

Call for Papers for presentation at the UNCITRAL Congress, 50th Anniversary
Modernizing International Trade Law to Support Innovation and Sustainable
Development



National Law Center
for Inter-American Free Trade

**FOCUS ON AGRICULTURAL FINANCING:
FARM LAND MORTGAGES AND ELECTRONIC WAREHOUSE RECEIPTS**

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At its 49th session, the Commission adopted the UNCITRAL Model Law on Secured Transactions that provides a state-of-the-art regime for security rights in movable assets. The Model Law has been designed to facilitate access to secured finance at a reasonable cost. Subject to a limited number of exceptions, a grantor may create a security right in any movable asset. However, the Model Law does not apply to security rights in immovable assets. Furthermore, as a result of a mandate to prepare a concise and simple model law, it has not included the relevant recommendations of the UNCITRAL Legislative Guide on Secured Transactions that apply to attachments to immovable property, such as freezers that may be affixed to a building. Accordingly, those businesses whose assets are governed or affected by immovables law will not be able to benefit from a newly reformed secured transactions framework along the lines of the Model Law. It should be noted that historically, UNCITRAL instruments have not dealt with issues relating to the law governing immovable assets. Given the importance of immovables for the type of financing described below, it is time for UNCITRAL to revisit this stance.

Agricultural activity is regularly conducted in connection with immovable property on which crops may be growing or a warehouse constructed to store harvested crops. In practice, many lenders take a security right in both movable as well as any immovable assets of the farmer. The Model Law would facilitate only the former thus leaving the treatment of rights in immovable property to the other law that is often outdated or unpredictable, especially in developing economies. The challenges in creating a security right over the immovable may even cause the lender not to engage in the transaction at all because reliance solely on crops is fraught with many risks. I propose for the UNCITRAL to consider whether the principles underlying the Model Law on Secured Transactions could effectively be extended to security rights in immovable property. Such considerations should go beyond agriculture as the issues that commonly arise in immovables financing are not unique to agriculture. Guidance is needed, as the National Law Center for Inter-American Free Trade has been discussing the possibility of extending the UNCITRAL secured transactions frameworks to security rights in immovables. These discussions are driven by a demand particularly from African countries in reform projects funded by the World Bank Group. One African country has already moved as far as submitting a secured transactions bill with a broad property scope to the government, anticipating the use of the Registry of Security Rights envisaged in the bill for the registration of mortgages. UNCITRAL should consider developing an annex to the Model Law that would contain model provisions relating to immovables financing that may either be incorporated in a State's enactment of the Model Law or separate legislation. It should also be explored whether the functions of registries for notices of security rights in movable assets could be usefully and effectively extended to the registration of encumbrances over immovables.

Regarding agricultural financing, I propose for UNCITRAL to consider the development of a model legal framework governing electronic warehouse receipts. While the Model Law covers security rights in negotiable documents that by definition include warehouse receipts, it does not

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provide any specific rules with respect to those issued electronically. Although the general rules of the Model Law would apply to security rights in electronic warehouse receipts, it is uncertain whether the application of those rules would be reflective of the prevailing practices, especially as related to exchange-traded warehouse receipts. The draft Model Law on Electronic Transferable Records, to be considered for adoption at the 50th Commission session, provides model provisions on electronic transferable records, including electronic warehouse receipts. However, the combination of these two UNCITRAL instruments is insufficient for States to design and implement a modern electronic warehouse receipts law that would cover not only the commercial aspects, such as the issuance and transfer of warehouse receipts, but also some operational aspects, such as the liability of warehouse, bonding, and insurance against damage to the stored goods, and others. Furthermore, certain commercial aspects, such as the trading of electronic warehouse receipts on exchanges are not covered by either of the two Model Laws. Such exchanges open commodities covered by electronic warehouse receipts to foreign buyers and lenders, thus increasing their marketability and price discovery. The future model law on electronic warehouse receipts should not include any provisions that would negatively affect the implementation of the Model Law on Secured Transactions, but rather provide complementary provisions found in domestic laws of this kind that, for instance, may relate to various duties of the warehouseman, such as to keep the stored goods identifiable. Many economies lack any warehouse receipts laws, failing to provide a predictable and modern legal regime that would be attractive not only to potential lenders but also buyers and intermediaries that deal in agricultural commodities and other assets commonly stored in warehouses. Recent efforts to engage in a project to develop a model law under the auspices of the Organization of American States have failed. UNCITRAL has an opportunity to demonstrate its leadership by setting global standards for warehouse receipts, building on its two Model Laws.