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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 Establishing an Electronic Warehouse Receipts System" (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 for Agricultural Products (CJI/doc.452/14). For the 86th regular session in March, 2015, the rapporteur presented a report of the progress made on the topic over the course of the previous year.

Since the last report, the rapporteur has been apprised of significant developments in work related to this topic by other organizations. These developments are summarized in this report and form the basis for the recommendations 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 under-utilized 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, at this point in time warehouse receipts are not widely used in Latin America as a source of financing.

Although there are many reasons for this situation, one possible legal hurdle is inherent in the instrument itself, or more particularly, inherent in the legal system pursuant to which the instrument is issued. Under the common law, a single document "warehouse receipt" is issued and serves both as proof of "ownership" and as negotiable paper capable of being given as collateral in a financial transaction. By contrast, under the civil law a dual document system is typically used whereby a certificate of property ("certificado de propiedad" or "título de propiedad") indicates "ownership"¹³ and a separate bond or pledge ("bono de prenda") is the

¹³ Subsequent to the previous report, further research revealed that the "certificate of property" issued under the civil law system does not convey absolute and permanent title to the goods stored, but rather, a set of rights that falls short, which is referred to as a "preferential possessory right." This nonetheless allows the holder to claim the possession of the goods stored with preference over the claims of "historical" owners and depositors of the stored goods. It has been suggested that in this regard, the rights of the holder of a warehouse receipt under the single receipt system (common law) are no different.

negotiable paper capable of being given as collateral. The complexity of this dual document system – particularly the associated increase in the potential for fraud – is thought to be one of the reasons for the underutilization of warehouse receipts as a financing instrument in civil law countries in the Americas.

Introduction of a system of *electronic* warehouse receipts might help to resolve the complexity and limitations of the dual document system and thereby advance the use of warehouse receipt finance. However, any set of principles or 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 remains as to how the dual document system should best be addressed.¹⁴

In order to advance discussions, the secretariat has a) initiated discussions with experts in Mexico, Chile, Argentina and the United States; b) requested OAS Member States for relevant legislation; and c) prepared a legislative comparison.

Recent Developments: During the course of this study, the rapporteur has been apprised of work in related areas being undertaken by other organizations, as follows:

a) FAO - Since the last report of the rapporteur, a publication has been released by the Food and Agriculture Organization of the United Nations, entitled “*Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends*.” This comprehensive study points out the importance of defining the national policy objectives behind such a legislative initiative. It reviews the forms and core elements of warehouse receipt legislation and provides an extensive set of case studies (which include Argentina, Brazil and the United States) to illustrate these concepts. 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” (page 35). The Brazilian case study illustrates the double receipt system in which warehouse receipts “are initially issued in duplicate paper form, the agricultural certificate of deposit and agricultural warrant, [and then] proceed in electronic format after registration.” Thereafter follows the observation that “an important challenge to ensure the integrity of electronic receipts is creating a unique electronic equivalent” (page 40). The conclusions note that “(s)pecific elements of legislation that deserve focused research in view of their recent introduction worldwide are electronic warehouse receipts and options for their legal design” (page 51).

b) UNCITRAL – The United Nations Commission on International Trade Law, Working Group IV on Electronic Commerce has, since 2011, been studying electronic transferable records which, as defined, would include electronic warehouse receipts.¹⁵ Subject to a final decision to be made by the Commission (July 2015), the Working Group has agreed to proceed with the preparation of a draft model law on electronic transferable records that “should provide for both

¹⁴ For example, the rapporteur has been apprised of a draft model law that would essentially replace the dual document system with a single document for paper-based receipts. It remains to be determined whether that is a feasible approach because, as recognized in the FAO study, the receipt format must be consistent with the general legal framework.

¹⁵ The term “electronic transferable *record*” (in contrast with a “transferable *instrument*”) generally refers to the electronic equivalent of both a transferable instrument *and* a document of title (UNCITRAL, A/CN.9/WG.IV/WP.119). Because under most legal systems a warehouse receipt is generally considered to be a document of title, an electronic warehouse receipt would be considered an “electronic transferable record” (UNCITRAL, A/CN.9/WG.IV/WP.118).

electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment” (UNCITRAL A/CN.9/834, para. 12). It has been widely felt that generic rules should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18) (i.e., rather than focusing on specific types).

c) NATLAW – The National Law Centre for Inter-American Free Trade has been working towards a draft model law that would cover both paper-based and electronic receipts. Most recently, however, the direction appears to be inclined towards sector-specific models: “In the absence of an unrealistic and impractical multi-sector, multi-trade Master Agreement, a standardized EWR text for a given trade within a given sector, such as for cotton, grains or coffee, offers a more realistic and practical path not only toward a Trans-Pacific EWR but also towards uniform national registries or a multi-national registry of EWRs. It would contain the terms and conditions of issuance, transfer, negotiation and pledge of the EWR as agreed upon by regular participants in that trade across national borders.” (Second Pacific-Rim Colloquium on Economic Development and the Harmonization of Commercial Law 2015: Summary, page 14).

Recommendations: These new developments have confirmed the highly technical and complex nature of this subject. In order to significantly advance the draft principles that have been presented to this Committee and to ensure consistency with other related projects as noted above, further and extensive consultations would be required with experts in the subject, not only legal experts but also those familiar with industry practice, as had been recommended in the Rapporteur’s previous report. However, at this time the necessary resources to permit such a meeting are not available and this situation is unlikely to change in the near future, especially given that under its new leadership, the OAS Secretariat is presently in a transitional period.

Accordingly, while recognizing the potential value of a draft set of principles or model law on electronic warehouse receipts for our hemisphere, the rapporteur recommends that:

- further consideration of the proposed draft be deferred until substantive consultations with appropriate experts becomes feasible; and
- the secretariat consider posting the draft principles to a closed website and exploring the feasibility of arranging for “virtual” online consultation with experts.