

RECENT ELECTRONIC WAREHOUSE RECEIPTS DEVELOPMENTS IN MEXICO

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I. INTRODUCTION

The National Law Center for Inter-American Free Trade's (NatLaw) delegation traveled to Mexico City from June 1-4 in 2015 upon an invitation by the Mexican Ministry of Economy (*Secretaría de Economía*) to meet with the governmental entities involved in the regulation and/or supervision of warehouses and the overall warehouse receipt system.¹ NatLaw met with the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) (NBSC), Ministry of Agriculture (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*), and the Mexican Central Bank (*Banco de México*), among others.² The Ministry of Economy's invitation included NatLaw's participation as a presenter at a two-day seminar organized by the Mexican Association of Warehouses (MAW) that gathered approximately 100 warehousemen, banker-members of the Mexican Bankers Association (MBA), and government officials.³ The purpose of these meetings and presentations was twofold. First, to acquaint NatLaw with the public and private entities involved in

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¹ Invitation from the Mexican Ministry of Economy to the Seminar, *El Almacén General de Depósito en el Marco de la Reforma Financiera* (May 6, 2015) (on file with the Nat'l L. Ctr. for Inter-Am. Free Trade).

² Seminar Agenda, *El Almacén General de Depósito en el Marco de la Reforma Financiera* (May 6, 2015) (on file with the Nat'l L. Ctr. for Inter-Am. Free Trade) [hereinafter Seminar Agenda].

³ *Id.*

the Mexican warehousing industry, and their concerns regarding the actual two-paper document warehouse receipt system. Second, to allow NatLaw to present a proposal aimed at modernizing and enhancing the Mexican warehouse receipt (WR) system.⁴

II. MEXICAN WAREHOUSE RECEIPT SYSTEM

In Mexico, the two paper document WR is mainly governed by the General Law of Securities and Credit Operations (*Ley General de Títulos y Operaciones de Crédito*) (GLSCO) together with other relevant laws and regulations.⁵ As in almost every other Latin American country, in Mexico a negotiable WR issued by a licensed warehouse is formed by two documents: a certificate of deposit (*certificado de depósito*) and a pledge bond (*bono de prenda*).⁶ According to Article 229 of the LGTOC, a certificate of deposit evidences ownership rights (*propiedad*) over the goods stored at the issuing warehouse.⁷ The certificate of pledge, on the other hand, evidences the creation of a security interest in the certificate of title (which represents the goods stored at the warehouse).⁸ In theory, both documents can circulate separately. However, in practice, both documents always travel together and they are never negotiated more than once.

III. RECOMMENDATIONS

A. Single Electronic Record System

On June 1, 2015, NatLaw met with the Ministry of Agriculture, the Mexican Central Bank, and the NBSC. This meeting was organized by the Ministry of Economy and its purpose was to brief the participating governmental agencies on the reasons behind NatLaw's recommendation that Mexico consider switching from a two paper document warehouse receipt system to a single electronic record system. NatLaw referred to materials from the Second Pacific-

⁴ Boris Kozolchyk & Lic. Adalberto Elias, Presentation at *El Certificado de Depósito Electrónico en México: Sigüientes Pasos* (Presentation at the Seminar, *El Almacén General de Depósito en el Marco de la Reforma Financiera*), NAT'L L. CTR. FOR INTER-AM. FREE TRADE (June 3, 2015) (on file with the Nat'l L. Ctr. for Inter-Am. Free Trade) [hereinafter NLCIFT's Presentation].

⁵ Ley General de Títulos y Operaciones de Crédito [LGTOC] [General Law for Securities and Credit Operations], Diario Oficial de la Federación [DOF], 27-08-1932, últimas reformas 13-06-2014 (Mex.), formato PDF, http://www.diputados.gob.mx/LeyesBiblio/pdf/145_130614.pdf [hereinafter LGTOC].

⁶ *Id.* art. 229.

