouse. In theory, the holder of the receipt (in most cases the depositor, *i.e.*, the producer or farmer) should be able to obtain credit secured against that warehouse receipt. However, it is generally known that warehouse receipts are not widely used in Latin America as a source of financing.

Although there are many reasons for this,¹¹ the focus of this study has been on the legal hurdles inherent in the instrument itself.¹²

Civil Law – Dual Document System: Upon delivery and deposit of goods with a warehouse operator, the operator typically issues a warehouse receipt to the depositor. Under the common law system, a single document is issued, known as a “warehouse receipt.” Under the civil law system, the operator issues a two-part document: 1) a certificate of property (“certificado de propiedad”) or title of ownership (“título de propiedad”) and 2) a certificate of pledge or bond (“bono de prenda”).

Under the common law, the warehouse receipt serves as both proof of ownership and as negotiable paper capable of being given as collateral in a financial transaction. By contrast, under the civil law, the certificate of property indicates ownership and the bond or pledge is the negotiable paper capable of being given as collateral. The reason for the dual documents is the principle in civil law that prohibits a creditor from keeping and taking ownership in the property that was given as a guarantee (*prohibición de pacto de lex comisoria*). Hence, the transfer of a receipt to a financial institution as a pledge in exchange for credit cannot connote the transfer of property rights in the goods. It is understood as an unacceptable conflict of interest.

In accordance with this legal theory, the certificate of property should remain with the depositor and the certificate of pledge should remain with the lender. In practice, however, it seems that this is not so and that in most cases both documents remain together, usually with the warehouse operator who may also serve as lender. The complexity of this dual document system is thought to be one of the reasons for the underutilization of warehouse receipts as a financing instrument.

Electronic Warehouse Receipts: Introduction of a system of electronic warehouse receipts may help to resolve the complexity and limitations of the dual document system – and thereby advance the use of warehouse receipt finance – simply by leapfrogging over the issue. When paper-based documents are replaced with an electronic register, there is no longer any need for differentiation between the “single document” (common law) or “dual document” (civil law) system because the potential conflict of interest “disappears,” given that the lender is no longer in possession of *any* paper documents.

¹¹ Practical reasons include the following: 1) lack of knowledge of this tool, both by producers and the financial system; 2) lack of sufficient numbers of credible (bonded) warehouses; 3) high cost of services.

¹² Other legal issues include the following: 1) uncertainty of whether deposited goods are free of liens; 2) difficulty with enforcement; 3) interference of an intervening bankruptcy (of warehouse operator).

The challenge, however, is in the transition. Any model law for electronic warehouse receipts should also recognize the validity of paper-based documents, especially as many countries do not yet acknowledge the legality of electronically transferable records. Consequently, the issue – whether an attempt should be made to modernize and replace the dual document with a simplified single documentary system - cannot be avoided. Even though the dual document system does not appear to be actually used in practice, it seems the legal fiction has to be maintained.

Research to Date: To help resolve this conundrum, discussions have been held over the past year with experts in Mexico, Chile, Argentina and the United States. Using the legislation and other information that has been provided by OAS Member States and otherwise obtained by the secretariat, a legislative comparison is underway (attachment). Research is ongoing, in particular, to consider whether and how reforms in various civil law countries address the dual document system; in most cases, it is being retained.

Recommendation: The Committee may wish to consider a recommendation that this topic be sent to a group of experts for further consideration and development of a draft model law for the Committee's consideration.

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