⁷ *Id.*

⁸ *Id.*

Rim Colloquium on Economic Development and the Harmonization of Commercial Law, which discussed some of the operational difficulties, risks, and uncertainties of the dual physical document system as it still operates in many European, Latin American, and African countries.⁹ NatLaw recommends that Mexico adopt a system of centralized issuance and transfer of a single electronic certificate of deposit equivalent to the widely used electronic warehouse receipt in the United States.¹⁰ This does not mean that physical certificates of deposit should be completely eradicated, but that both electronic and physical documents should coexist, as is the case in the United States.¹¹

B. Field Warehouses

On June 2, 2015, NatLaw visited one of Mexico's largest grain warehouses (silos), the *Almacadora Sur*, together with various representatives of governmental authorities that were present in the meeting a day before. *Almacadora Sur* has a modern set of facilities used mainly for the storage of agricultural products such as wheat, corn, flour, sorghum, rice, and coffee. These advanced measuring devices allow the warehouse to determine the true contents of the silos. When NatLaw inquired about the current risks of the issuance of WRs with non-existent goods, members of *Almacadora Sur* and some governmental authorities pointed to "field" or enabled warehouses (*almacenes habilitados*) as one of the main sources of fraudulent issuances. Field warehouses are storage facilities (also referred to as *bodegas*) generally located in the depositor's premises that are legally enabled to store goods and issue WRs by a licensed warehouse.¹² Once the facilities are certified and enabled by the licensed warehouse, the depositor can deposit goods there and request the licensed warehouse to issue a certificate of deposit (and pledge bond) for the goods stored—a document backed by the licensed warehouse. The depositor is able to use both documents as collateral for a loan because a licensed warehouse issues them. The main problem with field warehouses has to do with the enabling of storage facilities that are physically connected (i.e. same building) with non-enabled facilities.¹³ In this scenario, the same building is divided in two parts: an

⁹ See *Pacific Rim: Electronic Warehouse Receipts*, NAT'L L. CTR. FOR INTER-AM. FREE TRADE, http://www.natlaw.com/protected-page?destination=node/66022&back=pacific-rim-electronic-warehouse-receipts&protected_page=6 (password: EWR2015pacrim) (last visited Dec. 16, 2015).

¹⁰ NLCIFT's Presentation, *supra* note 4.

¹¹ *Id.*

¹² Ley General de Organizaciones y Actividades Auxiliares del Crédito [LGOC] [General Law of Organizations and Activities Related to Credit], art. 16, Diario Oficial de la Federación [DOF] 14 de Enero de 1985, últimas reformas 10 de Eneeros de 2014 (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/pdf/139.pdf> [hereinafter LGOC].

¹³ Interview with Lic. Elsa Ayala Gómez, Directora General de Normatividad Mercantil (Mexican Ministry of Economy) in Mexico City, Mex. (June 1, 2015).

enabled and non-enabled section. The internal division between both sections of the building is sometimes inexistent and this situation has given way to fraud. The goods for which negotiable certificates of deposit were issued can be easily moved from the enabled section to the non-enabled section of the building just by lifting and moving the bags from one place to another, to the detriment of the certificates' holders. This is a common practice in Mexico that needs to be eliminated for the benefit of the overall warehouse receipt system and its participants.¹⁴

C. Unitary Electronic Warehouse Receipt System

Finally, on June 3-4, 2015 NatLaw attended a seminar organized by MAW entitled, "The Licensed Warehouse within the Scope of the Financial Reform."¹⁵ The purpose of this seminar was to hear a review of standard practices and recent developments on WRs and the overall WR system. NatLaw's presentation was entitled, "The Electronic Certificate of Deposit in Mexico: Next Steps," and mainly advocated for Mexico's adoption of a unitary electronic warehouse receipt system as an alternative to the two paper based WR system.¹⁶ NatLaw explained and compared the rights conferred under Mexican law to the certificate of deposit and pledge bondholders with the rights conferred under U.S. law to the holders of WRs. NatLaw highlighted the fact that WRs and/or certificates of deposit should be understood to confer to its holder preferential possessory rights instead of a "fee simple absolute" right over the goods stored.¹⁷

NatLaw also pointed out some of the problems the dual physical WR system poses, including the ambiguity of the actual roles of stakeholders in the transfer/negotiation process of these two documents, and the difficulties of going electronic with a dual system in place. For instance, the point in time in which lenders usually fill out the fields in the pledge bond is when the borrower defaults on the loan, long after it was disbursed.¹⁸ This means that the pledge bond is generally endorsed and transferred in blank together with the certificate of deposit. According to warehousing experts in Mexico, this practice has caused legal disputes that could have been avoided if the pledge bond had been adequately filled out at the moment the loan was disbursed.¹⁹ NatLaw then described to the audience the unitary system, highlighting how either a purchaser or a lender could easily evidence a preferential possessory right with a single document.

¹⁴ *Id.*

¹⁵ Seminar Agenda, *supra* note 2.

¹⁶ NLCIFT's Presentation, *supra* note 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Lic. Manuel Munoz Martinez, Consejero de Almacenadora Accel, S.A., address at *El Almacén General de Depósito en el Marco de la Reforma Financiera*, conference organized by Asociación de Almacenes Generales de Depósito (June 3, 2015).

After discussing the advantages of a unitary system over a dual system, NatLaw discussed the advantages of an electronic system over a paper-based system. NatLaw pointed out that the electronic and physical systems are not mutually exclusive and should interact in order to fulfill the needs of those that do not have access to information technologies. Among the advantages of a unitary electronic system were: (1) the elimination for the need to store, ship, and track physical documents; (2) the ease in determining the actual holder of a certificate of deposit; (3) the ability of transactions involving electronic certificates of deposit to occur in a matter of seconds; (4) the elimination of forgery of physical documents; (5) the elimination of physical endorsement; (6) the reduction in the possibility of mistakes made in the certificate of deposit; and (7) the centralization of information on certificates of deposit, eliminating the warehouses' need of feeding three or four different registries (as Mexican law and regulations now require) to track the information generated by warehouses when issuing certificates of deposit.²⁰

D. Working Group

NatLaw's presentation concluded with the proposal for the establishment of a working group for the implementation of a unitary system and simultaneously the development of an electronic certificate of deposit with terms and conditions agreed upon by every stakeholder. It was mentioned that the *Registro Único de Certificados, Almacenes y Mercancías* (RUCAM) recently implemented by the Ministry of the Economy—a registry that does not create rights *in rem* but is only used to certify the existence of outstanding physical negotiable certificates of deposit and pledge bonds—could be further developed into a registry that creates possessory rights (i.e., rights *in rem*) over the electronic certificate of deposit by way of credits and debits in an electronic ledger. Representatives from FIRA (*Fideicomisos Instituidos en Relación con la Agricultura*) acknowledged that once the unitary electronic WR system is in place in Mexico the natural next step should be the development of a commodity exchange in which electronic certificates of deposit are traded and used as collateral.

IV. IMPLEMENTATION

The working group proposed by NatLaw is in its final stage of formation today. The Mexican Ministry of Economy has agreed to host a historic meeting in Mexico City from September 30, 2015 through October 2, 2015, with the objective of acquainting Mexican stakeholders with the actual practices and regulation of electronic WRs in the United States, and establishing a working group for the development of an electronic warehouse receipt. It is expected that

²⁰ *Id.*

public and private stakeholders and regulators will participate in this three-day meeting including the NBCS, the Mexican Central Bank through FIRA (*Fideicomisos Instituidos en Relación con la Agricultura*), the Mexican Ministry of Agriculture, MAW, warehousemen, and the Mexican Bankers Association (*Asociación de Bancos de México*), among others. The United States, on the other hand, will be represented by experts on electronic WR regulation from the United States Department of Agriculture as well as by representatives from Egrain, Inc., one of the four electronic platforms through which electronic WRs are issued, negotiated, and used as collateral. The working group established during this meeting will develop a unitary electronic WR system for Mexico.

